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COLOR CONSCIOUS: THE UNCONSTITUTIONALITY OF ADOPTIVE PARENTS' EXPRESSION OF RACIAL PREFERENCES IN THE ADOPTION PROCESS

Colin Schlueter*

The practice of transracial adoption, the adoption of a child who is not the same race as the adoptive parents, has been the subject of much controversy and debate.¹ When considering the intersection of racial classifications or considerations and the role they play in the adoption process, the primary disagreements appear to be, on one hand, over what solution is the most appropriate with regard to public policy, and, on the other, what solution is or is not constitutionally required.² This debate becomes all the more complicated when one considers the various impacts transracial adoption has on the three big players in the adoption game; the State, the child, and the potential adoptive parents.³

One of the murkiest, but perhaps most compelling, topics in the myriad of issues surrounding the transracial adoption debate is the constitutional implications, in an equal protection context, of the consideration of race in the adoption process.⁴ This

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¹ See generally, R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 877–78 (1998) (“The role of race in adoption has been an intensely and widely debated topic . . . attracting the attention of legal scholars, social scientists, journalists, and politicians.”).

² See David D. Meyer, Lecture, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL'Y 183, 186 (2007) (noting the “contending understandings of the legal constraints on considering race in the matter of child welfare . . .”); see also Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994) (reviewing how courts have differed in their determination of what is constitutionally permissible with respect to the consideration of race in custody or adoption proceedings and detailing policy arguments for and against transracial adoption).

³ See Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1454–58 (2006) (discussing the perceived and actual barriers to adoptive parents when considering transracial adoption); Meyer, *supra* note 2, at 184–85, 189 (noting the conflict between the law, the best interest of the child, and the child-welfare system); see also Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH & LEE L. REV. 203, 247–50 (2009) (describing the interaction of entities in the “adoption market” and some of the various interests of “Baby Market Intermediaries,” adoption agencies, and potential adoptive parents).

⁴ See, e.g., Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1243 (1991) (“It should be clear that the

Note neither seeks to clear nor further muddy these waters, but instead examines a segment of the long-running discourse on the intersection of race and adoption that seems to have gone relatively unaddressed. Although legal scholarship has paid a great deal of attention to adoption agencies when addressing the equal protection concerns implicated when state run adoption agencies or child welfare services consider race in the adoption or child custody process,⁵ the constitutionality of adoptive parents' ability to exercise a racial preference when adopting a child has gone relatively unexamined and unquestioned.⁶

What *should* be done, either from a public policy or best interest of the child standpoint, when considering potential adoptive parents' assertion of racial preferences in the adoption process, is not a novel topic of discussion.⁷ The possible constitutional restrictions on this "demand" side⁸ of the adoption equation, however, remains fairly neglected. This Note is not concerned with which one of the many prescriptive recommendations that scholars have offered with respect to transracial adoption is the correct one. It is concerned with what *must* be done under the Constitution.

As such, this Note will examine under what conditions potential adoptive parents could be subject to the strictures of the Constitution and the Equal Protection Clause when participating in the *state run* adoption process.⁹ It will develop the argument that,

powerful preference for same-race placement embodied in many of today's [adoption] policies violates guarantees against discrimination contained in . . . the Constitution."); Meyer, *supra* note 2, at 185–86 (noting the "murkiness of the legal landscape" with respect to the extent to which the courts may consider race when making child custody decisions).

⁵ See, e.g., Davidson M. Pattiz, Note, *Racial Preferences in Adoption: An Equal Protection Challenge*, 82 GEO. L.J. 2571, 2574 (1994) (positing that a de facto ban on transracial adoption in race-based adoption statutes "do[es] not satisfy the Constitution's equal protection mandate"); Mark C. Rahdert, *Transracial Adoption—A Constitutional Perspective*, 68 TEMP. L. REV. 1687 (1995) (arguing that, in accordance with the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the use of racial criteria in the adoption setting is subject to strict scrutiny).

⁶ Scholarly literature has paid little attention to the legality of potential adoptive parents asserting racial preferences in the adoption process since Professor Banks's 1998 response *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences*, *supra* note 1, to Elizabeth Bartholet's *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, *supra* note 4, in which Banks proposed his scheme of "strict nonaccommodation" on the part of adoption agencies when considering the racial preferences of adoptive parents, but stated that this policy was not "constitutionally required, but . . . constitutionally permitted." Banks, *supra* note 1, at 940; see also Maldonado, *supra* note 3, at 1470 ("Although there is a vast literature condemning race-matching practices, only recently have scholars begun to view adoptive parents' racial preferences as problematic.").

⁷ See *infra* note 13 and accompanying text (comparing arguments on transracial adoptions).

⁸ Cf. Krawiec, *supra* note 3, at 205–07 (discussing the idea of "baby market[s]" and "supply [and] . . . demand" in these markets).

⁹ This Note is only concerned with adoptions that are facilitated directly by a governmental agency, such as a state department of child or human services, as opposed to adoption organizations that do not receive governmental support, outside of licensure or regulatory oversight.

by way of the “state action” doctrine,¹⁰ potential adoptive parents’ assertion of racial preference in the adoption process could, and should, be subject to “strict scrutiny”¹¹ upon a challenge from a potential adoptive child under the Equal Protection Clause.¹²

Part I briefly discusses the debate, both from a public policy and legal standpoint, surrounding transracial adoption, and outlines the current state of the law with respect to the consideration of the race of the child or potential adoptive parents in child custody proceedings and the adoption process. Part II develops a hypothetical plaintiff—an adoptive child—and discusses the potential success of an equal protection claim by this child against prospective adoptive parents who have asserted a racial preference when engaging in a state facilitated adoption process. After concluding that this claim could be successful, Part III discusses a potential remedy a court might utilize to ensure equal protection for children in the adoption system, and the potential administrative and social ramifications of this remedy.

I. THE FRAMEWORK OF THE DEBATE OVER TRANSRACIAL ADOPTION

A. *The Issues*

The debate over transracial adoption seems to revolve around two, oftentimes conflicting, considerations; what is the best public policy with regards to outcomes for adoptive children and what is legally required with respect to the adoption process?¹³

See Krawiec, *supra* note 3, at 248 (stating that the “majority of international adoptions in the United States are carried out through licensed agencies . . .”).

¹⁰ *See, e.g.*, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 507 (3d ed. 2006).

¹¹ *See, e.g., id.* at 690.

¹² U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

¹³ *Compare* Howard M. Metzenbaum Multiethnic Placement Act (MEPA) of 1994, Pub. L. No. 103-382, §§ 551–54, 108 Stat. 4056, 4056–57 (1994) (“An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not . . . (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.” (emphasis added)); 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, 316 (2006) (explaining how the Inter-Ethnic Adoption Provisions of the Small Business Job Protection Act of 1996, 42 U.S.C. § 671(a)(18) (1996), amended MEPA by removing the “permissible consideration” language which allowed adoption agencies to consider the cultural, ethnic, or racial background of an adoptive child, and the ability of adoptive parents to meet the needs cultural of the child, in determining whether a child should be placed transracially), *and* Meyer, *supra* note 2, at 191–92 (describing the 1996 amendments “tightening MEPA”), *with* Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents’ Perspective*, 20 HARV. BLACKLETTER L.J. 167, 181–91 (2004) (outlining the various arguments in opposition to transracial adoption,

1. The Policy Arguments

Historically, transracial adoptions were not considered and were often prohibited by statute.¹⁴ As legal prohibitions on transracial adoption eroded under the scrutiny of equal protection cases in the 1960s and 1970s, the adoption of Black children by White families began to rise and eventually peaked in 1971.¹⁵

In response to this increase in the adoption of Black children by White families, the National Association of Black Social Workers (NABSW) issued a position paper trumpeting the evils of transracial adoption.¹⁶ The effect of the NABSW's position was to cause adoption agencies, both state and private, to turn towards race-matching, the process of placing adoptive children with parents of their own race.¹⁷ As a result, the number of transracial adoptions in the United States dwindled from its peak of 2,574 in 1971¹⁸ to 1,076 such adoptions in 1976.¹⁹

This accommodation of the NABSW's position against transracial adoption has resulted in a seemingly limitless back and forth between the representatives of many fields, both academic and professional, regarding the possible harms or benefits of transracial adoption, both to the adoptive children and minority populations as a group.²⁰ One need only to perform an Internet or database search for articles on

particularly the adoption of Black children by White families, and noting that these arguments include assertions that transracial adoption is detrimental to Black children who are adopted into White families and that transracial adoption is damaging to the Black community as a whole).

¹⁴ Michelle M. Mini, Note, *Breaking Down the Barriers to Transracial Adoptions: Can the Multiethnic Placement Act Meet This Challenge?*, 22 HOFSTRA L. REV. 897, 905 (1994) (citing LA. REV. STAT. ANN. § 9:422 (1965) (allowing only for the adoption of children of one's own race); TEX. REV. CIV. STAT. ANN. art. 46a (Vernon 1959) (forbidding the adoption of Black children by White persons and the adoption of White children by Black persons)).

