MORE "MUNICIPAL" THAN "COURT": USING THE ELEVENTH AMENDMENT TO HOLD MUNICIPAL COURTS LIABLE FOR THEIR MODERN-DAY DEBTORS' PRISONS PRACTICES

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INTRODUCTION

In the fall of 1980, after pleading guilty to burglary and theft by stolen property, Danny Bearden was sentenced to three years' probation and ordered to pay $750 in fines and restitution: $200 within two days and the remaining balance within four months.[1] Mr. Bearden borrowed money from his parents to make the first payment, but a month later, was laid off from his job and could not find other work.[2] Shortly before the remaining balance was due, he was forced to notify his probation officer that he would be late with his payment.[3] In response, the trial court revoked his probation, and Mr. Bearden was ordered to serve the remainder of his probationary period in prison.[4] Two years later, the Supreme Court set him free, holding that where a person on probation makes bona fide efforts to pay the fines they owe but is unable to do so through no fault of their own, it is "fundamentally unfair" to imprison them based on their poverty.[5] The Court thus affirmed the unconstitutionality of debtors' prisons,[6] which had been abolished by federal law in 1833, 150 years earlier, as well as by a number of states shortly thereafter.[7]

The Supreme Court's ruling has seemingly gone unheard: the practice of incarcerating people for their inability to pay endures.[8] Today, local courts continue to send people bills for unpaid debts that they incur merely by being arrested—and then sentence them to jail when they cannot afford to pay the ever-increasing fines and fees that are associated with the criminal legal system.[9] For instance, in 2014, every state except

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[1] Bearden v. Georgia, 461 U.S. 660, 662 (1983).

[2] *Id.* at 662-63.

[3] *Id.* at 663.

[4] *Id.*

[5] *Id.* at 667-69.

[6] This Note refers to debtors' prisons (the historical practice of incarcerating people for private, contractual debts) and debtors' prison schemes and practices such as fines and fees (the modern practice of charging people who enter the criminal legal system fines and fees and then incarcerating them for failing to pay) interchangeably.

[7] Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), https://perma.cc/U4UH-VS7M. For an in-depth, historical overview of debtors' prison practices in the United States, see Jill Lepore, *I.O.U.*, *How We Used to Treat Debtors*, NEW YORKER (Apr. 6, 2009), https://perma.cc/PE9Z-J6Q9.

[8] *See* Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 242-45 (2017) (discussing the evolution of debtors' prisons, including the practice of "leasing" Black men convicted of misdemeanors to private companies to pay off their debt, as well as the skyrocketing fines and fees that modern courts charge).

[9] *See, e.g.*, Hager, *supra* note 7; Jessica Pishko, *Locked Up for Being Poor*, ATLANTIC (Feb. 25, 2015), https://perma.cc/KPN4-J8PG; Tina Rosenberg, *Out of Debtors' Prison, with Law as the Key*, N.Y. TIMES (Mar. 27, 2015, 7:00 AM), https://perma.cc/XES9-99VX; Joseph

for Hawaii charged people for electronic monitoring devices, which they wear only because they are ordered to do so.[10] There are countless stories of people being sent to jail for failing to pay private probation fees,[11] medical debt,[12] credit card debt,[13] or for failing to appear in court to pay off traffic violations that they cannot afford.[14] Many of the fines and fees that municipal courts charge are driven by city revenue goals.[15]

Advocates challenging these contemporary debtors' prison practices in federal court have found some success, but municipalities unwilling to dam their revenue streams are now arguing that municipal courts cannot be sued because they are arms of the state and are thus immune from suit under the Eleventh Amendment. Whether municipal courts should receive Eleventh Amendment protection is an open question made all the more complex by the Eleventh Amendment and arm-of-the-state doctrine's muddled history and the circuits' disparate attempts at applying what limited Supreme Court precedent is available.

This Note argues that the rise of litigation against debtors' prisons calls for renewed attention to the arm-of-the-state test's consistency with the Eleventh Amendment's original purpose, and that, because of their local funding and control, municipal courts should not receive sovereign immunity. Part I discusses municipalities' contemporary use of debtors' prisons practices like fines and fees to generate revenue, how litigants have challenged those fines and fees, and how municipalities are contesting their responsibility. Part II examines the Eleventh Amendment's origins and purpose, which are the foundation for the arm-of-the-state doctrine. Part III lays out the Supreme Court's articulation of the arm-of-the-state doctrine and the circuits' incoherent attempts to craft their own arm-of-the-state tests. Finally, Part IV suggests first that, specifically in the

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Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), https://perma.cc/VG2R-JX4Z.

[10] Shapiro, *supra* note 9. In 2018, the non-profit Equal Justice Under Law filed a class-action suit against a private company which provides electronic monitoring services to multiple jurisdictions in California, alleging that the company extorts fees from poor people through threat of incarceration. Complaint at 2, Edwards v. Leaders in Cmty. Alternatives, Inc., No. 4:18-cv-04609, 2018 WL 6591449 (N.D. Cal. Dec. 14, 2018), https://perma.cc/5LWM-DWEU.

[11] Hannah Rappleye & Lisa Riordan Seville, *The Town That Turned Poverty into a Prison Sentence*, NATION (Mar. 14, 2014), https://perma.cc/XNQ9-PVL5.

[12] Susie An, *Unpaid Bills Land Some Debtors Behind Bars*, NPR (Dec. 12, 2011, 12:01 AM), https://perma.cc/G6EQ-524A.

[13] Chris Serres & Glenn Howatt, *In Jail for Being in Debt*, STAR TRIBUNE (Mar. 17, 2011, 4:40 PM), https://perma.cc/LS4F-ZHAC.

[14] Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014, 1:30 PM), https://perma.cc/9SM8-YMZ4.

[15] *See* Hager, *supra* note 7; ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 8-9 (2010), https://perma.cc/4Z2B-SHP8.

context of debtors' prison litigation, municipal courts should not receive sovereign immunity, and second that, in order to realign the arm-of-the-state doctrine with the Eleventh Amendment's purpose as described by the Supreme Court, further consideration must be given to focusing the arm-of-the-state test on funding and local control.

I. LITIGATION AGAINST MODERN-DAY DEBTORS' PRISONS AND MUNICIPAL PUSHBACK

A. Debtors' Prisons as Revenue Sources

As both commentators and court administrators themselves have noted, the resurgence of debtors' prisons is closely linked to shrinking municipal budgets and the recent financial crisis.[16] In 2003, the Conference of State Court Administrators ("COSCA") warned that "state governments today are experiencing the worst fiscal crisis in many decades," and that "deep budget cuts . . . are forcing court closures."[17] While COSCA emphasized that state legislatures should fund state courts, it noted that, "[i]n a tight budget environment, increasing fees and fines . . . may be a viable option" and that "enhanced collection of uncollected fines" would generate revenue.[18] In 2012, COSCA released a follow-up policy paper, aptly titled *Courts Are Not Revenue Centers*, cautioning its members that courts should "not impose unreasonable financial obligations assessed to fund other governmental services" and should "strive for a revenue structure that provides access, adequacy, stability, equity, transparency and simplicity"—an implicit rebuke of COSCA's earlier position.[19] Four years later, COSCA released yet another policy paper, this

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[16] Eric Balaban, *Shining a Light into Dark Corners: A Practitioner's Guide to Successful Advocacy to Curb Debtor's Prisons*, 15 LOY. J. PUB. INT. L. 275, 276 (2014); Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1793 n.30 (2010); Jerjian, *supra* note 8, at 248; Torie Atkinson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 190, 195-96 (2016).

[17] CONFERENCE OF STATE COURT ADMINISTRATORS, POSITION PAPER ON STATE JUDICIAL BRANCH BUDGETS IN TIMES OF FISCAL CRISIS 2 (2003), https://perma.cc/E27L-JQ98. COSCA is an organization consisting of all fifty states' state court administrators that advocates for the improvement of state court systems.

[18] *Id.* at 13-14.

