# Ingraham V Wright

## Notes

This is an aff about a court case called Ingraham v Wright – where the plantiffs requested for the banning of Corporal Punishment – the court ruled on a 5-4 against that – their rationale that cruel and unusual punishment was only in context of criminals and because school was an open institution that checked violations

The primary advantage to the aff is a small structural violence impact – which means you need to win impact framing.

The Judicial activism DA has 2 internal links to its impacts

1. the aff is in instance of judicial activism(defined as the perception of a ruling that has ulterior motives and goes beyond a strict interpretation of the Constitution)

2. The plan hurts the legitimacy of the court because some people will inv hate the aff

# AFF

## 1AC

### Corporal Punishment

#### In 1977, Ingraham v. Wright ruled that school corporal punishment was constitutional, creating a precedent that allows schools to discipline children with impunity

Human Rights Watch, last updated: 2015, (Human Rights Watch is a nonprofit, nongovernmental human rights organization “Corporal Punishment in Schools and Its Effect on Academic Success” Joint HRW/ACLU Statement," article published 4-15-2010, https://www.hrw.org/news/2010/04/15/corporal-punishment-schools-and-its-effect-academic-success-joint-hrw/aclu-statement)

In 1977, the U.S. Supreme Court ruled in its Ingraham v. Wright decision that school corporal punishment is constitutional, leaving states to decide whether to allow it. Nineteen U.S. states currently allow public school personnel to use corporal punishment to discipline children from the time they start preschool until they graduate 12th grade; these states are: Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming (Center for Effective Discipline, 2015). A total of 163,3331 children were subject to corporal punishment in these states’ public schools during the 2011–2012 school year. Corporal punishment is deﬁ ned as the use of physical force with the intention of causing a child to experience pain so as to correct their misbehavior (Straus, 2001); it is synonymous with physical punishment, but we will use the term “corporal punishment” in this report because it is the term used by school districts in the U.S. Although corporal punishment by parents tends to take the form of spanking a child’s buttocks with an open hand (Zolotor, Theodore, Chang, Berkoff, & Runyan, 2008), in schools, a teacher or administrator typically administers corporal punishment by using a large wooden board or “paddle” to strike the buttocks of a child. A typical state deﬁ nition of school corporal punishment is the one offered in the Texas Education Code, which speciﬁ es permissible corporal punishment as, “…the deliberate inﬂ iction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline.” (Texas Education Code, 2013) The Texas code thus allows school personnel to hit children with objects (“paddling”) and to use “any other physical force” to control children, as long as it is in the name of discipline. Some school districts specify the exact dimensions of the paddles to be used for discipline. For example, the Board of Education in Pickens County, Alabama, recommends that schools use a “wooden paddle approximately 24 inches in length, 3 inches wide and ½ inch thick” that does not have holes, cracks, splin- ters, tape, or other foreign material (Pickens County Board of Education, 2015, p. 27). Most corporal punishment involves elementary school students (North Carolina De- partment of Public Instruction, 2015), and given that elemen- tary school children range in average height from 43 inches at age 5 to 55 inches at age 10 (Centers for Disease Control and Prevention, 2000), a 2-ft-long paddle can be half as tall as the children being paddled. In any other context, the act of an adult hitting another person with a board of this size (or really, of any size) would be considered assault with a weapon and would be punishable under criminal law (Bitensky, 2006). Schoolchildren are disciplined with corporal punishment for a range of behaviors. Interviews with corporally punished students make clear that some of the precipitating incidents are quite serious, such as ﬁ ghting with fellow students, setting off ﬁ reworks in school, or getting drunk on a ﬁ eld trip (Human Rights Watch & the ACLU, 2008). In North Carolina, 63% of the cases of corporal punishment in the 2013–2014 school year were for disruptive behavior, ﬁ ghting, aggression, disorderly conduct, or bullying, while the remaining 37% were for bus misbehavior, disrespect of staff, cell phone use, inappropriate language, and other misbehaviors (North Carolina Department of Public Instruction, 2015). 1 Evidence from other states further indicates that not all misbehaviors that elicit corporal punishment are serious. Children have been corporally punished in school for being late to class, failing to turn in homework, violating dress codes, running in the hallway, laughing in the hallway, sleeping in class, talking back to teachers, going to the bathroom without permission, mispronouncing words, and receiving bad grades (Human Rights Watch & the ACLU, 2008; Mitchell, 2010). A review of over 6,000 disciplinary ﬁ les in a central Florida school district for the 1987–1988 school year found that whether corporal punishment was used was not related to the severity of the student’s misbehavior or to how frequently they had been referred for a rule violation (Shaw & Braden, 1990). This study suggests that school corporal punishment is not necessarily used as a “last resort” for frequently misbehaving students or only for serious infractions.

#### Corporal punishment is racist and causes serious medical injuries

NICOLE MORTORANO 2014 (Georgetown University Law Center, J.D. 2013; Teachers College, Columbia University, M.A. ; College of the Holy Cross, B.A. , “Protecting Children’s Rights Inside of the Schoolhouse Gates: Ending Corporal Punishment in Schools, ” THE GEORGETOWN LAW JOURNAL, Vol. 102:481, https://georgetownlawjournal.org/articles/100/protecting-children-s-rights-inside/pdf)

1. Corporal Punishment in Schools Harms Students’ Physical, Emotional, and Intellectual Well-Being Corporal punishment in schools detrimentally harms students by inflicting pain and injuries, attacking students’ dignity through humiliating punishment, and marginalizing students, which increases the likelihood that the physical punishment will lead to irreparable long-term academic, social, emotional, and physical consequences.145 For students with disabilities, the injurious nature of corporal punishment is particularly threatening to students’ well-being and ability to access federally guaranteed rights to education.146 Studies demonstrate that corporal punishment of children causes short-term pain and long-term medical consequences.147 “The Society for Adolescent Medicine has documented serious medical consequences resulting from corporal punishment, including severe muscle injury, extensive blood clotting (hematomas), whiplash damage, and hemorrhaging.”148 Other studies have found alarming correlations between children who are victims of corporal punishment and incidences of depression, suicide, antisocial behavior, and substance abuse.149 Research on corporal punishment in schools further confirms that this practice physically harms schoolchildren. Of the 223,190 students who received corporal punishment during the 2006–2007 school year, approximately 10,000–20,000 of those students sought medical attention.150 Qualitative research conducted by the Human Rights Watch and the American Civil Liberties Union demonstrates that corporal punishment in schools, including the use of paddling, can cause serious medical injuries.151 Physical injuries associated with the use of corporal punishment are particularly threatening for students with disabilities. Corporal punishment can aggravate student’s preexisting medical issues and underlying disabilities.152 For example, “corporal punishment can cause some children to regress in developmental terms, particularly for children on the autism spectrum. Corporal punishment, which is never appropriate for any child, is particularly abusive for these children.”153 Corporal punishment not only affects students’ physical well-being, but the practice also assaults students’ dignity and academic progress. The humiliating practice can erode the trust between students and their school communities and “leave the student[s] unable to learn effectively, making it more likely that [they] will drop out of school.”154 Proponents of this practice believe in its efficacy. However, studies demonstrate that corporal punishment, at best, only changes student behavior “for just a few minutes. Beyond its immediate impact, however, corporal punishment has unintended consequences, including increased aggression towards peers and disruptive and violent behavior that is anything but ‘disciplined.’”155 Moreover, “[s]chools that use corporal punishment often have poorer academic achievement, more vandalism, truancy, pupil violence and higher drop out rates.”156 Contemporary research demonstrates that nonphysical punishments and positive behavioral interventions are more effective at addressing student misbehavior,157 fostering positive school climates, and promoting conducive learning environments.158 For example, positive discipline models comprehensively and skillfully handle student disciplinary issues, working to address the underlying causes of a child’s misbehavior and teaching the child why and how to change misbehav-iors. These models include conflict resolution programs, character education classes, and peer courts. Without employing corporal punishment, these models collaboratively and respectfully teach positive behaviors and simultaneously foster positive school cultures.159 2. Corporal Punishment Violates Students’ Civil Rights Corporal punishment in schools violates students’ civil rights,160 as demonstrated by civil rights data from the U.S. Department of Education.161 This practice disproportionately targets students of color, students with disabilities, boys, and students from low socioeconomic backgrounds.162 These groups are “hit more frequently in schools, sometimes at 2–5 times the rate of other children.”163 Corporal punishment is used disproportionately against students of color. For example, even though African-American students comprise only 17.1% of the national school population, 35.6% of students who were paddled were AfricanAmerican schoolchildren.164 Similarly, African-American females are twice as likely as white females to be paddled in schools.165 “A 17-year-old girl spoke of the atmosphere produced by the racially disparate use of corporal punishment at her former high school in rural Mississippi: ‘It feels to me like we’re back in slavery.’”166 Students with disabilities are also subjected to corporal punishment at alarming rates. During the 2006–2007 school year, 41,972 special-education students were subjected to corporal punishment.167 “Students with disabilities make up 19 percent of those who receive corporal punishment, yet just 14 percent of the nationwide student population.”168 In Texas, the state with the highest incidence of corporal punishment, students with disabilities make up 10.7% of the school population, and yet 18.4% of students subjected to corporal punishment in 2006–2007 were students with disabilities.169 Similarly, in Tennessee, “students with disabilities are paddled at more than twice the rate of the general student population.”170 Students with disabilities are grossly affected by school-wide practices that employ corporal punishment. First, many of these students are being physically punished for conduct that is related to their underlying disabilities. Even though IDEA prohibits long-term suspensions when students’ misbehaviors are manifestations of their disability,171 this federal legislation does not yet afford the same protections when students are threatened with physical punishment. Consequently, research demonstrates that students with disabilities—including those with Tourette Syndrome, obsessive-compulsive disorder, and autism—are being paddled for conduct that is related to their disability.172 Second, the effects of corporal punishment are particularly alarming for students with disabilities. Physical punishment causes serious injuries,173 aggravates existing medical conditions,174 and indirectly excludes students from educational opportunities.175 Third, students with disabilities are often less able to protect themselves because schools routinely do not provide parents with notice of these punishments and these students may be unable to communicate these traumas to their parents.176 Consequently, students with disabilities are not only disproportionately targeted with this physical punishment, they also are routinely punished because of their disabilities, subjected to greater consequences, and afforded few, if any, procedural protections

#### Challenging institutional racism is a prior ethical question

Memmi, 2k --- Professor Emeritus of Sociology @ U of Paris, Naiteire (Albert, Racism, Translated by Steve Martinot, p. 163-165)

The struggle against racism will be long, difficult, without intermission, without remission, probably never achieved. Yet, for this very reason, it is a struggle to be undertaken without surcease and without concessions. One cannot be indulgent toward racism; one must not even let the monster in the house, especially not in a mask. To give it merely a foothold means to augment the bestial part in us and in other people, which is to diminish what is human. To accept the racist universe to the slightest degree is to endorse fear, injustice, and violence. It is to accept the persistence of the dark history in which we still largely live. it is to agree that the outsider will always be a possible victim (and which man is not himself an outsider relative to someone else?. Racism illustrates, in sum, the inevitable negativity of the condition of the dominated that is, it illuminates in a certain sense the entire human condition. The anti-racist struggle, difficult though it is, and always in question, is nevertheless one of the prologues to the ultimate passage from animosity to humanity. In that sense, we cannot fail to rise to the racist challenge. However, it remains true that one’s moral conduit only emerges from a choice: one has to want it. It is a choice among other choices, and always debatable in its foundations and its consequences. Let us say, broadly speaking, that the choice to conduct oneself morally is the condition for the establishment of a human order, for which racism is the very negation. This is almost a redundancy. One cannot found a moral order, let alone a legislative order, on racism, because racism signifies the exclusion of the other, and his or her subjection to violence and domination. From an ethical point of view, if one can deploy a little religious language, racism is ‘the truly capital sin. It is not an accident that almost all of humanity’s spiritual traditions counsels respect for the weak, for orphans, widows, or strangers. It is not just a question of theoretical morality and disinterested commandments. Such unanimity in the safeguarding of the other suggests the real utility of such sentiments. All things considered, we have an interest in banishing injustice, because injustice engenders violence and death. Of course, this is debatable. There are those who think that if one is strong enough, the assault on and oppression of others is permissible. Bur no one is ever sure of remaining the strongest. One day, perhaps, the roles will be reversed. All unjust society contains within itself the seeds of its own death. It is probably smarter to treat others with respect so that they treat you with respect. “Recall.” says the Bible, “that you were once a stranger in Egypt,” which means both that you ought to respect the stranger because you were a stranger yourself and that you risk becoming one again someday. It is an ethical and a practical appeal—indeed, it is a contract, however implicit it might be. In short, the refusal of racism is the condition for all theoretical and practical morality because, in the end, the ethical choice commands the political choice, a just society must be a society accepted by all. If this contractual principle is not accepted, then only conflict, violence, and destruction will be our lot. If it is accepted, we can hope someday to live in peace. True, it is a wager, but the stakes are irresistible.

#### Corporal punishment strips students of their dignity

Susan H. Bitensky 2008 (Professor of Law, Michigan State University College of Law. B.A. 1971, Case Western Reserve University; J.D. 1974, University of Chicago Law School. , “The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment,” Michigan State University College of Law Digital Commons at Michigan State University College of Law , U. Cin. L. Rev. 1327, http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1004&context=facpubs)

Pursuant to the Atkins-Roper-Kennedy paradigm, then, school corporal punishment should meet with the Justices' ready censure under the Eighth Amendment. The punishment does not aid deterrence, should not aid retribution, and cannot but aid in wronging the nation's youth. This analytical approach, though, does not exhaust the Court's options. In the alternative or as a supplementary technique in exercising independent judicial judgment regarding school corporal punishment under the Amendment, the Court could also invoke the Trop standard that governmentally imposed punishments may not run roughshod over human dignity. 534 The concept of "human dignity" admits of several shades of meaning. Webster's Dictionary defines "dignity" as "the quality or state of being worthy, honored, or esteemed., 535 This aggregation of synonyms, while not unhelpful, may be too impressionistic for purposes of legal analysis, without further explication. What, after all, does it really mean to be worthy, honored, or esteemed? Immanuel Kant's discourses on human dignity mine the phrase with more intellectual rigor. He conceived that humanity is only humanity and the bearer of dignity if human beings are ends in themselves; existing as a mere means to someone else's ends is a degradation. 536 In contrast to his meditations on human dignity in general, Kant was very much a man of his time (the eighteenth century) when it came to disciplining children, at least insofar as he assumed physical punishment was de rigeur.537 This fact does not, however, require the modem reader to regress two hundred or so years and refrain from applying Kant's concept of dignity to disciplining children in the twenty-first century. Kant himself acknowledged that children too must be treated as the bearers of dignity, even though he apparently did not stop to consider whether corporal punishment of children could undermine that dignity. "The child's duties.., consist in his being conscious that man possesses a certain dignity, which ennobles him above all other creatures, and that it is his duty so to act as not to violate in his own person this dignity of mankind. 538 Furthermore, Kant stated, it is quite against the child's dignity "to be cringing in one's behaviour to others., 539 The Supreme Court has, on occasion, described human dignity as an intact feeling of personhood, 54 an insight dovetailing with the Kantian construct of dignity as person cherished for being person. One commentator has added the interesting gloss that assertions of "raw power" trample human dignity, or personhood, underfoot. 541 This Article's definition of corporal punishment of children and description of the ill effects thereof, make a potent case that such punishment invades children's dignity. Inasmuch as this discipline is gratuitous use of physical force upon a child so as to cause somatic pain,542 the punishment necessarily discounts the child's personhood. He or she becomes a convenient means to the adult punisher's ends of unleashing pent-up anger or procuring a short respite from student intransigence.543 For the punisher, the child's pain and trauma are inconsequential to this process; any cringing before the upraised paddle is considered, if noticed at all, to be merely incidental. 44 Children's degradation appears to have reached its limit when a society ignores corporal punishment's toxic effects, including the punishment's perverse interference with children's development of conscience,545 and chooses instead to perpetuate irrational brute force-raw power-as pedagogy. As one perceptive student of the human heart has stated, "[t]here is a moment in the history of every beaten child when his mind parts with hopes of dignity-pushes off hope like a boat without a rower, and lets it go as it will on the stream, and resigns himself to the tally stick of pain.,546 The argument that school corporal punishment constitutes an indignity takes on particular pathos when viewed historically across society. It is telling that the groups of people, besides children, who have endured legalized corporal punishment have been enslaved or extremely oppressed.54 7 The experience of slaves in the antebellum South is vividly emblematic. Slaveholders were endowed with the prerogative of physically coercing their African American "property"; 548 the slaveholders were most partial to whipping to enforce submission.549 The abuse did not cease with the Emancipation Proclamation 550 or the Thirteenth Amendment. 551 During the Reconstruction era that followed the Civil War, vigilante groups like the Ku Klux Klan took advantage of the complicity and fear of local authorities to intimidate freedmen, their families, and sympathizers with a reign of terror. 552 The persecutors had a weakness for tradition, most often cracking the whip to get their message across.553 The bloodletting became so rampant that Congress ultimately enacted a series of statutes in an effort to protect Blacks and their supporters from the unrelenting corporal punishment. 554

#### And also causes mass dehumanization

Susan H. Bitensky 2008 (Professor of Law, Michigan State University College of Law. B.A. 1971, Case Western Reserve University; J.D. 1974, University of Chicago Law School. , “The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment,” Michigan State University College of Law Digital Commons at Michigan State University College of Law , U. Cin. L. Rev. 1327, http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1004&context=facpubs)

This glimpse at the past is not intended to imply that children in the United States effectively are, regardless of legal niceties, slaves. Rather, the point is that, like the slaves, sailors, and prisoners of yore,555 American children can still be corporally punished with impunity, including many students at school. 556 It is only our children who continue to have this dubious distinction. 557 Such discrimination, especially when set in the foreground of the historical tableau, raises a perturbing question: Has legalized corporal punishment of children persisted through the ages by an antecedent inequity in the way societies have regarded children? 558 When, for instance, educators paddle students, do they, unwittingly presume that the children are not fullfledged members of the human race, not fully human, because all other members enjoy legal protection from paddling? It would seem so, for otherwise these adults would assuredly not feel free to do to their young charges that which cannot be done legally to anyone else, i.e., physically attack the children. If school personnel corporally punish students, then there is a sense in which the students temporarily partake of the subhuman; they are stripped of their personhood and shorn of their human dignity. 559 The sorrow of children's dehumanization by corporal punishment is scandalously exacerbated for African American students. Black children in this country are recipients of a disproportionate amount of school corporal punishment. 560 The figures are staggering. Statistics for the 2003-2004 academic year show that Black students were hit in school at a rate that is more than twice their numbers in society at large. 561 This is an allocation of school corporal punishment evocative of the violent racism that once ravaged the American body politic. It is essentially a holdover from slavery and from slavery's ugly legacy of racial discrimination,562 and thus a particularly grave insult to African American students' human dignity

#### Dehumanization destroys VTL and outweighs all calculable impacts

Berube 97 – [David M., Professor of Communication Studies at University of South Carolina., “NANOTECHNOLOGICAL PROLONGEVITY: The Down Side,” <http://www.cas.sc.edu/engl/faculty/berube/prolong.htm>]

This means-ends dispute is at the core of Montagu and Matson's treatise on the dehumanization of humanity. They warn[s]: "its destructive toll is already greater than that of any war, plague, famine, or natural calamity on record -- and its potential danger to the quality of life and the fabric of civilized society is beyond calculation. For that reason this sickness of the soul might well be called the Fifth Horseman of the Apocalypse.... Behind the genocide of the holocaust lay a dehumanized thought; beneath the menticide of deviants and dissidents... in the cuckoo's next of America, lies a dehumanized image of man... (Montagu & Matson, 1983, p. xi-xii). While it may never be possible to quantify the impact dehumanizing ethics may have had on humanity, it is safe to conclude the foundations of humanness offer great opportunities which would be foregone. When we calculate the actual losses and the virtual benefits, we approach a nearly inestimable value greater than any tools which we can currently use to measure it. Dehumanization is nuclear war, environmental apocalypse, and international genocide. When people become things, they become dispensable. When people are dispensable, any and every atrocity can be justified. Once justified, they seem to be inevitable for every epoch has evil and dehumanization is evil's most powerful weapon.

#### You have an ethical obligation to reject corporal punishment

Henry S. Salt 1905 (“The Ethics of Corporal Punishment”, International Journal of Ethics, Vol. 16, No. 1 (Oct., 1905), pp. 77-88, The University of Chicago Press, [http://www.jstor.org/stable/2376204)](http://www.jstor.org/stable/2376204)/JS)

I lay stress on this question of the corporal punishment of the young, not only because it seems to furnish a clue to a right understanding of the ethics of corporal punishment as a whole, but also because I would protest against the common assumption that while the flogging of men is at least a grave responsibility, and the flogging of women is an abomination, the flogging of children, the weakest and most helpless class of all, is a wholesome and meritorious practice, which needs no more serious justification than to quote-and quote incor- rectly-a dubious saying attributed to Solomon many ages ago. Humanitarians maintain that all flogging is an abomina- tion, whether its victim be a man, a woman, or a child; but that it is perhaps most injurious in the case of a child, because at that age the ethical sense is more liable to be permanently confused and distorted by a lesson in personal violence as a substitute for moral persuasion. To beat the feeble and de- fenceless is an act which, in every other relation, is seen at once to be unspeakably cowardly and mean; it is also extremely likely to implant in the mind of the child who suffers it a tendency to act in a similar manner when the conditions are reversed, and when the slave is grown into the tyrant. Who shall say how much of the cruelty of adult life is due to the object-lessons of childhood?

\*\*\*Salt continues on page 88\*\*

To conclude, then: Corporar punishment, as the very antithe- sis of moral suasion and the compact embodiment of brute force, is an outrage on what should, above all things, be held sacred-the supremacy of the human mind and the dignity of the human body. It would be quixotic to hope that all use of physical violence, odious though it is, could be at present dispensed with, in a society which is but half emerged from barbarism; but this form of it, at least, the most barbarous, because the grossest and most sensual, must be uprooted and abandoned, before any true measure of civilization can be attained.

#### Overturning Ingraham v. Wright is key – it sets a precedent that all courts follow

Mark Walsh, 3-27-2014, (Mark is a contributing writer to Education Week. He writes about school-related cases in the U.S. Supreme Court and in lower courts, which he also covers in The School Law Blog. "Appeals Court Rejects Latest Challenge to Corporal Punishment," Education Week - The School Law Blog, http://blogs.edweek.org/edweek/school\_law/2014/03/appeals\_court\_rejects\_latest\_c.html)

A federal appeals court has rejected the lawsuit of a Mississippi 8th grader whose misbehavior led to a paddling by a school administrator. The student then fainted and fell face-first to the floor, breaking his jaw and five of his teeth, court papers say. A three-judge panel of the U.S. Court of Appeals for the 5th Circuit, in New Orleans, was unmoved by the student's lawsuit. It ruled unanimously that it was bound by the U.S. Supreme Court's 1977 decision in Ingraham v. Wright, which upheld the constitutionality of corporal punishment in schools. The case involves Trey Clayton, a student at Independence High School in the Tate County, Miss., school district. (The school evidently includes 8th grade.) The 5th Circuit's recitation of the facts is not very detailed about why Clayton was subject to paddling. It says the student was sent to the library by his classroom teacher for not being in his seat. In the library, Assistant Principal Jerome Martin noticed Clayton and told him his bad behavior was going to stop, court papers say. He then took Clayton to the office and paddled him three times. That's when the student fainted and suffered the jaw and teeth injuries. Also, the paddling left bruises and welts on Clayton's buttocks, his suit said. Clayton and his mother sued Martin and the school district under the Eighth Amendment, which bars cruel and unusual punishments, and under the 14th Amendment's due-process clause. A federal district court rejected the claims, and in a March 25 unpublished decision in Clayton v. Tate County School District, the 5th Circuit court affirmed. The court held that it was an open-and-shut case because the Supreme Court, in Ingraham, had rejected an Eight Amendment challenge to corporal punishment in schools. The appeals court rejected Clayton's suggestion that there was language in the 1977 decision that would allow lower courts to revisit the issue if the nation's attitude on corporal punishment changed. "To the extent that Ingraham left open an escape hatch, it is available for the Supreme Court, and not this court, to use," the 5th Circuit panel said. As for the 14th Amendment due-process claim, the appellate panel said Ingraham held that due process was satisfied as long as there are state law remedies for plaintiffs to pursue after the fact in the case of excessive corporal punishment. The panel said 5th Circuit precedent "has specifically held that post-deprivation state-law remedies available in Mississippi provide an adequate remedy, barring a student subject to corporal punishment from asserting a substantive due-process claim." The court did take notice of a recent article in the Georgetown Law Review (a law student's "note," actually) calling for the end of corporal punishment, but only for the note's description of how corporal punishment claims have been handled by various federal appeals courts. The law journal note, "Protecting Children's Rights Inside of the Schoolhouse Gates: Ending Corporal Punishment in Schools," by Nicole Mortorano, a 2013 graduate of Georgetown law school, notes that 19 states permit corporal punishment in some form in schools. "Even though most circuits allow litigants to raise 14th Amendment claims, this litigation is rarely successful," she writes. "Educators' use of physical punishment—particularly paddling—is rarely held to violate students' substantive due-process rights." Most circuits have adopted a legal standard that would allow only the most egregious cases of corporal punishment to be remedied, Mortorano writes. She calls for litigation that would lead to the Supreme Court overturning Ingraham, and legislation in Congress that would ban corporal punishment nationwide. "Corporal punishment in schools assaults our nation's commitment to guaranteeing human rights and protecting vulnerable populations," Mortorano writes.

### Plan

#### The United States federal judiciary should rule that corporal punishment in primary and/or secondary education violates the Amendment VIII of the United States constitution

### Solvency

#### The plan overturns Ingraham V. Wright on Eighth amendment grounds which bans corporal punishment in schools

NICOLE MORTORANO 2014 (Georgetown University Law Center, J.D. 2013; Teachers College, Columbia University, M.A. ; College of the Holy Cross, B.A. , “Protecting Children’s Rights Inside of the Schoolhouse Gates: Ending Corporal Punishment in Schools, ” THE GEORGETOWN LAW JOURNAL, Vol. 102:481, https://georgetownlawjournal.org/articles/100/protecting-children-s-rights-inside/pdf)

II. OVERTURNING INGRAHAM V. WRIGHT [T]he [Eighth] Amendment proscribes more than physically barbarous punishments. The Amendment embodies “broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . .” Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with “the evolving standards of decency that mark the progress of a maturing society.”113 Advocates seeking to ban corporal punishment in schools, in accordance with evolving standards of decency, need to look beyond litigating claims under the Fourteenth and Fourth Amendments. Overturning the Court’s jurisprudence in Ingraham v. Wright is the only means towards constitutionally protecting students from all forms of corporal punishment in schools. Consequently, advocates should raise claims under the Eighth Amendment and argue that Ingraham v. Wright is a case that meets the Court’s criteria for overturning precedents. Legal arguments to overturn Ingraham need to focus on three issues: (1) the applicable standards for overturning precedent; (2) the applicability of the Eighth Amendment to school contexts; and (3) the evolving standards of dignity, which demonstrate that corporal punishment in schools is cruel and unusual punishment. Despite the principle of stare decisis, the Court is willing to overturn erroneous constitutional precedent.114 The Court does not have a fixed formula for overruling precedent but rather examines factors such as the erroneous nature of its original analysis,115 contemporary evidence of the decision’s shortcomings,116 and whether the critical, underlying facts that justified its decision have changed.117 For example, the Supreme Court in Lawrence v. Texas118 overruled Bowers v. Hardwick119 and held that states cannot criminalize homosexual sodomy.120 In justifying its decision to depart from precedent, the Court in Lawrence critiqued Bowers’ originalist analysis of the country’s alleged longstanding history against homosexual conduct, explaining: “[T]he historical grounds relied upon in Bowers are more complex than the majority opinion... indicate. They are not without doubt and, at the very least, are overstated.”121 The Court further supported its holding by citing contemporary evidence that Bowers was wrongly decided. Specifically, it explained that international law protected consensual homosexual conduct,122 and that U.S. state actions post-Bowers had shifted away from penalizing individuals for private same-sex conduct.123 Similar to the petitioners in Lawrence, advocates seeking to ban corporal punishment need to demonstrate that the Court’s jurisprudence for overruling precedent is applicable to overturning Ingraham. A. THE EIGHTH AMENDMENT IS APPLICABLE TO CORPORAL PUNISHMENT IN SCHOOLS Advocates should critique Ingraham’s analysis and demonstrate why the Eighth Amendment is applicable to contexts beyond criminal punishments. Arguments about the expansiveness of the Eighth Amendment should focus upon the erroneous nature of Ingraham’s original analysis and contemporary evidence of the decision’s shortcomings. Specifically, advocates should discuss: (1) a textual analysis of the Eighth Amendment; (2) reexamination of Ingraham’s originalist analysis; (3) a reexamination of Eighth Amendment jurisprudence leading up to Ingraham; and (4) a living-Constitution analysis of the Eighth Amendment. A textual analysis of the Eighth Amendment suggests that the Amendment is not necessarily limited to criminal contexts. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”124 On the one hand, the canon of noscitur a sociis states that punishment should be defined by its companions—bail and fines.125 On the other hand, fines are not necessarily limited to criminal contexts, and the plain language of the Amendment is broad, referring to punishment rather than criminal punishment. The Ingraham majority relied upon an originalist analysis, which does not necessarily correspond with the plain language of the text.126 Ingraham’s majority concluded that the American Framers adopted the Eighth Amendment from the preamble to the English Bill of Rights, which explicitly stated that the prohibitions against excessive bail and cruel and unusual punishments were applied to criminal contexts.127 However, the American Framers excluded criminal contexts from the statutory language in the Eighth Amendment. This exclusion either signals the Framers’ intent to extend this right to contexts outside of the traditional criminal arena,128 or at least, this exclusion suggests unresolved ambiguity about the Framers’ intent, providing further reasons to rely upon the plain language of the Amendment. Moreover, a broader reading of the Bill of Rights in its entirety demonstrates that the Framers used limiting language in certain contexts (for example, “criminal prosecutions” in the Sixth Amendment), suggesting that the Framers would have inserted “criminal punishments” if they intended to limit the Eighth Amendment to criminal contexts. At the least, these conflicting interpretations suggest that the Framers’ intent is unclear. The Court’s jurisprudence leading up to Ingraham did not explicitly limit the Eighth Amendment to criminal punishments but rather suggested that the Amendment had a broader reach. For example, Trop v. Dulles involved an army private whose passport application was denied because he had previously been convicted for wartime desertion.129 Trop extended the Eighth Amendment’s punishments “beyond the confines of the penitentiary”130 by prohibiting Congress from “punish[ing] by taking away citizenship.”131 Similarly, Estelle v. Gamble did not involve traditional punishment but rather expanded the applicability of the Eighth Amendment to issues involving prisoners’ medical care.132 This Note argues that Estelle should be interpreted at an even broader level—as a case addressing the government’s treatment of individuals who are subjected to compulsory state institutions.133 For purposes of the Eighth Amendment, students should be treated similarly to prisoners: both groups are subject to compulsory attendance in state institutions and consequently need protection from cruel and unusual punishment inflicted by state officials.134 In these pre-Ingraham cases, the Court offered broad interpretations of the Eighth Amendment and never held that the Amendment was limited to criminal contexts.135 Assuming arguendo, however, that the Court’s pre-Ingraham cases can be classified as involving criminal punishments, this was due to the nature of society prior to 1977, rather than the underlying purposes of the Eighth Amendment. Ingraham’s four dissenting Justices explained: We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process. The effect has been that “every decision of this Court considering whether a punishment is ‘cruel and unusual’ within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment.” The Court would have us believe from this fact that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong.136 Regardless of whether the Framers were specifically concerned with criminal punishments, the Eighth Amendment is still applicable to corporal punishment in schools under a living-Constitution interpretation. At its core, the Eighth Amendment prevents the state from abusing its powers and enacting cruel and unusual punishments. At the time of the Amendment’s enactment, the state did not have the encompassing powers over all schoolchildren that it presently has and thus, the Framers might not have considered the Amendment’s applicability to schoolchildren.137 However, in contemporary society, there are some similarities in conditions faced by schoolchildren and prisoners, and consequently, schoolchildren need protections from the state’s powers to punish. For example, schoolchildren and prisoners are subjected to compulsory institutions (for example, mandatory school attendance and mandatory prison sentences), and both powerless groups are subjected to the state’s power to punish.138 The majority’s interpretation leads to an absurd result: allowing the Eighth Amendment to protect prisoners from physical punishment,139 while leaving schoolchildren politically and constitutionally powerless to protect themselves against comparable physical violence. The Ingraham dissent laments this troubling anomaly: “[Under the majority’s analysis,] if a prisoner is beaten mercilessly for a breach of discipline, he is entitled to the protection of the Eighth Amendment, while a schoolchild who commits the same breach of discipline and is similarly beaten is simply not covered.”140 A living-Constitution interpretation recognizes that schoolchildren and prisoners are similarly situated with respect to punishment, and consequently Eighth Amendment protections need to extend beyond the prison bars. Because the Eighth Amendment should not be limited to the criminal context, the relevant inquiry involves whether persons have been punished. Paddling students falls within the ordinary meaning of punishment. Ingraham’s dissent explains: Like other forms of punishment, spanking of schoolchildren involves an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed for the purpose of rehabilitating the offender, deterring the offender and others like him from committing the violation in the future, and inflicting some measure of social retribution for the harm that has been done.141 In discerning whether actions qualify as punishments, the analysis should focus upon the underlying purposes of the deprivation, rather than whether the underlying offense is deemed criminal.142 Advocates should argue that a purposive approach should be used in determining whether an individual has been punished. Ingraham’s dissent discussed this approach: In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment that is, to reprimand the wrongdoer, to deter others, etc. it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.143 Using the purposive approach, corporal punishment is inflicted with the purposes of reprimanding the schoolchild, deterring misconduct, and rehabilitating the child. Advocates should argue that the Eighth Amendment affords children protection from certain punishments in schools. iors. These models include conflict resolution programs, character education

