

2017

John Moore Jr.: *Moore v. City of East Cleveland* and Children's Constitutional Arguments

Nancy E. Dowd

University of Florida Fredric G. Levin College of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Family Law Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Nancy E. Dowd, *John Moore Jr.: Moore v. City of East Cleveland and Children's Constitutional Arguments*, 85 Fordham L. Rev. 2603 (2017).

Available at: <https://ir.lawnet.fordham.edu/flr/vol85/iss6/7>

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

JOHN MOORE JR.: *MOORE V. CITY OF EAST CLEVELAND* AND CHILDREN'S CONSTITUTIONAL ARGUMENTS

Nancy E. Dowd*

INTRODUCTION

At the heart of *Moore v. City of East Cleveland*¹ is seven-year-old John Moore Jr. When his grandmother tried to register John Jr. for school, the school attempted to exclude him by invoking a rule requiring that his grandmother be his legal guardian in order to register him. When that effort failed, the city, in a move that seems hardly coincidental, inspected his grandmother's house and determined John Jr.'s presence violated its zoning ordinance and ordered his removal.² Had his grandmother complied, she would no longer have been able to register him for school. How would we tell the story of John Jr. from his perspective, and how might we construct the case if his constitutional rights were asserted? In this Article, I first tell the story of the case from John Jr.'s perspective and then construct constitutional claims on his behalf.

John Jr.'s potential claims are not simply a matter of historical curiosity. Rather, considering his perspective suggests a potential strategy to confront racial, gender, and class inequalities among children today. Some of these inequalities require dismantling barriers that existing policies or practices put in children's way, making children's development and growth more difficult.³ Other inequalities are linked to state support that favors some identifiable groups of children over others.⁴

* Professor and David Levin Chair in Family Law, University of Florida Fredric G. Levin College of Law. My thanks to Robin Lenhardt and Clare Huntington, who organized the *Fordham Law Review* Family Law Symposium entitled *Moore Kinship* held at Fordham University School of Law, the students of the *Fordham Law Review*, and the participants, whose lively and questioning dialogue deeply affected my thinking for this Article. For an overview of the symposium, see R.A. Lenhardt & Clare Huntington, *Foreword: Moore Kinship*, 85 *FORDHAM L. REV.* 2551 (2017).

1. 431 U.S. 494 (1977).

2. Robin A. Lenhardt, Professor, Fordham Univ. Sch. of Law, Presentation at the Fordham Law Review Family Law Symposium: *Moore Kinship* (Oct. 14, 2016).

3. See generally PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* (2013) (explaining that poverty and housing policies reproduce disadvantage intergenerationally).

4. See generally GARY ORFIELD & JOHN T. YUN, CIVIL RIGHTS PROJECT, HARVARD UNIV., *RESEGREGATION IN AMERICAN SCHOOLS* (1999), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/resegregation-in-american-schools/orfiled-resegregation-in-american-schools-1999.pdf> (explaining that schools vary according to the

Children can make unique claims against the state; thus, children's constitutional arguments might include claims of positive rights to the necessary supports to achieve their developmental potential and maximize their opportunity.⁵ Children's positive rights are inescapably linked to their equality: all children must have developmental support to achieve their developmental capacity and become productive citizens. Because children are embedded in families, neighborhoods, and communities, the developmental support of children means essential attention to the policies, institutions, and structures that support the elements of their ecology ensure the individual life course of every child and the equality among all children. In sum, children's perspectives and interests are essential to advance the equality of all children and all families.⁶

To develop protections for children's rights and needs we must ask, "What about the child's perspective?" rather than subsume their interests in concepts of "family" or "parent."⁷ The child's perspective must be both individual and responsive to children's identities (individual and group).⁸ The inquiry must include whether there are insufficiencies in the degree of support among children that reproduce inequalities. Because patterns of inequality persist along race, gender, and class lines, it is critical that the child's perspective is raced and gendered to avoid continuing subordination in the name of universality.⁹ Children's rights therefore necessarily involve the intersection of their fundamental rights and their equality rights.