[19] CARL REYNOLDS & JEFF HALL, CONFERENCE OF STATE COURT ADMINISTRATORS, COURTS ARE NOT REVENUE CENTERS 1, 13 (2012), https://perma.cc/A66V-N377.

time calling for courts to put an end to practices that encourage incarceration based on failure to pay fines and fees.[20] COSCA has framed its policy papers as part of the organization's supposedly long-standing commitment to reducing or eliminating court funding through fees,[21] but COSCA called for just the opposite in 2003 when it suggested that increasing court fines and fees was a viable option for generating municipal revenue.[22] It is no wonder that cities and counties concerned about finding revenue streams to shore up their budgets have aggressively charged and collected fines and fees, pulling people into the criminal legal system to bolster municipal bottom lines.[23]

The city of Ferguson, Missouri, illustrates this phenomenon all too well.[24] In its 2015 report on the investigation of the Ferguson Police Department, the United States Department of Justice described the city's municipal courts' priority as "maximizing revenue,"[25] not the "fair administration of justice."[26] Ferguson "[c]ity, police, and court officials . . . worked in concert to maximize revenue at every stage of the enforcement process."[27] In fact, Ferguson city officials lauded then-Municipal Judge Brockmeyer for creating fees that the Department of Justice's report described as "abusive."[28] Correspondence between the Ferguson Court Clerk and Judge Brockmeyer emphasized the importance of meeting the court's targets for fine and fee collection.[29] Defendants who could not pay the fines and fees set by the Ferguson court were jailed.[30]

Unfortunately, Ferguson is not alone: in 2012, thirty-eight American cities received ten percent or more of their revenue from fines and fees,

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[20] *See* ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADMINISTRATORS, THE END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS (2016), https://perma.cc/JZL8-FGP2.

[21] *Id.* at 2.

[22] CONFERENCE OF STATE COURT ADMINISTRATORS, *supra* note 17, at 13-14.

[23] Hager, *supra* note 7; ACLU, *supra* note 15, at 8-9.

[24] *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9-15 (2015) [hereinafter "FERGUSON REPORT"], https://perma.cc/PPH4-EXY8 (describing Ferguson city officials' and police officers' revenue-driven practices).

[25] *Id.* at 9.

[26] *Id.* at 15.

[27] *Id.* at 10.

[28] *Id.* at 14. These fines and fees included a $50 fee for every time a person had a pending municipal arrest warrant cleared and a fine for failure to appear that increased every time the defendant failed to appear or pay the fine.

[29] FERGUSON REPORT, *supra* note 24, at 14-15.

[30] First Amended Class Action Complaint at 1, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Apr. 13, 2016), https://perma.cc/TK5G-PZPD.

and many more received at least five percent.[31] More recently, in response to multiple local judges setting fines to generate revenue for their municipalities, the New Jersey Supreme Court issued a memorandum to all municipal judges emphasizing that "[t]he imposition of punishment should in no way be linked to a town's need for revenue."[32] Municipal courts across the country have thus revived debtors' prisons practices through the use of fines and fees, effectively incarcerating people because they are poor.[33]

B. Legal Challenges to Debtors' Prisons Schemes Face Municipal Pushback

In the past decade, class action lawsuits have emerged as an effective strategy for civil rights organizations and advocates to challenge municipalities and counties' practice of using court- or law enforcement-imposed fines and fees to generate revenue, and incarcerating people who cannot pay those fines and fees. The National Center for State Courts, founded at Chief Justice Burger's urging in order to provide authoritative information on local courts,[34] reports fifty-two cases filed in state and federal court between 2012 and 2018 challenging fines and fees.[35] Organizations such as Equal Justice Under Law, the Southern Center for Human Rights, the Southern Poverty Law Center, and the American Civil Liberties Union have filed suits alleging modern-day debtors' prison schemes

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[31] U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR 20-22 (2017) (citing Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), https://perma.cc/T28M-5ZH2), https://perma.cc/DA2V-AD29.

[32] Memorandum on Fines and Penalties in Municipal Court from Stuart Rabner, Chief Justice of the New Jersey Supreme Court, to All Judges of the Municipal and Superior Courts (Apr. 17, 2018), https://perma.cc/2P5G-QCN6.

[33] *See, e.g.*, Atkinson, *supra* note 16, at 194-98 (2016); Mollie Bryant & Jerry Mitchell, *Lawsuit: Jackson Runs What Amounts to Debtors' Prison*, CLARION-LEDGER (Oct. 13, 2015), https://perma.cc/2Q3L-YM9Z; Nicholas K. Geranios & Gene Johnson, *ACLU Lawsuit: Benton County Jailing People Who Can't Pay Court Fines*, SEATTLE TIMES (Oct. 6, 2015, 5:12 PM), https://perma.cc/UHS7-5SXW; Lucas Sullivan & Dylan Tussel, *Convicts Entering Franklin County Jail Must Pay $40*, COLUMBUS DISPATCH (Nov. 30, 2011, 10:38 AM), https://perma.cc/8KCR-FJEY; Tanzina Vega, *Biloxi Accused of Running "Modern-Day Debtors' Prison.,"* CNN MONEY (Oct. 21, 2015, 2:05 PM), https://perma.cc/JVU2-G59A.

[34] *About Us*, NAT'L CTR. FOR STATE COURTS, https://perma.cc/NTT3-FARL (last visited May 10, 2019).

[35] *States That Have Recent Litigation Related to Fines, Fees, or Bail Practices*, NAT'L CTR. FOR STATE COURTS, https://perma.cc/PVY9-CRD4 (last visited May 10, 2019).

against cities in Alabama,[36] Arkansas,[37] Georgia,[38] Louisiana,[39] Mississippi,[40] Missouri,[41] South Carolina,[42] and Texas,[43] among others. Civil rights advocates have targeted multiple cities in Missouri specifically: in 2015, ArchCity Defenders[44] filed twin class action suits against the cities of Jennings and Ferguson, alleging that both cities had maintained brazen debtors' prison schemes for years with the express purpose of generating

[36] *See* First Amended Class Action Complaint, Mitchell v. City of Montgomery, No. 2:14-cv-186-MEF (M.D. Ala. May 23, 2014).

[37] *See* Complaint – Class Action, Dade v. City of Sherwood, No. 4:16-cv-00602-JM (E.D. Ark. Aug. 23, 2016), https://perma.cc/C96L-3L52. The parties reached a settlement in 2017. *See* Stipulation Regarding Settlement, Dade v. City of Sherwood, No. 4:16-cv-00602-JM (E.D. Ark. Nov. 14, 2017), https://perma.cc/Y8LU-HFN4.

[38] Complaint at 1-2, Jones v. Grady Cty., No. 1:13-cv-00156-WLS (M.D. Ga. Sept. 24, 2013). The District Court ultimately approved a settlement agreement. *See* Order Granting Final Approval of Class Action Settlement at 9, 14, Jones v. Grady Cty., No. 1:13-cv-00156-WLS (M.D. Ga. Oct. 14, 2015). *See also* Plaintiffs' Complaint for Declaratory and Injunctive Relief, Brucker v. City of Doraville, No. 1:18-cv-02375-RWS (N.D. Ga. May 23, 2018).

[39] *See* First Amended Class Action Complaint, Cain v. City of New Orleans, No. 2:15-cv-4479-SSV-JCW (E.D. La. Sept. 21, 2015).

[40] *See* Class Action Complaint, Bell v. City of Jackson, No. 3:15-cv-00732-TSL-RHW (S.D. Miss. Oct. 9, 2015); Class Action Complaint, Kennedy v. City of Biloxi, No. 1:15-cv-348 (S.D. Miss. Oct. 21, 2015).

[41] *See* Civil Rights Class Action Complaint, Whitner v. City of Pagedale, No. 4:15-cv-01655-RWS (E.D. Mo. Nov. 4, 2015). In 2018, the presiding judge approved a consent decree providing for steps to reform Pagedale's municipal court practices and city prosecutions. *See* Consent Decree, Whitner v. City of Pagedale, No. 4:15-cv-01655-RWS (E.D. Mo. May 21, 2018).

[42] *See* Class Action Second Amended Complaint, Brown v. Lexington Cty., No. 3:17-cv-1426-MBS-SVH (D.S.C. Oct. 19, 2017).

[43] *See* Class Action Complaint, West v. City of Santa Fe, No. 3:16-cv-00309 (S.D. Tex. Nov. 3, 2016).

