

2020

Children's Equality Rights: Every Child's Right to Develop to their Full Capacity

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Nancy E. Dowd, *Children's Equality Rights: Every Child's Right to Develop to their Full Capacity*, 41 *Cardozo Law Review* 1367 (2020)

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CHILDREN'S EQUALITY RIGHTS: EVERY CHILD'S RIGHT TO DEVELOP TO THEIR FULL CAPACITY

Nancy E. Dowd[†]

Children are born equal. Yet as early as eighteen months, hierarchies emerge among children. These hierarchies are not random but fall into patterns by race, gender, and class. They are not caused nor voluntarily chosen by children or their parents. The hierarchies grow, persist, and are made worse by systems and policies created by the state, perpetuating the position of the privileged and continuing the disadvantage of the subordinated. Children's equal right to develop to their capacity is severely undermined by policies and structures that hamper and block the development of some by creating barriers and challenges or failing to support them.

This Article argues that hierarchies among children violate their constitutional rights, by both the infliction of harm and the failure to provide affirmative support. It documents how our policies and structures reinscribe inequality on children and proposes a constitutional obligation to the contrary. The Article takes on the challenge of articulating a general constitutional theory of children's rights, suggesting that children's status, circumstances, and needs are the basis for a distinctive claim of positive rights.

Among the most critical of those positive rights is the right to developmental equality: the right of every child to maximize their developmental potential. Equality of development is a universal right of every child based on the principles of equality, equity, and dignity at

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the core of our equal protection jurisprudence. To make this claim, the Article unearths existing hierarchies and identifies the parameters of children's equality that are constitutionally meaningful. It then grounds a proposal for children's constitutional rights, including a positive right to developmental equality, in existing constitutional doctrine.

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INTRODUCTION

Children are entitled to equality. All children are born equal in human dignity and with equal rights to fully develop their cognitive and human potential.¹ But they are not born into equal circumstances.² Differences in newborns' innate capacity for development are dwarfed by the effects of their environments and the inequalities they face. Differences of context, linked to policies, structures, and systems, become the basis for children's inequalities and hierarchies.³ Inequality emerges in infancy, and hierarchies worsen during childhood, not due to anything over which parents or children have any control, but due to differences in context. The differences are not simply the result of individual circumstances. Rather, the absence of social support and the presence of roadblocks and challenges create the hierarchies that stymie children's equal development. The random opportunity of one context over another, one family over another, embedded within neighborhoods and communities unequally supported, linked to unequal systems of health, education, and economic support,

¹ See generally Margaret R. Burchinal et al., *Early Intervention and Mediating Processes in Cognitive Performance of Children of Low-Income African American Families*, 68 CHILD DEV. 935, 935 (1997); Jeffrey Brown et al., *Socioemotional Trajectories in Black Boys Between Kindergarten and the Fifth Grade: The Role of Cognitive Skills and Family in Promoting Resiliency*, 83 AM. J. ORTHOPSYCHIATRY 176 (2013); Kristin M. Scott et al., *From Higher Order Thinking to Higher Order Behavior: Exploring the Relationship Between Early Cognitive Skills and Social Competence in Black Boys*, 83 AM. J. ORTHOPSYCHIATRY 185 (2013).

² See *infra* Section I.A.

³ See NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 42–53 (2018) [hereinafter DOWD, REIMAGINING EQUALITY]. Inequalities are differences. Hierarchies are rankings of people or groups by status. The inequalities I focus on are constructed, not inherent differences. The hierarchies among children from most to least favored are largely based on identities.

translates into the likelihood of inequality and hierarchy.⁴ Instead of supporting children's innate equality, we create hierarchies that are tied to our failures to give them equal opportunities to thrive.

In this Article, I articulate a constitutional theory of children's rights under which children have distinctive equality rights. Children's constitutional rights have been recognized, but the theoretical basis and scope of those rights is an undeveloped area of constitutional doctrine.⁵ Moreover, even in those areas where children's equality rights have been recognized, most notably with respect to education, in *Brown v. Board of Education*,⁶ equality has been defined in a crabbed, limited way that has allowed inequalities by race and other hierarchies among children to be perpetuated, even exacerbated, over time. *Brown* and its progeny have been a failure for children; this definition of equality must be challenged and reclaimed.⁷

Children's equality rights ultimately rest on their common humanity, their common value, and their need for support in order to develop. Essential to that development are their families, neighborhoods, communities, and other adults with whom they commonly interface: caregivers, teachers, coaches, healthcare workers, police officers, and other adults. It is the responsibility of the state to facilitate children's equal development.⁸ Their needs require state support to sustain their equality from birth until they reach the benchmark of independent citizenship.⁹

⁴ Susan Nittrouer calls this the "ovarian lottery," borrowing the term from Warren Buffet, who identifies himself as a lottery winner. Susan Nittrouer, *Ending the Lottery*, 71 FLA. L. REV. FORUM 132 (2019).

⁵ See BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008) [hereinafter WOODHOUSE, *HIDDEN IN PLAIN SIGHT*].

⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁷ For data on resegregation, see GARY ORFIELD, *REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE* (2009). Sean Reardon of the Stanford Center on Poverty and Inequality conducts ongoing research on educational inequality and poverty. See *Education*, STANFORD CTR. ON POVERTY & INEQUALITY, <https://inequality.stanford.edu/cpi-research/area/education> [<https://perma.cc/R6WH-72DM>]. *Brown* is capable of being read in a far more radical way, which I explore in research and work in progress, tentatively entitled "*Radical Brown*."

⁸ See *infra* Part II.

⁹ Formally, citizenship and maturity are set at age eighteen, the age of adult status and the right to vote. Yet because of the individualized aspect of equality rights, developmental support might extend past age eighteen to ensure reaching independent citizenship, whether to complete necessary education

These positive rights are connected to, but distinctive from, affirmative rights claims of adults.¹⁰

Our constitutional obligation is that inequality not be reinscribed. While children are not simply passive subjects of adults, their dependency means that they neither choose their families nor their circumstances. They are not sufficiently capable, for long periods of their youth, and are not legally empowered, in most circumstances, to act for themselves.

The state's responsibility to children, as an expression of society's collective responsibility, emanates both from the necessity of correcting hierarchies among children that are of the state's creation, as well as the state's affirmative obligation to ensure every child has the support needed to develop to their maximum capacity and capability. The state's obligation is linked to its *parens patriae* role.¹¹ In part, this is a corrective role linked to the notion that the state should not harm children; indeed, it is responsible to protect them from harm. When harm disproportionately impacts children along lines of historic and continuing discrimination, the state's negative action (or inaction) is particularly egregious. The state's advantaging or privileging of other children, particularly those historically and contemporaneously at the top of hierarchies among children, is equally abhorrent.¹² Privilege coexists and interacts with subordination; the combination creates children's hierarchies.

Children's affirmative right is to that support necessary to achieve their full potential and claim their rights of full citizenship and sociopolitical participation on an equal footing.¹³ Their affirmative right of support is the right to that support necessary to maximize their developmental capacity and opportunity. The child's right is not to a minimum or adequate level of

or to take account of circumstances like foster care or the needs of children with disabilities. Independent citizenship does not preclude adult dependency (economic or otherwise).

¹⁰ Adult capacities are essential to realizing children's rights. Even when not essential to achieve children's rights, adults have affirmative rights of their own. On the positive rights of adults, see, Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

¹¹ See *infra* Section III.B.3.

¹² Identifying privilege within this structure is essential to debunk the myth of earned value that replicates the ignorance of racial hierarchy. See generally Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in *WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES* (1988); MARGARET A. HAGERMAN, *WHITE KIDS: GROWING UP WITH PRIVILEGE IN A RACIALLY DIVIDED AMERICA* (2018).

¹³ See DOWD, *REIMAGINING EQUALITY*, *supra* note 3, at 136–67.

support to reach average capacity, but rather to a fair opportunity to reach their full developmental potential. This is an individualized right, attentive to the individual needs and capacities of every child, to an equal chance in life: full support during childhood to maximize developmental capacity to the threshold of adulthood.¹⁴ Recognition of this constitutional obligation would trigger structural change to achieve these rights.¹⁵ What is needed is what I have called elsewhere a comprehensive New Deal for Children.¹⁶

Achieving children's equality rights requires first, that inequality and hierarchies due to subordinating government policies be dismantled. Second, policies and systems must be created to ensure necessary supports that ensure developmental equality. There must be an ongoing commitment to foster positive support and equality among children who are born with equal rights but in unequal contexts, as well as dealing with differences linked to inherent capacities or developmental disabilities. The implementation of children's equality also must deal with the transitional needs of children already on their developmental pathway who have been subjected to developmental inequality, and adults who are hamstrung due to hurdles placed in their path as children.¹⁷

My claim about children's equality rights rests on a robust definition of equality essential for equality to be meaningful, a foundation essential to our democracy, to our very definition of ourselves and our country. The constitutional argument is grounded in children's difference, dependency, and humanity, and the critical importance of equality to ensure that each child has a fair, equal chance to succeed, and have the tools to be an empowered social and political participant in our democracy. The argument is also grounded in the inherent value of each child, as well as the value of

¹⁴ *Id.* See generally *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“‘Inherent differences’ between men and women, . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an *individual’s* opportunity.” (emphasis added)).

¹⁵ DOWD, REIMAGINING EQUALITY, *supra* note 3, at 136–67.

¹⁶ *Id.*

¹⁷ On complex disadvantage, see generally Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods—A Constitutional Insult*, 6 RACE & SOC. PROBS. (2014). On the collateral consequences of the juvenile justice system long past the direct consequences of system involvement, see Sue Burrell, *Collateral Consequences of Juvenile Court: Boulders on the Road to Good Outcomes*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 333 (Nancy E. Dowd ed., 2015) [hereinafter A NEW JUVENILE JUSTICE SYSTEM].

each person to society when they are developmentally supported and contribute to the whole.

Children's positive rights cannot be exercised in isolation from families and communities, and require structural change, including economic opportunities, housing, and a vibrant ecology¹⁸ for children's developmental trajectory. While we have a long tradition of constitutional support for families, it is largely to prevent intrusion rather than to mandate responsive state support.¹⁹ Our tradition of family privacy and privatizing responsibility for children under the doctrine of "parental rights" has supported individual parental responsibility for children's development. Children's equality rights are not in conflict with parental or familial rights; they are in harmony with them, and demand stronger support for all families, not simply the privileging of some.²⁰ The larger challenge is to ensure that the state acts responsively, supportively, and with appreciation for diverse family forms and culture, as opposed to intruding in a subordinating way to dictate to families or to children.

The argument for children's constitutional equality rights includes how to define children as constitutional subjects and rights holders, as well as challenging the notion that our Constitution is a charter only of negative rights, rather than a guarantee of positive rights.²¹ Like race and gender analysis, articulating children's rights cannot be subject to an originalist perspective, as that would bind us to an outdated, rejected notion of children as property subject to patriarchal power and control.²² Instead, we must

¹⁸ On a positive, vibrant ecology, see *infra* discussion of Barbara Bennett Woodhouse, notes 233–254 and accompanying text.

¹⁹ Compare *Troxel v. Granville*, 530 U.S. 57 (2000), with *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

²⁰ The relationship between parents, children, and the state is complex and not free of conflicts on how to implement and sustain children's equality, but with respect to equality rights their interests align. With respect to other aspects of children's rights, conflicts between parents and children may easily be imagined but that does not undermine children's claim of rights.

²¹ *DeShaney*, 489 U.S. at 189.

²² The view of children at the time of the drafting of the original Constitution reflected the notion of children as property. See generally Steven Mintz, *Placing Children's Rights in Historical Perspective*, 44 CRIM. L. BULL. 2 (2008). Similar to the rejection of originalism with respect to race and gender views at the time the original Constitution or amendments were drafted as inconsistent with overarching constitutional principles; our view of children cannot be linked to this long-rejected idea of children and their relationship to a patriarchal family.

begin theoretically with the recognition that children are constitutional subjects that must be defined and evaluated in contemporary terms.

Children's equality requires attention to their current inequality, and who is at the bottom of children's hierarchies. Overwhelmingly, the children at the bottom reflect our persistent hierarchy of race: Black children and their families are disproportionate in every negative indicator about children.²³ Race is further exacerbated by intersections with gender that make particular inequalities specific to Black boys and Black girls.²⁴ But

²³ The child poverty rate, which continues to hover near twenty percent for all children, is highest and most extreme among children from birth to age five. For Black children, the poverty rate is one in three children for children from birth to age five, and near that rate for children from five to seventeen. Native American children under five exceed a one in three poverty rate and represent the highest rate among all racial groups of children. CHILDREN'S DEF. FUND, CHILD POVERTY IN AMERICA 2017: NATIONAL ANALYSIS (2018), <https://www.childrensdefense.org/wp-content/uploads/2018/09/Child-Poverty-in-America-2017-National-Fact-Sheet.pdf> [<https://perma.cc/P7C9-HW57>] [hereinafter CHILD POVERTY IN AMERICA 2017: NATIONAL ANALYSIS]. The rate of deaths due to gun violence among children and teens is shockingly high, over three thousand deaths in 2016, which translates to a death about every three hours. Black children and teens are disproportionately the victims of gun violence. CHILDREN'S DEF. FUND, CHILDREN'S DEFENSE FUND PROTECT CHILDREN NOT GUNS FACT SHEET: 2016 CHILD GUN DEATHS (2018), <https://www.childrensdefense.org/wp-content/uploads/2018/08/cdf-protect-children-not-guns.pdf> [<https://perma.cc/TLS9-73AM>]. On healthcare disparities, see generally Alan Nelson, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care*, 94 J. NAT'L MED. ASS'N 666 (2002) (summary of congressionally requested study on healthcare disparities). With respect to children's healthcare disparities, see Glenn Flores, *Technical Report—Racial and Ethnic Disparities in the Health and Health Care of Children*, 125 PEDIATRICS 979, 1014 (2010) ("A comprehensive review of the literature revealed that racial/ethnic disparities in children's health and health care are quite extensive, pervasive, and persistent. Disparities were noted across the spectrum of health and health care [and] . . . that racial/ethnic disparities are persisting or worsening over time . . ."). For an overall summary of educational disparities including inequalities in early childhood education, disparities at kindergarten, and persisting achievement disparities, see generally AM. PSYCHOLOGICAL ASS'N, ETHNIC AND RACIAL DISPARITIES IN EDUCATION: PSYCHOLOGY'S CONTRIBUTIONS TO UNDERSTANDING AND REDUCING DISPARITIES (2012), <https://www.apa.org/ed/resources/racial-disparities.pdf> [<https://perma.cc/FH49-LK65>]. Regarding achievement differences specifically, see LAUREN MUSU-GILLETTE ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2017, at iv (2017), <https://nces.ed.gov/pubs2017/2017051.pdf> [<https://perma.cc/8UDU-59H4>].

²⁴ Black boys, for example, are disproportionate on measures of school discipline, referral to special education, and exclusion from school, as well as disproportionate in the juvenile justice system both in representation overall and in the deep end of the system. Nancy E. Dowd, *Equality, Equity, and Dignity*, 37 LAW & INEQ. 5 (2019) [hereinafter Dowd, *Equality, Equity, and Dignity*]. Black girls suffer from similar disproportionalities but in ways unique to perceptions of them including issues of sexual harassment and sexual assault. KIMBERLÉ WILLIAMS CRENSHAW ET AL., AFRICAN AM. POL'Y FORUM, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015), www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf

Black children are not alone at the bottom. Poor white children, immigrant children, Native American children, and other nonwhite children are also at the bottom.²⁵ In addition, physical and mental disabilities often steer

[<https://perma.cc/8KNJ-UQPY>]; REBECCA EPSTEIN ET AL., GEORGETOWN LAW CTR. ON POVERTY & INEQUALITY, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [<https://perma.cc/L6SD-L6EN>] (perceiving Black girls as less "innocent" or childlike, thus less in need of support, more likely to be viewed as older and deserving of harsher consequences for perceived misbehavior, linked to data on discipline, school achievement, and juvenile justice system involvement).

²⁵ *Supra* text accompanying note 23 (poverty, education, health, and violence data include high rates for Hispanic and Native American children); Janelle Jones, *One-Third of Native American and African American Children Are (Still) in Poverty*, ECON. POL'Y INST. (Sept. 20, 2017), <https://www.epi.org/publication/one-third-of-native-american-and-african-american-children-are-still-in-poverty> [<https://perma.cc/S9AR-VYKL>] (despite overall poverty rate declines for children, Native American children were the only group to see no decrease in poverty rate); Michelle Sarche & Paul Spicer, *Poverty and Health Disparities for American Indian and Alaska Native Children: Current Knowledge and Future Prospects*, 1136 ANNALS N.Y. ACAD. SCI. 126, 127, 129–31 (2008) (noting variation among tribal groups in poverty rates with some tribes at forty percent poverty rate and significant health disparities between Native and non-Native children); EDUC. TR., THE STATE OF EDUCATION FOR NATIVE STUDENTS (2013), https://edtrust.org/wp-content/uploads/2013/10/NativeStudentBrief_0.pdf [<https://perma.cc/8E5P-T3CE>]; *American Indian Statistics*, HARV. U. NATIVE AM. PROGRAM STAT. PROJECT, <http://www.hunapstatisticsproject.info/TribeCategory/AllAmericanIndianPopulation.htm> [<https://perma.cc/P7WJ-GW2P>] (data on the intersecting systems of housing, education, employment, and health). On immigrant children, as well as the high poverty rate of recent immigrants, see *Immigrant Children*, CHILD TRENDS (Dec. 28, 2018), <https://www.childtrends.org/indicators/immigrant-children> [<https://perma.cc/FA9U-MAQ8>]; see also Mary Tamer, *The Education of Immigrant Children*, HARV. GRADUATE SCH. EDUC. (Dec. 11, 2014), <https://www.gse.harvard.edu/news/uk/14/12/education-immigrant-children> [<https://perma.cc/4F7X-EKKG>] (summarizing specific education issues of immigrant children unaddressed by most schools). Hispanic children are the fastest growing group of children in the United States, currently constituting twenty-five percent of children and estimated to be one third of American children by 2050. They suffer from high poverty rates, low educational achievement, health disparities, and housing inadequacies. See generally PATRICIA FOXEN & MARK MATHER, NAT'L COUNCIL OF LA RAZA, TOWARD A MORE EQUITABLE FUTURE: THE TRENDS AND CHALLENGES FACING AMERICA'S LATINO CHILDREN (2016), <http://publications.unidosus.org/handle/123456789/1627> [<https://perma.cc/NUG4-FZBB>]; see also DAVID MURPHEY ET AL., CHILD TRENDS, AMERICA'S HISPANIC CHILDREN: GAINING GROUND, LOOKING FORWARD (2014), <https://www.childtrends.org/wp-content/uploads/2014/09/2014-38AmericaHispanicChildren.pdf> [<https://perma.cc/B427-B2XZ>]; NAT'L RES. CTR. ON HISP. CHILD. & FAMILIES, <http://www.hispanicresearchcenter.org> [<https://perma.cc/84GK-Y24U>]. With respect to low income White children, while Whites are least likely to live in poverty, the sheer number of White children in poverty exceeds any other racial group, 12.1 million children in 2012. NAT'L CTR. FOR CHILDREN IN POVERTY, MORE WHITE CHILDREN IN LOW-INCOME FAMILIES THAN ANY OTHER RACIAL GROUP (2012), http://www.nccp.org/media/releases/release_138.html [<https://perma.cc/MHA2-PWLU>].

children toward the bottom, especially if they are already there because of race, gender, and class identities.²⁶ A strong doctrine of children's equality rights must be framed in a way that its core measure is the dismantling of hierarchies and the provision of support for every child to achieve to their capacity. It is essential to keep children of color at the center of the analysis rather than analyzing children in a whitewashed way.²⁷ Race is not the only hierarchy, but it is one that is visibly inscribed and places children in a lower rung on the hierarchy. It is critical to address and identify the path for other identities that currently correlate with subordination and inequality.

Children's rights require dismantling barriers to their equality (classic negative constitutional rights) but also implementing positive rights to support in order for children to achieve real equality. That right is only possible if every child is provided the developmental support necessary to maximize their individual potential and opportunity. I focus on developmental equality because it is critical to children's life chances and opportunities.²⁸

²⁶ There are gaps in achievement levels and graduation rates that have persisted over time. *See, e.g.*, STEPHANIE ARAGON, EDUC. COMM'N OF THE STATES, CLOSING THE ACHIEVEMENT GAP FOR STUDENTS WITH SPECIFIC LEARNING DISABILITIES (2016), https://www.ecs.org/wp-content/uploads/Information-Request_Closing-the-Achievement-Gap_August-2016.pdf [<https://perma.cc/S6YS-TAXL>].

