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NOTES

The Eleventh Amendment—The Fourth Circuit's Adaptation of *Hess v. Trans-Hudson Port Authority Corp.* in *Gray v. Laws*

*The reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man.*¹

The Eleventh Amendment is one of the Constitution's most provocative, elusive, and infrequently discussed provisions.² The 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.³

Historically, courts have construed this Amendment quite broadly, granting a shield of sovereign immunity to the states.⁴ This interpretation has protected states from suits in federal court in law, equity, or admiralty, by a state's own citizens, citizens of other states, and citizens of other countries.⁵ In most cases, the Eleventh Amendment's doctrine of sovereign immunity has protected unconsenting states from all suits in federal court.⁶

1. CONCISE DICTIONARY OF QUOTATIONS 290 (1985) (quoting GEORGE BERNARD SHAW, MAN AND SUPERMAN I).

2. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033 (1983); see also Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 61 (1989) (commenting that the wording of the Eleventh Amendment is "deceptively simple").

3. U.S. CONST. amend. XI.

4. See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1890 (1983).

5. See EDWIN CHERMERINSKY, *FEDERAL JURISDICTION* 367-68 (2d ed. 1994). For a comprehensive summary of the sovereign immunity doctrine and the Eleventh Amendment, see 12 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 300.03 (2d ed. 1995); 13 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* 2D § 3524 (2d ed. 1984).

6. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 486 (1987);

A literal reading of the Eleventh Amendment suggests, however, that its protection is not so sweeping.⁷ The jurisprudential development of the doctrine indicates that the scope of states' immunity is both narrower and broader than the Amendment suggests. In the past, the debate has centered on solving the questions of which parties can utilize the immunity protection of the Eleventh Amendment to block a federal suit and which parties may successfully bypass its protection.

Courts frequently have been called upon to determine whether counties, municipalities, or municipal agencies are protected by the Amendment's blanket of immunity.⁸ Traditionally, the general rule applied indicates that the Eleventh Amendment does not bar suits against these entities because local entities are not considered "arms of the state."⁹ Other entities, including state agencies and universi-

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-99 (1984). In addition, courts have opened the Amendment's umbrella of immunity protection to United States territories. See *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) (stating that Puerto Rico enjoys Eleventh Amendment protection); *Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981) (holding that Puerto Rico is a state for the purposes of the Eleventh Amendment).

7. The Eleventh Amendment does not bar suits brought against states by the United States. See *Pennhurst*, 465 U.S. at 104-06; *Arizona v. California*, 460 U.S. 605, 614 (1983); *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 646 (1892). The Amendment also does not bar the suit or limit the remedy in cases brought by a state against another state. See *Colorado v. New Mexico*, 459 U.S. 176, 182 n.9 (1982); *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838); see also *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[A]n original action between two states only violates the Eleventh Amendment if the plaintiff state is actually suing to recover for injuries to specific individuals."). The Amendment also has not been extended to bar suits against states in the courts of other states. See *Nevada v. Hall*, 440 U.S. 410, 421 (1979). For a discussion of *Nevada v. Hall*, see Margaret G. Stewart, *The State as an Unwilling Defendant: Reflections on Nevada v. Hall*, 59 NEB. L. REV. 246 (1980); Sandra A. Girifarco, Comment, *The Eleventh Amendment, Sovereign Immunity and Full Faith and Credit: No Constitutional Refuge for a State as a Defendant*, 42 U. PITT. L. REV. 57 (1980).

More significantly, however, the Court has recently decided that the Eleventh Amendment does not bar appellate jurisdiction in the form of Supreme Court review of cases brought in state court where the state is a party. See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation*, 496 U.S. 18, 30-31 (1990) ("We recognize what has long been implicit in our consistent practice and uniformly endorsed in our cases: The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts.").

8. See 12 MOORE ET AL., *supra* note 5, ¶ 300.03[3.4] (discussing the Eleventh Amendment's doctrine concerning state agencies, counties, boards, towns, cities and other entities).

9. See CHEMERINSKY, *supra* note 5, at 386; see, e.g., *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530-31 (1890); *Lytle v. Commissioner of Election*, 541 F.2d 421, 426 (4th Cir. 1976). Eleventh Amendment pro-

ties, have received extremely inconsistent treatment by the courts.¹⁰ In addition, courts have encountered difficulty interpreting the distinction between local and state agencies when the local agency exercises state power in such a way that the protection is necessary "to protect the state treasury from liability that would have had essentially the same practical consequences as a suit brought against the state."¹¹ Courts have not, however, afforded protection to political subdivisions that merely exercise a "slice of state power."¹²

The original text of the Constitution does not expressly provide

tection generally has not extended to suits brought against local governmental agencies. See *infra* note 12 and accompanying text. Professor Chemerinsky has offered this rationale for the Court's interpretation:

The ability to sue local governments in federal court is significant because it is this level of government that provides most social services in this country, such as police and fire protection, education, and sanitation. Therefore, if the Eleventh Amendment barred suits against municipalities, federal courts could not ensure compliance with the Constitution by those who are most likely to violate it.

CHEMERINSKY, *supra* note 5, at 386.

10. State universities have received varied Eleventh Amendment protection by the courts. Compare *Goss v. San Jacinto Junior College*, 588 F.2d 96, 98-99 (5th Cir.) (holding that a junior college could not be considered a "political subdivision" under Texas law), *modified*, 595 F.2d 1119 (5th Cir. 1979), *Durham v. Parks*, 564 F. Supp. 244, 246 (D. Minn. 1983) (specifying that the state constitution put the university out of state control for immunity purposes), and *Gordenstein v. University of Del.*, 381 F. Supp. 718, 721 (D. Del. 1974) (determining that the university was not a state for purposes of the Eleventh Amendment), with *Clay v. Texas Women's Univ.*, 728 F.2d 714, 716-17 (5th Cir. 1984) (granting Eleventh Amendment immunity when the university alone was named as the defendant), *Board of Governors of the Univ. of N.C. v. Helpingstine*, 714 F. Supp. 167, 174 (M.D.N.C. 1989) (determining that the University of North Carolina was an alter ego of the state), and *Ewing v. Board of Regents of the Univ. of Mich.*, 552 F. Supp. 881, 883-84 (E.D. Mich. 1982).

Eleventh Amendment case law offers another fine distinction. While a bridge and tunnel district have been given Eleventh Amendment immunity, see *Chesapeake Bay Bridge & Tunnel Dist. v. Lortzen*, 404 F.2d 1001, 1003 (4th Cir. 1968), *disavowed by Faust v. South Carolina State Highway Dep't*, 721 F.2d 934 (4th Cir. 1983) (determining that a state does not waive its Eleventh Amendment immunity when it undertakes activities on navigable waters under federal regulation), a bridge and tunnel authority has been held not immune, see *Raymond Int'l Inc. v. The MT Dalzelleagle*, 336 F. Supp. 679, 681-82 (S.D.N.Y. 1971).

11. *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979).

12. See *id.* at 401; see also *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978) (stating that neither the Tenth nor Eleventh Amendments offer protection for municipalities against suits); *Mount Healthy*, 429 U.S. at 280-81 (concluding that a school board was a "political subdivision" under Ohio law and therefore unable to receive Eleventh Amendment assistance from suit); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973) (determining that a county is a "citizen" and not an arm of the state for federal diversity purposes); *Lincoln County*, 133 U.S. at 530 (limiting the reach of the Eleventh Amendment "to those suits in which the State is a party on the record").

sovereign immunity for the states.¹³ The exclusion of such a doctrine stirred heated debate at the state ratification conventions.¹⁴ The

13. See Gibbons, *supra* note 4, at 1895. As Justice Stevens noted in *Nevada v. Hall*, 440 U.S. 410, 415 (1979), at common law in England, "[t]he King's immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong." *Id.*

The term "sovereign immunity" does not appear at any point in the Constitution. See Jennifer G. Schechter, Note, Constitutional Law—Sovereign Immunity—A Bistate Entity, Created By the Compact Clause and Financially Independent of Its Founding States, Is Not Entitled To Eleventh Amendment Immunity From Suit in Federal Courts—*Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), 26 SETON HALL L. REV. 431, 432 n.6 (1995).

Article III, § 2 of the United States Constitution outlines the boundaries of federal judicial power. See U.S. CONST. art. III, § 2. Congress does not possess the power to broaden the subject matter jurisdiction of the federal courts beyond the scope of Article III. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 12 (1985). Federal jurisdiction has, however, been extended in some areas to effectuate the policies behind Article III, including statutes providing for removal of cases to federal courts, for ancillary jurisdiction, and for pendent jurisdiction. See *id.* Article III classifies the federal judicial power into nine categories of cases and controversies. U.S. CONST. art. III. Two of these provisions provide:

The judicial Power shall extend to all Cases . . . between a State and Citizens of another State . . . and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

U.S. CONST. art. III, § 2. The Eleventh Amendment modified the interpretation of these two clauses, facially eliminating the amenability of states to suits in federal court by citizens of other states. See CHEMERINSKY, *supra* note 5, at 370.

14. Professor Chemerinsky writes:

A key matter in dispute is whether the . . . language of Article III was meant to override the sovereign immunity that kept states from being sued in state courts. There is no record of any debate about this issue or these clauses at the Constitutional Convention. However, at the state ratification conventions the question of suits against state governments in federal court was raised and received a great deal of attention. States had incurred substantial debts, especially during the Revolutionary War, and there was a great fear of suits being brought against the states in federal court to collect on these debts. More generally, the concern was expressed that although sovereign immunity was a defense to state law claims in state court, it would be unavailable if the same matter were raised against a state in a diversity suit in federal court.

CHEMERINSKY, *supra* note 5, at 370.

In support of the notion that Article III did not override general state sovereignty, Alexander Hamilton wrote in the Federalist Papers:

It is inherent in the nature of sovereignty, not to be amendable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity . . . it will remain with the States. . . .

THE FEDERALIST NO. 81, at 416-17 (Alexander Hamilton) (Max Beloff ed., 1987).

