

## NOTE

### TWINS OR TRIPLETS?: PROTECTING THE ELEVENTH AMENDMENT THROUGH A THREE-PRONG ARM-OF-THE-STATE TEST

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#### INTRODUCTION

In 1999, the Supreme Court held that the common law principle that the sovereign cannot be sued in its own courts without its consent was embedded in the Constitution's structure when it was ratified.<sup>1</sup> The Court, however, has not always adhered to this view. In 1793, when a citizen of South Carolina sued the State of Georgia to enforce a debt arising from the sale of Revolutionary War supplies, the Court ordered the State to fulfill its obligation even

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1. *Alden v. Maine*, 527 U.S. 706, 715–28 (1999). Although states subjected themselves to Article III federal judicial power, the states did not surrender their common law right to immunity from private suits. James Eugene Fitzgerald, Comment, *State Sovereign Immunity: Searching for Stability*, 48 UCLA L. REV. 1203, 1207 (2001) (discussing *Hans v. Louisiana*, 134 U.S. 1, 10 (1890)).

though the State had not consented to the suit.<sup>2</sup> Alarmed by the sudden opening of their treasuries to federal courts over which they had no control, states swiftly pushed through Congress and ratified the Eleventh Amendment.<sup>3</sup> Although the facts that triggered the adoption of the Eleventh Amendment are undisputed, the Amendment's core purpose has long been the subject of debate. While the language of the Amendment suggests that the most immediate purpose was reversing *Chisholm v. Georgia* and closing state treasuries to federal courts,<sup>4</sup> its broader purpose may have been confirming sovereign immunity as a constitutional principle and thus protecting the states' dignity interests.<sup>5</sup>

Although the Supreme Court has extended Eleventh Amendment immunity to a wide variety of bodies that states have created to administer their affairs, no practical and uniform method exists for determining whether such an entity is entitled to it. Federal courts, relying on particular views about the Amendment's core purpose, have created different "arm-of-the-state" tests to determine whether a particular entity should benefit from the state's immunity from suit. In *Mount Healthy City School District Board of Education v. Doyle*,<sup>6</sup> the Supreme Court applied a balancing test in holding that a school district was a political subdivision, rather than an arm of the state. The Court first noted that Ohio law classified school districts as political subdivisions.<sup>7</sup> Moreover, although the Ohio State Board of Education provided some guidance and funding to school districts, the districts had extensive powers to raise revenue by issuing bonds and levying taxes.<sup>8</sup> The school district's status under state law and its ability to generate its own revenue outweighed the state's financial assistance and administrative con-

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2. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

3. MELVYN R. DURCHSLAG, *STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 34–36 (2002). The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

4. DURCHSLAG, *supra* note 3, at 34–36.

5. *Alden*, 527 U.S. at 720–26, 728–29. The Court has not confined the Amendment to its language, but has rather relied on historical sources to expand the Amendment's scope. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004) ("For over a century, however, we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment."); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994)) (noting that the Eleventh Amendment does not exist solely to prevent "federal-court judgments that must be paid out of a State's treasury"); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . ."). Accordingly, the Court long ago held that citizens cannot even sue their own state in federal court. *Hans*, 134 U.S. at 10–17.

6. 429 U.S. 274, 280–81 (1977).

7. *Id.* at 280.

8. *Id.*

trol.<sup>9</sup> The Court, however, did not explain the relative weight of the factors or indicate if other factors could be considered.<sup>10</sup>

In its next arm-of-the-state case, *Lake Country Estates v. Tahoe Regional Planning Agency*,<sup>11</sup> the Court employed more factors in holding that the Tahoe Regional Planning Agency (“TRPA”), an entity created by an interstate compact between California and Nevada, was not entitled to Eleventh Amendment immunity.<sup>12</sup> The Court reached its conclusion after finding that: (1) the interstate compact described TRPA as a “separate legal entity” and a “political subdivision;” (2) counties and cities, rather than the states, appointed most of the directors of TRPA; (3) counties and cities provided TRPA’s funding; (4) the compact provided that TRPA’s obligations were not binding on either state; (5) local rather than state governments performed TRPA’s function, the regulation of land; and (6) TRPA’s authority to make rules was not subject to a veto by the state.<sup>13</sup> The Court noted that “[t]he intentions of Nevada and California, the terms of the Compact, and the actual operation of TRPA” made it clear that TRPA could not claim sovereign immunity.<sup>14</sup>

The Court in *Lake Country Estates* conducted a more comprehensive analysis than it had in *Mount Healthy*. In assessing the control factor, the *Lake Country Estates* Court looked at who selected the entity’s directors and whether the states had veto power over the entity’s decisions.<sup>15</sup> This provided more guidance to lower courts than the Court’s remark in *Mount Healthy* that school districts received “some guidance” from the Ohio State Board of Education.<sup>16</sup> Moreover, by asking whether the states would be liable for TRPA’s debts, the Court in *Lake Country Estates* directly considered the vulnerability of the state’s treasury to a potential judgment.<sup>17</sup> Finally, in *Lake Country Estates*, the Court examined for the first time the state’s intent in creating the entity and the entity’s actual operation.<sup>18</sup>

Although *Lake Country Estates* offered more guidance than *Mount Healthy*, lower courts struggled in applying the arm-of-the-state test. The Third Circuit stated that *Lake Country Estates* did not set out “an exclusive

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9. *Id.*

10. Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1263 (1992).

11. 440 U.S. 391 (1979).

12. Pursuant to congressional consent as required by the Constitution, Nevada and California created the TRPA to coordinate and regulate development in the Lake Tahoe Basin and to conserve its natural resources. *Id.* at 393–94. These bi-state entities are called Compact Clause entities.

13. *Id.* at 401–02.

14. *Id.* at 402.

15. *Id.* at 401–02.

16. 429 U.S. at 280.

17. 440 U.S. at 402.

18. *Id.*

list of factors to be considered.”<sup>19</sup> In addition, some courts added their own criteria<sup>20</sup> and others weighed the factors differently.<sup>21</sup> The District of Columbia Circuit underscored specific problems with the status under state law and control factors.<sup>22</sup> It also added its own twist to the control factor by considering the states’ power to remove or suspend the state-appointed directors from office.<sup>23</sup> The clearest indication of confusion was when the Second and Third Circuits reached different conclusions regarding the same bi-state entity: the Port Authority Trans-Hudson Corporation (“Authority”).<sup>24</sup> The circuits reached different outcomes because they weighed the factors differently and took different information into consideration to determine whether the factors were met.<sup>25</sup> When the Supreme Court first resolved the split, it did so without addressing the different applications of the arm-of-the-state test.<sup>26</sup>

Four years later, the Court again dealt with the Authority’s immunity and articulated the “twin reasons” analysis in *Hess v. Port Authority Trans-Hudson Corp.*<sup>27</sup> Noting that indicators of immunity did not point in the same direction,<sup>28</sup> the Court stated that the Eleventh Amendment’s “twin reasons

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19. *Port Auth. Police Benevolent Ass’n v. Port Auth. of N.Y. & N.J.*, 819 F.2d 413, 417 (3d Cir. 1987).

20. *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (considering whether the entity had the power to take property in its own name); *Port Auth. Police Benevolent Ass’n*, 819 F.2d at 417 (adding whether the entity performed a governmental or a proprietary function, whether the entity had the power to sue and be sued, and whether the property of the entity was immune from state taxation); *Tuveson v. Fla. Governor’s Council on Indian Affairs, Inc.*, 734 F.2d 730, 734 (11th Cir. 1984) (considering the Council’s functions, the way the legislature treated it, and state court decisions).

21. *See Jacintoport Corp. v. Greater Baton Rouge Port Comm’n*, 762 F.2d 435, 438–39 (5th Cir. 1985) (citing *Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 25 (5th Cir. 1980)) (holding that the treatment of the entity in state courts is the most important factor). *Contra Tuvenson*, 734 F.2d at 732 (citing *Miener v. Missouri*, 673 F.2d 969, 980 (8th Cir.); *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979)) (“Several courts of appeals have regarded the final factor, who ultimately pays, as the most crucial.”).

22. *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 223–24 (D.C. Cir. 1986) (noting that it was not clear what the purpose of the state law factor was and how courts should evaluate the control factor).

23. *Id.* at 228.

24. *Compare Port Auth. Police Benevolent Ass’n*, 819 F.2d at 418 (holding that the entity enjoyed Eleventh Amendment immunity), *with Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628, 631 (2d Cir. 1989), *aff’d*, 495 U.S. 299 (1990) (holding otherwise). The Port Authority Trans-Hudson Corporation is a wholly owned subsidiary of the Port Authority of New York and New Jersey, which was created through a bi-state compact between the two states with the consent of Congress. *Feeney v. Port Auth. Trans-Hudson Corp.*, 495 U.S. 299, 301 (1990).

25. The Second Circuit weighed more heavily the fact that neither State was liable for the entity’s debts, *Feeney*, 873 F.2d at 631, while the Third Circuit weighed more heavily the fact that state courts had treated the entity as a state agency performing functions on behalf of the states, *Port Auth. Police Benevolent Ass’n*, 819 F.2d at 415.

26. *Feeney*, 495 U.S. at 305 (holding that the states had waived the entity’s potential Eleventh Amendment immunity).

27. 513 U.S. 30 (1994).

