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## Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine

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## KEEPING THE ARMS IN TOUCH: TAKING POLITICAL ACCOUNTABILITY SERIOUSLY IN THE ELEVENTH AMENDMENT ARM-OF-THE-STATE DOCTRINE<sup>†</sup>

### ABSTRACT

*The Eleventh Amendment to the United States Constitution embodies the principle of state sovereign immunity, long held to bar suits by private litigants in federal courts or under federal law who seek redress for rights violations at the hands of state governments. But states themselves are not the only prospective defendants shielded by this form of sovereign immunity. As a subset of Eleventh Amendment jurisprudence, the arm-of-the-state doctrine allows government entities closely situated to their respective state governments to partake of the state's Eleventh Amendment sovereign immunity. Unfortunately, this doctrine, both in theory and in application, has been fraught with inconsistency and incoherence since the Supreme Court introduced it in 1977.*

*In its 1994 decision, Hess v. Port Authority Trans-Hudson Corporation, the Court offered some guiding rationales to assist the lower federal courts in conducting their arm-of-the-state analyses. The Court directed federal courts to analyze the status of state government entities in light of the twin reasons for sovereign immunity: protection of both the state's treasury and the state's dignity. While these twin reasons were intended to aid courts in applying the various factors of their arm-of-the-state tests, unfortunately—like the jurisprudence that preceded it—the Hess precedent has proven to be minimally effective.*

*As a solution, this Comment argues that, rather than the rationales previously offered by the Court, a political accountability rationale ought to guide the arm-of-the-state inquiry. This rationale has been present in the Court's sovereign immunity jurisprudence generally but has yet to be substantially incorporated in the arm-of-the-state context. By assessing factors that evaluate the degree to which a state's interests sufficiently coincide with an entity's affairs as well as the degree to which a state exercises sufficient*

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<sup>†</sup> This Comment received the 2014 Myron Penn Laughlin Award for Excellence in Legal Research and Writing.

*control over an entity, courts may better gauge whether a given entity is politically accountable to the state. Thus, courts can ensure that government entities held to partake of their state's sovereign immunity likewise are accountable to the same democratic forces that justify and check states' own assertions of sovereign immunity. Incorporating such a rationale will more effectively preserve the integrity of the democratic process in our federal system.*

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## INTRODUCTION

What do a county sheriff, a public school district, and a state lottery commission all have in common? They are arms of the state and immune from suit under Eleventh Amendment state sovereign immunity<sup>1</sup> jurisprudence.<sup>2</sup> What else do a county sheriff, a public school district, and a state lottery commission all have in common? They are *not* arms of the state and therefore *not* immune from suit under Eleventh Amendment state sovereign immunity jurisprudence.<sup>3</sup> At first blush, such blatant contradiction seems puzzling to say the least; unfortunately a closer examination of the decisions applying this doctrine, rather than revealing nuance and sophistication, simply exposes a muddled mess.

Eleventh Amendment state sovereign immunity shields states from private suits for money damages in federal court or under federally-created claims unless a state voluntarily waives its immunity or Congress validly abrogates it. A doctrine has evolved whereby arms of the state—entities situated sufficiently close to the state so as to, in effect, be part of the state itself—are likewise immune.<sup>4</sup> Federal courts<sup>5</sup> have recognized various government entities as arms in their respective states, from state universities<sup>6</sup> and lottery

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<sup>1</sup> Unless otherwise noted, all uses of “sovereign immunity” or its variant in this Comment refer to Eleventh Amendment state sovereign immunity under the U.S. Constitution.

<sup>2</sup> *Manders v. Lee*, 338 F.3d 1304, 1328–29 (11th Cir. 2003) (en banc) (sheriff); *Wojcik v. Mass. State Lottery Comm’n*, 300 F.3d 92, 101 (1st Cir. 2002) (lottery commission); *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250–51 (9th Cir. 1992) (public school district).

<sup>3</sup> *Burrus v. State Lottery Comm’n*, 546 F.3d 417, 423 (7th Cir. 2008) (lottery commission); *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 598 (5th Cir. 2006) (public school district); *Abusaid v. Hillsborough Cnty. Bd. of Cnty. Comm’rs*, 405 F.3d 1298, 1304 (11th Cir. 2005) (sheriff).

<sup>4</sup> For a general discussion of the arm-of-the-state doctrine with a summary of each circuit test, see 17A JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 123.23[4] (3d ed. 2013).

<sup>5</sup> Unless otherwise noted, all references to “courts” in this Comment are to federal courts.

<sup>6</sup> *E.g.*, *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 10–11 (1st Cir. 2011).

commissions<sup>7</sup> to public school districts<sup>8</sup> and county sheriffs<sup>9</sup> or even government contractors<sup>10</sup> in rare instances,<sup>11</sup> but on the other end of the spectrum, courts consistently recognize that political subdivisions, such as cities and counties, are not arms of the state.<sup>12</sup> To determine whether an entity is an arm of the state, federal courts typically engage in fact-intensive, multifactor inquiries guided by various rationales.

Arm-of-the-state analysis is complicated by the fact that in recent decades, state and local government structures have evolved considerably. Increasingly specialized government entities offer a variety of public services beyond classic core governmental functions, and government has grown while simultaneously becoming more fragmented through privatization, revenue sharing, and decentralization.<sup>13</sup> These processes have produced a limitless variety of government entities, and when litigants sue such entities, courts must decide whether these entities are arms of the state.

The Supreme Court has never offered an authoritative, systematic framework or test for conducting this arms inquiry. The circuit courts have instead crafted widely divergent tests, incorporating different factors and considerations into their analyses. The Supreme Court has articulated a few rationales to guide lower courts, but even these rationales have proved ineffective in generating consistency or coherence among the lower courts.<sup>14</sup>

Missing from the jurisprudential and scholarly dialogue is any developed appreciation for the role democratic processes and political accountability ought to play in the arm-of-the-state context. The Court has endeavored to stress the importance of these mechanisms in its Eleventh Amendment jurisprudence generally, as both a justification for and a logical corollary of

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<sup>7</sup> *E.g.*, *Wojcik*, 300 F.3d at 96.

<sup>8</sup> *E.g.*, *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 249 (9th Cir. 1992).

<sup>9</sup> *Manders v. Lee*, 338 F.3d 1304, 1305–06 (11th Cir. 2003) (en banc).

<sup>10</sup> *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1309–10, 1313 (11th Cir. 2000).

<sup>11</sup> For a detailed sampling of entities federal courts have recognized as arms of the state as well as entities denied such immunity, see 13 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3524.2 & nn.67–68 (3d ed. 2014).

<sup>12</sup> *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890) (denying that state sovereign immunity should extend to counties as is the case with “any city, town, or other municipal corporation”); *N. Ins. Co. of N.Y. v. Chatham Cnty.*, 547 U.S. 189, 194–95 (2006) (confirming that counties are not entitled to sovereign immunity).

<sup>13</sup> See Joseph Beckham, *The Eleventh Amendment Revisited: Implications of Recent Supreme Court Interpretations on the Immunity of Public Colleges and Universities*, 27 STETSON L. REV. 141, 147 (1997).

<sup>14</sup> See *infra* Part I.

sovereign immunity, but the Court has only touched in passing on the importance of political accountability in its arm-of-the-state cases.

This Comment argues that federal courts should take political accountability seriously in the Eleventh Amendment arm-of-the-state context to ensure that those entities that are to be cloaked in the state's sovereign immunity are likewise subject to the same forces of political accountability to which the state is itself subject. Courts can do this by ensuring, first, that the state's interests sufficiently coincide with a given entity's affairs such that the statewide electorate would be in a position to care about the entity's conduct or policies, and second, that the state exercises the kind of control over an entity to be able to hold that entity accountable. Accordingly, courts should assess factors that meaningfully gauge these two elements and disregard those factors that do not.

Taking political accountability seriously in the arm-of-the-state context would not necessarily ensure uniformity in the circuits' tests—only an authoritative test handed down by the Supreme Court might accomplish that. Case law may still produce facially inconsistent results where a type of entity may be recognized as an arm in one state but not in another depending on the particularities of state law.<sup>15</sup> And unless the Court adopts a single bright-line rule, the arm-of-the-state inquiry will inevitably require judges to engage in fact-intensive analyses involving case-by-case judgment calls. But by taking political accountability seriously, courts can better avoid mistakenly conferring immunity on entities that lack close political ties with the state, lest they benefit from the state's sovereign immunity without the corresponding political accountability that otherwise holds the sovereign in check.

To make the case for political accountability in the arms context, Part I briefly surveys the development of the arm-of-the-state doctrine, showing how a doctrinal twist spiraled into jurisprudential contortion. Then, Part II pulls the jurisprudence apart, teasing out the weaknesses inherent in the twin animating rationales the Court intended to guide the doctrine in its application. After diagnosing the problem inherent to the existing framework, Part III suggests a solution: a political accountability rationale ought to be incorporated into arm-of-the-state jurisprudence to better ensure that those entities recognized as arms are likewise politically accountable to the state. Part IV suggests a possible framework that incorporates a political accountability rationale,

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<sup>15</sup> See *supra* notes 2–3 and accompanying text.

exploring which factors would be relevant in a reconceived arm-of-the-state test. In critique of present practices, Part V examines factors courts presently consider but that skew a political accountability-inspired arms analysis. Finally, Part VI puts this Comment's framework to the test, considering how such an analysis might stack up had it been applied in a recent case handed down by the Fifth Circuit, *United States ex rel. King v. University of Texas Health Science Center–Houston*.<sup>16</sup>

Though the plaintiff in that case appealed the Fifth Circuit's decision, requesting the Supreme Court to give desperately needed clarity to the arm-of-the-state doctrine,<sup>17</sup> the Court once again passed on an opportunity to do so.<sup>18</sup> It has been more than twenty years since the Court's last comprehensive foray into this jurisprudence,<sup>19</sup> and in light of the Court's recent decisions in other sovereign immunity contexts making it more difficult for private litigants to sue government entities, the arms doctrine is likely to be fertile ground for litigation in the years to come.<sup>20</sup> Accordingly, the time is ripe for courts to begin taking political accountability seriously in Eleventh Amendment arm-of-the-state jurisprudence.

## I. BACKGROUND: THE ENDURING ENIGMA OF THE ARM-OF-THE-STATE DOCTRINE

In general, the doctrine of sovereign immunity prevents the state from being sued against its will.<sup>21</sup> Current jurisprudence holds that states may be sued by other states or by the federal government but that states are immune from suit by all private litigants.<sup>22</sup> In addition, Eleventh Amendment immunity protects states from suit both in federal court and in their own state courts under federally created claims.<sup>23</sup> Courts have recognized a few exceptions though: private litigants may sue state officers for prospective injunctive relief

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<sup>16</sup> 544 F. App'x 490 (5th Cir. 2013), *cert denied*, 134 S. Ct. 1767 (2014).

<sup>17</sup> Petition for Writ of Certiorari at 28, *King*, 134 S. Ct. 1767 (No. 13-927), 2014 WL 411565.

<sup>18</sup> 134 S. Ct. 1767 (mem.).

<sup>19</sup> See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994).

<sup>20</sup> Roger C. Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323, 373 (2000).

<sup>21</sup> For a summary of Eleventh Amendment jurisprudence, see WRIGHT ET AL., *supra* note 11, § 3524.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Though the Eleventh Amendment enshrines the doctrine of sovereign immunity as applied to the states, historically courts have interpreted this immunity to be broader than the literal words of the Eleventh Amendment. *Id.*

under *Ex parte Young*,<sup>24</sup> and a court may find that a state's immunity has been waived or abrogated under narrow exceptions.<sup>25</sup> But for these few exceptions, states are generally immune from damages suits by private litigants both in federal court and under federally created claims.

The doctrine of state sovereign immunity serves various policy goals. Two such goals articulated by the Supreme Court include protection of state treasuries and protection of state sovereignty from the affront to a state's dignity that would result from being haled before a court against its will.<sup>26</sup> In addition to these explicit Court-articulated goals, commentators have argued that state sovereign immunity serves additional interests. The doctrine curbs judicial interference in state affairs, giving government officers greater discretion and allowing government to operate more efficiently.<sup>27</sup> Sovereign immunity can also further federalism principles by restricting Congress' powers vis-à-vis the states—the federal government is less able to create liabilities that bind state governments.<sup>28</sup> Finally, because the actions of elected government officials theoretically reflect the will of the people, sovereign immunity furthers the interests of popular sovereignty by protecting state majoritarian policy preferences.<sup>29</sup> Thus, courts and commentators alike have articulated a number of normative bases for why states ought to enjoy immunity from suit under federal law in our federal system.<sup>30</sup>

These state-minded policy interests can be implicated without a state's formally being named as a defendant in a suit. Accordingly, in 1977 the Supreme Court first recognized, in *Mt. Healthy City School District Board of Education v. Doyle*, that it may be appropriate to confer Eleventh Amendment immunity to “arm[s] of the State,” that is, to lesser government entities subordinate to the state.<sup>31</sup> The Court briefly considered whether a local public board of education in Ohio was entitled to state sovereign immunity in a suit by a fired school teacher.<sup>32</sup> In assessing “the nature of the entity created by

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<sup>24</sup> *Ex parte Young*, 209 U.S. 123 (1908); see also WRIGHT ET AL., *supra* note 11, § 3524.3.

<sup>25</sup> WRIGHT ET AL., *supra* note 11, § 3524.

<sup>26</sup> *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47–48 (1994).

<sup>27</sup> CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 153 (1972).

<sup>28</sup> JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 3–4 (2002).

<sup>29</sup> See JACOBS, *supra* note 27, at 152.

<sup>30</sup> For a legal and normative critique of the doctrine of sovereign immunity however, see Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

<sup>31</sup> 429 U.S. 274, 280 (1977).

<sup>32</sup> See *id.* at 281–83.



state law,” the Court considered several facts, or factors, pertaining to the county school board’s structure and relationship to the state.<sup>33</sup> Ultimately, the Court determined that the board was more like a political subdivision than an arm of the state and as such did not warrant being shielded by the state’s sovereign immunity.<sup>34</sup>

In one sense, the Court’s willingness to consider dismissing suit on sovereign immunity grounds even without the state’s formally being a defendant was not a new practice: the Court had long held that regardless of the named defendants, dismissal of a suit is proper where the state is nonetheless the real party in interest.<sup>35</sup> But in another sense, both the language and legal theory of *Mt. Healthy* made for a new twist. Prior cases where courts had found the state to be the real party in interest were cases in which the state itself—and its treasury—arguably was the intended target of the litigation.<sup>36</sup> In *Mt. Healthy*, though, the defending party was an entity with its own funds distinct from the state’s.<sup>37</sup> Thus, *Mt. Healthy* suggested the possibility that a lesser government entity might share such a close relationship with the state that such an entity ought to be cloaked in the state’s sovereign immunity so as to protect the state’s sovereign interests, even if the state’s treasury were not directly implicated.