Discussing the contributions of Pennsylvania delegate James Wilson, Edward Elliot stated: "Where is this power lodged? Certainly not in the constitutions, for we have just seen that they may be changed at will by the people, in the citizens at large, and is paramount to all constitutions." EDWARD ELLIOT, BIOGRAPHICAL STORY OF THE

Eleventh Amendment was created in response to the Supreme Court's decision in *Chisholm v. Georgia*.¹⁵ In *Chisholm*, a South Carolina citizen sold war supplies to the State of Georgia in 1777.¹⁶ When Georgia failed to honor the contract, Chisholm sought a default judgment in federal court.¹⁷ The Court held that the state-citizen diversity clause of Article III supported Chisholm's cause of action in federal court against the State of Georgia.¹⁸ The House and Senate reacted swiftly to *Chisholm* and passed the Eleventh Amendment within four months.¹⁹ The ambiguity of the Constitution and the quick congressional reaction to *Chisholm* amplify the chief concerns of sovereign immunity: the dual notions of state autonomy and accountability.²⁰ These concerns still pervade Eleventh Amend-

CONSTITUTION: A STUDY OF THE GROWTH OF THE AMERICAN UNION 68 (1910).

In response to this interpretation of Article III, Patrick Henry replied:

"If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity."

Gibbons, *supra* note 4, at 1906 (quoting Patrick Henry's response to Madison's broad reading of Article III (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 490, 543 (J. Elliot ed., 1941))).

15. 2 U.S. (2 Dall.) 419 (1793).

16. See Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 141 (1977).

17. See *id.* at 141-42.

18. Four Justices wrote separately for the majority. There was one dissent. See *id.* at 142. For a thorough interpretation of Justice Iredell's dissent, see John V. Orth, *The Truth About Justice Iredell's Dissent in Chisholm v. Georgia* (1793), 73 N.C. L. REV. 255 (1994).

19. See Baker, *supra* note 16, at 143 n.21. Within five years, the states ratified the Eleventh Amendment. See RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 82-83 (1986); see also 12 MOORE ET AL., *supra* note 5, ¶ 300.03[2] (discussing the timely reaction of the Congress and state legislatures to the Court's decision in *Chisholm*).

20. See CHERMERINSKY, *supra* note 5, at 368; see also 13 WRIGHT ET AL., *supra* note 5, at § 3524 (indicating that the central factors in most state agency issues are the "degree of autonomy of the governmental entity and whether recovery against [the entity] would come from state funds"). Professor Chermerinsky puts forth three basic theories interpreting the Eleventh Amendment. See CHERMERINSKY, *supra* note 5, at 374-75. The first theory advocates that the Eleventh Amendment is a narrow portion of a broad limitation on federal court jurisdiction. See *id.* Federal court jurisdiction is thus limited by the states' broad power of sovereign immunity. See *id.* at 375-76. The second approach suggests that the Eleventh Amendment restates the common-law doctrine of sovereign immunity in existence before the adoption of the Constitution or the Eleventh Amendment. See *id.* at 378. The third interpretation of the Eleventh Amendment argues that the Amendment was only intended to limit diversity suits. See *id.* at 380. This theory interprets the Amendment as addressing only the language in Article III, § 2 allowing for "Controversies . . . between a State and Citizens of another state." *Id.*

ment jurisprudence and underlie the Fourth Circuit's recent decision in *Gray v. Laws*.²¹

This Note first summarizes the facts of *Gray*, and the determinations of the district court.²² Next, the Note discusses the basic Eleventh Amendment doctrine introduced by the court in *Gray* as a basis for their consideration of an "arm of the state" immunity question.²³ The Note then illustrates *Gray's* reliance on the Supreme Court's recent decision in *Hess v. Port Authority Trans-Hudson Corp.*²⁴ and its directions to the district court on remand.²⁵ In *Hess*, the Supreme Court standardized the Eleventh Amendment considerations for a multistate entity created pursuant to the Compact Clause.²⁶ *Gray* utilized this analysis in the context of a single entity question.²⁷ To lay a foundation for *Gray's* analysis of the single entity issue, the Note then reviews Eleventh Amendment jurisprudence and discusses the broadening of this constitutional provision past its textual scope.²⁸ The Note then evaluates the Fourth Circuit's reliance on *Hess* and its restructuring of the sovereign immunity doctrine.²⁹ Finally, the Note discusses the uncertainties of this new doctrine and predicts the Fourth Circuit's use of this enabling analysis.³⁰

In *Gray v. Laws*,³¹ the Fourth Circuit considered an Eleventh Amendment "arm of the state" issue in a case involving an employee at a county health department.³² John Gray worked at the Orange County Health Department (OCHD) in North Carolina for eighteen years as a sanitarian.³³ In May 1990, the county dismissed Gray for making improper sexual comments to women while on the job.³⁴ These allegations were reported to Gray's superiors, Dan Reimer

21. 51 F.3d 426 (4th Cir. 1995).

22. See *infra* notes 31-51 and accompanying text.

23. See *infra* notes 59-63 and accompanying text.

24. 115 S. Ct. 394 (1994).

25. See *infra* notes 64-77 and accompanying text.

26. See *Hess*, 115 S. Ct. at 400-06; *infra* notes 102-14 and accompanying text.

27. See *infra* notes 64-69 and accompanying text.

28. See *infra* notes 78-120 and accompanying text.

29. See *infra* notes 121-46 and accompanying text.

30. See *infra* notes 147-52 and accompanying text.

31. 51 F.3d 426 (4th Cir. 1995).

32. See *id.* at 428-29. In *Gray*, the court based much of its decision on *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), which addressed Eleventh Amendment immunity concerns relating to multistate entities created pursuant to the United States Constitution's Interstate Compact Clause. See U.S. CONST. art. I, § 10, cl. 3; *infra* note 93.

33. See *Gray*, 51 F.3d at 429.

34. See *id.*

and Tony Laws.³⁵ Gray alleged, however, that Tony Laws and Dan Reimer dismissed him in direct retaliation for allegations he made to superiors regarding the mismanagement and unequal enforcement of state sanitation laws.³⁶

Following his dismissal, Gray filed a Petition for Hearing with the North Carolina Office of Administrative Hearings.³⁷ The administrative law judge (ALJ) ruled that Gray had been improperly dismissed without "just cause."³⁸ In addition, the ALJ determined that the "on going confrontations" between Gray and his superiors gave the complaints a suspicious tone.³⁹ The ALJ concluded that, even assuming the truth of the sexual misconduct complaints, no basis existed for the dismissal.⁴⁰ The State Personnel Commission (SPC) adopted the decision and recommended that Gray be reinstated to the OCHD.⁴¹

Using the discretion afforded to him under North Carolina law, Reimer nevertheless refused to reinstate Gray.⁴² Gray appealed this

35. See *id.* Tony Laws was the director of Environmental Health at the Orange County Health Department, and was Gray's immediate supervisor from 1977 until his dismissal in 1990. See Appellees' Brief at 1, *Gray* (No. 94-1608). Dan Reimer, the Director of the Orange County Health Department, was the only person with the statutory authority to terminate Gray's employment. See *id.*

The allegations were brought to the attention of Laws and Reimer in early 1990. See *Gray*, 51 F.3d at 429. Jeff Ensminger, owner of a local catering establishment, told Laws in early 1990 that Gray had made sexual comments to Ensminger's wife during the course of an inspection. See Appellees' Brief at 1, *Gray* (No. 94-1608). At a meeting between Reimer and Ensminger on January 24, 1990, Reimer was informed of another incident with a local caterer. See *id.* A preliminary investigation of the matter was conducted by Laws at the direction of Reimer. See *Gray*, 51 F.3d at 429. Following an interview of the two women, Gray was placed on compulsory leave of absence with pay pending further investigation of the sexual allegations. See *id.* Gray testified in his own behalf at a formal pre-dismissal conference. See *id.* Following this inquiry, however, Reimer officially dismissed Gray. See *id.*

36. See *id.* For a discussion of the alleged bias of Dan Reimer and Tony Laws, see Appellant's Brief at 10-13, *Gray* (No. 94-1608).

37. See N.C. GEN. STAT. § 126-37 (1993); *Gray*, 51 F.3d at 429; see also N.C. ADMIN. CODE tit. XXVI, rr. 2A.0101 to .0701 (March & Apr. 1996) (summarizing the role of the North Carolina Office of Administrative Hearings); *id.* rr. 2B.0101 to .0204 (same); *id.* rr. 2C.0101 to .0504 (same); N.C. ADMIN. CODE tit. XXVI rr. 1.0101 to .0202 (Nov. 1994) (same); *id.* rr. 3.0101 to .0208 (same).

38. See *Gray*, 51 F.3d at 429; N.C. ADMIN. CODE tit. XXVI rr. 1.0100 to 0202 (Nov. 1994).

39. See *id.*

40. See *id.* The administrative law judge determined that no basis existed to conclude that Gray had used a position of authority to gain sexual favors. See *id.*

41. See *id.*

42. See *id.*; N.C. GEN. STAT. § 126-37(a) (1993).

decision in North Carolina state court.⁴³ The trial judge adopted the SPC recommendation and issued a reinstatement order restoring Gray to his former duties at OCHD.⁴⁴ In response, Gray filed claims against Orange County, OCHD, and Reimer and Laws (both in their individual and official capacities) alleging violations of his federal constitutional rights to free speech and due process under 42 U.S.C. § 1983.⁴⁵ Using the district court's supplemental jurisdiction, he filed state claims alleging violations of state constitutional rights, intentional infliction of emotional distress, and civil conspiracy.⁴⁶ The defendants then removed the case to federal court.⁴⁷

The district court held that North Carolina local health department officials act on behalf of the State of North Carolina and that the Eleventh Amendment's immunity doctrine barred these claims.⁴⁸ The district court dismissed all claims against Reimer and Laws in their official capacity for lack of jurisdiction.⁴⁹ The court also dismissed Gray's claims against Orange County and OCHD, asserting that Orange County could not be held responsible for the actions of state officers and that OCHD was not an entity capable of being sued under North Carolina law.⁵⁰ Summary judgment was granted in favor of Reimer and Laws on all claims brought against them in their individual capacity.⁵¹

On appeal to the United States Court of Appeals for the Fourth Circuit, Gray contended that OCHD was a county agency for purposes of the Eleventh Amendment and therefore was not protected by sovereign immunity.⁵² He further alleged that Reimer and Laws, as employees of OCHD, were county officials, who could be sued in their official capacity in federal court.⁵³ Finally, he asserted that the district court improperly granted summary judgment on the individ-

43. See *Gray*, 51 F.3d at 429.

44. See *id.* at 429-30.

45. See *id.* at 430.

46. See *id.*

47. See Appellant's Brief at 4, *Gray* (No. 94-1608).

48. See *Gray*, 51 F.3d at 430.

49. See *id.*

50. See *id.*; see also N.C. GEN. STAT. § 1-3A-34 (1995) (mandating the creation of local health departments); § 130A-39(b) (controlling a local health board's discretion in deviating from state rules); §§ 90A-4.1 to 4.2 (providing for state funding of local health departments); § 90A-50 (1992) (requiring sanitation examiners to be registered by the state).

