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Granting a Hall Pass to Public School Educators: How the Fifth Circuit's Decision in T.O.v. Fort Bend Independent School District Highlights the Inadequate Constitutional Curriculum for Academic Corporal Punishment

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GRANTING A HALL PASS TO PUBLIC SCHOOL EDUCATORS: HOW THE FIFTH CIRCUIT'S DECISION IN *T.O. v. FORT BEND INDEPENDENT SCHOOL DISTRICT* HIGHLIGHTS THE INADEQUATE CONSTITUTIONAL CURRICULUM FOR ACADEMIC CORPORAL PUNISHMENT

Jessica Whelan*

> "Battered schoolchildren are not interested in post-punishment relief. What they want—and deserve—is not to be hit in the first place."[1]

I. General Education: An Introductory Course on the Legal, Educational, and Social Context of Academic Corporal Punishment

After eighth-grade student Trey Clayton failed to sit in his assigned seat for class, an assistant principal struck him three times on the buttocks as punishment.[2] The paddling was so severe that Clayton fainted and fell face-first onto the concrete floor, breaking five teeth and his jaw.[3] As a result of the incident, Clayton's mother brought an action against the school and the assistant principal.[4] On review, the Fifth Circuit determined that Clayton's claim of excessive academic corporal punishment did not rise to the level of a substantive due process violation.[5]

In an academic setting, corporal punishment is a form of discipline used by school officials to inflict physical pain on students for the purpose

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1. Jerry R. Parkinson, *Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence that is Literally Shocking to the Conscience*, 39 S.D. L. Rev. 276, 311 (1994).

2. *See* Clayton *ex rel.* Hamilton v. Tate Cnty. Sch. Dist., 560 F. App'x 293, 295 (5th Cir. 2014) (summarizing facts of Trey Clayton's claim of excessive academic corporal punishment). More specifically, Clayton was not in the correct seat because he arrived to class and discovered another student had already taken his assigned seat. *Id.*

3. *Id.* (describing specific nature of Clayton's injury).

4. *Id.*

5. *Id.* at 297 (affirming district court's conclusion that Clayton's substantive due process claim was foreclosed by Fifth Circuit precedent because the state of Mississippi provides adequate legal remedies for students in these cases).

of correcting misbehavior.[6] Since the late 1970s, thirty-one states have statutorily banned the use of corporal punishment in educational environments, prompting a decline in its use from 4% of all schoolchildren in 1978 to less than 0.5% in 2015.[7] This development indicates larger social change, progressing over the course of several decades, toward the limitation and elimination of its use altogether.[8] Nevertheless, nineteen states continue to statutorily authorize corporal punishment in public school settings while prohibiting its use in other contexts, such as in child care and adoption institutions.[9] Studies show that corporal punishment may produce a range of negative consequences, including physical harm, emotional distress, and poor academic performance.[10] Moreover, it

6. *See* Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy* 30 SOC. POL'Y REP. 3 (2016).

7. *See id.* at 4 (providing a list of states that have legislatively banned the use of corporal punishment in public schools). In alphabetical order, the states that statutorily prohibit corporal punishment are Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Id.* The District of Columbia has also banned the use of academic corporal punishment. *Id.*; *see, e.g.*, 22 PA. CODE § 12.5 (2021); MINN. STAT. ANN. § 121A.58 (2021); N.J. STAT. ANN. § 18A:6-1 (2021); UTAH CODE ANN. § 53G-8-302 (2021).

8. *See* AMIR WHITAKER & DANIEL LOSEN, CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, THE STRIKING OUTLIER: THE PERSISTENT, PAINFUL, AND PROBLEMATIC PRACTICE OF CORPORAL PUNISHMENT IN SCHOOLS 12 (2019). In their article, Amir Whitaker and Daniel Losen note that more than half of U.S. states have banned corporal punishment in school since the 1970s. *Id.* Additionally, Whitaker and Losen observe wide and diverse support for its abolition, including support from over 100 pediatrician professional organizations, child psychologists, and the United States Department of Education. *Id.*; *see also* Protecting Our Students in Schools Act of 2021, H.R. 3836, 117th Cong. (2021); Ending Corporal Punishment in Schools Act of 2021, H.R. 1234, 117th Cong. (2021) (proposing federal legislation that would prohibit the use of corporal punishment in schools receiving federal funding).

9. *See* Gershoff & Font, *supra* note 6, at 4 (listing the nineteen states that still statutorily permit the use of corporal punishment in public schools as a disciplinary tactic). In alphabetical order, the states that statutorily permit corporal punishment in public schools are Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming. *Id.*; *see also* WHITTAKER & LOSEN, *supra* note 8, at 18 (emphasizing the contradiction between several states' statutory approaches to corporal punishment as compared to other child-focused settings). Georgia, for instance, permits the use of corporal punishment in public schools but prohibits its use in child care institutions, foster agencies, and adoption agencies. *Id.* Similarly, corporal punishment is statutorily permissible in Mississippi, but use of the practice is banned in state foster care and child care facilities. *Id.* at 19.

10. *See* WHITAKER & LOSEN, *supra* note 8, at 20.

disproportionately impacts students of color and students with disabilities.[11]

While the Supreme Court has resolved procedural due process issues in academic corporal punishment cases, in *Ingraham v. Wright*[12]—the leading case on the issue—the Court declined to consider whether these claims may produce substantive due process violations.[13] Since the 1977 *Ingraham* ruling, lower courts have struggled to reconcile its holding with the need to provide a standard for evaluating academic corporal punishment claims.[14] Seven circuit courts have found that such claims are properly analyzed under a version of the substantive due process "shocks the conscience" standard, which considers whether the force used was so egregious as to constitute a "brutal and inhumane abuse of official power liter-

11. *See id.* at 20–24 (examining the relationship between race and corporal punishment in public schools), Gershoff & Font, *supra* note 6, at 8–10 (discussing data showing racial disparities in the use of academic corporal punishment), HUM. RTS. WATCH & ACLU, A VIOLENT EDUCATION: CORPORAL PUNISHMENT OF CHILDREN IN U.S. PUBLIC SCHOOLS 118 (2008) (finding corporal punishment disproportionately affects students of color and students with disabilities, making the achievement of educational goals and proper behavioral guidance more difficult for these students). At the district level, research has shown that black children are more likely to be corporally punished than other students. *Id.* In over half of the school districts in Alabama and Mississippi, for instance, black children are at least fifty-one percent more likely to be corporally punished than white students. *Id.* These disparities are notably high in several other southern states, such as Louisiana, Georgia, and Florida. *Id.* The racial disparity rates outlined in this study are also comparable to school suspension and expulsion disparity rates, suggesting that black students are generally subject to more discipline than white students. *Id.* The study also acknowledged that few studies have examined the source of racial disparities in academic corporal punishment, but that factors such as the frequency of misbehavior and likelihood of attending schools using corporal punishment are not adequate explanations. *Id.* Students with disabilities are also disparately affected by academic corporal punishment, which raises concerns about schools' conformity with the Individuals with Disabilities Education Act ("IDEA"). *Id.* at 12. Gershoff and Font posit that this disparity is troubling for two reasons: (1) it suggests that school staff respond to the behavioral problems of students with disabilities by using "harsh" disciplinary methods, and (2) it could indicate that officials are punishing these students because of their disability, which is unlawful under the IDEA. *Id.*

12. 430 U.S. 651 (1977).

13. *Id.* at 659 n.12 (declining to consider whether the use of excessive academic corporal punishment is "arbitrary, capricious and unrelated to achieving any legitimate educational purpose").

14. *See* Parkinson, *supra* note 1, at 302–05 (arguing that the Supreme Court's *Ingraham* decision espoused an "indifferent attitude" towards academic corporal punishment that produced a "lack of direction for the lower federal courts" on resolution of these claims); *see also* Diane Heckman, *Fourteenth Amendment Substantive Due Process and Academic Corporal Punishment in the First Decade of the Twenty-First Century*, 271 ED. LAW REP. 509, 521 (2011) (summarizing federal appellate courts' respective positions on academic corporal punishment). Importantly, neither the First Circuit nor the D.C. Circuit has addressed the constitutionality of academic corporal punishment in any capacity. *Id.*

ally shocking to the conscience."[15] Two circuit courts view excessive academic corporal punishment as a seizure of the person meriting a Fourth Amendment "reasonableness" evaluation.[16] This type of inquiry analyzes whether an instance of corporal punishment was objectively unreasonable "under the circumstances then existing and apparent."[17] The Fifth Circuit, conversely, has taken a unique stance on academic corporal punishment jurisprudence.[18] The Fifth Circuit's standard dictates that claims of excessive corporal punishment in public schools brought under 42 U.S.C. § 1983 do not implicate substantive due process rights if adequate state remedies are available, as shown in *T.O. v. Fort Bend Independent School District*.[19]

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15. *See, e.g.*, Domingo v. Kowalski, 810 F.3d 403, 410–11 (6th Cir. 2016); Smith *ex rel.* Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 173 (2d Cir. 2002); Gottlieb v. Laurel Highlands Sch. Dist., 272 F.3d 168, 173 (3d Cir. 2001); Neal *ex rel.* Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1074–75 (11th Cir. 2000); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 564 (8th Cir. 1988); Garcia ex rel. Garcia v. Miera, 817 F.2d 650, 653–54 (10th Cir. 1987); *and* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (finding that academic corporal punishment claims may give rise to a substantive due process violation and adopting the "shocks the conscience" inquiry). The test was first applied to academic corporal punishment claims by the Fourth Circuit in *Hall v. Tawney* and adopted by six other circuits thereafter. *See* Parkinson, *supra* note 1, at 287–88 (stating *Hall* was the first federal circuit court to conclude that excessive academic corporal punishment could constitute a substantive due process violation and apply the "shocks the conscience" inquiry to such claims.) The test outlined in *Hall* is one typically used in police brutality cases and considers "whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Hall*, 621 F.2d at 613 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)) (adopting the "shocks the conscience" inquiry to evaluate academic corporal punishment claims).

16. *See, e.g.*, Doe *ex rel.* Doe v. Hawaii Dept. of Educ., 334 F.3d 906, 907 (9th Cir. 2003); Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1014–15 (7th Cir. 1995) (adopting a Fourth Amendment reasonableness standard for analysis of academic corporal punishment claims).

17. *See Wallace*, 68 F.3d at 1014–15 (rationalizing application of the reasonableness standard with a focus on objectivity). The Seventh Circuit emphasized the importance of objectivity to application of the reasonableness inquiry. *Id.* at 1015. Thus, to balance the competing interests of educators and students with respect to the disciplinary process, the test does not consider the respective intentions or viewpoints of either party. *Id.*

18. *See* Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 876–77 (5th Cir. 2000) (Wiener, J., concurring) ("[T]his circuit has become increasingly isolated in our position that substantive due process cannot be implicated by injuries that students suffer incidental to disciplinary corporal punishment as long as the state affords adequate civil or criminal remedies."); *see also* T.O. v. Ft. Bend Indep. Sch. Dist., 2 F.4th 407, 419 (5th Cir. 2021) (Wiener, J., concurring) (contending that Fifth Circuit's rule in academic corporal punishment cases is "completely out of step" with other federal appellate courts and Supreme Court guidance).

19. 2 F.4th 407; *see also Moore*, 233 F.3d at 871; Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990) (holding and then reaffirming the Fifth Circuit's standard). The Author of this Note uses phrases like "Fifth Circuit approach" and "Fifth Circuit

This Note argues that the standard proffered by the Fifth Circuit in *T.O.* improperly conflates procedural and substantive due process violations, misconstrues the role of arbitrariness in a judicial analysis, and restricts the scope of a federal § 1983 remedy for student litigants.[20] Further, this Note contends that the Supreme Court should reconsider the issue of academic corporal punishment, reject the Fifth Circuit's standard of review, and adopt a Fourth Amendment reasonableness inquiry.[21] First, Part II outlines the legislative and judicial developments governing the evaluation of academic corporal punishment claims. Next, Part III recounts the facts and procedural history of the *T.O.* decision. Additionally, Part IV provides a detailed overview of the Fifth Circuit's reasoning. Then, Part V critically analyzes the issues presented by the *T.O.* decision and argues that an established form of constitutional review is more appropriate for academic corporal punishment claims. Finally, Part VI discusses the potential social and judicial repercussions of *T.O.*, arguing that its holding exemplifies the need for updated Supreme Court guidance on academic corporal punishment claims.

II. A HISTORY LESSON: THE LEGISLATIVE AND JUDICIAL BACKGROUND OF ACADEMIC CORPORAL PUNISHMENT

An assessment of the *T.O.* case requires a broader understanding of legislative and judicial factors affecting the administration and adjudication of academic corporal punishment. Administratively, academic corporal punishment is subject to state legislation; no federal laws on the issue currently exist.[22] Still, students who experience excessive academic corporal punishment can pursue a federal judicial remedy under 42 U.S.C. § 1983, a civil rights statute prohibiting abuses of authority by state officials.[23] Notably, the Supreme Court's only evaluation of a § 1983 academic corporal punishment claim in *Ingraham v. Wright* left key issues of adjudication unresolved.[24] As a result, federal appellate courts have failed

standard" to refer to the Fifth Circuit's unique consideration of adequate alternative state remedies in a § 1983 substantive due process claim.

20. *See infra* Part V.

21. *See infra* Part V.

22. *See* Protecting Our Students in Schools Act of 2021, H.R. 3836, 117th Cong. (2021); Ending Corporal Punishment in Schools Act of 2021, H.R. 1234, 117th Cong. (2021) (both proposing federal legislation to restrict the use of academic corporal punishment in schools). Similar federal corporal punishment laws have been proposed but none have progressed to the voting stage. *See* Gershoff & Font, *supra* note 6, at 18 (summarizing efforts to implement federal academic corporal punishment legislation in 1990, 1991, 1993, 2010, 2011, 2014, and 2015).

23. For a more comprehensive discussion of 42 U.S.C. § 1983 as it relates to academic corporal punishment claims, see *infra* notes 38–49 and accompanying text.

24. *See* Ingraham v. Wright, 430 U.S. 651, 659 n.12 (1977) (declining to review whether the infliction of severe corporal punishment on public school students could qualify as a violation of substantive due process under the Fourteenth Amendment); *see also* Lekha Menon, Note, *Spare the Rod, Save a Child: Why the Su-*

to establish a unanimous standard of review for academic corporal punishment claims.[25]

A. *State Legislation: Statutes Governing Academic Corporal Punishment*

Public school corporal punishment is primarily governed by state law.[26] As previously mentioned, thirty-one states have explicitly banned the use of corporal punishment in an educational environment.[27] Pennsylvania, for instance, prohibits corporal punishment as a form of discipline in schools.[28] Similarly, Minnesota law does not permit school employees to use corporal punishment as a method of reform or penalty for "unacceptable [student] conduct."[29]

Nineteen states, however, still permit educators to use academic corporal punishment in most circumstances.[30] In Texas, educators may inflict physical pain on a student if they "reasonably believe" it is necessary to effectuate discipline.[31] Similarly, Mississippi law specifies that corporal

preme Court Should Revisit Ingraham v. Wright and Protect the Substantive Due Process Rights of Students Subjected to Corporal Punishment, 39 CARDOZO L. REV. 313, 319 (2017) (noting that in the forty years since *Ingraham*, the Court has not addressed the constitutionality of academic corporal punishment).

25. *See* Menon, *supra* note 24, at 332 (noting the Supreme Court's failure to speak on whether academic corporal punishment implicates substantive due process rights has produced a lack of guidance, but federal appellate courts have still had to evaluate these claims).

26. *See* Gershoff & Font, *supra* note 6, at 4 (noting academic corporal punishment is largely ignored by the federal government and is widely considered a state matter of governance).

