

Parental Rights: Rhetoric Versus Doctrine

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Professor Josh Gupta-Kagan observes that the Restatement of Children and the Law¹ does not transform the law of child abuse and neglect.² As he contends, this is neither a feature nor a bug.³ It is simply the reality of a restatement, which can only nudge, not reform, the law.⁴ I agree with Gupta-Kagan that only political will, not the American Law Institute (ALI), can fix the significant problems with the family regulation system. For advocates and scholars—including both of us—who seek structural and doctrinal change, the ALI has principles projects, and there is a broader ecosystem for law reform. But the nature of a restatement is to restate.

Notwithstanding this inherent constraint, I want to underscore one aspect of Gupta-Kagan's argument and suggest that the Restatement⁵ does more than may first meet the eye. Gupta-Kagan applauds the Restatement's embrace of parental rights for families facing coercive state intervention through the family regulation system. He demonstrates that at several doctrinal forks, the Restatement relies on parental rights to choose the rule that is more protective of family integrity. As Gupta-Kagan shows, by emphasizing these rights, the Restatement reinforces the doctrinal shield that helps protect marginalized families from state intervention. I second the value of this shield, but in my view, the Restatement does something else as well.

By restating the doctrine of parental rights—as it applies in the family regulation system and more broadly—the Restatement

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¹ Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

² Josh Gupta-Kagan, *Nudging Improvements to the Family Regulation System*, 91 U. CHI. L. REV. 469, 472–73 (2024).

³ See *id.* at 469.

⁴ See *id.* at 469–70; see also Douglas NeJaime, *Parents in Fact*, 91 U. CHI. L. REV. 513, 514–15 (2024).

⁵ RESTATEMENT OF THE LAW, CHILDREN AND THE LAW pt. 4 (AM. L. INST., Tentative Draft No. 5, 2023) (Children in Society).

offers an institutional counterbalance to the heated partisan rhetoric around parental rights. Across the country, political leaders and advocates are claiming that these rights mean parents can control school curricula, minors cannot access reproductive health care without parental involvement, and parents must know about a child's exploration of gender identity outside the home.⁶ This invocation of parental rights is not an attempt to recalibrate doctrine. It is a political strategy for advancing a world view.⁷ And it is highly effective, leading to considerable legislative success, at least for the moment.⁸

Legal scholars appropriately identify the dangers in this political strategy,⁹ but, as I argue in this brief response Essay, even as we recognize the problems with the rhetorical invocation of parental rights, we cannot lose sight of the *doctrinal* importance of parental rights. As I elaborate below, in both its process and substance, the Restatement quietly and steadily affirms existing legal doctrine. The Restatement identifies the core interest at stake in parental rights: the relationship of a parent and child and the ability for one to be with the other. Protecting the parent-child relationship is important for all families, but it is especially critical for marginalized families, who are at heightened risk of family separation. And by underscoring these interests and their deep doctrinal roots, the Restatement may (optimistically), provide a counterbalance to the ongoing culture wars.

I. THE LIMITS OF A RESTATEMENT AND THIS RESTATEMENT

I appreciate Gupta-Kagan's observations about where the Restatement falls short of even the modest goal of nudging the law to better serve children and families. Fortunately, the Restatement is still a work in progress, and there is time to fix some of the discrete issues he identifies. For example, he helpfully points out that some of the illustrations in the section on physical neglect reflect pathology logics.¹⁰ It is not too late to change the language of "choice" and "substance use." And notwithstanding the ALI's

⁶ See *infra* note 22 and accompanying text.

⁷ See *infra* notes 32–33 and accompanying text.

⁸ See *infra* note 22 and accompanying text.

⁹ See *infra* notes 23, 32–33 and accompanying text.

¹⁰ See Gupta-Kagan, *supra* note 2, at 497 (discussing S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1523 (2023) (arguing that the family regulation system reflects "pathology logics" by obscuring structural racism and inequality and instead blaming parents)).

preference for bookend illustrations with clear-cut fact patterns, it is possible to include a bit more nuance in the illustrations to give better guidance to courts and advocates on gray areas of the law.

