ARTICLES

RACE-BASED ADOPTION IN A POST-*LOVING* FRAME

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INTRODUCTION

Reading in the debate over transracial[1] versus race-matched[2] adoption, one

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This article is dedicated to the memory of Sam Postbrief (1947-1996), husband of my colleague, Wendy Gordon, whose warm encouragement, restless conscience, and passionate engagement with ideas helped illuminate my life throughout the all-too-short time I knew him.

[1] The word transracial has come to stand almost exclusively for the placement of black children in white homes. For a brief review of the history of transracial adoption, *see* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1174-82 (1991).

[2] This term refers to the placement of a child of a certain racial or ethnic background with an adoptive family of that background.

For an example of mandated race-matched adoption, see the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-63 (1988)). ("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a)).

Where race-matching is not mandated, it has recently come to roost as a statutory preference. *See, e.g.*, ARK. CODE ANN. § 9-9-102 (Michie Supp. 1995); CAL. CIV. CODE §§ 276, 276(2) (West 1982), *amended by* CAL. CIV. CODE §§ 222.35, 222.37 (West Supp. 1991) (effective July 1, 1991); MINN. STAT. ANN. §§ 259.255, 259.28 (West 1992).

The policy of race-matching has generated a politics of its own, amidst charges along two responsive lines. One of these is the view that race-matching has no intrinsic merit as a proxy for the best interests of adoptable children. The other is that the effort to race-match has significantly delayed the placement of children, especially black children, available for adoption so as to cause them harm.

In 1994 and again, in 1996, Congress stepped onto the scene. At first, its tread was light: the Howard M. Metzenbaum Multiethnic Placement Act, 42 U.S.C. § 5115(a) (1994), attempted a legislative compromise between the friends and foes of adoptive race-matching. It provided that state adoption agencies might not "*categorically deny* the opportunity to become an adoptive or foster parent, *solely* on the basis of the race, color, or national origin" of the prospective parent or child. *Id.* (emphasis added). It further pro-

might easily come to the view that it represents sword against shield. Advocates for the position that children should be race-matched to their adoptive parents appear to wield the sword of principle, while those who defend transracial adoption can be seen to advance — as advance they have — behind the shield of policy.[3] I believe that the debate requires re-casting. That is because non-race-

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vided that agencies could not "delay or deny" placements "or otherwise discriminate" within the adoption process "*solely*" on the basis of the race, color, or national origin of the prospective parent or the child. *Id.* (emphasis added).

This attempt at compromise quickly failed, as the critics of race-matching became incensed at the essentially unreviewable nature of the legislative standard and its tacit acceptance of delay. Even Senator Metzenbaum came forward to disavow the statute which bore his name. *See* Albert R. Hunt, *The Republicans Seize the High Ground on Transracial Adoption,* WALL ST. J., Mar. 9, 1995, at A19.

In August, 1996, President Clinton signed into law a rider to an unrelated bill which repealed the contested provisions of the Metzenbaum Act, replacing them with a stringent prohibition on both denial and delay for reasons of race or ethnicity. The new statutory scheme manifests its intended inhibitory bite through the inclusion of time-restricted review procedures, funding penalties, and sanctions drawn from Title VI of the Civil Rights Act of 1964. *See* The Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808 (codified as 42 U.S.C. 671(a) & 674).

Like its predecessor, the Metzenbaum Act, the new statutory scheme explicitly exempts the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (1988), from its purview. But that is not to say that Congress is fully satisfied with the workings of the Act. Recent efforts at tinkering are contained in H.R. 1448, 104th Cong. (1995). Despite evident dissatisfactions, Congress does not seem inclined to repeal the Act or to harmonize its view of tribal matching and tribal hegemony with its increasingly trenchant stand against race-matching generally.

[3] I mean to distinguish between "policies" and "principles" in the manner that Ronald Dworkin has done when he writes:

> I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community . . . . I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality . . . . The distinction can be collapsed by construing a principle as stating a social goal (*i.e.*, the goal of a society in which no man profits by his own wrong), or by construing a policy as stating a principle (*i.e.*, the principle that the goal the policy embraces is a worthy one) or by adopting the utilitarian thesis that principles of justice are disguised statements of goals (securing the greatest happiness of the greatest number). In some contexts the distinction has uses which are lost if it is thus collapsed.

RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 22-23 (1977) (citation omitted).

Like the distinction between goals and standards, the principle-policy divide I emphasize here collapses several causes, including over-stress. Nevertheless, it serves as a reminder that some, but not all, instrumental attempts at welfare-enhancement claim significance on account of their moral pedigree; and some claims of moral pedigree are more deserving of that status than others.

This observation backs up, interestingly, into the Hartian question of whether there is a rule of recognition for principles such that their conceptual relationship not only to poli-

matched adoption deserves to be understood as a matter of supervening principle — a principle that ought to govern issues of race in the forum of adoption. The fact-sensitivity necessary to the adoption process may, however, require the occasional compromise of this clear stance in response to circumstances that I will later reference.

The argument from principle that I will advance derives from the Supreme Court's decision in a different race-matching context — marriage. The case, handed down exactly thirty years ago, is *Loving v. Virginia*,[4] and the principle which found its constitutional voice in that case can accurately (if non-euphoniously) be described as the anti-anti-miscegenation principle. That is the way I shall refer to it in what follows. My argument, which draws all of its normative strength from *Loving*, is simple. It is that *Loving*'s proscription of state-mandated race-matching in marriage must dictate a similar proscription of state-mandated race-matching in adoption, on pain of incoherence and the resurrection of a clear moral wrong. I shall point out that a fully articulated effort at race-matching must fall of its own weight into a second deadly trap, absurdity, because the irony of our existence, a generation beyond *Loving*, is that the anti-anti-miscegenation principle has done a good deal of its work: It is becoming more and more difficult to find "races" to match.

To see the way that these normative and pragmatic descendants of *Loving* resettle the existing debate, one must observe the claims that are presently competing to dominate it. I shall attempt to depict them next.

I. PRINCIPLE AND POLICY WITHIN THE CURRENT FRAMEWORK OF DEBATE

A. *The Pro-Race-Matching Position*

Advocates of race-matched adoption hold that race is at the core of psychological and social identity and that the only way to affirm and protect a child's racial identity is to assure that she is raised within a family that is similarly identified.[5] Only there will outlook and experience coalesce to yield a reliable

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cies but to other types of norms can be reliably secured. For Hart's central and enduringly provocative account of the role of rules of recognition in relation to a (our) legal system, *see* H.L.A. HART, THE CONCEPT OF LAW (1961).