27. *See id.* (describing trend towards legislative prohibition of corporal punishment use in schools). For an alphabetical list of states that have banned the use of academic corporal punishment, see *supra* note 7.

28. *See* 22 PA. CODE § 12.5 (2021) (banning corporal punishment and limiting the use of force in an educational environment). Pennsylvania law defines corporal punishment as "physically punishing a student for an infraction of the discipline policy" and dictates that its use is prohibited. *Id.* "Reasonable force," however, may permissibly be used:

(1) To quell a disturbance.
(2) To obtain possession of weapons or other dangerous objects.
(3) For the purpose of self defense.
(4) For the protection of persons or property.

Id.

29. MINN. STAT. § 121A.58 (2021) (defining and prohibiting the use of corporal punishment). The provisions of Minnesota's corporal punishment statute are similar to that of Pennsylvania, but features a definition including: a) "hitting or spanking a person with or without an object or b) "unreasonable physical force causing bodily or substantial emotional harm." *Id.*

30. For a full list of states that still permit the use of corporal punishment in public schools, see *supra* note 9.

31. TEX. PENAL CODE ANN. § 9.62 (West 2021); TEX. EDUC. CODE ANN. § 37.0011 (West 2021) (defining the parameters of the educator-student relationship with respect to the use of corporal punishment). Pursuant to Texas law, corporal punishment is the "deliberate infliction of physical pain [and force] . . . as a means of discipline." TEX. EDUC. CODE ANN. § 37.0011. Texas specifically notes that instances of physical pain caused by "reasonable" athletic activities and cir-

punishment administered in a "reasonable manner" by an official acting within the scope of their employment in accordance with governing law does not qualify as negligence or child abuse.[32] Importantly, legislatures have imposed boundaries on the use of corporal punishment—a school official may be held civilly or criminally liable for excessive acts of corporal punishment in most states.[33] Despite limitations on corporal punishment for the safety of students, school officials may still be eligible for immunity from suit.[34] In Texas, for instance, a school employee is not personally liable for an act "incident to or within the scope of [the employee's duties]" *unless* the act constitutes excessive disciplinary force or injurious negligence.[35] Texas also provides immunity for education officials if their conduct falls within a "reasonable" level of force authorized by law.[36]

B. *Federal Legislation: 42 U.S.C. § 1983 and the Qualified Immunity Defense*

Currently, there is no federal statute governing the use of academic corporal punishment.[37] Without a targeted federal law, students are left to use 42 U.S.C. § 1983 as the vehicle to enforce their constitutional rights when an educator uses excessive academic corporal punishment under

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cumstances wherein restraint is required *do not* constitute corporal punishment. *Id.* Moreover, school disciplinary policy provisions may permit an educator to use corporal punishment as a form of discipline *unless* a student's parent or guardian annually provides a written, signed statement to the contrary. *Id.*

32. MISS. CODE. ANN. § 37-11-57 (2021) (describing the proper administration of corporal punishment). Mississippi law defines corporal punishment to include the "reasonable" use of physical force by a school official as "necessary to maintain discipline, to enforce a school rule, for self-protection, or for the protection of other students from disruptive events." *Id.*

33. *See* TEX. PENAL CODE ANN. § 9.62 (establishing criminal liability for academic corporal punishment only exists under Texas law where the use of deadly force is employed).

34. *See* TEX. EDUC. CODE ANN. § 22.0511 (West 2021); MISS. CODE ANN. § 37-11-57 (2021); LA. STAT. ANN. § 17:439 (West 2021) (all granting civil immunity to school officials from claims of excessive corporal punishment under some circumstances); see also ALA. CODE § 16-28A-1 (2021) (granting civil *and* criminal immunity to school officials from claims of excessive corporal punishment under some circumstances).

35. *See* TEX. EDUC. CODE. ANN. § 22.0511 (defining when a school district employee may obtain immunity from liability and providing that a school district may not require an employee to waive this benefit if the employee's act is covered under the immunity statute).

36. *See* TEX. EDUC. CODE ANN. § 22.0512 (West 2021) (outlining a school official's right to immunity from disciplinary proceedings). This statute shields the educator from disciplinary proceedings under circumstances where "reasonable" force is used, including actions to discharge, suspend, or terminate the employee, and actions brought by the State Board to enforce the educator's code of ethics. *Id.* Notably, section 22.0512 does not prevent a school district from enforcing its corporal punishment policy or bringing a disciplinary proceeding against an official who violates said policy. *Id.*

37. *See* Menon, *supra* note 24, at 319 (providing background on the development of corporal punishment jurisprudence in the United States).

the guise of state law.[38] In passing § 1983, Congress intended to create a federal remedy for citizens to compensate for the possibility that inadequate enforcement of state laws could result from "prejudice . . . neglect, intolerance, or otherwise."[39] While § 1983 is not itself a source of substantive rights, it is a method of enforcing established constitutional rights.[40]

Government officials may defend themselves in a § 1983 claim by asserting a qualified immunity defense and arguing that at the time of the incident, their actions could have been perceived as legal.[41] If successful, the official is shielded from liability.[42] A court evaluating a qualified immunity defense must determine whether: (1) a constitutional violation exists under the facts; and (2) that right was "clearly established" at the time of the government official's actions.[43]

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38. 42 U.S.C. § 1983. This statute specifically provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.; *see also* Tammi Markowitz, *Doe v. Hillsboro Independent School District: The Fifth Circuit Refuses to Hold Schools Liable Under § 1983*, 8 TEMP. POL. & C.R. L. REV. 193, 215 (1998) (contending the federal remedy of § 1983 constitutes the "only way" students can protect their constitutional rights when school districts or officials are immune from state liability for acts of excessive corporal punishment); *see also* William W. Watkinson, Jr., *Shades of Deshaney: Official Liability Under 42 U.S.C. § 1983 for Sexual Abuse in the Public Schools*, 45 CASE W. RES. L. REV. 1237, 1273 (1995) (arguing the § 1983 federal remedy is a necessary form of recourse for students when state law immunity insulates school districts or officials from state liability).

39. *See* Monroe v. Pape, 365 U.S. 167, 180 (1961) (describing the legislative intent of Congress in passing § 1983), *overruled by* Monell v. Dep't Soc. Servs. of City of N.Y., 436 U.S. 658 (1978). The Court identified three purposes of § 1983: (1) to "override" unconstitutional laws, (2) to compensate for inadequate state laws, and (3) to compensate for facially adequate, but practically inadequate state laws. *Id.* at 173–74. Congress was particularly concerned that state officers would refuse to enforce facially adequate state laws for discriminatory reasons, resulting in the denial of citizens' constitutional rights. *Id.* at 180.

40. *See* Graham v. Connor, 490 U.S. 386, 393–94 (1989) ("§ 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." (quoting Baker v. McCollan, 443 U.S. 137 (1979) (internal quotation marks omitted)). § 1983 broadly permits claims stemming from a state official's abuse of authority—including claims of police misconduct, whistleblowing, and corporal punishment. *Id.*

41. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (outlining the contours of the qualified immunity defense). A finding of qualified immunity must be based on the "objective reasonableness of an official's conduct," which is determined by reference to "clearly established law." *Id.*

42. *See id.* at 801 (finding "government officials. . . generally are shielded from liability" if "their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known").

43. *See* Pearson v. Callahan, 555 U.S. 223, 232 (2009) (describing the two-pronged standard of review for claims involving a qualified immunity defense). In *Pearson*, the Supreme Court held that when evaluating qualified immunity issues,

Judicial application of § 1983 is complex and varies based on the specific circumstances of an alleged violation.[44] In academic corporal punishment cases, students often use § 1983 to claim a violation of their substantive or procedural due process rights under the Fourteenth Amendment.[45] Fundamentally, academic corporal punishment violates a student's substantive due process rights when it is "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."[46] Procedurally, a student has a liberty interest in avoiding corporal punishment at school.[47] In the context of § 1983, courts have found that these types of violations differ materially, impacting the relevance of post-punishment state remedies to academic corporal punishment claims.[48] In *Monroe v. Pape*,[49] the Court established that a § 1983 federal remedy is "supplementary" to any available state remedies and that "the latter need not be first sought and refused before the [former] is invoked."[50] The Supreme Court restated *Monroe*'s general line of

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lower federal courts may exercise discretion to determine which of the two prongs should be addressed first given the circumstances of the immediate case. *Id.* at 236.

44. *See* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 3–4 (2d ed. 2008) (noting judicial evaluation of § 1983 litigation often involves a "wide array of claimants" and requires examination of "complex, multifaceted issues"). Examples of typical § 1983 claimants include prisoners, property owners, and public benefit recipients. *Id.* at 3. In evaluating these claims, courts may consider constitutional issues, federal and state statutory interpretation, and § 1983-specific jurisprudence. *Id.* at 4.

45. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 658–59 (1977) (describing the petitioners' claims as including allegations of procedural and substantive due process violations).

46. T.O. v. Ft. Bend Indep. Sch. Dist., 2 F.4th 407, 414 (5th Cir. 2021) (internal quotation marks omitted) (quoting Woodard v. Los Fresnos Indep. Sch. Dist. 732 F.2d 1243 (5th Cir. 1984)); *see also* Gottlieb *ex rel.* Calabria v. Laurel Highlands Sch. Dist., 272 F.3d 168, 174 (3d Cir. 2001); Neal *ex rel.* Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1075 n. 2 (11th Cir. 2000).

47. *See Ingraham*, 430 U.S. at 673–74 (describing the scope of a child's liberty interest in being free from academic corporal punishment). For a more in-depth discussion of how students' procedural due process rights are affected by academic corporal punishment, see *infra* Section II.C.1.

48. For a more thorough discussion of the relationship between substantive due process violations, procedural due process violations, and state remedies, see *infra* Section V.A.

49. 365 U.S. 167 (1961).

50. *See id.* at 183 (discussing the relevance of state remedies to a federal cause of action under §1983). The Court rejected the idea that the phrase "under color of" state law cannot be construed to provide a federal remedy for an offense that already exists in state law. *Id.* at 184. In support of this finding, the Court referenced an earlier case, *United States v. Classic*, which defined action taken under color of state law as the "misuse of power, possessed by virtue of state law" that is only made possible because the official "is clothed with the authority of state law." *Id.* (internal quotation marks omitted) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)) (finding that in the course of performing their duties, the appellees deprived voters of the right to have their votes counted at the primary election, which constituted a violation of the Constitution).

reasoning in *Zinermon v. Burch*,[51] finding that the rule articulated in *Monroe* applies to § 1983 claims alleging a violation of substantive due process or of a specific Bill of Rights provision, but not always to procedural violations.[52] The distinction between substantive and procedural violations of § 1983 is primarily evident in two ways: 1) the nature of the violation itself; and 2) the need to examine procedural safeguards, such as state remedies.[53] Procedural violations of § 1983 only occur if or when the state fails to provide due process of law, which happens over an extended period of time.[54] Because the lack of procedure is what creates the violation, courts need to look at whether the state provided and properly utilized procedural safeguards.[55] This process could include an evaluation of whether state remedies were available to the litigant, and if so, whether they were adequate.[56] Substantive violations, conversely, are generated when a state official takes wrongful action.[57] That wrongful action is the source of the violation, so courts do not need to look at procedural safeguards to conclude that an actionable substantive violation occurred.[58]

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51. 494 U.S. 113 (1990).

52. *See* Zinermon v. Burch, 494 U.S. 113, 125–26 (1990) (citing approvingly to *Monroe's* holding that under certain circumstances, a plaintiff may invoke § 1983 regardless of the availability of a state remedy for the deprivation of rights). First, a plaintiff may bring a § 1983 claim alleging a state official's violation of a specific protection defined in the Bill of Rights (such as freedom of speech). *See id.* at 125. Second, the plaintiff may sue the state pursuant to §1983 and claim a violation of substantive due process based on arbitrary governmental action. *See id.* For procedural violations, however, the existence of state remedies may be relevant in the judicial evaluation of a § 1983 claim. *Id.*

53. *See* Irene Merker Rosenberg, *A Study in Irrationality: Refusal to Grant Substantive Due Process Protection Against Excessive Corporal Punishment in the Public Schools*, 27 HOUS. L. REV. 399, 432 (1990) (explaining the distinction between substantive and procedural § 1983 violations in terms of characterization and judicial evaluation). In short, because a procedural inquiry "asks *how*" the violation occurred and a substantive inquiry "asks *whether*" the violation occurred, an evaluation of state remedies is only relevant in the latter case. *Id.*

54. *See id.* at 125 (explaining the nature of a § 1983 procedural due process violation). The Court emphasized that the constitutional guarantee of procedural due process is a safeguard against "the mistaken or unjustified deprivation of life, liberty, or property." *Id.* at 125–26 (quoting Carey v. Piphus, 435 U.S. 247, 259 (1978)).

55. *See id.* (describing the nature of §1983 procedural due process judicial inquiries and noting the necessity of evaluating procedural safeguards).

56. *See id.* at 126 (explaining the relevance of state remedies to a procedural due process evaluation). Because a § 1983 procedural due process inquiry involves the evaluation of procedural safeguards, that may require the consideration of state statutory remedies. *Id.*

57. *See id.* at 125 (noting a § 1983 substantive due process violation is "complete" for purposes of judicial review when the wrongful action occurs).

58. *See* Merker Rosenberg, *supra* note 53, at 432 (explaining how judicial evaluations of § 1983 substantive due process claims proceed). In a substantive inquiry, the court looks at "whether the state's action by itself is reasonable." *Id.* Moreover, this form of due process "prohibit[s] states from doing certain things regardless of the procedure they use." *Id.*; *see also* Zinermon v. Burch, 494 U.S. 113, 125 (1990).

Thus, a judicial evaluation of state remedies is not necessary to find a violation.[59]

C. *Judicial Standards of Review for Academic Corporal Punishment Claims*

Academic corporal punishment claims typically implicate provisions in the Fourth and Fourteenth Amendments.[60] Given the limited Supreme Court precedent on academic corporal punishment, these constitutional provisions have served as the basis for federal appellate courts' analyses.

1. *Supreme Court Guidance: Defining the "Wright" Approach to Academic Corporal Punishment Cases*

In 1977, the Supreme Court decided *Ingraham v. Wright*, the leading case addressing the matter of corporal punishment in an educational setting.[61] In that case, the parents of two public school students alleged violations of the students' Eighth and Fourteenth Amendment rights resulting from instances of disciplinary paddling.[62] Prior to the Supreme Court's grant of certiorari, the Fifth Circuit reviewed the petitioners' case, finding no constitutional basis for relief.[63]

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59. *See Zinermon*, 494 U.S. at 124–25 (finding the nature of substantive due process and Bill of Rights claims does not require an evaluation of similar state remedies under § 1983).

60. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

61. *See id.* at 653. In petitioners' school, the use of corporal punishment was statutorily authorized subject to limitations: the punishment could not be "degrading or unduly severe" or be administered by a school official without a prior consultation with a superior. *Id.* at 655–56 (internal quotation marks omitted) (quoting FLA. STAT. § 323.27 (1961)). These requirements, however, were not always followed, and testimony from students implied that the use of corporal punishment at petitioners' school was "exceptionally harsh." *Id.* at 657. After failing to respond to a teacher's instructions in a timely manner, petitioner James Ingraham received more than twenty "licks" with a paddle, resulting in the development of a hematoma requiring medical attention. *Id.* Petitioner Roosevelt Andrews similarly sustained injury from instances of disciplinary paddling, one of which rendered him unable to fully use his arm for a week. *Id.*

62. *Ingraham*, 525 F.2d at 911–12 (describing the threshold arguments made by petitioners). Pursuant to the Eighth Amendment, petitioners argued that the infliction of corporal punishment on public school students constituted "cruel and unusual punishment" both on its face and as applied to the case at issue. *Id.* at 911. Next, petitioners claimed that the use of academic corporal punishment deprives students of liberty without due process of law in violation of the Fourteenth Amendment because it is "arbitrary, capricious, and unrelated to achieving any legitimate educational goal . . . ." *Id.* Further, these punishments became more capricious in nature because respondents failed to provide a list of school regulations and corresponding punishments. *Id.* Lastly, the petitioners argued that respondents' failure to provide procedural safeguards prior to the infliction of corporal punishment constituted a further violation of the Fourteenth Amendment. *Id.* at 912.

