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THE CONSIDERATION OF RACE IN CHILD PLACEMENT: DOES IT SERVE THE BEST INTERESTS OF BLACK AND BIRACIAL CHILDREN?

DONNA B. MCELROY, ESQ.*

Every day, in every corner of America, we are redrawing the color lines and redefining what race really means. It's not just a matter of black and white anymore; the nuances of brown and yellow and red mean more – and less – than ever.¹

I. INTRODUCTION

In a Newsweek special report,² the editors explored an issue they believe will shape the twenty-first century - a redefinition of race.³ In so doing, Senior Editor Nancy Cooper noted that “[w]e’re in the middle of an incredibly significant ethnic and cultural shift.”⁴ Where once there were three racial census categories,⁵ today there are thirty.⁶ “Black” and “White,”⁷ as well as other race and ethnic distinctions, are still significant when it comes to the issues

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1. Jon Meacham, *The New Face of Race*, NEWSWEEK, Sept. 18, 2000, at 38.

2. *Id.*

3. Psychologists have begun to address this “changing face of America” and the special needs of the racially and culturally integrated family. See Amanda L. Baden & Robbie J. Steward, *A Framework for Use with Racially and Culturally Integrated Families: The Cultural-Racial Identity Model as Applied to Transracial Adoption*, 9 J. SOC. DISTRESS & THE HOMELESS, 309 (2000) (discussing the results of studies on transracial adoptions and providing a theoretical model to be used with individuals raised in racially integrated families).

4. Meacham, *supra* note 1, at 4.

5. See *id.* (noting that these categories were white, black and “quadroon”). See also Julie C. Lythcott-Haims, *Where Do Mixed Babies Belong: Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R. - C.L. L. REV. 531, 535 (1994) (citing a representative race-defining statute indicating that a “quadroon” was an individual whose fraction of black blood was 1/4).

6. Meacham, *supra* note 1, at 40.

7. This is not to suggest that other categories, such as ethnic background or religion, are insignificant. I limit my discussion to “black” and “white” because it would be impossible to address all of the issues unique to each of these different ethnic and racial groups. This paper is limited to an examination of those issues involving the placement of black and biracial children.

surrounding child placements.⁸ As childless couples race to adoption agencies, they realize that race does matter. But here, it is the race of the parents or prospective parents that matters more than the race of the child.

The term *transracial adoption* means the “placing of a child who is of one race or ethnic group with adoptive parents of another race or ethnic group.”⁹ Transracial adoptions reached their peak in the 1950's and 1960's.¹⁰ But in 1972, these adoptions slowed drastically with the publication of a position paper by the National Association of Black Social Workers¹¹ that criticized transracial adoptions. This paper resulted in a move towards racial matching.¹²

Courts and child placement agencies use the “best interests”¹³ test when placing black and biracial children with white families.

8. While this paper will limit the scope of its discussion to black and biracial children, it should be noted that the analysis made here is equally applicable to children of other racial and ethnic backgrounds.

9. Cynthia R. Mabry, “Love Alone is Not Enough!” In *Transracial Adoptions - Scrutinizing Recent Statutes, Agency Policies, and Prospective Adoptive Parents*, 42 WAYNE L. REV. 1347, 1350, n.9 (1996). The definition of transracial adoption generally refers to the placement of black children with white families. The majority of transracially adopted children are biracial or multiracial children with one white birth parent, who are adopted by white parents or interracial parents. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1175 (1991). One study found only four white children placed with black parents. *Id.* at 1175, n.12 (citing DAWN DAY, *THE ADOPTION OF BLACK CHILDREN: COUNTERACTING INSTITUTIONAL DISCRIMINATION* (Lexington Books 1979)).

10. Following World War II, families in the United States adopted children from a number of war-torn countries. The number of white children available for adoption decreased in the 1950's and 1960's, while the number of available black children increased. Fewer black families were available for the placement and adoption of this growing number of black children, while qualified white families waited years to adopt a child. Black children became the greatest available source for those who wished to adopt. To realistically deal with this problem, agencies began placing black children with qualified white families. The 1960's saw a push towards integration in schools, employment and adoption practices. See *infra* Part II.C for a further discussion of factors that led to the growth of transracial placements.

11. The National Association of Black Social Workers was founded in 1968 by a group of black social workers to address those social issues that concerned the black community. NABSW Homepage, at <http://www.nabsw.org/> (last visited Nov. 12, 2000).

12. Racial matching places a child with adoptive parents of the same race. See *infra* Part II.B.

13. While accepted as the proper test to decide child placement issues, no single definition of the “best interest standard” exists. In fact, it is not even defined in Black's Law Dictionary. BLACK'S LAW DICTIONARY (6th ed. 1990). The best interest standard requires that the court consider and weigh all factors relating to the child's placement, and make a decision in the child's best interest. See *infra* Part III (providing a description of the Best Interest Principle). See also Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503 (1984) (indicating that child placement should further the best interest of the child); Twila L. Perry, *Race and Child Placement: The Best Interests*

However, within this test there are the different and often competing interests of the state, the child placement agency, the prospective parents, and the child.¹⁴

The issue of race affects child placement in custody modification,¹⁵ foster care,¹⁶ and adoption.¹⁷ In all instances, the “best interest standard is used.”¹⁸ Recently, the Maryland Court of Special Appeals in *In re Adoption/Guardianship No. 2633*¹⁹ held that when applying the best interest principle, the race of an adoptive family is an acceptable factor for courts to consider.²⁰

The consideration of race and race-based adoption policies raises the issue of equal protection. The Fourteenth Amendment to the United States Constitution provides that the state may not abridge the “equal protection of the laws.”²¹ Equal protection means that when government action applies to members of a “suspect” class, the government must show a compelling interest necessary to accomplish

Test and the Cost of Discretion, 29 J. FAM. L. 51, 54 (1990/1991) (noting that “[t]he best interest rule is widely accepted as the proper test to decide child placement issues”).

14. See Howard, *supra* note 13, at 503 (noting that the use of the phrase “best interests” tends to obscure the fact that there are different interests involved).

15. Custody of children is defined as “[t]he care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding.” BLACK’S LAW DICTIONARY, *supra* note 13, at 385. Custody modification refers to changes in custody of children. See JOHN F. FADER, II & MARK E. SMITH, MARYLAND DOMESTIC RELATIONS CASE FINDER, § 4.13 (1993) (discussing change in circumstances and custody modifications).

16. Foster care refers to “continuous 24-hour care and supportive services provided for a minor child placed by a child placement agency in an approved home.” MD. CODE ANN., FAM. LAW § 5-501 (2002). Foster care is one type of “out-of-home placement.” FAM. LAW § 5-501. Courts may remove children may be removed from their natural parents after determining that the child is delinquent or in need of supervision, MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-02 (2002), or in need of assistance, MD. CODE ANN., CTS. & JUD. PROC. § 3-802 (2002). Placement is temporary until circumstances have changed and the child can be moved back into his home. FAM. LAW § 5-525 (2002). Foster care can also serve as temporary care until the child is placed for adoption. FAM. LAW § 5-525.1 (2002).

17. Adoption refers to the legal process “in which a child’s legal rights and duties toward his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted.” BLACK’S LAW DICTIONARY, *supra* note 13, at 49. See also Melisa C. George, Note, *Tossed Salad: Diversity Considerations in Adoptions*, 21 L. & PSYCHOL. REV. 197 (1997).

18. See *infra* Part III.

19. 101 Md. App. 274, 646 A.2d 1036 (1994).

20. *Id.* See also *infra* Part IV.B.2 for a discussion of the court’s reasoning in this decision.

21. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

a legitimate purpose.²² Race is a suspect class.²³ In *Palmore v. Sidoti*,²⁴ the Supreme Court found that when race is the sole consideration for a court's decision in a custody modification, it cannot survive strict scrutiny and thus violates the equal protection clause.²⁵

In Part II, this paper will discuss the history of transracial adoptions in the United States, noting the importance of race classification, the growth of transracial adoptions and the return to race-based placements.²⁶ Part III will examine the Best Interest Principle as the standard used in child placement, and will note that there are four competing perspectives as to what is actually in the child's "best interest."²⁷ Part IV will examine the Constitution, statutes, and case law as they relate to the issues raised in the debate over transracial adoptions.²⁸ Finally, Part V will provide an analysis of the issue of transracial adoptions and will argue that transracial adoptions are in the best interest of black and biracial children; that transracial adoptions are not detrimental to the child's self-esteem and self-assurance; and that race-based placement policies can destroy pre-existing bonds in foster families and prevent black and biracial children from ever being adopted.²⁹

22. See *Romer v. Evans*, 517 U.S. 620, 621 (1996) (indicating that a rational relationship must be established between the legislation and its legitimate purpose).

23. See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (considering the historical purpose of the Fourteenth Amendment and noting that race-based classifications render statutes constitutionally suspect).

24. 466 U.S. 429 (1984).

25. *Id.* See *infra* Part IV.B.3 for an explanation of equal protection case law and the relevant standards of proof, including strict scrutiny.

