Transracial Adoption and the Federal Adoption Subsidy

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I. INTRODUCTION

Raymond Bullard was two and a half years old when he was removed from his foster home, where he had lived happily for two years with a white family, to be placed with a black family. Raymond was taken from the only home he had known because the Philadelphia Department of Human Services had a policy against long-term interracial foster care and adoption placements. The removal was in no way attributed to the quality of care provided by Raymond's foster parents. Two years later, Raymond was diagnosed as clinically depressed. His speech impediment had grown worse and he displayed excessive aggression and preoccupation with death. Only after this diagnosis was made did the federal district court return Raymond to his initial foster home.[1]

Though Raymond's story is an exceptional one, it illustrates the significance race is accorded in child-placement decisions. Though no one intended to hurt Raymond, the child suffered tremendous emotional trauma as a result of the separation from his family due to concern about the color of his skin. Many children today are wallowing in unstable foster or institutional care rather than being placed with adoptive parents of another race. A child's race or cultural heritage are permissible factors for consideration in the determination of the best interests of the child.[2] Race-matching, however, is often valued above the immediate placement of children in permanent homes. Raymond's case introduces the complicated issues that arise from the consideration of race in the best interests

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1. *See* McLaughlin v. Pernsley, 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd on other ground*, 876 F.2d 308 (3d Cir. 1989).

2. *See* discussion *infra* Section II.B .

analysis and the resistance to transracial placements in the adoption context.

This Note uses affirmative action jurisprudence to explore the problems arising from the consideration of race in adoption and discusses whether the race-conscious federal adoption subsidy, which is given to adults wanting to adopt minority and other hard-to-place children, is a permissible means of encouraging the adoption of minority children. Adoption agencies and social workers resist making transracial adoption even though their resistance often precludes or delays the child's placement. The barriers imposed by bureaucratic decision-making are linked to the broader race issues being debated in the affirmative action context. Advocacy of the elimination of barriers to transracial adoption may seem inconsistent with support of the adoption subsidy—the first lessens, the importance of race, and the second underscores its significance. Nonetheless, both target the placement of children in permanent homes and aim to further the interests of the child. This Note analogizes racial discrimination in child placement to racial discrimination in the admissions and employment context and concludes that affirmative action measures are an appropriate remedy.

Part I of this Note presents an overview the problem: Disproportionate number of black children await adoption and black children endure longer waiting periods than do other children. Part II of this Note surveys the law on transracial adoption and examines the trend toward removal of barriers to transracial adoptions. Part III uses analogies to affirmative action cases addressing the benign use of racial classifications to explore the constitutionality of the federal adoption statute authorizing the subsidization of adults wanting to adopt minority and other hard-to-place children. Part IV focuses on current trends in affirmative action law and contemplates whether the subsidy would be found legal if the principles of *Hopwood v. Texas*[3] or *Wittmer v. Peters*[4] were embraced by the Supreme Court. The discussion reveals that the subsidy probably would pass constitutional muster if either approach became the law of the land. The Note ultimately advocates the federal adoption subsidy as a means of advancing the interests of minority children, concluding that the subsidy is constitutional given past discrimination by state actors charged with making child-placement decisions.

This Note builds upon a practical rather than idealistic position regarding the proper weight to be given to race in child placement decisions. Race and culture are indeed significant to a child's identity and affect her human experience in numerous ways. There is an intimate

3. 78 F.3d 932 (5th Cir. 1996).
4. 87 F.3d 916 (7th Cir. 1996).

connection between race, culture, and identity that shapes the way the child thinks about and perceives herself, others, and the world around her. There is no doubt that a black child raised in a white family and a black child raised in a black family will have distinct experiences. It also is highly likely that a black child raised in a white family will experience, to some extent, societal pressures, confusion about identity, and tension between the two worlds to which she belongs. These additional complications exacerbate the difficulties facing all minorities in American society.

Nonetheless, given the current crisis involving the disproportionate numbers of black children in need of permanent homes, transracial adoptions should be advocated. Race should never factor into a placement determination when the result is leaving a child in foster or institutional care. If there are no same-race parents with whom to place a child, the child should be placed *immediately* with adoptive parents of a different race. Put simply, race should never preclude or delay an adoptive placement for *any* period of time.

Race should be a factor in placement decisions in only one instance—when there are qualified black and white prospective parents waiting to adopt. In this circumstance, children should be assigned on a same-race basis. Given the stark reality that black children are adopted at a lower rate than are white children, we must grapple with the difficult issue of transracial adoption when same-race parents are not immediately available. The goal in adoption should be finding immediate, permanent homes for children. Children need families in which to grow and develop in a normal, healthy manner. The choice between making a transracial placement and waiting for a black family to become available to adopt a minority child should be easy—the transracial placement should be made, and the child should be given a home and family to call her own.

A. The Statistical Imbalance

Both the elimination of barriers to nonminority couples' adoption of minority children and the provision of a federal adoption subsidy are useful social policies. Both facilitate the location of permanent homes for the disproportionate numbers of minority children in the foster care system. The severity of the gap in placement rates between minority and nonminority children is a driving force in the transracial adoption controversy that warrants attention. Approximately forty-seven percent of the children waiting to be adopted are of color and forty percent are categorized as black, though blacks constitute only twelve percent of the U.S. popula-

tion.[5] On average, minority children wait two years before being matched with a parent, twice as long as nonminority children.[6]

In 1995, Senator Howard Metzenbaum found that nearly 500,000 children were in foster care in the United States.[7] Of these children, black children waiting to be adopted waited approximately twice as long as non-black children, who waited a median length of two years and eight months.[8] Because it is more difficult to find families willing to adopt older children, a child's chances of ever receiving a permanent placement decrease the longer a child remains in foster care.[9]

In 1991, the National Adoption Center's statistics revealed that 31% of families waiting to adopt were black and 67% were white.[10] Yet a survey by the National Center for Health Statistics concluded that only 7.6% of adoptions reported by women were transracial, of which 1.2% involved a white mother and a black child.[11] To be sure, many prospective adoptive parents are not interested in adopting across racial lines. Those who are, however, often encounter bureaucratic resistance that stems

5. *See* Nancy E. Rowan, *Interracial Adoption Part of Welfare Fight*, WASH. TIMES, Nov. 2, 1995, at A11 (quoting Rep. Jim Bunning, supporter of 1996 Adoption Promotion and Stability Act, which would bar race-based discrimination in adoption, as stating that because forty percent of the children in foster care but only twelve percent of Americans are black, minority children languish in foster homes); *see also* SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. No. 101-395, at 7, 38 (1990); CONSTANCE POHL & KATHY HARRIS, TRANSRACIAL ADOPTION 62 (1992). There are few statistics available on the percentages and races of children waiting to be adopted, because the federal government stopped gathering statistics in 1975, the year the United States National Center for Social Statistics issued its last report on adoption. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1174 n.10 (1991) (citing Joan H. Hollinger, *Introduction to Law and Practice, in* ADOPTION LAW AND PRACTICE 1-52 (Joan H. Hollinger ed., 1988)). More recent statistics are based on information collected on a voluntary basis from state substitute care systems. *See id.* (citing Telephone Interview with Dr. Toshio Totara, Director of the Research and Demonstration Department of the American Public Welfare Association (Jan. 29, 1991)).

6. *See* Bartholet, *supra* note 5 at 1201.

7. Minority children constitute approximately half of the population in the foster care system in the United States. The situation is worse in New York City, where in 1993 black children comprised almost 90% of the foster care population; *see* Judith K. McKenzie, *Adoption of Children with Special Needs*, THE FUTURE OF CHILDREN, Spring 1993, at 62, 69. Although this Note primarily focuses on black children, who currently face the longest waiting periods, many of the relevant studies and statistics treat all minority children. In addition, many of the issues discussed throughout the Note apply to both black and nonblack minority children. For these reasons, reference will be made to both black and minority children.

8. *See* Carla M. Curtis & Rudolph Alexander, *The Multiethnic Placement Act: Implications for Social Work Practice*, 13 CHILD AND ADOLESCENT SOC. WORK J. 401, 403 (1996) (quoting Department of Health and Human Services guidelines, 1995).

9. *See* NATIONAL COMM. FOR ADOPTION, ADOPTION FACTBOOK 176, 191 (1989).

10. *See* Bartholet, *supra* note 5, at 1187 n.62.

11. *See* RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION, RACE, AND IDENTITY: FROM INFANCY THROUGH ADOLESCENCE 14 & n.48 (1992) (quoting CHRISTINE A. BACHRACH ET AL., ADOPTION IN THE 1980S 5-7, 1989). Of the transracial adoptions reported in the survey, 1.2% involved a white mother and a black child, 4.8% involved a white mother and a child of a race other than black, most of which were Korean and Latin American, and 1.6% involved a white child and a mother of another race.

from personal or agency prejudices. These prejudices, furthermore, have been exacerbated by the continuing resistance of the National Association of Black Social Workers (NABSW) to transracial adoption.[12] A black child's chance of being adopted has already suffered as a result of the 1972 release by the NABSW of a position statement that referred to transracial adoption as "cultural genocide."[13] After the group announced its position, many groups shifted their policies and the number of transracial placements plummeted.[14]

Adoption agency policies often make race the central factor in the placement process.[15] Whites who have expressed an interest in adopting older black children with significant disabilities have been turned away from public adoption agencies.[16] Despite the need to find homes for minority children and the potentially large number of white parents wanting to adopt a child of another race,[17] children are often shifted between foster care situations, left to remain in institutions, or subjected to unnecessary delays in permanent placements. This is due, in part, to institutional aversion to transracial adoptions. Transracial adoptions take place more frequently in private adoption agencies, where many barriers present in the state adoption process do not exist.[18] Though public agencies are licensed by the state and run by state or city governments, there is minimal state regulation of private adoption agencies.[19] Therefore, private agencies are free to exclude race from consideration as they make placement decisions.[20]

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12. *See* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 97-98 (1993) (detailing interviews with directors of adoption agencies who described prejudices of state and agency bureaucrats and also pressure from NABSW chapter when placing children transracially).

13. The NABSW statement was presented at the organization's national conference held in Tennessee on April 4-9, 1972.

14. For a full discussion, see *infra* Section II.A.

15. *See* BARTHOLET, *supra* note 12, at 107 (1993).

16. *See* Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99, 101 (1995) (quoting JAMES BREAY, COMMONWEALTH OF MASS., WHO ARE THE WAITING CHILDREN? AN OVERVIEW OF THE ADOPTION SERV. SYSTEM IN THE MASS. DEPT. OF SOC. SERVS. 17 tbl. 3.3 (1994)).

17. *See* Davidson M. Pattiz, *Racial Preference in Adoption: An Equal Protection Challenge*, 82 GEO. L.J. 2571, 2601 (1994) (citing Simon & Altstein study (presented in TRANSRACIAL ADOPTEES AND THEIR FAMILIES, *infra* note 61) revealing that approximately 68,000 of the two million whites waiting to adopt indicated that they would adopt transracially if given the opportunity).

18. *See* Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2355 (1998) (correspondence).

19. *See* Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 329 (1997).

20. Several authors have discussed the great discretion exercised by adoption placement officials and the vagueness of the best interests standard. *See, e.g.*, Chip Chiles, *A Hand To Rock the Cradle: Transracial Adoption, the Multiethnic Placement Act, and a Proposal for the Arkansas General Assembly*, 49 ARK. L. REV. 501, 518 (1996); Barbara McLaughlin, *Transra-*

Social workers and adoption agencies wield a great deal of power in the adoption process. Courts view adoption agencies as the experts at discerning what is in a child's best interest.[21] Social workers have filled a gap "between a couple's desire to adopt and a court's ability to determine whether petitioners would indeed be adequate parents."[22] Social workers serve as "advocate[s] for couples who want[] to adopt and for women and institutions who want[] to surrender their children."[23] Some studies have revealed that a social worker's race is one of the strongest factors affecting her attitude towards transracial adoption.[24] Black social workers disapprove of transracial adoption more often than white social workers.[25]

Private biases and hostility towards transracial placements are not wholly to blame, however, for the statistical imbalance of minority children needing homes. Other factors contributing to the disproportionate numbers of minority children waiting for homes include societal perceptions of the importance of biological similarity within the family, the malleability of the law governing the consideration of race by bureaucrats, and the fact that many black adults today cannot meet the financial prerequisites adopted by the states for adopting children. The lack of guidance from the Supreme Court regarding the proper role of race in placement decisions and the lack of concrete federal law in this area also contribute to the problem.[26] Regardless of the cause, this problem demands immediate attention.

B. Efforts To Resolve the Imbalance

In recent years, various methods have been suggested or employed to redress the disproportionate numbers of minority children in the foster system. Some argue that race should not be a permissible factor in finding homes for children and advocate legislation requiring color-blind adoptions. Others argue that the criteria applied to white prospective

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cial Adoption in New York State, 60 ALB. L. REV. 501, 519-20 (1996); Rebecca Varan, *Desegregating the Adoptive Family: In Support of the Adoption Anti-Discrimination Act of 1995*, 30 J. MARSHALL L. REV. 593, 604 (1997).

