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Race as a Factor in Custody and Adoption Disputes: Palmore v. Sidoti

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RACE AS A FACTOR IN CUSTODY AND ADOPTION DISPUTES: *PALMORE v. SIDOTI*

INTRODUCTION

Most courts and state agencies resolve child custody or adoption disputes by selecting the situation which will serve the best interests of the child.[1] Many states have adopted this best interests doctrine by statute.[2] A statute typically lists factors that the judge may consider but usually also allows significant judicial discretion to examine any other relevant factors.[3] The best interests doctrine requires the court to exercise wide discretion because of the doctrine's emphasis on the individual child's interests. Public opinion has accepted the risk of judicial bias in return for the flexibility and child-centered nature of the approach.[4]

In April 1984 the United States Supreme Court decided *Palmore v. Sidoti*,[5] reversing a Florida court's custody decision involving the best interests test. The Florida court had transferred custody of a young child from her mother to her father, ruling that the mother's interracial remarriage violated the child's best interests.[6] The Supreme Court held that the equal protection clause of the fourteenth amendment prohibits the Florida court's consideration of the possible future effects of societal racial bias in modifying a custody determination.[7] The Court's unusual interference with a state custody decision and its application of a constitutional requirement to a custody proceeding demonstrate *Palmore*'s importance and its prob-

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1 Note, *Child Custody: Determining the Best Interests of the Child,* 7 J. JUV. L. 135 (1983) (citing state court cases basing custody decisions on child's best interests); Comment, *Race as a Consideration in Adoption and Custody Proceedings,* 1969 U. ILL. L.F. 256, 256 (1969) ("The states are in unanimous agreement that in adoption and custory [sic] proceedings, the welfare and best interests of the child are paramount." (footnote omitted)). For an argument that the best interests test needs revision, see Howard, *Transracial Adoption: Analysis of the Best Interests Standard,* 59 NOTRE DAME L. REV. 503 (1984).

2 *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-332 (Supp. 1984); COLO. REV. STAT. § 14-10-124 (Supp. 1984); FLA. STAT. ANN. § 61.13(3) (West Supp. 1985); KY. REV. STAT. ANN. § 403.270 (Baldwin 1983); MONT. CODE ANN. § 40-4-212 (1983).

3 *See, e.g., infra* note 32.

4 *See* Howard, *supra* note 1, at 545.

5 104 S. Ct. 1879 (1984).

6 "This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains [sic] school age and thus more vulnerable to peer pressures, suffer, from the social stigmatization that is sure to come."

Id. at 1881 (emphasis and citation omitted).

7 *Id.* at 1882.

able impact on custody and adoption placements.[8]

I
BACKGROUND

A. The Equal Protection Clause as Applied to Race

The equal protection clause of the fourteenth amendment prohibits a state from discriminating among its citizens because of their race.[9] To trigger the constitutional protection, state action must occur; because the actions of state courts are state action,[10] child custody proceedings must obey the fourteenth amendment. States activate the equal protection clause when they classify groups of people according to some characteristic. Although a state may classify individuals as members of a group for the purpose of legislative or judicial action, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[11] In most cases this classification must have some rational relationship to a legitimate state purpose.[12]

When a state classifies people by their race, however, the Constitution requires that the state act pursuant to a *compelling* state interest and that the classification used be *necessary* to accomplish the government's purpose.[13] In *Korematsu v. United States*[14] Justice Black,

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8 Although the *Palmore* opinion addresses only child custody decisions, the Court's reasoning may also apply to adoption proceedings because of the similar analysis used in both proceedings. *See infra* notes 30, 50-53 and accompanying text.

9 The equal protection clause holds that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § I. Adopted in the wake of the Civil War, the fourteenth amendment was designed to eliminate governmentally-imposed racial discrimination. Loving v. Virginia, 388 U.S. I, 10 (1967); Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

10 *See* Shelley v. Kraemer, 334 U.S. 1, 14 (1948) ("That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment . . . has long been established by decisions of this Court.").

11 Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (striking down state tax law for arbitrarily discriminating between domestic and foreign corporations).

12 J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 591 (2d ed. 1983) [hereinafter cited as NOWAK]. In Railway Express Agency v. New York, 336 U.S. 106 (1949), for example, the Court found that an ordinance prohibiting general advertising on vehicles, but allowing advertising relating to the vehicle owner's business did not violate the equal protection clause. The Court found a rational relationship between the city's concern for traffic safety and the classification used because the city authorities could have concluded that advertising one's own business creates a lesser traffic hazard than advertising another's; therefore, no equal protection violation existed. *Id.* at 109-10.

13 NOWAK, *supra* note 12, at 524; *see also* McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (law must be necessary to accomplishing state goal).

14 323 U.S. 214 (1944) (upholding Korematsu's conviction for unlawfully remain-

writing for the majority, described race as a "suspect" classification and stated that a reviewing court "must subject [the legislature's purpose] to the most rigid scrutiny."[15] The Court expanded the strict scrutiny test in 1964 in *McLaughlin v. Florida*.[16] The *McLaughlin* Court overturned a Florida statute punishing cohabitation between whites and blacks, holding that "[s]uch a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[17] The statute appeared as part of a chapter forbidding "Adultery and Fornication," and the Court found that the other racially neutral statutes in the chapter adequately served the state's valid interest in preventing promiscuity.[18] The Court thus invalidated the statute because the racial classification was not necessary to accomplish the state's purpose.

The Supreme Court cemented the strict scrutiny test in *Loving v. Virginia*.[19] An interracial couple who moved to Virginia after marrying in Washington, D. C., were convicted of violating Virginia's ban on interracial marriage.[20] Because the statute involved a racial classification, the Supreme Court applied strict scrutiny. Finding no legitimate state purpose for the law,[21] the Court declared it unconstitutional and reversed the Lovings' convictions without investigating the relationship between the racial classification and the state's goal.[22]

The number of statutory classifications expressly discriminating against specific racial groups has dwindled in the aftermath of *Loving*

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ing in restricted area from which Americans of Japanese descent had been forcibly evacuated during World War II).