### Framing

#### No great power war---deterrence, economic interdependence, political and business elites and social changes

John Aziz 14, former economics and business editor at TheWeek.com, Don't worry: World War III will almost certainly never happen, March 6, http://theweek.com/article/index/257517/dont-worry-world-war-iii-will-almost-certainly-never-happen

Next year will be the seventieth anniversary of the end of the last global conflict. There have been points on that timeline — such as the Cuban missile crisis in 1962, and a Soviet computer malfunction in 1983 that erroneously suggested that the U.S. had attacked, and perhaps even the Kosovo War in 1999 — when a global conflict was a real possibility. Yet today — in the shadow of a flare up which some are calling a new Cold War between Russia and the U.S. — I believe the threat of World War III has almost faded into nothingness. That is, the probability of a world war is the lowest it has been in decades, and perhaps the lowest it has ever been since the dawn of modernity.¶ This is certainly a view that current data supports. Steven Pinker's studies into the decline of violence reveal that deaths from war have fallen and fallen since World War II. But we should not just assume that the past is an accurate guide to the future. Instead, we must look at the factors which have led to the reduction in war and try to conclude whether the decrease in war is sustainable.¶ So what's changed? Well, the first big change after the last world war was the arrival of mutually assured destruction. It's no coincidence that the end of the last global war coincided with the invention of atomic weapons. The possibility of complete annihilation provided a huge disincentive to launching and expanding total wars. Instead, the great powers now fight proxy wars like Vietnam and Afghanistan (the 1980 version, that is), rather than letting their rivalries expand into full-on, globe-spanning struggles against each other. Sure, accidents could happen, but the possibility is incredibly remote. More importantly, nobody in power wants to be the cause of Armageddon.¶ But what about a non-nuclear global war? Other changes — economic and social in nature — have made that highly unlikely too.¶ The world has become much more economically interconnected since the last global war. Economic cooperation treaties and free trade agreements have intertwined the economies of countries around the world. This has meant there has been a huge rise in the volume of global trade since World War II, and especially since the 1980s.¶ Today consumer goods like smartphones, laptops, cars, jewelery, food, cosmetics, and medicine are produced on a global level, with supply-chains criss-crossing the planet. An example: The laptop I am typing this on is the cumulative culmination of thousands of hours of work, as well as resources and manufacturing processes across the globe. It incorporates metals like tellurium, indium, cobalt, gallium, and manganese mined in Africa. Neodymium mined in China. Plastics forged out of oil, perhaps from Saudi Arabia, or Russia, or Venezuela. Aluminum from bauxite, perhaps mined in Brazil. Iron, perhaps mined in Australia. These raw materials are turned into components — memory manufactured in Korea, semiconductors forged in Germany, glass made in the United States. And it takes gallons and gallons of oil to ship all the resources and components back and forth around the world, until they are finally assembled in China, and shipped once again around the world to the consumer.¶ In a global war, global trade becomes a nightmare. Shipping becomes more expensive due to higher insurance costs, and riskier because it's subject to seizures, blockades, ship sinkings. Many goods, intermediate components or resources — including energy supplies like coal and oil, components for military hardware, etc, may become temporarily unavailable in certain areas. Sometimes — such as occurred in the Siege of Leningrad during World War II — the supply of food can be cut off. This is why countries hold strategic reserves of things like helium, pork, rare earth metals and oil, coal, and gas. These kinds of breakdowns were troublesome enough in the economic landscape of the early and mid-20th century, when the last global wars occurred. But in today's ultra-globalized and ultra-specialized economy? The level of economic adaptation — even for large countries like Russia and the United States with lots of land and natural resources — required to adapt to a world war would be crushing, and huge numbers of business and livelihoods would be wiped out.¶ In other words, global trade interdependency has become, to borrow a phrase from finance, too big to fail.¶ It is easy to complain about the reality of big business influencing or controlling politicians. But big business has just about the most to lose from breakdowns in global trade. A practical example: If Russian oligarchs make their money from selling gas and natural resources to Western Europe, and send their children to schools in Britain and Germany, and lend and borrow money from the West's financial centers, are they going to be willing to tolerate Vladimir Putin starting a regional war in Eastern Europe (let alone a world war)? Would the Chinese financial industry be happy to see their multi-trillion dollar investments in dollars and U.S. treasury debt go up in smoke? Of course, world wars have been waged despite international business interests, but the world today is far more globalized than ever before and well-connected domestic interests are more dependent on access to global markets, components and resources, or the repayment of foreign debts. These are huge disincentives to global war.¶ But what of the military-industrial complex? While other businesses might be hurt due to a breakdown in trade, surely military contractors and weapons manufacturers are happy with war? Not necessarily. As the last seventy years illustrates, it is perfectly possible for weapons contractors to enjoy the profits from huge military spending without a global war. And the uncertainty of a breakdown in global trade could hurt weapons contractors just as much as other industries in terms of losing access to global markets. That means weapons manufacturers may be just as uneasy about the prospects for large-scale war as other businesses. Other changes have been social in nature. Obviously, democratic countries do not tend to go to war with each other, and the spread of liberal democracy is correlated against the decrease in war around the world. But the spread of internet technology and social media has brought the world much closer together, too. As late as the last world war, populations were separated from each other by physical distance, by language barriers, and by lack of mass communication tools. This means that it was easy for war-mongering politicians to sell a population on the idea that the enemy is evil. It's hard to empathize with people who you only see in slanted government propaganda reels. Today, people from enemy countries can come together in cyberspace and find out that the "enemy" is not so different, as occurred in the Iran-Israel solidarity movement of 2012.¶ More importantly, violent incidents and deaths can be broadcast to the world much more easily. Public shock and disgust at the brutal reality of war broadcast over YouTube and Facebook makes it much more difficult for governments to carry out large scale military aggressions. For example, the Kremlin's own pollster today released a survey showing that 73 percent of Russians disapprove of Putin's handling of the Ukraine crisis, with only 15 percent of the nation supporting a response to the overthrow of the government in Kiev. There are, of course, a few countries like North Korea that deny their citizens access to information that might contradict the government's propaganda line. And sometimes countries ignore mass anti-war protests — as occurred prior to the Iraq invasion of 2003 — but generally a more connected, open, empathetic and democratic world has made it much harder for war-mongers to go to war. ¶ The greatest trend, though, may be that the world as a whole is getting richer. Fundamentally, wars arise out of one group of people deciding that they want whatever another group has — land, tools, resources, money, friends, sexual partners, empire, prestige — and deciding to take it by force. Or they arise as a result of grudges or hatreds from previous wars of the first kind. We don't quite live in a superabundant world yet, but the long march of human ingenuity is making basic human wants like clothing, water, food, shelter, warmth, entertainment, recreation, and medicine more ubiquitous throughout the world. This means that countries are less desperate to go to war to seize other people's stuff.

#### Political psychology has changed---public won’t allow wars

Karina Sangha 11, MA Political Science-University of Waterloo, “”The Obsolescence of Major War: An Examination of Contemporary War Trends,” Vol 5, No 1: Spring 2011, http://web.uvic.ca/~onpol/spring2011/Two%20-%20Sangha.pdf

Indeed, beyond analyses as to the frequency of major war,¶ further support for the obsolescence of this institution can be found in a shift towards a non-militaristic political psychology.24¶ Evidenced not only by the reductions in military preparedness¶ worldwide, but also by cultural and political trends, this shift¶ would seem to be cementing in the developed world, particularly¶ among the great powers whose behaviour is our primary concern.¶ In the past, war has been glorified as a heroic and virtuous¶ endeavour, an inevitable product of human nature that cannot be¶ overcome.25 However, after centuries of violent warfare on the¶ European and Asian continents, beginning as early as the¶ seventeenth century, these views surrounding war began to change¶ throughout the developed world.26 The first truly active and¶ persistent group that sought to reform sentiments surrounding war¶ appears to have been the Quakers, a religious group that formed in¶ England in 1652 and espoused a strong reverence for life.27¶ Though vocal, their initial impact was limited. It was not until the¶ end of the Napoleonic Wars of 1803-1815 that anti-war sentiments¶ truly began to flourish, with the Quakers and others establishing¶ the first anti-war societies in Europe and North America.28 With¶ many minority groups opposing or prophesising the conclusion of¶ war, including such note-worthy scholars as Immanuel Kant and¶ John Stuart Mill, anti-war sentiment grew in the years leading up¶ to the First World War, resulting in governments of major¶ countries having to justify war in a way that had not been needed ¶ in the past.29 In some states, including Spain, Sweden, Switzerland,¶ Denmark, Portugal, and the Netherlands, anti-war sentiment¶ became so pronounced that governments sought to reform their¶ foreign policy and avoid war altogether.30¶ However, it was not until the cataclysm of World War I that¶ anti-war sentiments moved to the forefront in great power¶ societies.31 Novels and memoirs of the 1920s expressed these¶ views profoundly and pushed them into even wider circulation.32¶ Such sentiments were also present in international politics as¶ almost all of the great powers of the time pursued a policy of war¶ aversion. Arguably, World War II would not have broken out if it¶ were not for the charismatic Hitler or the aggressive policies of the¶ Japanese.33 The consequence of World War I was that most major¶ countries had foresworn war, at least major war. World War II¶ simply reaffirmed these sentiments.¶ The growing disdain for war continued throughout the Cold¶ War period and appears to have cemented today among the great¶ powers. In the United States, the world’s current superpower, antiwar¶ sentiment became particularly pronounced during the Vietnam¶ War, and negative sentiments can be seen today surrounding the¶ Iraq War in both the United States and the United Kingdom.34¶ None of these were wars were major wars, but the message¶ remains the same, namely that citizens in these countries are wary of devoting resources and lives to the pursuit of war. Indeed, as¶ indicated above, most of the great powers have reduced the amount¶ of resources devoted to developing strong militaries and are¶ generally on peaceful terms with one another. Countries like¶ Germany and France, which, for centuries, have devoted¶ significant amounts of time and resources to directly fighting one¶ another or planning to do so, are now engaged in peaceful¶ relations. Even Japan, a striking former aggressor state, seems to¶ have embraced peace. ¶ Ultimately, it would seem that the current absence of major war is not simply a temporary lull, but a more lasting change that¶ has been developing for centuries. Major war is not simply absent,it is obsolescent. A wide range of causes come together to account¶ for such obsolescence, which we will now examine in greater¶ detail.

#### No state would escalate to use nuclear weapons—history bears out that its irrational hypothesizing to continue scenario planning for nuke war

Michael Quinlan 9, distinguished former British defence strategist and former Permanent Under-Secretary of State, Thinking About Nuclear Weapons, 63-9

Even if initial nuclear use did not quickly end the fighting, the supposition of inexorable momentum in a developing exchange, with each side rushing to overreaction amid confusion and uncertainty, is implausible. It fails to consider what the situation of the decisionmakers would really be. Neither side could want escalation. Both would be appalled at what was going on. Both would be desperately looking for signs that the other was ready to call a halt. Both, given the capacity for evasion or concealment which modern delivery platforms and vehicles can possess, could have in reserve significant forces invulnerable enough not to entail use-or-lose pressures. (It may be more open to question, as noted earlier, whether newer nuclear-weapon possessors can be immediately in that position; but it is within reach of any substantial state with advanced technological capabilities, and attaining it is certain to be a high priority in the development of forces.) As a result, neither side can have any predisposition to suppose, in an ambiguous situation of fearful risk, that the right course when in doubt is to go on copiously launching weapons. And none of this analysis rests on any presumption of highly subtle or pre-concerted rationality. The rationality required is plain. The argument is reinforced if we consider the possible reasoning of an aggressor at a more dispassionate level. Any substantial nuclear armoury can inflict destruction outweighing any possible prize that aggression could hope to seize. A state attacking the possessor of such an armoury must therefore be doing so (once given that it cannot count upon destroying the armoury pre-emptively) on a judgement that the possessor would be found lacking in the will to use it. If the attacked possessor used nuclear weapons, whether first or in response to the aggressor's own first use, this judgement would begin to look dangerously precarious. There must be at least a substantial possibility of the aggressor leaders' concluding that their initial judgement had been mistaken—that the risks were after all greater than whatever prize they had been seeking, and that for their own country's survival they must call off the aggression. Deterrence planning such as that of NATO was directed in the first place to preventing the initial misjudgement and in the second, if it were nevertheless made, to compelling such a reappraisal. The former aim had to have primacy, because it could not be taken for granted that the latter was certain to work. But there was no ground for assuming in advance, for all possible scenarios, that the chance of its working must be negligible. An aggressor state would itself be at huge risk if nuclear war developed, as its leaders would know. It may be argued that a policy which abandons hope of physically defeating the enemy and simply hopes to get him to desist is pure gamble, a matter of who blinks first; and that the political and moral nature of most likely aggressors, almost ex hypothesis, makes them the less likely to blink. One response to this is to ask what is the alternative—it can only be surrender. But a more positive and hopeful answer lies in the fact that the criticism is posed in a political vacuum. Real-life conflict would have a political context. The context which concerned NATO during the cold war, for example, was one of defending vital interests against a postulated aggressor whose own vital interests would not be engaged, or would be less engaged. Certainty is not possible, but a clear asymmetry of vital interest is a legitimate basis for expecting an asymmetry, credible to both sides, of resolve in conflict. That places upon statesmen, as page 23 has noted, the key task in deterrence of building up in advance a clear and shared grasp of where limits lie. That was plainly achieved in cold-war Europe. 11 vital interests have been defined in a way that is clear, and also clearly not overlapping or incompatible with those of the adversary, a credible basis has been laid for the likelihood of greater resolve in resistance. It was also sometimes suggested by critics that whatever might be indicated by theoretical discussion of political will and interests, the military environment of nuclear warfare—particularly difficulties of communication and control—would drive escalation with overwhelming probability to the limit. But it is obscure why matters should be regarded as inevitably so for every possible level and setting of action. Even if the history of war suggested (as it scarcely does) that military decision-makers are mostly apt to work on the principle 'When in doubt, lash out', the nuclear revolution creates an utterly new situation. The pervasive reality, always plain to both sides during the cold war, is 'If this goes on to the end, we are all ruined'. Given that inexorable escalation would mean catastrophe for both, it would be perverse to suppose them permanently incapable of framing arrangements which avoid it. As page 16 has noted, NATO gave its military commanders no widespread delegated authority, in peace or war, to launch nuclear weapons without specific political direction. Many types of weapon moreover had physical safeguards such as PALs incorporated to reinforce organizational ones. There were multiple communication and control systems for passing information, orders, and prohibitions. Such systems could not be totally guaranteed against disruption if at a fairly intense level of strategic exchange—which was only one of many possible levels of conflict— an adversary judged it to be in his interest to weaken political control. It was far from clear why he necessarily should so judge. Even then, however, it remained possible to operate on a general fail-safe presumption: no authorization, no use. That was the basis on which NATO operated. If it is feared that the arrangements which a nuclear-weapon possessor has in place do not meet such standards in some respects, the logical course is to continue to improve them rather than to assume escalation to be certain and uncontrollable, with all the enormous inferences that would have to flow from such an assumption. The likelihood of escalation can never be 100 per cent, and never zero. Where between those two extremes it may lie can never be precisely calculable in advance; and even were it so calculable, it would not be uniquely fixed—it would stand to vary hugely with circumstances. That there should be any risk at all of escalation to widespread nuclear war must be deeply disturbing, and decision-makers would always have to weigh it most anxiously. But a pair of key truths about it need to be recognized. The first is that the risk of escalation to large-scale nuclear war is inescapably present in any significant armed conflict between nuclear-capable powers, whoever may have started the conflict and whoever may first have used any particular category of weapon. The initiator of the conflict will always have physically available to him options for applying more force if he meets effective resistance. If the risk of escalation, whatever its degree of probability, is to be regarded as absolutely unacceptable, the necessary inference is that a state attacked by a substantial nuclear power must forgo military resistance. It must surrender, even if it has a nuclear armoury of its own. But the companion truth is that, as page 47 has noted, the risk of escalation is an inescapable burden also upon the aggressor. The exploitation of that burden is the crucial route, if conflict does break out, for managing it to a tolerable outcome—the only route, indeed, intermediate between surrender and holocaust, and so the necessary basis for deterrence beforehand. The working out of plans to exploit escalation risk most effectively in deterring potential aggression entails further and complex issues. It is for example plainly desirable, wherever geography, politics, and available resources so permit without triggering arms races, to make provisions and dispositions that are likely to place the onus of making the bigger and more evidently dangerous steps in escalation upon the aggressor who wishes to maintain his attack, rather than upon the defender. (The customary shorthand for this desirable posture used to be 'escalation dominance'.) These issues are not further discussed here. But addressing them needs to start from acknowledgement that there are in any event no certainties or absolutes available, no options guaranteed to be risk-free and cost-free. Deterrence is not possible without escalation risk; and its presence can point to no automatic policy conclusion save for those who espouse outright pacifism and accept its consequences. Accident and Miscalculation Ensuring the safety and security of nuclear weapons plainly needs to be taken most seriously. Detailed information is understandably not published, but such direct evidence as there is suggests that it always has been so taken in every possessor state, with the inevitable occasional failures to follow strict procedures dealt with rigorously. Critics have nevertheless from time to time argued that the possibility of accident involving nuclear weapons is so substantial that it must weigh heavily in the entire evaluation of whether war-prevention structures entailing their existence should be tolerated at all. Two sorts of scenario are usually in question. The first is that of a single grave event involving an unintended nuclear explosion—a technical disaster at a storage site, for example, or the accidental or unauthorized launch of a delivery system with a live nuclear warhead. The second is that of some event—perhaps such an explosion or launch, or some other mishap such as malfunction or misinterpretation of radar signals or computer systems—initiating a sequence of response and counter-response that culminated in a nuclear exchange which no one had truly intended. No event that is physically possible can be said to be of absolutely zero probability (just as at an opposite extreme it is absurd to claim, as has been heard from distinguished figures, that nuclear-weapon use can be guaranteed to happen within some finite future span despite not having happened for over sixty years). But human affairs cannot be managed to the standard of either zero or total probability. We have to assess levels between those theoretical limits and weigh their reality and implications against other factors, in security planning as in everyday life. There have certainly been, across the decades since 1945, many known accidents involving nuclear weapons, from transporters skidding off roads to bomber aircraft crashing with or accidentally dropping the weapons they carried (in past days when such carriage was a frequent feature of readiness arrangements—it no longer is). A few of these accidents may have released into the nearby environment highly toxic material. None however has entailed a nuclear detonation. Some commentators suggest that this reflects bizarrely good fortune amid such massive activity and deployment over so many years. A more rational deduction from the facts of this long experience would however be that the probability of any accident triggering a nuclear explosion is extremely low. It might be further noted that the mechanisms needed to set off such an explosion are technically demanding, and that in a large number of ways the past sixty years have seen extensive improvements in safety arrangements for both the design and the handling of weapons. It is undoubtedly possible to see respects in which, after the cold war, some of the factors bearing upon risk may be new or more adverse; but some are now plainly less so. The years which the world has come through entirely without accidental or unauthorized detonation have included early decades in which knowledge was sketchier, precautions were less developed, and weapon designs were less ultra-safe than they later became, as well as substantial periods in which weapon numbers were larger, deployments more widespread and diverse, movements more frequent, and several aspects of doctrine and readiness arrangements more tense. Similar considerations apply to the hypothesis of nuclear war being mistakenly triggered by false alarm. Critics again point to the fact, as it is understood, of numerous occasions when initial steps in alert sequences for US nuclear forces were embarked upon, or at least called for, by indicators mistaken or misconstrued. In none of these instances, it is accepted, did matters get at all near to nuclear launch—extraordinary good fortune again, critics have suggested. But the rival and more logical inference from hundreds of events stretching over sixty years of experience presents itself once more: that the probability of initial misinterpretation leading far towards mistaken launch is remote. Precisely because any nuclear-weapon possessor recognizes the vast gravity of any launch, release sequences have many steps, and human decision is repeatedly interposed as well as capping the sequences. To convey that because a first step was prompted the world somehow came close to accidental nuclear war is wild hyperbole, rather like asserting, when a tennis champion has lost his opening service game, that he was nearly beaten in straight sets. History anyway scarcely offers any ready example of major war started by accident even before the nuclear revolution imposed an order-of-magnitude increase in caution. It was occasionally conjectured that nuclear war might be triggered by the real but accidental or unauthorized launch of a strategic nuclear-weapon delivery system in the direction of a potential adversary. No such launch is known to have occurred in over sixty years. The probability of it is therefore very low. But even if it did happen, the further hypothesis of its initiating a general nuclear exchange is far-fetched. It fails to consider the real situation of decision-makers, as pages 63-4 have brought out. The notion that cosmic holocaust might be mistakenly precipitated in this way belongs to science fiction.

#### And, reject high magnitude-low probability impacts—extinction is always outweighed by structural violence. Have an inherent skepticism DA probability, and allow probability to be 0% because of long internal link chains, unmentioned assumptions, and uncertainty of predictions.

Cohn 13 (Nate, “Improving the Norms and Practices of Policy Debate,” CEDADebate.org, College Policy Debate Forums, November 24, 2013, http://www.cedadebate.org/forum/index.php?topic=5416.0;wap2)

There were other problems. Many of the small affirmatives were unstrategic—teams rarely had solvency deficits to generic counterplans. It was already basically impossible to win that some morality argument outweighed extinction; it was totally untenable to win that a moral obligation outweighed a meaningful risk of extinction; it made even less sense if the counterplan solved most of the morality argument. The combined effect was devastating: As these debates are currently argued and judged, I suspect that the negative would win my ballot more than 95 percent of the time in a debate between two teams of equal ability. But even if a “soft left” team did better—especially by making solvency deficits and responding to the specifics of the disadvantage—I still think they would struggle. They could compete at the highest levels, but, in most debates, judges would still assess a small, but meaningful risk of a large scale conflict, including nuclear war and extinction. The risk would be small, but the “magnitude” of the impact would often be enough to outweigh a higher probability, smaller impact . Or put differently: policy debate still wouldn’t be replicating a real world policy assessment, teams reading small affirmatives would still be at a real disadvantage with respect to reality. . Why? Oddly, this is the unreasonable result of a reasonable part of debate: the burden of refutation or rejoinder, the responsibility of debaters to “beat” arguments. If I introduce an argument, it starts out at 100 percent—you then have to disprove it. That sounds like a pretty good idea in principle, right? Well, I think so too. But it’s really tough to refute something down to “zero” percent—a team would need to completely and totally refute an argument. That’s obviously tough to do, especially since the other team is usually going to have some decent arguments and pretty good cards defending each component of their disadvantage—even the ridiculous parts. So one of the most fundamental assumptions about debate all but ensures a meaningful risk of nearly any argument—even extremely low-probability, high magnitude impacts, sufficient to outweigh systemic impacts. There’s another even more subtle element of debate practice at play. Traditionally, the 2AC might introduce 8 or 9 cards against a disadvantage, like “non-unique, no-link, no-impact,” and then go for one and two. Yet in reality, disadvantages are underpinned by dozens or perhaps hundreds of discrete assumptions, each of which could be contested. By the end of the 2AR, only a handful are under scrutiny; the majority of the disadvantage is conceded, and it’s tough to bring the one or two scrutinized components down to “zero.” And then there’s a bad understanding of probability. If the affirmative questions four or five elements of the disadvantage, but the negative was still “clearly ahead” on all five elements, most judges would assess that the negative was “clearly ahead” on the disadvantage. In reality, the risk of the disadvantage has been reduced considerably. If there was, say, an 80 percent chance that immigration reform would pass, an 80 percent chance that political capital was key, an 80 percent chance that the plan drained a sufficient amount of capital, an 80 percent chance that immigration reform was necessary to prevent another recession, and an 80 percent chance that another recession would cause a nuclear war (lol), then there’s a 32 percent chance that the disadvantage caused nuclear war. I think these issues can be overcome. First, I think teams can deal with the “burden of refutation” by focusing on the “burden of proof,” which allows a team to mitigate an argument before directly contradicting its content. Here’s how I’d look at it: modern policy debate has assumed that arguments start out at “100 percent” until directly refuted. But few, if any, arguments are supported by evidence consistent with “100 percent.” Most cards don’t make definitive claims. Even when they do, they’re not supported by definitive evidence—and any reasonable person should assume there’s at least some uncertainty on matters other than few true facts, like 2+2=4. Take Georgetown’s immigration uniqueness evidence from Harvard. It says there “may be a window” for immigration. So, based on the negative’s evidence, what are the odds that immigration reform will pass? Far less than 50 percent, if you ask me. That’s not always true for every card in the 1NC, but sometimes it’s even worse—like the impact card, which is usually a long string of “coulds.” If you apply this very basic level of analysis to each element of a disadvantage, and correctly explain math (.4\*.4\*.4\*.4\*.4=.01024), the risk of the disadvantage starts at a very low level, even before the affirmative offers a direct response. Debaters should also argue that the negative hasn’t introduced any evidence at all to defend a long list of unmentioned elements in the “internal link chain.” The absence of evidence to defend the argument that, say, “recession causes depression,” may not eliminate the disadvantage, but it does raise uncertainty—and it doesn’t take too many additional sources of uncertainty to reduce the probability of the disadvantage to effectively zero—sort of the static, background noise of prediction. Now, I do think it would be nice if a good debate team would actually do the work—talk about what the cards say, talk about the unmentioned steps—but I think debaters can make these observations at a meta-level (your evidence isn’t certain, lots of undefended elements) and successfully reduce the risk of a nuclear war or extinction to something indistinguishable from zero. It would not be a factor in my decision. Based on my conversations with other policy judges, it may be possible to pull it off with even less work. They might be willing to summarily disregard “absurd” arguments, like politics disadvantages, on the grounds that it’s patently unrealistic, that we know the typical burden of rejoinder yields unrealistic scenarios, and that judges should assess debates in ways that produce realistic assessments. I don’t think this is too different from elements of Jonah Feldman’s old philosophy, where he basically said “when I assessed 40 percent last year, it’s 10 percent now.” Honestly, I was surprised that the few judges I talked to were so amenable to this argument. For me, just saying “it’s absurd, and you know it” wouldn’t be enough against an argument in which the other team invested considerable time. The more developed argument about accurate risk assessment would be more convincing, but I still think it would be vulnerable to a typical defense of the burden of rejoinder. To be blunt: I want debaters to learn why a disadvantage is absurd, not just make assertions that conform to their preexisting notions of what’s realistic and what’s not. And perhaps more importantly for this discussion, I could not coach a team to rely exclusively on this argument—I’m not convinced that enough judges are willing to discount a disadvantage on “it’s absurd.” Nonetheless, I think this is a useful “frame” that should preface a following, more robust explanation of why the risk of the disadvantage is basically zero—even before a substantive response is offered. There are other, broad genres of argument that can contest the substance of the negative’s argument. There are serious methodological indictments of the various forms of knowledge production, from journalistic reporting to think tanks to quantitative social science. Many of our most strongly worded cards come from people giving opinions, for which they offer very little data or evidence. And even when “qualified” people are giving predictions, there’s a great case to be extremely skeptical without real evidence backing it up. The world is a complicated place, predictions are hard, and most people are wrong. And again, this is before contesting the substance of the negative’s argument(!)—if deemed necessary. So, in my view, the low probability scenario is waiting to be eliminated from debate, basically as soon as a capable team tries to do it. That would open to the door to all of the arguments, previously excluded, de facto, by the prevalence of nuclear war impacts. It’s been tough to talk about racism or gender violence, since modest measures to mitigate these impacts have a difficult time outweighing a nuclear war. It’s been tough to discuss ethical policy making, since it’s hard to argue that any commitment to philosophical or ethical purity should apply in the face of an existential risk. It’s been tough to introduce unconventional forms of evidence, since they can’t really address the probability of nuclear war.

#### Rational impact calc goes aff—you are exponentially more likely to die from health issues than their threats

Richard Jackson 12, Director of the National Centre for Peace and Conflict Studies, the University of Otago. Professor of International Politics at Aberystwyth University, “The Great Con of National Security”, http://richardjacksonterrorismblog.wordpress.com/2012/08/05/the-great-con-of-national-security/

It may have once been the case that being attacked by another country was a major threat to the lives of ordinary people. It may also be true that there are still some pretty serious dangers out there associated with the spread of nuclear weapons. For the most part, however, most of what you’ve been told about national security and all the big threats which can supposedly kill you is one big con designed to distract you from the things that can really hurt you, such as the poverty, inequality and structural violence of capitalism, global warming, and the manufacture and proliferation of weapons – among others.¶ The facts are simple and irrefutable: you’re far more likely to die from lack of health care provision than you are from terrorism; from stress and overwork than Iranian or North Korean nuclear missiles; from lack of road safety than from illegal immigrants; from mental illness and suicide than from computer hackers; from domestic violence than from asylum seekers; from the misuse of legal medicines and alcohol abuse than from international drug lords. And yet, politicians and the servile media spend most of their time talking about the threats posed by terrorism, immigration, asylum seekers, the international drug trade, the nuclear programmes of Iran and North Korea, computer hackers, animal rights activism, the threat of China, and a host of other issues which are all about as equally unlikely to affect the health and well-being of you and your family. Along with this obsessive and perennial discussion of so-called ‘national security issues’, the state spends truly vast sums on security measures which have virtually no impact on the actual risk of dying from these threats, and then engages in massive displays of ‘security theatre’ designed to show just how seriously the state takes these threats – such as the x-ray machines and security measures in every public building, surveillance cameras everywhere, missile launchers in urban areas, drones in Afghanistan, armed police in airports, and a thousand other things. This display is meant to convince you that these threats are really, really serious.¶ And while all this is going on, the rulers of society are hoping that you won’t notice that increasing social and economic inequality in society leads to increased ill health for a growing underclass; that suicide and crime always rise when unemployment rises; that workplaces remain highly dangerous and kill and maim hundreds of people per year; that there are preventable diseases which plague the poorer sections of society; that domestic violence kills and injures thousands of women and children annually; and that globally, poverty and preventable disease kills tens of millions of people needlessly every year. In other words, they are hoping that you won’t notice how much structural violence there is in the world.¶ More than this, they are hoping that you won’t notice that while literally trillions of dollars are spent on military weapons, foreign wars and security theatre (which also arguably do nothing to make any us any safer, and may even make us marginally less safe), that domestic violence programmes struggle to provide even minimal support for women and children at risk of serious harm from their partners; that underfunded mental health programmes mean long waiting lists to receive basic care for at-risk individuals; that drug and alcohol rehabilitation programmes lack the funding to match the demand for help; that welfare measures aimed at reducing inequality have been inadequate for decades; that health and safety measures at many workplaces remain insufficiently resourced; and that measures to tackle global warming and developing alternative energy remain hopelessly inadequate.¶ Of course, none of this is surprising. Politicians are a part of the system; they don’t want to change it. For them, all the insecurity, death and ill-health caused by capitalist inequality are a price worth paying to keep the basic social structures as they are. A more egalitarian society based on equality, solidarity, and other non-materialist values would not suit their interests, or the special interests of the lobby groups they are indebted to. It is also true that dealing with economic and social inequality, improving public health, changing international structures of inequality, restructuring the military-industrial complex, and making the necessary economic and political changes to deal with global warming will be extremely difficult and will require long-term commitment and determination. For politicians looking towards the next election, it is clearly much easier to paint immigrants as a threat to social order or pontificate about the ongoing danger of terrorists. It is also more exciting for the media than stories about how poor people and people of colour are discriminated against and suffer worse health as a consequence.¶ Viewed from this vantage point, national security is one massive confidence trick – misdirection on an epic scale. Its primary function is to distract you from the structures and inequalities in society which are the real threat to the health and wellbeing of you and your family, and to convince you to be permanently afraid so that you will acquiesce to all the security measures which keep you under state control and keep the military-industrial complex ticking along.¶ Keep this in mind next time you hear a politician talking about the threat of uncontrolled immigration, the risk posed by asylum seekers or the threat of Iran, or the need to expand counter-terrorism powers. The question is: when politicians are talking about national security, what is that they don’t want you to think and talk about? What exactly is the misdirection they are engaged in? The truth is, if you think that terrorists or immigrants or asylum seekers or Iran are a greater threat to your safety than the capitalist system, you have been well and truly conned, my friend. Don’t believe the hype: you’re much more likely to die from any one of several forms of structural violence in society than you are from immigrants or terrorism. Somehow, we need to challenge the politicians on this fact.

