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NOTE

ALLEN V. COOPER: RAISING THE FLAG OF SOVEREIGN IMMUNITY IN THE SHIFTING SEAS OF COPYRIGHT

WILL R. GALLAGHER*

The expansion of maritime trade in the mid-1600s sparked the "Golden Age of Piracy," when fearless privateers plundered the high seas for fame and fortune.[1] One of the most infamous pirates of this era, Blackbeard, left plenty of both for the history books.[2] As traditional piracy has faded from our shores, digital piracy has largely taken its place. But no pirate legend or sea shanty could have foretold that Blackbeard's ship would one day be at the center of a stunning decision that condones modern piracy of citizens' copyrights, as long as the infringement is committed by a state.

In *Allen v. Cooper*,[3] the United States Supreme Court considered whether the Copyright Remedy Clarification Act ("CRCA") validly abrogated state sovereign immunity from copyright infringement suits.[4] Relying on a convoluted interpretation of the state sovereign immunity doctrine, the Court held that neither Article I nor the Fourteenth Amendment could anchor the law.[5] In the Court's view, the CRCA lacked "congruence and proportionality" between its intended remedy and the perceived record of state misconduct.[6] The decision completely bars infringement remedies for copyright owners whose works have been commandeered by a state, leaving them stranded without recourse until Congress can soon muster up a

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1. Stephen Barnett, *Monsters of Their Own Making: Understanding the Context of the Rise of the "Golden Age of Piracy*,*"* 5 LOGOS, Fall 2012, at 19.

2. *Id.* at 20 (recounting the lore surrounding Blackbeard and depicting his formidable appearance as "a complete fury; with three brace pistols in holsters, slung over his shoulders like bandoliers, and lighted matches under his hat sticking out over each of his ears").

3. 140 S. Ct. 994 (2020).

4. *Id.* at 1000.

5. *Id.*

6. *Id.* at 1007; *see infra* Sections IV.B–C.

more narrowly tailored statute.[7] Regardless of the historical record or degree of intent, allowing states to skirt liability for copyright infringement subverts the fundamental goals of the copyright system to promote and protect artistic expression.[8]

I. THE CASE

In 1717, the legendary pirate Blackbeard captured a French frigate, made it his flagship, and renamed it *Queen Anne's Revenge*.[9] Shortly thereafter, his new prize ran aground one mile off the coast of North Carolina.[10] Blackbeard and his crew escaped unharmed, and the wreckage lay beneath the sea for hundreds of years until 1996, when it was discovered by the maritime exploration firm Intersal.[11] Due to its proximity to shore, North Carolina legally owned the wreck and its booty.[12] The State contracted with Intersal to supervise the excavation.[13] Intersal then hired aquatic videography company Nautilus Productions, headed by Rick Allen, to document the process.[14] The agreement provided that Allen would finance the project and in return own copyrights in all of the resulting audiovisual works.[15]

In 2013, the State began posting some of Allen's images to its website without permission, and the parties negotiated a settlement whereby the State agreed to pay him $15,000 for its wrongdoing.[16] Notwithstanding the settlement, the State then passed "Blackbeard's Law," which explicitly placed media depicting any "derelict vessel or shipwreck" into the public domain, effectively eliminating Allen's copyright protections.[17] After discovering further infringement, Allen promptly filed suit in the United States District Court for the Eastern District of North Carolina.[18] The State countered by raising a sovereign immunity defense, but the district court

7. *See infra* Section IV.C.

8. *See infra* Section IV.D.

9. *Allen*, 140 S. Ct. at 999.

10. *Id.*

11. *Id.*

12. *Id.*; 43 U.S.C. § 2105(c); N.C. GEN. STAT. ANN. § 121–22 (West 2019). Thousands of artifacts have been recovered and restored, including twenty-four cannons. *See Discovery of the Shipwreck*, QUEEN ANNE'S REVENGE PROJECT, https://www.qaronline.org/history/discovery-shipwreck [https://perma.cc/9WS5-HZKZ].

13. *Allen*, 140 S. Ct. at 999.

14. *Id.*

15. *Id.*

16. *Id.*

17. N.C. GEN. STAT. ANN. § 121–25(b) (West 2016).

18. Allen v. Cooper, 244 F. Supp. 3d 525 (E.D.N.C. 2017), *rev'd*, 140 S. Ct. 994 (2020).

agreed with Allen that the CRCA had validly abrogated sovereign immunity from copyright infringement suits pursuant to Congress's authority to enforce the Fourteenth Amendment.[19] The State appealed, and the United States Court of Appeals for the Fourth Circuit reversed.[20] Following the Fourth Circuit's reversal, the Supreme Court granted certiorari to determine whether the CRCA had a valid constitutional basis in either Article I or the Fourteenth Amendment.[21]

II. LEGAL BACKGROUND

The doctrine of state sovereign immunity generally prohibits citizens from filing suit against a nonconsenting state.[22] It is rooted in the English common law principle that members of the ruling class could not be tried without their consent because their authority was unquestionable.[23] The Eleventh Amendment reinforces the state sovereign immunity doctrine by revoking federal courts' jurisdiction to hear suits brought by out-of-state plaintiffs against a state.[24] Over time, a meandering and divided Supreme Court has greatly expanded the scope of the state sovereign immunity doctrine, divorcing it from the plain text of the Amendment.[25]

Under the Court's jurisprudence, there are two mechanisms by which state sovereign immunity can be overcome. First, the state itself can waive immunity by enacting a waiver statute.[26] Second, immunity can be abrogated by an act of Congress.[27] Although the Court has always maintained the viability of both of these mechanisms, it has adopted increasingly restrictive standards in recent cases that make both of these avenues more difficult to

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19. *Id.* at 535 ("Congress was clearly responding to a pattern of current and anticipated abuse by the states of the copyrights held by their citizens."); *see also* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

20. Allen v. Cooper, 895 F.3d 337 (4th Cir. 2018).

21. Allen v. Cooper, 140 S. Ct. 994, 1000 (2020).

22. *Id.*

23. *See* Chisholm v. Georgia, 2 U.S. 419, 460 (1793) ("In England . . . no suit can be brought against the King, even in civil matters.").

24. 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.").

25. *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) ("Despite the narrowness of its terms . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . . .").

26. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) ("[I]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.").

27. *Id.* at 242–43.

navigate.[28] Implied or abstract language, whether in a state-initiated waiver of sovereign immunity or a congressional abrogation statute, no longer suffices.[29] Both waivers and abrogation statutes must clearly and "unequivocal[ly]" invoke abrogation to be valid.[30]

Abrogation statutes must also be supported by a valid constitutional basis.[31] Historically, statutes like the CRCA have anchored their abrogatory authority upon Article I and the Fourteenth Amendment.[32] In the past two decades, however, the Court has whittled the viable constitutional foundations down to a single provision: Section 5 of the Fourteenth Amendment.[33]

Section II.A outlines the murky history of the state sovereign immunity doctrine and traces its modern developments.[34] Section II.B reviews the doctrine's application to statutes passed pursuant to Article I powers.[35] Section II.C explains how the Court has shifted from a policy of deference to Congress to one of zealous oversight by restricting abrogations to those that are narrowly tailored to enforcing the Fourteenth Amendment.[36]

A. State Sovereign Immunity in United States Law

State sovereign immunity is a key check on federal power that derives from the unquestionable political authority of English feudal royalty.[37] As it was not discernible in the text of the Constitution, the Framers disagreed about whether state sovereign immunity was embodied therein by some other means.[38] Anti-federalists worried that the Constitution would permit suits brought by citizens against states in federal court, which they sought to

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28. *Id.* at 238–40; *see also* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (abrogation statutes must be tailored to "remedy or prevent" state conduct that violates the Fourteenth Amendment).

29. Dellmuth v. Muth, 491 U.S. 223, 230 (1989) ("[E]vidence of congressional intent must be both unequivocal and textual.").

