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Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child

MARY KATE KEARNEY*

This Article questions whether parents have a right to corporally punish their children, and, if they do, how this right should be defined. Although several possible sources of a substantive due process right of parental corporal punishment exist, it is clear that parents do not need the heightened constitutional protection afforded by a fundamental right. This is so because the political process already adequately protects the interests of parents in disciplining their children. To the extent that the political process chooses to permit parents to administer reasonable corporal punishment, this Article proposes a five-part test that courts can use to determine whether an act of corporal punishment fits within that reasonableness standard. This test is more sensitive to the interests of children than are current standards and resolves all doubts in favor of the children.

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The parental use of corporal punishment is common but controversial. When parents administer corporal punishment, the practice raises a host of legal issues. Those issues play out against a societal backdrop of heightened sensitivity to state intrusion into family privacy on the one hand and increased awareness of child abuse on the other. The legal issues involving the parental use of corporal punishment implicate two sets of concerns: courts must determine whether parents have a fundamental right to use corporal punishment and, if they do, how far that right extends.

1. Traditionally, and for the purposes of this Article, corporal punishment involves the intentional infliction of physical force upon a child. See, e.g., IOWA CODE § 234.40 (1994) (“intentional physical punishment of a . . . child”); N.Y. FAM. CT. ACT § 1012 (McKinney 1995) (“intentional[] . . . serious injury to a child”); see also MICH. COMP. LAWS ANN. § 380.1312(1) (West 1994) (“deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline”); MINN. STAT. ANN. § 127.45(1) (West 1994) (“hitting or spanking a person with or without an object; or . . . unreasonable physical force that causes bodily harm or substantial emotional harm”); N.D. CENT. CODE § 15-47-47 (1993) (“willful infliction of, willfully causing the infliction of, or willfully allowing the infliction of physical pain on a pupil”).

2. See Spare the Rod? Mother Arrested for Slapping Child, CHI. TRIB., July 1, 1994, § 1, at 7 (discussing controversy surrounding felony charges brought against a mother who slapped her nine-year-old son in a grocery store). As of the writing of this Article, charges are still pending against the mother.

3. For example, two recent state supreme court decisions awarding biological parents custody of their children after the children had been living with their adoptive parents have received widespread attention. See In re Petition of Doe, 638 N.E.2d 181 (Ill. 1994); In re Clausen, 502 N.W.2d 649 (Mich. 1993).

4. For example, one newspaper’s year-long investigation into the deaths of children in its community found that one leading cause of death was abuse by parents or a boyfriend of the child’s mother. See Steve Johnson, Killing Our Children, CHI. TRIB., Jan. 1, 1993, § 1, at 1.
This Article addresses both of those issues. The Article first concludes that parents who use corporal punishment should not receive the heightened protection conferred by a fundamental right because their interests are already adequately safeguarded by the political process. Second, to the extent that the political process chooses to permit parents to administer reasonable corporal punishment, courts should abandon the current test which defines the scope of that reasonableness and adopt the test proposed by this Article because it is sensitive to the interests of those most in need of protection under this right: children.

Part II of this Article considers the status of the parental right of corporal punishment and concludes that it should not be considered a fundamental right. If the Supreme Court recognized this practice as a fundamental, parental right, then the state could not restrict its use unless it had a compelling reason for doing so. The question of how something becomes a fundamental right has occupied the Court’s and commentators’ attention for years. Part II of this Article is divided into four sections, and each section considers a different potential source of a fundamental, parental right.

The Court first turns to its past opinions on the subject. No Supreme Court case has raised the issue of whether parents have a fundamental right to corporally punish their children. Those cases which recognize a fundamental, parental right to direct the upbringing of their children are silent on whether that right includes the right of corporal punishment. In a different context, the Court affirmed the right of schools to administer reasonable corporal punishment to their students without violating either the Cruel and Unusual Punishments Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. These cases, however, do not answer the question of whether parents have a fundamental right of corporal punishment, and thus, the Court cannot rely on them alone as a basis for such a right.

The second source considered in establishing a fundamental right is located in history and tradition. History and tradition have been criticized as a source of fundamental rights because of difficulties both

5. See discussion infra part II.A.
8. See discussion infra part II.B.
in determining what constitutes a tradition and in using tradition to protect the interests of minorities.\textsuperscript{9} The Supreme Court's debate in \textit{Michael H. v. Gerald D.}\textsuperscript{10} about the use of history and tradition to establish fundamental rights underscores the problems with relying on that source. In that case, Justices Scalia's and Brennan's differing readings of history and tradition prevented them from reaching a consensus about whose interests were protected by a fundamental right.\textsuperscript{11} A similar debate forecloses any consensus about whether history and tradition can serve to establish a fundamental right of parental corporal punishment.

A third source of fundamental rights, contemporary norms or the "evolving standards of decency,"\textsuperscript{12} raises similar problems to those presented by using history and tradition as a source of fundamental rights.\textsuperscript{13} The evolving standards of decency are perhaps more difficult to define than any other source of fundamental rights. The definitional problems involve figuring out whether those standards can be derived from a common experience, whether they can be pinpointed in time, and whether courts are equipped to define them.\textsuperscript{14} These three concerns effectively prevent the evolving standards of decency from acting as a basis for establishing a fundamental right of corporal punishment.

The last section of Part II concludes that the political process adequately protects parents' interests in using corporal punishment.\textsuperscript{15} The public has signaled its approval of corporal punishment through legislation which allows parents to administer reasonable corporal punishment. Even if that ability is threatened, parents can use the political process to protect their interests. As adults, parents have the right to vote, and they can exercise that right to change laws that they feel unduly limit their ability to administer corporal punishment. Because the majoritarian process safeguards parents' interests, they do not need the additional, constitutional protection of a fundamental right of corporal punishment. Fundamental rights should protect minority interests, and parents who use corporal punishment do not fall into that category.

\textsuperscript{10} 491 U.S. 110 (1989) (plurality opinion).
\textsuperscript{11} Compare id. at 124-25 (Scalia, J., plurality opinion), with id. at 139-40 (Brennan, J., dissenting).
\textsuperscript{13} See discussion \textit{infra} part II.C.
\textsuperscript{14} See Ely, supra note 9, at 43-52.
\textsuperscript{15} See discussion \textit{infra} part II.D.
Given the fact that the majoritarian process protects parents’ interest in reasonable corporal punishment, this Article also considers the question of what constitutes reasonable corporal punishment. Part III evaluates the current test for determining the reasonableness of parental corporal punishment, explains its deficiencies, and proposes a new test. Under the current test, courts consider the parents’ intent in administering the corporal punishment, the nature of the force, and the surrounding circumstances. Courts will balance these factors to determine whether, under the totality of the circumstances, the parents’ conduct was reasonable.

This test is flawed in two respects. First, this test will not enable courts to reach a consensus about the parameters of reasonable corporal punishment. Because the test is subject to differing interpretations, parents cannot rely on it to guide their behavior. Second, and more importantly, children cannot rely on this test to protect them from physical abuse. The test preserves the interests of parents—a powerful political group—at the expense of children—a politically isolated minority. The test ignores children, the group of people whose interests are most affected by the parameters of the standard, and allows parents, who may be motivated by self-interest, to set the limits on it. Therefore, this test achieves the opposite of its intended effect: it protects the interests of a powerful majority to the detriment of an isolated minority. Children’s interests were already ignored when the parental ability to use reasonable corporal punishment was established through the political process; they should not be overlooked for a second time as the parameters of the right are determined.

This Article proposes a test for reasonableness that is more sensitive to the interests of children. This new test evaluates the reasonableness of parents’ use of force with a series of five questions. These questions require courts to review a parent’s decision to use corporal punishment by asking: (1) What was the parent’s intent in administering the corporal punishment? (2) To what was the parent responding? (3) What did the parent do? (4) Could the corporal punishment have worked? (5) Did the parent have any alternatives? The questions are interrelated, so, for example, the milder the child’s misconduct, the less tolerant a court should be of parental use of corporal punishment. Because the questions

16. See Model Penal Code § 3.08 (1)(a), (b) (1985); Restatement (Second) of Torts § 147(1) (1965).
are interrelated, they give a court some discretion in weighing and evaluating them. Nevertheless, the standard also is clear in refusing to tolerate certain uses of parental force regardless of the provocation or any other circumstances. Some levels of force are so excessive or so misintended that they are clearly outside the boundaries of what society tolerates, and there is no room for judicial discretion in balancing that force against any of the other factors.

This new test better protects the interests of children. Even though courts balance parents’ and children’s interests under both tests, the new test requires courts to resolve all doubts in favor of the child. The new test safeguards children’s interests by holding parents to a higher level of behavior. Most significantly, this test requires parents to have exhausted other available alternatives before resorting to physical force. In so doing, corporal punishment represents a last measure that parents can use only after other means of discipline and education have been tried and have failed.

This requirement, however, does not always work against a parent’s decision to use force. Parents who administer corporal punishment after they have exhausted all available alternatives may be protected under this standard. In one situation, the parental use of corporal punishment was justified because the state had deprived the family of any alternatives.17 The state needs to ensure that parents have effective ways, other than corporal punishment, that help them to educate and discipline their children. If the state fails to provide alternatives, such as services and programs, then it should not be able to intervene and take away parents’ rights of corporal punishment. Thus, the requirement that less restrictive alternatives be considered before corporal punishment is imposed is attentive to the interests of parents but focuses on the need of children to be kept safe from harm.

This Article concludes that the Supreme Court does not need to recognize a fundamental right of parents to corporally punish their children. If the majority of people determines that parents should be able to use corporal punishment, then the political process can adequately protect that consensus. Given the legislative recognition of parents’ ability to administer reasonable corporal punishment, parents should not be able to secure additional judicial protection for their interests. Instead, that judicial protection should be reserved for those who lack a voice in the political process: children. Therefore, the courts should

17. See infra text accompanying notes 237-45 (discussing a situation where parents chained their drug-addicted daughter to a radiator in their home after the state ignored their pleas for assistance in dealing with her).
abandon the current test for defining the scope of the parental right and should adopt the test proposed in this Article. While the current test preserves parents’ interests at the expense of children’s rights, the new test is sensitive to the needs of children and safeguards their interests.

II. POTENTIAL SOURCES OF A FUNDAMENTAL RIGHT OF CORPORAL PUNISHMENT

The Supreme Court has recognized certain interests as fundamental rights under the Due Process Clause of the Fourteenth Amendment. Some interests are considered fundamental rights because they are specifically mentioned in the Bill of Rights, while other interests not enumerated in the Constitution may still be considered fundamental rights. Interests in this latter group can become fundamental rights when they are so important to an individual’s liberty that the Court wants to protect these interests from unjustified state intrusion.

The importance of recognizing certain unenumerated rights as fundamental lies in the increased level of protection accorded those rights. Typically, the state can infringe on a non-fundamental right if it

18. See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (overturning a state law restricting access to marriage and noting that the right to marry is of “fundamental importance”); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (holding that the right to vote in state elections may not be burdened by the imposition of a state poll tax); Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a state law banning the use of contraceptives as violative of the right of marital privacy).

19. See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940) (recognizing that the notion of liberty embodied in the Fourteenth Amendment embraces the freedom of religion guaranteed by the First Amendment); Stromberg v. California, 283 U.S. 359 (1931) (recognizing that the notion of liberty under the Due Process Clause of the Fourteenth Amendment includes the right of free speech guaranteed by the First Amendment).

20. See, e.g., Griswold, 381 U.S. at 484 (recognizing that fundamental rights may be found in the “penumbras” of the Constitution).

21. One of the most well-known instances of the Court’s elevating an individual’s liberty interest to the level of a fundamental right can be found in Griswold, where the Court affirmed a fundamental right to privacy when it determined that a law prohibiting the use of contraceptives unconstitutionally infringed on a “relationship lying within the zone of privacy.” Id. at 485. Although the Court did not define the parameters of this right to privacy, it endorsed the idea that a fundamental right could be located in the “penumbras,” not the text, of the Constitution. Id. at 484; see also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (discussing the right to privacy as “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”).
has a rational basis for doing so. Furthermore, the state can pass a law restricting a non-fundamental right as long as that law is "rationally related to a legitimate end of government."\textsuperscript{22} In contrast, the state usually cannot interfere with a fundamental right unless it has a compelling reason for doing so.\textsuperscript{23} In those cases, the Court will use a "strict scrutiny" approach to determine whether such an overwhelming or compelling need exists.\textsuperscript{24} This additional burden on the state to justify its regulation of fundamental, as opposed to non-fundamental, rights means that securing fundamental rights status may be critical to preserving a particular interest.\textsuperscript{25}

The Supreme Court can consult a variety of sources to determine whether an interest deserves heightened constitutional protection, and thus, fundamental right status.\textsuperscript{26} The Court may first review its past decisions to see how it has treated this interest, and may then look to history, tradition, and contemporary social norms or evolving standards of decency\textsuperscript{27} for additional guidance. The next three sections consider whether these sources provide the Court with a basis for identifying and defining a fundamental, parental right of corporal punishment.

