million budget for general programs for Africa has been funded to date. The total UNHCR funding for all of Africa for 1999, including the general program, special programs, and emergencies, is only $302 million. That compares to $520 million set aside just for special programs and emergencies for the Former Yugoslavia.

The international response to the refugee crisis in Africa remains woefully inadequate. The situation is made even worse by the disparity between the donations offered to assist European refugees and those offered to support African refugees. As Mrs. Ogata so succinctly noted on July 26, ''Undeniably, proximity, strategic interest and extraordinary media focus have played a key role in determining the quality and level of response.'' While this may explain why Kosovo has received far greater refugee assistance than have the multiple crises in Africa, it can not justify that imbalance. The suffering of a family driven from its home or a child wrenched from its family by war is no less because it happens in Africa, away from the media glare and the familiar sources of conflict in Europe.

While I understand that there are necessary limits to the resources available for the millions of refugees in the world, I believe we should render our precious contribution to humanitarian assistance in a fair and balanced manner. As I have said many times on this floor—why Kosovo and not Sudan or Sierra Leone or Rwanda? To those who will cite our ''strategic'' interests in Europe, I respond that I believe our ''moral'' interests are also critically important to this nation's standing in the world.

I appreciate the State Department's announcement of an additional mid-year $11.7 million contribution to the UNHCR's general program, of which $6.6 million was designated for Africa. This is a good start, but it still falls far short of what Africa needs and what Europe gets. It does not please me to have to highlight the regional disparity in refugee assistance. But I believe it is important for the Senate to be on record in strong support of a fair and balanced effort to meet the needs of refugees throughout the world.

STATE SOVEREIGN IMMUNITY FROM INTELLECTUAL PROPERTY LAWSUITS

Mr. SPECTER. I was surprised by the three decisions of the Supreme Court of the United States on June 23, 1999 which drastically reduced the Constitutional power of Congress and even more surprised by the lack of reaction by Members of the House and Senate to this usurpation of Congressional authority. [*College Savings Bank* v. *Florida Prepaid* 1999 U.S. LEXIS 4375, *Florida Prepaid* v. *College Savings Bank* 1999 U.S. LEXIS 4376 and *Allen* v. *Maine*, 1999 U.S. LEXIS 4374.]

Even though ignored by the Congress, these decisions have been roundly criticized by the academicians. Stanford University historian Jack Rakove, author of ''Original Meanings'', a Pulitzer Prize winning account of the drafting of the Constitution, characterizes Justice Kennedy's historical argument in *Alden* v. *Maine* as ''strained, even silly''.

Professor Rebecca Eisenberg of the University of Michigan Law School, in commenting on Florida Prepaid Postsecondary Education Expense Board versus College Savings Bank, said:

> ''The decision makes no sense'', asserting that it arises from ''a bizzarre states' rights agenda that really has nothing to do with intellectual property.''

Harvard Professor Laurence Tribe commented:

> ''In the absence of even a textual hint in the Constitution, the Court discerned from the constitutional 'either' that states are immune from individual lawsuits.'' (These decisions are) ''scary''. ''They treat states' rights in a truly exaggerated way, harking back to what the country looked like before the civil war and, in many ways, even before the adoption of the Constitution.''

In addition to treating the Congress with disdain, the five person majority in all three cases demonstrated judicial activism and exhibited what can only be viewed as a political agenda in drastically departing from long-standing law. Former Solicitor General Walter Dellinger described these cases as: ''one of the three or four major shifts in constitutionalism we've seen in two centuries.''

A commentary in The Economist on July 3, 1999 emphasized the Court's radical departure from existing law stating:

> The Court's majority has embarked on a venture as detached from any constitutional moorings as was the liberal Warren Court of the 1960's in its most activity mood.

In its two opinions in College Savings Bank versus Florida Prepaid and Florida Prepaid versus College Savings Bank, the Court held that the doctrine of sovereign immunity prevents states from being sued in Federal court for infringing intellectual property rights. In reaching these decisions, the Court discussed and dismissed two laws passed by Congress for the specific purpose of subjecting the states to suits in Federal Court: the Patent Remedy Act and the Trademark Remedy Clarification Act.

These decisions leave us with an absurd and untenable state of affairs. Through their state-owned universities and hospitals, states participate in the intellectual property marketplace as equals with private companies. The University of Florida, for example, owns more than 200 patents. Furthermore, state entities such as universities are major consumers of intellectual property and often violate intellectual property laws when, for example, they copy textbooks without proper authorization.

But now, Florida and all other states will enjoy an enormous advantage over their private sector competitors—they will be immune from being sued for intellectual property infringement. Since patent and copyright infringement are exclusively Federal causes of action, and trademark infringement is largely Federal, the inability to sue in Federal court is, practically speaking, a bar to any redress at all.