²⁷ I am indebted to Robin Lenhardt for the concept of "whitewashing." R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071 (2017) [hereinafter Lenhardt, *The Color of Kinship*]; Robin A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 53–54 (2015) [hereinafter Lenhardt, *Race, Dignity, and the Right to Marry*].

Even as it secures rights for LGBT Americans, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)] crafts a whitewashed version of marriage and dignity inconsistent with the actual experience of African Americans and other minorities with marriage. . . . [L]egal marriage in this country has, in fact, too often not enhanced dignity for African Americans and other minority groups. . . . [I]t has very often diminished black dignity and citizenship. Even more[,] as . . . growing evidence of the cumulative disadvantage and despair that marks African American life make plain—marriage, without more, is unlikely to secure black belonging anytime soon.

Id. (footnote omitted).

²⁸ The affirmative right to developmental support is different from the analysis of other scholars who have focused on children's procedural rights, participation rights, or rights in relation to parents or other caregivers. *See, e.g.*, Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099 (2011); Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355 (2004) [hereinafter Buss, *Constitutional Fidelity*]; *see also* Ursula Kilkelly, *Youth Courts and Children's Rights: The Irish Experience*, 8 YOUTH JUST. 39 (2008).

This Article is divided into three Parts. Part I describes hierarchies among children and the model of developmental equality. Existing inequalities among children generate my focus on their equal developmental rights. Part II defines what children's equality should mean by arguing that it encompasses three intertwined concepts: equality, equity, and dignity.²⁹ Part III links this robust definition of equality to a framework of children's rights. Children have unique claims to positive rights and affirmative demands on the state based on their inherent humanity, their need for developmental support to become full and equal social and political citizens by adulthood, and their dependency and vulnerabilities. I identify existing threads of constitutional jurisprudence that support children's rights. Children's rights might generate constitutional litigation claims, but more productively, children's rights would be used to implement policy in support of children's affirmative needs within the broader constitutional role of the legislative branch.³⁰ Within a children's rights framework, implementation of children's equality is not only possible, but essential, to a world fit for all children.³¹

I. CHILDREN'S HIERARCHIES AND DEVELOPMENTAL EQUALITY

A. *Inequalities Among Children*

By almost every measure, American children are highly unequal, a stratification process that begins almost at birth, and arguably starts even

²⁹ Dowd, *Equality, Equity, and Dignity*, *supra* note 24.

³⁰ The broad scope of legislative constitutional interpretation and power is the focus of Goodwin Liu with respect to constitutional rights to equal education. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006) [hereinafter Liu, *Education, Equality, and National Citizenship*]. Aoife Nolan makes a sophisticated, nuanced evaluation and argument for the judicial role in effectuating children's socio-economic rights. AOIFE NOLAN, CHILDREN'S SOCIO-ECONOMIC RIGHTS, DEMOCRACY AND THE COURTS 220–59 (2011) [hereinafter NOLAN, CHILDREN'S SOCIO-ECONOMIC RIGHTS].

³¹ "We want a world fit for children, because a world fit for us is a world fit for everyone." UNITED NATIONS CHILDREN'S FUND, A WORLD FIT FOR US: THE CHILDREN'S STATEMENT FROM THE U.N. SPECIAL SESSION ON CHILDREN: FIVE YEARS ON 2 (2007) [hereinafter A WORLD FIT FOR US], https://www.unicef.org/worldfitforchildren/files/A_World_Fit_for_Us.pdf [https://perma.cc/77HC-VAZQ].

earlier, due to differences in prenatal care and support.³² An astounding twenty percent live in poverty, and a significant number near poverty, and that fact alone correlates with highly negative developmental outcomes.³³ Moreover, the poverty rate, already high, grossly underestimates children's needs.³⁴ Many children have low quality health insurance.³⁵ More importantly, they suffer from a negative differential with respect to the social determinants of health that translate into higher rates of certain illnesses, such as asthma, linked to poor or inadequate housing or toxic factors in their environment.³⁶ A startling percentage of children do not have enough to eat, and what they do eat is not healthy, due to their parents' inadequate resources to afford a healthy diet.³⁷ For a significant number of children, their housing is inadequate, unhealthy, or unsafe, and income instability means they move frequently.³⁸

³² "African American women are three to four times more likely to die from childbirth than non-Hispanic white women, and socioeconomic status, education, and other factors do not protect against this disparity." THERESA CHALHOUB & KELLY RIMAR, CTR. FOR AM. PROGRESS, THE HEALTH CARE SYSTEM AND RACIAL DISPARITIES IN MATERNAL MORTALITY 1 (2018), <https://www.americanprogress.org/issues/women/reports/2018/05/10/450577/health-care-system-racial-disparities-maternal-mortality> [<https://perma.cc/8TH2-CESS>]. Similarly, infant mortality is highest among African American infants. *Infant Mortality by Race in the United States*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/21-infant-mortality-by-race#detailed/1> [<https://perma.cc/7HF9-ACWM>].

³³ CHILD POVERTY IN AMERICA 2017: NATIONAL ANALYSIS, *supra* note 23. On developmental correlations with poverty, see DOWD, REIMAGINING EQUALITY, *supra* note 3, at 11–15.

³⁴ On the scope of the underestimate, see *Child Poverty*, NAT'L CTR. FOR CHILDREN IN POVERTY, <http://www.nccp.org/topics/childpoverty.html> [<https://perma.cc/6NG4-P72L>].

³⁵ Even though nearly ninety-five percent of very young children have some health insurance, the quality of that insurance varies significantly. *Health Care Coverage for Children*, CHILD TRENDS, <https://www.childtrends.org/indicators/health-care-coverage> [<https://perma.cc/E447-NHJG>].

³⁶ See Flores, *supra* note 23. For the example of asthma and its connection to healthcare determinants, see Jodi Siegel et al., *Benefits of Pediatric Medical-Legal Partnerships*, 71 FLA. L. REV. FORUM 145 (2019).

³⁷ An estimated one in six children suffers from food insecurity. FEEDING AMERICA, CHILD FOOD INSECURITY (2018), <https://www.feedingamerica.org/sites/default/files/research/map-the-meal-gap/2016/2016-map-the-meal-gap-child-food-insecurity.pdf> [<https://perma.cc/Q8GD-6S3F>]. For the significant impact of food insecurity and poor nutrition on development, see Diana F. Jyoti et al., *Food Insecurity Affects School Children's Academic Performance, Weight Gain, and Social Skills*, 135 J. NUTRITION 2831 (2005).

³⁸ On the detrimental impact of housing inadequacy, moving, and youth homelessness, see OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., PROTECTING CHILDREN FROM UNHEALTHY HOMES AND HOUSING INSTABILITY (2014), <https://www.huduser.gov/portal/periodicals/em/fall14/highlight3.html> [<https://perma.cc/L2MT-A62T>]. On the developmental impact of housing,

Children's care and educational environments are highly unequal. It is commonplace for very young children to be cared for while their parents work,³⁹ but the quality of that care, and its capability to contribute to child development, is highly stratified.⁴⁰ High quality child care is correlated with cognitive development, language development, math skills, social skills, and the ability of young children to self-regulate.⁴¹ The distribution of high quality care is highly racially stratified, reflecting factors of residential segregation and disparate resources.⁴² Programs like Head Start, which provide high quality care, nevertheless serve only thirty percent of the children who qualify.⁴³ Preschool or prekindergarten, prior to the beginning of compulsory education, similarly is highly uneven in quality and is by no means universally available.⁴⁴ The average percent of state enrollment of four-year-olds is thirty-three percent, with the highest enrollment in only a few states surpassing seventy percent.⁴⁵ Programs designed to reach three-

see REBEKAH LEVINE COLEY ET AL., MACARTHUR FOUND., POOR QUALITY HOUSING IS TIED TO CHILDREN'S EMOTIONAL AND BEHAVIORAL PROBLEMS (2013), https://www.macfound.org/media/files/HHM_Policy_Research_Brief_-_Sept_2013.pdf [<https://perma.cc/8QJT-9KHW>].

³⁹ Sixty percent of preschool children are in childcare centers. Marianne M. Hillemeier et al., *Quality Disparities in Child Care for At-Risk Children: Comparing Head Start and Non-Head Start Settings*, 17 *MATERNAL CHILD HEALTH J.* 180, 180 (2013).

⁴⁰ *Id.* at 180–81. See also regarding differences in quality of care, Aaron Loewenberg, *Study Finds Large Quality Differences in Early Education Settings*, *NEW AMERICA* (June 6, 2016), <https://www.newamerica.org/education-policy/edcentral/qualitystudy> [<https://perma.cc/E6T2-B722>]. On the difficulty of getting access to care, see also Jonathan Cohn, *Finding Decent Child Care Is a Huge Struggle for Some Families, New Report Shows*, *HUFFPOST* (Dec. 6, 2018, 7:30 AM), https://www.huffingtonpost.com/entry/finding-licensed-child-care-report_us_5c089013e4b069028dc66697 [<https://perma.cc/3RGA-SZBY>] (summarizing report by Rasheed Malik et al., *America's Child Care Deserts in 2018*, *CTR. FOR AM. PROGRESS* (Dec. 6, 2018, 7:30 AM), <https://www.americanprogress.org/issues/early-childhood/reports/2018/12/06/461643/americas-child-care-deserts-2018> [<https://perma.cc/QU94-WD5Q>] (showing half the country has too few licensed care spots in comparison to demand. This study does not evaluate the quality of care but simply the availability of licensed care facilities.)).

⁴¹ Hillemeier et al., *supra* note 39.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ ALLISON H. FRIEDMAN-KRAUSS ET AL., NAT'L INST. FOR EARLY EDUC. RESEARCH, *THE STATE OF PRESCHOOL 2017*, at 5 (2018), http://nieer.org/wp-content/uploads/2018/04/YB2017_Executive-Summary.pdf [<https://perma.cc/TS3Z-PSGJ>]. One of the section titles of this report says it all: disparities exist and are growing. *Id.*

⁴⁵ *Id.* Nineteen states enroll fewer than ten percent of four-year-olds. *Id.*

year-olds are even less common.⁴⁶ Just a handful of states have universal programs intended to reach all children.⁴⁷ Even more significant than this uneven pattern of enrollment is the uneven quality of prekindergarten programs. The quality of prekindergarten ranges significantly, with widely different per child expenditures.⁴⁸ Few programs meet high quality standards, and as with early childcare, the level of quality is stratified by race and class.⁴⁹

These differences are particularly consequential to the early years of development, from birth to five.⁵⁰ This is a period of enormous development, due to explosive brain growth, maturing, and geometric increases in complexity, all of which are strongly affected by context.⁵¹ So, for example, differences in language development have been tracked as early as eighteen months, linked to differences in parental circumstances, styles of interaction, and education.⁵² In other words, inequalities emerge early not due to adversity but due to differences in context over which parents and children have little or no control.⁵³ Additional inputs and supports at this early stage can have significant effects. Those can include early home visiting programs to support all new parents, efforts to improve the social determinants of health pre-natally to reduce the incidence of low birthweight and support healthy births, robust pediatric care, high quality childcare, and high-quality prekindergarten. All of these supports help children otherwise

⁴⁶ *Id.*

⁴⁷ *Id.* at 23.

⁴⁸ *Id.*

⁴⁹ *Id.* at 6. For example, spending in real dollars declined from 2002–2017, and interstate spending varied substantially. *Id.* Most programs do not meet quality standards, and in some of the largest states serving the greatest proportion of children, the shortfall is dramatic. *Id.*; see also U.S. DEP'T OF EDUC., A MATTER OF EQUITY: PRESCHOOL IN AMERICA (2015), <https://www2.ed.gov/documents/early-learning/matter-equity-preschool-america.pdf> [<https://perma.cc/4JWK-MRE7>]. On inequities by class, which reflect racial disparities as well, see Jennifer LoCasale-Crouch et al., *Observed Classroom Quality Profiles in State-Funded Pre-Kindergarten Programs and Associations with Teacher, Program, and Classroom Characteristics*, 22 EARLY CHILDHOOD RES. Q. 3 (2007).

⁵⁰ See generally Joanna L. Grossman, *The Seeds of Early Childhood*, 71 FLA. L. REV. FORUM 117 (2019); HARV. U.: CTR. ON THE DEVELOPING CHILD, <https://developingchild.harvard.edu> [<https://perma.cc/E6H3-JD75>] (summarizing research on birth to age five).

⁵¹ Grossman, *supra* note 50; HARV. U.: CTR. ON THE DEVELOPING CHILD, *supra* note 50.

⁵² Anne Fernald et al., *SES Differences in Language Processing Skill and Vocabulary Are Evident at 18 Months*, 16 DEVELOPMENTAL SCI. 234 (2013); Patricia K. Kuhl, *Early Language Learning and Literacy: Neuroscience Implications for Education*, 5 MIND, BRAIN, & EDUC. 128 (2011).

⁵³ Kuhl, *supra* note 52.

relegated to the bottom to instead sustain their equality so that they enter school at relative equality and readiness.⁵⁴

We also know that adverse experiences can create or add to developmental differences if they are unaccompanied by support to build children's resilience.⁵⁵ Thus, added to developmental differences in context, toxic adversity greatly magnifies differences among children because it has the potential, if not countered with resilience support, to impact cognitive and emotional functioning that affects how well children do in school.⁵⁶ In early childhood, vulnerabilities and exponential growth make adversity particularly problematic, although adversity has an impact throughout childhood.⁵⁷ In the last two decades, research on the impact of early adversity has been conducted under the framework of the Adverse Childhood Experiences (ACEs) framework, which identifies particular adverse factors that have long term health effects and early cognitive impacts on learning, achievement, and educational outcomes.⁵⁸ The ACEs research indicates that

⁵⁴ High quality childcare has long-term effects as demonstrated by the Perry Preschool research. See, e.g., James J. Heckman et al., *The Rate of Return to the High/Scope Perry Preschool Program* (Nat'l Bureau of Econ. Research, Working Paper No. 15471, 2009), <https://www.nber.org/papers/w15471.pdf> [<https://perma.cc/XP4V-X8M2>]. On the value of home health and visiting nurse programs, see M. Rebecca Kilburn & Jill S. Cannon, *Home Visiting and Use of Infant Health Care: A Randomized Clinical Trial*, 139 PEDIATRICS 1 (2017); Council on Child and Adolescent Health, *The Role of Home-Visitation Programs in Improving Health Outcomes for Children and Families*, 101 PEDIATRICS 486 (1998).

⁵⁵ Nancy E. Dowd, *Radical ACEs: Building Resilience and Triggering Structural Change*, 71 FLA. L. REV. FORUM 80 (2019) [hereinafter Dowd, *Radical ACEs*]. For comprehensive work on the Adverse Childhood Experiences framework, see the Centers for Disease Control website on the framework and research, *Adverse Childhood Experiences (ACEs)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/acestudy/index.html> [<https://perma.cc/A3L6-EZJW>].

⁵⁶ Dowd, *Radical ACEs*, *supra* note 55.

⁵⁷ *Id.*

⁵⁸ *About the CDC-Kaiser ACE Study*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/about.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Fabout.html [<https://perma.cc/SQZ3-RNKB>]; Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREVENTATIVE MED. 245, 245-46 (1998); ROBERT ANDA, NAT'L ASS'N FOR CHILDREN OF ALCOHOLICS, *THE HEALTH AND SOCIAL IMPACT OF GROWING UP WITH ALCOHOL ABUSE AND RELATED ADVERSE CHILDHOOD EXPERIENCES: THE HUMAN AND ECONOMIC COSTS OF THE STATUS QUO* (2018), <https://nacoa.org/wp-content/uploads/2018/04/The-Health-Social-Impact-NACoA.pdf> [<https://perma.cc/LW8K-MEAB>]; AM. ACAD. OF PEDIATRICS, *ADVERSE CHILDHOOD EXPERIENCES AND THE LIFELONG CONSEQUENCES OF TRAUMA* (2014), https://www.aap.org/en-us/documents/ttb_aces_consequences.pdf [<https://perma.cc/AD9M-UTGU>].

adversity is common for all children, but high levels of adversity if left unaddressed can have lifetime negative consequences.⁵⁹ Apart from ACEs, other adversity factors with known negative correlations to child development include poverty and racism because of their strong links to socio-economic and cultural barriers and challenges.⁶⁰

Children's inequalities cannot be viewed in isolation. Children are embedded in families, and families similarly are not isolated but function within neighborhoods and communities that interact particularly with the world of work. Whether work provides a sufficient degree of economic security and income directly relates to children's outcomes. The balance, or lack of it, between work and family also has a strong impact on children.⁶¹ In addition, children are affected by the degree of support of the family forms within which they develop. So, for instance, lack of support for non-marital families is keenly felt by children and increases their subordination along a hierarchy of children.⁶² Neighborhood characteristics similarly affect the degree of support and opportunities for children and their families, and the extent of community resources.⁶³

⁵⁹ Nancy E. Dowd, *Straight out of Compton: Developmental Equality and a Critique of the Compton School Litigation*, 45 CAP. U. L. REV. 199 (2017) [hereinafter Dowd, *Straight out of Compton*].

⁶⁰ DOWD, REIMAGINING EQUALITY, *supra* note 3, at 9–18.

⁶¹ For an overview of work-family scholarship and key trends, see Suzanne M. Bianchi & Melissa A. Milkie, *Work and Family Research in the First Decade of the 21st Century*, 72 J. MARRIAGE & FAM. 705 (2010); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 1–11 (2010). For an in-depth look at work-family issues in low income families, see Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL'Y 1, 6–14 (2012).

⁶² Lenhardt, *Race, Dignity, and the Right to Marry*, *supra* note 27.

⁶³ The Washington state ACEs study is an example of this, recognizing the importance of community characteristics, not just child characteristics. CHRISTOPHER BLODGETT, WASH. STATE UNIV., *ACES IN HEAD START CHILDREN AND IMPACT ON DEVELOPMENT 1* (2014), <https://s3.wp.wsu.edu/uploads/sites/2101/2015/03/ACES-in-Head-Start-Children-and-Impact-on-Development-1-14.pdf> [<https://perma.cc/Q8CR-W39D>]; Christopher Blodgett, *Adopting ACEs Screening and Assessment in in [sic] Child Serving Systems* 6–7 (Wash. State Univ., Working Paper 7/30/12, 2012), <https://del-public-files.s3-us-west-2.amazonaws.com/Complex-Trauma-Research-ACE-Screening-and-Assessment-in-Child-Serving-Systems-7-12-final.pdf> [<https://perma.cc/3QM8-7DRG>]. Another perspective is provided by opportunity mapping, such as that developed by the Kirwan Institute, also applied in Washington state. JASON REECE ET AL., KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, OHIO STATE UNIV., *THE GEOGRAPHY OF OPPORTUNITY: MAPPING TO PROMOTE EQUITABLE COMMUNITY DEVELOPMENT AND FAIR HOUSING IN KING COUNTY, WA* (2010), <https://kirwaninstitute.osu.edu/docs/KingCounty.pdf> [<https://perma.cc/9VGS-FL5C>].

Once children reach school age, the educational system is critical to children's development. Yet the inequalities of early childhood are frequently exacerbated rather than addressed and resolved.⁶⁴ Differences in school readiness frequently widen into differences of achievement.⁶⁵ Moreover, if the population of children in particular schools presents unique needs that are left unaddressed, it may affect learning for all children.⁶⁶

Apart from differences that children bring to the schoolhouse door, differences between schools are stark. Schools are not equal in resources or outcomes.⁶⁷ It is not insignificant where a child goes to school; a child is not guaranteed an equal education irrespective of the school they attend. The quality of education varies radically from school to school. Differences of resources and funding (even if one measures equality from an equal resources definition) exist school-to-school within districts; between districts in a single state; and between states.⁶⁸ School funding is linked to property taxes, and thus to wealth. The allocation of resources by identified needs also varies among schools.⁶⁹ Schools are highly segregated by race and class, and educational outcomes follow those hierarchies.⁷⁰ Differences in measures of objective factors, "bricks and mortar," or the range of dollar resources, do not capture additional differences within school walls and

⁶⁴ See, e.g., PEDRO A. NOGUERA, *THE TROUBLE WITH BLACK BOYS . . . AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION* (2008).

⁶⁵ *Id.*; see also DOWD, *REIMAGINING EQUALITY*, *supra* note 3, at 19–27.

⁶⁶ See, for example, the Compton school district. Dowd, *Straight out of Compton*, *supra* note 59, at 222–27 (summarizing the Compton school litigation).

