SUPREME COURT OF THE UNITED STATES

No. 98–149

COLLEGE SAVINGS BANK, PETITIONER *v.* FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 23, 1999]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The Court holds that Congress, in the exercise of its commerce power, cannot require a State to waive its immunity from suit in federal court even where the State engages in activity from which it might readily withdraw, such as federally regulated commercial activity. This Court has previously held to the contrary. *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964). I would not abandon that precedent.

I

Thirty-five years ago this Court unanimously subscribed to the holding that the Court today overrules. Justice White, writing for four Members of the Court who dissented on a different issue, succinctly described that holding as follows:

> "[I]t is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability di-

> rectly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby." *Id.*, at 198 (opinion of White, J., joined by Douglas, Harlan, and Stewart, JJ.).

The majority, seeking to justify the overruling of so clear a precedent, describes *Parden*'s holding as a constitutional "anomaly" that "broke sharply with prior cases," that is "fundamentally incompatible with later ones," and that has been "narrowed . . . in every subsequent opinion." *Ante*, at 12. *Parden* is none of those things.

Far from being anomalous, *Parden*'s holding finds support in reason and precedent. When a State engages in ordinary commercial ventures, it acts like a private person, outside the area of its "core" responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation. A Congress that decides to regulate those state commercial activities rather than to exempt the State likely believes that an exemption, by treating the State differently from identically situated private persons, would threaten the objectives of a federal regulatory program aimed primarily at private conduct. Compare, *e.g.*, 12 U. S. C. §1841(b) (1994 ed., Supp. III) (exempting state companies from regulations covering federal bank holding companies); 15 U. S. C. §77c(a)(2) (exempting state-issued securities from federal securities laws); and 29 U. S. C §652(5) (exempting States from the definition of "employer[s]" subject to federal occupational safety and health laws), with 11 U. S. C. §106(a) (subjecting States to federal bankruptcy court judgments); 15 U. S. C. §1122(a) (subjecting States to suit for violation of Lanham Act); 17 U. S. C. §511(a) (subjecting States to suit for copyright infringement); 35 U. S. C. §271(h) (subjecting States to suit for patent infringement). And a Congress

that includes the State not only within its substantive regulatory rules but also (expressly) within a related system of private remedies likely believes that a remedial exemption would similarly threaten that program. See *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, *ante*, at ___ (STEVENS, J., dissenting). It thereby avoids an enforcement gap which, when allied with the pressures of a competitive marketplace, could place the State's regulated private competitors at a significant disadvantage.

These considerations make Congress' need to possess the power to condition entry into the market upon a waiver of sovereign immunity (as "necessary and proper" to the exercise of its commerce power) unusually strong, for to deny Congress that power would deny Congress the power effectively to regulate *private* conduct. Cf. *California* v. *Taylor*, 353 U. S. 553, 566 (1957). At the same time they make a State's need to exercise sovereign immunity unusually weak, for the State is unlikely to *have to* supply what private firms already supply, nor may it fairly demand special treatment, even to protect the public purse, when it does so. Neither can one easily imagine what the Constitution's founders would have thought about the assertion of sovereign immunity in this special context. These considerations, differing in kind or degree from those that would support a general congressional "abrogation" power, indicate that *Parden*'s holding is sound, irrespective of this Court's decisions in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), and *Alden* v. *Maine*, *ante*, p. ___.

Neither did *Parden* break "sharply with prior cases." *Parden* itself cited authority that found related "waivers" in at least roughly comparable circumstances. *United States* v. *California*, 297 U. S. 175 (1936), for example, held that a State, "by engaging in interstate commerce by rail, has subjected itself to the commerce power," *id.*, at

185, which amounted to a waiver of a (different though related) substantive immunity. See also *Taylor*, *supra*, at 568. *Parden* also relied on authority holding that States seeking necessary congressional approval for an interstate compact had, "by venturing into the [federal] realm, 'assume[d] the [waiver of sovereign immunity] conditions . . . attached.'" 377 U. S., at 196 (quoting *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 281–282 (1959)). Earlier case law had found a waiver of sovereign immunity in a State's decision to bring a creditor's claim in bankruptcy. See *Gardner* v. *New Jersey*, 329 U. S. 565, 573–574 (1947). Later case law, suggesting that a waiver may be found in a State's acceptance of a federal grant, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 247 (1985), supports *Parden*'s conclusion. Where is the sharp break?

The majority has only one answer to this question. It believes that this Court's case law requires any "waiver" to be "express" and "unequivocal." *Ante*, at 13. But the cases to which I have just referred show that is not so. The majority tries to explain some of those cases away with the statement that "what is attached to the refusal to waive" in those cases is "the forgoing of some federal beneficence," while what is involved here is "the exclusion of the State from [an] otherwise lawful activity." *Ante*, at 18. This statement does not explain away a difference. It simply states a difference that demands an explanation.