21. *See* McLaughlin, *supra* note 19, 60 ALB. L. REV., at 519.

22. SIMON AND ALTSTEIN, *supra* note 11, at 1.

23. *Id.*

24. *See id.* at 10, 12 (citing Anne Stern Farber, Attitudes of Social Workers toward Requests for Transracial Adoption (1972) (unpublished research project, University of Maryland School of Social Work); Dawn Day Wachtel, White Social Workers and the Adoption of Black Children (1973) (unpublished manuscript).

25. *See id.* at 10, 12.

26. *See* discussion *infra* Section II.C.

parents should not be used when searching for a black adoptive family.[27] The black community itself has initiated recruitment programs to encourage more black families to adopt black children.[28] All states have also instituted adoption assistance programs that make payments to parents who would like to adopt but are financially restricted from doing so.[29] In addition, all states have enacted adoption subsidy statutes that provide monetary subsidies for families that adopt "special needs" or "hard to place" children.[30]

II. THE HISTORY AND ELIMINATION OF RESTRICTIONS ON TRANSRACIAL ADOPTION

A. Historical and Legal Development of Transracial Adoption

An examination of the development of transracial adoption policies illustrates how ingrained race-based decision-making is in the adoption process. The matching principle, which holds that the adopted child and his or her parents should be paired according to physical, emotional, intellectual, and cultural characteristics, has always dominated adoption proceedings. Racial matching policies are based on the idea that what is "natural" in the context of the biological family is what is normal and desirable in the context of adoption.[31] Placement decision-makers have long been concerned with placing children with physically similar parents.[32] Primary emphasis has always been on race and religion, however, and identical religious backgrounds were initially deemed essential to child placements. In fact, a transreligious adoption controversy preceded the present controversy surrounding transracial adoption.[33]

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27. *See* Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 41 (1993). Fenton argues, for example, that, because black families are often headed by single parents, single-parent adoptions should be encouraged rather than rejected. *See id.* at 63.

28. *See* Michelle M. Mini, Note, *Breaking Down the Barriers to Transracial Adoptions: Can the Multiethnic Placement Act Meet This Challenge?*, 22 HOFSTRA L. REV. 897, 926-27 (1994).

29. *See* SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 5, at 45.

30. *See* Jane Patterson Auld, *Racial Matching vs. Transracial Adoption: Proposing a Compromise in the Best Interests of Minority Children*, 27 FAM. L.Q. 447, 453 (1993) (citing JOAN H. HOLLINGER ET AL., ADOPTION LAW AND PRACTICE §9-A.01 (1990)). Congress enacted the Adoption Assistance and Child Welfare Act in 1980 to encourage states to subsidize the adoption of children with special needs by matching state subsidies with federal dollars. *See* Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

31. *See* Bartholet, *supra* note 5, at 1172-73.

32. *See* Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 DUKE J. GENDER L. & POL'Y 1, 8 (1995).

33. *See* SIMON & ALTSTEIN, *supra* note 11, at 1-2.

The 1960s was a decade of increased acceptance of transracial adoption. This increase has been attributed to numerous factors including the 1960s Civil Rights Movement,[34] clinical data identifying the effects of maternal deprivation on infants' psychological development,[35] the passage of laws mandating reporting of suspected child abuse and neglect,[36] an increased awareness of the deficiencies of the foster care system,[37] identification of the battered child syndrome by the medical profession,[38] an insufficient number of minority homes available for minority children in need of placement, and a dramatic decline in the number of healthy white infants available for adoption.[39] The year 1971 marked the peak of transracial adoption levels: 2574 black children were placed with white families and 4846 black children were placed in black families.[40]

The NABSW's denunciation in 1972 of the practice of transracial adoption[41] halted the increase in transracial adoptions.[42] The NABSW's vigorous attack against transracial adoptions, which it labeled a form of

34. *See* Ruth-Arlene Howe, *Transracial Adoption: Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L. J. 409, 444-45 (1997).

35. Foster care is especially detrimental to children because many children in the foster care system are subjected to multiple placements. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 837 (1977) (stating that nearly 60% of children in foster care in New York City have experienced more than one placement and approximately 28% have experienced three or more placements). Joseph Goldstein, Anna Freud, and Albert Solnit, child psychiatrists whose developmental theories have been influential among child care workers and with courts, assert that children need a continuous and stable relationship with an adult caretaker for adequate development to occur. Placement decisions must safeguard the child's need for continuity of care, because interruptions in continuity result in the child's emotional attachments becoming increasingly shallow and indiscriminate. Placement decisions should also protect the psychological parent relationship whenever one already exists or someone seeks to provide this relationship to the child for whom it is lacking. The term "psychological parent" refers to the adult with whom a child forms emotional attachments that are necessary for healthy growth. This adult can be anyone who cares for the child and does not need to be a child's biological parent. *See* J. GOLDSTEIN ET AL., THE LEAST DETRIMENTAL ALTERNATIVE: BEYOND THE BEST INTERESTS OF THE CHILD 3-40 (1996).

36. *See* Howe, *supra* note 34, at 445. These mandatory reporting laws brought a greater number of black families in contact with the child welfare authorities. *See id.* at 445-46. Howe does not advocate transracial adoptions and criticizes the fact that authorities' preferred response to problems in black families caused by poverty has been to remove black children from their homes and to place them in foster care.

37. *See* Cynthia R. Mabry, *"Love Alone is Not Enough!* in Transracial Adoptions—Scrutinizing Recent Statutes, Agency Policies, and Prospective Adoptive Parents," 42 WAYNE L. REV. 1347, 1351 (1996).

38. *See* Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503, 505 (1984) (citing Kempe et al., *The Battered Child Syndrome*, 181 AM. MED. ASS'N. J. 17 (1962)).

39. *See* Howard, *supra* note 38, at 509.

40. *See* Jacqueline Macaulay & Stewart Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, *in* 1 RESEARCH IN LAW AND SOCIOLOGY 265, 284-85 (R. Simon ed., 1978).

41. COMPREHENSIVE BLACK CHILD AND FAMILY COMM., NAT. ASS'N OF BLACK SOC. WORKERS, POSITION PAPER 14-15 (1972). *See supra* note 13and accompanying text.

42. Carla M. Curtis & Rudolph Alexander, Jr., *The Multiethnic Placement Act: Implications for Social Work Practice*, CHILD AND ADOLESCENT SOCIAL WORK J., Oct. 1996, at 401, 401-02.

"genocide," resulted in a 30% decrease in the practice over the course of one year.[43] In its position paper, the NABSW stated that

> 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 protection of their future . . . . Black children in white homes are cut off from the healthy development of themselves as Black people. . . . Without a change in policy, 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.
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> We [the members of the NABSW] have committed ourselves to go back to our communities and work to end this particular form of genocide.[44]

The NABSW thus advanced two primary reasons for its opposition to transracial adoption: it prevents black children from forming a strong racial identity and it precludes the development of survival skills necessary to deal with a racist society. The publication of this denunciation had an enormous impact on the positions of many other influential groups and caused many agencies to reconsider their use of transracial adoptions and to weigh the practice's social, political and cultural consequences for the child.[45] The "objections raised by the NABSW have undoubtedly been the most influential in shaping policies which discourage the practice of transracial adoption."[46] Both adoption agencies and social workers changed their positions to accommodate that of "this outspoken and relatively unchallenged group of Black professionals."[47] After the release of the statement, many agencies "either established same race placements or used the NABSW report to justify existing race-matching policies."[48]

The position of the Child Welfare League, for example, radically altered, from encouraging to discouraging transracial adoptions: "It is preferable to place children in families of their own racial background."[49] The

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43. *See* RITA SIMON & HOWARD ALSTEIN, TRANSRACIAL ADOPTION: A FOLLOW UP 55-56 (1981) (illustrating the rapid decline in numbers of transracial adoptees after 1972). The number of transracial adoptions decreased from 1569 in the year 1972 to 1091 in the year 1973, to a mere 831 in the year 1975. *See id.*

44. COMPREHENSIVE BLACK CHILD AND FAMILY COMM., *supra* note 13; *see also* Bartholet, *supra* note 5, at 97 (quoting National Association of Black Social Workers, "Preserving Black Families: Research and Action Beyond the Rhetoric," February 1986, p. 31).

45. *See* J. LADNER, MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES 75 (1977).

46. Carol G. Goforth, *What Is She? How Race Matters and Why It Shouldn't*, 46 DEPAUL L. REV. 1, 44 (1996).

47. *Note, Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531, 551 (1994).

48. Cynthia R. Mabry, *supra* note 37, at 1353.

49. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE §4.5 (1973). A 1988 version of the same document stated that "[c]hildren in need of adoption have a right to be placed in a family that reflects their ethnicity or race. Children should not have their

National Association for the Advancement of Colored People (NAACP) advocates race- matching when possible, but prefers transracial adoption as an alternative to foster care:

> If there are black families available and suitable under the criteria of advancing the "best interest of the child," black children should be placed with such black families. If black families are not available for placement of black children, transracial adoption ought to be pursued as a viable and preferred alternative to keeping such children in foster homes. [50]

Today the NABSW continues to advocate racial matching but acquiesces to transracial adoptions made "after documented evidence of unsuccessful same race placements has been reviewed and supported by appropriate representatives of the African-American community."[51] Although the views of the NABSW are not empirically justified, they remain highly influential.[52] The NABSW's position paper raised objections to and concern about the development of transracial adoptees. The principal drawback asserted by those who oppose transracial adoption is that such placements cause the child to lose his or her sense of cultural and ethnic identity. Some argue that black children need black parents to learn how to cope with living in a racist society.[53] Others focus on the detrimental effect on the black community as a whole.[54] Ruth Arlene Howe, a race-matching advocate, underscores the group interests of the black community and views transracial adoption as the commodification of black children to satisfy white demand:

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adoption denied or significantly delayed, however, when adoptive parents of other racial groups are available." CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE § 4.5 (rev. ed. 1988).

50. Memorandum from Benjamin L. Hooks, Executive Director, NAACP, to All NAACP Units, National Board Members, and NAACP/SCF Trustees 7 (June 3, 1992), *reprinted in* Note, *Transracial Adoption in Light of the Foster Care Crisis: A Horse of a Different Color*, 10 N.Y.L. SCH. J. HUM. RTS. 147, 176 n.226 (1992).

51. In April 1994, the NABSW announced that:

> Family preservation, reunification and adoption should work in tandem toward finding permanent homes for children. Priority should be given to preserving families through the reunification or adoption of children with/by biological relatives. If that should fail, secondary priority should be given to the placement of a child within his own race. Transracial adoption of an African-American child should only be considered after documented evidence of unsuccessful same race placements has been reviewed and supported by appropriate representatives of the African-American community. Under no circumstance should successful same race placements be impeded by obvious barriers (i.e., legal limits of states, state boundaries, fees, surrogate payments, intrusive applications, lethargic court systems, inadequate staffing patterns, etc.).

See Varan, *supra* note 20, at 625 n.94 (1997).

52. *See* Jane Maslow Cohen, *Race-Based Matching in a Post-Loving Frame*, 6 B.U. PUB. INT. L.J. 653, 656 (1997) (stating that the arguments for race-matching are offered normatively and that the arguments are neither proven nor empirically justified).

53. *See* David S. Rosettenstein, *Trans-racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot,"* 68 ST. JOHN'S L. REV. 137, 142 (1994) (discussing the views of opponents of transracial adoption).

54. *See id.* at 144.

> By according no legitimacy to the group interests of African-Americans and focusing just on the individual rights of African-American children, these legal champions assure a supply of children to meet the market demands of white adults seeking to parent whatever children they select. These actions rob African-Americans of the privilege and responsibility of caring for their own children. No group can be assured continued existence and vitality if it does not bear and rear its own children.[55]

Howe also fears that as a result of transracial adoptions, prospective black applicants will be discriminated against, out-bid in the market place, or screened out by agency staff.[56]

Until recently, several states had matching or holding policies authorizing the delay of transracial placements for periods ranging from three months to several years. Holding policies sometimes require that a definite period of time pass before a transracial adoption be considered, usually one of between three and eighteen months. Other holding policies require that an agency hold a child until it can be proven, usually with documentation, that active efforts to recruit minority parents have failed.[57] The latter type of policy may result in even longer delays. California, for example, required a ninety-day waiting period after a child was given up for adoption before she could be considered for placement across racial or ethnic boundaries. The law imposed additional qualifications by requiring documentation that a "diligent search" using all appropriate resources and strategies had been made for a same-race placement.[58] Similarly, Arizona's "Policy of Placement of Children of Families of the Same Ethnic or Racial Background" included both a matching and a holding policy.[59] Nevada and Missouri had similar policies, with holding periods of three and six months, respectively.[60]

Today, only Arkansas and Minnesota maintain matching or preference policies that require preference for adoptions within the same racial group.[61] These two states establish a hierarchy of preference, placing adoptions by a blood relative at the top, followed by adoptions of a fam-

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55. Howe, *supra* note 34 at 409, 417 (1997).

