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DESEGREGATING THE ADOPTIVE FAMILY: IN SUPPORT OF THE ADOPTION ANTIDISCRIMINATION ACT OF 1995

REBECCA VARAN*

INTRODUCTION

Janie Doe, a four-year-old foster child, lives in a house full of toys, warmth, love—her parents always just one step away, ready to give her a hug. Then, one traumatizing day, a stranger tears her away from the secure arms of her mother into the world of the unknown. This stranger, a caseworker from the County Human Services Department, removes Janie, an African-American child, from her white foster parents because these foster parents initiated adoption proceedings. The County Human Services Department would not allow Janie's foster parents to adopt Janie because Janie's race is different from theirs.¹ As a result, Janie may remain in the foster care system indefinitely, even though her white

* J.D. Candidate, 1998. This Comment is devoted to my children, Nicolette and Thomas, for their infinite love, support and understanding.

1. Janie Doe is a conceptual character exemplifying the status of many foster children. The basis for this illustration comes from many different cases. Some children faced with this dilemma get to go home after their foster parents initiate a timely lawsuit. Many children, however, remain in the foster care system, unable to return to the only parents they have ever known. This hypothetical closely corresponds to an actual incident in which the Chester County, Pennsylvania Department of Children, Youth and Families removed a four-year old African-American foster child from a white couple who had cared for the child because a African-American social worker wanted to adopt the child. See, e.g., *Black Woman Wins Custody of Black Child, White Foster Parents Lose*, JET, Oct. 16, 1995 at 23 (discussing a case in which social workers removed a four-year-old African-American girl from the home of her foster parents who had cared for her since she was four months old); Jill Smolowe, *Adoption in Black and White*, TIME, Aug. 14, 1995, at 50. In the first case Smolowe discussed, social services' representatives asked the white foster parents to adopt the African-American foster daughters in their care. *Id.* However, before the foster family concluded the adoption process, social services' representatives removed the foster children from their foster home and placed them with an aunt. *Id.* The foster family in the second case presented in the article alleged that caseworkers seeking a same-race family for their African-American foster children delayed the white foster parents' adoption proceedings. *Id.* Finally, in the third example of an agency's attempt to create same-race adoption families, the agency sought to remove a foster child from her foster family. *Id.*

foster parents wish to adopt her.² Moreover, there are many qualified adults of different races seeking to adopt children just like Janie.³ Janie, and other children in similar situations, may never understand why the foster care system in the United States effectively denied them stable and loving families.

The foster care system is dangerously overloaded,⁴ and the number of children in foster care continues to escalate.⁵ Many prospective parents are ready to adopt a child of a different race.⁶ Yet, tens of thousands of minority children are stuck in foster care limbo because race plays a determinative role in adoption placements.⁷

The 104th Congress considered new legislation that would eliminate race as a factor in determining adoption placements.⁸

2. See, e.g., Martha Brant, *Storming the Color Barrier—Race: Hollywood and the Hill Tackle Adoption*, NEWSWEEK, March 20, 1995 at 29 (stating that "[t]he most dramatic cases are those in which minority kids are taken away from white parents who've been raising them"). In 1991, the National Adoption Center estimated that 67% of foster children waiting for stable homes were African-American; only 31% of prospective parents seeking to adopt children were African-American. *Id.*

3. See *id.*

4. See Howard M. Metzenbaum, S. 1224 *In Support of the Multiethnic Placement Act of 1993*, 2 DUKE J. GENDER L. POL'Y 165, 165 (1995) (concluding that presently "[c]hildren are entering foster care at a younger age in record numbers, and are staying in the system for longer periods of time."). See also *infra* note 168 and accompanying text for congressional findings regarding the number of children in the foster care system.

5. See Allen C. Platt, III, *Adopting a Compromise in the Transracial Adoption Battle: A Proposed Model Statute*, 29 VAL. U.L. REV. 475, 476 (1994) (suggesting that there were approximately 275,000 foster children in the United States in 1987, but by 1994, this figure had had grown to more than 500,000).

6. See Darlene A. Kennedy, *Question: Should Congress Facilitate Transracial Adoptions? Yes: End the Foster-care Ordeal for Black Children*, IN-SIGHT, June 5, 1995 at 18 (discussing the disparities between the number of minority foster children waiting for adoption and the number of minority adults waiting to adopt).

7. Social services representatives take minority foster children away from white, loving families because courts, legislatures and adoption agencies use the issue of race in deciding adoption placements. See *Black Woman Wins Custody of Black Child, White Foster Parents Lose*, *supra* note 1, at 23 (discussing a Pennsylvania case where the court allowed the Department of Children, Youth and Family Services to remove a four-year-old African-American girl from her white foster parents, and granted custody to an African-American social worker). See also Smolowe, *supra* note 1, at 50 (describing three cases of aborted adoption proceedings where race played a dominant role).

8. The Adoption Antidiscrimination Act of 1995, S. 637, 104th Cong. (1995) [hereinafter AAA]. With the commencement of the 105th Congress, this legislation is no longer pending. At the time of this writing, the bill has not yet been reintroduced. The proposed AAA specifically states that:

A State or other entity that receives funds from the Federal Government and is involved in adoption or foster care placements may not—(1)

Should the 105th Congress reintroduce and adopt by the Adoption Antidiscrimination Act of 1995 ("AAA"), the AAA would replace the recently repealed Multiethnic Placement Act ("MPA").⁹ Under the MPA, state adoption agencies had the authority to use race as one factor to deny an adoption placement.¹⁰ Unlike the failed MPA, the AAA would end racial-matchings and would allow qualified couples, regardless of their race, to adopt foster children.¹¹

In order to help foster children of all races and ethnic backgrounds find stabilized family settings, Congress should adopt the AAA. This legislation removes the race factor from adoption placements and ensures that adoption professionals make decisions on a color-blind basis. The AAA would permit qualified adults, irrespective of race, color or national origin, to adopt foster children.¹² As a proposed federal statute, the AAA is intended to reach all foster children in the United States.¹³

This Comment analyzes the AAA and discusses how this legis-

deny to any person the opportunity to become an adoptive or foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or (2) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, on the basis of the race, color, or national origin of the adoptive or foster parents, or the child, involved.

Id. § 3(a).

9. Multiethnic Placement Act of 1994, 42 U.S.C. §5115a (1995) (repealed 1996) [hereinafter MPA].

10. *Id.* According to the MPA:

An agency or entity, that receives Federal assistance and is involved in adoption or foster care placements may not - - (A) categorically deny to any person the opportunity to become an adoptive or a foster parent, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved; or (B) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved. . . . An agency or entity to which [above] 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 interest of a child. . . . 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 parent rights or otherwise make a child legally available for adoptive placement.

Id. § 5115a(a)(1)-(3).

11. AAA, S. 637, § 3(a).

12. *Id.*

13. *Id.* However, since African-American foster children constitute two-thirds of all foster children needing adoption, and white adults form a majority of adopting parents, this Comment focuses on cases and examples that involve white foster parents seeking to adopt African-American foster children. See Kennedy, *supra* note 6, at 18 (discussing the pros and cons of Congress facilitating interracial adoptions).

lation may result in eradicating some of the problems that plague the foster care system in the United States. Part I analyzes the traditional inclusion of race as an important factor in adoption placements as well as the arguments opposing interracial adoptions. Part II analyzes the goals and failures of the recently repealed MPA. Part III explains why congressional enactment of the AAA is necessary to improve the lives of both foster children and the couples who wish to adopt them. Part IV encourages Congress to again review and accept the AAA, and proposes certain amendments to improve the Act.

I. LEGAL, HISTORICAL, AND STATISTICAL BACKGROUND OF RACE-BASED ADOPTION PLACEMENTS

Many factors combine to encourage race-based adoption placements. For example, the courts actively factor in the race of the parties in deciding an adoption placement.¹⁴ In addition, state statutes emphasize the issue of race by allowing courts and adoption agencies to consider race in determining adoption placements.¹⁵ The consequences of using race as a factor in adoption placements are severe. Social groups and interested professional organizations have begun taking a similar stance. For instance, the National Association of Black Social Workers ("NABSW"), notably opposed to interracial adoptions, has traditionally supported the inclusion of race as an important factor in determining adoption placements.¹⁶ The legislative, judicial and social emphasis on race needlessly forces tens of thousands of foster children to wait years to find adoptive parents.¹⁷

A. *The Race Factor and the Legal System*

For years many courts and legislatures have struggled to im-

14. See generally Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99 (1995) (discussing the historical development of present race-matching policies in case law and society); Jo Beth Eubanks, *Transracial Adoption in Texas: Should the Best Interest Standard Be Color-Blind?*, 24 ST. MARY'S L. J. 1225 (1993) (discussing the history of adoption including the best interest standard in case law); Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994) (analyzing how courts and agencies dealt with the best interest of minority foster children).

15. See *infra* note 75 and accompanying text for illustrations of how Connecticut and Texas statutes allow race to be a factor in adoption placements.

16. See generally NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION STATEMENT (1994) (presenting the Association's current position regarding the role of race in adoptions).