[44] ArchCity Defenders is a nonprofit civil rights law firm based in St. Louis, Missouri, dedicated to combating the criminalization of poverty and state violence against poor people and people of color. *Who We Are*, ARCHCITY DEFENDERS, https://perma.cc/ZWE9-F3VL (last visited Dec. 27, 2019). Since its founding in 2009, the firm has filed numerous actions against municipalities in the St. Louis area challenging police misconduct, debtors' prisons, cash bail, and inhumane jail conditions, among other issues. *Civil Rights Litigation*, ARCHCITY DEFENDERS, https://perma.cc/247M-LL3V (last visited Dec. 27, 2019).

revenue.[45] ArchCity Defenders went on to file similar suits against the cities of St. Ann,[46] Maplewood,[47] and Florissant.[48]

While some debtors' prison class actions have ended in settlements or consent degrees,[49] a number of municipalities have objected to being held liable for their courts' actions. The city of Ferguson moved to dismiss ArchCity Defenders' suit in 2016[50] and again in 2017,[51] claiming in both motions that the Ferguson municipal court is immune from suit under the Eleventh Amendment.[52] Both motions were denied,[53] but Ferguson moved so again in 2019, insisting that the city has no control over the municipal court, that the municipal court is part of Missouri's state circuit court system, and that the municipal court is thus entitled to sovereign immunity.[54] The city of Maplewood also moved to dismiss ArchCity Defenders' suit, arguing that the Maplewood Municipal Court is an arm of the state and thus protected from suit by the Eleventh Amendment.[55] The

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[45] Class Action Complaint at 1, 36, Jenkins v. City of Jennings, No. 4:15-cv-00252-CEJ (E.D. Mo. Feb. 8, 2015); Class Action Complaint at 33-34, Fant v. Ferguson, No. 4:15-cv-00253-SPM (E.D. Mo. Feb. 8, 2015). The city of Jennings settled in late 2016, agreeing to compensate people who were incarcerated for failing to pay fines and fees. *See* Order Granting Final Approval of Class Action Settlement, Jenkins v. Jennings, No. 4:15-cv-00252-CEJ (E.D. Mo. Dec. 14, 2016).

[46] *See* Second Amended Class Action Complaint, Thomas v. City of St. Ann, No. 4:16-cv-01302-RWS (E.D. Mo. July 21, 2017).

[47] *See* Class Action Complaint, Webb v. City of Maplewood, No. 4:16-cv-01703 (E.D. Mo. Nov. 1, 2016).

[48] *See* Class Action Complaint, Baker v. City of Florissant, No. 4:16-cv-01693 (E.D. Mo. Oct. 31, 2016).

[49] *See supra* notes 37-38, 41, 45.

[50] *See* Defendant's Motion to Partially Dismiss Plaintiffs' First Amended Complaint, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Apr. 27, 2016).

[51] *See* Defendant City of Ferguson's Corrected Motion to Dismiss Counts I Through III and V Through VII for Lack of Subject Matter Jurisdiction, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Sept. 20, 2017).

[52] Defendant's Memorandum in Support of Its Motion to Partially Dismiss Plaintiffs' First Amended Complaint, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Apr. 27, 2016); Memorandum in Support of Defendant the City of Ferguson's Corrected Motion to Dismiss for Lack of Subject Matter Jurisdiction at 12-17, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Sept. 20, 2017).

[53] *See* Fant v. City of Ferguson, No. 4:15-cv-00253-AGF, 2016 WL 6696065 (E.D. Mo. Nov. 15, 2016); Fant v. City of Ferguson, No. 4:15-cv-00253-AGF, 2018 BL 48196 (E.D. Mo. Feb. 13, 2018) (denying Ferguson's 2016 and 2017 motions to dismiss, respectively).

[54] The City of Ferguson's Memorandum in Support of Its Motion to Dismiss Counts I Through III and V Through VII for Failure to Join an Indispensable Party at 2, 25, Fant v. City of Ferguson, No. 4:15-cv-00253-AGF (E.D. Mo. Mar. 5, 2019).

[55] Defendant's Memorandum in Support of Its Motion to Dismiss Plaintiffs' Class Action Complaint for Failure to State a Cause of Action at 13, Webb v. City of Maplewood, No. 4:16-cv-01703-CDP (E.D. Mo. Dec. 29, 2016).

District Court for the Eastern District of Missouri denied the city's motion[56] and the Eighth Circuit Court of Appeals denied the city's interlocutory appeal, holding that the city of Maplewood can be held liable for unconstitutional policies or customs even if all individual officials participating in those policies are immune from suit.[57] St. Ann moved to dismiss on identical grounds, arguing that the "alleged wrongs against [the plaintiffs] relate back, not to St. Ann, but to the municipal court division in St. Ann, an arm-of-the-state and the real party in interest" which is protected by Eleventh Amendment immunity.[58]

To date, cities' attempts to sidestep liability for their debtors' prisons by claiming that the local court is an arm of the state and distinct from the city itself have not succeeded,[59] but advocates who seek to challenge debtors' prisons schemes by suing the cities and courts perpetrating them face an open question: whether municipal courts are arms of the state protected from suit by the Eleventh Amendment.[60] The arm-of-the-state doctrine's muddled articulation offers little help in discerning an answer.

II. THE ELEVENTH AMENDMENT'S MURKY ORIGINS AND LIMITATIONS

A. The Amendment's Purpose

An overview of the Eleventh Amendment's purpose is helpful in understanding the origins and disarray of the arm-of-the-state doctrine. However, such discussion must begin with the acknowledgement that "step[ping] through the looking glass of the Eleventh Amendment leads

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[56] Webb v. City of Maplewood, No. 4:16-cv-1703, 2017 WL 2418011 (E.D. Mo. June 5, 2017).

[57] Webb v. City of Maplewood, 889 F.3d 483, 487-88 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 389 (2018). The circuit court noted that, even if the municipal court is a separate and distinct entity over which the city has no control, "the City will have a defense on the merits but not immunity from suit." *Id.* at 486.

[58] Memorandum in Support of Defendant the City of St. Ann's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 5, Thomas v. City of St. Ann, No. 4:16-cv-01302-RWS (E.D. Mo. Sept. 8, 2017). The court denied the motion, rejecting St. Ann's argument that it is immune from suit even if all of the individuals identified as participants in the contested practices are immune from suit. Order at 2, Thomas v. City of St. Ann, No. 4:16-cv-01302-RWS (E.D. Mo. Sept. 14, 2018).

[59] *See supra* notes 53, 57-58.

[60] Balaban, *supra* note 16, at 280-81.

to a wonderland of judicially created and perpetuated fiction and paradox."[61] Ratified in response[62] to *Chisholm v. Georgia*,[63] the Amendment's explicitly stated function is to prevent federal courts from hearing suits against a state brought by citizens of another state or a foreign state.[64] However, despite the Amendment's concise language,[65] the Supreme Court has expanded its meaning to protect states from being sued by their own citizens,[66] by foreign states,[67] and by Native tribes.[68] "As so construed, the Amendment is in substantial tension with the rule-of-law axiom that for every federal right there must be a remedy enforceable in the federal court: [people] . . . cannot enforce their federal rights in federal court suits against the states."[69] The modern conception of state sovereign immunity thus is a "hodgepodge of confusing and intellectually indefensible" judicially developed and maintained creation.[70]

Many have written on[71]—and debated—the underlying purpose and scope of the Eleventh Amendment and of state sovereign immunity. One

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[61] Spicer v. Hilton, 618 F.2d 232, 235 (3d Cir. 1980).

[62] *Id.*; *see also* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 515 (1978) ("The one interpretation of the eleventh amendment to which everyone subscribes is that it was intended to overturn *Chisholm v. Georgia*.").

[63] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (entering a default judgment against the state of Georgia in a suit by citizens of South Carolina to recover on confiscated bonds).

[64] U.S. CONST. amend. XI.

[65] The Eleventh Amendment states in its entirety that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[66] Hans v. Louisiana, 134 U.S. 1, 10-11, 15 (1890) (holding that a citizen of a state may not sue that state in federal court on a claim arising under federal law unless the state consents).

[67] *See* Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

[68] *See* Blatchford v. Native Village of Noatack, 501 U.S. 775, 779-82 (1991).

[69] Carlos Manuel Vásquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1686 (1997).