¹⁵ See *id.* at 905–06 (citing Bartholet, *supra* note 4, at 1180).

¹⁶ See Forde-Mazrui, *supra* note 2, at 926–27 (quoting Nat'l Ass'n of Black Social Workers, Preserving African-American Families, Position Paper (1973)). The NABSW paper was most concerned about the development of racial identity for Black children placed in White homes, particularly in a racially divided society. *Id.*

¹⁷ See Bartholet, *supra* note 4, at 1186–88 (describing race-matching; a process by which, in simplified terms, adoption agencies sort children and potential adoptive parents into groups based on race and ethnicity and then match potential adoptive children to adoptive parents based on racial or ethnic similarities between the two parties).

¹⁸ See *id.* at 1180 (citing R. SIMON & H. ALTSTEIN, TRANSRACIAL ADOPTION 29–30, 32 (1977)).

¹⁹ See Cynthia G. Hawkins-Leòn & Carla Bradley, *Race and Transracial Adoption: The Answer is Neither Simply Black or White nor Right or Wrong*, 51 CATH. U. L. REV. 1227, 1239 (2002) (citing 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)).

²⁰ Compare Bartholet, *supra* note 13 (applauding the recent enforcement of laws aimed at removing the consideration of race from adoption considerations) with Ezra E. H. Griffith & Rachel L. Bergeron, *Cultural Stereotypes Die Hard: The Case of Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY L. 303 (2006) (citing recent positions issued by NABSW, the

transracial adoption in order to be bombarded with opinions on every aspect of and from every side of the transracial adoption debate; some unequivocally supporting transracial adoption as a solution for combating the large number of Black children in the child welfare system as well as the larger scheme of racial animus, and others stating that such adoptions are only “symbolic” with respect to improved racial understandings or relations and are in fact detrimental to, or at least not sufficiently beneficial to, minority children and minority groups as a whole.²¹ The present general belief, however, appears to be that being adopted by “good parents” of another race is preferable, at least from the child’s standpoint, to being adopted by “unqualified” same-race parents or remaining in the foster system.²²

Additionally, strong empirical evidence from long-term studies shows that transracial adoption can be a positive, beneficial, and successful situation for many adoptees.²³ On a micro, individualistic level, transracial adoption has worked and

Child Welfare League, and the National Association of Social Workers in opposition to MEPA and its amendments and expressing support for the consideration of race in adoptive placements) and Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 105–08 (1994) (“Like school desegregation, transracial adoption poses risks to Black children and Black Communities. The emphasis on placing Black children in white homes raises the concern that less emphasis is being placed on strengthening Black homes. Despite the symbolic significance of transracial adoption, . . . [it] will never provide a solution to the many problems that the vast majority of Black children face in this society.”).

²¹ *Id.*

²² James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 896 (2003). *But see* Kathleen L. Whitten, *Permanent Families for African-American Foster Children in an Imperfect World*, 12 VA. J. SOC. POL’Y & L. 490, 494–96 (2005) (“[M]ost empirical studies cannot conclusively assess the adequacy of transracial adoptions due to their methodological shortcomings.”).

²³ *See, e.g.*, RITA J. SIMON & RHONDA M. ROORDA, IN THEIR OWN VOICES: TRANSRACIAL ADOPTEEES TELL THEIR STORIES 382, 392 (2000) (describing the authors’ interviews with twenty-four transracial adoptees and stating that “the [adoptees interviewed] believe[d] they benefitted by having been adopted . . . [and] that transracial adoption served them well . . .”); *see also* RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION, RACE & IDENTITY: FROM INFANCY TO YOUNG ADULTHOOD 221–23 (2d ed. 2002) (describing the findings of Simon and Altstein’s 1972 to 1991 study of transracial adoptees and their adoptive families and concluding that race was not a salient characteristic when it came to problems with adolescent alcohol or drug use, or running away). The study also found that transracially adopted children, in both adolescence and young adulthood, were “aware of and comfortable with their racial identit[ies],” that transracial adoptees felt “as much a part of their families” as the birth children of those families, and that there was no difference in the self-esteem or “familial integration” of transracial adoptees and birth children in the same family. *Id.* at 222–23. *But see* SANDRA PATTON, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA 169 (2000) (describing the results of her “interdisciplinary ethnographic study” of transracial adoptees and stating that “the development of a meaningful sense of racial identity is profoundly complex and problematic for African American and multiracial adoptees raised in White families”).

produced outcomes that are, overall, positive for both the adoptive family and the adoptee.²⁴ In total, “studies overwhelmingly show that children do very well raised in multiracial families,” and that such placements, when compared with their same race counterparts, do not show appreciable discrepancies in the areas of stability and attachment.²⁵ The simple, but powerful, conclusion one can draw from these findings is that transracial adoption can be in the best interest of an adoptee.²⁶

2. The Law

Although the “law” with respect to the consideration of race in the adoption process, and the closely related area of making child custody determinations, presents incongruous interpretations of what the Constitution permits or requires, it does inform, in concert with other constitutional doctrine, one as to the possible standards and methods of analyses the Supreme Court might use if confronted with a case such as the one proposed below.²⁷

a. The Statute: The Multiethnic Placement Act

Congress passed the Howard M. Metzenbaum Multiethnic Placement Act²⁸ (MEPA) in 1994, and brought the widespread practice of race-matching in adoptions to national attention.²⁹ The goal of MEPA was to reduce delays in the placement of children in the adoption system due to race and to “facilitate the adoption of minority children.”³⁰ MEPA, as it existed when it first passed, stated that:

²⁴ See SIMON & ALTSTEIN, *supra* note 23, at 221–23.

²⁵ See Meyer, *supra* note 2, at 202 (discussing the empirical research regarding the outcomes of transracial adoptees) (citing SIMON & ROORDA, *supra* note 23, at 13–25; SIMON & ALTSTEIN, *supra* note 23, at 10 tbl.1.5; Arnold R. Silverman, *Outcomes of Transracial Adoption*, FUTURE OF CHILD., Spring 1993, at 104, 117 (1993); Whitten, *supra* note 22, at 495–97).

²⁶ Whether a given action has been in the “best interest” of a child, a term which is inherently vague and open to broad interoperation, is difficult to pin down because such a determination requires either predictions about future outcomes, or the ex post proof of a negative, what the outcome would have been had a given action not been taken. As such, the “best interest” of the child is used in this context to mean a “positive” or “satisfactory” outcome. Such an outcome cannot be defined by set criteria or certain indicators, but, for the purposes of this Note, is simply defined as the absence of what could be characterized as a negative outcome. See Meyer, *supra* note 2, at 200 (noting the “amorphous” character of the concept of a child’s “best interests”).

²⁷ See Meyer, *supra* note 2, at 185–87 (explaining the “contending understandings of the legal constraints on considering race in matters of child welfare and suggest[ing] that both are wrong”).

²⁸ Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 551, 108 Stat. 4056 (1994).

²⁹ *Transracial Adoption—Congress Forbids Use of Race as a Factor in Adoptive Placements Decisions.—Small Business Jobs Protection Act*, Pub. L. No. 104-188, § 1808 (1996), 110 HARV. L. REV. 1352, 1354 (1997).

³⁰ *Id.* at 1355 (quoting S. Rep. No. 104-279, at 5 (1996)).

An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not—[] 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 [] 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.³¹

When initially passed, MEPA also contained a provision which permitted adoption agencies to take the “cultural, ethnic, or racial background of the [adoptive] child” into account as “one of a number of factors” when making a placement decision in order “to determine the best interests of the child.”³²

Two years later, Congress amended MEPA through section 1808 of the Small Jobs Protection Act of 1996, entitled “Removal of Barriers to Interethnic Adoption.”³³ The effect of this amendment was to remove the portion of MEPA’s original language which permitted adoption agencies, when making placement decisions, to consider race under certain circumstances,³⁴ thus “confirm[ing] that the appropriate standard for evaluating the use of race, color, or national origin in adoption and foster care placements is one of *strict scrutiny*.”³⁵ The Department of Health and Human Services’s (DHHS), the government agency tasked with enforcing MEPA, guidance letter on the MEPA amendments went on to state that “[the strict scrutiny] standard is reflected in the provision establishing that a violation of MEPA is deemed a violation of Title VI [which] incorporates the strict scrutiny standard.”³⁶ As such, the DHHS guidance stated, “the Interethnic Adoption Provisions and the U.S. Constitution forbid decision making [in the adoption process] on the basis of race or ethnicity except in the very limited circumstances where such a consideration would be necessary to achieve a compelling governmental interest,” and that “[t]he only compelling governmental interest related to child welfare that has been recognized by courts is protecting the

³¹ Multiethnic Placement Act § 553(a)(1)(A)–(B).

³² *See id.* § 553(a)(2); Bartholet, *supra* note 13, at 316 (discussing MEPA’s “permissible consideration” language).

³³ *See Meyer, supra* note 2, at 191 n.47.

