A CONSTITUTIONAL EDUCATION: USE OF THE ENFORCEMENT CLAUSE TO LIMIT THE UNFORTUNATE EFFECT OF THE QUALIFIED IMMUNITY DOCTRINE

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INTRODUCTION

Too often, claims under 42 U.S.C. § 19831 (“§ 1983 claims”) are meritorious, yet plaintiffs leave the courtroom uncompensated and defendants leave the courtroom unsanctioned. In many instances a civil rights violation has occurred, but the defendant asserts qualified immunity and the case is closed before trial,2 without any enforcement of the guarantees of the Fourteenth Amendment.3 Although the court may pronounce that there was a constitutional violation prior to dismissing the case on qualified immunity grounds, such a pronouncement has no real effect, as the case will still be dismissed without a judgment being entered against the defendant.4 And if there is no repercussion for violating the law, then there is no real enforcement of that law; such is the unfortunate effect of the qualified immunity doctrine.

According to the doctrine of qualified immunity, a viable § 1983 action will be dismissed against a state or local official5 if “[the offi-
cial's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A "reasonable officer" is not expected to know the most recent developments or nuances in the law. However, if it becomes obligatory for him to possess such knowledge, the "reasonable officer" will become one with a higher knowledge base, which will lead to higher expectations from the courts regarding what a "reasonable officer" would have known. An officer who is required to know about constitutional law is less capable of seeking refuge in the doctrine of qualified immunity.

This Comment explores what Congress can do through legislation to facilitate the creation of a more well-informed police force nationwide, so that the "reasonable person" as discussed in Harlow v. Fitzgerald, is one with a higher knowledge base of constitutional law. An officer with greater knowledge will raise the courts' expectations of what constitutes a "reasonable person." It will be more difficult for §1983 defendants to successfully assert qualified immunity, making pre-trial dismissals of §1983 actions less common; therefore making recovery and vindication more likely for §1983 plaintiffs.

There are multiple means by which Congress can achieve a similar end of a better informed police force and the resulting decrease in the success of qualified immunity assertions. These include the creation of a federal program to educate the officers or the attachment of a condition on spending that would require the states to educate their own officers. However, these will not be the focus of this Comment. Rather, this Comment focuses solely on the use of Section 5 of the Fourteenth Amendment, known as the "Enforcement Clause." In spite of the significant obstacles to Congress's use of the Enforcement Clause announced in City of Boerne v. Flores, I contend that the language used by the Court in City of Boerne and its other recent

Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes"). For a further discussion of Monroe and its impact on the shaping of §1983 litigation, see Rudovsky, supra note 2, at 28-31.


7 Although Harlow uses the phrase "reasonable person," the constitutional guarantees to which this Comment will refer are only enforceable against the state. Therefore, the only "person[s]" who need to know the law are state and local law enforcement officials. I will be treating "reasonable person" as the equivalent of "reasonable officer."

8 The creation of a federal program that uses only federal resources to educate law enforcement officers does not appear to implicate any constitutional problems.


10 U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

11 521 U.S. 507, 520 (1997) (announcing for the first time the congruence and proportionality standard).
cent Enforcement Clause decisions\textsuperscript{12} demonstrates that passing legislation to educate law enforcement officers is an appropriate and constitutional use of Congress's enforcement power.

Prior to discussing my proposal's viability under the Enforcement Clause jurisprudence, however, Part I will first discuss the qualified immunity doctrine as developed by the Supreme Court. Part II explains how the "Educate Law Enforcement Officers Act" ("ELEO")\textsuperscript{13} constitutes enforcement of the Fourteenth Amendment and thus fits squarely within the language of Section 5. Part III analyzes the line of cases that developed the congruence and proportionality standard, beginning with \textit{City of Boerne}, and then demonstrates how ELEO satisfies that standard. Finally, Part IV concludes the Comment and includes a brief discussion of the beneficial effects ELEO will have for prosecutors.

\textbf{I. QUALIFIED IMMUNITY\textsuperscript{14}}

\textbf{A. The Development of the Qualified Immunity Doctrine}

Qualified immunity cases stretch back over twenty-five years, and have undergone a significant change since the doctrine's inception as a defense to § 1983 claims. The immunity defense was first applied to § 1983 actions in \textit{Pierson v. Ray},\textsuperscript{15} where the Supreme Court concluded that Congress did not intend to abolish common law immunities, available for false arrest and imprisonment cases, when it enacted § 1983.\textsuperscript{16} The Supreme Court held that a defense of "good faith and probable cause" was available to the defendants in this action.\textsuperscript{17} Because the law that the defendant police officers relied upon in arresting the plaintiffs was later deemed invalid, the Court stated in


\textsuperscript{13} The "Educate Law Enforcement Officers Act" is the name I have given to my proposed hypothetical piece of legislation that, if passed by Congress, would mandate the education of all law enforcement officers.