While the basic rationale for conferring immunity upon arms of the state may seem intuitive, unfortunately, from its inception, the arm-of-the-state doctrine has lacked direction, coherence, and consistency. This has made possible the contradiction where a type of entity can be an arm of the state in one instance but not be an arm of the state in another instance, depending upon both the circuit test used and the applicable state laws governing the defendant

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 280–81. The Court considered the following to be relevant: Ohio law’s definition of “state” did not include local school districts, the school board was one of many boards that received guidance from the State Board of Education, the school board received substantial funding from the state, but the board also had the power to issue bonds and levy taxes. *Id.* at 280.

<sup>35</sup> *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (“[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.” (alteration in original) (quoting *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 464 (1945), *overruled on other grounds by Lapidus v. Bd. of Regents*, 535 U.S. 613 (2002))); *see also In re Ayers*, 123 U.S. 443, 488 (1887).

<sup>36</sup> *See* Jonathan W. Needle, Note, “*Arm of the State*” Analysis in Eleventh Amendment Jurisprudence, 6 REV. LITIG. 193, 207 (1987) (explaining that previous real-party-in-interest cases presented no arm-of-the-state question because any damage award would clearly have been paid from the state treasury).

<sup>37</sup> *Mt. Healthy*, 429 U.S. at 276, 280.

entity.<sup>38</sup> In the wake of *Mt. Healthy* and an analytically similar decision two years later, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,<sup>39</sup> commentators criticized the Court for failing to articulate a guiding rationale for the factor-based analyses used in its decisions.<sup>40</sup> In each case, the Court highlighted several traits of the entity in question, but the Court failed to indicate whether these traits constituted formal factors, whether its list of factors was exhaustive, or what such factors were intended to measure. To be fair, perhaps the Court did not intend to delineate a systematic framework for its arms doctrine in these cases, instead hoping lower courts would develop it. But if not, its decision to introduce a new legal concept without a guiding rationale or a normative definition against which other entities could be compared left courts with little guidance as they subsequently attempted to adapt their own arms tests to the Court's precedents.<sup>41</sup>

The Court finally articulated a guiding rationale for its arms doctrine in *Hess v. Port Authority Trans-Hudson Corp.*<sup>42</sup> In what has been the Court's most substantial arm-of-the-state case to date, the Court explained that "the Eleventh Amendment's twin reasons for being" are the protection of the states' treasury and dignity interests.<sup>43</sup> While the Court's incorporation of sovereign immunity rationales into the arms context was a welcome development, unfortunately, *Hess* raised more questions than it answered.

It is unclear, for example, how the twin reasons function analytically in the arms inquiry. Previous courts had considered a mix of factors in one analytical step to determine whether an entity was an arm of the state.<sup>44</sup> The *Hess* court, in contrast, appeared to consider the twin reasons as a second stage of analysis

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<sup>38</sup> See *supra* notes 2–3 and accompanying text.

<sup>39</sup> 440 U.S. 391 (1979). The Court determined that a bistate entity created jointly by California, Nevada, and Congress was not an arm of the state. *Id.* at 393, 401–02. The Court considered as relevant the legal description of the entity in the compact, the fact that a majority of the entity's governing members were locally appointed, the source of the entity's funding, whether the state was directly liable for judgments against the entity, whether the entity engaged in local or state functions, whether the entity's rulemaking power was subject to state veto, and California's attempt to sue the entity indicating a lack of state control over the entity. See *id.* at 401–02.

<sup>40</sup> E.g., 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, 1243 (1992); see also Needle, *supra* note 36, at 202–04.

<sup>41</sup> See Rogers, *supra* note 40, at 1243–44.

<sup>42</sup> 513 U.S. 30 (1994).

<sup>43</sup> See *id.* at 39–40, 47–48, 52.

<sup>44</sup> See *supra* notes 31–34, 38–41 and accompanying text.

after first considering various factors, which pointed in different directions.<sup>45</sup> This would seem to be the obvious reading at first blush,<sup>46</sup> but the Court then proceeded to reconsider several factors, suggesting that, rather than functioning as a second stage of analysis subsequent to and distinct from the initial factor-based analysis, the twin reasons instead are to function as a prism through which the factors should then be refracted.<sup>47</sup> If this is the correct analytic reading though, it is unclear what rationale should guide the initial factor analysis prior to consideration of the twin reasons. Protecting state treasury and dignity interests may be the basis for state sovereign immunity generally, but what is the normative basis for determining what an arm of the state is? What is the prototypical example of an arm of the state against which other entities can be compared, or are state arms inherently indefinable?<sup>48</sup>

So cryptic and confusing was *Hess* that shortly after the decision, one commentator predicted any existing lower court precedent could be made to fit within *Hess*'s precedent.<sup>49</sup> Circuit court decisions in the years since *Hess* have largely borne out this prediction. While some circuits have attempted to restructure their arms tests to conform to *Hess*'s analysis,<sup>50</sup> other circuits have merely read *Hess* as a gloss on their own precedents, insisting that *Hess*'s twin reasons implicitly pervade the arms tests and factors these circuits already use.<sup>51</sup> Even the circuits that have refashioned their arms tests in response to *Hess* have only done so facially, leaving their substantive analysis

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<sup>45</sup> See *Hess*, 513 U.S. at 44–48, 52 (considering such facts as which governing authority appointed the entity's commissioners, the degree of state veto power and control over the entity, the legal description of the entity in state case law and the legislation creating the entity, whether the entity's functions were state or local in character, and finally the entity's financial independence vis-à-vis the states' financial responsibility for the entity including whether the entity received state appropriations or generated its own funds).

<sup>46</sup> See, e.g., *Gorton v. Gettel*, 554 F.3d 60, 63–64 (2d Cir. 2009) (per curiam) (following this approach).

<sup>47</sup> See *Hess*, 513 U.S. at 47, 50 (reconsidering in light of the twin reasons the following: state control over the entity including appointment of commissioners and veto power, and the states' financial responsibility for the entity and the entity's financial independence).

<sup>48</sup> Professor Timothy Terrell has explained that, from a legal positivist perspective, an understanding of the central case of a given legal concept, including the defining features and traits that constitute the central case, is critical if one is to discern with any confidence whether any given instance fits within the respective legal concept. Timothy P. Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L. REV. 861, 865–68 (1982). The arm-of-the-state doctrine's lack of a clear central case has accordingly contributed to the incoherency and inconsistency of its doctrinal development.

<sup>49</sup> L. Pahl Zinn, Note, *Hess v. Port Authority Trans-Hudson Corporation: Erosion of the Eleventh Amendment*, 1995 DETROIT C.L. MICH. ST. U. L. REV. 1417, 1459.

<sup>50</sup> E.g., *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 12 (1st Cir. 2011) (explaining that the First Circuit had "relied primarily on the Court's decision in *Hess* to reformulate [its] analysis as a two-part inquiry whose steps reflected the Eleventh Amendment's twin concerns for the States' dignity and their financial solvency").

<sup>51</sup> E.g., *Cooper v. Se. Pa. Transp. Auth.*, 548 F.3d 296, 300–02 (3d Cir. 2008) ("Our approach is consistent with Supreme Court precedent . . .").

unchanged.<sup>52</sup> Given *Hess*'s failure to offer meaningful, systematic guidance in the arm-of-the-state context, lower courts have been left to their own devices to fashion their arms tests not simply in the years since *Hess*—rather, they have been on their own since the Court's first arms cases in the late 1970s.<sup>53</sup> Because these cases themselves failed to offer a coherent framework for discerning which entities qualify as arms of the state, it is no surprise the lower courts' tests are so widely divergent.<sup>54</sup> Given this lack of clarity or consistency in arm-of-the-state jurisprudence, one court has even admitted, "The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused."<sup>55</sup>

Calling the arm-of-the-state doctrine "confused" is generous; one commentator has instead characterized the doctrine as being in a complete state of disarray.<sup>56</sup> The decades since *Mt. Healthy* have produced the following: four Supreme Court sample case analyses, none of which purport to offer a systematic arm-of-the-state test or a formalized list of factors; two competing Eleventh Amendment rationales intended to guide the factor analysis; twelve very different circuit court tests, each with their own twists, measuring a litany of factors that vary by circuit; and scores of lower court precedents classifying a limitless variety of entities as arms of their respective states shielded with

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<sup>52</sup> *E.g., Irizarry-Mora*, 647 F.3d at 12 ("[T]he 'reshaping' of our law did not represent an actual change in the substance of the analysis.").

<sup>53</sup> *Regents of the University of California v. Doe* also concerned the arm-of-the-state doctrine, but this case concerned one narrow question pertaining to the Court's framework rather than offering a comprehensive analysis of the test as a whole as *Hess* did. *See* 519 U.S. 425, 426 (1997).

<sup>54</sup> *See* MOORE ET AL., *supra* note 4, § 123.23[4][b][iv]; *see also* *Tucker v. Williams*, 682 F.3d 654, 659 (7th Cir. 2012) (considering "(1) the extent of the entity's financial autonomy from the state" wherein the court considers (a) "the extent of state funding," (b) "the state's oversight and control of the entity's fiscal affairs," (c) "the entity's ability to raise funds independently," (d) "whether the state taxes the entity," and (e) "whether a judgment against the entity would result in the state increasing its appropriations to the entity"; and "(2) the 'general legal status' of the entity" (quoting *Kashani v. Purdue Univ.*, 813 F.2d 843, 845–47 (7th Cir. 1987))); *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 760 (6th Cir. 2010) (considering "(1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government" (quoting *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005))); *Del Campo v. Kennedy*, 517 F.3d 1070, 1077 (9th Cir. 2008) (considering "(1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity" (quoting *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 353 F.3d 1140, 1147 (9th Cir. 2004)) (internal quotation marks omitted)).

<sup>55</sup> *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996).

<sup>56</sup> *Rogers*, *supra* note 40, at 1296.

their state's sovereign immunity, or else not, with outcomes varying not only circuit by circuit but state by state within a given circuit.<sup>57</sup>

In responding to the disarray, instead of taking the present framework as a given, this Comment pulls it apart and identifies how the present framework has failed. While not purporting to offer a single definitive, infallible test, this Comment simply suggests how arm-of-the-state jurisprudence might be set on the right track by incorporating a rationale that has hitherto largely been ignored. To begin that discussion, this Comment first explores the inherent flaws of the current arm-of-the-state jurisprudential framework.

## II. PULLING APART THE ARMS (DOCTRINE): WHY *HESS*'S TWIN REASONS ARE INCOMPLETE

Before examining how the underlying rationale for the arm-of-the-state doctrine might be reconceived, this Comment first considers the current doctrinal framework's flaws. In doing so, this Comment shows that while *Hess*'s twin reasons perhaps may form an adequate basis for Eleventh Amendment sovereign immunity generally, the twin-reasons framework is nonetheless inadequate in the application of the arm-of-the-state doctrine itself.

### A. *Reason One: Protecting the State's Treasury—Direct Blows, Ripple Effects, and All Shades in Between*

Before *Mt. Healthy* introduced the modern arm-of-the-state doctrine, federal courts had long barred suit where the court found a state to be the real party in interest in the litigation. Since the state is ordinarily immune from suit under the Eleventh Amendment, clever litigants might attempt to work around this obstacle by naming another individual or entity as the defendant rather than the state itself.<sup>58</sup> In such cases where a monetary judgment would nonetheless inevitably draw from the state treasury, courts blocked these suits as well.<sup>59</sup> Typically, these real-party-in-interest suits named state government officials as the defendants,<sup>60</sup> but sometimes the defendant might be a

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<sup>57</sup> MOORE ET AL., *supra* note 4, § 123.23[4]; WRIGHT ET AL., *supra* note 11, at 3524.2.

<sup>58</sup> See *Edelman v. Jordan*, 415 U.S. 651, 664–65 (1974).

<sup>59</sup> *Id.*

<sup>60</sup> *E.g.*, *id.* at 653; see also *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 460, 463–64 (1945) (naming as defendants, in addition to a state entity, the individuals that constituted the entity's executive board), *overruled on other grounds by* *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002).

government entity instead.<sup>61</sup> Not all suits targeting the state were barred, though. Where a private litigant sued a state officer in his official capacity for injunctive relief, which effectively is still a suit against the state, courts held such suits did not run afoul of the Eleventh Amendment.<sup>62</sup>

The basis for differentiating between injunctive and damages suits against a state might seem unclear at first blush, but such differentiation is consistent with the historic basis for the Eleventh Amendment. After the Supreme Court interpreted Article III of the Constitution to permit a citizen of one state to bring a suit for damages against another state in *Chisholm v. Georgia*,<sup>63</sup> Congress enacted and the states ratified the Eleventh Amendment, which bars federal courts from hearing suits “against one of the United States by Citizens of another State.”<sup>64</sup> *Chisholm* was decided in 1793 when many states found themselves grappling with Revolutionary War debt, and many lawmakers feared that, as had the plaintiff in *Chisholm*, more creditors would sue cash-strapped state governments to collect on war debts.<sup>65</sup> This historic context led Justice Ginsburg to conclude in *Hess* that the primary purpose of state sovereign immunity as embodied in the Eleventh Amendment is to protect state treasuries—and taxpayer dollars—from monetary judgments so that states might be able to administer their financial affairs without the insolvency risk that private suits threaten.<sup>66</sup> Under this reading, the evil to be avoided under the Eleventh Amendment is not the possibility of any and all suits against states by private litigants but rather suits for damages.<sup>67</sup>

This narrative would appear to provide the conceptual basis for the arm-of-the-state doctrine. While not explicitly using real-party-in-interest phraseology itself, the *Mt. Healthy* Court cited to a line of cases where an

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<sup>61</sup> E.g., *State Highway Comm’n v. Utah Constr. Co.*, 278 U.S. 194, 196, 200 (1929); *Lincoln Cnty. v. Luning*, 133 U.S. 529, 529–30 (1890).

<sup>62</sup> E.g., *Ex parte Young*, 209 U.S. 123, 155–56, 159 (1908); see also WRIGHT ET AL., *supra* note 11, § 3524.3 (discussing the *Ex parte Young* doctrine). The *Ex parte Young* doctrine does permit prospective enforcement of federal law against a state that may result in monetary expenditures from the state, but such expenditures are considered to have only an ancillary rather than a direct effect on the treasury. WRIGHT ET AL., *supra* note 11, § 3524.3.

<sup>63</sup> 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

<sup>64</sup> U.S. CONST. amend. XI. For a discussion of *Chisholm* and its historic backdrop, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1045–63 (1983).

