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).

One of the most basic characteristics of a federalist system of government[1] is that the states composing the confederation are themselves independent sovereigns.[2] In the United States, a federal form of government is guaranteed by the Tenth Amendment to the United States Constitution, which reserves to the states all powers not expressly delegated to the federal government.[3]

The Eleventh Amendment,[4] which immunizes states from suit

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[1] *See* BLACK'S LAW DICTIONARY 611 (6th ed. 1990) (defining "federal government" as a "system of government administered in a nation formed by the union or confederation of several independent states").

[2] *See* Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting) (explaining that the federal government is sovereign with respect to the powers surrendered to it and the individual states are sovereign as to all reserved powers); *see generally* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987). Professor Amar discussed the events leading to the formation of the federal government and explained:

> [w]hat America needed, then, was some third model that balanced centripetal and centrifugal political forces—a harmonious Newtonian solar system in which individual states were preserved as distinct spheres, each with its own mass and pull, maintained in their proper orbit by the gravitational force of a common central body. It was exactly such a system—"in strictness, neither a national nor a federal Constitution, but a composition of both" —that the Federalists conceived in Philadelphia.

Id. at 1449 (quoting THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961)) (footnotes omitted); *see infra* note 3 (discussing the Tenth Amendment).

[3] *See* Kathryn Abrams, Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723, 737 (1984); New York v. United States, 112 S. Ct. 2408, 2417 (1992) (explaining that the Constitution divides powers between the federal and state governments); *see also* Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (declaring that Congress cannot exercise power in a manner that interferes with the integrity of the states or their ability to effectively function within the federal system); *but see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) (acknowledging that there are limits on state sovereignty).

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[4] U.S. CONST. amend. XI. The Eleventh Amendment provides that "[t]he 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." *Id.*

Article III, § 2 of the U.S. Constitution states that "[t]he judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the

in federal court, addresses concerns relating to the states' integrity and respect as components of a federal system of government.[5] Because the Eleventh Amendment's provision of sovereign immunity[6] ensures that states will not be forced to defend themselves in federal court, in most cases the Constitution protects unconsenting states from the imposition of judgments by federal courts.[7]

United States . . . to Controversies . . . between a State and Citizens of another State . . . ." U.S. CONST. art. III, § 2, cl. 1 (emphasis added). Article III prescribes federal court jurisdiction based on two criteria. 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, 1034 (1983). First, Article III permits federal jurisdiction when the parties to a case meet certain requirements. *Id.* Second, Article III provides for federal jurisdiction over certain subject matters. *Id.* The Eleventh Amendment has been interpreted as a limit on the federal courts' power to exercise traditional party-based and subject-matter-based jurisdiction over suits. *Id.* at 1035.

The date traditionally given for the adoption of the Eleventh Amendment is 1798, when the President officially proclaimed the Amendment's ratification. John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisolm v. Georgia (1793), 73 N.C. L. REV. 255, 256 n.8 (1994) (citations omitted). The states, however, were quick to accept the Eleventh Amendment, and the requisite number of states needed to ratify the Amendment was obtained by February of 1795. *Id.* at 256. The conventional interpretation of the Eleventh Amendment has been that the Amendment creates a "presumptive jurisdictional bar to private claims in federal courts against states, in the absence of either the state's consent or an explicit congressional abrogation of the state's immunity." Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 61-62 (1989) (footnotes omitted); *see also* Fletcher, *supra*, at 1035 (explaining that the Eleventh Amendment has been interpreted as prohibiting federal jurisdiction over private suits brought against states and suggesting that the Eleventh Amendment was intended as a limitation on Article III by limiting federal jurisdiction over state suits to those disputes initiated by the states).

[5] Hess v. Port Auth. Trans-Hudson Corp., 115 S. Ct. 394, 400 (1994) (quotation omitted).

[6] *See* BLACK'S LAW DICTIONARY 1396 (6th ed. 1990) (defining "sovereign immunity" as "[a] judicial doctrine which precludes bringing suit against the government without its consent").

The words "sovereign immunity" do not appear anywhere in the Eleventh Amendment. Michael P. Kenny, *Sovereign Immunity and the Rule of Law: Aspiring to a Highest-Ranked View of the Eleventh Amendment*, 1 GEO. MASON INDEP. L. REV. 1, 8 (1992).

[7] *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-99 (1984) (quotations omitted); *see also* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 486 (1987) (discussing "the sensitive problems 'inherent in making one sovereign appear against its will in the courts of the other'") (quoting Employees of the Dep't of Pub. Health and Welfare of Missouri v. Dep't of Pub. Health & Welfare of Missouri, 411 U.S. 279, 294 (1973) (Marshall, J., concurring)). It is important to note, however, that the Eleventh Amendment has not been interpreted as shielding states from suits brought by the federal government or suits brought by different states. Massey, *supra* note 4, at 68 (citing United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (citations omitted); North Dakota v. Minnesota, 263 U.S. 365, 372, 373 (1923); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 672 (1838)) (other citations omitted). For a discussion of exceptions to the Eleventh Amendment's provision of immunity see *infra* note 8.

The Constitution in its initial form did not expressly provide for state sovereign immunity from suit in federal courts.[8] Consequently, states were originally amenable to suit in federal fora.[9]

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[8] *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895 (1983) (explaining that based on Article III's explicit conferral of federal jurisdiction over all cases dealing with constitutional or federal questions, the Constitution did not provide for state sovereign immunity).

In *Edelman v. Jordan*, the Court explained that:

> 'The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.'

Edelman v. Jordan, 415 U.S. 651, 660 (1974) (quoting 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (1987 rev. ed. 1937)). The *Edelman* Court noted the objections to state suability by James Madison, Chief Justice John Marshall, and Alexander Hamilton. *Id.* at 661-62 n.9 (quotation omitted); *see also* THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (declaring that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without* . . . [the state's] *consent*").

The initial purpose of the Eleventh Amendment was to assure states that they would not be forced by federal tribunals to pay their Revolutionary War debts, thereby causing them great financial difficulty. *Hess*, 115 S. Ct. at 400 (quotation omitted) (citing Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 n.1 (1959) (quotation omitted); Missouri v. Fiske, 290 U.S. 18, 27 (1933)); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405, 406 (1821) (explaining that the Eleventh Amendment was passed to alleviate the states' apprehension that their debts could be prosecuted in federal courts).

It is well recognized that exceptions exist exposing states to suits in federal court despite the Eleventh Amendment. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985). First, the *Atascadero* Court explained that a state may consent to suit in federal court, thereby waiving its immunity. *Id.* (citing Clark v. Barnard, 108 U.S. 436, 447 (1883)). Second, the *Atascadero* Court noted that Congress, pursuant to section 5 of the Fourteenth Amendment and its "power 'to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment,'" may abrogate the applicability of the Eleventh Amendment absent state consent. *Id.* (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).

[9] *See, e.g.*, Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 420 (1793) (allowing a South Carolina citizen to maintain a cause of action in assumpsit against the State of Georgia in federal court). In *Chisolm*, the petitioner brought his suit in federal court pursuant to Article III's grant of federal jurisdiction over suits between "a State and Citizens of another State." *Id.* (quoting U.S. CONST. art. III, § 2). By a four-to-one vote, the *Chisolm* Court held that unless Georgia could present timely defenses to Chisolm's claim, a default judgment would be entered against the State. Orth, *supra* note 4, at 256 (citation omitted). The "immediate result of the majority decision in *Chisolm* was a proposed constitutional amendment, which would become the first to be adopted after the ten amendments comprising the Bill of Rights." *Id.* (footnote omitted). Dissenting in *Chisolm*, Justice James Iredell delivered an opinion that would later be a part of American constitutional history. *Id.* In subsequent decisions, the Supreme Court looked to Justice Iredell's dissent as the guide for how the Amend-

The response to state amenability to suit was overwhelmingly negative.[10] As a result, the Eleventh Amendment was ratified to prevent federal tribunals from imposing judgments on states.[11]

The doctrine of sovereign immunity shields states from suit in federal courts absent a state waiver of immunity or Congress's explicit abrogation of immunity.[12] Nonetheless, state officers acting in their individual capacities, political subdivisions, and municipalities are clearly subject to suits in federal courts.[13] Thus, at issue in

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ment should be interpreted. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 18-19 (1890) (proclaiming a preference for Justice Iredell's *Chisolm* dissent); *see also* Orth, *supra* note 4, at 260 (discussing the perception that Justice Iredell was a "state rightist"). Professor Orth believes that Justice Iredell's dissent has been misinterpreted. *See* Orth, *supra* note 4, at 262-66. First, Professor Orth noted that Justice Iredell's dissent was based solely on the Judiciary Act of 1789 and not on the Constitution. *Id.* at 263. Continuing, Professor Orth explained that "[t]o rediscover the statutory basis of [Justice] Iredell's dissent is to rediscover his consistency as a Federalist: one may dispense with the 'states rights' qualifier." *Id.* at 266. Professor Orth posited that Justice Iredell wanted to avoid the state's rights issue by refusing jurisdiction over the case, thereby foreclosing the debate that ultimately ensued. *Id.* at 267-68.

10 *See Hans*, 134 U.S. at 11 (discussing the fact that the *Chisolm* decision resulted in "a shock of surprise throughout the country"). Discussing the *Chisolm* case, the *Edelman* Court noted that the decision to render a state amenable to suit by a citizen of a different state "literally shocked the nation." *Edelman*, 415 U.S. at 662. The Court further explained that "[s]entiment for passage of a constitutional amendment to override the decision rapidly gained momentum." *Id.*; *see also supra* note 4 (discussing the passage of the Eleventh Amendment and its nearly immediate acceptance by the states).

11 *See Hans*, 134 U.S. at 11 (noting the passage of the Eleventh Amendment); *Edelman*, 415 U.S. at 662-63 (stating that unconsenting states are immune from suit in federal court) (citations omitted). For a discussion of the passage of the Eleventh Amendment and the reasons for its swift adoption, see *supra* notes 4 and 8.

12 *See Atascadero State Hosp.*, 473 U.S. at 238.

13 *See Ex parte* Young, 209 U.S. 123, 161 (1908) (allowing a claim for prospective injunctive relief, brought against a state official acting outside the realm of his authority, to be litigated in federal court); Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280, 280-81 (1977) (holding that a school board is not conferred with Eleventh Amendment immunity); Lincoln County v. Luning, 133 U.S. 529, 530, 531 (1890) (holding that a county is a corporate entity and that its relationship to the state is too remote to be worthy of Eleventh Amendment protection) (citations omitted).

Several commentators have questioned the rationale behind the Court's authorization of state officials, but not states, to be amenable to suit. *See* Kenny, *supra* note 6, at 17-19; *see also* Gibbons, *supra* note 8, at 1891 (discussing *Ex parte* Young). Professor Kenny challenged the "Humpty-Dumpty" logic inherent in the *Young* Court's holding that there was state action under the Fourteenth Amendment, but that Young was not acting as a "state" for Eleventh Amendment purposes. Kenny, *supra* note 6, at 17. Furthermore, Judge Gibbons explained that "courts have come up with various elaborate fictions to evade the [sovereign immunity] doctrine's more restrictive implications." Gibbons, *supra* note 8, at 1891. According to Judge Gibbons, "[t]he *Ex parte Young* rule that one can sue a state official acting under the color of state law is the most prominent example" of such a fiction. *Id.* (citing *Ex parte* Young, 209 U.S. 123, 161 (1908)) (other footnote omitted).

many cases is whether the party being sued is "the state" for Eleventh Amendment purposes.[14] This question is particularly intriguing when a plaintiff seeks to sue an entity created pursuant to a compact between two or more states and approved by Congress.[15]

The inquiry in *Mount Healthy* involved an examination as to whether a Board of Education is an "arm-of-the-state" protected by the Eleventh Amendment, or alternatively, whether the Board is a municipal corporation or political subdivision of the state and not covered by the Eleventh Amendment. *Mount Healthy*, 429 U.S. at 280. The *Mount Healthy* Court reasoned that "[t]he bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances . . . but does not extend to counties and similar municipal corporations." *Id.* (citing Edelman v. Jordan, 415 U.S. 651, 664 (1974); Moor v. County of Alameda, 411 U.S. 693, 717, 719, 721 (1973); Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 462 (1945); *Lincoln County*, 133 U.S. at 530). The Court looked to Ohio state law to answer this question. *See id.* Explaining that Ohio state law does not consider political subdivisions to be arms of the state and that Ohio law recognizes that school districts are in fact political subdivisions, the Court held that the school board was not entitled to Eleventh Amendment immunity from federal suit. *Id.* at 280, 281. The Court explained that this was primarily due to the fact that "[o]n balance, the record . . . indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State." *Id.* at 280. Because the school board had the power to issue its own bonds and levy its own taxes, the Court found that the board resembled a political subdivision despite its receipt of guidance and significant funds from the state. *Id.* (citations omitted).