\textsuperscript{14} Aside from my belief that qualified immunity too often prevents a civil rights plaintiff from obtaining compensation, I am not providing an extensive critique of the doctrine altogether. In Part II, I intend to provide an overview of the Supreme Court's development of the doctrine. Many other authors have devoted entire articles to the topic of qualified immunity, and I encourage the interested reader to examine other articles. See, e.g., Alan K. Chen, \textit{The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests}, 81 IOWA L. REV. 261, 267 (1995) (providing an extensive critique and suggesting, among other things, that there should be "immunity rules" rather than "immunity standards").

\textsuperscript{15} 386 U.S. 547 (1967) (applying immunity to Mississippi police officers when African American ministers brought a § 1983 action against them).

\textsuperscript{16} \textit{Id.} at 554.

\textsuperscript{17} \textit{Id.} at 557.
upholding a claim of immunity that "a police officer is not charged with predicting the future course of constitutional law." The Court proceeded to discuss the significance of the intent of the arresting officers. The Court concluded that although the law was not invalid at the time the arresting officers relied upon it, the case had to be remanded to the trial court for a determination of whether the arrest was to "[preserve] the custom of segregation in Mississippi" or "for the purpose of preventing violence." It is evident that the Court deemed the subjective intent of the officers an integral part of the immunity analysis.

Following Pierson, the Supreme Court began to extend the doctrine of qualified immunity. In Wood v. Strickland, the Court more clearly enunciated the two-pronged nature of the qualified immunity standard when it stated that immunity will not be granted if the defendant "knew or reasonably should have known that the action he took within his sphere of responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]." The Court enunciated both objective and subjective prongs to the qualified immunity test. Therefore, only "if the [defendant] has acted with such an impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith" could a plaintiff recover damages under the Strickland test.

This dual standard, however, was short-lived. The two-pronged analysis developed in Wood v. Strickland required a determination by the fact finder of the subjective motivation of the defendant. The need for such a finding made the pretrial dismissal of a § 1983 case on qualified immunity grounds unlikely, thus potentially exposing defendants to lengthy and ultimately unnecessary litigation. Accordingly, the Supreme Court decided to eliminate the subjective prong of the qualified immunity test in Harlow v. Fitzgerald. The Supreme Court announced that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

18 Id.
19 Id.
20 420 U.S. 308 (1975) (considering a § 1983 suit between plaintiff high school students and the defendant school board members).
21 Id. at 322.
22 Id.
known." Today, this is the standard to which claims of qualified immunity are judged.

Harlow also illustrates the Court’s acknowledgment that when qualified immunity is asserted by an official, the Fourteenth Amendment goes unenforced. The Court stated that “action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.” If qualified immunity precludes damage actions, then qualified immunity is blocking the only “avenue” to enforcement and vindication. The Court, however, does not appear to see this as a significant problem.

Cases that have reached the Supreme Court after Harlow have expounded upon this standard without providing any substantial change. In Anderson v. Creighton the Supreme Court again addressed “whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action.” The Court restated its test for qualified immunity, stating “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right” and “that in the light of pre-existing law the unlawfulness must be apparent.” Some of the language employed by Justice Scalia in reaching his seemingly impossible conclusion that the officer in Anderson “reasonably acted unreasonably” provides support for the contention that officers educated under ELEO will be less capable of claiming qualified immunity. The Court, through Justice Scalia, stated that the “relevant question” in Anderson was “whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officer possessed.” Perhaps an officer informed of the relevant case law, in this instance Fourth Amendment case law, could be presumed to possess more extensive “information.” Further, the Court restated its belief that qualified immunity is meant to protect officials from personal liability “as long as their actions are reasonable in light of current American law.” However, the Court did not answer how officers are supposed to know if their actions conform to “American law” if they are unaware of what the law is.

24 Id. at 818.
25 See infra Part III.
26 Harlow, 457 U.S. at 814.
28 Id. at 639.
29 Id. at 640.
30 Id. at 643.
31 Id. at 641 (emphasis added).
32 Id. at 646.
Since Anderson, the Supreme Court has done little to tinker with the doctrine of qualified immunity. In Conn v. Gabbert the Court explained that a court dealing with a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right" prior to determining whether the officer is entitled to qualified immunity. This initial determination, the Court claims, prevents an infinite regress and allows for the constitutional question to be resolved "to the benefit of both the officers and the general public." However, the plaintiff whose rights were violated receives no discernable benefit.

B. ELEO's Impact on Qualified Immunity

The doctrine of qualified immunity has some valid rationales that this Comment does not refute. This Comment merely seeks to illustrate that improvements can and should be made to the doctrine's application. Undeniably, law enforcement officers provide a difficult and valuable service to society. However, this does not mean that those officers would not benefit from a constitutional education.

