

AN OFF-LABEL USE OF PARENTAL RIGHTS? THE UNANTICIPATED DOCTRINAL ANTIDOTE FOR PROFESSOR MNOOKIN'S DIAGNOSIS

EMILY BUSS*

I INTRODUCTION

In his seminal article, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, Robert Mnookin noted the trend in custody law away from deference to “natural parents” (a term of the times) and toward an increased focus upon children’s best interests, implemented through individualized adjudications of those interests.¹ He devoted much of the article to arguing that the best-interests standard is fraught with problems in its application, and he called for solutions that move away from a judicial application of this standard whenever possible. But Mnookin in no way rejected the idea that custody law should be designed to serve children’s interests. The central wisdom of the article lies in the distinction Mnookin drew between a best-interests principle, relied upon to develop a legal regime, and a best-interests standard, applied by custody adjudicators in individual cases. Children’s interests would be far better served, Mnookin argued, if less was left to courts’ assessments of those interests.

Mnookin pursued this idea by outlining a better approach to custody decisionmaking in both the child-protection and private-custody contexts. This outline is shaped by his distrust of individualized adjudication and his embrace of the “psychological parent” theory rather than by an interpretation of the law. Indeed, in this remarkably prescient article, perhaps the only thing that Mnookin did not foresee was the doctrinal basis that would emerge for his prescriptions: The constitutional rights of parents, whose scope was just beginning to be developed at the time the article was published, have come to embody, and to a considerable extent protect, Professor Mnookin’s child-

Copyright © 2014 by Emily Buss.

This article is also available at <http://lcp.law.duke.edu/>.

* Mark and Barbara Fried Professor of Law, University of Chicago Law School. Many thanks to all the participants at the *Law and Contemporary Problems* symposium on Child-Custody Decisionmaking, for their invaluable comments, and to Jeremy Green for his excellent research assistance. The Arnold and Frieda Shure Research Fund provided support for this research.

1. 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

erving prescriptions. What this alignment suggests is that the development of the parental-rights doctrine, contrary to popular wisdom, has institutionalized a legal structure that better serves children's interests than one that leaves those interests in the hands of individual judges.

Recognizing the connection between parental rights and children's interests is not new.² What is new is the recognition of the striking correlation between Mnookin's child-focused legal prescriptions and the parent-focused developments in constitutional law. In this article I will explore the various implications of that correlation: There is some reason to think that Mnookin's article influenced the development of parental rights under the Constitution, a previously unappreciated effect of an article that has been so widely celebrated for its influence. Whether or not influenced by Mnookin's article, the development of the doctrine clearly responded to many of the concerns Mnookin addressed and did so in a way that teased out the substantive and procedural implications of those concerns. Those concerns can account not only for much of the doctrine's development, but also for the limits of that development, limits that cannot be squared with a parent-favoring view of parental rights. The correlation also suggests some potential for doctrinal growth, growth consistent with Mnookin's aspiration to embed best-interests principles in legal rules.

In this article, I discuss these points in five parts. Following this brief introduction, I set out in part II the state of parental rights under the Constitution at the time Mnookin wrote his article. Although there were only a few Supreme Court cases addressing parental rights at the time, it is nevertheless notable that Mnookin gave this doctrinal line only the slightest of nods. In part III, I set out Mnookin's prescriptions for custody determinations in both the public and private contexts and the justifications Mnookin offered for these prescriptions. In part IV, I follow the Supreme Court's development of parental rights in the child-protection context, a development that occurred within ten years of his article's publication in *Smith v. OFFER*,³ *Lassiter v. DSS*,⁴ and *Santosky v. Kramer*.⁵ Then, I discuss in part V the development of parental rights in the context of private-custody disputes, through the so-called unwed father cases, as well as *Troxel v. Granville*.⁶ I show in parts IV and V how the development of parental rights has largely served the aims set out in Mnookin's article, both in their reach and in their limitations. Finally, in part VI, I briefly conclude.

2. See Martin Guggenheim, WHAT'S WRONG WITH CHILDREN'S RIGHTS? 35-49 (2005); Emily Buss, 88 VA. L. REV. 635 (2002); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

3. 431 U.S. 816 (1977).

4. 452 U.S. 18 (1981).

5. 455 U.S. 745 (1982).

6. 530 U.S. 57 (2000).

II PARENTAL RIGHTS IN 1975

When Professor Mnookin's article was first published, there were five U.S. Supreme Court cases addressing parental rights under the Constitution. Only one of these, *Stanley v. Illinois*,⁷ addressed a parent's right to custody and the procedural rights that accompany that custodial claim. The other four, *Meyer v. Nebraska*,⁸ *Pierce v. Society of Sisters*,⁹ *Prince v. Massachusetts*,¹⁰ and *Wisconsin v. Yoder*,¹¹ were framed in substantive terms and addressed the state's authority to intervene in the child-rearing choices of undisputed custodians.

In his article, Mnookin made only one mention of any of these cases, a brief citation to *Pierce*, a *Lochner*-era¹² case that recognized the right of parents to "direct the upbringing and education of children under their control" as an aspect of "the fundamental theory of liberty" enshrined in the due process clause.¹³ What Mnookin said about *Pierce* is striking: "*Pierce v. Society of Sisters*, in which the Supreme Court struck down Oregon's attempt to compel attendance of children at public schools, may be viewed as a constitutionally-based limitation on state power to intrude into family decision-making."¹⁴ It is hard to see how else the case could be viewed, because it seems to offer strong doctrinal support for his embrace of the principle of family autonomy. It is also unclear why Mnookin did not cite to the more recent decisions recognizing that right, particularly the extremely recent and prominent *Yoder* decision. This slight and uncertain nod to *Pierce* and the lack of any mention of the other cases in the line makes clear that Mnookin considered these cases of limited relevance in addressing the problems of contemporary custody law that he was confronting.

More striking is the article's lack of attention to *Stanley v. Illinois*, a case that considered the constitutionality of an Illinois statute that excluded unmarried fathers from those with a custodial right to their genetic offspring. In the case before the court, Peter Stanley's children—with whom he had lived along with their mother on and off—were considered "dependent" and taken into state custody upon their mother's death.¹⁵ The Supreme Court found that

7. 405 U.S. 645 (1972).

8. 262 U.S. 390 (1923).

9. 268 U.S. 510 (1925).

10. 321 U.S. 158 (1944).

11. 406 U.S. 205 (1972).

12. "*Lochner* era" refers to the era at the turn of the twentieth century when the Supreme Court relied on the due process clause to strike down a broad range of legislative enactments following the landmark decision of *Lochner v. New York*, 198 U.S. 45 (1905). Although much of this due process doctrine was short-lived, the two cases relying on that doctrine to protect parents' right to control the education and upbringing of their children, *Pierce*, 268 U.S. 510, and *Meyer*, 262 U.S. 390, are still good law.

13. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

14. Mnookin, *supra* note 1, at 267.

15. *Stanley*, 406 U.S. at 658.

the Illinois statute's irrebuttable presumption that unmarried fathers were unfit violated Stanley's due process and equal protection rights under the U.S. Constitution.¹⁶ In this decision are the seeds of what became parents' robust constitutional rights against the state in child-protection proceedings and against parental competitors in the private-custody realm.

Although the due process analysis in *Stanley* was framed in procedural terms, at its core was a substantive constitutional conclusion: Parents, at least those who had a parental relationship with their children, could not be deprived of custody by the state absent a case-specific finding of unfitness. In subsequent cases, the Court made clear that this finding had to precede any judicial consideration of a child's best interests,¹⁷ a requirement designed to minimize the harms so eloquently articulated by Professor Mnookin. The Supreme Court further held in *Stanley* that the Illinois law violated unmarried fathers' equal protection rights by treating them differently from married fathers and all mothers, without justification.¹⁸ This commitment to gender equality in parental rights guarantees that there will be two people entitled to assert custodial claims when parents separate, making the difficulties of adjudication in the private-custody context a constitutional necessity. In the line of "unwed father" cases that followed *Stanley*, the Supreme Court engaged in a difficult and dogged attempt to define and limit those with authority to employ these adjudicative processes to engage in custodial disputes.¹⁹

III

MNOOKIN'S VISION

Professor Mnookin's analysis of the law governing child custody is powerful in its description, its criticism, and its prescription. Notably, it derives its power not from close legal analysis, but by demonstrating the incompetence of the traditional adjudicative process to make individualized assessments of best interests, and the hazard of relying on this process. Mnookin joined to this criticism of procedural design an embrace of the highly influential psychoanalytic theory of "psychological parenthood" famously advanced by Joseph Goldstein, Albert Solnit, and Anna Freud in their book *Beyond the Best Interests of the Child*,²⁰ published just two years before Mnookin's article. These two insights—one concerning the failings of the adjudicatory process and the other concerning the value of maintaining established parent-child bonds—led

16. *Id.* at 649.

17. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) ("After the State has established parental unfitness at the initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.").

18. *Stanley*, 406 U.S. at 658.

19. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson* 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

20. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

Mnookin to a set of prescriptions focused on the outcomes a legal system should seek to achieve for children in public and private custody disputes. After briefly setting out the two threads of his analysis and the prescriptions he derived from those threads, I will demonstrate how the parental-rights doctrine has grown up to provide those prescriptions with doctrinal support.

A. The Hazards of Individualized Adjudication

Mnookin noted two related problems with the application of a best-interests standard in individualized adjudications. The first is the problem of prediction: Unlike most adjudicatory contexts, in which courts are asked to determine what happened in the past, judges making custodial decisions are asked to predict the future.²¹ Ample evidence suggests that humans, whether judges or psychological experts, are not particularly good about making these predictions, and Mnookin suggested we are likely to be particularly bad when the prediction called for goes to the lifelong “psychological and behavioral consequences of alternative dispositions for a particular child.”²² The second problem is the inherently value-laden nature of any assessment of what will be good for a child.²³ There is no broad societal consensus about what makes the best, or best among the options, life for a child, or about which among the less than best alternatives for children (other than protection from physical abuse) will do the least harm. Mnookin also noted additional problems with adjudications in the child-custody context, some of which are more closely related to these two basic problems than others. He particularly noted the child’s inability to direct the course of litigation, which forces the adjudicator to look to adult proxies to play the role an individual involved in litigation ordinarily would play for himself.²⁴ In addition, he noted the limits of the information generally available to the court in these hearings, and the thinness of appellate review.²⁵

Although Mnookin stressed the particular dangers associated with open-ended best-interests adjudications, much of what he said applies with considerable force to any individualized custody adjudication, regardless of the standard applied. This is particularly true in the child-protection context, where difficulties predicting and accurately accounting for the risks associated with a child’s removal, joined with the judge’s middle-class values about how a child should be raised, threaten to skew the court’s assessment, whether that assessment is of what is “best,” or “necessary” or “reasonable.”²⁶ Similarly, in the private-custody context, much of Mnookin’s criticism goes to the harms caused by involving families in the adjudicatory process at all. Clear standards might make it easier, as he suggested, for parties to “bargain in the shadow of

21. Mnookin, *supra* note 1, at 258.

22. *Id.* at 250–51.

23. *Id.* at 226, 260.

24. *Id.* at 254.

25. *Id.* at 253–54, 257.

26. *Id.* at 269–70, 278.

the law,”²⁷ but it seems equally possible that the indeterminacy of the best-interests standard might scare parties into settling rather than rolling the dice at trial.²⁸ Whatever the standard to be applied, a trial will come with the considerable “costs—financial and emotional—of an adversary proceeding.”²⁹ Taking Mnookin’s analysis to its logical conclusion, the article sounds a warning, at least in the context of custody decisions, against the era’s infatuation with procedure, which reflected the widely held view that more process would produce a more accurate and just application of the law.³⁰

B. The Promise of the Psychological-Parent Theory

Although Mnookin’s critical analysis of individualized custody adjudications bucked the tide of the “due process revolution,”³¹ Mnookin rode the tide of Goldstein, Freud and Solnit’s newly published and much-attended theory of psychological parenthood. Through his frequent and prominent citations of their book, he singled out their work and built his prescriptions upon it.³² This particularized reliance is striking for two reasons. First, the authors’ theory reflects a particularly extreme view of a generally popular idea that children’s interests are served by preserving their attachments to current caregivers.³³ Second, Mnookin’s apparently strong endorsement of a single theory jars with

27. *Id.* at 282 (“[U]se of an indeterminate standard for adjudication may result in more cases being litigated than would be true if more rule-like standards governed custody disputes.”). For the origin of this now well-known phrase, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, 88 YALE L.J. 950 (1979).

28. See, e.g., Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 177, 178–85.

29. Mnookin, *supra* note 1, at 288.

30. JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) (describing the “widely held” perception “that since the early 1970s we have been in the grip of a ‘process explosion,’ a ‘due process revolution’ that has inundated the courts with claims of procedural deprivation”); see, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Although cases from this era commonly reflected an awareness that additional procedures came at a cost, this cost was to be balanced against the additional accuracy that came with the procedures in question. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). One of Mnookin’s many important contributions was the observation that accuracy was not always enhanced through individualized judicial decisionmaking.

31. *Id.* at 9 (citing F. GRAHAM, *THE DUE PROCESS REVOLUTION: THE WARREN COURT’S IMPACT ON CRIMINAL LAW* (1971)); see also Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971); Doug R. Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531 (1975).

32. See Mnookin, *supra* note 1, at 227 n.1, 228 nn.13 & 15, 247, 248 n.118, 249 n.125, 259 n.163, 260 n.169, 280–81, 282 n.231, 283 n.239, 285–86, 287 n.246, 289 n.253.

33. According to Goldstein, Freud, and Solnit, a young child forms the relevant level of attachment quite quickly, even within a year, and would be harmed if removed from that home. See GOLSTEIN, FREUD & SOLNIT, *supra* note 20, at 40, 48 (noting that infants and toddlers will lose their emotional and intellectual connection with an absent parent within days and arguing that the recognition of a new parent–child relationship should be tied to the child’s lived experience rather than requiring abandonment by a birth parent for a year or more as the laws generally do.) The theory champions favoring a foster parent over a genetic parent as soon as a psychological attachment has been formed between foster parent and child. *Id.* at 48.

his message that even professionals' predictions of child well-being are uncertain and value laden. Quoting Anna Freud herself, he noted that "many have conceded that their theories provide no reliable guide for predictions about what is likely to happen to a particular child."³⁴ Moreover, as subsequent cases illustrated, a set of custody rules that relies on a determination of who qualifies as a child's psychological parent invites the sort of individualized inquiry that the other thread of his analysis criticizes. In fact, the article's footnotes are full of qualifications about the application of the theory,³⁵ qualifications that may reflect Mnookin's appreciation of the potential for tension between his procedural and substantive prescriptions.

C. Professor Mnookin's Prescriptions

In the child-protection context, Professor Mnookin articulated two basic rules to guide custody determinations that would minimize the role of the state in child rearing and secure children's welfare. First, the state should only remove children from their home if they face "immediate and substantial danger," and if there is no reasonable means of protecting them in the home.³⁶ Second, children who are removed should be moved after a fixed time period to custodial permanency, whether that is by returning them to their birth families or by terminating parental rights and placing them in adoptive homes.³⁷ These two principles are now recognized as the core principles guiding custody decisions in child-welfare proceedings and have been set out most prominently in a series of federal enactments, which took nearly thirty years to catch up with Mnookin's ideas.³⁸ But the application of these principles still plays out in the context of individual adjudications vulnerable to the hazards Mnookin identified. It is through the development of parents' rights that some of these hazards have been and may continue to be at least partially addressed.

In the private-custody context, where the law's role is assisting private parties in working out their disputes, Mnookin offered the following

34. Mnookin, *supra* note 1, at 258–59 (citing Anna Freud, *Child Observation and Prediction of Development—A Memorial Lecture in Honor of Ernst Kris*, 13 *PSYCHOANALYTIC STUDY OF THE CHILD* 92, 97–98 (1958)).

35. See, e.g., Mnookin, *supra* note 1, at 249 n.125 (describing as "extreme cases" situations "where one claimant is a stranger to the child and the other is not"); *id.* at 259 n.163 (noting Goldstein, Freud, and Solnit's own qualification of the predictive power of their theory); *id.* at 260 n.169 (noting that Goldstein, Freud, and Solnit recognize the "difficulties of making long-term predictions" and therefore suggest that "only short-run effects be considered"); *id.* at 283 n.239 (rejecting Goldstein, Freud, and Solnit's "least detrimental alternative" approach as not preferable to the best-interests standard); *id.* at 287 n.246 (noting that Goldstein, Freud, and Solnit guidelines "do not facilitate choice in any but the easy case where one claimant is a psychological stranger to the child").

36. Mnookin, *supra* note 1, at 277–78 (citing Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 *HARV. ED. REV.* 599 (1973); S.B. 30, 1974 Leg. (Cal. 1974) (proposed California legislation based in part on the earlier, also-cited Mnookin article)).

37. *Id.* at 280.

38. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

“intermediate rules.”³⁹ First, and related to the child-protection context, children should not be placed with someone who might endanger them.⁴⁰ Second, “psychological parents” should be preferred over strangers, individuals with no developed relationship with a child.⁴¹ Third, among nondangerous psychological parents, genetic parents should be preferred over others.⁴² But Mnookin acknowledged that there was no good categorical rule that would allow a court to sort between two genetic parents, each of whom has an existing parental relationship with a child. Declaring that he had “returned from the safari with no game worth keeping,” Mnookin concluded that, in adjudicating disputes between genetic parents, the best-interests test, which he so effectively challenged, was the best there is.⁴³ Unsatisfied with this solution, Mnookin considered some alternative mechanisms for resolving these disputes, including the use of mediation. Less promising, if intriguing, is Mnookin’s discussion of the coin flip. In concluding that society would surely reject the coin flip, however, he conceded that there is some value to an attentive adjudicative process, even if the process produces no better than random results. In this sense, the *outcome* of an adjudication between equally qualified custodial contenders (if not the process itself) is basically benign. In contrast, any such adjudication in the child-protection context threatens to upset the traditional balance of power between parent and state.⁴⁴

Although Mnookin is most explicitly “without game” in his development of rules to guide custodial decisionmaking between two fit and involved parents, he also—throughout his entire analysis—stopped short of prescribing even those changes to existing legal doctrine that would be necessary to implement the rules he *had* successfully “bagged.” Confusion of best-interests aims and best-interests standards can be expected to continue to plague legislative enactments and judicial interpretations in the face of a growing commitment to affording a special protected status to children under law. And we might well worry that simply adding Mnookin’s rules to the courts’ general child-serving charge would leave adjudications vulnerable to the same distortions and inconsistencies identified with a best-interests standard. The most promising constraint on these hazardous tendencies, afforded to children at the more stable level of institutional design, has come through the development of parents’ constitutional rights, a development that occurred most intensively in the years immediately following the publication of Mnookin’s article.

39. Mnookin, *supra* note 1, at 282.

40. *Id.*

41. *Id.*

42. *Id.* at 282–83.

43. *Id.* at 282.

44. *Id.* at 265.

IV

PARENTAL RIGHTS IN CHILD-PROTECTION PROCEEDINGS

A significant case in the development of parental-rights doctrine was already underway when Mnookin's article was published. In *Smith v. OFFER*, foster parents had brought suit on their own behalf and on behalf of their foster children asserting a due process right to a full formal preremoval hearing before children living with foster parents for a year or more could be moved, whether to another foster home or back to their parents.⁴⁵ The suit, inspired by the recent due process blockbuster, *Goldberg v. Kelly*,⁴⁶ was brought against New York City and New York State officials.⁴⁷ But a group of parents with children in foster care intervened, arguing that the procedures proposed would violate their constitutional right to family integrity and would disserve their children's interests.⁴⁸ To avoid the risk of a conflict between the position of foster parents and foster children, the district court subsequently appointed separate counsel for the foster children, creating a total of five represented parties (foster parents, genetic parents, foster children, and the City and State of New York), all of whom claimed their positions in the litigation were in children's best interests.

Smith v. OFFER can be seen as a test case for Mnookin's analysis and his prescribed solutions. At stake was the level of procedure to be afforded in determining with whom foster children would live. The foster parents contended that a more elaborate preremoval hearing than was then provided would allow courts to ensure better outcomes for children by assessing the interest of each individual child with greater care.⁴⁹ Parties opposed to these hearings, including the state, city, parents and children (through their appointed counsel) contended that the hearings were not only not needed to serve children's interests, but in fact would be affirmatively harmful to children, particularly if interposed when the welfare department had decided to return children to their parents.⁵⁰ Thus, although the plaintiffs attempted to frame the

45. 431 U.S. 816, 819–20 (1977).

46. 397 U.S. 254 (1970). The importance of *Goldberg v. Kelly* to the development of the foster parent plaintiffs' argument in *Smith*, is set out in David L. Chambers & Michael S. Wald, *Smith v. OFFER, in IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 68 (Robert H. Mnookin ed., 1985).

47. *Smith*, 431 U.S. at 816 (1977).

48. *Id.* at 822. This is an admittedly reductive description of the claims asserted, over the course of the litigation, by the parents. A detailed account of the litigation, in general, and the parents' evolving arguments, in particular, is set out in chapters six through eight of Chambers & Wald, *supra* note 46, a volume edited by none other than Robert Mnookin himself.

49. *Smith*, 431 U.S. at 840–42.

50. See Brief for Infant Appellants Gandy et al. at 18, *Smith v. OFFER*, 431 U.S. 816 (1977) (Nos. 76-180, 76-183, 76-5193 & 76-5200) (arguing that “[t]he administrative hearings ordered by the District Court will in most cases delay and hinder, and in some cases, it might defeat, the preparation for a parent’s obligation (and right) to care for her or his children”); Brief for State Appellants at 12–26, *Smith*, 431 U.S. 816 (Nos. 76-180, 76-183, 76-5193 & 76-5200) (arguing that mandating preremoval hearings in all cases would not serve children’s interests and create “an unnecessary and harmful

case as one pitting the interests of children against the interests of a bureaucracy, it evolved into a contest about which adjudicative design would best serve these children's interests.⁵¹

The issues were framed in constitutional terms: Did foster parents, foster children, or both have a due process right to a full hearing prior to any move from a long-term foster home? The foster parents' argument for a preremoval hearing rested on their claim that they were the foster children's psychological parents, a claim bolstered in the litigation by the affidavits and depositions of Joseph Goldstein and Albert Solnit.⁵² Thus, two important themes from Mnookin's article—the contested value of individualized custody adjudication and the significance of psychological parenthood—were implicated in the case.

In resolving the case, the three-judge district court acknowledged the debate over the psychological parent theory, but overlooked the problems associated with custodial hearings. Indeed, the court's celebration of the value of these hearings reflects the central mistake Mnookin highlighted in his article:

A hearing dispels the appearance and minimizes the possibility of arbitrary or misinformed action. In cases such as these, the harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family are apparent. Plaintiffs' experts assert that continuity of personal relationships is indispensable to a child's well adjusted development. We do not need to accept that extreme position to recognize, on the basis of our common past, that the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment

[Moreover,] we are unable to agree with intervenors' contention that a hearing is . . . superfluous when a foster child is to be returned to his biological parents. Even under such circumstances, a hearing performs the salutary function of providing the agency with an organized forum in which to gather information⁵³

The district court went even further in requiring case-specific adjudications than the plaintiffs had advocated. Finding that foster children (but not foster parents) had a constitutional "right to be heard before being condemned to

burden on children and natural parents"); Brief of Appellants Naomi Rodriguez et al. at 74–75, *Smith*, 431 U.S. 816 (Nos. 76-180, 76-183, 76-5193 & 76-5200) [hereinafter Brief of Parent Appellants] (arguing that the preremoval hearing requirement imposes an "enormous emotional burden" on the parent-child relationship); Brief of New York City Appellants at 7, *Smith*, 431 U.S. 816 (Nos. 76-180, 76-183, 76-5193 & 76-5200) (arguing that preremoval hearings "will not necessarily aid in determining what is best for the foster child, and, in addition, may in fact be harmful to the child").

51. See *Smith*, 431 U.S. at 841 n.43 (noting that the appointment of counsel for the children does not prevent other parties in the case, "all of whom share some portion of the responsibility for guardianship of the child[ren,]" from arguing that their position best comports with foster children's best interests). *But see* Guggenheim, *supra* note 2, at 180 (suggesting that the sorting of the parties and positions in *Smith v. OFFER* reflected a general trend that polarized parents' and children's rights).

52. Chambers & Wald, *supra* note 46, at 101–02. Plaintiffs introduced into evidence the affidavits and depositions of Joseph Goldstein and Albert Solnit, two of the authors of *Beyond the Best Interest of Children*, which had so heavily influenced Mnookin's analysis. To counter this view, parent intervenors introduced some combination of affidavits and depositions from Robert Coles, a well-recognized child psychiatrist at Harvard, and David Fanshel and Shirley Jenkins, on the faculty of the Columbia School of Social Work, who had authored important studies of foster children. As the parents' attorney put it, referring to *Beyond the Best Interest of the Child*, "The case was the book." *Id.* at 102.

53. *OFFER v. Dumpson*, 418 F. Supp. 277, 282–83 (S.D.N.Y. 1976).

suffer grievous loss,”⁵⁴ the district court declared that *all* foster children living with foster families for one year or more were entitled to a hearing before they were moved, whether or not a hearing was requested by their foster parents, and whether the proposed move was to return a child to his parents or place him in another foster home.⁵⁵ The effect of this decision was to require thousands of new comprehensive hearings, a requirement that added the threat of massive cost and delay to the Mnookin-identified hazards of indeterminacy and value-laden skewing.⁵⁶

On appeal to the Supreme Court, the litigants had the benefit of Mnookin’s article, and, notably, it was cited to support both the foster parents’ and the birth parents’ position. Most straightforwardly, it was cited by the birth parents to support their argument that a preremoval-hearing requirement would skew decisionmaking in favor of foster parents. At various points in their merits and reply briefs, the parents cited Mnookin’s related observations about the indeterminacy of the best-interests standard,⁵⁷ the likelihood that custody adjudications would favor middle-class foster parents,⁵⁸ and the importance of establishing custody rules in the child-protection context that impose severe limits on the state’s intervention in the family.⁵⁹ Most intriguingly, Mnookin’s article was cited by amici, A Group of Concerned Persons for Children, which included Joseph Goldstein, Anna Freud, and Albert Solnit.⁶⁰ Much of their brief built upon their professional work as “pediatricians, child psychiatrists and psychoanalysts [devoted] to understanding and safeguarding the physical and emotional growth of children”⁶¹ to support their conclusion that both foster parents and foster children have a liberty interest in maintaining their family integrity, but the brief somewhat carelessly relied on Mnookin’s criticism of custody hearings in the foster-care context to argue for “full pre-separation hearing[s] by an independent decision maker.”⁶² Although they were certainly right to note that Mnookin criticized the “existing legal framework for foster care,” which gave priority to the “convenience of the social welfare system” over the interests of the child, they ignored the overall thrust of Mnookin’s analysis, which warned against the distortions these individualized custody hearings were likely to introduce.⁶³

54. *Id.* at 282.

