

STATE AND LOCAL GOVERNMENT CORPORATIONS AND GOVERNMENTAL PRIVILEGES IN THE UNITED STATES

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Abstract

The article analyzes the main traits of state and local government corporations in the United States: hybrid entities which are generally established by special statute and are endowed with both a corporate-like structure and governmental powers. Their existence is surrounded by vagueness. Nonetheless, they enjoy several governmental privileges. In particular, they benefit from tax exemptions on bonds issued, corporate earnings and properties owned. Furthermore, they may enjoy sovereign immunity and thus may not be held liable for torts. After briefly explaining their origins, current reasons for proliferation and the main characteristics of these entities, the analysis will focus on the tax exemptions and the sovereign immunity that they may enjoy. The purpose is to highlight the quasi-governmental nature of these entities and how, depending on the context, they act as public or private entities in order to benefit from both public and private traits.

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1. State and local government corporations and blurring names

State and local government corporations (or public authorities) are hybrid entities¹, endowed with both a corporate-like structure and governmental powers and privileges, established by special statute to perform limited public purposes – generally, to finance, build and operate revenue-producing facilities – and to operate outside the regular executive structure of governments, showing traits akin to both public agencies and private corporations.²

Referred to also as “shadow government”³, they are considered as “the fastest-growing, least well understood form of American government,” with no one ever performing a comprehensive survey of the entities.⁴ This lack of understanding of these complex entities is most likely rooted in the difficulty in reaching a consensus on their definition and classification.⁵ Notwithstanding the vagueness surrounding their existence, these entities are responsible for a large percentage of the management and financing activities of local and state governments: building and operating public infrastructures; providing essential services

¹ K. R. Kosar, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics* (2011). Kosar uses the term “hybrid” to refer only to federal government corporations. These entities, however, show some traits akin to state and local government corporations. See, for example, H. Seidman, *Public Enterprises in the United States*, 54 *Ann. Public Coop.* 3 (1983). While there are some similarities between federal government corporations and state and local public authorities (such as, the corporate-like structure and the governmental powers), the following analysis will not address these federal entities because their tort liability and tax regimes differ from those of state and local corporations. Furthermore, the “conduit financing” mechanism – see, section 4 below – has become particularly relevant at the state and local levels. The analysis will also use several examples from New York State, which has seen widespread use and development of these state and local corporations.

² J. Mitchell, *The American experiment with government corporations* (1999), 14. See also J. Leigland, *Public Infrastructure and Special Purpose Governments: Who pays and How?*, in D. C. Perry (ed.), *Building the Public City: The Politics, Governance and Finance of Public Infrastructure* (1995). See also The Michigan Law Review Association, *An Analysis of Authorities: Traditional and Multicounty*, 71 *Mich. L. Rev.* 1376 (1973).

³ D. Axelrod, *A budget quarter: Critical policy and management issues* (1989).

⁴ J. Leigland, *Public Infrastructure and Special Purpose Governments: Who pays and How?*, cit. at 2, 140.

⁵ R. R. Trautman, *Effects of institutional control on state debt activity and costs of debt programs: An empirical analysis* (1991).

such as transportation or solid waste disposal; administering loans and subsidies.⁶ The Port Authority of New York and New Jersey (Port Authority), for example, operates the main infrastructures in New York State and New Jersey. In particular, it runs the primary airports in the two States (Kennedy, Newark, LaGuardia, and Teterboro), and owns and operates the World Trade Center.⁷ Unsurprisingly, however, the public authorities that primarily address finance concerns are the most controversial ones. Indeed, they do not limit their activities to financing, but they also count providing financial resources to other public and private entities amongst their concerns.⁸ This is the case of the Dormitory Authority of the State of New York, one of the largest public financing entities in the United States, that provides financing and construction services for student dormitories and for many other structures, including hospitals and medical research centers.⁹

Public authorities are often confused with special districts, listed in the *Census of Governments* by the U.S. Census Bureau,¹⁰ that have an elected board of directors, are self-supporting, and are empowered with the ability to levy taxes:¹¹ their use of taxation as a form of income generation and the election of board of directors render special districts more similar to small-scale municipal governments, rather than public agencies or private corporations.¹²

Their identification, however, is not straightforward. Not all of the states use the term “public authorities” to identify such corporate bodies, which adds further complicity to an already uncertain context. Moreover, even their names blur: the term “authority” in the name may suggest that the entity is a public authority; but, also “agencies”, “funds”, “corporations” or “commission” may identify a public authority.¹³ As the New York

⁶ J. Leigland, *Public Infrastructure and Special Purpose Governments: Who pays and How?*, cit. at 2.

⁷ K. M. Henderson, *Other Governments: The Public Authorities*, in J. M. Stonecash (ed.), *Governing New York State* (2001), 210.

⁸ *Ibid.*, 213.

⁹ *Ibid.*

¹⁰ U.S. Department of Commerce, *Bureau of the Census, 2017 Census of Governments: Government Organization* (2017).

¹¹ R. J. Eger, *Casting Light on Shadow Government: A Typological Approach*, *J. Public Admin. Research & Theory* 16 (2006), 129. See also R. B. Hawkins, *Self-government by district: Myth and reality* (1976).

¹² J. Mitchell, *The American experiment with government corporations*, cit. at 2.

¹³ *Ibid.*

State Commission on Government Integrity has claimed, “no one has even an approximate count of how many of these organizations exist and where they are, much less an accounting of what they do.”¹⁴ Even the State Comptrollers, with the duty of supervising these public entities, have not adopted one sole method for listing these entities. For example, the New York Office of the State Comptroller has adopted a broader definition than that used by other observers, including entities that do not issue debt at all.¹⁵ According to the Public Authorities Reporting Information System (PARIS), in New York State there are 1,192 public authorities.¹⁶

After briefly explaining origins, current reasons for proliferation and main characteristics of state and local government corporations, this analysis will focus on two specific governmental privileges that they may enjoy: tax exemptions and sovereign immunity.

The analysis seeks to address the following issues. First, it looks to determine whether government corporations form a single category of entities that share the same traits and are governed by the same legal framework. Second, it seeks to ascertain whether these entities have a public or private nature, and whether such distinction is relevant. Third, it aims to determine whether public features prevail over private ones in the legal regimes of these entities or vice versa.