51. See *id.*

52. See *id.*

53. See *id.*

ual claims against Reimer and Laws.⁵⁴

The Fourth Circuit, in a panel decision written by Judge Luttig,⁵⁵ vacated and remanded the case for further consideration of the district court's finding that the county officials were entitled to Eleventh Amendment immunity.⁵⁶ The Fourth Circuit also vacated and remanded the district court's determination regarding the claims brought against OCHD and Orange County.⁵⁷ Similarly, the court vacated and remanded the district court's determination concerning the individual § 1983 and First Amendment claims against Reimer and Laws.⁵⁸

The Fourth Circuit began its analysis by discussing the foundations of the Eleventh Amendment and its application to state agencies.⁵⁹ The court recognized that although the Eleventh

54. *See id.*

55. The three judge panel consisted of Circuit Judge Hall, Circuit Judge Luttig, and United States District Court of South Carolina Judge Currie. *See id.* at 428.

56. *See id.* at 439.

57. *See id.* The district court dismissed the claims against Orange County, reasoning that the county could not be liable for the actions of state officials. *See id.* at 434 n.6. In light of the *Gray* court's decision to vacate and remand the decision which found that Reimer and Laws had acted on behalf of the state, the court vacated the district court's dismissal of the claims against the county. *See id.* The Fourth Circuit also vacated the dismissal of the claims against the Orange County Health Department "so that the district court may reconsider the department's susceptibility to suit in light of our decision in *Avery v. County of Burke*." *Id.* at 434 n.6 (citing *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981)).

58. *See id.* at 439. Gray alleged in his complaint that Reimer and Laws had "intentionally" and "maliciously" retaliated against him in response to the complaints he made to OCHD superiors. *See id.* He had complained about "capricious" and "arbitrary" behavior by Reimer and Laws while enforcing North Carolina law. *See id.* at 429; *see also supra* note 36 and accompanying text (referring to the alleged bias of Reimer and Laws).

The district court based its summary judgment decision on lack of support for Gray's allegations against the defendants within the "voluminous" submissions countering the motion for summary judgment. *See Gray*, 51 F.3d at 434. The Fourth Circuit concluded, however, that Gray's deposition included sufficient testimony to warrant further district court consideration of Gray's First Amendment claim. *See id.* In vacating and remanding these specific individual claims against the defendants, the Fourth Circuit remarked that it did "not intend to suggest in any way that summary judgment on this claim might not yet be available." *Id.* The court did, however, reaffirm the district court's dismissal of the due process claims against the county, OCHD, and Reimer and Laws in their official capacity. *See id.* at 434 n.6.

59. *See id.* at 430 (citing *Edelman v. Jordan*, 415 U.S. 651, 664 (1974)). In *Edelman*, the Supreme Court distinguished between prospective and retroactive relief. *See Edelman*, 415 U.S. at 664; *CHEMERINSKY*, *supra* note 5, at 396. In *Edelman*, the plaintiffs brought suit for injunctive relief against the Commissioner of the Illinois Department of Public Welfare, seeking to compel the state to comply with federal guidelines and to return funds previously withheld. *See Edelman*, 415 U.S. at 655. The *Edelman* Court drew an important distinction, holding that the Eleventh Amendment barred the retroactive

Amendment, by its specific terms, only applies to suits brought against a state by "Citizens of another State,"⁶⁰ the Supreme Court has held consistently that the Amendment applies with equal force to citizens within the defendant state.⁶¹ The court noted that the term "State" within the Amendment has been expanded and the immunity consequently broadened to encompass entities characterized as "arms of the state."⁶² The court concluded its brief discussion of the Amendment's foundation by elucidating the protection given state officials in their official capacity.⁶³

In order to answer the jurisdictional question in *Gray*, the Fourth Circuit turned next to the distinction between the immunity afforded to a state in federal court and the immunity denied to local governmental agencies.⁶⁴ As the basis for this analysis, the court turned to the Supreme Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*⁶⁵ While *Gray* dealt with Eleventh Amendment immunity in the context of an "arm of the state" entity, *Hess* dealt with a multistate entity formed pursuant to the Constitution's Compact Clause.⁶⁶

In analyzing the questions presented in *Gray*, the Fourth Circuit drew a comparison between *Gray* and *Hess*, asserting that "the same broad principles identified by the Court as relevant in the multi-state

claim but not the prospective claim. *See id.* at 658-59. The retroactive claim, which would require the state and not the individual to pay the withheld money, could not be compelled by the federal court. *See id.* at 676-77; *see, e.g., Cory v. White*, 457 U.S. 85 (1982) (barring an administrator's interpleader action in a suit between two states on the basis that *Edelman* did not restrict the Eleventh Amendment's force only to private parties seeking to impose liability which would be paid by state funds).

60. U.S. CONST. amend. XI.

61. *See Gray*, 51 F.3d at 430 (citing *Edelman*, 415 U.S. at 662-63); *see also* *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (refusing to allow a private citizen to sue the state to recover unpaid interest on state bonds); *ROTUNDA ET AL.*, *supra* note 19, at 85 (discussing the applicability of the Eleventh Amendment bar under various plaintiff scenarios).

62. *See Gray*, 51 F.3d at 430. The Eleventh Amendment bars suit when the state is the defendant. *See id.* Suits brought against agencies of the state are also barred, but suits against political subdivisions of the state are not. *See id.* at 431. The Supreme Court has determined that a municipal corporation is a "person," pursuant to 42 U.S.C. § 1983 (1979), and suit may be brought in either state or federal court for violating the rights of an individual. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). The Court has also declined to extend Eleventh Amendment protection to school boards. *See Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977).

63. *See Gray*, 51 F.3d at 430; *infra* note 89 and accompanying text (reviewing cases discussing the Eleventh Amendment's application to state officer suits).

64. *See Gray*, 51 F.3d at 431.

65. *See id.*; *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 394 (1994).

66. *See infra* notes 93, 102-14 and accompanying text.

entity context apply also in determining whether, within a single state, a governmental entity is 'state' or 'local' for purposes of the Eleventh Amendment."⁶⁷ *Gray*, as did *Hess*, determined that the primary concerns for the Eleventh Amendment analysis are the protection of state treasuries and the respect for the sovereign nature of the states in our union.⁶⁸ The court asserted that of these two concerns, however, the core concern of the Eleventh Amendment is the determination of the judgment's effect on the state treasury.⁶⁹

67. *Gray*, 51 F.3d at 431. Holding that the bistate entity principles were dispositive in this case, the court noted that the multistate principles discussed in *Hess* formed the basis for the Eleventh Amendment in general. *See id.* at 432. In *Gray*, the court identified both the protection of state treasuries and the preservation of state sovereignty as interests protected by of the Eleventh Amendment. *See id.* at 431-32. The Fourth Circuit asserted that *Hess* extracted these principles by reviewing court precedent concerning whether an entity within a single state context is "an arm or alter ego of the state." *Id.* *Gray* referenced cases cited in *Hess* addressing the nature of state agencies as arms of the state. *See id.* at 432 n.4. The *Gray* court also asserted that the Supreme Court's decision to remand in *Ristow v. South Carolina Ports Auth.*, 27 F.3d 84 (4th Cir.), *vacated*, 115 S. Ct. 567 (1994), a Fourth Circuit case addressing a single-state entity question of Eleventh Amendment immunity in light of *Hess*, provided further evidence of *Hess*' applicability to the question presented in *Gray*. *See Gray*, 51 F.3d at 433.

68. *See Gray*, 51 F.3d at 432. The court noted the historical roots of these two concerns. *See id.* First, the adoption of the Eleventh Amendment following the Supreme Court's dubious opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was largely based on fear of state liability for federal war debt. *Gray*, 51 F.3d at 431. *See generally* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1467-73 (1987) (discussing *Chisholm* and the concerns surrounding its deliberation). Next, the court noted the deeper roots of the Eleventh Amendment-the relationship between the states and the federal government and the individual autonomy of the states. *See Gray*, 51 F.3d at 432; *supra* note 20 and accompanying text.

69. *See Gray*, 51 F.3d at 433. The *Gray* court also noted that "[t]he principal differences between the multistate and single state analyses appear to be that, in the former but not the latter, a presumption against Eleventh Amendment immunity exists." *Id.* In the context of a multistate entity, there is generally no threat to the integrity of state control and the question of state control is generally a "perilous inquiry." *Id.* (citing *Hess*, 115 S. Ct. at 404). Highlighting the unique nature of a multistate entity, the *Hess* Court noted:

An interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency that several states jointly create to run the compact. Such an agency under the control of special interests or gubernatorially appointed representatives is two or more steps removed from popular control, or even of control by a local government.

Hess, 115 S. Ct. at 401 (citing MARIAN E. RIDGEWAY, *INTERSTATE COMPACTS: A QUESTION OF FEDERALISM* 300 (1971)).

The Fourth Circuit also noted the uncertainty surrounding the *Hess* decision in the application of these principles. *See Gray*, 51 F.3d at 433. The court rhetorically inquired into what the analysis should be when the two principal factors (the state treasury question and the state sovereignty question) point in the same or different directions. *See id.* Finally, the court asked how other "relevant" considerations, promulgated in *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979), fit into the Eleventh Amendment analysis. *See Gray*, 51 F.3d at 433; *infra* note 100 and accompany-

The *Gray* court then considered *Hess*' approach to Eleventh Amendment analysis in light of its own precedent.⁷⁰ The court asserted that the analysis of *Hess* did not deviate too far from Fourth Circuit single-state entity jurisprudence. The Fourth Circuit had recognized, in the single state and "arm of the state" context, the importance of judgments against the state treasury.⁷¹ The court recognized, however, that the *Hess* decision varied slightly from the Fourth Circuit analysis, increasing the weight given to the state sovereignty issue and moderately altering the factoring of other "relevant considerations."⁷²

Finally, the court directed the district court's reconsideration of the immunity questions in *Gray* on remand.⁷³ The court outlined North Carolina statutory provisions bearing on the determination of whether "official capacity" judgments against Reimer and Laws would be paid out of the state treasury.⁷⁴ Interpreting the effect of these laws on the instant case, the court indicated that "suits against local health department officials will be paid out of local funds allocated for that purpose."⁷⁵ Concerning the Eleventh Amendment

ing text.

70. See *Gray*, 51 F.3d at 434. While recognizing the similarities in these approaches, the court commented on what it called "errors in the district court's understanding of [its] precedent." *Id.* at 435; see *infra* notes 115-20 and accompanying text (discussing *Bockes v. County of Grayson, Va.*, 999 F.2d 788 (4th Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994)).