\textbf{A. Supreme Court Cases}

It is now well-settled law that the Court recognizes certain aspects of the parent-child relationship as falling within the category of unenumerated, fundamental rights.\textsuperscript{28} To understand the Court’s perspective on the status of parents’ rights as fundamental, one must examine a line of Supreme Court cases dating back over seventy years. In these cases, the Court recognized the fundamental right of parents to direct the upbringing of their children and included within that right the parental ability to make religious and educational choices for their offspring.\textsuperscript{29} The Court further observed that this right was not absolute when it came into conflict with the state’s interest in safeguarding the

\begin{itemize}
\item \textsuperscript{22} John E. Nowak \& Ronald D. Rotunda, Constitutional Law 379 (4th ed. 1991).
\item \textsuperscript{23} \textit{Id.} at 574-75.
\item \textsuperscript{24} \textit{Id.} at 575.
\item \textsuperscript{25} \textit{Id.} at 388.
\item \textsuperscript{26} See, e.g., Ely, supra note 9, at 16-51 (discussing possible sources the Court may use to identify fundamental rights).
\item \textsuperscript{27} Breithaupt v. Abram, 352 U.S. 432, 435-36 (1957).
\item \textsuperscript{29} See Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); \textit{Pierce}, 268 U.S. at 535; \textit{Meyer}, 262 U.S. at 399.
\end{itemize}
welfare of children.\textsuperscript{30} The Court, however, has been silent about whether the use of corporal punishment is considered part of this fundamental, parental right, and if so, how far the parental right extends.

In two decisions, the Supreme Court affirmed that the Due Process Clause of the Fourteenth Amendment protects the right of parents to make educational choices for their children. In \textit{Meyer v. Nebraska}, the Court struck down a state law that prohibited the teaching of any language but English to children in grade school.\textsuperscript{31} In making this determination, the Court noted that the Due Process Clause protects such liberty interests as “the right of the individual . . . to marry, establish a home and bring up children.”\textsuperscript{32} The parental right to bring up children carries a corresponding duty to educate them, and parents therefore have a liberty interest in choosing the kind of education that their children receive.\textsuperscript{33}

Two years after \textit{Meyer}, the Supreme Court determined that a state compulsory education law requiring parents to send children of certain ages only to public schools violated the Due Process Clause.\textsuperscript{34} In \textit{Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary}, the Court noted that \textit{Meyer} stood for the proposition that parents have a liberty interest in “direct[ing] the upbringing and education of children under their control.”\textsuperscript{35} According to the Court, the parental interest extended to the “right . . . [and] duty, to recognize and prepare [children] for additional obligations.”\textsuperscript{36} In \textit{Pierce}, that right gave parents the authority to select the kind of school that their children would attend.\textsuperscript{37}

In \textit{Meyer} and \textit{Pierce}, the Court upheld the fundamental right of parents to direct the upbringing of their children, at least in the context

\begin{footnotes}
\item[30] \textit{See} \textit{Prince}, 321 U.S. at 166.
\item[31] \textit{Meyer}, 262 U.S. at 403.
\item[32] \textit{Id.} at 399. In dicta, the Court contrasted the role that parents play in American society to their role in ancient Greece. In American society, parents have the responsibility for directing their children’s education while the state had that authority in ancient Greece. American society gives parents this authority over their children because it values the role of the individual more highly than ancient Greece did. Thus, the American legal system protects parental autonomy in making child-rearing decisions. \textit{Id.} at 401-02.
\item[33] \textit{Id.} at 400.
\item[34] \textit{Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary}, 268 U.S. 510, 534-35 (1925).
\item[35] \textit{Id.}
\item[36] \textit{Id.} at 535.
\item[37] \textit{Id.}
\end{footnotes}
of making educational choices. Although the Court acknowledged the state’s interest in promoting the health and welfare of its citizens,\textsuperscript{38} it determined that the parents’ interests should prevail in those cases.

Twenty years later, under different circumstances, the Supreme Court returned to this balancing test when considering the parental right to make child-rearing decisions against the state’s interest in protecting the health, welfare, and safety of children. This time, however, in \textit{Prince v. Massachusetts},\textsuperscript{39} the Court found the balance to favor the state and upheld the constitutionality of a state child labor law that prohibited children from selling newspapers in public places.\textsuperscript{40} The constitutionality of the statute was challenged by a nine-year-old girl and her guardian who were distributing religious literature on the street during the evening. They claimed that the statute violated the child’s First Amendment right to exercise her religion and the guardian’s Fourteenth Amendment right to “bring up the child in the way [she] should go, which . . . means to teach [her] the tenets and the practices of their faith.”\textsuperscript{41} Thus, the right of a parental figure to direct the religious upbringing of a child was at stake in \textit{Prince}. The Court determined that this right was subject to certain state restrictions regarding the welfare of children.\textsuperscript{42}

In examining the guardian’s rights, the Court noted the difficulty of balancing the interests between parent and state, especially when the state is seeking to regulate how a family practices its religion.\textsuperscript{43} The Court cited \textit{Meyer} and \textit{Pierce} for the proposition that there exists a “private realm of family life which the state cannot enter.”\textsuperscript{44} The Court recognized that parents have primary authority within this private realm to make child-rearing decisions about their children: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for

\begin{thebibliography}{99}
\bibitem{38} The Court acknowledged the role of the state in \textit{Meyer} and \textit{Pierce}, but it concluded that the parents’ rights were preeminent. The Court reasoned “[t]hat the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally . . . but the individual has certain fundamental rights which must be respected.” Meyer v. Nebraska, 262 U.S. 390, 401 (1923). Similarly, the Court noted that “[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.” Pierce, 268 U.S. at 535.
\bibitem{39} 321 U.S. 158 (1944).
\bibitem{40} \textit{Id}. at 170-71.
\bibitem{41} \textit{Id}. at 164.
\bibitem{42} \textit{Id}. at 167.
\bibitem{43} \textit{Id}. at 165.
\bibitem{44} \textit{Id}. at 166.
\end{thebibliography}
obligations the state can neither supply nor hinder.”45 Their authority, however, does not give parents exclusive control over their children’s upbringing. When parents exert control in a way that jeopardizes a child’s health, safety, or welfare, the state can use its parens patriae power to intervene in the parent-child relationship to protect the child.46

In *Prince*, the Court expressed concern about the adverse effects of child employment, particularly in public places, and the accompanying dangers of being on the street.47 The Court concluded that the state had the authority to protect children from these dangers by banning them from street preaching, although parents retained the right to make other decisions about their children’s religious training.48 Thus, the Court weighed the interests of the parents against those of the state and decided that under those circumstances, the state could limit the parental right to direct the religious upbringing of the child.

Thirty years later in *Wisconsin v. Yoder*, 49 the Supreme Court balanced those interests in favor of the parents when it affirmed their right to direct the religious upbringing of their children.50 The Court considered the interests of a group of Amish parents who argued that they should not be required to send their children to school beyond the eighth grade even though state law required children under the age of sixteen to be enrolled in school.51 Citing its decisions in *Meyer*, *Pierce*, and *Prince*, the Court weighed “the traditional interest of parents with respect to the religious upbringing of their children”52 against the state’s interests in compulsory education and child labor laws.53 In balancing those interests, the Court concluded that the Amish parents were not jeopardizing the welfare of their children by withdrawing them from school after the eighth grade.54 Instead, they were properly asserting their First and Fourteenth Amendment rights to exercise their

45. *Id.*
46. *Id.*
47. *Id.* at 168.
48. *Id.* at 171.
50. *Id.* at 231-32 (upholding the “fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children”).
51. *Id.* at 207-09.
52. *Id.* at 214.
53. *Id.* at 214-15, 228-29.
54. *Id.* at 234.
religion and to "prepare [their children] for additional obligations" by directing their religious upbringing. 55

In Meyer, Pierce, Prince, and Yoder, the Court endorsed the fundamental right of parents to direct the religious and educational upbringing of their children, but it did not define the scope of that right. These cases can be read narrowly to mean that the Court limited the parents' rights to making only educational and religious choices for their children. The debate in Meyer and Pierce focused on the parents' roles in determining how and where their children should be taught, and the discussion in Prince and Yoder addressed the parents' ability to direct the religious upbringing of their children. Therefore, the Court may have conferred a fundamental right on parents but confined their authority to making only certain kinds of decisions.

These cases also could be read more broadly to include the use of corporal punishment within the scope of parents' fundamental rights. 56 The Court did not specifically limit the constitutional protection of parental decisionmaking authority to choices about schooling and religious practices. In subsequent opinions, the Court cited these cases for the principle of "traditional parental authority in matters of child rearing and education" 57 and the right to "raise one's children." 58 These later cases arose when the Court was analyzing the substantive due process rights of a grandmother who challenged a zoning ordinance that defined family narrowly to exclude her relationship with her grandsons 59 and the rights of an unwed father who requested a hearing before his parental rights were terminated. 60 Thus, although the cases still do not touch on corporal punishment, their language about the parental right to direct the upbringing of one's children may supply the underpinnings of a parental right of corporal punishment. 61 The

55. Id. at 233 (quoting Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925)).
56. See, e.g., Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 ARIZ. L. REV. 11, 37 (1994) (arguing that "[t]he law characterizes the parent's right to punish a child as constitutional because the right resides in a parent's broad constitutional right to the care, custody, and control of [their] children").
60. Stanley, 405 U.S. at 649.
61. The authors of one article noted that the line of cases from Meyer to Yoder addressed situations in which the interests of parents and children are united and are in
Supreme Court, however, has never decided a case in which it considered whether the parental use of corporal punishment fell within the scope of the fundamental right of parents to direct their children’s upbringing. We must look then to cases in which the Court addressed the constitutionality of corporal punishment of children in other factual contexts.62

. In Ingraham v. Wright,63 the Court determined that corporal punishment could be used to discipline children in public schools without violating either the Cruel and Unusual Punishment Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment.64 Although the Ingraham Court did not decide the case on substantive due process grounds, the Court noted that in early school corporal punish-

opposition to the state’s interests. See Lee E. Teitelbaum & James W. Ellis, The Liberty Interest of Children: Due Process Rights and Their Application, 12 FAM. L.Q. 153, 170 (1978). In those situations, the parents should have more authority than the state to decide how a child should be raised. The authors maintain that parental control over children even extends to the parents’ use of physical force on the children as a way of preserving family harmony. Id. at 171. The authors suggest that perhaps this parental use of discipline should be constitutionally protected but caution that it must only be used to unite, rather than to disrupt, the family. Id. at 171-72; see also Fitzgerald, supra note 56 (classifying parents’ right to punish their children as constitutional).

Teitelbaum and Ellis are careful to distinguish the use of parental control in those situations where the parents and children have the same interests from those cases in which parents’ and children’s interests are in conflict. Teitelbaum & Ellis, supra, at 168-69. When parents’ and children’s interests compete, courts must be careful not to protect the parental interest at the expense of the children’s rights. According to the authors, the constitutional recognition of a parental right of control in the latter situation would “create[] a sphere of personal domination which . . . resembles the relationship of the early Roman father over his children.” Id. at 168. Furthermore, judicial approval of a parental right of control would undermine a child’s right of self-determination, and thus, must be avoided. Id.

62. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), aff’d without opinion, 423 U.S. 907 (1975). In Baker, the court considered whether a parent’s right to determine disciplinary measures for her son fell within the parental right to provide for a child’s “‘custody, care and nurture’” as established in Prince. Id. at 298 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). The case arose when the mother and child challenged the school’s decision to administer corporal punishment to the child against his mother’s wishes. Id. at 296. The court concluded that the mother’s right to oppose the corporal punishment of her child is not fundamental and that the state therefore need not show a compelling interest before imposing that punishment. Id. at 299. Although the court acknowledged that the Fourteenth Amendment protected “the right of parents generally to control means of discipline of their children,” it balanced that interest against the state’s “countervailing interest in the maintenance of order in the schools.” Id. at 296.


