NOTES

Protecting Children’s Rights Inside of the Schoolhouse Gates: Ending Corporal Punishment in Schools

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James Ingraham, an eighth grade student, was struck by an educator over twenty times with a paddle for not following his teacher’s instructions.1 The Supreme Court held that there was no constitutional violation.2

“Tim L., a fifth-grader in Texas, was beaten so severely that his genitals were bruised and swollen. His mother recalled that she ‘had to pull the underwear off his behind from the dried blood.’”3

“Corporal punishment [in schools] typically involves battering the pelvic area with a wooden board. The same act perpetrated against an adult constitutes sexual assault and battery—a felony.”4

“Not only is [corporal punishment in schools] legal child abuse, it’s a message schools shouldn’t deliver. Children are taught, by the example of authority-wielding adults, that violence is an acceptable response to inappropriate behavior.”5

“I see these children who get in fights and then get paddled. So you’re supposed to teach them not to hit by hitting them?”6

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2. Id. at 683 (holding no violation of petitioner’s Eighth Amendment or procedural due process rights).
“Today, ‘the only remaining group of American citizens who may be legally beaten are public school children.’”

INTRODUCTION

Corporal punishment in schools is defined as “paddling, spanking, or other forms of physical punishment, however light, imposed upon a student.” This definition excludes the use of physical restraints that are intended to protect children from imminent injury to themselves or others. In the United States, there is no federal law banning this violence against children, and nineteen U.S. states currently employ this tactic. Approximately one-quarter million students were subjected to corporal punishment during the 2005–2006 school year, with five states—Texas, Mississippi, Arkansas, Alabama, and Georgia—accounting for almost three-quarters of these incidences.

In 1977, in Ingraham v. Wright, the Supreme Court upheld the constitutionality of corporal punishment in schools, explaining that the practice does not implicate children’s Eighth Amendment rights. For the past few decades, scholars have questioned the prudence of the Court’s decision, and lower courts have grappled with the Supreme Court’s unanswered questions—whether corporal punishment in schools implicates students’ substantive due process rights and Fourth Amendment rights. At the legislative level, the majority of states and local districts have outlawed physical punishment in schools and Congress recently introduced a bill to ban corporal punishment in schools. And yet, several states continue to employ this outdated practice, making the United States one of the few countries that still tolerates violence against children in schools.

This Note argues that children’s rights advocates need to employ both a constitutional and a legislative strategy to ban the practice of corporal punishment in schools. Litigants need to raise Eighth Amendment cases, encouraging the Supreme Court to reexamine and overturn Ingraham. Because the Court moves cautiously and slowly in overturning constitutional precedents, advocates also need to push for legislative reform. Specifically, children’s rights

11. Id.
13. See discussion infra Part II.
14. See discussion infra section I.B.
15. See discussion infra section II.B.3.
16. See discussion infra section II.B.3.
advocates should pressure Congress to use its spending power to encourage all states to ban corporal punishment in schools.\textsuperscript{17} This legislative strategy will decrease the prevalence of corporal punishment in schools, while simultaneously fueling the constitutional movement and providing further evidence that physical punishment in schools assaults our society’s evolving notions of dignity and decency.

Part I of this Note analyzes corporal punishment in the constitutional arena. Section A discusses \textit{Ingraham} and section B covers the constitutional aftermath of the decision. Section B specifically explains how claims against corporal punishment in schools have been raised under the Fourth and Fourteenth Amendments, with circuit courts split regarding the applicability of these constitutional claims. Although other scholarship has explored the trajectory of circuit cases,\textsuperscript{18} this Note specifically argues that claims under the Fourth and Fourteenth Amendments are shortsighted: these fact-specific claims are rarely successful and only address the most egregious forms of corporal punishment in schools. Instead, this Note argues that reviving the constitutional challenge under the Eighth Amendment is the only constitutional means towards completely banning the practice in schools.

Part II presents a path by which the Supreme Court could overturn its jurisprudence in \textit{Ingraham} and recognize that corporal punishment in schools violates children’s Eighth Amendment rights. Part II discusses the jurisprudence surrounding overturning precedent. Section A discusses why the Eighth Amendment is applicable to corporal punishment in schools, and section B discusses why physical punishment in schools is cruel and unusual. Section B also summarizes existing scholarship, which explains the consequences of corporal punishment on children and the local, national, and international movements to abolish this practice. Although other scholarship has made similar claims, this Note adds additional research to the discourse and further analyzes the Supreme Court’s recent jurisprudence surrounding adolescent development and the protection of children’s rights.

Part III encourages advocates to employ a legislative strategy, while simultaneously fighting for constitutional changes. Although scholarship about corporal punishment has focused almost exclusively on constitutional issues, this Note uniquely equips advocates with constitutionally sound legislative reforms. Section A discusses how advocates should lobby Congress to amend the Individuals with Disabilities Education Act (IDEA), create incentive grants similar to Race to the Top, and pass legislation that categorically ends physical punishments in schools—or at least some of the above. Section B argues that Congress can use its spending powers to enact these reforms and encourage states to ban corporal

\textsuperscript{17} See discussion infra Part III.

punishment in schools.

I. CORPORAL PUNISHMENT IN SCHOOLS: THE CURRENT CONSTITUTIONAL ARENA

In 1977, Ingraham upheld the constitutionality of corporal punishment in schools, explaining that the practice did not implicate the Eighth Amendment and that due process hearings and notice were not required prior to the issuance of physical punishment in schools. After Ingraham, circuit courts attempted to determine whether other rights—namely substantive due process and Fourth Amendment rights—were implicated by the practice of corporal punishment in schools. Section A begins by explaining the majority and dissenting opinions in Ingraham, and section B discusses how circuit courts are split regarding whether and how litigants affected by corporal punishment in schools can raise constitutional claims outside of the Eighth Amendment arena. Section B argues that constitutional strategies under the Fourth and Fourteenth Amendments are limited because these claims are difficult to raise and only address a subset of corporal punishment in schools, namely the most egregious forms of physical punishment. There are reasons to protect against all forms of corporal punishment, yet claims under the Fourth and Fourteenth Amendments offer no protection against less severe forms of physical punishment in schools.

A. INGRAHAM V. WRIGHT: THE EIGHTH AMENDMENT AND PROCEDURAL DUE PROCESS

In a 5–4 decision in Ingraham, the Supreme Court upheld the constitutionality of corporal punishment in schools, explaining that a Florida school system did not violate the Eighth Amendment rights of junior-high students by employing corporal punishment. Six Justices also held that the school’s practice did not violate students’ procedural due process rights. Petitioners James Ingraham and Roosevelt Andrews filed a complaint against several administrators in the Dade County School System after both students received severe physical punishments at Drew Junior High School. Dade County School Board’s policy allowed corporal punishment, with limitations that included: requiring prior authorization from the school leader, paddling to the buttocks area only, limiting the typical punishment to one to five swats, and ensuring that the punishment did not cause physical injury and was not “degrading or unduly severe.” Contrary to Dade County’s policy, the petitioners received severe physical punishments for minor infractions. Andrews was unable to fully use his arm for a week after the school paddled his arm. Ingraham received twenty swats, which caused a hematoma that required medical care and multiday absences from

20. Id. at 653–54, 657.
21. Id. at 655–57 (citation omitted).
22. Id. at 655–56.
23. Id. at 657.
The Supreme Court granted certiorari regarding petitioners’ Eighth Amendment and procedural due process claims, while denying certiorari regarding petitioners’ substantive due process claims. The Court’s Eighth Amendment analysis involved a twofold approach: asserting the reasonableness of employing corporal punishment in schools and holding that the Eighth Amendment does not apply to noncriminal contexts. First, the Court seemingly argued that the punishment was not cruel and unusual due to the country’s historical practices, present-day employment of corporal punishment in “most parts of the country,” and conflicting public and professional opinion about the practice. The Court noted that common law—dating back to our country’s origins—allowed schools to employ reasonable force as disciplinary measures. Furthermore, at the time of the opinion in 1977, twenty-three states had legislated the issue of corporal punishment in schools, with only two states—Massachusetts and New Jersey—banning the practice.

Second, the Court held that Eighth Amendment rights do not extend to discipline in school contexts. The Court cited the language of the Amendment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” and then announced: “[B]ail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government.”

The Court also asserted that the history of the Eighth Amendment further supported its interpretation because the language of the Amendment derived from the English Bill of Rights of 1689, a document that exclusively addressed judicial enforcement of criminal law. Using an originalist interpretation, the Court asserted that the drafters of the U.S. Constitution were concerned with protecting the rights of those convicted of crimes. Conversely, the Court also cited cases where the Eighth Amendment was inapplicable.

The Court also held that students’ procedural due process rights did not
include the right to parental notice and hearing prior to the infliction of physical punishment.\textsuperscript{34} Although the Court recognized that students have a constitutionally protected liberty interest in “unjustified intrusions on personal security,” the Court deemed that “the traditional common-law remedies [that is, civil and criminal sanctions for mistreatment] are fully adequate to afford due process.”\textsuperscript{35} In determining whether the common law sufficiently safeguards the children’s due process rights, the Court used the typical due process standard:

First, the private interest that will be affected . . . second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the (state) interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\textsuperscript{36}

First, the Court explained that children’s personal security interest is weighed against the common law’s longstanding practice of using reasonable physical punishment as a disciplinary method.\textsuperscript{37} Second, the Court deemed that excessive punishments in Dade County schools were the “aberration,” and in those rare circumstances, students could rely upon the “openness of the school environment” and the provision of civil and criminal penalties under Florida law.\textsuperscript{38} Third, the Court asserted that additional requirements of notice and hearing would be unduly burdensome for schools, while “the risk of error that may result in violation of a schoolchild’s substantive rights can only be regarded as minimal.”\textsuperscript{39} Consequently, the Court ruled that children’s procedural due process rights were not violated, even though the school district did not provide the students with notice and hearing prior to the infliction of physical punishment.

