

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: COLLEGE SAVINGS BANK, Petitioner v. FLORIDA  
PREPAID POSTSECONDARY EDUCATION EXPENSE  
BOARD, ET AL.

CASE NO: 98-149 c.2

PLACE: Washington, D.C.

DATE: Tuesday, April 20, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COLLEGE SAVINGS BANK, :

4 Petitioner :

5 v. : No. 98-149

6 FLORIDA PREPAID POSTSECONDARY :

7 EDUCATION EXPENSE BOARD, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, April 20, 1999

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 10:09 a.m.

14 APPEARANCES:

15 DAVID C. TODD, ESQ., Washington, D.C.; on behalf of the  
16 Petitioner.

17 SETH P. WAXMAN, ESQ., Solicitor General, Department of  
18 Justice, Washington, D.C.; on behalf of the United  
19 States.

20 WILLIAM B. MALLIN, ESQ., Pittsburgh, Pennsylvania; on  
21 behalf of the Respondents Florida Prepaid  
22 Postsecondary Education Expense Board, et al.

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C O N T E N T S

|    |                                               |      |
|----|-----------------------------------------------|------|
| 1  |                                               |      |
| 2  | ORAL ARGUMENT OF                              | PAGE |
| 3  | DAVID C. TODD, ESQ.                           |      |
| 4  | On behalf of the Petitioner                   | 3    |
| 5  | ORAL ARGUMENT OF                              |      |
| 6  | SETH P. WAXMAN, ESQ.                          |      |
| 7  | On behalf of the United States                | 14   |
| 8  | ORAL ARGUMENT OF                              |      |
| 9  | WILLIAM B. MALLIN, ESQ.                       |      |
| 10 | On behalf of the Respondents Florida Prepaid  |      |
| 11 | Postsecondary education Expense Board, et al. | 26   |
| 12 |                                               |      |
| 13 |                                               |      |
| 14 |                                               |      |
| 15 |                                               |      |
| 16 |                                               |      |
| 17 |                                               |      |
| 18 |                                               |      |
| 19 |                                               |      |
| 20 |                                               |      |
| 21 |                                               |      |
| 22 |                                               |      |
| 23 |                                               |      |
| 24 |                                               |      |
| 25 |                                               |      |

1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 98-149, College Savings Bank v. Florida  
5 Prepaid Postsecondary Education Expense Board, et al.

6 Mr. Todd.

7 ORAL ARGUMENT OF DAVID C. TODD

8 ON BEHALF OF THE PETITIONER

9 MR. TODD: Mr. Chief Justice and may it please  
10 the Court:

11 Petitioner seeks reversal of the Third Circuit's  
12 judgment. The 1992 Trademark Remedy Clarification Act  
13 made the States liable for Lanham Act violations. The act  
14 was a valid exercise of the Fourteenth Amendment remedial  
15 power of Congress. In the alternative, Florida Prepaid  
16 should be deemed to have waived its immunity under the  
17 Parden doctrine. Solicitor General Waxman will argue the  
18 Parden issue. I would like to address abrogation.

19 The court of appeals found, and Florida Prepaid  
20 concedes that Congress has unequivocally expressed its  
21 intent to abrogate the State's immunity for violations of  
22 section 43(a) of the Lanham Act. The act was a valid  
23 exercise of Congress' power because section 43(a) protects  
24 business property rights from unfair competition,  
25 including false advertising.

3

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1           This Court has held that a business is a  
2 property right. That right includes the right to be free  
3 of unfair competition.

4           QUESTION: The Solicitor General doesn't agree  
5 with you on this point, I take it.

6           MR. TODD: The Solicitor General does not,  
7 Mr. Chief Justice.

8           QUESTION: That doesn't mean you're necessarily  
9 wrong, certainly.

10           (Laughter.)

11           MR. TODD: We like to think the Solicitor  
12 General is half right.

13           (Laughter.)

14           MR. TODD: It -- the -- this Court has clearly  
15 found that business is a property right. The specific  
16 property right which College Savings Bank claims in this  
17 case is the loss of customers and earnings caused by  
18 Florida Prepaid's false advertising.

19           The court of appeals acknowledged that a  
20 business is a property right, and that fact has also been  
21 conceded by Florida Prepaid.

22           QUESTION: In your view, Mr. Todd, was this  
23 property right created by Congress in the Lanham Act?

24           MR. TODD: In our view the property right was  
25 codified by the Congress in the Lanham Act. The tort of

1 unfair competition and trademarks has always been -- have  
2 always been wrongs that have been tied together. They  
3 have long been recognized at the common law, in the common  
4 law. The 1947 Lanham Act tied all these pieces together  
5 and created a clear statement of a Federal remedy for  
6 unfair competition.

7 QUESTION: Well, supposing Congress had never  
8 passed the Lanham Act but just felt that organizations  
9 such as yours were put at a considerable disadvantage by  
10 the sovereign immunity doctrine of the States. Could  
11 Congress have stepped in and said these are property  
12 rights created by State law but we don't think the States  
13 adequately protect even when they have sovereign immunity?

14 MR. TODD: That is our position, yes, Mr. Chief  
15 Justice, that the fact is that Congress can step in,  
16 having determined that the State remedies are genuinely  
17 inadequate and that there is a need to foster interstate  
18 commerce, the commerce of this country, for there to be a  
19 Federal standard governing these matters.

20 QUESTION: But you're in trouble, I think, if  
21 you say it's based on interstate commerce, because we've  
22 held that Congress can't abrogate sovereign immunity under  
23 it's commerce power.

24 MR. TODD: Yes, Mr. Chief Justice, we're aware  
25 of that. The passage of the Lanham Act is clearly based

1 upon the Interstate Commerce Clause. It is a Commerce  
2 Clause exercise of congressional power. I think it's  
3 notable there's never been any question but that this is a  
4 valid exercise of Congress' power. However, the  
5 abrogation of the State's immunity, which did not take  
6 place until 1992, is an exercise of Congress' section 5  
7 Fourteenth Amendment power.

8 Florida Prepaid argues that there is no ability  
9 on the part of Congress to protect property rights to the  
10 extent that they have been created or, I guess in this  
11 case, even codified by the Congress. This is a view of  
12 the scope of section -- of the Fourteenth Amendment and  
13 section 5 powers which finds no support in the text of the  
14 Fourteenth Amendment.

15 QUESTION: Is it your position that Congress  
16 passed this 1992 act to enforce the Due Process Clause of  
17 the Fourteenth Amendment?

18 MR. TODD: Yes, Mr. Chief Justice, it is our  
19 position.

20 QUESTION: And therefore they must have  
21 concluded that the invocation of sovereign immunity denied  
22 your clients their property without due process of law.

23 MR. TODD: They certainly decided that there was  
24 a need for a standard here, and that given what they found  
25 to be an inadequate protection of these rights by the



1 State, they determined that in the exercise of the section  
2 5 power there should be an abrogation.

3 This Court has found that it is for Congress, at  
4 least in the first instance, to determine whether and what  
5 legislation is needed in order to secure the rights  
6 protected by section 1 of the Fourteenth Amendment. It is  
7 our position that Congress did act pursuant to a valid  
8 grant of power under section 5.

9 QUESTION: Well, Mr. Todd, that assumes, I take  
10 it, that the right to be free from unfair competition is a  
11 property right to be protected.

12 MR. TODD: Yes, Justice O'Connor.

13 QUESTION: But it certainly is not like any  
14 traditional property right. Can you sell that right, do  
15 you suppose?