The right of states to sovereign immunity from most Federal lawsuits is guaranteed in the Eleventh Amendment to the constitution, which provides that:

> 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.

It has long been recognized, however, that this immunity from suit is not absolute. As the Supreme Court noted in one of the Florida Prepaid opinions, the Court has recognized 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. Secondly, a state may waive its sovereign immunity by consenting to suite.—College Savings Bank versus Florida Prepaid at 7.

Congress' power to enforce the Fourteenth Amendment is contained in Section Five of the Fourteenth Amendment, which provides that ''The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.'' One of the provisions of the Fourteenth Amendment, Section One, provides that no State shall, ''deprive any person of . . . property . . . without due process of law.'' Accordingly, Congress has the power to pass laws to enforce the rights of citizens not to be deprived of their property—including their intellectual property—without due process of law.

Employing this power under Section 5 of the Fourteenth Amendment, Congress passed the Patent Remedy Act and the Trademark Remedy Clarification Act in 1992. As its preamble states, Congress passed the Patent Remedy Act to ''clarify that States . . . are subject to suit in Federal court by any person for infringement of patents and plant variety protections.'' Congress passed the Trademark Remedy Clarification Act to subject the States to suits brought under Sec. 43 of the Trademark Act of 1946 for false and misleading advertising.

In Florida Prepaid versus College Savings Bank, the Court held in a 5 to 4 opinion that Congress did not validly abrogate state sovereign immunity from patent infringement suits when it passed the Patent Remedy Act. In an opinion by Chief Justice Rehnquist, the Court reasoned that in order determine whether a Congressional enactment validly abrogates the States' sovereign immunity, two questions must be answered, ''first, whether Congress has unequivocally expressed its intent to abrogate the immunity . . . and second

whether Congress has acted pursuant to a valid exercise of power.''

The Court acknowledged that in enacting the Patent Remedy Act, Congress made its intention to abrogate the States' immunity unmistakably clear in the language of the statute. The Court then held, however, that Congress had not acted pursuant to a valid exercise of power when it passed the Patent Remedy Act. The Court wrote that Congress' enforcement power under the Fourteenth Amendment is ''remedial'' in nature. Therefore, ''for Congress to invoke Section 5 it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.'' Florida Prepaid versus College Savings Bank at 20.

The court found that Congress failed to identify a pattern of patent infringement by the States, let alone a pattern of constitutional violations. The Court specifically noted that a deprivation of property without due process could occur only where the State provides inadequate remedies to injured patent owners. The Court then observed that:

Congress, however, barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment * * *. Congress itself said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the House Report, essentially repeating the testimony of the witnesses.—Florida Prepaid versus College Savings Bank at 27–28.

Accordingly, the Court concluded that:

The legislative record thus suggests that the Patent Remedy Act does not respond to a history of widespread and persisting deprivation of constitutional rights of the sort Congress has faced in enacting proper prophylactic Section 5 legislation. Instead, Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution.) Florida Prepaid versus College Savings Bank at 31–32.

Not only is the result of this opinion troubling—that states will enjoy immunity from suit—but so is the reasoning which supports this result. Here we have a Chief Justice of the Supreme Court choosing to ignore an act of Congress because he has concluded that Congress passed the legislation with insufficient justification. In essence, the Chief Justice is telling us we did a poor job developing our record before passing the Patent Remedy Act. As we all know, however, many of us support legislation for reasons that don't make it into the written record. The record is an important, but imperfect, summary of or views. This is why past Courts have been reluctant to dismiss Congressional motives in this fashion.

In College Savings Bank versus Florida Prepaid, the Supreme Court decided in a 5 to 4 opinion that Trademark Remedy Clarification Act (the ''TRCA'') was not a valid abrogation of state sovereign immunity. The Court, in an opinion by Justice Scalia, noted that Congress passed the TRCA to remedy and prevent state deprivations of two types 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. The Court contrasted these rights with the hallmarks of a protected property interest, namely the right to exclude others.

Justice Scalia reached the surprising conclusion that protection against false advertising secured by Section 43(a) of the Lanham Act does not implicate property rights protected by the due process clause so that Congress could not rely on its remedies under Section 5 of the 14th Amendment to abrogate state sovereign immunity. If conducting a legitimate business operation with protection from false advertising is not a ''property right'', it is hard to conceive of what is business property. That Scalia rationale shows the extent to which the Court has gone to invalidate Congressional enactments.

The Court then discussed whether Florida's sovereign immunity, though not abrogated, was voluntarily waived. Here, the Court expressly overruled its prior decision in *Parden* v. *Terminal R. Co*. 377 U.S. 184 (1964) and held that there was no voluntary waiver. In Parden, the Court had created the doctrine of constructive waiver, which held that a state could be found to have waived its immunity to suit by engaging in certain activities, such as voluntary participation in the conduct Congress has sought to regulate. Since Congress has sought to regulate interstate commerce, then a state which participated in interstate commerce by registering and licensing patents would be held to have voluntarily waived its immunity to a patent infringement suit. By overruling Parden, however, the Court held that a voluntary waiver of sovereign immunity must be expressed. Florida made no such express waiver of its sovereign immunity.

