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STATE EMPLOYERS ARE NOT SOVEREIGN: BY ANALOGY,  
TRANSFER THE MARKET PARTICIPANT EXCEPTION TO  
THE DORMANT COMMERCE CLAUSE TO STATES AS  
EMPLOYERS

LARA GARDNER\*

INTRODUCTION

This Note argues that states should be treated as market participants and not be given sovereign immunity under the Eleventh Amendment when they are acting as private employers. Through an expansive reading of the Eleventh Amendment, the Supreme Court has restricted the right of state employees to sue under federal statutes intended to protect employees when the state is the employer and it claims sovereign immunity.<sup>1</sup> Under the market participant exception to the dormant Commerce Clause, if a state is acting as a market participant, rather than a market regulator, it is no longer bound by the restraints of the Commerce Clause. The reasons that states acting as employers should be treated as market participants rather than sovereigns are as persuasive as the arguments supporting the market participant exception. By analogy, this doctrine should be transferred from its exclusive application in the dormant Commerce Clause context to include instances when states are acting as employers and thus, market participants. Traditionally, the market participant exception has worked to states' benefit, allowing them to act in

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1. Currently, the only mechanisms available to sue states without violating the principles of the Eleventh Amendment are waiver, suits against state officers, and abrogation. See Timothy S. McFadden, *The New Age of the Eleventh Amendment: A Survey of the Supreme Court's Eleventh Amendment Jurisprudence and a Review of Kimel v. Florida Board of Regents*, 27 J.C. & U.L. 519, 537 (2000); Sabina Sosunova & Bonnie A. Tucker, *The Eleventh Amendment: "A Work in Progress"*, 19 HOFSTRA LAB. & EMP. L.J. 255, 263-64 (2001). See discussion *infra* Part III.A on why these mechanisms are not enough to vindicate individual rights.

the same capacity as a private company without Commerce Clause concern. If states are going to enjoy the benefits of private employers, they ought to be subject to the same limits as private employers as well. As an employer, a state is not acting in its regulatory capacity. Rather, it is acting as a private actor. Therefore, it should be treated as a market participant and not evade regulation by claiming sovereign immunity.

## I. STATE SOVEREIGN IMMUNITY

A variety of rationales have been postulated to support the theory of state sovereign immunity. Until fairly recently, with decisions such as *Alden v. Maine*,<sup>2</sup> the constitutional authority used to endow states with sovereign immunity has been the Tenth Amendment. When the Tenth Amendment proved not sufficiently successful as a vehicle for state sovereign immunity, Eleventh Amendment arguments were used as a supplement.<sup>3</sup> Lately, the Court has applied reasoning beyond the Eleventh Amendment to justify state sovereign immunity.

### A. *The Tenth Amendment*

The Tenth Amendment to the Constitution states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>4</sup> The Supreme Court stated in 1941 that the Tenth Amendment was nothing more than “declaratory” that Congress must have authority to act under the Constitution.<sup>5</sup> This approach was followed until 1976 when the Court, in *National League of Cities v. Usery*, invalidated a federal law for violating the Tenth Amendment on the grounds that Congress was abrogating state sovereignty.<sup>6</sup> The

2. 527 U.S. 706 (1999). The Court in this case characterizes “[state sovereign] immunity as an absolute precept of political and legal tradition,” and “conveniently sidesteps the textual limitations of the Amendment.” Matthew Mustokoff, *Sovereign Immunity and the Crisis of Constitutional Absolutism: Interpreting the Eleventh Amendment after Alden v. Maine*, 53 ME. L. REV. 81, 85 (2001).

3. See George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1985).

4. U.S. CONST. amend. X.

5. *United States v. Darby*, 312 U.S. 100, 124 (1941) (“There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments. . .”).

6. 426 U.S. 833, 852 (1976).

case involved the Fair Labor Standards Act (“FLSA”).<sup>7</sup> The FLSA required employers pay employees a minimum hourly wage and one and half times the regular hourly rate for hours worked in excess of forty hours per week.<sup>8</sup> The Court held that state autonomy was sufficient to invalidate the application of the statute to state and local governments.<sup>9</sup> The Court stated that the Commerce Clause did not empower Congress to enforce the provisions of the FLSA against states in “traditional governmental functions.”<sup>10</sup> After this decision, litigants began bringing Tenth Amendment challenges to other laws.

Nearly ten years later, however, after a series of decisions where the Court rejected state sovereignty challenges under the Tenth Amendment,<sup>11</sup> a divided Court decided, in *Garcia v. San Antonio Metropolitan Transit Authority*, that the standards in *National League of Cities* had proven unworkable.<sup>12</sup> In *Garcia*, another FLSA case, the Court expressly overruled *National League of Cities*.<sup>13</sup> The Court stated that it was too difficult to determine where Congressional authority ended and State regulatory immunity began.<sup>14</sup> The Court also stated that “[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a ‘sacred province of state autonomy.’”<sup>15</sup>

*Garcia* was a 5–4 decision, with the dissents’ assurances that the Court would return to the reasoning of *National League of Cities*. Their predictions proved somewhat accurate; in 1991, the Court revived the Tenth Amendment in *Gregory v. Ashcroft*. The basis for the decision in *Gregory* was statutory construction and not the Tenth

7. 29 U.S.C. §§ 201–19 (2000).

8. *National League of Cities*, 426 U.S. at 835–36.

9. *Id.* at 852.

10. *Id.*

11. See *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982) (application of the Railway Labor Act to a state-owned railway did not violate the Tenth Amendment); *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742 (1982) (rejecting a Tenth Amendment challenge to portions of the Public Utility Regulatory Policies Act of 1978 which required state utility commissions consider FERC proposals); *EEOC v. Wyoming*, 460 U.S. 226 (1983) (upholding a federal law forcing states to comply with the Age Discrimination in Employment Act).

12. 469 U.S. 528, 531 (1985).

13. *Id.*

14. *Id.* at 530–31.

15. *Id.* at 554 (quoting *Wyoming*, 460 U.S. at 236).