56. *Id.* at 471.

57. *See* BARTHOLET, *supra* note 12, at 96-97.

58. *See* CAL. CIV. CODE § 276-276(2) (West Supp. 1991), *amended by* CAL. CIV. CODE §§ 222.35, 222.37 (West Supp. 1991).

59. The Arizona policy outlined the order in which its same-race preference placements must be followed, mandating that adoptive parents of the same racial or ethnic background be sought first, followed by a two parent family in which one parent was of the child's racial or ethnic background. "Intensive recruitment efforts are required, and after 90 days and the documented unavailability of a family of the child's background, other families may be considered." PATRICIA WILSON-COKER, OFFICE OF POLICY AND MANAGEMENT, A STUDY OF TRANSRACIAL ADOPTION IN THE STATE OF CONNECTICUT 72-73 (1988).

60. *See* BARTHOLET, *supra* note 12, at 96-97.

61. *See* Rita J. Simon and Howard Altstein, *TheRelevance of Race in Adoption Law and Social Practice*, NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 174 (1997).

ily with the same racial or ethnic heritage as the child, with adoptions by a family of a different race who is knowledgeable and appreciative of the child's racial or ethnic heritage at the bottom.[62] Most state statutes are silent as to the role of race in the adoption process. Eight states provide that the race of the parties shall be included in the adoption petition or listed in the court-ordered investigation, but do not detail how this information may be used in the placement decision.[63] Consistent with the federal law, eight other states prohibit the use of race to delay or deny an adoption placement.[64]

Evidence exists that the separation into black and white groups is only a preliminary step of the matching process for many adoption agencies. Black children may be classified subsequently by skin tone and accordingly placed in light, medium, or dark skinned categories, in the hopes of being matched with a parent in the complementary group.[65] These types of policies are subject to criticism, for increasing the time that children languish in foster care.

B. The Best Interests Standard and the "Relevant-But-Not-Decisive" Rule

Although the purpose of adoption and foster care is generally understood as an effort to advance the welfare of the child, there is little agreement as to how this goal should be accomplished. The best interests standard is widely accepted today in forty-one states and the District of Columbia as the proper standard to be followed in adoption and other child-placement contexts. The fact that the best interests standard is a subjective one allows placement decision-makers too much discretion, however, enabling them to abuse the power entrusted to them by privileging consideration of race over other factors. Adoption agencies, social workers, and courts are free to incorporate whatever characteristics they deem relevant into the decision-making process, and, for the most part, to assign any amount of weight they desire to those characteristics.

The existence of statutes prohibiting complete reliance on race indicates that racial considerations are deeply embedded in child-placement decisions and suggests that placement decision-makers tend to prioritize race above other factors. Elizabeth Bartholet underscores the immense resistance to transracial adoption: "Although agencies are generally

62. *See* ARK. CODE ANN. § 9-9-102 (Michie 1993 & Supp. 1995); MINN. STAT. ANN. § 259.29 (West Supp. 1997).

63. The District of Columbia, Illinois, Indiana, Missouri, New York, Oklahoma, and South Carolina have statutes of this sort. *See* SIMON AND ALTSTEIN, *supra* note 61, at 173.

64. California, Connecticut, Kentucky, Maryland, New Jersey, Pennsylvania, Texas, and Wisconsin have statutes of this type. *See id.*

65. *See* BARTHOLET, *supra* note 5, at 95.

somewhat more willing to consider transracial adoption for . . . children [with severe disabilities and older children], they are still likely to treat it at best as a last-resort option to be considered only after minority families have been recruited and appropriate waiting periods exhausted."[66]

A vast literature has been published on the best interests standard and all the competing interests included in that framework. In general, that standard holds that child-placement decisions must enhance the welfare of the child. Little guidance is provided by most state legislatures as to how any one factor of the child's welfare should be considered. Some states do, however, have statutes prohibiting the denial of an adoption on the basis of an adopting parent's marital status or because of a difference in race, color, or religion between a prospective adopting parent and the child to be adopted.[67]

Although the best interests standard has been praised for maximizing the well-being of the child and for permitting decision-makers to account for individual circumstances,[68] it also has been criticized for being subjective and vague and for permitting the consideration of political and social ends that are unrelated to the welfare of the child.[69] Margaret Howard identifies competing interests that are often considered under the best interests standard: a child's interest in his or her cultural identity as a member of a minority group, child-placement agencies' organizational interests, the minority group's interest in continuing as a discrete group, and the child's interest in being part of a stable and permanent family.[70] Howard points out that the precise hierarchy in which factors are placed may dictate whether or not the transracial adoption is permitted. If, for example, the principal goal is to find a stable and permanent family for the child, the transracial adoption will be encouraged when no same-race homes are available; if, however, cultural identity is weighed more heavily, the transracial adoption will be discouraged.[71] Twila Perry considers the discretionary nature of the best interests standard to be a deficiency:

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66. Bartholet, *supra* note 5, at 1204.

67. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-105.01 (West 1998); CONN. GEN. STAT. § 451-726; 20 ILL. COMP. STAT. ANN. 505/7 (West 1998); KY. REV. STAT. ANN. § 199.471 (Banks-Baldwin 1998); MICH. COMP. LAWS ANN. § 722.957(1) (West 1998); N.J. STAT. ANN. § 9:30-40 (West 1998).

68. *See* ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN, 16-18 (1985); Linda Henry Elrod, *Child Custody and Visitation, in* FAMILY LAW AND PRACTICE 32-1, 32-16 to 32-17 (Arnold H. Rutkin ed., 1992).

69. *See generally* Bartholet, *supra* note 5; Jo Beth Eubanks, *Transracial Adoption in Texas: Should the Best Interests Standard be Colorblind?*, 24 ST. MARY'S L.J. 1225 (1993); Howard, *supra* note 39; Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990).

70. *See* Howard, *supra* note 38, at 503-04.

71. *See id.* at 519.

> Although the rule is intended to be a multi-factor balancing test, it may often allow race inappropriately to achieve a dominant position. The rule affords a level of discretion by courts and agencies that permits decisions to be made on the basis of personal biases, unsupported assumptions, and incomplete analyses that are often insensitive to the range of children's needs and that ignore other important interests.[72]

State statutes illustrate the discretionary nature of this essential principle in child-placement proceedings. For example, the language of Connecticut's definition of the best interests standard indicates that its delineation of the factors that 'shall' be included is illustrative rather than exhaustive:

> For the purpose of this section, 'best interests of the child' shall include, *but not be limited to*, a consideration of the age of the child, the nature of the relationship of the child with the caretaker of the child, the length of time the child has been in the custody of the caretaker, the nature of the relationship of the child with the birth parent, any relationship that may exist between the child and siblings or other children in the caretaker's household, and the psychological and medical needs of the child . . . .[73]

Another Connecticut statute prohibits the use of race as the sole determining factor in adoption placement decisions: "If the commissioner of children and youth services is appointed as statutory parent for any child free for adoption under 45a-725, said commissioner shall not refuse to place such child with any prospective adoptive parent solely on the basis of a difference in race."[74] Presumably, complete reliance on race would not have to be explicitly prohibited were no one tempted to place so much emphasis on race.

Case law endorses the best interests standard, and the federal courts have repeatedly articulated that race may be a relevant, but not a decisive, factor in child-placement proceedings.[75] The "relevant-but-not-decisive" or "relevant-but-not-conclusive" rule was established in *In re Adoption of a Minor,* in which it was held that although race may be considered in the best interests determination, it may not be relied upon exclusively: "There may be reasons why a difference in race, or religion, may have relevance in adoption proceedings. But that factor alone can-

72. Perry, *supra* note 69, at 57.

73. CONN. GEN. STAT. § 45a-719 (1995) (emphasis added).

74. CONN. GEN. STAT. § 451-726 (1995); *see also* CONN. GEN. STAT. § 45a-727(c)(3) (1995) ("The court of probate shall not disapprove any adoption under this section solely because of an adopting parent's marital status or because of a difference in race, color, or religion between a prospective adopting parent and the child to be adopted . . . .")

75. *See In re* Petition of R.M.G. and E.M.G., 454 A.2d 776 (D.C. 1982) (stating that race may be a relevant but not deciding factor); *In re* Adoption of a Minor, 228 F.2d 446 (D.C. Cir. 1955) (stating that a difference in race may have relevance in an adoption proceeding but may not be decisive in determining the child's welfare); Rockefeller v. Nickerson, 233 N.Y.S.2d 314 (1962) (stating that race may be a relevant but not decisive factor in adoption proceedings).

not be decisive in determining the child's welfare."[76] The circuit court overruled the district court's denial of a natural white mother and her black husband's petition for adoption of a white child. The lower court had focused on the difficult social problems the boy could face were he to be adopted by a black man, including the loss of his status as a white man. The appellate court found the trial court's reliance on racial considerations to be impermissible because race was determinative of the child's fate rather than merely one factor in the best-interest analysis.

The relevant-but-not-conclusive standard has received much of the same criticism as the best interests standard: "With the present standard it is all too easy for the courts to use race as the foundation for their decisions and soothe constitutional injuries by disguising the decision behind a sprinkling of other justifications that standing alone would not support it."[77] Under the best interests standard, under which race can be a relevant-but-not-decisive factor in a placement decision, courts can make biased decisions while nevertheless ostensibly adhering to the permissible standard.

Drummond v. Fulton County Department of Family & Children's Services [78] exemplifies how courts can abuse the "relevant-but-not-decisive" rule. *Drummond* involved a white couple's request to adopt a mixed-race child who had been in its foster care for two years. Although the Drummonds had received excellent reviews regarding their care of the child, the placement agency decided to remove the child from their home because it was concerned about a black child being raised in a white home. The court rejected the Drummonds' complaint that their equal protection rights had been violated.[79] The *Drummond* court interpreted the current standard to mean that race can be decisive as long as a placement decision is not automatically rejected on racial grounds:

> But can race be taken into account, perhaps decisively if it is the factor which tips the balance between two potential families, where it is not used automatically? We conclude, as did another court which grappled with the problem, that the "difficulties inherent in interracial adoption" justify the consideration of "race as a relevant factor in adoption . . . ."[80]

Despite potential abuse of these rules, the United States Supreme Court endorsed both the best interests standard and the "relevant-but-not-decisive" rule in its only opinion on child placement, *Palmore v. Si-*

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76. *In re* Adoption of a Minor, 228 F.2d at 446, 448 (D.C. Cir. 1955).

77. Angela McCormick, *Transracial Adoption: A Critical View of the Court's Present Standards,* 28 J. FAM. L. 303, 315 (proposing a "but for" analysis in the review of placement decisions, under which the use of race would be unconstitutional if a different outcome would have been reached "but for" the consideration of race).

78. 563 F.2d 1200 (5th Cir. 1977).

79. *See Drummond,* 563 F.2d at 1204.

80. *Id.* at 1205.

doti.[81] Although family law is largely left to the individual states, the Court granted certiorari to review a Florida state court child-custody decision, because the case raised significant constitutional concerns about race discrimination. The Florida court had awarded a change in custody to the father on the grounds that the mother's cohabitation and subsequent marriage to a black man would expose the child to the social stigmas that can be faced by members of a mixed-race household.[82] Parental qualifications, devotion to the child, or adequacy of housing for either party were not at issue in the case.

The Court reversed the custody change and held that it was unconstitutional for the state to use race as the basis for removing a child from the custody of its biological parent. Although the Supreme Court advocated the use of the best interests standard, the Court took issue with Florida's complete reliance on race in its custody decision:

> The court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race. Taking the court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.[83]

The Court criticized Florida's reasoning that there would be a damaging impact on the child if she remained in a racially-mixed household and asserted that racial prejudice cannot be invoked to justify racial classifications: "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."[84]

The significance of this case with regard to transracial adoptions is unclear, since the Court's decision has been narrowly interpreted to apply only to parental custody disputes. The decision may indicate that some reasons for favoring same-race adoptions, such as avoidance of societal disapproval, are not to be considered when the best interestsof the child is determined. *Palmore* alternatively can be taken to mean that race cannot be the sole basis for removal of a child from custody. On this reading, the decision does not necessarily apply to the initial placement of children. The Court has made an analogous distinction in the employment discrimination context. The Court's jurisprudence in this area suggests that consideration of race in the making of the decision to fire someone is less acceptable than the consideration of race in the decision to hire someone.[85] Similarly, reliance on race in the decision to remove a

81. 466 U.S. 429 (1984).
82. *See id.* at 430.
83. *Id.* at 432.
84. *Id.* at 433.
85. For a full discussion of this distinction, see *infra* Section III.D.

child from a home in which he or she already has been placed may be seen as worse than reliance on race in deciding whether to place a child in a home. *Palmore* may also be seen as a restatement of the "relevant-but-not-decisive" rule governing the adoption context, for race was not precluded entirely from consideration in the custody decision.

