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 SCALIA delivered the opinion of the Court.

The Trademark Remedy Clarification Act (TRCA), 106 Stat. 3567, subjects the States to suits brought under §43(a) of the Trademark Act of 1946 (Lanham Act) for false and misleading advertising, 60 Stat. 441, 15 U. S. C. §1125(a). The question presented in this case is whether that provision is effective to permit suit against a State for its alleged misrepresentation of its own product– either because the TRCA effects a constitutionally permissible abrogation of state sovereign immunity, or because the TRCA operates as an invitation to waiver of such immunity which is automatically accepted by a State's engaging in the activities regulated by the Lanham Act.

I

In *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), we asserted jurisdiction over an action in assumpsit brought by a South Carolina citizen against the State of Georgia. In so doing, we reasoned that Georgia's sovereign immunity was qualified by the general jurisdictional provisions of Article III, and, most specifically, by the provision extending the

federal judicial power to controversies "between a State and Citizens of another State." U. S. Const., Art. III, §2, cl. 1. The "shock of surprise" created by this decision, *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 325 (1934), prompted the immediate adoption of the Eleventh Amendment, which provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more: It repudiated the central premise of *Chisholm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union. This has been our understanding of the Amendment since the landmark case of *Hans* v. *Louisiana*, 134 U. S. 1 (1890). See also *Ex parte New York*, 256 U. S. 490, 497–498 (1921); *Principality of Monaco, supra* at 320–328, *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 97–98 (1984); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 54, 66–68 (1996).

While this immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment– an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). Second, a State may waive its sovereign immunity by consenting to suit. *Clark* v. *Barnard*, 108 U. S. 436, 447–448 (1883). This case turns on whether either of these two

circumstances is present.

II

Section 43(a) of the Lanham Act, 15 U. S. C. §1125(a), enacted in 1946, created a private right of action against "[a]ny person" who uses false descriptions or makes false representations in commerce. The TRCA amends §43(a) by defining "any person" to include "any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity." §3(c), 106 Stat. 3568. The TRCA further amends the Lanham Act to provide that such state entities "shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this Act," and that remedies shall be available against such state entities "to the same extent as such remedies are available . . . in a suit against" a nonstate entity. §3(b) (codified in 15 U. S. C. §1122).

Petitioner College Savings Bank is a New Jersey chartered bank located in Princeton, New Jersey. Since 1987, it has marketed and sold CollegeSure certificates of deposit designed to finance the costs of college education. College Savings holds a patent upon the methodology of administering its CollegeSure certificates. Respondent Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid) is an arm of the State of Florida. Since 1988, it has administered a tuition prepayment program designed to provide individuals with sufficient funds to cover future college expenses. College Savings brought a patent infringement action against Florida Prepaid in United States District Court in New Jersey. That action is the subject of today's decision in *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, *ante*, p. ___. In addition, and in the same court, College Savings

filed the instant action alleging that Florida Prepaid violated §43(a) of the Lanham Act by making misstatements about its own tuition savings plans in its brochures and annual reports.

Florida Prepaid moved to dismiss this action on the ground that it was barred by sovereign immunity. It argued that Congress had not abrogated sovereign immunity in this case because the TRCA was enacted pursuant to Congress's powers under Article I of the Constitution and, under our decisions in *Seminole Tribe*, *supra*, and *Fitzpatrick*, *supra*, Congress can abrogate state sovereign immunity only when it legislates to enforce the Fourteenth Amendment. The United States intervened to defend the constitutionality of the TRCA. Both it and College Savings argued that, under the doctrine of constructive waiver articulated in *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964), Florida Prepaid had waived its immunity from Lanham Act suits by engaging in the interstate marketing and administration of its program after the TRCA made clear that such activity would subject Florida Prepaid to suit. College Savings also argued that Congress's purported abrogation of Florida Prepaid's sovereign immunity in the TRCA was effective, since it was enacted not merely pursuant to Article I but also to enforce the Due Process Clause of the Fourteenth Amendment. The District Court rejected both of these arguments and granted Florida Prepaid's motion to dismiss. 948 F. Supp. 400 (N. J. 1996). The Court of Appeals affirmed. 131 F. 3d 353 (CA3 1997). We granted certiorari. 525 U. S. ___ (1999).

