Missouri Law Review

Volume 60
Issue 4 *Fall 1995*

Article 6

Fall 1995

Eleventh Amendment: A Move towards Simplicity in the Test for Immunity

Jennifer A. Winking

Eleventh Amendment: A Move Towards Simplicity in the Test for Immunity

Hess v. Port Authority Trans-Hudson Corporation[1]

> 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.[2]

I. INTRODUCTION

In *Hess v. Port Authority Trans-Hudson Corp.*, the Supreme Court examined a recurring issue concerning which entities may claim immunity under the Eleventh Amendment.[3] The Eleventh Amendment was ratified in response to *Chisholm v. Georgia*,[4] which held that the language of Article III, § 2 makes a state amenable to suit in federal court by citizens of another state.[5] By its express terms, Eleventh Amendment immunity is only available to states being sued by citizens of other states.[6] Since its enactment some two centuries ago, the Amendment has been interpreted to extend to a state being sued by its own citizens[7] and to agencies which constitute an arm-of-the-state.[8]

---

1. Hess v. Port Authority Trans-Hudson Corp., 115 S. Ct. 394 (1994).
2. U.S. CONST., amend. XI [ratified February 7, 1795].
3. *Hess*, 115 S. Ct. at 397.
4. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (holding that Article III, §2 of the U.S. Constitution granted federal court's jurisdiction to hear controversies where an individual citizen of one state sued another state). In *Chisholm*, a citizen of South Carolina was allowed to sue the State of Georgia on a revolutionary war debt. *Id.*
5. Scholars generally agree that the Eleventh Amendment was adopted to overturn the Supreme Court's decision in *Chisholm v. Georgia*. *See, e.g.*, William A. Fletcher, *A Historical Explanation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1054 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1920 (1983); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430 (1987).
6. *See* the text of the Eleventh Amendment quoted at the beginning of this note.
7. Hans v. Louisiana, 134 U.S. 1 (1890).
8. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 463 (1945) (holding that if the judgment would be paid out of state funds, the state is the real party in interest regardless of whether it is the named defendant, and therefore, the suit is barred by immunity). Hagood v. Southern, 117 U.S. 52, 67 (1886) (holding that the

Governmental growth has given rise to new entities which contain qualities of both state actors and private business.[9] As these entities multiply and change, the immunity question returns to the forefront.[10] The *Hess* Court is not the first to address whether immunity is available to a bi-state entity.[11] The issue returned because of a conflict between the Second and Third Circuits regarding the test for immunity.[12] This note examines the Supreme Court's restatement of the test for immunity and its impact in future Eleventh Amendment cases.

II. FACTS AND HOLDING

Albert Hess and Charles F. Walsh were railroad workers employed by the Port Authority Trans-Hudson Corporation ("PATH").[13] PATH is a wholly owned subsidiary of the Port Authority of New York and New Jersey which operates a commuter railroad connecting New York City to northern New Jersey.[14] Both Walsh and Hess suffered job-related injuries in 1986 and

---

Eleventh Amendment prohibits suits against state officers and agents because they are representatives of the state). *But cf.* Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (holding that the Amendment was interpreted to exclude municipalities and political subdivisions because even though they were territorially within the state, politically they were corporations created by the state). *See also infra* notes 47-48 and 53 discussing the arm-of-the-state doctrine in its present form.

9. The growth of state government can be measured by the increase in state budgets, the increase in number of employees, and the development of specialized entities.

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, 1244 (1992). *See also infra* notes 133-141 for greater discussion of Rogers' article and its impact on the decision in *Hess*.

11. Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 282 (1959) (holding that there is a presumption of immunity available to bi-state entities as the creation of two states); Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 402 (1979) (holding that the Tahoe Regional Planning Agency, as a bi-state entity, was not entitled to Eleventh Amendment immunity under the arm-of-the-state test).

12. *Compare* Feeney v. Port Authority Trans-Hudson Corp., 873 F.2d 628, 630-32 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299 (1990) (holding that Eleventh Amendment immunity does not extend to PATH, and even if it did, PATH had waived the immunity) *with* Port Authority Police Benevolent Ass'n, Inc. v. Port Authority of New York and New Jersey, 819 F.2d 413, 414 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987) [hereinafter *Port Authority PBA*] (holding that the Port Authority, as an arm of the compacting states, was entitled to Eleventh Amendment immunity.).

13. *Hess*, 115 S. Ct. at 397.

14. *Id.*

1987, respectively, in unrelated accidents.[15] They each brought suit against PATH under the Federal Employers' Liability Act[16] (hereinafter "FELA").[17] Both filed their complaints within FELA's three-year time limit, but neither filed within the one-year statutory time limit[18] allowing individuals to sue the PATH.[19]

PATH asserted its Eleventh Amendment immunity and moved to dismiss the suits filed by Hess and Walsh based upon their failure to proceed against it during the one year period provided by statute.[20] The district court dismissed their claims on the grounds that PATH is cloaked with Eleventh Amendment[21] immunity and Hess and Walsh failed to make claims within the statutory period.[22] The district court followed the precedent in the Third Circuit[23] recognizing PATH as an arm-of-the-state.[24] The issue on appeal was not the workers' entitlement to benefits due to their injuries, but rather their ability to sue PATH in the federal forum.[25] On appeal, the Third Circuit consolidated *Hess* and *Walsh* and summarily affirmed the judgments.[26]

---

15. *Id.* Hess was working in the engine of a commuter train when, due to the negligence of the Port Authority, the window struck his right hand. He claimed a soft tissue injury and superiostela hematoma of the hand. Hess v. Port Authority Trans-Hudson, 809 F. Supp. 1172, 1174 (D.N.J. 1992). Walsh was injured when the passenger train door slammed into his right wrist and arm. Walsh v. Port Authority Trans-Hudson, 813 F. Supp. 1095, 1096 (D.N.J. 1993).

