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RACE-CONSCIOUS CHILD PLACEMENT: DEVIATING FROM A POLICY AGAINST RACIAL CLASSIFICATIONS

MYRIAM ZRECZNY*

INTRODUCTION

In the world of child placement, racial classifications are widespread. While outright prohibition of transracial placement will not pass constitutional muster, the use of race as a factor in determining the best interest of the child is frequent, endorsed, and sometimes even mandated by adoption agencies, statutes, and courts. Where equal protection issues have been raised, race-matching preferences have survived strict scrutiny in this nation’s courts.

Curiously, such matching policies have persisted in a legal system which is in nearly every other case offended by racial classifications that burden or stigmatize a particular group. Because such race-based classifications are inherently suspect and subject to strict constitutional scrutiny, race-conscious state action is rarely tolerated. In

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2. See infra notes 10-79 and accompanying text.

3. See, e.g., In re R.M.G. & E.M.G., 454 A.2d 776 (D.C. 1982). The statute at issue in In re R.M.G. required that the petition for adoption state the race of the involved parties. Id. at 783 n.6.


fact, excluding the context of affirmative action, only one racial classification has ever survived in the United States Supreme Court.\(^6\)

This distinctive realm of child placement, where prospective parents and available children are separated and classified on the basis of race, thus stands as an exception to the general rule that no racial classification is absolutely necessary to further any state interest, however compelling.\(^7\) Those with decision-making power in placement disputes have labeled the “best interest of the child” as the compelling state prerogative for purposes of a strict scrutiny analysis.\(^8\) They also maintain that the consideration of race is a necessary means of advancing this interest.\(^9\) It is suggested that a child’s welfare is best served by same-race parents, who can better instill a sense of racial integrity in the child.

This Note will examine current matching policies and judicial standards for child placement. It will then suggest that although same-race parenting would likely be optimal from a social and psychological standpoint, the consideration of race in a child placement proceeding is highly suspect from both a legal and practical standpoint. The best interest of the child is a compelling objective; however, consideration of race is neither a necessary nor narrowly tailored means of achieving this goal. Furthermore, consideration of race is often detrimental to a child’s well-being as it frequently results in long term foster care. Thus, despite the theoretical appeal of race-matching, the practice of race-matching often is at odds with the child’s best interest.

Moreover, plainly stating that race may be a “factor” in a placement proceeding is an extremely vague instruction. The unbridled scope of this instruction facilitates stigmatization by allowing race to become the decisive factor in placement proceedings. Because race, when used as a criterion in child placement, leads to discriminatory

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\(^6\) Korematsu v. United States, 323 U.S. 214 (1944) (holding that the compelling interest in prevention of espionage and sabotage required the exclusion of persons of Japanese ancestry from war areas). See also infra notes 80-116 and accompanying text.

\(^7\) The Supreme Court first articulated the “strict scrutiny” test in Korematsu, 323 U.S. at 216.

\(^8\) There is clearly state action with regard to adoption and child custody where a state statute prescribes or public agency practices race-matching or preferencing. In the case of private agencies, however, Elizabeth Bartholet suggests that where a private agency functions in areas that have traditionally been the realm of states and public agencies, such as creating an adoptive family, its actions could be considered state action. See Bartholet, supra note 5, at 1229 n.187.

\(^9\) See, e.g., Drummond v. Fulton County Dep’t of Family & Children Servs., 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).
application and perpetuation of racial prejudice, it should never enter the deliberations.

I. RACE AND CHILD PLACEMENT

A. Race-Matching Policies and Preservation of Culture in Adoptions

Because adoption agencies regard racial and cultural heritage to be part of a child's identity, such heritage is usually honored in the search for permanent families.\(^\text{10}\) Although private agencies put less emphasis on race,\(^\text{11}\) most agencies prefer "timely placements of children in same-race families where feasible within the law."\(^\text{12}\) Agencies will typically characterize this policy as a mere preference for same-race placement in their mailings and literature. In effect, however, the stated policies are more powerful than mere preference. Indeed, there appears to be a hidden agenda to avoid placing children transracially whenever possible.\(^\text{13}\)

Whatever the actual practice, public agencies almost always declare the ability to preserve a child's racial, ethnic, and cultural heritage as one issue to be considered when determining what placement will be in the best interest of the child.\(^\text{14}\) This policy raises two con-

10. Adoption Guidebook Comm., Junior League of Chicago, Adoption: A Guide To Adoption in Illinois 20 (1988) [hereinafter Adoption Guidebook]. See also National Adoption Exch., National Adoption Ctr., Questions Most Frequently Asked About Adoption. Interestingly, different placement standards apply with regard to race in the context of foster care. Perhaps due to the inherently temporary nature of foster care, there is considerably less hesitation on the part of agencies to place an African-American child in the care of white foster parents. See id. For an expansive view of agency policies, see Bartholet, supra note 5, at 1183-1200.

11. See Bartholet, supra note 5, at 1184. One agency reported that approximately 60% of the African-American children it places are placed interracially. The other 40% are placed with African-American families. Telephone Interview with Julie Tye & Linda Hageman, Directors of The Cradle Society (Oct. 22, 1993) [hereinafter Tye & Hageman Interview]. Judith Bailey, director of The Adoption Center in Massachusetts, another private agency, stated, "If a couple wants a white baby, I think they should get it. Even if it's a black couple. I don't force the issue. . . . [I]n my experience of adoption, racism is an issue." John Robinson, Judith Bailey's Circle of Love, BOSTON GLOBE, Mar. 17, 1992, at 53, 61.

12. Adoption Guidebook, supra note 10, at 20; accord Bartholet, supra note 5, at 1183.

13. These unwritten rules were detailed through a series of interviews conducted by Elizabeth Bartholet. See Bartholet, supra note 5, at 1183-88. See also Infants, Adoption Update (National Adoption Ctr., Phila. Pa.) at 1. (stating that most children are indeed placed with same race families). Even though the overwhelming majority of white couples seeking to adopt a child are in search of a white infant, transracial adoption does occur. One estimate indicates that private agencies place 50% of their minority children transracially, however, the statistics may vary. Joe Kroll, Media Sensationalizes Trans-racial Adoption Issues, Adoptalk Sampler (North American Council on Adoptable Children), 1993, at 7.

14. Adoption Guidebook, supra note 10, at 26. The Illinois Department of Children and Family Services, for example, lists the following factors:
cerns. First, it promotes a belief that the inherently nonnatural concept of adoption can be made "natural" simply by matching the skin color of the prospective parents and adoptees. Physical similarities, however, do not transform an adoptive family into a biological one.\textsuperscript{15} Over emphasis on physical similarities only reflects a policy which overlooks deeper notions of the meaning of family. It de-emphasizes the emotional bonding and support which should be the true measure of the success of a newly formed adoptive family.

Second, considering the ability of a family to preserve a child's racial heritage is problematic because of its overbearing effect on other factors involved in a placement decision. Most people would concede that an African-American family is inherently better equipped to preserve an African-American child's heritage.\textsuperscript{16} If, as race-matching policies implicitly assume, preservation of an African-American child's heritage is better for the child's emotional well-being, then the African-American parents may also be automatically more capable of meeting (at least some of) the "emotional needs of the child," another factor which is often considered by agencies before

1) the wishes of the child who demonstrates the maturity and cognitive ability to participate in the decision;
2) the physical, mental, and emotional needs of the child;
3) the child's need for stability and continuity of relationship with parent figures;
4) the interaction between the child and the prospective adoptive parent;
5) the prospective adoptive parent's ability to meet the physical, mental, and emotional needs of the child; and
6) the ability of the prospective adoptive family to provide an environment which would preserve the child's racial, ethnic, and cultural heritage.

\textit{Id.} Factors identified elsewhere may include: "moral fitness of the two parties"; the age, sex, and health of the child; and the potential family environment. \textit{See} D. Michael Reilly, \textit{Constitutional Law: Race as a Factor in Interracial Adoptions}, 32 \textit{CATH. U. L. REV.} 1022, 1022 n.1 (1983).

15. The current trend in Britain is to reject the ideal of race-matching and support a "more practical and less ideological approach to adoption." Veronique Mistiaen, \textit{Britain Prepares Laws to Liberalize Adoption}, \textit{CHI. TRIB.}, Jan. 2, 1994, § 6, at 1. New adoption laws in Britain seek to prohibit social workers from blocking transracial adoptions. While acknowledging that ethnic background is important, officials state that what is most important is the parents' capacity to support the child through life's challenges. \textit{Id.} British Health Secretary, Virginia Bottomley, stated that "[t]here should be no place for ideology in adoption. We want common sense judgments, not stereotyping." \textit{Id.}

American courts have rejected the notion that a child should live with a parent whom he or she more closely resembles. \textit{See}, e.g., Fouantaine v. Fouantaine, 133 N.E.2d 532, 534-45 (Ill. Ct. App. 1956) (reversing the district court's decision to leave the children with their African-American father, which was based solely on the children's and father's similar racial characteristics). Though Fouantaine involved a custody dispute between an interracial couple, the same sentiments should apply generally to adoptive mixed race families. \textit{But see} Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978) (stating that the "duplication of a child's biological environment" is an ideal goal for an adoption agency).