17. See generally Forde-Mazrui, *supra* note 14, at 934-43 (discussing both the role of the legal system as well as placement agencies in shaping the present race-matching policies).

prove the predicament of foster children. Nevertheless, they have failed to eradicate the problems that arise when the race of the foster child is different from that of the adoptive parents.¹⁸ The courts do not have a sufficient guideline to follow in weighing the race factor in relation to other factors.¹⁹ Because the courts use the race factor at their discretion in deciding adoption placements, the number of inconsistent decisions continues to grow. This disparity in the judicial use of race in adoption determinations is exacerbated by conflicts between various states' laws regarding the importance of race in adoption placements.²⁰ As a result, race-based adoption problems continued to escalate.²¹

1. *Judicial Recognition of the Race Factor*

Although courts vary in their approach to race as a factor in child placement, many courts have used race as a relevant factor for a long time.²² Despite the inconsistencies, the United States Supreme Court has yet to address the issue of interracial adoptions. The Court has, however, addressed the issue of race in custody placements. In *Palmore v. Sidoti*,²³ a father sought custody of his three year old daughter, Melanie, after learning that Melanie's

18. See generally Randall Kennedy, *Orphans of Separatism*, CURRENT, Oct. 1994, at 8 (discussing transracial adoptions in light of legal development and legislative enactment).

19. See, e.g., *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205-06 (5th Cir. 1977) (considering five different factors when dealing with child placement process); *In re D.I.S.*, 494 A.2d 1316, 1325 (D.C. 1985) (offering a number of discretionary factors for a court's consideration when dealing with a child's best interest standard in adoption proceedings); *In re R.M.G. and E.M.G.*, 454 A.2d 776, 791-92 (D.C. 1982) (discussing a three-step evaluation in cases dealing with race in adoption proceedings).

20. See *infra* notes 75-77 and accompanying text for illustrations of broad discrepancies in how various states deal with race considerations and adoption placements.

21. See *infra* note 168 and accompanying text for the most recent congressional findings regarding the number of children in the foster care system.

22. Courts began to use the race factor in custody cases where each parent was of a different race. Specifically, courts deciding custody cases began to use race considerations in child placements. See, e.g., *Fountaine v. Fountaine*, 133 N.E.2d 532, 534-35 (Ill. 1956) (holding that race alone cannot outweigh all other considerations and decide the question of custody); *Ward v. Ward*, 216 P.2d 755, 756 (Wash. 1950) (holding that awarding custody of the mixed-race children to an African-American father, and not the white mother, was in the best interest of the children).

23. 466 U.S. 429, 432 (1984). The *Palmore* Court did not decisively prohibit the consideration of race in custody cases. *Id.* Rather, the Court prohibited race considerations based solely on "the reality of private biases and possible injury they might inflict [on the child]." *Id.* at 433. Although custody cases are not the same as adoption cases, most cases that deal with the role of race in child placement are custody cases. *Id.*

mother married an African-American man.²⁴ The Florida trial court awarded custody to Melanie's father, despite the court's findings that the mother provided adequate housing, lived with a respectable new spouse, and was devoted to Melanie.²⁵ The trial court justified its holding by noting that private biases are likely to cause pressure and stress and that it was in Melanie's best interest to live with a parent of the same race.²⁶ The Florida District Court of Appeal affirmed that decision.²⁷ Melanie's mother appealed to the United States Supreme Court.²⁸

The Supreme Court overruled the lower courts' decision, holding that "the reality of private biases and possible injury they might inflict are [not] permissible consideration for removal of an infant child from the custody of its natural mother."²⁹ The Court recognized the state's role in protecting the best interest of children.³⁰ Further, the Court acknowledged the reality of private racial prejudice that may subject a child like Melanie "to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."³¹ Nevertheless, the Court balanced racial concerns against the conventional belief that children should remain with their natural mother.³² The Court did not prohibit the use of the race factor in custody cases.³³ It found

24. *Id.* at 430.

25. *Id.* at 432. The Florida court considered these three factors that seemed to constitute the best interest of the child standard in this case. *Id.* Since the mother and her cohabitant satisfied all three factors, the only factor left to consider was the race of the cohabitant. *Id.*

26. *Id.* at 431. The trial court exemplifies the general stance of many courts, that race cannot be a sole factor in custody cases. *Id.* at 431-32. However, race can be one factor among many other factors. *Id.* In a custody case, *Ward v. Ward*, the court held that children born to a white mother and a "colored" father would be better off "among their own people." 216 P.2d 755, 756 (Wash. 1950).

27. *Palmore*, 466 U.S. at 431.

28. *Id.* at 430. The Florida Supreme Court lacked jurisdiction to review the case because the appellate court affirmed without opinion. *Id.* at 431.

29. *Id.* at 433.

30. *Id.* The United States Supreme Court noted that "[t]he granting [of] custody based on the best interest of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Id.* It is, however, still not clear whether the Court's position applies broadly to child placements other than custody determinations.

31. *Id.*

32. *Id.* at 434.

33. *Id.* at 433. The Court acknowledged that this was not the first time that racial prejudice had been raised in order to validate racial classification. *Id.* To support its position, the Court cited to a much earlier case. *Id.* at 433-34 (citing *Buchanan v. Warley*, 245 U.S. 60 (1917)). In *Buchanan*, the Court invalidated a law preventing African-Americans from moving into areas dominated by whites. 245 U.S. at 82. The Court stated "[i]t is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public

that if a parent provides the required quality care, a court cannot remove the child based solely on racial prejudice and its effects.³⁴

The holding in *Palmore* typifies the stance most courts take on interracial placements in custody actions and adoptions. Namely, race alone cannot be a determinative factor in custody actions.³⁵ While most courts prohibit adoption placements based purely on race, as early as 1955, courts began to use race as an important factor in adoption placements.³⁶ Since then, many courts have found race considerations to be a relevant, although not the sole factor.³⁷ Courts, however, did not define the relevant circumstances, or the degree to which race, as a factor, should be considered.³⁸

For instance, in *In re Adoption of a Minor*, the United States Court of Appeals for the District of Columbia Circuit held that a court cannot deny an adoption based solely race or religion.³⁹ At the same time, the court noted that race or religion may be relevant factors, among many factors.⁴⁰ The court, however, did not identify the contexts in which these factors were relevant.⁴¹

A concrete guideline concerning the issue of race in adoption placements was finally promulgated in *In re R.M.G. and E.M.G.*⁴² The District of Columbia Court of Appeals took a more analytical approach to the consideration of race in adoptions.⁴³ Specifically, the court held that when deciding an issue of race in adoptions, a

peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.* at 81.

34. *Palmore*, 466 U.S. at 433.

35. See *supra* note 19 and accompanying text which illustrates that although most courts hold that race alone cannot be a sole determinant in either custody or adoption placements, courts show no consistency or agreement regarding the other factors that courts need to consider together with the race of the parties.

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

37. See *supra* note 19 and accompanying text for examples of cases where courts prohibited adoptions based solely on race considerations, but did not exclude the race factor from child placements in either adoptions or custody proceedings.

38. See, e.g., *In re Adoption of a Minor*, 228 F.2d at 448 (stating that differences in race or religion may be relevant in adoption proceedings).

39. See *id.* (illustrating that even in very early cases, race was not allowed to serve as a sole factor in placements of children).

40. *Id.*

41. *Id.* But see *Fontaine v. Fontaine*, 133 N.E.2d 532, 534 (Ill. App. Ct. 1956) (holding that the controlling factor influencing the court's decision in awarding custody was the best interest and welfare of the child). Moreover, the court held that in considering the issue of the best interest and welfare of children, race alone cannot outweigh all other considerations. *Id.* Again, the court did not address the degree of emphasis assigned to the race consideration. *Id.*

42. 454 A.2d 776 (D.C. 1982).

43. *Id.* at 791.

court must consider race-related questions.⁴⁴ Those questions focused mainly on the family's ability to raise a minority child.⁴⁵

Three years later in *In re D.I.S.*,⁴⁶ the same court rejected its own previously adopted guidelines.⁴⁷ The court found that the three-step analysis was incompatible with the flexibility approach that would require a trial judge to consider all factors influencing the child's best interest.⁴⁸ Under the best interest analysis, a trial judge must consider all relevant factors, including the race factor.⁴⁹ The best interest standard leaves the degree of relevance and weight assigned to race to the trial court judge's discretion.⁵⁰

Overall, courts agree that race cannot be the only or determinative factor in the best interest of the child analysis.⁵¹ However, courts generally have great flexibility and discretion when deciding race-based adoptions.⁵² Thus, judges apply the race factor at their own discretion when determining a child's placement.⁵³ This judicial discretion causes a substantial amount of ambiguity when parents try to adopt a child of another race.

2. *The Collision Between Race-Matching and Laws Prohibiting Racism*

Considerable tension exists between legal principles prohibit-

44. *Id.* The court presented a three-step evaluation: "(1) how each family's race is likely to affect the child's development of a sense of identity, including racial identity; (2) how the families compare in this regard; and (3) how significant the racial differences between the families are when all the factors relevant to adoption are considered together." *Id.* The court suggested considerations to use in following the proposed evaluation. *Id.*

45. *Id.*

46. 494 A.2d 1316 (D.C. 1985).

47. *Id.* at 1327.

48. *Id.* The concurring opinion in this case agreed with the majority in the result, but argued for the retention of the three-step analysis. *Id.* The concurring judge argued that courts dealing with adoption cases where race is a factor should use the three-step analysis. *Id.* The concurring opinion concluded that the application of the three-step approach in this case would provide no need for reversal. *Id.*

49. *Id.*

50. *Id.*

51. See e.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *In re Adoption of a Minor*, 228 F.2d 446, 448 (D.C. Cir. 1955).

52. See e.g., *In re D.I.S.*, 494 A.2d 1316, 1323 (D.C. 1985). The District of Columbia Court of Appeals recognized that although there is a high level of flexibility inherent in the best interest of the child standard, the concept has its limits. *Id.* Accordingly, "the standard requires the judge, recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives." *Id.* (quoting *In re J.S.R.*, 374 A.2d 860, 863 (D.C. 1977)).