55. *Id.* at 289.

56. Chambers & Wald, *supra* note 46, at 107.

57. Brief of Parent Appellants, *supra* note 50, at 67–68; Reply Brief of Appellants Naomi Rodriguez et al. at 9, *Smith v. OFFER*, 431 U.S. 816 (1977) (Nos. 76-180, 76-183, 76-5193 & 76-5200) [hereinafter Reply Brief].

58. Brief of Parent Appellants, *supra* note 50, at 76.

59. Reply Brief, *supra* note 57, at 1.

60. Motion of a Group of Concerned Persons for Children for Leave to File Brief Amici Curiae and Brief Amici Curiae at ii-iii, *Smith*, 431 U.S. 816 (1977) (Nos. 76-180, 76-183, 76-5193, and 76-5200).

61. *Id.* at ii.

62. *Id.* at 17.

63. *Id.* at 17 n.13.

This amicus brief reflects a potential tension between Mnookin's criticism of best-interests adjudications and his embrace of psychological parenthood and, relatedly, a blurring of the lines between Mnookin's child-protection and private-custody contexts. If psychological parents are generally to be given preference over genetic parents, but best-interests adjudications are a poor means of assessing whether foster parents have a psychologically stronger relationship with a child than genetic parents, should these flawed adjudications nevertheless be relied upon to identify the most important parental relationship for the child? Mnookin seems to largely answer this question by heavily favoring the parent over "the state" in his child-protection analysis, and by favoring genetic parents over any other parental claimant in the private-custody context, so long as the genetic parent does not qualify as a "stranger" to the child.⁶⁴ Where the rules slant this heavily in favor of genetic parents, the law will not need to rely on individualized adjudications to tease out the proper outcome in each case. And in the Supreme Court's decision in *Smith v. OFFER*, we see the Constitution deployed to prevent the expanded reliance on adjudicatory hearings that could undermine these clear rules.

In an opinion laced with citations to Mnookin's article (as well as to his earlier article about foster care),⁶⁵ the Court rejected the foster parents' claim that a preremoval hearing was required.⁶⁶ And although the Court stopped short of denying foster families any procedural rights,⁶⁷ the Court made it clear that foster parents' interest in maintaining their relationships with their foster children was subordinate to biological parents' liberty interest in family integrity under the Constitution:

[O]rdinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable. . . . It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.⁶⁸

64. See, e.g., Mnookin, *supra* note 1, at 249 n.125 ("[I]n *extreme cases* like these, where one claimant is a stranger to the child and the other is not, I would prefer the 'psychological parent' to a natural parent who is a stranger."); *id.* at 286 ("I believe that psychologists and psychiatrists can rather consistently differentiate between a situation where an adult and a child have a substantial relationship of the sort we characterize as parent-child and that where there is *no such relationship at all.*").

65. *Smith v. OFFER*, 431 U.S. 816, 835 n.36, 836 n.40 (1977) (citing Mnookin, *supra* note 1); *id.* at 823 n.8, 824 n.9, 826 nn.14 & 16, 836 n.40 (citing Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. ED. REV. 599 (1973)).

66. *Id.* at 856.

67. See, e.g., *id.* at 846 ("[T]he limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family.").

68. *Id.* at 846–47.

Thus, in a case in which lawyers, parties, and psychological experts battled over the proper conception of children's best interests, the Supreme Court embraced a design that gave special constitutional protection to the rights of natural parents in the face of a call for individualized assessments of those interests by neutral adjudicators. In this way, *Smith v. OFFER* represented an important first step in employing parental rights to constrain the growth of the law's reliance on individual best-interests adjudications to define and protect children's well-being.

Smith played an important role in minimizing the number of custodial claimants with authority to initiate custody adjudications, with their attendant hazards. But parents are also threatened by the same adjudicative hazards in their own child-protection hearings, which are needed to protect parents from the even greater hazards of unadjudicated removals. Again in this context, the Constitution's protection of parental rights—here both substantive and procedural rights—has provided an important doctrinal protection against the court-imposed hazards identified by Mnookin.

As noted, a central parental-rights case, *Stanley v. Illinois*, was already on the books when Mnookin wrote his article. The case was not, of course, a conventional child-protection case; indeed, Stanley's children were removed by the state automatically, without any regard for the care he had provided.⁶⁹ But the implication of the ruling for child-protection cases is obvious: Under *Stanley*, genetic parents with a formed and exclusive parental relationship with their children cannot be deprived of custody absent a finding of unfitness.⁷⁰ Thus, the most dangerous scenario Mnookin conceived, the scenario in which children could be removed or kept from their parents simply because they might do better elsewhere,⁷¹ is constrained by the constitutional protection of the "fit," if not ideal, parent.

Mnookin's discussion, however, captured how much room is left for a court to engage in skewed assessments where the meaning of "unfit" is not more sharply defined. To this end, he endorsed proposed California legislation, which provided,

A state may remove a child from parental custody without parental consent only if the state first proves: (a) there is an immediate and substantial danger to the child's health; and (b) there are no reasonable means acceptable to the parents by which the state can protect the child's health without removing the child from parental custody.⁷²

It appears that the development of this standard, and standards subsequently adopted in other states to encourage family preservation and to limit removals, was inspired by legislative policy choices rather than a

69. *Id.* at 646.

70. *Stanley v. Illinois*, 405 U.S. 645, 649 (1975) ("We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him.").

71. Mnookin, *supra* note 1, at 268.

72. *Id.* at 278 (quoting S.B. 30, 1974 Leg. (Cal. 1974)).

constitutional mandate.⁷³ But it is worth noting that at least one state supreme court has found similar requirements to be constitutionally required under the parental-rights doctrine,⁷⁴ a finding likely to be replicated elsewhere should a legislature attempt to move away from protective removal standards.

Although these substantive protections track Mnookin's prescriptions most closely, developments in parents' procedural rights have played an important complementary role. In two cases decided in quick succession, the Supreme Court recognized parents' constitutionally protected interest in procedures that would constrain judges' exercise of freewheeling power in assessing children's custodial interests. These cases addressed custodial decisionmaking during termination of parental-rights proceedings, but they have had a significant influence on removal and return decisions, at all stages of child-protection proceedings.

In the first of these cases, *Lassiter v. Department of Social Services*, the Court considered whether the due process clause gave all parents a right to counsel in termination proceedings.⁷⁵ Although the Court stopped short of recognizing a categorical right to counsel (instead calling for a case-by-case determination), it emphasized the strength of the parent's interest in the "companionship, care, custody and management" of a child, and the strong protection the Constitution afforded to that interest.⁷⁶ Moreover, it acknowledged that the state, as safeguarder of the child's welfare, shared the mother's interest in a fair process that would prevent her rights from being erroneously terminated. A wrongful termination of a parent's rights would hurt not only the parent, but also the child.⁷⁷

Affording parents counsel does not go to the heart of the adjudicative weaknesses set out in Mnookin's analysis, but it imposes an important additional constraint on the improper exercise of judicial discretion. The portions of the transcript set out in the *Lassiter* dissent amply illustrate such improprieties, which surely occurred in a context in which the judge saw himself

73. Chambers & Wald, *supra* note 46, at 117 ("Although there was relatively little legislative response [to the problems in the foster care system discussed in *Smith v. OFFER*] until the late 1970s, it is [Michael] Wald's impression based on personal contacts in a small number of states that *OFFER* probably played a negligible part in most reform efforts.").

74. See *In re Juvenile Appeal*, 455 A.2d 1313 (Conn. 1983) (subjecting the state's emergency removal standard, pursuant to which the plaintiff's children spent three years in foster care, to strict scrutiny, and finding that a standard that limited removal to circumstances of "serious physical illness or serious physical injury or immediate physical danger" was constitutional).

75. 452 U.S. 18, 24 (1981).

76. *Id.* at 27.