[70] John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983).

[71] *See, e.g.*, Gibbons, *supra* note 70, at 1892 (placing the Amendment in its historical context to argue that the Amendment is limited to preventing "the judicial power of the United States [from] extend[ing] to an action against a state if the only basis for federal jurisdiction is the presence of a diverse or alien party."); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 974 (2000) (questioning the assumption that nineteenth century remedies define what the Constitution requires and prohibits of remedies against states); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments,* 75 COLUM. L. REV. 1413, 1422 (1975) (describing the connection between Article III and the Eleventh Amendment as defining the scope of federal court jurisdiction).

predominant theory is that, in deciding *Chisholm v. Georgia*,[72] the Supreme Court abandoned the Constitution's Framers' intent that states be immune from private suit, and that the Amendment was enacted in order to restore that original understanding.[73] The Supreme Court endorsed this notion, noting that "[b]ehind the words of the constitutional provisions are postulates which limit and control. There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"[74]

Two centuries of "tortured reading" of the Eleventh Amendment[75] led to the Supreme Court's articulation of two entwined rationales for state sovereign immunity: the protection of state sovereignty from the offense of a state's being haled into court against its will, and the insulation of the state treasury from the judgments of federal courts.[76] Commentators have argued that state sovereign immunity serves a number of additional interests—allowing government to operate more efficiently,[77] restricting the federal government's ability to create liabilities that bind state governments,[78] and protecting the policy decisions of popularly-elected officials[79]—all of which reflect the Supreme Court's focus on federalism in developing Eleventh Amendment jurisprudence.[80]

B. Bypassing Eleventh Amendment Immunity by Suing Local Entities

Over the past century, the Supreme Court has carved out caveats to the broad protections that Eleventh Amendment sovereign immunity offers to states. There are three major exceptions: Congressional abrogation

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[72] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[73] Field, *supra* note 62, at 515. *See also* Monaco v. Mississippi, 292 U.S. 313, 325 (1934); Hans v. Louisiana, 134 U.S. 1, 12 (1890); Alan D. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1, 7, 9 (1967).

[74] *Monaco*, 292 U.S. at 322–23 (quoting THE FEDERALIST No. 81 (Alexander Hamilton)).

[75] DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 148 (2005).

[76] 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); Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1245 (1992).

[77] CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 153 (1972).

[78] JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 3–4 (2002).

[79] JACOBS, *supra* note 77, at 152.

[80] For additional in-depth commentary on the passage of the Eleventh Amendment and the ongoing debate over its doctrinal roots, see Field, *supra* note 62; Jackson, *supra* note 71.

of state sovereign immunity,[81] state waiver of sovereign immunity,[82] and suits brought under the doctrine of *Ex parte Young*.[83] However, these exceptions place constraints on Congress' power to abrogate state sovereign immunity[84] and on the remedies available.[85] Their utility is thus limited for plaintiffs who seek to challenge government employees' allegedly unconstitutional actions. As a result, many plaintiffs have chosen to sidestep Eleventh Amendment concerns by bringing legal actions against local municipalities and other political subdivisions instead, which are not rendered immune from suit by the Eleventh Amendment.[86]

As plaintiffs have turned to litigation against local and municipal governments and entities, local and municipal governments have simultaneously evolved and created new boards, authorities, and commissions in the name of expanding state services and emphasizing privatization, revenue-sharing, and decentralization.[87] With ever-expanding and decen-

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[81] Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996).

[82] Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167 (2003).

[83] *Ex parte* Young, 209 U.S. 123 (1908) (holding that plaintiffs may sue a state official in their official capacity for prospective injunctive relief in order to end a continuing federal law violation).

[84] *See Seminole Tribe*, 517 U.S. at 59-60 (holding that Congress cannot abrogate states' sovereign immunity pursuant to its powers under Art. I § 8 of the United States Constitution, commonly known as the Interstate Commerce Clause, but can use its powers under § 5 of the Fourteenth Amendment).

[85] *See Ex parte* Young, 209 U.S. 123 (allowing plaintiffs to sue state officials in their official capacity for prospective injunctive relief); *but see Seminole Tribe*, 517 U.S. at 74 (refusing to apply the *Ex parte Young* exception where Congress has "prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right").

[86] *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Lincoln Cty. v. Luning, 133 U.S. 529 (1890). Plaintiffs' ability to sue a municipality for constitutional violations is nevertheless limited because plaintiffs seeking to hold a municipality liable pursuant to 42 U.S.C. § 1983 must clear *Monell*'s heightened threshold of causation. As a result, today's federal dockets are "replete with cases . . . where immunities and the municipal causation requirement conspire to immunize local governments and their officials for conduct that violates the Constitution." Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 464 (2016).

[87] Jameson B. Bilsborrow, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 64 EMORY L.J. 819, 822 (2015); Linda Lobao, *The Rising Importance of Local Government in the United States: Recent Research and Challenges for Sociology*, 10 SOC. COMPASS 893, 897 (2016); Rogers, *supra* note 76, at 1244; *see also* Keon S. Chi et al., Council of State Governments, *Privatization in State Government: Trends and Issues*, SPECTRUM: J. ST. GOV'T, Fall 2003, at 13, https://perma.cc/F968-CKSK; John Joseph Wallis & Wallace E. Oates, Nat'l Bureau of Econ. Research, *Decentralization in the Public Sector: An Empirical Study of State and Local Government*, *in* FISCAL FEDERALISM: QUANTITATIVE STUDIES 5 (Harvey S. Rosen, ed., University of Chicago Press 1988), https://perma.cc/XS22-Y5SU.

tralizing local governments, plaintiffs can sue a "limitless" variety of government entities.[88] Each time they do, the presiding court must determine whether that entity is truly local. If the entity is situated sufficiently closely to the state, the court will consider the entity an "arm of the state" and thus immune from suit under the Eleventh Amendment despite any seemingly local character.[89]

III. THE ARM-OF-THE-STATE DOCTRINE'S HAPHAZARD EVOLUTION

A. The Supreme Court's Articulation

The Supreme Court has never issued a definitive framework for how to conduct the arm-of-the-state inquiry, and three Supreme Court cases represent the doctrine's modern canon.[90] In 1977, the Court recognized in *Mt. Healthy School District Board of Education v. Doyle* that Eleventh Amendment immunity may apply to lesser government entities that have such a close relationship with the state as to be "arm[s] of the state."[91] The Court considered whether a local public board of education in Ohio was entitled to state sovereign immunity in a suit by a district school teacher who had been fired.[92] The Court balanced factors relevant to determining whether the nature of the governmental entity in question makes it more like an arm of the state or more like a municipality or political subdivision.[93] Finding it relevant that Ohio law's definition of "state" did not include local school districts, and that the school board had "extensive" financial powers and freedom, the Court ultimately concluded that the district's status under state law and its ability to generate its own revenue outweighed the state's financial assistance and administrative involvement.[94] The district was "more like a county or city than . . . like an arm of the State" and thus not entitled to immunity.[95] However,

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[88] Bilsborrow, *supra* note 87, at 821-22.

[89] *See Mt. Healthy*, 429 U.S. at 280.

[90] In response to the Court's silence on how to apply the arm-of-the-state analysis consistently, the circuit courts have instead each crafted their own tests, with sometimes contradictory results. *See* discussion *infra* Section III.B.

[91] *Mt. Healthy*, 429 U.S. at 280.

[92] *Id.* at 281-83.

[93] *Id.* at 280.

