

TRANSRACIAL ADOPTION IN THE UNITED STATES: THE REFLECTION AND REINFORCEMENT OF RACIAL HIERARCHY

David Ray Papke*

Transracial adoption strikes most as an appealing undertaking. People who have adopted a child of another race or been adopted by parents of another race are usually delighted by the results and consider themselves truly fortunate. People who have participated in a transracial adoption might even assert that their families have transcended race and become “post-racial.” These individuals might claim they no longer take race to be an important category and designation in their daily lives and express the hope that others would come to see things in the same way.

In general, these sentiments are genuine and admirable, and this Article does not oppose transracial adoption. However, when transracial adoption is considered not from an individual’s perspective, but rather as a larger socio-legal phenomenon, problems emerge. Transracial adoption, after all, is not merely adoption involving members of different races; it is also a self-consciously racialized process. Case workers, lawyers, and judges bring racial awareness to the process, and some federal statutes speak explicitly to race. A racial hierarchy often manifests in transracial adoption because of variable political clouts and ideological valorizations of various races.

In the United States, the most obvious feature of transracial adoption is that whites serve overwhelmingly as the adopting race and also exercise the most control in the adoption process. If they are part of transracial adoption, Asians, Native Americans, and African Americans, by contrast, almost always serve as the biological parents and adoptive children.¹ Members of these racial groups also have less control of the adoption process than do whites.²

Whites who adopt children of different races are unlikely to reflect on the role white privilege plays in the process, but members of racial minority groups might react uneasily to the different roles played by the different races in transracial adoption. For some, it might seem that whites, because of their resources and

* © 2013 David Ray Papke, Professor of Law, Marquette University Law School. A.B., Harvard College; J.D., Yale Law School; Ph.D. in American Studies, University of Michigan. The author thanks faculty colleagues Janine Kim, Jessica Slavin, and Michael Waxman for insightful comments on earlier drafts of this Article and Brittany Earl, Marquette University Law School 2011, and Casey Shorts, Marquette University Law School Class of 2014, for valuable research assistance.

¹ While “a majority of adopted children are non-white,” a majority of adoptive parents (73%) are white. SHARON VANDIVERE ET AL., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS 13 (2009), available at <http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf>.

² For a discussion of the relative power exercised by adoptive parents over biological parents and children in the adoption process, see David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 472–74 (1999).

color, are once again getting what they want at the expense of minority racial groups.

This resentment can surface in either international or domestic adoptions. In the case of international adoptions, a poignant dilemma surfaces: “[I]n a sense, the access of affluent white Western women to children of color for adoption is often dependent upon the continued desperate circumstances of women in third world nations.”³ In the domestic setting, “Black women often see transracial adoption as one of the many contexts that reflect the continuing subordination of Black women in this society.”⁴ The point is that the workings of transracial adoption are influenced by race-related power, and for those with less power, the workings of power can pinch.

Beyond the basic pattern of racial dominance and subordination through which whites hold a superior position to minority groups in the adoption process, there are also ways that different minority groups are positioned vis-à-vis one another. One involves the race-related preferences of those who adopt. “Hierarchies of preference, race-based as well as nation-based, clearly influence which children parents are willing to adopt.”⁵ According to one researcher, “[m]ost whites prefer healthy white infants, and when they discover that such babies are in short supply they are more likely to adopt children of Columbian, Korean, and American Indian ancestry than to adopt African American children.”⁶

To some extent, biological parents and children from minority racial groups internalize the preferences of the white adopters. This, in turn, limits the development of solidarity among the racial minority groups which make children available for adoption by whites. When minority groups see themselves as superior to whichever minority group they perceive to be below them, the perception contributes to white dominance and control in the transracial adoption process.

This Article moves through three sections, tracing the history and summarizing the laws regarding whites adopting (1) Asians, (2) Native Americans, and (3) African Americans. The Article’s insistence that transracial adoption reflects and reinforces racial hierarchy is not coded opposition to transracial adoption. The hope, instead, is that those who adopt a child of another race or place a child with parents of another race will appreciate the racial dimensions of their actions and understand why members of racial minority groups might object. Concomitantly, legislators and judges should realize that their laws and rulings routinely favor the interests of whites and that this, as well, is politically troubling.

³ Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 105 (1998).

⁴ *Id.* at 104.

⁵ MIA TUAN & JIANNBIN LEE SHIAO, CHOOSING ETHNICITY, NEGOTIATING RACE: KOREAN ADOPTEES IN AMERICA 27 (2011).

⁶ HAWLEY FOGG-DAVIS, THE ETHICS OF TRANSRACIAL ADOPTION 12 (2002).

I. THE ADOPTION OF ASIANS

Race-matching constituted a fundamental premise in American adoption for many decades. Most of the time, enough white children were available for white couples who wanted to adopt. To the extent they were adopted, non-white children were adopted by members of minority groups. According to Sandra Patton, “[t]he underlying ideology was rooted in naturalizing and normalizing the state’s reproduction of White nuclear families. The goal was to have adopted children look *as if* they have been born into their families.”⁷ The process was hardly a tightly coordinated program, but surely it reflected a pervasive assumption that in both families and in society as a whole, it was best if the races stayed apart from one another.

The first major break from this pattern of race-matching occurred in the early 1950s when white Americans began adopting Asians in surprisingly large numbers. Indeed, between 1948 and 2009, fully 49% of all foreign children adopted by Americans came from, in order of magnitude, Korea, China, the Philippines, and India.⁸ Assuming that some percentage of Russian adoptees has also been Asian,⁹ over one-half of foreign adoptees coming to the United States have been Asian.

Among Asian adoptees, Korean adoptees are the first and largest group,¹⁰ with white adoption of significant numbers of Koreans dating back to the Korean War. Korea had no tradition of adoption comparable to that of western countries; Koreans only used adoption to continue family bloodlines and then only with relatives and within the same surnames.¹¹ However, three years of armed conflict between North and South Korea and their communist and capitalist allies had left many lost, abandoned, and orphaned children in need of homes and families. In addition, Koreans tended to reject illegitimate children and especially children from “wrong blood.”¹² Under the Korean family register system, citizenship passed from a father to a child, and an illegitimate child of a Korean mother and American soldier was a non-person legally and also ostracized by the general

⁷ SANDRA PATTON, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA 20 (2000).

⁸ See TUAN & SHIAO, *supra* note 5, at 4.

⁹ A total of 53,069 adoption visas were issued for Russian children from 1989 to 2008. See C.N. Le, *Adopted Asian Americans*, ASIAN NATION, <http://www.asian-nation.org/adopted.shtml> (last visited Dec. 8, 2012).

¹⁰ See TUAN & SHIAO, *supra* note 5, at 4.

¹¹ See Dong Soo Kim, *A Country Divided: Contextualizing Adoption from a Korean Perspective*, in INTERNATIONAL KOREAN ADOPTION: A FIFTY-YEAR HISTORY OF POLICY AND PRACTICE 4 (Kathleen Ja Sook Bergquist et al. eds., 2007).

