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Take Off the [Color] Blinders: How Ignoring the Hague Convention's Subsidiarity Principle Furthers Structural Racism Against Black American Children

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TAKE OFF THE [COLOR] BLINDERS: HOW IGNORING THE HAGUE CONVENTION’S SUBSIDIARITY PRINCIPLE FURTHERS STRUCTURAL RACISM AGAINST BLACK AMERICAN CHILDREN

DeLeith Duke Gossett*

“A definite purpose, like blinders on a horse, inevitably narrows its possessor’s point of view.” ~ Robert Frost

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INTRODUCTION

From its beginnings, adoption in the United States centered on the precept of “the best interests of the child.”1 The international community has also embraced this position,2 incorporating the “best interests” tenet into the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption (“Hague Convention” or “Hague”), a multilateral treaty established to avoid corruption in international adoption practices.3 Agreeing that “the best interests of the child should be the paramount principle governing the placement of children outside their biological families,” the Hague Convention includes a subsidiarity principle that emphasizes domestic placement as a child’s best interest and allows for international adoption only as a last-resort measure.4 As a


2. Jini L. Roby et al., Social Justice and Intercountry Adoptions: The Role of the U.S. Social Work Community, 58 SOC. WORK 295, 300 (2013), available at http://globalfop.files.wordpress.com/2012/11/social-justice-and-intercountry-adoption_-the-role-of-us-social-work.pdf. Although not defined by the Hague Convention, the Guide to Good Practice by the Hague Conference on Private International Law suggests that best interests considerations should include “the individual, familial, cultural, and social contexts of the proposed adoption [which] should be individualized and contextualized to take into account the child’s entire environment and existing relationships.” Id.


4. Id. at 1139–40 art. 4(b); ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 94 (1993) [hereinafter BARTHOLET, FAMILY BONDS].
current partner to the Hague Convention, the United States, through the State Department, closely monitors non-compliant countries and will ultimately shut down adoptions from countries whose systems do not adapt to Hague norms and thus do not serve the best interests of children.\(^5\)

In recent years, the United States has become known as the largest “receiving country” for international adoptions, bringing in nearly a quarter of a million children of other races and nationalities.\(^6\) The globalization of the adoption industry has changed the racial make-up of the American family and led to a more culturally diverse population. But, despite the increase in racially diverse families, the United States is certainly not colorblind in its approach to adoption. The well-known secret within the adoption community is that adoptive preferences follow a racial hierarchy. Race is still negatively incorporated into the cost of private adoptions, as industry standards continue to value black American children\(^7\) less than their lighter counterparts. According to one adoption agency director, the “adoption hierarchy” is reflective of a racist society that places—with corresponding monetary values—blonde, blue-eyed girls at the top and black boys at the bottom.\(^8\) This “evidence of racial hierarchy in the adoption market” suggests that racism has not been eradicated from American society, and the nation is not yet as

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5. For example, adoptions from Guatemala were shut down in 2007 when officials learned that U.S. demand led to coercion and kidnapping of children. Kevin Voigt, *International Adoption: Saving Orphans or Child Trafficking?*, CNN.COM (Sept. 18, 2013), http://www.cnn.com/2013/09/16/world/international-adoption-saving-orphans-child-trafficking/.


7. To eliminate confusion, the term “black” is used to refer to black and biracial Americans born in the United States, while the term African signifies children adopted from Africa.

colorblind as some would like to believe.\(^9\) As parents seek
children from abroad, more than 100,000 American children
still await adoption in the United States foster care system,
with minorities disproportionately represented and “aging
out” of the system.\(^10\) Almost a quarter of a million children
have aged out in the last fifteen years, nearly the same
number of children that Americans have adopted through
international adoption in the same time period.\(^11\)

What is less known is that the United States is also a
“sending country,” as it allows the international adoption of
its black and biracial children, many from foster care.\(^12\) The
United States does not follow the adopted children’s progress,
so the little data that exists on these children is inaccurate at
best. But the State Department’s figures on the number of
children sent are much lower than the numbers of children
reportedly received by Western European and Canadian
governments, suggesting the United States underreports the
number of minority children it sends abroad.\(^13\) As reports of
the practice have emerged, so has a consensus that the
“emphasis should be in finding children good homes here, not
shipping them out of the country.”\(^14\) Yet the United States
currently allows Americans to ignore the Hague’s subsidiarity
principle and participate in either Hague or non-Hague-
compliant international adoptions, creating a two-system
approach to international adoption for its own citizens while
requiring other countries to adhere to Hague Convention
protocols.\(^15\)


\(^12\) See infra Part III.B.

\(^13\) See id.

\(^14\) O’Neill, supra note 8 (quoting Roots Adoption Agency CEO Toni Oliver).

\(^15\) France also allows this unique situation. All other Hague signatory countries allow international adoptions only among member countries. Elizabeth Willmott Harrop, Adopting from Africa, Saving the Children?, THINK
Many well-meaning adoptive parents “believe that the myth of color-blindness can somehow deflect the realities of a racist society,” even as they adopt children of color from other nations. But as black American children are either bypassed in favor of more “exotic” African children, or have to go overseas to find a home, some have boldly called the international adoption practice “covert racism.” As one reporter observed, “The irony of one of the world’s wealthiest nations exporting its own children has not gone unnoticed. For many, it raises questions about identity, race and the tangled legacy of American slavery,” answered partly by “this country’s tortured racial politics.”

This Article begins in Part I by tracing the evolution of “color-blind” thought from America’s racist beginnings to the “post-racial” America that was supposedly ushered in with President Obama’s election. This section highlights Derrick Bell’s interest convergence theory that suggests that colorblindness was co-opted to satisfy white concerns and explains how colorblindness has instead given way to “color-blind racism.” Part II argues that, as with colorblindness, the best interests standard has been co-opted through international adoption to serve the desires of white prospective parents. It examines the Hague Convention’s purposes, emphasizes the subsidiarity provision that calls for international adoption only as a last-resort measure, and notes that the U.S. currently allows its citizens to adopt from


17. Globalization has been defined as “the growing interpenetration of states, markets, communications, and ideas across borders” and is a hallmark of modern society. Alison Brysk, Introduction: Transnational Threats and Opportunities, in GLOBALIZATION AND HUMAN RIGHTS 1 (2002).

countries that are both Hague- and non-Hague-compliant. It also examines the recently-proposed Children in Families First Act, which sought to facilitate more incoming international adoptions, even as black American children are sent away for foreign adoption. Part III discusses how the current two-system international adoption approach furthers structural racism against black American children, as black American children disproportionately languish in, and age out of, foster care with negative outcomes.

The Article closes with the stance that allowing the current two-tiered system of international adoption to continue is inconsistent with the Hague Convention. As a matter of public policy, the United States should enforce, for all adoptions, the proviso within the Hague Convention that allows for international adoption only if all avenues for intra-country adoption have been exhausted and there are no children available for adoption within the United States. The United States should not be disposing of its own available black children, sending them away to other countries for adoption, and then replacing them with children, of any color, from other nations.

I. RACE AND COLORBLINDNESS IN AMERICA

Dr. W.E.B. DuBois once remarked, “The problem of the twentieth century is the problem of the color line.” It was a line that separated black and white in almost every form of American society—a “hangover” from the days of slavery, according to Justice Hugo Black—with such a depth of racism that historian M.I. Finley argued that not “[e]ven emancipation and over a century of freedom” could remove its stigma. That is because in America, where “[b]y law, every

negro [was] presumed to be a slave,” race was the sole determinant of who was free and who was subject to slavery.\textsuperscript{23}

Progress, though slow, was made, and many Americans now subscribe to colorblindness and a belief that discrimination has all but disappeared; indeed, charges of racism or discrimination are often considered “as excuses or as minorities playing the infamous ‘race card.’”\textsuperscript{24} Thus, “racism” has become one of the new “taboo” words, and the very mention of race is often seen as “race baiting.”\textsuperscript{25} Even so, recent events have demonstrated that the nation has not attained the color-blind status it proclaims and racial tensions persist amidst adherence to post-racial thought.\textsuperscript{26}

\begin{itemize}
  \item[23.] Finkelman, \textit{supra} note 22, at 1012–16.
A. Colorblindness as an Aspirational Goal

Many scholars point to Justice Harlan's dissent in *Plessy v. Ferguson* as the beginning of what has been termed “color-blind” racial theory. Homer Plessy had challenged the constitutionality of an 1890 Louisiana statute that required railway companies to maintain “equal but separate” accommodations for “colored” passengers after he was forcibly removed from a train for refusing to vacate a passenger car intended for whites only. Justice Brown authored the majority opinion and concluded that separate but equal was a constitutionally acceptable standard. Affording great discretion to the Louisiana legislature to determine the reasonableness of its own actions, Justice Brown maintained that appropriate divisions could be based on the color of one’s skin and rejected the argument that “the enforced separation of the two races stamps the colored race with a badge of inferiority.” Such lawful segregation, according to Justice Brown, did “not necessarily imply the inferiority of either race to the other,” but was an assumption that the colored race had stamped upon itself. Therefore, in his view, the State of Louisiana could enact a law that required the separation of the races, one of whom had just endured more than 100 years
of slavery at the hand of the other, based solely on the color of its skin. And if the formerly indentured race felt slighted by the law, it was solely because it chose to feel inferior by the seemingly equal act, created by people from the subjugating race.

Dissenting, Justice Harlan advanced that the separation of citizens solely on the basis of race was “a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution,” which could not be justified “upon any legal grounds.” He warned that the Louisiana statute, and the majority’s construction of it, allowed “the seeds of race hate to be planted under the sanction of law,” which merely served to create a caste system of “legal inferiority” based solely on the color of one’s skin. In his view, the Fourteenth Amendment provided legal effect that all stood equal under the Constitution, “without regard to race.” Even if more aspirational than descriptive, Justice Harlan declared that “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”

The Supreme Court was called upon six times in the aftermath of Plessy to untangle applications of the “separate

33. Id. According to Justice Brown, even if it were the case that the law caused some slight, it was not the job of the Court to change it. Plessy, 163 U.S. at 551–52. Justice Brown wrote:

Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

34. During Reconstruction, several black politicians served in the U.S. House of Representatives, and P. B. S. Pinchback served as Louisiana governor from late 1872 to January, 1873. However, following the removal of federal troops from that state in 1877, black politicians became a rarity again. Nikki Brown, Jim Crow/Segregation, KNOWLA ENCYCLOPEDIA LA. (May 20, 2011), http://www.knowla.org/entry/735/.

35. Plessy, 163 U.S. at 559, 562.

36. Id. at 557–58, 560, 563. Plessy’s counsel raised the issue as to how far race-based laws could be taken, i.e., what prohibited the legislature from enacting “laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men’s houses to be painted white, and colored men’s black, or their vehicles or business signs to be of different colors,” an exaggerated, but prescient observation of the segregated Jim Crow America to come. Id. at 549.

37. Id. at 556, 559–60.

38. Id. at 559.
but equal” doctrine in the field of public education.39 Using tortured reasoning to reach predictable results, the Court found that the Fourteenth Amendment did not require integration into the white schools of Mississippi,40 nor did it require taxpayers in Georgia to take money away from a high school for whites to “establish and maintain a high school for colored children.”41 These cases simply moved the passenger train analysis into the classroom; neither case challenged the actual separate but equal doctrine.42 In time, the Court looked beyond the actual facilities and focused on the “intangible benefits” that separate settings could not provide.43 Still, of those six cases, none challenged the separate but equal doctrine, except Sweatt v. Painter, which acknowledged the issue but left it for another day.44

That day came when public schoolchildren in four states challenged their schools’ maintenance of segregated, but equal, facilities.45 NAACP lawyer Thurgood Marshall argued that segregation into “separate educational facilities” based solely on race was “inherently unequal,” and, finally, the Court agreed.46 Tracing school development since Plessy, the Court noted the dominant place that public education had come to be afforded in modern society.47 Given schools’ preeminence in the function of state and local governments, the Court underscored the fact that once the states “had undertaken to provide [the right of education, it] must be

