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State Governmental Corporation Immunity from Federal Jurisdiction Under the Eleventh Amendment

STATE GOVERNMENTAL CORPORATION IMMUNITY FROM FEDERAL JURISDICTION UNDER THE ELEVENTH AMENDMENT

> 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.[1]

This Comment will consider whether a diversity action in federal court against a state governmental corporation is a prohibited suit against the state under the eleventh amendment to the United States Constitution.[2] The inquiry will be limited to the power of states to create governmental corporations clothed with the state's immunity from federal jurisdiction.[3]

The eleventh amendment,[4] ratified in 1798, was passed in response to the Supreme Court's holding in *Chisolm v. Georgia*[5] that a state could be sued in federal court by a citizen of another state. The increased use of public corporate entities as a means of conducting the business of state governments has set the stage for increased litigation concerning the right of these entities to the state's eleventh amendment immunity. The purpose of this Comment is to criticize those cases which hold that a suit against a state governmental corporation is not an action against the state. These decisions are based on a technical distinction concerning the locus of state funds. An alternative will be suggested that accommodates the realities of modern forms of state government.

SUPREME COURT CASES

No United States Supreme Court case prescribes exactly the circumstances under which a suit against a state corporate entity can be deemed a suit against the state itself. Some Supreme Court cases construing the eleventh amendment, however, have been the genesis of the criteria used by the lower federal courts in this type of case.

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1. U.S. CONST. amend. XI.

2. Beyond the scope of this paper are those cases in which individual actions have been brought against states to enforce constitutional rights. In these cases the eleventh amendment is read in conjunction with and as limited by the fourteenth amendment. *See* McCoy v. Louisiana State Bd. of Educ., 332 F.2d 915 (5th Cir. 1964).

3. Also beyond the scope of this paper is the question of waiver of immunity once it exists. *See* Note, *The Passing of Sovereign Immunity*, 69 DICK. L. REV. 270 (1965); Note, *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 HARV. L. REV. 714 (1961).

4. See text of the amendment supported by note 1 *supra*.

5. 1 U.S. (2 Dall.) 17 (1793).

In *Petty v. Tennessee-Missouri Bridge Commission*,[6] suit was brought against an interstate compact entity created by two states. The commission was financially separate from both states and controlled by both states through appointment of commission members. Although the Supreme Court allowed the suit on the basis that immunity had been waived,[7] the case can be interpreted as suggesting that there was an immunity. Justices Frankfurter, Harlan and Whittaker dissented on the ground that the commission had an immunity which had not been waived.[8] Three justices concurring in the majority's opinion specifically stated that they did not meet the question of eleventh amendment immunity of interstate compact commissions approved by Congress under the Constitution.[9] Arithmetic shows that the remaining three majority justices and the three dissenters might have extended immunity to this type of interstate public corporation if waiver did not exist. If this were so, there is no good reason why a public corporation created by one state should be treated any differently. The question, however, remains open.

A series of Supreme Court cases hold that certain state government departments are immune from suit under the eleventh amendment. In *Ford Motor Co. v. Department of Treasury*,[10] suit was brought in a federal district court against the Indiana state treasury for a tax refund. On appeal, the Supreme Court said in finding immunity:

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.[11]

Although the case is not clear about what is "in essence" the money of the state, it has been interpreted by some courts of appeals as requiring the action to be against the state treasury.[12] What these courts are missing is that what are "in essence" state monies may be residing somewhere other than the state treasury, for example, in the hands of a state governmental corporate entity. The court in *Ford Motor Co.* relied upon an earlier case involving a state treasury, *Smith v. Reeves*,[13] which likewise did not squarely meet the issue of what are "in essence" state monies. Moreover, *Smith* was decided in 1900 in an era not faced with the

6. 359 U.S. 275 (1959).
7. Waiver was found from the language of the compact approved by Congress. 359 U.S. at 280.
8. 359 U.S. at 283.
9. *Id.*
10. 323 U.S. 459 (1944).
11. *Id.* at 464.
12. *See* discussion of these cases at notes 15-30 *infra* and accompanying text.
13. 178 U.S. 436 (1900).

legal problems that developed from innovative governmental forms such as corporations, authorities and administrative agencies.

