

**ELEVENTH AMENDMENT — SOVEREIGN IMMUNITY — BISTATE RAILWAY, THE PORT AUTHORITY TRANS-HUDSON CORPORATION, IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT — *Hess v. Port Auth. Trans-Hudson Corp.*, 63 U.S.L.W. 4009 (U.S. Nov. 14, 1994).**

The Supreme Court of the United States recently held that a bistate entity, created pursuant to the Constitution's Interstate Compact Clause, is not entitled to Eleventh Amendment sovereign immunity. *Hess v. Port Auth. Trans-Hudson Corp.*, 63 U.S.L.W. 4009 (U.S. Nov. 14, 1994). In so holding, the Court reasoned that there is a presumption against a grant of sovereign immunity when the entity is created pursuant to the Interstate Compact Clause of Article I § 10 cl. 3 "unless there is good reason to believe the States and Congress designed the entity to enjoy Eleventh Amendment immunity." *Id.* at 4014. The Court concluded that when a government entity is financially self-sufficient from its parent state, Eleventh Amendment immunity will not attach. *Id.*

Respondent Port Authority Trans-Hudson Corporation ("PATH") is an entity established by the states of New York and New Jersey ("States") with the purpose of better coordinating commerce through the port of New York. *Id.* at 4010. PATH operates a commuter railroad that connects New York City and northern New Jersey. *Id.* PATH was created in 1921 pursuant to the Interstate Compact Clause, which requires that a state obtain the consent of Congress prior to entering into an agreement or compact with another state. *Id.* PATH is governed by twelve commissioners, six appointed by each state. *Id.* at 4011. Four of the six appointees from each state must be resident voters from the Port of New York District, the area in which PATH operates. *Id.*

The States may remove their own commissioners for cause, and the governors of each state may veto actions of the commission. *Id.* Moreover, the legislatures of New York and New Jersey may jointly alter the powers and responsibilities of PATH. *Id.* As originally conceived, PATH was to be financially independent from its parent states and responsible for its own debts and obligations. *Id.* at 4010-11. The compact creating PATH bars it from drawing on state tax revenue. *Id.* Each State's financial obligation is limited to \$100,000 per year for administrative expenses until PATH generates enough revenue to cover its own expenses. *Id.* at 4011 n.7. The funds used in operating PATH come from tolls, fees, and investment income. *Id.* at 4011. The legislatures of the States, acting jointly, may dictate how surplus revenue is used. *Id.*

Petitioners Albert Hess and Charles F. Walsh, while working for PATH, were injured in separate incidents. *Id.* at 4010. Petitioners each sued PATH for alleged negligence and claimed monetary damages under the federal law

governing injuries to railroad workers, the Federal Employers' Liability Act ("FELA"). *Id.* Petitioners commenced their separate actions in the United States District Court for the District of New Jersey within the three year statute of limitations established by FELA. *Id.* PATH motioned to dismiss both complaints, asserting that it enjoyed sovereign immunity and, therefore, could not be sued in federal court without the States' consent. *Id.* Under the laws of New Jersey and New York, the States consented to suits against PATH if the suits were filed within one year of the accident. *Id.* Petitioners failed to meet the one year statute of limitations, and accordingly, the district court dismissed both actions. *Id.* Following Third Circuit precedent, the district court held that PATH was entitled to Eleventh Amendment protection. *Id.*

The Third Circuit, combining Petitioners' cases, summarily affirmed the district court's dismissal of both actions. *Id.* In recognizing that prior Second Circuit case law rejected the Eleventh Amendment immunity argument, the Supreme Court granted *certiorari* to resolve this conflict between the circuits. *Id.*

Writing for the majority, Justice Ginsburg explained the two primary purposes for the Eleventh Amendment. *Id.* at 4011. First, the Court noted that the Amendment was enacted to allay fears of the states that federal court judgments would require them to pay their Revolutionary War debts out of their state treasuries. *Id.* The states wanted such suits brought, with their permission, in state courts. *Id.* Second, the Court recognized that the Eleventh Amendment currently is used to preserve the dignity of states in the federal system. *Id.* at 4012.

