AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Federalism/Sovereign Immunity

**Allen v. Cooper, \_\_\_ U.S. \_\_\_ (2020)**

*Frederick Allen is a videographer who was hired to document the recovery of* Queen Anne’s Revenge*, the flagship of the Edward Teach (Blackbeard) that sank of the coast of North Carolina in 1718. Although Allen copyrighted the videos he made and photos he took, the State of North Carolina used those videos and photos without his permission on state websites and state newsletters. Allen responded by suing the state and the state governor, who by the time the case reached the Supreme Court was Roy Cooper. The state claimed that the suit was barred by* Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank *(1999), which held that states enjoyed sovereign immunity from patent lawsuits. A lower federal court, while agreeing that Congress could not abridge sovereign immunity under the national legislature’s Article I power over copyrights, ruled that Congress had validly abridged state sovereignty under the national legislature’s power to enforce the Fourteenth Amendment. The latter ruling was reversed by the Court of Appeals for the Fourth Circuit. Allen appealed to the Supreme Court of the United States.*

 *The Supreme Court unanimously upheld the Fourth Circuit. Justice Elena Kagan’s majority opinion held that the copyright claim was precluded by* Florida Prepaid *and that Congress had not demonstrated that abrogating state sovereign immunity in all copyright cases was a proportionate and congruent remedy for Fourteenth Amendment violations. Why does Justice Kagan think Congress had not passed the proportionate and congruent standard? Why did she think Congress should be given the chance to write a narrower law that met that standard? Was this an appropriate judicial effort to provide guidelines to the national legislature or, as Justice Clarence Thomas’s concurrence indicated, an inappropriate advisory opinion. Why were all the liberal justices so committed to precedent. Are the conservative justices as committed to liberal precedents? Was Kagan’s opinion an effort to provide a precedential foundation for not overruling* Roe v. Wade*?*

JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iecca83196cc611eabcef83564c7863ab) delivered the opinion of the Court.

In two basically identical statutes passed in the early 1990s, Congress sought to strip the States of their sovereign immunity from patent and copyright infringement suits. Not long after, this Court held in Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank (1999), that the patent statute lacked a valid constitutional basis. Today, we take up the copyright statute. We find that our decision in [Florida Prepaid](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))compels the same conclusion.

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In our constitutional scheme, a federal court generally may not hear a suit brought by any person against a nonconsenting State. That bar is nowhere explicitly set out in the Constitution. The text of the Eleventh Amendment (the single most relevant provision) applies only if the plaintiff is not a citizen of the defendant State.[2](https://1.next.westlaw.com/Document/Iecca83196cc611eabcef83564c7863ab/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740370000017248576c4cb80ac3db%3FNav%3DCASE%26fragmentIdentifier%3DIecca83196cc611eabcef83564c7863ab%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.History*oc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f7b14c4ccaeebc9cd1be1e16e2343580&list=CASE&rank=9&sessionScopeId=3a8aa29a882bda4f1c4a3c25fcb6f0ad60da48945fe38c363775d4c3b48ffa28&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.History*oc.Search%29#co_footnote_B00032050616469) But this Court has long understood that Amendment to “stand not so much for what it says” as for the broader “presupposition of our constitutional structure which it confirms.” That premise, the Court has explained, has several parts. First, “each State is a sovereign entity in our federal system.” *Seminole Tribe of Fla. v. Florida* (1996). Next, “[i]t is inherent in the nature of sovereignty not to be amenable to [a] suit” absent consent.  And last, that fundamental aspect of sovereignty constrains federal “judicial authority.”

But not entirely. This Court has permitted a federal court to entertain a suit against a nonconsenting State on two conditions. First, Congress must have enacted “unequivocal statutory language” abrogating the States' immunity from the suit.  And second, some constitutional provision must allow Congress to have thus encroached on the States' sovereignty. . . . No one here disputes that Congress used clear enough language to abrogate the States' immunity from copyright infringement suits. . . . The contested question is whether Congress had authority to take that step. . . .

Congress has power under Article I “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” That provision—call it the Intellectual Property Clause—enables Congress to grant both copyrights and patents. And the monopoly rights so given impose a corresponding duty (*i.e.,*not to infringe) on States no less than private parties.