64. Id.
ment cases, the authority to use corporal punishment was delegated from parent to school. Today, the Court recognized that the teacher’s authority is derived from the state’s power under compulsory education laws to administer corporal punishment “‘for the proper education of the child and for the maintenance of group discipline.’”

The Court weighed the state’s interests in discipline and education against a child’s “right to be free from ... unjustified intrusions on personal security,” which was part of the “historic liberties” protected by the Fourteenth Amendment.

The Court concluded that reasonable corporal punishment in school was “justifiable” because the state had a parens patriae interest in balancing “the child’s interest in personal security and the traditional view that some limited corporal punishment may be necessary in the course of a child’s education.”

In affirming this right of reasonable corporal punishment in public schools under the Eighth and Fourteenth Amendments, the *Ingraham* Court left open the issues of whether the Due Process Clause protects a fundamental, parental right of corporal punishment, and if so, how far that right extends. Thus, the legacy of *Ingraham* is that the democratic process is free to accept reasonable corporal punishment but is not required to tolerate it.

In sum, Supreme Court cases have recognized the fundamental right of parents to direct the upbringing of their children. This precedent does not specifically include corporal punishment as part of that right, nor does it define the scope of reasonable corporal punishment. Therefore, we have to look to other sources to determine if and how corporal punishment is part of that fundamental right. We can turn to history and tradition and to the evolving standards of decency to consider the status of corporal punishment as a fundamental right.

**B. History and Tradition**

The Supreme Court has used history and tradition as a source for identifying and defining fundamental rights. The Court observed

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65. *Id.* at 662 (quoting 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 3.20 (1956)).
66. *Ingraham*, 430 U.S. at 673.
67. *Id.* at 676.
68. History and tradition have replaced natural law as a source for fundamental rights under substantive due process. See NOWAK & ROTUNDA, supra note 22, at 388-91; see also Ely, supra note 9, at 22-32 (discussing the historical use of natural law in interpreting the Constitution); McCarthy, supra note 28, at 983-84 (chronicling the shift from natural law to tradition as a source of fundamental rights).
generally in *Snyder v. Massachusetts* that it could establish a fundamental right by relying on "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." More specific to our purposes, the Court has relied on history and tradition when defining the parameters of substantive due process in matters involving the family: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." This appeal to history and tradition as a source of fundamental rights has been debated by commentators and the Supreme Court.

Commentators who favor the use of history and tradition to establish fundamental rights often advance two reasons in support of their position. First, they maintain that history and tradition enable the Court to give fundamental rights status to interests that society has already agreed deserve protection. Over time, some principles will be rejected while others take root. Those principles that have withstood the test of time become traditions that reflect a societal consensus about

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70. Id. at 105.
71. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977) (plurality opinion); see also Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (noting that parents' "fundamental interest" in guiding their children's religious upbringing is reflected in the "history and culture of Western civilization"); Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (asserting that the Court should consult the "traditions and [collective] conscience" of the country as a source of establishing fundamental rights) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
74. *Developments, supra* note 72, at 1186-87; see also Lupu, *supra* note 72, at 1043-47 (discussing the "many ways in which history demonstrates recognition of a liberty as fundamental.") Id. at 1044.
75. *Developments, supra* note 72, at 1186.
what interests should be preserved.\footnote{76} For example, the principle of family autonomy has been established over time, and thus, has become an enduring tradition. As this tradition has taken root, people expect the Court to protect it. Therefore, when the Court recognizes family privacy as a fundamental right, it is simply giving constitutional protection to a principle that history and tradition already have carved out and upon which there is societal consensus.\footnote{77}

Second, these commentators contend that history and tradition represent neutral principles on which to ground fundamental rights.\footnote{78} The principles are neutral because the Court is consulting external authority when it recognizes a fundamental right rather than relying on the subjective beliefs of its members. Members of the Court can avoid imposing their own beliefs, or legislating from the bench, when they turn to "a relatively objective history" as a source of fundamental rights.\footnote{79} According to at least one commentator, this reliance on tradition will check the Court's authority by ensuring that societal consensus supports judicial recognition of a fundamental right.\footnote{80}

Critics, such as Professor Ely, of using history and tradition as a basis for fundamental rights raise two objections.\footnote{81} First, Professor Ely points to various problems with defining a tradition.\footnote{82} Those definitional problems include locating a tradition geographically and temporally, deciding when something is established enough to become

\footnote{76.\, \textit{But see} Brown, \textit{supra} note 72, at 182. The author rejects time as an essential element of establishing a tradition. The author argues that she does not endorse the more common definitions of tradition "because they presuppose that the practice at issue has withstood the test of time. For my purposes, the longevity of a practice is not decisive." \textit{Id.}}

\footnote{77.\, \textit{See, e.g., Moore}, 431 U.S. at 500-06 (noting that history and tradition protect the extended family); Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (noting that limits on substantive due process protection come from "respect for the teachings of history [and] solid recognition of the basic values that underlie our society") (citing Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring)).}

\footnote{78.\, \textit{Developments, supra} note 72, at 1187.}

\footnote{79.\, \textit{Id.}}

\footnote{80.\, \textit{Id.; see also} Brown, \textit{supra} note 72, at 191-92 (discussing the rationale behind the "common consent" theory). Brown explains that "evidence of longstanding acts of government is relevant to a constitutional analysis to the extent that such evidence suggests that those acts are legitimate because of the common consent to their continuation." \textit{Id.} at 192.}

\footnote{81.\, Ely, \textit{supra} note 9, at 39-43.}

\footnote{82.\, \textit{Id.} at 39; \textit{see also} Brown, \textit{supra} note 72, at 181-82. Brown offers several definitions for tradition, including: "a continuing pattern of culture beliefs or practices," along with "a long-established or inherited way of thinking or acting" or "the handing down of statements, beliefs, legends, customs, information, etc., from generation to generation." \textit{Id.} (quoting \textit{THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE} 2006 (2d ed. 1987)).}
a tradition, determining who defines a tradition, and figuring out what history has to say about creating a particular tradition. These ambiguities in defining a tradition put the Court in the position of having "to admit that tradition does not really generate an answer." The Court, therefore, must look elsewhere to determine what constitutes a fundamental right.

Second, Professor Ely criticizes the "undemocratic nature" of using the interests of past generations to establish a fundamental right today. A tradition for him is something that has withstood the test of time but may also be frozen in time. He is reluctant to have the Court establish a right based on a tradition that may be outdated and ignore contemporary societal beliefs. In addition, Professor Ely contends that judicial reliance on tradition is undemocratic because courts will be protecting the beliefs of the majority at the expense of minority interests. Often, a principle becomes a tradition when there is societal consensus about it, and that consensus is reached when a majority of people endorses the principle. When courts recognize a fundamental right in response to the majority's beliefs, they are abandoning their role of safeguarding the rights of the minority who cannot secure them through the political process and are usurping the legislature's job.

The Supreme Court has also debated how history and tradition should be interpreted when considering the existence of a fundamental right. Justices Scalia's and Brennan's divergent readings of history and tradition in *Michael H. v. Gerald D.* illustrate the difficulty of using those values to identify and define a fundamental right. The debate in *Michael H.* focused on competing definitions of the interest at stake.

83. Ely, supra note 9, at 39-40.
84. Id.
85. Id. at 42.
86. Id. ("The provisions for which we are trying to locate a source of values were phrased in open-ended terms precisely to admit the possibility of growth.") (footnote omitted).
87. Id. at 42-43.
88. Brown, supra note 72, at 192 (explaining the "common consent" theory).
89. Ely, supra note 9, at 42-43.
The level of specificity with which the interest was defined determined whether it had been historically and traditionally protected, and thus, whether the Court should have recognized it as a fundamental right. In *Michael H.*, a plurality of the Court narrowly defined the interest at stake when it determined that Michael H. had no substantive due process right to a relationship with his biological daughter, Victoria. Victoria’s mother was married to another man, Gerald D., when the child was conceived, and Gerald D. was listed as the child’s father on her birth certificate. After Michael H. was informed that he was Victoria’s biological father and blood tests confirmed this fact, he sought to establish his paternity and visitation rights. This appeal to the

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93. In *Bowers v. Hardwick*, the Supreme Court agreed that history and tradition could be used to establish a fundamental right. The debate centered on what that history means. 478 U.S. 186 (1986) (plurality opinion). As in *Michael H.*, the specificity with which the interest was defined determined whether it traditionally had been protected.

In *Bowers*, the Supreme Court held that a state sodomy statute did not violate the fundamental rights of homosexuals. *Id.* at 189. In the plurality opinion, Justice White framed the interest narrowly and concluded that history and tradition did not “extend a fundamental right to homosexuals to engage in acts of consensual sodomy.” *Id.* at 192. Justice White referred to the “ancient roots” of prohibitions against sodomy and cited criminal laws against sodomy that dated from colonial times to the present. *Id.* at 192-94. Based on this authority, he dismissed any claim that the right was grounded in tradition as “at best, facetious.” *Id.* at 194. Justice Burger, writing in concurrence, traced back the history of prohibitions against sodomy to Roman and English law to reach the same conclusion. *Id.* at 196-97 (Burger, J., concurring) (“Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”).

In dissent, however, Justice Blackmun disagreed with the level of specificity with which the plurality framed the interest. *Id.* at 199 (Blackmun, J., dissenting). Justice Blackmun stated that the case was not about “a fundamental right to engage in homosexual sodomy.” *Id.* (quoting plurality opinion at 191). Instead, the case was about “the right to be let alone.” *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)) (Brandeis, J., dissenting). By framing the case as a right to privacy issue, Justice Blackmun was able to draw on Supreme Court precedents that protect the rights of individuals to make choices about how they conduct their personal lives. *Id.* at 204-06. In a separate dissent, Justice Stevens also took issue with the plurality’s narrow framing of the interest. *Id.* at 214 (Stevens, J., dissenting). Justice Stevens noted that the plurality only examined homosexual sodomy and ignored heterosexual sodomy even though historically both kinds of sodomy were prohibited. *Id.* at 215. Justice Stevens’ reading of history and tradition, therefore, does not support Justice White’s exclusion of only homosexual sodomy from heightened constitutional protection. Again, differing judicial interpretations of history and tradition point out the inconsistencies and subjectivity of those values as sources for recognizing fundamental rights.

95. *Id.* at 113-14, 124.
96. *Id.* at 114.
Supreme Court arose out of the lower courts’ denial of his paternity and visitation claims.\(^{97}\) Justice Scalia, writing for the plurality, rejected Michael H.’s argument that he had a constitutionally protected liberty interest in his relationship with his biological daughter.\(^{98}\) In reaching that conclusion, Justice Scalia asserted the need to root a fundamental right in history and tradition.\(^{99}\) Given that need, Justice Scalia considered “whether the relationship between . . . Michael and Victoria has been treated as a protected family unit under the historic practices of our society.”\(^{100}\) Justice Scalia determined that history and tradition did not protect the relationship between an unmarried father and his illegitimate daughter,\(^{101}\) but history and tradition have protected the rights of legitimate parents and the “marital family.”\(^{102}\) Justice Scalia stated that Michael H. had failed to find any historical precedent to support constitutional protection of his relationship with his daughter:

> What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights . . . are made.\(^{103}\)

Thus, he concluded that the Court would not favor the interests of Michael H., the “adulterous natural father,” over the historically-recognized rights of Gerald D., the “marital father.”\(^{104}\) Justice Brennan, writing in dissent, challenged the level of specificity with which the plurality defined the interest at stake.\(^{105}\) Justice

\(^{97}\) Id. at 115-16.

\(^{98}\) Id. at 124.

\(^{99}\) Id. at 122 (“In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted . . . that it be an interest traditionally protected by our society.”).

\(^{100}\) Id. at 124.

\(^{101}\) Id. at 124-25.

\(^{102}\) Id. at 123-24 (noting the “historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family”) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

\(^{103}\) Id. at 127.

\(^{104}\) Id. at 130.

\(^{105}\) Id. at 139 (Brennan, J. dissenting). Justice Brennan suggested a broader interpretation of the interest:

> Today’s plurality, however, does not ask whether parenthood is an interest that historically has received our attention and protection; the answer to that
Brennan noted that the Court had not defined the interests so specifically in other family rights cases, such as a couple's decision to use contraceptives and an individual's right to raise his illegitimate children. If the Court had characterized the interests as narrowly in other cases, he concluded, it would have determined that those interests had not been protected by history and tradition, and thus, were not fundamental rights.

