

# Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine

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*The arm-of-the-state doctrine, which entitles certain governmental entities to the states' sovereign immunity, is an embodiment of American federalism. In theory, this doctrine ensures that federal courts appreciate the concerns for state sovereignty and solvency that motivated the passage of the Eleventh Amendment. However, a combination of factors—the Supreme Court's sparse guidance, the growth and diffusion of power across local, state, and federal governments, and the availability of other immunity doctrines—has rendered the arm-of-the-state doctrine an incomprehensible anachronism. Most courts determine whether an entity defendant receives arm-of-the-state immunity by examining the entity's legal status and structure. But many courts applying "entity-based" reasoning either reach overbroad conclusions that limit recoveries of future litigants or avoid applying the arm-of-the-state doctrine at all—and sometimes a circuit does a bit of both.*

*This Comment proposes a reworking of the arm-of-the-state doctrine to make it more suitable for application to modern government, in which local, state, and federal entities interact through a complex web of relationships. Under the proposed approach, courts apply their arm-of-the-state tests only to the entity activity at issue in a lawsuit, rather than to the entity as a whole. This "activity-based" approach narrows the scope of arm-of-the-state holdings so that they more accurately reflect allocations of power between a state and a local entity, which can vary according to the activity that a local entity performs. The activity-based approach is consistent with the Supreme Court's arm-of-the-state jurisprudence and parallels the Court's approach to evaluating entities under the municipal liability doctrine. The proposed adaptation might well encourage more, and more consistent, application of the doctrine, reintroducing federalism concerns into analyses of state-local relationships. Further, the activity-based approach both aligns defendants' liability more closely with control and ensures that potential future plaintiffs retain access to the federal courts over truly local entity action. Narrowing the doctrine's scope ensures that it protects fully and only the action that the Eleventh Amendment was intended to protect.*

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## INTRODUCTION

A police officer suspects someone of being an undocumented immigrant and detains them.<sup>1</sup> Later, that individual sues the local police department in federal court for establishing a policy of hardline immigration enforcement that violated their Fourth

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<sup>1</sup> This Comment consciously uses the singular “they.” While it is not “considered fully acceptable in formal writing, [it is] steadily gaining ground.” *The Chicago Manual of Style*, § 5.256 (Chicago 17th ed 2017).

Amendment rights. The department defends itself by asserting that it is an “arm of the state”—an entity so closely bound up with the state that it accesses the state’s sovereign immunity under the Eleventh Amendment,<sup>2</sup> exempting the department from suit in federal court. Will the department succeed in its defense and get the case dismissed for lack of federal jurisdiction?

Based on the current legal landscape, this question remains unresolved. Different circuits apply different tests for determining whether a local entity is an arm of the state entitled to Eleventh Amendment immunity. Most circuits assume that an entity either is or is not an arm of the state, and that status applies regardless of the activity at issue (an approach this Comment refers to as “entity-based”). Other circuits consider the activity at issue and the strength of the state’s relationship with the entity in regard to that activity (an approach this Comment refers to as “activity-based”). Notably, the latter approach allows an entity’s arm-of-the-state status to vary depending on the nature of the entity’s challenged activity.

When courts apply an entity-based arm-of-the-state test mechanically, there are predictable problems of over- and underinclusiveness. The practical effects on plaintiffs of a finding that the defendant is an arm of the state are that (1) plaintiffs may not be able to get a federal court to evaluate a given policy that they believe is unconstitutional, and (2) they may lose the ability to sue that defendant over unrelated actions in the future.

Theoretically, even if the local entity is deemed an arm of the state and is thus out of a federal court’s reach, plaintiffs may still sue local officers who carried out the policy in their individual capacities. However, this provides limited practical recourse.<sup>3</sup> Qualified immunity “gives government officials breathing room to

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<sup>2</sup> “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” US Const Amend XI.

<sup>3</sup> For a nuanced discussion of qualified immunity’s role in litigation, see Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L J 2, 36–51 (2017). Professor Schwartz observes that “[a]lthough qualified immunity is rarely the [formal] reason that Section 1983 cases end, there are other ways in which qualified immunity doctrine might influence the litigation of constitutional claims against law enforcement.” Id at 50. When suits actually proceed past that question, “[p]olice officers are virtually always indemnified” by their municipal employers. Joanna C. Schwartz, *Police Indemnification*, 89 NYU L Rev 885, 936–37 (2014) (explaining empirical results). While this poses problems for the “assumptions of financial responsibility relied upon in civil rights doctrine,” this would not be too much of a problem for plaintiffs if the goal is merely compensation. Id at 890. But

make reasonable but mistaken judgments about open legal questions,”<sup>4</sup> and protects officers from damages suits as long as their conduct does not violate “clearly established law.”<sup>5</sup> There is little guidance on “how factually similar a prior decision must be to the instant case in order for the law to be ‘clearly established.’”<sup>6</sup> If an officer is following or establishing an official policy, presumably the policy’s constitutionality is at least a colorable legal question. Under the “clearly established” standard required to overcome the qualified immunity of individual officers, such ambiguity likely means an officer acting pursuant to an official policy is entitled to qualified immunity if sued personally. This means that a plaintiff’s only viable option is to sue the local entity over the policy.<sup>7</sup> Thus, a court holding that the entity is an arm of the state on an entity-wide basis can severely impede potential plaintiffs’ access to justice.

A mechanical application of the entity-based arm-of-the-state approach can harm defendants in its indiscriminate broadness, as well. For example, a conclusion that defendants are not arms of the state means that they face liability in the future for actions mandated by state policies they cannot influence. Adding to all these problems, however, is that circuits employing an entity-based approach often do not apply their doctrine mechanically. Anticipating the issues discussed above, these circuits sometimes try to twist out of the entity-based strictures or avoid applying

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as described above, the qualified immunity doctrine in the context of dubiously constitutional official policy likely provides a barrier that most plaintiffs cannot overcome.

<sup>4</sup> *Ashcroft v al-Kidd*, 563 US 731, 743 (2011).

<sup>5</sup> *Harlow v Fitzgerald*, 457 US 800, 818 (1982). The Supreme Court has even commented that the qualified immunity doctrine protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v Briggs*, 475 US 335, 341 (1986).

<sup>6</sup> Schwartz, 89 NYU L Rev at 893 (cited in note 3). See also Charles R. Wilson, “Location, Location, Location”: *Recent Developments in the Qualified Immunity Defense*, 57 NYU Ann Surv Am L 445, 447–48, 459 (2000) (discussing the “philosophical challenge” posed by the “clearly established” standard and circuits’ different interpretive approaches).

<sup>7</sup> It is helpful to plaintiffs that courts do not see qualified immunity as bearing on the question of municipal liability. See, for example, *Bass v Pottawatomie County Public Safety Center*, 425 Fed Appx 713, 718 (10th Cir 2011) (rejecting a municipality’s inconsistent verdict argument in response to the jury finding the municipality liable while the individual officer was protected by qualified immunity); *Christensen v Park City Municipal Corp*, 554 F3d 1271, 1278 (10th Cir 2009) (finding individual officers to be protected by qualified immunity but that “[t]he defense of qualified immunity is not available to a municipality such as Park City”); *Watson v City of Kansas City*, 857 F2d 690, 697 (10th Cir 1988) (“[T]here is nothing anomalous about allowing [ ] a suit [against the city] to proceed when immunity [based on a lack of clearly established law] shields the individual defendants.”).

the arm-of-the-state doctrine altogether.<sup>8</sup> They may seek refuge in the other immunity doctrines, all of which use activity-specific reasoning to capture the intricacies of the modern administrative state. These other doctrines explain, for example, that government officials are protected from money damages suits instituted against them individually, either through “absolute” immunity (for certain functions)<sup>9</sup> or qualified, good-faith immunity (for every other function).<sup>10</sup> State governments are usually immune through the Eleventh Amendment.<sup>11</sup> Under the municipal liability doctrine, local governmental entities are immune from § 1983 liability unless their “official municipal policy of some nature caused a constitutional tort.”<sup>12</sup> When courts seek to avoid the “hammer” of an entity-based arm-of-the-state doctrine in favor of the “scalpels” available in other immunity doctrines, they reduce the arm-of-the-state doctrine’s relevance in contexts they find particularly troublesome—and reduce the coherence of the circuit’s arm-of-the-state doctrine as a whole. The entity-based interpretation and the struggles to implement it prevent the arm-of-the-state doctrine from being able to work substantive justice by properly aligning liability with power within state-local relationships.

This Comment argues that the circuit split over an activity-based or entity-based arm-of-the-state inquiry should be resolved in favor of the former. Further, it provides a model for this adaptation: each circuit should add into its existing arm-of-the-state test an *activity hinge* factor. Just as the term “hinge” implies a

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<sup>8</sup> See Part II.C.1.

<sup>9</sup> See, for example, *Forrester v White*, 484 US 219, 223–24 (1988) (explaining the policy motivations behind absolute immunity findings).

<sup>10</sup> See generally, for example, *Procunier v Navarette*, 434 US 555 (1978) (prison officials have good faith immunity); *Wood v Strickland*, 420 US 308 (1975) (school officials have good faith immunity); *Pierson v Ray*, 386 US 547 (1967) (police officers have a defense of good faith against § 1983 claims).

<sup>11</sup> However, Congress can abrogate state sovereign immunity by making a clear statement of intent to abrogate it and acting pursuant to constitutional authority. Although Article I of the Constitution does not give Congress the power to strip states of their sovereign immunity, Congress can use powers conferred by Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity. *Tennessee v Lane*, 541 US 509, 517 (2004). It is important to note that Congress has not abrogated sovereign immunity with respect to individual suits alleging civil rights violations against local or state entities, which are the topic of this Comment.

<sup>12</sup> *Monell v Department of Social Services of City of New York*, 436 US 658, 691 (1978). See also Erwin Chemerinsky, *Federal Jurisdiction* § 8.6 at 561 (7th ed Aspen 2016). For a discussion of § 1983 liability, see Part I.A.3.

device that allows flexibility in a machine, the activity hinge factor in the arm-of-the-state test allows courts to adjust the level of abstraction at which they consider the test's other factors. Applying the activity hinge factor first, the court uses state law to define the activity that the defendant was engaged in when the harm giving rise to suit occurred. Then, the court considers the test's other factors—such as state intent, monetary impact, and state control—only as they relate to that particular activity. The activity hinge factor's scope-defining function is modeled on the municipal liability doctrine's threshold process for defining the scope of its own analysis.<sup>13</sup> Before analyzing whether a municipality may be sued under 42 USC § 1983, the municipal liability doctrine uses state law to define the relevant activity at the outset. This activity-specific use of state law, familiar to all of the circuits, thus provides a means by which a circuit can narrow the scope of its arm-of-the-state test's other factors. This allows the factors bearing on sovereign immunity concerns to focus on the state's relationship with the local entity within the activity at issue, not in the abstract.

Indeed, the Eleventh Circuit already illustrates what is possible with a narrow, activity-specific approach. That circuit divides its factors into two subsequent steps, the first of which is deciding what activity will be evaluated. In the second step, courts in this circuit evaluate the other four factors in the circuit's arm-of-the-state test only as they relate to the specific activity.<sup>14</sup>

The Eleventh Circuit does not explicitly use the municipal liability doctrine for guidance. This Comment suggests that circuits should do so not because the municipal liability doctrine's guidance is necessary, but rather because it offers entity-based courts an easier transition to a new mode of analysis, relying on something they already know.

There are many reasons for adopting an activity-based arm-of-the-state doctrine. In addition to realizing the doctrine's potential to do substantive justice through narrower, more accurate holdings, an activity-based approach achieves broader constitutional objectives. A narrower approach to sovereign immunity

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<sup>13</sup> Part I.A.3 discusses the historical development and substantive analysis of the municipal liability doctrine. Part III discusses the threshold inquiry and how it may be incorporated into this Comment's proposed activity-based arm-of-the-state doctrine.

<sup>14</sup> See, for example, *Lake v Skelton*, 840 F3d 1334, 1337–38 (11th Cir 2016) (explaining the Eleventh Circuit's two-part arm-of-the-state test). This approach is further discussed in Part II.B.

would allow the Eleventh Amendment and general federalism principles to be more effectively realized in modern government. Current governmental entities are myriad and include intricately designed allocations of federal, state, *and* local power. An arm-of-the-state doctrine that awards or withholds sovereign immunity in one fell swoop over an entity cannot accurately capture the nuanced state-local relationships that exist in modern government. In order to ensure that the modern arm-of-the-state doctrine protects fully and only the entity behavior that the Eleventh Amendment was intended to protect, it needs an activity-based update.

Additionally, this shift would harmonize the level of abstraction at which existing arm-of-the-state test factors are applied with the level of abstraction employed in other immunity doctrines. This cross-doctrinal harmony would reduce the incentive for courts to twist or avoid the arm-of-the-state doctrine and create unpredictable results. It would also offer the Supreme Court a more consistent and predictable legal basis for clarifying which arm-of-the-state factors are most important for sovereign immunity purposes, and to what degree.

This Comment proceeds in four Parts. Part I sketches the purposes and substance of the relevant immunity doctrines before delving into the Supreme Court's sparse guidance on how to identify arms of the state. Part II details the existing split between circuits that use an entity-based approach when deciding whether an entity is an arm of the state and those that use an activity-based approach. Part III explains how the municipal liability doctrine's threshold inquiry may be implemented as the doctrinal guide for entity-based circuits, allowing these circuits to adopt an activity-based arm-of-the-state doctrine without wholly giving up their existing arm-of-the-state tests. Part III also addresses why the municipal liability doctrine is the correct choice for this role, compared to other activity-based immunity doctrines. Finally, Part IV addresses the broader reasons justifying the activity-based shift.

## I. BACKGROUND LAW

This Comment focuses on the arm-of-the-state doctrine, an outgrowth of the Eleventh Amendment's sovereign immunity for states. However, understanding other immunity doctrines sheds light on the far-reaching implications of the entity-based arm-of-the-state doctrine and this Comment's recommendation to rein it

in. To that end, this Part gives an overview of the various immunity doctrines implicated by this Comment. It includes the municipality doctrine, which is not strictly speaking an immunity doctrine but rather an immunity-creating schema of statutory construction. This Part then delves into the arm-of-the-state doctrine's development at the Supreme Court.