[4] 388 U.S. 1 (1967).

[5] Formal advocacy of race-matched child placement dates from at least 1972, when the National Association of Black Social Workers (hereinafter, the N.A.B.S.W.) took a unifiedly oppositional stand toward trans-racial adoption at their annual convention.

Their consensus position was stated as follows: "We affirm the inviolable position of Black children in Black families where they belong physically, psychologically, and culturally in order that they receive the total sense of themselves and develop a sound projection of their future." N.A.B.S.W.J., Summer 1973. The organization's president, Cenie J. Williams, Jr., put the matter more stridently in his annual report, which includes the following capitalized, italicized language:

BLACK CHILDREN REPRESENT THE FUTURE OF OUR RACE AND TO CONTINUE TO ALLOW WHITE PEOPLE TO MANIPULATE, CONFUSE AND DIS-

confirmation of race, one to which the child can bond as she comes to her own understanding of self and other in a dauntingly race-conscious, race-riven, and race-discriminatory society. These claims are strongly hinged to empiricism. Either parents who are racially identical to their adoptive child can offer a unique set of advantages, or they cannot. Either a strong racial identity is critical to a child's well-being, or it is not. Either children will suffer, predictably, on account of their (non-white) racial identities, or they will not.

The advocates of race-matching do not offer their claims primarily on the basis that they are empirically justified. At present, they are neither proven, nor are they the subject of gathering research. The argument for race-matching is offered normatively and, therefore, less vulnerably, as a matter of ethical appeal. Since this argument has been forged largely, if not entirely, by African-Americans who treat the history of their group as the paradigmatic point of reference for the race-matching debate, the claim is sheathed in the pain of past injustice, even as it sharpens to the following further point: A failure to place African-American children with African-American families not only weakens — indeed, potentially destroys — the ability of the children to form a reliably healthy identity, but it also weakens the African-American community by depriving it of its children. It is destructive of the community's autonomy, its ability to name its own.[6] This harm, like slavery, constitutes a deep social wrong, a wrong founded in domination and oppression, the sundering of the black family and its community. As a matter of purpose or effect, this wrong has been termed a form of genocide.[7]

PERSE OUR MOST PRECIOUS POSSESSION IS TO CREATE OUR OWN SUICIDE AS A RACE.

See Cenie J. Williams, Jr., *The Black Child*, *id.* at 6.

The N.A.B.S.W. position has been brought forward within the realm of contemporary debate and scholarship. Professor Ruth-Arlene Howe cites the N.A.B.S.W. 1972 policy position with approval, although her own policy recommendations do not track it. *See* Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131, 137, 158-160 (1995); *Transracial Adoption: Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. Pub. Int. L. J. 409 (1997). For a brief review of the effects of the N.A.B.S.W.'s position, including its effect on recent regulatory policies in child placement, *see* Bartholet, *supra* note 1, at 1179-81.

[6] *See, e.g.*, Morris F. X. Jeff, Jr., *President's Message*, N.A.B.S.W. NEWSL., Spring 1988, at 1-2.

> The lateral transfer of our children to white families is not in our best interest. Having white families raise our children to be white is at least a hostile gesture toward us as a people and at best the ultimate gesture of disrespect for our heritage as African people . . . . It is their aim to raise Black children with white minds . . . . We are on the right side of the transracial adoption issue. Our children are our future.

Id. See also Transracial Adoptions: Old Prejudices and Discrimination Float Under a New Halo, *supra* note 5, at 385. ("[O]nce again the stage is set for African-American children to be rudely separated from their families and communities.").

[7] *See, e.g.*, Felicia Law, *Transracial Adoptions: A Case of Colorblind Love or Cultural Genocide*, 1 BERKELEY MCNAIR J. 21-31 (1995). *See also* J. LADNER, MIXED FAMILIES:

Race-matched adoption serves a protective role both for African-American children and for their community and must be adhered to strictly, as a matter of principle. I shall refer to this principle hereafter as the principle of bonded identity.

B. *The Anti-Race-Matching Position*

Those who are arrayed in opposition to race-matched adoptions advance one or a combination of the following four claims. First, the law of adoption never has and never can fold in behind a single constraining rule, such as a mandate to race-match. Its traditional basis is not a rule but a standard — the best interests of the child.[8] While in some instances, a single factor may predominate in the determination of these interests, it is much more likely that they will best be furthered by a decision based on a wider-ranging set of factual ingredients and a looser-limbed, "all things considered" kind of judgment. Indeed, revisions of the best interests standard that are the product of recent legislative reforms tend to set forth a multiplicity of factors that courts must consider to support these notoriously discretionary, wide-bodied judgments.[9]

The second and the third claims reference two facts about the world. Given our present, rather lamentable state of knowledge, each of these represents a contested matter of concern. The second claim assumes that there are a great many more African-American children and other children of color available for adoption at any time and in any jurisdiction than there are qualified race-matched parents available to adopt them.[10] It follows, according to this claim,

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ADOPTING ACROSS RACIAL BOUNDARIES 76-77 (1977) ("Some supporters of the N.A.B.S.W. have echoed that sentiment — viewing transracial placements as . . . a 'genocidal plot' designed to destroy the black race.").

[8] Using the best interests of the child mandate to underline the distinction between a rule and a standard, Lon Fuller noted that its application involves the exercise of administrative discretion "which by its nature cannot be rule-bound." He continued, "the statutory admonitions to decide the question of custody so as to advance the welfare of the child is as remote from being a rule of law as an instruction to the manager of a state-owned factory that he should follow the principle of maximizing output at the least cost to the state." Lon Fuller, *Interaction Between Law and Its Social Context, quoted in* Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* LAW & CONTEMP. PROBS., Summer 1975, at 226, 255.

[9] *See, e.g.*, CAL. FAM. CODE § 3011 (West 1994); COLO. REV. STAT. § 14-10-124 (1995); MASS. GEN. LAWS ANN. ch. 208, § 28 (West 1987 & Supp. 1996); N.J. STAT. ANN. § 9:2-4 (West 1993); and UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1996).

[10] *See* Bartholet, *supra* note 1, at 1199-1200. To place children in race-matched homes, she observes, "agency policies in New York required that 'just about anyone' of the minority race be considered eligible as an adoptive parent for minority children." *Id.* at 1200 (citations omitted). *See also* Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children,* 92 MICH. L. REV. 925, 937-38 & nn.68-81 (1994).