Justice Brennan proposed that the Court instead define Michael H.'s interest more generally as "that of a parent and child in their relationship with each other." Using that definition, he concluded that Michael H.'s relationship with Victoria was "sufficiently substantial to qualify as a liberty interest under our prior cases." The problem with this definition, however, is that it begs the question. Justice Brennan cannot really determine whether parenthood has been protected historically without defining what he means by parenthood. Justice Brennan may have been offering a definition of parenthood when he compared Michael H.'s interests to those of unwed, biological fathers in earlier Supreme Court cases. He read those cases as establishing a tradition of protecting the rights of unwed fathers and concluded that Michael H.'s situation fell within that tradition.

Justice Brennan discussed at length the way that the plurality read past cases and used history and tradition to narrowly circumscribe the parameters of a fundamental right. He criticized the plurality's use of tradition because it ignored the "malleable" and "elusive" nature of tradition and cautioned against using tradition to place an "objective boundary" around the Constitution. Justice Brennan further noted that the question is too clear for dispute. Instead, the plurality asks whether the specific variety of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection.

*Id.*; see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085-98 (1990) (criticizing Justice Scalia's claim that he is proposing a value-neutral approach to selecting the level of generality for defining the fundamental right at stake in *Michael H.*).

107. *Id.* at 139-40.
108. *Id.* at 141-42. In turn, the plurality criticized this broad characterization of the interests for giving judges "imprecise guidance" and leading to "arbitrary decisionmaking." *Id.* at 128 n.6 (Scalia, J., plurality opinion).
109. *Id.* at 142 (Brennan, J., dissenting).
110. *Id.*
111. *Id.* at 142-43.
112. *Id.* at 137-38.
113. *Id.* at 137. Justice Brennan observed that, contrary to the plurality's assertions, tradition does not place an "objective boundary" around the Constitution. *Id.* The sources of our nation's traditions are varied and open to interpretation, and thus,
that even if the Court did consult history and tradition, it would find that in past cases history and tradition have been used to protect the rights of parents and, in particular, the rights of unwed, biological fathers.

Both Justice Brennan and Justice Scalia turned to history and tradition in determining whether Michael H.'s interests should be constitutionally protected, and they agreed that tradition protects the rights of fathers. Their debate centered on whether history and tradition protect "marital father[s]," as Justice Scalia maintained, or unwed, biological fathers, as Justice Brennan asserted. Thus, their differences were not in deciding whether to rely on history and tradition, but in figuring out what that history and tradition meant.

Courts face a similar problem of unclear history and elusive tradition when they seek to determine whether parents have a fundamental right to corporally punish their children. The courts agree that history and tradition protect parents' rights to guide their children's upbringing. The issues then become whether history and tradition include corporal punishment within that right, and if so, how far the right of reasonable corporal punishment extends.

The Supreme Court has recognized the fundamental rights of parents to direct the upbringing of their children as part of an enduring people can "disagree about the content [and significance] of particular traditions." Justice Brennan underscored the shifting nature of tradition by pointing out how difficult it is to fix the starting and ending points of a tradition. Therefore, the ephemeral, subjective nature of tradition makes it an unreliable source for defining a fundamental right.

114. Id. at 139 ("It is not that tradition has been irrelevant to our prior decisions.").
115. Id. at 138-39, 141-43. Justice Brennan further stated that: "It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents." Id. at 138.
116. Id. at 130 (Scalia, J., plurality opinion).
117. Id. at 142 (Brennan, J., dissenting).
118. This is the "malleable" and "elusive" nature of tradition problem that Justice Brennan flagged. Id. at 137.
119. See Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); see also Clasen v. Pruhs, 95 N.W. 640, 645 (Neb. 1903) (Sedgwick, J., concurring) ("Parental discipline, rightly understood, is to assist the strivings and aspirations of the child's better nature. And the child, needing this assistance, is therefore entitled to it."). (quoting JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 880 (1857)); Lander v. Seaver, 76 Am. Dec. 156, 161-62 (Vt. 1859) ("This great, and to some extent irresponsible, power of control and correction is invested in the parent by nature and necessity.").
American tradition, but it has never stated whether that tradition includes the parental right to administer corporal punishment. Proponents of including corporal punishment in the fundamental right will point to its long-standing use and widespread acceptance in American society and argue that this amounts to a tradition. They will note that this tradition of allowing parents to use corporal punishment to discipline their children has taken root over the past two centuries and can be traced back to English common law. Early American cases adopted English common-law principles and affirmed the “power of control and correction . . . invested in the parent by nature and necessity.” The tradition has deepened over time, and today every state continues to recognize the parental ability to administer reasonable corporal punishment. These legislative enactments,

120. See Pierce, 268 U.S. at 510; Meyer v. Nebraska, 262 U.S. 390 (1923).
121. See Ingraham v. Wright, 430 U.S. 651, 663 (1977) (noting the “historical and contemporary approval of reasonable corporal punishment” in public schools).
122. See id. at 660 (discussing the history of corporal punishment in the schools). The Court noted that “[t]he use of corporal punishment in this country as a means of disciplining schoolchildren dates back to the colonial period.” Id. The Court also noted the “background of historical and contemporary approval of reasonable corporal punishment.” Id. at 663. See also Baker v. Owen, 395 F. Supp. 294, 300 (M.D.N.C.) (noting “a settled tradition” of allowing reasonable corporal punishment in schools), aff’d without opinion, 423 U.S. 907 (1975); Jon M. Bylsma, Note, Hands Off! New North Carolina General Statutes Section 115C-390 Allows Local School Boards To Ban Corporal Punishment, 70 N.C. L. REV. 2058, 2062 (1992) (detailing how the in loco parentis justification for corporal punishment in schools has eroded and given way to justifications based solely on institutional control needs).
123. 3 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 120 (1768) (noting that battery is legal when parents are giving moderate correction to their children); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 169 (1797) (noting that parents have “a right to the exercise of such discipline, as may be requisite for the discharge of their sacred trust”) (footnote omitted); see also James Papakirk, Comment, Michigan’s New Corporal Punishment Amendment: Where the Good Act Giveth, Did the Amendment Taketh Away?, 10 COOLEY L. REV. 383, 387 (1993) (discussing the religious and secular roots of corporal punishment and noting that fundamentalist religious tradition accounts for much of the rationale for corporal punishment).
124. Lander v. Seaver, 76 Am. Dec. 156, 161-62 (Vt. 1859); see also Gould v. Christianson, 10 F. Cas. 857 (S.D.N.Y. 1836) (holding that when a father places his son on a navigational ship for the purpose of learning the trade, the ship master may inflict corporal punishment on that minor); Vanvactor v. State, 15 N.E. 341 (Ind. 1888) (holding that a teacher may rightfully apply corporal punishment and that the whipping of a child did not constitute assault and battery per se); Rowe v. Rugg, 91 N.W. 903 (Iowa 1902) (holding that a mother has the same right as a father to discipline a child); Small v. Morrison, 118 S.E. 12 (N.C. 1923) (explaining that an unmancipated child cannot bring a tort action against parents).
125. E.g., ALA. CODE § 13A-3-24 (1982); ALASKA STAT. § 11.81.430 (1989); ARIZ. REV. STAT. ANN. § 13-403 (1989); ARK. CODE ANN. § 5-2-605 (Michie 1987); COLO. REV. STAT. ANN. § 18-1-703 (West 1990); CONN. GEN. STAT. ANN. § 53a-18 (West 1986 & Supp. 1993); DEL. CODE ANN. tit. 11, § 468 (1987); GA. CODE ANN.
judicial decisions, and secondary authority can be interpreted to mean that history has endorsed a parental right of corporal punish­ment. Therefore, one can conclude that the parental right to use corporal punishment is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

Opponents of including corporal punishment as a fundamental right will challenge this reading of history. They might acknowledge that a practice of allowing parents to corporally punish their children has
developed over time, but they will assert that the tradition is under attack today. Those attacks have taken the form of heightened restrictions on parents who use corporal punishment and the banning of corporal punishment in other contexts, such as in public schools, in prisons, and in the foster care system. Furthermore, children have no ability to shape the history and tradition from which such a right would emerge. These changes in corporal punishment laws and the exclusion of children's voices from the process of establishing a right suggest that a societal consensus no longer exists on the use of corporal punishment. If traditions are based on the long-standing practices agreed to by a majority of the community and that agreement erodes, then the foundation for the tradition also crumbles.

It may be dangerous, therefore, to create a right based on a tradition when that tradition can disappear. If the tradition no longer exists, then the danger is that the right will also become extinct. Society used to be more tolerant of corporal punishment than it is today. The erosion of support for corporal punishment reflects the "malleable" and "elusive" nature of using tradition in establishing fundamental rights. A right should not be vulnerable to social whims, and its viability should not depend on whether a tradition has become outdated. The Court recognizes an interest as a fundamental right in order to protect the right when it comes under attack. The Court has never relied on historical consensus to contract the scope of a fundamental right; it has only turned to history and tradition to expand a right. Given the decreasing acceptance of corporal punishment, the Court should not use history and tradition to establish a right that may soon have to be contracted. In

129. *Spare the Rod? Mother Arrested for Slapping Child*, supra note 2, at 7 (discussing a mother's arrest for slapping her nine-year-old son across the face in a grocery store).

130. *National Coalition to Abolish Corporal Punishment in Schools, Corporal Punishment Fact Sheet 1* (1993) [hereinafter *FACT SHEET*] (noting that in the past 20 years, the number of states abolishing corporal punishment in schools has increased from 1 to 26); *see also* Nadine Block & Robert Fatham, *Convincing State Legislatures to Ban Corporal Punishment*, 9 CHILDREN'S LEGAL RTS. J. 21, 23 (1988) (noting that 30 of the 38 largest metropolitan areas do not allow the use of corporal punishment in their schools); Bylsma, *supra* note 122, at 2059 (arguing that a trend toward statutory bans on the use of corporal punishment has emerged and thus has broken the tradition of allowing corporal punishment in public schools).

131. *See, e.g.*, ILL. ANN. STAT. ch. 730, para. 5/3-8-7(b)(1) (Smith-Hurd 1993).

132. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1531.5(d) (West 1993).

133. *See* Ingraham v. Wright, 430 U.S. 651, 660 (1977) ("The use of corporal punishment in this country as a means of disciplining school children dates back to the colonial period."). *But see* FACT SHEET, *supra* note 130, at 1 (noting that the contemporary trend is to eliminate the use of corporal punishment in schools).

effect, when the right does not need protection, tradition ensures it. Once the right is under majoritarian attack and needs protection, history and tradition cannot provide it. Thus, the Court would be on firmer ground if it relied on some value other than history and tradition to establish a fundamental right of corporal punishment.

C. "Evolving Standards of Decency"

Another possible source considered in establishing fundamental rights is the "contemporary values" or "evolving standards of decency that mark the progress of a maturing society." The Supreme Court acknowledged the role of societal values in interpreting the Due Process Clause: "[D]ue process is not measured by the yardstick of personal reaction . . . but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process." The premise underlying the evolving standards of decency theory is that judges should use the values that modern society wants to protect as the basis for identifying fundamental rights. Once those values have developed to the point where they

135. Lupu, supra note 72, at 1047; see also Terrance R. Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1186 (1977) ("[C]onstitutional law is to be understood as expressing contemporary societal norms.").


137. Breithaupt v. Abram, 352 U.S. 432, 436 (1957). The Supreme Court has used this standard when deciding if the Eighth Amendment's Cruel and Unusual Punishment Clause had been violated. In Estelle v. Gamble, 429 U.S. 97 (1976), the Court struck down a prisoner's claim that arose when a physician failed to order additional tests to determine what was causing the prisoner's back problems. Id. at 107. The Court found that this failure to diagnose and treat did not amount to "deliberate indifference to serious medical needs," which was required to violate the evolving standards of decency under the Eighth Amendment. Id. at 106. In reaching this conclusion, the Court cited a line of Eighth Amendment cases in which it held unconstitutional "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" Id. at 102 (citations omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Thus, the Court indicated its willingness to look to contemporary values to assess the constitutionality of a practice under the Eighth Amendment, but it did not further explain how it would identify and define those evolving standards. More recently, the Court observed that "contemporary standards of decency always are violated" when prison officials use excessive force on prisoners. Hudson v. McMillan, 503 U.S. 1, 5 (1992).

have become part of the social fabric, the Court should protect them as fundamental rights under the Due Process Clause. In this way, the Supreme Court will be interpreting the Constitution to reflect societal changes and contemporary norms.