42. See Brown, 347 U.S. at 491.
43. Id. at 491–92 (citing Sweatt v. Painter, 339 U.S. 629, 633–34 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637, 641–42 (1950); Mo. ex rel. Gaines v. Canada, 305 U.S. 337, 345 (1938)). At the graduate level, the Court found that qualified black students who were made to attend separate educational facilities were denied equality with white students. Id.
44. Brown, 347 U.S. at 492; Sweatt, 339 U.S. at 636, NAACP Legal Defense and Education Fund attorney Thurgood Marshall, arguing for the petitioner in Sweatt and in Brown v. Board, invoked Justice Harlan’s dissent in Plessy in his brief to the Court, arguing that “classifications and distinctions based on race or color have no moral and legal validity in our society. They are contrary to our constitution and laws.” Ian F. Haney Lopez, Is the “Post” in Post-Racial the “Blind” in Colorblind?, 32 CARDOZO L. REV. 807, 809 (2011).
46. Id. at 493, 495.
47. Id. at 492–93.
made available to all on equal terms.”\textsuperscript{48} The Court noted that the children’s facilities were indeed equal “with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.”\textsuperscript{49} However, the Court looked beyond the tangible to “the effect of segregation itself on public education.”\textsuperscript{50} In reaching its decision, the Court referenced several psychological studies that showed that segregation based solely on race stamped children with a badge of inferiority sanctioned by law.\textsuperscript{51} Resonating with, although not referring to, Judge Harlan’s dissent in \textit{Plessy},\textsuperscript{52} the Court declared that such law-sanctioned segregation, “denoting the inferiority of the negro group” and detrimentally impacting the children, could not stand.\textsuperscript{53} The Court had finally made steps towards colorblindness, at least in the area of school segregation.\textsuperscript{54}

\textbf{B. Co-opting Colorblindness to Keep the Status Quo}

Colorblindness means that color should no longer be a basis of discrimination where “a majority oppresses a racially-defined minority.”\textsuperscript{55} The slate should be wiped clean, and all should be equal and on the same footing. If \textit{Plessy} ushered in more than half a century of legalized racism, \textit{Brown v. Board} provided the impetus for a civil rights movement that actively sought to end all vestiges of racism in American society.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{48} Id. at 493.
\item \textsuperscript{49} Id. at 492. The highest courts in Kansas, Virginia, Delaware, and South Carolina had each declared the separate schools were either equal in every way or were in the process of being equalized. Id. at 486–87, 492 n.9.
\item \textsuperscript{50} Id. at 492.
\item \textsuperscript{51} Id. at 494.
\item \textsuperscript{52} \textit{PATTERSON, supra} note 21, at 205. The Court did not refer to Justice Harlan’s dissent in \textit{Plessy} and “did not proclaim that the Constitution was color-blind.” Id. at xxiii, 68.
\item \textsuperscript{53} \textit{Brown}, 347 U.S. at 494.
\item \textsuperscript{54} While the Court paved the way for desegregation by prohibiting discrimination, it did not expressly require integration. See Lopez, \textit{supra} note 44, at 809–10 n.8 (citing Christopher W. Schmidt, \textit{Brown and the Colorblind Constitution}, 94 CORNELL L. REV. 203, 234 (2008) (recording a colloquy wherein Marshall sought to reassure a hesitant Justice Frankfurter that the NAACP was “not asking for affirmative relief,” but only for an end to “state-imposed segregation.”)); see also Briggs v. Elliott, 132 F. Supp. 776, 777 (1955) (per curiam) (“The Constitution . . . does not require integration. . . . It merely forbids the use of governmental power to enforce segregation.”).
\item \textsuperscript{56} \textit{PATTERSON, supra} note 21, at 71 (quoting Fisk University President Charles Johnson) (“If segregation is unconstitutional in educational
While Thurgood Marshall and the NAACP struggled for racial equality through the courts, citizens engaged in nonviolent acts of civil disobedience to show the unjustness of segregation. Students “sat-in” at segregated lunch counters, and Rosa Parks refused to give up a seat at the front of a bus reserved only for whites, leading others to do the same. Men, women, and children paraded on city streets and bridges, and they marched on the mall in Washington; almost every stride was met with violence and resistance.

1. Restrictive v. Structural Racism

Under a traditional or restrictive-racism construct, racism is identified by the intentionally harmful conduct by conscious and deliberate racists. Rooted in the actor’s dual beliefs of personal superiority and the targeted person’s inferiority because of particular characteristics, the traditional or restrictive form of racism requires a showing of intentional discrimination. In other words, racist behavior is not unconscious; the actor deliberately takes action, intent on causing a particular result that he believes his victim deserves. It requires “conscious volition,” or a showing of intent—the actor must consciously act on a racist belief to institutions, it is no less so unconstitutional in other aspects of our national life.

57. Early civil rights groups such as the Fellowship of Reconciliation (FOR) and the Congress of Racial Equality (CORE) drew from the nonviolence teachings of Mohandas Gandhi and sought change through nonviolent mass resistance. RAYMOND ARSENAULT, FREEDOM RIDERS 23, 59 (2006). Employing nonviolent civil disobedience tactics, Dr. Martin Luther King, Jr. became the recognized leader of the civil rights movement. PHILIP ABBOTT, POLITICAL THOUGHT IN AMERICA 301–02, 309–12 (1991).

58. PATTERSON, supra note 21, at 120–21.
59. ARSENAULT, supra note 57, at 57–58.
60. ABBOTT, supra note 57, at 312.
61. PATTERSON, supra note 21, at 37, 87.
62. Id.
63. Wiecek, supra note 55, at 4.
64. Id.
bring about the intended action.

For example, the Ku Klux Klan members who killed and stuffed into an earthen dam three young civil rights workers for registering Southern blacks to vote, acted on their racist beliefs to cause the particular outcome.\(^{65}\) The same is true of the church bombers who stole the lives of four little black girls attending Sunday school at a Birmingham church,\(^{66}\) and those who bombed the buses and then beat the “Freedom riders” who traveled into the Deep South on interstate buses to challenge unconstitutionally segregated transportation facilities.\(^{67}\) As did those responsible for beating, shooting, and throwing into the Tallahatchie River a young black teenager who reportedly whistled at a white woman,\(^{68}\) and Birmingham Commissioner of Public Safety Eugene “Bull” Connor who loosed vicious dogs and turned high-pressure water hoses on peaceful marchers, including children.\(^{69}\)

In the face of such blatant racism, the tide of public sentiment slowly turned in sympathy towards the peaceful protesters.\(^{70}\) However, as the Civil Rights Movement made gains, social thought evolved to include a bad-actor philosophy.\(^{71}\) Only those who employed measures like the above were considered to be racist, and the restrictive racism construct came to include only “the most overtly bigoted.”\(^{72}\)

Structural racism, on the other hand, does not need a bad

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65. Patterson, supra note 21, at 130.
66. Id. at 123.
67. Arsenault, supra note 57, at 143–48. Organized by the Congress of Racial Equality (CORE), the 1947 Journey of Reconciliation became the first organized “Freedom Ride” as it sought to enforce the provisions of Morgan v. Commonwealth of Virginia, 328 U.S. 373 (1946), a ruling which invalidated as unconstitutional a Virginia statute that required segregation of interstate bus passengers, but was largely ignored in the South. Id. at 19–21.
68. See Barbara Schwabauer, The Emmett Till Unsolved Civil Rights Crime Act: The Cold Case of Racism in the Criminal Justice System, 71 Ohio State L.J. 653, 655 (2010); Patterson, supra note 21, at 86.
70. Patterson, supra note 21, at 123. Compare Walker v. City of Birmingham, 388 U.S. 307 (1967) (characterizing the Birmingham marchers as a disorderly mob who displayed an impatient commitment to their cause) with Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (describing the same marchers as an organized group with defined leadership, whose peaceful enjoyment of their freedoms should not be contingent upon the uncontrolled will of an official who denied them free exercise of their constitutional rights) (Stewart, J., both opinions).
71. Nunn, supra note 25, at 436.
72. Wiecek, supra note 55, at 10.
actor. It results when a society systemically favors one group over another, leading to segregation, denial of opportunity, and racially-disparate outcomes for the disfavored group.\textsuperscript{73} Also known as institutional racism, it reinforces a “racial hierarchy of status” that results in the “social domination” of one group over another.\textsuperscript{74} For example, structural racism advances that racism against blacks was so rooted in American society, i.e., it was part of the structural makeup, that changing the actions of a few bad actors still did not affect all the racially-based negative outcomes for the subjugated group.\textsuperscript{75} In other words, structural racism exists despite intent, because a model of society that associates certain races with negative stereotypes will feed implicit biases that produce unconscious racism, even in the absence of blatantly racist actions.\textsuperscript{76}

\textbf{2. Bell’s Interest Convergence Theory}

According to critical race theorist Derrick A. Bell, Jr., racism is such a permanent part of American culture that rather than trying to change individual beliefs one bad actor at a time (an impossible task), the whole structure of society must change to eliminate racism.\textsuperscript{77} In his “Interest-Convergence” thesis, Bell suggested that racism would be eliminated only if the entire social structure of America changed in a manner palatable to the majority.\textsuperscript{78} In other words, racial equality takes place only when “it converges with the interests of whites,” or, stated differently, institutional changes and social policy advancements are made only when whites collectively benefit.\textsuperscript{79}

\textsuperscript{73} \textit{Id.} at 5–6.
\textsuperscript{74} \textit{Id.} at 6 (citing Ian F. Haney Lopez, \textit{Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination}, 109 YALE L.J. 1717, 1810 (2000)).
\textsuperscript{75} Nunn, \textit{supra} note 25, at 435.
\textsuperscript{77} Nunn, \textit{supra} note 25, at 435.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} “Interest convergence theory therefore rejects the notions of classical legal theory that idealism, abstract legal doctrine, or the deployment of novel legal strategies will bring about significant advances in civil rights. While all of these may play a role, interest convergence theory holds that it is the actual or perceived alignment of the interests of the elite with those of the subordinated
Further, Bell advanced that structural racism hides behind “the illusion of colorblindness and neutrality,” and suggested that racism continually reinvents itself—much as the character from Catch Me if You Can continuously reinvented his persona from pilot to doctor to prosecutor—to escape notice and continue course. Bell believed that racism would co-opt and appropriate any threatening movement or ideology as its own and, as one such example, pointed to Brown v. Board of Education’s holding that “separate but equal” was inherently unconstitutional. According to Bell, Brown reframed the narrative that “equality and fairness finally triumphed in both law and public opinion over the forces of intolerance.” Instead, Bell argued that Brown was actually driven by geopolitical concerns and happened only because it converged with the interests of white elites. After all, blacks had been arguing against “separate but equal” for years to no avail. Public sentiment regarding desegregation in 1954 certainly had not changed. Why the sudden shift from a doctrine to which the Court had so doggedly adhered?

The answer, according to Bell, was not so much the concern for the injured schoolchildren, or “those concerned about the immorality of racial inequity,” as it was concern by


81. See Nunn, supra note 25, at 435; see also CATCH ME IF YOU CAN (DreamWorks 2002) (chronicling the exploits of con artist Frank Abagnale, Jr., who used different personas to escape detection).

82. 347 U.S. 483, 491 (1954); Nunn, supra note 25, at 435–36.


85. Bell, supra note 84, at 524 (citing Roberts v. City of Bos., 5 Cush. 198, 206 (1849)).

86. Id. at 525–26.

white elites in how the United States was perceived in a post-war world.\textsuperscript{88} The abandonment of segregation needed to happen because whites in policymaking positions could not advance the principles of equality and freedom in their foreign policy efforts against Communism when racial strife existed at home.\textsuperscript{89} Bell pointed to black servicemen returning from World War II who became discontent with racial prejudice at home after experiencing a different world abroad.\textsuperscript{90} It was hard to expand the creed “all men are created equal” to third-world countries when democracy did not extend to the nation’s black men who fought for that very principle.\textsuperscript{91} So, instead, whites co-opted the movement for equality with \textit{Board v. Brown} and lessened the threat.\textsuperscript{92}

Even if Bell was incorrect that \textit{Brown v. Board}’s lip service to colorblindness and equality was co-opted merely to satisfy foreign interests, the fact remains that no matter the reasons behind it, the decision did little to change the status quo at home.\textsuperscript{93} Orders to integrate schools in the South were largely disregarded, and some districts openly resisted.\textsuperscript{94} The defiance of Arkansas governor Orval Faubus in using armed force to prevent nine black students from attending Central High School in Little Rock, Arkansas was quelled only by President Eisenhower’s deployment of the 101st Airborne

\begin{footnotesize}
\begin{enumerate}
\item Bell, \textit{supra} note 84, at 524.
\item \textit{Id.} Professor Mary Dudziak discovered documents that supported Bell’s argument that \textit{Brown} was aimed at containing communism abroad. \textit{See} Mary Dudziak, \textit{Desegregation as a Cold War Imperative}, 41 STAN. L. REV. 61, 62–63, 80–93 (1988) (“[T]he international focus on U.S. racial problems meant that the image of American democracy was tarnished. The apparent contradictions between American political ideology and practice led to particular foreign policy difficulties with countries in Asia, Africa and Latin America. U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home.”). \textit{The Pittsburgh Courier} said of \textit{Brown}, “This clarion announcement will also stun and silence America’s traducers behind the Iron Curtain.” \textit{Patterson, supra} note 21, at 71.
\item Bell, \textit{supra} note 84, at 524–25.
\item \textit{Id.} “America cannot maintain its leadership in the struggle for world democracy as long as the conditions exist which caused our arrest and conviction. We don’t fool anybody. People abroad know and are losing faith.” \textit{Arsenault, supra} note 57, at 54 (quoting CORE founder Bayard Rustin following his arrest and subsequent incarceration arising out of the Journey to Reconciliation Freedom Ride).
\item \textit{See} Bell, \textit{supra} note 84, at 523–24.
\item \textit{See} \textit{Patterson, supra} note 21, at 221; Bell, \textit{supra} note 84, at 528–29.
\item \textit{See} Bell, \textit{supra} note 84, at 528–29; Lopez, \textit{supra} note 44, at 810.
\end{enumerate}
\end{footnotesize}
The enrollment of the first black man at the University of Mississippi erupted into such rioting and violence that President Kennedy had to send 16,000 federal troops to intervene. And President Kennedy had to nationalize the Alabama National Guard when Governor George Wallace tried to block the entry of two black students to the University of Alabama to make good on his “segregation now, segregation tomorrow, segregation forever” campaign promise. Equality may have been the ideal, but it was certainly not the practice, neither in schools nor the rest of society. Colorblindness had been rejected by the majority of the Court in Plessy. It was rejected by a society that replaced slavery with Black Codes and then with Jim Crow. It was rejected by a society that fought the desegregation of its schools and met marches for racial equality with violent resistance. Color was just too important.