⁶⁷ For a sampling of education scholarship, see, for example, Liu, *Education, Equality, and National Citizenship*, *supra* note 30; William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897 (2017); Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle District No. 1*, 2014 MICH. ST. L. REV. 633 (2014); Noah B. Lindell, *Old Dog, New Tricks: Title VI and Teacher Equity*, 35 YALE L. & POL'Y REV. 189 (2016); Lauren A. Webb, *Educational Opportunity for All: Reducing Intradistrict Funding Disparities*, 92 N.Y.U. L. REV. 2169 (2017).

⁶⁸ Webb, *supra* note 67.

⁶⁹ *Id.*

⁷⁰ On the resegregation of schools since *Brown v. Board of Education* was decided in 1954, see GARY ORFIELD ET AL., CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, *BROWN AT 62: SCHOOL SEGREGATION BY RACE, POVERTY AND STATE* (2016), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state/Brown-at-62-final-corrected-2.pdf> [<https://perma.cc/2HDN-R4DX>]; Sheldon Berman, *The Resegregation of America's Schools*, 11 SCH. ADMIN. 14, 14 (2013) (discussing the value of integration and the record of resegregation).

within classrooms.⁷¹ For example, the level of support for children in the programs designed for the most gifted of students may be unequal due to the biases of teachers.⁷² The bottom line is unequal education that hardly provides each child with an equal opportunity to develop to their potential.⁷³

Children may behave in school or on the streets in ways that bring them into contact with police or other authority figures, and with the juvenile justice system. The policing and justice systems should be a support to children and family, ensuring their security and safety, and the well-being of children who interact with them. Those systems should be developmentally informed, structured with the knowledge of child development particularly in adolescence.⁷⁴ Yet both policing and the justice system are profoundly negative systems for children generally, and especially for some children who are over policed and under protected, or even threatened, by police.⁷⁵ The presence of police in schools has exacerbated and expanded this negative impact.⁷⁶ The juvenile justice system is profoundly negative developmentally, with its rehabilitative mission limited or non-existent in many states, so that ironically the system becomes a link to, rather than a deterrent from, adult criminal activity.⁷⁷ It is also a highly unequal system in terms of who is there: predominantly boys, and predominantly boys of color.⁷⁸ Because it is structured (however negatively) around boys, it also

⁷¹ Sharon E. Rush, *Protecting the Dignity and Equality of Children: The Importance of Integrated Schools*, 20 TEMP. POL. & C.R. L. REV. 73 (2010) [hereinafter Rush, *Protecting the Dignity and Equality of Children*]; Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1 (1999).

⁷² CARLA SHEDD, *UNEQUAL CITY: RACE, SCHOOLS, AND PERCEPTIONS OF INJUSTICE* (2015).

⁷³ Indeed, the pattern of inequality is particularly strong for Black boys, who have a pattern of low achievement, a high rate of discipline and identification of learning disability, and a high rate of referral to special education. Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47, 83–91 (2016) [hereinafter Dowd, *Black Boys Matter*].

⁷⁴ James Bell, *Child Well Being: Toward a Fair and Equitable Public Safety Strategy for the New Century*, in *A NEW JUVENILE JUSTICE SYSTEM*, *supra* note 17, at 23.

⁷⁵ *Id.*; see also VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011).

⁷⁶ Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2016).

⁷⁷ For a broad range of critiques of the existing system, see JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM (Nancy E. Dowd ed., 2011) [hereinafter JUSTICE FOR KIDS].

⁷⁸ *Id.*

works a separate, additional harm to girls.⁷⁹ The juvenile justice system, with all these drawbacks, is also frequently a default mental health system for kids in the absence of available mental healthcare.⁸⁰

Another negative system for kids is the foster care/child welfare system. For the children who come within its jurisdiction, the outcomes are predominantly negative.⁸¹ Children in foster care are less likely to achieve academically, more likely to fail to complete their education, and more likely to cross over into difficulties with the juvenile justice system.⁸² Their removal from their families frequently means a lack of family support or improvement in their developmental path.⁸³ The harms and abuse that cause children to come into the system are made worse, not better; and the degree of developmental support is inadequate. Similar to the juvenile justice system, the likelihood of coming within this system is disproportionately high for children of color.⁸⁴

Available economic supports for families are meager and inadequate at the low end of the income scale.⁸⁵ This is a system of temporary support that makes transition to a permanent, adequate standard of living difficult, even in times of employment opportunity.⁸⁶ The structure of supports (or lack of them) for the poor is significant when compared with high end tax support for middle and upper income families.⁸⁷ The inadequacies of economic

⁷⁹ Lawanda Ravoira & Vanessa Patino, *Girl Matters: Unfinished Work*, in JUSTICE FOR KIDS, *supra* note 77, at 157.

⁸⁰ David R. Katner, *Delinquency, Due Process, and Mental Health: Presuming Youth Incompetency*, in A NEW JUVENILE JUSTICE SYSTEM, *supra* note 17, at 104.

⁸¹ Leslie Joan Harris, *Challenging the Overuse of Foster Care and Disrupting the Path to Delinquency and Prison*, in JUSTICE FOR KIDS, *supra* note 77, at 62 [hereinafter Harris, *Challenging the Overuse of Foster Care*].

⁸² The data is dismal on educational outcomes, school disruption, disciplinary actions, and crossover into delinquency. See LEGAL CTR. FOR FOSTER CARE & EDUC., FOSTERING SUCCESS IN EDUCATION: NATIONAL FACTSHEET ON THE EDUCATIONAL OUTCOMES OF CHILDREN IN FOSTER CARE (2018).

⁸³ Harris, *Challenging the Overuse of Foster Care*, *supra* note 81.

⁸⁴ CHILD WELFARE INFO. GATEWAY, FOSTER CARE STATISTICS 2017, at 8 www.childwelfare.gov/pubs/factsheets/foster [https://perma.cc/SHR9-RDXU].

⁸⁵ Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317 (2014).

⁸⁶ *Id.*

⁸⁷ See Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791 (2014), for a discussion of the limited benefits to the poor from the tax system.

support are exacerbated by the limitations of the child support system, to the detriment of children.⁸⁸

Inequalities are not unique to the United States. Hierarchies are present in most countries, including rich countries.⁸⁹ Given the wealth of the United States as a whole, however, the scope and severity of children's inequalities place the United States significantly below comparable industrialized nations.⁹⁰

B. *Developmental Equality*

As the patterns of differences among children demonstrate, the hierarchies among children are linked to identities. Especially stark are racial hierarchies.⁹¹ Closely correlated to the Black/white binary of children's hierarchies are those of other children of color, Native American children, and immigrant children.⁹² Among Hispanic immigrant children, for

⁸⁸ See Daniel L. Hatcher, *Remembering Anti-Essentialism: Relationship Dynamics Study and Resulting Policy Considerations Impacting Low-Income Mothers, Fathers, and Children*, 35 LAW & INEQ. 239 (2017), for a discussion of child support inadequacies, especially for mothers, and the negative outcomes from pursuing low income fathers, as well as overall problems with the child support system.

⁸⁹ JOHN HUDSON & STEFAN KÜHNER, UNICEF OFFICE OF RESEARCH-INNOCENTI, INNOCENTI REPORT CARD 13: FAIRNESS FOR CHILDREN: A LEAGUE TABLE OF INEQUALITY IN CHILD WELL-BEING IN RICH COUNTRIES (2016) [hereinafter HUDSON & KÜHNER, INNOCENTI REPORT CARD]. The report investigates four categories of child well-being in forty-one Organisation for Economic Co-operation and Development (OECD) countries: income, education, health, and life satisfaction. The report not only identifies the condition of children at the bottom, but also how far below the median those children fall.

⁹⁰ *Id.* The United States, compared to other OECD countries, is thirtieth in income inequality; tenth in education inequality; fourteenth in health inequality; and twenty-first in life satisfaction. The U.S. rank overall is eighteenth. *Id.* One set of scholars has suggested that spending an additional one percent of the U.S. budget would substantially improve outcomes for children. John Hills, *The Blair Government and Child Poverty: An Extra One Percent for Children in the United Kingdom*, in ONE PERCENT FOR THE KIDS: NEW POLICIES, BRIGHTER FUTURES FOR AMERICA'S CHILDREN 156 (Isabel Sawhill ed., 2003). For 2017, the Urban Institute estimates spending on children as a percentage of the federal budget was nine percent, or \$375 billion. *Public Spending on Children in Five Charts*, URB. INST. (July 18, 2018), <https://apps.urban.org/features/public-spending-on-children> [https://perma.cc/5GDE-VGP5].

⁹¹ See *supra* text accompanying notes 27–31.

⁹² See *supra* note 25 and accompanying text. Patricia Snyder & Maureen Conroy, *Core Constructs in Federal Statutes for Young Children with or at Risk for Disabilities and Their Families: Implications for Comprehensive Early Childhood Policies and Systems*, 71 FLA. L. REV. FORUM 61 (2019); see CHRISTINE JOHNSON-STAU, CTR. FOR LAW & SOC. POLICY, EQUITY STARTS EARLY: ADDRESSING RACIAL

example, there is a disproportionately high rate of poverty.⁹³ Hispanic children, whether American born or immigrants, are least likely to be enrolled in preschool of all racial groups and likely to be lower in school readiness.⁹⁴ Class hierarchies, which often exacerbate racial hierarchies, are also dramatic among children.⁹⁵ Gender is another marker, with distinctive patterns of subordination for boys⁹⁶ and girls,⁹⁷ and a separate hierarchy for those who do not identify on a gender binary.⁹⁸ Finally, the identification of children at risk with or identified with disabilities is also subject to

INEQUITIES IN CHILD CARE AND EARLY EDUCATION POLICY (2017), https://www.clasp.org/sites/default/files/publications/2017/12/2017_EquityStartsEarly_0.pdf [<https://perma.cc/ER3C-ACL8>].

⁹³ Tania Maria Caballero et al., *Adverse Childhood Experiences Among Hispanic Children in Immigrant Families Versus U.S.-Native Families*, 140 PEDIATRICS 1 (2017). Interestingly, immigrant children had a 200% higher rate of poverty than native-born Hispanic children, who already have a high rate of poverty, close to fifty percent; but immigrant Hispanic children had a lower rate of ACEs. *Id.*

⁹⁴ “Hispanic three- and four-year-olds are less likely than White children to be prepared academically for Kindergarten, and less likely than other racial/ethnic groups to be enrolled in preschool or Head Start programs (63 percent not enrolled).” READY NATION, THE CASE FOR INVESTING IN AMERICA’S HISPANIC YOUNG CHILDREN 2 (2015), https://strongnation.s3.amazonaws.com/documents/123/803cd1b5-82e5-483c-9f42-a410f71c6c63.pdf?1470542120&inline;%20filename=%22Hispanic%20Brief_RN_NAT.pdf%22 [<https://perma.cc/SP4R-GYLC>]; see also Ray Collins & Rose Ribeiro, *Toward an Early Care and Education Agenda for Hispanic Children*, 6 EARLY CHILDHOOD RES. & PRAC. (2004).

⁹⁵ HUDSON & KÜHNER, INNOCENTI REPORT CARD, *supra* note 89.

⁹⁶ DOWD, REIMAGINING EQUALITY, *supra* note 3, at 19–50 (example of Black boys). See NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 73–100 (2010), for a discussion of the areas in which boys generally are disadvantaged.

⁹⁷ See, for example, EPSTEIN ET AL., *supra* note 24; Fanna Gamal, *Good Girls: Gender-Specific Interventions in Juvenile Court*, 35 COLUM. J. GENDER & L. 228 (2018), for a discussion of girls’ inequalities. See generally Catharine A. MacKinnon, *Introduction to Symposium on Toward a Feminist Theory of the State*, 35 LAW & INEQ. 255 (2017).

⁹⁸ See Kristin Zimmerman & Linda Shuhaiber, *The Limits of Being Transgendered*, 1 THEMIS: RES. J. JUST. STUD. & FORENSIC SCI. 35 (2013); Vivek Divan et al., *Transgender Social Inclusion and Equality: A Pivotal Path to Development*, 19 J. INT’L AIDS SOC’Y 1 (2016), for a discussion of transgender challenges.

hierarchy⁹⁹ to the extent those disabilities are identified, supported, and their developmental capacity is maximized.¹⁰⁰

One observer bluntly refers to this known pattern of children's hierarchies as creating an "Ovarian Lottery" for children: the luck of being born into a particular family.¹⁰¹ Such blatant inequality amidst a commitment to the principle of equality suggests a rigid system of stratification that defines equality by the record of the exception, rather than the patterns of the rule.¹⁰² If it is possible to transcend one's draw in the lottery, then that demonstrates the existence of equal opportunity. But for many children, the lottery defines their chances. This rule of hierarchy is no different in effect than systems of stigma identifying children by race, the marital status of their parents, or assumptions of their mental capacity.¹⁰³

The identification of children's hierarchies as identity-based means that children's development is not a "neutral" process of linear progression from infancy to adulthood, but rather one that is defined for children by race, gender, and class.¹⁰⁴ Apart from preferred children, challenges and barriers are created and/or reinforced for other children by both the presence of state policies and structures, as well as by the absence of support for every child. The development of those children not preferred by state

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[O]nly 39.9% of preschool children with disabilities spend 10 hours or more a week in early childhood programs with their peers without disabilities and receive the majority of their IDEA services in that location. These data indicate that more than 25 years after the passage of the American with Disabilities Act, more than 40 years after the passage of IDEA, and more than 50 years after the passage of Head Start, the majority of young children with disabilities have yet to experience inclusive early learning opportunities.

Snyder & Conroy, *supra* note 92, at 63–64.

¹⁰⁰ *Id.* at 65; see also Hyun-Joo Jeon et al., *Predicting School Readiness for Low-Income Children with Disability Risks Identified Early*, 77 EXCEPTIONAL CHILD. 435 (2011).

¹⁰¹ Nittrouer, *supra* note 4, at 132.

¹⁰² On the framing of stories about kids who transcend expectations, see, for example, Tariro Mzezewa, *As Trump Rages About Immigrants, They Go to the Ivy League*, N.Y. TIMES (Dec. 24, 2017), <https://www.nytimes.com/2017/12/24/opinion/trump-african-immigrants-ivy-league.html> [<https://perma.cc/N5AY-2U8Z>] (three sisters born in Cameroon accepted to Ivy League schools).

¹⁰³ I am comparing here the stigma of formal race segregation as well as de facto continuing racialized education, the formal legal stigmatizing of nonmarital children and continuing disadvantage imposed on those children, and the stigma of actual or perceived mental capacity expressed in the infamous case of *Buck v. Bell*, 274 U.S. 200 (1927).

¹⁰⁴ DOWD, REIMAGINING EQUALITY, *supra* note 3, at 42–97.

policy is not, then, a neutral process of evolution through identified stages related to different capabilities, such as cognitive, emotional, and physical capabilities.¹⁰⁵ Instead, the identities of children matter to the process of their development. Those identities trigger how others perceive them, their self-perception, and how institutions support or impede their growth. This creates, under current conditions, a series of challenges or outright hurdles to achieving and maximizing their developmental capacity.¹⁰⁶ At the same time, other children, with preferred identities, not only are developmentally supported, but they also learn that their preferred place is part of a natural hierarchy, so that their perceived success and value are perceived as earned, rather than a conferred privilege related to preferred identity.¹⁰⁷

The works of Margaret Beale Spencer¹⁰⁸ and Cynthia Garcia Coll¹⁰⁹ place these dynamics of the developmental process in perspective. As Spencer points out, the process of identity formation and development is strongly affected by race and gender identities, as well as economic resources associated with class.¹¹⁰ That affects not only the individual child but the people and institutions with which they interact, and how the child's actions

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Margaret B. Spencer et al., *A Theoretical and Empirical Examination of Identity as Coping: Linking Coping Resources to the Self Processes of African American Youth*, 7 *APPLIED DEVELOPMENTAL SCI.* 181, 182 (2003) [hereinafter Spencer et al., *A Theoretical and Empirical Examination of Identity as Coping*]; Margaret Beale Spencer et al., *Understanding Hypermasculinity in Context: A Theory-Driven Analysis of Urban Adolescent Males' Coping Responses*, 1 *RES. HUM. DEV.* 229, 231 (2004) [hereinafter Spencer et al., *Understanding Hypermasculinity in Context*]; see also Margaret Beale Spencer et al., *African American Adolescents: Adaptational Processes and Socioeconomic Diversity in Behavioural Outcomes*, 11 *J. ADOLESCENCE* 117, 134 (1988) [hereinafter Spencer et al., *African American Adolescents*]; Margaret Beale Spencer & Carol Markstrom-Adams, *Identity Processes Among Racial and Ethnic Minority Children in America*, 61 *CHILD DEV.* 290, 299 (1990).

¹⁰⁹ See Cynthia García Coll & Katherine Magnuson, *Cultural Differences as Sources of Developmental Vulnerabilities and Resources*, in *HANDBOOK OF EARLY CHILDHOOD INTERVENTION* 94, 94–111 (Jack P. Shonkoff & Samuel J. Meisels eds., 2d ed. 2000); Cynthia García Coll et al., *An Integrative Model for the Study of Developmental Competencies in Minority Children*, 67 *CHILD DEV.* 1891, 1895–97 (1996) [hereinafter Coll et al., *An Integrative Model for the Study of Developmental Competencies in Minority Children*]; Cynthia T. García Coll, Review, *Developmental Outcome of Minority Infants: A Process-Oriented Look into Our Beginnings*, 61 *CHILD DEV.* 270, 271–73 (1990); Cynthia García Coll & Laura A. Szalacha, *The Multiple Contexts of Middle Childhood*, 14 *FUTURE CHILD.* 81, 82 (2004).

¹¹⁰ Spencer et al., *A Theoretical and Empirical Examination of Identity as Coping*, *supra* note 108, at 182.

and reactions are perceived. Within this framework, inequality and stereotyping are normative and challenge the child of color's very perception and evolution of self throughout childhood (and into adulthood).¹¹¹ Moreover, actions by the child are perceived through this lens, so that one of the ironies of development for children of color is that strong self-identity can be a risk, as assertion of self can be perceived through the lens of stereotypes that particularly negatively impact the perception of boys of color.¹¹²

As Garcia Coll points out, the interaction of self, family, and neighborhood is framed by structures that marginalize and subordinate children of color, their culture, their neighborhoods, and their families.¹¹³ It requires them to develop, in order to survive and to thrive, skills of "border crossing" and management of implicit and explicit biases that are not required of favored/privileged children.¹¹⁴ Garcia Coll focuses on the impact of culture in the life of the child, as well as its influence in structures, such as schools, healthcare, and policing. She identifies the interplay of "social position, racism, and segregation [] that creates the unique conditions and pathways for children of color."¹¹⁵ These create experiences and developmental context not shared with privileged children.¹¹⁶ Notably, Garcia Coll points out that what are frequently labelled as deficits of children of color are frequently coping mechanisms and adaptations required by the demands of, and treatment by, the majority culture.¹¹⁷ They are a strength, but an asymmetric developmental skill demanded solely of nonwhite children.

Understanding the developmental dynamic as neither neutral nor equal, I have advocated for what I have termed "developmental equality."¹¹⁸ This concept combines our developmental knowledge with the principle of equality to meaningfully ensure that every child is supported to reach their

¹¹¹ Spencer et al., *African American Adolescents*, *supra* note 108, at 134.

¹¹² Spencer et al., *Understanding Hypermasculinity in Context*, *supra* note 108, at 236.

¹¹³ Coll & Szalacha, *The Multiple Contexts of Middle Childhood*, *supra* note 109.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 81.

¹¹⁶ *Id.*

¹¹⁷ Coll et al., *An Integrative Model for the Study of Developmental Competencies in Minority Children*, *supra* note 109, at 1895–97.

¹¹⁸ DOWD, REIMAGINING EQUALITY, *supra* note 3, at 66–79.

full developmental capacity.¹¹⁹ Critical to developmental equality is a clear understanding of the existing context of inequalities and hierarchies that creates different pathways for different children based on identities. In order to achieve developmental equality, those identity-based differentiations must be eliminated, in order for every child to have a fair and equal chance. In addition to dismantling challenges and barriers, developmental equality would require positive support essential for every child to achieve their developmental capacity. In light of the critical role of families to children's development, positive support would particularly, but not exclusively, focus on affirmative support of all families.¹²⁰

Developmental equality infuses the concept of equality with developmental knowledge about children's needs in order for them to grow to their maximum capacity. It also captures the unequal pathway to developmental capacity currently strongly affected by race, gender, and class identities. With this developmental insight and goal in mind, it is important that "equality" be understood and defined in a way that guarantees fairness to every child. The presence of hierarchies among children does not demand accommodations or affirmative action in the sense in which that term has been commonly used.¹²¹ Rather, it requires dismantling of the structures and policies that subordinate, and the construction of affirmative supports so that every child realizes their potential.¹²² It demands the elimination of differentiated developmental pathways based on identity that handicap and make more difficult some children's process of growth. To achieve this equality, we must have a full, robust definition of what children's equality requires.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ I distinguish structural change from the underlying assumption of much accommodation and affirmative action that leaves core norms and structures in place.

