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## Banning Corporal Punishment: A Constitutional Analysis

Deana A. Pollard

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## Banning Corporal Punishment: A Constitutional Analysis

# BANNING CORPORAL PUNISHMENT: A CONSTITUTIONAL ANALYSIS

DEANA A POLLARD\*

## TABLE OF CONTENTS

Introduction.....	448
I. State Legislatures Could Constitutionally Ban Child Corporal Punishment.....	451
A. The Fundamental Right to Control Children’s Upbringing.....	453
1. States could ban corporal punishment based on their police power to protect the citizenry at large ....	456
2. States could ban corporal punishment based on their <i>parens patriae</i> power to protect children.....	463
B. Religious Freedom.....	467
II. State Laws That Exclude Children From Protection Against Corporal Punishment Are Unconstitutional .....	471
A. State Laws Exclude Children from Protection Against Corporal Punishment.....	472
B. State Laws Excluding Children From Protection Against Corporal Punishment Cannot Withstand Even Intermediate Scrutiny Under an Equal Protection Analysis.....	473

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1. Children should be considered a suspect or quasi-suspect class.....	475
2. The state's interest.....	481
3. The means to advance the state's interest are not sufficiently related to the interest.....	484
C. State Laws Excluding Children From Protection Against Corporal Punishment Violate Children's Liberty Interests.....	489
Conclusion.....	492

## INTRODUCTION

In the last decade, a wealth of scientific research has caused most child psychologists and advocates to join many child researchers' long-standing belief that corporal punishment of children should be banned.<sup>1</sup> Child corporal punishment means acts of physical punishment of children that may or may not rise to the level necessary for prosecution under child abuse laws.<sup>2</sup> Particularly in the last five years, the research has demonstrated more clearly than ever that child corporal punishment, even moderate, common spanking

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1. For a thorough discussion of the history of child corporal punishment and the recent research supporting a ban on child spanking, *see generally* Deana A Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. \_\_\_\_ (2003) (forthcoming 2003). *See generally* Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983 (1996) (discussing the use of corporal punishment, its historical background, and legal implications); Symposium, *The Short- and Long-term Consequences of Corporal Punishment*, 98 PEDIATRICS 803 (1996) (relying on a variety of research to illustrate the effects of corporal punishment). The American Bar Association, the American Medical Association, the American Public Health Association, the American Psychological Association, the National Parent-Teachers Association, the National Association of School Psychologists, the National Education Association, the National Association of Social Workers, and the National Association of Pediatric Nurse Associates and Practitioners all support a ban of child spanking. *See* Resolution, American Bar Association (July 1985), at <http://www.abanet.org/child/abapolicies.html> (opposing the use of corporal punishment in educational institutions and advocating the amendment of state laws that permit the practice); *see also* American Humane Association, *The Use of Physical Discipline*, at <http://www.americanhumane.org/children/factsheets/discipline.htm> (speaking out against the use of physical punishment in homes and schools) (last visited Nov. 4, 2002); NAT'L ASS'N OF PEDIATRIC NURSE ASSOC. & PRACTITIONERS, POSITION STATEMENT, 7 J. PEDIATRIC HEALTH CARE 98, 98 (1993) (refusing to support the use of corporal punishment in public and private schools); COMM. ON SCH. HEALTH, AM. ACAD. OF PEDIATRICS, CORPORAL PUNISHMENT IN SCHOOLS, 106 PEDIATRICS 343, 343 (2000) (recommending that all states abolish corporal punishment in school by law and use other forms of behavioral management instead).

2. The distinction between legal child corporal punishment and corporal punishment that constitutes child abuse is not clear cut because it often turns on jury questions such as: was the parent acting with a proper purpose or with "malice," and was the parent's use of corporal punishment reasonable under the circumstances? *See, e.g.*, ALI MODEL PENAL CODE § 3.08 (1985). Corporal punishment that does not rise to the level of child abuse is often referred to as "subabusive" corporal punishment.

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 449

as practiced by more than ninety percent of American parents,<sup>3</sup> is correlated with, and probably causes, many problems for the spanked child. These problems include: increased anger, aggression, and tolerance for violence; lower self esteem; depressed cognitive development; lower scholastic achievement; increased drug use and abuse; increased psychological and physical illnesses; a weakening of parent-child bonding and family relationships; and ultimately, an increased chance of future family and societal violence.<sup>4</sup> In addition to the research demonstrating the dangers inherent in child corporal punishment are numerous studies showing that corporal punishment simply is not effective, or at best, no more effective, than other forms of punishment that do not carry similar risks of harm.<sup>5</sup>

American use of violence against children, including spanking and other forms of subabusive corporal punishment,<sup>6</sup> is presently unparalleled among industrialized nations.<sup>7</sup> America's rate of societal violence is also unparalleled among industrialized countries;

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3. Murray A. Straus et al., *Spanking by Parents and Subsequent Antisocial Behavior of Children*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 761, 761-65 (Aug. 1997) [hereinafter Straus et al., *Spanking by Parents*], available at <http://pubpages.unh.edu/~mas2/CP24.pdf>. The ninety percent of American parents utilizing corporal punishment is down from ninety-nine percent in the 1950s and ninety-seven percent in 1975. *Id.* at 761. More than fifty percent of parents who use corporal punishment on toddlers continue to use it into their children's teen years. *Id.*; see also Murray A. Straus & Julie H. Stewart, *Corporal Punishment by American Parents: National Data on Prevalence, Chronicity, Severity and Duration, in Relation to Child and Family Characteristics*, 2 CLINICAL CHILD & FAM. PSYCHOL. REV. 55, 57-60 (1999) [hereinafter Straus & Stewart, *Corporal Punishment*] (reporting from 1995 survey data that the prevalence of corporal punishment peaks at age four and rapidly declines thereafter and that the severity of the punishment is greatest between ages five and twelve), available at <http://pubpages.unh.edu/~mas2/CP36.pdf>.

4. See generally Pollard, *supra* note 1; *infra* note 56 (providing research on the effects of corporal punishment); Murray A. Straus et al., *Spanking by Parents and Subsequent Antisocial Behavior of Children*, 151 ARCH. PEDIATR. ADOLESC. MED. 761 (Aug. 1997); Murray A. Straus, *Spanking and the Making of a Violent Society*, 98 PEDIATRICS 837 (1996); Leonard P. Eron, *Research and Public Policy*, 98 PEDIATRICS 821, 822-23 (1996); Joan McCord, *Unintended Consequences of Punishment*, 98 PEDIATRICS 832 (1996); Elizabeth Stormshak et al., *Parenting Practices and Child Disruptive Behavior in Early Elementary School*, 29 J. CLINICAL CHILD PSYCHOL. 17 (2000).

5. For example, "time out" and other forms of non-physical punishment are equally or more effective than spanking and do not carry similar risks of harm to the child. See, e.g., Alexander K.C. Leung et al., *Counseling Parents About Childhood Discipline*, 45 AMER. FAMILY PHYSICIAN 1185 (1992) (citing, inter alia, M.L. Kelly et al., *Acceptability of Positive and Punitive Discipline Methods: Comparisons Among Abusive, Potentially Abusive, and Nonabusive Parents*, 14 CHILD ABUSE NEGLECT 219 (1990); Mark W. Roberts & Scott W. Powers, *Adjusting Chair Timeout Enforcement for Oppositional Children*, 21 BEHAVIOR THERAPY 257 (1990).

6. This term means acts of physical punishment against children that do not rise to the level required for prosecution under child abuse laws, such as slapping, grabbing, pushing, etc.

7. See, e.g., Murray A. Straus, *Spanking and the Making of a Violent Society*, 98 PEDIATRICS 837 (1996).

our violence rate is nearly four times that of Canada and nearly eight times that of our Western European counterparts.<sup>8</sup> American law supports and protects parental use of physical violence as a child-rearing method, with all fifty states recognizing some form of a privilege for parents and legal guardians to hit children in their custody.<sup>9</sup> Ironically, the privilege to “discipline” children with physical force is based on the notion that physical discipline is efficacious, a notion that is not only undermined but contradicted by the most recent, most reliable research regarding the impact of child corporal punishment. The reality is that physical discipline is dangerous and contributes to many individual and societal problems.

Other countries have responded to the research on child corporal punishment by banning the practice altogether, including spanking by parents in the home. Beginning with Sweden in 1979, twelve countries have now formally banned all forms of child corporal punishment, and another twelve countries and Mexico City have legislation pending.<sup>10</sup>

American law in relation to corporal punishment of children is at odds with scientific research regarding the impact and efficacy of this child-rearing method. This Article argues that American law must

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8. See Murray A. Straus, *Spanking and the Making of a Violent Society*, 98 PEDIATRICS 837, 837 (1996), available at <http://pubpages.unh.edu/~mas2/CP31.pdf> (summarizing and synthesizing numerous studies that have found a correlation between corporal punishment and later societal violence). Of course, there are other countries with much higher homicide rates than America, such as Mexico and Columbia. *Id.*

9. All fifty states recognize a parental “discipline” defense to actions that otherwise would constitute a violation of tort law and/or criminal law. See Pollard, *supra* note 1, at nn.263-99 and accompanying text; e.g., *People v. Whitehurst*, 12 Cal. Rptr. 2d 33 (Ct. App. 1992); *Commonwealth v. Ogin*, 40 A2d 549 (Pa. 1988); MODEL PENAL CODE § 3.08 (1985); RESTATEMENT (SECOND) OF TORTS § 147 (1965). Some legal analysts have argued that Minnesota has essentially banned child corporal punishment, based on Minnesota provisions enacted in 1997 providing that corporal punishment of children may constitute assault, not a defense to assault as in other American jurisdictions. Susan H. Bitensky, *Spane the Rod, Embrace Our Humanity, Toward A New Legal Regime Prohibiting Corporal Punishment*, 31 U. MICH. J.L. REFORM 353, 356 & n.5, 386-88 (1998) (citing MINN. STAT. ANN. §§ 609.06(1)(6), .379(1)(a), .379(2), .224(1)(1), .224(1)(2), .02(7) (West Supp. 1997)). However, a recent unpublished Minnesota court decision indicates that the parental privilege to hit children is still a valid defense to crimes and torts in Minnesota. See *In re Welfare of Minor Children of J.B.B.*, No.CO-00-1606, 2001 WL 243221, \*3 (Minn. Ct. App. Mar. 13, 2001) (holding that spanking of five and six year olds with a wooden lathe did not constitute abuse under the law because it did not result in injury and therefore finding the children’s removal from their parents’ custody was inappropriate).

10. Finland, Norway, Austria, Cyprus, Italy, Croatia, Latvia, the United Kingdom, Denmark, Israel, and Germany have all banned child corporal punishment. For a list of foreign laws banning child corporal punishment, see <http://www.stophitting.com>. Switzerland, Poland, Spain, Scotland, Canada, Jamaica, New Zealand, Namibia, South Africa, Sri Lanka, the Republic of Ireland, Belgium, and Mexico City all have legislation pending. *Id.*; see also <http://www.nospank.org>

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 451

change in accordance with current scientific knowledge about the individual and societal impact of child corporal punishment. The law could change in two ways. First, state legislatures could take the initiative to ban child spanking and other forms of subabusive corporal punishment. Second, state laws that exclude children from protection against assault based on a parental privilege should be declared unconstitutional as violating children's equal protection and liberty interests. This Article discusses the constitutional support for both methods of legal change.

Part I of this Article argues that states could ban corporal punishment by invoking either their police power to protect society or their *parens patriae* power to protect children in particular, based on the scientific research demonstrating that child corporal punishment causes harm both to children and society at large. Part I further discusses the most likely challenges to such state action, namely the parental right to control children's upbringing and religious freedom. The part concludes that neither the right to control children's upbringing nor religious freedom are absolute, and indeed both have taken the back seat to children's and/or societal welfare throughout the history of this country. Thus, these challenges would not pose a constitutional obstacle to a state's decision to ban child spanking.

Part II argues that current state laws excluding children from protection against assault and battery are unconstitutional. This part argues that children epitomize the "discreet and insular" minority in greatest need of protection under the Equal Protection Clause because of their political powerlessness, minority status, and history of discrimination. Moreover, this part argues that the state's "interest" in excluding children from protection from corporal punishment is undermined, not furthered, by current state laws because the state policies sought to be advanced by these laws are contradicted by current child psychology and social psychology research. Finally, this part argues that state laws excluding children from protection from corporal punishment violate children's liberty interest in being free from physical invasion.

#### I. STATE LEGISLATURES COULD CONSTITUTIONALLY BAN CHILD CORPORAL PUNISHMENT

Although a state ban on child corporal punishment is generally viewed as very progressive and liberal, and the U.S. Supreme Court is considered quite conservative at this time, there are reasons to believe that the current Court's deferential position towards state

sovereignty and state action mitigates in favor of the Court upholding such progressive state legislation. Beginning when Justice Kennedy joined the Court in 1989 and formed a five Justice conservative majority,<sup>11</sup> the Court has generally limited federal power and increased state power by interpreting numerous constitutional provisions consistent with a strong commitment to state sovereignty.<sup>12</sup> For example, the Court has strictly construed the Commerce Clause, thereby limiting Congress's power,<sup>13</sup> revived the Tenth Amendment as an independent, judicially enforceable limit on Congress's power,<sup>14</sup> and increased the breadth of Eleventh Amendment protection against suing a state.<sup>15</sup> All of these constitutional decisions afford greater power to the states and less power to the federal government. The Court has repeatedly demonstrated "judicial neutrality," frequently declaring that it would not hold government actions or state laws unconstitutional unless they violate clearly established constitutional principles.<sup>16</sup> The Court also has made clear its position

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11. The five conservative justices on the U.S. Supreme Court are Chief Justice Rehnquist and Justices Thomas, O'Connor, Scalia, and Kennedy.

12. For a discussion of the Court's shift to conservative decision making and general deference to government action following Justice Kennedy joining the Court, see Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 44-64, 99-103 (1989).

