REMEMBERING WHO FOSTER CARE IS FOR: PUBLIC ACCOMMODATION AND OTHER MISCONCEPTIONS AND MISSED OPPORTUNITIES IN *FULTON V. CITY OF PHILADELPHIA*

Chris Gottlieb†

The Supreme Court's opinion in Fulton v. City of Philadelphia*, which held that a Catholic foster care agency could refuse to accept gay foster parents, and virtually all commentary on the case, are flawed by a profound misunderstanding of key aspects of the foster care system. The case's role in the broader culture war between religious rights advocates and those supporting LGBTQ equality has led advocates on both sides to use* Fulton *for their own purposes at the expense of the families the foster care system is intended to serve.*

This Article explains that the most important constitutional interests at stake in the foster care context are the right of parents to raise their children and the right of children to maintain their family ties when they are placed in foster care. Ignoring these rights led the Fulton *Court and the litigants on both sides to misunderstand how foster care is a public accommodation (and therefore subject to certain nondiscrimination requirements). Properly understood, foster care is a public accommodation for foster children and—less obviously, but as importantly—their parents. The interests of potential foster parents are subordinate to the preeminent goal of the foster care system, which is maintaining family relationships whenever safely possible. Maintaining those relationships offers strong reason to allow foster care agencies to "discriminate" when they place a child in a foster home in the sense of selecting a foster home that will support the family, community, and cultural ties of the child.*

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† Director, NYU School of Law Family Defense Clinic. My thanks to Michael Bass, Anna Daniszewski, Abby Lederman, and Mariela Mannion for helpful research assistance. As the family defense community prepares to undergo a bittersweet transition, I would like to acknowledge how lucky I feel that—like most family defenders of my generation (and of several others)—my understanding of the constitutional rights discussed in this piece was shaped and inspired by Marty Guggenheim.

As an exception to the longstanding constitutional commitment to keep government out of the business of child rearing, foster care is a site of grave danger of abuse of government power. No credible analysis of the constitutional interests at stake in the foster care system can be undertaken without considering the United States' shameful history of violating the rights of marginalized families and illegally separating children from their parents and communities. This Article situates Fulton *in that historical context and argues that, counterintuitively, conservatives seeking to protect religious minorities and progressives fighting structural racism in the child welfare system have a strong common interest in encouraging foster care placements that preserve family, community, and cultural bonds.*

TABLE OF CONTENTS

INTRODUCTION

The Supreme Court case *Fulton v. City of Philadelphia*[1] has generated much heat over the rights of potential foster and adoptive parents. The Left says that LGBTQ couples have the right to be certified as foster or adoptive parents by the agency of their choice.[2] The Right says that foster and adoptive parents have the right to work with religious agencies that discriminate on the basis of sexual orientation.[3] The debate is striking for the extent of misunderstanding it reveals about the child welfare system. Partisans on both sides and the Court entirely miss that foster parents' rights in this context are entirely secondary to the rights of those the foster care system is meant to serve. Foster care is not a public accommodation offered to potential foster and adoptive parents. Foster care is not *for* foster parents. It is a public accommodation for foster children and—less obviously, but as importantly—their parents.

The primary goal of the American child welfare system, as articulated in federal statutes, state statutes in every state, and extensive case law, is to protect children from harm by supporting their safety while they remain with their parents whenever possible and, if they need to be

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1 141 S. Ct. 1868 (2021).

2 *See, e.g.*, James Esseks, Opinion, *The Next Big Case on LGBTQ Rights Is Already Before the Supreme Court*, WASH. POST (Oct. 9, 2020, 1:53 PM), https://www.washingtonpost.com/opinions/2020/10/09/next-big-case-lgbtq-rights-is-already-before-supreme-court [https://perma.cc/MWE8-QYAM]; Isaac Green & Malina Simard-Halm, *Our Parents Are Gay. Are Our Families Good Enough for the Supreme Court?*, SLATE (Nov. 3, 2020, 11:40 AM), https://slate.com/news-and-politics/2020/11/gay-parents-lgbtq-adoption-supreme-court.html [https://perma.cc/ER2C-WQEB]; Lindsay Mahowald & Caroline Medina, *Supreme Court Case Could Give Taxpayer-Funded Service Providers a Broad License to Discriminate Against LGBTQ People*, CTR. FOR AM. PROG. (Oct. 20, 2020), https://www.americanprogress.org/issues/lgbtq-rights/news/2020/10/20/491930/supreme-court-case-give-taxpayer-funded-service-providers-broad-license-discriminate-lgbtq-people [https://perma.cc/KV8Z-3ZHN] ("Should the Supreme Court side with Catholic Social Services, it would be a vital blow to LGBTQ individuals seeking government services.").

3 *See, e.g.*, Carrie Campbell Severino, *Fulton Extends the Court's Record of Religious-Liberty Victories*, NAT'L REV. (June 18, 2021, 12:41 PM), https://www.nationalreview.com/bench-memos/fulton-extends-the-courts-record-of-religious-liberty-victories [https://perma.cc/DB9N-HSWT]; Asma T. Uddin & Howard Slugh, Opinion, *A Way for the Supreme Court to Protect Religious Minorities*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/opinion/supreme-court-religion.html?smid=url-share [https://perma.cc/3TY5-QJES] ("Fulton presents an opportunity for the Supreme Court to reverse Smith and . . . . go a long way to increase constitutional protections for religious believers . . .").

separated, to proactively work to return them to their families as quickly as safely possible.[4] The right of parents to raise their children is one of the oldest and least contested rights protected by the Constitution, and the authority of government to intervene in parent-children relationships is strictly limited.[5] The jurisprudential origins stress that parents' rights to direct their children's upbringing is critical to the Constitution's commitment to protecting pluralism.[6] Many would persuasively argue that these rights belong not only to parents but also to their children, who have the right to be raised by their parents whenever safely possible and, when not safely possible, to remain connected to their families and communities of origin.[7]

Given that the foster care system is supposed to be designed as a system of temporary placement for children with the aim of reuniting families whenever possible,[8] it should be highly concerning that the foster children's parents were entirely absent from the *Fulton* lawsuit. This omission is a sign that many misunderstand the foster care system's preeminent purpose and undervalue the parent-child relationships of the low-income families who overpopulate that system. It is, of course, not a tangential point that these families are disproportionately families of color.[9] It is unimaginable that these families would be treated as they are if the system interacted primarily with more privileged communities. Any responsible analysis of the competing interests at stake in foster care must grapple with the United States' disturbing history of violating the rights of families from marginalized communities and illegally separating them.[10]

The needs of foster children were discussed by the *Fulton* parties (and numerous amici), but the discussion was striking for what it left out. The discussion of their interests talked about the children as if they come to foster care as free-floating individuals unconnected to families or communities. At times, the rhetoric surrounding the case even veered offensively toward the suggestion that the foster care system exists to provide children to couples seeking to adopt.[11]

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4 *See* discussion *infra* Section II.A.