#### Subsequently, low probability should be no probability – try or die logic promotes serial policy failure

**Sunstein 2** (Cass, Karl N. Llewellyn Distinguished Service Professor, University of Chicago, Law School and Department of Political Science, Probability Neglect: Emotions, Worst Cases, and Law, http://www.yalelawjournal.org/pdf/112-1/SunsteinFINAL.pdf)

If someone is predisposed to be worried, degrees of unlikeliness seem to provide no comfort, unless one can prove that harm is absolutely impossible, which itself is not possible.1 [A]ffect-rich outcomes yield pronounced overweighting of small probabilities . . . .2 On Sept. 11, Americans entered a new and frightening geography, where the continents of safety and danger seemed forever shifted. Is it safe to fly? Will terrorists wage germ warfare? Where is the line between reasonable precaution and panic? Jittery, uncertain and assuming the worst, many people have answered these questions by forswearing air travel, purchasing gas masks and radiation detectors, placing frantic calls to pediatricians demanding vaccinations against exotic diseases or rushing out to fill prescriptions for Cipro, an antibiotic most experts consider an unnecessary defense against anthrax.3 I. RISKS, NUMBERS, AND REGULATION Consider the following problems: • People live in a community near an abandoned hazardous waste site. The community appears to suffer from an unusually high number of deaths and illnesses. Many members of the community fear that the hazardous waste site is responsible for the problem. Administrative officials attempt to offer reassurance that the likelihood of adverse health effects, as a result of the site, is extremely low.4 The reassurance is met with skepticism and distrust. • An airplane, carrying people from New York to California, has recently crashed. Although the source of the problem is unknown, many people suspect terrorism. In the following weeks, many people who would otherwise fly are taking trains or staying home. Some of those same people acknowledge that the statistical risk is exceedingly small. Nonetheless, they refuse to fly, in part because they do not want to experience the anxiety that would come from flying. • An administrative agency is deciding whether to require labels on genetically modified food. According to experts within the agency, genetically modified food, as such, poses insignificant risks to the environment and to human health. But many consumers disagree. Knowledge of genetic modification triggers strong emotions, and the labeling requirement is thought likely to have large effects on consumer choice, notwithstanding expert claims that the danger is trivial. How should we understand human behavior in cases of this sort? My principal answer, the thesis of this Essay, is that when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood. That is, they are not closely attuned to the probability that harm will occur. At the individual level, this phenomenon, which I shall call **“probability neglect,”** produces serious difficulties of various sorts, including excessive worry and unjustified behavioral changes. When people neglect probability, they may also treat some risks as if they were nonexistent, even though the likelihood of harm, over a lifetime, is far from trivial. Probability neglect can produce significant problems for law and regulation. As we shall see, regulatory agencies, no less than individuals, may neglect the issue of probability, in a way that can lead to either indifference to real risks or costly expenditures for little or no gain. If agencies are falling victim to probability neglect, they might well be violating relevant law.5 Indeed, we shall see that the idea of probability neglect helps illuminate a number of judicial decisions, which seem implicitly attuned to that idea, and which reveal an implicit behavioral rationality in important pockets of federal administrative law. As we shall also see, an understanding of probability neglect helps show how government can heighten, or dampen, public concern about hazards. Public-spirited political actors, no less than self-interested ones, can **exploit probability neglect** so as to promote attention to problems that may or may not deserve public concern. It will be helpful to begin, however, with some general background on individual and social judgments about risks. A. Cognition On the conventional view of rationality, probabilities matter a great deal to reactions to risks. But emotions, as such, are not assessed independently; they are not taken to play a distinctive role.6 Of course, people might be risk-averse or risk-inclined. For example, it is possible that people will be willing to pay $100 to eliminate a 1/1000 risk of losing $900. But analysts usually believe that variations in probability should matter, so that there would be a serious problem if people were willing to pay both $100 to eliminate a 1/1000 risk of losing $900 and $100 to eliminate a 1/100,000 risk of losing $900. Analysts do not generally ask, or care, whether risk-related dispositions are a product of emotions or something else. Of course, it is now generally agreed that in thinking about risks, people rely on certain heuristics and show identifiable biases.7 Those who emphasize heuristics and biases are often seen as attacking the conventional view of rationality.8 In a way they are doing just that, but the heuristicsand- biases literature has a highly cognitive focus, designed to establish how people proceed under conditions of uncertainty. The central question is this: When people do not know about the probability associated with some risk, how do they think? It is clear that when people lack statistical information, they rely on certain heuristics, or rules of thumb, which serve to simplify their inquiry.9 Of these rules of thumb, the “availability heuristic” is probably the most important for purposes of understanding risk-related law.10 Thus, for example, “a class whose instances are easily retrieved will appear more numerous than a class of equal frequency whose instances are less retrievable.”11 The point very much bears on private and public responses to risks, suggesting, for example, that people will be especially responsive to the dangers of AIDS, crime, earthquakes, and nuclear power plant accidents if examples of these risks are easy to recall.12 This is a point about how familiarity can affect the availability of instances. But salience is important as well. “The impact of seeing a house burning on the subjective probability of such accidents is probably greater than the impact of reading about a fire in the local paper.”13 So, too, recent events will have a greater impact than earlier ones. The point helps explain much risk-related behavior. For example, whether people will buy insurance for natural disasters is greatly affected by recent experiences.14 If floods have not occurred in the immediate past, people who live on flood plains are far less likely to purchase insurance.15 In the aftermath of an earthquake, the proportion of people carrying earthquake insurance rises sharply—but it declines steadily from that point, as vivid memories recede.16 For purposes of law and regulation, the problem is that the availability heuristic can lead to serious errors of fact, in terms of both excessive controls on small risks that are cognitively available and insufficient controls on large risks that are not.17 The cognitive emphasis of the heuristics-and-biases literature can be found as well in prospect theory, a departure from expected utility theory that explains decision under risk.18 For present purposes, what is most important is that prospect theory offers an explanation for simultaneous gambling and insurance.19 When given the choice, most people will reject a certain gain of X in favor of a gamble with an expected value below X, if the gamble involves a small probability of riches. At the same time, most people prefer a certain loss of X to a gamble with an expected value less than X, if the gamble involves a small probability of catastrophe.20 If expected utility theory is taken as normative, then people depart from the normative theory of rationality in giving excessive weight to lowprobability outcomes when the stakes are high. Indeed, we might easily see prospect theory as emphasizing a form of probability neglect. But in making these descriptive claims, prospect theory does not specify a special role for emotions. This is not a puzzling oversight, if it counts as an oversight at all. For many purposes, what matters is what people choose, and it is unimportant to know whether their choices depend on cognition or emotion, whatever may be the difference between these two terms. B. Emotion No one doubts, however, that in many domains, people do not think much about variations in probability and that emotions have a large effect on judgment and decisionmaking.21 Would a group of randomly selected people pay more to reduce a 1/100,000 risk of getting a gruesome form of cancer than a similar group would pay to reduce a 1/200,000 risk of getting that form of cancer? Would the former group pay twice as much? With some low-probability events, anticipated and actual emotions, triggered by the best-case or worst-case outcome, help to determine choice. Those who buy lottery tickets, for example, often fantasize about the goods associated with a lucky outcome.22 With respect to risks of harm, many of our ordinary ways of speaking suggest strong emotions: panic, hysteria, terror. People might refuse to fly, for example, not because they are currently frightened, but because they anticipate their own anxiety, and they want to avoid it. It has been suggested that people often decide as they do because they anticipate their own regret.23 The same is true for fear. Knowing that they will be afraid, people may refuse to travel to Israel or South Africa, even if they would much enjoy seeing those nations and even if they believe, on reflection, that their fear is not entirely rational. Recent evidence is quite specific.24 It suggests that people greatly neglect significant differences in probability when the outcome is “affect rich”—when it involves not simply a serious loss, but one that produces strong emotions, including **fear**.25 To be sure, the distinction between cognition and emotion is complex and contested.26 In the domain of risks, and most other places, emotional reactions are usually based on thinking; they are hardly cognition-free. When a negative emotion is associated with a certain risk—pesticides or nuclear power, for example—cognition plays a central role.27 For purposes of the analysis here, it is not necessary to say anything especially controversial about the nature of the emotion of fear. The only suggestion is that when emotions are intense, calculation is less likely to occur, or at least that form of calculation that involves assessment of risks in terms of not only the magnitude but also the probability of the outcome. Drawing on and expanding the relevant evidence, I will emphasize a general phenomenon here: In political and market domains, people often focus on the desirability of the outcome in question and pay (too) little attention to the probability that a good or bad outcome will, in fact, occur. It is in such cases that people fall prey to probability neglect, which is properly treated as a form of **quasi-rationality**

* .28 Probability neglect is especially large when people focus on the worst possible case or otherwise are subject to strong emotions. When such emotions are at work, people do not give sufficient consideration to the likelihood that the worst case will actually occur. This is quasi-rational because, from the normative point of view, **it is not fully rational to treat a 1% chance of X as equivalent, or nearly equivalent, to a 99% chance of X, or even a 10% chance of X**. Because people suffer from probability neglect, and because neglecting probability is not fully rational, the phenomenon I identify raises new questions about the widespread idea that ordinary people have a kind of rival rationality superior to that of experts.29 Most of the time, experts are concerned principally with the number of lives at stake,30 and for that reason they will be closely attuned, as ordinary people are not, to the issue of probability. By drawing attention to probability neglect, I do not mean to suggest that most people, most of the time, are indifferent to large variations in the probability that a risk will come to fruition. Large variations can, and often do, make a difference—but when emotions are engaged, the difference is far less than the standard theory predicts. Nor do I suggest that probability neglect is impervious to circumstances. If the costs of neglecting probability are placed “on screen,” then people will be more likely to attend to the question of probability.31 In this light it is both mildly counterintuitive and reasonable, for example, to predict that people would be willing to pay less, in terms of dollars and waiting time, to reduce lowprobability risks of an airplane disaster if they are frequent travelers. An intriguing study finds exactly that effect.32 For similar reasons, market pressures are likely to dampen the impact of probability neglect, ensuring that, say, risks of 1/10,000 are treated differently from risks of 1/1,000,000, even if individuals, in surveys, show relative insensitivity to such differences. Acknowledging all this, I emphasize three central points. First, differences in probability will often affect behavior far less than they should or than conventional theory would predict. Second, private behavior, even when real dollars are involved,33 can display insensitivity to the issue of probability, especially when emotions are intensely engaged. Third, and most important, the demand for legal intervention can be greatly affected by probability neglect, so that government may end up engaging in extensive regulation precisely because intense emotional reactions are making people relatively insensitive to the (low) probability that the relevant dangers will ever come to fruition. C. Law It is not at all clear how the law should respond to probability neglect. But at a minimum, the phenomenon raises serious legal issues in administrative law, at least under statutes banning agencies from acting unless they can show a “significant risk”34 or can establish that the benefits of regulation outweigh the costs.35 If agencies are neglecting the issue of probability (perhaps because the public is doing so as well), they may well be acting unlawfully. Indeed, the law of judicial review shows an inchoate understanding of probability neglect, treating it as a problem for which judicial invalidation is a solution.36 The only qualification is that the relevant law remains in an embryonic state. There is much to be done, especially at the agency level, to ensure that government is alert to the probability that harm will actually occur. Outside of the context of administrative law, an understanding of probability neglect will help us to make better predictions about the public “demand” for law. When a bad outcome is highly salient and triggers strong emotions, government will be asked to do something about it, even if the probability that the bad outcome will occur is low. Political participants of various stripes, focusing on the worst case, are entirely willing to exploit probability neglect. Those who encourage people to purchase lottery tickets, focusing on the best case, do the same. An understanding of probability neglect simultaneously helps show why jurors, and ordinary officials, are not likely to be moved much by a showing that before the fact, the harm was not likely to occur. For many people, what matters is that the harm did occur, not that it was unlikely to do so before the fact. For law, many of the most difficult questions are normative in character: Should government take account of variations in the probability that harms will occur? Should government respond to intense fears that involve statistically remote risks? When people suffer from probability neglect, should law and policy do the same thing? At first glance, we might think that even if people are neglecting probability, government and law at least should not—that the tort system and administrators should pay a great deal of attention to probability in designing institutions. If government wants to insulate itself from probability neglect, it will create institutions designed to ensure that genuine risks, rather than tiny ones, receive the most concern. Such institutions will not necessarily require agencies to discuss the worst-case scenario.37 And if government is attempting to increase public concern about a genuine danger, it should not emphasize statistics and probabilities, but should instead draw attention to the worst-case scenario. If government is attempting to decrease public concern with a risk that has a tiny probability of coming to fruition, it may be ineffective if it emphasizes the issue of probability; indeed, it may do better if it changes the subject or stresses instead the affirmative social values associated with running the risk.38 On the other hand, public fear, however unwarranted, may be intractable, in the sense that it may be impervious to efforts at reassurance. And if public fear is intractable, it will cause serious problems, partly because fear is itself extremely unpleasant and partly because fear is likely to influence conduct, possibly producing wasteful and excessive private precautions. If so, a governmental response, via regulatory safeguards, would appear to be justified if the benefits, in terms of fear reduction, justify the costs. II. PROBABILITY NEGLECT: THE BASIC PHENOMENON When it comes to risk, a key question is whether people can imagine or visualize the worst-case outcome.39 When the worst case produces intense fear, surprisingly little role is played by the stated probability that that outcome will occur.40 An important function of strong emotions is thus to drive out quantitative judgments, including judgments about probability, by making the best case or the worst case seem highly salient.41 But it is important to note that probability neglect can occur even when emotions are not involved. A great deal of evidence shows that whether or not emotions are involved, people are relatively insensitive to differences in probabilities, at least when the relevant probabilities are low. A. Insensitivity to Variations Among Low Probabilities Do people care about probability at all? Of course they do; a risk of 1/100,000 is significantly less troublesome than a risk of 1/1000. But many people, much of the time, show a remarkable unwillingness to attend to the question of probability. Several studies show that when people are seeking relevant information, they often do not try to learn about probability at all. One study, for example, finds that in deciding whether to purchase warranties for consumer products, people do not spontaneously point to the probability of needing repair as a reason for the purchase.42 Another study finds that those making hypothetical, risky managerial decisions rarely ask for data on probabilities.43 Or consider a study involving children and adolescents,44 in which the following question was asked: Susan and Jennifer are arguing about whether they should wear seat belts when they ride in a car. Susan says that you should. Jennifer says you shouldn’t . . . . Jennifer says that she heard of an accident where a car fell into a lake and a woman was kept from getting out in time because of wearing her seat belt . . . . What do you think about this?45 In answering that question, many subjects did not think about probability at all.46 One exchange took the following form: A: Well, in that case I don’t think you should wear a seat belt. Q (interviewer): How do you know when that’s gonna happen? A: Like, just hope it doesn’t! Q: So, should you or shouldn’t you wear seat belts? A: Well, tell-you-the-truth we should wear seat belts. Q: How come? A: Just in case of an accident. You won’t get hurt as much as you will if you didn’t wear a seat belt. Q: Ok, well what about these kinds of things, when people get trapped? A: I don’t think you should, in that case.47 These answers might seem odd and idiosyncratic, but we might reasonably suppose that some of the time, both children and adults focus primarily on bad scenarios, without thinking a great deal about the question of probability. Many studies find that significant differences in low probabilities have little impact on decisions. This finding is in sharp conflict with the standard view of rationality, which suggests that people’s willingness to pay for small risk reductions ought to be nearly proportional to the size of the reduction.48 Perhaps these findings reflect people’s implicit understanding that in these settings, the relevant probability is “low, but not zero,” and that finer distinctions are unhelpful. (What does a risk of 1/100,000 really mean? How different is it, for an individual, from a risk of 1/20,000 or 1/600,000?) In an especially striking study, Kunreuther and his coauthors found that mean willingness to pay insurance premiums did not vary among risks of 1/100,000, 1/1,000,000, and 1/10,000,000.49 They also found basically the same willingness to pay for insurance premiums for risks ranging from 1/650, to 1/6300, to 1/68,000.50 The study just described involved a “between subjects” design; subjects considered only one risk, and the same people were not asked to consider the various risks at the same time. Low probabilities are not likely to be terribly meaningful to most people, but most educated people would know that a 1/100,000 risk is worse than 1/1,000,000 risk. When low-probability risks are seen in isolation and are not assessed together, we have an example of the problem of “evaluability.”51 For most people, most of the time, it is very difficult to evaluate a low probability, and hence isolated decisions will pick up small or no variations between people’s assessments of very different risks. But several studies have a “within subjects” design, exposing people simultaneously to risks of different probabilities, and even here, the differences in probabilities have little effect on decisions. An early study examined people’s willingness to pay (WTP) to reduce various fatality risks. The central finding was that the mean WTP to reduce such risks was, for over 40% of the respondents, unaffected by a large variation in the probability of harm, even though expected utility theory would predict significant effects from such variations.52 A later study found that for serious injuries, WTP to reduce the risk by 12/100,000 was only 20% higher than WTP to reduce the same risk by 4/100,000, even though standard theory would predict a WTP three times as high.53 These results are not unusual. Lin and Milon attempted to elicit people’s willingness to pay to reduce the risk of illness from eating oysters.54 There was little sensitivity to variations in probability of illness.55 Another study found little change in WTP across probability variations involving exposure to pesticide residues on fresh produce.56 A similar anomaly was found in a study involving hazardous wastes, where WTP actually decreased as the stated fatality risk reduction increased.57 There is much to say about the general insensitivity to significant variations within the category of low-probability events. It would be difficult to produce a rational explanation for this insensitivity; recall the standard suggestion that WTP for small risk reductions should be roughly proportional to the size of the reduction.58 Why don’t people think in this way? An imaginable explanation is that in the abstract, most people simply do not know how to evaluate low probabilities. A risk of 7/100,000 seems “small”; a risk of 4/100,000 also seems “small.”59 Most people would prefer a risk of 4/100,000 to a risk of 7/100,000, and I have noted that joint evaluation improves evaluability, which would otherwise be extremely difficult.60 But even when the preference is clear, both risks seem “small,” and hence it is not at all clear that a proportional increase in WTP will follow. As suggested by the findings of Kunreuther and his coauthors, it is likely that in a between-subjects design, WTP to eliminate a risk of 4/100,000 would be about the same as WTP to eliminate a risk of 7/100,000, simply because the small difference would not matter when each risk is taken in isolation.

## Case

### Hitting Kids Bad

#### You’re wrong

Gershoff, Elizabeth T. and Sarah A. Font 2016(Elizabeth T. Gershoff, School of Social Work, University of Michigan and Susan H. Bitensky, Michigan State University College of Law. Sarah Font has a Ph.D. Social Welfare from University of Wisconsin-Madison and a Master of Social Work from Western Michigan University “Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy,” Society for Research in Child Development, volume 30, number 1, https://www.srcd.org/sites/default/files/documents/spr\_30\_1.pdf)

Research has found corporal punishment is not effective at teaching children how to behave. Corporal punishment is not effective at increasing compliance in the short-term (Gershoff & Grogan-Kaylor, 2016) or at promoting long-term compliance and moral behavior (Regev, Gueron-Sela, & Atzaba-Poria, 2012). The more children receive corporal punishment, the more likely they are to be aggressive and to misbehave over time, over and above how aggressive or disobedient they are initially (Berlin et al., 2009; Gershoff, Lansford, Sexton, Davis-Kean, & Sameroff, 2012; Lee, Altschul, & Gershoff, 2013). Contrary to the arguments by defenders of school corporal punishment that banning it would result in an increase in misbehavior and delinquent activity (Dubanoski, Inaba, & Gerkewicz, 1983; Medway & Smircic, 1992), states that have banned corporal punishment from their schools have not seen a subsequent increase in juvenile crime over time (Gershoff et al., 2015). Therefore, no evidence exists that removing corporal punishment from schools creates a statewide permissive environment where youth fail to control their behavior.

#### Wrong

Susan H. Bitensky 2008 (Professor of Law, Michigan State University College of Law. B.A. 1971, Case Western Reserve University; J.D. 1974, University of Chicago Law School. , “The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment,” Michigan State University College of Law Digital Commons at Michigan State University College of Law , U. Cin. L. Rev. 1327, http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1004&context=facpubs)

The anecdotal and theoretical literature in the psychology field is, without mincing words, almost totally damning of school corporal punishment. 471 The explanation for this lies in the experts' determination that school corporal punishment has only one fleeting positive effect while giving rise to a host of potential negative effects. The sole positive outcome of hitting a child for disciplinary purposes is that he or she will probably cease misbehaving.472 This, without more, would seem to counsel putting a paddle in every classroom, front and center and near at hand. But, as usual, the devil is in the details. It turns out that the cessation of misbehavior is ephemeral and teaches the child nothing of lasting import.473 Some experts have theorized that the only reason a child, upon being spanked, stops misbehaving at all is that he or she is momentarily outraged.474 It appears that corporal punishment accomplishes little except, perhaps, to give a weary and exasperated adult an opportunity to vent or to provide a short respite from a child's trying conduct.475 While it is perfectly understandable that an adult attempting to manage an unruly child may need to let off steam or take a break, these are not disciplinary goals. This "positive" outcome is of extremely dubious, if not fanciful, value. On the other side of the equation, corporal punishment risks harming children in so many serious ways as to sink the scales against the rod to bathyal depths. It is no surprise to learn that striking a child may easily result in physical injuries such as abrasions and hematomas.476 There have also been reports of whiplash,477 sciatic nerve damage,478 fracture of the sacrum, 479 and hemorrhaging, 480 to name just a few of the more alarming physical injuries suffered by corporally punished children. Damage possibly to life and not infrequently to limb or skin, however, only begins to tell the tale. School corporal punishment is also correlated with increased childhood depression, 481 increased childhood aggression,482 increased likelihood of childhood posttraumatic stress disorder, 483 decreased childhood self-esteem, 484 and reduced childhood self-control. 485 Nor is this an exhaustive list.486

#### AT: Corporal punishment solves aggression/ compliance

Gerschoff and Bitensky November, 2007(Elizabeth T. Gershoff, School of Social Work, University of Michigan and Susan H. Bitensky, Michigan State University College of Law “ARTICLE: THE CASE AGAINST CORPORAL PUNISHMENT OF CHILDREN: Converging Evidence From Social Science Research and International Human Rights Law and Implications for U.S. Public Policy,” American Psychological Association Psychology, Public Policy and Law 13 Psych. Pub. Pol. and L. 231, https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=13+Psych.+Pub.+Pol.+and+L.+231&srctype=smi&srcid=3B15&key=6fc74bca550283ea00a4c7de78ebb93d)

Research Evidence Regarding the Impacts of Corporal Punishment on Children A large body of research over the course of the past hundred years has examined the effectiveness of corporal punishment as a means of correcting child misbehavior as well as its potential unintended negative side effects for children. It is a peculiar hallmark of the debate surrounding corporal punishment that the preponderance of literature examining its impacts has not looked at whether it is successful in achieving the goals parents have when using it, namely, promoting children’s obedience and reducing problematic behaviors. Rather, most research has examined whether corporal punishment might have unintended negative effects, such as increasing children’s levels of aggression. However, it is important to ﬁrst examine the evidence of its effectiveness, or the lack thereof, in achieving parents’ short- or long-term goals in using corporal punishment. There is, after all, no reason to resort to corporal punishment in the ﬁrst place if it does not work. In the sections that follow, we refer to the ﬁndings of a comprehensive review and meta-analysis of the effects of corporal punishment (Gershoff, 2002). Gershoff (2002) reviewed 88 studies that had been conducted over a period of 62 years and calculated average effect sizes for the associations of corporal punishment with 11 child outcomes. We complement the Gershoff ﬁndings with summaries of the ﬁndings from more recently published research. Does Corporal Punishment Promote Child Obedience and Reduce Child Problem Behavior? Parents use corporal punishment primarily to reduce undesirable child behavior in the present and to increase desirable child behavior in the future. It is useful to consider the success with which corporal punishment achieves these two goals separately, given that one is an immediate, short-term goal while the second is a future, long-term goal. The empirical ﬁndings on the short-term effectiveness of corporal punishment in achieving child compliance are mixed. Although the Gershoff (2002)meta-analysis of ﬁve studies examining children’s immediate compliance with a parent’s use of corporal punishment found a positive effect on average, the ﬁndings were highly inconsistent. The meta-analysis was primarily driven by the large effect size reported by one study (d 3.39; Bean & Roberts, 1981) but also included two other studies by the same investigator, one that basically found no relationship (d 0.01;Day&Roberts,1983)and one that found a negative relationship(d0.25; Roberts&Powers,1990).It is also worth noting that these authors have clearly stated that corporal punishment is not the only way to control child behavior and that parents with a history of abusing their children should be counseled not to spank (Day & Roberts, 1983; Roberts & Powers, 1990). Although parents clearly hope to promote children’s future compliance with whichever discipline technique they choose, exactly how corporal punishment should foster children’s long-term compliance or moral internalization is unclear from psychological theory and research. At its most basic, the association of a negative stimulus with a behavior should make the behavior less likely in the future. Yet this type of obedience is not thought of as internalized because it likely only occurs if the child perceives the threat of punishment to be high (e.g., the parent is nearby and likely to administer punishment). The primary goal of any socialization should be to promote children’s internalization of the reasons for behaving appropriately rather than to behave solely to avoid punishment (Hoffman,1983;Lepper,1983).The research to date indicates that physical punishment does not promote long-term, internalized compliance. In contrast to the ﬁndings on immediate compliance, the ﬁndings regarding corporal punishment as a predictor of moral internalization are more consistent, with 85% of the studies included in the Gershoff (2002) meta-analysis reporting corporal punishment to be associated with less moral internalization and long-term compliance. Similarly, the more children receive physical punishment, the less likely they are to express empathy for others (Lopez, Bonenberger, & Schneider, 2001). Parents report that one of the main instances in which they use corporal punishment is when their children have behaved aggressively, such as hitting a younger sibling, or antisocially, such as stealing money from parents (Catron & Masters, 1993; Holden, Coleman, & Schmidt, 1995; Zahn-Waxler & Chapman, 1982). Yet there are many reasons to suspect that physical punishment may increase, rather than decrease, children’s aggression and antisocial behavior, including that it models the use of force to achieve desired ends (Bandura & Walters, 1959; Eron, Walder, & Lefkowitz, 1971) and increases the likelihood that children will make hostile attributions that, in turn, increase the likelihood that they will behave inappropriately in social interactions (Dodge, 1986; Weiss, Dodge, Bates, & Pettit, 1992). Thus, it is particularly important to determine whether corporal punishment is effective in achieving one of parents’ main goals in using it, namely, to reduce children’s aggressive and antisocial behaviors. In Gershoff’s (2002) meta-analysis of 27 studies, every one of the studies found corporal punishment was associated with more, not less, child aggression. Of the 13 studies included in a meta-analysis of the association of corporal punishment to child antisocial behavior, 12 found more corporal punishment was associated with more antisocial behavior. In both cases, the size of the association was moderate (aggression: d 0.36; antisocial behavior: d 0.42; Gershoff, 2002). Similarly, in recent studies of children around the globe, corporal punishment has been associated linearly with more physical aggression (Canada: Pagani et al., 2004; China: Nelson, Hart, Yang, Olsen, & Jin, 2006; China, India, Italy, Kenya, Philippines, and Thailand: Gershoff et al., 2007; Lansford et al., 2005; Singapore: Sim & Ong, 2005), verbal aggression (Canada: Pagani et al., 2004), physical ﬁghting and bullying (United States: Ohene, Ireland, McNeely, & Borowsky, 2006), antisocial behavior (United States: Grogan-Kaylor, 2004, 2005), and behavior problems generally (Norway: Javo, Rønning, Heyerdahl, & Rudmin, 2004; United States: Bender et al., 2007; Kerr, Lopez, Olson, & Sameroff, 2004; McLoyd & Smith, 2002). The main conclusion to be drawn from these highly consistent results across the empirical literature is that if parents’ goals are to increase children’s moral internalization and to decrease their aggressive and antisocial behavior, there is little evidence that corporal punishment is effective in achieving these goal

#### More comprehensive studies prove

Gerschoff and Bitensky November, 2007(Elizabeth T. Gershoff, School of Social Work, University of Michigan and Susan H. Bitensky, Michigan State University College of Law “ARTICLE: THE CASE AGAINST CORPORAL PUNISHMENT OF CHILDREN: Converging Evidence From Social Science Research and International Human Rights Law and Implications for U.S. Public Policy,” American Psychological Association Psychology, Public Policy and Law 13 Psych. Pub. Pol. and L. 231, https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=13+Psych.+Pub.+Pol.+and+L.+231&srctype=smi&srcid=3B15&key=6fc74bca550283ea00a4c7de78ebb93d)

How Do We Know That Parental Corporal Punishment Causes Increased Child Deﬁance and Problem Behavior? The research summarized above suggests that, when examined through the lens of a parent’s goals, corporal punishment is not successful in achieving increases in long-term compliance and decreases in deﬁant and aggressive behavior. Because experiments assigning children to parents who spank or not or assigning parents to spank or no-spank conditions are both unfeasible and unethical, much of the research on parental corporal punishment is correlational (i.e., measuring relations among variables within one point in time) and thus precludes conclusions about direction of effect (Baumrind, Larzelere, & Cowan, 2002; Gershoff, 2002). Although there are many examples of rigorous, prospective, longitudinal studies of the effects of corporal punishment on children’s later development that provide some ability to draw causal conclusions (discussed below), the ﬁeld’s overall reliance on correlational studies of corporal punishment has left open the possibility that the causal pathway may not be entirely (or at all, by some accounts) from parent to child as is typically assumed. Two primary alternative hypotheses have been offered to explain the association of parent corporal punishment with higher levels of deﬁance and problem behavior in children. The ﬁrst such hypothesis is that this association is a child effect (Bell, 1968), or, in other words, it is the result of difﬁcult children eliciting corporal punishment from their parents rather than of parents’ use of corporal punishment causing children to be aggressive (Baumrind et al., 2002; Benjet & Kazdin, 2003; Larzelere, Kuhn, & Johnson, 2004). The other alternative hypothesis is that a third variable altogether, namely, shared genetics, predicts both parental corporal punishment and child problem behavior, and thus, the found associations between them are spurious (Reiss, 1995). We consider each hypothesis in turn, The child effect alternative hypothesis. The crux of this argument is that children high in problem behavior are more likely to frustrate their parents, who in turn will be more likely to use harsh discipline, in which case the direction of effect would be from child to parent rather than from parent to child (Baumrind et al., 2002; Benjet & Kazdin, 2003; Larzelere et al., 2004). Some support for the reasoning behind this alternative hypothesis comes from experiments in which both familiar and unfamiliar adults behaved more harshly with children who were difﬁcult (Anderson, Lytton, & Romney, 1986). Furthermore, parents use punishments generally and corporal punishment in particular more for misbehaviors involving aggression (Grusec & Kuczynski, 1980; Holden et al., 1995; Socolar & Stein, 1995), so it is reasonable to expect that children who engage in frequent aggressive acts would be corporally punished by their parents more than would less aggressive children. One way to address this question is by including initial levels of child problem behavior as a predictor along with parent’s use of corporal punishment to predict later child problem behavior. By controlling for initial levels of child problem behavior, such analyses are able to look at the unique prediction of corporal punishment as if all children had average levels of problem behavior. Studies reporting such analyses continue to ﬁnd that corporal punishment predicts later problem behavior even after initial levels of such behaviors and race, gender, and family socioeconomic status have been controlled (e.g., Grogan-Kaylor, 2004, 2005; Gunnoe & Mariner, 1997; Singer, Singer, & Rapaczynski, 1984; Weiss et al., 1992). These studies thus do not support the child effect hypothesis and rather lend support to the parent-to-child direction of effect. Yet such studies do not directly test whether child behavior problems predict parent corporal punishment in the future, which would be needed to entirely rule out the possibility that a child-to-parent direction of effect is at work. A second line of research addresses this possibility by comparing parent- with child-effect pathways using cross-lagged structural equation models. Cross-lagged models simultaneously estimate predictive paths from parental corporal punishment to child behavior and vice versa. Two such studies do conﬁrm the presence of a child effect on the frequency with which parents use harsh (including corporal) punishment (Cohen & Brook, 1995; Kandel & Wu, 1995), while a third did not ﬁnd a child effect on harsh punishment (Campbell, Pierce, Moore, Marakovitz, & Newby, 1996). In contrast, all three of these studies also found strong parent effects on later child behavior problems, and by comparing the percent of variance explained, Kandel and Wu (1995) concluded that initial child behavior problems and initial parent harsh punishment did a better job predicting subsequent child behavior problems in their cross-lagged model than they did subsequent harsh punishment. A very strong test of parent versus child effects comes from a recent evaluation of a parent-training program that included reduction of corporal punishment as a goal (Beauchaine, Webster-Stratton, & Reid, 2005). The study examined change in parents’ use of corporal punishment as a mediator of the impact of parent training on children’s externalizing problem behaviors. Crucially for the alternative hypothesis at hand, the model explicitly tested whether the parent training reduced child externalizing behavior problems by reducing parents’ use of corporal punishment (a parent effect) after controlling for child effects at baseline and across time. Results from research with over 500 families revealed that signiﬁcant reductions in children’s externalizing behavior problems were a direct result of decreases in parents’ reliance on corporal punishment as a result of program participation (Beauchaine et al., 2005). These analyses present strong support for a causal link between parents’ use of corporal punishment and children’s subsequent behavior problems.

