Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases

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The rights of children have recently taken a prominent role in the popular and judicial consciousness. This is largely due to litigation over marriage equality. In authoring the majority opinion in United States v. Windsor, *133 S. Ct. 2675 (2013), Justice Kennedy cited tangible and psychic harm to the children of same-sex couples as a basis for invalidating the federal Defense of Marriage Act. Post-*Windsor, *myriad state and federal courts similarly have recognized the manner in which state-level marriage bans inflict harm on the children of same-sex couples.*

Yet, while courts have recognized the significance of harm to children as a factual *matter, they have yet to address its significance as a* legal *matter. Specifically, they have ignored compelling Supreme Court precedent that directly addresses the equal protection rights of children. This body of law — which we refer to as "the child-centered cases" — unequivocally stands for the proposition that states may not deprive children of benefits in an effort to regulate adult behavior. Marriage bans do exactly this. Such laws deprive the children of same-sex couples the benefit of a legal relationship to one of their parents in an effort to incentivize opposite-sex couples to enter into the institution of marriage. This directly contravenes the legal principle articulated in the child-centered cases.*

Thus, at a minimum, the child-centered cases provide a clear legal principle for resolving the same-sex marriage issue. But we contend that

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these cases offer much more. In particular, in the child-centered cases we see the Court giving greater meaning to equal protection guarantees because it views children as proto-citizens. In this context, the Court recognizes certain substantive rights — namely, public education, family formation, and the right to transfer economic benefits from one generation to the next — as foundational to citizenship, and therefore worthy of special judicial solicitude. The Court recognizes that depriving children of these rights at the beginning of life sets a pattern of marginalization and deprivation that has lasting effects on their ability to develop into full-fledged citizens.

The citizenship theme running through the child-centered cases is significant for several reasons. First, it connects equal protection jurisprudence to the concept of citizenship. Second, it draws attention to the substantive rights associated with citizenship-formation. Third, while the special concerns articulated in these cases are inspired by the fact that the plaintiffs are children, recognizing the interference with the individual's ability to develop as a citizen can and should be extended to adults as well. In this sense, we are all proto-citizens — citizens in progress — entitled to basic civil rights necessary to thrive in our democracy.

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INTRODUCTION

The rights of children have recently taken a prominent role in the popular and judicial consciousness. This is largely due to litigation over marriage equality. While the marriage equality movement — and opposition to it — initially centered on the rights of adults, the rhetoric has shifted. Now, defenders of marriage bans cite the benefits of marriage for children.[1] Likewise, proponents of marriage equality point out that same-sex couples also have children, and that those children are equally entitled to whatever benefits the institution of marriage bestows.[2]

Judicial concern for the rights of children surfaced in *United States v. Windsor*, where Justice Kennedy cited tangible and psychic harm to the children of same-sex couples as a basis for invalidating the federal Defense of Marriage Act ("DOMA"):

> [DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. . . .
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> . . . .
>
> DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses.[3]

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[1] *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 43-49, U.S. v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026; *see also* Defendants' Supplemental Brief at 2-3, Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (2014) (Nos. 14-97, 14-327, 13-5090), 2014 WL 4374006.

[2] *See* Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondent Edith Windsor Addressing the Merits and Supporting Affirmance at 9-13, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 840028; *see also* Brief of Scholars of the Constitutional Rights of Children Susannah W. Pollvogt, Catherine E. Smith, and Tanya Washington as Amici Curiae in Support of Plaintiffs-Appellants and Reversal at 1-7, *Robicheaux*, 2 F. Supp. 3d 910 (No. 14-31037), 2014 WL 5501087.

[3] *Windsor*, 133 S. Ct. at 2694-95. For a detailed discussion of the harms to children imposed by marriage bans, see Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1595-1608 (2013); 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, 318-29 (2010); Catherine Smith, *The Rights of the Child*, DENV. U. L. REV. ONLINE (Apr. 12,

Post-*Windsor*, myriad state and federal courts similarly have recognized the manner in which state-level marriage bans harm the children of same-sex couples. Perhaps most prominently, Judge Posner placed harm to the children of same-sex couples at the center of his decision striking down marriage bans in Indiana and Wisconsin:

> Formally these cases are about discrimination against the small homosexual minority in the United States. But, at a deeper level . . . they are about the welfare of American children. . . .
>
> . . . .
>
> . . . To the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological parents or by adoptive parents.[4]

2011, 8:40 AM), http://www.denverlawreview.org/online-articles/2011/4/12/the-rights-of-the-child.html.