Police officers should be protected (and are protected through qualified immunity) from some liability when performing their jobs. Chief Justice Warren was correct when he stated that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." A knowledgeable police officer, however, will less frequently find himself in such a paradox. I acknowledge that the qualified immunity defense is based on "an explicit balancing of interests," only one of which is compensation for victims of constitutional violations. This is why ELEO aims to decrease (not eliminate) the prevalence of successful qualified immunity claims and achieve a corresponding in-

54 Id. at 290.
56 See, e.g., Kit Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions, 23 GA. L. REV. 597, 601 (1989) (stating that such valid rationales include protecting "public officials from being sued for every error in judgment, thereby diverting their attention from their public duties, preventing them from independently exercising their discretion because of fear of damages liability, and discouraging qualified persons from seeking public office at all").
58 Diana Hassel, Living a Lie: The Cost of Qualified Immunity, 64 Mo. L. REV. 123, 129 (1999) (discussing the balance between providing absolute protection to government officials which would "eviscerate § 1983" and providing no protection which would subject those officials to liability when acting in complete good faith); see also, Rudovsky, supra note 2, at 73 ("Formulating the proper standard for qualified immunity presents several fundamental questions concerning the appropriate balance between several competing interests . . . ").
crease in plaintiffs having their full day in court. This will be achieved because as ELEO increases the knowledge of all officers, courts will begin to expect the ELEO-educated “reasonable officer” to know more than the current “reasonable officer.” Thus, cases will less frequently be dismissed before trial on qualified immunity grounds.

Even the staunch proponents of the doctrine of qualified immunity should favor my proposal. The only reason why a successful plea of qualified immunity would become less prevalent under ELEO is because officers would be better educated and thus would be in a better position to discern whether their behavior violates the Constitution. Qualified immunity will still be available for truly deserving officers, but will not be available to those officers who had the knowledge to realize that they were violating the Constitution. One argument in favor of qualified immunity is that we want to encourage citizens to join the police force and they will not do so if they are subjecting themselves to civil liability. A second argument is that we want officers on the job to act without fear of exposing themselves to civil liability. These are legitimate concerns. However, an individual should be neither deterred from becoming a law enforcement officer nor deterred from exercising his discretion as an officer, simply because he will be held responsible for the knowledge obtained through his constitutional education. Expecting officers to be responsible for knowledge obtained under ELEO is not onerous and cannot be considered to defeat the legitimate rationales for qualified immunity’s existence in our judicial system. While the expectations of the officers will rise, ELEO will provide the necessary education so that the officers can meet those expectations. Under ELEO, a court will not expect any more of the officer than can be expected from the constitutional education provided to that officer. A deserving officer will still be able to seek refuge in the doctrine of qualified immunity. If the Harlow standard is satisfied after accounting for the officer’s constitutional education, then an officer will still be able to successfully assert qualified immunity.

II. ELEO AND THE FOURTEENTH AMENDMENT

Overall, the doctrine of qualified immunity presents a significant barrier for civil rights plaintiffs. The evolution of the doctrine from Pierson to the present illustrates the courts’ reluctance to hold law enforcement officers liable for their unconstitutional actions. When

59 See Kinports, supra note 36, at 601.
40 Id.
41 See supra notes 14-38 and accompanying text.
plaintiffs cannot, because of qualified immunity, successfully litigate their Fourteenth Amendment claims using § 1983, the Fourteenth Amendment essentially goes unenforced; if you can violate a law without experiencing any recourse, there is no enforcement. By passing ELEO, Congress will be limiting the prevalence of the Fourteenth Amendment being violated without any recourse, thus enforcing the Amendment.42

That Congress has this power to enforce the Fourteenth Amendment is obvious from its language, which states that Congress has the "power to enforce, by appropriate legislation, the provisions of this article."43 Recall that the Amendments that regulate the behavior of all police officers, such as the Fourth, Fifth, and Eighth Amendments, have been incorporated into the Fourteenth Amendment's Due Process Clause. Therefore, the Fourteenth Amendment dictates how an officer can perform his job and remain within the confines of the law at the same time.44 If officers are updated on and taught about these pertinent areas of constitutional law, qualified immunity claims will become less successful. Plaintiffs will be better able to obtain judgments against police officers who violate their civil rights, thus providing better enforcement of the Fourteenth Amendment's constitutional guarantees.

It is for this reason that it must be considered proper use of the enforcement power to require law enforcement units to regularly provide continuing legal education for its officers. This continuing legal education will cover developments in areas of constitutional law that pertain directly to the job that these officers are employed to perform. States require professionals in certain occupations to keep abreast of developments in their fields through continuing education,45 and such a requirement cannot be considered less important for law enforcement officers. If ELEO supplies the proper education, the qualified immunity barrier can be overcome, and the Fourteenth Amendment can be enforced with increased frequency and force.

