States Can Infringe upon Your Intellectual Property Rights with Impunity in the Era of "New Federalism"

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ABSTRACT

Allen v. Cooper transformed copyright by shifting away from the historical Constitutional underpinnings of copyright within our Federal system and by denying Congressional authority over its design. In this article, we argue that *Allen* is wrongly decided.

I. INTRODUCTION

Antagonized by half a century insouciance toward federalism boundaries,[1] the "New Federalism"[2] revival began under Chief Justice Rehnquist. As part of this revival, the Rehnquist Court substantially restrained Congress's authority to regulate commerce,[3] abrogate sovereign immunity,[4] fashion remedies pursuant to Section 5 of Fourteenth Amendment,[5] and "commandeer" state officials.[6] We see the Supreme Court's jurisprudence in this area as often focusing on two separate historical analyses: First, the Court takes a Constitutional era historical

[1] Between 1937 and 1995, no federal law was struck down for exceeding the scope of Congress's powers under the Commerce Clause. United States v. Durham, 902 F.3d 1180, 1208 (10th Cir. 2018). From 1937 to 1992, only one federal law was found to violate the Tenth Amendment, and that case was overruled less than a decade later. *See* Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 972 (1997) (providing that a decade after Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), in which the Court decided that a federal law requiring state governments to pay their employees the minimum wage violated the Tenth Amendment, the Court in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), pronounced that that the Tenth Amendment could not be used as a basis for invalidating federal legislation). Until 1997, it was thought that Congress had an unqualified power to enact laws enforcing the Fourteenth Amendment. *See* William E. Thro, *That Those Limits May Not Be Forgotten: An Explanation of Dual Sovereignty*, 12 WIDENER L.J. 567, 574 (2003).

[2] New Federalism is a system of governance that centers around preserving the theories of the separation of powers and checks and balances. New Federalism posits that the regulatory authorities of the state and federal governments are distinguishable and never overlap. *See, e.g.*, Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 642. In Collector v. Day, Justice Nelson articulated this principle as:

> The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States.

78 U.S. (11 Wall.) 113, 124 (1870).

[3] United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that Congress exceeded its Commerce Clause authority by passing the Gun-Free School Zones Act of 1990).

[4] Alden v. Maine, 527 U.S. 706, 712 (1999) ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996) ("The Eleventh Amendment prohibits Congress from making [states] capable of being sued in federal court.").

[5] City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the application of the Religious Freedom Restoration Act of 1993 to state and local governments because, it "alters the meaning of the Free Exercise Clause [and] cannot be said to be enforcing the Clause").

[6] Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

perspective to consider the extent that both the Framers and the States actually intended to bind the States as subservient to the federal government in a particular area of law. Second, if Congress has acted to bind individual states, then the Court looks to contemporary records justifying Congressional action. This second step is particularly relevant when the Constitutional era justification is based upon broader powers garnered by the Congress under the Fourteenth Amendment.

The Court's extension of the principles of New Federalism has continued in the Roberts Court Era, most recently in a case weighing Congressionally enacted copyright policy against the sovereignty of individual states to disregard copyright.[7] In *Allen v. Cooper*, a unanimous Supreme Court held that Congress's express power "[t]o promote the Progress of Science and useful Arts"[8] under Article I is not a sufficient warrant to overcome a State's sovereign immunity, reserved under the Eleventh Amendment,[9] in copyright suits.[10] Indeed, *Allen* drives another nail into the coffin of cooperative federalism,[11] manifesting the Court's adamance to further its New Federalist agenda even at the cost of rewriting the Constitution and its historical basis.

In this article, we argue that *Allen* is wrongly decided. In particular, the *Allen* Court made three key errors: **First**, the Court failed to consider the constitutional era historic record regarding the role of copyright and the balance between state and national government action. We argue that

[7] Allen v. Cooper, 140 S.Ct. 994 (2020).
[8] U.S. CONST. art. I, § 8, cl. 8.
[9] U.S. CONST. amend. XI.
[10] *Allen*, 140 S.Ct. at 1007.
[11] In a cooperative federalism system, Congress passes federal statutes, and the states must comply by those statutes to achieve federal goals. *See, e.g.*, Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 409 (providing that in a cooperative federalism system, "the federal government sets national environmental standards for the states to administer and enforce"); Dave Owen, *Cooperative Subfederalism*, 9 UC IRVINE L. REV. 177, 177 ("The federal government delegates to states the authority to implement a federally-created program, and those state implementing actions are subject to federal administrative oversight and mandatory review."); *see also* New York v. United States, 505 U.S. 144, 167 (1992) (describing the cooperative federalism system).

both the text and structure of the Constitution as well as the pertinent historical materials confirm that intellectual property law, particularly copyright and patent law, represent an exclusive realm reserved for the federal government.

In its analysis, the Court also made a **second** error—following *stare decisis* when unwarranted. In particular, the *Allen* Court concluded it was bound by its prior decision in the parallel patent case of *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*.[12] Although copyright and patent do share some common core features, the historical record regarding a national copyright policy is particularly strong. Following the Federal Convention, individual states generally did not step-forward with further grants of copyright protections and several affirmatively repealed their own preexisting copyright statutes.[13] In our view, this evidence tilts toward a conclusion that in the copyright space the States agreed "to be subordinate to the government of the United States."[14]

Third and last, in its analysis of contemporary records justifying Congressional action, the Court stepped into a legislative role rather than providing deference to Congressional reasoning and decision making. The message of the *Allen* Court is clear: Congress cannot make the states liable even for blatant and willful copyright misdeeds without compelling evidence of need. As part of its decision, the court also suggested the possibility of shifting goalposts in its Fourteenth Amendment analysis. Even if Congress complies with the standard announced in *Allen* and provides evidence to justify the abrogation of sovereign immunity, we believe the Court may still strike down the Act as still lacking in the court's eye or perhaps by acting upon doubts expressed

[12] 527 U.S. 627 (1999).
[13] *See* discussion *infra* Part IV.
[14] Chisholm v. Georgia, 2 Dall. 419, 440 (1793).

by Justice Thomas as to whether "copyrights are property within the original meaning of the Fourteenth Amendment's Due Process Clause."[15]

In our opinion, provided that Congress expressly articulates its intent, it has a solid constitutional authority to deprive States and other sovereigns of the defense of sovereign immunity against intellectual property infringement claims.[16] We come at this debate primarily as intellectual property law scholars surprised by the dismissive approach that the Supreme Court took in *Allen*. The outcome leaves copyright holders without cause of action even in cases of clear and deliberate infringement by States.

II. THE COURT'S SOVEREIGN IMMUNITY JURISPRUDENCE IS A MESS OF ITS OWN MAKING

In cases involving sovereign immunity, the Supreme Court has shown an inexhaustible appetite for "aristocratic judicial Constitution-writing"[17] in order to promote New Federalism. Consequently, Court's decisions on whether Congress could obviate sovereign immunity in the exercise of its enumerated powers has created a labile jurisprudence, one that follows sounds as opposed to sense and caprice as opposed to reason. For example, to reverse the plurality decision in *Union Gas*, the Supreme Court in *Seminole Tribe of Fla. v. Florida*[18] *unqualifiedly* maintained that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" under the Eleventh Amendment, only to reject that approach a decade later in *Cent.*

[15] *Allen*, 140 S.Ct. at 1008 (Thomas, J., concurring).
[16] Dellmuth v. Muth, 491 U.S. 223, 223 (1989) (providing that "Congress may abrogate the States' immunity only by making its intention unmistakably clear in the language of the statute") (internal quotation marks omitted); *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (holding that "Congress has the authority to render States so liable [in money damages] when legislating pursuant to the Commerce Clause").
[17] McDonald v. City of Chicago, 561 U.S. 742, 804 (2010) (Scalia, J., concurring).
[18] 517 U.S. 44, 73 (1996).

Va. Cmty. Coll. v. Katz.[19] As Professors Baude and Sachs recently explained, we see "a bewildering forest of case law, which takes neither the words nor the doctrines seriously."[20]

The Court in *Union Gas* embraced the notion that the Commerce Clause[21] permits Congress to abrogate state sovereign immunity because the States surrendered sovereignty with respect to interstate commerce when they "empower[ed] Congress to regulate commerce."[22] The United States had sued Union Gas Company under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[23] claiming the Company is responsible for cleanup costs of removing deposits of coal tar from a creek in Pennsylvania.[24] In response to the federal government's suit, Union Gas filed a third-party claim against the Commonwealth of Pennsylvania alleging that State's negligence in excavating the creek contributed to the tar deposits.[25] The State invoked Eleventh Amendment immunity, and both the District court and the Third Circuit sided with the State.[26] Rejecting the sovereign immunity defense, a plurality of the Court held that the Commerce Clause, like the Fourteenth Amendment, "expands federal power and contracts state power,"[27] on condition that Congressional intent to hold States liable for monetary damages in federal courts is patently manifest.[28]

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[19] 546 U.S. 356, 363 (2006) (citing *Seminole Tribe* to maintain that the "assumption that the holding in that case would apply to the Bankruptcy Clause … was erroneous").
[20] William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 611 (2021).
[21] U.S. CONST. art. I, § 8, cl. 3.
[22] *Union Gas*, 491 U.S. at 14 ("[T]he States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce, and [thus] by empowering Congress to regulate commerce, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." (citing Parden v. Terminal Ry of Ala. Docks Dept., 377 U.S. 184, 191-92 (1964) (internal quotation marks omitted))).
[23] 42 U.S.C. §§ 9604, 9606 (2021).
[24] *Union Gas*, 491 U.S. at 6.
[25] *Id*.
[26] *Id.* However, before Union Gas' petition for certiorari was granted, Congress amended CERCLA by passing Superfund Amendments and Reauthorization Act of 1986 to permit a suit for monetary damages against a State in federal courts. *See* 42 U.S.C. §§ 9601(20)(D), (21), 9607(a), (d)(2), (g), 9620(a)(1), 9659(a)(1).
[27] *Id* at 16-17.
[28] *Id* at 13.