But then a curious thing happened. After decades of struggle, civil rights lawyers “dropped their demands for colorblindness and began to stress the necessity of race-conscious remedies to achieve integration and substantive equality.” They sought measures like affirmative action, race-based preferences to remedy the effects of blacks having been previously systemically and categorically denied equality in a racially segregated society. And, consistent with Bell’s theory, as racial change threatened the

97. PATTERSON, supra note 21, at 94.
98. The Black Codes replaced slavery with laws, “which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.” Slaughter-House Cases, 16 Wall. 36, 70 (1872). Based on the Black Codes, post-Reconstruction “Jim Crow” racial segregation laws institutionalized the inferiority of the black race. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 393 (1978) (Marshall, J., concurring in part and dissenting in part) (describing segregation under Jim Crow laws).
100. Id. at 811. President Johnson signed the Civil Rights Act of 1964, which prohibited discrimination in employment based on race, color, religion, or national origin. 42 U.S.C.A. §§ 2000e et seq. Noting, however, that civil rights laws alone could not remedy past discrimination, President Johnson issued an executive order that required government contractors to “take affirmative action” in placing minority employees in all aspects of hiring and employment. Exec. Order No. 11246, 30 FR 12319 (1965).
established structure of power and privilege, those who had previously opposed colorblindness now had an interest in its use. While the Civil Rights Act “presumed to promote a color-blind society,” affirmative action efforts went far beyond that. Even though Justice Powell conceded that the black population “to some extent struggles still” (this, on the heels of a volatile civil rights movement just a decade before), he reduced over 350 years of bondage, servitude, and brutal inequality to “transitory considerations,” comparable to the recent experiences of some Italian, Greek, and Slavic immigrant groups. Justice Powell recognized that the framers of the

101. Lopez, supra note 44, at 810. While the Civil Rights Act “presumed to promote a color-blind society,” affirmative action efforts went far beyond that. Patterson, supra note 21, at 127, 136–37, 194.

102. Russell, supra note 56, at 1410.

103. Lopez, supra note 44, at 810; Nunn, supra note 25, at 436.


105. Id. at 275, 320. “The reply of many whites, especially of white ethnics who had only recently made it out of their own ghettos, was: our groups too faced prejudice and discrimination; we haven’t made it to the top of American society, either, as is shown by our sparse representation at elite levels; and it is not fair to change the rules in midstream, after we have committed ourselves to them.” Russell, supra note 56, at 1410 (quoting Richard D. Alba, Ethnic Identity: The Transformation of White America 317 (1990)). To counter the prejudice they had encountered, first- and second-generation immigrants “reaffirmed their own ‘whiteness’” by persecuting blacks, who ranked lower on the racial hierarchy. Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 29 (1993). But see Bakke, 438 U.S. at 400–01 (Marshall, J., concurring in part and dissenting in part):

The experience of Negroes in America has been different in kind, not
Fourteenth Amendment had sought to bridge the gap of inequality between the “Negro race and the white ‘majority.’” However, he refused to employ a similar contemporary approach on the basis that the Amendment, when reduced to writing, used “universal terms, without reference to color, ethnic origin, or condition of prior servitude.” He concluded that, “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” After all, justice was to be colorblind.

C. Color-Blind Racism in Post-Racial America

Many believe that the United States has entered a post-racial era, where colorblindness has been attained and race no longer matters. Best understood as a “rhetorical
response to colorblindness,” post-racialists respond to charges of racism with a denial that race is an issue. In other words, if colorblindness was once aspirational, then post-racialism is the attainment of that goal. Many claimed that the election of Barack Obama was “proof positive that the United States had entered a ‘post-racial’ era.” In a country with such a tortured racial history, the election of a black man to the American presidency was indeed monumental. As The Economist exclaimed, “America has turned the page on race.” To be sure, traditional racism as seen in days of Bull Connor has largely subsided and taken many of the overtly bad actors and actions with it.

Post-racialism draws on the bad-actor construct of restrictive racism and attributes acts of racism to the individual bigotry and animus of a few bad actors. Thus, the acceptable litmus test for racism in post-racial America has become whether someone commits an overtly racist act or utters a racial epithet as evidence of whether racism actually...
exists or not. The “absence of these examples in their lives says to them racism has vanished or is a great deal less prevalent than in the past.” Acts of racism that cannot be ignored are explained away as “isolated occurrence[s] that result from a few malevolent individuals,” not as the prevailing attitude of society.

Believing that traditional racism no longer exists, or was largely overcome with President Obama’s election, post-racialists reject structural racism and refuse to recognize its structural residue. But as Harvard law professor Randall

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120. Id. at 105–06.

121. Nunn, supra note 25, at 438. Recent legal jurisprudence feeds this theory, as many laws have “arguably created or reflect an egalitarian norm” by prohibiting discrimination based on characteristics of race. Maldonado, supra note 9, at 1469; see also 42 U.S.C.A. § 2000e et seq. The Supreme Court has generally characterized racism only in the traditional or restrictive-racism theory, requiring a deliberate act by one who consciously sets out to harm another with racial animus. Wieck, supra note 55, at 4, 7. The Court has not looked favorably on issues grounded in structural racism, such as affirmative action plans, leading some to say that the “most effective agent perpetuating [structural racism] has been the Supreme Court’s refusal to recognize it.” Id. at 4, 6–7.

122. Structural inequities show the color line still divides modern American society along racial lines. Housing patterns remain segregated, MASSEY & DENTON, supra note 106, at 60–82, and the 2010 census recorded an increasing wealth divide between white and black households, with the median white household income at $110,729, twenty-two times greater than the $4,955 of black households. Tami Luhby, Worsening Wealth Inequality By Race, CNN MONEY (June 21, 2012), http://money.cnn.com/2012/06/21/news/economy/wealth-gap-race/. Even though blacks make up about twelve percent of the population, they accounted for a mere nine percent of the nation’s job gains. Id. Unemployment for blacks is twice that of whites, and historically has been since the government began tracking unemployment figures in 1972. Annalyn Censky, Unemployment Falls . . . But Not For Blacks, CNN MONEY (Jan. 6, 2012), http://money.cnn.com/2012/01/06/news/economy/black_unemployment_rate/index.htm?id=EL. At the beginning of 2012, the unemployment rate for blacks stood at 15.8 percent for blacks and 7.5 percent for whites. Id. Disparities in educational opportunities have increased with black males making up only 2.8 percent of the undergraduate population even as white overrepresentation has risen at the top 468 schools. ANTHONY P. CARNEVALE & JEFF STROHL, GEORGETOWN U., GEORGETOWN PUB. POLICY INST., SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE 7–9, 19, (2013), available at http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Separate&Unequal.FR.pdf; SHAUN R. HARPER, THE JOINT CTR. HEALTH POL’Y INST. BLACK MALE STUDENTS AT PUBLIC FLAGSHIP UNIVERSITIES IN THE U.S.: STATUS, TRENDS, AND IMPLICATIONS FOR POLICY AND PRACTICE, 8, 20 (2005), available at http://www.jointcenter.org/hpi/files/manual/Black%20Male%20Students%20at%20Public%20Flagship.pdf. As one scholar aptly recognized, “[r]ace remains a
Kennedy reminds, to declare that racism no longer exists is to deny the “breadth, depth, and subtlety of racial divisions in American life [and to forget that] something as thoroughly ingrained as American racial prejudice, particularly its antiblack variant, would not suddenly dissipate despite the goodwill effectively summoned by Obama’s skillful campaign.” Thus, scholars argue that those who still consider the United States to be a color-blind society are actually taking a “very blind-sighted approach to race and color issues that prevents acknowledgment of unresolved issues of race and color inextricably intertwined with issues of power, status, and the allocation of resources.”

The problem with color-blind theory, however, when advanced by the former majority, is that it fails to see the flip side of the coin: “white privilege.” Based on the Latin word *privilegium*, meaning “a law affecting an individual,” white privilege has been defined as “an invisible package of unearned assets” belonging to whites because of a history of systemic racism. As some suggest, perhaps the greatest privilege of being white is that whites are not daily confronted with their race. Yet, when the issue is ignored, it reinforces what sociologists have termed “white

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123. RANDALL KENNEDY, THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY 9 (2011). “‘You know,’ the President recently remarked, ‘on the heels of [my electoral] victory over a year ago, there were some who suggested that somehow we had entered into a post-racial America, all those problems would be solved.’ Then he deadpanned: ‘That didn’t work out so well.’” Lopez, supra note 44, at 807.

124. Howe, supra note 1, at 89. Recently, after issuing a disclaimer that her statements were not racist, former Alaskan Governor and Vice Presidential hopeful Sarah Palin flippantly compared the national debt to slavery. When confronted with her use of hyperbole, which treated a system of bondage and torture as synonymous with a monetary obligation, Palin declared that people would be offended by her word usage only if they “misinterpreted” what she said. Jonathan Capehart, Sarah Palin Invokes Slavery, Inappropriately of Course, THE WASH. POST (Nov. 15, 2013), http://www.washingtonpost.com/blogs/post-partisan/wp/2013/11/15/sarah-palin-invokes-slavery-inappropriately-of-course/.


126. Id.

normativity."\textsuperscript{128} Whites begin to think that their privileged status is the norm, and that they are entitled to any benefits accruing to them under that system.\textsuperscript{129}

Indeed, under current post-racial thought, because color lines no longer exist, differences in race are not to be acknowledged.\textsuperscript{130} And those who dare to even bring up the issue of race are often vilified as racists themselves, or accused of “race baiting” or further marginalizing those who have made so much advancement.\textsuperscript{131} Termed “color-blind racism,” this “new form of societal racism” is just another example of how colorblindness has once again been seized to “defend and justify the contemporary racial order.”\textsuperscript{132} Unlike “the rallying cry of liberals during the years when Martin Luther King, Jr., dreamed of the day when all people would ‘be judged not by the color of their skin but by the content of their character,’ . . . [t]hose advocating colorblindness today are often not the proponents of racial equality.”\textsuperscript{133} Instead, colorblindness has been co-opted as “a doctrine of conservatives” who believe that mentioning race is a matter of “playing the race card” in an effort to unfairly disadvantage whites.\textsuperscript{134} And despite current color-blind rhetoric, whites

\textsuperscript{128} Wiecek, supra note 55, at 11.

\textsuperscript{129} Id. at 12.

\textsuperscript{130} See KENNEDY, supra note 123, at 248. But see Mura, supra note 119, at 100 (contrasting his daughter’s wish “to live in a world where the terms ‘racism’ and ‘race’ no longer exist” with the desire for her to understand that it is sometimes “necessary and a good thing to group people by race in order to redress a social injustice.”).

\textsuperscript{131} See Darron T. Smith, Kieran Romney and the Paradox of Transracial Adoption, HUFFINGTON POST (Jan. 2, 2014), http://www.huffingtonpost.com/darron-t-smith-PhD/kieran-romney_b_4531158.html (“[M]ost whites are paralyzed by the thought of being labeled ‘racist’ to the point that some clumsily and disingenuously invoke statements like ‘some of my best friends are Black’ to appear as though they are not racist. What the pundits seemed most upset about is that the obvious was spoken and the elephant in the room was addressed, rather than maintaining the façade of colorblindness.”); Mirkinson, supra note 25.

\textsuperscript{132} Bonilla-Silva & Dietrich, supra note 24, at 190–91; Lopez, supra note 44, at 828. One author analogized the continued black struggle as “the competition between blacks and whites to a race. The white person sees the black person line up at the starting line and says, okay, let’s have a fair race. If I win I’m the better qualified. But what the white person doesn’t realize . . . is that the black person has run several miles already to get to the starting line. It’s not a fair race at all.” Mura, supra note 119, at 121.