To note, as I have, that this claim is "contested" does not begin to capture the vehe-

that it is simply worse for children to languish within the bureaucratic coils of the notoriously inefficient and often harmful foster care and adoption systems than it is for them to be placed more expeditiously across transracial lines.[11]

The third claim starkly denies that race is the core feature of identity, while conceding that it is of varying importance to an individual's sense of self. This weakened assumption about the importance of race is generally offered without commitment to any theoretical position on the ontology of race or identity.[12]

The fourth claim — the most recent to enter the debate — is about the ontology of race. It denies that "race" is a factual, essential, or reliable category of understanding. Rather, it holds that race is a scientifically ungrounded social construct, a matter of learned and, therefore, highly mutable behavior for both the perceiver and the perceived.[13] This view treats the category of identity as

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mence, even the bitterness, which the contest displays. *See*, e.g., Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 44-45 (1993).

The National Urban League Pulse Survey claims to have revealed that one-third of all black household heads — some three million people — are interested in adopting a black child. This number far exceeds the total number of black children available for adoption in any year. But no one claims that an excessive number of prospective black adoptive parents have actually entered the adoption system seeking children. Explanations for the shortfall include the possibility that many would-be parents cannot afford the fees and costs of adoption (but that they can somehow afford the costs of child-rearing), *see Redefining the Transracial Adoption Controversy, supra* note 5, at 159); that such persons are often discouraged from coming forward by the perception that the adoption system is governed by a bureaucratic white bias, *see id.*; or by the need for financial subsidy, presently available only in the case of "special needs" children. In addition, it seems plausible that, as with all survey evidence, there may be framing biases at work, along with the well-known gap between opinion and action that undermines the reliability of survey research. It is also possible that prospective adopters are not willing to adopt the children actually available, many of whom are non-infants, have histories of adjustment or learning difficulties, or belong to large sibling groups.

[11] *See* Shari O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 492 & nn.32-34 (1986). *See also* 1 Westat, Inc., *Adoptive Services for Waiting Minority and Non-Minority Children* #4-14 (Apr. 15, 1986) (minority children wait an average of two years for placement; non-minority children wait an average of one year).

[12] Most, if not all, of the writings of liberals whose views are centered on the vital importance of racial integration take this form. An example of this view, used to take aim at the Multiethnic Placement Act, is to be found in Randall Kennedy, *Orphans of Separatism: The Painful Politics of Transracial Adoption*, 17 THE AMERICAN PROSPECT 38-45 (1994).

[13] The most eloquent and prolific current exemplar of this position is Kwame Anthony Appiah. For examples of his argument, *see* IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE (1992) and *The Uncompleted Argument: DuBois and the Illusion of Race, in* "RACE," WRITING, AND DIFFERENCE (Henry Louis Gates, Jr., ed., 1986).

In his 1994 Tanner lecture, Appiah adopted Ian Hacking's notion of the "dynamic nominalism" by which cultures bring into being divisions among persons through "our invention of the categories labelling them." In this way, we "make up people." Appiah

having a similar, highly mutable, non-objective shape, one that may harden into the basis of caste or privilege, to be sure, but not because of determinants that are owed any scientific or other relatively durable form of allegiance.[14]

Although the third and the fourth claims attach themselves, with varying degrees of potency, to issues outside the universe of adoption, their force within it is much the same as that of the two prior claims, both of which exist solely as a function of adoption policy. That force acts so as to deny to the principle of bonded identity the unifying reformulative power over the law of adoption to which its advocates aspire. I say "act" because the claim that race is a social

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examined this proposition primarily in respect to race, observing:

> Collective identities differ, of course, in lots of ways; the body is central to race, gender, and sexuality but not so central to class and ethnicity. And, to repeat an important point, racial identification is simply harder to resist than ethnic identification. The reason is twofold. First, racial ascription is more socially salient: unless you are morphologically atypical for your race group, strangers, friends, officials are always aware of it in public and private contexts, always notice it, almost never let it slip from view. Second — and again both in intimate settings and in public space — race is taken by many more people to be the basis for treating people differentially.

Appiah's lecture was published as *Race, Culture, Identity: Misunderstood Connections* in COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 80-81 (K. Anthony Appiah and Amy Gutmann eds., 1996).

For a stringent analysis of the difficulties that obtain in the application of the concept of racial identity to federal anti-discrimination law in both statutory and administrative contexts, *see* Christopher A. Ford, *Administering Identity: The Determination of 'Race' in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994).

[14] For a variety of treatments of the revisionist science and legal-social science positions on the social construction of race and, more generally, identity, *see* RICHARD C. LEWONTIN ET AL., NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE (1984); Masatoshi Nei and Arun K. Roychoudhury, *Genetic Relationship and Evolution of Human Races*, 14 EVOL. BIOL. 1 (1982); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); and Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995).

Outside of law, the revisionist project has a singular focus. It is to debilitate the idea that "race" is biologically determined. (*See, e.g.*, LEWONTIN ET AL., who argue that there is greater genetic variation within a "racial" population than across populations.) Within law, the more complex project taken on by revisionists such as Karst is to pursue, on the one hand, the deconstruction of essentialist categories such as "race" but to argue, on the other, that the harms done by our insistence on racial and other forms of invidious discrimination continue to deserve legal redress along the lines that affirmative action programs represent.

In the interest of modesty within social science and law, it seems appropriate to observe that the social constructivists who spear-head these revisionist projects stand on the shoulders of such distinguished scientists and social scientists as, respectively, the geneticist Theodosius Dobzhansky and the anthropologist Ashley Montague. For examples of their estimable work, *see* Theodosius Dobzhansky, *The Race Concept in Biology*, THE SCIENTIFIC MONTHLY, LII (1941) 161-65 and ASHLEY MONTAGUE, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE (4th ed., 1964).

construct could be seen to behave differently. It could, for instance, be harnessed by the advocates of bonded identity to their claim of principle, thereby functioning as a rationale for the need of children to bond. In two steps, this argument would go: Since the white oppressor insists on the construct of race and uses it as a basis for social oppression, a child's fragile sense of self requires strong, affirmative construction. And that is what only a race-matched family can provide.