Another case often cited for the same proposition is *State Highway Commission v. Utah Construction Co.*,[14] a contract action against the Wyoming Highway Commission. The Supreme Court found eleventh amendment immunity because, *inter alia,* the judgment would have to be paid out of the state treasury. This case is also inapposite because a locus of state funds other than the state treasury was not before the Court.

The question of what are "in essence" state funds remains. It is difficult, however, to see how funds in the hands of a state created, state controlled corporate entity "in essence" belong to anyone other than the state.

Lower Federal Courts Denying Immunity

The Supreme Court cases discussed above have been construed by some federal courts of appeals and district courts as requiring the action to be technically against the state treasury or requiring a setting in which the judgment could be satisfied only from the state treasury. *Harrison Construction Co. v. Ohio Turnpike Commission*[15] is typical of these cases. Suit was brought against the Commission in a federal district court for breach of contract and was dismissed for lack of jurisdiction. The Commission could not incur debt on behalf of the state, but was empowered to issue bonds in its own name and had tolls as its sole source of revenue. The Court of Appeals for the Sixth Circuit, reversing the district court, held that a suit against this governmental corporation was not a suit against the state: "This action will not and cannot in any way affect the treasury of the State of Ohio. That is a test of whether or not a suit is against the state."[16] As a further prop for its decision, the court said that the legislature did not want to "expose to risk the state treasury."[17]

The latter reasoning is fallacious. Had the state built the Ohio Turnpike under its own name instead of through its solely owned and controlled corporate entity, the state treasury would not be subject to federal jurisdiction.[18] Neither would the state be liable in a state court action without its consent.[19] Moreover, if

14. 278 U.S. 194 (1928).
15. 272 F.2d 337 (6th Cir. 1959).
16. *Id.* at 340.
17. *Id.* at 341.
18. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1944); State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194 (1928); Smith v. Reeves, 178 U.S. 436 (1900).
19. *See* West Park Shopping Center, Inc. v. Masheter, 6 Ohio 2d 142, 216 N.E.2d 761 (1966); Wilson v. Cincinnati, 172 Ohio 303, 175 N.E.2d 725 (1961); Raudabaugh v. State, 96 Ohio 513, 118 N.E. 102 (1917), *writ of error dismissed sub nom.* Palmer v. State, 248 U.S. 32 (1918).

the State of Ohio had itself financed the Ohio Turnpike by way of "revenue bonds,"[20] the state treasury would be immune from suit by bondholders.

In *Kansas Turnpike Authority v. Abramson*,[21] it was held that the federal court action against the Authority was not an action against the State of Kansas. The court reasoned that "the State of Kansas is in no wise interested in judgments against [the Authority],"[22] nor is "[t]he Authority . . . under the supervision of the State or an agency thereof."[23] Both reasons appear to be erroneous. The financial success or failure of the Authority would be a direct concern of the state, for from what other source would funds come if the Authority could not satisfy its obligations? The Authority may not be under daily supervision of a state officer, but it certainly is controlled by the state and occupies the position of a state agency.[24]

As was suggested with respect to the *Harrison* case, the Authority cannot shield the state treasury from federal jurisdiction that does not exist. Similarly, the Authority cannot shield the state from suit in its own courts—an action that does not exist without the state's consent. Viewed in this light, the distinction based on the technical location of the debt is artificial. Indeed, the Authority's funds are "in essence"[25] monies of the state because the state solely owns and controls this instrumentality.

Other federal court of appeals and district court decisions arrive at the same result, affecting, *inter alia*, Pennsylvania,[26]

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20. "Revenue bonds" here means the common type of government bond payable only out of revenue from a specified source (tolls), and expressly not a pledge of the full faith and credit of the state or a debt of the state.

21. 275 F.2d 711 (10th Cir. 1960).

22. *Id.* at 713.

23. *Id.*

24. *See* KAN. STAT. ANN. § 68-2003 (1963). This statute provides that two members of the five member Authority shall be appointed by the governor with the advise and consent of the State Senate. The Director of Highways, the Chairman of the Committee on Highways of the State Senate, and the Chairman of the Roads and Highways Committee of the State House of Representatives are the other members of the Authority.

25. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1944).

26. *See* Gerr v. Emrick, 283 F.2d 293 (3d Cir. 1960). The eleventh amendment issue was not discussed, but jurisdiction was predicated upon a lack of immunity of the Pennsylvania Turnpike Commission because the Commission was liable under a federal court interpretation via *Erie* of state law. *See also* Sherman v. Ulmer, 201 F. Supp. 660 (E.D. Pa. 1961); Masse v. Pennsylvania Turnpike Comm'n, 163 F. Supp. 510 (E.D. Pa. 1958); Linger v. Pennsylvania Turnpike Comm'n, 158 F. Supp. 900 (W.D. Pa. 1958); Hunkin-Conkey Constr. Co. v. Pennsylvania Turnpike Comm'n, 34 F. Supp. 26 (M.D. Pa. 1940).

New Jersey,[27] Indiana,[28] Missouri[29] and New York.[30]

FEDERAL COURTS EXTENDING IMMUNITY

Some federal courts have extended eleventh amendment immunity to state-created entities regardless of formal financial connection with the state. In *Hamilton Manufacturing Co. v. Trustees of State Colleges*,[31] the Court of Appeals for the Tenth Circuit held that

> [t]he judgment which Hamilton seeks to obtain would in effect be against the State of Colorado represented by the trustees of a nominal party. The entire impact of such a judgment would be against the state, as it could be satisfied only from funds payable out of the state treasury.[32]

Plaintiff was the assignee of the proceeds of a contract between the college trustees and a third party. The Trustees of the Colorado State Colleges are constituted a body corporate[33] whose members are appointed by the governor with the advise and consent of the state senate.[34] Although supported in part by state tax revenues,[35] additional funds are obtained from tuition charges fixed by the Trustees.[36] This governmental corporation is also empowered to issue its own bonds which are not technically obligations of the state.[37]

This recent case appears to stand alone as authority for the proposition that governmental corporations can come under the "umbrella of *Ford Motor Co.*"[38] The Trustees are constituted and empowered with the same attributes as governmental corporations in other states, but the court took the view that the funds of this public corporation were "in essence" funds of the state. The court also apparently recognized that any extraordinary demand on college funds, such as a judgment, would necessarily re-

27. *See* S.J. Grove & Sons v. New Jersey Turnpike Auth., 268 F. Supp. 568 (D.N.J. 1967).

28. *See* Moss v. Calumet Paving Co., 201 F. Supp. 426 (D. Ind. 1962) (no immunity for the Indiana Tollroad Commission).

29. *See* Maryland Cas. Co. v. State Highway Comm'n, 256 F. Supp. 666 (D. Mo. 1966).

30. *See* Zeidner v. Wulforst, 197 F. Supp. 23 (E.D.N.Y. 1961), an unusual holding that there was not complete eleventh amendment immunity of the New York Thruway Authority, but *limited immunity* because New York allowed it to be sued only in the New York Court of Claims.

31. 356 F.2d 599 (10th Cir. 1966).

32. *Id.* at 601.

33. COLO. REV. STAT. ANN. § 124-5-1 (1963).

34. COLO. REV. STAT. ANN. § 124-5-2 (1963).

35. COLO. REV. STAT. ANN. § 124-7-13(2) (1963).

36. COLO. REV. STAT. ANN. § 124-5-10 (1963).

37. COLO. REV. STAT. ANN. § 124-1-6, 7 (1963).

38. 356 F.2d at 601.

quire reimbursement from the state treasury.[39] This decision acknowledges and accommodates the de facto status of state governmental corporations.

In *Scott v. Board of Supervisors of Louisiana State University*,[40] a malpractice action was brought against the university for injury occurring in its hospital. The Fifth Circuit held that this governmental corporation[41] was immune from federal jurisdiction. The decision, however, does not go into the nature of the immunity other than to say that it is "constitutional."