#### A. Immunity Doctrines Broadly

This Section considers the Eleventh Amendment, which protects the states from being haled into federal court against their will, and various immunities besides arm-of-the-state immunity that apply to officers or entities.

##### 1. The Eleventh Amendment and the birth of the arm-of-the-state doctrine.

Passed by Congress in 1794 and ratified by the states in 1795, the Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>15</sup> In plain language, the text of this Amendment disallows any citizen of a different or foreign state from suing a state in federal court. The principal motivation for the amendment was the states' concern that "federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin."<sup>16</sup> In *Hans v Louisiana*,<sup>17</sup> the Court interpreted the Amendment even more broadly, explaining that the country's foundational principles, if not the text of the Amendment itself, rendered the states immune from suits brought by their own citizens as well.<sup>18</sup>

While the financial aspect was the most concrete interest motivating the Amendment, the Amendment protects an ideal of American federalism as well: the dignity of the states within the

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<sup>15</sup> US Const Amend XI.

<sup>16</sup> *Hess v Port Authority Trans-Hudson Corporation*, 513 US 30, 39 (1994), quoting *Pennhurst State School and Hospital v Halderman*, 465 US 89, 151 (1984) (Stevens dissenting). The Eleventh Amendment was enacted in response to the Supreme Court's decision in *Chisholm v Georgia*, 2 US (2 Dall) 419 (1793), in which the Court recognized the right of those who were not citizens of a given state to sue that state. *Id* at 431.

<sup>17</sup> 134 US 1 (1890).

<sup>18</sup> *Id* at 21 (declaring the "rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals").



republican system. “The very object and purpose of the [Eleventh] Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”<sup>19</sup> Being summoned as a defendant in such a suit “was thought to be neither becoming nor convenient” for a state.<sup>20</sup> As such, the “Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.”<sup>21</sup> In the modern era, the Court refers to financial liability and state dignity as “the Eleventh Amendment’s twin reasons for being.”<sup>22</sup>

The arm-of-the-state doctrine imputes to certain qualifying local entities a state’s Eleventh Amendment protection. Traditionally, states and their agencies gain the protection,<sup>23</sup> while counties and municipalities do not.<sup>24</sup> The reason for this was that the state “design[s]” the “internal structure” of state agencies, while political subdivisions such as cities, towns, and counties “function as independent corporate bodies.”<sup>25</sup> At one time, this distinction directly implicated whether a money judgment would be satisfied from the state treasury.<sup>26</sup> Thus, as the doctrine has developed, the essential question has become whether the defendant organization—a school board, a county, a city—is “an arm of

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<sup>19</sup> *In re Ayers*, 123 US 443, 505 (1887).

<sup>20</sup> *Id.*

<sup>21</sup> *Puerto Rico Aqueduct and Sewer Authority v Metcalf & Eddy, Inc.*, 506 US 139, 146 (1993). See also *Hans v Louisiana*, 134 US 1, 13 (1890), quoting Alexander Hamilton. See Federalist 81 (Hamilton), in *The Federalist* 541, 548 (Wesleyan 1961) (Jacob E. Cooke, ed) (“It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.*”) (emphasis in original).

<sup>22</sup> *Hess*, 513 US at 47.

<sup>23</sup> See, for example, *Will v Michigan Department of State Police*, 491 US 58, 66 (1989); *Alabama v Pugh*, 438 US 781, 782 (1978) (holding that a suit against the State Board of Corrections is barred by the Eleventh Amendment).

<sup>24</sup> See, for example, *Moor v County of Alameda*, 411 US 693, 717–21 (1973) (concluding that a municipality is “treated as a citizen of California” rather than an arm of the state); *Lincoln County v Luning*, 133 US 529, 530 (1890) (holding that a municipality is not an arm of the state but “part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State”).

<sup>25</sup> 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, 1246 (1992). See also *Luning*, 133 US at 530.

<sup>26</sup> See *Ford Motor Co v Department of Treasury of Indiana*, 323 US 459, 464 (1945). See also *Pennhurst*, 465 US at 101 (describing the test as whether the state is “the real, substantial party in interest”).

the State partaking of the State's Eleventh Amendment immunity" rather than a "political subdivision to which the Eleventh Amendment does not extend."<sup>27</sup>

The alignment between money judgments running against the state treasury and the distinction between political subdivisions and state agencies has become less clear, however, assuming it was ever as clear as the Court thought.<sup>28</sup> As for the political subdivision–state agency distinction, modern entities often blend features of the two, leaving courts in a bind when classifying an entity for Eleventh Amendment purposes.<sup>29</sup> The difficulties in classifying are compounded by the fact that the Court has not given any definitive guidance on what features matter, and how much, in determining whether an entity is a state arm or not.<sup>30</sup>

## 2. Immunity for officers.

Immunity for government officials refers to immunity for government actors in their personal capacity—when the plaintiff seeks damages from the individual officer.<sup>31</sup> This principle has a long history and an important practical purpose. Some degree of immunity from liability is necessary to ensure that government actors continue to perform their duties without fear of lawsuits chilling their legitimate activity. However, courts have to balance that interest against the values of compensating plaintiffs for harms and deterring government officials from behaving inappropriately.<sup>32</sup> In an effort to balance these dueling needs, courts have established an array of immunity doctrines.

Absolute immunity protects those performing judicial, legislative, and prosecutorial functions. The "focus is on the *function*

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<sup>27</sup> *Mount Healthy City School District v Doyle*, 429 US 274, 280 (1977).

<sup>28</sup> See Part II.C.2 for a more detailed discussion of the monetary judgment factor and its role in entity-based arm-of-the-state doctrines.

<sup>29</sup> See Rogers, Note, 92 Colum L Rev at 1247 (cited in note 25) (discussing the difficulties presented by interstate port authorities, levee boards, tourism companies, industrial insurance system agencies, potato commissions, and cement plants).

<sup>30</sup> This tension and its implications for the arm-of-the-state doctrine are discussed in Part I.B.

<sup>31</sup> See *Harlow v Fitzgerald*, 457 US 800, 806–08 (1982). When the plaintiff seeks damages from the official's employer, the immunities and liabilities refer to the state or local entity. See *McMillian v Monroe County*, 520 US 781, 785 n 2 (1997) (explaining how a suit against an officer in his official capacity is a suit against the entity the officer represents).

<sup>32</sup> See *Harlow*, 457 US at 807. See also *Wood v Strickland*, 420 US 308, 317–20 (1975) (explaining the reasoning and balancing of values underlying qualified and absolute immunity as applied in the school official context).

performed, rather than the title possessed.”<sup>33</sup> Thus, an official may not successfully claim absolute immunity in the future for an activity merely because they previously obtained immunity for an unrelated activity. The Court has consistently attempted to limit absolute immunity.<sup>34</sup> It “presum[es] [ ] that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties” and thus limits absolute immunity protection to its scope at common law unless the official persuades the court that “immunity is justified for the function in question.”<sup>35</sup> For instance, the Court has granted absolute immunity only in regard to money damages for judicial acts,<sup>36</sup> the legislative function,<sup>37</sup> prosecutorial functions,<sup>38</sup> and police officers in their capacity as witnesses.<sup>39</sup> This core of absolutely immune functions has given rise to various subgroups. For example, some courts refer to arm-of-the-sentencing-judge and quasi-judicial immunity, which derive from judicial immunity. These immunities similarly cover only certain relevant activities and not everything the defendant could do.<sup>40</sup> The Supreme Court has only granted absolute

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<sup>33</sup> Chemerinsky, *Federal Jurisdiction* § 8.6 at 568 (cited in note 12) (emphasis in original).

<sup>34</sup> See, for example, *Forrester v White*, 484 US 219, 224 (1988) (“This Court has generally been quite sparing in its recognition of claims to absolute official immunity . . . [and] careful not to extend the scope of the protection further than its purposes require.”). See also *Wood*, 420 US at 320 (explaining that the common law development of school official immunity doctrine shows an “implicit” judgment “that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations”).

<sup>35</sup> *Burns v Reed*, 500 US 478, 486–87.

<sup>36</sup> See, for example, *Stump v Sparkman*, 435 US 349, 358–59 (1978) (holding that a judge who issued an order to sterilize a fifteen-year-old girl, without any case filed, was entitled to absolute immunity for giving that order). A federal statute, the Federal Courts Improvement Act of 1996, later extended absolute immunity for judges from only suits for monetary judgments to suits for injunctive relief as well. Pub L No 104-317, § 309(c), 110 Stat 3847, 3853, codified at 42 USC § 1983.

<sup>37</sup> Federal congresspersons and their aides are absolutely immune from suits for damages and prospective relief. US Const, Art I, § 6. The Court has bestowed similar absolute immunity on state and local legislators for suits for money damages and equitable remedies. See *Bogan v Scott-Harris*, 523 US 44, 52 (1998). All of this immunity, however, only applies to legislative tasks. See *Gravel v United States*, 408 US 606, 625 (1972).

<sup>38</sup> See, for example, *Imbler v Pachtman*, 424 US 409, 424 (1976) (recognizing a prosecutor’s immunity from suit for damages for knowingly using perjured testimony to incarcerate an innocent person for nine years).

<sup>39</sup> See generally *Briscoe v LaHue*, 460 US 325 (1983) (providing absolute immunity to a police officer who gave perjured testimony from a damages suit).

<sup>40</sup> See, for example, *Walrath v United States*, 35 F3d 277, 282 (7th Cir 1994) (discussing how “[m]ost federal courts . . . [hold] that parole board members are absolutely

immunity that is not limited to the performance of certain functions to the President of the United States.<sup>41</sup>

A government official enjoys qualified immunity, or good-faith immunity, when they are acting in the scope of their employment but are not entitled to absolute immunity.<sup>42</sup> Qualified immunity “represents the norm” for executive branch officials.<sup>43</sup> It only protects against suits for “liability for civil damages insofar as [the official’s] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>44</sup> It does not protect against suits for injunctive relief.<sup>45</sup> Unlike other immunities such as absolute immunity and sovereign immunity, plaintiffs may overcome qualified immunity, but only by satisfying a very high burden.<sup>46</sup>

### 3. The municipal liability doctrine.

The municipal liability doctrine is not a common law immunity doctrine but rather a matter of statutory construction that sometimes results in immunity for qualifying officials and entities. This doctrine determines which defendants may be sued under 42 USC § 1983. This Comment distinguishes between (1) this doctrine’s threshold decision regarding the level of abstraction at which the court should conduct its substantive analysis, and (2) the substantive analysis that may practically result in immunity. This Section focuses on the substantive analysis of the

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immune from suit for their decisions to grant, deny, or revoke parole” and that those particular activities are entitled to arm-of-the-sentencing-judge immunity); *Draine v Leavy*, 504 Fed Appx 494, 495 (6th Cir 2012) (recognizing that “quasi-judicial immunity does not apply to functions performed by state parole officers that are not judicial in nature”); *Buckley v Fitzsimmons*, 509 US 259, 277 (1993) (explaining the “functional approach of *Imbler*, which conforms to the common-law theory,” and reaffirming the functional approach to immunity for executive officers); *Imbler*, 424 US at 430 (“[R]espondent’s activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force.”).

<sup>41</sup> See *Nixon v Fitzgerald*, 457 US 731, 748–54 (1982).

<sup>42</sup> See *id.* at 764 (White dissenting).

<sup>43</sup> *Buckley*, 509 US at 273, quoting *Malley v Briggs*, 475 US 335, 340 (1986).

<sup>44</sup> *Harlow*, 457 US at 818.

<sup>45</sup> See, for example, *Valley v Rapides Parish School Board*, 118 F3d 1047 (5th Cir 1997) (upholding injunction against school board); *Ying Jing Gan v City of New York*, 996 F2d 522 (2d Cir 1993) (recognizing a valid claim against a police department as to injunctive relief, but not as to damages). See also Chemerinsky, *Federal Jurisdiction* § 8.6 at 582 (cited in note 12).

<sup>46</sup> See, for example, *Crawford-El v Britton*, 523 US 574, 586–87 (1998). See also, for example, *Medina v Cram*, 252 F3d 1124, 1128 (10th Cir 2001) (stating that “[a]fter a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff”).

municipal liability doctrine to better situate the doctrine within the parties' argumentative toolbox. Later, Part III examines the doctrine's threshold inquiry, which informs this Comment's proposed activity-specific approach.

Under § 1983, a plaintiff may bring a civil action against "person[s]" for an alleged "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" that occur "under color of any statute, ordinance, regulation, custom or usage of any State or Territory."<sup>47</sup> Because § 1983 forms "the basis for almost all constitutional rulings arising from the actions of state and local governments and their officers," the municipal liability doctrine effectively determines whether a local entity will be sued or not.<sup>48</sup> The statute thus raises the question of who or what constitutes a "person." In *Monroe v Pape*,<sup>49</sup> the Court gave its first answer. The plaintiffs in *Monroe* sued the City of Chicago and certain officials, alleging an unreasonable search and seizure conducted "under color of the statutes, ordinances, regulations, customs and usages of Illinois and of the City of Chicago."<sup>50</sup> The Court held that the word "person" in § 1983 did not include municipalities, and thus that the complaint against the City had been properly dismissed below.<sup>51</sup>

In *Monell v Department of Social Services of the City of New York*,<sup>52</sup> the Court changed its mind.<sup>53</sup> In this case, female employees of the Department of Social Services and the New York Board of Education sued various municipal officials and entities under § 1983.<sup>54</sup> Plaintiffs challenged the defendants' official policy "compel[ing] pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons."<sup>55</sup> The lower

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<sup>47</sup> 42 USC § 1983.

<sup>48</sup> Chemerinsky, *Federal Jurisdiction* § 8.1 at 512 (cited in note 12). See also Debra L. Zorn, *Municipal Liability under Section 1983 – Williams v. Butler*, 18 Creighton L Rev 1267, 1267 (1984) ("Civil rights actions based on section 1983 constitute almost one-third of all federal question litigation brought by private parties in federal courts."), citing George Christie, *Cases and Materials on the Law of Torts*, 1115 n 1 (West 5th ed 1983).

<sup>49</sup> 365 US 167 (1961).

<sup>50</sup> *Id.* at 169 (quotation marks and citations omitted).

<sup>51</sup> *Id.* at 191–92. *Monroe* also explained that "under color of enumerated state authority" for purposes of § 1983 included actions in which officials "abuse[d] [their] position." *Monroe*, 365 US at 172 (quotation marks omitted). This aspect of *Monroe* remains good law, but it is not the focus of this Comment.