This Article is divided into three parts. First, I retell the story of *Moore* from John Jr.'s perspective and frame his potential claims. Second, I explore constitutional arguments under existing doctrine, using contemporary equal protection and substantive due process analyses. Finally, I suggest how a children's rights perspective might be even more persuasive as a strategy for John Jr. as well as for achieving opportunity and equality on behalf of contemporary children living amid and affected by structural inequalities that impact their developmental capacity.

wealth of the school districts, which mirror racially segregated housing patterns) [<https://perma.cc/XDF6-BVVH>].

5. For an example of this perspective, see G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989), *infra* note 59 and accompanying text (discussing the Convention on the Rights of the Child), and see also *infra* Part III (discussing children's positive rights).

6. For similar perspectives, see generally MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT AND AMERICA'S POLITICAL IDEALS* (2010); CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW THE LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

7. The U.S. Supreme Court's jurisprudence has strongly protected parents and families on the assumption that they will act in the best interests of their children and should be given deference in the care of children. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 58 (2000).

8. *See* Nancy E. Dowd, *Unfinished Equality: The Case of Black Boys*, 2 *IND. J.L. & SOC. EQUALITY* 36, 38–40 (2013).

9. *See* Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 *HOFSTRA L. REV.* 47, 114–15 (2016).

I. JOHN JR.'S PERSPECTIVE: RETELLING THE STORY
OF *MOORE V. CITY OF EAST CLEVELAND*

John Jr. went to live with his grandmother, Inez Moore, in East Cleveland in the late 1960s after his mother died.¹⁰ He was less than one year old when he moved in with his grandmother.¹¹ Many details about Inez Moore are unknown, but it does not seem unusual, given the gendered norms of the day, that John Jr.'s father would have turned to *his* own mother for help. The death of John Jr.'s mother left a vacuum of maternal care—the expected source of care for children—a gap filled by John Jr.'s grandmother.¹² John Jr.'s father also occasionally lived with him and his grandmother during the time between the death of John Jr.'s mother and John Jr.'s entry into school.¹³ Eventually, however, John Jr.'s father remarried and, with his new wife, moved into another house that John Jr.'s grandmother owned.¹⁴ Remaining with his grandmother might have been based on the stability and continuity that arrangement provided, the bonds between John Jr. and his grandmother, or the desire to solidify John Sr.'s new marriage. It might have reflected the strength of John Jr.'s other family ties in his grandmother's house. John Jr.'s cousin, Dale Jr., who was four years younger than John Jr., was raised with him as if they were brothers.¹⁵ Dale Jr.'s father, Dale Sr., also lived in the household. So, again, in the gendered norms of the times, John Jr. had a father figure in his household, his uncle, as well as the regular presence of his father. John Jr. also had the benefit of a large group of cousins, twenty-one in all.¹⁶ His grandmother's house was a two-family structure, and some of his cousins lived next door in the other half of the house.¹⁷ Thus, John Jr. had a stable, embedded set of family ties in a robust extended family. This family was a critical resource to him when countering the adverse effects of losing his mother at such a young age.¹⁸

John Jr.'s life, however, intersected with legal structures intended to manage and control East Cleveland by race and class when he began school; those structures would converge on this seven-year-old because of his

10. See Peggy Cooper Davis, *Moore v. East Cleveland: Constructing the Suburban Family*, in *FAMILY LAW STORIES* 77, 77–78 (Carol Sanger ed., 2008); see also Kerry Abrams, *Family History: Inside and Out*, 111 MICH. L. REV. 1001, 1010 (2013).

11. See Abrams, *supra*, note 10, at 1010.

12. *Moore v. City of East Cleveland*, 431 U.S. 494, 506 n.2 (1977) (Brennan, J., concurring) (referring to the essential “maternal influence” that John Jr. received from his grandmother after his mother’s death); see also *id.* at 505 n.16 (plurality opinion) (referring to John Jr.’s grandmother’s care as a “substitute for his mother’s . . . establish[ing] a more normal home environment”).

13. Davis, *supra* note 10, at 78.

14. Lenhardt, *supra* note 2.

15. *Moore*, 431 U.S. at 506 n.2 (Brennan, J., concurring) (characterizing their relationship as a sibling relationship).