[94] *Id.*

[95] *Id*. The Court also noted that the district board received a "significant" amount of money from the state of Ohio and some guidance from the state's board of education, but the district board's financial independence and the exclusion of local school districts from Ohio law's definition of "state" outweighed those considerations. *Id.*

the Court did not explain the relative weight of the factors that it considered and did not indicate whether courts should consider other factors.[96]

Mt. Healthy was not the first time the Court had considered dismissing a suit on sovereign immunity grounds without the state's being formally named as a defendant: the Court had long held that, where a state is the "real, substantial party in interest," regardless of the named defendants, the suit should be barred by the Eleventh Amendment.[97] But prior cases where courts had found the state to be the real party in interest were cases in which, if damages were to be awarded, there would be "no doubt" that they would come directly from the state treasury.[98] *Mt. Healthy* was not such a case, and thus suggested that a lesser government entity might share such a close relationship with the state that—so as to protect the state's interests—the entity should be protected from suit by state sovereign immunity regardless, even though the state's treasury may not be responsible for any ultimate payment.[99]

In the 1979 case of *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Court considered whether the Tahoe Regional Planning Agency ("TRPA"), a bi-state government entity, was entitled to state sovereign immunity.[100] Private landowners sued the TRPA, a bi-state compact between California and Nevada, alleging that the agency had adopted a land-use ordinance and engaged in other conduct that destroyed the petitioners' property values.[101] While the Ninth Circuit Court of Appeals, from which the petitioners appealed, concluded that TRPA received state sovereign immunity because it exercised a "specially aggregated slice of state power,"[102] the Supreme Court rejected the circuit's "expansive reading of the Eleventh Amendment."[103] The Court concluded that the TRPA could not claim sovereign immunity based on six factors: (1) the agency's characterization in the language of the compact; (2) the local government's role in appointing the agency's directors; (3) the local,

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[96] Héctor G. Bladuell, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 MICH. L. REV. 837, 838-39 (2007); Rogers, *supra* note 76, at 1263.

[97] Edelman v. Jordan, 415 U.S. 651, 663 (1974) (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945), *overruled on other grounds by* Lapides v. Bd. of Regents, 535 U.S. 613 (2002)).

[98] Jonathan W. Needle, Note, *"Arm of the State" Analysis in Eleventh Amendment Jurisprudence*, 6 REV. LITIG. 193, 207 (1987).

[99] *See Mt. Healthy*, 429 U.S. at 280; Bilsborrow, *supra* note 87, at 826.

[100] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 393 (1979).

[101] *Id.* at 394.

[102] *Id.* at 400 (quoting Jacobson v. Tahoe Reg'l Planning Agency, 566 F.2d 1353, 1359 (9th Cir. 1977), *aff'd in part, rev'd in part sub nom.* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979)).

[103] *Id.* at 400.

non-state source of the agency's funding; (4) the municipal nature of the agency's function; (5) the state government's inability to veto the agency's actions; and (6) the state's lack of financial responsibility for the agency's liabilities and obligations.[104] For the first time, the Court also examined the state's intent in creating the entity and the entity's actual operations.[105]

The Court acknowledged that, even though some agencies exercising state power had previously been allowed to invoke the protections of the Eleventh Amendment, those agencies had been found immune from suit "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself."[106] In articulating when state sovereign immunity applies to governmental entities, the *Lake Country Estates* Court cited two prior cases where immunity was at issue specifically because the state was the real party in interest due to the state treasury's ultimate responsibility for any monetary award.[107] The Court thus drew a connection between the arm-of-the-state and real-party-in-interest doctrines and underscored the importance of the state treasury's direct involvement in both.[108]

As parties continued to raise the issue of state sovereign immunity for local governmental entities, lower courts struggled to apply the *Mt. Healthy* and *Lake Country Estates* holdings, and the Second and Third Circuits eventually reached different conclusions about the same bistate entity, the Port Authority of New York and New Jersey. The Third Circuit, which concluded that the Port Authority was an arm of the state for purposes of Eleventh Amendment immunity, stated that *Lake Country Estates* did not set out an "exclusive list of factors to be considered" in an arm-of-the-state inquiry and conducted an inquiry based on the six *Lake Country Estates* factors as well as Port Authority's function, power to sue and be sued, and immunity from state taxation.[109] The Second Circuit, on the other hand, found that the Port Authority was not an arm of the state and thus not immune from suit.[110] While the Second Circuit also used the *Lake Country Estates* factors, the court found that the sixth factor—

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[104] *Id.* at 401-02; Bladuell, *supra* note 96, at 839.

[105] *Lake Country Estates*, 440 U.S. at 401.

[106] *Id.* (citing Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459 (1945)).

[107] *Id.* at 401 n.18.

[108] *Id.*; *see also* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Bilsborrow, *supra* note 87, at 826.

[109] Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. & N.J., 819 F.2d 413, 417 (3d Cir. 1987), *abrogated by* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994).

[110] Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628, 630 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990).

whether the agency's liability would place the state treasury at risk—was "the single most important factor" in determining whether an agency was intended to be an arm of the state for Eleventh Amendment purposes.[111] In holding that the Port Authority was not entitled to sovereign immunity, the Second Circuit emphasized that, in cases where the state is not the defendant, the "exposure of the state treasury" is "critical" to finding Eleventh Amendment immunity, and cited to cases which granted such immunity under the real-party-in-interest doctrine.[112] The Supreme Court resolved the split by concluding that the states had waived any immunity and did not address the differences in the circuits' arm-of-the-state analysis.[113]

Four years later, in *Hess v. Port Authority Trans-Hudson Corporation*, the Court recognized but did not resolve the circuits' confusion.[114] Acknowledging that the various "indicators of immunity" had pointed the Second and Third Circuits in different directions,[115] the Court reemphasized that shielding the state's treasury from liability was the "most salient factor" in Eleventh Amendment determinations.[116] The *Hess* Court went on to incorporate the Eleventh Amendment's "twin reasons for being"—the protection of the state's treasury and dignity interests—explicitly into its arm-of-the-state analysis.[117] Pointing to the Port Authority's financial self-sufficiency, the Court ultimately held that there was no concern as to state solvency or dignity and upheld the Second Circuit's finding that the Port Authority is not immune from suit.[118]

B. Chaos Amongst the Circuits

Although *Hess* provided lower courts with some guidance as to how they might apply the arm-of-the-state analysis, the Supreme Court did not clarify which factors courts should consider, how heavily they should weigh those factors relative to each other, or how the twin reasons are involved in the analysis.[119] The result has proven nothing less than chaotic: every circuit has developed its own version of the arm-of-the-state

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[111] *Id.* at 631.

[112] *Id.*

[113] Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990).

[114] Hess v. Port. Auth. Trans-Hudson Corp., 513 U.S. 30 (1994).

[115] *Id.* at 47.

[116] *Id.*

[117] *Id.* at 47-48.

[118] *Id.* at 39-40, 47-48, 52.

[119] *See* Bilsborrow, *supra* note 87, at 827-29 (questioning whether the twin reasons are a second stage of analysis after the reviewing court first considers the various arm-of-the-state factors, or whether the twin reasons function as a "prism" through which the factors should then be "refracted").

test, which in turn has produced scores of inter- and intra-circuit divergence as to which governmental entities are and are not arms of their respective states.[120] Some circuits have attempted to revise their arm-of-the-state analyses in light of *Hess*,[121] while others have maintained that their analyses are consistent with *Hess*' approach.[122]

Each federal circuit uses between two and seven factors to determine whether a governmental entity is an arm of the state that receives Eleventh Amendment immunity.[123] The factors fall into five broad categories: (1) whether the entity performs local or state functions; (2) the degree of state political and administrative control over the entity; (3) the entity's powers and financial autonomy from the state; (4) the entity's characterization by state law; and (5) whether the state treasury would ultimately pay any judgments against the entity.[124] The inquiry is ultimately one into the entity's status under the Eleventh Amendment, but because the criteria are so difficult to define, circuits apply the arm-of-the-state analysis on a fact-intensive, case-by-case basis.[125]

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[120] *See infra* notes 129-48.

[121] *E.g.*, Irizarry-Mora v. Univ. of P.R., 647 F.3d 9, 12 (1st Cir. 2011) (describing the First Circuit's decision to "reformulate [its] analysis as a two-part inquiry whose steps reflect[] the Eleventh Amendment's twin concerns for the States' dignity and their financial solvency" raised in *Hess*). Muddying the waters even further, this revision is in name only; the substance of the court's analysis remains the same. *Id.* ("[T]he 'reshaping' of our law did not represent an actual change in the substance of the analysis.").

[122] *E.g.,* P.R. Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 874 (D.C. Cir. 2008) (reading *Hess* as "confirm[ing] that we must apply the three-factor arm-of-the-state test and look to state intent, state control, and overall effects on the state treasury."); Ernst v. Rising, 427 F.3d 351, 359 (6th Cir. 2005) (describing the Sixth Circuit's four-factor based approach as "similar" to that of the Supreme Court).

