

SOVEREIGN IMMUNITY AND INTELLECTUAL PROPERTY

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I. THE STATE INFRINGER / INDIVIDUAL INFRINGER ANALOGY

Do states have constitutional sovereign immunity in copyright and patent lawsuits? The Supreme Court's recent conclusion in *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank* that the answer is "yes"¹ has generated a firestorm of criticism. This result, some argue, is indefensible as a matter of constitutional text, original meaning, and precedent; but as importantly, they say, it's practically unsound and unjustifiable—the transparent folly of the result shows that the court must have erred in its reasoning.²

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I should mention that I'm still a partner in VESOFT, Inc., a small software company that I co-founded in 1980; the company sells copyright-protected software that I wrote, and I thus earn a large part of my income from sales of intellectual property, including many sales to state government agencies.

1. 527 U.S. 627 (1999).

2. See 145 CONG. REC. S10359 (daily ed. Aug. 5, 1999) (statement of Sen. Specter) (decrying the "absurd and untenable state of affairs" where states are given "an enormous advantage over their private sector competitors"); 145 CONG. REC. S8069, S8070 (daily ed. July 1, 1999) (statement of Sen. Leahy) (arguing that it's wrong for there to be "one law for private universities, libraries, and educational institutions" and another for "State-run institutions"); Mike France, *How the High Court Is Penalizing Corporate America*, BUSINESS WEEK, Aug. 2, 1999, at 74 ("[the ruling] for no good reason treats state schools differently from private institutions"); Steven B. Pokoitiłow & Matthew W. Siegal, *Supreme Court Update, New Risk to Intellectual Property: Can States Infringe With Impunity?*, INTELL. PROP. STRATEGIST, Aug. 1999, at 1 (arguing that the decisions bar lawsuits even when the state "acts, for all intents and purposes, like any other peddler hawking his wares"); Michael J. Mehrman, *IP Decisions Strip Owners of Claims Against States*, NAT'L L.J., Oct. 25, 1999, at C10 (describing *Florida Prepaid* as creating "an amazing legal result . . . as a practical matter" as well as on more formal grounds); Philip Tomasso III, *Has the United States Supreme Court Given States a Leg up and Above*

Such an argument generally rests on a simple and intuitively appealing analogy: If a state agency infringes a copyright or patent, it should be treated no differently from a private entity that infringes a copyright or patent. Government-run UCLA should have the same rights as private USC.

But two alternative analogies suggest that sovereign immunity in such cases may not be so odd or unjust after all. I'm not sure which analogy is ultimately most persuasive, but I do think that the question is harder than it might first appear.

II. THE STATE INFRINGER / FEDERAL INFRINGER ANALOGY

Consider one such alternative analogy, between a state government agency (say, UCLA) and a federal government agency (say, the Department of Defense (DoD)). This seems to me as applicable at first glance as the UCLA-USC analogy, and perhaps more so, because we're comparing two government agencies rather than a government agency and a private entity.³

The DoD, it turns out, can infringe copyrights or patents more or less at will. If the copyright or patent owners find out about this infringement, they can sue in the U.S. Court of Claims for damages and, in patent and some copyright cases, attorney fees and court costs. But they can't get any of the other remedies that would have been available had the infringer been a private party—an injunction, treble damages for willful patent

the Law?, INTELL. PROP. TODAY, Jan. 2000, at 14 (supporting proposals that aim to "level the intellectual playing field" by avoiding the Court's decisions); Warren Richey, *Power Tilts Further Toward States*, CHRISTIAN SCI. MONITOR, June 24, 1999, at 1 ("The decisions . . . seem to set up a situation where state governments are free to engage in competitive, profit-making enterprises, and yet they are not bound by many of the same federal laws that regulate private businesses.").

I do not discuss here the textual, originalist, structural, and precedential arguments, which have been completely canvassed elsewhere. For a discussion of such arguments, see, e.g., the opinions in *Florida Prepaid* and Michael Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999).