13. See, e.g., *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (holding that Congress lacked authority under the Commerce Clause to provide civil penalties for violations of the Violence Against Women Act because gender violence is not of an economic nature in and of itself); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (finding that Congress did not have the authority to criminalize gun possession within a school zone since there was no evidence that it substantially affected interstate commerce).

14. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (discussing the significance of the Tenth Amendment as a protector of state sovereignty and the importance of autonomous state governments as a check on possible federal tyranny); *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that a provision requiring states to either assume liability for radioactive waste or process it according to federal standards infringed upon state sovereignty protected by the Tenth Amendment); *Printz v. United States*, 521 U.S. 898, 928 (1997) (striking down portions of the Brady Handgun Violence Prevention Act that required state actors to process background checks because the provision forced state officers to enforce federal laws).

15. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (finding that Congress lacked authority under Article I to abridge the state immunity granted by the Eleventh Amendment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66 (2000) (holding that the Age Discrimination in Employment Act did not abrogate states' Eleventh Amendment immunity, while Congress expressed a clear intent to do so, it exceeded its authority by materially increasing states' obligations in responding to age discrimination).

16. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (plurality opinion) (refusing to invalidate a state law allowing capital punishment of minors as young as sixteen years of age because to do so would be to replace state legislative decisions with the Court's "personal preferences," which would essentially turn the Court into "a committee of philosopher-kings").



that the theory and utility of federalism is, in part, to allow states to make social policy decisions based on their own judgment in areas in which no clearly efficacious means of achieving a social goal exists.<sup>17</sup> In this regard, Justices Kennedy and O'Connor have proclaimed that states must be allowed to "perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."<sup>18</sup> This policy of allowing states to exercise their judgment regarding difficult social issues based on concepts of federalism and sovereign immunity, coupled with the Court's historical deference to state laws aimed at protecting the public,<sup>19</sup> indicates that despite the Court's "conservative" composition, progressive social policy legislation banning child corporal punishment may nonetheless be given great deference as against federal constitutional challenges.

If a state chose to ban child corporal punishment, the state would be in the position of defending its action against potential constitutional challenges, which would most likely be based on infringement of the fundamental right to control children's upbringing or interference with religious freedom. Particularly considering the current Court's "hands off" position in relation to state legislative decisions,<sup>20</sup> state action banning corporal punishment could survive both of these constitutional challenges, based on its police power and/or *parens patriae* power.<sup>21</sup>

#### A *The Fundamental Right to Control Children's Upbringing*

The Court has consistently recognized a parent's right to control and rear his child as he sees fit as part of the liberty interest secured

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17. *Sæ e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (explaining that federalism means federal government powers are few and defined, states' powers are numerous and indefinite; proper balance of power between state and federal government will reduce the risk of tyranny and abuse from either front).

18. *Id.* at 580 (Kennedy, J., concurring, joined by Justice O'Connor).

19. *Sæ* discussion *infra* notes 44-60 and accompanying text (discussing the Court's recognition of state police powers as one of the broadest powers reserved to the states).

20. *Sæ e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 840 (1992) (applying lowering level of scrutiny to state laws regarding abortion); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 281 (1990) (deferring to state law evidentiary requirement for terminating life support); *Webster v. Reproductive Health Services*, 492 U.S. 490, 560 (1989) (deferring to state law regarding abortion); *sæ also* Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 57 (1980) ("The Court's inability to develop a theory of interpretation consistent with its premises—a theory for when it should accept constitutional claims and hold against the government—leaves the Court in a very deferential posture. Thus, one obvious consequence of the Court's jurisprudence is that the government generally wins constitutional cases.")

21. Discussion *infra* Part II.A1-2.

by the Due Process Clause.<sup>22</sup> The contours of the right and the standard applicable to state law challenges grounded in this right are not entirely clear. Specifically, the Supreme Court has never ruled on the issue of whether parents have a right to corporally punish their children as part of the parent's right to rear. To the contrary, the Ninth Circuit has held that parents do *not* have a clearly established right to inflict corporal punishment on their children.<sup>23</sup> Thus, the issue of whether prohibiting corporal punishment would violate a parent's right to rear his child must be gleaned from the Supreme Court's opinions on the parental right to rear in other contexts.

Allegations of government infringement of fundamental rights sometimes will be analyzed using strict scrutiny.<sup>24</sup> However, from its inception, the Court has only provided limited protection for the parental right to rear. Although the Court has characterized the parental right to control children as "fundamental," the Court has never applied strict scrutiny, or even intermediate scrutiny, to challenges of state laws based on a parent's right to rear children.<sup>25</sup> Thus, despite referring to the parental right to control children's upbringing as "fundamental," the Court's historical and contemporary analysis of the right has shown little deference to parental actions that may harm children.

In *Meyer v. Nebraska*,<sup>26</sup> the seminal case recognizing a parental right to rear, the Court essentially applied a rational basis test to the "fundamental" right to control children's upbringing.<sup>27</sup> The Court stated that a parent's liberty interest in child-rearing could be subverted to a state's proper exercise of its police power via legislation that has a "reasonable relation to some purpose within the competency of the state to effect."<sup>28</sup> In *Prince v. Massachusetts*,<sup>29</sup> the Court reiterated that the parental right to rear is far from absolute: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens,

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22. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

23. *Sweany v. Ada County*, 119 F.3d 1385, 1388 (9th Cir. 1997).

24. *See, e.g.*, *Adarand v. Peña*, 515 U.S. 200, 226 (1995) (holding that race-based classification requires strict scrutiny); *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984) (discussing race-based and marriage-based infringement on the right to custody of one's children); *Graham v. Richardson*, 403 U.S. 365 (1971) (applying strict scrutiny to alienage-based classification.); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding unconstitutional race-based infringement on right to marry).

25. Discussion *infra* notes 26-38 and accompanying text.

26. 262 U.S. 390 (1923).

27. *Id.* at 400.

28. *Id.*

29. 321 U.S. 158 (1944).

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 455

with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.<sup>30</sup> Similarly, in *Wisconsin v. Yoder*,<sup>31</sup> the Court stated that the power of a parent may be limited if it appears that parental decisions will have a “potential for significant social burdens.”<sup>32</sup> The *Yoder* Court specifically accepted the state’s arguments that it had an interest in “preparing citizens to participate effectively and intelligently in our open political system [in order to] preserve freedom and independence,” as well as in preparing individuals to be “self-reliant and self-sufficient participants in society.”<sup>33</sup> These interests fall squarely within the state’s police power to protect and advance society, even as against claims of fundamental rights infringement, provided these interests are served by the state’s actions.<sup>34</sup>

In 2000, the Court in *Troxel v. Granville*<sup>35</sup> repeated that the parent’s right to rear is “fundamental,” but did not articulate a standard of review.<sup>36</sup> The plurality opinion also did not answer the question of what state interest would suffice to justify state interference with the parent’s discretion to control children’s upbringing, but implied that harm or potential harm to a child would provide an adequate basis for the state to intervene to protect the child.<sup>37</sup> Justice Stevens’s dissenting opinion clarified that the balancing approach utilized in *Prince* and *Yoder* remains the standard: “A parent’s rights with respect to her child have thus never been absolute [and] a parent’s interests in a child must be balanced against the State’s long-recognized interests in *parens patriae*.”<sup>38</sup> Thus, challenges to state law based on

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30. *Id.* at 168.

31. 406 U.S. 205 (1972) (holding that the First and Fourteenth Amendments prevented the State from compelling formal education past age sixteen for Amish children because of religious objections).

32. *Id.* at 234.

33. *Id.* at 221.

34. In *Yoder*, however, the Court felt that requiring an additional one to two years of schooling would “gravely endanger if not destroy the free exercise of [the children’s] beliefs,” with little to no benefit to the state’s interest. *Id.* at 219.

35. 530 U.S. 57 (2000) (plurality).

36. *See id.* at 76-80 (holding that in the absence of a finding of unfitness, courts should defer to the rearing preferences of the child’s parents).

37. *See id.* at 63, 69 (indicating permissibility of state intervention if a parent fails to “adequately care” for his or her child).

38. *Id.* at 88 (Stevens, J., dissenting) (citing, inter alia, *Parham v. J.R.*, 442 U.S. 554, 605 (1979) and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Indeed, Justice Stevens argued that courts should be careful not to allow parents too much discretion when their actions may not serve their children well. *Id.* Justice Scalia agreed stating point blank that “the theory of unenumerated parental rights . . . has small claim to *stare decisis* protection.” *Id.* at 92 (Scalia, J., dissenting). Note also that Justice Thomas concurred, but stated that strict scrutiny should have been applied. *Id.* at 80 (Thomas, J., concurring).

the fundamental right to control children require that the Court balance the interests of the state in protecting children with the parent's right to control upbringing to determine whether an infringement on a parent's right is constitutional.

Although the interests of parents, children, and the state are intertwined in many of the Court's decisions, in general, states' ability to infringe on a parent's right to rear children can be broken into two categories: cases in which the state's interest is based on its police power to protect the public at large from societal ills<sup>39</sup> and cases in which the state's interest is based on its *parens patrie* power to protect children who cannot protect themselves.<sup>40</sup> A review of the case law indicates that either of these bases of state power alone is sufficient to support a ban on child corporal punishment as against challenges based on the parental right to control children's upbringing.<sup>41</sup> In addition, the Court has articulated other state interests relevant to constitutional challenges based on a parent's right to control children, such as a state's interest in strengthening the family as a valuable social institution.<sup>42</sup> Additional state interests provide additional support for state legislative action banning the practice of child corporal punishment.<sup>43</sup>

1. *States could ban corporal punishment based on their police power to protect the citizenry at large*

The state's police power embodies inherent plenary power for the state to promote all aspects of the public's welfare, including public health, safety, morals, and family values.<sup>44</sup> The Supreme Court has long recognized that the state's police powers are among the broadest powers reserved to the states and that state action pursuant to such police powers cannot be declared unconstitutional unless the action is "clearly arbitrary and unreasonable, having no substantial

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39. *Sae e.g.*, *Schall v. Martin*, 467 U.S. 253, 274 (1984) (discussing the authority of the state to use police power to protect the health and welfare of its citizens); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (same); *Jacobson v. Mass.*, 197 U.S. 11, 25 (1905) (same).

40. *Sae Prince v. Mass.*, 321 U.S. 158 (1944) (upholding state's authority to punish those who violate child labor laws).

41. *Sae infra* nn.44-106 and accompanying text.

42. *Sae e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 637-39 (1979); *Parham v. J.R.*, 442 U.S. 584, 610 (1979); *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977).

43. These interests include creating support for family members' needs that the state otherwise meets, such as health care costs and other economic needs, and fostering social pluralism. *Sae e.g.*, *Mboore v. City of Cleveland*, 431 U.S. 494, 505 (1977) (emphasizing extended family's value in protecting family members from economic or social adversity).

44. *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023 (1992).

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 457

relation to the public health, safety, morals, or general welfare."<sup>45</sup> The state clearly may prevent citizens from harming one another via its police power, including protecting children from poor parenting.<sup>46</sup> As such, police power provides the state with authority to act in furtherance of its interest in encouraging the emotional and intellectual development of children so that they may become autonomous, self-reliant citizens.

The Court has long recognized the state's police power to make laws infringing on individual rights for the benefit of society. In 1905, the Court considered the constitutionality of a Massachusetts mandatory smallpox vaccination law based on a variety of Fourteenth Amendment clauses, including the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause.<sup>47</sup> The individual involved refused to get vaccinated, based on his theory, supported by some medical experts, that vaccinations can have injurious effects on the person being vaccinated, including infecting the blood and possibly causing death.<sup>48</sup> The Court, however, upheld the statute as a proper exercise of the state's police power, which "must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety."<sup>49</sup>

In response to the individual's offer of proof that the vaccinations were ineffective or could cause other bodily harms, the Court noted that the majority of medical professionals believed that vaccinations against smallpox were very effective in preventing the spread of the disease.<sup>50</sup> The Court stated that it was within the state's power to "choose between" the competing theories in taking steps to protect the public in accordance with its police power.<sup>51</sup> The only limitation the Court articulated was that it would be an improper invasion of fundamental rights for a statute, purporting to protect the public health, safety, or morals, to have "no real or substantial relation to those objects."<sup>52</sup> As additional support for its conclusion that the smallpox vaccination was a proper exercise of the state's police

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45. *Id.* The Court has also stated that the state's police powers are among the "least limitable." See *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 548 (1917) (dictum).

46. *E.g.*, *Sights v. Barker*, 684 N.E.2d 224, 230 (Ind. App. 1997) (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

47. See *Jacobson v. Massachusetts*, 197 U.S. 11, 13-14 (1905) (finding an ordinance that required small pox vaccinations constitutional).

48. *Id.* at 36.

49. *Id.* at 25.

50. *Id.* at 34.

51. *Id.* at 30.

52. *Id.* at 31.

power, the Court cited a number of countries that had made general vaccination compulsory.<sup>53</sup> While the Court stated that it could not decide whether vaccination would prevent smallpox, the evidence, including "strong support in the experience of this and other countries," amply supported the state's conclusion, rendering it an appropriate exercise of police power.<sup>54</sup>

In response to the individual's "liberty" argument, the Court stated:

Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State; . . . The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.'<sup>55</sup>

The state thus has authority pursuant to its police power to ban corporal punishment for the purpose of decreasing societal violence, domestic violence, psychological and mental illness, and drug abuse, all of which have a deleterious effect on society at large. According to the majority of recent scientific research, these societal ills appear to result, at least in part, from corporal punishment.<sup>56</sup> Even if cause and

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53. *Jacobson*, 197 U.S. at 32 & n.1 (listing Denmark, Sweden, various German states, Prussia, Romania, Hungary, and Serbia as countries with compulsory vaccination laws). France, Italy, Spain, Portugal, Belgium, Norway, Austria, Turkey made vaccinations compulsory for state employees, students, and soldiers. *Id.* Additional countries' laws and statistics were cited by the court. *Id.*

54. *Id.* at 35.

