Protecting Patent Owners from Infringement by the States: Will the Intellectual Property Rights Restoration Act of 1999 Finally Satisfy the Court?

Brandon White
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I. INTRODUCTION

After years of hard work, you’ve finally done it. After eight years of college and years spent working in the laboratory, your hard work has finally paid off. Standing in the shower, washing away your sleepiness, you finally experienced that wonderful “Eureka” feeling. You knew the idea that popped into your head had never popped into the head of another. You just solved the problem you had been working on for years. Your invention will work and it will work well. You see your patent attorney. Eighteen months later, you finally have a patent for your invention. That is when your dream begins to unravel.

Unfortunately, the only significant markets for your invention are the state and federal governments. Maybe it was a method of testing automobile emissions.1 Maybe it was a tidal flow system.2 Whatever your invention, it turns out that a state government is using it without your permission and without paying you for its use. Outraged, you immediately see your patent attorney and file a lawsuit against the infringing state.3 Not long after your complaint is filed, your attorney calls you to inform you that a federal district court judge has dismissed your case because the state has immunity from suit under the Eleventh Amendment. Your attorney also informs you that you can not sue in state court be-

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cause the state courts cannot hear patent infringement cases. It appears your hard work and creative efforts are for naught. The state can infringe your patent and there is nothing you can do about it.

Unfortunately, the situation described above reflects the state of the law today. Under the Eleventh Amendment, states have long enjoyed immunity from suits brought by private citizens in federal courts. This immunity, with only a few exceptions, effectively renders Congress incapable of holding states to the same standards as it holds the federal government and private actors. As states begin to participate in the public markets not as governing bodies, but as businesses seeking to


5. See infra notes 33-163 and accompanying text.


7. States have enjoyed this immunity at least since the ratification of the Eleventh Amendment and the Supreme Court’s liberal interpretation of it in Hans v. Louisiana, 134 U.S. 1 (1890). See infra notes 45-52 and accompanying text.

8. See infra notes 130-152 and accompanying text.


make a profit, the doctrine of state sovereign immunity becomes particularly troublesome. Immunity for states acting in a proprietary capacity allows states to compete with private companies free of the restraints normally associated with patent law and other federal regulations.

State sovereign immunity leaves patent owners in an unenviable position: holding the valuable right to exclude all others, but unable to enforce that right against state infringers. Worse yet, issues sounding in patent law and suits to recover damages for patent infringement can be heard only before the federal courts, leaving no adequate remedy available in the state courts.


11. “Governmental growth has given rise to new entities which contain qualities of both state actors and private business. As these entities multiply and change, the immunity question returns to the forefront.” Jennifer A. Winking, Note, Eleventh Amendment: A Move Towards Simplicity In the Test For Immunity, 60 Mo. L. Rev. 953, 954 (1995). See also Gordon L. Hamrick, IV, Comments, Roving Federalism: Waiver Doctrine After College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 49 Emory L.J. 859, 860 (2000) (stating that the College Savings Bank decision “constructs a double standard for public and private participants in commercial enterprise, thus ensuring that the [College Savings Bank] decision will have a critical effect on the mix of incentives affecting states as they expand their entry into the arena of business for profit”). Cf. Susan Schoenfeld, Comment, The Applicability of Eleventh Amendment Immunity Under the Copyright Acts of 1909 and 1976, 36 Am. U. L. Rev. 163, 190 (1986) (“The manifest injustice of closing the doors of the federal courts to individuals seeking recovery against a state is starkly presented when an individual seeks damages for a state’s unlawful appropriation of copyrighted property.”).

12. Referring to a state’s immunity from patent infringement suits, the New Star Lasers court stated that it “can conceive of no other context in which a litigant may lawfully enjoy all the benefits of a federal property or right, while rejecting its limitations.” New Star Lasers, Inc. v. Regents of the Univ. of Cal., 63 F. Supp. 2d 1240, 1244 (E.D. Cal 1999).


14. “Every patent shall . . . grant to the patentee . . . the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States . . . .” 35 U.S.C. § 154 (1994).


Patent infringement by the states and their agencies, while not an historically significant problem, may very well become a significant issue if the Patent and Trademark Office continues to see significant growth in not only the number of patent applications it receives and issues each year, but also a continued expansion of the fields in which patents are issued. An increase in the number of states acting in proprietary non-governmental roles coupled with states taking increased advantage of the federal intellectual property system and the increase in the rate of patent issuance may find patent owners holding a “right

18. See infra notes 153 and 157 and accompanying text.
20. Comprehensive statistics of annual patent applications received and number of patents issued by the Patent and Trademark Office (PTO) are available on the PTO’s website (<http://www.uspto.gov>). These statistics indicate a sharp increase in the both the number of patent applications received and the number of patents issued. For example, in the years 1963, 1983, 1993 and 1999 the total number of patent applications received were: 90,982; 112,040; 188,739; 288,811 respectively. U.S. Patent and Trademark Office, U.S. Patent Statistics, Calendar Years 1963 – 1999 (visited March 27, 2001) <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.pdf>. In those same years the number of patents issued was: 48,971; 61,982; 109,747; 169,094. Id.
22. See supra note 11 and accompanying text. Cf. Schoenfeld, supra note 11, at 191 (arguing that states should only be amenable to suit when acting in a proprietary manner, not when acting in a governmental capacity).
without a remedy.”

Congress has made attempts, in light of recent Supreme Court cases affecting the state sovereign immunity doctrine, to protect the rights of patent owners in the event of a state infringement. However, the Court has not been receptive to those efforts. The Intellectual Property Rights Restoration Act of 1999 (IPRRA), a Senate Bill currently making its way through Congress, seeks to provide a remedy for patent infringement by the states that Supreme Court will find constitutional.

In this Comment, Part II will explore the history of state sovereign immunity under both the Eleventh Amendment and the common law. Part III examines Senate Bill 1835, also known as the Intellectual Property Rights Restoration Act of 1999. Part III looks at not only the substantive provisions of the IPRRA, but also at the legal arguments and policy concerns that support the Act. Part IV looks at other possible solutions available to remedy the patent infringement-state sovereign immunity dilemma. Part V concludes by stating that the Court should uphold the IPRRA, if it is enacted, as a valid act of Congress which provides an effective and meaningful remedy to private patentees while advancing the policies behind both patent law and the doctrine of state sovereign immunity.

24. Parden v. Terminal Ry. of the Ala. State Docks Dept., 377 U.S. 184, 190 (1964). “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.” Marbury v. Madison 5 U.S. (1 Cranch) 137, 163 (1803) (citation and internal quotations omitted).


28. The Court has held that numerous stringent criteria must be met before a state’s sovereign immunity will be found waived, abrogated or otherwise set aside. See infra notes 33-152 and accompanying text.

29. See infra notes 33-163 and accompanying text.

30. See infra notes 164-231 and accompanying text.

31. See infra notes 232-241 and accompanying text.
II. SOVEREIGN IMMUNITY AND STATE AMENABILITY TO SUIT

To properly understand the impact of sovereign immunity on patent infringement litigation, it is necessary to understand the background of the Eleventh Amendment and the recent developments in state sovereign immunity jurisprudence.32 Section A explores the basic principles of the modern sovereign immunity doctrine.33 Section B looks at exceptions to the sovereign immunity doctrine.34 Section C looks briefly at other protection for patent owners outside of the Patent Act.35

A. Sources of Sovereign Immunity

1. Eleventh Amendment

In 1793, the Supreme Court decided *Chisholm v. Georgia*.36 The decision allowed Chisholm, a South Carolina citizen to sue the State of Georgia to recover monies the State owed him. It was not disputed that the State was obligated to pay Chisholm certain monies. The real issue before the *Chisholm* Court was whether the federal courts had jurisdiction to hear a case where a citizen of one state sued the government of another state.37 The *Chisholm* Court determined that the federal courts did in fact have jurisdiction based upon the “letter of the Constitution”38


33. See infra notes 36-129 and accompanying text.

34. See infra notes 130-152 and accompanying text.

35. See infra notes 153-163 and accompanying text.


37. As the Court worded the issue it was “[c]an the State of Georgia, being one of the United States of America, be made a party-defendant in any case, in the Supreme Court of the United States, at the suit of a private citizen, even although he himself is, and his testator was, a citizen of the State of South Carolina.” *Id.* at 420.