In *Seminole Tribe*,[29] an Indian tribe sued the state of Florida and various state officers for breaching its statutory duty to "negotiate with the Indian tribe in good faith" toward the formation of a gaming compact under the Indian Gaming Regulatory Act (IGRA).[30] Florida and its Governor claimed Eleventh Amendment immunity, asserting that they are shielded from suit.[31] On the other side, the Tribe, relying on *Union Gas*, took the position that Congress abrogated Eleventh Amendment immunity when it enacted the IGRA.[32] The Court, in a five-to-four decision, overruled *Union Gas* finding that authority to waive state immunity does not exist under the Commerce Clause, and therefore the IGRA's passage could not take away Florida's sovereign immunity.[33]

Three years later, the Court reaffirmed the central holding of *Seminole Tribe*.[34] In *Florida Prepaid*, College Savings Bank claimed that tuition prepayment programs, administered by the Florida Prepaid Board, a Florida state entity, infringed its patent and sued under the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act)[35] for declaratory and injunctive relief, as well as money damages, attorney's fees, and costs.[36] The Patent Remedy Act expressly clarified that states could be held liable for patent infringement. Despite express Congressional Action, the Florida Prepaid Board moved to dismiss the infringement claim, asserting that the Act was an unconstitutional attempt by Congress to use its Article I powers to

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[29] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 51-52 (1996).
[30] 25 U.S.C. § 2710(d) (held unconstitutional by *Seminole Tribe*, 517 U.S. 44 (1996)). Congress enacted IGRA pursuant to its power under the Indian Commerce Clause.
[31] *Seminole Tribe*, 517 U.S. at 52.
[32] *Id.* at 60.
[33] *Id.* at 75-76.
[34] Fla. Prepaid Postsecondary Edu. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).
[35] 35 U.S.C. §§ 271(h), 296(a) (held unconstitutional by *Florida Prepaid*, 527 U.S. 627 (1999)). The Patent Remedy Act, enacted in 1992, amended the patent laws to expressly abrogate state sovereign immunity from patent infringement claims. *Id.*
[36] *Florida Prepaid*, 527 U.S. at 630-32.

abrogate state sovereign immunity.[37] College Savings Bank contended that Congress enacted the Act pursuant to its authority under § 5 of the Fourteenth Amendment[38] in order to "prevent a State from depriving a person of property without due process of law" dictated by § 1 of that amendment.[39]

The Chief Justice Rehnquist majority admitted that Congress's abrogation of the states' sovereign immunity to enforce the guarantees of due process regarding intellectual properties is, at least in theory, a valid exercise of congressional power under section 5 of the Fourteenth Amendment.[40] However, concerned that such a holding would pose a significant hurdle to the advancement of its New Federalist agenda, the majority struck down the Patent Remedy Act by encroaching on Congressional factfinding discretion.[41] Upon reviewing de novo the evidence that Congress relied on in passing the Act, the majority overrode and substituted Congress's determination as to sufficiency of evidence with that of its own.[42] The majority found only scarce evidence indicating systematic infringement of patents by States and inadequacy of state remedies. As such, there was no "congruence and proportionality between the injury to be prevented or remedied"[43] and the Patent Remedy Act.[44] Therefore, the abrogation of the states' sovereign

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[37] *Id.*
[38] U.S. CONST. amend. XIV, § 5.
[39] *Id.* at 641-42 n.7.
[40] *Id.* at 636-37 ("This Court in *Seminole Tribe* also reaffirmed … that Congress retains the authority to abrogate states' sovereign immunity pursuant to the Fourteenth Amendment").
[41] *See id.* at 638-44.
[42] *See id.* at 643 ("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. It did hear a limited amount of testimony to the effect that the remedies available in some States were uncertain"); *see also id.* at 640 ("In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations").
[43] *Id.* at 639 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).
[44] *See id.* at 641 ("The Senate Report, as well, contains no evidence that unremedied patent infringement by States had become a problem of national import").

immunity in the Act did not qualify as an appropriate enforcement legislation within the meaning of the Fourteenth Amendment.[45]

Almost a decade later in *Katz*, the Court departed from the express holdings of *Seminole Tribe* and *Florida Prepaid* by rejecting sovereign immunity in the bankruptcy context[46] *Katz* involved a debtor that operated a chain of campus bookstores, including four stores at state-run colleges in Virginia.[47] The debtor filed for bankruptcy in 2001, and its trustee, Bernard Katz, subsequently filed an adversary proceeding against the four Virginia schools seeking to set aside and recover alleged preferential transfers made by the debtor to the schools in the days leading up to its bankruptcy.[48] As "arms of the State," the Virginia schools maintained that they were entitled to sovereign immunity.[49] The sharply divided Court in *Katz* pronounced that the Bankruptcy Clause[50] afforded constitutional authority for Congress to drag States into federal courts.[51]

Katz offered a two-fold rational to justify its departure from the general rule formulated in *Seminole Tribe*. For one, the Court relied on "the Bankruptcy Clause's unique history."[52] The States, *Katz* explained, often discountenanced debtors' discharge orders issued by one another, springing from their "wildly divergent and uncoordinated insolvency and bankruptcy laws."[53] As such, the Framers, in adopting the Clause, purposefully gave Congress the authority "to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders."[54]

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[45] *See id.* at 646-47.
[46] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).
[47] *Id.* at 360.
[48] *Id.*
[49] *Id.*
[50] U.S. CONST. art. I, § 8, cl. 4.
[51] *Katz* 546 U.S. at 379 (noting that the Bankruptcy Clause itself gives Congress the power to "treat States in the same way as other creditors insofar as concerns Laws on the subject of Bankruptcies or exempt them from operation of such laws … the relevant abrogation is the one effected in the plan of the Convention, not by statute") (internal quotation marks omitted).
[52] *Id.* at 369 n.9.
[53] *Id.* at 357.
[54] *Id.* at 377.

For another, the Court reasoned that States themselves consented to federal court bankruptcy litigation "in the plan of the Convention."[55] Put differently, regardless of whether or not Congress articulates its clear intent to abrogate state sovereign immunity in federal statues on the subject of bankruptcies, States are not entitled to sovereign immunity, for they already waived it in the constitutional convention.[56] Fifteen years later, the *Allen* Court simultaneously expanded and limited its sovereign immunity jurisprudence.[57]

III. *ALLEN V. COOPER*: FACTS, BACKGROUNDS, AND THE DECISION

In 1996, while the Court was preoccupied with reinterpreting the Constitution in *Seminole Tribe*, the wreckage of *Queen Anne's Revenge* was discovered by a Floridan salvage and research company, Intersal, Inc.[58] Under established federal and state law, the wreck is owned by North Carolina.[59] Intersal and North Carolina entered into a salvage agreement designating each party's right to the wreckage.[60] The agreement provided that Intersal was entitled to the financial proceeds from documentary video and photography relating to the wreckage except that North Carolina would have access to said media for non-commercial educational or historical uses.[61]

In 1998, one year before *Florida Prepaid* came down, Intersal retained Fredrick Allen and his company to produce videos and photos of the wreck.[62] For the next thirteen years, during which Court's gallimaufry of confusing decisions on state sovereign immunity culminated in *Katz*, Allen took footage and photos of the shipwreck, and registered many copyrights with the U.S. Copyright

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[55] *Id.* at 377-78 (providing that "States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to Laws on the subject of Bankruptcies") (internal quotation marks omitted).
[56] *See id.*
[57] Allen v. Cooper, 140 S.Ct. 994 (2020).
[58] *Id.* at 999.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

Office.[63] North Carolina published Allen's copyrighted works on the internet without his consent in violation of the salvage agreement.[64] In 2015, Allen sued North Carolina and its various officials in the U.S. District Court for the Eastern District of North Carolina for copyright infringement.[65] The State then moved to dismiss the infringement claim on the basis of sovereign immunity under the Eleventh Amendment.[66] However, District Judge Terrence W. Boyle refused to dismiss the copyright claims, because "in this particular case Congress has clearly abrogated state immunity … and such an abrogation is congruent and proportional to a clear pattern of abuse by the states."[67]

In fact, the district court was right in that Congress expressly abrogated North Carolina's state sovereign immunity to be sued for copyright violations of the type alleged by Allen.[68] In 1990, Congress enacted the Copyright Remedy Clarification Act (CRCA) providing that:

> Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). *As used in this subsection, the term 'anyone' includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity.* Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.[69]

Thus, under the statute as clarified, "any State" may be sued for copyright infringement.

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[63] *Id.*
[64] *Id.* In 2013 and in response to Allen's claims of infringement, North Carolina, Intersal, and Allen reached a settlement agreement clarifying the terms of preexisting salvage agreement between the parties. Allen v. Cooper, 895 F.3d 337, 344-45 (4th Cir. 2018). As part of this settlement, North Carolina promised not to use any of Allen's "commercial documentaries" in the future and to mark Allen's "non-commercial media" with a time stamp and watermark before displaying it. *See id.*
[65] Allen v. Cooper, 244 F. Supp. 3d 525 (E.D.N.C. 2017).
[66] *Id.* at 531.
[67] *Id.* at 540.
[68] *See* 17 U.S.C. § 501(a) (held unconstitutional by *Allen*, 140 S.Ct. 994 (2020)).
[69] *Id.* (emphasis added).