Justice Ginsburg distinguished bistate entities from states, explaining that bistate entities occupy a different position in the federal system. *Id.* Bistate entities, the majority reasoned, are established by three discrete sovereigns, two states, and the Federal Government to solve those regional and national problems which do not coincide with political boundaries so as to be capable of political solution through national and state politics. *Id.*

The Court then found that a suit against a bistate entity in federal court does not offend the dignity of the bistate entity or the compacting states. *Id.* A bistate entity, the Court noted, cannot be offended by a federal court judgment because both the court and the entity share the National Government as a founder. *Id.* Additionally, the Court asserted that the compacting states of the entity will not have their dignitary interests encroached. *Id.* The Court observed that a federal tribunal is not alien to the states because the compacting states agreed to cooperate, power share, and coordinate with the Federal Government. *Id.* Moreover, Petitioners were suing under a federal law. *Id.* The majority also considered it significant that political control over the bistate entity is diffused and not subject to the control of any one state. *Id.*

Finally, Justice Ginsburg determined that Supreme Court precedent urged against affording PATH Eleventh Amendment immunity. *Id.* (citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979)). Justice Ginsburg noted that precedent holds that there is a presumption against granting Eleventh Amendment immunity to compact clause entities “[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose.” *Id.* at 4013 (quoting *Lake Country*, 440 U.S. at 401).

Justice Ginsburg acknowledged that the precedent looked at “indicators of immunity” that point away from immunity where: the states fail to retain political control over the entity; the prime function of the entity is traditionally left to local government rather than state government; the entity is described as a local unit rather than a state agency; and the entity’s obligations are not binding on the states. *Id.* at 4013. Justice Ginsburg conceded that the indicators of immunity as related to PATH did not point clearly toward or away from Eleventh Amendment immunity. *Id.* The majority observed that elected state officials from New York and New Jersey retained considerable power over PATH but it is financially independent from its compacting states. *Id.* The Court also failed to find a definite description for PATH because the compact did not label PATH as a state agency although the States’ courts repeatedly had. *Id.* Finally, the majority could not say whether PATH’s functions were traditionally left to local or state government. *Id.*

Justice Ginsburg, however, concluded that where the indicators of immunity are unclear, the Court must look to the two reasons for having the Eleventh Amendment. *Id.* at 4014. The majority stated that there is no dignitary encroachment, and therefore, the Court asked whether there is “‘good reason to believe’ the States and Congress designed [PATH] to enjoy Eleventh Amendment immunity.” *Id.* (quoting *Lake Country*, 440 U.S. at 401). In determining whether “good cause” exists, the Court refused to consider the amount of political control the states reserve for themselves when creating the compact entity. *Id.* Justice Ginsburg reasoned that states have significant control over local government entities, but they are not afforded Eleventh Amendment protection and that even if control were established as a significant factor in Eleventh Amendment analysis, the states never have sole control over compact clause entities. *Id.* Rather, the Court found that the most important factor in determining Eleventh Amendment immunity is the financial vulnerability of a state to the obligations of the government entity. *Id.* The majority noted that this approach is consistent with that utilized by the vast majority of circuits. *Id.* The Court found that the States were not financially vulnerable to judgments against PATH. *Id.* at 4015. Justice Ginsburg explained that financial vulnerability exists when

a state is obligated to pay the debts of the entity. *Id.* Recognizing that PATH would have less money to spend on projects that the States would otherwise provide, the majority deemed this an insufficient financial burden on the States to justify Eleventh Amendment immunity. *Id.*

Finally, the Court observed that the Second and Third Circuits are consistent, as both circuits recognize that a state's lack of financial obligation to a government entity is the critical factor in Eleventh Amendment analysis. *Id.* The Court found that the Third Circuit erred in ruling that PATH was not financially independent from the States based upon the compact provision, which called for state financing unless PATH revenues were "adequate to meet all expenditures." *Id.* The majority refused to accept this provision as significant because the States bound themselves to only minor amounts. *Id.* Accordingly, the Court held that PATH could be sued in federal court without the States' consent and, therefore, the one year limit specified in the States' consent statute would not bar Petitioner's claims against PATH. *Id.*

Justice Stevens joined the majority opinion but concurred separately to criticize the Court's Eleventh Amendment jurisprudence, which, the Justice reasoned, goes beyond the text and purpose of the Amendment. *Id.* (Stevens, J., concurring). Justice Stevens explained that the purpose of the Eleventh Amendment was to limit federal diversity jurisdiction by prohibiting actions brought by individuals against states. *Id.* at 4016 (Stevens, J., concurring). The Court's Eleventh Amendment decisions, the Justice reasoned, overreached that purpose to incorporate "prudential considerations of comity and federalism." *Id.* The expanded Eleventh Amendment, the Justice concluded, misguides and creates injustice because Eleventh Amendment sovereign immunity allows governments to act arbitrarily while desecrating the principle that there is a remedy for every wrong. *Id.*

Justice O'Connor, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, dissented. *Id.* (O'Connor, J., dissenting). Justice O'Connor asserted that there should be a presumption in favor of applying Eleventh Amendment immunity to bistate entities "unless Congress clearly and expressly indicates otherwise." *Id.* at 4017 (O'Connor, J., dissenting). The dissent concluded that where a state retains sufficient control over an entity performing government functions, the entity is an arm of the state and entitled to Eleventh Amendment immunity. *Id.* at 4018 (O'Connor, J., dissenting).