63. *See id.* at 912–19 (analyzing petitioners' claims and finding them improper as a matter of law). The Fifth Circuit first denied petitioners' Eighth Amendment claim, concluding that its constitutional reach does not extend to the administration of academic corporal punishment. *Id.* at 912. Primarily, the court deter-

After reviewing the Fifth Circuit's reasoning, the Supreme Court came to several conclusions regarding the constitutionality of academic corporal punishment claims. First, it held that the Eighth Amendment is not a viable constitutional avenue for these claims because the use of corporal punishment in a school setting does not constitute "cruel and unusual punishment" within the meaning of the Amendment as it is historically understood.[64] Considering petitioners' procedural due process claims, the Court noted that "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by . . . inflicting appreciable physical pain, . . . Fourteenth Amendment liberty interests are implicated."[65] Nevertheless, because of a low incidence of abuse, the open nature of public schools, and existing common law safeguards, the Court found that procedural due process did not require notice or a hearing prior to imposition of academic corporal punishment.[66] Notably, the Court declined to review a question concerning the relationship between substantive due process rights and academic corpo-

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mined that prisons and public schools were not "analogous in the context of Eighth Amendment coverage." *Id.* at 914–15. The court similarly rejected the notion that the practice of academic corporal punishment could be characterized as "arbitrary, capricious, or unrelated to legitimate educational goals" to support a substantive due process claim. *Id.* at 915–17. Finally, the Fifth Circuit found that the imposition of procedural process could "severely [dilute]" the disciplinary value of corporal punishment. *Id.* at 917–21.

64. *See Ingraham*, 430 U.S. at 670-72 (analyzing petitioners' Eighth Amendment claims). After finding that the history behind the Eighth Amendment justifies its application in criminal cases, the Court noted that a student and prisoner "stand in wholly different circumstances," rendering the former with "little need" for Eighth Amendment protections. *Id.* at 669–70. Notably, the court justified this reasoning by finding that public schools are subject to community supervision and moreover, that students are protected by the support of family, friends, teachers, and fellow pupils, all of whom may "witness and protest any instances of mistreatment." *Id.* at 670.

65. *Id.* at 674. The Court applied a traditional two-step procedural due process analysis, which first considers whether the alleged interests are within the Fourteenth Amendment's protection of life, liberty, or property and if satisfied, requires a determination of what procedures constitute "due process of law." *Id.* at 672. In establishing a liberty interest, the Court reasoned that the Fourteenth Amendment's scope of protection has traditionally included "freedom from bodily restraint and punishment[,]" which is implicated by the administration of academic corporal punishment. *Id.* at 673–74.

66. *See id.* at 672–80 (finding that while academic corporal punishment implicates a constitutionally protected liberty interest, traditional common law remedies are "fully adequate" to provide procedural due process). Analyzing the established liberty interest under the three-pronged test outlined in *Mathews v. Eldridge*, the Court reasoned that the violation of a student's rights would only produce a "minimal" risk of procedural error. *Id.* at 682 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (holding that in an evaluation of procedural due process, the court must consider: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of the interest through procedures used/the value of additional/substitute procedural safeguards; and 3) the government's fiscal and administrative interest).

ral punishment claims.[67] Thus, the Supreme Court has never addressed whether excessive academic corporal punishment implicates substantive due process rights or identified an appropriate standard for evaluating claims.[68]

2. *An Unfinished Lesson Plan: Disparate Federal Appellate Court Standards for Academic Corporal Punishment Cases*

Although the *Ingraham* ruling provided instruction for procedural due process issues arising pursuant to academic corporal punishment claims, its refusal to address substantive due process implications produced conflicting interpretations of constitutionality among the federal appellate courts.[69] Thus, while most courts have evaluated an academic corporal punishment claim under the Fourteenth Amendment, some circuits have found the issue to implicate Fourth Amendment rights.[70] In contrast, the Fifth Circuit has taken an isolated position on § 1983 claims, finding that a student's constitutional rights may not be implicated at all if adequate state remedies exist.[71]

To date, the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits have adopted a variation of the "shocks the conscience" test to evaluate academic corporal punishment claims, which they perceive to

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67. *See id.* at 659 n.12 (denying review of a question considering whether "infliction of severe corporal punishment upon public school students" could constitute a violation of substantive due process under Fourteenth Amendment).

68. *See id.* at 678 n.47 (restating the Court had "no occasion" in the case at issue to decide if instances of academic corporal punishment could give rise to an independent substantive due process claim).

69. *See* Parkinson, *supra* note 1, at 302-05 (providing commentary on the significance of *Ingraham* with respect to issues of constitutional interpretation).

70. *Compare* Domingo v. Kowalski, 810 F.3d 403, 410–11 (6th Cir. 2016), Smith *ex rel.* Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 173 (2d Cir. 2002), Gottlieb v. Laurel Highlands Sch. Dist., 272 F.3d 168, 173 (3d Cir. 2001), Neal *ex rel.* Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1074–75 (11th Cir. 2000), Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 564 (8th Cir. 1988), Garcia ex rel. Garcia v. Miera, 817 F.2d 650, 653–54 (10th Cir. 1987), *and* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (finding that academic corporal punishment claims may implicate substantive due process rights, requiring use of the "shocks the conscience" test), *with* Doe *ex rel.* Doe v. Hawaii Dept. of Educ., 334 F.3d 906, 907 (9th Cir. 2003), *and* Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1014 (7th Cir. 1995) (both concluding that the Fourth Amendment is applicable to academic corporal punishment claims).

71. *See, e.g.*, J.W. v. Paley, 860 F. App'x 926, 928–29 (5th Cir. 2021); Clayton *ex rel.* Hamilton v. Tate Cnty. Sch. Dist., 560 F. App'x 293, 297 (5th Cir. 2014); Serafin v. Sch. Of Excellence in Educ., 252 F. App'x 684, 685 (5th Cir. 2007); Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 875 (5th Cir. 2000); Fee v. Herndon, 900 F.2d 804, 806 (5th Cir. 1990); Cunningham v. Beavers, 858 F.2d 269, 271–72 (5th Cir. 1988); Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1245 (5th Cir. 1984); Coleman v. Franklin Par. Sch. Bd., 702 F.2d 74, 78 (5th Cir. 1983) (holding that the existence of adequate post-punishment remedies precludes a substantive due process constitutional claim in academic corporal punishment cases).

implicate substantive due process rights.[72] With the decision of *Hall v. Tawney*,[73] the Fourth Circuit became the first federal appellate court to recognize that instances of academic corporal punishment may violate a student's substantive due process rights.[74] Here, the court concluded that academic corporal punishment claims should be evaluated under the "shocks the conscience" standard:

> [W]hether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally *shocking to the conscience*.[75]

For academic corporal punishment claims, the "shocks the conscience" standard outlined in *Hall* is used by most of the circuit courts.[76] The Third Circuit adopted a tailored version of the "shocks the conscience" standard in *Gottlieb v. Laurel Highlands School District*,[77] finding that the inquiry's four elements should be evaluated separately.[78] In con-

72. For a full list of circuit courts adopting this standard, see *supra* note 70 and accompanying text.

73. 621 F.2d 607 (4th Cir. 1980).

74. *See id.* at 614–15 (finding that a student's substantive due process claim was viable because the school officials' potentially malicious application of corporal punishment resulted in a ten-day hospitalization, potential permanent spinal and lower back injury); *see also* Parkinson, *supra* note 1, at 287–88 (noting that the Fourth Circuit's decision in *Hall* was groundbreaking not only because it represented the first federal appellate recognition of students' substantive due process rights post-*Ingraham*, but also because it set a lasting standard of review for courts evaluating the constitutionality of academic corporal punishment claims).

75. *Hall*, 621 F.2d at 613 (emphasis added) (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). The "shocks the conscience" inquiry originated in police brutality cases, where courts considered whether actions taken by police officers against criminal suspects or detainees could rise to the level of a substantive due process violation. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952); *Johnson*, 481 F.2d at 1033. In *Hall*, the Fourth Circuit found that this inquiry constituted a proper means of analysis for academic corporal punishment cases and adopted the test wholesale. *Hall*, 621 F.2d at 613. Many commentators have questioned whether the traditional "shocks the conscience" standard is appropriate for academic corporal punishment cases given its harsh nature and origins in the criminal context. *See, e.g.*, Parkinson, *supra* note 1, at 289; Merker Rosenberg, *supra* note 53, at 399; Courtney Mitchell, Note, *Punishment in the Public Schools: An Analysis of Federal Constitutional Claims*, 73 L. & CONTEMP. PROBS. 321, 330–31 (2010); Menon, *supra* note 23, at 335 n.136 (evaluating the relationship between police brutality and academic corporal punishment, then either criticizing or questioning use of the unaltered "shocks the conscience" standard).

76. *See* Smith *ex rel.* Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 173 (2d Cir. 2002); Neal *ex rel.* Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1074–75 (11th Cir. 2000); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 564 (8th Cir. 1988); Garcia *ex rel.* v. Miera, 817 F.2d 650, 653–54 (10th Cir. 1987) (adopting the "shocks the conscience" standard articulated in *Hall*).

77. 272 F.3d 168 (3d Cir. 2001).

78. *See id.* at 173 (concluding courts should undergo a more refined inquiry into the circumstances of the claim to avoid conflating the elements of the *Hall*

ducting a substantive due process inquiry, the Third Circuit considers pedagogical justifications, the educator's intent, and the severity of the student's injury.[79] The Sixth Circuit also adopted the Third Circuit's test in *Domingo v. Kowalski*.[80]

Alternatively, both the Seventh and Ninth Circuits have analyzed academic corporal punishment claims under the Fourth Amendment's "objective reasonableness" standard.[81] The reasonableness inquiry considers "whether the [party's] actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[82] Although typically applied in a law enforcement context, some courts have extended the scope of the Fourth Amendment's protection to claims involving public school students based on the Supreme Court decisions in *New Jersey v. T.L.O.*[83] and *Graham v. Connor*.[84] In *T.L.O.*, the Supreme Court applied Fourth Amendment protection to searches of public school students by school administrators.[85]

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test to produce a "vague impressionistic standard") Specifically, the *Gottlieb* test considers: 1) whether there was a pedagogical justification for the use of force; 2) whether the force utilized was excessive to meet the legitimate objective; 3) whether the force was applied in a "good faith effort" to maintain/restore discipline—or alternatively, if it was used maliciously and sadistically for the purpose of causing harm; and 4) whether a serious injury resulted. *Id.*

79. *See id.* (outlining a tailored version of the "shocks the conscience" standard). Specifically, the *Gottlieb* test considers: 1) whether there was a pedagogical justification for the use of force; 2) whether the force utilized was excessive to meet the legitimate objective; 3) whether the force was applied in a "good faith effort" to maintain/restore discipline—or alternatively, if it was used maliciously and sadistically for the purpose of causing harm; and 4) whether a serious injury resulted. *Id.*

80. *See* Domingo v. Kowalski, 810 F.3d 403, 411 (6th Cir. 2016) (comparing the *Gottlieb* test to the *Hall* standard and noting the *Gottlieb* inquiry puts greater emphasis on the pedagogical justification of an educator's conduct than the *Hall* standard does). Here, the court emphasized that the relationship between an educator's actions and a pedagogical purpose is an important factor to consider in academic corporal punishment cases. *Id.* The *Domingo* court further explained that this relationship should be examined in part because "conduct intended to injure in some way *unjustifiable by any government interest* is the sort of official action most likely to rise to the conscience-shocking level." *Id.* (internal quotation marks omitted) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998)).

81. *See, e.g.*, Doe *ex rel.* Doe v. Hawaii Dept. of Educ., 334 F.3d 906, 907 (9th Cir. 2003); Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1014 (7th Cir. 1995) (adopting and then applying a Fourth Amendment inquiry to claims of excessive academic corporal punishment).

82. *See* Graham v. Connor, 490 U.S. 386, 397 (1989) (describing the general reasonableness inquiry used in an excessive force case).

83. 469 U.S. 325 (1985).

84. 490 U.S. at 396 (finding the validity of a § 1983 claim must be judged by the specific constitutional standard governing that right, as opposed to through a "generalized excessive force" standard); *see also T.L.O.*, 469 U.S. at 333 (evaluating the scope of protection afforded by the Fourth Amendment in the context of public schools). For a discussion of the merits of analyzing academic corporal punishment claims under the Fourth Amendment, see *infra* Section IV.C.

85. See *T.L.O.*, 469 U.S. at 333; *see also* Nicole Mortorano, *Protecting Children's Rights Inside of the Schoolhouse Gates: Ending Corporal Punishment in Schools*, 102 GEO.

Recognizing that the school setting differs substantially from a law enforcement setting, the *T.L.O.* court reconfigured the reasonableness inquiry.[86] Thus, the tailored inquiry permits educators to take measures "reasonably related" to the objectives of the search that are "not excessively intrusive" given the student's age, sex, and the nature of the infraction.[87] Moreover, in *Connor*, the Court found that allegations of excessive force should be analyzed under a specific constitutional provision rather than through "generalized notion[s] of 'substantive due process[.]'"[88]

In *Wallace ex rel. Wallace v. Batavia School District 101*,[89] the Seventh Circuit applied *T.L.O.* and *Connor* to hold that a public school educator who seizes a student violates the Fourth Amendment under circumstances where restriction of the student's liberty is unreasonable.[90] The court noted that given the Fourth Amendment's traditional application to law enforcement actions, a test applying its protections to student deprivations of liberty should be tailored to the academic setting.[91] Thus, when evaluating the objective reasonableness of an educator's actions, a court should remain cognizant of the natural and necessary liberty restrictions students endure in an educational environment.[92]

L.J. 481, 495–96 (2014) (acknowledging the *T.L.O.* decision could provide a legal ground for future academic corporal punishment litigants to claim a Fourth Amendment seizure).

86. *See T.L.O.*, 469 U.S. at 334 (addressing the disparity in circumstance between a law enforcement and school setting).

87. *See id.* at 342 (explaining when a school search is permissible in scope under the Fourth Amendment).

88. *Connor*, 490 U.S. at 395 n.10 (finding that the Fourth Amendment provides explicit constitutional protection for "seizures," which occur when a government actor has "restrained the liberty of a citizen" through "physical force or show of authority" (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

89. 68 F.3d 1010 (7th Cir. 1995).

