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Palmore Comes of Age: The Place of Race in the Placement of Children

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LECTURE

PALMORE COMES OF AGE: THE PLACE OF RACE IN THE PLACEMENT OF CHILDREN

*David D. Meyer**

I. INTRODUCTION

It is a great privilege to inaugurate this Lecture in honor of Walter Weyrauch. Professor Weyrauch's contributions to the fields of family law and comparative law are legendary. He has blazed multiple trails in legal scholarship, and a unifying hallmark of his work is that he approaches every topic with imagination and an open mind, driven by a desire to understand how the law is actually lived. Professor Weyrauch's scholarship reminds us at every turn that the law is not to be found exclusively or even

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* Mildred Van Voorhis Jones Faculty Scholar and Professor of Law, University of Illinois College of Law. I am grateful to Professors Nancy Dowd and Barbara Bennett Woodhouse, directors of the University of Florida's Center on Children and Families, for the invitation to deliver this Weyrauch Distinguished Lecture in Family Law, and to Professor Walter Weyrauch for the example of his work.

predominantly in law libraries and courthouses. Whether studying the legal traditions of the Romani people or how legal norms might govern outposts in space, Professor Weyrauch explores the complex ways in which law is interwoven with culture and occupies the interstices of human relationships, always paying close and respectful attention to the facts.[1] It is difficult to imagine a more useful model for the study of family law.

Among the many landmarks in his scholarship, Professor Weyrauch has written perceptively about race discrimination in this country and about the status of vulnerable groups more generally.[2] His work in this vein is partly the inspiration for my topic here—the role of race in decisions about the placement of children. A second inspiration is place, because Central Florida provided a particularly important legal landmark in this field: the Supreme Court's 1984 decision in *Palmore v. Sidoti*.[3]

Race in the placement of children has been a flashpoint for decades. Given that the topic joins two of the most charged subjects in American society, race and child welfare, it could hardly be otherwise.[4] From one perspective, the child-welfare system callously ignores or discounts the costs of state intervention borne by African American and other minority families.[5] From another, race is too often thrown out as an obstacle to

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1. *See, e.g.*, GYPSY LAW: ROMANI LEGAL TRADITIONS AND CULTURE (Walter O. Weyrauch ed., 2001); Walter O. Weyrauch, *Unwritten Constitutions, Unwritten Law*, 56 WASH. & LEE L. REV. 1211 (1999); Walter O. Weyrauch, *Oral Legal Traditions of Gypsies and Some American Equivalents*, 45 AM. J. COMP. L. 407 (1997); Walter O. Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323 (1993); Walter O. Weyrauch, *The "Basic Law" or "Constitution" of a Small Group*, 27 J. SOC. ISSUES 49 (1971); Walter O. Weyrauch, *The Law of a Small Group: A Report on the Berkeley Penthouse Experiments with Emphasis on Penthouse V* (Space Sciences Laboratory, Univ. of Cal., Berkeley, Internal Working Paper No. 54, 1967); Walter O. Weyrauch, *Law in Isolation: The Penthouse Astronauts*, TRANS-ACTION, June 1968, at 39.

2. *See* Walter O. Weyrauch, *The Romani People: A Long Surviving and Distinguished Culture at Risk*, 51 AM. J. COMP. L. 679 (2003); Walter O. Weyrauch, *An Immigrant's Encounter with Race in America*, 48 FLA. L. REV. 445 (1996).

3. 466 U.S. 429 (1984).

4. *See* Barbara Bennett Woodhouse, *"Are You My Mother?": Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 120 (1995) (observing that "[t]ransracial adoption combines some of the most potent dilemmas of modern America . . .").

5. *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM. L.Q. 461 (1999); Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421 (2004); Cristina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL'Y 303 (2006).

doing what is best for children and for the broader society.[6] Observers often seem to agree that placement decisions are distorted by unfortunate "racial politics," even when they fundamentally disagree about the direction of the distortion.[7]

In *Palmore*, the Supreme Court intervened pointedly to curb reliance on race.[8] Ruling in a divorce case out of Tampa, the Court held that the Equal Protection Clause did not permit a state court to transfer custody of a child based on her mother's decision to marry a man of a different race.[9]

Palmore's intervention, however, plainly did not end the debate over whether race may be considered in matters of custody and adoption.[10] In the more than two decades since *Palmore*, courts, legislators, caseworkers, and adoption agencies have continued to struggle, often heatedly, to define the appropriate role for race in the placement of children.[11] Years after *Palmore*, states continued to adhere to statutes or other legal guidelines establishing priorities or preferences for same-race placements, sometimes specifying the length of time children would be kept waiting while caseworkers searched for willing adoptive parents of the child's race.[12] Even after Congress enacted legislation in the mid-1990s effectively extending *Palmore*'s prohibition of race discrimination to the context of

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6. *See* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 130-40 (1999); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998).

7. ROBERTS, *supra* note 5, at 165 (asserting that racial politics undergird support for transracial adoption); Banks, *supra* note 6, at 880 (noting that "race politics" underlie the debate over children's best interests in transracial adoption); Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 984 (2003) (observing that in the controversy over transracial adoption "the label 'racial discrimination' is deployed on both sides of the argument").

8. *Palmore*, 466 U.S. at 429.

9. *Id.* at 433-34.

10. *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 385 (2003) (concluding that while some judges continue to limit the Court's mandate on pretextual grounds, "*Palmore* does appear to have made a difference in the resolution of some litigated disputes").

11. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 930-32 (1994) (noting that *Palmore* left considerable uncertainty in the lower courts).

12. *See* Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487, 497 (1991); David S. Rosettenstein, *Trans-Racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot,"* 68 ST. JOHN'S L. REV. 137 (1994).

foster care and adoption, observers clashed over whether federal law did not leave some wiggle room for "reasonable" considerations of race.[13]

Recently, new developments have only underscored the murkiness of the legal landscape. Indeed, the developments seem to point in opposite directions at once. On one hand, in the summer of 2006, an appellate court outside Chicago became the latest to read *Palmore* narrowly.[14] So long as race is not the *sole* factor, the court ruled, state actors are free to take race into account with other factors in deciding with whom a child should live.[15] *Palmore* had nothing to say, the Illinois court held, about a divorce court's decision to use race as a "tipping factor" in determining that a biracial child would be better off with her African-American mother than with her white father.[16] In this view, the Constitution poses a barrier only to the most ham-handed uses of race in custody, leaving the state with broad discretion to weigh race flexibly alongside other considerations in determining a child's best interests.