[4] Baskin v. Bogan, 766 F.3d 648, 654-56 (7th Cir. 2014); *see also* Latta v. Otter, No. 14-35420, 2014 WL 4977682, at *11 (9th Cir. Oct. 7, 2014) ("Defendants' essential contention is that bans on same-sex marriage promote the welfare of children, by encouraging good parenting in stable opposite-sex families. . . . Defendants have presented no evidence of any such effect."); *Baskin*, 766 F.3d at 658-59 (detailing the benefits that marriage confers upon children and that are denied children when their parents are not allowed to marry); Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) ("Because the Proponents' arguments are based on overbroad generalizations about same-sex parents, and because there is no link between banning same-sex marriage and promoting optimal childrearing, this aim cannot support the Virginia Marriage Laws."); Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *15 (S.D. Ohio Apr. 14, 2014) ("Defendant's discriminatory conduct most directly affects the children of same-sex couples, subjecting these children to harms spared the children of opposite-sex married parents."); Bourke v. Beshear, 996 F. Supp. 2d 542, 553 (W.D. Ky. 2014) ("The Court fails to see how having a family could conceivably harm children. . . . And no one has offered evidence that same-sex couples would be any less capable of raising children . . . ."); De Leon v. Perry, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014) ("There is no doubt that the welfare of children is a legitimate state interest; however, limiting marriage to opposite-sex couples fails to further this interest. Instead, Section 32 causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted. . . . Defendants have not provided any evidentiary support for their assertion that denying marriage to same-sex couples positively affects childrearing. Accordingly, this Court agrees with other district courts that have recently reviewed this issue and concludes that there is no rational connection between Defendants' assertion and the legitimate interest of successful childrearing." (citations omitted)); Bostic v. Rainey, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) ("Of course the welfare of our children is a legitimate state interest. However . . . needlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest."); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1212 (D. Utah 2013) ("The State does not contest the Plaintiffs' assertion that roughly 3,000 children are currently being raised by same-sex couples in Utah. These

Yet, while courts have recognized the significance of harm to children as a *factual* matter, they have yet to address its significance as a *legal* matter. That is, it is one thing to include harm to children among the catalog of harms that marriage bans impose, and to invalidate such laws because these harms "outrun and belie"[5] the justifications offered for the laws. It is another to say that such laws are per se unconstitutional because they violate the constitutional principle that states may not punish children for matters outside of their control.[6]

Compelling Supreme Court precedent directly addresses the equal protection rights of children. This body of law — which we refer to as "the child-centered cases" — unequivocally stands for the proposition that states may not deprive children of benefits in an effort to regulate adult behavior.[7] Marriage bans do exactly this. Such laws deprive the children of same-sex couples the benefit of a legal relationship to one of their parents in an effort to incentivize opposite-sex couples to enter into the institution of marriage.[8] This directly contravenes the legal principle

children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples." (citations omitted)).

[5] Romer v. Evans, 517 U.S. 620, 635 (1996) (holding unconstitutional Colorado's Amendment 2, which prohibited extension of anti-discrimination protections on the basis of homosexual, lesbian, or bisexual orientation). In authoring the majority opinion in *Romer*, Justice Kennedy abandoned the traditional tiers-of-scrutiny framework for analyzing equal protection claims and instead simply compared the magnitude of the harm imposed by a law to the justifications offered to defend it. *See id.* at 633-35. Similarly, in *Windsor*, Justice Kennedy balanced DOMA's harms against its justifications. *See Windsor*, 133 S. Ct. at 2693-96.

[6] *See* Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondent Edith Windsor, *supra* note 2, at 26 ("The Court highlighted the foundational mission of the Equal Protection Clause: 'to work nothing less than the abolition of all caste-based and invidious class-based legislation.' To be sure, not all laws that distinguish between groups fall under this prohibition. But laws that determine the legal, economic and social status of children, based on the circumstances of their birth, surely do. As the Court explained in Plyler, '[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.'").

[7] *See* Plyler v. Doe, 457 U.S. 202, 213 (1982); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972); Levy v. Louisiana, 391 U.S. 68, 70 (1968). We also include *Brown v. Board of Education*, 347 U.S. 483 (1954) in this body of cases, although not for the specific proposition that children may not be punished in an effort to regulate the conduct of adults. Rather, *Brown* connects to the larger theme presented in these cases and explored in this paper: that laws may not fundamentally compromise the ability of children to develop into full-fledged citizens.

[8] *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group, *supra* note 1, at 44 ("The link between procreation and marriage itself reflects a unique social

articulated in the child-centered cases. Thus, at a minimum, the child-centered cases provide a clear legal principle for resolving the same-sex marriage issue. But we contend that these cases offer much more.