3. Some readers responded to this analogy by suggesting that state infringements will be much more common than federal infringements, because there are 50 states (and over 50 state university systems) and only one federal government. It is of course impossible to know for certain whether this is so, but if one assumes that government entities generally use and infringe intellectual property in rough proportion to the magnitude of their operations, one might keep in mind that the federal government consumes about 20% of the U.S. GNP and the state governments put together consume about 10%. See BUDGET OF UNITED STATES GOVERNMENT, FISCAL YEAR 2001, HISTORICAL TABLES, at 277 tbl.15.1 (visited June 26, 2000) <<http://w3.access.gpo.gov/usbudget/fy2001/pdf/hist.pdf>>.

infringements, or any meaningful statutory damages for copyright infringements.⁴

UCLA's ability to infringe is in some ways *more* circumscribed than the DoD's, even after *Florida Prepaid*. The property owner can sue UCLA in state court under an inverse condemnation theory, claiming that the state has taken its property; the state would then have to give just compensation in the form of actual damages, just as the federal government would have to pay for an infringement by the DoD.⁵ (This availability of compensation

4. See 28 U.S.C. § 1498 (1998); 28 U.S.C. § 2412(d)(1)(A) (1998). These statutes allow only an award of the minimum statutory damages in copyright cases, which amounts to \$500 per infringed work (*not* \$500 per infringing copy), and only as an alternative to actual damages, not as a supplement. By contrast, nongovernmental defendants may have to pay up to \$20,000 per infringed work, or up to \$100,000 if the infringement is willful. See 17 U.S.C. § 504 (1999). I suspect that virtually no one would sue the government for \$500 per infringed work.

Of course, Congress *could* change the law to allow the full panoply of normal copyright and patent remedies—injunctions, statutory damages, and so on—against the federal government; under *Florida Prepaid*, Congress cannot do the same vis-à-vis state governments. But Congress hasn't changed the law this way as to the federal government, and there's no sign of it planning to do so. This persistence of a regime of unlimited federal infringement, subject only to after-the-fact damages, suggests that a similar regime of state infringement subject only to after-the-fact damages is hardly "absurd and untenable."

5. This is, to some extent, speculation on my part—no courts have yet, in the few months since the Court's decisions made this course of conduct necessary, specifically considered such compensation claims. But I think it's well-founded speculation: The Court has long held that interference with the right to exclude others is close to a *per se* taking of property. This has been the case even if the interference is not complete and the government still lets you exclude most people except for those whom the government designates. See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979). *But see PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (setting forth a limited exception in cases where the right to exclude is not economically valuable). The companion case to *Florida Prepaid* specifically stressed that the right to exclude others is an essential aspect of property. See *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666, 673 (1999). See also *Florida Prepaid*, 527 U.S. at 643 (suggesting that "a State's infringement of a patent . . . interfer[es] with a patent owner's right to exclude others," and thus might be seen as a deprivation of property when the state "provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent"); *id.* at 644 n.9 (stressing that "the State of Florida provides remedies to patent owners for alleged infringement on the part of the State," through, among other things, "a takings or conversion claim"). Courts have long said that patent infringement is a taking of private property, precisely on this theory. See *Hughes Aircraft Co. v. United States*, 86 F.3d 1566, 1571–72 (Fed. Cir. 1996) ("The government's unlicensed use of a patented invention is properly viewed as a taking of property under the Fifth Amendment through the government's exercise of its power of eminent domain . . ."), *vacated and remanded*, 520 U.S. 1183 (1997), *reinstated*, 140 F.3d 1470, 1477 (D.C. Cir. 1998); *Jacobs Wind Elec. Co. v. Department of Transp.*, 626 So. 2d 1333, 1337 (Fla. 1993); *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290 (1912); *James v. Campbell*, 104 U.S. 356 (1881). Thus, it seems to me that state government infringement of copyright or patent—the government's violation of the right of the owner to exclude others from using the property—is a taking which leads to a duty to compensate. Cf. Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 34 LOY. L.A. L. REV. (forthcoming 2000); Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of*

is a linchpin of my argument; if compensation were not available for state infringements, then neither the state-federal infringer analogy nor the one I develop in Part III would be apt.)⁶ In many, though not all, states, successful claimants can get costs and sometimes attorney fees.⁷ Moreover, unlike with federal infringements, the *Ex parte Young* doctrine