[14] *See* Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1245 (1992) (explaining that although the Eleventh Amendment purports to protect only the states themselves, the Supreme Court has extended sovereign immunity to protect state-created entities deemed "arms of the state"); *see, e.g.*, *Mount Healthy*, 429 U.S. at 280 (discussing that the case turned on whether the board of education was an "arm of the State"). The issue of whether it is a state or another entity not part of the "state" within the contemplation of the Eleventh Amendment that is being sued, invokes the question of whether the entity is an "arm-of-the-state." *See* Rogers, *supra*, at 1243 (discussing the "arm-of-the-state" doctrine). The "arm-of-the-state doctrine," Rogers explained, "bestows sovereign immunity on entities created by state governments that operate as alter egos or instrumentalities of the states." *Id.* Rogers criticized the Supreme Court's system of determining whether an entity is an arm-of-the-state, remarking that the Court "has resorted to a highly technical, ad hoc approach employing unintelligible factors in a balancing methodology that seeks to pigeonhole entities as either arms of the state or independent political subdivisions." *Id.* Rogers proposed a two-step analysis to determine whether the Eleventh Amendment shields an entity. *Id.* at 1309. First, Rogers stated, courts should look to the state's intent in creating the entity. *Id.* Second, Rogers continued, if the intent of the state cannot be ascertained, courts should examine whether the state bestowed the entity with the power to generate its own revenue. *Id.*

[15] *See, e.g.*, Hess v. Port. Auth. Trans-Hudson Corp., 115 S. Ct. 394 (1994). The Compact Clause of the United States Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." U.S. CONST. art. I, § 10, cl. 3. In consenting to interstate compacts, "Congress certifies that the States are acting within their boundaries in our federal scheme and that the national interest is not offended." *Hess*, 115 S. Ct. at 408 (O'Connor, J., dissenting). For a discussion of interstate compacts, see generally Fe-

In a recent decision, *Hess v. Port Authority Trans-Hudson Corp.*,[16] the United States Supreme Court considered whether a bistate entity, created pursuant to the Compact Clause and independent of the states' treasuries, was immune from suit in federal court.[17] Distinguishing bistate entities from individual states, the Court held that Port Authority Trans-Hudson Corporation (PATH), a bistate entity,[18] was not entitled to Eleventh Amendment immunity.[19] Because bistate entities do not reflect the interests of any single state and because Congress is involved in the creation of these entities, the Supreme Court declared that it would not be an affront to the entity to make it amenable to suit in the federal court system.[20]

Two employees of the PATH railway were injured in unrelated incidents.[21] In separate actions, each employee initiated a suit in

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lix Frankfurter & James M. Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1924-25).

16 115 S. Ct. 394 (1994) (5-4 decision).

17 *See id.* at 397, 406.

18 *Id.* at 397 ("PATH [is] a wholly owned subsidiary of the Port Authority of New York and New Jersey."). The bistate entity was created pursuant to the Compact Clause and approved by Congress. *Id.* at 398 (citation omitted). For a discussion of the Compact Clause, see *supra* note 15.

19 *Hess*, 115 S. Ct. at 400.

20 *Id.* at 400, 401 (citations omitted).

21 *Id.* at 397. Albert Hess, a New Jersey resident, was injured in the course of his employment for Port Authority Trans-Hudson Corporation (PATH). Hess v. Port Auth. Trans-Hudson Corp., 809 F. Supp. 1172, 1173, 1174 (D.N.J. 1992), *aff'd*, 8 F.3d 811 (3d Cir. 1993), *rev'd*, 115 S. Ct. 394, 397 (1994). Hess maintained that while working on a commuter train's engine, the train's window malfunctioned and hit his hand. *Id.* at 1174 (citation omitted). Hess alleged that the accident was caused by PATH's negligence and that he was not careless or irresponsible in any manner. *Id.* (citation omitted). Alleging that he was unable to perform his usual duties, Hess filed a complaint close to three years after the accident occurred. *Id.* Hess's claim was based on the Federal Employers' Liability Act (FELA) and the Boiler Inspection Act. *Id.* (citing Boiler Inspection Act, 45 U.S.C. § 23 (1970) (mandating that locomotives and boilers must be in proper condition and properly inspected before use); FELA, 45 U.S.C. §§ 51-60 (1970) (delineating the nature of liability railroad corporations have with respect to injured railroad workers)) (other citation omitted).

Seeking to dismiss the complaint, PATH contended that the Eleventh Amendment sheltered the agency from suit in federal court. *Id.* First, PATH maintained that it is "an arm of the States of New York and New Jersey" and thereby entitled to immunity. *Id.* at 1175; *see supra* note 14 (discussing the "arm-of-the-state" doctrine). Second, PATH explained that although the Supreme Court has held that consent-to-suit statutes constitute waivers of a state's immunity, the statutes in this case only consent to suits brought within one year. *Hess*, 809 F. Supp. at 1175 (citing Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 308-09 (1990) (citation omitted)). Therefore, PATH argued that Hess's claim was time-barred. *Hess*, 809 F. Supp. at 1175 (citation omitted).

Relying on *Feeney*, Hess argued that PATH waived its immunity entirely. *Id.* Moreover, Hess maintained that the consent-to-suit statutes were irrelevant as Hess brought his claim pursuant to FELA. *Id.* (citation omitted). Additionally, Hess as-

federal district court pursuant to the Federal Employers' Liability Act (FELA).[22] Although the plaintiffs failed to meet the one-year time limit delineated by state statutes consenting to suits brought against the Port Authority,[23] both complainants met the three-year statute of limitations prescribed by FELA.[24]

Pursuant to Third Circuit precedent conferring the Port Authority with sovereign immunity,[25] the district courts dismissed both plaintiffs' actions.[26] Because the plaintiffs did not sue within

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serted that state sovereign immunity had been abrogated by FELA. *Id.* (citation omitted). To support this assertion, Hess cited *Hilton v. South Carolina Public Railways Commission*. *Id.* (citing Hilton v. South Carolina Public Rys. Comm'n, 112 S. Ct. 560, 564-65 (1991) (holding that in state courts, states are not immune from suits brought under FELA)). Hess argued that the *Hilton* case held that FELA abrogated any sovereign immunity that state-owned railroads may have possessed. *Id.* (citations omitted). Furthermore, Hess maintained that even assuming that the consent-to-suit provisions were relevant, they could not supersede FELA's three-year statute of limitations. *Id.*

Charles F. Walsh, the second petitioner, brought his action pursuant to FELA as well. Walsh v. Port Auth. Trans-Hudson Corp., 813 F. Supp. 1095, 1096 (D.N.J. 1993), *aff'd*, 8 F.3d 811 (3d Cir. 1993), *rev'd*, 115 S. Ct. 394, 397 (1994). Walsh, an employee of PATH, alleged that he was injured as a result of PATH's negligence when a train door slammed into his wrist. *Id.* PATH moved for dismissal based on lack of subject matter jurisdiction. *Id.* (citation omitted). The applicable consent-to-suit statute contained a one-year statute of limitations. *Id.* Walsh filed suit almost three years after the accident occurred and alleged that FELA's three-year statute of limitations was applicable. *Id.*

22 *Hess*, 115 S. Ct. at 397 (referring to FELA, 45 U.S.C. § 51-60 (1970)).

23 *Id.* (citing N.J. STAT. ANN. §§ 32:1-157, 32:1-163 (West 1990) (consenting to suits and proceedings brought against the Port Authority provided that the actions are instituted within one year after the cause of action accrued); N.Y. UNCONSOL. LAWS §§ 7101, 7107 (McKinney 1979) (same as the New Jersey statutes, *supra*)).

24 *Id.*; *see* FELA, 45 U.S.C. § 56 (1970) (providing a three-year statute of limitations).

25 *Hess*, 115 S. Ct. at 398. The district court relied on a Third Circuit decision holding that the Port Authority was entitled to sovereign immunity because it could turn to the state for financial aid in times of need. *Id.* (citing Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. and N.J., 819 F.2d 413, 416, 418 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987)). The Third Circuit conferred the Port Authority with sovereign immunity despite its "solvency and size of its General Reserve Fund," and the remote possibility that the Authority would have to depend on state aid to cover its liabilities. *Port Auth. Police Benevolent Ass'n*, 819 F.2d at 416.

26 *Hess*, 115 S. Ct. at 398 (citing *Walsh*, 813 F. Supp. at 1098; *Hess*, 809 F. Supp. at 1185).

In holding that PATH was entitled to Eleventh Amendment immunity, the district court in *Hess* explained that past state and federal courts had recognized the Port Authority as "a direct governmental agency of New York and New Jersey, vested with absolute immunity to suit." *Hess*, 809 F. Supp. at 1178 (citing Leadbeater v. Port Auth. Trans-Hudson Corp., 873 F.2d 45, 47 (3d Cir. 1989), *vacated on other grounds sub nom.*, Benitez v. Port Auth. Trans-Hudson Corp., 495 U.S. 926 (1990); *Port Auth. Police Benev. Ass'n*, 819 F.2d at 414-18; Trippe v. Port of N.Y. Auth., 198 N.E.2d 585, 586 (1964); Luciano v. Fanberg Realty Co., 475 N.Y.S.2d 854, 855-56 (N.Y. App. Div. 1984); Port of N.Y. Auth. v. Weehawken, 99 A.2d 377, 379 (App. Div. 1953), *rev'd on other grounds*, 103 A.2d 603, 608 (1954)). Based on the Supreme Court's assumption without deciding

the one-year period in which the Port Authority consented to suit, the district courts held that their actions were barred by the Eleventh Amendment.[27] On appeal, the Third Circuit consolidated the two cases and summarily disposed of the matter by affirming

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that the Port Authority is entitled to sovereign immunity, *id.* (citing *Feeney*, 495 U.S. at 304-05), the court noted that Hess failed to object to PATH being treated differently from the Port Authority. *Id.*

Next, Judge Lechner examined whether the States had consented to suits against PATH in federal court. *Id.* at 1181. Although there were consent-to-suit statutes in effect, one of the conditions of consent, the court held, was that suit be brought within one year of the accrual of the claim. *Id.* at 1180 (citations omitted). Consequently, the court ruled that the States had not waived PATH's immunity. *Id.* at 1182.

The district court continued by addressing Hess's argument that he could sue PATH in federal court under FELA. *Id.* (citation omitted). Remarking that a state entity can only lose its immunity if Congress abrogates its applicability or the state explicitly consents to suit, the court announced that the Supreme Court had already found that in enacting FELA, Congress did not abrogate the Eleventh Amendment. *Id.* (citing *Feeney*, 495 U.S. at 301, 302, 305 (citation omitted); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 476, 478 (1987) (citations omitted)). Furthermore, the district court rejected Hess's reliance on *Hilton*, finding that *Hilton* dealt with suits in state court and not with Eleventh Amendment preclusion of suing states in federal court. *Id.* at 1183 (citation omitted); *see* Hilton v. South Carolina Public Rys. Comm'n, 112 S. Ct. 560, 562 (1991) (holding that in state courts, states are not immune from suits brought under FELA) (citations omitted).

Similarly, the district court in *Walsh* also dismissed the plaintiff's case. *Walsh*, 813 F. Supp. at 1096. Because the Third Circuit had held that the Port Authority was a state agency protected by the Eleventh Amendment, Judge Bassler determined that PATH, as a wholly-owned subsidiary of the Port Authority, was also entitled to sovereign immunity. *Id.* at 1096-97 (citing *Leadbeater*, 873 F.2d at 47 (stating that PATH is a wholly-owned subsidiary of the Port Authority); *Port Auth. Police Benevolent Ass'n*, 819 F.2d at 415 (holding that the Port Authority is a state agency entitled to Eleventh Amendment immunity)).