16. 35 Stat. 65 (codified as amended at 45 U.S.C. §51 (1986)).

17. For the district court decisions, *see* Walsh v. Port Authority Trans-Hudson Corp., 813 F. Supp. 1095 (D.N.J. 1993), and Hess v. Port Authority Trans-Hudson Corp., 809 F. Supp. 1172 (D.N.J. 1992). Because the issue on appeal was the same, the Appellate Court consolidated the cases and rendered its opinion affirming the district courts' decisions. Hess v. Port Authority Trans-Hudson Corp., 8 F.3d 811 (3d Cir. 1993).

18. The agreement between New York and New Jersey is set forth in the state statutes at: N.J. STAT. ANN. §§ 32:1-3-32:1-24 (West 1990 & Supp. 1995) and N.Y. UNCONSOL. LAW §§ 6401-6423 (McKinney 1979 & Supp. 1995).

19. *Hess*, 115 S. Ct. at 397.

20. *Id.* Similar statutes in New York and New Jersey waive Eleventh Amendment immunity for an injured employee during the first year following the accident. *Id.* at 398. *See supra* note 18 for citation to the state statutes.

21. *See* text accompanying *supra* note 2, setting forth the text of the Eleventh Amendment.

22. *Walsh*, 813 F. Supp. at 1096-1097 and *Hess*, 809 F. Supp. 1178-1182.

23. *Port Authority PBA*, 819 F.2d at 418 (granting PATH immunity from suit in federal court).

24. *Hess*, 115 S. Ct. at 397.

25. *Id.*

26. *Id.* at 398.

In order to resolve an intercircuit conflict,[27] the Supreme Court granted certiorari.[28] After applying the previous "arm-of-the-state" doctrine, Justice Ginsburg in her majority opinion reformulated the analysis by making the state's fiscal responsibility for the entity's debts the controlling factor.[29] The majority said that lower courts should begin with the presumption of non-immunity for bi-state entities.[30] Applying these changes in its analysis allowed the majority to conclude that PATH was not cloaked with Eleventh Amendment immunity.[31]

III. LEGAL BACKGROUND

The Eleventh Amendment was adopted in the wake of the decision in *Chisholm v. Georgia*.[32] The immunity granted by the Amendment to the states is not absolute. There are at least three limitations on the immunity from suit. First, the state can waive the immunity, thereby subjecting itself to suit.[33] Second, Congress can abrogate the immunity.[34] And, finally, even if the state is protected by the Eleventh Amendment, the exemption only

27. The intercircuit conflict was caused when the Third Circuit granted the Port Authority immunity in *Hess*, after the Second Circuit's decision denying the Port Authority immunity on basically the same facts. *Hess*, 8 F.3d at 811; *Feeney*, 873 F.2d at 631. The Supreme Court bypassed judgment on whether the Port Authority enjoyed Eleventh Amendment immunity when it affirmed the Second Circuit's decision in *Feeney*. *Feeney*, 495 U.S. at 308-09.

28. Hess v. Port Authority Trans-Hudson Corp., 114 S. Ct. 1292 (1994) (granting certiorari); *Hess*, 115 S. Ct. at 397.

29. *Hess*, 115 S. Ct. at 404.

30. *Id.* at 402.

31. *Id.* at 406.

32. *See supra* notes 4 and 5. For the history of the proposals in Congress and the eventual adoption of the Eleventh Amendment, *see* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to the Critics*, 56 U. CHI. L. REV. 1261, 1270-71 (1989).

33. The court will strictly scrutinize the language of the statute before it will find that the State has waived its immunity or that Congress has abrogated it. Atascardero State Hospital v. Scanlon, 473 U.S. 234, 239-40 (1985) (holding that state waives it immunity only by language stating that it consents to suit in *federal* court. Consenting to suit in its state court does not waive Eleventh Amendment immunity) (emphasis added).

34. Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (In order for Congress to abrogate Eleventh Amendment immunity, its intent must be made unmistakably clear).

extends to suit in a federal forum.[35] The Eleventh Amendment does not bar citizens from bringing the action in a state court.[36]

The current parameters of Eleventh Amendment immunity were defined by judicial interpretation following its adoption.[37] The propriety of the broad historical interpretation has been under attack in recent years by judges and scholars alike.[38] These interpretational issues have largely arisen from the Supreme Court's attempt to deal with entities that were not defined in 1795.

Because the Amendment has been interpreted to confer immunity only upon states, it has been proposed that the framers did not consider whether new governmental entities should share in that grant.[39] Bi-state compact entities are one of those relatively new forms of governance which have

---

35. The Eleventh Amendment literally restricts only the "[j]udicial power of the United States" from extending to suit by a citizen against another state. *See* text accompanying *supra* note 2.

36. *See* text accompanying *supra* note 2.

37. *See supra* notes 7 and 8 for a discussion of the cases which expanded the meaning of the Amendment beyond its text and basically defined its coverage.

38. Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989). In 1989, the Court was relatively split over the reading of the Eleventh Amendment. Critics of the Eleventh Amendment can be divided into three groups: First, the diversity theorists, who argue that the amendment would bar jurisdiction only when the sole basis of federal jurisdiction is diversity of citizenship; second, the congressional abrogation theorists, who argue that the states are immune from suit except when abrogated by Congress; and third, the pure textualists, who support an interpretation based solely on the plain meaning. *Id.* at 1342-44. Lawrence Marshall includes Justices Brennan, Marshall, Stevens and Blackmun in the diversity theorist category, and Chief Justice Rehnquist, Justices O'Connor and White in the congressional abrogation category. At the time of his article in 1989, Lawrence Marshall was uncertain of Justices Scalia and Kennedy's position. *Id.* at 1371 n.7.

See also, the following articles setting forth disagreement among scholars regarding the proper interpretation of the Eleventh Amendment. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 STAN. L. REV. 1033 (1983); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); William P. Marshall, *The Diversity Theory of the Eleventh Amendment*, 102 HARV. L. REV. 1372 (1989); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment*, 56 U. CHI. L. REV. 1261 (1989); William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 131 (1990).

39. Jonathan W. Needle, Note, *'Arm of the State' Analysis in Eleventh Amendment Jurisprudence*, 6 REV. LITIG. 193, 194 (1987) (citing Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978) and John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983)).

developed mainly during the twentieth century. The development of regional compact entities were necessary to fill the gap existing in the effective management of railroads, waterways, and highways.[40] Deciding whether these entities should be immune from suit in a federal forum has been an issue that the Supreme Court faced on a number of occasions during this century.[41]

The Supreme Court initially answered the question of the availability of Eleventh Amendment immunity to bi-state entities in 1959.[42] But since 1979, *Lake Country Estates v. Tahoe Regional Planning Agency*[43] has set the tone for conferring immunity to bi-state entities. In 1969, the Tahoe Regional Planning Agency [hereinafter TRPA] was created pursuant to compact between California and Nevada to coordinate and regulate development of the Lake Tahoe Basin and to conserve its natural resources.[44] Property owners around Lake Tahoe alleged that the TRPA, in adopting a land use ordinance, improperly took their property because the ordinance destroyed its value.[45] The court of appeals held that because TRPA's authority came from the states, it was an agent of the state protected by the Eleventh Amendment.[46] In

---

40. Frank P. Grad, *Federal-State Compact: A New Experiment in Cooperative Federalism*, 63 COLUM. L. REV. 825, 851-52 (1963) (citing Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 729 (1925), and agreeing with their conclusion that the interstate compact agency is the most flexible device for dealing with multi-state problems on a regional scale.)

41. *See* Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959); Lake Country Estate v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Port Authority Trans-Hudson v. Feeney, 495 U.S. 299 (1990).

42. *Petty*, 359 U.S. at 279 (holding that immunity was conferred on bi-state entities because they are agents of two states, but concluding that such immunity was not available in *Petty* because the states had waived it).

43. *Lake Country Estates*, 440 U.S. 391 (1979).

44. Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969) (codified as amended at CAL. GOV'T CODE §§ 66800-66801 (West 1983 & Supp. 1995) and NEV. REV. STAT. §§ 277.190-277.220 (1991 & Supp. 1994)).

45. *Lake Country Estates*, 440 U.S. at 394. Petitioners alleged alternative theories for a federal claim: A constitutional claim under the Fifth and Fourteenth Amendment due process clauses with diversity jurisdiction pursuant to 28 U.S.C. § 1331 and a cause of action authorized by 42 U.S.C. § 1983 with jurisdiction pursuant to 28 U.S.C. § 1343. *Id.* at 395.

The suit also named the members of TRPA's governing body and its executive officer as defendants along with TRPA. The district court held the individuals immune from liability. The court of appeals stated that the individual activity receives absolute immunity if it was legislative, but only qualified immunity if executive action. The court of appeals remanded to determine the character of the conduct. The Supreme Court affirmed this conclusion. *Id.* at 396, 402.

46. *Id.* at 396.

reversing the court of appeals, the Supreme Court formulated a test for determining when a bi-state agency is entitled to immunity. The test, generally referred to as the arm-of-the-state doctrine,[47] provides that if the compact created "an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such entity."[48]

In deciding whether TRPA was similar to a municipality or other political subdivision, the Court found the following factors important: both states disclaimed any intent to confer immunity on TRPA; the compact considered the TRPA a political subdivision; that its obligations were not binding on the states; that sixty percent of the governing members were chosen by local governments rather than state; that the county funded the TRPA; that the states had no veto ability[49]; and land regulation was traditionally done on a local level.[50] Although there were dissents regarding other issues in this case, no member of the Supreme Court dissented regarding the denial of immunity to the TRPA.[51]

In the same year that *Lake Country Estates* was decided, the Third Circuit also handed down a decision setting out three additional factors for evaluating an Eleventh Amendment immunity claim: (1) is the entity performing a governmental or a proprietary function? (2) does the entity have the power to sue and be sued? and (3) is the property of the entity immune from state taxation?[52]

With the arm-of-the-state doctrine[53] in place, the question of its effectiveness in the lower courts was yet to be decided. The Third Circuit was the first to apply it. In *Port Authority Police Benevolent Association, Inc. v.*

---

47. *Id.* at 401-02. *See infra* note 53.

48. *Lake Country Estates*, 440 U.S. at 401.

49. In fact, California had to resort to litigation to compel cooperation of the agency. California v. TRPA, 516 F.2d 215 (9th Cir. 1975).

