

DIGITAL BLACKBEARDS: COPYRIGHT INFRINGEMENT BY STATES AND THE “CONGRUENCE AND PROPORTIONALITY” TEST IN *ALLEN V. COOPER*

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I. INTRODUCTION

Today’s “[s]treaming [w]ars” have brought many new players into the market for subscriber dollars, with companies like Disney, Apple, and Amazon wading into an arena once originally dominated by Netflix and Hulu.¹ However, one might not expect to see the State of North Carolina enter the fray with its own streaming platform. Even more surprising might be the realization that, should North Carolina or any other state begin filling its treasury by charging consumers to stream unlicensed films, television shows, songs, or other copyrighted works on their websites, those states could do so without compensating copyright holders. Yet that is the implication of the Supreme Court’s recent decision in *Allen v. Cooper*.

The facts of the case concerned only a handful of copyrighted photographs and videos added to the State of North Carolina’s website without permission. The Justices, however, fully understood that the case’s implications could reach all copyright holders.² After all, if a state could post a photographer’s copyrighted images to its website without fear of facing monetary damages, it might be able to do the same with any number of other copyrighted works. Perhaps, noted Justice Breyer, a state might conceive of a “wonderful money-raising” venture whereby it charged consumers five dollars to watch the latest blockbuster on its own website.³ Under such a scheme, he continued, artists that created those works would “unfortunately receive nothing because

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1. See Jason Murdock, *Disney+, Netflix Streaming Wars Will Usher in New Age of Online Piracy, Warn Experts*, NEWSWEEK (Oct. 12, 2019, 6:30 AM), <https://www.newsweek.com/streaming-wars-apple-tv-plus-disney-plus-netflix-hulu-piracy-torrenting-risk-1464648> (discussing the significance of the arrival of new players in the entertainment streaming market).

2. See Transcript of Oral Argument at 36, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877).

3. *Id.*

everyone will have seen [their films] on the state's own streaming device."⁴ Similarly, Justice Kavanaugh speculated that a holding for North Carolina risked encouraging "rampant" copyright infringement by states, while Justice Sotomayor called the circumstances of the case "deeply troubling."⁵

Despite the harsh words and extreme hypotheticals during oral arguments, the Court returned a unanimous decision in favor of North Carolina.⁶ The holding protects even the most blatant copyright infringement when the pirates are states, giving them free reign to use copyrighted works however they choose, without the need to compensate creators.⁷ It is difficult to reconcile the Court's ultimate decision with the policy concerns that were evidently on the Justices' minds during oral arguments. The answer, however, rests in the doctrine of sovereign immunity.

Sovereign immunity gives state copyright pirates a tool far stronger than any sword wielded by Blackbeard, Jack Sparrow, or Long John Silver. Put simply, the doctrine prevents suits brought against non-consenting states in federal court. Though Congress has tried and, at times, succeeded in abrogating sovereign immunity, the Supreme Court made resoundingly clear in *Allen v. Cooper* that copyright holders do not have a recourse for obtaining damages against states under either Article I of the Constitution or any existing legislation passed through Congress's Fourteenth Amendment enforcement power.⁸

Sovereign immunity was built into the original constitutional framework of the United States at the behest of states worried that their treasuries would be depleted by countless lawsuits.⁹ The doctrine's abrogation can be permitted, however, where Congress enacts federal laws to combat unconstitutional behavior by states. However, Congress's power has its own limits. In *City of Boerne v. Flores*, the Court developed a "congruence and proportionality" test for assessing whether a given congressional action has overstepped its authority in curtailing unconstitutional behavior by states.¹⁰ In application, this "congruence and proportionality" test has proven challenging, yielding results

4. *Id.* at 37.

5. *Id.* at 39, 43.

6. *See Allen*, 140 S. Ct. at 999.

7. *See id.*

8. *See id.*

9. *See Alden v. Maine*, 527 U.S. 706, 720 (1999).

10. *See City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

that have been contradictory and frustrating.¹¹ This Note will explore why *Allen v. Cooper* is no exception.

After an overview of *Allen v. Cooper* in Part II, this Note will discuss the history, purpose, and abrogation of sovereign immunity in Part III. Part IV argues that the Supreme Court misapplied its congruence and proportionality test. While the Court maintained that its own precedent “prewrote” its decision in *Allen v. Cooper*, its reasoning leaves too much on the table and unconsidered.¹² The Court failed to grapple with the errors of its previous decisions and subsequently ignored differentiators that separated *Allen v. Cooper* from previous landmark cases, including differences between types of intellectual property and nuances of the relevant legislative record. Ultimately, in its overly rigid misapplication of its own precedent, the Court’s analysis became so heavily quantitative that it lost sight of the congruence and proportionality test’s genuine purpose. Part IV of the Note will then also discuss available congressional remedies, before concluding in Part V.

II. *ALLEN V. COOPER*

In a single calendar year, copyrighted works contribute over \$1.3 trillion dollars to the national GDP, amounting to roughly 7% of the U.S. economy.¹³ This number only stands to grow significantly in the future. From 2014 to 2017, industries revolving around copyrighted works grew at an annual aggregate rate of 5.23%, outpacing the rest of the U.S. economy by more than 137%.¹⁴ Contributing to this output is a workforce of nearly 5.7 million

11. See Michael J. Neary, Note, *Reversing a Trend: An As-Applied Approach Weakens the Boerne Congruence and Proportionality Test*, 64 MD. L. REV. 910, 936–38 (2005) (claiming that the Court’s use of the test in *Lane v. Tennessee*, 541 U.S. 509 (2004), conflicted with its application in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999)).

12. See *Allen*, 140 S. Ct. at 1007 (“*Florida Prepaid* all but prewrote our decision today.”).

13. Since 1990, the International Intellectual Property Alliance has measured the economic impact of copyright-related industries on the economy of the United States in a series of regular reports. This figure comes from their 2018 report, which is the most recent report, and is a conservative estimate only including “core copyright industries,” defined as those whose “primary purpose is to create, produce, distribute, or exhibit” materials that qualify for copyright protection. See STEPHEN E. SIWEK, INT’L INTELL. PROP. ALL., COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2018 REPORT 3 (2018), <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>. When the figure is expanded to include the “total” copyright industries, meaning those in which only aspects or portions of the products qualify for copyright protection, the number swells to \$2.2 trillion and roughly 11.59% of the United States economy. *Id.*

14. Like the previous figure, this one only pertains to “core” copyright industries. *Id.*

Americans.¹⁵ One of them is Frederick Allen, a videographer based in North Carolina.¹⁶

Starting in the mid-1990s, Allen spent nearly a decade working on a unique project for his home state.¹⁷ In 1996, Intersal, Inc., a marine salvage company, stumbled upon the sunken remains of a French slave ship that was captured by infamous pirate Blackbeard in 1717, rechristened as the pirate ship *Queen Anne's Revenge*, and run aground on a sandbar off the coast of Beaufort, North Carolina roughly one year later.¹⁸ Under federal and state law, the wreck belonged to the State, but North Carolina commissioned Intersal to lead the recovery of the sunken ship.¹⁹ Intersal, in turn, retained Allen to document the process, which he dutifully accomplished by capturing photographs and videos of the recovery.²⁰ He copyrighted each of his resulting works.²¹

Much like the ship he photographed, Allen soon found himself the victim of a modern-day pirate. In 2013, Allen noticed that North Carolina had uploaded his photographs onto its website without his permission.²² He sued for copyright infringement, and the State settled, agreeing to pay Allen \$15,000 for its infringement and laying out the parties' respective rights to the images moving forward.²³ Within two years, Allen alleged that the State violated the terms of the settlement when it posted five of Allen's videos online and used

15. *Id.*

16. *Allen*, 140 S. Ct. at 999.

17. *Id.*

18. *Id.*

19. *See* 43 U.S.C. § 2105(c); N.C. GEN. STAT. § 121–22 (2021). Notably, under the fifteen-year salvage agreement between North Carolina and Intersal, both parties acknowledged the state's ownership of the shipwreck and the company's salvage rights, which included the ability to “retain a designated portion of the financial proceeds arising from the sale of media relating to the *Revenge* and replicas of its artifacts.” *Allen v. Cooper*, 895 F.3d 337, 343 (4th Cir. 2018), *aff'd*, 140 S. Ct. at 994. Intersal retained “exclusive right to make and market all commercial narrative (written, film, CD Rom, and/or video) accounts” of the recovery. *Id.*

20. *Allen*, 140 S. Ct. at 999.