The Florida State Turnpike Authority also has been held immune from federal jurisdiction. In *Florida State Turnpike Authority v. Van Kirk*,[42] a suit against that body was viewed as a suit against the state. This district court relied heavily upon state law in deciding that the authority was the "alter ego" of the state. The court seemed persuaded by the fact that the entity was engaged in a state-wide operation.[43] In fact, the authority is financially independent from the state treasury,[44] but is state controlled:[45] "[I]n effect we have the state legislature telling one of its agencies to go out and condemn property and build the turnpike. . . ."[46] The essence of this holding is that this governmental corporation is a de facto agency of the state government and that suit against it is essentially a suit against the state. This appears to be a sensible approach to the problem that adapts to modern government forms notwithstanding the fact that sovereign immunity is not presently in vogue.[47]

A line of cases in the Ninth Circuit extends eleventh amendment immunity to municipal corporations controlled by political subdivisions. In *Lowe v. Manhattan Beach City School District*,[48] a school district was held to come under the "umbrella of the eleventh." This was a suit in federal court against the school dis-

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39. *See* note 32 *supra* and accompanying text.

40. 336 F.2d 557 (5th Cir. 1964).

41. The University in this case is constituted similar to the Trustees of the Colorado State College. *See* LA. CONST. art. 14, § 26, art. 12, § 7; LA. REV. STAT. § 17:1425 (1963).

42. 144 F. Supp. 364 (S.D. Fla. 1956).

43. *Id.* at 365.

44. FLA. STAT. ANN. § 340.13 (1958) provides that the debts of the Authority are not debts of the state and that the state's "full faith and credit" is not pledged.

45. FLA. STAT. ANN. § 340.05 (1958) provides that the governor shall appoint the members of the Authority and designate its chairman.

46. 144 F. Supp. at 365.

47. Some have contended that eleventh amendment immunity is systematically being eroded in the Supreme Court. This observation is gleaned from cases such as Parden v. Terminal Ry. of Alabama Docks Dep't, 377 U.S. 184, *reh. denied*, 377 U.S. 1016 (1964), where the Court found what amounted to an implied waiver by entry into interstate commerce. See 33 U. CHI. L. REV. 331 (1966).

48. 222 F.2d 258 (9th Cir. 1955).

trict for an unlawful taking of realty and buildings. The district court on its own motion dismissed the claim for lack of jurisdiction, finding that the suit was against the State of California. The court of appeals, although unnecessarily agreeing with this conclusion, reversed the lower court on the ground that it had jurisdiction based on a federal constitutional claim.[49]

Lowe was followed in *Miller v. Los Angeles*,[50] where the court of appeals decided with very little discussion that a California county was entitled to the state's eleventh amendment immunity, yet found jurisdiction based on a federal claim.

Lowe and *Miller* have been severely criticized by a district court in the Ninth Circuit. In *White v. Umatilla County*,[51] the district judge refused to follow these decisions and held that an Oregon county was not entitled to immunity.[52] The crucial factor in this decision appeared to be that the county was not controlled by the state government as one of its agencies.[53]

The Eighth Circuit has also held that a school district enjoys eleventh amendment immunity. In *Wihtol v. Crow*[54] suit was brought against an Iowa school district for infringement of a music copyright. The court flatly held that the eleventh amendment shielded the school district from federal jurisdiction.[55]

These cases involving municipal corporations not controlled by the state government illustrate the extreme interpretation of the

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49. *But cf.* Clark v. Washington, 366 F.2d 678 (9th Cir. 1966), where the same court of appeals found that the immunity of the State of Washington was not affected by the fact that the suit was brought under the Constitution and laws of the United States. The only distinction is that *Lowe* involved a governmental corporation whereas *Clark* involved a direct action against the state. *Compare* McCoy v. Louisiana State Bd. of Educ., 332 F.2d 915 (5th Cir. 1964).

50. 341 F.2d 964 (9th Cir. 1965). *See also* Delaway v. Richmond County School Bd., 284 F.2d 340 (4th Cir. 1960).

51. 247 F. Supp. 918 (D. Ore. 1965).

52. *Id.* at 920-21:

> Fortifying the thought that the subject was not adequately briefed nor thoroughly analyzed by the Court of Appeals in either *Lowe* or *Miller* is the fact that no mention is made of federal cases holding to the contrary. Furthermore, the issue before the court in *Lowe* and *Miller* was decided in favor of jurisdiction under 28 U.S.C. § 1331. What the court said in each of those cases on § 1332, the diversity statute, was completely unnecessary to the decision.