<sup>52</sup> 436 US 658 (1978).

<sup>53</sup> *Id.* at 694.

<sup>54</sup> *Id.* at 660–61.

<sup>55</sup> *Id.* at 661.

court agreed that the actions were unconstitutional, but it nevertheless denied plaintiffs' request for backpay because any damages would have been paid by the City of New York.<sup>56</sup> Granting that relief, the lower court reasoned, would "circumvent the immunity" that *Monroe v Pape* had previously conferred on municipalities sued under § 1983 when it held that local governments did not qualify as statutory people.<sup>57</sup> On appeal, the Court reversed *Monroe* on that point, holding instead that local governments are "persons' who may be defendants in § 1983 suits,"<sup>58</sup> in addition to the officials themselves. More than a decade later, in *Will v Michigan Department of State Police*,<sup>59</sup> the Court further clarified the statutory person by explaining that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983."<sup>60</sup>

These decisions taken together answer the question of whom, in a given case, a plaintiff can sue. *Monell* explained that local entities may only be sued over constitutional harms caused by their official policy or unofficial custom, not on a respondeat superior theory for their employees' constitutional torts.<sup>61</sup> For a plaintiff to sue both the employee in a personal capacity and the entity, the constitutional tort must have occurred pursuant to the entity's custom or official policy. Otherwise, the plaintiff may only sue the employee in a personal capacity.<sup>62</sup> *Will* supplements the analysis by explaining that if the officials or the policy were attributable to the state, not the local entity, then plaintiffs may sue neither the state nor the officials in their official capacity.<sup>63</sup> In effect, plaintiffs cannot seek monetary damages if a government official or local entity acted pursuant to an official state policy.<sup>64</sup>

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<sup>56</sup> *Monell*, 436 US at 662. Plaintiffs' request for injunctive and declaratory relief was held moot because after the complaint had been filed, the City and Board changed the harmful policy. *Id.* at 661.

<sup>57</sup> *Id.* at 662 (quotation marks and citations omitted).

<sup>58</sup> *Id.* at 700–01.

<sup>59</sup> 491 US 58 (1989).

<sup>60</sup> *Id.* at 71.

<sup>61</sup> *Monell*, 436 US at 663 n 7, 690–91.

<sup>62</sup> *Monell* explained in a footnote that the ability to bring an official-capacity suit against an official runs with the ability to bring suit against the employing entity itself. See *id.* at 690 n 55 (stating that a necessary implication of its holding was that "local government officials sued in their official capacities are 'persons' under § 1983" when the "local government would be suable in its own name").

<sup>63</sup> *Will*, 491 US at 71 (explaining that a suit against an official's office is "no different from a suit against the State itself").

<sup>64</sup> Plaintiffs may still sue state officials in their official capacities for injunctive relief for constitutional violations. *Ex parte Young*, 209 US 123, 159–60 (1908). In such a case,

Notably, this schematic interpretation of § 1983 reflects the complex distribution of state and local power in modern government. Not everything that a local entity does is pursuant to a local policy; states can and do direct local entities and offices to conduct certain actions.<sup>65</sup> The municipal liability doctrine is able to account for these nuances, while the entity-based arm-of-the-state doctrine—by judging a governmental entity as either entirely state or entirely local—cannot.<sup>66</sup>

The Court articulated the municipal liability doctrine's process for deciding whether a policy or an official is truly local or state in character in *McMillian v Monroe County*.<sup>67</sup> In this case, the plaintiff brought a § 1983 suit against the county and many officials after the Alabama Court of Criminal Appeals reversed his murder conviction because the state illegally suppressed evidence.<sup>68</sup> To determine whether the defendants could be sued under § 1983, the Court first considered “whether Alabama sheriffs are policymakers for the State or for the county when they act in a law enforcement capacity.”<sup>69</sup>

The Court noted that it was “not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action they engage in,” but rather was evaluating whether the sheriff “represents the State or the county when he acts in a law enforcement capacity.”<sup>70</sup> It explained that a plaintiff's ability to sue a local entity or official under § 1983—whether they count as “persons”—depends on “whether [the implicated] governmental officials are final policymakers for the local government in a particular area.”<sup>71</sup> If the official acts on behalf of a local entity, then the official and the local entity are both “persons” suable under § 1983. If the official acts on behalf of the state, then the local

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the official “would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State.” *Will*, 491 US at 71 n 10 (quotation marks omitted), quoting *Kentucky v Graham*, 473 US 159, 167 n 14 (1985).

<sup>65</sup> See note 188.

<sup>66</sup> This Comment focuses on the circuit split between what it terms entity-based and activity-based arm-of-the-state doctrines and recommends adopting the activity-based approach. Part II explains the differences and consequences of each approach.

<sup>67</sup> 520 US 781 (1997).

<sup>68</sup> *Id.* at 783–84.

<sup>69</sup> *Id.* at 785.

<sup>70</sup> *Id.* at 785–86.

<sup>71</sup> *McMillan*, 520 US at 785. See also *Jett v Dallas Independent School District*, 491 US 701, 737 (1989) (explaining the policymaker inquiry as “identify[ing] those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue”).

entity is not implicated by the official's actions. As such, the local entity cannot be sued under the statute, and the "state" official can only be reached for injunctive relief.<sup>72</sup> Rather than elucidating a particular test, the Court conducted a detailed, fact-intensive evaluation of the relevant state constitution and code.<sup>73</sup> It concluded that Alabama sheriffs were state officials in the particular activity of "law enforcement."<sup>74</sup> Thus, the county could not be sued because the policy was set by an effectively state-aligned official, not a local official. And the sheriff could not be sued in his official capacity, at least for damages, because he was a state official in the particular activity giving rise to the suit.

All federal courts conduct the municipal liability analysis in accordance with the Supreme Court's decision in *McMillian*. For purposes of this Comment, the most significant feature of this analysis is that it results in narrow holdings. For example, future plaintiffs may still sue an Alabama sheriff if the unconstitutional actions were taken outside of the "law enforcement capacity."<sup>75</sup> The municipal liability doctrine, then, practically provides a potential activity-specific immunity to local entity defendants from § 1983 suits.

#### B. The Supreme Court's Unclear, Case-by-Case Development of Its Arm-of-the-State Jurisprudence

The Supreme Court has faced the question of whether a local entity qualifies as an arm of the state many times over the years. In deciding this question, the Court has been inconsistent and has not definitively laid down a test for circuits to follow.<sup>76</sup> A "tension

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<sup>72</sup> See notes 63–64.

<sup>73</sup> *McMillian*, 520 US at 787–93. This substantive approach is different from that of the arm-of-the-state doctrine, which evaluates various factors in light of state law. This Comment advocates adopting only the municipal liability doctrine's use of state law to identify and focus on the relevant activity at issue, not its substantive approach. See Part III.

<sup>74</sup> *McMillian*, 520 US at 793.

<sup>75</sup> *Id.* at 786. This may seem like cold comfort, but, in fact, sheriffs can undertake many activities besides law enforcement, depending on state law. For example, in California, the activities of administering jails, investigating crimes, and obtaining and executing a search warrant are analyzed distinctly. See *Hurth v County of Los Angeles*, 2009 WL 10699013, \*2 (CD Cal) (providing an overview of the Ninth Circuit's function-specific municipal liability conclusions concerning sheriffs).

<sup>76</sup> Jameson B. Bilsborrow, Comment, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 64 *Emory L J* 819, 822, 827 (2015). One commentator has even referred to the doctrine as in a state of "disarray." Rogers, Note, 92 *Colum L Rev* at 1296 (cited in note 25).



between two lines of Supreme Court decisions” concerning the factors’ relative weights has developed.<sup>77</sup> In some cases, the Court finds the factor of whether a monetary judgment against the local entity would run against the state treasury to be decisive. In other cases, the Court has engaged in generalized balancing of whatever factors it seems to find relevant to the inquiry. The discussion of cases below illustrates the development of this split chronologically.

In *Edelman v Jordan*,<sup>78</sup> the Court affirmed the significance of financial impact on the state treasury in the arm-of-the-state analysis.<sup>79</sup> The plaintiff brought a class action for injunctive and declaratory relief, and the lower courts imposed a permanent injunction and required state officials to award retroactive benefits.<sup>80</sup> The Supreme Court reversed as to the retroactive payment, stating that a “suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.”<sup>81</sup> The inquiry focused exclusively on the monetary liability question. The Court also noted its longstanding position that a “county does not occupy the same position as a State for purposes of the Eleventh Amendment,”<sup>82</sup> but it suggested that there may be room for flexibility within this rule. It stated that county action is “generally” state action for Fourteenth Amendment purposes, but a county defendant is “not necessarily a state defendant” for purposes of Eleventh Amendment immunity.<sup>83</sup> This phrasing of the distinction suggests that some counties or “political subdivisions” could qualify as arms of the state and therefore be entitled to immunity. However, the Court did not go on to address the specific circumstances in which those qualifications would be met.

Three years later in *Mount Healthy City School District v Doyle*,<sup>84</sup> the Court formally introduced the term “arm of the State.”<sup>85</sup> An untenured teacher sued the Mount Healthy school board for reinstatement and damages, claiming that the decision

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<sup>77</sup> Jonathan W. Needle, Note, *The Arm of the State Analysis in Eleventh Amendment Jurisprudence*, 6 Rev Litig 193, 196 (1987).

<sup>78</sup> 415 US 651 (1974).

<sup>79</sup> Id at 667–71.

<sup>80</sup> Id at 653–56.

<sup>81</sup> Id at 663, 678.

<sup>82</sup> *Edelman*, 415 US at 667 n 12, citing *Luning*, 133 US at 530.

<sup>83</sup> Id.

<sup>84</sup> 429 US 274 (1977).

<sup>85</sup> Id at 280.

to not rehire him violated his First and Fourteenth Amendment rights.<sup>86</sup> The district court found for the plaintiff teacher.<sup>87</sup> As to the question of “whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment,” the district court found it “unnecessary” to reach “because it decided that any such immunity had been waived by Ohio statute and decisional law.”<sup>88</sup> The Supreme Court disagreed with that assessment and decided to address the question.<sup>89</sup> To do so, it engaged in a fact-intensive analysis of the entity’s characteristics.<sup>90</sup> Even though the plaintiff’s requested remedy included monetary damages, the Court did not address whether a money judgment would run against the state treasury—the very question that *Edelman* suggested would be decisive in determining whether a defendant entity was an arm of the state.<sup>91</sup> *Mount Healthy* stated that the answer to whether the local Board of Education was an arm of the state “depends, at least in part, upon the nature of the entity created by state law.”<sup>92</sup> The Court looked at the state statutory definitions of the entity, the entity’s monetary dependence on the state, and the state’s level of “guidance” or control over the entity.<sup>93</sup> It also noted that the local school boards in the state “have extensive powers to issue bonds” and “levy taxes within certain restrictions of state law”<sup>94</sup>—factors that could have easily related to the money judgment consideration key to *Edelman*. Yet without looking in that direction, the Court concluded that “[o]n balance,” a local school board “is more like a county or city than it is like an arm of the State” and therefore is not entitled to sovereign immunity.<sup>95</sup>

*Edelman* and *Mount Healthy* thus established two dueling lines of arm-of-the-state precedents, emphasizing different factors and providing little guidance as to which factors were decisive or at least more significant. In subsequent cases, the Court added even more factual considerations to the arm-of-the-state

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<sup>86</sup> *Id.* at 276, 282.

<sup>87</sup> *Id.* at 276.

<sup>88</sup> *Mount Healthy*, 429 US at 279.

<sup>89</sup> *Id.* at 279–80.

<sup>90</sup> *Id.* at 280–81.

<sup>91</sup> *Id.* at 277 (analyzing suit for reinstatement and \$50,000 in damages). See also note 81 and accompanying text.

<sup>92</sup> *Mount Healthy*, 429 US at 280.

<sup>93</sup> *Id.* at 280–81.

<sup>94</sup> *Id.* at 280.

<sup>95</sup> *Id.*

inquiry. In *Lake Country Estates, Inc v Tahoe Regional Planning Agency*,<sup>96</sup> a case about a bistate agency claiming immunity, the Court consolidated these earlier lines of cases, which were arguably inconsistent. *Lake Country* mentions the *Mount Healthy* factors of state law's characterization of the entity and the state's level of guidance or control, which may be inferred from features such as a potential "veto" power over the entity's decisions.<sup>97</sup> It also considered the *Edelman* factor of whether the "state treasury [would be] directly responsible for judgments against" the entity.<sup>98</sup> In addition, it considered some new factors: whether the governing members were local or state officials, whether the entity's obligations bound a state, whether there was a history of litigation between the entity and the state (because such a history suggests a lack of state control), and whether the function that motivated the entity's creation and led to the dispute in question was "traditionally . . . performed" at the local or state level.<sup>99</sup> The Court did not mention the *Mount Healthy* factors of taxes and bonds, but it did observe that "[f]unding . . . must be provided by the counties, not the States."<sup>100</sup>

In *Hess v Port Authority Trans-Hudson Corp*,<sup>101</sup> the Court reaffirmed the *Lake Country* factors and again included *Edelman's* state treasury factor as one of many factors to consider.<sup>102</sup> This time, however, it stated that "the prevention of federal-court judgments that must be paid out of a State's treasury" was the "impetus" for the Eleventh Amendment.<sup>103</sup> It discussed at length, and

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<sup>96</sup> 440 US 391 (1979).

<sup>97</sup> *Id* at 401–02. See also *id* at 401 & n 19 (referencing *Mount Healthy* before conducting its analysis).

<sup>98</sup> *Lake Country*, 440 US at 402.

<sup>99</sup> *Id*.

<sup>100</sup> *Id* at 401–02. This mandate was provided in the Compact Agreement, the agreement made between the two states and consented to by Congress, which created the bistate entity raising the Eleventh Amendment claim. *Id* at 393–94. *Lake Country's* facts, then, turned on the intricacies of the Agreement rather than state law. In later cases, the Court clarified that bistate agencies claiming Eleventh Amendment immunity under compact agreements and local entities claiming Eleventh Amendment immunity under state law are evaluated the same way. See *Auer v Robbins*, 519 US 452, 456 n 1 (1997). See also generally *Regents of the University of California v Doe*, 519 US 425 (1997). Some courts, however, still recognize minute distinctions between arm-of-the-state doctrine applications to intrastate and Compact Clause entities. For example, the DC Circuit asserts that *Hess* "recognized a presumption against sovereign immunity for Compact Clause entities." *Puerto Rico Ports Authority v Federal Maritime Commission*, 531 F3d 868, 872 (2008), citing *Hess*, 513 US at 42.

