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Recent Legislation: Constitutional Law – Congress Imposes New Restrictions on Use of Funds by the Legal Services Corporation – Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321

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RECENT LEGISLATION

CONSTITUTIONAL LAW — CONGRESS IMPOSES NEW RESTRICTIONS ON USE OF FUNDS BY THE LEGAL SERVICES CORPORATION. — Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

Fierce political battles have raged about the Legal Services Corporation (LSC) for much of its twenty-three year history.¹ Critics have attacked LSC for pursuing a “radical agenda” and for “engaging in dubious litigation that is of no real benefit to poor people,”² while supporters have termed LSC “the one program in the entire war on poverty that made a difference”³ and have decried the “campaign to deny the right of legal representation to the poor.”⁴ Last year, in the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA),⁵ Congress reduced LSC funding by thirty percent — to \$278 million in fiscal year 1996,⁶ a reduction of \$122 million from 1995⁷ — and imposed new restrictions on how LSC funds may be used. Congress banned legal services providers from using non-LSC funds to engage in certain activities and prohibited legal services attorneys from challenging welfare reform laws. The restrictions on non-LSC funds impose an unconstitutional condition on LSC grantees; the ban on welfare reform litigation assaults values protected by the First Amendment and the Due Process and Equal Protection Clauses.

Section 504 of OCRAA imposes nineteen restrictions on recipients of LSC funds.⁸ OCRAA’s restrictions differ from prior controls in two

¹ See LEGAL SERVS. CORP., 1994 ANNUAL REPORT 5 (1994); Clifford M. Greene, David R. Keyser & John A. Nadas, Note, *Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act*, 61 CORNELL L. REV. 734, 734–35 (1976). LSC “is a private, nonprofit corporation established by Congress to help provide equal access to justice under the law for all Americans.” LEGAL SERVS. CORP., *supra*, at 1.

² *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before the Subcomm. on Commerce, Justice, State and Judiciary of the House Appropriations Comm.*, 104th Cong. pt. 9, 129, 130 (1996) (testimony of Rep. Dan Burton).

³ James Ridgeway, *Legal Disservices*, VILLAGE VOICE, Aug. 6, 1996, at 20.

⁴ Editorial, *Cheating the Poor in Court*, BOSTON GLOBE, July 17, 1996, at A14.

⁵ Pub. L. No. 104-134, 110 Stat. 1321.

⁶ See *id.* tit. V. The fiscal year 1997 budget provides \$283 million in funding, virtually the same level as in 1996. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.A.N. (110 Stat.) 3009, [273].

⁷ See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1759 (1994) (providing \$415 million in funding for LSC in fiscal year 1995); Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, tit. II, ch. I, Pub. L. No. 104-6, 109 Stat. 73, 84 (rescinding \$15 million of LSC’s 1995 funding).

⁸ See OCRAA § 504. Section 504(a) states that “[n]one of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity” engaging in activities listed in the 19 subsections of section 504(a). *Id.* § 504(a). These

crucial ways.⁹ First, OCRAA prohibits LSC grantees from using non-LSC funds to engage in certain activities, including class action suits and lobbying.¹⁰ Second, restriction 16 prohibits LSC from funding a legal services provider "that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system."¹¹ Previous restrictions limited the types of cases in which LSC lawyers could engage; restriction 16 goes even further by limiting the arguments LSC lawyers may make on behalf of their clients.¹²

OCRAA unconstitutionally restricts the use of non-LSC funds. In contrast to past acts, which "applied restrictions contained in those acts only to the funds appropriated thereunder," the 1996 restrictions "prohibit[] LSC from funding any recipient that engages in certain specified activities,"¹³ regardless of whether LSC funds are used to support such activities.¹⁴ By conditioning LSC funding on the surrender of such rights as the right to file a lawsuit¹⁵ and the right to engage in advocacy,¹⁶ the restrictions implicate the First Amendment.

restrictions are incorporated into the 1997 appropriations bill by reference. See Omnibus Consolidated Appropriations Act, 1997, § 502(a). Prohibited activities include participation in redistricting matters, lobbying, class actions, representation of illegal aliens, abortion-related litigation, litigation on behalf of prisoners, and eviction proceedings of individuals charged with selling drugs. See § 504(a)(1)-(4), (7), (11), (14)-(15), (17).

⁹ The Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 (1994)), prohibits LSC grantees from using the funds in most fee-generating cases, criminal cases or civil cases arising out of criminal cases, political activities, labor-related activities, certain abortion cases, and litigation relating to desegregation. See *id.* § 1007(b). The fiscal year 1995 appropriations bill restricted LSC recipients from representing illegal aliens and from lobbying. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, § 403(b)(1) (applying the restrictions from Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, § 606(a), 104 Stat. 2101, 2149-51 (1990)).