Amendment.<sup>16</sup> However, the Court readdressed State sovereign immunity under the Tenth Amendment. In *Gregory*, state court judges in Missouri challenged as a violation of the Age Discrimination in Employment Act (“ADEA”)<sup>17</sup> a provision of the Missouri Constitution setting a mandatory retirement age for state judges.<sup>18</sup> The Court held that a federal law will be applied to the states only if there is an unambiguous statement from Congress that it “intends to pre-empt the historic powers of the States.”<sup>19</sup> Such a mandate would make it clear that Congress is choosing to exercise the full extent of its powers.<sup>20</sup> In the Court’s estimation, the ADEA lacked such a clear mandate,<sup>21</sup> and therefore, refused to preempt the mandatory retirement age.<sup>22</sup> The Court also stressed that the Tenth Amendment protects state sovereignty.<sup>23</sup>

Two decisions followed *Gregory* which affirmatively used the Tenth Amendment to invalidate federal employment laws, *New York v. United States*<sup>24</sup> and *Printz v. United States*.<sup>25</sup> In *New York*, the Court held that although Congress has substantial power to govern the nation “including areas of intimate concern to the States,” that power did not allow Congress to compel the states to act according to Congressional mandate.<sup>26</sup> In *Printz*, the Court stated that Congress could not “issue directives” to the states, ordering them to “address particular problems [ ]or command State[] officers . . . to administer or enforce federal” programs.<sup>27</sup> Although these cases used the Tenth Amendment to invalidate the laws, the application of the Tenth Amendment was different from that used in *National League of Cities* and *Garcia*.

*National League of Cities* attempted to define where federal authority ended and state authority began. The Congressional acts in question were examined as being on one side of the line or the other. This approach was ultimately discarded in *Garcia*. The *Garcia* court

16. 501 U.S. 452, 467 (1991).

17. 29 U.S.C. §§ 621–34 (2000).

18. 501 U.S. at 455.

19. *Id.* at 461.

20. *Id.*

21. *Id.* at 467.

22. *Id.* at 473.

23. *Id.* at 463.

24. 505 U.S. 144 (1992).

25. 521 U.S. 898 (1997).

26. 505 U.S. at 162.

27. 521 U.S. at 935.

determined that state sovereign immunity had to derive from the structure of the federal system itself.<sup>28</sup>

*New York* and *Printz* were not concerned with any lines or substantive structure.<sup>29</sup> Rather, in both cases, the Court said the Tenth Amendment was a rule to interpret the Constitution, and that the states retain original power not divested by the Constitution.<sup>30</sup>

In 2000, the Court unanimously rejected a Tenth Amendment challenge to the federal Driver's Privacy Protection Act ("DPPA")<sup>31</sup> in *Reno v. Condon*.<sup>32</sup> South Carolina challenged the statute on Tenth Amendment grounds, arguing that the statute made state officials the "unwilling implementors of federal policy."<sup>33</sup> The Court agreed that the statute would require effort by state employees, but disagreed that the principles of *New York* or *Printz* applied.<sup>34</sup> The Court distinguished these cases and further defined the principles under which Congress can regulate the states. The Court stated, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."<sup>35</sup> The Court did not agree with South Carolina that the statute violated these principles. The Court stated that the DPPA does not require the state to regulate its citizens; rather, the DPPA regulates the states as the owners of the driver record database.<sup>36</sup>

One of the Court's reasons for upholding the DPPA is that the statute "regulates the universe of entities that participate as suppliers to the market for motor vehicle information."<sup>37</sup> Because South Carolina is one of these "entities," it can be regulated. This is the reason states should be regulated as employers, but paradoxically, they are not.

28. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548–51 (1985).

29. Rather, these cases were concerned with procedural structure, saying that there were Tenth Amendment limits to the manner in which the federal government acted vis-à-vis the states, even though the federal government had substantive power under the Commerce Clause and under *Garcia*.

30. 505 U.S. at 156; 521 U.S. at 918–19.

31. 18 U.S.C. §§ 2721–2725 (2000).

32. 528 U.S. 141, 151 (2000).

33. *Id.* at 150.

34. *Id.* at 149.

35. *Id.*

36. *Id.* at 151.

37. *Id.*

Although the Tenth Amendment has been somewhat useful for arguing state sovereign immunity, the holding of *Garcia* is still good law. Based on that decision, the Court is unlikely to examine a statute based on an appraisal of whether it is “integral” or “traditional.”<sup>38</sup> However, lately, the Court has used the limits imposed by the Eleventh Amendment to define what actions Congress can authorize against the states. In fact, recent decisions have looked beyond the Eleventh Amendment to justify broad state sovereign immunity.

### B. *The Eleventh Amendment*<sup>39</sup>

The Eleventh Amendment is a strange amendment that has often been misinterpreted since its inception. Thirty years after the ratification of the Constitution, a group of private citizens from the state of South Carolina sued the state of Georgia in federal court.<sup>40</sup> Following the Supreme Court’s decision holding that Georgia had no immunity from suit by a citizen of another state, the Eleventh Amendment was created.<sup>41</sup>

The text of the Eleventh Amendment declares that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>42</sup> This new amendment limited the ability of citizens to sue a state that was not their own. Nearly one hundred years later, in *Hans v. Louisiana*, the Court interpreted the Eleventh Amendment to limit the ability of citizens to sue their own state as well.<sup>43</sup>

The Court in *Hans* theorized that because the Eleventh Amendment was ratified so quickly, it must have meant that the states intended to be immune as sovereigns.<sup>44</sup> Justice Bradley, writing

38. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985).

39. See McFadden, *supra* note 1, for an in depth analysis of the background of state sovereign immunity and the Eleventh Amendment.

40. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (holding that Article III, § 2 of the Constitution authorized suits against the states); McFadden, *supra* note 1, at 522.

41. See McFadden, *supra* note 1, at 524. “Less than three weeks after the *Chisholm* decision, both houses of Congress had approved the Eleventh Amendment,” and it was ratified within a year. *Id.* Many commentators have argued that such rapid ratification was evidence that the decision was incorrect. *Id.* However, it is arguable that the war debts owed by the states and concern over repayment played a role in the expeditious ratification.

42. U.S. CONST. amend. XI.

43. 134 U.S. 1 (1890).