42 One must remember that fitting within the language of the Fourteenth Amendment is only the first step in proving ELEO's constitutionality. ELEO must also pass the congruence and proportionality test developed in City of Boerne, as discussed in depth in Part III.
43 U.S. CONST. amend. XIV, § 5.
44 See, e.g., U.S. CONST. amend. IV (prohibiting "unreasonable searches and seizures").
ELEO's fit into Section 5 of the Fourteenth Amendment is further evidenced by Congress's enactment of § 1983 to enforce the provisions of that Amendment.\textsuperscript{46} The doctrine of qualified immunity, however, inhibits successful § 1983 litigation and thus inhibits the enforcement of the Fourteenth Amendment.\textsuperscript{47} If ELEO is passed, Congress will be enforcing the Amendment in the truest sense of the word, for § 1983 litigants will become more successful and therefore better able to enforce the Fourteenth Amendment. If with Congress's involvement there is more § 1983 success and thus more enforcement, Congress is constitutionally using its Section 5 power to enforce the Fourteenth Amendment.

Although the Supreme Court set up quite an obstacle in \textit{City of Boerne}, legislation requiring law enforcement officials to be informed of the state of constitutional law fits squarely within Congress's power under the Enforcement Clause. Qualified immunity prevents the Fourteenth Amendment from being enforced, in any significant sense of the word because aside from violations so flagrant that they become criminal,\textsuperscript{48} successful § 1983 actions provide the only meaningful mechanism through which civil rights can be enforced.\textsuperscript{49}

The jurisprudence surrounding attorneys fees and 42 U.S.C. § 1988(b)\textsuperscript{50} also supports the claim that ELEO would constitute proper enforcement of the Fourteenth Amendment. The Supreme Court has stated, with regard to attorneys fees in § 1983 litigation, that lawyers who represent civil rights plaintiffs are acting as "private attorneys general."\textsuperscript{51} Without the participation of these "private attorneys general," civil rights would go unvindicated.\textsuperscript{52} Generally speaking, the job of an attorney general is to enforce and prosecute the law on

\textsuperscript{46} See supra notes 3, 5.
\textsuperscript{47} See, e.g., Anderson v. Creighton 483 U.S. 635 (1987) (accepting a plea of qualified immunity, meaning that the plaintiff whose rights were declared by the Court to have been violated had no recourse and Fourteenth Amendment did not provide any real protection).
\textsuperscript{49} In \textit{Harlow v. Fitzgerald}, the Supreme Court admitted that "actions for damages may offer the only realistic avenue for vindication of constitutional rights." 457 U.S. 800, 814 (1982).
\textsuperscript{50} 42 U.S.C. § 1988(b) (2003) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs").
\textsuperscript{51} Farrar v. Hobby, 506 U.S. 103, 122 (1986) (O'Connor, J., concurring) (referring to the availability of attorneys fees under § 1988 as the "private attorney general theory").
\textsuperscript{52} City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) ("[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.").
behalf of government.\textsuperscript{53} Therefore, a "private attorney general" must be considered to be enforcing the dictates of the Fourteenth Amendment. Through ELEO, Congress would be supplementing the enforcement by these private attorneys general, which itself should be considered enforcement within the meaning of Section 5.

III. CONGRESSIONAL USE OF THE ENFORCEMENT CLAUSE\textsuperscript{54}

Although ELEO appears to be facially consistent with the language of the Enforcement Clause, the Supreme Court's decision in City of Boerne v. Flores\textsuperscript{55} has made it nearly impossible for Congress to effectively use its Section 5 enforcement power.\textsuperscript{56} Prior to the City of Boerne decision, the Court had upheld Congress's use of its enforcement power under the enforcement clauses of the Fourteenth and Fifteenth Amendments when addressing voting rights in City of Rome v. United States,\textsuperscript{57} Katzenbach v. Morgan,\textsuperscript{58} Oregon v. Mitchell,\textsuperscript{59} and South Carolina v. Katzenbach.\textsuperscript{60} In those cases, the Court seemed to view Congress's enforcement power to be quite broad.\textsuperscript{61} However, since City of Boerne, the Court has repeatedly blocked Congress's efforts to use the power given to it by the framers of the Fourteenth Amendment.\textsuperscript{62} Therefore, the Court's penchant for striking down such legislation presents the most formidable barrier to the type of legislation proposed in this Comment.

A. The City of Boerne Decision

The City of Boerne decision addressed Congress's use of its Section 5 enforcement power to pass the Religious Freedom Restoration Act of 1993 ("RFRA").\textsuperscript{63} The RFRA was passed in response to a decision in which the Court upheld the denial of employment benefits to

\textsuperscript{53} See Black's Law Dictionary 125 (7th ed. 1999) (defining "attorney general" as "[t]he chief law officer of a state or the United States, responsible for advising the government on legal matters and representing it in litigation").

\textsuperscript{54} See U.S. Const. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

\textsuperscript{55} 521 U.S. 507 (1997).

\textsuperscript{56} See infra Part III.A-B.

\textsuperscript{57} 446 U.S. 156 (1980).

\textsuperscript{58} 384 U.S. 641 (1966).

\textsuperscript{59} 400 U.S. 112 (1970).

\textsuperscript{60} 383 U.S. 301 (1966).

\textsuperscript{61} In Katzenbach v. Morgan, the Court stated that, "The Fourteenth Amendment . . . is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U.S. at 651.