Initially, the dissent criticized the majority for finding no encroachment upon the dignity of the States because the States ceded their sovereignty when they entered into an interstate compact. *Id.* at 4016 (O'Connor, J., dissenting). Justice O'Connor feared this reasoning could be taken to create a *per se* rule that bistate entities do not enjoy Eleventh Amendment protection. *Id.* The dissent explained that the requirement in the Compact

Clause, that Congress approve all interstate compacts, was intended to ensure that states not enter into agreements that will compromise federal or neighboring states' interests. *Id.* Accordingly, the dissent found that the federal government was not a full party to the compact merely because it consented to the agreement. *Id.*

Further, Justice O'Connor posited that even if the States ceded power to the Federal Government by entering into a compact, precedent dictates that Congress clearly should express an intent to abrogate a state's sovereign immunity before a state may be sued in federal court. *Id.* at 4017 (O'Connor, J., dissenting). Therefore, the Justice concluded, there should be a presumption of Eleventh Amendment immunity to Compact Clause entities absent a clear congressional expression to the contrary. *Id.* The dissent rejected the notion that there should be a presumption against immunity because such a presumption would allow Congress to dictate the applicability of the Eleventh Amendment regardless of how the compacting states structure the bistate entity. *Id.*

Finally, the dissent agreed with the majority that balancing indicators of immunity is not a helpful analysis. *Id.* The dissent, however, found fault with the majority's substitution of vulnerability of the state treasury to satisfy the obligations of the entities as the sole test of determining the applicability of the Eleventh Amendment. *Id.* The dissent reasoned that vulnerability of the state treasury is a "sufficient," but not "necessary," condition in granting Eleventh Amendment immunity. *Id.* Justice O'Connor noted that the Eleventh Amendment bars suits against states in federal courts regardless of the remedy sought because the Eleventh Amendment applies to actions in law and equity. *Id.*

The dissent favored a test that would ask "whether the State possesses sufficient control over an entity performing governmental functions that the entity may properly be called an extension of the state itself." *Id.* at 4018 (O'Connor, J., dissenting). Under the control theory, Justice O'Connor posited that courts should look at the amount of political control the state government and its electorate have over the entity. *Id.* The control, the Justice explained, should be real, immediate, and overseeing. *Id.* The dissent asserted that the control test would afford the States the flexibility needed in establishing state agencies. *Id.* The dissent concluded that New York and New Jersey possessed sufficient control over PATH to entitle the bistate entity Eleventh Amendment protection. *Id.*

#### ANALYSIS

*Hess* suggests that the present Court is not going to expand the doctrine of sovereign immunity. The majority opinion is remarkable because it buries

language that has broad implications for Eleventh Amendment jurisprudence into a decision that could have been decided on narrow grounds.

The majority began the opinion by reasoning that no dignitary interest is suffered by either the States or the entity because the entity and federal courts are ordained by a common founder, the federal government and because the States agreed to cede some of their sovereign power by compact. *Id.* at 4012. The Court concluded that there is a presumption against immunity for Compact Clause entities unless the Congress and the states structured the entity to enable it to enjoy immunity. *Id.* at 4013. The Court then found that a bistate entity is not a state actor if it is financially independent of its parent states. *Id.* at 4014.

The Court's reasoning could be used to restrict severely the doctrine of sovereign immunity. Just as the compacting entity and the federal court are ordained by a common founder, a state and a federal court are not strangers because the states ordained the federal courts by ratifying the Constitution. Further, the Court did not explain why there is a presumption that Congress did not intend the Eleventh Amendment to apply when it acts pursuant to the Compact Clause. When acting pursuant to other constitutional provisions, however, the Court has required Congress to show a clear and unequivocal intent for Eleventh Amendment immunity not to apply. *See id.* at 4017 (O'Connor, J., dissenting).

There is no reason to believe that the Court's reasoning was particularized to bistate entities. Although the Court did note the special role of bistate entities, upon closer analysis, the Court's reasons for distinguishing bistate entities from other entities is weak. *Id.* at 4012. The Court noted that bistate entities deserve different constitutional protection than states under the Eleventh Amendment because such entities look after national interests that are incapable of being addressed at the state level for political and geographic reasons. *Id.* The Court failed to recognize that the creation of a bistate entity requires the will of two state governments, which demonstrates that the interest to be served is capable of being taken up by state political action. Moreover, it is hard to imagine how PATH, as a bistate entity, preserves national interests any more than a single state agency, given that PATH is controlled by the States and not the Federal Government.