16 MR. TODD: No, but this Court has never narrowed  
17 a property right in anything approaching a right to  
18 alienate or sell. The fact of the matter is, this Court  
19 has found --

20 QUESTION: Well, can you exclude others from a  
21 right to unfair competition? I mean, it's so far removed  
22 from anything we would think of as a property right. The  
23 mere fact that unfair competition might hurt the business  
24 or cause economic harm has never been thought to create a  
25 property right. Every tort would do that, every zoning

1 regulation --

2 MR. TODD: Well, but --

3 QUESTION: -- would affect the business  
4 economically.

5 MR. TODD: Justice O'Connor, I think in the  
6 first case I would again like to reiterate that this Court  
7 has never held a particular set of attributes that must be  
8 met in order for a particular interest to be called  
9 property. They have held welfare benefits to be property,  
10 a cause of action to be property, a horse trainer's  
11 license to be property.

12 Many of these things are obviously not  
13 alienable, and you cannot use the term, right to exclude,  
14 as a part of any description of those property rights  
15 which have clearly been held to be property rights within  
16 the meaning of the Fourteenth Amendment.

17 QUESTION: But those things were all things that  
18 belonged to the person asserting the right. In your  
19 presentation you said that the right to do business is a  
20 property right. I'm prepared to concede that, but  
21 nothing has stopped your client here from doing business.

22 What you're complaining about is the fact that a  
23 competitor of your client has misrepresented his product.  
24 He has not even misrepresented your product. He has  
25 misrepresented his product, and I find it very difficult

1 to understand how that involves any property right.

2 MR. TODD: Well, Justice Scalia --

3 QUESTION: You still are free to do business, as  
4 you always have been.

5 MR. TODD: Well, Justice Scalia, we have not  
6 alleged takings. We are not contending that our property  
7 as a whole has been taken. We are alleging a deprivation,  
8 and we do have possession of something. We have  
9 possession of customers and earnings from those customers  
10 which are very much threatened by the false advertising,  
11 and it makes no difference whether the false --

12 QUESTION: Anything that takes away customers  
13 takes away a property right of yours?

14 MR. TODD: If it is proscribed by law, yes, I  
15 would say so, Mr. -- Justice Scalia.

16 QUESTION: Mr. Todd, I don't know anything about  
17 your business, but there are a lot of businesses where  
18 customer lists are sold. Is that true in your case? For  
19 example, I know in the dairy business they sell customer  
20 lists all the time, and so if you take away custom you're  
21 taking away part of something that's saleable, but that's  
22 not true here, I gather.

23 MR. TODD: Justice Stevens, in the context of  
24 this case, no. I think customer lists are really not an  
25 issue. It is perfectly clear, however, that --

1 QUESTION: And is it -- I want to be sure of one  
2 other thing. You're not claiming an infringement of your  
3 trademark?

4 MR. TODD: We are not.

5 QUESTION: No, okay.

6 QUESTION: In the case of *McDaniels v. Williams*,  
7 where the prisoner falls down the stairway and there's a  
8 question of whether there's a constitutional tort, we said  
9 that the Constitution, and the Fourteenth Amendment  
10 particularly, concerns the large concerns of governance,  
11 and that it is not designed to supplant tort law. It  
12 seems to me that the same observation could be made with  
13 reference to your case.

14 MR. TODD: Justice Kennedy, I think the cases  
15 are not at all closely related. In *Daniels*, you had a  
16 State employee leaving a pillow on the stairs. It was a  
17 random act of a given employee.

18 Here, we have a deliberate action by an agency  
19 created by the State of Florida. There's nothing random  
20 about this. This is not a tort of negligence. The State  
21 of Florida --

22 QUESTION: There's a difference in negligence  
23 and intent, but the observation still, it seems to me, has  
24 force in this case, that you're using the Constitution to  
25 make a constitutional violation out of what is generally

1 concerned to be a tort that is actionable within the  
2 concepts of tort law but not under the Constitution.

3 MR. TODD: I would suggest two things, that I  
4 think that this Court clearly has found -- they have never  
5 found a case -- I have no case specifically on point.  
6 However, this Court has found that this kind of a right  
7 represents a property right, the International News  
8 Service.

9 The position of petitioner is that a property  
10 right is a property right, and it is not constitutionally  
11 permissible to begin parsing property rights which are  
12 protectable under the Fourteenth Amendment and property  
13 rights which are not protectable, and to say that a  
14 business is property standing alone really doesn't mean  
15 anything unless you can give some enforcement power to  
16 that concept.

17 A business is obviously more than a building and  
18 desks and chairs. A business consists of goodwill, a  
19 going concern value, and a business as a property right is  
20 meaningless unless there is the ability to protect that  
21 business from this kind of injury.

22 QUESTION: That argument might get you somewhere  
23 if the claim in this case was that your goodwill had been  
24 taken or destroyed. If your competitor had misrepresented  
25 your product, I think that argument might have some

1 weight, but the competitor hasn't done that. He's  
2 misrepresented his product. Your goodwill has not at all  
3 been affected. You've been affected in no way, except  
4 that you lost customers.

5 MR. TODD: Well, Justice Scalia, the harm to the  
6 business from a competitor misrepresenting his own goods  
7 and services is identical to the harm caused by a  
8 misrepresentation of the competitor's --

9 QUESTION: It may be, but is it a deprivation of  
10 property? I assume, then, that if it's a deprivation of  
11 property, in addition to being a tort, it would be some  
12 sort of larceny. You ought to be able to get this fellow  
13 on a criminal charge for misrepresenting his product,  
14 because he's taken away some of your property.

15 MR. TODD: Well, Justice Scalia, with respect,  
16 there is nothing in the jurisprudence in this Court which  
17 suggests that property interests are limited to those  
18 things which would be deemed to be larceny if stolen.  
19 Welfare benefits, a horse trainer's license, and a  
20 driver's license aren't property interests -- are property  
21 interests, but they're not susceptible to that kind of a  
22 test.

23 QUESTION: Is that right, if it were possible to  
24 take away a horse trainer's license, as you say it's  
25 possible to take away your customers? If it's property,

1 it's property.

2 MR. TODD: Well --

3 QUESTION: This doesn't seem to me to be  
4 property. You might say that your goodwill is a sort of  
5 property and, I suppose, if he were slandering you, I  
6 could see that there's some property in there, but he's  
7 just gone off and is competing unfairly by misrepresenting  
8 his product.

9 MR. TODD: Justice Scalia, the entire business  
10 of College Savings Bank is threatened by this kind of  
11 false advertising, and I would like to close and save some  
12 time for rebuttal just by stating that neither the court  
13 of appeals nor Florida Prepaid has cited a single decision  
14 by this Court in which an economic interest has not been  
15 found to be property.

16 Mr. Chief Justice --

17 QUESTION: Mr. Todd, I have a question, though.  
18 Are there not other remedies that your client could have?  
19 Could you not bring an Ex parte Young type injunction  
20 against Florida Prepaid and say, stop what you're doing?

21 MR. TODD: Justice O'Connor, we believe that an  
22 Ex parte Young action would lie. It would not make us  
23 whole.

24 QUESTION: Are there State remedies for various  
25 State causes of action that could result in damages if

1 you're correct?

2 MR. TODD: There are not adequate State remedies  
3 across the board. Even in Florida the adequacy of the  
4 State remedy is dubious, at best.