¹²² This is what I have called a "New Deal" for children. DOWD, REIMAGINING EQUALITY, *supra* note 3, at 136–57.

II. EQUALITY: EQUALITY, EQUITY, DIGNITY

Equality, particularly children's equality, is composed of three separable but intertwined concepts: equality, equity, and dignity.¹²³ I use "equality" in this definition in two ways. First, it is an umbrella term or shorthand for the core constitutional principle of equal protection.¹²⁴ That principle is subject to interpretation and definition informed by the conceptualization of equality. Second, I also use "equality" to signify the current interpretation of that term. "Equality" as currently interpreted, as "sameness," is not a sufficient definition of the core constitutional principle. I argue not only that "sameness" must be redefined from its current constrained understanding, but also that the concepts of equity and dignity are equally critical concepts to a full, meaningful, substantive definition of equality. Each concept has its grounding in a concept of equal humanity that is at the core of our modern concept of equality.

In this Part, I separately explore each of these concepts. While these concepts are critical to judicial interpretation, they are just as importantly, and perhaps more importantly, the basis for the exercise of legislative power to fulfill the state's affirmative responsibility to assure and support equality.¹²⁵

My overarching claim is that equality must be defined as including equality, equity, and dignity as integral components. Equality is a substantive concept, with substantive meaning. That meaning has changed over time. True equality in the sense of race and gender inclusion into "we the people" requires the capability to exercise equal humanity and citizenship, not simply the formal recognition that an individual is a citizen. For children, equality requires providing the support capable of sustaining their equality at birth: their equal right to achieve to their full developmental capacity. Because children are not born in identical circumstances, and because the equality of adults has not been achieved, it is critical that inequality not be reinscribed on children. Thus, their claims to equality are unique and strong.

¹²³ An initial conceptual exploration of this tripartite concept of equality was the subject of Dowd, *Equality, Equity, and Dignity*, *supra* note 24.

¹²⁴ U.S. CONST. amend. XIV, § 1.

¹²⁵ On the distinction between judicial and legislative power, see Liu, *Education, Equality, and National Citizenship*, *supra* note 30.

A. Equality

Equality as interpreted under current equal protection jurisprudence confounds substantive equality in several ways: through the doctrine of state action, the requirement of discriminatory intent, the definition of intent as requiring a very high showing to demonstrate discriminatory intent, and the rejection of disparate impact theory.¹²⁶ Even when the elements of state action are present, as well as firm evidence of discriminatory intent, our idea of what equality requires is quite limited to identical treatment or “sameness,” and the absence of differential treatment, or “antidiscrimination.”¹²⁷ We lack a concept of equality as affirmative state responsibility tied to outcomes or to rectify patterns of inequality.

Reva Siegel and Darren Hutchinson have critiqued the limited interpretation of equality, including the substance, direction, and consequences of equal protection analysis.¹²⁸ Even radical change can be

¹²⁶ On state action, see *Civil Rights Cases*, 109 U.S. 3 (1883). On discriminatory intent and the rejection of disparate impact for constitutional claims, see *Washington v. Davis*, 426 U.S. 229 (1976). On the elevated standard for showing discriminatory intent, see *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

¹²⁷ In *Brown*, the Court rejects the separation part of “separate but equal,” but not the concept of equal as sameness. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954). This position is reaffirmed in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Regents of University of California v. Bakke*, 438 U.S. 265, 289–90 (1978).

It is settled beyond question that the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.

Bakke, 438 U.S. at 289–90 (internal quotation marks and citations omitted); see also *United States v. Virginia*, 518 U.S. 515 (1996) (women’s right to attend military academy with program of instruction that might not be attractive to many women, but the right is for individual access to the same opportunity). Antidiscrimination, meaning prohibiting intentional discrimination, has resulted in extreme limits on the use of positive action, despite the extensive remedies authorized in the school cases. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

¹²⁸ Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); Darren Lenard Hutchinson, “Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 [hereinafter Hutchinson, “Unexplainable on Grounds Other than Race”].

domesticated, Siegel cautions, or achieve little actual equality.¹²⁹ Hutchinson would argue further that existing doctrine protects and favors the privileged rather than the oppressed.¹³⁰ This analysis applied to children would mean existing doctrine is intended to benefit the privileged by protecting and reproducing privilege for the children of the elites. In addition, defining “discrimination” as intentional conduct rather than as patterns of inequality radically limits the scope of constitutionally protected equality.

Equality has been interpreted as meaning everyone is entitled to the “same.” It is important to identify what “sameness” means. If we define equality as the “same” inputs of dollars or goods or resources, at a minimum or adequate level, and as requiring no affirmative action by the state, then we are leaving children where we find them.¹³¹ Children’s needs and the differences in their contexts in which they are born demand a very different definition of equality. Keeping in mind the children at the bottom of children’s hierarchies, as well as these critiques of current equal protection concepts of equality, what strategies might be devised to construct a more robust definition of equality for children?

First, we might reinvigorate or redefine “equality” from within, by changing how we think about “sameness.”¹³² We might take the notion of “sameness,” the state’s affirmative obligation to treat every person the same, as meaning, for children, sameness of opportunities and therefore providing the support for each to achieve the “same” maximum developmental

¹²⁹ Siegel underscores discriminatory purpose as the doctrine that sustains racial hierarchy, by not seeing hierarchical patterns as violating equal protection. I agree, and further, suspect that with respect to children, the likely justification for children’s hierarchies that would be articulated is parents. In other words, if hierarchies exist among children, it is due to decisions made by parents. The lack of discomfort with hierarchies among children also might be tied to seeing “our” children differently than “other” children. Finally, the support of family privacy and resistance to a model of state support may also, in part, be based on fear of state intervention. Siegel, *supra* note 128.

¹³⁰ Hutchinson, “*Unexplainable on Grounds Other than Race*,” *supra* note 128. He argues equal protection should instead revolve around an anti-subordination principle.

¹³¹ A minimum level reflects this kind of notion of equality; that social and economic rights mean bare economic survival and social presence. See, e.g., Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113 (2008); see also Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987).

¹³² DOWD, REIMAGINING EQUALITY, *supra* note 3, at 115–35.

capacity.¹³³ Sameness defined in this way would require that the state remove obstacles in children's way that mean they do not have the same unfettered developmental path.¹³⁴ It would also require calibration of support to achieve the "same" opportunities even in the absence of removed obstacles or challenges. Similarly, we might reframe the notion of discrimination as requiring a showing of discriminatory intent consistent with what we know about the process of discrimination, cognition, and implicit bias.¹³⁵

A second strategy would open a new front of analysis as a basis for the redefinition of "equality" consistent with the broad constitutional principle. Specifically, this would argue for children's robust equality rights grounded on the preparation of children for equal social citizenship.¹³⁶ Born equal, equally supported developmentally, children would arrive at the threshold of adulthood as equal social citizens.¹³⁷ The social citizenship argument has

¹³³ Dowd, *Equality, Equity, and Dignity*, *supra* note 24. This is somewhat similar to, but not the same as, the "capabilities approach" of Martha Nussbaum. Capabilities are linked to the freedom to achieve well-being, and Nussbaum has specified the importance of *thresholds* to a list of capabilities all nations should guarantee to their citizens, which she links to the concept of dignity. The notion of capabilities seems very adult centered, but most significantly for my argument here, my advocacy of support to achieve the maximum developmental capacity of every child is distinctive from the idea of thresholds that either reflect a minimum or adequate standard, rather than all that an individual child is capable of. See generally MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011). Applying the capabilities approach to children, Nussbaum and Rosalind Dix argue that the approach justifies special priority to children among rights holders based on the factors of vulnerability (due to dependency) of children and a cost effectiveness principle, but they also note the capabilities approach does not strongly support a claim of distinct welfare or socio-economic rights, as I argue in this Article. Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549, 552–54 (2012).

¹³⁴ Dixon & Nussbaum, *supra* note 133.

¹³⁵ For implicit bias literature, see L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359 (2012); Amelia M. Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 58 B.C. L. REV. 809 (2017).

¹³⁶ The work that is most important to identify the social citizenship argument includes that of Kenneth Karst, Frank Michelman, and most importantly, William Forbath and Joseph Fishkin. Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014) [hereinafter Fishkin & Forbath, *The Anti-Oligarchy Constitution*]; Michelman, *supra* note 131.

¹³⁷ See, e.g., William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) [hereinafter Forbath, *Caste, Class, and Equal Citizenship*]; Fishkin & Forbath, *The Anti-Oligarchy Constitution*, *supra* note 136; Liu, *Education, Equality, and National Citizenship*, *supra* note 30.

strong appeal for legislative change as well as changing judicial interpretation.¹³⁸

The concept of social citizenship is a theory of positive rights grounded in Reconstruction and the New Deal.¹³⁹ While the theorizing of social citizenship has focused on adults and economic rights, an even stronger argument can be made for children. Children's positive rights are broader than economic rights and require support of maximum developmental capacity. So, distinct from the arguments of most prior scholars, I argue that with respect to children, the role of the state to provide developmental support for children is an obligation to maximize their capabilities, not to provide a bare minimum or a low level of adequacy.

Kenneth Karst has argued that dignity is central to equal citizenship: the core substantive principle of the Fourteenth Amendment is equal citizenship: "The substantive core of the amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as respected, responsible, and participating member."¹⁴⁰ Citizenship "embodies an ethic of mutual respect and self-esteem" and includes "participation and responsibility."¹⁴¹

For Karst, this is not a claim on the state or society for equalization or dismantling of economic hierarchies. "[T]he principle of equal citizenship is not a charter for sweeping economic leveling."¹⁴² He nevertheless acknowledges minimum welfare is essential to equal citizenship "when economic inequalities make it impossible for a person to have a 'fully human existence' and the political branches of government turn a blind eye."¹⁴³

Karst's conception is adult-centered. Children are not within his focus and so he does not consider how preparation for equal citizenship might have different parameters. The importance of his argument for reframing equality around social citizenship is conceptual: that the overarching aim of the Fourteenth Amendment was to confer rights equal to those of white

¹³⁸ The affirmative role of Congress to accomplish social citizenship accords with the scholarship of Goodwin Liu. Liu, *Education, Equality, and National Citizenship*, *supra* note 30.

¹³⁹ *Id.*; Fishkin & Forbath, *The Anti-Oligarchy Constitution*, *supra* note 136.

¹⁴⁰ Karst, *supra* note 136, at 4.

¹⁴¹ *Id.* at 6, 8 (internal quotations omitted).

¹⁴² *Id.* at 11. He sees the chief obstacle to equality by race and gender as "psychological," which can be cured by access to voting and ending discrimination. *Id.* at 26.

¹⁴³ *Id.* at 62 (internal footnote omitted).

men, who were the only model for “citizen” in the original Constitution. The perspective of privilege establishes a robust, complex norm of full and equal citizenship.

William Forbath builds upon the idea of social citizenship by expanding the foundation for the principle to the constitutional transformation wrought by the New Deal.¹⁴⁴ Forbath unearths this “lost” New Deal constitutional tradition, adding a framing of the meaning of equality beyond race, slavery, and the status of all African Americans as unequal. He argues the New Deal tradition is class-based, focused on what is economically essential for each person to be a citizen who participates in society and the polity. “Aimed against harsh class inequalities, [the New Deal] centered on decent work and livelihoods, social provision, and a measure of economic independence and democracy.”¹⁴⁵ The New Deal principles incorporate ideas of economic justice: what is key is work and economic opportunity, and this is what links class and caste.¹⁴⁶

At the same time, Forbath critically evaluates the New Deal, particularly its utter failure to deal with the short-lived Reconstruction effort to establish meaningful equality for Blacks. The New Deal reinforced racial subordination while providing incomplete class equality.¹⁴⁷ His critical look at how the New Deal plays out, particularly its reinforcement of the incomplete Reconstruction project of racial equality, and the retrenchment of racial hierarchy, makes social citizenship an admittedly imperfect and deeply flawed tradition. “The tangled knot of race and class lies unexamined at the heart of this history.”¹⁴⁸ Class equality and race equality are intertwined because of this incomplete and unrealized agenda.¹⁴⁹

Social citizenship shorn of its subordinating implementation nevertheless is a powerful definition of substantive equality. Together with Joseph Fishkin, Forbath has argued for an “anti-oligarchy Constitution” reinforcing the full social citizenship concept, looking to the New Deal as an

¹⁴⁴ Forbath, *Caste, Class and Equal Citizenship*, *supra* note 137.

¹⁴⁵ *Id.* at 1.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 7. “The constitutional bad faith that for half a century enabled both parties and all three branches of the federal government to condone or support Jim Crow and disenfranchisement, produced the anomaly of a reactionary core at the heart of FDR’s New Deal liberal coalition. This excluded most of black America from the benefits of the main New Deal programs.” *Id.* at 85.

¹⁴⁹ *Id.*

essential constitutional “moment” that changes the focus and meaning of equal protection and “equality,” but arguing for its meaning to include the lost goals of Reconstruction.¹⁵⁰ Fishkin and Forbath identify Roosevelt’s arguments for the New Deal based on several constitutional provisions: the general welfare clause, equal protection, and “first principles,” to provide the foundation for policies focused on work, education, housing, healthcare, and social insurance.¹⁵¹ Their contemporary argument is that concentrations of wealth/economic inequality harm democracy, and so become a constitutional problem.¹⁵² Translating this argument to children, some scholars similarly have identified economic inequality as undermining stability and basic support for children, suggesting policy proposals to help poor families.¹⁵³ If families are critical to democracy, then this is a similar argument about inequalities of wealth as foundationally destructive.

One scholar who has applied the idea of social citizenship to children is Goodwin Liu,¹⁵⁴ by drawing on the social citizenship concept to make his case for equal education based upon the Fourteenth Amendment “citizen” clause rather than the Equal Protection Clause.¹⁵⁵

At its core, the tradition holds that there is a “basic human equality associated with the concept of full membership of a community” and that it is the duty of government to ensure the civil and political as well as social and economic prerequisites for the realization of this equality.¹⁵⁶

This is a claim of positive rights essential to liberty.¹⁵⁷ Education is essential to citizenship. Therefore, the state has an affirmative obligation to ensure that each person has equal citizenship. This positive rights argument

¹⁵⁰ Fishkin & Forbath, *The Anti-Oligarchy Constitution*, *supra* note 136.

¹⁵¹ *Id.* at 689.

¹⁵² *Id.* at 690; *see also* Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369 (2018).

¹⁵³ Naomi Cahn & June Carbone, *Growing Inequality and Children*, 23 AM. U. J. GENDER, SOC. POL’Y & L. 283 (2015).

¹⁵⁴ Liu, *Education, Equality, and National Citizenship*, *supra* note 30; *see also* Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044 (2006) [hereinafter Liu, *Interstate Inequality*].

¹⁵⁵ Liu, *Education, Equality, and National Citizenship*, *supra* note 30, at 336–45.

¹⁵⁶ *Id.* at 336.

¹⁵⁷ *Id.*

is especially powerful for education. It assures a floor of opportunity, and therefore equity among citizens. Liu argues that the Fourteenth Amendment authorizes and “obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation.”¹⁵⁸ The Amendment is an affirmative grant of national citizenship. Therefore, he argues social and economic rights are an obligation of Congress.¹⁵⁹

The right claimed by Liu is firmly claimed as children’s right. He argues for the obligation to legislate a substantive minimum of education equity as a national standard.¹⁶⁰ That national standard is essential, he claims, because differences between the quality of schools and the quality of education within school districts, between districts, or any other variation that is intrastate are far less (although significant) than the differences between states.¹⁶¹ Liu’s powerful argument can and should be expanded beyond resource allocations to other needs and means to assure the educational system provides equal developmental support to all. I might argue that more than a national minimum is needed, but such a standard would be a substantial step toward an educational system designed to achieve developmental equality. Other systems that are also critical to children’s development as equal social citizens must serve all children equally with this goal in mind. Inherent in an analysis of funding alone can be an assumption of equality focused on sameness of resources or inputs into children’s education. But if equality is focused on opportunities and outcomes, then it can have two consequences. First, in order to assure equality of opportunity, the factors that get in the way of maximizing each child’s development must be a focus, even an obligation, for removal. Second, ensuring the same developmental opportunities and outcomes can mean differentiation in support to achieve that equality goal.

Equality for children requires, for each child, guaranteeing their development to their full capacity, for their individual benefit as well as society’s and the polity’s benefit. Social citizenship is a rich definition of substantive equality. Children’s equality means the assurance of the means

¹⁵⁸ *Id.* at 334.

¹⁵⁹ *Id.* at 340 (“Thus the legislated Constitution, in contrast to the adjudicated Constitution, is not ‘narrowly legal’ but rather dynamic, aspirational, and infused with ‘national values and commitments.’”).

¹⁶⁰ *Id.* (“I infer a distributive principle for educational opportunity that I call educational adequacy for equal citizenship.”). His analysis rests in part on the actions during Reconstruction to establish public education as a basis for equal citizenship.

¹⁶¹ Liu, *Interstate Inequality*, *supra* note 154.

to be equal as children, in order to become citizens with equal opportunity to succeed and contribute to society. Inherent in that understanding of equality, and of the concept of preparation and support based on the inherent value of children as well as their future equal citizenship, are equity and dignity. I turn to those co-equal threads intertwined with, and in, equality.

B. *Equity*

An infusion and reorientation of current equal protection analysis would create a deep substantive understanding of equality. Inherent in that redefinition of equality, but not current doctrine, are the principles of equity and dignity. Another way to argue for an expanded concept of the constitutional equality principle is to claim that equity and dignity are integral to equality.

At its core, equity means “fairness,” taking into account where someone stands and what they need to get to the end goal of equal opportunity or preparation for maximized social citizenship. Equity, by paying attention to differences, requires taking stock of what creates differences and generates hierarchy. If inequity exists, we must ask whether this is structural and state-caused or whether it simply reflects inherent differences among individuals.¹⁶² Attentiveness to inherent differences ensures fairness by providing the means to achieve the support and capability to maximize children’s development. At the same time, identification of structural barriers or discrimination that may be the source of identified differences or that cause differences to be perceived as “natural” when in fact they are created, requires working around immediate structural issues but devising long-term structural solutions, not simply accommodating and perpetuating structural problems.

¹⁶² See, e.g., KIRWAN INST., OHIO STATE UNIV., FAIR HOUSING AND EQUITY ASSESSMENT: DEVELOPING A SCOPE OF WORK TO MAXIMIZE EQUITABLE OUTCOMES (2012), <http://kirwaninstitute.osu.edu/my-product/fair-housing-and-equity-assessment-fhea-guide-series> [<https://perma.cc/J7KG-WCWD>]; REECE ET AL., *supra* note 63 (taking into account the composite indicators that impact child development, which may link to structural factors and essential policy to reverse this constitutional violation of children’s rights).

John Rawls identifies fairness with justice.¹⁶³ Fairness, according to Rawls, is grounded in equal opportunity. Differences must not be linked to lack of equal opportunity.¹⁶⁴ He accepts hierarchy as part of society but only if there is sufficient benefit or support for the least advantaged.¹⁶⁵ For equal opportunity to be meaningful, then, the means to reach full developmental capacity must be assured not solely by assured opportunity but also by assured support of developmental capacity.

Equity translates to fairness connected to needs. It inherently includes positive action and support in order to achieve the substantive goal of developmental equality, but also differentiation as needed for each child to achieve that end. In contrast to current definitions of equality as “sameness,” interpreted as “same treatment,” or “same benefits,” it does not limit children to a universal benefit but instead ensures fair outcomes.

Our treatment of children with disabilities is often identified as a paradigm of equity. In its current form, disability accommodation doctrine is helpful but partial. However, its limitations may be a guide for what equity should mean.¹⁶⁶ In its most robust form, recognition of disabilities triggers accommodation that permits the individual to accomplish the goal or access the opportunity. For some children, their disability may limit their developmental capacity, but it should not limit their ability to maximize their developmental potential. The disability paradigm also must be critically used. For example, the legal requirement of accommodation can be criticized as inadequate, and the assurance of support to achieve maximum development is not always well coordinated or sufficient.¹⁶⁷ In addition, the

¹⁶³ JOHN RAWLS, JUSTICE AS FAIRNESS: POLITICAL, NOT METAPHYSICAL 11–17 (1985).

¹⁶⁴ *Id.* at 13.

¹⁶⁵ *Id.* at 15.