53. See *In re Adoption of a Minor*, 228 F.2d at 448 (discussing the discretion of a trial judge concerning the application of the best interest of the child standard).

ing racial prejudice and race-matching adoptions.⁵⁴ Specifically, adoptive parents argue that statutes which permit courts to consider the race factor in adoption placements are unconstitutional since such statutes deny equal protection.⁵⁵ As a result, adoptive parents continue to bring equal protection actions challenging denials of their applications for adoptions based on racial grounds.⁵⁶

For instance, in *In re R.M.G. and E.M.G.*,⁵⁷ white foster parents challenged the decision of the District of Columbia Department of Human Resources approving the grandparents' petition for adoption of their grandchildren, thereby denying the foster parents' adoption rights.⁵⁸ In the equal protection analysis, the District of Columbia Court of Appeals disagreed with the foster parents' allegation that the "equal protection doctrine of the Constitution prohibits the use of skin color-defined race as a relevant issue in an adoption."⁵⁹ The crux of the court's position was the need for children to establish a "sense of identity."⁶⁰ The court

54. U.S. CONST. amend. XIV. The Equal Protection Clause of the Fourteenth Amendment has always been interpreted as imposing a restraint on the government's use of classification based on race. *See, e.g., Paltore*, 466 U.S. at 432 (suggesting that the "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race").

55. Thus far, most courts hold that it is not a violation of equal protection for a trial court, while determining a child's best interest, to use the race factor as long as it is not the sole or determinative factor in selecting a child's adoptive home. *See, e.g., Tallman v. Tabor*, 859 F. Supp. 1078, 1086 (E.D. Mich. 1994) (holding that race is a permissible factor when it is one of many factors considered in interracial custody and adoption cases).

56. *See, e.g., Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977); *Drummond v. Fulton County Dep't of Family & Children's Servs*, 563 F.2d 1200 (5th Cir. 1977); *Tallman*, 859 F. Supp. at 1078; *McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988).

57. 454 A.2d 776 (D.C. 1982).

58. *Id.* at 780. The foster parents in this case cared for the foster baby since she was about four months old. *Id.* At the time they received the baby, the foster parents realized that the child was sick, weighed only ten pounds and showed signs of retardation. *Id.* The court noted that, according to one of the doctors' testimony, the "foster parents nurtured [the baby] to good physical and mental health." *Id.* Clearly, the foster parents had great love for the baby. The grandparents had no knowledge of the existence of the baby. *Id.* Once they heard about their grandchild and the foster parents' desire to adopt the baby, they also filed a petition for adoption. *Id.* Thus, the adoption rested between two groups of people who seem to be driven by love and dedication to the child. *Id.* at 780-81.

59. *Id.* at 787.

60. *Id.* The District of Columbia Court of Appeals identified three components that comprised the "sense of identity" concept. *Id.* First, the court pointed to "a sense of 'belonging' in a stable family and community" as one element that enhanced one's sense of identity. *Id.* Next, "a feeling of self-esteem and confidence" was part of the identity formula. *Id.* Finally, "survival skills" that enable the child to cope with the world outside the family" was a factor that completed the "sense of identity" definition. *Id.*

stressed that without the ability to consider race in a child's placement, decision-makers—courts, expert witnesses, and the Department of Human Resources, for example—cannot focus on the child's sense of identity, which the court directly associated with the child's best interest.⁶¹ As a result, the court found that consideration of race was necessary to advance the best interest of the child and therefore the statute at issue did not violate equal protection rights.⁶²

The court in *Tallman v. Tabor*⁶³ held that in order to show a violation of the Equal Protection Clause of the United States Constitution, "[p]laintiffs must show that race was the sole or at least the predominant factor [in the placement decision]."⁶⁴ According to the *Tallman* court, case law established that as long as the race factor was not the only factor considered in placements, it did not violate the Equal Protection Clause.⁶⁵ As a result, foster parents must show that adoption agencies denied their petitions for adoption based solely on their race.⁶⁶

Similarly, the court in *Drummond v. Fulton County Dep't of Family and Children's Services*⁶⁷ held that, "[e]ven if government activity has a racially disproportionate impact, the impact alone does not sustain a claim of racial discrimination."⁶⁸ As in *Tallman*, the *Drummond* court found no violation of the foster parents' equal protection rights.⁶⁹ Unlike the *Tallman* court, the *Drummond* court considered five factors that would bear on the question of whether a possible equal protection violation existed.⁷⁰ For instance, the key question was whether there was a "racial slur or

61. *Id.*

62. *Id.* at 788.

63. 859 F. Supp. 1078 (E.D. Mich. 1994).

64. *Id.* at 1086. The focus of the *Tallman* court's discussion was very fact-specific. *Id.* The court questioned whether the plaintiff established that "a material issue of fact exists on the question of whether race was the predominant factor in the [placement] decision." *Id.*

65. *Id.*

66. *Id.*

67. 563 F.2d 1200 (5th Cir. 1977).

68. *Id.* at 1205.

69. *Id.*

70. *Id.* at 1205-06. First, the court considered the existence of "a racial slur or stigma." *Id.* at 1205. Second, the court suggested that case law indicates that the use of race as one of many factors is "legitimate." *Id.* Third, the court pointed to the need to consider the attitudes of prospective parents and their abilities to deal with foster children's possible problems. *Id.* Fourth, the *Drummond* court made an analogous inquiry into the religion factor in adoption placement. *Id.* The court concluded that case law indicates that, similarly to the religion factor, race may be used as a factor in adoption placements so long as it is not a sole or dominating factor. *Id.* Finally, the court suggested that adoption agencies need to be able to consider race as one of the factors in order to place a child "where he can most easily become a normal family member." *Id.*

stigma in connection with any race."⁷¹ As a result of comprehensive analysis of the equal protection issue, the *Drummond* court concluded that the use of race as a relevant factor in adoption placements was constitutional.⁷² Thus, foster parents who challenge the denial of their petitions of adoption on the basis of an equal protection violation must show that race was the sole reason why their petitions were denied.⁷³

3. *The Inconsistency Among State Statutes*

State legislatures address the issue of interracial adoptions in many different ways.⁷⁴ On one hand, states like Texas and Connecticut choose not to use race as a sole factor in adoption placements.⁷⁵ On the other hand, states like Minnesota and Arkansas clearly prefer that a foster child lives with a family of the same race.⁷⁶ Still, other states utilize a middle ground approach requir-

71. *Id.* at 1205-06.

72. *Id.* at 1206.

73. See Davidson M. Pattiz, Note, *Racial Preference in Adoption: An Equal Protection Challenge*, 82 GEO. L.J. 2571, 2580 (1994) (discussing race considerations in adoptions and the equal protection challenges).

74. See *infra* notes 75-77 and accompanying text for the variety of approaches different states take concerning the race factor in adoption placements.

75. See, e.g., CONN. GEN. STAT. ANN. §§ 45a-726 to -727 (West 1993 & Supp. 1996). According to the Connecticut statute, "[i]f the commissioner of children and youth services is appointed as statutory parent for any child free for adoption . . . said commissioner shall not refuse to place such child with any prospective adoptive parent solely on the basis of a difference in race." *Id.* § 45a-726.

Similarly, the Texas statute states that "[t]he department may not make a foster care placement decision on the presumption that placing a child in a family of the same race or ethnicity as the race or ethnicity of the child is in the best interest of the child." TEX. FAM. CODE ANN. § 264.108 (West 1996).

76. ARK. CODE ANN. § 9-9-102 (a)-(b) (Michie 1993). According to the Arkansas statute:

In all custodial placements by the Department of Human Services in foster care or investigations conducted pursuant to court order . . . , due consideration shall be given to the child's minority race or minority ethnic heritage [T]he court shall give preference, in the absence of good cause to the contrary, to: (1) A relative or relatives of the child, or, if that would be detrimental to the child or if a relative is not available; (2) A family with the same racial or ethnic heritage as the child, or, if that is not feasible; (3) A family of different racial or ethnic heritage from the child, which family is knowledgeable and appreciative of the child's racial or ethnic heritage.

Id. See also MINN. STAT. ANN. § 259.29 (West 1992 & Supp. 1997). According to the Minnesota statute:

[t]he authorized child-placing agency shall give preference, in the absence of good cause to the contrary, to placing the child with (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, (b) a family with the same racial or ethnic heritage as the child, or, if that is not feasible, (c) a family of different

ing reports of the child's or adoptive parents' race and using it in the adoption placement.⁷⁷

Although there is no uniformity among state laws regarding race in adoption placements, most statutes permit decision-makers to consider race as a factor in placements of foster children.⁷⁸ In addition, most states allow adoption agencies unquestionable discretion to consider race in adoption decisions.⁷⁹ As a result, except for the few states that either prohibit the presumption that race-matching is in the child's best interest or prohibit adoption placement based solely on race, race-based adoptions are widely practiced in many states and some state laws even encourage such adoption practices.⁸⁰

The use of the race factor by courts and state legislatures has had serious consequences. Courts and legislatures provide adoption agencies with wide discretion in applying the race factor when deciding adoption placements. As a result of this wide latitude of discretion, individuals who participate in adoption placements, some of whom are also members of organizations opposing interracial adoptions, frequently impose their personal beliefs on adoption placements.⁸¹

racial or ethnic heritage from the child which is knowledgeable and appreciative of the child's racial or ethnic heritage.

Id.