III

We turn first to the contention that Florida's sovereign immunity was validly abrogated. Our decision three Terms ago in *Seminole Tribe*, *supra*, held that the power "to regulate Commerce" conferred by Article I of the Con-

stitution gives Congress no authority to abrogate state sovereign immunity. As authority for the abrogation in the present case, petitioner relies upon §5 of the Fourteenth Amendment, which we held in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), and reaffirmed in *Seminole Tribe*, see 517 U. S., at 72–73, could be used for that purpose.

Section 1 of the Fourteenth Amendment provides that no State shall "deprive any person of . . . property . . . without due process of law." Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We made clear in *City of Boerne* v. *Flores*, 521 U. S. 507, ___, ___ (1997), that the term "enforce" is to be taken seriously— that the object of valid §5 legislation must be the carefully delimited remediation or prevention of constitutional violations. Petitioner claims that, with respect to §43(a) of the Lanham Act, Congress enacted the TRCA to remedy and prevent state deprivations without due process of two species of "property" rights: (1) a right to be free from a business competitor's false advertising about its own product, and (2) a more generalized right to be secure in one's business interests. Neither of these qualifies as a property right protected by the Due Process Clause.

As to the first: The hallmark of a protected property interest is the right to exclude others. That is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176 (1979). That is why the right that we all possess to use the public lands is not the "property" right of anyone— hence the sardonic maxim, explaining what economists call the "tragedy of the commons,"[1] *res publica, res nullius*. The Lanham Act may well contain provisions that protect constitutionally cognizable property interests— notably, its provisions dealing

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[1] See Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

with infringement of trademarks, which are the "property" of the owner because he can exclude others from using them. See, *e.g.*, *K mart Corp.* v. *Cartier, Inc.*, 485 U. S. 176, 185–186 (1988) ("Trademark law, like contract law, confers private rights, which are themselves rights of exclusion. It grants the trademark owner a bundle of such rights"). The Lanham Act's false-advertising provisions, however, bear no relationship to any right to exclude; and Florida Prepaid's alleged misrepresentations concerning its own products intruded upon no interest over which petitioner had exclusive dominion.

Unsurprisingly, petitioner points to no decision of this Court (or of any other court, for that matter) recognizing a property right in freedom from a competitor's false advertising about its own products. The closest petitioner comes is dicta in *International News Service* v. *Associated Press*, 248 U. S. 215, 236 (1918), where the Court found equity jurisdiction over an unfair-competition claim because "[t]he rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right." But to say that a court of equity "*treats* any civil right of a pecuniary nature *as* a property right" is not to say that all civil rights of a pecuniary nature *are* property rights. In fact, when one reads the full passage from which this statement is taken it is clear that the Court was saying just the opposite, namely, that equity will treat civil rights of a pecuniary nature as property rights even though they are properly not such:

> "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right . . . ; and the right to ac-

> quire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. . . . It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition." *Id*., at 236–237.

We may also note that the unfair competition at issue in *International News Service* amounted to nothing short of theft of proprietary information, something in which a power to "exclude others" could be said to exist. See *id*., at 233.

Petitioner argues that the common-law tort of unfair competition "by definition" protects property interests, Brief for Petitioner 15, and thus the TRCA "by definition" is designed to remedy and prevent deprivations of such interests in the false-advertising context. Even as a logical matter, that does not follow, since not everything which *protects* property interests is designed to remedy or prevent *deprivations* of those property interests. A municipal ordinance prohibiting billboards in residential areas protects the property interests of homeowners, although erecting billboards would ordinarily not deprive them of property. To sweep within the Fourteenth Amendment the elusive property interests that are "by definition" protected by unfair-competition law would violate our frequent admonition that the Due Process Clause is not merely a "font of tort law." *Paul* v. *Davis*, 424 U. S. 693, 701 (1976).