C. Federal Legislation

The first significant statute governing the consideration of race in the adoption context can be found in Title VI of the 1964 Civil Rights Act. Title VI prohibits discrimination by federally funded adoption agencies: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[86] The federal policy guidelines of Title VI, however, recognize an exception in the context of child placements:

> Generally, under Title VI, race, color, or national origin may not be used as a basis for providing benefits or services. However, in placing a child in an adoptive or foster home it may be appropriate to consider race, color, or national origin as one of several factors . . . . This policy is based on unique aspects of the relationship between a child and his or her adoptive or foster parents.[87]

No explanation is offered as to what these "unique aspects" are that alter Title VI's fundamental prohibition of racial discrimination.

More recent legislation has responded to the public outcry against delays and denials in child placements caused by a bureaucratic over-emphasis on race. Increasingly strict rules have been enacted to target the obstacles to adoption and other child placements caused by the practice of race-matching, each law an improvement on the previous one.

The Howard Metzenbaum Multiethnic Placement Act was proposed in 1993 to address this problem. The bill forbade the use of race, color, or national origin to "unduly delay or deny placement." The inclusion of the word "unduly" legitimized some delay in child placements due to the consideration of race. Nowhere in the Act was the term "unduly delay" defined, thus leaving the decision-makers with the liberty of deciding what holding periods were permissible in child placements. In reaction to the Metzenbaum bill, Harvard Law School professor Randall Kennedy requested his colleague's support as he condemned the "undue delay" standard as a congressional authorization for delays in child placements:

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86. 42 U.S.C. § 2000(d) (1994).

87. Memorandum from David Chavkin, Deputy Director for Program Dev., U.S. Dep't of Health and Human Servs., to Virginia Apodaca, Region X Director, the Office for Civil Rights (Jan. 19, 1981), *quoted in* Bartholet, *supra* note 5, at 1230.

> At present, there exists no congressional authorization for race matching, much less for any delay in child placements for purposes of racial matching. If this bill is enacted, there will exist congressional authorization for such delay. Furthermore, the standard of undue delay is vague, a fact which will lodge considerable power in the hands of social service bureaucrats whom reviewing the courts will presume to have expertise . . . the undue delay standard will add yet another barrier impeding those who wish to insure that *all* parentless children—including racial minority children—are given the opportunity to be raised by loving adults as soon as humanly possible.[88]

Teachers of American Law Schools quickly sent Congress a letter stating that the bill would actually discourage transracial placements by authorizing delays in child placements for purposes of race-matching.[89] In striking the word "unduly" from the law, a 1994 proposal at least remedied this criticism and eliminated congressional authorization for such delays.

The Multiethnic Placement Act of 1994 (MEPA)[90] was a great improvement upon the Metzenbaum bill. The word "unduly" was not included in the law, remedying the problem of the appearance of congressional authorization of delays in child placement for purposes of finding same-race families. The purpose of the law was "to promote the best interests of children by—(1) decreasing the length of time that children wait to be adopted; (2) preventing discrimination in the placement of children on the basis of race, color, or national origin."[91] Congress had found that

> (1) nearly 500,000 children are in foster care in the United States; (2) tens of thousands of children in foster care are waiting for adoption; (3) 2 years and 8 months is the median length of time that children wait to be adopted; (4) child welfare agencies should work to eliminate racial, ethnic, and national origin discrimination and bias in adoption and foster care recruitment, selection, and placement procedures.[92]

MEPA prohibited adoption agencies receiving federal funds from using race to delay or deny the adoption or foster care placement of a child, and authorized the Department of Health and Human Services to withhold federal funds from any agency not in compliance with the Act. It provided, in relevant part:

> (1) PROHIBITION. — An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not—

88. Letter from Randall Kennedy, Professor, Harvard Law School, to Colleagues 9 (Nov. 3, 1993) (on file with *The Yale Law & Policy Review*).

89. *See* Letter from The Undersigned Teachers at American Law Schools to Congress (on file with the *Yale Law & Policy Review*).

90. 42 U.S.C. § 5115(a) (1994).

91. Pub. L. No. 103-382, § 552 (1994), 108 Stat. 4056.

92. *Id.*

> (A) categorically deny to any person the opportunity to become an adoptive or a foster parent, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved; or
>
> (B) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.
>
> (2) PERMISSIBLE CONSIDERATION. — An agency or entity to which paragraph (1) applies may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of a child.
>
> (3) DEFINITION. — As used in this subsection, the term 'placement decision' means the decision to place, or to delay or deny the placement of, a child in a foster care or an adoptive home, and includes the decision of the agency or entity involved to seek the termination of birth parents rights or otherwise make a child legally available for adoptive placement....[93]

Although MEPA was a step in the right direction, it has been criticized as a mere restatement of the current federal law under Title VI[94] and for leaving with the Department of Health and Human Services the power to prevent agencies from using race to delay adoption, a power this department has not used in the past.[95] More importantly, the Act did nothing to change the excessive discretion inherent in the current standard and essentially repeated the "relevant-but-not-decisive" rule. One commentator criticized the 1994 law as attempting a "legislative compromise between the friends and foes of adoptive race-matching."[96]

MEPA prohibited delays or denials in child placements solely due to the race of the child or prospective parents. However, it listed racial and ethnic considerations as permissible factors in the best interests determination. This feature of the Act permitted delays or denials due to racial considerations as long as race was only one factor in the decision-making process. MEPA has been attacked in principle and practice:

> In its current form, however, the bill endorses the use of race as a factor in such placement. This is wrong in principle, as it would put the federal government, for the first time in our history, in the position of endorsing race separatism in the family. The [MEPA] also would be very problematic in practice, since social workers hostile to transracial adoption are likely to misuse the discretion it would give them to consider race, in order to continue current policies.[97]

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93. *Id.* § 553.
94. *See* Mini, *supra* note 28, at 967.
95. *See id.* at 961-62.
96. Cohen, *supra* note 52 at 653 n.2.
97. *See* Bartholet, *supra* note 16, at 104-05.

MEPA also required that the Department of Health and Human Services develop policy guidelines for child-placement agencies to follow.[98] In accordance with the MEPA, the guidelines provide that placement agencies may consider the race and ethnicity of the child as well as the capacity of the prospective adoptive parents to meet the child's needs when making the placement determination. The guidelines recognize the major role that social workers play in the making of adoption decisions. The guidelines specifically provide that social workers in foster care and adoption are in violation of MEPA when they (1) establish time periods during which only a same-race or same-ethnicity search will occur; (2) establish orders of placement preferences based on race, culture, or ethnicity; (3) specifically justify transracial placement; or (4) have the effect of delaying placements to find a family of a particular race or ethnicity.[99] A social worker who writes a false or invalid assessment to impede a transracial placement risks civil liability.[100]

The most recent legislation addressing the permissible role of race in adoption and child-placement decision-making repealed the aforementioned section of MEPA. The Adoption Promotion and Stability Act of 1996 is an improvement on MEPA because it forbids any delay or denial of child placement caused by decisions made "on the basis of race, color, or national origin of the adoptive or foster parent, or the child involved."[101] In contrast, MEPA forbade only those delays or denials of placements made "solely" on the basis of race, color, or national origin, indicating implicit approval of race-conscious practices leading to delays in and denials of placements.[102] The 1996 Act further provides for reduc-

98. On April 25, 1995, the Department promulgated these guidelines, concluding that race, color, or national origin is only permissible "when an adoption or foster care agency has made a narrowly tailored, individualized determination that the facts and circumstances in a particular case require the consideration of race, color, or national origin in order to advance the best interests of the child in need of placement." Carla M. Curtis & Rudolph Alexander, *The Multiethnic Placement Act: Implications for Social Work Practice*, 13 CHILD AND ADOLESCENT SOC. WORK J. 401, 404 (1996) (quoting Department of Health and Human Services guidelines).

99. *See id.* at 407. Social workers are permitted to explore prospective families feelings about parenting a child of a different race or ethnicity, as long as race is only one of many factors considered. *Id.* at 408.

100. *See* R. Alexander, Jr., *Social Workers and Immunity from Civil Lawsuits*, 40 SOC. WORK 648, 648-54 (1995).

101. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808(c)(1)(A)-(B), 110 Stat. 1755, 1904. On May 10, 1996, the House approved the Adoption Promotion and Stability Act of 1996, H.R. 3286, 104th Cong. Both the Adoption Anti-Discrimination Act of 1996 and language from H.R. 3286 were attached to the Small Business and Minimum Wage Bill, as reported in Conference Report No. 3448, and forwarded to President Clinton, who signed the legislation on August 20, 1996. The ensuing act, Removal of Barriers to Interethnic Adoption amends § 471(a) and § 474 of the Social Security Act, 42 U.S.C. §§671(a), 674 and repeals § 553 of the MEPA, 42 U.S.C. §5115(a). *See* Howe, *supra* note 34, at 472.

102. It should be noted that neither the 1994 bill nor the 1996 law affect the application of the Indian Child Welfare Act of 1978, which attribute equal value to the best interests of both the child and the tribe: "[I]t is the policy of this Nation [the United States] to protect the best

tion in funding to a state whose program is found to have violated 42 U.S.C. § 674(d),[103] requires the return of all funds awarded to nonstate entities within the state if such entity is found to have violated the section,[104] and states that any such denial of placement is a violation of Title VI of the Civil Rights Act of 1964.[105] Moreover, the 1996 Act eliminated a provision under which race was a "permissible consideration" in placement decisions.[106] The 1996 law was intended both to defray adoption costs and to promote the adoption of minority children.[107]

The law does not explicitly forbid the use of racial and ethnic considerations in child placements. Nevertheless, the law does indicate that race is an impermissible ground for denying the placement of a child for adoption or into foster care. The Adoption Promotion and Stability Act is the first congressional mandate to prohibit outright delays or denials in child placements caused by race-matching policies. Like its predecessors, however, the 1996 law is subject to manipulation by adoption agencies and social workers, who can easily circumvent the rule and untruthfully attribute delays to permissible reasons. Although the language of the MEPA is encouraging and gives the impression that the race-matching dilemma is nearing an end, the social workers and adoption agencies maintain enormous discretion under the new law. Elizabeth Bartholet lists numerous reasons for concern about the continuation of race-matching policies and resistance to the new law:

> State social service agencies tend to be committed from top to bottom to their race-matching ways. Private foundations and nonprofit child welfare groups have joined forces with public agencies to promote 'kinship care,' in part to help ensure that children in need of homes remain within their racial group. 'Cultural competence' is one of the code phrases in the post-MEPA era for assessing whether agencies remain sufficiently committed to same-race matching and whether they are doing enough to recruit families of color to make same-race placement possible. The U.S. Department of Health and Human Services, responsible for enforcing MEPA, is peopled with child welfare traditionalists imbued with the race-matching ideology.[108]

The fact that the law can be manipulated merely indicates the inherent difficulty of its enforcement and is not necessarily the consequence of

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interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children . . . ." 25 U.S.C. § 1902 (1978).

103. Social Security Act, 42 U.S.C.A. § 674(d)(1) (West Supp. 1998).

104. *Id.* § 674(d)(2).

105. 42 U.S.C.A. § 1996(b)(2) (West Supp. 1998).

106. *See* 42 U.S.C.A. 1996(b) (West Supp. 1998).

107. *See* 142 CONG. REC. 4775-77 (1996). The law provides that certain prospective parents are eligible to receive a tax credit of up to five thousand dollars per child for adoption expenses.

108. Elizabeth Bartholet, *supra* note 18 at 2354.

poor drafting. Yet it remains true that it is minority children who suffer the negative effects of poor enforcement of the law.

III. THE FEDERAL SUBSIDY: A SOLUTION CONSISTENT WITH AFFIRMATIVE ACTION CASE LAW

A. The Adoption Subsidy

Like the MEPA, the Adoption Assistance and Child Welfare Act of 1980 (Child Welfare Act) is a remedy for the disparate treatment of minority children who are in need of families. In existence since 1980, the Child Welfare Act addresses the disproportionate numbers of minority children in the foster care system. The legislative intent stated in the adoption assistance section of the Act includes the provision of homes for children who are hard to place. Prior to the enactment of the Child Welfare Act, state child welfare service programs governed by Title IV(B) of the Social Security Act were not closely monitored by the federal government.[109] Under the old system, the federal government made a relatively small federal contribution to the costs of state programs designed to protect and promote the welfare of children, including measures taken to place children in foster care, institutions and adoptive homes. Although Title IV(B) authorized annual appropriations of up to $266 million for child welfare services, the appropriation had never exceeded $56.6 million, or 21% of the amount authorized.[110] Additionally, most of the expenditures reported by the states under this program were used to provide foster care.[111]

The Child Welfare Act completely restructured the Social Security Act programs for children by encouraging greater efforts to find permanent homes for children, either by returning them to their own families, or placing them in adoptive homes. Under the terms of the Act, the amount of adoption assistance that the state will pay adoptive parents is to be agreed upon by the state agency and the parents, but may not exceed the foster care maintenance payment that would be paid if the child were in a foster family home. The amount may be readjusted by agreement to reflect any changed circumstances. Such adoption assistance payments will not be paid after the child reaches the age of eighteen or

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109. *See* SENATE COMM. ON FINANCE, ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980, S. REP. NO. 96-336, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1460.