³⁴ *See Bartholet, supra* note 13, at 316.

³⁵ Memorandum from Dennis Hayashi, Dir., Office of Civil Rights (OCR), and Olivia Golden, Principal Deputy Assistant Sec’y, Admin. for Children and Families (ACF), to OCR Reg’l Managers and ACF Reg. Dirs. (June 4, 1997) [hereinafter DHHS Guidance] (emphasis added), available at <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/jointguidancewacf.html> (discussing the “Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996”).

³⁶ DHHS Guidance, *supra* note 35; *see Bartholet, supra* note 13, at 317.

'best interests' of the child who is to be placed."³⁷ With this interest in mind, DHHS went on to state that "the consideration [of race or ethnicity in the adoption process] must be narrowly tailored to advance the [adoptive] child's interests, and must be made as an *individualized determination for each child*."³⁸ DHHS reiterated this important point later in its guidance letter, stating that, "[a]ny decision to *consider the use of race as a necessary element* of a placement decision must be based on concerns arising out of the circumstances of the individual case."³⁹

The recent enforcement of MEPA's provisions has added legitimacy to this strong language from DHHS.⁴⁰ The first such enforcement came in 2003 and was directed towards Hamilton County, Ohio's Department of Job and Family Services.⁴¹ First, DHHS's Office for Civil Rights (OCR) drafted a Letter of Findings stating that Hamilton County and the state of Ohio had violated provisions of MEPA and Title VI of the 1964 Civil Rights Act.⁴² Subsequently, DHHS's Administration for Children and Families (ACF) issued a Penalty Letter levying a \$1.8 million penalty against Hamilton County and Ohio.⁴³ In its penalty letter, DHHS confirmed that strict scrutiny is the standard by which it evaluates whether the use of race in the adoption placement process is permissible under MEPA, as well as Title VI, and admonished that child welfare workers have very limited "discretion to consider race in the placement process."⁴⁴ DHHS went on to find that MEPA proscribes the systematic consideration of race in the normal course of adoption placements, transracial or otherwise, and the disparate consideration of race in transracial as opposed to same-race adoption placements.⁴⁵ DHHS also took issue with programs that might influence a potential transracial

³⁷ DHHS Guidance, *supra* note 35; *accord* Hawkins-Leòn & Bradley, *supra* note 19, at 1248 (quoting the DHHS guidance memo regarding the implementation of the MEPA amendments).

³⁸ DHHS Guidance, *supra* note 35 (emphasis added); *accord* Hawkins-Leòn & Bradley, *supra* note 19, at 1248 (quoting the DHHS guidance memo regarding the implementation of the MEPA amendments).

³⁹ *See* DHHS Guidance, *supra* note 35; *accord* Bartholet, *supra* note 13, at 316 (emphasis added).

⁴⁰ *See* Bartholet, *supra* note 13, at 317 ("[T]he strict scrutiny standard . . . invokes a standard known in the legal world as condemning as unconstitutional under the Federal Constitution almost all race-conscious policies," and that "DHHS . . . has finally moved beyond the tough-sounding words that it issued providing interpretive guidance, to take action—action in the form of decisions finding states in violation of [MEPA] and imposing the financial penalties mandated by MEPA.").

⁴¹ *See id.* at 317, 320 n.6 (citing Letter from Lisa Simeone, Reg'l Manager, OCR Region V, to Suzanne Burke, Dir., Hamilton County Dep't of Job and Family Servs., and Tom Hayes, Dir., Ohio Dep't of Job and Family Servs. (Oct. 20, 2003), *available at* http://www.law.harvard.edu/faculty/bartholet/HHS_OCR.pdf (Letter of Findings, Docket No. 05997026)).

⁴² *See id.* at 317.

⁴³ *See id.* at 317–18 (citing Letter from Wade Horn, Assistant Sec'y, ACF, to Tom Hayes, Dir. Ohio Dep't of Job and Family Servs. (Oct. 23, 2003), *available at* http://www.law.harvard.edu/faculty/bartholet/mepa_letterofnotification.doc (imposing a \$1.8 million fine)).

⁴⁴ *See id.* at 317.

⁴⁵ *See id.* at 317–18.

placement decision based on the ability of the prospective adoptive parents, and even the community the child would be brought into, to meet the cultural needs, in terms of cultural education and appropriate respect and appreciation, of an adoptive child of a race different from their own.⁴⁶

Additional enforcement of MEPA by DHHS came in 2005, when DHHS issued a Letter of Findings to South Carolina's Department of Social Services.⁴⁷ DHHS concluded that the state's Department of Social Services had violated MEPA and Title VI.⁴⁸ Specifically at issue for DHHS, was South Carolina's practice of treating prospective parents' racial preferences with greater deference than other preferences and the fact that the agency essentially implemented a placement system based on racial classification by virtue of this elevating of prospective adoptive parents' racial preferences.⁴⁹ Again:

DHHS found illegal the agency's practice of treating transracial adoptions with greater scrutiny, faulting, for example, the inquiries into prospective parents' ability to adopt transracially, and ability to nurture a child of a different race, as well as inquiries into the racial makeup of such parents' friends, neighborhoods, and available schools.⁵⁰

Most interestingly, and in direct contrast with the lower court cases discussed below,⁵¹ DHHS also found South Carolina's consideration of race as a "tie-breaking" factor when making placement decisions to be in violation of MEPA.⁵² In justifying its findings, "DHHS . . . emphasized that strict scrutiny is the standard and that the law forbids any regular consideration of race, allowing its consideration only on rare occasions and even then only to the degree it can be demonstrated to be absolutely necessary."⁵³ As a consequence ACF levied a \$107,481 penalty against South Carolina.⁵⁴

⁴⁶ See *id.* at 318.

⁴⁷ See *id.* (citing Letter from Roosevelt Freeman, Reg'l Manager, OCR Region IV, to Kim Aydlette, State Dir., S.C. Dep't of Soc. Servs. (Oct. 31, 2005) [hereinafter OCR S.C. Letter of Findings], available at <http://www.hhs.gov/ocr/civilrights/activities/examples/Adoption%20Foster%20Care/0100438lof.pdf> (Letter of Findings)).

⁴⁸ See *id.* at 318, 320 n.7 (citing Letter from Wade Horn, Assistant Sec'y, ACF, to Kim Aydlette, State Dir., S.C. Dep't of Soc. Servs. (Feb. 24, 2006) [hereinafter ACF S.C. Penalty Letter], available at <http://www.law.harvard.edu/faculty/bartholet/mepaSCsignedpenaltyletter.pdf> (Penalty Letter)).

⁴⁹ See *id.* at 318–19.

⁵⁰ *Id.* at 319.

⁵¹ See discussion *infra* Part I.A.2.b (discussing *In re Marriage of Gambla*, 852 N.E.2d 847 (Ill. App. Ct. 2006) and other relevant cases).

⁵² Bartholet, *supra* note 13, at 319 (citing OCR S.C. Letter of Findings, *supra* note 47; ACF S.C. Penalty Letter, *supra* note 48).

⁵³ *Id.* at 318.

⁵⁴ *Id.* (citing OCR S.C. Letter of Findings, *supra* note 47; ACF S.C. Penalty Letter, *supra* note 48).

These “shot[s] across the bow[s]” of state adoption agencies send the clear message that DHHS intends to stand by the rigidity of the guidance it has issued on the interpretation of MEPA, and that the legal standard that adoption agencies must meet when considering race in the adoption process is one of the highest scrutiny.⁵⁵

b. The Cases

Although DHHS’s recent enforcement efforts clarify its intent with respect to the enforcement of MEPA and the standard by which it will judge the use of race in the adoption process,⁵⁶ the constitutional landscape with respect to the consideration of race in the adoption context remains somewhat muddled.⁵⁷

A twenty-five year-old Supreme Court case, *Palmore v. Sidoti*, seems to be the closest thing to a pronouncement from the Court as to how lower courts should deal with the consideration of race in the adoption context.⁵⁸ *Palmore* dealt with a custody dispute between a divorced couple, one of whom was a White woman “cohabiting with a Negro”⁵⁹ The lower court heard testimony from both parties and found that there were no issues as to the devotion of either parent to the child, adequacy of either parent’s housing, or the respective new spouse of either parent.⁶⁰ The trial court went on to discuss, however, the “inevitable” negative social ramifications for the child if she were placed in her mother’s biracial household and, with this consideration in mind, proceeded to award custody to the father.⁶¹

On review, the Court reversed the judgment of the trial court to “divest[] a natural mother of the custody of her . . . child because of her remarriage to a person of a different race.”⁶² In strong language, and after noting that the “[s]tate . . . has a duty of the highest order to protect the interests of minor children,” Chief Justice Burger wrote:

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural

⁵⁵ *Id.* at 319.

⁵⁶ *Id.*

⁵⁷ See Meyer, *supra* note 2, at 185–86 (explaining that the enactment of MEPA, in the eyes of “[o]bservers,” has not removed all the ambiguity from federal law with respect to the consideration of race in adoption, and that “[r]ecently, new developments have only underscored the murkiness of the legal landscape”).