16. \textit{See} Drummond, 563 F.2d at 1205 ("[i]t is a natural thing for children to be raised by parents of their same ethnic background.").
placement. However, the ability to meet the emotional needs of the child may involve more than just preserving and fostering the child’s racial heritage.

Although a direct link between the matching policies and the longer periods of time minority children remain in foster care has not been conclusively established, the connection seems to exist logically. For example, it is well established that there are markedly fewer African-American families waiting to adopt. By the same token, a healthy African-American infant will wait for placement approximately five times longer than a healthy white infant. A “majority of African-American children remain [in foster care] for well over two years,” and one third of these children remain for five or more years. Sadly, the longer a child remains in foster care, the less likely it becomes that the child will ever be adopted. Such data is consistent with the theory that race-matching delays placement of waiting minority children. If there are fewer African-American families waiting to adopt, and transracial placement is precluded, there are simply no homes available to care for the waiting African-American children.

Moreover, the presumption that an African-American family can best preserve an African-American child’s heritage or culture begs the question of whether a child is even born with a culture. Culture is a societal phenomenon. From the standpoint of an infant or toddler waiting to be adopted, it is not clear whether or not she has a culture to preserve, much less whether preserving it is actually in her best interest when the alternatives are considered. The threat of loss of

17. See Adoption Guidebook, supra note 10, at 26.
18. See infra notes 140-57 and accompanying text.
19. Office of Analysis & Inspection, Office of Inspector Gen., Minority Adoptions 7-8 (1988) [hereinafter Minority Adoptions]. In addition, while a ten year old white child with emotional problems will average ten months in foster care, a ten year old African-American child with the same problems will remain approximately twenty months in foster care. Id.
21. Id.
22. Perhaps the goal should be a broader “American culture,” which de-emphasizes separation and instead encourages education of white America by other ethnicities. Indeed, what “American culture” means and what it comprises has become increasingly unclear to some scholars. As one writer has noted:

Each year, this country becomes less white, less “European,” and less tightly bound by a single language. The United States now has a greater variety of cultures than at any time in its history. . . . In addition, some Americans who were born in the United States are saying they can no longer identify with its prevailing culture.

23. See James P. Comer & Alvin F. Poussaint, Black Child Care: How To Bring Up A Healthy Black Child In America (1975). Comer and Poussaint argue:
culture or heritage, then, may not be to the child individually, but rather to the race as a whole. At best, the threatened loss affects the individual child only to the extent that the child is a member of the race in peril. However, the individualized best interest of the child standard is not necessarily an appropriate vehicle for securing the collective well-being of a group.24

Furthermore, a “best interest of the child” standard that involves race-matching requirements may ultimately be an ineffective means of preserving African-American culture. As we have seen, insistence on preservation of “culture,” as a practical matter, means same-race placement. The end result is often long term foster care or complete preclusion of adoption. If children are consigned to foster care or institutions, they will be at a disadvantage and will have fewer resources to contribute to the future development of their ethnic culture. In the most immediate future, these children need families, not culture.

B. Statutory Race-Matching and Preferencing Policies

1. Mandated Racial Matching

Courts have not tolerated statutes which mandate race-matching and explicitly prohibit transracial child placement.25 In In re Gomez,26 the district court, relying on a Texas statute which prohibited transracial adoption, denied an African-American man’s petition to adopt his white wife’s two white daughters.27 After acknowledging that any statute which openly classifies people according to their race should be subject to strict scrutiny, the appellate court, without even a close analysis of the statute, was “impelled to the inevitable conclusion” that the statute was unconstitutional.28

Although infants become aware of color and feature differences, these things have no meaning to them. Unless they are taught in a very direct and specific way, they have little or no interest in the question of skin color or racial variations until around three years of age. Race is a complicated concept which they learn over time. It does not help to try to explain the idea of race to the infant.

Id. at 25.

24. The Supreme Court has expressed its disapproval of using an individual to further a group interest: “Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups.” Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1977).


26. Gomez, 424 S.W.2d 656.

27. Id. at 657. The Texas statute prohibited both the adoption of African-American children by whites, and also of white children by African Americans. Id.

28. Id. at 659.
Five years later, a similar Louisiana statute was invalidated in *Compos v. McKeithen*.\(^{29}\) *Compos* was a class action brought for a declaratory judgment to determine the validity of the Louisiana statute.\(^{30}\) The court rejected the defendant's argument that adoptive parents and children should have similar physical characteristics so that adoptees might obtain a so-called "normal" home environment.\(^{31}\) Analyzing the statute under strict scrutiny, the *Compos* court refused to defer blindly to the "wisdom of state legislatures" in cases involving racial classifications.\(^{32}\)

Reasoning that any possible disadvantages of different race placement did not outweigh the benefits of having a home, the *Compos* court held that the statute did not promote the best interests of children in all cases.\(^{33}\) In fact, the court explained that the interest being promoted was not the best interest of the child; rather, it was the "integrity of race in the adoptive family relationship."\(^{34}\) Finally, the *Compos* court acknowledged that there would be inherent difficulties in an interracial home in Louisiana, however, these challenges only justified consideration of race "as a relevant factor" in a placement proceeding, not as the decisive one.\(^{35}\)

2. Statutory Preferences for Same-Race Placement

While outright bans on transracial placement have been struck down, several state statutes (and most public placement agencies) continue to advocate a preference for same-race placement. For example, Minnesota's adoption law clearly articulates that "[t]he policy of the state of Minnesota is to ensure that the best interests of the child are met by requiring due, not sole, consideration of the child's race or ethnic heritage . . . ."\(^{36}\) Moreover, the statute provides that a

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30. Plaintiffs Guillermo and Carolie Compos were a Caucasian couple whose request to adopt an African-American child was denied by several agencies on the basis of the Louisiana statute. *Id.* at 265. Plaintiff Edmond Norman, an African-American man, and his wife Gerda, a white woman, were told by several different Louisiana agencies that they were not eligible to be adoptive parents because they were an interracial couple. *Id.*
31. *Id.* at 266.
32. *Id.*
33. *Id.* at 267. The court recognized that life in a transracial home was better than life in an institution. *Id.*
34. *Id.*
35. *Id.* at 266.
36. MINN. STAT. ANN. § 259.255 (West Supp. 1994). Interestingly, the words "not sole" were inserted into the statute in a 1993 amendment. Before the amendment, the statute read: "The policy of the state of Minnesota is to ensure that the best interests of the child are met by requiring due consideration of the child's race or ethnic heritage . . . ." MINN. STAT. ANN. § 259.255 (West 1992) (emphasis added).
court "shall give preference" first to relatives of the child, then to families of the same-race, and lastly to families of another race.\textsuperscript{37} Several states have similar statutes.\textsuperscript{38}

A similar policy is currently pending on the federal level. A bill has been proposed in the United States Senate which would mandate a preference for racial matching, while providing that the adoption of a minority child must not be unduly delayed for purposes of locating same-race parents.\textsuperscript{39} The goals of the Multiethnic Placement Act are "to decrease the length of time that children wait to be adopted" and "to prevent discrimination on the basis of race, color, or national origin."\textsuperscript{40}

Preference legislation may indeed be a sincere effort to benefit children and guard against societal prejudice. However, by authorizing even minimal delay and reflecting favoritism for race-matching, preference legislation is tantamount to a ban on transracial placement. It sends a signal to agencies that racial matching is better and leaves the system wide open to abuse. Moreover, it mandates racial separatism and codifies the prejudice lingering in American society. In reality, the federal bill, if passed, would do little to change current policies because it fails to take a firm stand on the issue of transracial place-

\textsuperscript{37} The current statute reads as follows:

The authorized child placing agency shall give preference, in the absence of good cause to the contrary, to placing the child with (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, (b) a family with the same racial or ethnic heritage as the child, or, if that is not feasible, (c) a family of different racial or ethnic heritage from the child which is knowledgeable and appreciative of the child's racial or ethnic heritage.

If the child's genetic parent or parents explicitly request that the preference described in clause (a) or clauses (a) and (b) not be followed, the authorized child placing agency shall honor that request consistent with the best interests of the child.

\textsuperscript{38} See, e.g., Ark. Code Ann. § 9-9-102 (Michie 1993) ("In all custodial placements . . . due consideration shall be given to the child’s minority race or minority ethnic heritage."); Md. Code Ann., Fam. Law § 5-311 (1993) (consent to adoption may not be withheld "for the sole reason that the race or religion of the prospective adoptive parents is different from that of the individual to be adopted . . . where to do so would be contrary to the best interests of the child.").

\textsuperscript{39} Charisse Jones, \textit{Role of Race in Adoptions: Old Debate Is Being Reborn}, \textit{N.Y. Times}, Oct. 24, 1993, at 1, 13. The sponsor of the bill, Senator Howard M. Metzenbaum, an Ohio Democrat, articulated an emerging belief in this country: "I’m so outraged at the fact that anyone would give priority to any issue over the welfare of a child." \textit{Id}. Implicit in this statement is that same race placement does not always further the best interest or "welfare" of the child, where the alternative is life in an institution or foster care. \textit{See also} Randall Kennedy, \textit{Kids Need Parents - Of Any Race}, \textit{Wall St. J.}, Nov. 9, 1993, at A14.