\textsuperscript{134} PAMELA ANNE QUIROZ, ADOPTION IN A COLOR-BLIND SOCIETY 1 (2007).
still continue to dictate social policy—including adoption policy—most often to their own advantage.  

II. THE CO-OPTION OF ADOPTION TO SATISFY WHITE INTERESTS

A. Co-opting Domestic Adoption

The dominant thought towards United States domestic adoptions in the mid- to late-twentieth century was that of the “as-if-genealogical” family.  

As if” adoptions described the ideal that adopted children should be incorporated into families “as if” they were born into that family, meaning the children should look like the adoptive parents and share their genealogical makeup.  

Thus, children were “matched” to parents who favorably compared in social, racial, and physical aspects.  

Adoption, then, tended to reflect the status quo, as the courts, churches, adoption professionals, and the general population maintained legal, religious, political, and social justifications for keeping children with families of their same race.  

That meant the adoption industry, like the rest of American society, remained largely segregated for years.

Indeed, many “believe that affirmative action undermines standards of merit in order to redistribute social goods proportionately for minority groups,” Perry, supra note 133, at 78, and why the United States Supreme Court was primed to take a color-blind approach to deny the most recent challenge to affirmative action.  


The Supreme Court has generally characterized racism only in the traditional or restrictive-racism theory, requiring a deliberate act by one who consciously sets out to harm another with racial animus.  

Wiecek, supra note 55, at 4, 7.  

The Court has not looked favorably on issues grounded in structural racism, such as affirmative action plans, leading some to say that the “most effective agent perpetuating [structural racism] has been the Supreme Court’s refusal to recognize it.”  

Id. at 4, 6–7.

135. QUIROZ, supra note 134, at 3, 14.


137. Id. at 20 (“The thrust of adoption law and policy is to pretend that blood is there; a fictive kinship is just like a biological relationship.”).


139. QUIROZ, supra note 134, at 36, 41.

By many accounts, most agencies denied blacks adoption services, and blacks were largely left out of the process. Accordingly, those adopting tended to be white parents seeking white children that looked like them. Black children available for adoption were considered to be “special needs,” or “hard-to-place;” most were never adopted. The black community simply took care of its own through relatives and kinship care rather than formal adoption processes. Even as services slowly began to include the adoption of black children, or “Negro” adoptions, the process remained segregated, with children being matched only with adoptive parents of the same race.

Significant changes in the latter part of the twentieth century, such as the availability of contraceptives and abortion, led to a shortage of healthy white infants placed for adoption. An industry that had operated on race-matching as in the best interests of the child suddenly found the supply of white children could not meet the demand. In 1967, after the Supreme Court struck down the prohibition of interracial marriage in *Loving v. Virginia*, a small but definite trend emerged as white families began adopting black children. However, the adoption of black children by whites garnered considerable negative attention and drew significant backlash from the black community, with some social workers calling such adoptions “the new slavery.”

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141. *Id.; QUIROZ, supra note 134, at 37.*
142. *Herman, supra note 140; Glaser, supra note 18.*
144. *Herman, supra note 140.*
145. *Perry, supra note 133, at 41. Other factors, such as delayed family planning with increased infertility, the legalization of abortion, and the declining stigma of single motherhood, contributed as well. *QUIROZ, supra note 134, at 40.*
146. *388 U.S. 1, 12 (1967).*
148. *Glaser, supra note 18; Perry, supra note 133, at 55 (“To some blacks, [the placement of black children in white homes by a white-dominated social worker industry] may suggest that the disempowerment of enslaved Blacks has*
Association of Black Social Workers (NABSW) reacted and, in 1972, publicly opposed the practice of transracial adoption, claiming that the adoption of black children by whites was a form of “cultural genocide” that returned blacks to “chattel status.” On the heels of a civil rights movement that was met by violence and white resistance to any form of black social advancement, the adoption of black children by whites was seen by many blacks as yet another attempt at disempowerment—and a further recasting of white domination and entitlement.

In the aftermath of the NABSW controversy, the adoption of black American children decreased by 39 percent. The decline was met with charges of racism against the black community and NABSW for laying claim to “their children,” instead of truly caring about the children's best interests. Indeed, those who opposed such adoptions were “accused of wanting race-conscious policy that failed to benefit children.” Opposition to race-matching increased, and scholars advanced that ad options would never be colorblind until agencies assigned children to adoptive parents without regard to their race. Harvard law professor Elizabeth Bartholet advocated that placing black children only in black homes was “inconsistent with an appropriate understanding of the role race should play in social ordering,” and advanced that racism could be eliminated through transracial adoption. Particularly concerned with the effect of color-conscious matching policies on black children languishing in foster care, Bartholet suggested that color-blind policies would allow more children

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continued in modern-day America.

149. Herman, Transracial, supra note 147; Bartholet, Family Bonds, supra note 4, at 90; Perry, supra note 133, at 42.
150. See Perry, supra note 133, at 55; Quiroz, supra note 134, at 3.
151. Maldonado, supra note 9, at 1455 & n.196. The Child Welfare League of America rewrote its adoption standards the next year to conform to the NABSW stance, resulting in a substantial chilling of the adoption of black American children. Herman, Transracial, supra note 147.
153. Quiroz, supra note 134, at 41.
154. Id. at 3; Maldonado, supra note 9, at 1470 (citing Perry, supra note 133, at 104).
155. Bartholet, Black Children, supra note 152, at 1172.
to escape foster care through adoption.\textsuperscript{156} Further, she advanced that the best interests of the child, i.e., finding a home, should be exercised without interference by the state\textsuperscript{157} or even by the child’s community of origin.\textsuperscript{158}

Congress responded to the NABSW controversy by enacting the Multiethnic Placement Act (MEPA).\textsuperscript{159} Signed into law by President Clinton in 1994 as part of the Improving America’s Schools Act, MEPA expressly prohibited agencies that received federal assistance from denying foster care or adoptive placements “solely on the basis of race.”\textsuperscript{160} Two years later, Congress amended MEPA to delete the word “solely” from the language of the Act, clarifying that race could not be a factor in placements, solely or otherwise.\textsuperscript{161} In other words, placements were to be colorblind—agencies that received federal funding could no longer use race to determine placements.\textsuperscript{162} This meant that prospective adoptive parents, most of whom were white and formerly denied children under race-matching policies, could no longer be denied the children they wanted due to the child’s race.\textsuperscript{163} Although these transracial adoptions never amounted to a significant

\begin{itemize}
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} See Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (refusing to consider race in its review of a Florida child custody determination which involved a subsequent mixed marriage).
  \item \textsuperscript{158} Id. at 1242, 1245–46, 1255; Perry, supra note 133, at 82–83. As colorblind discourse moved into the adoption arena, scholar Twila Perry termed Bartholet’s position “color-blind individualism.” Perry, supra note 133, at 43–45; see also Quiroz, supra note 134, at 18 (citing Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption (2003)); Bartholet, Black Children, supra note 152, at 1201–06, 1232–33; Joan Mahoney, The Black Baby Doll: Transracial Adoption and Cultural Preservation, 59 UMKC L. Rev. 487, 487–501 (1991).
  \item \textsuperscript{160} Id.
  \item \textsuperscript{162} Maldonado, supra note 9, at 1457. Private agencies were not so constrained and encouraged adoptive parents to select preferences in race. Id. at 1470 n.276 (quoting Bartholet, Black Children, supra note 152, at 1186–87) (“[A]n initial order of business for most adoption agencies is the separation of children and prospective parents into racial classifications.”).
  \item \textsuperscript{163} Emily Upshur & Jack Demick, Adoption and Identity in Social Context, in Adoptive Families in a Diverse Society 99 (Katarina Wegar ed., 2006).
\end{itemize}
number, what was previously taboo was now recast “as an altruistic effort toward social betterment” and a positive step toward the creation of a nonracist society. Colorblindness, through “best interests,” had been co-opted to satisfy white demand.

B. International Adoption and the Hague Convention’s Subsidiarity Requirement

International adoption in the United States originated from a humanitarian desire to aid children orphaned by war. It was not a common practice and the number of children adopted from outside of the United States remained relatively small. Following the NABSW controversy, however, Americans increasingly looked to foreign markets for children. By 1993, international adoption rates outpaced all other adoptions of unrelated children. As American demand for infants grew, and American supply dwindled, the United States brought in nearly a quarter of a million children from other nations and became known as the largest “receiving country” for international adoptions.

Although the globalization of adoption has provided more adoption opportunities, it has also opened avenues for potential abuses. Evidence of corruption, including child abduction, surfaced in Guatemala. Similar problems arose in Vietnam, India, Cambodia, and other countries, where children were bought and sold for adoption. Many who

164. Herman, Transracial, supra note 147 (estimating that only 2,500 adoptions were finalized even at their peak in 1970, and that no more than 12,000 black children were placed in white homes before 1975).
165. See QUIROZ, supra note 134, at 40; Perry, supra note 133, at 36, 45.
166. HOWELL, supra note 1, at 144, 171.
167. Id.
168. Maldonado, supra note 9, at 1455 & n.196.
170. Maldonado, supra note 9, at 1455 & n.196; Intercountry Adoption: Statistics, supra note 6.
172. Roby et al., supra note 2, at 2. The United States issued a moratorium on adoptions from Guatemala in 2008, which is still in effect. Id.
173. See DeLeith Duke Gossett, If Charity Begins at Home, Why Do We Go Searching Abroad? Why The Federal Adoption Tax Credit Should Not Subsidize
adopted from Ethiopia later discovered that their children were relinquished because of promises made to biological parents that the children would go to America for a good education and return home afterwards; the children were neither orphans nor abandoned, but were relinquished based on misunderstandings of the permanency of Western adoption. 174 This narrative proved to be recursive. 175 As international adoption increasingly devolved into what amounted to little more than child trafficking, countries sought to curb abusive practices through international regulation. 176

Passed with the express purpose of curbing child trafficking and other abuses arising from the global adoption


174. See, e.g., Tarikuwa Lemma, International Adoption: I Was Stolen From my Family, CNN (Sept. 16, 2013), http://edition.cnn.com/2013/09/16/opinion/international-adoption-tarikuwa-lemma-stolen-children/index.html (detailing the story of a girl whose father was told she and her sisters were being sent to the United States on a study program); John Nicol, Ethiopian Adoption: Canadian Parents Raise Concerns, CBC NEWS (Mar. 19, 2009), www.cbc.ca/canada/story/2009/03/19/f-ethiopia-adoption.html.


industry, the Hague Convention standardized the international adoption process between member countries and provided regulatory safeguards for member countries engaged in international adoption.\textsuperscript{177} It incorporated the “best interests of the child” principle and, as part of its protocols, required member countries to establish a central authority, which decides whether a child is legally adoptable.\textsuperscript{178} The Hague Convention also includes a proviso, known as the “subsidiarity principle,” which subordinates international adoption to domestic adoption.\textsuperscript{179} It notes that international adoption “may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”\textsuperscript{180} But it is allowed only as a last resort, after local authorities give “due consideration” that all possibilities for placement of the child within the state of origin have been considered.\textsuperscript{181} That means that international adoption might still be considered to be in the best interests of the child, but only if all avenues to domestic adoptions have been exhausted and found wanting.\textsuperscript{182}

The United States signed the Hague Convention in 1993 and began the long process toward ratification.\textsuperscript{183} The State

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\item \textsuperscript{177} Hague Convention, supra note 3; Yngvesson, supra note 176. The Hague Convention was seen as “an important development” over the CRC, as it was not interpreted to require foster care or institutionalization over international adoption. Bartholet, Human Rights, supra note 176, at 95; Csete et al., supra note 171, at 214.
\item \textsuperscript{178} Hague Convention, supra note 3, at 1134–46. The central authority is charged with establishing protocols ensuring the voluntary relinquishment of the child by the mother. Yngvesson, supra note 176. Any money exchanged is only to be for the “cost and expenses, including reasonable professional fees of persons involved in the adoption.” Hague Convention, supra note 3, at arts. 6–9, 32. For “foundlings,” or abandonments, the central authority must establish that no kin are available or willing to claim the child. Id.
\item \textsuperscript{179} Hague Convention, supra note 3, at 1139–40 art. 4(b).
\item \textsuperscript{180} Id. at 1139.
\item \textsuperscript{181} Id. “This principle recognizes that when the birth family experiences a crisis, the respective systems—such as the extended family network, community resources, and domestic permanency options—are the natural lines of protection for the child. ICA is an option for a child whose birth family cannot provide care and after consideration has been given to families in the country of origin.” Roby et al., supra note 2, at 6.
\item \textsuperscript{182} Hague Convention, supra note 3; Csete et al., supra note 171, at 214.
\item \textsuperscript{183} Some claim the United States did not come into compliance with the Hague Convention sooner, because of its extensive adoption activity with Guatemala, a country marked by corruption and where, it was said, “every 100th baby born in Guatemala grows up as an adopted American.” Peter
Department publicly declared adherence to the Hague Convention to be the official position of the United States government and encouraged “all countries to take the necessary steps to join and implement The Hague Inter-Country Adoption Convention.”\(^{184}\) Indeed, by the time the Hague Convention was ratified by the United States in 2008, many anticipated a gradual shift from international adoption towards domestic adoption programs, in line with the Hague Convention’s subsidiarity principle.\(^ {185}\) Soon after the regulations were promulgated and the treaty was finally implemented,\(^ {186}\) the State Department publicly stressed the “paramount position of the subsidiarity principle in international adoptions,” stating:

> It’s a fundamental tenet of the convention that when a child cannot be reintegrated into his or her birth family, the first option should be adoption by a family in that child’s country of origin. When that domestic adoption in the child’s country of origin is not possible, then inter-country adoption opens another opportunity for a child to find the loving home that he or she deserves.\(^ {187}\)

That is in line with U.S. obligations under international law. Article 18 of the Vienna Convention states that signatories to a treaty shall not defeat the purpose of a treaty.\(^ {188}\) In other words, once a country enters into an agreement, such as the Hague Convention, with another country, it must refrain from conduct that thwarts that

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\(^{185}\) Yngvesson, supra note 176, at 109; Glaser, supra note 18.