71. See *Gray*, 51 F.3d at 434.

72. See *id.*; *infra* notes 136-50 and accompanying text.

73. See *Gray*, 51 F.3d at 435.

74. See *id.* at 435-36; N.C. GEN. STAT. § 143-300.3 (1993); *id.* § 143-300.6 (1993); *id.* § 143-300.8 (1993); *id.* § 90A-51(4)(c) (1992); *id.* § 153A-97 (1991); *id.* § 130A-4(b) (1990); *id.* § 160A-167 (1987). Section 143-300.8 reads:

Any local health department sanitarian enforcing rules of the Commission for Health Services under the supervision of the Department of Environment, Health, and Natural Resources pursuant to G.S. 130A-4(b) shall be defended by the Attorney General, subject to the provisions of G.S. 143-300.4, and shall be protected from liability in accordance with the provisions of this Article in any liability in any civil or criminal action or proceeding brought against the sanitarian in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of enforcing the rules of the Commission for Health Services. The Department of Environment, Health, and Natural Resources shall pay any judgment against the sanitarian, or any settlement made on his behalf, subject to the provisions of G.S. 143.300.6.

N.C. GEN. STAT. § 143-300.8 (1993), *quoted in Gray*, 51 F.3d at 435-36.

75. *Gray*, 51 F.3d at 436. The court outlined four reasons for drawing the conclusion that local funds would pay any judgment against Reimer or Laws. See *id.* First, Reimer and Laws did not appear to qualify as "sanitarians" under N.C. GEN. STAT. § 90(A)-51(4)(c) (1992). See *Gray*, 51 F.3d at 436. Section 90A-51(4)(c) specifies that "sanitarians" is not inclusive of "public health officer[s] [and] public health department director[s]." *Gray*, 51 F.3d at 436 (citing N.C. GEN. STAT. § 90A-51(4)(c) (1992)). Sec-

immunity status of the OCHD, the court took a more cautious path of analysis. It outlined a series of statutory provisions indicating both state and county control of governmental control, summarily concluding that the OCHD seemed to rest under county control for the purposes of an Eleventh Amendment inquiry.⁷⁶ Further directing the course of the district court's reconsideration of the case, the *Gray* court disputed the district court's conclusion that the North Carolina appellate court's determinations regarding the characterization of the local health department should be determinative in this analysis.⁷⁷

Sovereign immunity jurisprudence determines the extent of the Eleventh Amendment's limitation on federal court jurisdiction. Historically, this doctrine has been instrumental in defining and illuminating the delicate balance of state and federal government rights.⁷⁸ In 1890, the Supreme Court in *Hans v. Louisiana*⁷⁹ consid-

ond, the court concluded that pursuant to N.C. GEN. STAT. § 130A-4(b) (1990), neither Laws nor Reimer were "enforcing the rules of the Commission [for Health Services]." *Gray*, 51 F.3d at 436. The court concluded that Reimer and Laws made employment decisions "which seemingly have nothing to do with the activities covered by section 130A-4(b)." *Id.* Third, the court noted that neither Reimer nor Laws engaged "in the scope and course of enforcing the rules of the Commission of Health Services" as required by N.C. GEN. STAT. § 143-300.8. *Gray*, 51 F.3d at 436. Finally, the court noted that North Carolina does not list a general statute covering judgments against local health department employees acting in their official capacities. *See id.* Because statutes already provide for payments of judgments against state employees, there would have been no need to enact § 143-300.8 unless local health department officials were not covered generally. *See id.*

76. *See id.* at 436-37. For statutes cited by the court in *Gray* that suggest counties are largely responsible for the creation and operation of local departments of health, see N.C. GEN. STAT. § 130-39(a) (1995); *id.* § 130A-34(b); *id.* § 130A-35(a), (b), (g); *id.* § 130A-41(c); *id.* § 153A-149(c)(13) (1991). *But see* N.C. GEN. STAT. § 90A-50 (1992) (authorizing the creation of the State Board of Sanitation Examiners and registration of sanitarians in North Carolina); *id.* § 130A-34 (1995) (mandating that counties regulate and manage public health services organizations); *id.* § 130A-39(b) (indicating that local board of health may enact more stringent rules where necessary).

77. *See Gray*, 51 F.3d at 437. In section IV of its opinion, the *Gray* court affirmed the district court's determination regarding Gray's § 1983 due process claims. *See id.* at 438. Gray contended that his due process rights were violated as a result of his employer's evasion of state procedural guidelines. *See id.* The court recognized, however, a distinction between state and federal procedures for due process violations. *See id.* Federal due process claims are measured against the federal standard and state procedures cannot dictate the process due the individual under the Constitution. *See id.* (citing *Riccio v. County of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990)). The court concluded that, under the federal standard, Gray received both the required notice and an opportunity to respond. *See id.*; *see also* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (noting that a state satisfies the Constitution's due process requirement in terminating an employee by providing notice of the proposed deprivation and a pre-deprivation opportunity to respond).

78. *See* CHEMERINSKY, *supra* note 5, at 368.

79. 134 U.S. 1 (1890).

ered the extent of federal jurisdiction in light of the Eleventh Amendment's textual provisions.⁸⁰ *Hans* concerned a Louisiana resident who sued the State of Louisiana in federal court for payment of money owed under state-issued bonds and coupons.⁸¹ The Court held that a state citizen could not sue his home state in federal court for failing to pay off state bonds under the Contracts Clause.⁸² The Court reasoned that suit brought by a citizen of the defendant state in federal court "was not contemplated by the Constitution when establishing the judicial power of the United States."⁸³ In its analysis, the Court reasoned that if the Eleventh Amendment forbade suits by

80. See *id.* at 9; see also *North Carolina v. Temple*, 134 U.S. 22, 30 (1890) (holding that a citizen of North Carolina could not pursue a suit against the auditor of the State of North Carolina). Following the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and the passage of the Eleventh Amendment, history witnessed a shadowy departure of Eleventh Amendment jurisprudence by the Supreme Court. See Orth, *supra* note 18, at 256-57. In the 1880s, the Eleventh Amendment reappeared in state bond cases in which citizens sought to compel the payment of bonds defaulted on by states. See *id.* at 257 ("Like the biblical bondholder who knows how to bring forth from his storeroom things old and new, the Supreme Court retrieved the Eleventh Amendment."). Finally, in the Court's centennial year, it squarely addressed the Eleventh Amendment concerns in *Hans v. Louisiana*, 134 U.S. 1 (1890).

81. See *Hans*, 134 U.S. at 1. For a detailed discussion of the facts surrounding this case, see JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 27 (1987).

82. *Hans*, 134 U.S. at 15. In fact, the Court noted: "The supposition that it would is almost an absurdity on its face." *Id.* The Supreme Court has repeatedly held against a state's citizens wishing to pursue claims against their own state in federal court. See *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Missouri v. Fiske*, 290 U.S. 18, 28 (1933). Recent Supreme Court Justices have criticized the *Hans* Court's liberal reading of the Eleventh Amendment and the ever-broadening scope of the immunity doctrine. See *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 407 (1994) (Stevens, J., concurring) ("[S]ince *Hans v. Louisiana*, the Court has interpreted the Eleventh Amendment as injecting broad notions of sovereign immunity into the whole corpus of federal jurisdiction."); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (Brennan, J., dissenting) (dissenting for four separate reasons, among them being his belief that the Eleventh Amendment applies only to diversity suits and not admiralty or federal question suits); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 302 (1985) (Brennan, J., dissenting) ("[T]he doctrine that has been created is pernicious. In an era when sovereign immunity has generally been recognized by courts and legislatures as an anachronistic and unnecessary remnant of the feudal legal system, . . . the Court has aggressively expanded its scope.").

83. *Hans*, 134 U.S. at 15; see *Fletcher*, *supra* note 2, at 1039-40 (noting that while the Court in *Hans* was careful to explain that the explicit wording of the Constitution does not mention the type of suit involved in *Hans*, other Court holdings have been more liberal in their interpretation of Eleventh Amendment terms). Some commentators have openly criticized the liberal interpretation of the *Hans* Court. See, e.g., Amar, *supra* note 68, at 1476 ("If coherence of general sovereign immunity doctrine is achieved only by mangling the Amendment's text, the obvious lesson should be that the Amendment was not designed to embody any such doctrine.").

out-of-state citizens, it was difficult to imagine that in-state residents would be free to sue their home state.⁸⁴ The Court considered it "anomalous" to allow such an interpretation of the Constitution.⁸⁵

The Court has also stretched the doctrine of Eleventh Amendment immunity to include "state" officers. In *Ford Motor Co. v. Department of Treasury of the State of Indiana*,⁸⁶ the Court again utilized the Amendment to protect the state treasury.⁸⁷ In this case, Ford Motor Company sued the State of Indiana, the governor, the state treasurer, and the state auditor to recover a refund of state income taxes.⁸⁸ The Court held that regardless of whether the state is a named party, the Eleventh Amendment shields state officers acting in their official capacity.⁸⁹ The Indiana statute upon which the peti-

84. See *Hans*, 134 U.S. at 15. The Court stated:

The letter [of the Constitution] is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States?

Id. See generally RICHARD A. POSNER, *OVERCOMING LAW* 232 (1995) (discussing the Court's decision in *Hans* as an example of liberal judicial activism).

85. See *Hans*, 134 U.S. at 18.

86. 323 U.S. 459 (1945).

87. See *id.* at 464 ("And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (citations omitted)). See generally CHEMERINSKY, *supra* note 5, at 394 (citing *Ford* and the general doctrine involving suits against state officers).

88. See *Ford*, 323 U.S. at 460.

89. See *id.* at 464. For a thorough discussion of the Eleventh Amendment's application to state officer suits, see 13 WRIGHT ET AL., *supra* note 5, § 3524; 12 MOORE ET AL., *supra* note 5, ¶ 300.03[4]. The Court in *Ford* noted, "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford*, 323 U.S. at 464 (citing *Smith v. Reeves*, 178 U.S. 436 (1900) and *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944)). The Court countered this, however, by acknowledging that "where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally." *Id.* at 462 (citing *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280 (1912)).