At the same time, however, the federal government has launched a new and aggressive campaign against race-matching in adoption.[17] This campaign reads *Palmore* broadly to condemn virtually all race-conscious decisionmaking in the placement of children.[18] In this view, even inquiring into a prospective adoptive parent's plans for dealing with the special challenges of a transracial placement is said to constitute race discrimination prohibited by federal statutes and, ultimately, the Constitution.[19]

In this Lecture, I want to examine these contending understandings of the legal constraints on considering race in matters of child welfare and suggest that both are wrong. What both approaches share in common is a craving for a bright-line solution: Court decisions such as the one from Illinois would categorically open the door to free-wheeling considerations

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13. *See* BARTHOLET, *supra* note 6, at 130-40 (describing the determination of many child-welfare workers to circumvent federal anti-discrimination mandates through "creative 'interpretations'" of federal law); *cf.* Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1457 (2006) (observing that, "[u]ndoubtedly, some agencies continue to race match, in contravention of the law . . .").

14. *See In re* Marriage of Gambla, 853 N.E.2d 847 (Ill. App. Ct. 2006).

15. *See id.* at 868-69.

16. *See id.* at 868 (noting that trial court had "believed that [race] . . . tipped the scale slightly . . ." in favor of the mother).

17. *See* Elizabeth Bartholet, *Commentary: Cultural Stereotypes Can and Do Die: It's Time to Move on with Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY L. 315, 317 (2006) (describing the "dramatic new development . . . on the enforcement front").

18. *See id.* at 317-19.

19. *See id.*

of race, while the new federal enforcement policy would slam the door shut except in the narrowest imaginable exceptions. My own view is that the Constitution does not provide such neat solutions. Strict scrutiny, properly understood, requires that any consideration of race must be justified by a persuasive demonstration that it yields very substantial benefits to children. I doubt that placement could often be denied on grounds of race under this standard, but neither do I believe that it mandates the unyielding color-blindness contemplated by federal officials and some scholars.

A frustrating feature of this understanding is that it would leave to case-by-case determination whether race could legitimately factor in to a placement decision. But this inefficiency is, in my view, an unavoidable result of the need to balance the Constitution's rightful skepticism of race-conscious decisionmaking by the government against the sometimes compelling needs of individual children.

I arrive at this conclusion in three steps. First, I describe briefly the key landmarks that frame the debate over race and child custody, including the Court's decision in *Palmore* and Congress's enactment and subsequent amendment of the Multiethnic Placement Act (MEPA) in the mid-1990s.[20] This will be familiar ground for many, but a brief orientation is necessary for what follows. Second, I turn to the recent judicial and administrative rulings, and contend that they either understate (in the case of the court opinions) or overstate (in the case of the administrative rulings) the constitutional and statutory constraints. Finally, I will close by suggesting what I see as the proper limits in this area.

I should emphasize the modesty of my project. I certainly do not claim to offer a comprehensive account of the enormously complex issues raised here, including the meaning of race, its significance to children, and the desirability or feasibility of aspiring to a "color-blind" society. All I can hope to accomplish in this brief space is to clear away some of the brush in recent arguments and to identify the relevant legal standards that should guide court decisions in this area. Given the confines of this platform, what follows necessarily appears in broad strokes. But I hope that it may suggest an analytical foundation upon which future arguments and empirical data might be organized.

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20. *See* Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994); Removal of Barriers to Interethnic Adoptions, § 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996) (codified at 42 U.S.C. § 671(a)(18)).

II. HISTORY AND LANDMARKS IN THE BATTLE OVER RACE AND CUSTODY

At the outset, it is worth recalling that laws regulating race in child placement were once an integral feature of Jim Crow. Statutes in Louisiana and Texas expressly prohibited adoption across racial lines.[21] And scholars have catalogued the extraordinary lengths to which state actors sometimes went to police the racial boundaries of family life in adoption and custody. In his book *Interracial Intimacies*, Randall Kennedy, for example, recounts the Kafkaesque story of Jacqueline Henley, a biracial child who could not be adopted by the African American foster parents who cared for and loved her, solely because she had been classified as "white" when she was born.[22]

In other jurisdictions where no such laws existed, social norms achieved the same result. There are almost no recorded instances of formal transracial adoptions before World War II.[23] The practice remained no more than a trickle until the 1960s, when the integrationist ideals of the Civil Rights era spurred new interest.[24] The number of Black children adopted by white parents shot up from 733 nationwide in 1968 to 2,574 just three years later.[25]

Then, the bottom fell out. One year later, in 1972, the National Association of Black Social Workers (NABSW) famously condemned the adoption of Black children by white families in incendiary terms, describing it as a "form of genocide."[26] Child welfare agencies pulled back, and in two years the number of transracial adoptions had been cut in half.[27]

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21. The statutes were both held unconstitutional in the late 1960s and early 1970s. *See In re* Adoption of Gomez, 424 S.W.2d 656 (Tex. Civ. App. 1967); Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972).

22. KENNEDY, *supra* note 10, at 3-12.

23. *See id.* at 387. Most accounts trace the history of transracial adoption to a 1948 case in which white foster parents in Minnesota adopted the Black foster child in their care. *See* HAWLEY FOGG-DAVIS, THE ETHICS OF TRANSRACIAL ADOPTION 3 (2002); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409, 441 (1997).

24. *See* BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION 165 (2002) (recounting how "[t]he optimism of the early civil rights movement inspired some white adopters to claim African American children as their own").

25. RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION, RACE & IDENTITY: FROM INFANCY TO YOUNG ADULTHOOD 10 tbl.1.5 (2d ed. 2002).

26. *Id.* at 14-15 (quoting position paper of the NABSW presented at its 1972 national conference); *see also* Barriers to Adoption: Hearings Before the S. Comm. on Labor and Human Res., 99th Cong., 214-18 (1st Sess. 1985) (statement of William T. Merritt, President, Nat'l Ass'n of Black Social Workers).

27. *See* SIMON & ALTSTEIN, *supra* note 25, at 10 tbl.1.5.

A parallel debate was unfolding at the same time concerning the adoption of Native American children. Critics charged that child welfare authorities were tearing apart tribal communities and threatening their future by removing large numbers of Indian children and placing them into non-Indian homes.[28] Evidence in the early 1970s suggested that roughly a third of Indian children had been removed from their families and placed out through adoption or foster care. Overwhelmingly, these placements were in non-Indian homes.[29]

In 1978, Congress acted to curb Indian adoptions through the Indian Child Welfare Act (ICWA).[30] ICWA requires deference in many cases to tribal courts. It directs that Indian children should be placed within the tribe, or with other Indian families whenever possible, and with non-Indians only as a last resort.[31] Many state child-welfare and adoption agencies embraced similar rules for transracial adoptions, sometimes requiring lengthy efforts to find a same-race placement before resorting to adoption across racial lines.[32]

But just as race was looming ever larger as an obstacle to adoption, two important developments pushed back in the other direction. The first was the Supreme Court's 1984 decision in *Palmore*. *Palmore* concerned custody after divorce, not adoption, but it had potentially broader implications.[33] Linda and Anthony Sidoti, both white, had divorced in 1980, and Linda had won custody of their three-year-old daughter, Melanie.[34] A year later, after Linda moved in with and planned to marry an African American man, Anthony sought a change of custody and the trial judge assented.[35] The judge explained that "there is no issue as to either [parent's] devotion to the child . . . or respectability of the new spouse,"

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28. *See* Matthew L.M. Fletcher, *Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 39-40 n.25 (2003-2004).