The use of evolving standards of decency as the basis for recognizing fundamental rights raises a host of issues. The majority of those issues focuses on defining the standard. First, the standard assumes the existence of uniform beliefs about what values should be protected. This standard, however, fails to acknowledge that our pluralistic society may mean that people who have different religious, ethnic, and socio-economic backgrounds do not share the same beliefs. Without these shared beliefs, people may not agree on what the evolving standards of decency are. These cultural differences among people and groups may be compounded by geographic differences when community norms vary among regions, states, and localities. The shifting meaning of community norms may make it impossible to reach any consensus about which contemporary values deserve constitutional protection.

A second, related issue focuses on determining the point in time that a societal belief forms the basis of a constitutional right. The dangers of fixing a point in time arise at both ends of the spectrum. At one
end, the concern is that the evolving standards of decency will enable the Court to base a fundamental right on a passing trend. When the trend has faded, the right will remain, but it will have no foundation. At the other end, the risk in waiting too long to recognize a right is that the evolving standards of decency will become indistinguishable from using tradition as a source of fundamental rights.

The Supreme Court has indicated, in at least one opinion, that the evolving standards of decency should form a "bedrock" for establishing a fundamental right.144 That language suggests that a right will only be recognized after the societal norm has been firmly established. If this is the requirement, there will be no difference between basing a fundamental right on the evolving standards of decency and grounding it in tradition. Currently, the only difference between the two sources of a right is that tradition requires the consensus to have lasted longer than is required under the evolving standards of decency.145 A tradition is a practice or belief that has withstood the test of time, while the evolving standards of decency include more recent, contemporary values. The challenge involved with using the evolving standards of decency is figuring out whether and how the law should change to reflect changing societal standards. People's perspectives, and thus societal standards, may change, but the law might not be able to implement these new perspectives and standards—perhaps because of a breakdown in the democratic process. When the Court blurs the sole distinction between the two sources, it undermines any advantage that the evolving standards of decency may offer and opens that standard up to the same criticisms pressed against tradition and consensus.146 The challenge then is to determine when a value is established long enough to be recognized as an evolving standard of decency but not so long that it is in effect a tradition.

The last major issue is determining the Court's role in defining the evolving standards of decency. Some commentators, such as Professor Ely, maintain that legislatures are better equipped than the Court to

144. Breithaupt v. Abram, 352 U.S. 432, 436 (1957). One commentator questions whether a consensus even existed in that case given the fact that it was a split decision, with three Justices dissenting. See Ely, supra note 9, at 45-46.
145. My colleague, Randy Lee, offered helpful insights into this distinction.
146. See supra text accompanying notes 81-89.
determine what contemporary values are. In Professor Ely's opinion, the legislature is the more democratic body because the public elects its members, and thus, is in a better position than the judiciary to ascertain society's "genuine values." Professor Ely concludes his criticisms of the Court's use of the evolving standards of decency by noting that this approach represents nothing "more than a conscious or unconscious cover for the judge's own values." Other commentators take issue with this position and note that courts are "admirably situated to observe and to sense the evolution of contemporary moral culture." One commentator has observed that the legislature's expertise in shaping economic and social policy does not extend to defining "the public morals." He notes that the legislature is equipped to respond only to established social conventions but that the Court "is ordained by tradition to serve as a forum for the subtle dialectical interplay of complex, principled ethical discourse." Thus, the Court's role in determining what constitutes the evolving standards of decency is unsettled.

These three concerns should be addressed when the issues involve the existence and scope of a fundamental, parental right to administer corporal punishment. The questions are whether the evolving standards of decency can establish this fundamental right and, if so, whether they define the parameters of the right.

147. See Ely, supra note 9, at 49-52 ("[A]s between courts and legislatures, it is clear the latter are better situated to reflect consensus."). Professor Ely argues that the legislature is better able to identify societal values than members of the judiciary, whom he labels the "nondemocratic elite." Id. at 51; see also Lupu, supra note 72, at 1047 (agreeing with "Professor Ely's observation that the opinions of lawyers, judges, and 'experts' alone are insufficient" to determine social consensus). But see Perry, supra note 142, at 729 (observing that "the Supreme Court...[is] quite competent to measure the metes and bounds of the public morals" and concluding that the Court "need not be paralyzed by self-doubt about its institutional ability to determine accurately the contours of the public morals"); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 189-90 (1993) (criticizing Ely's theory because it fails to recognize that the courts, by identifying the "defects" in the constitutional system, must make "substantive moral and political choices") (citing Bruce Ackerman's theory endorsing judicial involvement with substantive moral and political choices stated in Bruce A. Ackerman, Beyond Carotene Products, 98 HARV. L. REV. 713 (1985)).

148. Ely, supra note 9, at 51.

149. Id. at 52; see also JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 63-69 (1980). Professor Ely noted that even if consensus can be reached, "consensus is not reliably discoverable, at least not by courts." Id. at 64.

150. Perry, supra note 142, at 729; see also BRUCE A. ACKERMAN, I WE THE PEOPLE 6-7 (1991) (arguing that judicial opinions are legitimate implementations of the moral-political choices that the people have made).

151. Perry, supra note 142, at 729.

152. Id.
The main obstacle to using the evolving standards of decency to establish a fundamental right of corporal punishment is reaching a consensus about societal attitudes toward corporal punishment. People’s attitudes about corporal punishment may vary based on age, race, religion, socio-economic status, or geographic location. Certainly, they may vary depending on one’s status as a parent or a child, and the perspectives of children—who are the people most affected by this issue—have not been taken into account in the current debate. Therefore, there may be no “common experience” on which to build a “community sense” that parental use of corporal punishment deserves heightened constitutional protection. Without that consensus, a right does not exist.

Moreover, it is impossible to fix a point in time where the evolving standards of decency either clearly endorse or reject parental corporal punishment as a fundamental right. On one hand, there are signs that the standard is evolving away from recognition of the right, but the issue is unresolved. For example, some states have banned the use of corporal punishment on children in foster care and in public schools. On the other hand, there are indications that parental corporal punishment is recognized as a fundamental right. Every state has conferred on parents, through judicial decisions or legislative enactments, the right to use reasonable corporal punishment. These mixed signals indicate that neither the existence nor the absence of a right of parental corporal punishment can be fixed at a certain point in time. Because no
consensus exists, courts should leave the democratic process alone to protect the parental interest.

Finally, this lack of legislative consensus leaves courts with the task of ascertaining contemporary beliefs about the status of corporal punishment. As noted earlier, the problem with leaving this task to the courts is that judges might be tempted to impose their own beliefs about corporal punishment on society. 160 Thus, the evolving standards would not reflect the public’s view about corporal punishment; they would represent the viewpoint of the “nondemocratic elite.” 161

In sum, the evolving standards of decency are too unsettled to establish the existence of a fundamental right to corporal punishment. Although the parental right to direct the upbringing of one’s children is well-settled, there is no contemporary, societal consensus about whether that right includes parental use of corporal punishment or what constitutes reasonable corporal punishment. Similarly, tradition provides no consensus about the existence of a fundamental right to use corporal punishment and about how to balance parents’ and children’s interests in determining the parameters of reasonable corporal punishment. The “elusive” and “malleable” nature of basing a right on tradition and the wide range of contemporary values are shaky foundations on which to build a fundamental right. 162 Thus, one must look elsewhere for a parental right of corporal punishment.

D. The Political Process

Another place to look would be to the political process. Using the political process, society would turn to legislatures to recognize and define parents’ rights to corporally punish their children. At least one commentator has recommended that legislatures, not the courts, are in the best position to reflect societal consensus about what constitutes a fundamental right. 163 When the parental right to corporally punish one’s children is at issue, society should rely on the legislative process, and not look to the judiciary to establish such a right.

The first argument in favor of using the legislature to determine the status of a parent’s right to use corporal punishment is that the political process has already addressed and resolved this issue. Every state recognizes parents’ ability to administer reasonable corporal punishment, and states have given parents broad discretion to determine what is

160. See Ely, supra note 9, at 44-45; ELY, supra note 149, at 67-69.
161. See Ely, supra note 9, at 51.
162. See supra note 113 and accompanying text.
163. See Ely, supra note 9, at 49-51.
reasonable. The legislatures may not have clarified the parameters of reasonable corporal punishment, but they have sufficiently secured the parental interest so that the Court need not further protect it by establishing a fundamental, parental right of corporal punishment.

In response to this argument, one should not assume that a right which has not been threatened in the past will not be threatened in the future. When the issue is before the Court, the interest is clearly being threatened. Therefore, the judiciary is needed to safeguard the right by giving it fundamental status. However, the second argument in favor of leaving the issue to the political process may allay these concerns about the parental interest in corporal punishment being threatened.

The second argument is that the right to vote gives parents a way to protect themselves from these threats against their ability to use corporal punishment. Unlike children who are too young to have a voice in the political process, parents usually are adults who are old enough to vote. Parents who believe that the laws unfairly restrict their right to discipline their children can vote to change them. Other laws might not generate as much interest or debate as corporal punishment laws because they are far removed from the public's every day concerns. In contrast, the extent of the parental right to discipline children is a matter that directly affects how many people conduct their daily lives. Because corporal punishment is an issue that people feel strongly about, parents who believe that the laws are unduly burdensome can try to mobilize public opinion against them. If those parents are unable to generate support for their position, then the laws should stand. If, however, people agree that the corporal punishment laws infringe too greatly on

164. See supra note 125 and accompanying text.
165. See ACKERMAN, supra note 150, at 6-7.
166. The area of parent-child relations has received a great deal of public attention. For example, the discussion about "family values" during the 1992 presidential election symbolizes its emergence on the national agenda.
167. The usual difficulty with relying on this approach to establish a right is that it makes the existence of a right dependent on an expression of societal consensus. Under this approach, if a person or group cannot find a majority of people to agree with them, then they do not have a right. This typically presents a problem for people seeking to exercise rights such as abortion or certain kinds of speech. They are unable to form a societal consensus because of the nature of the right. The right of parental corporal punishment is different, however, because those who would exercise it are likely able to form a political consensus about its existence. This consensus is reflected in the legislative process which has traditionally been receptive to the right.
parents' rights, then those laws should be struck down or changed to comport with societal expectations.\textsuperscript{168} Parents can thus ensure that the legislature will safeguard their right, as long as it reflects societal consensus, and need not turn to the courts to preserve this right.

In conclusion, the Supreme Court should not identify a fundamental, parental right of corporal punishment for several reasons. First, no basis for recognizing such a right can be found in Supreme Court precedent, by looking to history and tradition, or by considering the evolving standards of decency. Although these sources do not explicitly reject fundamental rights status for parental use of corporal punishment, they are at best ambivalent about the nature of this parental interest, and thus, provide no consensus on which to ground a fundamental right. Second, a decision not to recognize a fundamental right of parents to administer corporal punishment seeks to safeguard children's right to autonomy. Children have a liberty interest in their own bodily integrity; there is a better chance of preserving this interest if the fundamental right of parents to direct their children's upbringing does not include the right to exert physical force. Third, the legislature is better able than the Court to ascertain the public's views on the use of corporal punishment and can draft laws that reflect the level of protection that society wants to give to parents who administer it. Because this majoritarian process adequately protects parents' ability to administer corporal punishment, there is no need for the Supreme Court to recognize a fundamental right.

Although the legislature is equipped to give parents the authority to administer reasonable corporal punishment based on a general consensus,\textsuperscript{169} there are certain things that should be protected from majoritarian regulation. This is so because the legislature responds to the majority, but the courts safeguard the interests of the minority. Therefore, the courts should determine the scope of the reasonableness standard. Once the legislature has established a general consensus in favor of reasonable parental corporal punishment, courts can impose limits on the parental use of force as a way of securing the interests of the minority—children.

\textsuperscript{168} But see Ely, supra note 9, at 43-45 (discussing the disadvantages of basing a right on a majoritarian consensus).