21. *Id.*

22. *Id.*

23. *Id.* The exact terms of the agreement are beyond the scope of this Note. Generally, the agreement divided Allen's footage into different categories, labeling some footage as “commercial documentaries” and some as “non-commercial media.” *See Allen*, 895 F.3d at 344. Intersal (with Allen as its designee) retained the exclusive right to produce a documentary about the recovery, which it would allow to be shown in public museums or for educational purposes. *See id.* Non-commercial media would be watermarked with the website for Allen's production company and was not to be displayed anywhere but the official website of the North Carolina Department of Natural and Cultural Resources, where a link to Intersal's and Allen's websites would be “clearly and visibly displayed.” *Id.* All remaining archival footage would be returned to Allen. *Id.*

one photograph in a newsletter.²⁴ Allen filed suit in federal court in 2015; this time, North Carolina refused to back down.²⁵ In an effort to get the case dismissed, the State cited the doctrine of sovereign immunity under the Eleventh Amendment, which prevents suits against non-consenting states in federal court.²⁶

The case would ultimately make its way to the Supreme Court, with Allen attempting to circumvent sovereign immunity in two ways. He argued first under Article I of the Constitution, which empowers Congress to grant both patents and copyrights in order to “promote the Progress of Science and useful Arts.”²⁷ The Court, however, had already rejected this reasoning. In its 1996 decision in *Seminole Tribe of Florida v. Florida*, the Court concluded that Article I could not be used to “circumvent” the limitations that sovereign immunity placed upon federal jurisdiction.²⁸ This was affirmed in 1999, when the Court’s decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* held unconstitutional the Patent Remedy Act’s attempt at abrogating sovereign immunity when states infringed on the rights of patent holders.²⁹ Allen pointed to *Central Virginia Community College v. Katz*, which allowed for the abrogation of sovereign immunity in bankruptcy proceedings under Article I.³⁰ The Court, however, concluded that *Katz* did not overrule *Seminole* or *Florida Prepaid* and was limited to the realm of bankruptcy proceedings.³¹ If Allen had a road to the abrogation of sovereign immunity, it would not be through Article I.

Allen’s second attempt at abrogation relied on Section Five of the Fourteenth Amendment. He pointed to the Copyright Remedy Clarification Act (CRCA) of 1990, which, he argued, appropriately leveraged Congress’s enforcement power under the Fourteenth Amendment to ensure that no state “deprive[s] any person of life, liberty, or property, without due process of

24. Allen’s complaint identified six “infringing works,” five of which were videos posted to YouTube and the other an image used in an article within a state-sponsored newsletter. *Id.* at 345.

25. *Allen v. Cooper*, 244 F. Supp. 3d 525 (E.D.N.C. 2017), *rev’d and remanded*, 895 F.3d at 337, *aff’d*, 140 S. Ct. at 994.

26. *Allen*, 140 S. Ct. at 999.

27. *Id.* at 1001 (quoting U.S. CONST. art. I, § 8, cl. 8).

28. *Id.* at 1002 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996)).

29. 527 U.S. 627 (1999).

30. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006). Far from abrogating sovereign immunity, the Bankruptcy Clause of Article I approached states as “competing sovereigns,” among whom federal courts could settle disputes in the face of “wildly divergent schemes” for discharging debt in different states. *Allen*, 140 S. Ct. at 1002–03 (quoting *Katz*, 546 U.S. at 365, 373).

31. *See Allen*, 140 S. Ct. at 1002–03.

law.”³² Unlike Article I’s Intellectual Property Clause, Section Five has been used by the Court to abrogate sovereign immunity, but only in certain circumstances.³³ Whether or not Allen’s case fell within one such circumstance required applying a test from *City of Boerne v. Flores*, under which congressional action was “appropriate” under Section Five only if there was “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”³⁴ This “congruence and proportionality” test functioned as an assessment of whether Congress’s means matched the ends of addressing a particular problem.³⁵ The assessment required looking at two variables. First, the Court needed to determine “the nature and the extent” of the constitutional problem facing Congress using the relevant legislative record as the clearest evidence.³⁶ Second, the Court considered the “scope” of Congress’s chosen response by asking whether the law it ultimately passed went beyond addressing actual constitutional violations.³⁷ Under this framework, only “reasonably prophylactic legislation” can pass muster.³⁸

In applying the “congruence and proportionality” test to Allen’s case, the Court claimed to have little wiggle room due to its established precedent.³⁹ Deciding to begin with the question of scope, the Court again turned to *Florida Prepaid*, its 1999 decision on the Patent Remedy Act.⁴⁰ Much like the CRCA in Allen’s case, the Patent Remedy Act aimed to abrogate sovereign immunity without limiting its scope to especially egregious cases involving non-negligent infringement or infringement explicitly authorized by state policy.⁴¹ The Court found that allowing for abrogation in instances where a state’s infringement had only been unintentional made the Patent Remedy Act’s scope unforgivably “indiscriminate.”⁴² Since the CRCA was effectively the copyright equivalent of the same statute, the Court reasoned that its scope was necessarily “identical” to that of the Patent Remedy Act, which is to say, likewise indiscriminate.⁴³

32. *Id.* at 1003 (quoting U.S. CONST. amend. XIV, § 1).

33. *Id.* at 1004.

34. *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)).

39. *Id.* at 1007.

40. *Id.* at 1004.

41. *Id.* at 1005.

42. *Id.* (quoting *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 646 (1999)).

43. *Id.* at 1006.

Apparently, no further analysis of copyright law or the statute itself was necessary.

Given this presumably broad scope, the CRCA could only survive the congruence and proportionality test if it had been passed off the back of exceptionally strong evidence of widespread constitutional violations.⁴⁴ Upon review, the Court was unsatisfied by the evidence. Once again, the Court's reasoning followed the example of *Florida Prepaid*. The previous decision had placed a significant amount of emphasis on the number of concrete examples of patent infringement, which were too few to "identify a pattern of unconstitutional" behavior.⁴⁵ The Court acknowledged a "significant disparity" between how Congress had created its legislative record when it passed the CRCA and the Patent Remedy Act.⁴⁶ The Court's conclusion regarding the evidence of the record, however, remained the same. Unlike the Patent Remedy Act, the CRCA was passed after Congress commissioned and reviewed a report from the then Register of Copyrights, Ralph Oman, who argued over the course of 158 pages that "copyright proprietors have demonstrated they will suffer immediate harm if they are unable to sue infringing states in federal court."⁴⁷ Despite the larger argument being made, the only data of interest to the Court were the dozen examples of infringement it counted throughout the document, only two of which it considered sufficiently intentional so as to be unconstitutional.⁴⁸ This figure, the Court concluded, was "exceedingly slight."⁴⁹

Comparing the "slight" evidence of harm to the "indiscriminate scope" of the statute meant that the CRCA could not survive *Boerne's* "congruence and proportionality" test as it had been applied in *Florida Prepaid*.⁵⁰ Having failed to abrogate sovereign immunity under Article I or Section Five, the CRCA was struck down, taking Allen's claim with it.⁵¹ The precedent was sufficiently clear that no Justice dissented, with Justices Breyer and Ginsburg only underlining in their concurrence that they found the Court's decisions in both *Seminole* and *Florida Prepaid* to be misguided but nevertheless controlling.⁵² Justice Thomas,

44. *Id.*

45. *Id.* at 1005.

46. *See id.* at 1006.

47. *Id.* (quoting REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFF., COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT 103 (1988)).

48. *Id.*

49. *Id.* at 1007.

50. *Id.*

51. *Id.*

52. *Id.* at 1009 (Breyer, J., concurring).

meanwhile, took issue with relatively minor aspects of the majority's opinion in his own concurrence.⁵³

If there was hope for copyright holders, it did not come from any dissenting voice but rather from a closing note in Justice Kagan's majority opinion.⁵⁴ The demise of the CRCA did not mean that Congress would never be able to pass a valid copyright law abrogating sovereign immunity; Congress would simply need to do so in light of the Court's recent decisions.⁵⁵ The CRCA had been passed before the decisions in *Seminole*, *Boerne*, and *Florida Prepaid*. Congress would now need to draft new legislation with a keen awareness of the hurdles these decisions placed in its path.⁵⁶ *Seminole*'s holding that Article I did not abrogate sovereign immunity meant that Congress needed to pass a new law properly abrogating the doctrine under Section Five. This could be achieved by intentionally creating a legislative record that linked the scope of the new law's abrogation to the unconstitutional injuries Congress was able to prove as per *Boerne*, *Florida Prepaid*, and now *Allen v. Cooper*.⁵⁷ Such a "tailored statute" could, the Court concluded, "effectively stop States from behaving as copyright pirates" and ultimately "bring digital Blackbeards to justice."⁵⁸ Reviewing the case and its precedent further, however, suggests that alternative recourses were possible.

