Trans-Racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot"

David S. Rosettenstein

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TRANS-RACIAL ADOPTION AND THE STATUTORY PREFERENCE SCHEMES: BEFORE THE "BEST INTERESTS" AND AFTER THE "MELTING POT"

DAVID S. ROSETTENSTEIN*

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INTRODUCTION

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those

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prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty in concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.¹

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.²

And caught in the middle are the children.

The topic of trans-racial adoption has generated much rhetoric and much study, and will undoubtedly continue to do so. Heated discussion seems to result because the topic exposes raw nerves from sociological and political points of view.

The legal arena is not much different, because the topic impacts key normative propositions. First, to what extent does the legal treatment of trans-racial adoption ensure that dispositional decisions relating to children awaiting adoption are made in the "best interests of the child"? Second, to what extent does the adoption process require us to turn our backs on the concept of the country as an ethnic "melting pot" and entrench affirmative obligations to acknowledge ethnicity in the legal system? Is it necessary to accept a model which premises cultural preservation on racial classification, and moreover, does trans-racial adoption constitute an appropriate context for its employment? Conversely, even if one applauds the Palmore v. Sidoti doctrine,³ which declines to pander to societal racism when deciding upon an appro-

² Barriers to Adoption: Hearings Before the Senate Committee on Labor and Human Resources, 99th Cong., 1st Sess. 214 (1985) (statement of William T. Merritt, President, National Association of Black Social Workers).
³ See Palmore, 466 U.S. at 433; see also supra text accompanying note 1.
appropriate disposition for the child, are we comfortable with the impact that adopting these values will have on a given child?

Surprisingly, there is relatively little recent discussion of the legal system's response to these questions in the general context of trans-racial adoptions. In particular, with the exception of a student Note, there has been no discussion whatsoever of the efforts of three states—Arkansas, California, and Minnesota—to re-

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6 See Ark. Code Ann. § 9-9-102 (Michie 1993). The section provides:
In all custodial placements...due consideration shall be given to the child's minority race or minority ethnic heritage.... In the placement or adoption of a child of minority racial or minority ethnic heritage... the court shall give preference, in the absence of good cause to the contrary, to...
(1) a relative...
(2) a family with the same racial or ethnic heritage as the child...

Id.

7 See Cal. Fam. Code § 8708 (Deering 1993). The statute states:
Where a child is being considered for adoption, the following order of placement preferences regarding racial background and ethnic identification shall be used...
(a) In the home of a relative.
(b) If a relative is not available...
with an adoptive family with the same racial background...
(c) If placement cannot be made under the rules set forth...within 90 days...
the child is free for adoption with a family of a different racial background...

Id.

8 See Minn. Stat. Ann. § 259.28(2) (West 1993). This section provides:
The policy of the state of Minnesota is to ensure that the best interests of children are met by requiring due, not sole, consideration of the child's race or ethnic heritage in adoption placements.... The court shall give preference...
to...
(a) a relative...
(b) a family with the same racial or ethnic heritage as the child...
(c) a family of different racial or ethnic heritage...
that is knowledgeable and appreciative of the child's racial or ethnic heritage.
spond to the considerations raised by trans-racial adoption by enacting legislation which establishes adoption placement priorities on the basis of race. This Article addresses these concerns by analyzing the statutory schemes, both from the perspective of whether they can substantively and procedurally ensure that dispositions are made in the best interests of the child, and also from the perspective of whether such statutes can survive a constitutional challenge. In passing on these issues, one must come to terms with one's own views on whether pessimism toward the possibility of eradicating racism justifies a color and community-conscious approach to the treatment of trans-racial adoption, and also whether peaceful multiculturalism is attainable through the reinforcement of racial identification. An additional consideration is whether the claimed benefits of a race-based placement necessarily outweigh the price that might be paid by adopting a scheme to achieve those benefits. This price is potentially paid not only by the values of society at large, but also by the integrity of the legal-social work complex associated with adoption placements. Most important, the individual child whose placement is in issue also pays the price.

I. DEMOGRAPHIC AND POLITICAL BACKGROUND

A. Demographics

By any standard, formal trans-racial adoptions have had a brief history in the United States, emerging in the 1950s, flourishing, relatively, in the 60s, and withering (at least as far as domestically born minority babies were concerned), but not completely.

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Id. The Minnesota statute was named the Minnesota Minority Heritage Protection Act, but since its provisions have now been extended to cover all races, this title may be somewhat of a misnomer. See Glynn, supra note 5, at 930 n.20.

9 See Janet Mason & Carol W. Williams, The Adoption of Minority Children: Issues in Developing Law and Policy, in ABA NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, ADOPTION OF CHILDREN WITH SPECIAL NEEDS 83, 94-96 (Ellen C. Segal ed., 1985). A few other states have addressed the subject by adopting or proposing to adopt analogous priority schemes in their relevant departmental manuals. These efforts raise essentially the same questions as are raised by the statutory schemes. Id. (giving sample of relevant policies); see Bartholet, supra note 4, at 1189. The enforceability of these policies may depend upon whether they are embodied in regulations or simply incorporated into practice manuals. Id. at 97. Their enforceability in fact is another matter. The location of these policies in practice manuals may hinder public monitoring of the enforcement, or modification of these policies. Id. Perhaps most problematic is the extent to which these policies may be adopted without public input.
disappearing, thereafter.\textsuperscript{10} The total number of formal adoptions in the United States was estimated at 72,000 in 1951, about 175,000 in 1970, and 129,000 in 1975, the last year in which the federal government collected statistics.\textsuperscript{11} Thereafter, 1985 estimates put the number of adoptions at around 65,000, but with substantial statistical errors of as many as 60,000 adoptions.\textsuperscript{12} Reliable statistics for trans-racial adoptions are even harder to ascertain. Simon and Altstein indicate that there were 831 trans-racial adoptions in 1975, a decrease from the all-time high of 2574 in 1971.\textsuperscript{13} These authors and others maintain that both public and private agencies are placing children trans-racially, but will not admit to doing so because of the political considerations involved.\textsuperscript{14}

Estimates suggest that in 1986 there were some 280,000 children in "out-of-home" placement, of whom 34.9\% were black.\textsuperscript{15} Certainly, not all of these children were placed out of their homes for adoption purposes. It has indeed been suggested that in the same year there was a total of 104,000 adoptions of children of all races, 51,000 of which involved adoptions by non-relatives.\textsuperscript{16} Although these statistics do not indicate the number of minority children available for adoption, two other studies, one in 1977 and another in 1983, found that only 37\% of black children apparently

\textsuperscript{10} Macaulay & Macaulay, Adoption for Black Children: A Case Study of Expert Discretion, 1 RES. IN L. AND SOC. 265, 280-88 (1978) (containing description of formal adoption system in United States, and its inability to resolve problems posed by trans-racial adoption).


\textsuperscript{12} See Simon & Altstein III, supra note 11, at 4-5.

\textsuperscript{13} See Simon & Altstein III, supra note 11, at 5; see also Simon & Altstein II, supra note 11, at 96 (indicating that in 1976 number of trans-racial adoptions rose to 1070).

\textsuperscript{14} See Simon & Altstein III, supra note 11, at 5.

\textsuperscript{15} See Bartholet, supra note 4, at 1173-74 n.10 (citing Telephone Interview with Dr. Toshio Tatara, Director of Research and Demonstration Department, American Public Welfare Association (Jan. 29, 1991)).

\textsuperscript{16} Nat'l Comm. for Adoption, 1989 Adoption Factbook 60; cf. supra note 12 and accompanying text.
available for adoption were in fact adopted. In 1987, Simon and Altstein estimated that there were between 33,000 and 40,000 black children in foster care awaiting adoption. Another 1986 analysis found that more than half the black children in foster care had been there for two years, compared with only one-third of the white children. Many, perhaps a majority, of the children in foster care experience more than one placement, and consequently their emotional development suffers.

It has been suggested that in 1984 there were two million white couples who wished to adopt, 68,000 of whom were willing to do so trans-racially. This, as Simon and Altstein point out, would be sufficient to place all of the black children awaiting adoption. Even if the number of black children available for adoption were double the 1987 estimate of 40,000, however, it appears that the black community would still be able to absorb them. The failure of the black community to adopt the black children awaiting adoption is allegedly one manifestation of the political forces at work in this arena.

B. Politics

Two political themes dominate the area of trans-racial adoption. The first relates to the perception of the desirability of making trans-racial placements. From any perspective, the essence of the argument is concerned with the virtues of race itself. The second theme pertains to the consequences of racism, relating either

17 Id. at 123 (citing WESTAT, INC., NATIONAL STUDY OF SOCIAL SERVICES OF CHILDREN AND THEIR FAMILIES (1978); AMERICAN PUB. WELFARE ASS’N, CHARACTERISTICS OF CHILDREN IN SUBSTITUTE AND ADOPTIVE CARE (1985)).
18 SIMON & ALTSTEIN III, supra note 11, at 5.
19 See NAT’L COMM. FOR ADOPTION, supra note 16, at 126 (citing H. Altstein and J. Rosenberg, Presentation Before the Third National Conference on Intercultural Families (Oct. 29, 1986)).
20 See Howard, supra note 4, at 506 n.11. At one point in New York, 60% of the children in foster care had experienced more than one placement and 28% of the children had experienced three or more placements. Id.; see Smith v. Organization of Foster Families, 431 U.S. 816, 837 (1977).
21 See Howard, supra note 4, at 506. While foster care was originally believed to be preferable to institutionalization, it is, however, considered less attractive than permanent placement. Id. at 508 (citing, inter alia, Michael S. Wald, State Intervention on Behalf of ‘Neglected’ Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights, 28 STAN. L. REV. 623, 671-72 (1976)).
22 SIMON & ALTSTEIN III, supra note 11, at 6.
23 SIMON & ALTSTEIN III, supra note 11, at 6.
to rationales for making only intra-race placements or to explanations of why there were apparently insufficient black households available to adopt black children.

One might have anticipated that the longest running political theme obstructing trans-racial adoptions would have its roots in the biases of the white-majority population. Although there are a few overt manifestations of this theme,\(^\text{24}\) they are far fewer than initially expected. The reality is that the adoption process did not need to actively display any racist propensity it might have had, because the doctrine of “matching,” which was widely accepted by the social work establishment, required that parents should only be allowed to adopt children who resembled the adoptive parents. The ostensible rationale for the doctrine was that the parent and child could better establish a relationship if differences were minimized, although the real reason for the doctrine may have been to hide the fact that the child was adopted.\(^\text{25}\) Conversely, when trans-racial adoption came to the fore in the 1960s, it did so not because the social work establishment viewed such adoptions as a vehicle for integrating society, but because it claimed such adoptions were a means to advance the best interests of the child.\(^\text{26}\)

The political objections to trans-racial adoption emanating from minority communities found expression in the often repeated 1972 position statement adopted by the National Association of Black Social Workers:

> Black children should be placed only with Black families whether in foster care or 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


\(^{25}\) See Macaulay & Macaulay, supra note 10, at 280. Nevertheless, it has been suggested that there was still a political agenda at work since exceptions were made to the doctrine of matching generally to permit whites to adopt a black child, not vice versa. The National Ass'n of Black Social Workers, Inc., Preserving Black Families: Research and Action Beyond the Rhetoric 31 (1986) [hereinafter Preserving Black Families]. The latter result was necessary because “the tradition of Black racial subordination made such a prospect untenable.” Id.

\(^{26}\) See Macaulay & Macaulay, supra note 10, at 284.
white homes are cut off from the healthy development of themselves as Black people.

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

The socialization process for every child begins at birth. Included in the socialization process is the child's cultural heritage which is an important segment of the total process. This must begin at the earliest moment; otherwise our children will not have the background and knowledge which is necessary to survive in a racist society. This is impossible if the child is placed with white parents in a white environment.27

This position reflects two themes. First, the advancement of a black identity through the obstruction of trans-racial adoption is in the interests of the black community. Race is the basis for the position taken in this theme. Second, an intra-racial placement is necessary to protect the child from the consequences of a racist society. If this latter premise is true, the argument would be consistent with an analysis seeking to advance the best interests of the child.

The theme which purports that one is dealing with a racist society is connected to another argument of the opponents of trans-racial adoption. They view the shortage of minority homes available to adopt minority children as a reflection of racism.28 The argument is that the social work establishment is staffed by predominantly white social workers who are responsible for recruiting and approving black adoptive families.29 In this context, several points are noted: (1) 83% of all child welfare workers are white, but 30-40% of their case load involves black families;30 (2) the system was only intended to,31 and is only geared to, pro-

27 SIMON & ALTSTEIN I, supra note 11, at 50 (quoting position paper developed at the National Association of Black Social Workers' Conference in Nashville, Tenn., Apr. 4-9, 1972).
28 SIMON & ALTSTEIN III, supra note 11, at 8-9.
29 SIMON & ALTSTEIN III, supra note 11, at 8.
30 SIMON & ALTSTEIN III, supra note 11, at 8-9 (citing Evelyn Moore, Black Children Facing Adoption Barriers, NASW News, Apr. 1984, at 9).
31 See PRESERVING BLACK FAMILIES, supra note 25, at 31.
vide white children to white families; and (3) as part of this process, the social work establishment uses white middle class standards to screen out lower and working class black families as potential adopters. Thus, one study found that aspiring black adoptive families were accepted at a rate of one-quarter of 1% as against a general national average acceptance rate of 10%.

It is unclear that all responsibility for the lack of availability of minority homes lies at the door of the social work establishment, nor is it clear that the complaints just outlined are necessarily a reflection of racism. It is also unclear that the appropriate response to these complaints requires an adoption scheme that merely regulates the final disposition rather than other processes associated with the operation of the adoption establishment. However, one tantalizing question does emerge: If control of the adoption process was vested in the white middle class, why did trans-racial adoptions undergo such a dramatic decline after the National Association of Black Social Workers publicly opposed it in 1972?

II. THE STATUTORY SCHEMES

Three states have adopted statutory preference schemes regulating trans-racial adoption. As far as the basic preference structure is concerned, the schemes of Arkansas and Minnesota are substantially identical. The California scheme is conceptually similar, although it displays a number of significant technical differences. Of the three, the Minnesota scheme is embedded in the most extensive legislative framework and has been the subject of the most litigation. By and large, the analysis in this paper will focus on the Minnesota scheme. Most of what will be said can be applied directly to the Arkansas provisions. From time to time, the technical differences of the California scheme will provide an interesting basis for comparison.

33 Simon & Altstein III, supra note 11, at 9. These black families were instead encouraged to become foster parents. Id.
34 Simon & Altstein III, supra note 11, at 9. The study reported that only 2 of 800 black families applying for adoptive parent status were approved. Id.
36 See supra text accompanying notes 13 and 27. According to Rita Simon, the National Association of Black Social Workers does not represent the beliefs of the general black population in the United States. Rita J. Simon, Transracial Adoption in South Africa: Phase I, 2 Reconstruction 102, 104 (1990) (indicating that 71% of both races support trans-racial adoption).
The Arkansas, California, and Minnesota legislatures require race or ethnic heritage to be taken into account when placing a child in foster care.\(^\text{37}\) In addition, Minnesota imposes the same requirements when recruiting foster families;\(^\text{38}\) when placing neglected children or children in need of protection or services in foster care where legal custody is transferred to a child placement agency or county welfare board;\(^\text{39}\) when transferring legal custody or appointing a guardian pursuant to a variety of petitions that may be filed in connection with juveniles;\(^\text{40}\) or when appointing a guardian because parental rights have been terminated and an individual is given legal custody of the child.\(^\text{41}\) A direct discussion of these latter provisions is somewhat beyond the scope of our present concerns, as is the legislative treatment of Native American children.\(^\text{42}\) Nevertheless, a number of the issues raised by these provisions impact on the question of adoption and thus will be alluded to from time to time.