30. *Atascadero State Hosp.*, 473 U.S. at 239–40.

31. Green v. Mansour, 474 U.S. 64, 68 (1985) (abrogation statutes must be enacted "pursuant to a valid exercise of power").

32. Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635–36 (1999) ("Congress justified the Patent Remedy Act under three sources of constitutional authority: the Patent Clause, Art. I, § 8, cl. 8; the Interstate Commerce Clause, Art. I, § 8, cl. 3; and § 5 of the Fourteenth Amendment.").

33. *City of Boerne,* 521 U.S. at 519.

34. *See infra* Section II.A.

35. *See infra* Section II.B.

36. *See infra* Section II.C.

37. *See* Hans v. Louisiana, 134 U.S. 1, 10–12 (1890).

38. *Id.* at 12–15.

prevent.[39] This construction, however, was widely rebuffed by anti-federalists and federalists alike, who maintained that states would be immune.[40] When the Supreme Court in 1793 permitted a diversity suit against a state in federal court in *Chisholm v. Georgia*,[41] Congress swiftly moved to overturn this widely disfavored ruling by enacting the Eleventh Amendment.[42] The text of the Amendment only specifically barred diversity suits, however, and left unclear the status of in-state and federal question suits.[43]

The open question of how the Eleventh Amendment would treat in-state plaintiffs was addressed in *Hans v. Louisiana*,[44] wherein the Supreme Court upheld Louisiana's sovereign immunity defense from a suit brought by the State's own citizen.[45] By distancing the doctrine from the constitutional text, the Court—newly appreciative of sovereign immunity—set in motion a new and more expansive interpretation of the doctrine that continues to drive modern sovereign immunity jurisprudence.[46] Nevertheless, members of the Court have fervently and increasingly disagreed about whether to adopt a broad interpretation that prevents most suits against states, as the Court had in *Hans*, or a narrow one that more closely tracks the language of the Eleventh Amendment.[47]

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39. *Id.* at 14. Article III empowers the federal judiciary to hear cases "between a State and citizens of another State." U.S. CONST. art. III, § 2, cl. 1. A literal interpretation of the neutral word "between" suggests that federal jurisdiction would exist regardless of whether the state is a plaintiff or a defendant. *See Between*, MERRIAM-WEBSTER (online ed., 2021), https://www.merriam-webster.com/dictionary/between ("by the common action of; jointly engaging; . . . in common to; shared by").

40. *Hans*, 134 U.S. at 13–14; THE FEDERALIST NO. 81, at 450 (Alexander Hamilton) (George Sade ed., 2006) ("Unless . . . there is a surrender of [sovereign] immunity in the plan of the convention, it will remain with the States.").

41. 2 U.S. 419 (1793).

42. *Hans*, 134 U.S. at 11 ("This amendment . . . actually reversed the decision of the Supreme Court."). Interestingly, the Eleventh Amendment does not change the language of the Constitution but rather tells us how to interpret it, or, more accurately, how not to interpret it. 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 . . . .") (emphasis added).

43. Allen v. Cooper, 140 S. Ct. 994, 1000 (2020).

44. 134 U.S. 1.

45. *Id.* at 15.

46. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

47. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Stevens, J., concurring) ("There is first the correct and literal interpretation of the plain language of the Eleventh Amendment . . . . In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment . . . ."), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

B. Abrogation of State Sovereign Immunity Under Article I

Article I of the United States Constitution grants Congress several enumerated powers, including the power to foster scientific and artistic innovation by "securing . . . exclusive" rights to patent and copyright owners.[48] These grants of federal authority necessarily limit state power.[49] But after handing down a series of inconsistent decisions in recent decades, a narrow majority of the Court has essentially abandoned Article I as a source of abrogatory power by separating state sovereign immunity from the federal-state power calculus entirely and concluding that immunity cannot be constrained even by ostensibly plenary Article I powers.[50]

In an early waiver case, *Parden v. Terminal Railway of Alabama Docks Dep't*,[51] the Court rejected a state's sovereign immunity defense in a suit brought under the Federal Employers Liability Act, finding that the state had impliedly waived its immunity when it ratified the Commerce Clause and subsequently engaged in interstate business.[52] The Court found that the Act's language, which held "every common carrier" liable to suits brought by passengers who suffered injuries, included state-owned railroad agencies.[53] Put simply: If Congress speaks broadly about a right to sue without expressly indicating that states are immune, then state and private actors are liable to

48. U.S. CONST. art. I, § 8, cl. 8 ("[Congress shall have power to] promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."). Commonly referred to as the Intellectual Property Clause, this language forms the foundation of both patent and copyright law. *See generally* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1 (1995).

49. *Union Gas Co.*, 491 U.S. 1, 16 (1989) ("[T]he Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States."), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

50. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

51. 377 U.S. 184 (1964).

52. *Id.* at 191 (stating states had "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce"); *see also* U.S. CONST. art. I, § 8, cl. 3 ("[Congress shall have power to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."). Although the *Parden* Court framed the statutory language as providing a "waiver" of immunity, the case is more aptly characterized as an abrogation rather than a waiver, since a waiver would not require any constitutional grounding. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985).

53. *Parden*, 377 U.S. at 185–88 ("We think that Congress, in making the FELA applicable to "every" common carrier . . . meant what it said. That congressional statutes regulating railroads in interstate commerce apply to such railroads whether they are state owned or privately owned is hardly a novel proposition; it has twice been clearly affirmed by this Court.").

the same extent.[54] Two decades later, the Court in *Atascadero State Hospital v. Scanlon*[55] departed from this precedent and limited the validity of waiver and abrogation provisions to cases where the state's intent to waive or Congress's intent to abrogate was unmistakably clear.[56]

Continuing to fluctuate in its interpretation of the sovereign immunity doctrine, the Court in *Pennsylvania v. Union Gas Co.*[57] once again rejected a state's sovereign immunity defense, this time regarding a federal waste management law that Congress had passed pursuant to Article I.[58] The Court found Congress's intent to abrogate sufficiently clear.[59] The Court then reasoned that by ratifying the Constitution, the states had broadly consented to liability for transgressing Congress's Article I authority in situations where Congress found it appropriate to hold them liable.[60] Without the ability to abrogate state sovereign immunity, the Court believed that Congress's exercise of its Article I powers would be unduly constrained.[61]

Seven years later, in *Seminole Tribe of Florida v. Florida*,[62] the Court completely reversed course and held that Article I could no longer provide a valid basis for abrogating state sovereign immunity.[63] The contested law in that case, which was passed pursuant to the Indian Commerce Clause,[64] directed states to negotiate with Native American tribes regarding the formation of casinos on tribal land.[65] The law specifically authorized federal courts to hear suits brought by tribes against states that failed to negotiate in good faith.[66] The Court quickly found that the statutory language demonstrated an "unmistakably clear" intent to abrogate sovereign immunity.[67] The principal question thus became whether the abrogation

54. *Id.*

55. 473 U.S. 234 (1985).

56. *Id.* at 239–40 ("[A] State will be deemed to have waived its immunity 'only where stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction."'").

57. 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

58. *Id.* at 23.

59. *Id.* at 8.

60. *Id.* at 19–20 ("[T]o the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.").

61. *Id.* at 19 ("[T]he congressional power thus conferred would be incomplete without the authority to render States liable in damages . . . .").

62. 517 U.S. 44 (1996).

63. *Id.* at 72–73.

64. U.S. CONST. art. I, § 8, cl. 3 ("[Congress shall have power to] regulate Commerce . . . with the Indian Tribes . . . .").

65. 25 U.S.C. § 2710(d)(3)(A).

66. 25 U.S.C. § 2710(d)(7)(A).