III. ABROGATION OF SOVEREIGN IMMUNITY

A. INTRODUCING SOVEREIGN IMMUNITY

Understanding the legal arguments that ultimately doomed Allen's case requires understanding the history and context from which the Eleventh Amendment emerged. While sovereign immunity is sometimes referred to as "Eleventh Amendment immunity," the phrase is only a "convenient shorthand" and ultimately something of a "misnomer."⁵⁹ The actual text of the Amendment only bars suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."⁶⁰ It does not

53. *See id.* at 1007–08 (Thomas, J., concurring) (taking issue with the majority's conception of binding precedent as demanding "special justification[s]" in order to be overruled, disagreeing with the majority's dicta on future copyright legislation, and questioning whether it was established law that copyrights are property under the Fourteenth Amendment).

54. *Id.* at 1007 (majority opinion).

55. *See id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Alden v. Maine*, 527 U.S. 706, 713 (1999).

60. U.S. CONST. amend. XI.

explicitly preclude suits brought against a state by one of its own citizens, like Frederick Allen bringing a claim against his home state of North Carolina. Ultimately, it is not the text but rather the history of the Eleventh Amendment that gives it its teeth. Thus, as with much of American law, the story of *Allen v. Cooper* begins not with a photographer's copyright infringement claim or even the pirate ship he photographed, but with the Founders themselves and their understanding of the Constitution.

In the eighteenth century, it was largely taken for granted that sovereigns (both literal monarchs and governing states) could not be hauled into court.⁶¹ The notion came from English law. Under the feudal system, no lord could be sued by his vassal in his own court, but each lord could face a suit in the court of a higher lord.⁶² Since the king sat at the top of the feudal pyramid, there was no higher court that could try him, meaning that sovereign immunity “rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong.”⁶³ This led Blackstone, whose works were the primary authority on the English legal landscape at the time of the Founders, to describe the concept as a common law rule that “no suit or action can be brought against the king, even in civil matters.”⁶⁴ Under Blackstone's conception, immunity and sovereignty were inextricably linked. Jurisdiction necessarily implied a “superiority of power” because a court's authority to try someone suggested a similar authority to enforce its judgment, and giving domestic courts such power to command a sovereign would necessarily undermine that sovereign's power.⁶⁵ As a result, by the time of the Founders, the concept of bringing suit against one's sovereign was a “thing unknown to the law,” and so much so that explicitly forbidding it was considered “hardly necessary to be formally asserted” when the Framers drafted the Constitution.⁶⁶

Nonetheless, discussions surrounding sovereign immunity became heated in the early days of independence. Following the Revolutionary War, several states were deeply in debt and concerned that the creation of a new federal sovereign would “subject them, like lower English lords, to suits in the courts of the ‘higher’ sovereign,” leaving their treasuries vulnerable.⁶⁷ The subsequent

61. See *Hans v. Louisiana*, 134 U.S. 1, 16 (1890) (discussing the Founders' perspective on sovereign immunity).

62. *Nevada v. Hall*, 440 U.S. 410, 415 (1979), *overruled by* *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019).

63. *Id.*

64. 1 WILLIAM BLACKSTONE, COMMENTARIES *235.

65. *Id.*

66. *Hans*, 134 U.S. at 16.

67. *Hall*, 440 U.S. at 418.

debate focused on the scope of judicial powers under Article III of the Constitution, which gave federal courts jurisdiction over “[c]ontroversies . . . between a State and Citizens of another State.”⁶⁸ Antifederalists considered it “humiliating and degrading” that a state might be called to answer “the suit of an individual” in federal court.⁶⁹ Federalists meanwhile maintained that this was neither the intent nor the implication of the Article, which would only allow for suits in which states were plaintiffs attempting to recover from individuals, not ones in which they were themselves defendants.⁷⁰ In his *Federalist Papers*, Alexander Hamilton attempted to placate worried antifederalists by affirming his commitment to sovereign immunity, which he saw as “inherent in the nature of sovereignty” and “the general practice of mankind.”⁷¹ Forcing a state to both meet claims brought by individuals and then adhere to the decisions of a federal court, he continued, was akin to “waging war” against the state and “altogether forced and unwarrantable.”⁷² Given these assurances, certain state conventions agreed to ratify the Constitution, but only with the understanding that their immunity remained intact.⁷³ The Constitution was, of course, eventually ratified along with the controversial language of Article III, despite antifederalist fears.

Only five years later, these fears were confirmed by the Supreme Court’s decision in *Chisholm v. Georgia*. The case, which concerned a citizen of South Carolina attempting to recover payment for goods sold to Georgia during the Revolutionary War, concluded with the stunning finding that a state could, in

68. U.S. CONST. art. III, § 2, cl. 1.

69. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1494 (2019) (quoting noted Antifederalist “Brutus,” the anonymous author of a series of essays designed to discourage New Yorkers from ratifying the proposed Constitution from 1787 to 1788).

70. Noting the “unusual vehemence” with which Article III had been met, John Marshall proclaimed, “I hope no gentleman will think that a state will be called at the bar of the federal court. . . . The intent is, to enable states to recover claims of individuals residing in other states.” *Alden v. Maine*, 527 U.S. 706, 718 (1999) (quoting 3 JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 555–56 (2d ed. 1854)). Echoing the point that states would only be plaintiffs but not defendants in such federal cases, James Madison underscored that it was “not in the power of individuals to call any state into court” at the Virginia ratification convention. *See id.* at 716–17 (quoting 3 ELLIOT, *supra*, at 533).

71. *Id.* (quoting THE FEDERALIST NO. 81, at 411 (Alexander Hamilton) (Ian Shapiro ed., 2009)).

72. *Id.* (quoting THE FEDERALIST NO. 81, at 412 (Alexander Hamilton) (Ian Shapiro ed., 2009)).

73. The New York Convention declared that its understanding was “[t]hat the judicial power of the United States, in cases in which a state may be a party, does not . . . authorize any suit by any person against a state” and underlined that it ratified the Constitution only “[u]nder these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution.” *Id.* at 718–19 (quoting 1 ELLIOT, *supra* note 70, at 329).

fact, be held liable in suit to a private individual from another state.⁷⁴ The Court's reasoning hinged largely on the use of the word "between" in Article III, which seemed to grant federal courts jurisdiction in any case involving both a state and an out-of-state opponent, regardless of which party was the plaintiff.⁷⁵ Imagining various possible government misdeeds, the Court presented its holding as a check on a state government's power in the name of "love of morality" and insisted that the nation, having just recently escaped "the vices of old Governments," could readily appreciate that "individuals had been victims to the oppression of States."⁷⁶ However, it seemed that even the Justices themselves understood that the holding would likely be met with criticism. One pointed out that if the Constitution was "inconvenient in practice," then perhaps an amendment was in order but that in the meantime, "all offices Legislative, Executive, and Judicial, both of the States and of the Union, are bound by oath to support it."⁷⁷ Indeed, an amendment was just around the corner.

The country's reaction to *Chisholm v. Georgia* demonstrated just how deeply ingrained the concept of sovereign immunity was to the founding generation. Newspapers condemned the "unexpected blow" to state sovereignty and worried that there might be a sudden raid on state treasuries.⁷⁸ The Massachusetts legislature characterized the decision as "repugnant to the first principles of a federal government."⁷⁹ The state House of Representatives in Georgia, the losing defendant in *Chisholm*, quickly passed a bill providing that anyone attempting to enforce the decision would be "guilty of [a] felony and shall suffer death, without benefit of clergy, by being hanged."⁸⁰ The most effectual response occurred in the U.S. Congress. The day after the *Chisholm*

74. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

75. The Court also dismissed the idea that the order of the parties in Article III was somehow instructive, writing,

The order in this instance, works no difference. In common language too, it would not violate the substantial idea, if a controversy, said to be between A. B. and C. D. should appear to be between C. D. and A. B. Nay the opportunity fairly occurs in two pages of the judicial article, to confine suits to States, as plaintiffs; but they are both neglected, notwithstanding the consciousness which the convention must have possessed, that the words, unqualified, strongly tended at least to subject States as defendants.

Id. at 421.

76. *Id.* at 422–23.

77. *Id.* at 468 (Cushing, J., concurring).

78. *See Alden*, 527 U.S. at 720.

79. *Id.* at 720 (quoting 15 ALEXANDER HAMILTON, PAPERS OF ALEXANDER HAMILTON 314 (Harold C. Syrett & Jacob E. Cooke eds., 1969)).

80. *Id.* at 721 (internal quotation marks omitted).

decision was announced, representatives in the House proposed an amendment to the Constitution, and within two months it had made its way through both houses.⁸¹ The result was the Eleventh Amendment.