2. Origins and reasons for proliferation

At the beginning of the 19th century, with the coming of the Industrial Revolution and the advent of the steam locomotive, states and municipalities sought to implement large projects, such as canals and railroads, accumulating record debts.¹⁷ Such a situation, coupled with government mismanagement and corruption, soon led to a public outcry demanding an amendment to the states’ Constitutions which would require a popular

¹⁴ *Ibid.* See also Council of State Governments, *State public authorities* (1970).

¹⁵ R. B. Ward, *New York State Government* (2006), 288.

¹⁶ Office of the New York State Comptroller, *Public Authorities by the Numbers* (2007).

¹⁷ J. Rosenbloom, *Is the Private Sector Really a Model of Efficiency and Independence? Re-evaluating the Use of Public Authorities During Recessionary Times*, 11 NYSBA Government, Law and Policy Journal 2 (2009), 7.

referendum before states and municipalities could borrow money.¹⁸

In the late 19th century with the arrival of the Progressive Era, states and municipalities were requested to increase public services and promote economic development, without raising taxes.¹⁹ They struggled, however, to raise capital by borrowing money with the constitutional requirement in place.²⁰ Citizens refused to approve further borrowing and as a result it was necessary to find an alternative way to raise funds.²¹ Politicians elected to adopt into the public sector a private corporate structure viewing the railroad companies as a model of efficiency: these companies, in fact, had developed innovative management practices and accounting methodologies that allowed them to operate on geographically vast areas.²²

The number of public authorities increased after World War II and they were employed to provide and fund public services and new infrastructures without increasing taxes.²³

Today, there are several reasons for their proliferation, most of which are common to all the states. One reason in particular is that they were viewed as an instrument to improve government efficiency, thanks to their flexible corporate structure and management.²⁴ This view rests also on the consideration that elected officials are generally ill-equipped to handle the responsibilities required by modern governments.²⁵ In addition, directors' terms often last longer than election cycles²⁶ and, for this reason, public authorities are expected to be free of political interference. These views are also supported by studies that show that centralized, rigid and hierarchical bureaucracies are unsuitable for ensuring the efficient use of resources in response to changing

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, 50 N.Y.L. Sch. L. Rev. 851 (2006), 864.

²⁴ See below on corporate-like structure.

²⁵ W. F. Willoughby, *Principles of Public Administration* (1927).

²⁶ C. Bourdeaux, *A Question of Genesis: An Analysis of the Determinants of Public Authorities*, 15 J. Public Adm. Res. Theory 3 (2004), 444. See also L. H. Gulick, *Authorities and How to Use Them* (1947).

needs: in today's world, institutions must be flexible, market-oriented, and entrepreneurial.²⁷

Another conclusion of their decision-making is that in being isolated from the political process, these authorities may relieve pressure on the state budget by allowing for money to be borrowed beyond the normal debt limits.²⁸ Moreover, public authorities allow for jurisdictional flexibility: they may operate across jurisdictional boundaries, delivering services on an area-wide basis and, therefore, addressing concerns that would require a regional or interstate solution.²⁹

There are also some "pathological" reasons, which could be ascribed to constitutional factors, and that have led to an abuse of this instrument. A case in point is the New York State Constitution: although there is no maximum limit for the amount of state debt, it provides that any increases in state debt must be authorized by voters through statewide referenda (no more than one proposal each year) and debt should be issued "for some single work or purpose."³⁰ Third, the Constitution requires a "full faith and credit" to repay state bonds.³¹ In particular, this debt is paid off through annual appropriations by the Legislature; if the latter fails to make the necessary appropriations, the State Comptroller shall divert state general revenues to make the proper payments.³² As a consequence, public authorities propose an effective alternative to this cumbersome voter-approval process for borrowing, and they are able to avoid debt and statutory limitations.³³ This is even more true for local governments, which, according to New York Constitution, cannot issue revenue bonds to finance public facilities

²⁷ D. Osborne, T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992).

²⁸ *Ibid.*, 205.

²⁹ R. B. Ward, *New York State Government*, cit. at 15, 283.

³⁰ NY CONST. Art. VII. See also K. W. Bond, *Local Development Corporations in the Eye of the Comptroller*, 29 NYSBA Municipal Lawyer 3 (2015), 21.

³¹ K. M. Henderson, *Other Governments: The Public Authorities*, cit. at 7, 206.

³² *Ibid.*

³³ B. S. Bunch, *The Effect of Constitutional Debt Limits on State Governments' Use of Public Authorities*, 68 Public Choice 57 (1991). See also J. Leigland, *Public Authorities and the Determinants of Their Use by State and Local Governments*, 4 J. Public Adm. Res. Theory. 4 (1994).

and they have recourse to local public authorities in order to achieve these purposes.³⁴

While some authors have highlighted how these instrumentalities have rendered possible the operations of facilities that would have not been realized otherwise,³⁵ others have underlined how these instrumentalities have reduced accountability, by allowing politicians to hide the true costs of government, and by shielding elected officials from making unpopular decisions.³⁶

3. Main traits: method of incorporation, corporate-like structure, governmental powers, funding sources, statutory restraints

Methods of incorporation. States often provide for the incorporation of a public authority with special acts of the legislative body, signed into law by a chief executive (generally, the governor).³⁷ The legislative act, therefore, is the primary source of its discipline. Less frequently, the incorporation of public authorities is made pursuant to general enabling acts.³⁸ In New York, for example, local authorities can be incorporated by officials of local governments under the Not-For-Profit Corporation Law, section 1411³⁹ to promote economic development of the local area.⁴⁰

³⁴ Office of the New York State Comptroller, *Public Authorities by the Numbers*, cit. at 16. See also K. W. Bond, *Local Development Corporations in the Eye of the Comptroller*, cit. at 31.

³⁵ J. Leigland, *Public Authorities and the Determinants of Their Use by State and Local Governments*, cit. at 33 concludes that public authorities issue debt when there is a need that cannot be otherwise met by general-purpose government borrowing.

³⁶ D. Axelrod, *Shadow Government* (1992). See also M. Heiman, *Public Authorities as Agents of Not-So-Quiet Revolution in Hazardous Waste Facility Siting*, in J. Mitchell (ed.), *Public Authorities and Public Policy* (1992), 137-152. See also C. Bourdeaux, *A Question of Genesis: An Analysis of the Determinants of Public Authorities*, cit. at 26, 442 concludes that the local government need to solve a policy problem in a politically competitive environment is a driving factor in the decision to establish these entities.

³⁷ J. J. Shestack, *The Public Authority*, 105 U. Pa. L. Rev. 553 (1957), 554.