\textsuperscript{40} Kennedy, \textit{supra} note 39, at A14. The bill would deprive agencies blocking transracial adoptions of federal adoption funds. Jones, \textit{supra} note 39, at 13.
ment. It merely reiterates the preferences already at work in many states.

3. Race as a "Factor"

Consideration of race as one factor among many in measuring the best interests of a child has proven to be the general rule among courts with regard to placement decisions. Where racial classifications are intermingled with a wealth of other factors, the discrimination may not be as obvious as it would be in the case of an outright ban on transracial adoption. Nevertheless, the "race as a factor" system leaves itself wide open to judicial and administrative abuse.

The weight allocated to race by courts in a child placement proceeding varies depending on the nature of the case. In cases involving a custody dispute between same-race natural parents, where one parent has subsequently become involved with a member of another race, little significance is accorded to race. Similarly, reviewing courts have allowed race to play only a small role in custody disputes between natural parents of different races. Finally, and most importantly, there are cases involving white foster parents seeking to adopt an African-American or biracial child. These foster parents battle

41. The senate bill has aroused apprehension in the National Association of Black Social Workers. See Jones, supra note 39, at 13. This is not surprising in light of the stand the organization has taken with regard to transracial placement in the past:

- Black children should be placed only with Black families whether in foster care or for adoption. Black children belong, physically, psychologically, and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people.

- Our position is based on:
  1. the necessity of self-determination from birth to death, of all Black people.
  2. the need of our young ones to begin at birth to identify with all Black people in a Black community.
  3. the philosophy that we need our own to build a strong nation.

- We... have committed ourselves to go back to our communities and work to end this particular form of genocide.


either against agencies who aim to place the child with African-American adoptive families, or against members of the child’s biological family.\textsuperscript{44} Race has been pivotal to the decisions in these cases.

\textit{a. Custody}

Where divorced, same-race parents dispute custody because one parent has become romantically involved with a member of a different race, courts have noted that the parent’s newly found interracial association is irrelevant.\textsuperscript{45} Courts have further agreed that the possibility of racial tension and community prejudice arising from the custodial parent’s interracial relationship is not presumptively relevant to traditional guidelines for custody adjudication.\textsuperscript{46}

Courts have also rejected as a justification for denial of custody the possible threat to a child’s racial integrity said to arise from the interracial relationship of a parent. In \textit{Myers v. Myers},\textsuperscript{47} a white father sought custody of his children because he feared that the racial identity of the children would be threatened by their mother’s subsequent relationship with an African-American man. The Pennsylvania court found the race of the mother’s companion irrelevant to the children’s developing sense of identity and refused to alter the custody arrangement.\textsuperscript{48}

The Supreme Court has spoken with regard to these types of custody disputes. In \textit{Palmore v. Sidoti},\textsuperscript{49} the petitioner sought custody of his three year old daughter one year after his divorce from the child’s mother. Both parents were white. The petitioner sought custody of the child based on “changed conditions,” namely, that the child’s mother was then living with an African-American man.\textsuperscript{50} The lower


\textsuperscript{45} \textit{See Edel}, 293 N.W.2d at 796 (precluding lower court, on remand, from considering the race of the mother’s boyfriend).

\textsuperscript{46} \textit{See Kramer}, 297 N.W.2d at 361 (“We emphatically reject the idea that parent child relationships are to be dictated by unsubstantiated judicial predictions concerning the effects of racial prejudice in the community. Community prejudice, even when shown to exist, cannot be permitted to control the makeup of families.”); \textit{Lucas}, 299 A.2d at 245 (holding that subsequent interracial remarriage in and of itself was not compelling reason to deny custody to natural mother).


\textsuperscript{48} \textit{Id.} at 591-92.


\textsuperscript{50} \textit{Id.}
court awarded custody to the father, noting that if the child were raised in an interracial home, she would face needless societal pressure and stigmatization.\(^{51}\) In applying strict scrutiny, the Supreme Court reversed the decision of the lower court, and concluded that taking the child away from her natural mother to protect her from the possible harm that societal prejudice might someday inflict was constitutionally impermissible.\(^{52}\)

Significantly, the \textit{Palmore} Court acknowledged that the best interest of the child was an "indisputably" compelling state objective, and noted the special role of the state in protecting the welfare of young children.\(^{53}\) However, the Court did not engage in a best interests analysis; that is, there was no conclusion that it would be in the best interest of the child to remain with her mother in the racially mixed home. Rather, the Court explained that although the threat of societal pressure was real, racial prejudice can be neither authorized nor effectuated by law.\(^{54}\) The structure of the Court's analysis implies a belief that it may indeed put a child's welfare in jeopardy to live with parents of different races. In fact, it seems that if racially motivated considerations were not forbidden, the Court might have removed the child from the mixed home.

Where the custody dispute involves natural parents of different races, custody will not be awarded on the basis that the child possesses physical characteristics which are more similar to those of one parent.\(^{55}\) Courts have emphatically rejected the notion that children of interracial marriages will be better adjusted if they live with the parent whom they more closely resemble.\(^{56}\) In \textit{Fountaine v. Fountaine},\(^{57}\) the appellate court reversed an award of custody to an African-American father which was based on the similarity of the children's and the father's "racial characteristics." The appellate court noted that even

\(^{51}\) \textit{Id.} at 431. The lower court explained, "[T]his Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come." \textit{Id.}

\(^{52}\) \textit{Id.} at 434. Although the Court used the term "substantial," the rest of the equal protection analysis indicates that it actually assumed the interest was "compelling." \textit{Id.} at 433.

\(^{53}\) \textit{Id.}

\(^{54}\) \textit{Id.} ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). \textit{See also} \textit{Palmer v. Thompson}, 403 U.S. 217, 260-61 (1971) (White, J., dissenting) (Decision-makers must never avoid constitutional questions by deferring to the "hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.").


though the trial judge "went to great lengths to ascertain how the welfare of the children might best be served," he abused his discretion by making race his decisive consideration.\textsuperscript{58}

Similarly, in \textit{Beazley v. Davis},\textsuperscript{59} the Nevada Supreme Court found that the lower court had abused its discretion when it granted custody of children of an interracial marriage to their African-American father simply because their physical characteristics were more African American than white. Analyzing the decision under strict scrutiny, the court expressed that the mother was prejudiced by the lower court's consideration of racial physical characteristics.\textsuperscript{60}

In these two types of cases, it is relatively clear why courts will not consider race as an important factor when determining custody. First, the presence of the natural parents reduces the difficulty of the decisions. In general, family law consistently favors protection of the biological, or "formal" family, a bias which has been endorsed by the Supreme Court.\textsuperscript{61} Therefore, there is a presumption that a child's best interests are served if she is raised by a natural parent.

Second, in a society which allows intermarriage, it would be illogical to deprive a natural mother the right to her child simply because she became involved with an African-American man subsequent to her divorce from a white man. She could, lawfully, marry an African-American man\textsuperscript{62} and later have children with him. To deprive her of the right to raise her own white child in whatever race home she desires is inconsistent where mixed race homes are otherwise "authorized" by law. The inconsistency could only be explained as a manifestation of notions of racial purity and social prejudice. It would be equally illogical to deny either parent of an interracial marriage custody on the basis of race, because the child would have grown up in a mixed race home in the absence of the divorce. To consider race in these custody disputes would simply be a method of taking subtle ac-

\textsuperscript{58} Id. at 534-35.
\textsuperscript{60} Id. at 207-08.
\textsuperscript{61} See, e.g., Trimble v. Gordon, 430 U.S. 762, 769 (1977) ("No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society."); Lehr v. Robertson, 463 U.S. 248, 257 (1983) ("[A]s part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family."). See also Alsdurf v. Alsdurf, 133 N.W.2d 479, 482 (Minn. 1965) ("The law in this state is well settled that it is in the best interests of a child to be brought up by the mother unless she is wholly unequal to such responsibility.").
tion against interracial marriage.\textsuperscript{63} Courts would effectively discourage interracial relationships by denying parties to such relationships the same rights to their children as same-race families would receive in the event of separation.

In light of the presence of the natural parents as well as society's acceptance of intermarriage, race plays a relatively minor role in custody disputes. As will be seen, however, race plays an integral role in foster care and adoptive placement.

\textbf{b. Foster Care and Adoptive Placement}

Cases dealing with foster care and adoptive placement can be divided into two categories. First, there are cases in which white adoptive parents compete with a member or members of the child's biological family for adoption of the child.\textsuperscript{64} Second, there are cases in which white adoptive parents compete either with an agency which intends to place the child with some unidentified same-race family in the future, or with an African-American adoptive family.\textsuperscript{65} These cases usually involve foster care. It is in this context that the "race as a factor" standard is most clearly exposed as tantamount to an outright ban on transracial placement.

Courts will sometimes avoid the constitutional issue altogether where there is a member of the child's biological family petitioning to adopt. In \textit{In re D.L.}, the Supreme Court of Minnesota declined to address the constitutionality of a statute which took race into consideration, stating that placement of a child with a family member is presumptively in the best interest of the child.\textsuperscript{66} Arguably, cases in which


\textsuperscript{66} \textit{D.L.}, 486 N.W.2d 375. Although the trial court also stated that placement with the natural family was most advantageous to the child, there was evidence presented on appeal that the judge may have been biased against the white foster parents. Apparently, the judge published the following statement in a local newspaper:

\begin{quote}
[T]he vast majority of white Minnesotans unthinkingly accept white culture as the norm—indeed, as the whole of reality. To such radical ethnocentrics, people of color are forever too weak (they "can't" act white, i.e. "normal") or too scary (they won't act white). Whites who want not to be racist expend huge effort trying to be clear and fair in their understanding of people of color, so as to help colored people transform themselves into a reasonable facsimile of white people. What we really must do is see that we, in our unexamined whiteness, are the problem. We should use our energy better,
a member of the natural family is involved should be grouped with custody cases, as it is presumptively less "offensive" to award custody to a biological family over an adoptive one.