26. See *infra* Part II.

27. See *infra* Part III.

28. See *infra* Part IV.

29. See *infra* Part V.

II. THE HISTORY OF TRANSRACIAL ADOPTIONS

A. Race Classification

Virginia was one of the first colonies to legally define race and attach legal and social significance to a person's classification.³⁰ In Virginia, there were only three racial classifications of legal significance -- "white," "Indian," and "Negro and mulatto."³¹ In the pre-Civil War period, both Negroes and mulattoes were identified as "black."³² The term "mulatto" referred to mixed-race individuals who had a mixture of white and Native-American blood, or white and Negro blood.³³ More importantly, by the early twentieth century, the definition of those classified as "white" narrowed to include only those without any "trace whatsoever" of black blood.³⁴ The drawing of legal racial classifications made it possible for states to prohibit interracial marriages and interracial sex. Enforced segregation in adult relationships led to bans on transracial adoptions.

B. Early Development of Transracial Adoption

Transracial adoptions were prohibited by law in many states for a number of years.³⁵ In fact, through the middle of the twentieth century, "there were near-absolute barriers to transracial adoption posed by adoption agency practice, by social attitudes,³⁶ and by the

30. See F. MICHAEL HIGGINBOTHAM, *RACE LAW: CASES, COMMENTARY, AND QUESTIONS* 5 (Carolina Academic Press 2001).

31. *Id.* at 12.

32. *Id.* at 5, n.4.

33. See *id.* at 5, n.6 (discussing the legal definition of "mulatto" based on an individual's percentage of non-white blood).

34. *Id.* at 17. In 1924, Virginia defined "white" as one "who has no trace whatsoever of any blood other than Caucasian; but persons who have [only] one-sixteenth or less of the blood of the American Indian . . . shall be deemed to be white persons." *Id.* at n. 58. Further, in 1930, Virginia defined colored as anyone "in whom there is ascertainable any Negro blood." *Id.* See also Lythcott-Haims, *supra* note 5. Through the twentieth century, states have enacted laws and courts have decided cases that have defined race. *Id.* An example of such laws notes the following classifications based on the fraction of "Black Blood" to race: 0 = White; 1/8 = octoroon; 1/4 = quadroon; 1/2 = mulatto; 3/4 = griffe; 7/8 = sacatra; 1 = negro. *Id.*

35. Mabry, *supra* note 9, at 1350.

36. Until the 1950's, segregation was legal. More importantly, it was socially acceptable and even encouraged through the 1960's. Mixing races was the "ultimate symbol of outrage and degradation" and a real threat to segregation. *Id.*

law.”³⁷ Perhaps the law was merely reflective of a segregated society that wished to maintain “racial separation in the context of the family.”³⁸ In a number of cases, courts determined that laws prohibiting transracial adoptions were unconstitutional, causing state legislatures to repeal them.³⁹

During this time, adoption agencies exhibited unlimited powers over the adoption process. They adopted a powerful policy of “matching.”⁴⁰ Race was an important factor because it was believed that racial matching maximized the child’s chances of bonding and forming a nurturing relationship with his or her new family.⁴¹ Until the late 1940’s, transracial adoptions were unheard of in this country.⁴² The earliest documented transracial adoption took place in Minneapolis, Minnesota, in 1948.⁴³

37. *Id.* Until 1954, segregation in public schools was legal. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Additionally, until the Supreme Court’s 1967 decision in *Loving v. Virginia*, restrictions on interracial marriages were legal. *Loving v. Va.*, 388 U.S. 1, 6 n.5 (1967). Into the 1960’s, many states prohibited transracial adoptions altogether. *See, e.g.*, LA. REV. STAT. ANN. § 9.422 (West 1965); TEX. REV. CIV. STAT. ANN. §§ 46a(8), 46b-1(4) (Vernon 1959). In other states, statutes provided that an adoptive child could be returned if it turned out that his race was different from that of the adoptive parents. *See, e.g.*, KY. REV. STAT. ANN. § 199.540 (1) (Michie 1982 & Supp. 1990); MO. ANN. STAT. §453.130 (Vernon 1952) (repealed 1952). Another statute provided that if the racial relationship of the parents to the child was forbidden under the marriage laws, then the adoption was likewise forbidden. *See* S.C. CODE ANN. § 10-2585 (Law. Co-op. 1962) (repealed 1964). At one time under Virginia law, if a white woman bore a brown child, that child would immediately be taken from the woman and placed in indenture. *See* Bartholet, *supra* note 9.

38. Bartholet, *supra* note 9, at 1176.

39. *See* Mabry, *supra* note 9, at 1350-51 (providing examples of case law invalidating such statutes, and subsequent statutes repealing them).

40. *Id.* During the late nineteenth and early twentieth century, adoption agencies followed the “matching” philosophy for child placement. Under this “matching” policy, prospective parents and adoptive children were matched by physical characteristics, religion, and intelligence. The goal of matching was to provide families with children who would be most like their biological children. This, the agencies believed, maximized the chance that bonding and nurturing would take place. In these early days, then, race was indeed an acceptable feature to match. *See* Bartholet, *supra* note 9, at 1176.

41. *See* Mabry, *supra* note 9, at 1350-51.

42. Jehnna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 176 (1997).

43. Mabry, *supra* note 9, at 1351 (noting that a white family adopted an African American child).

C. Growth of Transracial Adoptions

Following World War II,⁴⁴ the Korean War,⁴⁵ and the Vietnam War,⁴⁶ there was an increase in the number of white families adopting non-white children.⁴⁷ The 1950's and 1960's also saw an increase in the number of Latin American children adopted by white and mixed race couples.⁴⁸ With the social and legal changes of the 1960's came an increased acceptance of transracial adoptions.⁴⁹ In fact, in the 1950's and 1960's, more than ten thousand children of non-white races were adopted by white couples.⁵⁰

The significant increase in transracial adoptions is attributed to a number of factors.⁵¹ Adoption agencies saw this as a way to place the large number of minority children who were awaiting adoption.⁵² Additionally, while more children were entering foster care, the

44. World War II ended in 1939, and while many European children survived, many of their parents did not. Baden, *supra* note 3, at 310. International adoption became the remedy to deal with the considerable number of abandoned and homeless children. Mary Ann Candelario McMillan, *International Adoption: A Step Towards a Uniform Process*, 5 PACE INTERN. L. REV. 137 (1993). This intercountry adoption of children from war-torn nations continues to the present. *Id.*

45. During the Korean War, sexual relationships between U.S. servicemen and Asian women became common and resulted in tens of thousands of births of Amerasian children in Korea, as well as in Vietnam and the Phillipines. Robin S. Levi, *Legacies of War: The United States' Obligation Toward Amerasians*, 29 STAN. J. INTERN. L. 459, 460 (1993). Faced with tremendous discrimination in their own countries, these fatherless children became available for adoption by U.S. citizens. *Id.* at 460.

46. Vietnamese Amerasian children conceived during the Vietnam War continue to arrive in the United States as a result of the 1988 Homecoming Act, which recognizes the U.S. government's obligation to care for Vietnamese Amerasians. *Id.*

47. Hanan, *supra* note 42, at 176.

48. *Id.* While Latin America has recently become a major supplier of children, intercountry adoptions are a new phenomenon for these countries. McMillan, *supra* note 44, at 139. Adoption of these children within their own countries has been hampered by cultural, economic and religious conditions. *Id.*

49. The 1960's saw increased use of contraception, the legalization of abortion, and the increased social acceptance of unwed mothers, greatly contributing to the decrease in available white infants. Baden, *supra* note 3, at 311. See also Mabry, *supra* note 9, at 1351.

50. *Id.* See also Hanan, *supra* note 42, at 176.

51. See Howard, *supra* note 13, at 505-16. Howard identified seven factors contributing to the rise in transracial adoptions: (1) identification of the battered child syndrome; (2) deficiencies in the foster care system; (3) data identifying the effect of maternal and stable family deprivation on institutionalized children; (4) a reduction in the number of white children available; (5) reversal of agency policy to place the child with racially similar families; (6) an insufficient number of minority homes available for minority children needing placement; and (7) societal changes in attitudes towards racial integration, the adoption of black children white families, and the willingness of social workers to make such placements. *Id.*

52. *Id.*

quality of the foster care system began to deteriorate.⁵³ More significantly, there was a decline in the number of white children available for adoption and a decline in the number of minority adults looking to adopt.⁵⁴ Finally, the 1960's saw a new and growing interest in harmony between the races.⁵⁵

In spite of this, by the early 1970's, the number of transracial adoptions dropped significantly.⁵⁶ Suddenly, the policy of allowing transracial adoptions was viewed by many professionals as less desirable than inracial (same race) placement of black children.⁵⁷ The brief period of relative openness to transracial adoptions came to an abrupt end as a result of the position taken by the National Association of Black Social Workers in 1972.⁵⁸ Thus began a period when "transracial adoptions were drastically curtailed in favor of *racial matching*."⁵⁹

D. Shift to Race-Based Placement

In 1972, the National Association of Black Social Workers (NABSW) issued a resolution that reflected its growing concern over transracial adoption. The NABSW's condemnation of transracial adoptions resulted in a thirty-nine percent decrease in the number of

53. Mabry, *supra* note 9, at 1351.

54. *Id.* See also Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994) (noting that "[m]any factors converged to cause this increase"); Jacinda T. Townsend, *Reclaiming Self-Determination: A Call for Intra-racial Adoption*, 2 DUKE J. GENDER L. & POL'Y 173, 185-86 (1995) (discussing the obstacles that many black families face when attempting to adopt). Fewer blacks are adopting because even when they choose to adopt, they find the process too discouraging. Black families have found social workers to be biased and to discourage them from adopting. Second, black families are made to feel inferior by social workers, who critically examine their income, marital status, and the number of people in their families. Third, black families find that the payment of fees for adopting a child remind them of the buying and selling of black children into slavery. *Id.* A fourth, and very important economic reason, is that black families are not provided with information on available subsidies that can help to reduce the costs involved with adoption. *Id.* at 186. See also Howard, *supra* note 13, at 513. Even more notable is the fact that there is no difference between black and white adoption rates when the socioeconomic class is constant. *Id.* at 516.