More broadly, however, some of the shortcomings Gupta-Kagan identifies are because of the underlying law. It is true, as he argues, that the section on physical neglect places most of the burden on parents, rather than the state, to address the causes of physical neglect. Unfortunately, this is the law. Take housing, for example. Around the country, many families struggle with the lack of affordable, livable housing.¹¹ And for some families, housing instability is a contributing factor leading to state intervention through the family regulation system.¹² If a child is removed from the care of a parent due, at least in part, to housing instability, the state has an obligation to make reasonable efforts to reunify the family.¹³ As the Restatement clarifies, this obligation requires state agencies to help parents find housing, but it does not require the state agency to pay for that housing, even if this means not reunifying the family.¹⁴ In other words, the Restatement

¹¹ See *Housing Instability*, OFF. DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEPT. HEALTH & HUM. SERVS., <https://perma.cc/LA8B-SFEK>.

¹² See AMY DWORSKY, UNIV. OF CHI., *FAMILIES AT THE NEXUS OF HOUSING AND CHILD WELFARE* (2014).

¹³ See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.50(a) (AM. L. INST., Revised Tentative Draft No. 4, 2022) (on file with author) [hereinafter RESTATEMENT Revised Draft No. 4] (describing the obligation of the state to make reasonable efforts to reunify a family):

If a court orders the removal of a child from the care of a parent or guardian . . . the court will also order the state to make reasonable efforts to reunify the child and parent or guardian by helping the parent or guardian address the conduct and circumstances that led to the child's removal.

¹⁴ See *id.* § 2.50(a)(2) (requiring the state to “provide services necessary for the realization of the plan that are tailored to the needs of the family, available and accessible, and consistent and timely”); *id.* § 2.50 cmt. d (“[T]he state’s obligation is to help the parent remedy the conditions or behaviors that led to state intervention.”); *id.* § 2.50 cmt. o (discussing the relevance of constrained state funding and noting that the state has an obligation to deploy the resources it has available but noting that the overall constraint on state funding is still a factor in determining what constitutes a reasonable effort). For examples of cases discussing the state’s obligation regarding housing, which generally find that the state agency must assist the parent in finding housing and, for example, applying for housing assistance, but not requiring the state agency to pay for housing, see *W.A. v. Calhoun Cnty. Dep’t of Hum. Res.*, 211 So. 3d 849, 853 (Ala. Civ. App. 2016) (finding that the state failed to make reasonable efforts because, in part, the state made no efforts to address the father’s housing issues); *In re Melody L.*, 962 A.2d 81, 93 (Conn. 2009) (finding reasonable efforts when, among many other efforts, the state agency provided “assistance in obtaining appropriate housing; assistance in obtaining appropriate furniture”), *overruled by State v. Elson*, 91 A.3d 862 (Conn. 2014); *In re A.F.K.*, 317 P.3d 221, 229 (Okla.

reflects U.S. law and policy: the state does not have an affirmative obligation to address poverty. Thus, although I agree that the Restatement does not grapple with structural inequality and instead places responsibility on parents, this is because the law does so.¹⁵

More generally, parental rights go only so far in helping marginalized families.¹⁶ Mississippi is a good example. As Gupta-Kagan shows, Mississippi has low rates of child removal and termination of parental rights.¹⁷ It is unclear whether these statistics reflect a strong view of parental rights or state indifference to children. But it is clear that the state has some of the worst outcomes for children: the highest rate of child poverty in the country,¹⁸ the second highest teenage birth rate,¹⁹ and the highest infant mortality rates.²⁰ As many other scholars and I have argued, the right to be shielded from state intervention does not translate into an affirmative right to support from the state, notwithstanding the critical importance of this support for child well-being.²¹

In short, I agree with much of Gupta-Kagan's critique, but I am not sure the Restatement could do more, given the state of the

Civ. App. 2013) (finding reasonable efforts when the state made numerous referrals for services, including housing assistance).