The statement does appeal to an intuition, namely, that it is somehow easier for the State, and hence more voluntary, to forgo "federal beneficence" than to refrain from "otherwise lawful activity," or that it is somehow more compelling or oppressive for Congress to forbid the State to perform an "otherwise lawful" act than to withhold "beneficence." But the force of this intuition depends upon the example that one chooses as its illustration; and realistic examples suggest the intuition is not sound in the

present context. Given the amount of money at stake, it may be harder, not easier, for a State to refuse highway funds than to refrain from entering the investment services business. See U. S. Dept. of Commerce, Bureau of Census, Federal Aid to States for Fiscal Year 1998, p. 17 (Apr. 1999) (Federal Government provided over $20 billion to States for highways in 1998). It is more compelling and oppressive for Congress to threaten to withhold from a State funds needed to educate its children than to threaten to subject it to suit when it competes directly with a private investment company. See *id.*, at 5 (Federal Government provided over $21 billion to States for education in 1998). The distinction that the majority seeks to make– drawn in terms of gifts and entitlements– does not exist.

The majority is also wrong to say that this Court has "narrowed" *Parden* in its "subsequent opinion[s]," *ante*, at 12, at least in any way relevant to today's decision. *Parden* considered two separate issues: (1) Does Congress have the *power* to require a State to waive its immunity? (2) How *clearly* must Congress speak when it does so? The Court has narrowed *Parden* only in respect to the second issue, not the first; but today we are concerned only with the first. The Court in *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279 (1973), for example, discussed whether Congress *had, or had not,* "lift[ed]" sovereign immunity, not whether it *could, or could not,* have done so. *Id.*, at 285 ("Congress *did not* lift the sovereign immunity of the States" (emphasis added)). And *Employees'* limitation of *Parden*, to "the area where private persons and corporations normally ran the enterprise," took place in the context of *clarity*, not *power*. 411 U. S., at 284 (specifying that "Congress *can* act" outside the limited area (emphasis added)). Although two Justices would have limited *Parden*'s holding in respect to power, that

limitation would simply have required Congress to give the States advance notice of the consequence (loss of sovereign immunity), which, as they noted, happened in *Parden*. 411 U. S., at 296–297 (Marshall, J., concurring in result).

The remaining cases the majority mentions offer it no greater support. One said, "We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to §5 of the Fourteenth Amendment." *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 475 (1987). Two others also considered legislative clarity, not power. *Atascadero State Hospital*, *supra*, at 247 (Rehabilitation Act "falls far short" of clearly indicating a waiver by a State accepting funds under the Act); *Edelman* v. *Jordan*, 415 U. S. 651, 674 (1974) (same for Social Security Act). Even *Seminole Tribe* carefully avoided calling *Parden* into question. While specifying that Congress cannot, in the exercise of its Article I powers, "abrogate unilaterally the States' immunity from suit," 517 U. S., at 59, it left open the scope of the term "unilaterally" by referring to *Parden*, without criticism, as standing for the "unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity," 517 U. S., at 63. In short, except for those in today's majority, no member of this Court had ever questioned the holding of *Parden* that the Court today discards because it cannot find "merit in attempting to salvage any remnant of it." *Ante*, at 12.

Parden had never been questioned because, *Seminole Tribe* or not, it still makes sense. The line the Court today rejects has been drawn by this Court to place States outside the ordinary dormant Commerce Clause rules when they act as "market participants." *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204, 206–208 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 434–439 (1980);

Hughes v. *Alexandria Scrap Corp.*, 426 U. S. 794, 804–810 (1976). And Congress has drawn this same line in the related context of foreign state sovereign immunity. 28 U. S. C. §1605(a)(2). In doing so, Congress followed the modern trend, which "spread rapidly after the Second World War," regarding foreign state sovereign immunity. 1 Restatement (Third) of Foreign Relations Law of the United States, ch. 5, Introductory Note p. 391 (1987) (recognizing that "immunity . . . gave states an unfair advantage in competition with private commercial enterprise"); see also Report of the International Law Commission on the Work of its Thirty-Eighth Session, Art. 11, ¶1, p. 7, (United Nations Doc. A/41/498, Aug. 26, 1986) (when a State engages in a commercial contract with a foreign person, "the State is considered to have consented to the exercise" of foreign jurisdiction in a proceeding arising out of that contract). Indeed, given the widely accepted view among modern nations that when a State engages in ordinary commercial activity sovereign immunity has no significant role to play, it is today's holding, not *Parden*, that creates the legal "anomaly."