15 *Id.* at 216. The *Korematsu* decision remains the only case in which the Supreme Court has upheld a racial classification after applying strict scrutiny. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000 (1978). In Lee v. Washington, 390 U.S. 333 (1968) (per curiam), the Supreme Court affirmed a federal district court decree invalidating Alabama statutes that required racial segregation in prisons. In a separate concurrence, however, three justices emphasized that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Id.* at 334. These cases seem to imply that racial classifications are only constitutional in situations involving danger and immediate necessity.

16 379 U.S. 184 (1964).

17 *Id.* at 185, 194.

18 *Id.* The Court indicated in dicta that a racially discriminatory statute might be constitutional if the state could demonstrate that racial factors created the necessity for disparate treatment. *Id.* at 193.

19 388 U.S. 1 (1967).

20 *Id.* at 2-3.

21 *Id.* at 11. "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."

22 *Id.* at 11-12.

and *McLaughlin*.[23] Current equal protection cases often involve state actions aimed at correcting past discrimination or balancing the effects of remaining societal prejudice.[24] In *Palmore v. Sidoti* the Florida court attempted to use just such a balance.[25]

B. The "Best Interests of the Child" Test in Child Placement Proceedings

Society has often claimed a special interest in the welfare of children based on the rationale that children cannot always effectively represent their own interests.[26] In custody and adoption disputes in particular, courts have adopted the role of guardian of the child's welfare.[27] Custody disputes usually arise when a child's parents divorce and both parents, or occasionally a third party, seek legal custody of the child. The child becomes caught in the middle of this adversarial dispute, and the law therefore charges the court with protecting the child's interests.[28]

Adoption decisions are usually routine, uncontested proceedings.[29] Agencies, rather than courts, administer adoption placements by screening applicants and choosing custodians for the

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23 For example, Nowak, Rotunda, and Young state that "[t]he Court did not consider any race classification cases in the 1978-79 Term . . . ." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 109 n.16 (Supp. 1982).

24 *See* NOWAK, *supra* note 12, at 661-82 (discussing affirmative action programs). In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), a white student successfully challenged a medical school admissions policy that reserved a certain number of spaces in the entering class for minority applicants. Justice Powell, writing for two justices, reiterated that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291. Scholars have also discussed the constitutionality of benign racial classifications in other areas, such as disease testing, *see, e.g.*, Note, *Constitutional and Practical Considerations in Mandatory Sickle Cell Anemia Testing*, 7 U.C.D. L. REV. 509 (1974) (arguing that mandatory testing of blacks for sickle cell anemia is constitutional), employment, education, and housing, *see, e.g.*, Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966) (examining special treatment in these areas); Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 RUTGERS L. REV. 531 (1963) (asserting that quotas aimed at integrating neighborhoods would not violate Constitution).

25 *See infra* notes 74-86 and accompanying text.

26 J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 3-4 (1973) [hereinafter cited as GOLDSTEIN]. *See, e.g.*, Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925) (court's jurisdiction over custody "has its origin in the protection that is due to the incompetent or helpless").

27 For an argument that the child should always be represented by legal counsel, see GOLDSTEIN, *supra* note 26, at 66-67.

28 For an extensive discussion of custody proceedings, see GOLDSTEIN, *supra* note 26; Foster & Freed, *Child Custody (Part 1)*, 39 N.Y.U. L. REV. 423 (1964); Note, *supra* note 1.

29 *See* L. & E. BROOKS, ADVENTURING IN ADOPTION 45 (1939) (describing filing procedure and later short hearing).

children.[30] Disputes arise when an applicant contests an agency's denial of his petition for custodianship. Although the agency may be less self-interested than a divorced parent seeking custody, the court remains the only objective guardian of the child's interests. In both custody disputes and adoption proceedings the court weighs all relevant factors to determine which home environment will most benefit the child. This process is called the "best interests" test.[31]

1. *Application of the Best Interests Test*

Many states identify several factors a judge may consider in determining a child's best interests in a custody proceeding, although the judge does have broad discretion in choosing which factors to evaluate.[32] Several of these basic factors have been endorsed by almost every state. Courts always consider the relationship of the parties to the child.[33] Most courts prefer the natural parents over other individuals,[34] but if the child has established a strong relationship with another party, that relationship weighs heavily in the party's favor.[35] Courts also try to place children in the environment that will give them the most stability and continuity of care;[36] in fact,

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30 For an extensive discussion of adoption proceedings, see I. GOODACRE, ADOPTION POLICY & PRACTICE (1966) (discussing British adoption practices); A. SOROSKY, A. BARAN & R. PANNOR, THE ADOPTION TRIANGLE (1978) [hereinafter cited as SOROSKY]; Note, *Matching for Adoption: A Study of Current Trends,* 22 CATH. LAW. 70 (1976) (examining trends in state laws regarding factors adoption agencies should consider when placing child).

31 *See* Note, *supra* note 1, at 135 (many factors together form best interests test).

32 The Uniform Marriage and Divorce Act, adopted in eight states, allows the court to consider "all relevant factors" in "determin[ing] custody in accordance with the best interest of the child." The Act lists five specific factors. UNIF. MARRIAGE & DIVORCE ACT § 402 (1978).

The Florida statute involved in *Palmore* allows the court to consider "all factors affecting the best welfare and interests of the child." FLA. STAT. ANN. § 61.13(3) (West Supp. 1985). The statute lists nine specific factors the court may consider along with "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." *Id.* § 61.13(3)(j).

33 Foster & Freed, *supra* note 28, at 425-27. For a recitation of the parties sometimes involved in custody battles, see Note, *supra* note 1, at 135.

34 Foster & Freed, *supra* note 28, at 426 (most states assume "that a parent has a natural right to his child"); Behn v. Timmons, 345 So. 2d 388, 389 (Fla. Dist. Ct. App. 1977) ("[A] parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring . . . [, and] a child's welfare is presumed to be best served by care and custody by the natural parent.").