\(^{187}\) Press Release: Michele Bond, supra note 184.

Eighteen months after the United States implemented the Hague Convention, the State Department admitted that some adoptions were still non-Hague compliant because they began before the Hague Convention was finally implemented. However, the State Department suggested that prospective adoptions would be restricted to Hague countries, consistent with the subsidiarity principle’s requirement that adoption agencies make every effort to place children domestically before seeking their placement abroad. Indeed, the number of international adoptions into the United States decreased as countries began to develop programs that emphasized domestic adoption.

Recently, Ambassador Susan Jacobs issued a press release that noted that “every child deserves to grow up in a loving family environment,” but that is sometimes impossible in the child’s home country. In those cases, the United States supports “ethical, transparent intercountry adoptions as part of a fully developed child welfare system.” She stressed that, “[t]he Department of State works with eighty-nine partner countries under the 1993 Hague Convention to ensure that procedures are in place to protect the interests of children and families throughout the adoption process. The Hague Convention is a legal framework that ensures intercountry adoptions are transparent and ethical.” The implication was clear: the United States is a partner to the Hague Convention and works with other member countries to make sure international adoptions—when necessary—are

189. See id. Further, each party bound by the treaty must act in good faith. Id. at art. 26.
190. Id.
191. Id.
legal and ethical, and adherence to the Hague Convention facilitates those goals.

C. Co-opting International Adoption

Since the United States ratified the Hague Convention in 2008, and in line with the subsidiarity principle, many countries have increased the number of domestically-placed children and reduced the number of children made available for international adoption. Despite its stated commitment to the Hague Convention, however, the United States routinely allows its own citizens to bypass Hague Convention requirements and protocols to adopt children from countries that are not Hague members. State Department records show that thousands of children, most from non-Hague countries, are still being brought into the United States each year for adoption. Of the top sending countries in the last several years, four out of five were non-Hague members. Indeed, current law creates “a strong incentive for American parents to adopt foreign children” by allowing generous tax credits without discriminating between adoptions from Hague and non-Hague countries. These factors have created a two-tiered international adoption system: the United States, having ratified the agreement, encourages other countries to follow the Hague Convention—even shutting down adoptions from non-compliant countries—but allows American citizens to bypass the Hague Convention and its espoused protections and adopt from non-Hague compliant countries.

1. Reframing Whose Interests?

International adoption involves a recurring theme: adopters from wealthy nations descend upon poor, developing nations and deliver them of their children. Whereas

197. Id.
198. Id.
200. Voigt, supra note 5.
201. BARTHOLET, FAMILY BONDS, supra note 4, at 142. Even international adoption proponent Bartholet recognizes that international adoption “can be
international adoption used to “find families for children,” today the practice is about “finding children for families.”

What has resulted, contrary to Hague intentions, is a “revolving door” of incoming and outgoing children, where the Hague subsidiarity requirement is overlooked and children are traded between countries to satisfy parental preferences. The response by developing countries has been much the same as NABSW’s 1972 response to the adoptions of black children by whites. Many sending countries charge that international adoption is another form of imperialism and cultural genocide. They argue that wealthy nations, which have already exploited labor and raw materials, now allow their white parents to steal their countries’ last, most precious resource—their children.

And just as the black community and NABSW were vilified as being racist for laying claim to “their children,” developing nations that seek family unification efforts above international adoption by westerners are now portrayed as not caring about the “best interests” of their own children.

understood as the ultimate form of exploitation . . . the taking by the rich and powerful of the children born to the poor and powerless. In international adoption, the privileged classes in the industrialized nations adopt the children of the least privileged groups in the poorest nations.” Id.


203. Maldonado, supra note 9, at 1464–65 & n.248 (quoting HOWARD ALSTEIN & RITA SIMON, INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 1 (1991) (“[W]hat the West has generally viewed as charitable, humane and even noble behavior, developing countries have come to define as imperialistic, self-serving and a return to a form of colonialism in which whites exploit and steal natural resources.”); HOWELL, supra note 1, at 171; ADAM PERTMAN, ADOPTION NATION 23 (2000).

204. Maldonado, supra note 9, at 1464–65 & n.248 (quoting Jane Rowe, Perspectives on Adoption, in ADOPTION: INTERNATIONAL PERSPECTIVES 3, 6 (Euthymia Hibbs ed., 1991) (noting the “natural response” from poor, struggling countries is “[f]irst you want our labor and raw materials; now you want our children.”)).

205. See Bartholet, Black Children, supra note 152, at 1232–33. Akin to the cultural arguments made against black communities in the United States, Bartholet and others argue that these poor countries are more concerned with nationalism than the best interests of their children, who might have a better
To many, international adoption is an “amazing social program that changes people at no cost to the home country.”206 Indeed, modern proponents advance that the globalization of adoption presumably solves “adopter nations’ ‘need’ for children and children’s ‘need’ for ‘complete’ families.”207 But the number of “orphans” (reportedly as high as 200 million)208 has been grossly exaggerated; the actual number is less than a tenth of the number promoted.209 The change in orphan nomenclature is due in part to efforts of NGOs like the United Nations Children’s Fund (UNICEF), and Joint United Nations Programme on HIV and AIDS (UNAIDS), which label as “orphan,” for humanitarian aid purposes, those children who have lost a parent to death, separation, or abandonment.210 “True orphans,” in the historical context, those who have lost both parents, are now referred to as “double orphans,” merely a subset of the larger “orphan” population.211 However, UNICEF explicitly warns against misinterpreting “this difference in terminology” to mean that these children are “in need of a new family, shelter, or care,” i.e., international adoption, and stresses that the focus should instead be on supporting their families and communities.212

In reality, those working in developing countries stress that it is western demand that is actually increasing the number of “orphans.” Westerners begin to adopt, and the predictable pattern of supply and demand begins to emerge;
more orphanages are built, the orphanages seek more children, and the number of “orphans” increases to accommodate the demand.213 The United States government even acknowledges that when adoptions were closed in a number of countries, the orphanages emptied out, and the children went home.214 But the “convenient myth” that all adoptees from foreign nations are orphans allows those adopting to believe they are participants in a greater good even as they turn a blind eye to facts that do not support their purpose.215

It used to be that international adoption played a limited role in the care of orphans. Twenty years ago, Professor Bartholet advocated for international adoption as “an opportunity to solve some of these problems for some children.”216 But she also recognized that international adoption “can of course play only a very limited role. Long-term solutions lie in reallocating social and economic resources, both between countries and within countries, so that children can more generally be cared for by their birth families. But international adoption can play at least some role.”217 Even in the last few years, she commented that “[i]nternational adoption is not a panacea... The best solution, in any event, would be to solve the problems of social and economic injustice that prevent so many birth parents


214. See Links for the Week, INT’L ADOPTION READER BLOG (May 4, 2013), http://readerinternationaladoption.wordpress.com/2013/05/04/links-for-the-week-5/ (recounting experiences in Vietnam, Cambodia, and Guatemala, where the number of institutionalized children decreased when international adoption was closed in those countries); Conversations with America: Intercountry Adoption, U.S. DEP’T OF STATE (Nov. 20, 2012), http://adoption.state.gov/about_us/conversation_with_america.php.

215. HOWELL, supra note 1, at 57–58.

216. BARTHOLET, FAMILY BONDS, supra note 4, at 151.

217. Id.
from being able to raise their children themselves.”

The problem is that the current role it is playing—the same role that she envisioned—is no longer enough. Long a proponent of intercountry adoption “at the most enthusiastic end of the spectrum of supporters,”

Professor Bartholet now takes an extreme position towards international adoption and proposes concurrent planning as part of her model to do away with the subsidiarity principle:

Ideally, in my view, there should be no in-country preference. Countries should simply place children as soon as possible in any available adoptive homes. But if countries institute such a preference, as, under the Hague Convention, they are required to, they should do so in a way designed to cause no delay whatsoever in placement for children. Concurrent planning is the term for the adoption program inside the United States that should serve as the model.

The term “concurrent planning” refers to the practice in foster care where “adoption professionals work simultaneously to reunite children in foster care with their birth parents, while they work to prepare for adoption.”

It replaced the more traditional “sequential planning” where one permanency plan, such as reunification, is ruled out before an alternative plan is developed. This came about as the result of the Adoption and Safe Families Act of 1997 and its subsequent amendments, which require courts and child welfare agencies “to work on a much faster timetable by mandating that a hearing must be held no later than twelve months after a child enters foster care.”

Although not incorporated by every State, concurrent planning is an attempt to make sure that American children are placed earlier and do not languish in foster care.

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219. Id.
220. Id. at 107.
221. Id.
223. Adoption and Safe Families Act of 1997, supra note 161; Howe, supra note 1, at 89.
224. Bartholet, Human Rights, supra note 176, at 107. “At the point that a decision is reached not to reunite, the child can immediately move forward to adoption.” Id. More than half of the States do not require concurrent planning as part of their foster care permanency plan. CHILD WELFARE INFO. GATEWAY,
this concept into the international adoption framework is in contravention of the Hague Convention’s subsidiarity principle, which follows sequential planning: “Adapted to international adoption, this model would mean that adoption officials in the sending country would plan simultaneously for the international adoption, while they checked to see if any domestic placement would be possible, rather than planning the international adoption only after exhausting the possibility of domestic adoption.”

The lack of regard for the Hague Convention protocols and protections has been increasingly overt. In the aftermath of the 2010 Haiti earthquake that left more than a million people homeless, U.S. relief efforts focused almost exclusively on the children of the ravaged country. Even as waiting adults were turned away, the State Department suspended protocol and implemented its “humanitarian parole” policy to expedite the adoption of Haitian children by Americans. In the rush, more than 1,150 Haitian “orphaned” children were taken to the United States and it was not discovered until later that many were, in fact, not orphans, but had family who were searching for them in the chaos after the earthquake. When UNICEF, Save the Children, and World Vision called for a halt to the exodus of Haitian children so the government could determine which children were actually orphaned, international adoption advocates charged that these groups were not “working for the good of the children,” and that the Haitian children were being held hostage. Professor Bartholet criticized UNICEF, claiming it has played a “major role in recent attempts to restrict international adoption” because it takes the position that “permanent family” care in the country of origin is preferable to out-of-country adoption. Former Louisiana Senator Mary Landrieu echoed that statement by warning that “[e]ither

supra note 222, at 2.

225. Id.

226. JOYCE, supra note 16, at 3.

227. Id.

228. Id. at 5, 10, 20.

229. Id. at 11.


UNICEF is going to change or have a very difficult time getting support from the U.S. Congress.  

However, UNICEF’s position is consistent with the subsidiarity principle of the Hague Convention, the very agreement that Landrieu championed in 2000 when she sponsored the Intercountry Adoption Act, which implemented the Hague Convention. The problem for Landrieu, Bartholet, and other advocates is that the Hague Convention, with its preference for in-country adoption, no longer accommodates the increasing appetite for international adoption. Whitney Reitz, the State Department employee who orchestrated the expedited removal of children from Haiti, later reportedly stated of the operation, “[t]he idea was to help the kids. And if we overlooked Hague, I don’t think I’m going to apologize.” That attitude is common among adoption advocates. For example, Craig Juntunen adopted three children from Haiti following the earthquake and later established the Both Ends Burning campaign, which produced the documentary, Stuck. He has since proposed a clearinghouse model to circumvent Hague Convention safeguards to make international adoption speedier and more prevalent.  