77. See, e.g., D.C. CODE ANN. § 16-305 (1989) (providing that "[t]he petition or the exhibits annexed thereto shall contain the following information: . . . the race and religion of the prospective adoptee, or his natural parent or parents."); OKLA. STAT. ANN. tit. 10, § 60.12(a) (West 1987 & Supp. 1997) (requiring that "[a] petition for adoption shall be filed in duplicate, verified by the petitioners, and shall specify: . . . [t]he date and place of birth of the child and sex and race").

78. See *supra* note 75 and accompanying text for illustrations of state statutes that allow adoption agencies to consider race when deciding adoption placements.

79. See *supra* notes 75-77 and accompanying text for statutory language which allows adoption agencies broad discretion when considering race in adoption placements.

80. See *supra* notes 75-77 and accompanying text for statutory language which allows adoption agencies broad discretion when considering race in adoption placements.

81. NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION PAPER, (Apr. 1972), reprinted in R. SIMON & H. ALTSTEIN, *TRANSRACIAL ADOPTION*, 51, 52 (1972) [hereinafter "NABSW POSITION PAPER - 1972"].

Black social workers must be in the vanguard of Black community activity toward ending the practice of trans-racial placements of Black children. We enumerated various strategies toward self-education and public education relative to the problem and directions for specific program planning. They are listed as follows: . . . Education of all workers about the uniqueness of Black families. . . . Development of educational programs that will stimulate increased adoptive activity within the Black community. . . . Development of special recruitment programs within and outside of our agencies to locate Black homes. . . . Develop a communication network that will facilitate an exchange of information

B. The National Association of Black Social Workers: The Opponents of Interracial Adoptions

In the 1960s, adoption agencies actively sought white couples to adopt African-American children.⁸² The receptive social attitudes toward interracial adoptions caused certain groups to change their stance on the significance of the race factor in adoptions. For example, in 1958, the Child Welfare League of America ("CWLA") published its original views in the *Standard for Adoption Services*,⁸³ a publication of the social services profession.⁸⁴ The CWLA took the position that interracial adoptions were not necessarily indicative of problems relating to differences in race, and that race alone should not determine the selection of adoptive parents.⁸⁵ The organization later adopted a position whereby it indicated that adoption agencies should help to create interracial families.⁸⁶ The CWLA's new position not only discouraged race

among participants of this workshop. . . . We must be about the business of protecting the Black family and Black community as a legitimate and viable institution.

Id.

82. Margaret Howard, *Transracial Adoptions: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 505-16 (1984). Professor Howard offers several reasons for the increase in adoptions in the 1960s. *Id.* Specifically, these reasons are: (1) new laws requiring adoption agencies to report child abuse cases made the public more aware of child abuse and children's need of homes; (2) the foster care system became less efficient; (3) "clinical data identifying the effects of maternal deprivation resulting from institutional care on infants' psychological development were reported;" (4) "the number of healthy white infants available for adoption declined dramatically;" (5) not enough homes available for minority children; and (6) "change in social attitudes toward racial integration in the 1960's contributed to the willingness of families to adopt transracially and of social workers to make transracial placements."

Id.

83. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE, § 4.6 (1958).

Racial background in itself should not determine the selection of the home for a child. It should not be assumed that difficulties will necessarily arise if adoptive parents and children are of different racial origin. At the present time, however, children placed in adoptive families with similar racial characteristics, such as color, can become more easily integrated into the average family group and community.

Id.

84. *Id.*

85. *Id.* §§ 4.6, 4.11.

86. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE, § 4.5 (1968). The revised section 4.5 states:

Racial background in itself should not determine the selection of the home for a child. It should not be assumed by the agency or staff members that difficulties will necessarily arise if adoptive parents and children are of different racial origin. The agency should be ready to help families who wish to adopt children of another race to be prepared for, and meet, such difficulties as may occur In most communities there are families who have the capacity to adopt a child whose racial

matching, but actually favored providing assistance to families interested in adopting children of a different race.⁸⁷

However, this short period of interracial open-mindedness ended abruptly in 1972 when the National Association of Black Social Workers ("NABSW") criticized interracial adoptions.⁸⁸ In its position paper the NABSW announced:

We [the NABSW] have taken the position that Black children should be placed *only* with Black families whether in foster care or for adoption. . . . We, the participants of the workshop, have committed ourselves to go back to our communities and work to end this particular form of *genocide*.⁸⁹

In 1986, the NABSW reaffirmed its position against interracial adoptions.⁹⁰ The NABSW's controversial position became widely known and ultimately influenced the practice of adoption agencies and many state courts' decisions.⁹¹ In addition, the NABSW position paper caused other interested organizations to reconsider their stand concerning interracial adoptions.⁹²

background is different from their own. Such couples should be encouraged to consider such a child As in any adoption plan, the best interests of the child should be paramount.

Id.

87. *Id.*

88. NABSW POSITION PAPER - 1972, *supra* note 81, at 50-52.

89. *Id.* at 52 (emphasis added). The Position Statement also provided that: Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are the products of their environment and develop their sense of values, attitudes and self-concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people. Our position is based on: (1) the necessity of self-determination from birth to death, of all Black people. (2) the need of our young ones to begin at birth to identify with all Black people in a Black community. (3) the philosophy that we need our own to build a strong nation.

Id. at 50.

90. Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487, 489 (1991).

91. See, e.g., *In re Davis*, 465 A.2d 614, 622-23 (Pa. 1983) (pointing to the NABSW and its position that "black children should be placed only with black families, both in foster care and adoption in order that the children 'receive the total sense of themselves and develop a sound projection of their future'").

92. See *id.* at 623 (stating that the Child Welfare League of America "reverted in 1973 in accordance with the policy announced by the [NABSW] to . . . expression of a preference for placing children in families of their own racial background"); CHILD WELFARE LEAGUE OF AMERICA, STANDARD FOR ADOPTION SERVICES, § 4.5 (1978). The CWLA revised its stance reflecting the NABSW's position. Specifically, it stated that:

[t]he adoptive parents selected for a child should ordinarily be of a similar racial background, but children should not have adoption denied or significantly delayed when adoptive parents of other races are available. At the present time, children placed in adoptive families with

Once again, in 1991, the NABSW restated its stance that African-American children do not belong with white, Hispanic or Asian parents.⁹³ Recently, however, the NABSW has relaxed its position and, in its most recent position paper, has accepted interracial adoptions, but only after adoption placement authorities have exhausted all efforts of placing a child with the child's family or an adoptive family of the same race.⁹⁴ Nevertheless, social workers

similar distinctive characteristics, e.g., color, can become more easily integrated into the average family and community. If adoptive parents of the child's own race are not available in the agency, local, regional and national adoptive exchanges should be used In any adoption plan, however, the best interests of the child should be paramount. In most communities there are families who have the capacity to adopt a child whose racial background is different from their own. Consideration of these families as adoptive parents should include awareness that appropriate resources should be reasonably available to these families after placement to help them and the child with issues of cultural heritage and identity.

Id.

The number of adoption placements decreased in the 1970s. See RITA J. SIMON, *Adoption of Black Children by White Parents in the USA*, in ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY 229 (Philip Bean ed., 1984) (providing adoption statistics for the 1970s). The decade began with 2574 adoptions. *Id.* Thereafter, the number of adoptions fell rapidly. *Id.* In 1972 and 1973, there were 1544 and 1081 placements respectively. *Id.* In only three years, the number of adoptions fell almost 60%. *Id.*

93. Kennedy, *supra* note 6, at 18.

94. *Id.* See also NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION PAPER, (Apr. 1994) [hereinafter "NABSW POSITION PAPER - 1994"]. The NABSW's most recent stance on interracial adoption is set forth as follows:

[F]amily 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.).

Id. at 4. But see Bartholet, *supra* note 14, at 104 (criticizing the more liberal stance taken by the NABSW). Bartholet questions the NABSW's more liberal attitude toward interracial adoptions for a number of reasons: (1) the NABSW never conducted a poll of its membership on the issue; (2) a number of members of the organization actually terminated their membership in protest of the new position; and (3) some polls that have been taken suggest that many Afro-Americans do not support the change in the NABSW's position. *Id.* Bartholet suggests however that the increasing tolerance for interracial marriages has increased acceptance of the most recent position taken by the NABSW. *Id.*

who share the NABSW's view and are hostile to interracial adoptions may abuse their discretion and may virtually prohibit such adoptions as a practical matter.⁹⁵

C. Statistical Reality

The use of race as an important factor in adoptions has a detrimental impact on the number of children in foster care.⁹⁶ In the mid-1980's there were about 300,000 children in foster care. Recent congressional findings, however, indicate that as of 1995 there were approximately 500,000 children in the foster care system.⁹⁷ Tens of thousands of those children are waiting for adoption.⁹⁸ Roughly forty percent of foster children, or 200,000, are African-American or a mixed race.⁹⁹ In contrast, nearly sixty-seven percent of the families applying for adoption are white.¹⁰⁰

Since legislatures and courts allow adoption agencies to consider race as a factor in adoption placements, many adoption agencies unduly delay or create obstacles for white adults to adopt minority foster children. These adoption agencies hope that adults will ultimately adopt foster children of the same race.¹⁰¹ However, there are not enough prospective minority foster parents willing to adopt the alarmingly growing number of minority foster children.¹⁰² Thus, minority foster children, mostly African-American, wait for adoption twice as long as children of other races.¹⁰³ The growing number of children in foster care, coupled with present adoption policies, increases the time minority foster children must wait for a loving family. In fact, unless there are drastic changes in the nation's adoption system, the number of children in foster care may reach 900,000 by the year 2000.¹⁰⁴

Studies show that out of approximately two million white adoptive parents, 68,000 indicated that they would adopt a child of

95. Bartholet, *supra* note 14, at 105.

96. Rita Kramer, *Adoption in Black and White*, WALL ST. J., Oct. 24 1994, at A14.

97. *Id.*; AAA, S. 637, 104th Cong. § 2(a) (1995).