44. *Id.* at 11–12.

for the majority, argued that the Framers of the Constitution intended that the states retain sovereign immunity.<sup>45</sup> In effect, the Eleventh Amendment also meant to exclude suits by states' own citizens.<sup>46</sup> Today, the *Hans* reasoning is used to support a broad reading and application of the Eleventh Amendment.<sup>47</sup> However, there is no consistent agreement as to what the Eleventh Amendment means.<sup>48</sup>

Recent decisions have not been a clear majority; rather, opinions are splintered, with each Justice writing a separate opinion or dissent. In all but one case, the decisions are always a 5–4 split, with Justices Rehnquist, Kennedy, O'Connor, Scalia, and Thomas upholding state sovereign immunity and a broad reading of the Eleventh Amendment, and Justices Breyer, Ginsburg, Stevens, and Souter arguing for less sovereign immunity and a more narrow reading of the Eleventh Amendment.<sup>49</sup> The divided opinions are also often severed even further. For example, in *Seminole Tribe of Florida v. Florida*,<sup>50</sup> Justice Stevens and Justice Souter each wrote dissenting opinions. Similarly, in *Kimel v. Florida Board of Regents*,<sup>51</sup> Justice Stevens and Justice Thomas each wrote a separate opinion concurring in part and dissenting in part. The one consistent aspect of the numerous recent decisions, however, is that state sovereign immunity has expanded under the Eleventh Amendment.<sup>52</sup>

### C. Eleventh Amendment Cases Limiting Private Causes of Action

These recent decisions began with *Seminole Tribe of Florida v. Florida*.<sup>53</sup> This decision “was a key turning point in recent Eleventh Amendment jurisprudence.”<sup>54</sup> In *Seminole Tribe*, the majority rejected the claim that Congress, acting under its Commerce power, could abrogate a state's Eleventh Amendment immunity.<sup>55</sup> The Semi-

45. *Id.* at 12.

46. *Id.*

47. See McFadden, *supra* note 1, at 526. There are also many valid counter-arguments against such a broad reading of the Eleventh Amendment.

48. See *id.*

49. The exception is *City of Boerne v. Flores*, 521 U.S. 507 (1997). This case was decided 6–3.

50. 517 U.S. 44 (1996).

51. 528 U.S. 62 (2000).

52. See discussion *infra* Part III.C, for an in-depth discussion on the views of the current Justices.

53. 517 U.S. 44 (1996).

54. McFadden, *supra* note 1, at 549.

55. *Id.*



nole Tribe of Florida filed suit against the state of Florida in federal district court to compel negotiations under the Indian Gaming Regulatory Act (“IGRA”). IGRA was enacted under the Indian Commerce Clause<sup>56</sup> and authorized suit against a state in federal court.<sup>57</sup> The plaintiffs compared the Indian Commerce Clause to the Interstate Commerce Clause.<sup>58</sup> Relying on the Court’s decision in *Pennsylvania v. Union Gas Co.*,<sup>59</sup> the plaintiffs argued that Congress could abrogate state sovereign immunity to enforce legislation enacted pursuant to the Indian Commerce Clause.<sup>60</sup> The Court rejected this argument and in the process, overruled *Union Gas*.<sup>61</sup> The Court stated, “the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”<sup>62</sup> This decision made it clear that Congress had to pass statutes pursuant to Section 5 of the Fourteenth Amendment if it wanted to permit private suits against states in federal court.<sup>63</sup> Theoretically, if a statute was properly enacted under Section 5, an individual could sue a state for violation of the statute; if the statute was enacted under some other congressional power, then the state was immune from suit. Consequently, if an individual wants to sue a state in federal court, it has become necessary to determine under what Constitutional authority Congress has enacted particular legislation in order to ascertain whether a state is immune from suit.<sup>64</sup>

*City of Boerne v. Flores* also dealt with the issue of what federal statutes are validly enacted under Section 5 of the Fourteenth Amendment.<sup>65</sup> A Catholic parish in Boerne, Texas wished to expand its building. The City denied the parish a building permit on the grounds that the building was historic. The parish sued under the Religious Freedom Restoration Act (“RFRA”),<sup>66</sup> which prohibited gov-

56. *Seminole Tribe of Fla.*, 517 U.S. at 51–52.

57. *Id.* at 52.

58. U.S. CONST. art. I, § 8.

59. 491 U.S. 1 (1989).

60. *Seminole Tribe of Fla.*, 517 U.S. at 59–60.

61. *Id.* at 66.

62. *Id.* at 72.

63. See McFadden, *supra* note 1, at 549.

64. *Id.*

65. 521 U.S. 507, 517 (1997).

66. 42 U.S.C. §§ 2000bb–2000bb-4 (2000). The RFRA was passed in response to the Court’s holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which involved a free exercise claim brought by two native Americans who smoked peyote as part of a religious ritual. They challenged an Oregon statute that made use of peyote illegal. The Court upheld the law, holding that laws of general applicability which had

ernments at every level from substantially burdening the free exercise of religion unless the government could show that the burden was “in furtherance of a compelling government interest . . . and . . . [was] the least restrictive means of furthering that compelling governmental interest.”<sup>67</sup> In determining whether Congress validly passed RFRA pursuant to its Section 5 powers, the Court stated that Congress’s power under Section 5 of the Fourteenth Amendment only extends to enforcing the provisions of the Fourteenth Amendment, but that Congress could not determine what a right is.<sup>68</sup> To do so would be to make a substantive change in Constitutional protections.<sup>69</sup> In order to establish whether Congress was enforcing sanctions against unconstitutional actions or making a substantive Constitutional change, the Court created a “congruence and proportionality” test whereby the injury to be prevented or remedied must be proportional to the means adopted to achieve the end.<sup>70</sup> The Court stated that there had to be a “congruence between the means used and the ends to be achieved.”<sup>71</sup> Whether the remedy was appropriate would be determined by the “evil” of the problem.<sup>72</sup>

Based on this test, the Court concluded that RFRA was grossly out of proportion to the statute’s object.<sup>73</sup> The Court examined the legislative history of RFRA and found that Congress had failed to prove that any deliberate religious persecution had occurred in the past forty years.<sup>74</sup> Based on this finding, the Court held that RFRA was not remedial legislation.<sup>75</sup> Rather, the Court stated that the statute intended to change substantive Constitutional protections.<sup>76</sup>

In so ruling, the Court effectively limited Congress’s ability to pass legislation under Section 5 of the Fourteenth Amendment. The 6–3 opinion was extremely fragmented. Justice Kennedy wrote for the majority. Justice Stevens concurred in part. Justice Scalia concurred in part, in which Justice Stevens joined. Justice O’Connor wrote a

the effect of burdening the free exercise of religion are not subject to heightened or strict scrutiny, thereby requiring no compelling government interest.

67. 42 U.S.C. § 2000bb-1 (2000).

68. *City of Boerne*, 521 U.S. at 519.

69. *Id.*

70. *Id.* at 520.

71. *Id.* at 530.

72. *Id.*

73. *Id.* at 532.

74. *Id.* at 530.

75. *Id.* at 532.