29. *See* Cynthia G. Hawkins-Leon, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201, 202 (1997-1998); SIMON & ALTSTEIN, *supra* note 25, at 18.

30. Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. § 1901 (2000).

31. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). *See also* 25 U.S.C. §§ 1901-1915; Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 605-23 (2002) (describing ICWA's key features and operation).

32. *See* Bartholet, *supra* note 11, at 1189-96; Joan Heifetz Hollinger, *A Guide to the Multiethnic Placement Act of 1994 as Amended by the Interethnic Adoption Provisions of 1996*, ch. 1(C) (ABA Center on Child. & Law 1998), *available at* http://www.acf.hhs.gov/programs/cb/pubs/mepa94/mepachp1.htm (last visited June 4, 2007).

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

34. *Id.* at 430.

35. *Id.*

and insisted that "[t]he father's evident resentment of the mother's choice of a black partner [was itself] not sufficient to wrest custody from the mother."[36] But the judge reasoned that it would be in Melanie's "best interests" to avoid the "peer pressures" and "social stigmatization" sure to be visited upon an interracial household.[37]

The Supreme Court, in a unanimous opinion by Chief Justice Burger, held that the trial court's custody order in *Palmore* violated the Equal Protection Clause. Because the state court's custody decision turned on a racial classification, it triggered the "most exacting scrutiny," requiring proof that the classification was necessary to the achievement of a compelling state interest.[38] Burger's opinion allowed that protecting a young child's welfare was a state "duty of the highest order," but then failed to follow up by asking whether the change of custody was in fact necessary, or narrowly tailored, to protect Melanie's welfare.[39] Instead, the Court's opinion turned on a dime, effectively implying that the inquiry was beside the point: "[W]hatever problems racially mixed households may pose for children," the Court ruled, cannot sustain state action premised on racial prejudice[40]:

> The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. . . . [T]hey are not. . . . Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[41]

Palmore dealt only with a parental custody dispute. But its willingness to subject race-conscious custody decisions to strict scrutiny—and its condemnation of state efforts to shield children from racial prejudice by removing them from otherwise proper placements—cast a shadow over state preferences for same-race adoption as well. Any doubt on this score was removed by the enactment of the Multiethnic Placement Act (MEPA) in 1994. Even before MEPA, title VI of the Civil Rights Act of 1964 had

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36. *See id.* at 430-31.

37. *Id.* at 431.

38. *Palmore*, 466 U.S. at 432.

39. *Id.* at 433.

40. *Id.* at 434; *see also* Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 881 (2000) (observing that *Palmore* "concluded almost categorically that the harm of considering race in a custody case is greater than the possible gains").

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

broadly prohibited race discrimination in "any program or activity"[42] receiving federal funds—a statutory prohibition understood to be coextensive with the constitutional guarantee of equal protection.[43] MEPA was meant to give more specific content to this general guarantee by clarifying that any recipient of federal funds in the fields of foster care or adoption may not "delay or deny the placement of a child" on grounds of race.[44]

The original version of MEPA, passed in 1994, prohibited "delay[ing] or deny[ing] the placement" or "categorically deny[ing]" the chance to be a foster or adoptive parent "solely on the basis of . . . race."[45] The Act also expressly allowed agencies to "consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster . . . parents to meet the needs of a child."[46] The Act was significantly amended in 1996, stiffening the prohibition by dropping qualifying terms such as "categorically" and "solely," as well as the express allowance for evaluating race and cultural competence of prospective parents. As amended, the Act now prohibits, without qualification, "delay[ing] or deny[ing] the placement of a child . . . on the basis of race, color, or national origin."[47]

MEPA thus opened doors to transracial adoption that had been at least partly closed since the 1970s.[48] MEPA's timing also coincided with the enactment of another important federal statute, the Adoption and Safe Families Act of 1997 (ASFA).[49] ASFA aimed to quicken the pace of adoptions generally by limiting states' obligations under pre-existing federal law to attempt family reunification before terminating the rights of abusive or neglectful parents.[50]

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42. 42 U.S.C. § 2000d (2006).

43. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003); General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389-91 (1982).

44. *See* Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553(a)(1), 108 Stat. 3518, 4056 (1994).

45. *Id.* § 553(a)(2).

46. *Id.* For discussion of MEPA's original enactment and its subsequent amendment, see BARTHOLET, *supra* note 6, at 130-33; Hollinger, *supra* note 32.

47. Removal of Barriers to Interethnic Adoptions, § 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996) (codified at 42 U.S.C. § 671(a)(18)).

48. *See supra* text accompanying notes 27, 32.

49. Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 675(5)).

50. *See* Richard P. Barth et al., *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 372-76 (2005). For opposing views of ASFA's impact on children, compare BARTHOLET, *supra* note 6, at 188-89 (generally approving ASFA), *with* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 174-212 (2005),

The combined effect of MEPA and ASFA has been significant. The number of adoptions overall has more than doubled since ASFA took effect, and in some states, it has tripled.[51] Furthermore, a greater share of these adoptions cross racial lines: in 1998, fourteen percent of Black children adopted from foster care were adopted by a family of a different race; in 2004, the number had climbed to twenty-six percent.[52] While resistance to transracial adoption has declined, it is clear that many child-welfare professionals continue to believe, as a federal Interagency Task Force on Adoption stated in 1988, that "[a]ll things being equal, it is preferable to place a child in a family of his own racial background."[53] What is far less clear, especially after the amendments tightening MEPA, is whether it is legal for adoption workers to act on that belief.

III. RECENT DEVELOPMENTS—DIVERGING PATHS ON THE RELEVANCE OF RACE

Two recent developments highlight the range of opinion on the permissibility of considering race in making placement decisions for children. One suggests a broad allowance for race-matching, while the other suggests almost none. There is reason to think that neither is quite right.

A. *Barring Consideration of Race Only as the "Sole" Basis for a Custody Decision:* In re Marriage of Gambla

The Illinois case, *In re Marriage of Gambla*,[54] involved the divorce of an interracial couple. Both the husband, Christopher (who was white), and the wife, Kimberly (who was African American), sought sole custody of their only child, three-year-old Kira. Both of the experts in the case who

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and Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Any Miracles*, 20 EMORY INT'L L. REV. 43, 61 (2006) (contending that ASFA reflects "America's penchant for destroying families in the name of advancing children's rights").

51. *See* Jess M. McDonald et al., *Nation's Child Welfare System Doubles Number of Adoptions from Foster Care*, at 1 (Univ. of Illinois Sch. of Soc. Work, Child. & Fam. Res. Ctr. Oct. 2003), *available at* http://www.fosteringresults/results/reports/pewreports_10-1-03_doubledadoptions.pdf; Barth et al., *supra* note 50, at 385-88 (analyzing increase in adoption rate from foster care since ASFA's enactment).