35 *See* Chapsky v. Wood, 26 Kan. 650 (1881) (court continued custody in child's aunt rather than father because she and child had developed strong relationship over more than five years child had lived with her); Dickson v. Lascaris, 97 Misc. 2d 610, 411 N.Y.S.2d 995 (1978) (court continued custody in unrelated party rather than grant custody to father because she had cared for three children and developed strong psychological bond with them).

36 Goldstein, Freud, and Solnit have developed the concept of the psychological parent, arguing that a child develops an emotional attachment to the adult who acts as a parent to him and that bond should not be disturbed. GOLDSTEIN, *supra* note 26, at 17-

some experts value these as the most important factors in a child's healthy development.[37] The judge also examines the conduct of all the parties involved. Destructive behaviors such as excessive drinking or physical abuse weigh heavily against a prospective custodian.[38] Because divorce is already a difficult ordeal for a child, the judge usually chooses the custody situation that will allow the child to maintain interaction with siblings, relatives, and the noncustodial parent.[39] Courts also consider the physical and mental health of the adult parties and the child.[40] Finally, courts examine each party's financial status and lifestyle.[41]

Courts tend to agree on the importance of most of the factors discussed above, but judicial attitudes towards other factors vary. Some states utilize a "tender years" presumption, a preference for the mother as custodian of a child under a certain age,[42] while other states have discarded this doctrine.[43] Many courts value the preference of the child but vary its weight depending on the child's age

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20. *See also* White v. White, 215 Va. 765, 768, 213 S.E.2d 766, 768 (1975) (child's current home of three years with father provided more "warmth and stability of the home environment" than mother's apartment which was her tenth residence in three years); FLA. STAT. ANN. § 61.13(3)(d) (West Supp. 1985) (court should consider stability and continuity of child's environment when awarding custody).

37 Howard, *supra* note 1, at 508 & n.21.

38 *See, e.g.*, Dubicki v. Dubicki, 186 Conn. 709, 717, 443 A.2d 1268, 1272 (1982) (father's "irresponsibility, drinking, and the physical abuse" of his former wife were sufficient reasons to deny custody); FLA. STAT. ANN. § 61.13(3)(f) (West Supp. 1985) (moral fitness of parent is one factor in custody decision).

39 *See, e.g.*, Glasgow v. Glasgow, 426 P.2d 617, 620 (Alaska 1967) (keeping children of one family together is desirable); Tschappat v. Kluver, 193 N.W.2d 79, 82 (Iowa 1971) (children should not be separated unless circumstances require); FLA. STAT. ANN. § 61.13(3)(a) (West Supp. 1985) (court should choose custodial parent who will allow child more contact with noncustodial parent).

40 *See, e.g.*, Andreesen v. Andreesen, 252 Iowa 1152, 1157, 110 N.W.2d 275, 278 (1961) (mother suffering from paranoia denied custody because of concern for child's mental health); FLA. STAT. ANN. § 61.13(g) (West Supp. 1985) (physical and mental health of parents relevant to custody decision). *But cf.* Leisge v. Leisge, 223 Va. 688, 693-94, 292 S.E.2d 352, 355 (1982) (mother's hospitalization for emotional problems resulting from divorce insufficient to deny her custody).

41 *See, e.g.*, Painter *ex rel.* Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966) (court refused custody to father who led unconventional and bohemian lifestyle); Lembach v. Cox, 639 P.2d 197 (Utah 1981) (change in father's financial status, although relevant, not sufficient to modify custody award).

42 *See, e.g.*, Brown v. Brown, 409 So. 2d 1133 (Fla. Dist. Ct. App. 1982) (mother awarded custody of three-year old because of tender years doctrine despite residence of two older children with father); Grubbs v. Grubbs, 5 Kan. App. 2d 694, 696, 623 P.2d 546, 549 (1981) (age of two-year old child and need for maternal care tip balance for mother).

43 *See, e.g.*, Devine v. Devine, 398 So. 2d 686 (Ala. 1981) (rejecting tender years presumption as unconstitutional gender-based discrimination); Lane v. Lane, 446 A.2d 418, 419 (Me. 1982) (noting Maine court has never sanctioned use of rebuttable presumption in favor of mother).

and maturity.[44] Other courts refuse to force a child to choose between her parents.[45] In the past, courts often removed children from the custody of a parent who committed adultery or cohabitated after divorce.[46] Today most courts require proof that the child has suffered some adverse effect before ordering such a change.[47]

Courts also disagree on the treatment of race and religion in custody and adoption proceedings. Both factors have raised constitutional issues in other areas of the law, and some courts have concluded that constitutional principles preclude consideration of race and religion in custody and adoption proceedings.[48] Other jurisdictions, however, have used racial and religious factors to determine child placement.[49]

The best interests test applies to adoption placements as well as custody decisions.[50] The application of the test in adoption placements differs from its application in custody decisions, however, because the decisionmaker chooses parents, rather than choosing between two biological parents. The adoption placement is accomplished by "matching" the child with suitable custodians. "Matching" requires placing a child with parents who are similar to the child in certain basic characteristics.[51] Although many of the factors

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44 *See, e.g.,* Goldstein v. Goldstein, 115 R.I. 152, 341 A.2d 51 (1975) (judge considered 9 1/2 year old child's preference); FLA. STAT. ANN. § 61.13(3)(i) (West Supp. 1985) (court should consider child's preference if child is of "sufficient intelligence, understanding, and experience to express a preference").

45 For a discussion of the prohlems involved in asking a child's preference, see J. AREEN, CASES AND MATERIALS ON FAMILY LAW 555 n.2 (1978); Schowalter, *Views on the Role of the Child's Preference in Custody Litigation,* 53 CONN. B.J. 298 (1979).

46 *See, e.g.,* Spaulding v. Spaulding, 278 N.W.2d 639 (S.D. 1979) (mother's marital misconduct committed in children's presence sufficient to deny her custody).