¹⁶⁶ For contradictions and critiques, see generally Elizabeth R. Schiltz, *Hauerwas and Disability Law: Exposing the Cracks in the Foundations of Disability Law*, 75 LAW & CONTEMP. PROBS. 23 (2012); Allison Zimmer, *Solving the IDEA Puzzle: Building a Better Special Education Development Process Through* Andrew F., 93 N.Y.U. L. REV. 1014 (2018) (critiquing IDEA and the potential for change under Andrew). See also the policy issue of students placed in alternative schools, at the intersection of race and disability, Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871 (2018), as well as the links between disability and the school-to-prison pipeline, Shameka Stanford & Bahiyyah Muhammad, *The Confluence of Language and Learning Disorders and the School-to-Prison Pipeline Among Minority Students of Color: A Critical Race Theory*, 26 AM. U. J. GENDER, & SOC. POL'Y & L. 691 (2018).

¹⁶⁷ On the inadequacy of the legal requirement of accommodation, see, for example, Talha Syed, *Educational Accommodation and Distributive Equity: The Principle of Proportionate Progress*, 50 CONN. L. REV. 485 (2018).

disability paradigm reveals a norm that may reinforce the perception of the disabled child or adult as “other.”¹⁶⁸ While to some extent disability advocacy has required the norm to adjust (architectural and planning requirements, for example), separation and segregation still persist.¹⁶⁹

Equity does not have a single meaning, and in an environment of scarce resources, the most robust form of equity may not be possible.¹⁷⁰ But with respect to American children, scarcity is not an excuse.¹⁷¹ Fairness or equity should include the support necessary to maximize developmental capacity. In the process of assuring that support, identification of structural issues that generate differences that require differential support should lead to dismantling the structural impediments as well.

Children and education is an especially rich context in which to think about equity. Lauren Webb identifies a range of equity possibilities with respect to intradistrict funding disparities for education.¹⁷² Most promising among her possibilities are vertical equity and comprehensive equity.

¹⁶⁸ LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.-C.L. L. REV. 381 (2018) (bias in special education law in application); Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against “Inclusion,”* 72 WASH. L. REV. 775 (1997) (treating the child as “other” by separating the child versus inclusion or mainstreaming to restructure the community of learning, critique of inclusion concept as applied).

¹⁶⁹ Snyder & Conroy, *supra* note 92; Rud Turnbull, *Education, Ethical Communities, and Personal Dignity*, 55 INTELL. & DEVELOPMENTAL DISABILITIES 110, 110–11 (2017) [hereinafter Turnbull, *Education, Ethical Communities, and Personal Dignity*]; Rud Turnbull, *Disability Law and Policy: Core Concepts and the Ethical Principles of Family, Dignity, and Community*, in CELEBRATING 50 YEARS OF CHILD DEVELOPMENT RESEARCH: PAST, PRESENT, AND FUTURE PERSPECTIVES (Barbara Hanna Wasik & Samuel L. Odom eds., 2019).

¹⁷⁰ Alicia Ely Yamin, *Suffering and Powerlessness: The Significance of Promoting Participation in Rights-Based Approaches to Health*, 11 HEALTH & HUM. RTS. 5, 14–15 (2009). The CRC makes state obligations contingent on the ability of the particular country to provide resources within its total budget and resources. *Id.*

¹⁷¹ In fiscal year 2019, the estimated federal budget is \$4.407 trillion. Discretionary spending is \$1.305 trillion; over half that amount is spent on the military. Kimberly Amadeo, *U.S. Federal Budget Breakdown: The Budget Components and Impact on the U.S. Economy*, BALANCE, <https://www.thebalance.com/u-s-federal-budget-breakdown-3305789> [https://perma.cc/BYK5-YPYD] (last updated Feb. 13, 2020). “In 2017, 9 percent of the federal budget (or \$375 billion of \$3.9 trillion) was spent on children younger than 19. An additional \$106 billion in tax reductions was targeted to families with children. Combining budget outlays and tax reductions, federal expenditures on children totaled \$481 billion.” JULIA B. ISAACS ET AL., URBAN INST., KIDS’ SHARE 2018: REPORT ON FEDERAL EXPENDITURES ON CHILDREN THROUGH 2017 AND FUTURE PROJECTIONS (2018), <https://www.urban.org/research/publication/kids-share-2018-report-federal-expenditures-children-through-2017-and-future-projections> [https://perma.cc/22Y6-6J2R].

¹⁷² Webb, *supra* note 67.

Vertical equity means equity of opportunity, funding variations among students depending on their disadvantages, with the goal of providing access to resources needed to learn and thrive.¹⁷³ Vertical equity, by being attentive to disadvantages, should also examine the sources of disadvantages in order to not replicate or reify them. Some include in vertical equity an adequacy framework, that is, that achieving vertical equity would mean reaching a level of sufficiency.¹⁷⁴ This begs the question of what “sufficiency” means. Comprehensive equity solves this problem, combining adequacy and vertical equity, with adequacy defined at the high end, as the preparation or support needed to pursue a college education or a career after high school.¹⁷⁵ This incorporates a measure that links to meaningful economic opportunity.¹⁷⁶

The connection between inequity and structural, constructed harms bears reinforcement. A particularly powerful example of this is toxic water, which creates lifelong harms to children who are born in families who are affected by this silent but monstrously harmful source of developmental harm. Emily Benfer, in a comprehensive analysis, identifies toxic water as a government-created harm perpetuated by government failure to address the problem once identified.¹⁷⁷ Toxic water has its highest impact on children in poverty, and thus the impact is disproportionate by race.¹⁷⁸ These government failures are based on the framework of federal lead poisoning prevention laws.¹⁷⁹ If equity is defined only as providing the supports needed

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Health equities analysis similarly differentiates between ideas of equity. One scholar calls one approach the solidarity approach, focusing on society as a whole and providing all with a guarantee of the same access to healthcare, ignoring the needs of groups or individuals, similar to the horizontal equity approach in the education setting. MAMDOUH GABR, HEALTH ETHICS, EQUITY AND HUMAN DIGNITY, <http://www.humiliationstudies.org/documents/GabrHealthEthics.pdf> [<https://perma.cc/HR7Z-R5LA>]. Alternatively, the individual right approach is based on each individual's access to healthcare and equal outcomes. Gabr notes this is only possible in wealthy communities and/or countries. Because of the feasibility of this approach in the United States, this limitation is not relevant although the claim that it is undoubtedly will be made.

¹⁷⁷ Toxic water, such as the example of Flint, now emerging in other communities, is an example of government created harm and its disproportionate burden on the poor. Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color*, 41 HARV. ENVTL. L. REV. 493 (2017).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

for the children affected by lead poisoning, then the inadequacy of the laws, and the perpetuation of the harm, continue. If, on the other hand, the identification of the source of developmental difference leads to this identification of state policy or the lack of it, then equity demands going to the root of the problem and solving it.¹⁸⁰

Many structural obstructions in health and education that create differences among children are tied to the high rate of child poverty and widening income inequality.¹⁸¹ Olatunde Johnson argues for strategic approaches using available tools at multiple levels to expand the concept of equality.¹⁸² She, like many others, calls for inclusion to be neighborhood-focused.¹⁸³ She contends that the concept of economic inequality must expand to include race and gender.¹⁸⁴ Inattention to those factors by the “neutral” category of economic inequality ignores the race- and gender-specific nature of the barriers to equality and the differences that require attention under the demands of equity.¹⁸⁵

The focus of equity also may depend on the scope of the understanding of what supports or resources are relevant to maximizing developmental capacity. In the healthcare setting, for example, this is reflected in the concept of the social determinants of health.¹⁸⁶ Equity in healthcare for children is not solely about providing all the care (preventive or responsive to illness or injury) that they need, but also investigating why they have the healthcare needs that they have. A child that keeps returning to an asthma

¹⁸⁰ Equity for children also demands that adults not create the harms that affect children’s future. This is the theory of the climate change lawsuit brought by kids on behalf of themselves as a future generation harmed by the current actions of adults.

¹⁸¹ Leslie J. Harris, *Family Policy After the Fragile Families and Relationship Dynamics Studies*, 35 L. & INEQ. 223 (2017) (outlining essential policies for where we are versus where we should be).

¹⁸² Olatunde C.A. Johnson, *Equality Law Pluralism*, 117 COLUM. L. REV. 1973 (2017).

¹⁸³ See also Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553 (2014); Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016); Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97 (2015). Regarding strategies, see also Tahk, *supra* note 87 (direct benefits or support may be politically untenable, but tax strategies such as credits could be expanded).

¹⁸⁴ Olatunde C.A. Johnson, *Inclusion, Exclusion, and the “New” Economic Inequality*, 94 TEX. L. REV. 1647 (2016).

¹⁸⁵ On paying attention to gender, and specifically to fathers, see Hatcher, *supra* note 88, at 239.

¹⁸⁶ Rachel Rebouché & Scott Burris, *The Social Determinants of Health*, in THE OXFORD HANDBOOK OF U.S. HEALTH LAW 1097 (I. Glenn Cohen et al. eds., 2017).

clinic may be suffering due to inadequate or toxic housing.¹⁸⁷ Learning difficulties may relate to stresses on families and communities that weaken or render inadequate the social supports essential to maximizing educational benefits and opportunities.¹⁸⁸ Alternatively, it may simply be because families, especially very young parents, are lacking in support.¹⁸⁹

Equity is essential to equality, to ensure equal outcomes and opportunities, not the replication of hierarchy. Equity's attentiveness to needs and differences is linked to respect for every child's dignity.

C. Dignity

Dignity underscores an important, central human rights norm integral to the constitutional definition of equality.¹⁹⁰ Like equity, dignity gives substance to equality in ways that our current simplistic and limited definitional notions of equality alone may not, especially equality limited to

¹⁸⁷ Siegel et al., *supra* note 36. Forthcoming work by Angela Harris and Aysha Pamukcu argues the social determinants of health should generate a new civil rights strategy linking health inequities to subordination, reinvigorating civil rights in this critical structural area. Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, UCLA L. REV. (forthcoming 2020).

¹⁸⁸ CHRISTOPHER BLODGETT, WASH. STATE OFFICE OF FIN. MGMT., NO SCHOOL ALONE: HOW COMMUNITY RISKS AND ASSETS CONTRIBUTE TO SCHOOL AND YOUTH SUCCESS 1, 3 (2015), https://traumasensitiveschools.org/wp-content/uploads/2015/11/no_school_alone-Washington-State.pdf [<https://perma.cc/7KLV-R8JL>]. This project compiled data on school demographics, teacher qualifications, census data on socio-economic status, risk profiles of the Washington State Department of Social and Health Services, and measures of adult well-being from the Behavioral Risk Factor Surveillance System, with the goal of assessing not just student profiles but community resources, strengths, and weaknesses that impact the ability to serve student needs. *Id.*

¹⁸⁹ See *supra* text accompanying note 27.

¹⁹⁰ Dignity, along with equality and equity, is contained in the primary human rights document for children, the UN Convention on the Rights of the Child, 1990. G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) ("Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity . . ."). It is the core principle announced in the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). For an example of analysis of the human rights concept of dignity, see Alicia Ely Yamin, *Shades of Dignity: Exploring the Demands of Equality in Applying Human Rights Frameworks to Health*, 11 HEALTH & HUM. RTS 1 (2009).

“sameness” or “colorblindness.”¹⁹¹ Equity equals fairness, linked to children’s needs to maximize development. Equity, however, arguably does not set a level of equity at which it is achieved, as in a maximum or minimum or somewhere in between.¹⁹² Dignity, however, may provide a measure: dignity requires respect for the individual and recognizes their inherent humanity and equal worth.¹⁹³ So the right to dignity triggers collective responsibility for the equal development of each child, but also establishes the level of responsibility as the support necessary to achieve each child’s maximum capacity. So defined, that responsibility leads to dismantling barriers and inequalities, in order to support the dignity of each child.¹⁹⁴ Each child’s dignity is both as a child, and triggered by their own evolution to become an adult who equally participates, contributes, and is respected. Dignity enhances the depth of equality; strengthens the claim of necessary socio-economic rights and developmental rights; and substantively requires a full, maximum development approach that at the same time is highly individualized in order to be recognized for each child. Dignity empowers every child to be equal. It is about concrete opportunities and measurable outcomes, but it is also, as dignity underscores, about true respect.¹⁹⁵

One scholar identifies three meanings or elements of dignity: first, an inherent/ontological element; second, how one is treated by others; and third, as public responsibility or state obligation, the idea that “states have a positive obligation to progressively realise human dignity through the mechanism of socio-economic rights.”¹⁹⁶ Dignity is rooted in Kantian ethics: the categorical imperative that “everyone’s inherent human dignity has to be

¹⁹¹ *Supra* Section II.A (discussion of equality).

¹⁹² *Supra* Section II.B (discussion of equity).

¹⁹³ The Constitutional Court of South Africa has been a leader in interpretation of dignity as requiring substantive socio-economic rights for dignity to have concrete meaning. See THE DIGNITY JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA: CASES AND MATERIALS (Drucilla Cornell et al. eds., 2013). On children’s socio-economic rights under human rights and constitutional analysis, see also NOLAN, CHILDREN’S SOCIO-ECONOMIC RIGHTS, *supra* note 30.

¹⁹⁴ Professor Ton Liefaard, a leading international children’s rights expert, articulates this individual claim of dignity as the idea of “equality plus” where the plus is “equivalence.” Dowd, *Equality, Equity, and Dignity*, *supra* note 24.

¹⁹⁵ On dignity as empowerment to be equal, requiring meaningful respect, see *id.* at 13; Rinie Steinmann, *The Core Meaning of Human Dignity*, 19 POTCHEFSTROOM ELECTRONIC L.J. 1, 5 (2016).

¹⁹⁶ Steinmann, *supra* note 195, at 1.

respected and protected universally.”¹⁹⁷ As conceptualized in this three-part framework, public responsibility is a minimum: it is the state duty to provide an “existential minimum” of living conditions (housing, healthcare, food, and water).¹⁹⁸ As I use it here, public responsibility for the dignity of children, particularly the children at the bottom of children’s hierarchies, requires maximum support. Dignity triggers the right of equal developmental opportunity and support, to ensure each child’s maximum developmental capacity.

Rud Turnbull¹⁹⁹ defines dignity as “worthiness.” Worthiness includes or is expressive of the constitutional principles of life, liberty, equality, and the constitutional goal of happiness.²⁰⁰ His example of this in action is frequently his son, who had an intellectual disability.²⁰¹ The goal for his son was to maximize his developmental capacity, and to do so in a way that made his life meaningful, a life of dignity, to treat him as worthy. This meant his parents fighting for his inclusion in mainstream environments and fending off efforts to marginalize or patronize their child. Sharon Rush has similarly linked equality and dignity, arguing appreciation and valuing of diverse identities are part of equality and rests upon every child’s dignity.²⁰² This aspect of dignity requires cultural competence, appreciation of diversity, and nonhierarchical interactions among children. Dignity is therefore connected to cultural equality and mutual value.

¹⁹⁷ *Id.* It is incorporated in the Universal Declaration of Human Rights, German Basic Law, and section 10 of the Constitution of South Africa. *Id.*

¹⁹⁸ *Id.* at 7.

¹⁹⁹ Turnbull, *Education, Ethical Communities, and Personal Dignity*, *supra* note 169, at 110–11. Discussions with Rud and Ann Turnbull were instrumental to my thinking about dignity.

²⁰⁰ This includes protection from harm (life); autonomy, privacy, empowerment, participation, decisionmaking, and physical liberty (liberty); and anti-discrimination, cultural responsiveness, integration, and productivity (equality). Rud Turnbull, Co-Founder, Beach Ctr. on Disability, Univ. of Kan., Address at the University of Florida Anita Zucker Center for Excellence in Early Childhood Studies Symposium (Jan. 26, 2018); *see also* Interview by Minnesota Governor’s Council on Developmental Disabilities with Rud Turnbull (2014) [hereinafter Interview with Rud Turnbull] (interview with Rud Turnbull on these core concepts), <https://mn.gov/mnddc/rud-turnbull/rud-turnbull-18.html> [<https://perma.cc/226S-T5WC>].

²⁰¹ *See* Interview with Rud Turnbull, *supra* note 200.

²⁰² Rush, *Protecting the Dignity and Equality of Children*, *supra* note 71.

Peggy Davis²⁰³ reminds us of the critical link between children's dignity and family dignity. Dignity requires empowerment, not simply a more respectful state.²⁰⁴ Davis nevertheless is concerned with the potentially negative role of the state. In her view, support of children must include support for the integrity and dignity of their families.²⁰⁵ Jane Spinak carries this intersection between children's dignity and family dignity further,²⁰⁶ emphasizing that children and families are in synergy, not in conflict, with respect to their dignity needs. Using the concept of social citizenship, she argues for positive family support because healthy families are critical to a healthy democracy.²⁰⁷ Inequity "demands exploring every avenue to diminish that inequity, including revisiting our constitutional interpretation of basic rights."²⁰⁸ This perspective is important to underscore: children cannot be separated from their families (nor families from communities). Children's equality rights are inescapably bound up with families' dignity rights.

Some constitutional scholars might suggest that dignity could serve as a better alternative umbrella principle for children rather than equality. In other words, dignity could serve as a way to transcend the limits of existing equal protection doctrine and the interpretation of "equality."²⁰⁹ Kenji

²⁰³ Peggy Cooper Davis, *Little Citizens and Their Families*, 43 *FORDHAM URB. L.J.* 1009, 1012–15 (2016).

²⁰⁴ The difference is captured in one scholar's comparison of policing reforms, between liberal arguments for better training versus Black Lives Matter activists' focus on a different paradigm of policing. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 *N.Y.U. L. REV.* 405 (2018).

²⁰⁵ Davis, *supra* note 203, at 1020–21.

²⁰⁶ Jane M. Spinak, *Dignity Rights: A Response to Peggy Cooper Davis's "Little Citizens and Their Families"*, 43 *FORDHAM URB. L.J.* 1221 (2016). Spinak critiques the inadequacy of existing family support programs, including their insufficiency, their dignitary harm of recipients, and the exclusion of the most severely poor from policies like tax credits.

²⁰⁷ *Id.* at 1228–29. Spinak argues that the substance of dignity can be based on the CRC model of balancing child, family, and state. As the Supreme Court has already used the CRC to strike the juvenile death penalty, she argues, why not use it as the basis for entitlement as well?

²⁰⁸ *Id.* at 1229.

²⁰⁹ Another area of law that has used dignity arguments is criminal justice, as a tool in arguments regarding race and criminal law, mass incarceration, bias in the juvenile and adult criminal systems, and severe racial disproportionality. *See, e.g.*, Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 *U. PA. J. CONST. L.* 669, 669 (2005) ("Dignity remains the core aspirational value in the struggle for racial justice. For Americans of African descent, the relentless demand to be treated with respect and equal humanity resonates in virtually every sector of intellectual and cultural life."). Bracey reminds us that dignitary and stigmatic harm were the hallmarks of the slavery regime. *See also* Michael Pinard,

Yoshino names as dignity claims those constitutional arguments that intertwine equal protection and substantive due process claims, or equality/liberty claims.²¹⁰ He explores “dignity” claims as a possible pathway out of the limitations of equal protection jurisprudence.²¹¹ Yoshino sees the “liberty” door of fundamental rights doctrine as still open, even as “equality” has narrowed or shut.²¹² Yoshino’s analysis might suggest that linking dignity to liberty might be more fruitful for children’s equality, rather than my linking of dignity to equality. In other words, it might be better to claim for children a liberty/dignity claim, rather than an equality/dignity claim. But that coupling runs up against the inability of children to exercise full autonomy or liberty well into their development toward becoming adults.

Hutchinson suggests a different caution about using the concept of dignity.²¹³ Under the Court’s existing jurisprudence, he argues, dignity is undertheorized and ambiguous, has been used to undermine racial justice and defend the dignity of whites, fails to include all vulnerable groups, and is tied to judicial ideology that continues to reinforce white privilege.²¹⁴ Hutchinson’s concerns are well-founded and his critique is essential to keep in mind. Nevertheless, dignity is an important and powerful thread as part of equality, rather than as a replacement. It is not separate from it, or a means around limitations of equality; rather, it is an integral part of equality and positive rights unique to children.

D. *Equality and Identities*

Equality redefined in this way as robust substantive equality cannot be achieved by thinking about children neutrally, when their current reality marks them positively (by privileging them) or negatively (by disadvantaging them), or by identities (such as race, gender, and class). Because hierarchies among children are not only economic hierarchies, but

Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity, 85 N.Y.U. L. REV. 457 (2010) (discussing the collateral consequences of crime, both while incarcerated and during post-incarceration, regarding housing, benefits, work, and voting).

²¹⁰ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

²¹¹ *Id.*

²¹² *Id.*

²¹³ Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1 (2017).