16. See Davis, *supra* note 10, at 78.

17. See *id.* But see Lenhardt, *supra* note 2 (noting that this is not certain; it was not necessarily her daughter and a son, but might have been another family member).

18. The adverse-childhood-experiences framework counts the death of a parent as an adverse factor. On adverse childhood experiences generally, see *Adverse Childhood Experiences (ACEs)*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/acestudy> (last visited Apr. 14, 2017) [<https://perma.cc/T5JE-PFYB>].

identity as a black boy in a low-income family. Segregation, structurally supported by law, limited the places where John Jr. might have lived had he been born earlier; but, by the time he was born in the 1960s, East Cleveland was integrating.¹⁹ There were efforts to “manage” and resist integration and to prevent white flight that were both race and class focused through the use of zoning and housing codes.²⁰ In addition, schools were the primary structure for managing the process of racial change.²¹ It was Inez Moore’s actions to register John Jr. for school that triggered the *Moore* litigation.

When Inez Moore tried to register her grandson for school in 1972, she was told she could not do so because she lacked formal legal guardianship of John Jr.²² This must have seemed ridiculous to the person who had parented John Jr. since he was an infant and was his primary caretaker. Inez Moore was his functional mother and the head of her extended family. The guardianship requirement may have been an effort to stem the number of black children entering the school system, particularly low-income black children, who were disproportionately more likely to live in a household other than their parents’ household. Inez Moore decided to fight this policy and went to Legal Aid.²³ Legal Aid brought a class action on behalf of families similarly situated, and the school board settled by eliminating the guardianship requirement.²⁴

But this victory appears to have triggered a retaliatory effort by placing Inez Moore on the city’s radar. Shortly after the settlement on the guardianship issue, housing code inspectors appeared at her door on January 13, 1973.²⁵ John Jr. allegedly was “illegally” in her home and would have to be removed, which would also mean he could not be registered for school.²⁶ It seems too coincidental to think this investigation was accidental. A year after the initiation of the investigation, in January 1974, Inez Moore was cited in a criminal complaint and ordered to remove John Jr. from her home within ten days or face jail time and a fine.²⁷ Expelling a family member from her home would likely have been unthinkable as well as enraging.

Legal Aid again represented Inez Moore, beginning the lawsuit that would take more than three years to reach resolution. On May 31, 1977, which would have been near the end of the school year, when John Jr. was eleven years old, the U.S. Supreme Court in *Moore* declared the housing code

19. See Lenhardt, *supra* note 2. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court held that restrictive racial covenants are unconstitutional.

20. See Lenhardt, *supra* note 2.

21. The Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), was followed by decades of resistance in the North and South, followed by de facto resegregation. For the complex history of resistance to school integration, see *Parents Involved in Community Schools v. Seattle School District 1*, 551 U.S. 701, 805–19 (2007) (Breyer, J., dissenting).

22. See Lenhardt, *supra* note 2.

23. See *id.*

24. See *id.*

25. See *id.*; see also *Moore v. City of East Cleveland*, 431 U.S. 494, 533 (1977) (Stewart, J., dissenting).

26. As noted in the *Moore* plurality opinion, the citation issued in 1973 stated that “John [Jr.] was an ‘illegal occupant.’” *Moore*, 431 U.S. at 497 (plurality opinion).

27. See *id.*

provision unconstitutional.²⁸ John Jr. was allowed to remain in his home, with his family, and stay in school. He was probably old enough during much of this period to understand what might happen to him if the Supreme Court did not overrule the Ohio courts' negative decisions.

II. JOHN JR.'S CONSTITUTIONAL CLAIMS

Moore was brought, and won, by John Jr.'s grandmother, Inez Moore. What if the lawsuit had been brought on behalf of John Jr.? How would we define and construct his interests, and the harms he would suffer, if he was forced out of his grandmother's house and then forced to change schools? Could a claim be brought based on the harm of losing his functional sibling relationship with Dale Jr., in addition to his relationships with his grandmother and uncle? What impact would his removal have had on the other grandchildren and on children in the neighborhood and the community who would witness the power of the state being used to remove a seven-year-old from his home and school?