#### Corporal punishment is bad

C.C. Swisher 2008, (Mr. Swisher received his J.D. from Washington University in St. Louis “Constitutional Abuse of Public School Students: An argument for Overruling Ingraham v. Wright,” 8 Whittier J. Child & Fam. Adovc. 3, WHITTIER JOURNAL OF CHILD AND FAMILY ADVOCACY, Vol. 8:1)

B. THE FACTS SUPPORTING THE INGRAHAM OPINION HAVE BECOME SO DIFFERENT THAN THEY WERE IN 1977 THAT THE COURT SHOULD OVERRULE INGRAHAM. As the Supreme Court did not expressly consider social and psychological effects of "separate but equal" public facilities for different races in its Plessy decision, it also did not expressly consider the social, or psychological, consequences of corporal punishment in Ingraham.368 Instead, the Court seems to have assumed that corporal punishment is effective and harmless.3t ar69 Current research, however, overwhelmingly debunks those assumptions. 37 0 Elizabeth Gershoff recently conducted an exhaustive review of empirical studies of the association between parental use of corporal punishment and child behavior.371 On the positive side of the ledger, data supports an association between corporal punishment and immediate compliance with parental directions, but, as Professor Gershoff notes: Although immediate compliance may be a salient goal when parents initiate discipline, promoting the development of children's internal controls is more important to long-term socialization than immediate compliance. Moral internalization is defined as ... taking over the values of society as one's own so that socially acceptable behavior is motivated not by anticipation of external consequences but by intrinsic or internal factors .... Children's internalization of morals is thought to be enhanced by parental discipline strategies that use minimal parental power, promote choice and autonomy, and provide explanations for desirable behaviors.... [P]ower assertive methods such as corporal punishment promote children's external attributions for their behavior and minimize their attributions to internal motivations. Additionally, corporal punishment may not facilitate moral internalization because it does not teach children the reasons for behaving correctly, does not involve communication of the effects of children's behaviors on others, and may teach children the desirability of not getting caught. 372 Data establish several negative associations with corporal punishment of children.373 First, data demonstrate an association between corporal punishment and "increases in children's aggressive behaviors." 374 Professor Gershoff reported that one longitudinal study found that "parents' use of corporal punishment in childhood was the strongest predictor of adolescents' aggression 8 years later, whereas permissive parenting was not a significant predictor." 375 Researchers have hypothesized a variety of reasons for the relationship, but none deny that the relationship exists. 376 Second, Professor Gershoff' s review found that "[a]cross decades of research, corporal punishment has been implicated in the etiology of criminal and antisocial behaviors by both children and adults."377 One "longitudinal study of delinquency [found that] ... boys [who have] experienced a harsh parental disciplinary style [could have] ... their arrest rates at ages 17 through 45 [predicted]. '378 Another longitudinal study revealed that "the extent to which parents were aggressively punitive predicted their children's criminal behavior as adults." 379 Research also reveals the potential of corporal punishment to disrupt important childhood relationships. 380 Such disruption may lead to children's distrust of authority figures. 381 Fourth, "harsh punishment (including corporal punishment) has been associated significantly with adolescents' depressive symptomatology and distress." 382 Other studies have found an association between "coercive techniques" and "decreases in children's feelings of confidence and assertiveness and with increases in feelings of humiliation and helplessness." ' 383 Fifth, data shows "a strong tendency for parents who were corporally punished [as children] to continue the practice with their own children." 384 Furthermore, studies have found that experiencing corporal punishment as a child increases one's "likelihood of acting violently with an adult romantic partner."385 Finally, there is the risk of "corporal punishment" becoming abuse. In a study of abusive parents, two-thirds of them revealed that "their abusive incidents began as attempts to change children's behavior or to 'teach them a lesson.' " 386 It is often difficult for a person administering corporal punishment to recognize the severity of his attack. 387 In one study, "16% of incidents reported by mothers and 21% of those reported by fathers were rated by independent coders as severe (e.g., use of spoons, sticks, or belts). '388 Review of current social and psychological research leads to the inescapable conclusion that corporal punishment of children has substantial detrimental consequences for the child and society, with minimal benefit.389 Whatever may have been the state of psychological research at the time of the Ingraham decision, modem authority amply supports this conclusion. 39° Many of the harshest examples of physical injury resulting from corporal punishment of school children occur when the teacher or administrator imposes punishment reflexively. 391 Requiring notice and hearing before administering corporal punishment 392 should prevent such instances by imposing a cooling-off period. Furthermore, requiring notice and a hearing before administering corporal punishment decreases the likelihood of erroneous punishment. 393 Accordingly, the Court should, at a minimum, bring the law regarding corporal punishment into line with the law requiring notice and a hearing before suspending a student.394 Finally, suspension has not been shown to have the detrimental psychological and sociological consequences that corporal punishment has.395 Accordingly, avoiding erroneous corporal punishment is more important for the child and society than avoiding erroneous suspension.396 Protecting students and society from the substantial adverse consequences of corporal punishment demands more than notices and hearings. Requiring notice and a hearing before administering corporal punishment 397 is a worthwhile half-way measure if it saves a child's eye. A total ban of corporal punishment, however, is necessary when one compares the minimal, short term benefits to the substantial long term negative consequences for both the punished child and society, which result from corporal punishment. 398

#### Disproportionately used on minority students

Cynthia Northington 2007 ( Doctor of Philosophy (Ph.D.), Psychological Development - New York University, Master of Arts (M.A.), Educational Psychology - Montclair State University, Bachelor of Arts (B.A.), Psychology - Fairleigh Dickinson University,” The Corporal Punishment of Minorities in the Public Schools, ” National Association for Multicultural Education, http://www.tandfonline.com/doi/abs/10.1080/15210960701443789)

Corporal punishment is still legal under various circumstances in the United States public schools. This practice is specified in the discipline policies of cities and towns in roughly twenty-two states. Corporal punishment usually takes the form of paddling with wooden paddles or sticks by school administrators with the consent of the parents. Research has shown that this type of punishment is disproportionately administered to minority school children. White students are paddled with far less frequency. Boys are paddled more often than girls over all. This practice teaches school children that it is acceptable for larger, older people to inflict pain on small, younger people. The behavioral and social ramifications for future behavior are ominous. Corporal punishment is a controversial form of school discipline still practiced in United States public schools. Corporal punishment in schools describes the application of physical pain (via paddles, body postures, excessive exercise drills, or the prevention of urine or stool elimination) as a method of changing student behavior (Greydanus, Pratt, Spates, Blake-Dreher, GreydanusGearhart, & Patel, 2003; U.S. Department of Education, 2001a, USA Today, 2002). In 22 states, it can be legally administered to public school children. The frequency of this practice has decreased overall in the past decade. Yet minority students continue to remain disproportionately on the receiving end of this form of discipline in U.S. public schools (Doyle, 1989). Some reports indicate that African-American students are twice as likely to be the recipients of corporal punishment as students of other races (Dobbs, 2004). Students of low socioeconomic status are spanked more often than their counterparts. The rationale for this practice implies that a different standard of discipline is necessary for children who are minorities. This practice remains legal (under various circumstances) in the following states: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Wyoming. From 1980–1989, 14 states voted to ban this practice outright. In the 1990s, 10 states finalized their ban on this practice (American Academy of Pediatrics, 2000). In 2003, the state of Delaware was the first state in the millennia to ban corporal punishment. Unlike convicted criminals and prison inmates, school children are not protected by The Eighth Amendment of the U.S. Constitution that prohibits the use of cruel and unusual punishment on accused prisoners. Students of low socioeconomic status are spanked more often than their counterparts. The rationale for this practice implies that a different standard of discipline is necessary for children who are minorities. In 2000, 342,038 students were paddled in U.S public schools. Of that number, 132,065 students were African American (Starr, 2002; U.S. Department of Education, Office of Civil Rights, 2001b). While African Americans represent approximately 17% of the student population in the United States, they are twice as likely as white students to be recipients of corporal punishment (National Research Council Institute of Medicine, 2004). While comprising 63% of the school population, White students receive 55% of reported corporal punishments (via paddling). In Arkansas public schools, 30.75% of students paddled in 2001–2002 were African American. The statewide frequency of corporal punishment (via spanking) was 2.02 per student. Yet the frequency of spanking for African-American students was 2.23 per student. Statistically significant racial disparities for this practice exist in 18% of Arkansas districts (Arkansas Department of Education, 2002). In a political climate that demands accountability in education, classroom management practices that yield quantifiable results are lauded as the standard for best practices. By using corporal punishment, teachers and school authorities argue that they are acting in place of parents (from the Latin in loco parentis) in the educational environment. They are acting as the parent would if the parent was present (Conte, 2000). When students refuse to respect authority figures, it is argued that they must fear them, or school wide discipline is in jeopardy

#### AT: Some students need to get paddled

Cynthia Northington 2007 ( Doctor of Philosophy (Ph.D.), Psychological Development - New York University, Master of Arts (M.A.), Educational Psychology - Montclair State University, Bachelor of Arts (B.A.), Psychology - Fairleigh Dickinson University,” The Corporal Punishment of Minorities in the Public Schools, ” National Association for Multicultural Education, http://www.tandfonline.com/doi/abs/10.1080/15210960701443789)

The civil rights struggle of the 1960s embraced nonviolent solutions to unfair and unjust laws in the United States. Yet corporal punishment is the antithesis of the nonviolent behavioral ideal encouraged in schools across the United States. The codes of conduct in most public schools teach effective communication as a means of voicing a complaint. Conflict resolution and peer mediation are also encouraged in order to empower students to resolve disputes. Nevertheless, corporal punishment is modeled by teachers and administrators across the country in response to various behavioral infractions. Corporal punishment is even used to penalize students who resort to violence against their peers. The practice of penalizing students via corporal punishment for fighting with their peers on school grounds seems illogical and hypocritical. Yet such incidences continue to be mediated in court. In Atlanta, Georgia, a dispute between two high school students resulted in a physical altercation. The coach approached the students and after some interrogation hit one of the students in the eye with a weighted object. The student’s eye was knocked out of its socket. Albert Bandura (1973) proposes all behavior is learned via reinforcement and modeling. When teachers and administrators model the behavior of corporal punishment, students learn many lessons that do not facilitate prosocial behavior. Through corporal punishment students learn to use violence in order to achieve their own social goals. The modeling and acceptance of physically and psychologically aggressive behavior for students is teacher-sanctioned violence. It is sanctioned due to the teacher’s lack of awareness of its impact and unwillingness to choose prosocial alternatives to discipline. School administrators who believe that “some students” only understand violence are themselves perpetuators of societal violence. As long as society perceives African-American students as potentially more aggressive than their White counterparts, then it is argued that the use of corporal punishment in schools as a solution to behavior problems creates a self-fulfilling prophecy.

### Academics turn

(not an impact add on, but can read as a turn to some Das)

#### Corporal Punishment academically hurts students

Gershoff, Elizabeth T. and Sarah A. Font 2016(Elizabeth T. Gershoff, School of Social Work, University of Michigan and Susan H. Bitensky, Michigan State University College of Law. Sarah Font has a Ph.D. Social Welfare from University of Wisconsin-Madison and a Master of Social Work from Western Michigan University “Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy,” Society for Research in Child Development, volume 30, number 1, https://www.srcd.org/sites/default/files/documents/spr\_30\_1.pdf)

Research has found corporal punishment is associated with unintended negative consequences for children. Much of the research on corporal punishment has been about that administered by parents; in this large body of research, corporal punishment has been linked with a range of unintended negative outcomes (Gershoff, 2002; Gershoff & Grogan-Kaylor, 2016), including higher rates of mental health problems (Bugental, Martorell, & Barraza, 2003; McLoyd, Kaplan, Hardaway, & Wood, 2007), a more negative parentchild relationship (Coyl, Roggman, & Newland, 2002), lower cognitive ability and academic achievement (Berlin et al., 2009), and higher risk for physical abuse (Bugental et al, 2003; Zolotor et al., 2008). Only a few studies have considered academic and nonacademic outcomes associated with school corporal punishment specifi cally, none of which were conducted in the U.S. In a study conducted in West Africa, children who attended schools that used corporal punishment had lower scores in vocabulary and in executive functioning than children who attended schools that did not (Talwar, Carlson, & Lee, 2011). Data from the Young Lives study of four developing countries (Ethiopia, India, Peru, and Vietnam) revealed high levels of school corporal punishment at age 8 (between 20% and 80% of children in each country), and that these experiences of school corporal punishment at age 8 predicted by age 12 lower self-effi cacy and self-esteem (2 countries) as well as lower math scores (3 countries) and lower vocabulary scores (1 country) (Ogando Portela & Pells, 2015). Although these studies pertain to students outside of the U.S., their fi ndings are consistent with the abundance of U.S.-based research fi nding unintended negative consequences of parental corporal punishment.

#### Corporal punishment hurts performance

Human Rights Watch, 4-15-2010, (Human Rights Watch is a nonprofit, nongovernmental human rights organization “Corporal Punishment in Schools and Its Effect on Academic Success” Joint HRW/ACLU Statement," https://www.hrw.org/news/2010/04/15/corporal-punishment-schools-and-its-effect-academic-success-joint-hrw/aclu-statement)

V. The Impact of Corporal Punishment On Students' Academic Performance Harsh physical punishments do not improve students' in-school behavior or academic performance. In fact, one recent study found that in states where corporal punishment is frequently used, schools have performed worse academically than those in states that prohibit corporal punishment.[16] While most states demonstrated improvements in their American College Testing (ACT) scores from 1994 to 2008, "as a group, states that paddled the most improved their scores the least."[17] At the same time "the ten states with the longest histories of forbidding corporal punishment improved the most" with improvement rates three times higher than those states which reported frequent use of corporal punishment.[18] Many children who have been subjected to hitting, paddling or other harsh disciplinary practices have reported subsequent problems with depression, fear and anger.[19] These students frequently withdraw from school activities and disengage academically.[20] The Society for Adolescent Medicine has found that victims of corporal punishment often develop "deteriorating peer relationships, difficulty with concentration, lowered school achievement, antisocial behavior, intense dislike of authority, somatic complaints, a tendency for school avoidance and school drop-out, and other evidence of negative high-risk adolescent behavior."[21] One Mississippi student interviewed for A Violent Education described the effects of corporal punishment on his attitude towards school: "[Y]ou could get a paddling for almost anything. I hated it. It was used as a way to degrade, embarrass students. . . I said I'd never take another paddling, it's humiliating, it's degrading. Some teachers like to paddle students. Paddling causes you to lose respect for a person, stop listening to them."[22] Corporal punishment places parents and teachers in positions where they may have to choose between educational advancement and students' physical well-being. For instance, some parents who learn that their children are being struck at public school find themselves without recourse, unable to effectively opt-out from the practice, and unable to obtain legal or other redress when their children have been paddled against their wishes. Ultimately some parents find that the only way they can protect their children from physical harm is to withdraw them from school altogether.[23] Similarly, teachers who work in schools where corporal punishment is administered are often reluctant to send disruptive students out of the classroom because they are afraid the students will be beaten.[24] Moreover, a public school's use of corporal punishment affects every student in that school, including those who are not personally subjected to hitting or paddling. The prevalent use of physical violence against students creates an overall threatening school atmosphere that impacts students' ability to perform academically.[25] Often, children who experience or witness physical violence will themselves develop disruptive and violent behaviors, further disturbing their classmates' learning as well as their own.[26] Corporal punishment is a destructive form of discipline that is ineffective in producing educational environments in which students can thrive. Rather than relying on harsh and threatening disciplinary tactics, schools and teachers should be encouraged to develop positive behavior supports (PBS), which have proven effective in reducing the need for harsh discipline while supporting a safe and productive learning environment.[27] The Positive Behavior for Safe and Effective Schools Act (H.R. 2597) would help states and Local Education Agencies (LEAs) create positive learning environments by allowing them to use Title I funds to develop PBS practices. This bill would also require the Department of Education to provide assistance and support so that states may fully realize the potential of supportive and flexible behavior discipline practices. By abandoning ineffective and brutal disciplinary practices, and by encouraging the adoption of PBS methods, our nation can provide opportunities for all students to achieve academic success in a supportive and safe school environment.

### AT: Bostrom

#### Privileging “infinite” magnitude negates probability and destroys ethical decision-making

Oliver Kessler 8, Professor of Sociology at the University of Bielefeld, “From Insecurity to Uncertainty: Risk and the Paradox of Security Politics” Alternatives 33 (2008), 211-232

The problem of the second method is that it is very difficult to "calculate" politically unacceptable losses. If the risk of terrorism is defined in traditional terms by probability and potential loss, then the focus on dramatic terror attacks leads to the marginalization of probabilities. The reason is that even the highest degree of improbability becomes irrelevant as the measure of loss goes to infinity. The mathematical calculation of the risk of terrorism thus tends to overestimate and to dramatize the danger. This has consequences beyond the actual risk assessment for the formulation and execution of "risk policies": If one factor of the risk calculation approaches infinity (e.g., if a case of nuclear terrorism is envisaged), then there is no balanced measure for antiterrorist efforts, and risk management as a rational endeavor breaks down***.*** Under the historical con- dition of bipolarity, the "ultimate" threat with nuclear weapons could be balanced by a similar counterthreat, and new equilibria could be achieved, albeit on higher levels of nuclear overkill. Under the new condition of uncertainty, no such rational balancing is possible since knowledge about actors, their motives and capabilities, is largely absent. The second form of security policy that emerges when the deter- rence model collapses mirrors the "social probability" approach. It represents a logic of catastrophe. In contrast to risk management framed in line with logical probability theory, the logic of catastro- phe does not attempt to provide means of absorbing uncertainty. Rather, it takes uncertainty as constitutive for the logic itself; uncer- tainty is a crucial precondition for catastrophies. In particular, cata- strophes happen at once, without a warning, but with major impli- cations for the world polity. In this category, we find the impact of meteorites. Mars attacks, the tsunami in South East Asia, and 9/11. To conceive of terrorism as catastrophe has consequences for the formulation of an adequate security policy. Since catastrophes hap- pen irrespectively of human activity or inactivity, no political action could possibly prevent them. Of course, there are precautions that can be taken, but the framing of terrorist attack as a catastrophe points to spatial and temporal characteristics that are beyond "ratio- nality." Thus, political decision makers are exempted from the responsibility to provide security—as long as they at least try to pre- empt an attack. Interestingly enough, 9/11 was framed as catastro- phe in various commissions dealing with the question of who was responsible and whether it could have been prevented. This makes clear that under the condition of uncertainty, there are no objective criteria that could serve as an anchor for measur- ing dangers and assessing the quality of political responses. For ex- ample, as much as one might object to certain measures by the US administration, it is almost impossible to "measure" the success of countermeasures. Of course, there might be a subjective assessment of specific shortcomings or failures, but there is no "common" cur- rency to evaluate them. As a consequence, the framework of the security dilemma fails to capture the basic uncertainties. Pushing the door open for the security paradox, the main prob- lem of security analysis then becomes the question how to integrate dangers in risk assessments and security policies about which simply nothing is known. In the mid 1990s, a Rand study entitled "New Challenges for Defense Planning" addressed this issue arguing that "most striking is the fact that we do not even know who or what will constitute the most serious future threat, "^i In order to cope with this challenge it would be essential, another Rand researcher wrote, to break free from the "tyranny" of plausible scenario planning. The decisive step would be to create "discontinuous scenarios ... in which there is no plausible audit trail or storyline from current events"52 These nonstandard scenarios were later called "wild cards" and became important in the current US strategic discourse. They justified the transformation from a threat-based toward a capability- based defense planning strategy.53 The problem with this kind of risk assessment is, however, that even the most absurd scenarios can gain plausibility. By constructing a chainof potentialities,improbable events are linked and brought into the realm of the possible, if not even the probable. "Although the likelihood of the scenario dwindles with each step, the residual impression is one of plausibility. "54 This so-called Oth- ello effect has been effective in the dawn of the recent war in Iraq. The connection between Saddam Hussein and Al Qaeda that the US government tried to prove was disputed from the very begin- ning. False evidence was again and again presented and refuted, but this did not prevent the administration from presenting as the main rationale for war the improbable yet possible connection between Iraq and the terrorist network and the improbable yet possible proliferation of an improbable yet possible nuclear weapon into the hands of Bin Laden. As Donald Rumsfeld famously said: "Absence of evidence is not evidence of absence."\* This sentence indicates that under the condition of genuine uncer-  tainty, different evidence criteria prevail than in situations where  security problems can be assessed with relative certainty.

## Politics

### Shields the Link

#### Courts shield the link

Keith E. Whittington 5, Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

Political leaders in such a situation will have reason to support or, at minimum, tolerate the active exercise of judicial review. In the American context, the presidency is a particularly useful site for locating such behavior. The Constitution gives the president a powerful role in selecting and speaking to federal judges. As national party leaders, presidents and presidential candidates are both conscious of the fragmented nature of American political parties and sensitive to policy goals that will not be shared by all of the president’s putative partisan allies in Congress. We would expect political support for judicial review to make itself apparent in any of four fields of activity: (1) in the selection of “activist” judges, (2) in the encouragement of specific judicial action consistent with the political needs of coalition leaders, (3) in the congenial reception of judicial action after it has been taken, and (4) in the public expression of generalized support for judicial supremacy in the articulation of constitutional commitments. Although it might sometimes be the case that judges and elected officials act in more-or-less explicit concert to shift the politically appropriate decisions into the judicial arena for resolution, it is also the case that judges might act independently of elected officials but nonetheless in ways that elected officials find congenial to their own interests and are willing and able to accommodate. Although Attorney General Richard Olney and perhaps President Grover Cleveland thought the 1894 federal income tax was politically unwise and socially unjust, they did not necessarily therefore think judicial intervention was appropriate in the case considered in more detail later (Eggert 1974, 101– 14). If a majority of the justices and Cleveland-allies in and around the administration had more serious doubts about the constitutionality of the tax, however, the White House would hardly feel aggrieved. We should be equally interested in how judges might exploit the political space open to them to render controversial decisions and in how elected officials might anticipate the utility of future acts of judicial review to their own interests.¶ [CONTINUES]¶ There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, shifting blame for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

### Plan Popular

#### The plan is popular – this ev is in specific to punishment being administered at schools

Gershoff, Elizabeth T. and Sarah A. Font 2016(Elizabeth T. Gershoff, School of Social Work, University of Michigan and Susan H. Bitensky, Michigan State University College of Law. Sarah Font has a Ph.D. Social Welfare from University of Wisconsin-Madison and a Master of Social Work from Western Michigan University “Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy,” Society for Research in Child Development, volume 30, number 1, https://www.srcd.org/sites/default/files/documents/spr\_30\_1.pdf)

Americans no longer support the use of corporal punishment in schools. Although a majority of American adults (65% of women, 77% of men) still believe that children sometimes “need a good hard spanking” from their parents (Child Trends, 2013), they do not agree that schools should be allowed to use corporal punishment. In a 2005 national poll, 77% of respondents believed that teachers should not be allowed to spank students, with public support for school corporal punishment highest in Alabama, Arkansas, Mississippi, and Tennessee (SurveyUSA, 2005), consistent with the high rates of school corporal punishment in these states described above. Another national poll found a similar percentage of Americans expressing disapproval of school corporal punishment (74%), with high disapproval even among parents who spanked their own children (67%) and among Southerners (65%; Crandall, 2002). Tellingly, in a national survey of teachers throughout the country, corporal punishment was ranked as having the lowest effectiveness of the eight methods of discipline considered (Little & Akin-Little, 2008). Americans’ disapproval of corporal punishment is also manifest in the fact that 31 states have banned the practice from schools. This fact would appear to mark the “trend toward its elimination” (Ingraham v. Wright, 1977, at line 661) that the Supreme Court did not see in 1977 when only 2 states banned school corporal punishment, leading to its decision that the practice was constitutional.

## Judicial Activism Answers

### Uniqueness

#### Travel Ban thumps

Weiser, 6-29-2017 (Writer for the Gazette, "Courts shouldn't enter into political questions," Colorado Springs Gazette, http://gazette.com/courts-shouldnt-enter-into-political-questions/article/1606134)

The Supreme Court largely vindicated President Donald Trump's executive orders - temporarily suspending immigration from some specific countries this week. The court continued the injunctions with respect to aliens seeking to immigrate "who have a credible claim of a bona fide relationship with a person or entity in the United States" while allowing the temporary ban on immigration for those who do not to proceed. This compromise will hold until the Supreme Court hears the case in October. What's important is the court's rationale. "The Government's interest in enforcing §2(c) (the executive order), and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States," says the unsigned and unanimous opinion released Monday. President Trump's statutory authority to impose such bans has been upheld. The correctness or wisdom of doing so is a political question. If any action by a president pursuant to constitutional or statutory authority is seen as unpopular or unwise then the resolution is a political, not a judicial decision. It is not within the discretion of the courts to meddle in purely political questions. To permit the Judicial branch to rule on the political or social correctness of an executive action as the lower courts did in this case, is to unconstitutionally elevate it above both the Executive and Legislative branches by granting it the power to make or unmake law as it deems necessary or desirable. As Justice Neil Gorsuch wrote in his first (and unanimous) Supreme Court opinion, "the proper role of the judiciary. (is to) to apply, not amend, the work of the people's representatives." The wisdom, probity or fairness of a presidential determination that this or that person or group is ineligible to be admitted to the United States isn't related to the legality of doing so. The same was true of FDR's executive order 9066 of 1942 commanding all persons of Japanese ancestry to evacuate the West Coast, which today is seen as unconscionable and unfair. But at the time, the refusal of the Supreme Court to overturn the Japanese internment orders was based on the urgency of the war with Japan. In that case FDR's order was ratified and confirmed after the fact by an Act of Congress and the Court held that "It was within the constitutional authority of Congress and the Executive, acting together, to prescribe this curfew order as an emergency war measure." President Trump's orders, unlike FDR's, did not precede an Act of Congress they followed one that was enacted more than 65 years earlier, in 1952, which explicitly vested that authority in the president. That statute gave President Truman authority to bar the admission of Communists seeking to overthrow our government. Truman vetoed the statute but Congress overrode his veto, making it available to every subsequent president. A February, 2017 Time Magazine article lists recent instances of invocation of the statute by other presidents: "In 1981, President Ronald Reagan used it to bar "any undocumented aliens arriving at the borders of the United States from the high seas," while in 1986, he used it to bar Cuban nationals, with some exceptions. In 1994, Bill Clinton used it to bar anyone in the Haitian military or government affiliated with the 1991 coup d'état that overthrew the democratically-elected president. Ten years later, George W. Bush used it to bar corrupt members of the government of Zimbabwe from entering the U.S. And in 2012, Barack Obama used it to bar hackers aiding Iran and Syria. Trump, however, appears to be the first president to apply a blanket ban to everyone from a specific country since President Jimmy Carter used the provision to keep out Iranians during the Iran hostage crisis." In it's opinion upholding the statutory authority of the president to bar immigration the Supreme Court correctly reasoned that, "To prevent the Government from pursuing (a national security) objective by enforcing §2(c) (the executive order) against foreign nationals unconnected to the United States would appreciably injure its interests." Whether his decision was politically or socially acceptable or not is a matter of political opinion, and a matter for political resolution . in three and a half years.

### Legitimacy Resilient

#### Legitimacy empirically high and resilient

Nelson and Tucker 2017 (Michael J. Nelson Assistant Professor Department of Political Science Pennsylvania State University Patrick Tucker Ph.D. Candidate Department of Political Science Washington University in St. Louis, “The Stability of the U.S. Supreme Court’s Legitimacy,” pg online @ http://mjnelson.org/papers/NelsonTuckerPanel.pdf //um-ef)

We take up these challenges in this paper, drawing upon the most comprehensive panel data concerning support for the U.S. Supreme Court ever assembled. Tracking attitudes toward the Court measured over 11 waves and four years, our data enable us to test hypotheses about change and stability toward the U.S. Supreme Court that have been beyond the capacity of prior research designs to test. Our analysis thus enables us to address both micro-level and macro-level change in support for the U.S. Supreme Court over a period of time in which the Court’s rulings have been highly salient in American life, including rulings on the constitutionality of health care reform, voting rights, affirmative action, and same-sex marriage. Moreover, we are able to trace the persistence of any shifts in support, thereby providing some of the first evidence about the extent to which displeasing decisions are actually damaging to the Court. Our analysis reveals a remarkable stability in public support for the Court. Through a period in time in which the Court issued high profile and highly salient rulings on issues as diverse as the constitutionality of the Affordable Care Act, to the federal constitution’s guarantee of marriage to same-sex couples, to the ability of colleges to use race as a criteria in admissions, to the constitutionality of President Obama’s immigration plan, support for the Court was unwavering. Moreover, those changes that did occur were minor and predicted by a single factor: a respondent’s ideology. The results should allay fears that a decline in support has weakened the efficacy of the judiciary and instead suggests that the Court’s support may be even more robust than even the most optimistic previous accounts had suggested.

### No Link

#### No link and no backlash

Keenan D. Kmiec 2004 (Keenan has a J.D., School of Law fromUniversity of California, Berkeley and was a law clerk for the Samuel A. Alito, Jr“The Origin and Current Meanings of Judicial Activism”, 92 Cal. L. Rev. 1441, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1324&context=californialawreview)

This definition is attractive in the abstract, but as Judge O'Scannlain notes, "Judicial activism is not always easily detected, because the critical elements of judicial activism either are subjective or defy clear and concrete definition."23 There is rarely smoking gun evidence of an ulterior motive, and it can be exceedingly difficult to "establish a non-controversial benchmark by which to evaluate how far from the 'correct' decision the supposedly activist judge has strayed."23' Nevertheless, this definition seems particularly useful, if only because the scienter element limits the universe of "activist" decisions more than any of the preceding definitions. CONCLUSION The previous sections demonstrate that judicial activism is not a monolithic concept. Rather, it can represent a number of distinct jurisprudential ideas that are worthy of further investigation. For example, when scholars suggest that striking down arguably constitutional actions of other branches is judicial activism, they invite debate over the age-old questions of how one can best interpret the Constitution, and what should be the proper scope of judicial review in our tripartite system of government. Similarly, a charge of judicial activism as disregarding precedent raises complex issues about the nature of a judicial holding, and the amount of deference owed to different types of precedent. Indeed, each of the definitions discussed in Part II invites subsidiary questions that are as important as they are difficult to resolve. The moments in the history of judicial activism profiled in Part I of this Comment add depth and texture to these definitions by showing how the term was originally used. Arthur Schlesinger's insightful and thought provoking profile of the 1947 Supreme Court used the term "judicial activism" to convey fundamental ideas about law, politics, and the judicial role to a generalist audience. Edward McWhinney continued Schlesinger's tradition within legal academia, successfully treating judicial activism as a serious topic worthy of scholarly inquiry. In spite of these early examples, many will find Judge Hutcheson's imprecise and less-than-constructive invocations of the term to be the modem norm. They would agree with Judge Easterbrook's observation that the label of "judicial activism" is often akin to name-calling, a shorthand for "Judges Behaving Badly." '32 They will sympathize with Professor Randy Barnett's view that the term, "while clearly pejorative, is generally empty.1 233 Justice Scalia has voiced a version of this criticism. During oral arguments for Republican Party of Minnesota v. Kelly, 234 he claimed that calling oneself a strict constructionist while criticizing others for being judicial activists "doesn't mean anything. It doesn't say whether you're going to adopt the incorporation doctrine, whether you believe in substantive due process. It's totally imprecise. It's just nothing but fluff. '235 To a point, Justice Scalia is right. Today, a charge of "judicial activism" standing alone means little or nothing because the term has acquired so many distinct and even contradictory meanings. Nevertheless, when explained carefully, the term can be a starting point for meaningful conversation about the judicial craft, an opportunity to ask the subsidiary questions that go beyond the superficial. This Comment is an invitation to do just that.

### Court stripping NUQ

#### Activism and Court Stripping happening now

Amber Phillips, 02-12-2017, (Staff writer at the Washington Post, "It’s not just Donald Trump feuding with the courts. States are doing it, too.," https://www.washingtonpost.com/news/the-fix/wp/2017/02/12/its-not-just-donald-trump-feuding-with-the-courts-states-are-doing-it-too/?utm\_term=.8858c8ecc48f)

As President Trump escalates his confrontation with the judiciary branch in tweets and speeches, lawmakers in some half a dozen states are testing their state courts' independence with actual legislation. Bills have been proposed in Florida, Washington state and Idaho to allow those legislatures to override certain court decisions. In Arizona, the House passed a bill that would give the legislature the power to prohibit state courts from enacting federal court decisions. A series of bills are advancing in Oklahoma to increase the legislature's power over the courts, including a retirement-age restriction that would effectively wipe out most judges currently serving on the state's appeals court. The trend is also alive in Wyoming, where a bill to strip the courts of the power to hear any cases involving K-12 education funding recently passed the state Senate. Most of these bills are championed by Republican lawmakers in Republican states. But in Hawaii, where every state senator is a Democrat, a bill is advancing to give the Senate power to decide whether to reconfirm judges for multiple terms in office. The common theme driving this legislation is a concern among lawmakers that state courts have become too activist. "There is nothing the legislature can do in any way to push back against the court," said Florida state Rep. Julio Gonzalez (R), the author of a bill to allow the legislature to override Florida courts on issues of constitutionality. "That's not a check and a balance. That's not a dialogue. It's a monologue from the judiciary to everybody else." State judicial experts are alarmed by the flurry of proposals to give politicians more power over state courts, which decide some 95 percent of all cases. "This just shows a complete misunderstanding of what the function of courts are," said Sandy D'Alemberte, a former senior Democratic Florida legislator and former president of the American Bar Association. "It really needs to be there to resist majority sentiment, not be subject to it." What lawmakers see as activist, judicial experts say is a politicization -- often by lawmakers themselves -- of the courts. It's true that state and federal courts are taking up more and more cases that put them in direct conflict with the other branches of government. But just because the courts take up these cases doesn't mean they're overstepping their bounds. In fact, they argue the courts are doing exactly what the Constitution calls for: Being a check on political branches of government. "This notion that a legislature can just override a court ruling is quite radical," said Alicia Bannon, who is with the nonpartisan Brennan Center for Justice. "What this does is really shift power toward political institutions in a way I think should make people worried about the ability of courts to enforce the Constitution and protect people's rights." These past few weeks have been particularly illustrative of the escalating tension between the executive and legislative branches and the judiciary. Ignoring not-so-veiled threats from the president, a federal appeals court unanimously agreed Thursday to pause Trump's temporary travel ban on seven predominantly Muslim countries. There's actually a long history of push-and-pull between the executive and legislative branches of government and the courts. President Thomas Jefferson led the charge to impeach Supreme Court Justice Samuel Chase in 1804. In the early 20th century, there was a movement in some states to allow the public to recall court decisions it didn't like. Teddy Roosevelt even championed the idea. But -- no surprise -- after Colorado actually adopted such a law, a state court quickly swatted it down as unconstitutional. In the past few years, the political sentiment that courts need an extra check has come roaring back and found a home in an increasingly politically-charged society. North Carolina recently changed its state court elections from nonpartisan to partisan. In Oklahoma, lawmakers smarting from a series of 7-2 state Supreme Court rulings against them considered a bill requiring just one dissenting vote for the court to declare legislation unconstitutional. Last year, Kansas lawmakers fought a high-stakes game of chicken with its state Supreme Court that got so dramatic it managed to become headline news in the state. Under public pressure, lawmakers backed off a law to defund the state's entire judicial system after the court struck down a separate law. But the following year, some $1 million poured into a normally sleepy state Supreme Court election, much of it aimed at unseating four of the justices involved in the fight. (The justices narrowly held onto their seats.) All this isn't to say the judiciary is perfect. Progress Florida, a liberal nonprofit, released a report in January that found special interest money spent on state Supreme Court races more than doubled in the past ten years -- with $56.4 million expended in 2011 and 2012. "As the cost of races goes up, so does the influence of special interest groups," the report warned. Bannon said states do have the tools to deescalate these battles before it's too late. Changing the way justices are elected to make it a completely nonpartisan affair would be the largest and most impactful step. But that would require a total 180 away from the trend we're seeing today, which is a clear desire among politicians to challenge courts' independence in increasingly unprecedented ways.