28. The first factor, state control, pointed towards immunity because the states appointed all directors and could block the Authority’s measures. *Id.* at 44. The second factor, status under state

for being”—respecting the dignity of the states and insulating state treasuries from federal-court judgments—should be the prime guide in such a situation.<sup>29</sup> The Court first found no threat to the dignity of either New York or New Jersey.<sup>30</sup> Then, the Court found that the two states and Congress had not designed the Authority to enjoy Eleventh Amendment immunity.<sup>31</sup> Although the two states exercised significant control over the Authority, control was not considered determinative because state control of counties and other political subdivisions does not make these entities immune from suit under the Eleventh Amendment.<sup>32</sup> The Court next evaluated the vulnerability of the state’s purse, noting that various Courts of Appeals had recognized it as the most salient factor in determining Eleventh Amendment immunity.<sup>33</sup> The Court ultimately decided that this factor was not met because the Authority had a long history of paying its own debts and its actual financial independence contrasted with other entities that placed heavy fiscal tolls on their founding states.<sup>34</sup> The Authority did not enjoy immunity because a judgment against it would not, as a practical matter, expend itself against the state treasury.<sup>35</sup>

This Note argues that *Hess* failed to provide an adequate standard for determining whether an entity is an arm of the state and proposes such a standard. Part I argues that *Hess* is not an appropriate approach for three reasons. First, *Hess* does not provide uniformity in solving the arm-of-the-state

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law, pointed in both directions. On the one hand, state courts had categorized the Authority as an agency of the states rather than a municipal or local unit. *Id.* at 45. On the other hand, the compact and the implementing legislation had not typed the Authority as a “state agency,” but rather a “joint or common agency,” a “body corporate and politic,” and a “municipal corporate instrumentality.” *Id.* at 44–45. The third factor, whether the Authority served state as opposed to local functions, pointed in neither direction because states and municipalities alike owned and operated bridges, tunnels, ferries, airports, marine terminals, etc. *Id.* at 45. However, the fourth factor pointed against immunity because the states lacked financial responsibility for the Authority, it generated its own revenue, and it had operated for decades without receiving any money from the states. *Id.* at 45–46.

29. *Id.* at 39–40, 47.

30. The Court found that allowing plaintiffs to pursue their claims in federal court was not an affront to the Compact Clause entity because the federal court was not an instrument of a distant disconnected sovereign in relation to the entity, but was ordained by Congress, one of the entity’s founders. *Id.* at 41–42. The Court, however, did not explain how to evaluate this criterion in case the entity was not formed pursuant to the Compact Clause. *See infra* note 42.

31. *Hess*, 513 U.S. at 47 (citing *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 401 (1979)). While the Court articulated two “twin reasons” for the Eleventh Amendment, it considered the control factor before turning to the financial factor.

32. *Id.* at 47. The Court further undermined the control factor by indicating that gauging control could be a “perilous inquiry” and “an uncertain and unreliable exercise.” *Id.* (citing *Rogers*, *supra* note 10, at 1284).

33. *Id.* at 48.

34. *Id.* at 49–50.

35. *Id.* at 50 (citing *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 227 (1986)). The Court modified this standard shortly thereafter. In *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), a unanimous Court held that it was “the entity’s potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance,” that was relevant. *Id.* at 431. This holding departed from *Hess*, which concluded that immunity depended primarily on whether, as a practical matter, the state’s treasury would be vulnerable to a judgment. 513 U.S. at 50.

inquiry. Second, *Hess*'s nearly exclusive focus on the vulnerability of the state's treasury ignores other legitimate Eleventh Amendment interests. Third, *Hess* is counterproductive from a public policy perspective because it does not allow relatively autonomous entities to be considered arms of the state. Part II solves these problems by presenting and arguing for an alternative three-prong test that safeguards legitimate Eleventh Amendment concerns and promotes efficient public administration. This test considers three elements, each of which protects a core Eleventh Amendment purpose. To protect the state's dignity interests, courts should first look at state intent. Second, to protect state treasuries, courts should evaluate the state's legal and practical liability for the judgment. Third, to give due consideration to the state's ability to administer its affairs, courts should determine whether the entity serves a state function. An entity that meets at least two of these factors should have immunity because only then would Eleventh Amendment interests be strongly implicated.

### I. PROBLEMS WITH THE *HESS* APPROACH

This Part argues that the Supreme Court's approach in *Hess* is objectionable for three reasons. Section I.A argues that *Hess* does not promote uniformity in solving an important federal issue: which entities are clothed with Eleventh Amendment immunity. Section I.B argues that *Hess* does not fully protect legitimate Eleventh Amendment interests because it gives undue weight to the state treasury factor. Finally, Section I.C contends that *Hess* is counterproductive from a public policy perspective because it provides disincentives for public-private partnerships and entity independence. These problems suggest that the Court should adopt a new test.

#### A. *Lack of Uniformity*

*Hess* did not provide uniformity to the arm-of-the-state test. First, *Hess* left important questions unanswered regarding the overall application of the "twin reasons" analysis, allowing courts to address these differently. Second, *Hess* allowed courts to choose which and how many factors to consider. Third, *Hess* provided meager guidance to courts about how to evaluate whether a factor is met and how to weigh the different factors. The disparity that *Hess* has promoted disserves the strong interest in the uniform interpretation of federal law.

The arm-of-the-state test needs clarification. *Hess* left unanswered whether the legal liability of the state for the judgment is the most important factor or the only factor to be considered.<sup>36</sup> Some courts have followed the

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36. *Alkire v. Irving*, 330 F.3d 802, 811–12 (6th Cir. 2003) (citing *Brotherton v. Cleveland*, 173 F.3d 552, 560–61 (6th Cir. 1999)) (stating that, after *Hess*, it is unclear whether the question of who pays a damage judgment against an entity is the only factor or merely the principal one in the arm-of-the-state analysis); *see also Sturdevant v. Paulsen*, 218 F.3d 1160, 1166 (10th Cir. 2000) (citing *Duke v. Grady Mun. Sch.*, 127 F.3d 972, 978 (10th Cir. 1997) ("[E]ven after *Hess* and *Doe*,

holding in *Regents of the University of California v. Doe*<sup>37</sup> that the key issue is the state's legal liability for an adverse judgment, rather than the practical impact of the judgment on the state's treasury,<sup>38</sup> but the Eleventh Circuit has granted immunity based solely on practical impact<sup>39</sup> and a district court in the District of Columbia has granted immunity without even considering the state's legal liability for the judgment.<sup>40</sup> Even when courts consider the amount of funds that an entity receives from the state, it is not clear how much an entity must receive to meet the state treasury factor.<sup>41</sup> Besides these uncertainties regarding the state treasury factor, it is unsettled how lower courts should evaluate the "dignity of the state" inquiry in non-Compact Clause cases.<sup>42</sup> Circuits are even divided on whether *Hess* applies to non-Compact Clause cases.<sup>43</sup> In addition, while some courts have afforded immunity to private corporations acting as agents of the state,<sup>44</sup> other courts are

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which emphasized the primacy of the impact on the state treasury as a factor in determining immunity, other factors remain relevant.").

37. 519 U.S. at 431.

38. The Third, Fifth, and Ninth Circuits have asked whether, under state law, the state would be legally liable for the judgment against an entity to evaluate whether the state treasury factor is met. *Indep. Enters. Inc. v. Pittsburgh Water and Sewer Auth.*, 103 F.3d 1165, 1173 (3d Cir. 1997); *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 328 (5th Cir. 2002); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1142–43 (9th Cir. 2002). In addition, some circuits have explicitly rejected arguments that the practical impact of a judgment on the state's treasury is relevant. *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1182 (9th Cir. 2003); *Fresenius Med. Care Cardio. Res., Inc. v. P.R. & the Caribbean Cardio. Ctr. Corp.*, 322 F.3d 56, 75 (1st Cir. 2003) (citing *Metcalfe & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth.*, 991 F.2d 935, 941 (1st Cir. 1993)); *Vogt v. Bd. of Comm'rs*, 294 F.3d 684, 693 (5th Cir. 2002); *Duke*, 127 F.3d at 980–81.

39. *Manders v. Lee*, 338 F.3d 1304, 1327–28 (11th Cir. 2003).

40. The court only remarked that Massachusetts did not pledge its full faith and credit to the repayment of bonds that the entity issued. *U.S. ex rel K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 154 F. Supp. 2d 19, 23 (D.D.C. 2001).

41. The Fifth Circuit afforded immunity to the Education Service Centers ("Centers") in Texas because they received the "lion's share" of their budget from the state, but did not specify what this amount was. *Perez*, 307 F.3d at 328–29.

42. Compare *Harter v. Vernon*, 101 F.3d 334, 337–40 (4th Cir. 1996) (reducing the state dignity inquiry to "[w]hether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law"), with *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293–94 (2d Cir. 1996) (considering the state's scheme for liability of the entity, its source of funding, and the level of state control in assessing if a suit against the entity would be an affront to the dignity of the state). For a definition of Compact Clause entities, see *supra* note 12.

43. The Fifth Circuit's approach is perhaps the most divergent among the circuits because it explicitly rejected *Hess*'s applicability to single-state entities and it "largely ignore[s] *Lake Country Estates*." *Vogt*, 294 F.3d at 689 n.2. The Eighth Circuit has also questioned *Hess*'s applicability in non-Compact Clause cases. *Hadley v. N. Ark. Cmty. Technical Coll.*, 76 F.3d 1437, 1439 (8th Cir. 1996). *Contra Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (applying *Hess* to a single-state entity); *Fresenius*, 322 F.3d at 66 (same); *Mancuso*, 86 F.3d at 293 (same).

44. See *Manders*, 338 F.3d at 1326 (citing *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1310–11, 1313 (11th Cir. 2000)); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 948 F. Supp. 400, 412 (D.N.J. 1996) (citing *Skoblow v. Ameri-Manage, Inc.*, 483 So. 2d 809, 812 (Fla. Dist. Ct. App. 1986)).

reluctant to do so.<sup>45</sup> Even after *Hess*, the arm-of-the-state doctrine is confusing and difficult to apply.<sup>46</sup>

*Hess* did not lead to uniformity in the factors that circuits consider because its two-prong test applies only “[w]hen indicators of immunity point in different directions.”<sup>47</sup> Accordingly, the Third, Seventh, Eighth, and Ninth Circuits did not alter their arm-of-the-state tests at all in response to *Hess*.<sup>48</sup> Other circuits, however, have slightly adjusted their tests.<sup>49</sup> The Tenth Circuit has not followed a consistent approach, sometimes applying its pre-*Hess* test and sometimes applying a modified test.<sup>50</sup> The different factors the

45. See *Mass. Hous.*, 154 F. Supp. 2d at 23 (stating that a factor weighing against immunity was that the activities of the MHFA resembled those of a bank and thus were proprietary in nature); *Shands*, 208 F.3d at 1311 (finding no cases on point in which Eleventh Amendment immunity was provided to a private corporation).

46. *Mancuso*, 86 F.3d at 293 (“The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused.”); *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995) (describing *Hess* as “an opinion that is certain to generate confusion”).

47. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).

48. The Third Circuit continues to use its own three-factor test: 1) whether the judgment would be paid out of the state’s treasury, 2) the status of the agency under state law, and 3) the degree of autonomy the agency enjoys. *Carter v. City of Philadelphia*, 181 F.3d 339, 347 n.21 (3d Cir. 1999) (noting that *Hess* did not alter the circuit’s test because *Hess* did not adopt any test).

A district court in the Seventh Circuit continued to use the circuit’s three factor test after *Hess*: 1) the extent of the entity’s financial autonomy from the state; 2) its general legal status; and 3) whether it serves the state as a whole or only a region. *Lewis v. N. Ind. Commuter Transp. Dist.*, 898 F. Supp. 596, 599 (N.D. Ill. 1995) (citing *Kashani v. Purdue Univ.*, 813 F.2d 843, 845–47 (7th Cir. 1987)).

Courts in the Eighth Circuit “typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award would be derived from the state treasury.” *Hadley*, 76 F.3d at 1439 (quoting *Greenwood v. Ross*, 778 F.2d 448, 453 (8th Cir. 1985)). Shortly after *Hess*, the Eighth Circuit established that it saw “nothing inconsistent with the majority’s reasoning in *Hess* and the approach [it] ha[d] developed for deciding whether a particular institution . . . is entitled to Eleventh Amendment immunity.” *Id.*

The Ninth Circuit has continued using the five-factor test it developed before *Hess*. *Holz*, 347 F.3d at 1180. This test considers:

- 1) [W]hether a money judgment would be satisfied out of state funds;
- 2) whether the entity performs central governmental functions;
- 3) whether the entity may sue or be sued;
- 4) whether the entity has the power to take property in its own name or only the name of the state; and
- 5) the corporate status of the entity.

*Id.* (quoting *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988)).

49. The First Circuit restructured its seven-factor test into a two-prong inquiry after *Hess*. Compare *Fresenius*, 322 F.3d at 68, with *Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth.*, 991 F.2d 935, 939–40 (1st Cir. 1993). The Second Circuit incorporated the two-prong *Hess* approach into its analysis. *Mancuso*, 86 F.3d at 293–94.

The Fourth Circuit has stated that *Hess* did not materially alter its arm-of-the-state test, *Gray*, 51 F.3d at 434, but it did clarify that “the impact on the state treasury is generally determinative when the state will not have to pay for the judgment . . . .” *Harter v. Vernon*, 101 F.3d 334, 339 (4th Cir. 1996). When there is no impact on the state treasury, the Fourth Circuit continues to apply the three-factor test it used before *Hess*. *Id.*

50. Compare *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 994–96 (10th Cir. 1993) (considering the characterization of the entity under state law, the guidance and control exercised by the state over the entity, the degree of state funding received by the entity, and the entity’s ability to issue bonds and levy taxes on its own behalf), with *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999) (same). The Tenth Circuit, however, has sometimes applied a different framework in which it considers the same four factors, but in a two-prong test. See *Stur-*

circuits consider, and the inconsistency with which some circuits conduct their tests, hamper the uniform examination of this issue.

Circuits not only consider a variety of factors, they also evaluate the factors differently.<sup>51</sup> In examining the status of the entity under state law, the First Circuit considered: (1) the entity's enabling act; (2) other statutes; (3) state court decisions; (4) the entity's functions; and (5) the control the state exercised over it.<sup>52</sup> In contrast, the Eleventh Circuit exclusively considered that state law treated the entity as part of the county instead of the state.<sup>53</sup> To assess the state's control over the entity, the First Circuit considered how many of the entity's board members the governor appointed and whether the governor had the power to remove board members or veto the entity's decisions.<sup>54</sup> Courts in other circuits, however, did not take the state's veto power into consideration.<sup>55</sup> In addition, although the Tenth and Third Circuits considered whether the entity can sue and be sued under the control factor, enter into contracts in its own name, and take, hold, and handle real and personal property, other circuits did not.<sup>56</sup> Moreover, what constitutes a factor in one circuit is an element in another used to evaluate whether a factor is met.<sup>57</sup>

The circuits also afford varying weight to the elements and factors. Although the First Circuit did not give much weight to the enabling statute's indication that the entity was not a political subdivision,<sup>58</sup> the Eleventh Circuit

devant v. Paulsen, 218 F.3d 1160, 1164 (10th Cir. 2000); *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 978–982 (10th Cir. 1997); *Haldeman v. State of Wyo. Farm Loan Bd.*, 32 F.3d 469, 473 (10th Cir. 1994).

51. See *infra* note 56 and accompanying text. The confusion among the circuits may result from the lack of guidance from *Hess*. See *Gray*, 51 F.3d at 433.

52. *Fresenius Med. Care Cardio. Res., Inc. v. P.R. & the Caribbean Cardio. Ctr. Corp.*, 322 F.3d 56, 68–72 (1st Cir. 2003).

53. *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309, 1314 (11th Cir. 2003). Other circuits have also asked whether the entity serves state or local functions. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 327–32 (5th Cir. 2002); *Carter*, 181 F.3d at 349 (Third Circuit); *Harter*, 101 F.3d at 340, 342–43 (Fourth Circuit). Some scholars have criticized using the local/state government distinction. See Gerald E. Frug, *The Judicial Power of the Purse*, 126 *U. Pa. L. Rev.* 715, 756 n.217 (1978); see also Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 *S. CAL. L. REV.* 51, 57 n.23 (1990).

54. *Fresenius*, 322 F.3d at 71–72. *Contra Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 100 (1st Cir. 2002) (looking at whether the entity's annual budget was approved by the legislature and who appointed the director).

55. *Vogt v. Bd. of Comm'rs*, 294 F.3d 684, 694–95 (5th Cir. 2002); *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000); *Sturdevant v. Paulsen*, 218 F.3d 1160, 1167–69 (10th Cir. 2000); *Indep. Enters. Inc. v. Pittsburgh Water and Sewer Auth.*, 103 F.3d 1165, 1174 (3d Cir. 1997).

56. Compare *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999) and *Christy v. Pa. Tpk. Comm'n*, 54 F.3d 1140, 1149 (3d Cir. 1995), with *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1180 (9th Cir. 2003) and *Fresenius*, 322 F.3d at 71–72.

57. Compare *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 (9th Cir. 2003) (considering whether an entity can sue and be sued as one independent factor) and *Perez*, 307 F.3d at 327 (same), with *Christy*, 54 F.3d at 1144 (considering whether an entity can sue and be sued as one of four elements to evaluate the status under state law factor).

58. *Fresenius*, 322 F.3d at 69 n.14.

focused exclusively on whether a sheriff was part of a political subdivision to determine if the state had structured the entity as an arm of the state.<sup>59</sup> Furthermore, although some circuits afford the state treasury factor a disproportionate weight,<sup>60</sup> the Seventh Circuit called it the least important factor,<sup>61</sup> and held that an entity can be an arm of the state even if the state treasury remains untouched.<sup>62</sup>

Courts need to apply a uniform arm-of-the-state test. The lack of uniformity does not promote predictability in judgments and allows judicial fishing expeditions for factors or criteria that support a particular result. Furthermore, it prevents the consistent resolution of this important federal constitutional right of states,<sup>63</sup> which should be the same in all parts of the country.<sup>64</sup> Florida should not more easily clothe entities with Eleventh Amendment immunity than the District of Columbia just because the Eleventh Circuit and courts in the District of Columbia use different tests.<sup>65</sup> A uniform test does not mean that all school districts, for example, will have the same arm-of-the-state status.<sup>66</sup> Rather, the purpose is to equalize across circuits the status of entities that are structured similarly while allowing en-

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59. *Manders v. Lee*, 338 F.3d 1304, 1309–12 (11th Cir. 2003).

60. *Nat'l R.R. Passenger Corp. v. Pa. Pub. Utility Comm'n*, 288 F.3d 519, 524 (3d Cir. 2002) (affirming a district court decision holding that the state treasury factor outweighed the status under state law and state control factors); *Gray v. Laws*, 51 F.3d 426, 434 (4th Cir. 1995) (citing *Bockes v. Fields*, 999 F.2d 788, 790–91 (4th Cir. 1993)).

61. *Thiel v. State Bar of Wis.*, 94 F.3d 399, 401 (7th Cir. 1996) (citing *Crosetto v. State Bar of Wis.*, 12 F.3d 1396, 1402 (7th Cir. 1993)). *Contra* *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 732–33 (7th Cir. 1993) (suggesting that whether the entity has the power to raise its own funds is the most significant factor).

62. *Thiel*, 94 F.3d at 401 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1995)); *Scott v. O'Grady*, 975 F.2d 366, 372 (7th Cir. 1993). The Fifth Circuit also does not give the treasury factor decisive weight although it recognizes that this factor is significantly important. *United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004); *Perez*, 307 F.3d at 327.

63. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (noting that Eleventh Amendment immunity is a constitutional right of states). The superconstitutionalist interpretation of the Eleventh Amendment asserts that state sovereign immunity is not a common law doctrine subject to Congress's plenary powers, but rather a constitutionally protected state right inviolable by Congress. *Fitzgerald*, *supra* note 1, at 1211. The Supreme Court has endorsed the superconstitutionalist interpretation. *See Seminole Tribe*, 517 U.S. at 76 (holding that Congress cannot abrogate state sovereign immunity pursuant to its Article I powers); *Alden v. Maine*, 527 U.S. 706, 754 (1999) (stating that sovereign immunity is a constitutional principle that Congress cannot abrogate in state courts).

64. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 293 (1997) (highlighting the importance of having federal courts interpret federal rights as a means of serving a federal interest in uniformity); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 812 (1995) (same).

65. For example, while the Eleventh Circuit has readily afforded immunity to private corporations acting on behalf of the state, a district court in the District of Columbia has expressed reservations about affording immunity to entities with proprietary functions. *Compare Manders v. Lee*, 338 F.3d 1304, 1326 (11th Cir. 2003) (citing *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1310–11, 1313 (11th Cir. 2000)), *with* *U.S. ex rel K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 154 F. Supp. 2d 19, 23 (D.D.C. 2001).