77. *Lassiter*, 452 U.S. at 27 ("Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision."). This observation echoes language in *Brief Amicus Curiae of National Center on Women and Family Law, Inc., Community Action for Legal Services, Inc., et al.*, language supported by a citation to Mnookin's article. See *Brief Amicus Curiae of National Center on Women and Family Law, Inc., Community Action for Legal Services, Inc., et al.* at 46 & n.48, *Smith v. OFFER*, 452 U.S. 18 (1981) (No. 79-6423).

as the child's champion.⁷⁸ The holding in *Lassiter* is only a qualified vindication of parents' constitutional rights, but it paved the way for the next case, which more materially advanced Mnookin's agenda through a forceful recognition of parental rights.

In *Santosky v. Kramer*,⁷⁹ the Supreme Court introduced a rule, grounded in the Constitution's protection of parental rights, that was designed to impose a direct constraint on judges' exercise of discretion in severing the custodial relationship between a parent and child. The focus of the case was a New York law governing the involuntary termination of parental rights. Under that law, a court could terminate a parent's rights if it found, by a preponderance of the evidence, that a child was "permanently neglected."⁸⁰ When a trial court terminated the rights of John and Annie Santosky to their three children under this law, the parents challenged the preponderance standard as a violation of their due process rights.⁸¹ This constitutional challenge was rejected by the trial court and again by the New York Supreme Court, Appellate Division, which concluded that the preponderance-of-the-evidence standard "recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents . . ."⁸² Notable is not only the New York court's rejection of the parents' constitutional claim, but also its suggestion, so effectively skewered by Mnookin, that the best way to tease out a child's interests was to leave the sorting to an open-ended assessment by the trial judge.⁸³

In reversing the New York court, the U.S. Supreme Court rejected both of these conclusions. The Court set the stage for its due process analysis by recognizing the "fundamental liberty interest of natural parents in the care, custody, and management of their child."⁸⁴ Describing a parent's "desire for and right to" this relationship as "far more precious than any property right,"⁸⁵ and noting the absoluteness of a deprivation occasioned by legal termination of parental rights, the court concluded that the private interest at stake "weighs heavily against the use of the preponderance standard at a state-initiated permanent neglect proceeding."⁸⁶ Most significantly, the Court aligned the children's interests with those of their parents at this stage in the proceedings:

At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous

78. 452 U.S. at 54–55 n.22–25.

79. 455 U.S. 745 (1982).

80. *Id.* at 745.

81. *Id.* at 748–49.

82. *Id.* at 752.

83. *Id.* at 770.

84. *Id.* at 753.

85. *Id.* at 758.

86. *Id.* at 759.

termination of their relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.⁸⁷

The Court went on to identify factors discussed by Mnookin that “leave [permanent neglect] determinations open to the subjective values of the judge.”⁸⁸ The Court then echoed Mnookin’s analysis by noting the many sources of power imbalance in the litigation process that can be expected to skew the case against the parents, including the state’s greater access to funds and experts and the ability to actually shape the facts in the case by controlling parent–child interactions.⁸⁹ The Court concluded that these state litigation advantages, coupled with the low preponderance standard, created a significant prospect of erroneous termination, that is, a termination that hurt not only the parents but also the children.⁹⁰ Thus, through its analysis of parents’ constitutional rights, the *Santosky* court offered children more effective protection than they had been afforded by laws more expressly designed to identify and serve their interests.

Together, *Stanley*, *Smith*, *Lassiter*, and *Santosky* provide considerable constitutional support for Mnookin’s call for limited state interference with parental custody. But two of Mnookin’s prescriptions in the child-protection context press in a different direction. Mnookin’s call for state assistance to keep children in their homes⁹¹ seems at odds with parental rights aimed at minimizing state interference, as does his call for a relatively swift move to an alternative permanency plan if parents do not remedy their shortcomings within a designated period.⁹² After analyzing the current statutory and constitutional law that bears on each of these prescriptions, I will argue that recognizing a child’s constitutional right to family-preservation services is supported by constitutional doctrine, helpful for achieving Mnookin’s aim, and consistent with the protections the Constitution affords to parents. By contrast, recognizing a child’s independent right to a swift shift from a goal of family preservation to adoption, I will argue, is neither consistent with the protections afforded to parents under the Constitution, nor necessary to achieve Mnookin’s aim.

87. *Id.* at 760–61.

88. *Id.* at 762 (citing *Smith v. OFFER*, 431 U.S. 816, 835 n.36 (1977), which itself cites to Mnookin).

89. *Id.* at 763 (“The State’s ability to assemble its case almost inevitably dwarfs the parents’ ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State’s attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency’s own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.”)

90. *Id.* at 769.

91. Mnookin, *supra* note 1, at 272.

92. *Id.* at 280.

In 1980, Congress enacted the Adoption Assistance and Child Welfare Act,⁹³ which, among its central contributions, required judges to make “reasonable-efforts findings,” that is, findings that the state had made “reasonable efforts” to keep children safely with their parents in their homes before placing them, or continuing their placements, in foster care.⁹⁴ This requirement reflected a recognition that children’s interests are better served by keeping them with family whenever that can be done without subjecting them to abuse and neglect.⁹⁵ But, the reasonable-efforts requirement had an important weakness directly related to the problems identified by Mnookin. In placing enforcement responsibility in the hands of the judge charged with deciding whether children should be cared for by their parents, the law encouraged judges to sweep their assessment of “reasonable efforts” in with their overall assessment of what custodial arrangement was in the children’s best interests. Where a judge concluded, based on ill-founded predictions, a distorted sense of the relative risks, and his or her own values and experiences, that a child should be removed from a home, he or she had little trouble finding that whatever efforts had been made to keep the child in the home sufficed.

Two additional factors have further limited the impact of the reasonable-efforts requirement. First, the consequences of failing to find reasonable efforts in an individual case are abstract and financial. A no-reasonable-efforts finding leads to a loss of funding, but not a compelled delivery of services or a refusal to remove a child.⁹⁶ Second, in 1992, the Supreme Court determined that individuals did not have a private right of action to enforce the reasonable-efforts requirement, a ruling that has prevented parents and children from using the requirement to seek systemic change.⁹⁷ And although that ruling inspired Congress to change the statute to modify the implications of the Court’s holding, there was and is little political support for giving families the power to compel the state to help them.⁹⁸ For all these reasons, the statutory reasonable-efforts requirement has not had the impact Mnookin anticipated such a requirement would have in ensuring that families received the assistance they needed to remain together.⁹⁹

93. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

94. 42 U.S.C. § 671(a)(15) (2006).

95. See, e.g., *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearing on H.R. 3434 Before the Subcomm. on Pub. Assistance of the S. Comm. on Fin.*, 96th Cong. 63 (1979) (statement of Sen. Alan Cranston, Chairman, Subcomm. on Child and Human Dev., S. Comm. on Labor and Human Res.) (noting that the reasonable-efforts requirement will allow “unnecessary and prolonged foster-care placements [to] be greatly reduced—at a substantial savings to the taxpayer and an enormous benefit to the children and families”).

96. 45 C.F.R. § 1356.21(b)(2)(ii) (2013).

97. *Suter v. Artist M.*, 503 U.S. 347 (1992).

98. See *Henry A. v. Willden*, 678 F.3d 991, 1007 n.9 (9th Cir. 2012) (explaining that 42 U.S.C. § 1320a-2 (2006), colloquially known as the “‘Suter fix,’” overturned some of the reasoning of the case, without overturning the specific holding that [the reasonable-efforts requirement] was not privately enforceable”).

99. Guggenheim, *supra* note 2, at 189 (citing studies that conclude that judges frequently ignore

If parents or children had a constitutional right to this family-supportive assistance, they could enforce the right in federal court. Although there is no doctrinal support for a parental right of this nature, there is a doctrinal basis on which to forge a child's right. The only significant barrier is the Supreme Court's decision in *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*,¹⁰⁰ which is itself problematic.

In *DeShaney*, Joshua DeShaney claimed, through his mother, that the county social services agency had deprived him of his liberty interest in bodily integrity when it failed to intervene to protect him against his father's violence.¹⁰¹ Joshua's argument was based upon the Supreme Court's decisions in *Estelle v. Gamble*,¹⁰² and *Youngberg v. Romeo*,¹⁰³ which, in the contexts of a prison and a state institution, respectively, found that the U.S. Constitution imposed some affirmative obligation on the state to safeguard individuals "safety and general well-being."¹⁰⁴ Joshua contended that the state's child-protection involvement, which included an abuse investigation, a period of removal, and ongoing casework, created an affirmative duty on the part of the state to protect him from harm at the hands of his abusive father whose dangerousness had precipitated the state's involvement. The Court offered two arguments to support its rejection of the claim, one central, but problematic, and the other barely mentioned, but deserving of further attention. A reconsideration of the first argument and an appropriate tailoring of the second suggest that there is doctrinal support for the recognition of children's constitutional right to some affirmative assistance from the state to keep them with their families.

