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

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Setting The Stage

- ***Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)** (reaffirmed in ***Dellmuth v. Muth*, 491 U.S. 223 (1989)).**

  "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."

- ***Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).**

  "Congress has the authority to render States so liable [in money damages] when legislating pursuant to the Commerce Clause."

The Patent Remedy Act, 35 U.S.C. § 296(a) (enacted in 1992).

"Any State ... shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court ... for infringement of a patent."

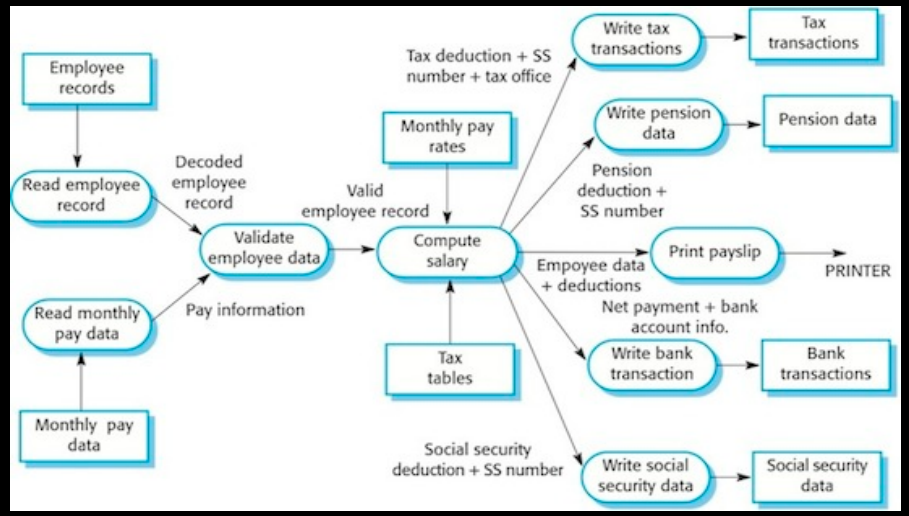
The Copyright Remedy Clarification Act, 17 U.S.C. § 511(a) (enacted in 1990).

"Any State ... shall not be immune, under the eleventh amendment … or under any other doctrine of sovereign immunity, from suit in Federal court ... for a violation … exclusive rights of a copyright owner…."

- ***Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).**

  "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."

"Modern-Day Piracy"



***Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).**

1. "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under … the Patent Clause."
2. The Court acknowledged that there might've been a valid Fourteenth-Amendment argument to uphold the Act as constitutional *only if* Congress had identified a clear pattern of infringements.

***Allen v. Cooper*, 140 S.Ct. 994 (2020).**

1. "*Florida Prepaid* all but prewrote our decision today. That precedent made clear that Article I's Intellectual Property Clause could not provide the basis for an abrogation of sovereign immunity."
2. "If not the Patent Remedy Act, not its copyright equivalent either, and for the same reason."

AFTERSHOCKS OF *ALLEN*

Post-*Allen*, copyright owners are left with no damage remedy for state infringing actions

- ***Alden v. Maine*, 527 U.S. 706 (1999).**

  Claims are subject to dismissal at state courts, for States enjoy "a constitutional immunity from private suits in their own courts."

- ***Issaenko v. Univ. of Minnesota*, 57 F. Supp. 3d 985 (D. Minn. 2014).**

  Claims under state-law causes of action are preempted by Federal copyright laws.

- ***Jim Olive Photography v. Univ. of Houston Sys.*, 624 S.W.3d 764 (Tex. 2021).**

  Claims are dismissed as non-cognizable

Allen Is Wrongly Decided

- There is no general principle of state sovereign immunity in the Constitution; the Eleventh Amendment does not embody a broader sovereign immunity doctrine
- *Allen*'s algorithm "if patent; then copyright" is based upon faulty logic inconsistent with historical evidence
- The Court cannot evaluate Congressional record *de novo*
- Agenda-driven reliance on *stare decisis* is not warranted

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The Term "Sovereign Immunity" Is Foreign to the Constitution

Eleventh Amendment Immunity
Limiting the subject-matter jurisdiction of the federal courts only when diversity is the basis of jurisdiction

Structural Immunity
The broader concept of immunity, implicit in the Constitution

The Eleventh Amendment Immunity

U.S. Const. art. III, § 2
"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States; …; to Controversies … between a State and Citizens of another State … and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

1788

Chisholm v. Georgia
"[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."