³⁸ *Ibid.*

³⁹ N.Y. Not-for-Profit Corp. Law § 1411 (McKinney).

⁴⁰ New York State Commission on Government Integrity, *Underground Government: Preliminary Report on Authorities and Other Public Corporations* (1990), 28.

Corporate-like structure. The corporate-like structure is the distinguishing trait of public authorities. This structure allows them to be “businesslike” in their operations and, therefore, to purportedly provide increased efficiency, expertise and independence in the delivery of public services.⁴¹

Government corporations do not generally have identifiable shareholders like a private corporation, since the government wholly owns the entity.⁴² They have, however, a board of directors – appointed for fixed terms and performing only policy functions – that in turn, appoint the executive directors and other top full-time staff that manage the corporation.⁴³ These individuals often remain from one gubernatorial administration to another.⁴⁴

The members of the board are appointed by elected officials (the governor, in the case of a state corporation, and the city council or the mayor, in the case of a local corporation) or serve in an ex-officio capacity due to a particular position in government (for example, an elected official or an administrator of a department).⁴⁵ Removals are often at the discretion of the governor, generally only for a cause, such as “inefficiency, neglect of duty or misconduct.”⁴⁶

Even within the same jurisdiction, the composition of the board may vary greatly: for example, the Massachusetts Turnpike Authority has a three-member board, while the Massachusetts Port

⁴¹ J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 854. See also G. E. Frug, *Beyond Regional Government*, 115 Harv. L. Rev. 1763 (2002). See also K. A. Foster, *The political economy of special-purpose government* (1997), 18.

⁴² J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 873. See also T. L. Ely, T. D. Calabrese, *Public Borrowing for Private Organizations: Costs and Structure of Tax-Exempt Debt Through Conduit Issuers*, 37 Public Budg. Finance 1 (2017), 5. See also R. J. Eger, *Casting Light on Shadow Government: A Typological Approach*, cit. at 11, 130.

⁴³ R. B. Ward, *New York State Government*, cit. at 15, 283.

⁴⁴ *Ibid.*

⁴⁵ J. Mitchell, *The American experiment with government corporations*, cit. at 2, 12. See also J. J. Shestack, *The Public Authority*, cit. at 38. See also R. Gerwig, *Public Authorities in the United States*, 26 Law and Contemporary Problems, (1961) pointing out that the governors and the attorney general are often named as ex-officio appointees, and such appointment reduces the corporation’s independence and increases the government’s desire to oversee corporation’s activities.

⁴⁶ C. Bourdeaux, *A Question of Genesis: An Analysis of the Determinants of Public Authorities*, cit. at 27, 446. See also R. Gerwig, *Public Authorities in the United States*, cit. at 45, 601. See, for example, New York State Consolidated Laws, Public Authorities, Article 8, Title 13-A.

Authority has a seven-member board. Also the freedom to make decisions can vary. The New York and New Jersey state governments, for example, have a veto power on the policies adopted by the Port Authority.⁴⁷

Governmental powers. A public authority may be also explicitly endowed with certain government powers, such as power of eminent domain.⁴⁸ Some authorities, such as MTA and the Power Authority of the State of New York are also endowed with the power to issue subpoenas,⁴⁹ while Port Authority can also provide police protection and regulations.⁵⁰

Funding sources. Public authorities, generally, can finance themselves by setting fees, charges and rents for their service.⁵¹ However, the main source of financing is represented by borrowing. The bonds issued are tax-exempt and not officially guaranteed by the “full faith and credit” of the state (and thus not subject to state’s limitations).⁵² Originally, government corporations mostly issued revenue bonds – a form of non-guaranteed debt backed by revenues derived from operations such as tolls or fees⁵³ to promote capital improvements to their own operating infrastructures.⁵⁴ However, soon these revenue bonds

⁴⁷ J. Mitchell, *The American experiment with government corporations*, cit. at 2, 13.

⁴⁸ *Kreutzer v. Illinois Commerce Comm'n*, 404 Ill. App. 3d 791, 811, 936 N.E.2d 147, 163 (2010). See also *City of Oakbrook Terrace v. La Salle Nat. Bank*, 186 Ill. App. 3d 343, 347, 542 N.E.2d 478, 480 (1989).

⁴⁹ N.Y. Pub. Auth. Law § 1265 (McKinney) (Metropolitan Transportation Authority) and N.Y. Pub. Auth. Law § 1006 (McKinney) (Power Authority of the State of New York): “For the purpose of exercising its powers and performing its duties hereunder and of securing such information as it may deem necessary hereunder, the authority shall have the power to compel the attendance of witnesses and the production of documents. The power hereby conferred upon the authority may be exercised by any one or more of the trustees if he or they are authorized so to act on behalf of the authority by resolution or by law. A subpoena issued under this section shall be regulated by the civil practice law and rules.”

⁵⁰ N.J. Stat. Ann. § 32:2-25 (West).

⁵¹ D. Cummings, P. Baxandall & K. Wohlschlegel, *Out of the Shadows, Massachusetts Quasi-Public Agencies and the Need for Budget Transparency* (2010), 9.

⁵² J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 868.

⁵³ D. Cummings, P. Baxandall & K. Wohlschlegel, *Out of the Shadows, Massachusetts Quasi-Public Agencies and the Need for Budget Transparency*, cit. at 51, 9.

⁵⁴ J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 868.

were issued for other purposes, and government corporations became vehicles used by private and public entities to obtain tax exempt financing as “conduit financiers”.⁵⁵

Furthermore, governments sometimes provide additional funding to certain authorities. For example, local housing authorities are often dependent on federal grants, while state-level transportation authorities often receive sums from dedicated taxes.⁵⁶

Statutory restraints. The corporate structure justifies government corporations’ exemptions from most statutory constraints governing public agencies, such as civil service⁵⁷ and procurement regulations,⁵⁸ as well as their broad discretion in developing internal policies, budgets and management techniques.⁵⁹ Corporation law principles are also applied to solve issues on government corporations operations.⁶⁰ On the other hand, government corporations – at least the state ones – are

⁵⁵ G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State – Public Authorities, the Chosen Financiers*, 11 NYSBA Government, Law and Policy Journal 2 (2009), 48. See also M. D. Robbins, Bill Simonsen, *Debt Issued Through Others: Conduits, Joint Powers Authorities, and Borrowing Costs in California Local Governments*, 32 Public Budg. Finance 2 (2012), 70.