5 QUESTION: Thank you, Mr. Todd.  
6 General Waxman, we'll hear from you.

7 ORAL ARGUMENT OF SETH P. WAXMAN  
8 ON BEHALF OF THE UNITED STATES

9 GENERAL WAXMAN: Mr. Chief Justice, and may it  
10 please the Court:

11 In Parden v. Terminal Railway all nine Justices  
12 agreed that at least where Congress has made its intent  
13 clear the voluntary participation by a State in a  
14 commercial business that has traditionally been engaged in  
15 not by States but rather by private parties for profit  
16 will establish consent to private suits out of that  
17 business in Federal court. This case --

18 QUESTION: General Waxman, most constitutional  
19 rights where you talk about waiver, it requires a very  
20 explicit, fully informed waiver, which I don't think what  
21 you just described would meet that test, do you?

22 GENERAL WAXMAN: I think -- I don't, and I think  
23 that the -- well, to the extent that Congress has made its  
24 intent clear is where that test is met. This Court, in  
25 the abrogation context in Atascadero and in the Parden



1 waiver context in Welch v. Texas Transportation made it  
2 clear that in order for there to be a loss by a State of  
3 its constitutional Eleventh Amendment right, the national  
4 legislature must speak with unmistakable clarity.

5 Now, waiver and abrogation are sometimes  
6 confused and, before this Court's decision in Seminole  
7 Tribe, it's understandable why they were, but they're very  
8 different concepts, as we think this Court recognized in  
9 Seminole Tribe. Abrogation is the unilateral act of power  
10 by the national legislature, acting within its  
11 constitutional scope.

12 Waiver requires the voluntary consent of the  
13 State, whether it's waiver by express language, or waiver  
14 by conduct and, Mr. Chief Justice, the act of waiver  
15 following notice must be such that it reflects a voluntary  
16 knowing waiver of a constitutional right. We definitely  
17 agree with that.

18 QUESTION: General Waxman, do you really think  
19 there's a difference between what you call a unilateral  
20 act of the Government, the Government saying, the State  
21 shall be liable for any damages arising from its operation  
22 of a railroad -- unilaterally, the State's liable if it  
23 operates a railroad -- and the Government saying on the  
24 other hand, the State shall be liable for any damages from  
25 the operation of a railroad if it should operate a

1 railroad --

2 GENERAL WAXMAN: That is --

3 QUESTION: -- and the latter -- the latter said,  
4 well, it's a choice to the State. If you want to operate  
5 a railroad you'll be liable for damages. We're not acting  
6 unilaterally. You waived it by operating a railroad.

7 GENERAL WAXMAN: The test -- there is a  
8 distinction between unilateral abrogation and consent, and  
9 the test really boils down to, as it does in the Tenth  
10 Amendment cases this Court has decided, like FERC v.  
11 Mississippi and United States v. New York, in terms of  
12 whether the State is exercising a genuine, reasonable  
13 choice and is not being coerced.

14 Now, in the specific context of the Eleventh  
15 Amendment, where this Court has always recognized the  
16 viability and applicability of the concept of waiver and  
17 consent, this Court, subsequent to Parden, in Missouri  
18 Employees qualified Parden in the way in which I just  
19 articulated.

20 That is, it's not just, if you run a railroad,  
21 or if you choose to run a railroad, it's that the Parden  
22 doctrine, that is, voluntariness will be imputed and  
23 applied to the State if what the State -- if the activity  
24 is not something that States traditionally has done but  
25 instead is something that private parties have done and

1 for profit. That's the test that we understand this Court  
2 substituted for Parden and therefore qualified Parden in  
3 Missouri Employees.

4 QUESTION: Is there a third --

5 QUESTION: General Waxman, I was surprised that  
6 we're talking throughout about consent, which is to some  
7 extent a fiction, and you didn't make an argument that I  
8 thought you might have made, which was, there's no  
9 sovereign immunity here at all.

10 After all, with respect to foreign countries we  
11 have a restrictive notion of sovereign immunity, and if a  
12 foreign sovereign engages in business they will be liable  
13 to answer in our courts. If we don't apply that same  
14 notion to our own States we are attributing to our States  
15 a kind of super sovereignty that we don't afford to any  
16 foreign nation, and that seems to me rather strange.

17 GENERAL WAXMAN: Well, I think -- I haven't made  
18 it expressly, but I think in the foreign sovereign  
19 immunities context we apply that rule in the context of,  
20 it is a consent. It is a waiver.

21 That is, we have enacted a law, the Foreign  
22 Sovereign Immunities Act, which says -- one of the  
23 elements of the act is, if you -- if a foreign sovereign  
24 engages in commercial activity within the personal  
25 jurisdiction and subject matter jurisdiction of the United

1 States courts, you are subject to those courts, and it's  
2 that same principle that applies here. Now, there are --

3 QUESTION: This Court didn't develop that  
4 principle. We didn't feel free ourselves to restrict  
5 traditional notions of sovereign immunity, even as to  
6 foreign countries, much less as to States of the Union.  
7 It was done by legislation of Congress.

8 GENERAL WAXMAN: The legislation of Congress  
9 simply permits, Justice Scalia, what we think is an  
10 operation here, which is the operation of a principle  
11 whereby if the legislature makes clear, unmistakably  
12 clear, the conditions under which engaging in a truly  
13 voluntary activity, commercial activity, the truly  
14 voluntary act of subsequently doing that, amounts to  
15 consent by conduct, and the general principle --

16 QUESTION: That applies to the United States as  
17 well, I assume, right?

18 GENERAL WAXMAN: Excuse me?

19 QUESTION: If you want to buy Justice Ginsburg's  
20 notion, I assume it would apply not only to the States but  
21 also to the Federal Government, that when the Federal  
22 Government acts in any private capacity, it will be  
23 subject to suit. I'm surprised that the SG's office would  
24 be attracted by that -- by that prospect.

25 GENERAL WAXMAN: Well, we're attracted by any

1 notion where -- any principle the logic of which carries  
2 us to the result we think is just, but --

3 (Laughter.)

4 QUESTION: Any port in a storm.

5 GENERAL WAXMAN: But I think, Justice --

6 QUESTION: General Waxman --

7 GENERAL WAXMAN: I think, Justice Scalia, if I  
8 can just respond to you for a moment, I think there are  
9 some important bedrock principles in the law that this  
10 Court has recognized that doesn't require any stretching  
11 for this Court to say that the Parden doctrine as a  
12 concept of waiver by consent with adequate notice and  
13 truly voluntary conduct is not one that should be  
14 abandoned.

15 There are perhaps more difficult questions about  
16 whether the facts of this case qualify, but there has  
17 always been a principle at the law that one may consent by  
18 knowing and voluntary conduct.

19 QUESTION: Does that principle assume that in  
20 this case the National Government could prevent the  
21 activity entirely?

22 GENERAL WAXMAN: I think you could never have --  
23 a State choice would never be voluntary if one of the --  
24 you know, if the quid was something that the Government  
25 couldn't possibly do. In other words, if the

1 Government --

2 QUESTION: So that would distinguish the case  
3 that we're talking about from Justice Scalia's case then,  
4 wouldn't it?

5 GENERAL WAXMAN: Yes, and in fact --

6 QUESTION: There's no super legislature that in  
7 effect would be able to bar the United States.

8 GENERAL WAXMAN: I think for me at least a  
9 useful way of thinking about the continuity of the Parden  
10 principle as it's been qualified following this Court's  
11 decision in Union Gas and Seminole Tribe is to think about  
12 those cases themselves.