38. *Id.*
as set forth in section 2 of Article III of the Constitution.\textsuperscript{39}

The states quickly responded to \textit{Chisholm} by ratifying the Eleventh Amendment.\textsuperscript{40} Effective in 1798, only five years after the \textit{Chisholm} decision, the Eleventh Amendment provides that “[t]he 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.”\textsuperscript{41} By its express terms, the Eleventh Amendment only bars federal court jurisdiction when suits are brought against states by non-resident citizens and citizens of foreign lands.\textsuperscript{42}

The Eleventh Amendment was initially construed narrowly. In \textit{Cohens v. Virginia},\textsuperscript{43} the Court held that the Eleventh Amendment only prohibited unconsenting states from being sued in federal court where the plaintiff was a resident of another state or a foreign country.\textsuperscript{44}

This narrow construction of \textit{Cohens} would not last long. In \textit{Hans v. Louisiana},\textsuperscript{45} the Supreme Court held that the principle of sovereign immunity reflected in the Eleventh Amendment rendered states immune from suits for monetary damages in federal court even where federal jurisdiction is premised on the presence of a federal question, despite this scenario not being expressly included in the Eleventh Amendment.\textsuperscript{46} In \textit{Hans}, a Louisiana citizen sued the State of Louisiana in federal court for

\textsuperscript{39} “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . between a State and Citizens of another State . . . .” U.S. CONST. art. III, § 2, cl. 1.

The Court held that it was “no degradation of sovereignty, in the States, to submit to the Supreme Judiciary of the United States.” \textit{Chisholm}, 2 U.S. (2 Dall.) at 425.

\textsuperscript{40} The \textit{Chisholm} decision “created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states.” \textit{Hans} v. Louisiana, 134 U.S. 1, 11 (1890). \textit{See also} Calvin R. Massey, \textit{State Sovereignty and the Tenth and Eleventh Amendments}, 56 U. CHI. L. REV. 61, 62 (1989).

\textsuperscript{41} U.S. CONST. amend. XI.

\textsuperscript{42} \textit{See}, e.g., \textit{Hans}, 134 U.S. at 10.


\textsuperscript{44} \textit{Id}. The literal text of the Eleventh Amendment only prohibits suits brought by “Citizens of another State or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

\textsuperscript{45} \textit{Hans}, 134 U.S. at 10.

\textsuperscript{46} \textit{Hans}, 134 U.S. at 10. \textit{See also} Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944); Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); \textit{In re} State of New York, 256 U.S. 490, 497-98 (1921); Duhne v. New Jersey, 251 U.S. 311 (1920); Smith v. Reeves, 178 U.S. 436, 447-49 (1900); Fitts v. McGhee, 172 U.S. 516 (1899). Years later, the \textit{Parden} Court would state that “a suit on state debt obligations without the State’s consent was precisely the ‘evil’ against which both the Eleventh Amendment and the expanded immunity doctrine of the \textit{Hans} case were directed.” \textit{Parden} v. Terminal Ry. of the Ala. State Docks Dept., 377 U.S. 184, 187 (1964). \textit{See also} Jaffe, \textit{supra} note 32, at 19.
payment on bonds that the State had repudiated. As a basis for federal jurisdiction, Hans, the Louisiana citizen, alleged the actions of the State violated the Contracts Clause of the United States Constitution. The Hans Court ruled in favor of the State on the basis of sovereign immunity under the Eleventh Amendment, thereby preventing a citizen from suing his own state in federal court. After the liberal interpretation of the Eleventh Amendment in Hans, states enjoyed absolute immunity from all unconsented suits in federal court, whether brought by resident or non-resident citizens.

Parden v. Terminal Railway of Alabama State Docks Department was the first case claiming Eleventh Amendment immunity where the cause of action was brought under a federal statute. The Parden Court held that the State of Alabama, by operating a state-owned railway, had constructively waived its sovereign immunity in federal court and could therefore be sued in a federal court under a federal statute for monetary damages. The Court's bipartite analysis asked whether (1) Congress intended to subject states to suit when it enacted the statute, and (2) whether Congress had the power to subject the states to suit in light of

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47. Hans, 134 U.S. at 1.
49. Hans, 134 U.S. at 3.
50. Id. at 18-21.
54. The Court noted that this case was distinctly unlike Hans where federal question jurisdiction was being invoked. Id. at 186. The Court stated that “[h]ere for the first time in this Court, a State’s claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress.” Id. at 187.
55. Petitioners in Parden where citizens of the State of Alabama who sued the State under the Federal Employers’ Liability Act for personal injuries sustained while the petitioners were employed by the state-owned railway. Id. at 184-85. The statute permitted suit against “common carrier[s] by railroad . . . engaging in commerce between the several States.” Petitioners contended the state-owned railway fell within the statutory definition and was therefore subject to suit in federal court. The State appeared specially and moved to dismiss based on its sovereign immunity. Id. at 185. The District Court dismissed the suit, and the Fifth Circuit affirmed, 311 F.2d 727. The Supreme Court reversed. Parden, 377 U.S. at 185.
56. Sovereign immunity may be waived. Id. at 186. A State’s freedom from nonconsensual suit will not protect it from suit to which it has consented. Id. at 186. See infra notes 130-137 and accompanying text.
57. Parden, 377 U.S. at 186.
The Court made short work of the first question by citing precedent in support of the proposition that Congress meant the specific statute to apply to both private and state-owned railways. The Court was not willing to create a "right without a remedy" by exempting state-owned railways from the plain meaning of the statute under the doctrine of sovereign immunity as Congress could not have intended such a "pointless and frustrating . . . result."

With respect to the second element, the Court found the Commerce Clause vested sufficient authority in Congress to regulate railroads operating in interstate commerce. By reasoning that, although the inherent nature of sovereignty has rooted within it immunity from suit, the states surrendered a portion of their sovereignty when they granted to Congress the power to regulate interstate commerce. To hold otherwise would have been an overtly paradoxical result, as it would allow a state to avoid liability from federal regulation merely by engaging in the regulated conduct.

However, the Parden Court made it clear that it did not intend to overturn the Eleventh Amendment or the rule of Hans, but rather stated it was the Court’s intention to find an implied or constructive waiver in situations like that presented in Parden. Constructive waiver was found in Parden because Congress intended to make states amenable to

58. Id. at 187.
59. In particular, the Court cited United States v. California, 297 U.S. 175 (1936), which held the federal Safety Appliance Act applicable to state-owned railways, and California v. Taylor, 353 U.S. 553 (1957), which applied the Railway Labor Act to a state-owned railway. United States v. California did not present Eleventh Amendment issues as the suit was brought not by an individual, but by the United States. Parden, 377 U.S. at 188 n.6. California v. Taylor did not directly present Eleventh Amendment issues, as it was a suit against a federal board. Id. at 188 n.7.
60. Parden, 377 U.S. at 187-88.
61. Id. at 190.
62. Id.
63. “The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST., art. I, § 8, cl. 3.
64. Parden, 377 U.S. at 190-192.
65. Id. at 190-91. See also Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944); THE FEDERALIST NO. 81 (Alexander Hamilton). Cf. Jaffe, supra note 32, at 3, 18 (tracing the history of sovereign immunity through English and American history).
67. See New York v. United States, 326 U.S. 572, 582 (1946) (“[B]y engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce.”)
69. Parden, 377 U.S. at 192. The Court stated that “[i]t remains the law that a State may not be sued by an individual without its consent.” Id.
suit by enacting the statute in question pursuant to a legitimate exercise of its Commerce Clause powers and by engaging in the regulated conduct some twenty years after the federal statute was enacted, no other view can be held but that the State impliedly consented to suit. The rule of Parden set forth a constructive waiver exception to Eleventh Amendment sovereign immunity. However, after more recent cases developed, the constructive waiver doctrine is no longer good law. States will no longer be deemed to have constructively waived their immunity by their conduct.

Edelman v. Jordan used the Eleventh Amendment to slam the door on monetary judgments against states that will inevitably be paid out of the state treasury. Edelman recognized a private party’s right to seek prospective relief under the doctrine of Ex parte Young, but declined to extend that doctrine to allow recovery of accrued, retroactive payments.

Following the trend of prior cases which allowed state sovereign immunity ample room to grow, Atascadero State Hospital v. Scanlon significantly altered the constitutional landscape of Eleventh Amendment analysis by making it still more difficult for Congress to make states amenable to suit in federal courts. In Atascadero, Scanlon, an applicant for a position as a graduate assistant with a state hospital, alleged

70. Id.
71. Id. The State, by venturing into the congressional realm "assume[d] the conditions that Congress under the Constitution attached." Petty v. Tennessee-Missouri Bridge Comm’n, 359 U.S. 275, 281-82 (1959). “[W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.” Parden, 377 U.S. at 196. Cf. South Carolina v. United States, 199 U.S. 437, 463 (1905); New York v. United States, 326 U.S. 572 (1946).
74. Id. at 663, 665. “[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.” Id. at 663.
75. Ex parte Young, 209 U.S. 123 (1908). For a discussion of the Ex parte Young doctrine see infra notes 158-163 and accompanying text.
76. Edelman, 415 U.S. at 669. To demonstrate how far the Edelman doctrine would extend, the Edelman Court impliedly affirmed its holding in Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). See Edelman, 415 U.S. at 668-69. In Ford Motor, a taxpayer who paid taxes under protest sought a refund of those taxes from the state officials responsible for their collection. Ford Motor, 459 U.S. at 459-461. The taxpayer alleged the taxes collected violated the U.S. Constitution. Id. The Ford Motor Court held the taxpayer’s action to be one against the State seeking a monetary judgment and barred by the Eleventh Amendment. Despite the fact that the taxpayer was merely seeking to recover only the monies he had paid to the state as a result of an unconstitutional tax exaction and not any additional damages, the Court still refused to accept jurisdiction of the matter. Id.
that the state hospital denied him employment because of his affliction with diabetes mellitus in violation of a federal statute. The State of California moved to dismiss the action on the basis of its Eleventh Amendment immunity. The court of appeals held that Eleventh Amendment immunity did not bar the cause of action by finding an implied waiver based on participation in a federal program. The Supreme Court reversed the court of appeals decision.

