STRICT SCRUTINY, BIRACIAL CHILDREN, AND ADOPTION

I. INTRODUCTION

One cannot fully understand what it is like to be a child of mixed race unless, of course, he or she is of mixed race. I grew up in a middle class neighborhood in which my sister and I were the only mixed race children. At an early age I discovered the differences between being white and black, but I remained unable to categorize my own family's diverse ethnic background. I once asked my grandfather why he was black and my grandmother was white. I was only five and could not understand why my skin color was not like my grandmother's or my grandfather's.

One day at recess in elementary school, my friends asked me if I was black, and I answered, "no, I am Portuguese." This was not true, but at my young age I felt that being black was a bad thing and denied this part of my heritage and culture. I felt ashamed to be different from my friends. I sincerely wanted to be like them and forget that I was any different. It was not until I entered junior high and high school that I really became comfortable with the fact that I was different.

Mine is just one example of what most biracial children go through while struggling to find their identities.[1] Biracial children[2] generally have special needs that must be satisfied for their successful identity formation.[3] The support of and ability to relate to family is essential for a young child trying to develop an appreciation for multiple ancestries.[4] A child's parents are the key to making this

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[1] *See* Donna M. Hickman & Susan Rashba, An Exploration of the Identity Development of Black/White Biracial Children iv (1976) (unpublished Masters of Arts and Masters of Science thesis, Boston University) (on file with Boston University Library) (stating that "biracial children have unique needs due to 1) racial attitudes in our society; 2) the pressure to identify with a single racial group; and 3) the small population of biracial children.").

[2] This Note will use the definition of "biracial children" proposed by Hickman and Rashba, who proposed that biracial children are children "whose biological parents are of different racial ancestry; one parent considered by society to be Caucasian, one parent considered by society to be Negro." *Id.*

[3] *See id.* at 77 (citing ROBERT J. SICKELS, RACE, MARRIAGE AND THE LAW 30 (1972)).

[4] *See id.* at 16 ("[G]reater strength is required of an interracial family than a uniracial

search for identity as smooth as possible.[5] The satisfaction of these needs is made more difficult when a biracial child is adopted. As a result, courts hearing biracial adoption cases[6] should give significant weight to the race of the adoptive child because it may have a significant impact on how a biracial child establishes his or her identity.

Presently, courts apply strict scrutiny to all racial classifications and to state adoption decisions.[7] Strict scrutiny requires that a state's use of a racial classification "serve a compelling governmental interest, and . . . be narrowly tailored to further that interest."[8] While a child's best interest is considered a compelling state objective,[9] supporters of strict scrutiny argue that a statute that takes race into account is not necessary to accomplish that objective. Any application of strict scrutiny, however, that does not take a child's race into account cannot adequately protect an adopted child's best interests.

Due to the overwhelming importance of the child's best interest, this Note advocates that courts should apply intermediate scrutiny rather than strict scrutiny in adoption cases. Section II of this Note describes the impact of being biracial on a child and his or her adoptive parents. Section III evaluates the role of adoption agencies in establishing criteria for the adoption process and specific congressional legislation. Section IV examines the history of the right to adopt. Section V analyzes the differences between intermediate and strict scrutiny, showing that intermediate scrutiny is more appropriate for biracial adoption cases. Section VI synthesizes the sociological, psychological, and legal evidence to show that strict scrutiny actually works against the best interests of the child.

This Note should not be taken to argue that interracial or transracial adoption is never desirable. This Note questions only the level of scrutiny courts use to decide cases involving biracial adoptions. Clearly, it is more desirable for a biracial child to be transracially adopted than to remain in foster or institutional care. When this is not the only viable option, however, courts should allow race to be a relevant factor.

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family. The racial difference is not a causal factor related to any specific maladjustment; instead it is a stress factor that places additional pressure on the parents and their children during a course of daily living.").

[5] *See id.*

[6] A biracial adoption, commonly referred to as a "transracial" adoption, occurs when a family of any race adopts a child who is of mixed race. By contrast, an interracial adoption occurs when a family of any race adopts a child who does not belong to the same race as the adoptive family. *See, e.g.*, Hickman & Rashba, *supra* note 1, at 12.

[7] *See* In re Petition of R.M.G., 454 A.2d 776, 786 (D.C. Cir. 1982).

[8] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

[9] *See* In re Adoption of Baker, 185 N.E.2d 51, 52-53 (Ohio Ct. App. 1962).

II. THE IMPACT OF BEING BIRACIAL

A. Challenges Facing Biracial Children

Being labeled biracial places extra burdens on young children.[10] Biracial children may have a more difficult time identifying with their parents.[11] Biracial children often lack a sense of security in their identity; tragically, such insecurity can stunt some children's emotional growth.[12] Additionally, children who are unable to identify with both of their parents often experience feelings of anxiety and guilt.[13]

Some biracial children may favor one parent over the other because they have an inability to relate to the parent of a different race.[14] Furthermore, a child who is unable to relate to one of his or her parents may end up resenting that parent.[15] If a child can resent a biological parent because she cannot relate to that parent, it is equally plausible, if not more so, that an adopted child will similarly resent an adoptive parent. This is not to suggest that race is the only factor that influences a child's ability to relate to either parent, but race is a relevant factor in how biracial children relate to their environment.[16]

Many biracial children who are unable to identify with both parents tend to reject that portion of their identity with which they cannot identify.[17] Children who are half black, for example, may reject their black ancestry and attempt to pass for white if their skin is light enough.[18] Those children who are unable to pass for white may abandon their white heritage because society rejects their "tenuous" white connection.[19] "Popular opinion holds that neither the black nor the white community will accept children born of interracial marriages."[20] In order for biracial children to be given an opportunity to appreciate their heritage, the race of adoptive parents should be given appropriate consideration.