Judge Boyle did not stop there, however. He went on to thoughtfully criticize the Court's Eleventh Amendment jurisprudence—namely the notion "that the Eleventh Amendment embodies a general doctrine of state sovereign immunity that extends to federal question cases in federal courts."[70] Judge Boyle objurgated the Court for its understanding of the Eleventh Amendment that is "unsupported by the original meaning and plain text of the Constitution or the Amendment itself and which does harm to the fundamental rule of law in this nation."[71]

> The doctrine of state sovereign immunity to federal law in federal court has frustrated the essential function of the federal courts to ensure the uniform interpretation and enforcement of the supreme law of the land. It frustrates the ability of individuals to receive what may be the only practical remedy available to them as plaintiffs. It does not enhance constitutional protections or advance the ideals of our constitutional form of government in which the people are sovereign. It is not required by the structure of the federal system designed by the Founders, and in fact has strangely turned our federal form of government and the Supremacy Clause on its head by leaving states free to resist at their pleasure that federal law which we claim is the supreme law of the land. Far from protecting the dignity of the states or ensuring domestic harmony, in modem times this anachronistic vestige of English commonwealth doctrine has been shown to accomplish one thing only: to shield state governments from the consequences of their illegal conduct that intrudes upon federal protections.[72]

Although Judge Boyle called on Supreme Court to reconsider its "flawed" interpretation of the Eleventh Amendment,[73] he made it clear that he "is constrained, under the absolute hierarchical system of courts in the federal judiciary, to hold that the defense of sovereign immunity is available to the states in federal court in a case arising under this [c]ourt's federal question jurisdiction."[74] Therefore, in permitting copyright claims to progress in litigation, Judge Boyle relied on *Florida Prepaid* to conclude that the CRCA was enacted in response to "clear pattern of abuse by the

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[70] *Allen*, 244 F. Supp. 3d at 535. According to Judge Boyle, "the Eleventh Amendment was meant to clarify the basis of diversity jurisdiction in the federal courts." *Id.*
[71] *Id.*
[72] *Id.* at 538.
[73] *Id.* at 535.
[74] *Id.* at 540.

states,"[75] and thus it was a valid exercise of Congress's power under section 5 of the Fourteenth Amendment.[76]

On appeal, the Fourth Circuit reversed on the issue of state sovereign immunity, concluding that the claims against North Carolina and its officials must be dismissed.[77] In his opinion, Judge Paul Victor Niemeyer concluded that Congress's abrogation of the sovereign immunity under the CRCA was unconstitutional.[78] First, "[n]either the text of the statute nor its legislative history indicates," Judge Niemeyer explained, "any invocation of authority conferred by § 5 of the Fourteenth Amendment.[79] Because "it is readily apparent that … Congress relied on the Copyright Clause in Article I of the Constitution" to enact CRCA, "the Act cannot effect a valid abrogation under § 5."[80]

Second, Judge Niemeyer held that Congress did not limit the scope of CRCA to "enforcement of rights protected by the Fourteenth Amendment," and thus "the Act cannot be deemed a congruent and proportional [Congressional] response to the Fourteenth Amendment injury."[81] Furthermore, substituting his opinion with that of Congress, Judge Niemeyer went on to suggest that no "prophylactic legislation under § 5"[82] is warranted in the area of intellectual property, for the evidence of intentional or reckless infringement on the part of the States "plainly falls short of establishing the 'widespread and persisting deprivation of constitutional rights.'"[83] To Judge Niemeyer, even "the amount of suits filed against allegedly infringing states in recent years" does not suffice to uphold the constitutionality of CRCA's abrogation of States' Eleventh

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[75] *Id.*
[76] *See id.* at 534-35.
[77] Allen v. Cooper, 895 F.3d 337 (4th Cir. 2018).
[78] *See id.* at 349-51.
[79] *Id.* at 349.
[80] *Id.* at 349-50.
[81] *Id.* at 351.
[82] *Id.* at 353.
[83] *Id.* (quoting City of Boerne v. Flores, 521 U.S. 507, 526 (1997)).

Amendment immunity.[84] For that reliance "did not comport with the Supreme Court's determination that Congress must identify a pattern of unconstitutional conduct before it abrogates Eleventh Amendment immunity."[85]

In reversing the district court decision, Judge Niemeyer refused to comment on Judge Boyle's candid disconcertment with the Court's interpretation of the Eleventh Amendment that it affords immunity to the States even in federal question jurisdiction cases.[86] This blatant disregard for Judge Boyle's argument echoes the belief that "[w]orrying about things that cannot be changed or corrected" is a fundamental mistake that "mankind keeps making century after century."[87] Ironically, "under the absolute hierarchical system of courts in the federal judiciary,"[88] the very same belief is embodied in the principle of *stare decisis*. To Judge Niemeyer, the depth or soundness of Judge Boyle's argument was not pivotal; what mattered was that it could not compel him to forgo the principle of *stare decisis* and abandon construction previously made under *Florida Prepaid*.[89]

Allen filed a petition for review in the Supreme Court presenting this question: "Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act in providing remedies for authors of original expression whose federal copyrights are infringed by states."[90] The Court granted certiorari and handed down its decision in March 2020 with Justice

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[84] *Id.*
[85] *Id.*
[86] Allen v. Cooper, 244 F. Supp. 3d 525, 535 (E.D.N.C. 2017) (citing Hans v. Louisiana, 134 U.S. 1 (1890), to state that the *Hans* Court's holding that "the Eleventh Amendment embodies a general doctrine of state sovereign immunity that extends to federal question cases in federal court is flawed and contrary to the fundamental nature and meaning of the Constitution").
[87] A maxim made famous by Marcus Tullius Cicero. It is perhaps a reflection of our bumptious personalities to criticize such a renowned political and legal figure, but we cannot resist to think that Cicero's fame in oratory must derive from statements better than this. For we find it difficult to make sense of Cicero's balderdash.
[88] *Allen*, 244 F. Supp. 3d at 540.
[89] *See Allen*, 895 F.3d at 353.
[90] Brief for Petitioners at i, Allen v. Cooper, 140 S.Ct. 994 (2020) (No. 18-877), 2019 WL 3714476.

Kagan delivering the opinion of the Court.[91] Justice Thomas concurred in part and concurred in the judgment, while Justice Breyer, joined by Justice Ginsburg, concurred in the judgment.[92] The decision was viewed by many commentators as a triumph of *stare decisis* and defeat of the rule of law, under the Constitution.[93]

Justice Kagan neither vaunted nor devalued the Court's prior jurisprudence on the doctrine of state sovereign immunity, offering only the uncontentious observation that it "is nowhere explicitly set out in the Constitution."[94] She began by announcing that *Florida Prepaid*, the patent case, "compels" the conclusion in Allen's copyright case: Congress abused its authority when it abrogated the States' immunity from copyright infringement suits in CRCA.[95] Given that "[t]he slate on which we write today is anything but clean," the Court explicated that "*Florida Prepaid* … forecloses" Allen's arguments that Congress acted in consistent with its authorities pursuant to Article I and Section 5 of the Fourteenth Amendment.[96]

As for Congress's authority under Article I to enact CRCA, the Court heavily relied on *Florida Prepaid* to reject Allen's argument.[97] In doing so, the Court alluded to the notion that a close relationship exists between patent law and copyright law: "if not the Patent Remedy Act, not

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[91] *Allen*, 140 S.Ct. at 996-97.
[92] *Id.*
[93] *See, e.g.*, Michael C. Dorf, *Supreme Court Gives States the Green Light to Infringe Copyrights*, VERDICT JUSTIA (Mar. 30, 2020), https://verdict.justia.com/2020/03/30/supreme-court-gives-states-the-green-light-to-infringe-copyrights ("Preserving the existing body of state sovereign immunity doctrine might be necessary to preserve other more valuable doctrines as part of a stare decisis bargain. But there is little to be said for the doctrine on its own merits").
[94] *Allen*, 140 S.Ct. at 1000. The Court's current stance on doctrine of sovereign immunity is that the Eleventh Amendment serves "as evidencing and exemplifying" of a "broader concept of immunity, implicit in the Constitution." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267-68 (1997); *see also* Federal Maritime Comm'n v. South Carolina Ports Authority, 535 U.S. 743, 753 ("[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity"). Recently, Justice Gorsuch named *Coeur d'Alene Tribe*'s reference to "broader concept of immunity, implicit in the Constitution" as "structural immunity". Penneast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting); .
[95] *Id.* at 999.
[96] *Id.* at 1001.
[97] *See id.* at 1001-02.

its copyright equivalent either, and for the same reason."[98] The Court also rejected the argument that *Katz* rectified the analysis the analysis under *Florida Prepaid* and *Seminole Tribe* by establishing a "clause-by-clause reexamination of Article I."[99] Justice Kegan narrowed the holding of *Katz*, explaining "the opinion reflects what might be called bankruptcy exceptionalism," in which the Bankruptcy Clause is "*sui generis*—again, 'unique'—among Article I's grants of authority."[100]

Addressing Congress's authority under Section 5 of the Fourteenth Amendment, the Court averred that *Florida Prepaid* served as both "the starting point of our inquiry here," as well as "the ending point too unless the evidence of unconstitutional infringement is materially different for copyrights than patents."[101] That said, the Court eventually determined that "the concrete evidence of States infringing copyrights (even ignoring whether those acts violate due process) is scarcely more impressive than what the Florida Prepaid Court saw."[102] Thus, given that "the balance … between constitutional wrong and statutory remedy is [] askew," the Court concluded that the CRCA is invalid under section 5.[103]