<sup>65</sup> MOORE ET AL., *supra* note 4, § 123.04[2]; see also ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 2.10.1, at 190–91 (4th ed. 2011).

<sup>66</sup> *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (“[T]he impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State’s treasury.”).

<sup>67</sup> See CHEREMINSKY, *supra* note 65, § 2.10.1, at 190–91.

effort to protect the state from monetary judgments was the controlling rationale.<sup>68</sup> While *Mt. Healthy* and its progeny began to consider a variety of nonfinancial liability factors,<sup>69</sup> the protection of state treasuries persisted as the dominant rationale in the Court's four arm-of-the-state cases.<sup>70</sup> Accordingly, for decades lower courts have assigned the most weight in their arms analyses to factors that tracked the treasury-protection rationale.<sup>71</sup> Conceptually, analysis under the arm-of-the-state doctrine would appear to be straightforward: if, in a suit against a government entity, a court finds the state to be the real party in interest and on the hook to pay the resulting judgment, then a conferral of the state's immunity upon that entity is warranted, but otherwise not.

But there are two problems with making a real-party-in-interest analysis dispositive. First, whether the state would be the real party in interest in a suit against a given entity is not necessarily an either-or calculation. When a government entity is sued, the closeness of the relationship between the particular entity and the state affects how financially implicated the state's treasury would be in the event of a judgment.<sup>72</sup> Focusing only on the narrow question of whether the state would directly pay for a judgment against an entity<sup>73</sup> ignores other ways in which a state nonetheless might be on the hook. If a state were required by its own laws to cover an entity's general budgetary shortfalls, then a judgment against that entity would indirectly require the state to pay such a judgment via increased appropriations to that entity.<sup>74</sup> Or, if the state were required to cover an entity's shortfalls as a result of only certain kinds of legal harms, a judgment against that entity in a suit for which the state was not responsible might financially weaken the entity, making it more reliant

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<sup>68</sup> *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (citing, *inter alia*, *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 460 (1945), *overruled on other grounds by Lapidus v. Bd. of Regents*, 535 U.S. 613 (2002); *Lincoln Cnty. v. Luning*, 133 U.S. 529 (1890)).

<sup>69</sup> See *Needle*, *supra* note 36, at 203.

<sup>70</sup> See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997); *Hess*, 513 U.S. at 48; *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400–01 (1979); see also cases cited *supra* note 68.

<sup>71</sup> MOORE ET AL., *supra* note 4, § 123.23[4][b][ii] n.51 (ten circuits).

<sup>72</sup> See *Rogers*, *supra* note 40, at 1291–96.

<sup>73</sup> *E.g.*, *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 233–34 (3d Cir. 2006).

<sup>74</sup> See, *e.g.*, *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1184–85 (9th Cir. 2003) (finding this fact as a basis for conferring immunity to an entity).

on the state in future suits for which the state would be responsible.<sup>75</sup> Even if the state were not legally required to cover an entity's budgetary shortfalls, if the statutory scheme nonetheless anticipated that as a matter of expected process, such an entity would turn to the state for financial support, we might still consider the state legally responsible for the entity's finances.<sup>76</sup>

There are yet other ways in which a state might be financially implicated by a suit against a lesser entity. Under a broader definition of state funding that includes appropriations that an entity receives from the state<sup>77</sup> or revenue that an entity is permitted to generate itself under a legal grant of authority from the state<sup>78</sup>—such as assessments, user fees, or revenue bonds<sup>79</sup>—one might consider the state to be legally responsible for a judgment against an entity, even though the state treasury expends nothing itself, because these other state-authorized generated revenues would pay the judgment.<sup>80</sup> Or, if an entity ordinarily contributed money to the state's treasury rather than only received it, then even though such an entity could likely afford a judgment, such a judgment against that entity would still result in less revenue for the state, thereby implicating the state treasury.<sup>81</sup> In all of these situations, a state's

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<sup>75</sup> See, e.g., *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 878–80 (D.C. Cir. 2008) (conferring immunity to entity because Puerto Rico would be legally liable for certain kinds of tort suits against an entity even if not for the particular statutory-based suit at hand).

<sup>76</sup> Compare *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 381 (9th Cir. 1993) (finding state law to anticipate that an entity would seek additional funding from the state in the event of a monetary judgment and holding this fact to support a conferral of immunity to the entity), with *Holz*, 347 F.3d at 1185 (“[T]he fact that the state may ultimately *volunteer* to pay the judgment . . . is immaterial; the question is whether the state treasury is legally obligated.” (second alteration in original) (quoting *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1425 n.3 (9th Cir. 1991))) (internal quotation marks omitted).

<sup>77</sup> E.g., *Raj v. La. State Univ.*, 714 F.3d 322, 329 (5th Cir. 2013) (noting as relevant to the arms inquiry that an entity received state funds and would pay judgments against it using those state funds). Compare *Holz*, 347 F.3d at 1182–85 (denying immunity to an entity whose budget was 98% state funds), with *Manders v. Lee*, 338 F.3d 1304, 1323 (11th Cir. 2003) (en banc) (conferring immunity to an entity even though its reliance on state funding was minimal).

<sup>78</sup> Compare *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1255 (10th Cir. 2007) (noting that although an entity raised its own funds, these funds were raised under authority of state law and defined as state funds by state law, and were accordingly state funds), with *Beentjes v. Placer Cnty. Air Pollution Control Dist.*, 397 F.3d 775, 779 (9th Cir. 2005) (noting that funds raised by an entity by authority of state law nonetheless did not constitute state funds).

<sup>79</sup> See DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 282–87, 326–29, 331, 370–71, 418–21, 446–48 (7th ed. 2010) (discussing various forms of state and local government finance mechanisms).

<sup>80</sup> See cases cited *supra* notes 77–78.

<sup>81</sup> Compare *Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 99 (1st Cir. 2002) (conferring immunity to a state lottery commission that contributed rather than received money from the state), with *Burrus v. State Lottery Comm'n*, 546 F.3d 417, 420 (7th Cir. 2008) (declining to confer immunity to state lottery commission that contributed rather than received money from the state).



treasury may be practically implicated as a result of a judgment. But even if we only consider as relevant whether a state is legally responsible (as opposed to practically responsible) for a judgment imposed against an entity, a wide conception of legal responsibility may implicate a state treasury to various degrees.<sup>82</sup> Yet, even if we say that a state's treasury is implicated in some sense, albeit via ripple effect, the more attenuated the treasury's being implicated, the more we might doubt that a particular entity ought to be cloaked in immunity.

But there is a second and more significant problem with basing an entity's arm status solely on a real-party-in-interest assessment, and this problem has nothing to do with money. There may be instances where the state's treasury is assuredly implicated in a suit against a given entity, but the entity's structural relationship vis-à-vis the state is so attenuated that the state is unable to meaningfully hold the entity accountable for the conduct that led to the lawsuit. If the state lacks direct control and oversight over a given entity, then even though the state's financial interests clearly may be implicated in a suit against that entity, the state may not be able to meaningfully hold the entity politically accountable so as to prospectively remedy the entity's offending conduct.<sup>83</sup> Thus, an entity's lack of political accountability vis-à-vis the state should be a basis for denying immunity to an entity even though the state is found to be the real party in interest.

### *B. Reason Two: Protecting the State's Dignity—Whatever that Means*

The discussion up to this point presupposes that the treasury-protection rationale—championed by *Hess*—is the normative basis for Eleventh

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<sup>82</sup> See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994) (“[I]s 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.”). In *Regents of the University of California v. Doe*, the Court noted that where the state was legally but not practically liable for an entity, then Eleventh Amendment sovereign immunity still applied because “it is the entity’s potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant.” 519 U.S. 425, 431 (1997). Some courts have read *Regents* to mean that legal liability but not practical liability matters in the analysis, e.g., *Cooper v. Se. Pa. Transp. Auth.*, 548 F.3d 296, 304 (3d Cir. 2008), and other courts sometimes seem to be willing to reach to find legal liability when only practical liability is apparent, see, e.g., *Holz*, 347 F.3d at 1184–85 (discussing a previous case in which the court considered the high economic value of an entity as a basis for finding the entity performed a “central government function”). While *Regents* may have foreclosed practical liability as a viable basis for Eleventh Amendment immunity, courts have construed legal liability to mean a number of different things beyond a literal reading that the state must be on the hook to directly pay the specific judgment against a given entity.

<sup>83</sup> See discussion *infra* Part IV.C.

Amendment sovereign immunity, let alone the arm-of-the-state doctrine, but many jurists and scholars debate that premise. There may be other normative values that sovereign immunity protects aside from the state's financial integrity. A competing historic and theoretical reading of Eleventh Amendment sovereign immunity is that such immunity is intended to protect the states from suits in general, lest their sovereign dignity be affronted.<sup>84</sup> The Court acknowledged this second rationale in *Hess*,<sup>85</sup> and since *Hess* the Court has increasingly emphasized the dignity-protection rationale in the Eleventh Amendment context, culminating in *Federal Maritime Commission v. South Carolina State Ports Authority*, in which the Court declared that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>86</sup> While the Court has yet to make this shift in emphasis explicit in its own arm-of-the-state jurisprudence,<sup>87</sup> some lower courts have nevertheless taken a cue from *Federal Maritime* by reducing the weight of factors that measure the degree of state treasury implication relative to the other factors these courts consider in their arms analyses.<sup>88</sup> The Supreme Court's willingness to consider nonfinancial factors in its early arm-of-the-state cases further supports the claim that the arm-of-the-state doctrine was never understood to protect only a state's financial interests.<sup>89</sup>

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<sup>84</sup> See Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003) (discussing the ascendancy of state dignity as a dominant theme in the Supreme Court's Eleventh Amendment sovereign immunity jurisprudence).

<sup>85</sup> 513 U.S. at 47.

<sup>86</sup> 535 U.S. 743, 760 (2002). While some early Supreme Court jurists argued that protecting state dignity was the theoretical basis for Eleventh Amendment immunity, Chief Justice John Marshall flatly rejected this argument, and Marshall's position dominated the Court's jurisprudence until the early 1990s when the Court resurrected the dignity rationale. See Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777, 799–806 (2003) (critiquing the Court for reviving the dignity rationale on historical and doctrinal grounds); see also Corey Brettschneider & David McNamee, *Sovereign and State: A Democratic Theory of Sovereign Immunity*, 93 TEX. L. REV. (forthcoming May 2015) (manuscript at 14–18), available at <http://ssrn.com/abstract=2387666> (critiquing the dignity-protection rationale as a basis for the Court's sovereign immunity jurisprudence).

<sup>87</sup> Justice O'Connor favored placing greater emphasis on the dignity-protection rationale in *Hess*—what she referred to as the states' sovereignty interest—but her opinion failed to garner majority support. See *Hess*, 513 U.S. at 59–62 (O'Connor, J., dissenting).

<sup>88</sup> See, e.g., *Benn v. First Judicial Dist.*, 426 F.3d 233, 239–40 (3d Cir. 2005) (noting that the financial-liability factor was relegated from the status as primary to the status as co-equal with other factors post-*Federal Maritime Commission*). But see, e.g., *Town of Smyrna v. Mun. Gas Auth.*, 723 F.3d 640, 651 (6th Cir. 2013) (noting that vulnerability of the state's coffers is still the most salient issue).

<sup>89</sup> *Needle*, *supra* note 36, at 221 (“[I]f the ‘who pays the judgment’ question has such power over ‘arm of the State’ analysis, then it cannot be understood as merely one of several factors . . . . If this question has such overriding force, there is really no balance at all.”).

But even if we concede that the dignity-protection rationale is the proper basis for sovereign immunity generally, or the arm-of-the-state doctrine specifically, and even if we were to decide that it may be appropriate to extend the state's immunity to certain entities even where the state's treasury is not implicated at all,<sup>90</sup> nonetheless, the dignity-protection rationale is an unhelpful guide in arm-of-the-state analyses. Whereas the effort to assess state treasury implication is at least empirically verifiable—we can measure whether the state will directly or indirectly be forced to pay a judgment—the effort to assess potential affront to a state's dignity is not.

If we consider the various factors courts consider in their arms analyses, we could simply decide that whereas financial factors track the treasury-protection rationale, nonfinancial factors as a matter of definition track the dignity-protection rationale.<sup>91</sup> Or, we could decide that all of the factors courts consider, financial and nonfinancial alike, measure whether a state's dignity would be affronted by suit against a given entity.<sup>92</sup> Indeed, courts have done both in their arms analyses.<sup>93</sup> But such reasoning presupposes that the present factors courts use actually measure the degree of affront to a state's dignity. Such reasoning is conclusory. As a consequence of courts' moves to map the dignity-protection rationale onto their preexisting arms tests post hoc, such a rationale merely serves as a rubber stamp for the analyses that courts already employ rather than as an operational guide that prescribes which factors will empirically lead courts to the right result. Ultimately "state dignity is difficult to translate into an operational legal standard,"<sup>94</sup> making it unhelpful as a basis for the arms framework.

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<sup>90</sup> *E.g.*, *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 761–62 (6th Cir. 2010).

<sup>91</sup> The Fourth Circuit has declared three factors to be determinative in evaluating the dignity-protection rationale, all factors which it likewise considered pre-*Hess*. *Compare* *Kitchen v. Upshaw*, 286 F.3d 179, 184 (4th Cir. 2002) (noting "1) the degree of control that the State exercises over the entity; 2) whether the entity deals with local rather than statewide concerns; and 3) 'the manner in which State law treats the entity'" (quoting *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001))), with *Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 457–58 (4th Cir. 1987) (same). Similarly, the First Circuit has designated the nonfinancial factors it used previously as tracking the dignity-protection rationale in its refashioned two-prong arms test, which reflects *Hess*'s twin reasons. *See Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 12–13 & n.3 (1st Cir. 2011).

<sup>92</sup> The Third Circuit insists that a concern for the state's dignity serves as a backdrop for all the factors of its arms test, financial and nonfinancial factors alike. *Cooper v. Se. Pa. Trans. Auth.*, 548 F.3d 296, 302 (3d Cir. 2008).

<sup>93</sup> *See* cases cited *supra* notes 91–92.

<sup>94</sup> *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 769 (7th Cir. 2005).

Further, as with the treasury-protection rationale, there is a second problem with basing an entity's arm status solely on whether a state's dignity might be affronted, a problem that has nothing to do with dignity. Even if we decide that a state's dignity would be affronted by a suit against a given entity, if there are not mechanisms presently in place that allow a state to hold the particular entity accountable for its conduct or policies, then the entity may well continue to violate the rights of private parties without any repercussion. The dignity-protection rationale, if state dignity is conceived in the abstract, may serve as a basis for conferring the state's immunity upon entities that are not politically accountable to the state.