### No Court Stripping

#### Congress won’t strip the court

Devins, 7 --- Professor of Law and Government at William and Mary (Winter 2007, Neal, University of Dayton Law Review, “ENACTING AND INTERPRETING STATUTES IN THE CONSTITUTION'S SHADOWS SYMPOSIUM: CONSTITUTIONAL AVOIDANCE AND THE ROBERTS COURT,” 32 Dayton L. Rev. 339, JMP) III.Conclusion: The Roberts Court and Constitutional Avoidance

What lessons should the Roberts Court glean from recent congressional attacks against the Court and from the Warren era? Should the Roberts Court make use of constitutional avoidance because it has a high opinion of Congress-that is, it believes Congress cares about the Constitution and wants to engage in meaningful constitutional dialogues? Alternatively, should it make use of constitutional avoidance because it fears that Congress is likely to strike back at constitutional rulings invalidating federal statutes? The answer is no to both questions. First, unlike Congress in the Warren era, today's Congress is less engaged in constitutional matters and less interested in asserting its prerogative to independently interpret the Constitution. n35 Second, it does not seem that Congress is poised to strike back at the Court. Unlike the Warren Court rulings, Rehnquist Court rulings did not prompt the ire of Congress. Recent court- stripping proposals, for example, have largely focused on state n36 and lower federal court n37 rulings rather than Supreme Court decisions. This has been a distinguishing feature for most of these proposals. And, as mentioned, the rulings in which the Court reinvigorated federalism by striking down all or part of 31 statutes did not prompt any significant response from Congress. Lawmakers do not have incentives to strip the Court of jurisdiction or otherwise engage in meaningful court-curbing practices. Though some lawmakers are interested in scoring points with their constituents by introducing anti-court legislation and making rhetorical statements about activist judges, there is little risk of Congress waging battle with the courts by enacting jurisdiction-stripping proposals. n38

### ! D – Soft Power

#### No impact to soft power—believers exaggerate benefits—hard power is comparatively more important

Gray 11—Professor of International Politics and Strategic Studies at the University of Reading, England [Colin S., April, “HARD POWER AND SOFT POWER: THE UTILITY OF MILITARY FORCE AS AN INSTRUMENT OF POLICY IN THE 21ST CENTURY,” Published by Strategic Studies Institute]

Soft power is potentially a dangerous idea not because it is unsound, which it is not, but rather for the faulty inference that careless or unwary observers draw from it. Such inferences are a challenge to theorists because they are unable to control the ways in which their ideas will be interpreted and applied in practice by those unwary observers. Concepts can be tricky. They seem to make sense of what otherwise is intellectually undergoverned space, and thus potentially come to control pliable minds. Given that men behave as their minds suggest and command, it is easy to understand why Clausewitz identified the enemy’s will as the target for influence.37 Beliefs about soft power in turn have potentially negative implications for attitudes toward the hard power of military force and economic muscle. Thus, soft power does not lend itself to careful regulation, adjustment, and calibration. What does this mean? To begin with a vital contrast: whereas military force and economic pressure (negative or positive) can be applied by choice as to quantity and quality, soft power cannot. (Of course, the enemy/rival too has a vote on the outcome, regardless of the texture of the power applied.) But hard power allows us to decide how we will play in shaping and modulating the relevant narrative, even though the course of history must be an interactive one once the engagement is joined. In principle, we can turn the tap on or off at our discretion. The reality is apt to be somewhat different because, as noted above, the enemy, contingency, and friction will intervene. But still a noteworthy measure of initiative derives from the threat and use of military force and economic power. But soft power is very different indeed as an instrument of policy. In fact, I am tempted to challenge the proposition that soft power can even be regarded as one (or more) among the grand strategic instruments of policy. The seeming validity and attractiveness of soft power lead to easy exaggeration of its potency. Soft power is admitted by all to defy metric analysis, but this is not a fatal weakness. Indeed, the instruments of hard power that do lend themselves readily to metric assessment can also be unjustifiably seductive. But the metrics of tactical calculation need not be strategically revealing. It is important to win battles, but victory in war is a considerably different matter than the simple accumulation of tactical successes. Thus, the burden of proof remains on soft power: (1) What is this concept of soft power? (2) Where does it come from and who or what controls it? and (3) Prudently assessed and anticipated, what is the quantity and quality of its potential influence? Let us now consider answers to these questions. 7. Soft power lends itself too easily to mischaracterization as the (generally unavailable) alternative to military and economic power. The first of the three questions posed above all but invites a misleading answer. Nye plausibly offers the co-option of people rather than their coercion as the defining principle of soft power.38 The source of possible misunderstanding is the fact that merely by conjuring an alternative species of power, an obvious but unjustified sense of equivalence between the binary elements is produced. Moreover, such an elementary shortlist implies a fitness for comparison, an impression that the two options are like-for-like in their consequences, though not in their methods. By conceptually corralling a country’s potentially attractive co-optive assets under the umbrella of soft power, one is near certain to devalue the significance of an enabling context. Power of all kinds depends upon context for its value, but especially so for the soft variety. For power to be influential, those who are to be influenced have a decisive vote. But the effects of contemporary warfare do not allow recipients the luxury of a vote. They are coerced. On the other hand, the willingness to be coopted by American soft power varies hugely among recipients. In fact, there are many contexts wherein the total of American soft power would add up in the negative, not the positive. When soft power capabilities are strong in their values and cultural trappings, there is always the danger that they will incite resentment, hostility, and a potent “blowback.” In those cases, American soft power would indeed be strong, but in a counterproductive direction. These conclusions imply no criticism of American soft power per se. The problem would lie in the belief that soft power is a reliable instrument of policy that could complement or in some instances replace military force. 8. Soft power is perilously reliant on the calculations and feelings of frequently undermotivated foreigners. The second question above asked about the provenance and ownership of soft power. Nye correctly notes that “soft power does not belong to the government in the same degree that hard power does.” He proceeds sensibly to contrast the armed forces along with plainly national economic assets with the “soft power resources [that] are separate from American government and only partly responsive to its purposes.” 39 Nye cites as a prominent example of this disjunction in responsiveness the fact that “[i]n the Vietnam era . . . American government policy and popular culture worked at cross-purposes.”40 Although soft power can be employed purposefully as an instrument of national policy, such power is notably unpredictable in its potential influence, producing net benefit or harm. Bluntly stated, America is what it is, and there are many in the world who do not like what it is. The U.S. Government will have the ability to project American values in the hope, if not quite confident expectation, that “the American way” will be found attractive in alien parts of the world. Our hopes would seem to be achievement of the following: (1) love and respect of American ideals and artifacts (civilization); (2) love and respect of America; and (3) willingness to cooperate with American policy today and tomorrow. Admittedly, this agenda is reductionist, but the cause and desired effects are accurate enough. Culture is as culture does and speaks and produces. The soft power of values culturally expressed that others might find attractive is always at risk to negation by the evidence of national deeds that appear to contradict our cultural persona.

### ! D – Democracy

#### Democracy doesn’t cause peace – statistical models are wrong.

Mousseau, 12

(Michael – Professor IR Koç University, “The Democratic Peace Unraveled: It’s the Economy” International Studies Quarterly, p 1-12)

Model 2 presents new knowledge by adding the control for economic type. To capture the dyadic expectation of peace among contract-intensive nations, the variable Contract- intensive EconomyL (CIEL) indicates the value of impersonal contracts in force per capita of the state with the lower level of CIE in the dyad; a high value of this measure indicates both states have contract-intensive economies. As can be seen, the coefficient for CIEL ()0.80) is negative and highly significant. This corroborates that impersonal economy is a highly robust force for peace. The coefficient for DemocracyL is now at zero. There are no other differences between Models 1 and 2, whose samples are identical, and no prior study corroborating the democratic peace has considered contractintensive economy. Therefore, the standard econometric inference to be drawn from Model 2 is the nontrivial result that **all prior reports of democracy as a force for peace are probably spurious, since this result is predicted and fully accounted for by economic norms theory.** CIEL and DemocracyL correlate only in the moderate range of 0.47 (Pearson’s r), so the insignificance of democracy is not likely to be a statistical artifact of multicollinearity. This is corroborated by the variance inflation factor for DemocracyL in Model 2 of 1.85, which is well below the usual rule-of-thumb indicator of multicollinearity of 10 or more. Nor should readers assume most democratic dyads have both states with impersonal economies: While almost all nations with contract-intensive economies (as indicated with the binary measure for CIE) are democratic (Polity2 > 6) (Singapore is the only long-term exception), more than half—55%—of all democratic nation-years have contract-poor economies. At the dyadic level in this sample, this translates to 80% of democratic dyads (all dyads where DemocracyBinary6 = 1) that have at least one state with a contract-poor economy. In other words, not only does Model 2 show **no evidence of causation from democracy to peace** (as reported in Mousseau 2009), but it also illustrates that this absence of democratic peace includes the vast majority—80%—of democratic dyad-years over the sample period. Nor is it likely that the causal arrow is reversed—with democracy being the ultimate cause of contract-intensive economy and peace. This is because correlations among independent variables are not calculated in the results of multivariate regressions: Coefficients show only the effect of each variable after the potential effects of the others are kept constant at their mean levels. If it was democracy that caused both impersonal economy and peace, then there would be some variance in DemocracyL remaining, after its partial correlation with CIEL is excluded, that links it directly with peace. The positive direction of the coefficient for DemocracyL informs us that no such direct effect exists (Blalock 1979:473–474). Model 3 tests for the effect of DemocracyL if a control is added for mixed-polity dyads, as suggested by Russett (2010:201). As discussed above, to avoid problems of mathematical endogeneity, I adopt the solution used by Mousseau, Orsun and Ungerer (2013) and measure regime difference as proposed by Werner (2000), drawing on the subcomponents of the Polity2 regime measure. As can be seen, the coefficient for Political Distance (1.00) is positive and significant, corroborating that regime mixed dyads do indeed have more militarized conflict than others. Yet, the inclusion of this term has no effect on the results that concern us here: CIEL ()0.85) is now even more robust, and the coefficient for DemocracyL (0.03) is above zero.7 Model 4 replaces the continuous democracy measure with the standard binary one (Polity2 > 6), as suggested by Russett (2010:201), citing Bayer and Bernhard (2010). As can be observed, the coefficient for CIEL ()0.83) remains negative and highly significant, while DemocracyBinary6 (0.63) is in the positive (wrong) direction. As discussed above, analyses of fatal dispute onsets with the far stricter binary measure for democracy (Polity = 10), put forward by Dafoe (2011) in response to Mousseau (2009), yields perfect prediction (as does the prior binary measure Both States CIE), causing quasi-complete separation and inconclusive results. Therefore, Model 5 reports the results with DemocracyBinary10 in analyses of all militarized conflicts, not just fatal ones. As can be seen, the coefficient for DemocracyBinary10 ()0.41), while negative, is not significant. Model 6 reports the results in analyses of fatal disputes with DemocracyL squared (after adding 10), which implies that the likelihood of conflict decreases more quickly toward the high values of DemocracyL. As can be seen, the coefficient for DemocracyL 2 is at zero, further corroborating that even very high levels of democracy do not appear to cause peace in analyses of fatal disputes, once consideration is given to contractintensive economy. Models 3, 4, and 6, which include Political Distance, were repeated (but unreported to save space) with analyses of all militarized interstate disputes, with the democracy coefficients close to zero in every case. Therefore, the conclusions reached by Mousseau (2009) are corroborated even with the most stringent measures of democracy, consideration of institutional distance, and across all specifications: The **democratic peace appears spurious**, with contract-intensive economy being the more likely explanation for both democracy and the democratic peace.

#### Democracy doesn’t solve war

Taner ‘2

(Binner, PhD Candidate – Syracuse U., Alternatives: Turkish Journal of Int’l Relations, 1(3), p. 43-44, http://www.alternativesjournal.com/binnur.pdf)

The discussion above suggests that the most important drawback of the “democratic peace” theory is the essentialization of the political regime as the only factor contributing to international peace and war. The ‘democratic peace’ theory underemphasizes, and most often neglects, the importance of other domestic factors such as political culture,35 degree of development, socio-economic and military considerations,36 the role of interest-groups and other domestic constituencies,37 strategic culture38 among others in decision-making. In other words, it is easily the case that the “democratic peace theory” lacks sensitivity to context and decisionmaking process. Although one should not dispute the fact that domestic political structure/regime type is an important component of any analysis of war and peace, this should be seen as only one of domestic variables, not necessarily the variable. Devoid of an analysis that gives respect to a number of other factors, superficial and sweeping generalizations will leave **many details in decision-making unaccounted for.** Consequently, although “democratic peace” theory should not be discarded entirely, current emphasis on the importance of “democracy” in eliminating bloody conflicts in the world should not blind scholars and policy circles alike to the fact that “democratic peace” is theoretically and empirically overdetermined.

### ! Turn – Democracy

#### Democratic peace theory is wrong- democracies do go to war

Layne 7

Christopher, Professor @ TX A&M, American Empire: A Debate, pg. 94

Wilsonian ideology drives the American Empire because its proponents posit that the United States must use its military power to extend democracy abroad. Here, the ideology of Empire rests on assumptions that are not supported by the facts. One reason the architects of Empire champion democracy promotion is because they believe in the so-called democratic peace theory, which holds that democratic states do not fight other democracies. Or as President George W. Bush put it with his customary eloquence, "democracies don't war; democracies are peaceful."136 The democratic peace theory is the probably the most overhyped and undersupported "theory" ever to be concocted by American academics. In fact, it is not a theory at all. Rather it is a theology that suits the conceits of Wilsonian true believers-especially the neoconservatives who have been advocating American Empire since the early 1990s. As serious scholars have shown, however, the historical record does not support the democratic peace theory.131 On the contrary, it shows that democracies do not act differently toward other democracies than they do toward nondemocratic states. When important national interests are at stake, democracies not only have threatened to use force against other democracies, but, in fact, democracies have gone to war with other democracies.

#### Democracies start more wars- statistical analysis proves

Henderson 2

Errol Henderson, Assistant Professor, Dept. of Political Science at the University of Florida, 2002, Democracy and War The End of an Illusion?, p. 146

Are Democracies More Peaceful than Nondemocracies with Respect to Interstate Wars? The results indicate that democracies are more war-prone than non-democracies (whether democracy is coded dichotomously or continu­ously) and that democracies are more likely to initiate interstate wars. The findings are obtained from analyses that control for a host of political, economic, and cultural factors that have been implicated in the onset of interstate war, and focus explicitly on state level factors instead of simply inferring state level processes from dyadic level observations as was done in earlier studies (e.g., Oneal and Russett, 1997; Oneal and Ray, 1997). The results imply that democratic enlargement is more likely to increase the probability of war for states since democracies are more likely to become involved in—and to ini­tiate—interstate wars.

## T

### Regulate

#### Counter interpretation – Regulation means rules of administrative agencies and laws made by courts

Barack Orbach 12 (Professor of Law at the University of Arizona College of Law, “What Is Regulation?”, Yale Journal on Regulation, http://yalejreg.com/what-is-regulation/)

**Lawyers frequently use the word “regulation” in reference to rules of administrative agencies**. This habit tracks the executive branch’s terminology.14 For example, Executive Order 12,866, which requires federal agencies to engage in cost-benefit analysis when “deciding whether and how to regulate,” defines “regulation” as “an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.”15 This meaning of the word mirrors another common perception of the term “regulation,” but surely does not capture the entire spectrum of regulatory instruments. **Much of our regulatory landscape does not originate in administrative agencies**.16 [FOOTNOTE 16] For example, **law made by courts—common law—is a traditional form of regulation**. See Andrew P. Morrisss et al., Regulation by Litigation (2008); Regulation Through Litigation (W. Kip Viscusi ed., 2002); Richard A. Posner, Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework, in Regulation vs. Litigation 11 (Daniel P. Kessler ed., 2010); see also Freedom Holdings, Inc. v. Spitzer, 358 F.3d 205 (2d Cir. 2004); Sanders v. Brown, 504 F.3d 904 (9th Cir. 2007); The T.J. Hooper v. Northern Barge, 60 F.2d 737 (2d Cir. 1932). ↩

## K

### Generic

#### Perm do the plan then the alt – Understanding the intricacies of politics, the state, and the military is a PREREQUISITE to effective resistance.

**Bryant 12** – (9/15, Levi, professor of Philosophy at Collin College and Chair of the Critical Philosophy program at the New Centre for Research and Practice, “War Machines and Military Logistics: Some Cards on the Table,” https://larvalsubjects.wordpress.com/2012/09/15/war-machines-and-military-logistics-some-cards-on-the-table/)

We need answers to these questions to intervene effectively. We can call them questions of “military logistics”. We are, after all, constructing war machines to combat these intolerable conditions. Military logistics asks two questions: first, it asks what things the opposing force, the opposing war machine captured by the state apparatus, relies on in order to deploy its war machine: supply lines, communications networks, people willing to fight, propaganda or ideology, people believing in the cause, etc. Military logistics maps all of these things. Second, military logistics asks how to best deploy its own resources in fighting that state war machine. In what way should we deploy our war machine to defeat war machines like racism, sexism, capitalism, neoliberalism, etc? What are the things upon which these state based war machines are based, what are the privileged nodes within these state based war machines that allows them to function? These nodes are the things upon which we want our nomadic war machines to intervene. If we are to be effective in producing change we better know what the supply lines are so that we might make them our target. What I’ve heard in these discussions is a complete indifference to military logistics. It’s as if people like to wave their hands and say “this is horrible and unjust!” and believe that hand waving is a politically efficacious act. Yeah, you’re right, it is horrible but saying so doesn’t go very far and changing it. It’s also as if people are horrified when anyone discusses anything besides how horribly unjust everything is. Confronted with an analysis why the social functions in the horrible way, the next response is to say “you’re justifying that system and saying it’s a-okay!” This misses the point that the entire point is to map the “supply lines” of the opposing war machine so you can strategically intervene in them to destroy them and create alternative forms of life. You see, we already took for granted your analysis of how horrible things are. You’re preaching to the choir. We wanted to get to work determining how to change that and believed for that we needed good maps of the opposing state based war machine so we can decide how to intervene. We then look at your actual practices and see that your sole strategy seems to be ideological critique or debunking. Your idea seems to be that if you just prove that other people’s beliefs are incoherent, they’ll change and things will be different. But we’ve noticed a couple things about your strategy: 1) there have been a number of bang-on critiques of state based war machines, without things changing too much, and 2) we’ve noticed that we might even persuade others that labor under these ideologies that their position is incoherent, yet they still adhere to it as if the grounds of their ideology didn’t matter much. This leads us to suspect that there are other causal factors that undergird these social assemblages and cause them to endure is they do. We thought to ourselves, there are two reasons that an ideological critique can be successful and still fail to produce change: a) the problem can be one of “distribution”. The critique is right but fails to reach the people who need to hear it and even if they did receive the message they couldn’t receive it because it’s expressed in the foreign language of “academese” which they’ve never been substantially exposed to (academics seem to enjoy only speaking to other academics even as they say their aim is to change the world). Or b) there are other causal factors involved in why social worlds take the form they do that are not of the discursive, propositional, or semiotic order. My view is that it is a combination of both. I don’t deny that ideology is one component of why societies take the form they do and why people tolerate intolerable conditions. I merely deny that this is the only causal factor. I don’t reject your political aims, but merely wonder how to get there. Meanwhile, you ~~guys~~ behave like a war machine that believes it’s sufficient to drop pamphlets out of an airplane debunking the ideological reasons that persuade the opposing force’s soldiers to fight this war on behalf of the state apparatus, forgetting supply lines, that there are other soldiers behind them with guns to their back, that they have obligations to their fellows, that they have families to feed or debt to pay off, etc. When I point out these other things it’s not to reject your political aims, but to say that perhaps these are also good things to intervene in if we wish to change the world. In other words, I’m objecting to your tendency to use a hammer to solve all problems and to see all things as a nail (discursive problems), ignoring the role that material nonhuman entities play in the form that social assemblages take. This is the basic idea behind what I’ve called “terraism”. Terraism has three components: 1) “Cartography” or the mapping of assemblages to understand why they take the form they take and why they endure. This includes the mapping of both semiotic and material components of social assemblages. 2) “Deconstruction” Deconstruction is a practice. It includes both traditional modes of discursive deconstruction (Derridean deconstruction, post-structuralist feminist critique, Foucaultian genealogy, Cultural Marxist critique, etc), but also far more literal deconstruction in the sense of intervening in material or thingly orders upon which social assemblages are reliant. It is not simply beliefs, signs, and ideologies that cause oppressive social orders to endure or persist, but also material arrangements upon which people depend to live as they do. Part of changing a social order thus necessarily involves intervening in those material networks to undermine their ability to maintain their relations or feedback mechanisms that allow them to perpetuate certain dependencies for people. Finally, 3) there is “Terraformation”. Terraformation is the hardest thing of all, as it requires the activist to be something more than a critic, something more than someone who simply denounces how bad things are, someone more than someone who simply sneers, producing instead other material and semiotic arrangements rendering new forms of life and social relation possible. Terraformation consists in building alternative forms of life. None of this, however, is possible without good mapping of the terrain so as to know what to deconstruct and what resources are available for building new worlds. Sure, I care about ontology for political reasons because I believe this world sucks and is profoundly unjust. But rather than waving my hands and cursing because of how unjust and horrible it is so as to feel superior to all those about me who don’t agree, rather than playing the part of the beautiful soul who refuses to get his hands dirty, I think we need good maps so we can blow up the right bridges, power lines, and communications networks, and so we can engage in effective terraformation.

#### Learning about state policy is key to solve-the alt is educationally bankrupt

Eckersley 4 Robyn, Reader/Associate Professor in the Department of Political Science at the University of Melbourne, “The Green State: Rethinking Democracy and Sovereignty”, MIT Press, 2004, Google Books, pp. 3-8

While acknowledging the basis for this antipathy toward the nation- state, and the limitations of state-centric analyses of global ecological degradation, I seek to draw attention to the positive role that states have played, and might increasingly play, in global and domestic politics. Writing more than twenty years ago, Hedley Bull (a proto-constructivist and leading writer in the English school) outlined the state's positive role in world affairs, and his arguments continue to provide a powerful challenge to those who somehow seek to "get beyond the state," as if such a move would provide a more lasting solution to the threat of armed conflict or nuclear war, social and economic injustice, or environmental degradation.10 As Bull argued, given that the state is here to stay whether we like it or not, then the call to get "beyond the state is a counsel of despair, at all events if it means that we have to begin by abolishing or subverting the state, rather than that there is a need to build upon it.""¶ In any event, rejecting the "statist frame" of world politics ought not prohibit an inquiry into the emancipatory potential of the state as a crucial "node" in any future network of global ecological governance. This is especially so, given that one can expect states to persist as major sites of social and political power for at least the foreseeable future and that any green transformations of the present political order will, short of revolution, necessarily be state-dependent. Thus, like it or not, those concerned about ecological destruction must contend with existing institutions and, where possible, seek to "rebuild the ship while still at sea." And if states are so implicated in ecological destruction, then an inquiry into the potential for their transformation even their modest reform into something that is at least more conducive to ecological sustainability would seem to be compelling.¶ Of course, it would be unhelpful to become singularly fixated on the redesign of the state at the expense of other institutions of governance. States are not the only institutions that limit, condition, shape, and direct political power, and it is necessary to keep in view the broader spectrum of formal and informal institutions of governance (e.g., local, national, regional, and international) that are implicated in global environmental change. Nonetheless, while the state constitutes only one modality of political power, it is an especially significant one because of its historical claims to exclusive rule over territory and peoples—as expressed in the principle of state sovereignty. As Gianfranco Poggi explains, the political power concentrated in the state "is a momentous, pervasive, critical phenomenon. Together with other forms of social power, it constitutes an indispensable medium for constructing and shaping larger social realities, for establishing, shaping and maintaining all broader and more durable collectivities."12 States play, in varying degrees, significant roles in structuring life chances, in distributing wealth, privilege, information, and risks, in upholding civil and political rights, and in securing private property rights and providing the legal/regulatory framework for capitalism. Every one of these dimensions of state activity has, for good or ill, a significant bearing on the global environmental crisis. Given that the green political project is one that demands far-reaching changes to both economies and societies, it is difficult to imagine how such changes might occur on the kind of scale that is needed without the active support of states. While it is often observed that states are too big to deal with local ecological problems and too small to deal with global ones, the state nonetheless holds, as LennartLundqvist puts it, "a unique position in the constitutive hierarchy from individuals through villages, regions and nations all the way to global organizations. The state is inclusive of lower political and administrative levels, and exclusive in speaking for its whole territory and population in relation to the outside world."13 In short, it seems to me inconceivable to advance ecological emancipation without also engaging with and seeking to transform state power.¶Of course, not all states are democratic states, and the green movement has long been wary of the coercive powers that all states reputedly enjoy. Coercion (and not democracy) is also central to Max Weber's classic sociological understanding of the state as "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory."14 Weber believed that the state could not be defined sociologically in terms of its ends\* only formally as an organization in terms of the particular means that are peculiar to it.15 Moreover his concept of legitimacy was merely concerned with whether rules were accepted by subjects as valid (for whatever reason); he did not offer a normative theory as to the circumstances when particular rules ought to be accepted or whether beliefs about the validity of rules were justified. Legitimacy was a contingent fact, and in view of his understanding of politics as a struggle for power in the context of an increasingly disenchanted world, likely to become an increasingly unstable achievement.16¶In contrast to Weber, my approach to the state is explicitly normative and explicitly concerned with the purpose of states, and the democratic basis of their legitimacy. It focuses on the limitations of liberal normative theories of the state (and associated ideals of a just constitutional arrangement), and it proposes instead an alternative green theory that seeks to redress the deficiencies in liberal theory. Nor is my account as bleak as Weber's. The fact that states possess a monopoly of control over the means of coercion is a most serious matter, but it does not necessarily imply that they must have frequent recourse to that power. In any event, whether the use of the state's coercive powers is to be deplored or welcomed turns on the purposes for which that power is exercised, the manner in which it is exercised, and whether it is managed in public, transparent, and accountable ways—a judgment that must be made against a background of changing problems, practices, and under- standings. The coercive arm of the state can be used to "bust" political demonstrations and invade privacy. It can also be used to prevent human rights abuses, curb the excesses of corporate power, and protect the environment.¶In short, although the political autonomy of states is widely believed to be in decline, there are still few social institution that can match the same degree of capacity and potential legitimacy that states have to redirect societies and economies along more ecologically sustainable lines to address ecological problems such asglobal warming and pollution, the buildup of toxic and nuclear wastes and the rapid erosion of the earth's biodiversity. States—particularly when they act collectively—have the capacity to curb the socially and ecologically harmful consequences of capitalism. They are also more amenable to democratization than cor- porations, notwithstanding the ascendancy of the neoliberal state in the increasingly competitive global economy. There are therefore many good reasons why green political theorists need to think not only critically but also constructively about the state and the state system. While the state is certainly not "healthy" at the present historical juncture, in this book I nonetheless join Poggi by offering "a timid two cheers for the old beast," at least as a potentially more significant ally in the green cause.17

#### Abstract ethics don’t produce political results besides violence – embrace the hard work of pragmatic reform.

Condit 15 [Celeste, Distinguished Research Professor of Communication Studies at the University of Georgia, “Multi-Layered Trajectories for Academic Contributions to Social Change,” Feb 4, 2015, Quarterly Journal of Speech, Volume 101, Issue 1, 2015]

Thus, when Žižek and others urge us to “Act” with violence to destroy the current Reality, without a vision of an alternative, on the grounds that the links between actions and consequences are never certain, we can call his appeal both a failure of imagination and a failure of reality. As for reality, we have dozens of revolutions as models, and the historical record indicates quite clearly that they generally lead not to harmonious cooperation (what I call “AnarchoNiceness” to gently mock the romanticism of Hardt and Negri) but instead to the production of totalitarian states and/or violent factional strife. A materialist constructivist epistemology accounts for this by predicting that it is not possible for symbol-using animals to exist in a symbolic void. All symbolic movement has a trajectory, and if you have not imagined a potentially realizable alternative for that trajectory to take, then what people will leap into is biological predispositions—the first iteration of which is the rule of the strongest primate. Indeed, this is what experience with revolutions has shown to be the most probable outcome of a revolution that is merely against an Evil. The failure of imagination in such rhetorics thereby reveals itself to be critical, so it is worth pondering sources of that failure. The rhetoric of “the kill” in social theory in the past half century has repeatedly reduced to the leap into a void because the symbolized alternative that the context of the twentieth century otherwise predispositionally offers is to the binary opposite of capitalism, i.e., communism. That rhetorical option, however, has been foreclosed by the historical discrediting of the readily imagined forms of communism (e.g., Žižek9). The hard work to invent better alternatives is not as dramatically enticing as the story of the kill: such labor is piecemeal, intellectually difficult, requires multi-disciplinary understandings, and perhaps requires more creativity than the typical academic theorist can muster. In the absence of a viable alternative, the appeals to Radical Revolution seem to have been sustained by the emotional zing of the kill, in many cases amped up by the appeal of autonomy and manliness (Žižek uses the former term and deploys the ethos of the latter). But if one does not provide a viable vision that offers a reasonable chance of leaving most people better off than they are now, then Fox News has a better offering (you'll be free and you'll get rich!). A revolution posited as a void cannot succeed as a horizon of history, other than as constant local scale violent actions, perhaps connected by shifting networks we call “terrorists.” This analysis of the geo-political situation, of the onto-epistemological character of language, and of the limitations of the dominant horizon of social change indicates that the focal project for progressive Left Academics should now include the hard labor to produce alternative visions that appear materially feasible.

#### Default to pragmatic action – radical solutions are easily conceivable but never become actualized outside the round

Condit 15 [Celeste, Distinguished Research Professor of Communication Studies at the University of Georgia, “Multi-Layered Trajectories for Academic Contributions to Social Change,” Feb 4, 2015, *Quarterly Journal of Speech*, Volume 101, Issue 1, 2015]

Thus, when Žižek and others urge us to “Act” with violence to destroy the current Reality, without a vision of an alternative, on the grounds that the links between actions and consequences are never certain, we can call his appeal both a failure of imagination and a failure of reality. As for reality, we have dozens of revolutions as models, and the historical record indicates quite clearly that they generally lead not to harmonious cooperation (what I call “AnarchoNiceness” to gently mock the romanticism of Hardt and Negri) but instead to the production of totalitarian states and/or violent factional strife. A materialist constructivist epistemology accounts for this by predicting that it is not possible for symbol-using animals to exist in a symbolic void. All symbolic movement has a trajectory, and if you have not imagined a potentially realizable alternative for that trajectory to take, then what people will leap into is biological predispositions—the first iteration of which is the rule of the strongest primate. Indeed, this is what experience with revolutions has shown to be the most probable outcome of a revolution that is merely against an Evil. The failure of imagination in such rhetorics thereby reveals itself to be critical, so it is worth pondering sources of that failure. The rhetoric of “the kill” in social theory in the past half century has repeatedly reduced to the leap into a void because the symbolized alternative that the context of the twentieth century otherwise predispositionally offers is to the binary opposite of capitalism, i.e., communism. That rhetorical option, however, has been foreclosed by the historical discrediting of the readily imagined forms of communism (e.g., Žižek9). The hard work to invent better alternatives is not as dramatically enticing as the story of the kill: such labor is piecemeal, intellectually difficult, requires multi-disciplinary understandings, and perhaps requires more creativity than the typical academic theorist can muster. In the absence of a viable alternative, the appeals to Radical Revolution seem to have been sustained by the emotional zing of the kill, in many cases amped up by the appeal of autonomy and manliness (Žižek uses the former term and deploys the ethos of the latter). But if one does not provide a viable vision that offers a reasonable chance of leaving most people better off than they are now, then Fox News has a better offering (you'll be free and you'll get rich!). A revolution posited as a void cannot succeed as a horizon of history, other than as constant local scale violent actions, perhaps connected by shifting networks we call “terrorists.” This analysis of the geo-political situation, of the onto-epistemological character of language, and of the limitations of the dominant horizon of social change indicates that the focal project for progressive Left Academics should now include the hard labor to produce alternative visions that appear materially feasible.