¹⁰ See OCRAA § 504(d)(1).

¹¹ *Id.* § 504(a)(16). Section 504(a)(16) permits representation of "an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law." *Id.*

¹² Most notably, the new restrictions effectively ban LSC recipients from making constitutional challenges to welfare laws. Both OCRAA and accompanying LSC regulations mistakenly assume that LSC lawyers can easily separate representation of individual clients from challenges to the legitimacy of welfare reform. See Welfare Reform, 61 Fed. Reg. 45,747, 45,759 (1996) (to be codified at 45 C.F.R. pt. 1639). Effective representation of an individual client, however, may require challenges to the constitutionality of state or federal welfare programs. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970).

¹³ Use of Non-LSC Funds, 61 Fed. Reg. 41,960, 41,960 (1996) (to be codified at 45 C.F.R. pt. 1610).

¹⁴ Prior to OCRAA, certain restrictions applied to LSC grantees' use of private funds, but none to non-LSC public funds. See 45 C.F.R. §§ 1610.1, 1610.2, 1610.3, 1612.7(a) (1995).

¹⁵ See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

¹⁶ See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

The restrictions on LSC grantees directly contradict the Supreme Court's ruling in *FCC v. League of Women Voters*.¹⁷ In that case, the Court held unconstitutional a ban on public television stations' airing editorials because the ban prohibited a station "from using even wholly private funds to finance its editorial activity."¹⁸ Even cases in which the Court has upheld government restrictions on speech strengthen this protection of the use of private funds. In *Regan v. Taxation with Representation*,¹⁹ the Court held that § 501(c)(3) of the Internal Revenue Code, which grants tax-exempt status only to nonprofit organizations that do not engage in lobbying,²⁰ does not violate the First Amendment, in part because such organizations still had the right to use nondeductible private funds to lobby.²¹ Similarly, in *Rust v. Sullivan*,²² in upholding regulations that prohibited recipients of federal family planning funds from using such funds "in programs where abortion is a method of family planning,"²³ the Court noted that a "grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy" with independent funds.²⁴ OCRAA denies LSC grantees similar leeway to use independent funds to support restricted activities and is thus unconstitutional.²⁵

Even without the restrictions on non-LSC funds, OCRAA is unconstitutional in that it makes LSC funding contingent on forfeiture of the right to challenge welfare laws. Restriction 16 is unconstitutional for three reasons. First, it undermines the First Amendment by invading the lawyer-client relationship. The Court has recognized that certain professional relationships constitute "spheres of free expression" in which government's ability to regulate speech is limited.²⁶ The fact

¹⁷ 468 U.S. 364 (1984).

¹⁸ *Id.* at 400.

¹⁹ 461 U.S. 540 (1983).

²⁰ See I.R.C. § 501(c)(3) (1994).

²¹ See *Taxation with Representation*, 461 U.S. at 544-45.

²² 500 U.S. 173 (1991).

²³ 42 U.S.C. § 300a-6 (1994), quoted in *Rust*, 500 U.S. at 178.

²⁴ *Rust*, 500 U.S. at 196 (emphasis omitted).

²⁵ The only court to have ruled on the constitutionality of the restrictions has agreed. See *Varshavsky v. Geller*, No. 40767/91, slip op. at 14-16 (N.Y. Sup. Ct. Dec. 24, 1996), reprinted in N.Y. L.J., Dec. 30, 1996, at 22; see also *Legal Aid Soc'y v. Legal Servs. Corp.*, Civil No. 97-00032 ACK, slip op. at 35-36 (D. Hawaii Feb. 14, 1997) (enjoining the LSC from enforcing nine of the restrictions as applied to the use of non-LSC funds). LSC responded to the Hawaii decision by issuing new regulations under which LSC grantees can transfer non-LSC funds to organizations that are sufficiently separated from the grantees. See *Use of Non-LSC Funds*, 62 Fed. Reg. 12,101, 12,103-04 (1997) (to be codified at 45 C.F.R. pt. 1610).

