

Articles

The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action

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Many people contributed, in varied ways, to this Article. I owe special thanks to three people. Duncan Kennedy, Randall Kennedy, and Joseph Singer. As many readers will recognize, my work draws on much in each of theirs, certainly to a greater extent than footnotes could attest. Many people read one of the many drafts of this Article. Others offered their thoughts on race and adoption at a time when my own thinking was at a level of sensibility and intuition rather than analysis and thesis. Brian Bix, Greg Chin, Peggy Cooper Davis, Richard Fallon, Philip Frickey, Joan Hollinger, Ruth-Arlene Howe, Mina Kim, Jim Liebman, Frank Michelman, Martha Minow, Rachel Moran, Twila Perry, Kerry Rittich, Dorothy Roberts, David Rosettenstein, Gerry Spann, and Laurence Tribe improved this Article substantially.

Thanks go to Harvard Law School and Vice Dean David Smith for providing the opportunity and resources to research and write this Article during my year as the Reginald F. Lewis Fellow. Jean Thomas provided the first forum for the ideas on which this Article is based. Thanks also go to Professor Elizabeth Bartholet. Her unconventional stand on transracial adoption and our discussions prompted me to take a position even more removed from the mainstream, and her criticisms of my argument prodded me to refine it and saved me from many inaccuracies. The adoption researchers and professionals listed *infra* in note 83 also gave generously of their time and expertise in helping me to understand an important and complicated issue.

Although we did not discuss race and adoption, Charles Lawrence was more helpful than he probably realizes, providing consultation and encouragement at a time when it was sorely needed. Molly Hammerberg provided diligent and committed research assistance without which I would have been less able to begin, much less complete, this Article.

Helping in ways that are difficult to summarize, but not to appreciate, and which are apparent throughout this Article and my life, has been my wife, Jennifer Eberhardt.

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Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination.¹

The role of race in adoption has been an intensely and widely debated topic during the past decade, attracting the attention of legal scholars,² social scientists,³ journalists,⁴ and

1. Martha Minow, *The Supreme Court, 1986 Term—Foreward: Justice Engendered*, 101 HARV L. REV. 10, 68 (1987).

2. See, e.g., Katharine Cannady, *The Use of Race as a Variable in Adoptive Placement Proceedings*, 1 SAN DIEGO JUST. J. 503 (1993); Chip Chiles, *A Hand To Rock the Cradle: Transracial Adoption, the Multiethnic Placement Act, and a Proposal for the Arkansas General Assembly*, 49 ARK. L. REV. 501 (1996); Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39 (1993); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503 (1984); Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131 (1995); Mark C. Rahdert, *Transracial Adoption—A Constitutional Perspective*, 68 TEMP. L. REV. 1687 (1995); David S. Rosettenstein, *Transracial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot"*, 68 ST. JOHN'S L. REV. 137 (1994); Jacinda T. Townsend, *Reclaiming Self-Determination. A Call for Intra-racial Adoption*, 2 DUKE J. GENDER L. & POL'Y 173 (1995); Barbara Bennett Woodhouse, "Are You My Mother?": *Reconceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107 (1995); Juliet A. Cox, Comment, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed To Maintain Societal Homogeneity?*, 59 MO. L. REV. 775 (1994); Jo Beth Eubanks, Comment, *Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind?*, 24 ST. MARY'S L.J. 1225 (1993); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994); Timothy P. Glynn, Note, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925 (1993); Davidson M. Pattiz, Note, *Racial Preference in Adoption: An Equal Protection Challenge*, 82 GEO. L.J. 2571 (1994); Myriam Zreczny, Note, *Race-Conscious Child Placement: Deviating from a Policy Against Racial Classifications*, 69 CHI.-KENT L. REV. 1121 (1994); D. Michael Reilly, *Constitutional Law: Race as a Factor in Interracial Adoptions*, *District of Columbia Survey*, 32 CATH. U. L. REV. 1022 (1983).

3. See, e.g., WILLIAM FEEGELMAN & ANN SILBERMAN, *CHOSEN CHILDREN: NEW PATTERN OF ADOPTIVE RELATIONSHIPS* (1983); L. GROW & D. SHAPIRO, *BLACK CHILDREN, WHITE PARENTS: A STUDY OF TRANSRACIAL ADOPTION* (1974); R. MCROY & L. ZURCHER, *TRANSRACIAL ADOPTION AND INRACIAL ADOPTÉES: THE ADOLESCENT YEARS* (1983); JOAN F. SHIREMAN, *GROWING UP ADOPTED: AN EXAMINATION OF MAJOR ISSUES* (1988); RITA J. SIMON ET AL., *THE CASE FOR TRANSRACIAL ADOPTION* (1994); RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTÉES AND THEIR FAMILIES* (1987) [hereinafter SIMON & ALTSTEIN, *TRANSRACIAL ADOPTÉES AND THEIR FAMILIES*]; RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* (1977) [hereinafter SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*]; RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION: A FOLLOW UP* (1981); Jacqueline Macaulay & Stewart Macaulay, *Adoption of Black Children: A Case Study of Expert Discretion*, in 1 RESEARCH IN LAW AND SOCIOLOGY 265 (Rita J. Simon ed., 1978); Elsie G.J. Moore, *Ethnic Social Milieu and Black Children's Intelligence Test Achievement*, 56 J. NEGRO EDUC. 44 (1987); Elsie G.J. Moore, *Family Socialization and the IQ Test Performance of Traditionally and Transracially Adopted Black Children*, 22 DEV. PSYCHOL. 317 (1986); Sandra Scarr & Richard A. Weinberg, *IQ Test Performance of Black Children Adopted by White Families*, 31 AM. PSYCHOLOGIST 726 (1976); Joan F. Shireman & Penny R. Johnson, *A Longitudinal Study of Black Adoptions: Single Parent, Transracial and Traditional*, 31 SOC. WORK 172 (1986).

4. See, e.g., Mindy Fetterman & Desda Moss, *Adoption Debate Again Focuses on Issue of Race*, USA TODAY, May 10, 1996, at 4A; Steven A. Holmes, *Bitter Racial Dispute Rages over Adoption*, N.Y. TIMES, Apr. 13, 1995, at A16; *Kids Need Good Adoptive Families of Whatever Color*, ATLANTA J. & CONST., May 7, 1996, at 20; Norman A. Lockman, *Cruel Bars to Trans-Racial Adoption Keep Black Kids Waiting*, MILWAUKEE J. SENTINEL, May 26, 1996, at 3; *Make Adoption Color-Blind*, BOSTON HERALD, May 10, 1996, at 24; Sue Anne Pressley, *Facing the Color Barrier Families*, L.A. TIMES, Jan. 12, 1997, at E1; Roni Rabin, *Can Black Children Raised by White Parents Develop a Positive Sense of Self and a Strong Racial*

politicians.⁵ The allure of the race-and-adoption controversy is quite understandable. Adoption policy, which implicates our most deeply held beliefs and values about family, community, and identity, impacts the lives of tens of thousands of children in need of adoption and untold numbers of adults who might seek to adopt.⁶ Race remains perhaps the central dilemma of American society, constantly debated but never resolved.

The intense and protracted race-and-adoption controversy has centered on the practice of race matching.⁷ Race-matching policies require that children be matched to adoptive parents on the basis of race;⁸ black children are placed

Identity?, NEWSDAY, July 13, 1995, at B4; Michael Rezendes, *Debate Intensifies on Adoptions Across Racial Lines*, BOSTON GLOBE, Mar. 13, 1994, at 1; Trish Williams, *Interracial Adoption: Still Difficult*, ST. LOUIS POST-DISPATCH, Jan. 17, 1996, at 4E.

5. See, e.g., Senator Howard M. Metzenbaum, *S. 1224—In Support of the Multiethnic Placement Act of 1993*, 2 DUKE J. GENDER L. & POL'Y 165 (1995). There have also been a variety of reports on race and adoption produced by legislative committees and task forces. See, e.g., TASK FORCE ON TRANSRACIAL ADOPTION, OFFICE OF POL'Y & MANAGEMENT, *A STUDY OF TRANSRACIAL ADOPTION IN THE STATE OF CONNECTICUT* (1988).

6. Precise figures on adoption are difficult to come by because records are maintained individually by states. According to one estimate, over 130,000 adoptions are granted each year, slightly less than half of which are between unrelated persons. See UNIF. ADOPTION ACT prefatory note, 9 U.L.A. 2 (1994). Because slightly more than half of all adoptions occur between related parties, even a conservative estimate of 100,000 adoptions per year would put the number of adoptions between unrelated parties at almost 50,000. See Kathy S. Stolley, *Statistics on Adoption in the United States*, 3 FUTURE OF CHILDREN 26, 30 (1993).

7. Nearly all overviews of adoption law consider race matching, both in terms of its desirability as social policy and its legal permissibility. These discussions of race matching oversimplify a very complicated issue by focusing on two considerations: racial attitudes and racial group membership. Supporters of race matching often argue that the racial attitudes of adoptive parents should be taken into account. See, e.g., Fenton, *supra* note 2, at 61; Howe, *supra* note 2, at 160, 164. Considering racial attitudes, however, is not the same as matching parents and children based on racial group membership. The racial attitudes stance, for example, logically suggests that the racial attitudes of all adoptive parents should be considered, no matter from what race they hope to adopt. In contrast, consideration of racial group membership would involve no particularized inquiry into a prospective adoptive parent's racial beliefs and attitudes, an approach that might be thought of as creating an irrebuttable presumption that racial commonality furthers a child's best interests. I owe this insight to Rachel Moran.

Popular and scholarly discussions of race matching, as well as judicial opinions, frequently conflate the issues of racial attitudes and racial group membership. In one case, for example, a court upheld the removal of a black child from the home of his white foster parents and the denial of the foster parents' adoption application on the basis of race, noting the importance of "considering the racial attitudes of potential parents." *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977). There was no evidence, however, that racial attitudes, as opposed to racial group membership, had anything to do with the agency's decision to remove the child.

8. Race-matching policies are a residue of earlier policies that matched children with parents based on a variety of characteristics, including hair color, eye color, intelligence, social class, and ethnic background. See LESLIE HARRIS ET AL., *FAMILY LAW* 1185 (1996) (noting that "the dominant approach to adoption has until fairly recently been the 'complete substitution' theory, in which adoptions are made to mimic biological parent-child relationships as much as possible"). For a discussion of this historical practice, see Fenton, *supra* note 2, at 42 n.19; and Macaulay & Macaulay, *supra* note 3, at 280. See also Jay M. Zitter, Annotation, *Race as a Factor in Adoption Proceedings*, 34 A.L.R.4th 167, 169-70 (1984) (observing that "[a]doption agencies have traditionally sought to implement a policy of ethnic and racial matching between the child and the prospective adoptive parents, frequently maintaining that the best-interests of the child were ordinarily served by correlating the physical appearance of the child to that of the parents"). Courts have also discussed the earlier policies of matching based on a variety of physical characteristics:

[A]doption agencies quite frequently try to place a child where he can most easily become a normal family member. The duplication of his natural biological environment is a part of that program. Such factors as age, hair color, eye color and facial features of parents and child are

only with black parents and white children only with white parents. Voices in the race-and-adoption debate range from those who strongly support race matching⁹ to those who strongly support transracial adoption.¹⁰ Race-matching proponents argue that it is in a black child's best interest to be placed with a black family¹¹ and that placing black children without regard to race therefore subverts the best-interests-of-the-child standard, the guiding principle of child welfare policy.¹² Proponents of transracial adoption, in contrast, argue that adoption agencies should accord less importance to race and should be willing to match children and parents across racial lines.¹³ They claim that race-matching efforts harm black children by denying or delaying their adoptive placement.¹⁴ They also note that race matching represents race-based

considered in reaching a decision. This flows from the belief that a child and adoptive parents can best adjust to a normal family relationship if the child is placed with adoptive parents who could have actually parented him.

Drummond, 563 F.2d at 1205-06.

9. In 1972, the National Association of Black Social Workers (NABSW) issued a position paper in which the organization took the following stance:

"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. . . . Black children in white homes are cut off from the healthy development of themselves as Black people. . . . [Proper socialization] is impossible if the child is placed with white parents in a white environment."

SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*, *supra* note 3, at 50 (quoting The National Association of Black Social Workers Conference, Nashville, Tenn., Apr. 9-12, 1972, Position Paper [hereinafter NABSW Position Paper]). The NABSW's categorical stance against transracial adoption is rare. Most commentators do not take the position that transracial adoption should never occur. The debate, instead, is about how much weight the parents' race and racial attitudes should be accorded in the placement decision for a black child. *See, e.g.*, Howe, *supra* note 2, at 133-34, 136-37, 159-61; Townsend, *supra* note 2, at 177-82.

10. The best-known advocate of transracial adoption is Harvard Law School Professor Elizabeth Bartholet. *See* ELIZABETH BARTHOLET, *FAMILY BONDS* (1993); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991). For arguments by other strong supporters of transracial adoption, see Michelle M. Mini, Note, *Breaking Down the Barriers to Transracial Adoptions: Can the Multiethnic Placement Act Meet This Challenge?*, 22 HOFSTRA L. REV. 897 (1994), which argues that race matching constitutes discrimination against black children; and Pattiz, *supra* note 2, which argues that de facto bans on transracial adoption are unconstitutional.

11. In support of their position, proponents of race matching offer three basic arguments, which relate to identity, culture, and coping skills. The identity claim asserts that black children need black parents in order to develop a proper racial identity. *See, e.g.*, Fenton, *supra* note 2, at 61; Howe, *supra* note 2, at 160; Townsend, *supra* note 2, at 179-80. The culture claim embodies the notion that not placing black children with black parents severs the children's ties to black culture. *See, e.g.*, Fenton, *supra* note 2, at 61; Howe *supra* note 2, at 160; Townsend, *supra* note 2, at 181-82. The coping skills claim suggests that white parents generally will be unable to teach a black child the skills necessary to survive and thrive while black parents can draw upon their own reservoir of coping skills, accumulated through their experience as black people in American society. *See, e.g.*, Fenton, *supra* note 2, at 60-61; Howe, *supra* note 2, at 133-34; Townsend, *supra* note 2, at 177-78.

12. *See infra* note 149 and accompanying text.

13. *See, e.g.*, Chiles, *supra* note 2, at 502 (arguing that Arkansas should prohibit the consideration of race in adoption); Rosettenstein, *supra* note 2, at 195-97 (arguing against race-based preference structures); Pattiz, *supra* note 2, at 2605-09 (proposing a race-neutral adoption statute).

14. *See, e.g.*, Bartholet, *supra* note 10, at 1248 (concluding that "racial matching policies should be abandoned . . . because they do serious injury to black children in the interest of promoting an inappropriate separatist agenda"); Mini, *supra* note 10, at 899-900; Pattiz, *supra* note 2, at 2572-73

state action, which is presumptively unconstitutional.¹⁵

Both proponents of race matching and proponents of transracial adoption contend that their chosen policy is best for the children involved. Yet the best-interests-of-the-child standard is of remarkably little use in defining the role of race in adoption. The meaning of the standard with respect to race is itself a matter of race politics insofar as different determinations regarding the significance of race in adoptive placement reflect divergent ideological visions of the "proper" role of racial identity in socialization. As long as ideological differences remain significant, so will varied interpretations of the best-interests-of-the-child standard.

Both supporters and opponents of race matching often assume that putting an end to the practice would make adoption policy colorblind.¹⁶ The race-and-adoption debate, then, is framed as a contest between those who believe that race-conscious state action (race matching) furthers the interests of black children, and those who believe that colorblind state action (transracial adoption) does so. Contrary to the assumptions that underlie the debate, however, race matching is not the only form of race-based state action that structures the adoption process.

Adoption agencies' classification of children on the basis of race¹⁷ facilitates and promotes the exercise of racial preferences by prospective adoptive parents.¹⁸ I term this practice "facilitative accommodation."¹⁹ When

15. See *infra* notes 59-70 and accompanying text; *infra* notes 111-112 and accompanying text.

16. See, e.g., HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 660 (2d ed. 1987) (stating that applying the holding of *Palmore v. Sidoti*, 466 U.S. 429 (1984)—that race-based social preferences may not be taken into account in child custody proceedings—to adoption "would achieve a useful result in eliminating racial considerations entirely"); Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 167 (1994) (advocating an end to race matching in order to attain a colorblind adoption process); Chiles, *supra* note 2, at 522-23 (assuming that a prohibition on race matching would make adoption colorblind). *But see* Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 103 (1993-1994) (observing that, without race matching, adoption would not become colorblind because white parents would still maintain nearly exclusive access to white children and would be able to decline to adopt black children). Professor Perry's analysis is insightful. She is one of the few critics to note that the end of race matching would not make adoption colorblind. Yet she does not seriously entertain the possibility that adoption *should* be colorblind. See *id.* at 102-04.

17. As Bartholet writes: "An initial order of business of most adoption agencies is the separation of children and prospective parents into racial classifications and subclassifications. Children in need of homes are divided into black and white pools. The children in the black pool are then classified by skin tone. . . ." Bartholet, *supra* note 10, at 1186. Bartholet describes these practices only in terms of race matching; she does not identify them as integral to accommodating parents' racial preferences.

18. See PATRICIA J. WILLIAMS, *THE ROOSTER'S EGG* 219-22 (1995) (noting that adoption agency forms asked her whether she had a racial preference). The adoption application used by nearly all agencies in New York State asks prospective adoptive parents to state a racial preference. See *New York State Department of Social Services Adoption Brochure* (visited Apr. 17, 1997) <<http://www.state.ny.us/dss/adopt/brochure.htm#The Adoption Process>>.

19. Currently, adoption agency personnel ask prospective adoptive parents what race they would prefer. Indeed, in most states, adoption agencies, consistent with the applicable state law and regulations, create lists of children by race. If a prospective parent states a desire for a white child, then the only children that agency personnel will suggest for adoption will be children from the "white" list. The prospective parent might be given the list of white children to peruse as well. Having made clear his or her desire for a white child, this parent would never see the "black" list, nor would agency personnel suggest

engaged in by public agencies, facilitative accommodation, like race matching, is an instance of race-based state action. In both cases, adoption agencies racially classify children. Through race matching, the state mandates the placement of children with parents on the basis of race. Through facilitative accommodation, the state's racial classification promotes the race-based decisionmaking of prospective adoptive parents by framing the choice of a child in terms of race, encouraging parents to consider children based on the ascribed characteristic of race rather than individually. In both cases, a court, in finalizing the adoption, validates the actions of the adoption agency.

As a result of facilitative accommodation policies, most black children in need of adoption are categorically denied, on the basis of race, the opportunity to be considered individually for adoption by the majority of prospective adoptive parents.²⁰ This could not occur were it not for current policies of facilitative accommodation.²¹ The racial classification on which facilitative accommodation practices rely is the type of harm prohibited by the Equal Protection Clause.²²

Worse, facilitative accommodation reinforces and legitimizes the type of race-consciousness that produces unjustified racial inequality, both in adoption and throughout American society. Adoptive parents' racial preferences dramatically diminish the pool of potential parents available to black children relative to that available to white children. The pool of parents available to black children is also of lower average quality than that available to white children, in part because many of those whites who adopt black children do so because they are considered by agencies to be among the least desirable

that the parent consider adopting any child from the "black" list.

Facilitative accommodation policies may also be tacit, by which I mean that the agencies allow parents to choose based on race without forthrightly asking about the prospective adoptive parents' racial preferences or compiling race-based lists of available children to aid adoptive parents in exercising their preferences. Agency personnel might be aware of the centrality of race to an adoptive parent's decisionmaking and do nothing to discourage or guard against race-based decisionmaking. Agency procedures might still (inadvertently) facilitate an adoptive parent's expression of racial preference. For example, agencies might show the potential adoptive parent a picture of each child available for adoption.

20. The overwhelming majority of adults seeking to adopt are white and few of these adults would consider adopting a black child. According to one commentator, only 68,000 of the approximately two million white couples who said they would like to adopt in 1984 were even willing to consider adopting a child of another race. See SIMON & ALTSTEIN, *TRANSRACIAL ADOPTEES AND THEIR FAMILIES*, *supra* note 3, at 6 (referring to a 1984 estimate by the President of the National Committee for Adoption). Moreover, whites who adopt transracially are five times as likely to adopt nonblack children than they are to adopt black children. See Stolley, *supra* note 6, at 34. A study conducted in California found that adoptive parents were less willing to adopt a black child than to adopt a drug-exposed child. See D. Brooks & R.P. Barth, *Preferred Characteristics of Children in Need of Adoption Services: A Comparison of Public/Private Agency and Independent Adopters and Workers' Responses to Expressed Preferences for African American Children* tbl.2 (1995) (unpublished manuscript, on file with author).

21. For children from the preferred group, race is one factor that may result in their placement, while for children from the unpreferred group, race is often the determinative factor in their exclusion.

22. Cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225-35 (1995) (holding that all racial classifications imposed by state actors must be analyzed with strict scrutiny); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1989) (plurality opinion) (same). For an analysis of facilitative accommodation's constitutionality, see *infra* Part II.

parents for white children. The severity of the social inequality produced by adoptive parents' preferences is made starkly clear by a fact too often accepted as inevitable, albeit lamentable, rather than as a predictable outcome of our own preference-promoting policies: Black children are simply worth less than white children.

Yet not one legal analyst has argued that public adoption agencies²³ cannot (as matter of law) or should not (as a matter of policy) promote adoptive parents' racial preferences through facilitative accommodation.²⁴ This is especially noteworthy in the case of proponents of transracial adoption,²⁵ many of whose criticisms of race matching are applicable to facilitative accommodation as well. Moreover, consideration of facilitative accommodation follows logically from consideration of race matching (that is, once one determines that the state should not place children on the basis of race, one must consider whether it should encourage parents to choose children based on race). Yet a federal statute that prohibits race matching by adoption agencies that receive federal funding says nothing about accommodation.²⁶ Thus, current adoption policy allows both facilitative accommodation and the exercise of the racial preferences that it presupposes. The asymmetry in the scholarly and public policy analysis of these two instances of race-based adoption policy is the anomaly that propels this Article.

Analysts assume that adoptive parents' racial preferences cannot or should not be altered and accept without question that parents should be able to choose the race of the children they adopt.²⁷ Yet there are alternatives to

23. I focus on public adoption agencies because of the constitutional issues implicated and on private adoption agencies because they are regulated in substantially the same manner as public agencies. The majority of domestic adoptions between unrelated persons are arranged by adoption agencies. See HARRIS ET AL., *supra* note 8, at 1182.

24. So far as I have been able to determine, the issue of facilitative accommodation has never been litigated. The few commentators who have mentioned facilitative accommodation have done so as a rhetorical device, in order to demonstrate the implausibility and undesirability of a nonaccommodation policy. See, e.g., Perry, *supra* note 16, at 103-04 (criticizing transracial adoption proponents for not endorsing genuine colorblindness through the prohibition of racial preferences by adoptive parents). Perry is one of the only commentators even to recognize the race-based nature of adoptive parents' preferences. See *id.* Her insight is an important one, upon which this Article builds.

25. This is not to say, however, that my analysis does not apply to proponents of race matching as well. The gap is apparent in their arguments also, although it is not so conspicuous because their avowedly race-conscious position could be understood as consistent with facilitative accommodation; the practice does not contradict their stated norms, values, and ideals. The gap is only troubling in the case of race-matching opponents because the facilitative accommodation issue is such an obvious and undeniable implication of their own legal analyses and normative visions.

26. See 42 U.S.C.A. §§ 671(a)(18), 1996b (West Supp. 1997).

27. Bartholet, for example, dismisses the possibility of not allowing parents to select children based on race in three brief sentences. See Bartholet, *supra* note 10, at 1254. Zreczny, in her analysis of race matching, concludes that "race should never be considered by an administrative body in any placement proceeding, including the initial adoptive placement setting." Zreczny, *supra* note 2, at 1151. She then states, without any empirical or logical support, that "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." *Id.*

facilitative accommodation.²⁸ The alternative that this Article embraces challenges white same-race preferences, in adoption and elsewhere. I propose a strict nonaccommodation policy that not only ends current practices of facilitative accommodation, but ultimately seeks to rid adoption of the racial preferences that systematically produce racial inequality in contemporary American society. This approach assumes that personal racial preferences are not natural, but rather are products of the ways in which legal rules and social policy have shaped racial identity and race-consciousness. Strict nonaccommodation is part of the broader project of confronting the white same-race preferences that create racial inequality in contemporary American society and reorienting our national debate about racial inequality.

My goal is to recast racial preferences as expressions of social phenomena rather than merely individual choices. Only if racial preferences are denaturalized can they be seen as something other than self-evidently innocuous and individual choices, as the embodiments of the same sentiments and sensibilities that give rise to racial inequality in a variety of contexts. White adoptive parents' racial preferences for white children are emblematic of the race-consciousness that serves as the linchpin of racial inequality.

This Article therefore pursues two related lines of inquiry. First, it examines the substantive policy issues implicated by the race-and-adoption debate. Second, it treats the controversy as a case study in the law and politics of race,²⁹ such that the analysis of race and adoption yields insight into the nature of race politics and racial inequality more generally. Through an exploration of the role of racial preferences in adoption, we may better understand the nature of contemporary racial inequality. Relatedly, the difficulty of removing racial preferences from adoption may be a measure of the formidability of those barriers to racial equality that result from and reflect the same type of race-consciousness that shapes adoption policy. The particulars of the race-and-adoption controversy suggest a rethinking of both

28. There are three "pure" types of adoptive placement schemes where race is concerned: race matching, facilitative accommodation, and random placement. Race matching could in principle be based on either racial commonality or racial difference. Facilitative accommodation may take into account the preferences of birth parents as well as adoptive parents. In practice, the three ideal types may be mixed, producing a "hybrid" scheme. For example, although race might be a consideration in the placement process, the agency could attempt to fulfill the adoptive parents' stated preferences. Finally, both hybrid and pure adoption schemes may be applied differently depending on the race of the parent and child involved. One might, for example, accommodate the desires of adoptive parents for a transracial placement but not for a same-race placement. In this Article, I generally focus for analytical purposes on the pure forms of adoption policy.

29. In taking this approach, I assume that adoption policy and debate with respect to race, at least in part, are shaped by race politics. In this view, the dynamic of the race-and-adoption controversy is emblematic of race politics generally. The issues posed by the race-and-adoption conundrum represent fundamental questions about the role of race in American society and in social policy, and about the sources and nature of racial inequality. Of course, the myriad elements of the problem of the color line are not all refracted through or reflected in the race-and-adoption controversy. But adoption may be representative enough to provide a helpful way to think about the mechanisms of racial inequality and the dynamics of contemporary race politics.

the mechanisms of racial inequality and the nature of contemporary race politics. The model of race politics suggested by an analysis of the controversy describes racial inequality as a necessary, rather than contingent or incidental, feature of the legal and political norms of contemporary American society.

This Article unfolds in five steps. Part I examines the work of a prominent proponent of transracial adoption, Professor Elizabeth Bartholet. I focus on Bartholet's work, primarily her 1991 article *Where Do Black Children Belong? The Politics of Race Matching in Adoption*,³⁰ because her argument regarding race and adoption is especially lucid, compelling, and comprehensive, and because she is the best-known and most outspoken advocate of transracial adoption.³¹ A close examination of Bartholet's work dramatizes the anomaly: While race matching has been analyzed in great detail, facilitative accommodation is all but ignored. Bartholet follows this pattern, even though many aspects of her argument against race matching could be applied to facilitative accommodation as well. Related to the minimal attention she accords facilitative accommodation is her failure to describe adoptive parents' racial preferences as relevant to the racial equality concerns that animate her work. Her position that adoptive parents should be able to select a child on the basis of race thus resolves a tension that she does not identify between the liberty and equality interests of adoptive parents and children, respectively.

30. Bartholet, *supra* note 10. Bartholet has written several other analyses of race matching, as well as a variety of articles on other aspects of adoption. See Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 DUKE J. GENDER L. & POL'Y 5 (1995); Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, 3 FUTURE OF CHILDREN 89 (1993); Elizabeth Bartholet, *Transracial Adoption: Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99 (1995); Elizabeth Bartholet, *What's Wrong with Adoption Law?*, 4 INT'L J. CHILDREN'S RTS. 263 (1996). With respect to race matching, these writings reiterate the views that *Where Do Black Children Belong?* put forth. In addition to this legal scholarship, Bartholet has written a succession of editorials in support of transracial adoption. See Elizabeth Bartholet, *Adoption Is About Family, Not Race*, CHI. TRIB., Nov. 5, 1993, at 23; Elizabeth Bartholet, *Blood Parents vs. Real Parents*, N.Y. TIMES, July 13, 1993, at A19; Elizabeth Bartholet, *In Foster-Care Limbo*, BOSTON GLOBE, Mar. 17, 1992, at 17; see also Elizabeth Bartholet, Letter to the Editor, *Rethink Adoption Policy*, BOSTON GLOBE, Jan. 17, 1994, at 14.

31. *Where Do Black Children Belong?* is now regarded as the centerpiece of the controversy over race matching in legal scholarship, and is perhaps the single most important defense of transracial adoption. Indeed, the recent intensification of the scholarly and political debate surrounding race and adoption arose in part because of Bartholet's forceful writings on this issue. Most of the recent articles about race and adoption are in conversation with the arguments Bartholet puts forth, even if only implicitly. See, e.g., Zreczny, *supra* note 2. The most insightful legal analysis of transracial adoption prior to Bartholet is Howard, *supra* note 2.

