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Too Much Protection with Too Little Support: A Look at the Eleventh Amendment in Light of Garcia v. Board of Education

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TOO MUCH PROTECTION WITH TOO LITTLE SUPPORT: A LOOK AT THE ELEVENTH AMENDMENT IN LIGHT OF *GARCIA V. BOARD OF EDUCATION*

INTRODUCTION

When a party files suit against a state in federal court there exists the possibility of the action being barred under the eleventh amendment to the Constitution of the United States. When a suit is filed against an agency of the state, such as a highway commission, port authority, ratemaking commission, or school board, a determination must be made as to the extent of the amendment's protection. If the state agency is the "alter ego" or "arm" of the state,[1] then it qualifies for protection from suit under the amendment. If however, the entity is deemed to be a "citizen" of the state, immunity under the eleventh amendment will not apply.

Garcia v. Board of Education[2] is the Tenth Circuit's latest attempt to decide whether local school boards qualify as alter egos of the State of New Mexico, and are therefore entitled to protection under the eleventh amendment. The focus of this discussion will be on the *Garcia* court's decision to allow eleventh amendment protection to extend to local school boards and the problems that arise from the court's failure to provide adequate precedent in support of such a decision.[3]

I. THE *GARCIA* CASE

J. Placido Garcia brought a section 1983[4] action against the Board of Education of the Socorro Consolidated School District in New Mexico. Garcia's claim arose out of the school board's decision not to renew his contract as superintendent for the school district.[5] The plaintiff

1. Factors which may constitute an adequate relationship between an agency and a state to qualify the agency as an "arm" of the state include (1) state statutory definitions; (2) the number of school boards within the state; (3) the extent of control and guidance exercised by the state over the school board; (4) the power of the school boards to issue bonds and levy taxes subject to certain state restrictions; and (5) the amount of state financial assistance. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977) (relying on provisions in the Ohio Revised Code Annotated). The last element was set forth by the Court in Edelman v. Jordan, 415 U.S. 551 (1974) holding that if the source of funds used to satisfy the judgment was paid out of the state treasury the board would be an "arm" of the state.

2. 777 F.2d 1403 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 66 (1986).

3. The *Garcia* court also discussed appellant's defamation counterclaim in detail. *See infra* notes 15 to 24 and accompanying text.

4. 42 U.S.C. § 1983 (1982). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. *Garcia*, 777 F.2d at 1405. The board met on February 11, 1980, and at that meet-

named as defendants the school board and its members in both their individual and official capacities.[6] Initially, the school board gave no public reason for its decision not to renew Garcia's contract. The plaintiff publicly stated, however, that his nonrenewal resulted from his refusal of the board's request to engage in illegal activities.[7] The board members then responded by drafting a statement explaining the reasons for their decision not to renew Garcia's contract.[8]

The plaintiff filed suit alleging a violation of his first amendment rights and a deprivation of liberty and property without due process of law.[9] The school board members counterclaimed for defamation.[10] The jury awarded the plaintiff $180,000.00 and the defendants nothing, from which the defendants appealed and the plaintiff cross-appealed.[11]

After filing appellate briefs, the board amended its position, asserting immunity from suit under the eleventh amendment to the United States Constitution.[12] This defense was raised but not pursued at the trial court.[13] Affirming in part and reversing in part, the Tenth Circuit Court of Appeals held that the eleventh amendment barred suit against the board and its members in their official capacities.[14] The court further held that the board members were public officials and could not recover on their defamation claim unless "actual malice" could be shown.[15]

II. THE COURT'S OPINION

A. *Defamation*

The majority opinion, delivered per curiam, discussed several issues involving defamation. Initially, the court addressed the board members' challenge to the trial court's jury instruction regarding their defamation

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ing, they voted four to one not to renew Mr. Garcia's contract. Mr. Gallegos voted against the motion not to renew the superintendent's contract, and the four defendant board members voted in favor. Appellant's Brief in Chief at 2, Garcia v. Board of Educ., 777 F.2d 1403 (10th Cir. 1985) (No. 82-1174), *cert. denied*, 107 S. Ct. 66 (1986).

6. *Garcia*, 777 F.2d at 1405. Following three different conversations with the trial court judge, Garcia voluntarily dismissed the suit against the individuals before the case went to the jury. *See id.* at 1405-06.

7. Appellee's Answer Brief at 3, Garcia v. Board of Educ., 777 F.2d 1403 (10th Cir. 1985) (No. 82-1174), *cert. denied*, 107 S. Ct. 66 (1986).

8. *Garcia*, 777 F.2d at 1405. The reasons given by the board included (1) constituents had continually expressed dissatisfaction with Mr. Garcia; (2) the conduct of the superintendent had been detrimental to staff morale; (3) Mr. Garcia had become increasingly unresponsive over the years and it had become more difficult to work with him. *Id.*

9. *Id.* at 1404-05.

10. *Id.* at 1405.

11. *Id.*

12. The eleventh amendment provides: "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." U.S. CONST. amend. XI.

13. *Garcia*, 777 F.2d at 1405.

14. *Id.* at 1408-09.

15. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 737-76 (4th ed. 1979).

claim.[16] As the court noted, the defendant board members were required to overcome certain aspects of *New York Times v. Sullivan*.[17] Arguing the need to prove only common law negligence, however, the defendants claimed that they were not public officials and therefore were not subject to the *New York Times* "actual malice" standards. In response, the court reviewed the accepted tests to determine public official status as set forth in *Rosenblatt v. Baer*.[18] For example, the public official designation applies to those persons in governmental hierarchy who "have, or appear to the public to have, substantial responsibility for or control over the governmental affairs."[19]

Despite the school board's effort to dodge the definitional boundaries of public official status, the court held that the school board and its members were considered public officials. Relying on *Rosenblatt*, the *Garcia* court found that governance of a public school system was of the utmost importance, and that strong public interest warranted the conclusion that the board members were public officials.[20]

In addition, the majority addressed the issue of whether a public official suing for defamation can obtain a judgment against a nonmedia critic as opposed to a media critic. By examining the holdings in several cases,[21] the court concluded that first amendment protection should depend on the subject of the speech and not the identity of the speaker.[22]

Finally, the issue of the necessary standard of proof was addressed by the court. Relying in part on the *New York Times* decision, the majority held that the difficulty in defining "media," the concern for preserving constitutional values and the undesirability of allowing greater constitutional protection for the media, merits the application of an "actual malice" standard when a public official sues a nonmedia defendant for defamation.[23] The court, therefore, decided that correct instructions were given to the jury and that the defendants could only recover on their counterclaim if actual malice was shown. Having exhausted the discussion of defamation, the court proceeded to the issues raised under the eleventh amendment.

B. *The Majority View of Eleventh Amendment Immunity*

In the earlier decision of *Edelman v. Jordan*,[24] the Supreme Court

16. *Garcia*, 777 F.2d at 1407. The trial court instructed the jury that in order to recover on their defamation claim, the school board members, as public officials, were required to prove that Mr. Garcia's statement was made with "actual malice."

17. 376 U.S. 254 (1964).

18. 383 U.S. 75 (1966).

19. *Garcia*, 777 F.2d at 1408 (citing Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)).

20. *Id.*; *see also Rosenblatt*, 383 U.S. at 85.

21. *Garcia*, 777 F.2d at 1409-11. The cases considered by the court include: Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); and Rosenblatt v. Baer, 383 U.S. 75 (1966).

22. *Garcia*, 777 F.2d at 1410.

23. *Id.* at 1411.

24. 415 U.S. 651 (1974). The defendants were two former directors of the Illinois Department of Public Aid, the Comptroller of Cook County and the Director of the Cook County Department of Public Aid. In view of the Court's decision that the eleventh

observed that, despite defendant's failure to pursue an eleventh amendment defense at the trial court level, the defense is jurisdictional and may be raised for the first time on appeal or if raised and abandoned, it may nonetheless be argued on appeal.[25] Relying on *Edelman*[26] the *Garcia* court, although sympathetic to the plaintiff's position, recognized the limitations placed on it by precedent.

The court then turned to the New Mexico Tort Claims Act,[27] and noted that, with the exception of eight classes,[28] governmental immunity had been statutorily reinstated. After examining the limitations on waiver of immunity by other sections of the New Mexico statutes,[29] the court concluded that the school board's attorney was without the authority to waive sovereign immunity, and that the school board was not estopped from raising an eleventh amendment defense.

After resolving these issues, the court turned its attention to determining whether the local school board members in their official capacity enjoyed protection under the state's eleventh amendment sovereign immunity. Following *Edelman v. Jordan*,[30] the Tenth Circuit held that a non-consenting state was immune from suit brought in federal court by its own citizens as well as by citizens of another state. In addition, the court, citing *Monell v. Department of Social Services*,[31] observed that state agencies and boards acting in their official capacities were protected from suit under the eleventh amendment. A dilemma arose, however, in determining whether the board or agency is acting on a state or local level. If it is determined to be "local" as defined by case law, eleventh amendment immunity is not available.[32]

The pivotal point in the decision arose when the court addressed the issue of whether New Mexico school boards were facets of the state or of the local government. The court virtually bypassed the entire issue, however, by claiming that it had already been raised and decided in both *Martinez v. Board of Education*[33] and *Maestas v. Board of Education*.[34]

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amendment prohibited the award of retroactive relief, the Court apparently felt it unnecessary to discuss whether the defendants and their agencies were entitled to raise the defense of the eleventh amendment in the first place. Conceivably, while the State Department and officials could raise the defense, the county officials might not. The Court did not discuss whether the county officials and their departments were the alter egos of the state. The Court categorized all the defendants as "state officials" without further distinction. *Id.*

25. *See Edelman*, 415 U.S. at 677-78.

26. 465 U.S. 89 (1984) (An eleventh amendment defense may be raised at any time in the proceeding).

27. N.M. STAT. ANN. §§ 41-4-4 to 25 (1978).

28. There is an exception to the immunity granted under N.M. STAT. ANN. § 41-4-4 (1978) for injury or damage caused by a public employee during the operation or maintenance of (1) motor vehicles, aircraft and watercraft; (2) buildings, public parks, machinery, equipment and furnishings; (3) airports; (4) public utilities; (5) medical facilities; (6) health care providers; (7) highways and streets; or (8) law enforcement officers.

29. *See* N.M. STAT. ANN. §§ 41-4-13 to 25 (1978).

30. 415 U.S. 651 (1974).

31. 436 U.S. 658 (1978).