90. *Id.* at 1014 (explaining that "reasonable" action may include the seizure of a disruptive student for disciplinary purposes depending on the circumstances of the situation). The plaintiff also brought a substantive due process claim under § 1983, but the court dismissed it on two bases. *Id.* at 1015. First, the Seventh Circuit had never acknowledged a substantive due process right as it related to academic corporal punishment and declined to do so under the circumstances. *Id.* Second, the court reasoned that the plaintiff's claim would not likely satisfy a substantive due process test, given that it had already failed under the less stringent Fourth Amendment inquiry. *Id.*

91. *Id.* at 1014. The court acknowledged that generally, the differences between a deprivation of liberty in a school setting as compared to that in a law enforcement setting amounts to an "awkward fit" between the Fourth Amendment and certain areas of potential application. *Id.* Searches or seizures administered in an educational setting, the court reasoned, are not substantially different from those effectuated in a law enforcement context—the goals of both types of action are similar. *Id.* A seizure of the person, however, distinguishes the two applications by purpose; law enforcement officials seek to investigate or apprehend suspects, while teachers pursue a disciplinary or educational goal. *Id.*

92. *See id.* at 1013–15 (analyzing the nature and limitations of students' liberty interests in an educational setting). Generally, the court noted, students "do not completely surrender their constitutional rights at the schoolhouse gate," but

Similarly, in *Doe ex rel. Doe v. Hawaii Department of Education*,[93] the Ninth Circuit held that claims of excessive force by a school official should proceed under a Fourth Amendment analysis based on the Supreme Court guidance implicit in *T.L.O.* and *Connor*.[94] Thus, the court concluded, a student's general Fourth Amendment right to be free from unreasonable seizure "extends to seizures by or at the direction of school officials."[95] Moreover, in a school context, the reasonableness inquiry must consider an alleged seizure in light of its educational purpose or objective.[96] The Ninth Circuit expounded upon its *Doe* rationale in *Preschooler II v. Clark County School Board of Trustees*,[97] finding that a reasonableness evaluation also requires an assessment of the student's age, sex, and the nature of their infraction.[98]

The Fifth Circuit declined to adopt a pre-established constitutional test for evaluating academic corporal punishment claims, instead formu-

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those rights are limited to "what is appropriate for children in school." *Id.* at 1013 (first quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); then quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).

93. 334 F.3d 906 (9th Cir. 2003).

94. *See id.* at 907 (clarifying the Ninth Circuit's standard of review for claims of excessive force brought against a public school official). Previously, in *P.B. v. Koch*, the Ninth Circuit declined to resolve the issue of whether a student's excessive force claim should be brought under the Fourteenth or Fourth Amendment. *See* P.B. v. Koch, 96 F.3d 1298, 1303 (9th Cir. 1996). Notably, the *Doe* court recognized that under some circumstances, a student's excessive force claim could be more properly examined pursuant to the Due Process Clause of the Fourteenth Amendment. *See* Doe *ex rel.* Doe v. Hawaii Dept. of Educ., 334 F.3d 906, 909 (9th Cir. 2003).

95. *Doe*, 334 F.3d at 909 (internal quotation marks omitted) (quoting Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1079 (5th Cir. 1995)). Moreover, the court found this expansion to be justified because the Fourth Amendment applies to government conduct motivated by "investigatory or *administrative* purposes[,]" which includes the discipline of students by an educator. *Id.* (emphasis added) (quoting United States v. Attson, 900 F.2d 1427, 1430–31 (9th Cir. 1990)).

96. *Id.* The court applied this standard based on the test outlined in *T.L.O.* relating to searches in a school environment. *Id.*; *see also* New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (establishing and explaining the type of inquiry that courts should undergo when evaluating the constitutionality of a school search).

97. 479 F.3d 1175 (9th Cir. 2006).

98. *See id.* at 1180 (summarizing and elaborating on the "reasonableness rubric" established in *Doe*).

lating its own unique standard.[99] In *Fee v. Herndon*,[100] the Fifth Circuit concluded that, while instances of corporal punishment in public schools implicate a constitutionally protected liberty interest, a student cannot state a substantive due process claim "if the . . . state affords adequate post-punishment . . . remedies" for allegations of excessive force.[101] The court reasoned that a substantive due process violation requires arbitrariness, and that, by definition, states that provide remedies for the mistreatment of students by educators do not act arbitrarily.[102] Because Texas provided civil and criminal remedies for academic corporal punishment claims, the *Fee* court found that no constitutional relief was available to the plain-

99. *See* Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 877 (5th Cir. 2000) (Wiener, J., concurring) (describing the evolution of the Fifth Circuit's standard from its review of Ingraham onward). In his *Moore* concurrence, Judge Wiener noted that the Fifth Circuit's standard was established through "a line of panel opinions, culminating in *Fee v. Herndon*," all "founded on the part of [the Fifth Circuit's] Ingraham decision that was not reviewed by the Supreme Court." *Id.* The standard dictates that in cases of academic corporal punishment, a student cannot state a substantive due process claim if the state provides adequate post-punishment legal remedies. *Id.* As articulated in *Fee*, the provision of adequate state remedies precludes arbitrary state, district, or individual educator action, which is a prerequisite for a successful substantive due process claim. *Id.*

100. 900 F.2d 804 (5th Cir. 1990).

101. *Id.* at 808. The court relied on the reasoning outlined in preceding Fifth Circuit cases to support its finding that adequate post-punishment remedies are sufficient to bar a substantive due process claim. *Id.* at 808–09. Following the *Ingraham* ruling, the Fifth Circuit first outlined this standard in *Coleman v. Franklin Parish School Board* and *Woodard v. Los Fresnos*, wherein the court found that corporal punishment of public school students does not give rise to a substantive due process claim, particularly when civil or criminal state remedies are available for redress. *See* Coleman v. Franklin Par. Sch. Bd., 702 F.2d 74, 78 (5th Cir. 1983); Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1245 (5th Cir. 1984). Further, in *Cunningham v. Beavers*, the court rejected the claim of a six-year-old student whose paddling injuries were found to be abusive by social welfare workers and a doctor, reasoning that the availability of adequate post-punishment recourse for such behavior did not support a characterization of "arbitrary" state action. *See* Cunningham v. Beavers, 858 F.2d 269, 271–72 (5th Cir. 1988).

102. *Fee*, 900 F.2d at 808. The court further explained that by making civil or criminal tort remedies available to students for instances of excessive academic corporal punishment, states have provided "all the process constitutionally due" under the Fourteenth Amendment. *Id.* Further, the court emphasized that the Constitution cannot be likened to a "criminal or civil code" permitting invocation for "the crimes or torts of state educators who act in contravention of the very laws designed to thwart abusive disciplinarians." *Id.*

tiffs.[103] The Fifth Circuit has consistently reaffirmed the standard of review outlined in *Fee* in subsequent academic corporal punishment cases.[104]

III. REVIEWING THE CLASS SYLLABUS: THE FACTS OF *T.O.*

In *T.O.*, the plaintiff sustained injuries after being subjected to corporal punishment while he attended Hunters Glen Elementary School in the Fort Bend Independent School District ("FBISD").[105] T.O., who was in first grade at the time of the incident, had been diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder ("ADHD" and "ODD").[106] As a result of this diagnosis, FBISD provided T.O. with a behavioral aide and behavioral intervention plan to aid his educational development.[107] This plan specifically required "oral redirection and placement in a quiet area" when T.O. engaged in inappropriate behavior.[108] In 2017, T.O.'s aide took him into the school hallway to calm down after he exhibited "disruptive classroom behavior[.]"[109] Angela Abbott, a fourth-grade teacher at T.O.'s school and a defendant in the case, offered assistance to T.O.'s aide.[110] After T.O.'s aide declined, Abbott proceeded to block T.O. from re-entering the first-grade classroom.[111] T.O. then attempted to push Abbott away from the door, hitting her leg in the process.[112] In response, Abbott grabbed T.O.'s neck, threw him to the

103. *Id.* at 806 (holding the substantive component of the Fourteenth Amendment is rendered "inoperative" because of available state remedies). According to Fifth Circuit precedent, *reasonable* instances of corporal punishment do not violate the Fourteenth Amendment or constitute arbitrary state action. *Id.* at 808. Texas law provides a non-arbitrary standard of conduct accompanied by adequate post-punishment criminal or civil remedies that may be invoked by students if school officials fail to adhere to these reasonable limitations. *Id.* Thus, the court could not justify the imposition of a "constitutional warrant to usurp classroom discipline" where the state of Texas had taken affirmative steps to protect students through the availability of state legal actions. *Id.* at 809.

104. *See, e.g.*, J.W. v. Paley, 860 F. App'x 926, 928–29 (5th Cir. 2021); Marquez v. Garnett, 567 F. App'x 214, 216–17 (5th Cir. 2014); Clayton *ex rel.* Hamilton v. Tate Cnty. Sch. Dist., 560 F. App'x 293, 297 (5th Cir. 2014); Serafin v. Sch. of Excellence in Educ., 252 F. App'x 684, 685 (5th Cir. 2007); Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 876 (5th Cir. 2000) (affirming the dismissal of the plaintiff's substantive due process claim because the state provided an adequate remedy for the alleged injuries).

105. *See* T.O. v. Ft. Bend Indep. Sch. Dist., 2 F.4th 407, 412 (5th Cir. 2021) (describing the factual circumstances of the case).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* T.O.'s aide explained that she had the situation "under control," but Abbott still chose to intervene, positioning herself between T.O. and the classroom door while he yelled about wanting to return to class. *Id.*

112. *Id.*

floor, and kept him in a choke hold for several minutes.[113] After T.O. began to foam at the mouth from the chokehold, his aide "asked Abbott 'to release him . . . because he needed air and she was holding him the wrong way.'"[114] Abbott eventually released T.O. from the chokehold when another witness arrived at the scene of the incident.[115] FBISD investigated the incident multiple times, but Abbott never faced professional or legal consequences for her role.[116]

In 2019, T.O.'s parents sued Abbott in the U.S. District Court, Southern District of Texas, under 42 U.S.C. § 1983.[117] They alleged Abbott's conduct violated T.O.'s constitutional rights under the Fifth, Fourth, and Fourteenth Amendments.[118] In response, Abbott and FBISD argued that T.O.'s constitutional claims "fail[ed] as a matter of law and [were] barred by qualified immunity."[119] The district judge referred the case to a magistrate judge, who concluded that Abbott's use of force did not qualify as a constitutional violation under *Fee*; thus, Abbott was entitled to qualified immunity.[120] The district court adopted this recommendation in full and

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113. *Id.* During this interaction, Abbott said that T.O. "needed to keep his hands to himself" and "had hit the wrong one." *Id.* (internal quotation marks omitted).

114. *Id.*; *see also* Petition for Writ of Certiorari at 10, *T.O.*, 2 F.4th 407 (No. 21-1014).

115. Petition for Writ of Certiorari at 10, *T.O.*, 2 F.4th 407 (No. 21-1014).

116. *See* T.O. v. Ft. Bend Indep. Sch. Dist., No. CV H-19-0331, 2020 WL 1442470, at *1–2 (S.D. Tex. Jan. 29, 2020) (describing the plaintiffs' claim in detail and then describing the requisite allegations to state a § 1983 claim). In their complaint, plaintiffs alleged that FBISD "ratified" Abbott's actions by giving her paid time off without disciplinary actions notwithstanding at least three internal investigations by the District. *Id.*

117. *Id.* at *1.

118. *Id.* Under the Fifth and Fourteenth Amendments, the plaintiffs alleged that Abbott violated T.O,'s right to bodily integrity by taking actions that "served no pedagogical, disciplinary, or legitimate purpose" and instead were motivated by a "prejudicial animus to [T.O.'s] disabilities." *Id.* Moreover, the plaintiffs presented evidence of the improper restraint techniques used by Abbott as a physically stronger individual than T.O. to support their allegation that Abbott's actions "shock the conscience." *Id.* Finally, the plaintiffs argued that Abbott's restraint constituted an "unreasonable seizure" under the Fourth Amendment based on a witness's testimony, which emphasized the duration of the improper maneuver. *Id.* Secondarily, the plaintiffs sued FBISD pursuant to the Americans with Disabilities Act, claiming discrimination based on T.O.'s disability. *Id.*

119. *Id.* at *2–3. The defendants cited *Fee* in support of the argument that because Texas law provides adequate remedies for corporal punishment claims, plaintiffs' constitutional claims fail as a matter of law. *Id.* at *3. Further, defendants argued that the claims against Abbott as an individual official were barred by her assertion of the qualified immunity defense. *Id.*

120. *Id.* at *4. Judge Stacy conducted an analysis of Abbott's actions, determining that they were taken in pursuit of a legitimate pedagogical purpose and thus qualified as a constitutionally permissible act of corporal punishment. *Id.* Judge Stacy emphasized that this conclusion was proper notwithstanding the fact that another person could find the amount of force she used to be "reasonable" under the circumstances. *Id.* Thus, because the plaintiffs failed to allege facts supporting a claim of excessive corporal punishment or unlawful seizure pursuant to

dismissed all claims.[121] The plaintiffs appealed, challenging the dismissal of their claims.[122]

IV. AN OPEN-NOTE ASSIGNMENT: A NARRATIVE ANALYSIS OF THE FIFTH CIRCUIT'S REAFFIRMATION OF THE "ADEQUATE ALTERNATIVE REMEDIES" STANDARD IN *T.O.*

On appeal, a panel of Fifth Circuit judges addressed whether the plaintiffs' allegations sufficiently claimed a violation of T.O.'s substantive due process rights under the Fourteenth Amendment or of his Fourth Amendment right to be free from unreasonable seizure.[123] The *T.O.* decision reaffirmed the Fifth Circuit approach to academic corporal punishment cases when the court held that T.O.'s constitutional claim could not succeed because the state of Texas provided adequate civil and criminal methods of recourse.[124]

The court began its analysis by outlining the necessary elements of an academic corporal punishment claim pursuant to § 1983 and Fifth Circuit precedent.[125] First, it recognized that corporal punishment in public

Fifth Circuit precedential standards, Judge Stacy recommended that the claim be dismissed. *Id.* at *5.

121. *See* T.O. v. Ft. Bend Indep. Sch. Dist., No. 4:19-CV-331, 2020 WL 1445701, at *1 (S.D. Tex. Mar. 24, 2020) (adopting the Magistrate Judge's findings and conclusions in full).

122. *See* T.O. v. Ft. Bend Indep. Sch. Dist., 2 F.4th 407, 413 (5th Cir. 2021).

123. *See id.* (summarizing the constitutional arguments supporting T.O.'s claims brought pursuant to § 1983).

124. *Id.* at 415. The court also rejected T.O.'s Fourth Amendment claim. *Id.* Despite recognizing that the Fourth Amendment is "applicable in a school context," the court interpreted inconsistency in the Fifth Circuit's caselaw on this topic as foreclosing a successful claim. *Id.* In one case, the Fifth Circuit concluded that allowing a student to succeed on a Fourth Amendment claim would effectively "eviscerate [the] circuit's rule against prohibiting [students' academic corporal punishment] substantive due process claims." *Id.* at 415; *see also* Flores v. Sch. Bd. of Desoto Par., 116 F. App'x 504, 510 (5th Cir. 2004). In other cases, conversely, the Fifth Circuit found that excessive force claims were subject to a Fourth Amendment analysis. *Id.*; *see also* Curran v. Aleshire, 800 F.3d 656, 661 (5th Cir. 2015); Keim v. City of El Paso, No. 98-50265, 1998 WL 792699, at *4 n.4 (5th Cir. 1998). Ultimately, the court concluded that it would not have been "clearly established" in the Fifth Circuit that Abbott's conduct was illegal under the Fourth Amendment to justify dismissing her qualified immunity defense. *Id.*

125. *T.O.*, 2 F.4th at 413. The court first acknowledged that under Supreme Court precedent, the Fourth Amendment is applicable in a school context. *Id.*; *see also* New Jersey v. T.L.O., 469 U.S. 325, 336–37 (1985); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995) (finding the Fourth Amendment encompasses searches of students conducted in public schools). In the Fifth Circuit, however, academic corporal punishment claims are traditionally analyzed under the Fourteenth Amendment because of the "well-established" principle that instances of "corporal punishment in public schools implicate a constitutionally protected liberty interest . . . " *T.O.*, 2 F.4th at 413–14; *see also* Ingraham v. Wright, 430 U.S. 651, 672 (1977) (characterizing the use of corporal punishment in public schools as a protected liberty interest). Thus, the panel concluded it would undergo a substantive due process analysis according to Fifth Circuit standards of review. *Id.*

schools constitutes a deprivation of substantive due process when it is "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning[.]"[126] As in *Fee*, however, the court reasoned that a state offering adequate post-punishment remedies has "provided all the process constitutionally due[,]" meaning a plaintiff cannot invoke a substantive due process violation.[127]

The court cited "fidelity to . . . precedent" as justification for its dismissal of T.O.'s Fourteenth Amendment substantive due process claim.[128] First, the court noted the use of force occurred in a disciplinary context.[129] Thus, the pedagogical setting of the interaction counseled in favor of dismissing T.O.'s claim, even if Abbott's intervention was inappropriate.[130] Next, the court reasoned that Texas law provides adequate civil and criminal remedies to compensate students for instances of excessive academic corporal punishment.[131] As such, the state did not act "arbitrar-

126. *T.O.*, 2 F.4th at 414.