⁵⁸ *Palmore v. Sidoti*, 466 U.S. 429 (1984); see also Meyer, *supra* note 2, at 185 (“*Palmore*’s intervention . . . plainly did not end the debate over whether race may be considered in matters of custody and adoption. In the more than two decades since *Palmore*, courts . . . have continued to struggle . . . to define the appropriate role for race in the placement of children.”).

⁵⁹ *Palmore*, 466 U.S. at 430.

⁶⁰ *Id.*

⁶¹ *Id.* at 431 (quoting the findings of the trial court).

⁶² *Id.* at 430.

mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. ‘Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.’⁶³

The Court ultimately held that “[t]he effects of racial prejudice, however real, cannot justify . . . removing an infant child from the custody of its natural mother.”⁶⁴ Although the language in *Palmore* seemed to be clear enough with respect to its stance on the consideration of race in child custody decisions by citing *Strauder v. West Virginia*⁶⁵ for the proposition that “[a] core purpose of the *Fourteenth Amendment* was to do away with governmentally imposed discrimination based on race,”⁶⁶ some lower courts have nonetheless adopted a questionably narrow reading of *Palmore*.⁶⁷

Recently, in *In re Marriage of Gambla*,⁶⁸ the Illinois Court of Appeals, relying on Illinois precedent that pre-dated *Palmore* by more than twenty-five years,⁶⁹ upheld the decision of a trial court to place a biracial child with her Black mother because, after finding the parents “equal” in other respects, the trial court permissibly

[N]oted that [the child] would have to learn to exist as a biracial woman in a society that is sometimes hostile to such individuals and that [her Black mother] would be better able to provide for [the child’s] emotional needs in this respect, [and] believed that this factor tipped the scale slightly in [the Black mother’s] favor⁷⁰

The trial court’s determination had been to award the mother *sole* custody of the child.⁷¹ The appellate court seemed to condone the blatant consideration of race in custody decisions so long as the consideration of the race of the parents or of the child did not outweigh the other relevant factors.⁷² In affirming the lower court’s ruling, the appellate court believed it was following the precedent of *Palmore* and other lower

⁶³ *Id.* at 433 (internal citations omitted).

⁶⁴ *Id.* at 434.

⁶⁵ 100 U.S. 303 (1879).

⁶⁶ *Palmore*, 466 U.S. at 432.

⁶⁷ See Meyer, *supra* note 2, at 186 (discussing the narrow reading of *Palmore* in *In re Marriage of Gambla*, 853 N.E.2d 847 (Ill. App. Ct. 2006)).

⁶⁸ 853 N.E.2d 847 (Ill. App. Ct. 2006), *cert. denied*, 552 U.S. 810 (2007).

⁶⁹ See *id.* at 868 (citing *Fontaine v. Fontaine*, 133 N.E.2d 532 (Ill. App. Ct. 1956)).

⁷⁰ *Id.* at 868; accord Meyer, *supra* note 2, at 193.

⁷¹ *Gambla*, 853 N.E.2d at 861 (emphasis added).

⁷² See Meyer, *supra* note 2, at 193.

courts confronting similar situations, stating: “so long as race is not the sole consideration for custody decisions, but only one of several factors, it is not an unconstitutional consideration. The dissent grossly misinterprets the holding of *Palmore* and ignores its progeny.”⁷³

The dissent in *Gambla* read the trial court’s decision to award custody to the biracial child’s Black mother because of her “slightly better ability to provide . . . a breadth of cultural knowledge and experience to help [her daughter] learn to exist as a biracial individual,” to mean that the trial court had based its custody decisions “solely on the premise” of the race of the parents.⁷⁴ The dissent believed that the trial court’s actions in considering the race of the child and the mother as the tipping or deciding factor in their custody decision were of the exact type precluded by *Palmore*. The dissent argued that, “[t]he United States Supreme Court has . . . specifically rejected the consideration of racial biases, or the effects of racial prejudice and classifications, in child custody matters as a violation of the Equal Protection Clause of the United States Constitution.”⁷⁵ Considering that the facts of *Palmore* and *Gambla* are not readily distinguishable,⁷⁶ this appears to be a correct interpretation of the Court’s language in *Palmore*.⁷⁷

⁷³ *Gambla*, 853 N.E.2d at 869 (citing *J.H.H. v. O’Hara*, 878 F.2d 240, 245 (8th Cir. 1989) (declining to read *Palmore* as “a broad proscription against the consideration of race in matters of child custody”)); accord Meyer, *supra* note 2, at 193; see also *Drummond v. Fulton County Dep’t of Family & Children Servs.*, 563 F.2d 1200, 1204–06 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (determining that use of race as merely one factor in making adoption decisions is constitutional); *Tallman v. Tabor*, 859 F. Supp. 1078 (E.D. Mich. 1994) (holding that race can be considered in determining custody so long as race is not the sole consideration); *In re Davis*, 465 A.2d 614, 621–29 (Pa. 1983) (holding that trial court should have considered race as a factor in making foster placement decision); *Farmer v. Farmer*, 439 N.Y.S. 2d 584, 588 (N.Y. Sup. Ct. 1981) (stating that “the general rule appears to be that race is simply one factor among many others which should be considered in determining what is in the child’s best interest”).

⁷⁴ *Gambla*, 853 N.E.2d at 876; accord Meyer, *supra* note 2, at 193.

⁷⁵ *Gambla*, 853 N.E.2d at 876 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)) (internal citation omitted).

⁷⁶ See Meyer, *supra* note 2, at 193 (arguing that the actions of the respective trial courts in question in both *Palmore* and *Gambla* were almost the exact same). Compare *Palmore*, 466 U.S. at 430 (stating that “the court made a finding that ‘there is no issue as to either party’s devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent’” (internal citations omitted)) with *Gambla*, 853 N.E.2d at 866 (stating that “the trial court found the parties to be equally qualified to care for [the child]”).

⁷⁷ See Meyer, *supra* note 2, at 193–94 (“[To the appellate court in *Gambla*, 853 N.E.2d 847,] 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. . . . 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.”).

B. Where Does the Standard Stand: Some Assumptions Going Forward

For the purposes of the discussion to follow, it is important to pinpoint a fairly specific standard by which the Court *would* or *should* judge the consideration of race in the context of adoption. In order to guide this determination one might look to the two ends of the spectrum described above,⁷⁸ side with one or the other, or reject both.⁷⁹

For the purposes of this Note, in keeping with what seems to be the Court's language in *Palmore*⁸⁰ and DHHS's enforcement of MEPA,⁸¹ the assumption will be that the Court, upon review of the use of racial classifications in adoption placement decisions, would apply strict scrutiny. As such, any such action would need to be narrowly tailored to serve a compelling state interest such as promoting the "best interest of the child."⁸² A more precise definition of this interest will be developed in a later section.

II. WHAT ABOUT THE PARENTS

For the majority of this discussion, little has been said regarding prospective adoptive parents' right to consider race in the adoption context. The rest of this Note will focus on this issue and consider how the existing law with respect to the consideration of race in determining child custody and placement could affect the ability of adoptive parents to assert their racial preferences in the adoption process. As discussed earlier, the possibility of legal constraints on a set of prospective adoptive parents' ability to express racial preferences has not been seriously considered.⁸³ In turn, the implications of not being able to control this "demand" side of the adoption market raises questions as to how effective even the strictest enforcement of the letter of MEPA can

⁷⁸ See *supra* Parts I.A.2, I.A.2.b.

⁷⁹ See Meyer, *supra* note 2, at 199 ("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.").

⁸⁰ But see *id.* at 200 (arguing that "Supreme Court precedent seems to refute the idea" that a child's "best interests" are a compelling state interest based on his reading of *Palmore* and several other Court cases).

⁸¹ See *id.*

⁸² See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children, . . . Florida law mandates that custody determinations be made in the best interests of the children involved. The goal of granting custody based on the best interests of the child is indisputably a *substantial governmental interest* for purposes of the Equal Protection Clause." (internal citations omitted) (emphasis added)); DHHS Guidance, *supra* note 35; see also CHEMERINSKY, *supra* note 10, at 669–77 (discussing a framework for equal protection analysis); Meyer, *supra* note 2, at 195 ("[A]ll race-conscious government decision making 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.").

⁸³ See *supra* note 6 and accompanying text.

be in eradicating the consideration of race, unconstitutional or otherwise, from the public adoption process.

This discussion will begin by formulating a “plaintiff” child and outlining their equal protection claim. In doing so, it will discuss how, through the “state action” doctrine, potential adoptive parents could be subject to the same constitutional strictures as other state actors when participating in the adoption process.⁸⁴ Lastly, this section will discuss a potential remedy the Court might employ, and the social and administrative difficulties this might present.