The Court of Appeals for the Eighth Circuit recently held that where the goal of a foster care plan is ultimate reunification with a natural parent, race may be considered in determining the best interest of a child. In *J.H.H. v. O'Hara*, white foster parents claimed that the Missouri Division of Family Services violated their right to equal protection where two African-American foster children were permanently removed from the foster home because of race. Although the intention of the agency when it initially removed the children from the plaintiff's home was to continue foster care elsewhere, the plan was modified to pursue eventual reunification with the natural father. The court refused to interpret *Palmore* as prohibiting the consideration of race in all placement proceedings.

In *In re R.M.G. & E.M.G.*, both the white foster parents of an African-American child and the child's African-American paternal grandparents petitioned for adoption. The trial court determined that both families exhibited great love and affection toward the child, and that all other factors were relatively equal. Noting, however, that "severe questions of identity" would probably arise from a transracial placement, the trial court awarded custody to the African-American paternal grandparents. Because the trial court did not adequately articulate its analysis with regard to the comparative weight of all the factors, the court of appeals reversed.

The court of appeals in *In re R.M.G.* directly acknowledged the dangers of discriminatory application of the statute where no real limits or directions were placed on a trial judge's consideration of race. This risk prompted the court to establish a specific system, comprised

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68. *Id.* at 240. Interestingly, the defendants presented evidence which aroused suspicion that the plaintiff's foster parents, who had been licensed foster parents for almost twenty years, had physically abused two other foster children in the past. *Id.* The substantiated risk of child abuse would seem to be in and of itself a reason to deny a foster family custody of children in the future.
69. *Id.* at 242.
70. *Id.* at 245.
72. *Id.* at 782.
73. *Id.* at 790 ("We would be naive simply to ignore [the possibility of discriminatory application] based on the commonly shared hope that times have changed.").
of three inquiries, through which race should be considered: (i) "how each family's race is likely to affect the child's development of a sense of identity, including racial identity"; (ii) "how the families compare in this regard"; and (iii) "how significant the racial differences between the families are when all the factors relevant to adoption are considered together." This narrow construction of the race-matching provision was intended to guard against abuse of discretion.

The Court of Appeals for the Fifth Circuit apparently did not display the same concern over possible discriminatory application of the "race as a factor" system. In Drummond v. Fulton County Department of Family and Children Services, the court denied a white couple's petition to adopt a biracial child to whom they had been foster parents for almost a year, and authorized removal of the child from the home. While the care provided by the Drummonds had been deemed excellent by the placement agency, the agency determined that it would be in the child's best interests if a permanent home was sought elsewhere. The Drummonds argued in part that they were denied equal protection because race played too great a role in the agency's decision.

Relying on Compos, the court found that race could be considered as a relevant factor as long as it was not the decisive one. The court insisted that consideration of race "suggests no racial slur or stigma in connection with any race." Moreover, the court felt that consideration of race precludes the "potentially tragic possibility" of placement with parents who will be unable to "cope with the child's problems." When "duplication of [a child's] natural biological environment" is the ideal goal of an adoption agency, consideration of race is not constitutionally forbidden.

74. Id. at 791.
75. Drummond v. Fulton County Dep't of Family & Children Servs., 563 F.2d 1200, 1203 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).
76. The Drummonds raised a due process argument in addition to their equal protection claim. They asserted two possible liberty interests: (1) their relationship with Timmy as "psychological parents," and (2) their interest in a reputation free from the stigma which would result if their petition were denied. Id. at 1206. The court rejected each of these interests. It found that the temporary nature of foster care, coupled with the fact that the foster relationship is state-created, rendered whatever interests might exist in the foster relationship, limited. Id. at 1206-07.

Timmy's liberty interest in a stable environment was also considered by the court, and although such rights were implicitly acknowledged, the court dismissed them. Id. at 1208.
77. Id. at 1205.
78. Id.
79. Id. at 1205-06.
II. EQUAL PROTECTION LAW AND RACIAL MATCHING POLICIES

The unconstitutionality of considering race in child placement is especially striking when considered in light of basic principles of equal protection and constitutional law. The equal protection clause of the fourteenth amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." The clause, however, does not preclude all classifications of people in any statute or policy. In fact, most statutory classifications will be upheld unless they are completely arbitrary; classifications need only be rationally related to some legitimate or important government interest. However, where a classification is drawn on the basis of race, it is considered "inherently suspect" and must succumb to a higher level of judicial scrutiny.

Classifications based on race, then, must be necessary to further compelling governmental objectives. The only case in which a racial classification survived this strict scrutiny is Korematsu v. United States, where the Supreme Court found that exclusion of Japanese Americans from certain areas of the West Coast was a necessary means for the military to further its interest in national security. Korematsu, however, is criticized among commentators as an appalling betrayal of constitutional rights which one could attempt to explain only on the very narrow grounds of wartime necessity. Indeed, subsequent decisions cite Korematsu primarily, if ever, for the narrow

80. U.S. CONST. amend. XIV, §1. Equal protection may be invoked where there is state mandated discrimination. The actions of judges working in their official capacity will constitute state action for fourteenth amendment purposes. Shelley v. Kraemer, 334 U.S. 1, 14 (1948).
81. See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Rotunda, supra note 4, at 400. The "mere rationality" standard is not a high hurdle. Courts will show great deference to the legislature where the classification is not drawn along racial lines. See Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949) (holding that the state goal of eliminating funeral insurance was legitimate); Railway Express Agency v. New York, 336 U.S. 106 (1949) (upholding a statute which banned purchasing or selling of advertising space on rental vehicles in general, but allowing business vehicles to advertise their own business).
85. Id. at 223. The Court acknowledged that "[c]ompulsory exclusion of large groups of citizens from their homes ... is inconsistent with our basic governmental institutions." Id. at 219-20. However, the Court insisted that "[t]o cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue." Id. at 223.
principle that racial classifications are inherently suspect and subject to the strictest judicial scrutiny.\textsuperscript{87}

Several landmark decisions concerning racial classifications have arisen in the family law area. In fact, two in particular effectively support interracial family relationships. In \textit{Loving v. Virginia}, the Supreme Court held that a Virginia antimiscegenation statute violated the equal protection clause.\textsuperscript{88} The Court found that there was “patently no legitimate overriding purpose independent of invidious racial discrimination” that could justify the statute.\textsuperscript{89} The Court further labeled the law as a measure “designed to maintain White Supremacy.”\textsuperscript{90} The \textit{Loving} Court implicitly recognized that the mixing of races was inevitable in modern society and any attempt to thwart this natural consequence of integration could only be viewed as prejudicial and bigoted. Similarly, in \textit{McLaughlin v. Florida},\textsuperscript{91} the Court struck down a Florida statute which prohibited interracial cohabitation. Using strict scrutiny,\textsuperscript{92} the Court ruled that the state’s purported interest in preventing promiscuity was not advanced by the racial classification.\textsuperscript{93}

Affirmative action is the only major context other than child placement in which racial classifications have been upheld by courts. However, even a racial classification which serves to remedy the effects of past discrimination toward a particular group is regarded as highly suspect and must be subjected to strict constitutional scrutiny.\textsuperscript{94} Cases that deal with such benign classifications require that the remedial program be narrowly tailored to address the specific discrimination it intends to remedy. Moreover, an affirmative action program may not be designed to remedy general past societal discrimination.\textsuperscript{95}


\textsuperscript{88} \textit{Loving}, 388 U.S. at 12. The lower court in \textit{Loving} referred to an earlier Virginia decision, \textit{Naim v. Naim}, 87 S.E.2d 749 (Va. 1955), as setting forth the purpose of the legislature in enacting the miscegenation laws. The court in \textit{Naim} listed the state’s purposes: (i) preservation of “the racial integrity of its citizens”; (ii) prevention of “the corruption of blood”; (iii) “a mongrel breed of citizens”; and (iv) “the obliteration of racial pride.” \textit{Id.} at 756.

\textsuperscript{89} \textit{Loving}, 388 U.S. at 11.

\textsuperscript{90} \textit{Id.} Justices Stewart and Douglas noted in their concurrence in \textit{McLaughlin v. Florida} that they could not “conceive of a valid legislative purpose . . . which makes the color of a person’s skin the test of whether his conduct is a criminal offense.” 379 U.S. 184, 198 (1964) (Stewart, J. and Douglas, J., concurring).

\textsuperscript{91} \textit{McLaughlin}, 379 U.S. 184.

\textsuperscript{92} \textit{Id.} Justices Stewart and Douglas noted in their concurrence in \textit{McLaughlin v. Florida} that they could not “conceive of a valid legislative purpose . . . which makes the color of a person’s skin the test of whether his conduct is a criminal offense.” 379 U.S. 184, 198 (1964) (Stewart, J. and Douglas, J., concurring).