⁵⁶ J. Mitchell, *The American experiment with government corporations*, cit. at 2, 96.

⁵⁷ In New York, for example, *Collins v. Manhattan & Bronx Surface Transit Operating Auth. (MABSTOA)*, 62 N.Y.2d 361, 465 N.E.2d 811 (1984). See also *Bergamini v. Manhattan & Bronx Surface Transit Operating Auth.*, 62 N.Y.2d 897, 899, 467 N.E.2d 521, 522 (1984). Because public authorities are not considered civil divisions, appointments and promotions can be made regardless of merit and fitness as determined by competitive examination, contrary to what New York Constitution requires for state civil service.

⁵⁸ In New York, for example, neither the State Finance law nor the General Municipal Law, which govern state and local governments procurement procedures apply to government corporations. N.Y. State Fin. Law §§135-146; N.Y. Gen. Mun. Law §§ 100-109-b.

⁵⁹ K. A. Foster, *The political economy of special-purpose government* (1997), cit. at 41, 10. See also J. Mitchell, *The American experiment with government corporations*, cit. at 2, 12.

⁶⁰ R. Gerwig, *Public Authorities in the United States*, cit. at 45, 612 “Miscellaneous legal problems affecting the powers of Authorities generally are determined in accordance with principles of corporation law, tempered by the always present controlling factor of public interest.”

usually subject to the administrative procedure acts and freedom of information laws applicable in the relevant jurisdiction.⁶¹

4. Tax exemptions and “conduit financing”

Public authorities may enjoy tax exemptions on bonds issued, corporate earnings and real property owned. In light of all these exemptions, the assumption that public authorities do not impose monetary costs on governments has been criticized, and it is claimed that they instead reduce general fund revenues.⁶²

First, interest received by investors, on public authorities' bonds, could be free of federal, state and local taxes. As a consequence, funds can be borrowed at a lower interest rate, and this makes viable a number of activities which would not be affordable at normal market rates.⁶³ While the exemption from state and local taxes is generally set forth in the incorporation statute, the exemption from federal taxation is rooted in the Federal Internal Revenue Code (IRC). Pursuant to the IRC, as interpreted by regulations and case law, the interest received by investors will be federally tax-exempt when the state or local entity issuing such a bond “has been delegated the right to exercise *part of the sovereign power*.”⁶⁴ For the purposes of the IRC, the followings are considered

⁶¹ With reference to the administrative acts, see J.E. Gersen, *Administrative Law's Shadow*, 88 *Geo. Wash. L. Rev.* 1071, 2020, 88, 1087 on the authorities created by interstate compact. For example, in New York, N.Y. A.P.A. Law § 102. With reference to freedom of information laws, see in New York, N.Y. Pub. Off. Law § 86 “Agency means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.”

⁶² *Ibid.* See also A. M. Sbragia, *Debt Wish: Entrepreneurial Cities, U.S. Federalism, and Economic Development* (1996), 194.

⁶³ R. A. Newman, *Tax-Exempt Financing for Nonprofit Facilities*, 24 *Prac. Real Est. Law*. 19 (2008), 20.

⁶⁴ According to the IRC, gross income for federal income tax purposes does not include interests on any “state or local bond,” 26 U.S.C.A. § 103. The following regulations interpreted this rule. Regulation section 1.103-1(a) provides that a State or local bond shall be issued by “a State, territory, a possession of the United States, the District of Columbia, or any political subdivision thereof,” 26 CFR § 1.103-1(a); while Regulation section 1.103-1(b) specifies that a political subdivision “denotes any division of any State or local government unit which is a municipal corporation or which has been delegated the right to exercise part of

as sovereign powers: (1) the power of eminent domain, (2) the power to tax, (3) the police power (*Commissioner v. Shamberg's Estate*).⁶⁵ In *Shamberg's Estate*, the Court of Appeals for the Second Circuit concluded that the Port Authority and the interests on bonds issued by the Port Authority were exempt from federal taxation.⁶⁶ The Port Authority was “endowed with the power of eminent domain, and with certain police powers, including the promulgation and enforcement of regulations for the conduct of navigation and commerce in the area defined as the Port of New York District.”⁶⁷ Delegation of only one of the sovereign powers – power of eminent domain or police power – might be sufficient for the authority to qualify for the tax-exemption, if the power is substantial under all circumstances. For example, Revenue Ruling 73-563 held that a rapid transit authority (RTA) possessed a substantial portion of sovereign powers to serve its essential governmental function – even if endowed only with police powers – which was understood as the power to enforce the public authority’s own regulations by maintaining a security force.⁶⁸

Government corporations’ earnings can be also exempt from federal income taxes.

The Internal Revenue Code does not expressly provide for such exemption; however, Revenue Rulings⁶⁹ clarifies that these entities are exempt under an “implied statutory immunity” should the entity be endowed with sovereign powers, as defined in *Shamberg's Estate*.⁷⁰

the sovereign power of the unit.” 26 CFR § 1.103-1(b). See E. P. Aprill, *Excluding the Income of State and Local Governments: the Need for Congressional Action*, 26 Ga. L. Rev. 421 (1992). See also American Bar Association Section of Taxation, *Comments on the Definition of Political Subdivision for Tax-Exempt Bonds and Other Tax-Advantaged Bonds*, 69 The Tax Lawyer 2 (2016), 318.

⁶⁵ *Comm'r of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998, 1005 (2d Cir. 1944).

⁶⁶ *Ibid.*

⁶⁷ *Shamberg's Estate v. Comm'r*, 3 T.C. 131, 143, *aff'd sub nom. Comm'r of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998 (2d Cir. 1944).

⁶⁸ Rev. Rul. 73-563, 1973-2 C.B. 24.

⁶⁹ 1971-1 C.B. 28 and 1971-1 C.B. 29.