The Supreme Court began its analysis by recognizing the expansive view of the Eleventh Amendment first set forth in *Hans*. The Court went on to acknowledge the waiver and the Fourteenth Amendment enforcement provision exceptions to the Eleventh Amendment. However, as the “Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States” these exceptions are tempered by limiting their application to narrowly tailored circumstances. The Court was unable to find a waiver based on a California Constitution provision, as the provision did not specifically state the State’s willingness to be subject to suit in federal court. However, the waiver analysis was not what would make *Atascadero* an important case in modern Eleventh Amendment jurisprudence. It was the holding that “Congress may abrogate the States’ constitutionally secured sovereign immunity from suit in federal court only by making its intention unmistakably clear in the language of the stat-

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78. *Id.* at 236. The federal statute in question was the Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *Id.*
79. *Id.*
80. Scanlon v. Atascadero State Hosp., 735 F.2d 359, 361 (9th Cir. 1984).
82. *Id.* at 237-38. The Court stated that the “significance of [the Eleventh] Amendment ‘lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III’ of the Constitution.” *Id.* at 238 (quoting Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 98 (1984)).
83. *See infra* notes 130-137 and accompanying text.
84. *See infra* notes 138-146 and accompanying text.
85. *Atascadero*, 473 U.S. at 238.
86. *Id.* at 238-240. “[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.’ Likewise, in determining whether Congress in exercising its Fourteenth Amendment powers has abrogated the States’ Eleventh Amendment immunity, we have required an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States.” *Id.* (internal citations and quotations omitted).
87. The California Constitutional provision provided that “[s]uits may be brought against the State in such manner and in such courts as shall be direct by law.” *Cal. Const.*, art. III, § 5. As the provision did not explicitly state that California waived its immunity and was willing to be subject to suit in federal courts, no waiver was found. *Atascadero*, 473 U.S. at 241.
ute” that rendered Atascadero important.\footnote{Id. at 242.} Broad statutory language will not be enough to find the requisite unmistakable intent to abrogate.\footnote{Id. at 246.} To abrogate a state’s sovereign immunity, Congress must specifically subject states to federal jurisdiction.\footnote{Atascadero, 473 U.S. at 246. See also Pennhurst, 465 U.S. at 99.} Therefore, the federal statute in question in Atascadero, by providing that “any recipient of Federal assistance” is liable for violations under the statute, did not evidence the requisite unmistakable intent to abrogate California’s sovereign immunity.\footnote{Atascadero, 473 U.S. at 246.}

Prior to the Atascadero decision, owners of federal intellectual property rights could fully protect their rights against infringement by the states.\footnote{Atascadero allowed states to avoid infringement and validity claims in federal courts. Blaney Harper, Intellectual Property and State Sovereign Immunity: The Eleventh Amendment Under Scrutiny, 9 NO. 7 COMPUTER LAWYER 21, 26 (1992).} States had long enjoyed the benefits of the intellectual property laws on equal footing with private parties. By the same token, and in accordance with the fundamental principles of equity on which our intellectual property laws are founded, the States bore the burdens of the intellectual property laws, being liable for infringements just like private parties. States were free to join intellectual property markets as participants, or to hold back from commerce and limit themselves to a narrower governmental role. The intellectual property right of exclusion meant what it said and was enforced evenhandedly for public and private entities alike. This harmonious state of affairs ended in 1985, [with the Atascadero decision].


93. Chew v. California, 893 F.2d 331 (Fed. Cir. 1990). In Chew, Marian Chew, a resident of Ohio, brought suit against the State of California for the State’s alleged infringement of Chew’s patent for testing automobile exhaust emissions.\footnote{Id. at 332.} The federal District Court dismissed the suit when the State claimed immunity under the Eleventh Amendment.\footnote{Id. Chew opposed the State’s motion at the district court, arguing (1) that the state had waived its immunity under state statues and the state constitution, (2) that the State impliedly consented by participation in the federal Clean Air Act, and (3) that Congress had abrogated the State’s immunity in various provisions of the Patent Act and by giving the federal courts exclusive jurisdiction over patent infringement suits.\footnote{Id. The District Court rejected all of Chew’s claims, the first two under Atascadero State Hospital v. Scanlon. Id. Only the abrogation theory was advanced on appeal. Id. The Federal Circuit upheld the dismissal, finding that, assuming Congress had the power to subject states to suit for patent infringement, “as a matter of statutory interpretation, that Congress has evidenced no intent to exercise such power in the patent statute” under 35 U.S.C. § 271(a) (1982). Id. at 334. The Federal Circuit found that the word “whoever” in the § 271(a) was not unmistakably clear evidence of Congressional intent to abrogate. Id. The Court also rejected an argument advanced by Chew that the public policy in awarding patents and the exclusiveness of federal jurisdiction in patent infringe-}
both decided by the Federal Circuit in 1990, upheld the States’ sovereign immunity under the Eleventh Amendment for patent infringement suits in federal court.95

In response to the Jacobs Wind and Chew decisions, Congress passed the Patent and Plant Variety Protection Remedy Clarification Act (PRCA)96 in 1992. The PRCA made clear that Congress intended the patent infringement provisions of the Patent Act to apply to the states.97 Congress provided several justifications for the PRCA: (1) immunity cuts against Article I, section 8, clause 8 of the U.S. Constitution, which grants Congress the power to issue patents for limited period to promote the progress of science; (2) the amendment prevents states from freely infringing thereby discouraging future innovation; (3) enabling patentees to sue states in federal court prevents states from enjoying advantages not available to private parties; (4) the federal government already consents to patent infringement suits; and (5) the original patent code contains no expression of congressional intent to exclude states from the reach of the statutes.98 To justify the legislation, Congress cited as its authority to pass the PRCA the Interstate Commerce Clause, the Patent
and Copyright Clause, and Section 5 of the Fourteenth Amendment.99

However, in 1996, the Supreme Court’s *Seminole Tribe* decision would render the PRCA invalid, at least under the Commerce Clause and the Patent Clause.100 In *Seminole Tribe*, the Supreme Court held that Congress may not abrogate state sovereign immunity under its Article I powers. The abrogation analysis of sovereign immunity under *Seminole Tribe* is (1) whether Congress has “unequivocally expressed its intent to abrogate the immunity” and (2) whether Congress acted “pursuant to a valid exercise of power.”101

The *Seminole Tribe* analysis began rather easily. The language of the statute in question, which was enacted after *Atascadero*, contained unequivocal language expressing the intent to abrogate a State’s sovereign immunity.102

The second part of the *Seminole Tribe* analysis sharply divided the 5-to-4 Court, and continues to do so to this day.103 The majority began by noting that the Court’s precedents have found the authority to abrogate under only two provisions of the Constitution.104 The first of these provisions is the Section 5 enforcement provision of the Fourteenth Amendment, which extends authority for Congress to enact “appropriate legislation” to enforce the prohibitions directed at the states in section 1 of that Amendment.105 The second abrogating provision is Article I’s Commerce Clause.106 The *Seminole Tribe* Court reexamined the five-

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100. *Seminole Tribe* held that only the Fourteenth Amendment could be used to abrogate a state’s sovereign immunity and that no Article I powers could abrogate a state’s sovereign immunity. *Seminole Tribe* v. Florida, 517 U.S. 44, 55-60 (1996).

101. *Id.* at 55.

102. *Id.* at 56-57.


105. U.S. CONST., amend. XIV. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). Section 5 of the Fourteenth Amendment receives this exalted status capable of overriding the Eleventh Amendment because it fundamentally altered the balance of state and federal power by expanding federal power at the expense of the states. *Id.* at 455.