John Jr.'s story suggests systemic links between housing regulation and the education system. Did these policies have a disproportionate impact? The housing ordinance was generated and targeted at regulating integration by African Americans and discouraging white flight as the racial balance changed in East Cleveland.²⁹ Did the brunt of those efforts fall on black children who, like John Jr., might not only be forced to move but might also be forced to change schools? Or on black children who were actively discouraged from attending schools? Is there a systemic claim that ought to be brought on John Jr.'s behalf focusing on the framework of housing regulation as it intersects with public education?

There are also structural links to income inequality, wealth inequality, and employment discrimination in this case. Both John Jr.'s and Dale Jr.'s fathers were present and engaged in their sons' lives. In the case, both appear to be struggling financially and hence were dependent on their mother to house themselves and their sons.³⁰ What dynamics or systems might be implicated in their economic difficulties that similarly intersect with housing and education? In other words, do we need to ask other questions linked to gender, race, class, and their intersections, to determine if John Jr. is being targeted because of the "sins" of his father? Patterns then and now of persisting employment discrimination would lead to income inequality that limit housing choices, even if no other factors intervene.³¹ The intersection

28. *See id.* at 499–500.

29. *Cf. id.* at 509–10 (Brennan, J., concurring); Davis, *supra* note 10, at 82–83; Lenhardt, *supra* note 2.

30. Dale Sr. could only legally be in his mother's home if he was dependent on her because of the terms of the housing code provision at issue in the case. *Moore*, 431 U.S. at 496 n.2 (plurality opinion). John Sr.'s economic status was less certain, but we know that he was occasionally part of his mother's household and did not have a home of his own, and when he remarried, he was living in his mother's other house. *See id.* at 497 n.4; Lenhardt, *supra* note 2.

31. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1998); SHARKEY, *supra* note 3.

with race further limits housing for both John Jr. and today's children.³² The linking of housing and income with differential schools generates for the children of low-income parents inequality in their developmental supports.³³

John Jr.'s potential claims are powerfully and fundamentally about inequality: they address being treated differently with respect to his family and home and the connected impact on his education. The state's actions discriminated among children on the basis of race, class, and family structure or form. They infringed on his fundamental rights of family by literally requiring his expulsion from his family's home. The equal protection claims would rest on the state's differentiation and discrimination among children based on family form, race, and class, causing harm to John Jr.'s fundamental rights to familial relationships and his necessary caregiving and developmental support, as well as disrupting his education. Because family rights are fundamental, discrimination based on family form arguably results in heightened scrutiny of the state's action.³⁴ Similarly, a race discrimination claim, grounded in the evidence of the racial purpose of the housing code provision and its racial impact on schools, would entitle John Jr. to strict scrutiny.³⁵ His class claim would at best merit heightened rational basis scrutiny.³⁶

Another constitutional theory would be infringement of fundamental rights protected by substantive due process—an intersectional and related claim to the equality arguments—for intrusion and destructive impact on his family relationships with his grandmother, cousin, and uncle. Here, John Jr. would be articulating a related claim to the one made by his grandmother: his rights to the continued familial relationships in his grandmother's household, which constituted his "family." He might make the developmental argument of the importance of such relationships to his well-being and growth. Because he had lost a parent, John Jr. might also argue for the importance of functional relationships rather than simply those connected to formal parental status, as well as the importance of the sustained sibling relationship with Dale Jr. In addition to these familial and developmental claims, John Jr. might further claim that the threatened disruption of his education violates his ability to learn and his right to educational support.³⁷

These claims would face significant doctrinal barriers. In the absence of discriminatory intent, structural claims are disfavored under the Equal Protection Clause as a result of *Washington v. Davis*.³⁸ Its limitation on structural claims has only strengthened over time, leaving in place for disparate impact claims only those that meet the limits set forth in *Yick Wo v. Hopkins*.³⁹ Under *Yick Wo*, discriminatory intent may be read from a

32. See generally SHARKEY, *supra* note 3.

33. See Dowd, *supra* note 9, at 67.

34. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

35. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

36. See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457–62 (1988); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

37. See *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

38. 426 U.S. 229 (1976).