\textsuperscript{93} \textit{Id.}


\textsuperscript{95} \textit{Id.} at 498-99.
Some of the most highly publicized affirmative action plans arose as attempts to remedy discriminatory policies in employment and in education. To illustrate, in *Wygant v. Jackson Board of Education*, the Jackson, Michigan school system amended its lay off policy to afford protection to recently hired minority teachers at the expense of nonminority teachers with seniority. The school board's traditional lay off policy was based on seniority; thus, when it came time for lay offs, that policy would have basically eviscerated the more recent hiring of the minority teachers.

In a plurality opinion, the Supreme Court struck down the new lay off plan because it found that none of the interests proffered by the board—responding to societal discrimination, the need for African-American role models for African-American students, and prior discrimination by the board itself—were sufficiently compelling to justify the racial classification. Moreover, even if any of these interests were compelling, the Court felt that the lay off plan was not narrowly tailored to address these interests.

Similarly, in *Regents of University of California v. Bakke*, the Supreme Court faced an affirmative action plan which, in essence, sought to reserve sixteen seats in each entering medical school class for disadvantaged minority students. White applicants, in effect, could not compete for these sixteen places. In a fragmented opinion, the Court held that the quota system in force at the University


98. *Wygant*, 476 U.S. at 270. The amended lay off provision stated, in relevant part:

In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. . . . Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance.

Id. at 270-71.

99. Id. at 270 n.1.

100. Id. at 274-78.

101. Id. at 283.


103. The University's admission program included a separate admission system for minority students, which operated with a special admission committee comprised mostly of minority members. Applications would go before the special committee if applicants noted their membership in a minority group on their applications. Id.

104. Id. at 289.
violated the equal protection clause. Justice Powell supported the University's asserted interest in the plan—the need for an ethnically diverse student body. However, he felt that the quota system was not necessary, and therefore not permissible.

There are several reasons why race-matching and race-preferencing policies of child placement cannot reasonably be characterized as remedial programs instituted to benefit African Americans as a group. First, it is clear from the affirmative action cases that the remedy must be specific to the discrimination it intends to counter. The most immediate difficulty, then, lies in defining the requisite level of specificity. For example, it may be argued that race-matching policies exist to remedy prior cases of transracial placement. This is problematic because the effect of preferencing policies has been to keep transracial placement to a minimum.

It is easier, however, to find past discrimination if that discrimination is more broadly defined. Even when transracial placement does take place, it has been noted that discrimination still occurs because the transracial placement is typically of an African-American child into a white family and rarely, if ever, vice-versa. It is the African-American children who have been taken away from their culture. Moreover, and more generally, transracial placement can be viewed as one part of a long historical pattern of discrimination against African Americans. As one scholar has noted, "[a] vast array of social policies going back to the institution of slavery can be characterized as responsible for the fact that it is African-American families whose children are disproportionately available for adoption and white families who are disproportionately in a position to seek adoption." However, this level of generality has not been endorsed as sufficient justification for an affirmative action program.

In addition, transracial placement viewed on a practical level is not discriminatory in the sense that it is not necessarily hurtful, as was, for example, the original failure of the school board to hire minority teachers in Wygant. Preferencing policies generally preclude trans-

105. Id. at 319-20.
106. Id. at 311-12.
107. Id. at 320.
108. Bartholet, supra note 5, at 1231-32.
109. Id. at 1184. It has been reported that only 1.2% of all adoptions were between a white mother and an African-American child. Id. at 1184 n.53.
110. Id. at 1232.
111. Id.
racial placement unless no matching families are found. Therefore, at least as far as public agencies are concerned, a transracial placement is an absolute last resort, and the best alternative for a hard to place child. As will be seen, the number of waiting children so greatly outweighs the number of African-American families waiting to adopt that the alternatives to transracial placement can only be long term foster care or institutionalization. When a transracial placement occurs, then, it is deemed as a benefit to the child, in light of the alternative of long term foster care, and not a hurtful act with prejudicial undertones.

Furthermore, a goal of traditional affirmative action programs has generally been to promote integration, as it is generally believed that "the nature of the racial problem . . . lies in the segregation of an oppressed class. . . ." Yet, the very essence of race-matching policies involves validating and perpetuating racial separation. Such policies, then, appear to be "backward-looking" rather than progressive.

Thus, it is difficult to reconcile the widespread racial matching that occurs in the context of child placement with basic principles of constitutional law. An analysis of these matching policies under strict scrutiny further reveals their unconstitutionality.

III. Race Matching and Race As A Factor Should Not Withstand Strict Scrutiny

A. The Compelling Interest

Courts have assumed, either explicitly or implicitly, that the best interest of the child is the overriding compelling governmental objective in the equal protection sense. That is, a child's welfare is of such magnanimous importance that it may justify even a racial classification. On the other hand, courts have agreed that a state's interest in protecting a child from societal prejudice is not a compelling interest for equal protection purposes. Unfortunately, in the context of race and child placement, a child's best interests and protection of a child from societal prejudice become highly intertwined. In fact, it may be

113. See infra notes 139-56 and accompanying text.
114. Bartholet, supra note 5, at 1233.
115. Id. at 1233.
impossible to separate a child's welfare (a compelling interest) from the effects that society has on that child (a non-compelling interest). 117

When courts consider race as a factor in determining the best interest of a child, of primary concern is the effect that a transracial placement will have on the child's sense of identity. As it is generally accepted that identity and self esteem are developed in childhood, concerns over the effect of a transracial placement on a child are logical. 118 An interracially placed child, it is argued, will be confused, unable to relate to either African-American or white communities. Consequently, an African-American child living in a white family will be ill-equipped to deal with the reality of racism in society. 119 Related to identity issues and of equal concern is the child's racial integrity, which includes the child's awareness of her own heritage and preservation of her biological culture. It is said that a child with a secure sense of self when she enters the world will be better prepared to confront inevitable racial tension. 120 If a child lives with different race parents, she will be unsure of herself and where she belongs.

As powerful as the state's interest in insuring the child's personal welfare may be, it is not clear that this is the interest actually being furthered. Rather, courts and adoption agencies seem to be furthering the less legitimate, underlying interest of protecting children from societal prejudice in the future. One court, in describing the impact of race on a child's identity, cited several disadvantages to transracial placement. 121 Notably, all of these disadvantages were external, that is, they derived from societal biases and not from personal identity struggles. The court expressed concern that the adoptive grandparents and other new relatives would reject the child; that friends and neighbors would treat the child differently; and that the child would face greater pressure from peers in adolescence. 122

118. See generally, Comer & Poussaint, supra note 23.
120. See, e.g., R.M.G., 454 A.2d 776. The court in R.M.G. included the existence of "survival skills" in its definition of identity. Id. at 787. See also Davis v. Berks County Children & Youth Servs., 465 A.2d 614 (Pa. 1983).
121. See Davis, 465 A.2d at 623.
122. The court stated that
[a] child of one race living in an environment consisting totally or predominantly of another race may face an imposing array of problems. The nonimmediate relatives (grandparents, aunts, uncles, cousins) of the adopting or foster parents may reject the child. Friends and neighbors may harbor racial animosity or be awkward in their dealings with the child, which may be manifested in insults and physical abuse. The child may have few role models. A predominantly different race environment tends to take
It is difficult, then, to separate the compelling goal of preserving racial identity from the less compelling goal of guarding against societal prejudice. In fact, the concern for preserving racial identity almost certainly derives from a history of racism whose effects are deeply engrained into the community. It is this history of racism that makes the African-American fears of annihilation or loss of identity plausible. Concern about African-American identity, therefore, gives credence to the social prejudice. In fact, the conflation of the two propounded interests—one legitimate and one not—and the difficulty of defining them, raises serious questions as to whether either of the articulated interests can ever be served.

B. Consideration of Race in Child Placement Is Not Necessary

Assuming, arguendo, that the best interest of the child is the compelling governmental interest being served, in order to pass constitutional analysis, race-matching classifications must be necessary to further the government interest at stake. Several points suggest that race-matching is not absolutely necessary, and, indeed, may be harmful. First, many studies indicate that transracial placements have been successful and beneficial for all parties involved. Second, the number of international adoptions, which are almost always transracial, is skyrocketing. Finally, in light of the number of waiting minority children, the alternatives to transracial placement, and the scarcity of minority families waiting to adopt, it seems that considering race in placement decisions actually thwarts the legitimate governmental interest in child welfare.

1. Success of Transracial Placement

Expert opinion regarding the success of transracial placement suggests that most of the transracial adoptions which have occurred have been positive experiences for families,\textsuperscript{123} agencies and chil-

\textsuperscript{123} See \textsc{Rita J. Simon \& Howard Altstein, Transracial Adoption: A Follow-Up} 114 (1981). Parents of transracially adopted children have reported that “their adoption experiences had brought happiness, commitment, and fulfillment to their lives . . . . The majority of the parents still feel . . . that their decisions to adopt transracially were among the wisest and most satisfying they had ever made.” \textit{Id.}
dren. As one organization professed, "thousands of children once considered unadoptable are living and growing up in loving permanent families . . . ." Studies indicate that transracial adoptees have fared well in their mixed families. Although data varies, statistical evidence indicates that interracial adoptees are well-adjusted and have self-esteem comparable to other adoptees. Findings have also been positive with regard to the transracial adoptee's sense of belonging in her new family and community.