5 *See* discussion *infra* Section II.B.3.c.

6 *Id.*

7 *See infra* notes 164–66 and accompanying text.

8 CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, REUNIFICATION: BRINGING YOUR CHILDREN HOME FROM FOSTER CARE 2 (2016), https://www.childwelfare.gov/pubPDFs/reunification.pdf [https://perma.cc/KA32-5WT6].

9 *See* discussion *infra* Sections II.B.4–II.B.5.

10 *Id.*

11 *See, e.g.*, Brief of Former Service Secretaries and the Modern Military Ass'n of America as Amici Curiae Supporting Respondents at 13–14, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) ("Because building a fulfilling family life is vital to service members' success,

Notably, the most important case about the constitutional constraints on religiously-based foster care agencies—the 1970s class action suit *Wilder v. Bernstein*[12]—was absent from the discussion around *Fulton* and is not mentioned once in the 110 pages of opinions issued in the case. And the decision in *Fulton* stood in striking contrast to the only other case in which the Supreme Court has discussed a claim of foster parents' rights. The decision in *Smith v. Organization of Foster Families for Equality and Reform* (*OFFER*)[13] provided a robust description of the constitutional issues at the heart of foster care, centered the importance of family integrity, and considered the complex policy choices underlying the foster care system. In particular, the *OFFER* Court was concerned about the dangers inherent in the use of state power to separate families.[14] *Fulton*, in contrast, said little about the foster care context of the case, and nothing aimed at stanching the dangers of abuse of state power with respect to the families the foster care system serves.

In the end, the Court dodged for now some of the tougher questions raised in *Fulton*, but as Justice Alito explains in his concurrence, it is not only a foregone conclusion that the question of whether a government contractor can violate an antidiscrimination law will come back to the Court, it may well come back with the same litigants.[15] For that reason alone, it is important to understand the failure of the discussion surrounding *Fulton* to grasp the essential character of foster care and the rights of the families it is meant to serve. And regardless of the future of these particular litigants, the case has highlighted the need to clarify the constitutional principles at stake in the regulation of foster care. Foster care is life-altering to the children who enter it and to the parents left behind. It is also a critical touchpoint for broader constitutional limits on government authority to intervene in intimate relationships.

This Article will argue that when the child welfare system separates children from their parents, there are strong interests that require maintaining the family, community, and cultural ties of the children who enter foster care. Those interests, particularly viewed in light of the past

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discrimination against LGBTQ families in the provision of adoption and foster care services undermines . . . military families who seek to grow their families through such services."); *see also* Brief of the American Psychological Ass'n, American Academy of Pediatrics, American Medical Ass'n, and American Psychiatric Ass'n as Amici Curiae in Support of Respondents at 13, *Fulton*, 141 S. Ct. 1868 (No. 19-123) ("Stigma in the public child welfare system adversely affects the physical and psychological well-being of sexual minorities looking to adopt or foster . . .").

12 Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988).

13 Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816 (1977).

14 *Id.*; *see also* discussion *infra* Part IV.

15 *Fulton*, 141 S. Ct. at 1887–88 (Alito, J., concurring) (expressing concern that, if the City of Philadelphia draws a new contract with CSS, "today's decision will vanish[,] the parties will be back where they started[,] . . . and CSS will file a new petition in this Court challenging *Smith*").

and current structural racism of the foster care system, provide strong justifications for "discriminating" in the selection of foster parents in the sense of preferring foster parents from the communities from which foster children come. These interests may or may not be dispositive when weighed against competing concerns, but they surely should be considered in formulating child welfare law and policy. Indeed, the justifications for maintaining the community and cultural ties of the children who enter foster care rise to the level of constitutional interests and lead to what may seem a counterintuitive take on the rights at issue in *Fulton*.

Little attention has been paid to how dramatic a shift occurred among progressive advocates in the years between *Employment Division, Department of Human Resources of Oregon v. Smith* (*Smith*),[16] where they, along with the leading liberals on the Court, sought to defend the rights of religious minorities, and *Fulton*, where progressives favored imposing a majoritarian rule on a religious minority.[17] That shift may well be justified, but its consequences should be understood. Failing to consider the consequences of this shift as they affect foster care led progressive advocates to fail to recognize the tensions between their position in *Fulton* and the most compelling contemporary progressive critiques of foster care. As a result, it went unnoticed that religious minorities and those fighting structural racism in the child welfare system may share a strong interest in encouraging diversity among (rather than within) foster care agencies.

This Article will revisit and sharpen the preeminent concerns and constitutional commitments that should guide any discussion of foster care in the Supreme Court. It will proceed in five parts. Part I situates *Fulton* with respect to the foster care system. Part II discusses several critical aspects of foster care that were ignored in discussions of *Fulton*, including the system's overarching goals as they relate to the role of foster and adoptive parents, the fundamental rights of parents to raise their children, and the related constitutional interests in pluralism and privatized parenting. This Part explains that these rights and interests cannot be meaningfully protected without situating them in the history of the American child welfare system and understanding the specific, well-documented dangers that have threatened these rights and interests. Part III discusses what the *Fulton* Court got right and what it got wrong in its analysis of foster care as a public accommodation, and the relevance

16 Emp. Div. Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

17 *But see* Ross Douthat, Opinion, *When Politics Isn't About Principle*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/2021/09/14/opinion/vaccine-politics.html [https://perma.cc/GZ6Y-5ZVU] (discussing the switch in partisan positions on religious liberty since *Smith* was decided).

of the seminal foster care case *Wilder v. Bernstein* to that analysis. Part IV discusses the striking lack of nuance in *Fulton*'s discussion of foster care and the dangers of the narrative choices of the decision, particularly as contrasted to the rich discussion of foster care in *OFFER*. Part V argues that the constitutional interest in pluralism at stake in the foster care arena raises several questions that were ignored in *Fulton* by the litigants, amici, and the Court. It explains how recent critiques of the child welfare system underscore the importance of centering children's familial and community attachments and argues that those who oppose exceptions to antidiscrimination requirements in the foster care context should take care not to create unjustified barriers to foster care services that serve these progressive values. This Part concludes by explaining that another case involving discrimination by foster care agencies would not be an appropriate vehicle for revisiting the questions of whether *Smith* should be overturned and, if it is overturned, what should replace it.