39. 118 U.S. 356 (1886).

disproportionate racial pattern only if there is no other explanation for the pattern.⁴⁰ The requirement of intentional discrimination in virtually all cases, moreover, has been interpreted as a strong standard of intent: a plaintiff must show that decisions with disproportionate effects were chosen because of those effects.⁴¹ The evidence of such intent might have been sufficient in *Moore* given the explicit racial considerations underlying the adoption of these policies.⁴² For contemporary children facing structural inequalities, discriminatory intent is less likely to be present. While there is evidence that state actions have disparate racial impact (and class impact) especially with respect to education (achievement and discipline, in particular, and the known differentials in the quality of schools), rarely are the likely racial impacts of a policy specifically articulated as the reason to adopt that policy.⁴³

Several strategies might improve the possibility of contemporary equal protection claims, but they would require changes to equal protection doctrine. First, the concept of intent could be expanded to incorporate the robust scholarship on implicit cognitive bias and stereotyping to reframe the definition of intent or to add a concept of reckless discrimination (similar to tort standards that treat recklessness as equivalent to intent).⁴⁴ Second, disparate impact analysis could be embraced as reflecting contemporary understandings of how discrimination functions, which is essential to achieve the constitutional design and meaning of equality. In essence, this would require either loosening the strictures of *Yick Wo* or revisiting *Davis*. Third, the doctrine could disavow the principle of color blindness, which so often has only reinforced white privilege, in favor of embracing color consciousness and the value of racial diversity as the hallmarks of equality.⁴⁵

Such a constitutional strategy seems daunting, which may counsel against it. But, it may be useful to remind ourselves that alternative constitutional interpretations that recognize precisely such interpretations of equal protection exist in robust constitutional dissents that outline a very different

40. *See id.* at 373–74.

41. *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 277 (1979).

42. *See* Lenhardt, *supra* note 2.

43. The complexity of the factors creating the pattern is such that it is also unlikely that such a case would meet *Yick Wo* standards unless a plaintiff demonstrates intersecting embedded mutually reinforcing segregated systems linked to state action.

44. On implicit bias, see generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005), and Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063 (2006). On reckless discrimination, see Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. (forthcoming 2017).

45. *See, e.g., Plessey v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.").

constitutional conception of equality.⁴⁶ In addition, it might be argued that *Obergefell v. Hodges*⁴⁷ suggests the possibility of a doctrinal opening to such reframed analysis.⁴⁸ Reframed equality analysis could bring a vast range of law and policy under scrutiny.⁴⁹ It might be argued that, indeed, it is time for exactly that to happen and to start with cases addressing children and youth.

Alternatively, some of John Jr.'s claims might be framed as fundamental rights claims under substantive due process. Today, the existence of *Moore* provides greater potential protection to a range of family forms, although *Moore* is certainly capable of being read narrowly.⁵⁰ If children have, in essence, the mirror image of their parents' and families' constitutional protection, then for a child today, such a claim would be fairly unremarkable. To the extent their claims are distinctive, it would expand and make more robust the scope of familial constitutional rights. Other potential claims (e.g., sibling rights and functional relationships) would face an uphill climb to recognition, given the persistent resistance to expanding the scope of fundamental rights. In addition, no fundamental rights claim would exist for disruption of John Jr.'s education without revisiting the Court's position that education is not a fundamental right.⁵¹ Finally, just as class arguments carry no particularly heightened standard of review under the Equal Protection Clause, so too under existing doctrine there is no fundamental right to even a basic survival level of economic support.⁵²

An alternative to recasting or challenging equal protection and fundamental rights analysis may be to bypass that difficult path altogether by using a children's rights argument incorporating specific substantive