I. THE IMPLICATIONS OF THE CHILD-CENTERED CASES BEYOND THE SAME-SEX MARRIAGE CONTEXT

In the child-centered cases we see the Court giving greater meaning to equal protection guarantees because it views children as proto-citizens.[9] In this context, the Court recognizes certain substantive rights — namely, public education, family formation, and the right to transfer economic benefits from one generation to the next — as foundational to citizenship, and therefore worthy of special judicial solicitude. The Court recognizes that depriving children of these rights at the beginning of life sets a pattern of marginalization and deprivation that has lasting effects on their ability to develop into full-fledged citizens.

difficulty with opposite-sex couples that is not present with same-sex couples — namely, the undeniable and distinct tendency of opposite-sex relationships to produce unplanned and unintended pregnancies. Government from time immemorial has had an interest in having such unintended and unplanned offspring raised in a stable structure that improves their chances of success in life and avoids having them become a burden on society."); Defendants' Supplemental Brief, *supra* note 1, at 2-3 ("Defining civil marriage as a man-woman relationship is rational because: (a) a principal legal purpose of marriage is to link children with an intact family formed by their biological parents, and (b) the vast majority of children are born from the sexual union of a man and a woman.").

[9] "Citizenship" is a complicated and multivalent concept. We recognize that it is often invoked to differentiate, exclude, and disinherit. Indeed, as discussed below, inclusive citizenship became a preoccupation of the Fourteenth Amendment as a direct response to the exclusive concept of citizenship deployed in *Dred Scott*. In this essay, we seek to use the term citizenship to invoke an aspirational political (rather than strictly legal) status of belonging to a common civic community. It is a status that courts interpreting the Equal Protection Clause should facilitate by striking down laws that tend to thwart attainment of that status. As aptly demonstrated by *Plyler v. Doe*, this aspiration can be nurtured regardless of whether the subjects of discrimination are citizens in a narrow, legal sense. 457 U.S. at 220 ("At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their 'parents have the ability to conform their conduct to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.' Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." (citations omitted)).

A. A Brief History of Citizenship and the Fourteenth Amendment

To understand the significance of the child-centered cases drawing a connection between equal protection principles and the concept of citizenship, it is important to understand the historical role of citizenship in the framing of the Fourteenth Amendment and the Equal Protection Clause.

In a sense, the Fourteenth Amendment and its Equal Protection Clause have their conceptual origins in the Court's reviled decision of *Dred Scott v. Sandford*.[10] In that case, the Supreme Court determined that, because Black Americans — whether enslaved or free — were not "citizens," they could not assert any of the rights enjoyed by citizens, including filing suit in court.[11] Per *Dred Scott*, citizenship was the gateway to and necessary prerequisite for even the most basic rights and privileges; citizenship as a category was finite and carefully guarded; citizenship as a status was inescapably defined by relationships of domination, subordination, and exclusion.

The Civil Rights Act of 1866 was enacted as a response to *Dred Scott* in an effort to fundamentally alter this exclusive notion of citizenship.[12] The Act explicitly guaranteed citizenship and, significantly, enumerated substantive rights associated with that status:

> [A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color [including former slaves] . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties . . . .[13]

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[10] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); *see* Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 13 (1977) ("What matters most about *Dred Scott* today is that the Court's assumptions about racial inferiority and restricted citizenship were just what the drafters of the Civil War amendments and Civil Rights Acts sought to overturn.").

[11] *Dred Scott*, 60 U.S. (19 How.) at 404-05.

[12] *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325-28 (1952) (noting that the Civil Rights Act of 1866 "wrote into law that persons born in the United States . . . were citizens of the United States, thereby overruling the *Dred Scott* decision").

[13] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981 (2012)).

The essence of the 1866 Act was to implement a broad notion of national citizenship to which certain core rights attached.[14] These core rights had a distinct focus on legal agency, including the right to sue, and economic agency, including the right to contract and a right to transfer wealth intergenerationally (i.e., "to inherit").[15]

The Fourteenth Amendment, in turn, was intended to elevate the protections of the Civil Rights Act to the level of constitutional guarantee.[16] As enacted, Section One of the Fourteenth Amendment provided:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[17]

Originally, the Privileges or Immunities Clause of the Amendment was meant to do much of the heavy lifting in terms of ensuring the equality of recently emancipated Black Americans. Although it did not enumerate the substantive rights it was meant to protect, as the Civil Rights Act had before it, the framers understood the provision to self-evidently incorporate those same rights set forth in the Act.[18]

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[14] *See* Gressman, *supra* note 12, at 1328 (commenting that the Civil Rights Act of 1866 "provided that such citizens, without regard to color, were entitled in every state and territory to the same right to contract, sue, give evidence, and take, hold and convey property"); *see also id.* at 1332 ("Such a concept of paramount national citizenship to which fundamental rights adhered had been the basis of the 1866 act and had been implicit in the whole movement to nationalize civil rights.").