98. AAA, S. 637 § 2(a).

99. Pattiz, *supra* note 73, at 2600-01.

100. Kennedy, *supra* note 5, at 18.

101. Ruth G. McRoy, *Question: Should Congress Facilitate Transracial Adoptions? No: Lower Barriers to Black Adoptive Families*, INSIGHT, June 5, 1995, at 20 (stating that adoption agencies "hold children hostage in foster care for as long as necessary to find the right 'racial match'").

102. *Id.* at 19.

103. AAA, S. 637, 104th Cong. § 2(a)(3).

104. McRoy, *supra* note 101, at 19. See also Rose Marie Penzerro & Laura Lein, *Burning Their Bridges: Disordered Attachment and Foster Care Discharge*, CHILD WELFARE, Mar. 1995, at 364 (encouraging foster and adoptive parents to keep children as long as necessary once they accept them because moving children from place to place is damaging).

a different race.¹⁰⁵ In fact, white families are more willing than African-American families to adopt older and disabled African-American children.¹⁰⁶ In Midwestern states, forty percent of interracially adopted children are disabled, twenty-three percent have psychological problems and thirty-three percent are victims of sexual abuse.¹⁰⁷ Because of the growing crisis in the foster care system and the inconsistency of state laws, in recent years Congress began to consider legislation to alleviate these problems.¹⁰⁸

II. THE UNSUCCESSFUL MPA

The MPA was Congress's initial response to the adoption crisis.¹⁰⁹ Although the MPA's purpose was noble, its tolerance of the use of race as a factor reinforced existing policies and did not improve the adoption dilemma.¹¹⁰ To the contrary, by legitimizing the use of race as a factor in adoption placements, the MPA exacerbated the adoption problem.¹¹¹ Recognizing its failure, Congress repealed the MPA in August of 1996.¹¹²

A. *The Purpose of the MPA*

Former Senator Howard Metzenbaum of Ohio was the main force behind the MPA.¹¹³ The alarming state of the foster care system in the United States motivated Senator Metzenbaum to initiate improvements in adoption placements.¹¹⁴ Metzenbaum introduced the MPA legislation after discovering that placement

105. Pattiz, *supra* note 73, at 2601.

106. *All In The Family*, THE NEW REPUBLIC, Jan. 24, 1994, at 7 [hereinafter *Family*].

107. *Id.*

108. The MPA included race as one of the factors considered in adoption placements. MPA, 42 U.S.C. § 5115a (1994) (repealed 1996). *See also* AAA, S. 637, 104th Cong. § 3(a) (4) (1995) (proposing to eliminate the race factor in adoptions).

109. *See supra* notes 9-10 and accompanying text for related section of the MPA.

110. *See Kennedy, supra* note 18, at 8 (discussing the negative aspects of the MPA).

111. *See id.* at 12 (indicating that the MPA is not a solution to the foster care crisis but rather an obstacle to the creation of "a more just, decent, and attractive society").

112. MPA, 42 U.S.C. § 5115a (1994) (repealed 1996). *See also* Albert R. Hunt, *A Good Mother's Day Gift: Pass the Adoption Bill*, WALL ST. J., May 2, 1996 at A15. Even the primary sponsor of the MPA, Howard Metzenbaum, supported the overturning of the MPA. *Id.* Senator Metzenbaum believes that Congress undercut the purpose of his bill and is therefore supporting the Republican Party's attempt to correct the adoption problems brought on by the use of race in placement decisions. *Id.*

113. Albert R. Hunt, *Politics and People: Metzenbaum Breaches the Adoption Color Barrier*, WALL ST. J., July 14, 1994, at A11.

114. *See Metzenbaum, supra* note 4, at 166 (discussing different reasons that motivated Senator Metzenbaum to push forward the MPA).

agencies prevented interracial adoptions, even after the child lived and bonded with foster parents.¹¹⁵ Although Metzenbaum did not oppose interracial adoptions, he still believed that "every child who is eligible for adoption has the right to be adopted by parents of the same race if that is possible."¹¹⁶ The MPA essentially reflected this position.¹¹⁷ Specifically, the MPA did not allow race, national origin, or color to be the sole consideration when making adoption placements.¹¹⁸ Under the MPA, race could be a factor in adoption placements, but it could not be the only or a leading factor.¹¹⁹

The MPA's primary purpose was to decrease the amount of time foster children waited for a loving adoptive family.¹²⁰ As Senator Metzenbaum stated, "[t]oo many social workers prefer warehousing children in foster care homes and institutions over their placement in loving, permanent interracial homes."¹²¹ The MPA sought to prevent placement discrimination based on race, color or national origin and to encourage qualified adults to adopt foster children.¹²²

Like Metzenbaum, Senator Carol Moseley-Braun of Illinois, a cosponsor of the MPA, believed that race, culture and heritage are important factors to consider in adoption placements.¹²³ Senator Moseley-Braun agreed that race should never be a determining factor, "especially if it would leave a child without a family."¹²⁴ Still, she believed that placing a foster child with parents of the same race may help the child "make psychological, social and cultural adjustments to a new family."¹²⁵

115. *Id.*

116. *Id.* at 165.

117. See generally Randall Kennedy & Carol Moseley-Braun, *Interracial Adoption: Is the Multiethnic Placement Act Flawed?*, ABA J., Apr. 1995, at 44-45 (indicating that the MPA clearly reflects the personal beliefs of Senator Metzenbaum).

118. See *supra* note 9 for a discussion of the restrictions outlined in the MPA.

119. See Metzenbaum, note 4, at 166 (discussing the MPA's prohibition of denying parents the opportunity to adopt children solely on the basis of race, color, or national origin).

120. MPA, 42 U.S.C. § 5115a. The MPA offered the following purposes for the Act:

It is the purpose of this subpart to promote the best interest of the 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; and (3) facilitating the identification and recruitment of foster and adoptive families that can meet children's needs.

Id.

121. Metzenbaum, *supra* note 4, at 166.

122. *Id.* at 167.

123. Kennedy & Moseley-Braun, *supra* note 117, at 45.

124. *Id.*

125. *Id.*

B. A Critique of the MPA

The MPA attracted many critics.¹²⁶ Although Marian Wright Edelman, speaking for the Children's Defense Fund, supported the MPA, many disagreed.¹²⁷ For instance, Randall Kennedy, a Harvard Law Professor, found the MPA "well-intentioned but badly misguided."¹²⁸ According to Professor Kennedy, the MPA represented the "moderate racial matching" approach.¹²⁹ Specifically, Kennedy argued that, by recognizing race as a legitimate factor in adoption placement decisions, the MPA supported same race adoptions. In other words, the MPA encouraged same-race adoptions and prohibited the use of race as a leading factor.¹³⁰ Kennedy noted that the MPA prohibited only limited versions of race-matching, for instance, where an agency denied an adoption of a child who lived and strongly bonded with the foster parents.¹³¹ Professor Kennedy also observed that the MPA did not address other, less extreme versions of race-matching.¹³² Consequently, the MPA may have further damaged the nation's foster care system because it gave tacit congressional approval to the pre-existing race-matching schemes.¹³³

Furthermore, the MPA placed a discretionary tool into the wrong hands.¹³⁴ Specifically, the statute allowed social workers to use, and possibly misuse, their discretion regarding race in adoption placements.¹³⁵ Thus, the MPA gave adoption agencies "carte blanche authority to hold children hostage in foster care for as long as necessary to find [parents of the same race]".¹³⁶

1. The MPA Harmed Minority Children

Opponents of race-matching provide many reasons why even the moderate racial-matching approach of the MPA is wrong. The leading argument against racial matching is that "it unnecessarily impedes the adoption of minority children."¹³⁷ As demonstrated in Part I of this Comment, there are hundreds of thousands of children in foster care in the United States, and the number is grow-

126. See, e.g., Kennedy, *supra* note 18, at 8 (criticizing the MPA for its "moderate" support of racial matching).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 9.

132. Kennedy, *supra* note 18, at 9-10.

133. Kennedy & Moseley-Braun, *supra* note 117, at 44.

134. See generally Bartholet, *supra* note 14, at 105 (indicating that "social workers [who are] hostile to transracial adoption are likely to misuse [their] discretion").

135. *Id.*

136. McRoy, *supra* note 101, at 20.

137. Bartholet, *supra* note 14, at 100.

ing at an alarming rate.¹³⁸ Further, the race-matching approach seems to greatly affect minority children (mostly African-American) by forcing them to wait for adoption often twice as long as children of other races.¹³⁹ Tragically, while parentless children wait for adoption, suitable parents of different races must also wait to adopt. Frequently, the only reason these couples are unable to create a family is because of racial differences.¹⁴⁰

Supporters of racial-matchings argue that parents of the same race as the child are in a better position to raise that child.¹⁴¹ Many studies, however, show that children of interracial adoptions do as well as children of biracial families.¹⁴² In addition, while many argue that minority foster children need to grow up within a family of the same race in order to obtain a sense of racial identity, there is disagreement within minority groups as to what that racial identity should be.¹⁴³ As Professor Kennedy points out, "Jesse Jackson would probably be more in agreement with Edward Kennedy than Clarence Thomas. Blacks do not agree. Nor do whites."¹⁴⁴

2. *The MPA Discouraged the Creation of Interracial Families*

The opponents of race-matching argue that race-based adoptions decrease the number of prospective parents willing to adopt

138. See *supra* note 168 and accompanying text for congressional findings regarding the number of children in the foster care system.

