2023

"Children's Equality Law" in the Age of Parents' Rights

Catherine E. Smith

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I. INTRODUCTION

I am issuing a rallying cry that the constitutional law canon be re-written from a children's rights perspective. The challenge may seem daunting, unrealistic, and naïve. It may also be unpopular because scholars and jurists across the political spectrum balk at the mere invocation of young people's rights. That very unpopularity has left the field of children's rights a relatively blank slate. The field begs for a creative, critical, and intersectional vision that centers young people in a framework that has far too long prioritized adults.[1] This adult prioritization, due in no small part to family law's parents' rights focus, imposes a chilling effect on a jurisprudential engagement with children's constitutional protections, including their Fourteenth Amendment equal protection rights.

The Equal Protection Clause of the Fourteenth Amendment was designed to abolish laws that suggest a "kind of 'class or caste' treatment" by imposing "special disabilities upon groups disfavored by virtue of circumstances beyond their control."[2] Yet, neither modern equal protection nor family law recognizes that children—and their rights—play an integral role in ensuring the nation's fidelity to its democratic ideals.

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1. Tanya Washington, *In* Windsor*'s Wake: Section 2 of DOMA's Defense of Marriage at the Expense of Children*, 48 IND. L. REV. 1, 36 (2014) ("'Minors, as well as adults, are protected by the Constitution and possess constitutional rights.' However, the scope and substance of those rights are not clearly defined, and are often obscured by parental rights." (footnote omitted)); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1463–64 (2018) ("Children's rights . . . remain relatively limited and qualified despite language in Supreme Court decisions suggesting that children broadly enjoy constitutional rights."). *But see* CONST. OF THE REPUBLIC OF S. AFR. Ch. 2, § 28.

2. Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982). The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

In an area that "lacks focus, vision, substance, and unifying principles," it is time to conceptualize the field of what I call "children's equality law."[3] One notion of children's equality law could include young people's substantive due process and equal protection rights, as well as any blended concepts, such as the right to dignity.[4] An even broader conceptualization could invoke a panoply of young people's social and civil rights, including many that have yet to be advanced or recognized.[5] For today, I explore a narrower inquiry: What is the Equal Protection Clause's obligation to young people, especially children whose unfair treatment creates and maintains group-based hierarchies in American society?[6] There are few answers.

I argue that relying on the assumption that *all* parents have the political power to protect their children, ignores the unequal political power between and among groups in American society. There are times when children must possess their own rights to protect themselves because their parents do not have the political power to act in their best interests.[7]

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3. Catherine E. Smith, Brown*'s Children's Rights Jurisprudence and How It Was Lost*, 102 B.U. L. REV. 2297, 2300 (2022).

4. *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323, 1325 ("[T]he surest principle that emerges from the dignity line of cases is recognition of an intimate relationship between substantive due process and equal protection guarantees of the Fourteenth Amendment."); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (explaining the *Obergefell* decision "tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity.").

5. *See, e.g.*, Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual Gender Parenting, and Biology*, 28 LAW & INEQ. 307, 309 (2010) (explaining an undeveloped area in "the legal rights of those who face discrimination because of their relationship to or association with gays and lesbians, including children in same-sex families"); *see* Brief of Amici Curiae Scholars of the Constitutional Rights and Interests of Children in Support of Respondents at 10–18, Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 6997161 (articulating how discrimination against parents impacts the relational and associational interests of children).

6. Smith, *supra* note 3, at 2299 ("After all, free and independent Black children have always been perceived as a significant threat to White supremacy, just as their subjugation has been one of the most powerful and effective means to uphold it."); *see generally* Catherine Smith, *A Revival: Brown v. Board of Education's Children's Rights Legacy* (on file with author) (arguing *Brown* shattered the constitutional silence about the exploitation of Black children to create and maintain a racial caste).