\textit{Ingraham} also included a dissenting opinion: three justices asserted that schoolchildren have the right to a hearing prior to the infliction of physical punishment;\textsuperscript{40} and four of the justices concluded that the Eighth Amendment is applicable to school contexts,\textsuperscript{41} and that some, but not all, forms of physical punishment in schools would be cruel and unusual punishments.\textsuperscript{42}

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\textsuperscript{34} Ingraham, 430 U.S. at 658, 662 n.22.
\textsuperscript{35} Id. at 672–73.
\textsuperscript{36} Id. at 675 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
\textsuperscript{37} Id. at 676.
\textsuperscript{38} Id. at 677–78.
\textsuperscript{39} Id. at 680–82.
\textsuperscript{40} Id. at 693–96 (5–4 decision) (White, J., dissenting).
\textsuperscript{41} Id. at 686–87, 691–92.
\textsuperscript{42} See id. at 685. In a footnote, Justice White explained:

There is little reason to fear that if the Eighth Amendment is held to apply at all to corporal punishment of school children, all paddlings, however moderate, would be prohibited . . . [I]t
did not “suggest[] that spanking in the public schools is in every instance prohibited by the Eighth Amendment,” but rather, stated that punishment in schools implicate Eighth Amendment rights and consequently, some forms of physical punishment would be unconstitutional.43

Justice White, on behalf of the four dissenting justices, explained that the Eighth Amendment is not limited to criminal punishments:

The Eighth Amendment places a flat prohibition against the infliction of ‘cruel and unusual punishments.’ This reflects a societal judgment that there are some punishments that are so barbaric and inhumane that we will not permit them to be imposed on anyone, no matter how opprobrious the offense. . . . If there are some punishments that are so barbaric that they may not be imposed for the commission of crimes, designated by our social system as the most thoroughly reprehensible acts an individual can commit, then, a fortiori, similar punishments may not be imposed on persons for less culpable acts, such as breaches of school discipline.44

The dissent focused on the plain language of the Eighth Amendment, which does not limit the protections to “criminal” contexts.45 The dissent then defined punishment by the underlying purposes of the deprivation, including retribution, rehabilitation, or deterrence, rather than “whether the offense for which a punishment is inflicted has been labeled as criminal.”46 The dissent explained that its conclusion was further supported by the Court’s Eighth Amendment jurisprudence: “In fact, as the Court recognizes, the Eighth Amendment has never been confined to criminal punishments.”47 Finally, the dissent concluded that schoolchildren, like prisoners, are entitled to protections against cruel and unusual punishments.48

B. THE INEFFECTIVENESS OF POST-INGRAHAM CONSTITUTIONAL CLAIMS

Post-Ingraham, litigants have attempted to raise constitutional claims under the Fourth and Fourteenth Amendments. This section argues that this constitutional strategy is limited at best because lower courts have only found constitutional violations in the most egregious cases of physical punishment. Consequently, advocates seeking to ban typical forms of corporal punishment—for example, paddling—need to look beyond litigating in the Fourth and Fourteenth Amendment contexts.

can hardly be said that the use of moderate paddlings in the discipline of children is inconsistent with the country’s evolving standards of decency.

Id. at 684 n.1.
43. Id. at 692.
44. Id. at 684 (citation omitted).
45. Id. at 685.
46. Id. at 686–87.
47. Id. at 688.
48. Id. at 688–91.
1. Substantive Due Process Claims Under the Fourteenth Amendment

The Due Process Clause “protect[s] . . . the individual against arbitrary action of government.”49 Violations of individuals’ substantive due process rights result from the executive abuse of power that rises to the “shocks-the-conscience” level.50 This standard is context-dependent: an officer’s deliberate indifference to a pretrial detainee’s medical care violates the prisoner’s substantive due process rights,51 whereas “a much higher standard of fault than deliberate indifference has to be shown for officer liability in a prison riot” or a high-speed police chase.52 The Court explains that the “shock-the-conscience” standard is dependent upon the degree to which executive officials are able to deliberate prior to judgments and actions.53

Although the Supreme Court did not address the issue of whether petitioners’ substantive due process rights were violated in Ingraham, the majority of the circuits have held that students affected by corporal punishment may raise Fourteenth Amendment claims. The Second,54 Third,55 Fourth,56 Sixth,57 Eighth,58 Tenth,59 and Eleventh Circuits60 have held that it is possible for

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50. See id. at 846.
52. Id. at 852–54 (holding that “high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment”).
53. Id. at 853. The Court explained:

To recognize a substantive due process violation in these circumstances when only midlevel fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments . . . . But when unforeseen circumstances demand an officer’s instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates the large concerns of the governors and the governed.

Id. (citations omitted) (internal quotations omitted).
55. See, e.g., Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist., 272 F.3d 168 (3d Cir. 2001); Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988).
59. See, e.g., Harris v. Robinson, 273 F.3d 927 (10th Cir. 2001); Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988).
60. See, e.g., Mahone v. Ben Hill Cnty. Sch. Sys., 377 F. App’x 913 (11th Cir. 2010); Davis v. Carter, 555 F.3d 979 (11th Cir. 2009); Peterson v. Baker, 504 F.3d 1331 (11th Cir. 2007); Kirkland v. Greene Cnty. Bd. of Educ., 347 F.3d 903 (11th Cir. 2003); Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069 (11th Cir. 2000),reh’g & reh’g en banc denied, 244 F.3d 143 (11th Cir. 2000).
corporal punishment in schools to violate students’ substantive due process rights. Although the Ninth Circuit historically analyzed these claims under the Fourteenth Amendment, the Ninth Circuit has recently applied the Fourth Amendment to certain cases involving corporal punishment. The Seventh Circuit also analyzes claims under the Fourth Amendment and has not affirmatively stated whether substantive due process claims can be raised. The Fifth Circuit does not allow students affected by corporal punishment to raise Fourteenth Amendment claims. The First Circuit and the D.C. Circuit have not yet addressed the issue.

Most circuits use the “shock-the-conscience” standard in determining whether an official’s use of corporal punishment against a student violated substantive due process rights. The leading case is the Fourth Circuit’s Hall v. Tawney, which lays out the “shock-the-conscience” standard that has been utilized or adapted by the majority of the circuits:

As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Thus, Hall requires that the punishment be: (1) severe; (2) disproportionate; (3) motivated by malice rather than negligence or bad judgment; and (4) a “brutal and inhumane” abuse of power that is shocking to the conscience. The majority of the circuits examine factors that are the same as or similar to Hall’s

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61. See, e.g., P.B. v. Koch, 96 F.3d 1298, 1302–03 (9th Cir. 1996).
62. See, e.g., Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1182 (9th Cir. 2007).
63. See, e.g., Wallace ex rel. Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1012, 1015–16 (7th Cir. 1995) (holding that “corporal punishment may be evaluated under the Fourth Amendment standard” and stating that “we do not believe that the Fourteenth Amendment’s Due Process Clause affords Wallace any greater protection than the Fourth Amendment from unwarranted discipline while in school”).
65. 621 F.2d 607 (4th Cir. 1980). In Hall, the teacher employed corporal punishment, even though the parents had explicitly told the school administrators that they did not want the school to paddle their child. Id. at 610. The complaint alleged that the child was paddled repeatedly, was “violently shoved . . . against a large stationary desk,” and had her arm “vehemently grasped and twisted,” which resulted in a ten-day hospital admission and “possible permanent injuries to her lower back and spine.” Id. at 614. The Fourth Circuit held that the plaintiff could raise a claim alleging violations of the child’s substantive due process rights. Id. at 614–15.
66. Id. at 613.
67. Id.
four-factor test. The Sixth\textsuperscript{68} and Tenth Circuits\textsuperscript{69} adopt the exact language of Hall’s four-factor test in analyzing whether the corporal punishment shocks the conscience. The Third,\textsuperscript{70} Eighth,\textsuperscript{71} and Eleventh\textsuperscript{72} Circuits use tests that are similar to Hall’s factors. Although the Second Circuit cases do not consistently delineate multi-factor tests, the Second Circuit does analyze whether the conduct shocks the conscience.\textsuperscript{73} In contrast, the Fifth Circuit employs the state remedy rule, which only offers non-constitutional protections (that is, criminal prosecutions, tort claims, or both) to students who are victims of school abuse.\textsuperscript{74}

\textsuperscript{68} See, e.g., Saylor v. Bd. of Educ. of Harlan Cnty., Ky., 118 F.3d 507, 514 (6th Cir. 1997) (holding no due process violation where the teacher paddled a fourteen-year-old boy five times).

\textsuperscript{69} See, e.g., Harris v. Robinson, 273 F.3d 927, 930 (10th Cir. 2001) (holding no due process violation where the teacher made a child with an intellectual disability clean the toilet with his bare hands).