In the context of adoption, Minnesota requires that a child's race or ethnic heritage be taken into account by the agency making the adoption placement,\(^\text{43}\) the court reviewing the placement and in "determining appropriate adoption."\(^\text{44}\) The legislature's directions to the court read as follows:

Protection of heritage or background. The policy of the state of Minnesota is to ensure that the best interests of children are met by requiring due, not sole, consideration of the child's race or ethnic heritage in adoption placements . . . .

In reviewing adoptive placement, the court shall consider preference, and in determining appropriate adoption, the court shall give preference, in the absence of good cause to the contrary, to (a) a relative or relatives of the child, or, if that would be detri-


\(^{38}\) Id. § 257.072 (West 1993).

\(^{39}\) Id. § 260.191.

\(^{40}\) Id. § 260.181(3).

\(^{41}\) Id. § 260.242.


\(^{44}\) See id. § 259.28(2).
mental to the child or a relative is not available, to (b) a family with the same racial or ethnic heritage as the child, or if that is not feasible, to (c) a family of a different racial or ethnic heritage from the child that is knowledgeable and appreciative of the child's racial or ethnic heritage.

If the child's genetic parent or parents explicitly request that the preference described in clause (a) or in clauses (a) and (b) not be followed, the court shall honor that request consistent with the best interests of the child.45

When enacted in 1983, the statutory provisions required the court or the child placement agency to obey the race-based preference structure only when considering the adoption of children of minority racial or ethnic heritage. The Arkansas statute is still in this form, but the Minnesota statute's restriction to minority children was eliminated in 1992,46 after the Minnesota Court of Appeals took the position that the original version of the statute was an unconstitutional denial of equal protection.47 This change neatly highlights the conflict between the social—query, sociological—premises underpinning the legislation and the political premises underpinning the constitutional analysis.

The principal California provision reads as follows:

Where a child is being considered for adoption, the following order of placement preferences regarding racial background and ethnic identification shall be used, subject to this section and section 8709, in determining the placement of the child:

(a) In the home of a relative.
(b) If a relative is not available, or if placement with available relatives is not in the child's best interest, with an adoptive family with the same racial background or ethnic identification as the child. If the child has a mixed racial or ethnic background, placement shall be made with a family of the racial or ethnic group with which the child has the more significant contacts.
(c) If placement cannot be made under the rules set forth in this section within 90 days from the time the child is relin-

45 Id. § 259.28(2). The statute further requires that if the child's genetic parents express a religious preference with respect to the child's placement then that preference has to be accommodated within the hierarchy of race-based placements specified in the statute. Id. Child placement agencies are required to conform to an identical set of priorities when making adoption placements. Id. § 259.255.


quished for adoption or has been declared free from parental
custody or control, the child is free for adoption with a fam-
ily of a different racial background or ethnic identification
where there is sensitivity to the child's race, ethnicity or cul-
ture. The child's religious background shall also be consid-
ered in determining an appropriate placement. Unless it
can be documented that a diligent search meeting the re-
quirements of section 8710 for a family meeting the place-
ment criteria has been made, a child may not be placed for
adoption with a family of a different racial background or
ethnic identification pursuant to this subdivision.48

These preference rules need not be followed for "good cause,"
which must be based on one or more of the following
considerations:

(a) Request of the parent or parents.
(b) The extraordinary physical or emotional needs of the child.
(c) The child is legally free for adoption for a period exceeding 90
days during which a diligent search was conducted, and no fam-
ily meeting the placement preference criteria is available for
placement . . . .
(d) Application of these rules . . . would not be in the child's best
interest.49

On its face, the California provision is conceptually similar to
those of Minnesota and Arkansas. Basically, it too prefers an ini-
tial placement with a relative, or failing that, with a person of the
same "racial background or ethnic identification" as that of the
child, or failing that, with a family evincing sensitivity to the
child's race, ethnicity or culture. There is, however, one immedi-
ate point of distinction between the Minnesota and California
statutes. The Minnesota provision declares it to be in the child's
"best interests" to be placed subject to the scheme.50 The Califor-
nia Code specifically acknowledges that a placement in terms of
the scheme may not be in the child's "best interests."51

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48 Cal. Fam. Code § 8708 (Deering 1993). A "diligent search" requires the agency
in question to use all appropriate resources in a directed effort to recruit a family
meeting the placement criteria through "(1) the use of all appropriate intra-agency
and interagency, state, regional and national exchanges and listing books, (2) child-
specific recruitment in electronic and printed media coverage, and (3) the use of
agency contacts with parent groups to advocate for specific waiting children." Cal.
49 Cal. Fam. Code § 8709 (Deering 1993) (limiting request provided by subsection
(a) to one emanating from "birth" parent, as defined in § 8512).
III. THE BEST INTERESTS OF THE CHILD

A. As Perceived by the Social Sciences

To date, a number of studies concerning trans-racial adoption have been conducted. The literature describing these studies tends to describe the results as mixed, inconclusive, and conflicting. In fact, virtually without exception, and subject to qualifications to be described below, the studies suggest that trans-racially adopted children do no worse than intra-racially adopted children, and, in some instances, do better than intra-racially adopted children.

Initial objections to the studies were that, since trans-racial adoption was at a stage of relative infancy, the studies had by and large been restricted to young children. It was postulated that the problems of trans-racial adoption would not emerge until the adopted children reached adolescence. However, although there are fewer studies covering this age group, they tend to confirm the conclusion that trans-racial adoption is, from a social sciences point of view, a viable option for minority children.

If this presentation is true, where does the vehement opposition of the National Association of Black Social Workers spring from? There are a number of lines of analysis.

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52 See Simon & Altstein III, supra note 11, at 145-46 (providing bibliography of most major trans-racial adoption studies).

53 See Arnold R. Silverman, Outcomes of Transracial Adoption, in Center for the Future of Children, The David and Lucile Packard Foundation, 3(1) The Future of Children 104 (1993) (providing overview of studies); see also Perry, supra note 4, at 98-100. Perry points out that most researchers suggest that where possible minority children should be placed in minority homes. Id. at 100, 111-12. Generally speaking, virtually none of the studies provide a foundation for this recommendation. Even where the studies indicate that trans-racial placements may give rise to problems on an individual basis, statistical analyses do not suggest that such placements are inherently more problematic than intra-racial placements. Id. at 98-100. Obviously, an intra-racial placement defines the race-related issues out of existence and in this sense alone it is a "better" solution. But, "better" in this context relates to issues impacting on the adult community, not necessarily on what is good for the child. Id.

54 See, e.g., Perry, supra note 4, at 100.

55 See Perry, supra note 4, at 100.


57 See supra text accompanying note 27.
First, the opposition may reflect the consequences of drawing inappropriate conclusions from the social workers' experiences. It is true, for example, that at least one study⁵⁸ has specifically suggested (but not within the limits of statistical significance) that Afro-American trans-racial adoptees (as distinct from both Colombian and Korean trans-racial adoptees who were also included in the study) might have poorer adjustments than intra-racial adoptees.⁵⁹ The sorts of cases reflected in the sample that led to this result might be similar to those in the social workers' experience which led the social workers to conclude that trans-racial adoptions were undesirable. The study went on, however, to isolate the various factors that might have been contributing to the maladjustment. Only two factors were relevant: the intensity of opposition among family and friends to the trans-racial adoption, and the age of the child at placement.⁶⁰ As between the two, "[r]ace difference and racial antagonism are not completely inert factors in influencing the outcome of a transracial adoption. Yet, they are overshadowed by the significance of factors associated with the child's age and long delays in his or her eventual adoptive placement."⁶¹ The authors also point out that "[t]he race factor itself proved to have no statistically significant value in accounting for the differences in adjustment scores."⁶²

This study and line of analysis suggest that when the social workers reject trans-racial adoptions outright, they are, almost literally, throwing the baby out with the bath water. The studies indicate that there is nothing inherently detrimental in a transracial adoption.⁶³ Obviously, if the family screening process reflects substantial opposition to the adoption among immediate family and friends, the aspiring adoptive parents should be considered unsuitable candidates for the placement. Specific problem environments do not, at least based on the studies, justify abandoning the concept of trans-racial adoption.⁶⁴ Furthermore, specific problem environments do not in themselves justify aban-

⁵⁸ See Feigelman & Silverman, supra note 56, at 594-96.
⁵⁹ See Feigelman & Silverman, supra note 56, at 595; see also Bartholet, supra note 4, at 1182.
⁶⁰ See Feigelman & Silverman, supra note 56, at 596-98.
⁶¹ See Feigelman & Silverman, supra note 56, at 597-98.
⁶² See Feigelman & Silverman, supra note 56, at 597.
⁶³ See McRory & Zurcher, supra note 56, at 144; Simon & Altstein III, supra note 11, at 116-18, 140-41; Feigelman & Silverman, supra note 56, at 601.
⁶⁴ See Silverman, supra note 53, at 117.
doning the fundamental premises of a legal system based on race-free classifications. The problems may reflect defects in the social services delivery system, but at least in the context of this aspect of the analysis, they do not reflect the inadequacies of the legal system.

More important, the study indicates that if the legal or administrative infrastructure requires that trans-racial adoption be considered only as a last resort, when all other placement options have proven to be unavailable, that infrastructure is laying the foundation for a self-fulfilling prophecy of a trans-racial adoption with a maladjusted adoptee. Furthermore, the study implies that a suitable and timely trans-racial adoption represents a better option for the child than an "in-racial" adoption that is delayed until a suitable placement is found.

The second line of analysis flowing from the National Association of Black Social Workers' objections takes a different direction. Their objections, in one sense, seem to assert that within the context of a trans-racial placement a minority child is incapable of developing a sense of self-esteem or self-concept. Although the studies reviewing this reasoning tend to refute it, this does not seem to be the primary focus of the National Association of Black Social Workers' position. The apprehension seems to be that if the children develop racial identities at all, they develop inappropriate identities. As was suggested earlier, there are really two themes at work here.

The first theme seems to suggest that it is necessary for the child to be given an in-racial adoption placement in order to develop a racial identity for the purposes of advancing the interests of the race as a whole. This argument may have independent merit in the political arena. In the context of the best interests of a particular child, it has none. To the extent that the argument precludes a trans-racial placement, either at all, or at least one made in a timely manner (because an in-racial placement is not available at the time the child needs placing), the argument represents the position that the benefits which inure to this particular

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65 See Feigelman & Silverman, supra note 56, at 598.
66 See Feigelman & Silverman, supra note 56, at 598.
67 See, e.g., McRoy & Zurcher, supra note 56, at 122; Simon & Altstein III, supra note 11, at 112.
68 See supra text accompanying note 27.
child by preserving and advancing racial group interests as a whole outweigh any detriment that the child may suffer by not being placed in a timely manner, or at all, on an intra-racial or trans-racial basis. However, the position might be reformulated in a more positive vein. The position would postulate that if an intra-racial placement were available, at the time the child needed it, this would be a preferred placement, and one which would be in the child's best interests. Of course, the position's premise is still open to question. But at least this recharacterization would be a far cry from one requiring a blanket prohibition against trans-racial placements, or a race-generated delay pending an in-racial placement.

The second theme is more problematic. The argument here is that because society is generally racist, a best interests of the child analysis dictates an in-race placement because intra-race acculturation is the only viable vehicle for providing the minority child with the necessary resources for social survival. Again, the

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70 See Bowen, supra note 4, at 528-30 (regarding adoption of blacks, "Where no bloodline member can step in, qualified non-related blacks should be given preference over whites."); Perry, supra note 4, at 125 (asserting that child should be placed in any available home regardless of racial differences where no intra-race home is available).

71 See Chestang, supra note 69. This work is misapplied routinely. The article in question is not a social science research piece, but a social philosophy essay. Id. at 101. While the author suggests that trans-racial adoptive parents will not be able to impart necessary social skills, his primary concern is to pose the questions, without the technical relevancy of the questions ever having been established. Subsequent work then assumes the questions are relevant. See McRoy & Zürcher, supra note 56, at 139-40. Thereafter, the concept of trans-racial adoption itself is criticized by virtue of the conclusions reached by this subsequent work, while the critics ignore the underlying issue of relevancy. See Office of Policy and Management, Conn. Comprehensive Planning Div., State of Connecticut, A Study of Transracial Adoption in Connecticut 19-20 (1988). In fact, Chestang's primary concern is that the children should not be left without a permanent home. See Chestang, supra note 69, at 101-04. The implication is that given the choice between displaced children and trans-racial adoption, the latter is to be preferred. He concedes, somewhat reluctantly, that "these children, if they survive, have the potential for becoming catalysts for society in general." Id. at 105. In analyzing the legal treatment of transracial adoption and the social consequences of the political environment, the author observes that the child will be subjected to particular pressure from some segments of the minority community who will treat the child as a traitor. Id. at 104; see Perry, supra note 4, at 104 (describing efforts at defining relevant survival skills); see also In re R.M.G. 454 A.2d 776, 802 (D.C. 1982) (Newman, J., dissenting). Judge Newman noted, "A healthy integrated personality involves one's having a stable concept of self as an individual as well as a group (black) identity." Id. at 802 n.11 (quoting Joyce Ladner, Mixed Families 104 (1977)). The judge's authority would carry more weight had the statement not been taken out of context. Actually, Ladner was drawing an adverse distinction to
cost-benefit components of this proposition must be closely examined. In this situation, in which a timely in-race placement is not available, and a trans-racial placement is either precluded or must at least be delayed until the prospect of an in-race placement appears as impossible, the proposition encompasses the position that the harm suffered by a child due to a lack of the survival skills necessary in a racist society outweighs the harm suffered by the child through prolonged or indefinite institutionalization or temporary placements.\(^7\) The most that can be said about this dissected version of the proposition is that it has not been refuted. Similarly, neither has it been proved.\(^7\) Only the group of current trans-racial adoptees can vindicate the thesis. To the contrary, however, the best evidence is that they are well on the way to refuting it.\(^7\) Current trans-racial adoptees seem to have developed a means of dealing with the racism they do encounter.\(^7\) Only a long-term analysis will determine whether these methods of coping are bought at an excessive cost relative to the disposition alternatives other than trans-racial placement.\(^7\) A best interests analysis must then ask whether it is more desirable to prohibit further trans-racial adoption pending analysis of the long-term risks, or more desirable to run these risks by allowing such place-

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\(^7\) From both philosophical and practical points of view, even the most aggressive proponents of intra-race placements acknowledge the underlying dilemma. See Amuzie Chimezie, *Transracial Adoption of Black Children*, 20 Soc. Work 286, 297 (1975) (asserting that choice between two alternatives should be made by blacks); *see also* Perry, *supra* note 4, at 110 (discussing notion that black parents may be in better position to transmit survival skills and knowledge to black children).

\(^7\) Even a staunch opponent of trans-racial adoption has acknowledged this. *See* Bowen, *supra* note 4, at 507 ("While it cannot be said on the basis of scientific data that transracial adoption is unsuccessful, it also is not the case that it has been proven successful."). The author's position is that, at least as far as hard-to-place black children are concerned, for the present and short-term future (until such time as further steps can produce intra-race placements for such children), "should a white family want to adopt these children, they should be encouraged; the long-run analysis is that the trauma and lack of family affection is more devastating than the denial of a home altogether, Black or White." *Id.* at 511.