55. *Id.* at 26. The Court also referred to the state's ability to force individual participation in the army, which carries the risk of being killed, as support for its position that vaccinations may be compelled against individual will. *Id.* at 29.

56. See, e.g., Leonard D. Eron, *Research and Public Policy*, 98 PEDIATRICS 821, 822-23 (1996) (discussing the correlation between physical punishment and its negative impact on the social behavior of children); Murray A. Straus, *Spanking and the Making of a Violent Society*, 98 PEDIATRICS 837, 838 (1996) (stating that research demonstrates that frequent use of corporal punishment directly increases the probability of a child becoming delinquent); Anthony M. Graziano et al., *Subversive Violence in Child Rearing in Middle-Class American Families*, 98 PEDIATRICS 845, 846 (1996) (discussing the adverse effects of corporal punishment on children's emotional state); Straus et al., *Spanking by Parents*, *supra* note 3, at 766-67 (finding that replacing corporal punishment with nonviolent discipline would reduce the risk of antisocial behavior and could reduce the level of violence in society); Straus & Stewart, *Corporal Punishment*, *supra* note 3, at 55-69 (analyzing the extent and nature of corporal punishment in America); Zvi Strassberg et al., *Spanking in the Home and Children's Subsequent Aggression Toward Kindergarten Peers*, 6 DEV. & PSYCHOPATHOLOGY 445, 456 (1994). Strassberg et al. used longitudinal studies to test the links between corporal punishment of children and later aggression toward kindergarten peers. *Id.* They

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 459

effect were not entirely clear, the state's police power includes discretion to choose between competing theories in making laws to protect the public.<sup>57</sup> Particularly where protection of minors is involved, the Court has deferred to state legislatures' choices, stating, "We do not demand of legislatures 'scientifically certain criteria of legislation.'"<sup>58</sup> As previously noted, the Court in *Wisconsin v. Yoder*<sup>59</sup>

concluded that parents' use of physical discipline appears to socialize children subsequently to aggress more, not less, towards peers. *Id.* They also found that the least aggressive children came from families in which parents did not spank, the most aggressive children came from families who used more violent discipline than spanking, and children of parents who spanked fell in between. *Id.* Interestingly, they found that the frequency of spanking was not the issue, but rather, *whether spanking occurred at all.* *Id.* at 456. In conclusion, the researchers stated:

Our findings are consistent with the position taken by researchers and clinicians in the area of family discipline and violence that physical punishment is not an appropriate part of the parental disciplinary repertoire. . . . [F]or purposes of public policy there seems to be enough accumulated evidence that physical punishment does not enhance and most probably is detrimental to optimal social development. . . . As a society, we are subjecting children to physical pain despite the failure of these tactics to be associated with improved socialization.

*Id.* at 459; see also Timothy Brezina, *Teenage Violence Toward Parents as an Adaptation to Family Strain: Evidence from a National Survey of Male Adolescents*, 30 YOUTH & SOC'Y 416, 437 (1999) (stating that there is a reciprocal relationship between parental aggression and adolescent-to-parent violence); Ronald L. Simons et al., *Socialization in the Family of Origin and Male Dating Violence: A Prospective Study*, 60 J. MARRIAGE & FAM. 467, 475 (1998) (noting that research demonstrates "a significant relationship between exposure to corporal punishment and subsequent dating violence"); Harriet L. MacMillan et al., *Slapping and Spanking in Childhood and its Association with Lifetime Prevalence of Psychiatric Disorders in a General Population Sample*, 161 CAN. MED. ASS'N J. 805, 805 (1999) (finding a "linear association between the frequency of slapping and spanking during childhood and a lifetime prevalence of anxiety disorder, alcohol abuse or dependence and externalizing problems"); Robert H. DuRant et al., *Exposure to Violence and Victimization and Depression, Hopelessness, and Purpose in Life Among Adolescents Living in and Around Public Housing*, 16 J. DEV. BEHAV. IN PEDIATRICS 233, 236 (1995) (pronouncing a correlation between corporal punishment and depression); Murray A. Straus, *Corporal Punishment of Children and Depression and Suicide Ideation*, in COERCION AND PUNISHMENT IN LONG-TERM PERSPECTIVES 59, 72-73 (Joan McCord ed., 1995) (highlighting research that demonstrates a link between "depressive symptoms and suicidal thoughts"); Sandra J. Holmes & Lee N. Robins, *The Influence of Childhood Disciplinary Experience on the Development of Alcoholism and Depression*, 28 J. CHILD PSYCHOL. & PSYCHIATRY 399, 399 (1987) (indicating that harsh discipline of children is associated with an increased likelihood of alcoholism and depression); Ronald C. Kessler & William J. Magee, *Childhood Family Violence and Adult Recurrent Depression*, 35 J. HEALTH & SOC. BEHAV. 13, 18-25 (1994) (discussing the effect of childhood violence on adult depression).

57. See *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) (asserting that state legislatures are compelled, of necessity, to choose between opposing theories when passing public health and safety laws). State legislatures are free to analyze all available information and determine the most likely and effective protections for threats such as disease epidemics. *Id.*

58. *Ginsberg v. New York*, 390 U.S. 629, 642-43 (1968). The Court in *Ginsberg* held that the New York legislature's decision that obscenity may impair the ethical and moral development of youth was valid despite a lack of scientific proof of a causal relationship between obscenity and ethical and moral development or antisocial conduct. *Id.* (quoting *Noble State Bank v. Haskell*, 219 U.S. 104, 110

clarified that states may limit parental discretion where such discretion has merely a "potential for significant social burdens."<sup>60</sup>

Thus, although a few child psychologists and some religious leaders continue to advocate the use of spanking in child-rearing,<sup>61</sup> states would have the power to ban corporal punishment by relying on the significant research indicating that a ban on child corporal punishment would benefit and protect society.<sup>62</sup> The fact that numerous European countries, the majority of child psychologists, the United Nations, the American Psychological Association, the American Medical Association, the National Association of Pediatric Nurse Associates and Practitioners, and the American Bar Association, among others, support a ban on corporal punishment lends additional support for a state's decision to ban corporal punishment based on its police power.<sup>63</sup>

There are additional societal concerns that mitigate in favor of the state's authority to ban corporal punishment as against challenges invoking the parental right to rear. First, the Court has expressed interest in strengthening family institutions as a whole, and specifically, protecting the relationship between the parent and the

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(1911)).

59. 406 U.S. 205 (1972).

60. *Id.* at 234 (holding that the First and Fourteenth Amendments prevented the State from compelling formal education past age sixteen for Amish children). The Amish defendants successfully demonstrated that missing two years of additional formal schooling would not impair the physical or mental health of their children or materially detract from their welfare or citizenship, thereby refuting even the possibility of creating significant social burdens.

61. See Robert E. Larzelere, *A Review of the Outcomes of Parental Use of Nonabusive or Customary Physical Punishment*, 98 PEDIATRICS 824, 827 (1996) (arguing that there are an insufficient number of empirical studies to support a ban on "nonabusive physical punishment"); *Proverbs* 23:13 ("Withhold not correction from the child: for if thou beatest him with the rod, he shall not die."); *id.* 23:14 ("Though shalt beat him with the rod, and shalt deliver his soul from hell."); *id.* 13:24 ("He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes."). For a list of other biblical passages supporting the use of severe physical punishment, see PHILIP GREVEN, *SPARE THE CHILD* 46-49 (2d ed. 1992); *Spanking in the Bible*, at <http://www.religioustolerance.org/spankin8.htm> (last visited Oct. 17, 2002) (discussing the religious foundations of corporal punishment). Dr. Ed Young of the Second Baptist Church in Houston Texas, one of the largest churches in the country, with televised sermons, openly advocates the use of child corporal punishment when necessary, even the use of belts on teenagers. Dr. Ed Young, sermon at the Second Baptist Church (Houston) (2001 series of lectures on the family).

62. See *supra* note 56 and accompanying text (providing extensive support for the societal benefits of a ban on child corporal punishment); see also MURRAY A. STRAUS, *BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES* (Maxwell Macmillan Int'l 1994) (discussing the adverse effects of corporal punishment).

63. See *supra* notes 1, 4 & 10 and accompanying text (highlighting organizational and international support for a ban on child corporal punishment).



## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 461

child.<sup>64</sup> The Court has specifically addressed the state's interest in the parent-child relationship, recognizing that parental guidance and trust are critical to a child's healthy development.<sup>65</sup> State courts have specifically declared that "preserving family unity" is a proper state objective.<sup>66</sup> Families serve as the primary institution for teaching children to become self-actualized citizens who contribute to society and serve family members' needs for emotional support and stability.<sup>67</sup> Strong family relationships are important because they also can play important economic roles like contributing to or covering expenses for health care, education, and various other welfare needs of its members.<sup>68</sup> Finally, strong families foster social pluralism, which furthers democratic ideals and the values underlying the First Amendment.<sup>69</sup>

In discussing whether a formal hearing should be required prior to admitting a child into a mental hospital per the parent's or guardian's wishes, the Court in *Parham v. J.R.*<sup>70</sup> emphasized that such a hearing would significantly intrude into the parent-child relationship, "pitting the parents and child as adversaries . . . ."<sup>71</sup> The Court stated that such a hearing "would exacerbate whatever tensions already exist between the child and the parents," causing significantly greater stress on the relationship than need be, especially considering the presumption that the parents' choice to admit the child is in the

64. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 610 (1979) (expressing concern regarding adverse effects on the parent-child relationship in the context of whether a formal hearing should be required before a parent admits a child into a mental hospital).

65. See, e.g., *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977):

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship.

*Id.* (citations omitted).

66. E.g., *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 825 (Cal. 1997) (citing *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989)).

67. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 637-39 (1979) (asserting parents' central role in the affirmative process of "teaching, guiding, and inspiring . . . is essential to the growth of young people into mature, socially responsible citizens."); *Smith*, 431 U.S. at 844 (describing the important role families play in promoting socialization of children through emotional attachment and instruction).

68. See, e.g., *Developments in the Law—The Constitution and the Family* 93 HARV. L. REV. 1156, 1215-6 (1980) [hereinafter *Developments in the Law*] (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 505 (1977) for its emphasis on extended families' ability to protect members from economic or social adversity).

69. *Id.*

70. 442 U.S. 584 (1979).

71. *Id.* at 610.

child's best interests.<sup>72</sup> Fundamentally, the Court is concerned about preserving the relationship between parents and children. Although the *Putnam* Court felt that a pre-admittance hearing to determine whether the parents' decision was appropriate would exacerbate any pre-existing family tensions, the interest in avoiding family discord must be considered relative to the facts at hand.<sup>73</sup>

The administration of corporal punishment creates and exacerbates family discord *per se*.<sup>74</sup> The interest in avoiding family discord through state interference is also substantially less where family discord already exists, as is the case with parental acts of corporal punishment.<sup>75</sup> In addition, to the extent that prohibiting corporal punishment discourages its use, less child abuse prosecution—with the attendant likelihood of creating or exacerbating family discord—should be necessary, leading ultimately to *less* state interference with family relations. Therefore, the concerns expressed in *Putnam* support banning corporal punishment.

Second, basic humanitarian concerns motivate the Court to protect children from poor parenting choices. In *Yoder*, the Court explained that compulsory education and child labor laws find their historical origin in common humanitarian instincts.<sup>76</sup> Based on these basic

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72. *Id.*

73. *See, e.g., id.* at 635 (Brennan, J., concurring) (arguing that a child's institutionalization already fractures family autonomy, making the concern over avoiding family discord significantly less); *see also* *Trammel v. United States*, 445 U.S. 40, 51-52 (1980) (recognizing that where a family relationship is already broken, the court need not bend over backwards or rely on archaic notions of family relationships to protect family integrity).

74. *See* *Graziano et al., supra* note 56, at 846 (stating that the use of corporal punishment has a negative effect on the emotional state of both parents and children); *Brezina, supra* note 56, at 432 (asserting that parental aggression fosters an aggressive response in male adolescents); Murray A. Straus & Kimberly A. Hill, *Corporal Punishment, Child-to-parent Bonding, and Delinquency* (July 1, 1997) (unpublished paper presented at the Fifth International Family Violence Research Conference, Family Research Laboratory, University of New Hampshire, Durham, NH, on file with author).

75. *See supra* notes 1, 4 & 56 and accompanying text (highlighting research that indicates that corporal punishment creates family discord in addition to a host of other social problems). The research, not to mention common sense, indicates that physically striking a family member does not preserve family unity, but rather, breaks the familial bonds needed for emotional health and the ability to form trusting relationships later in life. *See supra* note 56. The research has specifically shown that spanking causes anger and resentment in children, and anger and guilt in parents, and that spanked children are more likely to hit their parents. *Id.* This is hardly consistent with the notion of enhancing the parent-child relationship. In addition, to the extent that the government were to become involved in family matters because of a violation of an anti-spanking law, family discord already exists, making any intrusion into the family relationship less likely to "create" discord. Thus, the state's interest in preserving family integrity mitigates in favor of banning corporal punishment, not against it.

76. *Wisconsin v. Yoder*, 406 U.S. 205, 227 (1972). "Humanitarian" concerns

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 463

humanitarian values, the Court has set a limit on parental choices that would leave their children wholly illiterate, or subject them to inappropriate labor conditions.<sup>77</sup> From a purely humanitarian standpoint, it seems inhumane to cause physical pain to children simply because they are engaged in irritating or belligerent behavior that may be developmentally normal and age-appropriate, such as challenging authority and testing boundaries. Apart from the physical pain involved in spanking, humanitarian concerns justify banning corporal punishment based on its impact on the child's cognitive development and emotional/psychological well-being—the same concerns underlying the state's power to require that children be educated. It would be perverse to afford convicted felons greater protection from corporal punishment based on "humanitarian" concerns than relatively innocent (not to mention small) human beings.<sup>78</sup> These concerns lend additional support for a state to render unconstitutional the practice of corporally punishing children under its police power authority.