²¹⁴ *Id.*

are strongly racialized and gendered, a critical component of equity is “fairness” defined in racial and gender terms, just as a critical component of dignity is to stand from the perspective of children subordinated by race, gender, and class. Constructing a robust definition of equality requires rejecting the notion of the “neutral” child. At the same time, it is important to comprehend complex identities; to gain the perspective not simply of one identity, but to recognize the diversity, complexity, and variability of identities used to subordinate, such as those of Native American, Asian, Latinx, and immigrant children, along with their multiple intersections of race with gender, class, and other critical identities.

The work of Robin Lenhardt²¹⁵ and Khiara Bridges²¹⁶ reminds us of the ways in which race, gender, and class work with respect to children and families. They make visible the complex demands of equality and equity, as well as the importance of dignity. The subordination of families of color has meant the strained and limited definition of equality has failed to support these families historically and currently, carrying forward an intergenerational replication of inequality. This inequality when viewed from the perspective of children means that their place in the hierarchy begins at birth, and even before birth. The most crucial ecology for their early development is challenged by the maldistribution by race of the high rate of child poverty, and the known correlations between poverty and development. In addition, the two most important existing systems that intersect with their development, health, and education, are riddled with inequities that not only fail to deal with differences at birth, but frequently exacerbate and widen those differences.²¹⁷ Equity, “fairness,” as a reinforcement of attention to needs, must be consciously attentive to the lines along which those needs cluster. Equity must not only deal with needs but must also recognize patterns and should trigger structural reforms to eliminate inequities rather than solely attend to their effects while leaving

²¹⁵ Lenhardt, *The Color of Kinship*, *supra* note 27; Lenhardt, *Race, Dignity, and the Right to Marry*, *supra* note 27.

²¹⁶ Bridges discusses the interaction of race and class in the context of families receiving public assistance and the invasion of privacy that accompanies interactions of indigent women with the state. Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113 (2011) [hereinafter Bridges, *Privacy Rights*]; Khiara M. Bridges, *Towards a Theory of State Visibility: Race, Poverty, and Equal Protection*, 19 COLUM. J. GENDER & L. 965 (2010) [hereinafter Bridges, *Towards a Theory of State Visibility*].

²¹⁷ See *supra* text accompanying note 27.

them in place. Dignity requires recognizing and acting in a way that respects the humanity of all children. This must include socio-economic support of families that meaningfully respects their role in the development of children.

Lenhardt has argued that we must be “race attentive” to the role of law in subordinating families along racial lines.²¹⁸ Just as gender analysis has exposed the reinforcement of patriarchy, under both explicit and gender-neutral family law norms, so too family law requires critical race analysis to expose how legal rules racially subordinate. As an example, in her analysis of the *Obergefell v. Hodges* opinion,²¹⁹ Lenhardt challenges whether the embrace of same sex marriage as critical to “dignity” rang true for Black families.²²⁰ “I am not convinced that access to marital rights, without more, magically cures the stigma, deprivation, disparate treatment, and harm that come with outsider status. Indeed, marriage regulation, in some instances, could very well exacerbate these wrongs.”²²¹ To claim what marriage is and what it confers without considering the experience and current realities of Black families, she argues, “whitewashes” reality and reinforces subordination.²²² Dignity, Lenhardt concludes, cannot and should not be whitewashed;²²³ nor, I would argue, should equality or equity. Concepts as

²¹⁸ Lenhardt’s powerful example is the case of Walter Scott, shot in North Charlestown, South Carolina by a police officer as he ran away because he thought he was being pursued for unpaid child support. It is a graphic illustration of the interaction of systems of subordination linked to family. Lenhardt, *The Color of Kinship*, *supra* note 27, at 2105; *see also* Lenhardt, *Race, Dignity, and the Right to Marry*, *supra* note 27; Margaret F. Brinig, *Racial and Gender Justice in the Child Welfare and Child Support Systems*, 35 L. & INEQ. 199 (2017) (looking at child welfare from the lens of court records in one county in Indiana and showing the impact of frequent moves). Lenhardt identifies a set of principles that should be integral to equality and equity analysis and keeping race in view rather than hidden. Her list of principles includes a complex understanding of race; family norms and racial formation; exploring racial identities and intersectionality; exploring whiteness; looking at intersections of gender, class, sexual orientation, and race in kinship units and roles; structural inequalities; and broad kinship definitions and understanding, coupled with historical, interdisciplinary, narrative, empirical, and collaborative research methods. Lenhardt, *The Color of Kinship*, *supra* note 27, at 2101–02. One factor, structural inequality, might include how family policy, structure, and systems impact other areas. *Id.* *See also* Stanford researchers on the impact of “black spaces,” the evolution of stereotypes, and the impact on policing and housing values. Courtney M. Bonam et al., *Polluting Black Space*, 145 J. EXPERIMENTAL PSYCHOL. 1561 (2016).

²¹⁹ Lenhardt, *Race, Dignity, and the Right to Marry*, *supra* note 27.

²²⁰ *Id.*

²²¹ *Id.* at 53.

²²² *Id.*

²²³ *Id.*

well as outcomes must be measured in real terms. Children's identities must be kept in view if equality is to be achieved.²²⁴

Bottom line, as Lenhardt argues, race matters. Just as the typical developmental model is inadequate because it fails to take into account how race matters for Black children and other children at the bottom of the hierarchy, so too how we construct concepts will be inadequate if race, in addition to gender and class, is not kept firmly in view.

Khiara Bridges would argue that identities are critical to inequities that originate even prior to birth, based on state action that ignores "privacy" while subordinating mothers under the guise of assistance or oversight.²²⁵ Her ethnographic research at a major Manhattan hospital examines the delivery of healthcare under Medicaid policy, specifically the Prenatal Care Assistance Program (PCAP), focusing on the compelled interviews of pregnant women by professionals. These compelled consultations, Bridges contends, are a "gross and substantial intrusion by the government into poor, pregnant women's private lives."²²⁶ They are treated as families without constitutionally protected privacy.

Bridges argues that this treats wealth as the precondition for exercise of privacy rights and that it is assumed that poor families do not deserve such protection because they cannot produce good citizens.²²⁷ Privacy is not given away; rather, she argues, these mothers and families never had it to begin with because of poverty, and because they are women.²²⁸ Her claim about the nature of privacy and the justification for negative state action as oversight is a critical insight about how this is justified, how it operates in terms of principles, and how the state begins the process of marginalizing children. Because families are the core ecology for children, marginalizing families in this way replicates hierarchy for children not just at birth but before birth. Bridges's analysis reminds us that state action framed as support for children and families should be viewed with caution and skepticism.

²²⁴ For concerns about state intervention and the pattern of treatment of poor families, see also Bach, *supra* note 85 (the price for assistance is regulatory oversight and punitive mechanisms).

²²⁵ Bridges, *Towards a Theory of State Visibility*, *supra* note 216; see also Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270 (2018) (reviewing KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017)) (linking poverty and state action to creating and perpetuating poverty).

²²⁶ Bridges, *Privacy Rights*, *supra* note 216, at 116.

²²⁷ *Id.*

²²⁸ *Id.*

One final example of the construction of hierarchy among children by race and gender is the work of Priscilla Ocen.²²⁹ Ocen's focus is Black girls in the context of efforts to end trafficking, efforts that nevertheless result in increased criminalization of Black girls for prostitution-related offenses. She links the experience of Black girls to structural factors.²³⁰ She also criticizes the operation of school and the juvenile justice systems on girls as part of connected systems that disproportionately treat girls as criminals instead of victims.²³¹

Ocen links these patterns to the history of differential treatment of girls of color, resulting in the construction of their childhood as "liminal childhood."²³² Black girls are neither one thing or another, not children and not adults, part of the stereotypes attached to Black women that have origins in slavery and Jim Crow. "The stereotypes that deny Black children their childhood are both racialized and gendered."²³³ She argues "presumptions of childhood" are highly variable due to race and gender biases, resulting in, among other actions, the "overpolicing and underprotection of . . . Black girls."²³⁴ This exclusion from the favored view of who is a "child" mirrors Bridges's and Lenhardt's arguments, rendering Black girls outside reforms intended to treat girls involved in trafficking with dignity, as victims instead of criminals.²³⁵

As I have argued in my work focusing on the life course of Black boys, their developmental challenges are inextricably tied to race and the treatment of them, their families, and their communities.²³⁶ My model of developmental equality is built on the recognition of the developmental barriers and challenges that undermine developmental capacity rather than

²²⁹ Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586 (2015).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 1607–08.

²³³ *Id.* at 1593–94.

²³⁴ *Id.* at 1593.

²³⁵ Ocen argues in another work that a similar pattern explains the criminalization of Black mothers, prosecuting them for drug offenses rather than providing treatment in a way never done for White women unless they are poor. Priscilla A. Ocen, *Birthright Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163 (2017).

²³⁶ Dowd, *Black Boys Matter*, *supra* note 73.

support it.²³⁷ But this bears constant focus and reinforcement as otherwise the face of “children’s” equality can too easily become either an imaginary neutral child or the preferred white child.

Keeping race, gender, and class central to the project of promoting equality and dismantling hierarchies among children is critical to avoid the domestication of a robust children’s equality doctrine. Attention is critical because of intersections between stereotypes and treatment of Black bodies, and other bodies of color, with gender and class.²³⁸ The wealth of race scholarship reminds us that these inequities begin in childhood and reproduce in the ecology that denies equal development to children of color through the undermining of their families and communities.

E. *Equality Redefined: The Example of Early Childhood*

Equality, equity, and dignity are co-constitutive of children’s equality.²³⁹ The consequences of this definition of substantive equality are perhaps best appreciated by a specific example. Ensuring developmental equality in children’s earliest years would translate into a comprehensive early childhood system that would include family supports (income support; safe, sufficient stable housing in an affirmative neighborhood setting; employment; childcare; medical/healthcare) that would ensure that families however structured would be strongly supported in their capacity to nurture children and support their maximum development.²⁴⁰ Early childhood care and early childhood education would be universally available and of high quality. Supports to further cognitive equality might include early literacy

²³⁷ DOWD, REIMAGINING EQUALITY, *supra* note 3; Dowd, *Black Boys Matter*, *supra* note 73.

²³⁸ See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (Vintage Books 2017) (1997); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012). These intersections include the treatment of Black mothers and Black families; policies toward fathers including fathers of color and low-income fathers; and the impact of mass incarceration, family wealth, and intergenerational economic inequality.

²³⁹ These sketches of the implications of this definition of equality are consistent with comprehensive policies that exist in other countries. See, e.g., HUDSON & KÜHNER, *INNOCENTI REPORT CARD*, *supra* note 89.

²⁴⁰ What I describe here is a comprehensive system for children, but ideally the systems are inclusive of all adults, not limited to adults with children. So, for example, systems of health care, economic support, and policing/public safety to support children’s equality should support the well-being of all.

and medical services to support parents. Attention to the social determinants of health would extend the support of parents and families prenatally, to ensure the highest level of prenatal care, but also to ensure attention to environmental factors that could negatively affect parents or their developing child either pre-birth or after birth. Families would be assured of economic support and of the ability to balance work and family. The support of families would be attentive to communities within which families are located. Equality defined as the same outcome and opportunity linked to maximizing individual capacity would incorporate sameness tied to outcomes and opportunities, providing the foundation in early childhood for equal social citizenship. Equity would require attention to each child's needs and context, and the ecology essential to their support (families and communities). Dignity would ensure the concrete actions necessary to valuing each child's humanity by the quality, individualization, multidimensionality, and intersectionality embraced in their support.

In the next Part, I identify children's rights as the framework for children's equality rights. The first Section identifies the arguments for children as distinct constitutional subjects that are the basis for an overarching children's rights doctrine essential to constitutional analysis. The second Section discusses the threads in existing constitutional cases supportive of children's rights that include children's equality rights.

III. CHILDREN'S EQUALITY AND CHILDREN'S RIGHTS

Developmental equality incorporates the evidence-based scientific knowledge of development along with critical examination of existing hierarchies that impose developmental inequities. Developmental equality envisions dismantling the pattern of subordination of some children and the privileging of others, in favor of providing all children with an equal ability to maximize their developmental capacity and opportunity. A robust equality principle, inclusive of equality, equity, and dignity, ensures that the goal of fairness is meaningfully implemented and measured to take account of current inequities but also build a structurally and culturally equal society for all children. This identification of the issues and of the means to address

them assumes that children have special and powerful claims to equality as constitutional subjects.²⁴¹

What remains is justifying why children have distinctive rights. Section A describes the theoretical basis and framework of children's rights. Section B identifies the threads of existing constitutional doctrine compatible with children's rights generally, and specifically, children's right to developmental equality.

A. *Children's Rights*

Why do children have distinctive equality rights? First, they are unique because they are dependent on adults for their development. Their needs give them an affirmative claim on social resources to ensure their developmental success. Second, they are vulnerable because of their lack of development, vulnerability that changes over time and must be balanced with their evolving capacities. It is an essential positive characteristic of development that is the foundation for their being and for their evolution. Third, they are valued and valuable because they are children. Their perspectives and understandings are unique; they are not simply becoming adults, or mini adults; they are themselves, in their own right. Their humanity is precious and valuable. Finally, they are our future; they join society and democracy, their neighborhoods and communities, as full social citizens when they reach adulthood. Their future role makes their development and their equality socially essential.²⁴²

The most articulate voice on children's rights is Barbara Bennett Woodhouse.²⁴³ In her most recent book, she points to the toxic ecology (physical and social) surrounding all children and its impact on their small worlds.²⁴⁴ Those small worlds are even more toxic when we look to poor

²⁴¹ On positive rights arguments, see generally Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J. FORUM 942 (2018) [hereinafter Guggenheim, *The (Not So) New Law of the Child*]. He has strongly argued that families are the best vehicle to serve children's interests. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005).

²⁴² See also on children's distinctive qualities, John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 313–17 (1969).

²⁴³ BARBARA BENNETT WOODHOUSE, *THE ECOLOGY OF CHILDHOOD: HOW OUR CHANGING WORLD THREATENS CHILDREN'S RIGHTS* (2020) [hereinafter WOODHOUSE, *ECOLOGY OF CHILDHOOD*].

²⁴⁴ *Id.*

communities of color, and the multiple barriers, roadblocks, and subordination that doom children just as clearly as if they had been marked at birth. Woodhouse orients her evaluation of children's rights and needs on an ecological model that she calls ecogenerist.²⁴⁵ It draws its inspiration from the work of Urie Bronfenbrenner, and it is foundational to my model of developmental equality.²⁴⁶ As Woodhouse notes, children are situated in levels of ecology, nested and interacting systems.²⁴⁷ Ideally those systems function synergistically to facilitate every child's well-being and maximum development. Asymmetry, toxicity, and inadequacy impact systems that affect the worlds in which children function and differentially affect their opportunity to develop to their capacity. As Woodhouse notes, the overarching system of ideas, the macrosystem, drives the structures, systems, and their interaction in the small worlds of children.²⁴⁸ A recognition of children's rights would mean a significant shift in the macrosystem that would include children's equality rights to equal developmental opportunity. Woodhouse enriches this overarching perspective by incorporating social and developmental knowledge of what children need, what works to support those needs, and what forces and policies, to the contrary, undermine children's development.²⁴⁹ The generist part of her model is the obligation of one generation to another; writ large, it is society's role in the holistic support of children and youth, critically accomplished by state structures and policies, although also dependent on private efforts and mutual support.²⁵⁰

The justification for children's rights, according to Woodhouse, is rooted in the uniqueness of childhood, and the needs and evolving capacities of children that translate when supported into the maximization of their developmental capacity. Grounded in the United Nations Convention on the Rights of the Child (CRC), her analysis nevertheless is firmly rooted in constitutional principles.²⁵¹

²⁴⁵ *Id.*

²⁴⁶ URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* (1979).

²⁴⁷ WOODHOUSE, *ECOLOGY OF CHILDHOOD*, *supra* note 243.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

[T]he special nature of childhood, as a time of inherent dependency and also of evolving capacity, gives rise to another way of classifying children's rights—as “needs-based” and “capacity-based” rights. . . . [F]ive core principles . . . should inform our thinking about children's rights: Privacy, Agency, Equality, Dignity, and Protection. . . . [R]ights to privacy and autonomy, and rights to protection and assistance, function as complementary elements in a larger theory of children's rights.²⁵²

This framework of constitutional principles is compatible with the CRC, and the CRC is consistent with American constitutional principles.²⁵³ Thus, Woodhouse argues, the CRC is a useful scaffold upon which children's perspectives and interests can be constructed.²⁵⁴ Because it has been adopted by every other country in the world, and implemented over a period of three decades, it offers a wealth of pragmatic guidance and interpretive choices regarding the functioning of children's rights on the ground.²⁵⁵ Woodhouse cites to the child-friendly version of the CRC as especially helpful to thinking about children's rights from children's perspective: “Rights' are things every child should have or be able to do.”²⁵⁶

Composed of fifty-four articles, the CRC is committed to core principles of non-discrimination, equality, and “fairness;” use of the “best interests of the child” as the guiding principle of all adults making decisions about children; the provision of positive support for children's development, and therefore the recognition of their economic, social, and cultural rights; and respect for the primary and essential role of the family. As Woodhouse notes:

The overarching principles of the CRC should inform and reshape our approach to the ecology of childhood. Among the innovations in these overarching principles are: (1) holistic approach to best interests; (2) a commitment that unites public and private spheres;

²⁵² *Id.* at 212–13 (summarizing ecogeneism); see also WOODHOUSE, HIDDEN IN PLAIN SIGHT, *supra* note 5.

²⁵³ WOODHOUSE, ECOLOGY OF CHILDHOOD, *supra* note 243.

²⁵⁴ *Id.*

²⁵⁵ *Id.*; see *Committee on the Rights of the Child*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> [<https://perma.cc/B75D-FN8C>].

²⁵⁶ WOODHOUSE, ECOLOGY OF CHILDHOOD, *supra* note 243, at 214 (UNICEF child-friendly version of CRC 2012).

(3) a focus on systems and systemic change; and (4) a developmentally informed approach to children's participation. Together they have great potential for renewing the ecology of childhood.²⁵⁷

The specific rights of the CRC include rights of protection, rights of voice and participation, special rights of children with disabilities and children who are refugees, and positive rights of support.²⁵⁸ Most important for the equality rights that I focus on in this Article is the intersection of principles of equality with rights of development and positive rights that create public obligations.²⁵⁹ Among the socio-economic rights included in the CRC are healthcare, education, cultural identity, and respect for the child's culture. As Woodhouse points out,

By bridging the divide between private and public responsibility, the CRC advances a more ecological understanding of children's rights. It gives support to the argument that children's interests are not marginal to the discussion of policy and *must* be considered as a primary element in our individual and collective actions affecting them.

. . . States Parties must do more than refrain from interfering in the privacy of the family; they must provide support and assistance. As in the ecological model, children are seen in social context, in relationship to their families, and to the surrounding culture and community, as they are embedded in intimate microsystems and are dependent on the external exosystems that can either sustain or fail them. The CRC, like the ecological model, recognizes that many other influences besides the family play a role in determining whether an environment is fit for or harmful to children.²⁶⁰

Woodhouse argues that children's rights require that all policy must be developmentally informed and respect evolving capacity.²⁶¹ She emphasizes

²⁵⁷ *Id.* at 220.

²⁵⁸ G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

²⁵⁹ The key intersecting sections for developmental equality in the CRC are Article 2 on the best interests of the child and Article 4 on equality rights. *Id.* at 2–4.

²⁶⁰ WOODHOUSE, ECOLOGY OF CHILDHOOD, *supra* note 243, at 222.

²⁶¹ *Id.* at 224.

the importance of solidarity and generativity in her ecogenerist model.²⁶² Strategically, she encourages focus on the microsystemic and exosystemic level,²⁶³ including both legal and non-legal approaches to changing the macrosystem that can be initiated at the local level.²⁶⁴ Woodhouse's conception of children's rights, particularly her framing of positive developmental rights, is succinctly captured in the statement by children themselves about their rights: "[A] world fit for children . . . is a world fit for everyone."²⁶⁵

Emily Buss's theory of developmental jurisprudence²⁶⁶ complements Woodhouse's ecological focus and reminds us that law does not solely operate in the macrosystem but functions very concretely in the lives of children.²⁶⁷ Buss argues law is a developmental agent, and as such, law should act in positive ways and do so equally for all children. "Children are not simply changing as they grow up. They are being raised, and laws, and legal actors, and all of us as participants in a democracy, play a role, for good or for ill, in that childrearing."²⁶⁸ The law, Buss argues, is therapeutic: law is a treatment provider. It is also developmental, a childrearer:²⁶⁹ law shapes how children grow up.²⁷⁰ Her normative vision is that "[t]he law should aim to minimize the developmental harm it imposes and maximize the developmental benefits it provides."²⁷¹ Buss describes the standard to be achieved as ensuring children are prepared for the exercise of rights and responsibilities, and law's developmental role should give priority to, and support, care as a collective good for "our" children.²⁷² Her concept of children's rights therefore mirrors the concept of preparation for social citizenship.