Harvard sociologist Robert Park created the "marginal man" theory to explain the effects of disassociation from racial groups.[21] The "marginal man" is typically of "mixed blood" and is "predestined to live in two cultures and two

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[10] *See generally* Hickman & Rashba, *supra* note 1.

[11] *Id.* at 12.

[12] *Id.* at 8.

[13] *Id.*

[14] *Id.*

[15] Hickman & Rashba, *supra* note 1, at 8.

[16] *See generally id.*

[17] *Id.*

[18] *See id.* at 14.

[19] *See id.*

[20] Hickman & Rashba, *supra* note 1, at 13 (citing JOSEPH R. WASHINGTON, MARRIAGE IN BLACK AND WHITE (1970)).

[21] BARBARA TIZARD & ANN PHOENIX, BLACK, WHITE OR MIXED RACE? RACE AND RACISM IN THE LIVES OF YOUNG PEOPLE OF MIXED PARENTAGE 26 (1993).

worlds" to which he is a stranger.[22] The "marginal man" is in permanent turmoil and crisis; he possesses "spiritual instability, intensified self-consciousness, restlessness, and malaise."[23] Park believes that the "marginal man" was fortunate to be detached from both cultures and that we could learn about progress and the processes of civilization through the "marginal man."[24]

Everett Stonequist, however, argued that the "marginal man" is a negative classification because the white man sees him as inferior.[25] Consequently, Stonequist believed that the "marginal man" creates for himself a sense of isolation.[26] Studies performed in the 1980s suggest that biracial children adopted by white families are not proud of their racial origin.[27] "[T]he opportunity for establishing positive relationships with blacks on an everyday basis was a key factor in the child's development of a positive black identity and a corresponding feeling about other blacks."[28] Without this opportunity, biracial children will likely not develop this positive identity; they will experience or create for themselves feelings of isolation based on their race.

Studies have suggested that many mixed race children do not consider themselves to be black even though they admitted to applying the term black to other people of mixed race.[29] This discrepancy is often attributed to the child's unwillingness to deny her white ancestry.[30] Another possible explanation is that

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[22] *Id.* at 26 (citing Robert Park, *Human Migration and the Marginal Man*, 33 AM. J. SOC. 881, 893 (1928)).

[23] Park, *supra* note 22, at 893.

[24] *See id.* at 893 ("It is in the mind of the marginal man—where the changes and fusions of culture are going on—that we can best study the processes of civilization and of progress.").

[25] TIZARD & PHOENIX, *supra* note 21, at 27 (citing EVERETT STONEQUIST, THE MARGINAL MAN: A STUDY OF PERSONALITY AND CULTURE CONFLICT 138 (1937)). Stonequist asserted that the situation resulted in psychological maladjustment. He further suggested that "the marginal person has at least three significant phases in his personal evolution: 1) a phase when he is not aware that the racial or nationality conflict embraces his own career; 2) a period when he consciously experiences this conflict; and 3) the more permanent adjustments, or lack of adjustments, which he makes or attempts to make to his situation." STONEQUIST, *supra* at 121-22.

[26] TIZARD & PHOENIX, *supra* note 21, at 27.

[27] *Id.* at 34-35 (citing R. SIMON & H. ALTSTEIN, TRANSRACIAL ADOPTION: A FOLLOW-UP STUDY 13 (1981)). Two studies followed transracially adopted children from childhood through their teens. The studies also showed that children with white adoptive parents did not develop a black identity. *Id.*

[28] TIZARD & PHOENIX, *supra* note 21, at 35 (quoting R.G. MCROY & L.A. ZURCHER, TRANSRACIAL AND INRACIAL ADOPTEES 134 (1983)).

[29] *See* TIZARD & PHOENIX, *supra* note 21, at 46-47. Tizard and Phoenix state that fifty-four percent of those asked did not use black when referring to people of mixed race. Several of the forty-six percent who stated that they did use black to describe people of mixed race, did not apply the term to themselves, even though they were of mixed race. *Id.*

[30] *Id.* at 47.

young, mixed race children often go through an identity change in which they "transition from a black to a mixed identity."[31] The opposite of this occurs when mixed race adults pass for white and transition to a white identity.[32] Interestingly, the majority of mixed race individuals who decide to pass for white are male.[33] This may result from men having more opportunities to do so and more reasons to do so.[34] Generally, children who transition identities may not have fully developed survival skills, identity, and a sense of community.[35] A minority parent teaches his or her minority child how to survive in a racist world.[36] Race, consequently, should be a substantial factor to be considered in adoption proceedings involving biracial children.

Young children are also influenced by their parents' method of dealing with racism.[37] It is difficult to learn racism "survival skills" from a parent who does not experience racism. The successful transmission of survival skills is another reason why the courts should consider race and apply intermediate scrutiny in deciding biracial adoption cases.

Racism is inherent in our society and has been present throughout our history. The effects of a child's being biracial do not end when he or she becomes a teenager.[38] Teenagers too face many obstacles, such as dating and increased pressure to fit in with their peers.[39] The ability to establish and identify with both races at an early age will have an impact on the rest of a biracial individual's life.[40]

B. Challenges Facing Adoptive Parents

Opponents of transracial adoption believe that most problems develop as the adopted child emerges into adolescence and adulthood.[41] Marilyn and Loyal Rue, writing about their experience adopting what they call a "bicultural" child, wrote that they were naïve to think that their child would have a normal life and that they would be equipped to handle all of their child's needs, including unexpected emotional problems.[42] Because the Rues lived in a homogenous town in which

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[31] *See id.*

[32] Hickman & Rashba, *supra* note 1, at 14.