In other relatively recent cases, the Court has gone out of its way, almost on a personal basis, to chastise and undercut Congress. The case of *Sable* v. *FCC*, 492 U.S. 115 (1989) provides a striking example of this trend. In Sable, the Court struck down a ban on ''indecent'' interstate telephone communications passed by Congress in 1988. In rejecting this provision, the Court focused on whether there were constitutionally acceptable less restrictive means, short of a total ban, to achieve its goal of protecting minors. The Court then declared, in unusually dismissive and critical language, that Congress had not sufficiently considered this issue:

* * * aside from conclusory statements during the debates by proponents of the bill . . . that under the FCC regulations minors could still have access to dial-a-porn messages, the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be.

The bill that was enacted . . . was introduced on the floor. . . . No Congressman or Senator purported to present a considered judgement with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages.

If a member of the Congress made a judgement, by what authority does the Supreme Court superimpose its view that it wasn't a ''considered judgement''? A fair reading of the statements from the floor debate on this issue undercuts the Court's disparaging characterization of this debate. For example, Representative TOM BLILEY of Virginia gave a rather detailed and persuasive discussion of how he concluded that a legislative ban was necessary. Mr. BLILEY noted that in 1983, Congress first passed legislation which required the FCC to report regulations describing methods by which dial-a-porn providers could screen out underage callers. Mr. BLILEY then walks us through the repeated failure of the FCC to pass regulations which could withstand judicial scrutiny. Finally, Mr. BLILEY notes that:

. . . it has become clear that there was not a technological solution that would adequately and effectively protect our children from the effect of this material. We looked for effective alternatives to a ban—there were none.

The Court repeats its critique of Congressional action in the case of *Reno* v. *ACLU*, 521 U.S. 844 (1997). Here the Court struck down the Communications Decency Act, which prohibited transmission to minors of ''indecent'' or ''patently offensive'' communications. In this opinion, the Court again discusses whether less restrictive means were available and again concludes that Congress had not sufficiently addressed the issue. The opinion notes that:

The Communications Decency Act contains provisions that were either added in executive committee after the hearings [on the Telecom Act] were concluded or as amendments offered during floor debate on the legislation. . . . No hearings were held on the provisions that became the law.

The Court in Reno later notes that, ''The lack of legislative attention to the statute at issue in Sable suggests another parallel with this case.''

Once again, if Congress passes a law, by what authority does the Supreme Court conclude that we did not devote sufficient legislative attention to the law? In the Reno opinion itself the Court noted that some Members of the House of Representatives opposed the Communications Decency Act because they thought that less restrictive screening devices would work. These members offered an amendment intended as a substitute for the Communications Decency Act, but instead saw their provision accepted as an additional section of the Act. In light of this record, how can the Court say that Congress did not consider less restrictive means?

A recent trend in Supreme Court decisions, highlighted by these three cases, shows an activist court with a political agenda determined to restructure political power in America away from Congress and to the states. What is Congress to do? We could exercise greater care in the confirmation process, but that is hardly the answer. Supreme Court nominees in Senate confirmation hearings routinely promise to respect Congressional authority and not to make new law. Once on the Court, many of the justices ignore those commitments.

The decision in Florida Prepaid versus College Savings Bank leaves a slight opening for Congress to legislate again under Article 5 of the 14th Amendment to narrowly tailor a legislative approach to satisfy the Court. Given the intensity of the Court's agenda and its inventive and extreme rationales for declaring Congressional actions unconstitutional, it is highly doubtful that anything the Congress does will satisfy the Court in its current campaign.

Congress may have to initiate a constitutional amendment to re-establish its legitimate authority. Before these three cases, it was unthinkable that Congress' authority over trademarks, patents and copyrights would have been undercut by a doctrine of state sovereign immunity. How could that be in the face of the provisions of Article 1, Section 8 granting the Congress express authority over trademarks, patents and copyrights by its enumerated power:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries

These important issues merit immediate and extensive consideration by the Congress. Perhaps a constitutional amendment is the only way to reinstate the balance between the authority of the Congress and the usurpation by the Supreme Court.

RECOGNIZING THE WORK OF THE NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE

Mr. KENNEDY. Mr. President, with the announcement of his proposal to modernize and strengthen Medicare, President Clinton has demonstrated that we can achieve needed Medicare reform without compromising our clear commitment to the fundamental principles of that basic and highly successful program. Our goal is to preserve and strengthen Medicare, so that it effectively meets the needs of all senior citizens in the years ahead, as it has done so well for the past thirty-four years.