Intellectual Property by State and Municipal Governments Before and After Seminole Tribe, 55 WASH. & LEE L. REV. 849, 864-71 (1998); Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529 (1998) (discussing federal takings, but in an analysis that should also be applicable to takings by the states); Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property*, 67 TEX. L. REV. 685, 693-726 (1989). If it turns out that in some situations such infringements are not treated as takings, see, e.g., Christina Bohannon & Thomas F. Cotter, *When the State Steals Ideas*, 67 FORDHAM L. REV. 1435, 1475-77 (1999) (suggesting that this may sometimes be the case), then Congress should enact legislation—perhaps under the Spending Clause or some other grant of authority—to at least make sure that they are so treated.

I also agree with the argument that the statute which provides for exclusive federal jurisdiction of copyright and patent lawsuits, see 28 U.S.C. § 1338 (1999), doesn't prevent claims for takings of intellectual property rights from being brought in state court: Such takings claims are not "civil action[s] arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks," but are rather cases arising under the Takings Clause and its state equivalents. *Jacobs Wind Elec. Co.*, 626 So. 2d at 1335 n.5. See Scott P. Glauber, *Citizen Suits Against States: The Exclusive Jurisdiction Dilemma*, 45 J. COPYRIGHT. SOC'Y U.S.A. 63, 99-100 (1997); Edwin Wheeler, Remarks at the Berkeley Law & Tech. Roundtable Conf. 10 (Oct. 11, 1999) (transcript on file with author).

6. My analysis thus does not apply to cases such as *Alden v. Maine*, 527 U.S. 706 (1999), and *College Savings Bank v. Florida Prepaid Postsecondary Educ. Board*, 527 U.S. 666 (1999), which do not involve traditional intellectual property and in which an inverse condemnation remedy is unavailable. I don't know whether sovereign immunity in such cases is constitutionally mandated, but I believe that states ought to, in any event, waive immunity in such cases as a matter of policy. In my view, a government's refusal to pay compensation for injuries that it inflicts is generally unjust for the same reason that uncompensated takings of private property are unjust: In both situations, the government is forcing a particular innocent person to bear the cost of the government's policies, rather than spreading the cost among all taxpayers. The longstanding trend of governments waiving their sovereign immunity in such situations is quite laudable. True, in some situations, especially where the government action involves broad social policy (e.g., deciding how to invest police or prosecutorial resources) and has no close private analog, the tort system is a bad tool for guiding government conduct; but in those cases the government should be immune because of the specific nature of the government decision, not because of any general principle of sovereign immunity.

I also agree that tort law has in many ways gotten too broad, see, e.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION* (1992); PETER W. HUBER, *LIABILITY* (1990), and in some situations sovereign immunity may have the fortunate effect of disposing of some cases that should have been, but under current law would not be, rejected on substantive tort law principles. But the right solution here, I think, would be to trim back tort law generally, rather than providing a both over- and underinclusive protection to government entities alone. What's more, making sure that the burden of the law falls on all defendants, including the government, strikes me as a good way of increasing the pressure for such wholesome trimming. See *infra* text accompanying notes 19-20.

7. See, e.g., CAL. CIV. PROC. CODE §§ 1268.610, 1268.710 (1975). Awards of costs and fees are not, however, constitutionally mandated. See *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam).

lets the intellectual property owner get an injunction against state infringers notwithstanding state sovereign immunity.⁸

This analogy simply reflects the fact that the federal government has long asserted its sovereign immunity in intellectual property cases, leaving intellectual property owners whose rights it has infringed with only a limited remedy in an Article I court. Apparently Congress has concluded that the federal government as infringer *is* different from private infringers, maybe because, as I discuss in Part III, governments have long been allowed to violate property rights under the eminent domain power so long as they pay just compensation.⁹ Perhaps Congress was wrong to take this view, but so long as it does so, it becomes hard for federal legislators to argue that it's somehow shocking and highly impractical for states to be allowed to do the same thing.¹⁰