The district court proceeded by analyzing whether any exceptions allowed Walsh to maintain his suit against PATH. *Id.* at 1097. Rejecting Walsh's argument that PATH consented to suit, Judge Bassler found that PATH had only partially waived its sovereign immunity. *Id.* (construing *Feeney* narrowly and finding that PATH had only consented to suit for a one-year period). Next, the district court rejected Walsh's contention that Congress had abrogated the applicability of the Eleventh Amendment in FELA claims by pointing out that the Supreme Court had expressly rejected Walsh's argument in the past. *Id.* at 1097-98 (citing *Welch*, 483 U.S. at 475, 476, 478 (holding that both FELA and the Jones Act did not abrogate Eleventh Amendment immunity). Judge Bassler proclaimed that *Hilton*, a case coming from state court, was not applicable in Walsh's situation. *Id.* at 1098. The district court therefore held that the Eleventh Amendment immunized PATH and that there was no subject matter jurisdiction over the matter in federal court. *Id.*

[27] *Hess*, 115 S. Ct. at 398 (citing *Walsh*, 813 F. Supp. at 1098; *Hess*, 809 F. Supp. at 1185). In the *Hess* case, the district court noted the anomaly in applying FELA's three year limitation to suits against the Port Authority in state court, while applying the state's one year limit to consent to suit in actions brought in federal court. *Id.* (citing *Hess*, 809 F. Supp. at 1185). The district court further noted that a state court could entertain Hess's action because the Eleventh Amendment does not preclude suing a state in state court. *Id.* (citing *Hess*, 809 F. Supp. at 1183-84 (quotation omitted)).

both dismissals.[28]

To resolve an intercircuit conflict respecting immunity from suit in federal court,[29] the Supreme Court granted certiorari.[30] Holding that PATH, a wholly-owned subsidiary of a financially independent bistate entity, was not immune from suit under the Eleventh Amendment, the Supreme Court reversed the petitioners' dismissals and remanded their cases.[31]

In the 1890 case of *Hans v. Louisiana*,[32] the Supreme Court addressed the breadth of federal jurisdiction in light of the Eleventh Amendment.[33] In *Hans*, the Supreme Court held that a Louisiana citizen could not sue his home state in federal court because the Eleventh Amendment implicitly forbade such suits.[34] The

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28 *Id.* (citing *Hess*, 8 F.3d 811 (1993)).

29 *Id.* at 400. The Supreme Court noted that Second and Third Circuit precedent conflict on this issue. *Id.* at 399; *compare* Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628, 630 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299 (1990) (concluding that for Eleventh Amendment purposes, PATH is not a state agency) *with Port Auth. Police Benevolent Ass'n*, 819 F.2d at 418 (holding that the Port Authority was a state agency entitled to Eleventh Amendment immunity).

In *Feeney*, the Second Circuit held that PATH was not deserving of Eleventh Amendment sovereign immunity protection. *Hess*, 115 S. Ct. at 400 (citing *Feeney*, 873 F.2d at 631). Finding that the "insulation of state treasuries from the liabilities of the Port Authority outweighs both the methods of appointment and gubernatorial veto so far as the Eleventh Amendment immunity is concerned," the Second Circuit allowed Feeney's suit to be heard in a federal forum. *Id.* In *Feeney*, the Supreme Court affirmed the Second Circuit's decision because Feeney sued within one year of his injury. *Feeney*, 495 U.S. at 306-09 (relying on N.J. STAT. ANN. §§ 32:1-157, 32:1-162 (West 1990); N.Y. UNCONSOL. LAWS §§ 7106, 7107 (McKinney 1979)). Thus, the Court found that there was no Eleventh Amendment problem implicated. *Id.*

In *Port Authority Police Benevolent Ass'n*, however, the Third Circuit concluded that the Port Authority was entitled to Eleventh Amendment immunity. *Port Auth. Police Benevolent Ass'n*, 819 F.2d at 415. The Third Circuit predicated its holding on three bases. *Id.* at 415-17. First, the Third Circuit noted that state courts had characterized the Port Authority as an entity performing state functions. *Id.* at 415 (citations omitted). Second, the court explained that the Authority could turn to the states to recoup funds necessary for operating expenses. *Id.* at 416 (citations omitted). Finally, the Third Circuit detailed the Authority's strong connection to the states as manifested by state appointment of commissioners, the Authority's performance of state functions by involvement in commerce and transportation, and the governors' power to remove commissioners. *Id.* at 417 (citations omitted).

Justice Ginsburg noted that in *Hess*, consent to suit could not be maintained for jurisdictional purposes because the state's consent only lasts for one year. *Hess*, 115 S. Ct. at 400. Therefore, the Court was confronted with the issue of whether PATH could be classified as an entity entitled to immunity under the Eleventh Amendment. *Id.*

30 *Hess*, 114 S. Ct. 1292 (1994).

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

32 134 U.S. 1 (1890).

33 *Id.* at 9.

34 *See id.* at 15. Hans filed suit in the Circuit Court of the United States in Decem-

Hans Court rejected petitioner's argument, maintaining that allowing a citizen to subject his state to suit in federal court absent the State's consent would violate the principles underlying the adoption of the Eleventh Amendment.[35]

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ber of 1884 to recover the value of interest coupons attached to state bonds issued pursuant to acts of the Louisiana legislature. *Id.* at 1. Hans alleged that the state impaired a contract by failing to honor the bonds, thereby violating Article I, § 10 of the Federal Constitution. *Id.* at 3; *see also* U.S. CONST. art. I, § 10 (providing in pertinent part that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts").

The state allegedly violated the Constitution by enacting a new state constitution declaring that "the coupon of said consolidated bonds falling due on the first of January, 1880, be, and the same is hereby, remitted, and any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the state government." *Hans*, 134 U.S. at 2. Hans maintained that by replacing the old constitution and voiding the value of the bonds, the state repudiated the contracts between bond buyers and the state, thereby violating the United States Constitution's Contract Clause. *Id.* at 3.

After Hans instituted suit by serving the governor, the attorney general excepted, stating that the court lacked jurisdiction *ratione personæ*. *Id.* The attorney general defended by explaining that unless a state agrees to be amenable to suit, the court lacks jurisdiction over plaintiff's suit. *Id.* The attorney general asked that the case be dismissed, and his request was granted. *Id.* at 4, 5 (citing Hans v. Louisiana, 24 Fed. Rep. 55, 68 (1855)).

[35] *Id.* at 11. The Court commented that the result Hans sought was no less shocking than the Supreme Court's decision in *Chisolm*, which allowed a suit against a state in federal court. *Id.* at 10-11 (referring to Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)).

In its opinion, the *Hans* Court discussed the *Chisolm* decision and the passage of the Eleventh Amendment. *Id.* Clearly favoring the dissent in *Chisolm*, the *Hans* Court espoused Justice Iredell's position that the Constitution was never intended to provide individuals the right to sue sovereign states in a federal forum. *Id.* at 12, 18-19; *see supra* note 9 (discussing *Chisolm* and Justice Iredell's famous dissent).

To further support its position, the majority quoted from Alexander Hamilton's Federalist 81, which stated that "'[i]t is inherent in the nature of [state] sovereignty not to be amenable to the suit of an individual *without its consent* . . . . The contracts between a nation and the individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force.'" *Hans*, 134 U.S. at 12-13 (quoting THE FEDERALIST No. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (maintaining that debt collection in federal courts "could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable")). The Court proclaimed that despite the breadth of Article III, it was clear that Alexander Hamilton and Justice Iredell were correct, and that United States citizens by and large concurred. *Id.* at 13-14.

In *Welch v. Texas Department of Highways and Public Transportation*, the Court observed that Article III was never intended as a provision which would make States "'unwilling defendants in federal court.'" Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 479-80 (1987) (quoting Employees of Dep't of Pub. Health & Welfare of Missouri v. Department of Pub. Health & Welfare of Missouri, 411 U.S. 279, 291-92 (1973) (Marshall, J., concurring in the result)). Quoting Justice Mar-

In *Ford Motor Co. v. Department of Treasury of Indiana*,[36] the Supreme Court continued its commitment to protecting the states from suit in federal court.[37] There, the Supreme Court determined that regardless of whether a State was a named party, the Eleventh Amendment shielded state officers from suit in federal court when they were being sued in their capacities as officers of the State.[38] The Court further found that Eleventh Amendment

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shall's concurring opinion in *Employees v. Missouri Department of Public Health and Welfare*, the *Welch* Court proclaimed that:

> The Eleventh Amendment served effectively to reverse the particular holding in *Chisolm*, and, more generally, to restore the original understanding, see, *e.g.*, *Hans v. Louisiana* . . . . Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and "it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

Id. at 479-80 (quoting *Employees*, 411 U.S. at 292 (1973) (Marshall, J., concurring in the result) (quoting *Ex parte* New York, 256 U.S. 490, 497 (1921) (other citation omitted)).

Many scholars have criticized the Court's decision in *Hans*, noting its departure from the language in the Eleventh Amendment. *See, e.g.*, Steven Breker-Cooper, *The Eleventh Amendment: A Textual Solution*, 38 WAYNE L. REV. 1481, 1485 (1992) (urging that the Eleventh Amendment be interpreted as written); Gibbons, *supra* note 8, at 1893-94. Judge Gibbons explained that:

> [t]he theory that is now uncritically accepted as the true meaning of the eleventh amendment dates not to 1798—the year of the amendment's ratification—but to 1890, when a peculiar and temporary set of political circumstances led the Supreme Court, in one of the boldest examples of judicial activism in its history, to rewrite the amendment, giving it a meaning that its framers never intended it to have.

Id. at 1893.

[36] 323 U.S. 459, 462 (1944).

[37] *Id.*; *see also* Edelman v. Jordan, 415 U.S. 651, 663 (1974) (discussing the contributions of the *Ford* case to Eleventh Amendment jurisprudence).

[38] *Ford Motor Co.*, 323 U.S. at 463, 464 (citation omitted). The *Ford* Court explained that "[w]here . . . an action is authorized by statute against a state officer in his official capacity and constituting an action against the state, the Eleventh Amendment operates to bar suit except in so far as the statute waives state immunity from suit." *Id.* at 462 (citing Great N. Life Ins. Co. v. Read, 322 U.S. 47, 50, 51 (1944) (citation omitted); Smith v. Reeves, 178 U.S. 436, 438-39, 440 (1900) (citations omitted)). The Court remarked, however, that "[w]here 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.* (citing Matthews v. Rodgers, 284 U.S. 521, 528 (1932); Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280, 287 (1912) (citations omitted)).

immunity could not be waived by the state officers' appearance to defend in an action brought in federal court.[39] Concluding that

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In support of the Court's conclusions, Justice Reed first noted that the petitioner relied on Indiana Code § 64-2614(a), which required the petitioner to apply to the state treasury to obtain a refund of taxes illegally exacted. *Id.* at 463 (explaining the statute, which maps out the procedure a taxpayer must take to secure a refund of taxes alleged to be illegally extracted). Justice Reed explained that upon the denial of a taxpayer's claim the taxpayer was to recover the sum illegally exacted against the state treasury. *Ford Motor Co.*, 323 U.S. at 463 (footnote omitted). The Court contrasted this prescription for relief with a provision for recovery as against an individual. *Id.*, 323 U.S. at 463. Secondly, the Court stated that petitioner's joinder of the state's governor, treasurer, and auditor as defendants evidenced that petitioners sued the defendants "as the collective representatives of the state, not as individuals against whom a personal judgment is sought." *Id.* at 463-64 (noting that the defendants constituted the Department of Treasury's board). The Court noted that Ford did not assert claims against the defendants personally in their individual capacities. *Id.* at 464. The Court stressed that the petitioners sought to obtain a refund of their taxes and not to impose liability on the people sued. *Id.* Continuing, the Court stated that "when the action is in essence one for 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." *Id.* (citations omitted). Observing that previous holdings have established that "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding," the Court held that petitioner's case was barred by the Eleventh Amendment. *Id.* at 464, 470 (citing Worcester County Trust Co. v. Riley, 302 U.S. 292, 296 (1937); *Ex parte* New York, 256 U.S. 490, 500 (1921) (citations omitted); *In re* Ayers, 123 U.S. 443, 492 (1887)).

The Court found that the Eleventh Amendment "denies to the federal courts authority to entertain a suit brought by private parties against the state without its consent." *Id.* (citations omitted). In this case, however, the Court found that Indiana had not consented to suit in federal court. *Id.* at 465 (citations omitted). Referring to the jurisdictional provision of the Indiana statute, the Court analogized the situation at hand to the *Read* case, which found that a similar Oklahoma statute made the state amenable to suit only in state courts. *Id.* (citing *Read*, 322 U.S. at 54, 55). Quoting *Read*, the Court noted that when dealing "'with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'" *Id.* (quoting *Read*, 322 U.S. at 54).