Unfortunately, the Court's decision suffers from several shortcomings. First, the Court's Article I argument is premised on a "historic kinship"[104] that never existed between the two major branches of the intellectual property laws in relation to State authority. Quite to the contrary,

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[98] *Id.* at 1002.
[99] *Id.* at 1003 (internal quotation marks omitted).
[100] *Id.* at 1002.
[101] *Id.* at 1005.
[102] *Id.* at 1006.
[103] *Id.* at 1007.
[104] Sony Corp. of Am. v. Universal City Studios, Inc., 446 U.S. 417, 439 (1984) (providing that using patent law cases to decide copyright law claims is both appropriate and reasonable "because of the historic kinship between patent law and copyright law"). However, the Court has also cautioned that "[t]he two areas of law, naturally, are not identical twins" and care must be taken "in applying doctrine formulated in one area to the other." *Id.* n.19; *see also Impression Prods., Inc. v. Lexmark Int'l*, Inc., 137 S. Ct. 1523, 1539 (2017) (Ginsburg, J., concurring in part and dissenting part) ("Although there may be a historical kinship between patent law and copyright law the two are not identical twins" (internal quotation marks omitted)).

history shows that *Katz*'s two-fold rationale for abrogating sovereign immunity is equally applicable to the Copyright Clause as it was to the Bankruptcy Clause.[105] Second, in rejecting Allen's Section 5 argument, the Court stepped over its constitutionally limited bounds when it became a factfinder, reweighing evidence and substituting its judgment for that of Congress.[106] Third, the Court's interpretation of the Eleventh Amendment that "it constrains federal 'judicial authority'"[107] and protects states against suits arising under federal laws is indeed "unsupported by the original meaning and plain text of the Constitution or the Amendment itself."[108] Fourth and last, *Allen*'s "formulation of the *stare decisis* standard does not comport with [its] judicial duty under Article III,"[109] which requires the Court to rule "in accordance with what … the Constitution demands."[110] In the following sections, we will discuss each of these shortcomings in turn.

IV. A HISTORIC KINSHIP THAT NEVER EXISTED

The *Allen* Court tied its analysis of state sovereign immunity in copyright directly to the parallel analysis done in the patent context years before in *Florida Prepaid*. Both copyright and patent are enabled within the same constitutional clause—the so called "Intellectual Property Clause"—and so the same sovereign immunity principles apply.[111] The two doctrines are so closely linked that a decision in the patent context foreclosed the parallel copyright claim. "[I]f not the Patent Remedy Act, not its copyright equivalent either, and for the same reason."[112] In *Katz*, the Court found no state sovereign immunity in the bankruptcy context after reviewing the historic context. In *Allen*, however, the Court allowed *stare decisis* to drive its decision and did not conduct

[105] *See* discussion *infra* Part IV.
[106] *See* discussion *infra* Part V.
[107] *Allen*, 140 S.Ct. at 1000 (internal quotation marks omitted).
[108] Allen v. Cooper, 244 F. Supp. 3d 525, 535 (E.D.N.C. 2017).
[109] Gamble v. United States, 139 S.Ct. 1960, 1981 (2019) (Thomas, J., concurring).
[110] Oregon v. Mitchell, 400 U.S. 112, 218 (1970) (Harlan, J., concurring in part and dissenting in part).
[111] *See Allen*, 140 S.Ct. at 1002.
[112] *Id*.

the same level of historical analysis as in *Katz*. We argue here that had the *Allen* Court performed the same historical analysis as in *Katz*, it would have likely reached the same conclusion of no immunity regarding the Copyright Clause rather than simply following the patent case results. To better understand this contention, it is necessary to review the history of the intellectual property laws in the U.S, beginning with the pre-Constitutional period.

In the pre-constitutional period, States treated the two branches of intellectual property fundamentally differently.[113] With respect to copyrights, all States but Delaware enacted unique copyright statutes.[114] But for a few States, the enactment of the law was merely an empty gesture because it was never followed with enforcement regimes.[115] Pennsylvania, for example, enacted its copyright law in 1784 but suspended its implementation until "such time as all and every states of union shall have passed laws similar to the same."[116] A similar provision was included in the Maryland Copyright law.[117] Therefore, since Delaware never had a copyright law during the pre-Constitutional era, laws of Maryland and Pennsylvania never went into effect. However, unlike

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[113] *See generally* OREN BRACHA, OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790-1909 ch. 1 (Kindle ed. 2016) (e-book) (discussing that States developed legislative frameworks only for granting copyrights but not patents).

[114] Oren Bracha, *Commentary on the Connecticut Copyright Statute 1783*, *in* PRIMARY SOURCES ON COPYRIGHT (1450-1900), (Lionel Bently & Martin Kretschmer eds., 2008), www.copyrighthistory.org [hereafter Primary Sources]. The state copyright statutes were passed in the following chronological: Connecticut, January 1783; Massachusetts, March 1783; Maryland, April 1783; New Jersey, May 1783; New Hampshire, November 1783; Rhode Island, December 1783; Pennsylvania, March 1784; South Carolina, March 1784; Virginia, October 1785; North Carolina, November 1785; Georgia, February 1786; New York, April 1786. *Id.*

[115] *See id.*

[116] An Act for the Encouragement and Promotion of Learning by Vesting a Right to the Copies of Printed Books in the Authors or Purchasers of Such Copies During the Time Therein Mentioned (passed Mar. 15, 1784), *reprinted in* COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783-1906, at 20 (Thorvald Solberg, ed., 2d rev. ed. 1906) [hereinafter Copyright Enactments].

[117] *See* An Act respecting literary property (passed April 21, 1783), *reprinted in* Copyright Enactments, *supra* note 17, at 5. Section VI of the Maryland copyright statute titled provided that "[t]his act to commence and be in force from and after the time that familiar laws shall be passed respecting literary property in all and every of the United States." *Id.*

copyrights, the States neither considered patents as rights nor developed mechanistic legislative frameworks for issuing patents; there were ad hoc discretionary legislative grants.[118]

States' copyright statutes almost immediately lost their vitality in the post-Constitutional era.[119] Between the time the U.S. Constitution was ratified and the passage of the first copyright act and patent act, both in 1790, David Ramsay, a citizen of South Carolina, petitioned Congress praying for an injunction against unpermitted reproduction of his book, *History of the American Revolution*.[120] At the time, South Carolina had a pre-Constitutional copyright statute, enacted in 1784.[121] Ramsay' act of seeking, by Congressional petition, entitlement to any royalties arising from the sale of his book would indicate either that South Carolina had repealed its copyright statute following the ratification of the Constitution, or that the States, or generally "the People of the United States,"[122] accepted the reality that copyright had become a federal domain.[123] At the

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[118] OREN BRACHA, OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790-1909 ch. 1, 44-45 (Kindle ed. 2016) (e-book).
[119] *See* Bracha, *supra…16?*
[120] *House Journal*, 1st Cong., 1st Sess., April 15, 1789, 14. Ramsay's petition is available at Primary Sources, supra note 16. It reads:

> To his Excellency the President and the Honorable members of the Senate of the United States. The Petition of the subscriber humbly sheweth that your Petitioner having devoted a number of years to an investigation of the principles of the late revolution and to the collection of information and materials for writing the History of the same has at a great expense of time and money published a Book entitled "The History of the Revolution of South Carolina from a British province to an Independent State" and that with great labour he has prepared a general History of the late war with Great Britain which he proposes to publish in a short time under the title of "The History of the American Revolution" and your Petitioner humbly conceiving that in reason and justice he ought to be entitled to any Endowments arising from the sale of the aforementioned works as a compensation for his labour and expense and finding the same principle expressly recognized in the new Constitution your Petitioner therefore prays that a Law may pass securing to your Petitioner his heirs and assigns for a certain term of years the sale and exclusive right of vending and disposing of the same within the United States or that such other Regulation as to your wisdom may seem proper for the above purposes may be adopted. And your Petitioner as in duty bound with ever pray.

Id.
[121] *See* Bracha, *supra* note 16.
[122] U.S. CONST. pmbl.
[123] Some scholars have asserted that the States repealed their pre-Constitutional copyright laws following the passage of the first Copyright Act in 1790. *See, e.g.*, 6 William F. Patry, *Patry on Copyright* § 21:88 (2020) (noting that "the colonies, after becoming states, passed their own copyright laws prior to the enactment of the federal Constitution, only to repeal them after the Constitution's enactment, signaling their understanding that copyright was, in the new

very least, it appears that states' copyright statutes immediately fell into complete disuse following the ratification of the Constitution. [124] Many States later formally repealed their Copyright statutes, signaling the consensus that the state copyright systems had no place under the Constitution.[125]

On the other hand, state patents did not so quickly lose their attractiveness after ratification. Many inventors continued to apply for patent grants from States, and state legislatures continued to issue them.[126] In fact, the practice was so widespread and well-settled that prompted Congress to require inventors, who were seeking a federal patent grant, to surrender their state-issued patents.[127] For example, Congress expressly made issuance of federal patent protection for Oliver Evans's improvement on the flour mill contingent on him renouncing all previously-obtained state grants.[128] Unlike copyrights, there was no understanding, among either the States or among the People, that state patent practice should automatically cease following the ratification. In fact, the

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nation, entirely a federal domain"). Other scholars, on the other hand, have claimed that the state copyright laws only fell into disuse after the ratification of the Constitution, and the States formally repealed them years later on housekeeping with respect to laws that had long become inoperative. *See, e.g*., Bracha, *supra* note 16 (stating that "Any existing attractiveness of copyright protection under states law disappeared when the federal Copyright Act was legislated in 1790 and the local regimes, not extensively drawn on to begin with, fell out of use").