106. *Seminole Tribe*, 517 U.S. at 59. *Pennsylvania v. Union Gas Co.* held that the Commerce Clause could abrogate the Eleventh Amendment. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). *Union Gas* involved a lawsuit under federal environmental laws brought by the United States against a former mine owner who then impleaded the State of Pennsylvania. The *Union Gas* Court held that the federal statutes rendered the State subject to suit in federal court. In reaching their decision, the Court stated that Supreme Court decisions “mark a trail unmistakably leading to the conclusion that congress may permit suits against the States for money damages.” *Id.* at 14. The Court stated that “the power to regulate commerce includes the power to override States’ immunity from suit, but [the Court] will not conclude that Congress has overridden this immunity unless it does so clearly.” *Id.* at 14-15. The power to regulate commerce would be “incomplete with-
year old Union Gas decision which found abrogation possible under the Commerce Clause and found that it “depart[ed] from [the] established understanding of the Eleventh Amendment and undermine[d] the accepted function of Article III . . . [and] was wrongly decided.”107 The Court’s holding left Section 5 of the Fourteenth Amendment as the only clause capable of abrogating a state’s sovereign immunity.108 Subsequent to Seminole Tribe, the status of the PRCA was questionable.

In 1999, the Supreme Court decide a pair of cases where a state’s sovereign immunity and a patentee’s rights were in direct conflict.109 Florida Prepaid110 involved a patentee bringing suit against the State of Florida for infringement of the patentee’s patent.111 When suit was filed, the PRCA had already been enacted.112 However, after Seminole Tribe, the PRCA was only a valid congressional act if made pursuant to the Fourteenth Amendment. Following a Seminole Tribe analysis,113 the Court found the requisite intent to abrogate, but could not find the authority to abrogate under the Fourteenth Amendment.114 To be a valid abrogation under the Fourteenth Amendment, Congress must identify conduct transgressing the substantive provisions of the Fourteenth Amendment and must narrowly tailor the legislation to remedying and preventing such transgressing conduct as City of Boerne v. Flores115 set forth.116 As Congress did not identify a pattern of patent infringement by the states, the PRCA cannot be validly enacted pursuant to the Fourteenth Amendment.117

After the Florida Prepaid decision, the only remedy available to a patent owner for an infringement of his patent by a state entity was pro-
spective relief under the doctrine of *Ex parte Young*\(^{118}\) or pursuit of a state remedy. To make matters worse, the Supreme Court, on the same day as it handed down the *Florida Prepaid* decision, extended sovereign immunity to states engaged in purely commercial activities.\(^{119}\)

The current situation is bleak for patent and other intellectual property rights owners.\(^{120}\) As it stands, patent owners “have but one arrow left in their quiver to prevent or deter infringement of their intellectual property rights by States,”\(^{121}\) that being injunctive relief against particular employees of the state. While sovereign immunity has been drastically strengthened, injunctive relief under the doctrine of *Ex parte Young*\(^ {122}\) remains intact.\(^{123}\)

2. The Inherent Nature of the States as Sovereigns

The Court’s decisions “make clear that much of [the] state immunity doctrine has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment.”\(^ {124}\) According to many scholars, the presence of the Eleventh Amendment in the United States Constitution may be redundant; states may have had sovereign immunity all along\(^ {125}\) and may continue to have immunity greater than that set forth in the Eleventh Amendment.\(^ {126}\) The Constitution, the founding document

\(^{118}\) *Ex parte Young*, 209 U.S. 123 (1908).


\(^{120}\) *After Florida Prepaid*, “[p]atentees now occupy a very precarious position relative to the states, and are left with the prospects of no uniform, viable forum for addressing state violation of their property rights.” *Young*, supra note 13, at 509.

\(^{121}\) See Peters Testimony, supra note 19.

\(^{122}\) See infra notes 158-163 and accompanying text.

\(^{123}\) However, some feel, given the Court’s movement in recent years, that the doctrine of *Ex parte Young* may be subject to question. See Peters Testimony, supra note 19.


\(^{125}\) See 17 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 123.02 (3d. Release 126, 2000) (stating that before the formation of the United States, each state was a sovereign entity and enjoyed the benefit of the common law doctrine of sovereign immunity).

\(^{126}\) “[T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). “[T]he Constitution’s structure, and its history, and the authoritative interpretations by this Court make clear [that] the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . .” *Id.* “[I]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the state’s] consent.” *THE FEDERALIST* NO. 81. “Eleventh Amendment discourse is less concerned with analyzing the plain meaning of the Amendment’s text as it is with locating backdrop sovereign immunity concepts believed by the Court to be central to the federalism rubric.” *Hamrick*, supra note 11, at 864. *But see* Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 123 (1996) (questioning why, in a democratic republic the presumption is not against sovereign immuni-
of the United States, “recognizes the States as sovereign entities.”

Under the inherent power view of state sovereign immunity, the Eleventh Amendment was an explanatory amendment designed to remedy the Chisholm decision, not to create sovereign immunity in the first instance.

B. Exceptions to Sovereign Immunity

1. Waiver

Waiver constitutes a well-known exception to the doctrine of sovereign immunity sufficient to subject a state to suit in federal court. However, as with all waivers of constitutional rights, a waiver of sovereign immunity will not be lightly inferred. States may waive their immunity by making a general appearance in litigation before a federal court as accountability to the people, both at the polls and to wronged individuals in the courts, should be the inherent nature of sovereignty; John Randolph Prince, Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity, 104 Dick. L. Rev. 1 (1999) (arguing for an interpretation of the Eleventh Amendment that follows the clear textual language of the Amendment).

See Pfander, supra note 32, at 1269.

129. See Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (the Eleventh Amendment stands not so much for what it says, but for the presupposition which it confirms). But see Atascadero, 473 U.S. at 259 (Brennan, J., dissenting) (“There simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court.”).


131. “Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights….” Edelman v. Jordan, 415 U.S. 651, 673 (1974). The Court will find a waiver “only where stated ‘by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.’” Id. at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)). See also Atascadero, 473 U.S. at 241 (stating that the test for finding a waiver of immunity is a “stringent one”). “[C]ourts indulge every reasonable presumption against waiver” of constitutional rights. Aetna Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937).
court,\textsuperscript{132} by statute\textsuperscript{133} or by state constitution.\textsuperscript{134} A waiver of immunity before a state’s own courts will be insufficient to constitute a waiver of immunity before federal courts.\textsuperscript{135} A state will be deemed to have waived 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.’”\textsuperscript{136} Courts will no longer find a state to have constructively waived its sovereign immunity by its conduct.\textsuperscript{137}

2. Congressional Abrogation

a. Pursuant to Section 5 of the Fourteenth Amendment

As a patent constitutes property, a suit for patent infringement implicates interests protected by the Fourteenth Amendment.\textsuperscript{138} Fitzpatrick v. Bitzer,\textsuperscript{139} among others, stated that the Eleventh Amendment, and the

\begin{itemize}
  \itemFord Motor Co. v. Department of Treasury, 323 U.S. 459, 468-70 (1945). When waiver of Eleventh Amendment sovereignty is by statute, the question the courts must answer is whether the state intended to waive its sovereign immunity. Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 278-79 (1959). Compacts between states may also provide a basis to find a waiver of sovereign immunity. \textit{Id.}
  \itemAtascadero, 473 U.S. at 241. “[I]n order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State’s intention to subject itself to suit in federal court.” \textit{Id.}
  \itemChandler v. Dix, 194 U.S. 590, 591-92 (1904). Mere receipt of federal funds will also be inadequate to establish that a state has consented to suit. Florida Dep’t of Health and Rehabilitative Servs. v. Florida Nursing Home Ass’n., 450 U.S. 147, 150 (1981).
  \itemNew Star Lasers, Inc. v. Regents of the Univ. of Cal., 63 F. Supp.2d 1240, 1243 (E.D. Cal. 1999).
  \itemFitzpatrick v. Bitzer, 427 U.S. 445 (1976). Fitzpatrick involved former Connecticut State employees suing several state officials in their official capacities for gender discrimination in the administration of retirement benefit plans. Justice Rehnquist’s opinion stated that Title VII was appropriate legislation under the enforcement provision of the Fourteenth Amendment and any claim of sovereign immunity was thereby ineffective. Justice Brennan noted that the Eleventh Amendment was inapplicable here as the suit involved citizens of a State suing their own state and therefore it fell outside of the bounds of the Eleventh Amendment. \textit{Id. at} 457 (Brennan J., concurring in judgment). Brennan noted that any claim of sovereign immunity in the present case must fall under the “nonconstitutional but ancient doctrine of sovereign immunity.” \textit{Id.} Brennan concurred with the majority because he felt that by surrendering certain powers to the federal government under the commerce clause and Section 5 of the Fourteenth Amendment, no immunity in fact exists for the State to assert. \textit{Id. at} 458. Justice Stevens, in a separate concurring opinion, felt that the case should be decided not on Section 5 grounds, but based on the proposition that the Eleventh
principle of sovereign immunity which it embodies, is necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment.\textsuperscript{140} The Court felt that “Congress may in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”\textsuperscript{141} Abrogation under Section 5 was recently upheld in Seminole Tribe.\textsuperscript{142} Florida Prepaid\textsuperscript{143} set forth three criteria for abrogation under the Fourteenth Amendment: (1) Congress must establish a strong record of infringement by the States,\textsuperscript{144} (2) the abrogation must be drafted in such a way as to apply only to those states that do not provide a state remedy, i.e., it must be narrowly tailored\textsuperscript{145} and (3) the abrogation must extend only to non-negligent infringement by the states.\textsuperscript{146}

b. Pursuant to the Commerce Clause

\textit{Union Gas}\textsuperscript{147} held that Congress could abrogate a state’s sovereign immunity by acting pursuant to the Commerce Clause. It is now the law that Congress does not have abrogation power under the Commerce Clause or any other Article I power\textsuperscript{148} even when the Constitution grants Congress complete lawmaking authority over that area of law,\textsuperscript{149} leaving the enforcement provision of the Fourteenth Amendment as the only valid Congressional power capable of abrogating a state’s sovereign immunity.