76. *Id.*

dissenting opinion, which Justice Breyer joined in part. And Justices Souter and Breyer filed dissenting opinions. After this decision, the Court proceeded to dismantle every other Congressional means of abrogating state sovereign immunity.<sup>77</sup>

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, a bank that sold certificates of deposit to fund college education sued the Florida Prepaid Postsecondary Education Expense Board alleging unfair competition under § 43(a) of the Lanham Act,<sup>78</sup> claiming the Board made misleading statements about its savings plans.<sup>79</sup> The Federal government intervened to defend the constitutionality of applying the Lanham Act to the states. The Court held that state sovereign immunity was neither validly abrogated nor voluntarily waived by the State's activities in interstate commerce. Writing for the majority, Justice Scalia found that there were only two instances when an individual could sue the state: when Congress legislates to enforce rights under the Fourteenth Amendment or when a state consents to suit, thereby waiving its sovereign immunity.<sup>80</sup> Since Congress authorized suit under the Lanham Act pursuant to its Article I powers and because the State did not expressly consent to suit, Congress could not abrogate state sovereign immunity.<sup>81</sup>

In *Alden v. Maine*, the Court extended the state sovereignty immunity bar announced in *Seminole Tribe* from lawsuits against states in federal court to include suits against states in state court.<sup>82</sup> In *Alden*,<sup>83</sup> a group of probation officers sued the State of Maine for monetary damages in federal court alleging violations of the Fair Labor Standards Act ("FLSA").<sup>84</sup> Following the decision in *Seminole Tribe*, the district court dismissed the case.<sup>85</sup> The petitioners then filed suit in state court under the language of the FLSA which authorized private actions against states in their own courts.<sup>86</sup> The Court ended this practice as well, holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the

77. There are still some circumstances under which Section Five of the Fourteenth Amendment provides the justification for abrogation. For example, the Voting Rights Act.

78. 15 U.S.C. § 1125(a) (2000).

79. 527 U.S. 666, 670-71 (1999).

80. *Id.* at 670.

81. *Id.* at 672.

82. 527 U.S. 706 (1999).

83. *Id.* at 711-12.

84. 29 U.S.C. §§ 201 *et seq.* (2000).

85. *Alden*, 527 U.S. at 712.

86. *Id.*

power to subject nonconsenting States to private suits for damages in state courts.”<sup>87</sup>

The decision in *Alden* has fairly significant implications. It has moved state sovereign immunity from a narrow procedural rule to an “absolute principle of state sovereign immunity” because states cannot be subject to suits in their own courts for violations of federal law.<sup>88</sup> It also means that a handful of employees who happen to be employed by state governments are not protected by the federal regulations that protect all other employees. In the abstract, these employees are covered by the statutes; however, because they lack the right to sue to enforce these rights, they are effectively defenseless. The Court has made this clear in two cases where employees sued their states for violations of federal employee protection statutes, *Kimel v. Florida Board of Regents*<sup>89</sup> and *Board of Trustees of the University of Alabama v. Garrett*.<sup>90</sup>

In *Kimel*,<sup>91</sup> the Court again invalidated a Congressional attempt to abrogate state sovereign immunity under the Age Discrimination in Employment Act (“ADEA”), which bars employers from discriminating against individuals based on age.<sup>92</sup> The Court reiterated that the Eleventh Amendment stands more for what it presupposes rather than what it says; Congress must make clear its intent to abrogate and must do so under a valid grant of Constitutional authority.<sup>93</sup> Congress’s intentions to abrogate must be “unmistakably clear in the language of the statute.”<sup>94</sup> Congress may not base its abrogation of the states’ Eleventh Amendment immunity on the powers enumerated in Article I.<sup>95</sup> The Court found that the ADEA met the first

87. *Id.* The unusual aspect of *Alden* is that for the first time, the Court found state sovereign immunity beyond the Eleventh Amendment. The Court said

the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the State enjoyed before the ratification of the Constitution.

*Id.* at 713. The real question is whether states should still “enjoy” this immunity after ratification when the whole people adopted the Constitution through ratification conventions independent of state legislatures.

88. Mustokoff, *supra* note 2, at 83.

89. 528 U.S. 62 (2000).

90. 531 U.S. 356 (2001).

91. 528 U.S. 62 (2000).

92. 29 U.S.C. §§ 623 *et seq.* (2000).

93. *Kimel*, 528 U.S. at 72–73.

94. *Id.* at 73.

95. *Id.* at 79.

“stringent” test.<sup>96</sup> However, relying on the precedent established in *Seminole Tribe*, and using the congruence and proportionality test established in *City of Boerne*, the Court went on to find such suits against the states unauthorized under Congress’s civil rights enforcement powers under Section 5 of the Fourteenth Amendment. The Court stated that the burdens imposed by the ADEA were substantially higher than the conduct conceived of by the Act.<sup>97</sup> Congress had failed to demonstrate that evidence of age discrimination by the states required Congressional authorized enforcement by private plaintiffs via the ADEA.<sup>98</sup>

In *Board of Trustees of the University of Alabama v. Garrett*,<sup>99</sup> the Court held that citizens could not sue State employers for money damages under the Americans with Disabilities Act (“ADA”).<sup>100</sup> The ADA bars employers from discriminating against a qualified individual because of the individual’s disability.<sup>101</sup> Employers are required to “make reasonable accommodations” unless “the accommodation would impose an undue hardship on the operation of the employer’s business.”<sup>102</sup> The issue in the case was whether Congress acted pursuant to a valid grant of constitutional authority when it passed the ADA.<sup>103</sup> Applying a rational basis standard of review, the Court found that Congress acted without valid constitutional authority, claiming that Congress failed to identify a history of state discrimination against the disabled.<sup>104</sup>

The enforcement rights of federal statutes by employees were recently restrained even further when, in another 5–4 decision, the Court expanded the Eleventh Amendment to include actions against states by individuals before federal agencies. In *Federal Maritime Commission v. South Carolina State Ports Authority*, South Carolina Maritime Services leased a cruise ship in 1998, planning to operate it out of Charleston, South Carolina.<sup>105</sup> A state agency, the South Carolina State Ports Authority, refused to provide space because the

96. *Id.* at 73.

97. *Id.* at 82–83.

98. *Id.* at 83.

99. 531 U.S. 356, 360 (2001).

100. 42 U.S.C. §§ 12101 *et seq.* (2000).

101. 42 U.S.C. §§ 12112(a), 12111(2), (5), (7) (2000).

102. 42 U.S.C. § 12112(b)(5)(A) (2000).

103. *Garrett*, 531 U.S. at 364.

104. *Id.* at 368.