Petitioner's second assertion of a property interest rests upon an argument similar to the one just discussed, and suffers from the same flaw. Petitioner argues that businesses are "property" within the meaning of the Due Process Clause, and that Congress legislates under §5 when it passes a law that prevents state interference with business (which false advertising does). Brief for Petitioner 19–20. The assets of a business (including its good will)

unquestionably are property, and any state taking of those assets is unquestionably a "deprivation" under the Fourteenth Amendment. But business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense— and it is only *that*, and not any business asset, which is impinged upon by a competitors' false advertising.

Finding that there is no deprivation of property at issue here, we need not pursue the follow-on question that *City of Boerne* would otherwise require us to resolve: whether the prophylactic measure taken under purported authority of §5 (viz., prohibition of States' sovereign-immunity claims, which are not in themselves a violation of the Fourteenth Amendment) was genuinely necessary to prevent violation of the Fourteenth Amendment. We turn next to the question whether Florida's sovereign immunity, though not abrogated, was voluntarily waived.

IV

We have long recognized that a State's sovereign immunity is "a personal privilege which it may waive at pleasure." *Clark* v. *Barnard*, 108 U. S., at 447. The decision to waive that immunity, however, "is altogether voluntary on the part of the sovereignty." *Beers* v. *Arkansas*, 20 How. 527, 529 (1858). Accordingly, our "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 241 (1985). Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 284 (1906), or else if the State makes a "clear declaration" that it intends to submit itself to our jurisdiction, *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 54 (1944). See also *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 99 (1984) (State's consent to suit must be "unequivocally expressed"). Thus,

a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. *Smith* v. *Reeves*, 178 U. S. 436, 441–445 (1900). Nor does it consent to suit in federal court merely by stating its intention to "sue and be sued," *Florida Dept. of Health and Rehabilitative Servs.* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 149–150 (1981) *(per curiam)*, or even by authorizing suits against it "'in any court of competent jurisdiction,'" *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573, 577–579 (1946). We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit. *Beers* v. *Arkansas*, *supra*.

There is no suggestion here that respondent Florida Prepaid expressly consented to being sued in federal court. Nor is this a case in which the State has affirmatively invoked our jurisdiction. Rather, petitioner College Savings and the United States both maintain that Florida Prepaid has "impliedly" or "constructively" waived its immunity from Lanham Act suit. They do so on the authority of *Parden* v. *Terminal R. Co. of Ala. Docks Dept.*, 377 U. S. 184 (1964)— an elliptical opinion that stands at the nadir of our waiver (and, for that matter, sovereign immunity) jurisprudence. In *Parden*, we permitted employees of a railroad owned and operated by Alabama to bring an action under the Federal Employers' Liability Act (FELA) against their employer. Despite the absence of any provision in the statute specifically referring to the States, we held that the Act authorized suits against the States by virtue of its general provision subjecting to suit "[e]very common carrier by railroad . . . engaging in commerce between . . . the several States," 45 U. S. C. §51 (1940 ed.). We further held that Alabama had waived its immunity from FELA suit even though Alabama law expressly disavowed any such waiver:

> "By enacting the [FELA] . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit." 377 U. S., at 192.

The four dissenting Justices in *Parden* refused to infer a waiver because Congress had not "expressly declared" that a *State* operating in commerce would be subject to liability, but they went on to acknowledge— in a concession that, strictly speaking, was not necessary to their analysis— that Congress possessed the power to effect such a waiver of the State's constitutionally protected immunity so long as it did so with clarity. *Id.*, at 198–200 (opinion of White, J.).