13 If in Seminole Tribe, for example, Congress had  
14 said, look, the Supreme Court decided in Cabazan Band that  
15 States can't regulate Indian -- gaming by Indian tribes,  
16 but we're going to allow you to regulate gaming by Indian  
17 tribes so long as you consent to subject to Federal court  
18 dispute private party actions concerning the conduct of  
19 that regulation and your own gaming regulation, the States  
20 would have a choice to say, no, no, no, we're very happy  
21 not regulating, or undertake the regulatory regime.

22 QUESTION: But we don't allow waivers of  
23 constitutional rights whenever the Government has the  
24 ability to take away one thing in exchange for another.  
25 The Government can't say, you may go into the financial

1 market so long as you agree to waive your right against  
2 self-incrimination with respect to any activities.

3 GENERAL WAXMAN: That's right, and one of --  
4 for -- that's why one of the -- in the Spending Clause  
5 context one of the four -- the last of the four factors in  
6 South Dakota v. Dole is, it can't impose a condition that  
7 is itself prohibited by the Constitution. But for  
8 example, Congress didn't have the authority in South  
9 Dakota v. Dole consistent with the Twenty-First Amendment  
10 to say from now on the drinking age will be 21.

11 QUESTION: But the condition here is prohibited  
12 by the Constitution as well, just as the Federal  
13 Government has no power to coerce testimony against the  
14 defendant, so, also, the Government has no power to revoke  
15 the sovereign immunity of the State.

16 GENERAL WAXMAN: The --

17 QUESTION: And to coerce the one by saying we're  
18 not going to let you do -- run a railroad is no different,  
19 it seems to me, from coercing the other by saying we're  
20 not going to let you enter the financial market.

21 GENERAL WAXMAN: If there were coercion here,  
22 Justice Scalia, I would agree, but I think the facts of  
23 this case are quite similar to the facts in Reeves v.  
24 Stake, which was one of the trilogy of cases this Court  
25 decided under the market participant principle. If the

1 Court will recall, South Dakota was concerned that there  
2 were no cement producers in the region and that it was  
3 adversely affecting the infrastructure of the State and  
4 commercial development in the State.

5 Now, South Dakota had a number of means by which  
6 it could have remedied that. It could have --

7 QUESTION: Are you saying that when States do  
8 research, that this is not governmental?

9 GENERAL WAXMAN: No, no, not at all. I'm say --  
10 I'm --

11 QUESTION: The whole point of Reeves v. Stake  
12 was that it was a cement plant. It wasn't a governmental  
13 activity. The State was engaging in private business.

14 GENERAL WAXMAN: Right. The test -- the test  
15 that this Court articulated in those cases is, is this a  
16 market participant or a market regulator. Now, we are  
17 not -- the test that we advocate under Parden doesn't make  
18 that distinction. It's much narrower than that.

19 But the point is that when this Court decided  
20 the market participation cases, what it said is,  
21 because -- a premise of releasing the State of South  
22 Dakota from what otherwise would be certain obligations  
23 and restrictions under the Commerce Clause if it were  
24 acting as a State pursuant to a core State function was  
25 that as a -- it was acting as a private participant in a



1 market where people engage in for profit and therefore --  
2 and this Court said, therefore it is subject to the same  
3 benefits and legal burdens that other private participants  
4 are.

5 QUESTION: But some people have thought that  
6 States ought to get involved in the market. I mean,  
7 there's a whole theory of, you know, socialist economies.

8 Now, if the State of Minnesota should decide  
9 that it's just as important for the State to take an  
10 active part in the management of businesses, ownership of  
11 many things that used to be -- and they think that that's  
12 a necessary part of a State's function, who are we to say  
13 that that particular thing cannot be done. I don't know  
14 where you derive out of the Constitution your line between  
15 traditionally conducted State functions and State entry  
16 into the marketplace.

17 GENERAL WAXMAN: The entire force of my argument  
18 and logic of my argument is, the Government is not saying  
19 it can't be done, period.

20 That is, it involves an activity which, because  
21 States haven't traditionally done it but private parties  
22 have for profit, the State has a free and voluntary  
23 choice, and there is no constitutional principle, we  
24 submit, that entitles or ought to entitles a party like  
25 Florida Prepaid to participate voluntarily in a commercial

1 market engaging in commercial advertising under the  
2 enjoyment of the Lanham Act's protections, and yet to  
3 spurn the reciprocal obligation or condition clearly  
4 imposed by Congress of amenability to the remedial  
5 provisions of the act in order to ensure the fairness to  
6 all who compete in the market.

7 QUESTION: General Waxman, the law for a long  
8 time, and maybe it still hasn't made a distinction between  
9 governmental functions of a Government and proprietary,  
10 and I think a lot of courts just felt that didn't work,  
11 that it was just too hard to tell which was which.

12 Doesn't your distinction offer some of the same  
13 problems?

14 GENERAL WAXMAN: It does offer some of the same  
15 problems, but it's a distinction this Court was prepared  
16 to make and I think is prepared to make in the market  
17 participation, market regulation field that I just talked  
18 about, and even --

19 QUESTION: We do make it with respect to foreign  
20 sovereigns. That's exactly the line which doesn't, by the  
21 way, emerge from Congress in 1976. It was the  
22 Government's position for years --

23 GENERAL WAXMAN: And --

24 QUESTION: -- that there was no immunity once  
25 you engage in a market activity.

1           GENERAL WAXMAN: That's right, and we also --  
2 the courts also make it, Mr. Chief Justice, in other  
3 contexts. For example, the legal status of the United  
4 States or States as litigants in, I think it's United  
5 States v. California, the question was, is the United  
6 States appearing in court in a sovereign function or as a  
7 subrogee of a private party or representing some  
8 proprietary interest, and I think it's --

9           QUESTION: Why --

10          GENERAL WAXMAN: I was going to say, I mean,  
11 obviously the -- I would say the culmination of this  
12 Court's frustration in trying to distinguish between  
13 traditional Government functions and nontraditional  
14 Government functions was probably expressed by this Court  
15 in Garcia in the context of a substantive Tenth Amendment  
16 regulation and I would simply say in regard to that that  
17 what we have here is, number 1, this isn't the Garcia  
18 test. This is a test the parameters of which have been  
19 quite specific by Missouri Employees. It's also a test  
20 under the Eleventh -- may I finish my sentence?

21          QUESTION: Yes.

22          GENERAL WAXMAN: A test --

23          QUESTION: Assuming it's a short one, yes.

24          (Laughter.)

25          GENERAL WAXMAN: I won't put any dependent

1 clauses in it -- a test under the Eleventh Amendment  
2 which --

3 QUESTION: Which --

4 (Laughter.)

5 GENERAL WAXMAN: I won't put two dependent  
6 clauses in -- which presupposes the existence of a  
7 principal of consent or waiver.

8 Thank you for your courtesy.

9 QUESTION: Thank you, General Waxman.

10 (Laughter.)

11 QUESTION: Mr. Mallin, we'll hear from you. Am  
12 I pronouncing your name correctly?

13 ORAL ARGUMENT OF WILLIAM B. MALLIN

14 ON BEHALF OF RESPONDENTS FLORIDA PREPAID

15 POSTSECONDARY EDUCATION EXPENSE BOARD, ET AL.

16 MR. MALLIN: Mr. Chief Justice, and may it  
17 please the Court:

18 The right to be free of false advertising is not  
19 a property right protected by the Fourteenth Amendment.  
20 Thus, the 1992 amendment to the Lanham Act that purported  
21 to abrogate sovereign immunity of the States cannot be  
22 saved by the Fourteenth Amendment. This was the position  
23 accepted by the court of appeals, by the district court,  
24 and concurred in by the Solicitor General.