105. 535 U.S. 743, 747 (2002).

planned cruises were primarily for gambling.<sup>106</sup> The company filed a complaint with the Federal Maritime Commission in 1999, arguing that the state port authority discriminated when it refused the space and allowed two other ships, which permitted gambling, to dock.<sup>107</sup> An administrative law judge granted the state port sovereign immunity, but the Federal Maritime Commission overturned the ruling claiming the Eleventh Amendment applied only to judicial proceedings, not administrative agency proceedings.<sup>108</sup> The Fourth Circuit Court of Appeals reversed on the basis that sovereign immunity existed, regardless of the forum.<sup>109</sup> The Supreme Court agreed. Writing for the majority, Justice Thomas reiterated that sovereign immunity goes beyond the text of the Eleventh Amendment.<sup>110</sup> He said that the Eleventh Amendment “does not define the scope of States’ sovereign immunity; it is but one particular exemplification of that immunity.”<sup>111</sup>

The result of these opinions is that unless Congress can clearly show that it is relying on the Fourteenth Amendment and that it is relying in a manner that is congruent and proportional to the harm, citizens will be precluded from suing their state in either state court, federal court, or through an administrative agency proceeding. Unfortunately, unless the Court is willing to acknowledge that state employers are participants in the marketplace, state employees have extremely limited recourse when seeking protection under federal employment statutes.<sup>112</sup>

## II. THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE

The market participant exception to the dormant Commerce Clause recognizes that there is a difference between a state acting as a sovereign (exercising its taxing and regulatory powers) and a state behaving as a commercial actor. When states are market participants,

106. *Id.*

107. *Id.* at 747–48.

108. *Id.* at 749.

109. *Id.* at 750.

110. *Id.* at 751–52.

111. *Id.* at 753.

112. Christopher E. Sherer, *The Resurgence of Federalism: State Employees and the Eleventh Amendment*, 23 *HAMLIN J. PUB. L. & POL’Y* 1, 34 (2001). This author correctly points out that since current federal employment statutes were enacted prior to the current resurgence in federalism, Congress could not have known it would need to properly implicate the Fourteenth Amendment. *Id.* at 35.

entering the marketplace to do business, they will not be bound by Commerce Clause scrutiny.

#### A. *The Dormant Commerce Clause*

The Commerce Clause provides that “Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States.”<sup>113</sup> The provision grants legislative powers to Congress by furnishing Congress with the authority to regulate commerce between the states.<sup>114</sup> The dormant Commerce Clause is a judicial doctrine standing for the proposition that the existence of the Constitution’s federal commerce power restricts the states from improperly burdening interstate commerce even in the absence of Congressional regulation, meaning the states may not discriminate against interstate commerce or unduly burden interstate commerce even if not discriminatory.<sup>115</sup> The doctrine states “that certain state legislation which regulates interstate commerce is barred, even though Congress has not legislated in the area, simply because Congress could regulate pursuant to the actual Commerce Clause.”<sup>116</sup> The limits on state power derive from the basic purpose of the Commerce Clause, which was to create a “federal free trade unit,” with the purpose of fostering success and safety in the United States.<sup>117</sup> To protect these values, the Court created two rules. First, clearly protectionist state laws are subject to a “*per se* rule of invalidity.”<sup>118</sup> Second, a law is invalid even if it does not facially discriminate, but imposes an undue burden on interstate commerce unless the state can demonstrate a legitimate local interest, with only incidental effects on interstate commerce.<sup>119</sup>

113. U.S. CONST. art. I, § 8, cl. 3.

114. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

115. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994).

116. Mark D. Shaffer, *Reining in the Rehnquist Court’s Expansion of State Sovereign Immunity: A Market Participant Exception*, 23 WHITTIER L. REV. 1011, 1013 (2002). This author proposes applying the market participant exception to the states claiming sovereign immunity in many contexts beyond employment, including environmental, intellectual property, and numerous other areas of law. He analyzes why the current reading of the Eleventh Amendment should not be supported. He then argues that the Court could maintain a viable version of state sovereign immunity if it recognized the market participant exception when states are commercial actors rather than sovereigns. He does not spend any time arguing how the state fits as a market participant in each of these contexts.

117. Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 399 (1989).

118. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

119. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

To determine whether a statute is valid under the dormant Commerce Clause, the Court developed a balancing test.<sup>120</sup> Where a state law is not facially discriminatory, where it “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits.”<sup>121</sup> Thus, even if Congress has not specifically regulated in an area, if a state regulation burdens interstate commerce, and the state cannot offer a legitimate purpose for doing so, the regulation will be considered a violation of the dormant Commerce Clause.

### B. *The Market Participant Exception*

*Hughes v. Alexandria Scrap Corporation* was the first case to recognize the market participant exception to the dormant commerce clause.<sup>122</sup> *Hughes* involved a Maryland subsidy program created to ensure the recycling of abandoned automobiles known as “hulks.”<sup>123</sup> The program initially offered bounties for every Maryland-titled hulk converted to scrap.<sup>124</sup> Both in-state and out-of-state processors who destroyed hulks with Maryland titles were eligible to collect the bounty.<sup>125</sup> Maryland then revised the program, imposing stricter proof of title requirements on those delivering Maryland-titled hulks to out-of-state processors.<sup>126</sup> This resulted in a significant decline in the number of hulks delivered to out-of-state processors.<sup>127</sup>

The lower court invalidated the statute based on the Commerce Clause, claiming the statute burdened “the flow of bounty-eligible hulks across state lines.”<sup>128</sup> The Supreme Court reversed, reasoning that Maryland did not enter the market to regulate; rather, it entered the market and “restricted its trade to its own citizens or businesses within the state.”<sup>129</sup> The Court stated:

120. *Id.*

121. *Id.*

122. 426 U.S. 794, 809 (1976).

123. *Id.* at 798.

124. *Id.*

125. *Id.* at 799.

126. *Id.* at 800–01.

127. *Id.* at 801–02.

128. *Id.* at 802.

129. *Id.* at 808.



We do not believe the Commerce Clause was intended to require independent justification for such action . . . . Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.<sup>130</sup>

Thus the Court decided that when a State's action constituted participation in the market rather than regulation of it, the State would not be bound by the strictures of the Commerce Clause.

*Reeves, Inc. v. Stake* further defined the market participant rule.<sup>131</sup> In *Reeves*, South Dakota built a cement plant in 1919 in response to a cement shortage in the state.<sup>132</sup> The plant produced more cement than the state could use, however, so South Dakota began selling the cement to customers in nearby states.<sup>133</sup> Some time later, due to a variety of reasons, the plant was faced with greater demand than supply, so South Dakota decided it would sell cement to customers who lived in the state before it sold cement to out-of-state customers.<sup>134</sup>

An out-of-state buyer affected by the restriction filed suit claiming South Dakota was hoarding its cement in violation of the Commerce Clause.<sup>135</sup> The District Court agreed, but the Court of Appeals for the Eighth Circuit overturned the District Court's ruling, concluding that South Dakota was simply acting "in a proprietary capacity."<sup>136</sup>

The Supreme Court agreed with the Eighth Circuit, stating that "the [dormant] Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace."<sup>137</sup> The Court saw no Constitutionally-mandated plan to limit the states' ability to operate in a free market.<sup>138</sup> The Court explained that the exception is based on the "long recognized right of trader or manufacturer . . . to exercise his own independent discretion as to parties with whom he will deal" and that "evenhandedness" requires that states should share these "freedoms from federal constraints" as well.<sup>139</sup>

130. *Id.* at 809–10.