[33] *Id.*

[34] *Id.*

[35] Jacinda T. Townsend, *Reclaiming Self-Determination: A Call for Intraracial Adoption*, 2 DUKE J. GENDER L. POL'Y 173, 177 (1995).

[36] *Id.*

[37] *See* TIZARD & PHOENIX, *supra* note 21, at 119-20.

[38] ILAN KATZ, THE CONSTRUCTION OF RACIAL IDENTITY IN CHILDREN OF MIXED PARENTAGE: MIXED METAPHORS 200 (1996).

[39] Hickman & Rashba, *supra* note 1, at 19-20.

[40] *See id.*

[41] Rita T. Simon, *Adoption of Black Children By White Parents in the USA*, *in* ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY 232 (Philip Bean ed., 1984).

[42] Marilyn Rue & Loyal Rue, *Reflections on Bicultural Adoption*, *in* ADOPTION, *supra*

racism was prevalent, their child was forced to cope with racism alone.[43] The couple expressed fears that their child would never feel comfortable in this world because of the environment in which he was raised.[44] The Rues contend that "the amount of uncertainty in a bicultural situation is much greater than in monocultural families."[45] They believe that affirmation of two or more cultures is easier said than done.[46]

The Rues' experience is not unique. The Rues write also about how the adoptive white parents of a Native American boy tried to affirm the boy's heritage by purchasing books and seeing movies about Native Americans.[47] They failed, however, to counteract the boy's dysfunction both in school and with his family.[48] During therapy, the boy admitted that he was terrified that his parents were planning on abandoning him and thus took him to a reservation to prepare him for life there.[49]

The Rues also faced the problem of their child believing his Asian features were a curse because his classmates made fun of his race.[50] The Rues pointed out that they could only counter his feelings by reassuring him that he should be proud of his features.[51] They, however, had to do this in moderation to ensure that the child would feel like he was part of the family and that his parents would not leave him.[52]

Raising a biracial child presents challenges not encountered while raising a child of one's own race.[53] These stories just recounted take on added significance because they are real problems expressed by white adoptive parents and not by transracial adoption opponents. The real life problems facing adoptive parents may be the most poignant reason why race should not be treated under the strict scrutiny standard.

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note 41, at 249.

[43] *Id.*

[44] *Id.* at 250.

[45] *Id.* at 251.

[46] *See id.*

[47] Rue & Rue, *supra* note 42, at 251.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 252.

[52] Rue & Rue, *supra* note 42, at 251.

[53] *Id.* at 252.

III. THE ROLE OF ADOPTION AGENCIES AND CONGRESSIONAL STATUTES

A. Adoption Agencies

Historically, the best interests of the child have been considered a critical element in American adoption proceedings.[54] Modern adoption agencies use specified criteria to aid in the placement of children into suitable homes. Agencies typically try to match children with adoptive families according to race.[55] Adoption agencies justify this practice on the grounds that it furthers the best interests of the child "by correlating the physical appearance of the child to that of the parents, so that the child [can] be considered an integral part of the central family unit."[56] Several courts have held that adoption agencies may consider race as a relevant factor in adoption due to the difficulties inherent in interracial adoptions.[57]

Adoption agencies may consider race as a factor in adoption, just as they may consider a family's economic position.[58] While adoption agencies do not have a required minimum income for potential adoptive parents, the income of successful adopters is often well above average.[59] The result is that adoption agencies play an active role in excluding candidates based on economic status and race.[60] Critics of transracial adoption argue that adoption only serves the interests of the white population and the effort to recruit blacks and other minority adoptive parents is lacking.[61] Because other equally balanced factors used in the adoption decision-making process are not subject to strict judicial scrutiny, race should not be subjected to strict scrutiny.

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[54] *See* KATARINA WEGAR, ADOPTION, IDENTITY, AND KINSHIP: THE DEBATE OVER SEALED BIRTH RECORDS 25 (1997).

[55] Daphne Nell Wiggins, *The Multiethnic Placement Act of 1994: Background, Purpose, Interpretations and Effects of Legislation Regarding Transracial Adoption*, 20 L. & PSYCHOL. REV. 275, 281 (1996) (citing Jay M. Zitter, Annotation, *Race As Factor In Adoption Proceedings*, 34 A.L.R. 4th 169, 171 (1984)).

[56] *Id.*

[57] *See id.*

[58] WEGAR, *supra* note 54, at 36.

[59] *Id.* at 35 (citing BETTY REID MANDELL, WHERE ARE THE CHILDREN? A CLASS ANALYSIS OF FOSTER CARE AND ADOPTION 2 (1973)).

[60] WEGAR, *supra* note 54, at 36 (citing Amuzie Chimezie, *Transracial Adoption of Black Children*, 20 SOC. WORK 296, 296-301 (1975)).

[61] WEGAR, *supra* note 54, at 36.

B. The Indian Child Welfare Act

The Indian Child Welfare Act ("ICWA")[62] exemplifies the need to make exceptions in adoption proceedings. The ICWA protects the rights of the Native American community and Native American children by allowing the community to retain the right to keep its children within their community.[63]

The ICWA grants Native Americans exclusive jurisdiction over custody proceedings in order to preserve the "existence and integrity" of the Native American community.[64] The United States Supreme Court has extended the tribal court's jurisdiction to include adoption proceedings where the child was born off the reservation and voluntarily given up for adoption by both parents.[65] The Supreme Court has even granted tribal jurisdiction to such cases where the child has been living with the adoptive parents for a significant period of time.[66] Congress justified the ICWA under both the Commerce Clause and its responsibility for preserving Native American culture.[67] While the ICWA may be distinguished from statutes that take race into account, the ICWA would not survive strict scrutiny.