52. *See* Lynette Clemetson & Ron Nixon, *Breaking Through Adoption's Racial Barriers*, N.Y. TIMES, Aug. 17, 2006, at A1.

53. Interagency Task Force on Adoption, America's Waiting Children: A Report to the President from the Interagency Task Force on Adoption (1988).

54. 853 N.E.2d 847 (Ill. App. Ct. 2006).

had been qualified to offer opinions about Kira's best interests concluded that she would be better off with her father.[55] They based this judgment partly on observations of the parties' interactions, the mother's idiosyncratic views about conventional medical care, and some history of the mother obstructing the father's access to Kira. The trial court discounted the experts, however, and found both parents to be perfectly equal with respect to each "best interests" factor.[56] The deadlock was finally broken by considering race:

> The trial court noted that Kira would have to learn to exist as a biracial woman in a society that is sometimes hostile to such individuals and that Kimberly would be better able to provide for Kira's emotional needs in this respect. The trial court believed that this factor tipped the scale slightly in Kimberly's favor, and it awarded Kimberly sole custody of Kira.[57]

Reviewing this decision, the Illinois Appellate Court found that this approach comported both with state law and the constitutional dictates of *Palmore*. The state court reasoned that, in *Palmore*, "the custody award was unconstitutional, not because the trial court considered race, but because the trial court considered *solely* race."[58] The court concluded that "so long as race is not the sole consideration for custody decisions, but only one of several factors, it is not an unconstitutional consideration."[59] The court noted that this view was supported by "[v]olumes of cases from other jurisdictions" interpreting *Palmore* in the same way.[60] Under this reading of *Palmore*, the Illinois trial court's use of race was unproblematic because race was certainly not the only factor considered, it was just the only distinguishing factor.

This understanding of *Palmore* is almost certainly incorrect. As an initial matter, it is simply wrong to say that the *Palmore* trial court had considered only race. To the contrary, the court in Tampa had considered a series of allegations by the father about the mother's neglectful

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55. *Id.* at 861-62, 870.

56. *Id.* at 861-62, 866-68.

57. *Id.* at 868. The trial court's decision to match a biracial child with her African American mother rather than with her white father has precedent in a series of earlier divorce custody cases. *See* Forde-Mazrui, *supra* note 11, at 935-36 (reviewing cases); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990-1991).

58. *In re Marriage of Gambla*, 853 N.E.2d at 869 (emphasis in original).

59. *Id.*

60. *Id.*

caregiving,[61] but implicitly rejected these claims, finding "no issue as to either party's devotion to the child."[62] The court then went on, as did the trial court in *Gambla*, to consider race, a consideration that ultimately carried the day. In neither case, then, was race the "sole consideration" relevant to custody.

Nor, in any event, is there much analytic substance to the distinction between using race as a "sole" factor and using it to "tip scales" that would otherwise be balanced differently. The distinction recalls the debate in the Supreme Court's affirmative action cases over the relative weight to be assigned to race in admissions decisions. In *Regents of the University of California v. Bakke*,[63] Justice Powell valorized the use of race as a soft "plus" factor in a broader mix of diversity considerations, contrasting the overly rigid way in which the University of California-Davis medical program made race effectively the sole qualifying characteristic for its set-aside seats.[64] More recently, in the University of Michigan cases, the Court disparaged the undergraduate admissions program for rigidly quantifying the comparatively higher value it assigned to race as compared to other diversity factors.[65] It is important to remember, however, that the Court's evaluation was relevant to its determination of whether the racial classifications could be considered "narrowly tailored" to the compelling goal of diversity. By contrast, *Gambla* and similar cases have instead looked to the relative weighting of race to decide whether the classification should be subject to strict scrutiny in the first place.

Other courts have tried slightly different gambits to cabin or sidestep entirely the application of equal protection principles to race-based child-placement decisions. In an *en banc* decision in 1977, the former Fifth Circuit reasoned that race-matching should not be considered a suspect racial classification because race was considered only in "a nondiscriminatory fashion."[66] "Impact alone does not sustain a claim of racial discrimination," the court noted.[67] Rather, intent to discriminate must also be shown, and "[t]here has been no suggestion . . . that the defendants

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61. *See* Palmore v. Sidoti, 472 So. 2d 843, 844 (Fla. App. Ct. 1985) (among others, Melanie had suffered from head lice and poor hygiene); KENNEDY, *supra* note 10, at 380-81.

62. *See* Palmore v. Sidoti, 466 U.S. 429, 430 (1984) (quoting trial court's opinion).

63. 438 U.S. 265 (1978).

64. *Id.* at 317-18.

65. *See* Gratz v. Bollinger, 539 U.S. 244, 246-47 (2003).

66. Drummond v. Fulton Co. Dep't of Fam. & Children's Servs., 563 F.2d 1200 (5th Cir. 1977) (*en banc*). For an eloquent discussion of *Drummond* and its aftermath, see Carl E. Schneider, *Strangers and Brothers: A Homily on Transracial Adoption*, 2 WHITTIER J. CHILD & FAM. ADVOCACY 1 (2003).

67. *Id.* at 1205.

had any purposes other than to act in the best interests of the child when it considered race."[68] This reasoning, however, conflates motivation and intent. The Supreme Court has now clearly held that all classifications intentionally drawn on the basis of race are subject to strict scrutiny, even if the motivations behind the classification are benign.[69]

The former Fifth Circuit also sustained consideration of race in adoption by fitting it within broader policies to match adoptive parents and children according to all physical features, including eye color, hair color, facial features, and so on, on the "belief that a child and adoptive parents can best adjust to a normal family relationship if the child"[70] can pass as a genetic offspring. The court freely allowed that it did "not have the professional expertise to assess the wisdom of that type of inquiry," but deferred because the supposed benefit is plausible.[71]

Here again, the court's reasoning begged the question. The court's deference would be appropriate if only the rational-basis test applied; but strict scrutiny cannot be avoided simply by packaging race alongside non-suspect classifications. Under strict scrutiny, a court must be convinced of the "wisdom" and demonstrated necessity of using suspect classifications; plausible conjecture is not enough.[72]

Contrary to the artifices found in these cases, both old and new, all race-conscious government decisionmaking must be subjected to strict scrutiny. There is no basis for placing race-based decisions in the context of adoption and custody as somehow outside the scope of heightened constitutional review.

B. *The Move Toward Color-Blindness in Federal Enforcement Policy*

While *Gambla* has sought to narrow *Palmore* almost to its facts, officials in the federal government lately have been seeking to push *Palmore* to its outer limits. Writing in 2003, Randall Kennedy forecast dim prospects for aggressive enforcement of federal civil rights law against adoption agencies. He observed that the U.S. Department of Health and Human Services (HHS), the agency charged with enforcing MEPA and related laws against race discrimination, was dominated by "well-entrenched officials . . . [who] were opposed to the law in the first place"

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68. *Id.*

69. *See* Johnson v. California, 543 U.S. 499, 505 (2005); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27 (1995).