[15] Civil Rights Act, ch. 31, § 1.

[16] *See* Gressman, *supra* note 12, at 1329 (stating that members of Congress "felt that the centralizing of civil rights authority in the federal government should be made a permanent part of our constitutional way of life rather than remain dependent upon the fluctuating discretion of succeeding Congresses"); *see also* Karst, *supra* note 10, at 14 (noting that the framers of the Fourteenth Amendment wanted to secure the protections of the 1866 Civil Rights Act from political attack).

[17] U.S. CONST. amend. XIV, § 1.

[18] Karst, *supra* note 10, at 17 (noting that the rights protected by the 1866 Act describe the substantive component of equal protection). Other scholars have also noted that the 1866 Act articulates substantive aspects of equal protection:

> The latter clause, forbidding the states from abridging the privileges or immunities of citizens of the United States, has real meaning only against a background of national citizenship accompanied by the basic rights of the

But the substantive component of equal protection was almost immediately eviscerated by the Supreme Court.[19] In the *Slaughterhouse Cases*,[20] the Court determined that the Privileges or Immunities Clause referred only to the very small set of rights guaranteed on the basis of national citizenship,[21] thus eliminating the broad protections intended by that provision and disconnecting the ideas of citizenship and substantive rights.[22] The significance of this act of judicial interpretation cannot be overstated. It set the course for the evolution of equal protection jurisprudence going forward, perhaps contributing to the excessive formalism and lack of substantive focus in this area of law.

B. Connecting the Child-Centered Cases to Themes of Citizenship

From this perspective, the proto-citizenship theme running through the child-centered cases is significant for several reasons. First, it connects equal protection jurisprudence to the concept of citizenship

> individual. The promoters of the Fourteenth Amendment were not interested in prohibiting the states from interfering with the narrow, technical relationship of a citizen to the federal government. They were desirous of precluding the states from impinging upon the rights to life, liberty and the pursuit of happiness. And they thought of those rights as necessarily belonging to national citizenship, rights which they labelled privileges and immunities.

Gressman, *supra* note 12, at 1332.

[19] Karst, *supra* note 10, at 17-18 (noting that in the *Slaughter House Cases* — the first judicial interpretation of the amendment — "the Court narrowly rejected the notion that there was independent substantive content in the amendment's citizenship provisions.").

[20] 83 U.S. (16 Wall.) 36 (1872).

[21] *Id.* at 37. These included the right to travel, the right to vote, and the right to access the courts. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 750 (2011).

[22] *See Slaughterhouse Cases*, 83 U.S. at 37 ("The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the fourteenth amendment."); *see also id.* at 37 ("The first clause of the fourteenth article was primarily intended to confer citizenship on the negro race, and secondly to give definitions of citizenship of the United States, and citizenship of the States, and it recognizes the distinction between citizenship of a State and citizenship of the United States by those definitions."); Karst, *supra* note 10, at 18 (noting that, in the *Slaughterhouse Cases*, "the Court narrowly rejected the notion that there was independent substantive content in the amendment's citizenship provisions"). The dissent took issue with this characterization, arguing that the Privileges and Immunities Clause embraced all fundamental rights of citizenship, including "ownership of property and the pursuit of one's chosen employment." *See id.*

— a concept that was originally central to the mandate of the Fourteenth Amendment but then eviscerated by a hostile judiciary. Thus, the child-centered cases, which are poised to experience a resurgence,[23] may provide a framework for reanimating that connection.

Second, this theme draws attention to the substantive rights associated with citizenship-formation. Contemporary equal protection jurisprudence does not concern itself with substantive rights outside of the cramped category of fundamental rights. Consequently, the child-centered cases may prompt an expanded view of the substantive rights that equal protection should protect.

Third, while the special concerns articulated in these cases are inspired by the fact that the plaintiffs are children, this is not necessarily only because children are perceived as innocent. Rather, because children are at the beginning of the citizenship formation journey, the Court is especially attuned to the ways in which discriminatory laws can interfere with that journey. But this concern for interfering with the individual's ability to develop as a citizen can and should be extended to adult plaintiffs as well. In this sense, we are all proto-citizens — citizens in progress — and should be regarded as such. Thus, the child-centered cases provide a framework in which to understand and implement the Equal Protection Clause's essential, but suppressed, focus on citizenship as a vehicle for promoting equality and preventing the formation of an anti-democratic caste society.