66. *Rogers* suggested that the arm-of-the-state test should equalize the status of the same types of entities. *See Rogers*, *supra* note 10, at 1243 (“Even the more traditional state-created bodies, such as public universities, school districts, and highway and transit agencies, cannot always be placed squarely in the alter ego-political subdivision dichotomy.”).

ties that are structured differently to have different status.<sup>67</sup> Only a uniform test assures that this federal right applies equally everywhere.

### B. *Unprotected Interests*

Besides not providing a uniform arm-of-the-state analysis, *Hess*'s framework pays little attention to the effect that federal lawsuits can have on the states' administration of their public affairs. This shortcoming compromises the ability of states to deliver public services and violates an important tenet of the Eleventh Amendment.

#### 1. *Main Purpose*

The *Hess* Court, strictly adhering to the Eleventh Amendment's text, stated that the impetus for the Amendment was "the prevention of federal-court judgments that must be paid out of a State's treasury."<sup>68</sup> The Court also noted that the most important factor in most circuits is the protection of state treasuries and have accorded this factor dispositive weight.<sup>69</sup> These assertions were the basis for the majority's establishment of an arm-of-the-state framework that places undue consideration on the state treasury factor.

In contrast, Justice O'Connor's dissent viewed the principal purpose of the Eleventh Amendment as protecting state sovereignty.<sup>70</sup> Justice O'Connor noted that the text of the Amendment prohibits suits in law and equity and belies the assertion that the driving concern of the Eleventh Amendment is the protection of state treasuries.<sup>71</sup> The Amendment "does not turn a blind eye simply because the state treasury is *not* directly implicated."<sup>72</sup>

A majority of the Court has since adopted the view that protecting state treasuries is not the main purpose of the Eleventh Amendment. In *Federal Maritime Commission v. South Carolina State Ports Authority*, the Court held that state sovereign immunity precluded the Federal Maritime Commission ("FMC") from adjudicating a private party's complaint that a state ports authority violated the Shipping Act of 1984.<sup>73</sup> The majority explained that "the primary function of sovereign immunity is not to protect State treasuries . . . but to afford the States the dignity and respect due sovereign entities."<sup>74</sup>

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67. See *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1041 (9th Cir. 2003) (noting that using the same five-factor test, school districts in California were declared arms of the state while school districts in Nevada were not).

68. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994)

69. *Id.* at 48–49.

70. *Id.* at 59 (O'Connor, J., dissenting) (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

71. *Id.* at 60.

72. *Id.* at 61.

73. 535 U.S. 743, 747 (2002).

74. *Id.* at 769.

The Court has long adhered to *FMC*'s interpretation of the Eleventh Amendment's main purpose. Although the Amendment's language exactly tracks the facts of *Chisholm*, the Amendment stands for more than what it literally states.<sup>75</sup> As the Court stated over a century ago in *In re Ayers*, the Eleventh Amendment sought:

[T]o prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons . . . or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.<sup>76</sup>

This passage confirms the *FMC* Court's interpretation of the Amendment as primarily preserving the sovereignty of states within the federal system.

## 2. Equal Interests

Except in *Hess*, the Court has not afforded disproportionate weight to any one factor of the arm-of-the-state test. Before *Hess*, in explaining when an entity should be afforded Eleventh Amendment immunity, the Court stated in *Pennhurst State School & Hospital v. Halderman*:

The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."<sup>77</sup>

This passage specifically identifies three interests the Amendment protects through the arm-of-the-state analysis. First, the Amendment shields state treasuries from federal-court judgments. Second, the Amendment prevents federal courts from interfering with the states' public administration. Third, the Amendment prohibits federal courts from ordering the states to do or refrain from doing something. Not only are these interests different,<sup>78</sup> but the Court also did not attribute a higher status to any one of them. By failing to supply a hierarchy of the relevant interests, the *Pennhurst State* Court

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75. See *supra* note 5.

76. *In re Ayers*, 123 U.S. 443, 505 (1887). This interpretation has not gone uncontested. See *supra* note 1; see also *FMC*, 535 U.S. at 771 (Stevens, J., dissenting) ("If the paramount concern of the Eleventh Amendment's framers had been protecting the so-called 'dignity' interest of the States, surely Congress would have . . . grant[ed] the States immunity from process, rather than . . . merely delineat[ing] the subject matter jurisdiction of courts.")

77. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984) (quoting *Duran v. Rank*, 372 U.S. 609, 620 (1963)).

78. See *FMC*, 535 U.S. at 765 (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)) ("While state sovereign immunity serves the important function of shielding state treasuries . . . the doctrine's central purpose is to 'accord the States the respect owed to them as' joint sovereigns."); see also *infra* text accompanying notes 83–88.

suggested that the Eleventh Amendment is equally concerned with protecting these three interests. In addition, the Court's decision to employ balancing tests in *Mount Healthy* and *Lake Country Estates* made it appear that these interests were relatively equal.<sup>79</sup> Finally, the fact that, after *Hess*, the Supreme Court has afforded Eleventh Amendment immunity to entities even when the state treasury is not involved further supports the view that the Amendment must protect other important interests.<sup>80</sup>

The disagreement about the main purpose of the Eleventh Amendment also counsels against affording any one factor disproportionate weight. On the one hand, the majority in *Hess* stated that the impetus for the Eleventh Amendment was to protect state treasuries.<sup>81</sup> On the other hand, a different majority of the Court stated in *FMC* that the principal purpose of the Amendment was to protect state sovereign immunity, not to protect state treasuries.<sup>82</sup> Given the narrow margin of these decisions, and that both are grounded in plausible readings of the history of the Amendment, the arm-of-the-state analysis should not afford more protection to one interest than to any other. Instead, consistent with the balancing approach that the Court has historically applied, and its description of the test in *Pennhurst State*, the arm-of-the-state analysis should treat these interests as equal to protect appropriately all legitimate Eleventh Amendment interests.

### 3. Independent Evaluation

Although Eleventh Amendment interests are interrelated, independent examination of each is necessary to protect them fully. In *Pennhurst State*, the Court identified three equally legitimate and distinct Eleventh Amendment interests: (1) protecting state treasuries; (2) protecting states from federal court interference in their public affairs; and (3) protecting state dignity interests.<sup>83</sup> Perhaps the reason to protect state treasuries is to safeguard

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79. A literal reading of the above quoted passages in *In re Ayers* and *Pennhurst State* might lead to the conclusion that an entity that meets one of the three identified factors should be afforded immunity. Such a reading, however, would contravene the traditional balancing of the different factors that courts have undertaken. Furthermore, to protect the multiple purposes of the Eleventh Amendment, it is necessary to evaluate more than one factor.

80. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (holding that the University of California had Eleventh Amendment immunity even if the State of California would not have to actually pay a judgment against the University); *FMC*, 535 U.S. at 749, 765 (holding that the South Carolina Ports Authority was entitled to Eleventh Amendment protection even if a Federal Maritime Commission proceeding did not present a threat to the financial integrity of the state).

81. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994).

82. *FMC*, 535 U.S. at 769. *FMC* and *Hess* were decided by one vote and, notably, Justice Kennedy was in the majority both times. Justice Kennedy's majority opinion in *Alden* suggests that he would support *FMC*'s version of the purpose of the Eleventh Amendment. *See Alden v. Maine*, 527 U.S. 706, 728 (1999) (stating that the Eleventh Amendment confirmed sovereign immunity as a constitutional principle).

83. *See supra* text accompanying notes 77–79. Protecting the dignity interests of the states is the same as trying to avoid restraining them from acting or compelling them to act. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (noting that the Eleventh Amendment protects the dignity interests of unconsenting states in not being subject to coercive judicial processes at the

the states' prerogative to manage their public affairs because the function of a state's treasury is to finance the state's administration.<sup>84</sup> In other words, protecting state treasuries may be the means to protect the states' autonomy to make policy choices. Nevertheless, independent examination of these interests is necessary because a federal court can interfere with a state's administration of its affairs even if the state's treasury is not implicated. For example, if a court concludes that a port authority is not entitled to immunity because of its traditional financial independence, a multimillion-dollar judgment against it would inevitably interfere with the state's transportation affairs because money earmarked for financing operations or new development projects would have to be reallocated to satisfy the judgment.<sup>85</sup> A judgment against a state-created hospital/research entity that raises its own funds, like the Cardiovascular Center in *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico & the Caribbean Cardiovascular Center Corp.*,<sup>86</sup> may affect the entity's ability to buy new equipment and hamper its state-delegated mission to provide health services, although it may not affect the state's treasury directly. As the Eleventh Circuit has recognized, a judgment against an entity affects that entity's ability to perform state functions even though the state may not be legally liable for the judgment.<sup>87</sup> Thus, the arm-of-the-state test should independently examine the Eleventh Amendment's three equally legitimate interests.

### C. Public Policy

The *Hess* approach also creates undesirable public policy consequences because it sends states the message that only entities that are heavily dependent on state funds, or those for which the state is legally liable, will be immune from suit in federal court.<sup>88</sup> Consequently, states create financially

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instance of private parties). While the state's interest in being free from federal court intervention in its public affairs might also be characterized as a dignity interest, these two interests are not the same. See *infra* note 93 and accompanying text.

84. See Fitzgerald, *supra* note 1, at 1242 ("Sovereign immunity, on the other hand, keeps judicial and political processes separate, by allowing the political process, rather than the judiciary, to make necessary judgment calls as to 'the allocation of scarce resources among competing needs and interests.'") (quoting *Alden*, 527 U.S. at 751).

85. Even if the port authority has insurance coverage for judgments against it, higher insurance premiums would likely force it to reallocate its resources. Moreover, legal liability weighs in favor of Eleventh Amendment immunity. See *Doe*, 519 U.S. at 431.

86. *Fresenius Med. Care Cardio. Res., Inc. v. P.R. & the Caribbean Cardio. Ctr. Corp.*, 322 F.3d 56 (1st Cir. 2003).