Bartholet's work has received a significant amount of attention beyond the legal academy as well. Her book has been widely reviewed or excerpted in publications ranging from the *New York Times* to *Vogue* magazine. See Elizabeth Bartholet, *Family Matters*, VOGUE, Nov. 1993, at 102; Harriet S. Meyer, *Adoption, Assisted Reproduction*, 270 JAMA 2383 (1993) (reviewing BARTHOLET, *supra* note 10); Howard Davidson, *Adoption in the 90s*, A.B.A. J., July 1993, at 93 (same); Daniel Goldstine, *What's the Difference?*, N.Y. TIMES, Aug. 29, 1993, § 7 (Book Review), at 21 (same); Antoinette Martin, *Families by Choice*, DETROIT FREE PRESS, July 11, 1993, at 6J (same); Carolyn Moore Newberger, *Their Bottom Line: Children Need Families*, BOSTON GLOBE, May 23, 1993, at B42 (same).

Bartholet has had some influence on the legislative process as well. See, e.g., *Adopting Across Racial Lines*, BOSTON GLOBE, Mar. 18, 1994, at 12 (noting that Senator Howard Metzenbaum promised a change in the Multiethnic Placement Act as a result, in part, of "prodding by Bartholet").

Part II analyzes the constitutionality of current facilitative accommodation policies in order to demonstrate that the minimal scholarly attention devoted to the policies cannot be justified on the ground that they present no constitutional difficulties.³² Facilitative accommodation by public agencies represents the type of governmental racial classification that the Supreme Court has rejected. Under current interpretations of the Equal Protection Clause, these racial classifications should be subject to strict scrutiny and invalidated as unconstitutional.³³ My conclusion that facilitative accommodation is unconstitutional, however, should not be misread to suggest that such policies are the only problem. Many pernicious social practices operate beyond the reach of the Constitution, often with the aid of policies that, albeit constitutional, should be condemned as bad policy. The exercise of racial preferences in adoption is one such practice.

Part III describes the causes of the anomaly and sketches its implications. In the first half of this part, I locate the cause of the anomaly in a widely held conception of the self and the role of the state vis-à-vis the individual. The self is thought to be self-constituting, at least with respect to those values, choices, and beliefs most integral to individual identity and autonomy. The role of the state is to make possible the exercise of individual autonomy based on the subjective values and idiosyncratic desires that each unique individual freely chooses to embrace. Those expressions of individual choice that are understood as integral to individual autonomy are not scrutinized for the possibility that they are socially detrimental expressions of the sort of race-consciousness that American society might be better off without. Whereas state action raises the specter of an imposition of coercive orthodoxy, individual decisionmaking suggests a varied set of outcomes based on subjective, idiosyncratic choice.

In the second half of Part III, I trace the implications of the anomaly. The differences in perception and interpretation that constitute the anomaly are much more significant than they might initially appear. Facilitative accommodation and race matching are not simply different adoption policies; they are also race-based claims.³⁴ The anomaly, then, shapes our interpretation of the role of the claims of blacks and whites in the transracial adoption debate and, indeed, molds our understanding of the debate itself, obscuring the systematic role of racial preferences in adoption.

32. As adoption is largely a matter of state law, adoption practices vary from state to state. While nearly all states allow facilitative accommodation, the policies may be implemented differently in different states in ways that would affect their legal validity.

33. "Tacit" facilitative accommodation policies, however, would not be unconstitutional. "Tacit" or "implicit" facilitative accommodation policies are those in which the adoption agency would not ask prospective adoptive parents to state a racial preference, but the agency would not prohibit parents from selecting a child on the basis of race. The chief difference in the adoption process is that, under a tacit facilitative accommodation policy, prospective adoptive parents would have to consider children individually; the agency would not enable prospective parents to preclude summary consideration of an entire race of children.

34. For a definition of race-based claims, see *infra* Section III.B.

Part IV generalizes the analysis of the anomaly, developing a model of race politics that accounts for the creation of racial inequality. If facilitative accommodation and race matching correspond to the typical forms of race-based claims of whites and blacks, respectively, then the same processes that obscure facilitative accommodation and highlight race matching may function in politics to mask the race-based claims of whites and underscore those of blacks. In the model of race politics to which my analysis of the adoption controversy gives rise, racial inequality is a necessary and predictable (rather than contingent) outcome of “ordinary” political processes.³⁵ As in the case of adoption, racial inequality results from the apparently isolated, uncoordinated, personal choices of individuals—race-based choices that the law allows under the guise of neutrality. I characterize both this process and its outcome as atomized inequality.

In Part V, I propose a policy of strict nonaccommodation that would prohibit invidious racial discrimination on the part of adoptive parents in the selection of a child to become a member of their family. This policy is as consistent with the best-interests-of-the-child standard as the policies propounded by proponents of transracial adoption or race matching. More importantly, it would recognize the fact that racial preferences warrant particularly close examination because race remains the fault-line of American society. Indeed, on this view, the principles that strict nonaccommodation applies are not novel. Instead, the policy draws on established judicial and legislative approaches and applies them in a novel context.

The potential benefits of strict nonaccommodation are substantial,³⁶ but so are the impediments to its successful implementation. In addressing anticipated objections to my proposal, I sketch possible outcomes that might result from its enactment. The significance of the proposal does not, however, turn wholly on its political and practical feasibility. The very acts of discussing and analyzing the proposal could, by themselves, meaningfully alter subsequent debate about the nature of race politics and the causes of racial inequality.

I. CRITIQUING RACE-BASED ADOPTION POLICY: AN ASYMMETRICAL INQUIRY

How we deal with race in the intimate context of the family says a lot about how we think about and deal with race in every other context of our social lives.³⁷

35. In this model, racial inequality is produced primarily in the political, rather than the economic, realm. In contrast to other theories of inequality, my model of racial inequality could come about without the aid of discrimination. A norm of nondiscrimination, whether on the part of the state or private parties, is thus not a sufficient safeguard against racial inequality.

36. For one, it would produce a vastly increased number of homes for racial minority children in need of adoption. It would also change common expectations and understandings regarding race in a way that would make racial inequality a less integral feature of American society.

37. Bartholet, *supra* note 10, at 1174.

An examination of Elizabeth Bartholet's framing of the issue of race and adoption is illuminating in two ways. First, her analysis dramatizes the anomaly of vehement opposition to race matching coupled with minimal attention to facilitative accommodation policies. She notes the prevalence and potency of adoptive parents' racial preferences and rigorously applies the antidiscrimination norm to adoption.³⁸ She acknowledges that public law influences private values and wholeheartedly embraces a vision of familial and intimate connection not predicated on racial commonality. These aspects of Bartholet's analysis should lead her to scrutinize facilitative accommodation; yet she does not.

Second, Bartholet does not identify any racial equality concerns as resulting from the racial preferences that, by her own account, shape the adoption process. While race matching, in Bartholet's analysis, clearly implicates matters of racial equality, racial preferences and facilitative accommodation do not. Preferences are assumed to be both pervasive and somehow innocuous. Racial preferences, and hence facilitative accommodation, become an unquestioned given, rather than a focus of inquiry.

A. *A Race-Matching Critique That Undermines Facilitative Accommodation*

1. *Ubiquity and Potency of Racial Preferences*

Throughout *Where Do Black Children Belong?*, Bartholet notes the importance of race to adoptive parents.³⁹ Indeed, the article begins by observing the importance assigned to race in adoption: "When I first walked into the world of adoption, I was stunned at the dominant role race played. . . . It was central to many people's thinking about parenting. And it was a central organizing principle for the agencies which had been delegated authority to construct adoptive families."⁴⁰ The prevalence of race, she argues, assumes

38. See *id.* at 1252 (concluding that "even a mild [racial] preference is unwise as a matter of social policy" and that the "generally applicable legal rule that race should not be allowed to play *any* role in social decisionmaking should be held to apply in the adoption area as well" (emphasis added)) Bartholet is among those legal scholars most opposed to race matching. One of the few transracial adoption proponents more extreme than Bartholet is Jim Chen, who believes that transracial adoption is important because "family ties across racial lines will more quickly consume racial animus than any other social or legal force." Chen, *supra* note 16, at 167.

39. While asserting that "many [white families] are interested in adopting black children and older children with serious disabilities," Bartholet, *supra* note 10, at 1205-06, Bartholet acknowledges that "most prospective white adopters prefer to adopt healthy white infants," *id.* at 1205.

40. *Id.* at 1164-65. Bartholet observes that "[r]acial thinking dominates the world of international adoption as well." *Id.* at 1167. Those countries that offer white children for adoption are seen as more preferable places from which to adopt than those countries that offer brown-skinned children for adoption. For example, Brazil is "low on the desirability list for many prospective parents" because many of its children available for adoption are dark-skinned, while Chile "is considered a highly desirable country because it has such a white population Latin American countries with significant indian or mestizo but limited black populations generally fall between Chile and Brazil on the desirability list because the adoption 'market' rates indian as lower than white but higher than black." *Id.* at 1167

a special significance in light of the imbalances between the numbers of white as opposed to black children and the numbers of white as opposed to black adoptive parents. As Bartholet points out,

The large majority of the people actively looking to adopt in this country are white and for the most part they want white children, at least initially. The familiar refrain that there are no children available for adoption is a reflection of the racial policies of many adoption agencies and the racial preferences of many adoptive parents. The reality is that there are very few *white* children by comparison to the large pool of would-be white adopters. But there are many *nonwhite* children available.⁴¹

Put simply, adoptive parents, most of whom are white, prefer white children to black children.⁴² Bartholet does not endorse the racial attitudes of adoptive parents, however.⁴³ Such a view necessarily would conflict with her own normative vision of race, family, and community.

2. *Nonracialist Vision of Family and Intimate Connection*

Bartholet forthrightly embraces a vision of family not predicated upon racial commonality. It is this vision that fuels her normative critique of the ideology of race matching and her promotion of transracial adoption. Her rejection of racialism in the family is part of her rejection of the biological family as the model against which adoptive families should be compared.⁴⁴ A core element of Bartholet's overall critique of issues of family and

41. *Id.* at 1166 (footnotes omitted).

42. As with adoption generally, recent national data on the placement rates for black and white children and the time they spend waiting to be adopted is not readily available. But all available data suggests that black children are both less likely to be adopted than white children and likely to spend a longer time waiting to be adopted. Judith McKenzie notes that "[t]he proportion of [children of color] in foster care is three times greater than in the nation's population. . . . More than half of the children waiting for adoption nationally are children of color, and this population is rapidly increasing in most states." Judith K. McKenzie, *Adoption of Children with Special Needs*, 3 *FUTURE OF CHILDREN* 62, 68-69 (1993).

43. See Bartholet, *supra* note 10, at 1204. Although she does not want agencies to match parent and child on the basis of race, she does think that agencies should "encourage parents to explore their feeling with respect to race," which, presumably, might result in more parents deciding to adopt transracially. *Id.* at 1253. Bartholet also believes that "[i]t is important for agencies to try to help parents think through what they should do to affirm their child's racial identity." *Id.* at 1254.

44. One element of the biological model of the family is that children and parents should be as physically similar as possible. I term this the "look-alike urge." The look-alike urge is fundamental to both race matching and the adoptive parents' desire for a child of the same race. Bartholet believes that [it could] be an advantage for an adoptee to grow up in a family that is so obviously not fashioned in imitation of the biological model. Studies indicate that transracial adoptive parents are more open in discussing adoption with their children and that the children are more likely to identify themselves as adopted. These findings raise the interesting possibility that, in transracial adoptive families, the unblinkable difference of race may encourage a healthier acceptance of the fact that their family is in various other ways not the same as a biological family.

Id. at 1223 (footnote omitted).

reproduction is that biological connectedness is unnecessarily elevated to an ideal that people then strive to fulfill.⁴⁵

Bartholet criticizes the racialist thinking that serves to fuel adoptive parents' preferences as well as to promote support for race matching. Treating these attitudes as one species of widespread racialist thinking, she observes:

This adoption world is part of a larger social context in which there has always been a strong sense that racial differences matter deeply, and a related suspicion about crossing racial lines. Both black nationalists and white segregationists promote separatism, especially in the context of the family, as a way of promoting the power and cultural integrity of their own group. Even those blacks and whites generally committed to integration often see the family as the place to draw the line.⁴⁶

Bartholet seems not to want to draw that line. She would like to see more racial integration in the family, especially given the potential benefits for black children.⁴⁷ She criticizes the fact that "recruitment [of adoptive parents] has not been used in a positive way to encourage white parents to adopt hard-to-place minority children,"⁴⁸ and bemoans the fact that "[t]hose who believe in maintaining the separateness of the white community can take comfort from the fact that current racial policies provide a near absolute guarantee that white children will not be placed with black parents or with interracial couples."⁴⁹ Race matching is problematic, in part, because it "serve[s] to prevent racial integration in the intimate context of the family."⁵⁰

45. As Bartholet puts it: "Adoption professionals have idealized the biological family and structured the adoptive family in its image. They have argued that biologic sameness helps make families work, and so have promoted the goal of matching adoptive parents with their biologic look-alikes." *Id.* at 1246. These aspects of Bartholet's thought are developed more fully in her book. See BARTHOLET, *supra* note 10. Other commentators have similarly critiqued the way in which biological, and presumably heterosexual, families are privileged over other types of families. See, e.g., Mindy Schulman Roman, Note, *Rethinking Revocation: Adoption from a New Perspective*, 23 HOFSTRA L. REV. 733, 752 (1995) (arguing that current law regarding a birth parent's revocation of consent to adoption reflects the fact that judges and statutes privilege the biological link of the birth mother over the relationship developed with the child by the adoptive parents).

46. Bartholet, *supra* note 10, at 1246.

47. Some race-matching commentators, in contrast, believe that black children may suffer from growing up in a white family because they will lose their cultural identity as black people. See, e.g., Townsend, *supra* note 2, at 180 (claiming that transracially adopted black children "pay a price in order to fit in [and that] children can only act White for so long before they mourn that they are not White"); Woodhouse, *supra* note 2, at 127-28 (arguing that transracially adopted children have identity rights in their culture of origin).

48. Bartholet, *supra* note 10, at 1204. Race-matching proponents also focus on the inadequacy of recruitment, but of black parents rather than white parents. See, e.g., Fenton, *supra* note 2, at 47-48 (arguing that the adoption system should better meet the needs of black children and that part of that process involves additional recruitment of black parents); Townsend, *supra* note 2, at 186 (suggesting ways of expanding the number of black adoptive parents). For an analysis of the barriers to same-race placement, see TOM GILLES & JOE KROLL, BARRIERS TO SAME RACE PLACEMENT 12-15 (1991).

49. Bartholet, *supra* note 10, at 1246-47.

50. *Id.* at 1233.

To document the effects of transracial adoption, Bartholet reviews an impressive array of studies comparing children adopted transracially to those adopted by families of the same race and to children raised within their biological families. In her view, "the studies provide an overwhelming endorsement of transracial adoption."⁵¹ They offer "*no basis* for concluding that placement of black children with white rather than black families has any negative impact on the children's welfare . . . [and in fact] provide persuasive evidence that transracial adoption serves the interests of children."⁵²

Bartholet especially applauds the racial attitudes of transracially adopted children insofar as they are characterized by openness and acceptance:

The studies show that black children raised in white homes are comfortable with their blackness and also uniquely comfortable in dealing with whites. In addition, the studies show that transracial adoption has an interesting impact on the racial attitudes of the *white* members of these families. . . . The white as well as the black children are described as exhibiting an unusual absence of white racial bias, and as unusually committed to the vision of a pluralistic, multicolored world in which a person's humanity is more important than his race.

The studies show parents and children, brothers and sisters, relating to each other in these transracial families as if race was no barrier to love and commitment. They show the black adopted and the white birth children growing up with the sense that race should not be a barrier in their relationships with people in the larger social context.⁵³

As Bartholet correctly points out, whether one views these conclusions as positive or negative depends entirely on one's political perspective.⁵⁴ The perspective viewing them in a negative light, however, only arises within the context of an "inappropriate separatist agenda"⁵⁵ that has not been legally sanctioned. In contrast, for one who "believes that blacks and whites should be learning to live compatibly in one world, with respect and concern for each other, with appreciation for their racial and cultural differences as well as their

51. *Id.* at 1208.

52. *Id.* at 1210. In summarizing several research studies, Bartholet writes:

With astounding uniformity [the] research shows transracial adoption working well from the viewpoint of the children and the adoptive families involved. The children are doing well in terms of such factors as achievement, adjustment, and self-esteem. They seem fully integrated in their families and communities, yet have developed strong senses of racial identity. They are doing well as compared to minority children adopted inracially and minority children raised by their biological parents.

Id. at 1209.

53. *Id.* at 1225-26 (footnotes omitted).

54. *See id.* at 1216.

55. *Id.* at 1248.

common humanity, the evidence is positively heartwarming.”⁵⁶

3. *Public Law and Private Values*

Bartholet’s opposition to race matching is also animated by her sense that public law shapes private values. She notes that adoptive parents’ racial attitudes “are shaped and conditioned by messages they receive from adoption workers and the broader society, as well as by the adoption process.”⁵⁷ For one who values integration, race matching’s reinforcement of sentiments opposed to racial integration provides a reason to oppose it. One benefit of abandoning race matching, then, is that doing so would encourage greater openness to racial integration, including transracial adoption.

The observation that public policy shapes private values is significant because a strong argument in favor of facilitative accommodation is that the policy has no effect on racial preferences. If the expression of racial preferences were to remain unchanged in the absence of facilitative accommodation (as it would if preferences were exogenous to policy), then ending the policy would be an exercise in futility. On the other hand, if preferences at least in part reflect the values expressed through policy, then changing the policy may change the preferences. The prevalence of the preferences could no longer be invoked as a justification for the policy that has produced them.

4. *Application of the Antidiscrimination Norm to Adoption*

Bartholet’s legal analysis of race matching emphasizes the importance of the generally accepted norm of nondiscrimination and highlights the fact that it has not been applied in the adoption context.⁵⁸ She concludes that the nondiscrimination norm should preclude most instances of race matching because there are no persuasive reasons to suspend its applicability to adoption.⁵⁹

56. *Id.* at 1216.

57. *Id.* at 1249.

58. Numerous other commentators have analyzed the constitutionality of race-matching policies. *See, e.g.,* Rahdert, *supra* note 2; Glynn, *supra* note 2; Pattiz, *supra* note 2; Zreznny, *supra* note 2. Other commentators have considered the analogous issue of the role of race in custody determinations. *See, e.g.,* Lisa Jonas & Marshall Silverberg, Comment, *Race, Custody, and the Constitution*. *Palmore v. Sidoti*, 27 How. L.J. 1549 (1984).

59. *See* Bartholet, *supra* note 10, at 1231. Bartholet also contends that the current regime of race matching does not promote the best interests of children in need of adoptive families. *See id.* at 1254-55. This argument rests on two empirical claims. First, she asserts that the policy of race matching keeps black children in foster care for prolonged periods and creates incentives to place black children in substandard (same-race) family environments, both of which are detrimental to black children. *See id.* at 1193-95. Second, she argues that the beneficial effects of transracial adoption and its lack of negative outcomes make it preferable to the alternatives of no adoption (i.e., keeping children in foster care) or severely delayed adoption. *See id.* at 1210. Bartholet concludes that current race-matching policies subvert the best-interests-

Bartholet first identifies the scope and impact of the antidiscrimination norm, noting that the Federal Constitution, state constitutions, and other federal, state, and local laws prohibit discrimination on the basis of race by public entities, as well as by private entities exercising significant power over our lives: "In the past twenty-five years this body of law has grown so that today there are guarantees against race discrimination not only in housing, employment, and public accommodations, but in virtually every area of our community life."⁶⁰ The antidiscrimination principle applies regardless of whether a challenged action was intended to result in harm. "[E]ven 'benign' racial classifications are highly suspect and must be limited to narrowly defined situations."⁶¹ Bartholet cites *Palmore v. Sidoti*⁶² and *Loving v. Virginia*⁶³ for the proposition that "the state is not permitted to *insist* that race count as a factor in the ordering of people's most private lives."⁶⁴

Bartholet concludes that current race-matching policies are in conflict with constitutional and statutory prohibitions on race discrimination and should be illegal in most cases.⁶⁵ As she notes, "The fact that race is a recognizable factor in decision-making is enough under our general anti-discrimination norm to make out a case of intentional discrimination. Adoption agency policies make race not merely a factor, but the overwhelmingly significant factor in the placement process."⁶⁶ After considering in detail various possible reasons why adoption may be exempt from the generally applicable antidiscrimination norm, Bartholet notes that, although race matching seems, in some sense, benign, it "fit[s] none of the recognized exceptions to the antidiscrimination norm."⁶⁷ Race matching does not respond to exigent circumstances, nor does a failure to race-match pose any serious threat to the preservation of black culture or of

of-the-child standard and contravene the antidiscrimination norm that animates the applicable constitutional and statutory law. *See id.* at 1254-55. Thus, race matching is not only bad social policy but may be illegal as well. Both the legal and policy analyses draw upon Bartholet's normative vision of the role of race in the family, including the benefits that she believes will result from racial integration in the family.

60. *Id.* at 1226.

61. *Id.* at 1228.

62. 466 U.S. 429 (1984) (holding that consideration of social prejudices based on race is unconstitutional in custody determinations based on the child's best interests).

63. 388 U.S. 1 (1967) (finding antimiscegenation laws unconstitutional).

64. Bartholet, *supra* note 10, at 1227.

65. *See id.* at 1226.

66. *Id.* at 1229. Bartholet's analysis predates the enactment of the Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (codified as amended at 42 U.S.C.A. § 1996b (West Supp. 1997)), and is no longer completely applicable to the extent that MEPA prohibits race matching. *See infra* note 105 and accompanying text.

67. Bartholet, *supra* note 10, at 1231. This argument begs the question of whether the best-interests-of-the-child standard constitutes a compelling governmental interest. If the best-interests-of-the-child standard is a compelling government interest and if race matching is narrowly tailored to serve that interest, then race-matching policies would, essentially, be an exception to the antidiscrimination norm's prohibition on race-conscious state action. This is the approach that many courts have taken. *See, e.g., In re R.M.G.*, 454 A.2d 776 (D.C. 1982) (applying strict scrutiny to a statute that contemplated consideration of race and holding the statute valid because it allowed the consideration of race as one of many factors). For a summary of the case law on the use of race as a factor in adoptive placements, see Zitter, *supra* note 8.

black Americans as a community.⁶⁸ Moreover, race matching does not fit within a diversity- or remedy-based affirmative exception to the antidiscrimination norm.⁶⁹ Bartholet concludes that "the powerful preference for same-race placement embodied in many of today's policies violates guarantees against discrimination contained in Title VI of the Civil Rights Act and in the Constitution."⁷⁰ These same guarantees against discrimination also make the case against current forms of facilitative accommodation.

B. *Affirmation of Racial Autonomy*

Bartholet does not treat facilitative accommodation as a race-based social policy. Although her own observations indicate the prevalence of white parents' preference for white children, and she believes that race-based policy promotes race-based preferences, Bartholet identifies no race-based social policy, other than race matching, to which such preferences are linked. She comprehensively analyzes race matching but offers almost no critique of facilitative accommodation.⁷¹

Bartholet could argue, of course, that the race-based state action characteristic of facilitative accommodation should not be viewed as skeptically as the race-based state action involved in race matching. She could attempt to justify race-based state action in furtherance of private preferences. But she does not make either of these arguments. Bartholet does not treat current facilitative accommodation policies as even plausibly unconstitutional. Moreover, she expresses no doubt about the desirability of facilitative

68. See Bartholet, *supra* note 10, at 1231.

69. See *id.* at 1232-34.

70. *Id.* at 1243.

71. In fact, the invisible presence of facilitative accommodation indirectly fuels Bartholet's attack on race matching. In her analysis, the adverse placement outcomes of black children, which result in part from preferences and facilitative accommodation, are attributed to race matching. Given her failure to perceive the contingent nature of facilitative accommodation, race matching is the only *policy* to which she can contemplate linking the undeniably lamentable placement disparities. The practical outcome is this: If one wants to change social policy to help children in need of adoption, the logical place to look is race matching, for that is the only adoption *policy* that is understood to bear on race. Like Bartholet, race-matching proponents do not identify facilitative accommodation and adoptive parents' racial preferences as causally related to the disparate adoption rates of black and white children.

Given the difficulties of proof, any of three factors could defensibly be identified as the "cause" of the differential adoption rates of white and black children. A lack of black adoptive parents, race matching, or facilitative accommodation coupled with adoptive parents' racial preferences could logically cause differential rates of adoption according to race, insofar as a change in any of these factors might substantially affect the rate of adoption for black children. There is no empirical evidence that any of these factors is likely to be more responsible for the differential in adoption rates than the others. Race-matching proponents focus on the relative lack of black adoptive parents while transracial adoption proponents focus on race-matching policies. Because neither race-matching nor transracial adoption proponents focus on adoptive parents' racial preferences, they do not consider, in anything but the most cursory fashion, whether or how racial preferences should be confronted. Moreover, neither group identifies a race-based state policy that facilitates such preferences. This is a characteristic Bartholet shares with others who have assessed the legality of race matching. See Rahdert, *supra* note 2; Glynn, *supra* note 2; Pattiz, *supra* note 2; Zreczny, *supra* note 2; Reilly, *supra* note 2.

accommodation as a social policy. Bartholet recognizes that adoptive parents' racial preferences shape the adoption process,⁷² but she does not identify the *policy* of facilitative accommodation as in any way complicit with the operation of these preferences.⁷³

Consistent with her failure to scrutinize the policy of facilitative accommodation, Bartholet endorses the expression of adoptive parents' racial preferences. Indeed, instead of critiquing them, Bartholet indirectly affirms them. Bartholet couples her recommendation that race matching be abandoned with an endorsement of parents' right to choose a child from a state-funded and managed adoption agency on the basis of race. Toward the end of her article, in discussing the future of adoption policy, she states:

Agencies could and should allow prospective parents . . . to decide what role race should play in the adoption process. . . . It is wrong for the state to presume that a racial match is central to the happiness of every coupled parent and child. But it is equally wrong for the state to insist on arranging parent-child couplings without regard to the racial feelings of the people involved.⁷⁴

Bartholet's condemnation of race matching and endorsement of parental autonomy represent a reasonable response to the dilemma of race and adoption. The cessation of race matching may alter the disparate adoption rates of black and white children.⁷⁵ Yet Bartholet's solution wrongly suggests that adoptive parents' racial preferences raise no issue of racial equality. The fact that race matching harms children does not mean that facilitative accommodation and adoptive parents' racial preferences do not. Racial preferences produce inequality just as surely as race matching, even if they produce it differently. Adoptive parents' racial preferences deny to black children access to a pool of potential adoptive parents comparable to that available to white children.

72. See *supra* Subsection I.A.1.

73. It is entirely possible that Bartholet is aware of the facilitative role of facilitative accommodation but lacks evidence that these adverse outcomes would not persist in the absence of an explicit facilitative accommodation policy. After all, adoptive parents might strive to satisfy their racial preferences irrespective of adoption agency policies or procedures. This explanation is inadequate, however, to explain Bartholet's lack of analysis. Even in her thorough critique of race matching, Bartholet acknowledges the lack of conclusive proof that race matching accounts for the adverse outcomes she identifies; as such, she chooses to draw inferences. She states simply that "there is a strong causal connection between the policies [of race matching] and the delays and denial of placement that minority children face." Bartholet, *supra* note 10, at 1202. She cites the imbalance in the number of black and white adoptive parents relative to black and white children as providing "significant evidence that the reluctance to place transracially is responsible for delaying and denying placement to black children." *Id.* at 1202 n.103.

74. *Id.* at 1254.

75. Some analyses suggest that promotion of transracial adoption would decrease the racial disparities in adoption rates. See, e.g., Richard P. Barth, *Effects of Age and Race on the Odds of Adoption Versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285, 302 (1997) (concluding that "reducing the emphasis on racial matching must be a component of any serious plan to provide equal rights to a family for African American children").

Even if the end of race matching causes black children to be adopted in greater numbers, patterns of racial preference would continue to leave black children with a smaller pool of potential adoptive parents. Ending race matching, by itself, would not address this sort of racial inequality, which is the result of white adoptive parents' racial preferences. The goal of the non-race-matching system favored by Bartholet would be to allow those white parents who want to adopt black children to do so, not to change the views of those who would refuse to do so. Any change in preferences would be a by-product of the policy rather than its purpose. Such an endorsement of parental choice represents a resolution to a tension that Bartholet does not squarely address, between the liberty interests of white adoptive parents, on the one hand, and the racial equality interests of black children in need of adoption, on the other.⁷⁶ Should the right of parents to choose demarcate the limits of racial equality for children?⁷⁷

Although Bartholet does not view racial preferences as unalterable,⁷⁸ she does believe that "most black and white prospective parents are likely to continue to choose same-race children to the extent such children are available."⁷⁹ Adoptive parents' racial preferences, then, become an unfortunate, yet unquestioned, feature of the social terrain. While Bartholet critiques the practice of race-based matching by state agencies, she would allow race-based matching by individual adoptive parents. She thus strikes one balance between autonomy and equality. As I explain in later parts of this Article, I strike another. My goal is to put forth an adoption policy that, in addition to addressing the racial inequality that besets adoption, may also serve as a model for illuminating and challenging the sources of racial inequality in a variety of contexts.