¹² *Id.*

population.¹³ Thousands of biracial children of Korean women and American soldiers were homeless or, if they were fortunate, housed in dormitories.¹⁴

The first Americans to adopt Korean children in significant numbers were Henry and Bertha Holt, a white evangelical couple. Feeling that they had “more of the world’s goods than they needed,”¹⁵ the Holts adopted eight Korean children in 1955.¹⁶ The press called the adoptees “Korean orphans” or “Seoul orphans,” but, interestingly enough, the Holts sought only what they called “mixed-blood” children, that is, children with American biological fathers and Korean biological mothers.¹⁷ Mr. Holt actually went from Korean orphanage to Korean orphanage—almost as if shopping at competing animal shelters—looking at hundreds of children before selecting the eight he liked best.¹⁸ Beaming with a type of white entitlement, he then gave them American names and transported them back to his large commercial farm in Oregon, where, in keeping with his beliefs, the children were raised as Christians.¹⁹ Gathered in the Holts’ living room, the children delighted an American reporter by singing:

Jesus loves the little children of the world
All the children of the world
Red and yellow, black and white
All are precious in his sight
Jesus loves all the little children of the world.²⁰

Beginning an ongoing practice of supporting white efforts to adopt children of different races, Congress changed the law for the Holts. The Refugee Relief Act, which had been enacted because so many refugees had hoped to leave their camps and temporary homes and to enter the United States, limited a family such as the Holts to the adoption of only two foreign children.²¹ Oregon Senators Richard L. Neuberger and Wayne Morse introduced a special bill in Congress which literally made an exception for the Holts. President Dwight D. Eisenhower signed the bill into law on August 12, 1955.²²

¹³ See ARISSA HYUN JUNG OH, *INTO THE ARMS OF AMERICA: THE KOREAN ROOTS OF INTERNATIONAL ADOPTION* 2 (2008).

¹⁴ See TUAN & SHIAO, *supra* note 5, at 22.

¹⁵ Greg MacGregor, *Oregonian Takes 8 Seoul Orphans*, N.Y. TIMES, Oct. 2, 1955, at 124.

¹⁶ See Gene Kramer, “*Pied Piper*” *Corrals 12 Korean Babies, Flies Them to America for Adoption*, WASH. POST., Oct. 14, 1955, at 71; Malcolm Bauer, *Oregon Family of Eight Adds Eight More*, CHRIST. SCI. MON., Oct. 21, 1955, at 3.

¹⁷ See MacGregor, *supra* note 15, at 124.

¹⁸ *Id.*

¹⁹ See Bauer, *supra* note 16, at 3.

²⁰ *Children: New Faces*, TIME, Dec. 23, 1957, at 16.

²¹ See Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400 (codified as amended in scattered sections of 8 U.S.C.).

²² A Bill for the Relief of Certain War Orphans, S. 2312, 84th Cong. (1955).

The Holts went on to found one of the first international adoption agencies, and they returned to Korea time and again to adopt additional children. By December 1957, “they had arranged for the transportation to the United States and the adoption by families all around the country of no fewer than 575 mixed-blood foundlings.”²³ The Holts required that the adoptive parents be church-going Protestants, and they referred Catholics and Jews who wanted to adopt Korean children to other agencies.²⁴

With the Holts serving as an inspiration of sorts, the adoption of Korean children took off in the late 1950s and early 1960s. In 1961, South Korea enacted a law—the Extraordinary Law of Adoption for the Orphan Child—which encouraged Americans to adopt Korean children.²⁵ Not to be outdone, Congress removed the limits on how many Korean orphans could be granted the visas required for adoption.²⁶ The Holts converted their private efforts into a full-blown international adoption agency and were the leaders of what one scholar has labeled “the Christian-Americanist adoption movement.”²⁷ Other agencies, mostly without the Holts’ particular religious affiliations and special interest in “mixed-blood” children, also appeared. Between 1955 and 1966, American couples adopted 6,293 Korean children.²⁸ Within this group, 46% had white fathers, and 13% had African American fathers.²⁹ Eventually, the placement of ostracized bi-racial children for adoption became less prevalent, but the adoption of Korean children nevertheless continued. Of the 265,524 orphan visas granted by the United States State Department between 1948 and 2000, 92,402 or 34.8% were for children from Korea.³⁰

The surge in transracial adoptions involving Korean children during the 1950s and 1960s is especially noteworthy given the pronounced racism and xenophobia of the period. Indeed, as Arissa Hyun Jung Oh states, “it was nothing short of revolutionary for mostly white American families to be adopting mixed-race and full-blooded Korean children during the years before the passage of federal civil rights legislation when the U.S. remained a deeply segregated country.”³¹ Some states in the West barred marriages between Asians and whites, and in the South most states barred marriages between African Americans and whites. According to the legal historian Kermit L. Hall, “More statutes banned miscegenation than any other form of racially related conduct.”³² Even as late as the stirring *Loving v.*

²³ See *Children: New Faces*, *supra* note 20, at 16.

²⁴ *Id.*

²⁵ See Kim, *supra* note 11, at 6.

²⁶ *Id.*

²⁷ OH, *supra* note 13, at 14.

²⁸ See MOON H. JO, *KOREAN IMMIGRANTS AND THE CHALLENGE OF ADJUSTMENT* 9 (1999).

²⁹ *Id.*

³⁰ See *ASIAN NATION*, *supra* note 9.

³¹ OH, *supra* note 13, at 18.

³² KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 157 (1989).

*Virginia*³³ decision of the United States Supreme Court in 1967, which found anti-miscegenation statutes unconstitutional, seventeen states continued to prohibit marriages between whites and members of other races.³⁴

American immigration law was also racist. The McCarran and Walter Act of 1952 had modified the Oriental Exclusion Law of 1924, which had set very low immigration quotas for Asian countries and “even banned the immigration of Asian spouses of American citizens.”³⁵ A severe quota system remained in effect, however, and it was not until 1965 and the passage of the Immigration Act that Congress eliminated the national-origins quota system and allowed large numbers of Koreans and Asians to immigrate.³⁶ This legislative change for the first time allowed Asian immigration to equal European immigration in United States history.³⁷ The Korean share itself jumped from a mere 0.7% to 3.8%.³⁸

Why did Korean children become especially popular as adoptees? Some part of the answer derives from the international tensions and politics of the 1950s. The adoption of Korean children was often thought to be patriotic.³⁹ With the Cold War settled fully into place, the adoption of Koreans could be seen as a way to counter the Communist menace by “saving” children.⁴⁰ They could grow up as Christian Americans rather than atheistic Communists.⁴¹

Most importantly, Koreans acquired a reputation as a model minority group.⁴² Whites took them to be “superior to other racial minority groups in temperament, intelligence, and capacity for fitting into white society.”⁴³ This rampant stereotyping could and did influence whites seeking to adopt. Furthermore, there was no Korean opposition to the adoptions by American whites, and this helped assuage guilt feelings American adoptive parents might have felt about removing children from their home country.⁴⁴ Korean adoptees could grow up to be almost “honorary whites.”⁴⁵

Adoptions of Korean children reached 6,275 in 1986,⁴⁶ but after that the numbers began to drop. White Americans remained eager to adopt Korean children, but for various reasons the number of available Korean children declined.