87. *Manders v. Lee*, 338 F.3d 1304, 1327–28 (11th Cir. 2003) ("Sheriff Peterson . . . would have to pay any adverse federal court judgment against him in his official role out of the budget of the sheriff's office. If a significant adverse judgment occurs, . . . state funds are implicated because Sheriff Peterson would need to seek a greater total budget from . . . the State."); *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1312 (11th Cir. 2000) ("Any analysis by the court of the State's obligations under the various contractual provisions [between the State of Florida and a private entity administering a state program] would impermissibly intrude upon the future administration of the state program.")

88. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994); see also *supra* note 35.

independent entities at the expense of not clothing them with immunity from suit.<sup>89</sup> An entity's financial independence should not count against immunity for a number of reasons.

First, such an arm-of-the-state approach does not promote effective public administration because it discourages states from creating financially independent entities.<sup>90</sup> States might consider immunity vital for some entities to free them from the obligation to spend valuable resources in defending federal suits. Reluctance to afford immunity to entities that are capable of raising their own revenue promotes unnecessary dependence and waste of public resources.

Second, constraining the policy discretion of states in structuring their entities is against the Eleventh Amendment's interest in restricting the interference of federal courts in the states' administration of their affairs.<sup>91</sup> States have legitimate reasons to create financially independent entities while simultaneously clothing them with immunity.<sup>92</sup> They may not have the funds to finance an entity or may determine that there are better uses for scarce public resources. The arm-of-the-state test should not constrain these choices; otherwise federal courts could threaten the states' functions and dignity interests.<sup>93</sup>

Third, this framework provides a disincentive for private entities to partner with the state in delivering public services if there is a high risk of federal lawsuits. The private sector provides a great deal of public services<sup>94</sup> and public-private partnerships can be more efficient than public investment and government supply of services.<sup>95</sup> These partnerships, however, often

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89. See Kelly Knivila, Note, *Public Universities and the Eleventh Amendment*, 78 GEO. L.J. 1723, 1728 (1990) (arguing that the Supreme Court's "emphasis on fiscal and nonfiscal indications of autonomy is inadequate when applied to public universities" because "[t]he inquiry might discourage states from promoting institutional autonomy for fear that too great a grant of independence will strip the university of its [E]leventh [A]mendment immunity").

90. See *id.* at 1745 (arguing that a presumption that the state does not intend to clothe an entity with immunity when it gives it considerable autonomy may discourage states from structuring important government entities in the most effective manner possible).

91. See *supra* note 76 and accompanying text.

92. The fact that a state creates a financially independent entity does not mean that it does not consider it an arm of the state. States may create autonomous or financially independent entities while still intending to clothe them with their immunity so that the entities' public functions are not impaired. See Knivila, *supra* note 89, at 1729.

93. *Manders v. Lee*, 338 F.3d 1304, 1328–29 (11th Cir. 2003) (arguing that the state's sovereignty and integrity are directly affected when federal court lawsuits interfere with a state program or function). The states' dignity interests, however, are not only implicated by the federal court's intervention in a state function. States have an independent dignity interest in not being forced into federal court by private parties. See *supra* text accompanying note 76.

94. Michelle Estrin Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 799, 823 (2002) (explaining that the majority of government social service programs are already delivered by the private sector).

95. INTERNATIONAL MONETARY FUND [IMF], FISCAL AFFAIRS DEP'T, PUBLIC-PRIVATE PARTNERSHIPS 3 (2004), <http://www.imf.org/external/np/fad/2004/pifp/eng/031204.pdf>.

face significant risks and the private party bears most of these risks.<sup>96</sup> The private party is especially exposed to the legislative and government policy risk, which is the risk that the government is immune from legal action or that it will legislate in a way that negatively impacts the partnership.<sup>97</sup> Public-private partnerships could be much more unattractive to the private party if, besides the legislative and government policy risk, courts summarily deny the private party the ability to claim the state's immunity from suit when delivering public services on behalf of the state. If the risk of federal lawsuits against the private party is high and immunity is not an alternative, the government may have to provide a much more expensive premium than immunity to the private party.<sup>98</sup>

## II. A UNIFORM THREE-PRONG TEST

As discussed in Part I, courts need a uniform test that protects the three equally legitimate Eleventh Amendment interests. This Part offers a three-prong arm-of-the-state test that fulfills that need. Section II.A explains each of the three factors of the test: (1) state intent; (2) state liability; and (3) state function. Although the factors are not a radical departure from those courts have historically considered, this test provides a limited number of clear criteria to evaluate each factor and gives equal consideration to the three Eleventh Amendment interests. Section II.B shows the impact the test would have on the arm-of-the-state jurisprudence and Section II.C argues for the adoption of the test.

### A. *The Test*

Under the first factor of this test, courts would examine the statutory description of the entity and how much control the state exerts over the entity.<sup>99</sup> The second factor looks at the state's legal and practical liability for the en-

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96. These risks include construction risks, financial risks, performance risks, demand risks, and residual value risks. *Id.* at 12. Not every public-private partnership will be subject to all of these risks because the level of involvement of the private party varies from project to project.

97. QUEENSLAND GOV'T, STATE DEVELOPMENT, PUBLIC PRIVATE PARTNERSHIPS GUIDANCE MATERIAL: RISK MANAGEMENT 6, 38 (2002), [http://coordinatorgeneral.qld.gov.au/library/pdf/ppp/ppp\\_overview.pdf](http://coordinatorgeneral.qld.gov.au/library/pdf/ppp/ppp_overview.pdf).

98. *Id.* at 6 ("If the risk is one with a significant probability of interrupting or diminishing the payment stream that will service debt, the Private Party (debt financiers) will demand a significant premium to accept that risk. This significantly increases the costs of financing the project.")

99. This test, like any other, is not employed if the state has waived its Eleventh Amendment immunity. *See Alden v. Maine*, 527 U.S. 706, 755 (1999). A state waives its immunity by stating such a waiver through express language or by voluntarily invoking the jurisdiction of a federal court. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999); *Edelman v. Jordan*, 415 U.S. 651, 673 (1994). A state does not waive its immunity to suit in federal courts by consenting to suits in its own courts, by stating its intention to sue and be sued, or even by authorizing suits against it in any court of competent jurisdiction. *Fla. Dep't of Health and Rehabilitative Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 149–150 (1981) (per curiam); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577–579 (1946); *Smith v. Reeves*, 178 U.S. 436, 441–445 (1900).

tity's debts. Finally, the third factor assesses whether the entity is performing a function on behalf of the state.

Unlike other tests, this test equally weighs the three Eleventh Amendment interests to protect them fully.<sup>100</sup> Given that all three factors have the same weight, courts should only afford immunity if at least two of these factors are met. Immunity should extend only to those entities so closely aligned with the state that they act on its behalf because the text of the Eleventh Amendment affords immunity only to states.<sup>101</sup> Requiring that two factors are met ensures that an entity will be immune only when Eleventh Amendment interests are strongly implicated.

### 1. *State Intent*

The first inquiry is whether the state intended to provide the entity with immunity. The requisite intent can be met if the entity's enabling statute: (1) describes the entity as an arm of the state; or (2) indicates that the state controls the entity. Statutory language is the main indicator of intent under this test because the entity's description is the best assessment of a state's intent. This test eliminates the consideration of state court decisions in determining state intent because Eleventh Amendment immunity is a federal question that federal courts, not state courts, must decide.

#### a. *Description*

A state can express its intent to clothe an entity with its immunity from suit by describing it as an arm of the state, public or state agency or instrumentality, or not a political subdivision.<sup>102</sup> If the enabling statute describes the entity as a political subdivision or a municipal corporation, then the state intent factor is not met.<sup>103</sup> If the enabling statute describes the entity as a public corporation, the court should determine the precise nature of the entity established under state law.<sup>104</sup> If state law describes the public

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100. See *supra* Section I.B.

101. *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400–02 (emphasizing that the Eleventh Amendment, by its terms, affords immunity to “one of the United States” and that the immunity is only extended to agencies exercising state power).

102. See, e.g., *U.S. ex rel K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 154 F. Supp. 2d 19, 22 (D.D.C. 2001) (describing the entity as a “public instrumentality”).

103. Eleventh Amendment immunity does not extend to political subdivisions such as counties, municipalities, and similar municipal corporations. *Lake Country Estates*, 440 U.S. at 401; *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

104. *Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1204 (1st Cir. 1993) (citing *Moor v. County of Alameda*, 411 U.S. 693, 719 (1973)). Public corporations, just like political subdivisions, are not considered arms of the state. See, e.g., *Hopkins v. Clemson Agric. Coll.*, 221 U.S. 636, 645 (1911). Courts have recently, however, distinguished between political subdivisions and public corporations and entertained the question of whether some public corporations are arms of the state. See, e.g., *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44–45 (1994); *Moor*, 411 U.S. at 719; *Fresenius Med. Care Cardio. Res., Inc. v. P.R. & the Caribbean Cardio. Ctr. Corp.*, 322 F.3d 56, 61 (1st Cir. 2003); *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999). This distinction makes sense because political subdivisions such as counties are accountable

corporation as a purely local entity, then the state intent factor is not met.<sup>105</sup> If there are inconsistent descriptions of the entity in the statute or the entity does not fall within one of these categories, then a court should look at the control the state exercises over the entity.

One problem of considering the description of the entity is sham labeling.<sup>106</sup> This is not a serious concern under the three-factor test proposed in this Note, however, because the description of the entity only determines state intent. For arm-of-the-state status, an entity needs to meet two out of three factors, which reduces the risk of sham labeling.<sup>107</sup> Courts have attempted to mitigate sham labeling by assessing whether an entity labeled as an instrumentality has the same characteristics of other arms of the state.<sup>108</sup> This type of examination, however, expands and complicates the state intent inquiry and forces courts to look into factors that are not that important.<sup>109</sup> In addition, the sharing of attributes is not a good reflection of state intent because a state might have legitimate reasons for creating entities with some powers traditionally indicative of arm-of-the state status while still not intending to clothe them with immunity. For example, a state might immunize an entity from state taxation to ease financial burdens but might not intend to immunize the entity from federal civil rights violations.<sup>110</sup> Comparing entities to determine whether the state has extended its immunity to a particular entity constrains the state's ability to structure its entities. This examination also goes against the presumption that states act in good faith and against the judicial practice of not second-guessing the legislature's intentions.<sup>111</sup>

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to the particular citizens of a locality whereas public corporations may be accountable to the state as a whole.