76. For path-breaking discussions of the reciprocal nature of legal rights, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), and Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). For a discussion that illuminates the significance of Hohfeld's work by placing it in historical context, see Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 986.

77. For a discussion of the tension between racial equality and autonomy, see Dorothy Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363 (1996). For an explanation of this issue in the context of public accommodations laws, see Joseph William Singer, *Property and Equality: Public Accommodations and the Constitution in South Africa and the United States* (1997) (unpublished manuscript, on file with author).

78. In fact, Bartholet urges the creation of policies that might prompt more white parents to adopt transracially. "There can be no doubt that the current racial matching regime, by barring and discouraging white parents from transracial adoptions, rather than welcoming them in the agency doors, denies adoptive homes to minority children." Bartholet, *supra* note 10, at 1206. She also suggests that many adoptive parents' attitudes about adoption, including the disinclination to adopt across racial lines, "are shaped and conditioned by messages they receive from adoption workers and the broader society, as well as by the adoption process." *Id.* at 1249.

79. *Id.* at 1251 n.245.

II. CONSTITUTIONAL CRITIQUE OF FACILITATIVE ACCOMMODATION

In this part, I analyze the constitutionality of current facilitative accommodation policies in order to dramatize further the significance of the scant attention paid to facilitative accommodation policies and to argue that such policies are at least arguably unconstitutional.⁸⁰ That the question of the constitutionality of facilitative accommodation affords no quick and easy answer is part of what makes the relative lack of attention focused on the issue so troubling. If such policies were clearly constitutional, the fact that they have not been scrutinized would have little significance. If, on the other hand, such policies are at least arguably unconstitutional, one would expect some discussion of the issue. The cessation of current facilitative accommodation policies is but a first step in ridding adoption of the racial preferences that produce racial inequality.⁸¹ As background to this inquiry, Section II.A provides a brief overview of the adoption process.⁸² Section II.B explains the

80. Because my analysis of current equal protection doctrine is a positivist inquiry, my conclusion that its application would likely invalidate current facilitative accommodation policies should not be taken as a normative endorsement of the doctrine. The reasons the Supreme Court would oppose current facilitative accommodation policies are not the same as my own reasons. In my view, the current Court's colorblind equal protection jurisprudence is deeply and fundamentally flawed in two primary ways. First, it fails to distinguish those instances of race-based state action that promote and reinforce racial inequality from those aimed at furthering racial equality. Second, in taking for granted the background social conditions and processes through which ostensibly race-neutral law may produce race-based outcomes, current doctrine fails to grapple with the extent to which racial inequality may be promoted by laws that are ostensibly race neutral. Nonetheless, the fact that I believe current doctrine to be flawed should not suggest that I believe it to be useless. Even pernicious doctrine may be strategically employed to further salutary goals. My analysis might thus be termed ruthlessly instrumental.

81. The policies that might arise in response to the invalidation of facilitative accommodation policies are what I term tacit facilitative accommodation policies. They would not rely on any racial classification by state agencies. Pursuant to such policies, adoption agencies would neither ask prospective adoptive parents about their racial preferences nor make children available on a racially selective basis. There would be no race-based lists of children to facilitate fulfillment of adoptive parents' racial preferences. Instead, adoption agencies might merely show pictures of each child to potential adoptive parents, who would then choose a child based on their own idiosyncratic criteria. Many adoptive parents might represent to adoption agencies that their choice of child was determined by which child seemed to them the most "lovable" and "cuddly."

Because the revised policy would not explicitly mention race, strict scrutiny would be invoked only upon a finding of discriminatory purpose. *See, e.g.,* *Washington v. Davis*, 426 U.S. 229 (1976). For critiques of the discriminatory intent standard in equal protection doctrine, see Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1404, 1424-25 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); and Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989). The Court would no doubt find insufficient discriminatory intent to warrant heightened scrutiny, and the new policy would certainly withstand scrutiny under the rational basis test. The Court would conclude that the new adoption policy assures state neutrality with respect to race, even as both state officials and members of the Court might acknowledge that the outcomes of the adoptive process would be just as much determined by parental racial preferences as under the previous policy. To my mind, however, that the actual outcomes of the adoption process might be the same under the tacit facilitative accommodation scheme suggests the inadequacy of the discriminatory intent standard and also raises fundamental questions about the nature and extent of the government's responsibility to eradicate discrimination that manifests itself through facially neutral governmental policies. *Cf. Kennedy, supra*, at 1424-25 (critiquing the discriminatory intent standard).

82. I consider adoptions between unrelated parties rather than between relatives. Neither facilitative

current status of adoption law with respect to racial discrimination.⁸³ Section II.C provides a constitutional critique of facilitative accommodation.

A. *Overview of the Adoption Process*

Adoption, which is generally governed by state law,⁸⁴ occurs through one of three channels: public, private, and independent.⁸⁵ Each of these channels corresponds to a different degree of government involvement. Public adoption agencies are those governmental units that manage the process of adoption, typically child welfare agencies.⁸⁶ Private agencies are nongovernmental units licensed and regulated by the state.⁸⁷ Independent adoptions are organized by private intermediaries, such as lawyers, who establish the links between adoptive and birth parents.⁸⁸ The three different channels through which adoption occurs vary considerably. At one extreme, independent adoptions, although regulated by the state, occur with the least amount of governmental control. The independent adoption system does not rely on government funding, nor do the intermediaries assume any custodial responsibility over children. At the other extreme, public adoption agencies are usually run by state child welfare departments. Such agencies, which also manage foster-care systems, are funded and regulated by the government. Private adoption agencies fall between these two extremes. Although nongovernmental, they are often heavily dependent on government funding. They frequently assume responsibility for children who have entered public child welfare systems. Both private and public agencies are involved in the adoption process in a more

accommodation nor race matching usually arises in the case of adoptions between related parties (of course, if the child's family includes members of different races, the race-matching issue might arise.) Unlike adoption between unrelated parties, familial adoption often merely legally recognizes an existing relationship between adoptive parent and child. *See* CLARK, *supra* note 16, at 648 (stating that in adoptions between relatives there is often "every reason to grant the adoption decree")

83. As part of my research into facilitative accommodation policies and parental racial preferences, I interviewed dozens of individuals involved in adoption placement, research, and policy. These individuals and their organizational affiliations include Richard Barth, School of Social Welfare, University of California at Berkeley; Cheryl Carter-Shotts, Americans for African Adoptions; Felix Formino, Adoptive Parents Committee; Susan Freivalds, National Adoption Foundation; John Gaudiosi, Children's Bureau, Department of Health and Human Services; John Hargrove, Children's Bureau, Department of Health and Human Services; Carolyn Johnson, National Adoption Center; Joe Kroll, North American Council on Adoptable Children; Betty Laning, Open Door Society; Ernesto Loperena, New York Council on Adoptable Children; Penny Maza, Children's Bureau, Department of Health and Human Services; William Pierce, National Council for Adoption; Patrick Purtill, National Council for Adoption; Carolyn Smith, Massachusetts Adoption Resource Exchange; Ann Sullivan, Child Welfare League of America; and Toshio Tatara, American Public Welfare Association.

84. *See* HARRIS ET AL., *supra* note 8, at 1165 (noting that "[a]doption is largely governed by state law, and specific statutory requirements vary significantly from state to state").

85. *See id.* at 1179-84.

86. *See id.* at 1180.

87. *See id.*

88. *See id.* at 1179.

ongoing fashion than the adoption intermediaries who arrange independent adoptions.

The parents and children served by independent, private agency, and public agency adoptions differ along a number of dimensions: race, socioeconomic status, and, for the children, age and health status. Public agencies generally work with children who have entered the child welfare system because of some problem at home. Independent adoption, in contrast, involves children who are voluntarily placed for adoption, usually as infants. Parents who pursue independent adoption are on the whole of higher socioeconomic status and more likely to be white than parents who adopt through the public system.⁸⁹ Infants, black or white, are more likely to be placed through private or independent adoption than through the public system.⁹⁰ The public system also serves relatively more racial minority children than does independent adoption.⁹¹ As this description suggests, the adoption "market" is highly segmented, with many agencies serving only particular types of children and parents.

There are two stages to the adoption process. First, there must be a termination of the parental rights of the child's biological parents.⁹² The termination can either be voluntary (e.g., where the parent willingly relinquishes the child for adoption) or involuntary (e.g., where a child is removed from the home due to abuse or neglect).⁹³ Second, parental rights must be legally vested in the adoptive parents. Both steps require a judicial proceeding.⁹⁴ Only a court with proper jurisdiction can terminate the rights of the biological parents or create rights in the adoptive parents.

Adoption agencies play a crucial role in this process. Through the exercise of its broad authority,⁹⁵ an agency oversees and manages the process through which adoptive child and parent are matched.⁹⁶ The agency decides which

89. Cf. RICHARD P. BARTH ET AL., *ADOPTION IN CALIFORNIA: CURRENT DEMOGRAPHIC PROFILES AND PROJECTIONS THROUGH THE END OF THE CENTURY* 64 (1995) (noting that in California "since 1989, public agencies have been increasingly less likely to place children in families earning \$50,000 or more, and more likely to place them in families earning less than \$30,000"). This same study notes that those adopting from agencies have lower education levels than those adopting independently. *See id.*

90. *See* HARRIS ET AL., *supra* note 8, at 1183 (citing Center for the Future of Children, *Adoption: Overview and Major Recommendations*, 3 *FUTURE OF CHILDREN* 4, 14 (1993)); cf. BARTH ET AL., *supra* note 89, at 42 (finding that in California, "children adopted independently tend to be less than one month old when adopted").

91. *See* HARRIS ET AL., *supra* note 8, at 1183; cf. BARTH ET AL., *supra* note 89, at 40 (reporting that in California, "Caucasian children comprise the largest proportion of independent adoptions" while "African American children consistently have had low representation in independent adoption").

92. *See* HARRIS ET AL., *supra* note 8, at 1165.

93. *See id.* at 1165-67.

94. *See* CLARK, *supra* note 16, at 905.

95. *See id.* at 651 (noting that agencies possess "considerable legal power over the grant or denial of adoptions"); HARRIS ET AL., *supra* note 8, at 1179-80.

96. *See* CLARK, *supra* note 16, at 650-51 (describing the responsibilities of adoption agencies as consisting of "investigations and evaluations by trained persons of the child, his natural parents, and the adoptive parents [and the provision of] counseling services to the natural parents . . . and to the adoptive parents"); HARRIS ET AL., *supra* note 8, at 1179-80; ROBERT H. MNOOKIN & KELLY WEISBERG, *CHILD,*

family the child should be placed with or, if necessary, places the child in foster care and assumes legal custody of the child.⁹⁷ The agency interacts with both adoptive parents and birth parents. The agency counsels birth parents, assures that voluntary relinquishments meet the legal requirements of voluntariness, and performs other functions as necessary. The agency screens adoptive parents to assess their suitability for adoption, considers the parents' preferences for a child, and matches adoptive parents and children. As the arranger of the adoption, the agency makes recommendations to the court regarding the desirability of the adoption.⁹⁸ Typically, courts follow these recommendations.⁹⁹ Thus, the judiciary customarily validates and gives legal effect to the process and outcome that result from the agency's management of the adoption process.

B. *Current State of Adoption Law*

Currently, no state or federal statute explicitly regulates facilitative accommodation. Accordingly, observers assume that the law permits adoption agencies to classify children on the basis of race and to accommodate the racial preferences of adoptive parents.¹⁰⁰ As with race matching, a survey of statutory law yields little insight into the prevalence or effect of facilitative accommodation.¹⁰¹ Facilitative accommodation flourishes through lack of prohibition because it is deeply embedded in the institutional practices of adoption agencies.

To promote suitable matches, adoption law is strongly oriented toward fulfilling the preferences of adoptive parents.¹⁰² Adoption agencies attempt to ascertain and fulfill the preferences of adoptive parents as a means of determining and creating an appropriate placement.¹⁰³ Prospective adoptive parents are generally allowed to express preferences in a wide variety of areas. Health, age, sex, appearance, and prior experiences are all areas in which

FAMILY AND STATE 691-94 (1989) (discussing agency adoptions and comparing them to independent adoptions).

97. See CLARK, *supra* note 16, at 651-55.

98. See *id.* at 652 (concluding that "ultimately the adoption decision rests in the sound discretion of the trial court as guided and informed by the agency's report" about the appropriateness of the placement).

99. See HARRIS ET AL., *supra* note 8, at 1181.

100. This observation is based on my conversations with a wide range of researchers, policy analysts, government officials, and adoption agency personnel. See *supra* note 83.

101. As Bartholet notes, "Unfortunately, there has been no systematic documentation of the specifics of current racial matching policies . . . They are generally unwritten, and what is written may give few clues or even false clues as to the unwritten reality." Bartholet, *supra* note 10, at 1184-85

102. Cf. Fenton, *supra* note 2, at 39 ("Adoption developed in this country to meet the needs of nch, white, infertile couples who wished to have a family:").

103. During earlier eras, it was thought that agencies could create the most appropriate placement by matching adoptive parents and children based on a host of characteristics, an approach that comported with adoptive parents' preferences in that most adoptive parents have always preferred to adopt child who is "like" them. See *supra* note 8; *supra* note 44 and accompanying text

parents may say what type of children they want. Race is recognized as one of many reasonable preferences parents are likely to hold.

The only laws that proscribe the consideration of race in adoption apply to race matching. At the state level, laws regarding race matching vary from one jurisdiction to another.¹⁰⁴ At the federal level, the Multiethnic Placement Act¹⁰⁵ prohibits race matching by agencies that receive federal funding for adoption or foster care. Although the Multiethnic Placement Act has been widely discussed as an effort to make the adoption process nondiscriminatory,¹⁰⁶ the Act does nothing to prohibit facilitative accommodation by adoption agencies that receive federal funding.¹⁰⁷

C. *Challenging Facilitative Accommodation*

The prevalence of race matching has masked the significance of facilitative accommodation. Nearly all of the cases involving race and adoption have involved challenges to race matching.¹⁰⁸ No court has had the opportunity to rule on the constitutionality of current policies of facilitative accommodation.

1. *Harm of Facilitative Accommodation*

The first step in evaluating the constitutionality of facilitative accommodation policies is to identify the harm that the practice causes. The harm of current facilitative accommodation policies, in short, is that they enable adoptive parents to consider children by racial group, rather than individually. Thus, they allow, indeed encourage, parents summarily to exclude from consideration an entire race of children in need of adoption. This could not occur in the absence of facilitative accommodation.

Although facilitative accommodation applies whether parents prefer black children or white children, its apparent symmetry is more the semblance than

104. California, for example, established placement preferences, including race, that adoption agency personnel should consider in making a placement. See CAL. FAM. CODE § 8708 (West 1997); see also Chiles, *supra* note 2 (discussing Arkansas); Glynn, *supra* note 2 (discussing Minnesota).

105. 42 U.S.C.A. § 1996b (West Supp. 1997). The originally enacted version of the Multiethnic Placement Act prohibited delay in the placement of a child caused by attempts to race-match, but it also explicitly contemplated the consideration of race as long as doing so did not result in delay. See 42 U.S.C.A. § 5115a(a)(2) (West 1995) (repealed 1996). The Act as amended now reads:

A person or government that is involved in adoption or foster care placements may not—

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

42 U.S.C.A. § 1996b(1) (West Supp. 1997).

106. See, e.g., Chiles, *supra* note 2, at 505.

107. The Act's sponsor, Senator Howard Metzenbaum, failed even to mention the issue of facilitative accommodation in his discussions of the Act. See, e.g., Metzenbaum, *supra* note 5.

108. A fairly comprehensive listing of the cases involving race and adoption can be found in Zitter, *supra* note 8.

the substance of equality.¹⁰⁹ Because most adoptive parents are white, and because most potential adoptive parents prefer to adopt children of their own race, most black children are categorically excluded from the opportunity to be considered individually for inclusion in the families of many adoptive parents.¹¹⁰ The denial of individual consideration made possible by adoption agencies' policies of facilitative accommodation is significant because that harm is precisely the type of harm that the Supreme Court has previously identified as an evil of racial classification.¹¹¹ Racial classifications are wrong, according to the Court, because they promote the treatment of citizens on the basis of the groups to which they belong rather than as individuals.¹¹²

The widespread policy of accommodating adoptive parents' racial preferences burdens a subgroup of black Americans—namely, black children placed for adoption—who are uniquely powerless, isolated, and unrepresented in the political process. The group that current facilitative accommodation policies most burden does not include white children. Although white children are harmed by facilitative accommodation, they are not harmed to the same degree that black children are. White children are categorically excluded on the basis of race from consideration for inclusion in those families that state preferences for black children, but the magnitude of this injury is not as great as the respective harm to black children given the racial composition of the pool of adoptive parents. Because black parents (who typically want black children) constitute only a small portion of the total pool of adoptive parents,

109. Even if white children did suffer a magnitude of injury similar to that of black children, that would not immunize the racial classification from strict scrutiny or otherwise validate it as nondiscriminatory. As the Supreme Court has noted, "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

110. There is no serious dispute that the overwhelming majority of whites would not want to adopt black children. *See supra* note 20.

111. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in the judgment) (emphasizing "the Constitution's focus upon the individual"); *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (describing the injury of racial classification as a "denial of equal treatment . . . not the ultimate inability to obtain the benefit"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (describing the evil of the affirmative action plan at issue as denying certain citizens "the opportunity to compete for a fixed percentage of public contracts based solely upon their race"). Many legal scholars have also embraced the view that racial classifications by the government are inherently wrong. *See, e.g.,* CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION 90* (1991) (stating that one of the core principles of the Constitution is "the basic right of every person to be considered as a distinct individual and not in terms of the groups to which the government says he belongs").

112. Justices Scalia and Thomas have been the most outspoken proponents of this stance. As Justice Scalia stated in *Croson*:

The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin.

Croson, 488 U.S. at 520 (Scalia, J., concurring). Or as Justice Thomas stated in *Adarand*, "[R]acial classifications ultimately have a destructive impact on the individual and our society . . . [R]acial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple." *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment).

white children as a group are categorically excluded from only a small portion of adoptive families. Current facilitative accommodation practices do not result in an overwhelming majority of adoptive parents who decline, on the basis of race, to consider any white child for adoption.

Moreover, facilitative accommodation does not burden blacks generally because black adults and black children not placed for adoption are unaffected by it (at least directly). Black prospective adoptive parents are offered the same right as white parents to express a racial preference. Whether facilitative accommodation legally burdens the biological parents of black children placed for adoption is uncertain, in that those parents retain no legally cognizable interest in their biological children's welfare after relinquishment of their parental rights.¹¹³

A more generalized and diffuse harm of current facilitative accommodation policies is that they promote and reflect racial bias to the extent that they arise from the desire to allow adoptive parents to shield themselves from the social disapproval that might accompany the parents' adoption of a child of another race. The Supreme Court has held that state actions may be unconstitutional if they take account of race in such a manner as to promote, reflect, or further racial bias. As the Court announced in *Palmore v. Sidoti*:¹¹⁴ "Private [racial] biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."¹¹⁵ In *Palmore*, a husband sought custody from his former wife of their small child based on the fact that, after the wife got custody, she began to live with and later married a black man. The trial court held that the "social stigmatization" that the child would face as a result of growing up in a biracial household demanded an award of custody to the father.¹¹⁶ Without disputing the trial court's finding that racial prejudice would make the child's life difficult, the Court unanimously held that the trial court's consideration of race violated the Equal Protection Clause.¹¹⁷ The Court reasoned that "[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother."¹¹⁸ Allowing such classification would impermissibly countenance bigotry. "The Constitution cannot control such prejudices but neither can it tolerate them."¹¹⁹

113. See HARRIS ET AL., *supra* note 8, at 1165-67 (discussing termination of the rights of the biological parent). In voluntary adoptions, however, the child's biological parent is increasingly given a voice in the selection of the adoptive parents. See Mark T. McDermott, *Agency Versus Independent Adoption: The Case for Independent Adoption*, 3 FUTURE OF CHILDREN 146, 146-47 (1993) (stating that, from the birthparents' perspective, one advantage of independent adoptions is the ability to play an active role in the selection of adoptive parents).

114. 466 U.S. 429 (1984).

115. *Id.* at 433.

116. *Id.* at 431.

117. See *id.* at 433.

118. *Id.* at 434.

119. *Id.* at 433. The general principle of *Palmore* is essential to judicial evaluation of statutes or other

2. *Strict Scrutiny of Facilitative Racial Classification?*

Under the Equal Protection Clause of the Fourteenth Amendment, governmental policies and practices constituting racial classifications are subject to strict scrutiny and are generally invalidated as unconstitutional.¹²⁰ In the past, racial classifications were subjected to less than strict scrutiny if they were intended to promote diversity,¹²¹ to benefit historically disadvantaged racial minorities by combating persistent discrimination,¹²² or to remedy the lingering effects of past discrimination.¹²³ More recently, however, the Court has subjected even purportedly benign racial classifications to strict scrutiny,¹²⁴ in part based on the view that racial classifications are inherently stigmatizing.¹²⁵ As a plurality of the Court has stated: "There is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."¹²⁶ Alternatively stated, the Court "subject[s] racial classifications to strict scrutiny precisely because that scrutiny

governmental action premised on racial sentiments. If courts had allowed the racial sentiments or preferences of private individuals to be the basis for state action, *Brown v. Board of Education*, 347 U.S. 483 (1953), and its progeny might never have come to pass. As evident in the Court's opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the invocation of "natural" private racial sentiments served for many years as a reliable justification of de jure segregation. If the state could give public effect to private racial sentiments, the constitutional prohibition of racial discrimination would be eviscerated

120. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to a purportedly remedial racial classification by the federal government); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion) (applying strict scrutiny to a remedial racial classification by a city government); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("[T]he Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'" (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944))).

121. Justice Powell first articulated the diversity rationale for racial classifications. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313-14 (1978).

122. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (subjecting a benign racial classification by the federal government to intermediate scrutiny).

123. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980) (plurality opinion) (approving the use of a racial classification to remedy past discrimination). Even if these exceptions to strict scrutiny were still valid, accommodation of adoptive parents' racial preferences would be difficult to justify as either remedial or diversity-based. Racial classification of adoptive children does not promote diversity in that it facilitates adoptive parents' preferences for same-race families. Instead, such a classification may impede integration by entrenching and contributing to the perpetuation of racial homogeneity within the family. Accommodation does not fare much better under the remedial rationale. The adoptive classification helps to limit a child's opportunity to be considered individually for inclusion in the families of the majority of adoptive parents. It is difficult to imagine a rationale according to which the classification is meant either to remedy the effects of past discrimination or to counter the persistence of racial bias.

124. See, e.g., *Bush v. Vera*, 116 S. Ct. 1941 (1996) (plurality opinion) (applying strict scrutiny in finding unconstitutional a redistricting plan creating majority-minority congressional districts), *Miller v. Johnson*, 515 U.S. 900 (1995) (same). As Justice Scalia stated in his concurrence in *Adarand*:

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Adarand, 515 U.S. at 239 (Scalia, J., concurring).

125. See, e.g., *Croson*, 488 U.S. at 493 (plurality opinion).

126. *Id.*

is necessary to determine whether they are benign . . . or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification."¹²⁷ If current facilitative accommodation policies constitute a racial classification, therefore, they should be subjected to strict scrutiny. Moreover, they should arguably be subjected to the "strictest" scrutiny in light of the powerlessness of the black children they affect and the likelihood that such children's interests would not be protected by, or even represented in, the political processes that condone facilitative accommodation policies.¹²⁸

Nevertheless, the threshold question remains: Do current facilitative accommodation policies represent a racial classification? Most of these policies undeniably rely upon race: Adoption agencies assign children to racial groups and then affirmatively use that information to satisfy the racial preferences of adoptive parents. Adoption agencies routinely and of their own accord frame the choice of a child in terms of race. In general, the courts have treated such instances of governmental reliance on race as a racial classification. Supreme Court precedent yields three categories of justifications for not treating governmental reliance on race as a racial classification subject to strict scrutiny. The state's racial reliance may not call for strict scrutiny if (1) race is considered only as one factor among many; (2) the maintenance of racially identified information serves recordkeeping purposes; or (3) the state's reliance on race is not formalized in writing so as to become an official aspect of state policy.¹²⁹ I will analyze each of these exceptions in turn.

The race-as-one-factor-among-many exception has been relevant to cases regarding legislative districting, criminal profiles, and, ironically, race matching in adoption. Although the distinction between race as "a factor" and "the factor" once enjoyed wider judicial application and acceptance than it currently does,¹³⁰ recent decisions by the Court in the context of legislative districting underscore its continuing vitality. In litigation under the Voting Rights Act,¹³¹ the Court has accepted the view that a legislative district in the drawing of which race was only one of many factors should not be viewed as a racial classification.¹³² Although the members of the Court disagree on the threshold use of race that triggers strict scrutiny, a majority of the Court seems to embrace the view that a minimal reliance on race does not trigger the racial

127. *Vera*, 116 S. Ct. at 1963 (O'Connor, J., concurring).

128. Although the current Court does not appear to embrace such a political process approach to judicial review, I believe that such an approach is still a good one. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1974) (advocating an approach to judicial review based on *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), in which courts intervene on behalf of "discrete" and "insular" minorities lacking adequate political representation).

129. The typology is mine, of course, not the Court's.

130. Justice Powell, for example, seized on the distinction in *Regents of the University of California v. Bakke*, 438 U.S. 265, 315-19 (1978).

131. 42 U.S.C. §§ 1971-1973 (1994).

132. *See Vera*, 116 S. Ct. at 1941 (plurality opinion); *Miller v. Johnson*, 515 U.S. 900 (1995).

classification rule.¹³³ Similarly, in criminal profile cases, courts have countenanced law enforcement officers' reliance on race so long as it was not the primary or sole factor motivating the decision to detain a suspect.¹³⁴ Finally, with respect to race matching in adoption, courts have generally allowed agencies to consider race in both foster care and adoptive placements, so long as they do not use race categorically to preclude the possibility of transracial placements.¹³⁵

Under current facilitative accommodation policies, race is typically sufficient, by itself, to exclude a child from being considered by a prospective adoptive parent. Far from treating race as one of many factors, facilitative accommodation involves the use of race as a determinative factor in the selection of children by adoptive parents. Current facilitative accommodation policies allow adoptive parents to exclude an entire race of children purely on the basis of race. Most parents take the opportunity to do so.¹³⁶ Race is generally not considered by parents in conjunction with other factors; there is no balancing of myriad concerns, no comparison of competing considerations. Instead, those parents who avail themselves of the agency's racial classification typically use it to exclude all children of the races that the parents disfavor. This is precisely what adoption agencies expect and is part of why race plays such a prominent role in the application process.

Other factors, such as age, sex, and handicap status, may supply a basis for exclusion as well, and no doubt some black children would have been excluded on the basis of these other factors, irrespective of race. But the fact that these children might have been excluded on the basis of other factors should not obscure that they might have been excluded on the basis of race alone. Admittedly, facilitative accommodation is not a prototypical case of race-based state action in that the state's racial classification does not mandate the ultimate use to which race may be put. That race is typically a basis on

133. See *Vera*, 116 S. Ct. at 1951 (O'Connor, J., concurring) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts." (citations omitted)); see also *id.* at 1974 (Stevens, J., dissenting)

134. In *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976), the Court reasoned that United States border patrol agents could take apparent Mexican appearance into account in determining which cars to stop in the effort to halt the flow of illegal aliens into the United States from Mexico. In *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992) (en banc), the Sixth Circuit upheld the stopping of a black man exiting an airport terminal after arriving from another state in spite of evidence that the man was suspected of being a drug courier at least in part based on his race.

135. See, e.g., *In re R.M.G.*, 454 A.2d 776 (D.C. 1982) (upholding a District of Columbia statute authorizing the consideration of race in adoption proceedings); see also *J.H.H. v. O'Hara*, 878 F.2d 240 (8th Cir. 1989) (allowing the consideration of race as a factor in foster care placements); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977) (concluding that "'the difficulties inherent in interracial adoption' justify the consideration of 'race as a relevant factor in adoption'" (quoting *Compos v. McKeithen*, 341 F. Supp. 264, 266 (E.D. La. 1972))); *In re Davis*, 465 A.2d 614, 624 (Pa. 1983) (noting that race may not be "unduly emphasized" by the placement agency). The Supreme Court has never ruled on race matching.

136. It might be a different case, of course, if race only entered the process at the behest of adoptive parents. In fact, it is typically the agency, not the parents, that first frames the choice in terms of race.

which children are excluded from consideration is, one may argue, a private matter of parental choice rather than a public matter of state agency policy. This distinction is accurate but, perhaps, not so important. The argument is not that adoptive parents' choices constitute state action but that the state's framing the decision in racial terms is race-based state action. While the mere presentation of the opportunity to choose on the basis of race does not require parents to choose in this way, parents would not be able categorically to choose on the basis of race without facilitative accommodation. Without facilitative accommodation, parents' race-based decisionmaking would have to proceed one child at a time.