³³ 388 U.S. 1 (1967).

³⁴ See Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1190 n.8 (1966).

³⁵ See WON MOO HURH, *THE KOREAN AMERICANS* 34 (1998).

³⁶ See *id.* at 35.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See TUAN & SHIAO, *supra* note 5, at 26.

⁴⁰ See *id.* at 25.

⁴¹ See *id.* at 25–26.

⁴² See *id.* at 27.

⁴³ See *id.*

⁴⁴ *Id.* at 26.

⁴⁵ *Id.* at 27.

⁴⁶ RICHARD TESSLER, GAIL GAMACHE & LIMING LIU, *WEST MEETS EAST: AMERICANS ADOPT CHINESE CHILDREN* 10 (1999).

Always sensitive to criticism, at least by western standards, South Korea flinched when North Korea began deploring South Korean willingness to place Korean children with American families.⁴⁷ In addition, when South Korea hosted the 1988 Olympics, the international press reported extensively on the adoption of Korean children by Americans.⁴⁸ Suggestions that South Korea was “exporting” its children embarrassed Koreans.⁴⁹ As South Korea developed rapidly and began to prosper, leading to greater personal assets and wealth, South Koreans became less likely to place children for adoption.

Other Asian nations were in a position to provide children who could be adopted by Americans, and these nations could conceivably have replaced Korea as the leading supplier. Japan, for example, provided nearly 3,000 children for adoption by Americans between 1948 and 1962.⁵⁰ Many were the children of American servicemen and Japanese women, and, as in Korea, biracial children were ostracized. This troubling cultural bias was discovered and highlighted in 1959 by American actresses Sara Buckner and Yvonne Lime.⁵¹ Wandering the streets of Tokyo, the actresses encountered eleven half-American, half-Japanese abandoned children who were not allowed to stay in orphanages because they were biracial.⁵² When word spread that the actresses had taken in the children, 100 more Japanese-American children were left on their doorstep.⁵³ As the American military presence shrunk, fewer and fewer of these outcast biracial children were available for adoption. At one point, Vietnam also had large numbers of children who might have been adopted. The protracted Vietnam War had orphaned many children or hopelessly separated them from their parents. When the War ended in 1975, so-called Operation Babylift flew 2,700 orphans from Vietnam to the United States for adoption.⁵⁴ However, much more than Japan or Vietnam, China emerged as the Asian nation most prepared to provide adoptable children for Americans.

The reasons for the relatively sudden rise in adoptions from China relate in part to developments in China. As in Korea and most Asian countries, western-style adoption was uncommon, and, furthermore, the government had in 1979 instituted a one child policy in hopes of controlling population growth.⁵⁵ Chinese citizens in general preferred a male child, and some whose first child was female

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 9.

⁵¹ See *History*, CHILDHELP, <http://www.childhelp.org/pages/history> (last visited Dec. 8, 2012).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*; see also ASIAN NATION, *supra* note 9.

⁵⁵ See Matt Rosenberg, *China's One Child Policy*, ABOUT.COM GEOGRAPHY, <http://geography.about.com/od/populationgeography/a/onechild.htm> (last updated Aug. 12, 2012).

abandoned the girl or placed her in a state-operated orphanage.⁵⁶ Girls in the orphanages constituted a pool of adoptable children. In addition, China in the 1980s was anxious to receive western currency and, in particular, American dollars. One observer reported that as of 1995 China received an average of \$15,000 per adoption; a fee that did not include whatever Americans paid for travel expenses and adoption agency services.⁵⁷

Americans, anxious to adopt, perceived the situation in ways that effectively obscured issues related to transracial family building. With thoughts of a nefarious Communist regime and orphanages bursting with unwanted girls, Americans could and did think of themselves as rescuers. When adoptive parents testified before the Congressional-Executive Commission on China in 2002, they described and almost boasted of their rescues. Nancy Robinson testified that:

Inside the People's Republic of China there are thousands of children living in orphanages and foster homes. The overwhelming majority of these children are girls. Few possess more than the most basic clothing and many of them struggle with treatable medical problems. Without formal schooling or the crucial anchor of family, these orphan children face a lifetime of struggle for even the most basic employment. These are children who wait.⁵⁸

As was true with the adoption of Korean children, law was an important handmaiden in the adoption of Chinese girls by Americans. In China, the government enacted the nation's first adoption law in 1991, largely to facilitate the adoption of "orphans" by westerners.⁵⁹ There have been bumps in the road since 1991, such as the suspending of Chinese adoptions after the SARS outbreak in 2003 and the exclusion of morbidly obese adoptive parents in 2007, but in general Chinese law has facilitated speedy and reliable adoptions.⁶⁰ Furthermore, older would-be adoptive parents have been pleased to find that the age of eligibility of adopters in China is higher than it is for many adoption agencies in the United

⁵⁶ RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS 9–10 (2000). Numbers are uncertain, but some Chinese seem to have committed infanticide. *See id.*

⁵⁷ *Id.*

⁵⁸ *China's Children: Adoption, Orphanages, and Children with Disabilities, Roundtable Before the Congressional-Executive Commission on China*, 107th Cong. 2–3 (2003) (statement of Nancy Robertson, Pres. of the Grace Children's Found.).

⁵⁹ SARA K. DOROW, TRANSRACIAL ADOPTION: A CULTURAL ECONOMY OF RACE, GENDER AND KINSHIP 57 (2006).

⁶⁰ SIMON & ALTSTEIN, *supra* note 56, at 11.

States.⁶¹ In the United States, meanwhile, the various state adoption laws are well designed to accommodate the adoption of Chinese children.⁶²

Overall, the practice of Americans adopting Chinese children came to surpass that of Americans adopting Korean children.⁶³ In 1989, China allowed only 33 children to be adopted by Americans, but a decade later the number was over 4,000 annually.⁶⁴ China had become the largest source of international adoptees for Americans.⁶⁵ The numbers grew even larger in the first decade of the twenty-first century, making the adoption of Chinese girls “a major cross-cultural story.”⁶⁶

There are surely differences between the international adoption of Korean and Chinese children. For example, Americans adopting Chinese children, unlike those who have adopted Korean children, routinely travel to the children’s home country to pick them up.⁶⁷ This tends not only to fuel one’s sense of being a rescuer but also, presumably, engenders some degree of cross-cultural sensitivity and awareness.⁶⁸ Yet, despite the differences, Chinese adoptees, like Korean adoptees before them, achieved something of a preferred minority status among the white Americans who adopted them. Due to racial stereotyping and bias, many white Americans quite simply feel more comfortable adopting Asians than they do adopting members of other non-Caucasian racial groups. Images and descriptions of Asian children influence would-be adopters:

These descriptions suggest that Asians are superior to other racial minorities in terms of intelligence, temperament, and capacity for fitting into white society Especially for white parents with little firsthand knowledge or experience of other races, such racial imagery can profoundly influence who they are willing to adopt. These stereotypes reinforce beliefs that Korean adoption and Asian adoption more generally are socially acceptable and likely to be successful. White

⁶¹ *Id.* at 11–12. While some domestic adoption agencies do not welcome adoptive parents in their forties, Chinese officials routinely process applications from would-be adoptive parents under fifty years of age. *Id.*

⁶² For a review of Chinese adoption procedures and international adoption laws of the fifty states, see INT’L ADOPTION HELP, <http://www.internationaladoptionhelp.com> (last visited Apr. 15, 2013).