Only nine years later, 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), we began to retreat from *Parden*. That case held— in an opinion written by one of the *Parden* dissenters over the solitary dissent of *Parden*'s author— that the State of Missouri was immune from a suit brought under the Fair Labor Standards Act by employees of its state health facilities. Although the statute specifically covered the state hospitals in question, see 29 U. S. C. §203(d) (1964 ed.), and such coverage was unquestionably enforceable in federal court by the United States, 411 U. S., at 285–286, we did not think that the statute expressed with clarity Congress's intention to supersede the States' immunity from suits brought by individuals. We "put to one side" the *Parden* case, which we characterized as involving "dramatic circumstances" and "a rather isolated state activity," 411 U. S., at 285, unlike the provision of the Fair Labor Standards Act in question that applied to a broad class of state

employees. We also distinguished the railroad in *Parden* on the ground that it was "operated for profit" "in the area where private persons and corporations normally ran the enterprise." 411 U. S., at 284. Justice Marshall, joined by Justice Stewart, went even further, concluding that although, in their view, Congress *had* clearly purported to subject the States to suits by individuals in federal courts, it lacked the constitutional authority to do so. *Id.*, at 287, 289–290 (opinion concurring in result).

The next year, we observed (in dictum) that there is "no place" for the doctrine of constructive waiver in our sovereign-immunity jurisprudence, and we emphasized that we would "find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman* v. *Jordan*, 415 U. S. 651, 673 (1974) (internal quotation marks omitted). Several Terms later, in *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468 (1987), although we expressly avoided addressing the constitutionality of Congress's conditioning a State's engaging in Commerce-Clause activity upon the State's waiver of sovereign immunity, we said there was "no doubt that *Parden*'s discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law," and overruled *Parden* "to the extent [it] is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language," 483 U. S., at 478, and n. 8.[2]

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[2] In response to this string of cases criticizing or narrowing the holding of *Parden*, JUSTICE BREYER holds up three post-*Parden* cases as decisions that "support[ed]" *Parden*, *post*, at 4, or at least "carefully avoided calling [it] into question," *post*, at 6. His perception of "support" in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985), rests upon nothing more substantial than the fact that the case "suggest[ed] that a waiver may be found in a State's acceptance of a federal

College Savings and the United States concede, as they surely must, that these intervening decisions have seriously limited the holding of *Parden*. They maintain, however, that *Employees* and *Welch* are distinguishable, and that a core principle of *Parden* remains good law. A *Parden*-style waiver of immunity, they say, is still possible after *Employees* and *Welch* so long as the following two conditions are satisfied: First, Congress must provide unambiguously that the State will be subject to suit if it engages in certain specified conduct governed by federal regulation. Second, the State must voluntarily elect to engage in the federally regulated conduct that subjects it to suit. In this latter regard, their argument goes, a State is never deemed to have constructively waived its sovereign immunity by engaging in activities that it cannot realistically choose to abandon, such as the operation of a

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grant." *Post*, at 4. But we make the same suggestion today, while utterly rejecting *Parden*. As we explain elsewhere in detail, see *infra*, at 19–20, conditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity. JUSTICE BREYER's second case, *Welch*, overruled *Parden* in part, as we discuss above, and we think it quite impossible to believe that the following statement in the opinion did not "questio[n] the holding of *Parden* that the Court today discards," *post*, at 6: "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." 483 U. S., at 475. Calling what a prior case has flatly decided a "question" in need of "deciding," and (lest there be any doubt on the point) making it clear that we "intimat[e] no view" as to whether the answer given by that prior case was correct, surely was handwriting on the wall which even an inept cryptologist would recognize as spelling out the caption of today's opinion. As for *Seminole Tribe*, we explain elsewhere, see *infra*, at 15–17, how that case was logically and practically inconsistent with *Parden*, even though it did not expressly overrule it. JUSTICE BREYER realizes this well enough, or else his call for an overruling of that case, which occupies almost half of his dissent, see *post*, at 7–13, would be supremely irrelevant to the matter before us.

police force; but constructive waiver is appropriate where a State runs an enterprise for profit, operates in a field traditionally occupied by private persons or corporations, engages in activities sufficiently removed from "core [state] functions," Reply Brief for United States 3, or otherwise acts as a "market participant" in interstate commerce, cf. *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204, 206–208 (1983). On this theory, Florida Prepaid constructively waived its immunity from suit by engaging in the voluntary and nonessential activity of selling and advertising a for-profit educational investment vehicle in interstate commerce after being put on notice by the clear language of the TRCA that it would be subject to Lanham Act liability for doing so.