67. *Seminole Tribe*, 517 U.S. at 56.

rested on a valid constitutional basis.[68] The Court began this inquiry by comparing the Indian Commerce Clause to the Interstate Commerce Clause.[69] As noted above, the Court had recently championed the Interstate Commerce Clause as a valid basis for abrogation in *Union Gas*.[70] The *Seminole Tribe* Court found that the Indian Commerce Clause vested even greater power in the federal government than the Interstate Commerce Clause, nearly completely preempting any corresponding state regulatory authority.[71] Nevertheless, the Court overturned *Union Gas*, holding that Article I could not encroach upon state sovereign immunity.[72] The Court attacked the precedential value of *Union Gas* on the grounds that there was no majority opinion and that the conflicting rationales invited confusion.[73]

To overcome the barrier of *stare decisis*, the Court assumed an affirmative duty to overrule erroneous decisions, reiterating that it "has never felt constrained to follow precedent" when correcting past errors.[74] Moreover, because the petitioners did not argue that the Act was passed pursuant to Fourteenth Amendment powers, the Court declined to analyze whether the Act may be justified under the Fourteenth Amendment.[75] *Seminole Tribe* signifies a turning point in the majority's interpretation of state sovereign immunity wherein it now extends to areas where state laws are preempted and federal authority is exclusive, like Indian commerce, immigration, and intellectual property.[76] This newfound discord with preemption doctrine is unusual because it empowers states to elude legal accountability in areas of vital importance to the federal government under the theory that Article I simply cannot expand the constitutionally prescribed boundaries of federal court jurisdiction set forth in Article III.[77]

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68. *Id.* at 59 ("[O]ur inquiry . . . is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?").

69. *Id.* at 60–61.

70. *Id.* at 60.

71. *Id.* at 62.

72. *Id.* at 73.

73. *Id.* at 64.

74. Smith v. Allwright, 321 U.S. 649, 665 (1944).

75. *Seminole Tribe*, 517 U.S. at 60 ("[P]etitioner does not challenge the Eleventh Circuit's conclusion that the Act was passed pursuant to neither the Fourteenth Amendment nor the Interstate Commerce Clause.").

76. *Id.* at 72–73. The preemption doctrine prevents states from enacting laws that undermine federal law or regulate—even harmoniously—in certain areas that have been comprehensively legislated by Congress. *See* Arizona v. United States, 567 U.S. 387, 401 (2012) ("Where Congress occupies an entire field . . . even complementary state regulation is impermissible.").

77. *Seminole Tribe*, 517 U.S. at 65 ("[The conclusion] that Congress could under Article I expand the scope of federal courts' jurisdiction under Article III . . . 'contradicted our unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court

Yet in *Central Virginia Community College v. Katz*,[78] a 2006 bankruptcy case, the Supreme Court backpedaled on its sweeping holding from *Seminole Tribe*.[79] The *Katz* Court held that the Article I Bankruptcy Clause *did* empower Congress to abrogate state sovereign immunity from bankruptcy suits.[80] The Court distinguished bankruptcy from other Article I powers by focusing on the Framers' intent to enable the federal government to restrain the states' "wildly divergent" bankruptcy laws.[81] Quite remarkably, the Court found that no further action was needed by Congress to abrogate state sovereign immunity from bankruptcy suits—the abrogation had already been effectuated by ratification.[82] The erosion of Congress's authority to abrogate under Article I leaves copyright holders whose works have been infringed by a state with a single leg to stand on: the Fourteenth Amendment.

C. Abrogation Under the Fourteenth Amendment

The Fourteenth Amendment famously asserts that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ."[83] Section 5 of the Fourteenth Amendment authorizes Congress to "enforce" these protections through "appropriate legislation."[84] In so doing, the Amendment "fundamentally alter[s] the balance of state and federal power" by permitting Congress to redress state abuse.[85] Although the Supreme Court has always recognized that the Fourteenth Amendment can provide a basis for abrogating state sovereign immunity, in recent years it has greatly limited the extent of permissible congressional action by developing a new test[86] and subsequently applying that test as a means to strike down abrogation in the patent infringement context.[87]

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jurisdiction.'") (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)), *overruled by Seminole Tribe*, 517 U.S. 44.

78. 546 U.S. 356 (2006).

79. *Id.* at 363 ("[The] assumption that the holding in [*Seminole Tribe*] would apply to the Bankruptcy Clause . . . was erroneous.").

80. *Id.* at 359; *see also* U.S. CONST. art. I, § 8, cl. 4 ("[Congress shall have power to] enact uniform Laws on the subject of Bankruptcies throughout the United States . . . .").

81. *Katz*, 546 U.S. at 365.

82. *Id.* at 379 ("[T]he relevant 'abrogation' is the one effected in the plan of the [Constitutional] Convention . . ."). This finding contradicts the Court's typical rule that Congress must enact a clear abrogation provision relying on a valid constitutional provision. *Id.*

83. U.S. CONST. amend. XIV, § 1.

84. *Id.* § 5.

85. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996).

86. See *infra* Section II.C.1.

87. *See infra* Section II.C.2.

1. A New Test for Abrogation Under Boerne

In *City of Boerne v. Flores*,[88] the Supreme Court held that there must be "congruence and proportionality" between the injury to be corrected and Congress's remedy.[89] In other words, the scope of the abrogation must be proportional to the severity of state misconduct.[90] The *Boerne* test requires that the abrogatory legislation be narrowly tailored to address state conduct that actually violates the Due Process Clause in order to be considered "appropriate" by the Court.[91] The test compels an examination into the "nature and extent" of state conduct that allegedly violates the Due Process Clause of the Fourteenth Amendment, which is often evidenced by the legislative record.[92]

A critical feature of the *Boerne* test is that the scope of permissible abrogatory authority can only be assessed by the Court, as Congress may not substantively redefine Fourteenth Amendment protections.[93] While Congress can enact both remedial and prophylactic measures—a seemingly expansive scope—*Boerne* made clear that abrogation legislation must be in accordance with the Court's view of the problems at hand.[94] Because Congress lacks the authority to determine whether a particular state act violates the Due Process Clause, it must distinguish unconstitutional and constitutional state acts based on existing case law in order to succeed.[95]

2. Abrogation in the Intellectual Property Context Under Florida Prepaid

The first Copyright Act, passed in 1790 (just five years before the Eleventh Amendment), defined an infringer broadly as anyone who violated

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88. 521 U.S. 507 (1997).

89. *Id.* at 520. The challenged law in *Boerne* was the 1993 Religious Freedom Restoration Act. 42 U.S.C. §§ 2000bb–bb–4.

90. *City of Boerne*, 521 U.S. at 520.

91. *Id.* at 530; *see also* Zinermon v. Burch, 494 U.S. 113, 125 (1990) ("[T]he deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*.").

92. Allen v. Cooper, 140 S. Ct. 994, 1004 (2020).

93. *City of Boerne*, 521 U.S. at 527 ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.").

94. *Id.* at 519. According to the Court, abrogation statutes are permitted to redress some state conduct that does not inherently raise constitutional concerns. *Id.* at 518 (Congress may enact remedial legislation under the Fourteenth Amendment "even if in the process it prohibits conduct which is not itself unconstitutional").

95. *Id.* at 519 ("Congress does not enforce a constitutional right by changing what the right is."); *see also Allen*, 140 S. Ct. at 1004 ("[A] congressional abrogation is valid under Section 5 only if it sufficiently connects to conduct courts have held Section 1 to proscribe.").

any of the exclusive rights of a copyright owner.[96] For over 150 years, no court accepted a state's sovereign immunity defense in a copyright infringement suit.[97] But after the Supreme Court began to demand unequivocal abrogatory language, circuit courts followed suit and started to reject the abrogatory clarity of the Copyright Act to the immense frustration of aggrieved copyright owners.[98] To address this concern, Congress tasked Ralph Oman, the Register of Copyrights, with gauging the scope of harms caused by state infringement.[99] The Oman Report identified several clear instances of intentional infringement and warned of "dire financial and other repercussions that would flow" from state immunity.[100]

Armed with this information, the CRCA amended the language of the copyright infringement statute to make Congress's intent to abrogate state sovereign immunity unmistakably clear.[101] The updated law clarified that states "shall be subject to the provisions of [copyright law] in the same manner and to the same extent as any nongovernmental entity."[102] The new language also specified that states shall not be immune from copyright infringement suits "under the Eleventh Amendment" or "any other doctrine of sovereign immunity."[103] The Patent and Plant Variety Protection Remedy Clarification Act ("PRCA") then expanded the scope of the abrogation to

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96. Copyright Act of 1790, 1 Stat. 124 (1790). These include the right to reproduce, perform, and distribute the work, as well as create derivative works. *See* 17 U.S.C. § 106.