[123] For an in-depth description of each circuit's arm-of-the-state test and examples of its application, see 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 123.23[4] (3d ed. 2013).

[124] Rogers, *supra* note 76, at 1269.

[125] *Id.* at 1272.

The First Circuit uses a two-part test that requires the analysis of seven additional factors.[126] The Second Circuit has two tests: one considers six factors,[127] the other two,[128] and both emphasize the importance of protecting the state's treasury.[129] The Third Circuit holds that, in some cases, whether an entity is entitled to Eleventh Amendment immunity can be determined summarily from the statutes establishing and governing the entity.[130] On the other hand, where evidence beyond statutory language is required, the Third Circuit uses a three-factor test that gives each factor equal weight,[131] although the Third Circuit has historically ascribed the

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[126] Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56, 68 (1st Cir. 2003). In administering this test, First Circuit courts ask whether the state has structured the entity to share Eleventh Amendment immunity and whether there is a risk that money damages will be paid from the state treasury should the entity be found liable. To answer those two questions, First Circuit courts consider up to seven factors, including: (1) whether the agency has the financial power to satisfy judgments without involving the state; (2) whether the agency's function is governmental or proprietary; (3) whether the agency is separately incorporated; (4) how much control the state exerts over the agency; (5) whether the agency can sue, be sued, and enter contracts; (6) whether the agency's property is subject to state taxes; and (7) whether the state has immunized itself from liability for the agency's acts. *Id.* at 62 n.6 (quoting Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth., 991 F.2d 935, 939-40 (1st Cir. 1993)).

[127] Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996). Under this test, Second Circuit courts first consider six factors: "(1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state." *Id.* If those six factors "point in different directions," circuit courts then consider *Hess*' twin rationales for the Eleventh Amendment and ask whether allowing the entity to be sued in federal court will threaten the integrity of the state or expose the state treasury to risk. *Id.*

[128] Clissuras v. City Univ. of N.Y., 359 F.3d 79, 82 (2d Cir. 2004), *supplemented*, 90 F. App'x 566 (2d Cir. 2004). Under this test, Second Circuit courts consider (1) whether a judgment against the entity would render the state responsible for paying the damages, and (2) the extent of the state's control over the entity. *Id.*

[129] *Mansuco*, 86 F.3d at 293; *Clissuras*, 359 F.3d at 82. The Second Circuit's use of two distinct arm-of-the-state tests is perhaps due to *Pikulin v. City University of New York*, 176 F.3d 598 (2d Cir. 1999), which specifically discussed the status of the City University of New York ("CUNY") as an arm of the state. *Pikulin* was based in turn on a series of district court opinions issued before *Mancuso* that had discussed CUNY's arm-of-the-state status. *See, e.g.*, Burrell v. City Univ. of N.Y., 995 F. Supp. 398, 410–11 (S.D.N.Y. 1998); Minetos v. City Univ. of N.Y., 875 F. Supp. 1046, 1053 (S.D.N.Y. 1995); Moche v. City Univ. of N.Y., 781 F. Supp. 160, 165 (E.D.N.Y. 1992), *aff'd without opinion*, 999 F.2d 538 (2d Cir. 1993); Scelsa v. City Univ. of N.Y., 806 F. Supp. 1126, 1137 (S.D.N.Y. 1992); Silver v. City Univ. of N.Y., 767 F. Supp. 494, 499 (S.D.N.Y.), *aff'd on other grounds*, 947 F.2d 1021 (2d Cir. 1991); Ritzie v. City Univ. of N.Y., 703 F. Supp. 271, 276–77 (S.D.N.Y. 1989).

[130] Betts v. New Castle Youth Dev. Ctr., 621 F.3d 249, 254 (3d Cir. 2010).

[131] Benn v. First Judicial Dist. of Pa., 426 F.3d 233, 239-40 (3d Cir. 2005). The three factors that the Third Circuit considers are: (1) whether any money damages that result from the entity being held liable will come from the state treasury; (2) the agency's status under

most importance to whether the state treasury would pay any damages arising from the entity's liability.[132] The Fourth Circuit considers four non-exclusive factors,[133] the most important one being the state treasury's potential responsibility.[134] The Fifth Circuit's test uses six factors,[135] with the source of an entity's funding being the most important.[136] The Sixth Circuit uses four factors and gives the most weight to the state's potential liability.[137] The Seventh Circuit's test has two factors, one of which has five subparts, with financial autonomy the more important factor.[138] The Eighth Circuit uses a two-factor test, the ultimate question being whether

state law; and (3) the agency's degree of autonomy. Fitchik v. N.J. Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir. 1989).

[132] *Fitchik*, 873 F.2d at 659-62.

[133] S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc., 535 F.3d 300, 303 (4th Cir. 2008). The Fourth Circuit considers: (1) whether any judgment against the entity will be paid by or inure to the benefit of the state; (2) the degree of autonomy exercised by the entity; (3) whether the entity is involved with local or state concerns; and (4) how the entity is treated under state law. *Id.*

[134] Hutto v. S.C. Ret. Sys., 773 F.3d 536, 543 (4th Cir. 2014).

[135] Providence Behavioral Health v. Grant Rd. Pub. Util. Dist., 902 F.3d 448, 456 (5th Cir. 2018). The six factors are: (1) whether state statutes and case law view the agency as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned with local or statewide problems; (5) whether the entity can sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *Id.*

[136] Delahoussaye v. City of New Iberia, 937 F.2d 144, 147-48 (5th Cir. 1991).

[137] Ernst v. Rising, 427 F.3d 351, 359 (6th Cir. 2005). Sixth Circuit courts consider: (1) the state's potential liability for a judgment against the entity; (2) the language that state statutes and state courts use to refer to the entity and the degree of state control over the entity; (3) whether state or local officials appointed the entity's administrative officers; and (4) whether the entity's functions are that of state or local government. *Id.*

[138] Tucker v. Williams, 682 F.3d 654, 659 (7th Cir. 2012) (citing Kashani v. Purdue Univ., 813 F.2d 843, 845–47 (7th Cir.1987)). The Seventh Circuit considers the entity's financial autonomy and its general legal status; in analyzing the entity's financial autonomy, Seventh Circuit courts evaluate "the extent of state funding, the state's oversight and control of the entity's fiscal affairs, the entity's ability to raise funds independently, whether the state taxes the entity, and whether a judgment against the entity would result in the state increasing its appropriations to the entity."

the state is the real party in interest.[139] The Ninth Circuit uses five factors,[140] with the state's potential liability the most important.[141] The Tenth Circuit uses a four-factor test.[142] The Eleventh Circuit analyzes four factors[143] in light of the defendant's function when taking the challenged action.[144] Finally, the D.C. Circuit uses a three-factor test.[145] All of the circuits consider the entity's source of funding or financial independence in some way, but no two circuits use the same test.[146]

In deciding whether to grant Eleventh Amendment immunity to governmental entities, the circuits use nebulous factors that they do not weigh in any consistent manner, which creates unpredictable and occasionally conflicting results.[147] This raises fundamental concerns for litigants who seek to challenge practices, like fines and fees, of what would seem at first blush to be obviously municipal bodies, like municipal courts.

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[139] Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Tr. Co., 640 F.3d 821, 827 (8th Cir. 2011). Eighth Circuit courts examine the degree of an entity's independence from the state and whether a money judgment would implicate the state treasury. *Id. But see* United States *ex rel.* Fields v. Bi-State Dev. Agency of Mo.-Ill. Metro. Dist., 872 F.3d 872, 877 (8th Cir. 2017) (applying a six-factor test).

[140] Sato v. Orange Cty. Dep't of Educ., 861 F.3d 923, 928-29 (9th Cir. 2017). Ninth Circuit courts consider (1) whether a money judgment against the entity would be satisfied by state funds; (2) whether the entity performs central government functions; (3) whether the entity may sue or be sued; (4) whether the entity can take property in its own name or only the name of the state; and (5) the entity's corporate status.

[141] Doe v. Lawrence Livermore Nat. Lab., 131 F.3d 836, 839 (9th Cir. 1997).