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court sought to define more clearly "the distinction between personal and official-capacity suits." *Id.* at 165. The Court ruled

tioner relied lacked an express statement of unequivocal intent to submit to suit in federal court.⁹⁰ Finding that the immunity doctrine of the Eleventh Amendment acts as an absolute bar when private litigants seek to recover from the state treasury, the Supreme Court dismissed the auto-maker's suit for recovery of income tax payment.⁹¹

In 1979, however, the Court refused to extend Eleventh Amendment immunity to a bistate entity in *Lake Country Estates*,

that official-capacity suits represent "only another way of pleading an action against an entity of which an officer is an agent." *Id.* at 165-66 (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)); see *Brunken v. Lance*, 807 F.2d 1325, 1329 (7th Cir. 1986); *Foulks v. Ohio Dep't of Rehabilitation & Corrections*, 713 F.2d 1229, 1233 (6th Cir. 1983). In a personal capacity suit, the entity is not the real party in interest, and the award for damages can be executed solely on the personal assets of the actor. See *Graham*, 473 U.S. at 166. The purpose of the Eleventh Amendment is to protect state treasuries and not individual actors. See *Ford*, 323 U.S. at 464-65. Thus, in analyzing the distinction, the inquiry must begin by determining whether the suit is brought against the assets of the entity. Cf. *Hafer v. Melo*, 502 U.S. 21, 26 (1991) (indicating the importance of the treasury determination by noting "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury").

State indemnification policies are not relevant to the consideration of Eleventh Amendment issues. See *CHEMERINSKY*, *supra* note 5, at 394. A state officer cannot seek the protection of the Eleventh Amendment when a state statute requires that the state indemnify the officer with funds from the state treasury. See *id.*

The Supreme Court has also held that the Eleventh Amendment does not bar suits brought against state officers for injunctive relief. See *Ex Parte Young*, 209 U.S. 123, 149-54 (1908). In *Young*, the Court held that litigants may enjoin the actions of state officers in violation of federal law. See *id.* at 156, 159-60; see also *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1133 (1996) (determining that the "narrow exception" of *Ex Parte Young* did not extend to suits against state officials initiated pursuant to the Indian Gaming Regulatory Act); *Home Tel. & Tel. v. Los Angeles*, 227 U.S. 278, 288-89 (1913) (determining that, although the individual conduct of state officers is not entitled to sovereign immunity protection, the conduct is still state action for purposes of the Fourteenth Amendment).

90. See *Ford*, 323 U.S. at 465. "Th[e] express constitutional limitation [within the Eleventh Amendment] denies federal courts the authority to entertain a suit brought by private parties against a state without its consent." *Id.* at 464 (citing *Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *Missouri v. Fiske*, 290 U.S. 18, 25 (1933); *Ex Parte New York*, 256 U.S. 490, 497 (1921)); see *Kentucky v. Graham* 473 U.S. 159, 169 (1985). Quoting *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944), the *Ford* Court stated: "When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts. . . ." *Ford*, 323 U.S. at 465.

91. See *id.* at 464, 470. Concluding its opinion, the *Ford* Court remarked:

The advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrated by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law applicable to the questions raised.

Id. at 470.

Inc. v. Tahoe Regional Planning Agency.⁹² Tahoe Regional Planning Agency (TRPA), a California and Nevada creation pursuant to the Compact Clause,⁹³ regulated conservation and recreational planning in the Lake Tahoe Basin resort area.⁹⁴ The petitioners filed suit in federal court under the Fifth and Fourteenth Amendments,⁹⁵ alleging that TRPA, its executive officer, and members of the governing board had substantially diminished the value of their property.⁹⁶

The Supreme Court rejected the lower courts' rulings and denied TRPA Eleventh Amendment immunity.⁹⁷ The Court determined

92. 440 U.S. 391, 402 (1979).

93. U.S. CONST. art. I, § 10, cl. 3. The provision states:

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.

Id.

94. See *Lake Country*, 440 U.S. at 391. The Lake Tahoe Basin is a unique area famed for its scenic beauty and recreational opportunities. See *id.* at 393 n.2. The Tahoe Regional Planning Agency (TRPA) compact was formed by California and Nevada in 1968 to better regulate the development of this area while conserving its natural resources and physical wonder. See *id.* at 394. In 1969, as required by the Constitution's Compact Clause, Congress approved the formation of this entity. See *id.*

95. The petitioners claimed federal subject matter jurisdiction on two theories. See *id.* at 394-95. First, they alleged that the violations of the Fifth and Fourteenth Amendments gave rise to an implied cause of action. See *id.* at 395 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)). Second, the petitioners asserted that the TRPA acted "under color of state law," implicating 42 U.S.C. § 1983, thereby basing jurisdiction on 28 U.S.C. § 1343. See *Lake Country*, 440 U.S. at 395.

The district court dismissed the complaint against TRPA, the director, and the governing board. See *Jacobsen v. Tahoe Reg'l Planning Agency*, 387 F. Supp. 429, 439 (D. Nev. 1975), *aff'd*, 566 F.2d 1353 (9th Cir. 1977), *rev'd sub nom. Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979). Although it concluded that the plaintiff had sufficiently alleged a case of inverse condemnation, it ruled that TRPA had no authority to condemn property. See *id.* The district court further concluded that the officers were immune from liability for the exercise of discretionary functions. See *id.*

Although the Court of Appeals for the Ninth Circuit affirmed the dismissal of the complaint against TRPA, it reinstated the complaint against the individual respondents. See *Jacobsen v. Tahoe Reg'l Planning Agency*, 566 F.2d 1353, 1367 (9th Cir. 1977), *rev'd sub nom. Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979). The Ninth Circuit concluded, however, that the congressional approval required by the Compact Clause transformed TRPA into a federal law entity which denied the plaintiffs the right to invoke the color of state law doctrine pursuant to §§ 1343 and 1983. See *id.* at 1358. Finally, the Ninth Circuit found that the Eleventh Amendment immunized TRPA from suit in federal court, and that the individuals were afforded qualified immunity for executive action and absolute immunity for action of a legislative character. See *id.* at 1365. The court did, however, find an implied right of action under the Due Process Clause of the Fifth and Fourteenth Amendments actionable under § 1331. See *id.* at 1364.

96. See *Lake Country*, 440 U.S. at 396.

97. See *id.* at 402, 406.

that, although it had protected some agencies exercising state power,⁹⁸ it had nevertheless "consistently refused to construe the Amendment to afford protection to political subdivisions."⁹⁹ In its analysis of whether TRPA could claim Eleventh Amendment immunity, the Court considered a list of six factors.¹⁰⁰ The Court concluded that TRPA, its responsibilities more closely resembling that of a local government than that of a state, could not receive Eleventh Amendment immunity.¹⁰¹

Most recently, in *Hess v. Port Authority Trans-Hudson Corp.*,¹⁰² the Court was called upon again to determine whether the Eleventh Amendment protects a bistate entity created pursuant to the Compact Clause from suit in federal court. In *Hess*, two Port Authority Trans-Hudson Corporation (PATH)¹⁰³ workers brought suit in fed-

98. See *id.* at 400-01 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945)).

99. *Id.* at 400-01 (citing *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1985); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890)). The Court concluded that immunity could not be extended absent a good reason to believe that the states intended the bistate entity to "enjoy the special constitutional protection of the States." *Id.* at 401. Both states in the instant case filed briefs denying this intent to provide immunity. See *id.*

100. See *id.* at 401-02. The Court considered:

(1) the characterization of the entity by the language of its creating statutes; (2) the origin of the entity's funding; (3) whether the state is financially responsible for the liabilities and obligations incurred by the entity; (4) the source of the power to appoint the entity's officers or members; (5) whether the function performed by the entity is traditionally state or municipal; (6) and whether the entity's actions are subject to a veto by the state.

Id. The Fourth Circuit clarified and itemized these factors in *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051, 1052 (4th Cir. 1995).

101. See *Lake Country*, 440 U.S. at 401.

102. 115 S. Ct. 394 (1995). Justice Ginsburg wrote for the majority, joined by Justices Stevens, Kennedy, Souter, and Breyer. See *id.* at 397. Justice Stevens filed a concurring opinion. See *id.* at 407 (Stevens, J., concurring). Justice O'Connor filed a dissenting opinion joined by Chief Justice Rehnquist and Justices Thomas and Scalia. See *id.* at 408 (O'Connor, J., dissenting). For a discussion of *Hess* see Jennifer A. Winking, Note, *Eleventh Amendment: A Move Towards Simplicity in the Test for Immunity*, 60 MO. L. REV. 953 (1995) (discussing the Court's decision in *Hess*); Adam Adrignolo, *Eleventh Amendment—Sovereign Immunity—Bistate Railway, The Port Authority Trans-Hudson Corporation Is Not Entitled to Eleventh Amendment Immunity From Suit in Federal Court—Hess v. Port Authority Trans-Hudson Corp.*, 63 U.S.L.W. 4009 (Nov. 14, 1994), 5 SETON HALL CONST. L.J. 809 (1995) (same). See generally David Lightman, *Workers Can Sue: Multistate Agency Ruling Could Hurt State's Rights*, THE HARTFORD COURANT, Nov. 15, 1994, at A1 (discussing the states' rights concerns of the Court's decision in *Hess*).

103. PATH, a wholly owned subsidiary of the Port Authority of New York and New Jersey, operates a commuter railroad connecting New York City with northern New Jersey. *Hess*, 115 S. Ct. at 397.

eral court claiming a right to compensation under the Federal Employers' Liability Act (FELA),¹⁰⁴ a federal law governing injuries to railroad workers.¹⁰⁵ Both the district court and the United States Court of Appeals for the Third Circuit rejected the complaints on the ground that PATH was an agency of the state and entitled to the immunity afforded by the Eleventh Amendment.¹⁰⁶ The Supreme Court

104. Federal Employers' Liability Act, 45 U.S.C. § 51 (1994); *see also* *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184, 192 (1964) (holding that the State of Alabama waived its sovereign immunity and right to object to suit under Federal Employer's Liability Act when it approved § 8 of Article I of the Constitution, which gives Congress the right to regulate interstate commerce), *overruled in part by* *Welch v. Texas Highway & Pub. Transp. Dep't*, 483 U.S. 468, 476-78 (1987).

In *Welch*, the Court ruled that Congress must unmistakably make clear that waiver took effect for states to lose Eleventh Amendment protection. In *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), the Court stated that *Parden* was overruled only with respect to Eleventh Amendment protection. *Id.* at 204-05. States could still be sued under FELA in state court. *See Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1132 (1996) (holding that the Eleventh Amendment prevents Congress from authorizing suits by Native American tribes against states for prospective injunctive relief in order to enforce legislation passed pursuant to Indian Commerce Clause).