<sup>101</sup> 513 US 30 (1994).

<sup>102</sup> *Id* at 48–53 (discussing the "state treasury factor").

<sup>103</sup> *Id* at 48.

with apparent approval, how most of the courts of appeals have identified the treasury factor as “the most salient factor in Eleventh Amendment determinations.”<sup>104</sup> *Hess* stated that when the factors “point in different directions, the Eleventh Amendment’s twin reasons for being”—state solvency and dignity—“remain our prime guide.”<sup>105</sup> Thus, if the many factors do not weigh conclusively one way or the other, the monetary impact on the state treasury may practically be the decisive factor. One circuit court acknowledged that while *Hess* “at least indirectly identified the general factors to be considered,” the decision “is certain to generate confusion.”<sup>106</sup>

The Court expanded on the relative significance of the monetary judgment factor in *Regents of the University of California v Doe*.<sup>107</sup> It clarified that state financial liability was “of considerable importance,” but it also noted that the “question can be answered only after considering the provisions of state law that define the agency’s character.”<sup>108</sup> The Court explained:

When deciding whether a state instrumentality may invoke the State’s immunity, our cases have inquired into the relationship between the State and the entity in question. In making this inquiry, we have sometimes examined the essential [monetary impact on the State] . . . and sometimes focused on the nature of the entity created by state law to determine whether it should be treated as an arm of the State.<sup>109</sup>

This language suggests that the fact-intensive considerations route illustrated in *Mount Healthy* and *Lake Country* and the monetary impact route embodied in *Edelman* are both acceptable analytical options for judges. However, the Court’s statement that state treasury monetary impact is of “considerable importance” suggests that there are not truly two independent routes of analysis. Rather, these versions of the inquiry have become jumbled over time, with the money judgment factor being adopted within the *Mount Healthy–Lake Country* fact-intensive approach as one of many considerations. However, the Court has seemingly endorsed the circuits’ interpretation that the monetary

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<sup>104</sup> *Id.* For the court’s full analysis of the state treasury factor, see also *id.* at 48–53.

<sup>105</sup> *Hess*, 513 US at 47.

<sup>106</sup> *Gray v Laws*, 51 F3d 426, 431 (4th Cir 1995).

<sup>107</sup> 519 US 425 (1997).

<sup>108</sup> *Id.* at 430, 429 n 5.

<sup>109</sup> *Id.* at 429–30 (quotation marks omitted).

impact factor is the most significant one, although without clarifying exactly how significant it is or what exactly it entails.<sup>110</sup> The Court referred to the prevention of monetary judgments against state treasuries as the “impetus” and one of the “Eleventh Amendment’s twin reasons for being.”<sup>111</sup>

In sum, the doctrine has evolved from a clear but unmanageable rule into a jumble of factors within a generalized balancing test. The initial distinction between political subdivisions and entities whose judgments would be paid by the state<sup>112</sup> could not hold. As state governments and power expanded, it became clear that those two categories were not mutually exclusive. Political entities of a “hybrid” character have features of both state agencies and largely independent public corporations, “defy[ing] straightforward definition.”<sup>113</sup> Faced with this unmanageable legal distinction, the Court gradually incorporated many other factors in addition to monetary judgment. Indeed, the Court possibly saw this evolution coming even in *Edelman*, the canonical monetary judgment rule opinion, when it noted the existing *Luning* rule that “a county does not occupy the same position as a State for purposes of the Eleventh Amendment” but also hinted that a political corporation defendant might in some situations qualify as a “state defendant.”<sup>114</sup>

While identifying and weighing the relevant factors in the arm-of-the-state analysis has occupied most courts’ and commentators’ discussions of the arm-of-the-state doctrine,<sup>115</sup> relatively scarce attention has been paid to the scope of entity activity to which courts do or should apply these factors. The next Section explores this doctrinal ambiguity.

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<sup>110</sup> The court stated that it is the “entity’s potential legal liability for judgments, 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 in determining the underlying Eleventh Amendment question.” *Id.* at 425. This language left a lot of ambiguity in the monetary judgment factor, which this Comment discusses in Part II.C.2.

<sup>111</sup> *Hess*, 513 US at 47–48.

<sup>112</sup> See *Luning*, 133 US at 530 (explaining that political corporations are “part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be” one and not entitling the defendant county to the state’s sovereign immunity).

<sup>113</sup> Rogers, Note, 92 Colum L Rev at 1246–47 (cited in note 25).

<sup>114</sup> *Edelman*, 415 US at 667 n 12.

<sup>115</sup> See, for example, *Hess*, 513 US at 61 (O’Connor dissenting) (suggesting that the doctrine refocus on the factor of state control over the entity); Bilsborrow, Comment, 64 Emory L J at 847 (cited in note 76) (proposing a new factor to be included in the analysis); Rogers, Note, 92 Colum L Rev at 1301 (cited in note 25) (proposing that courts conduct a two-step inquiry).

C. The Supreme Court's Arm-of-the-State Opinions Have Created New Openings for Addressing and Clarifying the Scope of the Inquiry

Supreme Court majority opinions have not definitively stated a preference between a broader arm-of-the-state test that focuses on the entity's abstract relationship with the state and an activity-specific one that considers the entity's relationship with the state in regard to the particular action giving rise to suit. However, there are hints that the Court is becoming more receptive to the notion that what the entity was doing is relevant to the arm-of-the-state inquiry—and, ultimately, the idea that an entity can be an arm of the state in the performance of some actions while not in others.

For example, in *Lake Country*, the Court noted that “regulation of land use is traditionally a function performed by local governments. Concern with the proper performance of that function . . . was a primary motivation for the creation of [the entity] itself, and gave rise to the specific controversy at issue in this litigation.”<sup>116</sup> The Court's treatment of the “function,” or activity, involved in the case is ambiguous in a few ways. The Court mentions that the land use regulation function (1) was the primary reason for creating the entity and thus its primary function, and (2) gave rise to this suit in particular. The Court nonetheless failed to clarify which of these two facts is more important.

*Hess* further compounds the issue by not identifying what might happen if some of the entity's activities are state activities while others are local activities. In *Hess*, two railroad workers filed separate personal injury actions against their employer, a bistate railway.<sup>117</sup> In evaluating whether the defendant railway was an arm of the state entitled to Eleventh Amendment immunity, the Court noted that “Port Authority functions are not readily classified as typically state or unquestionably local,” because both states and municipalities perform them.<sup>118</sup> Unable to categorize the activities as either state or local, the Court in *Hess* simply ignored this consideration, declaring that it “does not advance our Eleventh Amendment inquiry.”<sup>119</sup> Thus, it is unclear how the Court wants judges to use an entity's activities when determining

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<sup>116</sup> *Lake Country*, 440 US at 402.

<sup>117</sup> *Hess*, 513 US at 33.

<sup>118</sup> *Id.* at 45.

<sup>119</sup> *Id.*

the proper level of abstraction at which to analyze arm-of-the-state factors. Is the question whether the entity's primary activities or purposes are state functions, whether *most* of the entity's activities are state functions, or whether the activity that gave rise to the suit is a state function? Although the first two questions are abstract in nature, the last question is rooted in the facts of each case. It asks what the entity was doing and how the state interacts with the entity with respect to the activity in question. In this third, activity-based formulation of the question, what the entity was created for and what proportion of its total statutory purposes can be categorized as state activities are irrelevant. What matters is the state's relationship with the entity's suit-related activity.

While *Hess* did not clarify whether the defendant's activity giving rise to the suit matters in the arm-of-the-state analysis, *Regents* at least acknowledged that the doctrine is unsettled on the question of how to define the scope of entity action to which the many factors will be applied.<sup>120</sup> The plaintiff in this case alleged that the University of California had wrongfully breached its agreement to employ him at a laboratory once it determined he could not acquire a necessary security clearance from the Department of Energy, which owned the laboratory.<sup>121</sup> The district court held that the University was an arm of the state immune to the suit, and the Ninth Circuit Court of Appeals reversed, largely on the ground that the Department of Energy's contract with the University would indemnify the state for any judgment incurred while performing that contract, including this suit's.<sup>122</sup> The Supreme Court reversed, concluding that legal liability, rather than financial liability and the state's ability to find a third-party indemnifier, mattered in evaluating the monetary judgment factor.<sup>123</sup> It also addressed but declined to "decide whether there may be some state instrumentalities that qualify as 'arms of the State' for some purposes but not others."<sup>124</sup> That possibility is, of course, a necessary conclusion of the activity-based approach proposed in this Comment.

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<sup>120</sup> Indeed, the entity-based circuits have struggled to reconcile this uncertainty as to the scope of the arm-of-the-state analysis with their steadfast belief in the entity-based approach. This tension is especially evident in their handling of the monetary judgment factor, which is discussed in Part II.C.2.

<sup>121</sup> *Regents*, 519 US at 426–27.

<sup>122</sup> *Id.* at 427–28.

<sup>123</sup> *Id.* at 431.

<sup>124</sup> *Id.* at 427 n 2.

A more recent case, *Northern Insurance Co of New York v Chatham County, Georgia*,<sup>125</sup> offered further hints that the Court might be open to an activity-based arm-of-the-state doctrine. In that case, the Court considered whether an insurance company could bring an admiralty suit against a county seeking damages stemming from a malfunctioning drawbridge incident.<sup>126</sup> The Court did not fully engage with its arm-of-the-state analysis or comment negatively on any of its prior decisions, but it noted that determining the scope of the inquiry might be important. It phrased the relevant question as whether “the County . . . was acting as an arm of the State *when it operated [a] drawbridge*.”<sup>127</sup> This language suggests an activity-based approach based on “bridge operation” activities specifically. However, the Court did not dig any deeper into the inquiry before upholding the lower court’s ruling based on the defendant county’s concession that it did not qualify as an arm of the state entitled to sovereign immunity.<sup>128</sup>

While these cases hardly show enthusiasm for clarifying the scope of the arm-of-the-state inquiry one way or the other, they do create openings that would justify such a clarification—and further justify adopting an activity-based arm-of-the-state inquiry. Commentators have dismissed the consequences of the activity-based approach and criticized the Court for “ma[king] 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.”<sup>129</sup> But this is precisely the approach this Comment

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<sup>125</sup> 547 US 189 (2006).

<sup>126</sup> *Id.* at 192.

<sup>127</sup> *Id.* at 197 (emphasis added).

<sup>128</sup> *Id.* at 195.

<sup>129</sup> Bilborrow, Comment, 64 Emory L.J. at 826 (cited in note 76). See also, for example, Rogers, Note, 92 Colum. L. Rev. at 1275 & n. 152 (cited in note 25) (describing an activity-based analysis by the First Circuit before it adopted the entity-based approach as “novel and rather dubious” because “Eleventh Amendment immunity would be qualified rather than absolute, a distinction that lacks both textual and precedential support”). This criticism was overstated at the time it was made and is even more erroneous today. Alex Rogers’s only support consists of a Ninth Circuit opinion rejecting activity-based arm-of-the-state reasoning, *Durning v Citibank, N.A.*, 950 F.2d 1419, 1426 (9th Cir. 1991), and a line in passing by the Supreme Court that the Eleventh Amendment bars suits against agencies “regardless of the nature of the relief sought.” *Pennhurst State School & Hospital v Halderman*, 465 US 89, 100 (1984). That a defendant may be immune in a suit for damages or injunctive relief hardly determines that the arm-of-the-state inquiry cannot be an activity-specific analysis. Further, subsequent decisions such as *Hess* and *Regents* have created openings for an activity-based approach since the decisions in *Durning* and *Halderman*. See Part I.B. See also Taylor Simpson-Wood, *While It May Be True That “the King Can Do No Wrong,” What about His Offspring?: The Labyrinthine Law of Arm-of-the-State Immunity*



advances because it most accurately reflects and protects the sovereign immunity concerns that motivated the arm-of-the-state doctrine in the first place. Indeed, courts adjudicating “arm of the sentencing judge” immunity recognize that the word “arm” does not require that an actor always be or not be such a limb.<sup>130</sup> Further, the Court’s arm-of-the-state opinions have created openings to address and clarify the scope of the analysis. The Court should take this opportunity to endorse an activity-based approach. This would provide a consistent level of abstraction at which the lower courts can operate, allowing the Court to more clearly evaluate the various factors and possibly clarify the significance of each. It would also ensure that the Eleventh Amendment’s protection applies only to action truly attributable to the state’s influence.

## II. THE CIRCUIT SPLIT IN THE ARM-OF-THE-STATE DOCTRINE

In light of the Court’s general lack of clarity regarding what factors courts should consider, the circuits have developed their own various arm-of-the-state tests. Most commentators seeking to impose more order onto the arm-of-the-state doctrine write about which considerations should be given more weight, rather than the level of abstraction at which these considerations should be evaluated.<sup>131</sup> This Comment examines the uncertainty on the latter point.

The circuit split derives from disagreement on whether an entity must only have one arm-of-the-state status. Most circuits assume that entities have only one status. These courts thus apply their arm-of-the-state factors to the entity as a whole rather than only to the relevant activity. Most commentators agree with this approach, dismissing out of hand the possibility that an entity could simultaneously be an arm of the state for some purposes and not an arm of the state for others.<sup>132</sup>

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*Examined through the Prism of Port Authorities*, 5 SC J Intl L & Bus 153, 164 (2009) (describing the Supreme Court as “blazing a jurisprudential path that can only be characterized as divisive”); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv L Rev 1559, 1564 (2002) (noting that “[t]hese decisions have generated an outcry in the academy”).

<sup>130</sup> See *Walrath v United States*, 35 F3d 277, 281–82 (7th Cir 1994) (providing an overview of circuits’ general agreement that absolute immunity is appropriate when an “official’s responsibilities are closely analogous to the adjudicative functions of a judge, or are ‘intimately associated’ with the judicial process itself”).

<sup>131</sup> See note 113.