\textsuperscript{169} As noted earlier, the problem of children not having a voice in the political process in which rights are established is a flaw in using history and the evolving standards of decency to determine the existence of a fundamental right of parental corporal punishment. Children are among the groups whose interests are prone to be ignored in analyzing the presence of a consensus. Therefore, they are precisely the kind of isolated people that rights are designed to protect. See supra text accompanying notes 153-68.
 III. THE SCOPE OF REASONABLE CORPORAL PUNISHMENT

A. The Current Test

Even if the political process chooses to permit parents to administer reasonable corporal punishment, courts still struggle to define the parameters of that reasonableness standard. The line between reasonable and excessive force has proved difficult to draw, and courts have been content to sketch the contours, but not the details, of how that line should be drawn. Although the current test for reasonableness may vary slightly among states, courts consistently rely on certain criteria to determine the reasonableness of the force. The courts may not actually articulate these criteria, but they consider three factors: parental intent in administering the corporal punishment, the nature of the corporal punishment, and the circumstances surrounding the punish-
First, parents can use physical force against their children if they intend to control, train, or educate the children through the use of such force. The parental use of force must be designed to preserve discipline or teach children and not to express anger or frustration toward them. If the force is not motivated by legitimate reasons, then courts will not look to the remaining factors and balance them. Second, the nature of the force used is relevant to deciding its reasonableness. The number of times the child is struck, the instrument used, and the location and severity of the child’s injuries all help to determine whether the corporal punishment is excessive or reasonable. Courts have considered these factors in the context of individual cases when evaluating the reasonableness of the force and have not attempted to draw bright lines about the level of force required to make the parental conduct unreasonable. Finally, the circumstances surrounding the corporal punishment include such factors as the child’s age and developmental level, the reason that the child is being punished, and the availability of other less severe means of discipline. These factors give courts a framework for evaluating the reasonableness of the parental use of corporal punishment.

172. See, e.g., MODEL PENAL CODE § 3.08 (1985); RESTATEMENT (SECOND) OF TORTS § 147(1) (1965).

173. RESTATEMENT (SECOND) OF TORTS § 147(1) (1965) (“A parent is privileged to apply such reasonable force ... upon his child as he reasonably believes to be necessary for its proper control, training, or education.”); see also MODEL PENAL CODE § 3.08 (1985) (“The use of force upon or toward the person of another is justifiable if: ... (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.”).

174. In re Rodney C., 398 N.Y.S.2d at 514-15 (distinguishing force applied for the “proper training or education of the child or for the preservation of discipline” from force “administered for the gratification of passion or rage.”) (citations omitted); see also State v. Hunt, 406 P.2d 208, 222 (Ariz. Ct. App. 1965) (commenting that corporal punishment becomes unreasonable when a “parent ceases to act in good faith and with parental affection, and acts immoderately, cruelly or mercilessly, with a malicious desire to inflict pain”) (citations omitted); Gillett v. Gillett, 168 Cal. App. 2d 102, 104, 335 P.2d 736, 737 (1959) (noting that a parent “may administer reasonable punishment with impunity, but when he exceeds that limit and does so willfully he commits a battery and is civilly liable for the consequences”).

175. In re Rodney C., 398 N.Y.S.2d at 515 (stating that the use of force is only permitted in those circumstances).

176. See, e.g., id. (discussing the “means of punishment,” which included the severity of injury and the number of marks on the child among other factors, as relevant to determining the reasonableness of the parents’ conduct).

177. For a discussion of how the courts have tried to draw the line between reasonable and excessive force, see State v. Thorpe, 429 A.2d 785 (R.I. 1985).

A consensus may exist about the parameters of what constitutes reasonable corporal punishment at the extreme ends of the spectrum—when it is clearly reasonable or clearly excessive.\textsuperscript{179} For example, most people would agree that if a child is throwing a temper tantrum in a public place, a parent is using reasonable force when she picks the child up and carries him away. Similarly, there is general agreement that a prolonged beating of a child resulting in permanent injuries to the child constitutes excessive force. The problem then is not in reaching an agreement about the broad parameters of the right at the extreme ends of the spectrum but in finding a consensus about the details of the right in the gray, middle area. In searching for consensus in that middle area, courts must balance two sets of historically protected rights: parents’ rights to corporal punishment and children’s substantive due process interests.\textsuperscript{180}

Children have a long-standing liberty interest in bodily integrity which must be weighed against the parental right to discipline through corporal punishment.\textsuperscript{181} This interest has its roots in century-old precedent in which the Supreme Court upheld the “right of every individual to the possession and control of his own person, free from all restraint or interference of others.”\textsuperscript{182} When the Court discussed this interest in the context of corporal punishment of children in schools, it noted that

\textsuperscript{179} A line between clearly reasonable and clearly excessive force has been drawn by legislatures and courts. \textit{See supra} note 125.

\textsuperscript{180} The issue of the existence of constitutional rights for children was unsettled at one point in American history. Although the extent of some of those rights may still be debated, it is well-settled that children are separate legal entities from their parents. \textit{See Developments, supra} note 72, at 1358. For a historical perspective on the rights of children as separate entities and the manner the Supreme Court has expanded or curtailed these rights, see \textsc{Samuel M. Davis \& Mortimer D. Schwartz, Children’s Rights and the Law} (1987).

\textsuperscript{181} \textit{See Ingraham}, 430 U.S. at 673 (noting children’s substantive due process interest in “be[ing] free from . . . unjustified intrusions on personal security”); \textit{see also} Baker v. Owen, 395 F. Supp. 294, 301 (M.D.N.C.), \textit{aff’d without opinion}, 423 U.S. 907 (1975). In \textit{Baker}, the court upheld a student’s right to minimal procedural due process before corporal punishment is inflicted on him in school. The court further noted that the child “does have an interest, protected by the concept of liberty in the Fourteenth Amendment, in avoiding corporal punishment. . . . We believe that the concept must include, in appropriate instances, personal security in the seemingly small things of life as well as in the obviously momentous.” \textit{Id}. 182. Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891); \textit{see also} Cynthia Deneholz Sweeney, Comment, Corporal Punishment in Public Schools: A Violation of Substantive Due Process?, 33 Hastings L.J. 1245, 1274 (1982) (discussing the individual’s right to bodily security as part of the right to privacy).
the right had been read to include “freedom from bodily restraint and punishment.” The right of bodily integrity, like all constitutional rights of children, however, is not identical to an adult’s right, nor is it absolute. The Court has explained in other situations why it considers children’s rights to be different from adults’ rights. The relevant reason applicable to the corporal punishment context is the need to respect the “parental role in child rearing.” Two important interests are therefore at stake in these cases, and courts are left to determine how to strike the appropriate balance between them.

The current test is deficient in balancing these interests in two respects. First, this test produces no consensus about where the line between reasonable and excessive force should be drawn. Individual decisionmakers will determine the scope of the parental right and will reach different conclusions about its parameters. The arbitrariness of their line-drawing leaves parents and the rest of society with little guidance about what level of force is appropriate. This is particularly troublesome because parents must raise their children on a daily basis, and therefore, must know the parameters within which they are working. Although the parameters of other fundamental rights, such as speech, also may be unresolved, the parental right of corporal punishment differs from those other areas in an important way. In the other areas, people can choose to take the risk of ambiguity, but parents need to know the exact scope of their right before acting.

Second, even if courts can agree on where the line between reasonable and excessive force should be drawn, that consensus represents the consensus of people in power: parents. Adults determine the parameters of the right, and many of those adults are parents who may be acting out of self-interest when they define the right. This test allows courts to

183. Ingraham, 430 U.S. at 674 (citation omitted).
184. See Developments, supra note 72, at 1358.
185. Bellotti v. Baird, 443 U.S. 622, 634 (1979) (discussing the constitutionality of a statute restricting minors’ access to abortions); see also Davis & Schwartz, supra note 180, at 201 (stating that in some areas, the law accords a “measure of autonomy to children;” but in other areas, such as torts, the law “grants a measure of autonomy” to the parents because of the inherent conflict between the desire to give children greater control over their lives and the need to protect them from their surroundings).
186. Bellotti, 443 U.S. at 634. The other reasons advanced were the “peculiar vulnerability” of children and their diminished decisionmaking capacity. Id.
187. But see State v. Singleton, 705 P.2d 825, 827 (Wash. Ct. App. 1985) (stating that the test for reasonableness of corporal punishment was not based on the subjective intent of the parent to discipline the child but was based objectively on all of the circumstances); Joan L. Neisser, School Officials: Parents or Protectors? The Contribution of a Feminist Perspective, 39 Wayne L. Rev. 1507, 1523 (1993) (“[A]n educator is held to an objective standard of care—whether a reasonable person would have considered the punishment appropriate.”).
ignore the voices of children, a politically isolated minority, whose interests are strongly implicated in the definition of reasonable corporal punishment. In balancing the interests of parent and child under the current test, courts are free to disregard the interests of those most in need of their protection: children.

B. The Proposed Test

In response to these flaws in the current test, courts should consider adopting a new test to determine the scope of reasonable parental corporal punishment. Courts should ask parents a series of five questions to evaluate the reasonableness of their conduct. The five questions direct the parents to review their decision to use corporal punishment. They ask: (1) What was your intent in administering the corporal punishment? (2) To what were you responding? (3) What did you do? (4) Could the corporal punishment have worked? (5) Did you have any alternatives?

This proposed test incorporates some elements of the current standard, but it refines those elements and introduces new ones. Like the current approach, this test looks at the parents' intent in administering the corporal punishment and the nature of the parents' conduct, but the similarities end there. This new test imposes heavier burdens on parents in assessing their intent and conduct than the criteria of the current test. For example, the Model Penal Code, the current standard that has been codified by many states, sets broad parameters to determine the reasonableness of the corporal punishment.188 Under that standard, the use of force is reasonable if two requirements are met. First, the purpose of the force must be to "safeguard[] or promot[e] the welfare of the minor, including the prevention or punishment of his misconduct."189 Second, the force is reasonable if it is not "designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degrada­tion."190 This test does not give judges much deference: it may not be that judges cannot be sensitive to children, but that this standard will not

188. MODEL PENAL CODE § 3.08 (1985); see, e.g., HAW. REV. STAT. § 703-309 (Supp. 1993); 18 PA. CONS. STAT. ANN. § 509 (1983).
189. MODEL PENAL CODE § 3.08(1)(a) (1985).
190. Id. § 3.08(1)(b).
allow them to be sensitive. In contrast, the new test does not tie the judge's hands against the child. Furthermore, the proposed standard includes three new elements that courts must consider: the situation that provoked the parental use of force; the availability of alternatives other than the use of force; and the effectiveness of the use of force.

The main advantage of this new test is its heightened sensitivity to the interests of children. This new test acknowledges that children's interests were not well-served in the recognition of a parental right to corporal punishment—especially a right that allows anything short of serious bodily injury. Standards such as the *Model Penal Code* are adopted by state legislatures even though they are adverse to children's interests because parents control the political process which establishes their right of corporal punishment. The only remaining way to preserve children's interests is to give them a voice in defining the scope of that right. The current test does not guarantee children that voice because it gives courts the latitude to define the right in ways that ignore children's interests and consider only the parents' rights. Although the new test has some subjectivity, it does not obstruct the judge from seeking to protect children from excessive corporal punishment. Therefore, this proposed test still balances the interests of parents and children, but it resolves them in favor of children's interests.

Under the proposed test, courts must scrutinize every aspect of the parents' decision to use corporal punishment before approving it. The test imposes certain limits on parental force, and exceeding those limits automatically invalidates the use of corporal punishment. To take an extreme example, a parent cannot discipline or educate a child by electrocuting him under any circumstances. In that situation, a court does not need to consider the nature of the punishment in light of any of the other factors, including the parent's intent, the circumstances leading up to the electrocution, the effectiveness of the force, and any alternatives to electrocution. Because the factors are interrelated, however, courts will balance them in other situations to determine the reasonableness of the force. For example, the intensity of the force permitted might vary depending on the severity of the situation: a parent can use more force on a child who traps a sibling in the laundry chute than on a child who disobeys a parent and plays outside in the mud. Thus, courts have a certain amount of discretion in determining what constitutes reasonable corporal punishment, but in exercising that discretion, they must first and foremost consider children's interests.

The first question in the new test, which requires courts to consider the parents' intent in administering corporal punishment, is similar but not identical to the current approach. The subtle but significant difference between the approaches highlights the proposed standard's
increased sensitivity to the interests of children. Under the current approach, many states have codified the Model Penal Code test for intent. This test provides that corporal punishment is justified if a parent is acting “for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct.”