\(^7\) McRoy & Zurcher, *supra* note 56, at 140; Johnson et al., *supra* note 74, at 52.

\(^7\) *See* McRoy & Zurcher, *supra* note 56, at 138-41; Johnson et al., *supra* note 74, at 53-54.
ments, when confronted with the known risks associated with the inability to make an intra-race placement, either in a timely fashion, or at all.\textsuperscript{77}

B. Within the Statutory Scheme—and Despite It

Minnesota requires that both adoption placements and adoption decrees be made in the best interests of the child.\textsuperscript{78} The state espouses the widely held position that adoption is a creature of statute, and the court's authority is therefore measured by the statute.\textsuperscript{79} In this context, the Minnesota statutory provisions contain a legislative determination that it is in the best interests of the child to make adoption placements or decrees with due consideration of the child's racial or ethnic heritage.\textsuperscript{80} This requirement in turn triggers a race-based disposition preference structure.\textsuperscript{81} Conversely, refusal to place a child for adoption or to grant an adoption decree still involves a disposition, even by default. An alternative disposition, for example, placing the child in foster care, may trigger an alternative statutory standard, and in Minnesota, this alternative disposition may itself require consideration of the child's racial or ethnic heritage.\textsuperscript{82}

In addition, however, Minnesota courts seem to be willing to inject into the process, at least to the point at which the statutorily controlled disposition does occur, the common law requirement that the child's best interests be determined independently of the race-based scheme.\textsuperscript{83} In a technical sense, this line of development is interesting from two points of view.

\textsuperscript{77} See Chimezie, supra note 72, at 300-01.
\textsuperscript{79} In re Jordet, 80 N.W.2d 642, 646 (Minn. 1957) ("Adoption was unknown at common law, and therefore we must go to the statute from which the right to adopt another's child derives its authority."); see In re Santos, 195 P. 1055, 1056 (Cal. 1921) ("[Adoption 'exists in this state only by virtue of the statute' . . . .").
\textsuperscript{80} See supra note 78 and accompanying text.
\textsuperscript{81} See supra note 78.
\textsuperscript{82} See, e.g., Minn. Stat. Ann. § 257.071 (West 1993) (providing for consideration of foster child's race or ethnic heritage to satisfy child's best interests).
\textsuperscript{83} Thus, Minnesota's statute requires the Commissioner of Human Resources to consent to an adoption before it can be granted. The law requires that the consent not be unreasonably withheld. However, where the County Bureau of Social Services argued that the race-based statutory preference scheme compelled the determination that the Commissioner's refusal to consent to an adoption was reasonable because the proposed adoption did not follow the statutory preference scheme, the Minnesota Court of Appeals rejected the argument. The court took the position that a decision contrary to the best interests of the child would be unreasonable per se and, further,
First, the Minnesota Supreme Court may ultimately conclude that the statutory preference scheme cannot be allowed to consume the best interests analysis even in the context of the disposition apparently regulated by the statute. In this regard, there is a substantial risk that any "best interests" analysis will be overwhelmed by the preference scheme. The various factors embodied in the analysis of where the best interests of the child may lie cannot be separated from the physical characteristics of the putative adoptive parent or parents. If the statutory preference scheme controls the disposition, the tail may truly wag the dog—unless we are convinced that the race-based disposition scheme is of such overwhelming importance that it ought to control the best interests analysis.

In this connection, the Minnesota Supreme Court has accepted the proposition that regardless of Minnesota's statutory preference scheme, there is a strong preference for permanent placement of the child with relatives, and that such a placement is presumptively in the best interests of the child on the basis of a common sense notion that blood relatives are most likely to look out for one another's interests. This premise seems dubious when invoked to defeat the efforts of an unrelated person who is going to much trouble and expense to overcome the placement efforts of the social work establishment, whose position is reinforced by a statutory race-focused placement scheme. The premise is equally troubling when it is used to justify the priority in the statutory preference scheme accorded to relatives. The very character of the preference scheme indicates that the concept of relative is used in the scheme not as a surrogate for identifying individuals likely to hold dear the interests of the child, but as a surrogate for identifying individuals who have a racial or ethnic heritage in common with that of the child. These objections, in and of them-
selves, do not necessarily imply that considerations of race by a court are inappropriate. They are objections to a scheme which allows a proxy for racial considerations to dominate the child's placement.

There is a second consequence flowing from the injection of a common-law analysis. Here, a construction of the statutory scheme permits the independent invocation of a common-law best interests analysis in which context the court may have to consider race-based issues. In this regard, one should remember that the analysis is not occurring in functional isolation. If the price of adhering to a race-based priority system, because a suitable adoptive family of the appropriate race is not available, is at best delay and at worst nonadoption, the best interests analysis should incorporate an evaluation of these costs against the purported benefits of the race-based placement. Minnesota's statutory scheme contains no specific provisions requiring consideration of these issues. The most that can be said is that the statutory scheme permits the preference order to be abandoned in the face of "good cause to the contrary." However, preliminary indications are that the Minnesota courts are not going to be overly zealous in setting aside the statutory priorities on the grounds of "good cause," at least when it can be demonstrated that the detriment caused to the child would more than likely be only temporary, and that an available alternative placement was otherwise in the child's best interests.

The relationship between the concerns of the California statute and the best interests of the child is perhaps as obscure as that of the Minnesota statute, but for different reasons. In Cali-

\[\text{Note 69-73.}\]

\[\text{Note 66.}\]

\[\text{Note 67.}\]

\[\text{Note 68.}\]
fornia, unlike Minnesota, there is no express declaration of state policy regarding the interests of the child as far as issues of race are concerned, apart from the statutory preference scheme itself. Moreover, although the California statute was never restricted in its application to minority races alone, the provision itself suggests that when priority is accorded to placement with a relative, this priority is for the purpose of meeting race-related concerns. Nevertheless, the statute does provide that a placement with a relative is not to be preferred if it is not in the child's best interests. This suggests that, at least in California, considerations going to the child's best interests that are both race-related, as well as unrelated to race, may be taken into account in deciding to dispense with a placement with relatives.

Moreover, the California statute acknowledges that a search for race-based placements may produce delays. Accordingly, the statute provides that in the event that a same-race family cannot be found within ninety days of the child being freed for adoption, a placement is permitted with a different-race family sensitive to the child's race, ethnicity, and culture. It is only a recent amendment to the Minnesota statute which has to some extent restricted a search for a suitable race-based placement from blocking any other placement.

Finally, unlike Minnesota, which permits the preference system to be abandoned for "good cause" but fails to explain "good cause," the California statute spells out what good cause might be. In California, one reason for not following the race-based preference system is that it would "not be in the best interests of the child."

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89 Id. § 8708(b) ("If a relative is not available, or if placement with available relatives is not in the child's best interest, [the child should be placed] with an adoptive family with the same racial background or ethnic identification as the child.").
90 Id. § 8708(c).
91 Although § 259.455 of the Minnesota Code requires that a child placing agency make "special efforts to recruit an adoptive family from among the child's relatives... [or] families of the same racial or ethnic heritage," the statute's recent amendment provides that this requirement will be satisfied "if the efforts have continued for six months after the child [has] become[ ] available for adoption or if special efforts have been 'satisfied and approved' by the court." Act of May 17, 1993, ch. 291, § 14, 1993 Minn. Sess. Law Serv. 1028, 1082 (West). Obviously, specification of the period of time beyond which racial issues cannot block the child's placement involves a more than somewhat arbitrary judgment. See Perry, supra note 4, at 124.
93 Id.
nia legislature, a race-related placement is not of such compelling moment that it can be allowed to overwhelm the other considerations going to a best interests analysis. The issue of how race does relate to these other considerations, however, is by no means clear.

C. Within the Administrative Infrastructure

There are many different pathways leading to a final decree of adoption. The child's parents may have died or voluntarily surrendered their child for adoption, or their rights may have been terminated in an adversarial proceeding. Generally, however, there is one constant factor in these various processes: the presence of the state's social work bureaucracy. Sometimes its role is somewhat remote, perhaps having been restricted to drawing up the rules under which a state licensed child placement agency facilitates the adoption. Sometimes the presence of the state's social work establishment is more immediate, such as when the state has legal custody and guardianship of the potential adoptee. The purpose of this subpart is to consider how the social work system might function when attempting to make decisions in the best interests of the child, while implementing the statutorily mandated race-based preference system.

In Minnesota, the adoption process generally requires a report to the court from the Commissioner for Human Services, which report is to include the recommendation whether to grant the petition. The statute appears to envisage that the Commissioner will have received a report from the appropriate county welfare board. The court hearing the adoption petition also has the authority to refer the matter for a report on the proposed adoption to either a licensed child placement agency or the county welfare department. In preparing their reports, both the Commissioner and the child placement agency or the county welfare department are required to ascertain whether the proposed home meets the race-based preference standards.

If this were all that these bodies had to do, the legal control of this reporting process might be a manageable task. The statutory

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94 See MINN. STAT. ANN. § 259.27(1) (West 1993).
95 Id.
96 Id. § 259.27(2) (noting that designation of agency depends on manner in which child entered adoption system).
97 Id. § 259.27(1), (2).
mandates, however, do not end there. The Commissioner is required to investigate the conditions and antecedents of the child to ascertain whether the child is a proper subject for adoption, and to make appropriate inquiry to ascertain whether the child and the home are “suited” to one another.98 Either the agency or the board must similarly investigate the “environment and antecedents of the child and of the home of the petitioner.”99 The statute allows the reports to disapprove of the adoption and to recommend to the court that the petition be dismissed.100

In light of the ability of the various reports to lay the foundation to reject the proposed adoption, statutory preference schemes such as Minnesota’s raise a number of concerns relating to the advancement of the adoptee child’s best interests. First, what is the relative significance of determinations made under the preference scheme vis-a-vis other factors such as the “environment” of the child or the proposed adoptive home? Second, when there is discretionary decision-making involved in preparing a report, what legal constraints do or ought to define the scope of that discretion? Third, what is the nature of the process in the course of which the discretion is exercised and the various factors are weighed? In asking these questions, it should be borne in mind that the issue is not simply one involving the best interests of the child, a complex enough question in itself, but is one which also involves accounting for the factor of race, replete as it is with political and legal overtones. The obscurity of the Minnesota scheme highlights some of the complexities involved.

As to the first question, the Minnesota statute commences with a general declaration of policy which requires “due” consideration of the child’s race or ethnic heritage in adoption placements.101 This declaration precedes, and appears to be independent of, the race-based preference scheme that follows it. Nevertheless, the provisions requiring reports from the Commissioner, welfare board or placement agency only direct them to ascertain whether the home meets the preferences set out in the

98 See id. § 259.27(1).
99 See MINN. STAT. ANN. § 259.27(2) (West 1993). The Arkansas provision is similar. ARK. CODE ANN. § 9-9-212(b) (Michie 1993).
100 MINN. STAT. ANN. § 259.27(1), (2) (West 1993). The California statute provides for reports to the court in both state-sponsored and private agency adoptions, but gives no indication as to the possible content of such reports. See CAL. FAM. CODE § 8715 (Deering 1993).
101 See supra text accompanying note 45.
subsequent paragraph of the same section of the statute. Does this mean that the Commissioner or these other bodies are restricted to a technical consideration of these preferences? If they are required to consider the declared policy, what is "due consideration"? Moreover, in this regard, what is the relationship between the preference section and the declaration of policy in the paragraph preceding it? Does the preference section apply only when there are potentially competing adoptive parents whose claims are to be accorded a priority on the basis of the statutory preference scheme? If the preference section only applies in competitive situations, but the Commissioner or other bodies can or must consider the declared policy, what role does this declaration play when the only petitioners seeking to adopt the child are of a different race? Does the policy require that they disapprove the proposed adoption? Of course, since the statute does not directly declare what "due consideration" is, this conclusion is by no means axiomatic.

As to the second question, suppose there are competing adoption petitions. The statute which refers consideration of the adoption to the Commissioner and the reporting bodies requires the court to follow the preference order in the "absence of good cause to the contrary." Does this mean that the Commissioner and, especially, the reporting bodies, as part of their reporting analysis, may or may not identify "good cause" for avoiding the preference structure? If they can or ought to make such an identification, what is "good cause"? California, at least, has included a statutory description of factors constituting "good cause" for not following the preference scheme. Any one of the following will suffice: a request from a parent not to follow the scheme—not doubt intended to facilitate concealing the pregnancy from "relatives"; the extraordinary physical and emotional needs of the child; the absence of a preferred family after a diligent search for more than ninety days from when the child became free for adoption; and the best interests of the child.

Further, in the absence of adoption by a relative, the Minnesota scheme next requires consideration of an individual who is of the same racial or ethnic heritage as the child, unless it is "not

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102 See Glynn, supra note 5, at 948-49 (discussing problem in context of court's decision-making process, not as part of administrative process).

103 MINN. STAT. ANN. § 259.28(2) (West 1993).

104 See CAL. FAM. CODE § 8709 (Deering 1993).
feasible." Is "feasibility" simply a function of physical existence, as suggested by the California statute's use of the term "available," or does it involve a qualitative evaluation as well? If it does, is it permissible for the Commissioner or reporting body to perform this evaluation? Finally, in the absence of petitioners in the two higher ranked groups, the statute permits consideration of a family of a different racial or ethnic heritage if it is "knowledgeable and appreciative of the child's racial or ethnic heritage." Is this restricted to competitive situations vis-a-vis families of another race who are not so knowledgeable, or is it the outer limit of the state's declared policy requiring due consideration of race, so that a family of a different race which is not so knowledgeable is always to be ousted from consideration? Similarly, under the California statute, if as a last resort, a family of a different race which is "sensitive" to the child's race, ethnicity, or culture cannot be found, does the statute preclude any other placement unless "good cause" for avoiding the preference scheme can be found?

Again, are these concerns the restricted province of the relevant court, or are they matters which the Commissioner or reporting body may, should, or must consider? Clearly, the Minnesota legislature envisaged that the social work infrastructure would have a role to play in at least some aspects of this process. Thus, the Commissioner of Human Services is required to "develop criteria for determining whether a prospective adoptive or foster family is 'knowledgeable and appreciative'" in the context just outlined, as well as to develop assessment tools to be used by agencies "in combination with group interviews and other preplacement activities to evaluate prospective adoptive and foster families of minority children." These tools must assess problem-solving skills, identify parenting skills, and, when required, evaluate the

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108 See Cal. Fam. Code § 8709 (Deering 1994). One way of looking at the question suggests, for example, that the child's physical or emotional needs may require that a placement which is not listed occur. Another approach suggests that even in the absence of a preferred placement the child's best interests require an immediate placement.
110 Id. § 257.072(4)(5) (emphasis added).
degree to which the prospective family is knowledgeable and appreciative of racial and ethnic differences.\(^{111}\)

Apart from technical questions such as who would be required to apply the criteria just described, or what sanctions would be levied for failure to follow the criteria or use the assessment tools,\(^{112}\) the statute fails to address the relationship of these concerns to other considerations going to the best interests of the child. Apparently, this is to be left to the discretion of the Commissioner or body preparing the report. To illustrate how problematic this approach may become, one provision, in force until July 1, 1993,\(^ {113}\) which was apparently at least related to the selection of foster families but which might also have applied to adoptive families, required an authorized child placement agency, in implementing the order of preference, to develop written standards for determining the suitability of proposed placements. The statute provides that “[t]he standards need not meet all requirements for foster care licensing, but must ensure that the safety, health and welfare of the child is safeguarded.”\(^ {114}\) This provision suggests that standards, presumably adopted to advance the best interests of the child, may be lowered in order to qualify a family within the order of preference—the child's best interests may be subordinated to the those factors encompassed by the race-based preference scheme. In addition, the provision suggests that the objective criteria associated with licensure be replaced by the sub-

\(^{111}\) Id. The fact that the provision is targeted exclusively to minority children suggests that the law is constitutionally suspect. See In re D. L., 486 N.W.2d 375, 379 (Minn. 1992).