131. 447 U.S. 429 (1980).

132. *Id.* at 430.

133. *Id.* at 431–32.

134. *Id.* at 432–33.

135. *Id.* at 433.

136. *Id.*

137. *Id.* at 436–37.

138. *Id.* at 437.

139. *Id.* at 438–39.

After these several cases and others that attempted to define the market participant exception, the Supreme Court imposed a limit on how far the exception can go in *South-Central Timber Development, Inc. v. Wunnicke*.<sup>140</sup> In *Wunnicke*, Alaska imposed a requirement whereby buyers of unprocessed Alaskan timber were required to “partially process the timber in Alaska prior to shipping it out of the state.”<sup>141</sup> The Court distinguished these actions from other cases where states were acting as market participants because Alaska was regulating how the buyer handled timber sold by the state.<sup>142</sup> The Court said that in *Hughes*, the state participated as a purchaser.<sup>143</sup> And in *Reeves*, the state, dealing with a product that was not a natural resource, participated by choosing with whom to do business.<sup>144</sup> In *Wunnicke*, the state was not only choosing with whom to do business, the state was telling them how they had to do business in order to participate with the state of Alaska. In doing so, Alaska was acting as “more than merely a seller of timber. . . . Despite the fact that the purchaser [had] taken delivery of the timber and paid for it,” the buyer could not do with the timber as it pleased.<sup>145</sup> The Court stated that a state could not impose conditions, “whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.”<sup>146</sup> Thus, the market participant exception allows states to function in the marketplace without concern from the Commerce Clause as long as they don’t impose conditions beyond their own dealings, conditions the Court considers regulation.

### III. APPLICATION OF THE MARKET PARTICIPANT EXCEPTION TO STATES AS PRIVATE EMPLOYERS

There are several reasons why the market participant exception should apply analogically to states when federal regulations apply to states acting as employers. First and foremost, when states employ the market participant exception, they enjoy the benefit of acting as a private company without Commerce Clause scrutiny. If states are able to enjoy the benefits of private companies, they should also be

140. 467 U.S. 82 (1984).

141. *Id.* at 84.

142. *Id.* at 95–96.

143. *Id.* at 95.

144. *Id.* at 96.

145. *Id.*

146. *Id.* at 97.

subject to the same restrictions as private companies. Finding otherwise leads to disparate treatment of state and private actors in commercial market regulation and arguably gives state business interests an unfair competitive advantages vis-à-vis private companies. Second, state employers are market participants. There are no instances when a state is an employer that it is acting in a regulatory capacity. Finally, the current Justices of the Court who argue for state sovereign immunity are some of the same Justices who argue strongly for the market participant exception. In fact, the arguments these Justices use when defending the market participant exception are equally as convincing when the states are employers. Therefore, the same reasoning ought to apply.

*A. States Should Not Have Their Cake and Eat it Too*

The market participant exception to the dormant Commerce Clause has worked to states' benefit. It allows them to act in the same capacity as a private company by discriminating against out-of-state interests without Commerce Clause concern. If states are going to enjoy the benefits of private employers, they ought to be subject to the same limits as private employers. Ostensibly, states are bound to follow federal law under the Supremacy Clause.<sup>147</sup> Under the current application of state sovereign immunity, federal employment legislation is valid under the Commerce Clause as applied to the states. Yet because Congress may not abrogate state sovereign immunity, there is essentially no remedy for a private individual against the state should the state violate the law, because the Court has made it virtually impossible for Congress to create remedies against the states without their consent. This creates an anomalous result. States are immune from suit for violating laws that apply to private employers and the federal government acting as an employer, even when the conduct of the parties is identical.

There are methods to enforce federal laws against the states to vindicate individual rights. In *Alden*, the Court laid out several of these methods, including using federal funds as an exchange for immunity waiver, lawsuits by the federal government on behalf of individuals, and suits against individual state officials for injunctive relief

147. U.S. CONST. art. VI.

or damages.<sup>148</sup> However, none of these methods provide all wronged individuals with satisfactory relief.

The first suggestion, to use grants of federal funds in exchange for waiver, is problematic on several levels. First, it leads to the same kind of inconsistent result currently experienced between state employees and federal and public employees. Citizens in states that have waived immunity will be able to sue under the statutes while citizens in states that have not waived immunity will not be able to sue. This leads to the same arbitrary result where one citizen will have a remedy while another citizen with the exact same claim will not, simply based on where that individual lives. “[E]nforcement of a person’s federal civil rights should not depend on whether a state decides to waive immunity for particular violations.”<sup>149</sup>

In addition, the likelihood of states taking this exchange is slim. Theoretically, the reasons chosen by Congress to approve legislation would compel state legislatures and governors to allow waiver by state employees of federal claims. Reality is less meticulous, however. For example, in Maine, Governor Angus King vetoed a bill passed by the Maine legislature that would have waived Maine’s immunity on FLSA claims, on the basis that such suits would be too inconvenient and expensive.<sup>150</sup> It is not unreasonable to assume that the result would be the same in other states.<sup>151</sup>

The other problem with waiver is that after *College Savings*, the Court requires states to affirmatively waive their immunity to suit. Previously, Congress could condition state participation in federally regulated commercial fields on its waiver of sovereign immunity, thus effecting a constructive waiver of sovereign immunity.<sup>152</sup> The Court in *College Savings* decided that constructive waiver was inconsistent with the requirement that a state show an unequivocal, “clear declaration” of its waiver.<sup>153</sup>

The *Alden* Court’s second suggestion, that the federal government sue on behalf of individuals, is also not a fully adequate remedy.

148. *Alden v. Maine*, 527 U.S. 706, 755–57 (1999).

149. *McFadden*, *supra* note 1, at 561. Enforcement of rights should also not depend on how much federal money is involved.

150. *Id.* at 561–62.

151. By the way, if the states were truly so opposed to these federal remedies as the majority seems to assume they are, then why weren’t they able to persuade their senators to carve out immunity for them in the federal legislation?

152. *Sosunova & Tucker*, *supra* note 1, at 263.