**Valid, descriptive understandings of the world are an essential prerequisite to emancipatory critique and epistemic decolonization.**

**Jones 04** – (August 2004, Branwen Gruffydd, PhD in Development Studies from the University of Sussex, Senior Lecturer in International Political Economy at Goldsmiths University of London, “From Eurocentrism to Epistemological Internationalism: power, knowledge and objectivity in International Relations,” Paper presented at Theorising Ontology, Annual Conference of the International Association for Critical Realism, University of Cambridge, http://www.csog.group.cam.ac.uk/iacr/papers/Jones.pdf)

The ‘common-sense’ view pervading recent discussions of epistemology, ontology and methodology in IR asserts that objectivity implies value-free neutrality. However, objective social inquiry has an inherent tendency to be critical, in various senses. To the extent that objective knowledge provides a better and more adequate account of reality than other ideas, such knowledge is inherently critical (implicitly or explicitly) of those ideas. 30 In other words critical social inquiry does not (or not only) manifest its ‘criticalness’ through self-claimed labels of being critical or siding with the oppressed, but through the substantive critique of prevailing ideas. Objective social knowledge constitutes a specific form of criticism: explanatory critique. The critique of dominant ideas or ideologies is elaborated through providing a more adequate explanation of aspects of the world, and in so doing exposing what is wrong with the dominant ideology. This may also entail revealing the social conditions which give rise to ideologies, thus exposing the necessary and causal relation between particular social relations and particular ideological conceptions. In societies which are constituted by unequal structures of social relations giving rise to unequal power and conflicting interests, the reproduction of those structured relations is in the interests of the powerful, whereas transformation of existing structured relations is in the interests of the weak. Because ideas inform social action they are casually efficacious either in securing the reproduction of existing social relations (usually as an unintended consequence of social practice), or in informing social action aimed at transforming social relations. This is why ideas cannot be ‘neutral’. Ideas which provide a misrepresentation of the nature of society, the causes of unequal social conditions, and the conflicting interests of the weak and powerful, will tend to help secure the reproduction of prevailing social relations. Ideas which provide a more adequate account of the way society is structured and how structured social relations produce concrete conditions of inequality and exploitation can potentially inform efforts to change those social relations. In this sense, ideas which are false are ideological and, in serving to promote the reproduction of the status quo and avoid attempts at radical change, are in the interests of the powerful. An account which is objective will contradict ideological ideas, implicitly or explicitly criticising them for their false or flawed accounts of reality. The criticism here arises not, or not only, from pointing out the coincidence between ideologies and the interests of the powerful, nor from a prior normative stance of solidarity with the oppressed, but from exposing the flaws in dominant ideologies through a more adequate account of the nature and causes of social conditions 31 . A normative commitment to the oppressed must entail a commitment to truth and objectivity, because true ideas are in the interest of the oppressed, false ideas are in the interest of the oppressors. In other words, the best way to declare solidarity with the oppressed is to declare one’s commitment to objective inquiry 32 . As Nzongola-Ntalaja (1986: 10) has put it: It is a question of whether one analyses society from the standpoint of the dominant groups, who have a vested interest in mystifying the way society works, or from the standpoint of ordinary people, who have nothing to lose from truthful analyses of their predicament. The philosophical realist theory of science, objectivity and explanatory critique thus provides an alternative response to the relationship between knowledge and power. Instead of choosing perspectives on the basis of our ethical commitment to the cause of the oppressed and to emancipatory social change, we should choose between contending ideas on the basis of which provides a better account of objective social reality. This will inherently provide a critique of the ideologies which, by virtue of their flawed account of the social world, serve the interests of the powerful. Exemplars of explanatory critique in International Relations are provided in the work of scholars such as Siba Grovogui, James Gathii, Anthony Anghie, Bhupinder Chimni, Jacques Depelchin, Hilbourne Watson, Robert Vitalis, Sankaran Krishna, Michel-Rolph Trouillot 33 . Their work provides critiques of central categories, theories and discourses in the theory and practice of IR and narratives of world history, including assumptions about sovereignty, international society, international law, global governance, the nature of the state. They expose the ideological and racialised nature of central aspects of IR through a critical examination of both the long historical trajectory of imperial ideologies regarding colonized peoples, and the actual practices of colonialism and decolonisation in the constitution of international orders and local social conditions. Their work identifies the flaws in current ideas by revealing how they systematically misrepresent or ignore the actual history of social change in Africa, the Caribbean and other regions of the Third World, both past and present – during both colonial and neo-colonial periods of the imperial world order. Their work reveals how racism, violence, exploitation and dispossession, colonialism and neo-colonialism have been central to the making of contemporary international order and contemporary doctrines of international law, sovereignty and rights, and how such themes are glaring in their absence from histories and theories of international relations and international history. Objective social knowledge which accurately depicts and explains social reality has these qualities by virtue of its relation to its object, not its subject. As Collier argues, “The science/ideology distinction is an epistemological one, not a social one.” (Collier 1979: 60). So, for example, in the work of Grovogui, Gathii and Depelchin, the general perspective and knowledge of conditions in and the history of Africa might be due largely to the African social origins of the authors. However the judgement that their accounts are superior to those of mainstream IR rests not on the fact that the authors are African, but on the greater adequacy of their accounts with respect to the actual historical and contemporary production of conditions and change in Africa and elsewhere in the Third World. The criteria for choosing their accounts over others derives from the relation between the ideas and their objects (what they are about), not from the relation between the ideas and their subjects (who produced them). It is vital to retain explicitly some commitment to objectivity in social inquiry, to the notion that the proper criterion for judging ideas about the world lies in what they say about the world, not whose ideas they are. A fundamental problem which underlies the origin and reproduction of IR’s eurocentricity is the overwhelming dominance of ideas produced in and by the west, and the wilful and determined silencing of the voices and histories of the colonised. But the result of this fundamental problem is flawed knowledge about the world. Eurocentricity is therefore a dual problem concerning both the authors and the content of knowledge, and cannot be resolved through normative commitments alone. It is not only the voices of the colonised, but the histories of colonialism, which have been glaring in their absence from the discipline of International Relations. Overcoming eurocentricity therefore requires not only concerted effort from the centre to create space and listen to hitherto marginalised voices, but also commitment to correcting the flaws in prevailing knowledge – and it is not only ‘the Other’ who can and should elaborate this critique. A vitally important implication of objectivity is that it is the responsibility of European and American, just as much as non-American or non-European scholars, to decolonise IR. The importance of objectivity in social inquiry defended here can perhaps be seen as a form of epistemological internationalism. It is not necessary to be African to attempt to tell a more accurate account of the history of Europe’s role in the making of the contemporary Africa and the rest of the world, for example, or to write counter-histories of ‘the expansion of international society’ which detail the systematic barbarity of so-called Western civilisation. It is not necessary to have been colonised to recognise and document the violence, racism, genocide and dispossession which have characterised European expansion over five hundred years.

### Biopolitics

#### Vote aff to take away the disciplinary tool wielded by the empire against its subjects

Tyson E. Lewis May 2006(Tyson E., Montclair State University, Faculty, “THE SCHOOL AS AN EXCEPTIONAL SPACE: RETHINKING EDUCATION FROM THE PERSPECTIVE OF THE BIOPEDAGOGICAL, ” Educational Theory, Volume 56 Issue 2, http://onlinelibrary.wiley.com/doi/10.1111/j.1741-5446.2006.00009.x/abstract)

The inferior legal status of children thus explains why students in schools can be subjected to searches, violations of free speech, and corporal punishment much more frequently than adults are. Simply put, students are not seen as citizen subjects but only as bearers of bare life, thus childhood emerges as the missing concept in Agamben’s work for understanding the ambiguities of a state between the human and the nonhuman. A brief history of Supreme Court decisions concerning the paradoxical location of children in relation to schooling exposes this point. Parham v. J.R. (1979) revealed the difficulty of granting children due process rights; Bethel School District No. 403 v. Fraser (1986) restricted rights of free speech in schools; New Jersey v. T.L.O. (1985) restricted children’s Fourth Amendment rights for freedom from unreasonable search and seizure, removing requirements for search warrants while also lowering probable cause thresholds; and Ingraham v. Wright (1977) did not require schools to use procedural safeguards before inflicting corporal punishment.42 This last case is most disturbing, especially when we consider that as of 2000, twenty-two states still permitted corporal punishment in schools, most of which is inflicted on youth of color. In fact, according to the National Coalition to Abolish Corporal Punishment in Schools, African American students are hit at a rate two times higher than their relative population size.43 Those procedural rights juvenile courts do grant children are either ‘‘watered down’’ (for example, they are not entitled to jury trials) or are being revoked at a surprising rate.44 As Agamben reminds us, the life worth living and the abandoned life are linked within the biopolitical — one supplements the other: ‘‘Every gesture, every event in the camp, from the most ordinary to the most exceptional, enacts the decision on bare life by which the German biopolitical body is made actual’’ (HS, 174). Thus in Germany the Jew as bare life became the necessary prop against which the German body could define itself. Could we not argue that the bare life of the poor, minority student exposed to the sovereign’s ban is intimately related to the overly commercialized body of the white, middle-class student? Are these bodies not intimately related to one another within a society divided along race and class lines? In the context of the state of exception, the two movements within biopedagogy — toward normalization and commodification and, conversely, toward immanent educational extermination — expose themselves as two sides of the pedagogical coin within Empire. As a result, the state of exception in education increasingly reveals its internal contradictions and the paradoxes issuing from the heart of biopedagogy itself: the tenuous relation between educational life and life in general. Education becomes a camp-like space where police and pedagogy enter a zone of indistinction sustained by the rhetoric of a just war. In this state of exception the contradiction reaches its climax, and the educational life of the student becomes indistinguishable from bare life: a state in which subjects are made to survive or subjected to social death in the form of abandonment. As John Devine has suggested, docile, autonomous, and productive subjects are not the end result of such exceptional circumstances in schooling.45 In fact, evidence suggests that the militarized implementation of zero-tolerance policies actually reinforces the behaviors that these policies are intended to prevent.46 Here surveillance panopticism is not meant simply to reform the soul or normalize conduct; rather, it acts as the gaze of the sovereign ban, leading to increased raids, confiscation of property, interrogations, and zero-tolerance suspensions. In sum, the state of war I have been outlining produces a disjunction that prevents the close alignment of schools with either the prison — which, according to Foucault, produces self-regulating and productive citizen subjects — or an ISA — which produces educated worker subjects through the process of ideological interpellation. Once the structure of the camp is exposed, then the school becomes an increasingly contested terrain where the stakes against educational death are clearly articulated.

# Neg

## Case Neg

\*\*\*not a great argument

#### Corporal Benefits is good – litany of reasons

Immediacy, Strong Deterrent, Compliance, Cost effective

Alexa Josphine, 5-31-2017, (Her work has appeared in the monthly publication "DRUM" magazine, among other publications. Josphine is pursuing her master's degree in journalism from Daystar University in Nairobi, Kenya., "The Advantages of Corporal Punishment," Legal Beagle, http://legalbeagle.com/8211462-advantages-corporal-punishment.html)

“The Advantages of Corporal Punishment” Almost a quarter of a million children in the U.S. were subjected to corporal punishment in public schools between the 2006 to 2007 academic year, according to “Impairing Education,” a report done by Human Rights Watch and the American Civil Liberties Union in August 2009. Corporal punishment is the deliberate infliction of physical pain such as flogging, slapping and paddling to punish wrongdoing. It can take the form of parental, school or judicial corporal punishment. Though opposition against it is strong, corporal punishment still has some strong advocates. IMMEDIACY Compared to alternative methods of retribution such as expulsion, suspension, grounding or community service, corporal punishment has immediate effects. It is a short-term method of punishment that can be quickly administered in the home, school or in prison. For example a student may stop talking and disrupting a class for a while if the teacher spanks him. The teacher can then go back to teaching without taking too much time managing a student’s behavior. STRONG DETERRENT Physical pain and fear is a strong deterrent for the person who receives corporal punishment and for those who witness it. People will associate a certain behavior with a certain consequence such as spanking, paddling or flogging. This encourages you to avoid those behaviors that elicit corporal punishment. Children being physically punished will also feel deterred from engaging in certain behaviors or activities that will attract physical punishment.(see ref 2) COMPLIANCE Psychologist Elizabeth Thompson Gershoff of the National Center for Children in Poverty at Columbia University generated a study on the effectiveness of corporal punishment. The study, which was summarized in 2002 in the American Psychological Association website, found a general agreement that this type of punishment is effective in eliciting immediate compliance. The association between corporal punishment and a child’s behavior is that there is increased compliance from the child COST EFFECTIVE Compared to alternative methods of punishment and discipline, corporal punishment can cost less. Most of the times in the case of parental and school corporal punishment, only a ruler, a paddle or a belt are required to retribution. Schools with limited finances and resources use corporal punishment as a more cost-effective method of discipline. In judicial corporal punishment an alternative method would be rehabilitation or community service programs, which can be costly to organize and maintain.

#### Banning Corporal Punishment is bad - empirics

Theodore Kettle 07 Jan 2010 (Writer at newsmax, “Pro-Spanking Studies May Have Global Effect,” Newsmax, http://www.newsmax.com/US/spanking-studies-children-spock/2010/01/07/id/345669/)

Two recent analyses – one psychological, the other legal – may debunk lenient modern parenting the way the Climategate e-mail scandal has short circuited global warming alarmism. A study entailing 2,600 interviews pertaining to corporal punishment, including the questioning of 179 teenagers about getting spanked and smacked by their parents, was conducted by Marjorie Gunnoe, professor of psychology at Calvin College in Grand Rapids, Michigan. Gunnoe’s findings, announced this week: “The claims made for not spanking children fail to hold up. They are not consistent with the data.” Those who were physically disciplined performed better than those who weren’t in a whole series of categories, including school grades, an optimistic outlook on life, the willingness to perform volunteer work, and the ambition to attend college, Gunnoe found. And they performed no worse than those who weren’t spanked in areas like early sexual activity, getting into fights, and becoming depressed. She found little difference between the sexes or races. Another study published in the Akron Law Review last year examined criminal records and found that children raised where a legal ban on parental corporal punishment is in effect are much more likely to be involved in crime. A key focus of the work of Jason M. Fuller of the University of Akron Law School was Sweden, which 30 years ago became the first nation to impose a complete ban on physical discipline and is in many respects “an ideal laboratory to study spanking bans,” according to Fuller. Since the spanking ban, child abuse rates in Sweden have exploded over 500 percent, according to police reports. Even just one year after the ban took effect, and after a massive government public education campaign, Fuller found that “not only were Swedish parents resorting to pushing, grabbing, and shoving more than U.S. parents, but they were also beating their children twice as often.” After a decade of the ban, “rates of physical child abuse in Sweden had risen to three times the U.S. rate” and “from 1979 to 1994, Swedish children under seven endured an almost six-fold increase in physical abuse,” Fuller’s analysis revealed. “Enlightened” parenting also seems to have produced increased violence later. “Swedish teen violence skyrocketed in the early 1990s, when children that had grown up entirely under the spanking ban first became teenagers,” Fuller noted. “Preadolescents and teenagers under fifteen started becoming even more violent toward their peers. By 1994, the number of youth criminal assaults had increased by six times the 1984 rate.” Since Sweden, dozens of countries have banned parental corporal punishment, like Germany, Italy, and in 2007 New Zealand, where using force to correct children entails full criminal penalties, and where a mother cannot even legally take her child’s hand to bring him where he refuses to go. The United Nations Committee on the Rights of the Child, meanwhile, challenges laws permitting any physical punishment of children and has called on all governments in the world to prohibit every form of physical discipline, including within the family. In the U.S., the National Association of Social Workers has declared that all physical punishment of children has harmful effects and should be stopped; social workers are being trained to advocate against physical discipline when they visit homes. And in 2007, San Francisco Bay area Assemblywoman Sally Lieber unsuccessfully proposed legislation imposing a California state ban on spanking children under the age of four. Contrary to popular belief, the pediatrician and leftist political activist Dr. Benjamin Spock did not popularize parental leniency. In early editions of his famously bestselling book, “Baby and Child Care,” Spock did not rule out spanking, (although he did later); on the contrary, Spock called for “clarity and consistency of the parents’ leadership,” considered kindness and devotion to be a necessity for parents who spank, and believed that the inability to be firm was “the commonest problem of parents in America.” Spock’s 21st century disciples, however, depart from his original precepts. DrSpock.com, which “embodies the strength and identity of world-renowned pediatrician Dr. Benjamin Spock, providing parents with the latest expert content from today's leading authorities in parenting,” and embraces Dr. Spock’s “philosophy and vision,” declares that “Punishment is not the key to discipline.” The parental guidance website contends that “Spanking teaches children that the larger, stronger person has the power to get his way, whether or not he is in the right.” DrSpock.com concludes that “The American tradition of spanking may be one reason that there is much more violence in our country than in any other comparable nation.” Of like mind is the American Academy of Pediatrics, whose official policy says: “Despite its common acceptance, spanking is a less effective strategy than timeout or removal of privileges for reducing undesired behavior in children. Although spanking may immediately reduce or stop an undesired behavior, its effectiveness decreases with subsequent use.” The academy adds: “The only way to maintain the initial effect of spanking is to systematically increase the intensity with which it is delivered, which can quickly escalate into abuse. Thus, at best, spanking is only effective when used in selective infrequent situations.” “Timeout,” a widely popularized alternative to physical discipline in which a child is separated from a situation or environment after misbehaving, was devised in the 1960’s by behavioral researcher Arthur Staats as “a very mild punishment, the removal from a more reinforcing situation.” Gunnoe’s findings are being largely ignored by the U.S. media, but made a splash in British newspapers. It is not the first time her work has been bypassed by the press. Her 1997 work showing that customary spanking reduced aggression also went largely unreported. Nor is she alone in her conclusions. Dr. Diana Baumrind of the University of California, Berkeley and her teams of professional researchers over a decade conducted what is considered the most extensive and methodologically thorough child development study yet done. They examined 164 families, tracking their children from age four to 14. Baumrind found that spanking can be helpful in certain contexts and discovered “no evidence for unique detrimental effects of normative physical punishment.” She also found that children who were never spanked tended to have behavioral problems, and were not more competent than their peers. As in climate change, politicians all over the world seem out of touch with the most rigorous science regarding parental discipline. The newest research could constitute powerful ammunition to parents rights activists seeking to reverse the global trend of intrusive governments muscling themselves between the rod and the child.

## Judicial Activism DA

### 1NC Shell

#### Uniqueness – Courts minimalist now – maintain precedent and avoid political decisions

Cass R Sunstein (Harvard Law professor, “Don't Expect the Supreme Court to Change Much”, Nov 9th 2016, https://www.bloomberg.com/view/articles/2016-11-09/don-t-expect-the-supreme-court-to-change-much)

The Donald Trump presidency, coupled with the new Congress, is likely to produce major changes in federal law. But for the Supreme Court, expect a surprising amount of continuity -- far more than conservatives hope and progressives fear. If, as expected, Trump is able to replace Justice Antonin Scalia, the court will look a lot like it did until Scalia died in February: four relative liberals (Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor); two moderate conservatives (John Roberts and Anthony Kennedy); and three relative conservatives (Clarence Thomas, Samuel Alito, and the new justice). That means it would reflect the same ideological makeup as the court that upheld Obamacare and required states to recognize same-sex marriages. It would contain the same five justices -- a majority -- who recently voted to uphold affirmative action programs and to invalidate restrictions on the abortion right. A court like that won't license a Republican-led executive branch to do whatever it wants. It will assert the rule of law. It will rarely veer off in novel directions. To be sure, things will be different if Trump is able to replace one of the liberal justices. Neither Ginsburg (who is 83) nor Breyer (78) is a spring chicken. But they both appear to be in good health; don't be surprised if they continue to serve for the next four years. Suppose, though, that one of them does resign. At that point, significant changes would be possible. But probably not many. One reason involves the idea of respect for precedent. The justices are usually reluctant to disturb the court's previous rulings, even if they disagree strongly with them. In this light, would a new majority really want to announce in, say, 2018, that states can ban same-sex marriage, after years of saying otherwise? That’s unlikely: Such an abrupt reversal of course, defeating widespread expectations, would make the law seem both unstable and awkwardly political. Would a Trump court want to overrule Roe v. Wade, which has been the law since 1973, and thus allow states to ban abortion? Considering the intensity of conservative opposition to abortion, that is somewhat more probable. But judges are not politicians, and again to avoid the appearance of destabilizing constitutional law, any majority would hesitate before doing something so dramatic. Would a court composed of Alito, Roberts, Kennedy, Thomas, and one or two Trump appointees be willing to grant broad new powers to the president? No chance. The current conservatives have expressed a great deal of skepticism about executive authority. They aren’t going to turn on a dime merely because the president is a Republican. There is a more general point. Many judges (and Roberts in particular) are drawn to “judicial minimalism”; they prefer to focus on the facts of particular cases. Quite apart from respecting prior rulings, they like small steps and abhor bold movements or big theories. An instructive example: In the 1970s, many progressives were terrified when President Richard Nixon found himself a position to transform a left-of-center court, led by Earl Warren, and to appoint no fewer than four “strict constructionists.” And to be sure, the Nixon court, as it was sometimes called, repeatedly disappointed the left. It halted the movement toward recognition of welfare rights, declined to expand the rights of criminal defendants and refused to recognize a constitutional right to education. But the whole period is aptly described as “the counter-revolution that wasn’t.” The Nixon court maintained a lot of continuity with its predecessor. Believing that the commitment to the rule of law entails humility and respect for the past, it preserved most of its precedents, even as it refused to build on them. It’s true that with further changes in the court’s membership, we should expect to see some incremental movements in the law, including expansions in gun rights, increased protection of commercial advertising and new constraints on the power of regulatory agencies. But there’s an excellent chance that in four years, constitutional law will look pretty much the same as it does now.

#### The Court’s ruling on education is a form of judicial activism which violates the political question doctrine and separation of power

F. Clinton Broden, Federal Criminal Defense Attorney, Litigating State Constitutional Rights to an Adequate Education and the Remedy of State Operated School Districts, 42 Rutgers L. Rev. 779, 809 (1990).

Some commentators have argued that, by intruding into an area outside of the judiciary's expertise such as education, courts will necessarily sacrifice the legitimacy of the judiciary. They contend that when the judiciary involves itself in political issues, such involvement must be regarded as a presumptively illegitimate exercise of judicial power.50 This view of judicial illegitimacy is an offshoot of Justice Mountain's philosophy of avoidance of political questions and the closely related doctrine of separation of powers. It is important that a court consider the issue of judicial legitimacy as it determines the appropriate remedy for a violation of the T&E clause. However, this consideration should not lead the court to forsake its duty to provide a remedy for a constitutional wrong. Several scholars who have written on the subject of judicial decrees and institutional remedies have recognized that, since protecting rights is a judicial enterprise, the institutional decree that serves that end is legitimate as well.' 5' As one scholar wrote: [T]he presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default. In that event, and for as long as those political bodies remain in default, judicial discretion may be a necessary and therefore legitimate substitute for political discretion.'52 While the courts' judicial power must necessarily include adequate remedial power, the potential problem of judicial illegitimacy does place practical constraints on this power. Therefore, before a court enters an institutional decree it must engage in some form of interest balancing by examining both the victims' interests and the social interest involved in the case. 153 The social interests in a T&E case are the societal benefits of local control over education and the right of communities to be free from protracted legal battles. The victims' interests are clearly the interests of children in receiving a thorough and efficient education.

#### Judicial activism destroys court legitimacy which causes court stripping and undermines separation of power

Diarmuid F. O’Scannlain March 2000 (Diarmuid Fionntain O'Scannlain is a Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit., “On Judicial Activism,” Open Spaces Publication, http://open-spaces.com/articles/on-judicial-activism/)

Preserving the constitutional compromise between law and liberty requires federal judges to defer to the legislative and executive branches on all issues properly within the realm of the law. If the text of the Constitution does not preclude the government’s action, the judge must uphold it. He must do so even if the government’s action is patently unfair or plainly inappropriate, for determining that something is “unfair” or “inappropriate” without an independent standard for fairness or appropriateness requires an exercise of sheer will. And the power to direct government action pursuant to one’s own will is precisely the power that a judge lacks. The judge’s duty to apply the law faithfully demands that he do more than merely defer to the political branches of government when they permissibly exercise governmental power. The very concept of law requires the judge to apply it in a manner that is both predictable and uniform. Predictability ensures that everyone knows what the law is at any given point in time. Uniformity ensures that the law is applied in the same way by any judge to any party anywhere in the country. When a judge is swayed by his own sentiment rather than considerations of deference, predictability, and uniformity, he fails by definition to apply the law faithfully. This is the essence of judicial activism. It is impossible to say with certainty in any given case that the judge’s sentiments will lead him to a “bad” decision, but no one could say that they never would. Any of us would appreciate a judge’s merciful departure from a draconian law. How many of us, though, would appreciate a judge’s draconian departure from a merciful law? The remedy for a bad law is to change the law through legislative action, not to depart from it one way or the other in the courts. The solution, in short, is democracy–the political process–and not judicial activism. Judicial activism is not always easily detected, because the critical elements of judicial activism either are subjective or defy clear and concrete definition. For instance, a critical consideration is the state of mind of the allegedly activist judge. Judicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective. Occasionally, the fact that a judge has an ulterior motive is evident, but oftentimes it is not. We are left to infer the existence of an ulterior motive from the relative distances that separate the judge’s actual decision from the decision that would have been correct and the one that would have most perfectly accorded with the judge’s personal sentiments. This gives rise to another difficulty in detecting judicial activism, which is that we must establish a non-controversial benchmark by which to evaluate how far from the “correct” decision the supposedly activist judge has strayed. Occasionally this, too, is easy–but not always. Because of the inherent difficulty in detecting judicial activism with any certainty, many activist decisions may pass without significant criticism and many others may be labeled by particularly sensitive commentators as “activist” when they are not. Perhaps the most notorious instance of judicial activism is captured in the century-old Supreme Court case, Rector of the Holy Trinity Church v. United States. Congress had enacted a statute declaring that: it shall be unlawful…in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien…into the United States…to perform labor or service of any kind. Because the defendant church had contracted with an English clergyman to come to New York City to serve as rector, the government brought suit under this statute. Both the trial and appellate courts ruled that the Church had violated the law. The Supreme Court disagreed. After observing that “this is a Christian nation,” Justice Brewer reached the remarkable conclusion for the Court that religious ministry could not have been the “labor or service of any kind” that Congress had intended to proscribe. Justice Brewer plainly thought, and all of his brethren agreed, that his departure from the statute did nothing but benefit the American people. Even if it was well received at the time, the Court’s characterization of the country might not be so benignly received today, particularly as the basis for departing from a statute duly enacted by our democratically elected representatives. The problem with the Court’s decision was that it undermined the predictability and uniformity of the law. Before the Supreme Court ruled, the statute was clear; afterwards, no one could predict its true scope. Moreover, lower courts would now be free to apply whatever exemptions they, too, thought Congress might have intended, regardless of the language Congress actually enacted. Judicial activism can have consequences that are far more profound than the unregulated immigration of nineteenth-century English rectors. When applied not simply to arcane statutes but to the United States Constitution–the foundational document of our Republic–judicial activism inevitably works a seismic shift in the balance between government and individual and has often done so on divisive questions. Take, for example, the question of whether an individual’s decision to end his own life is beyond the power of the government to regulate. After the people of the State of Washington rejected the ballot measure at the polls, several Washington residents brought suit and invited judges to give them what the legislative process would not: a governmentally enforceable right to assisted suicide. The United States Court of Appeals for the Ninth Circuit, which includes Washington and eight other Western states, eventually ruled for the plaintiffs, declaring that the Constitution guaranteed each of them a “right to die.” This decision, though purportedly compelled by the federal Constitution, rested upon nothing written in that document. Eight judges of the eleven-judge panel hearing the case simply promulgated a new constitutional right, one unheard of in over two hundred years of American history. The Supreme Court, in Washington v. Glucksberg, recognized the Ninth Circuit’s decision for the rejection of democracy that it was and unanimously reversed, but not before rivers of ink had flowed in celebration or condemnation of a judgment that seemed intrinsically more political than judicial. Perhaps the outcome reached by the Ninth Circuit was the better policy, arguably someone who is terminally ill and wants to end his life really should not have to act alone. It is certain that many people other than the plaintiffs in the Glucksberg case thought so. Even if it were true, which seems rather difficult to ascertain in any objective sense, this belief does not establish that the court made the right decision, because the court was wrong to make the decision at all. Readers who resist this conclusion need only look at the experience of the people of Oregon. Unlike their northern neighbors, a majority of Oregonians went to the polls only a couple of years later and enacted a law giving a terminally ill individual the right to physician-assisted suicide. Nevertheless, just like their northern neighbors, the people of Oregon were rebuked by a federal court declaring that they had overstepped the scope of governmental authority. In that case, entitled Lee v. Oregon, a federal judge held that in his view there was “no set of facts” in which Oregon’s newly enacted assisted suicide law could be considered “rational.” That conclusion must have come as quite a surprise to the thousands upon thousands of Oregonians who voted for the law. Surely, the conclusion must have unsettled the view of the eight Ninth Circuit judges who had previously joined together in declaring that the Constitution guaranteed the very right to assisted suicide that the same Constitution was now being read to preclude the people of Oregon from enacting. This uncomfortable tension was resolved when the Ninth Circuit reversed the Lee decision and returned the issue of assisted suicide once again to the realm of political discourse, where it belongs. Even for someone who cares not a whit about whether an individual has the right to assistance in committing suicide, these cases underscore the problems that arise when judges purport to apply the law but fail to apply it faithfully–the problems, that is, of judicial activism. The first of these problems is, of course, that our democratic republic descends into what Thomas Jefferson famously reviled as “oligarchy.” The will of one judge or a handful is substituted for the will of the popular majority–or, at the very least, the political representatives elected by and accountable to that majority. Moreover, because judges exert their will, when they do, by pronouncements applied retroactively in individual cases rather than by codified statutes or rules, the resulting “law” not only lacks democratic validity but predictability and uniformity as well. Decisions that manifest judicial activism do not, in short, amount to what we think of as “law” at all. When it involves constitutional interpretation, judicial activism presents a unique additional problem. A judicially active interpretation of the Constitution shifts the dividing line between government power and individual liberty. That judge-made shift, unless subsequently repudiated by the Supreme Court, can be remedied only by a constitutional amendment. Ratification of such an amendment, which requires supermajorities at both federal and state levels, is arduous by design and, when undertaken, is rarely successful. The consequence of all of this is that judicial decisions redefining individual liberties distort the delicate balance of power between the branches of government. What Congress could once do by the relatively straightforward process of statutory enactment, it can thereafter do only by discharging the Herculean task of constitutional amendment. Not only does judicial activism in whatever form hobble the political branches of government, it also undermines the judiciary itself. Courts, lacking the power to enforce their own judgments, rely on popular confidence in those judgments for their implementation. Judicial activism erodes this confidence and thereby erodes the efficacy of the judiciary as a whole. One need not look far to find the breakdown of confidence in, and resulting threat to the independence of, judicial decision-making. By far the most famous such incident occurred with the advent of the New Deal in the 1930s. Franklin Delano Roosevelt had been elected President after campaigning on the promise of federal relief from the widespread economic dislocation accompanying the Great Depression. Upon his inauguration, President Roosevelt proposed and, with the assent of the Congress, enacted into law an unprecedented program of economic reform. After the Supreme Court invalidated several popular statutes at the core of the President’s program, the President pursued a plan to “pack” the Supreme Court. He proposed to increase its membership so that he could appoint enough new Justices to win a majority in future cases. The plan was never executed because, faced with this threat, the Supreme Court relented and upheld subsequent legislation. It thus appeared that the Supreme Court very nearly became the casualty of its own judicial activism. Far from being merely a product of the exigencies of the Great Depression, political assaults on specific judicial decisions still occur. In the last presidential election, both parties’ nominees openly criticized a federal trial judge in New York for his refusal to admit as evidence in a drug prosecution large amounts of cocaine seized by law enforcement officers. After President Clinton suggested on the campaign trail that the judge might resign his office, the judge reconsidered his ruling and reversed it. This incident, like the Supreme Court’s about-face sixty years earlier, raises the disturbing specter of judicial decision-making by popular will, and the fear that our judges might have become little more than politicians in robes. What lesson can we learn from these experiences? Judicial activism generates a vicious cycle: it triggers a lack of confidence in judicial decisions which triggers political meddling which reinforces a lack of confidence in judicial decisions. A politician in robes is no judge at all. Once a judge imposes his will as legislator, he loses his democratic legitimacy. No one person in a democratic society of 270 million citizens should wield legislative power if only fifty-two people have approved of him. A judge who wields power like a politician enters the political process. Having forsaken neutrality, he will soon lose his independence. The people will allow a judge to be independent only for as long as they perceive him as truly neutral–forsaking decisions based upon his own interests and biases. Thus, judicial activism encourages political interference both in the process of judging and selection of judges. One need look no further than the current battle between the White House and the Senate over judicial nominees for a glimpse of the extent to which the judicial appointments process has become politicized. Nor does the threat of political interference end after the judge is selected. A multitude of proposals have been offered in Congress to weaken the independence of the judiciary. Some take the form of constitutional amendments to impose term limits on judges; others have been nothing more sophisticated than calls for the impeachment of particular judges who have rendered unpopular decisions. These may be only harbingers of what is to come. Fortunately, judges retain–at least for now–their independence to apply the law neutrally and faithfully. But so long as one judge indulges his own sympathies rather than following the text of the law before him, he will only make it harder for his colleagues to retain the courage to decide cases in faithful, predictable, and uniform ways.

#### Insert Impact Scenario

### Uniqueness

#### Courts are abstaining from educational policy now

Harvard Law Review 1-12-2015 (The Harvard Law Review publishes articles by professors, judges, and practitioners and solicits reviews of important recent books from recognized experts., “Education Policy Litigation as Devolution,” Vol 128 No. 3, https://harvardlawreview.org/2015/01/education-policy-litigation-as-devolution/)

I. JUDICIAL CONCERNS IN PAST EDUCATION LITIGATION Over the last sixty years, litigation seeking to vindicate educational rights has proceeded in two primary waves. First, federal court litigation has sought to effectuate Brown’s holding that schools may not segregate by race; over the latter half of the twentieth century, this litigation expanded into the minutiae of district-level policies before being hemmed in by the Supreme Court.9× Second, state and federal court litigation has sought to vindicate educational rights by asking that courts order increased funding for high-poverty schools; this litigation has been grounded in the federal Equal Protection Clause, its state equivalents, and state constitutional education guarantees. This Part surveys each wave, finding that both have won victories but stumbled against three interrelated categories of judicial concern. First, state and federal courts have frequently declined to rule on the merits of lawsuits against state education systems on separation of powers grounds. These courts have reasoned that in a democratic society, decisions about education policy and state budgeting are properly left to political actors who are elected based on their positions on public policy matters.10× This concern is grounded in a belief that courts should be wary of intruding on the traditional authority of the political branches to balance policy imperatives. Second, courts hearing education litigation have been troubled by concerns for local control. State courts have been reluctant to take decisionmaking authority away from districts, and federal courts have been reluctant to centralize decisionmaking at the federal level at the expense of states and districts.11× While this concern is distinct from the separation of powers concern discussed above, it shares a desire to let more democratically accountable political actors (whether at the state or local level) balance policy imperatives. Third, courts have expressed concerns that the judiciary simply lacks the necessary expertise to manage education policy competently. This concern is closely linked with the previous two categories: the greater competence of state legislatures and school districts to manage school systems is often cited as an argument in favor of judicial abdication. But it also reflects a different category of concern. Even if concerns for democratic accountability and the proper role of each branch were absent, courts might simply be wary of policy-design tasks for which they lack the institutional capacity. In both desegregation and funding litigation, early court victories have often led to judicial retreat as these three concerns (“traditional prudential concerns”) grew as cases stretched over years and decades.