53. The court said: "Although I have serious doubts on the subject it is possible that school districts in California are viewed as true state agencies with *full power and authority in the State* over the districts." *Id.* at 920 (emphasis added).

54. 309 F.2d 777 (8th Cir. 1962).

55. It should be noted that this was a matter of federal copyright law. *Compare* cases discussed in notes 48-50 *supra* and accompanying text. The only possible distinction is that those cases were constitutional in nature.

eleventh amendment, and their validity is doubtful.[56] Statutes in the states involved do not indicate that these entities are merely state administrative units,[57] a status which might be a valid basis for immunity.[58]

A federal district court in Texas also extended eleventh amendment immunity to a county-controlled entity. In *Fylipoy v. Gulf Stevedor Corp.*[59] it was held that a Texas Navigation District controlled by a county[60] was immune from federal jurisdiction. This decision appears to be incorrectly decided for the same reasons as were the California and Iowa municipal corporation cases. Control is at the municipal[61] rather than the state level.

The immunity of governmental corporations created by two or more states by interstate compact, suggested above in *Petty v. Tennessee-Missouri Bridge Commission*,[62] has been recognized in a few cases. In *Howell v. Port of New York Authority*[63] a district court, without discussing the eleventh amendment, held that the interstate compact entity involved was immune from suit in a federal court. It is not clear from this case whether the Authority was immune from federal jurisdiction or whether it merely was not liable under an *Erie* application of state law.

THE IMMUNITY OF FEDERAL GOVERNMENTAL CORPORATIONS

Although federal governmental corporations are normally subject to suit in federal courts, the reason is that consent to such suits has been given by Congress. In *Keifer & Keifer v. R.F.C.*,[64] a tort action was brought against the federal Reconstruction Finance Corporation. Justice Frankfurter, writing for the

56. *See also* Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) (dissenting opinion); Chicot County v. Sherwood, 148 U.S. 529 (1893); Lincoln County v. Lumming, 133 U.S. 529 (1890).

57. *See* CALIF. EDUC. CODE § 901 where provision is made for control of local school districts by local governing boards and officials elected at the local level. *See also* CALIF. GOV'T CODE § 25000 and IOWA CODE ANN. § 274.1 (1949) for similar provisions as to the respective entities.

58. *See* Hamilton Mfg. Co. v. Trustees of State Colleges, 356 F.2d 599 (10th Cir. 1966); Scott v. Bd. of Sup'rs of La. State Univ., 336 F.2d 557 (5th Cir. 1964); Florida State Turnpike Auth. v. Van Kirk, 144 F. Supp. 364 (S.D. Fla. 1956).

59. 257 F. Supp. 166 (S.D. Tex. 1966).

60. TEX. REV. CIV. STAT. ANN. art. 8263e, § 14 (1954) provides that the county "commissioners court" shall appoint Navigation District Commission members.

61. The word "municipal" here is used according to its popular meaning, that is, as applied to any political subdivision below the state government controlled level and involving less than all the state's citizens.

62. 359 U.S. 275 (1959).

63. 34 F. Supp. 797 (D.N.J. 1940). *Accord*, Rao v. Port of New York Auth., 122 F. Supp. 595 (E.D.N.Y. 1954), *aff'd per curiam*, 222 F.2d 362 (2d Cir. 1954). *But see* Zeidner v. Wulforst, 197 F. Supp. 23 (E.D.N.Y. 1961).

64. 306 U.S. 381 (1938).

majority, found that congressional intent was that this type of entity be subject to the jurisdiction of the federal courts. The opinion clearly stated, however, that "Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so?"[65] If Congress has the power to grant or withdraw immunity from its creations, then a suit against the entity is a suit against the federal government.