47 *See, e.g., In re* Marriage of Moore, 35 Colo. App. 280, 282, 531 P.2d 995, 997 (1975) (mother's cohabitation caused no detrimental effect to child and therefore was not grounds to deny her custody); Dinkel v. Dinkel, 322 So. 2d 22 (Fla. 1975) (adultery insufficient cause to deny custody unless directly bearing on child's welfare).

48 *See, e.g.,* Beazley v. Davis, 92 Nev. 81, 545 P.2d 206 (1976) (equal protection forbids consideration of race); Munoz v. Munoz, 79 Wash. 2d 810, 489 P.2d 1133 (1971) (court could not deprive father of his first amendment right to supervise his children's religious upbringing absent showing of harm to children). A more complete discussion of religion as a factor in custody cases is beyond the scope of this Note. For a discussion of the issue, however, see Mangrum, *Exclusive Reliance on Best Interests May Be Unconstitutional: Religion as a Factor in Child Custody Cases,* 15 CREIGHTON L. REV. 25 (1981). The constitutional ramifications of race as a factor in custody decisions are discussed *infra* text accompanying notes 93-105.

49 *See, e.g.,* Ward v. Ward, 36 Wash. 2d 143, 216 P.2d 755 (1950) (black father retained custody of biracial children because they appeared black); Burnham v. Burnham, 208 Neb. 498, 304 N.W.2d 58 (1981) (father awarded custody because of mother's religious beliefs).

50 Note, *supra* note 30, at 70 n.2. The Florida adoption statute requires the court to determine "that the best interests of the child will be promoted by the adoption" before entering a final decree. FLA. STAT. ANN. § 63.131 (West 1969).

51 Note, *supra* note 30, at 70.

considered in custody proceedings are also applied to the matching process, race, religion, and age are usually the three primary criteria.[52] Because of the emphasis on matching, decisionmakers rarely consider race irrelevant.[53] The use of race in adoption decisions, however, raises many of the same constitutional issues as its use in custody decisions.

2. *Race and the Determination of the Best Interests of the Child*

Racial factors can become important considerations in custody determinations when a uniracial[54] couple divorces and one parent remarries someone of another race[55] or when an interracial couple divorces and the placement of their biracial child is at issue.[56] In the case of a uniracial couple, the racial issue usually surfaces when one parent seeks a modification of the custody decree because the custodial parent has remarried an individual of a different race.[57] In seeking modification of the custody decree the complaining parent must demonstrate that a substantial change in circumstances has altered the best interests of the child.[58] The noncustodial parent may argue that the remarriage has created a substantial change in the child's circumstances because membership in an interracial family will subject the child to societal prejudice. Although other factors may contribute to the alleged changed circumstances, the racial issue usually

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52 *Id.* at 71. In the past, matching also considered hair and eye color, I.Q., and temperament. *Id.* at 70 n.6.

53 *See id.* at 72 ("It is uniformly agreed that it is in the best interests of a black child to be placed in a black home if one is available.").

54 The terms "uniracial," "interracial," and "biracial" are used throughout this Note. "Uniracial" refers to a person of one race or a couple, both of whom are of the same race. "Interracial" indicates a couple consisting of persons of different races. "Biracial" refers to the mixed race offspring of an interracial marriage.

Most of the cases discussed in this Note involve black/white racial conflicts. Some of the articles discussed, however, address the plight of other minority groups; for example, Howard, *supra* note 1, discusses adoption of Native American children.

55 *E.g.*, Palmore v. Sidoti, 104 S. Ct. 1875 (1984) (*see infra* notes 74-92 and accompanying text); Commonwealth *ex rel.* Lucas v. Kreischer, 450 Pa. 352, 299 A.2d 243 (1973) (*see infra* note 66 and accompanying text).

56 *E.g.*, Fountaine v. Fountaine, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956) (involving placement of two children of black father and white mother); Brokenleg v. Butts, 559 S.W.2d 853 (Tex. Civ. App. 1977) (involving placement of child of white father and Native American mother).

57 The issue of race can also arise in the initial determination of custody if one of the parents has already formed a relationship with a member of a different race.

58 *Palmore*, 104 S. Ct. at 1880. The change in circumstances can occur in either the petitioner's or the child's situation, Fungaroli v. Giles, 414 So. 2d 1176, 1178 (Fla. Dist. Ct. App. 1982), but it must be material or substantial. *E.g.*, Adams v. Adams, 385 So. 2d 688, 689 (Fla. Dist. Ct. App. 1980) (petitioner's remarriage and increased wealth insufficient to satisfy requirement); Berlin v. Berlin, 369 So. 2d 434, 435 (Fla. Dist. Ct. App. 1979) (stability of father's home compared with mother's planned move satisfied requirement). The petitioner carries the burden of proving the substantial change. Walfish v. Walfish, 383 So. 2d 274, 275 (Fla. Dist. Ct. App. 1980).

predominates.[59]

The cases involving biracial children focus on slightly different issues. The problem of social prejudice is not material in a biracial child custody case because the child, born into an interracial family, would have encountered racial prejudice even if his parents had never divorced. The controversy with biracial children, therefore, usually revolves around the child's sense of identity. The minority parent often fears the child will lose identification with the minority culture, resulting in a loss of self-esteem, if the other parent gains custody.[60] Although the uniracial and biracial cases raise different issues, courts tend to treat race in both situations in one of three ways: as the determinative factor, as one factor among many, or as totally irrelevant to the custody decision.[61]

Although many trial courts continue to base custody decisions solely on racial factors,[62] most appellate courts only allow consideration of race as one factor in the decision.[63] Some appellate courts, however, have approved the use of race as the dispositive factor in child placement,[64] usually in placing biracial children, because of the special problems these children encounter as a result of their

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59 *See, e.g., Palmore* (discussed *infra* text accompanying notes 74-86) (petitioner claimed his ex-wife's interracial remarriage and other factors altered their child's best interests; court focused on interracial marriage).