110. *See id.* at 1452-53, 1460.

111. *See id.* at 1461. According to HEW statistics, in 1979, about 3% of the total Federal, State, and local funding under Title IV(B) was used for adoption services, 8% for day care, 73% for foster care, 8% for protective services, and the remainder for a variety of other child welfare services. *See id.* at 1461.

for any period when the family income rises above the established limits.[112]

Under the Child Welfare Act, the federal matching rate is set at a flat rate of seventy-five percent, and federal grants for child welfare services that are set above the previous $56.5 million funding level cannot be used for foster care maintenance payments.[113] The Act adds a new section to Title IV(B) that specifically permits expenditures for state tracking and information systems, designed to protect the rights of children, natural parents, and foster parents.[114]

The subsidized adoption program provides federal matching funds once a state has determined that a child in foster care would be eligible for such funding or that a child has special needs that make the child difficult to place.[115] Each state is responsible for deciding which factors would ordinarily impede the adoption of certain children. Once the state determines that adoption assistance is needed, it may offer such assistance to the prospective adoptive parents, provided that the family's income does not exceed 125% of the median income of a family of four in the state, adjusted to reflect the particular family's size.[116] The Act is intended to facilitate the elimination of barriers to adoption and to provide permanent homes for children, particularly children who have unfavorable chances of placement because of a specific factor or condition. Thus the program offers incentives to families to adopt children who may not otherwise be adopted, and reduces government spending on costly foster care systems that are not necessarily conducive to the child's well-being.[117]

The federal adoption subsidy is an appropriate remedy for the discrimination faced by black children in adoption placement. This Note focuses on the adoption assistance section of the statute,[118] which addresses the statistical imbalance of minority children in need of adoptive parents. For affirmative action purposes, the crux of this section lies in the definition of a "special needs" child. The inclusion of ethnic background and minority status among appropriately considered factors that make a child extremely difficult to place makes this statute a race-based remedy, both on its face and in application:

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112. *See id.* at 1463.

113. *See id.* at 1452-53, 1462.

114. *See id.* at 1453, 1461.

115. *See id.* at 1450.

116. *See id.* at 1451, 1462.

117. *See id.* at 1462-63.

118. *See* 42 U.S.C.S. § 673 (1994).

> For purposes of this section, a child shall not be considered a child with special needs unless— (1) the State has determined that the child cannot or should not be returned to the home of his parents; and (2) the State has first determined (A) that there *exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group*, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section ....[119]

The inclusion of minority or ethnic status as a condition that discourages adoption is disturbing for several reasons. First, this implies that to be black is to bear a condition. Second, equating racial status with a handicap or disability may be viewed as offensive and stigmatizing. Paying adults to adopt black or other minority children may resemble bribery and suggest that a child is less valuable. Finally, the premise underlying the provision of a subsidy to parents adopting a child with special needs is that greater financial costs are associated with raising such a child. However, this is not true in the case of a child who falls in the special needs category simply because of his or her minority status.

Despite the apparent incongruity between race and other special needs categories, the disproportionate number of minority children waiting for parents results in waiting periods for these children that resemble those ensured by handicapped or ill children. The Act recognizes the longer waiting periods that minority children face due in part to race-matching practices and attempts to use the subsidy to remedy the harms suffered by these practices. In addition, the fee practices of adoption agencies and financial prerequisites established for adoption eligibility serve as disincentives and barriers to lower income and minority families wishing to adopt children.[120] In recognition of this fact, the Act attempts to remove some financial obstacles faced by black adults wishing to adopt.

B. Affirmative Action and the Adoption Subsidy

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[121] The federal subsidy is color-blind in language but color-conscious in application. As a

119. *Id.* (emphasis added).
120. *See* Howe, *supra* note 34, at 158.
121. U.S. CONST. amend. XIV.

federal race-based program, the adoption subsidy is implicated in the larger affirmative action controversy.[122] Governmental affirmative action programs typically use racial classifications to assist members of minority groups in achieving equal opportunity. Though affirmative action programs were created to counter the discriminatory and racist practices that historically have impeded the advancement of members of minority groups, opponents of these programs characterize racial preferences as discriminatory policies that contradict the government policy of treating all citizens equally.[123]

In its 1995 decision of *Adarand Constructors v. Pena*,[124] the Supreme Court held that all racial classifications, whether imposed by federal, state, or local government, are "inherently suspect" and must survive strict scrutiny review in order to be found constitutional.[125] In doing so, the Court overruled *Metro Broadcasting v. Federal Communications Commission*[126] to the extent that it applied intermediate scrutiny to state or local race-based classifications. The strict scrutiny standard applies regardless of whether the classification has a seemingly benign or invidious purpose.[127] Under the two-prongs of strict scrutiny review, an affirmative action program must serve a compelling governmental interest and be narrowly tailored to meet the end sought.[128] Despite its adoption of this higher standard of review for race-based classifications, the *Adarand* Court reiterated the government's authority to take race-based affirmative action when necessary to respond to the practice or lingering effects of racial discrimination against minority groups. The Court emphasized that racial classifications will not all fall when subjected to strict scrutiny

122. For a general discussion on affirmative action, *see, for example*, Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Don Munro, *The Continuing Evolution of Affirmative Action Under Title VII: New Directions After the Civil Rights Act of 1991*, 81 VA. L. REV. 565(1995); Martin Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J.L. & PUB. POL'Y 627 (1985); Mitchell H. Rubinstein, Note, *The Affirmative Action Controversy*, 3 HOFSTRA LAB. L.J. 111 (1985).

123. *See* David G. Savage, *New Cases Return a Volatile Issue to the Top of the Supreme Court's Agenda*, 81 A.B.A. J. 40, 41-42 (1995).

124. 515 U.S. 200 (1995).

125. *See id.* at 227 (1995).

126. 497 U.S. 547 (1990) (utilizing different equal protection standards for benign racial classifications imposed by federal and state or local governments).

127. In this discussion, "benign" racial classification will refer to classifications implemented to assist minorities, whether they have a remedial or non-remedial goal, that is, whether or not they are intended to redress the effects of past discrimination. "Invidious" racial classification, in contrast, will refer to racial classifications used to oppress a racial minority group.

128. *See Adarand* at 2117.

review, stating that it wished "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[129]

A great deal of affirmative action case law has developed addressing the permissible governmental objectives in various contexts and outlining the factors that should be considered in determining whether a program is narrowly tailored. The Supreme Court, however, has never addressed the benign use of racial classifications in the adoption context. Thus, it remains unclear what constitutes a compelling governmental interest in the adoption context. Though race-conscious relief is acceptable in limited terms, it is impossible to predict with certainty whether the federal adoption subsidy would survive a constitutional challenge. The remainder of this Note explores the constitutionality of the adoption subsidy program through analogies to case law on affirmative action in the scholastic admission and employment contexts and concludes that the subsidy would be upheld.

C. The Law on Graduate School Admissions

The use of benign race-based classifications in the context of graduate school admissions led to the landmark affirmative action case *Regents of the University of California v. Bakke*.[130] Commentators have spoken of *Bakke* as having "set the structure for all future discourse on affirmative action"[131] and as having been the "genesis for the Court's current majority position applying strict scrutiny to all race conscious affirmative action programs."[132] While it is difficult to distill from *Bakke* a definitive rule on the use of race in school admissions, the *Bakke* decision indicates (1) that race may be one of the many factors considered in the graduate school admissions context and (2) that the use of a rigid quota or plan imposing a fixed or reserved number of seats for minorities will probably not pass constitutional muster.

In *Bakke*, a white male who twice had applied and been rejected by the medical school at the University of California-Davis Medical School challenged the medical school's admission program on constitutional and statutory grounds. The program specifically reserved sixteen seats in each entering class of 100 for disadvantaged minority students, and many applicants admitted under the special program had lower test scores than did Bakke. Bakke alleged that the special admissions scheme violated the

129. *Id.*

130. 438 U.S. 265 (1978).

131. Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of TheoryAfter* Richmond v. J.A. Croson Co. *and* Metro Broadcasting, Inc. v. Federal Communications Commission, 17 T. MARSHALL L. REV. 317, 329 (1992).

132. David W. Case, *Setting a Higher Standard: Judicial Review of Federal Affirmative Action in the Wake of* Adarand, 16 MISS. C. L. REV. 369, 373 (1996).

Equal Protection Clause and Title VI of the 1964 Civil Rights Act. There was no majority opinion in *Bakke*, and six different opinions were written. Justices Brennan, White, Marshall, and Blackmun would have found the medical school's affirmative action policy constitutional.[133] Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist believed the program violated Title VII of the 1964 Civil Rights Act, which prohibits racial discrimination by federally funded institutions.[134] Because the Court was so divided, Justice Powell's intermediate opinion acquired particular significance. In a concurring opinion, Justice Powell wrote that the goal of having a diverse student body was a constitutionally permissible objective for an institution of higher education but that the means used by the school were not narrowly tailored to attaining the goal of a heterogeneous student body. Wary of strict quota or set-aside policies under which a certain number of places are reserved for minorities, Powell advocated the use of a more flexible program under which ethnic diversity was to be one factor considered in the decision (a "plus" factor).[135] Though *Bakke* indicates that quotas are impermissible, the "plus" approach continues to be used by many graduate schools.

In both the adoption and scholastic contexts, minorities can suffer racial discrimination at the hands of state actors. Like adoption agencies, social workers, and other child-placement decision-makers, members of university admission committees have great discretionary powers and are able to weigh race in their decisions. Discrimination can be masked. Nonracial considerations can be advanced to justify the decision to deny both a transracial adoption and the scholastic admission of a minority. The parallel between the two situations, however, is complicated by the presence of additional victims in the adoption context—the prospective adopting parents. When a minority applicant is rejected by a school on the basis of her race, it is the applicant who suffers the effects of the racial discrimination. In contrast, when a minority child is denied a transracial placement on the basis of her race, both the child and her prospective parents suffer the effects of the racial discrimination. Although the federal subsidy follows the child rather than the parents, it should be noted that more parties are directly affected by racial discrimination in the adoption context.

Since *Bakke*, the Supreme Court has not addressed the issue of affirmative action in the context of graduate school admissions, despite

133. *See Bakke*, 438 U.S. at 325 (Brennan, White, Marshall, and Blackmun, J., concurring in judgment and dissenting in part).

134. *See id.* at 421 (Stevens, J., dissenting in part).

135. *See Bakke*, 438 U.S. at 307, 316-17.

having had the opportunity to do so.[136] Very recently, the Supreme Court denied writ of certiorari to hear a highly publicized case that squarely confronted affirmative action in the context of graduate school admissions, challenged the significance of *Bakke*, and made it more difficult for affirmative action plans to stand.[137] In *Hopwood v. Texas*,[138] one white female and three white males brought an action claiming that their right to equal protection under the law had been violated by the University of Texas's admission policies, which were functionally equivalent to a quota system. The law school's procedure entailed separate admissions committees for evaluation of minority and nonminority applicants and ensured that each class would be five percent black and ten percent Mexican-American. These numbers were not randomly selected but corresponded to the percentages of minority college graduates in Texas. The presumptive-denial criteria for the two groups differed, and minority applicants who fell below the presumptive-denial criteria were not summarily denied admission but placed in the discretionary zone. [139]

Although the district court had found that diversity was a compelling governmental interest, it had also found that the law school's admissions policies were not narrowly tailored, primarily because of the burden they placed on third parties. The district court named four factors to be considered in the narrow tailoring analysis: (1) the possibility of alternate remedies, (2) the flexibility and duration of the relief, (3) whether the goals related to the percentage of minorities in the population, and (4) the adverse effects on third parties.[140] The trial court concluded that the law school's policy failed the fourth factor, because under the separate admissions procedures minority students were admitted without being

136. In fact, the Supreme Court appeared hesitant to address the issue in the first place, for in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), decided before *Bakke*, the Court rejected an opportunity to decide on the propriety of using race as a factor in graduate school admissions. DeFunis, a nonminority applicant, brought a suit against University of Washington Law School, a state-operated school, claiming that its admissions policy discriminated against him in violation of the Equal Protection Clause of the Fourteenth Amendment. Minority and nonminority applications were evaluated differently under the law school's admission procedures, and all but one of the minority applicants had lower index scores than that of DeFunis in the year he was rejected. The Supreme Court found the case moot, because injunctive relief had already been granted to DeFunis, and declined to address the affirmative action issue, stating that consideration of the constitutional issues was beyond its jurisdictional power under Article III. *See id.*

137. *See* Texas v. Hopwood, 518 U.S. 1033 (1996).

138. 78 F.3d 932 (5th Cir. 1996).

139. *See* Hopwood v. Texas, 861 F. Supp. 551, 575 (W.D. Tex. 1994). The law school had established a system under which students who met certain criteria were very likely to be admitted to the school, students who fell below certain criteria were likely to be denied admission, and the remaining students were placed in a discretionary zone. *See id.* at 935.

