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 STEVENS, dissenting.

This case has been argued and decided on the basis of assumptions that may not be entirely correct. Accepting them, *arguendo,* the judgment of the Court of Appeals should be reversed for the reasons set forth in JUSTICE BREYER's dissent, which I have joined. I believe, however, that the importance of this case and the other two "states rights" cases decided today merits this additional comment.

The procedural posture of this case requires the Court to assume that Florida Prepaid is an "arm of the State" of Florida because its activities relate to the State's educational programs. *Ante,* at 3. But the validity of that assumption is doubtful if the Court's jurisprudence in this area is to be based primarily on present-day assumptions about the status of the doctrine of sovereign immunity in the 18th century. Sovereigns did not then play the kind of role in the commercial marketplace that they do today. In future cases, it may therefore be appropriate to limit the coverage of state sovereign immunity by treating the commercial enterprises of the States like the commercial activities of foreign sovereigns under the Foreign Sover-

eign Immunities Act of 1976.[1]

The majority also assumes that petitioner's complaint has alleged a violation of the Lanham Act, but not one that is sufficiently serious to amount to a "deprivation" of its property. *Ante*, at 8. I think neither of those assumptions is relevant to the principal issue raised in this case, namely, whether Congress had the constitutional power to authorize suits against States and state instrumentalities for such a violation. In my judgment the Constitution granted it ample power to do so.[2] Section 5 of the Fourteenth Amendment authorizes Congress to enact appropriate legislation to prevent deprivations of property without due process. Unlike the majority, I am persuaded that the Trademark Remedy Clarification Act was a valid exercise of that power, even if Florida Prepaid's allegedly false advertising in this case did not violate the Constitution. My conclusion rests on two premises that the Court rejects.

First, in my opinion "*the activity of doing business*, or *the activity of making a profit*," *ante* at 8, is a form of property. The asset that often appears on a company's balance sheet as "good will" is the substantial equivalent of that "activity." It is the same kind of "property" that Congress described in §7 of the Sherman Act, 26 Stat. 210

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[1] See 28 U. S. C. §1605(a)(2) (commercial activity exception to foreign sovereign immunity). The statute provides the following definition of "commercial activity": "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U. S. C. §1603(d).

[2] As we held in *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 23 (1989), the Commerce Clause granted Congress the power to abrogate the States' common-law defense of sovereign immunity. I remain convinced that that case was correctly decided for the reasons stated in the principal and concurring opinions.

and in §4 of the Clayton Act, 38 Stat. 731. A State's deliberate destruction of a going business is surely a deprivation of property within the meaning of the Due Process Clause.

Second, the validity of a congressional decision to abrogate sovereign immunity in a category of cases does not depend on the strength of the claim asserted in a particular case within that category. Instead, the decision depends on whether Congress had a reasonable basis for concluding that abrogation was necessary to prevent violations that would otherwise occur. Given the presumption of validity that supports all federal statutes, I believe the Court must shoulder the burden of demonstrating why the judgment of the Congress of the United States should not command our respect. It has not done so.

For these reasons, as well as those expressed by JUSTICE BREYER, I respectfully dissent.