[142] Steadfast Ins. Co. v. Agric. Ins. Co., 507 F.3d 1250, 1253 (10th Cir. 2007). Tenth Circuit courts analyze: (1) state law's characterization of the entity; (2) the entity's autonomy under state law and the degree of control the state exercises over the entity; (3) the entity's state funding and ability to issue bonds or levy taxes on its own behalf; and (4) whether the entity in question is concerned primarily with local or state affairs. *But see* Watson v. Univ. of Utah Med. Ctr., 75 F.3d 569, 574-75 (10th Cir. 1996) (describing a two-part arm-of-the-state analysis).

[143] Ross v. Jefferson Cty. Dep't of Health, 701 F.3d 655, 660 (11th Cir. 2012) (quoting Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003)). Eleventh Circuit courts consider: (1) how state law defines the entity; (2) the state's degree of control over the entity; (3) the source of the entity's funds; and (4) who is responsible for judgments against the entity.

[144] Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003).

[145] P.R. Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 873 (D.C. Cir. 2008). D.C. Circuit courts consider: (1) the state's intent as to the entity's status, including the functions it performs; (2) the state's control over the entity; and (3) the entity's overall effects on the state treasury.

[146] *See supra* notes 126-45.

[147] *See* discussion *supra* Section III.A; Rogers, *supra* note 76, at 1243-44.

IV. MUNICIPAL COURTS, SOVEREIGN IMMUNITY, AND THE NEED FOR AN ARM-OF-THE-STATE TEST CONSISTENT WITH THE ELEVENTH AMENDMENT

A. Municipal Courts Are More "Municipal" Than "Court"

Municipal courts illustrate how the expansion of local governments' and their simultaneous privatization and decentralization can lead to a governmental entity that both makes hyperlocal decisions and is claimed to be an arm of the state by municipalities defending against debtors' prison lawsuits.[148] The National Center for State Courts defines municipal courts as stand-alone trial courts with limited jurisdiction that are funded "largely by a local unit of government."[149] In many states, these courts are created by towns or cities[150] and receive exclusively local funding.[151] As a result, municipal courts are frequently entangled with other municipal branches of government: for instance, in Missouri, municipal court employees often work for both the court and for their city's executive office, and many report to city officials working in the finance department.[152] Court administrators and clerks who report to city finance directors or officials have reported that their "city uses the court for one of their

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[148] *See* sources cited *supra* notes 52, 54-55, 58, 87.

[149] *Municipal Courts Resource Guide*, NAT'L CTR. FOR STATE COURTS, https://perma.cc/8PVV-PC4E (last visited Nov. 21, 2019).

[150] *See, e.g.*, *About the Nevada Judiciary*, SUPREME COURT OF NEV., https://perma.cc/LY69-B6NV (last visited May 10, 2019) ("Each of these [municipal] courts is funded by the city . . . ."); *An Overview of the Utah Justice Courts*, UTAH COURTS, https://perma.cc/8SYD-AF8K (last visited May 10, 2019) ("Justice Courts are established by counties and municipalities . . . ."); *Courts of Limited Jurisdiction*, WASH. COURTS, https://perma.cc/YM56-DJKJ (last visited May 10, 2019) ("Municipal courts are those created by cities and towns."); *Indiana Trial Courts: Types of Courts*, IND. JUDICIAL BRANCH, https://perma.cc/DQF7-UGM9 (last visited May 10, 2019) ("City and town courts may be created by local ordinance (local law)."); *Municipal Court*, S.C. JUDICIAL BRANCH, https://perma.cc/P6ET-DHWQ (last visited May 10, 2019) ("The council of each municipality may establish, by ordinance, a municipal court to hear and determine all cases within its jurisdiction."); *Municipal Courts*, N.D. COURTS, https://perma.cc/LMB7-A9SM (last visited May 10, 2019) ("Each municipality under 5,000 in population has the option of deciding whether or not to have a municipal court."); *Municipal Courts*, WIS. COURT SYSTEM, https://perma.cc/82XJ-PGGW (last visited May 10, 2019) (directing municipalities interested in creating a municipal court towards a set of resources); *The Supreme Court of Georgia History, Municipal Courts*, SUPREME COURT OF GA., https://perma.cc/NB84-27W5 (last visited Nov. 21, 2019) ("Cities and towns in Georgia establish municipal courts . . . .").

[151] *See* sources cited *supra* note 150; *State Court Structure Charts*, COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, https://perma.cc/3T96-YX9E (last visited May 10, 2019) (offering summaries of all fifty states' courts' structure, jurisdiction, and funding sources).

[152] Lawrence G. Myers, *Judicial Independence in the Municipal Court: Preliminary Observations from Missouri*, 41 CT. REV. 26, 27 (2004), https://perma.cc/4R5U-N8FP.

main sources of income."[153] Locally funded, locally established, and locally staffed, municipal courts—which take on tens of millions of cases a year and are the only way that most residents come into contact with the judicial system[154]—are thus quintessentially local entities which in turn are used to raise revenue for their cities and towns.[155]

Where courts have focused their arm-of-the-state inquiry on a municipal court's funding or level of local control—two *Lake Country* factors that circuits tend to emphasize in their arm-of-the-state analyses—municipal courts have not received Eleventh Amendment immunity from suit.[156] Moreover, while municipal courts are technically part of their state's judicial system,[157] they do not share the same jurisdictional or practical characteristics as other state courts.[158] State judicial systems are comprised of trial courts, mid-level appellate courts, and a highest court, typically the Supreme Court or Court of Appeals.[159] Municipal courts sit below all of these courts and are so specific to their town or city that even the National Center for State Courts does not mention them in its summary of state court systems.[160] It is thus disingenuous to paint municipal courts as identical to state trial or appellate courts, which have in the past been held to be arms of the state.[161]

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[153] *Id.* at 28.

[154] *See, e.g.*, Janet G. Cornell, *Limited-Jurisdiction Courts: Challenges, Opportunities, and Strategies for Action*, *in* FUTURE TRENDS IN STATE COURTS 67, 69 (2012) https://perma.cc/G76S-85UY (discussing limited jurisdiction courts' high case volume and interaction with residents); *The Municipal Courts of New Jersey*, N.J. COURTS, https://perma.cc/3R8Z-S9YV (last visited May 10, 2019) ("It is through the Municipal Courts that most citizens in the State come into contact with the judicial system . . . .").

[155] *See* discussion *supra* Section I.A.

[156] Kirkland v. DiLeo, No. 12-cv-1196 (KM), 2013 WL 1651814, at *5-6 (D.N.J. Apr. 15, 2013), *aff'd*, 581 F. App'x 111 (3d Cir. 2014); *In re* Brown, 244 B.R. 62, 69 (Bankr. D.N.J. 2000).

[157] *See Municipal Courts Resource Guide*, *supra* note 149.

[158] *See* sources cited *supra* notes 150-51, 154.

[159] *Comparing Federal & State Courts*, U.S. COURTS, https://perma.cc/JGA2-PR8B (last visited May 10, 2019).

[160] National Center for State Courts, *The Who, What, When, Where and How of State Courts*, VIMEO (Nov. 8, 2018, 10:40 AM), https://vimeo.com/299681452.

[161] *E.g.*, Greater L.A. Council on Deafness, Inc. v. Zolin, 812 F.2d 1103 (9th Cir. 1987), *superseded by statute on other grounds*, *as recognized in* Alexis v. County of Los Angeles, 698 F. App'x 345, 346 (9th Cir. 2017); Harris v. Mo. Ct. of App., 787 F.2d 427, 429 (8th Cir. 1986); Dolan v. City of Ann Arbor, 666 F. Supp. 2d 754, 764-65 (E.D. Mich. 2009), *aff'd*, 407 F. App'x 45 (6th Cir. 2011); Jones v. Winters, No. 4:09CV00019 BSM, 2009 WL 764539, at *3 (E.D. Ark. Mar. 19, 2009); NAACP v. State of California, 511 F. Supp. 1244, 1257-58 (E.D. Cal. 1981), *aff'd*, 711 F.2d 121 (9th Cir. 1983). Notably, many of these circuit-level opinions, which courts later cite when granting state trial courts sovereign immunity, were decided before *Hess* and thus do not incorporate the Supreme Court's most recent guidance on the arm-of-the-state analysis' overarching intent.