\textsuperscript{70} Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist., 272 F.3d 168, 173 (3d Cir. 2001). The Third Circuit test includes the following:

\textsuperscript{71} See, e.g., Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 564 (8th Cir. 1988). The Eighth Circuit’s test includes the following:

\textsuperscript{72} See, e.g., Peterson v. Baker, 504 F.3d 1331, 1334–37 (11th Cir. 2007) (holding no due process violation where the teacher grabbed a student’s neck, causing blue and red bruises, after the student initiated physical contact against the teacher). The Eleventh Circuit’s test includes the following:

\textsuperscript{73} Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 249, 252 (2d Cir. 2001). The Second Circuit held that the gym teachers’ alleged actions against a student (by dragging him, choking him, punching him, and slamming the child’s head) were conscience-shocking because the conduct was maliciously and sadistically employed in the absence of a discernible government interest and of a kind likely to produce substantial injury. \textit{Id.}

\textsuperscript{74} See, e.g., Serafin v. Sch. of Excellence in Educ., 252 F. App’x 684, 685 (5th Cir. 2007) (“Because there are adequate local remedies, Serafin’s substantive due process claims must fail as a matter of law.”); Moore v. Willis Indep. Sch. Dist., 233 F.3d 871 (5th Cir. 2000). Numerous scholars have critiqued the Fifth Circuit’s approach. For further analysis of the Fifth Circuit’s anomalous approach,
Even though most circuits allow litigants to raise Fourteenth Amendment claims, this litigation is rarely successful. Educators’ use of physical punishment—particularly paddling—is rarely held to violate students’ substantive due process rights. For example, the Second Circuit, in *Smith ex rel. Smith v. Half Hollow Hills Central School District*,75 found no substantive due process violation when a teacher slapped a seventh grade student “in the face at full-force with an open hand, allegedly causing [the child] both great physical pain and severe emotional pain for which he underwent psychotherapy.”76 Even though the child was allegedly hit for accidentally breaking an egg, the Second Circuit refused to find a constitutional violation: “Striking a student without any pedagogical or disciplinary justification—as Smith alleges McDermott did—is undeniably wrong. However, not all wrongs perpetrated by a government actor violate due process . . . . The single slap here falls short of that [shock-the-conscience] threshold.”77 Other circuits have similarly found that traditional forms of corporal punishment do not violate due process. For example, the Third Circuit, in *Gottlieb ex rel. Calabria v. Laurel Highlands School District*,78 held that an assistant principal did not violate a student’s substantive due process rights when he pushed the student backwards, which caused the student to suffer from chronic back pain.79 The Sixth Circuit, in *Saylor v. Board of Education of Harlan County, Kentucky*, held that the administrators did not violate the child’s substantive due process rights when they paddled him five times on the buttocks, which caused him bruising and swelling.80 The Eighth Circuit, in *Wise v. Pea Ridge School District*, similarly found no substantive due process violation when a coach paddled two boys, two times each, on the buttocks, when the students disregarded the coach’s instructions by continuing to play dodgeball.81

Litigation under the Fourteenth Amendment only protects students from the most dangerous or atrocious forms of corporal punishment. For example, the Second Circuit, in *Johnson v. Newburgh Enlarged School District*,81 held that the child’s substantive due process rights were violated when the gym teacher

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75. 298 F.3d 168 (2d Cir. 2002).
76.  Id. at 170, 173.
77.  Id. at 173.
78.  272 F.3d 168, 171, 175 (3d Cir. 2001).
80.  855 F.2d 560, 562, 564 (8th Cir. 1988).
81.  239 F.3d 246 (2d Cir. 2001).
“lifted him off the ground by his neck,” “dragged him across the gym floor,”
choked him, “slammed the back of [his] head against the bleachers four times,”
“rammed [his] forehead into a metal fuse box,” and “punched him in the
face.”82 Because most forms of physical punishment in schools do not amount
to that degree of abuse, constitutional protections under the Fourteenth Amend-
ment are severely limited at best. Professor Jerry R. Parkinson explains:

[The shock-the-conscience standard] suggests that a child in public school
will have to be severely beaten before a court will consider that child’s
constitutional claim. In practice, that is precisely what the standard has meant;
it has been extremely difficult to shock the conscience of the federal judi-
ciary.83

2. Claims Under the Fourth Amendment

Although most courts have addressed corporal punishment claims under the
Fourteenth Amendment, there is uncertainty about whether these claims should
be litigated instead under the Fourth Amendment.84 In Graham v. Connor,85 the
Supreme Court explained that excessive force claims will usually fall under the
Fourth or Eighth Amendment, and not the Due Process Clause.86 Graham
allowed the petitioner’s claim, involving the police’s use of excessive force
during an investigatory stop, to be heard only under the Fourth Amendment:
“Because the Fourth Amendment provides an explicit textual source of constit-
tutional protection against this sort of physically intrusive governmental conduct,
that Amendment, not the more generalized notion of ‘substantive due process,’
must be the guide for analyzing these claims.”87 Under the Graham rule,
corporal punishment claims can only be litigated under the Due Process Clause
if more specific constitutional standards (that is, the Fourth or Eighth Amend-
ments) do not apply.88 For example, post-Graham, the Ninth Circuit “typically
analyze[s] excessive force allegations against public school students under the
Fourth Amendment” rather than the Fourteenth Amendment.89

There are significant challenges in raising successful claims under the Fourth
Amendment, and most courts have either not addressed this avenue or held that
corporal punishment is not an unreasonable seizure. The Supreme Court has not

82. Id. at 249, 252.
83. Parkinson, supra note 7, at 289 (citation omitted).
84. See Kathryn R. Urbonya, Public School Officials’ Use of Physical Force as a Fourth Amendment
Seizure: Protecting Students from the Constitutional Chasm Between the Fourth and Fourteenth
Amendments, 69 GEO. WASH. L. REV. 1, 55 (2000) (contending that the Fourth Amendment is applicable
to claims against corporal punishment in schools).
86. Id. at 394.
87. Id. at 395.
88. See Urbonya, supra note 84, at 28 (“The short version of the Court’s long and frequent
discussion of the Graham rule is that substantive due process protection against physical force applies
only when another Amendment does not provide relief.”).
89. Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1182 (9th Cir. 2007).
yet addressed the issue of whether corporal punishment in schools implicates students’ Fourth Amendment rights prohibiting unreasonable seizures. Recent jurisprudence involving warrantless searches in schools suggests that students might be able to raise constitutional claims against unreasonable seizures in schools, including the infliction of physical punishment, under the Fourth Amendment.90 However, only a few circuits have allowed students to raise Fourth Amendment claims, and these cases have been mostly unsuccessful.91

One obstacle to raising Fourth Amendment claims is demonstrating that the school officials’ use of physical punishment constitutes a seizure. Fourth Amendment jurisprudence defines seizures typically within two categories: “(1) governmental officials intentionally using physical force to stop an individual; and (2) officials asserting authority to compel a stop and an individual’s compliance with that authority.”92 The Third Circuit has held that corporal punishment in schools does not constitute a seizure. In *Gottlieb ex rel. Calabria v. Laurel Highlands School District*, the Third Circuit explained that the Fourth Amendment was inapplicable because: (1) schools already curtail students’ liberty and any subsequent restraints invoke substantive due process issues as opposed to Fourth Amendment seizures;93 and (2) the “‘momentary use of physical force by a teacher in reaction to a disruptive or unruly student does not effect a ‘seizure’ of the student under the Fourth Amendment,’ and therefore ‘is a scenario to which the Fourth Amendment does not textually or historically apply.’”94

Litigants have the burden of proving that the action is not only a seizure but also is unreasonable. Only a few circuits—mostly in cases involving the seclusion or forcible removal of a student—have held that seizures under the Fourth Amendment are applicable to school contexts. For example, the Fifth Circuit in *Hassan v. Lubbock Independent School District*95 held that the student’s fifty-minute isolation in a holding room constituted a seizure under the Fourth Amendment.96 The Seventh Circuit held that a student was seized when her

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93. 272 F.3d 168, 171–72 (3d Cir. 2001). The Third Circuit explained:

> Courts have recognized that public schools are in a “unique constitutional position,” because “[o]nce under the control of the school, students’ movement and location are subject to the ordering and direction of teachers and administrators.” . . . The Fourth Amendment’s “principal concern . . . is with intrusions on privacy,” and therefore when the infraction deals not “with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails, but rather with the conditions of ongoing custody following such curtailment of liberty,” then the claim invokes principles of substantive due process.

*Id.* (citations omitted).
94. *Id.* at 172 (quoting Kurilla ex rel Kurilla v. Callahan, 68 F. Supp. 2d 566, 563 (M.D. Pa. 1999)).
95. 55 F.3d 1075, 1078–79 (5th Cir. 1995).
96. *Id.* at 1078–79.
teacher forcibly pulled the student’s arm to remove her from the classroom.\textsuperscript{97} The Tenth Circuit, for purposes of an appeal, assumed that a student was seized when the administrator nonforcibly removed the student from class and conducted a twenty-minute interrogation in the office.\textsuperscript{98} Even though the above cases determined that the Fourth Amendment was applicable in the school context, all of these cases held that the seizures were reasonable.

Although it is difficult to raise Fourth Amendment claims, recent jurisprudence in the Ninth Circuit demonstrates that it is not utterly impossible. In \textit{Preschooler II v. Clark County School Board of Trustees}, a teacher allegedly physically abused a four-year-old child who had a neurological disorder that caused tumors by hitting the child repeatedly in the head.\textsuperscript{99} The Ninth Circuit held that the alleged acts, if proven true, would violate the Fourth Amendment.\textsuperscript{100} Proponents who argue that corporal punishment implicates the Fourth Amendment point to the Court’s jurisprudence involving warrantless searches in schools.\textsuperscript{101} The Supreme Court in \textit{New Jersey v. T.L.O.} unequivocally held that students’ Fourth Amendment rights are implicated when school officials conduct warrantless searches,\textsuperscript{102} even though dicta from \textit{Ingraham} suggested that the Fourth Amendment was primarily limited to criminal contexts.\textsuperscript{103} Although \textit{T.L.O.} involved a school administrator’s search of a student’s purse, the Court’s holding might extend to students’ rights against unreasonable seizures as well. For example, the Court explained: “It is now beyond dispute that ‘the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers,’” including school officials.\textsuperscript{104} Consequently, \textit{T.L.O.} might provide future petitioners with legal grounds for raising Fourth Amendment seizure claims in school corporal punishment cases.\textsuperscript{105} Even if the Fourth Amendment is applicable to school contexts, these potential claims will be difficult to prove. Professor Kathryn R. Urbonya contends that the Fourth Amendment offers a litigation strategy that is more promising.