[124] See BRUCE BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 124 (1967) (providing that "the passing away of the state copyright systems was marked by the repeal of the New Jersey law in 1799 and the Connecticut law in 1812"). The only instance, to the best of our knowledge, that a state granted copyright protection after the ratification of the Constitution is the case of Joseph Purcell, a citizen of South Carolina. *See id.*; see also BRACHA, *supra* note ---, at 259, n. 457. in 1792, the South Carolina legislature passed a private act appointing Joseph Purcell as State Geographer as well as granting a 20-year exclusive publication right for his maps, with an award of monetary penalty to Purcell for each infringing copy discovered. 5 *Statutes at Large of South Carolina* 219–220 (Thomas Cooper ed. 1837–1868). It is important to note that the copyright protection in this case was granted via an enactment of a private act and not pursuant to South Carolina's copyright statute. *See id.* Additionally, given the fact that the copyright protection was tied with the appointment of Purcell to the position of a State Geographer, the protection could not be enforced in other states, whereas if the protection had been granted under South Carolina's copyright statute, it had been upheld in other states under the pre-Constitutional state copyright systems.

[125] See BUGBEE, *supra* note 124.

[126] P. J. Federico, *State Patents*, 13 J. PAT. OFF. SOC'Y 166, 167-69 (1931); *see also* BRUCE BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 101-02 (1967) (providing that, in 1791, the state of New Hampshire granted a patent to John Young for "discover[ing] and invent[ing] the art of building Chimneys and altering those already built, in such manner as will render them morally certain of carrying Smoke in tight Room, by which means a vast saving of fuel may be made" (citing 5 *Laws of New Hampshire* 790 (Henry H. Metcalf ed., 1916) (internal quotation marks omitted)).

[127] Patent Act of 1793, ch. 11, § 7, 1 Stat. 318-323 (repealed 1836).

[128] Prior to his petition for federal patent protection, Oliver Evans had secured patent grants from Pennsylvania, Delaware, New Hampshire, and Maryland for his improvement on the flour mill. See Edward C. Walterscheid, To Promote the Progress of Useful Arts: American Patent Law and Administration, 1798-1836 158-59 (1998).

States' different approaches to patents and copyrights, both prior and after ratification, calls into question the validity of the notion that "the historic kinship between patent law and copyright law" should always lead the Court to the same conclusion in copyright claims as that reached in patent claims.[129]

Although patent and copyright certainly share some kinship. The court's reference to the Intellectual Property Clause highlights a revisionary history. Although the Supreme Court has cited to the Constitutional provision in dozens of cases stretching into the 19th century, it was generally in a discussion of the patent and copyright clause. The court did not begin referring to the "intellectual property clause" until its 2003 decision in *Eldred*.[130] The basic conclusion here is that *Allen*'s algorithm "if patent; then copyright" is based upon faulty logic.

We believe that by not granting copyright protection following the Federal Convention, and subsequently, by voluntarily repealing their copyright statutes, the States agreed "'to be subordinate to the government of the United States,'" in the copyright space.[131] That is, in the words of *Katz*, the States agreed not to invoke sovereign immunity defense in copyright claims.[132]

Yet, what is more striking is that the case for concluding that the States consented not to assert any sovereign immunity defense in copyright suits is stronger than that for bankruptcy proceedings. Like state copyrights in the pre-constitutional era where each state had its own copyright statute, the States "had wildly divergent schemes for discharging debt, and often refused to respect one another's discharge orders."[133] However, unlike the States' approach to the

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[129] *See supra* note 104.
[130] *Eldred v. Ashcroft*, 537 U.S. 186 (2003). The Supreme Court's first use of the term "intellectual property" within an opinion appears to be in the tax decision of *C.I.R. v. Wodehouse*, 337 U.S. 369, 419 (1949).
[131] Alden v. Maine, 527 U.S. 706, 776 (1999) (Souter, J., dissenting) (quoting from later-Justice James Wilson's comments in the Pennsylvania Convention that "the government of each state ought to be subordinate to the government of the United States").
[132] The *Katz* Court used the same reasoning to hold that the States consented to suit brought under "Laws on the subject of Bankruptcies." Cent. Va. Cmty. Coll. V. Katz, 546 U.S. 356, 377 (2006)
[133] Allen v. Cooper, 140 S.Ct. 994, 1002 (2020) (internal quotation marks omitted).

copyright following the ratification, they did not abandon their pre-constitutional practice in bankruptcy proceedings; for over a decade after ratification, state courts continued to adjudicate bankruptcy cases exclusively based on their own precedents.[134] Thus, a conclusion that the States, in ratifying the Constitution, "acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted"[135] in bankruptcy proceedings—but not in copyright lawsuits—simply does not hold weight. The States' course of conduct in the post-ratification period implies that there was an understanding among them that copyright, but not bankruptcy, was entirely a federal domain.

Likewise, it is not clear how the Court's positions that "the Framers' primary goal in adopting the [Bankruptcy] Clause" was to grant Congress "the power to subordinate state sovereignty,"[136] and that the same did not exist when the Framers adopted the Copyright Clause,[137] can be squared with historic facts. The majority in *Katz* explained that "establishing *uniform* federal bankruptcy laws" was a constitutional prerequisite before federal courts could impose on state sovereignty.[138] But the irony is that the first Congress did not pass any "uniform Laws on the subject of Bankruptcies throughout the United States;"[139] in fact, "Congress had not passed bankruptcy legislation" until 1800, while "the very first Congress enacted … patent and copyright legislation,"[140] Furthermore, when Congress enacted the Nation's first bankruptcy law in 1800, it

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[134] *See generally* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13-15 (1995).
[135] *Katz*, 546 U.S. at 378.
[136] *Id.* at 357.
[137] *See Allen*, 140 S.Ct. at 1002-03.
[138] *Katz*, 546 U.S. at 373.
[139] U.S. CONST. art. I, § 8, cl. 4.
[140] *Katz*, 546 U.S. at 386 n.3 (Thomas, J., dissenting). Note that the Bankruptcy Act of 1800 was in force only for three years. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 24). In fact, the first permanent federal bankruptcy law was not enacted until 1898; "[t]hus, states were free to act in bankruptcy matters" for almost a century after the ratification of the Constitution. Tabb, *supra* note 131, at 13-14.

"left an ample role for state law,"[141] whereas by passing the first copyright and patent legislation a decade earlier, the first Congress intended to supplant state laws.[142] It does not take a particularly discerning eye to see the topsy-turvydom in the Court's decision in *Allen* and its reading of history. On one side, it interprets the Framers' intention in adopting the Bankruptcy Clause so liberally to suggest an abrogation of the States' sovereign immunity, despite existence of historic evidence to the contrary.[143] On the other side, it refuses to acknowledge compelling evidence indicating that the Framers' true intention in ratifying the Copyright Clause was to abrogate States' immunity from private suits.[144] The Court cannot have it both ways.

V. THE COURT CANNOT ACT AS LEGISLATURES

Remember that the Congressional statute at issue here, the CRCA, was enacted with the particular purpose of holding states liable for copyright infringement. The Supreme Court has found that the Fourteenth Amendment can potentially be used to justify elimination of state sovereign immunity in order to ensure due process and equal protection. However, in *Allen*, the Court demonstrated, once again, its strong desire to encroach on Congressional authority. By reexamining, and subsequently controverting, the sufficiency of the evidence presented to Congress during the CRCA's hearings, the Court essentially performed fact-finding, an area in which "the lack of competence on the part of the courts is marked."[145] Quite the opposite, however, is true: in reviewing legislation, the Court must refrain from "reweigh[ing] the evidence *de novo*,

[141] *Katz*, 546 U.S. at 386 n.3 (Thomas, J., dissenting).
[142] *See* Patent Act of 1793, ch. 11, § 7, 1 Stat. 318-323 (repealed 1836).
[143] *See* Allen v. Cooper, 140 S.Ct. 994, 1002-04 (2020).
[144] *See id.*
[145] Rostker v. Goldberg, 453 U.S. 57, 65 (1981).

or replac[ing] Congress'[s] factual predictions with [its] own."[146] In fact, the bar against the Court's evaluation of congressional record de novo finds support in the text of the Constitution.[147]

However, since "the slate" on which the Court wrote was "anything but clean,"[148] the *Allen* Court employed a standard set forth in *City of Boerne v. Flores* for its fact-finding inquiry:[149] "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[150] The test that the Court proposed in *City of Boerne* gave a green light to Congress to "remedy or prevent unconstitutional actions"[151] upon hearing "sufficient evidence of due process violations, whether actual or *potential*."[152] Yet, in applying the test to evaluate the sufficiency of the Congressional evidence in *Allen*, the Court only focused on "thin evidence of [actual] infringement," and entirely ignored the overwhelming evidence of potential copyright violations by the States.[153]

"Now what's the difference between the two—other than eight [documented instances of infringement]?" asked Justice Kegan at oral argument about the difference between *Florida Prepaid* and *Allen*.[154] Through her majority opinion, Justice Kegan answered this question: None.[155] It did not matter to the Court that Congress "saw the tip of the iceberg" of potential due

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[146] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994).
[147] *See* 6 Patry, *supra* note 122, § 21:88:23 (discussing that "[o]utside of the exceedingly few cases within its original jurisdiction, where it farms out fact-finding to a specially appointed master," the Seventh Amendment requires the Court to "take the case as it comes to it"). "This is equally true with the Supreme Court's encroachment on Congressional power; going behind the record presented to Congress and finding it (always) insufficient is behavior of the same character that the Seventh Amendment prohibits with jury fact-finding." *See id.*
[148] *Allen*, 140 S.Ct. at 1001.
[149] *Id.* at 1005.
[150] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).
[151] *Id.* at 519.
[152] Fla. Prepaid Postsecondary Edu. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627. 660 (1999) (Stevens, J., dissenting) (emphasis added).
[153] *Allen*, 140 S.Ct. at 1005.
[154] Transcript of Oral Argument at 24, Allen v. Cooper, 140 S.Ct. 994 (2020) (No. 18-87) [hereinafter *Allen* Oral Argument].
[155] *See id.* at 1002.

process violations on the subject of copyrights.[156] Nor did it matter that "Congress heard testimony that [copyright] infringement by States [would] increase in the future and acted to head off this speculative harm."[157] Nor did the Court consider the ample Congressional record indicating that the existence of an injunctive remedy or a possible state-law cause of action against infringing states is inadequate to prevent future infringing activities or to fully protect an aggrieved copyright owner.[158]

What is more troubling in *Allen* is the fact that the Court invalidated the 1990 statute based on the subsequently created "widespread and persisting deprivation of constitutional rights" standard.[159] As such, the Court cannot reasonably express its dismay over Congress not

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[156] *Allen* Oral Argument, *supra* note 151, at 25.