127. *Id.* For a list of Fifth Circuit cases holding the same, see *supra* note 69 and accompanying text.

128. *T.O.*, 2 F.4th at 414–15 (summarizing past cases wherein students' substantive due process claims were dismissed and, conversely, those in which claims were permitted). The Fifth Circuit has dismissed such claims when the conduct at issue occurred in a "disciplinary, pedagogical setting," such as in *Moore* (where the student was told to complete excessive physical exercise as punishment for talking to a friend), *Flores v. School Board of Desoto Parish* (where the teacher threatened, choked, and threw a student against a wall for questioning the teacher's directive), and *Marquez v. Garnett* (where an aide grabbed, shoved, and kicked a disabled student for sliding a compact disc across a table). *Id.* at 414 (first citing Marquez v. Garnett, 567 F. App'x 214, 215 (5th Cir. 2014); then citing Flores v. Sch. Bd. Of DeSoto Par., 116 F. App'x 504, 506 (5th Cir. 2004); and then citing Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 875 (5th Cir. 2000)). Substantive due process claims have been allowed to proceed where the conduct was "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Id.* (quoting Lee v. Herndon, 900 F.2d 804, 808 (1990)). The factual circumstances that have given rise to such an outcome include the alleged molestation of a student by a teacher in *Doe v. Taylor Independent School District*, as well as the strapping of a student to a chair for several days as an "experimental technique" in *Jefferson v. Ysleta Independent School District*. *Id.* (first citing Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 445 (5th Cir. 1994); then citing Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305 (5th Cir. 1987)).

129. *Id.* at 415. The court determined Abbott's actions were sufficiently related to a disciplinary purpose because T.O. had been removed from his classroom for disrupting class and because Abbott only used force after T.O. pushed and hit her. *Id.*

130. *See id.* The court found that the alleged facts did not support an inference that T.O. was the subject of a "random, malicious, and unprovoked attack," but rather implied that his action was unwarranted. *Id.* (quoting *Flores*, 116 F. App'x at 511); *see also Marquez*, 567 F. App'x at 217 (concluding an autistic seven-year old's action of sliding a compact disk across a desk was unwarranted and his aide's physical response occurred in a pedagogical setting). Thus, the court concluded, the circumstances of T.O.'s claim did not warrant deviation from the *Fee* standard. *Id.*

131. *T.O.*, 2 F.4th at 415. In the footnotes, the court identified provisions from Texas's Education Code (section 9.62) and Penal Code (section 22.051(a)) to justify its conclusion that the state provided adequate post-punishment remedies

ily," further justifying dismissal of T.O.'s substantive due process allegation.[132] In the footnotes, the court stated that it would continue to adhere to the "decades-old rule" outlined in *Fee*, notwithstanding Supreme Court decisions explicitly recognizing a contrary principle.[133] For these reasons, Abbott's conduct was not "clearly" illegal in the Fifth Circuit at the time of the incident to support a denial of her qualified immunity defense.[134]

The court also dismissed T.O.'s unreasonable seizure claim, finding the Fifth Circuit had not conclusively established whether a teacher's "momentary" use of force against a student implicates that student's Fourth Amendment rights.[135] In past cases, the Fifth Circuit rejected Fourth Amendment excessive force claims in the school setting, suggesting this type of application would improperly broaden the scope of the Fourth Amendment's protection and threaten the circuit's academic corporal punishment standard of review.[136] However, the court noted that other Fifth Circuit decisions have found claims of excessive force and unlawful arrest against school officials as properly analyzed under the Fourth Amendment.[137]

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for allegations of excessive academic corporal punishment. *Id.* at 415 n.28 (first citing TEX. PEN. CODE ANN. § 9.62 (West 2021); then citing TEX. EDUC. CODE ANN. § 22.0512 (West 2021)).

132. *Id.* at 414–15.

133. *Id.* at 416 n.34; *see also* Zinermon v. Burch, 494 U.S. 113, 125–26 (1990) (acknowledging an actionable § 1983 constitutional violation is complete when the wrongful action is taken, and a plaintiff may pursue a substantive due process claim under § 1983 notwithstanding the presence of similar state-tort remedies). The court explained that the Fifth Circuit has historically adhered to the *Fee* reasoning, even considering the contrary principle expressed in *Zinermon,* and that en banc consideration would be necessary to consider abrogating the rule. *T.O.*, 2 F.4th at 416 n.34.

134. *See T.O.*, 2 F.4th at 416. The court acknowledged that while "every school teacher" should know that inflicting pain on a student violates the student's constitutional right to bodily integrity, the Fifth Circuit had "clearly protected disciplinary corporal punishment from constitutional scrutiny" for over thirty years. *Id.* As such, the illegality of Abbott's conduct would not have been "clearly established" in the Fifth Circuit at the time of her interaction with T.O. *Id.*

135. *Id.* at 415.

136. *See* Flores v. Sch. Bd. of Desoto Par., 116 F. App'x 504, 510 (5th Cir. 2004) (concluding a student's excessive force claim should not be analyzed under the Fourth Amendment). The *T.O.* court cited *Flores*, which concluded that allowing excessive force claims under the Fourth Amendment would "eviscerate [the Fifth Circuit]'s rule against prohibiting substantive due process claims on the part of schoolchildren for excessive corporal punishment." *T.O.*, 2 F.4th at 415 (citing *Flores*, 116 F. App'x at 510). Moreover, the *Flores* court found that public school students were in a "unique constitutional position" because their "movements and location are subject to close control by schools and teachers," making the Fourteenth Amendment a more appropriate source of constitutional protection than the Fourth Amendment for excessive force claims involving a student. *Flores*, 116 F. App'x. at 510.

137. *T.O.*, 2 F.4th at 415; *see also* Curran v. Aleshire, 800 F.3d 656, 661 (5th Cir. 2015); Keim v. City of El Paso, No. 98-50265, 1998 WL 792699, at *4 n.4 (5th Cir. 1998) (finding claims against a security official and a sheriff in a school setting are properly analyzed under the Fourth Amendment).

V. A FLAWED CURRICULUM: A CRITICAL ANALYSIS OF *T.O.* AND THE FIFTH CIRCUIT'S APPROACH TO ACADEMIC CORPORAL PUNISHMENT CLAIMS

The court's holding in *T.O.*, which echoes the reasoning of Fifth Circuit precedent, is problematic for two reasons.[138] First, it improperly constrains the scope of § 1983, contrary to the Supreme Court's consistent holding that the availability of a state remedy does not preclude a substantive due process claim brought pursuant to § 1983.[139] Second, it limits the substantive due process analysis of arbitrariness to a state or school policy's provision of "adequate" post-punishment remedies while refusing to analyze individual arbitrary actions taken by education officials.[140] In comparison, the Fourth Amendment reasonableness standard provides a more appropriate method of review for academic corporal punishment claims.[141]

A. *§ 1983 and the Scope of Supplementary Remedies*

As exhibited in *T.O.*, the Fifth Circuit's approach to academic corporal punishment claims brought under § 1983 improperly conflates the distinct natures of procedural and substantive due process violations.[142] In *Zinermon*, the Court stressed a distinction between substantive and procedural due process violations, concluding that it is not always necessary to

138. *See* Brief for Disability Rights Texas et al. as Amici Curiae Supporting Appellant at 3, *T.O.*, 2 F.4th 407 (contending the continual affirmation of the Fifth Circuit's standard has precluded judicial inquiry into instances of excessive academic corporal punishment and would come to the same result in T.O.s' case); *see also* Brief for the Southern Poverty Law Center as Amicus Curiae Supporting Appellants, *T.O.*, 2 F.4th 407 (arguing the Fifth Circuit's standard improperly conflates the requirements of procedural and substantive due process inquiries with respect to the availability of state remedies); *see also* Petition for Writ of Certiorari at 8, *T.O.*, 2 F.4th 407 (criticizing the Fifth Circuit's standard generally and its preclusion of T.O.'s Fourth and Fourteenth Amendment claims).

139. For a full discussion of how the Fifth Circuit's "adequate alternative remedies" rule is inconsistent with Supreme Court guidance on § 1983 claims, see *infra* Section V.A.

140. For a detailed analysis of the issues with the Fifth Circuit's application of the arbitrariness concept, see *infra* Section V.B.

141. For more information on alternate standards of review and applicable guidance from Supreme Court precedent, see *infra* Section V.C.

142. *Compare* Monroe v. Pape, 365 U.S. 167, 183 (1961) (concluding that for § 1983 claims, a federal remedy may be invoked notwithstanding the existence of state remedies), Zinermon v. Burch, 494 U.S. 113, 125–26 (1990) (emphasizing a distinction between substantive and procedural due process claims, particularly when considering the use of state remedies), *and* Hall v. Tawney, 621 F.2d 611 n.5 (4th Cir. 1980) (contending a determination of constitutionally adequate due process does not preclude finding a substantive due process violation for the same conduct), *with T.O.*, 2 F.4th at 414 (holding that if adequate alternative state remedies exist for the alleged violation, a plaintiff cannot state a constitutional claim pursuant to § 1983).

consider alternative state remedies in a § 1983 analysis.[143] In cases concerning procedural due process, a constitutional violation is not complete *unless and until* a state fails to provide due process of law.[144] Thus, in a procedural due process analysis, the existence of state remedies may play a key role in the evaluation of procedural safeguards.[145] Conversely, because a substantive due process violation generates when the wrongful action occurs, the availability of adequate state remedies is not especially relevant to these claims.[146] Relying on the Supreme Court's decision in *Ingraham*, the Fifth Circuit's standard explicitly contravenes the reasoning of both *Monroe* and *Zinermon* to hold that state remedies are not just relevant in substantive due process analyses of corporal punishment cases—they are controlling.[147] However, the Supreme Court's decision in *Ingraham* only addressed issues of *procedural due process*—it does not stand for the proposition that the availability of post-punishment remedies is dispositive to a *substantive due process* claim under § 1983.[148] Other circuit courts have acknowledged that the Fifth Circuit's approach is inconsistent with established precedent.[149] In *Hall*, the Fourth Circuit emphasized "federal courts may not avoid the obligation to define and vindicate the federal constitutional right . . . because of a coincidence of related rights and

143. *See Zinermon*, 494 U.S. 124–27 (identifying and contrasting the respective characteristics of procedural and substantive due process violations generally and with respect to § 1983 claims).

144. *Id.* at 126.

145. *See id.* (specifying a procedural evaluation requires asking what process the state provided and in turn, whether that process was constitutionally adequate). In conducting this inquiry, a court would need to evaluate the procedural safeguards of relevant statutory or administrative procedure and then identify statutory or tort remedies for deprivations. *Id.*

146. *See id.* at 124–25.

147. *See* Clayton *ex rel.* Hamilton v. Tate Cnty. Sch. Dist., 560 F. App'x 293, 297 (5th Cir. 2014) (dismissing the student's substantive due process claim on the basis of Fifth Circuit precedent without analyzing the circumstances of his injury).

148. *See* Merker Rosenberg, *supra* note 53, at 426 (emphasizing the Fifth Circuit's approach misappropriates the *Ingraham* decision because the Court's reliance on state remedies only related to the petitioners' *procedural* due process claim).

149. *See, e.g.*, Neal *ex rel.* Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1075 n.2 (11th Cir. 2000) (invoking by implication the *Monroe* holding to reject the Fifth Circuit's approach, noting that the Fifth Circuit's refusal to recognize a cause of action if adequate state remedies exist has "been expressly rejected by other Circuits"); *see also* P.B. v. Koch, 96 F.3d 1298, 1302 n.3 (9th Cir. 1996) (emphasizing "no other court has adopted [the Fifth Circuit's] reasoning" on the topic of adequate state remedies). In *P.B.*, the Ninth Circuit also noted that the Fifth Circuit "[appeared] to have moved away from [its] position" by way of permitting a substantive due process claim notwithstanding the presence of state remedies in *Doe v. Taylor Independent School District*. *Id.*

remedies in the federal and state systems."[150] Many commentators have criticized the Fifth Circuit's approach for this reason.[151]

Additionally, the Fifth Circuit has implicitly recognized that its stance on adequate alternative remedies conflicts with binding precedent.[152] In *T.O.*, the reviewing panel acknowledged that multiple Supreme Court holdings are inconsistent with its approach.[153] Despite this conflict, the Fifth Circuit justified its noncompliance by differentiating between the circumstances of the aforementioned cases and T.O.'s case.[154] This distinction, while relevant, is not determinative; the Supreme Court has reaffirmed the *Monroe* line of reasoning several times under varying circumstances.[155] Moreover, as emphasized in *Monroe* and reaffirmed in subsequent cases, the legislative rationale behind § 1983 is a federal remedy is necessary to compensate for the potential of nonenforcement, even if a

150. Hall v. Tawney, 621 F.2d 607, 612 (4th Cir. 1980) (noting that the supplementary nature of federal relief under § 1983 in relation to the availability of alternate state avenues of relief is "of course settled" pursuant to *Monroe*).

151. *See, e.g.,* Parkinson, *supra* note 1, at 302–03 (finding that the Fifth Circuit's approach "ignores a distinction the federal courts have consistently made between procedural and substantive due process claims"); Merker Rosenberg, *supra* note 51, at 432–37 (opining the Fifth Circuit's standard for academic corporal punishment cases "wrenche[s] the concept of availability of state remedies from its procedural due process mooring, and misapplie[s] it to the substantive due process context").