2. *States could ban corporal punishment based on their parens patriae power to protect children*

The *parens patriae* power is the state's limited paternalistic power to protect individual citizens, such as children and mentally incompetent people, who cannot effectively protect themselves.<sup>79</sup> This power enables the state to act on behalf of a specific individual, such as a child, even if there is no threat to society or the public welfare. In this sense, it allows state action that would not be allowed

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underlie the Eighth Amendment's prohibition of cruel and unusual punishment, which has been used successfully to deny prison guards a right to use corporal punishment on prisoners. *Sæ, e.g., Hope v. Pelzer*, 122 S. Ct. 2508, 2514 (2002) (holding that prison guards violated the Eighth Amendment because handcuffing prisoner to hitching post for extended time period was cruel and unusual punishment); *Jackson v. Bishop* 404 F.2d 571, 579 (8th Cir. 1968) (concluding that prison guards use of "strap" on inmates violated the prohibition against cruel and unusual punishment).

77. *Id.*

78. For example, the Court has held that the use of physical violence against a prisoner may constitute cruel and unusual punishment even where a prisoner does not suffer serious injury. *Hudson v. McMillan*, 503 U.S. 1, 4 (1992). By comparison, the Model Penal Code approach to the parental discipline defense to assault and battery refuses to question a parent's reasonableness in administering even harsh corporal punishment that in fact causes serious injury, provided the parent is found to have been disciplining the child and did not use force "known to create a serious risk of death, serious bodily injury. . . or degradation." MODEL PENAL CODE § 3.08 (1980).

79. *Sæ, e.g., Schall v. Martin*, 467 U.S. 253, 265 (1984) (recognizing that state must take over parental role for children when parental control fails); *Addington v. Texas*, 441 U.S. 418, 426 (1979) (acknowledging state interest in caring for mentally ill individuals using *parens patriae* power).

under the state's police power because society at large is not at risk.<sup>80</sup>

The state's *parens patriae* power confers jurisdiction on the states to prohibit potentially harmful parental actions.<sup>81</sup> State courts have consistently relied on the state's *parens patriae* power in terminating parental custody rights altogether or limiting visitation, where such action is needed to protect the child.<sup>82</sup> In *Prince v. Massachusetts*,<sup>83</sup> a state law preventing children from selling newspapers and other periodicals on the street<sup>84</sup> was challenged by a child's legal guardian as an unconstitutional interference with freedom of religion and equal protection.<sup>85</sup> The state argued that the law was "to protect children from economic exploitation and keep them from the evils of such enterprises that contribute to the degradation of children."<sup>86</sup> The Court upheld the law, stating that a state's *parens patriae* power may be invoked to restrict a parent's control over a child, and that this entails "a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes . . . matters of conscience and religious conviction."<sup>87</sup>

The Court further stated that additional justification for the state to protect children exists when other "harmful possibilities," such as

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80. See *Developments in the Law*, *supra* note 68, at 1199-1202 (distinguishing the *parens patriae* and police power to justify state regulation of families and explaining that states acting under *parens patriae* authority should only advance the best interests of an incompetent person rather than objectives for the general public).

81. E.g., Schall, 467 U.S. at 265.

82. See, e.g., *Stokes v. Arnold*, 27 S.W.3d 516, 520 (Tenn. 2000) (holding parents' fundamental right to the care, custody, and control of their children may be surrendered when a parent "abandons the child or engages in acts that pose a threat of substantial harm to the child"); *In re Dependency of (W.R.)*, No. 95-7-01483-4, 2000 WL 1279305, at \*5 (Wash. Ct. App. Sept. 11, 2000) (stating that the "fundamental liberty interest in the care, custody and control of [one's] child . . . is not absolute. . . . The State has both a right and obligation as *parens patriae* to intervene to protect the child when the parent's actions or inactions endanger the child's physical or emotional welfare."); *In re the Appeal in Maricopa County Juvenile Action No. JD-6123*, 956 P.2d 511 (Ariz. App. 1997) (concluding that "the state may remove a child from a parent's custody if the child is threatened with immediate or apparent harm or danger") (citing *Nation v. Colla*, 841 P.2d 1370, 1378 (Ariz. Ct. App. 1991)). Some states protect individual children from poor parenting based on the state's police power. See *Sightes v. Barker*, 684 NE.2d 224, 230 (Ind. App. 1997) (protecting the best interests of the child is "unquestionably a proper exercise of the police power").

83. 321 U.S. 158 (1944).

84. The statute applied to boys under age twelve and girls under age eighteen. *Id.* at 160-61.

85. *Id.*

86. *Id.* at 164 &n.7.

87. *Id.* at 167; see also *N. Valley Baptist Church v. McMahon*, 696 F. Supp. 518, 524 (E.D. Cal. 1988) (holding that a child care statute prohibiting corporal punishment in preschool did not unconstitutionally interfere with free exercise rights, because "[w]hile the freedom to believe is absolute, the freedom to act is limited.") (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972)).

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 465

emotional excitement and psychological or physical injury to the child, are apparent.<sup>88</sup> While parents are free to become "martyrs," they are not free to make martyrs of their children before the children have reached the age of full and legal discretion to make informed choices for themselves.<sup>89</sup> State courts have consistently held that to the extent that a parent's right to rear conflicts with a child's right to well being, the welfare of the child must prevail.<sup>90</sup>

Protecting children from ignorance has been specifically recognized as within the state's *parens patriae* powers. In *Wisconsin v. Yoder*,<sup>91</sup> the state argued that the Amish position on education fostered ignorance against which the state must protect. The Court agreed that the state had a duty to protect children from ignorance but did not feel the state's purpose was sufficiently tied to its means under the facts of that case.<sup>92</sup> The Court also noted that compulsory education laws and child labor laws "find their historical origin in common humanitarian instincts," again recognizing the courts' protective function in regards to children.<sup>93</sup>

The Court has further clarified that a state's interest "in safeguarding the physical and psychological well being of a minor is compelling."<sup>94</sup> The Court in *Pitham v. J.R.*<sup>95</sup> stated that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."<sup>96</sup> Justice Brennan in his dissent stated:

In our society, parental rights are limited by the legitimate rights and interests of their children. . . . This principle is reflected in the

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88. *E.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). The corporal punishment research demonstrates harm resulting from corporal punishment as more than a mere possibility. *Supra* note 56.

89. *Prince*, 321 U.S. at 170.

90. *See, e.g.*, *In re Doe Children*, 938 P.2d 178, 184 (Haw. 1997) ("Hawai'i generally agrees with the view that when the rights of parents and the welfare of their children are in conflict, the welfare of the minor child must prevail") (citing *inter alia*, *In re Pawling*, 679 P.2d 916 (Wash. 1984)); *State ex rel. C.J.K.*, 774 So. 2d 107, 113 (La. 2000) (balancing the parent's liberty interest in rearing the child with the child's profound interest in terminating parental relationships and obtaining a secure and stable home and holding that "the courts of this state have consistently found the interest of the child to be paramount over that of the parent.').

91. 406 U.S. 205 (1972).

92. *See id.* at 222 (finding that the Amish parents provided sufficient evidence that members of their community were not ignorant but productive, lawabiding citizens and a "highly successful social unit" in society without the additional two years of high school).

93. *Id.* at 227.

94. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 756-58 (1982)).

95. 442 U.S. 584 (1979).

96. *Id.* at 603 (citing *Yoder*, 406 U.S. at 230 and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

variety of statutes and cases that authorize state intervention on behalf of neglected or abused children and that, *inter alia*, curtail parental authority to alienate their children's property, to withhold necessary medical treatment, and to deny children exposure to ideas and experiences they may later need as independent and autonomous adults.<sup>97</sup>

Banning corporal punishment is within the states' legitimate *parens patriae* power because it is associated with damage to the child's psychological, physical, cognitive, and emotional development.

In 2000, the Court considered the state's ability to intervene in parental decision making in *Troxel v. Granville*.<sup>98</sup> The Court affirmed a Washington Supreme Court decision invalidating a third party visitation statute because of the "sweeping" breadth of the statute and the level of discretion it afforded the trial judge.<sup>99</sup> The statute essentially allowed the judge to substitute his opinion about whether third party visitation was in the child's best interests without giving any deference at all to the parent's fundamental right to make such child-rearing decisions regarding visitation.<sup>100</sup> The Court reiterated the presumption expressed in *Purham* that fit parents act in their children's best interests, and stated that parents' decisions regarding their children must be afforded deference because of the fundamental right involved.<sup>101</sup> The Court declined to consider the Washington Supreme Court's decision that the Due Process Clause requires a showing of "harm" to the child before a parent's discretion could be questioned constitutionally, noting that some state visitation statutes afford adequate protection to parents' fundamental rights to control children's upbringing without a showing of harm or potential harm to the child.<sup>102</sup> Implicit in the Court's opinion is that a basis for state involvement in parental decision making exists where harm or potential harm to a child is present.<sup>103</sup> This is consistent with the Court's historical decisions allowing the state to intervene to protect children from harm or even "harmful possibilities."<sup>104</sup> Thus, although

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97. *Id.* at 630-31 (Brennan, J., dissenting) (citations omitted).

98. 530 U.S. 57 (2000).

99. *Id.* at 73.

100. *Id.*

101. *Id.* at 69-70.

102. *See id.* at 73-74 (explaining that state court adjudication for individual non-parental visitation statutes occur on a case-by-case basis requiring consideration of certain factors and the court was reluctant to hold specific statutes per se violations of the Due Process Clause) (citing, e.g., *Fairbanks v. McCarter*, 622 A2d 121, 126-27 (Md. 1993)).

103. *See id.* at 68-69 (noting that a state has no basis for involving itself in the decision making of a fit parent).

104. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1979).

this recent decision affords deference to parental decision making and reiterates that the parental right of control is “fundamental,” it does not alter the long-standing rule that state legislatures may act to protect children from potentially harmful parental decisions or practices. The scientific research on corporal punishment satisfies the state’s burden of showing a need to protect children from the harms of corporal punishment, which provides constitutional authority to take action to discourage the use of child corporal punishment.

Courts have the additional *parens patriae* interest and obligation of protecting children’s constitutional rights from parental or state interference. The Court in *Parham* clarified that the child has a “substantial liberty interest” against being confined to a mental institution unnecessarily, or suffering the adverse social consequences if people discover the child was institutionalized.<sup>105</sup> Similarly, the Court has held that a minor’s important personal right to an abortion supersedes notions of safeguarding the family unit and parental authority.<sup>106</sup> Therefore, the child’s liberty interest in being free from corporal punishment provides additional support for the state to ban corporal punishment to protect that interest. The state thus has ample legal support for banning corporal punishment based on its *parens patriae* power.

### B. Religious Freedom

The Free Exercise Clause embodied in the First Amendment provides absolute protection for religious beliefs and speech.<sup>107</sup> However, the Court has always drawn a distinction between religious beliefs and religiously-motivated conduct.<sup>108</sup> While the freedom to believe is absolute, the Free Exercise Clause does not provide absolute freedom from government regulation of religiously-motivated conduct.<sup>109</sup>

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105. *Parham v. J.R.*, 442 U.S. 584, 600 (1979).

106. *Sæ Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976) (holding a state’s requirement that a minor obtain parental consent to have an abortion to be an unconstitutional infringement on the minor’s right to privacy, and that such a requirement would not likely enhance parental authority or control); *sæ also Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 800 (Cal. 1997) (finding a law requiring parental consent or judicial authorization prior to an abortion in violation of California’s constitutional right to privacy).

107. *Welsh v. United States*, 398 U.S. 333, 372 (1970).

108. *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972).

109. *Sæ, e.g., Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 882, 890 (1990) (holding it constitutional to prohibit the ingestion of peyote and to deny unemployment benefits to those fired for their use of the drug, despite a claim that peyote use was sacramental); *Braunfeld v. Brown*, 366 U.S. 599, 608-10 (1961)

As with laws burdening the parental right to control children, the standard to be applied in free exercise cases is not entirely clear. Between 1963 and 1990, the standard was fairly clear: *Sherbert v. Verner*<sup>110</sup> held that where a state law has the unintended effect of burdening religious beliefs, the test is whether the law uses the least restrictive means to accomplish a compelling state purpose, i.e., strict scrutiny.<sup>111</sup> In particular, where the state's goals could be met as well, or almost as well, by giving an exemption to those whose religious beliefs would be burdened by the law, such an exemption would be constitutionally mandated.<sup>112</sup>

However, in 1990, the Court held in *Employment Division, Department of Human Resources v. Smith*<sup>113</sup> that generally applicable criminal laws that interfere with the Free Exercise Clause are enforceable without balancing the state interest against the burden on free exercise.<sup>114</sup> In other words, the generally applicable criminal law would be presumptively valid with no requirement that the state create an exemption where feasible.<sup>115</sup> This case essentially abolished the standard that government refusal to grant a religious exemption for laws interfering with free exercise be subjected to strict scrutiny. The Court reverted to the pre-1963 analysis, which essentially allowed the state to enact laws interfering with religious beliefs as long as the state's goals were secular and the laws regulated conduct rather than pure belief.<sup>116</sup> Under *Smith*'s deferential test for state law impinging on religious freedom, a generally applicable criminal law banning spanking would likely be upheld against religious freedom attacks.

However, the Court may adopt a more stringent standard of review in relation to a ban on corporal punishment because such a ban implicates both free exercise and the right to control the child's upbringing. In such a "hybrid" situation, where a free exercise claim is connected to another constitutional right—such as the right of parental control—the Court seemed to imply that deference to the state's action may not be quite as high, and perhaps the *Sherbert* test

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(upholding a Sunday-closing law despite a claim that it burdens the religious practices of those whose religion prohibits them from working on another day).

110. 374 U.S. 398 (1963).