The Eleventh Amendment was thus a product of the specific circumstances under which it was adopted, and this bore out in its language. Its text only speaks to suits brought against states by out-of-state plaintiffs, as had been the case in *Chisholm* due to the apparent loophole left open by Article III.⁸² “Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision.”⁸³ Presumably, Congress thought it did not need to “draft with a broader brush” by providing sweeping language about the general sovereignty of states and the immunity it allowed, since the national consensus was that states already had that sovereignty in the first place.⁸⁴ Rather than change the system, the Eleventh Amendment simply restored the original constitutional design to its pre-*Chisholm* status.⁸⁵

In the centuries since Congress adopted the Eleventh Amendment, it has been understood to stand “not so much for what it says, but for the presupposition...which it confirms.”⁸⁶ While the text of the Amendment might appear to restrict only Article III diversity jurisdiction of federal courts, the Court has consistently rejected strict readings of the Amendment’s text and instead offered unequivocal endorsements of the doctrine of sovereign immunity.⁸⁷ As a result, the Court has prohibited suits against non-consenting

81. *Id.*

82. *See* U.S. CONST. amend. XI.

83. *Alden*, 527 U.S. at 723.

84. *Id.* at 724.

85. *See id.* at 722.

86. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

87. The Court deemed one rigidly textualist reading of the Amendment “an attempt to strain the [C]onstitution and the law to a construction never imagined or dreamed of.” *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). It continued, asking,

Can we suppose that, when the [E]leventh [A]mendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that [C]ongress, when proposing the [E]leventh [A]mendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the [C]onstitution or laws of the United S[t]ates, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

Id.

states in many different circumstances.⁸⁸ Consistent through many of these decisions is a commitment to protecting state treasuries from otherwise limitless litigation.⁸⁹ While *Chisholm v. Georgia* was a lightning rod that brought sovereign immunity to the forefront of the national conversation, sovereign immunity in the United States “neither derives from, nor is limited by,” the text of the Amendment it inspired.⁹⁰

If Frederick Allen wanted his infringement claim against the state of North Carolina to succeed, he would first need to circumvent the Eleventh Amendment before the suit could be considered on its merits.

B. ABROGATION OF SOVEREIGN IMMUNITY

Fortunately for Frederick Allen, the doctrine of sovereign immunity can and has been abrogated in limited circumstances. Generally, abrogation falls into three buckets.

First, the *Ex parte Young* exception to the Eleventh Amendment holds that sovereign immunity does not bar citizens from enjoining state officers or officials from enforcing laws that violate the Constitution. Such a suit is not considered to be “against the state” but rather against the individual.⁹¹ This exception is limited, however, because it only applies to injunctions and cannot be leveraged to gain a retroactive award or compensate for monetary losses resulting from the state official’s misbehavior.⁹² This route was thus

88. *See* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1496 (2019) (collecting cases).

89. The Court’s treatment of sovereign immunity cases has hinged on protecting a state’s treasury from actions brought by individuals, with its firm stance being that whenever a suit is “in essence one for the recovery of money from the state, [then] the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit.” *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 464 (1945), *overruled by* *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002); *see* *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

90. *Alden*, 527 U.S. at 713.

91. *See Ex parte Young*, 209 U.S. 123, 154 (1908) (quoting *Smyth v. Ames*, 169 U.S. 466, 519 (1898)).

92. Though the *Ex Parte Young* exception might still have “an ancillary effect on the state treasury” that is “permissible and often an inevitable consequence,” it does not permit “any form of relief [that] may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled ‘equitable’ in nature.” *See Edelman*, 415 U.S. at 666, 668; *see also* *Hagood v. Southern*, 117 U.S. 52 (1886); *Ex parte Ayers*, 123 U.S. 443 (1887) (both showing the historical basis for the Court’s holding that the Eleventh Amendment can still bar actions aiming for equitable relief against state officials).

unavailable to Allen, who aimed to recover monetary damages for an infringement that had already occurred.⁹³

The second bucket of exceptions concerns states implicated by in rem bankruptcy proceedings. The Court has held that in ratifying the Bankruptcy Clause of Article I of the Constitution, states agreed not to assert sovereign immunity when faced with bankruptcy proceedings.⁹⁴ Far from undermining the sovereignty of the states, however, the Bankruptcy Clause approached them as “competing sovereigns,” among whom federal courts can settle disputes in the face of “wildly divergent schemes” for discharging debt in different states.⁹⁵ Bankruptcies are the exception that proves the rule. Allen argued that since the Bankruptcy Clause of Article I abrogated sovereign immunity, then perhaps the Intellectual Property Clause of Article I might too, but the Court quickly rebuked his argument.⁹⁶ Bankruptcy proceedings thus did not provide a workable route for Allen’s attempt at abrogation.

The third bucket is the most relevant to *Allen v. Cooper* and also the most nebulous: abrogation by congressional action. In order to abrogate sovereign immunity, Congress must first have “unequivocally expresse[d] its intent to abrogate [sovereign] immunity” within a given piece of legislation.⁹⁷ Second, Congress must have acted “pursuant to a valid exercise of power.”⁹⁸ Determining whether Congress has genuinely acted within the boundaries of its own power has proven complicated, even with the advent of the congruence and proportionality test.

93. An injunction—rather than monetary relief—would be insufficient to copyright holders like Allen after states had already infringed on their copyrights. Justice Breyer illustrated this point during the case’s oral arguments, offering a hypothetical in which a state streamed an individual’s copyrighted film in order to flood its treasury with rental fees. An injunction that prevented the state from continuing to stream the film tomorrow would do little for the copyright holder who had missed out on the streaming revenue from yesterday. See Transcript of Oral Argument at 38, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877).

94. See *Central Virginia Community College v. Katz*, 546 U.S. 356, 375–77 (2006) (allowing for the abrogation of sovereign immunity in bankruptcy proceedings under Article I).

95. See *id.* at 365–70, 373 (contrasting the difficulties that arose from conflicting bankruptcy laws between states, which the Court saw as “peculiar to the American experience,” with the clarity of English law, where having a single sovereign meant “a single discharge could protect the debtor from his jailer and his creditors”).

96. See *Allen*, 140 S. Ct. at 1002–03 (explaining that the Bankruptcy Clause did not simply allow Congress to abrogate sovereign immunity but rather abrogated sovereign immunity in and of itself). Further action by Congress was unnecessary in the realm of bankruptcy because states had already consented to the abrogation of sovereign immunity. See *id.* This did not, the Court continued, invite the clause-by-clause examination of Article I that Allen relied upon. See *id.*

97. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

98. *Id.*

1. *The Congruence and Proportionality Test*

The congruence and proportionality test is fundamentally a check on congressional authority, which was itself expanded by the Fourteenth Amendment.⁹⁹ Enacted in the wake of the Civil War, the Amendment ensured that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹⁰⁰ Meanwhile, Section Five gives the Amendment its enforcement power, granting Congress the authority to “enforce” it “by appropriate legislation.”¹⁰¹ This Amendment expanded the reach of the federal legislature into the realm of state prerogatives and thus “fundamentally altered the balance of state and federal power struck by the Constitution.”¹⁰²

That this federal power would have limits was understood and demanded even before the Amendment was adopted.¹⁰³ The Amendment was not, after all, intended to give Congress free reign to trample state autonomy but merely “allow[ed] Congress to correct the unjust legislation of the States.”¹⁰⁴ Broad interpretations of this purpose, which developed in the nineteenth century and survived into the twentieth, pushed a conception of Congress as able to pass any legislation, so long as the “end[s] be legitimate” and the means “not prohibited, but consist[ent] with the letter and spirit of the [C]onstitution.”¹⁰⁵ Other cases more firmly maintained that “[a]s broad as the congressional enforcement power is, it is not unlimited.”¹⁰⁶ Ultimately, the Court came to describe Congress’s power under Section Five as “remedial” rather than

99. *See Allen*, 140 S. Ct. at 1003.

100. U.S. CONST. amend. XIV, § 1.

101. *Id.* § 5.

102. *See Seminole Tribe*, 517 U.S. at 59.

103. The Amendment’s original wording granted Congress power to “make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens,” but that proposal was resoundingly defeated by congressmen like William Stewart of Nevada, who felt that the language went too far in granting Congress so much power that “there would not be much left for the State Legislatures.” *See City of Boerne v. Flores*, 521 U.S. 507, 520–21 (1997) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034, 1082 (1866)), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

104. *See id.* at 522 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866)).

105. *See Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966) (resurrecting the language of Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), more than a century later to conclude that the Fourteenth Amendment was a “positive grant of legislative power” that enabled Congress to “exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment”).

106. *See Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (“[T]he power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.”).