25 What petitioner CSB claims is that property is

1 some loss of revenue that could occur as a result of the  
2 alleged false advertising. This is rather new --

3 QUESTION: That's not an unusual suggestion, is  
4 it? As I remember, the Sherman Act provides that one  
5 who's injured in his property can recover damages, and  
6 he's injured in his property if he loses a lot of  
7 business. Why isn't the word property, as used in the  
8 Sherman Act, right on what we've got here?

9 MR. MALLIN: I think the use of property in the  
10 Sherman Act is for particular antitrust purposes. Its use  
11 in the Fourteenth Amendment has a constitutional dimension  
12 which has been spelled out in the jurisprudence of this  
13 Court.

14 QUESTION: Well, all I'm suggesting is, it's not  
15 a totally novel thought to say that someone whose business  
16 is destroyed, or seriously harmed through loss of profits,  
17 loss of revenue, loss of customers, has suffered an injury  
18 to his property.

19 MR. MALLIN: Yes, and --

20 QUESTION: You agree with that.

21 MR. MALLIN: In the sense that that person has a  
22 claim for the injury, but the question is whether this  
23 property, this revenue that's never been received, and the  
24 only way you could recover damage is by showing false  
25 advertising, causation, the fact of damages, and damages

1 with a reasonable certainty is all contingent, and that  
2 kind of a right, a right to be free of false advertising  
3 for Fourteenth Amendment purposes, hasn't been looked upon  
4 by property.

5 On March 3, this Court decided American  
6 Manufacturers Insurance v. Sullivan, where in the context  
7 of Workman's Compensation benefits in the State of  
8 Pennsylvania a beneficiary who had already been determined  
9 to be eligible was held not to have a property right in  
10 the continuation of payment of medical expenses because  
11 there was a requirement that the medical expenses had to  
12 be necessary and reasonable, and that had to be determined  
13 later, so that that kind of property doesn't raise a  
14 Fourteenth Amendment problem. Otherwise --

15 QUESTION: Do you think -- may I ask another  
16 question? Do you think goodwill is property?

17 MR. MALLIN: Goodwill is likely to be property.

18 QUESTION: And if so, if one's goodwill is taken  
19 away, has that person been deprived of property?

20 MR. MALLIN: If goodwill is taken away --

21 QUESTION: Or destroyed.

22 MR. MALLIN: Destroyed, which is a hard concept  
23 to grab a hold of, I think that there would be a problem  
24 of turning the tort that was involved into --

25 QUESTION: My question is very simple. If one's

1 goodwill been destroyed, has the person been deprived of  
2 property?

3 MR. MALLIN: I think if one's goodwill has been  
4 destroyed, it is likely the person has been deprived of  
5 property.

6 QUESTION: But you don't -- you assert that  
7 didn't happen here.

8 MR. MALLIN: No. There is -- clearly was  
9 destruction of goodwill.

10 QUESTION: There was no trade libel --

11 MR. MALLIN: The allegation here is that Florida  
12 Prepaid misdescribed its own property and as a result,  
13 says the plaintiff in the case below, I lost some business  
14 that I would have gotten, some revenue that I would have  
15 gotten, for which --

16 QUESTION: It's similar to a case under --

17 MR. MALLIN: -- there would be a tort claim for  
18 damages.

19 QUESTION: Similar to a claim under the  
20 Robinson-Patman Act if the competing sellers sold below  
21 cost for a long period of time, causing a plaintiff to  
22 lose a lot of business. That's sometimes thought of as a  
23 loss of property, but you're saying it's not.

24 MR. MALLIN: Yes. It's usually thought of as a  
25 loss of profits, and future profits, which have an element

1 of speculation in them, which is quite different from the  
2 kind of property rights that this Court has found on a  
3 case-by-case basis in its jurisprudence under the  
4 Fourteenth Amendment.

5 If we pause to consider the effect of treating  
6 this kind of a right as a property right under the  
7 Fourteenth Amendment, then the Fourteenth Amendment  
8 becomes a wide charter for legislation on any subject,  
9 going beyond the First Amendment, and really makes it  
10 relatively easy for the National Government to abrogate  
11 sovereign immunity.

12 QUESTION: Well, I think part of the  
13 Government's argument, your opponent's argument here,  
14 Mr. Mallin, is that Congress can perhaps write with a  
15 broader sweep than just strict definitions of property  
16 previously, along the lines of the Religious Freedom  
17 Restoration Act that was involved in the City of Boerne.

18 Were there findings by Congress here as to  
19 deprivations of property by the --

20 MR. MALLIN: When it comes to false advertising,  
21 unfair competition prong of the Lanham Act and the  
22 amendment to the Lanham Act there were no findings by  
23 Congress, no discussion from Congress, no suggestion that  
24 there's any kind of problem out there with the States  
25 doing this, or that there's any inadequacy of remedy.



1 There was nothing in the legislative record. There's  
2 nothing in the judicial record.

3 There is no reason to think that Congress is  
4 addressing any kind of a due process problem that relates  
5 to false advertising by States of any kind whatsoever, and  
6 what this amounts to is federalizing the law of torts so  
7 that -- the law of business torts in particular, and --

8 QUESTION: Yes, but you don't question the power  
9 of Congress to do that if the defendant were not a State.

10 MR. MALLIN: Pardon me, Your Honor?

11 QUESTION: You do not question the power of  
12 Congress to enact this legislation providing remedies  
13 against non-States, against private defendants.

14 MR. MALLIN: That's absolutely correct, Your  
15 Honor.

16 QUESTION: They can federalize to that extent.

17 MR. MALLIN: this is not a challenge to the  
18 constitutionality of the Lanham Act.

19 QUESTION: No, just the application to the  
20 States.

21 MR. MALLIN: Of Eleventh -- through the Eleventh  
22 Amendment.

23 QUESTION: Right, and your argument --

24 MR. MALLIN: We're not even challenging whether  
25 the law applies to the States. There could be Ex parte

1 Young to enforce it. What we're challenging is that there  
2 is not a basis to abrogate the Fourteenth Amendment.

3 QUESTION: But your argument would not apply if  
4 they'd asserted an infringement of their trademark, would  
5 they?

6 MR. MALLIN: Well, the argument in the case of  
7 the trademark would be a different set of arguments. The  
8 trademark area, again there's no showing of lack of  
9 remedies at the State. You don't have a due process  
10 problem just by interfering with property.

11 QUESTION: Well, is it your argument that  
12 Congress --

13 MR. MALLIN: There must be lack of revenue.

14 QUESTION: Is it your argument that Congress  
15 didn't make the appropriate findings? Obviously they  
16 thought there was some purpose in the legislation.

17 MR. MALLIN: Well, I'm sure they did, and at the  
18 time they passed the legislation it was before Seminole  
19 Tribe.

20 QUESTION: Right.

21 MR. MALLIN: And Congress was under the  
22 impression that under the Commerce Clause they could  
23 simply abrogate it.