For instance, in *Mississippi Band of Choctaw Indians v. Holyfield*,[68] Choctaw twins were born out of wedlock two hundred miles outside the reservation; their parents were members of the Choctaw tribe and lived on the reservation.[69] Both parents signed a consent-to-adopt form in the chancery court, thereby forfeiting their parental rights to the twins.[70] A petition for adoption was filed in the same court by a couple seeking to adopt the children.[71] The chancery court issued a final adoption decree without reference to the ICWA or the children's heritage, despite its knowledge of both.[72] The Choctaw tribe petitioned the chancery court to vacate the adoption decree; this petition was rejected because the tribe had never gained exclusive jurisdiction over the children.[73] The chancery court based its decision on the facts that the mother had gone out of her way to give birth off the reservation and secure adoption immediately and that the children had never lived on the reservation.[74] The Supreme Court of Mississippi affirmed the decision, stating that while the case did turn on jurisdiction, the chancery court

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[62] 25 U.S.C. § 1901 et seq. (2000).
[63] *See* Zitter, *supra* note 55, at 169.
[64] 25 U.S.C. §§ 1901, 1911.
[65] *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 40 (1989).
[66] *See id.* at 53-54.
[67] 25 U.S.C. § 1901.
[68] 490 U.S. 30 (1989).
[69] *Id.* at 37.
[70] *Id.* at 37-38.
[71] *Id.*
[72] *Id. at* 38.
[73] *Mississippi Band of Choctaw Indians,* 490 U.S. at 38-39.
[74] *Id.* at 39.

had jurisdiction because the children never resided on the reservation.[75]

In the U.S. Supreme Court, Justice Brennan, writing for the majority, stated that the Supreme Court of Mississippi did not have jurisdiction over the case and that the Choctaw Tribunal had sole jurisdiction.[76] Therefore, the State had no authority to grant the adoption to the white family who resided off the Choctaw reservation.[77] This case established a precedent in which the Supreme Court upheld a statute that manifests Congress' intent to preserve the culture and community of a selected race.

By passing legislation that preserves the Native American community, Congress has carved out an exception to the strict scrutiny standard for this particular community. Congress deemed the preservation of Native American culture necessary for their survival. If Congress and the Court are willing to carve out this exception based on the principle of preservation, then Congress and the Court should be willing to adopt a lower level of scrutiny in adoption cases involving minority and biracial children.

IV. THE RIGHT TO ADOPT

The Fourteenth Amendment of the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws."[78] Personal rights that are deemed to be fundamental and require due process include matters relating to marriage, contraception, procreation, family relationships, and child-rearing.[79]

The Equal Protection Clause of the Fourteenth Amendment requires that all similarly situated people shall be treated equally.[80] Courts presume that legislation is valid and will be upheld as long as the classification is "rationally related to a legitimate state interest;" this is known as "rational-basis" scrutiny.[81] The majority of Equal Protection challenges are subject to this basic level of scrutiny.[82] Courts apply strict scrutiny standards to legislation involving race, alienage, or national origin; "[strict scrutiny] will be sustained only if [it is] suitably tailored to serve a compelling state interest."[83]

The right to adopt is granted by statute and, therefore, adoption is not a fundamental right.[84] Additionally, "[b]ecause adoption was unknown at common

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[75] *Id.*

[76] *Id.* at 41.

[77] *Id.* at 40.

[78] U.S. CONST. amend. XIV, § 1.

[79] Paul v. Davis, 424 U.S. at 693, 713 (1976).

[80] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

[81] *Id.* at 440.

[82] *Id.*

[83] *Id.*

[84] *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844

law, it has often been stated that the adoption statutes must be strictly construed."[85] Moreover, child services agencies oversee all formal adoptions in order to protect the child's welfare, and state representatives are given the right to determine what is in the child's best interest.[86] Courts and government agencies must defer to the expertise of child services agencies and the appointed state representatives in determining what is best for the child. If adoption agencies have this priority over courts and other government agencies, families wanting to adopt cannot have a greater right than the adoption agency that is entrusted with the well-being of the child. Thus, it appears adoption is not a fundamental right and should not trigger strict scrutiny.

The Fifth Circuit in *Drummond v. Fulton County Department of Family and Children's Services*[87] acknowledged that liberty includes

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[88]

Nothing in this passage suggests that the right to adopt should be incorporated in bringing up children. Because the court has not recognized adoption as a protected fundamental liberty right, the biracial child's rights that are entrusted to the state must be controlling. The state must put the needs of the child before the needs of an adoptive family to ensure a healthy and balanced upbringing. A biracial child's needs include the consideration of race during adoption proceedings.

The *Drummond* case arose after a multiracial child, Timmy, was placed with white foster parents.[89] The foster agency rejected the Drummonds' petition for adoption, and the Drummonds filed suit claiming that their rights were violated.[90] The Drummonds lost on this claim because the decision to reject their petition did not violate any constitutional rights.[91] The Drummonds then filed suit in the Superior Court of Fulton County, alleging that their rights as foster parents had been violated because they did not receive a due process hearing before the agency made its decision.[92] They also claimed that their rights were denied on

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(1977).

[85] In re Adoption of Carl, 184 Misc. 2d 646, 649 (N.Y. Fam. Ct. 2000) (citing Matter of Robert Paul P., 471 N.E.2d 424, 426 (N.Y. 1984)).

[86] WEGAR, *supra* note 54, at 112.

[87] 547 F.2d 835 (5th Cir. 1977), *rev'd en banc*, 563 F.2d 1200 (5th Cir. 1977).

[88] *Id.* at 852 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added)). Though the panel decision was reversed, the Fifth Circuit *en banc* adopted this position of the court. *See Drummond*, 563 F.2d at 1206.

[89] *Drummond*, 547 F.2d at 837.

[90] *Id.* at 850.