The Court has, however, found that states may be sued in federal court pursuant to Congress's power under § 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (finding "the Eleventh, and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment") (citation omitted). With respect to 42 U.S.C. § 1983, though, the Court determined that Congress did not express that the statute warranted state amenability to suit, even though the statute was passed pursuant to § 5 of the Fourteenth Amendment. *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

Both Hess and Walsh filed their federal complaints within the three-year statute of limitations period required pursuant to the FELA. *See Hess*, 115 S. Ct. at 397. Neither Hess nor Walsh, however, filed within the one-year statute of limitations period indicated within the states' statutory consent to sue PATH. *See id.* at 397 (citing N.J. STAT. ANN. §§ 32:1-157, 32:1-163 (West 1990); N.Y. UNCONSOL. LAW §§ 7101, 7107 (McKinney 1979)).

105. *See id.* The workers, Albert Hess and Charles Walsh, were injured in unrelated accidents. *See id.* Hess asserted that while working on a train engine, "the window in said train malfunctioned and struck [his] right hand." *Hess v. Port. Auth. Trans-Hudson Corp.*, 809 F. Supp. 1172, 1174 (D.N.J. 1992), *aff'd*, 8 F.3d 811 (3rd Cir. 1993), *rev'd and remanded*, 115 S. Ct. 394 (1994). Walsh claimed his injury occurred when a passenger train door slammed shut on his right wrist and arm. *See Walsh v. Port. Auth. Trans-Hudson Corp.*, 813 F. Supp. 1095, 1096 (D.N.J.), *aff'd*, 8 F.3d 811 (3rd Cir. 1993), *rev'd and remanded*, 115 S. Ct. 394 (1994).

106. *See Hess*, 115 S. Ct. at 398. In line with Third Circuit precedent, *Port Authority Police Benevolent Association, Inc. v. Port Authority of N.Y. & N.J.*, 819 F.2d 413 (3d Cir. 1987), the district court dismissed the plaintiff's complaint and held that PATH's Eleventh Amendment immunity precluded suit in federal court past the one-year period to which the states of New Jersey and New York consented. *See Hess*, 115 S. Ct. at 398. Incidentally, the district court noted an interesting anomaly: "Had Hess sued in New Jersey or New York state court the FELA's 3-year limitation period, not the States' 1-year prescription, would have applied." *Id.* The Third Circuit consolidated the dismissals and affirmed the district court's decisions that PATH, an agency of the state for Eleventh

granted certiorari to further clarify the issues involved in Eleventh Amendment treatment of multistate agencies.¹⁰⁷ The Court reversed and held that a wholly-owned subsidiary of a financially independent bistate entity was not entitled to immunity under the Eleventh Amendment.¹⁰⁸

The Court reasoned that when the traditional indicators of immunity point in different directions,¹⁰⁹ the analysis must turn to the primary motivations for the Eleventh Amendment: the promotion of federal-state comity and the insulation of state treasuries from judgment.¹¹⁰ The Court concluded, first, that suit in federal court would not be disrespectful to either state as an independent body and that the federal courts did not possess an "alien" interest.¹¹¹ Having de-

Amendment purposes, was entitled to immunity and that judgments against the entity would be paid from the states' coffers.

107. See *Hess*, 115 S. Ct. at 397. The Court granted certiorari in order to resolve a discrepancy between the Third and Second Circuits regarding PATH's status as a bistate entity. See *id.* at 399-400. While the Third Circuit had found PATH protected by the Eleventh Amendment, the Second Circuit in *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628, 631 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990), determined that PATH was not a state agency. See Schechter, *supra* note 13, at 439 n.29.

Other courts have reached different determinations regarding multistate entities. Compare *Kozikowski v. Delaware River Port Auth.*, 397 F. Supp. 1115, 1120 (D.N.J. 1984) (denying immunity on waiver grounds), and, *Heffez v. Washington Metro. Area Transit Auth.*, 569 F. Supp. 1551, 1556 (D.D.C. 1983) (denying Eleventh Amendment immunity to the defendant multistate entity) with *Clarke v. Washington Metro. Area Transit Auth.*, 654 F. Supp. 712, 714-15 (D.D.C. 1986) (upholding two previous determinations that an entity created by the District of Columbia, Virginia and Maryland had immunity).

108. See *Hess*, 115 S. Ct. at 406.

109. See *id.* at 404. These "traditional indicators of immunity" refer to the considerations outlined in *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). See *supra* note 100 (listing factors).

110. See *Hess*, 115 S. Ct. at 404. Although *Hess* involved a bistate entity, similar to *Lake Country*, the *Hess* Court distinguished this prior precedent. See *id.* at 402. The Court in *Hess* noted that the relevant considerations of *Lake Country* "d[id] not . . . all point the same way." *Id.*

Although PATH acted under largely local control, each state, acting independently, possessed the power to veto PATH measures or enlarge PATH responsibilities. See *id.* at 402-03. Furthermore, while the legislative language did not describe PATH as a "state agency," state courts had categorized PATH as an agency of the state. See *id.* at 403 (citing *Whalen v. Wagner*, 152 N.E.2d 54, 56-57 (N.Y. 1958)). The Court also noted that New York and New Jersey lack financial responsibility for the entity and, more importantly, "[t]he States . . . bear no legal liability for Port Authority debts." *Id.* The Court in *Hess* recognized "the prevention of federal court judgments that must be paid out of a State's treasury" as the "most salient factor" of Eleventh Amendment analysis and the "impetus" for the Amendment's creation. *Id.* at 404.

111. See *id.* at 401. The Court gave three reasons for this conclusion. First, the Court reasoned that "the federal court, in relation to [a Compact Clause] enterprise, is hardly the instrument of a distant, disconnected sovereign; rather, the federal court is ordained by one of the entity's founders." *Id.* Second, the Court determined that states' integrity

cided this issue, the Court then asked whether a good reason existed to believe that Congress and the states intended PATH to possess Eleventh Amendment immunity.¹¹² In order to decide this issue, the Court “home[d] in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State’s treasury.”¹¹³ Bolstering this argument, the Court reviewed an expansive list of single-state-entity circuit court holdings asserting the supremacy of the state treasury determination.¹¹⁴ The Fourth Circuit has taken a similar analytical approach to the Eleventh Amendment by focusing both on federalism and treasury protection.

The Fourth Circuit addressed the question of Eleventh Amendment immunity in *Bockes v. County of Grayson, Virginia*.¹¹⁵ In *Bockes*, the former Director of the Grayson County Department of Social Services (GDSS) brought suit against the county, GDSS, and

was not compromised because, under the terms of the Compact, “the States agreed to the power sharing, coordination, and unified action that typify” these relationships. *Id.* Finally, the Court concluded that the federal court cannot be looked upon as an alien entity because the suits arise out of a federal law. *See id.*

112. *See id.* at 403.

113. *Id.* at 404.

114. *See supra* note 67 and accompanying text. In dissent, Justice O’Connor attacked the majority for creating what she saw as a per se rule against the application of the Eleventh Amendment to bistate entities. *See Hess*, 115 S. Ct. at 408 (O’Connor, J., dissenting). Justice O’Connor disapproved of the Court’s conclusions concerning the effect on the state’s integrity and the change in the Court’s view of the factors utilized in *Lake Country*, 440 U.S. at 402, to determine arm-of-the-state status. *See Hess*, 115 S. Ct. at 408 (O’Connor, J., dissenting).

Concerning this second proposition, Justice O’Connor criticized the majority’s reliance on the treasury factor in the determination of the arm-of-the-state issue. *See id.* at 409-12 (O’Connor, J., dissenting). Although Justice O’Connor acknowledged the circuit court’s general favor with this factor, she concluded that an exclusive analysis, centered on the treasury factor, was “erroneous” and misguided. *See id.* at 410 (O’Connor, J., dissenting) (citing *Benning v. Board of Regents of Regency Univs.*, 928 F.2d 775, 777 (7th Cir. 1991); *Puerto Rico Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 9 (1st Cir. 1990)). Justice O’Connor argued that the majority had transformed a “sufficient” condition for immunity into a “necessary” condition. *See id.* at 410 (O’Connor, J., dissenting). Further, she contended that the text of the Amendment itself stood against the majority’s holding. *See id.* (O’Connor, J., dissenting). While Justice O’Connor recognized the “sufficiency” of the state treasury factor, she refused to find it dispositive. *See id.* at 410 (O’Connor, J., dissenting). Justice O’Connor thought that “the proper question is whether the State possesses sufficient control over an entity performing governmental functions that the entity may properly be called an extension of the state.” *Id.* (O’Connor, J., dissenting). Justice O’Connor asserted, in keeping with the federalist viewpoint, that this inquiry more clearly respects the sovereign integrity of the states. *See id.* at 411 (O’Connor, J., dissenting). Justice O’Connor concluded by remarking that, in the instant case, the state governments exercised sufficient control over PATH to warrant Eleventh Amendment immunity. *See id.* at 411-12 (O’Connor, J., dissenting).

115. 999 F.2d 788 (4th Cir. 1993).

the Grayson County Board of Social Services (Board).¹¹⁶ The district court found the Board and GDSS immune from suit under the Eleventh Amendment, but held the county responsible under § 1983 for personnel decisions of the Board.¹¹⁷ The Fourth Circuit affirmed the district court's reasoning that the action was "in essence one for the recovery of money from the state."¹¹⁸ The court rejected Bockes' arguments that other relevant considerations, such as the state's characterization of the entity, the extent of state control, or the agency's dependence upon the state, should control the determination of the Eleventh Amendment question.¹¹⁹ Concerning the county, the court held that the Board acted pursuant to state-prescribed standards, thus securing the county's Eleventh Amendment immunity.¹²⁰

In suits against government entities, Eleventh Amendment inquiry seeks to determine whether entities with both state and local

116. *See id.* at 788. For a thorough discussion of the facts of *Bockes*, see *Bockes v. Fields*, 798 F. Supp. 1219, 1221 (W.D. Va. 1992), *modified*, 999 F.2d 788 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994). For 13 years, Nancy Bockes served as the Director of the Grayson County Department of Social Services. *See Bockes*, 999 F.2d at 789. In June 1990, she was fired without notice. *See id.* After a grievance proceeding, she was reinstated and granted one-half of her backpay. *See id.* Dissatisfied with this award, she filed a § 1983 action against the department, the county, and the individual members of the board in both their individual and official capacities. *See id.*

117. *See id.* The district court, accepting an Eleventh Amendment immunity argument, granted judgment as a matter of law for the board (both in their official and individual capacities) and the department. *See Bockes v. Fields*, 798 F. Supp. 1219, 1222-24 (W.D. Va. 1992), *modified*, 999 F.2d 788 (4th Cir. 1993) (affirming the Board and Department's immunity and reversing County's liability), *cert. denied*, 510 U.S. 1092 (1994). The district court found for the plaintiff with respect to the County, however, and awarded her damages. *See id.* at 1224-26.