140. *See id.* at 573.

compared to nonminority applicants.[141] It was held that nonminorities were affected adversely by this system.[142]

On appeal, the Fifth Circuit also invalidated the admissions policies used at the University of Texas Law School under strict-scrutiny analysis, but used a drastically different rationale.[143] The court held that diversity in a university student body can never be a compelling reason to impose racial classifications and that race cannot be used as a factor at all in admissions, not even as a "plus" factor as advocated by Justice Powell in *Bakke*: "[W]e see the case law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional."[144]

The court chose to rely on *Adarand*, indicating that it did not see its decision as contradicting *Bakke*, because only Justice Powell had found diversity to be a compelling governmental objective and because his view never has been supported by a majority of the Supreme Court justices. The court relied on Justice O'Connor's dissent in *Adarand* to support its view that remediation of the present effects of past discrimination was the only objective that would survive strict scrutiny review:

> Modern equal protection has recognized only one [compelling state] interest; remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classification.[145]

The *Hopwood* court similarly dismissed the finding in *Metro Broadcasting* that diversity can be a compelling governmental interest.[146]

As a factual matter, the *Hopwood* court rejected the claim that the University of Texas's policies had a remedial purpose, because there was no evidence that the law school itself had discriminated or that the policies addressed the present effects of past discrimination.[147] Finally, the *Hopwood* court altered the burden of proof as to causation, directing the lower court to shift the burden to the defendant law school to show by a

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141. *See id.* at 575.

142. *See id.* at 578.

143. *See Hopwood*, 78 F. 3d. at 943.

144. *Id.* at 945.

145. *Id.* at 945.

146. *See Metro Broadcasting*, 497 U.S. 547 (1990). The *Metro Broadcasting* Court found that safeguarding the public's right to receive a diversity of views and information over the airways was an integral component of the FCC's mission, served important First Amendment values, and was, at the very least, an important governmental objective. Though *Adarand* overruled *Metro Broadcasting* to the extent that it relied on intermediate scrutiny, *Adarand* does not limit benign racial classifications to remedial purposes. Currently, it is unclear whether diversity is a permissible governmental objective.

147. *See Hopwood*, 78 F. 3d at 953-54.

preponderance of evidence that the plaintiffs would not have been admitted under proper admissions policies.[148]

The *Hopwood* decision altered the law on affirmative action in crucial ways, eliciting immediate response from academics.[149] Though binding only on public schools within the jurisdiction of the Fifth Circuit, this decision reflects a conservative shift in Americans' attitudes toward the use of benign racial classifications and, at a minimum, jeopardizes the diversity objective as a compelling governmental interest in higher education, if not in all contexts. Pursuant to *Hopwood*, Texas, Louisiana, and Mississippi public universities are barred from using race as a factor in their admissions policies. These states have already suffered sharp declines in the numbers of minority applicants, declines that are attributable, at least in part, to the *Hopwood* decision.[150] *Hopwood's* significance is far-reaching; its force is not confined to the admissions context but could be extended to any and all contexts where affirmative action programs exist.

Though he concurred in the judgment, Judge Weiner noted that the majority's reasoning may have reached a result more harsh than that demanded by Supreme Court affirmative action jurisprudence:

> My decision not to embrace the ratio decidendi of the majority opinion results from three premises: First, if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that announcement. Second, Justice O'Connor expressly states that *Adarand* is not the death knell of affirmative action—to which I would add, especially not in the framework of achieving diversity in public graduate schools. Third, we have no need to decide the thornier issue of compelling interest, as the narrowly tailored inquiry of strict scrutiny presents a more surgical and—it seems to me— more principled way to decide the case before us.[151]

The Supreme Court's denial of certiorari is somewhat surprising because it would seem that the Court would want to correct the Fifth Circuit's prohibition on the use of benign racial classifications by public universities. In declining to hear the case, however, Justices Souter and Ginsburg stated that the University of Texas Law School's admissions policies were

148. The district court had placed the burden of proof on the plaintiffs to show that they would have been admitted absent the constitutional violation. In changing the burden of proof, the Fifth Circuit relied on a 1977 Supreme Court case, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

149. *See, e.g.*, Erin Albritton, Hopwood v. Texas*: Affirmative Action Encounters a Formidable and Fatal Match in the Fifth Circuit*, 71 TUL. L. REV. 303 (1996); Note, Hopwood v. Texas*: The Fifth Circuit Further Limits Affirmative Action Educational Opportunities*, 56 MD. L. REV. 273 (1997); Case Comment, *Fifth Circuit Holds that Educational Diversity Is No Longer a Compelling State Interest*—Hopwood v. Texas, 110 HARV. L. REV. 775 (1997).

150. As of February of 1997, the University of Texas law school experienced a 40% drop in the number of African-American applicants and a 20% drop in the number of Latino applicants as compared to 1996. *See Minority Applications Drop at Texas Schools*, NAT'L JURIST, May/June 1997, at 11.

151. *See Hopwood*, 78 F.3d at 963-64 (Weiner, J., concurring in the judgment).

no longer in controversy and that the Court wanted to wait for a final judgment on a program genuinely in controversy before addressing the affirmative action issue.[152]

Similarly, in 1995 the Court denied certiorari in a case involving the use of affirmative action in the awarding of scholarships in higher education.[153] In *Podberesky v. Kirwan*, the Fourth Circuit held that the University of Maryland's scholarship program was unconstitutional because it limited eligibility for one of its scholarships to black students. Maryland maintains two scholarship programs. The Banneker Scholarship program was a merit-based program for which only black students were eligible; the Francis Scott Key program was open to all students but had more stringent requirements. Podberesky, a Latino student, was unable to meet the rigorous standards of the Key program and was precluded from applying for the Banneker scholarship on the basis of his race.

The Fourth Circuit struck down the scholarship program as unconstitutional due to insufficient evidence of the present effects of past discrimination at the university. In *City of Richmond v. J.A. Croson*, the Supreme Court had required a finding of past discrimination to justify the application of race-based remedy.[154] The *Podberesky* Court found that the program was not narrowly tailored to remedy the effects of past discrimination that had resulted in low graduation rates for African-Americans, the school's negative reputation in the African-American community, the under-representation of African-American students in the student body, and the hostile environment African-American students allegedly faced. Like the *Hopwood* court, the Fourth Circuit required that affirmative action policies address the present effects of past discrimination.

D. The Law on Employment Policies in Hiring, Firing, and Promotions

Recent employment discrimination jurisprudence indicates that race-based affirmative action measures that burden innocent parties in order to benefit another group will be found unconstitutional. In particular, courts have found that the loss of an existing job imposes too large a burden on innocent parties and have tended to overturn such schemes. The federal adoption subsidy benefits black children without taking away benefits from another group, a fact that should be viewed favorably by a

152. Texas v. Hopwood, 518 U.S. 1033 (1996) (citing Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984)).

153. *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U. S. 2001 (1995).

154. *See* 488 U.S. 469, 493, 499, 510-11.

court determining whether an affirmative action measure is narrowly tailored to achieve its stated objective.

Generally, constitutional questions pertaining to affirmative action programs arise when race-conscious hiring, firing, and promotions policies are adopted voluntarily by a public employer or as a court-ordered response to remedy past discrimination. In *Wygant v. Jackson Board of Education*,[155] the Supreme Court overturned an affirmative action scheme affording black teachers greater protection from layoffs than white teachers. The provision at issue was part of a collective-bargaining agreement between the Board of Education and a teachers' union. The agreement provided that, if layoffs became necessary, teachers with the most seniority would be retained as long as the percentage of minority personnel laid off never exceeded the percentage of minority personnel employed at the time of the layoff. Subsequently, layoffs became necessary and some nonminority teachers were laid off despite having more seniority than some of the minority teachers who were retained. The nonminority teachers brought suit alleging violation of the Equal Protection clause of the Fourteenth Amendment.

In striking down the race-based layoff provision under strict scrutiny analysis, the Court concluded that the program was not narrowly tailored and rejected the two objectives advanced by the Board: the provision of minority role models for the school's minority students and the redress of past discrimination. The former goal was rejected on the grounds that it had no logical end and that it did not necessarily bear a relationship to the harm caused by prior discriminatory practices. The Court analogized the role model theory to societal discrimination:

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind.[156]

Instead, the Court required that there be strong evidence of prior discrimination by the governmental unit involved, evidence that it had not found in the case at hand, to justify even the limited use of racial classifications to remedy past discrimination.

The Court stated that even if the goal of providing minority role models were found to be compelling, the means employed were not narrowly tailored and could not survive strict scrutiny. While recognizing that innocent people are sometimes called upon to bear some of the bur-

155. 476 U.S. 267 (1986).
156. *Id.* at 276.

den caused by plans intended to remedy the effects of racial discrimination, the Court emphasized that the burden actually shouldered by non-minorities must be relatively light or at least diffused throughout society. Nevertheless, the Court distinguished the burden imposed on innocent employment applicants by hiring schemes:

> Denial of future employment is not as intrusive as loss of an existing job. . . . While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.[157]

The Court felt that less intrusive means of accomplishing similar purposes, such as the implementation of hiring goals, were available. The plan's adverse effect on non-minorities was clearly the critical factor in the court's decision to strike down the layoff scheme.

The distinction articulated between hiring and firing is significant in terms of the adoption subsidy. In *Wygant*, the Court objected to the challenged plan because whites were more likely than blacks to have to shoulder a particularly intrusive burden, job loss. The fact that the adoption subsidy benefits minorities without burdening non-minorities would be viewed positively under the narrow-tailoring analysis, since no class is disadvantaged by the awarding of the subsidy.

Local 28, Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission,[158] decided the same year as *Wygant*, is further proof of the theory that it is easier for a race-based classification to pass strict scrutiny if, while benefiting one party, it does not overly burden another. In *Local 28*, the Court upheld a court-ordered hiring goal that established a goal of 29.23% minority membership in a union that had repeatedly discriminated against minorities in the past. The selected percentage was not random, but was based on the percentage of minorities in the relevant labor pool in New York City. In addition, the Court also upheld the requirement that a special fund be created for use to implement measures intended to increase minority membership in the union.

In 1975 the district court had found that the petitioner union had violated Title VII of the Civil Rights Act of 1964 by discriminating against minorities in the areas of recruitment, selection, training, and advancement. The State Commission found that Local 28 had never had any black members or apprentices and that admission was conducted on a nepotistic basis in that new members had to be sponsored by current

157. *Id.* at 283.
158. 478 U.S. 421 (1986).

union members. Since the composition of the union was strictly white, this admission policy created an impenetrable barrier for minorities.[159]

The district court ordered the union to establish a 29% minority membership goal by 1981, based on its finding that the union had discriminated against qualified minorities through a variety of practices.[160] The court of appeals twice upheld both the special fund intended to increase minority membership and the affirmative action program, the latter of which was amended to establish a 29.23% nonwhite membership goal by September of 1987. After the initial order was entered, the union repeatedly was found guilty of having disobeyed the court's orders and fined. The court found the union guilty of egregious noncompliance with its orders and of determined resistance to all efforts to integrate its membership.[161] The union appealed, claiming that the membership goal and special fund were unconstitutional, that the district court had used incorrect statistics in evaluating the practices, and that race-conscious remedies could not be extended to individuals who had not been the direct victims of unlawful discrimination.

The Supreme Court affirmed the lower court's judgment, stating that the hiring goal was narrowly tailored to further the Government's compelling interest in remedying the effects of past discrimination. The Court found that the hiring goal and special fund were necessary to remedy the lack of minority membership caused by the union's pervasive and egregious discrimination, especially given the union's poor track record of compliance with court-ordered remedies. The Court concluded that the hiring goal was narrowly tailored to further the remedial objective on the basis of four factors: its flexible application, temporary nature, marginal impact on nonminorities, and the union's repeated refusals to comply with past court orders.[162]

The district court had adjusted the deadline for meeting the membership goal twice in the past and had repeatedly accepted the union's explanations for its failure to meet membership targets. The Court viewed

159. *See id.* at 427.

160. The court found that the union had adopted admissions criteria unrelated to job performance, resulting in an adverse discriminatory impact on minorities. Such practices included restricting the size of union membership in order to deny access to minorities, organizing unions selectively in industries with mostly white union workers, accepting only white transfer applicants from sister locals until the litigation began, and telling nonwhite members from sister locals that they were not eligible for transfer. *See id.* at 429-431.

161. *See id.* at 438.