²⁶² *Id.* at ch. 13.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ A WORLD FIT FOR US, *supra* note 31, at 2.

²⁶⁶ Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 741 (2016).

²⁶⁷ *Id.* at 741. Her focus is particularly on kids and mental health, and the consequences of the actions of law in child welfare and juvenile justice settings for children's mental health. *Id.* at 750–51, 766–67.

²⁶⁸ *Id.* at 741.

²⁶⁹ *Id.* at 742.

²⁷⁰ *Id.* at 741.

²⁷¹ *Id.* at 752.

²⁷² *Id.* at 753, 756.

Buss reminds us also to evaluate children's rights as unique rights.²⁷³ Her approach would separate, as Woodhouse does, children's rights into its own category and perspective. The analytical mistake that the Supreme Court has made over and over, according to Buss, is asking what adult rights children should have, versus asking what rights children have as children.²⁷⁴ The most distinctive characteristic of childhood, she argues, is that "childhood is . . . a period of rapid change."²⁷⁵ During this period of change, the differences of children from adults include children's capacities, their fluid identities, and their circumstances of living within custodial relationships which affect their experiences, status, and opportunities.²⁷⁶ Because of these characteristics, the recognition that "children are different," according to Buss, needs to be elaborated in a different way, including the existence of children's positive rights as "obligations owed."²⁷⁷

One other advocate for children's rights, Anne Dailey, links children's developmental needs to "children's fundamental constitutional rights in the caregiving relationship."²⁷⁸ She identifies three forms of children's rights: due process protection against intervention in the family, protection of children's interests, and "most far-reaching, . . . children's affirmative constitutional rights to a minimum level of caregiving services from the state."²⁷⁹ Her claim of affirmative rights is a constitutional minimum grounded upon caregiving relationship rights.²⁸⁰

Dailey's positive rights claim is grounded in children's distinctiveness²⁸¹ and their needs:

²⁷³ Buss, *Constitutional Fidelity*, *supra* note 28, at 355.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 358. The emerging capacity of children, among other things, is the basis for minor's reproductive rights. Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 HARV. J.L. & GENDER 503 (2011); B. Jessie Hill, *Constituting Children's Bodily Integrity*, 64 DUKE L.J. 1295 (2015).

²⁷⁶ Buss, *Constitutional Fidelity*, *supra* note 28.

²⁷⁷ *Id.* at 357, 398–400. Connected to this developmental framing is a more nuanced notion of children's vulnerability. Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179 (2017) (detailing how the Supreme Court uses "vulnerability").

²⁷⁸ Dailey, *supra* note 28, at 2104.

²⁷⁹ *Id.*

²⁸⁰ *Id.* The notion of a minimum is similar to the idea of thresholds for basic capabilities identified by Martha Nussbaum, although the identification of core capabilities differs. See Dixon & Nussbaum, *supra* note 133.

²⁸¹ Dailey, *supra* note 28, at 2169.

What the Court missed in *DeShaney* is the fact that affirmative rights for children are necessary in some circumstances for children to acquire the very skills of autonomous choice that the Court in *DeShaney* seeks to protect. It is not that children have an absolute right not to be harmed. Rather, from a developmental perspective, children have a right to the minimum level of caregiving services necessary to ensure their physical safety.²⁸²

Dailey also argues children have affirmative rights because they always are in someone's custody, either parents or the state in its *parens patriae* role.²⁸³ Because they are subject to custodial care, they have a right to the custodial environments that they need.²⁸⁴ Dailey defines children's right as a right to a minimum, to good enough caretaking support.²⁸⁵ In addition, she advocates a minimum affirmative right to education, because education is essential to citizenship and autonomous choice.²⁸⁶

Central to the articulation of children's rights of Woodhouse, Buss, and Dailey is children's development. Development is a trigger for, and part of the rationale for, children's distinctive rights. In addition, development, defined as developmental equality, is one of children's substantive rights. While development is not the sum total of children's rights, it is at the core. My argument is that children's equality requires maximum development support for every child and the eradication of current hierarchies.

²⁸² *Id.* at 2170.

²⁸³ *Id.* at 2169–71.

²⁸⁴ *Id.* at 2171.

²⁸⁵ *Id.* at 2176. Her more recent work with Laura Rosenbury focuses on recasting family law, arguing for a reframing and reweighing of interests to value children in more aspects of their lives. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018). For youth driven initiatives and empowerment, see Cheryl Bratt, *Top-Down or from the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 YALE L.J. FORUM 917 (2018), for an argument in favor of youth-driven initiatives, using the South African example. For a critique of Dailey & Rosenbury, see Guggenheim, *supra* note 241. For a critique of care as a state obligation, see Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001) (whether support for mothers and children will cause unforeseen backlash).

²⁸⁶ Dailey, *supra* note 28.

Historically, children had no rights; indeed, they were considered the property of their parents.²⁸⁷ We no longer treat children like property, nor do we take the view that children have no rights, but we lack a coherent theory about their rights. Objections to being more explicit and comprehensive, and objections about adopting the CRC have focused on the danger this creates for parental rights.²⁸⁸ The short answer to this objection is that children's equality rights are not in conflict with parents' rights, they are in harmony.²⁸⁹ Where conflict might occur is not due to different goals of parents and children, but rather the manner in which the state supports children and how the state conceives of its role.²⁹⁰ To achieve the goal of children's equality would require major redistribution and provision of resources, which creates political challenge.²⁹¹ It also would be a "sea change" at the level of constitutional and state law, both of which strongly privilege parents to control children's lives.²⁹² Children's equality could lead to

²⁸⁷ Mintz, *supra* note 22, at 2; *see also* Susan Gluck Mezey, *Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953–92*, 27 *FAM. L.Q.* 307 (1993) (parent, child, and classification issues).

²⁸⁸ THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION (Jonathan Todres et al. eds., 2006) [hereinafter Todres et al. eds., THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD]; WOODHOUSE, HIDDEN IN PLAIN SIGHT, *supra* note 5.

²⁸⁹ Parents have the obligation and duty to raise their children as part of the right of family privacy. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). State support would better enable them to do so irrespective of their private resources, to ensure their children the opportunity to develop to their fullest capacity. Thus, supporting children's equality supports parents.

²⁹⁰ Maxine Eichner, *The Privatized American Family*, 93 *NOTRE DAME L. REV.* 213, 258–65 (2017) [hereinafter Eichner, *The Privatized American Family*] (theory of buffered spheres and the necessity of supporting the private family under a five-point plan).

²⁹¹ The correction of hierarchies would require political will and dedication of resources. For example, proposals for universal healthcare are regularly critiqued on the basis of cost. *See, e.g.*, Ronald Brownstein, *The Eye-Popping Cost of Medicare for All*, *ATLANTIC* (Oct. 16, 2019) <https://www.theatlantic.com/politics/archive/2019/10/high-cost-warren-and-sanders-single-payer-plan/600166> [<https://perma.cc/UG65-UY53>]. More comprehensive proposals to confront the intersecting systems responsible for children's inequalities would be even more costly, although justified. For example, see the justification for spending one percent of the federal government for children's needs. *ONE PERCENT FOR THE KIDS: NEW POLICIES, BRIGHTER FUTURES FOR AMERICA'S CHILDREN* (Isabel Sawhill ed., 2003).

²⁹² Alstott argues, "[T]he metric of equality should be whether each child's developmental conditions will leave her at the threshold of adulthood with a set of opportunities that meet the equality criterion and the capacity to exercise judgment and bring values to bear in the choice she makes." Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 *S. CALIF. L. REV.* 1, 13 (2008). She identifies the qualities of an equal opportunity state, but questions

intrusive regulation of the family to meet state goals, purportedly to achieve children's equality.²⁹³ This is a significant and critical concern that must be addressed in the implementation of children's rights. Instead of resistance to children's equality framed as a parent-child conflict, the more likely conflict is between some parents and the state (parents subjected to hierarchies similar to their children's hierarchies).²⁹⁴

Whether framed as rights or interests, children's constitutional position requires a distinctive approach that complements existing constitutional doctrine on parents and families. The conception of children's rights is one that reflects core constitutional principles as well as an evolving understanding of the family and the state, designed to incorporate and support children to become full adult citizens.

B. *Constitutional Cases: The Threads upon Which a Doctrine of Children's Equality Rights Can Be Built*

Children's rights are the framework within which children's equality rests. Their substantive equality, incorporating equality, equity, and dignity, requires developmental equality. Developmental equality ensures the support of each child to maximize their developmental capacity and therefore their equal opportunities and outcomes. Their equality rights require paying attention to identities and current hierarchies and engaging in necessary structural and systemic change. These positive rights thus require the state not only to refrain from harm or subordination, but to actively support the development of all children as empowered equal social citizens.

In this Section, I explore what constitutional threads exist as a foundation to sustain a coherent, robust framework of children's rights. That framework would be the foundation for judicial or legislative action

whether the family as family is inherently at odds with equality because families are unequal to each other and within families, parental autonomy undermines children's equality and liberty. She sees that a shift to give greater support to children would be a dramatic change. *Id.*; see also Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141 (2004). Katherine Franke is cautious about a more expansive state role. Katherine M. Franke, *Taking Care*, 76 CHI.-KENT. L. REV. 1541 (2001).

²⁹³ Alstott, *supra* note 292; Appell, *supra* note 292.

²⁹⁴ On state intrusiveness for some parents but not all parents, along familiar lines of hierarchy, see for example the analysis of Lenhardt, *supra* note 218; Bridges, *supra* note 216; *supra* Section II.D.

grounded in children's affirmative constitutional rights.²⁹⁵ There has been some recognition in judicial opinions of children's relational interests; my focus here is on their socio-economic interests, what they can demand from the state, or the state's responsibilities.²⁹⁶

Existing constitutional doctrine includes several threads that support a doctrine of children's rights, particularly their equality rights.

1. Children Are Clearly Valued in Constitutional Law. Most Often They Are Valued by Recognizing the Importance of Parents and Families.²⁹⁷

The family is foundational to society and to democracy.²⁹⁸ The importance of family, unarticulated in the Constitution, nevertheless is recognized in the doctrine of substantive due process and is the basis of concepts of fundamental rights.²⁹⁹ The importance of children is central to that perspective/doctrine.³⁰⁰ Many of the key constitutional cases regarding fundamental rights center around children and their well-being, and reinforce the critical role of family in their lives and development.³⁰¹

²⁹⁵ At the same time, it must be acknowledged that some constitutional cases potentially pose barriers that must be addressed. These include the rejection of education as a fundamental right, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and viewing parental rights doctrine as in potential conflict with children's rights. The most significant is the view that our Constitution is one of negative rights. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989). I address these problematic threads in the last part of this Section.

²⁹⁶ On the responsive state, see Eichner, *The Privatized American Family*, *supra* note 290; and the responsive state from a vulnerabilities lens, see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010).

²⁹⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Troxel v. Granville*, 530 U.S. 57 (2000); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Although not a constitutional case, I would also include in this pantheon *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). The high value accorded to families within children's rights is a core component of international law doctrines. See Barbara Bennett Woodhouse, *The Family-Supportive Nature of the U.N. Convention on the Rights of the Child*, in Todres et al. eds., *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD*, *supra* note 288.

²⁹⁸ *Meyer*, 262 U.S. 390; *Pierce*, 268 U.S. 510.

²⁹⁹ *Id.*

³⁰⁰ *Obergefell*, 135 S. Ct. 2584.

³⁰¹ See, e.g., *Meyer*, 262 U.S. 390; *Pierce*, 268 U.S. 510; *Bellotti v. Baird*, 443 U.S. 622 (1979); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006).

These cases establish a basic rule that parents' rights are fundamental, highly respected, natural, and sacrosanct.³⁰² Many of these cases involve controversies framed as parents versus the state, or state intrusion into the family or into parental decisionmaking.³⁰³ Such intrusion is highly disfavored, even when there are significant state interests, such as the interest in children's education in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.³⁰⁴ Other cases involve intra-familial disputes between parents or parental figures who disagree about children's best interests, and the role of the state as the referee or ultimate decisionmaker.³⁰⁵ The strong recognition of parental rights does not mean that parental rights are absolute or unreviewable, as evidenced by countless decisions about custody, parental timesharing, and the application of the best interests doctrine.³⁰⁶

The parental rights doctrine, however, obscures children's interests, and their relationship to the state. With respect to parents, children are lost in the recognition of parental and family rights, rendered largely constitutionally invisible. Doctrine assumes that children's and parents' interests are identical or parallel, and that parents are best situated to act on behalf of their children; or that children are not capable of knowing their interests or what is "best" for them.

Even when children are more visible, they quickly disappear. For example, in *Obergefell*, children are prominently mentioned in Justice Kennedy's majority opinion as one of the four reasons why marriage is such a significant status and privilege, and thus a fundamental right: marriage is the preferred relationship within which to have children, providing them with recognition, stability, and protection.³⁰⁷ Children, marriage, and family are interlinked in this analysis, a paean to marriage. But after this prominent

³⁰² *Troxel*, 530 U.S. at 65 ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). This is also reflected in the high standard required for termination of parental rights, and the obligation that the state provide counsel in involuntary termination cases, and the clarity required in voluntary relinquishment for adoption.

³⁰³ See, e.g., *id.* at 65–67; *Prince v. Massachusetts*, 321 U.S. 158 (1944).

³⁰⁴ *Meyer*, 262 U.S. at 399–400; *Pierce*, 268 U.S. at 534–35.

³⁰⁵ In *Palmore*, *Adoptive Couple*, and *Troxel*, the state is determining resolution of controversies between parental figures or quasi-parental figures.

³⁰⁶ *Troxel*, 530 U.S. 57.

³⁰⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

statement, children disappear from the analysis.³⁰⁸ Marriage and family dominate from the perspective of the adult pair.³⁰⁹ Had a children's rights perspective been sustained, it might have built upon and enriched this slender foundation. The interests of children might be parallel but might be different or simply distinctive from those of their parents. Had children been considered throughout *Obergefell*, their interests would have been further explored.³¹⁰

Recognizing children's rights as implicit in the well-established parental rights doctrine makes sense and enriches the analysis of parental rights cases. Re-reading several cases with a children's rights perspective allows us to explore what this might mean. For example, in *Troxel v. Granville*, the case involving a dispute between a parent and grandparents over visitation, a children's rights perspective might consider the grandchildren's experience with, and the meaning attached to, their relationship with their grandparents.³¹¹ It might also place that relationship in context with their primary family at the time of the decision, which included their adoptive father.³¹² The constitutional issue raised in *Troxel*, regarding the right of a parent to regulate the other familial relationships in their children's lives, thus might not be solely viewed by comparing the mother to the grandparents, but also by considering the perspective and interests of the children with respect to all of the significant adults in their lives. Similarly, in *Michael H. v. Gerald D.*, involving the claim of a biological father to sustain his social relationship with his child, who he had lived with and parented, after the mother reconciled with her husband, one might consider the child's relationship with all relevant parental figures, including the child's mother, her mother's husband, and her biological/social father.³¹³ The majority opinion dismissed consideration of the child's constitutional

³⁰⁸ Catherine Smith, *Obergefell's Missed Opportunity*, 79 L. & CONTEMP. PROBS. 223 (2016) (*Obergefell* could have put children more front and center in the opinion, but the case does create future opportunity); see also Susan Hazeldean, *Anchoring More than Babies: Children's Rights After Obergefell v. Hodges*, 38 CARDOZO L. REV. 1397 (2017) (linking to rights of immigrant children).

³⁰⁹ *Obergefell*, 135 S. Ct. 2584.

³¹⁰ Only in *Troxel*, does Justice Stevens discuss this in his dissenting opinion. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), where the interests of the child are squarely raised, they are nevertheless dealt with dismissively.

³¹¹ *Troxel*, 530 U.S. 57.

³¹² *Id.* at 86–90.

³¹³ *Michael H.*, 491 U.S. 110.

interests, but reconsideration might evaluate the evidence of the guardian ad litem who had concluded that denial of the child's relationship with her biological father would harm the child.³¹⁴ Finally, in *Adoptive Couple v. Baby Girl*,³¹⁵ a case involving a conflict between prospective adoptive parents and the biological father, where the child had spent significant time living with all parties in the case, a children's rights perspective might encourage consideration of the child's relationships with all functional parents. In addition, one might consider the impact of framing the issue as one set of parents over another at a moment in time, a framing focusing on adult interests in their relationship with the child, as opposed to seeing the issue in terms of its impact on the future development of the child.

2. Children's Developmental Interests Are Acknowledged by Constitutional Recognition of Parental Responsibility, but That Responsibility Is Typically Framed as Exclusively Familial. Privatization Is Seen as Protecting the Family, but It Withdraws Support from Children, by Minimizing Responsibility for Children of the State or Broader Society.³¹⁶

Existing constitutional doctrine both overvalues and undervalues families with respect to children's development. Our rendering of children as hidden and families as privatized, protected structures of responsibility suggests we think respect for family renders children "equal enough." In other words, if the respect for parental and family privacy is equal, and increasingly broad concepts of "parent" and "family" are inclusive of the range of family forms and diversity of family cultures within which children grow and develop, each child benefits from family privacy. Family privacy honors and respects family, but family privacy is problematic in two ways. First, it is questionable whether all families are respected. The sharply different support for marital and non-marital families (and therefore for the

³¹⁴ *Id.*

³¹⁵ 570 U.S. 637 (2013) (decided on statutory grounds).

³¹⁶ Susan Frelich Appleton, *Obergefell's Liberties: All in the Family*, 77 OHIO ST. L.J. 919 (2016) [hereinafter Appleton, *Obergefell's Liberties*]. Appleton notes that one impact of the interplay between constitutional law and family law is the privatization of responsibility. While family forms may expand, family responsibilities, she argues, remain privatized. *Id.*; see also Susan Frelich Appleton, *How Feminism Remade American Family Law (And How It Did Not)*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 426 (Robin West & Cynthia Grant Bowman eds., 2019).

children within those family forms),³¹⁷ and the breakdown of respect for family and parents when children are raised in families that are poor and nonwhite belies the notion that all families are equally respected.³¹⁸ To the contrary, in the name of protecting or helping children, the state can be egregiously intrusive.³¹⁹ Second, the doctrine of family privacy relieves the state and society of their responsibility to children's development. Privatization and respect for the importance of family, however, might be read in a different way, to enhance the argument for children's rights. Children's rights compare children within different families who have common developmental needs. Families must be equal, or equally supported, for children to be equal. Limited state intervention should not mean limited state support. Rather, the responsive state would ensure the necessary support for every child, starting with essential support to their primary developmental ecology, their family. This means reading the parental and family rights cases with children's interests in mind.

Moore v. City of East Cleveland is an example of a case that exemplifies the critical ecology of parents and family for children; with respect to social and economic rights, their interests are intertwined.³²⁰ The grandmother in that case, who fought to prevent removal of her grandson from her home under a zoning ordinance, had also earlier brought suit to ensure that he could be enrolled in school.³²¹ Her claim of "family" respect and protection

³¹⁷ Bridges, *Towards a Theory of State Visibility*, *supra* note 216 (intrusion into the lives of Black mothers and fathers); Lenhardt, *Race, Dignity, and the Right to Marry*, *supra* note 27 (nonmarital families article).

³¹⁸ Bridges, *Privacy Rights*, *supra* note 216; Bridges, *Towards a Theory of State Visibility*, *supra* note 216; Hatcher, *supra* note 88. It is important to recognize the differential burdens of the poor and families of color. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977). *Smith* is a case about removal of foster kids from foster parents, and the rights of those parents. The case acknowledges the critique of intrusiveness due to poverty and disproportionality by race, and that recognition of foster parents as coequal to "natural" families would disproportionately affect poor and Black families. The opinion stays away from an analysis of the child's perspective, which was the basis for the lower court's ruling in favor of foster parents. *Id.*

³¹⁹ *Dandridge v. Williams*, 397 U.S. 471 (1970) (state can cap welfare based on the Aid to Families with Dependent Children at \$250.00 per month regardless of the family's size or need). This is a key case, like *DeShaney*. The Court permits the state not only to provide inadequate assistance, but to discriminate among poor children by upholding the family cap, in effect paying less per capita to children in larger families, allegedly as a legitimate means to encourage employment and discourage dependency. *Id.*

³²⁰ *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

³²¹ *Id.*

could be strengthened by consideration of her grandson's independent interests in his "family."³²² In addition, the Moore family interacted with systems essential to her grandson's support, within a community important to the support and valuing of the family. Imagine a responsive state instead of an intrusive one that twice infringed on the needs of this child and his family.³²³

The ecology of family is critical, based on the developmental data, to children's growth. To ensure a healthy ecology for every child, families must be supported in order to support children. An argument focused on children's equality does not mean separating children from their parents, in policy or in fact. Rather than using the core parental and family rights cases to absolve the state from responsibility, they should be used to justify support of family, and make it positive support that enhances the strength of the communities in which families are embedded.