Of course, state governments aren't necessarily identical, for intellectual property purposes, to the federal government. Intellectual property rights are federally created and federally secured; a state government's refusal to honor them might thus be seen by some as an improper interference with federal power. But note how this shifts the discussion from a pragmatic argument about the effective functioning of intellectual property law and a moral argument about effective protection for individual property rights to a constitutional structure argument about the proper allocation of federal and state power. Such an argument might justify a structural, doctrinal, historical, or textual criticism of *Florida Prepaid*, but it doesn't support the pragmatic or moral criticisms to which I'm responding here.

A pragmatic, rather than formal, counterargument is that shifting some intellectual property litigation into state courts will undercut the uniformity

8. See *Idaho v. Couer D'Alene Tribe*, 521 U.S. 261 (1997); *Ex parte Young*, 209 U.S. 123 (1908).

9. Likewise, the argument that state sovereign immunity violates the Agreement on Trade-Related Aspects of Intellectual Property Rights, which generally requires that governments at least give notice before infringing a work, see Simon Steel, Remarks at the Berkeley Law & Tech. Roundtable Conf. 4 (Oct. 11, 1999) (transcript on file with author), is also undercut by the fact that 28 U.S.C. § 1498 violates the same obligation. See Menell, *supra* note 5 ("Even before the *Florida Prepaid* decision, it is questionable whether the United States fully adhered to Article 31 with regard to notification of patent owners that their inventions were being used by government entities." (citing 28 U.S.C. § 1498 as an example of this nonadherence)); EUROPEAN COMMISSION, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 1998 § 6.1, at 42 (faulting the U.S. for allowing the federal government to infringe intellectual property rights without giving notice to their owners).

10. For examples of such arguments, see *supra* note 2.

of copyright and patent law,¹¹ more so than shifting some such litigation into the federal Court of Claims. But it's not clear that this empirical prediction is in fact likely to be borne out. Many important and complex bodies of federal law are simultaneously administered by state and federal courts: Consider free speech law, search and seizure law, eminent domain law, and equal protection law. Claims under these provisions, and under many other federal constitutional and statutory rules, can be brought both in federal and state court, and sometimes (for instance, when they are defenses to state criminal prosecutions) *must* be brought in state court.¹² But the sky hasn't fallen; and given courts' tendency to treat precedent from other jurisdictions as persuasive plus the Supreme Court's power to resolve those disagreements about the scope of federally secured rights that do arise,¹³ the joint state/federal project has generally achieved enough uniformity.

I doubt that shifting to state courts the relatively few copyright cases filed against states that don't waive immunity will lead to results any worse than those we've gotten under these other bodies of law. True, right now most state judges have never presided over copyright cases, and even after *Florida Prepaid* sinks in, most state judges will rarely run into them; but I suspect that most federal judges aren't copyright mavens, either.

Patent cases might pose unusual problems—the fact that federal law routes patent appeals to the U.S. Court of Appeals for the Federal Circuit bears witness to the unusual complexity and specialization of patent litigation. It's possible, then, that state courts are unusually likely to decide such cases badly and inconsistently, and it's conceivable that these decisions (though there will be few of them, since to my knowledge only a small fraction of patent lawsuits are filed against state government

11. See Leahy, *supra* note 2, at S8070 (arguing that the Court's "decisions will also make it harder for Congress to design a uniform system that will apply throughout the nation to protect important intellectual property interests"). Some may take the view that such state cases would not technically be intellectual property cases as such, because they would be filed under state inverse condemnation laws rather than under the Copyright and Patent Acts. But they would, in practice, be a form of intellectual property litigation and, as such, would likely have some collateral estoppel effect and some precedential effect on future copyright and patent cases.

12. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971); *Stone v. Powell*, 428 U.S. 465 (1976).