32. *Garcia*, 777 F.2d at 1407 (citing Monell v. Dept. of Social Servs., 436 U.S. 658 (1978)).

33. 748 F.2d 1393 (10th Cir. 1984).

According to the Tenth Circuit, it was bound by the *Martinez* and *Maestas* decisions that consider New Mexico school boards to be arms of the state. The *Garcia* court, therefore concluded that the eleventh amendment barred suit against the school board and its members in their official capacities.[35] Based on this analysis, the judgment was reversed and remanded for dismissal on the grounds of eleventh amendment immunity, and the verdict against the counter-claimant was affirmed.

C. *Judge McKay: An Alternate View*

Although Judge McKay concurred with the majority's holding regarding non-variance in the standard of proof for defamation and the timeliness of the eleventh amendment defense, he disagreed with the majority's reasoning in allowing a local school board eleventh amendment immunity.[36] Judge McKay asserted that the local school board should be viewed as a local entity, as the members are locally elected or appointed and render decisions regarding the governance of local schools.[37]

McKay noted that the majority's problem in determining which local units are similar to municipalities and therefore not protected by the eleventh amendment began with the court's reference to *Monell v. Department of Social Services*.[38] To the contrary, McKay would have focused on the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*.[39] According to the dissent, *Mt. Healthy* was the foundational opinion in developing a two-part balancing test to differentiate state alter egos from local governmental units. As Judge McKay explained, the test consists of determining to what extent the board functions autonomously from the state government, and the extent to which the agency is financially independent of the state treasury.[40] Citing *Edelman v. Jordan*, Judge McKay reiterated that if the money for the judgment against the board would be paid from the state treasury, then the board may be immune from suit.[41] McKay observed, however, that the "majority relied upon the source of the funds" standard to the exclusion of other factors emphasized in prior case law.[42]

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34. 749 F.2d 591 (10th Cir. 1984).

35. The majority is not alone in its view. For example, the following cases have also held school boards to be alter egos of states: Harris v. Tooele County School Dist., 471 F.2d 218 (10th Cir. 1973); Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962); O'Neill v. Early, 208 F.2d 286 (4th Cir. 1953).

36. *Garcia*, 777 F.2d at 1411 (McKay, J., concurring in part and dissenting in part).

37. The following cases have held school boards not to be alter egos of the state: Adams v. Rankin County Bd. of Educ., 524 F.2d 928 (5th Cir. 1975) (per curiam), *cert. denied*, 438 U.S. 904 (1978); Fabrizio & Martin, Inc. v. Board of Educ., 290 F. Supp. 945 (S.D.N.Y. 1968).

38. 436 U.S. 658 (1977).

39. 429 U.S. 274 (1977).

40. *Garcia*, 777 F.2d at 1412 (McKay, J., concurring in part and dissenting in part) (citing *Mt. Healthy*, 429 U.S. at 280-81).

41. *Id.* (McKay, J., concurring in part and dissenting in part) (citing Edelman v. Jordan, 415 U.S. 651, 663 (1974)).

42. *Id.* at 1412 (McKay, J., concurring in part and dissenting in part); *see also Mt. Healthy*, 429 U.S. at 280-81.

The majority based its opinion on the Tenth Circuit's decisions in *Martinez* and *Maestas*.[43] As the dissent recognized, these two cases held that New Mexico school boards are state entities despite the fact that other cases, addressing identical circumstances, have reached the opposite conclusion.[44] Judge McKay summed up the variations in the treatment between similarly situated school districts in two words—"absolutely ridiculous."[45] Furthermore, he noted the majority's failure to recognize the importance of the *Mt. Healthy* decision to the *Garcia* case, particularly as it related to the functions of the school board as set forth in the New Mexico statutes.[46] From his reading of the statute, McKay concluded that the New Mexico statutory scheme shows a clear intent to maintain local control over the schools and school boards.[47] Thus, the dissent stated that the majority, by focusing on the source of funds for the judgment, had ignored the crucial issue of determining control.

Additionally, the dissent illustrated the confusion that arises in attempting to isolate the source of the funds. After discussing the relevant sections of both the New Mexico Tort Claims Act[48] and the New Mexico Public Liability Funds statutory provision,[49] Judge McKay dismissed the statutes as inapplicable to the case at hand. He reached this conclusion by reasoning that although there is a constitutional provision governing the state's satisfaction of judgments, it does not necessarily extend to suits for violations of federal constitutional rights. Since neither statute clearly authorized the payment of a federal court judgment in an action involving constitutional rights,[50] Judge McKay concluded that there was no clear indication of how such a judgment would be paid. McKay believed that, due to this surrounding uncertainty, eleventh amendment immunity should not depend on the source of the funds for payment of a judgment.[51]

Having exhausted the source of funds issue, the dissent again stressed that the degree to which a local entity acts independently of the

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43. *See supra* text accompanying notes 28-29.

44. The dissent compared the Tenth Circuit decisions in Stoddard v. School Dist. No. 1, 590 F.2d 829 (10th Cir. 1979) and Unified School Dist. No. 480 v. Epperson, 583 F.2d 1118 (10th Cir. 1978), holding school boards to be local because judgments were to be paid from special levies raised within the district itself with a Utah case where the school board was held to be a state entity because of the "possibility" of a judgment being paid, at least partially, out of state funds. *See* Harris v. Tooele County School Dist., 471 F.2d 218 (10th Cir. 1973). McKay concluded that the only significant difference was that the Utah school districts were not required to levy taxes to pay liabilities. Thus, the judgment "might" have to be paid by the states. *Garcia*, 777 F.2d at 1413 (McKay, J., concurring in part and dissenting in part).