55. Mabry, *supra* note 9, at 1351.

56. Douglas R. Esten, *Transracial Adoption and the Multiethnic Placement Act of 1994*, 68 TEMP. L. REV. 1941 (1994).

57. Bartholet, *supra* note 9, at 1179.

58. *Id.* See also Howard, *supra* note 13, at 516-18 (discussing the condemnation of transracial adoption by the NABSW in its 1972 position paper).

59. Mabry, *supra* note 9, at 1351.

transracial adoptions in one year.⁶⁰ In arguing that “same-race placements were necessary for an African American child’s well-being,”⁶¹ the NABSW stated that:

Black children should be placed only with Black families whether in foster care or for adoption. Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people.⁶²

The workshop participants further committed themselves to “go back to [their] communities and work to end this particular form of genocide.”⁶³

The NABSW’s position was soon adopted by public and private adoption agencies alike. The paper’s impact on transracial adoptions was immediate and significant.⁶⁴ The number of black children adopted by white families in 1971 was 2,574.⁶⁵ By 1972, this figure dropped to 1,569, and in 1973 to 1,091.⁶⁶

While many state governments supported the NABSW’s argument,⁶⁷ Congress never passed legislation requiring race-based preference.⁶⁸ Rather, the adoption agencies began to play a major role

60. Howard, *supra* note 13, at 517 (citing Macaulay & Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, in 1 RESEARCH IN LAW AND SOCIOLOGY 265, 288 (R. Simon ed. 1978) (noting that there were 2,574 black-white adoptions in 1971, 1,569 in 1972, and 733 in 1974)).

61. Mabry, *supra* note 9, at 1352.

62. *Id.* The position of the NABSW was that: 1) blacks need to establish self-determination, from birth to death; 2) black children have a need to identify with black people in a black community, and that this need begins at birth; and 3) blacks need unity to build a strong nation. *Id.* See also Bartholet, *supra* note 9, at 1180.

63. Bartholet, *supra* note 9, at 1180. See also Howard, *supra* note 13, at 518.

64. Bartholet, *supra* note 9, at 1180.

65. *Id.*

66. *Id.*

67. Mabry, *supra* note 9, at 1353.

68. Bartholet, *supra* note 9, at 1182.

in the implementation of these policies.⁶⁹ They used the NABSW's position paper to justify the use of race-based policies.⁷⁰

Following the enactment of race-based adoption statutes, courts also began to factor in race when deciding adoption placement. Unfortunately, the courts did not provide adequate guidelines when racial considerations were balanced against other factors.⁷¹ Thus, race became a factor that was used at the court's discretion, resulting in inconsistent decisions.⁷²

E. Renewed Interest in Transracial Adoptions

Recently there has been a renewed interest in transracial adoptions. This trend may be related to the "disproportionately large number of black children" waiting for permanent homes.⁷³ The number of black parents seeking to adopt continues to fall below the number of black children entering the system.⁷⁴ Even when they desire to adopt, black families find that the process is discouraging, social workers are biased and critical, and adoption fees are high in comparison to their incomes.⁷⁵ While far too few black families are

69. *Id.*

70. See *Davis v. Berks County Children & Youth Servs.*, 465 A.2d 614, 623 n.8 (Pa. 1983) (providing illustrations of the Child Welfare League of America's varying positions on transracial adoptions since 1958); Perry, *supra* note 13, at 82-89 (propounding hypothetical reasons why agencies deferred to the NABSW position).

71. Rebecca Varan, *Desegregating the Adoptive Family: In Support of the Adoption Antidiscrimination Act of 1995*, 30 J. MAR. L. REV. 593, 597 (1997). See, e.g., MINN. STAT. ANN. § 259.29 (West Supp. 1997), which in relevant part provided: "The authorized child-placing agency shall give preference, in the absence of good cause to the contrary, to placing the child with (a) a relative . . . , (b) an important friend with whom the child has resided or had significant contact . . . , (c) a family with the same racial or ethnic heritage as the child, or . . . , (d) a family of different racial or ethnic heritage from the child which is knowledgeable and appreciative of the child's racial or ethnic heritage . . . facilitate implementing the preference." If the child's birth parent or parents explicitly request that placement in (a), (b) or (c) not be followed, the authorized child-placing agency shall honor that request. *Id.*

72. Varan, *supra* note 71, at 597.

73. Esten, *supra* note 56.

74. *Id.*

75. See *supra* note 54 for a discussion of the four factors affecting the availability of black adoptive parents. See also Barthelet, *supra* note 9, at 1196-97 (recognizing a limited effort on the part of adoption workers to recruit black families); Howard, *supra* note 13, at 513-14 (criticizing adoption agencies for failure to inform the black community of the need for adoptive families and failure to reduce the red tape and time involved in the process); Charlton C. Copeland, *Book Note*, 20 YALE L. & POL'Y REV. 513 (2002) (reviewing DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (discussing racial disparity in the child welfare system and proposing the shift of control of this system to black communities)).

able to adopt, the opposite is true for white families.⁷⁶ Unfortunately, recent race-based policies prevent white families from adopting available black children.⁷⁷

In 1987, the National Health Interview Survey (NHIS) estimated that eight percent of all adoptions were transracial.⁷⁸ In 1990, twenty thousand children were awaiting placement, forty-three percent of whom were black children.⁷⁹ While approximately eighteen thousand of those twenty thousand were placed, only twenty-nine percent of the available black children were placed that year.⁸⁰ In 1996, over five hundred thousand children were in state foster care.⁸¹ One-third of these children were African American.⁸² Experts expected only one-tenth of those children in foster care to be adopted by the end of the year.⁸³ An estimated fifteen percent of the thirty-six thousand adoptions of foster children that took place in 1998 were transracial or transcultural.⁸⁴ These statistics demonstrate that, unless adoption agencies permit and encourage transracial adoptions, many black and biracial children will not find permanent placements.

III. THE BEST INTEREST PRINCIPLE

The current legal approach to child placement focuses on “what would most appropriately serve the welfare and best interests of the child.”⁸⁵ This unclear standard permits judges to rely on their own personal judgments, morals and values, and other outside factors when

76. Esten, *supra* note 56, at 1942 (noting that there are many white families who are willing to adopt black children).

77. See Bartholet, *supra* note 9. Bartholet sees current race matching policies as “a coming together of powerful and related ideologies – old fashioned white racism, modern-day black nationalism and what I will call ‘biologism’ – the idea that what is ‘natural’ in the context of the biological family is what is normal and desirable in the context of adoption.” *Id.* at 1172.

78. NATIONAL ADOPTION INFO. CLEARINGHOUSE, at http://www.calib.com/naic/pubs/s_trans.htm (last visited Sep. 20, 2000) (noting that one percent of white women adopt black children, five percent of white women adopt children of other races, and two percent of women of other races adopt white children. These estimates include foreign-born children).

79. NATIONAL ADOPTION INFO. CLEARINGHOUSE, ADOPTION STATISTICS (July 1995).

80. *Id.* (noting that almost fifty-one percent of those adopted were white children).

81. 142 CONG. REC. H4433-03 (May 7, 1996) (testimony by Rep. Canady).

82. *Id.*

83. *Id.*

84. *Id.*

85. In re Adoption/Guardianship No. 2633, 646 A.2d 1036, 1043 (Md. Ct. Spec. App. 1994).

making adoption decisions.⁸⁶ Despite the presence of a child “in need of a loving, caring and supportive home,”⁸⁷ the final decision may not prove to be in the child’s “best interest.”⁸⁸

A. Defining the “Best Interests” Standard

Whether the court is deciding foster placement, custody, custody modification, or adoption, there is no simple answer when it comes to child placement. No two cases are exactly alike and the methods for determining a child’s best interest are very time consuming.⁸⁹ In each case, “[t]he fact finder is called upon to evaluate the child’s life chances in each of the homes competing for custody.”⁹⁰ The fact finder must “predict with whom the child will be better off in the future.”⁹¹ According to some theorists, what is in the child’s best interest “equals the fact finder’s best guess.”⁹²

B. Conflict of Interest and the Best Interest Standard

The best interest standard actually includes a number of different and often competing interests. Those with differing perspectives on what constitutes the “best interest of the child” include the adoption agency, the child, the adopting parents and the black community.

1. The Adoption Agency’s Perspective

The interest of the adoption agency is simple: to find a permanent home for the child.⁹³ Yet, the agency too has an obligation to place the child in a situation that will be in the child’s best interest. The agency wants to be certain that the family is stable, can provide the child with necessities, will love this child as their own, and will not

86. See David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31, 35 (1993).

87. George, *supra* note 17, at 197.

88. *Id.*

89. See *Montgomery County v. Sanders*, 381 A.2d 1154 (Md. Ct. Spec. App. 1977) (discussing the best interest standard as it is applied in Maryland in custody modification).

90. 1 JOHN F. FADER II, DOMESTIC RELATIONS LAW: CASES AND MATERIALS, at Children *1 (1998).