This move re-works the ontological claim into a behavioral one. But the advocates of bonded identity have not so much sought to worry after the ontological or behavioral implications of their position as to stand on its ethical appeal. In any event, the claim of social constructivism does not offer a reliable basis for conjunction. That is because a second possible valence — racial admixture and the increasingly arbitrary nature of racial classification — destabilizes its use, as we shall see.[15]

C. *The Stable Statism of Adoption*

Despite the wide positional disparities that we have been noting, participants on both sides of what I have denominated the principle-policy divide appear to accept without question two fundaments of the law of adoption. The first is that adoption will remain what it always has been, since it was grafted by statute into the early law of the states:[16] a status that can be neither privately created nor privately undone, as would be possible if adoption were to be subsumed within the law of contract. Instead, like marriage, adoption is, and seems destined to remain, a status defined and maintained by the state.[17] At the least, none who participate in the race-matching debate has sought to displace this condition.

The second matter of apparent consensus is that the broad-gauged standard under which individual adoption decisions are made (though not necessarily unmade) is, as mentioned earlier, the best interests of the child — a standard identical to that which forms the basis for contested child placement decisions in the law of guardianship and divorce. Those who portray race-matching as a matter

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[15] *See infra* text accompanying notes 43-51.

[16] Adoption is a creature — and a late-developing one, at that — of statutory, and not the common law. Its development in this country dates from the enactment of the earliest adoption statute, passed by the Massachusetts legislature in 1851. This move preceded the English development of adoption law by almost a century. The first such English statute was passed in 1926. *Compare* MASS. GEN. LAWS 1836-1853, ch. 324 (1854) *with* Adoption of Children Act, 1926, 16 & 17 Geo. 5, ch. 29 (Eng.). For a brief history of adoption law, *see* Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971).

[17] For a synoptic view of the adoption regime, minus the feature of local variation, see UNIF. ADOPTION ACT 9 U.L.A. 15 (1996). The existence in all states of the statutory regime does not deny a role to private-ordering. In fact, through the processes of black and "gray"-market adoption and the increasingly popular "open" adoption approach, that role is widening. For observations on these developments, *see* Jane Maslow Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105 (1987) and sources cited therein.

of necessity for children of color argue not to set aside the best-interests standard but, in effect, to weld it to an irrebuttable presumption of what, as to these children, is best. Their further claim of community-wide harm — non-congruent with this singularly child-centered standard — simply falls outside the analysis, where the communitarian foundation of the race-matching claim must hope that its presence gets ignored.

My concern to re-cast this debate does not look to re-make these two cornerstones of the adoption process: that it is a state-authored status and that individualized attempts at achieving the status are decided under an entrenched state-generated standard of broad application. Rather, my treatment of the issue simply observes the breadth and the depth of the state's monopoly over adoption and further observes the apparent immutability of that monopoly. It is what flows from this circumstance that controls the argument to which I shall now turn.

II. RE-CASTING THE DEBATE

A. *The Centrality of* Loving v. Virginia

The principle I seek to advance derives from the Supreme Court's decision in *Loving v. Virginia*.[18] In *Loving*, the Court unanimously held unconstitutional the Commonwealth of Virginia's statutory ban on "miscegenation." The legislative scheme criminalized attempts to marry by couples who fell within the statute's closely-defined categories of white and non-white: Following the traditional "one-drop" rule — one drop of "any blood other than Caucasian" — the state stripped individuals of the designation "white person" unless the errant blood caused the person to be one-sixteenth or less American Indian, in which case, they were deemed white.[19] The statute rendered it unlawful for white persons to marry other than white persons.[20] Non-whites were subject to no corresponding prohibition, the purity of their racial stock being of no social consequence.

As a form of state action based on the invidious treatment of race, the statute easily qualified for analysis based upon strict — indeed, fatal — scrutiny.[21] But

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[18] 388 U.S. 1 (1967).

[19] *See id.* at 5 (citing VA. CODE ANN. § 20-54 (Michie 1960)).

[20] *Id.* The Virginia legislature statutorily proscribed white-non-white marriages through the enactment of both civil and criminal sanctions. As a civil matter, such marriages were treated as void *ab initio* as a matter of public policy. *See* VA. CODE ANN. § 20-57. As a criminal matter, such intermarriage was punishable as a felony. *See id.* § 20-59.

The class plaintiffs in *Loving*, a white man and a black woman, had married in Virginia, which triggered their felony conviction, followed, creatively, by a sentence that amounted to banishment: on pleading guilty to a violation of the criminal ban on miscegenation, the couple received a suspended one-year jail term — suspended for 25 years on condition they leave Virginia and not return together during the period of suspension. *See* 388 U.S. 1 at 3.

[21] The Court's traditional strict scrutiny analysis has been described as strict in theory, fatal in fact because it has been applied under circumstances in which the defending state could offer no constitutionally acceptable justification for the action at issue. The formu-

Chief Justice Warren's magisterial opinion wasted no ink on analytical self-consciousness. Instead, the Court registered its reproach and repudiation of a systemic feature of supremacist, race-discriminatory rule-making that, as of the time of the opinion, still embarrassed the legislatures of sixteen states.[22] Relying on the "organic"[23] purposes of the Fourteenth Amendment, the Court rested on both the Due Process and the Equal Protection Clauses "[f]or reasons which seem to us to reflect the central meaning of those constitutional commands . . . ."[24] Turning first to the Equal Protection Clause, the Court crushed the state's "equal application" argument[25] under the weight of this triad of pronouncements: "There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race."[26] "[T]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification"[27] and "we have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race."[28]

The Court did not pause, in the onrush of judgment, to parse the meaning of invidiousness. On one reading, it left the bare fact of race-based marriage criminalization to do this work. On a second, more integrated reading, its alternate holding, based on the Due Process Clause,[29] exposed the nature of the harm

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lation was coined by Gerald A. Gunther in his oft-quoted Harvard Law Review Supreme Court Foreword. *See The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 2 (1972). For a later analysis of strict scrutiny that builds off Gunther's insights, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1451-54 (2d ed. 1988).

[22] Between the time the *Loving* case was filed and the time the Supreme Court handed down its opinion, one state saw fit to repeal its anti-miscegenation ban. This left Virginia and fifteen other states subject to the Court's ruling. *See* Loving, 388 U.S. at 6 n.5.

[23] *Id.* at 9.

[24] *Id.* at 2.