Examining section 64-2614, the Court found that the statute lacked the requisite express and unequivocal indication that the state consented to suit in federal court. *Id.* (citation omitted). Furthermore, the Court inferred from the statute's venue requirements that the state's intent was clearly to limit suability to state courts alone. *Id.* at 466. To further buttress its position, the Court examined other Indiana statutes that expressly limited plaintiffs who chose to sue the state to bringing suit in state courts alone. *Id.*

[39] *Id.* at 466-67, 469. In *Ford*, the Court explained that the respondents conceded that if it was possible to waive immunity by making an appearance, they had done so. *Id.* at 467. Because no Indiana law had dealt with this question, the Court reverted to the use of general policies. *Id.* The Court referred to the Indiana Constitution, which states that "'[p]rovision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.'" *Id.* at 467-68 (quoting IND. CONST., art. IV, § 24 (amended 1984)). The Court proclaimed that Indiana

the Eleventh Amendment's provision of sovereign immunity acts as an absolute bar to jurisdiction in suits where private litigants seek recovery that will be paid from the public funds of the state treasury, the Supreme Court dismissed the petitioner's claim for a state tax refund.[40]

Then, in 1959, the Supreme Court considered whether a sue-and-be-sued clause found in a bistate compact serves as a waiver of the bistate entity's Eleventh Amendment immunity.[41] The petitioner in *Petty v. Tennessee-Missouri Bridge Commission*[42] brought a negligence suit in federal court.[43] The Supreme Court held that the sue-and-be-sued clause served as a waiver of immunity, basing its decision both on the congressional intent and the jurisdictional

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clearly did not intend for there to be a policy allowing the state to consent to suit in a particular case absent a general consent to suit in all similar cases. *Id.* at 468. Because the state could waive its immunity only by enacting a general law, the Court found that it could not be presumed, absent clear language indicating otherwise, that state officials could have the discretion to permit or withhold consent on a case-by-case basis. *Id.* Furthermore, in examining the role of the state attorney general, the Court could not find any indication that the attorney general could unilaterally consent to suit absent the state's statutory consent to suit. *Id.* Moreover, the Court stated that Indiana decisions narrowly construe the power of the attorney general. *Id.* at 468-69. Therefore, the Court reasoned, it is clear that no authorized officer of the State had waived Indiana's sovereign immunity. *Id.* at 469.

Despite the fact that the Eleventh Amendment was not raised as a defense to the suit until the suit reached the Supreme Court, the Court held that the State could properly raise the Eleventh Amendment as a defense at that juncture. *Id.* at 467. The Court announced that adherence to the policy behind the Eleventh Amendment was of such great importance that the state could raise sovereign immunity as a defense even at that stage of litigation. *Id.*

40 *Id.* at 464, 470. The Court vacated the court of appeals' decision and remanded the case to district court, instructing the court to dismiss the case for "want of consent by the state to this suit." *Id.* at 470. The Court stressed that "[t]he 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 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.*

41 Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 277 (1959).

42 *Id.*

43 *Id.* at 278. Petitioner brought a negligence suit under the Jones Act. *Id.* (citing Seamen's Welfare (Jones) Act, 46 U.S.C. § 688 (1976) (allowing seamen, injured in the course of their employment, to bring personal injury actions in the district where the defendant employer resides or maintains a principal place of business) (amended 1982)). Petitioner's husband worked for the respondent commission and died in the course of his employment. *Id.* The respondent, a bistate entity, was created with the permission of Congress. *Id.* at 277. Missouri and Tennessee entered into a compact creating the Tennessee-Missouri Bridge Commission to operate ferries and build a bridge across the Mississippi River. *Id.* (citations omitted). The compact specified that the commission was to have the power "'to contract, to sue and be sued in its own name.'" *Id.* (citations omitted).

provision in the compact creating the entity.[44]

The Court once again found the Eleventh Amendment to be inapplicable in 1979, this time in a case involving a bistate entity.[45] In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,[46] the petitioners sued the Tahoe Regional Planning Agency (TRPA), a bistate entity,[47] in federal district court stating that the TRPA, its executive officer, and members of its governing body engaged in conduct that diminished the value of their property, in violation of the Fifth and Fourteenth Amendments of the United States Consti-

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[44] *Id.* at 279, 280. The Court based its opinion on the inclusion of a clause in the compact instructing that the compact would not serve to limit the jurisdiction of any of the courts "'of the United States over or in regard to any navigable waters or any commerce between the states.'" *Id.* at 281. The Court found that:

> [t]his proviso read in light of the sue-and-be-sued clause in the compact, reserves the jurisdiction of the federal courts to act in any matter arising under the compact over which they would have jurisdiction by virtue of the fact that the Mississippi is a navigable stream and that interstate commerce is involved. There is no more apt illustration of the involvement of the commerce power and the power over maritime matters than the Jones Act.

Id. (citing O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 39-43 (1943)). The Court further explained that allowing petitioner's suit would not be enlarging the jurisdiction of the federal courts; rather, it would simply be allowing a suit that has traditionally been within the purview of federal jurisdiction—those involving interstate commerce and maritime matters. *Id.*

The Court noted that at the time the compact was entered into and approved by Congress, the federal climate was clearly opposed to corporations that performed governmental functions receiving immunity from suit. *Id.* at 280 (discussing Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 390-91, 396 (1939)). *Keifer* held that a sue-and-be-sued provision in a federal charter granted to a public corporation was expansive and allowed tort suits against the public corporation. *Keifer*, 306 U.S. at 396-97. In light of the federal climate which dictated that sue-and-be-sued clauses be liberally interpreted, the Court found that it would be inconsistent with established policy to find a lack of consent to suit. *Petty*, 359 U.S. at 280-81. Consequently, the Court declined to interpret the sue-and-be-sued clause more narrowly than the Court had in *Keifer*. *See id.*

[45] Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 402 (1979).

[46] *Id.*

[47] *Id.* at 394. Located partially in Nevada and partially in California, Lake Tahoe and its surrounding area is a popular tourist cite. *Id.* at 393. To coordinate activities in the Lake Tahoe Basin area, and to conserve the basin's national resources, Nevada and California decided in 1968 that they would create a single agency. *Id.* at 394. Consistent with the constitutional requirement, Congress consented to the compact and the Tahoe Regional Planning Agency (TRPA) was formed. *Id.*; *see* Tahoe Regional Planning Compact, NEV. REV. STAT. ANN. §§ 277.190-277.230 (Michie 1995) [hereinafter "Tahoe Compact"]. TRPA was authorized by Congress to formulate and execute a regional plan for public services, land use, conservation, recreation, and transportation. *Lake Country Estates, Inc.*, 440 U.S. at 394; *see* Tahoe Compact, arts. V and VI (delineating TRPA's authority to make plans and regulations in furtherance of the Authority's goals).

tution.[48] On appeal, the Supreme Court reversed the lower courts' dismissal of the case and held that the TRPA was not entitled to immunity.[49] The Court acknowledged that although some agencies exercising state power have been allowed to invoke Eleventh Amendment sovereign immunity,[50] past courts have refused to extend immunity to political subdivisions.[51] Absent a clear indication that the states intended to confer immunity on a bistate entity, the

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[48] *Lake Country Estates, Inc.*, 440 U.S. at 394. Petitioners, owners of land in the Lake Tahoe basin, filed a complaint against the TRPA in district court seeking both equitable and legal relief. *Id.* They alleged that TRPA, a government entity, violated the U.S. Constitution by adopting a general plan and land-use ordinance that diminished the value of their property. *Id.* The petitioners maintained that this action constituted a taking without just compensation, in violation of their due process rights. *Id.*

The petitioners stated that there was subject matter jurisdiction in federal court based upon one of two theories. *Id.* at 394-95. First, petitioners contended that their claim presented a federal question because their suit was predicated on the Fifth and Fourteenth Amendments. *Id.* at 395 & n.7 (citing 28 U.S.C. § 1331 (1976) (defining the requirements for federal question jurisdiction)). Alternatively, the petitioners alleged that the TRPA acted "under color of state law," and that their claim was based on 42 U.S.C. § 1983, thereby basing jurisdiction on 28 U.S.C. § 1343. *Id.* at 395 & nn. 8, 9 (citing 42 U.S.C. § 1983 (1976) (providing a cause of action for individuals whose civil rights are deprived by state actors); 28 U.S.C. § 1343 (1976) (conferring upon district courts original jurisdiction to hear civil rights cases)).

Despite concluding that the petitioners sufficiently stated a cause of action for inverse condemnation, the district court dismissed the complaint because the TRPA lacked the authority to execute a taking. *Id.* at 395-96. The court further held that the defendants were not liable because they were exercising discretionary functions. *Id.*

Affirming the dismissal of the complaint as against TRPA, the Ninth Circuit Court of Appeals reinstated the petitioners' claims against the individual defendants. *Id.* at 396 (citing Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1360, 1366 (9th Cir. 1977)). Rejecting the petitioners' jurisdictional claims based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343, the court of appeals found that the existence of a compact between the states, executed with Congressional approval, made TRPA an entity acting pursuant to federal authority rather than under the color of state law. *Id.* The court, however, concluded that there was jurisdiction based on § 1331. *Id.*

Despite the existence of federal jurisdiction, and despite the respondents' failure to raise Eleventh Amendment concerns, the Ninth Circuit dismissed the suit against TRPA based on the belief that the TRPA was immune from suit under the Eleventh Amendment. *Id.* With respect to the individual defendants, the court remanded the case for a hearing, holding that those who acted in a legislative capacity were entitled to absolute immunity, and those whose functions were executive in nature were entitled to qualified immunity. *Id.* Petitioners appealed the Ninth Circuit's holding that TRPA was entitled to immunity under the Eleventh Amendment and that those working in a legislative capacity were entitled to complete immunity. *Id.* at 396-97.

[49] *Id.* at 402, 406.

[50] *Id.* at 400-01, 401 n.18 (citing Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 463-64 (1944) (other citations omitted)). For a discussion of *Edelman*, see *supra* note 8. For a discussion of *Ford*, see *supra* notes 36-40 and accompanying text.

[51] *Lake Country Estates, Inc.*, 440 U.S. at 401 (citing Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Moor v. County of Alameda, 411 U.S. 693, 717

Lake Country Estates Court concluded that bistate entities comparable to municipalities or counties are not protected by Eleventh Amendment immunity.[52]

Later, in *Atascadero State Hospital v. Scanlon*,[53] however, the Court held that a federal claim against a state hospital was barred by the Eleventh Amendment.[54] The respondent, Douglas James

(1973) (citations omitted); Lincoln County v. Luning, 133 U.S. 529, 530 (1890)) (other citation omitted).

52 *Id.* The Court refused to adopt a liberal interpretation of the Eleventh Amendment, finding that "[b]y its terms, the protection afforded by . . . [the Eleventh] Amendment is only available to 'one of the United States.'" *Id.* at 400 (quoting U.S. CONST. amend XI).

In discussing the states' intent with regard to the creation of the TRPA, the Court noted that Nevada and California filed briefs disclaiming any intent of conferring immunity upon the TRPA. *Id.* at 401. The states referred to sections of the Tahoe Compact that reflected their intentions of treating TRPA as a political subdivision as opposed to "an arm of the state." *Id.*; *see supra* note 14 (discussing the arm-of-the-state doctrine). In article III(a) of the Tahoe Compact, TRPA is referred to as a "separate legal entity." *Lake Country Estates*, 440 U.S. at 401 (citing Tahoe Compact, art. III(a) (discussing the organization of TRPA)). The Court proclaimed that in article VI(a), the entity is explicitly deemed to be a "political subdivision." *Id.* (citing Tahoe Compact art. VI(a) (discussing TRPA's powers)). The compact agreement further stipulated that six out of ten governing members be appointed by cities and counties while only two are appointed by each state. *Id.*, 401 n.20 (noting Tahoe Compact, art. III (a)). Moreover, the Court acknowledged that funding for the entity is provided by counties, not the states. *Id.* at 401-02, 402 n.21 (citation omitted). Finally, the Court noted that judgments against the TRPA and obligations of the TRPA are not binding on either state. *Id.* at 402 (citation omitted).