II

I resist all the more strongly the Court's extension of *Seminole Tribe* in this case because, although I accept this Court's pre-*Seminole Tribe* sovereign immunity decisions, I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*. Cf. *EEOC* v. *Wyoming*, 460 U. S. 226, 249–250 (1983) (STEVENS, J., concurring). In my view, Congress does possess the authority to abrogate a State's sovereign immunity where "necessary and proper" to the exercise of an Article I power. My reasons include those that JUSTICES STEVENS and SOUTER already have described in detail.

(1) Neither constitutional text nor the surrounding debates support *Seminole Tribe*'s view that Congress lacks

the Article I power to abrogate a State's sovereign immunity in federal question cases, (unlike diversity cases). *Seminole Tribe*, 517 U. S., at 82–83, and nn. 8, 9 (STEVENS, J., dissenting); *id.*, at 142–150 (SOUTER, J., dissenting); compare the majority's characterization of this argument, *ante*, at 22.

(2) The precedents that offer important legal support for the doctrine of sovereign immunity do not help the *Seminole Tribe* majority. They all focus upon a critically different question, namely, whether *courts*, acting without legislative support, can abrogate state sovereign immunity, not whether Congress, acting legislatively, can do so. See *Principality of Monaco* v. *Mississippi*, 292 U. S. 313 (1934); *Hans* v. *Louisiana*, 134 U. S. 1 (1890); *Chisholm* v. *Georgia*, 2 Dall. 419, 429 (1793) (Iredell, J., dissenting); *Seminole Tribe*, *supra*, at 119 (SOUTER J., dissenting) ("Because no federal legislation purporting to pierce state immunity was at issue, it cannot fairly be said that *Hans* held state sovereign immunity to have attained some constitutional status immunizing it from abrogation").

(3) Sovereign immunity is a common-law doctrine. The new American Nation received common-law doctrines selectively, accepting some, abandoning others, and frequently modifying those it accepted in light of the new Nation's special needs and circumstances. *Seminole Tribe*, *supra*, at 130–142 (SOUTER, J., dissenting). The new Nation's federalist lodestar, Dual Sovereignty (of State and Nation), demanded modification of the traditional single-sovereign immunity doctrine, thereby permitting Congress to narrow or abolish state sovereign immunity where necessary.

(a) Dual Sovereignty undercuts the doctrine's traditional "logical and practical" justification, namely (in the words of Justice Holmes), that "there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U. S.

349, 353 (1907). When a State is sued for violating federal law, the "authority" that would assert the immunity, the State, is not the "authority" that made the (federal) law. This point remains true even if the Court treats sovereign immunity as a principle of natural law. *Alden* v. *Maine*, *ante*, at ___ (SOUTER, J., dissenting).

(b) Dual Sovereignty, by granting Congress the power to create substantive rights that bind States (despite their sovereignty) must grant Congress the subsidiary power to create related private remedies that bind States (despite their sovereignty).

(c) Dual Sovereignty means that Congress may need that lesser power lest States (if they are not subject to federal remedies) ignore the substantive federal law that binds them, thereby disabling the National Government and weakening the very Union that the Constitution creates. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 407–408 (1819); *Cohens* v. *Virginia*, 6 Wheat. 264, 386–387 (1821).

(4) By interpreting the Constitution as rendering immutable this one common-law doctrine (sovereign immunity), *Seminole Tribe* threatens the Nation's ability to enact economic legislation needed for the future in much the way that *Lochner* v. *New York*, 198 U. S. 45 (1905), threatened the Nation's ability to enact social legislation over 90 years ago.

I shall elaborate upon this last-mentioned point. The similarity to *Lochner* lies in the risk that *Seminole Tribe* and the Court's subsequent cases will deprive Congress of necessary legislative flexibility. Their rules will make it more difficult for Congress to create, for example, a decentralized system of individual private remedies, say a private remedial system needed to protect intellectual property, including computer-related educational materials, irrespective of the need for, or importance of, such a system in a 21st century advanced economy. Cf. *Florida*

Prepaid Postsecondary Ed. Expense Bd. v. *College Savings Bank*, *ante*, at ___ (STEVENS, J., dissenting) (illustrating the harm the rules work to the patent system). Similarly, those rules will inhibit the creation of innovative legal regimes, say, incentive-based or decentralized regulatory systems, that deliberately take account of local differences by assigning roles, powers, or responsibility, not just to federal administrators, but to citizens, at least if such a regime must incorporate a private remedy against a State (*e.g.*, a State as water polluter) to work effectively. Yet, ironically, Congress needs this kind of flexibility if it is to achieve one of federalism's basic objectives.

That basic objective should not be confused with the details of any particular federalist doctrine, for the contours of federalist doctrine have changed over the course of our Nation's history. Thomas Jefferson's purchase of Louisiana, for example, reshaped the great debate about the need for a broad, rather than a literal, interpretation of federal powers; the Civil War effectively ended the claim of a State's right to "nullify" a federal law; the Second New Deal, and its ultimate judicial ratification, showed that federal and state legislative authority were not mutually exclusive; this Court's "civil rights" decisions clarified the protection against state infringement that the Fourteenth Amendment offers to basic human liberty. In each instance the content of specific federalist doctrines had to change to reflect the Nation's changing needs (territorial expansion, the end of slavery, the Great Depression, and desegregation).