153. *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

It is unlikely that the federal government would be willing to sue on behalf of most individual plaintiffs. To do so, the federal government would have to be more actively involved in enforcing individual rights, a result that makes little sense in light of the fact that one point of broadening state sovereign immunity is to limit the reach of the federal government.<sup>154</sup> In addition, this resolution leads to the disparate result where one individual will have a remedy and another will not for the same conduct.<sup>155</sup> The bottom line is that the federal government will not have enough resources or interest to pursue many valid claims unless they are part of more systemic abuse in a given state.

The methods available to private plaintiffs are inadequate to vindicate their federal rights. Citizens need to be able to sue state employers who violate their individual federal rights. If states are allowed under the market participant exception to escape Commerce Clause scrutiny because they are not acting like sovereigns, then states should not be allowed to claim sovereign immunity for the same actions.

### B. *State Employers are Market Participants*

Under foreign international common law, a sovereign is only immune from suit when it acts as a sovereign. When a state is participating in commerce, it is subject to all commercial laws and to suit for violating these laws.<sup>156</sup> Initially, all sovereigns were immune. During the early twentieth century, the restrictive theory was embraced. Under this theory, foreign sovereign immunity became limited to internal legislative acts, administrative acts, acts concerning its armed

154. See McFadden, *supra* note 1.

155. The final suggestion, suing individual state officials for injunctive relief or damages, is not likely to be an effective remedy either. Suing a state official as an exception to the Eleventh Amendment was first developed in *Ex Parte Young*, 209 U.S. 123 (1908). The Court in that case held that the Eleventh Amendment does not bar suits against state officers, even when the remedy frustrates an official state policy. *Id.* at 150. Although the basic holding of the case is still valid, the Court has limited its use, most recently in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287–88 (1997). The end result is that in many cases, citizens will not be able to sue individual state officials for violations of federal law.

156. *Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 357–58 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). This case goes into great detail explaining what acts are those of a sovereign. *Id.* at 360. It also gives a detailed explanation of why states acting as market participants should not be able to claim sovereign immunity. *Id.* at 357. The court says that the purpose of treating sovereigns as market participants “is to try to accommodate the interest of individuals doing business with foreign governments.” *Id.* “Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should only be accorded only in clear cases.” *Id.*

forces, and acts of diplomacy.<sup>157</sup> This theory of sovereign immunity was codified in the Foreign Sovereign Immunities Act (“FSIA”).<sup>158</sup> Under FSIA, when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are commercial within the meaning of the FSIA.<sup>159</sup> The question is not whether the foreign sovereign is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives.<sup>160</sup> Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce.<sup>161</sup>

This approach is useful when examining the state in the role of employer. When states are acting as employers, they are engaging in the same types of actions as private employers, and hence, like market participants. Interviewing, hiring, assigning work, monitoring work performance, paying salaries, paying benefits, and terminating employees are not the acts of a sovereign, they are the acts of market participants. And these are the actions taken by states as employers.

One might see an exception when states employ elected or appointed officials. In this circumstance, it appears that the state is acting in a sovereign capacity; these officials are carrying out the duties of the sovereign, thus conceiving the state through their actions. Therefore, the state ought not be treated as a market participant. However, the relationship between these officials as employees and the state as their employer is different from the relationship between the state and these officials while acting on the states’ behalf. As employees, these officials perform their jobs like employees in other contexts, and when the state is acting in this capacity, the state as employer ought to be treated as a market participant.<sup>162</sup>

Another instance where the employer state might be seen as more of a sovereign than as a market participant is in subcontracting. What if the state were to issue employment requirements for subcon-

157. *Id.* at 357–58.

158. 28 U.S.C. §§ 1602–1611 (2000).

159. *See Victory Transp.*, 336 F.2d at 360–61.

160. *Id.*

161. *Id.*

162. Certain federal statutes, such as the ADEA, limit the statutes’ applicability to elected officials. In such instances, the individual may not be able to sue the state employer, but the limit should not be because the state is immune from suit. Rather the limitation should arise from the nature of the position itself and the nature of the federal statute being utilized. *See* Pub. L. 93-259, § 28(a), 88 Stat. 74, 29 U.S.C. § 630(b)(2) (2000).

tractors that it would require of itself if it were not using subcontractors? Such requirements could be seen as regulation, thereby eliminating the use of the market participant exception. An analogous framework is state-mandated preference laws.<sup>163</sup> These are laws where states require municipalities to hire a certain number of minorities in subcontracts. In determining whether a state is a market participant under state-mandated preference laws, courts examine whether the local government enforcing the law is acting as an arm of the state or is acting independently.<sup>164</sup> If the local government is acting on behalf of the state, it is treated as a market participant.<sup>165</sup> If it is acting on its own, it is not treated as a market participant.<sup>166</sup> “[S]tates mandating preferences on dependent local governments are acting as market participants, whereas states mandating preferences on autonomous local governments are acting as regulators.”<sup>167</sup> This view of state-mandated hiring preferences could translate to state-mandated requirements of sub-contractors. Depending on the level of dependence of the subcontractor, the state as employer would be treated as a market participant and not be allowed to claim sovereign immunity when doing so.

Another approach would be to determine whether the requirements imposed on the subcontractors are the same requirements private employers impose on subcontractors. If they are the same, the state is acting as a market participant. If they are requirements only a sovereign could impose, and not a private employer, then the state is acting as a sovereign and sovereign immunity would apply.

The Supreme Court itself defines the activities of a sovereign versus a market participant. In *White v. Massachusetts Council of Construction Workers*,<sup>168</sup> the Court found that everyone affected by the city’s order was working for the city. This fact was crucial to the market-participant analysis in that case. The state was hiring and imposed hiring requirements. The Court found these actions to be those of a market participant. In fact, the Court in *Wunnicke*<sup>169</sup> expressly

163. See Benjamin C. Bair, *The Dormant Commerce Clause and State-Mandated Preference Laws in Public Contracting: Developing a More Substantive Application of the Market-Participant Exception*, 93 MICH. L. REV. 2408, 2409 (1995).

164. *Id.* at 2416.

165. *Id.* at 2417.

166. *Id.*

167. *Id.* (emphasis omitted).

168. 460 U.S. 204 (1983).

169. *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 94–95 (1984).

cited *White*,<sup>170</sup> stating that the fact the State was acting as an employer was “crucial to the market-participant analysis.”<sup>171</sup> In *College Savings*, the Court stated that when states are acting as market participants, the risk they will act as sovereigns “is entirely absent.”<sup>172</sup> The Court used as examples such sovereign activities as using custom duties, exclusionary trade regulations, and other exercises of governmental power. None of these actions or any other sovereign-type activities apply when states are acting as employers. Since states as employers are not acting as sovereigns, but rather are acting as market participants, they should not enjoy sovereign immunity.