3. A Basis for Broad Support for Children as a Social and State Responsibility, Not Solely a Private Family Responsibility, May Be Found in the Doctrine of *Parens Patriae*.

Parens patriae is the state's role to ensure "the interests of society to protect the welfare of children It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."³²⁴ *Parens patriae* thus not only acts as a limitation on parental rights, but also is a basis for state and social responsibility for children. As a doctrine that has evolved considerably over time, *parens patriae* would be considerably enhanced by recognition of children's rights and interests.³²⁵

³²² *Id.* For a re-reading of *Moore*, see Robin A. Lenhardt & Clare Huntington, Foreword, *Moore Kinship*, 85 FORDHAM L. REV. 2551 (2017). On the importance of caregiving to children, see Dailey, *supra* note 28; Eichner, *The Privatized American Family*, *supra* note 290.

³²³ See discussion *supra* text accompanying notes 298–300 on the dangers of the intrusive state. See, e.g., *Dandridge*, 397 U.S. 471.

³²⁴ *Prince v. Massachusetts*, 321 U.S. 158 (1944). This interest of the state is not negated by a claim of religious practice. *Id.*

³²⁵ The doctrine has evolved from hierarchical and patriarchal concepts of the state and of the family; in the modern welfare state, one of the key roles of the state is care for the well-being of children. See Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 526 n.45 (1996).

For example, the role of the state as protector might be recast or refocused on children's equality, to protect children against discrimination and enhance their equality interests.³²⁶ The state within its *parens patriae* role could also act affirmatively on behalf of society to support children, particularly with respect to education, health, and limiting children's employment.³²⁷ Each of these affirmative acts by the state represents a recognition of the responsibility of the state and society in general for the well-being and development of children. This responsibility is framed as achieving maximum opportunity, not a minimum.³²⁸ A children's rights doctrine would more clearly elevate this role of the state from a voluntary to a mandatory responsibility and would ensure that support would be informed by both developmental and equality interests of children.

³²⁶ *Palmore v. Sidoti*, 466 U.S. 429 (1984). Abuse and neglect doctrines or involuntary termination of rights are instances where the state is cast as the protector of children. *Santosky v. Kramer*, 455 U.S. 745 (1982). In *Santosky*, the daughter was removed first; then son was removed ten months later; and when a third child was born, the child was removed three days after birth. The opinion fails to account for the collective and individual perspectives of the three children, and more particularly, why only one child was initially removed from the parent's care. The Court describes this as "a *parens patriae* interest in preserving and promoting the welfare of the child." *Id.* at 766. The state plays a similar role when the interests of parents and children are in conflict, to ensure that parents do not abuse their power. *Parham v. J.R.*, 442 U.S. 584 (1979). In these consolidated cases, the Court considered the admission of children to mental hospitals upon the recommendation of their parents. The children were quite young: J.L. was six years old when admitted; J.R. was seven years old. *Id.* The articulation of parental rights and interests in this case is quite strong; children's liberty interests are recognized but combined with parental rights. The state also acts as protector when ensuring that children are protected in judicial proceedings consistent with constitutional due process guarantees. See also *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (upholding procedure for child witness in child abuse case as not in conflict with the Sixth Amendment Confrontation Clause, based on the state's interest in the well-being of the child; discussion of the state's "transcendent interest in [] the welfare of children").

³²⁷ *Prince*, 321 U.S. 158. See also the education cases, *Brown v. Board of Education*, 347 U.S. 483 (1954); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

³²⁸ *Supra* text accompanying notes 122–123, 135–137.

4. Children Are Clearly Recognized in Constitutional Law as Different from Adults.³²⁹

Although children are recognized as different from adults in constitutional law, still lacking is a more coherent and comprehensive articulation of their rights, and the rationale for their distinctive rights. The classic articulation of the basis of children's difference is a three-part standard. Three "reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults [are]: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."³³⁰ This is the basis for treating children in some instances as less than full constitutional subjects.³³¹

Children's difference has evolved from judicial notice to grounding in interdisciplinary developmental science. This has led to a more nuanced developmental perspective especially with respect to adolescents.³³² The cases include some that rest on children's lack of capacity based on this developmental perspective,³³³ and others that recognize adolescents' capacity to make independent choices.³³⁴ This recognized developmental perspective invites a fuller, more expansive use of developmental scholarship that reflects age-based general differences, but also understands development as a moving target, rather than seeing children as

³²⁹ "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979). This observation, of course, is but the beginning of the analysis. The Court long has recognized that the status of minors under the law is unique in many respects. "As Mr. Justice Frankfurter aptly put it: 'Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.'" *Id.* at 633–34.

³³⁰ *Id.*

³³¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *see also* *Ginsberg v. New York*, 390 U.S. 629 (1968) (distinctive role of the state in regulating to limit access of children to particular information; *parens patriae* role of the state).

³³² *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

³³³ *See also In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966); *In re Winship*, 397 U.S. 358 (1970).

³³⁴ *Bellotti*, 443 U.S. 622; *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006).

undifferentiated.³³⁵ The developmental perspective, in other words, is present in constitutional law but merits expansion.³³⁶ The use of a developmental frame so far primarily has been to understand children but not as yet to recognize children's development rights.

Beyond its use to evaluate capacity,³³⁷ development should be used in a different way—to identify needs, but also to identify and evaluate the needs of individual children. Furthermore, developmental research and perspective, critically evaluated, might also be used to evaluate the key systems that impact children. Of critical importance to the broad use of the developmental perspective is to use a framework that understands that the process of development is not neutral, because the context for all children is not neutral.³³⁸ Specifically, the context for children of color currently is strongly negatively influenced by racism, creating challenges and barriers that impact children's equality because their developmental path is affected by identity.³³⁹ The developmental perspective is one place where formalized, inadequate notions of race and racism might be addressed, including comprehending how race functions in children's lives.³⁴⁰ A more nuanced development perspective should make the inequities clearer, and the responsibility of society and the state also clear: to achieve every child's right to maximize their developmental capacity, and equality.

5. Children's Equality Rights Are Distinctive and Unique Due to Their Developmental Interests, and Equality Among and Between Children Has Been Recognized.

The distinctive, affirmative equality rights of children are linked to their developmental needs and the scope of the obligation to them, that every

³³⁵ DOWD, REIMAGINING EQUALITY, *supra* note 3; *supra* Part II.

³³⁶ WOODHOUSE, HIDDEN IN PLAIN SIGHT, *supra* note 5.

³³⁷ *Supra* text accompanying notes 332–333 (juvenile justice case); *supra* text accompanying note 334 (reproductive rights case).

³³⁸ *Palmore v. Sidoti*, 466 U.S. 429 (1984). Elements in this decision can be read to establish a state duty to children regarding race, and the obligation that the state cannot directly or indirectly reinforce bias through law.

³³⁹ *Supra* text accompanying notes 108–117.

³⁴⁰ This is an area of need and caution, as epitomized by the specific instance of how courts and commentators read the doll studies in *Brown*, the erasure of race in many family law cases, and the undermining of welfare rights.

child should be supported to their maximum development. Children's equality rights are supported by two lines of constitutional cases, those dealing with illegitimate/non-marital children, and with public education.

The illegitimacy cases, involving challenges to state statutes that denied support or inheritance rights to non-marital children, are remarkable for their judicial evolution from a simple rationality argument to a more careful articulation about what is wrong with these classifications.³⁴¹ The cases are a part of a broader dialogue about equal protection analysis and how different classifications trigger ever increasing levels of scrutiny.³⁴² Illegitimacy is a state created identity that impacts economic support.³⁴³ In *Trimble v. Gordon*, the culminating case of this evolution in analytical standards,³⁴⁴ a now developed articulation of why such classifications are wrong is articulated: Children are innocents, dependents, reliant on others for their support; they are equal in that dependency.

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

³⁴¹ *Levy v. Louisiana*, 391 U.S. 68 (1968) (wrongful death of the parent); *Gomez v. Perez*, 409 U.S. 535 (1973) (child support); *Clark v. Jeter*, 486 U.S. 456 (1988) (child support and paternity and statute of limitations); *Trimble v. Gordon*, 430 U.S. 762 (1977) (intestate succession); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) (wrongful death of the child). This area of doctrine is not completely consistent. See *Labine v. Vincent*, 401 U.S. 532 (1971); *Mathews v. Lucas*, 427 U.S. 495 (1976).

³⁴² Illegitimacy was the origin of intermediate analysis under equal protection.

³⁴³ *Clark*, 486 U.S. 456; *Glonn*, 391 U.S. 73; *Gomez*, 409 U.S. 535; *Labine*, 401 U.S. 532; *Levy*, 391 U.S. 68; *Trimble*, 430 U.S. 762.

³⁴⁴ 430 U.S. 762. The Court rejects strict scrutiny as necessary, without explaining why, but says the scrutiny will nevertheless be strong; at the same time, it says the mere statement of a legitimate state purpose (support of families) is not enough. *Id.* at 767. Rather, the state has to show how this classification serves that end (so the court is distancing itself from *Labine*). *Id.* at 769. The Court then rejects the family support argument as illegitimate/unsupportable because to do so burdens children who had nothing to do with their parents' decision. *Id.* at 769–70.

The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.³⁴⁵

These cases stand for the irrationality of hierarchies among children because all children have needs that must be addressed. They are central to an argument for children's equality. The principle of the dependency of children and their equality in that dependency is the thread that emerges in these cases, beyond the notion that labelling them based on their parents' marital status is irrational and unjustified. This is a children's rights position, the closest we come to examining issues through children's perspective and with awareness of their dependency, particularly here, their economic dependency.

Similarly, the education cases establish a principle of children's equality with respect to education, one of the most critical developmental supports provided to children. *Brown v. Board of Education* remains a key equality case for children, even with its shortcomings as applied.³⁴⁶ In *Brown*, the Court assumes that white schools are all equal and superior to Black schools. That superiority exists even in the face of "objectively" equal but separate schools. The mere separation of children by race is inherently unequal.³⁴⁷ The unspoken assumption is that white schools are better, and also that integrated schools will be equal schools. Once you open the schoolhouse door, the Court assumes the outcome will be equality; an equality not only of bricks and mortar, but also of culture and meaning.³⁴⁸ The Court views the only children harmed as Black children because it understands that is the meaning of separated schools whether equal by objective measures or not.³⁴⁹ Inherent even in that limited view is the replication of privilege for white children as part of the process of creating stigma and difference. Segregation is not a formalized system; it is a totalized system. Ending it requires

³⁴⁵ *Id.* at 769–70 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (footnote omitted)).

³⁴⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

³⁴⁷ *Brown*, 347 U.S. at 493.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

achieving equality that is substantive, not simply formal. *Brown* is a great case, a critical case, but its meaning must be redefined.³⁵⁰

Cases applying *Brown* struggle with its meaning.³⁵¹ Two of those cases are particularly important to children's equality rights. In *San Antonio v. Rodriguez*, the Court refused to invalidate the Texas school financing system, despite its unequal allocation of funds to school districts along wealth lines.³⁵² The Court failed to recognize wealth discrimination or class status as triggering higher scrutiny; found that no child was deprived of an education, and implied any such right at most would be to a minimum or adequate education; and refused to recognize education as a fundamental right, although it was recognized as incredibly important.³⁵³ In dissent, Justice Marshall makes arguments consistent with the concept of developmental equality.³⁵⁴ He would find a fundamental right to education rather than wait for the legislature to do this while the harm continues to children.³⁵⁵ He grounds his analysis in focusing on children. Education's importance to children is linked to other rights, particularly to preparing them to exercise their political rights, rather than the developmental argument with which he began.³⁵⁶

On the other hand, *Plyler v. Doe* links educational rights to the equality rights recognized for non-marital children, rejecting the exclusion of undocumented children from Texas schools.³⁵⁷ Sanctioning children by denying them an education is treated as parallel to marking children born outside of marriage as undeserving of support.³⁵⁸ Moreover, the nature of the deprivation is seen as especially egregious. Even if education is not recognized as a right, in *Plyler*, the Court seems to treat it so in all but name.³⁵⁹ It is recognized as critically important to the child and society; as

³⁵⁰ In work in progress, I argue that *Brown* is capable of being read in a far more radical way. *Radical Brown* (work in progress).

³⁵¹ *Parents Involved in Cmty. Sch.*, 551 U.S. 701.

³⁵² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Plyler v. Doe*, 457 U.S. 202 (1982).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

the means to political participation and group and individual equality.³⁶⁰ Denial imposes illiteracy and inability to contribute. This is essentially an argument for the concept of social citizenship for children. As with the illegitimacy cases, the children here are visible and central, not subsumed under the rights or interests of their parents.³⁶¹ The strength of the *Plyler* decision suggests that there is real potential to work around, limit, or override *Rodriguez*, and return to the robust potential of *Brown*.³⁶²

6. Challenges to Children's Rights Remain.

I have identified the basis for support of children's rights, but it is important to acknowledge what stands in the way. First, the rejection of education as a fundamental right in *Rodriguez* is an unavoidable barrier to the affirmative rights of children that must be addressed.³⁶³ I would argue, as have others, that the case was wrongly decided.³⁶⁴ Alternatively, the scope of those cases might be minimized in a way that would still permit recognition of children's equality rights. This implicates the meaning and application of *Brown*,³⁶⁵ requiring reexamination of the meaning of equality in that case and its implications for current severe educational inequalities that stymie children's development and create hierarchies among children.

Second, the parental rights doctrine, which supports the critical role of families to realize children's rights, has historically been raised in resistance to children's rights.³⁶⁶ The ability to recognize and balance multiple interests,

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² For a sampling of the commentary critical of *Rodriguez* plus a broad notion of educational equality, see, for example, Camille Walsh, *Erasing Race, Dismissing Class: San Antonio Independent School District v. Rodriguez*, 21 BERKELEY LA RAZA L.J. 133 (2011); Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 L. & INEQ. 81 (2006); Maurice R. Dyson, *Rethinking Rodriguez After Citizens United: The Poor as a Suspect Class in High-Poverty Schools*, 24 GEO. J. ON POVERTY L. & POL'Y 1 (2016).

³⁶³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

³⁶⁴ For scholarship critical of *DeShaney*, see *infra* note 372. For scholarship critical of *San Antonio*, see *supra* note 362.

³⁶⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³⁶⁶ Indeed, this was the primary argument raised against signing onto the CRC. *Supra* text accompanying note 288. The United States' outlier status as the sole country that has not signed on to the CRC suggests these are arguments that it is time to revisit. Even more so with the passage of time, the fears raised regarding the CRC are unfounded.

however, is a core principle of constitutional analysis that can encompass recognition of children's rights together with the strong interests of parents.³⁶⁷ Furthermore, recognition of children's rights, within a concept of a responsive state, would facilitate the role of parents, not trample upon parental rights or intrude upon family privacy, by making it essential that support for children is not simply a private responsibility.

The most challenging constitutional interpretation to children's equality rights, however, and to children's rights generally, is the view that the Constitution only recognizes negative rights.³⁶⁸ In *DeShaney v. Winnebago County Department of Social Services*, the Court held that a child had no claim for the state's failure to protect him from his abusive father, despite multiple reports of child abuse and investigations substantiating the abuse. The Court found that the state had done no harm because it had violated no duty; the harm came from a private actor. In defending this analysis, the majority famously states that the Constitution protects only negative rights; it does not confer positive rights.³⁶⁹ In the subsequent case of *Castle Rock v. Gonzales*,³⁷⁰ when a police department failed to act to do anything after a parent violated a custody and protection order, a claim framed to bypass *DeShaney* was rejected as well.³⁷¹ Here, as in other cases, the interests of the children were subsumed under other arguments; they are not visible in their own right and from their perspective.

A wealth of commentary has argued why these cases were wrongly decided.³⁷² The involvement of the state in *DeShaney* and *Castle Rock* argues for state responsibility once children have been identified as at risk. The trigger of obligation in those cases is clearly sufficient. The claim of solely negative rights in the Constitution has never addressed the children's rights argument that I am making here. Instead of a right of protection, the children's equality claim is one of equal developmental support. This would require comprehensive policy and structural change, not the identification

³⁶⁷ See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

³⁶⁸ *Appleton, Obergefell's Liberties*, *supra* note 316, at 919.

³⁶⁹ *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

³⁷⁰ *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

³⁷¹ *Id.*

³⁷² For critique of *DeShaney*, see Rebecca Aviel, *Restoring Equipose to Child Welfare*, 62 HASTINGS L.J. 401 (2010); for critique on *Castle Rock*, see G. Kristian Miccio, *The Death of the Fourteenth Amendment: Castle Rock and Its Progeny*, 17 WM. & MARY J. WOMEN & L. 277 (2011); Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, 14 GEO. J. GENDER & L. 43 (2013).

of particular children at risk of harm. In the area of equality rights, the state's obligation is to children as a group, both to end a policy of differentiation, hierarchies, subordination, and privileging, but also to require that it affirmatively ensure developmental support. It is the state acting not as the protector of individual children, but as the supporter of all children, facilitating their development, and ensuring that each child is supported equally.

It is important to remember that our case law includes dissenting opinions that interpret our Constitution to include the ability to reach private action, embrace social equality as an obligation of the state, recognize the necessity of affirmative action to reverse the depth of racism and structural discrimination, and recognize that patterns of discrimination/disparate impact are sufficient to trigger dismantling subordinating policies or structures.³⁷³ These dissents are not a radical fringe, but embody a principled basis for doctrine. Dissents historically have paved the way for emerging rights.³⁷⁴ Following the path of constitutional dissents at the very least reminds us that we are not bound to our current doctrine.

Equally important, we might begin a positive rights argument with *Strauder v. West Virginia*.³⁷⁵ In that case, decided early in the interpretation of the Equal Protection Clause of the Fourteenth Amendment, the Court clearly acknowledged the affirmative meaning of the equality guarantee: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right . . ." ³⁷⁶ *Strauder* was acknowledged in *Brown* as the core of the affirmative right to equality recognized for children.³⁷⁷ *Strauder* says much more. Not only does it recognize the constitutional duty of the state to act, but the case also broadly defines the equality to be achieved. *Strauder* represents a clear recognition that equality is not a formal status but a meaningful sociopolitical state of

³⁷³ DOWD, REIMAGINING EQUALITY, *supra* note 3, at 115–35.

³⁷⁴ Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PENN. J. CON. L. 1 (1999).

³⁷⁵ 100 U.S. 303 (1879); *see also* *Virginia v. Rives*, 100 U.S. 313 (1879); *Ex Parte Virginia*, 100 U.S. 339 (1879).

³⁷⁶ *Strauder*, 100 U.S. at 307–08.

³⁷⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

being that requires positive action to replace subordination and its consequences.³⁷⁸

For children, positive rights are essential to prevent reproducing inequality. Positive rights constitute a distributive argument grounded in the meaning of equality. Children's distinctive place in democracy should be a basis to transcend any judicial hesitation to recognize the necessity of judicial action.³⁷⁹ Affirmative legislative action, likely to be far more comprehensive, is clearly unhampered by these issues.³⁸⁰

CONCLUSION

The importance of children's rights and their equality is undeniable. These rights are essential to every child's future and their relationship with each other. It is critical to adults to fulfill their responsibility to all children because of the value of each child to all of us; and even, selfishly, to the well-being of people who are now adults and will someday be supported by today's children.

How can we justify anything less than equality? How would we explain this, to a child? Imagine, to the contrary, a world with every child treated with equality, equity, and dignity. Imagine a world with every child fully supported to become a productive, engaged citizen at the threshold of adulthood. Imagine children gathered at that threshold. When we pay particular attention to the identities of who is there and look for the children who have been historically at the bottom, what if all children are there, standing together, equal as when they were born. Then we are closer to making a world fit for children, and ultimately, a world fit for everyone. Our challenge is to fuse that vision to mechanisms that support rather than intrude, that empower rather than subordinate, that equalize all rather than prioritize some.

³⁷⁸ *Strauder*, 100 U.S. at 307–08.

³⁷⁹ Aoife Nolan, *Economic and Social Rights, Budgets and the Convention on the Rights of the Child*, 21 INT'L J. CHILD. RTS. 248 (2013); NOLAN, CHILDREN'S SOCIO-ECONOMIC RIGHTS, *supra* note 30, at 43–92.

³⁸⁰ Liu, *Education, Equality, and National Citizenship*, *supra* note 30.