13. See 28 U.S.C. § 1257 (1988) (authorizing Supreme Court review over cases involving "any title, right, privilege, or immunity . . . specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States," which would include the right to just compensation for takings of property as much as it would First or Fourth Amendment rights).

agencies)¹⁴ will interfere with the practical administration of the patent system. But it's far from certain, and in my view not very likely.

III. THE INTELLECTUAL PROPERTY / TANGIBLE PROPERTY ANALOGY

Intellectual property advocates often stress that intellectual property is property, with dignity and worth equal to that of tangible property.¹⁵ Copyright infringement, they say, is theft (witness the title of the No Electronic Theft Act),¹⁶ and people who make unauthorized copies of their buddies' computer games are as bad as shoplifters.¹⁷

But state governments have long had the power to take tangible property for public use, subject only to the requirement that they provide a procedure for after-the-fact compensation. If state governments are entitled to take private property generally, why shouldn't they be able to take intellectual property in particular, again subject to the requirement of reasonable after-the-fact compensation?

One possible answer, with which I sympathize, is that the eminent domain power is itself troublesome (morally and practically, if not constitutionally) because it improperly interferes with the owner's property rights and lets government entities unfairly compete with private actors who lack this power,¹⁸ and that it should therefore be restricted to rare

14. Of course, it's possible that *Florida Prepaid* will embolden state governments to infringe patents much more often, even given the likelihood that they will have to pay compensation for such infringements, and that state courts will therefore start deciding many patent takings cases in the future; only time will tell whether this possibility comes to pass.

15. See, e.g., Joyce Kasman Valenza, *Computers Can Inspire Plagiarism as Pencil and Paper Never Could*, PHILADELPHIA INQUIRER, Dec. 25, 1997 ("Instruction in information ethics should begin as early as students begin to write. Children should understand that intellectual property is property."); *Paying for Creativity*, THE TENNESSEAN, June 9, 1996, at 4D ("Intellectual property whether that property is a book, a computer program, a movie or a song is still property, demanding of protection by the laws of this land."); Donalee Moulton, *IP and the Cyberspace Revolution: Is It All Hype?*, LAWYERS WEEKLY, June 30, 1995 ("As a creator, I object to my article being online and not being paid for it. Intellectual property is property. It's no different than any other property." (quoting lawyer Timothy Perrin)).

16. No Electronic Theft Act, Pub. L. 105-147, amending 17 U.S.C. § 506(a).

17. See, e.g., *Hearings Before the Subcomm. on Int'l Econ. Pol'y, Export and Trade Promotion, of the Senate Comm. on Foreign Rel.*, 106th Cong. (1999) (statement of Colleen Pouliot, Chair, Business Software Alliance Board of Directors) ("Most of us would never think of shoplifting a box of software from the store, yet many people do not think twice about copying a CD-ROM from a friend or making multiple copies of a program for use in their business. Software piracy of the kind I have just described, so-called 'end user' piracy, is theft . . .").

18. See, e.g., Specter, *supra* note 2, at S10359 (arguing that *Florida Prepaid* would give "state-owned universities and hospitals . . . an enormous advantage over their private sector competitors").

situations of serious public need. But such an argument is hardly an argument against the post-*Florida Prepaid* regime as such. To be credible, it must be addressed to a wide range of eminent domain proceedings, not just those involving intellectual property.

Further, if one thinks that eminent domain is problematic, it may actually be good to have all property owners, and not just tangible property owners, be at risk of having their property taken. "There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."¹⁹ Consider, for instance, that some people have suggested that state government power to seize intellectual property ought to be limited by a strengthening of the "public use" requirement.²⁰ I heartily approve of this proposal; but note that this suggestion, which might eventually help protect the rights of property owners generally, was made precisely because intellectual property has now become more subject to the same risks of government taking that other property has always had to bear.

Another possible problem that some may see in the *Florida Prepaid* decision is that companies will now have to hire counsel who know not only copyright law but also the relevant state's eminent domain law, and that state courts or administrative tribunals may be subtly biased in favor of their own governments and thus may give inadequate compensation. But, again, this argument is better addressed to eminent domain generally. Tangible property owners may rightly cheer their acquisition of allies in their fight to make eminent domain proceedings easier and fairer.