Next, the Court stated that the function of TRPA, which was to regulate land use, was one traditionally associated with local governance. *Id.* It was this local purpose, the Court noted, which motivated the creation of the TRPA in the first place. *Id.* Furthermore, the Court continued, although the TRPA, like towns, cities, and counties, was created by states, the states could not veto laws made by TRPA. *Id.* The Court highlighted California's necessity to resort to litigation in an attempt to dictate the TRPA's action as the most compelling indicator that TRPA was not an "arm-of-the-state." *Id.*, 402 n.22 (citing California v. TRPA, 516 F.2d 215, 217 (9th Cir. 1975)).

Based on the intentions of the compacting States, the actual terms of the compact, and the functions of the TRPA, the Court concluded that absent an absolute constitutional rule mandating immunity, no immunity should be granted. *Id.* at 402. The Court stated that "[b]ecause the Eleventh Amendment prescribes no such rule, we hold that TRPA is subject to 'the judicial power of the United States' within the meaning of that Amendment." *Id.* (quoting U.S. CONST. amend XI).

53 473 U.S. 234 (1985).

54 *Id.* at 236, 247. The Court's *Atascadero* decision was delivered shortly after the Court rendered its decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), which was a "watershed federalism case, seemingly undercutting the concept of state sovereignty." Rogers, *supra* note 14, at 1258-59; *see also Garcia*, 469 U.S. at 554 (holding that in enacting wage and hour requirements as part of the Fair Labor Standards Act, Congress did not exceed its powers to legislate pursuant to the Commerce Clause). *Atascadero*, however, "fortified state sovereignty by imposing the demanding clear-statement rule upon both Congressional abrogation and state waiver of Eleventh Amendment immunity." Rogers, *supra* note 14, at 1259 (footnote omitted).

Scanlon, alleged that the Atascadero State Hospital refused to offer him employment, in violation of the Rehabilitation Act of 1973.[55] Overruling the Ninth Circuit, the *Atascadero* Court held that Congress, in passing the Rehabilitation Act, did not abrogate the Eleventh Amendment's prohibition of suits against the states.[56] In reaching its holding, the Court addressed the respondent's three arguments.[57] First, the Court found that California's constitution, which waived state immunity in certain instances, did not waive the Eleventh Amendment's provision of sovereign immunity in this instance.[58] Second, despite the Rehabilitation Act's broad language, the Court concluded that Congress had not explicitly abrogated

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[55] *Atascadero State Hosp.*, 473 U.S. at 236. Scanlon, who suffered from diabetes and was completely blind in one eye, claimed that he was denied a position because of his handicaps. *Id.* He alleged that the hospital's actions violated the Rehabilitation Act of 1973 and other statutes. *Id.*; *see* Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) (prohibiting programs receiving federal funds from discriminating on the basis of handicap).

The petitioners sought dismissal of Scanlon's claim based on the Eleventh Amendment's sovereign immunity provision. *Id.* The district court granted the hospital's motion. *Id.* The Ninth Circuit affirmed the dismissal, finding that the complaint failed to address an essential element of his claim; namely that a primary purpose of the institution's receipt of federal funds was to provide employment. *Id.* (citing Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1271 (9th Cir. 1982)).

Scanlon petitioned for certiorari and his appeal was granted. *Id.* (citing Scanlon v. Atascadero State Hosp., 465 U.S. 1095 (1984)). The Supreme Court vacated the Ninth Circuit's judgment and remanded the case based on a decision holding that the section 504 prohibition of employment discrimination is not confined to programs that obtain federal aid primarily for providing employment. *Id.* at 236-37 (citing Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 637 (1984)).

On remand, the Ninth Circuit reversed the district court's dismissal, holding that "'the Eleventh Amendment does not bar [respondent's] action because the State, if it has participated in and received funds from programs under the Rehabilitation Act, has implicitly consented to be sued as a recipient under 29 U.S.C. § 794.'" *Id.* at 237 (quoting *Scanlon*, 735 F.2d 359, 362 (1984)). The Ninth Circuit found that consent to suit could be inferred from the state's participation in programs funded by the Rehabilitation Act. *Id.*; *see also Scanlon*, 735 F.2d at 361.

The Supreme Court noted a conflict between the Ninth Circuit, as presented by this case, and decisions made in First and Eighth Circuits. *Atascadero State Hosp.*, 473 U.S. at 237 (citing Ciampa v. Massachusetts Rehabilitation Comm'n, 718 F.2d 1, 6 (1st Cir. 1983) (affirming the dismissal of petitioner's claim brought pursuant to the Rehabilitation Act based on the Eleventh Amendment); Meiner v. Missouri, 673 F.2d 969, 982 (8th Cir.) (affirming the dismissal of petitioner's claims, including a claim under the Rehabilitation Act, based on the Eleventh Amendment), *cert. denied*, 459 U.S. 909 & 916 (1982)). To resolve this intercircuit conflict, the Court granted certiorari. *Id.* (citing Atascadero State Hosp. v. Scanlon, 469 U.S. 1032 (1984)).

[56] *Id.* at 246.

[57] *Id.* at 240 (rejecting the respondent's three reasons for arguing the Eleventh Amendment's inapplicability).

[58] *Id.* at 241. The California constitution provides that "[s]uits may be brought against the state in such manner and in such courts as shall be directed by law." CAL. CONST. art. III, § 5. Relying on this provision, Scanlon maintained that the constitu-

the Eleventh Amendment's applicability.[59] Finally, reasoning that

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tion subjected California to suits in any and all courts unless the state affirmatively asserted its immunity. *Atascadero State Hosp.*, 473 U.S. at 241.

The *Atascadero* Court explained that:

> [t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment. . . . As we explained just last Term, 'a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.' . . . [Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984).] Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court.*

Id. (other citations omitted).

Based on this stringent standard, the Court concluded that California's constitutional provision did not waive immunity. *Id.* The Court found that the provision did not specifically articulate the State's willingness to succumb to suits in federal court. *Id.* In fact, Justice Powell noted that the California provision appeared to be a simple authorization to the legislature to waive immunity. *Id.*

[59] *Id.* at 246 (citation omitted). The majority rejected the respondent's contention that the legislative history of the Rehabilitation Act indicated abrogation of immunity. *Id.* at 242. Such a finding, the Court reasoned, would be inconsistent with past decisions which dictate "that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Id.* (citation omitted).

Moreover, the Court proclaimed that the Eleventh Amendment ensures that the proper balance between state and federal governments is maintained. *Id.* (quotation omitted). Justice Powell proclaimed that congressional abrogation of state immunity pursuant to the Fourteenth Amendment disturbs the traditional balance in a federal system. *Id.* at 242-43 (citation omitted). Noting that the Eleventh Amendment guarantees such a balance, the Court declared that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty." *Id.* at 243; *see also* Erwin Chemerinsky, *Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term*, 39 DEPAUL L. REV. 321, 332 (1990) (referring to the strict requirement of express abrogation of the Eleventh Amendment as the "clear statement rule").

Next, Justice Powell remarked that an additional inquiry must be made in determining Congressional abrogation of state immunity. *Atascadero State Hosp.*, 473 U.S. at 243. The courts, Justice Powell stated, must determine whether their jurisdiction has been expanded. *Id.* Justice Powell announced that "[a]lthough it is of course the duty of this Court 'to say what the law is,' . . . it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power." *Id.* (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)); *see also* American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951) (explaining that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation"). Therefore, the majority upheld the high standard requiring "that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero State Hosp.*, 473 U.S. at 243 (footnote omitted).

Justice Powell continued by questioning whether Congress intended to abrogate sovereign immunity in passing the Rehabilitation Act. *Id.* at 244. The Justice noted

Congress had never made acceptance of federal funds conditional on a state's waiver of sovereign immunity, the Court rejected the respondent's contention that the State consented to suit by accepting federal aid.[60]

Only two years later, in *Welch v. Texas Department of Highways and Public Transportation*,[61] the Supreme Court reaffirmed its holding in *Atascadero*.[62] In *Welch*, the petitioner filed suit under the Jones Act, which requires injured seamen to bring suit in district court.[63] Based on the Eleventh Amendment's conferral of sovereign immunity, the Court affirmed the dismissal of the petitioner's claim.[64] Drawing a parallel between this case and *Atascadero*, the

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that the statute provides relief for any violation of § 504 of the Rehabilitation Act by "'any recipient of Federal assistance.'" *Id.* at 245 (quotation omitted). In holding that the Rehabilitation Act does not abrogate Eleventh Amendment state immunity, the majority concluded that:

> given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

Id. at 246 (citing *Pennhurst*, 465 U.S. at 99 (citing Quern v. Jordan, 440 U.S. 332, 342 (1979))).

60 *Id.* at 247. The majority reversed the Ninth Circuit's determination that the State consented to suit by accepting federal aid. *Id.* at 246 (citing *Scanlon v. Atascadero State Hosp.*, 735 F.2d 359, 362 (9th Cir. 1982)). First, the Court found that the Rehabilitation Act did not explicitly manifest Congress's intent to subject states to federal jurisdiction absent their consent. *Id.* at 247. Second, the Court determined that the Rehabilitation Act did not force states to waive their immunity as a condition for receiving federal aid. *Id.*

61 483 U.S. 468 (1987).

62 *Id.* at 471-72.

63 *Id.* at 471 & n.1; *see* Jones Act, 46 U.S.C. § 688(a) (1982) (allowing seamen injured in the course of their employment to sue their employers in district court). Petitioner, Jean Welch, was injured in the course of working on a state ferry dock in Texas. *Welch*, 483 U.S. at 471. Petitioner's suit was instituted pursuant to § 33 of the Jones Act, which requires that seamen, injured in the course of employment, bring personal injury suits in "'the court of the district in which the defendant employer resides or in which his principal office is located.'" *Id.* at 471 & n.1 (quoting 46 U.S.C. § 688(a) (1982)).

64 *Id.* at 471-72. Holding that the Eleventh Amendment barred suit in federal court, the district court dismissed Welch's complaint. *Id.* at 471 (citing Welch v. State Dep't of Highways & Pub. Transp., 533 F. Supp. 403, 407 (S.D. Tex. 1982)). A divided Fifth Circuit reversed the district court. *Id.* (citing Welch v. State Dep't of Highways & Pub. Transp., 739 F.2d 1034, 1035 (5th Cir. 1984)). On rehearing en banc, however, the court of appeals affirmed the district court's decision. *Id.* (citing Welch v. State Dep't of Highways & Pub. Transp., 780 F.2d 1268, 1290 (5th Cir. 1986)). The *Welch* Court noted that the court of appeals discussed *Parden v. Terminal Railway of the Alabama State Docks Department*, which held that a state employee could bring a claim against the State under the Federal Employer's Liability Act (FELA). *Id.* (citing Parden v. Terminal Ry. Docks Dep't, 377 U.S. 184, 190 (1964); FELA, 45 U.S.C. §§ 51-60 (1963) (delineating the recourse for injured railroad employees)). The Court ex-

Court refused to find that the broad language of the Jones Act served to expose the states to suit in federal court.[65] The Court reasoned that state immunity must be upheld to preserve the integrity of the State in a federal system of government, which is based on two distinct sovereigns.[66]

Against this foundation of precedent, the United States Supreme Court, in *Hess v. Port Authority Trans-Hudson Corp.*,[67] determined that the Eleventh Amendment failed to immunize PATH, a bistate entity, from suit in federal court.[68] Because of factors indicating that PATH is an entity separate from its creator States,[69] and because PATH was conceived as a financially-independent organization,[70] the Court held that state sovereign immunity did not shield it from suit in federal court.[71]

Writing for the majority, Justice Ginsburg began by providing

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plained that *Parden* is relevant to the *Welch* case because the Jones Act applied FELA to seamen. *Id.* (citing Jones Act, 46 U.S.C. § 688(a) (1982)). The Supreme Court noted that despite the *Parden* decision, the Fifth Circuit concluded that although not explicitly rejected, *Parden* had been limited significantly. *Id.* (quotation omitted); *see Welch*, 780 F.2d at 1270-71 (explaining that *Parden*'s breadth was limited by a Supreme Court decision holding that in order to collect on a private federal remedy, state employees must show that Congress intended to extend the remedy to them) (citations omitted).

Relying on the Supreme Court's *Atascadero* decision, the court of appeals found that there was no explicit abrogation of immunity in the Jones Act itself, and that the State had not waived its immunity with respect to Jones Act suits. *Welch*, 483 U.S. at 471-72 (citing *Atascadero State Hosp.*, 473 U.S. at 242); *see supra* notes 52-59 and accompanying text (discussing the *Atascadero* decision). Therefore, the court of appeals held that the State was immune from suit in federal court by virtue of the Eleventh Amendment. *Welch*, 483 U.S. at 472 (citing *Welch*, 780 F.2d at 1273-74 (citation omitted)).