105. See *Moor*, 411 U.S. at 718–19.

106. See, e.g., *Sutton*, 173 F.3d at 1232 n.5 (“Though the name of the school includes the word ‘State,’ mere labeling of a governmental entity is not sufficient to find it an ‘arm of the state.’”).

107. Even though the amount of funds an entity receives from the state and the function the state entrusts it with are not indicative of state intent under this test, it is likely that a state will provide an entity with a significant amount of funds or that it will entrust the entity with the performance of a state function if the state describes it as an arm of the state. Thus, in most cases, these two factors would often function as corroborative evidence that the state means what it says.

108. See, e.g., *Fresenius*, 322 F.3d at 68–69. Some characteristics which courts have considered are the legal powers of the entity, such as whether it can sue and be sued, enter into contracts, hold property in its own name, or is exempt from state taxation, to test the real status of an entity. *Daniel v. Am. Bd. of Emergency Med.*, 988 F. Supp. 127, 152 (W.D.N.Y. 1997).

109. See *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 319 (5th Cir. 2001) (noting that whether the agency has authority to enter into litigation and hold property are less important factors than the source of the entity's funds); *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995) (noting that where a California school district could sue and be sued and hold property in its own name, these two factors weighed against a finding of immunity, but they were not entitled to as much weight as the other three).

110. See Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 CARDOZO L. REV. 35, 39, 78 (2004) (noting that a broad scope of liability for prisons run by private entities helps to ensure accountability for civil rights violations of prisoners).

111. See *Alden v. Maine*, 527 U.S. 706, 755 (1999) (stating an unwillingness to assume that the states would refuse to honor the Constitution or the binding laws of the United States).

b. *Control*

Alternatively, a court can find the requisite intent by assessing the control the state has over the entity's decision-making process. A state controls an entity's decision-making process if it can directly appoint a majority of the officers or board members of the entity<sup>112</sup> or if it can veto the entity's decisions.<sup>113</sup> Examining the enabling statute readily indicates if either of these elements is met. These types of control—appointment and veto—evinced the state's intent to make the entity one of its arms.<sup>114</sup> The appointment power ensures control over the entity's decision-making process, because the state can choose members who share its particular policy preferences. Similarly, the veto power affords the state substantial control over entity outcomes, which signals that the entity is acting on behalf of the state.<sup>115</sup>

The power to remove those appointed is not necessary under this test to meet the control element. Undoubtedly, the power to remove would also signal the state's intention to check the decision-making power of an entity.<sup>116</sup> If such power is required, however, states may not afford some entities the independence they need to perform their public duties effectively.<sup>117</sup> The arm-of-the-state test must be flexible enough to allow states to structure their entities in a way that does not compromise their public functions.

Other forms of control are excluded because they are not good indicators of state intent to immunize the entity. First, as the *Hess* majority found, the power of the state to “destroy or reshape” its political subdivisions is not a good indicator of the state's intent to share its Eleventh Amendment immunity.<sup>118</sup> A state reveals its intent to share immunity by controlling the decision-making processes of an entity.<sup>119</sup> The power to destroy or reshape political subdivisions does not allow the state to control these processes because it does not guarantee the influence over the leadership of these entities that the appointment and veto power have. Second, the informal political dynamics could be such that the state almost always gets to decide what the

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112. See, e.g., *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999) (finding that the state clearly exercised control over a school because the school's board consisted solely of state board of education members).

113. See, e.g., *Thiel v. State Bar of Wis.*, 94 F.3d 399, 401, 402 (7th Cir. 1996) (noting that the Wisconsin Supreme Court retained ultimate authority to review the State Bar of Wisconsin's By-laws).

114. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 61 (1994) (O'Connor, J., dissenting) (“If the lines of oversight are clear and substantial—for example, if the State appoints and removes the entity's governing personnel and retains veto or approval power over an entity's undertakings—then the entity should be deemed an arm of the State for Eleventh Amendment purposes.”).

115. *Id.*

116. *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 223, 228 (1986).

117. See *supra* notes 89–90 and accompanying text.

118. *Hess*, 513 U.S. at 47.

119. See *supra* note 114 and accompanying text.

entity would do. Gauging this type of control, however, is very difficult for courts to do.<sup>120</sup> Informal instances of control do not evince strong state intent to make an entity its arm because the state does not legally constrain the entity's decision-making authority. Measuring control based on what really matters—appointment power and veto power—is much more efficient and feasible.<sup>121</sup>

Although some circuits consider the control factor separately from the state intent factor,<sup>122</sup> control should be considered an element of the state intent factor for two reasons. First, the enabling statute could be poorly drafted or non-existent, making it hard to decipher intent. Second, the degree of control the state exercises over an entity is generally indicative of its intent in creating the entity.<sup>123</sup>

### c. Excluded Elements

Courts should not consider other potential indicators of state intent. Among these, the evaluation of state court decisions is perhaps the most common.<sup>124</sup> State court decisions have limited usefulness and have not been consistently weighed.<sup>125</sup> In addition, gauging state intent from state court decisions is sometimes burdensome for federal courts.<sup>126</sup> Federal courts have

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120. See *Rogers*, *supra* note 10, at 1265 (“[T]he power to appoint may be restricted by other political dynamics that may escape the court’s scrutiny.”).

121. *Hess*, 513 U.S. at 62 (O’Connor, J., dissenting) (noting that the control inquiry “should turn on real, immediate control and oversight, rather than on the potentiality of a State taking action to seize the reins”).

122. *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) (considering how the governing members of the entity were appointed independently from whether the state had veto power over the entity’s actions); *Christy v. Pa. Tpk. Comm’n*, 54 F.3d 1140, 1144–45 (3d Cir. 1995) (considering the “degree of autonomy the agency enjoys” independently from the entity’s status under state law).

123. See *supra* note 114. This general assumption does not hold in the case of public universities, however, where state control might directly impair the purposes of the university. See *Knivila*, *supra* note 89, at 1728. While allowing control to reflect state intent to clothe an entity with immunity might create disincentives for entity autonomy, this danger is mitigated by the fact that this factor can be met through statutory description of the entity as an agency, instrumentality, or arm of the state. In addition, state control is not determinative of arm-of-the-state status under this test.

124. See, e.g., *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 328 (5th Cir. 2002); *Harter v. Vernon*, 101 F.3d 334, 342 (4th Cir. 1996).

125. The *Hess* Court ruled that the Authority was not an arm of the state despite the fact that state courts had repeatedly characterized the Authority as “an agency of the States.” 513 U.S. at 45, 52. Compare *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 995 (10th Cir. 1993) (not giving deference to decisions of Utah courts that had consistently held that school districts shared the state’s sovereign immunity), with *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000) (giving some deference to the Colorado Supreme Court’s determination that the entity was an arm of the state for Eleventh Amendment purposes). Despite *Hess*’s rejection of state court interpretations of the Authority, the First and Third Circuits have afforded great deference to state court treatment of entities. *Redondo Constr. Corp. v. P.R. Highway and Transp. Auth.*, 357 F.3d 124, 128 (1st Cir. 2004); *Christy*, 54 F.3d at 1148.

126. See *Mancuso*, 86 F.3d at 295 (concluding that the inconsistent ways New York state courts had treated the Thruway Authority made it impossible to know whether it was an independent corporation or a traditional state agency).

also afforded little weight to state court decisions because determining whether an entity is an arm of the state is a federal question.<sup>127</sup> Another way to assess intent is by asking whether the state has disclaimed legal liability for the entity's debts.<sup>128</sup> A state's disclaimer of liability, however, is an imperfect indicator of intent because the state may want the entity to be liable for suits to enhance accountability.<sup>129</sup>

## 2. State Liability

The second factor courts should consider is whether the state would be responsible for a judgment against the entity. This factor is included to follow *Doe*,<sup>130</sup> because it is the most direct trigger of the Eleventh Amendment,<sup>131</sup> and because it is undoubtedly the most prevalent among circuits.<sup>132</sup> This factor can be met if the entity's enabling statute establishes that the state is legally responsible for the entity's debts or judgments against it.<sup>133</sup>

Alternatively, if the statute does not specify whether the state is legally liable for the entity's debts, the factor can be met if the state provides more than half of the entity's total funds. Courts that consider the amount of funds an entity receives from the state have never established the exact proportion of state funds necessary to meet this factor.<sup>134</sup> The First Circuit has come closest to articulating a clear standard by concluding that this factor was not met because "the majority of PRCCCC's funding now comes from sources other than the Commonwealth's treasury."<sup>135</sup> Given that more than half is the narrowest interpretation of a majority, it is reasonable to find this factor met when an entity receives such a proportion of funds from the state. If more than half of an entity's budget is comprised of state funds, that entity undoubtedly receives the lion's share of its funds from the state and a court could infer that a judgment against the entity would affect the state's treasury.<sup>136</sup> In addition,

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127. See, e.g., *Sturdevant*, 218 F.3d at 1164; *Ambus*, 995 F.2d at 995.

128. See *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628, 631 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990) (noting that the states' disclaimer of responsibility from the entity's expenses, including liability for personal injury judgments, evinces intent to protect the states' treasuries), *cited in Hess*, 513 U.S. at 46.

129. See *Kritchevsky*, *supra* note 110, at 78–79.

130. See *supra* note 35.

131. *DURCHSLAG*, *supra* note 3, at 3.

132. *Hess*, 513 U.S. at 47–49; see *supra* notes 38–41, 48–50.

133. See *supra* note 38 and accompanying text.

134. The Fifth Circuit concluded that this factor was met because the Centers received a "lion's share" of their funds from the state, although the court did not specify what percentage this represented. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 329 (5th Cir. 2002). The Supreme Court only indicated that the Port Authority was "financed predominantly by private funds." *Hess*, 513 U.S. at 45.

135. *Fresenius Med. Care Cardio. Res., Inc. v. P.R. & the Caribbean Cardio. Ctr. Corp.*, 322 F.3d 56, 72 (1st Cir. 2003).

136. *Perez*, 307 F.3d at 327–28.

when an entity receives more than half of its funding from the state, the legislature has made an important policy commitment. Requiring such an entity to pay a judgment could hinder the purpose for which the state provided those funds, especially if there are many other suits.