\textsuperscript{62} See infra Part III.A-B.

church members who had used peyote, over a defense implicating the Free Exercise Clause. The Court believed that in passing the RFRA, Congress had altered the previously defined meaning of the Free Exercise Clause and that "[t]he design of the Amendment and the text of Section 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." The RFRA was struck down because it required more of the states than did the Free Exercise Clause, and Congress is neither permitted to alter the clause's requirements through legislation nor declare what those requirements are. Therefore, in City of Boerne, Congress's role was limited to enforcement of the restrictions and guarantees of the Fourteenth Amendment as previously defined by courts. The Court sent the message that anything beyond the predefined scope will be struck down as unconstitutional.

1. The Congruence and Proportionality Test

In order to assure that Congress adheres to this limiting principle, the Court announced the "congruence and proportionality" test. The Court created this test to protect the line between legislation that remedies or prevents constitutional violations and legislation which makes a substantive change from encroachment by Congress. The congruence and proportionality test states that Congress cannot pass a law under Section 5 unless there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Generally speaking, the principle of congruence focuses on the reach of the law in question as compared to the number of jurisdictions in which violations of that law allegedly occur. Therefore, the fewer nationwide violations that there are, the less congruence there will be if the law covers the entire nation. Proportionality focuses on a comparison between what the law forbids and how a state could act and still be in accordance with the Consti-

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65 Id. at 519.
66 Id. (stating that "Congress does not enforce a constitutional right by changing what the right is . . . it has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation").
67 Id. at 520.
68 Id. at 519-20 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.").
69 Id. at 520.
70 See id. at 530 (discussing the legislative record of the RFRA).
tution. If what the law forbids is so expansive that it conceivably prohibits constitutional state action, then there is no proportionality. Both of these principles protect the ideal that it is for the courts and not Congress to decide the substance of the Fourteenth Amendment's restrictions on the states. When a statute violates the congruence and proportionality test, the Court believes that Congress impermissibly takes over this decision-making role. Therefore, Congress is limited to only passing legislation that conforms to the scope of the right, as defined by the courts.

The RFRA failed the congruence and proportionality test for a variety of reasons. The Court believed that unlike the Voting Rights Act, the RFRA's legislative record was insufficient to warrant the imposition of such restrictions on every state. According to the Court, however, this incongruence was "not RFRA's most serious shortcoming." The main problem with the RFRA was that it was "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." The Court found the RFRA's "reach and scope" to be too broad, especially as compared to legislation in the area of voting rights. The restrictions imposed by the RFRA on the states were simply too stringent to be proportional, which essentially means that the states could conceivably pass laws that would be constitutional under the Free Exercise Clause that the RFRA would prohibit. Therefore, the Court concluded that the RFRA was both incongruent and disproportional.

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71 See id. at 535 (describing the RFRA as "broader than is appropriate if the goal is to prevent and remedy constitutional violations").
72 Id.
73 While I find the City of Boerne decision to impose too many constraints on Congress, there are some who believe that the limitations are necessary. See, e.g., Michael Van Arsdall, Comment, Enforcing the Enforcement Clause: City of Boerne v. Flores Chips Away at Congressional Power, 48 CATH. U. L. REV. 249, 291 (1998) (calling the decision a "step in the right direction").
74 Rachael Toker, Recent Development, Tying the Hands of Congress: City of Boerne v. Flores, 33 HARV. C.R.-C.L. L. REV. 273, 297 (1998) (discussing Justice Kennedy's City of Boerne holding, that the RFRA did not remedy "intentionally discriminatory laws" and "did not maintain a sufficient nexus with the constitutional guarantees").
75 The Court stated that "[i]n contrast to the record which confronted Congress and the judiciary in voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." City of Boerne, 521 U.S. at 530. Later the Court continued, stating that "[i]n most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry." Id. at 535.
76 Id. at 531.
77 Id. at 532.
78 Id. The Court proceeded to discuss how the Voting Rights Act was confined to those areas in which there was the most discrimination, and that while Section 5 legislation did not require "termination dates, geographic restrictions or egregious predicates," such limitations "tend to ensure Congress' [sic] means are proportionate to ends legitimate under § 5." Id. at 533.
79 Id.
B. Subsequent Supreme Court Decisions

After City of Boerne, congruence and proportionality became both the litmus test for Congress's use of the Enforcement Clause and the favorite tool of the Supreme Court to strike down federal enforcement legislation that it believes encroaches upon the power of the states by imposing requirements that exceed those of the Fourteenth Amendment. Since the City of Boerne decision, the Supreme Court has applied the congruence and proportionality standard in other cases, including Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,80 Kimel v. Florida Board of Regents,81 and Board of Trustees of the University of Alabama v. Garrett.82 In each of these opinions the Court referred back to the same language from City of Boerne illustrating the point that "Congress cannot 'decree the substance of the Fourteenth Amendment's restrictions on the States.... It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."83 It will be demonstrated that the Court's reliance on this point actually supports the constitutionality of ELEO. Further, the Court's explanations of the shortcomings of the laws in Kimel, Florida Prepaid, and Garrett also support ELEO as a proper use of Congress's Section 5 power.84