60 The court in Raysor v. Gabbey, 57 A.D.2d 437, 395 N.Y.S.2d 290 (1977), recognized these concerns, although the factual situation differed from the one discussed here. *Id.* at 441-42, 395 N.Y.S.2d at 294-95. See also the discussion of identity in Farmer v. Farmer, 109 Misc. 2d 137, 439 N.Y.S.2d 584, 586 (1981).

61 The court in Farmer v. Farmer, 109 Misc. 2d at 143-44, 439 N.Y.S.2d at 588, described these three categories.

62 Because many appellate courts mention the use of race as a determinative factor in reversing trial opinions, apparently trial courts still treat race as the deciding factor. *See, e.g.,* Boone v. Boone, 90 N.M. 466, 468, 565 P.2d 337, 339 (1977) (mother's relationship with black man cannot be determinative of best interests of children); Langin v. Langin, 2 Ill. App. 3d 544, 276 N.E.2d 822 (1971) (race cannot be determinative).

63 *See, e.g., Farmer,* 109 Misc. 2d at 146, 439 N.Y.S.2d at 589. In White v. Appleton, 53 Ala. App. 702, 304 So. 2d 206 (1974), a mother had left her child with the child's grandmother for two years and then moved out of the state, where she married interracially. The appellate court refused the mother's request to move the child to this new home because it feared that the lack of mother-child contact, the new location, and the stepfather of a different race could make the relocation "prove to be a traumatic experience" for the child. *Id.* at 705, 304 So. 2d at 209. Thus, combined with other factors, the mother's interracial marriage was properly considered in determining the child's best interests. *See also* Dickson v. Lascaris, 97 Misc. 2d 610, 411 N.Y.S.2d 995 (Fam. Ct. 1978). In *Dickson,* a New York trial court continued the custody of three black children in a third party rather than their black father because one of the children had special needs resulting from neurosurgery, the third party had cared for the children for many years while their father had abandoned them, and the father had remarried a white woman. *Id.* at 613-15, 411 N.Y.S.2d at 997-99. The court did not find the racial issue particularly significant, but it "note[d] the social implications of such a family situation and its potential impact on the children." *Id.* at 616, 411 N.Y.S.2d at 1000.

64 *Farmer,* 109 Misc. 2d at 143-44, 439 N.Y.S.2d at 588.

mixed racial heritage.[65] Other courts have eliminated the consideration of race as a factor in custody decisions. The Pennsylvania Supreme Court, for example, has argued that if the children are "raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such."[66] In spite of isolated appellate decisions that eliminate race from consideration or allow its use as the determinative factor for a biracial child, a majority of appellate courts view race as one factor among many in a custody decision.[67]

Race has long been a consideration in adoption cases as well,[68] and scholars have debated its proper role in adoption proceedings as hotly as in custody cases.[69] Generally, the same divisions in thought exist in adoption cases as in custody proceedings, although many child placement specialists argue that race is somewhat more relevant to adoption placements because of matching concerns.[70]

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65 *Id.* In Raysor v. Gabbey, 57 A.D.2d 437, 395 N.Y.S.2d 290 (1977), a New York appellate court decided that the controversy between the black father and white maternal grandparents of a biracial child turned on "the ability of the custodian to recognize the stresses arising through racial differences and deal with them intelligently." *Id.* at 442, 395 N.Y.S.2d at 294-95. The father had argued that his daughter would be better off with him because she appeared black and her grandparents had placed her in an all-white school, while he lived in a racially integrated neighborhood. The appellate court agreed that the racial issue could be determinative but remanded the case to the family court for further findings, including investigations by social workers into the suitability of each party's environment. *Id.* at 442-44, 395 N.Y.S.2d at 294-96.

Another example of determinative treatment of race occurred in Ward v. Ward, 36 Wash. 2d 143, 216 P.2d 755 (1950). The Supreme Court of Washington upheld the trial judge's determination that a black father should retain custody of the two daughters of his interracial marriage because the children physically appeared black. The judge stated that the children would "have a much better opportunity to take their rightful place in society if they [were] brought up among their own people," and, therefore, placement with their father was in the children's best interests. *Id.* at 145, 216 P.2d at 756. *Palmore,* discussed *infra* text accompanying notes 74-86, is one of the few cases involving a uniracial child.

66 Commonwealth *ex rel.* Lucas v. Kreischer, 450 Pa. 352, 355-56, 299 A.2d 243, 246 (1973) (quoting Commonwealth *ex rel.* Lucas v. Kreischer, 221 Pa. Super. 196, 207, 289 A.2d 202, 207 (1972) (Hoffman, J., dissenting)).

67 *See Farmer,* 109 Misc. 2d at 156, 439 N.Y.S.2d at 589 (summarizing different court rules).

68 Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings,* 17 BUFFALO L. REV. 303, 304 (1967).

69 *See, e.g., id.* (ideally race should not influence adoption decision, but some situations require consideration of race in order to serve child's best interests); Comment, *supra* note 1 (interracial adoption should be encouraged); Comment, *The Interracial Adoption Implications of* Drummond v. Fulton County Department of Family and Children Services, 17 J. FAM. L. 117 (1978) [hereinafter cited as Comment, *Interracial Adoption*] (adoption agencies and courts should not base adoption decisions entirely on racial considerations); Comment, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place,* 17 J. FAM. L. 333 (1979) [hereinafter cited as Comment, *Racial Matching*] (race should play some role in adoption decisions, but child's best interests must be decisive factor).