The tension within international adoption comes in the framing of an issue that puts family rights on one side and benefits to orphans on the other. But tempering that is the fact that the courts do not recognize a prospective parent’s corresponding right to adopt as superior to the best interests of the child. In fact, the interests of the prospective adoptive parents have been held to be subordinate to the

232. Id.  
234. JOYCE, supra note 16, at 3.  
235. Voigt, supra note 5. Stuck documented several adoption experiences in Vietnam, Ethiopia, and Haiti. Id.  
236. Id. Juntunen seeks to raise levels of international adoptions in the United States to 50,000 children a year with a nine-month waiting time. Id.  
237. QUIROZ, supra note 134, at 9.  
238. Briggs & Marre, supra note 183, at 5; see also Mullins v. Oregon, 57 F.3d 789, 794 (9th Cir. 1995) (“Whatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest.”); Lindley for Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989) (“[W]e are constrained to conclude that there is no fundamental right to adopt.”).
state's interest.\textsuperscript{239} It is a process that comes with “messy contradictions,” in that the supposed client—the child, whose best interest is always to prevail—is not the paying client.\textsuperscript{240} Instead, as the current baby markets reflect, the needs of the adult prevail as the secondary client who gets to make the choices.\textsuperscript{241}

Nevertheless, prospective parents understand that adoption into homes cannot happen without them and thus equate their desire to adopt as the fulfillment of the child’s right to the home they deserve. This leads to a sense of entitlement; Americans routinely refer to children in other countries as “their” children, as if they have a superior claim to them than the domestic state, and lament that the process takes so long to bring them “home.”\textsuperscript{242} When the State Department shuts adoption in a country for reasons of fraud and corruption, Americans blame the United States for “interfering” with the adoption of the children on which they had set their sights, as if the United States is the bad actor for requiring a transparent process as called for by the Hague Convention.\textsuperscript{243}

The reality is that international adoption helps only a handful of children, leaving the needs of the majority of children in sending nations unaddressed.\textsuperscript{244} What is happening is a continuing shift in the adoption paradigm from a focus on the best interests of the child to a demand from Western couples who seek children “for their own sense of fulfillment,”\textsuperscript{245} and who will go to great lengths and expense to “match the kind of family they’re trying to

\textsuperscript{239} Maldonado, \textit{supra} note 9, at 1468–69 & n.270 (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (“The State, of course, has a duty of the highest order to protect the interests of minor children.”)).

\textsuperscript{240} Id.

\textsuperscript{241} Sara Dorow, \textit{Producing Kinship Through the Marketplaces of Transnational Adoption}, in \textit{BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES} 73 (Michele Bratcher Goodwin ed., 2010) (citing Family Foundations Director Marjorie Sessions); MODELL, \textit{supra} note 136, at 19 (“In the United States, adoption is presumed to be for the child’s sake. Yet adoption is also a way of creating a family, and this other purpose complicates the application of ‘best interests.’”).

\textsuperscript{242} Voigt, \textit{supra} note 5.

\textsuperscript{243} HOWELL, \textit{supra} note 1, at 139.

\textsuperscript{244} QUIROZ, \textit{supra} note 134, at 26.

\textsuperscript{245} Gill Haworth et al., \textit{Infertility and Inter-Country Adoption}, in \textit{ADOPTING AFTER INFERTILITY} 135 (Marilyn Crawshaw & Rachel Balen eds., 2010); Briggs & Marre, \textit{supra} note 183, at 1, 5; HOWELL, \textit{supra} note 1, at 17–18, 20–21, 138, 178.
Statistics show that 95 percent of all orphans are over the age of five. Yet, Americans tend to adopt younger children, and prospective parents will spend over $60,000, and years on waiting lists—all to “save” children who sometimes have yet to be born.

2. Children in Families First Legislation

Abandoning their former position that children would better be served by solving “the problems of social and economic injustice that prevent so many birth parents from being able to raise their children themselves,” some advocates now argue that international adoption is the “most logical solution” to the “disparity between the number of abandoned and orphaned children in some countries and families and individuals wishing to adopt in others.” Indeed, they claim that the Hague protective protocols merely serve as a stumbling block to “saving” children. Thus, international adoption proponents push for even less regulation, alleging that Hague restrictions ultimately hurt children and cause them to spend their lives in orphanages where the “results are more developmental problems, more kids on the street and more cost to the government to institutionalize these kids.”

Viewing the reduced numbers of international adoption as a failure on the part of the government to meet the needs of children abroad, Senator Landrieu introduced legislation in the form of the Children in Families First Act of 2013

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246. Ko, supra note 16.
249. Bartholet, Black Children, supra note 152, at 97.
250. See Selman, supra note 6, at 97.
251. Voigt & Brown, supra note 209; Voigt, supra note 5.
252. Voigt, supra note 5; BARTHOLET, FAMILY BONDS, supra note 4, at 165. But see supra notes 213–14 regarding how demand for children is creating “orphans.”
253. Children in Families First: FAQs, http://childreninfamiliesfirst.org/chiff-faqs/ (last visited Aug. 27, 2014). “The sad reality is that [international adoption] is declining because international adoption has wrongly been forced off the table of appropriate permanency options for children.” Id.
254. Children in Families First Act of 2013 [hereinafter 2013 CHIFF], S.
and the Children in Families First Act of 2014\textsuperscript{255} (collectively, CHIFF). Drafted by Whitney Reitz, the former State Department employee who worked around the Hague Convention to bring the Haitian children to the United States,\textsuperscript{256} CHIFF focused on every child’s “human right to a family,” and promised to reclaim the role in international child welfare that it said the government had “effectively relinquished” to UNICEF.\textsuperscript{257} It proposed to create a new office within the State Department, along with a new Ambassador position,\textsuperscript{258} that it said would streamline the processing of inter-country adoption cases to “allow international adoptions to become a strong and important part of how we protect children.”\textsuperscript{259} With growing bipartisan support and endorsements by groups such as Craig Juntunen’s Both Ends Burning (BEB), Christian organizations like Saddleback Church, the Southern Baptist Convention (SBC), and Christian Alliance for Orphans (CAFO), and many adoption agencies,\textsuperscript{260} the bill sought to help improve the lives of the estimated “200 million orphans in the world.”\textsuperscript{261}

But in reframing the practice of international adoption as

\begin{itemize}
  \item \textsuperscript{256} See supra note 234 and accompanying text. Reitz announced that she had been hired by Sen. Landrieu to draft the legislation. Whitney Reitz, Address at Pepperdine Law School, Nootbaar Institute on Intercountry Adoption: Orphan Rescue or Child Trafficking? (Feb. 8, 2013).
  \item \textsuperscript{258} The 2013 CHIFF version established a Bureau of Vulnerable Children and Family Security, with an Assistant Secretary position. 2013 CHIFF, S. 1530. The 2014 CHIFF version changed the name to the Office of Vulnerable Children and Family Security. 2014 CHIFF, S. 2475.
  \item \textsuperscript{259} CHIFF: Messaging Points, supra note 257.
  \item \textsuperscript{261} Id. Landrieu drastically reduced that number in May 2014. “By some estimates, there are over 150 million orphans in the world.” Children in Families First: One Pager, http://childreninfamiliesfirst.org/wp-content/uploads/2014/05/Children-in-Families-First-one-pager-2014-05-8.pdf (last visited Aug. 27, 2014). See also supra notes 208–14 and accompanying text regarding the inflated number of orphans.
\end{itemize}
every child’s right to have a permanent family, the proposed legislation operated to make more international children available for adoption to Americans.\footnote{262} CHIFF imported the “concurrent planning” concept championed by Professor Bartholet\footnote{263} and put it on equal footing with the Hague subsidiarity principle:

\begin{quote}
The principle of subsidiarity, which gives preference to in-country solutions, should be implemented \textit{within the context of a concurrent planning strategy}, exploring in- and out-of-country options \textit{simultaneously}. If an in-country placement serving the child’s best interest and providing appropriate, protective, and permanent care is not quickly available, and such an international home is available, \textit{the child should be placed in that international home without delay}.\footnote{264}
\end{quote}

In fact, just days before Senator Landrieu introduced CHIFF in the Senate, Prof. Bartholet advanced this same position:

\begin{quote}
[T]he United States could advocate for an appropriate definition of Hague subsidiarity, namely one that prefers in-country adoption only when it can be accomplished with \textit{no delay} in placement. \textit{Subsidiarity should be defined and limited by a Concurrent Planning strategy}, in which countries plan \textit{simultaneously} both for domestic and international adoption, preferring domestic over international placement only when an equally qualified domestic home is immediately available.\footnote{265}
\end{quote}

But this is not consistent with the Hague Convention’s subsidiarity principle—which is sequential, \textit{not} simultaneous—and looks to international adoption as a last resort, after all possibilities of domestic adoption and other forms of in-country care have been exhausted.\footnote{266} Rather, it was an attempt to force concurrent planning as a best practice—what is not even required by half of U.S. states—into international adoption, so that more children would be

\begin{footnotes}
\item[262] See 2014 CHIFF, S. 2475; 2013 CHIFF, S. 1530.
\item[263] See supra note 220 and accompanying text.
\item[264] 2014 CHIFF, S. 2475; 2013 CHIFF, S. 1530 (emphasis added).
\item[266] See Hague Convention, supra note 3.
\end{footnotes}
available for adoption.\textsuperscript{267}

In many respects, CHIFF mimicked the failed Families for Orphans Act (FFAO).\textsuperscript{268} Introduced in 2009 by Senator Landrieu and Republican co-sponsor James Inhofe, and drafted by the Families for Orphans Coalition (most of whose members also serve as the CHIFF Executive Working Committee),\textsuperscript{269} the bill conditioned United States foreign aid on a country’s willingness to allow the international adoption of its children as part of the effort to secure “permanent” homes for orphans.\textsuperscript{270} Under the guise that “all children belong in families,”\textsuperscript{271} the bill provided a means to facilitate thousands of additional international adoptions through a new office that would be created within the State Department.\textsuperscript{272} Countries receiving aid were required to conduct a biennial orphan census, and offered “additional financial incentives, including technical assistance, grants, trade, and debt relief” in exchange for sending “their children abroad for international adoption.”\textsuperscript{273} Despite the bipartisan effort, the bill was not passed.\textsuperscript{274}

Critics stated that CHIFF, much like its failed predecessor, actually aimed to tie foreign assistance to a country’s willingness to participate in intercountry adoption for the benefit of Americans who want to adopt.\textsuperscript{275} As recently as 2012, as part of a CAFO Summit panel\textsuperscript{276} at Rick

\textsuperscript{267} CHILD WELFARE INFO. GATEWAY, supra note 222, at 2.
\textsuperscript{268} See Families for Orphans Act, S. 1458, 111th Cong. (2009).
\textsuperscript{269} Id. The Coalition was led by former Joint Council on International Children’s Services President Tom DiFilipo, National Council for Adoption President Chuck Johnson, and America World Adoption agency founder Brian Luwis. Id. Some of these same members, including Joint Council on International Children’s Services and National Council for Adoption, also served on the CHIFF Executive Working Committee, alongside Saddleback Church, Christian Alliance for Orphans, and Both Ends Burning, among others. See CHIFF: Legislation, supra note 260.
\textsuperscript{270} See Families for Orphans Act, S. 1458, 111th Cong. (2009). Specifically, the bill sought to “ensure that all aid efforts receiving funding from the United States recognize and support the need for the preservation and reunification of families and the provision of permanent parental care for orphans.” Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id. The bill created the Office for Orphan Policy, Diplomacy and Development. Id.
\textsuperscript{273} JOYCE, supra note 16, at 225–26 (quoting adoption reform group, Ethica).
\textsuperscript{274} Id. at 227.
\textsuperscript{275} Id. at 225–26.
\textsuperscript{276} The panel also included former FFOA drafters Chuck Johnson and Brian Luwis, as well as former Congressional Coalition on Adoption Institute
Warren’s Saddleback Church, one of the former FFAO drafters, Tom DiFilipo, continued to herald the idea of tying foreign aid to international adoption.277 Suggesting that funding should be limited to countries that had an express policy that “all children belong in families,” DiFilipo urged adopting families to “demand, not ask for or suggest, that the US government establish a policy that children belong in families. I’m talking about international aid money, whatever it is related to.”278 He denigrated efforts to promote “family preservation . . . by building schools or putting in water wells”—work that enhanced domestic infrastructure and reduced the need for international adoption—as alternative forms of orphan care not based on permanency policy.279

However, tying federal aid to a country’s willingness to deliver its children for adoption is treating children as a commodity. And reframing a country’s desire to care for its own children, or to improve efforts to comply with the Hague Convention, as a failure to help children belies adoption proponents’ true critique, that countries are cutting off the supply that we demand, and feeds the neocolonialist arguments that claim international adoption serves the interests of privileged families from wealthy nations at the expense of the poorest.280 While child abandonment arguably provides both a moral and legal basis for adoption, recent adoption narratives strongly suggest that international adoption increasingly involves the adoption of children procured from living parents, oftentimes by nefarious practices.281 And it comes at a tremendous social cost to

Executive Director Kathleen Strottman, former staffer to Senator Landrieu. Id. at 224.