Determining if more than half of the entity's budget comes from state funds might be difficult in some cases. For example, the share of the entity's budget coming from the state might vary from year to year. In such a case, a court should examine the entity's budget for the year in which the judgment would be satisfied because that is the most relevant period of time in determining the vulnerability of the state's purse.<sup>137</sup>

This factor adopts both *Doe's* legal liability standard<sup>138</sup> and the practical impact arguments the Eleventh Circuit advanced in *Manders v. Lee*.<sup>139</sup> Legal liability is the most specific element protecting the state's purse. In the absence of a clear statutory statement regarding the state's legal responsibility for the entity's debts, courts should consider the financial impact of the judgment on the state's treasury to protect the Amendment's interest in shielding state treasuries from federal courts.

This factor could be met even if an entity has the ability to raise its own revenues.<sup>140</sup> A state may have the obligation to satisfy a judgment against the entity despite the entity's ability to raise its own revenues. In addition, an entity's ability to raise its own revenues does not necessarily reflect the state's intent that the entity live exclusively by its own means; it might reflect the nature of its operations or insufficient state resources to fund it. Moreover, making financial independence count against immunity does not promote efficient public administration.<sup>141</sup>

### 3. State Function

The third factor is whether the entity performs a state function. An entity performs a state function if it is a state's exclusive agent in discharging a public function statewide.<sup>142</sup> Admittedly, an entity likely performs a state function if the enabling legislation describes it as an arm or an instrumentality of the state. The first and third factors nonetheless remain distinguishable. The first factor refers to how the state has described the entity while the third refers to the function the state has assigned to the entity.

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137. *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 295 (2d Cir. 1996) (“[T]he arm-of-the-state doctrine focuses not on initial funding, but on current funding.” (citing *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1053 (4th Cir. 1994))).

138. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997).

139. *Manders v. Lee*, 338 F.3d 1304, 1327–28 (11th Cir. 2003); *see also supra* note 39 and accompanying text.

140. *Contra U.S. ex rel K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 154 F. Supp. 2d 19, 23 (D.D.C. 2001).

141. *See supra* Section I.C.

142. *See Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000).

In addition, the third factor cannot be met through statutory language, but rather through an independent assessment of the entity's function.<sup>143</sup>

Courts should conduct an independent evaluation to ensure that a suit would not interfere with the state's administration of its affairs. Gauging whether an entity performs a public function could be a burdensome inquiry for courts to undertake.<sup>144</sup> Under this test, however, state function is narrowly defined to avoid this problem: an entity performs a state function *only* when the state has a constitutional or statutory obligation that it must carry out itself statewide and that it delegates exclusively to the entity.<sup>145</sup>

This narrow construction of the state function factor derives from the Eleventh Amendment's principle of non-interference with a state's prerogative to administer its affairs. A state will only obligate itself to carry out functions that it considers essential to the public welfare.<sup>146</sup> Therefore, such a function can be considered an affair of the state entitled to a considerable presumption of Eleventh Amendment protection.<sup>147</sup> When a state delegates that function exclusively to an entity, it is as if the state were carrying out that function itself because, in either case, there would be a single provider for the service. A federal lawsuit against the entity to which the state has exclusively delegated an important public function, therefore, is a suit against the state itself. In both instances, whether the suit is against the state or the entity, private parties attack the only provider of that service. Thus, exactly the same considerations that support Eleventh Amendment protection for the state also support protection for an entity that is exclusively performing a public function on behalf of the state.<sup>148</sup> This is not necessarily the case when the state delegates a function to multiple entities. In such a case, a federal lawsuit against the entity does not interfere to the same extent with the state's administration of its affairs because there are

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143. In fact, all three factors are distinguishable. An entity may not be described as an agency or receive state funds, but still perform a public function. *See Shands*, 208 F.3d at 1311 (identifying some private corporations that, while not funded or controlled by the state, were afforded immunity because they were acting as agents of the state). Alternatively, a state may delegate to an entity a state function without necessarily intending to bestow it with its immunity to enhance the entity's accountability. *See Kritchevsky*, *supra* note 110, at 48.

144. *See Rogers*, *supra* note 10, at 1302 (describing the inquiry as unintelligible); *see also Evans v. Newton*, 382 U.S. 296, 299 (1966) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (noting the difficulty of distinguishing between private and state action)).

145. Under the state action doctrine, "public function" is defined as a function that has been "traditionally the *exclusive* prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)). The definition of state function under this test is different because there is no need to inquire about the traditional nature of the function. As long as the state commits itself to carry out a function, even if this function is not a traditional one for the state, it is a state function for purposes of this factor.

146. *See S.D. Cement Plant Comm'n v. Wasau Underwriters Ins. Co.*, 778 F. Supp. 1515, 1520–22 (D.S.D. 1991) (holding that the state cement plant was an arm of the state in part because the South Dakota Constitution and a corresponding statute established that the sale and manufacture of cement was a public function and because the legislature aimed to improve the quality of life by establishing a cement program).

147. *See id.* at 1521–22.

148. *See Shands*, 208 F.3d at 1311 (collecting cases).

other providers. Likewise, when a state delegates a function for an entity to perform in a specific territorial boundary, and the entity is not a division of a statewide system, the effects of any lawsuit will be felt only locally. The narrow definition of the state function factor ensures that the protection that this factor provides is only applicable when a federal lawsuit represents a substantial threat to the public welfare.

The Beech Street Corporation in *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*<sup>149</sup> is an example of an entity that meets the state function factor. The state of Florida has a statutory obligation to “offer a comprehensive package of health insurance and retirement benefits and a personnel system for state employees.”<sup>150</sup> The Department of Management Services, responsible for managing Florida’s health insurance program, contracted with Unisys Corporation to fulfill this function.<sup>151</sup> Unisys then subcontracted with Beech Street Corporation.<sup>152</sup> Therefore, the State of Florida delegated exclusively to Unisys and Beech Street a public function that the State had a statutory obligation to perform statewide.<sup>153</sup>

An entity can meet the state function factor even if it performs the function only within a particular locality.<sup>154</sup> The entity must be a part of a statewide system, not an independent entity of that system, and be exclusively performing a statewide function that other parts of that system are not. The centers in *Perez v. Research 20 Education Service Center* are examples of such an entity.<sup>155</sup> Pursuant to the state’s constitution, which requires it to “establish and make suitable provision for the support and maintenance of an efficient system of public free schools,”<sup>156</sup> the Texas Legislature created the Centers to enable school districts to operate more efficiently and economically and to implement statewide initiatives.<sup>157</sup> Unlike the local school districts, which are independent and only perform local functions, the Centers are controlled by the Commissioner of Educa-

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149. *Id.* at 1308.

150. FLA. STAT. ANN. § 110.123 (West 2006).

151. *Shands*, 208 F.3d at 1309–10.

152. *Id.* at 1310.

153. *Contra* *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). On the facts of *Rendell-Baker*, the public function factor would not be met because the private corporation was one of the many institutions Massachusetts could contract with simultaneously to fulfill its statutory duty to develop suitable educational programs for special education students. MASS. GEN. LAWS ANN. ch. 71B, §§ 3–4 (West 1981); *see Rendell-Baker*, 457 U.S. at 834.

154. *See* *Voght v. Bd. of Comm’rs of the Orleans Levee Dist.*, 294 F.3d 684, 695 (5th Cir. 2002) (citing *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 321–22 & n.10 (5th Cir. 2001); *Delahoussaye v. New Iberia*, 937 F.2d 144, 148 (5th Cir. 1991)) (noting that although limited territorial boundaries suggest that an agency is not an arm of the state, an exception applies when a regional entity is an administrative division of a statewide system). The Orleans Levee District, an entity created by the Louisiana legislature to protect New Orleans from floods, was held to not be an administrative division of the state because there were 19 levee districts in the state of Louisiana and they were not part of a larger system. *Id.*

155. 307 F.3d 318 (5th Cir. 2002).

156. TEX. CONST. art. VII, § 1.

157. TEX. EDUC. CODE ANN. § 8.002 (Vernon 2006).

tion and administer statewide programs.<sup>158</sup> The Centers satisfy the state function factor because they have been exclusively delegated the function of ensuring the efficiency of the local school districts and are the only entity in the educational system performing this duty statewide.<sup>159</sup>

While there are questions about the appropriateness of public-function inquiries in the arm-of-the-state analysis,<sup>160</sup> evaluating this factor is crucial to further the Eleventh Amendment's interest in not interfering with the states' administration of their public affairs. Allowing a suit in federal court against an entity without considering whether the state has entrusted it with the performance of a public function would interfere with the "course of [the states'] public policy and the administration of their public affairs."<sup>161</sup> The fact that some circuits employ the governmental-proprietary function factor highlights the importance of examining an entity's functions.<sup>162</sup>

### B. *The Test's Impact*

This test, unlike those most circuits apply, weighs all factors equally but would not alter the results that the Supreme Court reached in important arm-of-the-state cases. The decisions of the Third, Fourth, and Tenth Circuits will be particularly affected because these circuits have afforded the state treasury factor dispositive weight.<sup>163</sup> In accord with the Court's decision in *Lake Country Estates*, however, TRPA would be immune because it was a political subdivision that was not funded by California and Nevada.<sup>164</sup>

158. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 327, 330 (5th Cir. 2002). State functions are not to be confused with the public functions that local governments perform. Local governments, although created by the states, do not perform state functions under this test because they are autonomous political entities that administer a particular territorial boundary, not statewide programs.

159. *See id.* at 330–31; TEX. EDUC. AGENCY, STRATEGIC PLAN FOR THE FISCAL YEARS 2005–2009 PERIOD XX (2004), [http://www.tea.state.tx.us/stplan/0509\\_stratplan.pdf](http://www.tea.state.tx.us/stplan/0509_stratplan.pdf). *But see* *McMillian v. Monroe County*, 520 U.S. 781, 788 (1997). Sheriffs in Alabama would not meet the state function factor because they share with the Alabama Department of Public Safety the function of enforcing state criminal law. *Id.* at 790; Alabama Department of Public Safety, Welcome Message from Colonel W. M. Coppage and Lieutenant Colonel Glenda Deese, <http://www.dps.state.al.us/public/misc/welcome/> (last visited Nov. 14, 2006).