70 *See* Comment, *Interracial Adoption, supra* note 69, at 151; Comment, *Racial Match-*

Studies reveal that adopted children struggle with their sense of identity and self-worth,[71] and the imposition of racial differences may only traumatize the child further. Thus, many specialists believe that the race and racial attitudes of potential adoptive parents are crucial to a placement decision.[72] As in custody cases, most appellate courts have held that racial matching and parental attitudes towards race are not determinative factors but are only two factors among many to consider in selecting an adopting family.[73]

II

PALMORE V. SIDOTI: THE PROCEEDINGS

Linda and Anthony Sidoti were divorced in Florida in May 1980 with Linda receiving custody of their three year old daughter.[74] In September 1981 Anthony filed to modify the custody order, alleging a change in the child's living conditions.[75] Under Florida law, the party seeking to modify an existing custody order must prove that some condition affecting the child's life has "substantial[ly] change[d]."[76] In this case the conditions cited included the mother's cohabitation with, and subsequent marriage to, a black man, Clarence Palmore, Jr. The father also alleged that the mother had failed to provide proper care for the child.[77]

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ing, supra note 69, at 333. For a discussion of the special concerns in adoption cases see *supra* notes 50-53 and accompanying text.

71 For a more complete discussion of the unique problems of interracial adoptees, see SOROSKY, *supra* note 30, at 33-45, 202-04; Grossman, *supra* note 68, at 327-35; Comment, *Racial Matching, supra* note 69, at 355-63; Note, *supra* note 30.

72 *See* Raysor v. Gabbey, 57 A.D.2d 437, 442, 395 N.Y.S.2d 290, 294-95 (1977); Commonwealth *ex rel.* Lucas v. Kreischer, 450 Pa. 352, 356, 299 A.2d 243, 245 (1973).

73 *See, e.g., In re* RMG & EMG, 454 A.2d 776 (D.C. 1982) (although race is significant factor in adoption, it is not determinative); *In re* Adoption of a Minor, 228 F.2d 446, 448 (D.C. Cir. 1955) (race alone "cannot be decisive in determining the child's welfare"); Compos v. McKeithen, 341 F. Supp. 264, 266 (E.D. La. 1972) ("we regard the difficulties inherent in interracial adoption as justifying consideration of race as a relevant factor in adoption, and not as justifying race as the determinative factor"). *But cf.* Drnmmond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977) (race can "be taken into account, perhaps decisively if it is the factor which tips the balance between two potential families"), *cert. denied,* 437 U.S. 910 (1978). For a good discussion of these cases, see Comment, *Racial Matching, supra* note 69, at 343-52; Grossman, *supra* note 68.

74 Palmore v. Sidoti, 104 S. Ct. 1879, 1880 (1984).

75 *Id.*

76 "The court . . . shall have continuing jurisdiction . . . to modify . . . when such is found to be necessary by the court because there has been a substantial change in the circumstances of the parties." FLA. STAT. ANN. § 61.13(1)(a) (West Supp. 1985). As written, this provision only applies to judicial modification of child support obligations. Florida courts, however, routinely apply this analysis when considering a modification of child custody. *See, e.g.,* Stearns v. Szikney, 386 So. 2d 592 (Fla. Dist. Ct. App. 1980); Adams v. Adams, 385 So. 2d 688 (Fla. Dist. Ct. App. 1980). See also *supra* note 58 for an explanation of the phrase "substantial change in circumstances."

77 104 S. Ct. at 1880.

The trial court found that the quality of child care provided by the two households would be similar and concluded that the important difference between the two homes arose from the mother's interracial marriage.[78] The judge believed the child would inevitably suffer social stigmatization as a member of an interracial family and, therefore, found that the child's best interests dictated awarding custody to the father.[79]

The trial court's ruling followed a long-standing Florida precedent most recently applied in the 1974 case of *Niles v. Niles*.[80] The *Niles* trial court had changed custody of two children from their mother to their father. In addition to the mother's emotional instability and the children's worsening conduct, the trial court focused on the mother's pending interracial marriage, describing the mother's choice of an interracial lifestyle as "unacceptable to the father of the children and to the society in which we live."[81] The appellate court affirmed this decision because the possible effects of the interracial marriage were not the sole basis for the trial court's opinion.[82] In *Palmore* the trial court applied the reasoning of *Niles* and awarded custody to the father.[83] The Florida Second District Court of Appeals affirmed without opinion.[84]

The United States Supreme Court granted certiorari because of "important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race."[85] Although recognizing that state custody determinations are not ordinarily within its purview, the Court found that the state court's racially based decision violated the equal protection clause. The Supreme Court reversed the Florida order and returned custody to the mother.[86]

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78 *Id.* at 1880-81. The trial court identified two other factors used in its analysis: (1) the father's resentment of the mother's selection of a black partner, which the court described as "not sufficient" to remove custody from the mother and (2) the mother's cohabitation with her partner. The trial court reasoned that the second factor was "of some significance" because it demonstrated the mother's tendency "to place gratification of her own desires ahead of her concern for the child's future welfare." *Id.* at 1881.

79 *Id.*

80 299 So. 2d 162 (Fla. 1974).

81 *Id.* at 162.

82 *Id.* at 162-63.

83 104 S. Ct. at 1881.

84 426 So. 2d 34 (Fla. 1983). The Florida Supreme Court has no jurisdiction to review an appellate court decision that merely affirms a lower court holding. FLA. CONST. art. V, § 3(b)(3); Jenkins v. Florida, 385 So. 2d 1356, 1359 (Fla. 1980) ("This court may only review a decision of a district court of appeal that *expressly* and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law . . . . The single word 'affirmed' comports with none of these definitions.").

85 *Palmore,* 104 S. Ct. at 1881.

86 *Id.* at 1881-82.

III
ANALYSIS

A. The Supreme Court's Holding in *Palmore v. Sidoti*

The brevity[87] of the Court's unanimous opinion indicates that the Supreme Court found *Palmore v. Sidoti*[88] an easy application of equal protection principles. The Court rejected the Florida court's use of the possible effects of racial prejudice to remove an infant child from the custody of her natural mother.[89] Although it acknowledged that the state has a compelling interest in awarding custody based on the best interests of the child, and even that an interracial home may create additional pressures for a child,[90] the Court refused to sanction judicial consideration of societal prejudice in custody proceedings. Noting that the fourteenth amendment was designed to eliminate racial discrimination by state governments, the Court stated, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[91]

Unfortunately, the narrow language and brief analysis in the *Palmore* opinion do not reveal the extent of the Court's holding. The final sentence of the *Palmore* decision demonstrates the opinion's narrow application: "The effects of racial prejudice, however real, cannot justify a classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."[92] The *Palmore* holding addresses a custody battle in which the result turns solely on the possible effects of racial prejudice, but it apparently does not prohibit all consideration of race or racial issues in custody proceedings. The question whether courts can still consider racial issues other than the problems generated by social prejudice remains unanswered.