\(^{112}\) See supra text accompanying note 111.


\(^{114}\) See Minn. Stat. Ann. § 257.072(7)(1)(b) (West 1993). The wording of the provision is so obscure that it is not immediately clear whether the standards should only apply to foster placements, or whether they apply whenever the agency implements the statutory order of preference. Even if the provision is intended to be restricted to the former situation, it presumably would impact directly on adoptions which arise in the context of so-called “fost-adopt” placements, in which it is envisaged that the foster family might go on to adopt the child. The statutory provision would also apply, albeit indirectly, when an adoption is sought by foster parents who were previously qualified as such under standards developed by the agency.
jective criteria of the agency as it seeks to achieve its race-related objectives. In such a context, the processes by which the Commissioner or these bodies reach their conclusions become important.

The Child Welfare League takes the position that the decision to sanction a proposed adoption "should be the responsibility of the professional social work staff; it should be made by more than one person (usually the social worker and the supervisor), and should take into consideration any findings of consultants from other professional fields." Given the League's premiere role in establishing standards for the provision of social work services to children, it is not too surprising to find that adoption agencies do follow a group decision-making procedure, in which decisions may be reached by consensus rather than by formal majority. In this context, an individual social worker's values, beliefs, perceptions, or emotions have a strong potential to play a significant role. Thus, in its comment to the standard requiring group decision-making, the Child Welfare League notes that "[i]t should be recognized that social workers' feelings may influence the decision . . . ." Apparently the League's view is that by making a group decision, individual concerns can be overridden. This, however, is only the first layer of concern. The League ignores the fact that the members of the group will very often be people who have a continuing work relationship with one another. This raises the specter of decision-making premised on the long-term needs of that relationship rather than those of the individual child. The particular difficulty in the present context is that the decision involves considerations of race. The race-focused concerns being raised in connection with the child or the adoption petitioners are all too readily imputable to the decision makers. It is probably for reasons like these that the National Association of Black Social Workers' position on trans-racial adoption was able to have such a

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116 See, e.g., A Study of Transracial Adoption in Connecticut, supra note 71, at 71.
117 See, e.g., Drummond v. Fulton County Dep't of Family & Children's Servs., 547 F.2d 835, 846 (5th Cir. 1977). The Drummond court stated, "[A] group consensus is probably the best way to decide what to do. This certainly is too risky a situation for any one person to make the decision alone." Id.
118 See supra note 115 and accompanying text.
119 See Drummond, 547 F.2d at 837-39; A Study of Transracial Adoption in Connecticut, supra note 71, at 71.
120 See Macaulay & Macaulay, supra note 10, at 297.
radical impact on the extent to which such placements were made.\textsuperscript{121}

The only way this problematic group dynamic can be eliminated is to have all the decision makers be of the same race. This technique, however, leaves open the prospect of a warped consideration of racial issues in the substantive decision. After all, this has been one of the historical objections of minority groups to the social work establishment.\textsuperscript{122} The problem might be overcome if appropriate statutory or regulatory standards could be drafted, but there is evidence that anything going beyond policy and practice guidelines, and in particular anything requiring adherence to a strict decision-making formula, would be resisted by social workers.\textsuperscript{123} Nevertheless, there are those who believe that the social work infrastructure does require this control.\textsuperscript{124}

Another aspect of the process is disquieting. Given that the process is rooted in a tradition of discretionary decision-making by experts, to what extent is it desirable to subject this process to review? After all, it has been observed that the delegated decision-making process, involving the imprecise best interests of the child standard, avoids hard normative victories and resulting political dissonance.\textsuperscript{125} The question is whether this benefit is sufficient when the issue involves the race-related values of society and the application of or failure to apply those values to children. This is not just an intellectual challenge. Minnesota's Commis-

\textsuperscript{121} See \textit{supra} text accompanying note 36. Macaulay and Macaulay maintain that opponents of trans-racial adoption had a great advantage because decision-making power had been so completely delegated to professionals. Indeed, they suggest that had legislative prohibitions against such adoptions been sought, many legislators would have been unwilling to listen. See Macaulay & Macaulay, \textit{supra} note 10, at 303.

\textsuperscript{122} See, e.g., Macaulay & Macaulay, \textit{supra} note 10, at 278-79.

\textsuperscript{123} See \textit{A STUDY OF TRANSRACIAL ADOPTION IN CONNECTICUT, supra note 71, at 71.}

\textsuperscript{124} Macaulay & Macaulay, \textit{supra} note 10, at 305; Howard, \textit{supra} note 4, at 528-30; Perry \textit{supra} note 4, at 83 n.121. A comment to the latest discussion draft of the proposed new Uniform Adoption Act relating to the need for inclusion of specific requirements covering the eligibility of stepparents for consideration as adopters states, [The provision is necessary] in order to clarify that one of the intentions of the [Act] is to limit the discretion of agencies and to require that agencies pay careful attention not only to their own sense of what is appropriate for a minor, but to the whole of society's sense of what is best for children. \textit{UNIF. ADOPTION ACT, § 2-104 commentary (Proposed Discussion Draft Feb. 12, 1993).}

\textsuperscript{125} Macaulay & Macaulay, \textit{supra} note 10, at 302; cf. Drummond v. Fulton County Dep't of Family & Children's Servs., 547 F.2d 835, 860 (5th Cir. 1977) (Roney, J., dissenting) ("The case-worker system of social service established by the state for the processing of these very difficult personal and social decisions should not be destroyed under a constitutional edict.").
sioner of Human Services has asserted that the state's statutes effectively endow the Commissioner with a nonreviewable right to veto any proposed adoption that does not comport with the state's race-based preference scheme.\(^{126}\) Although the Minnesota Court of Appeals acknowledged the state judiciary's traditional deference to an agency's expertise and special knowledge in the field of its technical training, education, and experience,\(^{127}\) the court was of the view that the statutes did permit judicial review and that appropriate deference could be accorded during this review process.\(^{128}\) Similarly, California courts have held that even if the statute uses words like "review" and "appeal," the court is free to exercise an independent judgment and is not limited to an analysis of the state agency's exercise of its discretion.\(^{129}\) Of course, in considering the desirability of a review process, it should be remembered that the consequence of litigation is almost inevitably a delay during which "the minor will remain in limbo while assorted would-be adopters litigate their 'right' to adopt."\(^{130}\) The tripartite character of the process, involving as it does, the placement agency, the child, the aspiring parents, and in some instances, the birth parents, almost invites the prospect of losing the child's interests.\(^{131}\)

\(^{126}\) In re S.T., 497 N.W.2d 625, 627 (Minn. Ct. App. 1993). On the relative authority of the court and the state and private agencies in California, see In re McDonald, 274 P.2d 860 (Cal. 1954).

\(^{127}\) In re S.T., 497 N.W.2d at 628 (holding Commissioner's consent is not required for court to allow adoption).

\(^{128}\) Id. at 623; see In re Moorhead, 600 N.E.2d 778, 785 (Ohio Ct. App. 1991). One view of a "strict scrutiny" based constitutional law standard is that the process requires a trial court to make its own determination without deference to the relevant social work agency. Id.

\(^{129}\) In re D.S., 236 P.2d 821 (Cal. Ct. App. 1951) (holding that court could overrule decision of state agency against adoption of abandoned child even without showing that state agency had abused its discretion); see James v. Holy Fam. Adoption Servs., 274 P.2d 860, 866 (Cal. 1954) (extending independent review to adoption of voluntarily relinquished and abandoned children).

\(^{130}\) UNIF. ADOPTION ACT, supra note 124, § 2-104 commentary (Proposed Discussion Draft Feb. 12, 1993); see Bartholet, supra note 4, at 1224 (noting that studies indicate that children benefit from permanent placement as opposed to foster care).

\(^{131}\) Bartholet, supra note 4, at 1224. It might be simpler to attempt to protect the child's interests within the agency's discretionary decisionmaking structure. From a purely technical point of view, however, legal authority over the child will frequently be vested in the agency itself. If there were a complete unity of interest between the agency and the child, it might be appropriate for the agency's legal staff to represent the interests of the child. See CHILD WELFARE LEAGUE, supra note 115, § 6.28. But agencies have their own institutional agendas, which may lead their interests to diverge from those of any particular child. Thus, for example, in Minnesota, the Com-
Even if it is considered appropriate to review an agency's decision, triggering that review is not necessarily an easy task. Nor is it assured that a review will involve an appropriate analysis. As to the former proposition, it does not seem desirable to have to mount a constitutional challenge to the statute to see that considerations relating to the child's best interests are applied appropriately. Additionally, as discussed at some length below, standing to challenge the constitutionality of such a provision may be a commodity in short supply. When race-based factors play a role in the placement decision, however, it appears desirable to probe the discretionary decision-making process. As we have seen, the Minnesota statutory scheme does little to lay any formal foundation for such a process; to make matters worse, as just noted, the Commissioner of Human Services has asserted a nonreviewable veto power. In contrast, the current Discussion Draft of the new Uniform Adoption Act takes a different approach. Having specifically rejected the appropriateness of considerations of race, ethnicity, or religious affiliation in any placement decision by an agency, the draft provides that an agency's decision to place a minor with an individual is presumed to be in the best interests of the minor. When placement, however, is with someone other than a relative, stepparent, or foster parent as defined in the Act, this presumption may be rebutted by a relative, stepparent, or foster parent proving "in an appropriate action by a preponderance of evidence" that the child has substantial emotional ties to the adopting individual and that an adoptive placement with that individual would not be contrary to the best interests of the minor.

missioner of Human Services is required to report to the Indian Affairs Council, the Council on the Affairs of Spanish-speaking People, the Council on Black Minnesotans and the Council on Asian-Pacific Minnesotans with respect to minority placements. MINN. STAT. ANN. § 257.072(5) (West 1993).

See infra notes 143-45 and accompanying text.

See supra text accompanying note 126.


Id. § 2-104(c).

Only those relatives, stepparents, or foster parents who have cared for the minor for 12 months or more within the preceding 24 months, or a relative who makes a written request to adopt the child, are covered by the provision. Unif. Adoption Act, § 2-104(1)(a)(iii), (iv) commentary (Proposed Discussion Draft Feb. 12, 1993). Moreover, only specific relatives are covered. Id. § 1-101(14).

Unif. Adoption Act § 2-104(c).

Id.
One final consideration is relevant here. Even if it is possible to get a court to review an agency's decision, it is not clear that courts would be willing to participate in the process. Certainly, an early appraisal by commentators on trans-racial adoption was that the judiciary quickly became adept at employing technicalities to avoid the mine field of normative values that cases of this type embody.\footnote{Macaulay & Macaulay, supra note 10, at 305-06; see also Bazemore v. Davis, 394 A.2d 1377, 1383 (D.C. 1978) (en banc). “A norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations.” Id.} In this regard, at least in Minnesota, it would seem that matters are delicately poised.\footnote{See supra text accompanying notes 83-87, 126, 133; see also Glynn, supra note 5, at 926 n.5 (discussing Minnesota's battle over trans-racial adoption statutes).} However, as has been noted, abdicating responsibility for decision-making to “experts” is a social ritual designed to minimize the price of conflict. But the low price of reduced conflict may exact a high cost in the actual consequences of those decisions.\footnote{Macaulay & Macaulay, supra note 10, at 306 (citing Kenneth E. Boulding, \textit{Truth or Power}, 190 SCIENCE 423 (1975)).}

IV. CONSTITUTIONAL LAW QUESTIONS AND RELATED ISSUES

A. Introduction

The constitutional law questions raised by the injection of race into the arena of adoption are potentially many and varied. To begin with, there are the various participants: the adoption petitioners, possibly able to assert “rights” based on a role as a foster parent or “relative”; the state, often as current guardian or legal custodian of the child, or at a minimum as licensor of a child placement or adoption agency; a natural parent, whose parental rights may or may not have been terminated; and finally, the child. There is also the legal “device” at issue—a statutory or common law rule or regulation: (1) purporting to be dispositive of the outcome; (2) establishing a presumption or preference; (3) articulating a “factor” for consideration by the decision maker; or (4) requiring that the decision maker be supplied with race-related information, which may or may not impact on the decision. The purpose behind the rule or regulation cannot be ignored. In the jargon of constitutional law analysis, it may be “invidiously discriminatory,” “remedial,” or “benign.” Further, regardless of the purpose, essentially the same characterizations may be attributed
to the application of the rule or regulation. Finally, there is the posture of the case. Is it, for example, a competitive situation, when petitioners of different races are pitted against each other for authority to adopt the child? Are a single family’s efforts to adopt being adversely impacted by a divergence between its own race and that of the child? Is it a situation in which a child is being indefinitely institutionalized or otherwise impermanently placed because no adoptive parents of the same race are available, and a trans-racial placement is constrained by the law in some way? All of this is without consideration of whether the law’s characterization of “race” in these contexts is sufficient to pass constitutional muster.

Some of these topics are beyond the scope of this Article. Generally, limited statutory provisions requiring an administrative agency and the courts to abide by a specified race-based preference scheme, in the best interests of the child, when sanctioning an adoption, are considered. Even a relatively brief consideration, however, of the legislation in light of the questions just raised manifests the specter of a project having the worst attributes of a hydra and a bramble bush. A single logically coherent place to begin the analysis probably does not exist. Nevertheless, an examination of some of the parties involved partially helps to eliminate some extraneous concerns, but more importantly, it leads to a more or less common starting point from which to feed the process into well-established, although contentious, analytic frameworks.

B. Parties Involved

1. Generic Adoptive Parent

In the abstract, an aspiring parent is not generally regarded as having a “right” to adopt, and so a constitutional law analysis is not founded on “liberties.”\textsuperscript{142} In the absence of the ability to af-

\textsuperscript{142} See Tibbets v. Crossroads, Inc., 411 N.W.2d 535, 537 (Minn. Ct. App. 1987) (holding that “penumbras” composing constitutional right of privacy do not encompass right to adopt). It is problematic to talk about “liberty interests” or “fundamental rights” in the technical sense, because the constitutional rights that surround the family have their origins in a variety of sources. Indeed, in any given case the “liberty” at stake may be seen by different justices as predicated on different theories. For example, the majority in Zablocki v. Redhail, 434 U.S. 374 (1978), ruled that the “liberty” to marry was available because the statute in question failed an equal protection analysis, but Justice Stewart found a foundation for it in the Due Process Clause. The current view that a “liberty” to adopt does not exist is subject to change, espe-
firmatively assert a "right" that is allegedly being infringed by racial considerations, the would-be adoptive parent whose efforts to adopt are being thwarted by these considerations has little choice but to attempt to eliminate, or restrict the role of, these considerations in the adoption process. In short, the mere existence of the race-based preference scheme puts the would-be adopter into a negative litigation posture. It is not the merits of the applicant but the demerits of the statutory system that are in issue. In this regard, the constitutional law weapon of choice is an "equal protection" analysis.