We think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it. As we explain below in detail, *Parden* broke sharply with prior cases, and is fundamentally incompatible with later ones. We have never applied the holding of *Parden* to another statute, and in fact have narrowed the case in every subsequent opinion in which it has been under consideration. In short, *Parden* stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law. Today, we drop the other shoe: Whatever may remain of our decision in *Parden* is expressly overruled.

To begin with, we cannot square *Parden* with our cases requiring that a State's express waiver of sovereign immunity be unequivocal. See, *e.g.*, *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47 (1944). The whole point of requiring a "clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. But there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference

between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity. *Beers*, 20 How., at 529.[3]

Indeed, *Parden*-style waivers are simply unheard of in the context of *other* constitutionally protected privileges. As we said in *Edelman*, "[c]onstructive consent is not a doctrine commonly associated with the surrender of con-

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[3] In an attempt to cast doubt on our characterization of *Parden* as a groundbreaking case, JUSTICE BREYER points to three earlier decisions which allegedly demonstrate that *Parden* worked no major change. These cases, however, have only the most tenuous relation to *Parden*'s actual holding– as one might suspect from the dissent's soft-pedaled description of them as "roughly comparable" and involving (in quotation marks) "'waivers.'" *Post*, at 3. The first two, *United States* v. *California*, 297 U. S. 175 (1936), and *California* v. *Taylor*, 353 U. S. 553 (1957), involved neither state immunity from suit nor waiver, but the entirely different question of whether substantive provisions of Commerce Clause legislation applied to the States. The former concerned a suit brought against a State by *the United States* (a situation in which state sovereign immunity does not exist, see *United States* v. *Texas*, 143 U. S. 621 (1892)), and the latter expressly acknowledged that "the Eleventh Amendment" was "not before us," 353 U. S. at 568 n. 16. The last case, *Gardner* v. *New Jersey*, 329 U. S. 565 (1947), which held that a bankruptcy court can entertain a trustee's objections to a claim filed by a State, stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts. See *supra*, at 8. In sum, none of these cases laid any foundation for *Parden*– whose author was quite correct in acknowledging that it "presented a question of first impression," *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 299 (1973) (Brennan, J., dissenting).

stitutional rights." 415 U. S., at 673. For example, imagine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with the buying or selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? After all, the trading of securities is not so vital an activity that any one person's decision to trade cannot be regarded as a voluntary choice. The answer, of course, is no. The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Aetna Ins. Co.* v. *Kennedy ex rel. Bogash*, 301 U. S. 389, 393 (1937). See also *Ohio Bell Telephone Co.* v. *Public Util. Comm'n of Ohio*, 301 U. S. 292, 307 (1937) (we "do not presume acquiescence in the loss of fundamental rights"). State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. *Great Northern*, 322 U. S., at 51; *Pennhurst*, 465 U. S., at 98. And in the context of *federal* sovereign immunity— obviously the closest analogy to the present case— it is well established that waivers are not implied. See, *e.g.*, *United States* v. *King*, 395 U. S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). We see no reason why the rule should be different with respect to state sovereign immunity.

Given how anomalous it is to speak of the "constructive waiver" of a constitutionally protected privilege, it is not surprising that the very cornerstone of the *Parden* opinion

was the notion that state sovereign immunity is not constitutionally grounded. *Parden*'s discussion of waiver began with the observation:

> "By empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity." 377 U. S., at 192.

See also *id.*, at 193–194, n. 11. Our more recent decision in *Seminole Tribe* expressly repudiates that proposition, and in formally overruling *Parden* we do no more than make explicit what that case implied.

Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin— they are the same side of the same coin. "All congressional creations of private rights of action attach recovery to the defendant's commission of some act, or possession of some status, in a field where Congress has authority to regulate conduct. Thus, *all* federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and— to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability— can be redescribed as invitations to 'waiver.'" *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 43 (1989) (SCALIA, J., dissenting). See also *Fitzpatrick*, 427 U. S., at 451–452 (referring to congressional intent to "abrogate" state sovereign immunity as a "necessary predicate" for *Parden*-style waiver). There is little more

than a verbal distinction between saying that Congress can make Florida liable to private parties for false or misleading advertising in interstate commerce of its prepaid tuition program, and saying the same thing but adding at the end "if Florida chooses to engage in such advertising." As further evidence that constructive waiver is little more than abrogation under another name, consider the revealing facts of this case: The statutory provision relied upon to demonstrate that Florida constructively waived its sovereign immunity is the very same provision that purported to abrogate it.