⁷⁰ E. P. Aprill, *The Integral, the Essential, and the Instrumental: Federal Income Tax Treatment of Governmental Affiliates*, 23 J. Corp. L. 803 (1998), 808. See also E. P. Aprill, *Excluding the Income of State and Local Governments: the Need for Congressional Action*, *cit.* at 65. See also Gen. Couns. Mem. 36, 994 (Feb. 3, 1977): the IRS concludes that the definition of a political subdivision adopted in the

In addition, public authorities may be exempt from state and local property taxes. The statute, generally, expressly exempts them. For instance, the New York Public Authority Law clearly exempts the real property owned by enumerated state, regional and local authorities.⁷¹

Public authorities' tax exemptions – in particular, the exemption on interest received by investors on bonds issued – have fostered a specific use of government corporations as “conduit financiers”: in other words, public authorities have become a vehicle used by private and public entities to obtain tax exempt financing.⁷²

Acting as “conduit” between a specific capital project – to be implemented by other entities – and bondholders, the public authority issues bonds whose proceeds are lent to the parties implementing the project; investors can have recourse only to those parties and the project.⁷³ As the interest on the bonds paid to investors is exempt from taxation, private entities can obtain in this way low-cost tax exempt financing.⁷⁴ The Housing Finance Agency, for example, issues bonds to encourage private investors to build and maintain affordable housing in New York State.⁷⁵ Some authors have pointed out that too many public authorities exist

regulations under section 103 should be used in interpreting other Code provisions dealing with political subdivisions. See also IRS, <https://www.irs.gov/pub/irs-tege/eotopice90.pdf>. Please note that in order to qualify for the corporate earning's tax exemption, a government entity might also demonstrate to be an (1) integral part of the state or political subdivision thereof; or (2) meet the requirements under section 115 (Internal Revenue Code); or (3) an instrumentality of state and local governments. 1987-1 C.B. 18. These categories, however, frequently overlap, and are not clearly defined.

⁷¹ Among these corporations, there are transportation authorities: see Capital District Transportation Authority (Pub. Auth. Law § 1316); Central New York Regional Transportation Authority (Pub. Auth. Law § 1341); Metropolitan Transportation Authority (Pub. Auth. Law § 1275).

⁷² G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State – Public Authorities, the Chosen Financiers*, cit. at 55, 48. See also M. D. Robbins, B. Simonsen, *Debt Issued Though Others: Conduits, Joint Powers Authorities, and Borrowing Costs in California Local Governments*, cit. at 55, 70.

⁷³ S. L. Schwarcz, *The Use and Abuse of Special-Purpose Entities in Public Finance*, 97 Minn. L. Rev. 2 (2012), 8.

⁷⁴ *Ibid.*

⁷⁵ G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State – Public Authorities, the Chosen Financiers*, cit. at 55, 49. See also R. B. Ward, *New York State Government*, cit. at 15, 291.

exclusively for the purpose of financing capital projects.⁷⁶ Not only private parties but also the state has recourse to public authorities for the financing of capital projects: in this case, the debt issued by public authorities is backed by state appropriations (“state-supported debt”).⁷⁷ This is the most controversial form of borrowing that raises constitutional concerns as it is considered as a vehicle to circumvent public referendum requested by the Constitution.⁷⁸ However, “today, conduit financing by public authorities is virtually the exclusive source of borrowed funds for State infrastructure needs,” due to the difficulties in approving the different bond acts.⁷⁹ This is also one of the reasons why, for example, in New York case law is well-settled in considering conduit financing by a government corporation for state purposes as constitutional.⁸⁰ In particular, states generally enter into complex agreements with public authorities (such as leasebacks) that allow the States to pay “indirectly” for the bond using public funds.⁸¹

⁷⁶ A. Sbragia, *Debt wish: Entrepreneurial cities, U.S. federalism, and economic development*, cit. at 62.

⁷⁷ G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State – Public Authorities, the Chosen Financiers*, cit. at 56, 49. See also R. B. Ward, *New York State Government*, cit. at 15, 291.

⁷⁸ Office of the New York State Comptroller, *Public Authorities by the Numbers*, cit. at 16.

⁷⁹ G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State – Public Authorities, the Chosen Financiers*, cit. at 56, 50.

⁸⁰ *Ibid.*, 53. See also *Wein v. City of N.Y. (Wein I)*, 36 N.Y.2d 610, 613, 621 (1975); *Wein v. State (Wein II)*, 39 N.Y. 2d 136, 140 (1976); *Schulz v. State*, 84 N.Y.2d 231 (1994).

⁸¹ M. D. Robbins, B. Simonsen, *Debt Issued Though Others: Conduits, Joint Powers Authorities, and Borrowing Costs in California Local Governments*, cit. at 55 describing the certificates of participation (COPs), a form of tax-exempt lease purchase particularly used by California’s public authorities. J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 869 describing a notorious example of leaseback between the state and a public authority: the “sale” of the Attica prison by New York State in 1991. Attica State Prison and a piece of Interstate 187 were sold by New York State to a specific state government corporation, the Urban Development Corporation (UDC). UDC issued \$247 million in bonds to buy the prison; such capital was used by the State to balance a shortfall in the New York State budget. However, UDC was not designed to manage a prison, and the debt services on the bonds issued by UDC also needed to be repaid. As a consequence, the State leased the prison back from the government corporation, for an amount equal to the principle and interest on the bonds originally issued. These bonds are still being paid for and they will cost New York taxpayers over \$750 million. This fact also showed that

To describe this particular use of public authorities as mechanism to circumvent constitutional debt limitations, some authors have also spoken of “backdoor” borrowing, where the “back door” is used much more extensively than the “front door” of voter-approved debt to finance the state’s expansive capital programs.⁸²

5. Tort liability and sovereign immunity

Public authorities can be held liable for torts only to the extent that they do not enjoy sovereign immunity or governmental immunity that applies to governmental entities. Sovereign immunity is a well-rooted common law doctrine according to which state and federal governments cannot be sued unless they have waived their immunity or have consented to being sued.⁸³ It expresses the superiority of the sovereign over the rights of the private citizens.⁸⁴ Among the reasons that support this theory today there is the need to preserve government funds, to reduce the judicial workload and to give operational flexibility to elected officials.⁸⁵ Only federal and state governments – but not local governments – are entitled to this immunity, in addition to their “arms” – the latter term being used to include in the protection also officials and agencies.⁸⁶ States’ immunity is not based on a particular constitutional provision; rather, the source on the sovereignty can be traced back to the thirteen independent colonies before the ratification of the U.S. Constitution.⁸⁷

the bonds issued by government corporations are often used for reasons unrelated to the delivery of public services – such as to fill budget gaps.

⁸² R. B. Ward, *New York State Government*, cit. at 15, 291.

⁸³ D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts* (2011), 329.

⁸⁴ W. H. Bryson, *The Prerogative of the Sovereign in Virginia: Royal Law in a Republic*, 73 *Tijdschrift voor Rechtsgeschiedenis* 371 (2005).