50. *Lake Country Estates*, 440 U.S. at 401-02. One author has summarized the factors for deciding whether an entity resembles a political subdivision or a state as follows: (1) language of the agreement; (2) state's fiscal responsibility; (3) funding; (4) who does the appointing; (5) characterization of the agency's function as traditionally state or municipal; and (6) state ability to veto. Rogers, *supra* note 10, at 1263-64.

51. *Lake Country Estates*, 440 U.S. at 406-09.

52. Blake v. Kline, 612 F.2d 718, 722 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

53. The arm-of-the-state doctrine, as delineated in *Lake Country Estates*, was a factor based test for determining whether an entity could be considered part of the state and thus qualify for sovereign immunity granted by the Eleventh Amendment. It measures whether an entity is functioning like a state agency or if it is more like a political subdivision, which has not been entitled to immunity.

Port Authority of New York and New Jersey,[54] the Police Benevolent Association [hereinafter "PBA"] brought a § 1983 action seeking to enjoin the Port from using an expired promotion list for promotional purposes.[55] The district court found that PBA had been deprived of property without due process.[56] However, before the court entered the order, the promoted individuals moved to intervene and dismiss on grounds of Eleventh Amendment immunity.[57] The district court granted both motions and PBA appealed.[58]

On the question of immunity, the Third Circuit interpreted *Lake Country Estates* as making the immunity dependent upon whether the Port Authority was more like an arm of the state or like a municipality.[59] In making that judgment the Third Circuit applied the factors delineated by the Supreme Court.[60] Application of the factors led the Third Circuit to conclude that the Port Authority functions as an agency of the state.[61] But before granting immunity, the Third Circuit still believed it was necessary to comply with the conditions it previously announced in *Blake*.[62] Summarily dispensing with these factors, the court concluded that the Port Authority was entitled to Eleventh Amendment Immunity.[63] Interestingly, the Third Circuit never mentioned the divided sovereign—the fact that the Port Authority was the

---

54. 819 F.2d 413 (1987).

55. *Id.* at 413-14.

56. *Id.* at 414.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. A summary of the courts findings are: (1) While the compact did not refer to it as a state agency, the courts had always done so and the legislature did not attempt to alter such definition; (2) the Authority was initially funded by the state; (3) if the Authority's funds were depleted (while the court admits that is highly unlikely), the state legislatures would appropriate funds necessary to meet its expenditures; (4) the governing body was chosen entirely by the states; (5) facilitating commerce was traditionally a function of government; and (6) the state governors had veto power. *Id.* at 415-17.

62. The Court held the Authority's functions were governmental; that it was exempt from state property taxes; and that while it statutorily consented to suit, it excepted injunctive relief from the consent, and alone, consent to suit was not sufficient to abrogate immunity. *Id.* at 418 (citing Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981)). The Third Circuit cited a Supreme Court decision for the proposition that a statute allowing an institution to sue and be sued cannot alone take away Eleventh Amendment immunity. *Id.* at 418.

63. *Id.*

creation of two states—as an issue. Nor did the court consider the effect of having Congress involved in the original compact creating the organization. The entire decision was dependent on the answers to the variables set forth in both *Lake Country Estates* and *Blake*.

Within a few years, the Second Circuit handed down a decision contrary to the Third Circuit opinion in *Port Authority PBA*, holding that PATH[64] was not entitled to Eleventh Amendment immunity.[65] Applying the arm-of-the-state doctrine of *Lake Country Estates*, the Second Circuit decided that there was not enough evidence or "good reason" for finding PATH to be a state agency.[66] The court decided that PATH's liability would not place the states' treasuries at risk; therefore, it could not receive immunity.[67]

In recognizing that its decision created a conflict with the Third Circuit, the Second Circuit noted that the divergence was due to their different interpretation of the states' exposure to liability.[68] As further support for not adopting the Third Circuit's interpretation, the Second Circuit held that, even if PATH had Eleventh Amendment immunity, it waived the same by consenting to suit in any court located in the New York district.[69]

Although the Supreme Court affirmed the *Feeney* decision, it did so only on the waiver issue.[70] The opinion, written by Justice O'Connor, assumed for purposes of the waiver issue that PATH was a state agency entitled to the states' sovereign immunity.[71] The Supreme Court concluded that since PATH's statutory consent to suit included suit in a federal court, it waived

---

64. PATH (the defendant in *Feeney*) and the Port Authority (the defendant in *Port Authority PBA*) are the same for Eleventh Amendment purposes because PATH is a wholly owned subsidiary of the Port Authority. The facts in *Feeney* are substantially similar to *Hess* in that the action was brought by an employee of PATH for recovery under FELA.

65. Feeney v. Port Authority Trans-Hudson, 873 F.2d 628 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990).

66. *Id.* at 631.

67. *Id.* The court stated that this was not an exclusively determinative, but was the single most important factor. *Id.*

68. *Id.* at 631-32. The Second Circuit stated that the Third Circuit's understanding was erroneous because the state was not *required* to make appropriations if a judgment depleted PATH's funds. *Id.* (emphasis added).

69. *Id.* at 632.

70. *Feeney*, 495 U.S. at 308-09. Notably, Justice O'Connor authored the opinion in *Feeney*, which affirmed the denial of immunity to PATH, even though she also authored the dissent in *Hess*, objecting to the complete denial of immunity to PATH.