²⁶ In *Rust*, the Court suggested that "the Government's ability to control speech" may be limited in certain "sphere[s] of free expression" — such as universities — that are "fundamental to the functioning of our society." *Rust*, 500 U.S. at 200. The *Rust* Court suggested without deciding that the doctor-patient relationship also may be such a sphere. See *id.*; see also David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 746-47 (1992) (arguing that restrictions on the speech of government-funded lawyers would be unconstitutional).

that lawyers, whether defense lawyers representing criminal suspects or legal services lawyers representing welfare recipients, are often at odds with the state argues strongly for extending such limitations to the lawyer-client relationship. Indeed, the Court has recognized that lawyers must be free to argue as they see fit: "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."²⁷ Under restriction 16, a legal services lawyer may no longer make certain arguments on a client's behalf and thus no longer has full freedom to pursue a client's interests. Even if Congress is free to limit the types of cases in which LSC-funded attorneys may engage, once Congress sets such boundaries, it should not intrude into the lawyer-client relationship by regulating the viewpoint of attorney speech.²⁸ To do so runs directly counter to the right of lawyers and their clients to challenge laws in court.²⁹

Second, restriction 16 violates the First Amendment by explicitly restricting the speech of private actors. The Court has distinguished a government's legitimate pursuit of policy objectives from unconstitutional constraints on speech by examining whether affected individuals are state actors.³⁰ In holding unconstitutional a state university's refusal to subsidize a Christian magazine, the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*³¹ emphasized that the speech in question was neither government speech nor speech on behalf of the government.³² In this context, government funding was designed "to encourage a diversity of views from private speakers."³³ The Court distinguished *Rust* — in which the Court allowed Congress to prohibit doctors in federally funded family planning programs from discussing abortion with their patients³⁴ — as a case in which the state, as speaker, could "make content-based choices."³⁵

LSC-funded attorneys fall on the private-actor side of the *Rosenberger/Rust* divide. Although created by Congress, LSC is an independent, non-government, nonprofit corporation intentionally

²⁷ *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1976)) (internal quotation marks omitted).

²⁸ *Cf. Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [the] right not only to advocate [one's] cause but also to select what [one] believe[s] to be the most effective means for so doing.")

²⁹ *See Lenhart v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) ("We long have recognized the important political and expressive nature of litigation."); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963) (declaring that litigation is "a form of political expression" that "may well be the sole practicable avenue open . . . to petition for redress of grievances").

³⁰ *See Robert C. Post*, *Subsidized Speech*, 106 YALE L.J. 151, 155 (1996).

³¹ 115 S. Ct. 2510 (1995).

³² *See id.* at 2518-19.

³³ *Id.* at 2519.

³⁴ *See Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991).

³⁵ *Rosenberger*, 115 S. Ct. at 2518-19.

insulated "from the influence of . . . political pressures."³⁶ Moreover, LSC's organic act provides that LSC "shall not, under any provision . . . , interfere with any attorney in carrying out his professional responsibilities to his client."³⁷ In contrast, title X of the Public Health Service Act,³⁸ the law at issue in *Rust*, authorizes the Secretary of Health and Human Services "to make grants and enter into contracts with public or nonprofit private entities" to assist in establishing "family planning projects."³⁹ Government funds are available to clinics and doctors under title X "to transmit specific information pertaining to [the government's] own program."⁴⁰ The doctors in *Rust* were conveying the government's message in a way that LSC-funded attorneys explicitly and deliberately are not. The *Rosenberger* Court's admonition is particularly relevant: "Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the [state] may not silence the expression of selected viewpoints."⁴¹

Third, restriction 16's prohibition on challenging welfare laws denies equal protection and due process to LSC clients. Restriction 16 prohibits LSC clients — and only LSC clients — from challenging welfare laws. In *Romer v. Evans*,⁴² the Court recently declared that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."⁴³ Even more recently, in *M.L.B. v. S.L.J.*,⁴⁴ in which an indigent mother faced a challenge to her retaining parental rights over her child, the Court reaffirmed that, in cases involving "[t]he basic right to participate in political processes as voters and candidates" and in "cases criminal or 'quasi criminal in nature,'"⁴⁵ states may not condition appellate review on the ability to pay court fees.⁴⁶ Taken together, the pronouncements in *Romer* and *M.L.B.* on the requirements of the Due Process and Equal Protection Clauses suggest two reasons why restriction 16 is invalid. First, litigation challenging welfare laws is inherently political and deserves the same rigorous protec-

³⁶ 42 U.S.C. § 2996(5) (1994). In introducing recommendations for the establishment of LSC in 1971, President Nixon stressed that, "if we are to preserve the strength of the program[,] we must make it immune to political pressures and make it a permanent part of our system of justice." H.R. REP. NO. 93-247, at 2 (1973) (internal quotation marks omitted).

³⁷ 42 U.S.C. § 2996(e)(b)(3) (1994).

³⁸ 42 U.S.C. §§ 300-300a-6a (1994).