II. CHILDREN AS PROTO-CITIZENS

In this section, we perform a close reading of the child-centered cases.[24] These cases have been marginalized in the equal protection

[23] As of the this writing, there may be additional marriage equality decisions forthcoming from the courts, including possibly the United States Supreme Court, and these decisions may invoke the constitutional rights of children. But the constitutional rights of children may well be raised in other contexts, including future battles over accommodating religious objections to same-sex marriage and alternative family formations, such as polygamous marriages. *See* Joint Petition for a Writ of Certiorari, Obergefell v. Hodges, No. 14-556 (U.S. Nov. 14, 2014), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2014/11/Ohio-Henry-Obergefell-petition-11-14-141.pdf.

[24] We recognize that there are inherent dangers in focusing on the plight of children as a vehicle for addressing equal protection violations that affect adults. *See generally* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73 (2003) (discussing the ramifications of the strategy of early illegitimacy advocates to frame the legal questions around the rights of children — namely that, this choice of framing left questions about parents' rights in its wake and reinforced sex-based

canon, in part because at least some are anomalous in that the Court purported to apply rational basis review,[25] but in fact employed a fairly searching scrutiny.[26] They are also marginalized in part precisely because their subjects were children, and it is believed that sympathy or a belief in the inherent moral innocence of children influenced the Court's approach.[27] We contend, however, that there are important themes in these cases that transcend the specific context of the rights of children (although those rights themselves are clearly of great import). In particular, we suggest that the child-centered cases take seriously the important (but not necessarily fundamental) nature of substantive rights that serve as a foundation for formation of full citizens.[28]

A. The Right to Public Education: Black Children as Proto-Citizens

The first of these cases, *Brown v. Board of Education*,[29] has *not* been marginalized on either of the bases discussed above. To the contrary, *Brown* is the case that many scholars credit with giving rise to the strict scrutiny standard,[30] and it is not viewed as a case primarily about children.[31] And yet we believe that focusing on the way in which the

stereotypes). It is easier, in a way, to have concern for children, who are presumptively "innocent," than for adults, who may have lived their lives in ways with which we disagree. Our purpose here is not to elevate children as morally superior subjects, but to capture any insight that can be gained from examining the effects of discrimination on those who are at the beginning of life.

[25] *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 71 (1968) ("Though the test has been variously stated, the end result is whether the line drawn is a rational one.").

[26] *See* Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 UC DAVIS L. REV. 527, 533 (2014) (noting that the illegitimacy/non-marital status cases started out looking like a more vigorous version of rational basis review, but were self-consciously crafted as intermediate scrutiny cases).

[27] *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 459 (1988) ("We have not extended this holding [in *Plyler*] beyond the 'unique circumstances' . . . .") (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring)); *see also* Michael A. Olivas, *The Political Efficacy of* Plyler v. Doe*: The Danger and the Discourse*, 45 UC DAVIS L. REV. 1, 11 (2011) ("Scholars who have looked carefully and thoughtfully at the case have determined it to be sui generis, not so much limited to its facts but as possessing weak doctrinal force and little Constitutional significance. Its gravitational pull has not affected many subsequent cases, as none has come before the Court since then on all fours.").

[28] Writing in 1977, Kenneth L. Karst asked, "WHAT is the substance of substantive equal protection?" Karst, *supra* note 10, at 1.

[29] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[30] *But see* Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 3 (2013) (contesting that *Brown* supports the contemporary, symmetrical conception of strict scrutiny for all facial race classifications).

[31] *See* Homer H. Clarke, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 3

Court regarded the child plaintiffs as proto-citizens adds another, useful dimension to our understanding of this seminal case, and its influence on the child-centered cases to follow.

Brown "ushered in the modern era of equal protection jurisprudence."[32] Prior to *Brown*, the "separate-but-equal" rule of *Plessy v. Ferguson* was the law of the land, and authorized racial segregation as entirely consistent with the Equal Protection Clause.[33] With *Brown*, the Supreme Court overturned the rule of *Plessy* and rejected the notion that public schools segregated on the basis of race could ever be "equal."[34] The Court declared that state-mandated segregation expressed and enforced the notion that black children were inferior, and that, beyond depriving black children of equal educational opportunities, this segregation had lasting effects on a black child's self-perception and sense of belonging to the community:

> To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .
>
> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[35]

Thus, the *Brown* Court focused on the long-lasting impact racial segregation would have on Black Americans and particularly Black American children.