The second exception to the rule that racial classifications are subject to strict scrutiny pertains to recordkeeping. In *Tancil v. Woolls*,¹³⁷ for example, the Court summarily affirmed a lower court judgment regarding Virginia statutes that required the state to maintain voting, property, and divorce records on the basis of race. The lower court had invalidated portions of the statute that required the maintenance of racially designated property tax voting records, but upheld those that required racial designations on divorce records. The court did not apply strict scrutiny to either set of provisions, an approach with which the Supreme Court agreed.

A justification for the court's decision not to subject the *Tancil* statutes to strict scrutiny is that no government action, services, benefits, or decisions flowed from the statutes' racial designations. The case involved no claim that the state's racial recordkeeping would be used to effect differential access to, or distribution of, government services or benefits. This rationale suggests that the government's simply taking account of race is not sufficient to create a racial classification; some additional action must turn on the classification.

This exception to the norm of colorblindness allows racial recordkeeping to enforce antidiscrimination laws.¹³⁸ Such practices are warranted under a rationale similar to that in *Tancil*: The state does not intend to use race-based records to distribute government benefits or services or to perform government functions in a racially selective manner. To the extent that such records do alter the provision of government services, benefits, or functions, it is to correct for infringements of constitutionally protected or statutorily created rights that the race-based recordkeeping identifies. Race-based recordkeeping, in some contexts at least, is essential to the enforcement of our nation's antidiscrimination laws.

Under current facilitative accommodation policies, however, government services and benefits turn on the racial listing of children in need of adoption. Public adoption agencies provide state services. If part of such services is the

137. 379 U.S. 19 (1964) (per curiam).

138. Cf. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971) (acknowledging that in school segregation cases race must be taken into account not only to determine whether a constitutional violation has occurred, but also to fashion an appropriate remedy).

opportunity to be considered individually for adoption, then the state's racial classification differentially affects, on the basis of race, a child's receipt of that service. Indeed, the agencies' racial classifications cannot be justified on the grounds that they are simply for recordkeeping purposes or that they facilitate enforcement of antidiscrimination laws; the classifications represent government complicity in widespread discrimination that denies children, on the basis of race, the opportunity to be considered individually.¹³⁹

The third exception to the rule that racial classifications are subject to strict scrutiny is where state actions are not the result of a formal, written policy. In the suspect profile cases,¹⁴⁰ for example, there was no formal, written policy on the role of race in investigatory work.¹⁴¹ In contrast, current facilitative accommodation policies are formal. The racial designation is written into adoption agency applications as part of the screening through which adoptive parents first enter the process. And to comply with prospective adoptive parents' stated preferences, agencies racially classify the children who are waiting to be adopted.

The policy of facilitative accommodation cannot, therefore, avoid the application of strict scrutiny under any of the Court's existing exceptions. The Court has not proclaimed any exception for classifications that facilitate private racial preferences. In fact, the Court has subjected to strict scrutiny and invalidated just such classifications. In *Anderson v. Martin*,¹⁴² for example, the Court invalidated, as violative of the Equal Protection Clause, a state law that mandated that "the nomination papers and ballots . . . designate the race of candidates for elective office."¹⁴³ The law applied to white and black candidates alike. As with current facilitative accommodation policies, voters were free to disregard the racial designation. The Court struck the law down nevertheless, reasoning that "by placing a racial label on a candidate at the most crucial stage in the electoral process . . . the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another."¹⁴⁴

139. Under the *Tancil* exception, an agency's mere compilation of the race of children it places for adoption would not be a racial classification subject to strict scrutiny. Nor would a race-based list of adoptive parents maintained in order to track the experiences of different racial groups in the adoption process. It would be ironic indeed if the antidiscrimination norm precluded maintenance of the race-based records necessary to measure the effectiveness of other antidiscrimination measures.

140. See *supra* note 134 and accompanying text.

141. In both *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-64 (1976), and *United States v. Taylor*, 956 F.2d 572, 578 (6th Cir. 1972) (en banc), the courts noted that the law enforcement officers had declined to commit to writing any suspect profile that included race.

142. 375 U.S. 399 (1964).

143. *Id.* at 400.

144. *Id.* at 402. The Court's ruling did not rely on the notion of discriminatory intent since the Court did not define intent as the constitutional standard for racial discrimination until *Washington v. Davis*, 426 U.S. 229 (1976).

As with facilitative accommodation, the constitutional challenge to the statute at issue in *Anderson* did not implicate voters' right to select the candidate of their choice. As the Court noted:

[I]t is well that we point out what this case does not involve. It has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State to require or *encourage* its voters to discriminate upon the grounds of race.¹⁴⁵

Similarly, the constitutional infirmity of current facilitative accommodation policies does not depend on whether prospective adoptive parents should be able to consider race in selecting children. Instead, the constitutional infirmity pertains to the government's role in the perpetuation and encouragement of race-based private decisionmaking. The invalidation of facilitative accommodation would clearly prohibit only public adoption agencies from affirmatively framing the choice of a child in terms of race.

In sum, because facilitative accommodation is a systematic, formalized practice that encourages parents to rely on race as a decisive factor in determining which children they will individually consider for adoption, the current facilitative accommodation policies of public adoption agencies should be treated by courts as a racial classification and subjected to strict scrutiny.¹⁴⁶

3. *Application of Strict Scrutiny*

When strict scrutiny is applied, a policy that classifies citizens on the basis of race is upheld only if it is narrowly tailored to further a compelling governmental interest.¹⁴⁷ Do current facilitative accommodation policies further any compelling state interest? If so, are they narrowly tailored with respect to promoting that interest?

Facilitative accommodation policies are perhaps intended to further the best interests of children in need of adoption by precluding their placement with adoptive parents who do not want them on account of race.¹⁴⁸ Although

145. *Anderson*, 375 U.S. at 402 (emphasis added).

146. Facilitative accommodation policies could also be held invalid under federal and state antidiscrimination statutes. For example, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994), prohibits racial discrimination by bodies that receive federal funds.

147. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

148. An argument that embodies a perhaps more realistic expression of the goals and sensibilities that animate adoption law and policy is that facilitative accommodation serves the interests of adoptive parents. To the extent that the public adoption system depends on the support of potential adoptive parents, the system must be attuned to their desires and preferences. But stating the compelling interest in these terms merely begs the question of whether adoptive parents' racial preferences are the sorts of choices that the

the best-interests-of-the-child standard is the central principle of child welfare policy,¹⁴⁹ the Supreme Court has declined to hold that furtherance of the standard is a compelling government interest. Instead, the Court has held only that furtherance of the standard is a "substantial government interest."¹⁵⁰ Lower courts, however, have treated the best-interests-of-the-child standard as a compelling state interest.¹⁵¹

Even assuming that serving the best interests of adoptive children is a compelling state interest, facilitative accommodation policies must also be narrowly tailored to promote that interest if they are to survive strict scrutiny. There is little reason to conclude, however, that current facilitative accommodation policies are necessary to avoid inappropriate placements. Being placed with a parent who does not want him or her is clearly adverse to a child's best interest, but current facilitative accommodation policies play no role in avoiding such adverse outcomes. The cessation of facilitative accommodation policies would not in any way lessen prospective adoptive parents' ability to select children on whatever basis they choose. Adoption is about matching a parent to a child, not a parent to a race. The best interests of adoptive children are furthered by matching *individual* children to parents, not by allowing prospective adoptive parents to preclude consideration of an entire *group* of children on the basis of race. Adoption agencies could avoid adverse placements by allowing prospective parents to spend time with a prospective adoptee. If the match seems to be a bad one or if the parent rejects the child, for whatever reason, then the adoption should not go forward.¹⁵²

The cessation of current facilitative accommodation policies, therefore, would not coerce parents to adopt any child against their will, on the basis of race or otherwise, or any child whom they felt unsuited to parent properly. Moreover, adoption agencies have an obligation to assess the suitability and fitness of prospective adoptive parents, and they would continue to do so in the absence of facilitative accommodation. If an agency determines that a

law should reflect and promote.

149. See, e.g., Eubanks, *supra* note 2, at 1233-35 ("The best interests standard has been widely used as the appropriate test in deciding child placement, both in custody and adoption proceedings. Generally, the best interests standard holds that the sole guideline in determining placement of the child should be furtherance of the welfare of the child." (footnote omitted)). An excellent analysis of the best-interests standard in the context of transracial adoption is Howard, *supra* note 2

150. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

151. See, e.g., *In re R.M.G.*, 454 A.2d 776, 786 (D.C. 1982)

152. No doubt, at least some adoptive parents would decline to adopt a particular child on account of race. The state, however, would not be involved in promoting or legitimizing such race-based decisionmaking. In any event, one wonders whether potential parents who feel strongly enough about race to reject a child solely on that basis should be allowed to adopt a child at all. The racial sentiments that animate such a choice might not create a positive and loving environment for any child. To take an extreme example, the racial views of white supremacists who reject a black child on the basis of race might also harm any white child they adopt. Perhaps the racial views of all parents should be investigated, whether they adopt transracially or not. Indeed, attitudes toward a child on account of race are as reasonable a basis for disqualification of an adoptive parent as the socioeconomic and lifestyle standards upon which agencies currently rely. I owe this insight to Rachel Moran and Ruth-Arlene Howe.

particular child should not be placed with a particular adoptive parent, it would decline to make such a placement.

Facilitative accommodation might also be thought to further the best interests of children by promoting the systemic goals of efficient and accessible adoption. If adoption agencies were prohibited from making children available on a racially selective basis or from providing racially identifying information about children, the adoption process might become more burdensome and inefficient, resulting in fewer adoptions. The additional burdens might be substantial enough to cause some portion of adoptive parents to leave the public system or not to adopt at all. Either way, children would lose because the aggregate number of adoptions would decrease. As I discuss in Part V, however, the adverse outcomes of ending current policies may not be as dire as many people would imagine.

Facilitative accommodation might also be justified as furthering adoptive parents' interest in establishing an adoptive family modeled on the biological family. The policy and adoptive parents' preferences, in this view, may in fact be less about race than about establishing an adoptive family that mirrors as closely as possible the biological family that the parents might otherwise have had. Both the policy and the preferences could thus be justified on nonracial grounds. As I demonstrate in Part IV, however, the way in which "biological" goals take on a racial cast only becomes intelligible in light of the racial assumptions of American society. Adoptive parents' means of modeling their adoptive family on the template of the biological family ultimately collapses back into race.

4. *Liberty, Privacy, and Personhood Defenses*

The most intuitively compelling argument against invalidation of current facilitative accommodation policies is that such policies are necessary to secure adoptive parents' rights to liberty, privacy, or personhood.¹⁵³ Under this view, if current facilitative accommodation policies are essential to furthering adoptive parents' privacy or liberty interests, they are not only constitutionally permitted, but constitutionally required. The Court has recognized two types of constitutionally protected privacy interests relevant to the race-and-adoption issue: associational and decisional interests.¹⁵⁴ Both interests acquire special

153. I make no attempt to draw analytical distinctions between these overlapping concepts, which I understand to encompass associational interests as well. Throughout this section, I use the terms privacy and liberty almost interchangeably. The scholarly literature in the area is voluminous. For an insightful analysis of such rights, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15-1 to -21 (2d ed. 1988). See also Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

154. The Court has recognized constitutionally protected privacy interests in numerous cases. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down a state law interfering with the fundamental right to marry); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (striking down a

importance in the context of the family. Indeed, the Court has long recognized a “private realm of family life which the state cannot enter.”¹⁵⁵

The Court has, on many occasions, recognized the importance of decisional privacy, most notably in the landmark abortion case *Roe v. Wade*.¹⁵⁶ *Roe* and its progeny can be read to stand for the proposition that some matters are so inherently personal and integral to one’s personhood that decisions bearing on such matters must be made by the individual rather than by the state.¹⁵⁷

The Court has repeatedly held as well that government action may not unduly interfere with one’s right to associate with whomever one desires.¹⁵⁸ Associational interests prohibit not only laws that directly proscribe associational freedom, but also any law that exerts a “deterrent effect on the free enjoyment of the right to associate.”¹⁵⁹ Moreover, such interests obtain a special significance in the context of the family. In *Moore v. City of East Cleveland*,¹⁶⁰ for example, the Court invalidated a local zoning law that defined “single family” in a manner that excluded two cousins and their grandmother, thus prohibiting them from living together in a house zoned for a “single family.” In distinguishing the East Cleveland regulation from other zoning ordinances that the Court had previously upheld,¹⁶¹ the Court noted that East Cleveland chose “to regulate the occupancy of its housing by slicing deeply into the family itself.”¹⁶² Similarly, in *Loving v. Virginia*,¹⁶³ the Court invalidated on both due process and equal protection grounds a Virginia miscegenation law that prohibited whites and nonwhites from marrying each other. The Court emphasized the importance of the family context: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”¹⁶⁴

zoning ordinance that limited residential occupancy to a statutorily defined family), *Roe v. Wade*, 410 U.S. 113 (1973) (striking down state laws prohibiting abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognizing the privacy right of unmarried persons to use contraception); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that states must permit access to courts if they are the only means for dissolving marriages); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down statutes prohibiting interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the use of contraception by married persons falls within the zone of privacy); *NAACP v. Alabama*, 357 U.S. 449 (1958) (upholding associational interests). *But see* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a statutory prohibition on consensual homosexual sodomy).

155. *Moore*, 431 U.S. at 499 (plurality opinion) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

156. 410 U.S. 113 (1973).

157. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

158. *See, e.g.*, *Moore*, 431 U.S. at 505-06 (plurality opinion); *NAACP v. Alabama*, 357 U.S. at 460.

159. *NAACP v. Alabama*, 357 U.S. at 466 (invalidating a state statute that required the NAACP to disclose its membership lists).

160. 431 U.S. 494 (1977) (plurality opinion).

161. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court upheld a zoning ordinance that regulated occupancy of residences by unrelated individuals.

162. *Moore*, 431 U.S. at 498 (plurality opinion).

163. 388 U.S. 1 (1967).

164. *Id.* at 12.

Freedom of choice may well be the byword of constitutional jurisprudence regarding state constraints on individual associational and decisional rights. Individuals must be allowed to choose; the state may not choose for them. Indeed, nearly all of the state statutes invalidated on the grounds of decisional or associational privacy interests have been prohibitive, usurping individuals' right to choose.¹⁶⁵ The right to choose is nowhere more important than in the intimate realm of family.¹⁶⁶ Because matters of family formation in particular can implicate both associational and decisional interests, individuals' liberty interests are especially weighty in that context. Adoption is one such mode of family formation; therefore, adoptive parents' interests seem especially weighty.

As a threshold matter, however, it is not clear that prospective adoptive parents would be able to assert *any* legally cognizable privacy- or liberty-based interest. The Court has never recognized a constitutional right to become an adoptive parent. Nor do foster parents have a constitutionally protected liberty interest with respect to their foster child.¹⁶⁷ Of course, parents who *have* adopted a child possess the same liberty and privacy rights as biological parents. But the issue of facilitative accommodation concerns the rights of *prospective* adoptive parents, who have no preexisting legally recognized interest in a relationship with any particular child.

Even assuming, for the sake of argument, that prospective adoptive parents have decisional and associational rights to choose, the cessation of current facilitative accommodation policies would not violate those rights. In a post-accommodation world, prospective adoptive parents would remain able to select a child as they see fit. Ending facilitative accommodation would not coerce any adoptive parents into unpreferred family arrangements. The withdrawal of one basis of government facilitation of private choice would not substitute state orthodoxy. The scope of individual choice of prospective adoptive parents would remain as broad as under current facilitative accommodation policies. Only explicit state facilitation of race-based choices

165. The Court is especially solicitous with respect to government actions that impede or distort the political process. *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (holding that a law limiting the approved uses of busing imposed substantial and unique burdens on racial minorities); *Hunter v. Erickson*, 393 U.S. 385 (1969) (striking down the portion of a city charter requiring the approval by the city council and a majority of voters to pass any ordinance regulating housing discrimination based on race or religion); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (affirming the California Supreme Court's invalidation of a housing law designed to allow private discrimination). The Court has noted, however, that even statutes that facilitate, rather than require, private choice based on race may be constitutionally invalid. *See Anderson v. Martin*, 375 U.S. 399 (1964) (striking down a Louisiana election law that mandated the inclusion of each candidate's race on nomination papers and election ballots); *see also supra* text accompanying notes 142-145.

166. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("[T]he Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

167. *See Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977) (concluding that foster parents' relationship to their foster child "is not a protected liberty interest, but [is] an interest limited by the very laws which create it").

would be eliminated. Indeed, the cessation of current facilitative accommodation policies could only infringe adoptive parents' interests if the state were required to facilitate the racial decisionmaking of prospective adoptive parents. The Court has never recognized any such affirmative state duties. Constitutional rights are negative; they define where the state may not go, not where it must.¹⁶⁸

Moreover, the argument against facilitative accommodation is not that it infringes the rights of prospective adoptive *parents* but that it violate the rights of the *children* awaiting adoption. However important the permissive-coercive distinction with respect to parents' rights, its relevance to *children* in need of adoption is minimal. That adoptive parents may choose not to avail themselves of the opportunity offered by agencies' racial classification of children does not negate the harm that black children suffer as a result of being racially classified by the very governmental agencies that have assumed responsibility for their well-being. Black children have little "choice" but to suffer the discriminatory practices that government policy promotes.

D. *Summary*

One cannot be certain how the Court would rule on facilitative accommodation. The Court's stance toward racial classifications suggests that it would invalidate such a policy. Although not identical to the types of classifications that the Court has struck down in the past, facilitative accommodation fits within no recognized exception to the racial classification rule. But the Court might not treat facilitative accommodation as a racial classification at all. The Court might hold, for example, that the state's action merely facilitates parents' preexisting preferences and that the policy does not effect any particular outcome. The racial designation would be emphasized as a basis of private, but not government, decisionmaking. The Court might identify the intimate and personal nature of adoption, a means of family formation, as justifying the priority of parents' preferences and might argue that any stigma suffered by children from the classification would be less than the stigma associated with individual rejection. The Court might even justify facilitative accommodation on the ground of administrative convenience in that the policy makes the adoption process less expensive than it would otherwise be. However the Court would rule, the constitutionality of facilitative accommodation is uncertain enough that the failure of commentators to address the issue is noteworthy.

168. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating a statute that required parents to have their children educated in public schools), *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a law that forbade the teaching of modern languages other than English to young schoolchildren).

III. SOURCES OF THE ANOMALY

How can we account for the paucity of attention that facilitative accommodation has received? Given the volume and apparent thoroughness of the scholarly attention focused on race matching,¹⁶⁹ and the complicated constitutional character of facilitative accommodation, how could facilitative accommodation have been overlooked? What accounts for this anomaly? What are its implications?

In the first half of this part, I identify the cause of this anomaly. I locate it in a widely held implicit conception of the individual as autonomous, private, and self-deliberating, an understanding characteristic of the social vision of contemporary liberalism.¹⁷⁰ Our conception of the nature of the self and the role of the state vis-à-vis the individual shapes our understanding of both "private" racial preferences and the state action that promotes them. It causes us to view adoptive parents' racial preferences as natural and not as the products of particular legal rules, social practices, or the dynamics of racial group competition.¹⁷¹ Relatedly, we tacitly posit individual autonomy in opposition to state action such that state policies that constrain individual choice in personal matters are perceived as state action while those that promote it are not. Consequently, we suppress awareness of the extent to which state action facilitates the racial preferences of adoptive parents.

In the second half of this part, I consider how the anomaly shapes understandings of the race-and-adoption debate. That we perceive race matching, but not facilitative accommodation, as an instance of race-based state action is more significant than it might seem, for facilitative accommodation and race matching are not simply alternative adoption policies. As outcomes of race politics and expressions of symbolic racial group conflict, they are also race-based claims.¹⁷² Facilitative accommodation is a white race-based claim; race matching, a black race-based claim. Our asymmetrical identification of the race-based claims of blacks and whites in adoption policy shapes public interpretation of the debate. Proponents of transracial adoption are seen as advocates of racially egalitarian adoption who place the needs of children above the demands of race politics. Supporters of race matching, in contrast,

169. See sources cited *supra* notes 2-5.

170. See, e.g., James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995).

171. It is as though adoptive parents' racial preferences constitute a background rule. As Duncan Kennedy notes:

We assert that something that is background for others is causally important in the hope that if we are right, and we can make people see it, we will make it plausible that there are more ways to change the status quo than previously appeared. We argue against that part of its legitimacy that derived from its appearance of inevitability.

DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 248 (1997).

172. Race-based claims are those policy positions whose appeal stems in part from the fact that they further, or are perceived to further, a particular racial group's interests, either in symbolic or practical terms. See *infra* Section III.B.

appear as an ideologically rigid, politically oriented interest group who may be willing to sacrifice the well-being of children for the sake of promoting a racially separatist agenda.

A. *Individualism: An Interpretive Prism*

Our conception of the nature of the self and of the role of the state vis-à-vis the individual is reflected in two widely shared intuitions. First, those aspects of the self most central to identity are thought to exist separate and apart from legal rules and the social processes they engender. Second, the role of the state, and of law, is to allow individuals to choose their life projects and individual identities as they see fit.¹⁷³ We understand the individual as self-constituting, self-deliberating, and seeking his own subjectively chosen ends in life.¹⁷⁴ Those desires most central to individual identity are thought to derive from individual values and motivations rather than from social processes and group dynamics. The more personal and intimate the matters to which racial attitudes relate, the more likely we are to think of them as expressions of the autonomous and self-deliberating individual, unmoored from social, historical, and symbolic processes. The more public the subject of the attitudes, the more likely we are to view them as having been generated external to the self, perhaps by legal rules and social practices. Racial attitudes about the most intimate of matters are, in this view, considered both extralegal and natural, an interpretation that the resistance to change of relative racial attitudes supports.¹⁷⁵ In matters of legal regulation as well, change in public-regarding attitudes is generally easier to bring about than change in private-regarding ones.

The more personal and intimate the issues to which racial attitudes relate, the less likely we are to evaluate them morally. Attitudes regarding those matters considered to be uniquely within the province of individual discretion are insulated from moral scrutiny and are less likely to be viewed as

173. Robert Nozick provides a particularly strong defense of this notion. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 29-35 (1974); see also RONALD DWORKIN, *A MATTER OF PRINCIPLE* 205-06 (1985) ("[L]iberalism as based on equality justifies the traditional liberal principle that government should not enforce private morality."); JOHN RAWLS, *POLITICAL LIBERALISM* 190 (1993) (noting that "one common theme of liberal thought is that the state must not favor any comprehensive doctrines and their associated conception of the good"); William Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 *YALE L.J.* 1495, 1527-31 (1994) (arguing that the right of privacy is a shield against state standardization of individuals' life patterns and choices). A well-known critic of this view of liberalism is Michael J. Sandel. See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* (1996) [hereinafter SANDEL, *DEMOCRACY'S DISCONTENT*]; MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) [hereinafter SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE*].

174. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 265 (1986) (describing the ideal of autonomous persons creating their own lives through progressive choices from a multiplicity of valuable options).

175. See Emory S. Bogardus, *Measuring Social Distance*, 9 *J. APPLIED PSYCHOL.* 299, 299-308 (1925). For a more recent investigation of social distancing, see J. Daniel Cover, *The Effects of Social Contact on Prejudice*, 135 *J. SOC. PSYCHOL.* 403 (1995); and Suzanne Nickolai-Mays & Beverly Grottkau, *Attitudes Toward Social Distancing*, *EDUCATION*, Fall 1991, at 144.

expressions of bias, prejudice, or stereotyping, all of which are morally disfavored. Attitudes about public issues, in contrast, attract moral judgments. The result is that we may think less of someone who believes that blacks and whites should not work together or attend school together than we would of someone who preferred to marry within his own race. Thus, people are less likely to make moral evaluations about precisely those issues that are most resistant to change.

Attitudes seem more a matter of individual choice and identity the more they diverge from the norm. Personal beliefs and attitudes become perceptually salient to the extent that they are differentiated from the social background.¹⁷⁶ We do not seek the causes of an attitude or belief in the absence of an individual who has differentiated himself from the social background. Nonconforming attitudes and beliefs function more as a marker of individual character and values than the same beliefs would if they were widely held. We attribute significance to uncommon personal views.¹⁷⁷ Conversely, insofar as one expresses an attitude about which there is near consensus, the attitude will not be seen as worthy of notice.¹⁷⁸ Nor would it elicit moral evaluation. Because individual choices integral to identity are personally chosen, based on subjective values, we expect the social outcomes of these intimate choices to be varied, irregular, and unsystematic, an expression of the idiosyncratic elements that make up each individual's unique personality.¹⁷⁹

Those aspects of autonomy,¹⁸⁰ identity, and privacy that are thought to be integral to the individual are all deemed of value to society. Those preferences, values, and choices that are integral to or seem to affirm individual autonomy, privacy, or identity are viewed as important as well. They become objects of state protection or interests that the state attempts to further. Because they are subjectively chosen and integral to individual identity, we are hesitant to criticize them morally. We distinguish morally between those attitudes articulated in a manner that suggests the affirmation of individual dignity and worth and those attitudes that we interpret as denying individual social worth or derogating individual uniqueness. Attitudes that are framed as preferences based on race are not equated with attitudes that premise

176. See Reid Hastie, *Causes and Effects of Causal Attribution*, 46 J. PERSONALITY & SOC. PSYCHOL. 44, 44-56 (1984); Bernard Weiner, "Spontaneous" Causal Thinking, 97 PSYCHOL. BULL. 74, 81-83 (1985).

177. See Weiner, *supra* note 176, at 80-81.

178. See Edward E. Jones et al., *Role Playing Variations and Their Informational Value for Person Perception*, 63 J. ABNORMAL & SOC. PSYCHOL. 302, 303 (1961); Harold H. Kelly, *Attribution in Social Interaction*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 1, 19 (Edward E. Jones et al. eds., 1972).

179. Cf. Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175 (1982) (linking autonomy to a relativist conception of value choice).

180. See STEVEN LUKES, *INDIVIDUALISM* 56 (1973) (arguing that autonomy is a value that has always been central to liberalism). The classic account of individual autonomy is JOHN STUART MILL, *ON LIBERTY* (David Spitz ed., W.W. Norton & Co. 1975) (1859).

rejection on the basis of race, even though there is little logical distinction between the two.¹⁸¹ Attitudes expressed as preference are insulated from scrutiny because they seem to affirm individual worth. Conversely, attitudes framed as dispreferences are understood as denial of the worth of the other. Thus, our moral response to a sentiment results in part from whether it is expressed as a preference (which we interpret as affirming individual autonomy and identity) or as a dispreference (which we interpret as negating the value of individual identity). Preferences for people in intimate settings are not subjected to moral scrutiny, even if dispreferences elicit moral censure.¹⁸²

Constitutional law protects individuals' rights against the state.¹⁸³ State action, not private action, raises the specter of orthodoxy; state action, not private action, therefore, represents the sort of power that the Constitution seeks to constrain. Indeed, we intuitively situate individual autonomy in opposition to state action. The infringement of choice underscores the presence of the state while the promotion of choice obscures it. The measure of state uninvolvedness, of state neutrality, is understood as the range of discretion through which individuals are allowed to realize their privately formulated desires, goals, and values.¹⁸⁴ The presence of choice obscures the extent of affirmative state involvement. State action deemed constitutionally impermissible usually constrains, rather than promotes, individual choice.¹⁸⁵

Yet, while individual choice is central to our perception of state action, the most intimate of individual choices are not understood as a product of state policy at all. Instead, they are assumed to be chosen personally and to be a reflection of subjective values and goals that express each individual's unique

181. Cf. Marilyn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis*, 86 PSYCHOL. BULL. 307, 321-22 (1979) (noting that people are more willing to express in-group favoritism than out-group derogation)

182. One may, however, have a moral and legal right to make choices that would themselves be evaluated as immoral. See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 156 (1992) (noting that "having the moral liberty to do X does not mean that doing X is either morally correct or free from moral criticism")

183. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (noting that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual [and] are personal rights"). Many legal scholars question whether rights should be conceived of as individual possessions. See, e.g., Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (arguing that interpretation of the Equal Protection Clause should rely on a principle of group disadvantage rather than of antidiscrimination); Charles Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995) (urging that the law focus not only on procedural fairness for individuals, but also on issues of substantive equality for groups).

184. See RAWLS, *supra* note 173, at 192 (describing, as one meaning of state neutrality, the view "that the state is to ensure for all citizens equal opportunity to advance any conception of the good they freely affirm"). Thus, adoption policies that promote individual choice imply the absence of state involvement, or at least preclude the possibility of state infringement of anyone's rights. Therefore, unless a state policy explicitly constrains individual choice, as with race matching, we assume away state involvement.

185. This is not to say that all state burdens or limitations on individual choice are considered unconstitutional state action. The Supreme Court has allowed, for example, prohibitions on homosexual sodomy. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

personality.¹⁸⁶ Thus, those private preferences and attitudes most integral to individual autonomy and identity are understood neither as a product of social dynamics nor as a proper object of legal regulation.