⁶³ In 1998, for example, 4,263 children from China were adopted by citizens of foreign countries, while only 1,829 were adopted from Korea. See SIMON & ALTSTEIN, *supra* note 56, at 19.

⁶⁴ *Id.* at 8.

⁶⁵ TESSLER, *supra* note 46, at 4.

⁶⁶ KARIN EVANS, *THE LOST DAUGHTERS OF CHINA: ABANDONED GIRLS, THEIR JOURNEY TO AMERICA, AND THE SEARCH FOR A MISSING PAST 3* (2000).

⁶⁷ See DOROW, *supra* note 59, at 42–43.

⁶⁸ The China Center of Adoption Affairs has required prospective American adoptive parents to state in writing that they will teach their adoptive children about Chinese culture. See DOROW, *supra* note 59, at 43.

adoptive parents, for the most part, do not anticipate extra challenges beyond those associated with parenting any child.⁶⁹

Professor Dorow quotes a relieved white father from a homogeneous Midwestern town as saying his adopted Chinese daughter would be accepted because Asians had a “different kind of stereotype.”⁷⁰

If whites are eager to adopt Asian children because, among minorities, Asians are most likely to conduct themselves like whites, this of course valorizes whiteness and reinforces white superiority. “Far from threatening the prevailing racial order, the practice [of transracial adoption] was actually seen as reinforcing it.”⁷¹ In addition, prioritizing the adoption of children from one minority race inevitably reflects badly on others. In particular, “motifs of model Asian America play off the construction of abject black America and failed black-white relations . . . allegedly manifest in welfare dependence, criminality, and ingratitude.”⁷² The stereotype of the hard-working, studious Asian, which is so prevalent in transracial adoption, is “used to discipline blacks (chastising them for their ‘laziness’)”⁷³

This juxtaposition of Asian and African American children in transracial adoption parallels, albeit subtly, contrasts and tensions that have surfaced between Asians and African Americans in other sectors of American life. The media, for example, never seemed to tire of underscoring conflict between Korean storekeepers and African American customers in Los Angeles before and during the ugly rioting prompted by the trial verdict for the policemen who beat the African American Rodney King.⁷⁴ Korean merchants complained that African Americans were lazy and violent, while African Americans resented the relative prosperity of the Koreans and their success as “the socialized other.”⁷⁵ From the white perspective, “[t]he differences between Blacks and Asians emerge as a tale of relative nonwhiteness.”⁷⁶

Also, a large percentage of Asians and Asian Americans voted against affirmative action programs in the California Civil Rights Initiative of 1996.⁷⁷

⁶⁹ TUAN & SHIAO, *supra* note 5, at 27 (citation omitted).

⁷⁰ DOROW, *supra* note 59, at 46.

⁷¹ TUAN & SHIAO, *supra* note 5, at 26.

⁷² DOROW, *supra* note 59, at 42.

⁷³ FOGG-DAVIS, *supra* note 6, at 66.

⁷⁴ See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles,”* 66 S. CAL. L. REV. 1581, 1585–86, 1590–93 (1993).

⁷⁵ See Reginald Leamon Robinson, “*The Other Against Itself*”: *Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 27 (1993).

⁷⁶ Ikemoto, *supra* note 74, at 1583.

⁷⁷ Janine Young Kim, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2409 (1999).

Politicians such as Newt Gingrich had told Asians and Asian Americans that affirmative action would hurt their chances of obtaining university admission by advancing the interests of African Americans, and many Asians and Asian Americans accepted this interpretation.⁷⁸ Having been perceived by their adoptive parents as the ideal minority-race adoptees, academically and otherwise, some Asian adoptees internalize those sentiments and question the abilities of members of other minority-race groups.

II. THE ADOPTION OF NATIVE AMERICANS

Suggestions of white superiority are evident in not only the adoption of Asians by whites but also the adoption of Native Americans by whites. The latter variety of transracial adoption boomed at roughly the same time as the adoption of Korean children was surging, but tribal groups offered more resistance to transracial adoption than did Koreans. Eventually, demonstrating its sense of *noblesse oblige*, the United States Congress enacted legislation that partially shielded Native Americans from white would-be adopters.

The removal of Native American children from their families by whites has a long history in the United States. The institution of white-run boarding schools for Native American children dates back to the 1800s. In the late 1800s, the Federal Bureau of Indian Affairs developed a whole network of boarding schools, in which the children were supposed to develop an appreciation of the dominant white culture and also expunge “traces of tribal ‘barbarism’ that their own heritage was thought to represent.”⁷⁹ According to Richard Pratt, who was the turn-of-the-century director of the Carlisle Industrial School for Indians, a student at his school was supposed to “[q]uit being an Indian”⁸⁰ The schools were located far from the children’s reservations, and the school administrators often denied children the right to speak their native languages or to participate in any tribal rituals.⁸¹ The federal government also operated a program through which Native American children were placed on white farms, the hope being that these placements would have a civilizing effect on the children.⁸² The scholar Barbara Atwood did not mince words when she said the federal programs amounted to “blatant cultural genocide.”⁸³

These programs ended as the federal government gradually abandoned its efforts to destroy Native American cultures, but during the 1960s the Bureau of

⁷⁸ *Id.* at 2408.

⁷⁹ VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 241 (1983).

⁸⁰ See SALLY JENKINS, *THE REAL ALL AMERICANS: THE TEAM THAT CHANGED A GAME, A PEOPLE, A NATION* 121 (2007).

⁸¹ Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 *EMORY L.J.* 587, 602 (2002).

⁸² *Id.*

⁸³ *Id.*

Indian Affairs, working along with the Child Welfare League of America, began to place Native American children in white foster homes and adoptive families. The “Indian Adoption Project,” as it was dubbed, aggressively sought off-reservation placements for Native American children.⁸⁴ Officials at the Bureau of Indian Affairs and the Child Welfare League of America assumed Native American children would be better off if removed from their reservations.⁸⁵

The situation for Native American children became even more precarious in the early 1970s when the demand for healthy white infants and toddlers, who could be adopted, came to exceed the supply.⁸⁶ Would-be white adoptive parents became increasingly willing to adopt transracially. As had been the case with Asian children since the 1950s, Native American children now emerged as potentially desirable adoptees. Indeed, would-be adoptive parents could feel good about their plans because social workers and others reported that many Native American children were neglected by the adults in their apparently dysfunctional families.⁸⁷ Absent among the self-styled “rescuers” was any appreciation that many Native Americans consider the responsibility of child-rearing to be a communal task.⁸⁸ This child-rearing seemed flawed if looked at from the dominant white perspective, which assigned child-rearing duties to biological parents and more nuclear families.⁸⁹

So many whites sought to adopt Native American children that tribal leaders began to think the very future of their tribes was becoming endangered. Their children, after all, were their most precious possession.⁹⁰ Furthermore, it appeared that people who had historically been their conquerors and oppressors were once again getting just what they wanted. Adoption agencies, religious groups, and adoptive parents were prepared, it seemed, to blithely or self-righteously take children from one race and encourage them to assimilate into another.