("Another case not generally considered a children's rights case, but one which promised great potential benefits for children, was *Brown v. Board of Education*.").

[32] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 668 (3d ed. 2006).

[33] Plessy v. Ferguson, 163 U.S. 537, 548-51 (1896) (involving a black citizen of the United States who purchased a train ticket and sat in a section of the train reserved for white passengers per a Louisiana law; the Supreme Court held that this regulation did not violate the Fourteenth Amendment because the Louisiana legislature acted reasonably when it relied on "established usages, customs, and traditions of the people" to enact it).

[34] *Brown*, 347 U.S. at 495 (holding that barring black school children from admission into the public schools in their community on a nonsegregated basis deprived these children of equal education opportunities in violation of the Equal Protection Clause).

[35] *Id.* at 494 (quoting the Kansas lower court's findings).

The Court's concern with the long-term well-being of children must be seen against the backdrop of the traditional view that children were not necessarily subjects of concern in constitutional law. As Professor Barbara Woodhouse explains, "[h]istorically, children were objects and not subjects of law, functioning more in the role of parental property than as persons. They were rarely seen as bearers of due process and equal protection rights."[36] *Brown* took the rights of children seriously.

Further, while the *Brown* Court was self-evidently concerned with the challenged segregation because it was on the basis of race, it was also particularly concerned because that segregation concerned an important substantive right — that to public education:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[37]

Education was not valuable solely as one of many government-provided benefits, but as a gateway to civic belonging.

The Court went on to explain the precise manner in which education facilitates participation in society as a full and equal citizen:

> Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[38]

Without education, black children would be denied the basic tools to participate in our democracy as citizens. The *Brown* Court made important connections between youth, race discrimination, education, and citizenship. These connections have yet to be fully recognized or theorized as having broader implications regarding the effects of discrimination against children as well as against adults.

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[36] Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1577.

[37] *Brown*, 347 U.S. at 493.

[38] *Id.* at 493.

B. The Right to the Benefits of Family Formation: Non-Marital Children as Proto-Citizens

The Court further referenced the necessary prerequisites to citizenship in cases dealing with the rights of non-marital children. Children born outside of marriage had long been subjected to extensive discrimination and were, indeed, deemed "nonpersons" — also *filius nullius* or the "child of no one" — under the law.[39] Under this view, "illegitimate" children were denied social and legal benefits; they could not inherit or obtain financial parental support, wrongful death recovery, social security, and countless other benefits.[40]

But in the late 1960s, with a growing judicial and popular awareness of the unfairness of systemic discrimination, activists sought to challenge the laws that quite literally disinherited non-marital children from the benefits of being part of a family.[41] In particular, the Court's 1968 decision in *Levy v. Louisiana*[42] laid the foundation for a discernible shift in the exclusion of non-marital children.[43]

At issue in *Levy* was a Louisiana law that prohibited non-marital children from receiving wrongful death benefits upon the passing of a parent.[44] The five young children in *Levy* had lost their mother to negligent medical treatment, but the Louisiana state court denied them wrongful death recovery because they were not deemed "children" within the meaning of the wrongful death statute.[45] In reversing the

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[39] 1 WILLIAM BLACKSTONE, COMMENTARIES *447 ("The rights [of a non-marital child] are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody."); *see also* Gareth W. Cook, Note, *Bastards*, 47 TEX. L. REV. 326, 327 n.11 (1969) (citing BLACKSTONE, *supra*, at *459); Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2373 n.3 (2007) (citing BLACKSTONE, *supra*, at *447).

[40] *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 346-47 (2011).

[41] *See* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 92 (2003) (describing *Levy* as the first of a series of cases framing illegitimacy classifications as violations of the federal Equal Protection Clause); *see also id.* at 90-91 ("Legal criticism of illegitimacy law began to develop in the 1940s. . . . When, twenty years later, legislation had yielded only piecemeal reform, civil rights lawyers of the 1960s brought something new to the illegitimacy debate: the claim that discrimination against illegitimates was not just immoral and irrational, but unconstitutional, and that the federal courts should be called on to address this illegality.").

[42] Levy v. Louisiana, 391 U.S. 68 (1968).

[43] *See* Davis, *supra* note 41, at 95 (citing *Levy*, 391 U.S. at 70) (noting that "the Court's decision broke new ground").

[44] *See Levy*, 391 U.S. at 69-70.