[25] The claim of "equal application," which Virginia had relied on in an earlier litigation involving its miscegenation ban, would have immunized the state's scheme from the Fourteenth Amendment's proscription of invidious racial discrimination on the ground that it defined the criminal offense as applicable to all persons who stood in violation of it. *See* Naim v. Naim, 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956). In *Naim*, the Supreme Court of Appeals of Virginia had looked back to an 1882 U.S. Supreme Court decision, *Pace v. Alabama*, 106 U.S. 583 (1883), in which the Court had validated an "equal application" analysis. Although the *Naim* decision traveled on appeal to the United States Supreme Court, it was allowed to stand — ignominiously — for want of a federal question. *See* Naim v. Naim, 350 U.S. 985 (1956).

Virginia's Office of the Attorney General stuck by equal-application analysis despite its rejection by the Supreme Court in a criminal case three years ahead of *Loving*. *See* McLaughlin v. Florida, 379 U.S. 184, 188 (1964).

[26] Loving, 388 U.S. at 11.

[27] *Id.*

[28] *Id.* at 11-12.

[29] *See id.* at 12.

the state sought to perpetuate through its thuggishly intrusive racist intermeddling. Here, relying on its earlier response to a non-race-based, yet-more-thuggish criminal statute, the Court tersely characterized marriage as one of the " 'basic civil rights of man . . . fundamental to our very existence and survival.' "[30] Then, the Court simply affirmed the value of marriage as a "fundamental freedom"[31] of the individual, one which, on grounds of race, "cannot be infringed by the State."[32]

At a stroke, the Court's judgment in *Loving* eradicated the constitutional status of all of the extant marital anti-miscegenation statutes.[33] In an instant, anti-miscegenation met its death as a formal, community-based norm. Moreover, for reasons that probably include the definitive nature of the Court's stand,[34] the adjacent efforts of the Court to de-fang a second invidiously discriminatory status, illegitimacy,[35] and its legislative abolition in many states in the decade before *Loving* was decided,[36] that anti-miscegenation died the cold death of infamy.

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[30] *Id.* (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[31] *Id.*

[32] *Id.*

[33] *See id.* at 6 n.5 for a roster of then-extant statutory bans.

[34] The Court's language leaves no doubt that a constitutionally permissible basis for a state ban on "miscegenation" cannot be found. *Compare* the Court's relentless reconstruction of each of the state's arguments at pp. 7-10, *with* its responses at pp. 11-12.

It is inspiring to see that the Court's double-pronged Fourteenth Amendment responses were advanced, just ahead of its decision to take the case, by a legal scholar who, most impressively, took his stand as one of Virginia's own. *See* Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966). The Court cites Wadlington's work at 388 U.S. 1 at 5-6 for the author's careful reconstruction of the legal history of anti-miscegenation; it cites to no extant literature outside of doctrine for the normative piece of its work.

[35] Over a considerable period of years, the Court, using its test of "intermediate" scrutiny, took aim at a multitude of statutory schemes under which illegitimate children were treated invidiously on that account. Although the Court has never departed from its general stance that discrimination against the illegitimate is wrongfully opprobrious and a denial of equal protection, it has never raised the level of scrutiny so as to effectively proscribe all such discriminations. In recent years, it has relaxed its gaze in regard to certain inevitable matters of statutory regard, such as the applicable period of limitations for the private initiation of paternity suits. *Compare* the Court's earliest anti-discrimination cases involving illegitimacy, such as *Trimble v. Gordon*, 430 U.S. 762 (1977), *Levy v. Louisiana*, 391 U.S. 68 (1968) and *Glona v. American Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968) *with* such later cases as *Lalli v. Lalli*, 439 U.S. 259 (1978) and *Pickett v. Brown*, 462 U.S. 1 (1983).

Despite the evident weakening of the Court's normative attack over time, I do not mean to gainsay the standard view that the thrust of the Court's work has helped to efface the pejorative legal treatment of persons born outside of marriage, with whatever lessened degree of social disapprobation the change in the legal norm has worked to foster.

[36] During the decade and a half before *Loving* was decided, fourteen states legislatively abolished their bans on interracial marriage. These states are noted by the *Loving* Court at

Never, as a matter of states' rights, social tradition, religious injunction, or any other community-based normative commitment, has anti-miscegenation been revived as the basis of a legal claim. In one further instance, the Court reviewed *Palmore v. Sidoti*,[37] a case that raised the anti-miscegenation issue again, this time, in the more individualized, fact-sensitive setting of a child-custody case arising out of a biracial re-marriage. There, the anti-miscegenation norm died for a second time.[38]

The Court has not had a third opportunity to consider the relationship between racial admixture and family formation.[39] Given that the concept of precedent is inapt in regard to constitutional caselaw and that the factual setting — most likely adoption — would cause the case to differ from *Loving* and *Palmore*, how

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388 U.S. at 6 n.5. The Court also took notice of *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), in which the California Supreme Court jumped out in front of both state legislatures and state courts in declaring interracial marriage prohibitions violative of the Equal Protection Clause.

In *Perez*, the concurring opinion of Justice Carter cited the United Nations Charter as newly-minted authority for the liberal, interracial moral order to which the law must adhere. It can be no accident that the sea-change that *Perez* initiated followed closely on a war in which black and white American soldiers fought together and died together in the first integrated units that the United States Armed Services ever composed.

It is generally hard to evaluate the extent to which doctrinal change is specifically advanced by arguments in the academic literature. The Court's conclusive response to anti-miscegenation legislation, occurring just when it did, may constitute a noteworthy exception. It may, indeed, reference a moment when a judicial bench was moved to review a social and legislative movement venerable for the length of its history — the anti-miscegenation ban pre-dated the enactment of the Fourteenth Amendment — through a normative lens freshly ground into the substance of analysis by an energetic legal academic. *See* Wadlington, *supra* note 34.

For an originalist attempt to preserve the old order, also published on the verge of the Court's review, *see* Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966). For a second attempt, published in an apparent effort to deflect the Court from continuing on the path it had entered in *McLaughlin v. Florida*, 379 U.S. 184 (1964), *see* R. Carter Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws*, 43 N.C. L. REV. 92 (1964).

[37] 466 U.S. 429 (1984).

[38] *See id.* at 434. Had the Court not rejected the trial court's view of interracial marriage as prejudicial to the welfare of children *per se* — that is, without evidence of actual harm — it would have eviscerated the strength of *Loving* across a wide area of application: divorce-related custody disputes. My argument as to adoption therefore travels through *Palmore* as a necessary derivative of *Loving*.