24 QUESTION: Right.

25 MR. MALLIN: And that's what they tried to do.

1 QUESTION: But they thought there was a reason  
2 to do so, or they wouldn't have passed the statute.

3 MR. MALLIN: Yes, but the reason had -- the  
4 reasons have nothing to do with the constitutional  
5 dimensions --

6 QUESTION: Well, they have --

7 MR. MALLIN: -- of the Eleventh Amendment.

8 QUESTION: If you're arguing, though, that there  
9 were not adequate findings you're in effect saying they  
10 should have made different findings, aren't you? Are you  
11 not -- is that not your argument?

12 MR. MALLIN: Well, I don't think this Court has  
13 required findings from Congress. Findings can be very  
14 helpful if there is the right kind of findings to know  
15 which way to go.

16 QUESTION: Let me just ask one, to be sure I  
17 understand --

18 MR. MALLIN: But there's got to be a basis --

19 QUESTION: Let me ask you a question, please.

20 MR. MALLIN: Yes.

21 QUESTION: If Congress had said, we have studied  
22 the matter at great length and we think there's a problem  
23 that Florida has a couple of hundred patents out there and  
24 other -- there's all sorts of patent infringement,  
25 trademark infringement going on by States, because they've

1 accepted the suggestion that Justice Scalia made, they've  
2 decided to go into business all over the place where they  
3 didn't before, and we think there's a real problem, and  
4 therefore we're enacting this statute, would that have  
5 made any difference? I don't think it would.

6 MR. MALLIN: No. There has to be a basis for  
7 what it's doing.

8 QUESTION: Well, I'm assuming there was a basis  
9 factually for what they did, but nevertheless, wouldn't  
10 you argue they're without power to take care of that  
11 problem?

12 MR. MALLIN: On that -- first of all, on the  
13 property right, since there's no property right, yes, I  
14 would argue that they're without par, and since the record  
15 shows that there are remedies on the State level, I  
16 would --

17 QUESTION: It seems to me that's totally  
18 irrelevant, because you're saying even if Congress had  
19 found there were no remedies, the result would be the  
20 same.

21 MR. MALLIN: Well, if Congress had found there  
22 were no remedies and there were no remedies, and deference  
23 is -- Congress is entitled to deference on its findings --

24 QUESTION: Well, in the City of Boerne case I  
25 think the Court said that where Congress seeks to go

1 beyond the strict coverage of the amendment itself and  
2 perhaps wants to have -- file a -- classified as  
3 enforcement legislation, that the fact that Congress had  
4 found that there were a number of abuses, it could be of  
5 some importance in deciding whether Congress could go that  
6 extra step.

7 MR. MALLIN: Yes. In that case, it indicated  
8 that Congress has discretion, and the fact that they had  
9 some findings would be significant, but in the end  
10 Congress can't change the Constitution to redo what the  
11 remedy is, and if there's a constitutional wrong the  
12 remedy has to have a proportionality and congruence to  
13 what the alleged constitutional wrong is. Now, in the  
14 false advertising, there's no indication that there's any  
15 problem whatsoever from the Congress, or from the  
16 literature, or on any basis.

17 QUESTION: Mr. Mallin, may I switch you to the  
18 other prong on this argument, and I would like to return  
19 to the question that I asked General Waxman. As I  
20 understand what's called the restricted notion of  
21 sovereign immunity it isn't a matter of consent. It is a  
22 matter of how we define sovereign immunity, restricted  
23 doesn't include commercial activities, and that notion is  
24 codified in the Foreign Sovereign Immunities Act.

25 There is a certain anomaly, is there not, to say that

1 States are not suable in Federal court because of their  
2 sovereign immunity when any foreign nation would be?

3 MR. MALLIN: With all respect, Justice Ginsburg,  
4 I do not see that anomaly. Sovereign immunity for foreign  
5 countries I believe is a matter of the will of Congress  
6 that could be created on whatever --

7 QUESTION: Well, Congress codified what had been  
8 a doctrine of common law, Federal common law doctrine that  
9 had been around many, many years before the Foreign  
10 Sovereign Immunities Act.

11 MR. MALLIN: Well, the point I'm making, it is  
12 not constitutional, so Congress could massage it the way  
13 it wanted to. Foreign Governments are not --

14 QUESTION: It was a definition of what does  
15 sovereign immunity mean? I mean, what -- it all goes back  
16 to, you can't sue the King, and what was the scope of that  
17 immunity, and I thought the idea was, well, it isn't --  
18 doesn't cover everything that a sovereign does, only some  
19 things.

20 MR. MALLIN: Your Honor, I would tend to think  
21 that Congress made a policy decision there with regard to  
22 foreign Governments. The Eleventh Amendment covers  
23 States. States are covered by it as a constitutional  
24 matter, and there's never been anything in the  
25 jurisprudence of this Court to suggest that sovereign

1 immunity doesn't apply to States when States are doing  
2 something that's arguably commercial.

3 QUESTION: Well, that's true except when a State  
4 is in the court of another State, the Nevada v. Hall case.  
5 Does Nevada have sovereign immunity from suit in a  
6 California court?

7 MR. MALLIN: A suit between States and States?

8 QUESTION: No, a suit by a citizen of California  
9 against the State of Nevada in a California court.

10 MR. MALLIN: A California State court?

11 QUESTION: Yes.

12 MR. MALLIN: I don't think that's --

13 QUESTION: In this case, for instance, could the  
14 Florida entity have been sued in the State courts of  
15 another State?

16 MR. MALLIN: That would depend on the law of  
17 those other States. The Eleventh Amendment doesn't  
18 address that problem. The Eleventh Amendment is a  
19 limitation on the judicial power of --

20 QUESTION: Yes, but it might indicate that the  
21 sovereign immunity of the State is subject to some  
22 qualification. If the State could be sued in the courts  
23 of another State, what would be the policy against  
24 prohibiting suit in the Federal court? The object of the  
25 Eleventh Amendment is the State ought to be sued in its

1 own courts, if at all, but if it can be sued in the courts  
2 of another State, and there's jurisdiction in that other  
3 State, why should the State care if it goes to a Federal  
4 court in New Jersey as opposed to a State court in New  
5 Jersey?

6 MR. MALLIN: The question of whether a State can  
7 be sued in another State is first a question of State law  
8 and it might raise constitutional dimensions but they  
9 would not be Eleventh Amendment --

10 QUESTION: Well, let me put it this way --

11 QUESTION: Mr. Mallin, do you think --

12 QUESTION: Let's assume -- let's assume that the  
13 Florida entity here could be sued in a State court in the  
14 State of New Jersey. Let's assume that. What is the  
15 interest in insisting on a State court of another State as  
16 opposed to a jurisdiction of a Federal court? What would  
17 be the purpose of that?

18 MR. MALLIN: Well --

19 QUESTION: Other than the words of the Eleventh  
20 Amendment, which --

21 MR. MALLIN: Yes. That's -- what I was -- when  
22 you say the entity --

23 QUESTION: If we probe the reason for it --

24 MR. MALLIN: The reason for it is that the  
25 Eleventh Amendment is a limitation on the judicial power



1 of the United States, and it represents a concern that the  
2 States had from the very beginning of being hauled into  
3 the courts of the new National Government and subjected to  
4 the will of the new National Government in their courts.

5 QUESTION: Mr. Mallin, do you think that lending  
6 and borrowing money can fairly be described as a  
7 commercial activity?

8 MR. MALLIN: Well, in some contexts, yes, it  
9 could be described as commercial --

10 QUESTION: In any contexts, could it not? I  
11 mean, isn't most of the prototypical commercial activity  
12 lending and borrowing money?