³⁹ *Id.* § 300(a).

⁴⁰ *Rosenberger*, 115 S. Ct. at 2519.

⁴¹ *Id.* at 2519.

⁴² 116 S. Ct. 1620 (1996).

⁴³ *Id.* at 1628.

⁴⁴ 117 S. Ct. 555 (1996).

⁴⁵ *Id.* at 568 (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971)).

⁴⁶ *See id.* at 561.

tion that other forms of political participation receive.⁴⁷ Second, unlike in cases in which the court has refused to require government to subsidize the exercise of rights, the government here — as in *M.L.B.* — has created LSC clients' legally disadvantaged status.⁴⁸ Practically, restriction 16 requires LSC clients to rely on lawyers who are precluded from asserting their clients' rights and interests zealously, and thus violates both due process and equal protection.

Furthermore, the vital role the legal system plays in our political framework argues strongly for prohibiting government from selecting which arguments citizens may make in court. Speech deserves First Amendment protection when "particular speakers in particular circumstances ought constitutionally to be regarded as independent participants in the process of democratic self-governance."⁴⁹ In issuing courtroom challenges — especially constitutional challenges — to federal and state laws, lawyers and their clients play crucial roles in the American democratic process. "[T]he Framers . . . expected that the federal courts would assume a power . . . to pass on the constitutionality of actions of the Congress and the President, as well as of the several states";⁵⁰ a statute prohibiting lawyers from bringing constitutional challenges undermines the courts' ability to serve this vital function.

Many in the legal services community have been reluctant to oppose OCRAA, fearful that any challenge might incite congressional Republicans to actualize threats to eliminate LSC altogether.⁵¹ The Act must be challenged, however, for it sets a dangerous precedent. Congress cannot control the speech of private actors, and the congressional hold on the federal purse strings should not be permitted, whether by intimidation or by legislation, to insulate congressional activity from judicial scrutiny.

⁴⁷ See Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights — Part I*, 1973 DUKE L.J. 1153, 1215 ("There is something sharply jarring about a set of rules which firmly inveighs against exclusion of persons from the vote, while rather freely allowing their exclusion from the litigation arena."); see also *Romer*, 116 S. Ct. at 1628 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

⁴⁸ The *M.L.B.* Court distinguished *Taxation with Representation* and *Lyng v. International Union*, 485 U.S. 360 (1988), as cases in which complainants "sought state aid to subsidize their privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action." *M.L.B.*, 117 S. Ct. at 568. In contrast, the complainant in *M.L.B.* was seeking "to be spared from the State's devastatingly adverse action," the stripping of her parental rights. *Id.*

⁴⁹ Post, *supra* note 30, at 162.

⁵⁰ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 15 (1962).

⁵¹ See Jan Hoffman, *Counseling the Poor, But Now One by One*, N.Y. TIMES, Sept. 15, 1996, at 47; Ridgeway, *supra* note 3, at 21. Three cases challenging the restrictions have been filed. See Amended Class Action Complaint, *Velazquez v. Legal Servs. Corp.*, Civil Action No. 97 CV 00182 (E.D.N.Y. Jan. 27, 1997); Motion for Preliminary Injunction, *Legal Aid Soc'y v. Legal Servs. Corp.*, Civil No. 97-00032 ACK (D. Hawaii Jan. 9, 1997); *Varshavsky v. Geller*, No. 40767/91, slip op. at 14-16 (N.Y. Sup. Ct. Dec. 24, 1996), reprinted in N.Y. L.J., Dec. 30, 1996, at 22.

TRANSRACIAL ADOPTION — CONGRESS FORBIDS USE OF RACE AS A FACTOR IN ADOPTIVE PLACEMENT DECISIONS. — Small Business Jobs Protection Act, Pub. L. No. 104-188, § 1808 (1996).

With bipartisan support,¹ little public opposition,² and minimal fanfare, the 104th Congress moved to end the longstanding practice of matching adoptive parents and children according to race. Repealing a previous federal statute that explicitly allowed consideration of race as a factor in placement determinations,³ the Small Business Jobs Protection Act (SBJPA) makes clear that adoption agencies can no longer use race to delay or deny adoptive placement.⁴ Yet the law leaves open whether agencies can deny placement on the grounds that the prospective adoptive parents lack sufficient racial or cultural sensitivity.⁵ Expected interpretive guidelines may well determine whether the new law succeeds in eliminating the institutional barriers to transracial adoption (TRA).⁶ These guidelines should have a clear message: racial sensitivity screening contravenes the spirit of the new law, fails to accomplish what screening's advocates most seek — protection of black cultural identity⁷ — and thus is unacceptable under the SBJPA.