*C. The Twin Reasons' Twin Problems: Flawed Theory Produces Flawed Application*

Not only is the *Hess* twin-reasons framework problematic in theory, but as lower courts have applied the framework, it has produced results that seem at odds with *Mt. Healthy*'s original arm-of-the-state versus political subdivision dichotomy.<sup>95</sup> Presumably, *Hess* can explain why a political subdivision like a city or county should not be considered an arm of the state: one would expect that a city's finances would be wholly distinct from the state's finances,<sup>96</sup> and presumably a state's dignity would not be affronted should a city government be sued.<sup>97</sup> Hence, a conferral of the state's immunity on such local entities would be unwarranted.

Yet the Eleventh Circuit has appeared to do what the Supreme Court has refused to do by extending sovereign immunity protection to county health departments and county sheriffs.<sup>98</sup> In the case of county-level entities, given the Supreme Court's clear precedents that a county is not an arm of the state, intuitively it would seem that neither would a county health department nor a sheriff be an arm, yet the Eleventh Circuit has held otherwise. To be fair, the Eleventh Circuit has not held these entities to be immune from suit as a matter of permanent status but rather conducts its arms analysis on a

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<sup>95</sup> See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

<sup>96</sup> Though if a city were to receive substantial subsidies from the state, such a fact would appear to warrant a conferral of immunity under the *Hess* framework.

<sup>97</sup> Though, one could argue that a state's sovereign dignity would be affronted were a city to be sued since cities derive their existence from the state and exercise those powers that the state delegates to them. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

<sup>98</sup> *Ross v. Jefferson Cnty. Dep't of Health*, 701 F.3d 655, 657 (11th Cir. 2012) (per curiam) (county health departments in Alabama); *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (en banc) (county sheriffs in Georgia).

function-by-function basis, making an entity's immunity context specific.<sup>99</sup> This reasoning would warrant a conferral of sovereign immunity on political subdivisions only in certain contexts, but the Supreme Court has appeared to insist that political subdivisions are precluded from sovereign immunity categorically.<sup>100</sup> At least within some courts, though, county-level entities can be considered arms of the state. Thus in some cases, it seems the arm-of-the-state doctrine has morphed into a fingertip-of-the-state doctrine.

At the other extreme, the Seventh Circuit has held that a state lottery commission was not an arm of the state.<sup>101</sup> The State Lottery Commission of Indiana produces substantial revenue for the state (rather than receiving state revenue), and presumably the commission was equipped to pay a monetary judgment itself rather than having to pass a judgment off to the state.<sup>102</sup> But again, intuitively it would seem that a *state* commission created by *state* law exercising a function *statewide* on behalf of the *state* would be an arm of the *state*. In a case like this, the arm-of-the-state doctrine has become more of a shoulder-of-the-state doctrine.

Without teasing out these two examples, it should at least be evident that such results are not intuitive. A county sheriff or health department certainly seems to occupy the political-subdivision category as *Mt. Healthy* frames it, and a state commission would seem to occupy the arm category as a state agency. What should be clear is that the *Hess* framework, whether in theory or in application, is and has been problematic.

To avoid these inherent problems, before courts recognize an entity as an arm of the state, they should be confident that such an entity is politically accountable to the state, lest there be no possibility of a check against its assertion of sovereign immunity. Accordingly, a political-accountability

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<sup>99</sup> See *Manders*, 338 F.3d at 1308. *But see* P.R. Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 873 (D.C. Cir. 2008) (“[O]nce an entity is determined to be an arm of the State under the three-factor test, that conclusion applies unless and until there are relevant changes in the state law governing the entity.”).

<sup>100</sup> See cases cited *supra* note 12.

<sup>101</sup> *Burrus v. State Lottery Comm'n*, 546 F.3d 417, 417–18 (7th Cir. 2008).

<sup>102</sup> *Id.* at 418. In so concluding, the Seventh Circuit appealed to language in *Hess* demanding that revenue-generating entities with no financial reliance on the state not be considered immune under the Eleventh Amendment. *Id.* at 420. Dissenting in *Hess*, Justice O'Connor was willing to consider additional considerations beyond just the treasury concern as sufficient bases for a conferral of sovereign immunity, and given the conservative shift in the Court since *Hess* was decided, it is not clear that today the Court would consider an entity's revenue generation for the state as determinative in warranting a denial of immunity to an entity like the State Lottery Commission of Indiana. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 60–61 (1994) (O'Connor, J., dissenting).

rationale needs to be incorporated into the arm-of-the-state doctrine. But is there any jurisprudential warrant for courts to do so? In short, yes there is. Part III demonstrates that the doctrinal foundation already exists for such an analytic move; courts simply need to take the plunge.

### III. CONNECTING THE DOTS OF POLITICAL ACCOUNTABILITY: FROM ELEVENTH AMENDMENT JURISPRUDENCE GENERALLY TO THE ARM-OF-THE-STATE DOCTRINE SPECIFICALLY

This Part first discusses the important role democratic process and political accountability play in the Supreme Court's sovereign immunity jurisprudence generally. Then, this Part examines the doctrinal basis for inferring a political accountability rationale from the Court's own arm-of-the-state jurisprudence.

#### *A. Political Process in Sovereign Immunity Jurisprudence*

As noted at the outset, the doctrine of sovereign immunity serves several policy objectives, including protection of the state's treasury and dignity, ensuring the separation of powers, and promoting government efficiency.<sup>103</sup> Also noted at the outset is that sovereign immunity can be understood to promote democratic processes as well.<sup>104</sup> When we talk about the state, we are not referring to some abstract entity but rather the citizens that comprise the state.<sup>105</sup> These citizens comprise the state electorate, and the electorate collectively chooses its state lawmakers, who are responsible for passing laws, approving budgets, and appointing heads to a variety of state agencies. One function at the core of democratic governance is the allocation of the citizens' limited tax dollars through various appropriations. The electorate, operating through the state, may decide to allocate funds so as to permit their courts to grant relief to private parties harmed by the state.<sup>106</sup> If so, the state may decide to waive its sovereign immunity either in part or in whole so as to honor the claims of litigants.<sup>107</sup> But if the electorate opts to allocate its limited tax resources for other purposes, the state may instead decide to preserve its immunity—perhaps resulting in lower taxes.<sup>108</sup> This option is likewise

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<sup>103</sup> See *supra* text accompanying notes 26–28.

<sup>104</sup> J. Brian King, Note, *The State Political Processes Theory of the 11th Amendment*, 19 REV. LITIG. 355, 356 (2000) (“[S]tate sovereign immunity is the product of a democracy at work.”).

<sup>105</sup> See *id.* at 363.

<sup>106</sup> See *id.* at 360.

<sup>107</sup> Most states have waived immunity in some contexts. *Id.* at 359 & n.15.

<sup>108</sup> See *id.* at 360.

available to the state, in which case private litigation, if permitted by the courts, would force public payments in an undemocratic manner.<sup>109</sup>

The obvious objection to sovereign immunity is that it allows for the violation of individual rights.<sup>110</sup> If a state cannot be forced to answer for its conduct unless it consents to suit, then likewise a state need not respect the rights of its citizens unless it decides to do so.<sup>111</sup> But a preference for sovereign immunity implies that we necessarily tolerate the occasional violation of individual rights in exchange for the policy benefits sovereign immunity provides.<sup>112</sup> Thus sovereign immunity amounts to a macro policy preference.<sup>113</sup>

If, in spite of the policy advantages discussed above, the doctrine of sovereign immunity still gives us pause, fortunately there is a natural check built into the system—the check of political accountability. As Professor Harold Krent has argued, sovereign immunity gives the government the freedom to pursue policies consistent with democratic majoritarian interests, but this power is then counterbalanced by the political pressure those same democratic majorities can exert on lawmakers should the government abuse its policy discretion.<sup>114</sup> Thus, if the government, through its elected officials or otherwise, engages in behavior or pursues policies that have the effect of violating individual rights, to the extent that the people disapprove, they can check the government at the ballot box by electing new officials who will

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<sup>109</sup> Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 790 (2008) (arguing that private litigation "allocates public funds in a way that is primarily determined by the judiciary, not the democratic process, making it more difficult to abide by the principle of majoritarian rule and to maintain the proper boundaries needed to establish separation of powers"); Brettschneider & McNamee, *supra* note 86 (manuscript at 7) ("Retention of the power of the purse requires immunity from suits that could bankrupt or imperil states from pursuing ends decided upon by the people.").

<sup>110</sup> CHRISTOPHER SHORTELL, RIGHTS, REMEDIES, AND THE IMPACT OF STATE SOVEREIGN IMMUNITY 161–62 (2008).

<sup>111</sup> See Chemerinsky, *supra* note 30, at 1213–15.

<sup>112</sup> See Lauren Villa, Note, *Public Service, Private Entity: Should the Nature of the Service or Entity Be Controlling on Issues of Sovereign Immunity?*, 78 ST. JOHN'S L. REV. 1257, 1257 (2004) ("When the cost of exposure to unlimited liability outweighs the benefits of accountability, the government's ability to continue public services is placed in jeopardy. Sovereign immunity serves to protect the public by ensuring the continued availability of essential public services.").

<sup>113</sup> Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 905–06 (2010) (explaining that sovereign immunity reflects a concern for separation of powers and majoritarian rule rather than a notion that the state is intrinsically infallible).

<sup>114</sup> Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1531 (1992); see also Brettschneider & McNamee, *supra* note 86 (articulating a democratic theory that accounts for and justifies sovereign immunity).

cease such behavior or change such policies.<sup>115</sup> This remedy may provide no consolation to individuals whose rights have been violated, and it does little to cure retrospective wrongs, but as a polity we make these sacrifices for the resource-allocation freedom we otherwise gain.<sup>116</sup> Given this arrangement, the possibility of political accountability can be the only counterbalancing check against inequitable applications of sovereign immunity.<sup>117</sup>

And this check actually works. Exercises of political accountability often follow in the wake of states' assertions of sovereign immunity to produce reforms that prospectively vindicate individual rights. A particularly good example of this is the aftermath of the Supreme Court's landmark decision in *Alden v. Maine*, which held that a group of state probation officers seeking federally mandated overtime wages could not sue the state of Maine in state court without its consent.<sup>118</sup> The officers' labor union waged a lengthy lobbying campaign, and their efforts culminated in state legislation granting partial remuneration to the officers and future wage protections for government employees, but more significantly, the new law waived Maine's sovereign immunity in future wage dispute suits.<sup>119</sup>

Exercises of political accountability are not guaranteed to follow, of course. A private party's ability to vindicate her rights via extrajudicial means is most likely to succeed if she has access to resources and if the underlying cause is backed by political support.<sup>120</sup> This means that the rights of weaker plaintiffs with access to fewer resources and whose causes are not politically sympathetic will likely fail to be vindicated in the face of a state's assertion of sovereign immunity.<sup>121</sup> Additionally, "situation-specific" conduct by government agents—such as an instance of a government physician's negligence—is also unlikely to be checked by the political process because such conduct does not stem from and pertain to purposeful policymaking.<sup>122</sup> But the point of the political-accountability check to sovereign immunity is not that every harmed party will be vindicated but rather that the possibility of

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<sup>115</sup> See Krent, *supra* note 114, at 1535 ("The only check on these actions is at the ballot box.").

<sup>116</sup> See *id.* at 1531 n.5.

<sup>117</sup> Sisk, *supra* note 113, at 900–01 ("When people do suffer significant harm as a result of policy choices made within constitutional bounds by the government, the remedy lies in democratic governance.").

<sup>118</sup> See *Alden v. Maine*, 527 U.S. 706 (1999); see also SHORTELL, *supra* note 110, at 132–36.

<sup>119</sup> See SHORTELL, *supra* note 110, at 132–37; see also *id.* at 80–81, 110–12 (discussing additional examples where exercises of political accountability followed states' assertions of sovereign immunity).

<sup>120</sup> See *id.* at 157.

<sup>121</sup> See *id.*

<sup>122</sup> Krent, *supra* note 114, at 1532.



vindication via the political process exists. The electorate may well express a tacit policy preference for permitting certain rights violations to go unremedied so as to preserve the state fisc; the doctrine of sovereign immunity simply allows the majority to select such risk in exchange for reduced public costs if it so chooses.

The proposition that sovereign immunity and political accountability are two sides of the same coin is certainly not a new one—the Supreme Court has been echoing this point for years.<sup>123</sup> In the Court’s first case to articulate a broader conception of state sovereign immunity than that suggested by the literal words of the Eleventh Amendment, the Court in *Hans v. Louisiana* stressed that it was the legislature’s prerogative to represent the state’s “polity and its will . . . to preserve justice and judgment, and to hold inviolate the public obligations.”<sup>124</sup> Those who have suffered purported harms are not without recourse; they simply must seek relief from the politically accountable legislature rather than from the politically insulated courts. The Court was even more emphatic about the interplay of sovereign immunity and political process in *Alden v. Maine*.<sup>125</sup> Holding for the first time that a state could not be compelled to answer in its own courts for a federally-created claim,<sup>126</sup> the Court explained that “private suits for money damages . . . place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens.”<sup>127</sup> Since public financial resources are scarce, the decision of how to spend those limited resources, whether to satisfy judgments or to pay for the myriad of other public expenses facing the state, should be left to the political process rather than to the courts to decide.<sup>128</sup> Thus, “[w]hen the Federal Government asserts authority over a State’s most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.”<sup>129</sup>

We see these same concerns expressed in other sovereign immunity contexts as well. Under the sovereign immunity abrogation doctrine, whereby Congress may abrogate the states’ immunity in limited contexts via its

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<sup>123</sup> For a more detailed discussion of the Court’s concern for preserving democratic processes as reflected in its sovereign immunity jurisprudence and elsewhere, see Marc D. Falkoff, Note, *Abrogating State Sovereign Immunity in Legislative Courts*, 101 COLUM. L. REV. 853, 853–69 (2001); King, *supra* note 104, at 356–64.

<sup>124</sup> 134 U.S. 1, 21 (1890); Falkoff, *supra* note 123, at 858–59.

<sup>125</sup> 527 U.S. 706 (1999).

<sup>126</sup> *Id.* at 712.

<sup>127</sup> *Id.* at 750–51.

<sup>128</sup> *Id.* at 751.