[157] *Florida Prepaid*, 527 U.S. at 656 (Stevens, J., dissenting) (noting that while the Court admitted that Congress had heard testimony on potential increase of state infringement of patents, the "Court's opinion dismisses this rationale" as sufficient to abrogate immunity). Much like the Patent Remedy Act, the legislative record of CRCA shows that Congress heard expert predictions that copyright infringement by the States would only increase over time unless Congress abrogated their immunity. *See, e.g.*, *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings Before the Subcomm. On Courts, Intellectual Property, & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 85-96 (1989) (statement of Barbara Ringer, former Register of Copyrights) (stating that since States are "major users of copyrighted material" and since they "will not pay for something they can get free," "[i]t does not take an oracle to predict what will happen unless [Congress] accept[s] the Supreme Court's invitation [in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)] to abrogate State sovereign immunity for copyright infringement").

[158] *See* H.R. REP. No. 101-282, at 8-9 (1989). Note that the House Report lacked any examples of successful state-law claims remedying copyright infringement. *See id.* The reason is clear: Such claims have been notably unsuccessful. See, e.g., Issaenko v. Univ. of Minnesota, 57 F. Supp. 3d 985 (D. Minn. 2014) (holding that a former researcher's claim under Minnesota's Uniform Deceptive Trade Practices Act against supervising professor at state university in her individual capacity was preempted by Copyright Act); Jim Olive Photography v. Univ. of Houston Sys., 624 S.W.3d 764 (2021) (dismissing inverse condemnation claim under Texas law); *see also* S. REP. No. 101-305, at 12 (1990).

> Injunctive relief is inadequate as a means of protecting copyrighted material for a number of reasons. Injunctions only prohibit future infringements and cannot provide compensation for violations that have already occurred. The time factor involved from the discovery of the infringement to obtaining the injunction can be extensive which makes this remedy totally ineffective for works of limited life. Some copyrighted materials, such as music, don't furnish a tangible product which can be withheld, thus the only meaningful remedy for infringement is damages. And last, injunctive actions are prohibitively expensive, especially for small companies, as there is no reimbursement for attorneys' fees for the prevailing party.

Id.

[159] City of Boerne v. Flores, 521 U.S. 507, 526 (1997).

"compil[ing] an extensive legislative record"[160] or reciting all instances of copyright infringements by the States. Justice Stevens's dissent in *Florida Prepaid* is worthy of inclusion here:

> It is quite unfair for the Court to strike down Congress' Act based on an absence of findings supporting a requirement this Court had not yet articulated. The legislative history of the Patent Remedy Act makes it abundantly clear that Congress was attempting to hurdle the then-most-recent barrier this Court had erected in the Eleventh Amendment course—the "clear statement" rule.[161]

When the Court instructs Congress how to exercise its discretion, but refuses to spell out the entire standard, the Court should not reflexively and retroactively invalidate congressional enactments at a later date when it chooses to announce the full standard.

Being apparently devoid of the ability to learn from mistakes of the past, *Allen*'s majority offered yet another pathway forward for Congress should it hope "to bring digital Blackbeards to justice."[162] "[G]oing forward, Congress will know" the standards set forth in *Allen*," and thus it "would presumably approach the issue differently than when it passed the CRCA," and "if it detects violations of due process, then it may enact a proportionate response" to "effectively stop States from behaving as copyright pirates."[163] It takes considerable audacity for *Allen*'s majority to advise Congress regarding future copyright legislation; after all what guarantee is there that the Court will not tailor a new standard to strike down a future Section 5 legislation even if Congress manages to comply with *Allen*'s standards? The Court "should not purport to advise Congress on how it might exercise its legislative authority, nor give [its] blessing to hypothetical statutes or legislative records not at issue."[164]

VI. YET, THERE IS MORE TO BE SAID

[160] *Florida Prepaid*, 527 U.S. at 660 (Stevens, J., dissenting).
[161] *Id.* at 654 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 171 (1985)).
[162] Allen v. Cooper, 140 S.Ct. 994, 1005 (2020).
[163] *Id.*
[164] *Id.* at 1008 (Thomas, J., concurring in part and concurring in the judgment).

Allen was decided based on a notion that the Eleventh Amendment grants immunity to the States in federal-question jurisdiction cases, such as, private copyright infringement lawsuits.[165] However, as Judge Boyle elucidated, this notion is nothing but a misconception.[166] The term "sovereign immunity" is foreign to the Constitution, and its concept was not decisively formulated and read into the Constitution by the Framers during the Constitutional period.[167] A careful review of the ratification debates reveals that there was a great disparity of views expressed by the Framers on the issue of state immunity.[168] On one side of the spectrum, James Wilson (later-Justice) argued

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[165] *See id.* at 1001-03. The Court summarized this notion in Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267-68 (1997), as follows:

> The Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment. To respect the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying, we have extended a State's protection from suit to suits brought by the State's own citizens. Hans v. Louisiana, 134 U.S. 1 (1890). Furthermore, the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction. As a consequence, suits invoking the federal-question jurisdiction of Article III courts may also be barred by the Amendment. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[166] *See* Allen v. Cooper, 244 F. Supp. 3d 525, 538 (E.D.N.C. 2017).

[167] *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1475-92 (1987) (discussing that there is no general principle of state sovereign immunity in the Constitution and that the Eleventh Amendment does not embody a broader sovereign immunity doctrine); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 44 n.179 (1988) (stating that both the historical evidence and the text of the Constitution "do not support a broad rule of constitutional immunity for states*"); see generally* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 259-81 (1985) (Brennan, J., dissenting) (providing that "[n]ew evidence concerning the drafting and ratification of the original Constitution indicates that the Framers never intended to constitutionalize the doctrine of state sovereign immunity").

[168] *See, e.g.*, David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 7 (1972) (stating that the Framers were divided on the issue of sovereign immunity and that " it is impossible to tell just how widely shared were the opinions on either side of this question while ratification was pending"); *see also* Alden v. Maine, 527 U.S. 706, 764 (1999) (Souter, J., dissenting). We think on the doctrine of sovereign immunity, Justice Brennan's observation regarding unavailability of compelling evidence of the Framers' intention is on point:

> All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant-that of the drafters, the congressional disputants, or the ratifiers in the states?—or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states. And apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive.

William J. Brennan, *The Constitution of the United States: Contemporary Ratification, Address at the Text and Teaching Symposium* (Oct. 12, 1985), *reprinted in* 43 GUILD PRAC. 1, 4 (1986).

that the concept of sovereign immunity for States rested on a legal fiction that the States were sovereign:

> Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, that the sovereignty resides in the people; they have not parted with it; they have only dispensed such portions of the power as were conceived necessary for the public welfare.[169]

Justice Wilson did not stop there; instead, he went further, arguing that to allow the States escape liability on ground of sovereign immunity should raise the Constitution's impartial eyebrows; "[w]hen a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing."[170] This seems to be the prevailing attitude recognized by the leading contemporary jurists in *Chisholm v. Georgia*,[171] who ruled that Alexander Chisholm of South Carolina could sue the unconsenting State of Georgia in the Supreme Court to collect money owed for goods sold during the American Revolutionary War.[172]

On the other end of the spectrum was Alexander Hamilton, propounding that a State shall "not be amenable to the suit of an individual without its consent," unless "there is a surrender of this immunity in the plan of the convention."[173] It reasonably follows from Hamilton's own words

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[169] *Alden*, 527 U.S. at 777 (Souter, J., dissenting) (quoting Wilson's comments in the Pennsylvania Convention).
[170] *Id.*
[171] Chisholm v. Georgia, 2 U.S. 419 (1793).
[172] In his dissenting opinion in *Alden*, Justice Souter astutely dissected *Chisholm*'s holding as follows:

> In sum, then, in Chisholm two Justices (Jay and Wilson), one of whom had been present at the Constitutional Convention, took a position suggesting that States should not enjoy sovereign immunity (however conceived) even in their own courts; one (Cushing) was essentially silent on the issue of sovereign immunity in state court; one (Blair) took a cautious position affirming the pragmatic view that sovereign immunity was a continuing common law doctrine and that States would permit suit against themselves as of right; and one (Iredell) expressly thought that state sovereign immunity at common law rightly belonged to the sovereign States. Not a single Justice suggested that sovereign immunity was an inherent and indefeasible right of statehood.