[91] *Id.* at 849.

[92] *Drummond*, 547 F.2d at 850.

equal protection grounds.[93] The Georgia Supreme Court affirmed the court's dismissal of the suit.[94] The court further ruled that state law governed property interests.[95] Since Georgia state law does not provide a right for foster parents to adopt, there can be no such claim under the Due Process Clause of the Fourteenth Amendment.[96]

Following the dismissal of their claim by the Georgia Supreme Court, the Drummonds appealed to the Fifth Circuit.[97] Judge Roney, speaking for the majority, held that it was proper to consider race in the placement process of children since the consideration did not suggest any stigma or racial epithet.[98] Judge Roney further stated that it is natural for children to be raised by parents of their same ethnic background.[99] Additionally, he noted that no court had held that it is impermissible to consider race in adoption placement.[100] Judge Roney relied in part on professional literature to justify the need to consider the racial attitudes of the adopting parents.[101] The judge perceived race to be analogous to religion as a factor in adoption proceedings, for which the court found no constitutional infirmity.[102] Significantly, the court stated:

> [A]doption agencies quite frequently try to place a child where he can most easily become a normal family member. The duplication of his natural biological environment is a part of that program. Such factors as age, hair color, eye color and facial features of parents and child are considered in reaching a decision. This flows from the belief that a child and adoptive parents can best adjust to a normal family relationship if the child is placed with adoptive parents who could have actually parented him. To permit consideration of physical characteristics necessarily carries with it permission to consider racial characteristics. *This Court does not have the professional expertise to assess the wisdom of that type of inquiry, but it is our province to conclude, as we do today, that the use of race as one of those factors is not unconstitutional.*[103]

The Fifth Circuit rejected the Drummonds' argument that they were deprived of a liberty interest due to the familial relationship that they developed with

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[93] *Id.*

[94] *Id.*

[95] *Id.* at 851 (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972)).

[96] *Id.*

[97] *Drummond*, 563 F.2d 1200, *rev'ing* 547 F.2d at 850, *and cert. denied,* 437 U.S. 910 (1978). On appeal to the Fifth Circuit, the panel initially reversed the district court's holding. On rehearing the case *en banc*, the court reversed the panel's holding, thereby affirming the lower court's findings.

[98] *Id.* at 1205.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Drummond,* 563 F.2d at 1205.

[103] *Id.* at 1205-06 (emphasis added).

Timmy.[104] The court rejected a constitutionally recognized familial relationship between foster children and their foster parents, citing Justice Brennan's rejection of such a claim in *Smith v. Organization of Foster Families for Equality & Reform*.[105] The relationship between the foster family and the foster child, therefore, cannot be afforded the same liberty right given to biologically connected families.[106] In his concurring opinion in *Smith*, Justice Stewart concluded that state created-family life is only temporary, with power given to the states to define and control such relationships.[107] Both the majority and concurring opinions in *Smith* illustrate that there is no federal constitutional protection for the right to adopt. Any protection that exists must bederived from the state granting the adoption.[108]

The child's best interests are the primary focus of adoption and, therefore, outweigh any statutory rights of families seeking to adopt.[109] Taking race into account in adoption cases is not arbitrary because of the sociological and psychological effects facing biracial children. Race is a substantial factor that must be given proper consideration to avoid further harm to a class of children who have difficulty establishing their identity. Consequently, the courts should defer to the criteria established by adoption agencies in order to allow those qualified in the field to determine the important factors in the adoption evaluation. Therefore, strict scrutiny does not have a place in adoption proceedings.

V. THE APPROPRIATE LEVEL OF JUDICIAL SCRUTINY

Courts employ three basic levels of scrutiny when reviewing government actions.[110] Rational basis scrutiny requires that the government have a legitimate objective, with a rational relation between the means chosen by the government and the stated objective.[111] Strict scrutiny requires the government to have a compelling objective, with the means employed by the government necessary to achieve that compelling interest.[112] Intermediate scrutiny calls for an important objective, with a substantive relationship between that objective and the means used.[113] Intermediate scrutiny is the appropriate standard of review to protect the

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[104] *Id.* at 1206.

[105] *Id.* at 1206; *see Smith*, 431 U.S. 816. In *Smith*, Justice Brennan stated that a familial relationship is one that is generally tied together through a biological connection. He articulated that while this biological connection is not always determinative, the relationship of a foster family is distinguishable because the latter is created by the state. *See id.* at 843-44.

[106] *See Smith*, 437 U.S. at 844-46.

[107] *Id.* at 863 (Stewart, J., concurring).

[108] *See id.*

[109] *See In re Baker*, 185 N.E.2d at 52-53.

[110] *See City of Cleburne*, 473 U.S. at 439.

[111] *See id.* at 439-40.

[112] *Id.* at 440-41.

[113] *Id.* at 441.

best interests of the child while allowing race to be a factor in biracial adoption proceedings.

A. Intermediate Scrutiny

1. The Struggle Between Intermediate and Strict Scrutiny for Racial Classifications: *Regents of the University of California v. Bakke*[114]

Regents of the University of California v. Bakke illustrates the Supreme Court's inability to reach a majority opinion on the level of scrutiny applicable to racial classifications.[115] This inability supports applying intermediate scrutiny in order to balance the concerns of the Justices. The dissent in *Bakke* suggested a categorical approach that would benefit biracial adoptions. In his dissenting opinion, Justice Brennan wrote that intermediate scrutiny should be applied to remedial racial classifications.[116] Justice Brennan stated that strict scrutiny should be applied only when racial classifications restrict fundamental rights or when the classifications are suspect.[117] He also compared race to gender to show that intermediate scrutiny should be applied to the case at bar.[118] Both race and gender are used "to stereotype and stigmatize politically powerless segments of society."[119]

The Court, however, has not been able to draw a clear line between "honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping."[120] This line drawing problem is also present with programs designed to alleviate the realities of past discrimination that create similar stigma in gender discrimination.[121] Just as an individual cannot control his race, he can

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[114] 438 U.S. 265 (1978).