A. The Infant

Black children account for 15 percent of the child population in the United States, but they represent approximately 32 percent of the children in foster care.⁸⁵ This fact puts their numbers at approximately 163,000 children in foster care.⁸⁶ Additionally, Black children are less likely than children of other races to move to a permanent living situation in a timely way and, along with Native American children, have lower rates of adoption than children from other ethnic groups.⁸⁷ Because most of the debate surrounding transracial adoption centers on the adoption of Black children by White families,⁸⁸ the hypothetical infant in this scenario will be Black. Additionally, in order to simplify the analysis, this infant will be a newborn, have no apparent health problems, and be immediately available for adoption. As such, he will meet all of the preferences of our hypothetical adoptive parents except for their race preference.

B. The Parents

Although their race is not ultimately important to this analysis, the parents in this scenario will be White, they will meet all the qualifications of the adoption agency handling the adoption of the above-described child, and they will have just begun the process of approval for a child and matching with an adoptive child. Furthermore, let us assume that these adoptive parents are in the process of going through an initial interview process where they provide information to the adoption agency, both about themselves and, as is often the case, about the type of child they wish to adopt.⁸⁹

⁸⁴ See *supra* Part I.B.

⁸⁵ SUSAN SMITH ET AL., EVAN B. DONALDSON ADOPTION INSTITUTE, FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE 5 (2008).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See PAMELA A. QUIROZ, ADOPTION IN A COLOR-BLIND SOCIETY 42 (2007) (“[B]lack children and white parents have always defined the debate about transracial adoption, achieving a symbolic importance” (quoting ELLEN HERMAN, TRANSRACIAL ADOPTIONS, THE ADOPTION HISTORY PROJECT, (2007), http://www.uoregon.edu/~adoption/topics/transracial_adoption.htm)).

⁸⁹ See, e.g., Tenn. Dep’t of Children’s Servs., Foster/Adoption Application for Parenting (2009), available at <http://www.state.tn.us/youth/adoption/FosterAdoptionApplicationfor>

C. The Discriminatory Action

Now comes the action that has received so little critique. What happens when potential adoptive parents walk into the adoption agency with a pre-determined image of their new child; a new child that may be of a certain race or ethnicity. The first issue that needs to be addressed is how this image is translated into action and how this action conveys the adoptive parents' racial preference to the adoption agency.

During an initial interviewing or screening process, the adoptive parents' expression of a race preference for their potential adoptive child can take place in one of two ways; an adoption agency may allow them to state which babies, based on race, they are willing to accept or which babies, based on race, they are not willing to accept.⁹⁰

After this initial expression of a race preference, potential adoptive parents may again be given the chance to express a racial preference.⁹¹ Even if they do not assert an initial racial preference, adoptive parents have another chance to make an adoptive decision based on racial considerations when accepting or rejecting a potential adoptive child.⁹² If the infant the adoption agency offers the parents does not meet their requirements or desires, perhaps because its race does not match their preferences, they may reject it without consequences stemming from this rejection on the basis of race.

Let us assume that our adoptive parents and hypothetical adoptive child are involved in this very situation. The parents enter the adoption agency, and, because they would prefer a White or Hispanic infant, note this in their initial interview with the adoption official, overtly stating that they would prefer a White or Hispanic child or that they are only willing to accept White or Hispanic children for adoption.⁹³ Assuming the adoption agency is familiar with DHHS's recent enforcement of MEPA, they may decide that, in light of the precedent set by this enforcement, that it is only appropriate to offer our newly born Black infant to the couple, because the potential adoptive parents and the Black infant are compatible in all other respects. Let us even

ParentingCS-0411.pdf (presenting areas on their application for potential adoptive parents for them to state their race and the race of the children they hope to adopt).

⁹⁰ See Maldonado, *supra* note 3, at 1470 n.276 ("Most adoption agencies ask prospective adoptive parents to select the race of the children they would consider adopting, and parents can be quite specific when selecting the racial and ethnic breakdown of their child. . . . Some public agencies have lists of available children classified by race."); Bartholet, *supra* note 4, at 1186–87.

⁹¹ Maldonado, *supra* note 3, at 1471.

⁹² *Id.*

⁹³ This expression of racial preference and the state's facilitation of this preference was the subject of Richard Banks's article, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, in which he argued that the process by which state adoption agencies solicit or take into account the racial preferences of adoptive parents violates Equal Protection. Banks, *supra* note 1, at 899–914. Professor Banks's article focused on the actions of the adoption agency, while the argument at hand is concerned primarily with the actions of parents, regardless of whether the adoption agency actively solicits their racial preferences. See Maldonado, *supra* note 3, at 1470.

assume that the adoption agency, in an effort to walk the line of compliance with DHHS and Supreme Court precedent⁹⁴ have installed some process by which they determine that the transracial placement would be in the best interest of the child and that the consideration of race in *this* adoption, with respect to this child and this family, is not constitutionally permitted. Regardless, however, the parents reject the child because of his race, and, as a result, increase the amount of time he must spend in foster care.⁹⁵

The “harm” remaining in a situation without permanent parents poses to children is a topic that warrants some discussion.⁹⁶ Once placed in the foster care system, either voluntarily or as a result of the termination of the biological parents’ parental rights, the clock begins to tick. The longer a child remains in the foster care system, the more entrenched they become in the “hard-to-place” category of children.⁹⁷ As a child grows older and he or she accumulates damaging experiences in foster care,⁹⁸ he or she becomes a less desirable candidate to prospective adoptive parents,⁹⁹ and the chance of ever being adopted decreases.¹⁰⁰

Some commentators have gone so far as to describe the consequences of “institutionalization and successive foster care placements” as “ravaging.”¹⁰¹ Children who do not have the benefit of a relationship with a person who fills the role of a parent, if only psychologically, may develop a host of problems, including a decreased or non-existent ability to “form deep emotional attachments or warm social relationships,” and decreased intellectual function.¹⁰² As such, when faced with the options of remaining in the foster care system or being placed in an adoptive family of a race other than that of the child, the latter is by far the lesser of the two “evils.”¹⁰³

⁹⁴ See discussion *supra* Part I.A.2.a.

⁹⁵ See Maldonado, *supra* note 3, at 1425–26 (finding that White Americans are five times more likely to adopt a non-African-American child than an African-American one).

⁹⁶ The intricacies of whether this “harm” is too speculative or attenuated to maintain a justiciable claim is an issue that goes somewhat beyond the scope of this Note. All that is important, however, is a tenable assumption that a child *could*, in theory, make the requisite showing of “harm” or “injury” to have a justiciable claim. See CHEMERINSKY, *supra* note 10, at 63 (discussing standing requirements).

⁹⁷ See Bartholet, *supra* note 4, at 1204.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See Hawkins-Leòn & Bradley, *supra* note 19, at 1265 (citing Amanda Spake, *Judges Push to Get Kids Into Stable Homes*, U.S. NEWS & WORLD REP., Apr. 19, 1999, at 62–63; Kristie Ann Rooney, *Racial Matching vs. Transracial Adoption: An Overview of the Transracial Adoption Debate*, 53 J. MO. B. 32, 32 (1997)).

¹⁰¹ See Forde-Mazrui, *supra* note 2, at 938 (citing Shari O’Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 492 (1986)).

¹⁰² *Id.*

¹⁰³ See Silverman, *supra* note 25, at 115 (after reviewing studies regarding the outcomes of transracial adoptees, describing the findings of researchers who found that, “the deleterious consequences of delayed placement are far more serious than those of transracial placement,”

Additionally, and aside from any present or future “harm” that a child may experience due to increased time in the foster care system or an institution, adoption could be viewed as a state provided privilege or benefit, one which children without legal parents desire. As such, the denial of an equal opportunity to partake of this benefit, the equal opportunity to be adopted by any given set of parents, could also be seen as “harm” to a potential adoptive child.¹⁰⁴

D. The Claim

At this point, the potential adoptive parents have either made an overt expression of racial preference regarding the type of child they wish to adopt, or rejected a child that is offered to them on the sole basis of its race. Their “demand side” preference¹⁰⁵ has essentially nullified the adoption agency’s ability to work towards an adoption process where each child has an equal chance of adoption regardless of their race. The question now becomes what recourse, if any, does our child have against these parents who have rejected him solely on the basis of his skin color?

For this scenario, assume our child raises a claim, through a guardian ad litem, by way of a § 1983 suit,¹⁰⁶ alleging that the prospective adoptive parents have violated his Fourteenth Amendment right to the equal protection of the law.¹⁰⁷ The law in question would be the applicable state statutes that authorize and regulate the adoption process.¹⁰⁸

and that their findings implied that “when a choice must be made between transracial placement and continued foster or institutional care, transracial placement is clearly the option more conducive to the welfare of the child.”)

¹⁰⁴ See Banks, *supra* note 1, at 900–01 (describing the harms of “facilitative accommodation” to include the denial of individualized consideration for each child, regardless of race, and their exclusion from being considered as adoptive candidates for certain parents on account of their race (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in the judgment) (emphasizing “the Constitution’s focus upon the individual”))); see also *Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (describing the injury of racial classification as a “denial of equal treatment . . . not the ultimate inability to obtain the benefit.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (describing the evil of the affirmative action plan at issue as denying certain citizens “the opportunity to compete for a fixed percentage of public contracts based solely upon their race”); CHEMERINSKY, *supra* note 10, at 75–82 (discussing causation and redressability).