¹ See 142 CONG. REC. E787 (daily ed. May 14, 1996) (statement of Rep. Stokes); Randall Kennedy, *Let Love, Not Color, Be the Key to Adoption*, BOSTON GLOBE, July 21, 1996, at C2.

² See Interview with Elizabeth Bartholet, Professor of Law, Harvard Law School, in Cambridge, Mass. (Oct. 21, 1996) [hereinafter Bartholet Interview].

³ See Howard M. Metzbaum Multiethnic Placement Act of 1994 (MEPA) § 551, 42 U.S.C. § 5115a(a)(2) (1994).

⁴ The SBJPA states:

[N]either the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may —

(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of race, color, or national origin of the person, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

Pub. L. No. 104-188, § 1808(a)(3) (1996).

⁵ See, e.g., Joan Heifetz Hollinger, *Responses to "Where Do Black Children Belong?"*, RECONSTRUCTION, 1992, at 49, 50 (arguing against racial matching, but for requiring of demonstrated racial sensitivity); Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131, 164 (1995) (same); see also 142 CONG. REC. H4820 (daily ed. May 10, 1996) (statement of Rep. Jackson-Lee) ("States and entities must make an effort to ensure that prospective adoptive parents of a child from a different race are sensitive to the child's cultural background.").

⁶ See Telephone Interview with Patrick Purtill, National Council on Adoption (Nov. 18, 1996) [hereinafter NCOA Interview]. The NCOA believes that the Department of Health and Human Services will issue guidelines, rather than formal regulations, in order to leave agencies more "wiggle room" to make partially race-based decisions. *Id.*; cf. Melissa Baker, *Adoption Provisions in the Small Business Job Protection Act of 1996*, W MEMO, July-Aug. 1996, at 21 (noting arguments that the SBJPA may allow continued consideration of race).

⁷ Because TRA in the United States most often involves white couples adopting black children, see Anita Allen, *Responses to "Where do Black Children Belong?"*, RECONSTRUCTION, 1992, at 46, 46, this Recent Legislation focuses on that model of transracial adoption.

For much of this nation's history, most lawmakers viewed mixing of the races as socially and morally repugnant, and a number of states prohibited transracial adoption by law.⁸ Courts eventually held these laws unconstitutional,⁹ and courts today generally forbid the use of race as a decisive factor in adoptive placement.¹⁰ The modern civil rights era saw transracial adoptions in unprecedented numbers.¹¹ But this upswing soon came to an end because, many believe, of a 1972 position paper by the National Association of Black Social Workers,¹² stating categorically: "Black children should be placed only with Black families."¹³ Thereafter, state statutes,¹⁴ common law doctrine,¹⁵ and agency policies — written and unwritten¹⁶ — "virtually prohibit[ed] multi-ethnic and transracial foster care and adoption placements."¹⁷

Two sides of the post-civil-rights-era TRA debate stand in stark opposition. TRA proponents argue that individual black children benefit from being placed in permanent homes sooner rather than later.¹⁸

⁸ See, e.g., LA. REV. STAT. ANN. § 9:422 (West 1965); TEX. REV. CIV. STAT. ANN. arts. 46a(8), 46b-(4) (Vernon 1959); *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (describing the trial court's rationale for upholding Virginia's antimiscegenation law).

⁹ See, e.g., *Compos v. McKeithen*, 341 F. Supp. 264, 268 (E.D. La. 1972); *In re Gomez*, 424 S.W.2d 656, 659 (Tex. Civ. App. 1967).

¹⁰ See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1239 & nn.212-14 (1991).

¹¹ See RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 29-30 (1977). The number of transracial adoptions reported in the United States grew from 733 to 2574 between 1968 and 1971. See *id.* at 30. The number of transracial adoptions reported peaked in 1973 at 3921; in the past 20 years, only a few hundred have been reported each year. See Judy Peres, *Adoptees Say Love, Not Race, Matters*, CHI. TRIB., May 12, 1996, at 1.

¹² See, e.g., Bartholet, *supra* note 11, at 1179-81; Randall Kennedy, *Yes: Race-Matching Is Horrendous*, A.B.A. J., Apr. 1995, at 44, 44; Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 925 (1994).

¹³ NATIONAL ASS'N OF BLACK SOC. WORKERS, POSITION PAPER (1972), reprinted in SIMON & ALTSTEIN, *supra* note 12, at 50 [hereinafter NABSW POSITION PAPER]. The NABSW based its position both on its assessment of the individual best interests of black children and on the black community's interest in preserving its cultural identity. Although the NABSW remains opposed to transracial adoption, see NCOA Interview, *supra* note 6, it today takes a somewhat more moderate public stance, see Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 52 n.84 (1993).