[115] Bakke, a white male, challenged the University of California Medical School's special admissions program; the school reserved a designated number of openings for minority students. *Id.* at 269. The special admissions program contained a separate admissions system for evaluating applications from minority students. *Id.* at 272-73. Bakke claimed that the special admissions system discriminated against him on the basis of race and claimed that the system was unconstitutional. *Id.* at 278. Justice Powell, casting the swing vote, held that the program was unconstitutional and ordered the school to admit Bakke. *Id.* at 320. Justice Powell reasoned that strict scrutiny applies to all racial classifications and that the medical school failed to show that the program was necessary to promote a substantial state interest. *Id.* Justice Powell, however. did not rule out the possibility that such a program could survive strict scrutiny if properly devised. *Id.*

[116] *See id.* at 359 (Brennan, J., dissenting). Justice Brennan (joined in part by Justices White, Marshall, and Blackmun) dissented from Justice Powell's opinion, which served as the swing vote in this case. There was no majority opinion in the case.

[117] *Id.* at 357.

[118] *Id.* at 360.

[119] *Id.* (quoting Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting)).

[120] *Bakke*, 438 U.S. at 360.

[121] *See id.*

no more control his gender.[122] Due to the similarities between race and gender, the Justices believed that racial classifications must be justified with "an important and articulated purpose."[123]

The dissent's argument illustrates the appropriateness of intermediate scrutiny when the racial classification does not infringe a fundamental right.[124] Race is one of the factors used in determining the placement of adoptive children. As stated in Section III, adoption is not a fundamental right; it is a privilege granted by state statute. Furthermore, the use of race in adoption proceedings is not suspect when it is used to determine the best interests of the child. Following the logic of Justice Brennan, intermediate scrutiny should be applied to racial determinations in adoption cases.

2. *In re Petition of R.M.G.*[125]

In re Petition of R.M.G. demonstrates the contention surrounding the level of scrutiny to apply in adoption proceedings. Dating back to *Korematsu v. United States*, the Supreme Court has held that all statutes taking race into account are constitutionally suspect and will be subject to strict scrutiny.[126] The *R.M.G.* court rejected intermediate scrutiny despite the fact that other courts accepted an intermediate level of review that falls between strict scrutiny and rational basis scrutiny.[127] The standard set forth by the intermediate standard requires

> an important and articulated purpose and that purpose [must serve] an important governmental objective to which the prescribed use of race is substantially related and which - in contrast with the usual situation when race is invoked - does not stigmatize any group . . . by reflecting a presumption that one race is inferior to another or by putting the weight of government behind racial hatred or separatism.[128]

Four judges believed intermediate scrutiny was appropriate with "benign"

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[122] *Id.* at 361.

[123] *Id.*

[124] *Id.* at 357.

[125] 454 A.2d 776 (D.C. Cir. 1982). An unmarried, black, teenage mother signed away her parental rights to her child without the father's knowledge. The child was place with white foster parents who, within one year, petitioned for adoption. *Id.* at 779. The Department of Human Resources initially recommended approval and, at the mother's request, notified the biological father of the petition for adoption. *Id.* The father objected, and his parents filed a petition for adoption with his consent. *Id.* The trial court granted an interlocutory decree of adoption to the grandparents. *Id.* The foster parents filed a petition for a stay of the adoption, which was denied. *Id.* They also appealed for a rehearing *en banc*. *Id.* The Court of Appeals issued a stay on the trial court's decision in order to rule on the *en banc* petition. *Id.*

[126] *See* 323 U.S. 214, 316 (1944).

[127] *In re Petition of R.M.G.*, 454 A.2d at 785 (citing Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

[128] *Id.* (quoting *Bakke*, 438 U.S. at 361) (internal quotes omitted)).

racial classifications.[129] However, the majority in *R.M.G.* held that strict scrutiny is the appropriate standard of review in family law.[130] The court conceded that the child's best interest is a compelling interest, even in the absence of specific case law.[131] The court's analysis, therefore, focused on whether the statute at issue was necessary and precisely tailored to achieve the child's best interests.[132] While the court found that this classification did survive strict scrutiny, the critical inquiry was whether the statute "is precisely enough tailored to the child's interest, . . . or suffers instead from a more generalized application that possibly reflects invidious discrimination."[133] The majority set forth a three-step analysis to determine whether the trial court adequately analyzed the racial issue.[134]

The court's evaluation asked: 1) how each family's race is likely to affect the child's development of a sense of identity; 2) how the families compare in this regard; and 3) how significant the racial differences between the families are when all factors are considered.[135] The first prong addresses the child's self-esteem, confidence, and ability to cope with problems outside the family; the third prong is important when prospective parents of different races receive positive ratings.[136] The trial court must make specific findings on how race would affect the child growing up.[137]

However, that inquiry requires the trial judge to predict into the future with a high level of accuracy. There is no scientific formula to determine how each individual child will respond to living transracially, nor is there a significant amount of empirical data on this issue. Consequently, it is impossible for a racial classification in the adoption context to survive the *R.M.G.* standard due to its rigid and demanding framework. Intermediate scrutiny would protect the best interests of the child while preventing any abuse from using race as a factor. It would also provide a more practical test without forcing the trial judge to make specific findings for which he has no expertise.

