

State Sovereign Immunity and Technology Transfer

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In June 1999, the United States Supreme Court issued two decisions recognizing that states have sovereign immunity from suits for intellectual property infringement. These two decisions, *Florida Prepaid*¹ and *College Savings Bank*,² prompted several bills in Congress aimed at establishing state intellectual property liability.³ The bills, versions of the Intellectual Property Restoration Act, would require states to waive their immunity as a precondition to being able to fully enforce their own intellectual property rights. If enacted, this legislation will have a significant impact on technology transfer. The purpose of this article is to explain the historical and legal context for the Supreme Court's decisions and the Intellectual Property Restoration Act.

Part I: The Meaning of the Eleventh Amendment

The Constitutional Debates

To understand the current issues regarding sovereign immunity, it is helpful to trace their historical roots in the debates leading to ratification of the U.S. Constitution. During those debates, the extent to which the Constitution would require the states to relinquish power to the new national government was a subject of impassioned argument. One such argument—the one most relevant here—focused on whether the Constitution would allow a state to be sued in federal court without the state's consent.⁴ The states conceived of themselves as sovereign entities, and, according to the traditional, monarchy-based jurisprudence, immunity from suit was a necessary attribute of sovereignty.⁵ The ratification debates specifically focused on two provisions in Article III, Section 2 of the

Constitution, which address suits in federal court against state governments.⁶ These provisions provide that the judicial power of the United States extends to suits “between a State and Citizens of another state” and “between a State . . . and foreign states, citizens or subjects.” Two opposing views emerged as to the meaning of these provisions.