[39] A case that might eventually re-present an issue of race and family formation to the Court is *Matthew O. v. Texas Dep't of Protective & Regulatory Serv.*, No. 95-04417 (Dist. Ct., Travis County, Tex. 1995). This case, brought to invalidate adoption procedures that authorize race-matching at the alleged cost of substantial delays in permanent placements, arose prior to the enactment of the most recent federal response to race-matching, *see supra* note 2, which it, therefore, did not test. As of this writing, the case has been nonsuited without prejudice to its re-filing within a stipulated period.

should anti-anti-miscegenation assert itself as a matter of supervening principle, this time in regard to adoption law?

B. *Applying the Anti-Anti-Miscegenation Principle to Adoption*

The question I have finally posed returns us to race-matching but re-casts that debate within a frame that is shaped by *Loving*. Though it should be clear where this framework takes us, a more generous response to the seriousness of what is at stake leads me to widen and re-contour the issue into this one: as an object lesson in political morality, not simply a case in the constitutional doctrine of marriage or the family, what was the *Loving* case *about*?

Above all, *Loving* was about two matters of political morality, wedded to each other in principle. One of these is the intolerability of state authority over racial intimacy. Without this, the toleration and anti-subordination principles that continually re-animate the promise of the Fourteenth Amendment would be left stranded in the face of the domineeringly intrusive presence of the state's coercive force. The second matter of meaning, derivative of the first, operates at a higher level of abstraction. It leaves to individuals, and not to the states, or in political-theoretical terms, to "the state," the very ongoingness of racial distinctiveness, for if the state cannot constitutionally prohibit interracial marriage, then it cannot object to the legitimacy of interracial reproduction, the practical manner through which the principle of anti-anti-miscegenation begets its future.

The legacy of *Loving* is, therefore, not necessarily either hope or promise but rather, the cold-sober fact that the prohibition of state-coerced racial separatism could lead to the end of not just state-supported racism but race itself. That is what makes *Loving* the most important family law case in constitutional jurisprudence. In the long view of history, it should make *Loving* one of the most important constitutional cases overall.

But prognostication over the long view of history is not my purpose here. What remains to be accomplished is the evaluation of one principle — the principle of bonded identity that is the heart of the race-matching position — against the principle of anti-anti-miscegenation, which is the soul of *Loving*'s state-oppositional stand. The anti-anti-miscegenation principle deserves primacy in the contest between the two and that the anti-anti-miscegenation principle commands the debate's policy positions as well. We have already established that adoption, like marriage, is a state-run regime. And we have observed that *Loving* has noncontroversially, by this time in history, deprived the state of authority over the perpetuation of racial separation by means of its legitimating function over marriage. Now, we are left with two competing propositions. Either it is the case that the state must be similarly prohibited from furthering racial separatism through its legitimating function in adoption, or a decisive difference must be appealed to as the compelling basis for distinguishing statist control over the significance of race within these two aspects of the familist regime. What might this difference be?

C. *One Debate, Two Principles: Which Should Govern?*

Circling back to the race-matching debate, it seems clear that the proponents of race-matching would treat the black adoptive child's needs as decisive to the establishment of difference between the marital and adoptive segments of the regime.[40] To see where this argument takes us, let us assume that the empirical premise at the center of the race-matching claim is true; namely, that a secure black identity *depends* upon familial race-matching.[41] What is supposed to follow from this is that all black children should be race-matched in adoption. But this claim would require much greater support to be valid. Among its necessary forms of support would be validation for the position that other markers of personal identity — gender or religion, for example — are less deserving of attention in the adoptive matching process than is race: that other features of social and personal identity deserve to be subordinated to racial identity if they cannot be conjunctively served.

And then there is the factor of time. As many critics of race-matching have noted, the high demand for suitable black adoptive parents under a race-matching scheme far exceeds the current and predictable supply.[42] Even if income and age standards were set aside as constraints on the matching process — and no one responsibly suggests that they could be entirely set aside — no reliable demonstration exists that all black adoptive children could be expeditiously race-matched to an adoptive home.[43] So at the level of policy implementation, the principle of bonded identity must be presumed to over-bear the harm of delay, even significant delay, in the release of children from such deleterious holding patterns as long-term foster care and even from institutional residential arrangements in order for race-matching to supervene.

But no cost-benefit analysis that would suitably depreciate the harm of delay has yet been undertaken. Until the methodology, including empirical study, is in place to lend plausibility to such an analysis, it is impossible for the principle of bonded identity to hold sway. Moreover, the unlikelihood that plausibility can be achieved is currently demonstrated by the fact that the older a child is at the time he or she is cleared for adoption, the less likely it is that he or she will get adopted. Thus, only on account of a stark reversal of supply and demand in the market for adoption would a market-clearing outcome come into play. With no such reversal on the horizon, the advocates of race-matching must be prepared

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[40] *See supra* notes 5-7.

[41] I note that Professor Howe has not adopted this bright-line empirical stand but does insist that a secure Black identity is necessary to the well-being of a racially-black adult. I do not understand her to endorse a position with a similarly bold outline in the case of persons she is willing to stipulate as racially mixed. *See* Howe, *Redefining the Trans-racial Adoption Controversy*, *supra* note 5, at 137, 158-160.

[42] *See, e.g.*, Bartholet, *supra* note 1; Forde-Mazrui, *supra* note 10; Kennedy, *supra* note 12 and sources cited therein.

[43] *Compare* the claims made in Howe, *supra* note 5, and Fenton, *supra* note 10, *with* the facts alleged in *Matthew O. v. Texas Dep't of Protective & Regulatory Serv.*, No. 95-04417 (Dist. Ct., Travis County, Tex. 1995).

to sacrifice the welfare of older black adoptive children to that of younger black adoptive children to hold fast to their stand. If they are prepared to yield up to the principle of race-matching the welfare of one of the least well-off segments of the population of children eligible for adoption, the ethical appeal of the principle itself subjects itself to sacrifice. In the process, the unacknowledged gap between the child-centered best interests standard and the community-based race-matching principle must stand revealed.