3. Alienage Classifications

Courts apply either intermediate scrutiny or strict scrutiny in alienage classification cases, depending on how the classification is applied.[138] This willingness to apply two levels of scrutiny demonstrates the need to be flexible in certain circumstances. This flexibility should also take place in biracial

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[129] *Id.*
[130] *Id.* at 786.
[131] *Id.*
[132] *In re Petition of R.M.G.*, 454 A.2d at 786.
[133] *Id.* at 788.
[134] *See id.* at 791.
[135] *Id.*
[136] *See id.* at 792.
[137] *In re Petition of R.M.G.*, 454 A.2d at 793.
[138] *See* Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982).

adoptions.

In *Cabell v. Chavez-Salido*, the appellees were lawful permanent resident aliens who were denied positions as deputy probation officers.[139] They challenged the constitutionality of the citizenship requirement that prevented them from obtaining the desired positions.[140] Appellees alleged unlawful alien discrimination, among other claims.[141]

The Court recognized a distinction between the economic and sovereign functions of government on the grounds that "although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community."[142] Therefore, strict scrutiny applies to alien restrictions involving economic interests, while intermediate scrutiny applies to restrictions related to a "political function."[143] The court justified this differentiation as an unwillingness to interfere with "a State's constitutional prerogatives," its "establishment and operation of its own government," and "qualifications of an appropriately designated class of public office holders."[144] The court developed a two-part test to determine whether a public office fit into the "political function" exception.[145] The court held that a probation officer fit under the "political function" exception and, therefore, was entitled to intermediate scrutiny instead of strict scrutiny.[146]

Similarly, in *Bernal v. Fainter*, a resident alien unsuccessfully applied to be a notary public.[147] His application was denied due to Texas' citizenship requirement.[148] However, unlike *Cabell*, the court applied strict scrutiny instead of intermediate scrutiny.[149] The court's rationale was that, "[a]s a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny.[150] The court reasoned that alien classifications should receive the same treatment as racial classifications, subjecting both to strict scrutiny."[151] One exception to strict scrutiny is the "political function" which "applies to laws that exclude aliens from positions intimately related to the process of democratic self-government."[152] The court applied the two-part test in *Cabell* and reasoned that a notary public was not

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[139] *Id.* at 434.
[140] *Id.*
[141] *Id.* at 435.
[142] *Id.* at 438.
[143] *Cabell,* 454 U.S. at 439.
[144] *Id.* (quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1973)).
[145] *Id.* at 440.
[146] *Id.* at 447.
[147] *See* 467 U.S. 216 (1984).
[148] *Id.*
[149] *See id.*
[150] *Id.*
[151] *Id.*
[152] *Bernal,* 467 U.S. at 219.

central to the state government and, therefore, strict scrutiny applied.[153]

The willingness of the court to carve out an exception for a "political function" suggests that the court should be willing to create an exception for adoption cases involving biracial children. It is incongruous for the court to allow intermediate scrutiny in alienage classifications in certain circumstances while not having the same flexibility with racial classifications in the appropriate context.

4. Gender Discrimination

Although gender discrimination is similar to racial classifications, the Supreme Court nevertheless applies intermediate scrutiny, not strict scrutiny, in gender discrimination cases. In *Frontiero v. Richardson*, the Supreme Court invalidated a statute that presumed that the wife of a serviceman was a dependent but required the husband of a servicewoman to prove dependence on the wife to obtain benefits.[154] The Government conceded that there was no justifiable reason for treating the two genders differently and that the sole reason for the disparate treatment was "administrative convenience."[155] The Government argued that it was simply more cost efficient to assume that women are dependent on their husbands.[156]

The Court held that in order for such a provision to be constitutional, it must comport with a stricter level of scrutiny than rational basis scrutiny, which is applied to equal protection cases.[157] The court reasoned that gender classifications, like race, are inherently suspect and must be subjected to a stricter level of scrutiny.[158] While the Court spoke of strict scrutiny, *Frontiero v. Richardson* is characterized as symbolizing intermediate scrutiny.[159] *Mississippi University for Women v. Hogan* additionally applied intermediate scrutiny to invalidate the University's prohibition against male enrollment.[160] Although

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[153] *Id.* at 227.

[154] 411 U.S. 677, 688 (1973). The statute required a female uniformed officer seeking benefits for her dependent husband to prove dependency when no such requirement was placed on men seeking benefits for their wives. *Id.* The statute also allowed men to obtain benefits for their wives even if they provided less than half of their support, whereas petitioner would not be able to receive benefits for her similarly situated husband. *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 682-83.

[158] *Id.* at 688.

[159] *See City of Cleburne*, 473 U.S. at 451-53 (Stevens, J., concurring) ("Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age or . . . mental retardation, do not fit well into sharply defined classifications."); *id.* at 469 (Marshall, J., dissenting) ("Heightened but not strict scrutiny is considered appropriate in areas such as gender, illegitimacy, or alienage because the Court views the trait as relevant under some circumstances but not others.").

[160] 458 U.S. 718 (1982). The University's prohibition was determined to be not substantially related to the stated objective. *Id.*

neither provision withstood judicial scrutiny, the relevant fact is that intermediate scrutiny is the chosen standard for gender discrimination despite the fact that the *Frontiero* Court held gender classifications, like racial classifications, to be inherently suspect.[161]

If the Court is willing to apply intermediate scrutiny to other classifications, such as alienage and gender, which are similar to racial dassifications, it would not be beyond judicial reasoning for the Court to apply intermediate scrutiny to biracial adoption jurisprudence. Denying this exception from the usual standard applied to racial classifications would potentially harm prospective biracial children adoptees. The welfare of children is an important interest, the protection of which the Government has entrusted to Children's Services. To apply strict scrutiny to Children's Services' decisions would undercut its primary responsibility to put the best interests of the children first.