97. *Sovereign Immunity and the Protection of Intellectual Property: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 12 (2002) (statement of Marybeth Peters, Register of Copyrights, United States Copyright Office) [hereinafter "Marybeth Statement"]. For example, relying on *Parden*, the Ninth Circuit found the 1790 act's language sufficient to abrogate state immunity. Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1284 (9th Cir. 1979).

98. Richard Anderson Photography v. Brown, 852 F.2d 114, 117–18 (4th Cir. 1988); Lane v. First Nat'l Bank of Bos., 871 F.2d 166, 168–69 (1st Cir. 1989); Chew v. California, 893 F.2d 331, 334 (Fed. Cir. 1990) ("[T]he general term 'whoever' is not the requisite unmistakable language of congressional intent necessary to abrogate Eleventh Amendment immunity.").

99. The Register of Copyrights is the title given to the director of the U.S. Copyright Office. *See* 17 U.S.C. § 701.

100. *See* U.S. COPYRIGHT OFFICE, REG. OF COPYRIGHTS, *Copyright Liability of States and the Eleventh Amendment* iii (1988) [hereinafter "Oman Report"], available at https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf [https://perma.cc/3YF3-572N].

101. 17 U.S.C. § 511(a) ("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, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner . . . .").

102. *Id.* § 501(a).

103. 17 U.S.C. § 511(a). The disclaimer of immunity under "any" doctrine tacitly recognizes the Court's recent divorcing of the doctrine from its textual roots. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Stevens, J., concurring), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

patent infringement suits two years later.[104] Utilizing nearly identical language, the two acts plainly foreclose the use of sovereign immunity as a defense in infringement cases and make states liable in the same manner as citizens.[105]

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[106] the Supreme Court struck down the PRCA, the sister statute to the CRCA, as an overreach of congressional authority.[107] The Court agreed that the language of the PRCA clearly invoked abrogation, but after *Seminole Tribe*, Congress's abrogatory authority could only reside within the Fourteenth Amendment.[108] While courts have generally recognized intellectual property as a form of property protected by the Fourteenth Amendment,[109] the *Florida Prepaid* Court maintained that merely negligent state conduct cannot "'deprive' [a] person of property within the meaning of the Due Process Clause."[110] Despite the fact that intent is not an element of copyright infringement, the Court chided Congress for not distinguishing its evidence of state infringement on the basis of intent.[111] State infringement, per this novel construction, is unconstitutional only if it is intentional or if the state subsequently fails to offer an adequate remedy.[112] Because state infringement is not inherently unconstitutional, abrogation statutes must be narrowly tailored to remedy the subset of infringements that are.[113]

After reviewing the testimony regarding state infringement contained in the United States Senate and House reports, the Court concluded that the evidence "suggested that most state infringement was innocent or at worst

104. 35 U.S.C. § 296(a).

105. *Id.*; 17 U.S.C. § 511(a).

106. 527 U.S. 627 (1999).

107. *Id.* at 647 (holding that the PRCA was not appropriately tailored to correcting unconstitutional state patent infringement).

108. *Id.* at 648 ("Article I . . . does not give Congress the power to enact such legislation after *Seminole Tribe*.").

109. *See* Brown v. Duchesne, 60 U.S. 183, 197 (1857) ("For, by the laws of the United States, the rights of a party under a patent are his private property . . . ."); *see also* Consolidated Fruit-Jar Co. v. Wright, 94 U.S. 92, 96 (1877) ("A patent for an invention is as much property as a patent for land."). *But see* Allen v. Cooper, 140 S. Ct. 994, 1008 (2020) (Thomas, J., concurring in part and concurring in the judgment) ("I believe the question whether copyrights are property within the original meaning of the Fourteenth Amendment's Due Process Clause remains open.").

110. *Florida Prepaid*, 527 U.S. at 645.

111. *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.").

112. *Id.*

113. *Id.* at 639 ("[Congress] must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.").

negligent."[114] In the Court's view, the limited record of actual due process violations did not justify the sweeping remedy prescribed by the PRCA.[115] The Court listed several limitations Congress might have considered in order to tailor the Act to more precisely address due process violations, such as "limiting the remedy to certain types of infringement" (i.e., intentional or knowing infringement) or "only against [s]tates with questionable remedies or a high incidence of infringement."[116] With the *Florida Prepaid* precedent looming large, the Court next turned from patent to copyright infringement in *Allen*.

III. THE COURT'S REASONING

In *Allen v. Cooper*, the Supreme Court addressed whether the CRCA was a valid exercise of congressional power.[117] The Court unanimously held that Congress lacked the authority to enact the CRCA under either its Article I or Fourteenth Amendment powers.[118] After reviewing the enigmatic history of the state sovereign immunity doctrine, the Court reiterated its two requirements for permitting a federal court to hear a suit against a nonconsenting state: (1) a clearly defined abrogation statute with (2) a valid constitutional basis.[119] The Court agreed that the CRCA contained unequivocal language, but ruled that Congress lacked the authority to enact it.[120]

Under a strict reading of *Seminole Tribe*, Article I can no longer provide a basis for abrogation.[121] The Court rejected Allen's argument that the *Katz* exception invited "a clause-by-clause approach" to analyzing the validity of an abrogation statute supported by Article I.[122] The Court justified this exception by distinguishing bankruptcy suits in several ways.[123]

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114. *Id.* at 645.

115. *Id.* at 645–47. *But see* City of Boerne v. Flores, 521 U.S. 507, 531 (1997) (finding that deficiencies in the legislative record should not sway judicial decision-making).

116. *Florida Prepaid*, 527 U.S. at 647.

117. 140 S. Ct. 994, 999 (2020).

118. *Id.*

119. *Id.* at 1000–01.

120. *Id.* at 1001 ("No one here disputes that Congress used clear enough language to abrogate the States' immunity from copyright infringement suits.").

121. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 73 (1996) ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

122. *Allen*, 140 S. Ct. at 1002-03. *See id.* at 1003 ("Our decision, in short, viewed bankruptcy as on a different plane, governed by principles all its own.").

123. *Id.* First, the Court reasoned that bankruptcy proceedings do not offend state sovereignty to the same extent as copyright infringement proceedings due to their *in rem* nature. *Id.* at 1002. *In rem* proceedings are prosecuted against real property and assets, not people. *Id.* Second, the Court looked to the legislative history of the Bankruptcy Clause, arguing that the Framers intended the

Having foreclosed Article I, the Court next turned to Allen's Fourteenth Amendment argument.[124] Finding the case analogous to *Florida Prepaid*, the Court explained that the CRCA could not be upheld without overturning that case because the PRCA and CRCA are functionally identical.[125] Expressing a robust appreciation of *stare decisis*, the Court maintained that precedent should not be overturned without a "special justification" amounting to more than the belief "that the precedent was wrongly decided."[126]

The Court agreed that the Fourteenth Amendment enables Congress to abrogate state sovereign immunity, but only if the abrogation statute passes the "congruence and proportionality" test established in *Boerne*.[127] Doubling down on *Florida Prepaid*, the Court maintained that copyright infringement, like patent infringement, violates the Due Process Clause only when it is intentional or when the state fails to offer an adequate remedy.[128] The bulk of the Court's analysis analogized the legislative records of the PRCA and CRCA and the evidence of state abuse contained therein.[129] The Court was unpersuaded of the existence of a widespread infringement problem.[130] In light of the expansive scope of the CRCA, which made states liable in all cases of infringement, the Court concluded that the documented evidence of actual due process violations and the sweeping remedy were disproportionate.[131] Offering an olive branch to Allen and other aggrieved copyright holders, the Court speculated that Congress could enact an acceptable intellectual property abrogation statute in the future, as long as it is responsive to the *Boerne* test.[132]

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federal government to play a "leading role" in establishing nationally uniform policies for discharging debt. *Id.* Third, and perhaps most strikingly, the Court found that the language and legislative history of the Bankruptcy Clause were together sufficient to abrogate state sovereign immunity without any action from Congress. *Id.* at 1003 ("Relying on the above account of the Framers' intentions, the Court found that *the Bankruptcy Clause itself* did the abrogating.") (emphasis in original).