<sup>132</sup> See, for example, Needle, Note, 6 Rev Litig at 212 (cited in note 77) (dismissing the possibility that “an essentially non-‘arm of the State’ entity may in some of its activities qualify as an ‘arm of the State’”); Bilborrow, Comment, 64 Emory L J at 826 (cited in

This Comment refers to this more common conception as “entity-based” thinking. A holding under the entity-based approach is problematically broad. Barring a change in the state law makeup of an entity, the entity-based approach predetermines the arm-of-the-state status for every future suit concerning the defendant.

Meanwhile, this Comment’s proposed approach is “activity-based.” This approach considers arm-of-the-state test factors only as they apply to the activity at issue.<sup>133</sup> It results in much narrower holdings, such as the Eleventh Circuit’s holding that a local sheriff is an arm of the state solely “with respect to feeding inmates.”<sup>134</sup> These narrow holdings better reflect the intricate power allocations between state and local entities in modern government.

#### A. The Entity-Based Approach

The abstract, entity-based approach is much more common among the circuits than the activity-based approach. This Section uses the DC and First Circuits to illustrate the broad themes of the entity-based side of the circuit split.<sup>135</sup> It then discusses the inherent tension between the entity-based approach and the money judgment factor in particular, which further illustrates how this approach cannot achieve the motivating purposes of the Eleventh Amendment in the modern age.

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note 76) (calling such a duality a “contradiction”); *Farr v Chesney*, 441 F Supp 127, 131 (MD Pa 1977) (“[T]he Court is not convinced that a particular agency can be both statewide and local in nature so that only a portion of its activities are protected by the Eleventh Amendment.”).

<sup>133</sup> For circuits not currently employing an activity-based approach, this Comment recommends adopting the municipal liability doctrine’s method for defining the activity at issue. See Part III.

<sup>134</sup> *Lake v Skelton*, 840 F3d 1334, 1342 (11th Cir 2016).

<sup>135</sup> For examples of other circuits’ entity-based approaches, see *Gorton v Gettel*, 554 F3d 60, 62 (2d Cir 2009); *Karns v Shanahan*, 879 F3d 504, 513 (3d Cir 2018); *United States v Pennsylvania Higher Education Assistance Agency*, 745 F3d 131, 136–38 (4th Cir 2014); *United States v University of Texas Health Science Center–Houston*, 544 Fed Appx 490, 494–95 (5th Cir 2013); *Kreipke v Wayne State University*, 807 F3d 768, 774–75 (6th Cir 2015); *Parker v Franklin County Community School Corp*, 667 F3d 910, 926–29 (7th Cir 2012); *Public School Retirement System of Missouri v State Street Bank & Trust Co*, 640 F3d 821, 827, 830 (8th Cir 2011) (stating that “[c]ourts generally assess an entity’s independence in comparison to the type of independence that a political subdivision possesses,” and that the monetary judgment question “is one of ‘potential’ benefit [to the State], however; whether a money judgment *in this particular case* will actually benefit [the State’s] treasury is not the relevant inquiry”) (emphasis added); *Colby v Herrick*, 849 F3d 1273, 1276–77 (10th Cir 2017).

Each circuit structures its own test with different factors, assigned weights, and rationales. Despite these differences, all entity-based circuits share the notion that an arm-of-the-state status must be evaluated in the abstract and apply to all of the entity's various activities. The DC Circuit explains the entity-based approach succinctly:

The status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors. Rather, once an entity is determined to be an arm of the State under the [DC Circuit's] three-factor test, that conclusion applies unless and until there are relevant changes in the state law governing the entity.<sup>136</sup>

The DC Circuit evaluates how the state characterizes the entity's functions generally.<sup>137</sup> Citing both *Hess* and *Lake Country*, the DC Circuit has characterized the question as "whether [the entity] performs functions typically performed by state governments, as opposed to functions ordinarily performed by local governments or non-governmental entities."<sup>138</sup> In *Puerto Rico Ports Authority v Federal Maritime Commission*,<sup>139</sup> the circuit court reviewed the Federal Maritime Commission's determination that the Ports Authority was not an arm of Puerto Rico and thus not entitled to sovereign immunity in an action brought by terminal operators alleging violations of the Shipping Act of 1984.<sup>140</sup> The court concluded that while the various functions performed were "not readily classified as typically state" functions, the state's enabling act for the entity had a state-wide purpose.<sup>141</sup> This act, it explained, "point[ed] in the direction of arm-of-the-[state] status."<sup>142</sup>

The above analysis shows that the DC Circuit employs an abstract, entity-based test, focusing on the cumulative characterization of all of an entity's legal purposes. Like the *Hess* Court, the DC Circuit does not clarify what percentage of an entity's activities must be state-related, or how important a state-dictated activity must be, for the entity to qualify as an arm of the state. And

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<sup>136</sup> *Puerto Rico Ports Authority v Federal Maritime Commission*, 531 F3d 868, 873 (DC Cir 2008).

<sup>137</sup> *Id.* at 875.

<sup>138</sup> *Id.*

<sup>139</sup> 531 F3d 868 (DC Cir 2008).

<sup>140</sup> *Id.* at 870–71.

<sup>141</sup> *Id.* at 875, quoting *Hess*, 513 US at 45.

<sup>142</sup> *Puerto Rico Ports Authority*, 531 F3d at 876.

unlike *Lake Country*, the DC Circuit seems unconcerned with identifying a “primary” function or activity that gave rise to the entity’s being.<sup>143</sup>

Meanwhile, the First Circuit employs another test that operates at the same broad level of abstraction. Its two-step arm-of-the-state test asks only how the state has structured the entity and then, “[i]f the structural indicators point in different directions,” about the impact on the state’s treasury.<sup>144</sup> In *Fresenius Medical Care Cardiovascular Resources, Inc v Puerto Rico and the Caribbean Cardiovascular Center Corp*,<sup>145</sup> the First Circuit considered whether a public corporation hospital was an arm of the state in a breach of contract action.<sup>146</sup> It evaluated Puerto Rico’s constitution, the entity’s enabling legislation and mission, and the entity’s general work.<sup>147</sup> It concluded that the entity competes with “[a] mosaic of medical providers . . . and nothing about [it] marks it as serving a uniquely governmental function.”<sup>148</sup> Again, this illustrates an abstract evaluation of the entity’s cumulative functions and defining legal language, not an evaluation focusing on the legal language defining the relevant activity or facts. The court also noted that there is “a fair degree of control” exerted by the state over some areas of the entity’s activity, such as periodic audits, annual report requirements, and occasional gubernatorial intervention on management and personnel issues.<sup>149</sup> The court did not mention which activities were at issue in either its discussion of the entity’s general activities or its discussion of the state’s relative levels of control. It merely mentioned the facts cursorily in the beginning of its opinion.<sup>150</sup> Instead, it kept its analysis broad—applicable to the entity’s entire span of possible actions and detached from the facts.

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<sup>143</sup> *Lake Country*, 440 US at 402.

<sup>144</sup> *Fresenius Medical Care Cardiovascular Resources, Inc v Puerto Rico and the Caribbean Cardiovascular Center Corp*, 322 F3d 56, 65 (1st Cir 2003).

<sup>145</sup> 322 F3d 56 (1st Cir 2003). Notably, this opinion declared a new test, getting rid of a prior approach that allowed “sovereign immunity [to] var[y] from case to case, depending on the entity’s function at issue.” *Orocovis Petroleum Corp v Puerto Rico Ports Authority*, 2010 WL 3981665, \*1 (D Puerto Rico).

<sup>146</sup> *Fresenius*, 322 F3d at 59.

<sup>147</sup> *Id* at 68–75.

<sup>148</sup> *Id* at 71.

<sup>149</sup> *Id*.

<sup>150</sup> *Fresenius*, 322 F3d at 59 (noting that plaintiff’s claim was for breach of contract and of the implied covenant of good faith and fair dealing). For a similarly broad application of the control factor in the entity-based approach, see *Karns*, 879 F3d at 518.

## B. The Activity-Based Approach

The Eleventh Circuit is the only circuit that applies a consistent activity-based arm-of-the-state doctrine in all contexts.<sup>151</sup> Like the other circuits, the Eleventh Circuit has its own factors: it first determines “the particular function in which the defendant was engaged when taking the actions” giving rise to the suit (what this Comment calls the *activity hinge*); and secondly determines “whether the defendant is an ‘arm of the State’ in his performance of the function.”<sup>152</sup> That second step includes factors such as state law definitions of the entity, degree of state control, funding sources, and who would bear any monetary judgment.<sup>153</sup> The circuit applies these factors in a way that “evaluate[s] both the [entity’s] governmental structure . . . vis-à-vis the State and the functions in issue.”<sup>154</sup>

This articulation of the test illustrates how the choice between activity-based and entity-based approaches effectively controls the scope of a court’s application of its other relevant factors. This choice serves as a hinge for broadening or narrowing the scope of the total inquiry. For example, in *Manders v Lee*,<sup>155</sup> a § 1983 excessive force action against a county and the sheriff in his official capacity, the Eleventh Circuit appeals court evaluated its other arm-of-the-state test factors—such as state control, funding, and impact on the state treasury—solely as they related to the activity at issue in the case.<sup>156</sup> It did not look to the entity-wide distribution of these factors.

In *Lake v Skelton*,<sup>157</sup> the Eleventh Circuit reaffirmed its activity-based approach.<sup>158</sup> It first used state law to define the relevant activity as “providing food to inmates.”<sup>159</sup> It then used the Georgia state constitution’s definition of sheriffs as “constitutional officer[s] of the state,” and the state’s direct assignment of responsibility to feed inmates to sheriffs rather than to other local

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<sup>151</sup> The Supreme Court has slipped into activity language at least once, without clarifying whether this signaled a change in the doctrine or was merely an oversight. See *Northern Insurance Co*, 547 US at 197. See also notes 130–33.

<sup>152</sup> *Lake*, 840 F3d at 1337. See also *Pellitteri v Prine*, 776 F3d 777, 779 (11th Cir 2015) (restating the “particular function” scope of the circuit’s inquiry).

<sup>153</sup> *Lake*, 840 F3d at 1337–38.

<sup>154</sup> *Id.*

<sup>155</sup> 338 F3d 1304 (11th Cir 2003).

<sup>156</sup> *Id.* at 1318–28 (applying the various factors to the function giving rise to the suit).

<sup>157</sup> 840 F3d 1334 (11th Cir 2016).

<sup>158</sup> *Id.* at 1337–38.

<sup>159</sup> *Id.* at 1339.

entities, to conclude that Georgia sheriffs were arms of the state in the context of providing food for inmates.<sup>160</sup>

The specificity of the activity-based approach allowed the *Lake* court to concentrate on the state law provisions relevant to the activity at issue rather than getting lost in those delineating other sheriff-related services and obligations. Although the state law's definition of the sheriff as a state official would have been relevant in an entity-based analysis as well, it would have been considered alongside all other state law provisions and activities performed by the sheriff's office. This may well have resulted in the food provisions being outweighed by other provisions characterizing the office as more local than state in nature. An entity-based court might conclude that the sheriff's office *as a whole* is a "local" office and thus withhold sovereign immunity—even though providing food *specifically* is a "state" activity. In contrast, according to an activity-specific approach, the sheriff's state law characterization mattered only in relation to the function of providing inmates with food, which the *Lake* court concluded was a state activity.<sup>161</sup> No other state law provisions or activities were relevant. As such, the activity-based approach may result in more specific, tailored, and even different results in arm-of-the-state inquiries than those of entity-based approaches. The activity-based approach reaches these results because it narrows the scope of the court's evaluation of the relevant state law provisions, levels of state control, and other factors to only consider the entity activity giving rise to the suit. Thus, adopting an activity-based approach is akin to adopting a hinge that alters the scope of the inquiry.

This attention to scope is an advantage over the entity-based approach, which necessarily results in under- and overinclusive arm-of-the-state status holdings. If an entity-based approach were taken with the *Lake* case, for example, the court would have considered how much control the state has over the sheriff *generally*, not with respect to the activity of feeding inmates. Evaluating Georgia law's treatment of sheriffs broadly, the court possibly would conclude that the sheriff's activities as a whole were more local than state in character. This evaluation would likely lead the court to conclude that the sheriff is *never* an arm of the state—a broad holding that subjects the sheriff to future liability even in

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<sup>160</sup> *Id.* at 1339–42.

<sup>161</sup> *Lake*, 840 F3d at 1339–42.

cases in which the state ordered him to act in a certain way. Thus, the entity-based approach does not adequately align influence or control with liability. In doing so, it undermines the Eleventh Amendment's goals of protecting only state or state-directed activity.

C. Instances of Internal Struggle within Entity-Based Circuits Suggest That the Arm-of-the-State Doctrine Needs an Activity-Based Update

Occasionally, entity-based circuits briefly illustrate the entity-based arm-of-the-state doctrine's inability to capture modern state-local power relationships or do substantive justice. This Section discusses two examples of these instances. The first example, provided by the Ninth Circuit, shows how entity-based courts can twist their doctrine to include more activity-specific reasoning when facing specific types of defendants—in this example, law enforcement defendants. This may be an effort to do substantive justice in particularly charged contexts, wherein the defendant entities elude the entity-based approach's broad categorizations. The second example details how entity-based courts struggle with the monetary judgment factor, a driving impetus for the Eleventh Amendment, because this factor does not lend itself to entity-based reasoning. These examples suggest that in order to achieve the Eleventh Amendment's core motivations today, the doctrine must adapt to an activity-based model.

1. The Ninth Circuit's struggle with law enforcement defendants.

While the Ninth Circuit remains steadfast in its support for the entity-based version of the doctrine, its lower courts brush aside aspects of this doctrine in cases that prove especially troublesome. This creates internal inconsistency and weakens the arm-of-the-state doctrine's potential to do substantive justice generally, even if it achieves that justice in a particular case.

The Ninth Circuit set out its arm-of-the-state test in *Mitchell v Los Angeles Community College District*:<sup>162</sup>

[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,

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<sup>162</sup> 861 F2d 198 (9th Cir 1988).

[4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.<sup>163</sup>

The circuit evaluates these factors “in light of the way [state] law treats the governmental agency.”<sup>164</sup> The phrasing of these factors suggests that the Ninth Circuit intended to advance an entity-based arm-of-the-state test. Indeed, the holding in *Mitchell* itself was broad and applied to all potential activities performed by the defendant.<sup>165</sup> However, Ninth Circuit courts are quite attentive to context when dealing with law enforcement defendants.<sup>166</sup> The circuit has not clarified the reasons for this minor shift into activity-based thinking. It may be that Ninth Circuit courts felt more compelled to do substantive justice for the plaintiffs within the charged context of civil rights claims against law enforcement defendants. Whatever the reason, the Ninth Circuit unofficially decided to move away from its entity-based arm-of-the-state approach in the law enforcement context.