### Uniqueness – Legitimacy

#### Supreme Court legitimacy is on the brink—staying “above the fray” of partisan disputes is key—the plan disrupts that.

Gershman 16 (Jacob Gershman, covers law for The Wall Street Journal and is lead writer of the Law Blog, “How Supreme Court Legitimacy is Shaped”, 4/8/16)

While clashing over the Supreme Court vacancy, President Barack Obama and Senate Republicans both agree to some extent that the legitimacy of the nation’s highest court is at stake. To the president, it’s political infighting over the next nominee that’s wounding the institution. “The courts will be just an extension of our legislatures and our elections and our politics and that erodes the institutional integrity of the judicial branch,” Mr. Obama said, speaking at the University of Chicago Law School on Thursday. GOP Sen. Chuck Grassley, in remarks on the Senate floor earlier this week, didn’t use the word “legitimacy.” But the chairman of the Senate Judiciary Committee talked about the public’s waning confidence in the court. In his view, that negative perception flows from polarizing rulings and reflects public frustration when justices don’t stick to the constitutional text and base their votes on political preferences. How people perceive, understand and judge the highest court in the nation has long fascinated and puzzled social scientists. Scholars looking at the subject have focused on the idea of legitimacy as the high court’s most precious resource. It’s the steel frame protecting the institution when a seismic ruling is handed down. Evaluations of legitimacy tend to be more stable over time than job approval numbers, but when it erodes, it can be much more damaging. According to James L. Gibson, a political science professor at Washington University in St. Louis, there was “little if any diminution of the court’s legitimacy in the aftermath of Bush v. Gore,” the 2000 case that resulted in the George W. Bush presidency. That’s because, he says, the high court had a deep reservoir of goodwill to drawn on. In a recent paper he co-wrote analyzing survey data, he explores further how the high court accumulates and loses legitimacy, drawing two main conclusions. One is that the greatest threat to the court’s legitimacy “comes from perceived politicization: the belief that the Court is just an ordinary political institution, largely indistinguishable from the other political branches.” The other is that for much of the public, ideological disappointment with rulings doesn’t by itself fuel a perception that the court is politicized. People can disagree with controversial decisions, but​ goodwill endures if people feel​ that justices ruled with principled sincerity. These days Republicans are far more likely than Democrats to disapprove of the way the Supreme Court is handling its job. And the court’s “job approval,” as measured by Gallup, is lower than usual as a whole. But, according to Mr. Gibson, there’s no evidence that Republicans judge the court as any less legitimate. Complicating the analysis, he conceded in an interview with Law Blog, is a lack of reliable recent data measuring institutional support. But Mr. Gibson says if he has any advice for the justices, it’s to “stay above the fray.”

### Links – Ingraham v Wright

#### Ingraham strengthened the PQD—the plan reverses that

Philip K. Piele 1978 (Assoc. Prof. and Director, ERIC Clearinghouse on Educational Management, Univ. of Oregon., “Neither Corporal Punishment Cruel nor Due Process Due: The United States Supreme Court's Decision in Ingraham v. Wright “, Journal of Law & Education Vol. 7, No. 1)

On July 29, 1974, a three-judge panel of the Fifth Circuit Court of Appeals, concluding that "the system of punishment at Drew not only violated the constitutional prohibition against cruel and unusual punishment, but also violated due process," ' 1 5 reversed the dismissal ruling of the district court and ordered the case returned for further proceedings. But upon rehearing, the en banc court of appeals rejected the earlier conclusions of the three-judge panel and affirmed the judgment of the district court.'" After finding the cruel and unusual punishment clause to be inapplicable to corporal punishment in public schools, the full court made it clear that "[w]e do not mean to imply by our holding that we condone child abuse, either in the home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. 17 Furthermore, the court went on to say that if Ingraham's testimony as to the severity of the punishment he received at Drew was true, 'a Florida state court could find the defendants civilly and criminally liable. ' 18 But, emphasizing that the proper action involved "tort and criminal law, not federal constitutional law,"19 the court said, "We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery." 20 Eschewing the imposition of procedural standards that would involve "further interference by federal courts into the internal affairs of public schools,"21 the full court also held that there was no procedural due process violation of the fourteenth amendment, nor was there any substantive violation, noting that "[p]addling of recalcitrant children has long beeh an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children."22 Granting certiorari on the two questions of cruel and unusual punishment and procedural due process, the United States Supreme Court heard oral arguments in early November 1976. Six months later, on April 19, 1977, the Court, in a 5-4 decision, affirmed the judgment of the Fifth Circuit Court of Appeals that the cruel and unusual punishment clause of the eighth amendment of the Constitution does not apply to corporal punishment in the public schools, nor does the due process clause of the fourteenth amendment require that students subject to corporal punishment be given notice of charges against them and an opportunity to be heard.2

### Links – Education

#### Ruling on education policy undermines the Political Question Doctrine and destroys its legitimacy

Cole 12/23/14. (Jared P. Cole, Legislative Attorney at the Congressional Research Service. The Political Question Doctrine: Justiciability and the Separation of Powers. https://fas.org/sgp/crs/misc/R43834.pdf)

In contrast, another theory, famously explained by Alexander Bickel in his enunciation of the “passive virtues” of the judiciary, understands the political question doctrine to permit courts to decline to adjudicate a case for prudential reasons as well.62 Writing in the aftermath of Brown v. Board of Education and the significant pushback that decision engendered in the South, Bickel sought to preserve the legitimacy of an unelected judicial branch.63 On the one hand, when courts declare legislation or executive branch actions to be unconstitutional, Bickel argued, they frustrate the will of the people.64 This “countermajoritarian difficulty” posed a significant problem because the judiciary’s power arises from its perceived legitimacy in adjudicating cases, rather than from passing or enforcing laws.65 At some point, continued judicial invalidation of public will risks losing that legitimacy. But at the same time, judicial rulings upholding the constitutionality of legislation also risk legitimating unprincipled or harmful policies. Bickel noted that “[t]he Court’s prestige, the spell it casts as a symbol, enable it to entrench and solidify measures.... The Court, regardless of what it intends, can generate consent and may impart permanence.”66 Upholding a statute or government practice as constitutional, while usually not intended to function as an endorsement on policy grounds, could nevertheless be perceived as such by the public. Accordingly, rather than risk losing legitimacy by invalidating a law or entrenching a poorly conceived policy choice by upholding it, a court may exercise the passive virtues by refraining from adjudicating the case at all.67 And when it does so, Bickel noted, the judiciary often sparks and participates in a dialogue with the other branches of government and the public which helps develop the issue further.68 One method Bickel identified of practicing the passive virtues is by invoking the political question doctrine to decline to adjudicate a case.69 Bickel argued that the political question doctrine was founded on the Court’s sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally (‘in a mature democracy’), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.70 Rather than issuing rulings that outstripped the mood and temper of the country, a court could invoke the passive virtues, like the political question doctrine, to restrict itself to “declar[ing] as law only such principles as will—in time, but in a rather immediate foreseeable future—gain ... widespread acceptance.”71 By “stay[ing] its hand” and declining to adjudicate certain issues, the judiciary could thus allow the political branches to hash out issues over time—“elicit[ing] the correct answers to certain prudential questions that ... lie in the path of ultimate issues of principle.”72

#### Aff undermines PQD—previous cases prove.

Bilan 16 Anthoy Bilan, University of Notre Dame Law School, The Runaway Wagon: How Past School Discrimination, Finance, and Adequacy Case Law Warrants a Political Question Approach to Education Reform Litigation, Notre Dame Law Review, 4-2016, <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4648&context>=ndlr

In a format familiar to school finance litigation, the Vergara court found that the state’s tenure statutes so detrimentally affected teaching that education quality was unconstitutionally harmed.4 While this result may seem extreme, the history of state education litigation, with comparisons to federal segregation litigation, shows not only that these dramatic remedies are not surprising but also that an application of the political question doctrine proves effective in scaling back any policy-based court excesses. As will be argued here, then, Vergara displays the natural conclusion of courts accepting inherently political questions as admissible claims. \* Candidate for Juris Doctor, Notre Dame Law School, 2016. I would like to thank my instructor, Professor Nicole Garnett, for her thoughtful suggestions and helpful discussions, which were instrumental to this Note’s development. I would also like to thank Professor Peter Karsten in whose undergraduate seminar I learned to read the law. Any oversights are solely the responsibility of the author. http://www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-un constitutional.html (noting that the case could “prompt challenges to tenure laws in other states”). 4 Vergara, slip op. at 9–10. 1225 \\jciprod01\productn\N\NDL\91-3\NDL309.txt unknown Seq: 2 31-MAR-16 9:52 1226 notre dame law review [vol. 91:3 Part I of this Note, after a brief introduction to the political question doctrine, outlines relevant school segregation case law and follows up with a history of school finance and adequacy litigation. Part II discusses the patterns and parallels formed by these two areas of law, with particular attention focused on the choices and consequences of judicial decisions under the rubric of the political question doctrine. Part III introduces a few recent additions to the history of school finance litigation, with particular focus on Vergara. Part IV discusses these recent cases in light of the analysis in Part II. Part IV particularly considers how recent school finance litigation resembles the character of federal discrimination cases before limiting principles were installed by the U.S. Supreme Court. Furthermore, Part IV discusses how cases like Vergara are the logical conclusion of not applying political question concerns to school finance claims. Ultimately, courts ought to make a universal reference to the political question doctrine as a controlling principle for decisions in school adequacy litigation. I. POLITICAL QUESTIONS: FROM SCHOOL DISCRIMINATION TO SCHOOL FINANCE The political question doctrine is a branch of nonjusticiability, which acts as a restriction on court authority to accept claims. This jurisdictional bar has developed as a response to concerns that courts were rendering judgments in the area of public policy. The federal political question doctrine seeks to remove issues from court supervision that by their nature are better left to the cognizance of another branch of government.5 While it is true that state courts are under no obligation to accept federal instruction on justiciability, many state courts have adopted and applied the federal political question factors as enunciated in Baker v. Carr. 6 The political question doctrine prevents judges from using limited courtroom tools to fashion remedies that overturn or compel new legislation. Otherwise, judges may be utilizing testimony limited to selected experts in order to change policies originally crafted by the representative legislature. Additionally, the political question doctrine contemplates that there are certain issues where policy and law are 5 Baker v. Carr, 369 U.S. 186, 217 (1962) (“Political question[s] . . . [are] essentially a function of the separation of powers.”). The critical factors are a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Id. 6 See infra text accompanying notes 46, 129, 133 (discussing applications of Baker by state courts). \\jciprod01\productn\N\NDL\91-3\NDL309.txt unknown Seq: 3 31-MAR-16 9:52 2016] the runaway wagon 1227 so intermingled that the question simply becomes unfit for judicial resolution. When judges try to resolve these deep, policy-based issues in a courtroom, high emotion may generate “bad law.”7 Worse yet, as courts proceed to resolve cases that are actually policy questions, judicial power shakes off its definitive boundaries. By way of introduction, political question issues in education law emerged from attempts at education reform where advocates, frustrated with the legislative process, sought to use courts to enforce their policy goals.8 Although reformers initially succeeded in the segregation context, the difficulties in controlling this policy-oriented litigation compelled the U.S. Supreme Court to limit federal authority in discrimination cases partially through use of political question principles.

#### Court education policy violates political questions doctrine.

Rell et al 08. (Jodi Rell, former governor of Connecticut, along with codefendants and legal team. Defendants-Response-Brief-to-Supreme-Court-of-Connecticut. 2008. ccjef.org/wp-content/uploads/Defendants-Response-Brief-to-Supreme-Court-of-Connecticut-Feb-21-2008.pdf)

In claims that reach far beyond this Court’s holdings in Horton and Sheff, plaintiffs seek to have the Court act as a super-legislature over all of the State’s public schools in 169 municipalities, deciding matters ranging from the qualification of teachers to appropriate class sizes. They not only seek to constitutionalize specific educational requirements traditionally left to the legislature and municipalities, they also ask this Court to interpret the state constitution as requiring specific educational outcomes. Entertaining plaintiffs’ claim would represent an improper and unprecedented interference by the courts with core legislative functions, and entanglement in this State’s education policy-making. This Court should hold -- as have many sister-state courts faced with similar claims -- that this case presents a political question outside this Court’s jurisdiction. Even if this Court has jurisdiction, the Connecticut constitution does not contain a judicially-cognizable guarantee of a “suitable” education. Article eighth, §1’s history, this Court’s decisions and the text of other constitutional provisions make clear that the lack of such a textual basis was intentional. As the trial court correctly recognized, Connecticut could have chosen to write a suitability standard into its constitution, as other states have, but chose not to do so. This Court should decline plaintiffs’ invitation to re-write the state constitution to create a sweeping affirmative constitutional obligation that is contrary to the framers’ intent and would make this Court -- rather than elected officials -- the primary decision-maker for the education policies of this State. Plaintiffs and the amici claim that affirming the trial court’s decision will place Connecticut alone among the states that have considered the issue. These arguments do not withstand scrutiny. No other state has done what plaintiffs have asked this Court to do, namely, without explicit language, engraft a suitability requirement into the state constitution that, when invoked, wrests control of the state’s education system from the other co-equal branches of state government. The handful of states with comparable constitutional educational provisions have either rejected such claims on justiciablity grounds, or have only found a right to a minimum qualitative level, a claim not asserted by plaintiffs below. Moreover, Connecticut’s well-established right to equal educational opportunity -- a claim which remains in this case -- fully protects the interests of Connecticut’s children simultaneously allowing the people and their elected officials to run the schools, and permitting educators the flexibility necessary for educational innovation. This Court should affirm the trial court’s decision.

### i/L – Legitimacy

#### Court legitimacy is necessary to uphold separation of powers

Nelson and Ringsmuth 13 – Kjersten R., Associate Professor of Criminal Justice and Political Science at North Dakota State University, and Eve M., Associate Professor of Political Science at Oklahoma State University “ Inter-Institutional Dynamics: Assessments of the Supreme Court in a Separation of Powers Context,” Political Behavior Vol 35 No. 2 June 2013 pages 357-382//ninerz

The manner in which the Supreme Court should promote "fundamental law" in the U.S. system has been heavily debated. This debate stems from an implicit tension involving the Court's power of judicial review, its lack of ability to enforce its own decisions, and its status as an unelected (and therefore "less democratic") institution. The Court is tasked to be an independent protector of fundamental law against any potential encroachment of popular will (McCloskey 1994) in large part because the justices, who are insulated from public disapproval by life tenure, are in the best position to do so. As Choper (1980) points out, protecting fundamental law often means ensuring the personal liberties of an unpopular minority. Democratically accountable institutions' propensity for infringements on personal liberties - particularly of small and unpopular minority groups - is "not infrequent" and "[s]ince, almost by definition, the processes of democracy bode ill for the security of personal rights... the task of custodianship has been and should be assigned to a governing body that is insulated from political responsibility and unbeholden to self- absorbed and excited majoritarianism" (p. 68). In fact, the necessity of the Court's intervention to secure these liberties increases as the group in question gets smaller and the contempt of the majority toward it rises (Choper 1980). At the same time, checking the actions of another branch risks a decrease in legitimacy, which in turn may lead to non-compliance with its "counter- majoritarian" decisions, given the justices' limited ability to enforce their own decisions. When the Court exercises judicial review it must render judgment on a policy that was validated by democratically elected representatives and which - at least in theory - is some approximation of the preferences of a majority. Choper (1980) contends that the Court can render its institutional standing more tenuous when it invalidates a democratically based law or action.2 Eventually, "...the Court's continued antimajoritarian rulings will tip the balance of credit accumu- lation and expenditures and animate a public sentiment that it has but a gossamer claim to legitimacy in a democratic society, thus either inducing popular disregard of the Court's decisions or inspiring political forces to seek to bring it to heel, or both" (pp. 139-140). This dynamic highlights the difficult balancing act the Court must deal with - while its standing with the public may suffer when it (repeatedly) makes decisions that counter majority preferences, and while it needs this standing in order to remain a potent political institution, one of its fundamental raison d'etre is to hand down these potentially unpopular opinions. This idea of the Court's standing with the public has been further refined into the concept of Supreme Court legitimacy. Court legitimacy, also known as diffuse support, is considered "a reservoir of... good will" that provides a buffer against disagreement with short-term policy outputs (Easton 1965, p. 273) and "support for the maintenance of the institution" as it currently exists (Caldeira and Gibson 1992, p. 638). Individuals who report high levels of diffuse support for the Court would oppose any efforts to alter the structure or practices of the Court.3 In another iteration of this concept, Gibson (2007) likens the idea of diffuse support to that of institutional "loyalty," or "the idea that failure to make policy that is pleasing in the short term does not necessarily undermine basic [short- and long-term] commit- ments to support the institution" (p. 512). This concept of legitimacy is distinct from specific support for the Court, which accounts for public reactions to specific Court cases - or, more generally, to the perceived ideological direction of the Court (e.g., Caldeira and Gibson 1992; Durr et al. 2000; Gibson 2007).4

#### Court legitimacy key to uphold separation of powers principles – rulings they make are necessary

Harriger 11 – Katy J., Department Chair and Professor, Department of Political Science, Wake Forest University, “Judicial Supremacy or Judicial Defense? The Supreme Court and the Separation of Powers,” Political Science Quarterly, Vol 126, No. 2, Summer 2011, pages 201-221, accessed via Jstor//ninerz

In The Federalist, No. 78, Alexander Hamilton argued that federal judges' life tenure and power of judicial review were "peculiarly essential in a limited constitution" and necessary in order to allow them to serve as "the bul warks of a limited constitution against legislative encroachments." "Limitations of this kind," argued Hamilton, "can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void."1 This argument by Hamilton envisions the Supreme Court playing the role of "enforcer" of the limits on the power of Congress and more generally, the federal and state gov ernments. While this understanding of the power of judicial review has be come entrenched in the U.S. constitutional tradition, the breadth of the power remains a subject of debate, with judicial willingness to strike down the acts of the other branches frequently subjected to criticism as "activism."2 Early in the Court's history its rather limited agenda was taken up with questions of the boundary of power between the branches and levels of gov ernment. For much of the twentieth century however, the Court allocated sub stantially more of its agenda to cases involving individual rights claims against state and sometimes federal governments than to cases involving power distri bution among governmental entities.3 Over the last several decades, the Court has seemed to become more interested again in deciding structural questions, policing the federal system,4 and "refereeing" the separation-of-powers system.5 In the first decade of the twenty-first century, that trend has continued, with the Court now a key player in the legal controversies about presidential power during war time. Between 2004 and 2008, the Court consistently rejected the George W. Bush administration's claims that it had the authority to detain "enemy com batants" indefinitely without habeas corpus review of that detention, and to try them through military commissions created by the President. First, the administration claimed that persons held at Guantanamo Bay were outside the juris diction of the federal courts, and that it could detain even U.S. citizens as enemy combatants without providing them habeas corpus review. The Court disagreed.6 Next, it claimed that it could try enemy combatants in military commissions that it established and that Congress had blocked the Court's ability to review that question. The Court disagreed.7 Next, and now most clearly with the help of Congress, it claimed that the Military Commissions Act of 2006 permitted the administration to try detainees without access to federal habeas corpus review. Again, the Court disagreed.8 The Court's persistent rejection of the Bush administration's broad claims of executive power, and even more particularly, its rejection of combined con gressional and executive efforts to limit court review, seems surprising in the face of a recent record that suggests judicial deference to the other branches in times of war.1' Some modern legal scholars have suggested that in matters of war and foreign affairs, the Court has deferred—and ought to defer—to the other branches, because it lacks competency to address issues of this type.10 I argue here that placing these cases in the context of the last four decades of the Court's jurisprudence in the area of separation of powers makes its willingness to take on the president and Congress on these issues not surprising at all." I will contend that the Court has taken on, with little resistance from and in fact some complicity with the other branches of government, the role of "enforcer" for the separation-of-powers system. How do we explain this development and what are its implications for inter-branch relations? In this article, I explore these questions, arguing that the Supreme Court's recent activity in detainee rights cases can best be understood in the context of a longer-term trend of "judicial activism" in separation-of-powers cases. Well before George W. Bush's assertions of execu tive authority, the Warren E. Burger court had begun asserting itself as the referee of the separation-of-powers system. Its increased attention to structural questions was driven, in part, by political developments outside the court that provided increased opportunities to consider these questions. But because the Court controls its agenda to the extent that it does, one must look internally as well. Here, I contend the judicial philosophies of justices on the Court allowed for more agreement on separation-of-powers issues than on more ideologically divisive issues and, most importantly, that a common belief in judicial supremacy and interest in defending judicial power can explain the Court's activism in this area. An examination of the conflicts addressed by the Burger and William Rehnquist courts and of the ways in which they were resolved suggests a hierarchy of institutional "winners" and "losers," in which the executive and the states'2 tend to prevail over Congress, but in which if any of those powers come into conflict with judicial power, the courts and the needs of the judicial process trump the other assertions of power. Because the detainee cases directly implicate judicial power in terms of access to federal habeas corpus review, it is not surprising that the Court decided as it did, given these trends. During the Burger and Rehnquist courts (1970-2004), a number of significant cases involving questions about the separation of powers were considered. It may suffice to simply list the most well-known to make the point: United States v. Nixon (1974), Buckley v. Valeo (1976), Nixon v. Administrator of General Ser vices (1977), Goldwater v. Carter (1979), Nixon v. Fitzgerald (1982), INS v. Chadha (1983), Bowsher v. Synar (1986), Morrison v. Olson (1988), Mistretta v. U.S. (1989), Clinton v. Jones (1997), City ofBoerne v. Flores (1997), Clinton v. City of New York (1998), Hamdi v. Rumsfeld (2004), and Rasul v. Bush (2004). In some cases, the conflicts are inter-branch. In others, they involve challenges to the exercise of governmental powers by actors outside of government. All of these cases involved the Court in deciding issues about the limits on the power of Congress, the president, and the Court. The increased activism of the court around structural questions has not gone unnoticed. Thomas Keck and Herman Schwartz have both identified this as one of the areas in which the Rehnquist court has engaged in "activism."13 While the term "activism" is often used in popular rhetoric to criticize decisions the commentator tends to disagree with,14 here I use it in the Hamiltonian sense. All judges are presumed to be "activist" on behalf of cer tain constitutional values and, as Robert Nagel has argued, this behavior is probably inherent in the process of constitutional interpretation.15 It is tied to judicial role conception and judicial philosophy and does not assume either liberal or conservative outcomes. William R Marshall calls this kind of activism "counter-majoritarian" and defines it as "the reluctance of the courts to defer to the decisions of the democratically elected branches."16 Writing in 2003, Bruce Peabody and John Nugent argued that "the separation of powers is more central to public affairs than it has been for over thirty years."17 The increased importance of these issues to the Court can be demonstrated in more systematic ways. A topic search, using the key words "government/separation of powers" in a search engine for Supreme Court cases from its entire history18 generates a list of 86 cases between 1792 and 2004. Of those 86 cases, 45 of them (52 percent) were decided during the 34 years of the Burger and Rehnquist courts (16 percent of the Court's history). The Burger court was particularly active in the area of separation of powers and the Rehnquist court more so on the issue of feder alism. In this article, I focus on the cases dealing with separation-of-powers issues during the Burger and Rehnquist courts that have been recognized as "landmark."19 (Table 1 identifies these cases, excepting the most-recent Guantanamo decisions.)

### Impact – SOP kills heg

#### The SOP battle alone collapses heg.

G. John Ikenberry, 2001 (Professor at Georgetown, “Getting Hegemony Right,” The National Interest, http://www.columbia.edu/itc/sipa/U6800/readings-sm/Ikenberry\_Hegemony.pdf)

When other major states consider whether to work with the United States or resist it, the fact that it is an open, stable democracy matters. The outside world can see American policymaking at work and can even find opportunities to enter the process and help shape how the overall order operates. Paris, London, Berlin, Moscow, Tokyo and even Beijing-in each of these capitals officials can readily find reasons to conclude that an engagement policy toward the United States will be more effective than balancing against U.S. power. America in large part stumbled into this open, institutionalized order in the 1940s, as it sought to rebuild the postwar world and to counter Soviet communism. In the late 1940s, in a pre-echo of today's situation, the United States was the world's dominant state--constituting 45 percent of world GNP, leading in military power, technology, finance and industry, and brimming with natural resources. But America nonetheless found itself building world order around stable and binding partnerships. Its calling card was its offer of Cold War security protection. But the intensity of political and economic cooperation between the United States and its partners went well beyond what was necessary to counter the Soviet threat. As the historian Geir Lundestad has observed, the expanding American political order in the half century after World War II was in important respects an "empire by invitation."(n5) The remarkable global reach of American postwar hegemony has been at least in part driven by the efforts of European and Asian governments to harness U.S. power, render that power more predictable, and use it to overcome their own regional insecurities. The result has been a vast system of America-centered economic and security partnerships. Even though the United States looks like a wayward power to many around the world today, it nonetheless has an unusual ability to co-opt and reassure. Three elements matter most in making U.S. power more stable, engaged and restrained. First, America's mature political institutions organized around the rule of law have made it a relatively predictable and cooperative hegemon. The pluralistic and regularized way in which U.S. foreign and security policy is made reduces surprises and allows other states to build long-term, mutually beneficial relations. The governmental separation of powers creates a shared decision-making system that opens up the process and reduces the ability of any one leader to make abrupt or aggressive moves toward other states. An active press and competitive party system also provide a service to outside states by generating information about U.S. policy and determining its seriousness of purpose. The messiness of a democracy can, indeed, frustrate American diplomats and confuse foreign observers. But over the long term, democratic institutions produce more consistent and credible policies--policies that do not reflect the capricious and idiosyncratic whims of an autocrat.

### Impact – Legitimacy solves soft power + conflict

#### Legitimacy key to global conflict suppression and soft power.

Dawinder S. Sidhu 11 (Dawinder S. Sidhu is a professor at UNM Law, “Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict”, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1003&context=nslb)

There can be little doubt that military victory overseas, at present, stands beyond the grasp of American’s long and powerful arm.22 Perhaps even more sobering is the fact that even if the United States was faring better on the military front, such success would be insufficient to prevail in the war. As the 9/11 Commission noted, al Qaeda “represents an ideological movement, not a fi nite group of people,” akin to a “decentralized force.”23 The American strategy, however, appears to be one based on warfare. Judge Richard A. Posner observed that “we have no strategy for defeating them, only fighting them.”24 President Obama’s foreign policy objectives in the war have been considered to be “exclusively military” and, on that score, the war “is not going well.”25 Put differently, the American efforts appear to be limited in scope and disappointing in that narrow subset of possible action against transnational terrorism. These facts are beyond dispute—in committing the terrorist atrocities on 9/11, al Qaeda provoked the United States into a war in Afghanistan that was expanded to Iraq. These confl icts are being waged primarily on the military arena, and the achievement of American goals in both arenas has been frustrated despite years of effort, billions of dollars, and the lives of many American soldiers. What can we do differently? What other instruments are available to the United States such that defeating—not just capably fighting—the terrorists may be a closer prospect? Specifically, how can American law be an advantage to our national security? This Article seeks to answer these questions. In this Article, I will argue that the American response to Islamic terrorist factions must move outside the military sphere in which battles are fought between arms and men to a more conceptual contest for hearts and minds, where the ammunition in this abstract war will be fundamental American principles, particularly a constitutional commitment to the rule of law, and where advancements in the war will be based on incrementally increased attraction to America. This approach will speak to one’s will and conscience in an effort to secure a more lasting respite from the ongoing struggles that have no foreseeable end in sight, have been at- ended by suffering and sorrow, and have claimed a growing number of victims on all sides.26 Part I will distinguish between “hard power,” which generally constitutes the ability to attain favorable foreign policy outcomes by way of military force or economic coercion, and “soft power,” defi ned as the ability to achieve those outcomes by way of attraction.27 Though soft power generally is thought to include a nation’s values, social norms, and culture, academic studies have not fully demonstrated that a nation’s legal dimensions—specifically its legal institutions and adherence to the rule of law—are also a form of soft power.28 This part will attempt to make this showing, citing to aspects of the American constitutional design that may be attractive to people of other communities, including Muslims.29 The legal principles established by the Framers and enshrined in the Constitution are a source of attraction only if we have meaningfully adhered to them in practice. Part II will posit that the Supreme Court’s robust evaluation of cases in the wartime context suggests that the nation has been faithful to the rule of law even in times of national stress. As support, this part will provide examples of cases involving challenges to the American response to wars both before and after 9/11, the discussion of which will exhibit American respect for the rule of law. While the substantive results of some of these cases may be particularly pleasing to Muslims, for instance the extension of habeas protections to detainees in Guantánamo,30 this part will make clear that it is the legal process—not substantive victories for one side or against the government—which is the true source of American legal soft power. If it is the case that the law may be an element of soft power conceptually and that the use of the legal process has reflected this principle in practice, the conclusion argues that it would benefit American national security for others in the world to be made aware of the American constitutional framework and the judiciary’s activities related to the war. Such information would make it more likely that other nations and peoples, especially moderate Muslims, will be attracted to American interests. This Article thus reaches a conclusion that may seem counterintuitive—that the judicial branch, in the performance of its constitutional duty of judicial review, furthers American national security and foreign policy objectives even when it may happen to strike down executive or legislative arguments for expanded war powers to prosecute the current war on terror and even though the executive and legislature constitute the foreign policy branches of the federal government. In other words, a “loss” for the executive or legislature, may be considered, in truth, a reaffi rmation of our constitutional system and therefore a victory for the entire nation in the neglected but necessary post-9/11 war of ideas.31 As such, it is the central contention of this Article that the judicial branch is a repository of American soft power and thus a useful tool in the post-9/11 conflict.

#### Leveraging effective US soft power is key to prevent a laundry list of existential scenarios, including *terrorism*, *disease*, *proliferation*, *alliances* and *genocide*

Lagon, 11 (Mark P. Lagon, International Relations and Security Chair at Georgetown University's Master of Science in Foreign Service Program and adjunct senior fellow at the Council on Foreign Relations. He is the former US Ambassador-at-Large to Combat Trafficking in Persons at the US Department of State, Sept/Oct 2011, "The Value of Values: Soft Power Under Obama", World Affairs Journal, http://www.worldaffairsjournal.org/article/value-values-soft-power-under-obama#ER, DA: 7-7-2015)

Despite large economic challenges, two protracted military expeditions, and the rise of China, India, Brazil, and other new players on the international scene, the United States still has an unrivaled ability to confront terrorism, nuclear proliferation, financial instability, pandemic disease, mass atrocity, or tyranny. Although far from omnipotent, the United States is still, as former Secretary of State Madeleine Albright called it, “the indispensible nation.” Soft power is crucial to sustaining and best leveraging this role as catalyst. That President Obama should have excluded it from his vision of America’s foreign policy assets—particularly in the key cases of Iran, Russia, and Egypt—suggests that he feels the country has so declined, not only in real power but in the power of example, that it lacks the moral authority to project soft power. In the 1970s, many also considered the US in decline as it grappled with counterinsurgency in faraway lands, a crisis due to economic stagnation, and reliance on foreign oil. Like Obama, Henry Kissinger tried to manage decline in what he saw as a multipolar world, dressing up prescriptions for policy as descriptions of immutable reality. In the 1980s, however, soft power played a crucial part in a turnaround for US foreign policy. Applying it, President Reagan sought to transcend a nuclear balance of terror with defensive technologies, pushed allies in the Cold War (e.g., El Salvador, Chile, Taiwan, South Korea, and the Philippines) to liberalize for their own good, backed labor movements opposed to Communists in Poland and Central America, and called for the Berlin Wall to be torn down—over Foggy Bottom objections. This symbolism not only boosted the perception and the reality of US influence, but also hastened the demise of the USSR and the Warsaw Pact. For Barack Obama, this was the path not taken. Even the Arab Spring has not cured his acute allergy to soft power. His May 20, 2011, speech on the Middle East and Northern Africa came four months after the Jasmine Revolution emerged. His emphasis on 1967 borders as the basis for Israeli-Palestinian peace managed to eclipse even his broad words (vice deeds) on democracy in the Middle East. Further, those words failed to explain his deeds in continuing to support some Arab autocracies (e.g., Bahrain’s, backed by Saudi forces) even as he gives tardy rhetorical support for popular forces casting aside other ones. To use soft power without hard power is to be Sweden. To use hard power without soft power is to be China. Even France, with its long commitment to realpolitik, has overtaken the United States as proponent and implementer of humanitarian intervention in Libya and Ivory Coast. When the American president has no problem with France combining hard and soft power better than the United States, something is seriously amiss.