3. Other Exceptions

The Eleventh Amendment does not preclude states from suing other states,\textsuperscript{150} and the federal government is not precluded from bringing ac-

\textsuperscript{140} Id. at 456.
\textsuperscript{141} Id.
\textsuperscript{144} Id. at 638-39.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 645-46.
\textsuperscript{149} Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).
tions against the states. Nor will the Eleventh Amendment prevent federal courts from hearing appeals of federal questions properly commenced before state courts when the state is a defendant.

C. Other Patentee Protections

1. State Law and the State Court System

While federal courts have exclusive jurisdiction over matters of patent infringement, most states have some other types of protections for intellectual property rights independent of the Patent Act. Unfortunately, these state law remedies fail to provide any remedy for an infringed patent. However, a private patentee may be able to assert a takings claim in state court. Of course, it remains a federal legislative option to amend the current Patent Act to allow patent infringement cases in state courts.

151. Id.
153. “[T]he 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. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety, and copyright cases.” 28 U.S.C. § 1338(a) (1994). However, state courts can decide patent issues that are properly before it. See, e.g., Intermedics Infusaid v. University of Minn., 804 F.2d 129 (Fed. Cir. 1986); In re Oxicmetric, Inc., 748 F.2d 637 (Fed. Cir. 1984); Becher v. Contoure Labs. Inc., 279 U.S. 388 (1929).
155. “As federal courts have exclusive jurisdiction over cases arising under . . . federal laws, the majority’s conclusion that the Eleventh Amendment shields States from being sued under them in federal court suggests that persons harmed by state violations of federal copyright, bankruptcy, and antitrust laws have no remedy.” Seminole Tribe v. Florida, 517 U.S. 44, 77 n.1 (1996) (Stevens, J., dissenting).
157. According to the Supreme Court’s *Alden* decision, immunity in state court is equivalent to immunity in federal court. *Alden* v. Maine, 527 U.S. 706 (1999). Therefore, this remedy would only be effective to the extent States would willingly waive their immunity before the State courts for actions under the federal patent Act. Peters Testimony, *supra* note 19. It would appear unlikely, particularly in light of the strength of the State’s sovereign immunity before the federal courts, that States would expose themselves to additional liability before the State courts. *Id.* However, state court patent jurisdiction creates new problems. The need for uniform patent law led to the creation of the Court of Appeals for the Federal Circuit. *Id.* Allowing patent claims to be heard before state courts would greatly increase the number of interpretations of patent law, thereby defeating the purpose of the federal Circuit. *See id.* (discussing similar problems should Congress allow copyright claims under Title 28 to be heard in state court). Furthermore, state court judges have no experience

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2. Injunctive Relief

As a general rule, the jurisdiction bar of the Eleventh Amendment prohibits suits against unconsenting states regardless whether the relief sought is legal or equitable in nature. However, under the doctrine of *Ex parte Young*, the Court created a narrow exception to the general rule. Under *Ex parte Young*, federal courts may enjoin state officials from committing continuing or future violations of federal law, but the courts may not award retroactive or monetary damages. *Ex parte Young* essentially states that when a state official acts in violation of federal law, that employee is, by definition, acting outside the scope of his official duties, as a state cannot authorize one of its employees to violate federal law. Therefore, a state employee is not immune and may be enjoined. However, *Ex parte Young* relief is limited, as it does not allow for the recovery of damages for past infringement.

III. THE INTELLECTUAL PROPERTY RIGHTS RESTORATION ACT OF 1999

After the apparently failed Congressional attempts to provide a remedy to patent owners for patent infringement by the states, on November 1, 1999, Senator Leahy introduced a bill known as the Intellectual Property Rights Restoration Act of 1999 (IPRRA).

The basic premise of the IPRRA is quite simple: any state wishing to own federal intellectual property, including patents, must expressly with the issues surrounding patent law. See id. (stating similar experience problems under the Copyright Act). See also Gulf Offshore Co. v. Mobile Oil Corp., 453 U.S. 473, 483-84 (1981) (stating the policies behind exclusive federal jurisdiction).

159. *Ex parte Young*, 209 U.S. 123 (1908). The theory of *Ex parte Young* is that an unconstitutional act is void and therefore does not “impart to [the state officer] any immunity from responsibility to the supreme authority of the United States.” Id. at 160. As a state does not have the authority to authorize unconstitutional acts, state officers are “stripped of [their] official or representative character and [are] subject[ ] to the consequences of [their] official conduct.” Id.
162. *Ex parte Young*, 209 U.S. 123 (1908). See also Lemelson v. Ampex Corp., 372 F. Supp. 708, 711 (N.D. Ill. 1974) (“Government units have no authority to violate the patent laws, and when they do so, they act outside the scope of their authority.”).
163. Many consider the doctrine of *Ex parte Young* to be a “legal fiction” and a “massive, judge-made exception” to the Eleventh Amendment. E.g., Monaghan, supra note 126, at 127; Ann Althous, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 Hastings L.J. 1123, 1123 (1989). Others, however, consider the Eleventh Amendment an exception to *Ex parte Young*. See Monaghan, supra note 126, at 126, n.173.
164. IPRRA.
165. The IPRRA applies to patents, protected plant varieties, copyrights, mask works, original
waive its sovereign immunity and consent to suit as a condition of being eligible to receive additional federal intellectual property. The IPRRA requires that, in a state’s application for federal intellectual property, the state provide an assurance that it will waive its Eleventh Amendment immunity in any subsequent actions arising under federal intellectual property law. To ensure that a state does not retract its assurance after being granted intellectual property rights, the IPRRA provides consequences to states that acquire federal intellectual property rights by providing an assurance of waiver and breach that assurance by claiming sovereign immunity when the state is sued. By forcing the state to take action, the IPRRA avoids the pitfalls previously encountered in attempts to hold states liable for patent infringement. The IPRRA solution is “clear and salable, with a compelling proportionality and nexus between the problem and the remedy” and should be enacted and upheld.

The theory of the IPRRA has met with some judicial approval, at least in dicta, in prior cases. The law as it currently exists seems to designs, trademarks, and service marks. IPRRA § 101(1).

166. Section 111(a) prohibits any state from acquiring federal intellectual property without opting into the federal intellectual property system as defined in Section 101(3). IPRRA § 111(a). The federal intellectual property system encompasses the protection and enforcement of federal intellectual property laws, including through the award of damages, injunctions and declaratory relief. IPRRA § 101(3). Section 111(b) provides that in order for a state to opt into the federal intellectual property system as required under § 111(a), the state provide an assurance under procedures established in § 131-137 that the state will waive its sovereign immunity in any action brought under federal intellectual property laws. IPRRA § 111(b).

167. IPRRA § 111(b).

168. If a state asserts sovereign immunity for an action under federal intellectual property laws, it will be deemed to have breached its assurance if the assertion of immunity is not withdrawn within sixty days. IPRRA § 112. To deter such breaches, § 113(a) states that intellectual property applications which contain an assurance of waiver and that are pending on the date of the breach are deemed abandoned and not subject to revival. IPRRA § 113(a). Also, a state may not collect damages or other monetary relief under the federal intellectual property right that is or has been owned by the state within five years of the date of the breach. IPRRA § 113(b). Further, states will be barred from opting back into the federal intellectual property system for one year from the date of the breach. IPRRA § 113(c).

169. See supra notes 36-129 and accompanying text.

170. See Peters Testimony, supra note 19. “Equity and common sense tell us that one who chooses to enjoy the benefits of a law—whether it be a federal grant or the multimillion-dollar benefits of intellectual property protections—should also bear its burdens.” 145 CONG. REC. S13552-04, S13557 (1999) (statement of Sen. Leahy).
support the IPRRA approach. Even with the law on its side, the IPRRA might still need more to be found constitutional.