111. *Id.* at 403. Where the state acts for the purpose of denying citizens the right to exercise a religious belief, the government action will be strictly scrutinized and will almost always fail to pass constitutional scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

112. *Sherbert*, 374 U.S. at 407; *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546.

113. 494 U.S. 872 (1990).

114. *See id.* at 884-85 (declining to use the *Sherbert* test to invalidate an across-the-board criminal prohibition on selling certain products on Sunday).

115. *Id.* at 888-89.

116. *Id.* at 879, 885 (citing *Reynolds v. United States*, 98 U.S. 145 (1878)).



## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 469

would still apply.<sup>117</sup> On the other hand, the majority also pointed out that it had “never invalidated *any* government action on the basis of the *Sherbert* test except the denial of unemployment compensation,”<sup>118</sup> and stated: “[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.”<sup>119</sup> Indeed, the Court noted that in recent years, it “abstained from applying the *Sherbert* test (outside the unemployment field) at all.”<sup>120</sup> Thus, it appears that the Court may defer to state action infringing on religious practices even where it involves a “hybrid” challenge, provided that it is a generally applicable criminal law and does not involve unemployment benefits.

Even if the Court were to apply the *Sherbert* “strict scrutiny” test to a state law banning corporal punishment, it would still survive such scrutiny. There is no question that protecting children is a compelling state interest.<sup>121</sup> The key questions are: whether there are less restrictive means to protect children from the ills associated with corporal punishment and whether granting an exemption would preclude the state’s objective from being served as well or almost as well.<sup>122</sup>

There are no less restrictive means for the state to meet its goal of protecting children from the harms associated with corporal punishment than by banning it. Much of the scientific research indicates that even subabusive corporal punishment, such as common

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117. *See id.* at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972)) (asserting that “The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections).

118. *Id.* at 883 (emphasis added).

119. *Id.* at 884.

120. *Id.* at 883 (citing *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. NW. Indian Cemetery Prot. Ass’n*, 485 U.S. 439, 441-42 (1988); *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986)).

121. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 756-64 (1982) (upholding child pornography laws despite First Amendment claims because (1) a state has a compelling interest in protecting the well-being of its youth; (2) pornographic materials that feature children promote their sexual abuse; (3) marketing of child pornography is illegal; (4) there is no legitimate value in such materials; and (5) it is consistent with prior decisions of the Court); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (upholding a child labor law that prohibits parents from furnishing periodicals to children for sale on the street, despite a claim that the law impedes on a Jehovah’s witness’ right to encourage and teach their children their religious beliefs).

122. *See* *Quib v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993), *cert. denied*, 511 U.S. 1127 (1994) (holding that a state juvenile curfew law was not narrowly tailored such that there were no less restrictive means available to achieve the goal of protecting juveniles from harm).

spanking, is harmful to children.<sup>123</sup> Thus, prosecution under state child abuse laws, while less restrictive, is not an effective alternative because it cannot accomplish the state's interest in protecting children from harm resulting from subabusive corporal punishment. If the state goal is to protect children from harm believed to result from *any* amount of corporal punishment, then there is no less restrictive way to protect children other than banning all corporal punishment.

The next question is whether the state's objective could be served as well if an exemption were made for persons who use corporal punishment as part of their religious beliefs. The state's interest in protecting children as a whole from the dangers associated with corporal punishment could not be met if some children's parents were exempted from the law. This is particularly true considering a large number of American Christians believe that corporal punishment is required or allowed by their religion.<sup>124</sup> An exemption to a ban on corporal punishment for religious reasons would defeat the purpose of protecting children (as well as society) from the ills produced by corporal punishment, and violates the spirit of equal protection, particularly considering the children's liberty interests at stake. An exemption for religiously-motivated use of corporal punishment is therefore not constitutionally required.

Religious freedom challenges to state action that interferes with the parents' rights to rear their children in accordance with their faith have failed in the past where the religiously-motivated rearing method created "harmful possibilities" for the child.<sup>125</sup> The Court's current position in relation to religious freedom challenges to state law is quite deferential. Based on historical precedent, as well as the Court's statements and analysis in *Smith*, a generally applicable criminal law banning corporal punishment would likely survive constitutional scrutiny, even if it were subjected to *Sherbert's* "strict scrutiny" analysis.

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123. See *supra* note 56 (providing research on harms of corporal punishment of children).

124. See *supra* note 61 & *infra* note 160 (discussing support in Christianity for the corporal punishment of children).

125. See *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (listing situations where the Court has restricted parental liberty interest in raising children according to religious beliefs in favor of protecting the child).

## II. STATE LAWS THAT EXCLUDE CHILDREN FROM PROTECTION AGAINST CORPORAL PUNISHMENT ARE UNCONSTITUTIONAL

State laws that specifically allow for corporal punishment of children, but no one else, constitute state action that denies children equal protection of the laws. In addition, these laws violate children's liberty interest in their bodily integrity. Although the current conservative Court generally may not be inclined to recognize new liberties, individual rights, or suspect classifications,<sup>126</sup> the current research on child corporal punishment amply supports arguments that exempting children as a class from laws protecting them from assault and battery violates their constitutional rights. Thus, in the event that state legislatures fail to act in response to the research on child corporal punishment, current state laws exempting children from tort and criminal laws of general applicability should be challenged on constitutional grounds.

This section will first argue that children should be considered a suspect or quasi-suspect class, and that laws singling them out as subjects of corporal punishment cannot withstand even intermediate scrutiny under an equal protection analysis because there is an insufficient relationship between corporal punishment and any important state interest sought to be advanced by such laws.<sup>127</sup> Second, this section will argue that children have substantive due process rights in freedom from bodily harm and that laws allowing corporal punishment are unconstitutional based on the insufficient relationship between such laws and the state interest sought to be advanced by such laws.

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126. See generally Erwin Chemerinsky, *The Supreme Court, 1988 Term Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 44-46, 103-04 (1989) (examining the Rehnquist Court, which consistently has made conservative decisions on a variety of controversial areas such as civil rights, abortion rights, government affirmative action programs and drug testing).

127. These laws should not survive even rational basis analysis, because allowing physical punishment of children advances no legitimate state interest. In practice, however, rational basis scrutiny almost never operates to strike down laws. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 533 (2001) ("The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. . . . a law should be upheld if it is possible to conceive any legitimate purpose. The result is that it is rare for the Supreme Court to find that a law fails the rational basis test."); see, e.g., *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980) (exemplifying level of judicial deference given when Court applies rational basis test).

*A State Law Exclude Children from Protection  
Against Corporal Punishment*

All states have exceptions to tort and criminal assault and battery perpetrated against children when the assault or battery is committed for purposes of disciplining the child.<sup>128</sup> The privilege to discipline a child with use of corporal punishment can be traced to the 1700's, where a similar concept of disciplinary rights attendant to training responsibilities allowed masters to corporally punish servants, scholars, and apprentices.<sup>129</sup> Some states' laws are based on Section 3.08 of the Model Penal Code, which provides:

The use of force upon or toward the person of another is justifiable if: (1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or person acting at the request of such parent, guardian or other responsible person and: (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation . . . .<sup>130</sup>

State laws vary, but most employ concepts set forth in the Model Penal Code, such as the requirement that the punishment be for training purposes, and a requirement that the punishment be reasonable, not designed to cause serious bodily harm or death.<sup>131</sup> The tort law privilege is similar in terms of protecting the parent from liability where the parent is attempting to discipline the child and does so "reasonably." The Restatement (Second) of Torts, Section 147 provides: "A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education."<sup>132</sup>

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128. *Sæ, e.g.*, *People v. Whitehurst*, 12 Cal. Rptr. 2d 33 (Ct. App. 1992); *Commonwealth v. Ogin*, 40 A2d 549 (Pa. 1988).

129. *Sæ, e.g.*, WILLIAM BLACKSTONE, *BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND* 120 (1768) ("Battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice.")

130. MODEL PENAL CODE § 3.08 (1985).

131. *Sæ, e.g.*, COLO. REV. STAT. ANN. § 18-1-703 (West 1990) (defining certain special relationships in which the use of force is justifiable); DEL. CODE ANN. tit. 11, § 468 (1995) (permitting the use of reasonable and moderate force by persons defined as having a special responsibility for the care, discipline, or safety of others).

132. Note the use of the word "it" in relation to the child, as if the child were an inanimate object or a chattel. Of course, children were considered property of their

*B. State Law Excluding Children From Protection Against Corporal Punishment Cannot Withstand Even Intermediate Scrutiny Under an Equal Protection Analysis*

As the Supreme Court first clarified in *The Civil Rights Cases*,<sup>133</sup> state action is required to implicate constitutional rights.<sup>134</sup> State law, whether statutory or common law, constitutes state action.<sup>135</sup> Where state laws specifically *exclude* children from protection from assault and battery, children could challenge such state laws treating them differently than others in the same way that an unmarried father could challenge a state law treating him differently than other (married) fathers for purposes of awarding custody of his children to the state.<sup>136</sup>

When the Court reviews challenges to federal or state law based on the equal protection provisions of the Fifth or Fourteenth Amendments, it generally applies only minimal scrutiny, known as the "rational basis" test.<sup>137</sup> Under this test, the law will be upheld provided it is rationally related to a legitimate state purpose, and the Court will consider reasons outside of the legislature's articulated purposes to find a rational relationship.<sup>138</sup>

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fathers in ancient societies, and fathers were allowed not only to spank them, but to sell them or kill them, too. *Sae, e.g., Edwards, supra* note 1, at 986-87.

133. 109 U.S. 3 (1883).

134. *Id.* at 17 (1883) ("[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings").

135. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) ("state action . . . refers to exertions of state power in all forms").

136. *Sae Stanley v. Illinois*, 405 U.S. 645 (1972). Although in *Stanley* the state actively took away Stanley's children, any time a state acts to deprive one group of people rights that other groups have, state action exists and equal protection concerns arise. Indeed, state laws specifically excluding children from crimes and torts impacting their personal security are worse than the law at issue in *Stanley*, in that children's status as minors is immutable until they attain the age of majority, unlike an individual's marital status, which is terminable at will. Even in jurisdictions where the defense to torts and crimes based on discipline of children has not been codified, every court order applying the common law discipline defense constitutes state action. *Sae, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948); *see also New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that where a court applies even a common law rule of law to disputes between private citizens, state action is present, "It matters not that the law has been applied in a civil action and that it is common law only. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"). Where state law protects parents from criminal prosecution and civil liability for assault and battery, state power has been invoked to prevent children from pursuing legal remedies for harm that are available to other citizens.

137. *Sae, e.g., Bolling v. Sharpe*, 347 U.S. 497, 500 (1953) (invalidating segregation in District of Columbia schools on the grounds that segregation was not "reasonably related to any proper governmental objective").

138. *Sae, e.g., McDonald v. Bd. of Elections*, 394 U.S. 802, 809 (1969) (noting the

In order to subject a law to a heightened level of judicial scrutiny, the law must either utilize a suspect or quasi-suspect classification, or must infringe on a fundamental right.<sup>139</sup> If a class is considered suspect, the highest level of scrutiny is required: strict scrutiny requires the law to be necessary to achieve a compelling government purpose and narrowly tailored to meet that purpose.<sup>140</sup> This level of scrutiny has been required in analyzing laws that classify persons based on race or national origin,<sup>141</sup> nonresidency in some situations,<sup>142</sup> and sometimes alienage.<sup>143</sup> Intermediate scrutiny, where the analysis does not weigh quite so heavily against the law in question, is applied to quasi-suspect classifications such as gender, illegitimacy, alienage in certain circumstances, and the illegal alien status of children.<sup>144</sup>

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presumption that legislatures act constitutionally even if the legislative history is silent on their motives or purpose).

139. *See* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (reasoning that classifications based on certain factors should be presumed to be based on "prejudice and antipathy" because certain factors are usually irrelevant to achieving a legitimate state interest); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (stating that the Court would not meet its obligation under the Fourteenth Amendment if it applied to every classification such a deferential standard of review as rational basis review). *See generally* *Developments in the Law, supra* note 68, at 1188 (observing that without a more intrusive level of review, the Equal Protection Clause could not perform its historical function of protecting "racial minorities from a hostile majority") (citations omitted).

140. *See* *Loving v. Virginia*, 388 U.S. 1, 10-11 (1967) (applying this test to determine whether the racial classification made by a miscegenation law constituted "arbitrary and invidious discrimination").

141. *See, e.g.,* *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (invalidating state miscegenation law under strict scrutiny review after holding that racial classifications are "constitutionally suspect" because the purpose of the Fourteenth Amendment was to eliminate state-sponsored racial discrimination) (citations omitted).

142. *See, e.g.,* *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 390-91 (1978) (using rational basis review when analyzing law establishing different hunting fees for residents and non-residents and upholding law because the classification did not impede on a fundamental right and was rationally related to a legislative interest).

143. *See, e.g.,* *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973) (invalidating a law which prohibited non-residents from holding permanent state civil service positions, because the law was "neither narrowly confined nor precise in its application"); *see also In re Griffith*, 413 U.S. 717, 721 (1973) (observing that aliens as a class are a "prime example" of a "discrete and insular minority... for whom such heightened judicial solicitude is appropriate") (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938)); *Graham v. Richardson*, 403 U.S. 365, 371-73 (1971) (same). Traditionally, it must be shown that a suspect classification is motivated by a discriminatory purpose before strict scrutiny will be applied. *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 265-66 (1977).