The Supreme Court granted petitioner's writ of certiorari to determine whether the claim was jurisdictionally barred by the Eleventh Amendment. *Id.* (citing *Welch*, 479 U.S. 811 (1986)).

65 *Id.* at 476. The Court noted that "[b]ecause of the role of the States in our federal system, '[a] general authorization for suit in the federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.'" *Id.* (quoting *Atascadero State Hosp.*, 478 U.S. at 246 (holding that § 504 of the Rehabilitation Act of 1973 does not contain the explicit language necessary to negate Eleventh Amendment immunity)) (citing Quern v. Jordan, 440 U.S. 332, 342 (1979); Employees v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973)).

66 *Id.* at 488 (quotation omitted). Writing for the majority, Justice Powell reminded that "[b]ecause of the sensitive problems 'inherent in making one sovereign appear against its will in the courts of the other,' . . . the doctrine of sovereign immunity plays a vital role in our federal system." *Id.* at 486-87 (quoting *Employees*, 411 U.S. at 294 (Marshall, J., concurring in the result)).

67 115 S. Ct. 394 (1994) (5-4 decision).

68 *Id.* at 397.

69 *Id.* at 402-03 (citations omitted).

70 *Id.* at 403.

71 *Id.* at 406.

an analysis of the nature and characteristics of the Port Authority.[72] The Justice explained that the Port Authority was created pursuant to an interstate compact approved by Congress.[73] Noting the Port Authority's geographic domain,[74] the Court stated that the Port Authority was intended to be financially independent with its funds coming from private investors.[75] Justice Ginsburg then discussed the Port Authority's internal governance and the States' role in appointing the Port Authority's directors and in initiating Authority action.[76]

Continuing, the Court instructed that the founding States are not liable for the debts and liabilities incurred by the Port Authority.[77] The Court observed that the States agreed to contribute a small amount to the Port Authority only if the money was necessary to cover administrative expenses and salaries.[78] The Court noted,

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72 *Id.* at 398-99 (citations omitted).

73 *Id.* at 398 (citation omitted). The Court noted that New York and New Jersey entered into the compact to better achieve efficiency and coordination in transportation and commercial activities. *Id.* (quoting N.J. STAT ANN. §§ 32:1-1 (West 1990); N.Y. UNCONSOL. LAWS § 6401 (McKinney 1979)).

74 *Id.* (citing N.J. STAT. ANN. § 32:1-3 (West 1990) (delineating the boundaries of the "Port of New York District"); N.Y. UNCONSOL. LAWS § 6403 (McKinney 1979) (same as the New Jersey statute)).

75 *Id.* (citing United States Trust Co. v. New Jersey, 431 U.S. 1, 4 (1977)). Fees, tolls, and investment income, the Court noted, account for the Port Authority's financial stability. *Id.* at 399 (citation omitted).

76 *Id.* (citations omitted). Twelve state-selected commissioners serve as the Port Authority's directors and govern the Port Authority. *Id.* (citing N.J. STAT. ANN. §§ 32:1-5, 32:1-35.61, 32:12-3 (West 1990); N.Y. UNCONSOL. LAWS §§ 6405, 6612 (McKinney 1979) (other citation omitted). The commissioners can be removed if the State that appointed them can establish cause. *Id.* (citing N.J. STAT. ANN. §§ 32:1-5, 32:12-5 (West 1990); N.Y. UNCONSOL. LAWS § 6405 (McKinney 1979) (other citation omitted). Furthermore, the compact requires four of the six commissioners to be residents of the State that appointed them. *Id.* (citing N.J. STAT. ANN. § 32:1-5 (West 1990); N.Y. UNCONSOL. LAWS § 6405 (McKinney 1979)).

The governor of each State has the authority to veto actions taken by directors appointed by that State. *Id.* (citing N.J. STAT. ANN. §§ 32:1-17, 32:1-35.61, 32:2-6 to 32:2-9 (West 1990); N.Y. UNCONSOL. LAWS §§ 6417, 6612, 7151-7154 (McKinney 1979)). The state legislatures can change the powers and responsibilities of the Port Authority only by acting jointly. *Id.* (citing N.J. STAT. ANN. § 32:1-8 (West 1990); N.Y. UNCONSOL. LAWS § 6408 (McKinney 1979)). Furthermore, the state legislatures are jointly responsible for determining how the Port Authority should allocate excess revenues. *Id.* (citing N.J. STAT. ANN. § 32:1-142 (West 1990); N.Y. UNCONSOL. LAWS § 7002 (McKinney 1979)).

77 *Id.* The Court articulated that pursuant to the compact and the statutes implementing the Port Authority, the Authority could not draw on revenue from state taxes, impose charges on the treasuries of either State, or pledge either State's credit. *Id.* (citing N.J. STAT. ANN. §§ 32:1-8, 32:1-33 (West 1990); N.Y. UNCONSOL. LAWS §§ 6408, 6459 (McKinney 1979)).

78 *Id.* (citing N.J. STAT. ANN. § 32:1-16 (West 1990); N.Y. UNCONSOL. LAWS § 6416 (McKinney 1979)). Governors of both States must approve the Authority's adminis-

however, that a judgment against the Port Authority could not be obtained against either State individually.[79]

After providing a brief history of the Eleventh Amendment,[80] the Court distinguished the nature of bistate entities from that of states.[81] Contrasting bistate entities with states, the Court indicated that bistate entities represent three different components as opposed to a single state, which represents only its citizens.[82] The goals of bistate entities, the Court elaborated, fail to reflect the interests of any single state or the national government.[83]

Next, the Court submitted that the functions performed by bistate entities extend beyond regional interests, affecting national interests.[84] The Court articulated that the Port Authority exemplifies the usefulness of bistate entities, noting that states could work together to accomplish feats neither state could undertake alone.[85] Proceeding, the Court explained that making Compact Clause entities amenable to suit in federal courts would not be an affront to the entity's dignity.[86] Because federal courts represent the interests of one of the compact entity's components, the Court reasoned that federal courts are not detached from the controversy.[87] Furthermore, the Court indicated that an individual state's integ-

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trative expenses and there is an annual ceiling of $100,000 for contributions from each State. *Id.* (citing N.J. STAT. ANN. § 32:1-16 (West 1990); N.Y. UNCONSOL. LAWS § 6416 (McKinney 1979)).

79 *Id.*

80 *Id.* at 400. The Court stated that the Amendment's purpose is to protect states from being sued in federal courts absent their express consent. *Id.*; *see supra* note 4 (discussing the history of the Eleventh Amendment). The Court explained that plaintiffs who want to sue states not consenting to suit in federal court must bring their claims in state courts. *Hess*, 115 S. Ct. at 400.

81 *Id.* at 400-01 (citations omitted).

82 *See id.* at 400. Noting that states are "separate sovereigns" and distinct elements of a union, the Court explained that bistate entities created pursuant to an interstate compact represent three constituencies: each founding state and the federal government. *Id.*

83 *See id.* at 400-01 (citation omitted); *see also* Frank P. Grad, *Federal-State Compact: A New Experiment in Cooperative Federalism*, 63 COLUM. L. REV. 825, 854-55 (1963). Grad explained that entities formed pursuant to a compact deal with regional problems; therefore, they should not be interpreted as manifesting state-like sovereignty. *See* Grad, *supra*, at 854 (explaining that such compacts should not be regarded as "narrow concept[s] of state sovereignty"). Rather, these entities should be viewed as "independently functioning parts of a regional polity and of a national union." *Id.* at 854-55.

84 *Id.* at 401 (citing West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 27 (1951)).

85 *Id.* (citation omitted). The Court commented that the States, "'independent but futile in their respective spheres,'" could not make the best use of their ports on the Hudson River absent unified action. *Id.* (quoting Frankfurter, *supra* note 15, at 697).

86 *Id.* at 401.

87 *Id.* Because of the requirement that Congress approve of the compact, the

rity would not be diminished as a result of suit in federal court.[88] The Court emphasized that this is especially true when, as here, the case arises under federal law.[89] Proffering that the characteristics of a bistate entity do not evince a tight bond with the people of one state,[90] Justice Ginsburg declared that bistate entities are not subject to the wishes of the citizens of any single state by virtue of the various parties involved in an interstate compact.[91] Thus, the Court concluded that there is no reason to accord a compact entity with the Eleventh Amendment immunity to which a state is entitled.[92]

This holding, the Court noted, is consistent with *Lake Country Estates*, the only other case where the Court determined whether a bistate entity was entitled to Eleventh Amendment immunity.[93] Recounting the *Lake Country Estates* decision, wherein the Court denied immunity,[94] Justice Ginsburg commented that *Hess* is a more

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Court contended that federal courts are not "instruments of a distant, disconnected sovereign." *Id.; see supra* note 15 (discussing the Compact Clause).

88 *Hess*, 115 S. Ct. at 401. The Court emphasized that federal courts should not be viewed as remote tribunals with respect to the compacts, which are "cooperative trigovernmental arrangements." *Id.*; *see supra* note 15 (discussing the Compact Clause); *see also* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 314, 315 (1990) (Brennan, J., concurring in part and concurring in judgment) (observing that no single state dominates in a bistate compact; rather, it is shared federal and state power that pervades the governance of the entity); MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 297-300 (1971) (discussing the role that states play in an interstate compact and concluding that entry into a compact diminishes a state's ability to act independently within the scope of activities encompassed in the compact).

89 *Hess*, 115 S. Ct. at 401 (citation omitted).

90 *Id.* The Court explained that compact entities' "political accountability is diffuse; they lack the tight tie to the people of one State that an instrument of a single state has[.]" *Id.* The Court further reminded that "'[a]n interstate compact, by its very nature, shifts a part of the state's authority to another state or states, or to the agency the several states jointly create to run the compact.'" *Id.* (quoting RIDGEWAY, *supra* note 88, at 300); *see supra* note 15 (discussing the Compact Clause).

91 *Hess*, 115 S. Ct. at 401, 402. In contrast, the Justice stated, single state entities, created exclusively to serve its state's constituents, are subject to wishes of the citizenry of one state. *Id.* at 402.

92 *Id.*

93 *Id.* For a discussion of *Lake Country Estates, Inc.*, see *supra* notes 45-52 and accompanying text. The *Hess* Court noted two prior decisions where bistate entities had waived their immunity. *Hess*, 115 S. Ct. at 402 n.12 (citing *Feeney*, 495 U.S. at 308-09; Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 281 (1959)).

94 *Id.* at 402. In *Lake Country Estates, Inc.*, TRPA argued that because both of its founding states were protected by sovereign immunity, "then surely [the Eleventh Amendment] . . . must shield [TRPA,] an entity 'so important that it could not be created by [two] States without a special Act of Congress.'" *Id.* (quoting *Lake Country Estates, Inc.*, 440 U.S. at 400). The *Lake Country* Court rejected an expansive reading of the Eleventh Amendment, stating that "[b]y its terms, the protection afforded by . . . [the Eleventh] Amendment is only available to 'one of the United States.'" *Lake Coun-*

difficult case because the indicators of immunity do not all point in one direction.[95]

Because the Port Authority was conceived as an entity financially independent from the States, the Court determined that the Authority was not entitled to immunity under the Eleventh Amendment.[96] The Court reasoned that lack of reliance on the state treasury was an indicator weighing heavily in favor of a finding that the entity did not deserve immunity.[97] The *Hess* Court rejected the Third Circuit's justification for immunity, which was that the States would contribute money to PATH in limited situations.[98] Instead, Justice Ginsburg adopted the Second Circuit's reasoning in *Feeney*,

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try Estates, Inc., 440 U.S. at 400 (quoting U.S. CONST. amend. XI). The *Lake Country* Court further explained that despite possessing "slices of state power," political subdivisions are not entitled to Eleventh Amendment immunity. *Id.* at 401.

95 *Hess*, 115 S. Ct. at 402. The Court noted that in *Lake Country Estates, Inc.*, all indicia of whether immunity should have been extended to TRPA indicated that the entity was not entitled to protection. *Id.* Continuing, the Court explained that in *Lake Country Estates, Inc.*, it was conceded that TRPA was a political subdivision in the compact itself, and the majority of TRPA's members were required to be municipal appointees. *Id.* With respect to TRPA, the *Hess* Court explained that the compact explicitly stated that it was not to be construed as binding either state. *Id.* Justice Ginsburg articulated that TRPA's main purpose was to regulate land use—a function traditionally handled by local governments. *Id.* Furthermore, the *Hess* Court noted that no state could veto TRPA's rules and that it was TRPA's local governance function itself that gave rise to the suit in the first place. *Id.* (citation omitted).