¹⁴ See, e.g., MINN. STAT. ANN. § 259.28 (West 1992) (giving preference to placing a child with a same race family, or, if that is not possible, with prospective adoptive parents who are "knowledgeable and appreciative of the child's racial or ethnic heritage").

¹⁵ See, e.g., *Drummond v. Fulton County Dept. of Family & Children's Servs.*, 563 F.2d 1200, 1205-06 (5th Cir. 1977) (en banc) (holding that adoption agencies should consider race in placement decisions); *In re Davis*, 465 A.2d 614, 622 (Pa. 1983) (holding that precedent broadly supports considering race as a factor in agency placement decisions).

¹⁶ For a discussion of these policies and a detailed history of race-matching, consult Jacqueline Macaulay & Stewart Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, in 1 RESEARCH IN LAW AND SOCIOLOGY 265, 284-85 (Rita J. Simon ed., 1978); and Bartholet, cited above in note 11, at 1183-200.

¹⁷ Howard M. Metzenbaum, S. 1224 — *In Support of the Multiethnic Placement Act of 1993*, 2 DUKE J. GENDER L. & POL'Y 165, 166 (1995).

¹⁸ See, e.g., Bartholet, *supra* note 11, at 1223-26 (canvassing several studies showing that delays in permanent placement create a number of risks, including psychological trauma); Ken-

Because empirical studies suggest that black children experience no psychological harm from being raised by white parents and that these children still develop a healthy sense of black identity,¹⁹ TRA proponents see only benefits from eliminating race entirely from placement decisions.

On the other side, TRA's opponents argue first that TRA may undermine the individual interests of black children.²⁰ Second, they assert that the black community — a community with which black children are "inevitably identified"²¹ — has a legally cognizable collective interest in group preservation and self-determination.²² Many of these TRA opponents name fears of cultural assimilation or "genocide." Their fears are based not on the claim that overwhelming numbers of black children will be transracially adopted, but on the assertion that the black community will lose control over its own group identity.²³

The 1994 passage of the Howard M. Metzenbaum Multiethnic Placement Act²⁴ (MEPA) brought the widespread policy of race matching into sharp focus on the national level. Faced with evidence of children spending years in temporary care,²⁵ Congress prohibited state and federally funded agencies from delaying or refusing to place a child in an adoptive or foster home on the basis of the race of the parent and child involved.²⁶ Infuriating those who held race matching

nedy, *supra* note 13, at 44; Forde-Mazrui, *supra* note 13, at 936-38. Studies have long suggested that "[t]here are many more black children [waiting for adoption] than there are waiting black parents." ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 96 (1993); accord SIMON & ALTSTEIN, *supra* note 12, at 26-35.

¹⁹ See, e.g., Bartholet, *supra* note 11, at 1211-16, 1221-25. The studies that Bartholet and others deploy generally conclude that transracial adoptees' self-esteem, social adjustment, and sense of racial identity are comparable to or better than those of intraracially adopted children. See *id.* These findings are bolstered by the personal accounts of some black transracial adoptees, who describe positive experiences growing up in white families. See, e.g., Peres, *supra* note 12.

²⁰ TRA opponents have criticized the studies cited in support of the proposition that black children suffer no ill effects from being raised by white parents. See, e.g., Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 57-59 (1993); see also Asher D. Isaacs, *Interracial Adoption: Permanent Placement and Racial Identity — An Adoptee's Perspective*, 14 NAT'L BLACK L.J. 126, 138 (1995) (concluding that some of the most frequently cited TRA studies "offer strong evidence" that transracial adoptees fail to develop a "positive racial identity"). Even Rita Simon, coauthor of one of the studies most frequently cited in support of TRA, believes that, although transracial adoption is far better than no adoption, "[w]hen there are black families available for black children, they should be placed in black homes." Rita J. Simon, *Responses to "Where Do Black Children Belong?"*, RECONSTRUCTION, 1992, at 51, 51.

²¹ Perry, *supra* note 20, at 53.

²² See *id.* at 65-72. This claim is grounded in the belief that racism is "pervasive and permanent" in America, that race is pivotal in shaping individuals' lives, and that, because the presence of diverse cultures is a societal good, a group's interest in maintaining its cultural distinctiveness should be protected. *Id.* at 43.

²³ See *id.*

²⁴ Pub. L. No. 103-382, §§ 551-554, 108 Stat. 4056, 4056-57.