71. *Id.* at 299 and 304-05 (relying upon the conclusion of *Petty*, 359 U.S. at 279, which held that the suit against a bi-state entity must be considered one against the State since the entity is an agency of the two states which create it).

immunity.[72] Because the Supreme Court by-passed the issue of PATH's immunity specifically, and the test for bi-state entity immunity generally, those questions remained unresolved.[73]

On the heels of the *Feeney* decision, a note was published which criticized the Supreme Court's manner of handling the question of Eleventh Amendment immunity.[74] Rogers took a critical approach in examining the arm-of-the-state doctrine employed by the Supreme Court[75] in Eleventh Amendment cases, and reasoned that because the Supreme Court has failed to give adequate direction, the lower courts adopted their own derivations causing non-uniform results in Eleventh Amendment immunity cases.[76] Rogers proposed that the Supreme Court should adopt a test similar to the one used in resolving antitrust state action immunity.[77] Rogers submitted the following two-pronged test: the courts should, after reviewing the state enabling act which created the entity, (1) award immunity only when the state expressly designates the entity as a state agency, and (2) if the statute is unclear, immunity should be denied unless the entity was not empowered to generate its own revenue.[78]

With the challenges leveled by Rogers' note and the conditions ripe for resolution of the disagreement between the Second and Third Circuits, it was only a matter of time for the right case to make its way to the Supreme Court.

IV. INSTANT DECISION

A. Majority Opinion

After a brief recitation of the facts and the lower-court decisions, the majority reviewed the development of the Port Authority to set the stage for

72. *Id.* at 308-309. Even though the denial of immunity was unanimous, four Justices refused to join in Part II of the majority opinion because it dealt with abrogation and waiver as exceptions to immunity. The concurrence asserted that the issue should be whether the Eleventh Amendment would take away federal jurisdiction, because the amendment is merely a jurisdictional provision. *Id.* at 310 (Brennan, J., concurring). Justice Brennan, arguing for the concurrence, stated that immunity should not be granted because the Eleventh Amendment does not cover federal question jurisdiction and therefore could not bar the suit. *Id.*

73. *Id.* at 308-09.

74. *See* Rogers, *supra* note 10.

75. *See supra* note 53.

76. Rogers, *supra* note 10, at 1246.

77. Rogers, *supra* note 10, at 1297-1300.

78. Rogers, *supra* note 10, at 1301, 1305.

deciding whether Eleventh Amendment immunity should be granted.[79] The majority first noted the Port Authority was a bi-state entity created pursuant to the Constitution's Interstate Compact Clause.[80] Before analyzing whether the Port Authority should be immune from suit in a federal forum, the majority discussed the general attributes of all bi-state entities which must be considered when deciding Eleventh Amendment immunity cases.[81] The bi-state entity does not perform the functions of a state because it addresses problems not otherwise served by the state and it operates without concern for state boundaries.[82] A further distinction between bi-state entities and a state is that creation of a bi-state entity depends upon the agreement of several states supported by federal approval.[83] As the majority summarized, because a bi-state entity is not subject to unilateral control by a state, it should not be reviewed in the same manner as state agencies.[84]

The majority then applied the formula previously stated by the Supreme Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*[85] for deciding when a bi-state entity is entitled to immunity.[86] The majority affirmed the presumption created in *Lake Country Estates* that bi-state entities do not receive immunity unless there is good reason to believe that the states structured the new agency to share in their immunity and Congress concurred.[87] Once again, the majority rejected any argument for an expansive reading of the Amendment.[88] In following *Lake Country Estates*, the majority listed the relevant factors to determine whether the states intended

79. *Hess*, 115 S. Ct. at 398.

80. *Id.* at 398. The Interstate Compact Clause reads as follows:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. 1, § 10, cl. 3.

81. *Hess*, 115 S. Ct. at 400-01.

82. *Id.* at 400.

83. *Id.*

84. *Id.* at 401-02.

85. 440 U.S. 391 (1979).

86. *Hess*, 115 S. Ct. at 402.

87. *Id.*

88. *Id.*

to cloak the entity with immunity.[89] The factors were more difficult to apply in *Hess* because the answers point in different directions.[90]

PATH argued that the degree of state control should provide enough impetus for the Court to find it to be a state agency for Eleventh Amendment purposes.[91] The majority recognized those factors relevant to the state control question,[92] and acknowledged their importance, but held that control factors cannot be decisive when dealing with a bi-state entity.[93] The majority considered state control in light of the inherent division of control, and the inability of the court to gauge actual control.[94]

After weighing the fiscal considerations in *Hess*,[95] the majority found that since a judgment against PATH would not be enforceable against either state, the state treasuries were not in jeopardy.[96] Therefore, the states lacked fiscal responsibility for the entity, which indicated the entity should be denied immunity.[97] PATH argued that, since a judgment would reduce the

---

89. *Id.* The Supreme Court in deciding *Lake Country Estates* took six characteristics into consideration in deciding whether the entity was entitled to immunity. Those factors are: (1) whether it constituted a political entity; (2) division of control between the local and state governmental entities; (3) the source of the entity's funding; (4) the compact's statement that the state is not liable for the entity's debt; (5) the goals of the entity; and (6) the failure to have a state veto. *Lake Country Estates*, 440 U.S. at 401-02.

90. *Lake Country Estates*, 440 U.S. at 401-02. In this way, *Hess* differs from *Lake Country Estates* because the factors in *Lake Country Estates* all pointed to denying the entity immunity.

91. *Id.* at 404.

92. Factors of state control consist of the selection of the commissioners who govern the authority, the veto power over commissioners action given to the governor of each state, and the legislatures combined ability to increase power of the commissioners and utilize surplus revenue. *Id.* at 399.