¹⁵ In other work, Gupta-Kagan makes a powerful normative argument for what the law could and should do to disentangle poverty and neglect and address poverty head on. See generally Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. (forthcoming 2024).

¹⁶ I have been making this argument for nearly two decades. See Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1570 (2023) [hereinafter Huntington, *Pragmatic Family Law*]; Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 656–58 (2006).

¹⁷ See Gupta-Kagan, *supra* note 2, at 499–502. Elsewhere, I have argued that rights have limited traction in ensuring low-income families receive support from the state. See Huntington, *Pragmatic Family Law*, *supra* note 15, at 1513.

¹⁸ *Percent of Children Under 18 Years Below Poverty Level in the Past 12 Months (for Whom Poverty Status is Determined)*, U.S. CENSUS BUREAU (2021), <https://perma.cc/6FEV-LCW6> (noting that over 27% of children were living below the poverty level in 2021).

¹⁹ *National Center for Health Statistics: Mississippi*, CTRS. FOR DISEASE CONTROL & PREVENTION (2021), <https://perma.cc/FA7C-AL2C>.

²⁰ *Id.*

²¹ See, e.g., MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* 19–42 (2020) (demonstrating that the United States and other wealthy countries spend approximately the same amount of money on children, but in the United States, much of this investment comes from families, rather than the state, leading to vastly unequal outcomes for children and placing an enormous burden on families); CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 82–108 (2014) (arguing that family law can be characterized as “ill-timed, ill-conceived, or inadequate” state regulations that are reactive to the effects of poverty, rather than proactive in supporting parents and children).

law. As the next Part shows, parental rights face an additional challenge: politicians and advocates invoking these rights as a political hammer. But here, the Restatement does offer some relief—or at least a counterweight to the rhetoric.

II. RHETORIC VERSUS DOCTRINE

Parental rights are in the news. And not in a good way. In multiple contexts, movement conservatives are invoking parental rights to advance a socially conservative political agenda.²² As scholars in different disciplines have shown, there is nothing new in this strategy.²³ But as we—legal scholars, advocates, and members of the public—express concern about the weaponization of

²² See Adam Nagourney & Jeremy W. Peters, *How a Campaign Against Transgender Rights Mobilized Conservatives*, N.Y. TIMES (Apr. 16, 2023), <https://perma.cc/2Y2H-K24Y> (describing the effort of conservative groups, such as the American Principles Project and the Alliance Defending Freedom, to deploy anti-trans arguments as a wedge issue and put it under the banner of parental rights). Governor Glenn Youngkin was an early adopter of this strategy, winning the Virginia election by making parental rights in education a central issue in the campaign, with a clear message about not teaching the history of racial injustice. See YouTube: Social Warrior (Glenn Youngkin 2021) (on file with author). Similarly, and not coincidentally, what is known colloquially as Florida’s Don’t Say Gay law is titled the Parental Rights in Education Act, and it restricts how public-school teachers, among other “school personnel,” discuss sexual orientation and gender identity in kindergarten through eighth-grade classrooms. FLA. STAT. ANN. § 1001.42(8)(c)(3) (West 2022). There are countless other examples. See, e.g., Melissa Moschella, *Critical Race Theory, Public Schools, and Parental Rights*, HERITAGE FOUND. (Mar. 24, 2022), <https://perma.cc/28AL-JZQB> (arguing that that teaching critical race theory in public schools is “contrary to parental rights”). For a description of this trend, see Mary Ziegler, Maxine Eichner & Naomi Cahn, *Erosion by Misdirection: The New Uses and Abuses of Parental Rights* 22–27 (Univ. of Va. L. Sch. Pub. L. & Legal Theory Paper Series, Rsch. Paper No. 2023-62, 2023).