7. There also may be time when parents lack the political will to act to protect their children from harm. The author offers climate change and gun violence as examples of current events that disproportionately impact children, yet adults have failed to collectively intervene to stop them. *See* Smith, *supra* note 3, at 2301; *The Climate Crisis is a Child Rights Crisis: Introducing the Children's Climate Risk Index*, UNICEF 4 (Aug. 2021), https://www.unicef.org/media/105376/file/UNICEF-climate-crisis-child-rights-crisis.pdf [https://perma.cc/ABT7-A3PX] ("Children bear the greatest burden of climate change. Not only are they more vulnerable than adults to the extreme weather, toxic hazards and diseases it causes, but the planet is becoming a more dangerous place to live."); Robert

In this Article, I will briefly highlight the meager doctrinal landscape for children's equal protection rights. I will then argue that the current family law system, relying on parents to act in the best interest of children to protect them, falls far short in a society built upon group-based hierarchies. Sometimes, parents will not have the political power to act in their children's best interest to intervene to stop their unequal treatment at the hands of state and private actors. In fact, several landmark cases demonstrate that often out of necessity, children's rights play a pivotal role in ensuring our nation's fidelity to its aspirational equal protection values. In these cases, children invoked their own rights to protect themselves and in doing so, provided a constitutional back-stop for group-based discrimination. Finally, this Article will briefly explain the importance of developing the field of children's equality law.

II. CHILDREN'S MEAGER EQUAL PROTECTION LANDSCAPE

There is a meager understanding of equal protection law and its parameters for children because constitutional law relies heavily on parents' rights. The Supreme Court has yet to decide if children as a class should be deemed "suspect" or "quasi-suspect," nor has it delineated a doctrinal route to assess when state action violates young people's equal protection rights.[8] This holds true whether child-plaintiffs seek to challenge differential treatment in comparison to adults or to other similarly situated children.[9]

Gebeloff, Danielle Ivory, Bill Marsh, Allison McCann & Albert Sun, *Childhood's Greatest Danger: The Data on Kids and Gun Violence*, N.Y. TIMES MAG., (Dec. 18, 2020), https://www.nytimes.com/interactive/2022/12/14/magazine/gun-violence-children-data-statistics.html [https://perma.cc/FAZ5-RWCB] ("What is clear is that the United States is an extreme outlier when it comes to gun fatalities among children. When researchers at the Kaiser Family Foundation recently compared a set of similarly large and wealthy nations, they found that among this group, the United States accounted for 46 percent of the child population but 97 percent of all child gun deaths.").

8. Smith, *supra* note 3, at 2300–03; Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1567–68 ("[C]hildren—the poorest, most vulnerable, and least empowered members of our society—are not a 'suspect class.'"). *But see* Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing tiers of scrutiny applied in equal protection law). *Clark* extended heightened scrutiny to children of unmarried parents; however, *Clark* is treated in equal protection law as *sui generis*. Some cases seem to have provided an alternative route to heightened scrutiny, though without an explicit acknowledgment or indication that they establish a precedent. *See* Plyler v. Doe, 457 U.S. 202, 208–09 (1982); *id.* at 234 (Blackmun, J., concurring) ("[C]lassifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions.").

9. Smith, *supra* note 3, at 2300–03.

In the absence of an explicit doctrinal framework, children invoking equal protection claims face inconsistent treatment. On one hand, some courts treat children as if they are mini adults.[10] On the other hand, some courts find children's status relevant and incorporate it into their constitutional analysis. Oddly, there is little guidance on when or why courts opt for one approach over the other, and both approaches result in limiting—not extending—children's rights.[11]

The incoherency of children's equal protection law is, in part, due to the fact that the Supreme Court's substantive due process law prioritizes parental autonomy—an idea and a set of protections that dominate the family law domain. Instead of developing children's rights, the field of family law heavily relies on parents to act in the best interest of their children out of an abiding concern that children "lack the capacity for autonomous choice"[12] and that imbuing children with rights may lead to interference with parental rights.[13]

III. PARENTS' RIGHTS AND THE "PARENT-AS-PROXY" RATIONALE

The principle that parents have a fundamental right to raise their children is deeply entrenched in American constitutional and family law.[14]

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10. For example, lower federal courts often summarily dismiss children's equal protection claims, finding that classifications on the basis of age are nonsuspect under Massachusetts Board of Retirement v. Murgia, a Supreme Court case about a mandatory state retirement plan challenged by a fifty-year-old police officer. *See, e.g.*, United States v. Cohen, 733 F.2d 128, 135 (D.C. Cir. 1984) ("Minors, for example, are not a suspect class."); Williams v. City of Lewiston, 642 F.2d 26, 28 (1st Cir. 1981) ("Minors are not a 'suspect' class; and they can be treated differently from adults consistent with the Constitution."). These lower courts do not consider young people's subjective qualities, characteristics, circumstances, or needs that differ from those of older persons; they rotely apply rational basis to their equal protection claims.