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. . . . . The Intellectual Property Clause . . . covers copyrights and patents alike. So it was the first place the [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))Court looked when deciding whether the Patent Remedy Act validly stripped the States of immunity from infringement suits. . . . [W]e said, Congress could not use its Article I power over patents to remove the States' immunity. We based that conclusion on [*Seminole Tribe*v. *Florida*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996077541&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), decided three years earlier. There, the Court had held that “Article I cannot be used to circumvent” the limits sovereign immunity “place[s] upon federal jurisdiction.” . . . And to extend the point to this case: if not the Patent Remedy Act, not its copyright equivalent either, and for the same reason. Here too, the power to “secur[e]” an intellectual property owner's “exclusive Right” under Article I stops when it runs into sovereign immunity. § 8, cl. 8.

Allen claims, however, that a later case offers an exit ramp from [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). In *Central Va. Community College v. Katz* (2006), we held that Article I's Bankruptcy Clause enables Congress to subject nonconsenting States to bankruptcy proceedings (there, to recover a preferential transfer). . . . But everything in [*Katz*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008249421&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism. . . . [*Katz*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008249421&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) focused on the Bankruptcy Clause's “unique history.” The Clause emerged from a felt need to curb the States' authority. The States, we explained, “had wildly divergent schemes” for discharging debt, and often “refus[ed] to respect one another's discharge orders.”  “[T]he Framers' primary goal” in adopting the Clause was to address that problem—to stop “competing sovereigns[ ]” from interfering with a debtor's discharge.  And in that project, the Framers intended federal courts to play a leading role. The nation's first Bankruptcy Act, for example, empowered those courts to order that States release people they were holding in debtors' prisons. So through and through, we thought, the Bankruptcy Clause embraced the idea that federal courts could impose on state sovereignty. In that, it was *sui generis*—again, “unique”—among Article I's grants of authority.

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. . . . [T]here is no difference between copyrights and patents under the Clause, nor any material difference between the two statutes' provisions. So we would have to overrule [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) if we were to decide this case Allen's way. But *stare decisis*, this Court has understood, is a “foundation stone of the rule of law.”  To reverse a decision, we demand a “special justification,” over and above the belief “that the precedent was wrongly decided.”

Section 5 of the Fourteenth Amendment, unlike almost all of Article I, can authorize Congress to strip the States of immunity. The Fourteenth Amendment “fundamentally altered the balance of state and federal power” that the original Constitution and the Eleventh Amendment. Its first section imposes prohibitions on the States, including (as relevant here) that none may “deprive any person of life, liberty, or property, without due process of law.” Section 5 then gives Congress the “power to enforce, by appropriate legislation,” those limitations on the States' authority. That power, the Court has long held, may enable Congress to abrogate the States' immunity and thus subject them to suit in federal court.

For an abrogation statute to be “appropriate” under Section 5, it must be tailored to “remedy or prevent” conduct infringing the Fourteenth Amendment's substantive prohibitions.  Congress can permit suits against States for actual violations of the rights guaranteed in Section 1. And to deter those violations, it can allow suits against States for “a somewhat broader swath of conduct,” including acts constitutional in themselves.  But Congress cannot use its “power to enforce” the Fourteenth Amendment to alter what that Amendment bars. That means a congressional abrogation is valid under Section 5 only if it sufficiently connects to conduct courts have held Section 1 to proscribe.

To decide whether a law passes muster, this Court has framed a type of means-end test. For Congress's action to fall within its Section 5 authority, we have said, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” On the one hand, courts are to consider the constitutional problem Congress faced—both the nature and the extent of state conduct violating the Fourteenth Amendment. That assessment usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong. On the other hand, courts are to examine the scope of the response Congress chose to address that injury. Here, a critical question is how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations. . . .

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In enacting the Patent Remedy Act, [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) found, Congress did not identify a pattern of unconstitutional patent infringement. . . . Given that absence of evidence, [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))held, the Patent Remedy Act swept too far. Recall what the Patent Remedy Act did—and did not. It abrogated sovereign immunity for any and every patent suit, thereby “plac[ing] States on the same footing as private parties.” . . . The statute's “indiscriminate scope” was too “out of proportion” to any due process problem.  It aimed not to correct such a problem, but to “provide a uniform remedy for patent infringement” writ large.  The Patent Remedy Act, in short, did not “enforce” Section 1 of the Fourteenth Amendment—and so was not “appropriate” under Section 5.

Could, then, this case come out differently? Given the identical scope of the CRCA and Patent Remedy Act, that could happen only if the former law responded to materially stronger evidence of infringement, especially of the unconstitutional kind. . . . Before enacting the CRCA, Congress asked the then-Register of Copyrights, Ralph Oman, to submit a report about the effects of the Eleventh Amendment on copyright enforcement. Oman and his staff conducted a year-long examination, which included a request for public comments eliciting letters from about 40 copyright holders and industry groups. The final 158-page report concluded that “copyright proprietors have demonstrated they will suffer immediate harm if they are unable to sue infringing states in federal court.” Is that report enough, as Allen claims, to flip [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))'s outcome when it comes to copyright cases against the States?