152. *See* T.O. v. Ft. Bend Indep. Sch. Dist., 2 F.4th 407, 416, n.34 (5th Cir. 2021) (addressing argument that *Zinermon v. Burch* and *Knick v. Township of Scott* "implicitly abrogate[ ]" the *Fee* doctrine). Despite these adverse rulings, the Court saw no reason to stray from *Fee* without en banc consideration. *Id.*

153. *Id.*

154. *See id.* at 416 (emphasizing *Knick* concerns Fifth Amendment Takings claims where *T.O.* addresses academic corporal punishment; moreover, the court has continued to adhere to *Fee* notwithstanding the *Zinermon* decision). The court added that even if *Zinermon* or *Knick* implicitly abrogated *Fee*, the impact of these decisions would still not be enough to defeat Abbott's qualified immunity defense. *Id.* Given the Fifth Circuit's established standard towards academic corporal punishment, it would not have been "clearly established" that Abbott's conduct was illegal when the incident occurred. *Id.* Additionally, neither *Zinermon* nor *Knick* would have been sufficient to notify Abbott of a change in legality concerning her behavior. *Id.* As notice of illegality is necessary to defeat a claim of qualified immunity, the court affirmed Abbott's defense. *Id.*

155. *See* Zinermon v. Burch, 494 U.S. 113, 124–25 (1990) (holding that the *Monroe* rule is applicable to § 1983 claims against state mental health facility workers); Knick v. Twp. Of Scott, Pa., 139 S. Ct. 2162, 2173 (2019) (finding the *Monroe* rule to govern in Takings claims, as well as in any other claim arising from the Bill of Rights); Pakdel v. City & Cnty. of S.F., 141 S. Ct. 2226, 2231 (2021) (reaffirming *Knick's* finding that the exhaustion of state remedies is not a prerequisite to an action under § 1983); *see also* Merker Rosenberg, *supra* note 53, at 429–30 (first citing *Zinermon*, 494 U.S. at 125; then citing Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 20–22 (1978); then citing Daniels v. Williams, 474 U.S. 327, 336–43 (1986); then citing Davidson v. Cannon, 474 U.S. 344, 348 (1986); then citing Hudson v. Palmer, 468 U.S. 517 (1984); and then citing Parratt v. Taylor, 451 U.S. 527, 540–44 (1981)) (describing several Supreme Court cases that have implicitly or explicitly expressed adequate state remedies are only relevant in a procedural due process analysis).

form of state recourse appears "adequate" on its face.[156] Thus, the protection of rights envisioned by the legislature in passing § 1983 is not explicitly limited by circumstance.[157]

B. *Assumptions, Arbitrariness, and Adequacy: The Fifth Circuit's "Triple-A" Policy on Academic Corporal Punishment*

In *T.O.*, the Fifth Circuit promulgated a line of assumptive reasoning about the adequacy of post-punishment remedies to reach its decision. The court's reasoning assumed that if a state or school policy provides "adequate" post-punishment remedies to a student, then an educator's actions were not sufficiently arbitrary to justify a full substantive due process inquiry.[158] The court's "arbitrariness" theory also implicitly relied on the rationale proffered by the Fifth Circuit's *Ingraham* decision—that it would be a "misuse of judicial power" to determine whether an educator acted arbitrarily in a specific instance.[159] In *Ingraham*, the Fifth Circuit concluded this limitation applies where corporal punishment is administered pursuant to a school policy containing limitations to prevent the use of arbitrary behavior by school officials.[160] Nevertheless, the Fifth Circuit's

156. *See* Monroe v. Pape, 365 U.S. 167, 180 (1961) (finding it "abundantly clear" that § 1983 was passed in part to afford a federal right to plaintiffs because state laws may not be enforced "by reason of prejudice, passion, neglect, intolerance or otherwise," resulting in the unjust denial of constitutional rights); *see also Zinermon*, 494 U.S. at 125 (noting that § 1983 intended to address issues deriving from methods of statutory implementation taken by state officials, regardless of whether a law appears facially adequate).

157. For a list of cases distinct in circumstance but holding the same, see *supra* note 155 and accompanying text.

158. *See T.O.*, 2 F.4th at 414 (concluding that the state's provision of adequate post-punishment remedies is "all the process constitutionally due"; thus, it cannot act arbitrarily under these circumstances); *see also* Parkinson, *supra* note 1, at 302 (contending the Fifth Circuit's standard is based on the theory that the presence of adequate state court remedies precludes a federal court from conducting a full substantive due process inquiry).

159. *See T.O.*, 2 F.4th at 414–15 (finding Abbott's actions occurred "in a disciplinary context" and implying, pursuant to *Fee*, no further inquiry into the nature of those actions was necessary); *see also* Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976) (concluding it is a "misuse of . . . judicial power" to determine whether five "licks" from a paddle—as opposed to ten "licks"—constitutes arbitrary action), *aff'd*, 430 U.S. 651 (1977). Importantly, this sentiment was never analyzed nor affirmed by the Supreme Court in its review of *Ingraham* because the Court declined to consider the substantive due process element in general. *Ingraham*, 430 U.S. at 651, 659 n.12 (declining review of the substantive due process question); *see also* Merker Rosenberg, *supra* note 51, at 408–09 (contending the Fifth Circuit's approach to academic corporal punishment effectively refuses to judge the rationality of individual educator actions). In its review of *Ingraham*, the Fifth Circuit implied that "either [arbitrariness] in and of itself is not a constitutional deprivation, or . . . it is not a constitutional deprivation because of the existence of state tort and criminal actions." Merker Rosenberg, *supra* note 53, at 408–09 (footnote omitted).

160. *See Ingraham*, 525 F.2d at 917 (determining the guidelines set down in the school policy established standards "tend[ing] to eliminate arbitrary or capri-

interpretation of arbitrariness and adequacy improperly restricts judicial analysis of a substantive due process claim.[161]

First, other circuits have rejected the interpretation of the arbitrariness requirement proffered by the Fifth Circuit.[162] In *Hall*, the Fourth Circuit expressly disagreed with the Fifth Circuit's position by concluding that an instance of corporal punishment based on an "episodic application of force" may prove sufficient to state a substantive due process claim.[163] The Fourth Circuit also cited a dissenting opinion from the Fifth Circuit's review of *Ingraham*, which contended that the majority's position would "separate sharply the moderate kind of corporal punishment authorized by [a state statute] . . . from the severe beatings administered to the [students] . . . ."[164] Two other circuits have also found that a non-arbitrary school policy is not a dispositive factor in an evaluation of a school official's actions.[165] These analyses support the position that the existence of

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cious elements in any decision to punish[,]" and, as a result, it would be unnecessary for the court to examine the individual actions of the school official); *see also* Merker Rosenberg, *supra* note 51, at 420–21 (noting the Fifth Circuit standard restricts a judicial evaluation of whether an individual educator acted arbitrarily under the Fourteenth Amendment).

161. *See* Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 878 (5th Cir. 2000) (Wiener, J., concurring) (questioning the thoroughness of the Fifth Circuit's adequacy analysis). Judge Wiener's concurring opinion states that the Fifth Circuit has not "closely examined the adequacy of . . . state remedies," instead dismissing § 1983 claims against school districts or individual officials regardless of immunity. *Id.*

162. *See, e.g.*, Neal *ex rel.* Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1073–74 (11th Cir. 2000); Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 657 n.9 (10th Cir. 1987); Hall v. Tawney, 621 F.2d 607, 612 (4th Cir. 1980) (disputing the Fifth Circuit's restrictive approach to the evaluation of individual arbitrary action notwithstanding the presence of a non-arbitrary state law or school policy).

163. *Hall*, 621 F.2d at 613–14 (recognizing that application of a substantive due process standard may prove difficult, but that this issue "may not be avoided in the face of . . . proof sufficient to raise the possibility that . . . an intolerable abuse of official power . . . has occurred through disciplinary corporal punishment").

164. *Ingraham*, 525 F.2d at 926; *see also Hall*, 621 F.2d at 612 (rejecting the Fifth Circuit's conclusion that federal constitutional rights cannot be dependent on specific, potentially unauthorized, instances of corporal punishment). In his *Ingraham* dissent, Judge Godbold characterized the Fifth Circuit's limitation as a "rule of convenience" that would prove unsustainable in future cases. *Id.* (quoting *Ingraham*, 525 F.2d at 920 (Godbold, J., dissenting)) (disagreeing with the majority's assertion that determining whether punishment exceeded constitutional limits would be an "abuse of power"). Judge Rives, in turn, reasoned that the abuse of school or state limitations on the use of corporal punishment by education officials "does not alter the basic fact that [such] beatings [are] performed by officials clothed with state authority." *Id.* (quoting *Ingraham*, 525 F.2d at 925–26 (Rives, J., dissenting)) (arguing the majority's assertion is inconsistent with established § 1983 precedent).

165. *See* Garcia ex rel. Garcia, 817 F.2d at 657 n.9 (noting although analysis of a school regulation is relevant to determining the excessiveness of punishment, it is not dispositive). In *Garcia ex rel. Garcia*, the Tenth Circuit found that the presence of a non-arbitrary school regulation does not automatically establish a "constitutional safe harbor" for wrongful conduct taken by a school official. *Id.* The *Garcia* court also emphasized that conduct deemed "wrongful" under § 1983 "can-

a non-arbitrary school policy governing the administration of academic corporal punishment should not be viewed as a determinative factor in a court's evaluation of a § 1983 claim.[166]

Second, the Fifth Circuit's reasoning is based on two problematic legislative assumptions: (1) the state laws and school policies in question are both inherently and functionally adequate, rendering them rational as a matter of law; and (2) corporal punishment is not itself an arbitrary form of punishment.[167]

The Fifth Circuit's line of reasoning assumes that most state laws and school policies are adequate to justify the denial of a federal remedy.[168] On this basis, the court has found these laws and policies do not promote arbitrary action on the part of a state educator.[169] This assumption is evident in a string of Fifth Circuit analyses, including *T.O.*[170] To support its

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not be immunized by state law." *Id.* (quoting McClary v. O'Hare, 786 F.2d 83, 85 (2d Cir. 1986)); *see also Neal ex rel. Neal*, 229 F.3d at 1073–74 (concluding the Fifth Circuit's *Ingraham* opinion did not foreclose the possibility that individual instances of arbitrary corporal punishment could rise to the level of a constitutional violation). The Eleventh Circuit distinguished its case circumstances from that of the Fifth Circuit's *Ingraham* decision, emphasizing that the teacher at issue acted arbitrarily of his own accord, not explicitly pursuant to a school policy. Neal *ex rel.* Neal, 229 F.3d at 1074. Further, even assuming that the teacher's use of corporal punishment was authorized, the court found that a substantive due process violation still occurred because his use of force was intentional, excessive, and could foreseeably produce serious injury. *Id.* at 1076.

166. *See Moore*, 233 F.3d at 879–80 (Wiener, J., concurring). Judge Wiener's concurrence in *Moore* is illustrative of the issue with the Fifth Circuit's arbitrariness approach. *Id.* Specifically, Judge Wiener opines that the Fifth Circuit's position—which implies that no student injury administered "under the banner of discipline" can be the result of arbitrary action as long as state actions are in place—"flies in the face" of substantive due process as understood by most federal appellate courts. *Id.*

167. *See Ingraham*, 525 F.2d at 915–17 (concluding that the state law and school policy in question were both adequate and then justifying the legitimacy of corporal punishment in schools).

168. *See id.* at 917 (emphasizing that a regulation may only be held to violate substantive due process if it "bears no reasonable relation to the legitimate end of maintaining an atmosphere conducive to learning"); *Moore*, 233 F.3d at 875–76 (concluding that the provision of civil and criminal remedies preclude the plaintiffs from successfully stating a violation of substantive due process); Fee v. Herndon, 900 F.2d 804, 809 (5th Cir. 1990) (denying the plaintiffs' substantive due process claim because the state of Texas provides civil and criminal relief against overzealous educators and "does not allow teachers to abuse students with impunity"); *see also* Merker Rosenberg, *supra* note 51, at 431 (contending the Fifth Circuit's interpretation of state law adequacy effectively constitutes a judicial finding of a "reasonable state regulatory system").

169. For a more detailed explanation of how the court came to this conclusion, see *supra* notes 126–31 and accompanying text.

170. *See, e.g.*, J.W. v. Paley, 860 F. App'x 926, 928–29 (5th Cir. 2021); T.O. v. Ft. Bend Indep. Sch. Dist., 2 F.4th 407, 414 (5th Cir. 2021); Marquez v. Garnett, 567 F. App'x 214, 216–17 (5th Cir. 2014); Clayton *ex rel.* Hamilton v. Tate Cnty. Sch. Dist., 560 F. App'x 293, 297 (5th Cir. 2014); Serafin v. Sch. of Excellence in Educ., 252 F. App'x 684, 685 (5th Cir. 2007); Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 876 (5th Cir. 2000) (dismissing a student's substantive due process claim

finding of adequate alternative remedies in these cases, the court referenced two Texas statutes and a case decided thirty-three years earlier.[171] Even presuming these remedies are facially adequate, the *T.O.* court made no effort to investigate the actual rate of success for students' state claims, nor did it address the merit of the school's corporal punishment policy.[172] Moreover, in the Fifth Circuit, school officials and districts may enjoy immunity from suit in several circumstances.[173] The Fifth Circuit's strict adherence to its arbitrariness standard implies that claimants cannot succeed in stating a substantive due process claim unless the court finds the school policy or law at issue is inadequate, and thus arbitrary in nature.[174] Based on the Fifth Circuit's past evaluations of these elements, a contrary outcome seems unlikely.[175]

The Fifth Circuit's approach is also based on an assumption grounded in academic corporal punishment jurisprudence—that corporal punishment is not itself an arbitrary method of student discipline.[176] The Supreme Court's *Ingraham* decision relies heavily on the idea that academic corporal punishment represents a *legitimate* state educational inter-

based on the decision in *Fee*, which is grounded in the idea that adequate state laws and policies prevent the use of arbitrary individual action).

171. *See T.O.*, 2 F.4th at 415 n.28.

172. *See id.* at 415 (noting that the Fifth Circuit has "consistently held" Texas law provides adequate civil and criminal liability for school officials, while abstaining from undertaking its own analysis of the cited remedies).

173. *See* TEX. EDUC. CODE ANN. § 22.0512 (West 2021) (permitting immunity pursuant to the constraints of section 9.62 of the Texas Penal Code, which authorizes the use of force—but not deadly force—against a student to the degree believed to be reasonably necessary "to further the special purpose or to maintain discipline in a group"). This statute shields the educator from disciplinary proceedings under these circumstances, including actions to discharge, suspend, or terminate the employee, and actions brought by the State Board to enforce the educator's code of ethics. *Id.*; *see also Moore*, 233 F.3d at 877–78 (arguing that the Fifth Circuit's academic corporal punishment cases "have never closely examined the adequacy of those state remedies," instead dismissing § 1983 claims "regardless of whether [the defendants] might be immune from suit").

174. *See Moore*, 233 F.3d at 878 (arguing if all the defendants in *Moore* were found to be immune from liability pursuant to Texas law, it would be unclear the state provided an adequate remedy to injured students at all).

175. *See id.* at 876 (concluding Texas offers adequate state remedies for claims of excessive corporal punishment, thus barring the student from proving arbitrariness and advancing a substantive due process claim); Clayton *ex rel.* Hamilton v. Tate Cnty. Sch. Dist., 560 F. App'x 293, 297 (5th Cir. 2014) (rejecting the student's constitutional claim based on a finding that Mississippi's post-punishment remedies constituted an adequate form of legal recourse); Fee v. Herndon, 900 F.2d 804, 809 (5th Cir. 1990) (citing Texas's provision of adequate civil and criminal remedies as justification for finding the student's substantive due process rights were not violated); Cunningham v. Beavers, 858 F.2d 269, 272 (5th Cir. 1988) (finding a student whose injuries were deemed "abusive" could not state a substantive due process claim because Texas provided adequate state remedies for any excessive punishment imposed).

176. For an explanation of why corporal punishment has historically been viewed as a proper form of discipline, see *infra* notes 176–81 and accompanying text.

est, and is thus not an arbitrary form of punishment.[177] Similarly, the Fifth Circuit's standard relies on an assumption that corporal punishment is an appropriate means of discipline for public school policies to endorse.[178] In its review of *Ingraham*, the Fifth Circuit acknowledged a student's right to substantive due process is "a guaranty against arbitrary legislation," which requires "that the law not be unreasonable and that the means selected . . . have a real and substantial relation to the object sought to be attained."[179] Thus, the court concluded, school policies that authorize the use of corporal punishment are constitutionally permissible because they have a "real and substantial relation" to the legitimate purpose of establishing an effective learning atmosphere.[180]

In the context of the social and educational climate surrounding the 2021 *T.O.* decision, this rationale holds considerably less weight.[181] At the time of the *Ingraham* decisions, it could have been reasonably argued the use of corporal punishment had a "real and substantial relation" to the object of effective discipline.[182] Today, this argument is far less persuasive—thirty-one states have banned its use in public school; numerous studies have found troubling disparities in its practice; and national

177. *See* Ingraham v. Wright, 430 U.S. 651, 681–82 (1977) (emphasizing that its position is based on a "legislative judgment, rooted in history and reaffirmed in the laws of many States, that corporal punishment serves important educational interests").