93. *Id.* at 404.

94. *Id.* The majority cited Rogers' note for his criticism of the "arm-of-the-state" doctrine used to decide when an entity is cloaked with Eleventh Amendment immunity. *Id.*

95. A review of the states' fiscal responsibility for the Authority indicated that while the states were responsible for some of the support of PATH, they were not liable for its debts. In the interstate compact, the states agreed to appropriate sums to cover PATH's administrative expenses, but the contribution of funds was to end once PATH's revenues were adequate to meet those expenditures. The majority noted that the Port Authority has a large general fund and extensive assets, and as a result, the states are exempt from funding it. More importantly, the interstate compact bars PATH from receiving tax revenues, from binding the state with creditors or imposing any charges to the states. *Id.* at 399 and 403.

96. *Id.* at 404.

97. *Id.* at 406.

Authority's surplus, and the state would have to fund otherwise self-funded projects, the impact on the states would be the same as if the judgment were directly against the state.[98] The majority rejected this argument and stated that the proper focus in considering fiscal responsibility should be on losses and debts rather than the use of profits or surplus.[99] Although the states had admitted that they would readily support the Authority if a judgment were to wipe out its funds, the majority labeled this, at best, indirect responsibility.[100]

The other factors in the balancing test did not advance the majority's conclusion because they were not sufficiently indicative of the Port Authority's character. The majority compared the Port Authority to a municipality,[101] and found the comparison inconclusive.[102] Although state courts generally refer to PATH as a state agency, the compact and other legislation refer to it as "common agency", or "body politic" or "instrumentality."[103] Furthermore, PATH's functions are not analogous to either traditionally state or local functions.

After considering all of the factors and finding that they point in different directions, the majority relied on a default analysis of the twin rationales for the Eleventh Amendment—state solvency and dignity.[104] In *Hess*, the majority held that PATH was not entitled to Eleventh Amendment immunity because requiring PATH to answer in federal court neither poses a threat to the states' dignity nor places the states' treasuries at risk.[105] These purposes would not be served if Eleventh Amendment immunity is granted in this case, therefore the majority denied immunity.[106]

The majority went on to amend the test by holding that financial responsibility should, in future cases, be the dispositive factor in deciding

---

98. *Id.* at 405.

99. *Id.* at 406 (stating that since a federal judgment against the Port Authority would not be enforceable against the state, the state is not being injured by allowing the plaintiff to proceed in a federal forum against the entity).

100. *Id.* at 403.

101. Traditionally municipalities have not received Eleventh Amendment immunity even though they are subdivisions of the state. Lincoln County v. Luning, 133 U.S. 529 (1890).

102. The majority would have denied immunity if the entity was more similar to a municipality than a state agency because case law has said that political subdivisions are not afforded protection under the Eleventh Amendment. Since the comparison was inconclusive, a different basis was necessary to support the denial or granting of immunity. *Hess*, 115 S. Ct. at 403.

103. *Id.*

104. *Id.* at 404.

105. *Id.* at 406.

106. *Id.*

whether to grant immunity.[107] The majority based this finding on the fact that one of the concerns of the Eleventh Amendment was the concern for state solvency.[108] As additional support for this view, the majority cited numerous cases which relied upon protecting state solvency as the major factor in applying the immunity doctrine.[109]

B. Concurring Opinion

While in agreement with Justice Ginsburg's opinion, Justice Stevens believed it necessary to express his position.[110] His position is motivated by a desire to reverse what he believes to be a longstanding misinterpretation of the Eleventh Amendment.[111] He cited *Hans v. Louisiana*[112] as the beginning of the Court's broad interpretation of the Eleventh Amendment, which led the Court to place "a lesser value on administering justice to the individual than on giving government a license to act arbitrarily."[113] Stevens maintains that the Court has created two Eleventh Amendments, one that is textual and another that is a policy of prudence.[114] The latter, according to Stevens, is not a matter of constitutional law.[115] In order to remedy this wrong, Stevens suggests that instead of reading more into the Eleventh Amendment than is there, the Court should grant justice to the individual. In this case, justice was done by denying immunity to PATH.[116]

C. Dissenting Opinion

Four Justices dissented. Written by Justice O'Connor, the dissenting opinion took issue with both the test and result espoused by the majority.[117] The dissent criticized the majority for placing too much emphasis on

---

107. *Id.*
108. *Id.*
109. *Id.* In fact, the majority noted that the Second and Third Circuit were in agreement as to the overarching importance of the state treasury factor, but the Circuits approached this factor in different manners, therefore reaching different results. *Id.* at 405.
110. *Id.* at 407.
111. *Id.*
112. Hans v. Louisiana, 134 U.S. 1 (1890).
113. *Hess*, 115 S. Ct. at 407.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 408-412 (O'Connor, J., dissenting).

congressional consent to interstate compacts.[118] Congressional consent does not change the nature of state power nor make the federal government a participant, and therefore, it should not enter into consideration of Eleventh Amendment immunity.[119] The dissent preferred a presumption of immunity unless Congress has expressly abrogated the same.[120] By adopting the opposite presumption, the dissent argued that Congress may now effectively dictate Eleventh Amendment immunity in the context of interstate entities.[121] Although the arm-of-the-state analysis was not flawless, the presumption should be for immunity because two states acting together are likely to be as deserving of immunity as a state acting individually.[122]

The dissent attacked the majority's creation of one overarching principle—vulnerability of the state treasury—in deciding immunity questions.[123] In making it a necessary condition, the majority reduces the scope of immunity to the point of underprotecting state sovereignty.[124] Furthermore, the text of the Amendment contradicts that conclusion since it grants immunity to suits in law or equity.[125]

Arguing for the application of Eleventh Amendment immunity in this case, the dissent asserted that the issue of state control was the most important factor because it indicates whether an entity is an arm-of-the-state.[126] The dissent thought this a better formula because it is more flexible while also taking into account the majority's concern for the state treasury.[127]

V. COMMENT

The consequence of *Hess v. Port Authority Trans-Hudson* is three-fold. First, in denying the Port Authority immunity, *Hess* finally resolves the immunity question that had been lingering since 1990 when the Second Circuit's denial of immunity confronted the Third Circuit's previous grant of

---

118. *Id.* at 408.