11. Smith, *supra* note 3, at 2302–03; *but see* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that Black minors were deprived of equal protection rights under the Fourteenth Amendment because "in the field of public education the doctrine of 'separate but equal' has no place"); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding that "it is invidious to discriminate against" children born to unmarried parents); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) ("Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimates violates the Equal Protection Clause of the Fourteenth Amendment."); *Plyler*, 457 U.S. at 205, 230 (1982) (holding that Texas violated the Equal Protection Clause of the Fourteenth Amendment when it denied undocumented school age children free public education otherwise available to children who are U.S. citizens or "legally admitted aliens" because Texas failed to show such denial furthered some substantial state interest).

12. Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2101 (2011).

13. *Id.*

14. Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 77–78 (2021) ("Although concerns about expansive parental rights and their detrimental effects on children's

"Before the twentieth century, the combined status of biological parenthood and marriage signified legal authority of almost limitless scope."[15] The Supreme Court firmly established the primacy of parental rights in the early 1920s in *Meyer v. Nebraska* and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*.[16]

In 1923, in *Meyer*, a teacher at a parochial school was convicted for violating a Nebraska law that prohibited teaching children below eighth grade a language other than English.[17] The teacher alleged that his conviction for teaching a young child German violated his substantive due process right.[18] The Supreme Court agreed, explaining that "[w]ithout doubt" the substantive due process provision:

> denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, *establish a home and bring up children* . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[19]

Two years later, the Court heard *Pierce*.[20] In this case, two private schools—Society of Sisters of the Holy Names of Jesus and Mary, a religious Roman Catholic School, and Hill Military Academy for boys—challenged the State of Oregon's Compulsory Education Act.[21] The schools claimed that the law constituted a Fourteenth Amendment substantive due process violation because it interfered with parents' rights to choose schools on behalf of their children, the right of the child to influence the parents' choice of school, and right of schools and teachers to engage in a business or profession.[22] In reliance on *Meyer*, the Court struck down the law as unreasonably interfering with the "liberty of parents and guardians to direct the upbringing and education of children under their control."[23]

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interests have been voiced over the years, courts and commentators remain staunchly committed to the protection of near-absolute parental rights of childrearing."); *see* Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J.F. 942, 943–44 (2018).

15. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406–07 (1995).

16. 262 U.S. 390 (1923); 268 U.S. 510 (1925).

17. 262 U.S. at 396–97.

18. *Id.* at 399.

19. *Id.* (emphasis added).

20. 268 U.S. 510 (1925).

21. *Id.* at 529–31.

22. *Id.* at 533.

23. *Id.* at 534–35 ("The child is not the mere creature of the state; those who nurture him and

The Court has held steadfast to its position in subsequent decisions, stating that "[t]he law's concept of family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[24] The Court's jurisprudence expresses a strong expectation that parents will act in their children's best interests.[25]

Unfortunately for many children, this "parent-as-proxy" rationale—that parents will act in their best interest—also drives a meager approach to children's equal protection rights. Both the explicit and implicit deference to parental autonomy impose a chilling effect on a robust engagement with and proliferation of young people's rights across constitutional law, including their Fourteenth Amendment equal protection rights.[26]

Resting on a faulty, and perhaps privileged, assumption that all children and parents are similarly situated, the parent-as proxy rationale

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direct his destiny have a right, coupled with a high duty, to recognize and prepare him for additional obligations."); *see also* Washington, *supra* note 1, at 41 ("These cases made it difficult for children to present their rights as independent from parental rights and as enforceable against infringement by parents and the State."). The Court did acknowledge limitations on parents' or a guardian's autonomy in subsequent cases. In Prince v. Massachusetts, an aunt and custodian of a nine-year-old girl was convicted for violating a Massachusetts child labor law that stated "[n]o boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place" and allowed for prosecution of parent or guardian. 321 U.S. 158, 160–61 (1944). These cases also "implicitly raised questions about the existence, scope, and substance of rights held by the children over whom adults exercised authority." Washington, *supra* note 1, at 41.