144. *See* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (holding that a law is not exempt from scrutiny or subject to a reduced standard of review if the policy discriminates against males instead of females); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (invalidating a law which provided illegitimate children less time in which to establish paternity, because the short time limit was "not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims"); *Cabell v. Chavez-Salido*, 454 U.S. 432, 442-44 (1981) (upholding California law which prevents non-U.S. citizens from holding any government position classified under the category of peace officer, because prohibition is substantially

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 475

When intermediate scrutiny is the standard, the case law language and standards vary slightly; the state action or classification must be substantially related to achieving an important government interest.<sup>145</sup>

1. *Children should be considered a suspect or quasi-suspect class*

The Supreme Court has articulated a number of factors to be used in determining whether a group of people should be considered a suspect or quasi-suspect class. In general, underlying all suspect classifications is the stigma of inferiority and second class citizenship.<sup>146</sup> However, two fundamental concerns have motivated the Court to afford special protection for certain groups in society: fairness and the judicial system's responsibility to protect minorities from the majoritarian political process.<sup>147</sup>

The specific factors courts look to in making a determination as to the proper level of scrutiny are: whether the class member has a choice in being a class member, i.e., whether the trait involved is "immutable";<sup>148</sup> whether class members suffer from unique disabilities based on stereotyped notions of abilities and characteristics;<sup>149</sup>

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related to the State's interest in maintaining self-government); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (observing that the "weak congruence between gender and the characteristic or trait that gender purported to represent" required extraordinary review); *Plyler*, 457 U.S. at 230 (invalidating laws, which denied public education to minor, illegal aliens, because the laws did not further a "substantial state interest"); *Oyama v. California*, 322 U.S. 633, 646 (1948) (holding that discrimination based on racial descent can only be excused in the "most exceptional circumstances").

145. *Sae, e.g., Grogan*, 429 U.S. at 197 (invalidating law which prohibited males under twenty-one years old from purchasing 3.2% alcoholic beer but allowed eighteen year old females to purchase it, because sex does not represent a "legitimate, accurate proxy for the regulation of drinking and driving"); *Hogan*, 458 U.S. at 724 (holding that the proponent of a law classifying individuals based on gender bears the burden of demonstrating that the classification is related to an "exceedingly persuasive justification" and serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives") (citations omitted).

146. *Sae, e.g., Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (highlighting factors which make certain classifications suspect); *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (1971) (finding unconstitutional a state ban on women bartenders and holding such classifications based on gender be treated as suspect since sex is "immutable and had a stigma of inferiority").

147. *Developments in the Law supra* note 68, at 1365.

148. *Sae, e.g., Plyler*, 457 U.S. at 220 (reasoning that being a minor, illegal alien is an immutable characteristic on the ground that the minor has no choice in being an illegal alien because they cannot control their parents' decision to either enter or leave the country and cannot otherwise affect their own status as an illegal alien); *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (observing that for an illegitimate child, the status of illegitimacy is immutable, but holding that being the father of an illegitimate child is not immutable because the father could have changed his status through legitimization); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (holding that sex is an immutable characteristic "determined solely by the accident of birth").

149. *Sae Hogan*, 458 U.S. at 725 (cautioning that a policy is invalid if it is based on

whether the class historically has suffered from discrimination;<sup>150</sup> and whether the class is politically powerless, such as with “discreet and insular minorities.”<sup>151</sup> None of these factors per se determine the level of scrutiny, rather, they are considered together in assessing the judiciary’s appropriate level of protection.<sup>152</sup> In addition, when a classification is considered “suspect,” it tends to be irrelevant to any proper legislative goal.<sup>153</sup>

Children should be considered a suspect or quasi-suspect class. Regarding the first factor, childhood is an immutable trait during the period of minority status because children have no choice in being born and have no way out of minority status pending the passage of time. Immutability is important primarily because it relates to a class member’s control over his class status, and it would be unfair to discriminate against him when he has no way out of class membership. Thus, in finding unconstitutional a Texas law that denied public education to minor children of illegal aliens, the Court in *Plyer* emphasized that minor illegal aliens have no control over their status, that they could “affect neither their parents’ conduct nor their own status,”<sup>154</sup> and that “legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”<sup>155</sup> In essence, legal burdens should bear some relationship to individual responsibility or wrongdoing, and because children have no control over their undocumented status, basic notions of fairness require that they not be singled out and discriminated against.<sup>156</sup>

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“archaic and stereotypic notions,” such as the need to protect members of a gender from their own inherent handicaps or innate inferiority).

150. *See, e.g., Frontiero*, 411 U.S. at 682-84, 688 (explaining that strict scrutiny is justified when classifications are based on sex, in part because of the United States’ “long and unfortunate history of sex discrimination”).

151. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971) (holding aliens to be a “discrete and insular” minority) (citations omitted); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1939) (suggesting that prejudice against discrete and insular minorities may “curtail the operation of those political processes ordinarily to be relied on to protect minorities,” requiring more intrusive judicial review); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding that a “large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts” is not so politically powerless as to require the special protection of stricter review).

152. *Plyer*, 457 U.S. at 216-17.

153. *Id.* at 216 & n.14 (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) and *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

154. *Id.* at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

155. *Id.* (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

156. *Id.*



## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 477

Second, the Court examines whether incorrect stereotyped characteristics unfairly disadvantage the class.<sup>157</sup> The question is whether the challenged law would perpetuate stereotypes against the class that are not truly indicative of the class members' abilities or characteristics.<sup>158</sup> While children are no doubt less competent than adults and less able to contribute to society in many ways, they are subject to unique disabilities based on archaic and fundamentally incorrect stereotypes about their nature and their need to be disciplined in a specific way in order to become responsible members of society. For centuries it was believed that children were born vile and evil, and that these character flaws needed to be beaten out of them.<sup>159</sup> Many adults distrust children and assume the worst when a child behaves in a manner that would be socially unacceptable for an adult, despite the fact that such socially unacceptable behavior may be developmentally normal and appropriate for the child.

Christianity is a powerful political force in the United States, and many Christians believe that if children are not spanked, they will become spoiled, and their souls may not be saved.<sup>160</sup> All of these stereotypes continue to exist despite common knowledge in the developmental psychology community that children go through developmental stages in which belligerence is normal and in no way indicates a problematic, evil or antisocial personality.<sup>161</sup> Laws specifically supporting corporal punishment of children perpetuate these stereotypes because they are premised in part on the notion that children need to be physically assaulted to learn appropriate behavior. Perpetuation of factually unsupportable stereotypes against a class has been specifically noted as a reason to confer suspect or quasi-suspect status to that class.<sup>162</sup>

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157. *See, e.g.,* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 722-23 (1982) (finding a violation of the Equal Protection Clause where a nursing school limited its enrollment to women only, perpetuating the stereotype that nursing is a woman's job).

158. *Id.* at 729-30; *see also* *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (determining that a statutory requirement for police officers to retire at age fifty was constitutional because age is an indicator for diminished physical capacity and not merely a stereotype).

159. *See* PHILIP GREVEN, *SPARE THE CHILD* 46-49 (2d ed. 1992); MURRAY A STRAUSS, *BEATING THE DEVIL OUT OF THEM* (Transaction Publisher's ed., 2001); Mason P. Thomas, *Child Abuse & Neglect, Part I: Historical Overview, Legal Matrix, & Social Perspectives*, 50 N.C. L. REV. 293 (1972).

160. *See, e.g.,* Proverbs, 23: 13-14, 13: 24; *see generally* GREVEN, *supra* note 159.

161. *See, e.g.,* Strauss, *supra* note 159, at 52 ("two year olds are two year olds, and it is almost inevitable that there will be situations when they continue to do something the parent does not want them to do..."); Irwin A. Hyman, *The Case Against Spanking* 16 (1997) (discussing adolescents' need to "differentiate" from parents and feel a "sense of independence.>").

162. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973) (plurality

Third, the Court looks to whether class members have been subjected to a history of purposeful unequal treatment.<sup>163</sup> This factor was critical to the Court's determination that women as a class were entitled to heightened scrutiny.<sup>164</sup> This factor also contributed to the Court's decision that age is not deserving of heightened scrutiny, as the elderly have experienced nowhere near the level of purposeful unequal treatment as persons of a minority race or national origin status.<sup>165</sup>

Children have been subjected to a long history of discrimination. For centuries, children have been depicted as inherently evil.<sup>166</sup> They are members of a historical sub-class, oppressed, and unable to make any important life choices on their own.<sup>167</sup> For decades in this country and others, children could be beaten, raped, mutilated, mistreated, or even killed with no legal recourse, simply because they were children and the law did not recognize them as worthy of protection.<sup>168</sup> Children's size and lower intellectual capacity no doubt contributed to the history of discrimination against them, as they are unable to fight back both physically and intellectually.<sup>169</sup> The statistics on child mistreatment and the public's and legislatures' failure to protect children more effectively, indicate a "continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary"<sup>170</sup> in relation to protecting our children from the dangers of corporal punishment.<sup>171</sup>

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opinion) (determining that sex is a suspect class because "a sex characteristic frequently bears no relation to the ability to perform or contribute to society. . . .").

163. *See* *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (contrasting the aged, who are not considered a suspect class, with those who have been discriminated against on the basis of race or national origin). A history of purposeful, unequal treatment is apparent where a class has been "saddled with such disabilities . . . or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*

164. *See* *Frontiero*, 411 U.S. at 682-84 (plurality opinion) (describing a long history of sex discrimination as evidenced by the laws of the 19th century, which were laden with "gross, stereotyped distinctions between the sexes").

165. *See* *Murgia*, 427 U.S. at 313; *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973) (refusing to find victims of wealth discrimination a suspect class because such a class is, *inter alia*, "large, diverse, and amorphous").

166. *See supra* note 159.

167. *See* Althea Gregory, *Denying Protection to Those Most in Need: The FDA's Unconstitutional Treatment of Children*, 8 ALB. L.J. SCI. & TECH. 121, 140-41 & n.90 (1997) (arguing that children meet the Court's requisite "history of discrimination" standard and should therefore be a suspect class subject to an equal protection analysis).

168. *See e.g.*, *Edwards*, *supra* note 1, at 986-87.

169. *Gregory*, *supra* note 167, at 140-41.

170. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 443 (1985).

171. *Cf. id.* (noting that existing legislation outlawing discrimination of the mentally retarded and funding allocated to such an end belied a claim of legislative antipathy).

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 479

Finally, the Court considers whether the class has been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."<sup>172</sup> Children epitomize political powerlessness because they cannot vote. Children are the quintessential "discrete and insular" minority referred to in *United States v. Carolene Products*.<sup>173</sup> The key is not the number of children, but the amount of representation in the legislature and whether the group has access to the political process.<sup>174</sup>

While some would argue that children are adequately represented in the political process because adults were once children and will treat children in legislative arenas with "full concern and respect, despite their formal and complete exclusion from the electoral process,"<sup>175</sup> this is simply undermined by the statistics on child abuse and the fact that the law protects everyone *except children* from corporal punishment. Children can neither vote nor lobby for protective legislation, they do not operate or control the social institutions that affect them, and they have no input in the legal system that consistently denies them rights and protections given to adults.<sup>176</sup> Children are bound by the law in the same way as adults, yet do not receive the same protection as adults,<sup>177</sup> leaving them in a position similar to aliens who pay taxes and may be called into the armed forces, yet are unable to receive welfare benefits.<sup>178</sup>

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172. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

173. 304 U.S. 144, 153 (1938) (implying that those deemed "discrete and insular minorities" may require a more searching judicial inquiry because the political process ordinarily relied upon to protect minorities is hampered by prejudice).

174. See Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 815 (1984) (describing the Court's use of "minority" in relation to the quality of representation and political decision-making power a group has and not its mere quantity). For example, although women constitute a majority of the population, they are still underrepresented in political bodies. *Id.*

175. *Cebum Living Cr.*, 473 U.S. at 472-73 & n.24 (Marshall, J., concurring in part, dissenting in part).

176. See LOIS G. FORER, *UNEQUAL PROTECTION: WOMEN, CHILDREN, AND THE ELDERLY IN COURT* 195-210 (W.W. Norton & Co. 1991) (asserting that children's social problems are perpetuated by a denial of the same legal rights provided to adults). The author expounds that adults are able to resolve their social problems precisely because of their legal rights and the enforcement of those rights through the courts. *Id.* at 197.

177. *Id.*

178. See *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding that a state statute violated the Equal Protection Clause because it denied welfare benefits to resident aliens). In some states, young children cannot be sued, which relieves them of some legal obligations to which adults must adhere. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 158 (2000) (stating that for children older than four, the question of whether the child has formed tortious intent is a question of fact); Oscar S. Gray, *The Standard of Care for Children Revisited*, 45 MD. L. REV. 597, 598 (1980) (stating that a

Analysis of the factors used to determine suspect or quasi-suspect classification all weigh in favor of affording children some protected status. While it is unlikely that the Court as presently constituted will recognize an additional suspect class,<sup>179</sup> it should at least designate a quasi-suspect classification, based on these factors.

There are also normative reasons for applying heightened scrutiny to laws that single out children and allow them to be hit and spanked. The "process theory" is based on the premise that governmental action burdening groups excluded from the political process is inherently suspect.<sup>180</sup> The judiciary is, theoretically, a non-majoritarian branch that protects the politically powerless and operates as a mechanism for correcting flaws in the political process.<sup>181</sup> Children clearly are powerless citizens, not just politically, but financially, academically, cognitively, and in their inability to travel. There is a fundamental flaw in a governmental system that fails to protect the smallest, weakest members of society from physical assault perpetuated by larger, more powerful persons who control them in every way.

While some may argue that child abuse statutes fulfill this protective duty, the statistics prove that the statutes are woefully inadequate because: (1) child abuse is rampant despite the legal implications of abusing children; (2) child abuse jurisprudence unjustifiably affords great deference to parents' purported motives, which allows even serious physical injury to children to go unpunished; and (3) child abuse statutes do not protect children from the emotional, cognitive, and psychological damage that can occur from subabusive corporal punishment.<sup>182</sup> Perhaps more

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majority of states do not allow children to be sued for contributory negligence).

179. See *supra* note 126 and accompanying text.

180. See, e.g., Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073 (1980); Miller, *supra* note 174, at 831 (enunciating that the process theory supports judicial intervention on behalf of the political powerless minority where the minority is the "subject of either 'first degree prejudice' or 'incorrect stereotypes'").