Whatever other roles *Fulton* plays in constitutional jurisprudence, it is a case about foster care, and foster care deserved more attention in the decision and the coverage of the decision than it received.

I. *FULTON* AND FOSTER CARE

Fulton v. City of Philadelphia is a case enmeshed in the foster care system, though its motivations were clearly generated outside that system. It was well understood by the litigants and court observers that *Fulton* was a single battle in a broader cultural war over how to balance LGBTQ rights against claims by religious minorities of a right to refuse to treat LGBTQ individuals equally with others.[18]

The lawsuit was filed against the City of Philadelphia by Catholic Social Services (CSS) and three foster parents, who claimed the City had violated their First Amendment rights when it decided to stop referring children to CSS's foster care program due to its policy of not certifying same-sex couples as foster parents.[19] CSS was one of numerous private foster care agencies with which Philadelphia contracted to provide foster care for children who had been removed from their parents by state officials. It was undisputed that no same-sex couple had been turned down by CSS.[20] The controversy that led to the case began with a 2018 article in the *Philadelphia Inquirer*, which reported that two of Philadelphia's contract agencies had policies of refusing to certify same-sex couples as foster parents.[21] In the wake of the article, the City closed down referrals of foster children to those two agencies and announced that it would not renew contracts with them unless they ended their discriminatory policy.[22] One of those agencies, CSS, and three foster parents who had been certified by CSS sought a federal injunction directing the City to restart referrals of foster children to the agency, while allowing it to continue to refuse to certify same-sex couples. The plaintiffs

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18 *See, e.g.*, Andrew R. Lewis, *The Supreme Court Handed Conservatives a Narrow Religious Freedom Victory in* Fulton v. City of Philadelphia, WASH. POST (June 18, 2021, 6:00 AM), https://www.washingtonpost.com/politics/2021/06/18/supreme-court-handed-conservatives-narrow-religious-freedom-victory-fulton-v-city-philadelphia [https://perma.cc/LK4C-DHAN]; Adam Liptak, *Supreme Court Backs Catholic Agency in Case on Gay Rights and Foster Care*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/17/us/supreme-court-gay-rights-foster-care.html [https://perma.cc/B5FG-654V] ("The decision, in the latest clash between antidiscrimination principles and claims of conscience, was a setback for gay rights and further evidence that religious groups almost always prevail in the current court."); Ariane de Vogue, *Supreme Court Rules in Favor of Catholic Foster Care Agency That Refused to Work with Same-Sex Couples*, CNN (June 17, 2021, 1:44 PM), https://www.cnn.com/2021/06/17/politics/supreme-court-fulton/index.html [https://perma.cc/QPU7-GYJB] ("Today's decision is another victory for religious groups, but not the major one that they sought . . ." (quoting Professor Steve Vladeck)).

19 *Fulton*, 141 S. Ct. at 1876.

20 *Id.* at 1875.

21 Julia Terruso, *Two Foster Agencies in Philly Won't Place Kids with LGBTQ People*, PHILA. INQUIRER (Mar. 13, 2018), https://www.inquirer.com/philly/news/foster-adoption-lgbtq-gay-same-sex-philly-bethany-archdiocese-20180313.html [https://perma.cc/63U5-USDY].

22 *See Fulton*, 141 S. Ct. at 1875–76.

asserted that refusing to certify same-sex couples was an exercise of religious liberty based on the religious belief that marriage is between a man and a woman. They argued that it is a violation of free exercise to deny them their longstanding role as foster care providers for exercising their religion in this way and a violation of their free speech to condition their ability to provide foster care on making what they viewed as a statement of endorsement of same-sex couples.[23]

The district court denied preliminary relief, holding that the City had acted lawfully under *Smith*, which allows infringement on religious exercise if the infringement results from a neutral and generally applicable law; the Third Circuit affirmed.[24] The Supreme Court granted certiorari on the questions of whether the City's actions were allowed under *Smith* and whether *Smith* should be reversed.[25]

Many expected the Court to use *Fulton* as the vehicle to overturn *Smith* and expand the realm of cases in which strict scrutiny is applied to claims of religious discrimination—and that certainly was the hope of CSS[26] and its supporters.[27] The Court, however, declined to take that step, finding it did not need to reach the question of whether to overturn *Smith* because it held that the antidiscrimination provisions the City applied to CSS were not generally applicable, making *Smith* inapplicable.[28] Without *Smith* governing, strict scrutiny applied, and the Court held it was an unconstitutional constraint of CSS's religious liberty to force them to choose between keeping their policy about same-sex foster parents or keeping their foster care program.[29]

In declining to revisit *Smith*, the Court indicated it was likely to return to the question soon, with three Justices saying they were ready to do so and two others expressing skepticism that *Smith* was rightly

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23 *Id.* at 1876.

24 Fulton v. City of Philadelphia, 320 F. Supp. 3d 661 (2018), *aff'd*, 922 F.3d 140 (2019), *rev'd*, 141 S. Ct. 1868 (2021).

25 *Fulton*, 141 S. Ct. at 1876.

26 *See* Brief for Petitioners at 37–52, *Fulton*, 141 S. Ct. 1868 (No. 19-123) (devoting nearly half of their arguments to the shortcomings of *Smith*).