²⁵ See *id.* § 552, 108 Stat. at 4056; Metzenbaum, *supra* note 18, at 166.

²⁶ See 42 U.S.C. § 5115a(a)(1) (1994).

responsible for "locking black kids into foster limbo,"²⁷ however, MEPA nevertheless permitted agencies to "consider the cultural, ethnic, or racial background of the child . . . as one of a number of factors."²⁸ Subsequent HHS regulations seemed to prove the critics' point: MEPA served to validate many of the state race-matching policies that the statute was designed to remedy.²⁹ Ultimately, Senator Metzenbaum himself worked for MEPA's repeal, recognizing that the race-as-a-factor proviso created a loophole large enough for agencies to pursue race-matching policies with vigor.³⁰

With last summer's passage of the SBJPA, Congress tacitly concluded that the TRA proponents were right: race matching was at least partly responsible for continued delay in adoptive placement.³¹ But what Congress replaced MEPA with may seem on its face a strikingly similar bill. Both MEPA and the SBJPA aim to minimize the length of time children spend in temporary care³² and to "facilitat[e] the adoption of minority children."³³ Both laws expressly prohibit delaying or denying placement based on race.³⁴ The key alteration Congress made was to excise the MEPA "permissible consideration" language³⁵ from the SBJPA.³⁶ In evaluating the extent to which race may continue to play a role under the new law, the absence of this provision reveals Congress's intent to eliminate race, including racial sensitivity screening, from the adoption calculus.

Nevertheless, TRA opponents' second claim — that there exists a group interest in protecting black cultural identity — has led advocates on both sides of the debate perennially to call for some form of cultural screening.³⁷ At first glance, cultural screening appears to be a satisfying compromise — children get placed in permanent homes without the delay for racially matched parents; the black community gets some assurance that its cultural heritage will be protected. Indeed, whether or not black children raised in white families are

²⁷ Letter from Professors at Harvard Law School to Sen. Larry Craig (Oct. 4, 1994) (on file with the Harvard Law School Library).

²⁸ 42 U.S.C. § 5115a(a)(2).

²⁹ See Bartholet Interview, *supra* note 2. States' "race preference" statutes generally required adoption agencies to select racially matched prospective parents before turning to families of different races. See, e.g., MINN. STAT. ANN. § 259.28(2) (West 1992).

³⁰ See Howe, *supra* note 5, at 160-61.

³¹ One legislator cited with deep disapproval statistics showing that half a million children continued to "languish every year in foster care." 142 CONG. REC. H4818 (daily ed. May 10, 1996) (statement of Rep. Smith).

³² See 42 U.S.C. § 5115a(a)(1)(B); 142 CONG. REC. H4819-20 (daily ed. May 10, 1996) (statement of Rep. Jackson-Lee).

³³ S. REP. NO. 104-279, at 5 (1996); cf. Metzenbaum, *supra* note 18, at 166-67 (arguing that MEPA will improve children's lives and combat racial discrimination).

³⁴ See 42 U.S.C. § 5115a(a)(1)(B); Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808(a)(3), 110 Stat. 1755, 1903.

³⁵ 42 U.S.C. § 5115a(a)(2).

³⁶ See § 1808(a)(3), (d), 110 Stat. at 1903-04.

³⁷ See, e.g., Hollinger, *supra* note 5, at 50; Isaacs, *supra* note 20, at 155-56.

harmed by losing a meaningful sense of their cultural identity,³⁸ the interest of a minority culture in protecting some sense of group identity should not be dismissed.³⁹ Community culture yields benefits worth protecting:⁴⁰ instilling in members a sense of moral grounding,⁴¹ bolstering members' self-respect,⁴² and establishing a social network capable of driving economic attainment.⁴³

Yet cultural screening will not protect the interests of the black community that are at stake in TRA. First, because self-selection is likely among white parents seeking to adopt transracially,⁴⁴ those with any overt — and therefore readily detectable — racial bias or insensitivity will screen themselves out. Whatever remaining “racial sensitivity” agencies seek to establish must involve subtler forms of racial awareness that are difficult, if not impossible, to isolate in the course of an agency's evaluation process.⁴⁵ Beyond this, it is unclear at best what criteria could convincingly establish white prospective parents' requisite sensitivity. A few scholars have proposed criteria,⁴⁶ but implementing a standard as free-form as, for example, “cultural competence”⁴⁷ seems far easier in theory than in practice.⁴⁸

Even if the bureaucracy functioned ideally, cultural screening would fail to safeguard an unassimilated black cultural identity. First, even if one were to accept the view that “[i]nstitutional racism and

³⁸ Compare NABSW POSITION PAPER, *supra* note 14, at 50 (“Black children in white homes are cut off from the healthy development of themselves as Black people.”), and Isaacs, *supra* note 20, at 128 (describing the pain that he endured as a black child raised in a white cultural environment), with BARTHOLET, *supra* note 18, at 105 (arguing that black transracial adoptees have “as strong a sense of black identity and racial pride as other minority children”), and James McBride, *Adopting Across the Color Line*, N.Y. TIMES, June 3, 1996, at A15 (praising his white mother and noting that one of his black siblings has become a professor of African-American history).