In Boland v. Leska, the Pennsylvania Superior Court relied on a state statute which codified the Model Penal Code standard and held that a step-father did not act with “malicious intent” when he administered corporal punishment twice to his step-son. The court determined that the step-father was not trying to injure the child; he simply wanted to show the child that he was angry and to discipline the child. Thus, the court concluded that it found no evidence that the step-father’s motives were “improper.” Under the proposed standard for intent, however, a court should reach the opposite conclusion. The fact that the step-father was trying to show the child that he was angry, even though he did not want to hurt the child, would be sufficient evidence of an “improper” parental motive. A court would conclude that the step-father was acting, at least in part, for his own purposes, and therefore, did not have the appropriate intent to make the use of force justifiable.

The new test would require courts to distinguish between parents who use corporal punishment to educate or discipline their children and those who use it to express their anger or to humiliate or hurt their children. Parents who fall into the first category are using physical force to teach their children lessons about how to behave. For example, a parent who slaps a child because the child is misbehaving in a public place has the appropriate intent if the purpose of the slap is either to communicate to the child that the behavior is unacceptable or to control

192. Id.
194. Id. at 78.
195. Id.
196. Id.
197. One possible objection is that this proposed standard for intent is too difficult to apply because it requires courts to isolate the parents' intent in administering the punishment. Courts would be required to distinguish between parental intent to educate or discipline and intent that expresses parental anger or frustration with the child. A response to this objection is that courts are well-equipped to determine parental intent and have not found it difficult to ascertain in past cases. See id.
the child's conduct. In contrast, parents in the second category do not use physical force out of concern for their child's welfare; instead, they are administering corporal punishment to express feelings of anger or frustration toward a child. The mixed parental motive tolerated by the Boland court under the current test does not take into account the child's needs. In contrast, the new test requires that the parental intent behind corporal punishment serve the child's interests rather than indulge the parent's urges.

The second and third questions should be considered together because they address related issues. These questions ask the parents to consider to what were they responding when they administered the corporal punishment and whether this use of force was consistent with the behavior to which they responded. The current test does not require that the parent's use of corporal punishment bear any relation to the child's behavior, but the new test correlates the two sets of behavior. Under the new test, courts must balance the child's behavior against the nature of the corporal punishment: the less severe the child's misconduct, the less appropriate it is to use corporal punishment to educate or discipline the child. This factor improves on the old test because it requires parents to justify their decision to use corporal punishment, and it permits reasonable corporal punishment only in cases of severe misbehavior. Thus, the new test preserves children's rights to bodily security in situations where those interests formerly received no protection.

In Boland, for example, a court evaluating the parent's use of force under the new test might have reached a different conclusion from the one reached by the Pennsylvania Superior Court. The court determined that a step-father was taking appropriate "disciplinary measures" when he grabbed his step-child and left neck bruises in one instance and slapped the child on the face in another. The court concluded that these uses of force were reasonable, in part, because they "closely followed errant behavior by the child." The child's "errant behav-

198. See Andrea Monsees, The Sometimes-Person: Legal Autonomy and the Child, 6 OHIO N.U. L. REV. 570, 579-80 (1979). This author found that "[t]here is no requirement that the degree of punishment chosen by a parent be commensurate with the act of the child." Id. at 579. She further stated that "[a] minor need not do anything morally, legally, or ethically improper to be disciplined." Id. at 580.

199. This new test suggests that there are certain behaviors of children that cannot justify corporal punishment. See infra notes 200-03 and accompanying discussion of Boland v. Leska.

200. Boland, 454 A.2d at 78.
201. Id.
202. Id.
ior" consisted of losing a sweater in the first instance and not responding to his mother's questions about a missing item the second time. 203 Under the new standard, that behavior would not be considered severe enough to warrant blows to the head leaving bruises. The incidents were not severe because at least one, losing the sweater, was probably an innocent mistake, and both were isolated and unrelated. Thus, a court applying this new test could conclude that the parent had overreacted to the child's minor infractions when he administered corporal punishment.

This new test, however, does not always sacrifice parental interests in favor of children's rights. The application of the second and third questions to a recent example of corporal punishment demonstrates how the test protects parents who administer corporal punishment to help their children. That situation involved a couple's decision to chain their teenage daughter to the radiator to prevent her from roaming the streets in search of drugs. 204 In 1991, Eliezer and Maria Marrero were arrested and charged with unlawful imprisonment and endangering the welfare of their fifteen-year-old daughter, Linda. 205 For two months, the couple had chained Linda to a radiator in their Bronx, New York, apartment at night to prevent her from going out in search of drugs. 206 They took this drastic action immediately after two drug dealers came to their apartment holding Linda at gunpoint and threatening to kill her because she owed them money. 207 Their action also followed years of unsuccessful efforts to get their daughter help through social service agencies. After Linda became addicted to crack and began to roam the city searching for drugs, her parents approached the Child Welfare Administration, the police, Family Court, and a group home seeking assistance in taking care of their daughter. 208 When no government official responded, the Marreros sent Linda, who still drank from a baby bottle, to Puerto Rico to live with relatives, but the relatives sent her

203. Id.
205. Id.
207. Id. at B6.
208. Id.; see also John T. McQuiston, Girl Chained by Parents Says She Wants to Stay at Home, N.Y. TIMES, Sept. 17, 1991, at B1, B4 ("When I asked for help, they wouldn't take me. . . . That's an injustice.").
back home because they could not control her.209 As Linda’s departures from home lengthened and her drug use escalated, her parents chained her by the left ankle to a radiator. They placed her in front of a television, a VCR, a stereo, and video games.210 Mrs. Marrero reflected on the situation: “I only had her chained for two months . . . . There was nothing else for me to do. We are not criminals. We are just people and we have the right to live.”211 The charges against the Marreros were soon dropped, and the family moved out of New York City.212 Linda spent two years in a drug rehabilitation facility and then left the facility, against her counselors’ advice, to live with her family. A month after she returned to her parents, she was charged with assaulting another student at the school she was attending.213

In answering the second question, a court would conclude that the Marreros were responding to far more serious misbehavior than the child’s conduct in Boland.214 Therefore, the events leading up to the Marreros’ confinement of Linda justified their use of corporal punishment. Unlike the child who barely misbehaved in Boland, Linda was out of control. Linda’s inability to take care of herself was the primary reason behind the Marreros’ action.215 In the same way that parents do not allow their young children to wander alone outside because they cannot take care of themselves, so too did Linda’s parents seek to prevent their daughter from going out alone because she could get hurt. Linda’s past behavior demonstrated that she was not capable of controlling her own conduct: she used to leave home in search of drugs, and she would resort to any measures to get them. The nature, duration, and frequency of Linda’s misconduct all contributed to the severity of the situation. From the age of twelve, Linda roamed the streets in search of drugs; she often would return home battered and disheveled.216 Furthermore, Linda had been disappearing for over three years. She was leaving more often and for longer amounts of time and was becoming more dependent on drugs.217 In addition to responding to Linda’s long-standing pattern of disappearances into the street, the Marreros were

210. Id.
211. McQuiston, supra note 208, at B1, B4.
213. Id.
215. See McQuiston, supra note 208, at B1.
216. Gonzalez, supra note 206, at A1; McQuiston, supra note 208, at B1.
confronting the more immediate problem of drug dealers’ death threats toward their daughter.\textsuperscript{218} In sum, the severity of Linda’s drug habit, as evidenced by the desperate measures she took to get drugs, the length of her addiction, and her increased absences from home, help to explain why the Marreros took the steps that they did. The Marreros did not confine Linda because they wanted to punish her for getting beaten up; rather, they were trying to alter her behavior. The parents responded to their daughter’s needs with strong measures because they were trying to save her life.

Turning to the third question, a court would conclude that the use of force was consistent with the behavior to which it responded. The Marreros’ decision to chain their daughter inside the apartment may have represented a unique response to the situation, but this use of force was not excessive. The length of the punishment and the instrument used only seem extreme when considered in isolation and not in the context of the entire situation. During the day, Linda was allowed to wander around the family’s apartment.\textsuperscript{219} When she was chained at night, she had a television, video games, and a stereo to occupy her, and she slept on a hideaway bed.\textsuperscript{220} Although her confinement lasted for two months, Linda had frequent visitors and was allowed to leave the apartment during the day in the company of another family member or friend.\textsuperscript{221} A chain might not be considered a typical instrument of corporal punishment; however, the Marreros used it to prevent Linda from being hurt, not to hurt her. Moreover, Linda suffered no physical or emotional injuries from being chained. In fact, she professed that she “loved her parents, wanted to be back home and understood why they had disciplined her.”\textsuperscript{222} Therefore, the amount of time that she was confined, the instrument used, and the absence of injury indicate that the nature of the force used on Linda was reasonable.

The fourth question asks whether the corporal punishment could have worked in the particular situation where it was used. Some people will criticize this question as being too result-oriented. They will argue that courts should not determine the reasonableness of parental behavior by

\begin{itemize}
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.; see also Seth Faison, Jr., Teen-Age Girl Found Chained in Bronx Residence, \textit{N.Y. TIMES}, Sept. 15, 1991, § 1, at 35.
\item \textsuperscript{222} McQuiston, \textit{supra} note 208, at B1.
\end{itemize}
looking at its consequences. Raising children is not a utilitarian operation so parents should not be able to justify the use of force by saying: “If it worked, then it is automatically good.” The fourth factor, however, does not endorse this approach; rather, it says the opposite: “If corporal punishment could not have worked, then it is automatically bad.” Therefore, an affirmative answer to this question does not mean that the parental use of force was reasonable. Courts would continue to determine reasonableness based on all of the factors in the test.

One might argue that it is not always clear what it means for something to work. Courts should define that concept to include cases in which the use of physical force brings about even a temporary improvement in the situation. This definition is best because it allows parents to use corporal punishment as a tool of education and discipline. If the use of physical force does not enable parents to teach or discipline their children, then it does not work, and parents would concede that there is no need to protect their right to administer it. Moreover, this definition is easy to apply because it gives courts an objective way to evaluate the success of the corporal punishment. Courts can simply look to outward manifestations of behavioral changes in the child to determine whether the corporal punishment worked. Those manifestations take the form of the child stopping or starting certain conduct or somehow altering the behavior that got him or her into trouble. An example shows how easy it is to apply this definition. If a child is going to electrocute his sibling, the parent slaps the child’s hand to get him to drop the cord. The corporal punishment has worked because slapping the child’s hand caused him to stop the behavior which got him into trouble. The parent does not have to work on long-term behavior modification techniques to determine if the corporal punishment worked. The immediate, short-term effect is sufficient to establish that the use of force worked.

The strengths of this definition of the concept of working are apparent when it is applied to the Marreros’ use of corporal punishment on Linda. The parents’ chaining their daughter inside the apartment worked because it brought about at least a temporary improvement in the situation. The parents’ decision to confine Linda temporarily improved the situation because it safeguarded Linda’s welfare at a dangerous time in her life. The corporal punishment temporarily secured Linda’s welfare because it kept her off of the streets for two months, away from drugs and drug dealers who had threatened her. Her confinement to the apartment improved the situation because she stopped using drugs during that period. In addition, the publicity surrounding her parents’ decision
to chain her led to her being placed in a residential treatment program.\textsuperscript{223} Admittedly, the Marreros' actions did not permanently safeguard her welfare because she disappeared back onto the street both immediately\textsuperscript{224} after her parents took off the chains and later after she was released from the residential treatment facility.\textsuperscript{225} However, even though the corporal punishment did not permanently secure her welfare, the corporal punishment worked because it improved Linda's behavior during the time it was implemented and guaranteed her safety while it was in effect.

This definition of what it means for corporal punishment to work should be used instead of alternative meanings. For example, courts should reject a definition that requires them to figure out if the corporal punishment has led the child to develop the internal controls he needs to stop engaging permanently in certain behavior. Although society may want corporal punishment to bring about long-term behavioral modification in a child, this definition is too ambiguous and subjective to be applied consistently. It would be difficult, if not impossible, for courts to assess the effectiveness of the corporal punishment on that level. Courts would have to ascertain the child's state of mind to decide if he or she had developed those internal controls, and that assessment is beyond the courts' expertise. Moreover, this process would draw courts into developing their own standards for evaluating the child's state of mind. Those standards will vary based on the decisionmaker. Further, they are based on the kinds of value judgments better left for the legislature to make.