27 *See, e.g.*, Brief of Fifteen Pennsylvania State Senators, Amici Curiae, Supporting Petitioners, *Fulton*, 141 S. Ct. 1868 (No. 19-123); Brief of Amici Curiae Former Foster Children and Foster/Adoptive Parents and the Catholic Ass'n Foundation in Support of Petitioners at 32 n.14, *Fulton*, 141 S. Ct. 1868 (No. 19-123) ("This Court should revisit [*Smith*] and replace it with a clear standard more protective of free exercise." (citation omitted)); Brief of Amicus Curiae the Robertson Center for Constitutional Law in Support of Petitioners at 3, *Fulton*, 141 S. Ct. 1868 (No. 19-123) ("Given the widespread criticism—and outright rejection—of *Smith* from so many quarters. . . . *Smith* should find no refuge in *stare decisis*.").

28 *Fulton*, 141 S. Ct. at 1877.

29 *Id.* at 1881–82.

decided.[30] There is little doubt that another challenge to *Smith* is not far in the future.[31] In his concurrence, Justice Alito anticipated that the question may even be brought back to the Court again by the same *Fulton* litigants because the peripheral issues that allowed the Court to avoid the central *Smith* question could be shed.[32]

In putting off the question of reconsidering *Smith*, the Court condemned *Fulton* to having a relatively unimportant legacy; in all likelihood, the case's greatest significance will be as a steppingstone on the path to the Court's ultimate post-*Smith* approach to free exercise. Yet, despite its likely long-term insignificance, *Fulton* offers an important opportunity to consider the profound constitutional aspects of foster care from the highest vantage point because so few cases bring the subject to the Supreme Court.[33] Unfortunately, upon examination, most of what the case demonstrates is widespread indifference to and misunderstanding of the constitutional concerns that arise when the State puts children in foster care. These issues are well worth attention whether or not they come to the fore in a *Fulton II* as predicted by Justice Alito. Understanding the constitutional issues that are inevitably at play in the foster care context would be critical to a *Fulton II* and might well, as discussed below, provide strong reason to avoid a *Fulton II*.[34] As

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30 Justices Alito and Gorsuch expressed their willingness to overturn *Smith*; Justice Thomas joined in both opinions. *See id.* at 1888 (Alito, J., concurring) ("We should reconsider *Smith* without further delay . . . [as] *Smith*'s interpretation [of the Free Exercise Clause] is hard to defend."); *Id.* at 1931 (Gorsuch, J., concurring) (arguing that the Court should revisit *Smith* since "[i]t's not as if we don't know the right answer"). Justice Barrett dedicated her concurrence to the competing interests in the question of revisiting *Smith* but did not advocate for its reversal outright. *Id.* at 1882 (Barrett, J., concurring) ("While history looms large in this debate, I find the historical record more silent than supportive on the question . . . . In my view, the textual and structural arguments against *Smith* are more compelling.").

31 See the 2018 case *Masterpiece Cakeshop v. Colorado*, where the question was whether a baker acting on religious beliefs could refuse to bake a custom wedding cake for a gay wedding in violation of an antidiscrimination ordinance. There, too, the Court sidestepped the central question of whether the Constitution creates a religious exception to generally applicable antidiscrimination laws. 138 S. Ct. 1719, 1727–28 (2018) (acknowledging that if the religious exemption to public accommodations antidiscrimination laws "were not confined," the result would be "a community-wide stigma inconsistent with the history and dynamics of civil rights laws," but ultimately concluding that, in the case at bar, "a narrower issue is presented"). While declining to reach a holding on the larger question, the Court implied it would be likely to return. *See id.* at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts . . .").

32 *See supra* note 15 and accompanying text.

33 The Supreme Court has only decided five cases that touch at all on foster care, even though foster care is one of the most awesome uses of state power in the realm of a fundamental right. *See* M.L.B. v. S.L.J., 519 U.S. 102 (1996); Santosky v. Kramer, 455 U.S. 745 (1982); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981); Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816 (1977); Stanley v. Illinois, 405 U.S. 645 (1972).

34 *See infra* Part V.

importantly, these constitutional issues are relevant to decisions affecting children and families made by executive branch officials and family and dependency courts around the country every day.

Before turning to the specifics of what the *Fulton* Court and litigants said—and notably did not say—about foster care, it is useful to start by reviewing some basic, and yet too-often ignored, aspects of the purpose and structure of the foster care system and the profound constitutional issues that arise when the government separates children from their parents.

II. THE RELEVANT CONTEXT OF THE AMERICAN FOSTER CARE SYSTEM

A. *The Primary Goal of the Foster Care System Is Family Reunification*

The American child welfare system has grown dramatically in the past fifty years. Though the number has come down from its peak, there are over 420,000 children in foster care in the United States today.[35] This number represents the most visible part of the child welfare system but only a fraction of the number of children and families who interact with this system each year. Over a third of American children are subjected to child maltreatment investigations.[36] The vast majority of the families involved are low-income, with Black and Native American families significantly overrepresented.[37] A shocking 53% of Black children's parents are investigated by child welfare officials at some point.[38]

The primary articulated goals of the modern American child welfare system are to protect children from abuse and neglect and, whenever possible, to do so by proactively providing support that will allow them to remain safely with their families. These goals were enshrined in the first federal child welfare legislation, which stated in the 1970s that "national policy should strengthen families to prevent child abuse and neglect, provide support for needed services to prevent the unnecessary

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35 CHILD.'S BUREAU, THE AFCARS REPORT, NO. 27 (2020) [hereinafter AFCARS 2020], https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [https://perma.cc/AV8P-RN3A]; *see also* CHILD.'S BUREAU, THE AFCARS REPORT, NO. 12 (2006) [hereinafter AFCARS 2006], https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport12.pdf [https://perma.cc/2G3U-M3CM] (reporting 567,000 children in foster care on September 30, 1999).

36 Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among U.S. Children*, 107 AM. J. PUB. HEALTH 274, 278 (2017).

37 AFCARS 2020, *supra* note 35, at 2.

38 Kim, Wildeman, Jonson-Reid & Drake, *supra* note 36.

removal of children from families, and promote the reunification of families where appropriate."[39] They were reiterated when Congress enacted the Adoption Assistance and Child Welfare Act of 1980,[40] which required as a condition of federal foster care funds that states provide "reasonable efforts . . . to prevent or eliminate the need for removal of the child from his home, and . . . to make it possible for the child to return to his home."[41] Even when Congress enacted the Adoption and Safe Families Act of 1997, which shifted policy toward increasing adoptions of foster children, it reiterated that children should be kept with, or returned to, their parents when safely possible.[42] In 2018, Congress further emphasized the goal of family preservation by passing the Families First Act, which provides additional funding for services aimed at keeping children with their families.[43] Every state has passed implementing legislation that embeds these goals in state law.[44]

Foster care is intended to be temporary, and most often, it is relatively short-term, with 40% of children who enter foster care leaving in less than a year and roughly 70% leaving in under two years.[45]

In order to prevent children from lingering in foster care, federal law requires that courts identify and regularly review a "permanency plan" (the exit goal) for each case.[46] For the majority of children in foster care,

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39 Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 5 (1974) (codified at 42 U.S.C. § 5101 note (Congressional Findings (10)).