160. *See supra* note 144.

161. *In re Ayers*, 123 U.S. 443, 505 (1887); *see supra* text accompanying note 76.

162. The First and Eleventh Circuits, as well as a district court in the District of Columbia, have highlighted the importance of considering the entity's functions. *See Fresenius Med. Care Cardio. Res., Inc. v. P.R. & the Caribbean Cardio. Ctr. Corp.*, 322 F.3d 56, 68 (1st Cir. 2003); *Wojcik v. Mass. State Lottery Comm'n.*, 300 F.3d 92, 99 (1st Cir. 2002); *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 225 (D.C. Cir.1986); *U.S. ex rel K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 154 F. Supp. 2d 19, 23 (D.D.C. 2001). The Eleventh Circuit afforded the same weight to the state treasury factor and whether the suit would interfere with the state's administration of its public affairs. *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311–12 (11th Cir. 2000).

163. *See supra* notes 49, 60.

164. *See supra* note 13 and accompanying text. The Court in *Mount Healthy* and in *Lake Country Estates* did not conclude that the entities were not entitled to Eleventh Amendment immunity immediately after finding that they were political subdivisions under state law, but rather considered this as a factor to balance against other factors. *See supra* notes 7, 13. Likewise, under

An examination of *Hess* illustrates that the effect of this test depends on the structure of a particular entity under state law. First, the Authority meets the state intent factor even though the entity's enabling statute is ambiguous in describing the entity. The enabling statute describes the Authority as the "municipal corporate instrumentality of the two states for the purpose of developing the port [of New York] and effectuating the pledge of the states in the said compact."<sup>165</sup> The statute also describes the authority as "a body, both corporate and politic, with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district."<sup>166</sup> In a different section, the statute provides that the Authority "which was created by agreement of the [two] states as their joint agent for the development of the transportation and terminal facilities . . . is the proper agency to act in their behalf . . . to effectuate, as a unified project, the said interurban electric railway and its extensions."<sup>167</sup> Because the enabling statute is ambiguous,<sup>168</sup> a court must look at the control the state exercises over the Authority. In this case, the states of New York and New Jersey can appoint and remove the commissioners of the Authority.<sup>169</sup> Moreover, the states can veto the entity's decisions.<sup>170</sup> Thus, the Authority meets the state intent factor.

The other two factors are not met. The states of New York and New Jersey are not legally liable for the Authority's debts and they do not provide it with any funds.<sup>171</sup> In addition, the Authority does not perform a state function. The states of New York and New Jersey pledged their "faithful cooperation in the future planning and development of the port of New York."<sup>172</sup> They delegated their obligation to plan and develop the port of New York exclusively to the Authority.<sup>173</sup> This function, however, is entirely local as the Authority's operations are confined to a district and the entity is not part of a statewide system administering statewide programs.<sup>174</sup>

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this test, whether an entity is a political subdivision is an element of the state intent factor, which must be considered jointly with the state treasury and state function factors. When dealing with a county, a city, or a municipality, however, Eleventh Amendment immunity does not apply. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). TRPA does not meet the state intent factor because it is a political subdivision. It also does not meet the state treasury factor because it is funded by cities and counties. Thus, it would not be entitled to immunity under this test because it fails to meet two of the three factors.

165. N.J. STAT. ANN. § 32:1-33 (West 1990); N.Y. UNCONSOL. LAW § 6459 (McKinney 2000)

166. N.J. STAT. ANN. § 32:1-7; N.Y. UNCONSOL. LAW § 6407.

167. N.J. STAT. ANN. § 32:1-35.50(8); N.Y. UNCONSOL. LAW § 6601(8).

168. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-45 (1994).

169. N.J. STAT. ANN. § 32:1-5; N.Y. UNCONSOL. LAW § 6405.

170. *Hess*, 513 U.S. at 44.

171. *Id.* at 45-46.

172. N.J. STAT. ANN. § 32:1-2; N.Y. UNCONSOL. LAW § 6402.

173. N.J. STAT. ANN. 32:1-4, 32:1-17, 32:1-35.50(8); N.Y. UNCONSOL. LAW § 6404, 6407, 6601(8).

174. N.J. STAT. ANN. § 32:1-3, 32:1-7.

Another example demonstrates how this test allows entities with financial and political independence to be considered arms of the state. The New York State Thruway Authority is a relatively autonomous entity that would be immune from suit under this test.<sup>175</sup> First, the state intent factor is met because, although the Thruway Authority is not described clearly as an agency or a political subdivision,<sup>176</sup> the Governor of New York, with the advice and consent of the State Senate, appoints all three board members of the Thruway Authority.<sup>177</sup> The Thruway Authority does not meet the second factor because the State of New York is not liable for the entity's debts and does not provide most of its funds.<sup>178</sup> Nevertheless, the Thruway Authority meets the third factor because it performs a state function—the State of New York obligated itself to plan and develop safe and efficient transportation facilities.<sup>179</sup> In carrying out this duty, the State has relied exclusively on the Thruway Authority “to finance, construct, reconstruct, improve, develop, maintain or operate a thruway system.”<sup>180</sup> The State has made it clear that “such purposes are in all respects for the benefit of the people of the state of New York . . . to facilitate transportation for their recreation and [that] the authority shall be regarded as performing a governmental function in carrying out its corporate purpose.”<sup>181</sup>

### *C. Why Should Courts Adopt this Test?*

The test in this Note has several advantages over other proposed and currently employed tests. It protects legitimate Eleventh Amendment interests of states better than other tests, but it does not give states a blank check to give away immunity merely by stating an intent to do so. A test affording immunity to an entity based solely on a state's clear statement<sup>182</sup> would give states too much leeway and effectively remove from federal courts the responsibility of determining which entities are entitled to Eleventh Amendment immunity. Under such a test a state could, for example, immunize an entity just by describing it as state agency, regardless of the function the entity actually performs or the amount of state funds it receives. In addition, such a test does not respond to any of the overriding purposes of the Eleventh Amendment, particularly the interest in protecting states' treasuries. These purposes can be implicated even if the entities are not described as arms of the state. In contrast, the test proposed in this Note combines factors that evaluate

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175. The Second Circuit concluded that this entity was not an arm of the state. *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 291 (2d Cir. 1996).

176. *Id.* at 293–94.

177. *Id.* at 295.

178. *Id.* at 295–96.

179. N.Y. TRANSP. LAW § 10 (McKinney 1994).

180. N.Y. PUB. AUTH. LAW § 353 (McKinney 2004).

181. *Id.*

182. *See Rogers, supra* note 10, at 1301–05.

statutory language and the structure that the state has given to the entity. Furthermore, unlike other tests,<sup>183</sup> this test avoids affording dispositive weight to a single factor, thus protecting the three equally legitimate Eleventh Amendment interests.<sup>184</sup>

This Note's test would also lead to uniformity in conducting the arm-of-the-state analysis. Leaving circuits free to use whatever factors they consider appropriate, and whatever elements to evaluate such factors, as *Hess* does, promotes the current disarray in deciding Eleventh Amendment immunity. Some circuits have not even used consistent approaches themselves, sometimes using different elements to evaluate the same factor in different cases.<sup>185</sup> They have also employed vague criteria.<sup>186</sup> This state of affairs has allowed courts to pick factors and elements selectively to reach a desired result. The proposed test eliminates these problems by giving circuits clear guidance on what factors to analyze and how to analyze them. While the factors might sound like they invite subjective analysis, the elements to evaluate these factors are not open to interpretation and significantly narrow the inquiry. Adopting this test would lead to the uniformity that such an important federal right demands.<sup>187</sup>

Lastly, this test attempts to eliminate disincentives for effective public administration. Current tests sometimes, intentionally or unintentionally, equate dependency on state funds or state control with immunity.<sup>188</sup> This provides disincentives for states to create financially or politically independent entities.<sup>189</sup> This Note's test solves this problem by giving less weight to these considerations. In fact, this test does not preclude the possibility that a state can immunize politically or financially autonomous entities.<sup>190</sup>

#### CONCLUSION

This Note argues that *Hess* is problematic because it failed to provide a simple and uniform standard to determine whether an entity is an arm of the

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183. *Nat'l R.R. Passenger Corp. v. Pa. Pub. Utility Comm'n*, 288 F.3d 519, 524 (3d Cir. 2002); *Harter v. Vernon*, 101 F.3d 334, 339 (4th Cir. 1996).

184. *See supra* notes 5, 76–79 and accompanying text.

185. *Compare* *Lewis v. N. Ind. Commuter Transp. Dist.*, 898 F. Supp. 596, 599 (N.D. Ill. 1995) (citing *Kashani v. Purdue Univ.*, 813 F.2d 843, 845–47 (7th Cir. 1987)) (considering the extent of the entity's financial autonomy from the state, its general legal status, and whether it serves the state as a whole or only a region), *with* *Crosetto v. State Bar of Wis.*, 12 F.3d 1396, 1402 (7th Cir. 1993) (considering the extent of state control over the entity, the entity's role with respect to the state, and whether a judgment against an entity would be satisfied from state funds). *See also supra* note 54 and accompanying text.

186. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 329–30 (5th Cir. 2002) (finding that the control factor was met because the state commissioner of education had "broad authority" over the Centers and that the state treasury factor was met because the state provided the Centers with the "lion's share" of their budget).

187. *See supra* text accompanying notes 63–64.

188. *See supra* note 89 and accompanying text.

189. *See supra* note 90 and accompanying text.

190. *See supra* Section I.C.; *supra* notes 175–181 and accompanying text.

state. *Hess* also left a core interest of the Eleventh Amendment unprotected—preventing federal courts from interfering with the states' administration of their affairs—because it did not require independent evaluation of whether an entity serves a state function. The test proposed in this Note attempts to correct these shortcomings. Its factors protect the multiple purposes of the Eleventh Amendment, and the structure of the test eliminates disincentives for efficient public administration. Adopting this test would ensure that the right of states to be immune from suit in federal court is fully protected and adjudicated uniformly across the nation.