In denying Joshua DeShaney's claim, the Court focused on the distinction between positive and negative rights. For the most part, the Court explained, the Bill of Rights creates no affirmative right to government assistance. The only exceptions, the Court acknowledged, are in contexts in which the state has deprived an individual of his ability to care for himself, such as when it confines an individual in prison or a state hospital.¹⁰⁵ What this argument overlooks is the commonality between prisoners, institutionalized adults, and children. Children, like these institutionalized adults, are deprived of their liberty, in large part by operation of law. As with Nicholas Romeo, that deprivation is justified by children's limited capacities,¹⁰⁶ but to a significant extent it is still the law that prevents them from "acting on their own behalf," whether that is seeing to their

the reasonable-efforts requirement, or "rubber stamp" the reasonable-efforts finding).

100. 489 U.S. 189 (1989).

101. *Id.* at 195.

102. 429 U.S. 97 (1976).

103. 457 U.S. 307 (1982).

104. *DeShaney*, 489 U.S. at 199–200.

105. *Id.* at 196.

106. Nicholas Romeo was developmentally delayed, with the mental capacity of a normally developing eighteen-month-old child. *Youngberg*, 457 U.S. at 309.

own needs or enlisting the assistance of other adults to do so.¹⁰⁷ In myriad ways, the law enforces the authority of parents over their children, and where parents put their children at risk, the law requires all responses to that risk to be channeled through the state's child-protection system.¹⁰⁸ And as with Romeo, the constraint the state imposes on children's liberty can be understood to create certain constitutional duties.¹⁰⁹ What those duties are, of course, is a separate question.

The Court's second argument against the recognition of an affirmative right to protection is not even mentioned as a ground for rejecting Joshua DeShaney's constitutional claim. Rather, it is offered only as a "defense" of the state's failure to act:

In defense of [the county functionaries] it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause¹¹⁰ that forms the basis for the present charge of failure to provide adequate protection.

This defense could be offered as an argument against Joshua's constitutional claim: Where two constitutional rights can be set against each other, they threaten to cancel each other out. At least as dangerously, as Mnookin would warn us, they threaten to leave decisionmaking in the hands of the judges, here not even family court judges, whose discretion will not be easily limited in the context of potentially dueling constitutional rights. It is theoretically possible to draw the line between the parents' right to family integrity, which stops precisely where the state determines that the parents are harming their child, and a child's right to be protected from harm, which starts at the same place. But such a theoretical description reveals a lack of understanding of how parents' constitutional rights constrain an adjudicatory system that is inclined to be inadequately protective of the interests these rights protect. Affording children symmetrical rights to be protected from parents would eviscerate any corrective value of those parental rights.

In *DeShaney*, the Court would have been truer to its precedents if it had acknowledged the state's role in Joshua's diminished liberty but nevertheless found his claim incompatible with the rights afforded to parents under the Constitution. This approach would have left the Court room to recognize a child's constitutional right to some assistance, perhaps some "reasonable efforts," that would allow the child to remain safely at home. Unlike a right to protection *from* parents, this claim for assistance to live safely *with* parents does not set the law up for a clash of constitutional rights. To the contrary,

107. *DeShaney*, 489 U.S. at 200 (noting that the state's affirmative duty to protect, recognized in *Estelle and Youngberg*, was triggered by "the state's affirmative act of restraining the individual's freedom to act on his own behalf").

108. I develop this aspect of the argument at greater length in *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355.

109. See *Youngberg*, 457 U.S. at 317.

110. *DeShaney*, 489 U.S. at 203.

recognition of a right to some such assistance would further tilt the law in favor of preserving families, as Mnookin prescribed.

Mnookin's final prescription in the child-protection context—his call for a relatively swift move to alternative permanency through adoption where parents fail to remedy their deficits in fitness—cannot be similarly constitutionalized without undermining his overall vision. Although, in theory, the Court could recognize some form of a child's "right to permanency," such a right would create the same sort of problematic rights conflict that properly troubled the Court in *DeShaney*. Nor is such a claim of right necessary for the achievement of Mnookin's prescription. Like the reasonable-efforts requirement, Mnookin's prescription for a swift move toward permanency for all children has been incorporated into federal law. Under the Adoption and Safe Families Act, enacted in 1997,¹¹¹ agencies are required to change the permanency plan for children who spend fifteen out of the previous twenty-two months in foster care from return home to adoption, except where certain conditions are found by the court to be met.¹¹² But unlike the reasonable-efforts requirement, there is considerable evidence that the permanency timeline has been broadly enforced, and this enforcement has dramatically increased the number of children moved from foster care to adoption.¹¹³ This may be because the rule reinforces the middle-class judges' inclinations that produce the skewing in custody adjudications Mnookin described.¹¹⁴ Where the politics of the majority and the values of the judges already favor the imposition of the timelines, the Constitution is not needed to ensure that this Mnookin prescription is achieved. Indeed, this alignment of adjudicative and legislative interests suggests that here, too, the parental-rights doctrine is needed to impose some constraint, and it has been so employed by lower courts.¹¹⁵ Where categorical rules associated with elapsed time in foster care serve as the basis

111. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

112. 42 U.S.C. § 675(5)(E) (Supp. 1997).

113. See CHILD WELFARE LEAGUE OF AM., PERMANENCY FOR CHILDREN AND FAMILIES THROUGH REUNIFICATION, KINSHIP CARE, AND ADOPTION, available at <http://www.cwla.org/advocacy/2Permanency.pdf> (noting the dramatic increase in adoption rates between 1998 and 2001); see also FRED H. WULCZYN, ADOPTION DYNAMICS: THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT (2002) (reporting data suggesting that in addition to the increase in adoptions caused by enactment of Adoption and Safe Families Act, the law may have also had the unintended consequence of reducing the reunification rate).

114. Guggenheim, *supra* note 2, at 196 (noting that American culture resists providing assistance to parents perceived as "undeserving," and therefore supports the removal, and potential subsequent termination of parental rights, of children whose parents' "only crime is being too poor to raise their children in a clean and safe environment without additional benefits").

115. See *In re Adoption/Guardianship No. J9610436*, 794 A.2d 778 (N.H. 2002) (finding that the state had made inadequate efforts to support the father's care of his children, and that the pursuit of termination and adoption violated the father's fundamental parental rights); see also *In re H.G.*, 757 N.E. 2d 864, 873 (Ill. 2001) (striking down Illinois's statute implementing the Adoption and Safe Families Act time frame as a violation of parents' constitutional rights); Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 148 (2004) (arguing that the fifteen and twenty-two month timeline should be constitutionally challenged).

for termination, as Mnookin contended they should, those time periods and the parents' behavior during that period must qualify as a demonstration of unfitness in order to justify the change in permanency plan.

Although the development of the constitutional rights of parents after the publication of Mnookin's article has hardly resolved all problems he identified in the child-protection system, this development has gone a long way in offering a doctrinal basis for Mnookin's prescriptions for change. Most basically, the doctrine supports Mnookin's call for the protection of family autonomy and the preservation of parent-child relationships whenever possible. But even to the extent Mnookin's vision contemplates decisions to remove children from their parents' custody, the parental-rights doctrine has helped ensure that such removal decisions are made in a manner that minimizes the adjudicative risks Mnookin identified. The parental-rights doctrine also defines a space within which compatible but distinct children's rights might be developed, which would allow families to press more effectively for the state support advocated by Mnookin but thus far only minimally achieved.

V

PARENTAL RIGHTS IN PRIVATE CUSTODY DISPUTES

At the time of Mnookin's article, there were no cases addressing parents' constitutional rights in the context of custody disputes between private individuals. *Stanley v. Illinois* considered the custodial rights of a father under the Constitution, but his battle was with the state.¹¹⁶ In this way, *Stanley* represented the first in the line of cases discussed in the previous part that set limits on the state's custodial intervention in the family. But the Court's due process analysis in *Stanley* also supports the conclusion that some individuals are constitutionally entitled to be recognized as parents, and that this group includes at least some individuals who possess a combination of genetic and relational connection to a child, as Peter Stanley did.¹¹⁷ The brief equal protection analysis in the case suggests that this parental claim is relevant, not only against the state, but also against others with a comparable parental claim. What *Stanley* does not address is how the competing claims of parents are to be resolved and what role the Constitution plays in addressing this question.

In a series of "unwed father" cases addressing disputes between private litigants that followed *Stanley*, this question was squarely before the Court. Indeed, beginning with *Stanley* in 1972, and continuing through *Quilloin v. Walcott* in 1978,¹¹⁸ *Caban v. Mohammed* in 1979,¹¹⁹ *Lehr v. Robertson* in 1983,¹²⁰ and *Michael H. v. Gerald D* in 1989,¹²¹ the Court appears committed to working

116. See *supra* text accompanying notes 15–18.

117. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

118. 434 U.S. 246 (1978).