⁸⁵ M. R. Brown, *Deterring bully government: A sovereign dilemma*, 76 *Tul. L. Rev.* 149 (2001). See also The Harvard Law Review Association, *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 *Harv. L. Rev.* 714 (1961) arguing that the policies underlying sovereign immunity – namely, preventing the depletion of public funds and protecting authorized official actions – would not be infringed by refusing to apply this doctrine to public authorities.

⁸⁶ T. J. Centner, *Discerning Immunity for Governmental Entities: Analyzing Legislative Choices*, 24 *Rev. Policy Res.* 425 (2007), 425.

⁸⁷ V.C. Jackson, *Suing the federal government: Sovereignty, immunity, and judicial independence*, 35 *Geo. Wash. Int’l L. Rev.* 521 (2003). See also M.R. Durchslag, *State sovereign immunity: A reference guide to the United States Constitution* (2002).

Today few states, such as Alabama and Arkansas, have a still strong protection of this doctrine, that extends also to contractual claims.⁸⁸ For example, Arkansas Constitution provides that “the State of Arkansas shall never be made defendant in any of her courts” (art. V§20).⁸⁹ Art. XVI§2 adds that the legislature shall “provide for the payment of all just and legal debts of the State;”⁹⁰ pursuant to this provision, therefore, the legislature created the Arkansas State Claims Commission, an administrative body composed of commissioners appointed by the governor and confirmed by the senate, with the sole discretion on the determination of the payment of the debts and obligations of the state; commission’s decisions cannot be appealed to any court.⁹¹ Based on a strict interpretation of the constitutional provisions, in 2018 the Supreme Court of Arkansas held that an employee of a publicly-funded college was barred from filing a claim in court against the entity for failing to compensate him for working overtime, because the college was protected by sovereign immunity.⁹² Similarly, the same court ruled that a private company acting as surety could not seek a declaratory judgment in court against an “arm” of the state.⁹³ The surety had issued a statutory performance bond to secure the performance of a private construction company under a highway construction contract between the private construction company and the Arkansas State Highway Commission. ⁹⁴ However, because the private construction company had allegedly breached the construction contract, the Arkansas State Highway Commission demanded the surety to ensure contract performance. The surety unsuccessfully

⁸⁸ K. McShane, *FFF Sovereign Immunity Series*, Nat’l. L. Rev. (Sept. 30,2022).

⁸⁹ Ark. Const. art. V, §20.

⁹⁰ Ark. Const. art. XVI, §2.

⁹¹ R. C. Dalby, *Too Plain to Be Misunderstood: Sovereign Immunity Under the Arkansas Constitution*, 71 Ark. L. Rev. 761 (2019), 763.

⁹² Bd. Of Trs. Of the Univ. of Ark. V. Andrews, 2018 Ark. 12, at 12, 525 S. W. 3d 616, 622.

⁹³ *Travelers Cas. & Sur. Co. of America v. Ark. State Highway Comm’n*, 353 Ark. 721, 728-29, 120 S.W.3d 50, 53-55 (2003) “By contracting as a surety with the State, Travelers relegated any relief based on breach into the hands of the legislative branch. Although Travelers does not seek any affirmative relief, it does seek to control the State's right to seek affirmative relief under the performance bond. As such, the suit for declaratory judgment is one against the State and is barred by sovereign immunity.”

⁹⁴ *Ibid.*

sought in court a ruling that it was not liable to the Commission on its performance bond.⁹⁵

Many more states retain immunity, but they permit liability under few specific circumstances, such as for injuries suffered for accidents on negligently managed state property or highways.⁹⁶ Many other states, such as New York, adopted statutes waiving sovereign immunity, but retaining it in many circumstances. Even in these states, sovereign immunity is generally retained for discretionary decisions and for some business torts, such as libel, misrepresentation, abuse of process.⁹⁷ Therefore, even under these liberal statutes, substantial areas of immunity are preserved.⁹⁸ Also, many states set a cap for compensatory damages, and they do not allow any punitive damages.⁹⁹

In addition to sovereign immunity, states are entitled to the protection of the Eleventh Amendment to the U.S. Constitution, which could be considered as an exemplification of state sovereignty.¹⁰⁰ This Amendment forbids suits against states in federal courts, providing for a “jurisdictional immunity”¹⁰¹: it does not prohibit suits against states in state courts, nor does it forbid suits against state officers, as long as the state’s treasury is not

⁹⁵ *Ibid.*

⁹⁶ Mich. Comp. L. Ann. § 691.1407; Wyo. Stats. § 1-39-104.

⁹⁷ Idaho Code § 6-904. See also D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts*, cit. at 84, 717.

⁹⁸ D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts*, cit. at 84, 717. See also A. M. Benintendi, *Valdez v. City of New York: The “Death Knell” of Municipal Tort Liability?*, 89 St. John’s L. Rev. 1345 (2015), 1369 “Although the State of New York purported to waive its right to sovereign immunity in the Court of Claims Act, the Court of Appeals has relegated the Court of Claims Act waiver to insignificance through various judicially imposed exceptions to and exclusions from that waiver.”

⁹⁹ Fla. Stat. Ann. § 768.28; Pa. Consol. Stat. Ann. § 8528.

¹⁰⁰ T. J. Centner, *Discerning Immunity for Governmental Entities: Analyzing Legislative Choices*, cit. at 86, 427 “The enactment of the Eleventh Amendment has led to a common perception that the amendment grants sovereign immunity. This is a misnomer; the sovereign immunity of states is not derived from the Eleventh Amendment (Aldern v. Maine, 1995). The sovereignty held by states before our federal Constitution was ratified is the source of state sovereign immunity.”

¹⁰¹ U.S. Constitution Amendment XI: “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 subject of any foreign state.”

subject to the judgement.¹⁰² As the Eleventh Amendment is considered as an exemplification of state sovereignty, only states and their “arms” may be entitled to this protection,¹⁰³ excluding therefore political subdivisions such as counties and political municipalities.¹⁰⁴

On the other hand, local governments cannot invoke sovereign immunity, as they are not sovereign entities and have long been chartered by the states.¹⁰⁵ Notwithstanding, they may claim defenses towards liability, as provided by states’ constitutions, legislations and courts: this immunity is generally addressed as “governmental immunity.”¹⁰⁶

Public authorities may be considered to act as “arms” of the state, and therefore be entitled to Eleventh Amendment protection and sovereign immunity to the extent that the incorporating state retains it. Thus, in states such as Arkansas public authorities’ liability as “arms” of the state will extend far beyond the exercise of discretionary decisions.