24. Troxel v. Granville, 530 U.S. 57, 68 (2000) (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)); *see also* Dailey & Rosenbury, *supra* note 1, at 1457; Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2178 (2011) ("From the perspective of choice theory, children do not enjoy most constitutional rights because they lack the capacity for autonomous choice."); Barbara Bennett Woodhouse, *Children's Rights*, *in* HANDBOOK OF YOUTH AND JUSTICE 377 (Susan O. White, ed. 2001) ("The legal distinction between childhood and adulthood, reflected in concepts like 'minority status' and 'the age of majority,' is grounded in beliefs about children's lack of capacity to act rationally and their need to be under some responsible adult's control and care.").

25. Dailey & Rosenbury, *supra* note 1, at 1459 ("Although the doctrine of absolute parental power has now been abandoned, the law nevertheless retains a strong commitment to parental rights." (footnote omitted)).

26. *See, e.g.*, Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights Into Constitutional Doctrine*, 2 UNIV. PA. J. CONST. L. 1, 28–30 (1999); Washington, *supra* note 1, at 40 ("Many fear that the enlargement of children's rights will circumscribe parental authority over their children."); Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/ [https://perma.cc/6SXP-2VNL] (explaining that the United States is one of the few countries that has failed to ratify the U.N. Convention on the Rights of the Child in deference to parents' rights).

obscures the importance and necessity of children's rights. There are times when parents do not possess the requisite political power to protect their children, and young people—and their rights—play a formidable role in protecting themselves and the groups to which they belong.[27]

IV. CHILDREN'S RIGHTS AS A CONSTITUTIONAL BACK-STOP

When parents lack the political power to protect their children from group-based discrimination, children's rights serve as a constitutional back-stop. There are powerful historical examples of children who invoked their own rights to fend off state practices that treated them unequally because of their group membership, perpetuating "an underclass of future citizens and residents."[28] For example, immigrant parents often lacked political power to halt discriminatory practices that deprived their children rights to property ownership or to obtain an education. In these times, immigrant children's rights, not parents' rights, curbed rampant national origin and racial discrimination against them and their families.

For instance, consider the case of *Oyama v. California*.[29] In the mid-1930s, Kajiro Oyama purchased land in the name of his minor son, Fred.[30] Kajiro then sought guardianship so that he could manage the property.[31] As World War II advanced, so too did anti-Japanese sentiment.[32] In the name of national security, approximately one hundred and twenty thousand persons of Japanese descent, including the Oyamas, were

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27. Unequal treatment does not simply harm members of the in-group, it may also injure those who are related to or associate with members of the group. For example, even if children of LGBT parents identify as heterosexual, they are discriminated against because of their relation to or association with their same-sex parents. *See, e.g.*, Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307, 309 (2010) ("An underdeveloped area of sexual orientation and gender identity scholarship is the legal rights and remedies of those who face discrimination because of their relation to or association with gays and lesbians, including children [in] same-sex families."); Brief of Amici Curiae Scholars of the Constitutional Rights and Interests of Children as Amici Curiae Supporting Respondents at 1, Masterpiece Cakeshop, LTD v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2017) (No. 16-111) ("Amici focus exclusively on the legal and social harms to children because of their relationship to or association with their lesbian, gay, bisexual and/or transgender ("LBGT") parents in the commercial and public spheres.").

28. Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring); *see* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (holding that segregation creates a feeling of inferiority among Black children and that "segregation is a denial of the equal protection of the laws").

29. 332 U.S. 633 (1948).

30. *Id.* at 636.