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

71. *Id.* at 1206.

72. *See Johnson*, 543 U.S. at 509-15.

and were unlikely to take any "aggressive steps" to enforce it.[73] Yet, even while Professor Kennedy's book was probably at press, officials in the HHS Office for Civil Rights were preparing a 60-page letter finding Hamilton County, Ohio, and the State of Ohio in violation of title VI and MEPA.[74] Although the agency had launched more than 130 investigations over the previous 5 years, this was the first time it had issued a formal letter finding a violation.

The enforcement letter marks an important turning point in the federal government's understanding of the legal strictures on race-matching.[75] The letter ruling, based on an investigation into adoptions in the Cincinnati area spanning more than four years, catalogued a series of illegal practices, both in agency policies and in individual adoptive placements. It began with the case of two-year-old Leah Hahn (a pseudonym assigned by HHS).[76] Leah, who is African American, had been born with Fetal Alcohol Syndrome and a form of dwarfism. After she had been in the permanent custody of the county for about six months, a married couple, the Atkinsons, inquired about the possibility of adopting her.

The Atkinsons appeared in many respects to be an ideal placement. They had three biological children, each of whom had significant special health needs, and they were longtime foster parents to a fourth child, an Alaskan Native who, like Leah, had a form of dwarfism as well as other special needs. The Atkinsons learned about Leah from Little People of America, a national advocacy group in which the Atkinsons were active. There was, however, a potential catch: The Atkinsons were white and lived in North Pole, Alaska, a suburb of Fairbanks.[77]

Caseworkers in Cincinnati responded cautiously to the Atkinsons' expression of interest. They wanted to know how many African Americans lived in Alaska and in the area where the Atkinsons lived. They asked about the racial composition of the Atkinsons' church and school system. Finally, some caseworkers were concerned about the Atkinsons' stated

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73. KENNEDY, *supra* note 10, at 433. Bartholet, writing in 1999, similarly observed that HHS "has been awfully quiet" and found no "evidence of the kind of enforcement activity that would make significant change in the near future seem likely." BARTHOLET, *supra* note 6, at 133; *see also* Schneider, *supra* note 66, at 4 & n.16 (discussing the HHS's failure to enforce MEPA vigorously).

74. Letter of Findings, from Lisa M. Simeone, Regional Manager of the Office for Civil Rights, U.S. Dep't of Health & Hum. Servs., to Suzanne A. Burke, Director of the Hamilton Cty. Dep't of Hum. Servs., & Tom Hayes, Director of the Ohio Dep't of Job & Fam. Servs. (Oct. 20, 2003) [hereinafter Ohio Letter of Findings], *available at* www.hhs.gov/ocr/mepa/hamilton_co2.pdf.

75. *See* Bartholet, *supra* note 17, at 317.

76. Ohio Letter of Findings, *supra* note 74, at 15.

77. *Id.*

intention to raise Leah in "a color-blind manner"; one caseworker expressed the view that "there [is] no such thing as 'color blind.'"[78]

The agency decided to wait on consideration of the Atkinsons' application to see if alternative placements might be found.[79] After several months, the agency matched Leah with an African American woman in Columbus, Ohio, who ultimately decided that she did not want to adopt a child with dwarfism.[80] Thereafter, Leah was adopted by a white woman in Cleveland.[81] Although the new mother was white, HHS found that race still drove the agency's decision.[82] It noted that "this placement was looked upon favorably by [the county agency] because [the woman's] neighborhood was integrated, and some of her family members were biracial."[83]

HHS held that this consideration of race violated title VI,[84] the statutory ban on race discrimination that parallels the U.S. Constitution's guarantee of equal protection.[85] The agency had both delayed and ultimately denied the Atkinsons' application on grounds of race.[86] HHS did not base its finding only on the county's decision to defer its decision on the Atkinsons. It also held that the agency had no business inquiring about the racial diversity of the Atkinsons' community and social circles, or their plans for addressing Leah's racial identity.[87] As HHS saw it, the county's selective inquiry into community diversity and plans for addressing a child's racial heritage *only* in cases of transracial adoption showed that "different standards" applied depending on the race of the applicants. Such discrimination, HHS ruled, could not be justified by "generalized assumptions and stereotypes of parents based on their race"—such as that African American parents are specially able to guide African American children in coping with racial prejudice.[88] Instead, under strict scrutiny, any

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78. *Id.* at 16.
79. *Id.*
80. *Id.* at 17.
81. Ohio Letter of Findings, *supra* note 74, at 18.
82. *Id.*
83. *Id.*
84. Civil Rights Act of 1964, 42 U.S.C. § 2000a.
85. Ohio Letter of Findings, *supra* note 74, at 18-19.
86. *Id.*
87. *See id.* at 54, 58.
88. *Id.* at 55-56. HHS found that agency had repeated its violation of title VI when it made similar inquiries of other white prospective adoptive parents, including Chad and Ruth Lamm of rural Easton, Illinois stating:

> HCDHS employed race-based criteria in evaluating the Lamms as prospective adoptive parents for Leah. HCDHS sought out information about how much

inquiry relating to race must be supported by exceptional facts suggesting that a particular child has a peculiar and compelling need for a same-race placement.[89] Under this approach, for instance, it might be permissible to consider race in placing an older teenager who was adamant in resisting placement with white parents; but broader assumptions about the benefits to children of interacting with adults who share the child's racial background are impermissible.[90]

In a separate Penalty Letter, HHS ultimately fined Ohio $1.8 million for its repeated transgressions.[91] In practical terms, the amount of this penalty may be as significant as the legal reasoning that underlies it. As Elizabeth Bartholet rightly points out, HHS's willingness to impose—for the first time—such a severe financial penalty "raises the stakes in a way that agency directors and agency workers will not be able to ignore."[92]

HHS underscored its newly aggressive commitment to prohibiting race-matching in a second enforcement action against South Carolina in 2005.[93] As in the Ohio enforcement action, the Department found that the State's routine practice of subjecting "families who were willing to adopt transracially . . . to an extra layer of scrutiny to assess their ability to adopt transracially" violated both MEPA and title VI.[94] HHS opined that "assessing the race and ethnicity of the parents' friends, the race and ethnicity of the members of the parents' church, the race and ethnicity of the parents' neighbors, and the racial and ethnic make-up of nearby schools," and generally "forc[ing] the prospective parent to defend their ability to nurture a child of a different race or ethnicity," was illegal.[95] So, too, was asking prospective transracial adoptive parents whether their

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> contact the Lamms had with the African American community and whether there were African American teachers or students in the local school system . . . HCDHS based its need for race-based inquiries solely on the fact that Leah was of a different race than the Lamms.