Before commencing an equal protection analysis, indeed almost any constitutional law analysis, the question of standing must be addressed. As even the briefest excursus into Tribe reveals, the question of standing is one of considerable subtlety. Moreover, in the adoption context, the problem may be made manifest by inaction rather than action. Thus, to ground the issue factually, would an aspiring parent in Minnesota have standing to challenge a statute if that potential adopter is never offered an adoptive placement by an authorized child placement agency, and the would-be adopter believes that that failure is attributable to the agency following the requirements of the race-based preference statute requirements? Can the complainant show personal injury traceable to the unlawful conduct and likely to be redressed by the requested relief?

2. Natural Parent

Under normal circumstances, one might anticipate that a natural parent would have little control over race-related issues associ-
ciated with the adoption of his or her child. Generally, the parent will have surrendered parental rights voluntarily, or those rights will have been terminated involuntarily. Given the severance of the link with the natural parent, it might seem inappropriate to permit this individual to impose his or her views on race upon the choice of a suitable adoptive parent. This assumption appears to be contrary to the perspective of the statutory framework. Statutory schemes frequently give the natural parents some input into questions of both the race and religion of adoptive parents. Whether such provisions exist for the psychological benefit of the natural parent or for the practical benefit of the adoption process, in that they induce a greater measure of cooperation on the part of the natural parent, or whether such provisions reflect certain metaphysical social values, is not usually apparent. In any event, Minnesota has provisions of this type. They require both child placement agencies and courts to honor any request by a genetic parent that the race-based preference scheme not be followed inasmuch as the scheme gives priority to a placement with a relative or person of the same race or ethnic heritage as the child. These requests are to be honored only in a manner consistent with the best interests of the child. Perhaps in this way the scheme noticeably does not enable the genetic parent to preclude consideration of when an adoptive family of a different racial or ethnic heritage is “knowledgeable and appreciative” of the child’s racial or ethnic heritage. Similarly, in California there may be “good cause” not to follow the race-based preference scheme if a parent requests that it not be followed. Not surprisingly, in Arkansas the statute contains no express provision permitting a parent to request a trans-racial placement.

Since the Minnesota statute gives the genetic parent the opportunity to request a trans-racial placement which the state or court can nevertheless dishonor in certain circumstances, the statute does seem to provide a genetic parent with the necessary foundation from which to mount a constitutional law challenge to the

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146 One of the reasons for this provision may be to enable the parent to avoid information regarding pregnancy coming to the attention of family members.
148 Id. § 259.28(2) (“The court shall honor that request consistent with the best interests of the child.”).
149 Cal. Fam. Code § 8709 (Deering 1993). The new provision restricts this authority to statutorily defined “birth” parents. Id. § 8709(a).
statute itself. More important, by giving the parent the opportunity to request an alteration in the preference structure, the statute opens up the issue of the inherent integrity of this structure. After all, the statutory premise for the structure is a legislative determination that it is in the best interests of the child that "due consideration be given to the child's racial or ethnic heritage."\textsuperscript{151} This is followed by the preference scheme. If the issue of the race of the adoptive parents is so important, why should legislative determinations in that regard even potentially be reversible at the whim of the genetic parent?\textsuperscript{152} Conversely, if the issue is not that important, is the race of the adoptive parent in fact being used as a proxy for some other characteristic? For instance, the legislature has declined to allow the genetic parent the ability to override the requirement that the adoptive parent be "knowledgeable and appreciative" of the child's racial and ethnic heritage. Is the adoptive parent's "race" a short cut to identifying a person who is "knowledgeable and appreciative"? Is this process not an example of stereotyping? Furthermore, if this is the legislature's logic, is it not stigmatizing to make the implicit converse assumption that a person of a different race will not have the requisite appreciation or knowledge?

3. Relative

The statutes of Arkansas, California, and Minnesota all display a preference for the child to be adopted by relatives. Relatives, as a class, indeed seem favored as potential adoptive parents.\textsuperscript{153} Thus, when the original version of Minnesota's preference statute was held to be unconstitutional by the Minnesota Court of Appeals, the court inferred a legislative preference for adoption by relatives based on a legislative intent to reinforce the biological family and a historical common-law preference for vesting custody.

\textsuperscript{151} MINN. STAT. ANN. §§ 259.28(2), 259.255 (West 1993).
\textsuperscript{152} See Ark. Code Ann. § 9-9-102 (Michie 1993). Ironically, the Arkansas statute, which does not specifically give the genetic parent this authority, is more immune to constitutional challenge, even though the motive behind not providing for a genetic parent to request a trans-racial placement may be suspect. See generally id.
\textsuperscript{153} The Draft Uniform Adoption Act gives a preference to relatives, distinguishing between relatives who have cared for the minor for 12 months or more in the last 24 months and those who have not. UNIF. ADOPTION ACT § 2-104 (Proposed Discussion Draft Feb. 12, 1993) and commentary. The latter are ranked behind a stepparent or foster parent who has cared for the child during this 12 month period. Id. The comment to the draft states that adoption agencies should be bound by society's general sense of what the most appropriate order of preference should be. Id.
in relatives as persons, who through kinship, would be disposed to do more for the welfare of the child.\textsuperscript{154} Another jurisdiction sees relatives as “better equipped as living examples thereof to inject into the life of the adoptee the real sense of her . . . heritage and culture.”\textsuperscript{155} Thus, in the context of Minnesota’s preference scheme, according the highest priority to a relative would seem unobjectionable were it not for the legislation’s prior history.

As originally enacted, Minnesota’s legislation was targeted only at preserving the racial or ethnic heritage of minorities.\textsuperscript{156} After the provisions were found to be unconstitutional, the sections containing the preference structure were amended to delete references to minorities.\textsuperscript{157} The sections were otherwise left intact. This history suggests that one rationale for according a preference to relatives in the original version of the statute was to use the classification of “relative” as a proxy for achieving race-related objectives. Indeed, the Arkansas statute, which is otherwise identical to that of Minnesota, is still facially restricted in its application to minority children.\textsuperscript{158} Notwithstanding the elimination of the reference to minorities from the amended Minnesota sections, it is arguable that the original historical overlay of race-related concerns remains. Accordingly, a nonrelative aspiring parent whose claim is rejected by an agency or the court in favor of the claim of a relative of a different race might have the foundation for a constitutional challenge to the statutes. It should be noted in this regard that whatever the virtues of relatives in connection with the adoption of a child, these virtues are all capable of being enumerated in appropriate legislation. Further, assuming that the objective of any legislation is to advance the best interests of the child, the use of the term “relative” is at best an approxima-

\textsuperscript{154} In re D.L., 479 N.W.2d 408, 412-13 (Minn. Ct. App. 1991), aff’d on other grounds, 486 N.W.2d 375 (Minn.), cert. denied 113 S. Ct. 603 (1992). The court held that the statute violated the Fourteenth Amendment’s Equal Protection Clause in that its original version applied only to minority children. Id. at 413. The court found that this was an unnecessary racial classification since the heritage of a minority child could be protected by simply creating a preference for all placements to be made with relatives. Id. at 413. On appeal, the Minnesota Supreme Court further reasoned that “kin will be disposed to do more for [the] welfare [of the child] and to advance its interests than those who lack the prompting of kinship . . . .” In re D.L., 486 N.W.2d at 380 (citing State ex rel. Waldron v. Bienek, 193 N.W. 452, 452-53 (Minn. 1923)).

\textsuperscript{155} In re D.I.S., 494 A.2d 1316, 1322 (D.C. 1985).


\textsuperscript{157} 1992 Minn. Sess. Law Serv. ch. 577, §§ 4, 5 (West).

\textsuperscript{158} Ark. Code Ann. § 9-9-102(b) (Michie 1993) (applying to children “of minority racial or minority ethnic heritage”).
tion. Undoubtedly, there are relatives with the necessary virtues and those without them. Moreover, since the process of adoption placement and confirmation by the court necessarily requires a case-by-case screening of potential adoptive parents, any argument that the use of "relative" is appropriate as a shorthand device in the interests of efficiency seems spurious.169 These arguments are even more compelling in relation to the Arkansas statute which, as noted, is restricted in its application to minority children. In the context of a constitutional challenge, these considerations bear heavily on the adequacy of the tailoring of this legislation to its declared goals.

Although the use of the term "relative" is typically sought to be used in the best interests of the child, the Minnesota statutory scheme accords the highest priority to a relative unless one is unavailable or such a placement would be "detrimental" to the child. The Minnesota Supreme Court has interpreted the scheme's structure as precluding the need for a best interests of the child analysis.160 Parenthetically, this interpretation came at a time when the statutory provision applied exclusively to minority children.161 Thus, if the concept of "relative" is there for its embodiment of "race" and for whatever other virtues relatives are presumed by the legislature to possess, the child's best interests were expressly subordinated to race-based concerns. The apparent insensitivity of this approach might be softened somewhat were the courts willing to take a broad view of when a proposed adoption by a relative would be detrimental to the child. In the Minnesota Supreme Court's view, however, there must be "a demonstrated actual injurious impact of the relationship on the physical or emotional well-being of the child or a showing to a reasonable degree of certainty that the facts and circumstances of the proposed placement pose the substantial likelihood that actual harm will occur."162 By contrast, the California statute specifically provides

159 Who is a better candidate for adoptive parent, great uncle George, finally tracked down after an eight-year search, or the foster parents with whom the child has lived, since birth, during the search process?

160 See In re M.M., 452 N.W.2d 236, 239 (Minn. 1990) (en banc). Technically, this interpretation occurred in the context of a case transferring legal custody and guardianship, not an adoption case. Id. However, the preference provision at issue, § 260.181(3), was identical to the statutory preference scheme regulating adoptions effective at that time.

161 Id.

162 Id.; see In re D.L., 486 N.W.2d 375 (Minn.), cert. denied, 113 S. Ct. 603 (1992). Foster parents appealed from an order granting adoption to the child's grandparents.
that the scheme need not be followed "if placement with available relatives is not in the child's 'best interest.'"\footnote{163}

Furthermore, although the statutory scheme is described as a preference scheme, it has been applied as one creating a presumption. Thus, a person seeking to avoid the statutory order of preference is required by Minnesota Supreme Court interpretation to make an affirmative showing that placement with a relative would be detrimental to the child.\footnote{164} Presumably, if the challenge were to a placement with a family of the same racial or ethnic heritage as the child, the burden would be on the challenger to establish that that placement was not "feasible"—which probably amounts to no basis for a challenge at all.\footnote{166}

Finally, to be sure, the statutory preference scheme need not be followed in the presence of "good cause to the contrary."\footnote{167} Presumably, this would give the courts at least one bite at a "best interests" analysis in the context of the preference scheme,\footnote{168} as well as an opportunity to override the racial basis of the scheme's structure. It is doubtful, however, absent a successful constitutional attack on the provision itself, that the court would be able to do anything more than conclude that, in the particular circumstances of the case, a proposed disposition generated by racial concerns would be inappropriate.\footnote{169} Presumably, the need to over-

\footnote{163} CAL. FAM. CODE § 8708(b) (Deering 1993).
\footnote{164} In re D.L., 486 N.W.2d at 377 (holding that absent showing of good cause or detriment to child, placement with relatives is presumptively in child's best interests).
\footnote{165} See MINN. STAT. ANN. §§ 259.28(2), 259.255 (West 1993).
\footnote{166} See infra notes 235-41 and accompanying text (discussing strict scrutiny analysis of presumption).
\footnote{167} See MINN. STAT. ANN. §§ 259.28(2), 259.255 (West 1993).
\footnote{168} Minnesota's adoption statute provides that the court is to grant an adoption petition only upon finding that it is in the best interests of the child. Id. § 259.28(1)(a). However, this requirement presumably applies only with respect to an adoption by any petitioner remaining after the court has eliminated other contenders using the preference scheme. As such, this subdivision does not provide the opportunity for the court to decide which claimant is in the child's best interests, except possibly if two or more claimants with the same degree of priority remain after the application of the scheme. The Minnesota scheme can be contrasted with the California scheme, which contains a statutory description of "good cause" for not following the race-based scheme. "Good cause" includes the fact that a placement following the scheme would not be in the best interests of the child. CAL. FAM. CODE § 8709(d) (Deering 1993).
\footnote{169} See, e.g., In re D.L., 479 N.W.2d 408 (Minn. Ct. App. 1991), aff'd on other grounds, 486 N.W.2d 375 (Minn.), cert. denied, 113 S. Ct. 603 (1992). The Minnesota...
ride the preference structure on the basis of "good cause" will be an affirmative obligation left at the door of the challenger.\footnote{In \textit{Re D.L.}, 486 N.W.2d at 381. In \textit{In re D.L.}, the Minnesota Supreme Court accepted the trial court's approach for adjudging competing adoption petitions from the child's grandparents and foster parents. \textit{Id.} Given the existence of the statutory preference, the trial court proceeded to hear the grandparents' petition first, and then permitted the foster parents to intervene, but only for the purpose of presenting evidence on the question of whether there was "good cause" for not following the preference scheme. \textit{Id.} at 377-78.}

It is worth remarking that society has endowed the ties of relationship with a strong metaphysical value. The challenge in the context of placing a child for adoption is to extricate from those ties those attributes which actually inure to the best interests of a given child, and to refrain from using those ties to inject spurious considerations into the dispositional analysis, thereby corrupting the metaphysical value itself.

4. Foster Parents

For practical reasons, foster parents are the group most likely to be aware of being disadvantaged by a statutory preference scheme such as that of Minnesota's. In Minnesota, when a child is placed for adoption by a licensed child placement agency, the agency is required to abide by the preference scheme.\footnote{See \textsc{Minn. Stat. Ann.} § 259.255 (West 1993). In Arkansas, the Department of Human Services, in making foster care placements, is required to give "due consideration . . . to the child's minority race or minority ethnic heritage." \textsc{Ark. Code Ann.} § 9-9-102(a) (Michie 1993).} A similar rule applies in California.\footnote{\textsc{Cal. Fam. Code} § 7950 (Deering 1993).} This would suggest that if the placement were occurring in an orderly way, no person in a group enjoying a lower priority in the preference scheme would even be aware of the availability of a child until the prospect of adoption by a person in a higher ranked group was exhausted.

Foster parents are one group to whom this premise would not apply. Although the legislation requires that the race-based order
of preference be applied in making foster care placements,\textsuperscript{173} the reality is that the pressure to make a foster care placement will generally be much more immediate than the pressure to make an appropriate adoption placement. In these circumstances, unless there are readily available "relatives" or suitable foster homes of the same race, there is a reasonable prospect that the child will be placed in a home with a different racial background.\textsuperscript{174} Even though the foster family is likely to be aware that the child is available for adoption, psychological and sociological bonds between the foster parents and the child may start to form even while the search for "preferred" adoptive parents is underway.