31. *Id.*

32. *See* Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 995 (2010).

evacuated from the West Coast.[33] While the Oyamas were living in Utah pursuant to relocation orders, California sought to take the land in Fred Oyama's name under escheat proceedings.[34] The state alleged that Kajiro Oyama intended to subvert the California Alien Land Law of 1913, which prohibited immigrants ineligible for citizenship from purchasing land or attempting to evade the law.[35] Kajiro and Fred Oyama challenged the law as a violation of their equal protection rights.[36] The California Supreme Court upheld the law, finding Fred Oyama suffered no constitutional violation.[37] The United States Supreme Court reversed.[38] Though the Court failed to address Kajiro Oyama's rights, it did find the Alien Land Law violated young Fred Oyama's equal protection rights as an American citizen.[39] As the Court explained, "[i]n short, Fred Oyama lost his gift, irretrievably and without compensation . . . . The only basis for this discrimination against an American citizen, moreover, was the fact that his father was Japanese and not American, Russian, Chinese, or English."[40]

Almost forty years later, another group of children were denied an education solely because they were undocumented Mexican immigrants.[41] Again, immigrant children could not rely on their parents to "act in their best interest" because their undocumented parents did not have the political power to intervene to protect them. In *Plyler v. Doe*, these young plaintiffs invoked their own right to the equal protection of laws, challenging the Texas statute that withheld funds from local school districts that enrolled and educated children not "legally admitted" to the United States.[42] The Supreme Court held that denying children a public education because of their parents' undocumented status was unconstitutional.[43]

As *Oyama* and *Plyler* demonstrate, there are times when children need rights to protect themselves. In the process these young people established

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33. *Oyama*, 332 U.S. at 637; United States v. Hohri, 482 U.S. 64, 66 (1987).

34. *Oyama*, 332 U.S. at 637.

35. *Id.* at 636–37. The Alien Land Law sought to deter Japanese immigrants from moving to the state "by curtailing their privileges." *Id.* at 657 (Murphy, J., concurring).

36. *Id.* at 635.

37. *Id.* at 639–40.

38. *Id.* at 640.

39. *Id.*; Villazor, *supra* note 32, at 985–86 ("Regrettably, *Oyama* did not address the question of whether the Alien Land Law violated the equal rights of noncitizen Japanese.").

40. *Oyama*, 322 U.S. at 644.

41. Plyler v. Doe, 457 U.S. 202, 206 (1982).

42. *Id.* at 205.

43. *See id.* at 229–30.

a bedrock Fourteenth Amendment principle—the state may not use children of immigrant parents as a vehicle to relegate an entire group to an underclass status.

Similarly, children of unmarried parents invoked their equal protection rights to chip away at a long history of unfair treatment. In *Levy v. Louisiana*, a Black mother of five children died due to a state hospital's medical malpractice.[44] Louise Levy's children sued to recover for their mother's wrongful death only to be denied relief because "morals and general welfare . . . discourage[] bringing children into the world out of wedlock."[45] The Supreme Court reversed, holding that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."[46] Following the *Levy* decision, the Court heard additional cases recognizing children of unmarried parents' equal protection rights, eventually extending heightened scrutiny to this group of children whose parents did not have the political power to protect them.[47]

The story of Black children and their rights offers another example of the important role children's rights play in ensuring fidelity to our democratic ideals. In an oppressive Jim Crow regime, Black adults sought the equal protection of the laws to ensure that "there was to be no 'dominant race' and no 'subordinate and inferior class of beings.'"[48] Yet, it was Black children—and their rights—that delivered the coup-de-grâce to the "separate but equal" doctrine in *Brown v. Board of Education* ("*Brown I*").[49]

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44. 391 U.S. 68, 69–70 (1968); John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liability Insurance Co., 118 U. PA. L. REV. 1, 2 (1969).

45. *Id.* at 70 (quoting Levy v. State *ex rel.* Charity Hosp. of La. at New Orleans Bd. of Adm'rs, 192 So.2d 193, 195 (La. Ct. App. 1966)).

46. *Id.* at 72; *see* Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1591–92 (2013); Catherine E. Smith & Susannah Pollvogt, *Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons From Child-Centered Cases*, 48 U.C. DAVIS L. REV. 655, 659–60 (2014); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 95 (2003).

47. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing tiers of scrutiny applied in equal protection law). *Clark* extended heightened scrutiny to children of unmarried parents; however, *Clark* is treated in equal protection lore as *sui generis*. *See generally* Davis, *supra* note 46, at 92 (citing Jefferson v. Hackney, 406 U.S. 535 (1972)) (explaining litigation aimed at race, gender, and poverty to address the plight of nonmarital children failed because the Supreme Court refused to extend heighted scrutiny to disparate racial impact of illegitimacy laws).

48. Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 13 (1977).

49. *See* 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

Finally, children also played a critical role in the LGBT rights movement. Children of LGBT parents sought equal access to the countless benefits they were denied because their parents could not marry. Although framed as "interests" instead of "rights," the injuries to these children were integral to the Supreme Court's recognition of same-sex couples' fundamental right to marry.[50] In *Obergefell v. Hodges*, the Supreme Court was clear that "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[51] In addition to acknowledging the injury of same-sex marriage bans to LGBT people, the court also "included a greater solicitude for the children of same-sex couples and a greater appreciation of their stake in marriage equality."[52]

Further, parents' rights are not only used to chill the development of children's rights, but they are sometimes used as a cudgel to limit young people's rights and their respective gains.[53] *Brown I* demonstrated the fragility of children's rights and how a politically powerful majority invoked parents' rights as a cudgel to eradicate or limit children's rights and the advancements they garnered. In the aftermath of the Court's 1954 *Brown I* decision, it was the invocation of "parents' rights"—White parents' rights—that served as the cudgel to the newly acknowledged rights of Black children.[54] In the resistance to *Brown I*, Southern White

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50. Catherine E. Smith, *Smith J., Concurring*, *in* WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S SAME-SEX MARRIAGE DECISION 146, 146 (Jack Balkin ed., Yale Univ. Press 2020) ("The ten child-plaintiffs in this case are indistinguishable from children being raised by different-sex couples in their need for and interest in the benefits afforded by the state institution of marriage. Yet marriage bans do not treat these two groups of children the same—they make it impossible for the children of same-sex couples to access these state-supported benefits."), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3600144 [https://perma.cc/G3M8-FK3X].

51. *See* 576 U.S. 644, 673 (2015).

52. Brief for Amici Curiae Scholars of the Constitutional Rights and Interests of Children in Support of Respondents at 6, Masterpiece Cakeshop LTD v. Colo. Civil Rts. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (citing *id.* at 668). Of note, shortly after Justice Kennedy's retirement he stated that he cast the swing vote in favor of marriage equality because marriage bans cause harm to children. Bloomberg Television, *Retired Justice Kennedy Says His Gay Marriage Ruling 'Surprised' Him*, YOUTUBE (Nov. 28, 2018), https://www.youtube.com/watch?v=v8Ja8JKVYsA.

53. David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 68 (2006) ("[I]mmigration law goes beyond merely ignoring the interests of children. Immigration law is systemically and specifically designed to limit the role of children and the value placed on their interests.").

54. *See* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 95–96 (2004).

politicians organized a "massive resistance" to school desegregation.[55] A year after *Brown I*, the Supreme Court itself caved to White adults' demands by issuing its infamous order in its 1955 *Brown v. Board of Education* decision ("*Brown II*") that desegregation should occur "with all deliberate speed,"[56] allowing states to indefinitely delay implementation of the desegregation order. A year after *Brown II*, nineteen U.S. Senators and a majority of confederate-state congressmen published the "Southern Manifesto," staking their claim that the Supreme Court wrongly decided both *Brown* decisions in part because White "parents should not be deprived by Government of the right to direct the lives and education of their own children."[57]

As history demonstrates, even as Black parents increasingly gained civil rights, those rights were not enough to protect their children from the attack on integration efforts.[58] Ten years after *Brown I*, "little to no desegregation took place in public schools . . . . Instead of desegregating, some districts closed their entire school systems and White parents moved to White areas or enrolled their children in private schools, often using state funds to do so."[59] We continue to see remnants of segregation battles play out today as state legislatures across the country, under the banner of parents' rights, pass bans on the teaching of critical race theory and African American history in schools.[60] Further, it is no coincidence that post *Obergefell v. Hodges*—recognizing same-sex couples' fundamental

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55. *The Southern Manifesto and "Massive Resistance" to* Brown, LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/ [https://perma.cc/YP8Q-ANV6].