45. *Garcia*, 777 F.2d at 1413 (McKay, J., concurring in part and dissenting in part).

46. *See* N.M. STAT. ANN. § 22-5-4 (1978).

47. *Garcia*, 777 F.2d at 1413 (McKay, J., concurring in part and dissenting in part).

48. N.M. STAT. ANN. §§ 41-4-1 to 27 (1978).

49. N.M. STAT. ANN. § 41-4-23 (1978).

50. *See Garcia*, 777 F.2d at 1416 (McKay, J., concurring in part and dissenting in part) (the dissent discusses Article 8, section 7 of the New Mexico Constitution and selected portions of the New Mexico statutes).

51. *See supra* note 1 and accompanying text.

state is a major factor in determining whether the eleventh amendment applies. Reiterating the approach taken in *Mt. Healthy*[52] and *Unified School District No. 480 v. Epperson*,[53] McKay restated his position that where the state controls a local body to the extent of making decisions that affect the constitutional rights of its citizens, the eleventh amendment should apply. If, however, the school board functions independently of the state, then immunity under the eleventh amendment should not be available. The dissent further maintained that in order for immunity to apply, the state must maintain actual control over the board. General supervision over the board's actions would not be sufficient. McKay concluded by stating that the New Mexico school boards act independently of the state in day-to-day management.[54] The general supervision that the state provides is not sufficient to qualify the school board for protection under the eleventh amendment. Thus, McKay determined that the New Mexico school board is subject to suit, and he would have affirmed the trial court's decision.[55]

III. BACKGROUND

A. *Pre*-Garcia

It is doubtful that Justice Blackstone was aware of the imprint he would leave on American jurisprudence when in 1765 he coined the phrase "The King can do no wrong."[56] For centuries Blackstone's phrase has been the foundation for the doctrine of sovereign or governmental immunity. This doctrine has insulated both individual public officials and state and local governments from suit.

Under the original doctrine of governmental immunity, which has been captured in the eleventh amendment, the state and its political subdivisions were amenable to suit only if they consented to such. From its earliest inception, the doctrine barred the recovery of an aggrieved plaintiff from a sovereign defendant without consideration of the cause of action or merits of the case. Recognizing the inherent injustice that

52. *Mt. Healthy*, 429 U.S. at 280-81 (four factors used to determine the extent of an agency's autonomy).

53. 583 F.2d 1118 (10th Cir. 1978).

54. *Garcia*, 777 F.2d at 1417 (McKay, J., concurring in part and dissenting in part).

55. McKay ignored the plaintiff's assertion that the trial court erred in submitting other constitutional issues to the jury. The plaintiff's failure to sustain his burden of showing that his interest in free speech was a major factor in the school board's decision, McKay noted, was fatal to his first amendment claim. *Garcia*, 777 F.2d at 1417 (McKay, J., concurring in part and dissenting in part) (citing *Mt. Healthy*, 429 U.S. at 284-87). Similarly, McKay rejected the property interest issue on the basis that a property interest does not exist in the mere hope or expectation of contract renewal. To succeed on the liberty interest claim, the reasons for dismissal must stigmatize the plaintiff's reputation or foreclose future employment opportunities. *Id.* at 1418 (McKay, J., concurring in part and dissenting in part). Should such a stigma result, due process requires that an opportunity to be heard be provided. *Cf.* Paul v. Davis, 424 U.S. 693, 708-10 (1976) (mere injury to reputation alone was not deprivation of plaintiff's "liberty" interest). McKay concluded that it could not be said as a matter of law that the trial court erred in submitting the constitutional issues to the jury.

56. 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 516 (1923).

occurred from such lack of consideration, courts began to modify[57] the absolute immunity maxim. The modifications occurred on a state-by-state basis and involved everything from complete abrogation to total acceptance of immunity. Further, the stringent theory of "The King can do no wrong" which was prevalent in the Blackstone era, has been tempered with sensitivity to individual rights. One indication of such temperance was the passage of section 1983.

B. *Section 1983*

Originally called the Ku Klux Klan Act of 1871,[58] section 1983 is the section of the Civil Rights Act under which Garcia alleged violations of his first amendment rights. Garcia also asserted that the defendants deprived him of liberty and property without due process.[59] Section 1983 was initially enacted to provide a measure of federal control over state and territorial officials who were reluctant to enforce state laws against persons violating the rights of newly freed slaves and union sympathizers. Creating a right of action in the federal courts against local government officials provided a neutral forum for an aggrieved citizen to present his complaint.[60]

In general, section 1983 serves as an enforcement provision for the fourteenth amendment.[61] The two primary elements of this provision, as explained by the Supreme Court, are (1) the deprivation of a federal right and, (2) that the person caused the deprivation while acting under color of state or territorial law.[62] Other elements of a section 1983 action include proof of proximate cause[63] and redress.[64] Usually, this last

57. One modification included separating the sovereignty of public entities' functions from the general class of sovereign activity. Thus, a harm caused by a public employee engaged in an activity not deemed sovereign was not granted immunity. A second modification involved the development of a waiver of immunity thereby consenting to the suit. Such consent was inferred from actions on the government's part such as purchasing liability insurance. Patula, *The Colorado Governmental Immunity Act: A Prescription for Regression*, 49 DEN. L.J. 567, 567-68 (1971).