In *Streit v County of Los Angeles*,<sup>167</sup> the plaintiffs sought damages for overdetention under § 1983 against the county and the sheriff’s department.<sup>168</sup> In evaluating whether the sheriff’s department was an arm of the state, the circuit court first laid out the entity-based *Mitchell* factors and then conducted its analysis of those factors that were amenable to activity-specific thinking at an activity-specific level.<sup>169</sup> It evaluated whether the monetary judgment in this particular case would run against the state treasury and whether the particular activity was a “central government function.”<sup>170</sup> The last three *Mitchell* factors do not lend

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<sup>163</sup> *Id.* at 201.

<sup>164</sup> *Holz v Nenana City Public School District*, 347 F3d 1176, 1181 (9th Cir 2003), quoting *Belanger v Madera Unified School District*, 963 F2d 248, 251 (9th Cir 1992).

<sup>165</sup> See *Mitchell*, 861 F2d at 201 (“We hold that, under California law, the district is a state entity that possesses eleventh amendment immunity.”).

<sup>166</sup> See *Roe v County of Lake*, 107 F Supp 2d 1146, 1148 (ND Cal 2000) (explaining that “a sheriff may act for the State and the county in different capacities”); *Holz*, 347 F3d at 1181 (reviewing its entity-based circuit precedent as to school districts, which directs that “school districts in California are arms of the state” and “school districts in Nevada are *not* arms of the state”) (emphasis in original).

<sup>167</sup> 236 F3d 552 (9th Cir 2001).

<sup>168</sup> *Id.* at 556.

<sup>169</sup> *Id.* at 566–67.

<sup>170</sup> *Id.* at 567. Occasionally, Ninth Circuit courts apply the *Mitchell* monetary judgment factor in a suit-specific way in non-law enforcement contexts, further illustrating the lack of clarity as to the scope of its inquiry. See *Laurie Q. v Contra Costa County*, 304 F Supp 2d 1185, 1202 (ND Cal 2004) (noting that “the state would possess no legal liability for any money judgment against the County premised on the violations alleged in this



themselves to activity-based thinking. The court conducted an entity-based analysis and found the “record [ ] bare with respect to the remaining two factors.”<sup>171</sup> After this mixed arm-of-the-state analysis, the court reached an activity-based conclusion, holding that the sheriff’s department “is not an arm of the state of California in its administration of the local county jails.”<sup>172</sup> This is a marked contrast from the circuit’s arm-of-the-state doctrine jurisprudence regarding other types of entities. When evaluating the arm-of-the-state status of school districts,<sup>173</sup> state-created commissions,<sup>174</sup> or air pollution control districts,<sup>175</sup> for example, Ninth Circuit courts evaluate all of the *Mitchell* factors, except occasionally the monetary judgment factor, at the entity-based level. This contrast in approaches suggests that the Ninth Circuit recognized the flaws in the entity-based approach and found that they were too much to bear in the law enforcement civil rights context.

Since the Ninth Circuit adopted an activity-based arm-of-the-state analysis as to law enforcement defendants, it has progressively reduced the significance of this analysis in this context such that the municipal liability doctrine effectively controls. The courts possibly found the internal inconsistencies caused by maintaining an activity-specific subset within their entity-based doctrine untenable. For example, in *Elford v Freitas*,<sup>176</sup> the plaintiff, a formerly incarcerated individual, alleged that county prison officials violated his First Amendment rights when they refused to give him certain magazines.<sup>177</sup> He requested injunctive relief and monetary damages.<sup>178</sup> The court considered the defendant sheriff’s claim that “he, other jail staff, and the County of Sonoma are immune from suit under the Eleventh Amendment.”<sup>179</sup> It characterized the claim as an arm-of-the-state claim, citing

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action”). But see *Holz*, 347 F3d at 1182–85 (evaluating in a partly entity-based way the funding structure of Alaska public schools).

<sup>171</sup> *Streit*, 235 F3d at 567.

<sup>172</sup> *Id.*

<sup>173</sup> See *Holz*, 347 F3d at 1181; *Savage v Glendale Union High School, District Number 205, Maricopa County*, 343 F3d 1036, 1041 (9th Cir 2003).

<sup>174</sup> See *Sornson v Oregon Commission on Children*, 887 F Supp 2d 1111, 1119 (D Or 2012) (finding that the defendant performs central government functions in general).

<sup>175</sup> See *Beentjes v Placer County Air Pollution Control District*, 397 F3d 775, 782–84 (9th Cir 2005) (evaluating the central government function factor in general).

<sup>176</sup> 2012 WL 850737 (ND Cal).

<sup>177</sup> *Id.* at \*1.

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

<sup>179</sup> *Id.* at \*6.

*Mount Healthy* and *Regents* to explain the doctrine and its adherence to state law characterizations.<sup>180</sup> However, it then went on to cite the Ninth Circuit's definitive case on the municipal liability doctrine and *Streit*'s arm-of-the-state analysis in the same breath, concluding that the defendants were not arms of the state for purposes of this particular action.<sup>181</sup>

Similarly, in *Hurth v County of Los Angeles*,<sup>182</sup> the court implied that the municipal liability and arm-of-the-state doctrines apply the same test. The court issued an order for supplemental briefing "regarding the legal status" of the sheriff's department "under California law," in response to the defendants' motion to dismiss the sheriff's department from the suit.<sup>183</sup> It wrote that the "true question . . . is whether the Sheriff's Department is a subdivision of the *state*" or "of the municipality."<sup>184</sup> It discussed arm-of-the-state and municipal liability precedents alongside each other without drawing any distinction between the two and concluded that further briefing on state law characterization would answer its stated question.<sup>185</sup> After taking it under consideration, the court rejected the motion to dismiss on the ground that according to Ninth Circuit precedent, "a California county sheriff is a municipal, not state, actor when engaged in law enforcement functions such as investigating crime (which is the function at issue in the present case)."<sup>186</sup> In coming to this conclusion, the court cited only municipal liability doctrine precedents, further demonstrating the arm-of-the-state doctrine's gradual irrelevance in the Ninth Circuit law enforcement context. Perhaps responding to this trend, law enforcement defendants in the Ninth Circuit tend to bring municipal liability arguments rather than arm-of-the-state arguments when attempting to avoid litigation.<sup>187</sup>

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<sup>180</sup> *Elfand*, 2012 WL 850737 at \*6.

<sup>181</sup> *Id.*, citing *Brewster v Shasta County*, 275 F3d 803, 805–06 (9th Cir 2001) and *Streit*, 236 F3d at 567.

<sup>182</sup> 2009 WL 10699013 (CD Cal).

<sup>183</sup> *Id.* at \*3. See also *id.* at \*1.

<sup>184</sup> *Id.* at \*2 (emphasis in original).

<sup>185</sup> *Id.* at \*2–3.

<sup>186</sup> *Hurth v County of Los Angeles*, 2009 WL 10696491, \*3 (CD Cal) (order denying defendant's motion to dismiss).

<sup>187</sup> See *Prescott v County of Stanislaus*, 2010 WL 3783950, \*3 (ED Cal); *Armstrong v Siskiyou County Sheriff's Department*, 2008 WL 686888, \*5–7 (ED Cal). Even cases that have cited *Streit* only cited to its discussion of municipal liability. See *Payne v County of Calaveras*, 2018 WL 6593347, \*3 (ED Cal); *Brass v County of Los Angeles*, 328 F3d 1192, 1195 (9th Cir 2003); *Kei Wei Lei v City of Oakland*, 2018 WL 7247172, \*2 (ND Cal).

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In short, the example discussed above shows an entity-based arm-of-the-state circuit struggling to reconcile the different scopes of the various immunity doctrines, as well as these doctrines' different purposes. Notably, the circuit decided it would be easier to just not mention the arm-of-the-state doctrine in particularly challenging contexts—those involving officials or entities that perform a fair number of both state and local activities—rather than face the question of the entity-based approach's capacity head on. This end result suggests that while the entity-based arm-of-the-state approach is more popular, its internal coherence and ability to achieve Eleventh Amendment objectives are suspect.

Despite this reluctance to challenge the status quo, courts do not need to feel constrained by potentially overbroad entity-based holdings. These holdings, and entity-based courts' efforts to reduce the arm-of-the-state doctrine's relevance in challenging contexts, are leading the doctrine's slow descent into incoherence. Circuits can deploy the arm-of-the-state doctrine in an activity-specific way, ensuring that local entities bear the liabilities for truly local activities but not for state-mandated activities. While other immunity doctrines could just step in and achieve this result—as the Ninth Circuit's evolution in the law enforcement context demonstrates—adapting the arm-of-the-state doctrine so that it can function in the modern world is a worthy goal. Entity-based courts seem to dislike acknowledging what would be logically consistent outcomes according to their entity-based arm-of-the-state reasoning: that an official might act for the state or the locality while never being an arm of the state (or while always being an arm of the state). This aversion risks both doctrinal inconsistency and a lack of judicial attention to federalism principles. An activity-based arm-of-the-state test would ensure that the Eleventh Amendment's particular constitutional objectives continue to get the attention they deserve by forcing courts to formally consider the state interests that bear on local action. As states continue to narrowly but forcefully direct predominantly local entities such as police departments, it is crucial that courts apply the arm-of-the-state doctrine with a scalpel rather than a hammer.<sup>188</sup>

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<sup>188</sup> For example, California's "Sanctuary City" law explicitly removes local law enforcement officials' discretion in the immigration enforcement context. See Cal Govt Code

2. The revelatory struggle to reconcile entity-based reasoning with the Eleventh Amendment's foundational monetary judgment factor.

The monetary judgment factor is included, under varying names, within every arm-of-the-state test. Courts give this factor particular weight when applying the doctrine because it reflects one of the Eleventh Amendment's motivating concerns.<sup>189</sup> Its significance makes the entity-based circuits' struggle with how to fit it into their tests particularly revealing. These struggles bolster the constitutional and purposivist arguments for shifting to an activity-based arm-of-the-state doctrine, which would better achieve the Eleventh Amendment's goal of protecting the state purse.

While most of the factors in the various entity-based circuit tests emphasize the entity's status generally, these tests occasionally consider the monetary judgment factor with respect to the facts of the case—that is, asking whether this particular judgment would run against the state treasury. The Supreme Court has provided little clarity on what monetary features matter, and the entity-based circuits struggle to reconcile the Court's attention to the monetary impact of a given suit with the notion that they should focus on the entity's broad characteristics. A survey of the entity-based circuits reveals strained efforts to make sense of the Court's unclear guidance while still imposing entity-based formalities on the doctrine. For example, the Fifth Circuit treats this “most important” factor, which it terms “the source of the entity's funding,” as a “two-part inquiry.”<sup>190</sup> It first considers “the state's liability for any judgment” against the defendants at issue and then considers the state's “liability for [the entity's] general

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§§ 7284, 7284.6(a)(2)–(6), 7282.5(a). An activity-based arm-of-the-state doctrine would recognize that California law enforcement entities operate as arms of the state in this context, entitling them to sovereign immunity for suits arising from immigration enforcement actions, while not necessarily shielding them from suits arising from their other activities. Meanwhile, an entity-based approach would place enormous pressure on the arm-of-the-state inquiry in this immigration context because the holding would control the entity's arm-of-the-state status in every other suit, regardless of state control over the activity. Any conclusion would be both under- and overinclusive in its shielding of the entity. See also generally *Arizona v United States*, 567 US 387 (2012) (challenging SB 1070, an Arizona bill that required police officers to make warrantless arrests when they had probable cause to believe that the arrestee was an undocumented immigrant).

<sup>189</sup> See Parts I.A.1, I.B.

<sup>190</sup> *Cozzo v Tangipahoa Parish Council—President Government*, 279 F3d 273, 282 (5th Cir 2002).

debts and obligations.”<sup>191</sup> Thus, this entity-based test incorporates entity-based and activity-based analyses into this single factor, attempting to fulfill the Eleventh Amendment’s motivating monetary judgment purpose while staying true to the circuit’s entity-based reasoning.

Other entity-based circuits treat the monetary judgment factor as a wholly activity-based inquiry alongside other purely entity-based inquiries. For example, in the Fourth Circuit, courts ask first “whether the state treasury will be liable for the judgment,” and, if it will not be, they then “consider other factors.”<sup>192</sup> And still another circuit attempts to meld the fact-specific and abstract inquiries into one: the Eighth Circuit writes that a “State’s role in financing an entity’s operation can indicate whether a money judgment in favor of the entity may benefit the State’s treasury.”<sup>193</sup> This circuit, invoking the Supreme Court’s language in *Regents* that “it is the entity’s potential legal liability . . . that is relevant,”<sup>194</sup> phrased the monetary question as “one of ‘potential’ benefit [ ]; whether a money judgment in this particular case will actually benefit the [state treasury] is not the relevant inquiry.”<sup>195</sup>

In entity-based circuit opinions, then, there is clear tension between the fact that the state may only pay for certain judgments against an entity or an official and these courts’ view that an arm-of-the-state status is supposed to remain constant across all of an entity’s activities. The discussion in one Fourth Circuit opinion is particularly revealing. In *Gray v Laws*,<sup>196</sup> a former sanitarian for the county health department sued the department, the county, and individuals after being fired.<sup>197</sup> The lower court dismissed claims against the individuals in their official capacities on the ground that “in making employment decisions,” they “act on behalf of the state rather than the county” and thus receive Eleventh Amendment immunity.<sup>198</sup> The appeals court admitted that “[i]t is often difficult to determine whether a government entity with both state and local characteristics constitutes an ‘arm

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<sup>191</sup> *Id.*

<sup>192</sup> *Cromer v Brown*, 88 F3d 1315, 1332 (4th Cir 1996).

<sup>193</sup> *Public School Retirement System of Missouri v State Street Bank & Trust Co*, 640 F3d 821, 830 (8th Cir 2011).

<sup>194</sup> *Regents*, 519 US at 431.

<sup>195</sup> *Public School Retirement System of Missouri*, 640 F3d at 830.

<sup>196</sup> 51 F3d 426 (4th Cir 1995).

<sup>197</sup> *Id.* at 429–30.