119. *Id.*

120. *Id.* at 409.

121. *Id.*

122. *Id.*

123. *Id.* at 410.

124. *Id.*

125. *Id.*

126. *Id.* at 411. An example of clear and substantial control would be State appointments of the entity's governing personnel coupled with veto power over the entity's acts. *Id.* Since both these factors are present in the *Hess* case, the dissent would grant PATH immunity.

127. *Id.*

immunity to the Port Authority.[128] The conflict heightened in 1992 when the Third Circuit followed its earlier analysis and again granted immunity.[129] In granting certiorari in *Hess*, the Supreme Court addressed the immunity issue,[130] and upon a review of PATH's attributes, the majority reversed the Third Circuit's grant of immunity and basically adopted the Second Circuit's analysis.[131]

Second, and more importantly, *Hess* forced the Supreme Court to respond to the underlying problem which gave rise to the case: the difficulties with the *Lake Country Estates* arm-of-the-state doctrine. Since the test was implemented, the lower courts had difficulty applying it uniformly.[132] Instead of merely applying the test, the lower courts were adding to it in a way to reach a result they found acceptable.[133] For instance, the Third Circuit refused to give full deference to the *Lake Country Estates* test—instead it increased the test by also applying its own version in *Blake v. Kline*.[134] In *Feeney*, the Second Circuit emphasized the risk to the state treasury factor although the original test did not emphasize any one factor over the others.[135]

A number of articles have recognized that the *Lake Country Estates* test was no longer functional and advocated revision.[136] The note by Alex Rogers was most effective in pointing out the failures in the test.[137] Rogers focused on the disparities created by the circuits and how a fact-intensive test, such as the arm-of-the-state doctrine, was ineffective in resolving the

---

128. *Port Authority PBA*, 819 F.2d at 418 (granting immunity to the Port Authority); *Feeney*, 873 F.2d at 633 (denying PATH immunity under the Eleventh Amendment).

129. *Hess*, 8 F.3d at 811.

130. Unlike *Feeney*, waiver could not be argued in *Hess* since both petitioners missed the statutory deadline for suit in federal court. Since waiver was not an available back door, the Court was forced to respond to the entitlement issue.

131. *Hess*, 115 S. Ct. at 408. The dissent, on the other hand, supported the Third Circuit's analysis focusing on state control objectives, and would have granted PATH immunity. *Id.* at 411-12 (O'Connor, J., dissenting).

132. *See generally* 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 (1992), for a detailed exposition of the lower court's application and alteration of this test. *See also supra* notes 32-78 and accompanying text.

133. Rogers, *supra* note 10, at 1263-65. This dysfunctional application is the heart of Rogers' argument for adopting a new test. *Id.*

134. *Port Authority PBA*, 819 F.2d at 417-18.

135. *Feeney*, 873 F.2d at 631.

136. *See* Rogers, *supra* note 10, at 1282-83; Needle, *supra*, note 39, at 225.

137. Rogers, *supra* note 10, at 1282-83.

important issues.[138] Justice Ginsburg found Rogers' article convincing enough to recognize it in her opinion.[139]

Although the need for clarification and restatement of the analysis of Eleventh Amendment immunity was apparent, the majority and the dissent strongly disagreed as to what revisions should be made. The dissent sought to retain most of the former analysis while clarifying the rough edges and making state control the most important factor.[140] Justice O'Connor's dissent resonates with concern for abiding by precedent.[141]

The majority attempted to ground its new formulation in the precedent of *Lake Country Estates* by analyzing all of its factors in relation to the situation in *Hess* and purported to retain those factors.[142] But in examining the precedent, the majority altered its meaning. Indeed, the majority states that *Lake Country Estates* set up the presumption against immunity.[143] *Lake Country Estates* actually limited the presumption of non-immunity to situations where the entity was comparable to a political subdivision, and the majority stretched that presumption to cover all bi-state entities, even those which do not look like municipalities.[144]

---

138. Rogers, *supra* note 10, at 1264-65. Rogers attributes the lower court's confusion in Eleventh Amendment cases to the Supreme Court's lack of direction. *Id.* Rogers cited the following cases as examples of the variety of factors employed by the lower courts: Benning v. Board of Regents of Regency Universities, 928 F.2d 775, 777 (7th Cir. 1991) (considering four factors); Puerto Rico Ports Authority v. M/V Manhatten Prince, 897 F.2d 1, 9 (1st Cir. 1990) (considering seven factors); Urbano v. Board of Managers of N.J. State Prison, 415 F.2d 247, 250-51 (3d Cir. 1969) (considering nine factors); Tuveson v. Florida Governor's Counsel on Indian Affairs, Inc., 734 F.2d 730, 732 (11th Cir. 1984) (court characterizing is most important factor). *Id.* at 1269-70.