118. *Bockes*, 999 F.2d at 790 (quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945) (citations omitted)). "It is also well established that this immunity extends to state agencies and officials, when a monetary judgment against them would be paid from the state treasury." *Id.* The Fourth Circuit determined that sovereign immunity would extend to the County Health Board because a "substantial portion" of the judgment would be paid from state funds. *See id.* The court determined that 80% of the district court's judgment would come from the Virginia treasury. *See id.*

119. *Id.* (citing *Keller v. Prince George's County*, 827 F.2d 952, 964 (4th Cir. 1987); *Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 457-58 (4th Cir. 1987)). The court asserted that the determination of the money damages from the state treasury is the threshold question in an "arm of the state" analysis. *See id.* at 791. When this inquiry does not provide clear guidance, however, these alternative factors may be considered to determine the immunity of the entity. *See id.*

120. *See id.* The court observed that in the Commonwealth of Virginia, authority is reserved for the State Board of Health to set "general goals and programs" for social services personnel. *See id.* ("[T]he Grayson County Board enjoyed its discretion to fire Ms. Bockes at the prerogative of and within the constraints imposed by the Commonwealth.").

characteristics constitute an "arm of the state."¹²¹ In answering this question in the context of a county health department and its employees, *Gray v. Laws* sought the guidance of recent Supreme Court precedent.¹²² While *Gray* acknowledged *Hess*' pronouncement of the "significantly different position in our federal system that multi-state entities occupy,"¹²³ it determined that the same general principles applicable in the Compact Clause context could be extended to the situation in *Gray*.¹²⁴ The court, however, struggled to explain the similarities in light of *Hess*' strong emphasis on the differences.¹²⁵

The *Hess* Court made clear statements differentiating the multistate from the single-state entity situation.¹²⁶ In *Hess*, the Court viewed the bistate entity as existing outside of the twin concerns of the Eleventh Amendment: the sovereign dignity of the states and the protection of states from suit in federal court.¹²⁷ In light of this, the Court asserted that a presumption against Eleventh Amendment immunity exists in the multistate entity analysis, something the Court has never asserted in an individual state context.¹²⁸ Furthermore, the Court accentuated the structural differences between a compact entity and a single-state entity analyzed pursuant to an "arm of the state" determination.¹²⁹ Finally, the *Hess* Court followed the lan-

121. See *Gray*, 51 F.3d at 431.

122. See *id.* at 431-35; *supra* notes 102-14 and accompanying text.

123. *Gray*, 51 F.3d at 431 (quoting *Hess*, 115 S. Ct. at 400).

124. See *id.* at 431-35.

125. See *supra* notes 67-72 and accompanying text.

126. See *Hess*, 115 S. Ct. at 400-02. Justice Ginsburg stated: "Bistate entities occupy a significantly different position in our federal system than do the States themselves. The States, as separate sovereigns, are the constituent elements of the Union. Bistate entities, in contrast, typically are creations of three discrete sovereigns: two States and the federal government." *Id.* at 400 (citing VINCENT V. THURSBY, INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT (1953)).

127. See *id.*; *supra* note 20 and accompanying text. The Court emphasized the national interest involved in the Compact Clause entity. See *Hess*, 115 S. Ct. at 400. Quoting *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951), the Court noted that a compact "is more than a supple device for dealing with interests confined within a region. . . . [I]t is also means of safeguarding the national interest. . . ." *Id.* at 401; see also *Virginia v. Tennessee*, 148 U.S. 503, 519-20 (1893) (requiring congressional consent of an agreement tending to increase the political power of the states, which may encroach upon or interfere with the supremacy of the United States).

128. See *Hess*, 115 S. Ct. at 402.

129. See *id.* at 400-01. As entities requiring congressional approval, multistate entities address "interests and problems that do not coincide nicely either with the national boundaries or with State lines." See *id.* at 400 (quoting THURSBY, *supra* note 126, at 5); see also Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 697-98 (1925) (discussing the necessity of PATH's creation under the Compact Clause); Frank P. Grad, *Federal-State*

guage of the Eleventh Amendment, limiting sovereign immunity to "one of the United States," thus further enhancing the differences in the two situations.¹³⁰

The Fourth Circuit, notwithstanding the strong differences proffered in *Hess*, brought multistate analysis within *Hess*' reach by emphasizing the Eleventh Amendment's foundations. According to *Gray*, the concerns underlying Eleventh Amendment sovereign immunity are common regardless of the entity analyzed and differences in structure should not limit courts from drawing support from the basic Eleventh Amendment framework set down in *Hess*.¹³¹ Although the Fourth Circuit recognized that "[i]t is impossible to glean from the [Supreme] Court's opinion in *Hess* the precise differences between the analyses governing multi-state entities and single state entities," the court asserted that the core values recognized in *Hess* sprang from cases addressing single-state entity questions.¹³² In dismissing the differences between the multistate and single-state entity, the *Gray* court gave itself the opportunity to draw all that it needed and wanted from the *Hess* analysis.

Having concluded that the fundamentals set forth in *Hess* would

Compact: A New Experiment in Co-Operative Federalism, 63 COLUM. L. REV. 825, 854-55 (1963) (commenting that states will not succeed in the eradication of regional problems "if they regard compacts . . . as an affirmation of a narrow concept of state sovereignty. They may succeed if, along with the assertion of legitimate interests of their own, they regard their role as historic, independently functioning parts of a regional polity and of a national union").

130. See *Hess*, 115 S. Ct. at 402 (quoting *Lake Country*, 440 U.S. 391, 400 (1979)). Although the Court acknowledged that sovereign immunity protection has sometimes been extended to "arm of the state" actors when the suit jeopardized the state treasury, it reiterated that the Court has consistently refused to extend the parameters of the Eleventh Amendment to political subdivisions. See *id.* In conclusion, the Court noted that sovereign immunity would be extended to bistate entities created pursuant to the Compact Clause when "there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States' themselves, and that Congress concurred in that purpose." *Id.* (quoting *Lake Country*, 440 U.S. at 401).

131. See *Gray*, 51 F.3d at 431-32. The court maintained that the primary concerns of the Eleventh Amendment, "that federal court judgments not deplete state treasuries and that the sovereign 'dignity' of the states be preserved . . . should dominate the inquiry in cases where it is difficult to discern whether a particular entity is an arm of the state." *Id.*

132. See *id.* at 432; see also *id.* at 432 n.4 (citing the circuit court precedent in *Hess* to support its assertion of the foundation for the Eleventh Amendment). Contrary to *Gray*, the Fifth Circuit recently rejected the argument that *Hess* applied to a single-state entity situation. See *Pillsbury Co. v. Port of Corpus Cristi Auth.*, 66 F.3d 103 (5th Cir. 1995). In *Pillsbury*, the Fifth Circuit limited *Hess* to situations involving bistate entities not created pursuant to state statute. See *id.* at 104. But see *Winters v. Mowery*, 884 F. Supp. 321, 322-23 (S.D. Ind. 1995) (applying *Hess* to an "arm of the state" situation and citing *Gray* for support).

guide the court, *Gray* attempted to effectuate the immunity principles of *Hess* within the context of the Fourth Circuit single-entity analysis. Although *Hess* indicated the most relevant characteristics to consider in a multistate entity situation, it did not offer guidance into the application of its test in an "arm of the state" Eleventh Amendment analysis.¹³³ Notwithstanding this uncertainty, the *Gray* court sought a more lucid single-entity analysis by gleaning from *Hess* the dispositive nature of the state treasury factor.¹³⁴ While *Gray* solidified the position of the state treasury factor in this analysis, it amplified the very concerns *Gray* raised about the *Hess* opinion by not specifying the course to take with regard to *Lake Country's* "other relevant considerations."¹³⁵

The *Gray* court contended that *Hess* did not significantly alter the Eleventh Amendment analysis developed by the Fourth Circuit over time.¹³⁶ In *Bockes*, the Fourth Circuit found the state treasury factor dispositive in an "arm of the state" inquiry.¹³⁷ Prior Fourth

133. See *Gray*, 51 F.3d at 433; *supra* note 110 and accompanying text.

134. See *supra* note 69 and accompanying text; see also *Hess*, 115 S. Ct. at 405 (recognizing that the "vast majority of Circuits . . . have concluded that the state treasury factor is the most important factor to be considered . . . and, in practice, have generally accorded this factor dispositive weight") (quoting Brief for States of New Jersey, New York at 18-19, *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394 (1995) (No. 93-1197)).

135. See *supra* notes 109-10 and accompanying text (looking at the purpose of the Eleventh Amendment); *infra* notes 136-46 and accompanying text (discussing "other relevant considerations" in addition to the state treasury factor). While noting the effect that *Hess* had on the analysis in the instant case, most notably the inclusion of the state sovereignty issue as partially controlling, the *Gray* court commented that *Hess* also pushed the Fourth Circuit to "formulate differently several of the other relevant considerations." *Gray*, 51 F.3d at 434. *Gray* did not, however, organize the other relevant considerations, established in *Lake Country* and itemized in *Ristow*, into a useful analysis. In its opinion, the Fourth Circuit noted the uncertainty in the *Hess* opinion of the place for the other factors in *Lake Country*. See *supra* note 69 and accompanying text. In the end though, *Gray* never fully answered these questions.

136. See *supra* notes 67-69 and accompanying text.

137. See *supra* notes 118-19 and accompanying text. In determining the real party in interest for Eleventh Amendment purposes, other courts have come to similar conclusions. See, e.g., *Quern v. Jordan*, 440 U.S. 332 (1979); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1320 (9th Cir. 1989) (describing the nexus between the county air pollution control district and the state treasury as the "critical factor" in the Eleventh Amendment determination); *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir. 1985) (stating the rule that "the Eleventh Amendment barred suits by private parties seeking to impose a liability which must be paid from public funds in the state treasury"); *Berry v. Arthur*, 474 F. Supp. 427 (D.S.D. 1979). Other courts have indicated, however, that despite the importance of the state treasury factor, it is not dispositive in the analysis. See *Jenson v. State Bd. of Tax Comm.*, 763 F.2d 272, 277 (7th Cir. 1985).

Professor John R. Pagan gives additional support to the substantial importance of the state treasury factor. See John R. Pagan, *Eleventh Amendment Analysis*, 39 ARK. L. REV.