91. *Id.*

92. *Id.*

93. Howard, *supra* note 13, at 528-30 (noting that adoption agencies are very powerful in child placement matters and are allowed a great deal of discretion in these matters).

neglect or abuse the child.⁹⁴ In making an adoption determination, the agency considers, among other factors, the family's finances, its home environment, criminal records, and the existence of other foster or adopted children in the family.⁹⁵ From the adoption agency's perspective, race is only one factor to consider.

2. *The Child's Perspective*

From the child's perspective, his or her best interest is served by immediate and permanent placement with a family.⁹⁶ In fact, early permanent placement is a central factor in the healthy emotional development of the adoptive child.⁹⁷ A new placement may have an adverse emotional effect on a child who has already spent a number of years in a foster home placement.⁹⁸ It is very likely that he or she has developed a sense of belonging to his or her foster family. Certainly, a child who is loved and wanted will not want to be torn away from his or her foster family to be placed in a new home. When agencies continue to move children from one family to another, they are disrupting their lives, their sense of stability and severing any family bonds they may begin to develop.⁹⁹ Yet, multiple moves are often frequent for foster home children. One Missouri study noted that as many as one-third of foster care children had lived in four or more foster homes in less than five years.¹⁰⁰ In 1977, approximately sixty percent of the children in foster care in New York had more than one placement, and twenty-eight percent had been in three or more

94. See Hanan, *supra* note 42.

95. *Id.*

96. Howard notes that a black child awaiting adoption has two interests. The first is his or her interest in a stable, loving family. The second is an interest in maintaining a cultural identity. Howard observes that when same-race families are not available, these interests "operate at cross-purposes and would lead to opposite results." This is because the interest in a stable and permanent placement requires placement in any "suitable available family, regardless of race," while the interest in cultural identity requires placement in a same-race family, "even if the child has to wait." Howard, *supra* note 13, at 544-45.

97. Bartholet, *supra* note 9, at 1224 (citing W. FEIGELMAN AND A. SILVERMAN, CHOSEN CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS 93 (1983) (comparing the effects of interracial adoptions with the effects of delaying placement and found the latter to be more harmful)).

98. *McLaughlin v. Pemsley*, 693 F. Supp 318, 327 (E.D. Pa. 1988) *aff'd*, 876 F.2d 308 (3d. Cir. 1989).

99. See Bryce J. Christensen, *Two Cheers for Independent Adoption*, WALL STREET JOURNAL, Dec. 3, 1987, n.107. See also *In re Jasmon O.*, 878 P.2d 1297, 1305 (Cal. 1994) (noting that children can develop psychological separation anxiety disorder when they are faced with the prospect of separation from foster parents who have raised them since infancy); *McLaughlin*, 693 F. Supp at 327 (noting that a child had become severely depressed as a result of his separation from the family who had cared for him since he was an infant).

100. Christensen, *supra* note 99.

placements.¹⁰¹ Thus, from the child's perspective, race is not a factor to be considered.

3. *The Adopting Parents' Perspective*

While transracial adoptions refer to the adoption of a child of one racial classification by parents of another racial classification, in the United States transracial adoptions normally refer to the adoption of a child of color by white parents.¹⁰² In these cases, the family has not only provided for the child's physical needs, but has already bonded with their foster child. Since, from the perspective of both the adoption agency and the child, an immediate and permanent placement is the goal, the prospective adoptive parents see placement of the child with them as the solution. From the adopting parents' perspective, race is not a factor to consider.

4. *The Black Community's Perspective*

In 1972, the NABSW took the position that the adoption of black children by white families is a type of genocide.¹⁰³ From its perspective, the best interest of the black child is met when he was placed with a black family. Identifying unique needs of the black child, the NABSW believes that black children need to establish a sense of self, an identity that black children cannot receive from white parents.¹⁰⁴ The NABSW notes that black children need to establish self-determination, and that this is something that only a black family can teach a black child.¹⁰⁵ In addition, the NABSW points out that black children have a need to identify with black people in a black community, and growing up in a white home, in an all-white or predominantly white community, will impede the black child from developing this identity.¹⁰⁶

Today the NABSW has made the preservation of black families its focus.¹⁰⁷ In 1994, the organization published its current

101. *Smith v. Org. of Foster Fams. for Equity and Reform*, 431 U.S. 816, 837 (1977).

102. Kristie Ann Rooney, *Racial Matching vs. Transracial Adoption: An Overview of the Transracial Adoption Debate*, 53 J. MO. BAR 32 (1997).

103. See *supra* note 62 and accompanying text. See also Bartholet, *supra* note 25, at 1180.

104. See *supra* note 62 and accompanying text.

105. See *supra* note 62 and accompanying text.

106. See *supra* note 62 and accompanying text. See also Howard, *supra* note 13, at 530-33 (discussing the interest of minority groups in deciding whether non-whites can adopt minority children and in maintaining their cultural and racial identity).

107. Margaret F. Brinig, *Moving Toward a First-Best World: Minnesota's Position on Multiethnic Adoptions*, 28 WM. MITCHELL L. REV. 553, n.22 (2002).

policy position regarding transracial adoptions.¹⁰⁸ While reaffirming its stand that “African American children should not be placed with white parents under any circumstances,” it has taken the position that black families “are disproportionately affected by the child welfare system.”¹⁰⁹ The NABSW recommends that an attempt first be made to place the black child within his extended family.¹¹⁰ When this is not possible, placement should be made within the child’s own community.¹¹¹ Further, when considering a transracial adoption, the NABSW encourages social workers and agencies to place black and biracial children with families who understand the reality of race in our country today, the dangers of isolating the a child from members of his or her race, and the need to teach and experience cultural diversity.¹¹²

While an immediate and permanent placement for the black child is desirable, the NABSW would prefer that agencies delay placement until a more acceptable placement can be made within the black community. From the black community’s perspective, race is the most important factor to be considered.¹¹³

IV. THE LAW

Congress and the courts have attempted to improve the state of foster care and to initiate improvements in adoption placements through legislation and judicial decisions.

108. MICHELLE M. HUGHES, ILL. INST. FOR CONTINUING LEGAL EDUC. HANDBOOK, § 8.15 (2002).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. While most of the criticism aimed at transracial adoptions has come from the NABSW, there are a number of other outspoken opponents. Rooney, *supra* note 102, at 32. Opponents suggest that the needs of the black culture and its survival must be considered and that the special needs of a child of color cannot be met in a transracial placement. Brinig, *supra* note 107, at 553-54. As an alternative, one group has proposed kinship foster care or the permanent placement of the child with members of his extended family. *Id.* at 577-84. Professor Dorothy Roberts has criticized the Child Welfare System and accused the government of the destruction of the black family by “reinforcing disparaging stereotypes about black family unfitness.” Copeland, *supra* note 75, at 514. See also Susan L. Brooks, *The Case for Adoption Alternatives*, 39 FAM. & CONCILIATION CTS. REV. 43 (2001) (examining alternatives to the traditional adoption that foster relationships with biological and extended families).

A. Federal Law

The debate over whether white families should be permitted to adopt black children continued for over twenty years.¹¹⁴ Then in 1994, Congressional research revealed that of the nearly 500,000 children in foster care, tens of thousands were waiting for adoption.¹¹⁵ The median length of time that children waited to be adopted was two years and eight months.¹¹⁶ Congress was specifically disturbed about the large number of minority children who remained in foster care waiting adoption.¹¹⁷ In addition, it was disturbed by the continued use of race-matching policies by adoption agencies.¹¹⁸ Finally, Congress recognized that there was an urgent need to locate and recruit available and qualified black families to adopt.¹¹⁹

Alarmed over the large number of children in institutions and foster care, Congress passed the Multiethnic Placement Act (MEPA) in October of 1994,¹²⁰ and the Small Business Job Protection Act of 1996 (SBJPA).¹²¹ Both acts prohibited the improper use of race, color or national origin in custody placement proceedings, by governments or entities that received federal funds.¹²² Thus, the law affected all fifty states and an unknown number of agencies.¹²³ However, the MEPA did permit states and agencies to take into consideration the culture, ethnic, or racial background of the child, as well as the ability of the potential family to meet the needs of the child.¹²⁴ Because of

114. Mabry, *supra* note 9, at 1349.

115. Howard M. Metzbaum Multiethnic Placement Act of 1994, Pub. L. 103-382, §552, 108 Stat. 4056 (1994). Mabry, *supra* note 9, at 1354.

116. Pub. L. No. 103-382, 108 Stat. 382.

117. *Id.*

118. *Id.*

119. *Id.*

120. 42 U.S.C. § 5115a (West 1994), *repealed by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996).