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87 The opinion occupies fewer than three pages in the Supreme Court Reporter.

88 104 S. Ct. 1879 (1984).

89 "Whatever problems racially-mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1971." *Id.* at 1882 (referring to Buchanan v. Warley, 245 U.S. 60 (1971), in which the Court invalidated a Kentucky statute which prohibited blacks from buying homes in white neigbborhoods). Although the trial court considered other factors in addition to the problems of societal prejudice the child might experience, the Supreme Court concluded that race was the dispositive factor, stating that "it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability." *Id.* at 1881.

90 104 S. Ct. at 1882.

91 *Id.* For a more complete discussion of equal protection principles, see *supra* notes 9-25 and accompanying text.

92 104 S. Ct. at 1882.

B. Other Possible Racial Considerations in Child Custody Cases

In some instances courts may need to examine racial issues to serve a child's best interests. The *Palmore* holding would not prohibit judicial consideration of racial factors in three commonly occurring situations. Each of these cases involves effects on a specific child in a particular environment and therefore avoids the broad classification prohibited by the equal protection clause.

First, the judiciary can properly consider racial prejudice in custody decisions when it causes actual harm to the child. In *Palmore* the father objected to the mother's custody because of the possible future effects of racial prejudice directed at the child because of the mother's interracial marriage.[93] The Supreme Court's rejection of this prospective argument of possible future harm should not preclude a judge from considering racial factors that have caused demonstrable harm to a child. If in the future the father were to present objective evidence that the child had suffered some detriment because of the interracial family situation, judicial reconsideration of the initial custody award would be required to protect the child's best interests.[94]

A second situation not addressed by the Court's holding in *Palmore* concerns actual parental prejudice. *Palmore* prohibits only the consideration of generalized societal prejudice when a court awards custody.[95] Prospective racial prejudice will arise most dramatically when a natural parent is prejudiced against the other parent's spouse, or vice versa.[96] In evaluating which natural parent should receive custody, the courts must consider the possibility that the prejudice of a spouse or natural parent might hinder the child's relationship with the other natural parent.[97]

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93 *Id.* at 1881.

94 *See supra* notes 58-59 and accompanying text. Courts properly consider such factors as the child's academic performance, psychological well-being, and behavior. *See, e.g.*, J. AREEN, *supra* note 45 at 102-05 (1983 Supp.) (discussing hypothetical case, *Rose v. Rose*, based on actual case in which court allowed reexamination because child was emotionally unstable and depressed); Note, *The Best Interests Doctrine: Its Application in Divorce, Modification & Non-Parental Custody Disputes*, 8 J. JUV. L. 184, 188 (1984) (court considers child's educational needs in modifying custody decree).

95 *See Palmore*, 104 S. Ct. at 1882 & n.3. The Court's language is somewhat ambiguous; however, the four cases cited by the Court involved racial classifications that were justified solely on the grounds of vague hypothetical dangers caused by widespread racial intolerance. It appears that this societal prejudice was the Court's greatest concern in *Palmore*.

96 In *Palmore*, for example, the white father was prejudiced against the black stepfather. Appellant's Petition for Certiorari, Appendix A at 25-27, Palmore v. Sidoti, 104 S. Ct. 1879 (1984).

97 *E.g.*, FLA. STAT. ANN. § 61.13(3)(a) (West Supp. 1985) lists "[t]he parent who is more likely to allow the child frequent and continuing contact with the nonresidential

The third example not prohibited by *Palmore* involves the special problems encountered by a mixed-race child of an interracial marriage. These biracial children encounter certain stresses because of their mixed racial heritage, ranging from confusion over self-identity to societal hostility toward their biracial ancestry.[98] Child specialists have developed substantial evidence indicating that the custodian's ability to cope with these specialized problems is crucial to serving a biracial child's best interests.[99] In making these custody decisions courts ignore the racial characteristics of the parties and only compare each parent's ability to care for the child's special psychological needs. The biracial situation differs from the two discussed above because the court's analysis does not deal directly with the harmful effects of racial discrimination in comparing the two alternative placements and thus clearly falls outside the *Palmore* holding.[100]

In addition to not violating the *Palmore* holding, judicial use of racial factors in each of the above discussed examples is constitutional under standard equal protection analysis.[101] In each case, the limited use of race should not trigger equal protection strict scrutiny because the court is not using broad classifications to favor one race over another.[102] Instead, it uses the specific racial issue as one factor in comparing the two potential households and their ability to care for the child's needs. Because no racial classification occurs, strict scrutiny does not apply.

Even if this use of racial factors does trigger strict scrutiny, the requirements of the equal protection clause are still satisfied. First, the Supreme Court in *Palmore* acknowledged that the state's interest in using the best interests test in child custody placements is a compelling one.[103] Second, the use of the racial factors enumerated above is necessary to accomplish the state's purpose, and the state

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parent" as one factor affecting the child's best interests. Grossman discusses this problem in the context of nonparents turning the child against parents. Grossman, *supra* note 68, at 326.

98 *See* Raysor v. Gabbey, 57 A.D.2d 437, 442, 395 N.Y.S.2d 290, 294-95 (1977); Farmer v. Farmer, 109 Misc. 2d 137, 141, 144-45, 439 N.Y.S.2d 584, 586, 588 (1981).

99 *Farmer*, 109 Misc. 2d at 140-43, 439 N.Y.S.2d at 586-87.

100 *See supra* notes 89-92 and accompanying text.