181. See Miller, *supra* note 174, at 828-29 (noting that protection is limited to a group who has been injured based on the assumption that they cannot take care of themselves politically).

182. See, e.g., MODEL PENAL CODE § 3.08 (1985), which allows parents to defend acts of corporal punishment resulting in even permanent disfigurement or death as long as the force is used to punish the child's misconduct and was not "designed to cause or known to create a substantial risk of causing death, serious bodily injury. . . ." It is thus possible for a parent to defend even killing a child if the force used was not "designed" to cause death or serious harm, and the Model Penal Code fails to protect against more subtle emotional and psychological injury resulting from moderate corporal punishment. See also, e.g., FLA. ST. § 39.01(2), which provides: "Corporal discipline of a child by a parent or legal guardian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child."

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 481

important for equal protection analysis is the reality that statutes specifically giving adults the right to strike minors unfairly isolate children. This in turn sends children a message that they are unworthy of the same protections as other Americans, consequently leaving them to the mercy of ignorant parents.<sup>183</sup> The U.S. Government owes more than this to its most vulnerable citizens. Indeed, the United Nations has taken the position that its member governments owe children more, and as a result, governments all over the world have banned the use of corporal punishment against children.<sup>184</sup>

## 2. *The state's interest*

Generally, the government has little difficulty demonstrating an "important" interest; almost any articulated government purpose has proven sufficient in prior cases.<sup>185</sup> The statutes that create a right for parents to physically punish their children generally contain express legislative findings.<sup>186</sup> The statutory language regarding discipline and the parents' need to train and educate their children seems to defer to parents' right to choose their child-rearing practices, which

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(emphasis added). "Harm" is defined to exclude corporal punishment that does not result in physical injury such as "sprains . . . bone or skull fractures . . . brain or spinal cord damages . . . intracranial hemorrhage . . . asphyxiation, suffocation, or drowning . . . burns . . . cuts . . . bites." *Id.* § 39.01(30)(a)(4). Thus, the statute fails to protect children from emotional harm per se.

183. It is this author's position that the government also owes parents a moral duty to inform them of the scientific data relating to corporal punishment, as a protective measure similar to warnings given in other situations. For example, the FDA warns the public about drugs when the effects are *unknown*, particularly as they relate to pregnant or lactating women, yet no government entity warns parents about the potential life-long harmful impact of "normal" spanking. The government seems to turn a blind eye to children's need for protection from corporal punishment. Some legal scholars believe that children are singled out and left unprotected in other contexts as well. *See, e.g., Gregory, supra* note 167, at 122 (arguing that a FDA regulation, which allows manufacturers to avoid testing a drug on children provided that the drug is not specifically marketed toward children, violates the Equal Protection Clause).

184. *See supra* note 10 (listing countries that have banned corporal punishment).

185. *See, e.g., Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 315-16 (1976) (rationalizing that a statute can be constitutional even where the state did not choose the best means to promote its interest). *But see Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 & n.17 (1982) (deciding that giving women a "choice of educational environments" was not important enough to warrant excluding men from the school's nursing program); *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (declaring administrative convenience or conservation of limited educational resources are not considered important government interests justifying the denial of resources to a particular segment of society).

186. *See generally* Pollard, *supra* note 1 (noting, however, that legal analysts have assumed that laws creating corporal punishment rights in parents are based on the premise that the right to discipline a child is concomitant with the duty to rear); *see, e.g., COLO. REV. STAT. ANN.* § 18-1-703 (West 1990); *DEL. CODE ANN.* tit. 11, § 468 (1995); *PAGE'S OHIO REV. CODE ANN.* tit. 29, § 2919.25(A) (Anderson 2002).

is part of parents' fundamental right to control their children's upbringing.<sup>187</sup> At first glance, there is little question that states have an "important" interest in protecting a fundamental constitutional right, particularly considering the privacy aspects of the right to control children's upbringing. However, the state's real interest lies in advancing the policies underlying the right to control children's upbringing. These policies must be understood before the state interest can be analyzed accurately.

The policies underlying the parental right to rear children can be gleaned from reviewing the relevant Supreme Court decisions. The right was first recognized by the Court in *Meyer v. Nebraska*,<sup>188</sup> where the Court struck down a law that prohibited teaching grade-school children languages other than English.<sup>189</sup> The Court held that the Due Process Clause protects liberty interests such as the individual's right to marry, establish a home, and raise children.<sup>190</sup> The Court stated that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . .," and as such parents should be free to choose how to educate them.<sup>191</sup>

The *Meyer* Court thus acknowledged the parental right to rear children vis-à-vis its recognition of parents' discretion over their own children's education as part of their duty to raise the children to become productive members of society.<sup>192</sup> The Court recognized that parents need some deference and privacy if they are to effectuate their child-rearing goals.<sup>193</sup> Implicit in the Court's reasons for establishing the parental right to rear children are the assumptions that the parent will: (1) know how to teach the child to be a productive member of society; and (2) use his discretion to rear efficaciously, presumably with the child's best interests in mind. Ultimately, this case stands for the proposition that the state's interest

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187. See *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) (labeling the parental right to rear children "fundamental," but appearing to apply a rational basis-type test). "[T]his liberty may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Id.* In addition, to the extent that laws have been challenged as violating the parental right to rear, the standard strict scrutiny test has not been employed. Instead, the Court has balanced potential harm to the child and society against the parental right to rear. See *Troxel v. Granville*, 530 U.S. 57, 66-67 (2000) (reviewing the evolution of the Court's recognition of parental rights over their children in various aspects).

188. 262 U.S. 390 (1923).

189. *Id.* at 392.

190. *Id.* at 399.

191. *Id.* at 400.

192. *Id.*

193. *Id.*

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 483

in allowing parents child-rearing discretion is to create productive citizens.<sup>194</sup>

Two years later, in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*,<sup>195</sup> the Court reiterated that the Due Process Clause protects parents' interest in directing the upbringing and education of children because of parental duty to prepare the child for adult life.<sup>196</sup> The Court held unconstitutional a state law that required attendance at public schools for children between the ages of eight and sixteen, which effectively precluded private school attendance during those years.<sup>197</sup> The Court explained the parent's privacy interest in making choices about a child's upbringing as follows: "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>198</sup> The term "additional obligations," according to the Court many years later, "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."<sup>199</sup> Again, the Court makes the above-referenced assumptions about the parent's ability and desire to mete out his parenting obligations with the child's best interests in mind, and assumes that protecting parental discretion and family privacy will advance the state's interest in producing healthy, productive citizens.<sup>200</sup>

The Court recognized the two aforementioned assumptions justifying parental discretion in child-rearing over fifty years later in *Panham v. J.R.*<sup>201</sup> The Court stated that "the law's concept of the family rests on a presumption that parents possess what a child lacks

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194. *Sae id.* (harmonizing parental right to child rearing with societal value stemming from educating children in a way that is "regarded as useful and honorable, essential . . . to the public welfare").

195. 268 U.S. 510 (1925).

196. *Sae id.* at 534-35 (holding that a state compulsory education law that required parents to send children to public schools up to a certain age violated the Due Process Clause, as the parents' protected discretion included the discretion to send their children to private schools).

197. *Sae id.* at 535-36 (permitting the case to be brought by private schools whose businesses would be impaired or destroyed if the law was enforced; the schools were allowed to raise the constitutional issue of impermissible state interference with a parent's right to choose how to rear, e.g., educate, their children).

198. *Id.* at 535.

199. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

200. *Sae, e.g., id.* at 234 (rationalizing that Amish parents have a right to have their children abstain from attending two additional years of compulsory education mandated by the state because the parental decision would "not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society").

201. 442 U.S. 584 (1979).

in maturity, experience, and capacity for judgment required for making life's difficult decisions,<sup>202</sup> and that the law has traditionally assumed that the "natural bonds of affection lead parents to act in the best interests of their children."<sup>203</sup> The state's interest in protecting family privacy, including the right to control children's upbringing, rests on the fundamental premise that deference to parents' child-rearing choices will produce good citizens. A state may choose to defend laws specifically excluding children from protection against corporal punishment based on its interest in protecting parents' fundamental right to make decisions regarding the upbringing of their children. This defense will survive intermediate scrutiny if the state can show that the laws are "substantially related" to the state's objective of producing healthy, intellectually advanced, socially responsible members of society.

3. *The means to advance the state's interest are not sufficiently related to the interest*

Child corporal punishment does not advance the state's interest in producing good citizens. Indeed, the research indicates that persons subjected to corporal punishment are more likely to commit crimes such as assault, as well as to suffer from a variety of psychological and physical problems that detract from productive citizenship.<sup>204</sup> Three arguments support the assertion that child corporal punishment should not reside in the realm of parental decision making. First, familial privacy can produce harms that far outweigh the benefit of general privacy policies. Second, research contradicts the notion that parents know best how to raise children. Third, statistics on child abuse undermine the law's traditional assumption that parents will act with their children's best interests in mind.

First, there is an inherent tension between privacy and protecting victims in domestic situations. "Privacy" in a scenario involving domestic violence equates to some family members (usually the bigger, stronger ones) victimizing other family members. While fifty years ago, notions of "privacy" and family autonomy took precedence over state and local officials' involvement in domestic violence, today

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202. *Id.* at 602.

203. *Id.*

204. See, e.g., Strauss, Sugarman & Giles-Sims, *supra* note 4, at 766-67; Marjorie Lindner Gunnoe & Carrie Lea Mariner, *Toward a Developmental-Contextual Model of the Effects of Parental Spanking on Children's Aggression*, 151 ARCH. PEDIATR. MED. 768, 771 (1997); Zvi Strassberg et al., *Spanking in the Home and Children's Subsequent Aggression Toward Kindergarten Peers*, 6 DEV. & PSYCHOPATHOLOGY 445, 456 (1994).



## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 485

concepts of protecting the innocent and justice prevail.<sup>205</sup> The government cannot take a "hands-off" approach to private familial activity if it seeks to redress domestic violence. Thus, most state laws protect spouses from rape and other domestic violence regardless of where it occurs.<sup>206</sup>

Laws already protect children from numerous abuses, including corporal punishment that crosses the line into physical "abuse." To the extent that society believes corporal punishment is a form of abuse, or otherwise should be discouraged in the same way as domestic violence, the notion of "privacy" must be balanced against the need to protect victims of corporal punishment. Where corporal punishment is involved, privacy should give way in this context as it has in relation to spousal rape and other forms of domestic violence.

In addition, the concept of privacy is generally grounded in the idea that certain human relationships need a zone of privacy to protect and enhance certain personal goals in the relationship, such as to allow for personal autonomy, self-evaluation, emotional release, and freedom to express oneself fully.<sup>207</sup> These goals are enhanced when families are left alone in their disciplinary practices. However, corporal punishment simply cannot be considered a means of enhancing these goals, since the bulk of objective evidence indicates that it is counterproductive to these goals, injecting fear, anger, distrust, and other unhealthy emotions into the parent-child relationship and leading to the destruction, not enhancement, of family bonds.<sup>208</sup> If society's goal is to enhance family relationships and strengthen parent-child bonds, we must use research on spanking to discourage its use, thereby advancing society's goals for human relationships.

Second, polls and statistics on corporal punishment undermine the assumption that parents are in the best position to know what is best for their children. Data indicates that most American parents are quite ignorant about the potential harms involved with corporal

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205. For example, fifty years ago it was difficult, if not impossible, for wives to have their husbands prosecuted for domestic violence or even forced sexual relations.

206. Indeed, spousal rape no doubt occurs often in the married couple's home, but may be prosecuted nonetheless.

207. *E.g.*, Edward Imwinkelried, *Rivalry Between Truth and Privilege: The Weaknesses of the Supreme Court's Reasoning in Jaffee v. Redmond*, 49 *HASTINGS L.J.* 969, 985-88 (1998).

208. *See generally* Timothy Brezina, *Teenage Violence Toward Parents as an Adaptation to Family Strain: Evidence from a National Survey of Male Adolescents*, 30 *YOUTH & SOCIETY* 416 (1999); Graziano et al., *supra* note 56; Murray A. Straus & Kimberly A. Hill, *Corporal Punishment, Child-to-Parent Bonding, and Delinquency*, Paper presented at the 5th International Family Violence Research Conference, Durham, NH: Family Research Laboratory, University of New Hampshire (July 1, 1997).

punishment and believe that corporal punishment is “necessary” at times to shape a child into a good, responsible citizen.<sup>209</sup> While there may be little doubt that most parents *intend* to teach and shape their children through spanking, the simple fact is that many parents are not well-educated about its efficacy, not to mention the harms that may result from its use. Thus, although parents almost certainly are in the best position to assess a child’s personality and behavioral problems, this is not tantamount to being in the best position to know how best to help their child. The state possesses superior information than most parents on this issue and should act to educate parents and to discourage the use of corporal punishment. Although this argument may offend some parents, it is more socially responsible than allowing the dangerous and ubiquitous practice of corporal punishment to continue by turning a blind eye to the scientific evidence.

Third, it is naïve to assume that bonds of affection will lead parents to act in their children’s best interests. Child abuse statistics prove that many parents do not act in their children’s best interests at all times, for a variety of reasons.<sup>210</sup> Even the most loving of parents may unwittingly act against their children’s best interests by using corporal punishment. It is not necessarily a function of whether the parents *intend* to act in their children’s best interests, but rather, whether they *in fact* act in their children’s best interests: about ninety percent of parents use corporal punishment on their children, and the bulk of research indicates that this practice is against children’s best interests.<sup>211</sup>

Thus, laws supporting child corporal punishment based on the idea that parents know best how to discipline their children and will exercise that knowledge in the child’s best interests cannot meet even intermediate scrutiny. The simple reality is that many parents are ignorant about the consequences of corporal punishment and

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209. See Straus, Sugarman & Giles-Sims, *supra* note 4, at 763. American support of corporal punishment is, however, declining. *Id.* See also HYMAN, *supra* note 161, at 16 (“Almost every study shows that over 90 percent of parents report that they have spanked their toddlers.”).