178. *See* T.O. v. Ft. Bend Indep. Sch. Dist., 2 F.4th 407, 414 (5th Cir. 2021) (finding that actions taken for a disciplinary purpose are related to a "legitimate state goal," and thus, an educators' use of corporal punishment is permissible if taken in furtherance of a pedagogical purpose).

179. Ingraham v. Wright, 525 F.2d 909, 916 (5th Cir. 1976) (quoting Sims v. Bd. of Ed. Of the Indep. Sch. Dist. No. 22, 329 F. Supp. 678, 684 (D.N.M. 1971)) (arguing the evidence did not support a conclusion that the form of corporal punishment authorized by law and policy is arbitrary, capricious, or unrelated to the legitimate state purpose of determining its educational policy).

180. *Id.* at 916–17 (reasoning that corporal punishment is a valid means to the "maintenance of discipline and order in public schools" which is crucial to an effective educational environment).

181. *See* Gershoff & Font, *supra* note 5, at 15 (providing evidence of the decline in public support for the use of corporal punishment in schools). A 2005 national poll showed that seventy-seven percent of respondents believed teachers should not be allowed to spank students; similarly, a 2002 national poll received a seventy-four percent disapproval rate for academic corporal punishment in general. *Id.* at 14–15. Moreover, in a 2008 national survey of teachers, corporal punishment was ranked as having the lowest effectiveness of eight disciplinary methods considered. *Id.* at 15. These findings, along with the fact that thirty-one states have since statutorily banned the use of corporal punishment in schools, contribute to a "trend toward [the practice's] elimination" that was not present when the Supreme Court decided *Ingraham* in 1977. *Id.*; *see also* Parkinson, *supra* note 1, at 309–10 (1994) (arguing that a reasonable judge would be "hard pressed" to find that "ordinary" corporal punishment is rationally related to the legitimate state goal of maintaining an atmosphere conducive to learning).

182. *See* Gershoff & Font, *supra* note 6, at 15 (finding that the Supreme Court's justification for asserting the constitutionality of academic corporal punishment was because, at the time, only two states had banned the practice in schools).

health, education, and legal organizations have explicitly denounced its use.[183] Research has also shown that corporal punishment is not an effective disciplinary tactic—it does not increase behavioral compliance and can result in negative academic consequences for a student, such as lower test scores, increased absenteeism, and damage to student-teacher relationships .[184] Thus, little evidence remains to suggest that corporal punishment contributes to an atmosphere "facilitat[ing] the effective transmittal of knowledge," as the Fifth Circuit opined in *Ingraham*.[185]

Of course, it must be acknowledged that the nineteen states permitting the administration of corporal punishment may still view it as having a "real and substantial relation" to an effective learning atmosphere.[186] However, most of these states prohibit the use of corporal punishment in related settings, such as in state foster care systems, childcare institutions, and day care programs.[187] These environments, while not completely analogous to that of public school, share notable similarities, the most striking of which are the need for discipline and the goal of fostering edu-

183. *See id.* at 37 (providing a list of national organizations opposed to school corporal punishment); *see also* Mortorano, *supra* note 83, at 506 (listing several organizations that explicitly oppose the practice of corporal punishment in schools).

184. *See, e.g.*, Heddy Muransky & Linda J. Fresneda, *What Do Prisoners and Zoo Animals Have in Common? They Have More Protection from Physical Violence than School Children in Nineteen States*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 73, 77 (2015) (noting research shows that the use of corporal punishment teaches students to avoid punishment instead of creating a real behavioral change); Gershoff & Font, *supra* note 6, at 12 (finding evidence suggests that corporal punishment is not effective at teaching students how to behave, and may actually increase the likelihood that they act aggressively or misbehave more over time); WHITAKER & LOSEN, *supra* note 8, at 20–21 (citing research which finds the use of corporal punishment in schools produces often results in negative academic consequences and is "traumatic and not educationally necessary").

185. *Ingraham*, 525 F.2d at 917 (stating corporal punishment can contribute to maintaining discipline and facilitating an effective learning environment, justifying the conclusion that laws permitting its use are neither unreasonable nor arbitrary), *aff'd*, 430 U.S. 651 (1977).

186. *See* WHITTAKER & LOSEN, *supra* note 8, at 25 (contending the continued use of academic corporal punishment in many states may be grounded in individual educators' preference for punitive forms of discipline). A 2012 report on corporal punishment in Florida supports this notion by finding that the educators who "philosophically agreed" with its use were subjected to the practice as students. *Id.* Moreover, the educators surveyed in this study viewed corporal punishment as "a method to promote boundaries and communication." *Id.*

187. *See* Gershoff & Font, *supra* note 6, at 13 (showing that twelve of nineteen states permitting corporal punishment in schools have banned it in other similar settings); *see also* WHITAKER & LOSEN, *supra* note 8, at 18–19 (providing data indicating that many states authorizing corporal punishment in school settings bar its administration in other, related institutions). Georgia, Louisiana, Florida, Alabama, and Mississippi all permit corporal punishment in an educational environment but otherwise prohibit the practice. WHITAKER & LOSEN, *supra* note 8, at 18–19. Moreover, many of these states recognize that corporal punishment can be detrimental to a child's physical and mental health and contribute to the neglect and mistreatment. *Id.*

cation and development.[188] At minimum, this comparison reflects an inconsistency as to whether corporal punishment is developmentally and morally acceptable.[189] In these states, the statutory authorization of corporal punishment in public schools may even be considered an anomaly given that many states ban its practice in other institutions where children may be disciplined.[190] Thus, the Fifth Circuit's continued application of a standard relying on the validity of academic corporal punishment is problematic given the societal and educational trend against its use.[191]

C. *The Fourth Amendment: An "Objectively Reasonable" Standard for Evaluating Academic Corporal Punishment Claims*

In *T.O.*, the Fifth Circuit declined to apply a Fourth Amendment analysis to T.O.'s claims, citing an inconsistency in the circuit's case law.[192] Nonetheless, the Fourth Amendment reasonableness standard is superior to the Fifth Circuit's approach in three considerable ways. First, application of a reasonableness inquiry more closely aligns with Supreme Court precedent than the Fifth Circuit's standard.[193] The *Ingraham* decision

188. *See* Gershoff & Font, *supra* note 6, at 13 (contending that evidence of states banning corporal punishment from other settings where children are cared for but permitting it in public schools implies that these states "already recognize the harm corporal punishment can pose to children").

189. *See* Parkinson, *supra* note 1, at 306 (arguing "inconsistencies surface" when laws concerning corporal punishment in the school are compared to those governing other childcare facilities). Addressing this inconsistency, Parkinson compares language from two Virginia cases decided by the same court, one of which addresses corporal punishment in the school and one concerning its use in a childcare center. *Id.* In the former case, the court refused to find a substantive due process violation under the "shocks the conscience" test when an educator "pierced [a student's] upper left arm with a straight pin" as a method of discipline. *Id.*; *see also* Brooks v. Sch. Bd., 569 F. Supp. 1534, 1535 (E.D. Va. 1983). In the latter case, the court explicitly acknowledges that the state's compelling interest in protecting children from harm is served by corporal punishment bans. *Id.*; *see also* Forest Hills Early Learning Ctr. v. Lukhard, 661 F. Supp. 300, 313 (E.D. Va. 1987). Moreover, the court justifies its decision by recognizing the many negative consequences of corporal punishment, including physical or mental harm, aggressive behavior, and indicia of child abuse. *Lukhard*, 661 F. Supp. at 313.

190. *See* WHITAKER & LOSEN, *supra* note 8, at 18–19.

191. *See* Heckman, *supra* note 14, at 522 (comparing the Fifth Circuit's standard of review to those of other circuit courts and finding that the standard "fails to accommodate modern changes in public opinion").

192. For an explanation of the Fifth Circuit holdings addressing the application of Fourth Amendment standards to a school context, see *supra* notes 134–36 and accompanying text; *see also* T.O. v. Ft. Bend Indep. Sch. Dist, 2 F.4th 407, 415 (5th Cir. 2021). The Fifth Circuit has previously acknowledged that the Fourth Amendment may apply in a school context, finding that the Amendment's protection against unreasonable seizures protects students from improper forms of discipline. *See* Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1079 (5th Cir. 1995) (analyzing a claim related to an official's conduct towards a student on a school-sponsored trip under the Fourth Amendment).

193. *Compare* Graham v. Connor, 490 U.S. 386, 396 (1989) (holding that excessive force claims should be evaluated under the Fourth Amendment), *with* New

does not explicitly endorse the use of either standard for academic corporal punishment cases.[194] However, application of a tailored Fourth Amendment reasonableness inquiry finds implicit support in the Supreme Court decisions of *T.L.O.* and *Connor*.[195] By finding the Fourth Amendment applies to searches of students in a public school setting, the *T.L.O.* Court recognized a clear distinction between a public school and law enforcement setting, requiring a tailored version of the traditional Fourth Amendment in the former case.[196] Thus, criticism that the Fourth Amendment only encompasses criminal seizures is less persuasive in light of *T.L.O.*[197] Moreover, in *Connor*, the Court emphasized that allegations of excessive force should not be analyzed through "generalized notion[s] of 'substantive due process,'" where a specific constitutional provision is applicable.[198] Courts in the Seventh and Ninth Circuits have used these holdings to find excessive force allegations against an educator should be analyzed pursuant to the Fourth Amendment.[199] Conversely, the Fifth Circuit's standard finds little support in Supreme Court jurisprudence.[200]

Second, the Fourth Amendment offers a more appropriate balancing inquiry than the Fifth Circuit's standard.[201] The reasons for extending

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Jersey v. T.L.O., 469 U.S. 325, 333 (1985) (holding that the Fourth Amendment's protection against unreasonable searches and seizures applies in a school context).

194. *See* Parkinson, *supra* note 1, at 287 (emphasizing the Supreme Court's *Ingraham* ruling made no determination on the relationship between academic corporal punishment and substantive due process).

195. For a more thorough explanation of how the *T.L.O.* and *Connor* decisions have been interpreted to provide support for a Fourth Amendment standard of review in the academic corporal punishment context, see *supra* notes 80–86.

196. *See generally T.L.O.*, 469 U.S. at 333 (describing the special nature of a school environment and how a standard of review for school-related claims should take those considerations into account).

197. *See generally id.* (explaining constitutionality of extending Fourth Amendment protection to the school environment); *see also* Mortorano, *supra* note 85, at 495-96 (2014) (acknowledging that the *T.L.O.* decision could provide a legal ground for future academic corporal punishment litigants to claim a Fourth Amendment seizure).

198. Graham v. Connor, 490 U.S. 386, 395, 396 n.10 (1989) (finding the Fourth Amendment provides explicit constitutional protection for "seizures," which occur when a government actor has "restrained the liberty of a citizen" through "physical force or [a] show of authority" (internal quotation marks omitted) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

199. *See* Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1182 (9th Cir. 2007) (referencing *Connor*'s directive that § 1983 excessive force allegations should be analyzed under the Fourth Amendment, rather than through substantive due process); Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1012 (7th Cir. 1995) (citing *T.L.O.* to support the adoption of a Fourth Amendment standard for academic corporal punishment claims).

200. For a further discussion of how the Fifth Circuit's standard of review for § 1983 contradicts established Supreme Court precedent, see *supra* notes 141–45 and accompanying text.

201. *See* Mitchell, *supra* note 75, at 340 (arguing the reasonableness inquiry permits the "diminished [societal] tolerance" of academic corporal punishment to play a role in the adjudication of student claims).

Fourth Amendment protection to a school environment are based on an understanding of the respective roles students and educators play in establishing a conducive educational environment.[202] The tailored reasonableness inquiry takes important factors into account, such as the nature of a triggering infraction and the characteristics of the student.[203] This inquiry reflects a judicial effort to appropriately balance the distinct liberty interests of a teacher and student in a school setting.[204] The appropriateness of this inquiry is reflected in the outcomes of the major federal appellate cases using a Fourth Amendment standard.[205] A balance of interests for the Fifth Circuit's standard, in contrast, suffers from overreliance on disciplinary intent.[206] The Fifth Circuit's standard thus defers heavily to educators, assuming that their actions are non-arbitrary or based in pedagogical rationale except under extreme circumstances.[207]

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202. For an explanation of courts' emphasis on providing a standard for evaluation of school-related claims that adequately accounts for the competing interests inherent to an educational environment, *see supra* notes 90–92 and accompanying text.

203. *See* New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (defining the permissible scope of a school search). The Court specified a school search is permitted when "the measured adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.*

204. *See* Mitchell, *supra* note 75, at 337–38 (reasoning both the Seventh and Ninth Circuits have "properly balanced" the circumstances of a student's misbehavior with the severity of the educator's disciplinary response). Further, the reasonableness inquiry allows the court to acknowledge the role of imminence as it pertains to an educator's action, which can be weighed against the student's liberty interest to determine whether an educator reacted disproportionately to an infraction. *Id.* at 338.

205. *See id.* at 337–38 (discussing the importance of considering the nature of a triggering infraction in a Fourth Amendment academic corporal punishment analysis). In both *Doe* and *Preschooler II*, for instance, the Ninth Circuit found that the educator's use of force was proportionately unreasonable in comparison to the students' minor disciplinary infraction. *See Preschooler II*, 479 F.3d at 1180; Doe *ex rel.* Doe v. Hawaii Dept. of Educ., 334 F.3d 906, 909–10 (9th Cir. 2003) (both permitting students' claims to proceed under the Fourth Amendment). Conversely, in *Wallace*, the Seventh Circuit determined the educator's action of pulling the student's elbow was reasonable given the severity of the triggering infraction, which threatened disruption to other students' learning environment. *See* Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1012 (7th Cir. 1995) (concluding the student litigant failed to show the educator's actions were disproportionately administered).

206. *See* T.O. v. Fort Bend Indep. Sch. Dist., 2 F.4th 407, 414–15 (5th Cir. 2021) (reasoning even if Abbott's reaction to T.O. was inappropriate or ill-advised, it occurred in a disciplinary context and thus justifies dismissal of his claim).

207. For a comparison of cases where the Fifth Circuit permitted a student's constitutional claim to proceed as compared to those rejected, see *supra* note 127. By its own account, the Fifth Circuit's standard for denying a student's substantive due process claim is based on the existence of state remedies/school polices which are deemed non-arbitrary, as well as a possible pedagogical justification for an educator's actions. For a description of the rationale behind the court's denial of T.O.'s claim, see *supra* notes 127–32 and accompanying text.

Finally, the Fourth Amendment standard of review may increase the likelihood of success for students' academic corporal punishment claims.[208] In comparison to the Fifth Circuit's standard, students are more likely to bring successful claims under the reasonableness inquiry.[209] Some legal scholars have argued that satisfying the reasonableness standard is deceptively simple in practice, but students have fared no better under the Fifth Circuit's standard of review.[210] In the Fifth Circuit, the success of a student's constitutional claim is almost entirely dependent on the availability of "adequate" remedies in the student's state of residency.[211] Moreover, in *T.O.*, the Fifth Circuit referenced past case circumstances as an implicit benchmark for the evaluation of his claims.[212] The Fifth Circuit's line of academic corporal punishment cases makes clear that, barring an egregious abuse of power unrelated to a discernible pedagogical purpose, a student's claim will not supersede the availability of state remedies.[213] Statistically, substantive due process claims analyzed under the Fifth Circuit's standard have seen an extremely low rate of success; over the past forty-four years, only two such claims have been permit-

208. *See generally* Mitchell, *supra* note 75 (arguing students may be more successful under a Fourth Amendment standard of review than under the "shocks the conscience" or Fifth Circuit standards).