119. 441 U.S. 380 (1979).

120. 463 U.S. 248 (1983).

121. 491 U.S. 110 (1989).

through a range of variations on the claims of fathers to hash out the scope of parents' constitutional right to assert custodial interests in a child.¹²² What emerges is hardly a right with sharp contours, but rather a set of incomplete rules that gives states considerable leeway in defining parentage, while imposing some constitutional limits. What is striking about these rules, both in their recognition of rights and in their refusal to do so, is that they produce outcomes that conform very closely to Professor Mnookin's prescriptions. To see this, it is useful to consider the cases along two dimensions: The first focuses on the extent to which the Constitution establishes rules of priority among claimants, rules that track Mnookin's "intermediate rules."¹²³ The second focuses on the extent to which the Constitution imposes constraints on custody litigation, constraints that capture Mnookin's overall concern with the hazards of individualized adjudications.

The Constitution has been interpreted to endorse Mnookin's genetic starting point: The genetic relationship, the Supreme Court explained in *Lehr v. Robertson*,¹²⁴ establishes a special entitlement to act as a parent and thereby to acquire constitutional protection for that relationship:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the federal Constitution will not automatically compel a State to listen to his opinion where the child's best interests lie.¹²⁵

The Court went on to reject the claim of the genetic father, Jonathan Lehr, whom it determined had failed to demonstrate "a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child.'"¹²⁶ The Court explained that the "most effective protection of the putative father's opportunity to develop a relationship with the child is provided by the laws that authorize formal marriage and govern its consequences,"¹²⁷ but

122. The Supreme Court took up the rights of unmarried fathers again in *Nguyen v. INS*, 533 U.S. 53 (2001), this time in the context of citizenship rights conferred through parentage. Although the analysis in *Nguyen* is consistent with the earlier custody-focused cases, the difference in context reduces its relevance here.

123. Mnookin, *supra* note 1, at 282. Note that the first of these rules is that "custody should not be awarded to a claimant whose limitations or conduct would endanger the health of the child under the minimum standards of child protection." Because the analysis of correlated parental rights has already been considered in part IV, I do not repeat that analysis here.

124. 463 U.S. 248 (1983).

125. *Id.* at 262. Although the message of this passage pretty clearly endorses the constitutional relevance of the psychological aspects of parenting, the court stops short of weighing the significance of genetics and relationship directly against one another. *See id.* at 262 n.18 ("Of course, we need not take sides in the ongoing debate among family psychologists over the relative weight to be accorded biological ties and psychological ties, in order to recognize that a natural father who has played a substantial role in rearing his child has a greater claim to constitutional protection than a mere biological parent.").

126. *Id.* at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

127. *Id.* at 263.

that this is not the only way to protect a genetic parent's parental claim, as *Stanley* had already demonstrated.

In *Stanley*, the Court afforded protection to an unmarried father who had both a genetic and relational connection with his children. Further serving Mnookin's aims, the lack of any competitors directed that Stanley should be able to assume and maintain custody without any recourse to the adjudicative process.¹²⁸ In *Lehr*, however, and in *Quilloin v. Walcott*,¹²⁹ which the Court had decided five years earlier, the fathers' genetic relationship was not paired with psychological parenthood.¹³⁰ Although both Jonathan Lehr and Leon Quilloin had more of a relationship with their children than the "strangers" posited by Mnookin,¹³¹ they clearly were not the men with whom the children had established their strongest father-child attachment. In both cases, these attachments were formed with the mothers' husbands, whose attempt to adopt the children had inspired the genetic fathers' litigation.¹³²

The rules that prevented these two genetic fathers from blocking the adoptions worked in different ways in the two cases. Both had the effect of protecting the child's relationship with the psychological parent, but only *Lehr* had the additional effect of preventing the genetic father's engagement in an individualized custody adjudication. In *Quilloin*, the genetic father participated at considerable length in a hearing addressing whether adoption was in the child's best interests.¹³³ What *Quilloin* lacked was the power a mother or a married father would have had to block the adoption merely by withholding his consent. In *Lehr*, by contrast, the genetic father challenged the state's failure to even give him notice of the hearing.¹³⁴ In both cases, the court found no constitutional protection for these fathers' claims, and in *Lehr* the court emphasized the state's interest in establishing limits on open-ended notice requirements that could "complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees."¹³⁵ Thus, in a series of cases

128. 405 U.S. at 647–48 (rejecting state's argument that Stanley's rights were not violated because he could petition for adoption or custody, noting the loss suffered between the "doing and the undoing" of the separation and the uncertainty of Stanley's success in such proceedings).

129. 434 U.S. 246 (1978).

130. *Lehr*, 463 U.S. at 261 (1983).

131. Mnookin's second intermediate rule is that courts should prefer a psychological parent to a claimant, including a genetic parent, who is a "stranger" to a child. Mnookin, *supra* note 1, at 282.

132. In *Quilloin*, the child was eleven years old, had lived with his mother's husband most of his life, and expressed his desire to be adopted by the mother's husband. The genetic father had had some contact, but the contact was intermittent and perceived by the mother to be disruptive. 434 U.S. at 251. In *Lehr*, the child was considerably younger, but the contact with the genetic father even more attenuated. 463 U.S. at 249–50 (genetic father never supported and rarely saw his daughter in the two years since her birth).

133. *Quilloin*, 434 U.S. at 253.

134. The state did not take the position that notice to genetic fathers was never required, but only that notice was not required where a man fell into none of the several legally recognized classes of possible fathers. 463 U.S. at 251–52.

135. *Lehr*, 463 U.S. at 264

between 1972 and 1983, the Court interpreted parents' constitutional rights in line with Mnookin's prescriptions: The superiority of a genetic fathers' claim is protected by the Constitution, but only if that genetic claim is used to develop an actual parent-child relationship with a child.¹³⁶

In *Caban v. Mohammed*, the Supreme Court considered a case in which both parents had a genetic and psychological relationship with their children, and in that context, the Court found that the equal protection clause required the parents to have equal control over termination and adoption proceedings.¹³⁷ *Caban* thus left us with Mnookin's insoluble problem: Whereas procedural rights can limit the custodial threats posed by those who do not qualify, under Mnookin's analysis, to be recognized as parents, they cannot prevent a contest between two parents defined by the Constitution as equal. Indeed, the constitutional equality of parental pairs has the effect of guaranteeing a right to precisely the contest that has caused all the problems Mnookin identified.

In the years immediately following the publication of Mnookin's article, legislators and courts fueled by a growing commitment to gender equality in law and family life began providing for children's placement in the "joint custody" of both separated parents.¹³⁸ Throughout the 1980s, the joint-custody "revolution" swept the country, in part pressed by the political efforts of fathers' rights groups.¹³⁹ But over time, practical limitations slowed this trend, and, today, only a small percentage of children are placed in the joint physical custody of both parents.¹⁴⁰

A legislative failure to create a custodial preference for, and a court's refusal to order, joint physical custody, have, on occasion, been challenged as a violation of a parent's rights.¹⁴¹ There is a compelling simplicity to this

136. The Supreme Court recognized the twin significance of genetic lineage and an actual parent-child relationship in the immigration context in *Nguyen v. INS*, 533 U.S. 53, 62, 64-65 (2001) (recognizing the importance of the state's interests in "assuring that a biological parent-child relationship exists," and encouraging the development of "real, everyday ties that provide a connection between child and citizen parent").

137. 441 U.S. 380, 388 (1979).

138. See, e.g., Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 458 (1984) (describing the rapid and enthusiastic embrace of joint custody arrangements as a "small revolution" in custody law in the 1980s prompted, in part, by of the blurring of traditional sex roles).

139. *Id.*

140. See Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 781-82 (2006) ("[A]fter experimentation with joint custody, some states have realized that continual moving between households may be harmful to children, that the bulk of newly divorced spouses cannot remain as positively involved with each other on an everyday basis as joint physical custody requires, or that the presumption is causing more litigation to already crowded dockets.").

141. See, e.g., *Hassinger v. Seeley*, 707 N.W. 2d 706 (Minn. Ct. App. 2006) (rejecting a father's argument that Minnesota statutes were unconstitutional because they did not create a custodial preference for joint physical and legal custody); *Fanning v. Fanning*, No. 16787, 1999 WL 33263 (Va. Cir. Ct. Jan. 21, 1999) (rejecting a father's argument that the court was required, under the Constitution, to afford him equal time with and responsibility for his daughter); Michael Newdow, *Family Feud*, SLATE (June 18, 2004, 5:39 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2004/06/family_feud.html (arguing that the Constitution mandates equality in custodial

argument: The Constitution recognizes the fundamental right of fit genetic parents with an existing parental relationship to control the upbringing of their children and forbids gender-based disparities in divvying up that control when parents separate. To that argument might be added Mnookin's own analysis suggesting that neither a best-interests standard nor any backward-looking rules will consistently and appropriately identify what is best for children.¹⁴² If neither rules nor discretion has much to offer in sorting out custody between two fit parents, why not rest custodial decisions on a commitment to equality?