162. In his concurrence, Justice Powell lists the five factors distilled from previous cases that should be applied when considering the proper scope of race-conscious programs: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers in the union and the percentage of minority workers in the relevant population; (4) the availability of waiver provisions in the plan; and (5) the effect of the plan on innocent third parties. *See id.* at 486.

the program favorably because it was a means to ensure compliance with court orders rather than a strict racial quota unlinked to the union's past actions. Also significant to the Court's finding was the fact that the membership goal and special fund were temporary measures that would end as soon as the union's membership reflected the percentage of minorities in the relevant local labor force. The burden on nonminorities was deemed slight because, unlike the policy at issue in *Wygant*, this program did not result in the loss of jobs or the experiencing of adverse effects by union members. The Court also stated that the benefits of race-conscious remedies need not be received solely by the victims of past discrimination.[163]

In *United States v. Paradise*,[164] the Court upheld a rigid promotion program, similar to a quota system, that had been developed as a remedial measure based on past discrimination. The district court had found that the Alabama Department of Public Safety (the Department) systematically had excluded blacks from employment as state troopers until 1972. The district court consequently had issued a hiring quota and had ordered that the Department utilize nondiscriminatory practices in such areas as promotions.[165] When no blacks were promoted to upper rank positions by 1979, a consent decree was approved in which the Department would develop a promotion procedure that did not adversely affect blacks.[166] When no black troopers had been promoted by 1981, a second consent decree was approved in which the Department agreed to administer a promotion test that would not adversely affect blacks.[167] Upon finding that this test had an adverse impact on blacks, the district court in 1983 again ordered the Department to submit a plan that did not adversely affect blacks and that would result in the promotion of fifteen qualified candidates to the position of corporal.[168]

When the Department proposed that four of the fifteen promotions be awarded to blacks, the district court rejected the proposal. The court ordered instead that at least fifty percent of those promoted to corporal and other high ranks be black so long as there were qualified blacks available for promotion.[169] This order was to be applicable if less than twenty-five percent of persons holding a particular rank were black until the Department developed a promotion plan that did not adversely affect blacks. The United States appealed on the grounds that the promotion

163. *See id.* at 422.
164. 480 U.S. 149 (1987).
165. *See id.* at 153.
166. *See id.* at 157.
167. *See id.* at 159.
168. *See id.* at 162.
169. *See id.* at 162-163.

scheme violated the Equal Protection Clause of the Constitution.[170] The Supreme Court held that the one-for-one promotion scheme survived strict scrutiny.[171] As in *Local 28,* the Court found that the state had a compelling governmental interest in remedying the racial imbalance caused by Alabama's past discriminatory practices.

The Court also concluded that the program was narrowly tailored despite its strict numerical promotion requirement:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity of the relief and the efficacy of alternative remedies; the flexibility and duration of the relief; the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties. When considered in light of those factors, it was amply established, and we find that the one-for-one promotion requirement was narrowly tailored to serve its several purposes, both as applied to the initial set of promotions to the rank of corporal and as a continuing contingent order with respect to the upper ranks.[172]

The Court found the plan necessary to eliminate the effects of the Department's long-term, pervasive discrimination. The plan was considered to be flexible because it made exceptions for external forces, could be waived if there were no available qualified black candidates, and only applied when the department needed to make promotions. Also viewed favorably was the fact that the plan was temporary and lasted only until the Department developed a promotion procedure that had no disproportionately negative impact on blacks.[173] Likewise found appropriate was the numerical relief ordered, that one black candidate had to be promoted for every white candidate promoted, until twenty-five percent of the officers of that rank were black, mirroring the percentage of minorities in the relevant labor pool.

The burden on third parties was found to be slight, since the plan only postponed the promotions of qualified whites. The Court likened the burden imposed by the promotion preference to the burden imposed by hiring goals, noting that the temporary fifty percent promotion requirement would not cause white employees to be discharged, as would layoff preferences: "Consequently, like a hiring goal, it [imposes] a diffuse burden, . . . foreclosing only one of several opportunities."[174] In upholding a strict numerical promotion scheme, the Court implied that it will view the burden caused by race-based promotion preferences to be less than those

170. *See id.* at 153.
171. *See id.* at 167.
172. *Id.* at 171 (1987) (citations omitted).
173. *See id.* at 178.
174. *Id.* at 183 (citing *Wygant,* 476 U.S. at 283).

caused by hiring goals and will view hiring goals and promotion preferences as far less devastating on third parties than layoff schemes.

The Supreme Court appears more willing to find race-conscious measures constitutional when they are utilized in the employment context than in other contexts. This fact may explain why a numerical solution may be denied in one arena and accepted in another. The long history of discrimination and refusal to obey consent decrees apparent in the cases discussed above should not be minimized. *Local 28*, for example, arguably shows as much about the Court's willingness to assert its authority in order to enforce its own decrees as it does about acceptable affirmative action schemes.

To be sure, *Paradise* and *Local 28* highlight the principle that remedial programs will be found to be directed toward a compelling governmental interest if there is a finding that the entity enforcing the race-conscious measure discriminated in the past. These cases also identify factors to be considered in the narrow tailoring analysis in the employment context, many of which overlap with those named in other affirmative action contexts. The employment discrimination cases also indicate that rigid numerical schemes very similar to quotas may pass the narrow tailoring test. Finally, *Paradise and Local 28* announce a distinction never before articulated regarding the burdens caused by employment hiring and firing. Viewed together, these cases indicate that there is a need for and a commitment to race-based policies and reject the idea that only very narrow race-based policies can be implemented. They further suggest that the implementation of affirmative action programs is permissible and that the propriety of their use is to be determined on a case-by-case basis.

The Supreme Court recently denied certiorari to a Seventh Circuit case that addressed the constitutionality of promotion preferences[175] and reached the opposite conclusion from that of the Fifth Circuit in *Hopwood*. In contrast to the *Hopwood* court, the court in *Wittmer v. Peters*[176] underscored the need for race-based measures and rejected the suggestion that racial classifications can be used only for remedial purposes. In *Wittmer*, the Seventh Circuit held that the giving of preference to a black male applicant for the position of lieutenant at a county boot camp because of his race did not violate the Equal Protection Clause.

After applying unsuccessfully for the position of lieutenant, white correctional officers brought suit because they had scored higher on the test administered to applicants than the black correctional officer who

175. Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997).
176. 87 F.3d. 916 (7th Cir. 1996).

was chosen for promotion.[177] The Seventh Circuit found that the promotion survived strict scrutiny, because the promotion of black officers was considered to be a penological necessity in the particular prison involved. The prison administration's major strategy for inmate reform was the meting out of harsh treatment of inmates by drill sergeant-like correctional officers in order to break the inmate's spirit and remold his character. [178] A black lieutenant was considered necessary for the job because black inmates were believed to be unlikely to submit to brutality administered exclusively by whites. Prison administration experts indicated that the boot camp would not succeed in its mission to reform inmates unless a black male was appointed to one of the lieutenant slots. The staff was considered too white to achieve this mission, because though almost seventy percent of the prison's inmates were black, its security staff was less than six percent black.[179]

The court directly addressed the existence of interests other than that of remedying the effects of past discrimination that are compelling enough to justify the use of racial classifications. Judge Posner firmly rejected the assertion that the redress of the present effects of past discrimination is the only permissible objective under strict scrutiny, stating that statements by courts proffered to support this proposition were dicta rather than holdings and thus not authoritative.[180] The court concluded that nonremedial interests may warrant a discriminatory measure: "[O]ur point is that the rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions."[181] In a manner consistent with much of the employment discrimination case law, *Wittmer* maintains that the legitimacy of affirmative action is context- and situation-specific:

> A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him. . . . It is not as if the rectification of past discrimination had a logical or equitable priority over other legitimate goals that discrimination might serve.[182]

177. The three white men had ranked third, sixth, and eighth on the test, whereas the black man had ranked forty-second. *See id.* at 917.

178. *See id.*

179. *See id.* at 920. Interestingly, though the Court accepted the argument that black lieutenants were needed to avoid the appearance of white domination of black inmates, it rejected, as it had in *Wygant,* the argument that black correctional officers were needed as positive role models. *See id.* It should be noted that one reason advanced for preferring the same-race placement of black children is that they will be provided with black role models. The role-model theory may be rejected by the Court in the adoption context as well.

180. *See id.* at 919.

181. *Id.*

182. *Id.*

Wittmer is a significant case for several reasons. In effect, the *Wittmer* decision restores meaning to the term "benign discrimination." By holding that the redress of past discrimination is not the only legitimate purpose for a race-based classification and by accepting a compelling governmental interest never before recognized, *Wittmer* lends hope that strict scrutiny is not "strict in theory, but fatal in fact." This novel decision creates many possibilities for the recognition of other legitimate justifications for the use of race-conscious measures. In light of *Wittmer*, the fact that the federal adoption subsidy may serve a nonremedial objective never before recognized would not make the subsidy automatically unconstitutional. The precedential value of *Wittmer* in a nonprison context is debatable, however, given that courts often are deferential where prison administration is concerned. It is not clear that the Supreme Court would adopt the *Wittmer* court's rationale in a different context. Although the *Wittmer* decision is binding on only the states within the Seventh Circuit and may be distinguishable on its facts from other cases, it provides a counterexample to the *Hopwood* court's strict reading of the single permissible governmental objective justifying the implementation of race-conscious remedies.

IV. THE FEDERAL ADOPTION SUBSIDY UNDER *HOPWOOD* OR *WITTMER*

There is currently a split between the Fifth and Seventh Circuits over the use of racial classifications for nonremedial purposes. A tension exists between the *Hopwood* and *Wittmer* decisions regarding the permissible use of race-conscious remedies. This Part argues that the federal adoption subsidy would survive strict scrutiny under either *Hopwood* or *Wittmer* and thus would be constitutional regardless of which decision the Supreme Court upholds.

Despite the semblance of order in affirmative action jurisprudence, the permissibility of a race-based classification varies depending on area in which the classification is being used. As one judge recently put it, the cases leave the definition of what constitutes a compelling governmental interest "suspended somewhere in the interstices of constitutional interpretation."[183] What is clear is that a race-based classification must be narrowly tailored to serve a compelling governmental interest in order to be found constitutional. The constitutionality of the federal adoption subsidy is ripe for exploration, given that the continued existence of affirma-

183. Hopwood v. Texas, 78 F.3d. 932, 964 (5th Cir. 1996) (Wiener, J., concurring).

tive action programs is in jeopardy after the passage of the California Civil Rights Initiative[184] and the rendering of the *Hopwood* decision.

The *Hopwood* opinion altered the political and legal landscape of affirmative action jurisprudence, throwing into question the continued viability of the *Bakke* decision. After *Hopwood*, the constitutionality of a race-based classification that is narrowly tailored to further the goal of diversity is ambiguous at best. In effect, *Hopwood* seeks to eradicate the concept of benign discrimination by equating the term with traditional discrimination against minorities and to bar race-conscious remedies except when they are implemented to address the present effects of past discrimination.

The federal adoption subsidy can be found constitutional whether the Supreme Court embraces the holding and reasoning of *Hopwood* or that of *Wittmer*.[185] The Court, of course, is not bound to follow either standard, but the subsidy is likely to be upheld under any of several standards. Under *Hopwood*, the redress of past discrimination is the only legitimate purpose justifying a race-conscious measure. Therefore, it is necessary to determine whether the goal of the federal adoption subsidy is indeed a permissible governmental objective serving a remedial purpose. At first glance, it would seem that the goal of finding permanent homes for hard-to-place children would fail under *Hopwood*'s strict definition of a compelling governmental interest. Evidence of past discrimination by states, however, should establish the need for the adoption subsidy as a remedial measure. For instance, a finding that most states maintain or only recently have repealed discriminatory policies—for example, policies that preclude transracial adoption until either a certain time period has expired or the exhaustion of efforts to make same-race placements is documented—may be compelling enough to justify the use of the race-conscious federal adoption subsidy.

A state's repeal of holding statutes or policies would not necessarily indicate the absence of state discrimination. Indeed, a court might view the fact that federal legislation was deemed necessary to supersede the numerous state statutes allowing or mandating delays or denials of transracial placements as indicating the gravity and magnitude of state-sponsored racial discrimination in child placement. In itself, this fact may provide sufficient evidence to justify the use of a racial classification to

184. After the California Civil Rights Initiative, 1996 Cal. Legis. Serv. 209 (West), outlawed race-based preferences at the state-operated universities in California, Boalt Hall School of Law's minority enrollment experienced an enormous drop: fall enrollment plummeted from 28 Latino and 20 black students in 1996 to a mere 14 Latino students and one black student in 1997. *See* Annie Nakao, *UC Law School Task Force Tells Boalt To Woo Minorities; Urges Better Outreach, Changes in Educating Applicants*, S.F. EXAMINER, Oct. 17, 1997, at A1.

185. For the purpose of this discussion, it should be assumed that the holdings of *Hopwood* and *Wittmer* are taken to extend to the adoption context.

remedy the present effects of past discrimination. Of course, under the stringent *Hopwood* standard, only states within which holding statutes had been enforced and that offered evidence of their past discrimination would be able to offer the subsidy.

Holding statutes would not be the only form of state action that could justify race-conscious remedial measures. In the adoption context, the conduct and personal biases of adoption agencies, social workers, and bureaucrats toward transracial placements have contributed to the disproportionate numbers of minority children needing homes. Though *Wygant* and *Wittmer* demonstrate that general societal discrimination is not a sufficient justification for the use of a race-based remedial measure, the specific discrimination perpetuated by adoption agencies, social workers, and bureaucrats is not the kind of vague societal discrimination described in these cases. Courts tend to reject the "general societal discrimination" rationale for race-based classifications it has no logical ending point and is difficult to measure and monitor. Unlike general societal discrimination, the conduct of adoption agencies can be identified more precisely and has a more direct impact on children awaiting adoption.