139. See *supra* note 168 and accompanying text for congressional findings regarding the number of children in the foster care system.

140. See Bartholet, *supra* note 14, at 101-02 (discussing the situation of African-American foster children, specifically that there are not enough African-American adoptive parents and that adoption agencies only place children in transracial homes as a last resort).

141. Kennedy, *supra* note 18, at 10. For instance, Senators Metzenbaum and Moseley-Braun believe that it is best for children to be adopted by parents of the same race because of psychological, social and cultural adjustments. See *supra* notes 113-25 and accompanying text for a discussion of both Senators' views.

142. See, e.g., Bartholet, *supra* note 14, at 103 (citing WILLIAM E. CROSS, *SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY* 108-14 (1991)). For example, a study of transracial adopted families demonstrated that 94% of adoptees enjoy their family life, and 93% believe that they have loving and supportive parents. McRoy, *supra* note 101, at 20.

143. Kennedy, *supra* note 18, at 10-11. Professor Kennedy inquires:

Is an appropriate sense of blackness evidenced by celebrating Kwanza, listening to rap, and seeking admission to Morehouse College? What about celebrating Christmas, listening to Mahalia Jackson and seeking admission to Harvard? And what about believing in atheism, listening to Mozart, and seeking admission to Bard? Are any of these traits more or less appropriately black? And who should do the grading on what constitutes racial appropriateness? Louis Farrakhan? Jesse Jackson? Clarence Thomas?

Id.

144. Kennedy & Moseley-Braun, *supra* note 117, at 44.

a child without regard to race.¹⁴⁵ Because of negative social attitudes towards interracial adoptions, these parents turn away from adopting a child of a different race.¹⁴⁶ Consequently, the number of prospective parents decreases, while the number of foster children, mostly minority, increases.¹⁴⁷

Opponents of interracial adoption argue that minority families need encouragement to adopt foster children.¹⁴⁸ Specifically, these groups contend that encouraging minority families to adopt children of their own race would ease the crisis in the nation's foster care system.¹⁴⁹ Alternatively, race-matching opponents point out that while many minority parents do adopt children in the foster care system, the primary problem is that there are too many minority children in need of homes.¹⁵⁰ To illustrate, the adoption rate for African-American adults is four times greater than for white or Hispanic families.¹⁵¹ Nevertheless, the number of minority children in foster care overwhelmingly exceeds the number of minority families willing to adopt.¹⁵²

3. *The MPA Promoted Race Separatism*

Critics of race-matching claim that it promotes "race separatism."¹⁵³ For instance, Professor Elizabeth Bartholet writes that "race matching policies only make sense when seen as part of a more general move for race separatism," reflecting a 1970's movement that included NABSW's well-known position statement.¹⁵⁴ In this movement, supporters of race-matched adoptions argued that only African-American parents can teach African-American chil-

145. Kennedy, *supra* note 18, at 9. "Some adults who would be willing to raise a child regardless of racial differences find themselves unwilling to do so in the face of social pressures that stigmatize transracial adoption as anything from second-best to cultural genocide." *Id.*

146. *Id.*

147. *Id.* Supporters of racial-matchings claim that a government emphasis on preserving families and decreasing poverty would result in fewer foster children and no need for interracial adoptions. *Id.* See also Bartholet, *supra* note 14, at 101. Those in opposition to interracial adoptions argue that the government established policies and programs created for family preservation and reunification years ago. *Id.* Today, many criticize such programs because the cost of preserving families is "subjecting children to unconscionable abuse and neglect." *Id.*

148. Kennedy & Moseley-Braun, *supra* note 117, at 45.

149. *Id.*

150. Bartholet, *supra* note 14, at 101.

151. Kennedy & Moseley-Braun, *supra* note 117, at 45.

152. See Bartholet, *supra* note 14, at 101 (indicating that since about half of the children in foster care are children of color, "[b]lacks would have to adopt at many times the rate of whites to provide homes for all of the waiting black children.").

153. *Id.* at 102.

154. *Id.*

dren how to "survive in a racist society."¹⁵⁵ In other words, only African-American parents have the necessary "coping skills."¹⁵⁶

While this point of view may have some merit, there are many reasons why American society should adopt colorblind adoption policies.¹⁵⁷ Foremost among these reasons is that all children, whether white, African-American, Hispanic, or Asian, need a stable, loving family and should not be held in an unnecessary state of flux pending the successful healing of racial tensions in this country. Moreover, studies show that adopted children of interracial families grow up in many ways like adopted children of transracial families.¹⁵⁸ In other words, minority children in interracial families develop a clear sense of "self-esteem, racial identity, and basic attitudes about race relations."¹⁵⁹ Furthermore, some commentators stress that an increased interracial society would lead to a lessening of racial discrimination and oppression over time. For instance, in response to the claim that minority adults are in a better position to teach minority children how to conquer racist oppression, Professor Kennedy suggests that white adults, as the oppressors, are in a better position to teach children how to surpass such oppression and flourish in today's society.¹⁶⁰ In addition, "race separatism" takes society back to the time when separate but equal was the law.¹⁶¹ This is not the general direction in which this country has progressed over the previous half century.¹⁶²

155. *Id.*

156. *Id.* See generally Jacinda T. Townsend, *Reclaiming Self-Determination: A Call for Interracial Adoption*, 2 DUKE J. GENDER L. & POL'Y 173 (1995) (providing some arguably compelling reasons to match a foster child's race to the race of prospective adoption parents).

157. JOYCE A. LADNER, *MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES* 75 (1977) (concluding from a study that, although there are problems that interracial families need to deal with, foster children nevertheless deserve to have a stable home and family); RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION: A FOLLOW-UP* 97 (1981) (discussing an extensive study on interracial adoptions and suggesting that despite some problems attributed to transracial adoptions, the families involved were happy families); William Feigelman & Arnold R. Silverman, *The Long-Term Effect of Transracial Adoption*, 58 SOC. SERV. REV. 588, 589 (1984) (deciding, based on a study, that interracial adoptions are much more advantageous to children than no home at all); Mahoney, *supra* note 90, at 491-93 (discussing a number of studies focusing on interracial adoptions by using the following sources); Joan F. Shireman & Penny R. Johnson, *A Longitudinal Study of Black Adoptions: Single Parent, Transracial, and Traditional*, 31 SOC. WORK 172 (1986) (discussing a study of African-American infants adopted by both white and African-American parents, and concluding that children "grow well" in all types of homes).

158. Bartholet, *supra* note 14, at 103; WILLIAM E. CROSS, *SHADE OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY* 108-14 (1991).

159. Bartholet, *supra* note 14, at 103.

160. Kennedy, *supra* note 18, at 10.

161. *Id.* at 11.

162. Bartholet, *supra* note 14, at 103.

Historically, it is against the moral fabric of the United States to discriminate on the basis of color, race or ethnic origin.¹⁶³ Indeed, the United States Constitution and twentieth century jurisprudence make clear that federal interests in areas like employment and housing are best served when color, race and ethnic origin are discounted as a basis for decision-making.¹⁶⁴ It is equally unacceptable to deny a prospective parent the opportunity to adopt a foster child of a different race based on the belief that only minority adults are equipped to raise minority children.¹⁶⁵

Such misguided policy, if followed in an employment context, would allow an employer to hire white workers because the employer believes that white workers would get along better or bond with one another easier, thereby increasing morale and productivity in the workplace. In housing, such a policy would permit white landlords to rent only to white tenants on the justification that they get along well and pay on time. Fortunately, employment and housing laws prohibit considerations of color, race and national origin. Adoption laws should similarly prohibit such considerations. After all, "[w]hat parentless children need are not 'white,' 'black,' 'yellow,' 'brown,' or 'red,' parents, but *loving* parents."¹⁶⁶

Although the drafters of the MPA intended to help foster children find adoptive parents in a more expeditious manner, this noteworthy objective did not succeed. Because the MPA allowed race to play a role in adoption placements, it unintentionally promoted racial separatism, permitted separatists to use their discretion in adoption placements and failed to relieve the exploding foster care population.¹⁶⁷ In response, Representative Jim Bunning proposed the AAA to solve the continuing adoption crisis.

III. THE COLOR-BLIND AAA

The continuing controversy over interracial adoptions, coupled with the problem of a growing foster care population, induced Congress to consider new federal adoption legislation, the Adoption Antidiscrimination Act of 1995.¹⁶⁸ If enacted, the AAA will

163. Kennedy, *supra* note 18, at 10.

164. *Id.*

165. *Id.*

166. *Id.* at 11.

167. *Id.* at 8-9. See generally Bartholet, *supra* note 14 (addressing the negative aspects of race separatism).