1. *Individualism and State Action*

Although I have argued that both race matching and facilitative accommodation constitute state action under current judicial standards, the presumably traditional perception of whether state action exists turns on the link between the state's role and individual autonomy. Facilitative accommodation promotes individual choice, while race matching thwarts it. Race matching is seen as state action because it prohibits adoptive parents' exercise of their racial preferences, while facilitative accommodation is not viewed as state action because it merely facilitates parents' racial preferences. Facilitative accommodation is seen as neutral state deference to private choice, while race matching is perceived as the imposition of orthodoxy through state action.¹⁸⁷

With facilitative accommodation, the state's assent to private choices about family formation, whatever the basis of these choices, blinds us to its active entanglement with racial preferences.¹⁸⁸ Agencies' acquiescence to a wide range of adoptive parent preferences, racial ones among them, is understood as simply a means of providing a service in a way calculated best to meet the needs of the likely consumers. Race matching, in contrast, presents the state as regulator rather than as service provider.¹⁸⁹ Indeed, race matching interferes with the expression and fulfillment of the individual preferences of adoptive parents. Thus, race matching is understood by proponents and critics alike as intervention in, and regulation of, the adoption process, whereas facilitative accommodation is perceived as mere market facilitation and efficient service provision.

For similar reasons, we view supporters of race matching as a special interest, a race-based group with a political agenda, while we view supporters of facilitative accommodation as lacking an organized political agenda, let alone a race-based one. The most visible and effective supporter of race

186. See LUKES, *supra* note 180, at 52 (describing autonomy as a condition in which "an individual's thought and action is his own, and not determined by agencies or causes outside his control").

187. This characterization is adopted by both proponents and critics of transracial adoption. They share the view that race matching is state involvement and, by implication, that facilitative accommodation is not. They differ only about whether race matching is a justifiable or prudent form of state regulation.

188. This analysis suggests that one criticism of a proposal for nonaccommodation is that it unduly "interferes" with the natural functioning of the adoption process. Prohibition of racial preferences would seem more like government regulation than facilitative accommodation, even though there is no logical and defensible distinction between the two.

189. Race matching could be understood as providing a service to adoptive children, but unfortunately the adoption process, in spite of claims to the contrary, is generally understood more through reference to the needs of adoptive parents than of children in need of adoption. See Howe, *supra* note 2, at 140.

matching has been the National Association of Black Social Workers (NABSW). In 1972, the group issued a position paper that has been described as a manifesto in support of race matching.¹⁹⁰ As the group readily admits, the issue is both political and race-based. In fact, the group's success at politicizing the issue has resulted, in part, from its assertions regarding the issue's racial dimensions. NABSW casts the issue in terms of group interests, describing transracial adoption as a threat to the welfare of the black community. Not only does the group make the issue racial, the group is explicitly racial—it is the National Association of *Black* Social Workers.

In contrast, the supporters of facilitative accommodation would likely include prospective adoptive parents who would not comprise an organized political group, much less one with avowedly racial aims or composition. One could not imagine their issuance of a "manifesto" in favor of facilitative accommodation. Nor would they be likely to advocate an explicitly racial position. Their argument in favor of facilitative accommodation would be couched almost wholly in terms of the importance of individual choice, the intimate nature of decisions about family formation, and the overriding significance to children of being wanted by the families that adopt them—all rationales that appear not to bear on race at all.

As individual decisionmaking becomes more salient, the role of the state becomes less noticeable. It is as though we understand the world through reference to an equation in which individual action and state action are inversely related.¹⁹¹ Stated most generally, rules of prohibition are understood as involving the state, but rules of permission are not.¹⁹² The realization of individual preference implies the absence of state orthodoxy and hence of state regulation. We remain alert to the uses and potential abuses of state power, but

190. NABSW Position Paper, *supra* note 9, reprinted in SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*, *supra* note 3, at 50. The position paper described transracial adoption as a form of "genocide." SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*, *supra* note 3, at 52; see *supra* note 9. NABSW has periodically reaffirmed this position. As the President of the NABSW stated in 1985:

We are opposed to transracial adoption as a solution to permanency placement for Black children. We have an ethnic, moral and professional obligation to oppose transracial adoption. We are therefore *legally* justified in our efforts to protect the rights of Black children, Black families, and the Black community. We view the placement of Black children in white homes as a hostile act against our community. It is a blatant form of race and cultural genocide.

Barriers to Adoption: Hearings Before the Senate Comm. on Labor and Human Resources, 99th Cong. 214 (1985) (statement of William T. Merritt, President, NABSW).

191. This is not always true, of course. Invalid state action is not always identified as that which limits individual autonomy. In the areas of politics especially, the Court has struck down laws that expand the scope of at least some citizens' autonomy. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967) (affirming a state court's invalidation of a law that prevented the state from limiting private rights to discriminate in the housing market); *Anderson v. Martin*, 375 U.S. 399, 402 (1964) (invalidating a state law that required ballots to identify the race of candidates because it effectively "encourage[d] . . . voters to discriminate upon the grounds of race").

192. We tend not to see state involvement as long as the state is not mandating that we do something; state involvement is equated with state prohibition. Duncan Kennedy notes, "We don't think of ground rules of permission as ground rules at all, by contrast with ground rules of prohibition." DUNCAN KENNEDY, *SEXY DRESSING ETC.* 90 (1993).

we are disinclined to view individual choice as a form of public power appropriately constrained through constitutional doctrine.

2. *Individualism and Racial Preferences*

Although adoptive parents' preferences are viewed as race-based, the policy that supports them is not. Even as the racial element of the preferences is undeniable, we suppress awareness of the racial nature of the policy of facilitative accommodation. The invisibility of the policy of facilitative accommodation is linked in part to our perception and evaluation of the racial preferences that the policy presupposes. Although we are aware of the racial character of adoptive parents' preferences, we do not understand them as having been generated by legal rules, state policy, and the social practices that state policies legitimate. It is as if racial preferences in adoption come from outside the law. Taking account of them through law is, then, if not the natural thing to do, at least a presumptively legitimate course of action.¹⁹³ Alternatively, if we saw racial preferences as generated by the law, we would scrutinize both the preferences and the legal framework within which they arise. They could not be treated as a preexisting and unalterable feature of the social terrain.

Not only are racial preferences in adoption understood as extralegal, but they are not seen as inherently troublesome or problematic. We take for granted that an individual would want to adopt a child of his own race. We see little reason to question the assumptions, beliefs, and values that underlie such preferences. We are unlikely to characterize an adoptive parent's preference for a white child as a type of racial bias, prejudice, or stereotyping. Because racial preferences in the context of intimacy and family life, including adoptive parents' preferences, seem so quintessentially personal and so much a matter of individual choice, we unself-consciously sever such preferences from the sociohistorical processes of group conflict and racial ideology¹⁹⁴ that have helped to generate them.¹⁹⁵ Adoptive parents' racial preferences, then, are

193. Because same-race preferences are not critiqued, no questions arise as to the wisdom of policies of facilitative accommodation. Conversely, because facilitative accommodation is not seen as a *policy choice*, the contingency of racial preferences is never recognized. Causality is difficult to disentangle. Our attitudes toward same-race preferences probably cause us not to scrutinize facilitative accommodation, and the naturalness of the facilitative accommodation policy provides no impetus to question the nature of our own racial preferences. Indeed, if racial preferences were genuinely unalterable, then there would perhaps be only one sensible policy. Because racial preferences seem so inevitable and unavoidable, a policy that defers to them does not seem like a policy at all.

194. Ironically, attitudes toward matters of intimate interracial affiliation, such as sexual relations, may reside at the core of sociohistorical patterns of racial conflict and inequality. See CALVIN C. HERNTON, *SEX AND RACISM IN AMERICA passim* (1965); CHARLES HERBERT STEMBER, *SEXUAL RACISM: THE EMOTIONAL BARRIER TO AN INTEGRATED SOCIETY passim* (1976).

195. To her credit, Bartholet asks more questions in this regard than most prospective adoptive parents probably do. She wonders about the nature of her racial choices and what they say about her. See BARTHOLET, *supra* note 10, at 169-70.

regarded as expressions of individual choice akin to preferences based on hair color, eye color, or age.¹⁹⁶

The failure to scrutinize the nature of racial preferences is nowhere more evident than in the designation of some children as having "special needs." On a widespread basis, racial minority children are labeled as having "special needs" because, on account of their race, most adoptive parents do not want to adopt them.¹⁹⁷ Black children are therefore classed with blind children, deaf children, children with cerebral palsy, drug-addicted children, and so forth. As one scholar notes: "Black children, by the mere fact of their racial status, are labeled as 'hard-to-place' or 'special needs' children. [These terms] have focused the problem with the child rather than with the system that does not adequately serve their [sic] needs."¹⁹⁸ The preferences of adoptive parents are recast as the "needs" of black children. This designation shifts attention away from the adoptive parents to the children in need of adoption; the desires of parents are recast as the deficiencies of children, deflecting all attention from the nature, motivation, and origin of the choices made by prospective adoptive parents.

The (mis)perceptions produced by our implicit understanding of individual choice and autonomy are self-perpetuating. The failure to see the legally problematic nature of facilitative accommodation removes from the debate any policy option that does not presume the naturalness and immutability of racial preferences. In turn, failure to consider policies that challenge racial preferences in adoption reinforces the preferences' appearance of inevitability, which is part of what insulates them from critique in the first place. Beliefs about individual racial preferences, therefore, exclude from debate the very policies that might undermine them.¹⁹⁹

196. *Cf. Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205-06 (5th Cir. 1977) (analogizing race in the adoption context to hair color, eye color, and other physical attributes).

197. See Alice Bussiere & Ellen C. Segal, *Adoption Assistance for Children with Special Needs*, in ADOPTION LAW AND PRACTICE § 9.01 (Joan Hollinger et al. eds., 1994). As Bussiere and Segal write

A child is considered a child with special needs when the state has determined that there exists with respect to the child a specific factor or condition (such as ethnic background, age, membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that the child cannot be placed with adoptive parents without providing [financial] assistance . . . or medical assistance

Id. § 9.01[1], at 9-3; see also McKenzie, *supra* note 42, at 62 (noting that the definition of children with special needs includes "older children, children of color, children with physical, mental, or emotional problems, and children who are part of a sibling group") Individuals who adopt a child with "special needs" are eligible for subsidy payments that are not available to other adoptive parents in order to encourage such placements. See 42 U.S.C.A. §§ 670-679a (West 1991 & Supp. 1997)

198. Fenton, *supra* note 2, at 46.

199. Moreover, the debate about race and state neutrality in the adoption controversy influences our understandings of race and state neutrality in law and policy more generally. The absence of analysis of facilitative accommodation also shapes the application of legal doctrine and thereby molds our understanding of the concepts of nondiscrimination and state neutrality. In placing particular policy options beyond the realm of debate, the anomaly contributes to shaping the application and interpretation of legal

B. *Definition and Identification of Race-Based Claims*

Race-based claims are those policy positions whose appeal stems from the fact that they further or are perceived to further a particular racial group's interests, either in symbolic or practical terms. This definition of race-based claims is, admittedly, not a rigorous one. It is imprecise and potentially overbroad.²⁰⁰ In part, this reflects the subtle way in which race shapes contemporary American politics and debate. One of the assumptions of this Article is that it is not always easy to identify race-based claims. Most policies that are forthrightly premised on race are race-based claims,²⁰¹ but many policies that reveal no hint of race on their face or provide for symmetrical race-based treatment are also race-based claims.

Race matching and facilitative accommodation are race-based claims in two respects. First, they further the realization of black and white adoptive

principles such as the antidiscrimination norm. If legislatures and courts accept the argument that race matching constitutes prohibited racial discrimination and announce that adoption should be colorblind, the resulting antidiscrimination norm would implicitly sanction policies that forthrightly accommodate the racial preferences of adoptive parents. This reconstruction of the meaning of antidiscrimination would reinforce a particular consciousness regarding the meaning of state neutrality with respect to race. Consciousness is important because policy debate is shaped by our understanding of the meaning of core principles such as antidiscrimination. Legal doctrine's prohibition of state-mandated race matching, as evidence of race neutrality by the state, would reinforce the tacit understanding of race neutrality as deference to "private" racial prerogatives.

This particular conception of the meaning of race neutrality in adoption is especially evident in the debate about and understanding of the Multiethnic Placement Act. As initially enacted, the Act explicitly allowed race to be considered for purposes of race matching. *See* 42 U.S.C.A. § 5115a(a)(2) (West 1995) (repealed 1996) (stating that adoption agencies receiving federal funding "may consider the . . . racial background of the child and the capacity of the . . . adoptive parents to meet the needs of a child of this background as one of a number of factors"). There was much criticism of this version of the Act because it represented the first federal endorsement of race matching in adoption. *See, e.g.,* Randall L. Kennedy, *Yes: Race-Matching Is Horrendous*, A.B.A. J., Apr. 1995, at 44. Partly in response to such criticism, the Act was amended so as to prohibit all manner of race matching by adoption agencies that receive federal funding. The amended Act was unflinchingly discussed as a means of ending racial discrimination in the adoption process. *See, e.g.,* Douglas R. Esten, *Transracial Adoption and the Multiethnic Placement Act of 1994*, 68 TEMP. L. REV. 1941 (1995); Daphne Nell Wiggins, Note, *The Multiethnic Placement Act of 1994: Background, Purpose, Interpretations and Effects of Legislation Regarding Transracial Adoption*, 20 LAW & PSYCHOL. REV. 275 (1996). Although the revised Act could be read to prohibit facilitative accommodation, it is clear that the Act's sponsors did not intend it to proscribe policies relating to the facilitative accommodation of adoptive parents' racial preferences. The amended Act states: "A person or government that is involved in adoption . . . placements may not . . . delay or deny the placement of a child . . . on the basis of the race, color, or national origin of . . . the child . . ." 42 U.S.C.A. § 1996b(1) (West Supp. 1997); *see also id.* § 671(a)(18) (containing similar language with respect to state eligibility for federal adoption assistance). This is precisely what many adoptive parents do; adoptive parents, as persons involved in adoption, deny the placement of children solely on the basis of race.

200. Given the likelihood that support for any policy will differ along racial lines, for example, might not any government policy be classified as a race-based claim?

201. Affirmative action programs giving preferences to racial minorities, for instance, are undeniably race-based claims. By itself, this characteristic does not counsel for or against the implementation of affirmative action programs. Race-based claims may embody policies that are desirable or undesirable for completely independent reasons. Designating a political position or policy proposal as race-based is a descriptive rather than evaluative label. For an overview of arguments relating to affirmative action, see generally DEBATING AFFIRMATIVE ACTION (Nicolaus Mills ed., 1994); and RACIAL PREFERENCE AND RACIAL JUSTICE (Russell Nieli ed., 1991). For a defense of affirmative action, see Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

parents' desires, respectively. Second, they promote racial group status through the placement of black and white children.²⁰² Exercising parental authority over a child of another race is an assertion of group power. Prohibiting others from exercising authority over children of one's own race is also an expression of group power. Both whites and blacks pursue this sort of symbolic group power, albeit through different means. Whites as a group and white parents individually gain the most under facilitative accommodation;²⁰³ blacks as a group and black parents individually gain the most under race matching.

There are three types of adoptive placement schemes: random racial placement, race matching, and facilitative accommodation. Under a random racial placement program, neither the state nor the adoptive parent could specify the race of the child to be adopted. Prospective parents' access to adoptive children would be based on adoption agencies' assessments of parental suitability and fitness to adopt, which, in practice, correlates with the parents' socioeconomic status. Because of the aggregate differences in the socioeconomic status of blacks and whites, white parents, as a group, would be better situated in the adoption queue than black parents, as a group. But neither blacks nor whites would have any assurance of being matched with a child of the same race. Thus, both groups would confront the possible frustration of their race-based desires for an adoptive child. A random placement policy, therefore, would not reflect the race-based claims of either blacks or whites.

Under race matching, black adoptive parents are granted exclusive access to black children. Because the number of black children available for adoption exceeds the number of blacks waiting to adopt, prospective black adoptive parents are able to choose from a wide variety of black children without competition from whites. Race matching allows white parents access only to white children. Given the racial demographics of adoption, this means that many white adoptive parents are either unable to adopt at all or have to go to great lengths to do so.

Facilitative accommodation, in contrast, ensures white parents' nearly exclusive access to white children, while also allowing them access to black children. Because most potential adoptive parents are white and white adoptive parents, as a group, are better situated to adopt than black adoptive parents, white parents would be the prime candidates for placement of white children.²⁰⁴ Blacks, meanwhile, would compete with whites for black children but would have no genuine access to white children (because of the

202. See Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995) (discussing the role of familial racial purity in racial group conflict and power dynamics).

203. See Howe, *supra* note 2, at 161-64.

204. See Perry, *supra* note 16, at 104 (observing that even without race matching adoption would not become colorblind because white parents would still maintain nearly exclusive access to white children and would be able to decline to adopt black children).

relative lack of white children and the socioeconomic disparities between whites and blacks).²⁰⁵ Only through a facilitative accommodation regime, therefore, would whites have nearly exclusive access to white children *and* access to black children.²⁰⁶ In fact, under a pure facilitative accommodation regime, white parents, as a group, would be better situated than black parents, as a group, to adopt black children.

The benefits of race matching and facilitative accommodation not only accrue to individual black and white parents, respectively, but also to blacks and whites as groups engaged in symbolic competition and group status struggle.²⁰⁷ "Control" of the children of one's own racial group is a measure of group status and power, as is "control" over the children of another racial group. Both whites and blacks strive for this type of symbolic group status and power. But the racial demographics of adoption mean that they are likely to pursue different strategies and also to realize different degrees of success. Whites are able, through facilitative accommodation, to control both their "own" children and some portion of black children. Blacks, in contrast, seem to have little prospect of parenting white children at all; consequently, their strategy focuses on not allowing black children to be parented by whites. Black children who are parented by whites are perceived as a "loss" to the black community. Race matching, on the other hand, confers symbolic benefits on blacks relative to whites in that it assures that all black children placed for adoption will end up with black adoptive parents, an outcome no other adoption policy would produce.²⁰⁸ Race matching presumes the importance of racial commonality for black children and parents, such that race matching is thought to provide a symbolic benefit to the black community as a whole.²⁰⁹

205. Whether through facilitative accommodation or race matching, black parents are likely to be provided with black children. Black adoptive parents might be indifferent between facilitative accommodation and race matching. Under either policy, they will adopt black children and would not be forced to adopt a white child. Only through race matching would black parents have exclusive access to black children.

206. See Perry, *supra* note 16, at 104. Perry suggests that "the transracial adoption debate is really about . . . the right of white people to parent whichever children they choose." *Id.* at 107.

207. This analysis assumes, without attempting to prove, that race politics is laden with symbolism and that racial group conflict is often carried out through symbolic means. *Cf. id.* at 65-77 (describing whites' potential subordination of blacks by adopting black children); Roberts, *supra* note 202, at 257-68 (noting the symbolic and practical role of white parental preferences in the maintenance of racial inequality); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1436-44 (1991) (recounting the historical use of control of the black family as an instrument of racial oppression). See generally J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2321-42 (1997) (arguing that groups compete for social status and prestige through symbolic politics).

208. See Perry, *supra* note 16, at 53.

209. See Howard, *supra* note 2, at 530-45 (noting the benefits that accrue to black children and the black community from same-race placement); Perry, *supra* note 16, at 68-72 (noting the importance of same-race placement to the black community).

Although both white and black race-based claims are present in the adoption debate, they are not similarly perceived. The white race-based claim is rarely understood to be a race-based claim at all while the black race-based claim is thought of, by its supporters and critics alike, in terms of race.²¹⁰ Their different forms should not, however, be allowed to obscure their common function and purpose. As we shall see, the differing perceptions of the race-based claims of blacks and whites have racial implications even though biased perceptions may not be motivated by racial prejudice.²¹¹ The fact that we do not perceive facilitative accommodation as a race-based claim contributes to a widely accepted interpretation of the race-and-adoption controversy.

Narratives²¹² of the race-and-adoption controversy in the news media portray one of two related images. First, many stories of race and adoption involve a family, usually white, that seeks to adopt a child of another race, usually a black child.²¹³ Such stories typically recount the adoptive family's struggles to overcome the barriers placed in its path by a racist adoption bureaucracy and, to a lesser extent, by societal attitudes.²¹⁴ The family struggles valiantly to transcend the racist thinking embedded in an adoption system that opposes transracial adoption. Policies of race matching threaten to prohibit the white family from adopting a black child and thereby to consign black children to foster care.

Contrary to what the abundance of news coverage may suggest, this type of story is highlighted in part because it is so unusual. It is news. White

210. Bartholet, for example, identifies the social workers' position with a separatist ideology. See Bartholet, *supra* note 10, at 1248. She does not identify the racial preferences of white adoptive parents with any "ideology." The race-based claims of white adoptive parents are simply an expression of individual preferences or perhaps, less charitably, racial bias. The black social workers have a "separatist agenda," but no such "agenda" is imputed to the thousands of race-conscious white adoptive parents. Their racial attitudes are simply the (unfortunate) state of the world, bias that is individual and diffuse (in spite of its prevalence). As a result of her different interpretations of their nature, Bartholet pronounces one form of race-based claim, but not the other, as out of step with American values and sensibilities. One becomes a focus of her legal critique while the other nearly disappears as a social phenomenon worthy of analysis. Ironically, the specific race-consciousness that is more influential in shaping the outcomes of adoption is the one that Bartholet ignores.

211. I use the term "biased" here in a purely descriptive sense and intend no moral or subjective evaluation of the nature of the bias. For a discussion of a wide range of cognitive biases, see RICHARD NISBET & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980).

212. Narratives are important because they influence public consciousness and popular perceptions as well as legal debate and doctrine. For one of the best explanations and demonstrations of the importance of narrative, see Richard Delgado, *Storytelling for Oppositonists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989). For other examples of the significance of narrative to societal understandings, see DERRICK BELL, *AND WE ARE NOT SAVED* (1987); and RICHARD DELGADO, *RODRIGO'S CHRONICLES* (1995).

213. See, e.g., *Kids Need Good Adoptive Families of Whatever Color*, *supra* note 4; Lockman, *supra* note 4; Pamela P. Novotny, *Children Paying Price of Adoption Politics*, CHI. TRIB., Apr. 30, 1995, at 6; Sue Anne Pressley, *Texas Interracial Adoption Case Reflects National Debate: Family Waged a Legal Fight for 2 Black Youngsters*, WASH. POST, Jan. 2, 1997, at A1; Edward Robinson, *Judge Lets Black Woman Keep Girl During Adoption Battle*, PHILA. INQUIRER, Sept. 23, 1995, at B1.

214. See, e.g., Rezendes, *supra* note 4.

parents who want to adopt a black child are perceptually foregrounded.²¹⁵ In contrast, the stories of the multitudes of white parents who desire only a white child are not seen as presenting a racial story at all. Stories about white families in pursuit of white children typically do not mention race, as though racial considerations arise only when parents attempt to adopt across race lines.

The second story line offers no hero or villain. These articles probe the issue of whether transracial adoption “works.”²¹⁶ They focus on the outcomes of transracial adoption and ask how transracially adopted children fare in an atypical family situation. They look to see whether transracially adopted children are well-adjusted. They examine transracial adoptees’ own struggles regarding their racial identities, their attempts to establish connections with members of their own race, and their efforts not to feel estranged or isolated from the culture and community of their racial group. These stories may also focus on whether parents are able to parent a child of a different background properly and what strategies a parent might use to promote the development of a child of another race. These stories proceed from the assumption that transracial adoption is fraught with difficulty.

Neither of these narratives identifies adoptive parents’ racial preferences and facilitative accommodation policies as matters of racial inequality. In these accounts, white adoptive parents are presented as potential saviors²¹⁷ and are not implicated for creating any manner of racial inequality. We see those individuals who seek to adopt transracially, but we do not see the vast majority of white adoptive parents who, if pressed, would categorically refuse to adopt black children.

The resultant images of black adoptive parents and white adoptive parents are starkly different. White adoptive parents appear to have embraced a nonracialist self-conception while black adoptive parents appear nowhere near as racially open. We hear few if any stories of black parents adopting across racial lines.²¹⁸ That this absence results largely from the demographics of adoptive parents and children does not diminish the power of its imagery or

215. See Weiner, *supra* note 176, at 81-82 (demonstrating that attention and causal attributes are elicited by unusual or unexpected events).

216. See, e.g., Ronald K. Fitten, *Transracial Adoption—Mixing Color and Family—Can We Successfully Integrate Issues of Race and Culture with Issues of Child Rearing? A New Law Says We Must Try*, SEATTLE TIMES, Oct. 22, 1995, at A1; Rabin, *supra* note 4; Paul Shepard, *Transracial Adoption Debate Comes of Age: First Blended Kids Reach Adulthood*, NEW ORLEANS TIMES-PICAYUNE, Sept. 24, 1995, at A12; Karen Uhlenhuth, *Adoption and Race: Do Children Suffer or Benefit from Being Placed with Parents of a Different Color?*, KAN. CITY STAR, Jan. 22, 1995, at H1; Lena Williams, *Should Race Figure in Adoptions? At Stake Can Be a Child’s Cultural Identity, Esteem*, ST. LOUIS POST-DISPATCH, Mar. 29, 1995, at 4E.

217. See, e.g., Pressley, *supra* note 213.

218. See Townsend, *supra* note 2, at 181 (noting that, in spite of the rhetoric regarding the wonderful symbolism of transracial families, “no one suggests Black parents adopt White babies to create the proverbial melting pot”).

symbolism. Blacks are depicted as espousing nationalist race politics, elevating ideology above the welfare of children.²¹⁹

The different images of blacks and whites, and of race-matching supporters and transracial adoption proponents, produce a dynamic that virtually guarantees a move away from race matching. Race matching is seen as counterproductive, if not racist. Transracial adoption is seen as a noble effort to transcend race, to surmount the racial barriers that have always divided us. That children will benefit by being adopted rather than by remaining in foster care is a great impetus to embracing transracial adoption. That innocent children would be the victims of race matching fuels rejection of it.

The move away from race matching does not decrease the prevalence of facilitative accommodation. As the power of adoption agency personnel to decide placements on the basis of race diminishes, the power of individual adoptive parents to consider race expands. White parents' propensity to choose white children perpetuates racial disparities comparable to those that race matching has been derided for accentuating and transracial adoption has been applauded for redressing. Yet the persistence of the problem does not promote an examination of adoptive parents' preferences, which remain neatly offstage, as if irrelevant to the drama that attracts everyone's attention.

The one possibility that does not arise in this scenario is that of placing adoptive parent preferences at the center of debate. Facilitative accommodation policy allows such preferences to structure the racially disparate outcomes of the adoption process. The differing likelihood of adoption on the basis of race becomes an important instance of racial inequality. This racial inequality is produced by the ostensibly race-neutral policy of facilitative accommodation in conjunction with the exercise of the racial preferences of adoptive parents. This outcome might result even in the absence of explicit facilitative accommodation policies, however. The procedural discrimination of facilitative accommodation promotes the substantive inequality of disparate adoption outcomes due to race, but the substantive outcome does not arise wholly from the procedural defect. The inequality comes about in major part as a result of the individual attitudes of those who seek to adopt children.

IV. MODELING RACE POLITICS

In this part, I generalize the analysis put forth in Part III. This approach is premised on the assumption that adoption policy and debate, as one instance of our nation's seemingly interminable and pervasive race problem, embodies a characteristic pattern of contemporary race politics and of the mechanisms of racial inequality. I propose that facilitative accommodation and race

219. See, e.g., *All in the Family*, NEW REPUBLIC, Jan. 24, 1994, at 6 (criticizing harshly the stance of the NABSW).

matching are typical of the race-based claims of whites and blacks, respectively. The race-based claims of whites are typically colorblind while those of blacks are often race-conscious. The race-and-adoption controversy thus suggests a model of race politics in which race-based claims predominate, but in which the race-based claims of whites are often not perceived as being race-based. Our asymmetrical identification of race-based claims produces a cycle of race politics in which the race-based claims of blacks appear ever more illegitimate for transgressing the colorblind ideal, while the race-based, but ostensibly colorblind, claims of whites appear ever more morally commendable and politically legitimate. This model of race politics shows how and why, in the post-Jim Crow era, ostensibly race-neutral legislation may in fact predictably produce racial inequality.²²⁰

Because of the differential success of the race-based claims of blacks and whites, policies that embody a vision of formal equality may promote substantive inequality. Policies premised on the notion of formal equality typically take for granted background social processes or preexisting baselines of resource distribution and allow the racial inequality that results from them. In this part, I recount the contemporary and historical processes that culminate in the different forms of the race-based claims of blacks and whites. I then describe the model of contemporary race politics produced by the intertwining of the race-based claims of blacks and whites with the dominant norms of American law and politics. The resulting cycle of race and politics necessarily produces racial inequality.

A. *Contemporary Basis of Race-Based Claims*

Race is a primary element of self-definition for both blacks and whites. Race-based claims are prevalent in contemporary American society for two reasons.²²¹ First, the concrete economic and political concerns²²² that comprise individual interests run along lines of race.²²³ Second, individuals act in a manner that reflects or furthers the status and well-being of their racial

220. This theme has been extensively discussed in the literature produced by critical race theorists. See, e.g., Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Lawrence, *supra* note 81.