139. Her recognition was used as extra support for the argument that state-controls analysis is unreliable and unmanageable, and therefore, should not be the controlling factor, as the dissent argued. *Hess*, 115 S. Ct. at 404. Notably, the majority adopted the first part of Rogers' approach, which advocated non-immunity unless the state clearly expressed an intent to make it a state agency. The majority rejected the second part of his test which focused on the ability of the entity to generate its own revenue. *Id.* at 406.

140. *Id.* at 411-12 (O'Connor, J., dissenting). The dissent also recognizes Rogers' article as making clear the disparity between courts, and agrees that perhaps one factor ought to be controlling, but argued for "state control" factor rather than state treasury. *Id.* at 410 (O'Connor, J., dissenting).

141. *Id.* The dissent argues that making the state treasury factor the controlling factor contradicts the text of the Amendment itself, which allows for suits in law *or equity*. *Id.*

142. *Id.* at 402-03.

143. *Id.* at 402.

144. *Lake Country Estates*, 440 U.S. at 401.

Although the majority proposes to take only a half step away from the former "factor based analysis" of Eleventh Amendment immunity, *Hess* discarded the old analysis. The test now consists of (1) a presumption that bi-state entities do not qualify for Eleventh Amendment immunity, (2) unless the states' treasuries are exposed to liability for a federal judgment against the entity.[145] The majority purports to retain the analysis of whether the states confer immunity in structuring the entity.[146] As noted by the dissent, however, making fiscal responsibility the overarching factor will make it determinative.[147] The two-prong test will, in effect, eliminate the need to review any other factors.

Finally, the third important component of *Hess* is the timing of the decision. If one only considers the *Hess* decision, it would be difficult to reconcile the strong dissent in *Hess* with the unanimous holding of non-immunity in *Feeney*, especially in light of the fact that Justice O'Connor authored both opinions. The lower-court struggle with the application of the immunity test was apparent by 1990, so the majority in *Feeney* must have had a reason for postponing resolution of that issue.

The Supreme Court had a prime opportunity to resolve the disparity in *Feeney*, but they chose to decide the case on other grounds.[148] A review of *Feeney* reveals an attempt to formulate a narrow holding based solely on the issue of waiver.[149] Instead of taking up the issue of whether bi-state entities were entitled to immunity, Justice O'Connor made assumptions in order to get to the issue of waiver.[150] Justice O'Connor was joined in her majority opinion by Chief Justice Rehnquist, and Justices White, Scalia and Kennedy.[151] In *Hess*, Justice O'Connor was joined in the dissent by Chief Justice Rehnquist, and Justices Scalia and Thomas.[152] Justice Kennedy was the only justice to change sides when the immunity question reappeared in *Hess*.[153] From Kennedy's position with the majority in *Hess*, we can infer that had the Court taken up the immunity question in 1990, he may have been the fifth vote for denial of immunity. Therefore, the majority in *Feeney* chose

145. *Hess*, 115 S. Ct. at 406.

146. *Id.* at 404.

147. *Id.* at 410 (O'Connor, J., dissenting).

148. *Feeney*, 495 U.S. at 308-09.

149. *Id.* at 306.

150. *Id.* at 305 (Justice O'Connor inserted the assumption made in *Petty* that bi-state entities are entitled to immunity because they are a joint agency of two states).

151. *Id.* at 300.

152. *Hess*, 115 S. Ct. at 408 (O'Connor, J., dissenting).

153. *Id.* at 397. Three of the five justices, including the opinion's author, making up the majority in *Hess*, did not participate in the *Feeney* decision. They are Justices Ginsburg, Souter and Breyer.

to review only the waiver issue because they risked losing a majority if they had forced the immunity issue.

If Kennedy had sided with the concurrence,[154] the result would have been more drastic because the four concurring Justices were intent upon overruling *Hans v. Louisiana* and redefining the Eleventh Amendment to be solely a jurisdictional provision. By 1994, when the *Hess* case reached the Supreme Court, only one of the four concurring Justices in *Feeney* remained on the bench.[155] Thus, although the great debate continues in regard to the meaning of the Eleventh Amendment, the support for eliminating any expansive meaning for the Eleventh Amendment has dwindled down to one justice. Although *Hess* constitutes a loss for the supporters of complete immunity, it looks like the possibility of overturning the 100 year-old precedent established by *Hans v. Louisiana* has passed for now.

VI. CONCLUSION

From a cursory review of the *Hess* decision, it would appear merely to take up a rung on the ladder of Supreme Court decisions interpreting the protection of the Eleventh Amendment. In reality, this decision makes some startling changes. *Hess* arises from the evergrowing sentiment for diluting the once ominous reach of Eleventh Amendment immunity. It represents an interim step: not going as far as relegating immunity to jurisdictional status, as argued by Justice Stevens, but also not maintaining the presumption of immunity for bi-state entities. *Hess* may not make much difference in the number of cases granting or denying immunity, since most courts had generally concluded that bi-state entities did not qualify for immunity, but it does clear up the immunity test allowing for a quick resolution in place of the cumbersome test delineated in *Lake Country Estates.*

JENNIFER A. WINKING

154. The concurrence in *Feeney* was limited solely to the holding denying immunity. *Feeney*, 495 U.S. at 309-18 (Brennan, J., concurring).

155. Justice Stevens argued in his concurrence in *Hess* for the overturning of *Hans v. Louisiana. Hess*, 115 S. Ct. at 407 (Stevens, J., concurring).