121. Pub. L. No. 104-188, 100 Stat. 1755; HR 3448, 104th Cong., 2d Sess. (Aug. 20, 1996).

122. Mabry, *supra* note 9, at 1359.

123. *Id.*

124. 42 U.S.C.A. § 5115(a)(2) (West 1994) (repealed 1996). The statute provides in relevant part: (1) An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not (A) categorically deny to any person the opportunity to become an adoptive or a foster parent, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved; or (B) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved. (2) Permissible consideration: An agency or entity to which paragraph (1) applies may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child

this last provision in the MEPA and the possible equal protection implications, the provision was deleted and repealed by the SBJPA.¹²⁵

Congress designed the MEPA to end race-based decisions in adoption placement.¹²⁶ The purpose of the law was to promote the best interest of the children by decreasing the wait time for children prior to adoption, preventing discrimination in the placement of children, and assisting in the identification and recruitment of foster and adoptive families that can meet children's needs.¹²⁷ To comply with the MEPA goal of recruiting qualified black families for placement, agencies are required to locate families who "reflect the ethnic and racial diversity of [adoptable] children in the State [where] adoptive homes are needed."¹²⁸

B. Maryland Law

1. Statutory Law

Maryland law encourages transracial adoptions by preventing the use of race as the determinative factor in adoptions. Under Maryland law, once the court has terminated the natural parents' rights, a child may be adopted with the consent of the child placement agency.¹²⁹ The placement of the child cannot be withheld by the executive head of the agency, based solely on the race or religion of the potential adoptive parents, unless it would be in the best interest of the child.¹³⁰ Further, the Maryland Court of Special Appeals held that

of this background as one of a number of factors used to determine the best interests of a child.
Id.

125. Publ. L. No. 104-188, 110 Stat. 1755 (Aug. 20, 1996). *See Mabry, supra* note 9 (discussing whether the MEPA would have survived a strict scrutiny analysis). In *Palmore v. Sidoti*, the Supreme Court noted that "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concern. Such classifications are subject to the most exacting scrutiny." 466 U.S. 429, 432-33 (1984). Racial and ethnical distinctions must be strictly scrutinized by the courts, and "such classifications are constitutional only if they embody narrowly-tailored measures that further compelling governmental interests." *Adarand Constructors v. Pena*, 515 U.S. 200 (1998).

126. *George, supra* note 17, at 206.

127. *Mabry, supra* note 9, at 1358.

128. *Id.* at 1360 (citing the Federal Adoption Assistance and Child Welfare Act, 42 U.S.C.A. § 622(b)(9) (West 1995)).

129. MD. CODE ANN., FAM. LAW § 5-311(b) (2000). If the individual is at least 10 years of age, he or she must also give consent to the adoption. § 5-311(b)(2).

130. MD. CODE ANN., FAM. LAW § 5-311(b)(2) (2000). This statute provides in relevant part that the executive head of the child placement agency may not withhold consent for the sole reason that the race or religion of the prospective adoptive parents is different from that of the individual to be adopted or of the birth parents, where to do so would be contrary to the best interests of the child. § 5-311(b)(2).

statutes such as MEPA were enacted to resolve exactly those situations in which potential adoptive parents are denied the right to adopt based solely on either religion or their race.¹³¹

2. Case Law

The case of *In re Adoption/Guardianship No. 2633*¹³² reflects the law in Maryland and raises the typical arguments regarding issues of transracial adoption, including application of the best interest standard, immediate and permanent placement, maintaining strong emotional bonds between foster parents and foster children, providing the black child with self-awareness and a sense of belonging, and possible Fourteenth Amendment violations. In this case, the white foster parents of a black child, Tiffany, were denied the right to adopt the child.¹³³ Tiffany and her two older brothers were removed from the custody of their mother in July 1990.¹³⁴ At the time of her removal, Tiffany was six months old. She was addicted to crack from birth.¹³⁵ The social service agency placed the children in separate foster homes. Tiffany went to the home of a white family, the Mauks, known for their work with drug-addicted infants, while her brothers were placed with a black family, Mr. and Mrs. S.¹³⁶

Within a year, Tiffany showed significant developmental improvement and had developed a strong relationship with the two adopted children of the Mauks.¹³⁷ Within the first two weeks of their custody of Tiffany, the Mauks began to inquire about the possibility of adopting her.¹³⁸ But in November 1991, Washington County Department of Social Services (WCDSS) decided to place Tiffany with the S. family, which had care of her two brothers.¹³⁹

131. *In re Adoption/Guardianship No. 2633*, 646 A.2d 1036 (1994), *cert. denied*, 516 U.S. 809 (1995).

132. *Id.*

133. *Id.*

134. *Id.* at 1039.

135. *Id.* It was later learned that Tiffany had been a victim of sexual abuse as well. *Id.*

136. *Id.* The Mauks had already adopted two children: Janae, a four-year-old black child, and Dustin, a four-year-old biracial child. Both of these children had formerly been in the Mauk's care as foster children. *Id.*

137. *Id.* When Tiffany had first entered the Mauk's home, her development was below her chronological age. Within a year she had reached normal development and her pediatrician attributed this to the care received from the Mauks. *Id.*

138. *Id.*

139. *Id.* Up to this point, there had been no attempt on the part of either the WCDSS or the S. family to maintain any contact between Tiffany and her brothers, Justin and Rodney. In fact, Mr. and Mrs. S. admitted that they had given no thought prior to this placement or the idea of adopting Tiffany. *Id.*

WCDSS decided that the Mauks were unsuitable and pursued an adoption for Tiffany with Mr. and Mrs. S.¹⁴⁰ The WCDSS initially wanted to reunite Tiffany with her brothers.¹⁴¹ While the WCDSS considered the race of the potential adoptive parents, it could not quantify the weight that was placed on that factor.¹⁴² The WCDSS did note that the Mauks lived in a predominantly white neighborhood and that they were concerned about the possibility that Tiffany would not be integrated into a black community.¹⁴³

On March 29, 1992, Tiffany fell into a swimming pool and was taken to the hospital.¹⁴⁴ The hospital advised that it would be in Tiffany's best interest to remain in the Mauk home.¹⁴⁵ Despite this advice, the WCDSS removed her on April 1, 1992 and placed her with the S. family.¹⁴⁶ After two and a half weeks, the Mauks were granted visitation. In May 1992, however, the visitations were abruptly terminated without any explanation from the WCDSS.¹⁴⁷ Eventually the Mauks filed a cross-petition for adoption.¹⁴⁸

At the circuit court hearing, both parties presented expert testimony on the effect of race in determining Tiffany's placement.¹⁴⁹ On January 6, 1993, the circuit court ordered that the parties be evaluated by a neutral party.¹⁵⁰ Finally, on May 6, 1993, more than a year after Tiffany had been removed from the Mauk's home, the court-appointed expert recommended that Tiffany be permanently placed with the S. family.¹⁵¹ While the expert recognized that the Mauks were equally suitable as adoptive parents for Tiffany, she felt that "Tiffany [would] suffer loss again if she [was] sent back to the Mauks. This [would] be debilitating to her development and well-being."¹⁵²

140. *Id.*

141. *Id.*

142. *Id.* at 1040.

143. *Id.* This was also a concern voiced by the NABSW in the adoption of their position paper. *See supra* Part II.D.

144. *In re Adoption/Guardianship No. 2633*, 646 A.2d at 1040.

145. *Id.* This advice was based on the observations of the treating physicians who noted that Tiffany had suffered a trauma. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1041. The court appointed Barbara DiCocco, a licensed social worker. *Id.*

151. *Id.*

152. *Id.* Ms. DiCocco's opinion was based on her belief that there was "the potential for further harm to the child if she was removed yet again from an environment that the evidence suggests she considered to be her home." *Id.*

The Mauks appealed the circuit court's decision and argued that the WCDSS violated Maryland law by placing Tiffany with the S. family.¹⁵³ The Mauks also argued that the trial court erred in dismissing their complaint under 42 U.S.C. § 1983.¹⁵⁴ The Maryland Court of Special Appeals, while recognizing that the actions of the WCDSS were "reprehensible," held that Tiffany should remain with the S. family.¹⁵⁵

The Mauks asserted that the WCDSS denied their adoption solely because of racial factors.¹⁵⁶ Additionally, the WCDSS failed to grant "preference for adoption based on their status as long-term foster parents."¹⁵⁷ The court explained that Maryland law does not give foster parents the right of first refusal.¹⁵⁸ Rather, the court stated, "the relevant provision clearly states that the agency must "consider" placement with a current long-term foster parent."¹⁵⁹

The court noted that the Mauks had not requested consideration by the agency for the adoption of Tiffany until after the agency determined the S. family was suitable.¹⁶⁰ There was no rejection based on race. The court then stated that the trial court was required to use the "best interest" standard and in so doing "[t]he trial court may evaluate any number of factors when making a decision in an adoption proceedings."¹⁶¹ The trial court considered all issues raised by the parties, and while race played a role in its decision, it was not the overriding factor.¹⁶² Additionally, the court emphasized that the "proper focus of the trial court's inquiry" is Tiffany's best interest, and not the Mauks'.¹⁶³ The Maryland Court of Special Appeals held that the trial court had "made a well-informed and rational decision when it

153. *Id.* The Mauks also argued that the trial court had abused its discretion by granting the S. family's Petition for Adoption and by finding that it was in Tiffany's best interest. *Id.*

154. *Id.* The Mauks argued that they had standing to state a claim under 42 U.S.C. § 1983 and that they were denied equal protection under the Fourteenth Amendment. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1042-43.

158. *Id.* Rights of first refusal are sometimes described as preemptive rights or rights of preemption. A right of first refusal "has been described as closely related in purpose to an option." *Ollie v. Rainbolt*, 669 P.2d 275 (Okla. 1983). Such rights give to the holder a preferential treatment. The Mauks claimed that they had the right to refuse to adopt Tiffany before WCDSS made her available for permanent adoptions.

159. *In re Adoption/Guardianship No. 2633*, 646 A.2d at 1042-43.

160. *Id.*

161. *Id.*

162. *Id.* at 1044.