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\item \textsuperscript{97} Wallace v. Batavia Sch. Dist., 68 F.3d 1010, 1011, 1014 (7th Cir. 1995) (“[I]n the context of a public school, a teacher or administrator who seizes a student does so in violation of the Fourth Amendment only when the restriction of liberty is unreasonable under the circumstances then existing and apparent.”).
\item \textsuperscript{98} Edwards ex rel. Edwards v. Rees, 883 F.2d 882, 883–84 (10th Cir. 1989).
\item \textsuperscript{99} 479 F.3d 1175, 1178 (9th Cir. 2007).
\item \textsuperscript{100} Id. at 1181.
\item \textsuperscript{101} See Urbonya, supra note 84, at 51–52.
\item \textsuperscript{102} 469 U.S. 325, 333 (1985).
\item \textsuperscript{103} Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977) (“It has been said of the Fourth Amendment that its ‘overriding function . . . is to protect personal privacy and dignity against unwarranted intrusion by the State.’ . . . But the principal concern of that Amendment’s prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations.” (quoting Schmerber v. California, 384 U.S. 757, 767 (1966))).
\item \textsuperscript{104} \textit{T.L.O.}, 469 U.S. at 334 (quoting Elkins v. United States, 364 U.S. 206, 213 (1960)).
\item \textsuperscript{105} See id. at 333.
\end{itemize}
than claims under the Fourteenth Amendment because the “unreasonableness” standard is an easier threshold than the “shock-the-conscience” standard. However, this Note contends that the Fourth Amendment threshold in the school context will not offer much relief for litigants.

The Court has established a more relaxed standard of reasonableness for searches within the school context, suggesting that school officials will also be afforded a more lenient standard of reasonableness when conducting seizures of schoolchildren. For example, *New Jersey v. T.L.O.* weighed the interests of the schoolchildren’s right to privacy with the needs of the school in maintaining safety, and explained that a search in the school context “does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.”

Rather, school-based searches are comparable to *Terry* stop and frisks, which require only that state officials have reasonable suspicion that a crime has been committed. Consequently, successful corporal punishment claims under the Fourth Amendment will likely need to demonstrate that the school official conducted a seizure of the student without any reasonable suspicion that the child was involved in wrongdoing or that the scope of the seizure (arguably the severity of the bodily intrusion or harm) was unreasonable in relation to the justifications for the seizure. The reasonableness analysis in the school context suggests that claims under the Fourth Amendment will be almost as difficult to prove as claims under the Fourteenth Amendment.

The few circuit cases that have addressed the Fourth Amendment issue generally demonstrate either: (1) the right against unreasonable seizures is inapplicable to corporal punishment in schools; or (2) if the Fourth Amendment applies, seizures in schools will most likely survive the court’s reasonableness analysis. Similarly, in the Fourteenth Amendment context, it is highly unlikely that the physical punishment imposed upon the schoolchild will meet the courts’ grueling shock-the-conscience standard. At best, Fourth and Fourteenth Amendment claims will only provide redress for the most egregious

106. Urbonya, supra note 84, at 4, 92 n.29 (“[I]f the Fourth Amendment applies to evaluating the constitutionality of school officials’ use of force, then students stand on the more protective ground of a ‘reasonableness’ standard; but if the Fourteenth Amendment applies, they fall into the deep chasm of the Fourteenth Amendment’s difficult ‘shocks-the-conscience’ standard.”).


108. *See id.*

109. *See, e.g.*, Swisher, supra note 91, at 44 (“Current jurisprudence gives abused students no hope under the Eighth Amendment and little hope under the Fourth or Fourteenth Amendments.”).

110. *Cf. T.L.O.*, 469 U.S. at 341–42 (stating that “[u]nder ordinary circumstances, a search of a student by a teacher or other school official will be ‘justified at its inception’”) (footnote omitted).


112. *See, e.g.*, Wallace v. Batavia Sch. Dist., 68 F.3d 1010, 1014 (7th Cir. 1995) (holding that the Fourth Amendment applied but was not violated when a teacher pulled a student’s wrist and arm); *see also* Swisher, supra note 91, at 38–45 (outlining the circuit-court split regarding the applicability of the Fourth Amendment to anticorporal punishment claims).
forms of corporal punishment. Constitutional claims under either Amendment provide no relief for children who are subjected to less injurious forms of physical force and abuse in schools.

II. OVERTURNING INGRAHAM V. WRIGHT

[T]he [Eighth] Amendment proscribes more than physically barbarous punishments. The Amendment embodies “broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . .” Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with “the evolving standards of decency that mark the progress of a maturing society.”

Advocates seeking to ban corporal punishment in schools, in accordance with evolving standards of decency, need to look beyond litigating claims under the Fourteenth and Fourth Amendments. Overturning the Court’s jurisprudence in Ingraham v. Wright is the only means towards constitutionally protecting students from all forms of corporal punishment in schools. Consequently, advocates should raise claims under the Eighth Amendment and argue that Ingraham v. Wright is a case that meets the Court’s criteria for overturning precedents. Legal arguments to overturn Ingraham need to focus on three issues: (1) the applicable standards for overturning precedent; (2) the applicability of the Eighth Amendment to school contexts; and (3) the evolving standards of dignity, which demonstrate that corporal punishment in schools is cruel and unusual punishment.

Despite the principle of stare decisis, the Court is willing to overturn erroneous constitutional precedent. The Court does not have a fixed formula for overruling precedent but rather examines factors such as the erroneous nature of its original analysis, contemporary evidence of the decision’s


The rule of stare decisis . . . is not inflexible . . . . Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.

Id. (citations omitted)

115. See Citizens United v. FEC, 558 U.S. 310, 362–63 (2010) (“Beyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned . . . . [and] whether ‘experience has pointed up the precedent’s shortcomings.’” (citations omitted)); Lawrence v. Texas, 539 U.S. 558, 577–78 (2003).
shortcomings, and whether the critical, underlying facts that justified its decision have changed. For example, the Supreme Court in Lawrence v. Texas overruled Bowers v. Hardwick and held that states cannot criminalize homosexual sodomy. In justifying its decision to depart from precedent, the Court in Lawrence critiqued Bowers’ originalist analysis of the country’s alleged longstanding history against homosexual conduct, explaining: “[T]he historical grounds relied upon in Bowers are more complex than the majority opinion . . . indicate. They are not without doubt and, at the very least, are overstated.” The Court further supported its holding by citing contemporary evidence that Bowers was wrongly decided. Specifically, it explained that international law protected consensual homosexual conduct, and that U.S. state actions post-Bowers had shifted away from penalizing individuals for private same-sex conduct. Similar to the petitioners in Lawrence, advocates seeking to ban corporal punishment need to demonstrate that the Court’s jurisprudence for overruling precedent is applicable to overturning Ingraham.

A. THE EIGHTH AMENDMENT IS APPLICABLE TO CORPORAL PUNISHMENT IN SCHOOLS

Advocates should critique Ingraham’s analysis and demonstrate why the Eighth Amendment is applicable to contexts beyond criminal punishments. Arguments about the expansiveness of the Eighth Amendment should focus upon the erroneous nature of Ingraham’s original analysis and contemporary evidence of the decision’s shortcomings. Specifically, advocates should discuss: (1) a textual analysis of the Eighth Amendment; (2) reexamination of Ingraham’s originalist analysis; (3) a reexamination of Eighth Amendment jurisprudence leading up to Ingraham; and (4) a living-Constitution analysis of the Eighth Amendment.

A textual analysis of the Eighth Amendment suggests that the Amendment is not necessarily limited to criminal contexts. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” On the one hand, the canon of noscitur a sociis states that punishment should be defined by its companions—bail and

116. See Lawrence, 539 U.S. at 576–80.
117. Swisher, supra note 91, at 45–46.
119. 478 U.S. 186 (1986).
120. Lawrence, 539 U.S. at 577–79.
121. Id. at 571.
122. Id. at 576 (“To the extent that Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere.”).
123. Id. at 559 (“The 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States that still proscribe sodomy[,] . . . there is a pattern of nonenforcement with respect to consenting adults in private.”).
124. U.S. Const. amend. VIII.
fines. On the other hand, fines are not necessarily limited to criminal contexts, and the plain language of the Amendment is broad, referring to punishment rather than criminal punishment.

The \textit{Ingraham} majority relied upon an originalist analysis, which does not necessarily correspond with the plain language of the text. Ingraham’s majority concluded that the American Framers adopted the Eighth Amendment from the preamble to the English Bill of Rights, which explicitly stated that the prohibitions against excessive bail and cruel and unusual punishments were applied to \textit{criminal contexts}. However, the American Framers excluded criminal contexts from the statutory language in the Eighth Amendment. This exclusion either signals the Framers’ intent to extend this right to contexts outside of the traditional criminal arena, or at least, this exclusion suggests unresolved ambiguity about the Framers’ intent, providing further reasons to rely upon the plain language of the Amendment. Moreover, a broader reading of the Bill of Rights in its entirety demonstrates that the Framers used limiting language in certain contexts (for example, “criminal prosecutions” in the Sixth Amendment), suggesting that the Framers would have inserted “criminal punishments” if they intended to limit the Eighth Amendment to criminal contexts. At the least, these conflicting interpretations suggest that the Framers’ intent is unclear.

The Court’s jurisprudence leading up to \textit{Ingraham} did not explicitly limit the Eighth Amendment to criminal punishments but rather suggested that the Amendment had a broader reach. For example, \textit{Trop v. Dulles} involved an army private whose passport application was denied because he had previously been convicted for wartime desertion. \textit{Trop} extended the Eighth Amendment’s punishments “beyond the confines of the penitentiary” by prohibiting Congress from “punish[ing] by taking away citizenship.” Similarly, \textit{Estelle v. Gamble} did not involve traditional punishment but rather expanded the applicability of the Eighth Amendment to issues involving prisoners’ medical care.