“substantive.”¹⁰⁷ The distinction suggests that Congress can use its enforcement power remedially in order to prevent unconstitutional actions by states but cannot pass “general legislation upon the rights of the citizen” by substantively defining new rights under the guise of the Fourteenth Amendment.¹⁰⁸

The line between congressional action that is substantive and that which is remedial is admittedly murky. The *City of Boerne v. Flores* “congruence and proportionality” test was an attempt to provide clarity.¹⁰⁹ While admitting that the distinction between the remedial and the substantive was “not easy to discern” and that Congress should be granted “wide latitude” to determine where that distinction lies, the Court nevertheless underlined that “the distinction exists and must be observed.”¹¹⁰ The rule it offered was ostensibly simple. Writing for the majority, Justice Kennedy explained, “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”¹¹¹ At its core, the congruence and proportionality test as explained in *Boerne* was simply a tool for assessing overall appropriateness. Strong remedial measures that might be justified when implemented to address a problem in one context might be found entirely out of proportion and entirely unwarranted when used to address a lesser problem.¹¹² As a result, the *Boerne* Court advocated for considering Congress’s “remedial measures . . . in light of the evil presented.”¹¹³

In actually applying the congruence and proportionality test in *Boerne*, the Court eschewed a confusing list of enumerated factors and instead engaged in a qualitative and holistic assessment of the legislation at hand. At issue was the Religious Freedom Restoration Act (RFRA), passed in 1993 in an effort to combat any state law that targeted religious beliefs and practices.¹¹⁴ The Act prevented a state from “substantially burden[ing]” an individual’s exercise of their religion unless the government could demonstrate that the burden represented the “least restrictive means” of furthering a “compelling governmental interest.”¹¹⁵ The Court weighed different facets and implications

107. See Civil Rights Cases, 109 U.S. 3, 13 (1883); *Boerne*, 521 U.S. at 519–20.

108. *Boerne*, 521 U.S. at 525 (quoting *Civil Rights Cases*, 109 U.S. at 13).

109. *Id.* at 520.

110. *Id.* at 508.

111. *Id.*

112. *Id.* at 530.

113. *Id.*

114. *Id.* at 529.

115. 42 U.S.C. § 2000bb-1, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

of the Act. It began (but notably did not conclude) its analysis with an assessment of the historical record that Congress considered when it passed the Act, finding that no examples of the religious persecution that the Act allegedly addressed had occurred in the forty years prior to its enactment.¹¹⁶ Since the Act applied to any burden experienced by a religious group, it stood to impact a large swath of state laws, providing “[s]weeping coverage” that would “ensure its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”¹¹⁷ In addition, the Court found that the RFRA’s “stringent” nature was overly burdensome for states because it would likely prove difficult to counter a plaintiff’s allegation that their religious expression had been burdened.¹¹⁸ Meanwhile, the test required the state to show it had used the least restrictive means for furthering its interest.¹¹⁹ All this amounted to “the most demanding test known to constitutional law.”¹²⁰ In short, the RFRA’s reach was far, its scope enormous, and its burden onto states quite considerable—all in the name of combating an evil that might not have been a meaningful problem in the first place. There was no congruence or proportionality between the problem and its attempted solution, so the Court concluded that Congress, in passing the RFRA, had acted beyond “its sphere of power and responsibilities” under the Fourteenth Amendment.¹²¹

In the years since *Boerne*, the congruence and proportionality test has failed to bring the clarity that the Court aspired for in its majority opinion. Academics have criticized the inconsistent manner in which the test has been applied, as well as the “divergent and arbitrary” decisions it has prompted.¹²² *Allen v. Cooper* continued this tradition.

116. *Boerne*, 521 U.S. at 530.

117. *Id.* at 532.

118. *Id.* at 533–34.

119. *Id.*

120. *Id.* at 534.

121. *Id.* at 535.

122. See Y. Frank Ren, Note, *Fixing Fourteenth Amendment Enforcement Power: An Argument for a Rebuttable Presumption in Favor of Congressional Abrogation of State Sovereign Immunity*, 94 B.U. L. REV. 1459, 1476 (2014) (arguing that the “congruence and proportionality” test be abandoned altogether); see also Neary, *supra* note 11, at 936–38 (claiming that the Court’s use of the test in *Tennessee v. Lane*, 541 U.S. 509 (2004), was a novel “as-applied” approach that focused on whether the remedy was justified in one specific context, as opposed to assessing Congress’s chosen remedy “as a whole”). Neary noted that if the *Florida Prepaid* Court had used this methodology, the Patent Remedy Act would likely have passed the congruence and proportionality test. Neary, *supra* note 11, at 938.

IV. CONGRUENCE AND PROPORTIONALITY IN *ALLEN V. COOPER*

Frederick Allen's claim in *Allen v. Cooper* sat at the fulcrum of precariously balanced doctrines involving the competing rights of states and the authority of Congress. *Boerne* did not offer any bright-line rules, involved no exhaustive list of factors, and did not suggest that any variable should be weighed as more significant than any other.¹²³ Notably, the test involved some consideration of the relevant legislative record, but if examining historical examples of unconstitutional activity was the starting point of the Court's analysis, it was by no means its end point.¹²⁴ In *Boerne*, the congruence and proportionality test helped the Court broadly consider the scope, reach, and stringency of a congressional action to arrive at a holistic conclusion.¹²⁵

Neither *Florida Prepaid* nor *Allen v. Cooper* received this level of considered analysis. As a result, both cases were poorly decided. Both decisions eschewed holistic considerations of the statutes at hand in favor of a strict review of the relevant historical record. This ignored the intent of the congruence and proportionality test and reduced it to a rote and overly quantitative exercise in counting historical examples. As Justices Breyer and Ginsburg suggested in their concurrence, the Court "erred" in *Florida Prepaid*.¹²⁶ However, the fact that their "longstanding view has not carried the day" did not necessarily doom Allen's case in the manner the Justices suggested.¹²⁷ The nature of the historical record and facets of intellectual property law should have distinguished Allen's case, making the Court's holding in *Allen v. Cooper* an even more egregious mistake than *Florida Prepaid*. The ultimate effect of the decision is a waste of congressional resources for the sake of a test with an increasingly unclear benefit.

A. APPLYING THE CONGRUENCE AND PROPORTIONALITY TEST

Applying the congruence and proportionality test as it was conceived in *Boerne* requires looking first at the problem that the CRCA aimed to address and then at the scope of the solution it offered. Nuances of the legislative record suggest that evidence of state infringement should not be as casually dismissed as it was by the Court. Meanwhile, distinctions between patent and copyright suggest that the scope of the CRCA was not entirely settled by

123. See *supra* text accompanying notes 114–21.

124. See *supra* text accompanying notes 114–21.

125. See *supra* text accompanying notes 114–21.

126. *Allen v. Cooper*, 140 S. Ct. 994, 1009 (2020) (Breyer, J., concurring).

127. See *id.*

Florida Prepaid and demands its own consideration, a step in the congruence and proportionality analysis that the Court declined to perform.

1. *The Nature and Extent of the “Evil Presented”*

As described in *Boerne*, the congruence and proportionality test demands analyzing the appropriateness of a remedial action “in light of the evil presented,” which in turn requires identifying the “evil” or injury that Congress was aiming to prevent.¹²⁸ The Court has typically done so by turning to the legislative findings that compelled Congress’s action in the first place.¹²⁹

While a close look at the relevant legislative record is important, it is not a dispositive inquiry. *Boerne* is very clear that the legislative record is but one factor, not the deciding factor in the congruence and proportionality test.¹³⁰ Even in *Boerne*, where the Court found no examples of generally applicable laws passed because of religious bigotry, it still maintained that the hole in the legislative record was “not RFRA’s most serious shortcoming.”¹³¹ Then again in *Florida Prepaid*, where the Court devoted all but the final three paragraphs of its case-specific analysis to the legislative record at hand, the Court still maintained that a “lack of support in the legislative record is not determinative.”¹³² The congruence and proportionality test in *Boerne* does not offer a specific quantitative tipping point at which a given number of examples in the legislative record suddenly render a remedy appropriate under Section 5. It is instead useful to approach the legislative record as a thumb on the scale, whereby a particularly severe or particularly frequent “evil” will demand a particularly forceful response from Congress.¹³³

Yet *Allen v. Cooper* was explicitly decided on the nature of its legislative record. Having already decided that the scope of the CRCA was identical to

128. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803; see also Neary, *supra* note 11, at 935 (explaining that the first step in the analysis of *Tennessee v. Lane*, 541 U.S. 509 (2004), was “identifying the rights that Congress intended to enforce through passage of Title II of the ADA and the congressional findings that compelled Congress to pass Title II”).

129. See *Boerne*, 521 U.S. at 530.

130. See *id.* at 531 (“Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but ‘on due regard for the decision of the body constitutionally appointed to decide.’” (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part))).

131. *Id.*

132. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 646 (1999).

133. See *Boerne*, 521 U.S. at 530 (“Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966))).

the “indiscriminate” scope of the Patent Remedy Act in *Florida Prepaid*,¹³⁴ the Court decided that the CRCA could only survive a congruence and proportionality inquiry if the legislative record included “stronger evidence” of infringement.¹³⁵ Upon review, the Court was unimpressed by what it found.¹³⁶ In its hastiness to dismiss the legislative record as too quantitatively slight, the Court lost sight of nuances within the evidence that suggest that Congress had identified a legitimate problem that was only likely to increase.