163. *Id.*

concluded that Tiffany's interests would best be served by adoptive placement with the S. family."¹⁶⁴

The court held that to sustain a claim that they were denied due process, the Mauks must "show that they were deprived of a federally secured right by persons acting under color of state law."¹⁶⁵ Noting that "the foster parent relationship is a creature of statute"¹⁶⁶ and is not legally equivalent to either adoptive or biological families, the court concluded that "the preservation of the foster care family unit for adoptive purposes is not a liberty interest protected by the Constitution."¹⁶⁷ Therefore, the Mauks couldn't sustain their due process claim.

The Court of Special Appeals agreed with the Mauks' argument that they had been denied equal protection.¹⁶⁸ The court noted the trial court finding that the WCDSS used race as the sole factor in determining Tiffany's placement.¹⁶⁹ After considering the facts in the light most favorable to the Mauks, the trial court concluded that the WCDSS had not violated the Mauk's equal protection rights. Although the Court of Special Appeals agreed that the trial court erred in its findings, it held that the error was harmless because, at the time of the motion, the Mauks were without any remedy.¹⁷⁰ The relief initially sought by the plaintiffs had become moot by the trial court's independent ruling in the adoption proceedings.¹⁷¹

3. *Equal Protection Issues*

White foster parents alleging that the agency's denial of their request to adopt their black foster child was a violation of their rights have historically brought most adoption-related equal protection claims.¹⁷² Because the United States Supreme Court held that while the rearing of a child is a fundamental right,¹⁷³ the adoption of a child

164. *Id.*

165. *Id.* at 1045.

166. *Id.*

167. *Id.* at 1045-46.

168. *Id.* at 1048.

169. *Id.*

170. *Id.* at 1048-49.

171. *Id.* at 1049.

172. See *J.H.H. v. O'Hara*, 878 F.2d 240 (8th Cir. 1989), cert. denied, 493 U.S. 1072 (1990); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977) (en banc), cert. denied, 437 U.S. 910 (1978); *Tallman v. Tabor*, 859 F. Supp. 1078 (E.D. Mich. 1994); *DeWees v. Stevenson*, 779 F Supp. 25 (E.D. Pa. 1991); *McLaughlin v. Pemsley*, 693 F. Supp. 318 (E.D. Pa. 1988), aff'd, 876 F.2d 308 (3d Cir. 1989).

173. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

is not,¹⁷⁴ equal protection claims brought at the state level have been more popular. The Due Process Clause of the Fourteenth Amendment provides constitutional protection for family relations.¹⁷⁵ When state agencies and courts use race to determine child placement, legitimate concerns arise over possible Equal Protection violations.¹⁷⁶

In *Palmore v. Sidoti*,¹⁷⁷ the Supreme Court held that race can not be used to determine an adult's ability to care for and raise a child.¹⁷⁸ In *Adarand Constructors v. Peña*,¹⁷⁹ the Court held in that all government action subjecting a person to unequal treatment must justify use of such classifications.¹⁸⁰ The Court stated that "all racial classification, imposed by a federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny."¹⁸¹ The strict scrutiny standard dictates that the use of racial classifications to determine adoptive placement "[is] constitutional only if they embody narrowly tailored measures that further compelling governmental interests."¹⁸² The *Adarand* decision will have a significant impact on government adoption agencies that show preference toward one race over another.¹⁸³ In fact, it is likely that those who oppose interracial adoptions will be unable to meet the high standard of strict scrutiny.¹⁸⁴

4. Case Law From Other Jurisdictions

Most courts have permitted a child's race to influence his or her placement.¹⁸⁵ Because so many difficulties can arise with

174. In re Opinion of the Justices, 530 A.2d 21, 24 (N.H.1987) (noting that there is "no such right to adopt, to be a foster parent, or to be a child care agency operator, as these relationships are legal creations governed by statute").

175. These protections come from the Court's decision that family relationships are "within the zone of privacy created by several fundamental constitutional guarantees." *Griswold v. Conn.*, 381 U.S. 479, 485 (1965).

176. U.S. CONST. amend XIV, § 1. See also Forde-Mazrui, *supra* note 54 (discussing case law and implications of Equal Protection violations).

177. 466 U.S. 429 (1984).

178. *Id.*

179. 515 U.S. 200 (1995).

180. *Id.*

181. *Id.* at 227. This case, while dealing with anti-discrimination clauses in government contracts, is relevant to transracial adoption statutes because it held that all government actors are required to justify racial classifications that subject any person to unequal treatment. *Id.*

182. *Id.*

183. George, *supra* note 17, at 206 (discussing the application of strict scrutiny to any use of racial criteria).

184. *Id.*

185. *Id.* at 205. See also *Compos v. McKeithen*, 341 F. Supp. 264 (E.D. La. 1972) (discussing the allowance of race as a factor in deciding adoption of a black child by a black husband and white wife); *In re Gomez*, 424 S.W. 2d 656 (Tex. App. 1967) (permitting race to be one of the factors considered in a black man's adoption of his white wife's two daughter).

interracial adoptions, race may be considered as one of the factors in making a placement decision.¹⁸⁶ Courts recognize that “it is a natural thing for children to be raised by parents of their same ethnic background,”¹⁸⁷ and thus, considering race in child placement does not constitute an equal protection violation.¹⁸⁸ Despite disagreements about the extent to which race may be used, all courts agree that race may not be used automatically to prescribe the appropriate adoptive placement of a child.¹⁸⁹ When a white couple was prevented from adopting a black child, the Ohio Court of Appeals noted that while cultural heritage is a factor to be considered, it could not be the “determinative factor.”¹⁹⁰

186. *J.H.H. v. O'Hara*, 878 F.2d 240, 244 (8th Cir. 1989) (holding that “race may be considered as a relevant factor in determining the best interest of the child”).

187. *Drummond v. Fulton County Dep't of Family & Child Servs*, 563 F.2d 1200, 1205 (5th Cir. 1977) (holding that “consideration of race in the child placement process suggests no racial slur or stigma in connection with any race”). *See also* *Re Petition of D.I.S.*, 494 A.2d 1316 (App. D.C. 1985); *Re Petition of R.M.G.*, 454 A.2d 776 (App D.C. 1982) (upholding the statutory requirement that race be a relevant consideration in determining whether an adoption should be approved despite a contention that it violated the equal protection doctrine); *Re Adoption of A Minor*, 228 F.2d 446 (App. D.C. 1973) (approving an interracial adoption as serving the best interest of the child); *Compos*, 341 F. Supp. at 264 (ruling that a Louisiana statute providing that a “single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race” was unconstitutional because it violated the equal protection provision of the Fourteenth Amendment when it limited interracial adoptions); *Krakov v. Dep't of Pub. Welfare*, 92 N.E.2d 184 (Mass. 1950) (pointing out that due regard should be given to race and religion); *Spath v. Willis*, 423 N.Y.S.2d 551 (3d Dept. 1980); *In re Moorehead*, 600 N.E.2d 778 (Ohio 1991); *State ex rel. Portage County Welfare Dep't v. Summers*, 311 N.E.2d 6 (Ohio 1974); *Re Adoption of Baker*, 185 N.E.2d 51 (Oh. 1962) (noting that the statute provided specific guidance by requiring investigation into the parties' respective racial, religious, and cultural backgrounds); *In re Gomez*, 424 S.W.2d 656 (Tex. Civ. App. 1967) (holding that a statute providing that no white child could be adopted by a black, nor could a black child be adopted by a white, was unconstitutional as violating the equal protection clause).

188. *Drummond*, 563 F.2d at 1205. *See also* *Rooney*, *supra* note 102, at 33 (noting that “*Drummond* established the principle that adoption decisions lacking invidious intent do not offend the Equal Protection Clause.”). In *Drummond* the adoption agency had considered race only to promote the child's welfare. *Rooney*, *supra* note 102, at 33.

189. *See e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (noting 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 found to be an appropriate person to have such custody”).

190. *In re Moorehead*, 600 N.E.2d 778, 786 (Ohio Ct. App. 1991). The court noted that factors such as the ability of the prospective adoptive parent to care for the child, to provide a safe and stable home, and to provide for the child's racial and cultural needs, should be considered. *Id.*

C. Race as a Factor in Custody Cases

The courts are split on the issue of whether courts can use race as a factor in custody disputes. Some courts have held that racial characteristics cannot determine whether a black father or white mother should be awarded custody of their biracial children.¹⁹¹ These courts maintain that it is improper to modify the custody of a child from the natural mother, based solely on the mother's remarriage to a person of a different race.¹⁹² The court in *Holt v. Chenault*¹⁹³ held that the impact of the custodial mother's subsequent biracial marriage is an inappropriate basis for the modification of custody.¹⁹⁴ However, in *Raysor v. Gabbey*, the court held that race is a relevant factor in the placement of a biracial child when the natural father is black and the grandparents are white.¹⁹⁵ The court process used to determine custody of a child when race is a factor is applicable to transracial adoption placement.

V. ANALYSIS

A. Transracial Adoptions are in the Best Interest of the Black Child

The child is ultimately affected by the agency's decision to either approve a transracial placement or leave the child in a temporary home while searching for a same-race family.¹⁹⁶ Transracial adoptions encourage the immediate and permanent placement of a child and can prevent the emotional problems that arise when a child is taken from a loving family with which he has already developed a positive relationship.¹⁹⁷ On the other hand, the NABSW argues that only same race adoptions can guarantee the development of a black child's cultural identity and develop positive self-esteem.¹⁹⁸

191. *Fontaine v. Fontaine*, 133 N.E.2d 532 (1956).