40 Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101, 94 Stat. 501, 503 (codified at 42 U.S.C. § 670).

41 *Id.*

42 *See* 42 U.S.C. § 671(a)(15)(B) (expressing that, with limited exceptions, federal funding for foster care requires that "reasonable efforts shall be made to preserve and reunify families . . . prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and . . . to make it possible for a child to safely return to the child's home").

43 Family First Prevention Services Act, Pub. L. No. 115-123, § 50702, 132 Stat. 64 (2018) ("The purpose of this subtitle is to . . . provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services."); *see also* John Kelly, *A Complete Guide to the Family First Prevention Services Act*, IMPRINT (Feb. 25, 2018, 10:02 PM), https://imprintnews.org/finance-reform/chronicles-complete-guide-family-first-prevention-services-act/30043 [https://perma.cc/ZK8X-CTHC]; Teresa Wiltz, *This New Federal Law Will Change Foster Care as We Know It*, STATELINE (May 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/05/02/this-new-federal-law-will-change-foster-care-as-we-know-it [https://perma.cc/NVZ8-9GTN].

44 *The Child Welfare Placement Continuum: What's Best for Children?*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 3, 2019), https://www.ncsl.org/research/human-services/the-child-welfare-placement-continuum-what-s-best-for-children.aspx [https://perma.cc/9M2L-9PUT].

45 CHILD.'S BUREAU, FOSTER CARE STATISTICS 2, 7 (2021), https://www.childwelfare.gov/pubPDFs/foster.pdf [https://perma.cc/7BHA-7AM4].

46 42 U.S.C. § 671(a)(15).

the permanency goal is reunification with their parents.[47] The federal funding appropriated for foster care is uncapped, but the funding is provided only for cases in which the State made reasonable efforts to avoid the need for removal, and is cut off if, after a child goes into foster care, the State does not make reasonable efforts to achieve the permanency goal.[48] In other words, although there is no limit to the amount of federal funding a state can receive for foster care, it will only receive the funding if it proactively supports family reunification, unless and until a court makes a specific determination to shift away from the preferred goal of reunification.

This policy is consistent with the strong parental rights protections provided by the Constitution[49] but goes well beyond what is constitutionally required; it reflects a considered view that keeping families together is not only a matter of negative rights but a value that should be proactively pursued. As New York's highest court put it: "One of the fundamental values in our society is that which respects and fosters the relationship between parent and child. Thus, our [termination of parental rights] statute reflects a cultural judgment that society should not terminate the parent-child relationship unless it has first attempted to strengthen it."[50] One adoption organization put it succinctly:

> Reunification with birth parents has consistently remained the primary permanency plan for children in foster care. Our child welfare system recognizes that children have a right to be raised in their families of origin if they can be safe in that environment, and designed a system to support that value.[51]

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47 AFCARS 2020, *supra* note 35, at 1.

48 42 U.S.C. § 671(a). There are, however, exceptions: the State continues to be eligible for funding even if it does not make reasonable efforts if the child has faced aggravated circumstances, if the parent has been convicted of a violent offense, or if a parent's rights to a sibling of the child have already been terminated. *Id.*

49 Parents' interest "in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests" protected by the Fourteenth Amendment. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000). Indeed, the Supreme Court *has* declared it "'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to "the companionship, care, custody, and management of his or her children"' is an interest far more precious than any property right." Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)). Moreover, the fundamental liberty interest of parents "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Id.* at 753. As long as "there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds." *Id.* at 766–67.

50 *In re* Leon RR, 48 N.Y.2d 117, 126 (1979).

51 ADOPTUSKIDS, EQUIPPING FOSTER PARENTS TO ACTIVELY SUPPORT REUNIFICATION 1 (2019), https://www.adoptuskids.org/_assets/files/AUSK/Publications/equipping-foster-parents-

This longstanding policy commitment has been buttressed in recent years by empirical evidence of the harms of family separation and foster care[52] and, in particular, by recognition of the profound racial harms of foster care.[53] Studies show that family separation causes trauma[54] and that foster care leads to worse outcomes on virtually every socioeconomic measure.[55] In the wake of renewed attention to racial justice, a stream of political and policy leaders, including, among many others, the Biden Administration, the American Academy of Pediatrics, and leading children's advocacy organizations, have acknowledged that the child welfare system has unnecessarily separated families—Black families in particular—and renewed calls to avoid family separations and more aggressively support reunification.[56]

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to-support-reunification-web508.pdf [https://perma.cc/86WL-9Y28]; *see also* Presidential Proclamation No. 10192, 86 Fed. Reg. 23849 (May 5, 2021), https://www.govinfo.gov/content/pkg/FR-2021-05-05/pdf/2021-09573.pdf [https://perma.cc/QQ7L-NZPJ].

52 *See, e.g.*, Delilah Bruskas & Dale H. Tessin, *Adverse Childhood Experiences and Psychosocial Well-Being of Women Who Were in Foster Care as Children*, 17 PERMANENTE J. 131 (2013); Douglas F. Goldsmith, David Oppenheim & Janine Wanlass, *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 JUV. & FAM. CT. J. 1 (2004); Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS 5 (2016), https://pediatrics.aappublications.org/content/pediatrics/138/5/e20161118.full.pdf [https://perma.cc/HW8B-FHUD]; Eli Hager, *The Hidden Trauma of "Short Stays" in Foster Care*, MARSHALL PROJECT (Feb. 11, 2020, 6:00 AM), https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care [https://perma.cc/7FN4-G4ML].