58. H.R. REP. No. 548, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 2609.

59. *Garcia*, 777 F.2d at 1404.

60. *See supra* note 52.

61. Section 1983 operates on a "double incorporation" principle by incorporating the fourteenth amendment which has been construed to incorporate selected provisions of the Bill of Rights. Thus, this provision affords a civil remedy for the constitutional amendments incorporated into the due process clause and applied to the states. *See generally*, S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO SECTION 1983 § 2.03 (Cum. Supp. 1982).

62. Gomez v. Toledo, 446 U.S. 635, 640 (1980). The Court observed "These elements reflect a congressional judgment that damages remedied against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Id.*

63. The need to show proximate cause was the result of the Court's decision in Monell v. Dept. of Social Servs., 463 U.S. 658, 691-92 (1978) (requiring that the plaintiff show a causal relationship between defendant's conduct and the alleged deprivation of rights).

64. To successfully maintain a section 1983 suit, a plaintiff must show actual damage resulting from defendant's conduct. *See, e.g.*, Corriz v. Baranjo, 667 F.2d 892 (10th Cir. 1982).

element is satisfied by showing that the defendant's conduct caused some actual damages.

A defense of immunity can be raised to defeat an otherwise valid section 1983 claim. Such a defense can be presented in two ways: absolute immunity or qualified immunity.[65] Absolute immunity protects the defendant entirely from any liability for damages asserted under section 1983. Qualified immunity, on the other hand, only protects a defendant whose actionable conduct was undertaken in good faith.[66] Although the immunity defenses were originally available to both individuals and governmental entities faced with a federal civil rights action, in recent years such immunities have been narrowed to protect only individual defendants, and only against damages.[67]

C. *Eleventh Amendment*

Article III of the Constitution provides, in part, that "[t]he judicial Power [of the United States] shall extend . . . to Controversies . . . between a State and Citizens of another State. . . ."[68] The United States Supreme Court was called upon to decide if article III implied that a state could be sued in assumpsit in federal court by a citizen of another state.[69] In the early decision of *Chisholm v. Georgia*,[70] the Court, despite the existence of common law sovereign immunity, held that a state could be sued in a federal court by a citizen of another state.[71] However, in order to reinstate the doctrine of sovereign immunity to the states, and in response to the Court's holding in *Chisholm*, the eleventh amendment was passed by Congress in 1798.[72] By its terms, the eleventh amendment affords protection from suits by citizens of another state, but does not provide protection for states sued in federal court by their own citizens. The Supreme Court addressed this problem in *Hans v. Louisiana*.[73] The Court in *Hans* held that states should also enjoy eleventh amendment protection from suits brought in federal court by their own citizens.[74] Despite the expanded protection given to the states, the Court did not view its decision as an extension of eleventh amendment coverage.[75] Rather, the Court reiterated that the amendment served to affirm a state's sovereign immunity.

Notwithstanding the Court's posture in *Chisholm* and *Hans*, there re-

65. Rader, *Section 1983, The Civil Rights Action: Legislative and Judicial directions*, 15 CUM. L. REV. 571, 610 (1985).

66. *Id.* at 611-13 (discussion of absolute and qualified immunity).

67. *Id.* at 610-11.

68. U.S. CONST. art. III § 2.

69. Silfen, *Constitutional Law — The Eleventh Amendment as Applied to State Agencies: A Survey of the Cases and a Proposed Model for Analysis*, 22 VILL. L. REV. 153, 153-54 (1976-77).

70. 2 U.S. (2 Dall.) 419 (1793).

71. *Id.* at 420. Chisholm, a citizen of South Carolina, bought an action as executor of the estate of Farquhar, also a South Carolina citizen, on a claim for goods delivered to the state of Georgia for which no payment was received.

72. *See supra* note 12.

73. 134 U.S. 1 (1890).

74. *Id.*

75. *Id.* at 12-14.

mained an uncertainty as to the level of protection being provided by the eleventh amendment. The line between permissible and impermissible action was more clearly defined by the Supreme Court in *Edelman v. Jordan*.[76] Though not a school board case, *Edelman* set the pace for later decisions regarding the eleventh amendment. Specifically, the plaintiff in *Edelman* brought an action against two Illinois state officials. The suit alleged deprivation and untimely payment by defendants of the plaintiff's monthly assistance program checks.[77]

Based on its reading of eleventh amendment history, the Court concluded that "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[78] Emphasizing the agency's financial status, the Court held that the eleventh amendment constituted a bar to the retroactive decree ordered by the district court.[79] Thus, the *Edelman* Court, though intending to clarify the application of the eleventh amendment, instead created more confusion regarding its applicability.

Further confusion arose in 1978 when the Court again was confronted in *Monell v. Department of Social Services*[80] with determining what circumstances give rise to eleventh amendment protection. Having previously held that states as well as state officials and agencies were subject to eleventh amendment protection, the Court focused on the circumstances under which such protection may be available to state officials and agencies. The plaintiffs in *Monell* were pregnant women employed by the New York State Department of Social Services and the Board of Education. They sought redress for being required to take unpaid leave of absence before such leaves were medically necessary. The *Monell* Court set forth the rule that if an agency is the alter ego[81] of the state, then it enjoys eleventh amendment immunity. If, however, the agency is determined to be local in nature as defined by case law, it will not enjoy eleventh amendment immunity.[82] Thus, *Monell* narrowed the applicability of eleventh amendment immunity by establishing a dichotomy between state and local functions to be determined by the relationship between the state and the entity being sued.[83]

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76. 415 U.S. 651 (1974).