B. Strict Scrutiny - Adarand Constructors, Inc. v. Pena[162]

Adarand Constructors, Inc. v. Pena finally settled the debate over what level of judicial scrutiny should be applied to cases under the Fifth Amendment's Due Process Clause.[163] The Supreme Court held that strict scrutiny is the appropriate level of review for Fifth Amendment cases.[164] Justice O'Connor, delivering the majority opinion, applied the three propositions, skepticism, consistency, and congruence, established in *Richmond v. J.A. Croson Co.*[165] to support the Court's holding.[166] Skepticism mandates that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination."[167] Consistency requires that the race of "those burdened or benefited" does not determine the

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[161] *See Frontiero*, 411 U.S. at 688.

[162] 515 U.S. 200 (1995). This dispute arose over an incentive program set up by the US Government. The Central Federal Lands Highway Division awarded the general contract for highway construction to Mountain Gravel & Construction Company ("Mountain"). *Id.* at 205. Mountain then awarded a subcontract for guardrail work to Gonzales Construction Company in order to receive additional compensation from the government for subcontracting to "socially and economically disadvantaged individuals," including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act." *Id.* The Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA") required that at least ten percent of the funds must go to small businesses "controlled by socially and economically disadvantaged individuals." *Id.* at 207. Adarand Constructors ("Adarand") challenged the government's incentive program claiming that it violated equal protections guaranteed by the Due Process Clause of the Fifth Amendment. *Id.* at 204.

[163] *See id.* at 212-31, 235-39.

[164] *Id.* at 235.

[165] 488 U.S. 469 (1989).

[166] *See Adarand*, 515 U.S. at 223-24.

[167] *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986)).

standard of review under the Equal Protection clause.[168] Congruence requires that equal protection analysis be the same under the Fifth and the Fourteenth Amendments.[169]

In his dissenting opinion, Justice Stevens criticized the majority's consistency approach because it "justif[ies] treating differences as though they were similarities."[170] Justice Stevens argued that a single standard of review cannot apply to racial classifications that serve a remedial purpose, as well as those that are invidious discrimination.[171] Justice Stevens also argued that while the majority attempts to achieve consistency, gender discrimination is subject to intermediate instead of strict scrutiny.[172] Justice Stevens found the majority's congruence argument to be untenable due to its failure to consider the "significant difference between a decision by the United States Congress to adopt an affirmative-action program and such a decision by a State or municipality."[173]

Justice Stevens addressed several issues relevant to biracial adoption jurisprudence. First, the consideration of race would not work as invidious discrimination in adoption jurisprudence.[174] While it is questionable whether this could be considered remedial in nature, the use of race in determining the best interests of the child is closer to remedial than invidious discrimination. The fact that the use of race in adoption cases does not fit squarely into a remedial classification or an invidious discrimination demonstrates that consistency is ill advised when the cost is great. To treat adoption cases the same as invidious discrimination cases would have little value. Courts would look at the utility of race as inherently suspect and overlook the sole objective: the best interests of the child. As Justice Marshall stated in his dissenting opinion in *City of Cleburne*, the level of scrutiny applied to equal protection cases should depend on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[175]

Secondly, no harm would come from treating biracial adoption jurisprudence in the same manner that courts treat gender discrimination cases. As we have seen in alienage discrimination cases, the court applies strict scrutiny unless the classification fits within the "political function" exception. Not only should the court carve out an exception for biracial adoption jurisprudence, it should also apply intermediate scrutiny to this category of cases.

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[168] *Id.* at 224 (quoting *Croson*, 488 U.S. at 494).

[169] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).

[170] *Id.* at 245 (Stevens, J., dissenting).

[171] *Adarand*, 515 U.S. at 246 (Stevens, J., dissenting).

[172] *Id.* at 247.

[173] *Id.* at 249.

[174] *See id.* at 256-63.

[175] 473 U.S. at 460 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)).

VI. CONCLUSION

The best interests of the child require courts to apply intermediate judicial scrutiny in biracial adoption jurisprudence. The challenges that face both the biracial child and the adoptive parents are substantial enough to justify taking race into account. Race is a helpful factor in biracial adoption because it determines what is in the child's best interest. The personal accounts of white adoptive parents demonstrate that the challenges of raising a biracial child are significant and that the child may need special attention to facilitate a healthy identity.

Moreover, adoption agencies have authority to decide what is best for the adoptive child. The best interests of the child are the central issue in adoption proceedings. Therefore, courts must give deference to the expertise of the adoption agencies. This can only be done through intermediate scrutiny. With the ICWA, Congress has recognized the need to be less rigid in order to protect the culture and community of Native Americans. Congress' willingness to make a narrow exception for Native Americans lends support for a similarly narrow exception for biracial adoption.

Furthermore, the right to adopt is granted by statute and is not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. The dissent in *Bakke* stated that strict scrutiny only applies to cases involving fundamental rights. Since adoption is not a fundamental right, intermediate scrutiny should apply. Additionally, the dissenting Justice believed that racial classifications are akin to gender classifications, which are only subjected to intermediate scrutiny. When there are substantial similarities between the classifications, it is hard to explain the different treatment by the Court. The dissenting Justice showed that there is no clear majority believing that strict scrutiny should apply to all racial classifications. In cases involving gender classifications and alienage classifications, the Court does not apply strict scrutiny, despite the invidious nature of these classifications. Just as in gender and alienage classifications, using racial classifications, in certain contexts, does promote a legitimate purpose, and is not invidious in nature. The Court cannot refuse this exception based on consistency due to the Court's willingness to find other areas that should not be treated consistently.

All of these factors demonstrate why intermediate scrutiny is the appropriate judicial review in cases of biracial adoption. Strict scrutiny does not promotethe best interests of the child and should therefore be abandoned. Intermediate scrutiny is best suited to handle the best interests of the child in biracial adoptions.

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