221. See, e.g., BELL, *supra* note 212 (using allegorical narratives to assess the economic and political issues affecting blacks since the founding of the United States); Balkin, *supra* note 207 (discussing group conflicts over social status and structure in defining America's cultural debates).

222. The intertwining of race and political interest should not be surprising, given that race as we know it was created and manipulated in furtherance of political and economic ends. See GEORGE FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* (1979); Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95 (1990).

223. Cf. MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH* (1996) (analyzing the sources and implications of the substantial wealth disparity between blacks and whites of all socioeconomic levels).

group *as a group*.²²⁴ In the first case, individual interests are aggregated into racial group interests because of the structuring of American society along race lines. In the second case, racial group interests are reflected in individual behavior. Consequently, racial group interests are understood, often implicitly, as individual interests by virtue of one's stake, both symbolic and practical, in the status and well-being of one's racial group.²²⁵

Socioeconomic stratification,²²⁶ residential segregation,²²⁷ and the differential racial impact of particular laws all contribute to the confluence of racial and political interest. Even if individuals act purely on self-interest, we would still see members of racial groups acting as though in concert because their individual interests are structured along lines of race.²²⁸ This is more apparent with blacks than whites because whites' political behavior evidences more differentiation along socioeconomic lines than that of blacks.²²⁹ Nonetheless, racial hierarchy means that individual interests usually run along race lines.

Individuals understand themselves as having a stake in the well-being of their racial group such that they promote policies to bolster or protect racial group status, separate from such policies' effects on concrete individual interests.²³⁰ Individual interests are thus defined as a function of group interests.²³¹ The fact of race itself creates a separate political interest. Individuals might be said to have an interest in the status, reputation, power, or standing of their racial group. As a member of a group, one gains (and suffers) vicariously from changes in the status of the group. This interest exists apart from, and in addition to, the concrete personal interests that also contribute to racial group claims.

224. See generally DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR, RACIAL POLITICS AND DEMOCRATIC IDEALS* (1996) (discussing the characteristics of self-interest and group-unanimity in racial public opinion polling and research).

225. Cf. MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* 77-88 (1994) (developing a model linking blacks' individual interests with their perceptions of groups interests).

226. See GERALD DAVID JAYNES & ROBIN M. WILLIAMS, JR., *A COMMON DESTINY BLACKS AND AMERICAN SOCIETY* 35-45 (1989) (citing socioeconomic statistics showing disparities between blacks and whites).

227. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID SEGREGATION AND THE MAKING OF THE UNDERCLASS* 221-23 (1993) (describing the substantial degree of residential segregation in American society).

228. See CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS THE REPRESENTATION OF AFRICAN-AMERICANS IN CONGRESS* 7-10 (1995) (describing the factors that cause blacks' individual interests to run along race lines).

229. See *id.* at 193 (citing statistics suggesting that white voters do not vote along race lines)

230. See KINDER & SANDERS, *supra* note 224, at 81-91 (suggesting that collective and group interests are at the basis of black public opinion rather than self-interest); cf. EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 14 (1989) (documenting how race has become perhaps the defining issue of American politics)

231. See DAWSON, *supra* note 225, at 77-88. For two of the best analyses of how whites come to define their interests, see DAVID ROEDIGER, *THE WAGES OF WHITENESS* (1994); and David Roediger, *White Workers, New Democrats, and Affirmative Action*, in *THE HOUSE THAT RACE BUILT BLACK AMERICANS*, U.S. TERRAIN 48 (Wahneema Lubiano ed., 1996)

Underlying this phenomenon is the social psychological process of social identity formation.²³² Social identity theory posits that an individual's self-regard and sense of well-being are affected in part by the status and well-being of the group of which the individual feels himself a member.²³³ Thus, individuals will act in ways that promote the well-being of their group.²³⁴ This tendency is likely to be especially powerful with respect to race because race is such a dominant social category.²³⁵ Once again, this tendency is more obvious with blacks than whites because blacks are more likely to formulate forthrightly their own interests in terms of the interests of blacks as a group.²³⁶

Whites' political stances may reflect the dynamics of real and symbolic intergroup conflict²³⁷ rather than personal prejudice.²³⁸ White voting behavior, for example, reveals the way in which social identity and perceptions of relative group status affect individual political behavior. White voters are much more likely now than before the civil rights movement to vote for black candidates.²³⁹ White voters in several majority-white cities, for example, have elected black mayors in recent years.²⁴⁰ Yet racial group competition does inhibit white support of black politicians. Whites are less likely, for example, to vote for black candidates in cities with substantial black populations.²⁴¹ In such cases, symbolic group conflict influences individual political preferences. As one scholar puts it, "An individual's attitudes toward other groups are formed by perceptions of the threat that the other groups pose for the individual's own group, even though the individual may not feel personally

232. See HENRI TAJFEL, *HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY* (1981); Henri Tajfel & James L. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS 7* (Stephen Worchel & William G. Austin eds., 1986).

233. See Tajfel & Turner, *supra* note 232, at 15-18.

234. See *id.* at 8-13 (describing individual identity as a function of group identity).

235. See Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, in *FEMINISM AND HISTORY* 183 (Joan Wallach Scott ed., 1996) (describing how the category of race subsumes and gives meaning to other social categories, including gender).

236. See DAWSON, *supra* note 225, at 10-11 (describing the importance of racial group status for black Americans).

237. For a description of the distinction between real and symbolic group conflict, see Jim Sidanius & Felicia Pratto, *The Inevitability of Oppression and the Dynamics of Social Dominance*, in *PREJUDICE, POLITICS AND THE AMERICAN DILEMMA* 173, 181 (Paul Sniderman et al. eds., 1993).

238. Undeniably, racial prejudice has declined remarkably during the past half century. See HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA* 8-14 (1985) (describing the historical change in racial attitudes).

239. See SWAIN, *supra* note 228, at 208 (noting that from 1970 to 1990, 24 black Representatives were elected to Congress from districts that were less than 65% black, including eight Representatives from majority-white districts). Some whites nevertheless remain disinclined to support a black candidate. See KATHERINE TATE, *FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS 3* (1993).

240. See Richard H. Pildes, *The Politics of Race*, 108 *HARV. L. REV.* 1359, 1366 n.41 (1995) (book review).

241. See *id.* at 1368-69.

threatened."²⁴² White voter behavior, then, is not so much a function of prejudice or racial bias, as of group politics and symbolic group conflict.

Group-based behavior can also be prompted by the symbolic manipulation of racial imagery. During the 1970s, the Republican party managed to capture much of the southern vote by linking particular social policies with race.²⁴³ More recently, attacks on affirmative action and immigration have gained force through identification of those policies with low-status racial groups.²⁴⁴ The campaign against affirmative action in California, for example, created an image of affirmative action beneficiaries as black, even though white women have arguably benefited more from affirmative action than blacks. White resentment of affirmative action could not have been mobilized effectively if it were understood as resistance to the gains of white women rather than those of blacks and other minorities.²⁴⁵ Whites may not be consciously aware of the race-based nature of their political behavior, but the influence of racial identity and symbolic group conflict is undeniable.

The two factors that promote race-based claims²⁴⁶ are not easily separable. Each reinforces the other. The fact that objective individual interests run along lines of race encourages people to conceptualize their political interests in terms of race. Racial group interests could serve as a proxy for individual interests.²⁴⁷ The greater people's tendency to rely on the proxy of racial group interests, the more likely their behavior will be to promote political outcomes that tie individual interests to race, making it ever more rational to rely on the group interest proxy. By defining their interests in terms of race, people act in ways that strengthen the link between interests and race. Disentangling these two factors is not as important as recognizing their existence, their conceptual distinctiveness, and their relationship.

242. DAWSON, *supra* note 225, at 62.

243. See THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 81 (1991); see also TATE, *supra* note 239, at 22 (noting "the Republican party's easy use and manipulation of civil rights and race as campaign issues")

244. See R. Richard Banks, *The Power of Racial Imagery*, S.F. CHRON., Apr. 3, 1995, at A19

245. Cf. Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994) (arguing that Americans equate racial justice and colorblindness, with the result that race is seen as an illegitimate basis for affirmative action programs). White resistance to the group-based claims of blacks is frequently explained as a preference for individual rather than group-based rights. See PAUL SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 177-78 (1993). In this view, the political stances of whites are really not race-based so much as they are principle-based. If this were true, we would expect whites to be equally averse to group claims no matter on whose behalf the claims were asserted. In fact, however, whites are less favorably disposed to group-based claims when offered in the interests of blacks than when offered on behalf of other groups, such as women. See Culp, *supra*, at 169.

246. See text accompanying notes 222-224.

247. Political scientist Michael Dawson describes this process among African Americans as the "black utility heuristic." DAWSON, *supra* note 225, at 10. For a description of this process among whites, see SCHUMAN ET AL., *supra* note 238, at 179 ("Once issues are defined in terms of political conflict between racial groups, political threat does become 'personal.'")

B. *Historical Origins of Contemporary Race-Based Claims*

The different forms of the contemporary race-based claims of blacks and whites are a historically specific product of American political and legal culture. The changing political and legal context of the past half century has produced black and white race-based claims that take dramatically different forms. For blacks and whites alike, the forms of their race-based claims reflect the interplay of their historically formed collective racial identities and their differing positions in American economic, social, and political structures.

The divergence in contemporary forms of race-based claims can be traced to the social and cultural changes that began in the early- to mid-twentieth century. During this time, attitudes toward race shifted markedly. The notion of innate racial differences fell into disrepute. The idea of racism was born.²⁴⁸ Racial divisions in American society became a subject of scrutiny rather than an unquestioned given. Issues of racial injustice moved to the forefront of the American political agenda. In the aftermath of World War II and during the Cold War, events that highlighted the contradiction between America's racial practices and its democratic ideals, we began to examine our racial character.²⁴⁹

American legal culture embraced a notion of colorblind individualism.²⁵⁰ The doctrine of equal protection would no longer tolerate racial distinctions in the law. Ostensibly race-blind law would soon become a constitutional necessity, as well as a moral ideal.²⁵¹ This political process reflected the ascendant yet embattled view that race should not be a basis of political mobilization. The widely embraced ideal is that politics should not be an arena of racial group conflict.²⁵² Although race matters a great deal in politics, most people believe that it should not. Political agendas articulated in order to advance the welfare of a particular racial group are frowned upon as racially partisan and divisive. We believe both that racial groups, ideally, should not enter politics as groups and that claims put forth on behalf of racial groups are undesirable,²⁵³ atypical rather than usual aspects of the political process.²⁵⁴

248. See ROBERT MILES, *RACISM* 42-43 (1989) (noting that the word "racism" first appeared in 1938).

249. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61 (1988).

250. See Perry, *supra* note 16, at 43.

251. Cf. R. Richard Banks, *Nondiscriminatory Perpetuation of Racial Subordination*, 76 *B.U. L. REV.* 669 (1996) (book review) (discussing colorblindness as a moral ideal); Lino Graglia, *Racial Preferences, Quotas, and the Civil Rights Act of 1991*, 41 *DEPAUL L. REV.* 1117, 1118 (1992) (arguing that race-consciousness is immoral).

252. See NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUITY AND PUBLIC POLICY* 1-32 (1975) (describing the American ethnic pattern as embodying the belief that race and ethnicity may matter in private life but should not be a basis of political rights).

253. Although the general sentiment is undeniably averse to group rights, there are many supporters of the notion. See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989).

254. Relatedly, our legal culture values neutrality. The very idea of the rule of law embodies the notion of the law as the neutral arbiter of conflict. The antidiscrimination principle prohibits the disparate treatment of individuals on the basis of their racial group membership. The discriminatory intent standard

The civil rights movement capitalized on the ascendance of the moral vision of colorblindness by wrapping appeals for racial transformation in the cloak of the colorblind ideal. The triumph of the civil rights movement, however, affected whites and blacks differently. Race-consciousness became less salient for whites and more salient for blacks. Whereas the Holocaust, World War II, and the civil rights movement caused whites outwardly to abjure race awareness, the unprecedented success of the race-based civil rights movement caused blacks unabashedly to embrace race as a source of identity and political mobilization.

In part as a result of these changes, blacks and whites understand their racial identity differently and have different degrees of self-conscious racial identity. Whites often believe that blacks are obsessed with race and that they filter everything through its prism. They are right, insofar as the observation reflects an implicit comparison with whites' (lack of) self-conscious racial identity. Blacks often believe that whites are unwilling to notice their own race. They too are right.²⁵⁵ Black racial identity is self-conscious. White racial identity is transparent.²⁵⁶ Blacks experience themselves as black in a way that whites do not experience themselves as white.²⁵⁷ Neither way of being is right or wrong or necessarily better or worse. But the ways are different, and it is that difference that partially accounts for the different forms of race-based claims.

Blacks' race-based claims are usually formal, organized, and explicit. Their racial presuppositions are clearly articulated. Their goals are usually announced through groups formed explicitly to push race-based claims or through racial representatives.²⁵⁸ Whites also act in a race-based manner, but their race-

of equal protection doctrine is the means of identifying legislative or state action that unfairly disadvantages individuals on the basis of group membership. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). For a description of the discriminatory intent standard, see Kennedy, *supra* note 81, at 1404-05.

255. See Barbara J. Flagg, "Was Blind, But Now I See": *White Race-Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (discussing the need to recognize white racial identity as one of many possible identities, rather than as an unspoken racial norm).

256. See Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995).

257. These differences in white and black identity are the result of the ways in which race has and has not impinged upon individual consciousness throughout history. Blacks developed more of a self-conscious racial identity than did whites because race limited blacks. Race created a caste-like social structure that conferred upon them their identity and status. No amount of individual initiative or social mobility could diminish the extent to which they would be defined by their race. The old joke asking, in one variation, "What do you call a black man with a Ph.D.?" expresses this truth. For whites, race created no limitation that forced awareness of their own race upon them. Although their experience was every bit as racialized as that of blacks, because race offered them benefits rather than constraints, whites were not likely to become self-conscious of it. While race was a ceiling for blacks, it provided a platform for whites.

258. Support for these assertions can be found with even the most cursory historical review. During the 1960s, for example, black nationalists' claims were wedded to notions of the importance of black autonomy and black control of black community institutions. See TATE, *supra* note 239, at 152. See generally STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER* (1967). Race-based claims were not, of course, confined to blacks of a particular political inclination; Martin Luther King, Jr., for example, also articulated race-based claims.

based claims are rarely expressed in racial terms and are not articulated as means of advancing whites' racial interests.²⁵⁹ Instead, they are often ostensibly premised on values and goals unrelated to race. Individualism, autonomy, limited government, states' rights—all have been vehicles for the expression of white race-based claims.²⁶⁰

The recent rise of the moral ideal of colorblindness has thus combined with blacks' and whites' unchanging structural positions to produce divergent types of race-based claims. In contemporary society, blacks' race-based claims are typically explicit whereas whites' race-based claims are most often covert and ostensibly race-blind. Whites are able to effectuate their race-based claims through ostensibly neutral rules.²⁶¹ White racial goals are implemented through state mechanisms but not in a way that underscores the role of state action; white race-based claims may even rely on an apparent withdrawal of government presence.²⁶²

Group claims can be effectively cloaked within, and concealed by, assertions of the importance of individual liberty because liberty *is* an important American value. Liberty-based arguments are not simply a pretext for race-based positions. Many assertions of the importance of personal autonomy do not implicate race or are not about race exclusively. Yet, in a society in which race remains perhaps the deepest and most enduring fracture, race frequently animates debates about liberty and autonomy. Whites appear simply to favor individual initiative, personal autonomy, and other values rooted in political liberalism.²⁶³ They are, by all indications, content with the natural functioning of the market, the idiosyncratic nature of private preferences, the enforcement of contractual rights, and the delegation of power to localized rather than centralized control.²⁶⁴ Blacks, in contrast, are always calling upon the government to *do* something.²⁶⁵ They want the state to

259. For example, the southern strategy of the Republican party tacitly linked white racial identity to a concrete political agenda. See EDSALL & EDSALL, *supra* note 243, at 74-98.

260. See generally A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996) (discussing the history of the legal process with respect to race).

261. See Richard Delgado, *Rodrigo's Fourth Chronicle*, 45 STAN. L. REV. 1133, 1153-54 (1993).

262. Cf. Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 317-19 (1977) (noting the legislative repeal of particular rights in several states when it became clear that the Reconstruction Amendments required that blacks as well as whites be protected by whatever rights were recognized).

263. See Paul Sniderman et al., *The Politics of the American Dilemma: Issue Pluralism*, in PREJUDICE, POLITICS AND THE AMERICAN DILEMMA, *supra* note 237, at 212, 232-36 (emphasizing the extent to which white Americans promote policies based on aspects of the American creed, including individualism, autonomy, and initiative).

264. See Crenshaw, *supra* note 220, *passim*.

265. Cf. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (describing race-based affirmative action programs as "racial paternalism" that "stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences").

assert its power by “intervening” in the functioning of the free market, “disrupting” the division of power characteristic of federalism,²⁶⁶ and even attempting to inhibit the “natural” expression of “individual” preferences.²⁶⁷ Blacks are less able to effectuate covert race-based claims because of their relative economic powerlessness, social isolation, and political insularity.²⁶⁸

C. *Modeling Race Politics*

The different forms in which the race-based claims of blacks and whites are likely to be articulated generate a predictable dynamic of race politics, a process that is self-reinforcing across time. Because blacks’ claims are explicitly race-based and so self-evidently at odds with the colorblind ideal, they are regarded as presumptively illegitimate. Because whites’ covert race-based claims appear to comport with the colorblind ideal, they are regarded as presumptively legitimate and are more likely to be successful than are blacks’ race-based claims. Whites are successful in pursuing their race-based claims without appearing to be racial at all. Blacks’ race-based claims are less successful for being at odds with the colorblind ideal of American law and politics. But even when blacks’ race-based claims do prevail, their success, which is perceived as having resulted from the assertion of a racial demand, undermines the possibility of future success by fueling white resentment and reinforcing blacks’ embrace of race as a political identity.

Black political action must constantly contend with charges of inappropriate racialism. The white community demands that blacks’ race-based claims advocate inclusion and colorblindness rather than race-based treatment. Yet, as a result of blacks’ self-consciously racial identity, it is only through organization on the basis of race that blacks are able both to gain support among their own group and to exert effective pressure for political change. The precondition of their ability to put forth a claim (i.e., organizing on the basis of race) simultaneously undermines the claim’s effectiveness. Blacks recognize that outward racialism does not give them the moral high ground, but many hesitate to endorse colorblind politics because they do not believe it will be effective, either due to their history of success with explicitly race-based claims or their social, economic, and political status. The prevailing view that politics should be nonracial dooms blacks’ explicitly racist appeals to limited and diminishing success over time, as each attempt to effectuate an openly race-based claim fuels the resistance and resentment of whites who thwart such claims.

266. See *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (arguing that proposed civil rights legislation would “make Congress take the place of the State legislatures and . . . supersede them”).

267. This is perhaps how many people would characterize my argument in this Article

268. Cf. Sniderman et al., *supra* note 263 (assuming that whites adhere to neutral values while blacks push a racial agenda).

When blacks are successful in their race-based claims, they are perceived as having pursued a *racial* demand. Every formulation of a political claim in terms of race, whether successful or not, heightens whites' perception of the race-based nature of blacks' political activism and deepens blacks' own sense of the significance of race as a political identity. This reinforces whites' negative valuation of blacks' political activity and heightens the salience of blacks' racial identity for blacks and whites alike. White resentment erodes political support for black initiatives,²⁶⁹ and this in turn may cause some blacks to redouble their efforts at racial organization. This deepens white resentment, propelling blacks into ever greater race-consciousness. To counter the presumption of illegitimacy, black political activism must divert much energy to the process of justification, among both blacks and whites. Over time, blacks may become less able to prevail on their race-based claims, both because of mounting public criticism of, and withering internal support for, a race-based agenda.

Whites, meanwhile, continue to exert race-based claims without appearing to do so.²⁷⁰ They realize their racial goals without ever articulating those goals in terms of race or seeming to subvert the normal functioning of various "neutral" legal rules and policies. Their exercises of racial power do not seem to be expressions of power at all. Their racial identity does not become socially salient because they have no need to politicize it. That their racial identity is not salient makes it less likely that policies they promote, even those that produce disparate racial outcomes more extreme than those of blacks' race-based claims, would be identified as racially motivated or race-based.

This process also shapes whites' understanding of themselves. The legitimating effect of a nonracial expression of racial power means that those who obtain the benefits of the power can reproduce a system that works to their advantage without ever experiencing themselves as having made a racial demand. They have (genuinely in their minds) done nothing more than advocate for individual liberty, the enforcement of contract rights, or associational freedom.²⁷¹

Yet, even as whites do not experience themselves or their politics in racial terms, the fact that nonracial policies work in their favor predisposes them to favor such policies; blacks may oppose such policies for the converse, and equally logical, reason that they so often seem to work against them. These contrary responses only exacerbate the cycle of race politics. Thus, while the race-consciousness of whites remains transparent, that of blacks becomes a

269. *See id.* at 229-31 (suggesting that whites may come to resent blacks because of blacks' repeated pleas for special treatment).

270. *See* Flagg, *supra* note 255, *passim*; *see also* David Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 130-32.

271. As expected, political analysts often unintentionally provide excellent examples of the failure of whites to understand themselves politically in racial terms. *See, e.g.*, Sniderman et al., *supra* note 263.

source of controversy itself, creating debate about the value of blacks' race-based identity. The race-consciousness of blacks becomes the focus of debate and is frequently thought itself to be a problem.²⁷²

Blacks could, of course, abandon their race-based strategy and thereby assuage white suspicions of the legitimacy of their methods and goal. Yet the salience of blacks' racial identity would remind blacks and whites alike of the possibility of blacks' reverting explicitly to race politics. This would raise questions about whether blacks' abandonment of race-based politics was genuine and in good faith. Whites would remain distrustful. Blacks' efforts to reassure whites of the sincerity of their embrace of colorblind politics would leave blacks resentful at having repeatedly to prove themselves. Some blacks might abandon race-based politics, and some whites would point to such blacks as models of nonracial leadership. These colorblind blacks would proclaim the superiority of their approach, admonishing other blacks that they too could advance if they would only abandon their racialism.²⁷³ To the extent that blacks' rejection of race-based politics brought about an equilibrium, it would be an unstable one, capable at any moment of reverting to explicit racialism and the polarization it tends to produce.²⁷⁴

D. *Race Politics and Racial Inequality*

The differential success of the race-based claims of blacks and whites predictably produces racial inequality. Whites' race-based claims, animated as they are by group interests, create racial inequality in spite of their formal neutrality. The ostensibly colorblind policies that reflect such race-based claims typically defer to background social processes and preexisting baselines of resource distribution. The irony, then, is that policies that instantiate a vision of formal equality systematically promote substantive inequality. Formally neutral, colorblind policies produce racial inequality, not because they necessarily do so, but because the particular colorblind policies enacted are themselves the products of the symbolic group conflict of race politics.

272. The transracial adoption debate, for example, suggests that what stands in the way of black children's placement in permanent adoptive homes is the organized opposition of a group of black social workers who misguidedly espouse a radical racial separatism. The children's salvation lay in the laudable desires of those white families who would eagerly adopt them were it not for the effectiveness of the opposition mounted by nationalistic race-conscious groups such as the black social workers. While those colorblind whites who wish to adopt black children assume the foreground of our perceptual field, the attitudes of the overwhelming majority of white adoptive parents are relegated to an unseen background. See *supra* notes 210-219 and accompanying text.

273. Cf. Orlando Patterson, *Going Separate Ways: The History of an Old Idea*, NEWSWEEK, Oct. 30, 1995, at 43 (arguing that "black separatism" is destructive and ineffective).

274. Ultimately, this process would reinforce the aspects of blacks' and whites' individual identity and social status that gave rise to the process in the first place. Blacks become race-conscious and whites colorblind. Whites become more able to realize their group interests through neutral and nonracial policies linked to individualism, autonomy, and freedom of choice. Blacks remain unable to effect change, except through the sort of race-based organized activity that it becomes increasingly difficult to orchestrate.

The same characteristics of American society that give rise to race-based claims cause background social processes to function systematically with respect to race. Racial preferences in adoption, for example, are both intimate and systematic. Because background social processes function in a systematic fashion and because the baseline established by preexisting resource disparities systematically favors whites rather than blacks, the state cannot be neutral with respect to race. As long as race maintains its force in American society, neutrality is only possible in a formal equality model that emphasizes the state's relation to the individual rather than the substantive conditions that the state's action or inaction promotes or allows. I describe the inequality produced by the background social processes or preexisting resource distributions as "atomistic inequality."

Atomistic inequality is less the intended result of any formal policy by a single entity than the outcome of the values, preferences, and decisions of a combination of autonomous, private actors within an ostensibly neutral legal, political, or economic framework. If, as I assume, the racial dynamics of adoption are characteristic of the racial dynamics of American society more generally, then atomistic inequality may be a meaningful and helpful way to conceptualize contemporary racial inequality. Put simply, atomistic inequality may typify the current production of racial inequality. The outcomes of contemporary race politics may predictably give support to individual choice and autonomy in a manner that perpetuates racial inequality. This view may explain how racial inequality persists and is recreated in spite of the triumph of the Equal Protection Clause over overtly race-based policies.

The reproduction of racial inequality is not merely an unfortunate by-product of the implementation of neutral rules and universal principles. Instead, racial inequality is the necessary outcome of a process that systematically denies black race-based claims and gives effect to white race-based claims. The colorblind ethos combines with the different forms of white and black race-based claims to legitimize outcomes that would be viewed in a more suspect light were they recognized as resulting, in part, from the assertion of race-based claims.²⁷⁵ From this perspective, the racially disparate and disadvantaging impact of "neutral" policies is not merely an unfortunate and unintended outcome of such rules. Nor is it necessarily the expression of covert biases of either politicians or voters. Instead, it is a predictable consequence of racial group politics. The racial outcome of "neutral" rules is part of what determines their political support, not because voters are necessarily prejudiced, but because legislative outcomes are the expression of real and symbolic racial group conflict.

275. Cf. Mari Matsuda, *When the First Quail Calls*, 14 *WOMEN'S RTS. L. REP.* 297, 299 (1992) (calling for "legal concepts that challenge the citadel of neutrality").

Atomistic inequality also does its work because constitutional standards are directed to the problem of state power rather than to the problem of private power. The state action doctrine only awkwardly redresses the racial inequality that results from the exercise of individual choice. This tension is reflected in the Supreme Court's state action decisions. The Court's holdings implicitly recognize the importance of private power in creating racial inequality. At the same time, the state action concept itself is at odds with the recognition of the need to constrain private power. The Court's state action decisions in race-related cases reveal the Court's reliance on what I believe to be accurate intuitions about the racial nature of individual choice and autonomy. At the same time, the assumptions embedded within the state action inquiry itself highlight the inadequacies of current equal protection doctrine with respect to race. The Court's tendency to stretch to find state action in those cases alleging a race-based violation of rights²⁷⁶ indicates the Court's (correct) intuition that race-based individual choice is not the same as other discriminations. The classic example of this, of course, is the most famous of all state action cases, *Shelley v. Kraemer*.²⁷⁷ Thus, the state action inquiry both denies, by searching for state rather than private action, and recognizes, by invalidating essentially private conduct, the significance of the promotion of racial inequality through private means. My goal is not to advocate reform of the state action doctrine. Others have tackled the task much more effectively than I could hope to do.²⁷⁸ Instead, my goal is to reformulate our understanding of the politics of race.

Debate about how far the law should go to curtail private discrimination is usually envisioned as a balancing test. On one side is society's interest in

276. The Court identified state action in several race-based cases. See, e.g., *Norwood v. Harrison*, 413 U.S. 455 (1973) (holding that discriminatory private schools are not entitled to state-purchased textbooks); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (finding an equal protection violation by a restaurant in a state-owned building); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding racially restrictive covenants unconstitutional). But see *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (finding no state action in alleged discrimination at a private club).

277. 334 U.S. 1 (1948). *Shelley* concerned a racially restrictive covenant. In violation of the covenant, a black family purchased and moved into a home. The white neighbors' attempt to enforce the covenant, if successful, would have dispossessed the black homeowners for violating the covenant. The Court held that, although the covenant was privately created, its judicial enforcement constituted impermissible state action. See *id.* at 18-20. This analysis left the Court in the awkward position of acknowledging that the covenants were valid so long as they were purely voluntary. Under this reasoning, an agreement by white homeowners among themselves never to sell to a black would not be actionable.

The Court's decision can be understood as a tacit recognition of the nature of race politics, an awareness of the fact that whites typically express racial group power through processes that seem to occur naturally without the aid of the state. *Shelley* may not have presented an issue of state action so much as of racial group action. This understanding of *Shelley* can become part of a broader theory that recognizes the special nature of race politics and the special threats posed by racial group claims. This approach is consistent with a political process theory of judicial review, in which legislation that burdens racial minorities is intensively scrutinized because it suggests a possible defect in the processes that produced the legislation. See ELY, *supra* note 128.