Not surprisingly then, the bulk of the high profile litigation occurs in the form of challenges to the preference scheme in the contexts of battles for the right to adopt between foster parents and claimants higher on the preference ladder. In this regard, foster parents have no priority in the state's preference scheme. Moreover, in the larger scheme of things, courts generally have been reluctant to endow the class of foster parents with any particular status in constitutional law.\textsuperscript{175} Even when such constitutional acknowledgement is accorded them, it tends to be in the realm of procedural rights rather than as substantive entitlements to be considered as potential adoptive parents.\textsuperscript{176}

\footnotesize{\textsuperscript{173} See Minn. STAT. ANN. §§ 257.072(7)(1), 260.181(3) (West 1993).}

\footnotesize{\textsuperscript{174} See Perry, supra note 4, at 125 (suggesting that white foster families be pre-screened regarding ability to care for minority children on potentially long-term basis).}

\footnotesize{\textsuperscript{175} See Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 846-47 (1977) ("Whatever liberty interest might otherwise exist in the foster family, as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."); see also J.H.H. v. O'Hara, 878 F.2d 240, 245 n.5 (8th Cir. 1989) (determining that placement did not violate any clearly established constitutional rights of foster parents), cert. denied, 493 U.S. 1072 (1990); Drummond v. Fulton County Dep't of Family and Children's Servs., 563 F.2d 1200, 1206-08 (5th Cir. 1977) (en banc) (rejecting arguments that adoptive parents have protected interests under Fourteenth Amendment), cert. denied, 493 U.S. 1072 (1990); DeWees v. Stevenson, 779 F. Supp. 25, 27 (E.D. Pa. 1991) (holding that foster parents do not have cognizable liberty interest); Perry, supra note 4, at 106-09. But see Brown v. County of San Joaquin, 601 F. Supp. 653, 662, 664 (E.D. Cal. 1985) (observing that "psychological ties" could lead to "state created liberty interest" under certain circumstances); In re Jamie G., 241 Cal. Rptr. 869, 873-74 (Ct. App. 1987) (finding mother with neither blood relation nor legal ties had no due process right), cert. denied, 488 U.S. 835 (1988).}

\footnotesize{\textsuperscript{176} See Mason & Williams, supra note 9, at 108. It has been suggested that the greater the extent to which states, through their agencies or legislation, create interests for foster parents which the courts are willing to acknowledge in the context of}
This ambivalence toward foster parents is understandable. A legally protected relationship opens the Pandora’s box of an irretrievable child once the child is placed in foster care. Although the sympathies may not be all one way with respect to a child so placed after neglect or abandonment, the situation is otherwise when the child is the subject of a voluntary surrender by a parent aware of the need for help. Yet, the ambivalence is an unsophisticated one. Rules spawned in anticipation that the child will be returned to a pre-existing family group need not necessarily apply in contexts in which that outcome is no longer contemplated. Of course, this does not imply that the foster parents’ claims need to be elevated to those of constitutional dimension. It does mean, however, that when the claims of such foster parents are weighed against those asserting a preference by virtue of race or heritage, the foster parents should not be handicapped by the system’s spurious concerns regarding the potential impact of those claims on the system’s collateral operations.

Thus, when it comes to the adoption process in general, and the application of a statutory preference like those under consideration in particular, a good case can be made for legally giving foster parents more than a passing nod. Unlike the other aspiring parents in the preference hierarchy, foster parents already have a working relationship with the child, which is a successful relationship from the child’s point of view because otherwise an alternative placement would have been found. Granted, a placement which works in the short-term may not be one which is appropriate in the long run. Nevertheless, it seems perverse, on the basis of a presumption formulated in the abstract, to terminate a viable relationship in favor of those marginal benefits that another relationship might offer by virtue of race or formal social relation-

177 See UNIF. ADOPTION ACT § 2-104 (a)(1)(iii) (Proposed Discussion Draft Feb. 12, 1993) (affording preference to foster parents who have cared for child for 12 months or more during preceding 24 months).

178 See Glynn, supra note 5, at 943 (arguing that Minnesota statute does not create presumption that petitioner must overcome, but merely functions as “plus,” way to “tip the scales,” or “mere factor”). From the perspective of an analysis which focuses on the best interests of the child, Glynn’s argument is persuasive. In fact, there is no conclusive presumption that a placement on the basis of race is in the child’s best interests, although the Minnesota statute comes close to such a presumption. However, from the perspective of an aspiring parent of a different race who is otherwise as qualified as a same-race adoptive parent, the statute does function as a presumption.
ship. Can the legislature and, in due course, the courts be comfortable enough with the correlation between anticipated benefits and legal classification to justify the almost axiomatic social upheaval?179

Encountered here is one of the classic examples of the legal system's discomfort at having to address function-based relationships rather than status-based relationships. This situation is manifested whenever the law is required to determine a disposition using the best interests standard. In the interests of certainty and efficiency, the pressure on the legal system, and for that matter, the administrative system, seems to continue relentlessly in the direction of status.180 Why not have adoption by race or relationship? It seems, and is, a lot simpler than the detailed balancing of a multitude of nonquantifiable variables inherent in a "best interests" analysis. This may be another reason for the intensity of litigation and debate that racial preference adoption statutes provoke. Such schemes may be viewed as simply being employed for the benefit of the legal process itself rather than to advance the interests of the child in the manner the system is claimed to do. This helps to explain why such schemes are so difficult to manage within the umbrella of a "best interests" analysis. It also helps to explain why these preference schemes may be prone to unconstitutionality, if the courts ever reach the issue of

179 See Perry, supra note 4, at 100-05. The author argues that existing emotional bonds should not be disrupted to effect an intra-race placement. Id. at 102. She points out that the unstated assumption in most of the cases is that the long-term effects of racial considerations are more important than the imminent potential damage of breaking psychological bonds. Id. Perry adds that when many of the leading cases were decided, the decisions were premised upon the courts' speculation about the future rather than on social science research, and that the research conducted since that time does not support the courts' assumptions. Id. at 104.

180 At this juncture, a minor deviation is justified to note that these situations reflect examples of the apparent shift from status to contract. Many foster parents are now required to acknowledge by contract that whatever the incidents of the status of foster parent might be, a longer term expectation of the right to adopt is not one of them. See Nat'l Ass'n of Atty's Gen., Legal Issues in Foster Care 21 (1976). A representative foster care contract provided:

We acknowledge that we are accepting the child placed with us for an indeterminate period... We are aware that the legal responsibility for the foster child remains with the Agency, and we will accept and comply with any plans the Agency makes for the child. This includes the right to determine when and how the child leaves us, and we agree to cooperate with the arrangements made toward that end.

Id. (emphasis added).
constitutionality—the schemes may be seen as not being used to do what they purport to do.

From the foster parents’ point of view, however, the intensity of their objections has its roots in another source. Unlike an aspiring parent in the abstract, whether of an appropriate race or ethnic heritage or a would-be relative who has been “found” by social workers, the foster family wants this child, not just any child. Another reason for the intensity is that the cases suggest that not infrequently the foster parents speak for the voice least often heard from in the context of these adoption proceedings, the voice of the child.

5. The Child

Although nominally the focus of attention in the legal analysis of trans-racial adoptions, the child possesses only a tiny voice, perhaps no voice at all. Part of the problem is practical. A newborn infant is clearly in no position to articulate adoption preferences, nor for that matter are many older children. This practical premise, however, has laid the foundation for a constitutional law analysis which makes the advancement of a position which is uniquely the child’s difficult indeed.

Some efforts have been made in this direction. Thus, in *Drummond v. Fulton County Department of Family & Children’s Services*, counsel for the child sought to establish a liberty interest for the child which was characterized as the “right to a stable environment,” premised in part on the “love, affection, and concern” that developed between the child and foster parents who sought to adopt him. It was argued that this liberty interest would, in turn, lay the foundation for a claim that the child was entitled to assert procedural due process rights with respect to the proposed termination of his pre-existing relationship with his foster parents. The court rejected the idea that the child had such a liberty interest. By contrast, the dissent seemed to be of the

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182 *Id.* at 1208, 1210; see also *Perry*, *supra* note 4, at 72-76.

183 *Drummond*, 563 F.2d at 1208.

184 *Id.* at 1209. A panel of the Fifth Circuit previously had appeared to find that such a right did exist. *Drummond v. Fulton County Dep’t of Family & Children’s Servs.*, 547 F.2d 835, 856 (5th Cir. 1977), *on reh’g*, 563 F.2d 1200 (5th Cir. 1977), and *cert. denied*, 437 U.S. 910 (1978). The full court was carefully evasive on the issue, making sure to limit the decision to instant facts, “This decision by its facts is neces-
view that the child has a protected interest. In this regard, it cited statements made by the United States Supreme Court in Smith v. Organization of Foster Families for Equality and Reform to the effect that the relationship between the child and foster parents could be as close as that which exists in biological families. Other courts have also rejected claims brought by the children. In Child v. Beame, an argument that children had an equal protection claim on the grounds that by virtue of race they had been denied access to adoption, and thus, denied a stable permanent home, survived a motion in a federal district court to dismiss for failure to state a claim for relief, but failed on the merits. Nevertheless, with this decision in mind, another federal district court simply rejected the idea that a child had any constitutional right to a “permanent, stable adoptive home.”

The dissent in Drummond was particularly upset by a perception that the state’s position was that, since the legislative/administrative structure was designed to accommodate the child’s best interests, it was acceptable to leave everything relating to the child’s welfare and status to the uncontrolled and unreviewable discretion of state and county employees. From a legal point of view, how would the child’s concerns be articulated within any decision-making structure? One view is that this must occur within the agency infrastructure. Another source is seen as the child’s natural parents. In addition, one judge has preferred to characterize a trans-racial adoption as a consensual matter in which, because the child is not of consenting age, the court stands in for the

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185 563 F.2d at 1214-15 (Tuttle, J., dissenting).
187 Drummond, 563 F.2d at 1214 (Tuttle, J., dissenting); see Brown v. County of San Joaquin, 601 F. Supp. 653, 664 (E.D. Cal. 1985).
189 Id.
190 Joseph and Josephine A. v. New Mexico Dep't of Human Servs., 575 F. Supp. 346, 352 (D.N.M. 1983) ("[T]here is no caselaw even suggesting that these children are somehow entitled, as a matter of constitutional law, to enjoy the benefits of a foster or adoptive family.").
191 Drummond, 563 F.2d at 1215 (Tuttle, J., dissenting).
192 See supra note 131 (discussing apparent simplicity of protecting child’s best interests through agency discretion).
193 Drummond, 547 F.2d at 858 (Roney, J., dissenting). “Because an infant is incapable of exercising [certain rights] for himself, under Georgia law either the parents who voluntarily gave up a child for adoption or the agency given legal custody of a child must exercise that right for him.” Id. at 858-59.
child to decide what is in the child's best interests. In a different twist, a foster parent and aspiring trans-racial adoptive parent sued to block a proposed intra-racial adoption by bringing suit in the capacity of the child's "next friend." Needless to say, foster parents suing in their own names undoubtedly see themselves as representing the child's position. So confused, or perhaps complex, is the situation that one court has allowed the appointment of both a guardian ad litem and an attorney to represent the child.

Broadening the representational mayhem still further, there are those who claim, either overtly or covertly, that broader social groups should assert the child's position on the relevancy of race to the question of adoption placements. To some extent, the statutory preference schemes purport to do just this. This also occurs when a judge compels a participant to establish why a trans-racial placement should be allowed. The power to decide what is appropriate for a minority child has also been claimed for the minority communities. This raises the interesting question of the procedure by which these groups might articulate their concerns. Would they do so through legislation or the administrative process? Arguably, preference scheme legislation is a concrete manifestation of an effort to turn the question over to the minority communities. However, given the lack of subtlety of the preference structure, this process cannot be accepted as one concerning itself

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195 Child, 1992 U.S. Dist. LEXIS 19954, at *2. The court took the view that procedurally the better posture for the petitioner was to seek relief as a petitioner for adoption. Id. at n.1.

196 Drummond, 547 F.2d at 857.

197 In re R.M.G., 454 A.2d at 801 (Newman, J., dissenting).

If the child had capacity to decide for herself, she would certainly not be prevented from taking note of the different race of those proposing to adopt her. When the court does the same on her behalf, there is no indication of invidiousness that necessitates the strictest level of scrutiny.

Id. A potentially problematic aspect of this approach is highlighted by the court's concern to develop a technique for reviewing a trial court's decision with a view to identifying possible racial bias. Id. at 790.

198 Chimezie, supra note 72, at 297-98. Articulation of the community's position has also been acknowledged as problematic. Id. at 298; see Perry, supra note 4, at 116-17 (arguing that blacks as group have interest in issue).
with the interests of any one child in particular, at least as far as
the question of a race-based placement is concerned.\(^{199}\)

Obviously, none of the voices is necessarily a reliable spokes-
person for the child. Moreover, for the purposes of constitutional
law, it is well to heed the comment of Justice Brennan, writing the
opinion of the Court in \textit{Regents of the University of California v. Bakke},\(^{200}\) that even a purportedly “benign” race-based program, to
survive intermediate scrutiny, may not single out “those least well
represented in the political process to bear the brunt of a benign
program.”\(^{201}\)

\textbf{C. The Technical Analysis}

1. Introduction

The Supreme Court has never conducted an analysis of a
race-based preference scheme applicable to adoptions, nor indeed
has it conducted an analysis of the mere consideration of race in
the context of an adoption placement. Yet, as Tribe points out, the
Supreme Court has tended to regard all “governmental uses of ex-
plicit racial classifications as constitutionally problematic to some
degree . . . .”\(^{202}\) This conclusion reflects an analysis of cases con-
cerning various manifestations of preference schemes “favoring”
minorities. Although none of these cases involves statutory adop-
tion schemes reflecting racial considerations, in all of the cases the
Justices seem to think that some form of heightened scrutiny is
required.\(^{203}\) If the rights involved could be construed as funda-
mental, any effort to burden those rights with racial considera-
tions generally would trigger “strict scrutiny” by the court.\(^{204}\)
Adoption is perceived as a creature of statute, and at least from
the adults’ perspective, has never been perceived as imposing on
“fundamental” rights.\(^{205}\) Accordingly, any heightened level of
scrutiny would have to be that triggered by an equal protection
analysis. Any such analysis, when applied to adoption, becomes

\(^{199}\) But see Perry, \textit{supra} note 4, at 118. The author argues that the child’s inter-
est are advanced by promoting a “healthy and positive racial identity.” \textit{Id}. It should
be noted that Perry advocates this perspective only in a context in which race is not
used to disrupt an existing “caretaker” relationship. \textit{Id}.


\(^{201}\) \textit{Id}. at 361.

\(^{202}\) \textit{See Tribe, supra} note 143, at 1523.

\(^{203}\) \textit{See Tribe, supra} note 143, at 1523.

\(^{204}\) \textit{See Tribe, supra} note 143, at 1464.

\(^{205}\) \textit{See Grossman, supra} note 4, at 306.
intensely difficult. This is a function of difficulties associated with the equal protection doctrine itself, and of ambiguities, uncertainties and contradictions associated with the role of race in the context of adoptions.

2. The Equal Protection Analysis

For over a decade, it has been virtually impossible to isolate a single equal protection case, let alone a consistent series of decisions, from which it is possible to extract any more than a plurality perspective. Thus, it seems futile to attempt to predict precisely how a Supreme Court of a specific composition would respond to a case introducing race into the adoption arena. Nevertheless, the pluralities have articulated certain themes, and the intersection of these themes and the concerns of race-conscious adoption schemes is both enlightening and troubling.

a. Strict Scrutiny

Whether an equal protection analysis in the adoption context would demand strict scrutiny is unclear. Nevertheless, despite earlier lower court approaches to the contrary, current Supreme Court jurisprudence seems to suggest that a strict scrutiny analysis is appropriate. Moreover, even if the statutory preference schemes do attract strict scrutiny, the precise approach that would be followed in conducting the analysis in the context of a trans-racial adoption case is far from clear.