Since what is sometimes called “Indian law” is largely federal law, those concerned with the large-scale adoption of Native American children by whites looked to the United States Congress for protective legislation. One might think at first that any efforts by Congress to treat the adoption of Native American children

⁸⁴ *Id.* at 603.

⁸⁵ Incidentally, the same sentiments were part of similar programs in Canada. *See* Keri B. Lazarus, *Adoption of Native American Children and First Nations Children: Are the United States and Canada Recognizing the Best Interests of the Children?*, 14 *ARIZ. J. INT’L & COMP. L.* 255, 264–67 (1997). Meanwhile, in more recent years, Canada has been something of a positive model for the “settler states,” which also include Australia, New Zealand, and the United States. *See* FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 284–87 (2009).

⁸⁶ *See* Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 *U. DET. L. REV.* 451, 455–56 (1989).

⁸⁷ *See* Lazarus, *supra* note 85, at 265–66.

⁸⁸ *See id.* at 264–65.

⁸⁹ *See id.*

⁹⁰ *See infra* text accompanying notes 107–109.

differently than the adoption of children of other races would present equal protection problems under the United States Constitution. However, in a somewhat surprising line of decisions, the federal courts have for the most part seen the federal government's relationship with Native Americans as "the structural relationship between sovereigns, rather than the relationship of sovereigns to disadvantaged individuals that characterizes equal protection claims."⁹¹

The Supreme Court of the United States' decision in *Morton v. Mancari*⁹² was especially important in clearing the way for legislation related to the adoption of Native American children. In that decision, the Court said that the Interior Department's preferential promotions of Native American employees did not present constitutional problems.⁹³

By emphasizing that the preference attached only to members of federally recognized tribes and concerned entities that governed those tribes in a unique fashion, therefore, the Court was not positing a counterfactual nonracial status for Indian people, but was instead demonstrating the ways the classification fulfilled the goals emerging from the unique federal relationship.⁹⁴

According to the Court, special treatment "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the [Bureau of Indian Affairs] in a unique fashion."⁹⁵ The Court went on to describe "how, over the centuries, the federal government took much land from native peoples, both promising them protection in return and leaving them in dire need of it."⁹⁶

Congress did in fact hold hearings on the adoption of Native American children in 1974, 1977, and 1978, and leaders of Native American organizations and tribes made their plea for federal restrictions and limitations on the adoption of Native American children. In the 1978 hearings before the House of Representatives' Subcommittee on Indian Affairs and Public Lands, Native American leaders deplored the inability of adoption and social services agencies to appreciate Native American child-rearing.⁹⁷ LeRoy Wilder, representing the Association of American Indian Affairs, underscored white ignorance of the extended Native American family. "Indian cultures," he said, "universally

⁹¹ Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1168 (2010).

⁹² 417 U.S. 535 (1974).

⁹³ *Id.* at 546-48.

⁹⁴ Berger, *supra* note 91, at 1186.

⁹⁵ *Morton*, 417 U.S. at 554.

⁹⁶ Berger, *supra* note 91, at 1186 (citing *Morton*, 417 U.S. at 552).

⁹⁷ *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affairs & Public Lands of the H. Comm. on Interior & Insular Affairs*, 95th Cong. 69 (1978) [hereinafter *Hearings*].

recognize a very large extended family. Many relatives of Indian children are considered by tribal custom to be perfectly logical and able custodians of Indian children.”⁹⁸ Faye La Pointe of the Puyallup Tribe of Indians added that “[t]he extended family still exists in Indian country, it means living together, loving together, crying together, sharing all things and never having to worry about being alone. It is not a religion, not law, not a mandate. ‘It is a way of life.’”⁹⁹

The magnitude of Native American adoptions by whites was striking. Albert Trimble, Executive Director of the National Congress of American Indians, said that 25–35% of all Indian children had been separated from their families.¹⁰⁰ Citing to a nineteen-state study of Native American adoptions, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians reported that Indian adoption and foster care placement rates in the various states ranged from at least two to a staggering twenty times higher than they were for non-Indians.¹⁰¹ “Where the statistics were available,” Isaac continued, “they showed that most of the adoptions and placements, sometimes 95 percent of them, were with non-Indian families.”¹⁰² Isaac was sure what the ramifications would be if whites continued to adopt Native American children in such high numbers:

If Indian communities continue to lose their children to the general society through adoptive and foster care placements at the alarming rates of the recent past, if Indian families continue to be disrespected and their parental capacities challenged by non-Indians social agencies as vigorously as they have in the past, then education, the tribe, Indian culture have little meaning or future.¹⁰³

A number of Catholic organizations opposed legislation to shield Native American children from adoption by whites,¹⁰⁴ but Congress did eventually pass the Indian Child Welfare Act (“ICWA”).¹⁰⁵ When the legislation made its way to the White House, President Jimmy Carter expressed reservations and almost vetoed it.

⁹⁸ *Id.* (statement of LeRoy Wilder, Attorney, Ass’n of Am. Indian Affairs).

⁹⁹ *Id.* at 204.

¹⁰⁰ *See id.* at 296.

¹⁰¹ *See id.* at 191.

¹⁰² *Id.*

¹⁰³ *Id.* at 62.

¹⁰⁴ Catholic Social Services of Tucson, the National Conference of Catholic Charities, and Seattle Catholic Children’s Services filed opposition statements. *Id.* at 298–303. Jane Daniel, Adoption Coordinator of Catholic Social Services of Tucson, said of the pending legislation, “[t]he value of home and family is sacrificed on the altar of Indian-ness.” *Id.* at 302.

¹⁰⁵ Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3071 (1978) (codified at 25 U.S.C. §§ 1901–63).

In the end, the central figure may have been Congressman Morris Udall, who had been moved by the Indians' cause and had shepherded the bill through the Interior Committee he chaired. The powerful Arizonan made his case directly to the president and let it be known that he would block a civil service bill, a White House favorite, unless the child welfare act was signed.¹⁰⁶

ICWA began with findings of unusual directness. "There is no resource," Congress said, "more vital to the continued existence and integrity of Indian tribes than their children."¹⁰⁷ Congress was determined, the Act said, "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families"¹⁰⁸ If Native American children were placed in foster care or with adoptive families, Congress concluded, it was best to find homes that reflected, and were sensitive to, Native American culture.¹⁰⁹

Space is too limited to address ICWA in any detail, but the steps taken to give the tribes protection against their children being removed from the reservations and placed in white foster homes or adoptive families are numerous and substantial. For starters, aware of state court complicity in the untoward removal of Native American children from reservations, ICWA provides for exclusive trial court jurisdiction in foster care and adoption proceedings over any Native American child who either resides or is domiciled on a reservation.¹¹⁰ For non-domiciliary children, ICWA creates what one court has called "presumptive[] tribal jurisdiction."¹¹¹ That is, if a Native American child's parents or tribe petitions, the state court is supposed to relinquish its jurisdiction.¹¹²

The most striking substantive provisions of ICWA involve priorities in custody contests. ICWA requires that judges give a preference to members of a Native American child's family, members of the child's tribe, and any other Native American in an adoption contest with a white individual or family seeking to adopt

¹⁰⁶ CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 260 (2005).