Id. at 20.

89. BARTHOLET, *supra* note 6, at 132.

90. *See id* at 132-33 (quoting HHS "Guidance" Memorandum dated June 5, 1997).

91. Penalty Letter from Wade F. Horn, Assistant Secretary for Children and Families, HHS, to Tom Hayes, Director of the Ohio Dep't of Job & Fam. Servs. (Oct. 20, 2003), *available at* www.law.harvard.edu/faculty/bartholet/mepa.php (last visited Mar. 6, 2007).

92. Bartholet, *supra* note 17, at 319.

93. Letter of Findings from Roosevelt Freeman, Regional Manager of HHS Office for Civil Rights, to Kim S. Aydlette, Director of the South Carolina Dep't of Soc. Servs. (Oct. 31, 2005) [hereinafter South Carolina Letter of Findings], *available at* http://www.hhs.gov/ocr/mepa/LOFFINALOct3105.pdf.

94. *Id.* at 22.

95. *Id.*

extended families would welcome a child of a different race or whether their neighbors would react with hostility.[96] In short, "[a]n evaluation system which assesses a parent's ability to adopt transracially evaluates applicants differently on the basis of race, color or national origin, and thus violates Title VI."[97] The Department fined South Carolina $107,481.[98]

IV. TOWARD A NEW UNDERSTANDING OF THE SCRUTINY REQUIRED OF RACE-CONSCIOUS CUSTODY DECISIONS

HHS's rigid view of the legal strictures on race in child placement could not be more different from the almost-anything-goes attitude exemplified by the Illinois court's decision in *Gambla*. Whereas *Gambla* was prepared to validate almost any use of race as a factor in placement decisions, so long as it was not exclusive, HHS would permit almost none. Indeed, even assuming that transracial placements raise unique child-welfare issues appears to skirt the law, in the agency's view. HHS's hostility to race-matching is certainly more in keeping with the tenor of MEPA's evolution toward color-blindness in adoption and foster care, but in some respects may go too far. The Department is right to subject race-based decisions to strict scrutiny. Title VI, after all, follows constitutional standards in scrutinizing race discrimination, and MEPA ties its standards to title VI. But there is reason to doubt that strict scrutiny so tightly limits government inquiry into race.

In one important respect, HHS's view of strict scrutiny is actually too loose. The Department—like the courts in *Gambla*[99] and similar cases, and like a good deal of the scholarship in this area—assumes that states have a "compelling interest" in ensuring the "best interests" of affected children.[100] The Supreme Court came close to stating the same view in *Palmore*, although it stopped just short: it described the "best interests" of children as a "substantial" government objective before going on to

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96. *See id.* at 24.

97. *Id.* at 23. In addition, HHS also found that South Carolina violated MEPA and title VI by going out of its way to accommodate the racial preferences of birth mothers in placing children and using race as a "'tie-breaking' factor among families otherwise equally appropriate for a child." *Id.* at 20, 26-27.

98. Penalty Letter from Wade F. Horn, Assistant Secretary for Children and Families, HHS, to Kim Aydlette, Director of South Carolina Dep't of Soc. Servs., at 3 (Feb. 24, 2006), *available at* www.law.harvard.edu/faculty/bartholet/mepaSCsignedpenaltyletter.pdf.

99. *See supra* text accompanying note 54.

100. *See, e.g.*, Ohio Letter of Findings, *supra* note 74, at 11 ("The only compelling governmental interest for race-based decisionmaking in the context of adoption and foster care placements is protecting the 'best interests' of the child who is to be placed.").

undercut that proposition by holding that "whatever" the impact on children, their custody may not be reassigned out of concerns for racial prejudice.[101]

The difficulty with classifying a child's "best interests" as a compelling state interest, besides the fact that Supreme Court precedent seems to refute the idea,[102] is that the concept is simply too amorphous.[103] It could mean anything from shielding a child from life-threatening harm to simply giving a child a tiny, marginal advantage over available alternatives. To legitimately qualify as "compelling," any potential gain for children must be quantified as significant, not merely extant.[104]

Because of the slipperiness of the "best interests" standard, some judges and scholars have concluded that the only child-welfare interest substantial enough to rank as "compelling" is preventing serious harm to a child.[105] But this may well be too narrow. Given the state's basic trust obligation to children and the way in which the state's own future is tied to the well-being and healthy development of the next generation, it seems plausible to understand the state's "compelling" interests as extending beyond merely sparing a child from injury to ensuring that children have the opportunity to flourish. This conclusion would be consistent with the decision in *Troxel v. Granville*,[106] which left the door open to state intervention to preserve children's important relationships with non-

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101. Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984). As Margaret Brinig points out, it is of course possible that the trial court's concern with the child's "best interests" was pretextual and intended to "provide cover for a more sinister agenda." Margaret F. Brinig, *The Child's Best Interests: A Neglected Perspective on Interracial Intimacies*, 117 HARV. L. REV. 2129, 2147 (2004).

102. *Palmore* itself seems inconsistent with genuine recognition of a child's best interests as a compelling public interest, since the trial court's undisturbed "best interests" finding was insufficient to sustain its custody order. In addition, *Reno v. Flores*, 507 U.S. 292, 304 (1993), *DeBoer v. DeBoer*, 509 U.S. 1301, 1302 (1993), and *Caban v. Mohammed*, 441 U.S. 380, 391 (1979), each subordinate claims concerning the "best interests" of children to other constitutional values, suggesting that the asserted interest is something less than truly "compelling."

103. *Cf.* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 114 (2000); *cf.* Perry, *supra* note 57, at 56-57 (contending that "in the child placement decisionmaking where racial differences are present, the touchstone rule of custody—the best interests rule—does little to assist in analyzing or resolving the difficult issues often presented").

104. *See* David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1489-90 (2006).

105. *See* Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 DRAKE L. REV. 279, 331 (2000); Garnett, *supra* note 103, at 114; *In re* Custody of Smith, 969 P.2d 21, 28-29 (Wash. 1998), *aff'd on other grounds, sub. nom.* Troxel v. Granville, 530 U.S. 57 (2000).

106. 530 U.S. 57 (2000).

parents even in the absence of proof that they would otherwise be harmed.[107] If this is correct, then race-based decisionmaking in this context is permissible only if it can be demonstrated that taking race into account is needed to substantially benefit children.