<sup>129</sup> *Id.*

authority under Section 5 of the Fourteenth Amendment, the Court has increasingly insisted that Congress do so by means of a sufficiently clear statement in its legislation.<sup>130</sup> The Court's clear-statement requirement reflects a concern that Congress should clearly take responsibility and be accountable when it intends to hold states liable rather than passing off its responsibility onto the courts.<sup>131</sup> The Court's concern for protecting the states' distinct political identities and processes in our federal system is not confined only to sovereign immunity contexts; we see this concern reflected throughout the Court's recent jurisprudence generally.<sup>132</sup> And it may be that when we examine the Court's dignity language in its recent sovereign immunity cases, we actually find a concern for protecting the states' political prerogatives.<sup>133</sup>

Given the Supreme Court's emphasis on the important role state political autonomy and political process play in the sovereign immunity context generally, what is surprising is how absent this emphasis is in its arm-of-the-state jurisprudence.<sup>134</sup> If the state electorate's ability to hold the state politically accountable is the only natural check against the immunity the state otherwise enjoys, then it would seem that a consideration of whether the electorate is positioned to hold a given entity politically accountable should play an important role in the courts' arm-of-the-state analysis as well.<sup>135</sup> After all, the arm-of-the-state doctrine measures the outer reach of sovereign immunity, determining the minimal requirements that make the state's interests sufficiently implicated to warrant a conferral of the state's immunity on a particular entity.<sup>136</sup> Because this doctrine measures sovereign immunity's

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<sup>130</sup> See Falkoff, *supra* note 123, at 862–63.

<sup>131</sup> See *id.*

<sup>132</sup> See King, *supra* note 104, at 360–63 (discussing the Court's emphasis of state autonomy in Commerce Clause and Tenth Amendment contexts).

<sup>133</sup> James Leonard, *Ubi Remedium Ibi Jus, or, Where There's A Remedy, There's A Right: A Skeptic's Critique of Ex Parte Young*, 54 SYRACUSE L. REV. 215, 319 (2004) (“Dignity is really shorthand for a state’s prerogative to organize itself and make decisions according to political sensibilities.”). After discussing the Court’s decisions leading up to and including *Alden v. Maine*, Leonard concludes: “To sum up, the Court’s decisions, either explicitly or by application, reflect a view that sovereign immunity protects the political decision making of the states.” *Id.* at 320–27; see also Falkoff, *supra* note 123, at 865–66 (explaining that the Court’s dignity language reflects a concern for protecting the prerogatives of the politically accountable branches of government).

<sup>134</sup> Of course, such an absence is most obviously due to the fact that the Court has yet to revisit the arm-of-the-state doctrine in full in the years since *Hess*.

<sup>135</sup> Florey, *supra* note 109, at 793 (“[T]he democratic-process rationale . . . can prove useful in determining whether sovereign immunity should be extended to a given situation.”).

<sup>136</sup> See Brettschneider & McNamee, *supra* note 86 (manuscript at 5) (“On our democratic conception of sovereignty, immunity extends as far as (but no further than) democratic legitimacy warrants. Otherwise, many legitimate democratic decisions cannot take effect.”).

reach, a consideration of whether sovereign immunity's natural institutional check likewise reaches a particular entity is relevant. Only entities with a sufficiently close relationship with the state, such that the state can meaningfully hold that entity politically accountable, should be shielded by the state's immunity. Some commentators have argued about whether a given entity should be entitled to enjoy the state's immunity<sup>137</sup> or whether the state ought to be able to dole out its Eleventh Amendment immunity to whomever it pleases.<sup>138</sup> Such reasoning misses the mark. Sovereign immunity is not ultimately about immunity entitlements but rather about a delicate constitutional framework undergirded by principles of federalism designed to maximally protect conditions that permit democracy.<sup>139</sup> Sovereign immunity cases are about protecting that balance, and this focus should be present in the arm-of-the-state context as well.

### *B. The Importance of Political Accountability in Hess*

Should courts decide to take seriously a political-accountability rationale in the arm-of-the-state context, is there any support for such an analytical move in the Supreme Court's precedents? Once again, indeed there is. In discussing the nature of bistate entities in *Hess*, Justice Ginsburg, writing for the Court, made a point to stress that because bistate entities are created through the cooperation of multiple states as well as Congress, "their political accountability is diffuse; they lack the tight tie to the people of one State that an instrument of a single State has."<sup>140</sup> She further elaborated: "[W]ithin any single State in our representative democracy, voters may exercise their political will to direct state policy; bistate entities created by compact, however, are not subject to the unilateral control of any one of the States that compose the federal system."<sup>141</sup> Because a bistate entity's affairs do not coincide with the interests of a single statewide electorate, no single statewide electorate could hold such an entity politically accountable. More forcefully, Ginsburg homed in on the treasury-protection rationale in her analysis: if the state ultimately

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<sup>137</sup> See Steven Plitt, Valerie J. Fasolo & Daniel Maldonado, *The Changing Landscape of Eleventh Amendment Immunity in the Context of the Americans with Disabilities Act and the Rehabilitation Act After Garrett: Are Arizona School Districts Beyond Suit?*, 34 ARIZ. ST. L.J. 871, 872–73 (2002).

<sup>138</sup> See Kelly Knivila, Note, *Public Universities and the Eleventh Amendment*, 78 GEO. L.J. 1723, 1729, 1732 (1990).

<sup>139</sup> See *supra* notes 114–17 and accompanying text.

<sup>140</sup> *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994).

<sup>141</sup> *Id.*

would be forced to pay a judgment rendered against an entity pertaining to that entity's conduct, then the state's interests are assuredly implicated.<sup>142</sup>

While courts have readily picked up on Ginsburg's emphasis of the treasury-protection rationale,<sup>143</sup> it is unclear why courts have failed to give much weight to her explicit political accountability language. Perhaps courts considered such analysis to be too specific to bistate entities to be of much use in more typical arm-of-the-state cases. But one could just as easily extend this reasoning to intrastate entities, which may be geographically limited to one county or one part of a state; here too an entity's affairs would fail to coincide with the statewide electorate's interests. In this case, if a single county official were violating people's rights, while the statewide electorate *potentially could* hold such an official accountable, the statewide electorate is not likely to care enough to impose the necessary political pressure to check an errant county official. If an intrastate entity's jurisdiction or reach did not coincide with the whole state, then, as with bistate entities, this fact would be grounds for determining that such an entity is not an arm of the state warranting the protection of the state's sovereign immunity.

In her *Hess* dissent, Justice O'Connor stressed even more emphatically than Justice Ginsburg the importance of political accountability considerations in the arms context. O'Connor chided Ginsburg for not giving more weight to the state control factor.<sup>144</sup> If a state exercises sufficient control over an entity, then the state can hold that entity accountable.<sup>145</sup> O'Connor added: "So long as a State's citizens may, if sufficiently aggravated, vote out an errant government, Eleventh Amendment immunity remains a highly beneficial provision of breathing space and vindication of state sovereignty."<sup>146</sup> For O'Connor, the danger lies in extending immunity to entities that are not politically accountable; in such cases an immune entity's bad conduct or policies could continue unchecked. Conversely, when a state does wield the kind of control over an entity allowing for meaningful accountability, this leads to the conclusion that the given entity is an arm of the state. Thus for O'Connor, "[a]n arm of the State . . . is an entity that undertakes state functions and is politically accountable to the State, and by extension, to the electorate."<sup>147</sup>

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<sup>142</sup> See *id.* at 48.

<sup>143</sup> See MOORE ET AL., *supra* note 4, § 123.23[4].

<sup>144</sup> See *Hess*, 513 U.S. at 61 (O'Connor, J., dissenting).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

If we read Ginsburg's and O'Connor's opinions together, two elements appear necessary to ensure an entity is politically accountable to the state. First, an entity's affairs must coincide with the state's interests. Second, a state must wield sufficient control over an entity to allow the state to hold the entity politically accountable. Only if both elements are met would a conferral of the state's immunity on an entity be warranted.

Neither Ginsburg nor O'Connor explicitly proposed the framework this Comment has articulated. Ginsburg rendered predominant whether a state's treasury would be implicated in a suit against an entity, what this Comment has subsumed into the "state's interests" element, and she dismissed the relevance of the control factor.<sup>148</sup> In contrast, O'Connor was willing to confer immunity on a given entity either for the reason Ginsburg emphasized or because a state exercises sufficient control over an entity.<sup>149</sup> Given O'Connor's willingness to consider either basis, her approach to the question of political accountability as this Comment has framed it appears to be disjunctive,<sup>150</sup> whereas the framework this Comment offers is conjunctive. A conjunctive approach more effectively gauges whether an entity is politically accountable to the state: if the electorate, acting through the state, is able but not interested in holding an entity accountable, then there likely will be no will to do so.<sup>151</sup> In contrast, if the electorate is interested but not able to hold an entity accountable, then any attempt to hold an entity accountable will be ineffectual. Only if both conditions are met are the preconditions for political accountability triggered.

At least one circuit has briefly touched on the political accountability rationale lying dormant in *Hess's* precedent.<sup>152</sup> This Comment proposes that more courts follow suit. The incorporation of a political accountability rationale into the arm-of-the-state doctrine would not require a complete overhaul of the tests courts currently use or a jettisoning of all the factors they currently consider. Many of these factors already measure a state's propensity to hold entities politically accountable, though courts have not considered such

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<sup>148</sup> See *id.* at 47–48 (majority opinion).

<sup>149</sup> *Id.* at 60–62 (O'Connor, J., dissenting).

<sup>150</sup> See *id.* at 60–63.

<sup>151</sup> By "interested," I do not mean that the electorate necessarily disapproves of what the entity is doing but rather that the electorate as a whole stands to be affected by the entity's conduct or policies and would therefore be in a position to care.

<sup>152</sup> *Del Campo v. Kennedy*, 517 F.3d 1070, 1076 (9th Cir. 2008) (finding that "private parties whose only relationship to the sovereign is by contract" are "certainly more removed from state power, and from democratic control, than a county or a Compact Clause organization").

factors through a political-accountability lens.<sup>153</sup> And undoubtedly some factors courts currently consider should fall out of the analysis since it is unclear what operational rationale informs these factors.<sup>154</sup> But incorporation of a political-accountability rationale into arm-of-the-state jurisprudence would shore up the weaknesses inherent in the *Hess* twin-reasons framework, ultimately giving us confidence that entities dubbed arms of the state properly warrant that designation. The following discussion imagines how such a reconceived framework might function.

#### IV. A PROPOSED POLITICAL-ACCOUNTABILITY-INSPIRED ARM-OF-THE-STATE FRAMEWORK

This Part lays out a framework for how courts might determine whether a particular entity is politically accountable to the state, discussing which factors would and would not matter in that calculus. While the two elements previously sketched are both necessary to this framework—state interest and state control—there is less rigidity to how and which factors should be evaluated under each element. There may be factors or considerations hitherto not considered by the courts—or this Comment—that prove relevant to the calculus, and a court could determine that certain factors warrant more or less weight than others.<sup>155</sup> This Comment should ultimately be understood as the beginning of the conversation rather than the last word.

The following discussion first examines a threshold inquiry concerning which entity a court should examine when conducting its arms analysis. Then, discussion turns to an examination of factors especially relevant in deciding whether a state's interests are sufficiently implicated by a given entity's affairs. Finally, Part IV closes by considering factors measuring whether the state exercises sufficient control over an entity for political accountability purposes.

##### *A. A Threshold Inquiry: Identifying the Real Entity to Be Examined*

Before examining in closer detail the two elements previously sketched, a threshold question in any arm-of-the-state analysis must be resolved: one must

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<sup>153</sup> See *infra* Part IV.

<sup>154</sup> See *infra* Part V.

<sup>155</sup> For example, if an entity received minimal state appropriations, this fact would suggest that the state's interests were implicated but not to the same degree as if an entity received significant appropriations from the state. See, e.g., *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 548 (3d Cir. 2007) (willing to consider that a factor may tilt in one direction or the other rather than weighing factors in a strict binary fashion).

determine the relevant entity to be examined. The obvious answer would be the entity being sued. Yet, while not considering this threshold question formally, courts frequently consider traits of larger parent entities when determining the arm status of the formally named defendant.<sup>156</sup> On the one hand, such analysis would seem disingenuous—it would seem such courts may examine the traits of a parent entity simply because the court might be dissatisfied with the expected result should it only confine its analysis to the traits of the formally named defendant. But on the other hand, the real-party-in-interest doctrine, from which the arm-of-the-state doctrine developed, counsels that a court should determine who the real defendant is rather than just who the nominal defendant is.<sup>157</sup> A clever litigant could target a sub-entity whose parent entity the litigant knows full well is an arm of the state. Thus courts should identify the proper entity to be examined.

In making that determination, courts should identify the greatest single institutional unit whose head officer or board of officers exercises full discretionary authority all the way down the chain of command. In some cases a court should consider the central state agency to be the relevant entity even though a branch office may be the target of the suit. For example, if a state police department exercised full discretionary control over all its police posts, it would not make sense for a court to examine an individual post as a distinct entity.<sup>158</sup> The permitted conduct and policies of any individual police post would likely be indicative of policy statewide, and therefore a court should consider the statewide entity as a whole. It would be pointless for a court to recognize an agency as an arm of the state but simultaneously to determine that the agency's constituent offices were each vulnerable to suit. While a single branch office could engage in questionable conduct, if the parent entity truly exercises centralized control, then such branch conduct would be a function of the policies of the parent entity that permits such conduct.

In other cases, a court should not examine a larger parent entity as the relevant entity if a confederated governing structure connects variously situated entities. For example, if a state created a network of statewide special purpose districts to effect a particular state policy, such as California's county air pollution control districts, and if such districts exercised local administrative discretion with minimal oversight from a central board, then a

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<sup>156</sup> *E.g.*, *United States ex rel. King v. Univ. of Tex. Health Sci. Ctr.—Hous.*, 544 F. App'x 490, 495–97 (5th Cir. 2013).

<sup>157</sup> *See supra* text accompanying notes 58–62.

<sup>158</sup> *See, e.g.*, *Tucker v. Williams*, 682 F.3d 654, 659 (7th Cir. 2012).

single district should be the relevant entity for arm-of-the-state purposes rather than a central state board.<sup>159</sup> In this case, each sub-entity really would be its own governing unit and the proper point of focus.

Having established the relevant entity to be examined, a court should then apply factors assessing whether the state's interests sufficiently coincide with the entity's affairs.

### *B. State Interest Factors*

First, courts must determine whether the state's interests sufficiently coincide with the entity's affairs such that the statewide electorate would be positioned to even care about the entity's conduct or policies. Put more concisely, this question asks whether the state is interested in holding the entity politically accountable. This question does not concern whether the state, its current leaders, or the statewide electorate do in fact care about the conduct in question, or whether they approve or disapprove. Rather, this question concerns whether the entity's affairs touch upon the statewide electorate's concerns as a whole. This is the "state's interests" element of the framework. The following factors effectively gauge state interest.