It is impossible to argue that there was no evidence of copyright infringement by states at the time that the CRCA was passed.¹³⁷ One might claim, and the Court certainly did, that the evidence was not overwhelming, but state-sanctioned infringement of copyrights was certainly occurring, even if it was not overwhelming.¹³⁸ The Court examined a 158-page report compiled by the then-Register of Copyrights, Ralph Oman (“Oman Report”), who maintained after a year-long inquiry that “copyright proprietors have demonstrated they will suffer immediate harm if they are unable to sue infringing states in federal court.”¹³⁹ Rather than engage with the reasoning or qualifications within the Oman Report, the Court simply counted the number of examples of infringement. It was willing to concede that there were a dozen instances of state infringement, counting seven court cases and five “anecdotes,” of which it felt only two were intentional.¹⁴⁰ The Court was willing to acknowledge that unconstitutional copyright infringement had occurred even at the time that the CRCA was passed but wagged its finger that so few examples were not “the stuff from which Section 5 legislation ordinarily arises.”¹⁴¹ It did not, however, go so far as to offer any guidance regarding how many examples it would need to see before it could permit Congress to intervene.¹⁴² If one dozen was insufficient, it is unclear if two dozen would have been acceptable, or three or four dozen. Simply counting the number of cases makes for an unsatisfying application of the congruence and proportionality test because *Boerne* eschewed any specific quantitative threshold in favor of a general assessment of appropriateness that demands

134. *See infra* Section IV.A.2 (examining the Court’s analysis of the scope of the CRCA); *Allen v. Cooper*, 140 S. Ct. 994, 1005–06 (2020).

135. *Allen*, 140 S. Ct. at 1006.

136. *Id.*

137. *See supra* text accompanying notes 44–49.

138. The Court’s contention was that the legislative record did not feature enough examples, but it did concede that some of the examples evidenced genuine unconstitutional infringement by states. *See Allen*, 140 S. Ct. at 1006.

139. *Id.* (quoting U.S. COPYRIGHT OFF., *supra* note 47, at 103).

140. *Id.*

141. *Id.*

142. *See id.*

more than counting. As a result, the Court's application strays from the heart of the congruence and proportionality inquiry.

Evidence within the Oman Report may have been limited, but there were reasons for these limitations. First, the evidence before Congress was from a limited period of time.¹⁴³ Congress commissioned the Oman Report in the wake of the Court's decision in *Atascadero State Hospital v. Scanlon* in 1985, which held that "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."¹⁴⁴ The decision was seen as a departure from previous decisions, which had been more flexible in the abrogation of sovereign immunity.¹⁴⁵ In response to *Atascadero*, courts across the country suddenly concluded that the Copyright Act lacked the sufficiently unequivocal language necessary for abrogating sovereign immunity.¹⁴⁶ Thus, that states were immune from liability for copyright infringement was still a relatively new idea when Congress commissioned the Oman Report in 1987 and later passed the CRCA in 1990.¹⁴⁷ Therefore, the dozen or so examples cited in the Oman Report, which included two recent cases before the Fourth and Ninth Circuits, had all occurred within the last decade before the CRCA.¹⁴⁸ By comparison, the record of patent infringement by states at issue in *Florida Prepaid* showed only eight examples of infringement suits prosecuted against states in the 110 years between 1880 and 1990.¹⁴⁹ Thus, the Court's conclusion that the evidence motivating the CRCA and the Patent Remedy Act were "equivalent" is reductive.¹⁵⁰ The former's evidence suggested a growing trend, while the latter showed scant evidence over the course of a century. At the very least, the CRCA stood on firmer evidentiary ground than had the Patent Remedy Act.

The Oman Report should be understood as representing merely the "tip of the iceberg" of copyright infringement by states, due to the limitations of

143. See Brief of Ralph Oman as Amicus Curiae Supporting Petitioners at 14, *Allen*, 140 S. Ct. 994 (No. 18-877) [hereinafter Oman Brief].

144. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845.

145. See Oman Brief, *supra* note 143, at 6–7 (citing *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1284–85 (9th Cir. 1979), as an example of a circuit court permitting before *Atascadero* the abrogation of sovereign immunity under the Copyright Act).

146. See *id.* (referencing several decisions).

147. See *id.* at 14.

148. See *id.* at 7, 14.

149. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (noting that the legislative record of the Patent Remedy Act only included two examples and that it was actually the Federal Circuit's opinion that offered additional research to bring the count to eight).

150. See *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

Oman's methodology.¹⁵¹ As head of the Copyright Office, Oman was well informed on the subject matter but did not have the subpoena power necessary to create a genuinely comprehensive catalogue of infringement by states.¹⁵² Rather than seeking public comment, he instead depended on a "modest request for information" sent to a "relatively small group of individuals and organizations savvy enough to be aware of the notice and to prepare and submit responsive comments."¹⁵³ At the time, this did not strike Oman as a problem. He understood his task as helping Congress understand the "practical problems" faced by copyright holders under the Eleventh Amendment, as opposed to creating an inscrutable record that would survive a congruence and proportionality test not yet developed by the Court.¹⁵⁴ As a result, he prepared an overview intended as "illustrative rather than exhaustive."¹⁵⁵ The Oman Report should thus be read as providing a flavor of the kinds of infringement experienced by copyright holders and the range of industries being threatened. When read in that light, it is easier to appreciate the diversity of the data in the report, which included complaints from individuals, small and large businesses, and companies spanning numerous industries, including healthcare, the arts, education, and financial data.¹⁵⁶ In simply counting the number of examples, the Court took the Oman Report as overly literal, imagining that it showcased the full extent of state infringement, which was never its intended function.

The Oman Report successfully highlighted a real problem that only grew in the decades after the CRCA. In October 1990, Congress passed the CRCA, citing the Oman Report as "persuasive" evidence of an increasingly serious problem that would "continue to occur if this legislation . . . is not enacted."¹⁵⁷ Congress's predictive judgment has proven accurate, especially after the Court's own decisions signaled that the CRCA might be overturned. The Fifth Circuit was first to overturn the CRCA in 2000, correctly predicting that it was "doomed in the wake of" the Court's 1999 decision in *Florida Prepaid*.¹⁵⁸ The decision likely discouraged other plaintiffs from mounting cases against infringing states, and yet a recent compilation identified more than 150 copyright cases filed against states in the twenty years since the Fifth Circuit's

151. Oman Brief, *supra* note 143, at 13.

152. *Id.*

153. *Id.*

154. *See id.*

155. *Id.* at 14.

156. *Id.* at 12.

157. Oman Brief, *supra* note 143, at 19 (quoting H.R. REP. NO. 101-282, at 8 (1989)).

158. *Chavez v. Arte Publico Press*, 204 F.3d 601, 608 (5th Cir. 2000).

decision.¹⁵⁹ The cases cover widely different industries. Public universities and schools distributed unauthorized electronic copies of books, with one instance leading to the infringing distribution of nearly 100 copyrighted books in a single academic year.¹⁶⁰ Software company Oracle submitted its own amicus brief detailing its legal battle with the state of Oregon, in which the state pirated millions of dollars' worth of copyrighted software after reneging on a contractual waiver of its Eleventh Amendment rights.¹⁶¹ Getty Images, the British-American media company, identified fifty instances of copyright infringement by states.¹⁶² The Software & Information Industry Association, a trade association representing 800 technology companies, undertook its own review and discovered seventy-seven matters involving infringement by state entities over the course of just six years.¹⁶³ Even if the data within the legislative record of the CRCA was limited, the intervening years have made clear that infringement of copyright by state actors continued to damage copyright holders even before the Act was formally struck down by the Court in *Allen v. Cooper*. In short, the Oman Report's predictive analysis was correct.

By placing so much emphasis on a quantitative review of the Oman Report, the Court too casually dismissed evidence that Congress weighed when it passed the CRCA in 1990. Interpreting the Oman Report as an illustrative snapshot of infringement by states, rather than a comprehensive catalog, demonstrates that the evil of state copyright infringement existed at the time of the CRCA and has remained pervasive ever since.

2. *The Scope of Congress's Remedial Action*

Having determined that the legislative history of the CRCA was lacking, Justice Kagan devoted little time in her majority opinion in *Allen v. Cooper* to assessing the scope of the CRCA.¹⁶⁴ The congruence and proportionality test only demands an appropriateness between the problem identified and the means used to address it. As a result, a slight or particular problem might still be appropriate if addressed through a necessarily slight or particular remedy. As such, even a limited legislative record might still satisfy the congruence and proportionality test if it corresponds to a deliberately limited congressional

159. Oman Brief, *supra* note 143, at 19–20.

160. See Brief of the Copyright Alliance and the Chamber of Commerce of the United States as Amici Curiae in Support of Petitioner at 15, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877).