¹⁰⁷ Indian Child Welfare Act § 1901(3).

¹⁰⁸ *Id.* § 1902.

¹⁰⁹ "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." *Id.*

¹¹⁰ *Id.* § 1911(a).

¹¹¹ *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 962 (Ariz. Ct. App. 2000).

¹¹² Cases involving a Native American child with only attenuated connections to a tribe have proven especially likely to cause controversy. *See Atwood, supra* note 81, at 623.

the child.¹¹³ This provision, more than any other, helps guard against the “raiding” of reservations by whites. Members of Native American communities are deemed the most appropriate adoptive parents of Native American children, and the assumption is clear that Native American parenting practices are to be desired for Native American children.

Might the kind of thinking that went into shielding Native American children from adoption and professing respect for Native American child-rearing within extended families also apply to African American children and their families? Some thought the similarities between Native Americans and African Americans were striking enough to justify extending ICWA to African Americans.¹¹⁴ Both Native Americans and African Americans, the argument went, relied on extended families and a community-oriented approach to raising their children:

The concept of extended family is not uncommon within the African American community. There, too, by custom and tradition, if not necessity, members of the extended family (be they aunts, uncles, cousins, or grandparents—both fictive and real) have responsibilities and duties related to familial childbearing and living in general. The African American family structure—like its base root, the West African family structure—is “child-centered.” As previously stated, the Native American family structure is similarly child-centered.¹¹⁵

In general, this type of argument gained little traction. In order to bring African Americans under ICWA, Congress and the federal courts would have had to alter the legal understanding of tribes and tribal nations, conceptualizations that connote some degree of sovereignty. Furthermore, the type of guardian-ward relationship that Congress has been assigned by the Supreme Court for Native Americans has not been recognized for African Americans.¹¹⁶ Congress might have a sense of oblige for Native Americans, but it does not extend to African Americans especially in a post-war on poverty era.

The failure to couple the adoption of African American children with that of Native American children is representative of the hierarchy among minority races as understood by whites. From the white perspective, Native Americans may not occupy a step on the minority-race ladder as high as that occupied by Asians, but Native Americans do stand above African Americans. Harvard law professor Elizabeth Bartholet observed a version of this hierarchy in play while adopting two children from South America.¹¹⁷ She noted that children from Brazil tended to be

¹¹³ Indiana Child Welfare Act § 1915(a).

¹¹⁴ See Cynthia G. Hawkins-León, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201, 210–12 (1997).

¹¹⁵ *Id.* at 210.

¹¹⁶ See *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

¹¹⁷ Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1167 (1991).

African Brazilian, while those from Chile were more likely to be white.¹¹⁸ This made the latter more desirable for adoption among white Americans.¹¹⁹ Other Latin American countries, meanwhile, made available adoptable children who were mestizo or drawn from native peoples' communities.¹²⁰ According to Bartholet, "the adoption 'market' rates indian [sic] as lower than white but higher than black."¹²¹

One suspects that the white ranking of racial minorities is in some part internalized by members of the racial minorities and cuts against any solidarity there might have been between Native Americans and African Americans in this area. Despite the often-heard comparisons of rural reservations to urban ghettos, the following examples illustrate that Native Americans and African Americans are not always in solidarity with one another. First, at the Congressional hearings leading to the enactment of ICWA, LeRoy Wilder of the Association of American Indian Affairs most likely had African Americans in mind when he said with a huff, "Mr. Chairman, we are not talking about minority children. We are talking about Indian children."¹²² Second, Thurgood Marshall was apparently surprised when Justice Jackson pursued comparisons between African Americans and Native Americans in the oral arguments preceding the legendary *Brown* decision.¹²³ When Jackson asked if equal protection guarantees should also be extended to Native Americans, Marshall said:

I think . . . we are in a position of having grown up. Indians are no longer wards of the Government. I do not think that they stand in any special category. And in all of the southern states that I know of, the Indians are in a preferred position so far as Negroes are concerned¹²⁴

When pushed further on the matter, Marshall conceded equal protection arguments could conceivably apply, but, Marshall added, "[t]he biggest trouble with Indians is that they have not had the judgment or the wherewithal to bring lawsuits."¹²⁵

ICWA remains in effect today. Occasional voices have been heard over the years calling for its repeal,¹²⁶ but Congress has not chosen to do so. One case

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *Hearings, supra* note 97, at 71.

¹²³ *See BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT 50* (Leon Friedman ed., 2d ed. 2004).

¹²⁴ *Id.*

¹²⁵ *Id.* Somewhat unbelievably, Marshall and Jackson went on to banter about Native Americans, with Jackson jokingly saying, "In some respects, in taxes, at least, I wish I could claim to have a little Indian blood." *Id.*

¹²⁶ *See* Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 584–85

involving ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*,¹²⁷ has made its way to the United States Supreme Court. The Court agreed the tribal court jurisdiction provisions of ICWA were constitutional, and the opinion of the Court “constitutes an emphatic endorsement of the federal policy of protecting tribal authority in child welfare proceedings affecting Indian children, even when the tribal-will is ostensibly in conflict with parental choice.”¹²⁸ The greatest resistance to ICWA seems to come from state court judges sympathetic to whites who want to adopt Native American children and who, in some cases, have actually begun raising children through foster care placements in their homes.¹²⁹

Overall, ICWA has altered transracial adoption involving Native American children. Native American tribal leaders challenged the adoption of Native American children by whites. Congress and the federal courts, manifesting the type of honorable and generous behavior that is sometimes associated with superior status, provided protection for tribal interests in Native American children. In the present, many whites would still delight in the opportunity to adopt Native American children, but whites have been, in a sense, chastised and warned by the very government they dominate. Whites now approach such adoptions with great caution and trepidation. The number of transracial adoptions in which whites adopt Native American children has dropped appreciably.¹³⁰

III. THE ADOPTION OF AFRICAN AMERICANS

As was true with the adoption of both Asian and Native American children by whites, the adoption of African American children by whites grew more common in the 1960s. Abortion and increasingly effective contraception devices and practices had led to reductions in the number of white infants and toddlers who might be placed for adoption.¹³¹ Numerous African American children, meanwhile, were in foster care or institutional care, and they were potentially available for adoption.¹³² Growing numbers of whites turned to this source of adoptable

(1996); see also Michele K. Bennett, *Native American Children: Caught in the Web of the Indian Child Welfare Act*, 16 HAMLIN L. REV. 953, 972–73 (1993).

¹²⁷ 490 U.S. 30 (1989).

¹²⁸ Atwood, *supra* note 81, at 620.