Florida Prepaid presented the Court with its first opportunity to apply the congruence and proportionality test that it had developed just two years earlier in City of Boerne.85 Florida Prepaid challenged the Patent Remedy Act ("PRA"),86 which was Congress's attempt "to secure the Fourteenth Amendment's protections against deprivations of property without due process of law."87 The Court addressed whether the PRA was unconstitutional and ultimately determined that it was an impermissible use of Congress's Section 5 power.88 The Court declared that there was no congruence between the PRA and the actions it prohibited because there were only a "handful of instances" of state patent infringement, thus Congress had failed to identify any "pattern of patent infringement by the States."89 Further, the Court

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83 Kimel, 528 U.S. at 81 (quoting City of Boerne, 521 U.S. at 519).
84 See infra notes 85-104 and accompanying text.
85 City of Boerne was decided on June 25, 1997 and Florida Prepaid was decided on June 23, 1999.
88 Id. at 637-39.
89 Id. at 645, 654. The Court later referred to the instances of states depriving patentees of property and leaving them without a remedy under state law as "scarcer still." Id. at 647.
deemed that the PRA’s "indiscriminate scope" was disproportionate to the Constitution's prohibitions because the PRA too pervasively forbade otherwise constitutional state action. The PRA was therefore declared unconstitutional, and the Court had taken the next step in constraining Congress's use of Section 5.

One term later, in Kimel, the Court addressed the appropriateness of another piece of legislation passed pursuant to Section 5. The legislation in question in Kimel was the Age Discrimination in Employment Act ("ADEA"). Predictably, the Court again stressed that Congress cannot determine the substantive meaning of the Fourteenth Amendment protections. Then, the Court applied the congruence and proportionality test to the ADEA. Unsurprisingly, the Court again found that the "substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the ADEA." The Court also looked to the legislative record of the ADEA and concluded that it was incongruent because there was insufficient evidence of unconstitutional discrimination by state or local governments to warrant Congress's passage of the ADEA. Because states are permitted in some instances to discriminate on the basis of age and because there were no legislative findings, the ADEA failed the congruence and proportionality test.

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90 Id.
94 See Kimel, 528 U.S. at 62. ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."). The Court, however, added the caveat that "the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult." Id. With ELEO, however, this determination would be very straightforward.
95 Id. at 82.
96 Id. at 83. The Court proceeded to discuss the constitutional stature of age classifications and how age does not constitute a "suspect classification," meaning that "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." Id. at 82-84.
97 The Court stated that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." Id. at 89.
98 See Johanna Pirko, Note, The Erosion of Separation of Powers Under the "Congruence and Proportionality" Test: From Religious Freedom to the ADA, 53 HASTINGS L.J. 519, 527 (2002) ("In addition to the absence of legislative findings demonstrating any history of age discrimination by the states, the Court based its determination that the ADEA was not congruent section [sic] 5 legislation on three previous Court decisions establishing that employment discrimination against the aged is subject only to rational basis review.").
The most recent of the "congruence and proportionality" cases is Garrett. In Garrett, the Court addressed the constitutionality of Title I of the Americans with Disabilities Act of 1990 ("ADA"). The Court was quick to restate the now "long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees." The Court began its inquiry by asking whether Congress had "identified a history and pattern of unconstitutional employment discrimination by the States against the disabled." The Court concluded that Congress had failed to make the requisite findings and thus the Act was incongruent. The Court then compared the scope of the constitutional right with the scope of the Act, and ultimately concluded that states were providing the constitutional minimum and therefore the Act was a disproportionate and an impermissible use of Section 5. As expected, this case hammered another nail in the coffin of Congress's use of Section 5. Presently, what constitutes valid enforcement of Fourteenth Amendment has been severely limited.

101 Id. at 368. The scope of the rights required to be afforded to the disabled had been determined in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).
102 The Court stated that "had Congress truly understood [the evidence in the legislative record] as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings. There is none." Garrett, 531 U.S. at 371.
103 See id. at 366-72 (discussing how Title I of the ADA required the states to provide accommodations that exceeded those required by the Constitution as determined in Cleburne).
104 See Mark. A. Johnson, Note, Board of Trustees of the University of Alabama v. Garrett: A Flawed Standard Yields a Predictable Result, 60 Md. L. Rev. 393, 394 (2001) (arguing that the "ill-conceived Section 5 formulation" resulted in a predictable outcome).
C. How ELEO Would Succeed Where the Others Have Failed

The line of cases discussed above, beginning with *City of Boerne*, has made it clear that Congress cannot “decreed the substance of the Fourteenth Amendment’s restrictions on the States.” Using the congruence and proportionality test, the Supreme Court has struck down many of Congress’s efforts to use its enforcement power because those efforts violated the prohibition against defining the substance of the Amendment. However, the shortcomings of the RFRA, PRA, ADEA, and ADA, as found by the Court, could not be found in ELEO.