Alden, 527 U.S. at 789 (Souter, J., dissenting).

[173] The Federalist No. 81, 548-49 (Jacob E. Cooke ed. 1961) [hereafter The Federalist].

that at the Convention the States might have agreed to surrender a portion of their sovereign immunity to be sued in federal courts on certain subject matters. The only question is, what are those subject matters? Article III alone provides an answer:

> The judicial Power shall extend to *all Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.[174]

Under the clear language of the Article III, federal courts have unqualified power to exercise jurisdiction over "all cases" that are derived from federal statutes enacted under Congress's enumerated powers.[175] As such, the States are not immune from violations of such laws, notably when they have no power to enact conflicting state statutes under Supremacy Clause.[176]

At the very least with respect to the Copyright Clause, the historical fact that the States immediately abandoned their pre-Constitutional copyright practices signifies that "there [was] a surrender of [States'] immunity in the plan of the convention."[177] Therefore, at the eve of the Grand Convention in Philadelphia, making States subject to liability for copyright infringement, in the contemplation of the Framers, was not deemed to abrogate state sovereignty—which was nonexistent.

It is worthy of notation that Hamilton referred to the natural law—but not the common law—as the source of sovereign immunity; "[i]t is inherent in the *nature* of sovereignty, not to be amenable to the suit of an individual without its consent. *This is the general sense and the general practice of mankind*."[178] That is to say, under Hamilton's view of sovereign immunity the States

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[174] U.S. CONST. art. III, § 2 (emphasis added).
[175] *Id.*
[176] U.S. CONST. art. VI (providing that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").
[177] *See* The Federalist, *supra* note 33.
[178] *See* The Federalist, *supra* notes 33.

cannot escape liability for acts in violation of federal laws, such as copyright infringements, for natural law theory of immunity holds that "[a] sovereign is exempt from suit … on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[179] Therefore, even among the most conservative ideologues of the states' immunity in the Constitutional period there was an understanding that a state can resort to the doctrine of sovereign immunity only to evade suits for which causes of action arise wholly under the state law.[180]

In January 1798, the Eleventh Amendment was ratified, providing 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.[181]

Howbeit, the natural-law view of states' immunity did not at all lose its currency following the ratification of the Eleventh Amendment. For example, in 1819 Chief Justice Marshall, who was among leading proponents of state sovereign immunity at the Plan of Convention,[182] articulated

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[179] Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (Holmes, J.).

[180] *But see* Baude & Sachs, *supra* note 20, at 614 (providing that the sovereign immunity has a common law origin because "[t]his immunity existed before the Constitution; it wasn't eliminated by Article III; and it largely can't be abrogated by Congress under Article I"). We believe this contention is inconsistent because if a state's immunity from suit is a right rooted in common law, it is defeasible by federal statutes except to the extent that the law becomes a constitutional principle. That is to say, a state's immunity is not abrogable only when the state is sued by certain kinds of plaintiffs specified in the Eleventh Amendment. We are also persuaded by Professor Nelson's historical characterization of doctrine of sovereign immunity: it was more likely a doctrine of personal jurisdiction whereby a sovereign could not be sued for it was practically impossible to compel the sovereign's attendance by civil process. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1567-1608 (2002). Note that characterization of the Framers' framework for sovereign immunity as either a natural law theory or a personal jurisdiction theory does not change the conclusion that "the original Constitution was not thought to confer such an affirmative privilege [to assert sovereign immunity even in situations not covered by the terms of the Eleventh Amendment] on states. The notion that Congress cannot use its Article I powers to abrogate the 'personal jurisdiction' type of immunity therefore stands on shakier ground than the Court acknowledges." *Id.* at 1566-67.

[181] U.S. CONST. amend. XI.

[182] At the Virginia ratifying convention, John Marshall echoed

> I hope no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a

that the States are subject to exclusive authority of the federal government on claims involving issues of federal laws:

> In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.[183]

It is obvious from Justice Marshall's opinion that he earnestly believed that the Eleventh Amendment is no bar to suits against states derived from violations of the federal laws. Likewise, another example is afforded by *Howell v. Miller*[184] where an illustrious panel of the Sixth Circuit Court of Appeals, including justice Harlan sitting by designation and later-justice Taft, explicitly rejected in important dicta the suggestion that the Eleventh Amendment permits the States to infringe copyrights with impunity.[185] Therefore, as Justice Brennan discussed in his dissenting opinion in *Atascadero State Hosp. v. Scanlon*,[186] the notion that the Eleventh Amendment "embodie[s] a principle of state sovereign immunity as a limit on the federal judicial power" is a fallacy. But, if so, then what immunity does the Eleventh Amendment grant to the States? To answer this question, we must first identify the why for which the Eleventh Amendment was proposed.

> state cannot be defendant.... It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.

Alden v. Maine, 527 U.S. 706, 718 (1999) (quoting later-Chief Justice Marshall's remarks in the Virginia Convention).

[183] M'Culloch v. Maryland, 17 U.S. 316, 410 (1819).

[184] Howell v. Miller, 91 F. 129 (6th Cir. 1898).

[185] *See id.* at 136 (providing that "the eleventh amendment gives no immunity to officers or agents of a state in withholding the property of a citizen without authority of law, [and thus a] state cannot authorize its agents to violate a citizen's right of property, and then invoke the constitution of the United States to protect those agents against suit instituted by the owner for the protection of his rights against injury by such agents").

[186] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 259 (1985) (Brennan, J., dissenting) (noting that "[t]he flawed underpinning is the premise that either the Constitution or the Eleventh Amendment embodied a principle of state sovereign immunity as a limit on the federal judicial power").

It is often said that the Eleventh Amendment was ratified in response to the ruling in *Chisholm*.[187] Should that be the case, it is reasonable to expect that the Amendment was intended to be applicable only to cases for which diversity was the basis of jurisdiction, because the Court's decision in *Chisholm* hinged exclusively on diversity jurisdiction.[188] This should not be surprising, because at the time of ratification of the Eleventh Amendment the federal courts had not been granted original federal-question jurisdiction.[189] Nor did the 1790 Copyright Act provide federal courts with federal-question jurisdiction, which led to first copyright infringement claims to be brought in state courts.[190]

Moreover, the pertinent legislative history implies that Congress enacted the Eleventh Amendment to grant the States protection from suits specifically brought under diversity jurisdiction. After the Court handed down its decision in *Chisholm*, at least two resolutions were introduced in Congress to propose the Eleventh Amendment.[191] The House resolution provided:

> No State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit

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[187] See, e.g., Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468, 484 (1987) (stating that "[n]o one doubts that the Eleventh Amendment nullified the Court's decision in *Chisholm*"); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669 (1999) (noting that the Eleventh Amendment "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").

[188] It does not take a particularly close reading of *Chisholm* to realize that it was not a federal question case. *See Atascadero* 473 U.S. at 282 (Brennan, J., dissenting) (noting that "[a]lthough the case involved a contract, it was brought pursuant to the state-citizen diversity clause and not directly under the Contracts Clause of the Constitution").

[189] Section 13 of the first Judiciary Act reads:

> [T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

Act of Sept. 24, 1789, c. 20, 1 Stat. 73, 80 to 81. The federal-question jurisdiction was created in the Judiciary Act of 1801, but it was repealed in 1802. *Atascadero* 473 U.S. at 290 n.43 (Brennan, J., dissenting). The first Judiciary Act itself is an evidence of Congress's understanding that state sovereign immunity had no place under the newly ratified Constitution. See id. at 280 n.30 (Brennan, J., dissenting) (providing that "[t]he First Judiciary Act itself may well suggest Congress' understanding that States would be suable in federal court").

[190] Patry, supra note 23 (noting that "[i]n 1819, original (but not exclusive) jurisdiction over copyright and patent cases was granted to the federal courts, 56 years before general federal question jurisdiction").

[191] *Atascadero* 473 U.S. at 283-85 (Brennan, J., dissenting).

> of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.[192]

The second resolution was introduced in the Senate with the text of the Eleventh Amendment as later ratified.[193] Since Congress did not adopt the former resolution, there should be no doubt that Congress did not intend to constitutionalize state sovereign immunity in federal courts for all cases—but only for diversity-jurisdiction cases.[194]

In a nutshell, the conclusion condenses as follows: The Eleventh Amendment, itself, defines the scope of state sovereign immunity as to apply only to diversity-jurisdiction cases. To argue that the text of the Eleventh Amendment provides only "one particular exemplification of that immunity,"[195] would be to read into the Constitution what one wish to see there. Therefore, since the right to copyright has its foundation in the federal law, the States are not immune from copyright infringement actions.

VII. THE POISONOUS DOCTRINE OF *STARE DECISIS* IS A MAJOR THEME IN *ALLEN*

In holding that Allen had no copyright claim, and that sovereign immunity ruled the day, Justice Kegan held steadfast to *stare decisis*.[196] She openly acknowledged that *stare decisis* "is a foundation stone of the rule of law."[197] Additionally, Justice Kegan proposed a high standard for how and when a precedent can be overruled: "[t]o reverse a decision, we demand a special justification over and above the belief that the precedent was wrongly decided."[198] To Justice Kegan, a "charge of error" that *Florida Prepaid* "misjudged Congress's authority under the

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[192] Proceedings of the United States House of Representatives (Feb. 19, 1793), GAZETTE OF THE U.S. (Phila.), Feb. 20, 1793, *reprinted in* 5 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 605, 605-06 (Maeva Marcus ed., 1994).
[193] *Atascadero* 473 U.S. at 283-85 (Brennan, J., dissenting).
[194] *Id.* at 286 (providing that "[h]ad Congress desired to enshrine state sovereign immunity in federal courts for all cases, for instance, it could easily have adopted the first resolution introduced … in the House").
[195] Fed. Mar. Com'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002).
[196] Allen v. Cooper, 140 S.Ct. 994, 1003 (2020).
[197] *Id.* (internal quotation marks omitted).
[198] *Id.* (internal quotation marks omitted).