It is not. Behind the headline-grabbing conclusion, nothing in the Oman Report, or the rest of the legislative record, cures the problems we identified in [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). As an initial matter, the concrete evidence of States infringing copyrights (even ignoring whether those acts violate due process) is scarcely more impressive than what the [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))Court saw. Despite undertaking an exhaustive search, Oman came up with only a dozen possible examples of state infringement. . . . Neither the Oman Report nor any other part of the legislative record shows concern with whether the States' copyright infringements (however few and far between) violated the Due Process Clause. Of the 12 infringements listed in the report, only two appear intentional, as they must be to raise a constitutional issue. . . . Under [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the CRCA thus must fail our “congruence and proportionality” test. . . .

That conclusion, however, need not prevent Congress from passing a valid copyright abrogation law in the future. In doing so, Congress would presumably approach the issue differently than when it passed the CRCA. At that time, the Court had not yet decided [*Seminole Tribe*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996077541&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), so Congress probably thought that Article I could support its all-out abrogation of immunity. And to the extent it relied on Section 5, Congress acted before this Court created the “congruence and proportionality” test. For that reason, Congress likely did not appreciate the importance of linking the scope of its abrogation to the redress or prevention of unconstitutional injuries—and of creating a legislative record to back up that connection. But going forward, Congress will know those rules. And under them, if it detects violations of due process, then it may enact a proportionate response. That kind of tailored statute can effectively stop States from behaving as copyright pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice.

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iecca83196cc611eabcef83564c7863ab), concurring in part and concurring in the judgment.

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First, although I agree that *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank* (1999), is binding precedent, I cannot join the Court's discussion of *stare decisis*. The Court claims we need “ ‘special justification[s]’ ” to overrule precedent because error alone “cannot overcome *stare decisis*.” That approach “does not comport with our judicial duty under Article III.”  If our decision in [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))were demonstrably erroneous, the Court would be obligated to “correct the error, regardless of whether other factors support overruling the precedent.”  Here, adherence to our precedent is warranted because petitioners have not demonstrated that our decision in [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) “is incorrect, much less demonstrably erroneous.” . . .

Second, I do not join the Court's discussion regarding future copyright legislation. In my view, we should opine on “only the case before us in light of the record before us.”  We should not purport to advise Congress on how it might exercise its legislative authority, nor give our blessing to hypothetical statutes or legislative records not at issue here.

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JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iecca83196cc611eabcef83564c7863ab), with whom JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iecca83196cc611eabcef83564c7863ab) joins, concurring in the judgment.

The Constitution gives Congress certain enumerated powers. One of them is set forth in the Intellectual Property Clause: Congress may “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” “And the monopoly rights so given,” the Court acknowledges, operate against “States no less than private parties.” *Ante*, at 1006. States, in other words, have “a specific duty” not to infringe that “is assigned by law” and upon which “individual rights depend.” *Marbury v. Madison* (1803). One might therefore expect that someone injured by a State's violation of that duty could “resort to the laws of his country for a remedy,” especially where, as here, Congress has sought to provide one. . . .

Yet the Court holds otherwise. In its view, Congress' power under the Intellectual Property Clause cannot support a federal law providing that, when proven to have pirated intellectual property, States must pay for what they plundered.  To subject nonconsenting States to private suits for copyright or patent infringement, says the Court, Congress must endeavor to pass a more “tailored statute” than the one before us, relying not on the Intellectual Property Clause, but on § 5 of the Fourteenth Amendment.  Whether a future legislative effort along those lines will pass constitutional muster is anyone's guess. But faced with the risk of unfairness to authors and inventors alike, perhaps Congress will venture into this great constitutional unknown.

That our sovereign-immunity precedents can be said to call for so uncertain a voyage suggests that something is amiss. Indeed, we went astray in *Seminole Tribe of Fla. v. Florida* (1996), as I have consistently maintained. We erred again in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank* (1999), by holding that Congress exceeded its § 5 powers when it passed a patent counterpart to the copyright statute at issue here. But recognizing that my longstanding view has not carried the day, and that the Court's decision in [*Florida Prepaid*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146905&pubNum=0000780&originatingDoc=Iecca83196cc611eabcef83564c7863ab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))controls this case, I concur in the judgment.