209. *See id.* at 336–39 (discussing the potential for a higher rate of student success under the reasonableness standard).

210. *See, e.g.,* Mortorano, *supra* note 85, at 494–96 (contending in the context of corporal punishment, Fourth Amendment claims may be "almost as difficult to prove" as Fourteenth Amendment claims). Successful Fourth Amendment claims may need to demonstrate that the school official's seizure was not based on reasonable suspicion of wrongdoing. *Id.* at 496. Moreover, students may need to show that the severity of the bodily injury was disproportionate in comparison to the reasons for the seizure. *Id.;* see also Heckman, *supra* note 14, at 545 (arguing the reasonableness inquiry may not constitute a preferable alternative to the shocks the conscience standard). In her article, Diane Heckman contends that compared to the shocks the conscience test, the reasonableness inquiry is not more clearly tailored to the evaluation of factors relevant to academic corporal punishment cases, such as the age of the student or the nature of the disciplinary infraction. *Id.*

211. *See T.O.*, 2 F. 4th at 414; *see also* Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990) (finding if a state provides adequate post-punishment remedies for a student, the Due Process Clause is not implicated "irrespective of the severity of these injuries or the sensitivity of the student"); Clayton *ex rel.* Hamilton v. Tate Cty. Sch. Dist., 560 F. App'x 293, 297 (5th Cir. 2014) (dismissing the student's claim because Mississippi provided post-punishment remedies without any analysis of specific factual circumstances).

212. *See T.O.*, 2 F.4th at 414–15 (listing factual circumstances in which the Fifth Circuit previously dismissed substantive due process claims and likening T.O.'s situation to those cases, while distinguishing from cases involving truly "arbitrary" and "capricious" actions).

213. *See id.* (stating a student must be the subject of a "random, malicious, and unprovoked attack" to justify deviation from Fifth Circuit precedent). For a more thorough summary of the only two claims the Fifth Circuit has found to satisfy this standard, see *infra* note 214.

ted to proceed.[214] The Fifth Circuit's test thus prevents nearly all student constitutional claims from progressing past a basic substantive analysis.[215]

VI. FAILING TO MAKE THE GRADE: THE *T.O.* DECISION AS A MICROCOSM OF THE UNRESOLVED ANALYTICAL AND SOCIAL ISSUES RESULTING FROM *INGRAHAM*

In the wake of significant legislative progress reducing the use of academic corporal punishment after *Ingraham*, one legal scholar in the 1990s warned the legal community not to become "complacent."[216] Nearly three decades later, that sentiment still bears repeating.[217] Legislative change towards abolishing corporal punishment has largely stagnated, but the incidence of injury and abuse has not.[218] The Fifth Circuit's decision in *T.O.* highlights several deficiencies in the federal remedy for academic corporal punishment claims.[219] Primarily, it shows the current circuit split regarding the constitutionality of § 1983 academic corporal punishment cases is untenable in both an analytical and social context.[220] Given the drastic social and educational developments since its last review of aca-

214. *See* Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 445 (5th Cir. 1994) (allowing a substantive due process claim to proceed when the charged educator allegedly molested the student); *see also* Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305–06 (5th Cir. 1987) (permitting the claim where an educator allegedly tied the student to a chair for two days as an "instructional technique"). These claims, the Fifth Circuit reasoned, were found permissible notwithstanding the presence of state remedies because the educators' behavior was "unrelated to any legitimate state goal" unlike actions taken for a pedagogical purpose. *See T.O.*, 2 F.4th at 414 (explaining the court's reasoning for permitting students' substantive due process claims to proceed in these cases). Moreover, in *Doe*, the court noted that much of the rationale expressed in *Fee* was inapplicable to the case at issue because the sexual molestation of a student could never be justifiable, so no "state interest" could support that action. *See Doe*, 15 F.3d at 451–52 (justifying the verdict notwithstanding *Fee*).

215. *See* Parkinson, *supra* note 1, at 297–98 (arguing based on the Fifth Circuit's track record, students in states with post-punishment remedies "will continue to summarily be shown the door" when they attempt to bring federal claims).

216. *See id.* at 310 (arguing despite the substantial progress made towards ending corporal punishment, many students still face imminent danger from the use of corporal punishment in schools, which is exacerbated by the federal courts' "hands-off" approach to the issue).

217. *See id.* (contending the progress made does not change the fact that thousands of children remain subject to corporal punishment and suffer serious physical/emotional repercussions from its administration).

218. For a more in-depth discussion of the disparate use of corporal punishment based on race, disability status, and gender, see *infra* notes 232–34 and accompanying text.

219. *See* Parkinson, *supra* note 1, at 297–98 (noting the circuit split is "particularly troubling" in light of the high percentage of corporal punishment incidents in the Fifth Circuit).

220. For a discussion of the analytical and social implications of the Fifth Circuit's line of reasoning and the circuit split in general, see *infra* Sections VI.A. and VI.B.

demic corporal punishment, the Supreme Court should address this issue and consider adopting a Fourth Amendment standard of review.[221]

On an analytical basis, the *T.O.* decision highlights the unsustainable nature of a circuit split on the method of review for academic corporal punishment claims.[222] While most federal appellate courts view these claims as implicating constitutional rights regardless of available adequate state remedies, a larger disagreement regarding the proper standard of judicial review persists.[223] Similarly, legal scholars considering the issue have come to varying conclusions about the proper standard of review, diverging based on factors such as the likelihood of a successful outcome, the presence of an appropriate balance between interests, and the level of constitutional support.[224] This legal dispute has engendered a federal remedy producing substantially disparate results for students depending in large part on residency—most notably, for students in the Fifth Circuit.[225] The continuation of this analytical split also exacerbates the disproportionate administration of corporal punishment in public schools.[226] As a result, updated Supreme Court guidance would promote conformity as to both a standard of review and judicial outcome.[227]

A Supreme Court judgment in an academic corporal punishment case could also be the only impetus for the Fifth Circuit to retreat from its isolated position, given that en banc consideration would be required to

221. *See* Heckman, *supra* note 14, at 549.

222. See *supra* note 14 and accompanying text.

223. See *supra* notes 15–17 and accompanying text.

224. *Compare* Menon, *supra* note 24, at 341–43 (contending the "shocks the conscience" standard should be rejected in favor of a reformulated substantive due process inquiry), *with* Mitchell, *supra* note 75, at 331–36 (criticizing the "shocks the conscience" standard on the basis of misapplication, improper balance of interests, and the potential for judicial activism, then advocating for the Fourth Amendment's reasonableness standard), *with* Mortorano, *supra* note 85, at 497 (arguing the Supreme Court's *Ingraham* decision should be overturned and academic corporal punishment cases should be evaluated under the Eighth Amendment).

225. *See* T.O. v. Ft. Bend Indep. Sch. Dist., 2 F.4th 407, 421 (5th Cir. 2021) (Wiener, J., concurring) (noting the combination of "hindsight and thirty years of watching [the *Fee*] rule being applied to the detriment of public school students in Texas, Mississippi, and Louisiana" has strengthened his conviction that both *Fee* and *Ingraham* were wrongly decided); *see also* Parkinson, *supra* note 1, at 302 (arguing the inter-circuit conflict "treats the constitutional rights of schoolchildren differently depending on where they live").

226. *See* Parkinson, *supra* note 1, at 297–98 (emphasizing the circuit split is problematic in light of the high incidence of corporal punishment occurring within Fifth Circuit states); *see also* WHITAKER & LOSEN, *supra* note 8, at 10 (finding whether a child is subject to academic corporal punishment may in large part depend on their state of residency). In the nineteen states where the use of corporal punishment is authorized in schools, almost forty-five percent of the schools in practicing districts do not actively use this method of discipline. WHITAKER & LOSEN, *supra* note 8, at 10. Thus, students attending different schools in the same district may have substantially different disciplinary experiences. *Id.*

227. *See* Heckman, *supra* note 14, at 548–49; Parkinson, *supra* note 1, at 309–11 (both urging the Supreme Court to reconsider the issue it declined to evaluate in *Ingraham*).

reconsider the approach outlined in *Fee*.[228] Given the Fifth Circuit has declined to take this course of action for several decades, it is unlikely the standard would be reviewed or refined without the added pressure of a Supreme Court decision.[229]

The lack of analytical conformity for judicial evaluations of academic corporal punishment claims also has larger social implications.[230] The *T.O.* decision, as well as other Fifth Circuit precedent, specifically endorse a line of reasoning that fails to adequately account for substantial changes in social and legislative attitudes towards the use of corporal punishment in an educational environment.[231] Moreover, the *T.O.* holding implicitly minimizes the severity of the threat that the use of arbitrary corporal punishment poses to public school students by continuing to promulgate an outdated and strict standard for constitutional vindication.[232] Studies have shown that corporal punishment is administered disparately based on race, disability status, and sex—particularly in the states composing the Fifth Circuit.[233] The use of corporal punishment in public schools has

228. *See* Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 877 (5th Cir. 2000) (Wiener, J., concurring) (acknowledging the Fifth Circuit's strict adherence to *stare decisis* prevents a panel of judges from overturning the *Fee* doctrine without en banc consideration, notwithstanding the fact that *Fee* itself was decided by a panel).

229. *Compare id.* at 380 (arguing that the Fifth Circuit should not "demur in [its] own housekeeping chores" by forcing the Supreme Court to eliminate the circuit split existing between the Fifth Circuit and the majority of other federal appellate courts), *with T.O.*, 2 F.4th at 421 (Wiener, J., concurring) (reaffirming his disagreement with the *Fee* doctrine as outlined in *Moore*, and urging his Fifth Circuit colleagues to "fix the error before the Supreme Court decides to fix it for us").

230. *See* Gershoff & Font, *supra* note 6; WHITAKER & LOSEN, *supra* note 8 (discussing the negative social implications associated with academic corporal punishment); *see also* Parkinson, *supra* note 1, at 305–06 (discussing the impact of the circuit split on social issues).

231. *See* Mortorano, *supra* note 85, at 505–07 (pointing to trends towards banning corporal punishment and shifts in public opinion as showing that corporal punishment is now viewed as "cruel and unusual").

232. *See* WHITAKER & LOSEN, *supra* note 8, at 13 (providing statistics indicating all three of the Fifth Circuit states—Mississippi, Texas, and Louisiana—rank in the top ten for states with the highest rates of corporal punishment in the United States). According to data from the 2013-14 and 2015-16 school years, Mississippi had the highest corporal punishment rate of all the states at 9.3%, with Texas at 4.6% and Louisiana at 2.8%. *Id.; see also* Brief for the Southern Poverty Law Center as Amici Curiae Supporting Appellants, *T.O.*, 2 F.4th 407 (emphasizing the negative impact of the Fifth Circuit's standard of review on academic corporal punishment use in Mississippi, Texas, and Louisiana). In its amicus brief, the Southern Poverty Law Center contended that continued use of the Fifth Circuit's standard has not only "left [the circuit] on an academic island," but also produced "tragic but predictable results: the three states comprising [the Fifth Circuit] use it far more than other states in the nation." Brief for the Southern Poverty Law Center as Amici Curiae Supporting Appellants at *2, *T.O.*, 2 F.4th 407.

233. *See* Mortorano, *supra* note 85, at 504–05 (arguing the disproportionate use of corporal punishment in schools may constitute a civil rights violation, given that students of color, students with disabilities, and male students are targeted more frequently than other pupils); *see also* WHITAKER & LOSEN, *supra* note 7, at 21-

also been linked to the school-to-prison pipeline.[234] Research has shown that corporal punishment can contribute to absenteeism, fractured student-teacher relationships, lower academic gains, and dropping out—all of which increase the likelihood that a student is "pushed out of school and into the justice system."[235]

In light of these findings, the *Ingraham* decision no longer accurately characterizes the social and educational issues surrounding academic cor-

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28 (compiling data regarding disparities in race, disability status, and sex). With regard to race, data from the 2015-16 school year shows that 9.7% of black students receive corporal punishment in schools where it is practiced; this reflects more than double the rate for white students at 4.7%. WHITAKER & LOSEN, *supra* note 8, at 21. A racial differentiation based on sex is also apparent; black boys have the highest rates of corporal punishment at 14%, with black girls at 5.2% (compared to white girls at 1.7%). *Id.* at 23. Mississippi in particular has the highest disparity rate between gender and race; in the 2013-14 school year, 8% of black girls received corporal punishment in Mississippi as compared to 2.4% of white girls. *Id.* The study also found that students with disabilities are corporally punished at a higher rate than their classmates without disabilities. *Id.* at 28. This disparity is particularly prevalent in Texas, which administered corporal punishment to disabled students at a rate of 7.8% as compared to the 4.3% rate for students without disabilities. *Id.* Mississippi recently banned its use on students with disabilities, but prior to that statutory change, the state had the nation's highest corporal punishment rate for students with disabilities at 10.4%. *Id.* at 27.

234. *See* WHITAKER & LOSEN, *supra* note 8, at 25 (providing statistics indicating a correlation between the administration of corporal punishment and the school-to-prison pipeline). *Id.*; *see also* Megan Helton, *A Tale of Two Crises: Assessing the Impact of Exclusionary School Policies on Students During A State of Emergency*, 50 J.L. & EDUC. 156, 168-69 (2021) (defining the school-to-prison pipeline trend and considering the impact of punitive discipline on its continuance). The school-to-prison pipeline phenomenon is exemplified by the "growing trend of minority students who are being pushed out of educational institutions and into the criminal justice systems," in part because of overreliance on exclusionary disciplinary methods. *Id.*

235. *See id.*; *see also* HUM. RTS. WATCH & ACLU, *supra* note 11, at 50 (emphasizing the degrading elements of corporal punishment that can lead to a lack of academic engagement and motivation, which may result in dropout), Helton, *supra* note 234, at 172 (arguing exclusionary methods of discipline and truancy can both contribute to the likelihood that a student leaves school and enters the criminal justice system), Lanette Suarez, *Restraints, Seclusion, and the Disabled Student: The Blurred Lines Between Safety and Physical Punishment*, 71 U. MIAMI L. REV. 859, 879–81 (2017) (contending the use of corporal punishment contributes to factors like lack of motivation, absenteeism, and emotional distress, which in turn perpetuate the school-to-prison pipeline phenomenon). Chronic truancy, for instance, often results in declining academic performance, which may in turn lead to dropout. Helton, *supra* note 234, at 172–73. Because corporal punishment can produce medical complications for students requiring extensive hospitalization, this can add to the likelihood that a student becomes chronically truant. HUM. RTS. WATCH & ACLU, *supra* note 11, at 50. The use of physical punishment as a replacement for educational technique and counseling may also produce negative emotional consequences for students, increasing the likelihood of dropout. Suarez, *supra* note 235, at 880–81. Ultimately, research shows that "high school dropouts are consistently overrepresented in the prison population." Helton, *supra* note 234, at 173.

poral punishment.[236] While most state legislatures have rejected the use of corporal punishment in public schools, federal courts must strengthen the federal judicial remedy to ensure that students who are still subjected to this practice have a viable method of recourse.[237] Therefore, the Supreme Court should re-address the constitutionality of academic corporal punishment with consideration of new societal and educational developments.[238]

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236. *See* Parkinson, *supra* note 1, at 304–06 (criticizing the *Ingraham* decision as contributing to a dispassionate federal judicial evaluation of students' claims, particularly in light of the serious developmental issues that corporal punishment may cause).

237. *See id.* at 310.

238. *See* WHITAKER & LOSEN, *supra* note 8, at 12 (emphasizing the drastic developments in public and legislative attitudes on corporal punishment since the 1970s).