As the dissent noted, the majority opinion failed to discuss the general trend in Eleventh Amendment jurisprudence that its opinion defies. *Id.* at 4017 (O'Connor, J., dissenting). In *Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964), the Court held that a railroad employee could sue a state owned railroad in federal court under FELA. The Court in *Parden* did not require a clear statement of congressional intent to abrogate a state's sovereign immunity. *Id.* at 190.

Through the mid-seventies and eighties, the Court began to champion Eleventh Amendment sovereign immunity by requiring an unequivocal expression of congressional intent before a state may be haled into federal court under a federal law. By 1987, in *Walsh v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468 (1986), the Court's defenders of sovereign immunity felt comfortable overruling *Parden's* Eleventh Amendment analysis to the extent that it did not require Congress unequivocally to abrogate the states' sovereign immunity under FELA. *Id.* at 478 (plurality opinion). In *Lake County*, the Court had held that a bistate entity is presumed not to be a "state" for purposes of the Eleventh Amendment. *Hess*, 63 U.S.L.W. at 4013 (citing *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979)). This decision remains good law. The Court in *Hess* transplanted the *Lake* presumption, which is properly used to determine if an entity's status is that of a state, by using this presumption to determine if Congress and the states intended to abrogate the states' sovereign immunity.

*Hess*, therefore, essentially restored the result in *Parden* at least where a bistate entity is the defendant. While it is no longer the law that a presumption exists that Congress wishes to abrogate state immunity whenever it legislates pursuant to constitutional mandate, the presumption will exist where the states and Congress act pursuant to the Compact Clause. *Id.* at 4012-13.

The Court need not have addressed the issue of whether Congress is assumed to have abrogated the States' sovereign immunity because the Court found that PATH was not a state actor or "one of the United States" for purposes of Eleventh Amendment immunity. *Id.* at 4018. The majority position was strengthened by *Lake County*, which held there is a presumption that bistate entities are not state actors but more closely are akin to local governments, which are not Eleventh Amendment state actors. *Id.* at 4017 (citing *Lake County Estates*, 440 U.S. 391 at 401). Once the majority recognized the vulnerability of a state's treasury as the key factor in determining whether the entity is a state actor for purposes of the Eleventh Amendment analysis, the inquiry should have ended. At least, the majority should have addressed why the level of state control, as advanced by the dissent, should not be the overriding factor.

Justice Stevens, who joined the majority opinion in full and wrote separately, was more honest about his intentions for Eleventh Amendment immunity. *Id.* at 4015 (Stevens, J., concurring). The Justice was clear when he espoused that he thought the Eleventh Amendment should be interpreted narrowly to limit federal diversity jurisdiction against states and not to create sovereign immunity. *Id.* That a concurring Justice endorses the abolition of sovereign immunity in its entirety and can find a home in the

majority opinion is evidence of the potential sweep of the Court's decision. *See id.*

The dissent correctly identified the "crux" of the Court's opinion to be that bistate entities do not enjoy sovereign immunity because the States agreed to cede power by compact. *Id.* The dissent, however, may have overreacted by stating that the majority created a *per se* rule that there is no Eleventh Amendment immunity when states form a compact entity. *Id.* The majority was not entirely clear if it based its decision on the States' implied waiver, Congress's presumed abrogation, or the fact that the entity is not a state actor. *See id.* at 4012-13. If the majority's holding is interpreted as resting on the financial analysis of the entity, then there is room for states to compact and form an entity deserving immunity simply by making the entity financially dependent upon the compacting states. If read more broadly, however, this opinion may create a presumption against sovereign immunity whenever Congress takes action pursuant to its constitutional mandate. As the dissent noted, such a presumption would run contrary to recent precedent, which holds that the presumption favors the Eleventh Amendment unless Congress clearly expresses otherwise. *Id.* at 4017 (O'Connor, J., dissenting).

Finally, the dissent explained why the amount of control that a state exercises over the entity should govern the determination of whether the entity is an arm of the state. *Id.* The dissent offered practical considerations for why this should be the rule, reasoning that a control theory affords states flexibility in establishing entities. *Id.* at 4018 (O'Connor, J., dissenting). Further, Justice O'Connor explained that where control is sufficient to confer immunity on the entity, the voting public will ensure that the agency is accountable. *Id.* Although the dissent was quick to point out to the majority that the test of the Eleventh Amendment mentions "equity" to dismiss the notion that financial vulnerability is the proper inquiry, the dissent's analysis also is flawed in that it fails to give textual support for the control test. *Id.* at 4017 (O'Connor, J., dissenting).

Accordingly, the majority opinion established financial vulnerability of the states' treasuries as the most important factor in determining the applicability of sovereign immunity to bistate entities. The Court's reasoning, however, could serve as a precedent for future attacks on sovereign immunity outside of the bistate entity context.

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