¹²⁹ For criticisms of state courts’ disrespect of ICWA, see Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585 (1994) (discussing issues raised by concurrent jurisdiction under the ICWA); Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419 (1998) (identifying and analyzing the inconsistent application of the ICWA by state courts).

¹³⁰ See WILKINSON, *supra* note 106, at 261.

¹³¹ Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487, 488 (1991).

¹³² See Bartholet, *supra* note 117, at 1201.

children, and integrationist beliefs and attitudes further fueled the enthusiasm of some would-be adoptive parents to adopt transracially.

Fortunately, or unfortunately depending on one's perspective, the surge in the adoption of African American children by whites which started in the 1960s did not continue. Professor Bartholet might overstate things when she states, "In 1972 this brief era of relative openness to transracial adoption came to an abrupt end,"¹³³ but still, the pace did slow. The reason was criticism from important organizations, the most influential of which was the National Association of Black Social Workers (NABSW). In its 1972 position paper NABSW opposed the adoption of African American children by whites.¹³⁴ NABSW argued that such adoptions denied African American children their racial heritage, disabled these children in a racist society, and undermined the African American community. Indeed, NABSW went so far as to characterize the adoption of African American children by whites as a "form of genocide."¹³⁵

The NABSW position paper was offensive to those whites who felt entitled to adopt whomever they wanted just because they were white, but the paper did influence some social workers involved with the placement of African American children in adoptive homes.¹³⁶ The Boys and Girls Aid Society of Oregon conducted elaborate surveys of transracial adoption that show the impact of NABSW's position paper.¹³⁷ The surveys present data from 252 adoption agencies which reported from the four consecutive years 1969–1972. The data shows that while the placement of African American children in African American adoptive families dropped only 7% in 1972, the placement of African American children in white adoptive families dropped a striking 39%.¹³⁸ The overall drop in African American children being placed for adoption in 1972 was 20% for the agencies reporting.¹³⁹

Census figures for the period are not broken down by race, but they indirectly support the findings of the Boys and Girls Aid Society of Oregon regarding the impact of NABSW's position paper. After steadily rising throughout the 1960s, national adoption totals reached a high of 175,000 in 1970.¹⁴⁰ Then, the total

¹³³ *Id.* at 1179.

¹³⁴ See Nat'l Ass'n of Black Social Workers, *Position Paper Developed from Workshops Concerning Transracial Adoption* (1972), reprinted in RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 50 (1977).

¹³⁵ Bartholet, *supra* note 117, at 1180.

¹³⁶ Bartholet discusses the NABSW's influence on the Child Welfare League and its position regarding transracial adoption. *Id.* at 1180–81.

¹³⁷ See *Opportunity, National Survey of Black Children Adopted in 1972*, ADOPTION HIST. PROJECT, <http://darkwing.uoregon.edu/~adoption/archive/OpportunityNSBCA.htm> (last visited Mar. 12, 2011).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1978*, at 363, tbl. 574 (99th ed.), available at <http://www2.census.gov/prod2/statcomp/documents/1978-05.pdf>.

dropped by 1975 to only 129,000.¹⁴¹ Most of the drop occurred not with adoptions by stepparents and other relatives but rather with adoptions by nonrelatives.¹⁴² These adoptions were the most likely to be arranged by public agencies and to involve parents and adoptees of different races.

The most noteworthy challenges to adoption agencies that were hesitant or unwilling to place African American children with whites came from white foster parents. Although it is not routinely the case, foster parents sometimes develop a loving relationship with their foster children and take steps to adopt them. When several white foster parents sensed that adoption agencies' race-matching policies and, in particular, reservations about whites adopting African Americans stood in their way, they sued in the federal courts.¹⁴³ The challenges rested mostly on an equal protection argument, but in general the argument failed.¹⁴⁴ Some of the courts seem to have thought "the use of race-based foster and adoptive placement is at worst benign discrimination akin to affirmative action."¹⁴⁵

With the complaints of disgruntled white foster parents and would-be adoptive parents ringing in its ears, the United States Congress held hearings on the issue of whites adopting African American children. Congress found that approximately 500,000 children were at that point in time in foster care and that tens of thousands were waiting for adoptive homes.¹⁴⁶ A slight majority of the latter were African Americans.¹⁴⁷ Congress also found that while children in foster care who had been routed for adoption on average waited two years and eight months to be adopted, African American children waited much longer.¹⁴⁸

The hearings led to the Howard M. Metzenbaum Multiethnic Placement Act (MEPA) of 1994.¹⁴⁹ It prohibited state and local officials from denying to individuals the opportunity to become foster or adoptive parents solely on the basis of the prospective parent's or the child's race, color, or national origin. MEPA also prohibited public agencies receiving federal assistance from delaying or denying a

¹⁴¹ U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 370, tbl. 614 (110th ed.), available at <http://www2.census.gov/prod2/statcomp/documents/1990-04.pdf>.

¹⁴² *Id.* While adoptions by relatives dropped from 85,800 in 1970 to 81,310 in 1975, adoptions by nonrelatives dropped from 89,200 in 1970 to only 47,700 in 1975. *Id.*

¹⁴³ See *McLaughlin v. Pemsley*, 876 F.2d 308 (3d Cir. 1989); *Drummond v. Fulton Cnty. Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977); *In re Petition of R.M.G. & E.M.G.*, 454 A.2d 776 (D.C. 1982).

¹⁴⁴ See Michael P. Kennedy, *In the Best Interests of the Child: Religious and Racial Matching in Foster Care*, 3 GEO. MASON U. C.R. L.J. 299, 303 (1993).

¹⁴⁵ *Id.* at 324.

¹⁴⁶ See Devon Brooks et al., *Adoption and Race: Implementing the Multiethnic Placement Act and the Interethnic Adoption Provisions*, 44 SOC. WORK 167, 169 (1999).

¹⁴⁷ See *id.* at 168.

¹⁴⁸ *Id.* at 169.

¹⁴⁹ Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 42 U.S.C.) (repealed 1996).

child's foster or adoptive placement *solely* on the basis of the prospective parent's or the child's race, color, or national origin. For all intents and purposes, Congress was speaking just of whites serving as foster parents for African Americans or seeking to adopt African Americans. Lest there be any confusion on the matter, Congress added a provision to MEPA saying it did not apply to Native Americans.¹⁵⁰

One final hope for those African Americans who wanted to at least slow the adoption of African American children by whites was found in a provision in MEPA stating that race could remain *a* factor in an adoption placement.¹⁵¹ In fact, under the statute, race could even be *the* most important factor in transracial adoption.¹⁵² Prominent law professors such as Elizabeth Bartholet and Randall Kennedy were horrified by this possibility, and they lobbied against this aspect of MEPA.¹⁵³

Since Congress's overall goal was to smooth the way for whites who wanted to adopt African American children, Congress moved hastily to close the loophole allowing race-matching in adoption. Congress amended MEPA in 1996 with the Removal of Barriers to Interethnic Adoption Act (IEAA); the latter effectively precluded any consideration of race whatsoever.¹⁵⁴ The amendment even "contained an enforcement provision whereby federally funded state programs and private programs receiving federal funds that violated IEAA would have their funding reduced by two percent for the first violation, three percent for the second violation, and five percent for the third and each subsequent violation during any fiscal year."¹⁵⁵

Champions of MEPA as amended by IEAA might delight in the notion that the new federal law concerning the adoption of African American children by whites constituted a step toward racial equality. During the 1990s, the traditional white/black racial binary had yet to yield much sway to notions of "multiculturalism," and the image of whites freely adopting African American children could symbolize progress of sorts. "The picture of whites adopting black children symbolizes our color-blind aspirations, proof that racial barriers can be overcome by familial care."¹⁵⁶

¹⁵⁰ *Id.* § 553(f). Some were troubled by the distinction made between African American and Native American children. See Hawkins-León, *supra* note 114, at 211–12.