56. 349 U.S. 294, 301 (1955).

57. 102 CONG. REC. 4460 (1956) (calling *Brown* decisions "unwarranted" and accusing the Court of "substitut[ing] naked power for established law."); *see also The Southern Manifesto of 1956*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/ [https://perma.cc/KW53-AN8J] (describing Representative Howard Smith's speech introducing the Southern Manifesto on the House floor).

58. *See* Dailey & Rosenbury, *supra* note 1, at 1460 ("Contemporary judges, policymakers, and scholars therefore generally embrace parental rights as the appropriate starting point for protecting children's interests."). In fact, as described in this article about *Brown I*, in many civil rights struggles, children's rights and interests open a window of opportunity for adults in their larger group, only to see that door closed to children as the focus shifts to adults. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (children's rights); Obergefell v. Hodges, 576 U.S. 644 (2015) (children's interests).

59. Smith, *supra* note 3, at 2324.

60. Alia Wong & Nirvi Shah, *The Fight for African American Studies in Schools Isn't Getting Easier, Even After 50 Years*, USA TODAY (Feb. 17, 2023), https://www.usatoday.com/story/news/education/2023/02/17/desantis-college-board-battle-over-ethnic-studies/11229921002/ [https://perma.cc/9YPV-PR7T]; *see* Suzette Malveaux, *A Taxonomy of Silencing: The Law's 100-Year Suppression of the Tulsa Race Massacre*, 102 B.U. L. REV. 2173, 2211 (2022) (discussing this type of ban in-depth).

right to marry—and *Bostock*—finding LGBT employment discrimination as prohibited under Title VII of the Civil Rights Act—there is backlash under the moniker of parents' rights being deployed against LGBT children.[61]

Children's equal protection law remains incoherent, despite the powerful examples above of the salutatory impact of children's rights. The cases are rarely seen or interpreted as a collection of cases establishing a children's equal protection jurisprudence. Instead, they are rendered invisible as the political tides turn back to parents and adults. Parents' rights chill and obscure the evolution of young people's rights.

In situations in which parental rights are insufficient to protect children's interests, it is essential for children to have their own separate rights and the ability to exercise them. Children's rights can serve as necessary and indispensable tools in the civil rights arsenal to prevent laws and practices that use children to create "an underclass of future citizens and residents."[62]

V. CONCLUSION

Consistent with my call to rewrite the constitutional law canon, I argue for the development of the field of "children's equality law." Neither modern equal protection law nor family law recognizes the fallacy of relying on parents to protect children in legal and political systems founded upon inequality among groups that are socially constructed along the lines of race, citizenship, sexual orientation, gender identity, or marital status. Children in these systems are not mere bystanders; they are often used to create or maintain the power dynamics and perpetuate the large-scale inequalities between and among groups.[63] A robust children's equal protection rights jurisprudence would fill important gaps in our understanding of constitutional and civil rights law, including establishing the principle that children must possess their own rights to protect themselves and, sometimes, adults as well.

Children's equal protection rights can serve as a backstop to ensure our country's fidelity to its aspirational principles that there "be no 'dominant race' and no 'subordinate and inferior class of beings.'"[64] They

61. 576 U.S. 644 (2015); 140 S. Ct. 1731 (2020).

62. *Plyer*, 457 U.S. at 239 (Powell, J., concurring).

63. *See* Smith, *supra* note 3, at 2319–25.

64. Karst, *supra* note 48, at 13 (quoting Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857).

do not solely protect young people from impermissible discrimination; they also advance the rights of the marginalized groups to which these young people belong. As Professor Villazor explains: "*Oyama* helped to turn the tide against ongoing public discrimination directed at the recently interned Japanese families."[65] And Professor Hiroshi Motomura describes *Plyler* as the "high-water mark of immigrants' rights" in the United States.[66] In *Brown*, the decision struck down segregation of K-12 public schools and over a ten-year period, through per curiam opinions, the Supreme Court extended its mandate mostly to Black adults, mandating integration of state-run graduate and professional schools, public parks and beaches, public transportation, city golf courses, public restaurants, courthouses, private orphanages, and state-regulated athletic contests.[67] "For all the criticisms of *Brown I*'s failure to desegregate public schools, it nonetheless served as the gateway to the universal principle that segregation of 'public facilities of any kind' was impermissible."[68] Children's rights are not always in tension with parents' rights; both sets of rights may work in tandem to promote equal justice under the law.

(enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV). See *id.* at 1–4 for a discussion of the incoherency of equal protection law writ large.

65. Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 985 (2010) ("*Oyama's* protection of a Japanese American's right to own property returned some measure of security against California's relentless efforts to exclude the Japanese community."); *see also id.* at 986 ("*Oyama* paved an important path towards fulfilling the promise of equality in property ownership that the Supreme Court later enshrined in Shelley v. Kraemer.").

66. Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2043 (2008) ("*Plyler* remains a high-water mark of immigrants' rights.").

67. *See, e.g.*, Florida *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413, 413–14 (1956) (per curiam) (recognizing equal right to be admitted to state law school on the same basis as other qualified applicants); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, 54 (1958) (per curiam) (upholding equal access to public park facilities); Mayor of Balt. v. Dawson, 350 U.S. 877, 877 (1955) (per curiam) (prohibiting racial segregation in public bathhouses and beaches); Gayle v. Browder, 352 U.S. 903, 903 (1956) (per curiam) (prohibiting segregation on public buses and public transportation); Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955) (per curiam) (vacating the Fifth Circuit's decision regarding equal access to public golf courses); Turner v. City of Memphis, 369 U.S. 350, 351, 354 (1962) (per curiam) (upholding equal use of public restaurant in municipal airport); Johnson v. Virginia, 373 U.S. 61, 61–62 (1963) (per curiam) (reversing conviction of petitioner and holding that state may not require segregation in courtrooms); Pennsylvania v. Bd. of Dirs. of City Trs., 353 U.S. 230, 231 (1957) (per curiam) (private orphanages); State Athletic Comm'n v. Dorsey, 359 U.S. 533, 533 (1959) (per curiam) (state-regulated athletic contests). *But see* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 254–55, 270–71 (1977) (reversing lower court's decision that denial of multifamily zoning perpetuated racial segregation and therefore violated equal protection due to lack of showing discriminatory intent as motivating factor).

68. Smith, *supra* note 3, at 2310; *see also* Palmer v. Thompson, 403 U.S. 217, 243 (1971) (White, J., dissenting) ("In a series of opinions [closely following *Brown I*] in time, the Court emphasized the universality and permanence of the principle that segregated public facilities of any kind were no longer permissible . . . .").

These cases also advance our understanding of equal justice under the law writ-large. The most powerful example of children's rights serving as a gateway to expanding protections for all marginalized groups comes from *Brown I* itself, which cited *Oyama*. In fact, it can be argued that Black children—and their rights—"ushered in" the modern equal protection framework for adults.[69]

The prevailing view that it is necessary to limit children's rights in reliance on an expectation that parents will act in their children's best interest is a flawed one.[70] There is ample evidence that there are times when parents cannot protect their children from unequal treatment. It is time to reconsider the parent-as-proxy rationale. In an age of parents' rights, those committed to equal justice under the law must continue to make space for children and their rights and place them at the center of the equal protection inquiry.[71]

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69. Mario L. Barnes, Erwin Chermerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO L.J. 967, 970–71 (2010). For example, in Oyama v. California, 332 U.S. 633, 647 (1948), the Supreme Court held for the first time that aliens were also "persons" within the reach of the Fifth and Fourteenth Amendments' equal protection clauses, and Plyler v. Doe is considered a "high water mark" for immigrants' rights.

70. *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979) (offering three reasons why children's rights are not equated with adults: "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"); *see also* Troxel v. Granville, 530 U.S. 57, 68 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children."); Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2101 (2011).

71. Professor Martha Minow argues, "[b]ecause an institution ostensibly devoted to children's best interests could hurt them, the Supreme Court concluded that children need and deserve the kinds of rights against the exercise of state power that adults enjoy." Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J., 1, 11 (1986). Paradoxically, at the time *Brown I* was decided, Black adults' rights had yet to be extended to the right to live in an integrated America. Smith, *supra* note 3, at 2310.