277. Id.

278. Id.

279. Id.

280. See, e.g., Maldonado, supra note 9, at 1465 (citing Twila Perry, Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory, 10 YALE J.L. & FEMINISM 101, 105 (1998) (urging advocates of international adoption to address history of colonialism, cultural imperialism, and economic exploitation that lead poor women in poor countries to give their children to privileged women in Western nations)).

281. E.J. Graff, The Lie We Love, FOREIGN POL’Y Nov.-Dec. 2008, at 58, 63 (detailing accounts of babies stolen from mothers, mothers forced into giving away their babies because they cannot pay inflated hospital bills, and child finders who purchased, defrauded, coerced, or stole children from their families).
women who do not have the means to care for their children in their own country. If every child has a “right to a loving home,” as international advocates and policymakers insist, that should include the children’s right to live in their country of origin with their birth families, not just in the family that is willing to pay upwards of $60,000 or more for them. Instead, poverty has caused thousands of poor unmarried women to abandon or relinquish their children for international adoption.

A true social initiative should include “[s]upporting families and communities so that they can look after their children themselves [so that] not only are individual children more likely to thrive and go on to be better parents, they are more likely to contribute to their communities and to their country’s development.” For example, a mother in Addis Ababa, Ethiopia could remain united with her child for $15 per month. Institutionalization would not be a concern, and Americans would not have to spend upwards of $60,000 to “save” an “orphan.” Instead, poor mothers have become providers of children for parents in wealthier countries, as biological and community ties are forever severed and a billion dollar, unregulated adoption industry is fed, all in the “best interests” of the child and to fulfill “their right” to a loving home. Once again, the best interests standard has been co-opted to serve white interests through international adoption.

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282. Roby et al., supra note 2, at 4 (citing poverty as the leading cause of “rescue”—driven desire to adopt internationally).
283. See supra notes 244–48 and accompanying text.
286. Id.
287. Roby et al., supra note 2, at 3, 5–6; Voigt, supra note 5 (citing Susan Soonkeum Cox).
288. See O’Neill, supra note 8 (quoting Roots Adoption Agency CEO Toni Oliver). The high cost of adoption has left black families out of a process dominated by whites, so the children are being adopted into primarily white homes. Id.
III. **STRUCTURAL RACISM AGAINST BLACK AMERICAN CHILDREN**

Today, nearly twenty years after the Multiethnic Placement Act sought to eliminate race considerations in public placements, race still matters in adoption. As adoption expert Ellen Herman suggests, “Our history continues to plague us.” Even the language used to classify adoptions shows an ingrained preference that reflects historical traditions. The adoption of white children by white parents is still considered “traditional” while the adoption of any black child is dubbed a “minority” adoption. Reminiscent of *Plessy*, biracial children and those with even “one drop” of black blood are considered legally black and therefore classified a minority.

**A. The Plight of Black American Children in Foster Care**

It is indisputable that supply and demand drives the domestic adoption industry; the price depends on the child’s “market rating, with the cost for a white child being significantly higher than that for an American minority child.” Indeed, the “adoption hierarchy reflects our society” as many private agencies still operate under a shifting fee structure that follows “historical race-conscious indicators” and commands a higher premium for children that rank higher on the “desirability list.” Children are ranked—with corresponding monetary values—by racial and gender

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preference, with blonde, blue-eyed girls at the top, black boys at the bottom, and biracial children in between.\textsuperscript{295}

Agencies claim that placing differing valuations on children of different races is not racism.\textsuperscript{296} Instead, they justify the inequitable practice by claiming that the reduced fees are necessary to incentivize the adoption of black children who otherwise might not be adopted.\textsuperscript{297} Agencies claim they “have to work much harder to find homes for our African-American babies.”\textsuperscript{298} But experts say this rationale is illogical. “If placing white children is far easier than placing black babies, it would seem that less work would result in less pay and lower fees.” And, if true, it sheds light on an American society that, despite its color-blind rhetoric, still values—and segregates—children according to their skin color, even before they are born.\textsuperscript{299}

Nearly thirty-five years ago, Elisabeth Landes and Richard Posner performed an economic analysis of the then-contemporary “baby market” in the United States and found that the shortage of white babies was leading to “baby selling.”\textsuperscript{300} They compared foster children, many of whom were black, to the unwanted and unsold inventory in warehouses.\textsuperscript{301} Even though their research was well-grounded in empirical statistics, it nevertheless received strong backlash because it referred to children in terms of supply and demand.\textsuperscript{302} To many, using market terms to refer to children was seen as reducing their value to that of a mere commodity and was akin to “putting a child on an auction

\textsuperscript{295} Six Words, supra note 294. Adoption fees commonly range from $35,000 to $40,000 for white children, while the cost to adopt a black child is generally less than half that, anywhere from $10,000 to $18,000. Biracial children fall somewhere in between. Id.; see also Goodwin, supra note 1, at 6 (listing as little as $4,000 for black children compared to $50,000 for healthy white infants); QUIROZ, supra note 134, at 5 (describing a three-tier pricing system with whites at the top, “honorary whites” in between, and black at the bottom); O'Neill, supra note 8 (citing Adoption-Link agency director Margaret Fleming); Glaser, supra note 18.

\textsuperscript{296} Six Words, supra note 294.

\textsuperscript{297} Id.

\textsuperscript{298} Davenport, supra note 290.

\textsuperscript{299} Id.

\textsuperscript{300} Elisabeth Landes & Richard Posner, The Economics of the Baby Shortage, 7 J. LEGAL STUD. 323 (1978).

\textsuperscript{301} Martha Ertman, The Upside of Baby Markets, in BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 27 (Michele Bratcher Goodwin ed., 2010).

\textsuperscript{302} Goodwin, supra note 1, at xi–xiii, 4–5.
block,” which renewed negative images of slavery.303

A “vast array of social policies going back to the institution of slavery can be characterized as responsible for the fact that it is black families whose children are disproportionately available for adoption and white families who are disproportionately in a position to seek adoption.”304

The growing income gap between white and black Americans305 ensures that, while no longer prohibited de jure,306 the majority of blacks are now de facto non-participant prospective parents in the adoption process, while whites dominate the adoption marketplace.307 But even as many whites employ the color-blind rhetoric of a post-racial society, and say race no longer matters, many choose not to adopt black American children, even though there is plenty of supply and the cost to adopt is less.308 Indeed, many purport to be colorblind in their approach to adoption simply because they adopt a child of color from another nation.309

The large Christian evangelical orphan care and adoption movement has emerged as the embodiment of a post-racial approach to adoption.310 Many Christian evangelicals have heeded the Southern Baptist Convention’s (SBC) call to its 16 million members to become involved in some form of adoption.311 Committed to “defending the cause of the fatherless,” the movement sees international adoption as missional, i.e., a means to fulfill the “Great Commission” of bringing the gospel to “all nations, tribes, peoples, and tongues,”312 as they save hundreds of millions of orphans.313

The movement’s marriage of fundamentalism with the social

303. Id. at xi–xiii; Ertman, supra note 301, at 27.
304. Bartholet, Black Children, supra note 152, at 1232. “Taking all these perspectives together, transracial adoption can be characterized, and indeed has been by the NABSW and others, as one of the ultimate forms of exploitation by whites of the black community and the black family.” Id.
305. See supra note 122.
306. See supra note 141 and accompanying text.
307. Howe, supra note 1, at 88.
308. See supra notes 293–99 and accompanying text.
312. Revelation 7:9–10 (New King James).
313. JOYCE, supra note 16, at 55–56, 72–73. But see supra notes 208–14 and accompanying text regarding the inflated number of orphans.
gospel has led to the mass adoption of children from developing nations, most recently from Africa (and from countries which are not members of the Hague Convention).314

Preaching colorblindness and “a God who doesn't see race,” the movement has led to the creation of “rainbow congregations,” such as SBC leader and Adopted for Life author Russell Moore’s former church, where members adopted 140 children from other nations.315 The result is a unique diversification within the very churches that “defended segregation just over a generation ago.”316 But as one political science scholar noted, it is not an integration based on participants of equal footing; rather, it is a noticeably white movement of “imported diversity,” where most of the color shows up in the black faces of children who have been adopted into white congregations.317 However, by not “talking to black adults, who may have endured the effects of the church’s institutional bias [and] instead by adopting children from other races and cultures,”318 the

317. JOYCE, supra note 16, at 69. Held May 2013, the 2500 attendees at CAFO’s Summit 9, the largest evangelical gathering for those committed to the cause of the orphan, broke previous Summit attendance records. However, almost all of the 2500 attendees were white, except for the black children in strollers and some black guest speakers. Moore, Juntunen, and Sen. Landrieu spoke at Summit 9, and it is where Sen. Landrieu first announced that she would be introducing the CHIFF legislation. Jedd Medefind, Major Orphan Legislation Introduced in U.S. Senate, CHRISTIAN ALLIANCE FOR ORPHANS (Sept. 19, 2013), http://www.christianalliancefororphans.org/blog/2013/09/19/major-orphan-legislation-introduced-in-u-s-senate/.
318. JOYCE, supra note 16, at 71, 73. “Through the civil rights period and beyond, sectors of the convention remained thickly entwined with white supremacy and segregation, though in recent years, it has made efforts to move past its history—for instance, drafting a 1995 resolution apologizing to all African-Americans for once espousing slavery. Still, the evangelical denomination remains quite white and Southern: 80 percent of its 16 million members are white and 90 percent are concentrated in the South and Texas.” Norton, supra note 316.
progress ensured is the continued subordination of blacks, as African children are ripped from their families and communities of origin to grow up in white families in a country with unsettled issues on the black race. Yet, many white adoptive parents are seemingly not aware of or overlook this facet as they satisfy their own desires to adopt.

The problem with white privilege is that it leads to white normativity and entitlement under the status quo. White prospective parents believe they have a right to adopt whomever they choose from wherever they choose, even as children in the United States are overlooked and remain in foster care. This is evidenced when parents routinely bypass the Hague and its subsidiarity principle, which requires parents to adopt children in need of homes in their own country before adopting internationally. As one agency director bluntly stated, “There is no shortage of American families willing to adopt. There is a shortage of American families willing to adopt these kids.”

Put bluntly, black American children are simply not in demand by white American parents. Despite current color-blind rhetoric, Americans attach social constructs to race. Some scholars have argued that white America still clings to “transnational racial imagery,” which has produced a perception in the American mindset of black American children with seemingly insurmountable childhoods. Thus, children from overseas

319. JOYCE, supra note 16, at 71, 73.
320. For example, Moore diminished the sometimes traumatic experiences that children adopted from different ethnicities and cultural backgrounds face when he drew comparisons to his own “trans-ethnic” spiritual adoption, saying, “[y]ears ago I was adopted into a family of a different ethnicity than my own, and it was traumatic. You should see how long it took me to learn Hebrew.” Russell D. Moore, Transracial Adoption and the Gospel, THE TOUCHSTONE BLOG (May 29, 2008 12:17 pm), http://touchstonemag.com/merecomments/2008/05/transracial-ado/.
321. See id. Moore, for example, succumbed to the rhetoric of color-blind racism when he likened people with valid concerns of such adoptions to George Wallace’s “progressive . . . heirs . . . standing in the orphanage door.” Id.
322. Glaser, supra note 18.
323. Dorow, supra note 241, at 71. Additionally, the “vilification of poor mothers of color,” including the stereotype of foster care children as “crack babies,” black infants who were exposed in utero to crack cocaine, was fed by the media in the 1980s and 1990s and still exists today. Id. (citing Ana Ortiz & Laura Briggs, The Culture of Poverty, Crack Babies, and Welfare Cheats: The Making of the “Healthy White Baby Crisis,” 21 SOC. TEXT 39–57 (2003)); see also Glaser, supra note 18 (The “false assumptions about crack deepened white America’s reluctance to adopt black children” from foster care).
are seemingly more desirable to adopt than black American children in foster care. 324 Even CAFO President Jedd Medefind suggested that it is sometimes seen as more “exotic” to adopt children from the other side of the world than “the other side of the tracks,” 325 echoing the observation of one adoption scholar that, “[O]ur society is more open to international adoptions of other races than it is to domestic [transracial adoptions].” 326 As one adoption attorney summed, “Americans like to think our society is colorblind, but it isn’t.”327 Indeed, many parents will wait years for a foreign child that sometimes has yet to be born rather than adopt a black child in American foster care that needs an immediate home.328

Even the most ardent proponents of international adoption cannot deny that black American children are not finding homes in this country.329 Professor Bartholet once championed interracial adoption as a means of reclaiming children from foster care.330 The fact is that black American children experience lower rates of adoption from foster care than other races and age out disproportionately. 331 The United States foster care system is home to 402,378 children, including 101,840 children who currently await adoption.332 Although blacks make up only 14 percent of the total United States population,333 black children are disproportionally

324. Glaser, supra note 18 (citing Emory University’s Fetal Alcohol Center Director Claire Coles); Dorow, supra note 241, at 71; see supra notes 312–17 and accompanying text.