77. The plaintiff claimed that the defendants, agency employees of the Illinois Department of Public Aid, authorized grants only in the months during which the applications were approved, and that they failed to follow the time regulations for processing applications. *Id.* at 653-56.

78. *Id.* at 663.

79. *Id.* at 668.

80. 436 U.S. 658 (1978).

81. The term "alter-ego" has often been used by the courts to mean that the agency embodies the attributes of the state and is entitled to its protection under the eleventh amendment. *See, e.g.*, George R. Whitten Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177, 180 (1st Cir. 1974) (quoting Charles Simkin & Sons, Inc. v. State Univ. Constr. Fund, 352 F. Supp. 177 (S.D.N.Y. 1973)).

82. *Garcia*, 777 F.2d at 1407.

83. *Id.*

D. *The "Alter Ego" Concept*

The alter ego issue was expanded by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*.[84] The Court offered guidelines to be used in determining whether an entity is entitled to protection under the eleventh amendment. Similar to the circumstances in *Garcia*,[85] the plaintiff in *Mt. Healthy* was an untenured teacher who was discharged under alleged violations of her civil rights. Among the events leading up to the section 1983 action were: An altercation with another teacher, arguments with employees, swearing and obscene gestures to students and a phone call made by the plaintiff to a radio station to discuss a faculty memorandum relating to teacher dress and appearance. The radio station subsequently announced the adoption of a school dress code as a news item. Thereafter, the defendant school board advised the plaintiff he would not be rehired and cited his lack of tact regarding professional matters, with specific reference to the two unfavorable incidents, as grounds for its decision.[86]

Claiming a violation of his rights under the first and fourteenth amendments, the plaintiff brought an action against the school board. The district court found in favor of the plaintiff, and the decision was affirmed on appeal.[87] Disagreeing with the district court's posture on the school board's eleventh amendment immunity claim,[88] the Supreme Court addressed the issue of whether such immunity extends to school boards.[89]

On appeal, the Court addressed the issue of whether the Mt. Healthy Board of Education should be viewed as an arm, or alter ego, of the State and thus entitled to eleventh amendment immunity, or instead as a municipal corporation or other political subdivision that does not enjoy the shield of the eleventh amendment.[90] In its brief discussion, the Court determined that "[t]he answer depends, at least in part, upon the nature of the entity created by state law."[91] The Court pointed out that under Ohio law, the term "State" does not include "political subdivisions," of which local school districts are considered members.[92] The Court also noted that Ohio had many local school boards of which the defendant was only one. The defendant school board was, however,

84. 429 U.S. 274 (1977).

85. *See supra* notes 2-11 and accompanying text.

86. *Mt. Healthy*, 429 U.S. at 274 (although not detailed in the case, the altercation with the other teacher resulted from an obscene gesture by the respondent).

87. The district court concluded that the telephone call to the radio station was clearly protected by the first amendment and that because it had played a substantial part in the board's decision not to rehire the plaintiff, he was entitled to reinstatement with back pay. *Id.* at 276.

88. The district court evaded the issue of whether the eleventh amendment applied to school boards. The court maintained that application of the eleventh amendment was irrelevant to the case because, even if it did exist, it had been waived by the board. *Id.* at 279-80.

89. *Id.* at 280.

90. *Id.*

91. *Id.*

92. *Id.*

subject to some guidance from the Ohio State Board of Education and received significant revenue from the state.[93] Finally, the local school boards had power to levy taxes and issue bonds. Based on these findings, the Court concluded that the Ohio school board was not entitled to immunity under the eleventh amendment because "[o]n balance, the record . . . indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State."[94] Thus, *Mt. Healthy* established some of the factors to consider in determining an entity's status under the eleventh amendment.[95]

E. *Cases Since* Mt. Healthy

Since *Mt. Healthy*, several courts have addressed the issue of whether a particular school board or district is entitled to eleventh amendment immunity. For example, in *Unified School District No. 480 v. Epperson*,[96] the Tenth Circuit resolved a dispute initiated by two school teachers against a Kansas school district. The teachers claimed that their teaching contracts were not renewed in retaliation for their exercise of first amendment rights. The *Epperson* court set forth that "the powers, nature, and characteristics of the board or agency must be critically examined under state law." It further held that courts must examine: "(1) To what extent does the board, although carrying out a state mission, function with substantial autonomy from the state government and, (2) to what extent is the agency financed independently of the state treasury."[97] Applying these factors to the case, the *Epperson* court held that: (1) because an award of damages would be paid not by the state but by a special levy within the defendant school district, and (2) because the defendant was only supervised and not controlled by the state board of education, the defendant was not immune from suit under the eleventh amendment.[98]