¹⁰⁵ See Krawiec, *supra* note 3, at 247–50 (advancing the idea of a “baby market”).

¹⁰⁶ 42 U.S.C. § 1983 (2010) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

¹⁰⁷ U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

¹⁰⁸ See, e.g., VA. CODE ANN. §§ 63.2-1200-1201 (2010) (statutes delineating who is eligible to adopt a child, who may be placed for adoption, who may place a child for adoption, and the method by which the adoption process takes place).

1. The State Action Doctrine

The first issue that must be addressed, is by what mechanism can private individuals, the adoptive parents who are engaging in the adoption process, be subject to the strictures of the Constitution, which only binds state actors?¹⁰⁹

The “state action doctrine” allows the reach of the Constitution to extend to situations in which the actions of private actors are of such a character that they can reasonably be considered state actors.¹¹⁰

As the amorphous “state action doctrine” has developed, some scholars have found it helpful to break the relevant cases into two overlapping groups, “Public Function Exception” cases and the “Entanglement Exception” cases.¹¹¹ The “Public Function” cases generally deal with situations where a private entity, such as a corporation or private group, has in some way supplanted the government in the performance of one or more of its traditional roles, “powers traditionally exclusively reserved to the State.”¹¹² The “Entanglement Exception” cases have wrestled with situations in which “the government affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution.”¹¹³

In *Lugar v. Edmonson Oil Co.*,¹¹⁴ the Court added substance to the “Entanglement Exception” by laying out a two-part test for determining whether the action of private individuals was of such a character, due to its facilitation by a public or governmental authority, so as to subject it to the strictures of the Constitution.¹¹⁵ The *Lugar* court stated that:

Our cases have . . . insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of “fair attribution.” First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together

¹⁰⁹ See, e.g., CHEMERINSKY, *supra* note 10, at 507 (“The Constitution’s protections of individual liberties and its requirement for equal protection apply only to the government. Private conduct generally does not have to comply with the Constitution.”).

¹¹⁰ See, e.g., *id.*

¹¹¹ See, e.g., *id.* at 518–19, 527 (describing “The Public Function Exception” and “The Entanglement Exception” to the state action doctrine as the primary groups into which state action cases can be grouped, but also noting the considerable overlap between the groups).

¹¹² See *id.* at 518–19 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)).

¹¹³ *Id.* at 527.

¹¹⁴ 457 U.S. 922 (1982).

¹¹⁵ *Id.*

with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.¹¹⁶

The *Lugar* test carried forward, in perhaps a more concisely stated fashion, the idea alluded to by the Court in *Burton v. Willimington Parking Authority*,¹¹⁷ the notion that “state action” can be found in the conduct of private individuals where there is a “symbiotic relationship” between the government and private actions.¹¹⁸ The Court later applied the *Lugar* test to find “state action” in *Georgia v. McCollum*, and *Edmonson v. Leesville Concrete Co.*¹¹⁹ In *Edmonson*, the Court found “state action” in the use of peremptory challenges in civil litigation.¹²⁰ The Court in *Edmonson* seemed to more fully develop, or at least put a finer point on, the second prong of the *Lugar* test, a point which was recognized in *McCollum*.¹²¹ The Court in *McCollum*, relying on *Lugar*, and *Edmonson*’s more fully articulated version of the second prong of the *Lugar* test, found “state action” in the use of peremptory challenges by criminal defendants, because the privilege of peremptories is created by law and jury selection is a government function that is made possible by the power of the state and the control of a judicial officer.¹²² The *McCollum* court remarked that:

[T]he Court in *Edmonson* found it useful to apply three principles: (1) “the extent to which the actor relies on governmental assistance and benefits”; (2) “whether the actor is performing a traditional governmental function”; and (3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority.¹²³

This further articulation of the *Lugar* test allows for a better-defined application of the sometimes vague “state action” doctrine.

¹¹⁶ *Id.* at 937; see also CHEMERINSKY, *supra* note 10, at 530 (quoting *Lugar*, 457 U.S. at 937).

¹¹⁷ 365 U.S. 715 (1961).

¹¹⁸ See CHEMERINSKY, *supra* note 10, at 532 (citations omitted).

¹¹⁹ See *id.* (citing *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991)).

¹²⁰ See *Edmonson*, 500 U.S. at 627 (“The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.”); CHEMERINSKY, *supra* note 10, at 531.

¹²¹ See *McCollum*, 505 U.S. at 52; CHEMERINSKY, *supra* note 10, at 530.

¹²² *McCollum*, 505 U.S. at 51–55.

¹²³ *Id.* at 51 (citing *Edmonson*, 500 U.S. at 621–22).

a. Adoptive Parents' Choice as State Action

Given the test for finding “state action” described in *Lugar*,¹²⁴ it is possible to find that adoptive parents’ participation in the state run adoption process is appropriately considered “state action” and should be subject to constitutional control. With respect to the first prong of the *Lugar* test, it is readily apparent that adoptive parents, when seeking to adopt through a state agency, are only able to engage in this process “by the exercise of some right or privilege created by the State.”¹²⁵ But for the state taking the role of a willing actor in facilitating adoptions through its agencies, parents would be forced to look elsewhere for adoption opportunities.¹²⁶

As for the second prong of the *Lugar* test, framed by the considerations the Court focused on in *Edmonson*,¹²⁷ it is obvious that adoptive parents rely solely on the assistance of the government when seeking to adopt a child through a state run agency. The state holds the power to confer the legal status of parentage and the attendant rights that accompany this status.¹²⁸ When choosing to adopt through a state agency, the parents rely solely on the discretion and authority of the state adoption agency to match them with potential children and ultimately place the children in their homes.¹²⁹ The “demand” side of the adoption relationship must prove to the “supply” side that they are worthy of the “good” being supplied, and it is only through the acquiescence and permission of the state that the “demand” will be satisfied.¹³⁰ As such, the “governmental assistance and benefits” described as being indicative of “state action” in *Lugar* is readily apparent.

Whether potential adoptive parents are performing a “traditional governmental function”¹³¹ depends on how one characterizes the function that adoptive parents are performing. The act of adopting can be characterized in one of two ways. First, one could view it as simply providing care to children who are not cared for by their biological parents. When conceptualized in this manner, the state and the adoptive parents play the same role and provide the same function as far as the child is concerned. They are simply the surrogate provider of care to a child who is no longer cared for by their biological parents.

¹²⁴ See *supra* note 115 and accompanying text.

¹²⁵ *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

¹²⁶ See generally Dwyer, *supra* note 22, at 884 (noting adoptions facilitated privately between biological parents and adoptive parents and adoptions through private adoption agencies as alternatives to adoptions through state run agencies).

¹²⁷ See *Lugar*, 457 U.S. at 937.

¹²⁸ See, e.g., Dwyer, *supra* note 22, at 858–59 (laying out a general synopsis of the state’s power to confer legal maternity and paternity status, and facilitate adoptions).

¹²⁹ See, e.g., *id.* at 884–89 (briefly describing the typical home study process that takes place before the state will place a child in an adoptive home and outlining the multitude of factors a state agency may consider when deciding whether to place a child with potential adoptive parents).

¹³⁰ See *id.*; see also Krawiec, *supra* note 3, at 247–50 (discussing the “baby market”).

¹³¹ *Georgia v. McCollum*, 505 U.S. 42, 52 (1992).

Adoption could also be characterized as a process in which the State serves as an intermediary, never intending to be the permanent receptacle for children who have no legal parents, but facilitating the movement of children to permanent homes with the attendant establishment of a new set of legal parents.¹³² In this regard, the State's function, in terms of the service they provide to the parentless child, could be categorized as distinct from the function of the final adoptive parents, who assume the legal parental rights to the child, and, presumably, do not plan to voluntarily relinquish these rights or pass them on to someone else at a later point.

Which interpretation of the functions the State and the adoptive parents play in the provision of care for parentless children is unclear. As such, the Court would likely choose whichever interpretation best suits its final determination with respect to the "state action" question.

With respect to the final principle articulated by the Court in *McCullum*, "whether the injury caused is aggravated in a unique way by the incidents of governmental authority,"¹³³ it is difficult to say that the state involvement somehow aggravates the injury, since there would likely be no injury but for the involvement of the State. One could hypothesize that, without state run adoption agencies or even any state regulation of adoptions, private actors would step in to facilitate the entire adoption "market" and could, in theory, freely consider race in their child-placement decisions. In such a world, the injury to children who are passed over for adoption due to the racial preferences of adoptive parents would likely be as great as it would under the present circumstances where potential parents are allowed to engage in the same behavior. As such, the State's involvement in the adoption process likely does nothing in and of itself to increase the harm to parentless children resulting from being passed over by potential adoptive parents on the basis of their race.