¹⁵¹ Multiethnic Placement Act of 1994 § 533(a)(2).

¹⁵² The scholar Ralph Richard Banks said this made MEPA "the first federal statute to condone race matching." Ralph Richard Banks, *The Multiethnic Placement Act and the Troubling Persistence of Race Matching*, 38 *CAP. U. L. REV.* 271, 273 (2009).

¹⁵³ See FOGG-DAVIS, *supra* note 6, at 10.

¹⁵⁴ Removal of Barriers to Interethnic Adoption Act, Pub. L. No. 104-188, § 1808(a), 110 Stat. 1755 (codified as amended in scattered sections of 42 U.S.C.).

¹⁵⁵ Cynthia G. Hawkins-León & Carla Bradley, *Race and Transracial Adoption: The Answer is Neither Simply Black or White nor Right or Wrong*, 51 *CATH. U. L. REV.* 1227, 1244–45 (2002).

¹⁵⁶ See FOGG-DAVIS, *supra* note 6, at 11.

But alas, any advancement of racial equality through MEPA and IEAA is minimal. We know that prior to the enactment of the statutes, social work policy and practice was committed to placing children with members of the same race; this meant African Americans were the preferred adoptive parents for African American children and also did not adopt white children.¹⁵⁷ According to the Executive Director of the North American Council on Adoptable Children, we also “know that since the passage of MEPA children of color have been increasingly placed transracially while white children are still placed almost exclusively with same race families.”¹⁵⁸ In reality, MEPA and IEAA are primarily designed to clear the way for white would-be adoptive parents. Federal law also implicitly “denies both the existence of systemic racism and the salience of racial and cultural differences in a racially stratified society, while claiming the moral high ground of racial ‘neutrality.’”¹⁵⁹

CONCLUSION

This Article has offered accounts of historical developments and summaries of the current laws concerning whites adopting Asians, Native Americans, and African Americans. American whites started adopting Asian children in substantial numbers in the 1950s and grew increasingly eager to do so over time, in some cases thinking of these children almost as honorary whites. Korea and China in different periods proved cooperative in accommodating white preferences, and American lawmakers facilitated this kind of transracial adoption. Whites also began to adopt Native American children from their reservations, removing them from their families and tribes in increasingly large numbers in the 1960s and 1970s. At first, the federal government aided white adopters, but when tribal leaders resisted this variety of transracial adoption, Congress, in the spirit of *noblesse oblige*, enacted ICWA to protect Native American children from adoption agencies, church groups, and would-be adoptive parents. Some African Americans also complained when whites showed an interest in adopting African American children, usually through county welfare departments responsible for foster care and child protection programs. These complaints briefly slowed the adoption of African American children by whites, but ultimately Congress enacted MEPA and then amended it with IEAA. This legislation, as well as supportive courtroom decisions, cleared the way for whites who wanted to adopt African American children.

These varieties of transracial adoption obviously differ from one another, but in each of them, whites have held the superior position. Lawmakers have provided supportive legislation when necessary, and in the courts, whites, as the adopting

¹⁵⁷ See Banks, *supra* note 152, at 271–72.

¹⁵⁸ See Joe Kroll, *Testimony Before the U.S. Commission on Civil Rights*, N. AM. COUNCIL ON ADOPTABLE CHILD. (Sept. 21, 2007), available at <http://www.nacac.org/policy/Sept07CivilRightsTestimony.pdf>.

¹⁵⁹ PATTON, *supra* note 7, at 22.

parties, have held the upper hand.¹⁶⁰ The importance of law, legal institutions, and legal proceedings should not be underestimated in the socio-legal phenomenon of transracial adoption, and law, legal institutions, and legal proceedings in general have been on the side of whites.

To some extent, this basic pattern illustrates what Professor Harris has characterized as a property interest in whiteness.¹⁶¹ “Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.”¹⁶² Whites who adopt children of another race are unlikely to reflect on their superior position, but members of minority groups might react angrily to white privilege in the adoption process.

On a more nuanced level, transracial adoption also reflects preferences and biases with regard to various racial minority groups. Many whites have a racial hierarchy in mind when they approach adoption, and members of minority racial groups sometimes pick up and internalize white preferences and biases. When Asian children attained their position as particularly desirable adoptees, for example, this racial preference reflected badly on members of other races, especially African Americans. Asian children were regarded as hard workers, good students, and successful assimilators, but African American children were just the opposite. Hence, they were less desirable as adoptees, as were potential adoptees from Africa itself. “Despite recent high-profile adoptions by pop culture luminaries such as Angelina Jolie and Brad Pitt and Madonna, adoptions from Africa are not viewed in the same light as adoptions from Asia.”¹⁶³ The raising of children in extended families was grudgingly cast as tolerable and even honorable for Native Americans, but African American child-rearing did not seem to merit the same treatment by white lawmakers. Furthermore, there is no indication that Native Americans saw significant similarities between their child-rearing and that of African Americans. Transracial adoption, in its own way, speaks of the shift some have observed from the traditional hierarchy of whites over non-whites to a hierarchy of non-African Americans over African Americans.¹⁶⁴

In conclusion, individual whites who adopt children of another race admittedly have a range of motivations, and many manage to transcend racism in their adoptions and their subsequent family lives. However, transracial adoption as a socio-legal phenomenon remains racialized. Participants have preferences and

¹⁶⁰ I have argued in another context that adoption law customarily cuts in favor of adoptive parents. See David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 472–74 (1999). In transracial adoption, the adoptive parents are almost always whites.

¹⁶¹ See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

¹⁶² *Id.* at 1713–14 (citation omitted).

¹⁶³ TUAN & SHIAO, *supra* note 5, at 143.

¹⁶⁴ See *id.* at 37.

standing related to their races, and transracial adoption reflects and reinforces the nation's dominant racial hierarchy. In the area of transracial adoption and in the society as a whole, a "post-racial" era has not dawned, even with the election of a President who was in part raised abroad and understands himself as a man of color.¹⁶⁵ In the contemporary United States, race remains associated with power or the lack thereof, and race-related power continues to play a role in many troubling ways.

¹⁶⁵ To date, most legal scholars who have reflected on "post-racialism" have attempted to refute rather than endorse the notion. *See generally* Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010); Sumi Cho, *Post-racialism*, 94 IOWA L. REV. 1589 (2009); john a. powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785 (2009).