Nor do we think that the constitutionally grounded principle of state sovereign immunity is any less robust where, as here, the asserted basis for constructive waiver is conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of "market participants." Permitting abrogation or constructive waiver of the constitutional right only when these conditions exist would of course limit the evil— but it is hard to say that that limitation has any more support in text or tradition than, say, limiting abrogation or constructive waiver to the last Friday of the month. Since sovereign immunity itself was not traditionally limited by these factors, and since they have no bearing upon the voluntariness of the waiver, there is no principled reason why they should enter into our waiver analysis. When we held in *Seminole Tribe* that sovereign immunity barred an action brought under the Indian Gaming Regulatory Act against the State of Florida for its alleged failure to negotiate a gambling compact with the Seminole Tribe of Indians, we did not pause to consider whether Florida's decision not to negotiate was somehow involuntary. Nor did we pause to consider whether running a tugboat towing service at "fair and reasonable rates" was for-profit, was traditionally per-

formed by private citizens and corporations, and otherwise resembled the behavior of "market participants" when we held, in *Ex parte New York*, 256 U. S. 490 (1921), that sovereign immunity foreclosed an admiralty action against the State of New York for damages caused by the State's engaging in such activity. *Hans* itself involved an action against Louisiana to recover coupons on a bond— the issuance of which surely rendered Louisiana a participant in the financial markets.

The "market participant" cases from our dormant-Commerce-Clause jurisprudence, relied upon by the United States, are inapposite. See, *e.g.*, *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); and *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). Those cases hold that, where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator. Since "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants," "[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the [dormant] Commerce Clause." *White*, *supra*, at 207–208, n. 3. The "market participant" exception to judicially created dormant-Commerce-Clause restrictions makes sense because the evil addressed by those restrictions— the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens, see *Hughes*, *supra*, at 808— is entirely absent where the States are buying and selling in the market. In contrast, a suit by an individual against an unconsenting State is the very evil at which the Eleventh Amendment is directed— and it exists whether or not the State is acting for profit, in a

traditionally "private" enterprise, and as a "market participant." In the sovereign-immunity context, moreover, "[e]venhandness" between individuals and States is not to be expected: "The constitutional role of the States sets them apart from other employers and defendants." *Welch*, 483 U. S., at 477. Cf. *Atascadero*, 473 U. S., at 246.[4]

The United States points to two other contexts in which it asserts we have permitted Congress, in the exercise of its Article I powers, to extract "constructive waivers" of state sovereign immunity. In *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959), we held that a bistate commission which had been created pursuant to an interstate compact (and which we assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact. And we have held in such cases as *South Dakota* v. *Dole*, 483 U. S. 203 (1987) that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the

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[4] As for the suggestion of JUSTICE BREYER that we limit state sovereign immunity to non-commercial state activities because Congress has so limited *foreign* sovereign immunity, in accord with the "modern trend," see *post*, at 6–7 (citing the Foreign Sovereign Immunities Act (FSIA), 28 U. S. C. §1605(a)(2)), see also JUSTICE STEVENS' dissent, *post*, at 1–2: This proposal ignores the fact that state sovereign immunity, unlike foreign sovereign immunity, is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends. The text of the Eleventh Amendment, of course, makes no distinction between commercial and non-commercial state activities– and so if we were to combine the dissent's literalistic interpretation of that Amendment with its affection for FSIA, we would have a "commercial activities" exception for all suits against States except those commenced in federal court by citizens of another State, a disposition that hardly "makes sense," *post*, at 6 (BREYER, J., dissenting).

actions. These cases seem to us fundamentally different from the present one. Under the Compact Clause, U. S. Const., Art. I, §10, cl. 3, States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity. So also, Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity. JUSTICE BREYER's dissent acknowledges the intuitive difference between the two, but asserts that it disappears when the gift that is threatened to be withheld is substantial enough. *Post*, at 4-5. Perhaps so, which is why, in cases involving conditions attached to federal funding, we have acknowledged that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, *supra*, at 211, quoting from *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 590 (1937). In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed— and the voluntariness of waiver destroyed— when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.