Eleventh Amendment sovereign immunity has reached far beyond its textual boundaries to preclude virtually all suits against unconsenting states. While the inherent sovereignty of the states is often credited for this expansive view of the Eleventh Amendment, modern Eleventh Amendment jurisprudence can simply be boiled down to policy concerns trumping the law. To pass constitutional muster, the IPRRA needs support of not only the law, but needs to preserve the policies behind the modern interpretation of the state sovereign immunity doctrine. As explained below, the IPRRA will in fact satisfy the law and preserve the policies of the Eleventh Amendment.

A. IPRRA Is Not An Abrogation of a State’s Sovereign Immunity

The stringent requirements for congressional abrogation of a state’s sovereign immunity is simply no longer an issue under the IPRRA. Under the IPRRA, the elimination of the state sovereign immunity bar occurs not through Congressional abrogation, but rather through a voluntary and knowing waiver by the state.

B. IPRRA Provides a Valid Method to Induce Waiver by the States

As waiver represents a valid exception to the state sovereign immunity doctrine, states can not complain that the IPRRA violates their defense of immunity before the federal courts. The waiver of a state’s sovereign immunity constitutes a waiver of a constitutional right. As such, this waiver of immunity must meet a higher standard than waivers of other rights. Particularly, the waiver must be both knowing and voluntary.

The only challenge that might arise regarding the waiver theory un-

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172. See supra notes 138-146 and accompanying text.
173. “Abrogate” means “[t]o annul, cancel, revoke, repeal, or destroy.” BLACK’S LAW DICTIONARY 4 (abridged 6th ed. 1991). The IPRRA leaves the state’s sovereign immunity intact. No state is precluded from raising an immunity defense at any time, even after opting into the IPRRA. The fact that Congress may choose to condition the receipt of federal intellectual property by states upon the state assuring that it will waive its immunity at some future point doe not “annul, cancel, revoke, repeal, or destroy” the sovereign immunity of any state.
174. See supra notes 130-137 and accompanying text.
175. But see Hamrick, supra note 11, at 874-75 (arguing waiver of Eleventh Amendment sovereign immunity is a waiver of a jurisdiction right, not necessarily a constitutional right, and therefore the higher standard does not apply).
der the IPRRA is the issue of coercion. States could argue that, while they knowingly waivered their immunity, it was coerced and therefore involuntary. However, the coercion argument is ineffective with respect to the Patent Act. Congress is free to condition the grant of a patent on certain conditions as it sees fit, so long as the legislation promotes the advancement of science and technology.

C. Congress Can Enact IPRRA Under Congress’ Article I, Section 8, Clause 3 Powers

It is well established that Congress has plenary power under the Patent and Copyright Clause. The only limitation placed upon Congress when acting under the authority of the Patent and Copyright Clause is that the legislation must “promote the Progress of Science and useful Arts.” Given Congress’ plenary power, Congress is free to condition the issuance of a patent on the compliance with specific requirements.

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176. There will be no issue of whether the waiver of immunity was knowingly made. The IPRRA procedures for providing an assurance of waiver eliminates this argument’s viability.

177. As Congress had plenary power to enact patent statutes and is able to condition the issuance of a patent, a state cannot be coerced by Congress withholding issuance of a patent to a state unless the state meets certain criteria. Cf. South Dakota v. Dole, 483 U.S. 203 (1987) (allowing Congress to condition receipt of federal funds upon state meeting certain conditions so long as the condition is in the pursuit of the public welfare and is done in an unambiguous manner).

College Savings Bank discusses that forced waiver based on a state’s conduct is not sufficient to abrogate a state’s sovereign immunity. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 684-85. (1999). The IPRRA is readily distinguishable from the issue in College Savings Bank. The IPRRA does not limit a state’s conduct and does not explicitly punish it for its conduct. States are free to infringe patents and have the Eleventh Amendment defense available, however, if states wish to receive rights in additional intellectual property, they must opt-in and waive their immunity. As Congress is not required to issue patents to parties who fail to comply with the Patent Act’s statutory provisions, Congress can choose to not allow states to receive patents absent their opting-in. By not forcing the state to limit its activities, the IPRRA avoids the problems discussed in College Savings Bank.


including a requirement that the party receiving the federal intellectual property be amenable to suit.

Additionally, patents are not issued as of right.\textsuperscript{181} No one has a constitutional right to receive a patent. Furthermore, the Patent and Copyright clause is permissive; it does not command Congress to grant patents, but merely permits it.\textsuperscript{182} Congress has authority under the Patent and Copyright Clause to prescribe to whom and on what terms and conditions a patent will issue.\textsuperscript{183}

\section*{D. IPRRA Does Promote the “Progress of Science and the useful Arts”}

The opt-in procedure of the IPRRA does “promote the Progress of Science and the useful Arts.”\textsuperscript{184} States constitute one of the largest potential markets many inventors will have for their inventions, and in some cases, the only potential market.\textsuperscript{185} To allow a state to infringe a patent without a remedy for the inventor removes a large portion of the inventor’s potential market,\textsuperscript{186} and would significantly chill the inventor’s incentive to create. By providing a real monetary remedy against infringing states, inventor’s creative energies will not be dampened and society as a whole will continue to benefit from the creation of new and improved technologies.\textsuperscript{187}

\textsuperscript{181} “A patent constitutes a ‘gift or gratuity’ bestowed by the federal government, and if Congress has conditioned its receipt on a waiver of Eleventh Amendment immunity to a declaratory suit, then Congress has acted permissibly.” New Star Lasers, Inc. v. Regents of the Univ. of Cal., 63 F. Supp. 2d 1240, 1244 (E.D. Cal. 1999).


\textsuperscript{185} For example, if an inventor were to invent a device that would allow police to safely stop a fleeing automobile during a high-speed pursuit, much of the demand for such a device would likely come from state police agencies that would be protected by the Eleventh Amendment.


\textsuperscript{187} “[E]nhancing the scope or enforceability of intellectual property rights increases the expected reward to those engaged in intellectual work, thereby spurring intellectual creativity and the exploitation of works. Inversely, impediments to the enforcement of the intellectual property rights or limitations on remedies reduce this reward stream and opportunity for exploitation, thereby dampening the incentives of those who engage in creative enterprise.” Menell, supra note 186, at 1399. See also Robert P. Merges, \textit{One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000}, 88 CAL. L. REV. 2187, 2189 (2000) (stating the growth of intellectually property law is “closely intertwined with new technologies”).
Congress has plenary authority as to all matters affecting the issuance of patents\(^\text{188}\) and may set forth conditions that must be satisfied before a patent will issue.\(^\text{189}\) The Constitution does not mandate that patents issue,\(^\text{190}\) rather, it merely gives Congress the authority to issue patents on such terms as Congress sees fit\(^\text{191}\) subject only to the limitation that the issued patent promote science and technology.\(^\text{192}\) Further, the states could not complain about “special” requirements being placed on them,\(^\text{193}\) as the Patent and Copyright Clause does not have the requirement of uniformity that other clauses of Article I, Section 8 have.\(^\text{194}\)


189. “Within the scope established by the Constitution, Congress may set out conditions and tests for patentability.” Graham v. John Deere Co., 383 U.S. 1, 6 (1966). See also Rubbermaid, Inc. v. Contico Int’l, Inc., 381 F. Supp. 666, 668 (E.D. Mo. 1974); McClurg v. Kingsland, 42 U.S. 202 (1843). At present, utility, novelty and nonobviousness are the three requirements for a patent to issue. Congress would seemingly be free to add a fourth criteria, such as, amenability to suit or waiver of immunity. “Incident to [the Patent Clause powers], Congress may attach conditions on the receipt of exclusive intellectual property rights. Indeed, [Congress has] always attached certain conditions . . . in order to obtain a patent.” 145 CONG. REC. S13552-04, S13557 (1999) (statement of Sen. Leahy).


191. “The right to a patent is purely statutory and Congress has full power to prescribe to whom and upon what conditions a patent shall issue.” Owen v. Heimann, 12 F.2d 173, 174 (D.C. Cir. 1926). “No person has a vested right to a patent . . . but is privileged to seek the protected monopoly only upon compliance with the conditions which Congress has imposed.” Boyden v. Commissioner of Patents, 441 F.2d 1041, 1043 (D.C. Cir. 1971).

192. “Congress having created the [patent] monopoly, may put such limitations upon it as it pleases.” Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 494 (1900). See Healey, supra note 9, at 1771 (stating that Congress “must” be able to enforce patent laws against the state to achieve the purpose of the Patent Act).

193. “The right to a patent is purely statutory and Congress has full power to prescribe to whom and upon what conditions a patent shall issue.” Owen v. Heimann, 12 F.2d 173, 176 (D.C. Cir. 1926).