²³ See ELIZABETH GILLESPIE MCRÆ, *MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY* 112–15, 150 (2018) (describing the commitment of white segregationist mothers, after the decision in *Brown v. Board of Education*, 347 U.S. 483 (1953), to exercise parental rights to protect their children from integration and preserve school curriculum that emphasized “[g]ood white mother[ing]” practices of rearing children who supported the “physical, political, and social distance from black men, women, and children” and garnering national opposition for teaching materials that undermined white supremacy); Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529, 533 (2023) (describing how advocates use parental rights to advance private preferences and choices in what Millat calls “anti-themed” education legislation, which targets teaching concepts relating to gender and sexual identity as well as critical race theory in an effort to keep “values-based” education in the home and out of schools); Gillian Frank, *“The Civil Rights of Parents”: Race and Conservative Politics in Anita Bryant’s Campaign Against Gay Rights in 1970s Florida*, 22 J. HIST. SEXUALITY 126, 127–37 (2013) (describing how advocates transformed the fight over a local ordinance in Florida prohibiting discrimination against gay men and women into a national fight by invoking parental rights and strategically rephrasing a political agenda through child-protection rhetoric, and further describing how this strategy has been used in

parental rights, it is critical to distinguish parental-rights rhetoric from parental-rights doctrine.²⁴

As Professor Elizabeth Scott and I have argued, the doctrine of parental rights promotes child well-being for two main reasons.²⁵ First, by restricting the state's authority to intervene in families, parental rights promote the stability of the parent-child relationship.²⁶ This protection furthers healthy child development for all children, but it is especially important for low-income families and families of color, who are subject to intensive state scrutiny.²⁷ Second, parental rights ensure that in most contexts, parents, rather than a state actor, make decisions about what advances a particular child's interests.²⁸ The legal system defers to parents' decisions about their children both because parents are well positioned to know what their child needs and because state intervention exposes the child to the risk of family disruption and contentious litigation.²⁹ To be sure, some legal scholars take issue with this distribution of decision-making authority,³⁰ but these debates are good-faith conversations about which legal rules best serve the interests of children.

By contrast, the rhetorical invocation of parental rights is a political strategy for a polarized era. For example, Democrats and

numerous other contexts, including anti-busing campaigns); Naomi R. Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory*, 53 SETON HALL L. REV. 1443, 1459, 1465–70 (2023) (describing the decades-long history of the conservative movement invoking parental rights to circumscribe minors' access to abortion); Jill Lepore, *Why the School Wars Still Rage*, NEW YORKER (Mar. 14, 2022), <https://perma.cc/7DMF-2FQG> (describing the history of political advocates invoking parental rights and noting that today's fights are about sexual orientation, gender identity, and race, but a century ago, parents and school districts tangled over evolution); Mary Ziegler & Naomi Cahn, *Opinion: What Parents Are Really Getting From The GOP's 'Parental Rights' Agenda*, CNN (Mar. 30, 2023), <https://perma.cc/SZ86-2CHU>:

These claims made sense when many conservatives were unsure about the wisdom of directly attacking the legitimacy of integration, gay rights or the other issues of the day. Focusing on parental prerogatives was easier, and seemingly appealed to Americans who had not yet made up their minds, or who did not wish to appear bigoted.

²⁴ Other legal scholars are also distinguishing parental rights rhetoric from parental rights doctrine. See generally Ziegler et al., *supra* note 22.

²⁵ See generally Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020).

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.* at 1416–17.

²⁹ See *id.*

³⁰ See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 110–27 (2021).

Republicans disagree sharply about the government's role in addressing racial inequity.³¹ Conservative advocates are framing this issue in the language of parental rights to indirectly advance a view that is harder to advance directly: movement conservatives do not want to argue against racial justice, so they make a parental-rights argument against schools teaching critical race theory.³² Similarly, marriage equality is settled as a legal matter, so instead of attacking that right, conservatives invoke parental rights to claim that schools should not teach young children about same-sex relationships.³³