This Note argues that \textit{Estelle} should be interpreted at an even broader level—as a case addressing the government’s treatment of individuals who are subjected to compulsory state institutions. For purposes of the Eighth Amendment, students should be treated similarly to prisoners: both groups are subject

\begin{footnotes}
\item 127. See \textit{Ingraham}, 430 U.S. at 664–65.
\item 128. See \textit{id.} at 685 (White, J., dissenting).
\item 129. 356 U.S. 86, 88 (1958).
\item 130. Bitensky, \textit{supra} note 126, at 1340.
\item 131. \textit{Trop}, 356 U.S. at 103.
\item 132. 429 U.S. 97, 104 (1976).
\item 133. \textit{Cf. id.} at 103 (explaining “the government’s obligation to provide medical care for those whom it is punishing by incarceration”).
\end{footnotes}
to compulsory attendance in state institutions and consequently need protection from cruel and unusual punishment inflicted by state officials. 134 In these pre-\textit{Ingraham} cases, the Court offered broad interpretations of the Eighth Amendment and never held that the Amendment was limited to criminal contexts. 135

Assuming arguendo, however, that the Court’s pre-\textit{Ingraham} cases can be classified as involving criminal punishments, this was due to the nature of society prior to 1977, rather than the underlying purposes of the Eighth Amendment. \textit{Ingraham}’s four dissenting Justices explained:

We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process. The effect has been that “every decision of this Court considering whether a punishment is ‘cruel and unusual’ within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment.” The Court would have us believe from this fact that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong. 136

Regardless of whether the Framers were specifically concerned with criminal punishments, the Eighth Amendment is still applicable to corporal punishment in schools under a living-Constitution interpretation. At its core, the Eighth Amendment prevents the state from abusing its powers and enacting cruel and unusual punishments. At the time of the Amendment’s enactment, the state did not have the encompassing powers over all schoolchildren that it presently has and thus, the Framers might not have considered the Amendment’s applicability to schoolchildren. 137

However, in contemporary society, there are some similarities in conditions faced by schoolchildren and prisoners, and consequently, schoolchildren need protections from the state’s powers to punish. For example, schoolchildren and prisoners are subjected to compulsory institutions (for example, mandatory school attendance and mandatory prison sentences), and both powerless groups are subjected to the state’s power to punish. 138 The majority’s interpretation leads to an absurd result: allowing the Eighth Amendment to protect prisoners

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134. \textit{See} Bitensky, \textit{supra} note 126, at 1347–51.
137. \textit{Cf.} \textit{Wisconsin} v. \textit{Yoder}, 406 U.S. 205, 228 (1972) (“The origins of the requirement for school attendance to age 16...are not entirely clear. But to some extent such laws reflected the movement to prohibit most child labor under age 16 that culminated in the provisions of the Federal Fair Labor Standards Act of 1938.”).  
from physical punishment, while leaving schoolchildren politically and constitutionally powerless to protect themselves against comparable physical violence. The Ingraham dissent laments this troubling anomaly: “[Under the majority’s analysis,] if a prisoner is beaten mercilessly for a breach of discipline, he is entitled to the protection of the Eighth Amendment, while a schoolchild who commits the same breach of discipline and is similarly beaten is simply not covered.”

A living-Constitution interpretation recognizes that schoolchildren and prisoners are similarly situated with respect to punishment, and consequently Eighth Amendment protections need to extend beyond the prison bars.

Because the Eighth Amendment should not be limited to the criminal context, the relevant inquiry involves whether persons have been punished. Paddling students falls within the ordinary meaning of punishment. Ingraham’s dissent explains:

Like other forms of punishment, spanking of schoolchildren involves an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed for the purpose of rehabilitating the offender, deterring the offender and others like him from committing the violation in the future, and inflicting some measure of social retribution for the harm that has been done.

In discerning whether actions qualify as punishments, the analysis should focus upon the underlying purposes of the deprivation, rather than whether the underlying offense is deemed criminal. Advocates should argue that a purposive approach should be used in determining whether an individual has been punished. Ingraham’s dissent discussed this approach:

In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment that is, to reprimand the wrongdoer, to deter others, etc. it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

140. Ingraham v. Wright, 430 U.S. 651, 689 (1977) (5–4 decision) (White, J., dissenting); see Hudson, 503 U.S. at 4, 9 (1992) (holding that “the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury”); see also Susan H. Bitensky, The Constitutionality of School Corporal Punishment of Children as a Betrayal of Brown v. Board of Education, 36 LOY. U. Chi. L.J. 201, 220–21 (2004) (“Putting Ingraham together with Hudson creates the bizarre situation in which convicted criminals are afforded more protection against violence in prison than children are provided in school. Something is very wrong with this picture, and the defect is in Ingraham, not Hudson.”).
141. Ingraham, 430 U.S. at 685–86 (White, J., dissenting).
142. Id. at 686–87.
143. Id. at 687 n.3 (quoting Trop v. Dulles, 356 U.S. 86, 96 (1958)).
Using the purposive approach, corporal punishment is inflicted with the purposes of reprimanding the schoolchild, deterring misconduct, and rehabilitating the child. Advocates should argue that the Eighth Amendment affords children protection from certain punishments in schools.

B. CORPORAL PUNISHMENT IN SCHOOLS IS CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment protects against punishments that are “incompatible with ‘the evolving standards of decency.’”144 This section demonstrates that corporal punishment is incompatible with evolving standards of decency and violates the Eighth Amendment due to (1) its detrimental individual and societal consequences; (2) increasing trends towards banning corporal punishment, as illustrated through public opinion, federal proposals, state laws, local policies, and international law; (3) national movements to create positive school cultures; and (4) the Supreme Court’s own jurisprudence and evolution towards more progressively protecting children’s rights.

1. Corporal Punishment in Schools Harms Students’ Physical, Emotional, and Intellectual Well-Being

Corporal punishment in schools detrimentally harms students by inflicting pain and injuries, attacking students’ dignity through humiliating punishment, and marginalizing students, which increases the likelihood that the physical punishment will lead to irreparable long-term academic, social, emotional, and physical consequences.145 For students with disabilities, the injurious nature of corporal punishment is particularly threatening to students’ well-being and ability to access federally guaranteed rights to education.146 Studies demonstrate that corporal punishment of children causes short-term pain and long-term medical consequences.147 “The Society for Adolescent Medicine has documented serious medical consequences resulting from corporal punishment, including severe muscle injury, extensive blood clotting (hematomas), whiplash damage, and hemorrhaging.”148 Other studies have found alarming correlations between children who are victims of corporal punishment and incidences of depression, suicide, antisocial behavior, and substance abuse.149 Research on corporal punishment in schools further confirms that this practice

145. See, e.g., Swisher, supra note 91, at 50–52 (explaining Elizabeth Gershoff’s “exhaustive review of empirical studies of the association between parental use of corporal punishment and child behavior”).
146. See 20 U.S.C. § 1400 (2006 & Supp. IV 2011) (stating the purpose of IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education”).
148. Id. at 4.
physically harms schoolchildren. Of the 223,190 students who received corporal punishment during the 2006–2007 school year, approximately 10,000–20,000 of those students sought medical attention.\textsuperscript{150} Qualitative research conducted by the Human Rights Watch and the American Civil Liberties Union demonstrates that corporal punishment in schools, including the use of paddling, can cause serious medical injuries.\textsuperscript{151}

Physical injuries associated with the use of corporal punishment are particularly threatening for students with disabilities. Corporal punishment can aggrivate student’s preexisting medical issues and underlying disabilities.\textsuperscript{152} For example, “corporal punishment can cause some children to regress in developmental terms, particularly for children on the autism spectrum. Corporal punishment, which is never appropriate for any child, is particularly abusive for these children.”\textsuperscript{153}

Corporal punishment not only affects students’ physical well-being, but the practice also assaults students’ dignity and academic progress. The humiliating practice can erode the trust between students and their school communities and “leave the student[s] unable to learn effectively, making it more likely that [they] will drop out of school.”\textsuperscript{154} Proponents of this practice believe in its efficacy. However, studies demonstrate that corporal punishment, at best, only changes student behavior “for just a few minutes. Beyond its immediate impact, however, corporal punishment has unintended consequences, including increased aggression towards peers and disruptive and violent behavior that is anything but ‘disciplined.’”\textsuperscript{155} Moreover, “[s]chools that use corporal punishment often have poorer academic achievement, more vandalism, truancy, pupil violence and higher drop out rates.”\textsuperscript{156} Contemporary research demonstrates that nonphysical punishments and positive behavioral interventions are more effective at addressing student misbehavior,\textsuperscript{157} fostering positive school climates, and promoting conducive learning environments.\textsuperscript{158}

For example, positive discipline models comprehensively and skillfully handle student disciplinary issues, working to address the underlying causes of a child’s misbehavior and teaching the child why and how to change misbehave-

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\textsuperscript{150} Valerie Strauss, \textit{When Whacking Kids at School is Legal}, \textsc{Wash. Post} (Feb. 9, 2011), http://voices.washingtonpost.com/answer-sheet/discipline/when-whacking-kids-at-school-i.html.
\textsuperscript{151} \textsc{Human Rights Watch} & \textsc{Am. Civil Liberties Union}, \textit{supra} note 147, at 4.
\textsuperscript{152} \textsc{Human Rights Watch} & \textsc{Am. Civil Liberties Union}, \textit{supra} note 3, at 7.
\textsuperscript{153} \textsc{Human Rights Watch} & \textsc{Am. Civil Liberties Union}, \textit{supra} note 147, at 5.
\textsuperscript{154} \textit{Id.} at 2.
\textsuperscript{157} \textit{See} Holden, \textit{supra} note 155.
\textsuperscript{158} \textsc{Human Rights Watch} & \textsc{Am. Civil Liberties Union}, \textit{supra} note 3, at 11. This report explains research-proven alternatives to corporal punishment, including the School-Wide Positive Behavior Support (PBS) model. \textit{Id.}
\end{verse}
iors. These models include conflict resolution programs, character education classes, and peer courts. Without employing corporal punishment, these models collaboratively and respectfully teach positive behaviors and simultaneously foster positive school cultures.\textsuperscript{159}