In City of Richmond v. J. A. Croson Co., a plurality took the view that a statutory scheme setting aside a certain portion of city contracts for minority businesses should be subjected to strict scrutiny. A dissenting group of three Justices took the position that an intermediate level of scrutiny would suffice. The plural-

206 See Perry, supra note 4, at 85; Glynn, supra note 5, at 936-42.
207 See Perry, supra note 4, at 120. Perry argues that conventional affirmative action based techniques are inappropriate, in part because it cannot be assumed that the use of racial classification is necessarily beneficial to the child. Id. at 86; see also infra text accompanying notes 216-33.
209 Id. at 493. The Court noted that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . . ." Id. Justice Kennedy stated that "any racial preference must face the most rigorous scrutiny by the courts." Id. at 519 (Kennedy, J., concurring). Justice Scalia argued that "strict scrutiny must be applied to all governmental classification by race . . . ." Id. at 520 (Scalia, J., concurring).
210 Id. at 535 (Marshall, J., joined by Brennan, J. and Blackmun, J., dissenting) (arguing that "race-conscious classifications designed to further remedial goals 'must
ity advanced a number of reasons for its position. First, certain citizens were denied the opportunity to compete for certain contracts by virtue of the preference scheme; thus, race adversely affected their right to be treated with equal dignity and respect.\textsuperscript{211} It is noteworthy that the group prejudiced by the scheme was the white majority, the same group adversely impacted by the Arkansas statute and the original version of Minnesota’s statute, and likely to be adversely impacted by the now facially race neutral provisions of both Minnesota’s and California’s schemes.\textsuperscript{212}

There is one significant analytical difference, however, between the programs of Richmond and the preference schemes.\textsuperscript{213} As previously mentioned,\textsuperscript{214} with the exception of foster parents, aspiring parents do not know that a particular child is available for adoption. That in itself is not offensive and, indeed, may be desirable. The offensive overtone is generated by the fact that these schemes place adoption agencies in a situation in which, at the discretion of the agency, this information is not made available to a would-be parent because of that parent’s race, a practice

serve important governmental objectives and must be substantially related to achievement of those objectives’’) (quoting University of Cal. Regents v. Bakke, 438 U.S. 265, 359 (1978)).

\textsuperscript{211} Id. at 493.

\textsuperscript{212} See Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954). The fact that a statute is now race-neutral does not avoid the possibility of an equal protection analysis. Id. Indeed, even if all of the preferences in the Minnesota statute were eliminated, other than the preferred relatives, an argument could be made that there was a racially discriminatory impact. Although without more, this would not be fatal, if an examination of the legislative history revealed a discriminatory intent, then even the now overtly race-free statute might still be vulnerable to an equal protection challenge. Washington v. Davis, 426 U.S. 229 (1976); see also Glynn, supra note 5, at 936 n.54 (arguing that plaintiff must show discriminatory intent for equal protection violation). Depending on how one construes the distribution of burdens and benefits attendant upon a race-based adoption placement, the individuals burdened by the statutory scheme may or may not be members of a historically victimized class. See O’Brien, supra note 4, at 496.

\textsuperscript{213} See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The concept of competing to adopt a child sits somewhat uncomfortably alongside the assertion of a right to compete for a construction contract. But factually and functionally the two schemes are in some ways similar. In the Richmond scheme, a contract otherwise to be given to a minority business enterprise could go to a majority enterprise in the event that qualified minority enterprises were unavailable or unwilling to participate. Id. at 478-79. Likewise, in Minnesota, a trans-racial adoption placement is permitted if an in-racial placement is not “feasible.” See MINN. STAT. ANN. § 259.255 (West 1992).

\textsuperscript{214} See supra text accompanying notes 171-80 (stating lower priority adoptive parents are not aware of availability of child until option of adoptive parents in higher ranked group is exhausted).
which surely offends the principle that all citizens are due equal protection. The public character of the construction bidding procedure stands in stark contrast, laying the foundation for ensuring the integrity of the administrative process. The “secrecy” of the adoption process feeds into the propensity for professionals to “mystify” their craft. It seems inappropriate that racial considerations facilitate this process without at least substantial justification.\

A second reason advanced by the plurality in Croson for utilizing strict scrutiny was to identify whether the purpose behind the legislation was “benign” or “remedial,” or whether it was to advance illegitimate notions of racial inferiority or simple racial politics. The concept of remedial race-based legislation is fairly well developed within the context of an equal protection analysis, although the limiting parameters are somewhat obscure. For example, four Justices in Croson were of the opinion that to qualify as a legitimate remedial scheme the statute must be targeted at the victims of prior discrimination. Three Justices suggested that the discrimination must have emanated from the governmental unit now subjected to the proposed remedial scheme.

The remedial model of equal protection analysis starts to come under some pressure when applied to adoption scenarios; however, the extent of the pressure varies depending on which of the parties' perspectives one uses. Clearly, it is hard to argue that a newborn infant has been the victim of prior discrimination. This argument may also be difficult to make with respect to an

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215 See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 317 (1986) (Stevens, J., dissenting) (arguing that valid purposes of race consciousness do not transcend harm to those disadvantaged by special preference).

216 Croson, 488 U.S. at 493; see In re R.M.G., 454 A.2d 776 (D.C. 1982). In re R.M.G. is one of the few cases in which the constitutional aspects of racial considerations relating to adoption were extensively considered. In re R.M.G., 454 A.2d at 779-94. However, the court did not reach a majority decision on the relevant issue. Id. Judge Ferren, writing the lead opinion, came to the conclusion that strict scrutiny should be applied because historically “in a family-law context . . . racial classifications . . . have resulted in particularly vivid examples of invidious discrimination.” Id. at 786. These constitutional issues seem to be in something of a “chicken” or “egg” dilemma. Although the Supreme Court plurality uses strict scrutiny to determine whether the law is discriminatory, Judge Ferren does so because the law was presumed to be discriminatory. Id.

217 See Croson, 488 U.S. at 503, 517.

218 Id. at 504; see Wygant, 476 U.S. at 274 (noting that Supreme Court “has never held that societal discrimination alone is sufficient to justify a racial classification”).

219 See Kathleen M. Sullivan, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 HARV. L. REV. 78, 93 (1986). Some make the argument that historical
older child, unless one accepts the notion that a race-focused placement of this older child should have been made in the past, and that the scheme is in place to remedy this deficiency. Even if this is the analysis, the scheme is unlikely to qualify as remedial in fact since, unless there is an excess of minority adoptive homes, the placement of the older child is at the expense of a younger minority child who, in due course, will simply be a replacement member of the aggrieved group. Conversely, if the argument is that the race-based preference structure was enacted for the benefit of minority adoptive families who historically had been discriminated against, the traditional analysis would hold up. Although it is argued that a white-dominated social work establishment fails to effectively recruit minority adoptive families,\(^\text{220}\) the preference schemes are generally not supported as a remedial device targeted at this group.\(^\text{221}\) The victims of the low recruiting are the minority children who, it is argued, should be placed in a minority home.\(^\text{222}\) In any event, conventional wisdom suggests that there is a surplus of minority children awaiting adoption, so any minority adoptive parent who is otherwise qualified should be able to adopt.\(^\text{223}\)

There is currently resistance within the Supreme Court to another justification for a race-conscious scheme that does not depend on discriminatory conduct by any particular governmental unit. This argument suggests that a scheme may be put in place

discrimination has systematically made blacks a disadvantaged class and, therefore, every black is a victim. E.g., id.

\(^\text{220}\) See Simon & Altstein III, supra note 11, at 8-9 (claiming that lack of effort by predominantly white social workers to recruit black families and use of white, middle-class standards precludes acceptance of black families); see also Howard, supra note 4, at 513-14 ("Agencies have been criticized for failing to take affirmative steps to recruit black families . . . social and economic criteria imposed by adoption agencies have been so high that [few] black and Indian families can meet them . . . .").

\(^\text{221}\) See Howard, supra note 4, at 503. "The child placement system in the United States is governed by the best interests principle: that intervention and placement or other disposition should be carried out only to further the best interests of the affected child." Id. (emphasis added).

\(^\text{222}\) See Perry, supra note 4, at 74.

\(^\text{223}\) There are assertions that aspirant minority adoptive families were discriminated against by imposing inappropriate "white" qualification criteria on them. However, the preference schemes as such would not be the remedy for this manifestation of discrimination. A change in the qualifications for acceptability would be a remedy, and there is some indication that agencies are now inclined to adjust their standards when minority adoptive parents are involved. Parenthetically, it might be noted that if this adjustment is inappropriate, the victims of the discriminatory process are once again the minority children.
to offset the consequences of general "societal discrimination."\textsuperscript{224} In \textit{Croson}, a plurality of four Justices rejected the idea that "societal discrimination" would be available to support a race-based classification.\textsuperscript{225} The precise parameters of societal discrimination are not clear. Arguably, however, the proposition that minority children should be placed with minority families in order to provide those children with the foundation to cope with racism in the external world would be legitimized by the acceptance of a societal discrimination theory. To some extent, this is an analog of the argument advanced unsuccessfully in \textit{Wygant v. Jackson Board of Education}\textsuperscript{226} that minority teachers should not be laid off in order to ensure that appropriate role models remained for the students.\textsuperscript{227} The analogy is at best only a partial one. Although one of the objects of the role model theory was to provide examples to minority children,\textsuperscript{228} another view was that the minority teachers were there for the benefit of the majority children to enable them to learn that "the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land."\textsuperscript{229}

One reason why an analysis on the basis of societal discrimination floundered in \textit{Wygant} was that it was not possible to adequately tie the remedial structure to the underlying problem.\textsuperscript{230} Whether a race-conscious preference scheme in adoption cases could surmount this hurdle is unclear. Is it a prerequisite to overcome the consequences of a racially discriminatory society that the individual who is a member of the oppressed minority should have a developed racial identity, or would it be sufficient for this individual to possess a self-concept or identity which does not necessarily embody a strong racial underpinning? If the latter, the preference scheme might not be necessary at all, for there is evidence that it is possible for a child placed trans-racially to develop

\textsuperscript{225} City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497, 505 (1989); see \textit{Wygant v. Jackson Bd. of Educ.}, 476 U.S. 267, 274 (1986) (asserting that Supreme Court "never has held that societal discrimination alone is sufficient to justify a racial classification").
\textsuperscript{226} \textit{Id.} at 274-75.
\textsuperscript{227} \textit{Id.} at 275-76.
\textsuperscript{228} \textit{Id.} at 274.
\textsuperscript{229} \textit{Id.} at 315.
\textsuperscript{230} \textit{Id.} at 274-75.
a self-concept.\textsuperscript{231} If the racially oriented placement is not necessary, the scheme would fail a strict scrutiny test which requires that the means employed be "closely tailored" to the goal\textsuperscript{232} in order to avoid the gratuitous injection of race-based classifications.\textsuperscript{233} The scheme would also fail on a constitutional basis even if it were established that a strong racial identity was desirable, unless it could also be established that an individual of a different race was incapable of fostering the development of such an identity. In this regard, the Arkansas, Minnesota, and California statutory schemes appear to author their own constitutional demise, since they envisage that persons of another race who are knowledgeable and appreciative of, or sensitive to, the child’s racial and ethnic heritage may be considered as adoptive parents, albeit later in the order of preference.\textsuperscript{234}

Consideration must be given to one final aspect of a requirement that the legislature’s devices be necessary and closely tailored to meet the legislation’s goals. Apart from the fact that operationally, either by interpretation of the courts or within an administrative agency, such a preference is likely to become an irrebuttable presumption,\textsuperscript{235} in a context which in any event requires an individualized, factor-by-factor evaluation, what justification can be advanced for employing a sweeping preference scheme? If the preference scheme is truly targeted at identifying people with desirable qualifications, how can it be argued that it is constitutionally permissible, given a requirement to use necessary close-tailored means, to employ proxy terminology in a scheme in which various proxies are ranked expressly or implicitly by race? At what point does such a preference scheme tend to suggest that the proxies have attributes which, while politically desirable, are not functionally necessary and thus constitutionally unacceptable?

Even if it were argued that the same race preference category was created as an administrative device for identifying a potential.

\textsuperscript{231} See supra note 67; see also Howard, supra note 4, at 536 ("The studies indicate that transracially adopted children, generally speaking, experience good emotional development.").

\textsuperscript{232} City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989). “[I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.” Id. at 507.

\textsuperscript{233} Id. at 493.

\textsuperscript{234} See supra text accompanying note 45.

\textsuperscript{235} See supra text accompanying notes 164-70.
group of individuals who would be appropriately “knowledgeable and appreciative” or “sensitive,” a strict scrutiny test would dispose of this position for at least two reasons. First, in the context of a strict scrutiny analysis, an argument of administrative convenience is apparently untenable. Second, the use of race as a device for identifying people with certain characteristics is generally frowned on in the context of a constitutional analysis because of the propensity to further racial stereotyping. Within a race-based adoption preference scheme, this stereotyping question can be analyzed from three points of view. First, that the minority adoptive parent is endowed with certain characteristics—the ability to inculcate in the child a racial identity and the ability to deal with the consequences of a racist world. Second, that all majority adoptive parents lack these skills, along with the implicit notion that, at least passively, they manifest the racism of the broader society. Third, that all minority children raised in a minority family have those characteristics which the race-based preference scheme foresees minority adoptive parents will pass on to any minority child they adopt.

The above three points would be applicable to a raced-based preference even if the preference related exclusively to minority children. The real threat of the Minnesota and California preference schemes is that the schemes are applicable to the adoption of children of all races. The source of disquiet with the schemes sur-

236 See Perry, supra note 4. The author maintains that intra-racial adoptions “obviously” have possible benefits such as a sharing of personal experiences and transmitting needed survival skills in racist situations. Id. at 110. In addition, the author recognizes arguments that “Afro-centric” or “black family values” can only be transmitted in a black family setting. Id. at 114. These recognized generalizations can also add to administrative convenience by narrowing the variety of placement options, but the author concludes that a race-free placement process is administratively convenient. Id. at 124-25.

237 Croson, 488 U.S. at 508 (“[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who fully have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.” (citing Frontiero v. Richardson, 411 U.S. 677, 690 (1973))).

238 Id. at 494 (“[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.” (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978))).


240 See Chimezie, supra note 72, at 299.

241 See Chimezie, supra note 72, at 300; see also Perry, supra note 4, at 84 (discussing relationship between stereotyping and stigmatization).
faces when one realizes that they also require that administrative agencies and the courts search for parents who by clear implication are expected to be knowledgeable and appreciative of the child's racial or ethnic heritage, with at minimum a conceptual view that those adoptive parents inculcate a racial identity into the child. In such cases, the underlying premise used to justify the development of such schemes in the interests of minority children do not exist. In the standard analytical model, a majority race child does not need special skills or a unique racial self-perception in order to cope with minority oppression. Finally, in this context, other premises advanced by the National Association of Black Social Workers for adopting a race-centered placement system move concern from the level of disquiet to the level of acute alarm if the system were truly implemented on a race-neutral basis. Do we need our young white children to begin at birth to identify with all white people in a white community, and are those white children needed to build a strong white nation?