53 *See, e.g.*, CHILD.'S RIGHTS, FIGHTING INSTITUTIONAL RACISM AT THE FRONT END OF CHILD WELFARE SYSTEMS: A CALL TO ACTION (2021), https://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf?utm_source=dailykos&utm_medium=email&utm_campaign= [https://perma.cc/GF2U-TK4A]; ELISA MINOFF, CTR. FOR THE STUDY OF SOC. POL'Y, ENTANGLED ROOTS: THE ROLE OF RACE IN POLICIES THAT SEPARATE FAMILIES 15–19 (2018), https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf [https://perma.cc/U4AR-MAWT].

54 *See* Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161 (2019).

55 *See* MINOFF, *supra* note 53, at 17; Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007) (finding children who enter foster care to experience higher rates of juvenile delinquency, teen pregnancy, and unemployment than those who are not removed from their parents); M.H. MORTON, A. DWORSKY & G.M. SAMUELS, MISSED OPPORTUNITIES: YOUTH HOMELESSNESS IN AMERICA 10 (2017), https://voicesofyouthcount.org/wp-content/uploads/2017/11/VoYC-National-Estimates-Brief-Chapin-Hall-2017.pdf [https://perma.cc/S2ZS-WQ3E] ("[N]early one-third of youth experiencing homelessness had experiences with foster care . . . .").

56 *See* Press Release, Joseph R. Biden, Jr., *supra* note 51; CHILD.'S RIGHTS, *supra* note 53, at 3 ("[F]or many among the millions who actually experience it, the child welfare system is an entrenched set of government structures designed to reinforce the racist history of oppression and separation of Black families in the United States. That must change." (footnote omitted)); *Final Recommendations*, AM. ACAD. OF PEDIATRICS, https://www.aap.org/en/advocacy/child-welfare-report/final-recommendations [https://perma.cc/MM22-9MBU] (Apr. 16, 2021) (supporting primary prevention services that would "ensure that families can access needed concrete supports

B. *The Role of Foster Parents and Foster Care Agencies in Supporting Foster Children's Familial Bonds*

Because foster care is designed to be temporary, and the favored outcome is reunification of foster children with their parents, foster parents have a specific role and set of obligations related to supporting parent-child bonds and reunification. Even when a foster care case leads to adoption, there are strong arguments that the foster-turned-adoptive parents have obligations to support the child's familial bonds and cultural connections. This Section will discuss three aspects of foster parents' obligations to support the connections children have when they enter foster care: (1) the obligation to actively support family reunification; (2) the obligation to maintain the child's ties to her family of origin after adoption or guardianship is granted to the foster parent; and (3) the obligation to support ties to the child's community of origin after adoption or guardianship is granted to the foster parent.

1. A Key Aspect of the Foster Parent's Role Is to Support Children's Relationships with Their Parents and Actively Work Toward Family Reunification

Foster parents have a highly qualified form of custody that is dramatically different from a parent's legal rights.[57] A foster parent has a contractual relationship with a child welfare agency, and the care that foster parents provide children is subject to extensive regulation and monitoring.[58] Children are typically placed in foster care only if their family home is found to be unsafe.[59] Upon such a finding, courts give

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rather than facing the prospect of unnecessary investigation and a child needlessly entering foster care").

57 The child welfare agency and foster parents have physical custody of foster children but do not have legal custody—this remains with the parents while the child is in foster care. *See Foster Care*, N.Y. STATE UNIFIED CT. SYS., https://ww2.nycourts.gov/courts/5jd/family/fostercare.shtml [https://perma.cc/5PH9-8ARW] ("The agency has physical custody of the child, but the parent continues to have legal rights to the child.").

58 Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 845 (1977) (contrasting the fundamental rights of parents with the "foster family which has its source in state law and contractual arrangements").

59 CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, FACTSHEET: HOW THE CHILD WELFARE SYSTEM WORKS 5–6 (2020), https://www.childwelfare.gov/pubs/factsheets/cpswork [https://perma.cc/6QYG-YL57]. Some foster care placements are made voluntarily or result from the death of parents, but the vast majority of children enter foster care today based on determinations that they were abused or neglected by their parents. *See* Katharine Hill, *Prevalence, Experiences, and Characteristics of Children and Youth Who Enter Foster Care Through Voluntary Placement Agreements*, 74 CHILD. YOUTH SERVS. REV. 62, 64–65 (2017).

child welfare agencies temporary custody of the children, and the agencies contract with adults in the community to take the children into their homes on terms set by the agencies.[60] Before they may be given temporary care of a child in foster care, the adults must be certified as suitable to the task. The certification and supervision of the foster homes is done by government child welfare agencies in some jurisdictions and, in other jurisdictions, by private agencies (such as the agency in Philadelphia, CSS, whose practices were at issue in *Fulton*).[61] Among the many terms of the contractual arrangement are financial payments to foster parents while the child is in their care[62] and, importantly, the obligation to return the child to the agency upon demand.[63]

Under the contracts, foster parents are required to provide safe care that meets the foster children's needs, including their physical, educational, and emotional needs.[64] Typically, supporting the children's connections to their parents is critical to meeting the children's emotional needs.[65]

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60 *See* CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, REUNIFICATION: BRINGING YOUR CHILDREN HOME FROM FOSTER CARE, *supra* note 8, at 2.

61 *See* Natalie Hetro & Sharen Ford, *Understanding the Differences Between State and Private Foster Care Agencies*, FOCUS ON THE FAM. (Feb. 24, 2022), https://www.focusonthefamily.com/pro-life/foster-care-state-vs-private-agencies [https://perma.cc/QYQ9-JRK8]; Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021).

62 Although child welfare agencies generally describe these payments as intended only to meet the child's financial needs, there are few restrictions on how they are spent, and foster parents who foster children who are hard to place receive substantially larger subsidies regardless of whether the children have greater financial needs. It has been persuasively argued that foster care subsidies are more aptly and constructively referred to as pay for caregiving work. *See* Hannah Roman, *Foster Parenting as Work*, 27 YALE J.L. & FEMINISM 179 (2016).

63 *See Org. of Foster Fams.*, 431 U.S. at 826 ("The typical contract expressly reserves the right of the agency to remove the child on request."); *In re* Michael B., 604 N.E.2d 122, 128 (N.Y. 1992) ("[F]oster care custodians must deliver on [sic] demand not 16 out of 17 times, but every time, or the usefulness of foster care assignments is destroyed. To the ordinary fears in placing a child in foster care should not be added the concern that the better the foster care custodians the greater the risk that they will assert, out of love and affection grown too deep, an inchoate right to adopt." (quoting Spence-Chapin Adoption Serv. v. Polk, 274 N.E.2d 431, 436 (N.Y. 1971))).