Framing the legal question in this way has several implications. First, race may not be considered where it yields only marginal gains for child welfare. Under this view, the Illinois court was plainly wrong in *Gambla* to rely on race where it found that this consideration tipped the scales only "ever so slightly" in favor of the mother.[108] Benefits so small cannot justify the very real costs of entrenching race-conscious decisionmaking by the government. The U.S. Supreme Court has long emphasized that racial classifications are costly for society because they "delay the time when race will become a truly irrelevant, or at least insignificant, factor."[109] In the context of custody decisions, they arguably impose distinctive costs as well on individual family members, erecting barriers between parents and children and effectively validating for children "racial designations which stem, at least in part, from a rigid historical system of racial identification."[110] Particularly given these costs, it is indeed difficult, as Twila Perry has written, to imagine a sufficiently strong justification for considering race in custody disputes between a child's parents.[111] In such cases, both parents presumably already have established a loving bond with their child motivating them to be sensitive to their child's needs, and both have demonstrated a willingness to overcome racial boundaries in their own relationship. Under these circumstances, resorting to general considerations of race in deciding custody seems quite unlikely to yield substantial benefits to the child.

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107. For an extended analysis of the opinions in *Troxel*, see David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125 (2001).

108. *In re* Marriage of Gambla, 853 N.E. 2d 847, 871 (Ill. App. Ct. 2006).

109. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); *see also* Johnson v. California, 543 U.S. 499, 507 (2005) (discussing the harm that comes from government policies that "perpetuat[e] the notion that race matters most").

110. Perry, *supra* note 57, at 69. For additional discussion of the costs to children, see Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99, 100 (1995) (observing that barriers to transracial adoption "separate children and prospective parents into racial categories, assign children to racially-matched parents, and hold children for whom there is no racial match available . . ."); Bartholet, *supra* note 11, at 1223-26 (reviewing "the evidence as to costs for children of current inrace placement preferences"); Forde-Mazrui, *supra* note 11, at 936-43 (describing "the psychological costs to individual Black children when courts and agencies practice racial matching.").

111. *See* Perry, *supra* note 57, at 126-27.

Second, given the available empirical evidence about child well-being in transracial adoptions, it is highly doubtful that a broad use of race to decide custody issues could be sustained. Studies overwhelmingly show that children do very well raised in multiracial families.[112] Indeed, researchers have found that transracial placements are as stable and deeply attached as same-race placements, and that "transracial adoptees do as well on measures of psychological and social adjustment as black children raised inracially in relatively similar socio-economic circumstances."[113] Interview data with adult transracial adoptees generally offer the same positive assessment.[114] Therefore, it will generally be difficult to demonstrate a "substantial benefit" to children from a same-race placement, particularly if the alternative would require a significantly longer wait in temporary foster or institutional care.[115]

Yet, there are surely some individual cases where children might benefit substantially from taking race into account. Suppose, for example, that a transracial placement would place an African American child into an isolated, all-white community intensely hostile to African Americans, and that the white adoptive parents had given no serious thought to dealing with this dilemma. Without doubt, it could be shown that placing the child in a less hostile environment would substantially benefit her. Researchers studying child welfare in transracial placements have found that "[i]n particular, a community's racial dynamics can affect transracially adopted children's adjustment," and that "[t]hose making transracial placement decisions should thus consider community- and neighborhood-level influences."[116]

Yet, here is where I think *Palmore* and the HHS interpretation go wrong. *Palmore* suggests that "whatever" the harm to children, a custody decision cannot "give effect" to prejudice.[117] For its part, HHS contends that even to inquire about the racial diversity and potential hostility of a transracial placement imposes "different standards." But without inquiring,

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112. *See* RITA J. SIMON & RHONDA M. ROORDA, IN THEIR OWN VOICES: TRANSRACIAL ADOPTEES TELL THEIR STORIES 13-25 (2000); SIMON & ALTSTEIN, *supra* note 25; Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 FUTURE OF CHILDREN 104, 117 (1993); Kathleen L. Whitten, *Permanent Families for African-American Foster Children in an Imperfect World*, 12 VA. J. SOC. POL'Y & L. 490, 495-97 (2005). *But cf.* Margaret F. Brinig, *Promoting Children's Interests Through a Responsible Research Agenda*, 14 U. FLA. J.L. & PUB. POL'Y 137, 149-51 (2003) (noting limitations in available studies).

113. Bartholet, *supra* note 11, at 1255.

114. *See* KENNEDY, *supra* note 10, at 468-78; SIMON & ROORDA, *supra* note 112.

115. *See* Schneider, *supra* note 66, at 9.

116. Whitten, *supra* note 112, at 497.

117. Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984).

it is impossible to know if the child would substantially benefit from a different placement.

HHS faults Ohio for failing to subject same-race adoptive placements to the same scrutiny. A presumption that Black parents have special competence to help children grapple with the cruelties of racial prejudice, HHS argues, is nothing more than a stereotype. Yet, the Supreme Court has arguably challenged that notion. In *Grutter v. Bollinger*,[118] the 2003 case upholding the use of race-based affirmative action at the University of Michigan Law School, the Court held that racial diversity in the classroom is a compelling state interest. The Court accepted that race alone is sufficient to mark the experience of "being a racial minority in a society in which race unfortunately still matters."[119] The contexts are obviously different, but the core proposition carries over: in our society, being a racial minority provides distinctive experience that yields insight into navigating prejudice.[120] It is an insight that cannot be as routinely attributed to whites. Sharon Rush has made the same point effectively in her personal account of raising her daughter in a transracial family, documenting how her experience transformed her own understanding of race and racial prejudice.[121]

The Supreme Court thus found that there is a compelling educational benefit from being exposed to classmates of different races in a law school or college classroom, because the contributions of minority-race students will inevitably be informed by the distinctive experience of living in a society in which "race . . . matters." If we accept that proposition, it requires only a small leap to imagine a similar benefit to children from being exposed to caregivers and playmates of diverse racial backgrounds, and to accept that minority-race caregivers will have a distinctive base of experience to draw upon in addressing issues of racial prejudice. This is not to suggest, of course, that the advantage of this experience is enormous or all-important, nor that considerations of race should predominate. As Hawley Fogg-Davis has written:

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118. 539 U.S. 306, 343 (2003).

119. *Id.* at 333.

120. *See* Tanya Washington, *Loving* Grutter*: Recognizing Race in Transracial Adoptions*, 16 GEO. MASON U. CIV. RTS. L.J. 1, 10-12 (2005). Hawley Fogg-Davis has written perceptively about the complex process of "racial navigation," in which "individuals . . . challenge existing racial meanings in a lifelong process of self-reflection and -revision." FOGG-DAVIS, *supra* note 23, at 2.

121. *See* SHARON E. RUSH, LOVING ACROSS THE COLOR LINE: A WHITE ADOPTIVE MOTHER LEARNS ABOUT RACE (2000). Rush writes, for instance, "[a]s I write this book and look back over the years . . . , my understanding of the complexities of race make me realize how limited my views were when my daughter was a baby." *Id.* at 23.

> Race matters, but we need to be careful in thinking about *how* it ought to matter. Racial expectations weigh heavily on our minds and bodies, but we should not think of these expectations as overpowering our capacity to respond to racial ascription in active ways that foster multifaceted self-concepts.[122]

Yet the new HHS enforcement policy considers the racial diversity of the neighborhoods, schools, and churches of prospective adoptive parents essentially irrelevant and wholly out of bounds.