One might argue that while states may properly exercise eminent domain power over state-created property rights (such as rights in land or in chattels), they may not properly exercise eminent domain power over federally-created property rights such as copyrights or patents.²¹ This position may either be justified on the grounds of federal preemption,²² or on the principle that the eminent domain power is an inherent reservation of rights by the entity that created the property interest in the first place,

19. *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). Even putting together the owners of taken tangible property and the owners of taken intellectual property would still leave them as a small minority, but I think Jackson's argument also applies when a law's burden is broadened to cover a larger minority instead of a smaller one.

20. See, e.g., S. Doc. No. 106-1835, sec. 1(a)(22) (1999) (interpreting the public use requirement fairly broadly in order to condemn state interferences with federally secured intellectual property rights). Cf. *Steel*, *supra* note 9, at 19 (making a narrow claim about the public use requirement).

21. This is related to but subtly different from the argument given towards the end of Part II.

22. See generally *Kwall*, *supra* note 5, at 703-11 (discussing this question).

and that therefore it is analytically improper for a subordinate sovereign to exercise eminent domain over a right created by a superior sovereign.²³

Such a claim, though, is again a formal one, not a pragmatic one. It should be evaluated alongside the Court's textual, historical, precedential, and structural constitutional arguments, but it does little to support the theory that the regime inaugurated by the *Florida Prepaid* decision simply doesn't make practical or moral sense. What's more, I'm not sure this claim flies even as a formalist argument. Many of the property rights in land in the Western states were originally created by federal land grants, either before or after the states were created. To my knowledge, though, few people have claimed that such property interests are beyond the state's eminent domain power. One could argue that states may exercise eminent domain power over interests in land that were originally federally created but traditionally state-enforced, but not over intellectual property interests that are both federally created and generally federally enforced; but such an argument again turns more on formalist concerns than on practical or moral matters.

A more practical distinction between eminent domain in tangible property cases and in intellectual property cases is that a taking of tangible property is usually obvious to the property owner. If the government has taken my land for a flood control basin or is requiring that I give third parties access to it, I will know that the taking has happened, and will be able to promptly demand compensation. If the government is using my software without my permission, I might never learn of this, and thus never even ask for the compensation that I am owed.

This might be reason to interpret the Due Process Clause as requiring the government to provide some notice, whether before or after the fact, whenever it knowingly deprives people of part of their property rights by using their intellectual property without authorization—such an obligation should greatly reduce the difference in visibility between takings of intellectual property and takings of tangible property. If no such due process requirement is enforced, then perhaps the intellectual property / tangible property analogy might be properly rejected, but those who criticize the *Florida Prepaid* regime on pragmatic or moral grounds would still have to confront the federal / state infringer analogy: After all, under 28 U.S.C. § 1498, the federal government doesn't have to provide notice to the person whose property it's infringing.

23. See Steel, *supra* note 9, at 16.

CONCLUSION

People often judge constitutional decisions against what they see as common sense or moral right. In theory, one could argue that decisions must rest or fall on other sources of constitutional argument—text, original meaning, precedent, and the like. But given that these sources can be ambiguous or at least contested, pragmatic or moral arguments are often valuable checks on one's theorizing, and might even sometimes be tiebreakers.²⁴

My tentative conclusion is that the *Florida Prepaid* results are far from practically senseless or morally repugnant. They do run against one intuitively appealing theory (state infringers should be treated like individual infringers) but they are actually more consistent than the pre-*Florida Prepaid* regime with two other theories (state infringers should be treated like federal infringers, and intellectual property should be treated like tangible property).

Readers can decide for themselves which of these analogies is more persuasive; I'm frankly not sure. But at least the existence of the latter analogies should caution us against being too quick or too heated in pragmatic or moral condemnation of the Court's decisions.

24. See, e.g., Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1531 (1999).