13 MR. MALLIN: I think it's a very --

14 QUESTION: And what was the Eleventh Amendment  
15 directed against, primarily? What kind of suits were they  
16 worried about?

17 MR. MALLIN: Well, the suit that created the  
18 great controversy was a suit on a note, on a debt.

19 QUESTION: They were worried about suing for  
20 debts that they had contracted in order to fund the war,  
21 isn't that right?

22 MR. MALLIN: Right. That was one of the great  
23 worries, but the Eleventh Amendment has never been so  
24 limited, and --

25 QUESTION: Is it the case that if a State

1 decides it's going to go in the ice cream business and it  
2 sells shirts, decides to open their own coffee bars, run  
3 grocery stores, that Federal commercial regulation is just  
4 out the window insofar as Federal commercial regulation  
5 involves giving individuals who are hurt private actions  
6 in a Federal court. No fraud cases, no securities fraud  
7 cases, no antitrust price-fixing cases, no Federal Trade  
8 Commission cases. All those cases, even though the States  
9 knew -- the new Starbucks, they saw money in that.

10 (Laughter.)

11 QUESTION: All Federal regulations out, insofar  
12 as it depends upon private people who are hurt bringing  
13 causes of action in a Federal court. Is that your view?

14 MR. MALLIN: My view is, I don't know where this  
15 Court may draw the line.

16 QUESTION: But all what line? What line? I  
17 wanted to know, is it all out? Your answer is either yes  
18 or no. If your answer is yes, I'm going to ask you why  
19 did Hamilton and Madison take against Starbucks? I mean,  
20 if you're answer's no, I'm very interested. I mean, what  
21 line?

22 MR. MALLIN: The line that this Court has drawn  
23 so far, the line it drew in the Parden case, as modified,  
24 is a line of sometimes called poor Government functions.  
25 this case involves education.

1 QUESTION: So you would say that if, in fact,  
2 they do go into a proprietary field, if they do go into  
3 the business, a business, then they do waive, then they do  
4 waive any rights. Then you're arguing that this isn't one  
5 of those cases.

6 MR. MALLIN: Well --

7 QUESTION: Which is it you --

8 MR. MALLIN: -- they don't waive it simply by  
9 going into the proprietary business. There has to be some  
10 statutory setup.

11 QUESTION: Oh, no, no, we'll write the statute.  
12 We'll say, by the way, as Justice Scalia pointed out  
13 right --

14 MR. MALLIN: They'll have to provide something  
15 that's --

16 QUESTION: -- at the beginning, we'll write that  
17 in.

18 (Laughter.)

19 QUESTION: That's no problem. I want to know if  
20 you're going to defend this line, nothing proprietary, or  
21 if you're going to try to distinguish your case. Which is  
22 it?

23 MR. MALLIN: What I'm trying to do is to say one  
24 must be careful about Government activities too quickly to  
25 say they're proprietary. In the modern State, for

1 example, in education, funding education involves all  
2 kinds of programs.

3 QUESTION: With Starbucks, if they're out their  
4 selling coffee, T-shirts, and bananas, or whatever, then  
5 you have no problem with the waiver.

6 MR. MALLIN: Yes, I have no problem with staying  
7 that that's beyond State activities that --

8 QUESTION: Where do you find that in the  
9 Eleventh Amendment? I mean, you just -- do you find that  
10 in the Eleventh Amendment somewhere?

11 MR. MALLIN: No, I don't find that in the  
12 Eleventh Amendment. I'm drawing that from the  
13 jurisprudence of your Court --

14 QUESTION: Oh, okay.

15 MR. MALLIN: -- up until now.

16 QUESTION: A lot of which is hard to find in the  
17 Eleventh Amendment.

18 (Laughter.)

19 QUESTION: But you are going to make it in  
20 effect section 5 doctrine, is that it? The section 5  
21 power under the Fourteenth Amendment is basically going to  
22 have this Parden condition on it, together with a  
23 commercial activity condition, so that if the activity, as  
24 Justice Breyer said, truly is commercial, and the States  
25 truly do have a choice whether or not to get into it, then

1 there is power to protect property under section 5 and, in  
2 a case like this, as he put it, if they were selling  
3 coffee rather than engaging in tuition funding schemes, it  
4 would be within the power of Congress to subject them to  
5 the Lanham Act. Is that your position?

6 MR. MALLIN: No, I made no such suggestion.

7 QUESTION: All right. Now, why is --

8 MR. MALLIN: No, the Fourteenth Amendment --

9 QUESTION: Where do you -- you spoke of drawing  
10 a line, and I thought you were conceding that that might  
11 be the place to draw the line. Where do -- what is the  
12 line, and where would you draw it?

13 MR. MALLIN: There is two issues, one is Parden,  
14 and one is the Fourteenth Amendment. I thought we were  
15 talking about Parden.

16 QUESTION: Okay.

17 MR. MALLIN: The implied waiver. I have never  
18 suggested in any way that under the Fourteenth Amendment,  
19 section 5, that this line of Government function and non-  
20 Government function has anything to do with it. The  
21 question there, is there property, and I think there's not  
22 here, and is there due process of law in the State.

23 QUESTION: Okay.

24 MR. MALLIN: Which I think there is there.

25 QUESTION: So you're saying there is still a

1 vital Parden exception in effect to the limitation  
2 announced in Seminole, is that right, as far as you know?  
3 Parden -- you concede that Parden is good law if --

4 MR. MALLIN: No.

5 QUESTION: -- you've got facts to support it?

6 MR. MALLIN: No, I do not, and we haven't --

7 QUESTION: You don't?

8 MR. MALLIN: -- got to that point. Many lower  
9 courts -- strike many. A number of lower courts have  
10 concluded that Parden didn't survive Seminole Tribe.

11 QUESTION: Okay.

12 MR. MALLIN: Some have questioned it.

13 QUESTION: Here's -- the thing that I'm trying  
14 to get at is, I thought you were conceding that there is  
15 some kind of a line to be drawn, that whether we're  
16 talking about Eleventh Amendment Article I power, or  
17 whether we're talking about the section 5 enforcement  
18 power, there are some things that the State can do to  
19 subject -- that the National Government can do to subject  
20 the States to national regulation like the Lanham Act, but  
21 certain conditions have to be met, and that is how I  
22 thought you were saying you draw the line. What are those  
23 conditions, or did I misunderstand you completely?

24 MR. MALLIN: On -- I'm sorry, Your Honor. On  
25 the Fourteenth Amendment I wasn't suggesting that there's

1 any line to be drawn between commercial, so-called  
2 commercial activities of the State or other activities of  
3 the State. That's simply an issue of whether the State  
4 has taken property, interfered with property, so there  
5 must be property involved, and whether the State has  
6 provide due process, there must be due process involved,  
7 so --

8 QUESTION: So that, for example, if the State  
9 does go into a Starbucks operation and it becomes very  
10 predatory, it's driving all of its competitors out of  
11 business, there is no power under section 5, I take it,  
12 under which the Government might act, the National  
13 Government might act?

14 MR. MALLIN: Unless it's taken property. It's  
15 got to go to a property right under normal business torts.

16 QUESTION: It's driving its competitors out of  
17 business. Is that taking property?

18 MR. MALLIN: No, Your Honor, I don't think so.

19 QUESTION: Okay. What if it's hiring thugs to  
20 go in and burn its competitors' coffee bars down? Any  
21 possibility of Federal action then, under section 5?