The Court consistently relies upon the language in *City of Boerne* to stress the point that it is the Court and not Congress that decrees the substance of the Fourteenth Amendment protections. With ELEO, however, Congress would abstain from defining the substance of the Fourteenth Amendment protections. Congress would be completely deferring to the judgments of the courts and their developed definitions of the substance of the Fourteenth Amendment protections. Law enforcement officers would be taught constitutional law as defined by the courts, thus eliminating the separation of powers concerns that have arisen in other Section 5 cases. The Court has stated that “Congress was granted the power to make the substantive constitutional prohibitions against the States effective,” but not to define them. When qualified immunity is asserted, the judicially defined

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105 The Tenth Amendment may raise other concerns regarding the constitutionality of ELEO. In *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court speaks of federalism concerns when Congress attempts to interfere with the policing powers of the state. However, I am a strong believer that the Fourteenth Amendment significantly altered the balance between the federal government and the states. Therefore problems that may arise in the Commerce Clause context due to federalism concerns should not arise in the Fourteenth Amendment context. The Fourteenth Amendment was passed to specifically limit the states, and Congress must be permitted to do so without raising federalism concerns that properly arise in other contexts. Further, the Supreme Court has often distinguished between *Print* -type analyses and *City of Boerne*-type analyses. See, e.g., Penn. Dept. of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (distinguishing between a constitutional exercise of Congress’s power under the Commerce Clause in *Print* and under the Fourteenth Amendment in *City of Boerne*).

106 *City of Boerne*, 521 U.S. at 519. The Court also stated that “[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.” *Id.* at 527.

107 See supra Part III.A-B.


109 When I discuss Fourteenth Amendment protections in this context, I am referring to the Fourth, Fifth, and Eighth Amendments.

110 *City of Boerne*, 521 U.S. at 522. In *Kimel*, the Court has described its role in Section 5 litigation as “determin[ing] whether [the law] is in fact... an appropriate remedy or, instead, merely an attempt to substantively redefine the State’s legal obligations.” 528 U.S. at 88.
substantive constitutional prohibitions are ineffective, thus making ELEO a proper use of this acknowledged power even in this Court's eyes.

The concerns enunciated by the Court in the congruence and proportionality cases, regarding Congress's overstepping its bounds by defining the substance of the protections, is simply nonexistent in ELEO. The Court developed the congruence and proportionality test to decipher whether Congress had overstepped its bounds. With ELEO, it is very clear that Congress is not overstepping its bounds because there is absolutely no congressional effort to define or expand the substance of the Fourteenth Amendment's protections.

The first step in this inquiry is always to define the scope of the right at issue to make sure that the proportionality requirement is met. Historically, if the scope of the constitutional right is narrower than the scope of the law passed by Congress, the law fails the proportionality prong. Here, the right at issue is the right of § 1983 plaintiffs to have the protections of the Fourteenth Amendment enforced in the courts. The scope of ELEO, if passed by Congress, would assure that this right is respected through the education of law enforcement officers. This framework provides the basis for the proportionality analysis of ELEO.

Admittedly, there is no constitutional requirement that speaks to the education of law enforcement officers. Based on the congruence and proportionality line of cases, critics of ELEO may rely on this fact alone to demonstrate that ELEO is not proportional. Critics may also claim that ELEO is worse than those cases because Congress is not defining or expanding the Fourteenth Amendment's protections. Rather, Congress is creating a new requirement. However, if those critics recall the reasoning behind the proportionality prong, they will see that the other line of cases is not analogous or applicable to ELEO. In developing the proportionality prong, the Court reasoned that it did not want the Constitution imposing requirement "X" on the states and Congress imposing requirement "X plus" on the states. Put another way, the Court did not want Congress to attempt to define or expand the substance of the protections of the Fourteenth Amendment. However, the Constitution says X and ELEO says inform the officers about X so that when they get to court, they cannot claim qualified immunity and the Fourteenth Amend-

111 See, e.g., Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999) ("[F]ollowing City of Boerne, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy . . . .").

112 See discussion of City of Boerne, Kimel, Garrett, and Florida Prepaid supra Part III.A-B.

113 As stated above and restated below, I believe that when qualified immunity is successfully pled, the Fourteenth Amendment goes unenforced.

114 See supra Part III.A-B.
ment can be enforced. The Court developed the proportionality prong to allay its fears of Congress overstepping its bounds by defining or expanding the protections of the Fourteenth Amendment. Arguably then, the proportionality test is inapplicable to ELEO because it does not trigger this fear. Through ELEO, Congress neither defines nor expands the protections of the Amendment. If the proportionality analysis is limited, as I believe it is, to a comparison between what requirements Congress imposes and what requirements the Constitution imposes, then ELEO is devoid of proportionality problems. Although critics may argue that ELEO is still constitutionally suspect because it imposes a requirement on the states that is nowhere in the Constitution, such an argument misses the point of the proportionality prong. The Court explicitly stated in City of Boerne that "[l]egislation that deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’" Therefore, so long as ELEO does not define or expand any protections (which it would not), and it deters and remedies violations (which it would), it is devoid of proportionality problems and satisfies this first prong.