[45] *Id.* at 70.

state court, the Supreme Court first determined that non-marital children were persons entitled to assert constitutional rights: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[46]

The Court then went on to scrutinize the justifications for Louisiana's exclusion of non-marital children from wrongful death recovery, and found them wanting. Specifically, the state court determined that such laws were valid as an effort to regulate the conduct of adults — these laws expressed the sentiment that "'morals and general welfare . . . discourage[] bringing children into the world out of wedlock.'"[47] Purporting to apply rational basis review to this justification, the Court nonetheless noted that it has "been extremely sensitive when it comes to basic civil rights,"[48] and in reliance on *Brown* reminded us that it has not "hesitated to strike down an invidious classification even though it had history and tradition on its side."[49] The *Levy* Court also explicitly recognized that "[t]he rights asserted here involve the intimate, familial relationship between a child and his own mother."[50]

In this context, the Court posed a pointed inquiry:

> When the child's claim of damage for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?[51]

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[46] *Id.* The Court further attempted to humanize Levy and her children by describing the bonds of their relationship. *See id.* ("Louise Levy, gave birth to these five illegitimate children and that they lived with her; that she treated them as a parent would treat any other child; that she worked as a domestic servant to support them, taking them to church every Sunday and enrolling them, at her own expense, in a parochial school.").

[47] *Id.* (quoting Levy v. Louisiana, 192 So. 2d 193, 195 (La. Ct. App. 1966)). The Louisiana Supreme Court denied certiorari because it found the Court of Appeals made no error of law. *See* Levy v. Louisiana, 193 So. 2d 530, 530 (La. 1967).

[48] *Levy*, 391 U.S. at 71 (citations omitted).

[49] *Id.* at 71 (citing Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966); Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[50] *Id.*

[51] *Id.*

Intriguingly, the Court connected the legal benefits of family formation not only to the fact that non-marital children were similarly situated to marital children, but to the fact that non-marital children would grow into adult citizens with all the burdens of citizenship. If they were to bear these burdens, they must be entitled to commensurate rights of citizenship. Those rights included the legal benefits of family formation and, in particular, the intergenerational transfer of financial benefits[52] upon the death of a parent — the type of economic and social safety net that family relationship are meant to provide.[53] The fact that the wrongful death statute was economic in nature did not stop the Court from recognizing the larger social and political significance of denying those family-supporting benefits to non-marital children.

Just a few years later, the Supreme Court struck down another Louisiana law that discriminated against non-marital children, and in so doing, the Court strongly echoed the principles established in *Levy*. In *Weber v. Aetna Casualty & Surety*,[54] the challenged law awarded workers' compensation proceeds to a deceased worker's marital children but denied the same proceeds to his non-marital children.[55] The Court emphasized the obvious similarities to the circumstances presented in *Levy*:

> Here, as in *Levy*, there is impermissible discrimination. An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate [child] later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover.[56]

The Court further explained that the very purpose of workers' compensation laws was to alleviate the harsh effects of the early

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[52] The right to recognized family relationships and the associated right to transfer economic benefits between generations take on a special importance in light of the role of denying these rights as a means of enforcing persistent race inequality. *See* Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631.

[53] The authors do not endorse the transfer of wealth via family relationships as a normative or optimal vehicle to provide economic safety nets for children or adults, however, if this is a primary vehicle, it cannot be afforded some and denied to others similarly situated.

[54] 406 U.S. 164 (1972).

[55] *See id.* at 167-68.

[56] *Id.* at 169.

common law system, under which family members could not assert claims on behalf of the deceased.[57] To exclude a class of children from this social safety net was a significant and troubling form of discrimination.[58]

Importantly, the *Weber* Court turned to *Brown* for guidance, explaining that, "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny."[59] The Court conceded that "the regulation and protection of the family unit have indeed been a venerable state concern," however, excluding children who are equally deserving of the protections of the family unit did not further this goal.[60]

While only the *Levy* decision articulated an explicit connection to the notion of citizenship, both of these seminal cases on the rights of children recognize the importance of legally recognized family relationships. In particular they recognize family formation and the government-provided rights and benefits that attend the family relationship as "basic civil rights"[61] that merited protection. Because of the importance of these substantive rights, deprivation of those rights resulted in severe and lasting consequences, such that any discriminatory deprivation should be closely scrutinized.

Thus, the non-marital status cases enhance our understanding of the types of substantive rights that support the individual's development as a citizen and merit special protection as a result.