124. *Id.*

125. *Id.* ("[T]here is no difference between copyrights and patents under the Clause, nor any material difference between the two statutes' provisions.").

126. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014) (citing Dickerson v. United States, 530 U.S. 428, 443 (2000) (internal quotation marks omitted)).

127. *Allen*, 140 S. Ct. at 1004 (citing City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

128. *Id.* ("Under our precedent, a merely negligent act does not 'deprive' a person of property."); *see also* Daniels v. Williams, 474 U.S. 327, 328 (1986) (conduct must be intentional or reckless to violate the Due Process Clause).

129. *Allen*, 140 S. Ct. at 1007 ("*Florida Prepaid* all but prewrote our decision today.").

130. *Id.* at 1006 ("[N]othing in the Oman Report, or the rest of the legislative record, cures the problems we identified in *Florida Prepaid*.").

131. *Id.* at 1007 ("Under *Florida Prepaid*, the CRCA thus must fail our 'congruence and proportionality' test.") (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

132. *Id.* ("That conclusion, however, need not prevent Congress from passing a valid copyright abrogation law in the future."). It is important to note that *Seminole Tribe* and *Boerne* were both

Justice Breyer, joined by Justice Ginsburg, wrote a concurring opinion, arguing that both Article I and the Fourteenth Amendment could support the abrogation.[133] Although both Justices Breyer and Ginsburg had dissented in *Seminole Tribe* and *Florida Prepaid* and indicated their discomfort with the majority's current interpretation of the doctrine, they concurred because they considered those cases to be binding precedent.[134]

Justice Thomas also wrote a concurring opinion addressing three concerns.[135] First, he spurned the Court's approach to *stare decisis* as needing a special justification beyond mere error to overrule a decision.[136] Second, he voiced his opposition to advising Congress on crafting hypothetical pieces of legislation.[137] Third, he questioned whether copyrights are encompassed within the original meaning of "property" under the Fourteenth Amendment.[138]

IV. ANALYSIS

In *Allen v. Cooper*, the Supreme Court struck down the CRCA, holding that Congress could not broadly abrogate state sovereign immunity from copyright infringement lawsuits.[139] As a result, states can now infringe with impunity, subverting the goals of copyright law and leaving copyright holders with no feasible remedy.[140] This Note argues that, while consistent with *Boerne* and *Florida Prepaid*, the case was wrongly decided because it extends a series of errant decisions that collectively have blown the Court off course from a constitutionally justifiable interpretation of the state sovereign immunity doctrine.[141]

Section IV.A contends that the perennial ambiguity of the state sovereign immunity doctrine and its atextual modern interpretation undermine its application in the present case to categorically bar all copyright infringement suits against states.[142] Section IV.B argues that the CRCA

decided several years after the CRCA and PRCA were enacted. Thus, Congress believed that it could pass those statutes in accordance with the just-decided opinion in *Union Gas*, and had no way of knowing that the statutes and legislative record would be scrutinized under the *Boerne* test. *Id.*

133. *Id.* at 1008 (Breyer, J., concurring in the judgement).

134. *Id.* at 1009 ("[R]ecognizing that my longstanding view has not carried the day, and that the Court's decision in *Florida Prepaid* controls this case, I concur in the judgment.").

135. *Id.* at 1007 (Thomas, J., concurring in part and concurring in the judgment).

136. *Id.* at 1007–08.

137. *Id.* at 1008.

138. *Id.*

139. *Id.* at 999 (majority opinion).

140. *See infra* Section IV.D.

141. *See infra* Section IV.A.

142. *See infra* Section IV.A.

should have been upheld as a valid exercise of Congress's Article I authority to regulate intellectual property.[143] Section IV.C raises a parallel argument regarding the Fourteenth Amendment.[144] Finally, Section IV.D suggests that the practical effect of *Allen* is to encourage state infringement and unfair market dominance—results which are openly at odds with the central tenets of the copyright system.[145]

A. The Contentious History and Modern Atextual Interpretation of the State Sovereign Immunity Doctrine Undermine its Application to Bar Remedies for State Copyright Infringement

The contorted logic underlying the contemporary interpretation of state sovereign immunity calls into question the precedential value of several recent cases.[146] The doctrine is mentioned nowhere in the Constitution and has never been explicitly defined.[147] It is more closely aligned with a monarchial political philosophy than a democratic one, and thus does not translate smoothly from English into American common law.[148]

Over time, a narrow majority of the Court has adopted an increasingly broad interpretation of state sovereign immunity, resulting in an erosion of available remedies for state intrusions on federally guaranteed rights.[149] As the doctrine now stands—at its most powerful point in history—these remedies are now exclusively limited to situations where Congress, acting pursuant to its authority to "appropriate[ly]" enforce the Fourteenth Amendment, enacts legislation with unequivocal language that is narrowly tailored to remedying due process violations.[150]

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143. *See infra* Section IV.B.

144. *See infra* Section IV.C.

145. *See infra* Section IV.D.

146. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 7 (1988) ("[I]nstitutional values of *stare decisis* are ill-served by formal adherence to a doctrine riddled with exceptions designed to counterbalance its evils.").

147. *Id.* at 4 ("The Eleventh Amendment, and the doctrine . . . which it represents, has long been perceived as a doctrinal abyss, replete with inconsistencies borne of pragmatic adjustments to the principle for which it supposedly stands.").

148. In contrast with the English feudal system, political authority in a representative democracy like the United States derives principally from the people. *See* Allen v. Cooper, 244 F. Supp. 3d 525, 537 (E.D.N.C. 2017) ("The founders envisioned and wrote a Constitution founded upon the sovereignty of the people, not the states."), *rev'd*, 140 S. Ct. 994 (2020). The doctrine's invocation of the invincible state appears to be at odds with the idea of democratic sovereignty, where authority supposedly flows from, not to, the people. *Id.*

149. Jackson, *supra* note 146, at 3 ("[Sovereign] immunity is in tension with [the principle] . . . that the law will generally provide a remedy for rights violated by the government . . . .")

150. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

The expansion of the doctrine to bar federal question suits and suits brought by in-state plaintiffs ignores the explicit language in the Eleventh Amendment, which only prohibits suits brought by out-of-state citizens.[151] This stands as an exception to a traditionally accepted canon of statutory construction.[152] The text of the Amendment does not mention in-state plaintiffs at all.[153] If the Amendment aimed to treat in-state and out-of-state plaintiffs equally, then there would have been no need to distinguish them. While the enacted Amendment only literally bars diversity suits, earlier drafts of the Amendment would have unconditionally barred suits against states in all cases.[154] This implies that the Amendment was only intended to bar diversity suits.[155] Furthermore, *Chisholm*—the impetus for the Amendment's passage—was a model diversity case.[156] Recognizing the Amendment's specific exclusion of diversity suits, the Court in an early case affirmed that the Eleventh Amendment did not bar federal question suits.[157] By straying from this interpretation, the Court has steered the state sovereign immunity doctrine away from its constitutional harbor into choppy and uncharted waters.[158]

151. U.S. CONST. amend. XI.

152. The interpretative canon *expressio unius est exclusio alterius* ("the explicit mention of one [thing] is the exclusion of another") suggests that that when a specific class of people is specified, an intention to exclude all others may be inferred. *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (9th ed. 2009).