ELEO has no difficulty satisfying the remaining congruence portion of the test. Congruence is determined, in part, by looking to the congressional record developed during the debate over this legislation. As discussed above, each of the laws in City of Boerne, Florida Prepaid, Kimel, and Garrett had insufficient evidence in the record to satisfy the congruence prong. The Court deemed the evidence in those acts’ legislative records lacking adequate examples of violations nationwide to warrant the passage of legislation under Section 5. ELEO certainly does not have this lack of evidence. Thousands of § 1983 claims are brought each year. Among those thousands of claims, qualified immunity is frequently asserted, meaning that the problem of plaintiffs not having their day in court and defendants escaping unpunished occurs nearly everywhere. A fully developed
congressional record will be replete with examples of qualified immunity being successfully asserted, which means that the Fourteenth Amendment has not been enforced. The problem of civil rights violations going unenforced due to successful assertions of qualified immunity does not only occur in a handful of areas, but rather it occurs throughout the entire country. This is a key distinguishing factor between ELEO and the RFRA, PRA, ADA, and ADEA, where the respective legislative records of those laws failed to indicate a sufficient number of constitutional violations nationwide, thus making those laws incongruent. ELEO's record will have more than enough examples of the Fourteenth Amendment going unenforced. Therefore, satisfying the congruence is a mere formality.

IV. CONCLUSION

It must not be overlooked that requiring law enforcement officers to know the state of constitutional law will not only benefit civil rights plaintiffs, but it will also benefit states in criminal prosecutions. If law enforcement officers are better informed regarding what they can and cannot do under the Fourth and Fifth Amendments, the amount of evidence excluded under the exclusionary rule will decrease, and will thus result in more successful criminal prosecutions. Because the exclusionary rule requires that evidence obtained in violation of the Constitution be excluded from trial, a law enforcement officer educated under ELEO performing a criminal investigation may be less likely to commit an error that could compromise the success of a prosecution.

When an individual's civil rights have been violated by a law enforcement officer, that individual is entitled to have the courts enforce the dictates of the Fourteenth Amendment by providing compensation or other forms of relief. Congress passed § 1983 to provide for this enforcement by private individuals. However, this enforcement only occurs when the plaintiff is compensated and vindicated, and the defendant is held responsible for his violations. Without any compensation or vindication, there is no court-ordered penalty imposed upon the violator, and thus there is no enforcement in any significant sense of the word. Unfortunately, this is what the doctrine of qualified immunity achieves. Because qualified immunity relies

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Reece v. Groose, 60 F.3d 487, 489 (8th Cir. 1995); Archer v. Sanchez, 933 F.2d 1526, 1529 (10th Cir. 1991); Leena v. Lane, 882 F.2d 1171, 1177 (7th Cir. 1989); Baker v. Racansky, 887 F.2d 183, 185 (9th Cir. 1989); Unwin v. Campbell, 863 F.2d 124, 128 (1st Cir. 1988); Jones v. Pruitt & Mauldin, 851 F.2d 1321, 1324 (11th Cir. 1988). The district courts which have extensively applied Anderson are too numerous to list.

120 The landmark case of Mapp v. Ohio, 367 U.S. 643 (1961), held that all evidence obtained in a search or seizure that violates the Fourth Amendment is inadmissible in state prosecutions.
upon what a court could expect a reasonable officer to know about the state of the law, an education program such as ELEO will raise the court's expectations and raise the likelihood of being a successful § 1983 plaintiff.

The more success § 1983 plaintiffs have, the more the Fourteenth Amendment is being enforced. Congress has been given the power to enforce the Fourteenth Amendment, and by passing ELEO, that is exactly what it will be doing. In spite of the tight constraints that the Supreme Court has placed upon Congress's use of Section 5 of the Fourteenth Amendment, ELEO constitutes a use of this power that must withstand a judicial challenge for three reasons: (1) ELEO complies with the language of Section 5 itself; (2) ELEO does not define or expand the substance of the Fourteenth Amendment's protections, which was the motivating fear of the Court when it announced the congruence and proportionality test; and (3) ELEO avoids the shortcomings of other laws that the Court has struck down as not congruent and proportional.

Congress must be permitted to utilize the important power given to it by the Fourteenth Amendment and enforce the Amendment by supplementing the efforts of those private individuals who themselves attempt to enforce the Amendment by bringing § 1983 claims. Without Congress's interjection, the Fourteenth Amendment will continue to go unenforced each time an officer successfully pleads qualified immunity. Mandating the education of law enforcement officers will enforce the Fourteenth Amendment through an increase in complete adjudications of § 1983 claims. The protections of the Fourteenth Amendment are hollow if we accept that an officer's insufficient knowledge of constitutional law is sufficient to prevent a plaintiff from having his full day in court.