192. *Langin v. Langin*, 276 N.E.2d 822 (1971).

193. 722 S.W.2d 897 (Ky. 1987).

194. *Id.*

195. 395 N.Y.S.2d 290 (1977) (stating that there are many factors to be considered in determining the child's best interests, including the fact that a biracial child must face unique problems).

196. Howard, *supra* note 13, at 533 (discussing the interests of the individual child).

197. *See supra* note 62 and accompanying text.

198. *See supra* Part II.D.

B. Race Should Not Be A Factor

Some have argued that race should, in fact, be a factor in child placement because such a consideration is in the black child's best interest. The NABSW is against all transracial adoptions for a number of reasons. Specifically, the NABSW recommends that black children be placed in black families "where they belong physically, psychologically and culturally in order that they receive the total sense of themselves and develop a sound projection of their future."¹⁹⁹ The NABSW argues that if black children are placed in white homes they are "cut off from the healthy development of themselves as black people"²⁰⁰ The nurturing of one's self identity is a primary function of a family, and the NABSW argues that a white family cannot provide a positive self identity for a black child.²⁰¹ Further, they believe that only a black family can provide a black child with the coping mechanisms necessary to survive in today's society.²⁰²

Those who support same-race placement note that a transracially adopted child may face other unique problems. For example, the child may be the only black child in an otherwise white neighborhood, attend an all-white school or church, and be placed in a position where he will face possible rejection by his peers.²⁰³ Further, a black child will stand out in his family based on physical factors alone.²⁰⁴ Supporters of same-race placements argue that the importance of identifying with ones own family is significant, and would never be achieved by a black child in a white family.²⁰⁵

Evidence exists to support the NABSW's claim "that minority children in general experience problems with self-esteem and emotional adjustment due to the effects of prejudice and racism."²⁰⁶ Many critics of transracial adoption agree that a white family cannot

199. Rooney, *supra* note 102, at 32. See also Forde-Mazrui, *supra* note 54, at 926.

200. Rooney, *supra* note 102, at 32.

201. *Id.*

202. For the small number of transracially adopted children who have developed identity problems, failure of the adoptive parents to acknowledge the child's racial background was a factor in causing confusion. A.R. Silverman, *Outcomes of Transracial Adoption*, 3 THE FUTURE OF CHILDREN: ADOPTION 104, 108. See also Hanan, *supra* note 42, at 198 (noting that regardless of a parent's skin color, a parent's attitude towards the child's racial heritage and identity has a strong impact on how the child views himself).

203. Howard, *supra* note 13, at 534.

204. Rooney, *supra* note 102, at 32.

205. See Anne Adams Lang, *When Parents Adopt a Child and a Whole Other Culture*, N.Y. TIMES, March 8, 2002, available at <http://www.nytimes.com/specials/030800gen-adoption.html>; Howard, *supra* note 13, at 538.

206. Howard, *supra* note 13, at 537.

provide the type of environment that will help a black child retain and develop his cultural identity.²⁰⁷

In direct contradiction to the NABSW position, one study showed that transracially adopted children developed healthy, positive attitudes about racial identity and self-esteem.²⁰⁸ Studies indicate that transracially adopted children “are as well adjusted as their inracially placed counterparts.”²⁰⁹ Several studies indicate that transracial adoptive parents foster “a healthy sense of racial identity and pride in their children.”²¹⁰ One might “seriously call into question the wisdom of resisting transracial placement” when looking at the success revealed by studies on transracial adoptions.²¹¹ While some studies have reported difficulties with transracial adoptions, they are inconclusive.²¹²

Black adoptees raised in white families tend to develop different attitudes about race and race relations than do black adoptees raised in black families.²¹³ Some evidence indicates “that transracial adoption may even have a positive impact in terms of black children’s sense of comfort with their racial identity.”²¹⁴ Additionally, researchers note that “transracial adoptees appear more positive than blacks raised inracially about relationships with whites, more comfortable in those relationships, and more interested in a racially integrated lifestyle.”²¹⁵

Other studies disagreed with the NABSW position and its arguments.²¹⁶ A comprehensive twelve-year, longitudinal study of

207. *Id.* at 538.

208. Rita J. Simon, *From Data to Public Policy: Affirmative Action, Sexual Harrassment, Domestic Violence, and Social Welfare*, 37 JURIMETRICS J. 343, 345 (1997) (book review).

209. Forde-Mazrui, *supra* note 54, at 944.

210. *Id.* at n.122.

211. *Id.* at 944.

212. *Id.* at n.125. See also Howard, *supra* note 13, at 534, n.155. Rita Simon and Howard Altstein conducted a longitudinal study of transracial adoptees, publishing their results in 1977, 1981, and 1987. Bartholet, *supra* note 9, n. 11. Since this study, many other similar studies have been conducted, comparing transracially adopted children to children raised by foster families, families with single mothers, and unrelated black families. See Brinig, *supra* note 107, at 586-87 and accompanying footnotes; Rooney, *supra* note 102 at 34 (examining results of empirical studies). Generally, these studies have shown that transracially adopted children exhibit comparable coping skills, educational success, family relationships, and self-esteem as other groups of children. *Id.*

213. Bartholet, *supra* note 9, at 1216-17.

214. *Id.*

215. *Id.* at 1218 (indicating that some transracial adoptees describe themselves as biracial or American or “human” rather than black).

216. See Bartholet, *supra* note 9, at 1211-16; Howard, *supra* note 13, at 534-45; Rooney, *supra* note 102, at 34.

adopted children, found that transracially adopted children were comparable to other adoptees in terms of self-esteem, coping abilities, family relationships, and educational achievement.²¹⁷ Contrary to the NABSW's predictions, "transracially placed children have a sense of racial identity and pride comparable with inracially placed black children."²¹⁸

To subscribe to the idea that only a black family can provide a black child with a sense of self and identification with the black community assumes that all black families place an equal emphasis on the development of these characteristics. However, "not all black families identify with black culture," foster a sense of ethnic pride and "provide a positive cultural setting for their children."²¹⁹

Growing up in a transracial family provides the child with unique advantages. For example, the child develops a sense of belonging to more than one culture,²²⁰ of being more tolerant of the differences of others,²²¹ and experiences the richness of celebrating more than one culture.²²² In addition, opponents of transracial adoptions overlook the impact of the family and the basic characteristics of the parents, both of which are independent of race.²²³ They similarly ignore the importance of environmental attitudes, parenting attitudes and skills, and the effect these factors will have on the child's adjustment.²²⁴ The transracially adopted child will identify with some culture or race based on his knowledge, awareness, competence, and comfort with that cultural or racial group.²²⁵ This identification may be with the child's own race, with the race of his adoptive parents, or with a multi-race group.²²⁶

In its analysis of what might happen when a black child is placed in a white family, the NABSW overlooks that love, self-esteem and survival skills do not come in colors. Most white families desiring to adopt a black child are already aware of the problems that they and

217. Rooney, *supra* note 102, at 34. Rita Simon and Howard Altstein conducted this study. *Id.*

218. *Id.*

219. Forde-Mazrui, *supra* note 54, at 948.

220. See Baden, *supra* note 3; Bartholet, *supra* note 9, at 1218.

221. See Baden, *supra* note 3; Bartholet, *supra* note 9, at 1218.

222. See Baden, *supra* note 3; Bartholet, *supra* note 9, at 1218.

223. Baden, *supra* note 3, at 312.

224. *Id.*

225. *Id.*

226. See Baden, *supra* note 3. The author identifies a theoretical model that separates racial identifications and cultural identifications. *Id.* The author identifies four types of culture identifications: 1) Bicultural Identification; 2) Pro-Self Cultural Identification; 3) Pro-Parent Cultural Identification; and 4) Culturally Undifferentiated Identification. *Id.*

the child will face. They are aware of the need to foster the child's cultural and racial identity. The placement of a black child in a white family is not a less desirable option to a delay in placement, perhaps even a permanent delay, until an available black adoptive family is located. The immediate and permanent placement of a waiting child is more important than maintenance of ethnic heritage and cultural identity because the longer the placement is delayed the less likely that child will ever be placed with an adoptive family.

Evidence shows that a delay in placement, even when it is to accommodate inrace placement, is costly to children awaiting adoption.²²⁷ Professionals agree that "children need continuity in the context of a permanent home in order to flourish."²²⁸ Experts in child development note that "continuity and stability in a child's environment is essential," and the "absence of a stable and enduring parental relationship" is "devastating and traumatic to a child's development."²²⁹ Evidence also shows that children do better in adoption than in foster care.²³⁰ More importantly, the child's age at placement is "a central factor in determining just how well adoptees will do in terms of various measures of adjustment."²³¹

A study by Feigelman and Silverman, concluded that "deleterious consequences of delayed placement are far more serious than those of transracial adoption."²³² Further, their findings implied that "when a choice must be made between transracial placement and continued foster or institutional care, transracial placement is clearly the option more conducive to the welfare of the child."²³³ Black children who cannot be placed with black families, because policy makers or social workers choose not to place them in transracial adoptions, will face "significant and lasting psychological harm."²³⁴

Thus, the key issue is the expeditious placement of the black child in a qualified family, regardless of the family's race. The "best interest" of the child dictates that he or she be placed as quickly as possible in a qualified family setting.