153. U.S. CONST. amend. XI.

154. Michael Landau, *State Sovereign Immunity and Intellectual Property Revisited*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 513, 528 (2012) ("Congress rejected the first proposed version of the Eleventh Amendment, which provided in part that 'no state shall be liable to be made a party defendant' . . . which would have effectively barred both in-state and out-of-state citizen suits.") (citation omitted).

155. *See* Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT'L L. 283, 292 (2003) ("The case for *expresio unius* is also stronger when the subject matter of the proposed implicit exception was within the contemplation of the drafters.").

156. Chisholm v. Georgia, 2 U.S. 419, 466 (1793) ("The grand and principal question in this case is, whether a State can . . . be sued by an individual citizen of another State?"). Thus, if the passage of the Eleventh Amendment can be accurately characterized as a reaction to *Chisholm*, the legislature was reacting to a diversity case. *Id.*

157. Cohens v. Virginia, 19 U.S. 264, 382 (1821).

158. *See* Alden v. Maine, 527 U.S. 706, 759–60 (1999) (expanding scope of sovereign immunity to prohibit suits against states in state court). The departure of sovereign immunity jurisprudence from reliance on the text is best described as a rejection of the idea that the doctrine is limited in any way by the text of the Eleventh Amendment. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

B. The Court Should Have Deferred to Congress's Article I Authority to Regulate and Protect Copyrights

The Court supported the idea that Congress may abrogate state sovereign immunity pursuant to its Article I authority until its 5–4 ruling in *Seminole Tribe* unexpectedly foreclosed that route.[159] Given the Court's subsequent retreat in *Katz* from that holding, and the fact that copyright infringement is exclusively in the federal domain, the Court erred in relying on *Seminole Tribe* as controlling authority and instead should have looked to the text of the Intellectual Property Clause.[160]

1. The Overbroad Holding in Seminole Tribe *Capriciously Forecloses Congress's Authority to Abrogate State Sovereign Immunity Pursuant to Article I*

The Court in *Seminole Tribe* went astray when it boldly rejected all of Article I as a potential basis for abrogation.[161] In overturning *Union Gas*, a majority of the Court abandoned the idea that the states had implicitly waived sovereign immunity by ratifying Article I.[162] Strikingly, the holding extended to all of Article I, despite the fact that Article I encompasses a broad range of powers, including in areas like intellectual property, which are the exclusive province of the federal government.[163] The practical result of *Seminole Tribe* is to preclude any possibility of grounding intellectual property abrogation statutes on the Intellectual Property Clause—as

159. *See* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 475 (1987) ("We assume . . . that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment."). Although Congress's Article I powers are extensive, the Court did not categorically permit Article I powers to be used to abrogate sovereign immunity in all cases. *See* Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 286–87 (1973) ("[W]e decline to extend *Parden* to cover every exercise by Congress of its commerce power . . . .").

160. Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 652 (1999) (Stevens, J., dissenting) ("It was equally appropriate for Congress to abrogate state sovereign immunity in patent infringement cases in order to close a potential loophole in the uniform federal scheme, which, if undermined, would necessarily decrease the efficacy of the process afforded to patent holders.").

161. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 73 (1996) ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

162. Pennsylvania v. Union Gas Co., 491 U.S. 1, 14 (1989) ("Congress'[s] authority to regulate commerce includes the authority directly to abrogate States' immunity from suit."), *overruled by Seminole Tribe*, 517 U.S. at 44. Furthermore, every federal circuit court to have faced this issue has decided in favor of abrogation. *Id.* at 15.

163. *Id.*

Congress intended with the CRCA and PRCA—enabling the *Allen* Court to completely ignore the text and legislative history of the clause.[164]

The holding of *Seminole Tribe* was undermined by the Court's later allowance of an exception for bankruptcy suits in *Katz*.[165] The *Katz* Court sidestepped a proper *stare decisis* analysis by simply claiming that the relevant language of *Seminole Tribe*, which stated, "Article I cannot be used to circumvent the constitutional limitation placed upon federal jurisdiction," was dicta rather than a holding.[166] But if the Bankruptcy Clause could be entertained and upheld as an exception automatically justifying abrogation, then why did the *Allen* Court not even consider the Intellectual Property Clause?

2. *The Intellectual Property Clause Deserves Recognition as Establishing a Fundamental Federal Power*

Unique among Article I powers, the Intellectual Property Clause empowers Congress to "secure[] … exclusive Right[s]" to copyright holders.[167] This language implies that the Framers intended the copyright holder to be the sole lawful owner of the work.[168] Like bankruptcy, intellectual property laws are federally uniform, with federal courts enjoying exclusive jurisdiction over patent and copyright suits.[169] This uniformity is key for the system to function most effectively.[170] Historically, the Court has

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164. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 636 ("*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 either the Commerce Clause or the Patent Clause.").

165. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006).

166. *Id.* at 363 ("We acknowledge that statements in both the majority and the dissenting opinions in [*Seminole Tribe*] reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. . . . Careful study and reflection have convinced us, however, that that assumption was erroneous.").

167. U.S. CONST. art. I, § 8, cl. 8.

168. THE FEDERALIST No. 43, at 267 (James Madison) (H. Lodge ed., 1908) ("The utility of this power will scarcely be questioned. . . . The States cannot separately make effectual provision for either [copyrights or patents], and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.").

169. *See* Lemelson v. Ampex Corp., 372 F. Supp. 708, 711 (N.D. Ill. 1974) ("The entire structure of the patent laws is meant to provide a national, uniform system to provide the most meaningful protection for the inventor."); *see also* 28 U.S.C. § 1338(a) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.").

170. J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 502, p. 402 (R. Rotunda & J. Nowak eds., 1987) ("It is beneficial to all parties, that the national government should possess this power; to authors and inventors, because, otherwise, they would be subjected to the

held that states have implicitly waived immunity in areas that are federally preempted.[171] That was precisely the basis for the Court's decision in *Katz*, which abrogated state sovereign immunity from bankruptcy suits because Congress had clearly intended bankruptcy laws to be uniform.[172] These facts, along with the plain text of the Intellectual Property Clause, provide strong evidence that states had implicitly waived sovereign immunity from intellectual property suits by ratifying the Constitution, as they had apparently done in bankruptcy suits.[173]

C. The Court Should Have Deferred to Congress's Authority to Enforce the Protections of the Fourteenth Amendment

In addition to the strong support from Article I, the CRCA should also have been upheld as a valid exercise of Congress's Fourteenth Amendment powers.[174] The CRCA is designed to remedy state infringement in a fair and uniform way that simultaneously respects the Framers' intentions in establishing the copyright system, adheres to the actual text of the Constitution, and protects the rights of copyright holders.[175]

In applying the *Boerne* test to intellectual property, the Court placed too much weight on the record of state infringement.[176] Also, the Court erred in introducing an intent element to determine whether an infringing state had violated the Due Process Clause.[177] This is inconsistent with copyright law, under which infringement is a strict liability offense.[178]

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varying laws and systems of the different states on this subject, which would impair, and might even destroy the value of their rights.").

171. Landau, *supra* note 154, at 560.

172. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006).

173. *Lemelson*, 372 F. Supp. at 711 ("[I]n granting to Congress the right to create exclusive patents, the states largely surrendered their sovereignty over patents.").

174. *See* Allen v. Cooper, 244 F. Supp. 3d 525, 540 (E.D.N.C. 2017) ("Congress has clearly abrogated state immunity in cases arising under the CRCA, and such an abrogation is congruent and proportional to a clear pattern of abuse by the states."), *rev'd*, 140 S. Ct. 994 (2020).