46. See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612, 2632–52 (2013) (Ginsburg, J., dissenting); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803–68 (2007) (Breyer, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528–62 (1989) (Marshall, J., dissenting); *McCleskey v. Kemp*, 481 U.S. 279, 320–45 (1987) (Brennan, J., dissenting); *Feeney*, 442 U.S. at 281–88 (Marshall, J., dissenting); *Univ. of Cal. v. Bakke*, 438 U.S. 265, 387–402 (1978) (Marshall, J., dissenting); *Washington v. Davis*, 426 U.S. 229, 256–71 (1976) (Brennan, J., dissenting); *Palmer v. Thompson*, 403 U.S. 217, 231–40 (1971) (Douglas, J., dissenting); *United States v. Guest*, 383 U.S. 745, 761–62 (1966) (Clark, J., concurring); *id.* at 774–86 (Brennan, J., concurring in part and dissenting in part); *Korematsu v. United States*, 323 U.S. 214, 233–42 (1944) (Murphy, J., dissenting); *id.* at 242–48 (Jackson, J., dissenting); *The Civil Rights Cases*, 109 U.S. 3, 26–62 (1883) (Harlan, J., dissenting); *Slaughter-House Cases*, 83 U.S. 36, 83–111 (1872) (Field, J., dissenting).

47. 135 S. Ct. 2584 (2015).

48. See *id.* at 2611 (Roberts, J., dissenting); *id.* at 2640 (Alito, J., dissenting).

49. *Davis*, 426 U.S. at 248 (“A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”).

50. While the case can be read broadly to support functional families and nontraditional families, it could also be limited to extended families that look only like the one headed by Inez Moore, that is families with blood ties.

51. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

52. See *supra* note 36.

guarantees connected to children's development and equality of those developmental rights. I explore this possibility in the following part.

III. CHILDREN'S RIGHTS

Children's rights doctrine is largely uncharted and undeveloped territory in constitutional law, but that very nebulosity, combined with threads of recognition of such a doctrine, including some sensitivity to developmental factors, may suggest room for doctrinal development.⁵³ This would mean not only protecting children from the inadequacies and inequalities of state policies and institutions but also giving them claims that recognize their positive rights.⁵⁴ Equality for children, and their special dependency on the systems of society to achieve their developmental potential, arguably generates such obligations. It is their developmental needs that are my focus here.

The theoretical grounding for children's rights is in recognizing children's inevitable dependency and needs; children's vulnerability, in a positive and negative sense; the social value of investing in children as future citizens, building their human capital; the moral argument of value of children as human beings who cannot flourish without support; and a human rights argument grounded in their special position because of their dependency and potential. The United Nations Convention on the Rights of the Child (UNCRC), although not adopted by the United States, is nevertheless a useful starting point to think broadly about children's rights.⁵⁵ The four key principles of the UNCRC are the best interests of the child;⁵⁶ the right to life, survival, and development;⁵⁷ the right to equality or nondiscrimination;⁵⁸ and respect for the voice and empowerment of children.⁵⁹ These principles

53. For example, the recognition of developmental principles in a range of cases is one of those threads. *See generally* BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BENJAMIN FRANKLIN TO LIONEL TATE* (2008); Anne Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099 (2011).

54. This is likely to generate resistance as well, given the view by many that our Constitution only provides negative rights. *See, e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

55. *See generally* Nancy E. Dowd, *A Developmental Equality Model for the Best Interests of Children*, in *IMPLEMENTING ARTICLE 3 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD* 112–30 (Elaine E. Sutherland & Lesley-Anne Barness Macfarlane eds., 2016). The United States is the only nation that has not ratified the UNCRC, but a coalition of sponsors has suggested a U.S. Children's Bill of Rights that closely follows the principles of the UNCRC. *See* Press Release, First Focus Campaign for Children, 120+ Advocacy Groups Endorse Children's Bill of Rights (Oct. 28, 2015), <https://campaignforchildren.org/news/press-release/120-advocacy-groups-endorse-childrens-bill-of-rights/> [<https://perma.cc/2NDH-4275>]; *see also* FIRST FOCUS CAMPAIGN FOR CHILD., <http://campaignforchildren.org> (last visited Apr. 14, 2017) [<https://perma.cc/H42U-JAVR>]. Also essential would be overruling *Rodriguez*. Education as a fundamental right is clearly suggested by the language in *Brown* and *Plyler*. This might open the door to establishing other foundational children's rights in the poverty, child welfare, and juvenile justice systems.