Above all, we must reject any proposals that undermine the ability of senior citizens to obtain the health care they need, or that attempt to transform Medicare into a voucher program, as the Medicare Commission's recommendations and other premium support plans do. Such proposals are risky schemes. They abandon Medicare's successful social insurance compact, and current guarantee of a defined benefit. Premium support proposals could price conventional Medicare out of reach and force senior citizens to join HMOs. They threaten to compromise the quality of care and reduce access to care. That is unacceptable to senior citizens, and it should be unacceptable to members of Congress.

There are a number of hard-working organizations dedicated to the well-being of senior citizens. I welcome this opportunity to comment on one such group—a distinguished public interest organization that works effectively to protect the interests of senior citizens and ensure fairness in Medicare reform. The National Committee to Preserve Social Security and Medicare is a major leader in the national effort to protect and strengthen both Social Security and Medicare. I commend the Committee and its members for their commitment and their leadership, and I look forward to working closely with them in the critical weeks and months ahead to achieve the great goals we share.

THE EMERGENCY STEEL LOAN GUARANTEE AND EMERGENCY OIL AND GAS GUARANTEED LOAN ACT OF 1999

Mr. BYRD. Mr. President, last night, the U.S. House of Representatives passed the conference report to H.R. 1664, the bill containing the Emergency Steel Loan Guarantee and Emergency Oil and Gas Guaranteed Loan programs, by a vote of 246 yeas to 176 nays. H.R. 1664 was passed by the Senate on June 18, 1999.

The steel and oil and gas loan guarantee programs will provide qualified U.S. steel producers and small oil and gas producers with access to a $1.5 billion GATT-legal, revolving loan guarantee fund to back loans through the private market. A board of the highest caliber—consisting of the Chairman of the Board of Governors of the Federal Reserve System, who will serve as the Chair, the Secretary of Commerce, and the Chairman of the Securities and Exchange Commission—will oversee the programs. These distinguished board members will ensure careful analysis of the guarantee award process, including actions needed by U.S. steel mills and oil and gas producers to secure a financial recovery along with a reasonable prospect for repayment of the federally guaranteed loans. The loan guarantee programs are written to provide the board members with the flexibility necessary to offer the maximum benefit to U.S. steel and oil and gas businesses and the maximum protection to the taxpayers.

The passage of H.R. 1664 is a vital measure for both the U.S. steel industry and the oil and gas industry, and it was a personal pleasure for me to work with the fine Senator from New Mexico, Mr. DOMENICI, on this important legislation. I authored the steel loan guarantee provisions, while my good friend Senator DOMENICI authored the provisions for oil and gas. After several long nights, some tough negotiations, and countless consultations, H.R. 1664, a bill that joined our two programs, will deliver critical assistance to hard working Americans. H.R. 1664 is, indeed, a ''buy American bill.'' But, more importantly, the passage of H.R. 1664 is a vote of confidence for American workers and American families.

Passage of H.R. 1664 is an important statement by this Congress in support of the men and women in the U.S. steel industry. These workers have played by the global trade rules only to find themselves cheated by our trading partners who ignore the rules in order to maximize their own profits. Illegal steel trade has created exceedingly difficult finanical circumstances for the U.S. steel industry, and the U.S. steel industry deserves the benefits provided under H.R. 1664. Those benefits simply will provide essential loan guarantees to address the cash flow emergency created by the historic surge of cheap and illegal steel. They are vital to the future viability of many, many steel jobs.

The historic level of illegally dumped imported steel is a national crisis. The record levels of these foreign imports have caused over 10,000 thousand U.S. steelworkers to experience layoffs, short work weeks, and reduced pay. American steel companies have suffered from reduced shipments, significant drops in orders, price depression, lower profits, and worse. Already, at least six U.S. steel manufacturers have filed for Chapter 11 bankruptcy protections, jeopardizing employees, families, and entire communities. This steel loan guarantee program can help to prevent further bankruptcies, and provide vitally important support for the survival of small- and medium-sized steel manufacturers.

Steel communities are proud of their role throughout this nation's history. Through the work of men and women in places like Weirton, West Virginia, and Pittsburgh, Pennsylvania, the backbone of this nation was forged. Steel has always been a driving force in the growth and prosperity of our nation.

I applaud the action by this Congress in passing H.R. 1664. It was the right thing to do. I urge the President to quickly sign the bill into law. These loan guarantee programs will operate through the private market to help sustain good-paying jobs, support our national security, and save taxpayers millions of dollars from lost tax revenues and increased public assistance payments.

Mr. DOMENICI. Mr. President, I say to Senator BYRD, in both the steel and the oil and gas loan guarantee programs, the legislation provides that loan guarantees may be issued upon application of the prospective borrower