D. *The Pragmatics of Race-Matching: Arbitrariness Overtakes Principle, as "Race" Runs Away*

But what if the categories of "black" and "white" are themselves arbitrary, in the sense that they do not adequately or accurately represent a sorting device for the children they purport to distinguish? A recent front-page article in the New York Times speaks to this question. It opens: "Edward Cooper, a Portland, Ore. businessman, is black. His wife and business partner, Barbara McIntyre, is white. Their 12-year-old son, Ethan McCooper, is, like his name, a blend of his parents, and harder to classify."[44] The article proceeds to describe interracial marriage as a " 'big wave' "[45] that we are riding — a wave that will continue to swell as we become an increasingly multi-racial population. Already, in the 1990 Census, approximately three million adult Americans reported that they were married to a person of a different race.[46] These people, many of whom are pressing for the addition of "multi-racial" as a Census category, further reported as of that same year, that they had two million interracial children.[47]

Should these three million adults and their millions of children when they reach adulthood, be denied standing to adopt our "black" adoptable children? Under the equality principle, should they be equally disadvantaged from adopting "white" children? Should they be eligible to adopt only "multi-racial" children or, more stringently, "multi-racial" children who are, in accord with some standard for the calibration of "multi-"racial identity, identical to themselves?

What race or races is a "multi-racial" child? Should the strands that make up each child's racial admixture be traced so as to ensure that they are identical, or at least adequately similar, to the racial admixture of a couple in line to adopt? How can the matter of adequacy be brought to rest? How might tracing be reliably accomplished? Who should bear its cost? Even if their full ancestry were to be known, what if the two halves of a couple were to have different racial histories? What if the racial mix of the child, the would-be parents, or either of them

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[44] Linda Matthews, *More Than Identity Rides On a New Racial Category*, N.Y. TIMES, July 6, 1996, at A1.

[45] *Id.* at A7.

[46] *See* Table 62, Bureau of the Census: Statistical Abstract of the United States: 1996, (116th ed.) Washington, D.C., 1996.

[47] *See* Matthews, *supra* note 44, at A1. *See also Rally Held for Multiracial Category on 2000 Census*, BOSTON GLOBE, July 21, 1996, at A21; *and* Lylah M. Alphonse, *Race Needs 'Other' Option*, BOSTON GLOBE, Oct. 5, 1996, at C1.

cannot be reliably traced? How "black" must a child in an increasingly mixed-racial social order be in order to remain, categorically, "black"?

More pungently, how should — how must — the Equal Protection Clause bear down on multi-racialism within the adoption context to do equal justice to "black," "white," and "multi-racial" children? Assuming that ethnicity is no less entitled to deference than is race, how should adoption placement respond to children of, for example, "Asian" ancestry?[48] If a "black" child's identity is to be strengthened through race-matching, mustn't this same goal obtain with respect to Cambodian, Chinese, Japanese, and Vietnamese children? Should race-matching in an "Asian" context be required to take account of the fact that the Chinese have been enemies of the Cambodians for thousands of years? Should inter-racial and inter-ethnic enmities become a focus of adoption policy once it sets sail to preserve and enhance "identity"?

How could the claim of group-based harm — the disability that the African-American community is said to experience through the prevention of naming its own — not be treated to equal respect in connection with other groups', other communities' constitutive concerns? For a state to design, or to re-design, an adoption policy that pays appropriate deference to the principle of bonded identity by applying equal sensitivity to each racial and ethnic category within its scheme, while avoiding the subordination of one race's interests to another, seems an obvious impossibility. The effort to maintain racial integrity — indeed, racial significance — within the familist regime of a dynamically pluralist society *must* be arbitrary. Increasingly, the demographic trend toward "multi-racialism" — partially, albeit only partially, in response to *Loving* — stretches the concept of "race" beyond determinate shape.[49] On just this account, the ef-

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[48] The blended category "Asian," overriding as it does the unique political and cultural histories and traditions of the peoples who inhabit or come from East Asia, South-East Asia and South Asia, is an indigenous American construct. As a newly-forged attribute of social perception, the category causes a wide array of Americans who previously understood themselves to fall into two categories to now fall into three — American, "Asian," and that which references their particular ethnicity of origin. This overlay is producing diverse positive and negative social and political consequences, streaked with overtones that derive from the admixture of voluntary and involuntary participation in the new categorization that is accompanying its development. For an intriguing popular report on this development, *see* Norimitsu Onishi, *Merging Identity — A Special Report; New Sense of Race Arises Among Asian-Americans*, N.Y. TIMES, May 30, 1996, at A1.

[49] Two recent book-length treatments observe and document the increasing erasure of distinct racial boundaries. One, a collection of essays, takes direct aim at the United States Census for its increasingly futile failure to take multi-racialism into account. *See* RACIALLY MIXED PEOPLE IN AMERICA (Maria P.P. Root ed., 1992). The other employs the tool of multiple regression analysis to demonstrate both the factual nature of racial and ethnic admixture and social awareness of the tendency toward admixture. *See* RICHARD D. ALBA, ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA (1990).

For an historical account of "aggressive" miscegenation in the antebellum South — including the stark fact that in one county in Virginia, the 1860 Census listed more than a quarter of the slave population and more than one-half the population of free blacks as

fort to maintain the insularity of racial categorization becomes absurd.

For these reasons, it is little wonder that the recent inter-disciplinary interest in the social construction of race is in the popular ascendancy.[50] The descriptive focus of this work aims to demonstrate the indeterminacy of race. It sees its own validation in the tendencies toward interracial marriage and interracial reproduction that are intimidating the concept of race. But even if there were no such tendencies afoot, those who challenge the establishment of racial categories argue on essentially normative grounds. Their challenge does not, therefore, participate in such fundamental debates as whether color is an objective or a subjective phenomenon. Instead, their argument concerns the arbitrariness of discriminations — invidious discriminations — bottomed on both ancestry and color, the blatantly unstable bases, since they can obviously pull apart, for the establishment of race. As one of the most eloquent spokespersons for social constructivism puts the matter, rattling the cage of conceptual stability as he writes:

> The denomination of race, like other forms of social identity, depends upon a set of theoretically-committed criteria for ascription, not all of which are held by everybody, and which may not be consistent with one another even in the ascriptions of a single person; and there is then a process of identification in which the label shapes the intentional acts of (some of) those who fall under it.[51]

This process of identification leads inevitably to instances of easy social and personal identification and to instances which, in either social or individual cases, are hard. In the matter of race, the ascriptive categories are likely to have "vague boundaries."[52] One can observe the Virginia anti-miscegenation statute at issue in *Loving* as an attempt to make the vague boundaries of race rigidly secure. That was, after all, the purpose of the "one-drop rule." But Virginia's romantic attachment to deemed-whiteness for the sufficiently dilute (one-sixteenth or less) descendants of Pocahontas gave away the store.[53] Why should a one-sixteenth non-white person have been "white enough" to qualify for privileged personhood under a regime of White Supremacy, rather than someone who was

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"mulatto." *See* BRENDA E. STEVENSON, LIFE IN BLACK AND WHITE: FAMILY AND COMMUNITY IN THE SLAVE SOUTH (1996).