56. G.A. Res. 44/25, *supra* note 5, art. 3.

57. *Id.* arts. 5–6.

58. *Id.* art. 2.

59. *Id.* art. 5.

encompass the notion of the state's positive obligations to children and where those obligations lie. I focus here on the intersection between developmental rights and equality rights. Children should be entitled to developmental equality.⁶⁰

Children's rights doctrine combines positive rights with developmental support and equality rights to ensure that every child is supported to his or her greatest potential.⁶¹ Indeed, it is critical that the "child" that is the focus of children's rights not be conceptualized neutrally, without gender, race, or class, as those identity characteristics are strong developmental factors as well as equality factors.⁶² Developmental rights might include, but not be limited to, the protection and support of family bonds; family support, ensuring economic sufficiency and that economic differences do not translate into developmental differences; developmental supports geared to developmental ages and stages (e.g., early childhood development versus adolescence); and institutional support for development, such as child health equity, educational equity, and a rehabilitative juvenile justice system minimally utilizing incarceration. Connected to these developmental supports would be supports for families to minimize or eliminate child poverty and the direct and associated ills of poverty for children's development. While some might argue that positive rights should be limited to minimum needs, that approach would entrench inequalities by ensuring the likelihood of differential developmental supports depending on the accident of one's birth. To the contrary, the component factors that facilitate healthy development can be identified and should be provided for all children. In addition, as our existing disability statutes provide, when children have disabilities that affect their developmental path, the state should provide additional support so that they might reach their developmental potential.⁶³ Structural faults should be corrected where systems interfere with children's developmental rights or operate to perpetuate race and gender inequalities.

The case for children's rights is grounded first in making the fundamental rights argument and then arguing the presence of both equal protection and substantive due process violations by the state's failure to meet the standards implicit in children's rights in the developmental context. In *Moore*, this would mean not only dismantling the immediate systems causing harm—here the housing/zoning system in combination with the school system—but also looking at John Jr.'s degree of support as he experienced the loss of his mother and the extent to which supports were available to his father, grandmother, family, neighborhood, and community.

Particularly important for the argument that could be made on behalf of John Jr. is his right to develop to his potential, a right equal to that of other children without respect to identity, race, gender, or class. For John Jr. and other children of color for whom identity triggers inequality in resources,

60. See generally Dowd, *supra* note 9.

61. See *id.* at 50.

62. See *id.* at 52.

63. See *id.* at 112 & n.369.

neighborhoods, family support, educational opportunity, and scrutiny by the police powers of the state, such arguments are particularly essential and strong.⁶⁴ They would require not only dismantling housing and educational policies and institutions that fail to provide equal developmental support but also would aim to prevent the active developmental harm of actions like the demand to remove a child from his family threatened by the City of East Cleveland.

For contemporary children, a positive children's rights argument would be particularly helpful in providing constitutional grounding to address some of the most confounding issues of social justice that affect them: child poverty; the disproportionate distribution of adverse childhood experiences among poor children; the toll on development of ongoing racism and racial inequality; the negative impact of surveillance, discipline, and policing; and the overall negative consequences of the juvenile justice and criminal justice systems.⁶⁵ One example of this might be mandating supports to families and communities in early childhood to equalize readiness and opportunity at entry into preschool and kindergarten. Even to the extent of supporting claims to remove obstacles and equalize support in existing systems (versus meeting the standards of positive rights), such an analysis might more fruitfully confront educational inequalities in achievement and discipline that disproportionately impact children of color.

The concept of children's rights therefore provides an expanded mechanism to confront the inequalities that plague children and families, and it offers a powerful strategy to confront equality as a whole. Supporting, even mandating, action by the state is essential to provide real opportunities to children today who face daunting intersectional structural inequalities that may further rigidify our persisting race and class inequalities. Through the eyes of children, maybe it will be clearer to see our way forward.

64. *See supra* note 31.

65. *See supra* note 31; *see also* Dowd, *supra* note 9.