The goals of placement of black children in permanent homes and of the redress of past discrimination by state actors cannot be separated, given the intimate connection between the state's past practices and the disproportionately long waiting periods faced by black children seeking to be adopted.[186] Examination of the roles of two categories of actors contributing to the placement problem makes this point clear. The first category consists of bureaucrats working for state agencies. These state actors have the power to prevent transracial adoptions, whether they do so based on personal bias or adherence to state-imposed regulations. Such bureaucrats are analogous to employers who do not want to hire or promote black employees. The harm caused by their conduct is more specific than "general societal discrimination."

The members of the second relevant category of actors,[187] private adoption agencies and social workers receiving federal money, also directly impact the lives of children awaiting adoption. These actors have great discretion and can consider race in the best interests determination and in controlling placement outcomes. Furthermore, they are licensed by the state and act under state supervision. In addition, they perform a traditional state function, the placement of children in need of homes. Accordingly, these workers are state actors. Given racially discriminatory

186. *See* discussion *supra* Part I.

187. Members of a third category of actors, persons wanting to adopt, are not state actors because their decision whether or not to adopt a black child is a private choice that is not linked to or sponsored by the government.

state action, whether committed by public or private adoption agencies, the goals of remedying the effects of past discrimination and finding homes for hard-to-place children are not independent but rather closely connected goals in the adoption forum.

In determining the legitimacy of the proffered goal, the Court also may examine the subsidy's legislative history to determine the reason for the passage of the Child Welfare Act. The adoption assistance section of the Child Welfare Act identifies its purpose as the elimination of barriers to transracial adoption and providing homes for children who are hard to place.[188] This fact supports the conclusion that the subsidy is intended to be a remedy for past racial discrimination by state actors. Courts may construe mention of the elimination of barriers to transracial adoption as referring to state holding statutes or to the actions of state actors in adoption agencies or state child welfare departments. The subsidy thus would meet *Hopwood*'s stringent requirements and pass the first prong of strict scrutiny.

If the subsidy passes this first prong of strict scrutiny review, it will then be scrutinized against the second prong: whether it is narrowly tailored to achieve its goal. In order to make such a showing, a state would probably have to provide evidence that the child with whom the subsidy would travel has a special need that makes her hard to place and that a reasonable but unsuccessful effort has been made to place the child without the provision of such assistance. Such data would show that the state has a compelling governmental interest in placing this child because her special characteristic, race, is directly correlated to the difficulty the state faces in placing her.

A state also could provide data demonstrating that state action has contributed to the longer waiting periods experienced by black children, such as the existence, in the present or recent-past, of holding statutes leading to longer waiting periods for minority children.[189] In addition, both black children awaiting adoption and nonblack persons wishing to adopt black children suffer racial discrimination when transracial adoptions are denied or delayed. To the extent that courts take note of the number of persons and groups affected by the racial discrimination implicated in a given case, they may view this fact as indicating an enhanced need for remedial measures to be taken.

Under *Hopwood*, without evidence of present racial discrimination, the provision of the federal adoption subsidy to parents adopting black

188. *See supra* Section III.A.

189. Though many other factors will be contemplated in the narrow tailoring analysis, they will be addressed in detail in the subsequent discussion of *Wittmer* because, under *Hopwood*, the greater hurdle appears to be overcoming the first prong of strict scrutiny.

children would be vulnerable to a charge of government utilization of an unconstitutional racial classification. The statute could be reconceptualized, however, to allow its use in states in which a showing of a remedial purpose would be difficult. Such would be the case, for example, in those states that had never implemented holding polices. The language of the statute could be altered by omitting the race-based "special needs" category and replacing it with a race-neutral "hard-to-place" or "underadopted" category. These alternative terms could include all children who are not placed with adopted families. This type of categorization would change the subsidy from a race-conscious remedy to a facially neutral one, satisfying a court's demand for narrow tailoring of remedies while at the same time targeting children in need of homes.

Lastly, *Hopwood* shifted the burden of proof from plaintiff to defendant by requiring the University to show by a preponderance of the evidence that the Caucasian plaintiffs would not have been admitted to the University of Texas Law School even had applicants of all races been treated equally. An analogous challenge to the constitutionality of the subsidy could be brought by a white child alleging that since a family adopting her would not be given the subsidy, she was disadvantaged relative to black children whose adoptive families would receive the subsidy. Alternatively, the child could argue that she had not been given the benefit of having the subsidy travel with her, resulting in her having waited longer to be adopted than a similarly situated black child would have had to wait. Under *Hopwood*, it would appear that a state defending its provision of the subsidy to families adopting black children would have to show that the white child denied the subsidy was not harmed by this practice—that is, that her chances of being adopted had not been or would not be affected by the provision of the subsidy to another child. Adoption placement does not involve direct competition in the same way that school admissions do. The decision to adopt one child over another can be based on a variety of factors. Furthermore, while schools whose admissions policies are challenged may be forced to reveal the criteria by which they make their admissions decisions and to judge all students by the same standard, the decisions of adoptive parents, who are not state actors, cannot be subject to the same scrutiny. Such persons need not delineate the characteristics they sought in a child nor prove that they judged each prospective adopted child against the same predetermined standards. Furthermore, since many parents are seeking to adopt children of a particular race, and white children are in greater "demand," the existence of the subsidy probably would not affect a white child's chances of being adopted. It is unlikely that a family would choose to adopt a

black child over a white one solely because of the availability of the subsidy.

In sum, despite the high barrier to survival of race-conscious remedial programs under *Hopwood*, the federal adoption subsidy would be able to survive challenge. By showing that race illegitimately had played a part in the placement decisions made in many states, whether because of the actions of biased child-placement workers or because of the existence of holding policies, the provision of the federal adoption subsidy as a means of redressing racially discriminatory state action could be justified.

If *Wittmer,* rather than *Hopwood*, were embraced as the law of the land, the federal adoption subsidy would be subject to a slightly different analysis. Were *Wittmer* to govern, grounds other than the redress of past discrimination by state actors would suffice to show a compelling government interest in providing the race-conscious federal adoption subsidy. First, there is a dramatic statistical disparity between the waiting periods faced by and the placement rates of minority children and white children. Furthermore, children are dependent beings who can neither determine nor safeguard their own interests. Psychologists have indicated that children need direct, intimate, and continuous care that can be provided by parents and that the parent-child relationship is necessary for the proper social adaptation and psychological development of the child.[190] A child's unique sense of time—one which, unlike an adult's, is based on the urgency of her emotional needs rather than a time period's actual duration—makes rapid permanent placement an urgent need.[191] In addition, the state is responsible for children in its care and should take all possible measures to remove children from the foster system and place them in adoptive homes as quickly as possible, especially given the evidence that it is very difficult to find families willing to adopt older children. Finally, as discussed above, racially discriminatory state action has contributed to the disproportionately long waiting periods endured by black children. Given these facts, there would seem to be a compelling state interest in the provision of the federal adoption subsidy.

The goal of encouraging the placement of black children is more likely to be accepted under *Wittmer* than under *Hopwood*. While the *Hopwood* court viewed race-conscious remedies as legitimate only if they were designed to address the current effects of past discrimination, the *Wittmer* court upheld an affirmative action measure based on the importance of the goal being pursued. Just as the relationship between the use of affirmative action measures to the success of the penological strategies used by a prison led the *Wittmer* court to find the measures taken to be

190. *See* GOLDSTEIN, *supra* note 35, at 8-40.
191. *See id.* at 41-46.

constitutional, a court could find that a critical end is served by the provision of the federal adoption subsidy.[192] Although the Supreme Court has never recognized the placement of children in permanent homes as a compelling governmental interest, the subsidy's placement goal is likely to be found acceptable because *Wittmer* indicates that a finding of legitimacy is both context- and situation-specific.

Courts scrutinizing the constitutionality of the adoption subsidy would surely focus on substance over form in an effort to ascertain the true purpose of the subsidy. Nevertheless, a court would likely come to the following conclusions on the narrowness of tailoring of the subsidy. The subsidy addresses the problem it claims to address by making it possible for a greater number of minority children in need of homes to receive permanent placements. The subsidy is flexible, and does not entail any type of a rigid quota or fixed quantity set-aside. It provides forward-looking relief, is limited in extent and is not over-inclusive—if, in a given year, there are no minority children who need help being placed, no subsidies will be distributed on the basis of race. The subsidy in no way provides a windfall for non-deserving minority children. The application of the subsidy is also subject to administrative review, as states are periodically required to report on the program's success and to identify the beneficiaries of the program.

In the narrow tailoring analysis, it also would be noted that the subsidy is distinguishable from many race-based classifications because it applies to hard-to-place children of all races. The special needs definition is more race-neutral than other possible means of facilitating the placement of black children, since it identifies other children, such as older or handicapped children, and includes them within the hard-to-place category. Furthermore, the subsidy targets one of the most significant barriers to adoption by black adults, financial constraints. In an important sense, provision of the subsidy levels the playing field and gives adults of all races an opportunity to adopt a child. Another indication of narrow tailoring is the fact that in benefiting minority children in need of homes the subsidy does not burden any other group. That the subsidy does not create a disadvantaged class or group of people would be viewed favorably by a court.

It must be acknowledged, however, that though the subsidy is facially neutral and appears to apply to any adult wishing to adopt a child with a condition making her difficult to place, it may be the case that in reality the subsidy is allocated primarily to poor black families wanting to adopt minority children. The existence of the adoption subsidy has not prevented placement decision-makers averse to transracial adoption from

192. *See* Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996).

rejecting white families trying to adopt black children. In a practical sense, provision of the adoption subsidy is a way to ensure that homes are found for minority children regardless of the biases of placement decision-makers. Both social workers who feel that insufficient efforts have been made to locate black families for waiting black children and social workers who prioritize child placement over racial considerations can be satisfied by the adoption subsidy. Regardless of their preferences regarding the race of adults adopting black children, child-placement decision-makers do in fact want to help black children be placed.

Nevertheless, if the federal adoption subsidy has tended to be used largely as a mechanism to encourage more black adults to adopt and has been given almost exclusively to blacks, it is vulnerable to challenge by nonminority adults.[193] There appears to have been little protest against the receipt of the subsidy by whites adopting transracially. Given the vocal opposition of race-matching proponents to transracial adoption, this fact suggests that in practice the subsidy is seldom given to such whites. Though the subsidy attempts to encourage the adoption of black children without regard to the race of the adoptive parents, strongly held feelings about the importance of race hinder its effectiveness. As the discussion of the Multiethnic Placement Act has shown, it is extremely difficult to prevent the illegitimate use of racial considerations by placement decision-makers.[194] In applying strict scrutiny to the federal adoption subsidy, a court would consider whether or not the subsidy is indeed conferred almost exclusively upon black adults.

The negative ramifications of discrimination against nonblack adults wishing to adopt would be countered by the fact that the subsidy applies to all hard-to-place children—handicapped, minority, and older children alike. White adults are not prevented from adopting older, handicapped, or other nonminority special needs children. Therefore, the inclusion of minority children among those covered by the subsidy neither creates a disadvantaged class of nor burdens nonminority children.

In sum, the subsidy will be found narrowly tailored under the principles expressed in either *Hopwood* or *Wittmer* because it is clearly directed toward the compelling government interest in finding homes for hard-to-place children. The federal adoption subsidy, then, would likely pass constitutional muster if either *Hopwood* or *Wittmer* ultimately prevails as law of the land.

193. Another class likely to have standing to challenge the subsidy is white children who are not adopted and do not benefit from the subsidy. They, however, do not present a foreseeable problem, since white children without a handicap are readily adopted in society and thus have no need for the benefit the subsidy confers.

194. *See* discussion *supra* Section II.B.

V. CONCLUSION

Fifty percent of the children in the United States waiting to be adopted are children of color, double the proportion of minority children in the country's population. On average, minority children wait twice as long as nonminority children before being matched with a parent. Although there are long lists of white adults wanting to adopt them, minority children languish in foster or institutional care. This is in part the result of an overly flexible "best interests" standard governing placement outcomes. The best interests standard makes race a relevant-but-not-decisive factor in child-placement determinations, a fact that can be taken advantage of by bureaucrats opposed to transracial adoption.

Bureaucratic resistance to transracial adoption hurts black children because it precludes or delays permanent placements. The federal adoption subsidy is a permissible solution to the difficulties of placing minority children in adoptive homes. The provision of a subsidy to persons adopting black children may seem to perpetuate government reliance on racial classification. However, the federal adoption subsidy is an effective, laudable, and constitutional mechanism for the location of permanent homes for minority and other hard-to-place children in the foster system.

Whether the principles of *Hopwood* or *Wittmer* are applied, the federal adoption subsidy would likely pass constitutional muster. The continued use of the federal adoption subsidy to address the disproportionately large numbers of black children waiting to be adopted should be advocated.