101 *See supra* notes 9-22 and accompanying text.

102 *See supra* notes 11, 15, 18 and accompanying text; *see also* Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 984 & n.278 (1984) (arguing that racial classification that does not disadvantage anyone does not violate equal protection).

103 *Palmore*, 104 S. Ct. at 1882. The Supreme Court described the state's goal as "indisputably a substantial governmental interest." Although this language is somewhat ambiguous, the remainder of the opinion demonstrates that the Court concluded that the first requirement of strict scrutiny was satisfied. *Id. See supra* notes 13,19-21 and accompanying text.

could not reasonably use any less intrusive means to accomplish the goal. Although the Court's discussion of the second requirement of strict scrutiny analysis in *Palmore* is rather limited,[104] nothing in the opinion suggests that the Court rejects the analysis that numerous child care experts, state legislatures, and courts have endorsed, that a child's special racial needs must be considered if a placement decision is truly to serve that child's best interests.[105]

C. The Application of *Palmore v. Sidoti* to Adoption Cases

The final concern left unanswered by the *Palmore* court is the decision's applicability to adoption. Adoption involves certain concerns that do not arise in custody determinations, which have led judges to treat the two proceedings differently.[106] The court assumes a more active role in adoption than in custody proceedings because the child has no available natural parents. The court attempts to place the child, who may have already developed her own beliefs and values, with a compatible family; this process is known as matching.[107] In interracial adoptions, many courts emphasize the child's need for racial identity.[108] The attitudes of adopting parents may especially influence the struggling child. To minimize the child's self-identity crisis, decisionmakers attempt to select families who will expose the child to culturally-diverse experiences.[109]

Although *Palmore* addresses only the child custody problem, nothing in the opinion suggests that a different analysis would apply to adoption proceedings. Therefore, the possible effects of societal racial prejudice should no longer be considered in adoption placement. Other racial issues affecting the best interests of the individual child, however, should remain valid under the rationale developed above.[110]

The brevity of the Court's opinion in *Palmore* provides little guidance for lower courts facing other equal protection questions concerning child placement. Each of the situations discussed above illustrates the variety of factual settings confronting courts in custody and adoption proceedings and demonstrates the crucial impor-

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104 The Court did not explicitly identify why the trial court's analysis failed the second part of the standard. *See supra* notes 13, 16-18 and accompanying text.

105 *See supra* notes 60, 98-99 and accompanying text.

106 *See supra* notes 51-53, 68-73 and accompanying text.

107 "Matching refers to the practice of placing a child with adoptive parents who, based upon a number of factors, are similar to the child's biological parents." Note, *supra* note 30, at 70 (footnotes omitted); *see also supra* notes 51-52 and accompanying text.

108 Studies show that adoptees already experience self-identity problems and that racial factors may complicate the situation even further. *See supra* note 71.

109 *See* SOROSKY, *supra* note 30, at 203-04.

110 *See supra* text accompanying notes 93-105.

tance of an individualized assessment of the factors pertinent to a child's best interests. Judges must therefore not be constrained by inflexible rules that prohibit the consideration of relevant racial issues. *Palmore* clearly prohibits the consideration of race in certain situations; however, the Court has not foreclosed the possibility that a specific racial consideration is constitutional and in the best interests of the child.

D. Potential Effects of *Palmore v. Sidoti* on the Best Interests Doctrine

Palmore v. Sidoti stands out as one of the few child custody cases decided by the Supreme Court.[111] It is especially significant because it applies a constitutional limitation to the best interests test. This application of equal protection principles indicates that the Court may similarly restrict the best interests analysis to protect other constitutional rights. For example, courts have long considered parental religious, associational, and political affiliations in making child placement decisions.[112] These considerations implicate the parents' exercise of their first amendment rights and therefore may warrant similar treatment to the issues involving fourteenth amendment rights.[113] Although a more thorough examination of first amendment rights exceeds the scope of this Note, *Palmore* may strengthen these rights.

Palmore may affect the best interests doctrine even more fundamentally than just by forbidding consideration of certain factors that abridge constitutionally protected rights. Supporters of the doctrine cite its grant of judicial discretion to focus solely on the child's interests as a major advantage.[114] After *Palmore,* if a judge considers even one factor affecting a constitutional right of a party, the losing party may have grounds for appeal. Thus, *Palmore* may cause an erosion of the best interests doctrine's flexibility and increase the number of appeals, encouraging states to abandon the doctrine and search for less discretionary methods of determining child placement.[115]

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111 104 S. Ct. at 1881.

112 *See* Mangrum, *supra* note 48, at 55-74 (discussing considerations of religious factors as part of best interests doctrine).

113 First amendment rights may be limited for a number of reasons. *See* NOWAK, *supra* note 12, at 857-1081.

114 *See* Howard, *supra* note 1, at 545 (discretionary best interests test correctly focuses on individual child).

115 A number of states and scholars have expressed displeasure with the discretionary best interests doctrine and have supported a return to presumptions or more specific rules. In Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981), for example, the West Virginia Supreme Court adopted the presumption for the primary caretaker. The presumption will favor the parent who has cared for the child on a daily basis. Only if the

CONCLUSION

Palmore v. Sidoti may herald great change in the fields of child custody and adoption. Although the Court's constitutional analysis is not entirely clear, *Palmore* certainly forbids consideration of the possible effects of societal racial prejudice in a custody decision. Whether the court intends to prohibit the use of all racial issues remains unclear. This Note suggests that some racial issues which directly affect the well-being of the child should survive constitutional scrutiny. The judiciary should continue to use the flexible best interests test to safeguard the welfare of children facing custody and adoption proceedings even if that test requires the evaluation of racial factors in the specialized situations discussed in this Note.

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child has had no primary caretaker will the court actually choose between the two parents. This presumption replaces similar doctrines, such as the tender years presumption, which favored the mother over the father. *See also* Howard, *supra* note 1 *passim* (advocating a best interests test broken down into subparts).