A "strict scrutiny" analysis requires that the question of placing the child with a family on a racial basis be considered from another perspective. In order to pass constitutional muster, the preference scheme must advance a "compelling" state interest. In the context of a race-conscious adoptive placement, this issue becomes somewhat murky. Not infrequently, the state's compelling interest is seen as advancing the best interests of the child. In this regard, an adoption preference scheme is merely a means to a constitutionally legitimate end. This means, however, does not exist in isolation. The law accepts that a variety of factors are relevant to the child's best interests. One example is the existence of a stable family environment. If the effect of insisting on the enforcement of a race-specific placement is such that it requires

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242 See Perry, supra note 4, at 121-23.
243 See Perry, supra note 4, at 122.
244 See supra text accompanying note 27.
245 See Croson, 488 U.S. at 493, 505 (referring to whether legislative body is "pursuing a goal important enough" or "is demonstrating a compelling interest" to justify using such a "highly suspect tool").
246 See, e.g., In re R.M.G., 454 A.2d 776, 786, 802 (D.C. 1982) (stating that court implicitly treats advancement of child's best interests as "compelling" government interest); see also J.H.H. v. O'Hara, 878 F.2d 240, 245 (8th Cir. 1989) (stating racial and cultural needs consistent with best interest are compelling government interests); DeWees v. Stevenson, 779 F. Supp. 25, 28 (E.D. Pa. 1991) (stating racial classification of foster parents survives equal protection challenge only if necessary to achieve compelling state interest) (citing Loving v. Virginia, 388 U.S. 1, 11 (1967)).
the child to be institutionalized or moved from foster home to foster home on an indefinite basis, then at some point, the preference scheme has ceased to be a “means” and has become the end in its own right.\textsuperscript{247} At that point, it becomes very difficult to argue that the state has a “compelling” interest in seeing that a child has a secure racial identity, at least vis-a-vis the interests of the child, and perhaps even from the broader perspective of society. Further, to the extent that arguments in favor of race-specific adoption placements advanced to avoid a trans-racial placement which is perceived as part of a racial or cultural “genocide” program, or to build a strong “nation” out of a minority group,\textsuperscript{248} the preservation or advancement of a racial group becomes the end. At this juncture, a state’s “compelling interest” position becomes untenable, at least under traditional “modern” theories of constitutional law.\textsuperscript{249} Of course, the last two points highlight the fact that legal issues associated with trans-racial adoption placements pose some fundamental questions for the legal system on the social values it wishes to espouse.

\textbf{b. Intermediate Scrutiny}

Up to this stage, the discussion has focused on the strict scrutiny analysis established to remedy the consequences of prior discrimination; however, even within this framework there are voices which suggest that strict scrutiny is not required. Thus, three Justices in \textit{Croson} would adopt an intermediate level of scrutiny in which race-conscious classifications designed to further remedial goals would survive scrutiny if they served important governmental objectives and were substantially related to the achievement of those objectives.\textsuperscript{250} This test would perhaps assist the constitutionality of a race-based adoption preference scheme in permitting race to be used as a proxy for identifying those people with the parenting skills which the scheme purports to pursue.

\textsuperscript{247}See \textit{McLaughlin v. Pernsley}, 693 F. Supp. 318, 327 (E.D. Pa. 1988), \textit{affd}, 876 F.2d 308 (3d Cir. 1989). This case involved a two year foster care placement which was changed solely on the grounds of the foster parents race. The change was found to violate the original foster parents’ equal protection rights. \textit{Id.} at 324.

\textsuperscript{248}See \textit{supra} text accompanying notes 2, 27.

\textsuperscript{249}See, e.g., \textit{Croson}, 488 U.S. at 493, 510 (applying strict scrutiny analysis to root out “simple racial politics”).

\textsuperscript{250}\textit{Id.} at 535, 548 (Marshall, J., dissenting, joined by Brennan, J. and Blackmun, J.) (noting that race-conscious classifications must serve “important governmental objectives and must be substantially related to achievement of those objectives”).
Further, assuming that the "best interests of the child" were still the "end," the substantial relationship analysis might permit the use of a race-based placement without having to demonstrate that a placement based on race was "necessary" to achieve that end.

Interestingly, there are even echoes in the halls of constitutional law which suggest that an intermediate level of scrutiny might tolerate a different "end," for instance, the reinforcement of social diversity.\(^{251}\) Certainly, a majority of the Supreme Court has accepted that Congress may enact "benign" race-focused legislation that is not necessarily aimed at remedying prior discrimination.\(^{252}\) Unfortunately, for those who would like to pursue this potential line of development, the most recent plurality of the Court on the issue has recognized that "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments,"\(^{253}\) apparently on the basis that such classifications would be more prone to abuse in the states.\(^{254}\) Tribe observes that an earlier plurality in *Regents of the University of California v. Bakke*\(^{255}\) would have accepted a state-originated race-conscious program and subjected it to intermediate scrutiny when: (1) no fundamental right was involved; (2) the disadvantaged class did not have the traditional indicia of suspectness to command extraordinary protection from the majoritarian political process; (3) race was relevant to the goal

\(^{251}\) See *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 566 (1990) (plurality opinion) (maintaining goal of race-based "broadcast diversity" was acceptable).

\(^{252}\) Id. at 563.

\(^{253}\) Id. at 565.

\(^{254}\) Id. Justice Brennan, writing for the Court, cited earlier comments from Justice Scalia to the effect that the "Federal Government [sic] is unlikely to be captured by minority racial or ethnic groups and used as an instrument of discrimination." Id. at 566. Justice Scalia also noted that there is a "'heightened danger of oppression from political factions in small, rather than large, political units.'" Id. (quoting *Croson*, 488 U.S. at 522-23).

In this regard, even if an intermediate level of scrutiny was applied to benign goals advanced by a state, courts might well be leery of systems which delegate substantial discretionary decision-making power based on race to the depths of an administrative infrastructure, vesting the effective authority in some small administrative sub-unit. Thus, it is not surprising that Judge Ferren, in *In re R.M.G.* 454 A.2d 776 (D.C. 1982), after noting that the Fifth Amendment, not the Fourteenth Amendment, applied to the District of Columbia, and that the Fifth Amendment did not contain an equal protection clause, nevertheless concluded that it was unthinkable that the Constitution would impose a lesser duty on the federal government than the Fourteenth Amendment demanded of the states. Id. at 784 n.10.

sought; and (4) the classification was not based on a presumption of racial inferiority and did not promote racial hatred or separatism. \textsuperscript{256}

Passing over any concerns that these schemes might implicate a fundamental right of freedom of association, \textsuperscript{257} or some other unidentified right, attributable to aspiring parents of any race, or the child, there might be some debate whether the minority child was being disadvantaged by the majority political processes. Obviously, majority adoptive parents would not have the hallmarks of a discrete and insular minority that an equal protection analysis sets out to protect. This is not necessarily true of minority children, however, even when the pressure for the preference scheme would seem to originate within the minority adult community. It would still be discriminatory for the majority political process to abandon concern for the child in implementing a scheme to accommodate broader political goals of the minority adult community. This theme harkens back to the earlier discussion of who speaks for the child and whose interest is truly being served in the process. \textsuperscript{258} Further, there would be concerns as to

\textsuperscript{256} See Tribe, supra note 143, at 1530 (citing Bakke, 438 U.S. at 357). Judge Newman dissented in In re R.M.G., taking the view that an intermediate level of scrutiny was to be applied because the consideration of race in the context of an adoption proceeding was “benign.” In re R.M.G. 454 A.2d at 800 (Newman, J., dissenting). The application was benign because (a) it did not use racial factors to stigmatize a particular group—it was not based on the presumption that one race was inferior to another and it did not cause the court to endorse racial bigotry and separatism; and (b) its purpose and effect was not “pernicious with respect to the distribution of burdens and benefits among racial groups”—its purpose was not to improve the position of any racial group, “but simply to protect the best interests of the child.” Id.

Meanwhile, Judge Newman wrote that, if it emerged that “appropriate race-conscious factors” were being manipulated to achieve invidious goals, then strict scrutiny should be applied. Id. at 801 (Newman, J., dissenting); see Perry, supra note 4, at 60, 76-80, 119 (arguing that if potential adoptive parents do not have existing relationship with child, there cannot be stigmatization for constitutional law purposes). The basis of this argument is not clear. Does constitutional law require that a particular person will be stigmatized by the invocation of a racial classification? Is it not sufficient if a group will be stigmatized? Or, is stigmatization just one manifestation of victimization which, under current analysis, the Supreme Court seems to suggest must be personal? See supra text accompanying notes 218-19, 238-40.

The Fifth Circuit in Drummond seems to imply that a provision cannot be stigmatizing if its sole purpose is legitimate. Drummond v. Fulton County Dep’t of Family and Children’s Servs., 563 F.2d 1200, 1205 (5th Cir. 1977). This approach would help validate a race-based preference statute if its sole purpose was perceived as advancing the best interests of the child. The earlier analysis supra suggests that this requirement could not be met. See supra text accompanying notes 52-141.

\textsuperscript{257} See Trane, supra note 143, at 1478.

\textsuperscript{258} See supra text accompanying notes 191-200.
the relevancy of race in achieving the “best interests” goal, either with respect to the need for the parent to be of a particular race, or even more fundamentally with whether the child needs to develop a racial identity. This issue implicates the final component of the four-part test: At what point does the reinforcement of a racial identity promote racial hatred or separatism?

V. After the “Melting Pot”

Trans-racial adoption is an issue that forces the legal community to address what is to be expected from the Constitution. Is it an instrument of social aspiration or social accommodation, or can it be both?

In Palmore v. Sidoti, the Court unequivocally accepted the premise that the operating principles of the Constitution should not bow to the pressures of social realities, no matter what price the participants in the underlying social drama are called upon to pay. It is an appropriate perspective for an institution as lofty as the nation’s highest court, for if it cannot sound the clarion call of aspiration, who might?

But, the call is muted in the legal trenches. Some courts deliberately avoid a response; distinction is the order of the day. Others, sensitive to the aspirations, abandon them to the accommodations. Thus,

[T]he court . . . is concerned that the very problems which give rise to race-related concerns may unintentionally be exacerbated by overemphasizing them. It is difficult to make race irrelevant, as it should be, if adoption and other social decisions are driven by racial considerations, however benign.

In making adoption decisions, state agencies cannot ignore the realities of the society in which children entrusted to them for placement will be raised, or the affect on children of those realities as documented by professional studies. The court would hope, however, that these agencies also will be mindful of the possibility that an overemphasis on racial issues may retard efforts to achieve a color blind society, and of the need to avoid

259 See supra text accompanying notes 68-77.
261 Id. at 433-34. In Palmore, the Supreme Court held that although the lifestyle chosen by a mother was unacceptable to the child's father, the father's private biases would not be given effect by the Constitution. Id. at 433.
even the appearance that an adoption decision may have been based on race per se.\textsuperscript{263}

The struggle between values and realities is reflected in a parallel debate over the nature of legal analytical theories and devices and the relationship of these to the social realities. One judge has described an aspect of the problem this way:

If the possibility of invidious discrimination in the same context is all that is necessary to bar intermediate scrutiny—regardless of the fact that the actual consideration of race was clearly benign—then such scrutiny is never possible. That approach would place too extreme an impediment to benign and important uses of color consciousness. Unless and until the promised land of racial equality is achieved, it is unrealistic to blind ourselves to color in such instances.\textsuperscript{264}

The concern, however, must be that the mere presence of these theories and devices will reinforce the negative underlying social values that were the original source of the problem. As Justice Powell stated in a context outside of trans-racial adoption:

No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive . . . . [A] court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.\textsuperscript{265}

In this regard, race-based preference structures must give great cause for concern, both as to the schemes themselves and the visions of society of the schemes' drafters. Not only do the schemes purport to respond to the consequences of racism in society, but they are calculated to ensure that the children placed for adoption under the auspices of the scheme will anticipate a racist society in the future, and as likely as not, will in due course produce a generation of children of the same mindset. Implicitly, the schemes do not accept the "melting pot" as a viable model of society. From the perspective of the National Association of Black Social Workers, "[t]he United States is not a melting pot. It never


\textsuperscript{264} In re R.M.G., 454 A.2d 776, 800-01 (D.C. 1982).

has been, and it's not going to be.”\textsuperscript{266} From this point of view, the preference schemes probably reflect the minimum legal acknowledgement due the social reality. Others who accept the racism of society would still see the schemes, with their emphasis on ethnicity and race, as going too far, for in their view, “[i]f you are talking about the melting pot, on the whole we are a melted society . . . ethnicity isn't very important any more, and race is terribly important.”\textsuperscript{267}

If the “melting pot” model does indeed prove to be an empty crock, reflecting unachievable aspirations rather than temporarily intransigent social realities, then there will be substantial ramifications for the longer term constitutional treatment of trans-racial adoptions. The long-term strength of the Constitution depends on such structural and philosophical integrity as its applications endow it. Equally, constitutional viability depends on operational credibility. Can such credibility be achieved using a nonviable social model? Correspondingly, can constitutional interpretation afford to pay the price of letting the genie of race-based nationalism out of the bottle, having spent the better part of two centuries engaged in the enterprise of bottling this very genie? As Justice Stevens has put it:

> A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. In order to achieve that goal we must learn from our past mistakes, but I believe the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future.\textsuperscript{268}

In this regard, does the specific problem environment of trans-racial adoption justify abandoning the fundamental premise of a legal system based on race-free classifications?

*Palmore v. Sidoti,*\textsuperscript{269} is an important case. Its technical application may be limited and it may shrug aside its own impact on the best interests of a given child. Nevertheless, it represents a large philosophical footprint of constitutional law. When the issue of race-based preferences reaches the United States Supreme

\textsuperscript{266} Simon & Altstein III, supra note 11, at 9 (quoting Black Children Facing Adoption Barriers, NASW News, Apr. 1984, at 9).

\textsuperscript{267} Simon & Altstein III, supra note 11, at 10 (quoting Herbert Gans, A Place for Foster Children, N.Y. Times, June 27, 1984, at C15).


\textsuperscript{269} 466 U.S. 429 (1984).
Court, as it ultimately will, the locus of that footprint may be revealed, be it granite or lily-pad.

**Conclusion**

The race-based adoption preference schemes should be viewed as highly problematic devices employed in a politically contentious environment. In the face of what seems to be a substantial need for adoptive homes by minority children, the schemes take the posture that the preferred placement for a minority child is a minority home, although the social science evidence in this regard is far from conclusive. The schemes' position appears to be that the best interests of the child will be met by such a placement, even though the price of the scheme may be delay in the placement, disruption of existing relationships, and even the possibility of no placement at all. The schemes endow the social service infrastructure with substantial discretionary decision-making authority when the premise for the exercise of that authority is race and the adequacy of legal review is open to question.

The preference system impacts on the potential interests of a variety of different constituencies, not all of whom are legally appropriately situated to deal with the consequences of the scheme. Particularly disadvantaged in this regard are the adoptee child and any foster parents. Although the definitive basis for the evaluation of the constitutionality of such a scheme is unclear, it seems both likely and necessary for a strict scrutiny analysis to be applied. The three current state schemes are unlikely to survive such scrutiny, although the schemes' prospects might be better if an intermediate level of scrutiny were employed.

In summary, a child affected by the question of trans-racial adoption is potentially trapped in the middle of dangerous political and legal crossroads. The interests involved in selecting the path down which to travel are not necessarily the child's. As usual, adults with agendas of their own are the ones to speak. At issue, apart from any concern for the child, are questions of race, social polarization, bigotry, uncertainty in the social sciences, and the processes and values of the legal system. A race-based system of adoption placement priorities emerges as a dubious legal instrument with marginal, if any, benefits for the child, and if sanctioned, as an instrument which requires rethinking some of the fundamental normative values underpinning constitutional law.