175. *Id.*

176. *Id.*

177. Allen v. Cooper, 140 S. Ct. 994, 1004 (2020) ("[I]nfringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause.").

178. *See* 17 U.S.C. § 501. Consider two similarly situated defendants in two copyright infringement suits: a state agency and a citizen. Despite being sued under the very same law, courts would have to assess intent with regard to the agency—but not the citizen—in order to conduct a proper analysis.

1. The Court Overstated the Significance of the CRCA's Record of State Infringement

The Court's requirement of a substantial record of past infringement as reflected in the CRCA's legislative history presents several problems. First, it stands at odds with the Court's assurance that Congress may pass "prophylactic legislation."[179] Second, the most relevant timeframe for Congress to assess state infringement was the few years between the Court's tightening of the "unequivocal language" requirement in 1985 and the passage of the CRCA, and it was unreasonable to expect Congress to find a record brimming with infringement in this short time.[180] By limiting its assessment of state infringement to the 1988 Oman Report, the Court conveniently ignored every instance of infringement that has occurred since.[181] There are several other reasons why the actual number of instances of infringement is likely much higher than documented in the legislative record.[182] States were historically unprotected from infringement suits and thus naturally deterred from infringing, so the relative scarcity of litigation is hardly surprising.[183] But in the wake of the Court's decisions restricting Congress's abrogatory authority, the fear (now fact) that states can simply assert immunity and win the case discourages aggrieved copyright holders from filing suit in the first place.[184] After *Allen*, district courts must follow the decision of the Supreme Court and can no longer make an independent finding.[185] This means that copyright holders simply cannot prevail against a state until Congress passes a new abrogation statute that is acceptable to the Court.[186] Finally, the Copyright Office does not have the resources or

179. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000). Ironically, the very same opinion in which the Court introduces a test that dramatically restricts permissible abrogations also claims to grant "much deference" to Congress in designing Fourteenth Amendment legislation. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference.") (alteration in original) (internal citation omitted).

180. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985).

181. Brief for Ralph Oman as Amicus Curiae Supporting Petitioners at 14, Allen v. Cooper, 140 S. Ct. 994 (2020) (No. 18-877), https://www.supremecourt.gov/DocketPDF/18/18-877/87373/20190207102951115_2019-02-07%20No%2018-877%20Oman%20Amicus%20Br.pdf [hereinafter Brief for Ralph Oman].

182. *Id.*

183. *Id.*

184. Marybeth Statement, *supra* note 97, at 14–15. Even if sovereign immunity concerns do not preempt filing altogether, most disputes end with a settlement agreement rather than proceeding to trial. Landau, *supra* note 154, at 553.

185. *See generally* Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565 (2017) (explaining the history and contours of the rule that lower courts must follow binding precedent).

186. *Id.*

authority to assemble a comprehensive catalogue of state infringement.[187] The Oman Report solicited information by means of a news bulletin, and the study was by no means intended to be exhaustive, or even comprehensive.[188]

Even if states do not begin systematically abusing copyrights, each infringement deserves a remedy.[189] There should not be a magic number of violations of any type of conduct required to warrant a remedy.[190] Under this purely reactionary framework, there would be no reason to outlaw murder, for example, if the murder rate was low. Also, the problems are only going to get worse as intellectual property becomes increasingly important to state enterprises and business.[191] Courts should not only look to the history of state conduct, but also consider the foreseeable future.[192]

2. State Copyright Infringement is a "De Facto" Infringement of a Copyright Holder's Due Process Rights

The Court's complaint that the CRCA's record did not distinguish intentional and unintentional state violations is unwarranted because intent is not an essential element of a copyright infringement claim.[193] Intent can, however, substantially affect the award of statutory damages.[194] A state that only negligently infringes could be held liable for a lesser amount, and the same would be true if the parties' positions were reversed.[195] Thus, even with a broad abrogation, as intended by the CRCA, the law is flexible enough to

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187. Brief for Ralph Oman, *supra* note 181, at 13.

188. *Id.* at 8–9.

189. Justice John Marshall famously decreed that for every violation of a legal right, there should be a corresponding remedy. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803).

190. *Id.*

191. U.S. Pat. & Trademark Off., *Intellectual Property and the U.S. Economy: 2016 Update*, 1 (2016), https://www.uspto.gov/learning-and-resources/ip-motion/intellectual-property-and-us-economy [https://perma.cc/GLB9-EPD5] ("IP-intensive industries continue to be a major, integral and growing part of the U.S. economy."); *see also* Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 657 (1999) (Stevens, J., dissenting) ("States and their instrumentalities are heavily involved in the federal patent system.").

192. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 654–55.

193. *See* 17 U.S.C. § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner" will be held liable as an infringer). Copyright infringement cases generally proceed predictably. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (providing an overview of copyright infringement doctrine). First, the court asks the plaintiff to demonstrate ownership of a valid copyright. *Id.* Second, the court looks for evidence that the defendant copied any original and protectable elements of that work. *Id.*

194. *See* 17 U.S.C. § 504(c)(2) (stating that in cases where the infringement is unintentional, the minimum statutory damages award may be lowered from $750 to $200 but in cases where the infringement is willful, the maximum statutory damages award may be increased from $30,000 to $150,000).

195. *Id.*

account for intent and allocate damages accordingly.[196] This flexibility enables the CRCA to treat states fairly and simultaneously hold them accountable for their actions.[197]

Florida Prepaid held that a copyright owner's due process rights are violated when an infringing state fails to offer an adequate remedy.[198] But a damages award from a successful infringement suit is, in most cases, the only remedy that can adequately compensate the copyright owner.[199] The state law causes of action that the Court suggested as alternatives are insufficient because they do not allow for the same degree of damages awards.[200] A plaintiff asserting a copyright infringement claim may seek (1) an injunction to prevent further copying; (2) actual damages based on a calculation of lost profits; or (3) statutory damages if actual damages cannot easily be determined.[201] Seeking an injunction is often not a viable strategy because by the time it is issued, the damage has already been done.[202] An award of statutory damages, however, can net up to $150,000 per instance of infringement.[203] Thus, striking down the CRCA and barring all infringement suits against states deprives aggrieved copyright holders of any meaningful recourse.

D. Failure to Hold States Liable for Copyright Infringement Subverts the Fundamental Goals of the Copyright System to Promote and Protect Artistic Expression

The copyright system enables artists to enrich the world with the fruits of their creative labors.[204] The value of a copyright is derived from the exclusive rights vested in the owner; securing these rights is essential to a fair

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196. *Id.*

197. *Id.*

198. Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642–44 (1999).

199. *Id.* at 655 (Stevens, J., dissenting) (arguing that the lack of comparable remedies underscores the importance of the CRCA and PRCA).

200. *Id.* at 659. Also, suits against states generally cannot be brought in state court either. *See* Alden v. Maine, 527 U.S. 706, 759–60 (1999).

201. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433–34 (1984); 17 U.S.C. § 504.

202. Transcript of Oral Argument at 38, Allen v. Cooper, 140 S. Ct. 994 (2020) (No. 18-877). Once copyrighted material has been widely shared on the Internet, for example, the copyright owner can never fully regain exclusive control. *Id.* Also, court costs and attorney's fees cannot be recovered by a plaintiff seeking an injunction, while they can be recouped by a plaintiff seeking damages, making the latter a more appealing option. *Id.*

203. 17 U.S.C. § 504.

204. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

and properly functioning system.[205] The system must delicately balance the rights of artists to control and profit from their works with the benefits gained by society.[206] *Allen* squarely disrupts this balance by allowing states to exploit copyrighted works without permission.[207] On average, people are less likely to create protectable works now that states can freely infringe.[208]

Now, more than ever, states are deeply engaged in copyright-intensive enterprises such as education, publishing, research, and tourism.[209] Leveraging sovereign immunity in the intellectual property marketplace upsets the balance between states and private actors and disincentivizes creators from working with states.[210] There are several recent examples—that the Court either failed to capture or willfully ignored—of states successfully asserting sovereign immunity in order to claim ownership of works that were codeveloped with private entities.[211] When states are able to extract "substantial concessions of basic rights under the Copyright Act" by simply citing *Allen*, it is clear that they can easily obtain a financial advantage and unfairly burden copyright owners.[212] The Supreme Court has in the past cautioned states that when they act like a business, they will be treated like

205. *Id.*; 17 U.S.C. § 106.