2. Corporal Punishment Violates Students’ Civil Rights

Corporal punishment in schools violates students’ civil rights,\textsuperscript{160} as demonstrated by civil rights data from the U.S. Department of Education.\textsuperscript{161} This practice disproportionately targets students of color, students with disabilities, boys, and students from low socioeconomic backgrounds.\textsuperscript{162} These groups are “hit more frequently in schools, sometimes at 2–5 times the rate of other children.”\textsuperscript{163}

Corporal punishment is used disproportionately against students of color. For example, even though African-American students comprise only 17.1% of the national school population, 35.6% of students who were paddled were African-American schoolchildren.\textsuperscript{164} Similarly, African-American females are twice as likely as white females to be paddled in schools.\textsuperscript{165} “A 17-year-old girl spoke of the atmosphere produced by the racially disparate use of corporal punishment at her former high school in rural Mississippi: ‘It feels to me like we’re back in slavery.’”\textsuperscript{166}

Students with disabilities are also subjected to corporal punishment at alarming rates. During the 2006–2007 school year, 41,972 special-education students were subjected to corporal punishment.\textsuperscript{167} “Students with disabilities make up 19 percent of those who receive corporal punishment, yet just 14 percent of the

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159. \textit{Id.}
160. Bitensky, \textit{supra} note 140, at 217. Bitensky states:

Corporal punishment of black schoolchildren is laden with historical and cultural messages that they are inferior to other children, and these messages are reinforced by the fact that black students are twice as likely to suffer such punishment as white students. The lack of confidence thereby inspired in African-American students is apt to interfere with the learning process. It was precisely the Supreme Court’s dismay over black children’s harboring such inferiority feelings, with the resultant impediment to education, that undergirded and formed part of the holding in \textit{Brown I}. When the \textit{Ingraham} Court ruled that the Eighth Amendment does not apply to public school corporal punishment, the Court effectively sanctioned the continuation of this practice as a constitutional matter and betrayed \textit{Brown I}’s potential to equalize, truly and substantively, schooling for blacks and whites in this country.

\textit{Id.}
163. \textit{Id.}
164. \textit{HUMAN RIGHTS WATCH \& AM. CIVIL LIBERTIES UNION, supra} note 3, at 5.
165. \textit{Id.} at 6.
166. \textit{Id.} at 7.
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nationwide student population.”

In Texas, the state with the highest incidence of corporal punishment, students with disabilities make up 10.7% of the school population, and yet 18.4% of students subjected to corporal punishment in 2006–2007 were students with disabilities. Similarly, in Tennessee, “students with disabilities are paddled at more than twice the rate of the general student population.”

Students with disabilities are grossly affected by school-wide practices that employ corporal punishment. First, many of these students are being physically punished for conduct that is related to their underlying disabilities. Even though IDEA prohibits long-term suspensions when students’ misbehaviors are manifestations of their disability, this federal legislation does not yet afford the same protections when students are threatened with physical punishment. Consequently, research demonstrates that students with disabilities—including those with Tourette Syndrome, obsessive-compulsive disorder, and autism—are being paddled for conduct that is related to their disability. Second, the effects of corporal punishment are particularly alarming for students with disabilities. Physical punishment causes serious injuries, aggravates existing medical conditions, and indirectly excludes students from educational opportunities. Third, students with disabilities are often less able to protect themselves because schools routinely do not provide parents with notice of these punishments and these students may be unable to communicate these traumas to their parents. Consequently, students with disabilities are not only disproportionately targeted with this physical punishment, they also are routinely punished because of their disabilities, subjected to greater consequences, and afforded few, if any, procedural protections.

3. Contemporary Society Views Corporal Punishment as Cruel and Unusual

Increasing trends towards banning corporal punishment demonstrate that society’s norms and understandings of children’s dignity have evolved since the 1977 Ingraham decision. Shifts in public opinion, changing practices at the state and local levels, national movements, and international law demonstrate that

168. Id. at 2.
169. HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, supra note 3, at 5, 7.
170. HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, supra note 147, at 6.
172. HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, supra note 147, at 5.
173. Id. at 4 (“The Society for Adolescent Medicine has documented serious medical consequences resulting from corporal punishment, including severe muscle injury, extensive blood clotting (hematomas), whiplash damage, and hemorrhaging. Many children whose stories are documented in this report sustained serious injuries from paddling.”).
174. Id. at 5 (“Among families we interviewed, episodes of corporal punishment directly preceded children’s regression in developmental terms, particularly for children with autism.”).
175. Id. at 2 (“Studies show that beatings can damage the trust between educator and student, corrode the educational environment, and leave the student unable to learn effectively, making it more likely that she will drop out of school.”).
176. Id. at 6.
physical punishment in schools is a barbaric and outdated practice that assaults contemporary notions of children’s rights. Public opinion has shifted away from viewing corporal punishment as an acceptable means of discipline in schools. “In an ABC News poll, 72% of respondents opposed physical punishment in grade schools. Even in the South, where corporal punishment is most common, just 35% were in favor.” Many associations and organizations oppose corporal punishment in schools, including the American Medical Association, the American School Counselor Association, the National Association for the Advancement of Colored People, the National Association of Elementary School Principals, the National Association of Secondary School Principals, the National Association for State Boards of Education, the National Education Association, and the National Parent Teacher Association. Newspapers throughout the United States have written editorials condemning the use of physical punishment in schools. For example, Adam Cohen, from Time magazine, explains: “To residents of much of the U.S., beating schoolchildren sounds like a throwback to the nation’s distant past.”

American institutions have already outlawed corporal punishment in other contexts, which reaffirms that the State should not be utilizing physical punishment against members of society. For example, the government already protects populations against corporal punishment, including individuals incarcerated in federal prisons, and children “in other settings, such as hospitals, health facilities, Head Start programs, and nonmedical community-based facilities.”

State and local practices further demonstrate that corporal punishment in schools is becoming increasingly unacceptable. Since Ingraham, the prevalence of corporal punishment in schools has plummeted. Over 1.5 million students were subjected to corporal punishment in 1976; the number dropped to less than one-quarter million during the 2005–2006 school year. Although only two states prohibited corporal punishment in schools when the Court issued its opinion in Ingraham in 1977, thirty-one states ban the practice today.

State policies and local regulations demonstrate that corporal punishment is an outdated practice, with most of the incidents of violence occurring in just

177. Cohen, supra note 149.
180. Cohen, supra note 149.
182. Id. § 2(11).
184. Id.
five southern states. “Almost 40% of all the cases of corporal punishment occur in just two states: Texas and Mississippi, and if we add Arkansas, Alabama and Georgia, these five states account for almost three quarters of all the nation’s school paddlings.” Even within the states that condone corporal punishment, increasing numbers of local districts are outlawing the practice. Ninety-seven of the one hundred largest school districts in the United States prohibit the use of corporal punishment in schools, including major cities in states that allow corporal punishment, such as Dallas, Texas; Houston, Texas; Mobile County, Alabama; East Baton Rouge Parish, Louisiana; Memphis, Tennessee; Atlanta, Georgia; and Miami-Dade, Florida.

At the national level, there has been momentum to increase the federal government’s role in promoting positive school cultures, supporting nonviolent behavioral interventions, and limiting the use of harsh disciplinary policies. In 2011, the House Committee on Education and the Workforce considered H.R. 3027, the Ending Corporal Punishment in Schools Act of 2011. In 2010, the House of Representatives passed H.R. 4247, the Preventing Harmful Restraint and Seclusion in Schools Act, which was reintroduced in 2011 as the Keeping All Students Safe Act of 2011. These bills address the use of physical punishment, physical restraint, and physical seclusion in schools and demonstrate that the federal government is working to promote nonviolent disciplinary practices.

International law and other countries’ practices provide further evidence of the evolving standards of dignity and demonstrate that corporal punishment is cruel and unusual and violates human rights law. International law has categorically denounced violence against children and “all industrialized countries except, the United States and one state in Australia, have banned” corporal punishment in schools. International law defines corporal punishment as “any punishment in which physical force is used and intended to cause some degree

189. See discussion infra section III.A.
190. See Preventing Harmful Restraint and Seclusion in Schools Act, H.R. 4247, 111th Cong. (as passed by the House of Representatives Mar. 3, 2010).
192. For additional information about the use of physical restraints and seclusion in schools, see generally Keeping All Students Safe Act, S. 2020, 112th Cong. (2011), and Laura C. Hoffman, A Federal Solution That Falls Short: Why the Keeping All Students Safe Act Fails Children with Disabilities, 37 J. LEGIS. 39 (2011). States such as New York are also passing legislation to protect students from aversive behavioral interventions, such as electric-shock therapy. See Mark Walsh, Justices Decline Appeal on ‘Aversive Interventions,’ EDUC. WEEK (Apr. 29, 2013), http://blogs.edweek.org/edweek/school_law/2013/04/justices_decline_appeal_on_ave.html. These regulations were recently upheld by the Second Circuit, which provides additional evidence that the tide is turning away from using unnecessary, dangerous physical behavioral interventions. See id.
193. See discussion infra section III.A.
Various human rights instruments denounce the use of cruel, inhuman, or degrading punishment and prohibit the use of corporal punishment in schools. For example, the Convention on the Rights of the Child (CRC) is “the world’s most universally ratified human rights treaty” and unequivocally protects children from all forms of violence and physical punishment:

State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the children from all forms of physical or mental violence, injury or abuse . . . while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

The United States is a signatory but not a party to many of the human rights instruments that protect against violent punishment, including the CRC, the UN Convention on the Rights of Persons with Disabilities (CRPD), and the International Covenant of Economic, Social, and Cultural Rights (ICESCR). As a signatory, the United States is “obliged to refrain from acts which would defeat the object and purpose of a treaty.” Even though the United States is only a signatory to the CRC, 193 countries are parties to this Convention, which offers further evidence that evolving standards of dignity include protecting children from physical violence in schools.