The Stevenson study underscores the fact that racial admixture in America is not hinged to the evolution of our jurisprudence. Nevertheless, the recent accelerations in multi-racialism and in the social approbation of this trend described in the Root and Alba works seems more than modestly suggestive of the environmental impact that the *Loving* decision has helped to create and acknowledge.

[50] The ascendant popularity of this new inter-disciplinary tendency can be seen on college campuses in the emergence of courses and courses of study on the deconstruction of racial identity. *See, e.g.*, COURSE DESCRIPTIONS, AFRO-AMERICAN STUDIES 11 ("What is an African-American?") and Afro-American Studies 124 ("Constructions of Identity"), Harvard University (descriptions on file with the author).

[51] Appiah, *Race, Culture, Identity: Misunderstood Connections*, *supra* note 13, at 80.

[52] *Id.*

[53] *See* VA. CODE ANN. § 20-57 (Michie 1960), *cited in* Loving, 388 U.S. at 4.

only, say, one-thirty-second non-white? Should descendants of the Cherokee Nation have qualified for deemed-whiteness because their ancestors owned slaves?[54]

It is because intimate social relations have always conducted themselves behind the storehouse of formal rules that the current theoretical interrogation of race as a social construct does not depend on trends. No rule can possibly capture the inherent ingredients of race. Only cultural contingency can determine what "race" is and what, in political and social terms, it means. This Olympian view does not begin to suggest that race is an invalid category for all purposes. A child who is old enough to conceive of himself as black and who might, on strong evidence about his particular history and social development, substantially benefit from adoptive placement with a suitable, ready, and willing family that conceives of itself as black, should not be tossed in another direction by an agency of the state that can easily accomplish this goal. Racially arbitrary placement as an unmediated response to the arbitrariness of a racially-motivated regime may produce needless insensitivity to the welfare of especially needy children, at the level of close application. In such situations, I stand ready to admit that even the anti-anti-miscegenation principle should give sway. But to grant this much is only to return to the concern that fact-sensitive results that are in the best interests of adoptive children are to be preferred to a regime of unbending principle.[55] It is not to grant that the state should treat race-matching as a matter of either governing principle or governing policy when it exercises control over the placement of children. To do so would be to accede to the intolerable: that the state may undertake to construct the perpetuation of race.

III. CONCLUSION

I began this discussion by reviewing the positions that have been marked out in the current debate over adoptive race-matching. I identified bonded identity as the principle to which the proponents of race-matching adhere. I noted that this

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[54] For a full treatment of the Cherokees as slave-holders, *see* THEDA PERDUE, SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY, 1540-1866 (1979), where it is noted that the precontact Cherokees held members of other tribes as slaves but later adopted ways imitative of white southern plantation life, including the usage of black slaves. *See also* the relevant discussion in ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH, A COMPARATIVE STUDY 179-80 (1982).

[55] The intention I mean to note here involves my acceptance of the possible need for a side-constraint in regard to what I otherwise mean this article to convey: the need for governance of the best interest standard by the anti-anti-miscegenation principle. In what I believe to be a narrow set of cases based on clearly demonstrated necessity — proven psychological necessity — I concede that race uncompromised by the factor of significant delay may be entitled to play a role. Were we next to engage in policy design, I would insist on a suitably narrow and, from an evidentiary standpoint, a stringent standard for the application of this constraint.

By no means, therefore, do I endorse the weak and unstructured representation of the relationship of race to the articulated decisional mandates in the Multi-Ethnic Placement Act. *See supra* text accompanying note 2.

principle is argued for as if its justifications as a matter of individual and group-based harm are, and can be, fused. I went on to tease apart some of the implications of that position when it comes into direct contact — and conflict — with the best interests of the child standard that is intended, even by the proponents of race-matching, to remain the dominant substantive undertaking in adoption placement decisions. In so doing, I observed the difficulties that the principle of bonded identity has in making its way on the ground.

What fell out of this line of inquiry was that, even if bonded identity is assumed to have empirical validity, its supervention in the debate over adoption placement depends upon a wide array of unacceptable endeavors. These include the arbitrary assignment of inferiority to other markers of personal identity; the arbitrary denial of the ill effects of placement delay; the arbitrary concentration of adoption resources on the self-perceived needs of a particular racial group — or the explosion of a need for resources to meet the self-perceived needs of other unstably-defined groups; and the increasingly arbitrary retention of a categorical understanding of race. This understanding is one that demographic tendencies and a theoretically unsurprising inter-disciplinary movement within social theory both vitally resist. All of these concerns followed our initial grant of empirical validity to the proposition that a "secure" black identity depends upon familial race-matching. But there is no justification for that initial concession: the direct empirical relationship between race-matching and personal security has not been persuasively demonstrated. The empirical methods on which to found a reliable assessment of the relationship do not presently exist.

Still, the best reason to adhere to the anti-anti-miscegenation principle does not derive from the weakness of its rival. It is that, like several previous generations' devotion to White Supremacy, proponents of bonded identity demand that the state perform a role that our Constitution should be understood to forbid. That role would not only permit but require the state — more peculiarly, each of the fifty states — to construct, maintain, and, through the placement of some of our most vulnerable and dependent children, enforce an increasingly fractured, arbitrary, and ineluctably divisive definition of "race."

In *Loving v. Virginia*,[56] the Supreme Court ended the right of states to harness their monopoly over marriage to such a dangerous machine. The danger of the machinery that *Loving* begins to describe did not transmogrify into something more benign once the White Supremacist notion of racial purity got banished from the motives for legitimate state action. Putting the state in charge of the maintenance of black purity is entitled to no higher regard than allowing the state to patrol the boundaries of white purity. The establishment of identity on racial grounds is simply not the state's business to enforce. The maintenance of racial categories in the service of this illicit business is exactly what *Loving* set out to end. The invidiousness of the conduct of this activity by the state is completely independent of the question of which persons and which groups may be aided or harmed by the conduct.

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[56] 388 U.S. 1 (1967).

It is in the best interests of this nation that our state-run familist regime accept the governance of the anti-anti-miscegenation principle, and that states be constrained to operate their child placement regimes inside of *Loving*'s frame.