Discussing the Port Authority, the *Hess* Court stated that although eight of the 12 commissioners are required to be resident voters of New York City or the port district, indicating local governance, this factor is offset by the States' control over the Authority. *Id.* The Court further explained that the commissioners are all state appointees whose decisions could be vetoed by their state's governor. *Id.* Furthermore, the Court continued, the States, acting together, could expand the Port Authority's duties and responsibilities by joint legislative action. *Id.* at 402-03. For a list of statutes concerning the creation and governance of the Port Authority, see *supra* notes 72-78.

Additionally, the Court stated that neither the compact nor the implementing legislation referred to the Authority as a state agency. *Hess*, 115 S. Ct. at 403. In fact, the Court noted that in state decisions, the Port Authority was deemed to be an agency of the State as opposed to a political subdivision. *Id.* (citing Whalen v. Wagner, 152 N.E.2d 54, 58 (N.Y. 1958)).

Because transportation concerns are implicated on both local and state levels, Justice Ginsburg related, Port Authority functions could not be clearly categorized either as local or state actions. *Id.* Therefore, the consideration of the Port Authority's functions did not advance the Court's Eleventh Amendment inquiry. *Id.*

96 *Id.* at 403, 405, 406 (citing United States Trust Co. v. New Jersey, 431 U.S. 1, 4 (1977)) (other citation omitted). The Court further noted that New York and New Jersey are not liable for the Port Authority's debts, nor are they responsible for judgments against the Authority or PATH. *Id.* at 406.

97 *Id.*

98 *Id.* at 403 (citing Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth., 819 F.2d 413, 416 (3d Cir. 1987)); *see supra* note 77 (discussing the Port Authority's ability to receive small sums of money from the state treasuries in limited scenarios).

which emphasized the extremely limited financial commitment the States made to the Port Authority.[99]

Next, the majority explained that when traditional indicators of immunity compel opposite conclusions, the Court will look to the two purposes behind the application of the Eleventh Amendment as a guide.[100] The Court stated for a second time that subjecting a Compact Clause entity to suit in federal court would not be disrespectful to any one state.[101] Moreover, the Court commented that the federal courts do not represent wholly alien interests, as Congress is involved with the creation of a Compact Clause entity.[102]

After establishing that there would be no affront to either State's dignity, the Court proceeded to examine whether there was sufficient evidence to believe that both the States and Congress intended for the Authority to enjoy Eleventh Amendment sovereign immunity.[103] Addressing PATH's argument that it was entitled to immunity because of alleged state control, the Court rejected the entity's logic on two grounds.[104] First, the Court enunciated that every state-created entity is state-controlled to an extent because states can repeal the actions that created the entity.[105] Second, the Court reemphasized that no single state could control the actions of an entity created pursuant to the Compact Clause.[106]

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99 *Hess*, 115 S. Ct. at 403 (citing Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628, 631 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299 (1990)). The *Feeney* court explained that three characteristics of the States' financial commitment to the Port Authority evidence the States' intentions of remaining insulated from the Authority's expenses and liabilities: 1) the Port Authority is barred from relying on state backing as collateral for its liabilities; 2) even the $100,000 allowance to the Port Authority could only be issued after approval from the governor of each state; and 3) the allowance is very limited in nature. *Feeney*, 873 F.2d at 631.

100 *Id.* at 404 (citation omitted).

101 *Id.*; *see supra* notes 86-88 and accompanying text (explaining that suability would not be an affront to state dignity).

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

103 *Id.* (citation omitted).

104 *Id.* PATH stressed that the Eleventh Amendment should extend to the entity because the States have control and wield authority over it by virtue of the governors' veto power and the States' appointment of commissioners. *Id.*

105 *Id.* Quoting *Feeney*, the Court remarked that "'[p]olitical subdivisions exist solely at the whim and behest of their state,' . . . yet cities and counties do not enjoy Eleventh Amendment immunity." *Id.* (quoting *Feeney*, 495 U.S. at 313 (Brennan, J., concurring in part and concurring in the judgment) (citations omitted)) (citing 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 (1890)).

106 *Id.* (citation omitted). One commentator has noted the uncertainty with respect to the application of a control test in assessing whether immunity should be conferred on a bistate entity. Rogers, *supra* note 14, at 1284.

Further rejecting PATH's proposed control test, the Court noted that one purpose of the Eleventh Amendment was to prevent state treasuries from being depleted by federal judgments.[107] To bolster the majority's reliance on the treasury factor, Justice Ginsburg referred to circuit court decisions holding that the most important factor in determining immunity is whether an entity is supported by state treasuries.[108] Thus, the Court proclaimed that the Port Authority's history of financial independence supported the majority's finding that the Authority is not shielded by the Eleventh Amendment.[109]

Continuing, Justice Ginsburg refused to accept PATH's contention that the entity should be conferred with sovereign immunity because it dedicates its surplus earnings to funding state causes.[110] Although an entity may use excess earnings to perform charitable functions that otherwise might be undertaken by the state, the majority concluded that this function does not equate the entity with a state and does not confer state status for sovereign immunity purposes.[111]

Finally, noting the lack of intercircuit conflict concerning the

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107 *Id.* (citing Fletcher, *supra* note 4, at 1129).

108 *Id.* (citing Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 732 (7th Cir. 1994); Hutsell v. Sayre, 5 F.3d 996, 999 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1071 (1994); Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth., 991 F.2d 935, 942-43 (1st Cir. 1993); Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 818 (3d Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 2281 (1992); Barket, Levy, & Fine, Inc. v. St. Louis Thermal Energy Corp., 948 F.2d 1084, 1087 (5th Cir. 1991); Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628, 631 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990); Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 440 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986)).

109 *Id.* at 405, 406. The Court contrasted *Hess* with *Alaska Cargo Transport, Inc. v. Alaska Railroad Corp.*, wherein a railroad corporation was accorded Eleventh Amendment immunity because it was a thinly-capitalized venture that was highly dependent on the State for funds. *Id.* at 405 (citing Alaska Cargo Transp., Inc. v. Alaska R.R. Corp., 5 F.3d 378, 381, 382 (9th Cir. 1993)). The Court also distinguished the case at bar from *Morris v. Washington Metropolitan Area Transit Authority*, wherein sovereign immunity shielded an interstate entity because Congress and the states foresaw that the entity would be heavily dependent on funds from the governments of the participating states. *Id.* (citing Morris v. Washington Metro. Area Transit Auth., 781 F.2d 218, 225-27, 228 (D.C. Cir. 1986)).

110 *Id.* at 405-06.

111 *Id.* at 406. Justice Ginsburg pronounced that:

> [t]he proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No"—both legally and practically—then the Eleventh Amendment's core concern is not implicated.

Id.

criteria on which Eleventh Amendment immunity should be adjudged,[112] Justice Ginsburg pinpointed the issue by stating that the only dispute was whether the Port Authority's debts were those of its creator States.[113] In closing, Justice Ginsburg proclaimed that the Port Authority was not entitled to sovereign immunity because it is a financially-independent entity.[114] Accordingly, the Court reversed the judgment of the court of appeals, and both the *Walsh* and *Hess* cases were remanded for further proceedings.[115]

In a separate opinion, Justice Stevens provided additional support for the majority's conclusion.[116] Justice Stevens explained that by allowing individuals to pursue their remedies in federal court, the *Hess* Court furthered the Framers' goal of promoting justice.[117] Criticizing the Court's expansive reading of the Eleventh Amendment in the past, Justice Stevens commended the Court's holding.[118]

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112 *Id.* Both the Second and Third Circuits agreed that whether a judgment will be satisfied through the use of state funds is the best indicator of immunity. *Id.* (citations omitted).

113 *Id.* (citations omitted).

114 *Id.* Justice Ginsburg perceived that because the Port Authority was self-sufficient, recovery of damages in federal court would not undermine the purposes behind the Eleventh Amendment, which are to maintain states' dignity and solvency. *Id.*

115 *Id.*

116 *Id.* at 407 (Stevens, J., concurring).

117 *Id.* Reminding that the language of the Eleventh Amendment in its historical context should be interpreted as prohibiting only diversity actions from being brought against a state in federal court, *id.* (citing Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 509-10 (1987) (Brennan, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 289 (1985) (Brennan, J., dissenting)), Justice Stevens lamented that:

> since *Hans v. Louisiana* . . . the Court has interpreted the Eleventh Amendment as injecting broad notions of sovereign immunity into the whole corpus of federal jurisdiction. The Court's decisions have given us "two Eleventh Amendments," one narrow and textual and the other—not truly a constitutional doctrine at all—based on prudential considerations of comity and federalism.

Id. (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Stevens, J., concurring)) (other citations omitted).

118 *Id.* Justice Stevens proclaimed that "when confronted with the question of whether a judge-made doctrine of this character should be extended or contained, it is entirely appropriate for a court to give controlling weight to the Founders' purpose to 'establish Justice.'" *Id.* at 407 n.3 (Stevens, J., concurring) (quoting U.S. CONST. pmbl.). Justice Stevens continued, exclaiming that "[t]oday's decision is faithful to that purpose." *Id.* at 407 (Stevens, J., concurring).

Justice Stevens referred to the Court's past interpretation of the Eleventh Amendment as "an engine of injustice." *Id.*; *see* Amar, *supra* note 1, at 1426 (explaining that sovereign immunity could be used by state actors, who intentionally violate constitutional rights, to shield themselves from being adjudged liable in federal court thereby possibly undermining citizens' remedies).

Dissenting, Justice O'Connor, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, rejected the Court's findings that PATH, an interstate entity, is not immune from suit.[119] Furthermore, the dissent disagreed with the majority's contention that state funding of judgments should be the most important factor in determining whether an entity should be afforded immunity.[120] Interpreting the majority's decision as a ruling that the Eleventh Amendment is almost always inapplicable to concerted state actions, Justice O'Connor disapproved of the Court's emphasis on the constitutionally-mandated requirement that Congress consent to bistate compacts.[121]

Conceding that congressional approval of compacts plays an important part in our federal system of governance,[122] Justice O'Connor opined that the consent requirement has no repercussions on the degree of state power used in conjunction with the creation of the compact.[123] Justice O'Connor reasoned that congressional approval of a compact denotes state activity within the scope of state power; therefore, the Justice urged that there is no justification for per se disallowance of Eleventh Amendment immunity.[124]

Furthermore, the dissent insisted that even assuming the correctness of the majority's analysis that states cede part of their sov-

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119 *Id.* at 408 (O'Connor, J., dissenting).

120 *Id.* (citation omitted).

121 *Id.* The dissent maintained that the majority's decision rested on the premise that through participating in a bistate compact, the participant states "ceded their sovereignty." *Id.* (citation omitted). The dissent condemned the Court's expansive reasoning. *Id.* at 408-09 (O'Connor, J., dissenting) (arguing that Congress's participation in the compact's creation should not be determinative in assessing immunity).

122 *Id.* at 408 (O'Connor, J., dissenting). Justice O'Connor noted that in *Cuyler v. Adams*, the Court explained that Congressional approval of concerted state action is required to ensure both that states are not impinging on federal concerns and that their actions will not interfere so as to significantly disadvantage other states. *Id.* (citing Cuyler v. Adams, 449 U.S. 433, 440 n.8 (1981) (quotation omitted)).

123 *Id.* Justice O'Connor noted that "the consent clause neither transforms the nature of state power nor makes Congress a full-fledged participant in the underlying agreement; it requires *only* that Congress 'check any infringement of the rights of the national government.'" *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1403, at 264 (1873)).