4. The Supreme Court’s Jurisprudence Demonstrates the Evolution Towards Greater Protections for Children’s Rights

Although the Court in 1977 may not have considered children’s rights, vulnerabilities, and political powerlessness, recent jurisprudence has afforded greater constitutional protections to children. Given the changing tide within the Court’s own jurisprudence, overturning Ingraham falls in line with recent decisions and evolutions toward recognizing adolescents’ constitutional rights.

Despite historical practices harshly penalizing juveniles and the Court’s previous decisions that treated juveniles comparably to adults, the Court has overturned cases and recognized that the Constitution affords unique protections to children. In a string of recent death-penalty cases, the Court has held that

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197. Human Rights Watch & Am. Civil Liberties Union, supra note 147, at 58.
198. Id. at 60.
capital punishment against minors violates the Eighth Amendment. In 2005, the Court in *Roper v. Simmons* overruled *Stanford v. Kentucky* and categorically banned imposing capital punishment on juvenile offenders. In 2012, the Court in *Miller v. Alabama* held that sentencing minors to mandatory life imprisonment, regardless of the crime committed, is cruel and unusual punishment. *Miller* extended *Graham v. Florida*, which had previously protected children from mandatory life imprisonment for nonhomicide cases.

Outside of the death penalty context, the Supreme Court has further protected children’s Fourth and Fifth Amendment rights in school contexts. Even though *Ingraham* suggested that the Fourth Amendment is not applicable to unreasonable searches and seizures in schools, the Court’s 1985 decision in *New Jersey v. T.L.O.* held that students are in fact protected from unreasonable searches by school officials. Moreover, in 2011, the Court in *J.D.B. v. North Carolina* afforded greater protections in the Fifth Amendment context, holding that “a child’s age properly informs the Miranda custody analysis.”

In reaching its recent decisions, the Court relied upon contemporary research regarding adolescent development demonstrating that juveniles are less mature, more impulsive, more susceptible to pressures, and consequently, less culpable than adults. Moreover, the Court looked to evolving notions of dignity, and pointed to international and state practices that afforded greater protections to children. For example, the Court noted that U.S. states rarely sentenced juveniles to capital punishment, and that the United States was one of only eight countries—Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China—that had executed a juvenile between 1990 and 2004.

Ultimately, overturning *Ingraham* would align with the Court’s recent jurisprudence surrounding adolescent development and children’s constitutional rights. The Court has already recognized that evolving notions of dignity require the Court to depart from historical practices and previous holdings. Moreover, the Court’s jurisprudence in the death-penalty arena demonstrates the Court’s recognition that children deserve greater protections against state punishments. Just as evolving standards of dignity have encouraged the Court to protect children from certain criminal punishments, evolving standards of dignity should encour-

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209. Id. at 2399.
age the Court to recognize that it should no longer be constitutionally acceptable to physically punish schoolchildren.

III. LEGISLATIVE REFORM: USING SPENDING POWERS TO ENCOURAGE THE MOVEMENT TO ABOLISH CORPORAL PUNISHMENT IN SCHOOLS

Even though the Supreme Court does not permanently maintain erroneous constitutional decisions under the guise of stare decisis, the Court is often slow and hesitant to overturn its jurisprudence. Consequently, the most promising and fastest means for change lie within the legislative branch. Moreover, legislative change would further fuel efforts to overturn \textit{Ingraham} by providing additional evidence that corporal punishment in schools is antithetical to evolving standards of dignity. Advocates should encourage Congress to enact change via several legislative options, including amending the Individuals with Disabilities Education Act (IDEA) to specifically protect students with disabilities from physical punishment, creating incentive-based grants that encourage states to prohibit corporal punishment in local schools, and passing legislation that categorically bans corporal punishment in schools. Congress is likely able to use its spending powers to enact any and all of these proposals.

A. LEGISLATIVE PROPOSALS TO PROTECT SCHOOLCHILDREN FROM CORPORAL PUNISHMENT IN SCHOOLS

This Note encourages Congress to ban corporal punishment by employing a multiprong legislative strategy: (1) amending IDEA to protect students with disabilities from corporal punishment; (2) creating grants to incentivize states to ban corporal punishment and implement School-Wide Positive Behavior Interventions and Supports; and (3) passing the Ending Corporal Punishment in Schools Act of 2011.

Advocates should lobby Congress to amend IDEA to prohibit the use of corporal punishment against students with disabilities. When the Education for All Handicapped Children Act—a law that was later renamed and revised as IDEA—was passed, it achieved bipartisan support and “generated remarkably little opposition in Congress.” Championing the rights of people with disabili-

212. For example, the Court did not overturn its “separate but equal” doctrine for almost sixty years. See \textit{Brown v. Bd. of Educ.}, 347 U.S. 483, 495 (1954); \textit{Plessy v. Ferguson}, 163 U.S. 537, 550–52 (1896).
215. See \textit{Human Rights Watch & Am. Civil Liberties Union}, supra note 147, at 9 (recommending that Congress “[p]rohibit the use of corporal punishment against students with disabilities, as defined by the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973 . . . . [and] [d]efine corporal punishment as any punishment in which physical force, however light, is used with intent to discipline”).
216. \textit{R. Shep Melnick, Between the Lines: Interpreting Welfare Rights} 149–50 (1994) ("Disabilities . . . are universally viewed as \textit{[affecting]} . . . rich and poor, black and white, and residents of inner cities, suburbs, and farm districts—even members of Congress and their families. This fact has made
ties is a cause that cuts across party lines, and advocates should channel this political energy towards protecting certain students from physical punishment in schools. Amending legislation to protect students with disabilities would arguably achieve more immediate results and protections for students with disabilities and simultaneously would build greater momentum for overcoming hurdles and passing more comprehensive legislation that protects all students from corporal punishment.

IDEA is intended to protect educational opportunities for students with disabilities, and yet the law does not explicitly protect these students from corporal punishment.\footnote{HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, supra note 147, at 36–37 n.128 (citing federal cases holding that IDEA does not protect students with disabilities from corporal punishment).} IDEA does prohibit the use of long-term suspensions and expulsions as consequences for behaviors that are manifestations of the student’s disabilities.\footnote{20 U.S.C. § 1415(k) (2006); 34 C.F.R. § 300.530 (2012); see also HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, supra note 147, at 66 (“IDEA does not directly address discipline unless it amounts to a change of placement—that is, a significant suspension (typically for 10 or more days) or expulsion.”).} Advocates should lobby Congress to amend IDEA and protect students from receiving physical punishments for conduct that is a manifestation of their disabilities. Moreover, because physical punishment can “aggravate . . . medical conditions . . . [and] cause some children to regress in developmental terms,”\footnote{HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, supra note 147, at 44–45. The report interviewed families and found:}

[S]everal students on the autism spectrum who received corporal punishment in the early grades regressed in toilet training. . . . Some parents observed that their children with autism exhibited self-injurious behavior after single or repeated episodes of corporal punishment, whereas previously these children had not injured themselves. . . . Many parents noted that their children with autism became more fearful after receiving corporal punishment, especially around their schools. . . . Some students with autism became more aggressive following episodes of physical punishment.

Id. at 46–47.
for the . . . condition.”

Although federal legislation protects children from abusive restraints and seclusion methods in health-care facilities and nonmedical community-based facilities, no federal legislation currently protects children from these practices in educational settings. Special-education advocates are lobbying for more sweeping legislation, including the prohibition of “any other form of restraint [and locked seclusion rooms] except in situations in which the student poses a clear and imminent physical danger to himself or others.” In 2010 and 2011, Congress introduced federal legislation to protect “school children against harmful and life-threatening seclusion and restraint practices.” In addition legislation at the state level is affording increasing protections to students with disabilities. For example, Arizona recently passed legislation restricting the use of seclusion rooms and consequently “join[ed] more than 30 other states that impose rules on the restraint of students in public schools.” Advocates against corporal punishment should partner with the activists in the special-education community who are lobbying for schools to use positive, nonphysical behavioral interventions.

At the local and national level, there has been momentum to end harsh disciplinary practices that contribute to the School-to-Prison Pipeline, which this Note contends aligns with the movement to end corporal punishment in schools. The School-to-Prison Pipeline describes the overreliance on harsh school-disciplinary practices, including zero-tolerance policies and criminalizing minor school misbehavior, which push students out of public schools and

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222. Id. § 290jj.
into the juvenile justice system or the streets. 228 Recent studies, including a longitudinal study of one million students in Texas, illustrate the prevalence and effects of school exclusionary practices. 229 Although much of the research surrounding the School-to-Prison Pipeline focuses on the effect of school exclusionary practices such as suspensions and expulsions, these practices share many similarities with the use of physical punishment in schools. For example, research on the School-to-Prison Pipeline demonstrates that harsh disciplinary practices disproportionately target students of color and students with disabilities, and too often these exclusionary practices are consequences for minor behaviors. Similar civil rights concerns are present with the use of corporal punishment because schools disproportionately use corporal punishment against certain demographics of students and use physical punishments to address a “wide range of misbehavior, including minor infractions such as chewing gum, being late, sleeping in class, talking back to a teacher, violating the dress code, or going to the bathroom without permission.” 230 The federal government has recently set up a Department of Justice task force to address the School-to-Prison Pipeline, and the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights held a congressional panel in December 2012 to examine the consequences of harsh school disciplinary policies. 231 Advocates for banning corporal punishment in schools should both partner with the movement to end the School-to-Prison Pipeline and broaden this movement’s message to include ending physical punishments in schools.