The answer has come through lives lived: Joint physical custody often does not work well for children. A substantive commitment to an equal division of custody between two fit parents would prevent courts and legislatures from imposing gender-imbalanced custody arrangements based on weakly justified reasons or reasonless discretion, but it would produce a solomonically inferior resolution. The fact that the development of parental rights has stopped short of requiring an equal splitting of custody between two equally constitutionally qualified parents suggests that these rights may be limited by the law's commitment to children's welfare rather than the other way around. Thus, although the Constitution offers no assistance in solving Mnookin's private-custody puzzle, constitutional developments have, importantly, stopped short of solving the puzzle at a cost to children.

The final case in the custodial line of unwed father cases, *Michael H. v. Gerald D.*,¹⁴³ shows similar constitutional constraint. In *Michael H.*, the Court took those following the line of cases by surprise when it significantly qualified the constitutional rights of genetic parents who had an established parental relationship with their children.¹⁴⁴ This qualification came in a context where there was a competing nongenetic psychological father, who had been married to the genetic and psychological mother since before the child was born.¹⁴⁵ As a presumptive father, the mother's husband had not only formed a parental relationship with the child, but was also legally recognized as the child's father.¹⁴⁶ What makes *Michael H.* such a difficult case is that it compounds the problem of potentially equal custodial competitors that Mnookin could not solve. Where Mnookin noted the difficulty of dividing custodial authority between *two* fit parents, *Michael H.* confronted the possibility of *three*. The

allocation, and defining equality as "an absolute right to 50 percent time with [one's] children").

142. Mnookin, *supra* note 1, at 264 ("[R]ules that relate past events or conduct to legal consequences may themselves create substantial difficulties in the custody area [because of] our inadequate knowledge about human behavior and our inability to generalize confidently about the relationship between past events or conduct and future behavior [and because] the very lack of consensus about values that makes the best-interests standard indeterminate may also make the formulation of rules inappropriate.").

143. 491 U.S. 110 (1988).

144. *See id.* at 131 (holding that a California law that prevents a genetic father from establishing his paternity when both the mother and the mother's husband are opposed does not violate the constitutional rights of the genetic father).

145. *Id.* at 113–15.

146. *Id.*

state's interest, in refusing to recognize an adulterous genetic father as a legal father, was to avoid the multiplication of custodial claimants who had authority to invoke a custody court's assistance.¹⁴⁷

In refusing to afford the genetic father constitutional protection, the Court in effect gave the state the ability to impose some limits on the proliferation of the individualized custody adjudications whose hazards Mnookin's article revealed. But it did this at some cost to the protection of the child's interest in preserving relationships with psychological parents. As with *Smith v. OFFER*, *Michael H.* confronted the tension between Mnookin's promotion of litigation avoidance on the one hand and the recognition and protection of psychological parenting relationships on the other. And as in *Smith*, the outcome and analysis in *Michael H.* favored litigation avoidance, a preference arguably supported by the weight of Mnookin's analysis.

Although *Michael H.* allowed the state to impose some limits on the number of custodial claimants, it did not give any individuals the right to block out custodial competitors. Much work has been left to legislators and courts, who must sort among potential claimants. This sorting has only grown more complex as the number of potential claimants has grown through the increasing use of assistive reproductive technologies and the increasing variety of accepted family forms. As with the more "simple," two-parent private custody dispute, the Constitution has proved less useful here than in the child-protection context.

There are, however, circumstances where the Constitution affords parents a constitutional right to entirely block the claims of custodial competitors, and this occurs where the competitors have no parental claim. In these circumstances, the parents' interest in avoiding court adjudication parallels their interest in avoiding state intervention in other contexts, and Mnookin's criticism of the best-interests adjudications captures the special risks associated with allowing the hearings. In the recent case of *Troxel v. Granville*,¹⁴⁸ the Supreme Court afforded some protection to parents against these nonparental claimants, but in many of the case's six opinions, there are alarming indications that Mnookin's message is getting lost.

In *Troxel*, a mother challenged a Washington statute that gave courts authority to order visits with nonparent third parties where courts determined that such visits were in children's best interest. Although Mnookin did not focus on visits as a subset of custodial claims, everything in his analysis applies with considerable force to these claims. And in rough terms, the Court interpreted the Constitution to provide some protection to children from the hazards of adjudicatory indeterminacy. However, of the six justices to write opinions in the case, only Justice Thomas suggested an approach that would provide the level of protection called for by Professor Mnookin's analysis. In Justice Thomas's

147. *Id.* at 126 ("What Michael asserts here is a right to have himself declared the natural father and thereby to obtain parental prerogatives.").

148. 530 U.S. 57 (2000).

view, the parental-rights cases required that intrusions on parental authority be given “strict scrutiny” and that therefore there should be a strong presumption against visits that were opposed by a fit and involved parent.¹⁴⁹ All the other justices, including Justice O’Connor, who wrote for a plurality of the Court, interpreted parental rights to leave considerable room for court adjudication of a child’s best interests, even if encumbered by some parent-protective limitations.¹⁵⁰ Some of this child-disserving analysis may reflect a certain confusion of the claims of nonparents with relationships to children—which are clearly subordinated to the custodial interests of involved parents under Mnookin’s scheme—with claims of psychological parents—which might well be entitled to recognition in Mnookin’s view, particularly if the nongenetic but psychological parents had filled the role in lieu of, rather than in addition to, the genetic parents.¹⁵¹

But the most serious offender among the Justices is clearly dissenting Justice Stevens, whose celebration of best-interests adjudication and the long successful history of its use, sounds the alarm among the Mnookin enlightened.¹⁵² What is particularly alarming about Justice Stevens’s opinion is that it is so celebrated among child advocates.¹⁵³ The ease with which we can slip back into confusing a commitment to serving children’s best interests through law with the assignment of individualized best-interests adjudications to judges underlines the value of enforcing strong parental rights as an important safeguard against this seductive confusion.

In the private-custody context, Mnookin offered fewer prescriptions and expressed more doubt about the proper resolution of disputes than he did in the child-protection context. Those prescriptions he did offer comport well with the parental-rights cases that were decided soon after he published his article, cases that considered who was constitutionally entitled to assert custodial claims, and through what procedures. Perhaps as notably, parental rights have not been

149. *Id.* at 80 (Thomas, J., concurring).

150. *Id.* at 70 (offering examples of other state laws that imposed some additional substantive or procedural constraints on judges’ adjudication of children’s best interests).

151. *See, e.g., id.* at 70 (citing data indicating that, in 1998, “approximately 4 million children . . . lived in the household of their grandparents”); *id.* at 98 (Kennedy, J., dissenting) (“My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child’s primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child.”).

152. *Id.* at 90–91 (Stevens, J., dissenting) (“Far from guaranteeing that parents’ interests will be trammelled in the sweep of cases arising under the statute, the Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parent’s protected interests and the child’s.”).

153. *See, e.g.,* Christina M. Alderfer, *Troxel v. Granville: A Missed Opportunity to Elucidate Children’s Rights*, 32 LOY. U. CHI. L.J. 963, 1002 (2001) (“Sadly, Justice Stevens was the only member of the Supreme Court to recognize that visitation cases involve not only a weighing of the interests of the parents and the state, but, in addition, the interests of the child.”); *see also* Judith Sperling-Newton et al., *Protect Children’s Rights*, CHI. TRIB., June 26, 2000, at 10 (“Fortunately, at least one member of our nation’s highest Court considered the case from the children’s perspective.”).

applied in the private-custody context to achieve results that, while doctrinally coherent, would clearly disserve children's interests. As potential custodial claimants proliferate, parental rights can play an important role in keeping children out of the adjudicatory process.

VI

CONCLUSION

Just as *Smith v. OFFER* served as an early case testing the linkage between parental rights and Mnookin's prescriptions, so *Troxel v. Granville* offers a contemporary demonstration of the connection, and of the work parental rights can do in protecting children from the hazards of individual best-interests adjudications. The tentative and fragmented nature of the Court's decision in *Troxel*, however, reminds us of the fragility of those protections, fragility that flows from our best intentions. We aspire, through law, to do what is best for each and every child, and we require the discipline imposed by the parental-rights doctrine to resist the temptation—so powerfully challenged by Mnookin—to trust in judges to work out, in each and every case, what this means. And just as the parental-rights doctrine imposes constraints on the law's reliance on individualized adjudications to determine children's interests, so the laws' commitment to children's interests imposes constraints on the parental-rights doctrine. As it has evolved, the parental-rights doctrine has proved more true to Mnookin's child-serving vision than the best-interests adjudications which proliferated in opposition to it.