Traditionally, the discussion on whether a government corporation qualifies as an “arm” of the state has focused on the interpretation of the clause in the public authorities’ incorporation statute, that allows the entity to sue and be sued in its own name (“sue-and-be-sued” clause). Many courts have assumed that, in absence of such clause in their enabling statute, these authorities would be entitled to complete protection from liability, where such protection was enjoyed by the incorporating state.¹⁰⁷

Recently, courts have shifted their focus to other factors to determine whether a government corporation is acting as an “arm” of the state government. Among these factors, there is the source of the entity’s funding: if an entity is given the power to generate its

¹⁰² D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts*, cit. at 84, 330.

¹⁰³ Northern Insurance Company of New York v. Clatham County, 547 U.S. 189, 193 (2006).

¹⁰⁴ Lake Country Estates, Inc. V. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979).

¹⁰⁵ D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts*, cit. 84, at 330. For a further analysis of the corporate origins of the City of New York, see H. Hartog, *Public Property and Private Power. The Corporation of the City of New York in American Law, 1730-1870* (1983).

¹⁰⁶ A. R. Brown-Graham, *Local governments and the public duty doctrine after Wood v. Guilford County*, 81 N. C. L. Rev. 2291 (2003).

¹⁰⁷ The Harvard Law Review Association, *The Applicability of Sovereign Immunity to Independent Public Authorities*, cit. at 86, 718.

own funds or receive from sources different from the state, it is unlikely to be entitled to the Eleventh Amendment immunity.¹⁰⁸ Other factors include the extent of state control over the entity, whether the state designates the entity as an “instrumentality” or the like, and the type of functions performed by the entity.¹⁰⁹

In *Williams v. Dallas Area Rapid Transit*, the U.S. Court of Appeals for the Fifth Circuit discusses the application of these factors to a regional transportation authority operating in the Dallas region (Texas) and concludes that the public authority was not an “arm” of the state for the purpose of the Eleventh Amendment.¹¹⁰ The Court of Appeals considered the “sue-and-be-sued” clause in the enabling statute not to be significantly relevant in the inquiry. In contrast, courts should primarily look at the source of the authority’s funds, as this factor would determine whether a judgment against corporation would be paid from the state’s coffers.¹¹¹ This factor, in fact, weighted against the regional transport authority’s immunity, which did not receive any state funds, and its bond obligations were not guaranteed by the State of Texas.¹¹² Other factors weighted also the grant of sovereign immunity: the authority’s activities benefitted only local inhabitants, and not the state as a whole, and the statutory characterization of the authority as “governmental unit” was definitely broader than the term “arm” of the state under the Eleventh Amendment.¹¹³

The same factors were also analyzed in *Lake Country Estates*, where property owners sued the Tahoe Regional Planning Authority, a bi-state agency created by a compact between Nevada and California, claiming that one of its ordinances deprived them of the beneficial use of their lands. After taking into consideration the factors above mentioned, the U.S. Supreme Court concluded that the Authority was not entitled to Eleventh Amendment protection.¹¹⁴ In fact, this agency received its funds from the

¹⁰⁸ C. N. May, A. Ides, S. Grossi, *Constitutional Law, National Power and Federalism (Examples & Explanations)*, (2019).

¹⁰⁹ *Ibid.*, 196.

¹¹⁰ *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 319 (5th Cir. 2001).

¹¹¹ *Ibid.*, 320.

¹¹² *Ibid.*

¹¹³ *Ibid.*, 319.

¹¹⁴ *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401, 99 S. Ct. 1171, 1177, 59 L. Ed. 2d 401 (1979) “Unless there is good reason to believe

counties in which it operated (and not from the two states); the States have identified this entity as a “political subdivision” and a “separate legal entity”, and not as their “instrumentality”; its land use functions were typically exercised by local governments, and not by the States; while its governing board was controlled by cities and counties (and not by the States).¹¹⁵

In *Marshall v. Port Authority of Allegheny County*, however, the Supreme Court of Pennsylvania held that the government corporation was entitled to sovereign immunity, considering it as an “agency of the Commonwealth” rather than a local agency, giving conclusive importance to the incorporating statute of the authority.¹¹⁶ Even though the Port Authority’s board of directors was appointed by county commissioners, the entity was created by the State (Commonwealth), rather than by local government, through an incorporating statute that makes expressly clear in its language that the authority “acts as an agency of the Commonwealth.”¹¹⁷

Therefore, state government corporations could qualify for sovereign immunity, and thus not be liable for torts to the extent retained by the incorporating state. The clause “sue-and-be-sued” in the enabling legislation does not exclude the sovereign immunity, and it appears irrelevant in the court’s examinations.

Based on this analysis, and unlike state public authorities, local public authorities will most likely not qualify as “arms” of the state for sovereign immunity purposes. The factors developed by courts clearly weigh against this qualification, and this is based on the aforementioned view that municipalities were not originally sovereign, and therefore their instrumentalities cannot be entitled to privileges that they do not have themselves. However, two considerations are worthy of note. First, when a judgement is against a political subdivision rather than from the state or its “arm”, it would be in effect be a judgement against the state treasury and the courts are likely to treat the action as being one against the state and provide immunization from suit in federal

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, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.”

¹¹⁵ *Ibid.*

¹¹⁶ *Marshall v. Port Auth. of Allegheny City.*, 524 Pa. 1, 8, 568 A.2d 931, 935 (1990).

¹¹⁷ *Ibid.*

court.¹¹⁸ Second, local governmental entities may be entitled to “governmental immunity”, as defined in the state’s case law, constitutional provisions, state statutes or judicial decrees.¹¹⁹ Some states have adopted local government tort immunity acts, limiting the scope of immunity protection in accordance with local governments and their instrumentalities. For example, in *Marshall* the Court of Appeals held that the Port Authority of Allegheny County qualified as a “local agency” under the governmental immunity statute (Local Immunity Act)¹²⁰ enacted by the State of Pennsylvania, and therefore, it was still insulated from liability.¹²¹ Courts also tend to grant immunity when the local entity performs governmental functions: these are functions performed by the governmental entities as agents of the state, as opposed to proprietary functions that are undertaken by the government for the public, but typical of private enterprises. Disagreement exists among the courts however on the test for determining whether an activity is governmental or proprietary.¹²² Courts may consider an activity as proprietary if a fee is paid, it is carried out for profit, or it has historically been performed by a private enterprise.¹²³ Other courts also whether the activity relates to a public service.¹²⁴ Some authors, however, have argued that such distinction is one of the most confusing in municipal law, and rulings are inconsistent not only between different jurisdictions but also within the same one.¹²⁵ Some courts have concluded that the operation of a municipal solid waste system or the construction of public highways or streets,¹²⁶

¹¹⁸ C. N. May, A. Ides, S. Grossi, *Constitutional Law, National Power and Federalism (Examples & Explanations)*, cit. at 102, 197.