V

The principal thrust of JUSTICE BREYER's dissent is an attack upon the very legitimacy of state sovereign immunity itself. In this regard, JUSTICE BREYER and the other dissenters proclaim that they are "not *yet* ready," *post*, at 7 (emphasis added), to adhere to the still-warm precedent of *Seminole Tribe* and to the 110-year-old decision in *Hans*

that supports it.[5] Accordingly, JUSTICE BREYER reiterates (but only in outline form, thankfully) the now-fashionable revisionist accounts of the Eleventh Amendment set forth in other opinions in a degree of repetitive detail that has despoiled our northern woods. Compare *post*, at 7–9, with *Atascadero, supra*, at 258–302 (Brennan, J., dissenting); *Welch*, *supra*, at 504–516 (Brennan, J., dissenting); *Seminole Tribe*, 517 U. S., at 76–99 (STEVENS, J., dissenting); *id.*, at 100–185 (SOUTER, J., dissenting). *But see Alden* v. *Maine*, *post*, at ___ (SOUTER, J., dissenting). The arguments recited in these sources have been soundly refuted, and the position for which they have been marshaled has

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[5] JUSTICE BREYER purports to "accept this Court's pre-*Seminole Tribe* sovereign immunity decisions," *post*, at 7, but by that he could not mean *Hans*, but rather only the distorted view of *Hans* that prevailed briefly between *Parden* and *Seminole Tribe*. *Parden* was the first case to suggest that the sovereign immunity announced in *Hans* was so fragile a flower that it could be abrogated under Article I– a suggestion contrary to the reality that *Hans itself* involved a congressional conferral of jurisdiction enacted under Article I. See *Union Gas*, 491 U. S., at 36–37 (SCALIA, J., dissenting). Moreover, that conferral of jurisdiction was combined, in *Hans*, with a substantive claim under the Contracts Clause of the Constitution itself, which one would think to have greater, rather than lesser, abrogative force than a substantive statute enacted pursuant to the Commerce Clause. (The dissent would apparently interpose that the statute in *Hans* did not expressly "purpor[t] to pierce state immunity," *post*, at 8, quoting *Seminole Tribe*, 517 U. S., at 119 (SOUTER, J., dissenting)– but the opinion in *Hans* did not allude to that refinement, nor did *Parden* think it made any difference. The so-called "clear statement rule" was not even adumbrated until nine years after *Parden*, in *Employees*, *supra*, 411 U. S., at 284–285.) It is difficult to square the dissent's reliance upon the distinction that the present case involves a federal question (and is therefore not explicitly covered by the Eleventh Amendment), see *post*, at 7–9, with its professed fidelity to *Hans*, the whole point of which was that the sovereign immunity reflected in (rather than created by) the Eleventh Amendment transcends the narrow text of the Amendment itself. Or to put it differently, the "pre-*Seminole Tribe* sovereign immunity decisions" to which the dissent pledges allegiance appear to include *Chisholm* v. *Georgia*. *But see* U. S. Const. Amdt. 11.

been rejected by constitutional tradition and precedent as clear and conclusive, and almost as venerable, as that which consigns debate over whether *Marbury* v. *Madison* was wrongly decided to forums more other-worldly than ours. See *Union Gas*, 491 U. S. at 33–34, 35–42 (SCALIA, J., dissenting); *Seminole Tribe*, at 54–73; *Alden*, *post*, at __. On this score, we think nothing further need be said except two minor observations peculiar to this case.