Intellectual Property Clause" is too minimal to "overcome *stare decisis*."[199] Put in other words, the *Allen* Court said that it would not reverse a previous five-to-four decision, such as, *Florida Prepaid* and *Seminole Tribe*, that was wrongly decided.

It is doubtful, however, that Justice Kegan intended to endorse a groundbreaking proposition that the Court is not obligated to overrule demonstrably erroneous decisions. For if it were otherwise, she would not be able to defend overruling of the "separate but equal" doctrine announced in *Plessy v. Ferguson*.[200] Likewise, according to Justice Kegan, the Court should have followed *stare decisis* and not decided *Lawrence v. Texas*,[201] *McLaughlin v. Florida*,[202] *Brandenburg v. Ohio*,[203] or *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*.[204] But, it is highly suspect and nearly implausible that Justice Kegan ever questions the validity of these cases even though they were sailed against the stream of *stare decisis*.

Then, why did Justice Kegan in *Allen* choose to couch her opinion in terms of deference to precedents wrongly decided? Why did she feel the need to get three conservative members of the Court to "coalesce easily around a shared analysis and conclusion, without having to reinvent the jurisprudential wheel" via "going to first-principles?"[205] Professor Michael Dorf offers a thoughtful answer:

> By accepting controversial state sovereign immunity precedents that the Court's conservative wing set in the 1990s, perhaps the Court's liberal justices are offering

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[199] *Id.*
[200] 163 U.S. 537 (1896) (overruled by Brown v. Bd. of Ed., 347 U.S. 483 (1954)).
[201] 539 U.S. 558 (2003) (the Court found the Texas homosexual sodomy statute unconstitutional, and overruled its earlier decision in Bowers v. Hardwick, 478 U.S. 186 (1986)).
[202] 379 U.S. 184 (1964) (the Court pronounced that the Florida miscegenation statute that prevented sex between whites and blacks was constitutional, overruling Pace v. State, 106 U.S. 583 (1883)).
[203] 395 U.S. 444 (1969) (overruling Whitney v. California, 274 U.S. 357 (1927), by replacing *Whitney*'s "the clear and present danger" test by the "imminent lawless action" standard).
[204] 551 U.S. 877 (2007) (overruling the well-established statutory interpretation case of Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), which had banned minimum resale price maintenance unlawful *per se*).
[205] Richard M. Re, *Is "Stare Decisis ... for Suckers"?*, PRAWFSBLAWG (Mar. 24, 2020, 8:30 AM), https://prawfsblawg.blogs.com/prawfsblawg/2020/03/is-stare-decisis-for-suckers.html.

> a kind of deal: We will preserve your states's rights precedents, so you should preserve our abortion rights precedents.[206]

The concurring opinion of Justices' Breyer and Ginsburg in *Allen* is also worth discussing. Instead of recapitulating their old arguments on federalism and sovereign immunity, the two justices, who dissented in *Florida Prepaid*, simply acknowledged that their "longstanding view has not carried the day, and that the Court's decision in *Florida Prepaid* controls this case."[207] While Justice Breyer's concurrence in *Allen*, may indicate, in theory, that "a generational divide" exists among the Justices on the left,[208] in practical terms, wrongly decided precedents scored a win in the result. Perhaps, the time is ripe to remind Justice Breyer that even the second Justice John Harlan, as committed as he was to the doctrine of *stare decisis*,[209] never supported a constitutionally erroneous decision under the guise of *stare decisis*:

> After much reflection I have reached the conclusion that I ought not to allow stare decisis to stand in the way of casting my vote in accordance with what I am deeply convinced the Constitution demands. In the annals of this Court few developments in the march of events have so imperatively called upon us to take a fresh hard look at past decisions, which could well be mustered in support of such developments, as do the legislative lowering of the voting age and, albeit to a lesser extent, the elimination of state residential requirements in presidential elections. Concluding,

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[206] Michael C. Dorf, *Supreme Court Gives States the Green Light to Infringe Copyrights*, VERDICT JUSTIA (Mar. 30, 2020), https://verdict.justia.com/2020/03/30/supreme-court-gives-states-the-green-light-to-infringe-copyrights (explaining the high bar Congress must meet to abrogate state sovereign immunity).

[207] Allen v. Cooper, 140 S.Ct. 994, 1009 (2020).

[208] Tom Goldstein, Comment to *Live Blog of Orders and Opinions (Update: Completed)*, SCOTUSBLOG (Mar. 23, 2020, 8:45 AM), https://www.scotusblog.com/2020/03/live-blog-of-orders-and-opinions-48/ (providing that "The two who were there when it announced this controversial line of sovereign immunity precedent -- Breyer and Ginsubrg [sic]-- say they would overrule it").

[209] *See generally* Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent as a Punishment*, 22 FLA. ST. U. L. REV. 591, 646-68 (1995) (describing Justice Harlan's strong commitment to stare decisis); *see also* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). Justice Harlan in *Moragne* articulated discussed the significance of the doctrine of *stare decisis*:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are [1] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Id.

> as I have, that such decisions cannot withstand constitutional scrutiny, I think it my duty to depart from them, rather than to lend my support to perpetuating their constitutional error in the name of *stare decisis*.[210]

At least Justice Thomas did not endorse the Court's interpretation of *stare decisis*. Citing his opinion in *Gamble v. United States*,[211] Justice Thomas censured the Court's formulation of the *stare decisis* standard, for it "does not comport with [the Court's] judicial duty under Article III,"[212] which requires faithful interpretation of the Constitution. However, when it comes to the New Federalism Eleventh Amendment jurisprudence, Justice Thomas does not believe that the Court's prior decisions in *Florida Prepaid* and *Seminole Tribe* "clearly conflict with the text of the Constitution" and as such, he does not see any reason to "privilege the text over [the Court's] own precedents."[213] "Here, adherence to our precedent is warranted because petitioners have not demonstrated that our decision in *Florida Prepaid* is incorrect, much less demonstrably erroneous."[214]

Much like Justice Kegan's view that "[r]especting *stare decisis* means sticking to some wrong decisions"[215] is wrong, Justice Thomas's result-oriented approach reflecting his ideological opposition to the abrogation of state sovereign immunity in federal question cases is amiss. A Justice's oath and obligation is to the Constitution and the People, not to the previous Justices of the Supreme Court or an ideological belief. As Justice Douglas recognized, "[i]t is the Constitution which [Justices swear] to support and defend, not the gloss which [their] predecessors may have put on it."[216] Indeed, it is of no consequence how many Justices have voted in the past to eternize

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[210] Oregon v. Mitchell, 400 U.S. 112, 218 (1970) (Harlan, J., concurring in part and dissenting in part).
[211] 139 S.Ct. 1960 (2019).
[212] *Allen*, 140 S.Ct. at 1007-08 (internal quotation marks omitted).
[213] June Medical Servs. LLC v. Russo, 140 S.Ct. 2103, 2151 (2020) (Thomas, J., dissenting).
[214] *Allen*, 140 S.Ct. at 1008 (internal quotation marks omitted).
[215] Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 455 (2015)
[216] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

a constitutional error perpetuate, because "the authority of a thousand is not worth the humble reasoning of a single individual"[217] when the Constitution is at the stake.

VIII. CONCLUSION

The *Allen* Court, in effect, left copyright owners with no damage remedy for state infringing actions. Post-*Allen*, copyright owners must find refuge in state courts where their infringement claims are most likely subject to dismissal, for States enjoy "a constitutional immunity from private suits in their own courts."[218] Even if copyright owners bring suit to recover damages under state causes of action for which the state constitutions waive immunity—such as inverse condemnation claims—the state courts will dismiss. As was the case in *Jim Olive Photography v. Univ. of Houston Sys.* where the Texas Supreme Court held that "[a]llegations of copyright infringement assert a violation of the owner's copyright, but not its confiscation, and therefore factual allegations of an infringement do not alone allege a taking,"[219] foreclosing another potential route for seeking damages from infringing states.

In *Marbury v. Madison*, Chief Justice Marshall offered his rhetorical question: "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?"[220] And the answer is clear: "every individual [should be able] to claim the protection of the laws, whenever he receives an injury."[221] By affording the federal right to damages under the CRCA and the Patent Remedy Act, Congress fulfilled "[o]ne of the first duties of government," which is to afford "the protection of the laws" to copyright and patent owners.[222]

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[217] GERARD PIEL, THE AGE OF SCIENCE: WHAT SCIENTISTS LEARNED IN THE TWENTIETH CENTURY 21 (2001) (quoting Galileo).
[218] Alden v. Maine, 527 U.S. 706, 740 (1999).
[219] Jim Olive Photography v. Univ. of Houston Sys., 624 S.W.3d 764 (2021).
[220] Marbury v. Madison, 1 Cranch 137, 162 (1803).
[221] *Id.*
[222] *Id.*

We believe *Allen* was born out of the unholy union of right-leaning Justices, who are not shy of resorting to "aristocratic judicial Constitution-writing" to promote their New Federalist agenda, and left-leaning Justices, who hope to establish *stare decisis* as a unifying force to preserve their more liberal precedents. *Allen*'s true victims are copyright owners whose rights are chipped away.