³⁹ Countless critiques of the United States's history of discrimination against black Americans detail the profound personal and social cost of discounting group-based interests. See, e.g., PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 6–7 (1984); RICHARD WRIGHT, NATIVE SON at xiii–xv (1940).

⁴⁰ As Will Kymlicka explains, “[w]ithout [cultural structures], children and adolescents lack adequate role-models, which leads to despondency and escapism . . .” WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 165–66 (1989).

⁴¹ See *id.* at 166.

⁴² See Isaacs, *supra* note 20, at 138–39.

⁴³ Cf. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 66 (1995) (touting the virtues of communal activity).

⁴⁴ See NCOA Interview, *supra* note 6 (arguing that self-selection and existing non-race-based screening criteria ensure that parents are sensitive to the needs of any adopted child).

⁴⁵ See BARTHOLET, *supra* note 18, at 70–72 (describing agencies' evaluation processes).

⁴⁶ See, e.g., Howe, *supra* note 5, at 164; Isaacs, *supra* note 20, at 155–56.

⁴⁷ Howe, *supra* note 5, at 164 n.169 (quoting PATRICIA I. JOHNSTON, ADOPTING AFTER INFERTILITY 130 (1992)) (internal quotation marks omitted). Howe adds that transracial adoptees should “have opportunities for institutional affiliations within the Black community.” *Id.* at 164.

⁴⁸ A key obstacle to screening is that abstract formulations fail, perhaps by definition, to grapple with what constitutes a positive racial identity. Neither Isaacs' formulation nor Howe's “opportunities for institutional affiliations” adequately define this concept.

culturally biased social workers⁴⁹ prevent many blacks from adopting through agencies, adding cultural screening to the current system would empower these same "white" institutions to judge whether whites evince the appropriate amount of racial sensitivity. Screening would thus give more authority to the institutions many hold responsible for underestimating the importance of black identity.

Second, using a formulaic set of criteria to establish the existence of racial sensitivity risks perpetuating the "pop" concept of black culture that screening advocates reject. Cultural screening embraces the fiction that there exists an appropriate set of cultural indicia that reflect an appropriately "black" upbringing. But developing a unitary definition of black culture in the United States seems an impossible, and unfortunate, task.⁵⁰

Third, that cultural screening is considered only in the transracial context assumes that blackness itself reveals one's cultural preparedness to raise a black child. Just as parents' whiteness is no guarantee that a white child will embrace or understand the multifaceted meanings of "white culture," black parents' blackness alone is no sure indicator of their children's cultural trajectory. To make such assumptions the basis of public policy is theoretically to delimit the life options of individual blacks and the cultural development of a dynamic black community. Cultural screening is a search by the ill-prepared using tools that are untested for a virtue that is ill-defined.

The SBJPA should not be construed to authorize cultural sensitivity screening because such screening undermines the goal to which those who chafe at transracial adoption most aspire — the maintenance of a distinct and vibrant black cultural community. If adoption agencies are true to the spirit of the new law — and honest with themselves about the possibility of measuring "cultural sensitivity" — their policies will reject racial sensitivity screening while Congress's goal of promoting adoption is still fresh in institutional memory.

⁴⁹ Isaacs, *supra* note 21, at 147, 148; see also Fenton, *supra* note 14, at 46 ("There is a systematic, institutional bias against transracial adoption."); Jacinda T. Townsend, *Reclaiming Self-Determination: A Call for Intra-racial Adoption*, 2 DUKE J. GENDER L. & POL'Y 173, 185-86 (1995) (describing the biases of social workers and agency procedures that inhibit black families from adopting through agencies).

⁵⁰ Kennedy, *supra* note 1. As Martha Minow writes in a different context: "preserving distinctive cultures does not mean preserving them in amber, but instead allowing them to grow and change in light of the struggles of their members and the pressures from outside challenges." Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, 28 OSGOOD HALL L.J. 409, 435 (1990).