278. The literature on the state action concept is extensive. See, e.g., Charles L. Black, Jr., *Foreword "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Nerken, *supra* note 262.

stamping out racial discrimination. On the other side we find individual autonomy, freedom of choice, and the ideal of unfettered individualism. Within this framing, the idea is often proffered that the state should be neutral with respect to private behavior. Any attempt to eradicate private discrimination would mean constraining individual autonomy in a way most Americans find offensive.

The analysis offered in this Article suggests that this framing of the issue is radically mistaken. The balance to be struck is not between state-imposed racial orthodoxy on one hand and atomized individual actions on the other. Private discrimination may be justified through reference to norms of individual choice and the importance to personal flourishing and well-being of maintaining a realm of autonomy, but private race-related choices are anything but personal and idiosyncratic. More often, they are systematic. Posing the dilemma in this way does not guarantee different answers, but it does require different questions and different discussions. In Part V, I address the different questions that facilitative accommodation in the adoption context raises.

V. STRICT NONACCOMMODATION: A PROPOSAL IN OPPOSITION TO RACIAL PREFERENCES

[T]he master's tools can indisputably be used both to deconstruct the house and to complicate the master's own sense of precisely whose house it is anyway.²⁷⁹

In this part, I put forth a proposal to rid the state-funded adoption process of those individual racial preferences representative of the type of race consciousness that promotes racial inequality.²⁸⁰ My proposed policy, which I term strict nonaccommodation, is not constitutionally required, but it is constitutionally permitted. My concern here is not with what the Constitution compels us to do so much as with what our understanding of race politics and racial inequality counsels that we should do. Given the impossibility of state neutrality with respect to race, strict nonaccommodation offers one method of confronting the inequality-producing racial dynamics of American society. In Section V.A, I explain the purposes of strict nonaccommodation and how the policy should be understood. Section V.B explains the mechanics of strict

279. Houston A. Baker, Jr. et al., *Representing Blackness/Representing Britain: Cultural Studies and the Politics of Knowledge*, Introduction to BLACK BRITISH CULTURAL STUDIES 1, 15 (Houston A. Baker, Jr. et al. eds., 1996). This statement is an indirect response to Audre Lorde, who, in the context of challenging "racist patriarchy," remarked that "*the master's tools will never dismantle the master's house*. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change." AUDRE LORDE, *SISTER OUTSIDER* 112 (1984).

280. My proposal does not fully consider the issue of race matching because race matching is already illegal for those agencies that receive federal funds. See *supra* note 105 and accompanying text. My proposal does, however, assume a non-race-matching regime; otherwise, facilitative accommodation is, in effect, a non-issue.

nonaccommodation. Section V.C analyzes the policy in terms of the best-interests-of-the-child standard. Section V.D assesses the constitutionality of strict nonaccommodation. Section V.E considers the nature of adoptive parents' racial preferences. Finally, Section V.F sketches the possible practical consequences of implementing strict nonaccommodation, highlighting the political and social forces that may make successful implementation of the policy difficult.

Admittedly, deep-seated resistance to strict nonaccommodation may create unintended adverse consequences so severe as to preclude the policy's implementation. Yet, the proposal's significance does not turn wholly on its feasibility. The analysis presented in this Article provides a way of interpreting a decision not to implement strict nonaccommodation that itself would shed light on the raw nature of race politics and the durability of the impediments to racial inequality.

A. *Purposes of Preference Eradication*

Strict nonaccommodation, if successful, would expand dramatically the number of homes available to black children in need of adoption and would diminish the racial disparities in adoption rates. Moreover, strict nonaccommodation would express the message that we will not countenance unjustified racial inequality, in adoption or elsewhere. As Barholet observes: "Adoption puts the state, or state-licensed agencies, in the position of structuring the uniquely private relationship involved in a family."²⁸¹ Whether adoption is free of troublesome racial discrimination or fundamentally shaped by it, the impact of racial considerations reflects the character of a largely state-run and regulated process that bears greatly on the welfare of children at the most vulnerable and defenseless point in their lives. The state is embroiled in adoption as it is in no other process so integral to intimate association and decisionmaking.

I invoke colorblindness here as a means rather than as an end. That it is useful here does not mean that it is the answer to most, or even many, race-related dilemmas.²⁸² My proposal reflects a vision of race that might be described as culturally pluralist but nonessentialist. It does not prohibit all individual racial preferences in adoption but is directed instead at the most unjustifiable and harmful type of individual racial preference. It does not, in principle, proscribe those preferences that are expressions of group identities that we might promote as a means of maintaining a diverse, culturally plural

281. Barholet, *supra* note 10, at 1244.

282. See Culp, *supra* note 245, at 162 (noting that race-neutral policies are only as good as the results they produce).

society. Such identities benefit society and do not create inequality. The proposal is thus asymmetrical and does not purport to be neutral.

The policy is fundamentally animated by the goal of substantive racial equality, which often requires disruption of background social practices or alteration of preexisting baselines of resource distribution. In some cases, colorblind state policy and private action will further the goal of equality; in other cases, race-conscious policy and private action will. The case against individual race consciousness in adoption is not that it violates abstract moral principles,²⁸³ but that it produces the concrete outcomes of racial inequality.²⁸⁴ Relatedly, although many multiracial families would result from successful implementation of strict nonaccommodation, the policy should not be read as promoting multiracial families as a normative good. Racial integration in the family would be an expected by-product of strict nonaccommodation, not its goal.

Strict nonaccommodation is one aspect of a broader effort to undermine the mechanisms of racial inequality and reorient our national debate about its nature. Challenging parental preferences is the solution to the particular problem of racial inequality in adoption that best illuminates the nature and causes of racial inequality more generally. This approach assumes that adoption may be profitably viewed as a particular example of processes that produce racial inequality in American society. It does not assume, however, that the characteristics of the particular and systemic problems of racial inequality, in adoption and society, respectively, are identical. For example, other potential solutions to the particular problem—such as complete cessation of race matching or expanded and improved recruitment of black adoptive parents—may obscure or even entrench the social processes that produce systemic racial inequality.

Strict nonaccommodation does not embody the full implications of the argument that this Article advances. While I identify private racial preferences as systematically producing inequality, strict nonaccommodation applies only to those adoptions that are linked to public funding.²⁸⁵ The proposal is thus animated by the very notions of state involvement and of the public-private

283. See generally K. ANTHONY APPIAH & AMY GUTTMAN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996) (exploring the personal and political significance of racial identity); George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117 (1995) (describing the expansion of the concept of discrimination during the civil rights era).

284. See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 940-46 (1989).

285. See HARRIS ET AL., *supra* note 8, at 1179-80. Although private adoption agencies are not directly subject to constitutional standards because they are not state agencies, they are indirectly affected by constitutional norms against discrimination through state regulation. Constitutional norms are not directly applicable to private adoption agencies under the public function test because adoption is not an inherently governmental function traditionally and exclusively reserved to the state. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (determining that supplying electrical service was not a public function); *Evans v. Newton*, 382 U.S. 296 (1966) (treating provision of a park as a public function).

divide that this Article's analysis of racial inequality suggests should not be accorded much significance. This disjunction between critique and proposal strikes a pragmatic rather than principled balance between the implications of the analysis and the societal resistance that the proposal is likely to engender. In light of the critique, the proposal is quite minimalist, calling for much less than the analysis suggests it should.

B. *Mechanics and Substance of Strict Nonaccommodation*

My proposal is a simple one: Adoption agencies that receive any government funding should not accommodate adoptive parents' racial preferences. Beyond ceasing the classification of children by race in order to facilitate the satisfaction of adoptive parents' racial preferences, adoption agencies should make clear to prospective adoptive parents that their racial preferences are to play no role in the parents' selection of a child to adopt.²⁸⁶

My vision of strict nonaccommodation consists of two elements. First, prospective adoptive parents would generally be prohibited from discriminating on the basis of race in their selection of a child to adopt, and birth parents who participate in the selection of adoptive parents would generally be prohibited from discriminating on the basis of race in doing so. Prospective adoptive parents and birth parents would be informed at the outset that the adoption process is not one in which racial discrimination is allowed. Parents would be encouraged to withdraw from the process if they did not think that they could abide by that rule, and adoption agency officials would have the authority to remove parents from the process if they determined that the parents in fact were discriminating on the basis of race. Parents could even be asked to sign a nondiscrimination agreement just as do other parties who do business with or enter a relationship with the government. Admittedly, this approach runs the risk of unintentionally underscoring the importance of race by constantly proclaiming that it must not matter. Nonetheless, the extent to which race currently matters in adoption suggests that mere governmental blindness to race would not decrease its significance.

Second, the general principle of nondiscrimination is qualified by my goal of promoting the maintenance of particular groups in the interest of cultural pluralism. Notwithstanding the law's focus on the rights of individuals and the

286. I have no illusion that this proposal will meet with immediate and widespread acceptance. Nonetheless, I believe that it is worth fighting for. Judith Butler says it best:

To make trouble was, within the reigning discourse of my childhood, something one should never do precisely because that would get one *in* trouble. The rebellion and its reprimand seemed to be caught up in the same terms, a phenomenon that gave rise to my first critical insight into the subtle ruse of power: The prevailing law threatened one with trouble, even put one in trouble, all to keep one out of trouble. Hence, I concluded that trouble is inevitable and the task, how best to make it, what best way to be in it.

JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* at vii (1990).

primacy of the individual rather than the group in liberal political and social theory, our society has an important interest in maintaining cultural diversity. In American society, racial identity for minority groups is linked, though not identical, to a distinctive set of cultural characteristics, a *nomos*.²⁸⁷ To the extent the *nomos* is race-linked, racial minorities would be allowed to choose a child on the basis of race as a means of furthering that *nomos*. If one embraces cultural pluralism and accepts the inevitability of the state's either suppressing or promoting such communities (given the impossibility of neutrality), then such racially identified choices should be promoted in principle. The claim of contributing to the cultural pluralism of American society through their own race-consciousness is a claim that blacks and other racial minorities, but not whites, can make.²⁸⁸ The *nomos* of whiteness as a racial identity is nothing more than a historically generated and self-perpetuated set of privileges, expectations, and entitlements that are implemented through and reflected in the dominant norms, processes, rules, and structure of American society. There is no white race-based culture separate from mainstream American culture. In principle, then, strict nonaccommodation should allow fulfillment of the racial preferences of racial minorities, but not those of whites.

The demands of race politics, however, may make it difficult to enact a policy that allows blacks, but not whites, to choose a child of their own race. Whites might argue that such an asymmetry is unfair, perhaps even unconstitutional, a conclusion the Supreme Court might adopt as well. Even as it strives to undo the most pernicious race-consciousness, such a policy might itself be decried as a pernicious type of race-based treatment. More debate might ensue about the justice of the asymmetry than about the idea of nonaccommodation itself. If the merits of the policy were obscured by contentious debate about whether groups should be treated differently, I would advise the practical solution of not allowing any expression of same-race preference.

A blanket prohibition on the expression of racial preferences would not be detrimental to cultural pluralism in American society. No racial minority group would be in danger of disappearing as a result of random racial placement in adoption, negating neither racial community nor individual racial identity.²⁸⁹

287. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (describing a *nomos* as a "normative universe . . . [.] a world of right and wrong, of lawful and unlawful, of valid and void").

288. Cf. DAVID R. ROEDIGER, *TOWARDS THE ABOLITION OF WHITENESS* 13 (1994) ("Whiteness describes . . . not a culture but precisely the absence of culture. It is the . . . attempt to build an identity based on what one isn't and on whom one can hold back.").

289. A possible exception is Native Americans, whom I would except from my proposal. Race matching of Native-American children might be said currently to operate through the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923 (1994). The Act vests exclusive jurisdiction over placement decisions involving Indian children in Indian tribes and establishes preferences for adoptive placement. I do not intend to suggest that the policy established with regard to Indian children should be treated as analogous

Transracially adopted individuals, both black and white, would still be racially identified in accordance with their appearance and ancestry. They would continue to understand themselves as white or black, as the case may be.²⁹⁰

Although the policy would seek to make race independent of the assignment of children to parents, race would remain relevant in the adoption process under strict nonaccommodation. Racial attitudes warrant attention. That people may be willing to forego their preferences does not exempt their attitudes from scrutiny. As this Article has demonstrated, race profoundly shapes both individual values and social processes. In principle, then, we should investigate the racial attitudes of all individuals who wish to adopt, whatever the race of the parent and whatever the race of the child.

The practical difficulties of implementing this principle, however, would be substantial. What constitutes healthy racial attitudes on the part of adoptive parents? Should social workers be granted the discretion to make such a determination? In order for a racial attitude assessment policy to be administrable, it would have to be formulated at a fairly general level. But the more general the specification of a racial attitudes standard, the less useful and meaningful it would be. General standards would expand social workers' discretion. On the other hand, specific standards that attempted to narrow the range of social worker discretion would be nearly impossible to formulate. As contentious as the controversy about race matching is, and as divergent as views about individual preferences are, the likelihood of reaching any policy agreement about the racial attitudes necessary for proper socialization seems exceedingly slight. Sufficient agreement might be attainable only for a policy so general as to be of little use. Thus, the meaningful assessment of adoptive parents' racial attitudes may be essential in principle but unattainable in practice.

Strict nonaccommodation would not preclude adoptive parents' expression of non-race-based preferences. That racial preferences are not honored does not mean that adoptive parents' preferences based on sex,²⁹¹ age,²⁹² or

to race classifications. Although the analogy may seem appropriate, the situations are quite distinct. For example, the case of Indian children is *sui generis* given that Indian tribes are formally recognized as quasi-independent groups with rights of sovereignty. For a discussion of the concerns implicated by the Indian Child Welfare Act, see Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DET. L. REV. 451 (1989); and Patnce Kunesh-Hartman, Comment, *The Indian Child Welfare Act of 1978. Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131 (1989). The Supreme Court discussed the Indian Child Welfare Act in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

290. The situation might be different if, say, 80% of black children were up for adoption and were likely to be placed with white families. Under such a scenario, transracial adoption could mean that the majority of black children would be raised in white families. This would not necessarily be undesirable, but it would warrant a rethinking of the probable outcomes in terms of the group's identity.

291. I have found no evidence that girls are systematically disadvantaged in the adoption process or that adoptive parents are resistant to adopting girls. For example, more Korean girls are adopted by American families than any other national/gender combination. See Stolley, *supra* note 6, at 34-35.

292. The fact that most adoptive parents desire infants unquestionably disadvantages older children. This observation should not, however, lead to the conclusion that such preferences should be condemned.

religion²⁹³ should not continue to be honored. My recommended prohibition on some racial preferences derives from my analysis of the role and impact of race-consciousness in American society. This Article does not apply this type of analysis to other characteristics on the basis of which adoptive parents might express a preference.

Race can be singled out in this manner precisely because it *is* different from other social groupings. Without attempting a detailed analysis of other characteristics, such as age, religion, sex, and health status, it is fair to say that in American society, as a matter of historical fact, race is unique. Race is the only basis on which millions of people were enslaved, and then, after having been granted a nominal freedom, were physically segregated, politically disenfranchised, physically brutalized, socially stigmatized, and economically oppressed. The special significance of race compared to other characteristics is mirrored in the adoption process. The available evidence suggests that girls are adopted at nearly the same frequency as boys. Jews are adopted at nearly the same frequency as Christians.²⁹⁴ Age and health status are, of course, extremely important in adoptive outcomes. All of these characteristics have played a different role in American politics and history from that played by race, a fact that constitutional law recognizes.²⁹⁵ I do not contend that

There are at least three factors that differentiate age preferences from race preferences. First, age is not a discrete, unchanging category. No child remains an infant. Second, as a normative matter, age is a characteristic to which parents can rightly accord importance. The orthodox view with race, in contrast, is that it should not matter. And, it should matter less with children than in any other context, given that children only become racialized as they develop. Third, the age issue will become less significant as we address the race issue. Specifically, because black children are disproportionately represented among older children in need of adoption, increased adoption of black children (when they are young) will diminish the ranks of older unadopted children in years to come.

293. Religious matching currently occurs in practice although it is not statutorily required. *See* CLARK, *supra* note 16, at 915 (observing that a "substantial number of . . . states have statutes which contemplate in some form or other that religion will be brought to the attention of the court in adoption proceedings or that the adoption shall be awarded 'when practicable' to a person of the same religious faith as the child"); HARRIS ET AL., *supra* note 8, at 1201 ("Legally, religious matching in adoption and foster care . . . has been transformed from a mandatory rule to a discretionary policy.").

Aside from the constitutional distinction between classifications based on race and those based on religion, the social effect of religious matching is not comparable to that of race matching. Indeed, religious matching may be most objectionable due to its likely racial impact. *See, e.g.*, Martin Guggenheim, *State-Supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children: Wilder v. Bernstein*, 56 BROOK. L. REV. 603, 605 (1990) (discussing a case in which a challenge to religious matching was in part based on the racial impact of denying black Protestant children access to placements in adoptive families). More generally, in American society, race has been and continues to be a basis for discrimination, exclusion, and group subordination in a way that religion is not. Nevertheless, while there may be less reason to prohibit religious matching constitutionally, the case for religious matching as social policy is not especially persuasive. *See, e.g.*, CLARK, *supra* note 16, at 661-67 (criticizing religious matching as unsound social policy). At any rate, my assumption of no race matching carries no necessary implications for religious matching.

294. If children in need of adoption are disadvantaged on the basis of religious factors, it is likely to be as a result of mandatory religious matching by the adoption agency, rather than adoptive parents' religious preferences. *See generally* Don F. Vaccaro, Annotation, *Religion as a Factor in Adoption Proceedings*, 48 A.L.R.3d 383 (1973) (listing cases discussing whether, and to what extent, religion is a proper factor to be considered in adoption proceedings).

295. *See* TRIBE, *supra* note 153, § 16-25, at 1558 (noting that "the Supreme Court treats state classification by race, national origin, or, in some cases, alien status or illegitimacy, as suspect and therefore

adoptive parents should be given no choices in the adoption process, simply that they should not be able to exercise race-based choices.

An irony of strict nonaccommodation is that it would in some ways disadvantage black prospective adoptive families. Because black adoptive parents are generally less socioeconomically advantaged than white adoptive parents, black parents are less well-positioned to adopt. Thus, a policy that counters white race-based claims raises the prospect of harming black adoptive families. This possibility is a recurrent paradox of racial justice efforts. In matters of race, gains rarely come without losses.

C. *Best-Interests-of-the-Child Standard*

The best-interests-of-the-child standard is widely accepted as the guiding principle in child placement decisions.²⁹⁶ My proposal is not contrary to this standard, but I do not attempt to justify it in those terms. With respect to race, no proposed adoption policy could be accurately described as a necessary implication of the best-interests-of-the-child standard. Neither the policy recommendations of race-matching proponents nor those of transracial-adoption proponents are derived from a careful application of the standard. The standard is almost wholly indeterminate with regard to race and is therefore of little help in selecting the race-related principles that should guide adoption policy. Nonetheless, since it seems natural to frame the debate in terms of the best-interests-of-the-child standard, both supporters of race matching and proponents of transracial adoption have done so.²⁹⁷

subject to strict scrutiny"); see also Kennedy, *supra* note 81, at 1410 (noting that "in the United States racial prejudice—particularly that which is anti-black—displays an intensity and persistence that is distinguishable from all other biases").

296. See *supra* note 149 and accompanying text.

297. See *supra* notes 11-14 and accompanying text. Bartholet, along with other proponents of transracial adoption, removes any trace of race from the best-interests-of-the-child standard. Notwithstanding disclaimers regarding the political contingency in evaluating the desirability of any particular racial identity, Bartholet smuggles an integrationist bias into her formulation of the best-interests-of-the-child standard. After noting the political contingency of any evaluation of findings of transracial adoption's impact on racial attitudes, see Bartholet, *supra* note 10, at 1216, Bartholet later suggests that race matching is inappropriate because "the preservation and promotion of a separate black culture and community . . . have not been incorporated in the basic law of the land on race," *id.* at 1234. A few pages later, she rejects the assertion "that growing up with same-race parents is a benefit of overriding importance to black children" based on judicial hostility to similar claims. *Id.* at 1237. After admitting uncertainty as to whether "black children will be significantly better off with 'their own kind,'" *id.* at 1238, Bartholet completely disposes of the possibility by observing that "it is not the kind of assumption that has been permitted under our nation's anti-discrimination laws," *id.* Without saying so, she thus (re)defines the best-interests-of-the-child standard through reference to the antidiscrimination norm. This allows her, in essence, to reject a race-conscious interpretation of the best-interests standard under the guise of neutral legal analysis.

Bartholet's manipulation of the antidiscrimination principle to give content to the best-interests-of-the-child standard begs the question of what one has to do with the other. A formulation of the best-interests-of-the-child standard can no more be justified through reference to a legal ideal of colorblindness than an employee's best interests can be adequately defined through reference to labor law. Any conception of a child's best interests must rely upon a descriptive and normative analysis of children's emotional,

There are two plausible bases from which to argue that my proposal is contrary to the best interests of children. First, one might argue that increasing the number of transracial adoptions would be detrimental to children's interests. Of course, this argument must confront the fact that there is no empirical evidence that transracial adoption harms children, nor any logical reason to expect that it would. One can draw no one ideology-based conclusion about the relative merits of transracial, as opposed to same-race, adoption. The best-interests standard is logically indeterminate with respect to race, in part because race shades all intimate relationships, not only interracial relationships. Although we may not similarly perceive the presence of race in same-race as opposed to cross-race relationships, racialized identities impact both equally. Race shapes these relationships in conflicting ways because race shapes individuals, both black and white, in conflicting ways. The fact that we are more likely to see race as an issue or to trace aspects of social interaction to race in interracial as opposed to intraracial settings says a great deal about how we view race but nothing about any inherent quality of race itself. Race will matter differently if a child is placed with a black family as opposed to a white family, but there is no way to evaluate or to compare the relative gains and losses.²⁹⁸ Extensive empirical study might show that intraracial environments are in some ways unquestionably superior to interracial environments. In still other ways, perhaps the majority of ways, the differences would prove impossible to rank in any manner not hopelessly controversial and disputed.

A common version of the argument that transracial adoption harms children asserts that the children will develop malformed racial identities.²⁹⁹ Undeniably, some portion of transracially adopted children may grow up to feel that their racial identity is lacking. Even worse, they may trace various personal problems to their "inadequate" racial identity and their transracial family. The causal significance they attribute to their transracial family, however, might be more a reflection of where our society trains us to look for causes than of actual causes. If the individual experienced the same problems but had been adopted by a family of the same race, the racial character of the

psychological, physical, and spiritual needs. A legal principle such as antidiscrimination does not provide such a foundation.

298. For example, assuming that a child "loses" the opportunity to develop a particular racial identity when the child is placed with a family of another race, that child will not be left identity-less. Instead, the child will develop another identity, which may confer both advantages and disadvantages relative to the identity the child did not develop. Many of the differences between the two identities will be difficult to evaluate nonarbitrarily. This same sort of argument applies to the issue of coping skills for black children. Black children placed with white adoptive parents would not fail to develop any coping skills, but they might have different coping skills from those they would develop if they were raised in a black family. We could suppose that a black family might teach some coping skills better than a white family but also that a white family might teach some coping skills better than a black family. This analysis draws indirectly, but heavily, on the work of Stuart Hall. See STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES (David Morley & Kuan-Hsing Chen eds., 1996).

299. See, e.g., Fenton, *supra* note 2, at 61; Howe, *supra* note 2, at 160; Townsend, *supra* note 2, at 179-80.

family would probably not be viewed as a likely cause, even though issues of racial identity are as present in same-race families. The causal inference, then, may be a matter of interpretive salience rather than causal significance.

What if, however, particular problems really are more likely to occur among transracially adopted individuals? In this case, the causal significance attributed to the transracial family environment might reflect widespread societal views about transracial families and the social processes to which such attitudes give rise. If transracial families are socially stigmatized, as intimate interracial relationships were generations ago, one would indeed expect individuals in such relationships to experience more difficulties than individuals in socially approved relationships. This sort of individual harm, however, hardly justifies a social policy when past and present policies have engendered the societal views and patterns that caused the problems associated with interracial affiliations. If societal attitudes and social practices are in part a function of current and past policies, then the detrimental consequences of relationships that contravene those attitudes and practices cannot be used as a justification for the continuation of these policies. If the problems that beset transracially adopted children are a matter of current social patterns or cultural values, the task may be to use policy to change those patterns and values. Alternatively, we could normatively endorse the status quo, but in no case should we simply surrender as though the current situation were inevitable.

Another potential risk of strict nonaccommodation is the placement of children with parents who do not genuinely want them. Such adoptive placements would not provide the loving and supportive environments that one's family should and might be worse than staying in foster care. Although the matching of parents with children that they do not want on account of race could arise with both black and white parents and children, the risk is greatest that white parents who would prefer to adopt a white child will be put in the position of adopting a black child.

It is unclear how substantial or common a problem this would be. White prospective adoptive parents who prefer a white child but nonetheless adopt through a public or private agency would be gambling that they would not receive a white child. What proportion of parents would risk this gamble is uncertain. The stronger a prospective parent's racial preference, the greater the likelihood he or she would decline to risk nonpreferred placement. Those parents willing to take the risk would likely not hold as strong a racial preference as those parents unwilling to take the risk, but there would be a possibility that parents moderately averse to adopting a child of another race would adopt subject to the nonaccommodation policy. Thus, there would be a risk of unwanted placements on the basis of race, but the extent of that risk would be inversely related to the strength of adoptive parents' preferences.

In any case, "less wanted" placements would not be inevitable for either black or white children. Adoption agencies would screen adoptive parents, and

any judged unfit (for reasons including those having to do with racial attitudes) should be excluded from the process altogether.³⁰⁰ Parents' stated willingness to adopt without regard to race would be a necessary but not sufficient condition for a child to be placed with them. It would be the adoption agency's responsibility to ascertain parental fitness with regard to racial views and attitudes just as with respect to a variety of other considerations.

D. *Constitutionality of Strict Nonaccommodation*

Strict nonaccommodation as a condition for federal funding in connection with child welfare and placement would apply to public and private adoption agencies but not to individuals who arrange independent adoptions. The proposal is clearly constitutional with respect to public adoption agencies.³⁰¹ Even if Congress could not directly enact strict nonaccommodation as applied to private adoption agencies, my proposal could be enacted as a condition attached to federal spending.³⁰² The government can condition its spending on adherence to mandates that it cannot implement directly.³⁰³ Congress may not be able to prohibit private racial discrimination in adoption, but it cannot be required to subsidize such discrimination through its provision of government funds.³⁰⁴

There are two alternative arguments that strict nonaccommodation imposes no unconstitutional conditions. First, the policy burdens no preferred constitutional right since there is no constitutional right to become an adopted parent.³⁰⁵ Second, even if it does burden a constitutional right, that right must be weighed against children's right to be free from racial discrimination in the state-funded and state-regulated adoption process. Although the Court has not

300. Most adoption laws allow for extensive screening of prospective adoptive parents by the adoption agency in order to insure that the parents are suitable for a child placement. *See, e.g.*, UNIF. ADOPTION ACT § 11, 9 U.L.A. 46 (1994).

301. Because there is no constitutional right to become an adoptive parent, *see* *Griffith v. Johnston*, 899 F.2d 1427, 1437 (5th Cir. 1990), the government is not required to provide the opportunity to adopt, much less to make available any particular range of choices to prospective adoptive parents. More importantly, the furtherance of adoptive parents' asserted right to choose a child on the basis of race may require the state to do what it cannot constitutionally do: State facilitation of adoptive parents' "right" to discriminate in the formation of their adoptive family would infringe the right of black children to be free from invidious racial discrimination by the state. If adoptive parents have the right to receive affirmative state assistance in the realization of their racially discriminatory preferences, then black children, by implication, have no right to be free from racial classifications by the state. This cannot and should not be the law.

302. For a discussion of the constitutionality of conditioned federal spending, *see* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).

303. *See* *Buckley v. Valeo*, 424 U.S. 1, 85-109 (1976) (upholding the regulation of publicly financed presidential elections through the setting of minimum vote-capture thresholds).

304. *Cf.* *Harris v. McRae*, 448 U.S. 297, 316-17 (1980) (noting that, "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom").

305. *See* *Griffith*, 899 F.2d at 1437.

recognized a constitutional right to become an adoptive parent, the Court has recognized rights related to family formation. A parent's choice of a child to adopt, on whatever basis the parent desires, could be accorded constitutional protection, in which case strict nonaccommodation would create an unconstitutional conditions problem. In contrast to other scenarios that raise unconstitutional conditions issues, however, in adoption, the rights of adoptive parents and the rights of children in need of adoption are in tension.³⁰⁶ Parents' right to autonomy burdens children's right to be free from state-supported racial discrimination. The state thus cannot be neutral as to the rights of parents and children in the adoption system. Strict nonaccommodation rearranges the relative rights of adoptive parents and children. Under strict nonaccommodation, parents would have less of a right to choose a child on whatever basis they desire. This policy would not be the first that forced parental rights to yield to the state's interest in eradicating discrimination.³⁰⁷

Conversely, strict nonaccommodation enlarges children's rights to be free from racial discrimination in adoption. In this regard, strict nonaccommodation is ideologically consistent with the many proposals that have called for an expanded recognition of children's rights.³⁰⁸

E. *Nature of Adoptive Parents' Preferences*

There are two overlapping categories into which most expressions of racial preference in adoption can be placed. Preferences may represent adoptive parents' vision of their family, based on their attitudes, values, and beliefs about race (what I term parent-centered preferences), or they may represent a concern for the well-being of their adopted child (what I term child-centered preferences).³⁰⁹ Both parent-centered and child-centered preferences are, in part, responses to racial views and patterns that are widespread in American society. Parent-centered preferences include parents' desire for a child who looks like them, for an adoptive family modeled on the biological family, for a child they feel able to parent competently, or for a family that is socially

306. For articles discussing this tension, see, for example, Barbara Bennett Woodhouse, *Hatching the Egg*, 14 CARDOZO L. REV. 1747 (1993); Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996); and Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

307. See *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (rejecting a "freedom of choice" desegregation plan that perpetuated racial segregation); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (striking down a plan designed to maintain racial segregation by replacing the public school system with tuition grants to be used in nonsectarian private schools).