The eleventh amendment alter ego issue was also raised in *Stoddard v. School District No. 1*.[99] In this case, the Tenth Circuit was presented with a suit by a schoolteacher against a Wyoming school district, members of the board of trustees, and a principal, alleging nonrenewal of her contract for reasons violative of the first and fourteenth amendments.[100] Reiterating the Court's holding in *Mt. Healthy*, the Tenth Circuit court stated that "[t]he School District in the instant case is 'more like a city or county than it is like an arm of the state.' "[101] Thus, the Wyoming

93. *Id.*
94. *Id.*
95. For a general discussion of the factors that have been the basis for other courts' decisions regarding whether a school board is the alter-ego of the state, see Comment, *State Governmental Corporation Immunity from Federal Jurisdiction under the Eleventh Amendment*, 72 DICK. L. REV. 296 (1968).
96. 583 F.2d 1118 (10th Cir. 1978).
97. *Id.* at 1121-22 (citations omitted).
98. *Id.* at 1123.
99. 590 F.2d 829 (10th Cir. 1979).
100. *Id.*
101. *Id.* at 835 (citations omitted).

school district was not an arm of the state, and was therefore not entitled to eleventh amendment immunity.

The alter ego issue was also raised by the Fifth Circuit in *Moore v. Tangipahoa Parish School Board*.[102] Although the facts differed slightly from the *Mt. Healthy*, *Epperson*, and *Stoddard* cases, the conclusion was the same. In a class action desegregation case against a Louisiana school board, the *Moore* court noted several factors which exhibited the boards' local character[103] and held that Louisiana school boards were autonomous political subdivisions and not alter egos of the state from the standpoint of sovereign immunity.

Finally, the alter ego issue was considered in *Travelers Indemnity Co. v. School Board of Dade County*.[104] The facts involved an action by a surety based on a performance bond against the county board of education.[105] Notwithstanding the facts of the case, the *Travelers* court quoted the Fifth Circuit, stating:

> [t]he Eleventh Amendment does not bar [a plaintiff] from such award so long as the entities sued are locally controlled, essentially local in character, and funds to defray the awards would not be derived primarily from the State Treasury. (Citations omitted). Our analysis of the nature of Florida School Boards in the context of determining their similarity to municipalities is sufficient to convince us that they are not the type of entities which are sheltered by the Eleventh Amendment.[106]

Based on these standards, the court concluded that nothing in the nature of the county school boards in Florida would entitle it to eleventh amendment protection.[107]

IV. Analysis: Garcia's Effect Under Existing Law

The Tenth Circuit Court's decision in *Garcia* with regard to the alter ego issue disregards the Supreme Court's holding in *Mt. Healthy*. The *Garcia* opinion, though not the first to stray[108] from the *Mt. Healthy* and *Epperson* decisions, represents a substantial detour from accepted standards. The decision also ignores relevant public policy issues.

In a cursory manner, the *Garcia* majority addressed the eleventh amendment alter ego issue, and then disposed of the matter based on

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102. 594 F.2d 489 (5th Cir. 1979).

103. The *Moore* court noted the following:

> [1] Louisiana school boards, such as the defendants, have the power to sue and be sued . . . [2] they have the power to contract . . . [3] they have the power to purchase, hold and sell property . . . [4] they have the power to borrow funds . . . [5] they have the power to levy and collect taxes from which back pay claims can be met.

Id. at 493-94 (5th Cir. 1979) (quoting the district judge in Smith v. Concordia Parish School Bd., 387 F. Supp. 887, 891 (W.D. La. 1975)).

104. 666 F.2d 505 (11th Cir. 1982).

105. *Id.*

106. *Id.* at 507 (quoting Campbell v. Gadsen County Dist. School Bd., 534 F.2d 650, 655-56 (5th Cir.), *reh'g denied*, 539 F.2d 710 (1976)).

107. *Id.* at 508.

108. *See supra* note 35.

prior holdings in *Martinez v. Board of Education*[109] and *Maestas v. Board of Education*.[110] Unfortunately, the cases relied upon most heavily by the *Garcia* court handle the eleventh amendment issue inadequately. Thus, the resultant weakness seeps over into *Garcia*.

Close examination of the *Martinez* opinion reveals the inherent flaws in the court's analysis. Specifically, the *Martinez* court recognized the need to decide whether New Mexico school boards were local in nature or were controlled by the state board. Rather than examining the powers and responsibilities allocated to the local boards by statute,[111] the court selectively examined six duties delegated to the state board by the legislature.[112]

From this brief examination of the selected duties, and in conjunction with Art. XII, section 6, of the New Mexico Constitution, the court concluded that the state had extremely broad powers over public schools.[113] The court did recognize, however, and pay lip service to the fact that some of the provisions of the New Mexico statutes were identical to those analyzed in *Mt. Healthy*. However, the court claimed that the enumerated powers found in *Mt. Healthy* "were not in the context of the state board's 'control, management, and direction.' "[114]

Finally, the *Martinez* court agreed that issuing bonds for capital improvements was a significant concern, and that the local boards had the initial decision of whether or not to provide for such improvements. Once again, the court skirted the issue of local control by noting that the right to approve bond issues rested with the state depending on the type of bonds proposed.[115] As a result, the court held that the local boards were arms of the state system of education.

The *Garcia* court found favor with the reasoning applied by the *Martinez* and *Maestas* courts and relied heavily on these decisions. Such reliance, however, led the court to a decision that might have been altered by a more thorough investigation. Specifically, the *Garcia* court would have been well advised to review and discuss the sixteen functions allo-

109. 748 F.2d 1393 (10th Cir. 1984).