C. The Right to Public Education Revisited: Undocumented Immigrant Children as Proto-Citizens

A decade after *Weber*, the Court revisited these themes in *Plyler v. Doe*.[62] Interestingly, it is this case dealing with the equal protection rights of non-citizens that most clearly and powerfully expressed the virtue of protecting the citizenship potential of all subjects of discrimination.

At issue in *Plyler* was a Texas law that denied public education to children who could not document their citizenship status.[63] The state justified the law as an effort to marshal scarce resources and to

[57] *See id.* at 171-72.

[58] *See id.* at 172.

[59] *Id.* at 172 (citations omitted).

[60] *Id.* at 173.

[61] Levy v. Louisiana, 391 U.S. 68, 71 (1968) (citations omitted).

[62] 457 U.S. 202 (1982).

[63] *Id.* at 205-06.

discourage undocumented immigrants from entering and remaining in the United States.[64]

First, in a move reminiscent of *Levy*, the Court addressed whether the undocumented immigrant children were "persons" within the meaning of the Equal Protection Clause, and concluded that they unequivocally were so.[65] Then, in keeping with *Levy* and *Weber*, the *Plyler* Court strongly rejected the notion that a state could deny important benefits to children in an effort to control the conduct of their parents:

> Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.[66]

Quoting *Weber*, the *Plyler* Court added:

> [V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . 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 . . . child is an ineffectual — as well as unjust — way of deterring the parent.[67]

The Court further emphasized that undocumented children had little or no control over their undocumented status, and that this was cause for concern: "Legislation imposing special disabilities upon groups

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[64] *Id.* at 228-29 (acknowledging the state's arguments, the court writes, "First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. . . . Second, while it is apparent that a State may 'not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools,' appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education." (citations omitted)).

[65] *Id.* at 210 ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." (citations omitted)).

[66] *Id.* at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

[67] *Id.* at 220 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[68] The Court expressed concern that persistent differential treatment of undocumented immigrants resulting in "an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law."[69] Thus, caste-creating discrimination is not only harmful to the subjects of that discrimination, but to our democratic commitments themselves.

In addition, hearkening back to *Brown*, the *Plyler* Court expressed special concern about the discrimination in that case because it involved the substantive right of public education, which the Court recognized had a role in developing individuals as citizens.[70] This despite the fact that the excluded children in this case were not citizens — or at least not yet:

> But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.[71]

Purportedly applying only rational basis review, the Court in fact carefully considered the relationship between the trait at issue (the children's undocumented status) and the benefit being denied (primary education), and concluded that there was no articulable connection between the two.

Thus, *Plyler* touches on a recurring theme in the child-centered cases: an inquiry focused less on whether it is superficially "rational" for the state to differentially distribute benefits based on a certain trait, and more on whether it is *fair to the individual* to withhold a benefit on that basis. Taking into account the long-term effects of discrimination on one's ability to develop as a citizen and participate in civil society serves to heighten this fairness inquiry.

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[68] *Id.* at 216 n.14.

[69] *Id.* at 219.

[70] *Id.* at 222-23.

[71] *Id.* at 223.

CONCLUSION

Contemporary equal protection jurisprudence is generally insensitive to the relative importance of the substantive rights at issue in any given discrimination. The Court applies strict scrutiny where a "fundamental" right is implicated, but this category is sparsely populated and the Court does not appear inclined to expand it anytime soon.[72] The child-centered cases discussed above suggest that it might be possible to identify certain substantive rights that, while not "fundamental," are nonetheless strongly connected to our ability to develop as citizens.

In conclusion, we raise this question: What would an equal protection jurisprudence look like that treated all subjects of discrimination as proto-citizens? Per the child-centered cases, such a jurisprudence would first express appropriate regard for the ability and right of all individuals to develop as full-fledged citizens. Second, it would be especially sensitive to discriminatory laws affecting those substantive rights that support citizenship. Third, it would dispense altogether with deferential rational basis review in these cases and carefully consider the impact of excluding the subject of discrimination from the right at issue.

[72] Indeed, the Court could have easily invoked fundamental rights analysis in *United States v. Windsor*, as marriage is one of the few recognized fundamental rights. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (subjecting restrictions on access to marriage to strict scrutiny because such restrictions implicate a fundamental right); Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (noting that the fact that anti-miscegenation laws were discriminatory with respect to marriage was an independent basis for applying strict scrutiny, separate from the fact that the laws relied on race classifications); *see also* Susannah W. Pollvogt, *Marriage Equality,* United States v. Windsor*, and the Crisis in Equal Protection Jurisprudence*, 42 HOFSTRA L. REV. 1045, 1059-61 (2014) (exploring reasons why the Court may have avoided a fundamental rights analysis in *Windsor*).