#### *1. Entity's Effect on State Treasury*

This element most naturally captures *Hess's* treasury-protection rationale. If a state stands to pay the judgment entered against a given entity with the electorate's tax dollars, then the state's interests are surely implicated by the entity's affairs. But as the discussion in Part II.A explained, there are gradations in the degree to which a state's treasury might be implicated. Some courts are only willing to consider as relevant whether a state will be forced to pay as a result of the suit at hand, but other courts are willing to consider the state treasury to be implicated if the entity receives state funds generally or even contributes money to the state.<sup>160</sup>

This Comment takes the position that a broader definition of state treasury implication is appropriate because it more fully reflects the electorate's financial interest in the entity's affairs. But assuming that a broader definition is appropriate, how much treasury implication is enough? The state's financial interests are far less implicated by an entity that receives minimal state funds

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<sup>159</sup> See *Beentjes v. Placer Cnty. Air Pollution Control Dist.*, 397 F.3d 775, 782–84 (9th Cir. 2005).

<sup>160</sup> See *supra* notes 72–81 and accompanying text.



than by an entity that receives millions, and simply calculating the percentage of an entity's budget that consists of state funds is not relevant because a small percentage may represent a large actual dollar amount.<sup>161</sup> But making a fixed dollar amount the relevant threshold is logically flawed because a large sum of money today may not be considered a large sum of money decades from now due to inflation. And voters can become incensed to learn that an entity receiving even nominal tax dollars is behaving in an objectionable manner.<sup>162</sup> This Comment does not attempt to resolve the question of how much matters and instead simply notes that financial interest is only one relevant factor in the state's interests element, which itself is just one relevant element in the overall framework this Comment proposes.

That said, it does matter what a court defines to be state funding. Courts ought not to define as state funds revenues that a local or regional entity generates and keeps for itself.<sup>163</sup> In the case of assessments, user fees, charges, revenue bonds, or other kinds of local taxes that an entity may have authority to impose, such funds are generated locally or paid by those who directly use the entity's services.<sup>164</sup> These are not general tax dollars paid by the state's tax-paying citizens. Thus, if an entity's funds consist of this local variety of government funding, local voters might have reason to be upset with how an entity spends those dollars, but the statewide electorate is not likely to be concerned.

Also irrelevant in determining whether the state's treasury is implicated is whether an entity is capable of generating its own funds,<sup>165</sup> or whether the entity can afford to pay a judgment from its own reserves without having to rely on the state.<sup>166</sup> Such considerations may make sense if one assumes a narrower definition of state treasury implication that is only concerned with whether the state will be responsible for the judgment in the instant case. But

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<sup>161</sup> See, e.g., *King*, 544 F. App'x at 496 (noting that though only 23% to 26.5% of an entity's budget consisted of state funds, these percentages represented millions of dollars).

<sup>162</sup> See *Lawmakers Deal with Voter Anger over 'Pork,'* USA TODAY (May 2, 2006, 4:53 AM), [http://usatoday30.usatoday.com/news/washington/2006-05-02-pork-voters\\_x.htm](http://usatoday30.usatoday.com/news/washington/2006-05-02-pork-voters_x.htm) (discussing voters' unrest even when entities receive minimal government appropriations).

<sup>163</sup> See, e.g., *Beentjes*, 397 F.3d at 779 (finding state-authorized vehicle surcharges to be local taxes). *But see* *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1255 (10th Cir. 2007) (considering the funds an entity was authorized to generate under state law to be state funds).

<sup>164</sup> See MANDELKER ET AL., *supra* note 79.

<sup>165</sup> *But see, e.g., Beentjes*, 397 F.3d at 780 (finding an entity's independent revenue-generating ability to be evidence pointing away from arm-of-the-state status); *Rogers*, *supra* note 40, at 1305–08 (arguing that an entity's ability to generate its own revenues is relevant in the arms context).

<sup>166</sup> *E.g., Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 233–34 (3d Cir. 2006).

such reasoning is generally highly suspect in other areas of the law—we do not consider the depth of a defendant’s pockets as relevant to whether a defendant should be liable in a given case because such reasoning makes a financially secure defendant an unwilling insurance provider irrespective of whether he was actually in the wrong.<sup>167</sup> Furthermore, the Court has precluded such reasoning in the arms context, clarifying that the state’s potential legal liability is what matters, rather than whether the state will actually pay money in the instant case.<sup>168</sup> Thus courts should eschew consideration of an entity’s own solvency or access to its own funds in determining its arm status.

## 2. *Entity’s Geographic or Jurisdictional Reach*

Measuring whether a state’s interests coincide with an entity’s affairs is not solely a function of finances though; the entity’s jurisdictional or geographical reach matters too. Courts frequently consider this factor already, though often as part of a factor that evaluates whether an entity’s functions are state or local in character.<sup>169</sup> If an entity exclusively exercises a particular function in service to the entire state, then the entire statewide electorate would fall within the scope of the entity’s conduct or policies.<sup>170</sup> In this case, should the entity violate one person’s rights, there is a chance any member of the statewide electorate could be the next victim, and therefore the whole electorate is, in a sense, touched by the entity’s conduct.

In contrast, if the entity were geographically or jurisdictionally confined to one county or region of the state, the rest of the electorate would be unaffected by that entity’s conduct or policies.<sup>171</sup> Even if a localized entity invoked the ire of all the voters within that locality, unless the electorate as a whole were implicated, the state as a whole would be far less likely to hold that localized entity politically accountable. Local voters may be able to hold a local entity politically accountable on a local level—for example, county voters might vote out the county sheriff—but local political accountability is not the same as state political accountability. Only if the state’s political accountability

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<sup>167</sup> See FED. R. EVID. 411 advisory committee’s note.

<sup>168</sup> *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997).

<sup>169</sup> See, e.g., *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 295 (2d Cir. 1996).

<sup>170</sup> See Héctor G. Bladuell, Note, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 MICH. L. REV. 837, 858–61 (2007).

<sup>171</sup> See, e.g., *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 597 (5th Cir. 2006); see also Bladuell, *supra* note 170, at 859.

meaningfully extends to a given entity should there be a basis for conferring the state's sovereign immunity to that entity as well.

It is important to note that a designation of arm status may be appropriate even though an entity's functions have a narrow focus, which only affect a segment of the population. Thus, for example, it may be appropriate for a state division of military affairs to be recognized as an arm of the state, even though the statewide electorate is not predominantly composed of service members.<sup>172</sup> If one were a service member, though, that person would fall within such an agency's jurisdiction, and it is in this sense that the entire electorate is implicated.

### C. *State Control Factors*

As a second element, courts must determine whether the state exercises sufficient control and oversight over an entity to allow the state to meaningfully pressure it to change its policies or conduct. Put more concisely, this question asks whether the state is able to hold an entity politically accountable. The issue is whether the state presently has the legal means to control an entity's conduct, not something akin to cultural or social pressure. This is the "state control" element of the framework.

The majority in *Hess* refused to give much weight to the control factor in its analysis. The majority cited a student commentator, Alex Rogers,<sup>173</sup> who criticized the use of a control factor on the grounds that courts have a tendency to apply the factor inconsistently and to consider "vague indices of control or influence," rendering the use of a control factor unhelpful and unpredictable in the arms context.<sup>174</sup> Ginsburg, writing for the majority, added that states have the power to dissolve state-created entities like political subdivisions, yet such ultimate state control does not imply that political subdivisions should be recognized as arms of the state.<sup>175</sup>

In her *Hess* dissent, O'Connor directly challenged the majority's assessment. She insisted that "[t]he critical inquiry . . . [is] whether and to what extent the elected state government exercises oversight over the entity."<sup>176</sup>

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<sup>172</sup> See, e.g., *Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 46–47 (2d Cir. 1999).

<sup>173</sup> *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47–48 (1994) (citing Rogers, *supra* note 40, at 1280, 1302 & n.264).

<sup>174</sup> Rogers, *supra* note 40, at 1280–84.

<sup>175</sup> See *Hess*, 513 U.S. at 47.

<sup>176</sup> *Id.* at 61 (O'Connor, J., dissenting).

According to O'Connor, two considerations are especially relevant in determining whether the state's "lines of oversight are clear and substantial"; these include whether "the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings."<sup>177</sup> O'Connor acknowledged Ginsburg's point that states exercise ultimate control over state-generated entities in their ability to dissolve such entities at will, but she argued that "does not mean that state governments actually exercise sufficient oversight to trigger Eleventh Amendment immunity under a control-centered formulation."<sup>178</sup> Instead, "[t]he inquiry should turn on real, immediate control and oversight, rather than on the potentiality of a State taking action to seize the reins."<sup>179</sup> While O'Connor's view was the dissenting view, lower courts have generally followed O'Connor in taking state control factors seriously.<sup>180</sup> Accordingly, this Comment's framework affirms consideration of state control as O'Connor articulated by arguing that the relevant control factors in the arms context are, first, the state's ability to freely remove an entity's governing officers, and second, the state's ability to wield general veto power over the entity's conduct and policies.<sup>181</sup>

### 1. *State Removal Power*

The first relevant control factor is whether the state, through the governor, legislature, or otherwise, has the legal authority to freely remove an entity's officers or board members at will outside the state's normal impeachment process.<sup>182</sup> Should the state merely have the power to appoint board members but not to remove and replace them, such an indicator of control would give courts no meaningful information as to whether the state could hold the entity politically accountable should the entity's leadership engage in behavior or pursue policies the electorate finds to be unacceptable.<sup>183</sup> Officers that cannot be removed have little incentive to conform their conduct to the expectations of those who appointed them. Removal power, not just appointment power, is

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 62.

<sup>179</sup> *Id.*

<sup>180</sup> See MOORE ET AL., *supra* note 4, § 123.23[4][b][i] (showing most circuits assess forms of state control as a relevant factor in their arms analyses).

<sup>181</sup> Some courts ask whether an entity is autonomous from the state, which is basically the same thing as asking whether the state exercises control over the entity. *E.g.*, *Cooper v. Se. Pa. Transp. Auth.*, 548 F.3d 296, 299 n.4 (3d Cir. 2008) (measuring the entity's autonomy from the state).

<sup>182</sup> See *Hess*, 513 U.S. at 47 (considering removal power).

<sup>183</sup> *E.g.*, *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 295 (2d Cir. 1996) (finding state's appointment power of little relevance without state's removal power).

what matters.<sup>184</sup> And the state's ability to impeach and thereby remove an entity's officers is not a relevant form of removal power because such a drastic measure is usually reserved for truly blameworthy conduct, rather than used as a means of removing officers who make administrative and policy choices that state officials find objectionable.<sup>185</sup> The power to impeach is a kind of ultimate state control akin to the kind of state power to dissolve entities, which both Ginsburg and O'Connor denounced as having any relevance to the inquiry.<sup>186</sup>

## 2. *State General Veto Power*

The second relevant control factor is whether the state exercises general veto power over an entity's conduct and policy decisions. The state could certainly exercise meaningful control over an entity without micromanaging the entity's affairs; the question is whether the state could ultimately step in and trump an entity's discretion in carrying out its affairs if the state decided to do so.<sup>187</sup> But veto power is a matter of degree, and courts make a mistake to cherry pick mere isolated instances of state oversight or regulation as relevant, particularly where such oversight or regulation has no connection to the conduct that led to the suit.<sup>188</sup> For example, if a state merely received reports or records from an entity without the ability to act on that information, that would not amount to meaningful control;<sup>189</sup> but, if the state received meaningful information and feedback from an entity coupled with the ability to control an entity's policies and conduct, then that would amount to meaningful control.<sup>190</sup>

But not all of the factors courts currently consider are helpful in determining whether an entity should be recognized as an arm of the state, as Part V illustrates.

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<sup>184</sup> Rogers, *supra* note 40, at 1265 ("The power to appoint does not translate into the power to control . . .").

<sup>185</sup> See Carrie Yutzy, *How Does the Impeachment Process Work?*, LEGALZOOM (Dec. 2009), <http://www.legalzoom.com/legal-headlines/government-politics/how-does-impeachment-process>.

<sup>186</sup> See *supra* notes 173–81 and accompanying text.

<sup>187</sup> See, e.g., *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 231–32 (3d Cir. 2006) (finding autonomy factor to point toward immunity where the Governor ultimately exercised veto power over the entity's decisions though the entity generally managed its own affairs).

<sup>188</sup> See, e.g., *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1254–55 (10th Cir. 2007) (considering as relevant that entity had to comply with certain employment, finance, and reporting regulations).

<sup>189</sup> See, e.g., *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 295–96 (2d Cir. 1996) (finding the state lacked sufficient veto power over an entity that was required to submit to the state an annual report but where state removal and general veto power were lacking).

<sup>190</sup> See, e.g., *Steadfast*, 507 F.3d at 1254–55 (finding the entity's auditing and reporting requirements combined with forms of state oversight and removal power indicative of state control).

## V. A CRITIQUE OF CURRENTLY USED ARM-OF-THE-STATE FACTORS

Having laid out the questions and factors that best measure whether an entity is politically accountable to the state, this section briefly considers a variety of factors courts presently consider that distort the political-accountability calculus. This Comment groups these factors into three categories: (A) factors attempting to gauge state intent, (B) factors that are inherently definitional, and (C) factors that otherwise fail to gauge political accountability.

### A. *Factors Attempting to Gauge State Intent*

One misleading factor some courts consider is whether the state intends for an entity to be cloaked in the state's sovereign immunity.<sup>191</sup> Courts may also consider differently worded factors that essentially are proxies of state intent such as "how state law treats the agency generally,"<sup>192</sup> the "general legal status" of the entity,<sup>193</sup> or whether the state has "structured the entity to share its sovereignty."<sup>194</sup> Framed this way, the entire arm-of-the-state inquiry can be cast in terms of state intent. Has the state intended that a given entity should be an arm cloaked in immunity *as indicated by* all the factors courts consider? This broad, general sense of state intent derives from language in the Supreme Court's cases suggesting that the entire arms inquiry is one of discerning state intent.<sup>195</sup> But to treat intent as a factor in this sense is to collapse the entire inquiry into a single factor; doing so is no substitute for the substantive analysis otherwise necessary in gauging political accountability.

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<sup>191</sup> *E.g.*, *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 12 (1st Cir. 2011). The First Circuit initially attempts to determine whether the state's explicit intent is clear, and if the answer is ambiguous, it proceeds to consider additional factors as evidence of intent. *Id.*

<sup>192</sup> *Cooper v. Se. Pa. Transp. Auth.*, 548 F.3d 296, 306 (3d Cir. 2008) (quoting *Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989)) (internal quotation mark omitted).