C. *The Justices Who Support State Sovereign Immunity Support States as Market Participants*

The current Justices of the Supreme Court who argue for state sovereign immunity are the same Justices who argue strongly for the market participant exception. “Chief Justice Rehnquist and other justices of the majority in recent state sovereign immunity decisions are clearly willing to recognize the constitutional difference between a state acting as a state—versus a state acting as a market participant—when that distinction supports their states’ rights ideology.”<sup>173</sup>

In the recent Eleventh Amendment cases,<sup>174</sup> five Justices—Kennedy, O’Connor, Rehnquist, Scalia, and Thomas—consistently support state sovereign immunity. The current Justices who were present during the Tenth Amendment cases supported state immunity in those cases as well. There is no clear majority in *City of Boerne*, but for reasons other than sovereign immunity. Kennedy, Rehnquist, Scalia, and Thomas are in the majority. O’Connor dissents, not based on state sovereignty, but First Amendment grounds. In *City of Boerne*, Justice O’Connor explains that she thinks First Amendment jurisprudence took a wrong turn in *Oregon v. Smith*.<sup>175</sup> In response to *Smith*, Congress enacted RFRA, the statute on which *City of Boerne*

170. 460 U.S. 204.

171. 467 U.S. at 95.

172. *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999).

173. Shaffer, *supra* note 116, at 1014.

174. *Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank*, 527 U.S. 666; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Federal Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

175. *City of Boerne v. Flores*, 521 U.S. 507, 544–45 (1997).



is based.<sup>176</sup> O'Connor argues that *Smith* should be overturned, thus eliminating the need for the decision in *City of Boerne*.<sup>177</sup> Justice Stevens concurs in the *City of Boerne's* result, again not for state sovereignty reasons. Justice Stevens argues that RFRA is a violation of the First Amendment Establishment Clause.<sup>178</sup>

Most of the market participant cases took place before the members of the current Court were appointed. However, in one way or another, most of the Eleventh Amendment majority have expressed a preference for the exception. For example, in *Wunnicke*, Justice Rehnquist and Justice O'Connor were both on the court.<sup>179</sup> Both dissented in that case, arguing that Alaska was acting as a participant in the market.<sup>180</sup> Since *Wunnicke* was the first case to limit the market participant exception, and these Justices disagreed with this limitation, it is reasonable to surmise that they support a strong market participant exception for the states. Justice Stevens, the only other current member of the court on *Wunnicke*, joined the majority limiting the market participant exception. He is one of the four who regularly dissent in the state sovereign immunity cases. Justice Souter mentions the market participant exception in his dissent in a Commerce Clause case, *C & A Carbone, Inc. v. Town of Clarkston*.<sup>181</sup> However, Justice Souter only mentions that the city involved is a market participant and does not use this fact for analysis. More significantly, Chief Justice Rehnquist points out in another Commerce Clause case, *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, that the dormant Commerce Clause is irrelevant if the state is acting as a market participant.<sup>182</sup> This is just another example of his support for the market participant exception.

Justice Scalia is an ardent supporter of state sovereign immunity, finding for the states in every Eleventh Amendment case and supporting the states in Tenth Amendment cases as well. In *College Savings Bank*, one of the Eleventh Amendment cases, Justice Scalia looks at the market participant exception in discussing whether a

176. *Id.*

177. *Id.*

178. *Id.* at 536.

179. *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 101-02 (1984).

180. *Id.* at 102-03.

181. 511 U.S. 383, 430 (1994).

182. 511 U.S. 93, 114 (1994).

state may constructively waive immunity.<sup>183</sup> He states that the market participant exception “makes sense because the evil addressed by [dormant commerce clause] restrictions . . . is entirely absent where the States” are market participants.<sup>184</sup>

In a footnote, Justice Scalia states that a commercial activities exception for all suits against States, except those commenced in federal court by citizens of another state, “hardly makes sense” because the text of the Eleventh Amendment “makes no distinction between commercial and noncommercial state activities.”<sup>185</sup> However, the current application of state sovereign immunity is not in the text of the Eleventh Amendment either, yet the Court, including Justice Scalia, is willing to “make sense” of such an application.<sup>186</sup> Though admittedly, the Commerce Clause (and by implication the dormant Commerce Clause) does focus on commercial activities.

Although his comments make it doubtful that Justice Scalia would consider viewing employer states as market participants in terms of federal employment statutes, his reasoning behind the market participant exception applies just as suitably when the state is acting as an employer as it does when the state is exempt from Commerce Clause scrutiny under the market participant exemption. Such an application makes more sense than treating state employers as sovereigns when they are clearly acting as participants in the marketplace.

## CONCLUSION

States should not be given sovereign immunity under the Eleventh Amendment when they are acting as private employers, but should be treated as what they are: market participants. As an employer, a state is not acting in its regulatory capacity, but is participating in the market as a private actor. States have benefited from being seen as market participants, allowing them to function in the same

183. *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999).

184. *Id.*

185. *Id.* at 686 n.4.

186. See generally Scott Fruehwald, *The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism*, 53 *MERCER L. REV.* 811 (2002). This article argues that the current interpretation of the Eleventh Amendment is unprincipled. The author points out that Justice Scalia has claimed that he will not look at the Framers' intent to find the meaning of a text, but rather finds meaning in the text itself. *Id.* at 852–53. This view is ironic (and even perhaps intellectually dishonest) considering the Court's current interpretation of the Eleventh Amendment.

capacity as a private company without Commerce Clause concerns. If state employers are going to enjoy the freedom from Commerce Clause restraints, they ought to be subject to the same limits as private employers. This can be done by using the market participant exception in another capacity, and treating state employers as a market participants. Such a determination would not be difficult. When Congress passes a law of general applicability pursuant to the Commerce Clause whereby violators of federal law are subject to suit in federal court, then sovereign immunity is abrogated.<sup>187</sup> If the law does not regulate commerce, then the Commerce Clause will render the law invalid. If the federal statute regulates commerce, and the state is in violation of the federal statute, then the state is acting as a market participant and Congress may abrogate its sovereign immunity. Alternatively, when the state is acting as an employer, there is no sovereign immunity because the state is a market participant. Thus, states would be immune when acting as sovereigns, but subject to the same restrictions as their private counterparts when acting as employers, and thus, market participants.

187. This proposal is essentially a return to *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), and an overturning of all of the Eleventh Amendment cases since *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), whether they deal with the employee/employer relationship or not.