In total, however, it appears that the "symbiotic relationship"¹³⁴ between the state adoption agency and potential adoptive parents is of a sufficient character that the Court *could* find that the actions of the private actors engaging in the adoption process constitute "state action" and must comply with the strictures of the Constitution.

2. Equal Protection and the Application of Strict Scrutiny

Having found the requisite "state action,"¹³⁵ we must turn to whether our adoptive child, who our parents have passed over due to his race, has endured a violation of his Fourteenth Amendment right to the equal protection of the law.¹³⁶

¹³² See Krawiec, *supra* note 3, at 207 (describing "Baby Market Intermediaries" as those entities that facilitate the "baby market," and serve as a go between for the "suppliers" to the "baby market" and those who wish to adopt a child).

¹³³ *McCullum*, 505 U.S. at 51 (1992).

¹³⁴ See Krawiec, *supra* note 3, at 207.

¹³⁵ See, e.g., CHEMERINSKY, *supra* note 10, at 507.

¹³⁶ U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive . . . any person within its jurisdiction the equal protection of the laws.").

a. The Expression of an Initial Racial Preference

Once “state action” has been found in the act of private individuals engaging in the state facilitated adoption process, the *parents* themselves, as opposed to the adoption agency, categorically excluding certain children from consideration as potential adoptees by stating racial preferences to adoption agency workers becomes likely unconstitutional.¹³⁷ The action of categorically refusing to consider the adoption of certain children based solely on their race violates the Equal Protection Clause in almost exactly the same way that “Facilitative Accommodation” does.¹³⁸ In other words, Professor Banks’s proposal of “Strict Nonaccommodation,” under which both adoption agencies and adoptive parents would be prohibited from categorically excluding children from consideration for adoption based on race,¹³⁹ would be constitutionally required. Adoptive parents would be prohibited from expressing an overt racial preference with respect to potential adoptive children unless of course the adoptive parents can meet the requirements of strict scrutiny.

b. The Rejection of a Potential Child Based on Race

As discussed above,¹⁴⁰ there is a second point at which potential adoptive parents may unconstitutionally deny a child the opportunity to be adopted due to his race. Regardless of whether the adoptive parents express any overt racial preference during their initial interactions with the adoption agency, they may nonetheless reject a child because of his or her race when the child is presented to them as a potential candidate for adoption.¹⁴¹ In such a case, the expression of a racial preference is covert and harder to detect, but no less constitutionally impermissible.¹⁴²

The first step then is to prove a discriminatory purpose in the actions of the adoptive parents when they choose not to adopt a child that is offered to them.¹⁴³ Making this showing is perhaps the largest hurdle the child must meet when trying to create a credible Equal Protection claim because it will be the rare occasion when a set of

¹³⁷ See Banks, *supra* note 1, at 881 (arguing that “facilitative accommodation,” the process by which adoption agencies categorically deny potential adoptive children the opportunity to be individually considered for adoption based on the overt and asserted racial preferences of the adoptive parents, violates the Equal Protection Clause).

¹³⁸ *Id.*

¹³⁹ See *id.*, at 941–45.

¹⁴⁰ See *supra* Part II.C.

¹⁴¹ See Banks, *supra* note 1, at 893–95 & n.73 (citations omitted).

¹⁴² See generally CHEMERINSKY, *supra* note 10, at 710 (citing *Washington v. Davis*, 426 U.S. 229 (1976), for the proposition that “laws that are facially neutral as to race and national origin will receive more than rational basis review only if there is proof of a discriminatory purpose.”).

¹⁴³ See *id.*

potential adoptive parents will admit that their reason for rejecting a potential adoptee was his or her race.

As such, it may be appropriate for the Court to adopt a procedure to facilitate the rooting out of potential discriminatory intent. The approach it has adopted for testing for racial discrimination in to use of preemptory challenges could serve as an instructive model.

In *Batson v. Kentucky*¹⁴⁴ the Court set out a process by which a court can review a party's use of preemptory challenges in criminal trials to determine if there has been "impermissible discrimination" in the striking of jurors.¹⁴⁵ A defendant can challenge the striking of jurors on Equal Protection grounds if he can make a sufficient showing that the race of the struck juror motivated a prosecutor's use of a preemptory challenge.¹⁴⁶ If a party can make a showing sufficient to allow a judge to "draw an inference that discrimination [in the making of the challenge] has occurred,"¹⁴⁷ then he has made a prima facie showing of impermissible discrimination, a showing that has a fairly low threshold,¹⁴⁸ and the burden shifts to the challenged party to offer a "clear and reasonably specific" explanation of a "legitimate" basis for the challenge.¹⁴⁹ The judge must then decide whether this explanation is sufficient to overcome the "inference" established at the first step.¹⁵⁰ Although the effectiveness of *Batson* in practice has received serious question,¹⁵¹ it is possible to modify the *Batson* procedure to apply to claims of racial discrimination in the adoption process.¹⁵²

Quite simply, should a set of potential adoptive parents choose to reject a given child, the adoption agency could, just as a defense attorney might, use their judgment to decide whether to challenge the parents' choice as a potential equal protection violation. If the adoption agency or an appointed guardian *ad litem* believes that a set of parents has rejected a child because of their race, they could challenge this potentially discriminatory action on behalf of the child. The procedure could operate much

¹⁴⁴ 476 U.S. 79 (1986).

¹⁴⁵ See generally CHEMERINSKY, *supra* note 10, at 710–21 (discussing facially neutral laws with discriminatory impact or administration).

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* at 719 (stating that the Court's decision to reverse in *Johnson v. California*, 543 U.S. 499 (2005), reinforced its intent to set a "low threshold" for producing evidence to raise the necessary "inference" under *Batson*).

¹⁴⁹ See *id.* (outlining the application and subsequent refinement of the Court's holding in *Batson*).

¹⁵⁰ See *id.*

¹⁵¹ See Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 BROOK. L. REV. 95, 104 (2008) ("The *Batson* scheme has been criticized since its inception. Courts, litigants, and commentators have criticized it as difficult to implement and ineffective in protecting the rights granted to litigants and jurors by *Batson* and its progeny. Many courts are frustrated with their inability to second-guess the reasons behind an attorney's race-neutral reason given at the second step of the analysis . . .").

¹⁵² See *id.*

in line with *Batson*, where a judge could decide if the weight of the evidence was sufficient to raise an inference that the parents had refused to adopt a child because of their race. The court would then give the parents an opportunity to express their race neutral justification for rejecting the child, and the judge could then determine whether the justification was sufficient to overcome the inference of a violation of the child's equal protection rights.¹⁵³

c. The Justification of the Racial Classification

Having established a possible infringement of the child's Equal Protection rights, the potential adoptive parents may be able to justify their racial classification if they can meet the requirements of "strict scrutiny."¹⁵⁴ They must be able to "show an extremely important reason for [their discriminatory] action *and* . . . must demonstrate that the goal cannot be achieved through any less discriminatory alternative."¹⁵⁵

Under "strict scrutiny" in the equal protection context, the first question becomes what, if any, "compelling" purpose can the state actor assert to justify their racial classification?¹⁵⁶ The obvious choice in the case at hand is "the best interest of the child."¹⁵⁷

The first task is to pinpoint what defines this "amorphous" interest.¹⁵⁸ Courts and scholars have suggested that a "best interest of the child" standard sufficient to "rank as 'compelling'" for the purposes of equal protection, may lie at or between one of two extremes, the avoidance of serious harm to the child and any perceptible gain for the well-being of the child.¹⁵⁹ What may be most appropriate, given the two extremes, is to find some middle ground. For example, the State's compelling interest may lie in seeing that a child has the opportunity to "flourish" or that decisions regarding the child offer him or her a "substantial benefit."¹⁶⁰

With this understanding of the "best interest of the child" in place, it would be incumbent on the adoptive parents to successfully show a court that their adopting of a child of a given race would in some way be detrimental to the child's ability to

¹⁵³ See CHEMERINSKY, *supra* note 10, at 718–19 (describing the mechanics of a *Batson* challenge).

¹⁵⁴ See CHEMERINSKY, *supra* note 10, at 694 ("It now is clearly established that racial classifications will be allowed only if the government can meet the heavy burden of demonstrating that the discrimination is necessary to achieve a compelling government purpose." (citing DERRICK J. BELL, JR., RACE, RACISM AND AMERICAN LAW 34–36 (1973))).

¹⁵⁵ *Id.* at 694–95.

¹⁵⁶ *Id.*

¹⁵⁷ See *supra* note 82.

¹⁵⁸ See Meyer, *supra* note 2, at 200 (describing the "best interests" standard as "too amorphous").

¹⁵⁹ See *id.* at 200–01.