124. Expert testimony, however, may not be of great assistance in an adversarial setting. Where opposing sides introduce expert psychiatric testimony, it may be easier to understand why judges have difficulty resolving the issue of race and a child's mental welfare. For example, in Farmer v. Farmer, the court was faced with a custody dispute between an African-American father and a white mother over their biracial child. Farmer v. Farmer, 439 N.Y.S.2d 584 (N.Y. Sup. Ct. 1981). Five experts were introduced, specialists in the areas of psychology, social work, and psychiatry. Those appearing on behalf of the defendant professed that the child would be better off with an African-American parent, not only because society would view her as African American, but because "her ability to cope with identity problems will depend upon the support she gets from parents and from her own experience as she matures. In this respect . . . a black identification will serve her best." Id. at 587.

Experts for the plaintiff, on the other hand, testified that while race may be important, it is not controlling. Most important is the "child's perspective of itself received from the nurturing parent." Id. Other key factors include love and affection toward the child, stability of the home and of the parents themselves, and general parenting ability. Id. The child's best interest, it was explained, is defined by her need for the "concern and interest" of the parent, and the parent's "maturity." Id.

Given the seemingly conflicting viewpoints, it is not surprising that courts are hard-pressed to come to any sort of consistent, reasoned decision. However, it may be argued that while expert predictions and recommendations are helpful, they are not as persuasive as empirical data. Therefore, the empirical studies may be more useful, and indeed more accurate predictions of the success of transracial placement, and thus a better place for judges to turn.

125. Adoption Guidebook, supra note 10, at 8.

126. Simon and Altstein stated that although most of the families studied reported favorably, some families experienced special difficulties: "For every five families in which there are the usual pleasures and joys along with sibling rivalries, school-related problems, and difficulties in communication between parent and child, there is one family whose difficulties are more profound and are believed by the parents to be directly related to the transracial adoption." Simon & Altstein, supra note 123, at 113. The problem most often noted by parents was a tendency on the part of the adoptee to steal from family members. Id.

127. See Ruth G. McRoy & Louis A. Zurcher, Jr., Transracial and Inracial Adoptees: The Adolescent Years 118-19 (1983). McRoy and Zurcher found that the total self-esteem "score" of transracially and inracially adopted adolescents were nearly identical. Moreover, the mean "score" for the study's "norming sample"—white, non-adopted adolescents—was approximately the same as that of the transracially placed African-American children. Id. at 118-19. The researchers noted that although the transracial adoptees experienced special social difficulties, "they were able to develop coping skills and adjustment mechanisms that worked, which yielded normative self-concepts and self-esteem." Id. at 122. See also Bartholet, supra note 5, at 1211-16.

128. See generally Rita J. Simon & Howard Altstein, Transracial Adoptees and Their Families (1987). Simon and Altstein point out the strong commitment between the adoptees and their families based on fifteen years of observation of the families:

For the children, even during these sensitive, complicated years of adolescence, their adoptive parents are the only family they have and the only set of parents they want. Some of the family relationships have been rocky, accusative, and angry—and some remain so—yet they are a family and they are fully committed to one another.
In fact, empirical evidence supports the argument that transracial adoptees possess a strong sense of their biological identity. Moreover, transracial adoptees are said to emerge into adulthood with healthy attitudes toward relationships between races, and are more willing to live racially integrated lives. Transracial adoptees, having been socialized in two cultures, may be better equipped to function in a multi-racial, multi-ethnic society.

2. International Adoption

The increasing number of international adoptions provides additional compelling evidence that race need not play a part in a child placement decision. In 1992, there were approximately 6,531 international adoptions by U.S. citizens. Of this number, half were Asian children. In the 1970s and 1980s, most foreign children came to the United States from South Korea. Many foreign born adoptees also come from Latin America, India and the Philippines. Although the countries from which children are available vary depending on current world events, in recent years a large portion of foreign born chil-

Id. at 140.

129. Simon & Altstein, supra note 123, at 16. A study conducted in 1981 indicated that 45% of white parents thought that their biracial or African-American child identified himself as African American. Id. The same study indicated that 64% of the parents surveyed were reluctant to speculate on whether their child would seek out a same-race spouse. Id. at 17. The researchers noted that this type of response indicates that these parents are reluctant to come to grips with these issues. Id.


132. Bruce Porter, I Met My Daughter at the Wuhan Foundling Hospital, N.Y. TIMES, Apr. 11, 1993, § 6, at 24. There are approximately 10,000 Korean adoptees in Minnesota. The numbers have decreased to some degree, however, and the Korean government may end foreign adoption by 1995. The Koreans' emphasis on bloodlines and ancestry may account for the large number of United States' adoptions which have occurred. Peg Meier, Minnesota's 10,000 Korean Adoptees; History, Connections Led to State Having Second Most in Nation, STAR TRIB., Sept. 19, 1993, at 7E.

133. Infants, supra note 13.

134. For example, after World War II, United States' military personnel stationed abroad adopted thousands of children whose parents were killed or somehow missing as a result of the war. Richard Carlson, Transnational Adoption of Children, 23 TULSA L.J. 317, 325 (1988). Similarly, Americans stationed in Korea during the conflict there, driven by the tragic circumstance of war orphans, adopted them in huge numbers. Id. at 328. The tragic situation even prompted Congress to introduce emergency legislation, modifying the immigration quotas so as to accommodate the growing numbers of children being adopted by American citizens. Id. International
dren adopted by United States citizens have come from China.\textsuperscript{135} International adoption, then, is nearly always interracial.

The success of international adoption\textsuperscript{136} suggests that we do not accept the idea that racial identity is critical. It is taken for granted that the adoption will be transracial. Consideration of the race of prospective parents is secondary, and is neither an obstacle to, nor a consideration in, placement. Agencies do not typically search for same-race families. Race is merely regarded as an issue about which the adoptive parents must be educated. For example, Illinois agencies will typically provide, among their other services, an adoption “preparation” program for parenting a child of a different race or culture.\textsuperscript{137} Parents who adopt internationally are encouraged to exhibit the “certain sensitivity” necessary to raise a child of a different race.\textsuperscript{138}

adoption, then, is often justified on the grounds that the children are usually in crisis. They are children with no future in their birth country, and their alternative to intercountry adoption is often institutionalization. See International Concerns Comm. for Children, Report on Foreign Adoption (1993) [hereinafter Report on Foreign Adoption].

135. See Porter, supra note 132. Interestingly, the high premium placed by the Chinese on boys means that the majority of adoptable Chinese infants are girls. Id. In 1988, only 12 Chinese children were adopted by Americans. However, this number has increased dramatically. Between September 1991 and October 1992, approximately 20 Chinese infants were adopted by United States’ citizens per month, and between October 1992 and November 1992, the number increased to 57. Id.

China modified its adoption laws in late 1991 by erasing the requirement that one adoptive parent be Chinese or have significant Chinese connections. Id. Beijing has, however, temporarily halted foreign adoptions while the rules are reviewed and revised. Susan Caughman & Laurie Heineman, Chinese Adoptions, N.Y. Times, Apr. 18, 1993, § 6, at 8.

136. See e.g., Meier, supra note 132, at 7E. The increasing success of the Korean adoptees in Minnesota is attributed in part to the fact that “families and agencies were better prepared for cultural differences.” Id.

137. Adoption Guidebook, supra note 10, at 29.

138. Report on Foreign Adoption, supra note 134, at 19. The prospective parents of international adoptees are encouraged to consider the following questions:

1. What are your ideas about race? What characteristics do you think Asian, Indian, Latin American, etc., people have? Do you expect your child to have these characteristics? The children become Americanized; therefore try to visualize that cute little baby growing up into a child, a teenager, an adult, a parent. Think about grandchildren.

2. How do you feel about getting lots of public attention, stares, etc.? Possibly your adopted child will get too much attention and other children will tend to feel left out.

3. You will become an interracial family. Do you raise your child to have the same identity as you or your other children? How do you help him develop his own identity? Should his name reflect his national origin? What relationship will the name have to the sense of “Who am I”? Imagine a child you know and love being sent overseas to be adopted. How would you want him raised? As an American in a foreign country? A native in that country?

4. How can you learn to know what it’s like being nonwhite and growing up in a white society if you don’t know this from your own experience? You will have to find out how to reach or educate yourself to become sensitive to your child’s world.