<sup>198</sup> *Id.* at 430.

of the state' for Eleventh Amendment purposes."<sup>199</sup> However, it would not budge on its rhetorical commitment to the entity-based inquiry, even as it announced a test that included an activity-specific question regarding the monetary judgment.<sup>200</sup> Most pointedly, it remarked that the district court had "mistakenly assumed" that the Eleventh Amendment inquiry is "functional" because "the same individual is not always a state employee or always a county employee."<sup>201</sup> It attempted to clarify:

While it is true that whether a judgment against an official is payable from the state treasury on occasion may depend upon the function being performed by the official . . . , the primary consideration of Eleventh Amendment immunity is whether the state is liable for the judgment against the employee, not the function performed by the employee.<sup>202</sup>

This, of course, does not clarify how the Eleventh Amendment inquiry cannot be essentially "functional" as the district court claimed, because the function performed may determine whether the state is liable. These rhetorical efforts show a circuit straining to interpret Supreme Court precedent as justifying reducing the activity's role in the monetary judgment question, even as the motivating purposes of the Eleventh Amendment counsel a contrary conclusion.

In sum, these entity-based courts have struggled to achieve one of the Eleventh Amendment's core purposes—protecting the state treasury—when various state and local purses face potential liability for entity action. By attempting to attribute entity-based reasoning to Supreme Court precedents, these courts reveal that reasoning's inadequacy. In fact, the openings created in those precedents,<sup>203</sup> combined with the modern fact of intricate state-local relationships and payment arrangements, provide forceful reasons for adopting an activity-based arm-of-the-state doctrine.

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<sup>199</sup> *Id.* at 431.

<sup>200</sup> *Gray*, 51 F3d at 433–34.

<sup>201</sup> *Id.* at 435 (quotation marks omitted).

<sup>202</sup> *Id.*

<sup>203</sup> See Part I.C.

### III. REUNITING THE CIRCUITS AT AN ACTIVITY-SPECIFIC LEVEL: HOW IT CAN BE DONE

The activity-based approach offers key policy advantages in terms of aligning liability with power and achieving substantive justice for plaintiffs and defendants. Part IV will further explain these more far-reaching rationales. In this Part, however, the focus is on *how* to achieve an activity-based arm-of-the-state doctrine. This Part lays out how the municipal liability doctrine offers a means to achieving an activity-based arm-of-the-state doctrine by providing a state law-based framework for defining the relevant activity. This Part then justifies why the municipal liability doctrine specifically is the best guide for courts making the proposed adaptation.

#### A. How Courts Can Use the Municipal Liability Doctrine to Achieve an Activity-Based Arm-of-the-State Approach

A simple way to adopt an activity-based approach across circuits is to merely add a “hinge” factor to existing circuit tests that is inspired by the municipality liability analysis.<sup>204</sup> The identification of the relevant activity as defined by state law is the starting point for both the municipal liability doctrine’s analysis and the arm-of-the-state doctrine’s various, circuit-specific steps. If a circuit can effectively adopt the municipal liability doctrine’s activity-defining framework in the form of a new factor within its existing arm-of-the-state test, then the rest of the existing steps in various arm-of-the-state tests will apply in a narrow, activity-focused way. The circuit can still conduct its evaluation of the substance of the question—whether the entity is an arm of the state within that activity—according to its own interpretation of the Supreme Court’s arm-of-the-state precedents.

The Eleventh Circuit provides an example of one way to incorporate an activity-based element. It has created a two-step arm-of-the-state test, in which it first “determine[s] the particular function” at issue and then considers various other factors as they apply to that function.<sup>205</sup> The circuits need not completely follow

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<sup>204</sup> The substantive analysis and purposes of the municipal liability doctrine are explained in Part I.A.3. This Part focuses on this doctrine’s threshold determination of what level of abstraction is appropriate for conducting that substantive inquiry. This threshold process can be incorporated into the arm-of-the-state doctrine to create the activity-specific update proposed in this Comment.

<sup>205</sup> *Lake*, 840 F3d at 1337 (11th Cir 2016). See also *Pellitteri v Prine*, 776 F3d 777, 779 (11th Cir 2015) (restating the “particular function” scope of the circuit’s inquiry).

the Eleventh or any other circuit's test. This Comment's proposed activity hinge factor would be added into the existing circuit tests, determining the scope of the tests' other factors. This change would enable inter-circuit movement toward uniformity in the *scope* of each arm-of-the-state test while preserving some intra-circuit traditions with respect to the precise elements each circuit considers. For example, there is no need for the First Circuit to cast off its existing arm-of-the-state test factors and adopt the Eleventh Circuit's factors. The inclusion of an activity-defining hinge factor based on the municipal liability doctrine's activity-based framework would provide a sufficient change because it would require the circuit's other factors to be evaluated in a more context-specific way. This better achieves the motivating concerns behind the doctrine by ensuring that Eleventh Amendment immunity only covers activities in which an entity, which may do many acts largely irrelevant to and beyond the reach of the state, essentially functions as an arm of the state.

It is possible to achieve a fundamental shift in scope without mandating a wholesale overhaul of every entity-based arm-of-the-state test. As long as the Supreme Court has yet to clarify the relative importance of arm-of-the-state test factors, the circuits' organization of those factors may remain the same. Consider the DC Circuit. This circuit has a three-part test that does not include any "function" or "activity" factor. Rather, it looks at "state intent, state control, and overall effects on the state treasury."<sup>206</sup> Supplementing these elements with a factor that focuses on the activity involved in the case at hand would anchor the whole inquiry in the facts of the case. The state control factor would be correspondingly changed in scope to focus on state control *with respect to the activity at issue*, not state control over the entity broadly. State intent, which is the means by which the DC Circuit evaluates state law characterization of the entity, would similarly be changed: the factor would now focus on how state law treats the challenged activity. Adding an activity hinge factor to this circuit's test—or any other entity-based test—would influence how the rest of the factors are applied. The activity hinge factor would, at minimum, limit the scope of the court's evaluation and thus narrow the scope of the holding to situations in which the entity engages in those same activities. This reorientation is key to creating an arm-of-the-state doctrine that responds to modern

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<sup>206</sup> *Puerto Rico Ports Authority*, 531 F3d at 874.



structures of power between local entities and the states. It would ensure that when the state sufficiently influences a given activity, the entity does not face legal liability for following directions it may not disobey. At the same time, this activity-based approach's limited scope means that future plaintiffs' actions may proceed against the same entity regarding activities that afford that entity more discretion and local control.

Although this shift in scope would not mandate that the circuits change how they weigh each factor in their tests, it would accomplish two important tasks for the future of the arm-of-the-state doctrine. First, it would allow the doctrine to do substantive justice across modern government. The Ninth Circuit, for example, might find that the arm-of-the-state doctrine is appropriate for law enforcement inquiries after all, and this would allow the Eleventh Amendment's federalist concerns to be fully represented in those cases. While the municipal liability doctrine can do similar work in narrowing the focus of the state-local relationship inquiry, it does not formally and purposefully advance those same constitutional concerns and thus cannot be a fully adequate replacement for the arm-of-the-state doctrine. Second, adopting a clearly defined, uniform level of abstraction at which the doctrine operates will create an opportunity for the Supreme Court to clarify the appropriate weight to give each factor. This is because narrowing the scope of the test to the challenged activity removes any ambiguity over whether courts should consider control of the entity generally or just control over the activity in question, decisively settling on the latter. Clearly defining the scope would create a collection of lower court opinions operating in the same framework, allowing the Supreme Court to more effectively evaluate the effects of each factor or test on outcomes. Perhaps if lower courts more clearly defined the scope of their arm-of-the-state tests, the Supreme Court would be more willing to clarify which factors should be considered, and how important each factor should be.

B. Why the Municipal Liability Doctrine Offers the Most Effective and Feasible Means for Making the Change to Activity-Based Reasoning

The municipal liability doctrine provides a model for how to define entity activities using state law. As discussed in Part I.A.3, under the municipal liability doctrine, states may not be sued under § 1983 as a matter of statutory construction, rather than as a

matter of doctrinal immunity. The doctrine defines “the state” for purposes of the statute according to a narrow, activity-specific analysis of state law.<sup>207</sup> The municipal liability doctrine thus offers an avenue by which the arm-of-the-state doctrine can adopt the activity-based approach of other immunity doctrines while retaining its special attention to how the state defines its own entities and their actions. This special attention ensures that the arm-of-the-state doctrine retains the same respect for state sovereignty that animates its original source of authority: the Eleventh Amendment.

This attention to state law and state sovereignty makes the municipal liability doctrine a thematically superior choice for the transition to an activity-based arm-of-the-state doctrine than the other immunity doctrines. Even though the other doctrines also occupy the activity-specific level of abstraction, their analyses do not offer any real guidance for the arm-of-the-state doctrine given its particular constitutional purposes. Other immunity doctrines have developed according to common law reasoning, shifting as defendants convince the Court that their activities fit within the objectives of ensuring efficient government while maintaining sufficient plaintiff redress.<sup>208</sup> Meanwhile, the arm-of-the-state doctrine uses state law definitions to determine an entity’s status, which is arguably an effort by federal courts to show proper respect for the states when deciding sovereign immunity questions. The arm-of-the-state doctrine also has remained loyal to the Eleventh Amendment’s motivating concerns of protecting state dignity and financial solvency; the Court is generally unmoved by policy arguments that, for example, some local entities should be immune from suit for the sake of efficient government.<sup>209</sup> Thus, the absolute immunity doctrines provide no applicable guidance on how to define the relevant activity. The municipal liability doctrine is the best, and indeed the only, candidate for this purpose.

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<sup>207</sup> See *McMillian*, 520 US at 795:

[W]hile it might be easier to decide cases arising under § 1983 and *Monell* if we insisted on a uniform, national characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government: the States have wide authority to set up their state and local governments as they wish.

<sup>208</sup> See, for example, *Burns v Reed*, 500 US 478, 485 (1991) (explaining that “common-law immunity [of prosecutors, judges, and grand jurors in certain activities] was viewed as necessary to protect the judicial process”).

<sup>209</sup> See, for example, *Hess*, 513 US at 47 (explaining that the Eleventh Amendment’s “twin reasons for being” are state dignity and financial liability, and using state law in its evaluation).

As illustrated by the Eleventh Circuit's approach, the municipal liability doctrine shares essential elements with an activity-based arm-of-the-state test. As a threshold matter, both use state law to identify a relevant activity, and then, substantively, both evaluate the state-local relationship only within the context of that activity. Because all of the federal courts are familiar with the municipal liability doctrine's threshold determination of the activity at issue, shifting to an activity-based arm-of-the-state doctrine would merely impose a framework they are already familiar with.<sup>210</sup>

Further, the courts' application of the municipal liability doctrine has been largely successful in terms of predictability and deterrent effect on entity and officer behavior.<sup>211</sup> Of course, commentators have suggestions on how to refine the municipal liability doctrine to better achieve certain objectives,<sup>212</sup> but this doctrine's flaws seem salutary when compared to the issues in the

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<sup>210</sup> See *McMillian*, 520 US at 785 (“[T]he question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, ‘all or nothing’ manner. . . . [We] ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue.”).

<sup>211</sup> See Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga L Rev 845, 862–64 (2001) (“Holding the municipality itself liable for injuries caused by its own unconstitutional policies and customs makes it more difficult to take refuge in the ‘bad apply theory’ and more likely that the municipality will take steps to remedy the broader problems.”); G. Flint Taylor, *A Litigator’s View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DePaul L Rev 747, 748 (1999) (arguing that in addition to helping plaintiffs reach the “municipal deep pocket,” municipal liability claims “facilitate the development of systemic evidence of deliberate indifference to police brutality”); Matthew J. Cron, et al., *Municipal Liability: Strategies, Critiques, and a Pathway toward Effective Enforcement of Civil Rights*, 91 Denver U L Rev 583, 606, 606–07 nn 171–73 (2014) (“For many plaintiffs, the potential of preventing future civil rights violations is significantly more important than receiving monetary compensation for their own injuries. To that end, many plaintiffs request (and receive) injunctive relief in municipal liability cases that may have no direct benefit to an individual plaintiff.”).

<sup>212</sup> See, for example, Peter H. Schuck, *Municipal Liability under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 Georgetown L J 1753, 1779 (1989) (arguing that the municipal liability doctrine’s “official policy” requirement “encourages courts to ask the wrong questions” and recommending a focus on private tort law concepts that establish “responsibility for the injury”); Fred Smith, *Local Sovereign Immunity*, 116 Colum L Rev 409, 478 (2016) (arguing that because “immunities for governmental agents and immunities for local entities often work in tandem to block constitutional accountability,” the municipal liability doctrine “should take this synergy into account”); Cron, et al., 91 Denver U L Rev at 604 (cited in note 211) (arguing that “courts have been hyper-vigilant about protecting municipalities” and that their “high standards have resulted in a scarcity of successful municipal liability claims in the federal courts”). While those writers focus on repairing the doctrine, still some commentators would get rid of the doctrine entirely. See John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 Va L Rev

arm-of-the-state doctrine as currently conceived.<sup>213</sup> And as a practical matter, municipal liability is here to stay: “[I]t [is] near-delusionary to expect the Court to revisit its municipal liability jurisprudence.”<sup>214</sup> Importing just the threshold inquiry of the municipal liability doctrine is thus a feasible task. By adopting the municipal liability doctrine’s approach to defining a narrow, state law-responsive scope, the arm-of-the-state doctrine can become uniform at least in regard to its level of abstraction.

#### IV. REUNITING THE CIRCUITS AT AN ACTIVITY-SPECIFIC LEVEL: WHY IT SHOULD BE DONE

This Part offers a brief explanation of how an activity-based arm-of-the-state approach better accomplishes the broad motivations behind sovereign immunity and achieves substantive justice in the modern world.

##### A. Achieving Federalism’s Purposes within Modern Government

The Eleventh Amendment’s “twin reasons for being,” the protection of state dignity and solvency,<sup>215</sup> have become lost in current government’s complicated, hybrid entities. While federalism scholars attempt to incorporate the growth of local power into their conceptions of constitutional action and sovereignty analyses, courts applying the Eleventh Amendment similarly struggle to identify, let alone protect, “state” action. The arm-of-the-state doctrine tries and fails to identify factors and relative weights that, applied to various entity actions, achieve the Amendment’s motivating purposes in a consistent, predictable way.<sup>216</sup> The

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207, 249–50 (2013) (recommending a single liability rule for constitutional torts and, accordingly, the elimination of “the small pocket of strict liability created by *Monell*”).

