



Copyright and State Sovereign Immunity: The *Allen v. Cooper* Decision

May 15, 2020

On March 23, 2020, the Supreme Court issued [its opinion](#) in *Allen v. Cooper*, concluding that Congress lacked the authority to enact the Copyright Remedy Clarification Act of 1990 (CRCA), which purported to abrogate state sovereign immunity in copyright infringement actions. The CRCA, which sought to remedy alleged state copyright infringement, [provides that](#) any “State, and any [State] instrumentality, officer, or employee” [shall be liable](#) for copyright infringement “in the same manner and to the same extent as any nongovernmental entity.” In *Allen*, the Supreme Court [held](#) that the CRCA was not a valid exercise of Congress’s constitutional powers under [Article I](#) or [Section 5](#) of the Fourteenth Amendment, although the opinion [leaves open](#) the possibility that a narrower congressional abrogation of state sovereign immunity for copyright suits might be constitutional.

The immediate practical effect of the decision is that copyright holders cannot sue state governments for copyright infringement without their consent. The decision’s broader significance lies in clarifying the limitations on Congress’s power to provide remedies for state constitutional violations. This Sidebar will review the law of state sovereign immunity, the dispute in *Allen v. Cooper*, the Court’s opinion, and the implications for Congress.

The Law of State Sovereign Immunity

Because states are separate and independent sovereigns within the U.S. federal system, they generally [cannot](#) be sued in state or federal court without their consent. Although Congress has some authority to abrogate state sovereign immunity—that is, to enact statutes authorizing certain lawsuits against states—this authority is [fairly narrow](#). First, Congress’s intent to abrogate state sovereign immunity must be “[unmistakably clear](#)” from the statutory language. Second, even an unmistakably clear abrogation is effective only when made under a “[valid grant of constitutional authority](#).”

In the 1996 case of *Seminole Tribe v. Florida*, the Supreme Court held that Congress [cannot](#) abrogate state sovereign immunity pursuant to its Article I powers, such as the [Commerce Clause](#). *Seminole Tribe* [acknowledged](#), however, that Congress could rely on Section 5 of the Fourteenth Amendment as a source of power to abrogate state immunity. In [later cases](#), the Court established that Congress may rely on the Fourteenth Amendment to abrogate state immunity only if there is “[a congruence and proportionality](#)” between the constitutional injuries that the abrogation legislation seeks to remedy, and the means

Congressional Research Service

<https://crsreports.congress.gov>

LSB10465

Congress uses to redress them. In determining whether legislation is congruent and proportional (and thus constitutional), courts examine (1) “the scope of the constitutional right at issue”; (2) whether Congress has “identified a history and pattern” of relevant constitutional violations by the states; and (3) whether the law’s scope is “out of proportion” to a valid remedial objective.

Applying this test in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Supreme Court in 1999 [invalidated](#) the Patent and Plant Variety Protection Remedy Clarification Act (the [Patent Remedy Act](#)), which purported to abrogate state sovereign immunity for patent infringement cases using nearly identical language as the CRCA. In enacting the Patent Remedy Act, Congress [pointed](#) to three potential sources of constitutional authority: the Commerce Clause; the [Intellectual Property \(IP\) Clause](#), which provides Congress power to grant patents and copyrights; and the Fourteenth Amendment. In light of *Seminole Tribe*, however, the parties [conceded](#) that Article I powers could not support the Patent Remedy Act, and the Court thus [agreed](#) that “the Patent Remedy Act cannot be sustained under either the Commerce Clause or the [IP] Clause.”

Instead, the primary issue in *Florida Prepaid* was whether the Patent Remedy Act was constitutional under Congress’s powers to enforce the [Fourteenth Amendment](#), which (among [other things](#)) provides that states shall not “deprive any person of . . . property, without due process of law.” On this issue, the Court found that although patents “[may be considered ‘property’](#)” within the meaning of the Due Process Clause, not all patent infringement by states would violate the Constitution. Rather, state patent infringement violates the Due Process Clause only when the infringement is both (1) “[intentional or reckless](#)” and (2) without [any adequate remedy](#) under state law. Because the congressional record supporting the Patent Remedy Act revealed only “a handful of instances of state patent infringement” that did not necessarily violate the Constitution, *Florida Prepaid* [held](#) that the Patent Remedy Act’s abrogation failed the congruence and proportionality test, and was therefore invalid.

In 2006, however, the Supreme Court limited the central holding of *Seminole Tribe* in *Central Virginia Community College v. Katz*, which addressed whether a bankruptcy trustee could sue to recover certain assets that a bankrupt business had transferred to several state-run schools. The state schools [moved](#) to dismiss the bankruptcy proceedings on the basis of state sovereign immunity. Although *Seminole Tribe* [broadly stated](#) that Congress could not abrogate state sovereign immunity pursuant to Article I powers, *Katz* [held](#) that one Article I power—the [Bankruptcy Clause](#)—could support the abrogation of state sovereign immunity. Rejecting the general statements of *Seminole Tribe* as “*dicta*,” the Court held that the history and purposes of the Bankruptcy Clause amounted to a waiver of state sovereign immunity effected by the “[plan of the \[Constitutional\] Convention](#)” itself. In reaching this conclusion, the Court relied on the *in rem* (i.e., property-based) nature of bankruptcy jurisdiction, and the Bankruptcy Clause’s purpose of establishing a [uniform federal response](#) to the problems created by the state-by-state patchwork of insolvency laws that existed before the Founding.

The Dispute in *Allen v. Cooper*

In 1717, the pirate Edward Teach (better known as Blackbeard) [captured](#) a French vessel and renamed her *Queen Anne’s Revenge*. The next year, the ship ran aground and Blackbeard abandoned her off the coast of North Carolina. In 1996, the private salvage firm Intersal [discovered](#) the wreck, and North Carolina’s Department of Natural and Cultural Resources (the Department) signed an agreement with Intersal to recover it. Intersal in turn retained Rick Allen, a videographer, to document the salvage effort, and Allen later [registered](#) copyrights in his photographs and videos of the recovery.