By naming something “rhetorical,” I do not mean to underplay the impact of these political moves. But these political assertions of parental rights are decidedly not an effort to change doctrine. Indeed, an embrace of parental rights would lead to some outcomes that the same advocates presumably do not want. For example, a strong regime of parental rights might mean that a school must inform a parent about a child's gender expression at school, but this regime would also mean that a parent, not the state, makes healthcare decisions for a child, including whether to seek and obtain gender-affirming care. Indeed, a strong theory of parental rights is at the heart of litigation seeking to enjoin state laws that restrict minors' access to gender-affirming care.³⁴

³¹ See PEW RSCH. CTR., BEYOND RED VS. BLUE: THE POLITICAL TYPOLOGY 7 (2021):

Perhaps no issue is more divisive than racial injustice in the U.S. Among the four Republican-oriented typology groups, no more than about a quarter say a lot more needs to be done to ensure equal rights for all Americans regardless of their racial or ethnic background; by comparison, no fewer than about three-quarters of any Democratic group say a lot more needs to be done to achieve this goal.

³² See Ziegler et al., *supra* note 22, at 23–24.

³³ See *id.* at 22–25; see also Lepore, *supra* note 23 (describing how fights about issues such as public school curricula stand in for larger societal disagreements: when parents objected in the early twentieth century to the teaching of evolution, they were also objecting to Progressive Era reforms, and when today's parents oppose teaching the history of racial injustice, they are also expressing a view on the need for the government to address racial inequity).

³⁴ See generally Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419 (2023). For a court decision recognizing this claim, see *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1138, 1151 (M.D. Ala. 2022) (preliminarily enjoining the portions of the Alabama law that prohibit minors from obtaining puberty blockers and hormone therapies because these provisions likely discriminate on the basis of sex and violate a parent's right to make health care decisions for a child; not enjoining portions of the law that prohibit gender-affirming surgery for minors and prohibit school officials from keeping a child's gender identity secret from a parent), *vacated*, *Eknes-Tucker v. Gov. of Ala.*, 2023 WL 5344981, at *1 (11th Cir. 2023); *In re Abbott*, 645 S.W.3d 276, 280–84 (Tex. 2022) (upholding a preliminary injunction against the state agency on the ground that interpreting gender-affirming care

In both its process and substance, the Restatement can—potentially—help focus attention on what children and families need, as opposed to what politicians are doing to garner votes. As a process matter, reporters spend years sifting through hundreds of cases to find through lines, and the process of writing a restatement includes multiple, iterative opportunities for collaboration and consultation.³⁵ Each black-letter section proceeds through three, sometimes four, layers of review and input.³⁶ Reporters meet regularly with advisers who specialize in the field—judges, academics, and practicing lawyers—for input on early drafts and sharing of perspectives, and then each substantive section in a restatement is reviewed and discussed by the ALI Council and finally the full membership.³⁷ This process, with repeated opportunities for listening and learning from varying perspectives, is decidedly different from politicians and advocates using family law as a wedge issue to gain political power.

As a substantive matter, even as many family law scholars express concern about the political deployment of parental rights,³⁸ we should not lose sight of the doctrinal importance of parental rights for all families and especially those caught up in

as child abuse may infringe on parental rights). For a court decision rejecting this claim, see *L.W. v. Skrmetti*, 73 F.4th 408, 416–17 (6th Cir. 2023) (internal quotations and citations omitted):

Parents, it is true, have a substantive due process right to make decisions concerning the care, custody, and control of their children. But the Supreme Court cases recognizing this right confine it to narrow fields, such as education[] and visitation rights. No Supreme Court case extends it to a general right to receive new medical or experimental drug treatments. In view of the high stakes of constitutionalizing areas of public policy, any such right must be defined with care. . . . The challengers have not shown that a right to new medical treatments is deeply rooted in our history and traditions and thus beyond the democratic process to regulate.

The Eighth Circuit upheld a preliminary injunction of Arkansas’s law based on a sex discrimination claim and thus did not reach the plaintiffs’ parental rights claim. See *Brandt v. Rutledge*, 47 F.4th 661, 669, 672 (8th Cir. 2022) (stating that “[a] minor born as a male may be prescribed testosterone . . . but a minor born as a female is not permitted to seek the same medical treatment” and upholding the district court’s preliminary injunction because plaintiffs are likely to succeed on their sex discrimination claim).