<sup>193</sup> *Tucker v. Williams*, 682 F.3d 654, 659 (7th Cir. 2012) (quoting *Kashani v. Purdue Univ.*, 813 F.2d 843, 845–47 (7th Cir. 1987)) (internal quotation marks omitted).

<sup>194</sup> *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 874 (D.C. Cir. 2008) (quoting *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr.*, 322 F.3d 56, 68 (1st Cir. 2003)) (internal quotation mark omitted) (subsuming into this question all the factors of its arms test). The District of Columbia Circuit separately lists state intent as one of its arms factors, but to frame the entire question as "whether the State 'clearly structured the entity to share its sovereignty'" implies that an overall assessment of the state's intent is in view. *Id.* (quoting *Fresenius*, 333 F.3d at 68).

<sup>195</sup> *See Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) ("Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves . . . there would appear to be no justification for reading additional meaning into the limited language of the Amendment.")

State intent, if conceived in this broad sense, is a fairly useless factor unless courts mean that specific intent is what matters: did the state intend not merely to create the kind of entity so structured that a federal court would recognize the entity as an arm of the state, but rather did the state specifically intend, regardless of the entity's structure and relationship to the state, that a federal court would honor a state's choice that an entity be immune from suit?<sup>196</sup> While the Supreme Court's arms cases have suggested that intent matters, the language of its opinions suggests they have in mind the former understanding of intent rather than the latter.<sup>197</sup> Furthermore, the Court's insistence that arm-of-the-state doctrine is a matter of federal law, and that state law is consulted merely to discern the nature of the entity's character, would appear to preclude state-specific intent per se as a relevant consideration.<sup>198</sup> It makes little sense to read the Court as saying that various factors are relevant in discerning whether the state intended to structure an entity a certain way, one of which is the factor of the state's own specific intent. Either specific intent should be dispositive, which the Court's use of factor-based tests precludes, or else intent is a collective function of all the factors.

But suppose the Court did mean to imply that specific intent matters, which some lower courts have intimated<sup>199</sup>—should it?<sup>200</sup> On the one hand, assuming such intent is even objectively discernable in the relevant state law, a factor gauging state-specific intent as to an entity's immunity status would appear to fit comfortably within the political-accountability rationale this Comment has articulated. Particularly if lawmakers included a clear statement in the relevant statute that a given entity is to be cloaked in the state's Eleventh Amendment immunity,<sup>201</sup> then such intent arguably reflects a policy choice on the part of the electorate acting through their lawmakers, which the electorate could later demand be changed if it so chooses, and this policy preference should then be honored by federal courts.<sup>202</sup>

On the other hand, a state ought not to be able to bestow its Eleventh Amendment immunity upon entities whose affairs do not coincide with the

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<sup>196</sup> See, e.g., *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 596 (5th Cir. 2006) (“[T]his court examines . . . whether the state statutes and caselaw view the agency as an arm of the state . . .”).

<sup>197</sup> See *Lake Country Estates, Inc.*, 440 U.S. at 401.

<sup>198</sup> See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997).

<sup>199</sup> E.g., *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 265 (4th Cir. 2005).

<sup>200</sup> For commentary arguing that state specific intent should matter, see Bladuell, *supra* note 170, at 853–57; Rogers, *supra* note 40, at 1301–05.

<sup>201</sup> E.g., *Md. Stadium Auth.*, 407 F.3d at 265.

<sup>202</sup> See Rogers, *supra* note 40, at 1290–91.

state electorate as a whole or that the state has created in such a way that it cannot control them; this would violate the sovereign immunity versus political accountability balance. The following example illustrates this point: suppose a state created a confederated network of special districts covering the state to serve a specific policy function, such as pollution control.<sup>203</sup> Suppose the state created these entities to largely be independently managed with locally elected officers and each financed by their own state-authorized local taxes or revenue bonds. Suppose further that the state lacked both general veto power over the special districts and the ability to remove their officers at will. In short, suppose the state decided these entities should be isolated from the state's own political pressures. But finally, suppose that the state included in the statute authorizing such entities a clear statement that each was to partake of the state's Eleventh Amendment immunity. What result?

One could argue that such isolated special districts should be considered arms of the state because the state, representing the statewide electorate, chose to confer Eleventh Amendment immunity upon such entities (or attempted to do so). But such entities would be so isolated from the state that, unless they generally manifested consistent policies statewide, it is unlikely the entire statewide electorate could ever be mobilized to pressure the state to repeal the clear statement of specific intent in the future. In such a case, the voice of the electorate at one point in time would effectively bind the wishes of all future electorates.<sup>204</sup> Thus, for political accountability to be meaningful, it must be constantly present. Accordingly, courts should not consider any indications of the state's specific intent in their arms analyses.

Even assuming that state intent were a legitimate factor to be considered in the arms context, short of a clear statement of specific intent, it is doubtful that courts can reliably discern whether a state intends for an entity to be shielded by its immunity.<sup>205</sup> Often, sources of state law, including constitutions, statutes, and case law,<sup>206</sup> can be ambiguous or contradictory.<sup>207</sup> And courts

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<sup>203</sup> See *Beentjes v. Placer Cnty. Air Pollution Control Dist.*, 397 F.3d 775, 776 (9th Cir. 2005).

<sup>204</sup> See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (“[O]ne legislature cannot abridge the powers of a succeeding legislature.”). In this case, while a subsequent legislature could remove a statement of specific intent from an entity's enabling statute, a prior legislature would have systematically removed the source of political pressure that would normally inform the legislature in the exercise of its powers.

<sup>205</sup> Rogers, *supra* note 40, at 1288–91.

<sup>206</sup> See, e.g., *Md. Stadium Auth.*, 407 F.3d at 257–58 & nn.2–4, 265 (considering state statutes, regulations, constitutional provisions, and state case law to determine how state law treats an entity).

<sup>207</sup> See *Pub. Sch. Ret. Sys. v. State St. Bank & Trust Co.*, 640 F.3d 821, 830–33 (8th Cir. 2011) (engaging in a detailed parsing of state law in an attempt to discern whether the state's treasury was legally implicated).



may be willing to give weight to any number of texts in determining intent, all the way down to amicus briefs filed by the state's attorney general.<sup>208</sup> Furthermore, courts may inappropriately read significance into texts and phrases that may never have been intended to bear on the arm-of-the-state question.<sup>209</sup> Limited space here precludes a full examination of how courts' attempts to "divine the state's intent" can be highly problematic.<sup>210</sup> Suffice it to say, the factor of state intent, whether explicit or implicit, is of little utility in a political-accountability-inspired arm-of-the-state framework.

### *B. Factors that are Inherently Definitional*

Courts should also avoid considering factors that are inherently definitional.<sup>211</sup> These factors themselves require line drawing in an arms context already requiring a fair amount of line drawing. Many courts attempt to discern whether an entity's functions are more properly considered state functions or local functions.<sup>212</sup> Similarly, courts consider whether an entity's functions are more governmental or proprietary in nature.<sup>213</sup> With the growth and fragmentation of state government and the increasing pressure for government to provide additional services, states have spawned numerous hybrid government entities that are difficult to classify.<sup>214</sup> Nevertheless, courts have persisted in using these definitional factors in their analyses.

The problem with such line drawing is that it is driven more by intuition than any clear normative standards. An entity may engage in state functions and local functions or functions that are both.<sup>215</sup> The same may be said about governmental versus proprietary functions. Where one draws the line depends on what one chooses to focus on. One might just as well decide that a public

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<sup>208</sup> Cf. *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 876 (D.C. Cir. 2008). On the one hand, considering a brief filed by a state official to determine how state law conceives of an entity appears to fit the political accountability rationale: if the electorate is unhappy with how its politically accountable officials have characterized entities in litigation, it can vote such officials out of office. On the other hand, efforts to glean state-intent evidence from amicus briefs serves as an example of how far courts may be willing to reach to support one outcome or another.

<sup>209</sup> See *Plitt et al.*, *supra* note 137, at 910–12; *Rogers*, *supra* note 40, at 1284 n.193.

<sup>210</sup> *E.g.*, *Petition for Writ of Certiorari*, *supra* note 17, at 25.

<sup>211</sup> See, e.g., *Rogers*, *supra* note 40, at 1296.

<sup>212</sup> *E.g.*, *Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009) (per curiam).

<sup>213</sup> *E.g.*, *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 12 n.2 (1st Cir. 2011).

<sup>214</sup> *Beckham*, *supra* note 13, at 147.

<sup>215</sup> See *Gorton*, 554 F.3d at 63 (finding the state versus local factor to be neutral since public education is both a state and local function in New York); *Rogers*, *supra* note 40, at 1278–79.

school district serves a local function,<sup>216</sup> a state function,<sup>217</sup> or something in between.<sup>218</sup> A state police department may consist of individual branch offices all over the state, and yet the significance of any single branch office may be incidental to what is actually a centralized oversight and management arrangement.<sup>219</sup> It is not clear that an individual state police post can be understood to neatly serve either a state or local function. And an entity's otherwise local functions may nevertheless have significant statewide impact.<sup>220</sup>

Similarly, with the privatization trend of recent decades, states have outsourced the provision of services to government contractors or have opted to create a number of quasi-public entities to provide services, with courts wrestling with how to categorize such entities.<sup>221</sup> In other areas of constitutional law, the Supreme Court has long since abandoned the effort to define government functions as either governmental or proprietary in nature.<sup>222</sup> Accordingly, it likewise makes little sense for courts to continue the state versus local and governmental versus proprietary line drawing exercises in the arms context.

Aside from the objective sorting difficulty these dichotomies create, even assuming such sorting can be done objectively, these factors tell us nothing about the degree of political accountability the state wields over the entity in question. Privatization aside, state governments have increasingly taken on additional services beyond traditional core governmental functions, whatever we might imagine those to be.<sup>223</sup> But that does not mean that the state's interests are any less implicated or the state any less able to hold an entity

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<sup>216</sup> See, e.g., *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1048 (9th Cir. 2003) (finding public schools in Arizona not to serve a central government function).

<sup>217</sup> E.g., *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 253 (9th Cir. 1992) (finding public schools in California to serve a central government function).

<sup>218</sup> E.g., *Gorton*, 554 F.3d at 63 (finding public schools to serve both state and local functions in New York).

<sup>219</sup> See, e.g., *Tucker v. Williams*, 682 F.3d 654, 659 (7th Cir. 2012).

<sup>220</sup> *Rogers*, *supra* note 40, at 1277.

<sup>221</sup> Compare *Del Campo v. Kennedy*, 517 F.3d 1070, 1072 (9th Cir. 2008) (finding a government contractor not to be an arm), with *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311–12 (11th Cir. 2000) (finding a government contractor to be an arm).

<sup>222</sup> E.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985) (“We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity . . . that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”); see also *Rogers*, *supra* note 40, at 1276 (discussing various areas of constitutional law where the governmental versus proprietary distinction has been abandoned).

<sup>223</sup> See *Rogers*, *supra* note 40, at 1243–44.

politically accountable if the function has traditionally been considered proprietary in nature. And while the state versus local distinction would seem to be relevant to the political-accountability rationale, that is because it is a proxy for the geographic or jurisdictional factor discussed previously.<sup>224</sup> The better approach is for courts to consider an entity's jurisdictional scope directly rather than approximating that factor with the non-falsifiable state versus local definitional factor.

### C. *Factors that Otherwise Fail to Gauge Political Accountability*

Finally, courts should avoid considering factors that otherwise reveal nothing about political accountability.<sup>225</sup> For example, courts sometimes consider whether an entity can hold property or enter contracts in its own name,<sup>226</sup> whether the entity can carry its own liability insurance,<sup>227</sup> what the entity's tax status is,<sup>228</sup> whether the entity can sue or be sued,<sup>229</sup> or what the entity's corporate status is in the enabling legislation.<sup>230</sup> Such factors may be proxies for measuring the entity's autonomy or legal status,<sup>231</sup> but as a measure of an entity's political accountability in their own right, these factors are of little use.

Courts further consider whether an entity has the ability to generate state-authorized revenue itself,<sup>232</sup> exercise the power of eminent domain,<sup>233</sup> or whether the entity is heavily regulated by the state.<sup>234</sup> But cities are likewise authorized by the state to tax and exercise the power of eminent domain and

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<sup>224</sup> See *supra* Part IV.B.2.

<sup>225</sup> Courts often consider these factors as indicia under other factors, *e.g.*, *Cooper v. Se. Pa. Transp. Auth.*, 548 F.3d 296, 306 (3d Cir. 2008) (considering under the "status under state law" factor whether the entity was separately incorporated, whether it could sue or be sued, and whether it was immune from state taxation), but sometimes these factors are considered independently, *e.g.*, *Del Campo*, 517 F.3d at 1077 (considering whether an entity can sue or be sued, whether an entity can take property in its own name, and an entity's corporate status as independent factors).

<sup>226</sup> *E.g.*, *Cooper*, 548 F.3d at 309.

<sup>227</sup> *E.g.*, *id.*

<sup>228</sup> *E.g.*, *Tucker v. Williams*, 682 F.3d 654, 659 (7th Cir. 2012).

<sup>229</sup> *E.g.*, *Del Campo*, 517 F.3d at 1077.

<sup>230</sup> *E.g.*, *Beentjes v. Placer Cnty. Air Pollution Control Dist.*, 397 F.3d 775, 778, 784–85 (9th Cir. 2005) (considering as relevant an entity's classification as a "body corporate" in the entity's enabling statute (quoting CAL. HEALTH & SAFETY CODE § 40700 (1996))).

<sup>231</sup> See *Rogers*, *supra* note 40, at 1284–87 (categorizing these as "jural independence" factors).

<sup>232</sup> *E.g.*, *Tucker*, 682 F.3d at 659.

<sup>233</sup> *E.g.*, *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 295 (2d Cir. 1996).

<sup>234</sup> *E.g.*, *Pub. Sch. Ret. Sys. v. State St. Bank & Trust Co.*, 640 F.3d 821, 828 (8th Cir. 2011).

cities are bound by state regulations,<sup>235</sup> yet cities are not arms of the state.<sup>236</sup> Courts should not consider factors that are just as applicable to political subdivisions as to arms of the state, not only because such factors falsely differentiate but also because, again, such factors are not instructive of whether the entity is actually politically accountable.

Having discussed factors that are both helpful and unhelpful in the political-accountability-inspired arm-of-the-state framework this Comment recommends, Part VI explores how this framework might work in practice.