168. See AAA, S. 637, 104th Cong. § 2(a) (1995) stating:

Congress finds that-

nearly 500,000 children are in foster care in the United States; tens of thousands of children in foster care are waiting for adoption; 2 years and 8 months is the median length of time that children wait to be adopted, and minority children often wait twice as long as other children to be adopted; and child welfare agencies should work to eliminate

improve the foster care system and adoption placements by completely eliminating the consideration of race in adoption placements.¹⁶⁹ Further, the proposed AAA would likely create loving and happy families as well as foster a more just and socially balanced society.¹⁷⁰

A. The Goal of the AAA

Representative Jim Bunning of Kentucky, who is not a stranger to the interracial adoption problem, introduced the AAA to Congress.¹⁷¹ Bunning's daughter experienced delays in adopting a child of a different race, apparently due to race considerations.¹⁷² The proposed AAA, if enacted, would solve the problem of discrimination in adoption placements.¹⁷³ The AAA would prohibit agencies that receive federal funds from denying or delaying the placement of a foster child with a qualified family because of race, color or national origin.¹⁷⁴ The bill also proposes penalties for violations of its provisions.¹⁷⁵ Many senators, including former Senator Metzenbaum, realize that the MPA did not solve the existing

racial, ethnic, and national origin discrimination and bias in adoption and foster care recruitment, selection, and placement procedure. *Id.*; Adoption Promotion and Stability Act of 1996, H.R. 3286, 104th Cong. (1996) [hereinafter APS]. The APS, introduced in April of 1996, like the AAA, would prohibit a state that receives "Federal assistance from denying to any person the opportunity to become an adoptive or a foster parent on the basis of the race, color, or national origin of the person or of the child involved." H.R. REP. No. 104-542, Pt. 2, at 21 (1996). See also Albert R. Hunt, *Politics & People: The Republicans Seize the High Ground On Transracial Adoption*, WALL ST. J., Mar. 9, 1995, at A19 (discussing the AAA and its possible advantages).

169. AAA, S. 637 § 2(b). "The purpose of this act is to promote the best interest of the children by - (1) [d]ecreasing the length of time that children wait to be adopted; and (2) preventing discrimination in the placement of children on the basis of race, color, or national origin." *Id.*

170. See Kennedy, *supra* note 18, at 13 (indicating that "the fact that such a bill [the MPA] even exists in 1994 - 40 years after *Brown v. Board of Educ.*], 30 years after the Civil Rights Act of 1964 - is evidence that there is much to be done in order to create a more just, decent, and attractive society.").

171. Hunt, *supra* note 168.

172. *Id.*

173. AAA, S. 637 § 2(b).

174. *Id.* § 3(a).

175. *Id.* § 3(b). According to the AAA the following penalties are applicable:

State Violators. - A state that violates subsection (a) [prohibition subsection] shall remit to the Secretary of Health and Human Services all funds that were paid to the State under part E of title IV of the Social Security Act (42 U.S.C. 670 et seq.) (relating to the foster care and adoption assistance) during the period of violation.

Private Violators. - Any other entity that violates subsection (a) shall remit to the Secretary of Health and Human Services all funds that were paid to the entity during the period of the violation by a State from funds provided under part E of title IV of the Social Security Act.

Id.

foster care crisis and now support the AAA.¹⁷⁶

B. *The Proposed AAA Improves the Foster Care System*

There are many reasons why the AAA, by making the adoption process color-blind, will improve the foster care system. Once enacted, the AAA will prevent adoption agencies from considering race in adoption placements. Currently, adoptive parents must battle adoption agencies that practice same-race adoption placements.¹⁷⁷ For instance, Beverly and David Cox, a white couple, were the foster parents of two African-American girls for five years.¹⁷⁸ After five years of raising the sisters, the Milwaukee County Human Services Department asked the couple to adopt the girls and the Coxes agreed.¹⁷⁹ According to Beverly Cox, the girls' aunt did not want a white family to adopt the girls and decided to take care of them herself.¹⁸⁰ Despite a request by the Human Services Department, a court prohibited the Coxes from adopting the two girls.¹⁸¹ The Coxes' story is not unusual.¹⁸²

Ann and Scott Mullen encountered a similar problem when they attempted to adopt two African-American brothers they raised since infancy.¹⁸³ The Mullens, a white couple, alleged that the caseworkers intentionally prolonged the adoption process to allow more time to find an African-American family for the boys.¹⁸⁴ Similarly, the Mandels were foster parents who experienced difficulties with an interracial adoption. The Mandels were foster parents to Robyn who came into their care when she was three days old.¹⁸⁵ Robyn, an African-American baby abandoned on San Francisco's Mission Street, was addicted to crack cocaine.¹⁸⁶ The county adoption agency, due to the "lack of racial match," tried to remove Robyn from the Mandels' home.¹⁸⁷ The rules in the proposed AAA

176. Brant, *supra* note 2, at 29.

177. Smolowe, *supra* note 1, at 51.

178. See, e.g., Brant, *supra* note 2, at 29 (discussing interracial adoption film "Losing Isaiah" in light of true cases of foster parents losing their foster children).

179. Smolowe, *supra* note 1, at 51.

180. *Id.*

181. See Mahoney, *supra* note 157, at 491-92 (indicating that a study by Feigelman and Silverman concluded that foster children are much better off with mixed-race foster families than without a permanent home).

182. Smolowe, *supra* note 1, at 51.

183. *Id.*

184. See generally MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 148 (1976) (suggesting that African-American social workers are not convinced by the positive results of studies on interracial adoptions, and those workers strive for "more practical alternatives" that would avoid interracial adoptions).

185. Smolowe, *supra* note 1, at 51.

186. *Id.*

187. See *id.* (suggesting that social workers do not contact foster families for

would eliminate the race factor and would allow loving, qualified parents to adopt their foster children.

C. *Loving Interracial Families Raise Healthy Children*

The AAA allows interracial adoptions, and promotes the type of loving home in which children grow up to be confident and possess positive self-esteem.¹⁸⁸ Despite some critics' claims that only adults of the same race as adopted children can prepare these children to deal with race-related obstacles in life, numerous studies tell a different story.¹⁸⁹ In fact, a number of studies concluded that children of interracial families grow up emotionally healthy and equally comfortable with their race as children of same-race families.¹⁹⁰ Furthermore, children of interracial adoptions grow up with a self-esteem as high as that of children in the general population.¹⁹¹

For example, Rita Simon, an American University law professor, conducted a study by tracking 240 white families who adopted African-American children.¹⁹² After more than a decade of investigation, Simon concluded that interracial adoptions have an overall positive effect on children.¹⁹³ According to the study, there were no differences between adoptees of a single race household and adoptees of a interracial home.¹⁹⁴ This study found no significant self-esteem differences between adoptees and other children.¹⁹⁵ In fact, adoptees felt enriched by their African-American and white backgrounds.¹⁹⁶ Further, many of these children found race to be an

years or until those families initiate adoption proceedings).

188. See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1211 (1991) (presenting numerous studies that generally conclude that foster children of interracial adoptions grow up with the same strong self-esteem as any other children).

189. See *Family*, *supra* note 106, at 7 (concluding that most interracial adoption studies indicate that minority children grow up healthy and happy). But see Twila Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1993-1994) (offering arguments for placing African-American children with African-American adoptive parents whenever possible); Townsend, *supra* note 156, at 177-82 (discussing the advantages of being raised by the same-race family).

190. See *Family*, *supra* note 106, at 7.

191. Bartholet, *supra* note 188, at 1214-15.

192. See *supra* note 156 and accompanying text for other studies on interracial adoptions.

193. See *also supra* note 156 and accompanying text for other studies on interracial adoptions.

194. See *supra* note 156 (suggesting that despite some problems related to differences in race, the overall results of interracial adoption studies were positive).

195. *Id.*

196. *Family*, *supra* note 106, at 6. The study further shows that while the children were growing up the adoptive parents were "overly sensitive to racial concerns, causing one transracial adoptee to complain that 'not every dinner

"unimportant factor," an outlook which the NABSW labeled "inappropriate."¹⁹⁷

Critics of interracial adoptions argue that biological family preservation eliminates the need for interracial adoptions. Although preserving families, and fighting poverty and substance abuse are indeed necessary policies, these policies alone do not solve the problems of the foster care system.¹⁹⁸ The proposed AAA provides assistance to foster children in situations where family reunification is impossible.¹⁹⁹ Moreover, many fear that pushing family preservation too far results in child abuse and neglect.²⁰⁰

D. The AAA Reflects this Country's Legal Principles

The AAA, by eliminating the race factor in adoption placements, reflects the legal principle of equality in the United States.²⁰¹ This principle encourages one to look at others as unique individuals, and prohibits decisions based on racial generalizations.²⁰² The AAA would assist in changing social attitudes towards interracial adoptions and encourage adults of all races to adopt.²⁰³ The Act appropriately shifts the focus from race to parenting skills.²⁰⁴ The AAA would further the process of creating a color-blind society while moving away from separatism.²⁰⁵

IV. PROPOSAL

While the issue of interracial adoption is controversial, the adoption crisis requires immediate action. The AAA answers that call by addressing the crisis and by proposing solutions to some of the major problems of adoption placements. The Act would be a significant step toward providing a happy and healthy childhood for all foster children. The AAA expressly prohibits the use of race in adoption placements. As a result, it solves the problem of too many children in foster care, of minority foster children waiting too long to be adopted, and of possible biases among child welfare agency workers and their influence on adoption placements. The Act, by eliminating race consideration from adoption placements, strives to promote the best interests of all foster children.

conversation has to be a lesson in black history." *Id.*

197. *Id.*

198. See Bartholet, *supra* note 14, at 101 (arguing that policies of family preservation and reunification have been priorities for years).

199. McRoy, *supra* note 101, at 19.

200. Bartholet, *supra* note 14, at 101.

201. Kennedy, *supra* note 18, at 11-12.

202. *Id.*

203. Kennedy, *supra* note 18, at 9.

204. Michelle M. Mini, *Breaking Down the Barriers to Transracial Adoptions: Can the Multiethnic Placement Act Meet This Challenge*, 22 HOFSTRA L. REV. 897, 921-31 (1994).