³⁵ See *How ALI Works*, ALI ADVISER, <https://perma.cc/PC6G-8QX3>.

³⁶ See *id.*

³⁷ See *id.*; see, e.g., *Restatement of the Law, Children and the Law*, AM. L. INST., <https://perma.cc/THG5-G9U7> (listing the advisors for the Restatement).

³⁸ See, e.g., LaToya Baldwin Clark, *The Critical Radicalization of Parents’ Rights*, 132 *YALE L.J.* 2139, 2178–89 (2023) (arguing that parents’ rights have been used to fight critical race theory in schools in the name of children’s innocence); Ziegler et al., *supra* note 22, at 22–26 (discussing the use of parents’ rights against abortion, gender identity, and racial injustice).

the family regulation system. Gupta-Kagan reminds us that parental rights make it harder for the state to intervene in family life and harder to remove a child from the care of a parent.³⁹ Parental rights also impose affirmative obligations on the state to try to reunite the family if a child has been placed in state custody.⁴⁰ The Restatement's black-letter rules set forth these and other protections for families, and the rules are rooted in both the Constitution and social science evidence about the importance of stability in the parent-child relationship.⁴¹ These protections are especially salient in light of new evidence coming out of the pandemic showing that when state agencies stopped removing children during the early days of COVID-19, child outcomes remained positive along a range of metrics.⁴² Thus, properly enforced,⁴³ parental rights can make a significant difference in the lives of children and families—especially the most vulnerable.

³⁹ See Gupta-Kagan, *supra* note 2, at 474–75.

⁴⁰ *Id.* at 492.

⁴¹ See, e.g., RESTATEMENT Revised Draft No. 4 § 2.41 cmt. a:

[T]he U.S. Constitution protects the integrity of the parent–child relationship. The state has an interest in safeguarding children from serious harm, but the state must use the least intrusive means to protect the child, which usually precludes removal. Research on child development underscores the importance of maintaining stable relationships between children and their parents. Thus, although a child may face a risk of harm in the care of the parent, this risk must be balanced against the risk of harm from removal and placement in foster care. Finally, the goal of the child welfare system is not to punish parents but rather to help them provide adequate care to their children. The state will try to keep children with a parent or guardian while helping the family address the issues that led to state intervention if that can be accomplished without serious risk to the child.

⁴² See Melissa Friedman & Daniella Rohr, *Reducing Family Separations In New York City: The Covid-19 Experiment and a Call for Change*, 123 COLUM. L. REV. F. 52, 52 (2023):

With the near-complete shutdown of New York City [during the onset of the COVID-19 pandemic], the child welfare apparatus had no choice but to remove fewer children from their homes. Catastrophe did not ensue. Rather, the numbers tell a different story. Children remained safe across a range of metrics, avoided the trauma of removal from their homes during a global pandemic, and experienced sustained safety as the City began to reopen.

⁴³ See Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1070–80 (2015) (proposing a “robust” conception of rights, particularly to support children in poverty). I second Gupta-Kagan’s support for models of parent representation that are flourishing in New York City and around the country. See Gupta-Kagan, *supra* note 2, at 474 (“One reason parental rights remain essential parts of the law (and the Restatement) is that, whatever problems may result from the law granting parents control over children, any limitations on those rights necessarily imposes some form of state power over families.”).

The Restatement will not resolve polarization in the United States. But by offering both a process and venue for different interests to come together and a finished product that can help guide courts, the Restatement offers stability and grounding in this contentious time.

CONCLUSION

Like Gupta-Kagan, I, too, look forward to a Restatement (Second) of Children and the Law that reflects a sea change in the state's support of families. Until then, advocates and legal scholars should continue to name and critique the misuse of parental-rights rhetoric while also reaffirming the importance of parental-rights doctrine in promoting the well-being of children.