When that definition is applied to the Marrero situation, the issue becomes whether the corporal punishment led Linda to develop internal controls to permanently stop her self-destructive search for drugs. It is obvious that the corporal punishment did not have that effect in Linda's case. The definition asks a court to measure the long-term effectiveness of corporal punishment at the time of trial, and it is impossible to predict with certainty whether the corporal punishment will deter Linda from returning to her old habits in the future. Furthermore, that definition asks too much of parents. It demands that the temporary process of administering corporal punishment guarantee permanent results. This

\begin{itemize}
  \item \textsuperscript{223} Nieves, \textit{supra} note 212, § 1, at 24.
  \item \textsuperscript{224} Gonzalez, \textit{supra} note 206, at B6.
  \item \textsuperscript{225} Nieves, \textit{supra} note 212, § 1, at 24.
\end{itemize}
definition effectively deprives parents, such as the Marreros, of a short-term solution to an immediate need and for which there may be no long-term answer.

An affirmative answer to the question of whether the corporal punishment works does not necessarily mean that the court will find the parental behavior reasonable. However, a negative answer does mean that the court will find the parental behavior unreasonable. Thus, a judicial determination that corporal punishment improves the situation, even temporarily, allows the court to consider the reasonableness of the force under the other parts of the test.

The fifth question asks whether the parents had any alternatives to administering corporal punishment. This factor imposes an additional burden on parents because they must consider other options before using physical force to discipline their children. Under this standard, parents cannot administer corporal punishment to children if other less restrictive forms of discipline are available. Corporal punishment should be considered a more extreme form of discipline than other methods, such as taking privileges away from a child or simply talking to a child about his misbehavior. It is more extreme because corporal punishment teaches children that the use of physical force is an appropriate response to a situation. Society punishes this use of force outside the parent-child situation so parental corporal punishment of children sends the message that conduct not tolerated elsewhere is acceptable in this context. The state cannot use physical force on adults in its custody if it has alternative ways of exercising control over them. Similarly, parents should not be able to use physical force on their children if they have other less restrictive ways of exercising control over them. Because the use of physical force is more onerous than other parental actions and not tolerated in other contexts, parents should only employ it if other less burdensome alternatives are not available to them.

226. See, e.g., Fact Sheet, supra note 130, at 1 (discussing arguments against and alternatives to corporal punishment in the public schools).

227. Children who are abused are more likely to abuse others. This cycle of violence means that parental use of corporal punishment will carry over from one generation to another. See, e.g., Lenore E. Walker, The Battered Woman Syndrome 18-20 (1984) (noting that battering is a learned behavior that arises from being abused as a child); Cynthia Crosson Tower, Understanding Child Abuse and Neglect 423 (2d ed. 1993) (suggesting that victims of abuse at a young age may feel a need to “reconstruct the patterns of their childhoods” as a result of a feeling of powerlessness).

228. Many states ban the use of corporal punishment on prisoners. See, e.g., Okla. Stat. Ann. tit. 57, § 31 (West 1993) (stating that it is “unlawful for any person to administer any corporal punishment of any kind to any inmate”). In addition, criminal assault and battery statutes prohibit the kind of force tolerated in the form of corporal punishment.
A recent decision by the Supreme Court of Hawaii underscores the importance of considering alternatives to corporal punishment in deciding the reasonableness of the parental use of force.229 In Hawaii v. DeLeon, the court relied on a state statute that codified the Model Penal Code standard for reasonable force when it determined that a father’s use of force against his teen-age daughter was not excessive.230 The father decided to administer the punishment after he had told his daughter repeatedly that she could not invite her friends over to the house because they were a “bad influence.”231 After she continued to do so, he further informed her that her continued disobedience would result in her being “spank[ed] ... with a belt.”232 The relevant statute prohibited force “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.”233 The Supreme Court of Hawaii overturned the trial court’s ruling and determined that the father did not inflict “extreme pain” on his daughter.234 According to the court, the father’s initial conduct did not violate the statute when he hit his daughter between six and ten times on the thighs with a belt, causing pain that lasted for an hour and a half, bruises that remained for one week, and a trip to the emergency room.235 Furthermore, the court decided that the father had not caused his daughter “gross degradation” when he later cut her waist-length hair up to her neck.236

Under the new test, the DeLeon court would have to consider the father’s conduct in light of available alternatives and would reach a different result. The father did not suggest that his daughter could see her friends elsewhere; he did not “ground” her from going out; and he did not threaten to take away any other privileges if she disobeyed his orders. Instead, when his daughter broke the “house rules,” the father immediately resorted to severe, physical force. He first hit his daughter so hard and so often that the police who were called to the scene believed she needed medical attention, and then he cut off her hair. This

230. Id. at 1383-84.
231. Id. at 1383.
232. Id.
233. Id.
234. Id.
235. Id.
236. Id.
parental failure to try other less restrictive forms of discipline before turning to physical force would make the father’s conduct in DeLeon excessive under the new test.

The requirement that parents must consider alternatives to corporal punishment does not always favor children’s interests over parents’ needs. Sometimes parents attempt alternative ways of disciplining or educating their children, and the failure of these efforts underscores the need to uphold their right of corporal punishment. Courts should assess the reasonableness of the corporal punishment in light of the alternatives available to the parents. In cases where parents have no alternatives to using corporal punishment, courts should preserve that parental right. This is particularly true if the state has played a role in depriving parents of alternative ways of disciplining or educating their children. When the state deprives parents of effective ways of controlling their children, it should give them some other way to achieve the same ends. For example, if the state has refused to make parenting classes, counseling, or other services available to parents to help them cope with the demands of parenthood, then it should not be able to take away their only remaining effective tool of discipline: corporal punishment.

The Marreros’ plight illustrates this problem. There, the state failed to provide parents with workable alternatives to corporal punishment and then penalized them when they turned to physical force as a last resort. For almost three years, the couple struggled to figure out a way to keep Linda off of the streets. The Marreros sought help from family and friends and sent Linda to live in Puerto Rico, but no one could control her. The family could not afford to pay for private drug treatment so they turned to the state for assistance. Mrs. Marrero approached the Child Welfare Administration, the Family Court, and the police in search of someone to take custody of her daughter. All of them refused and left the Marreros with the responsibility of taking care of Linda. When the Marreros tried to fulfill that responsibility by doing the only thing they thought would work, the state intervened and told

238. Id. at B6.
239. See Nieves, supra note 212, §1, at 21.
241. Newman, supra note 154, § 4, at 12 (“[T]ime and again, Linda continued to run away, and her parents felt that no one had a solution.”); Nieves, supra note 212, § 1, at 21 (“[The Marreros] had no way to help her, they said, and did not know what else to do with a daughter who had been running wild for years.”); Gonzalez, supra note 206, at B6 (“It was the only way [Mr. Marrero] had to get her to abandon those vices”’) (quoting a neighbor of the Marreros).

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them that they had exceeded the scope of their parental authority.\textsuperscript{242} Even though the Marreros’ use of physical force was the only thing that kept their daughter off of the streets and away from drugs, the state arrested them for endangering Linda’s welfare. A public policy expert commented on the Marreros’ dilemma:

The parents in this situation were absolutely at a loss for how they would accomplish what society and what they themselves wanted for their child . . . . Because no matter how much others try to say parents are to blame, they are not giving them the tools to figure out the question of how to convince a child not to do drugs.\textsuperscript{243}

The state conveyed a mixed message to the Marreros when it told them simultaneously not to chain Linda at home but to keep her safe and off the streets.\textsuperscript{244} When the parents tried to protect their daughter the only way they knew how, the state punished their efforts for being too extreme. The state should not be able to take away the Marreros’ only means of safeguarding their daughter’s welfare without putting something in its place. When the state chose not to help Linda, it also lost the power to dictate how others might help her.\textsuperscript{245}

Courts may be reluctant to sift through alternatives to corporal punishment and weigh them to determine the reasonableness of the use of force. This reluctance could be based on the subjective nature of

\begin{itemize}
\item \textsuperscript{242} Faison, \textit{supra} note 221, § 1, at 35.
\item \textsuperscript{243} Newman, \textit{supra} note 154, § 4, at 12 (quoting Peter W. Forsythe, Vice-President, Edna McConnell Clark Foundation).
\item \textsuperscript{244} \textit{Id.} Peter W. Forsythe, Vice-President of the Edna McConnell Clark Foundation and a public policy expert, has commented on the state’s conflicting expectations of parents: “We’re giving parents a mixed message . . . . We’re saying to them, ‘We don’t like the way you’re disciplining your children, but we want you to control them better.’” \textit{Id.}
\item \textsuperscript{245} In \textit{DeShaney v. Winnebago County Dep’t of Social Servs.}, 489 U.S. 189 (1989), the Supreme Court considered whether a county social services agency was liable under the Fourteenth Amendment for failure to protect a child from his father’s repeated beatings. Writing for the majority, Justice Rehnquist determined that the agency was not liable because it had failed to act and had not entered into a special relationship with the child that would give rise to an affirmative duty to act. \textit{Id.} at 194-95. In dissent, however, Justice Brennan wrote that the state had acted when it directed others to report child abuse to the social services agency, received and investigated reports of abuse of this child, failed to remove the child from his father’s custody, and then represented that it had taken care of the problem. \textit{Id.} at 208-10 (Brennan, J., dissenting). According to Justice Brennan, the state must do the job right once it agrees to do it. \textit{Id.} at 210. Similarly, the state must provide parents with alternatives to corporal punishment once it decides to restrict their use of physical force.
\end{itemize}
these determinations. Courts would be second-guessing parental decisions to use force which may be made quickly and without awareness of other options. In so doing, courts would be substituting the values of individual decisionmakers for parents' values. For example, a judge might believe that a parent had not thoroughly explored alternatives to corporal punishment, while the parent had not even thought of these options or had considered and discarded them in light of superior knowledge about what works with that child.

There are two responses to this concern. First, courts are equipped to evaluate the parental decision to use force in light of available alternatives. Courts have the job of determining the reasonableness of individuals' conduct on a daily basis, and they are in the best position to consider the parental use of force under all of the circumstances. Judges and juries can draw on their own experiences to assess the availability of less restrictive forms of punishment, and they should be encouraged to do so. The availability of alternatives is simply one factor in this balancing test. The weight of this factor probably would be affected by how apparent the option was and how long the parent had to think. Second, this factor ensures that courts will weigh the interests of children in the balancing test. Children have an interest in being kept safe from physical harm, and the requirement that courts consider the parental use of force in light of less restrictive alternatives narrowly circumscribes the scope of the parental right. Thus, the parameters of the parental right of corporal punishment are limited to protect children's rights to bodily integrity.

In sum, this five-part test gives courts, parents, and children a helpful way to determine the reasonableness of the parental use of corporal punishment. Because the political process safeguards the parental ability to use corporal punishment, children do not have a voice in determining whether a right should be recognized. That decision has already been made for them. The only place where their voices can be heard is in determining the scope of reasonable corporal punishment, and this new test gives them that opportunity.

This new test is more sensitive to the needs of children than the current standard is in several ways. First, it requires parents to search for less restrictive alternatives to corporal punishment before using physical force on their children. Therefore, parents must turn to corporal punishment only as a last resort. Corporal punishment is not the preferred means of discipline or education, but it is tolerated if there are no available alternatives. Furthermore, this test evaluates the nature of the physical force in light of the situation that precipitated that force and requires a correlation between the two. Using this approach, the parental use of force may be unreasonable if the circumstances do not justify it.
Finally, this test is attentive to children's needs without sacrificing parents' interests. This concern for parental rights can be seen in the application of this test to the Marreros' situation. In that situation, a court adopting this new test should conclude that the parental use of force was reasonable because the parents were responding to a life-or-death situation and had exhausted alternative forms of discipline. Parents do not bear the exclusive responsibility for providing those alternatives; the state should assist parents, such as the Marreros, who ask for help when they cannot control their children. When the state refuses to help, it cannot restrict the parents' ability to use corporal punishment. The test thus balances the interests of parents and children in a way that is sensitive to the needs of both groups.

IV. CONCLUSION

The Supreme Court should not recognize a fundamental right of parental corporal punishment. The Court cannot locate a source that establishes such a right, and it should reserve that heightened constitutional protection for interests that cannot be safeguarded by the political process. Because the political process adequately preserves parents' ability to administer reasonable corporal punishment, courts should turn their attention to protecting the interests of the politically isolated minority—children. Courts can secure the interests of children in the way that they define the parameters of reasonable corporal punishment. The current test that courts use to draw the line between reasonable and excessive force represents parents' interests at the expense of children's rights. In contrast, the test proposed in this Article is sensitive to the needs of children. The test requires courts to resolve all doubts in favor of children and only permits corporal punishment if parents do not have less restrictive alternatives available. Thus, this test admits the reality of parental use of corporal punishment, but within that reality, seeks to protect the interests of children.