22 MR. MALLIN: I want to be sure I understand the  
23 hypothetical, Your Honor.

24 QUESTION: The State goes into the coffee bar  
25 business and decides a good way to increase its business

1 would be to burn the coffee bars of its competitors. Is  
2 there anything the National Government can do under the  
3 property prong of the Fourteenth Amendment?

4 MR. MALLIN: Yes. That would be a violation if  
5 the State burned property of its competitors. It would be  
6 taking that property. You still have the question of  
7 whether there was a due process right in the judiciary of  
8 the State presumably, if State agents burn somebody else's  
9 property, and every State that I know of you can bring a  
10 suit in a State, in the State courts and get full  
11 compensation --

12 QUESTION: So long as --

13 MR. MALLIN: -- so the State is not denying due  
14 process at all.

15 QUESTION: So the National Government could not  
16 say, we have our doubts about the effectiveness of that  
17 remedy in the courts of the very State that it's burning  
18 down the bars. That would not be open to the National  
19 Government.

20 MR. MALLIN: The National Government has --

21 QUESTION: That would not be a basis to section  
22 5 legislation.

23 MR. MALLIN: Congress has discretion, but that  
24 discretion can't change the fact that if the State  
25 provides due process of law so that the individual whose



1 bar was burned could bring a suit in the State court and  
2 obtain full compensation, the State has not deprived  
3 property without due process at all.

4 QUESTION: Yes, but what if they do as some  
5 States. They have a total sovereign immunity. They don't  
6 provide a remedy. Some States would not provide a remedy  
7 in that situation.

8 MR. MALLIN: Yes. If --

9 QUESTION: What do you do --

10 MR. MALLIN: Yes, Your Honor, if it's well-  
11 established that the State takes property and doesn't have  
12 a remedy for it, that that's lack of due process of law.  
13 In a taking case every State is required to have --

14 QUESTION: Well, given that, doesn't -- are you  
15 then saying in that situation it would be appropriate  
16 to -- it would be permissible for Congress to authorize a  
17 suite against a State in a Federal court for damages?

18 MR. MALLIN: Yes, where the State has denied due  
19 process of law, but there's nothing in this record --

20 QUESTION: I don't think they have to authorize  
21 it. Wouldn't there be a constitutional --

22 MR. MALLIN: Yes. The Constitution requires in  
23 a taking case that the State have a remedy, inverse  
24 condemnation. If that remedy is not adequate there can be  
25 certiorari to this Court directly out of that proceeding.

1 QUESTION: Yes, but all those cases are before  
2 our latest decisions. You're sure the Eleventh Amendment  
3 would not be a defense in those cases. You're agreeing  
4 that that would not be.

5 MR. MALLIN: Yes. I'm assuming that it would  
6 not be because of the requirement, the constitutional  
7 requirement that that remedy be provided.

8 QUESTION: Now, as to the other line, you say  
9 there are two arguments, one's the Fourteenth Amendment,  
10 the other one is Parden. I'm not sure what your position  
11 is. Do you favor this distinction between commercial and  
12 noncommercial or not?

13 MR. MALLIN: No. I --

14 QUESTION: You seem to have gotten yourself into  
15 the position of defending it. I had thought that you  
16 thought that Parden was gone.

17 MR. MALLIN: Yes. My first position is that  
18 Parden is inconsistent with Seminole Tribe, and that this  
19 Court should take this occasion to recognize that and  
20 overrule Parden. That's my first position.

21 QUESTION: In other words, you're thinking that  
22 Hamilton and Madison and -- they -- if you'd even asked  
23 them, let's imagine you asked them, say we have this State  
24 that's gone sort of wild for commercial ventures, and  
25 they're acting not like a duck, they're acting like a

1 business, exactly, identical, but you, Mr. Madison,  
2 believe that those same rules that affect every other  
3 business of the United States that Congress has enacted  
4 like antitrust laws should not apply, simply because the  
5 name on the -- on that business, which is in every other  
6 respect identical happens to be the Commonwealth of  
7 Massachusetts Shoe Store, or -- et cetera.

8 I mean, let's imagine we ask the Founding  
9 Fathers. I mean, why wouldn't they have said, acts like a  
10 duck, treat it like a duck. Acts like a business, treat  
11 it like a business.

12 MR. MALLIN: If we have an Eleventh Amendment  
13 issue, on the Eleventh Amendment the State cannot be sued  
14 unless it denies due process or it has a voluntary  
15 amendment. The Federal Government is not without  
16 remedies. The Federal Government can sue.

17 The Federal Government can pass a spending  
18 statute and require certain things that relate to that  
19 spending statute to be done by the State, an individual  
20 can use ex parte Young to put a stop to that activity, so  
21 we're not saying that Federal law can just be ignored, but  
22 the private suit by a private individual for money damages  
23 is prohibited by the Eleventh Amendment, and it should not  
24 be allowed on the basis of a legal fiction that there's  
25 been a waiver when there really hasn't been a waiver.

1 QUESTION: Is it your --

2 MR. MALLIN: In a situation where the waiver is  
3 demanded, the waiver is the same as abrogation.

4 QUESTION: Mr. Todd, is it your position that  
5 there is no sovereign immunity principle operating here  
6 which is in addition to or different from the Eleventh  
7 Amendment? You've spoken a number of times of the  
8 Eleventh Amendment as being barred. Is there any  
9 sovereign immunity principle aside from the Eleventh  
10 Amendment?

11 MR. MALLIN: Well, the State has its own  
12 sovereign immunity principles, and when I say Eleventh  
13 Amendment I'm talking about the --

14 QUESTION: Well, cognizable -- cognizable in a  
15 Federal court.

16 MR. MALLIN: -- entire bundle that this Court  
17 has read into the Eleventh Amendment.

18 QUESTION: Cognizable in a Federal court. Is  
19 there any sovereign immunity principle in addition to the  
20 terms of the Eleventh Amendment that would be cognizable  
21 in a Federal court as a State defense?

22 MR. MALLIN: Well, I think the Eleventh  
23 Amendment, as interpreted by this Court, includes a full  
24 bundle of sovereign immunity, so that would be taken into  
25 account.

1 QUESTION: Well, does it include any concept of  
2 sovereign immunity in addition to the strict terms of the  
3 Eleventh Amendment itself?

4 MR. MALLIN: In addition to the Eleventh  
5 Amendment?

6 QUESTION: Yes.

7 MR. MALLIN: Only those things that the Court  
8 has interpreted that it be included. It doesn't  
9 include --

10 QUESTION: Well, I'm asking you how the Court  
11 should interpret it. A State is defending a Lanham Act  
12 suit, say. Does the State have -- and let's assume  
13 section 5 is not involved here for a moment. Does the  
14 State have any defense other than a defense consisting of  
15 the terms of the Eleventh Amendment itself? Can the  
16 State, in other words, claim a sovereign immunity defense  
17 which is broader than the strict terms of the Eleventh  
18 Amendment?

19 MR. MALLIN: The State claims a sovereign  
20 immunity defense that goes beyond their specific language  
21 of the Eleventh Amendment, to include what was thought to  
22 be the original understanding as bound by Hans v.  
23 Louisiana and later confirmed by this Court among other  
24 places in Seminole Tribe.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mallin.

1                   The case is submitted.

2                   (Whereupon, at 11:09 a.m., the case in the  
3 above-entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

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

CASE NO:        98-149

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Jonathan M. May  
(REPORTER)