227. See *supra* Part II.E.

228. Bartholet, *supra* note 9, at 1223 (citing a study by W. Feigelman and A. Silverman that compared the significance of race matching to the significance of delay in placement).

229. *Id.* at n.162.

230. *Id.* at 1224.

231. *Id.*

232. *Id.*

233. *Id.* at 1224-25.

234. *Id.* at 1225.

C. Race-Based Placement Can Destroy Pre-existing Family Bonds

Courts have consistently held that agencies may consider race as a relevant factor, but not as the sole, determinative factor in child placement.²³⁵ Such decisions often discount emotional bonds developed between a child and his foster family and can lead to heart-breaking results.²³⁶ When agencies continue to move foster care children from one family to another, the agencies disrupt the children's lives, upset their sense of stability, and sever developing family bonds.²³⁷ Bonding is crucial to adoption and an important part of a child's emotional development.²³⁸ Children who are separated from their foster family suffer emotionally.²³⁹ The prospect of separation can cause these children to develop a psychological separation anxiety disorder or severe depression.²⁴⁰

D. Race-based Placement Prevents Adoptable Children From Being Adopted

One-half of all children waiting to be adopted are black.²⁴¹ Forty-three percent wait up to four years to be adopted.²⁴² In New Orleans, it is so difficult to place black boys that they are labeled as "special needs," the same title as children who suffer from emotional problems and physical handicaps.²⁴³ In Pennsylvania, two-thirds of the hard to place children are black, and that only one-third of potential adoptive families are black.²⁴⁴ Based on these figures, it is evident that many black children may never be placed.

Statistically, it is in the black child's best interest to be adopted immediately. Black foster care children presently wait for adoption thirty-three percent longer than the national median.²⁴⁵ In fact, a healthy black infant will wait approximately five times longer than a

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

236. *See supra* Part III.B.2 (discussing the results of severed family bonds).

237. *See supra* Part III.B.2.

238. *See supra* notes 95-96 and accompanying text.

239. *See supra* note 95 and accompanying text.

240. *See supra* note 95 and accompanying text.

241. George, *supra* note 17, at 198 (citing Desda Moss, *Adoption Plan Only a First Step, Advocates Say*, USA TODAY, May 7, 1996, at 3A).

242. *Id.*

243. *Id.* (citing Edward Pratt, *Debating Interracial Adoptions*, SAT. STATE TIMES/MORNING ADVOCATE, May 18, 1996, at 7B).

244. *Id.* *See also Texas Seeks Colorblind Adoption*, NAT'L L. J., April 24, 1995, at A10.

245. Rooney, *supra* note 102, at 32 (citing Davidson M. Pattiz, *Racial Preference in Adoption: An Equal Protection Challenge*, 82 GEO. L.J. 2571, 2572 (1994)).

healthy white infant to be placed. The longer a child stays in foster care, the less likely he will be adopted. The alternative to transracial placement is not always same-race placement. The child can be placed in foster care, institutional care, temporary care or not placed at all.²⁴⁶ Therefore, if the foster care system relies solely on black couples to adopt black and biracial children, many of these children will remain unplaced.

E. Transracial Adoptions Are Not Detrimental to Black Child's Self-Esteem or Self-Awareness

Transracially adopted children develop very positive attitudes about their racial identity and their self-esteem.²⁴⁷ Evidence demonstrates that transracially adopted children develop a strong sense of black identity.²⁴⁸ Consistently, studies have indicated that as many as seventy-five percent of transracially adopted preadolescent and younger children have adjusted well in their adoptive homes.²⁴⁹ A recent study, it was found that transracial adoption was not "detrimental for the adoptee in terms of adjustment, self-esteem, academic achievement, peer relationships, parental and adult relationships."²⁵⁰

While institutionalization and foster care are detrimental to the emotional development of the black child,²⁵¹ studies have generally shown that transracially adopted children develop well emotionally.²⁵² One study, focusing on the adoption of black children by white families, found that "some black adoption workers saw transracial adoptions as a perhaps less-preferable but nevertheless pragmatic means of giving black children the kind of continuing care, nurturance and sense of belonging so important to the child's optimum physical, emotional, and social development."²⁵³ No evidence supports the proposition that only a black family can provide a black child with self-esteem and self-awareness.

246. Howard, *supra* note 13, at 535.

247. *See supra* Part V.A.

248. *See supra* notes 197 to 208 and accompanying text.

249. Silverman, *supra* note 202.

250. A.R. Dharma, M.K. McGue, and Benson, P.L., *The Emotional and Behavioral Adjustment of United States Adopted Adolescents: Part I. An Overview*, CHILD. & YOUTH SERV. REV. 18, 83-100.

251. Howard, *supra* note 13, at 535 (noting that the weight of clinical data and psychological opinion supports this conclusion). *See also* Howard, *supra* note 13, at n.14-24.

252. *Id.* at 537.

253. *See id.* at n.21.

F. Race-Based Placement Violates the Fourteenth Amendment

Race-based placement is a violation of the Fourteenth Amendment and Title VI section 601 of the Civil Rights Act of 1964.²⁵⁴ The Supreme Court has continued to view racial classification for the purpose of child placement as inherently suspect.²⁵⁵ In *Palmore v. Sidoti*,²⁵⁶ a unanimous Court held that a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.”²⁵⁷ The Court noted that when persons are classified by race, that classification is “more likely to reflect racial prejudice than legitimate public concerns”²⁵⁸ and, as a result, any such classifications “are subject to the most exacting scrutiny.”²⁵⁹ Additionally, in *Adarand Constructors, Inc. v. Peña*,²⁶⁰ the Supreme Court reaffirmed the rule in *Palmore* and made it clear that all racial and ethnic distinctions require strict judicial scrutiny.²⁶¹ Courts and agencies can only consider race in the placement of children if they can demonstrate a compelling state interest.

While the imposition of strict scrutiny does not result in a per se violation, only one case, *Korematsu v. United States*,²⁶² has survived this high level of judicial strict scrutiny.²⁶³ *Korematsu* was the first equal protection case in which the Court applied strict scrutiny.²⁶⁴ Additionally, several Supreme Court justices have, in recent years, declared that they would not have upheld the statute in question in *Korematsu* today.²⁶⁵ Thus, the Court has admitted that the

254. Esten, *supra* note 56, at 1942. See also Publ. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C.A. § 2000(d) (1994)). “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

255. Re Petition of R.M.G., 454 A.2d. 776, 787 (App D.C. 1982).

256. 466 U.S. 429 (1984).

257. *Id.* at 432.

258. *Id.*

259. *Id.*

260. 515 U.S. 200 (1995).

261. *Id.* at 227.

262. 323 U.S. 214 (1944).

263. Paul E. McGreal, *Alaska Equal Protections: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209 (1998).

264. *Korematsu*, 323 U.S. at 214.

265. McGreal, *supra* note 263. “Members of the Court have since heaped disparagement on that case, leaving it as the one instance in which a racial classification has survived strict scrutiny.” *Id.*

only statute declared constitutional after strict scrutiny analysis would not survive that same level of scrutiny today.²⁶⁶

When race is used as a factor in child placement decisions, it falls within the category of illegitimate classifications. Neither the government nor the adoption agencies can justify their use of racial classification in the decision-making process unless the classification is a narrowly-tailored measure for achieving some compelling government interest. Only those policies and practices that can survive a strict scrutiny analysis can continue. When used as the sole factor for consideration in adoption placement, race-based adoption policies cannot survive strict scrutiny. However, when race consideration is simply one of many factors that will bear on the child's best interest, there is no Fourteenth Amendment infringement.

VI. CONCLUSION

Every year, thousands of children wait for placement while agencies search for qualified families.²⁶⁷ The paucity of potential black families to adopt the disproportionate number of black children makes it even more difficult to place these children. The result is that these children may be left unadopted for years or in many cases never adopted at all. The resulting economic impact on society resulting from this dilemma is considerable. Instead of placing these children in the homes of eager and qualified families, same-race policies place an increased burden on the already overtaxed foster care system and put similar economic pressures on related social welfare agencies.

Many criticize the adoption of black children by white families, arguing that it deprives these children of necessary self-realization and cultural pride. Studies have not validated these concerns. There is no evidence that growing up in a black family is the only way to insure that a black child will grow into a functional adult. More important is the recognition that the preservation of culture is a goal that is separate from the goals of adoptions. Such social engineering is in contravention to the child's best interest.

If the best interest of the child is met by placing him in a family that will share his racial, cultural and ethnic heritage, then transracial adoption may not be the answer. However, delaying placement to seek out a family of the same race is contrary to the goals

266. *Id.*

267. *Mabry*, *supra* note 9, at 1349.

of adoption and the best interests of the child. The answer, then, is to recruit in order to build an existing pool of potential black adoptive families.

Race as the determinative factor in child placement violates the Equal Protection Clause of the Fourteenth Amendment. The Court repeatedly held that any action on the part of the government or adoption agencies using race as a factor in child placement must survive strict scrutiny. While race may be one of the factors considered, it cannot be the *only* factor considered in child placement. When race is only one of the factors considered in placement, there is no equal protection violation. Only when preferential treatment for placement is based on racial classifications is there an infringement.

In 1896, dissenting in *Plessy*, Justice Harlan noted that “[o]ur Constitution is color-blind.”²⁶⁸ If the Constitution is color blind, why isn’t the adoption process? The consideration of race in child placement, logically and constitutionally, does not serve the best interest of the black or biracial child.

268. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