5. Your family will now be interracial for generations. Adoption of a child of another race or country is not just a question of an appealing little baby. How do you feel about interracial marriage? How does your family feel about interracial marriage? How do you feel when people assume that you are married to an Asian person?
3. Consideration of Race as Harmful: The Waiting Children

A child without a family is a child deprived of the most fundamental human right. A child has a birthright to grow up in an atmosphere of love and family concern. A child has no birthright to protein-deficient diets, to forks or chopsticks, to a belly full of parasites, to a childhood free of caresses and parental encouragement. A child has no birthright to a particular shape of house nor to speaking a particular language. A child has a birthright to parental love. Can an orphanage ever meet the needs of any abandoned child? Should we not try to meet the needs of a greater majority of homeless children by increasing the number of intercountry adoptions? Nationality and citizenship mean nothing to a child who is subnormal, or dead, from the deprivation of institutionalization.139

Although this statement was made to encourage international adoptions, its message may apply within the national transracial adoption context as well. The sheer numbers of minority children waiting in foster or agency care may themselves compel invalidation of both racial matching policies and consideration of race as a factor in any placement proceeding. In the adoption context, “waiting children” include, by most agency figures, African-American children of all ages, among them healthy infants and toddlers.140 The National Adoption Center has a register of 1,500 children. Of those 1,500 children, 67%...
are biracial or African-American.\textsuperscript{141} In New York City alone, as of June 1993, 75\% of the waiting children were African-American.\textsuperscript{142} Healthy white infants and toddlers, on the other hand, are extremely hard to come by, especially through public agencies.\textsuperscript{143}

The number of minority children waiting for permanent families is so much greater than the number of white, healthy waiting children that many agencies, rather reluctantly, have categorized minority children as “special needs” children.\textsuperscript{144} According to several agencies and adoption groups, a special needs child can be variously dubbed “hard to place,”\textsuperscript{145} “waiting,”\textsuperscript{146} or “a child for whom we have fewer families.”\textsuperscript{147}

While the number of African-American children waiting for homes is growing, the number of African-American families seeking to adopt is not growing. The disparity between the numbers of white families seeking to adopt and the number of African-American families seeking to adopt strongly suggests that racial matching policies will inevitably lead to longer periods of foster care, and therefore run counter to the best interests of the child. Some hypothesize that better efforts to recruit minority families for minority children could reduce the need for transracial adoptions.\textsuperscript{148}

\textsuperscript{141} Jones, supra note 20, at 2. The American Public Welfare Association, however, reported that as of June 1993, only about 40\% of the nations waiting children were African American. Jones, supra note 39, at 1.

\textsuperscript{142} Jones, supra note 39, at 1.

\textsuperscript{143} See Ken Watson, The History and Future of Adoption, Keynote Address Before the 17th Annual NACAC Conference in Ottawa, Ontario (Aug. 8, 1992), in \textit{ADOPTALK SAMPLER} (North American Council on Adoptable Children), 1993, at 3. Mr. Watson further stated that getting a white child can depend heavily on the financial situation or societal power of the adoptive parents. \textit{Id.}

\textsuperscript{144} See \textit{ADOPTION WORKS . . . FOR EVERYONE: A BEGINNER’S GUIDE TO ADOPTION} 5 (“Although most adoption groups do not believe ethnicity alone should result in a child being considered to have a special need, federal and state regulations consider ethnicity within that category.”).

\textsuperscript{145} \textit{Id.} at 5.

\textsuperscript{146} \textit{Id.} at 12.

\textsuperscript{147} Tye & Hageman Interview, supra note 11.

\textsuperscript{148} See Kroll, supra note 13, at 7 (“[W]e will . . . continue to advocate for an examination of the dynamics that keep qualified families from serving as foster or adoptive parents to children of their race.”). Another criticism of the adoption system is that it is “culturally insensitive.” Jones, supra note 39, at 13.

Minority families often feel that adoption is something meant only for white, wealthy families. Though certain agency policies are not aimed to exclude minorities, they often have a disparate impact on minorities due to socio-economic hardships. Examples of such policies include the charging of fees, preferences for couples, inadequate explanation of federal subsidy programs, requirement of medical exams of the entire applying family, sufficiency of living space, and agency staff attitudes of insensitivity. Moreover, four out of eleven agencies surveyed by the Office of Human Development Services noted that they did not accept applications from AFDC recipients. \textit{MINORITY ADOPTIONS, supra} note 19, at 10.
However, significant efforts have been and are currently being made.149

Efforts to recruit minority families may include publicizing in minority newspapers, featuring individual children in the media, adoption fairs and special events, and sending staff members to recruit at minority organizations, especially churches.150 Agencies also will make efforts to see minority applicants more quickly than white applicants, and will make efforts to have more minorities on their staff. In fact, most public agencies have specifically trained their staff in “minority adoption methods” or “cultural sensitivity.”151

In addition, there are several federal programs designed to find homes for African-American children, presumably with African-American families.152 The Adoption Opportunities Program153 provides grants to states and non-profit groups for training programs and creating services to break down barriers to adoption and to help find permanent homes for waiting children.154 In addition, the Adoption

149. Despite such efforts, the number of African-American families actually recruited is discouragingly small. One agency stated that of the fifty families currently in the “approval stage” of the adoption process, two were African American. Tye & Hageman Interview, supra note 11.

150. MINORITY ADOPTIONS, supra note 19, at 3-4. Other special efforts include formal “interagency coordinating mechanisms,” including the Black Family Registry in Detroit. The Registry lists all African-American applicants on a central registry for use by all agencies. Id. at 13. Interagency committees such as KINSHIP share information about waiting children and families. Id.

151. Agencies are encouraged to educate their social workers to understand and be sensitive to the traditions and attitudes of African Americans. “Cultural sensitivity training” includes “interpersonal communication, including eye contact, voice level, stance, and body space. All facets of the culture under study should be explored, including its fashion, music, visual arts, drama, literature, food, and celebrations.” JONES, supra note 20, at 5.

Apparently, this type of training is necessary. The Office of Human Development Services studied minority recruitment efforts in five major metropolitan cities. Researchers met with agency administrators, foster care and adoption workers, minority applicants and adoptive families, representatives of community organizations, and officials of state agencies. Of all the minority applicants surveyed, 89% were satisfied with the last agency they went to, but 76% reported complaints about the other agencies they approached. These families reported feeling uncomfortable, and 18% of the families were so dissatisfied that they nearly gave up. MINORITY ADOPTIONS, supra note 19, at 4-5.

152. INTERAGENCY TASK FORCE ON ADOPTION, AMERICA’S WAITING CHILDREN: A REPORT TO THE PRESIDENT FROM THE INTERAGENCY TASK FORCE ON ADOPTION 26-30 (1988) [hereinafter TASK FORCE REPORT]. The Task Force on Adoption advised the President that greater efforts should be made to recruit black families. As far as transracial placement, the Task Force recommended a policy that although transracial placement should be permitted, it is preferable to place a child with a family of his own racial background. A “policy for transracial adoptions should stand alongside an active minority recruitment policy.” Id. at 30. Clearly, the Task Force believes that same race placement is better than interracial placement.


154. For example, grants were used to create the “One Church/One Child” programs, which are community efforts to find homes for black children. Other similar organizations are “Homes for Black Children” and “Friends for Black Children.” TASK FORCE REPORT, supra note 152, at 50.
Race-Conscious Child Placement Assistance Program\textsuperscript{155} provides federal reimbursement to agencies of 50\% of administrative costs, 75\% of training costs, and not less than 50\% of maintenance payments made for eligible children in foster care.\textsuperscript{156}

Despite these efforts, the number of minority children waiting to be adopted continues to grow. Precluding or discouraging transracial placement will only prolong their wait.

C. Race as a Factor is Not Narrowly Tailored to Advance a State Interest in Child Welfare

Even if one assumes that consideration of race may be an important tool in determining the best interest of a child, a racial classification is "necessary" to serve a compelling state interest only when it is narrowly or precisely tailored to achieve this purpose.\textsuperscript{157} The general rule that race may be considered as a factor in a placement proceeding is a tremendously vague instruction. Courts already have extremely broad discretion with respect to determining the best interest of the child.\textsuperscript{158} Inserting another unstructured rule into these already discretionary deliberations only exacerbates the difficulties faced by judges in making a best interests determination and lends itself to abuse of discretion.\textsuperscript{159}

\textsuperscript{156} Task Force Report, supra note 152, at 26.
\textsuperscript{159} Judges have questioned their own ability to decide what is in a child's best interest. One judge explained that setting standards for adoption proceedings "involves policy choices which go to the heart of the welfare of the child, probably for the rest of the child's life.... Are we, as Federal Judges, endowed with sufficient prescience to decide such delicate issues?" Drummond v. Fulton County Dep't of Family & Children Servs., 563 F.2d 1200, 1212 (5th Cir. 1977) (Brown, J., concurring); cert. denied, 437 U.S. 910 (1978). See also Perry, supra note 119, at 57. Professor Perry argues for a more structured consideration of race because the highly discretionary best interest rule facilitates decisions based on "personal biases, unsupported assumptions, and incomplete analyses." Id.

By the same token, it is difficult for a judge to determine whether an agency abused its discretion in its consideration of race. For example, the dissent in Drummond described the difficulty of knowing whether race had indeed been the deciding factor without a detailed and in-depth hearing:

The complaint alleged that the action of the defendants in removing Timmy from custody of the Drummonds was motivated solely on racial grounds, that it was done pursuant to a policy that black or part black children could not be placed for adoption with a white couple. One of the great defects in the proceeding here is the fact it is utterly impossible to determine whether or not this allegation is true.... [T]here is no indication that any word about other reasons than [sic] Timmy's race went into any decision-making or was the basis for the final decision.

Drummond, 563 F.2d at 1219 (Tuttle, J. and Goldberg, J., dissenting).
As previously discussed, the factor of race in determining the best interest of the child is ill-defined. In some cases it has meant nothing more than a consideration of what the opposing parties look like. At other times, "race as a factor" has included the prospective parents' attitudes about race, and their potential ability to provide the child with the racial "education" thought to be necessary during the child's formative years.