## VI. TESTING A POLITICAL-ACCOUNTABILITY-INSPIRED ARM-OF-THE-STATE FRAMEWORK

In this final Part, this Comment illustrates how the political-accountability framework described here might be applied by examining *United States ex rel. King v. University of Texas Health Science Center–Houston*, recently decided by the Fifth Circuit.<sup>237</sup> After applying its arm-of-the-state test, the court held that University of Texas Health Science Center–Houston (UTHSCH) was an arm of the state of Texas and therefore immune from suit.<sup>238</sup> The plaintiff petitioned the Supreme Court for review, arguing that UTHSCH should not be considered an arm of the state and additionally requested the Court to clarify its arm-of-the-state framework.<sup>239</sup> The Court denied certiorari and accordingly declined the opportunity to clarify the doctrine.<sup>240</sup> Thus, this Comment will attempt to give the plaintiff her day in court. This Part first summarizes the Fifth Circuit’s analysis; it then briefly critiques that analysis; and finally, it examines the facts of *King* in light of the framework proposed by this Comment, concluding that *King*’s outcome would be a much closer result.

### A. *The Fifth Circuit’s Analysis of King*

In holding that UTHSCH is an arm of Texas for Eleventh Amendment purposes, the Fifth Circuit examined UTHSCH using its six-factor test:

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<sup>235</sup> See 4 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 23:3 (West 2014) (discussing tax power); 3 *id.* § 21:11 (discussing eminent domain); 3 *id.* § 14:4 (discussing relationship between state and local law).

<sup>236</sup> *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890).

<sup>237</sup> 544 F. App’x 490 (5th Cir. 2013), *cert denied*, 134 S. Ct. 1767 (2014).

<sup>238</sup> *Id.* at 499.

<sup>239</sup> See Petition for Writ of Certiorari, *supra* note 17, at 5, 23–24, 29.

<sup>240</sup> 134 S. Ct. 1767 (mem.).

(1) whether the state statutes and caselaw characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.<sup>241</sup>

In applying the first factor, the court noted that while none of the sources of Texas state law explicitly characterized UTHSCH as an arm of the state for Eleventh Amendment purposes, less explicit indicia of the state's characterization of UTHSCH were enough to point toward immunity.<sup>242</sup> The court noted that Texas's constitution provides for a University of Texas System (UTS) of which UTHSCH was a part, and state law defined "a [public] university system or an institution of higher education" to be a "state agency."<sup>243</sup> The court was also persuaded by the existence of state decisional law referring to UTHSCH as an agency or governmental entity.<sup>244</sup>

Applying the second factor, the court was persuaded that UTHSCH's funding scheme pointed toward arm status.<sup>245</sup> While the court acknowledged only 23% to 26.5% of UTHSCH's funding consisted of state funds, the court stressed the large values such percentages represented: "\$26 million from student tuition and fees . . . about \$170 million in direct state appropriations, and . . . over \$25 million from other state agencies."<sup>246</sup> While the plaintiff argued UTHSCH would legally be unable to use its segregated state funds to pay a judgment anyway, implying that the state's financial interests were not implicated, the court rebuffed this argument.<sup>247</sup> The court cited favorably Fifth Circuit precedent holding that because legislatures appropriate funds to entities based on their expected budgetary needs, unexpected judgments against such entities would cut against the financial assumptions upon which the legislature made its appropriations, thereby interfering with the state's fiscal autonomy.<sup>248</sup> Because UTHSCH received substantial funding and a judgment against it

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<sup>241</sup> *King*, 544 F. App'x at 495.

<sup>242</sup> *Id.* at 495–96.

<sup>243</sup> *Id.* at 495 (alteration in original) (quoting TEX. GOV'T CODE ANN. § 572.002(10)(B) (West 2012)) (internal quotation marks omitted).

<sup>244</sup> *Id.* at 495–96.

<sup>245</sup> *Id.* at 496–97.

<sup>246</sup> *Id.* at 496.

<sup>247</sup> *See id.*

<sup>248</sup> *Id.* at 497 (citing *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976)).

would interfere with the state's fiscal autonomy, this factor pointed toward immunity.<sup>249</sup>

Applying the third factor, the court found that UTHSCH did not exercise local autonomy because UTHSCH is part of UTS, which itself is governed and administered by a single board of regents whose members are appointed by the Texas governor with the consent of the senate.<sup>250</sup> Additionally, the court found that all UTHSCH contracts were subject to the board of regents' rules or approval and that UTHSCH had to comply with various accounting and financial reporting requirements as a state agency, further evidence pointing toward immunity.<sup>251</sup>

Applying the sixth factor out of order, the court found that the board of regents fully controlled all lands held by UTS, of which UTHSCH was a part.<sup>252</sup> Also, the court noted that state law gave the board power to acquire land via eminent domain, adding that such acquired property was by definition state land.<sup>253</sup> These facts likewise pointed toward immunity.<sup>254</sup>

Applying the fourth factor, the court reasoned as it had under previous factors that UTHSCH was properly understood as part of a statewide university system, UTS, and such a system, with its statewide branches, was not occupied primarily with local concerns.<sup>255</sup> The court was comfortable finding that education and research were matters of statewide concern in Texas as a matter of definition per state law, again pointing toward immunity.<sup>256</sup>

Only the fifth factor pointed away from immunity: the court found that UTHSCH could sue and be sued as a separate, distinct entity under Texas law.<sup>257</sup>

Nonetheless, the court concluded that because five of six factors in its arm-of-the-state test pointed toward immunity, UTHSCH should be recognized as an arm of the state of Texas.<sup>258</sup>

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 497–98.

<sup>256</sup> *Id.* at 498.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

### B. Critique of the Fifth Circuit's Arm-of-the-State Analysis

The Fifth Circuit's arm-of-the-state analysis unfortunately suffers from many of the problems identified by this Comment. First, the court engages in definitional reasoning, apparently attempting to discern state intent with respect to UTHSCH. This Comment has argued that the state's intent factor is normatively unjustified in the arms context because states could intend that an entity enjoy the state's immunity without responsibly structuring the entity to be responsive to the state's political pressures, which undermines the rationale this Comment argues should animate the arm-of-the-state doctrine.<sup>259</sup> Accordingly, the court's effort to discern whether UTHSCH is defined as a state agency under state law, whether its lands are defined as state lands, and whether education and research are considered state functions is unhelpful to the analysis given the inherently definitional nature of such considerations.<sup>260</sup>

Additionally, factors such as whether an entity can sue and be sued or hold property in its own name, standing alone, are similarly unhelpful to the analysis for reasons discussed previously.<sup>261</sup> And finally, when assessing the state's degree of control that it exercises over UTHSCH, the court majored on the minors and minored on the majors. The court considered such extraneous facts as whether UTHSCH was required to comply with certain kinds of state regulations and whether its contracts were subject to approval by the board of regents, but the court failed to consider substantive indicia of control such as whether the state could remove the members of the board of regents or veto its decisions.<sup>262</sup> Thus, much of the court's analysis is normatively problematic in light of the considerations discussed in this Comment.

### C. King in Light of this Comment's Proposed Framework: A Different Result?

An examination of this case in light of this Comment's political accountability framework may well yield a different result. First, as a threshold inquiry, the entity properly under examination in this case should be UTS, the University of Texas System, rather than UTHSCH. The Fifth Circuit focused on UTHSCH as a distinct entity, but it examined four of its six factors with respect to UTS, of which UTHSCH is a part.<sup>263</sup> This kind of back and forth

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<sup>259</sup> See *supra* Part V.A.

<sup>260</sup> *King*, 544 F. App'x at 495–96.

<sup>261</sup> See *supra* Part V.C.

<sup>262</sup> See *King*, 544 F. App'x at 497.

<sup>263</sup> *Id.* at 495–98.

shifting conflates the issues and suggests the court is searching for the facts that might support its holding rather than examining a single defined entity and letting whatever conclusion flow that may from a consistent examination of that entity. The plaintiff criticized the court's conflation of UTHSCH with UTS as tautological.<sup>264</sup> But following this Comment's prescription that a court should examine as the relevant entity the largest institutional unit exercising administrative and policy control over the entire unit, UTS would appear to be the right point of reference. The board of regents exercises full control over UTS, of which UTHSCH is a part.<sup>265</sup> Presumably this means that the board of regents of UTS has discretion to remove officers or employees all the way down the chain of command and has power to override decisions made by such individuals. Anyone working for UTHSCH is thus accountable to the board of regents. Thus UTS, which is controlled by the board of regents, is the appropriate entity to be examined.

Under this Comment's first element, a court should find that Texas's interests sufficiently coincide with UTS's affairs, thus pointing toward immunity. First, Texas law makes plain that UTS's jurisdiction or geographic reach covers the whole state.<sup>266</sup> Second, UTS as a whole presumably receives substantial state funds. While the Fifth Circuit only considered UTHSCH's finances, one can fairly infer that UTHSCH's funding is likely representative of all sister schools in the UTS network, meaning that UTS is a recipient of such state funds. Because the electorate as a whole is likely to care about the conduct and policies of an entity that covers the whole state and consumes substantial state tax dollars, the state's interests element points toward arm status.

Under this Comment's second element, however, a court may find that Texas does not wield the kind of immediate control over UTS warranting a conferral of immunity, though this is a closer call. First, it is unclear whether the members of UTS's board of regents can be removed at will by the state. While state statutory law governing UTS provides that members of the board of regents are to be appointed by the governor and approved by the senate, the statute is silent as to whether board members can likewise be removed at will.<sup>267</sup> The language of the Texas constitution indicates that the governor and

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<sup>264</sup> Petition for Writ of Certiorari, *supra* note 17, at 12.

<sup>265</sup> *King*, 544 F. App'x at 497.

<sup>266</sup> *See id.* at 495–98.

<sup>267</sup> TEX. EDUC. CODE ANN. § 65.11 (West 2012).



senate acting together can remove board members.<sup>268</sup> But this removal mechanism is addressed by the part of Texas's constitution concerning impeachment, and a full-blown impeachment process or a related removal mechanism that is permitted for cause is not the kind of immediate, discretionary removal power that this Comment's framework anticipates.<sup>269</sup> Admittedly, this past year the Texas House of Representatives came close to impeaching a member of the board of regents on policy grounds rather than the kind of criminal or unethical behavior impeachment traditionally concerns,<sup>270</sup> and a court might be persuaded by this example that the state's available mechanism for ousting board of regents members does create enough political accountability to point toward immunity, but this is a closer call. Second, there is no evidence the governor or the legislature wields the kind of discretionary administrative veto power over the board this Comment also considers relevant. Thus, on the whole, there is a strong argument that the state control element points away from immunity.

Because one of the two elements considered here arguably fails to be satisfied, UTS and its sub-entities should not be recognized as arms of the state. But what to take away from this case study?

First, suppose a court applied this Comment's framework to *King's* facts (and in particular was satisfied that Texas does wield sufficient control over UTS) and therefore reached the same result as the Fifth Circuit in granting immunity. Would that defeat this Comment's central premise that the arm-of-the-state doctrine needs a better framework? In short, no. The foregoing discussion illustrates that a political-accountability-inspired arm-of-the-state framework makes the outcome in *King* a closer call; accordingly, there are many borderline cases where a more coherent framework would make a critical difference in outcomes. And one should hope

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<sup>268</sup> TEX. CONST. art. XV, § 9(a) ("In addition to the other procedures provided by law for removal of public officers, the governor who appoints an officer may remove the officer with the advice and consent of two-thirds of the members of the senate present."); *see also* TEX. EDUC. CODE ANN. § 65.11 ("The government of the university system is vested in a board of nine regents appointed by the governor with the advice and consent of the senate.").

<sup>269</sup> *See* TEX. GOV'T CODE ANN. §§ 665.002, 665.052, 665.054 (West 2012).

<sup>270</sup> *See* Marissa Barnett, *Panel Censures but Doesn't Impeach UT Regent Wallace Hall*, DALLASNEWS.COM (Aug. 11, 2014, 11:47 PM), <http://www.dallasnews.com/news/state/headlines/20140811-panel-censures-but-doesnt-impeach-hall.ece>. The Texas House of Representatives stopped just short, censuring the board member instead, and the house's threatened impeachment was unusual because unelected state officials had only been impeached twice during Texas history, both for criminal acts. Skip Hollandsworth, *Is This the Most Dangerous Man in Texas?*, TEX. MONTHLY (Aug. 2014), <http://www.texasmonthly.com/story/ut-regent-wallace-hall-controversy-investigation-and-impeachment>.

that this Comment's framework would confirm the result in a number of past cases. At the least, it is more analytically sound for courts to reach the right result in a given case *because of* the framework used rather than *in spite of* the framework used.

But as this Comment has argued, this Comment's proposed framework may well call for a different result in *King*, which hopefully illustrates important ways the arm-of-the-state doctrine needs to be improved. An opposite result in *King* would surely cut against considerable precedent across the circuits, which generally tends to confer arm status to state universities,<sup>271</sup> and some may find it alarming that many state universities could potentially be stripped of their arm status under the framework this Comment proposes. But if the goal is to identify an analytically sound and normatively justified arm-of-the-state framework, one should not assess any proposed framework in light of whether it validates previous holdings, for that begs the normative question. Instead, this Comment argues that we must determine whether the entity under consideration is actually politically accountable. If it should be the case that many state universities are not, then they should not be recognized as arms. For those who believe that state universities' immunity should be preserved, the solution is simple: states can modify their laws so that officials like the members of the board of regents in this case can easily be removed by the state. But courts should not confer immunity on entities that are not politically accountable to the state.

#### CONCLUSION

As things stand, one cannot reliably predict what a government entity's arm status may be without actually litigating the case. The arm-of-the-state doctrine's lack of predictive value does a disservice to potential plaintiffs, government entities, and states alike in managing their expectations. Unless the Supreme Court adopts a simple, bright-line rule, arms jurisprudence will continue to be a heavily fact-dependent affair requiring considerable judicial effort and discretion. Critics are right to bemoan the condition of this complicated, nonintuitive doctrine.

But what critics *should also* bemoan is that, while courts take the natural institutional check of political accountability as a given in Eleventh

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<sup>271</sup> Frank H. Julian, *The Promise and Perils of Eleventh Amendment Immunity in Suits Against Public Colleges and Universities*, 36 S. TEX. L. REV. 85, 99–102 (1995) (detailing examples of public universities being designated as arms of the state).

Amendment jurisprudence generally, to date, this concern has barely surfaced in the arm-of-the-state context. It may be that judicial intuition and fact-specific precedents usually lead courts to the right result. But until a concern for political accountability is made explicit as an operational rationale guiding the courts' factor-based arms analyses, we must continue to rely on jurisprudential luck to ensure that arm-of-the-state cases result in normatively justified outcomes. Where entities are sheltered from both the threat of suit as well as the political pressures that counterbalance sovereign immunity, their incentives are skewed, and the delicate system of checks and balances and separation of powers that preserves the soil of democracy is undermined. Courts must take political accountability seriously if states are to keep their arms in touch.

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