First, Justice BREYER and the other dissenters have adopted a decidedly perverse theory of *stare decisis*. While finding themselves entirely unconstrained by a venerable precedent such as *Hans*, imbedded within our legal system for over a century, see, *e.g.*, *Welch*, *supra*, at 494 n.27; *Union Gas*, *supra*, at 34–35 (SCALIA, J., dissenting), at the same time they cling desperately to an anomalous and severely undermined decision (*Parden*) from the 1960's. Surely this approach to *stare decisis* is exactly backwards– unless, of course, one wishes to use it as a weapon rather than a guide, in which case any old approach will do. Second, while we stress that the following observation has no bearing upon our resolution of this case, we find it puzzling that JUSTICE BREYER would choose this occasion to criticize our sovereign-immunity jurisprudence as being ungrounded in constitutional text, since the present lawsuit that he would allow to go forward– having apparently been commenced against a State (Florida) by a citizen of another State (College Savings Bank of New Jersey), 948 F. Supp., at 401–402– seems to fall four square within the literal text of the Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to *any* suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U. S. Const. Amdt. 11 (emphasis added). See *Seminole Tribe*, *supra*, at 82 n. 8 (STEVENS, J., dissenting).

As for the more diffuse treatment of the subject of federalism contained in the last portion of JUSTICE BREYER's

opinion: It is alarming to learn that so many Members of this Court subscribe to a theory of federalism that rejects "the details of any particular federalist doctrine"— which it says can and should "change to reflect the Nation's changing needs"— and that puts forward as the only "unchanging goal" of federalism worth mentioning "the protection of liberty," which it believes is most directly achieved by "promoting the sharing among citizens of governmental decision-making authority," which in turn demands (we finally come to the point) "necessary legislative flexibility" for the people's representatives in Congress. *Post*, at 9–10. The proposition that "the protection of liberty" is most directly achieved by "promoting the sharing among citizens of governmental decision-making authority" might well have dropped from the lips of Robespierre, but surely not from those of Madison, Jefferson, or Hamilton, whose north star was that governmental power, even— indeed, especially— governmental power wielded by the people, *had to be dispersed and countered*. And to say that the degree of dispersal to the States, and hence the degree of check by the States, is to be governed by Congress's need for "legislative flexibility" is to deny federalism utterly. (JUSTICE BREYER's opinion comes close to admitting this when the only example of a "federalism" constraint that it can bear to acknowledge as being appropriate for judicial recognition is the invalidation of a *State's* law under— of all things, given the passion for text that characterizes some parts of his opinion— the "dormant Commerce Clause," *post*, at 11.) Legislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher. Congressional flexibility is desirable, of course— but only within the *bounds of federal power* established by the Constitution. Beyond those bounds (the theory of our Constitution goes), it is a menace. Our opinion today has sought to discern what the

bounds are; the dissent denies them any permanent place.

Finally, we must comment upon JUSTICE BREYER's comparison of our decision today with the discredited substantive-due-process case of *Lochner* v. *New York*, 198 U. S. 45 (1905). It resembles *Lochner*, of course, in the respect that it rejects a novel assertion of governmental power which the legislature believed to be justified. But if that alone were enough to qualify as a mini-*Lochner*, the list of mini-*Lochners* would be endless. Most of our judgments invalidating state and federal laws fit that description. We had always thought that the *distinctive* feature of *Lochner*, nicely captured in Justice Holmes's dissenting remark about "Mr. Herbert Spencer's Social Statics," *id.*, at 75, was that it sought to impose a particular economic philosophy upon the Constitution. And we think that feature aptly characterizes, not our opinion, but JUSTICE BREYER's dissent, which believes that States should not enjoy the normal constitutional protections of sovereign immunity when they step out of their proper economic role to engage in (we are sure Mr. Herbert Spencer would be shocked) "ordinary commercial ventures," *post*, at 2. What ever happened to the need for "legislative flexibility"?

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Concluding, for the foregoing reasons, that the sovereign immunity of the State of Florida was neither validly abrogated by the Tradmark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce, we hold that the federal courts are without jurisdiction to entertain this suit against an arm of the State of Florida. The judgment of the Third Circuit dismissing the action is affirmed.

It is so ordered.