1789

§ 13 of Judiciary Act of 1789
"[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."

1793

1795

The House Resolution for U.S. Const. amend. XI
"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 of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States."

1798

U.S. Const. amend. XI
"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."

Structural Immunity/What is the Operative Legal Framework?

Common Law?

1. "American Colonies" were not sovereign states antecedent to the Declaration of Independence

2. Common Law sovereign immunity was a defeasible power, like other common law rights

Personal Jurisdiction?

1. A sovereign could not be sued for it was practically impossible to compel the sovereign's attendance by civil process
2. Congress could modify the principles of general law restricting/forming plaintiffs' ability to form "Controversies" with certain defendants

Natural Law?

1. "It 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*." The Federalist No. 81.

2. "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." *M'Culloch v. Maryland*, 17 U.S. 316 (1819) (Marshall, C.J.).

3. "The judicial department … is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party." *Cohen v. Virginia*, 19 U.S. 264 (1821).

4. 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." *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907) (Holmes, J.).

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Clause-by-Clause Analysis of Historical Evidence

- ***Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).**
  "Article I (particularly, the Commerce Clause) cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."

- ***Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).**
  "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under … the Patent Clause."

- ***Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).**
  1. "Although statements in *Seminole Tribe* reflect an assumption that that case's holding would apply to the [Bankruptcy] Clause, careful study and reflection convince this Court that that assumption was erroneous."
  2. "Congress may, at its option, … treat States in the same way as other creditors insofar as concerns 'Laws on the subject of Bankruptcies' …. Its power to do so arises from the Bankruptcy Clause itself; the relevant '*abrogation*' is the one effected in the plan of the Convention, not by statute."
  3. "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."

Katz Rationale Is Equally Applicable to the Copyright Clause

Bankruptcy History

Pre-1788: States "had wildly divergent schemes," and "refused to respect one another's discharge orders

1788-1800: State courts continued to adjudicate bankruptcy cases based on their own precedents

1800: Congress passed the first Bankruptcy Act

Post-1800: Federal courts could order States to release people they were held in debtors' prisons

Copyright History

Pre-1788: States but Delaware enacted their own copyright statues

1788-1790: Ramsay of South Carolina petitioned Congress praying for an injunction against unpermitted reproduction of his book

1790: Congress passed the first Copyright and Patent Act

Post-1790: States voluntarily repealed their copyright statutes

Patent History

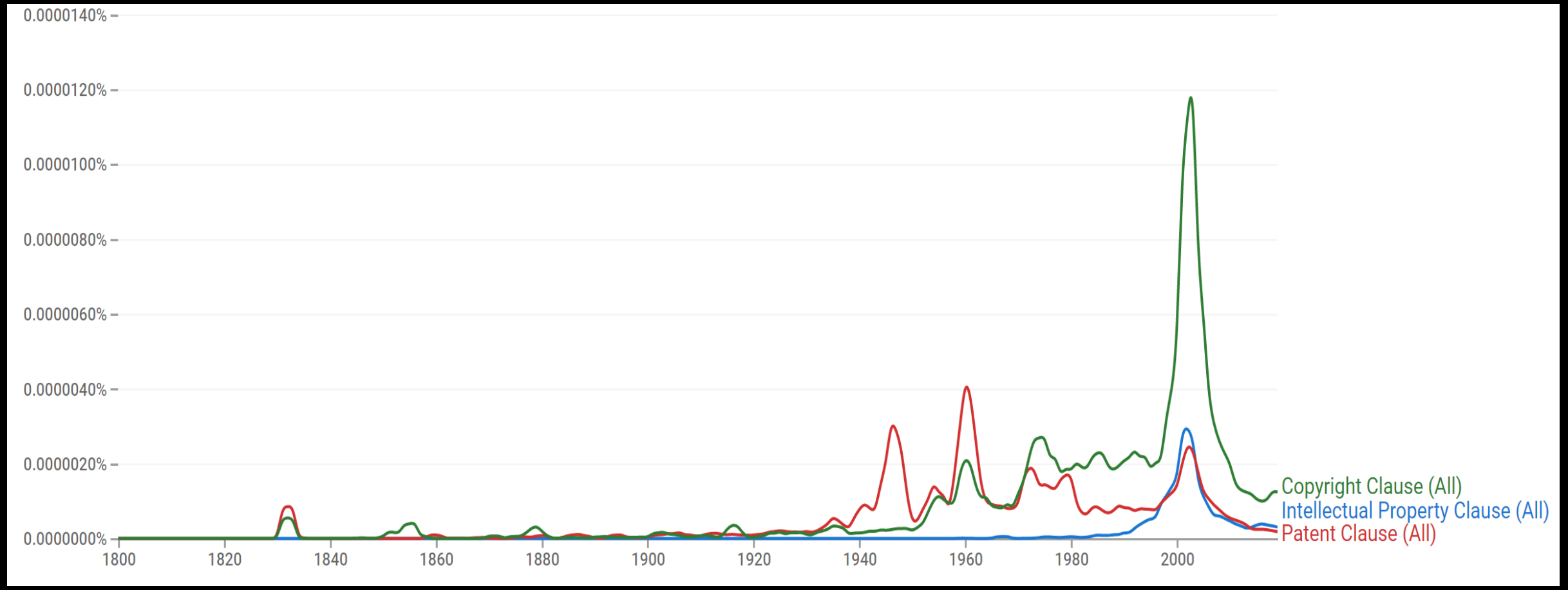
Pre-1788: Only ad hoc discretionary legislative grants