In *F.H.A. v. Burr*,[66] the Supreme Court considered whether the Federal Housing Administration was subject to a garnishment proceeding. Holding that Congress had authorized the FHA "to sue or be sued," the court stated: "[T]here can be no doubt that Congress has full power to endow the Federal Housing Administration with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process."[67] Further rationale for this view is found in *Inland Waterways Corp. v. Young*,[68] where the Supreme Court held that a national bank may pledge assets to secure deposits of funds made by a governmental corporation just as it could when the funds were deposited by the United States Treasury. The court reasoned that

> [s]o far as the powers of a national bank to pledge its assets are concerned, the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem. . . . The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the government's losses.[69]

Here it is clearly stated that the funds of a federal governmental corporation are the funds of the federal government. This holding and the reasoning supporting it, by analogy, invalidate holdings of lower federal courts to the effect that the funds of state governmental corporations are not funds of the state. To whom else could the real interest in such corporations belong? *Keifer, Burr* and *Inland Waterway* clearly show that the Supreme Court views federal governmental corporations as de facto branches of the federal government. It is difficult to see how state governmental corporations can be viewed as having a different relationship with their creators by the lower federal courts.

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65. *Id.* at 389. *See also* R.F.C. v. Menihan Corp., 312 U.S. 81, 83 (1940) (where *Keifer* was cited and the statement of congressional power to create immune entities was reiterated).

66. 309 U.S. 242 (1939).

67. *Id.* at 244, *citing* Federal Land Bank v. Priddy, 295 U.S. 229 (1934) *and* Keifer & Keifer v. R.F.C., 306 U.S. 381 (1938).

68. 309 U.S. 517 (1939).

69. *Id.* at 523. *See also* Woodring v. Wardell, 309 U.S. 527 (1939) (a companion case).

A State's Interest in the Property of a Public Corporation

Certain older Supreme Court cases recognized the sole interest of the states in the corporate entities they create. In *Mount Pleasant v. Beckwith*[70] the Court said that

> the powers of [a municipal corporation] may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic.[71]

Legislatures, as guardians of the public interest, have complete power to create, modify or destroy public corporations as public exigency requires.[72] Such pervasive power coupled with state control and public purpose compels the conclusion that, as with federal governmental corporations, state corporations and the state are one and the same.

It has also been recognized that the property of state-created governmental corporations is indeed the property of the state. In *Merriweather v. Garrett*,[73] the Supreme Court said regarding a municipal corporation: "Upon dissolution, the property [of a public corporation] passes under the immediate control of the state, the agency of the [public] corporation then ceasing."[74]

In light of these old decisions, which have retained their vitality, the holdings in the lower federal courts denying immunity to state corporations emerge as unwarranted extensions of the power of the federal judiciary over the affairs of the states.

Conclusion

The problem of state governmental corporations in the federal courts is a growing one. The federal courts that do not extend eleventh amendment immunity to these entities ignore their de facto status as an essential part of state government. The approach of the Tenth Circuit,[75] albeit in the minority, accommodates reality by recognizing that the funds of governmental corporations are "in essence" monies of the state, thereby bringing suits against them within the purview of *Ford Motor Co. v. Department of Treasury*.[76]

This reasoning is reinforced by the Supreme Court cases declaring that Congress has the power to create departments of

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70. 100 U.S. 514 (1879).
71. *Id.* at 524.
72. *See* United States v. Baltimore & O. R.R., 84 U.S. (17 Wall.) 332 (1873).
73. 102 U.S. 472 (1880).
74. *Id.* at 513.
75. *See* Hamilton Mfg. Co. v. Trustees of State Colleges, 356 F.2d 599 (10th Cir. 1966).
76. 323 U.S. 459 (1944).

government in the form of governmental corporations and also has the power to make them immune from suit. If, lacking waiver, federal governmental corporations have immunity, no sound reason exists why states cannot create departments of government in the form of governmental corporations which enjoy the eleventh amendment immunity of the state. The Supreme Court cases declaring the absolute power, control and interest of the state in and over governmental corporations define the true nature of governmental corporations as de facto state government.

Those federal courts holding that suits against state governmental corporations are not suits against the state ignore the realities of modern state government as well as Supreme Court decisions. Extension of federal jurisdiction appears to be the only motivation for these cases, because in diversity jurisdiction it is the state that gives the remedy. When immunity under state law exists, federal jurisdiction is hollow; but in more progressive states where governmental immunity is being eroded away, the federal courts are making an unwarranted encroachment upon the states in the face of the eleventh amendment.

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