64 *See* 42 U.S.C. § 671(a)(24) (requiring that states certify that foster parents "be prepared adequately with the appropriate knowledge and skills to provide for the needs of the child . . . including knowledge and skills relating to the developmental stages of the cognitive, emotional, physical, and behavioral capacities of a child, and knowledge and skills relating to applying the standard to decisions . . . [about] social, extracurricular, enrichment, cultural, and social activities"); *see also* Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE CHILD. 75 (2004).

65 *See* BIRTH & FOSTER PARENT P'SHIP, A RELATIONSHIP BUILDING GUIDE 2 (2020), https://ctfalliance.sharefile.com/share/view/sfbf4965b0cb04a4cb3aee4a034aa2042 [https://perma.cc/HPM6-AYRS] ("When foster care is necessary, the goal is to provide a temporary safe, stable and nurturing environment for children and adolescents while actively seeking and supporting reunification with their families. A robust relationship between a child or youth's birth parents and foster parents or kinship caregivers can help achieve this outcome and reduce trauma

Beyond the obligation to support foster children's relationships with their parents because of their importance to the children's emotional wellbeing, foster parents are also required to assist the agency in its obligation to proactively work with parents to achieve family reunification, if possible, by supporting the parent-child relationship and addressing the issues that led to the foster care placement.[66] As one best practice guide put it, when recruiting foster parents, "it is critically important to fully address the importance of foster parents' role in reunification. . . . [and] effectively position foster parents to help work toward reunification."[67]

One important component of ensuring that the parent-child bond is sustained during the foster care placement is ensuring frequent visitation between children and their parents. As the federal agency that oversees foster care has explained:

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for everyone."). Increased contact with parents has been shown to decrease depression and behavior problems in foster children. Lenore M. McWey, Alan Acock & Breanne Porter, *The Impact of Continued Contact with Biological Parents upon the Mental Health of Children in Foster Care*, 32 CHILD. & YOUTH SERVS. REV. 1338 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2928481 [https://perma.cc/X2NP-5VLW].

66 *See In re Michael B.*, 604 N.E.2d at 128 ("Foster parents, moreover, have an affirmative obligation—similar to the obligation of the State—to attempt to solidify the relationship between biological parent and child."). States are beginning to make these obligations clear in their recruiting of foster parents. *See, e.g.*, *Prospective Foster Parent*, S.C. DEP'T OF SOC. SERVS., https://dss.sc.gov/child-well-being/foster-care/prospective-foster-parent [https://perma.cc/4NTC-ZXX9] ("Foster parents also provide support for birth parents who may struggle with poverty, domestic violence, substance abuse and mental health issues."); *Foster Care*, N.Y. STATE OFF. CHILD. & FAM. SERVS., https://ocfs.ny.gov/programs/fostercare/#role [https://perma.cc/26JB-KJJ8] (describing the role of a foster parent as one that includes cooperating with "the child's parents in carrying out a family reunification . . . plan" and "[u]nderstanding and assist[ing] with the needs and goals of family visits"); *see also* Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 336 (1996) ("Involving foster parents in reunification planning as soon as the child is placed is essential."); ADOPTUSKIDS, *supra* note 51, at 2 ("Creating space for relationship-building . . . will become transformational in the life of a parent, also in the life of a child . . . . A house divided is no good for a child." (quoting a birth parent)); *id.* at 2–3 ("Foster parents who *actively* support reunification understand that reunification is most often in the child's best interest, and are committed to doing what is best for the child, even if it involves complexity or loss for the foster family.").

67 ADOPTUSKIDS, *supra* note 51, at 1; *see also* Beyer, *supra* note 66, at 335 ("Foster care represents a support service to the family and not just substitute parenting for the child."); Roman, *supra* note 62, at 197 ("Another significant aspect of foster parents' labor . . . involves supporting the child's relationship with her family of origin. Foster parents play an essential role in reunification.").

> Youth in out-of-home care . . . especially need to stay connected with their birth parents and other family members to maintain the integrity of these relationships when they return home. Foster parents, in particular, play a critical role in cultivating relationships with birth parents to support child and parent visitation and contact and increase the likelihood of successful reunification.[68]

Best practices now include frequent visits in settings maximally conducive to parent-child interactions.[69] Once only expected to provide transport, foster parents today are expected to actively help children prepare for and process the emotional challenges of family visits[70] and sometimes host visits so they can be moved out of agency offices.[71]

The foster parent's role in sustaining children's ties to their parents has been expanded in other ways as well, including actively engaging with parents as partners, mentoring them when helpful, and supporting their efforts to reunify with their children.[72] The best vision of the proper role of modern foster parents is as "an engaged member of the team working toward reunification . . . . embrac[ing] the approach of shared parenting,

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68 *Birth Parent/Foster Parent Relationships to Support Family Reunification*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/permanency/reunification/parents/reunification [https://perma.cc/R8JY-5D7T].

69 CASEY FAM. PROGRAMS, STRATEGY BRIEF STRONG FAMILIES: HOW CAN FREQUENT, QUALITY FAMILY TIME PROMOTE RELATIONSHIPS AND PERMANENCY? 4 (2020), https://caseyfamilypro-wpengine.netdna-ssl.com/media/20.07-QFF-SF-Family-Time.pdf [https://perma.cc/EY3P-QFK5] (recommending that "[f]amily time should occur in places that provide as homelike and familiar of a setting as possible," "[f]amily time should occur as often as possible," and "[i]nfants and young children may need short visits daily or every other day to maintain their connection with a parent").

70 *See, e.g.*, Melissa Blinn, *Family Visitation for Children in Foster Care*, PEOPLE PLACES, https://peopleplaces.org/familyvisitation [https://perma.cc/4FYM-QKVD] ("Foster parents are key to preparing the child for the family visit and helping support and process with the child after the visit.").

71 *See, e.g.*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., POL'Y & PROC. #2013/02, DETERMINING THE LEAST RESTRICTIVE LEVEL OF SUPERVISION NEEDED DURING VISITS FOR FAMILIES WITH CHILDREN IN FOSTER CARE 3 (2013), https://www1.nyc.gov/assets/acs/policies/init/2013/C.pdf [https://perma.cc/X7S8-93EN] (providing generally that "foster parents may escort children to visits, host visits in their homes (if they agree to do so), and actively participate in visit arrangements").