If Congress is to have any power with respect to patents, it must have the power to preserve the rights accompanying the patent. The essence of a patent is the right to exclude others. United States v. Winslow, 227 U.S. 202 (1913).

In his Atascadero dissent, Justice Brennan noted that the goal of the current Eleventh Amendment doctrine seems to be to obstruct Congress’ ability to exercise its powers in an otherwise unexceptional manner and a manner well within the reach of its Article I powers. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 255 (1985) (Brennan, J., dissenting).

E. Courts Should Defer to Congressional Policy Absent Constitutional Violation

Furthermore, in interpreting the IPRRA, courts should give deference to the legislative policy Congress has chosen. Traditionally, American courts have passed on the opportunity to decide on the wisdom and utility of legislation and have deferred to the choices of the legislature.195

F. IPRRA Is In the Public Interest

Deciding how strong to make patent rights requires a delicate balancing.196 This delicate balancing, however, favors granting patentees a right to pursue an infringement action against state entities and to recover monetary damages.197 Patents and their accompanying rights are the life-blood of a strong economy198 and are essential for inventors to be competitive in the marketplace.199 The value of patents in the modern
world cannot be understated. Patent rights provide the incentive for individuals and corporations to strive to create new and useful goods for the benefit of society as a whole. Additionally, the disclosure of the technology behind the patented invention required by the Patent Act provides for geometrical growth of the various sciences, as other inventors will feed off of the disclosures made in the issued patent.

Innovation and creativity have been the fuel of our national economic boom over the past decade. The United States now leads the world in computing, communications and biotechnologies . . . . Our national prosperity is, first and foremost, a tribute to American ingenuity. But it is also a tribute to the wisdom of our Founding Fathers, who made the promotion of what they called “Science and the Useful Arts” a national project, which they constitutionally assigned to Congress. And it is no less of a tribute to the successive Congresses and Administrations of both parties who have striven to provide real incentives and rewards for innovation and creativity by providing strong and even-handed protection to intellectual property rights.

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200. “We are living in a world of increasingly complicated and transient technology, a world that lends itself to scientific achievements capable of fundamentally altering the human condition. Intellectual property law, especially patent law, is instrumental to the advancement of this technology.” Craig Allen Nard, Legitimacy and the Useful Arts, 10 HARV. J.L. & TECH. 515, 515-16 (1997).


202. See Healey, supra note 9, at 1771, 1771 n.243 (stating that “Congress must enforce valid patent rights as an incentive for inventors to continue to develop technologies”); Randall S. Hersom, Note, The Constitutionality of the Intellectual Property Remedy Clarification Acts and the Awards of Relief, 16 J. CORP. L. 521, 525 (1991) (stating that without the exclusive right to control use of patented inventions, inventors have little incentive to invest in the development of new technologies or to reveal those technologies to the public). Cf. Jones, supra note 201, at 731-32 (discussing incentives for creation of beneficial works under federal copyright law and the deleterious effect of not allowing remedies to protect those works from infringement).

continued existence of strong patent rights, including the availability of a real remedy against the states, is in the public interest.204

Infringement by the states has not been a serious problem.205 It would appear that few, if any, inventors206 have had their creative energies thwarted by the unavailability of a remedy against state infringers.207 However, the IPRRA seeks to nip the state infringement problem in the bud. Providing a solution to a potentially serious problem in its infancy makes infinitely more sense than seeking to remedy a problem only after it has become a serious concern.208

204. “It is the public interest which is dominant in the patent system.” Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 665 (1944). See also Young, supra note 13, at 510 (stating the current situation patent owners find themselves in when states infringe, i.e., either seeking a state to waive its sovereign immunity or being forced to rely upon a state law ground, does not advance the public policy set forth in the Patent Clause). “As a matter of public policy and fairness, states should not be immune from any suit arising under patent law.” Healey, supra note 9, at 1771. Cf. New Star Lasers, Inc. v. Regents of the Univ. of Cal., 63 F. Supp.2d 1240, 1244 (E.D. Cal. 1999) (“Without the judicial enforcement provided by the national government, a patent would have little or no value . . . .”). “[P]atent policy is the province of Congress, not the federal courts.” Cf. Harper, supra note 92, at 25. State infringement of patent rights might result in short term benefits to the public, but those benefits would quickly disappear into a long-term detriment. Hersom, supra note 202, at 525-26.

205. A search for cases involving patent infringement by a state or an arm of the state turns up only a handful of cases. E.g., Chew v. California, 893 F.2d 331 (Fed. Cir. 1990); Jacobs Wind Elec. Co., Inc. v. Florida Dep’t of Transp., 919 F.2d 726 (Fed. Cir. 1990).

206. However, this may be because few, if any, inventors would have contemplated that exclusive rights in a patent were not exclusive as to a state. “It would also surprise our citizens to learn that their exclusive rights to a patent was not exclusive and that governmental units could infringe upon that right.” Lemelson v. Ampex Corp., 372 F. Supp. 708, 712 (N.D. Ill. 1974).

207. The issue is not whether State infringement has been frequent in the past, but rather whether we can assure American inventors and investors and our design trading partners that, as State involvement in intellectual property becomes ever greater in the new information economy, U.S. intellectual property rights are backed by guaranteed legal remedies.

145 CONG. REC. S13552-04, S13556 (1999) (statement of Sen. Leahy). “The legal landscape is surely one of the facts accessed in . . . a cost-benefit analysis and one would expect it to add to the incentives and disincentives that must be taken into account before a rational actor enters the commercial arena.” Hamrick, supra note 11, at 874. But see Nelson, supra note 4, at 313 (stating that state sovereign immunity will make “few inventors [willing to] expend the effort and resources to develop inventions for which they might not be compensated”).

208. When questioned by Rep. Kastenmeier about the timeliness of the PRCA, then Acting Commissioner of Patents and Trademarks Jeffrey M. Samuels had this to say: “There have not been many cases that have raised [the issue of sovereign immunity in the patent context.] [Providing a remedy against state infringers] is a step that should be taken not because the possibility exists in light of Atascadero and in light of the Chew case that more States will get involved in infringing patents. I guess as a general policy statement, we believe that those engaged – those who do engage in patent infringement should be subject to all the remedies that are set forth in the Patent Act and that the rights of a patent owner should not be dependent upon the identity of the entity who is infringing.
Providing a remedy against the states will send a message to America’s innovators and inventors that spending time, money, and energy to develop new intellectual property is a worthwhile endeavor that will be rewarded with a patent that no party will be able to infringe.209

G. IPRRA Discourages State Malfeasance

It is often argued that state accountability for federal intellectual property rights violations is much ado about nothing. However, as the number of patents exponentially increases,210 infringement by the states is likely to become a more significant problem.211

One need not cite to authority to support the proposition that states should not infringe patents owned by private individuals. So simple and fundamental a proposition can hardly be found elsewhere in the law. By failing to hold states accountable for patent infringement,212 states are implicitly encouraged to infringe patents as they have their only real deterrent, monetary damages, removed.213

As states have no authority to violate patent laws,214 they can hardly
complain that the IPRRA is violative of their rights. A state’s sovereign immunity does not, and should not, extend to acts outside of the scope of its legitimate authority.215

States and their entities are significant participants in the patent and intellectual property markets.216 States and the “arms of states” should be held to a higher standard. At the very least, states should be held to the same standard as private actors.217 Governments who are permitted to commit infringement essentially have a license to commit torts against private patent owners.218 This would never be acceptable in any other context.


The “hodgepodge of confusing and intellectually indefensible judge-made law”219 surrounding the Eleventh Amendment is no longer appropriate, assuming it ever was, in light of the current relationship between federal and state governments.220 The policy of the Patent Act

215. Lemelson argues that an uncompensated infringement of a private party’s patent constitutes an unconstitutional taking and therefore outside of the state’s legitimate authority and as such sovereign immunity should not exempt the state for infringing a patent. Lemelson v. Ampex Corp., 372 F. Supp. 708, 711 (N.D. Ill. 1974).

216. Qazi, supra note 9, at 804. Cf. Harper, supra note 92, at 22 (stating that entities having Eleventh Amendment immunity purchase over $1 billion dollars of copyrighted material).

217. “We can probably all agree that when a State, or a State agency or an officer or employee of a State acting in an official capacity, infringes a copyright or another federal intellectual property right, the State should be held accountable for that infringement just as any other person or entity would be.” Peters Testimony, supra note 19. “Because states reap the benefits of patent laws, these laws should be applied equally to states, companies, and individuals.” Healey, supra note 9, at 1772-73.