325. JOYCE, supra note 16, at 235; see also Gossett, supra note 173, at 858–62 (explaining how Angelina Jolie’s international adoptions inspired emulation and influenced current attitudes towards international adoptions).

326. Morrison, supra note 291, at 179 (citing telephone interview with University of Texas Professor and Associate Dean of Research Ruth G. McRoy).

327. Glaser, supra note 18 (quoting international adoption attorney Steven Kirsh).

328. Goodwin, supra note 1, at 8; Ko, supra note 16.

329. See Perry, supra note 133, at 82–83 (observing that even as advocates push for less regulation to allow more international adoptions, black American children are languishing in foster care and aging out at increased rates).

330. See supra notes 155–58 and accompanying text.


overrepresented in foster care in nearly every state in the nation and remain in foster care longer than children of other races. \textsuperscript{334}

Further, approximately 20,000 children emancipate each year from foster care unadopted. \textsuperscript{335} Even as recent headlines tout that the United States foster care population is shrinking, the number of children who age out of the system has steadily increased, from 3.1 percent in 1998 to the current rate of 10 percent. \textsuperscript{336} For example, in Delaware, a state with a total black population of just over 20 percent, 56.7 percent of the children aging out of foster care were black. \textsuperscript{337} Of those that age out of the system, many are unlikely to graduate high school or attain a college degree. \textsuperscript{338} Most face dismal futures of incarcerations, unplanned pregnancies, and homelessness. \textsuperscript{339} A recent study showed population stands at thirteen percent. \textit{Id.}


\textsuperscript{335}. 2014 AFCARS Report, supra note 10, at 3 (showing 23,090 children aged out of foster care in 2013).

\textsuperscript{336}. \textit{Id.; see also} \textsc{The Pew Charitable Trusts, Time for Reform: Aging Out and On Their Own; More Teens Leaving Foster Care Without a Permanent Family} 1 (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/Kids_are_Waiting_TimeforReform0307.pdf.


\textsuperscript{339}. \textit{Id.; Sara McCarthy & Mark Gladstone, Cal. Senate Office of Research, Policy Matters} 7–8 (2011), available at http://www.sor.govoffice3.com/vertical/Sites/%7B3BD1595-792B-4D20-8D44-626EF05648C7%7D/uploads/Foster_Care_PDF_12-8-11.pdf. The California Senate Office of Research surveyed the California prison population and found that blacks made up the largest percentage of those who had previously been in foster care, even though blacks account for only six percent of the state’s population. \textit{Id.}; Dan Walters,
that, “on average, for every young person who ages out of foster care, taxpayers and communities pay $300,000 in social costs like public assistance, incarceration, and lost wages to a community over that person’s lifetime . . . almost $8 billion in social costs to the United States every year.”

B. The Exportation of Black American Children

Even as international adoption proponents suggest that wealthy nations like the United States have the means to help children in underdeveloped countries through international adoption, many are unaware that the United States is also shipping its children abroad for adoption. Most of the children are black or biracial, and most are being sent to Canada, although recent years have seen an increase in children being sent to the Netherlands and Ireland. Many are private adoptions; adoption agencies also advertise programs specifically geared to the foreign adoption of children from U.S. foster care, noting that foreign parents will have an easier time adopting “children who are not Caucasian.” It is a trend that is not highlighted, with some fearing that drawing attention to the fact that black children are being adopted by white foreigners will trigger the same backlash that happened with NABSW and transracial adoption in the 1970s.

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344. Howe, supra note 1, at 88 (citing Ruth-Arlene W. Howe, Redefining the Transracial Adoption Controversy, 2 DUKE J. GENDER L. & POLY 131 (Spring 1995)); Sheila M. Poole, Canadians Look South to Adopt Black Kids, ATLANTA J.-CONST. (Aug. 24, 2004). According to Holt International Children’s Service
Official records show that 446 American children have been adopted abroad since the United States ratified the Hague Convention in 2008.345 Before then, the federal government did not track the number of American children adopted internationally,346 but investigative reports discovered that the United States was sending hundreds of children to Canada.347 Because the Hague’s subsidiarity principle requires that every effort be made to place children domestically before resort to international adoption, it was expected that it would be harder to place American children abroad when the regulations were finally implemented.348 But official State Department figures show that the number of American children sent internationally for adoption has

spokeswoman, Susan Soonkeum Cox, “They are not in the sunshine.” Glaser, supra note 18.


346. Glaser, supra note 18 (citing former National Council for Adoption President Tom Atwood and U.S. Department of State spokeswoman Kelly Shannon); Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 F. REG. 54064 (proposed Sept. 15, 2003). It was not until the Hague Convention was ratified and the central adoption authority was created, that the State Department was directed to establish a case registry and report each child that was sent or received through intercountry adoption, whether from a Convention country or not. IAA, § 102(e), 114 Stat. 828; 104(b)(2), 114 Stat. 829 (Oct. 6, 2000) (codified as 42 U.S.C. § 14914(b)(2)).


348. O’Neill, supra note 8. As a result, parents from Europe and Canada adopted a large number of American black children just prior to 2008 in a rush to adopt before “the gates shut.” Id.
actually increased nearly 300 percent in the years since Hague ratification. 349 Other countries report that the increase is closer to 1,000 percent. 350 According to Prof. Peter Selman, international adoption expert and statistical adviser to the Hague Convention, receiving countries report a much higher number of American children than the United States claims it sends, suggesting that the number of minority children sent abroad is underreported. 351

For example, official United States reports show that Canada has received only 179 American children since ratification. 352 However, Canada’s central authority reports that it received 189 children from the United States in 2008, 253 children in 2009, and 220 children in 2011, a total of 662 children in just those three years, more than triple the reported six-year total of 179 children the United States claims it sent to Canada since 2008. 353 Likewise, the United States reports that it sent 180 American children to the Netherlands in the last six years. 354 Yet, the central

349. See infra notes 352–56.
350. Peter Selman, Address at Pepperdine Law School, Nootbaar Institute on Intercountry Adoption: Orphan Rescue or Child Trafficking? Adoption (Feb. 8, 2013) [hereinafter Selman, Pepperdine Address].
351. Id.
353. Selman, Pepperdine Address, supra note 350.
authority of the Netherlands reports that it received fifty-six children from the United States in 2008, thirty-four children in 2009, and forty-three in 2011, a total of 133 children in just those three years and more than double the amount claimed by the United States.355 Similarly, Ireland reports receiving more American children than the number officially reported by the United States.356 As Professor Selman notes, it raises questions as to why the numbers are being underreported.357

Although the actual outbound numbers, by any calculation, are a fraction of the incoming number of children, the question remains why the United States, one of the more wealthy nations in the world, allows the intercountry adoption of its minority children.358 It is ironic, given the United States’ position as one of the wealthiest nations in the world and its presumed commitment to domestic placement, that any of America’s black children can only find a home abroad. The United States certainly does not fit the typical profile of a sending country. “The nations that send children abroad for adoption are generally Third World countries convulsed by poverty and violence,” says Professor Bartholet.359 Twenty years ago, she suggested that:

[s]ending children abroad for adoption tends to highlight rather than hide the fact that there are problems at home. Indeed, opposition to foreign adoption is based in large part on embarrassment within the sending countries over having their domestic problems revealed by this public

355. Selman, Pepperdine Address, supra note 350.
358. The Adoption Authority of Ireland has raised concerns that adoptions from the United States might not satisfy Hague Convention requirements, particularly that the subsidiarity principle is not being followed. Adopting from the USA, ADOPTION AUTHORITY IR. (Oct. 20, 2011), http://www.aai.gov.ie/index.php/hague-countries/florida-usa.html (referencing Ireland’s Adoption Act 2010).
359. BARTHOLET, FAMILY BONDS, supra note 4, at 45. As one professional summarized, it is “an embarrassment . . . that we cannot place our own children.” See Stahl, supra note 347.
confession of inability to take care of their own children.360

Racism is cited as the main reason that children in private adoptions are sent overseas, with some believing black or bi-racial children would be discriminated against in this country because of their race.361 It is prevalent enough to lead Adam Pertman, former Executive Director of the Evan B. Donaldson Adoption Institute, to say, “In the United States, as much as Americans want to believe it’s not true, we are still a country where there is at least some degree of racial prejudice.”362 “At the very least,” says one adoption professional, “the tiny exodus raises provocative questions in a nation used to seeing itself as a haven for international adoptees. Americans adopt children from other countries because of war, famine or because they are boarded in orphanages. Why would we be exporting our kids?”363 It cannot be said that there are no available homes here, not when thousands of children are being brought into the country for adoption.

CONCLUSION

Decades ago, scholars decried a system that placed a premium on white infants and thus reduced black children to a lesser value.364 While the “best interests of children” should “always prevail over the special interests of the adults seeking to adopt them,”365 that standard cannot but lose some of its meaning when a category of children is systematically devalued based solely on skin color. As one scholar noted, “If U.S. adoptions were primarily focused on child welfare and charity, rather than adult need and desire, the costs associated with adopting white children would not exceed that of black children,” and many more American children would find homes.366 And, whether the children are being imported into the country or exported out of it, the reality is that black children are “still commodities to be purchased and

360. BARTHOLET, FAMILY BONDS, supra note 4, at 152.
361. Id. As told by one birth mother, “[t]here’s too much prejudice over here.” See Brown, supra note 342.
363. O’Neill, supra note 8 (quoting Roots Adoption Agency CEO Toni Oliver).
364. Perry, supra note 133, at 40–41.
365. Goodwin, supra note 1, at 10.
366. Id. at 8.
sold in a white-controlled marketplace.”

Some adoption professionals have gone as far as to call the entire international adoption process “covert racism,” claiming that black families within the United States would like to adopt, but are once again left out of a process very much dominated by whites. And the debate boils down to whether adoption is really about the best interests of the child, “or is instead about the right of white people to parent whichever children they choose.”

Exactly whose rights and which homes are being championed?

Professor Ronald Dworkin once wrote that a government must “show equal concern for the fate” of all its citizens, noting that “it is important, from an objective point of view, that human lives be successful rather than wasted . . . .” Black children in the American foster care system should not have to disproportionately age out because there are no available homes for them in this country. Nor should the United States, once a haven for discarded children, be sending its black children abroad for adoption, then replacing them with children—of any color—from other nations.

The United States government should not be pushing legislation like the Children in Families First Act that acts to facilitate even more international adoptions to the detriment of children in this nation. As a matter of public policy, the United States should abolish the current two-tiered system and not allow international adoptions from non-Hague countries. Further, as a Hague member, the United States should enforce for all adoptions the Hague Convention’s proviso that allows international adoption only if all avenues for intra-country adoption have been exhausted and there are no children available for adoption within the United States. That means, consistent with the Hague’s subsidiarity requirement, the United States should not allow any

367. Perry, supra note 133, at 55.
368. O’Neill, supra note 8 (quoting Roots Adoption Agency CEO Toni Oliver).
369. Perry, supra note 133, at 107.
371. “As a country, we should examine if we’re doing everything we can to find homes for these children here.” Glaser, supra note 18 (quoting Adam Pertman). To encourage the adoption of United States-born children, one scholar proposed legislation that requires applicants to first seek to adopt a U.S. born child before being allowed to adopt internationally. Maldonado, supra note 9, at 1472–78.
international adoptions—whether to or from the United States—until all domestic placement efforts have been exhausted.

Structural racism does not need a bad actor; instead it is facilitated by actions that are “not directly discriminatory but [have] a discriminatory effect, whether intended or not.”372 It is displayed in an adoption system that places a monetary premium on all other children but black American children and sends black children abroad for adoption so they can find a home outside of foster care. It is a problem that cannot be covered up with color-blind rhetoric and accepted post-racial theory, or even by bringing in children of color from other nations. It is time to take off the blinders. “[W]e have to develop a global consciousness about what it is we’re doing,” says Richard Sullivan, an associate professor of social work and family studies at the University of British Columbia in Vancouver, while asking, “Why are kids in our own countries not moving towards permanency? . . . Let’s be more honest about what this really is.”373 Otherwise, the status quo will continue and “[t]he problem of the twenty-first century will be the problem of the color line. . . . By any standard of measurement or evaluation, the problem has not been solved in the twentieth century and thus becomes a part of the legacy and burden of the next century.”374

373. Glaser, supra note 18.
374. Patterson, supra note 21, at xxix (quoting John Hope Franklin, The Color Line: Legacy for the Twenty-First Century 5 (1993)).