Circuit cases also indicated a recognition of the controlling status of the drain on the state treasury.¹³⁸ *Hess* displaced traditional Fourth Circuit analysis, however, by inserting the state sovereignty issue and relegating the "other relevant" considerations to a less important status in the analysis.¹³⁹ Recently, in *Ristow v. South Carolina Ports Authority*¹⁴⁰ the Fourth Circuit noted this insertion but based its decision exclusively on the state treasury factor.¹⁴¹ Although *Gray* gave some indication of the order of the analysis, the weight given the sovereignty issue and other relevant considerations is less clear.¹⁴²

447, 461 (1986). In his article, Professor Pagan outlines four questions to consider in political subdivision analysis:

(1) Will the judgment against the entity be satisfied with funds in the state treasury?; (2) Does the state government exert significant control over the entity's decisions and actions?; (3) Does the state executive branch or legislature appoint the entity's policymakers?; and (4) Does state law characterize the entity as a state rather than as a subdivision?

Id. Professor Pagan noted: "Affirmative answers to these questions, especially the first, indicate the entity is an arm of the state; negative answers suggest a subdivision." *Id.* It should be noted that these characteristics show a substantial resemblance to the *Lake Country* factors. See *id.*; *supra* note 100 and accompanying text.

138. See *Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 457-58 (4th Cir. 1987). In *Ram Ditta*, the court stated: "While many factors must be considered in determining whether an entity is the alter ego of the state, it is generally held that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded." *Id.* at 457 (citing *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 304 (6th Cir. 1984); *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982); *Blake v. Kline*, 612 F.2d 718, 723-24, 726 (3d Cir. 1979); *Miller-Davis Co. v. Illinois State Toll Highway Auth.*, 567 F.2d 323, 327 (7th Cir. 1977)); see also *Ristow v. South Carolina Ports Auth.*, 27 F.3d 84, 86 (4th Cir. 1994) (indicating that of the relevant considerations, "the responsibility of the state treasury for the judgment, is generally the most important"), *vacated*, 115 S. Ct. 567 (1994) (remanded to the Fourth Circuit, 58 F.3d 1051 (4th Cir.), *cert. denied*, 116 S. Ct. 514 (1995)).

139. See *Gray*, 51 F.3d at 434; see also *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1053 n.4 (4th Cir.) (indicating the prominence of the treasury factor and the inclusion of the sovereignty issue by the *Hess* decision), *cert. denied*, 116 S. Ct. 514 (1995).

140. 58 F.3d 1051 (4th Cir.), *cert. denied*, 116 S. Ct. 514 (1995). *Ristow* involved the Eleventh Amendment immunity of the South Carolina Ports Authority. See *id.* at 1051. Fred Ristow, a truck driver, was injured as a result of the alleged negligence of a Ports Authority employee. See *id.* at 1051-52. Ristow filed suit in federal court and the suit was referred to a United States magistrate judge. See *id.* at 1052. The Magistrate dismissed the complaint on the ground that the Ports Authority was immune from suit under the Eleventh Amendment. See *id.* Ristow appealed and the Fourth Circuit affirmed. See *id.* at 1051. The Supreme Court granted certiorari and remanded the case back to the Fourth Circuit for reconsideration under the principles announced in *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394 (1994). See *Ristow*, 58 F.3d at 1051. On its second trip through the Fourth Circuit, the court again affirmed the Magistrate's dismissal. See *id.*

141. See *id.* at 1053 n.4. The *Gray* court indicated that its application of *Hess* would cause the Fourth Circuit to "formulate differently several of the other relevant considerations that [the Fourth Circuit] had previously enumerated." *Gray*, 51 F.3d at 434.

142. See *Gray*, 51 F.3d at 434. *Gray* provides that when the state treasury factor will be unaffected by any judgment, immunity "must be determined by resort to the other

Drawing upon the basic framework of *Hess*, the court nevertheless directed the district court's evaluation of these issues on remand.¹⁴³ In this discussion, the court repeatedly pressed its assertion of the controlling nature of the state treasury factor in the immunity determination.¹⁴⁴ Relying on *Hess* and its own conclusions in *Ram Ditta v. Maryland National Capital Park and Planning Commission*,¹⁴⁵ the court demonstrated its relegation of the other relevant considerations to a secondary place in Eleventh Amendment analysis.¹⁴⁶ In remanding the case to the district court, the Fourth Circuit laid a firm foundation for the analysis in the instant case, but left uncertainty for Eleventh Amendment questions.

Although the *Gray* court recognized the weight *Hess* gave the insulation of the state treasury from the judgments of Article III courts, it left unresolved the consideration to be given the promotion of federal-state comity. While *Gray* indicated the twin nature of these concerns, it seemed to disregard the state treasury's sibling in

relevant considerations referenced by the Court, chief among which are whether the suit will jeopardize 'the integrity retained by [the] State in our federal system,' and whether the state possesses such control over the entity" that it could be characterized as an "arm of the state." *Id.* (quoting *Hess*, 115 S. Ct. at 400). It is unclear, however, whether these concerns carry equal weight with the factors labeled in *Ristow*, 58 F.3d at 1052, or are to be given special deference above the *Lake Country* factors. See *supra* note 100 and accompanying text.

143. See *Gray*, 51 F.3d 434-38; *supra* notes 73-77 and accompanying text (explaining the court's discussion of statutory provisions indicating governmental control and payment of suits). The court remanded the issue of Eleventh Amendment immunity back to the district court. See *Gray*, 51 F.3d at 434; see also *Keller v. Prince George's County*, 827 F.2d 952, 964 (4th Cir. 1987) ("[t]he District Court is in the best position to address in the first instance the competing questions of fact and state law necessary to resolve the eleventh amendment issue." (quoting *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 515 n.19 (1982) (alteration in original))).

144. See *Gray*, 51 F.3d at 435-36; *supra* note 71 and accompanying text.

145. 822 F.2d 456 (4th Cir. 1987).

146. See *Gray*, 51 F.3d at 437. The court dismissed appellees contention that the state's categorization of the entity should be controlling. See *id.* The court seemed to suggest that this determination, similar to the other considerations introduced in *Lake Country*, would be regarded as secondary to the state treasury issue. See *id.* at 435-37.

In its brief to the Fourth Circuit, the appellees relied on North Carolina state law mandating a conclusion that local health departments are state agencies for the purposes of Eleventh Amendment analysis. See Appellees' Brief at 37-38, *Gray* (No. 94-1608); see also *Robinette v. Barriger*, 116 N.C. App. 197, 202, 447 S.E.2d 498, 502 (1994) (holding that local health departments "are agents of the state" and that a county health supervisor is an agent of the state); *EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources*, 108 N.C. App. 24, 28, 422 S.E.2d 338, 341 (1992) (concluding that a local health department is sufficiently invested with duty and power by the state to be considered an agent thereof). After judging this factor to be non-dispositive of the immunity question, the court questioned the use of these cases in light of Fourth Circuit precedent. See *Gray*, 51 F.3d at 437-38 (citing *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981)).

the final analysis.¹⁴⁷ In its *suggestions* to the district court on remand,¹⁴⁸ the Fourth Circuit dealt almost exclusively with the consideration of state treasury protection.¹⁴⁹ In emphasizing the similarity of approach between *Hess* and Fourth Circuit cases such as *Ram Ditta* and *Bocke*—which lack any real consideration of state integrity—the court picked what it needed from *Hess* to support its own assertion that the two approaches were similar.¹⁵⁰

In *Gray v. Laws*, the court wrestled multistate jurisprudence into a settled single-entity analysis. Although *Hess* discouraged a definitive comparison of the two doctrines, *Gray* persisted in adapting the Supreme Court's multistate interpretation to satisfy its needs in a non-compact situation. While *Gray* affirmed the Fourth Circuit's prior disposition of sovereign immunity questions, the court cut a sufficient doorway for it to enter the doctrine and modify the structure at a later date. In *Gray*, the court left undetermined the questions of federal-state comity and state control in the analysis, alternatively placing them as "chief" concerns in the immunity analysis and on an equal footing with other *Lake Country* factors.¹⁵¹ Directing the district court's reconsideration of the instant case, *Gray* bedrocked the state treasury factor as the threshold question. In total, the concreteness of the state treasury determination may make the consideration of other factors less necessary. The state treasury question, easier to analyze through the interpretation of statutes, may work toward a

147. See *Gray*, 51 F.3d at 431-35. *Gray* repeatedly emphasized the dual foundations of the Eleventh Amendment, as outlined in *Hess*. See *id.*; see also *supra* notes 68-69 and accompanying text. *Gray*, uncertain as to placement of certain factors in the *Hess* analysis, even raised concerns with *Hess*' lack of guidance on how to conduct Eleventh Amendment analysis. See *Gray*, 51 F.3d at 433.

148. See *supra* notes 73-77 and accompanying text.

149. See *Gray*, 51 F.3d at 435-37. In addition, in acknowledging that a presumption against immunity exists in the multistate entity context, the court noted that, in the multistate situation, no "threat to the integrity and dignity of the states" exists. See *id.* at 433. It would seem that this emphasis would lend itself to great consideration of the sovereign nature of the states in the single entity situation.

150. See *supra* notes 70-72 and accompanying text. It must be acknowledged that the federal-state comity notion may receive less significance in an "arm of the state" issue, such as in *Gray*. The court in *Gray*, however, relegated the state integrity concern, recognized as a foundation for the Eleventh Amendment, to a secondary status. See *Gray*, 51 F.3d at 434. The court stated:

If, on the other hand, the state's treasury will not be affected by a judgment in the action, then the availability of immunity for single state entities, as opposed to multistate entities, must be determined by resort to the other relevant considerations referenced by the Court, chief among which are whether the suit will jeopardize "the integrity retained by [the] State in our federal system."

Id. (quoting *Hess*, 115 S. Ct. at 400).

151. See *supra* notes 70-72 and accompanying text.

greater disregard of the other considerations in the future.¹⁵² Thus, *Gray's* adaptation of *Hess*, although built on a multistate foundation, may further the progression of the single entity "arm of the state" doctrine.

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152. See generally Joseph R. Grodin, *Are Rules Really Better Than Standards?*, 45 HASTINGS L.J. 569, 569-72 (1994) (questioning recent appellate reliance on rules over standards); Donald P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 989-98 (1990) (indicating the certainty of rule-related analysis and the unpredictability of judgment-based rules); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-82 (1989) (discussing the necessity of rules in our judicial system); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 434-37 (1985) (discussing the merits of both rules and standards in the context of "doctrinal formalism").