In my view, the U.S. Constitution permits states to inquire specifically into the racial diversity and "hospitality" of transracial child placements for the same reason it permits colleges and universities to consider race in student admissions: because we live in a society in which "race unfortunately still matters." But the government should be permitted to act upon the information it gathers—to delay or deny a transracial placement—only where the child would provably benefit very substantially.

This approach contemplates that the permissible use of race will be determined case by case, after reasonable inquiry into the home life offered by a prospective parent. Race would then be permitted to guide placement decisions only when it could be shown that particular facts relating to a prospective adoptive home, or to a child's developmental needs, established a very strong benefit from same-race placement. Under this approach, it might well be lawful for an agency to prefer a same-race placement of a minority-race child over placement in an isolated, all-white community with white parents who have no sensitivity to the ongoing reality of racial prejudice in contemporary society. Any such judgment must take into account far more than just race, of course. If the parents in the transracial placement were uniquely equipped to meet the child's special health needs, for example, or if superior placements elsewhere were not readily available, so that alternatives would mean continued impermanence in the child's upbringing, the comparative significance of race would quickly fade. But if, all things considered, evidence established that placing a child in a same-race household would substantially benefit the child, the Constitution should not be understood to stand in the way.

For many, the indeterminacy of requiring judicial assessments of the substantiality of claimed benefits for children will be deeply unsatisfying. Some will object, not unreasonably, that case-by-case balancing will make it easier for caseworkers who categorically oppose transracial adoption to

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122. FOGG-DAVIS, *supra* note 23, at 113.

manipulate outcomes, injecting race even where the facts do not prove its substantial importance.[123] Others from a different perspective will object that it compromises the well-being of children by not making their "best interests" the polestar of all placement decisions. And still others will object that the failure to erect a bright-line bar on race discrimination undermines the principle of equality.

Yet, I see no good alternative in a context in which important constitutional values conflict. *Palmore* itself, as Barbara Woodhouse has pointed out, rested on a categorical intuition: that taking account of race and prejudice perpetuates racial division.[124] Yet what is unsatisfying about *Palmore*—and what has left the door open to such confusion in the decades since—is its failure to come to grips with the balancing that is inevitably required in this setting. *Palmore* acknowledged that children have their own powerful interests at stake in this dilemma, and then promptly set them aside in the cause of eradicating racial prejudice. It is messy and can be misused, but finding some balance point between the intersecting interests of society and children with regard to race and custody seems to me unavoidable given the flaws of contemporary society, in which "race unfortunately still matters."

V. CONCLUSION

More than three decades after *Palmore v. Sidoti*, the nature of the legal constraints on considerations of race in public decisions about children remains contested and unsettled. We are, however, making progress toward a consensus. In part because of Congress's intervention through MEPA and the Interethnic Adoption amendments of 1996, and newly aggressive enforcement of federal law, longstanding barriers to transracial adoption are falling away.

Palmore and related changes in federal constitutional and statutory law have not worked a revolution in family composition; indeed, social preferences for intraracial intimacy remain strikingly durable decades after

123. Randall Kennedy, for example, argues that "pragmatic considerations counsel in favor of the institution and enforcement of a *strict* antidiscrimination norm in adoption," because "[n]othing less will break the deeply entrenched habit of race matching that remains rife throughout this country." KENNEDY, *supra* note 10, at 417-18; *accord* BARTHOLET, *supra* note 6, at 130 (warning that "any leeway given to utilize race would be used to evade [the antidiscrimination mandate]").

124. Woodhouse, *supra* note 4, at 124.

the removal of legal obstacles.[125] Yet, there are signs of change here as well. The numbers of transracial adoptions are growing both domestically and internationally; the share of African American children adopted from foster care by parents of a different race nearly doubled between 1998 and 2004,[126] and in 2006, Ethiopia became the fifth largest country of origin for children adopted internationally in the United States (up from 16th in 2000).[127] And, importantly, studies of families who have bridged racial lines in parenting continue to be generally reassuring about the outcomes.[128]

Yet, as the Illinois court's recent decision in *Gambla* reflects, many observers continue to believe that race remains a relevant and often important factor in determining the custodial and familial associations of children. The Illinois court, like others before it, resolved the tension by allowing for race to be freely considered in placing children, so long as race is not given overtly dominant weight.[129] That is progress, to be sure—it removes at least the most heavy-handed categorical uses of race as a qualifying characteristic for parenthood—but it plainly leaves the door open for wide reliance on racial preferences and stereotypes that are wholly unsupported and unsupportable.

In stark contrast, the aggressive posture recently taken by HHS in interpreting federal law effectively pushes race entirely from the field of relevant considerations. Its hostility to considerations of race is so strong that it would forbid not only preferences for same-race placements, but even inquiring into the preparedness of transracial adopters to protect their children against racial prejudice.[130]

I have suggested that the strict scrutiny required by the Constitution for racial classifications—the standard that drives HHS's interpretation of the federal statutory prohibitions of race discrimination in child placements—does not compel the degree of color-blindness suggested by the HHS's recent enforcement actions. Strict scrutiny would not permit routine reliance on race as a factor in placement decisions, but leaves room

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125. *See* RACHEL MORAN, INTERRACIAL INTIMACY 99-101 (2001); Banks, *supra* note 6, at 887-88; Bartholet, *supra* note 11, at 1204-06; Joanna L. Grossman & John DeWitt Gregory, *The Legacy of* Loving, 51 HOW. L.J. (forthcoming 2007).

126. *See supra* note 52 & accompanying text.

127. *See* Jane Gross & Will Connors, *Surge in Adoptions Raises Concerns in Ethiopia*, N.Y. TIMES, June 4, 2007.

128. *See supra* notes 112-14 & accompanying text. *But cf.* Brinig, *supra* note 101, at 2150-59 (presenting empirical data suggesting some additional risks for children raised by interracial couples).

129. *See supra* text accompanying notes 58-60.

130. *See supra* text accompanying notes 94-97.

for reliance where considerations of race are demonstrably necessary to achieving substantial gains in the welfare of an affected child. The available social science does not suggest that children are commonly harmed by transracial placements; indeed, in certain respects they appear to enjoy distinct benefits. Yet, studies also suggest that the readiness of transracial adoptive parents to anticipate and address issues relating to race is an important factor in ensuring that success.[131] At a minimum, then, some specialized inquiry into the preparedness of transracial adoptive parents seems justifiable. Beyond that, considerations of race in child placement must depend upon empirical proof that, for a particular child, the benefits of preferring a same-race placement would be sufficiently significant to justify the social costs of race-conscious decisionmaking. While the available evidence suggests this will not be often, it remains incomplete and recognizes—as should the Constitution—that the circumstances and needs of some individual children are exceptional.

131. *See* Whitten, *supra* note 112, at 497.