Narrowing the definition and scope of the race factor in order to narrowly tailor race-matching is theoretically appealing, but practically ineffective. First, as already suggested, it is unclear what race and culture mean to an infant, particularly one whose parentage might include different ethnicities.

Second, considering race as a factor allows courts to latch onto a very tangible factor (race) in an otherwise very intangible and discretionary best interest of the child analysis. Race is simply too powerful an influence to be relegated to the status of a mere factor among many. A judge can physically see the race of the prospective parents and adoptees. A judge cannot physically see the emotional commitment a family might feel for a child, nor can she predict with one hundred percent accuracy the "fitness" of particular parents. Whether particular parents will indeed preserve the heritage of an African-American child is impossible for a judge to predict. The temptation to assume that an African-American family would be in a better position to do so is highly apparent. Race is a concrete, unchanging factor.

It would be relatively easy, therefore, for a judge, consciously or not, to rely on the race of prospective parents in making the difficult determination.

160. See, e.g., Fountaine v. Fountaine, 133 N.E.2d 532, 532-33 (Ill Ct. App. 1956). See also Ward v. Ward, 216 P.2d 755, 756 (Wash. 1950) ("These unfortunate girls, through no fault of their own, are the victims of a mixed marriage and a broken home. They will have a much better opportunity to take their rightful place in society if they are brought up among their own people.").


162. Drummond serves to illustrate the influence of race on a placement decision. In Drummond, the foster parents' liberty interest in "reputation" was deemed not to have been damaged by removal of the child, for "the sole finding about the Drummonds is that in the judgment of the agency, they are not the best available parents for Timmy, at least in part for a reason beyond their control, i.e., their race. Their treatment of Timmy as foster parents was spoken of in glowing terms." Drummond, 563 F.2d at 1207.

163. Because a prospective parent's wealth might fall into consideration where the inquiry addresses the parent's ability to give the child a proper home, health care, or nutrition, it might be argued that wealth, too, is a tangible factor that risks abuse by a judge. However, not only is "wealth" a changing, somewhat unpredictable factor, but some degree of economic stability is important in light of the risks of malnutrition and disease. The same risks are not at issue in the consideration of race.
Third, courts already clearly believe that an African-American child will fare better with African-American parents and, to the extent this belief is appropriate, it can be incorporated when the court looks to whether the emotional and psychological needs of the child will be met. Courts should not be permitted to use race as a means of escaping the difficult task of evaluating what will be best, in each individual instance, for a child's growth and personal prosperity.

Because race will necessarily outweigh all other factors in a best interest of the child analysis, its presence in the placement process amounts to a preservation, whether intentional or not, of racial prejudice. To perpetuate distinctions between people by allowing race to come into play in child placement is counterintuitive in that it only serves to accentuate these differences.

IV. Colorblind Placement

The inherent difficulties in applying a racial classification compel a conclusion that race should never be considered by an administrative body in any placement proceeding, including the initial adoptive placement setting. The prospective parents should be the only parties allowed to consider race in their adoption choices. An adoptive family should be permitted to adopt whatever race child it wants, and administrative agencies should not interfere. If parents of any race meet the necessary agency qualifications, then they should be allowed to adopt the child of their choice. If they select a child of a different race, they should be presumed able and willing to adequately address all of her needs.

This is not to say that an agency or judge cannot attempt to prepare or educate parents before they adopt a different race child, as is

164. Davis v. Berks County Children & Youth Servs., 465 A.2d 614, 628 (Pa. 1983). The Davis court professed a hope that the importance of race in child placement would decrease proportionately with the decrease of societal prejudice. Id. However, it could be argued that such a hope is ironic in light of the court's decision to uphold the constitutionality of considering race as a factor, as this decision may only perpetuate the very racial classifications and biases it seeks to avoid.

Interestingly, the trial court in Davis found race to be an "extrajudicial consideration" and therefore refused to consider it as a factor in the proceeding. Id. at 622. The appellate court held that, indeed, race should have been considered, but that the trial court's failure to do so was harmless, as all other factors compelled a finding against the white prospective parents. Id.

165. One father of a transracially adopted child, when asked whether he expected his daughter to seek out a same-race spouse in the future, noted, "Our children have been raised in a home atmosphere where race has no bearing on relationships. I suspect she [a black nine-year-old daughter] will feel free to seek out someone on the basis of personality, not race. . . ." Simon & Altstein, supra note 123, at 17.
often done in the international sphere.\textsuperscript{166} Such preparation, if deemed necessary, would not implicate any racial stigma or slur. It would simply impress upon the parents the gravity of their decision to undertake a difficult but rewarding challenge.

It is probably most often the case that a white family who wants to adopt an African-American child has liberal attitudes toward relationships between races, and is open to ideals of integration and social change.\textsuperscript{167} As has been suggested elsewhere, "[i]ndividuals who are in the vanguard of this social movement [toward acceptance of racial integration] . . . should be encouraged, not deterred."\textsuperscript{168} The interest of these families is most likely to love, raise, and educate a child in a happy, healthy environment.\textsuperscript{169} To deny such families this right, and to deny waiting children the right to these families merely on account of race, is highly suspect from a constitutional perspective and unwise from a perspective of social policy and child welfare.

The best interests of children are served by placing children with stable, healthy families. One would expect that a healthy family environment, regardless of race, will adequately prepare a child for life in society as we know it. Indeed, it is believed that parental nurturing plays a major role in preparing for and combatting the effects of a difficult society.\textsuperscript{170} As one judge has aptly explained, "[I]n a multiracial society such as ours, racial prejudice and tension are inevitable. If

\textsuperscript{166} See supra notes 131-38 and accompanying text.

\textsuperscript{167} See, e.g., Simon & Altstein, supra note 123, at 10. Experts have noted that many white parents will adopt an African-American child because "of their own involvement in the civil rights movement and as a reflection of their general sociopolitical views." \textit{Id.} The notion of people adopting different-race children as veritable trophies of their liberalism, however, is of notable concern to some critics. With regard to children of foreign birth, one adoption worker proclaimed, "You are adopting a child, not a tropical house-plant to put in the living room." \textit{Report on Foreign Adoption, supra note 134, at 19.}


\textsuperscript{169} Although it is probably not the conscious purpose of adoptive parents, one consequence of transracial adoption may be to open up "another window through which to view the world. Simply put, [the transracial adoptees] help make the parents' lives more varied, more interesting, and more challenging." Simon & Altstein, supra note 123, at 114.

\textsuperscript{170} See generally Comer & Poussaint, supra note 23. Interestingly, Comer & Poussaint noted that although differences in culture will affect styles of child rearing, fundamental child rearing practices are the same for all races:

[African-American] basic child-rearing practices should be the same as those of others . . . . Good child-rearing principles are fundamentally the same for all, because the basic needs of children are universal. Youngsters need food, clothing, shelter, and protection from physical and psychological damage . . . . Modern life forces groups of every kind to have the flexibility necessary to accept changes. As long as such changes protect and provide for the best interest of our children, there is little reason for concern. Black parents must realize that culture changes are normal and do not mean culture loss. \textit{Id.} at 22-23.
children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such."\textsuperscript{171} The American family, interracial or not, is an ideal arena in which to concentrate our preliminary efforts to combat prejudice.\textsuperscript{172} Indeed, the inattention of race-matching policies to parental nurturing provides a compelling interest against their implementation.

The reality is that there are a disproportionate number of minority children without homes. A history of discrimination and a variety of socio-economic phenomena are responsible for this. Thus, these children are the responsibility of all Americans. Removing race from a “best interest of the child” determination will speed up the adoption process for children whose placement has been needlessly delayed, and will fight against the tendency to always think in racial terms. It is impossible to achieve integration and combat racism when public policies such as race-matching perpetuate separatism and the ancient premium placed on racial purity.

CONCLUSION

Though racially homogenous families may be optimal environments for children, advocating even a preference for race-matching is both legally flawed and socially impractical. Racial classifications have not been historically tolerated, yet, courts have upheld policies that include race as a factor to be considered in child placement proceedings.

While the governmental interest in insuring the welfare of children is certainly compelling, consideration of race is neither necessary nor narrowly tailored to advance this interest. Transracial placements have proven to be successful. Moreover, the number of international adoptions, which are nearly always interracial, is increasing. Furthermore, the unstructured rule that race may play a role in a placement decision lends itself to abuse of discretion. From a constitutional perspective, then, race-conscious child placement is impermissible.

In addition, from a practical standpoint, race-matching will often be at odds with the best interest of the child. Because there are too few African-American families seeking to adopt, the immediate effect


\textsuperscript{172} As one scholar noted, "using race as a factor . . . is arguably stigmatizing in that it represents the cumulative judgment that, in the most intimate association of all, family life, it is best that the races should remain separate." Perry, \textit{supra} note 119, at 78.
of race-matching will be to deprive waiting children of permanent homes.

In light of the legal and practical problems raised by race-matching, even a mere preference for same-race placement should not be advocated by states, adoption agencies, or the federal government. Any explicit or implicit policy preferencing separation of the races does nothing more than stamp approval on primitive notions of racial purity and perpetuate racial prejudice.