¹¹⁹ T. J. Centner, *Discerning Immunity for Governmental Entities: Analyzing Legislative Choices*, cit. at 86, 433 providing the examples of Georgia and Texas.

¹²⁰ 42 Pa.C.S. §8522.

¹²¹ *Marshall v. Port Auth. of Allegheny City.*, 106 Pa. Cmwlth. 131, 133, 525 A.2d 857, 858 (1987), *aff’d*, 524 Pa. 1, 568 A.2d 931 (1990).

¹²² D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts*, cit. at 84, 718-719.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ H. D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173 (2016), 174. See also J. C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 Iowa L. Rev. 277 (1990)

¹²⁶ H. D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173 (2016), cit. at 125, 175-176.

the collection of garbage,¹²⁷ the operation of electric light plants or water systems¹²⁸ are governmental functions; on the other hand, others have ruled that these are proprietary functions.¹²⁹

As a consequence, local public authorities, that do not fulfill the courts' requirements to qualify as an "arm" of state for sovereign immunity purposes, may be entitled to protection from liability.

To conclude this discussion on government corporations' liability, few considerations should be devoted to the analysis of a federal cause of action, introduced in the U. S. Code to allow victims of federal rights violations – committed by a state actor – to resort directly to federal courts, without first exhausting state remedies.¹³⁰ Under section 1983 title 42 of the U.S. Code, in fact any person acting "under color of" state law is liable for depriving a citizen of federal constitutional or statutory rights; among these suits, claims of violations of the Fourteenth Amendment due process rights are particularly common.¹³¹ With reference to the "under color of state law" requirement, the U.S. Supreme Court emphasized the significance that the wrongdoer commits the federal rights violation in the exercise of a power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law".¹³² Public authorities may be sued under section 1983 when they exercise any of the government powers granted by the incorporation statute, such as the authority to issue rules or regulations or the power of eminent domain. However, case law is unanimous in holding that states and their "arms" are not suable persons under section 1983, considering also that the Eleventh Amendment immunity prohibits private parties from suing a state in a federal court without its consent.¹³³ The designation of a government corporation as "arm" of the state is based on an examination of the same factors that govern the determination of the Eleventh Amendment protection, such the

¹²⁷ *City of Atlanta v. Chambers*, 205 Ga.App. 834, 424 S.E.2d 19 (1992).

¹²⁸ *Patterson v. City of Little Rock*, 202 Ark. 189, 149 S.W.2d 562 (1941).

¹²⁹ H. D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173 (2016), cit. at 125, 192.

¹³⁰ M. G. Collins, *Section 1983 Litigation in a Nutshell* (2016), 4-6.

¹³¹ 42 U.S.C §1983.

¹³² *West v. Atkins*, 487 U.S. 42, 49 (1988). See also M. S. Gilmore, *Introduction to Liability and Immunities Under 42 U.S.C. 1983*, 51 Advocate 17 (2008), 17.

¹³³ The Harvard Law Review Association, *Government Tort Liability*, 111 Harv. L. Rev. 2009, 2009-2010.

public authority's economic and financial autonomy that weighs against its qualification as "arm" of the state.¹³⁴ On the other hand, a section 1983 claim could be asserted against local governments and local government corporation, as they do not enjoy the same state protection. According to established case law, their liability is limited to only those violations that result from the entity's custom, policy or official decisions.¹³⁵

6. Conclusion

A government corporation could be thought of as a fictitious category that includes entities with various legal structures and characteristics, each designed to achieve a specific public purpose while acting in a businesslike manner. These entities share certain common traits: a separate legal personality, a corporate-like structure, governmental powers and the ability to set their own charges and fees for the services they provide. Like private corporations, they could issue bonds – not guaranteed by the "full and faith credit" of the state – without the need for a public referendum as required for the issuance of government bonds. Their debt is not included in the state budget. Moreover, even though they generally do not have identifiable shareholders, they are provided with a board of directors and officers, and escape many strict regulations applicable to state agencies, such as the civil service and procurement restrictions. On the other hand, like public agencies, they exercise governmental powers and they enjoy many tax exemptions on bond issues, earnings and properties owned. Furthermore, they are frequently incorporated through a special statute and are subject to the administrative procedure acts and freedom of information laws, which are applicable to the state government corporations at the very least.

However, there is no prototype of public authority. Some characteristics are present in some corporations, but not in others. Some government corporations have government powers that others do not, such as the power of eminent domain or the power

¹³⁴ *Hass v. Port-Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). See also M. G. Collins, *Section 1983 Litigation in a Nutshell*, cit. at 130, 150.

¹³⁵ *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

to issue regulations; some authorities are also incorporated under general incorporation laws rather than by special statute.

The different interrelationships of their specific characteristics affect government corporations' legal status, which varies depending on the circumstances and the reference parameter: they are considered as public agencies at times, and private entities at others. Courts may consider the entity as a state arm for sovereign immunity purposes based on a variety of factors, including the amount of state funding, their designation in the incorporation statute, state control over the entity's activities, and the type of function at issue. Thus, the entity will be protected by the Eleventh Amendment and will not be sued in federal court. It will also be protected in state courts to the extent that the incorporating state retains immunity. While Arkansas' arms of state may enjoy contractual sovereign liability, government corporations in many more states such as New York State, will be afforded less protection with immunity granted only when making discretionary decisions or other specific circumstances, such as the commission of business torts; the amount of damage they must pay may also be subject to caps, and punitive damages may be excluded. Local government corporations are unlikely to be considered arms of state, especially if they do not receive state funds, but they may be considered public for governmental immunity purposes: this will generally occur when they perform governmental functions rather than proprietary ones. On the other hand, entities that are not arms of the state for sovereign purposes may be considered as public for federal exemptions of bonds and corporate earnings. This will happen if the entity is given a substantial amount of sovereign power such as the eminent domain power, regardless of whether the state funds the entity or designates the entity as its instrumentality.