161. See Brief of Oracle America, Inc. as Amicus Curiae in Support of Petitioners at 1–3, *Allen*, 140 S. Ct. 994 (No. 18-877).

162. See Brief of the Copyright Alliance and the Chamber of Commerce, *supra* note 160, at 13–16.

163. See *id.*

164. *Allen*, 140 S. Ct. at 1006–07.

remedy. Deciding that the legislative record of the CRCA was limited did not necessarily render it inherently unconstitutional and should not have been the extent of the Court's analysis.

The Court did not assess the scope of the CRCA because it took for granted that its scope was "identical" to that of the Patent Remedy Act.¹⁶⁵ Having already decided in *Florida Prepaid* that the scope of the Patent Remedy Act was "indiscriminate," meaning that "[a]n unlimited range of state conduct" would trigger abrogation of sovereign immunity, the Court took at face value that the same was true of the CRCA.¹⁶⁶ However, the scope of the CRCA was not as "indiscriminate" as the Court alleged, at least not by the standards dictated by the *Boerne* test.¹⁶⁷ In both *Florida Prepaid* and *Allen v. Cooper*, the Court limited its assessment of scope to the fact that neither the Patent Remedy Act nor the CRCA confined the abrogation of sovereign immunity to a particular subset of infringement cases.¹⁶⁸ This reasoning fails to consider the other parameters that limit the scope of the CRCA, particularly those that are unique to copyright law and had not already been examined in *Florida Prepaid*.

The CRCA was first limited in terms of subject matter. The CRCA applied exclusively to copyright infringement cases against states, meaning it did not intrude upon a large swath of unrelated state laws. This set both the CRCA and the Patent Remedy Act apart from the Religious Freedom Restoration Act (RFRA) originally at issue in *Boerne*, where the Court first developed the congruence and proportionality test. In contrast, the RFRA was not limited to any subject matter or cause of action and imposed a test upon all laws that might burden the exercise of any individual's religion.¹⁶⁹ Under the RFRA, a potential plaintiff could have brought a claim against any "branch, department, agency, instrumentality, and official"¹⁷⁰ citing any federal or state law, "statutory or otherwise," adopted before or after the RFRA's enactment.¹⁷¹ In *Boerne*, the Court distinguished the RFRA from the Voting Rights Act of 1965, which had also been passed under Congress's Section Five enforcement power but was smaller in its reach and scope, only affecting a "discrete class" of laws (in that case, state voting laws).¹⁷² Here, the CRCA was more like the Voting

165. *Id.* at 1007.

166. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646–47 (1999).

167. *Allen*, 140 S. Ct. at 1007.

168. *Id.* at 1005.

169. 42 U.S.C. § 2000bb-1, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

170. *Id.* § 2000bb-2.

171. *Id.* § 2000bb-3.

172. *See Boerne*, 521 U.S. at 531–33 (discussing *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)).

Rights Act than the RFRA because it only stood to impact a discrete set of claims, copyright infringement suits brought against states. In terms of its impact on state laws, the CRCA was even more limited than both the RFRA and the Voting Rights Act because it had no impact at all on any substantive rule of state law.¹⁷³ Unlike the RFRA, the CRCA identified a single problem and enabled a single judicial route for addressing that problem without imposing newfound scrutiny of existing state laws governing unrelated interests.

In confining its scope to the realm of copyright, the CRCA was also limited because copyright is an inherently limited doctrine, even more so than patent law. Unlike patents, which grant protection over ideas, copyrights grant protection over the original expression of an idea.¹⁷⁴ As a result, copyright law leaves room for various permitted uses that patent law does not. For example, independent creation by a second comer who has not actually copied another's work as a factual matter will not lead to liability.¹⁷⁵ Similarly, the merger doctrine holds that copyright protection cannot extend to the expression of an idea that can only reasonably be expressed in so few ways that protecting the expression will result in protecting the idea itself.¹⁷⁶ Furthermore, the existence of a robust fair use defense allows the repurposing of copyrighted works for "criticism, comment, news reporting, teaching . . . , scholarship, or research."¹⁷⁷ These various acceptable uses amount to safe harbors in which a state could not be held liable due to the innate limitations of copyright protection. Similar acceptable uses are not available in the realm of patent law, making copyright liability a more limited cause of action than patent

173. In *Florida Prepaid*, Justice Stevens made a similar argument that the Patent Remedy Act had "no impact whatsoever on any substantive rule of state law, but merely effectuates settled federal policy to confine patent infringement litigation to federal judges." See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 662 (1999) (Stevens, J., dissenting).

174. See *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 151 (S.D.N.Y. 1924) (discussing an illustrative example involving two mapmakers, who collect firsthand evidence to create maps of the same terrain but will not infringe on one another's copyrights even if their maps are practically identical); *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (exploring the distinction between copyrights and patents).

175. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[B] (release no. 116, 2022) ("[W]hen two works are substantially similar with respect to protectible expression, if the defendant did not copy as a factual matter, but instead independently created the work at issue, then infringement liability must be denied."); see *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478 (1974).

176. See *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1143 (11th Cir. 2007) (noting that something as basic as using a circle with a line drawn through it to connote that a certain activity or object is not permitted in a given location cannot be copyrighted, because there are so few ways to express that idea).

177. 17 U.S.C. § 107.

infringement.¹⁷⁸ By extension, the CRCA was necessarily tailored to a more limited range of misconduct than was the Patent Remedy Act at issue in *Florida Prepaid*, which undermines the Court's conclusion that the "scope of the two statutes is identical."¹⁷⁹ In reality, the limitations of copyright law built limitations into the scope and reach of the CRCA that were not present in *Florida Prepaid*. For the sake of assessing congruence and proportionality, these limitations decrease the scope of the CRCA to ensure it is proportional to the problem of state copyright infringement.

Further acceptable uses are spelled out under Title 17 of the United States Code, offering states other circumstances in which they could evade liability without citing the doctrine of sovereign immunity. Under § 110, Congress had already provided states with additional protections for government uses of copyrighted materials intended to benefit the public.¹⁸⁰ Specifically, the provision exempts government bodies from liability when performing various works at agricultural or horticultural fairs,¹⁸¹ the "systematic mediated instructional activities of a governmental body,"¹⁸² and in performances "specifically designed for and primarily directed to blind or other handicapped persons."¹⁸³ Meanwhile, public schools can evade liability for the "performance or display of a work" by either students or their teachers "in the course of face-to-face teaching activities."¹⁸⁴ These additional safe harbors further speak to the inherent limitations of copyright that reduce the proportionality of the CRCA's impact on state actors. The CRCA may not have built-in original limitations on state liability, but that does not render the scope of the Act as "indiscriminate" as the Court imagined in its holding.¹⁸⁵ Instead, its scope was already defined by the limitations of copyright law itself.

Where the reach of the CRCA is broad, it is so by necessity. *Boerne* noted that the presence of termination dates or geographic restrictions within Section Five legislation will "tend to ensure Congress' means are proportionate to ends

178. See Brief of the Copyright Alliance and the Chamber of Commerce, *supra* note 160, at 18.

179. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

180. 17 U.S.C. § 110.

181. *Id.* § 110(6).

182. *Id.* § 110(2).

183. *Id.* § 110(8).

184. *Id.* § 110(1).

185. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020); see Brief of the Copyright Alliance and the Chamber of Commerce, *supra* note 160, at 18 (discussing both the sections of 17 U.S.C. § 110 above, as well as §§ 108 and 504(c)(2), pertaining to research performed in libraries and reproductions by educational institutions, respectively).

legitimate under” its enforcement power.¹⁸⁶ In the context of the Voting Rights Act, for example, this took the form of additional procedural requirements that would only remain in effect for seven years and were imposed upon only jurisdictions with a history of discriminatory practices.¹⁸⁷ Admittedly, no such restrictions were present in the CRCA, but it is difficult to imagine what they might actually have been. Unlike voting rights, which are tied to a particular place because one can only vote in one location, the rights of copyright holders require broad protection across different geographical regions because of the vast availability of copyrighted works in both electronic and hard copy formats. As a result, limiting the CRCA’s impact to certain states or a given temporal window would be “impractical to the point of [being] self-defeating” because it would undermine the legislation’s ability to secure “uniform, dependable, nationwide protection.”¹⁸⁸ Furthermore, while the *Boerne* Court noted that such restrictions might be helpful for measuring the proportionality of congressional action, “[t]his [was] not to say, of course, that [Section] 5 legislation requires termination dates, geographic restrictions, or egregious predicates.”¹⁸⁹ As a result, it should not count against the CRCA’s proportionality that it did not include any temporal or geographic restrictions.