308. See, e.g., Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994).

309. There is, of course, no sharp demarcation between the two types of desires inasmuch as we are socially formed and develop "individual" desires only within a particular social context. This view accords with that of communitarianism. See, e.g., SANDEL, *DEMOCRACY'S DISCONTENT*, *supra* note 173; SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE*, *supra* note 173.

accepted rather than disapproved. Child-centered preferences include parents' desire for a child who would not be socially stigmatized, racially isolated, or unable to develop sufficient coping skills or an appropriate racial identity.

Parents' formulate their own values in the context of larger society. An adoptive parent who desires a family that is socially approved may accede to the bases upon which approval is granted or withheld in American society. Similarly, insofar as a child's well-being is a function of how people respond to the child, assessments of a child's best interest take account of societal norms and values. Perhaps the most common parent-centered preference is the desire for a child who allows the adoptive family to mimic the biological family. Adoption is frequently pursued by those who have been unsuccessful at having children biologically. Having failed at biological reproduction, parents may attempt to create an adoptive family on the template of the biological family. Because racial difference would presumably negate the biological pretenses of such adoptive families, parents sometimes accept only a child of their own race. The urge to recreate the biological family is a strong one. In fact, the notion that adoptive families should approximate as closely as possible the norm of the biological family has guided adoption policy historically.³¹⁰

Other parent-centered preferences focus on the difficulties that confront a parent who adopts transracially, or the impediments to adopting a child of a different race. Prospective adoptive parents might view the parenting challenge of transracial adoption as greater than they are willing or able to confront. A parent who holds this view might harbor no race-related vision of family, but might simply recognize that parenting across race lines creates formidable challenges. These parents might gladly adopt across race lines but for the social disapproval of others. They would note that irrespective of their own racial views, they must contend with the racial views prevalent in society, and because of the way society is, adopting across race lines could create a family circumstance fraught with trouble. Even those parents who would be willing to put up with the special difficulties of being a transracial family may decline to pursue such a placement because of the difficulty of being placed with a child of another race as a result of race-matching policies.

Child-centered preferences focus on the needs of children and are justified as a matter of what is best for the child. A person whose decision to adopt within his or her own race expresses a child-centered preference might believe that being transracially adopted would be detrimental to the child for one of two reasons. First, the prospective parent might not feel that he or she could adequately impart coping skills and identity to the child. White parents might think that they do not know enough about black culture or history and would be cheating the child out of a culture and a past. Second, a child-centered

310. See *supra* note 8; *supra* note 44 and accompanying text.

preference might arise from the view that to be transracially adopted would be an inherently troublesome situation that is harmful to the child, irrespective of the parenting skills of the adoptive parents. In this view, parents may be unable to counter the ostracization, teasing, or taunting that might plague a transracially adopted child. In a society riven by race, black children in white families, or white children in black families, might be unable to find a place.

As matters of individual decision, each of these parent- and child-centered preferences is understandable. They require no trace of what we might view as racial animus or bias. But each of these preferences ultimately collapses back into race; each capitulates or reflects current racial values and attitudes. The parent-centered racial preference, predicated on a vision of the adoptive family built on the model of the biological family, accurately interprets the prevailing understandings of race. Racial difference would in fact be a salient marker that the adoptive family was not a "real" biological family. Yet the salience of race, the fact that racial difference would make it "obvious" that the child was adopted, is a matter of social rather than natural reality. Race seems to be a proxy for appearance, in large part because the physical features that are markers of race are more salient than other physical features. The differential significance of race-based as opposed to non-race-based physical features is also reflected in the fact that parents' desire for a child who looks like them generally yields to the force of race-based reasoning in which racial commonality suggests physical similarity and racial difference precludes physical similarity. Thus, race is understood as signifying the genetic link of biological relatedness.

A parent and child of the same race appear to look more alike than a parent and child of a different race because our implicit theory of race constrains judgments of similarity, physical and otherwise.³¹¹ People within racial groups are not viewed as similar to one another because they share the same physical characteristics; instead, their physical characteristics are judged to be similar because they share the same race. The categories produce the perceived similarity, not the other way around. As long as racial commonality remains, by itself, sufficient to suggest that a family is natural, and racial difference remains a guarantee of a family's unnaturalness, could there be any stronger evidence that race remains the ultimate, irreducible marker of difference or commonality, the defining boundary of community? Other instances of parent-centered and child-centered preferences are more obviously a response to the racial patterns of American society. The difficulties of transracial adoption, for either parent or child, are a matter of the racial patterns and attitudes that prevail in American society.

311. See Jennifer Lynn Eberhardt & Jennifer Lynn Randall, *The Essential Notion of Race*, 8 PSYCHOL. SCI. 198, 199 (1997) (book review).

Racial preferences also recreate patterns of symbolic intergroup conflict. The dynamics of intergroup conflict can be observed in the patterns of white parents' adoption of nonwhite children. All the available evidence suggests that the majority of white parents who adopt across race lines would rather adopt a nonblack child than a black child.³¹² White adoptive parents, in this view, may decline to adopt a black child because the child is not "like" them. These same parents may be more likely to adopt an Asian child because the child is within their imagined community. What this assumes or reflects is that the stigma and stereotypes applied to black children are not similarly applied to Asian children.

During the peak of transracial adoption in the early 1970s, approximately 2500 black children were adopted by white families.³¹³ Currently, white families adopt approximately 1100 black children and nearly 6000 Asian and Hispanic children per year.³¹⁴ One study showed that during one year 6% of all adoptions involved a white mother adopting nonwhite children; 1% were white mothers adopting black children; and 5% were white mothers adopting nonwhite, nonblack children.³¹⁵ Certainly there are many factors that contribute to this disparity, including a preference for healthy infants. Nonetheless, white adoptive parents' willingness to adopt nonwhite children who are also nonblack suggests that the need to replicate the biological family may not be as powerful as commonly thought.

Nearly all adoptive parent preferences, whether parent-centered or child-centered, recognize and capitulate to the racial realities of American society. No doubt, the social patterns and views to which preferences respond are real and often potent. Yet these patterns and views are not natural; they are in part products of individual action, the aggregate expressions of the same choices that are rationalized as mere responses. Adoptive parents might feel, perhaps rightly so, that they are responding to, rather than individually responsible for, the racial dynamics of American society.

However rational one deems adoptive parents' preferences, the racial conditions to which they respond are a matter of social policy, not individual choice. The reasonableness of a desire does not determine the reasonableness of a policy in support of or in recognition of that desire, especially if the desire is in part the outcome of earlier race-based policies and the social arrangements that they supported. The desire may be individually reasonable but socially troublesome. As long as race functions as the ultimate marker of difference, in the family and elsewhere, racial division in society is intractable

312. See *supra* note 20.

313. See Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 *FUTURE OF CHILDREN* 104, 106 (1993) (summarizing a variety of studies on the effects of transracial adoption).

314. See *id.* at 106.

315. See Stolley, *supra* note 6, at 34.

and inevitable.³¹⁶ One way to begin to change both the desire and the background social conditions to which the desire responds is to alter adoption policy. Estimates of the difficulty of changing preferences should not be allowed to distort judgments about the desirability of doing so, and indeed, the prevalence of such preferences may be a measure of the extent to which race remains the fault line in American society.

F. *Feasibility of Nonaccommodation*

Attempts to implement a strict nonaccommodation policy would no doubt encounter numerous practical difficulties. There are at least three administrability arguments against my proposal. First, one might argue that there is insufficient political will to enact strict nonaccommodation. Adoptive parents might oppose it, but who would support it, and why? Second, one might contend that, as a practical matter, racial preferences cannot be removed from the adoption process. Third, one might predict that a strict nonaccommodation policy would prompt so many prospective adoptive parents to forego public or private agency adoption as to threaten the viability of the agency adoption system. Each of these three arguments raises important issues, and I will address each in turn.

1. *Political Will*

For a policy of strict nonaccommodation to be adopted, the proposal would have to gain the support of an interest group willing to advance its cause. A prerequisite of change is that people must first begin to perceive the existence of the policy and to understand it as a choice of one manner of state action rather than another. The character of race politics, our implicit theory of individual autonomy, and the assumption of the possibility of neutrality make this task a challenging one.

Because strict nonaccommodation does not promote the race-based claims of either blacks or whites, neither group is likely to support strongly the policy. Nonaccommodation thus seems to lack a constituency. Instead of providing benefits—symbolic or concrete—to a particular group, strict nonaccommodation would at most provide diffuse gains benefiting society as a whole. Even these gains—the transformation of consciousness and confrontation with the mechanisms of racial inequality—might seem more painful than beneficial, more a cost than a benefit. The only discrete group

316. The notion that there is value in mimicking biological families is itself questionable. Adoptive families should not be seen as poor imitations of biological families, as successful only to the extent they recreate or mimic the biological model.

arguably benefited would be children in need of adoption, and they neither vote in elections nor fund favorite candidates.

Finally, racial preferences in adoption are not disfavored. Notwithstanding extensive antidiscrimination laws and the transformation of racial attitudes during the past half-century, racial preferences in matters of intimate association are perceived as innocuous rather than invidious. Even if people perceive facilitative accommodation as a social policy that can be changed, they may not want to change it. And even people who think facilitative accommodation should be abolished may not feel strongly enough to spend the energy necessary to change the policy, much less to support strict nonaccommodation. That adoptive parents' racial preferences discriminate against black children may be accepted as a necessary cost of personal choice. The costs to adults of denying racial preferences in adoption may be thought to exceed the cost to children and society of allowing them.

2. *Inevitability of Racial Preferences*

Racial preferences in adoption may also be intractable. Even if the state implemented strict nonaccommodation, adoptive parents could still base their decisions on race without admitting that they were doing so. If indulging the preference is important to adoptive parents, it is likely that they would not state their racial reasons for rejecting a particular child.

Alternatively, racial preferences might persist because adoptive parents would not be fully aware of their existence.³¹⁷ Prospective adoptive parents may choose children in part on the basis of race without being aware that they are doing so.³¹⁸ They may find some children "cuddly" and "lovable" and others not, and they might not know why. Many parents who genuinely want to choose a child other than on the basis of race might not be fully able to do so.

3. *Parental Resistance*

Strict nonaccommodation may cause parents to forego agency adoption rather than renounce their preferences. Those families who are only willing to accept a child for adoption on the basis of race, but who are not financially able to adopt through independent placement, might decide to forego adoption altogether. Many prospective adoptive parents with economic resources would

317. Cf. Lawrence, *supra* note 81, at 330 (arguing that racism is irrational because individuals are not fully aware of the meanings they attach to race).

318. Cf. *id.* at 335-36 (discussing the role of the unconscious in creating less apparent racial prejudice). This would be a variant of what social psychologists term "aversive racism." See John Dovidio et al., *Resistance to Affirmative Action: The Implications of Aversive Racism*, in AFFIRMATIVE ACTION IN PERSPECTIVE 83, 86 (F.A. Blanchard & F.J. Crosby eds., 1989).

pursue independent or international placements. Although black and white parents might resist strict nonaccommodation, white parents would be more likely and able to adopt internationally or independently, whereas black parents would be more likely to forego unrelated adoption altogether. Because of the racial ratios of prospective adoptive parents, the flight of white parents from the agency adoption system would pose a greater threat to the stability of the entire system than the flight of black parents.³¹⁹

Two problems might result from parents' decisions to forego agency adoption. First, fewer families might be available for those children in need of adoption. Second, government-funded adoption agencies might lose public support. Although both black and white parents alike would leave, the proportion of exiting white parents would almost certainly be greater than the proportion of exiting black parents. The exit of potential adoptive parents from the agency adoption process would diminish the total number of adoptive parents. The exodus of white parents would not significantly affect the pool of parents available for black children because those whites open to adopting a black children would probably remain in the system. The pool of available parents for black children, however, would be diminished by those potential black adoptive parents who decide against agency adoption as a result of strict nonaccommodation. But the magnitude of the decrease in black parents would likely be less than the magnitude of the decrease in white adoptive parents, because of black parents' lesser chance of being matched with a white child and their lesser financial ability to adopt independently or internationally.

Thus, there is reason to doubt that black children would be substantially harmed, even if the most dire forecast of white adoptive parents' abandonment of the agency adoption system came to pass. After all, the parents most likely to abstain from adopting altogether, or to leave the public system and resort to independent or international adoption, would not be willing to adopt under the current policy unless they could specify the race of the child. Fewer adoptions would occur through public agencies but that does not mean that

319. In fact, a nonaccommodation policy might dramatically *expand* the number of families available to adopt black children. The largest group of potential adoptive parents currently unavailable to black children does not consist of those white families who are practically barred from adopting them by race-matching policies. Rather, the largest group of potential parents for these black children consists of those who now adopt white children. Based on the information provided by Bartholet and others, more new homes could be made available to black children if a legal prohibition on public facilitative accommodation of parental racial preferences transformed the preferences of only a small portion of white families who would currently adopt white children than if all the white parents who have been seeking to adopt transracially were immediately allowed to do so. Yet the debate completely bypasses the source of the greatest number of eventual adoptive homes for black children.

A policy of nonaccommodation of parental racial preferences might contribute to a nonracialist vision of family that would eventually lead white families who currently do not want to adopt black children to do so. That such an outcome seems unlikely, if not farfetched, is a testament to our belief in the settled nature of current expectations, expectations shaped in part by the law. The current racial expectations of adoptive parents are no more intractable and no less subject to change than the racial expectations of a century ago. In public schooling, transit, and interpersonal relations, white expectations have been defeated and transformed, all without the downfall of basic public institutions.

fewer families would be available for black children. Those white families who chose to leave the public system or declined to adopt would not have adopted black children in any case. So while their "loss" may be important for other reasons, it cannot be decried on the grounds that it harms black children.

There may thus be no net loss in the parents available to black children. There would be a net loss in the number of parents available to adopt white children. But the number of white adoptive parents so exceeds the number of white children currently available for adoption that all white children in need of adoption would nonetheless be placed successfully. In sum, even if a significant proportion of potential adoptive parents leave the system, children, black and white alike, would be no less likely to be placed successfully in an adoptive family.

But even if the exodus of adoptive parents does not prove detrimental to individual children in need of adoption, it might contribute to undermining public support of agency adoption. Publicly funded adoption, and the child welfare system more generally, might be viewed more skeptically. Advocacy groups might put forth proposals to decrease government funding of adoption and child welfare services. Some might even urge privatization of child welfare and adoption services.

In evaluating the likelihood that parents would desert the agency system, the analogy of public education comes to mind.³²⁰ When white students and their families fled blacks and the public schools, the schools suffered. Education suffered. And perhaps the black children on whose behalf integration was pursued may have suffered as well. But public adoption is not public education. Schools require the participation of students and their parents in a way that adoption agencies do not. If fifty percent of parents transferred their children out of a school district, the educational process would no doubt be hindered. If fifty percent of white adoptive parents decided not to adopt, adoption would continue largely unaffected, in fact, the numbers of prospective adoptive parents and children in need of adoption would be *more* balanced.

4. *Beyond the Feasibility of Nonaccommodation*

It is true that the consequentialist argument against nonaccommodation becomes more persuasive the more dire and negative the outcomes to which a nonaccommodation policy would lead. But it is also true that the severity of the adverse consequences is at least a rough measure of the depth and potency of racial bias in American society. The more pernicious the effects of racial bias, the greater our obligation to combat it. The more completely existing

320. For discussions of the effects of school desegregation plans on public education systems, see GARY ORFIELD, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1997); and JOSEPH WATRAS, *POLITICS, RACE, AND SCHOOLS: RACIAL INTEGRATION, 1954-1994* (1997).

racial attitudes undermine the possibility of a nonaccommodation policy, the more directly we are confronted with the depth of racial division in American society, and the less we are able to deny the extent to which racial bias continues to shape both social practices and government policies. Thus, the case for bowing to instrumental concerns becomes more compelling just as the necessity of resisting and countering racial bias also becomes more pressing. This leaves us with a paradox: The greater the reasons to accommodate, the more urgent the need to alter the conditions that require facilitative accommodation. The less feasible nonaccommodation seems, the more the reason to challenge the attitudes that preclude its implementation.

The probable outcome of a nonaccommodation policy also raises a recurring dilemma of racial justice efforts: The greater the need to change the system, the less the possibility of doing so because the unintended outcomes might be more adverse and severe. The extent to which white parents will leave the public adoption system is at least a rough measure of their race-consciousness. The greater their race-consciousness, the more white parents will leave the system. In order to encourage white potential adoptive parents not to leave the system, adoption policy must not challenge their race-consciousness. As long as the goals of their race-consciousness can be effectuated, they will stay.

Yet it is the race-consciousness of white adoptive parents that makes it necessary to change the system. The expression of their race-consciousness both produces the outcomes that necessitate changes in the system and represents the force that resists change in the system. This is the conundrum of racial justice efforts in America. Reform is more palatable to whites the more piecemeal it is: The more minimal the change, the more popular the program. Proposals that embody more than minimal change are often opposed for that very reason, at least to the extent that the perceived interests of blacks and whites are opposed.³²¹ Whites would oppose meaningful programs precisely because of their racial impact. In adoption, the attitudes that have created and perpetuated the problem are the very things trotted out as justification not to take actions that would either change those attitudes or substantively address the undesirable outcome they have created.

Concession to these political realities would seem to leave two plausible options: Either we can accept race matching and hope that such a policy will create political pressure to bring more black parents into the adoption process, or we can accept facilitative accommodation and hope that white parents adopt black children who would otherwise remain in foster care. Strict nonaccommodation could be disastrous. It may be the case that white parents

321. Olati Johnson makes a similar point in regard to efforts to promote residential integration. See Olati Johnson, *Integrating the "Underclass": Confronting America's Enduring Apartheid*, 47 *STAN. L. REV.* 787, 815 (1995) (noting that "integration is only politically pragmatic to the extent it is tokenist, beyond that, it will likely be resisted").

will leave the system and that public support for a government-administered adoption system would further diminish. In a sharp departure from the current scholarly trend, commentators may begin to explore the possibility of widespread independent adoptions. Think tanks would study the idea. Grass roots organizations would mobilize support. The President might even pledge to "end adoption as we know it." The privatized system and the resulting skeleton of a public system may be unimaginably worse for black children than the current public one. This scenario, in my estimation, is far from implausible. Even the slight possibility of its occurrence counsels against hastily enacting a policy of nonaccommodation, thus unfortunately precluding the only policy that might offer meaningful positive change.

This forecast may be too dire, for it takes for granted the racial patterns and attitudes whose transformation would be the purpose of the policy. Law is symbolic as well as practical.³²² "Legal institutions can express culture, or they can help shape it. Where legal institutions help shape culture, they do so in part by instantiating and reinforcing particular conceptions of the nature of persons and their good."³²³ Legal norms are expressions of societal values and ideals. Even when they fail to remake the world immediately in accord with their command, legal principles communicate an image of how the world should be, of how we want our world to be, of the type of society and relationships among which we want to live.

In the short term, the symbolic benefits of strict nonaccommodation would have to be weighed against its practical costs.³²⁴ Insofar as the vision of race embodied in strict nonaccommodation differs from the prevailing racial logic, there would indeed be costs. Law's symbolic role would then be counterpoised to administrative and practical concerns. Over the long term, however, the symbolic impact of law may change the practical consequences of strict nonaccommodation.

The practical long-term outcomes of any policy result, at least in part, from the symbolic role of law. Law shapes long-term outcomes in two respects. First, law is a statement of public values that creates expectations as well as reflects them.³²⁵ Second, law shapes social practices even as it takes account of them. These two aspects of law's influence reinforce each other. If adoption policy formalizes the norm that race should not matter, more adoptive

322. See KENNEDY, *supra* note 192, at 107 (noting that "the legal system creates as well as reflects consensus").

323. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 173 (1996).

324. *Cf. id.* at 132-36 (arguing in the context of prostitution that the nonideal nature of our world may require that we adopt laws that reflect compromise from the ideal).

325. See *id.* at 222 (observing that "[p]references' bring law into being, but law also makes and changes 'preferences'"); see also Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 109 (1984) ("[T]he power exerted by a legal regime consists less in the force it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.").

parents would be willing to adopt children of another race.³²⁶ And as mixed-race adoptive families became more common, the stigma attached to them would diminish, as would the difficulties of being a transracial adoptee. The lessened stigma would, in turn, prompt more families to adopt children of different races. Current social practices and expectations cannot be taken as a given when forecasting the likely impact of a nonaccommodation regime.³²⁷ The purpose of nonaccommodation is to change such expectations and practices, and the measure of its success is the extent to which it does. But no assessment of the prospects of strict nonaccommodation should take for granted the very patterns of racial preference and beliefs that such a policy would seek to change.

A well-articulated policy of strict nonaccommodation might transform our society so that a generation or two from now no one would view preferring one infant over another on the basis of race as a reasonable thing to do. Such a forecast may sound preposterous until one recalls the nature of the arguments about de jure segregation and recognizes that our society has changed to an extent that even many of our most racially liberal late nineteenth-century forbearers would have found completely unimaginable.

One of the defenses of segregation was that it reflected natural racial sentiments and patterns of social interaction that were immune to the influence of law.³²⁸ For whites, segregation reflected firmly held expectations about the nature of social life. Segregation was so deeply embedded in policy and practice that many of its defenders expressed genuine fears that any attempt to delegitimize it would result in catastrophe. There were predictions of racial unrest and violence. Indeed, efforts to end de jure segregation did provoke violence,³²⁹ and judicial endorsement of racial integration sparked violent resistance.³³⁰ But few people would conclude that the gains in racial justice during the past one hundred years were not worth their costs. Social change is always unsettling.

We have reached the other side of the challenge posed by de jure segregation: Racial sentiments are no longer invoked to justify racially segregated education or public accommodations. Even the most traditional of white southerners have relinquished the racial expectations with which they may have been raised. Whites who ride the bus no longer expect blacks to give

326. Cf. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 64-67 (1990) (arguing that most preferences are endogenous to legal rules and norms).

327. Cf. *id.* at 41-42 (reasoning that "when preferences are a function of legal rules, the rules cannot, without circularity, be justified by reference to the preferences").

328. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (asserting that the purpose of the Fourteenth Amendment could not possibly have included the abolition of distinctions based on color implicit in the natural order of things).

329. See MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER passim* (1987)

330. See *id.* at 27 (noting that "the Court's landmark ruling in *Brown v. Board of Education* produced a violent reaction").

up their seats or move to the back of the bus. Blacks no longer avert their eyes when whites approach.³³¹ And whites no longer feel free to call a black man "boy." Such examples seem quaint reminders of a bygone era—they are, and that is my point. We have undergone a revolution in racial expectations and etiquette that would have seemed a fanciful impossibility to most Americans a century ago.

Although law was certainly not the only factor in this massive social transformation, without the assistance of changes in the law, changes in our society and in our racial expectations would not have come about so rapidly. By not reinforcing whites' expectation that blacks would give up their seats and move to the back of a crowded bus, for example, the law helped to change those expectations.³³² So effective was the law at this process that now the expectation itself seems unreasonable. We would think less of a person who harbored such an expectation and would feel ashamed of ourselves for doing so. We might come to regard such a view not as a natural racial preference, but as an example of the pernicious racial thinking upon which the atrocities of de jure segregation and the Holocaust alike rested. Strict nonaccommodation is important and meaningful, not because it reflects who we are, but because it suggests who we might be.³³³

Although the fact that children may suffer in the short term counsels caution, I am certain that even if we do not implement a policy of nonaccommodation for the practical reasons discussed above, the analysis of race-based claims and race politics presented in this Article should contribute to an alternative interpretation of why a nonaccommodation policy is undesirable. Under this interpretation, our decision not to institute a nonaccommodation policy should not be viewed as a simple reflection of the importance of individual autonomy,³³⁴ a recognition of privacy rights in the context of family formation, or an attempt to promote the best interests of children in need of adoption. The decision to continue to accommodate adoptive parents' racial preferences should be seen as a tragic capitulation to racialism and a tacit admission of the potency, ubiquity, and systematic nature of the private beliefs and desires that sustain racial inequality.

331. John Dollard observed that such behaviors were integral to race relations in the South during the first half of this century. See JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 250-66 (3d ed. 1949) (representing the accommodation of blacks to the southern caste system).

332. For an excellent recounting of the battle against segregated transit, see CATHERINE BARNES, *JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT* (1983).

333. Cf. SUNSTEIN, *supra* note 326, at 67 (stating that often "aspirations form the basis for laws that attempt to influence processes of preference formation").

334. If race-based claims are expressed through policies that promote "autonomy" and "individualism," then those values cannot be presumed valid and worthy of deference. See *supra* Part II. Nor should "individual" preferences be regarded as legitimate simply because they are deeply and genuinely held and of long standing. With respect to racial preferences, in adoption and elsewhere, those characteristics may be precisely the reason to scrutinize such preferences.

The feasibility of a remedy should not alter our perception of the nature and depth of the wrong.³³⁵ The harm is no less severe for being unavoidable. Black children are harmed by the racial preferences of white adoptive parents. We should not allow “[t]he absence of a ready legal solution [to] become[] confused with the absence of a significant social problem.”³³⁶

VI. CONCLUSION

My approach in this Article has followed two intertwined lines of inquiry. First, I have sought to illuminate and analyze a neglected aspect of adoption policy. Second, I have sought to understand the dynamics of American race politics, which shapes policy debate as well as legal doctrine.

The first line of inquiry teaches us about adoption. Adoption policy is important because it impacts the lives of many tens of thousands of adults and children each year. This Article has made clear the complicity of state-endorsed facilitative accommodation policies in the race-based choices that harm black children. The race-and-adoption debate must involve more than an examination of race matching. The first step toward remedying racial inequality in adoption is to bring into view the full range of difficulties and possibilities that current adoption policies pose. As evident in the adoption controversy, however, broadly framing the problem does not guarantee a solution, for it may simply underscore the difficulty of the issue. Nonetheless, it is better, I think, to have provisional and contingent responses to the right questions than certain answers to the wrong ones.

The second line of inquiry teaches us about race. Undeniably, race remains a troublesome issue in American society. But it is also undeniable that the nature of racial problems and the mechanisms of racial inequality have changed. Race does matter, though not in the same way as in years past. The deliverance from one set of problems has confronted us with another—one that is perhaps more ambiguous, nuanced, and contradictory than that of any other era of American history. The dynamics of contemporary race politics necessarily produce racial inequality in American society.

Prevailing modes of interpreting race politics reinforce the social and economic conditions that make racial conflict and tension inevitable. The norm of colorblindness does not permit recognizably race-conscious state action, but its instantiation of formal equality does defer to nonneutral background social processes, including private racial preferences, that predictably produce substantive racial inequality.

335. Randall Kennedy makes this point forcefully. See Kennedy, *supra* note 81, at 1415, 1429-40 (making clear in the context of capital punishment that the feasibility of a remedy should not obscure the nature of the underlying wrong).

336. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 276 (1987).

This Article's two areas of inquiry—adoption and race politics—are, of course, linked. For adoption policy is one arena for race politics, and the demands of race politics shape the adoption debate. Consequently, an understanding of each informs the analysis of the other. The model of race politics illuminates the contours of the adoption controversy, which, indeed, can adequately be understood only through reference to the general processes of race politics. Conversely, adoption debate and policy provide concrete manifestations of race politics, against which the model can be measured. My specific approach has been to investigate facilitative accommodation and racial preferences in adoption policy in order to gain insight into both race politics and adoption.³³⁷

My strict nonaccommodation proposal draws on the link between race politics and adoption. Its purpose is not only to change adoption. Nonaccommodation will, I hope, also alter race politics through counteracting the social processes and racial understandings that perpetuate both racial conflict and racial inequality. As this hope indicates, particular expressions of race politics may be turned to the task of transforming the very political and social conditions that produce them. There is no guarantee that strict nonaccommodation will be implemented, or even that it is feasible. Its utility, however, does not turn primarily on its implementation. The character and force of the resistance to the policy would reveal much about the impediments to racial equality in American society. Unearthing our own assumptions may be the essential first step to fashioning responses to the questions we too often decline to ask.

337. While my analysis regarding adoption is amply supported by evidence, my theory of race politics and racial inequality is necessarily speculative. I have derived a general theory from a particular case. I believe that the specific case of adoption embodies patterns and characteristics common to racial debate and politics more generally, but I have no way of proving as much. The link between the two may be thought of as an assumption, a premise, or even an intuition.