¹⁶⁰ *Id.* (citing *Troxel v. Gainesville*, 530 U.S. 57 (2000), "which left the door open to state intervention to preserve children's important relationships with non-parents even in the absence of proof that they would otherwise be harmed").

flourish.¹⁶¹ For example, they may be able to establish that the child would be rejected or ostracized by the community in which the adoptive parents live and that the potential harm that could be caused by living in the community would be worse than the harm caused by having the child remain in the foster care system.¹⁶²

E. The Remedy

Should the potential adoptive parents not be able to meet their burden of showing that their race based rejection of a potential child is justified by some substantial harm that may come to the child should they adopt them, the court would then have to fashion a remedy to redress the violation of the child's equal protection rights.¹⁶³ Generally, redressability requires that there be a "substantial likelihood" that the requested remedy would result in the complaining party receiving relief from the injury that is complained of.¹⁶⁴

In equal protection cases, however, the Court has modified its redressability jurisprudence somewhat.¹⁶⁵ If a plaintiff can articulate their claim in terms of being denied the opportunity to compete or to be fairly considered for a certain benefit, the Court has held that this denial is a violation of Equal Protection and a potentially redressable injury in of itself, regardless of whether the remedy would actually secure the benefit the plaintiff seeks.¹⁶⁶ For example, in *Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville*, the Court found a violation of equal protection where an "ordinance created a preference for minority businesses in receiving city contracts."¹⁶⁷ The Court stated that:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained

¹⁶¹ *Id.*

¹⁶² *But see* CHEMERINSKY, *supra* note 10, at 696–97 (describing the Supreme Court's rejection of racial prejudice as a basis for child custody in *Palmore v. Sidoti*, 466 U.S. 429 (1984)).

¹⁶³ *See* CHEMERINSKY, *supra* note 10, at 75 (stating that in order to sustain a justiciable claim, "[a] plaintiff also must allege and prove that the personal injury is . . . likely to be redressed by the requested relief." (quoting *Allen v. Wright*, 468 U.S. 737, 743 (1995))).

¹⁶⁴ *See generally id.* (collecting cases and explaining that where the connection between the injury claimed and the requested remedies' ability to redress this injury is speculative or not apparent from the record, the Court will likely dismiss the claim as non-justiciable).

¹⁶⁵ *Id.*

¹⁶⁶ *See id.* at 80 ("When a plaintiff alleges a denial of equal protection, the injury is the denial of the ability to evenly compete. Even if ultimately the plaintiff would not receive the benefit, a favorable court decision redresses the harm by providing equal opportunity.").

¹⁶⁷ *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993).

the benefit but for the barrier in order to establish standing. The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier not the ultimate inability to obtain the benefit.¹⁶⁸

Additionally, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Court held that the university’s affirmative action program, which reserved a specific number of admissions for minority students, violated Equal Protection.¹⁶⁹ Even though there was no guarantee that the plaintiff would be admitted to the university in the absence of the affirmative action program, the Court found the injury at issue to be the denial of the equal opportunity to compete for each admissions spot, regardless of whether the plaintiff obtained actual admission.¹⁷⁰ The Court found that the remedy of ruling the admissions program unconstitutional and enjoining the university from utilizing it would redress this injury.¹⁷¹

A child who has been categorically excluded from consideration for adoption on account of his or her race has suffered the type of injury the Court examined in *Bakke* and *Florida Chapter of the Associated General Contractors of America*. The potential adoptive child has been denied the equal chance to compete for the opportunity to be adopted solely because of his race, and this denial is a redressable injury.¹⁷² The simple remedy that the Court could employ would be an injunction prohibiting potential adoptive parents from expressing a racial preference when participating in the state run adoption process and from rejecting potential adoptive children on the basis of their race absent a compelling reason.¹⁷³ Even though a child could never be forced on a set of adoptive parents,¹⁷⁴ potential adoptive parents who are found to be in violation of such an injunction could be sanctioned accordingly.

F. Feasibility and Implications

The ultimate concerns of allowing a claim of this nature to go forward and actually result in a favorable resolution for a child, are the impact it might have on the

¹⁶⁸ *Id.*

¹⁶⁹ CHEMERINSKY, *supra* note 10, at 80.

¹⁷⁰ *Id.* (discussing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978)).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See discussion *supra* Part II.C.

¹⁷⁴ See Banks, *supra* note 1, at 910–11 (“The Court has recognized two types of constitutionally protected privacy interests relevant to the race-and-adoption issue: associational and decisional interests. . . . The Court has repeatedly held as well that government action may not unduly interfere with one’s right to associate with whomever one desires. Associational interests prohibit not only laws that directly proscribe associational freedom, but also any law that exerts a ‘deterrent effect on the free enjoyment of the right to associate.’” (quoting *NAACP v. Alabama*, 357 U.S. 449, 460, 466 (1958))).

participation of potential adoptive parents in the state run adoption process and the detriment adoption agencies may suffer as a result of the attendant administrative pressures. It is entirely possible that when faced with having to put aside their racial preferences when engaging in the state run adoption process, adoptive parents would increasingly turn to private “intermediaries” when seeking to fulfill their adoption needs.¹⁷⁵ On a macro level, this would have the opposite of the intended effect. A ruling that could, in theory, increase the pool of potential adoptive parents for each individual child, could in fact decrease the overall pool of adoptive parents, a condition that could nullify any benefits that might accrue to each child individually.¹⁷⁶

Additionally, adoption agencies, which are not known as the bastions of adequate staffing or funding,¹⁷⁷ would be burdened with the task of trying to not only ensure that their actions were in compliance with the Constitution, but also that each child is protected from the potentially unconstitutional actions of potential adoptive parents. Such a situation that would not only require additional resources, but would also place an adversarial wedge in a relationship that should be more collaborative than combative.

With just these general and cursory considerations in mind, it is apparent that a ruling in favor of the child in a case similar to the one outlined in this Note has the potential to have detrimental consequences for most if not all of the players in the state run “adoption market.”¹⁷⁸ As such, it seems possible that the Court may try to get out of hearing such a claim altogether, likely by letting it fall through the asymmetries of the “state action doctrine.”¹⁷⁹

CONCLUSION

The “supply” side of any market for a given good is only half of the equation, and “demand” can be equally determinative of the final outcome in given market.¹⁸⁰ In the

¹⁷⁵ See Banks, *supra* note 1, at 956–57 (“Strict nonaccommodation may cause parents to forego agency adoption rather than renounce their preferences. Those families who are only willing to accept a child for adoption on the basis of race, but who are not financially able to adopt through independent placement, might decide to forego adoption altogether. Many prospective adoptive parents with economic resources would pursue independent or international placements. Although black and white parents might resist strict nonaccommodation, white parents would be more likely and able to adopt internationally or independently, whereas black parents would be more likely to forego unrelated adoption altogether.”); Krawiec, *supra* note 3, at 204–05.

¹⁷⁶ Banks, *supra* note 1, at 957 (“[P]roblems might result from parents’ decisions to forego agency adoption. . . . fewer families might be available for those children in need of adoption.”). *But see id.* at 957–58 (arguing that the circumstances under a system of strict nonaccommodation may not result in a “net loss” of potential parents to Black children).

¹⁷⁷ *Id.* at 897 (noting that public adoption agencies are usually “run by state child welfare departments” and are “often heavily dependent on government funding”).

¹⁷⁸ *Id.*

¹⁷⁹ See *supra* Part II.D.1.

¹⁸⁰ See Krawiec, *supra* note 3, at 247–50 (describing the interaction of entities in the “adoption market”).

“market” for adoptive children,¹⁸¹ both sides of the equation must be regulated if public officials or legislators hope to achieve full control over the “adoption market” and the expression of racial preferences in this market.¹⁸² Although MEPA assumedly takes care of the “supply” side,¹⁸³ meaningful restrictions on the expression of racial preferences by potential adoptive parents do not presently exist.¹⁸⁴ Subjecting adoptive parents to the strictures of the Constitution is one way by which this regulation could be achieved without potentially unpopular legislation.¹⁸⁵

Regardless of whether such an end would make good policy sense and many have argued that it would,¹⁸⁶ it is possible that this outcome is constitutionally required. Through the “state action doctrine,” parents could be held accountable to potential adoptive children for their expression of racial preferences and would have to meet the rigors of “strict scrutiny.” This could be a way towards an adoption process that only considers race when absolutely necessary; a state of affairs where each child has the equal opportunity at a chance for a permanent home.

¹⁸¹ *Id.*

¹⁸² *Cf.* Banks, *supra* note 1, at 941–51 (describing “strict nonaccommodation” as a control on the ability of parents to express racial preferences in the adoption process as a counter point to controlling an adoption agency’s ability to consider race in the same process).

¹⁸³ *See supra* Part I.B.1.

¹⁸⁴ *See* Banks, *supra* note 1, at 882 (“Yet not one legal analyst has argued that public adoption agencies cannot (as matter of law) or should not (as a matter of policy) promote adoptive parents’ racial preferences through facilitative accommodation.”).

¹⁸⁵ *Cf. id.* at 955–58 (examining the potential political resistance to legislation that would implement his policy of “strict nonaccommodation,” and a potential backlash by prospective adoptive parents to such a policy).

¹⁸⁶ *See id.* at 883.