In 2013, after the Department posted some of Allen’s images online, Allen [accused](#) the Department of copyright infringement. The parties settled this dispute and entered into a settlement agreement. Subsequently, the Department [posted](#) several videos online that incorporated Allen’s copyrighted footage.

Allen then sued the Department and named state employees for copyright infringement. The Department [moved](#) to dismiss the suit based on state sovereign immunity.

The district court denied the motion to dismiss, [holding](#) that Congress had validly abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment. On appeal, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) [reversed](#), holding that Congress [could not](#) rely on the IP Clause to abrogate state sovereign immunity in light of *Florida Prepaid*, and that the CRCA [swept too broadly](#) to be valid legislation to enforce the Fourteenth Amendment. The Supreme Court granted certiorari in *Allen v. Cooper* on June 3, 2019.

The Decision in *Allen v. Cooper*

Justice Kagan wrote [the opinion](#) of the Court, which five other Justices joined in full. The opinion’s analysis closely tracks that of *Florida Prepaid*, which the Court states “[all but rewrote](#)” its decision in *Allen*. First, the Court [held](#) that Congress lacked power to abrogate state sovereign immunity in copyright suits under the IP Clause, concluding that *Florida Prepaid* was controlling on this point as a matter of [stare decisis](#). Given that the IP Clause [covers](#) “copyrights and patents alike,” if the Clause could not sustain the Patent Remedy Act, then it [cannot](#) support the “copyright equivalent” of the CRCA, “and for the same reason.” The Court roundly rejected the notion that *Katz* disturbed *Florida Prepaid*’s analysis on Article I abrogation, [concluding](#) that “everything in *Katz* is about and limited to the Bankruptcy Clause” and the “‘singular nature’ of bankruptcy jurisdiction.”

Second, the Court [concluded](#) that Congress did not validly abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment, which grants Congress the power to legislate to prevent and remedy due process violations by the states. The Court found that, in enacting the CRCA, Congress had [neither](#) identified a sufficient pattern of unconstitutional copyright infringements by the states [nor](#) tailored the CRCA’s remedies to actual constitutional violations. Specifically, the congressional record supporting the CRCA [identified](#) no more than a dozen state copyright infringements, most of which were not “willful” in nature—and therefore did not violate the Due Process Clause. Moreover, the legislative record contained “[no information](#)” about the availability of state law remedies that could alleviate any due process violation. Justice Kagan’s opinion [suggested](#), however, that the result in *Allen* “need not prevent Congress from passing a valid copyright abrogation law in the future,” if supported by an adequate legislative record and sufficiently tailored to unconstitutional copyright infringements by states.

Justice Thomas [wrote separately](#) to note his more limited view of stare decisis and to [question](#) whether copyrights are “property” under the Due Process Clause, but otherwise joined most of Justice Kagan’s opinion. Justice Breyer, joined by Justice Ginsburg, [concurred](#) only in the judgment on stare decisis grounds. Justice Breyer agreed that *Florida Prepaid* controlled the case, but [expressed](#) his “longstanding” view that the Court had erred in *Florida Prepaid* and other state sovereign immunity cases.

Implications for Congress

As a practical matter, the most direct effects of *Allen v. Cooper* are for copyright holders and users of copyrighted works. [Amici that supported Allen](#) feared that a decision upholding state sovereign immunity would increase uncompensated use of copyrighted works by states and their instrumentalities, such as state universities, [harming](#) the creators of those works economically, and [undermining](#) the incentives to create provided by copyright protection. Justice Breyer raised this concern at oral argument, [musing](#) about whether states could use their immunity to copyright suits to raise funds by setting up a website to show Hollywood movies online, without compensation to copyright holders.

It is far from clear that such fears are any more than hypothetical, however. [Amici that supported North Carolina](#), for their part, maintain that practical, political, and institutional constraints will [prevent](#) states

from abusing their sovereign immunity. On the contrary, they argue, the state immunity from copyright suits clearly established in *Allen* may benefit the public by [facilitating](#) the public mission of state universities and libraries, who are now freer from fears of copyright liability.

The broader legal effects of *Allen* relate to the scope of Congress’s power to abrogate state sovereign immunity. Prior to the decision, whether *Katz* unsettled the basic legal principle of *Seminole Tribe* (i.e., that Article I powers cannot be used to abrogate state sovereign immunity) was unclear. *Allen* firmly [establishes](#) that *Katz*’s holding is limited to the bankruptcy context, and that the Court will not engage in the sort of “[clause by clause](#)” Article I analysis that the petitioners in *Allen* had urged. *Allen* is also notable in that it appears that all nine Justices now accept *Seminole Tribe* as settled precedent, even though a substantial minority of Justices (some still on the Court) was “[not yet ready to adhere](#)” to the decision less than two decades ago.

To the extent that Congress disagrees with the outcome of *Allen v. Cooper*, it could seek to enact new abrogation legislation more narrowly tailored than the CRCA. *Allen* keeps open the Fourteenth Amendment as a source of abrogation authority, subject to the [fact-specific](#) “congruence and proportionality” test. The Court’s analysis in *Allen* [suggests](#) that such legislation would stand a greater chance of surviving constitutional scrutiny if (1) the supporting legislative record demonstrates a substantial “[history and pattern](#)” of intentional, unremedied state copyright infringement; and (2) the remedy is limited (or, at least tailored more closely) to intentional, unremedied state copyright infringement.

Author Information

Kevin J. Hickey
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS’s institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.