If the Court’s Eleventh Amendment doctrine were grounded on principles essential to the structure of our federal system or necessary to protect the cherished constitutional liberties of our people, the doctrine might be unobjectionable; the interpretation of the text of the Constitution in light of changed circumstances and unforeseen events – and with full regard for the purposes underlying the text – has always been the unique role of [the Supreme] Court. But the Court’s Eleventh Amendment doctrine diverges from text
and the exclusive federal jurisdiction for actions arising under the Patent Act are sound and well established. The Patent Act seeks to promote science by awarding a successful patent applicant a right to exclude all others from practicing the patented invention. These strong policies are not counterbalanced by the policy of the state sovereign immunity.221

The impetus of the Eleventh Amendment is the prevention of federal court judgments that must be paid out of a state’s treasury.222 This justification for sovereign immunity seems insincere. State treasuries routinely pay monetary damage awards for causes of action under state or federal law if brought by the federal government.223 The possibility of a state being bankrupted by being subject to the same federal laws as is any other private actor seems quite ridiculous.224 The Alden Court was not willing to assume that states are willing to disregard the federal Constitution or refuse to obey valid federal laws.225 Furthermore, “the injunctive relief that is permitted can often be more intrusive – and more expensive – than a simple damages award would be.”226

Not only does the Eleventh Amendment seek to prevent federal courts from ordering judgments to be paid to private parties out of state treasuries, it also serves to avoid the “indignity” of subjecting states to the coercive process of judicial tribunals at the insistence of private parties.227 While a state might truly be embarrassed if found liable for patent infringement, this policy concern, if appropriate at all,228 is substan-

221. “The widely accepted view among modern nations [is] that when a State engages in ordinary commercial activity sovereign immunity has no significant role to play.” College Sav. Bank, 527 U.S. at 699 (Breyer, J., dissenting). See also Lane v. First Nat’l Bank, 871 F.2d 166, 173 (1st Cir. 1989) (recognizing policy of Copyright Act is weightier than policy of state sovereign immunity for actions arising under the Copyright Act)


224. See Schoenfeld, supra note 11, at 191 (stating that enabling individuals to sue states for copyright infringement “will not place a great burden on the states or their treasuries”). But see Alden v. Maine, 527 U.S. 706, 750 (1999). (“Private suits against nonconsenting States – especially suits for money damages – may threaten the financial integrity of the States.”).

225. Alden, 527 U.S. at 754-55.


228. See Kimel v. Florida Bd. of Regents, 528 U.S. 62, 93-95 (2000) (Stevens, J., dissenting) (arguing that the Framers did not intend the courts to preserve a state’s dignity, but rather intended
tially outweighed by the need to provide private patentees with a remedy against infringing states.

An additional policy is to allow states to control their own public policy and administration of internal affairs.\(^{229}\) The essence of this argument is that states would never be able to fulfill their responsibilities to their citizens if they were continually forced to explain themselves and their actions in a court of law.\(^{230}\) As to purely governmental affairs, this justification may be valid. However, when states engage in commercial activity outside the sphere of pure governmental function, the ability of the state to provide for its people would not be affected.\(^{231}\)

**IV. OTHER REMEDIES**

The failure of the IPRRA to pass judicial scrutiny or its inability to gain the requisite votes to become a law should not sound the death knell in the attempt to hold infringing states liable for that patent infringement.\(^{232}\) It might be that state infringement never becomes an issue and all will be well. However, if the issue makes it to the court system again, courts should take the opportunity to rethink past precedent.\(^ {233}\)

the normal operation of the legislative process and the procedural safeguards included therein to guard state interests).

229. Blake v. Kline, 612 F.2d 718 (3d Cir. 1979); Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 CASE W. RES. L. REV. 396, 398 (1987). But see 146 CONG. REC. S7758 (2000) (statement of Sen. Leahy) (stating that recent Supreme Court decisions on sovereign immunity have extended the doctrine “not just to essential organs of State government, but also to a wide range of State-funded or State-controlled entities and commercial ventures.”)

230. Monaghan, supra note 126, at 124.


232. See Harper, supra note 92, at 25 (stating that if Congress does not remedy the state infringement problem, patent owners will continue to suffer economic harm).

The thought of states being able to violate property rights of resident and non-resident citizens is repugnant to the American system of property. Sovereign immunity, at least within the context of patent infringement, is an antiquated and unnecessary doctrine.\textsuperscript{234} Of course courts simply cannot ignore the principles of the Eleventh Amendment;\textsuperscript{235} however a more liberal approach to issues such as waiver or implied consent can accomplish the necessary ends without violating a state’s sovereign immunity or the text of the Eleventh Amendment.\textsuperscript{236} The courts should not give constitutional status to a nontextual, common-law doctrine of sovereign immunity and then use this status to deny the federal government the right to exercise powers expressly given to Congress by the states.\textsuperscript{237}

Another possible solution would be for Congress to remove the federal judiciary’s exclusive jurisdiction over issues arising under the Patent Act. However, this solution would likely cause more problems than it would remedy.\textsuperscript{238} But, given that trademark law and unfair com-

creates an immunity defense only in the specific situation encountered in the Amendment itself, i.e., suits between a State and citizens of another State. \textit{Id.;} Althouse, supra note 163, at 1127-29. Furthermore, Brennan argues that the surrender of a portion of their sovereignty to Congress in Article I, sovereignty does not exist with respect to federal laws passed under the authority of Article I. Stare decisis is perverted when relied upon as a defense for deliberate violations of well-established federal law. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 98 (2000) (Stevens, J., dissenting).

\textsuperscript{234} See supra note 220 and accompanying text.

\textsuperscript{235} However, allowing Congress to more readily abrogate a state’s sovereign immunity pursuant, particularly in light of the broad interpretation of the Commerce Clause, might render the Eleventh Amendment a nullity. Weitzman, supra note 15, at 333.

\textsuperscript{236} See \textit{Atascadero}, 473 U.S. at 248 (Brennan, J., dissenting) (stating that it might be time for the Court to reexamine its Eleventh Amendment jurisprudence in light of the modern federal system).

Taking a more liberal approach would requiring overruling numerous recent Supreme Court cases. This attack on precedent should not stand in the way of revisiting the Eleventh Amendment. As Chief Justice Taney said:

I do not, however, object to the revision of [a question he had believed decided by earlier cases], and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.


\textsuperscript{237} Herbert Hovenkamp, \textit{Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions}, 96 COLUM. L. REV. 2213, 2238 (1996). See also Cong. Rec. S7758-01, S7758 (2000) (statement of Sen. Leahy) (stating that the recent Supreme Court decisions, particularly, \textit{Alden, Florida Prepaid and College Savings Bank}, were “startling in their reasoning, casting aside the test of the Constitution, inferring broad immunities from abstract generalizations about the federalism, and second-guessing Congress’ reasoned judgment about the need for national remedial legislation.”).

\textsuperscript{238} For example, inexperienced state court judges would be ill equipped both legally and technically to handle complex patent infringement actions. See Weitzman, supra note 15, at 334. The Circuit Court of Appeals for the Federal Circuit was created to provide uniformity of the patent

https://ideaexchange.uakron.edu/akronlawreview/vol35/iss3/5
petition laws coexist between the federal and state systems, double jurisdiction might be a potential remedy.

In the end, a Constitutional amendment may be the only way to restore federal intellectual property right protection, but it is unlikely that states will rush to ratify such an amendment.

V. CONCLUSION

The law of sovereign immunity, as it currently stands, constitutes a serious threat to a significant portion of the patent community. The inability of private patent owners to recover past monetary damages against a state infringer has the potential to create a serious chilling effect on the development of new, improved, and beneficial technologies. Furthermore, the inability of an individual or private company to seek a declaratory judgment against a state as a patent owner expands the monopoly of the Patent Act as to the state in a manner wholly inconsistent with the underlying purposes of the Act.

The only textual legal authority for sovereign immunity is the Eleventh Amendment. However, this Amendment, in clear and unambiguous language creates state immunity only in certain, specific circumstances. A liberal interpretation of the Amendment, as seen in cases from *Hans* to *Seminole Tribe*, creates weaknesses in federal law, particularly law that is exclusively federal, that are nearly insurmountable.

If the IPRRA becomes law, it will serve to significantly, if not completely remedy the current sovereign immunity problem with respect to private patent owners. Not only will the IPRRA provide a remedy, it will, more importantly, be able to survive judicial scrutiny. The Patent and Copyright Clause provides a constitutional basis for Congress to enact the IPRRA. Further, the strict abrogation doctrine of recent Supreme Court cases is completely avoided by requiring states to waive sovereign immunity or lose the right to obtain patent rights in the future. This waiver, being a voluntary choice among several options, is clear, unambiguous, and noncoercive, and as such is a valid waiver of sovereign immunity.

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239. See Weitzman, supra note 15, at 334.
240. One solution might be to readily allow removal to the federal courts. Another would be to allow suit in state court only when a State asserts sovereign immunity.
Brandon White