The Court was too quick to assume that the scope of the CRCA was necessarily overly broad. By relying on the similarities between copyright and patents, it oversimplified its inquiry. The Court too heavily relied on the fact that it had previously found the scope of the Patent Remedy Act to be cripplingly indiscriminate in *Florida Prepaid*, thus overlooking contextual limitations that explain why the relevant legislative record was limited. Together, these factors suggest relevant nuances that the Court did not meaningfully consider in its application of the congruence and proportionality test.

B. CONGRESSIONAL REMEDIES FOR THE COURT’S DECISION IN *ALLEN*
V. COOPER

Ultimately, *Allen v. Cooper* leaves Congress with a command to go back to the drawing board. Acknowledging that the “congruence and proportionality” test had not been invented until after the CRCA was enacted, the Court invited the legislature to “enact a proportionate response” now that it “know[s] [the] rules” for abrogating sovereign immunity under its enforcement powers.¹⁹⁰ If

186. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

187. *See id.*

188. Reply Brief for Petitioners at 24, *Allen*, 140 S. Ct. 994 (No. 18-877).

189. *Boerne*, 521 U.S. at 533.

190. *See Allen*, 140 S. Ct. at 1007.

Congress jumps through judicial loopholes, the Court suggested, a new law might “bring digital Blackbeards to justice.”¹⁹¹ While useful as a call to action, this advice showcases the shortcomings of the Court’s analysis in *Allen v. Cooper*.

The Court, or at least the majority opinion authored by Justice Kagan, seemed confident that Congress can, and perhaps even should, pass a new law that will effectively duplicate the CRCA to achieve its intended purpose.¹⁹² The Court offered that when Congress passed the CRCA, it “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.”¹⁹³ Should Congress conduct its research again and build a longer list of constitutional violations, “it may enact a proportionate response,” and “[t]hat kind of tailored statute can effectively stop States from behaving as copyright pirates.”¹⁹⁴ Notably, the Court did not dispute that state copyright infringement is a problem or even that it can be remedied under Congress’s Section Five powers. The Court did not consider abrogation under these circumstances fundamentally unjustified or somehow an affront to the balance between state and federal powers. Instead, while it may have found the CRCA’s legislative record too slight, the Court’s frustration was not that the record’s shortcomings suggest a lack of unconstitutional violations but rather that those violations simply were not appropriately documented as of 1990. Implicit within Justice Kagan’s majority opinion is an acknowledgement that curtailing state infringement is a worthwhile endeavor but one that will require Congress return to a topic it already identified, studied, and addressed through legislation a full three decades ago—all in the name of satisfying a vague congruence and proportionality test with uncertain quantitative demands.

Congress, it seems, heard the Court’s advice and is willing to follow Justice Kagan’s prescription, even if doing so is not an especially productive use of congressional resources.¹⁹⁵ Understanding the significance of the Court’s holding in *Allen v. Cooper* and noting that they were “concerned about the impact [it] may have on American creators and innovators,” Senators Thom Tillis (R-North Carolina) and Patrick Leahy (D-Vermont) took up Kagan’s

191. *See id.*

192. *Id.*

193. *Id.*

194. *See id.*

195. Letter from Sens. Thom Tillis & Patrick Leahy to Acting Register of Copyrights and Dir. of the U.S. Copyright Off. Maria Strong (Apr. 28, 2020), <https://www.copyright.gov/policy/state-sovereign-immunity/letter.pdf>.

challenge.¹⁹⁶ Barely a month after the Court's holding, they sent a pair of letters to both the U.S. Copyright Office and the U.S. Patent and Trademark Office, requesting a study on the impact of infringement by states.¹⁹⁷ Grateful that *Allen v. Cooper* offered a "blueprint for how to validly abrogate State sovereign immunity from certain copyright infringement claims," the Senators asked for help in "identifying a pattern of unconstitutional infringement" with consideration for the extent to which such infringement resulted from "intentional or reckless conduct."¹⁹⁸ The Senators asked that the results be delivered so that "Congress can evaluate whether legislative action needs to be taken."¹⁹⁹ Regardless of those results, neither *Boerne*, nor *Florida Prepaid*, nor *Allen v. Cooper* provided a quantitative benchmark for developing a sufficient legislative record. As a result, Senators Tillis and Leahy were left with a relatively complicated task: creating a robust legislative record that must include a certain number of examples (at the risk of sinking the legislation otherwise) but without a clear mandate as to how many examples will prove sufficient.

A new legislative record and a more tailored statute may satisfy the congruence and proportionality test, but it is far from clear why satisfying that test is useful. Considering that the Court appeared willing to recognize that the CRCA addressed a legitimate problem, contending only that it failed under the parameters of the congruence and proportionality test, one must wonder whether it is the test and not the legislation that is insufficient. The test requires that congressional actions abrogating sovereign immunity be assessed only as they existed at the moment of their enactment, which curtails Congress's ability to pass prophylactic legislation. Even where Congress successfully identifies a problem barreling forward like a train on its tracks, the congruence and proportionality test prevents Congress from stepping out of its way and instead demands that Congress only provide a remedy after the point of collision.²⁰⁰

Additional scholarship should examine whether or not the "congruence and proportionality" test is the proper tool for assessing the abrogation of sovereign immunity in the first place.²⁰¹ One can imagine many different

196. *Id.* at 1.

197. *Id.*

198. *Id.* at 1–2.

199. *Id.* at 2.

200. Limiting Congress's Fourteenth Amendment powers to actions justified by a historical record would require that the legislature "await maximal state violations before laboring to fashion minimalist, patchwork federal remedies that *might* withstand judicial review." See Reply Brief for Petitioners, *supra* note 188, at 2.

201. For discussion and criticism of the "congruence and proportionality" test, see, for example, Ren, *supra* note 122, at 1461; Randolph J. Haines, *Getting to Abrogation*, 75 AM. BANKR. L.J. 447 (2001); Joseph M. Pellicciotti & Michael J. Pellicciotti, *Sovereign Immunity* &

models that might be more efficient. Alternatives might involve recalibrating the Court's analysis to place less emphasis on the historical record, allowing Congress to be more forward-thinking with its legislation, instead of being constrained by the past. Perhaps rather than asking the Court to second-guess Congress, the test should be replaced with judicial deference toward a rebuttable presumption in favor of congressional abrogation, as one scholar has advocated.²⁰² To the other extreme, should the Court remain committed to its quantitative analysis, its approach would be more actionable if it were accompanied by an explicit benchmark. Regardless of the exact nature of the solution, there is ample room for improvement.

Ultimately, the Court's acknowledgement that a new and tailored law might bring digital Blackbeards to justice signaled both that Congress can abrogate sovereign immunity to protect copyright holders from infringing states and that doing so might benefit copyright holders.²⁰³ Congress seems poised to try to do so, even at the expense of its own time and energy.

V. CONCLUSION

Senators Tillis and Leahy may have found the Court's decision in *Allen v. Cooper* to be a useful blueprint,²⁰⁴ but that assessment is generous. In applying *Boerne's* congruence and proportionality test, an inquiry originally intended to assess the general appropriateness of congressional efforts to abrogate, sovereign immunity became rigid and quantitative. The Court's decision skirted meaningful analysis of the CRCA's scope, deciding instead to gesture to a decision from twenty years ago in *Florida Prepaid*, which concerned a different strand of intellectual property law, without considering the meaningful differentiators that separate copyrights from patents. Such distinctions could have distinguished *Allen v. Cooper* from *Florida Prepaid* and should not have been left unconsidered. Having dismissed the question of scope entirely, the Court placed the entire weight of its decision-making on a purely quantitative inquiry into the CRCA's legislative record. Yet, while the Court suggests that congruence and proportionality can be addressed by simple counting, it does not offer a quantitative threshold it might instead have

Congressionally Authorized Private Party Actions Against the States for Violation of Federal Law: A Consideration of the U.S. Supreme Court's Decade Long Decisional Trek, 1996–2006, 59 BAYLOR L. REV. 623 (2007); William J. Rich, *Hiding in Plain View: A Path Around Sovereign Immunity for State Government Employees*, 25 WM. & MARY BILL RTS. J. 1179 (2017).

202. This is the solution for which Y. Frank Ren advocates in his own Note, arguing that a rebuttable presumption would be a “return[] to a deferential approach that nevertheless retains some space for state sovereignty.” Ren, *supra* note 122, at 1461.

203. See *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

204. See *supra* text accompanying notes 195–99.

found satisfying. It also ignored relevant nuances that explain the shortcomings of the legislative record.

Senators Tillis and Leahy are left to construct a new legislative record that they have been told must include more examples in order to meet an imagined threshold, though exactly how many more examples are required remains unclear. In the meantime, while we may not actually see *Pirates of the Caribbean* and other blockbusters streaming on www.nc.gov, artists and inventors alike will remain adrift and at the mercy of whichever state pirates decide to flex their Eleventh Amendment muscles.