1788-1790: Many inventors continued to apply for patent grants from states

1790: Congress passed the first Copyright and Patent Act

Post-1790: States did not repeal their patent issuance practice; Congress required inventors, seeking a federal patent surrender state-issued patents

"Historic Kinship" Fallacy



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The Court Cannot Act as Legislatures

Atascadero: Clear statement rule

1985

Congress passed CRCA and PRA

1990-92

Seminole Tribe: Article I cannot be used; 14th Am. can

1996

1997

***City of Boerne v. Flores*, 521 U.S. 507 (1997).**

1. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."
2. Congress can "remedy or prevent unconstitutional actions" upon hearing "sufficient evidence of due process violations, whether actual or *potential*."

Three Fundamental Flaws with *Allen* & *Florida Prepaid*

- ❑ Unfair for the Court to strike down Congress' Act based on a requirement that had not yet been articulated
- ❑ In applying the *City of Boerne* test to evaluate the sufficiency of the Congressional evidence, the Court only focused on "thin evidence of [actual] infringement," and ignored the overwhelming evidence of potential copyright/patent violations by the States
- ❑ The Seventh Amendment is a bar on the Court's fact-finding business

Encroachment on Congressional Fact-Finding Discretion Continues

Allen: "[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."

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The Poisonous Doctrine of *Stare Decisis* & "New Federalism" Agenda

Wrongly Decided Precedents Scored a Win in *Allen*

- "To reverse a decision, we demand a special justification over and above the belief that the precedent was wrongly decided."
- A "charge of error" that *Florida Prepaid* "misjudged Congress's authority under the Intellectual Property Clause" is too minimal to "overcome stare decisis."
- Even the second Justice John Harlan, as committed as he was to the doctrine of stare decisis, 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."

Allen: Illegitimate Nail into the Coffin of Cooperative Federalism

- As part of the "New Federalism" revival, the Court has substantially restrained Congress's authority to regulate commerce, abrogate sovereign immunity, fashion remedies pursuant to Section 5 of Fourteenth Amendment, and "commandeer" state officials.
- Two-Prong Test:
  1. Focus on the intention of the States and the Framers
  2. Analyzing contemporary records justifying Congressional action
- *Allen* fails both prongs: its result-oriented approach reflects ideological (as opposed to Constitutional) opposition to the abrogation of state sovereign immunity in federal question cases

CONCLUSIONS

- "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?" ***Marbury v. Madison*, 2 L.Ed. 60 (1803) (Marshall, C.J.).**
- The Eleventh Amendment, itself, defines the scope of state sovereign immunity as to apply only to diversity-jurisdiction cases
- Congress did not intend to constitutionalize state sovereign immunity in federal courts for all cases—but only for diversity-jurisdiction cases
- The "unique-history" reasoning of the Court in ***Katz*** regarding the Bankruptcy Clause applies to the Copyright Clause with almost equal force
- The Poisonous Doctrine of *Stare Decisis*

Thank You for Your Attention!