In the context of debtors' prison litigation, municipal courts should not receive Eleventh Amendment immunity not only because they are unlike the rest of their state's judicial system but also because they are not acting on that system's behalf.[162] When court employees like clerks and judges—who frequently report to their city's executive branch—charge defendants fines and fees in order to generate municipal revenue,[163] the municipal court acts not as part of the state judicial system but as part of and on behalf of its municipality.[164] While the Supreme Court has on one occasion suggested in dicta that, where local governments provide judicial services, they are "typically" treated as arms of the state for Eleventh Amendment purposes,[165] the Court has not clarified whether municipal courts are included in that definition.

Given that municipal courts' practice of charging fines and fees is driven by municipal revenue generation, not by the "fair administration of justice,"[166] the court's function seems more municipal than judicial. Thus, municipal courts charging fines and fees act as part of the municipality they sit in—and municipalities are not protected from suit by the Eleventh Amendment.[167] But the confused state of the arm-of-the-state doctrine means that litigants cannot predict when courts will recognize this reality.

B. The Arm-of-the-State Analysis Should Reflect the Eleventh Amendment's Intent

Given the Supreme Court's ambiguous guidance on the arm-of-the-state analysis, federal circuits' divergent approaches, and the ever-expanding role of local government, the arm-of-the-state doctrine should be

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[162] *See* sources cited *supra* notes 150-53.

[163] *See* sources cited *supra* notes 151-53, 154; discussion *supra* Section I.A.

[164] *See supra* notes 16, 24.

[165] Tennessee v. Lane, 541 U.S. 509, 527 n.16 (2004) ("[J]udicial services [are] an area in which local governments are typically treated as 'arm[s] of the State' for Eleventh Amendment purposes . . . .") (citing Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1977)). Notably, none of the cases that were cited to support the Supreme Court's dictum involved municipally funded municipal courts.

[166] FERGUSON REPORT, *supra* note 24, at 15. When municipal court employees impose fines and fees with the express purpose of increasing municipal revenue—and do so in close concert with non-judicial branches of the local government—they participate in a scheme that has no underlying judicial rationale. "The purpose of courts is to be a forum for the fair and just resolution of disputes, and in doing so to preserve the rule of law and protect individual rights and liberties." NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, NAT'L CTR. FOR STATE COURTS, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES 2 (2018), https://perma.cc/H6S3-9E2L. The use of debtors' prison practices thus undermines the court system's judicial function for pecuniary gain. *See also* sources cited *supra* notes 17, 31, 33.

[167] *See* sources cited *supra* note 86.

refocused to more fully embody the Supreme Court's twin rationales for sovereign immunity[168] and the historical basis for the Eleventh Amendment.[169]

One possibility, as suggested in an article which has been cited by the Supreme Court and numerous federal courts,[170] is confining the test to two inquiries that promote structural federalism[171]: (1) how state law defines the governmental entity; and (2) whether the governmental entity is empowered to generate its own revenue.[172] Author Alex E. Rogers describes the threshold question that courts should address as whether the state enabling act that created the entity expresses—in unmistakably clear language—that the state intends to designate the entity as an arm of the state.[173] This approach embodies the Supreme Court's reliance in both *Mt. Healthy* and *Lake Country Estates* on the state law's explicit language concerning the entity in question.[174] If the state statute does not clearly articulate an intent to designate the entity as an arm of the state, the court should consider whether the entity has the independent power to raise its own revenue.[175] Only those entities that are not empowered to generate funds through means such as "the issuance of debt" should be granted Eleventh Amendment immunity.[176] This two-part analysis is consistent

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[168] Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47-48 (1994).

[169] *See* Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934).

[170] *E.g.*, *Hess*, 513 U.S. at 59; P.R. Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 879 (D.C. Cir. 2008); Beentjes v. Placer Cty. Air Pollution Control Dist., 397 F.3d 775, 780 (9th Cir. 2005); Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56, 62 n.5 (1st Cir. 2003); Gray v. Laws, 51 F.3d 426, 432 n.3 (4th Cir. 1995).

[171] For an in-depth discussion of structural federalism, a theory fundamental to the relationship between the state and federal governments, see Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014); Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Vertically and Horizontally*, 115 COLUM. L. REV. SIDEBAR 4 (2015); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483 (1998).

[172] Rogers, *supra* note 76, at 1296. The author notes that courts have blended multiple facets of the financial relationship between the entity and the state, and that the question of whether the state treasury will ultimately be held liable is frequently unresolvable because enabling statutes do not always mandate that the state satisfy the entity's judgment. *Id.* at 1294-95.

[173] *Id.* at 1288-91. This heightened level of inquiry into the state's law reflects the "clear statement" requirement for congressional abrogation and state waiver of Eleventh Amendment immunity. *See* Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305-06 (1990); Siegel, *supra* note 82.

[174] *See* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 401-02 (1979); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

[175] Rogers, *supra* note 76, at 1305.

[176] *Id.*

with the Supreme Court's interpretation of at least part of the Eleventh Amendment's intent as protecting the state treasury from liability for judgments against a non-state governmental entity.[177] If the entity cannot generate its own funding and relies entirely on state funding, any judgment will logically come from the state treasury, and the Eleventh Amendment will protect the entity from suit, but if the entity both generates its own revenue and receives state funding, courts will have to engage in a fact-based inquiry to determine the extent of the entity's ability to generate its own revenue.[178] However, because the proposed analysis focuses solely on the entity's financial autonomy, rather than the speculative impact of a judgment on the state's treasury or future funding for the entity, courts will not be forced to conduct the same kind of intensive analysis that they currently undertake.[179]

Other commentators have proposed: focusing on the state's intent to provide the entity with immunity, the state's legal and practical liability for the judgment, and whether the entity serves a state or local function;[180] reframing the inquiry to be one about political accountability, specifically considering whether the state's interests sufficiently coincide with the entity's affairs;[181] and asking instead only whether the basis of jurisdiction is diversity of citizenship or federal question.[182] While these approaches rightfully attempt to make sense of the arm-of-the-state doctrine's ambiguity, they do not accomplish the necessary task of both simplifying courts' analyses and integrating the rationales for Eleventh Amendment immunity.

Because they do not resolve the arm-of-the-state doctrine's ambiguity and do not explicitly address funding, these proposals will engender either continued inter-circuit divergence or a move away from the original purposes of the Eleventh Amendment—or both. The two-factor approach more accurately addresses the shortcomings of the arm-of-the-state doctrine in its current form.

Based on the twin reasons for the Eleventh Amendment, protecting the state's treasury and "dignity,"[183] a governmental entity's financial independence and status under state law are appropriately paramount con-

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[177] Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47-48 (1994).

[178] Rogers, *supra* note 76, at 1308.

[179] *Id.*

[180] Bladuell, *supra* note 96, at 852-53.

[181] Bilsborrow, *supra* note 87, at 849.

[182] Anthony J. Harwood, *A Narrow Eleventh Amendment Immunity for Political Subdivisions: Reconciling the Arm of the State Doctrine with Federalism Principles*, 55 FORDHAM L. REV. 101, 120 (1986).

[183] Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47-48 (1994).

siderations in the arm-of-the-state analysis: in the age of local government,[184] it has never been more important that municipalities and municipal courts not be able to hide behind the cloak of state sovereign immunity.

CONCLUSION

The rise of modern-day debtors' prison practices and debtors' prison litigation reveal the need for renewed attention to the arm-of-the-state doctrine's disarray. The Supreme Court's limited precedent has not provided sufficient guidance for the federal circuits, which have in turn produced divergent arm-of-the-state analyses with inconsistent results. Based on the doctrine in its current form, municipal courts should not be immune from debtors' prison suits—but litigants cannot predict that courts will come to that conclusion. There is thus a pronounced need for a more coherent arm-of-the-state test that reflects the Eleventh Amendment's intent. Courts would be wise to center two factors in their analysis: the entity's status under state law and the entity's financial independence. Under this more precise articulation of the arm-of-the-state inquiry, it becomes clear that municipal courts which charge defendants fines and fees in order to generate revenue for themselves and for the municipality in which they sit should not be immune from suit. As locally established, locally staffed, and locally and self-funded entities, municipal courts must be held liable for their debtors' prison schemes.

[184] Lobao, *supra* note 87, at 897.