### Impact – Legitimacy solves democracy

#### Judicial independence is key to global democratic consolidation

van Aelstyn, Counsel of Record for the Center for Justice & Accountability, 4 (Nicholas, Brief of the Center for Justice & Accountability, the International League for Human Rights, & Individual Advoacates for the Independence of the Judiciary in Emerging Democracies as Amici Curiae in Support of Petitioners, In the Supreme Court of the United States on Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit, Fawzi Khalid Abdullah Fahad Al Odah et al., Petitioners v. United States of America et al., Respondents, & Shafiq Rasul et al., Petitioners v. George W. Bush, et al., Respondents, Supreme Court case numbers 03-334 and 03-343)

Many of the newly independent governments that have proliferated over the past five decades have adopted these ideals. They have emerged from a variety of less-than-free contexts, including the end of European colonial rule in the 1950's and 1960's, the end of the Cold War and the breakup of the former Soviet Union in the late 1980's and 1990's, the disintegration of Yugoslavia, and the continuing turmoil in parts of Africa, Latin America and southern Asia. Some countries have successfully transitioned to stable and democratic forms of government that protect individual freedoms and human rights by means of judicial review by a strong and independent judiciary. Others have suffered the rise of tyrannical and oppressive rulers who consolidated their hold on power in part by diminishing or abolishing the role of the judiciary. And still others hang in the balance, struggling against the onslaught of tyrants to establish stable, democratic governments. In their attempts to shed their tyrannical pasts and to ensure the protection of individual rights, emerging democracies have consistently looked to the United States and its Constitution in fashioning frameworks that safeguard the independence of their judiciaries. See Ran Hirschl, The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions, 25 Law & Soc. Inquiry 91, 92 (2000) (stating that of the “[m]any countries . . . [that] have engaged in fundamental constitutional reform over the past three decades,” nearly all adopted “a bill of rights and establishe[d] some form of active judicial review”). 19 Establishing judicial review by a strong and independent judiciary is a critical step in stabilizing and protecting these new democracies. See Christopher M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, 44 Am. J. Comp. L. 605, 605-06 (1996) (describing the judicial branch as having "a uniquely important role" in transitional countries, not only to "mediate conflicts between political actors but also [to] prevent the arbitrary exercise of government power; see also Daniel C. Prefontaine and Joanne Lee, The Rule of Law and the Independence of the Judiciary, International Centre for Criminal Law Reform and Criminal Justice Policy (1998) ("There is increasing acknowledgment that an independent judiciary is the key to upholding the rule of law in a free society . . . . Most countries in transition from dictatorships and/or statist economies recognize the need to create a more stable system of governance, based on the rule of law."), available at http://www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw. pdf (last visited Jan. 8, 2004). Although the precise form of government differs among countries, “they ultimately constitute variations within, not from, the American model of constitutionalism . . . [a] specific set of fundamental rights and liberties has the status of supreme law, is entrenched against amendment or repeal . . . and is enforced by an independent court . . . .” Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, 49 Am. J. Comp. L. 707, 718 (2001). This phenomenon became most notable worldwide after World War II when certain countries, such as Germany, Italy, and Japan, embraced independent judiciaries following their bitter experiences under totalitarian regimes. See id. at 714- 15; see also United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (“Since World War II, many countries have adopted forms of judicial review, which — though different from ours in many particulars — unmistakably draw their origin and inspiration from American constitutional theory and practice. See generally Mauro Cappelletti, The Judicial Process in Comparative Perspective (Oxford: Clarendon Press, 1989).”). It is a trend that continues to this day. 20 It bears mention that the United States has consistently affirmed and encouraged the establishment of independent judiciaries in emerging democracies. In September 2000, President Clinton observed that "[w]ithout the rule of law, elections simply offer a choice of dictators. . . . America's experience should be put to use to advance the rule of law, where democracy's roots are looking for room and strength to grow." Remarks at Georgetown University Law School, 36 Weekly Comp. Pres. Doc. 2218 (September 26, 2000), available at http://clinton6.nara.gov/2000/09/2000-09-26- remarks-by-president-at-georgetown-international-lawcenter. html. The United States acts on these principles in part through the assistance it provides to developing nations. For example, the United States requires that any country seeking assistance through the Millenium Challenge Account, a development assistance program instituted in 2002, must demonstrate, among other criteria, an "adherence to the rule of law." The White House noted that the rule of law is one of the "essential conditions for successful development" of these countries. See http://www.whitehouse.gov/infocus/developingnations (last visited Jan. 8, 2004).12 A few examples illustrate the influence of the United States model. On November 28, 1998, Albania adopted a new constitution, representing the culmination of eight years of democratic reform after the communist rule collapsed. In addition to protecting fundamental individual rights, the Albanian Constitution provides for an independent judiciary consisting of a Constitutional Court with final authority to determine the constitutional rights of individuals. Albanian Constitution, Article 125, Item 1 and Article 128; see also Darian Pavli, "A Brief 'Constitutional History' of Albania" available at http://www.ipls.org/services/others/chist.html (last visited Janaury 8, 2004); Jean-Marie Henckaerts & Stefaan Van der Jeught, Human Rights Protection Under the New Constitutions of Central Europe, 20 Loy. L.A. Int’l & Comp. L.J. 475 (Mar. 1998). In South Africa, the new constitutional judiciary plays a similarly important role, following generations of an oppressive apartheid regime. South Africa adopted a new constitution in 1996. Constitution of the Republic of South Africa, Explanatory Memorandum. It establishes a Constitutional Court which “makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.” Id. at Chapter 8, Section 167, Item (5), available at http://www.polity.org.za/html/govdocs/constitution/saconst.html?r ebookmark=1 (last visited January 8, 2004); see also Justice Tholakele H. Madala, Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary, 26 N.C. J. Int’l L. & Com. Reg. 743 (Summer 2001). Afghanistan is perhaps the most recent example of a country struggling to develop a more democratic form of government. Adoption by the Loya Jirga of Afghanistan's new constitution on January 4, 2004 has been hailed as a milestone. See http://www.cbsnews.com/stories/2004/01/02/world/main59111 6.shtml (Jan 7, 2004). The proposed constitution creates a judiciary that, at least on paper, is "an independent organ of the state," with a Supreme Court empowered to review the constitutionality of laws at the request of the Government and/or the Courts. Afghan Const. Art. 116, 121 (unofficial English translation), available at http://www.hazara.net/jirga/AfghanConstitution-Final.pdf (last visited January 8, 2004). See also Ron Synowitz, Afghanistan: Constitutional Commission Chairman Presents Karzai with Long-Delayed Draft Constitution (November 3, 2003), available at http://www.rferl.org/nca/features/2003/11/03112003164239.as p (last visited Jan. 8, 2004). B. Other Nations Have Curtailed Judicial Review During Times Of Crisis, Often Citing the United States' Example, And Individual Freedoms Have Diminished As A Result. While much of the world is moving to adopt the institutions necessary to secure individual rights, many still regularly abuse these rights. One of the hallmarks of tyranny is the lack of a strong and independent judiciary. Not surprisingly, where countries make the sad transition to tyranny, one of the first victims is the judiciary. Many of the rulers that go down that road justify their actions on the basis of national security and the fight against terrorism, and, disturbingly, many claim to be modeling their actions on the United States. Again, a few examples illustrate this trend. In Peru, one of former President Alberto Fujimori’s first acts in seizing control was to assume direct executive control of the judiciary, claiming that it was justified by the threat of domestic terrorism. He then imprisoned thousands, refusing the right of the judiciary to intervene. International Commission of Jurists, Attacks on Justice 2000-Peru, August 13, 2001, available at http://www.icj.org/news.php3?id\_article=2587&lang=en (last visited Jan. 8, 2004). In Zimbabwe, President Mugabe’s rise to dictatorship has been punctuated by threats of violence to and the co-opting of the judiciary. He now enjoys virtually total control over Zimbabweans' individual rights and the entire political system. R.W. Johnson, Mugabe’s Agents in Plot to Kill Opposition Chief, Sunday Times (London), June 10, 2001; International Commission of Jurists, Attacks on Justice 2002— Zimbabwe, August 27, 2002, available at http://www.icj.org/news.php3?id\_article=2695&lang=en (last visited Jan. 8, 2004). While Peru and Zimbabwe represent an extreme, the independence of the judiciary is under assault in less brazen ways in a variety of countries today. A highly troubling aspect of this trend is the fact that in many of these instances 23 those perpetuating the assaults on the judiciary have pointed to the United States’ model to justify their actions. Indeed, many have specifically referenced the United States’ actions in detaining persons in Guantánamo Bay. For example, Rais Yatim, Malaysia's "de facto law minister" explicitly relied on the detentions at Guantánamo to justify Malaysia's detention of more than 70 suspected Islamic militants for over two years. Rais stated that Malyasia's detentions were "just like the process in Guantánamo," adding, "I put the equation with Guantánamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, "Malaysia Slams Criticism of Security Law Allowing Detention Without Trial," Associated Press, September 9, 2003 (available from Westlaw at 9/9/03 APWIRES 09:34:00). Similarly, when responding to a United States Government human rights report that listed rights violations in Namibia, Namibia's Information Permanent Secretary Mocks Shivute cited the Guantánamo Bay detentions, claiming that "the US government was the worst human rights violator in the world." BBC Monitoring, March 8, 2002, available at 2002 WL 15938703. Nor is this disturbing trend limited to these specific examples. At a recent conference held at the Carter Center in Atlanta, President Carter, specifically citing the Guantánamo Bay detentions, noted that the erosion of civil liberties in the United States has "given a blank check to nations who are inclined to violate human rights already." Doug Gross, "Carter: U.S. human rights missteps embolden foreign dictators," Associated Press Newswires, November 12, 2003 (available from Westlaw at 11/12/03 APWIRES 00:30:26). At the same conference, Professor Saad Ibrahim of the American University in Cairo (who was jailed for seven years after exposing fraud in the Egyptian election process) said, "Every dictator in the world is using what the United States has done under the Patriot Act . . . to justify their past violations of human rights and to declare a license to continue to violate human rights." Id. Likewise, Shehu Sani, president of the Kaduna, Nigeriabased Civil Rights Congress, wrote in the International 24 Herald Tribune on September 15, 2003 that "[t]he insistence by the Bush administration on keeping Taliban and Al Quaeda captives in indefinite detention in Guantánamo Bay, Cuba, instead of in jails in the United States — and the White House's preference for military tribunals over regular courts — helps create a free license for tyranny in Africa. It helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso." Available at http://www.iht.com/ihtsearch.php?id=109927&owner=(IHT)&dat e=20030121123259. In our uni-polar world, the United States obviously sets an important example on these issues. As reflected in the foundational documents of the United Nations and many other such agreements, the international community has consistently affirmed the value of an independent judiciary to the defense of universally recognized human rights. In the crucible of actual practice within nations, many have looked to the United States model when developing independent judiciaries with the ability to check executive power in the defense of individual rights. Yet others have justified abuses by reference to the conduct of the United States. Far more influential than the words of Montesquieu and Madison are the actions of the United States. This case starkly presents the question of which model this Court will set for the world. CONCLUSION Much of the world models itself after this country’s two hundred year old traditions — and still more on its day to day implementation and expression of those traditions. To say that a refusal to exercise jurisdiction in this case will have global implications is not mere rhetoric. Resting on this Court’s decision is not only the necessary role this Court has historically played in this country. Also at stake are the freedoms that many in emerging democracies around the globe seek to ensure for their peoples.

#### Our judiciary is modeled – that destroys democracy

van Aelstyn, Counsel of Record for the Center for Justice & Accountability, 4 (Nicholas, Brief of the Center for Justice & Accountability, the International League for Human Rights, & Individual Advoacates for the Independence of the Judiciary in Emerging Democracies as Amici Curiae in Support of Petitioners, In the Supreme Court of the United States on Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit, Fawzi Khalid Abdullah Fahad Al Odah et al., Petitioners v. United States of America et al., Respondents, & Shafiq Rasul et al., Petitioners v. George W. Bush, et al., Respondents, Supreme Court case numbers 03-334 and 03-343)

This is chiefly, but not solely, a domestic concern. People around the world have long noted that the United States’ experiment with a tripartite government and an independent judiciary has, with some notable and regretted missteps, succeeded in living up to the ideals expressed in its Constitution. They have noted that the federal judiciary, specifically this Court, has managed to guarantee civil liberties even in times of strife. This success has made the U.S. system a model for countries around the world, particularly countries seeking to construct a civil society after decades of tyranny and oppression. However, these attempts to construct civil societies are consistently under assault. And as in this case, often the lead argument for dismantling such systems is national security. Indeed, some would-be democracies already have begun to justify prolonged detentions without judicial review on the basis of the detentions at Guantánamo Bay. Amici urge this Court to exercise jurisdiction over the claims asserted by the detainees at Guantánamo Bay not only because it is the only result consistent with more than two hundred years of legal precedent in this country, but also because the people of countries around the world look to the United States to uphold the ideals so elegantly reflected in its Constitution. When the United States fails to live up to these ideals, the cause of individual rights is diminished not just here but everywhere. ARGUMENT I. A GOVERNMENT WITH CHECKS AND BALANCES IS ESSENTIAL TO SAFEGUARDING INDIVIDUAL FREEDOMS. A. For More Than 200 Years The United States Has Recognized That A Strong, Independent Judiciary Is Essential To The Preservation Of Individual Liberties. The United States was founded on the ideal that a tripartite system of government was essential to the preservation of freedom. Giving life to the political theories of such philosophers as Locke and Montesquieu, the Framers determined that freedom could only be assured if each branch of the government served as a check on the other. See Bernard Bailyn, The Ideological Origins of the American Revolution 26-30, 323 (1992); Gordon S. Wood, The Creation 8 Of The American Republic 1776-1787, 150-52 (1993). According to Montesquieu, there can be no liberty “if the power of judging is not separate from legislative power and from executive power . . . . If it were joined to executive power, the judge could have the force of an oppressor.” Montesquieu, The Spirit of the Laws 157 (1748) (Anne Cohler, et al., eds., Cambridge Univ. Press (1989)). Echoing Montesquieu, the Framers proclaimed that “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” The Federalist No. 47 (James Madison); see also Bowsher v. Synar, 478 U.S. 714, 722 (1986) (“Even a cursory examination of the Constitution reveals the influence of Montesquieu’s thesis that checks and balances were the foundation of a structure of government that would protect liberty.”). In this balance, the judiciary, no less than any other branch, ensures that the government of the United States does not, in one fell swoop or by increments, become tyrannical. While the U.S. system of government necessarily contemplates a series of checks and balances, the Framers and this Court recognized that those checks are a dead letter unless exercised. “The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.” I.N.S. v. Chadha, 462 U.S. 919, 951 (1983). While these checks and balances must certainly be exercised in times of peace, they become all the more crucial in times of crisis. The Constitution is not a fair weather document. Its provisions do not allow either the executive or the legislative branches to dismantle it for convenience whatever the threat. "[T]he existence of inherent powers ex necessitate to meet an emergency . . . is something the forefathers omitted. \* \* \* Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion . . . they made no express provision for exercise of extraordinary authority because of a crisis." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring). This is so because whatever the perceived threat, at all 9 times “[t]he declared purpose of separating and dividing the powers of government [is] . . . to ‘diffus[e] power the better to secure liberty,’” Bowsher, 478 U.S. at 721-22. To allow anything less would upset the very nature of the U.S. system of government and threaten individual rights. See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 125 (1866) (the Framers “knew . . . the nation they were founding . . . would be involved in war . . . and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen”). B. Much of the World Has Followed The United States’ Lead. In the two and a half centuries since the Framers advocated for the importance of independent judicial review in preventing oppression and tyranny by an unchecked executive, history has proven them right. First, as discussed in Section II, infra, the example of the United States itself has demonstrated that this safeguard works. Second, as discussed in Section III, infra, the international conventions adopted by the United Nations and other intergovernmental organizations reflect the nearly universal, if often only aspirational, recognition of these principles by the global community. Finally, as discussed in Section IV, infra, the profoundly high regard with which these principles are held has been most dramatically demonstrated by the efforts and sacrifices of those struggling to establish their emerging democracies as stable, free and just countries within the community of nations. Thus, the United States’ heritage of a judiciary empowered to check executive power has become more than a national hallmark. It has become a fundamental element of modern governments seeking to ensure individual freedoms. Just as the people of the United States have recognized that a strong judiciary is essential to individual freedoms, so too have the peoples of other nations around the world.

#### Global democratic consolidation checks inevitable extinction

Diamond ‘95 (Larry, Senior Fellow at the Hoover Institution, Promoting Democracy in the 1990s, December, <http://www.wilsoncenter.org/subsites/ccpdc/pubs/di/fr.htm>)

This hardly exhausts the lists of threats to our security and well-being in the coming years and decades. In the former Yugoslavia nationalist aggression tears at the stability of Europe and could easily spread. The flow of illegal drugs intensifies through increasingly powerful international crime syndicates that have made common cause with authoritarian regimes and have utterly corrupted the institutions of tenuous, democratic ones. Nuclear, chemical, and biological weapons continue to proliferate. The very source of life on Earth, the global ecosystem, appears increasingly endangered. Most of these new and unconventional threats to security are associated with or aggravated by the weakness or absence of democracy, with its provisions for legality, accountability, popular sovereignty, and openness. LESSONS OF THE TWENTIETH CENTURY The experience of this century offers important lessons. Countries that govern themselves in a truly democratic fashion do not go to war with one another. They do not aggress against their neighbors to aggrandize themselves or glorify their leaders. Democratic governments do not ethnically "cleanse" their own populations, and they are much less likely to face ethnic insurgency. Democracies do not sponsor terrorism against one another. They do not build weapons of mass destruction to use on or to threaten one another. Democratic countries form more reliable, open, and enduring trading partnerships. In the long run they offer better and more stable climates for investment. They are more environmentally responsible because they must answer to their own citizens, who organize to protest the destruction of their environments. They are better bets to honor international treaties since they value legal obligations and because their openness makes it much more difficult to breach agreements in secret. Precisely because, within their own borders, they respect competition, civil liberties, property rights, and the rule of law, democracies are the only reliable foundation on which a new world order of international security and prosperity can be built.

### Impact – Court Stripping kills heg

#### Court stripping destroys judicial legitimacy

Andrew D. Martin, Prof of Political Science at Washington University. 2001. Statuatory Battles and Constitutional Wars: Congress and the Supreme Court

But the large policy payoff in the constitutional cases. What does the ability of the President and Congress to attack through overrides or other means constitutional court decisions imply in terms of the cost of the justices bear? If an attack succeeds and the court does not back down, it effectively removes the court from the policy game and may seriously or, even irrevocably harm its reputation, credibility, and legitimacy. Indeed, such an attack would effectively remove the court from policy making, thus incurring an infinite cost. With no constitutional prescription for judicial review, this power is vulnerable, and would be severely damaged if congress and the president were effective in attack on the Court. But even if the attack is unsuccessful, the integrity of the court may be damaged, for the assault may compromise its ability to make future constitutional decisions and, thus, more long-lasting policy. One does not have to peer as far back as scott v. sandford to find examples; Bush v. Gore (2000, U.S.) may provide one. To be sure, the new President and Congress did not attack the decision, but other memebers of government did of course, unsuccessfully at least in terms of the ruling’s impact. Yet, there seems little doubt that the critics (not to mention the decision itself) caused some major damage to the reputation of the cout, the effects of which the justeces may feel in the not-so-distant future.

#### Supreme Court legitimacy key to US hegemony around the world- direct link turn to their affirmative

Knowles 09, (Robert Knowles, professor at New York University Public Law, American Hegemony and the Foreign Affairs Constitution, 41 Ariz. St. L.J. 87 2009)

This Article offers a new model for assessing appropriate judicial¶ deference in foreign affairs that takes account of American-led order. By¶ maintaining consistent interpretation of U.S. and international law over time¶ and providing virtual representation for other nations and non-citizens, U.S.¶ courts bestow legitimacy on the acts of the political branches, provide¶ public goods for the world, and increase America's soft power-all of¶ which assist in maintaining the stability and legitimacy of the American-led¶ hegemonic order.¶ This "hegemonic" model substantially eliminates the problematic¶ deference gap between foreign and domestic cases and enables courts to¶ appropriately balance foreign affairs needs against other separation-ofpowers¶ goals by "domesticating" foreign affairs deference. The hegemonic¶ model also has explanatory and predictive value. In four recent cases¶ addressing habeas claims by alleged enemy combatants, the Supreme Court¶ rejected special deference." It refused to defer to the executive branch interpretations of foreign affairs statutes and international law, and even¶ asserted military exigencies. The hegemonic model justifies this recent¶ rejection of special deference and explains why it could augur increased¶ judicial involvement in foreign affairs.

### Impact – Court Stripping Turn

#### Court stripping turns the aff – preserving legitimacy is key

Curt Bentley, 2007 (Curt, Constrained by the liberal tradition, Brigham Young University Law Review, p. lexis)

This institutional limitation theory focuses primarily on the constraints imposed on the Court because of its relationship with the other branches of government. The Supreme Court is not wholly dependent upon other branches of government; the unique legitimacy given its interpretations of the Constitution by the American people provides it with real influence of its own. n116 However, the institutional limitation theory posits that since the Court possesses neither the purse nor the sword, n117 it relies upon its  [\*1745]  legitimacy in the eyes of the American people in order to pressure the legislative and executive branches to enforce its decrees: The Supreme Court ... possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution. This legitimacy the Court jeopardizes if it flagrantly opposes the major policies of the dominant alliance; such a course of action, as we have seen, is one in which the Court will not normally be tempted to engage. n118 Without legitimacy in the eyes of the public, both Congress and the President might feel justified in resisting the ruling of the Court either through jurisdiction-stripping n119 or by simply refusing to enforce its decrees. n120 There is precedent for both in American history. n121 The Court risks becoming substantially weakened, or even irrelevant, when the political branches ignore judicial decrees and where it nonetheless doggedly pursues the counter-majoritarian course. n122

#### Congressional retaliation will undercut courts --- they have no institutional protection against the backlash

Barbara B. Crabb, 2012(Barbara is a United States District Judge, Western District of Wisconsin, Wisconsin Law Review, “ADDRESS: ROBERT W. KASTENMEIER LECTURE: BRIDGING THE DIVIDE BETWEEN CONGRESS AND THE COURTS,” 2012 Wis. L. Rev. 871) \*\*modified for ableist rhetoric

Another thirty years passed before the judicial system had the opportunity to become self-governing. In 1922, Congress authorized the establishment of what is now the Judicial Conference of the United States, to be made up of the chief judges of each circuit court of appeals, headed by the Chief Justice, and charged with the responsibilities of holding annual meetings to make policy, report on the condition of the dockets in each circuit, and submit recommendations for improving the administration of justice. n21 In 1939, Congress established the Administrative Office of the United States Courts, subject to the control of the Chief Justice and the Judicial Conference, and gave the office financial control of the lower federal courts and primary responsibility for the administration of the federal judiciary. n22 Among other things, this meant that for the first time, the courts were not in the questionable position of having to seek funding from the most frequent litigator in their courts, the Department of Justice. n23 In 1967, Congress authorized the establishment of the Federal Judicial Center, the judiciary's educational and research arm. n24 In 1980 and again in 2002, Congress enacted legislation giving the judicial councils of each circuit new responsibilities for judicial discipline. n25 [\*878] These major changes in court administration put the judicial branch on a firmer footing than it had been in the nineteenth century and gave it a larger measure of autonomy, but they did not change the basic relationship between the two branches. The judiciary remained dependent on Congress for the confirmation of new judges, the creation of new judgeships, funding for courthouses, their basic budgets, and procedural rules, just as it is today. The courts still have no independent source of funding. They have no right to be heard on congressional decisions to expand or restrict the scope of the courts' jurisdiction or to enact laws that will increase the courts' workload. In other words, when it comes to matters affecting institutional independence, the judiciary has no constitutional protection and its power is limited to persuasion. If Congress wanted to, it could retaliate against the courts by cutting the courts' funding; disestablishing individual courts; adding or taking away Justices from the Supreme Court; imposing ~~crippling~~devastating restrictions on the operations of the courts; narrowing their jurisdiction; impeaching individual judges and Justices; and refusing to confirm nominees to fill judicial vacancies.The framers set up what could well be a recipe for disaster: giving the judiciary the last word on the law, with the inevitable controversies that authority will provoke, and then giving it no institutional protection. It is a little like giving a person a very old and very unpredictable gun for personal security. If used properly, the gun may perform its intended function, but it's just as possible that it will inflict great damage on its owner. Making the judiciary the final arbiter on the meaning of the law, with the authority to declare a law or practice unconstitutional gives it power, but a power that can be explosive and set off backlashes of varying proportions. By no means is it a power that can ward off encroachment by the other branches. When an entity has little power in a relationship, it behooves it to assess the sticking points between it and its protagonist, husband carefully what little power it possesses, employ diplomacy, look for areas in which the interests of both parties are in alignment, and seek ways to enhance what little power of persuasion it has.

## Politics

### Courts = not shielded

#### Health care proves—Republicans will lash out against unpopular Supreme Court decisions:

Stephen Manual, 2012 **(6/28/2012,** staff writer, “Will Supreme Court judgment help Obama win presidential election?” Accessed 7/26/2012 at <http://www.allvoices.com/contributed-news/12483143-will-supreme-court-judgment-help-obama-win-presidential-election>, rwg)

Finally, President Barack Obama has carried the day. He stood winner as the Supreme Court ruled on Thursday to uphold the Affordable Care Act. However, the president remained humble during his speech following the decision. He said that it was a victory for the American people and his administration would continue to work for betterment of the people. The Supreme Court judgment is clearly against the anticipation of Republicans, as they were predicting a contrary decision on the issue. The judgment can be called one of the biggest victories of the Obama administration in years. However, the question arises whether the Obama administration will be able to translate the victory into successful election campaign or not. Observers believe the administration would definitely exploit the judgment in its favor and try its best to convince electorates to cast vote for Obama in the upcoming presidential election. The visionary abilities of Obama would be highlighted and people would be told about revolutionary plans of Obama for the people and that all these plans would be implemented only if he is reelected into the office in November’s election. The judgment would also help the Obama administration to undermine capabilities of Republican presidential candidate Mitt Romney. Observers opine the judgment dealt a heavy blow to the Republicans, as they believed the court would strike down the individual mandate – at the very least. They were planning to celebrate the judgment and shaming the Obama administration once the verdict was out, but they were shocked after the judgment was released. Observers believe that the Obama administration has got a fresh opportunity to set the house in order and focus more on public-related issues so that they could bag maximum votes in the upcoming presidential election. It is the best opportunity for Obama to sell his Health-Care law to the masses. Mitt Romney, while giving his reaction on the Supreme Court judgment, said that he would repeal the law if elected to the presidency in the November election. He even said that there was a need to get rid of Obama if people want to get rid of Obama-care. Definitely, Republicans would lash out at the law in their public meetings and try to invoke public anger on the issue. Republicans believe the ruling of the Supreme Court can hamper their campaign against Obama.

## Topicality

### Regulate

#### Regulate means to delegate lawmaking power from the legislature to an agency

Ellig 9 – Dr. Jerry Ellig, Senior Research Fellow at the Mercatus Center at George Mason University, “The Future of Regulation”, 11-9, http://publicpolicy.pepperdine.edu/academics/research/policy-review/2010v3/content/the-future-of-regulation.pdf

Many times in casual conversation the term ‘regulation’ is used to refer to any restriction imposed by the government that defines certain actions as legal or illegal, but the definition is actually more specific. **Regulation occurs when a legislature delegates some of its lawmaking power to a regulatory agency, which then issues detailed rules, the purpose of which is to carry out the intention of the legislature. Regulations are issued by a regulatory agency**, with the intention of filling in the gaps in legislation. In the case of federal regulation, it fills in the gaps left by the U.S. Congress.

## CP

### Congress

#### Congress should

#### Amending IDEA to protect students with disabilities from corporal punishment

#### Create grants to incentivize states to ban corporal punishment

#### Passing the Ending Corporal Punishment in Schools act of 2011

#### It solves

NICOLE MORTORANO 2014 (Georgetown University Law Center, J.D. 2013; Teachers College, Columbia University, M.A. ; College of the Holy Cross, B.A. , “Protecting Children’s Rights Inside of the Schoolhouse Gates: Ending Corporal Punishment in Schools, ” THE GEORGETOWN LAW JOURNAL, Vol. 102:481, https://georgetownlawjournal.org/articles/100/protecting-children-s-rights-inside/pdf)

LEGISLATIVE PROPOSALS TO PROTECT SCHOOLCHILDREN FROM CORPORAL PUNISHMENT IN SCHOOLS This Note encourages Congress to ban corporal punishment by employing a multiprong legislative strategy: (1) amending IDEA to protect students with disabilities from corporal punishment;213 (2) creating grants to incentivize states to ban corporal punishment and implement School-Wide Positive Behavior Interventions and Supports; and (3) passing the Ending Corporal Punishment in Schools Act of 2011.214 Advocates should lobby Congress to amend IDEA to prohibit the use of corporal punishment against students with disabilities.215 When the Education for All Handicapped Children Act—a law that was later renamed and revised as IDEA—was passed, it achieved bipartisan support and “generated remarkably little opposition in Congress.”216 Championing the rights of people with disabili-ties is a cause that cuts across party lines, and advocates should channel this political energy towards protecting certain students from physical punishment in schools. Amending legislation to protect students with disabilities would arguably achieve more immediate results and protections for students with disabilities and simultaneously would build greater momentum for overcoming hurdles and passing more comprehensive legislation that protects all students from corporal punishment. IDEA is intended to protect educational opportunities for students with disabilities, and yet the law does not explicitly protect these students from corporal punishment.217 IDEA does prohibit the use of long-term suspensions and expulsions as consequences for behaviors that are manifestations of the student’s disabilities.218 Advocates should lobby Congress to amend IDEA and protect students from receiving physical punishments for conduct that is a manifestation of their disabilities. Moreover, because physical punishment can “aggravate... medical conditions... [and] cause some children to regress in developmental terms,”219 IDEA should categorically ban schools from using physical means to punish students with disabilities. Advocates should protect all students from corporal punishment by mobilizing already existing interests to promote positive school cultures and eliminate the use of harsh disciplinary measures. For example, the special-education community has lobbied for federal legislation to address school practices that seclude and restrain students. The National Disability Rights Network defines seclusion as “involuntary confinement” and physical restraint as “[a]ny manual method... [or] device... that immobilizes or reduces... [mobility]; or [a] drug or medication when it is used as a restriction to manage the... behavior or restrict the... freedom of movement and is not a standard treatment or dosage for the . . . condition.”220 Although federal legislation protects children from abusive restraints and seclusion methods in health-care facilities221 and nonmedical community-based facilities,222 no federal legislation currently protects children from these practices in educational settings.223 Special-education advocates are lobbying for more sweeping legislation, including the prohibition of “any other form of restraint [and locked seclusion rooms] except in situations in which the student poses a clear and imminent physical danger to himself or others.”224 In 2010 and 2011, Congress introduced federal legislation to protect “school children against harmful and life-threatening seclusion and restraint practices.”225 In addition legislation at the state level is affording increasing protections to students with disabilities. For example, Arizona recently passed legislation restricting the use of seclusion rooms and consequently “join[ed] more than 30 other states that impose rules on the restraint of students in public schools.”226 Advocates against corporal punishment should partner with the activists in the special-education community who are lobbying for schools to use positive, nonphysical behavioral interventions. At the local and national level, there has been momentum to end harsh disciplinary practices that contribute to the School-to-Prison Pipeline,227 which this Note contends aligns with the movement to end corporal punishment in schools. The School-to-Prison Pipeline describes the overreliance on harsh school-disciplinary practices, including zero-tolerance policies and criminalizing minor school misbehavior, which push students out of public schools and into the juvenile justice system or the streets.228 Recent studies, including a longitudinal study of one million students in Texas, illustrate the prevalence and effects of school exclusionary practices.229 Although much of the research surrounding the School-to-Prison Pipeline focuses on the effect of school exclusionary practices such as suspensions and expulsions, these practices share many similarities with the use of physical punishment in schools. For example, research on the School-to-Prison Pipeline demonstrates that harsh disciplinary practices disproportionately target students of color and students with disabilities, and too often these exclusionary practices are consequences for minor behaviors. Similar civil rights concerns are present with the use of corporal punishment because schools disproportionately use corporal punishment against certain demographics of students and use physical punishments to address a “wide range of misbehavior, including minor infractions such as chewing gum, being late, sleeping in class, talking back to a teacher, violating the dress code, or going to the bathroom without permission.”230 The federal government has recently set up a Department of Justice task force to address the School-toPrison Pipeline, and the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights held a congressional panel in December 2012 to examine the consequences of harsh school disciplinary policies.231 Advocates for banning corporal punishment in schools should both partner with the movement to end the School-to-Prison Pipeline and broaden this movement’s message to include ending physical punishments in schools. As advocates garner the necessary political support, they should lobby for proposals that encourage states to protect all schoolchildren from corporal punishment. Using a grant-based program, Congress can financially encourage states to replace corporal punishment practices with more progressive approaches for promoting positive and safe school cultures.232 For example, in 2009, the American Recovery and Reinvestment Act allocated $4.35 billion to the Race to the Top Fund, which provided competitive grants to encourage states to innovatively address four key areas: (1) adopting college- and careerreadiness standards; (2) creating data systems to track student progress and improve teaching; (3) “[r]ecruiting, developing, rewarding, and retaining effective teachers and principals”; and (4) “[t]urning around our lowest-achieving schools.”233 The Obama Administration’s recent success with Race to the Top grants demonstrates states’ willingness to plan and implement progressive educational reforms that are aligned with federal goals for education.234 The Race to the Top grants required only minimal funding from the federal government and yielded substantial results. Congress should use its track record of success with these grants to encourage states to outlaw corporal punishment in schools. These grants can specifically target school-culture issues that have been gaining attention at the national level. For example, these incentive grants can address multiple facets of the School-to-Prison Pipeline, target harsh disciplinary practices such as corporal punishment, zero-tolerance policies, and longterm suspensions, and support schools in implementing research-proven positive behavioral intervention and support. Finally, advocates should lobby for legislation that categorically bans corporal punishment in schools and withholds federal funding from noncompliant states. For example, advocates should mobilize efforts to pass the Ending Corporal Punishment in Schools Act of 2011, which bans corporal punishment in federally funded schools, penalizes educational institutions that employ corporal punishment,235 and awards school-climate grants to institutions in need of assistance.236 The bill defines corporal punishment as “paddling, spanking, or other forms of physical punishment, however light, imposed upon a student.”237 The bill is based upon congressional findings, which include all children’s “right[s] to be free from any corporal punishment.”238 The findings explain how corporal punishment targets “hundreds of thousands of school children” each year239 and disproportionately affects African-American schoolchildren and students with disabilities.240 The bill protects schoolchildren by categorically banning corporal punishment in public schools, withholding funding from schools that continue authorizing or using corporal punishment, and awarding grant monies to help schools “improv[e] school climate and culture by implementing school-wide positive behavior support approaches.”241 Legislative strategies—including amending IDEA, creating incentive grants to encourage state actions, and enacting categorical bans against corporal punishment—are promising means to protect children from physical punishment in schools. Legislative strategies can effectively and timely capture changing public opinion, evolving notions of dignity, and the increasing urgency to reform school culture. Moreover, these legislative strategies can further fuel constitutional efforts to overturn Ingraham by providing the Court with additional evidence that physical punishment against students is cruel and unusual.