124 *Id.* at 408-09 (O'Connor, J., dissenting). Justice O'Connor proclaimed that sovereign immunity is implicated when states permissibly exercise state power. *Id.* at 409 (O'Connor, J., dissenting). The Justice continued, acknowledging that "'[i]f [C]ongress consent[s], then the states . . . in this respect [are] restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, [leaves] the states as they were before . . . .'" *Id.* (quoting Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 724 (1838)) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-33, at 523 (2d ed. 1988)).

ereignty to Congress in creating bistate entities, it does not necessarily follow that particular entities are unworthy of sovereign immunity.[125] Justice O'Connor proposed that the correct interpretation of the Constitution results in a presumption that interstate entities are conferred with immunity absent a clear and express indication that Congress intended to abrogate such immunity in a specific case.[126] Lamenting that the Court ignored traditional Eleventh Amendment analysis, Justice O'Connor rejected the Court's reasoning because it suggests that Congress can unilaterally decide whether the Amendment will apply in the context of interstate entities.[127]

Noting the majority's inconsistency concerning the weight attributed to the States' ability to control the activities of an interstate entity, the dissent asserted that simply because "arm-of-the-state" analysis may lead to a tenuous basis for applying sovereign immunity does not mean that a presumption of amenability to suit should be made.[128] Justice O'Connor emphasized that multiple states acting in concert may be just as entitled to Eleventh Amendment immunity as a single state.[129]

Acknowledging that the Court correctly recognized problems with applying a multi-factor test, Justice O'Connor questioned the majority's emphasis on the relationship between the state treasuries and the entity in assessing whether immunity is proper.[130] In relying on this factor, the dissent argued that the Court was mini-

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125 *Id.*

126 *Id.* Justice O'Connor based this proposition on judicial precedents that have consistently required that Congress express intent to abrogate immunity using a clear and unambiguous statement. *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 (1985)) (other quotations omitted).

127 *Id.* (citation omitted). The dissent noted the majority's implication that even if the states intended an entity to be conferred with sovereign immunity, "the baseline is no immunity . . . [unless] Congress manifests a contrary intent." *Id.* The dissent observed that the Court has never before "held that the Eleventh Amendment immunity itself attaches at the whim of Congress." *Id.*

128 *Id.* Justice O'Connor noted that the Court emphasized the states' lack of control over interstate entities, thereby implying that state control is relevant to Eleventh Amendment analysis. *Id.* The Justice pointed out, however, that in other portions of the opinion the Court disclaimed the importance of inquiring into state control over the entity. *Id.* (citation omitted).

129 *Id.*

130 *Id.* at 409, 410 (O'Connor, J. dissenting). Justice O'Connor indicated that the six-factor test proposed in *Lake Country Estates* provided little guidance to lower courts. *Id.* at 409 (O'Connor, J., dissenting); *see supra* notes 45-52 and accompanying text (discussing *Lake Country Estates*). The Justice proclaimed, however, that neither the Eleventh Amendment nor Supreme Court precedents compel the conclusion that an entity's reliance on the state treasury is determinative for assessing immunity. *Hess*, 115 S. Ct. at 410 (O'Connor, J. dissenting).

mizing state sovereignty by removing constitutionally provided immunity.[131] The dissent denounced the majority's analysis because the language of the Eleventh Amendment does not distinguish between suits brought "'in law *or equity*.'"[132] Therefore, the dissent rejected the Court's highlighting of monetary factors.[133]

Justice O'Connor conceded that the majority was correct in suggesting that an entity funded by state treasuries is entitled to Eleventh Amendment immunity.[134] The dissent, however, refused to validate the corollary—that an entity not funded by state treasuries is not entitled to immunity.[135] The essential indicator of immunity, the dissent proposed, is state control over the entity.[136] Emphasizing state control, Justice O'Connor concluded, effectuates a balance which protects state sovereignty while simultaneously precluding abuse of the Eleventh Amendment.[137]

Next, the dissent professed that the control test would encompass the majority's treasury factor and, further, would expand the scope of inquiry in making a determination of immunity.[138] This approach, Justice O'Connor opined, would ensure that states possess the flexibility essential in maintaining sovereign authority.[139]

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131 *Id.* (citations omitted).

132 *Id.* (quoting U.S. CONST. amend. XI) (citations omitted).

133 *Id.* at 408 (O'Connor, J., dissenting). The dissent explained that although *Chisolm v. Georgia*, which gave rise to the adoption of the Eleventh Amendment, involved money damages, the Eleventh Amendment clearly extends beyond the specific issues posed by *Chisolm* and applies to equitable suits as well. *Id.* (citing Cory v. White, 457 U.S. 85, 91 (1982) (explaining that "the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity")) (other citations omitted); *see supra* note 4 (discussing the adoption of the Eleventh Amendment).

134 *Id.* at 410 (O'Connor, J., dissenting). The dissent indicated that if a state was forced to pay a judgment rendered by a federal court, "its ability to set its own agenda, to control its own internal machinery, and to plan for the future—all essential prerequisites of sovereignty—would be grievously impaired." *Id.*

135 *Id.*

136 *Id.* Justice O'Connor argued 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 itself." *Id.* The dissent remarked that sufficient control may exist regardless of whether a state treasury is liable for the entity's debts. *Id.* at 410-11 (O'Connor, J., dissenting). Justice O'Connor maintained than an "arm-of-the-State . . . is an entity that undertakes state functions and is politically accountable to the State, and by extension, to the electorate." *Id.* at 411 (O'Connor, J., dissenting). Therefore, the Justice asserted that "the critical inquiry . . . should be whether and to what extent the elected state government exercises oversight over the entity." *Id.*

137 *Id.*

138 *Id.* (citation omitted).

139 *Id.* The dissent noted that it is unlikely that an entity would be funded by state treasuries and fail the proposed control test. *Id.*

Addressing the majority's dismissal of a control test,[140] Justice O'Connor commented that the fact that an entity could be created or terminated at the state's prerogative does not signify fulfillment of the control test.[141] Rather, the dissent insisted, the assessment of control rests on state involvement and oversight of an entity's affairs.[142]

Applying the control test to *Hess*, the dissenting Justices concluded that PATH was entitled to Eleventh Amendment immunity because the States maintained sufficient control over both the Port Authority and PATH.[143] The dissent pointed out that each State was entitled to select, and had the power to remove, its own commissioners, that the governors of New York and New Jersey could veto actions taken by his or her State's commissioners, and that commissioners from each State had to be present at all Port Authority meetings.[144] Accordingly, the dissenters opined that the States exercised sufficient control over the Port Authority and PATH, thereby warranting the Eleventh Amendment's protection from suit in federal court.[145]

Faced with the opportunity to end the confusion surrounding the application of the Eleventh Amendment, the *Hess* Court, like its predecessors, failed to read the Amendment as it was intended.[146] Although the majority correctly held that PATH was amenable to suit in federal court,[147] the Court continued to apply the Eleventh Amendment as judicially reconstructed. Rather than follow the Constitution as written and predicate its holding on federal question jurisdiction not being subordinated to the Eleventh Amendment, the *Hess* Court adopted an imprecise test to deter-

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140 *Id.* (citation omitted). The majority rejected the adoption of a control test because states have control over cities, counties, and political subdivisions, and yet, these instrumentalities have never been afforded Eleventh Amendment immunity. *Id.* (citing Lincoln County v. Luning, 133 U.S. 529, 530 (1890)).

141 *Id.* (quotation omitted).

142 *Id.* Justice O'Connor articulated that the control test should focus on actual state oversight as opposed to a state's potential for taking action. *Id.* The dissent instructed that to assess whether a state sufficiently controls an entity, one must look to state law. *Id.* The Justice announced that if a state, pursuant to state law, delegates control of an entity to municipalities, then the control test has not been met and the Eleventh Amendment will not confer the entity with sovereign immunity. *Id.*

143 *Id.*

144 *Id.* (citing N.J. STAT. ANN. §§ 32:1-5, 32:1-17 (West 1990); N.Y. UNCONSOL. LAWS §§ 6405, 6417 (McKinney 1979)).

145 *Id.* at 412 (O'Connor, J., dissenting).

146 *See* Gibbons, *supra* note 8, at 2004 (calling for "the Supreme Court to acknowledge that the eleventh amendment applies only to cases in which the jurisdiction of the federal court depends solely upon party status").

147 *Hess*, 115 S. Ct. at 397, 406.

mine "arm-of-the-state" status.[148]

Without question, states are sovereign entities within their own spheres.[149] Absent constitutional conferral of authority to the federal government enabling legislation in particular areas, the states maintain the power to legislate and administer laws in their own individual capacities in order to serve their own best interests.[150] At the same time, however, the Constitution vests the federal government with the power to make and execute laws that impact the United States as a whole.[151]

It is antithetical to this system of governance to interpret the Eleventh Amendment in a manner that allows states to escape fed-

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148 *See id.* at 404, 406 (recognizing that dependence on the state treasury is the most important consideration in deciding whether an entity should be immune). In contrast, Judge Gibbons argued that the Court should recognize Congress's power to abrogate state immunity in all matters subject to federal regulation. Gibbons, *supra* note 8, at 2004. Similarly, Justice Brennan lamented that the Court's Eleventh Amendment jurisprudence has been unstable and lacks "a firm historical foundation, or a clear rationale." *Atascadero State Hosp.*, 473 U.S. at 257 (1984) (Brennan, J. dissenting). Justice Brennan pointed out that even an anti-Federalist author believed that the powers of federal courts should be consistent with the powers of the Congress. *Id.* at 272 (Brennan, J. dissenting).

Furthermore, Justice Stevens opined that the Eleventh Amendment should be interpreted as barring only diversity actions brought against a state. *Hess*, 115 S. Ct. at 407 (Stevens, J. concurring). With respect to Justice Stevens's concurring opinion stating that prior interpretations of the Eleventh Amendment have deviated from the Founders' intentions by conflicting with "the just principle that there should be a remedy for every wrong," *id.* (citing Marbury v. Madison, 1 Cranch 137, 163 (1803)), one should note that Justice Stevens's logic can be questioned, as the Eleventh Amendment does not preclude remedies in state court. *See* Hilton v. South Carolina Pub. Rys. Comm'n, 112 S. Ct. 560, 565 (1991) (citations omitted) (discussing that the inability to bring a claim in federal court does not preclude pursuing a cause of action in a state court).

149 *See supra* note 2 and accompanying text (discussing state sovereignty).

150 U.S. CONST amend. X. The United States Government is one of enumerated powers; "it can exercise only the powers granted to it." McCulloch v. Maryland, 17 U.S. 316, 404 (1819). The *McCulloch* Court noted that "the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist." *Id.*

151 U.S. CONST. art. I, § 8 (providing Congress with legislative powers); art II, § 3 (providing the executive branch with executive powers). In *Ex parte Virginia*, the Court explained that:

> in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

Ex parte Virginia, 100 U.S. 339, 346 (1880).

eral jurisdiction in matters that are federal by their nature.[152] Such an interpretation is inconsistent with the Founders' conception of a strong and unified national government, and furthermore, deviates from the rationale behind federal preemption.[153]

Though it is only on rare occasions that the Court overrules an existing precedent,[154] constitutional consistency and fidelity to the principles behind the organization of the United States, and behind the passage of the Eleventh Amendment, dictate that immunity should apply only in diversity suits.[155] Failure to comport with the Eleventh Amendment as written has yielded inconsistencies and has led to slippery-slope tests that cannot be reconciled with the underlying purposes behind our federal government.

Reading the Eleventh Amendment as written would not impermissibly infringe on state sovereignty, but rather, would restore the balance that the Constitution intended. The Court moved in the right direction by its refusal to confer immunity on PATH.

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152 One must consider whether it is possible that the Founders conceived the formation of a federal government where federal courts could not have original jurisdiction in matters concerning federal law. For example, in *McCulloch v. Maryland*, the Court proclaimed:

> it may with great reason be contended, that a government, entrusted with such ample powers, on due execution of which the happiness and prosperity of a nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution.

McCulloch, 17 U.S. at 408.

It should be noted, however, that in limited circumstances, plaintiffs can sue states or state officials in federal court. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (holding that Congress could abrogate sovereign immunity under the Commerce Clause, thereby rendering states amenable to suit in federal court); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (concluding that Congress may abrogate state or state officials' immunity under the Fourteenth Amendment thereby allowing them to be sued in federal court); *Ex parte* Young, 209 U.S. 123, 155-56 (1908) (allowing an equitable claim seeking prospective relief against a state official acting outside the realm of his authority to be heard in federal court).

153 *See* BLACK'S LAW DICTIONARY 1177 (6th ed. 1990) (defining "preemption" as a "[d]octrine adopted by [the] U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws"); *see also* U.S. CONST. art. VI (proclaiming that the "Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land").

154 *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-09, 2814-16 (1992) (discussing the Court's reluctance to overrule precedents and the Court's commitment to adherence with the rule of stare decisis) (citations omitted).

155 *See supra* note 147 and accompanying text (discussing scholars' beliefs that the Eleventh Amendment was intended to apply solely to diversity actions instituted against states).

One can only hope that the Court will continue to progress by looking back to 1795 to interpret the Eleventh Amendment.

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