<sup>213</sup> See Simpson-Wood, 5 SC J Intl L & Bus at 153, 163–64 (cited in note 129) (describing the Supreme Court as “blazing a jurisprudential path that can only be characterized as divisive”); Nelson, 115 Harv L Rev at 1564 & n 17 (2002) (cited in note 129) (noting that “[t]hese decisions have generated an outcry in the academy”).

<sup>214</sup> Avidan Y. Cover, *Revisionist Municipal Liability*, 52 Ga L Rev 375, 421 (2018) (noting the Court’s history with the doctrine and “principles of stare decisis, separation of powers, and . . . federalism,” and arguing that Congress should step in and create a bifurcated municipal liability regime).

<sup>215</sup> *Hess*, 513 US at 47.

<sup>216</sup> See Rogers, Note, 92 Colum L Rev at 1247–52 (cited in note 25) (explaining that the “growth and decentralization of modern state governments have exposed the deficiencies of [the arm-of-the-state doctrine’s] anachronistic approach” and that “courts cannot make principled distinctions”).

activity-based approach, by anchoring the existing factors in various circuit tests to the activity at issue, at least recognizes that the relationship between a state and a local entity can vary across the latter's many purposes. This narrower approach leaves less room for error—less irrelevant, complicated entity activity to get lost in. It perhaps even allows the courts to conduct the sort of narrow analysis that earlier justices likely anticipated in creating the arm-of-the-state doctrine, back when entities carried out only one or a couple activities.

Local political subdivisions receive their power from the state itself, meaning that when the state withdraws discretion or local control from local officials, those local officials are not acting according to their own designs.<sup>217</sup> They have no choice but to accept the grant of power that the state gives them. As such, state legislatures have enormous power over all governmental entities at their disposal, whether they choose to exercise it or not. This relationship between the state and its local governmental entities creates the possibility that local entities may be simultaneously carrying out local policy—acting in a largely autonomous, discretionary way with power granted by the state—while also carrying out state policy that has been handed down from the capitol. Whether they focus on local concerns with local perspectives entirely depends on the will of the state government. When the state hands down its chosen directives, the local entities charged with fulfilling those directives should be recognized as acting as arms of the state, for they have no choice in the matter and the state has removed their ability to exercise locally focused discretion. The contextual differences between state-mandated action and a hands-off grant of state power to local actors are stark and should be legally recognized in the sovereign immunity analysis.

Within the municipal liability doctrine, some circuits already recognize this distinction. In the Second Circuit, a municipality can be held liable if it had some discretion under state law in the

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<sup>217</sup> *City of Trenton v New Jersey*, 262 US 182, 187 (1923):

[A] municipalit[y] ha[s] no inherent right of self government which is beyond the legislative control of the State. . . . [It] is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will.

See also *City of Columbus v Ours Garage and Wrecker Service, Inc.*, 536 US 424, 428–29 (2002) (“Ordinarily, a political subdivision may exercise whatever portion of state power the State, under its own constitution and laws, chooses to delegate to the subdivision.”).

matter and made a “conscious choice” to enforce an unconstitutional state law provision.<sup>218</sup> Meanwhile, if state law required municipal enforcement of the unconstitutional provision or there was a general local policy to enforce all the state’s statutes, the municipality could not be liable under the municipal liability doctrine.<sup>219</sup> Thus, this doctrine recognizes that state laws vary in terms of how much discretion they grant municipalities in certain matters. This Comment proposes an analogous recognition in the arm-of-the-state doctrine: in activities in which state statutes force municipalities to act in a certain way, the municipality should be recognized as an arm of the state entitled to Eleventh Amendment immunity for claims arising out of those actions.

Notably, the activity-based approach would narrow the holding not to the facts themselves, but to something broader: the activity in which defendants engaged.<sup>220</sup> This scope is broad enough that precedent will be useful—it will prevent the inquiry from getting lost in the facts of what exactly local actors did in response to state influence. For example, if the local entity *ignored* the state’s direction and this disobedient action gave rise to a suit, the disobedience would not change the fact that the state held great sway over how the local entity performed that activity. The local actors in such a case would be entitled to sovereign immunity as an arm of the state, even though they did not actually follow the policy they were ordered to follow. Under the entity-based approach, the state’s power over that activity could be irrelevant to the arm-of-the-state conclusion if the entity strikes the court, according to its various factors, as *generally* state-aligned or politically distinct.

An outcome that apparently awards a disobedient local entity with sovereign immunity anyway may seem intuitively unfair. However, it ensures that the activity-based arm-of-the-state test retains its kinship with the Eleventh Amendment’s foundational concerns about state solvency and sovereign dignity. Recognizing an entity as an arm of the state when the state sufficiently influences local policy, even if this means entitling disobedient entities to sovereign immunity in those contexts, reinforces the strength

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<sup>218</sup> See *Vives v City of New York*, 524 F3d 346, 353 (2d Cir 2008).

<sup>219</sup> Id. See Dina Mishra, Comment, *Municipal Interpretation of State Law as “Conscious Choice”*: *Municipal Liability in State Law Enforcement*, 27 *Yale L & Pol Rev* 249, 249–51 (2008) (explaining the circuit split as to local flexibility’s significance in municipal liability claims and arguing that municipalities’ interpretations of ambiguous laws should be included in the inquiry).

<sup>220</sup> *McMillian*, 520 US at 783.

of the state. It empowers the state to enforce its policies through public pressure or internal changes to the entity in the context it is deemed to essentially control. In contrast, an arm-of-the-state doctrine that implicitly recognizes local entity disobedience as legitimate local action when the state has set a contrary policy would undermine the foundational rule of sovereign immunity. Such a doctrine suggests that local entities' powers are not derived from the state after all.

The above analysis demonstrates how the arm-of-the-state doctrine can achieve the Eleventh Amendment's motivating federalism purposes if properly altered in scope. Currently, at least one entity-based circuit attempts to avoid the doctrine's overbroad outcomes by maneuvering so that the arm-of-the-state doctrine need not apply at all in a given context.<sup>221</sup> While at first glance the idea of simply replacing the arm-of-the-state doctrine with one of the many other activity-specific, immunity-like doctrines seems appealing, this is an ill-advised, shortsighted solution. It creates doctrinal incoherence within each circuit's entity-based doctrine and prevents the arm-of-the-state doctrine from reinforcing its important constitutional purposes within modern government's diffuse, varied structure. The other, precisely tailored immunity doctrines are intended to achieve different objectives;<sup>222</sup> none can provide a sufficiently complete replacement for another. Indeed, the arm-of-the-state doctrine's monetary judgment factor, roundly viewed as the most significant consideration in the analysis, seems to call for activity-based reasoning.<sup>223</sup> To ensure that the motivating purposes of the Eleventh Amendment receive their due attention in adjudications involving state-local relationships, the doctrine tasked with advancing those purposes must adapt.

## B. Achieving Substantive Justice

Aligning liability with power furthers substantive justice by accurately influencing potential parties' behavior in the future. Entity-based arm-of-the-state doctrines cannot effectively do this. Consider, for example, some entity-based circuits' evaluations of sheriffs. One Fifth Circuit panel applied the circuit's six-factor

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<sup>221</sup> See Part II.C.1.

<sup>222</sup> See Part I.A.

<sup>223</sup> See Part II.C.2.

arm-of-the-state test to the parish-level office of a Louisiana sheriff and concluded that “a sheriff in Louisiana may not be properly characterized as an arm of the state.”<sup>224</sup> This holding precludes potential immunity for sheriffs regarding any action at all—even if the state requires the sheriff to adhere to a certain state legislature-directed policy.<sup>225</sup> This overexposure to liability does not deter the state from creating and mandating harmful policies for the sheriff’s department to follow, and it can result in financial harm for local defendants. On the other side of the entity-based arm-of-the-state approach’s broad holdings, the Fourth Circuit applied its arm-of-the-state test to sheriff’s offices and concluded that South Carolina sheriffs *are* arms of the state.<sup>226</sup> This creates error in the other direction: plaintiffs are unable to sue South Carolina sheriffs in their official capacities over entirely locally dictated policies. Neither of these decisions achieves substantive justice by creating accurate incentives for behavioral change.

Both the defendant and plaintiff would prefer a more tailored arm-of-the-state analysis. From the defendant’s perspective, aligning liability with power is worthwhile because local entities receiving state directives in specific contexts should not be forced to pay for those policies’ harms, both as a normative matter and because there is no effective deterrence mechanism in holding the wrong entity accountable. From the plaintiff’s perspective, the activity-based approach prevents locally determined policies from escaping federal adjudication because the entity or office *generally* has a close relationship with the state. And in policy-based suits, the sort of suits in which arm-of-the-state defenses would plausibly arise, a suit against an individual officer will likely fail to overcome qualified immunity.<sup>227</sup> This reality makes suits against the local entity or office critical to plaintiffs’ chances for redress. If an entity or office can access the state’s sovereign immunity for every action it undertakes, plaintiffs are further separated from justice.

*Burns v Reed*<sup>228</sup> provides an example of how activity-based immunity can more accurately align power with liability and thus achieve better substantive justice in each case. Here, a plaintiff

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<sup>224</sup> *Cozzo v Tangipahoa Parish Council—President Government*, 279 F3d 273, 283 (5th Cir 2002), quoting *Porche v Saint Tammany Parish Sheriff’s Office*, 67 F Supp 2d 631, 636 (ED La 1999).

<sup>225</sup> For examples of such state directives, see note 188.

<sup>226</sup> *Cromer v Brown*, 88 F3d 1315, 1332 (4th Cir 1996).

<sup>227</sup> See notes 5–7 and accompanying text.

<sup>228</sup> 500 US 478 (1991).



brought an action against a state prosecuting attorney for damages under § 1983 because the attorney had “giv[en] legal advice to the police and [ ] participat[ed] in a probable-cause hearing.”<sup>229</sup> The attorney asserted that both activities fell within the scope of absolute prosecutorial immunity, and he convinced both the district and appeals courts to dismiss the case.<sup>230</sup> The Court affirmed in part and reversed in part, entitling the attorney to absolute immunity for participating in the probable cause hearing but not for providing legal advice to police.<sup>231</sup> Such a result, limited according to activity, would be impossible under an entity-based arm-of-the-state test. Adopting an activity-based arm-of-the-state test across all suits—not just § 1983 claims—would create an Eleventh Amendment immunity defense that only reaches as far as necessary to protect sovereign interests. Further, there are no persuasive reasons why courts must use broad, bright-line rules in their arm-of-the-state analyses when they capably make fact-specific inquiries in cases like *Burns* for the other immunity doctrines.<sup>232</sup>

#### CONCLUSION

Most circuits evaluate the arm-of-the-state status of an entity by looking at the entity as a whole, rather than focusing on the relationship between the entity and the state within the suit-related activity. This approach does not achieve the purposes of the Eleventh Amendment itself, nor does it align with the narrower conceptions of immunity seen in other immunity doctrines. An update is necessary to ensure that the arm-of-the-state doctrine achieves its constitutional purposes when applied to the complex state-local relationships that characterize modern government. Without that update, entity-based courts will likely continue to minimize the doctrine’s role in an ad hoc manner when faced with intricate relationships that the entity-based approach

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<sup>229</sup> Id at 481.

<sup>230</sup> Id at 483.

<sup>231</sup> Id at 494 (“Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. . . . That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor’s role in judicial proceedings, not for every litigation-inducing conduct.”).

<sup>232</sup> Even in the entity-based arm-of-the-state analysis, courts conduct long, detailed evaluations of state law in reaching their results. The activity-based test does not demand more from them; it simply refocuses this effort on the state law provisions relevant to the activity at issue in the case. See, for example, *Fresenius*, 322 F3d at 58–65 (taking eight pages to conduct an entity-based arm-of-the-state analysis).

cannot handle.<sup>233</sup> This shortsighted solution creates incoherence within each circuit's doctrine and removes the Eleventh Amendment's core concerns of state sovereignty and solvency from the analysis of state-local power situations. Instead, the doctrine should be recuperated so that it functions as effectively as the other immunity doctrines in achieving its motivating constitutional purposes. To reaffirm those constitutional concerns in courts' analyses of modern governmental action, this Comment provides a means by which circuits can adopt an activity-based arm-of-the-state approach.

Each circuit should introduce an activity hinge element into its existing arm-of-the-state test that serves to narrow the scope of the test's other factors. The primary virtue of this approach is that it focuses the court's eye on the state's relationship with the entity within the relevant activity rather than across the entity a whole. The Eleventh Circuit already employs this activity-based approach and enjoys a relatively straightforward, internally coherent doctrine.<sup>234</sup> Entity-based circuits may adopt this Comment's proffered approach while staying true to their own individualized tests by using the municipal liability doctrine as a guide for the proposed activity hinge factor. They need only use the municipal liability doctrine's guidance for identifying the relevant activity according to state law. Clarifying the scope of the arm-of-the-state doctrine also provides an opportunity for the Supreme Court to conclusively identify what constitutes a proper arm-of-the-state test.

An activity-based approach would ensure that the arm-of-the-state doctrine fulfills its intended federalism objectives and does substantive justice in individual cases. It would anchor the many circuits' various tests to the relevant facts and state law definitions, thus protecting the state's sovereignty and solvency while ensuring plaintiffs' ability to sue local entities over more locally controlled actions. And it would capture the realities of modern state-local relationships, assigning liabilities and immunities that align with actual allocations of power.

Currently, entity-based circuits struggle to reconcile entity-based reasoning with complicated state-local relationships. These struggles—particularly in relation to the doctrine's foundational monetary judgment factor and its unavoidable, inherent activity-

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<sup>233</sup> See Part II.C.1.

<sup>234</sup> See Part II.B.

based features—suggest that the activity-based approach is truly the best way to achieve the Eleventh Amendment’s purposes in the present day.<sup>235</sup> This Comment’s proffered approach would rehabilitate the arm-of-the-state doctrine so that it achieves the Eleventh Amendment’s motivating purposes while also more effectively working substantive justice in individual cases by aligning power with liability. The arm-of-the-state doctrine would be capable of handling modern governmental arrangements in a world in which the relationships between states and local entities are ever more complex.

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<sup>235</sup> See Part II.C.