206. *See* 17 U.S.C. § 107 (specifying that "the "fair use" of a copyrighted work . . . for "purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.").

207. Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 652 (1999) (Stevens, J., dissenting).

208. *Id.*

209. In the past forty years, over 32,000 copyright registrations have been assigned to state universities. Marybeth Statement, *supra* note 97, at 18.

210. Oman Report, *supra* note 100, at 15–16.

211. *See* Mktg. Info. Masters, Inc. v. Bd. of Trs. of Cal. St. Univ. Sys., 552 F. Supp. 2d 1088 (S.D. Cal. 2008) (dismissing copyright infringement suit regarding state university's alleged plagiarism of private report); InfoMath, Inc. v. Univ. of Ark., 633 F. Supp. 2d 674 (E.D. Ark. 2007) (dismissing copyright infringement suit regarding state university's unauthorized use of privately-owned course content); Jacobs v. Memphis Convention & Visitors Bureau, 710 F. Supp. 2d 663 (W.D. Tenn. 2010) (dismissing copyright infringement suit regarding state tourist agency's unauthorized use of copyrighted images); Xechem Int'l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr., 382 F.3d 1324 (Fed. Cir. 2004) (dismissing patent infringement suit regarding codeveloped cancer drug).

212. Oman Report, *supra* note 100, at 11 ("Schools expect permission to create literally thousands of copies of translations or thousands of audio cassettes or derivative works and they expect publishers to grant these permissions at no charge."); *see also* Marybeth Statement, *supra* note 97, at 14–15.

one.[213] But the expansion of sovereign immunity to allow states to infringe with impunity flouts this principle.[214]

One potential solution to the problem *Allen* creates is for Congress to "play hardball" with the states by conditioning federal funding on a state's waiver of sovereign immunity from intellectual property suits.[215] Congress already has a history of successfully employing similar tactics to further other policy objectives, such as raising the drinking age.[216] A conditional waiver of immunity may be a practical solution if addressing state infringement is found to be reasonably related to a specific area of federal funding.[217]

Congress's clearest path forward, however, as suggested by the Court, is to try again to craft an abrogation statute that satisfies the *Boerne* test by relying on an updated catalogue of infringement.[218] This new statute could distinguish intentional and unintentional state conduct in order to paint a clearer picture of the ongoing problems.[219] The urgency of the situation has prompted a rapid response: a study is already underway between Congress and the Patent and Copyright Offices to define the contours of this prospective law.[220] The first phase of the study involved a comment solicitation period from the Copyright Office directed towards aggrieved copyright holders and other interested stakeholders.[221] The goal of the public comment period, as evidenced by the questionnaire, was to create a catalogue

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213. Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184, 196 (1964) ("[W]hen a state . . . enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.").

214. Noticeably, the federal government has agreed to play by the rules, promising money damages in federal court when it violates the exclusive rights of a citizen copyright owner. 28 U.S.C. § 1498(b) ("[W]henever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States . . . the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement . . . .").

215. Landau, *supra* note 154, at 561.

216. *See* South Dakota v. Dole, 483 U.S. 203, 212 (1983) (holding that Congress may condition a state's receipt of federal highway funds on the state agreeing to raise the drinking age to twenty-one). The condition was upheld as a valid exercise of Congress's spending power because it was "reasonably calculated" to address the public welfare concern of drunk driving. *Id.* at 209.

217. Landau, *supra* note 154, at 562 (arguing that such a condition would "certain[ly]" be upheld).

218. Allen v. Cooper, 140 S. Ct. 994, 1007 (2020) ("[The decision] need not prevent Congress from passing a valid abrogation law in the future.").

219. *Id.*

220. Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 34,252 (June 3, 2020), https://www.federalregister.gov/documents/2020/06/03/2020-12019/sovereign-immunity-study-notice-and-request-for-public-comment.

221. *Id.*

of state infringement that satisfies the constraints of the *Boerne* test.[222] The comment period was extended twice, from two months to four.[223] On November 5, 2020, the Patent and Trademark Office launched its own parallel request for information to measure recent trends in state patent and trademark infringement.[224]

On December 11, 2020, the Copyright Office held a roundtable discussion over Zoom, inviting stakeholders from all over the country to voice their concerns in the wake of *Allen*.[225] The discussions centered around three major topics: (1) evidence of state infringement; (2) state policies or practices regarding infringement; and (3) whether alternative remedies could be considered adequate.[226] The anecdotal testimony and survey results presented therein will surely provide useful guidance as Congress considers the next steps.

V. CONCLUSION

In *Allen v. Cooper*, the Supreme Court held that the CRCA was an unconstitutional attempt by Congress to abrogate state sovereign immunity from copyright infringement suits, as it was not sufficiently tailored to remedy violations of a constitutional magnitude and failed to show a conclusive pattern of state misconduct.[227] This holding, which effectively bars all remedies when a state infringes, does not comport with either the

222. *Id.* ("Please provide information regarding . . . [w]hether the infringement was intentional or reckless, and the basis for that conclusion[.]").

223. Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 37,961 (June 24, 2020), https://www.federalregister.gov/documents/2020/06/24/2020-13725/sovereign-immunity-study-notice-and-request-for-public-comment; Sovereign Immunity Study: Notice and Request for Public Comment (extending deadline to September 2 for "initial comments" and October 2 for "written reply comments and empirical research studies"); Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 61,034 (Sep. 29, 2020), https://www.federalregister.gov/documents/2020/09/29/2020-21566/sovereign-immunity-study-notice-and-request-for-public-comment (extending deadline to October 22).

224. Sovereign Immunity Study, 85 Fed. Reg. 70,589 (Nov. 5, 2020), https://www.federalregister.gov/documents/2020/11/05/2020-24621/sovereign-immunity-study. This request was subsequently expanded to provide for additional questions. Sovereign Immunity Study, 86 Fed. Reg. 6636 (Jan. 22, 2021), https://www.federalregister.gov/documents/2021/01/22/2021-01305/sovereign-immunity-study.

225. Sovereign Immunity Study: Announcement of Public Roundtables, 85 Fed. Reg. 70,654 (Nov. 5, 2020), https://www.federalregister.gov/documents/2020/11/05/2020-24577/sovereign-immunity-study-announcement-of-public-roundtables.

226. U.S. Copyright Office, *State Sovereign Immunity Study*, COPYRIGHT.GOV (Dec. 11, 2020), https://www.copyright.gov/policy/state-sovereign-immunity. For the full text of the proceedings, see Transcript of Proceedings, *In re* Sovereign Immunity Roundtables, U.S. Copyright Office (Dec. 11, 2020), https://www.copyright.gov/policy/state-sovereign-immunity/2020.12.11-roundtable-transcript.pdf.

227. Allen v. Cooper, 140 S. Ct. 994, 999 (2020).

plain text of the Constitution or the public policy goals of the copyright system.[228] Although both Article I and the Fourteenth Amendment grant Congress wide latitude to protect intellectual property,[229] artists and inventors are now more vulnerable than ever to state exploitation in the wake of this short-sighted decision.[230] The silver lining is that abrogating sovereign immunity from copyright suits need not require the reversal of any Supreme Court precedent as long as Congress moves forward with creating an enhanced catalogue of state infringement, which it appears to be doing.[231] These recent developments inspire hope that the copyright protections intended by the Framers will soon be restored, enabling smooth sailing once again in the copyright seas.

228. *See supra* Section IV.A
229. *See supra* Sections IV.B–C.
230. *See supra* Section IV.D.
231. *Id.*