205. Bartholet, *supra* note 14, at 103.

Although the proposed AAA addresses a significant problem in the adoption and foster care system, lawmakers can make many improvements. For instance, clear, definitive standards that govern adoption agencies' adoption placement decisions would eliminate ambiguity and placement problems. The National Conference of Commissioners on Uniform State Laws ("NCCUSL") founded the Uniform Adoption Act ("UAA").²⁰⁶ Although the UAA allows race to be one of the factors considered in adoption placements, it nevertheless offers many sound standards for adoption agencies.²⁰⁷ State lawmakers, in establishing adoption laws, should adopt many of the standards promulgated by the NCCUSL and incorporated in the UAA.

Further, the AAA should provide special assistance for adoptive families so their relationships are successful from the start. Specifically, the AAA should provide a comprehensive educational program to teach interracial families how to deal with problems that members of the interracial family may encounter.²⁰⁸ Adoption agencies should take advantage of the many studies regarding interracial adoptions and their results pointing to possible problem areas.²⁰⁹

Additionally, adoptive parents must feel confident that the relationship between themselves and their adoptive child is the same as any other legal relationship between a child and its biological parents.²¹⁰ The adoption process must be timely and fully disclosed to prospective parents.²¹¹ Moreover, the government should financially assist adoptive families with a tax credit to defray the cost of adoption.²¹² Foster children should also have legal representation in creating or in terminating a family.²¹³ Most im-

206. See UNIFORM ADOPTION ACT, 9 U.L.A. 45 (1994). See also *infra* Appendix A for a proposed revised draft of the AAA. This proposed draft incorporates language that expands the scope of the AAA and ensures that the AAA corresponds more closely with the provisions of the UNIFORM ADOPTION ACT. See *id.* at sections 5-11.

207. See *infra* Appendix A at sections 5-11 for proposed additional standards that state and local agencies should follow in adoption proceedings.

208. See Platt *supra*, note 5, at 496 (suggesting that adoptive parents must complete a "Cultural Sensitivity Training Course" when adopting a child of a different racial or ethnic background).

209. See Mahoney, *supra* note 90, at 491-93 (providing a number of studies on interracial adoptions and their conclusions).

210. See *infra* Appendix A at sections 6-8 for proposed language relating to the legal relationship between adoptive parents and children.

211. For proposed language relating to the timeliness and disclosure of adoption evaluations, see *infra* Appendix A at section 10.

212. See H.R. 3286, 104th Cong. § 23(b)(1) (1996) (providing for a \$5000-per-child tax credit in order to alleviate the cost of adoption). See also James J. Hall, *Ways and Means Approves Tax Credit for Adoption*, WLN 3208, May 6, 1996, available in 1996 WL 260497 (suggesting that "the average cost of adopting a child in the United States is \$20,000").

213. For specific language regarding the appointment of a lawyer, see *infra*

portantly, the AAA should require adoption agencies, social workers, and others involved in the adoption process, to reach out to prospective adults interested in interracial adoptions.²¹⁴

Educating the public about the foster care crisis and calling for help are a few simple ways of opening many loving homes to foster children. For instance, religious organizations, child advocacy groups, any interested organizations, the media and politicians are only a few examples of the window of exposure for adoption agencies and foster children. Despite its room for improvement, the AAA is a big step toward the removal of interracial barriers and the creation of brighter futures for all foster children. Accordingly, Congress should adopt the proposed AAA with the slight modifications proposed in this Comment.

CONCLUSION

Regardless of which side of the adoption dilemma one advocates, the ultimate goal is the betterment of foster children's lives. Hopefully, some day, adoption agencies will allow and encourage adults to care for, nurture and love Janie Doe, and the many minority foster children that she symbolizes. For it is true, as it was said so many times, love is colorblind.

Appendix A at section 9.

214. For proposed language requiring adoption agencies to reach out to prospective parents, see *infra* Appendix A at section 5. See also Platt, *supra* note 4, at 497 (suggesting the use of "all appropriate intra-agency, inter-agency, state, regional and national exchanges and listing books" among other sources).

APPENDIX

SECTION 1. SHORT TITLE

This Act may be cited as the Adoption Antidiscrimination Act of 1995.

SECTION 2. FINDINGS AND PURPOSE.

(a) FINDINGS -Congress finds that—

nearly 500,000 children are in foster care in the United States;

tens of thousands of children in foster care are waiting for adoption;

2 years and 8 months is the median length of time that children wait to be adopted, and minority children often wait twice as long as other children to be adopted; and

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.

(b) PURPOSE – The purpose of this Act is to promote the best interests of children by—

decreasing the length of time that children wait to be adopted; and

preventing discrimination in the placement of children on the basis of race, color, or national origin.

SECTION 3. REMOVAL OF BARRIERS TO INTERRACIAL AND INTERETHNIC ADOPTIONS.

PROHIBITION- A State or other entity that receives funds from the Federal Government and is involved in adoption or foster care placements may not—

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

delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

PENALTIES –

STATE VIOLATORS – A State that violates subsection (a) shall remit to the Secretary of Health and Human Services all funds that were paid to the State under part E of title IV of the Social Security Act (42 U.S.C. 670 et seq.) (relating to foster care and adoption assistance) during the period of the violation.

PRIVATE VIOLATORS – Any other entity that violates subsection (a) shall remit to the Secretary of Health and Human Services all funds that were paid to the entity during the period of the violation by a State from funds provided under part E of title IV of the Social Security Act.

PRIVATE CAUSE OF ACTION –

IN GENERAL – Any individual or class of individuals aggrieved by a violation of subsection (a) by a State or other entity may bring an action seeking relief in any United States district court or State court of appropriate jurisdiction.

STATUTE OF LIMITATIONS – An action under this subsection may not be brought more than 2 years after the date the alleged violation occurred.

ATTORNEY'S FEES – In any action or proceeding under this ACT, the court, in the discretion of the court, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses and costs, and the States and the United States shall be liable for the fee to the same extent as a private individual.

STATE IMMUNITY – A State shall not be immune under the 11th amendment to the Constitution from an action in Federal or State court of appropriate jurisdiction for a violation of this Act.

NO EFFECT ON INDIAN CHILD WELFARE ACT OF 1978 – Nothing in this Act shall be construed to affect the application of the Indian Child Welfare Act of 1978

SECTION 4. REPEAL.

Subpart 1 of part E of title V of the Improving America's Schools Act of 1994 (42 U.S.C. 5115a) is amended—

by repealing sections 551 through 553; and
by redesigning section 554 as section 551.

SECTION 5. RECRUITMENT OF ADOPTIVE PARENTS BY AGENCY.

An Agency receiving public funds pursuant to Title IV-E of the federal Adoption Assistance and Child Welfare Act, 42 U.S.C. Sections 670 et seq., or pursuant to a State's adoption subsidy program, shall make a diligent search for and actively recruit prospective adoptive parents for minors in the agency's custody who are entitled to funding from those sources and who are difficult to place for adoption because of a special need as described in any applicable federal or state law on minors with special needs. The department shall prescribe the procedure for recruiting prospective adoptive parents pursuant to this section.

SECTION 6. LEGAL RELATIONSHIP BETWEEN ADOPTEE AND FORMER PARENT AFTER ADOPTION.

Except as otherwise provided . . . when a decree of adoption becomes final:

the legal relationship of parent and child between each of the adoptee's former parents and the adoptee terminates, except for a former parent's duty to pay arrears for child support; and

any previous court order for visitation or communication with an adoptee terminates.

SECTION 7. WHO MAY ADOPT OR BE ADOPTED.

Subject to this Act, any individual may adopt or be adopted by another individual for the purpose of creating the relationship of parent and child between them.

SECTION 8. LEGAL RELATIONSHIP BETWEEN ADOPTEE AND ADOPTIVE PARENT AFTER ADOPTION.

After a decree of adoption becomes final, each adoptive parent and the adoptee have the legal relationship of parent and child and have all the rights and duties of that relationship.

SECTION 9. APPOINTMENT OF LAWYER OR GUARDIAN AD LITEM.

In a proceeding under this Act which may result in the termination of a relationship of parent and child, the court shall appoint a lawyer for any indigent, minor, or incompetent individual who appears in the proceeding and whose parental relationship to a child may be terminated, unless the court finds that the minor or incompetent individual has sufficient financial means to hire a lawyer, or the indigent individual declines to be represented by a lawyer.

The court shall appoint a guardian ad litem for a minor adoptee in a contested proceeding under this Act and may appoint a guardian ad litem for a minor adoptee in an uncontested proceeding.

SECTION 10. TIME AND FILING OF EVALUATION.

The evaluator shall complete a written evaluation and file it with the court within 60 days after receipt of the court's order for an evaluation, unless the court for good cause allows a later filing.

If an evaluation produces a specific concern . . . , the evaluation must be filed immediately, and must explain why the concern poses a significant risk of harm to the physical or psychological well-being of the minor.

An evaluator shall give the petitioner a copy of an evaluation when filed with the court and for two years shall retain a copy and a list of every source for each item of information in the evaluation.

SECTION 11. PLACEMENT FOR ADOPTION BY AGENCY.

An agency authorized to place a minor for adoption shall furnish to an individual who inquires about its services a written statement of its services, including the agency's procedure for selecting a prospective adoptive parent for a minor and a schedule of its fees.

An agency that places a minor for adoption shall authorize in writing the prospective adoptive parent to provide support and medical and other care for the minor pending entry of a decree of adoption. The prospective adoptive parent shall acknowledge in writing responsibility for the minor's support and medical and other care.

Upon request by a parent who has relinquished a minor child, the agency shall promptly inform the parent as to whether the minor has been placed for adoption, whether a petition for adoption has been granted, denied, or withdrawn, and, if the petition was not granted, whether another placement has been made.

SECTION 12. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect 90 days after the date of enactment of this act.