210. See, e.g., Edwards, *supra* note 1, at 983 (citing U.S. Dep’t of Health & Human Services, A Nation’s Shame: Fatal Child Abuse and Neglect in the United States: a Report of the U.S. Advisory Board on Child Abuse and Neglect xxiv-vi, 16 (1995), which explains that over 2000 children die each year at the hands of their parents, while 18,000 are permanently disabled, and 142,000 are seriously injured as a result of excessive “discipline”).

211. See *supra* note 3 and accompanying text (discussing the prevalence of corporal punishment in the United States); see also *supra* note 56 (providing research detailing the detrimental effects to children, families, and society resulting from corporal punishment).

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 487

unwittingly harm their children while attempting to discipline them. The effect of deference to parents in this regard is not only substantially unrelated to the state's interest, but counterproductive to it. There is an insufficient relationship between deference to parents because "parents know best" and the state's interest in producing healthy citizens to withstand even intermediate scrutiny.

In other contexts, the Court has taken a "get real" position in relation to outdated notions of family roles and policy justifications. For example, in 1980, the Court recognized that the spousal privilege should be held only by the testifying spouse.<sup>212</sup> The Court explained that the privilege originated in the now obsolete notion of a woman as chattel with no independent legal identity, and took the position that if one spouse is willing to testify against the other spouse, there is "probably little left in the way of marital harmony for the privilege to preserve."<sup>213</sup>

The Court should apply a similar practical approach to protecting children from corporal punishment based on outdated notions of children as inherently evil, and "property" of their fathers, as well as outdated notions that parents instinctively know best when it comes to child-rearing and creating healthy family relationships.<sup>214</sup> The reality is that when parents use corporal punishment to "teach" children, it is ineffective and counterproductive, and it harms the child, the parent, and society at large. The laws supporting corporal punishment are thus obsolete and counterproductive to the goal of producing strong families and healthy citizens. The government would more efficaciously enhance and protect family relationships by banning the use of corporal punishment and concurrently educating the public about the damaging effects of using corporal punishment on children.<sup>215</sup>

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212. *Trammel v. United States*, 445 U.S. 40, 53 (1980).

213. *Id.* at 52.

214. *See supra* note 159 and accompanying text (discussing historical views of children); *see also supra* note 211 and accompanying text (highlighting the extensive use of corporal punishment by parents in the United States despite the overwhelming evidence of its harmful effects).

215. Sweden's actions are exemplary. It banned parental corporal punishment and engaged in an extensive public awareness campaign, including television advertisements, milk carton advertisements, and letters to all parents of minors, informing them of the dangers of corporal punishment and the fact that it had been banned, and offering suggestions on alternative methods of punishment, such as time out. *See* Joan E. Durrant, *The Swedish Ban on Corporal Punishment: Its History and Effects in FAMILY VIOLENCE AGAINST CHILDREN: A CHALLENGE FOR SOCIETY* 19-25 (Detlev Frehsee et al. eds., 1996), available at <http://www.nospank.net/durrant.htm> (last visited Jan. 8, 2003); Global Initiative to End All Corporal Punishment, States with Full Abolition, at <http://www.endcorporalpunishment.org/pages/frame.html> (last visited Jan. 8, 2003).

In similar challenges to state law, the Court has struck down laws it found to be counterproductive to the state's purported purpose. In *Meyer v. Nebraska*,<sup>216</sup> the Court specifically analyzed the purpose of the law which was "to promote civic development by endorsing English as the mother tongue and restricting the education of children in foreign tongues."<sup>217</sup> Although the state may go "very far, indeed, to improve the quality of its citizens, physically, mentally, and morally . . .,"<sup>218</sup> the method employed was counterproductive because:

[T]here seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.<sup>219</sup>

The Court basically held that a law that takes educational opportunities from children is inconsistent with the state's purpose of supporting children's well-being and intellectual opportunities. Indeed, the opposite was true: fluency in a foreign language advanced the state's interest in educating its citizens. The law was unconstitutional because it was not closely related to the state's interest in civic development, but in fact was found to be counterproductive to it.

In *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*,<sup>220</sup> the state's "manifest" purpose was to educate its youth by compelling attendance at public schools.<sup>221</sup> The Court held that the state had an interest in educating its young citizens, but if no relationship exists between denying the right of private education and the state's interest in educating its children, the law would impermissibly infringe on the parent's right to choose the children's education.<sup>222</sup> In this regard, the Court noted the inefficacy of the law "[the private schools] are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious."<sup>223</sup> Since the impact of the law was not to advance the state's interest in educating its youth, but to the contrary, to preclude children from obtaining a

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216. 262 U.S. 390 (1923).

217. *Id.* at 401.

218. *Id.*

219. *Id.* at 403.

220. 268 U.S. 510 (1925).

221. *Id.* at 531.

222. *Id.* at 534-35.

223. *Id.* at 534.

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 489

private education, the law was not sufficiently related to the state's purpose.<sup>224</sup>

Similar to *Meyer* and *Pierce*, laws supporting child corporal punishment not only fail to advance the state's purpose, but ultimately cause individual and societal problems that are inconsistent with the state's purpose. If corporal punishment laws are reviewed under heightened scrutiny, they will fail to pass constitutional muster.

*C. State Laws Excluding Children From Protection Against Corporal Punishment Violate Children's Liberty Interests*

The Constitution forbids the government from depriving any person of "life, liberty, or property" without due process of law.<sup>225</sup> The Due Process Clauses of the Fifth and Fourteenth Amendments protect more than procedural due process: some deprivations of life, liberty or property are unconstitutional regardless of the adequacy of the procedures involved. This concept is known as substantive due process.<sup>226</sup>

Children have a liberty interest in not being physically assaulted. Over a hundred years ago, the Court recognized the right of each person to possess and control his body and to be free from restraint and interference.<sup>227</sup> The Court has already recognized that children have a constitutionally protected liberty interest in being free of bodily restraints or bodily harm.<sup>228</sup> In *Ingraham v. Wright*,<sup>229</sup> the Court upheld the use of school corporal punishment against constitutional challenges based on procedural due process and the Eighth Amendment right to be free from cruel and unusual punishment.<sup>230</sup>

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224. *Id.* at 535.

225. U.S. CONST. amends. V, XIV, § 1; *e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

226. *E.g.*, *Developments in the Law* *supra* note 68, at 1166-67. Substantive due process flourished during the Lochner Era, named after the Supreme Court case of *Lochner v. New York*, 198 U.S. 45 (1905), which held that a state cannot set maximum hours for bakery employees. In so doing, it defined a new standard for judicial review of a state law "Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual . . ." *Id.* at 56. This standard has been criticized as allowing the judiciary to substitute their social and economic beliefs in lieu of legislative decisions. The Lochner Era is generally recognized as beginning with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) and ending with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

227. *Sae* *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (finding that courts have no lawful authority to compel plaintiff to submit to a bodily examination in an action for personal injury).

228. *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

229. 430 U.S. 651 (1977).

230. *Id.* at 672.

The Court nonetheless acknowledged a child's substantive due process right in being "free from... unjustified intrusions on personal security."<sup>231</sup> A number of circuit courts have considered whether corporal punishment in the schools violates students' substantive due process rights.<sup>232</sup> The Fifth Circuit has stated that "[c]orporal punishment is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal or maintaining an atmosphere conducive to learning."<sup>233</sup> Children thus have a liberty interest in being free from corporal punishment.<sup>234</sup>

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231. *Id.* at 672-73 (holding that use of corporal punishment in schools did not violate the Eighth Amendment and that the Due Process Clause did not require notice and a hearing prior to imposition of corporal punishment in schools because "traditional common law remedies are fully adequate to afford due process").

232. *Sae, e.g., Metzger v. Osbeck*, 841 F.2d 518, 519 (3d Cir. 1988) (assessing whether a physical education teacher used excessive physical discipline when he placed his arms around a student's neck, causing him to fall unconscious); *Hall v. Tawney*, 621 F.2d 607, 612-15 (4th Cir. 1980) (finding that disciplinary corporal punishment in public schools may infringe upon the students' substantive due process rights); *Saylor v. Bd. of Educ.*, 118 F.3d 507 (6th Cir. 1997) (concluding that disciplinary paddling in the schools did not per se violate substantive due process); *London v. Dirs. of DeWitt Pub. Schs.*, 194 F.3d 873, 877 (8th Cir. 1999) (holding that a teacher did not violate a student's right to substantive due process when the two engaged in an altercation and the teacher banged the student's head into a pole while removing him from the cafeteria); *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000) (deciding that a coach used excessive corporal punishment and violated a student's substantive due process rights when he struck the student with a metal lock, causing partial blindness).

233. *Woodard v. Los Fresnos Indep. School Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984); *see also Jefferson v. Ysleta Indep. School Dist.*, 817 F.2d 303, 304 (5th Cir. 1987) (affirming a lower court's refusal to dismiss a parents' § 1983 claim against a teacher and principal based on their infringement on a child's constitutional liberty interest where the teacher tied an eight year old student to a chair for an entire school day). In *Jefferson*, the court held that qualified immunity protects a public official from liability only if he does not violate a clearly established statutory or constitutional right of another that is known or knowable to a reasonable person. *Id.* at 305. As such, it held the teacher responsible for knowing that the child had a Fifth and Fourteenth Amendment right to be free of bodily restraint of the magnitude inflicted. *Id.* A child's liberty right is not identical to an adult's and is not absolute, but it is nonetheless a right that must be considered against a parent's use of corporal punishment and state action singling children out for such punishment. *Sae Developments in the Law supra* note 68, at 1358 (asserting that children have constitutional rights independent from adults, and arguing that constitutional guarantees of equal protection and procedural due process apply with full force to children); Cynthia Denenholz Sweeny, Comment, *Corporal Punishment in Public Schools: A Violation of Substantive Due Process?*, 33 HASTINGS L.J. 1245, 1274 (1982) (arguing that a child's interest in freedom from excessive corporal punishment in public schools is a fundamental right).

234. Indeed, children's interest in being free from corporal punishment is as great as, if not greater than, adults' interest in similar rights. Children's vulnerability to physical harm, both in terms of greater damage to smaller bodies and inability to fight back, as well as their inability to extricate themselves from relationships with adults, leaves them particularly vulnerable to physical violations. As such, they particularly need safeguards to protect their liberty.

## 2002] A CONSTITUTIONAL ANALYSIS OF CORPORAL PUNISHMENT 491

Where state action is challenged on substantive due process grounds, such as where a state law infringes on a person's fundamental liberty interest, the state must demonstrate a sufficiently important purpose to justify its infringement of the right.<sup>235</sup> Also, the means used must be sufficiently related to that purpose.<sup>236</sup> If the state cannot show both a sufficiently important interest and a sufficient nexus between the purpose and the state action taken to advance that purpose, then its action is unconstitutional.

Government action that interferes with a fundamental right may be analyzed under the fundamental rights branch of equal protection, or under a substantive due process analysis.<sup>237</sup> As a practical matter, under both equal protection and substantive due process analysis, the nature of the right affected, the state's interest in infringing on the right, and the efficacy of the state's method for advancing its interest should all be considered to determine constitutionality.<sup>238</sup> Both analyses involve a balancing approach: only government interests of sufficient importance will justify interference with fundamental rights.<sup>239</sup>

Realistically, the degree of protection or level of analysis afforded to fundamental rights should not depend upon whether the constitutional challenge is grounded in equal protection or substantive due process. While terminology may vary a bit, the analyses are essentially the same.<sup>240</sup> State laws that single children out for physical punishment cannot withstand constitutional scrutiny under either equal protection or due process analysis because of the insufficient relationship between the state purpose and the action taken to advance the purpose. These laws therefore constitute an unconstitutional infringement on children's liberty interests.

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235. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 216, 230 (1982).

236. *E.g.*, *id.* at 230.

237. *Developments in the Law supra* note 68, at 1193-97 & n.241.

238. *See Developments in the Law supra* note 68, at 1193-97 (discussing the methods of review to be applied in both substantive due process and equal protection analysis).

239. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 230-31 (1982) (holding that Texas's interest in preserving school resources for use by its lawful residents did not withstand equal protection scrutiny because it was not substantial enough to support denial of public education to undocumented school-age children).

240. However, one point of difference is that under equal protection analysis, only articulated legislative purposes will be considered under heightened scrutiny. On the other hand, substantive due process analysis, like rational basis analysis, allows the court to utilize any conceivable government purpose in its analysis. *Miller, supra* note 174, at 810-12.

## CONCLUSION

America is an extremely violent society relative to other advanced industrialized nations. The government should take action to reduce the rate of societal violence in accordance with scientific research on its origins. Child corporal punishment is associated with elevated levels of societal violence and probably causes aggression and antisocial behavior on the part of the spanked child. As such, the government should ban child corporal punishment as part of a comprehensive effort to reduce societal violence in general.

Banning child corporal punishment would produce additional benefits. Corporal punishment is an unhealthy intrafamilial practice that is a factor in a variety of individual ills, including physical, mental, and emotional disorders. It is also a known precursor to child abuse.<sup>241</sup> Juxtaposed to all of the individual and societal harms associated with child corporal punishment is substantial research—conducted both by proponents and opponents of corporal punishment—that child corporal punishment is not effective, or no more effective, than other forms of punishment that do not carry the risks associated with corporal punishment. Therefore, child corporal punishment is unnecessary, of questionable efficacy, and risky.

The research findings on corporal punishment have led to a rapidly growing world-wide trend to ban the child-rearing practice altogether. It is time for America to join this trend and take action to protect children, their parents, and society at large from the harms associated with child corporal punishment.

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241. See Edwards, *supra* note 1, at 993 n.56; see also generally DAVID G. GIL, VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES (1970); G.R. PATTERSON, COERCIVE FAMILY PROCESS (1982).