But those changing doctrines reflect at least one unchanging goal: the protection of liberty. Federalism helps to protect liberty not simply in our modern sense of helping the individual remain free of restraints imposed by a distant government, but more directly by promoting the sharing among citizens of governmental decisionmaking authority. See B. Constant, Political Writings 307 (B.

Fontana transl. 1988) (describing the "Liberty of the Ancients Compared with that of the Moderns"). The ancient world understood the need to divide sovereign power among a nation's citizens, thereby creating government in which all would exercise that power; and they called "free" the citizens who exercised that power so divided. Our Nation's founders understood the same, for they wrote a Constitution that divided governmental authority, retained great power at state and local levels, and which foresaw, indeed assumed, democratic citizen participation in government at all levels, including levels that facilitated citizen participation closer to a citizen's home.

In today's world, legislative flexibility is necessary if we are to protect this kind of liberty. Modern commerce and the technology upon which it rests needs large markets and seeks government large enough to secure trading rules that permit industry to compete in the global market place, to prevent pollution that crosses borders, and to assure adequate protection of health and safety by discouraging a regulatory "race to the bottom." Yet local control over local decisions remains necessary. Uniform regulatory decisions about, for example, chemical waste disposal, pesticides, or food labeling, will directly affect daily life in every locality. But they may reflect differing views among localities about the relative importance of the wage levels or environmental preferences that underlie them. Local control can take account of such concerns and help to maintain a sense of community despite global forces that threaten it. Federalism matters to ordinary citizens seeking to maintain a degree of control, a sense of community, in an increasingly interrelated and complex world.

Courts can remain sensitive to these needs when they interpret statutes and apply constitutional provisions, for example, the dormant Commerce Clause. But courts cannot easily draw the proper basic lines of authority.

The proper local/national/international balance is often highly context specific. And judicial rules that would allocate power are often far too broad. Legislatures, however, can write laws that more specifically embody that balance. Specific regulatory schemes, for example, can draw lines that leave certain local authority untouched, or that involve States, local communities, or citizens directly through the grant of funds, powers, rights, or privileges. Depending upon context, Congress may encourage or require interaction among citizens working at various levels of government. That is why the modern substantive federalist problem demands a flexible, context-specific legislative response (and it does not help to constitutionalize an ahistoric view of sovereign immunity that, by freezing its remedial limitations, tends to place the State beyond the reach of law).

I recognize the possibility that Congress may achieve its objectives in other ways. *Ex parte Young*, 209 U. S. 123 (1908), is still available, though effective only where damages remedies are not important. Congress, too, might create a federal damages-collecting "enforcement" bureaucracy charged with responsibilities that Congress would prefer to place in the hands of States or private citizens, *Alden* v. *Maine*, *ante*, at ___; *Printz* v. *United States*, 521 U. S. 898, 977 (1997) (BREYER, J., dissenting). Or perhaps Congress will be able to achieve the results it seeks (including decentralization) by embodying the necessary state "waivers" in federal funding programs— in which case, the Court's decisions simply impose upon Congress the burden of rewriting legislation, for no apparent reason.

But none of these alternatives is satisfactory. Unfortunately, *Seminole Tribe*, and today's related decisions, separate one formal strand from the federalist skein— a strand that has been understood as anti-Republican since the time of Cicero— and they elevate that strand to the

level of an immutable constitutional principle more akin to the thought of James I than of James Madison. They do so when the role sovereign immunity once played in helping to assure the States that their political independence would remain even after joining the Union no longer holds center stage. See *Nevada* v. *Hall*, 440 U. S. 410, 418 (1979). They do so when a federal court's ability to enforce its judgment against a State is no longer a major concern. See The Federalist No. 81, p. 488 (C. Rossiter ed. 1961) (A. Hamilton). And they do so without adequate legal support grounded in either history or practical need. To the contrary, by making that doctrine immune from congressional Article I modification, the Court makes it more difficult for Congress to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers. By diminishing congressional flexibility to do so, the Court makes it somewhat more difficult to satisfy modern federalism's more important liberty-protecting needs. In this sense, it is counterproductive.

III

I do not know whether the State has engaged in false advertising or unfair competition as College Savings Bank alleges. But this case was dismissed at the threshhold. Congress has clearly said that College Savings Bank may bring a Lanham Act suit in these circumstances. For the reasons set forth in this opinion, I believe Congress has the constitutional power so to provide. I would therefore reverse the judgment of the Court of Appeals.