As advocates garner the necessary political support, they should lobby for proposals that encourage states to protect all schoolchildren from corporal punishment. Using a grant-based program, Congress can financially encourage states to replace corporal punishment practices with more progressive approaches for promoting positive and safe school cultures. 232 For example, in 2009, the American Recovery and Reinvestment Act allocated $4.35 billion to the Race to the Top Fund, which provided competitive grants to encourage states to innovatively address four key areas: (1) adopting college- and career-readiness standards; (2) creating data systems to track student progress and improve teaching; (3) “[r]ecruiting, developing, rewarding, and retaining effective teachers and principals”; and (4) “[t]urning around our lowest-achieving

228. See, e.g., ASKEW ET AL., supra note 227, at 7.
230. HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, supra note 3, at 2.
232. See HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, supra note 147, at 9 (recommending that Congress “[s]upport measures to improve school discipline through the implementation of positive behavior systems by passing the Positive Behavior for Safe and Effective Schools Act (HR 2597)”).
The Obama Administration’s recent success with Race to the Top grants demonstrates states’ willingness to plan and implement progressive educational reforms that are aligned with federal goals for education. The Race to the Top grants required only minimal funding from the federal government and yielded substantial results. Congress should use its track record of success with these grants to encourage states to outlaw corporal punishment in schools. These grants can specifically target school-culture issues that have been gaining attention at the national level. For example, these incentive grants can address multiple facets of the School-to-Prison Pipeline, target harsh disciplinary practices such as corporal punishment, zero-tolerance policies, and long-term suspensions, and support schools in implementing research-proven positive behavioral intervention and support.

Finally, advocates should lobby for legislation that categorically bans corporal punishment in schools and withholds federal funding from noncompliant states. For example, advocates should mobilize efforts to pass the Ending Corporal Punishment in Schools Act of 2011, which bans corporal punishment in federally funded schools, penalizes educational institutions that employ corporal punishment, and awards school-climate grants to institutions in need of assistance. The bill defines corporal punishment as “paddling, spanking, or other forms of physical punishment, however light, imposed upon a student.” The bill is based upon congressional findings, which include all children’s “right[s] to be free from any corporal punishment.” The findings explain how corporal punishment targets “hundreds of thousands of school children” each year and disproportionately affects African-American schoolchildren and students with disabilities. The bill protects schoolchildren by categorically banning corporal punishment in public schools, withholding funding from schools that continue authorizing or using corporal punishment, and awarding grant monies to help schools “improv[e] school climate and culture by implementing school-wide positive behavior support approaches.”

Legislative strategies—including amending IDEA, creating incentive grants to encourage state actions, and enacting categorical bans against corporal punishment—are promising means to protect children from physical punishment in schools. Legislative strategies can effectively and timely capture chang-

236. Id. § 6(c)(2).
237. Id. § 12(1).
238. Id. § 2(1).
239. Id. § 2(6).
240. Id. § 2(7)–(8).
241. Id. § 6(a).
ing public opinion, evolving notions of dignity, and the increasing urgency to reform school culture. Moreover, these legislative strategies can further fuel constitutional efforts to overturn *Ingraham* by providing the Court with additional evidence that physical punishment against students is cruel and unusual.

**B. LEGISLATIVE REFORMS TO BAN CORPORAL PUNISHMENT WOULD LIKELY BE CONSTITUTIONALLY PERMISSIBLE**

The above proposals—amending IDEA, creating incentive-based grants, and categorically banning corporal punishment in schools—would likely survive constitutional muster under Congress’s spending powers. The federal government has increasingly and constitutionally used its powers to encourage state actions, particularly to address social and economic issues that have traditionally been delegated to the states. These proposals are similar to the highway legislation upheld in *South Dakota v. Dole*, and distinct from the constitutionally impermissible expansion of Medicaid in *National Federation of Independent Business (NFIB) v. Sebelius*.

The above proposals are permissible because the federal funding schemes do not likely reach the coercive threshold. In *Dole*, the Court upheld legislation that made a percentage of federal highway funds conditional upon states banning sales of alcohol to individuals under twenty-one years old. In *Dole*, the Court explained that the federal funds were a small percentage of the states’ overall budgets, and consequently the legislation permissibly pressured states to change alcohol laws without impermissibly coercing actions. The federal education schemes, which comprise small percentages of the states’ overall budgets, are similar to *Dole* and, consequently, are likely constitutionally permissible actions under Congress’s spending clause powers.

Although the Supreme Court recently concluded that the expansion of Medicaid was unconstitutional under Congress’s spending clause powers, *NFIB* will not likely affect the constitutionality of federal education legislation, including the proposals offered in this Note. In *NFIB*, the Court ruled that the Medicaid expansion, which threatened to withhold all existing Medicaid funding from noncompliant states, was an unconstitutional use of Congress’s spending powers because the law coerced states and did not offer “a genuine choice” about whether to accept federal conditions. Professor Eloise Pasachoff offers a

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244. 132 S. Ct. 2566 (2012).
247. *Id.* at 211.
three-part framework for dissecting NFIB’s coercion analysis:

First, does the condition in question threaten to take away funds for a program that is separate and independent from the program to which the condition in question is attached? Second, if it does, did the states have sufficient notice at the time they accepted funds for the first program that they would also have to comply with the second program? Third and finally, if not, is the amount of funding at stake so significant that the threat to withdraw it constitutes economic dragooning?250

According to Professor Pasachoff, for legislation to be deemed unconstitutional, all three questions must be reached and answered in the affirmative.251 Using this inquiry, it becomes clear that “Medicaid expansion is truly sui generis in its program design, in the scope of its funding, and in its effect on state budgets”;252 and federal education legislation would likely withstand NFIB’s coercion analysis.253

First, this Note’s proposals to amend IDEA are permissible exercises of Congress’ spending clause powers under NFIB’s coercion analysis. The inquiry likely stops at the first prong because amending disciplinary provisions in IDEA does not create a new program, but rather, it merely modifies existing legislation. IDEA already requires a manifestation determination before children with disabilities receive long-term suspensions or expulsions.254 Banning corporal punishment against children with disabilities would merely modify the existing law, which already protects these children from certain egregious punishments. Even if this Note’s proposal is deemed to be a new program, without notice to states at the time that IDEA was enacted, the amount of funding does not constitute economic dragooning. Professor Pasachoff explains:

Of the total $552 billion dollars in federal funds provided to the states in 2010, [$12.5 billion came from IDEA, constituting]... around 2% of all federal allocations to the states (as compared to 42% for Medicaid). Whereas cutting off federal Medicaid funding would jeopardize state budgets by over 10%, IDEA... spending constitutes only [0.76%] of the average state budget... All of these figures are far closer to the amount approved in Dole than to the amount disapproved in NFIB.255

Second, this Note’s recommendation to create incentive-based grants also survives NFIB’s coercion analysis. These grants would be separate programs and would not threaten to take away funding from existing programs. Moreover,

250. Pasachoff, supra note 245, at 612.
251. Id. at 594.
252. Id. at 582.
253. Id. at 577.
the size of this funding does not amount to economic dragooning. Similar to Race to the Top grants, which only allocated $4.35 billion in discretionary monies, this Note’s proposal would involve small sums of money—which are also similar to the highway funds already deemed constitutional in Dole.

Third, this Note’s proposal to withhold all federal education funding is distinct from withholding funds in the Medicaid context and, consequently, likely survives NFIB’s coercion analysis. This recommendation is either a permissible condition on the use of federal funds, or it is an independent program if: (1) additional funding attaches to the condition (for example, funding for the Ending Corporal Punishment in Schools Act of 2011); or (2) the condition significantly modifies existing federal education legislation to the extent that it constitutes a “shift in kind, not merely degree.” Even if it is an independent program, it likely survives the NFIB analysis because the amount of federal funding does not constitute economic dragooning. Professor Pasachoff explains:

Of the $522 billion the federal government provided to the states in 2010, over $233 billion, or 42%, went to Medicaid. A much smaller figure, $70 billion, or 12.8%, of this $522 billion went to elementary and secondary education. Medicaid spending accounts for over 20% of the average state’s annual budget, of which the federal share ranges from 50 to 83%, with an average of 64%. Elementary and secondary education spending also constitutes about 20% of the average state’s annual budget, but the federal share of this spending is only about 21%.

... [In fiscal year 2010], the average state relied on federal Medicaid dollars for 14% of its state expenditures, while the average state relied on federal dollars for elementary and secondary education for 4.4% of its state expenditures.

There are thus very good reasons to think that the laws conditioned on all federal education funding fall within ‘the outermost line where persuasion gives way to coercion.’

This Note’s proposals likely survive constitutional muster under Congress’s spending clause powers: withholding federal education funding is not analogous to withholding Medicaid funding. This Note’s recommendations do not
coerce state actions but rather permissibly incentivize states to ban corporal punishment in schools.

**CONCLUSION**

Violence against children in schools is detrimental to students and society, does not advance educational goals, and is antithetical to evolving standards of decency. This Note argued that advocates should employ a twofold strategy: litigating cases to overturn *Ingraham* and lobbying Congress to enact legislation banning corporal punishment in schools. Although post-*Ingraham* litigation has focused on the applicability of the Fourth and Fourteenth Amendments, these constitutional claims are limited at best—they only protect against the most egregious forms of corporal punishment that are deemed to “shock the conscience” or be “unreasonable” in school contexts. Consequently, categorically banning corporal punishment in schools would require the Court to reconsider *Ingraham* and recognize that physical punishment of schoolchildren is cruel and unusual.

Advocates seeking to constitutionally abolish corporal punishment in schools should focus on the applicable standards for overturning precedent, the applicability of the Eighth Amendment to school settings, and the evolving standards of dignity, which demonstrate that physical punishment in schools is cruel and unusual. As advocates develop long-term litigation strategies to overturn *Ingraham*, advocates should simultaneously lobby Congress to use its spending powers to encourage all states to ban corporal punishment in schools.

As schools prepare children for democratic citizenship, these institutions must protect children’s safety, guarantee students’ rights, and teach nonviolence by employing nonviolent behavioral interventions. Corporal punishment in schools assaults our nation’s commitment to guaranteeing human rights and protecting vulnerable populations. Our society has already recognized that corporal punishment is inhumane against federal prisoners and other populations. It is time to afford these same protections to schoolchildren, by prohibiting physical punishment inside of the schoolhouse gates.