110. 749 F.2d 591 (10th Cir. 1984).

111. N.M. STAT. ANN. § 22-5-4 (1978).

112. The seven duties selectively examined by the court included:

> (1) designate courses of instruction taught in all public schools in the state; (2) determine the qualifications for . . . any person teaching . . . or administering in public schools according to law . . . a system of classification adopted . . . by the state board; (3) suspend or revoke a certificate held by an . . . instructor or administrator according to law for incompetency, immorality or for any other good and just cause; (4) prescribe courses of instruction, requirements for graduation and standards for all public schools; (5) accept and receive all grants of money from the federal government . . . and disburse the money; (6) adopt regulations for the administration of all public schools; and (7) provide for management . . . to operate any public school or school district which has failed to meet requirements of law, state board standards or state board regulations.

Martinez, 748 F.2d at 1394-95.

113. *Id.* at 1394.

114. *Id.* at 1395.

115. *Id.*

cated to local schools by the New Mexico legislative scheme.[116]

The dissent recognized the importance of considering these factors. Had the majority reviewed the statute, their outlook on the *Garcia* case may have been altered. For example, the New Mexico statutes allow the local school boards to employ a superintendent, to fix the superintendent's salary, to fix the salary of all employees, to acquire and dispose of property, to issue general obligation bonds of the school district, and to adopt regulations pertaining to the administration of all powers or duties of the local school board.[117] These functions are clearly local in nature, and require, only "some guidance" from the state board.[118] Therefore, according to the *Mt. Healthy* rationale, immunity based on state control is lacking.

In addition, not only does the *Garcia* decision ignore *Mt. Healthy*, but the decision also departs from similarly situated cases in other circuits.[119] Ultimately, *Garcia* serves to complicate and blur the view of who or what is entitled to protection under the eleventh amendment. The opinion provides a lenient application of eleventh amendment immunity, yet fails to provide a stabilized definition of what constitutes an alter ego. As it stands, the *Garcia* opinion can best be analogized to a newborn foal attempting to stand for the first time: there exists the desire to achieve a goal, but without the necessary support, the attempt is wobbly and the result is to fall back to the position from which he started.

V. BEYOND GARCIA

Notwithstanding *Garcia*, section 1983 and subsequent cases[120] exemplify a movement away from "The King can do no wrong" to an era that recognizes the responsibility of local school board members for their decisions. Threat of suit for wrongful conduct by school board officials effects both the type and the quality of the decisions school board members make. Further, such shifts influence the preparation that board members must undergo in taking office, as they will be held accountable for protecting the rights of persons employed by the school and of students enrolled in it.[121] *Garcia*, however, exempts board mem-

116. *See supra* note 104.

117. *Garcia*, 777 F.2d at 1414 (citing N.M. STAT. ANN. § 22-5-4 (1978)).

118. *Mt. Healthy*, 429 U.S. at 280.

119. *See supra* notes 102-107 and accompanying text.

120. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975) (school officials held liable for violation of student's constitutional rights); Hickman v. Valley Local School Dist., 619 F.2d 606 (6th Cir. 1980) (reinstatement and back wages for teacher dismissed for exercise of first amendment rights); Kingsville Independent School Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980) (awarding reinstatement to a teacher who sued the school board for violation of civil rights); Adelberg v. Labuszewski, 447 F. Supp. 267 (N.D. Ill. 1978) (money damages awarded for violation of superintendent's civil rights).

121. The opposite side of the coin entails the notion that the threat of personal liability for school board members interferes with the proper functioning of the educational system by inhibiting public officials in the performance of their duties including involving school officials in legal battles for months or years. *See* J. MAHONEY, SECTION 1983: SWORD AND SHIELD 318 (R. Freilich & R. Carlisle ed. 1983).

bers from having to justify or defend the actions taken, as any such challenges will now be warded off with the eleventh amendment shield.

Under the umbrella of the eleventh amendment, the *Garcia* case gives a higher priority to the protection of the school boards then to the protection and compensation of individuals experiencing infringements of civil and constitutional rights. The viability of such a decision remains questionable. Given the decisions that have emerged from other jurisdictions, the *Garcia* court could have chosen several alternatives to granting complete immunity. One such alternative is the qualification of eleventh amendment immunity in situations involving school districts. For example, if total abrogation of eleventh amendment immunity is not desired, then perhaps a standard should be proposed which obligates the New Mexico School Districts and Boards to compensate plaintiffs for tortious activity committed by their employees. In essence, the goal is to assure that a school board occupies no better position than citizens do. Without doubt, circumstances will arise under which the force of such a compensation principle will be suspended, thus, a system of strict liability is not at issue.[122]

Ultimately, a compensation principle enforced against the New Mexico School Districts and school boards would help promote important societal goals. America's educational system strives to enlighten the young and transform illiterates into literates while socializing individuals into various civil roles.[123] Since the school officials play a crucial role in a vital part of America, it is only reasonable to expect some form of accountability on the part of those officials. It is such accountability that is lacking in the *Garcia* decision. In essence, the *Garcia* decision reduces the accountability of those who influence the very heart of American life.

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122. P. SCHUCK, SUING GOVERNMENT, Yale University Press 111 (1983).
123. W. KNAAK, SCHOOL DISTRICT TORT LIABILITY IN THE 70'S 1 (1969).