72 *See Foster Care: A Path to Reunification*, CHILD WELFARE INFO. GATEWAY (Mar. 13, 2019), https://www.childwelfare.gov/more-tools-resources/podcast/episode-35 [https://perma.cc/ZQT9-E62M]; *Policy #1: Support Relationships Between Birth and Foster Families*, CHAMPS, https://playbook.fosteringchamps.org/policy-goal/support-relationships-between-birth-and-foster-families [https://perma.cc/P92G-7AYM]. A wide range of child welfare organizations embrace this approach. *See* Chipungu & Bent-Goodley, *supra* note 64, at 86 (observing that foster parents are increasingly "expected to advocate for children, mentor birth parents, and provide members of the team . . . with key information about the well-being and permanency of children," including the formal responsibilities underscored in ASFA).

and . . . committed to building a positive, child-focused relationship with the birth family."[73]

In short, in order for the foster care system to achieve its aim of reunifying children with their parents whenever possible, the modern child welfare system relies upon foster parents to become active supporters of reunification as a key part of their role. Building strong, constructive relationships between parents and foster parents is therefore a critical component of serving foster children.

2. Foster Parents Are Obligated to Support Parent-Child Bonds Even When the Permanency Goal Is Not Family Reunification

a. The Child Welfare System's Turn Toward Adoption

Although family reunification remains the preferred outcome of foster care, since the 1997 passage of the Adoption and Safe Families Act (ASFA), American child welfare policy has also emphasized pursuing adoption when children have been in foster care for a certain length of time.[74] Thus, to fully understand the role of foster parents with respect to birth parents, one must also consider their obligations when the permanency goal is not reunification.

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73 ADOPTUSKIDS, *supra* note 51, at 3; *see also* Beyer, *supra* note 66, at 335 ("Foster care represents a support service to the family and not just substitute parenting for the child. . . . Partnerships between birth and foster families through visiting, shared parenting, and informal contacts ensure maintenance of the family-child relationship while the child is in care and during reunification."); Chipungu & Bent-Goodley, *supra* note 64, at 86; Andrew Sanchirico & Kary Jablonka, *Keeping Foster Children Connected to Their Biological Parents: The Impact of Foster Parent Training and Support*, 17 CHILD & ADOLESCENT SOC. WORK J. 185 (2000); Jerry Milner, *Staying the Course for Families*, IMPRINT (Feb. 11, 2021, 5:56 AM), https://imprintnews.org/child-welfare-2/staying-course-families-what-got-right_/51632 [https://perma.cc/N479-9PUH] ("The field is beginning to embrace foster care as a support for whole families rather than a substitute for parents—its traditional role.").

74 *See* Adoption and Safe Families Act of 1997, 105 Pub. L. No. 89, 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 670–679) (requiring that the State pursue adoption of any child who has been in foster care for fifteen of the last twenty-two months and providing for financial incentives to states that pursue adoptions in greater numbers and at a greater speed). Notably, ASFA has come under strong criticism in recent years, and there are advocacy efforts aimed both at scaling back ASFA's prioritization of adoption and calling for outright repeal of ASFA. *See, e.g.*, *Adoption and Safe Families Act*, UNITED FAM. ADVOCS., https://www.unitedfamilyadvocates.org/adoption-and-safe-families-act [https://perma.cc/7XHA-XLXV] (providing and supporting detailed recommendations for ASFA reform, including that "ASFA should be repealed and our foster system reenvisioned"); *Solutions and Strategies*, MOVEMENT FOR FAM. POWER, https://www.movementforfamilypower.org/solution-and-strategies [https://perma.cc/QB72-CH6P] (characterizing ASFA as a "violent law" that has been "devastating for Black, American Indian, Latinx and poor white communities" and calling for its repeal); REPEAL ASFA, https://www.repealasfa.org [https://perma.cc/W5SP-3WHF] ("We are directly impacted mothers, community organizations, and allied advocates across the country, fighting for family liberation.").

ASFA was intended to address the problem of children lingering in foster care when reunification was not viable.[75] Under ASFA, states are required to hold regular court hearings (called "permanency hearings") to monitor foster care placements and encourage discharge planning.[76] Courts must review whether reasonable efforts have been made by the child welfare agency to achieve the discharge goal (called the "permanency goal") and assess whether the goal should be family reunification or something else.[77] If a child has been in foster care for fifteen out of the last twenty-two months, the agency must consider filing a termination of parental rights petition and moving toward adoption.[78] If parental rights are terminated and a child is adopted, Title IV-E of the Social Security Act provides subsidies to the adoptive parents.[79] In addition to requiring states to consider moving toward adoption once a child has been in foster care for fifteen months, ASFA encourages agencies to engage in concurrent planning,[80] which includes working toward family reunification while placing children with foster parents who would adopt them if reunification does not occur. As a result of

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75 Richard P. Barth, Fred Wulczyn &Tom Crea, *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 372–73 ("Congressional testimony during pre-ASFA hearings focused on two central issues: (1) the failure of state child welfare agencies to promote child safety . . . and (2) the problem of foster care drift. . . . Rising state caseloads, longer average stays in foster care, and a growing number of children waiting for adoption all reflected foster care drift . . . . [and] ASFA addresses both core issues.").

76 42 U.S.C. § 675(5)(c) (requiring "a permanency hearing to be held . . . no later than 12 months after the date the child is considered to have entered foster care . . . and not less frequently than every 12 months thereafter during the continuation of foster care . . . [to] determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption . . . or referred for legal guardianship"); *see also id.* § 671(a)(15)(B) (requiring states to create permanency plans that prioritize "reasonable efforts . . . to preserve and reunify families").

77 *Id.* § 675(5). As discussed in the text, ASFA prioritizes adoption as the permanency plan preferred next after reunification. The other permanency goals that are authorized under ASFA are legal guardianship, permanent placement with a fit and willing relative, and "another planned permanent living arrangement," which is only allowed if there has been a finding that none of the other goals would serve the child's best interests. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 302, 111 Stat. 2115 (codified as amended at 42 U.S.C. § 675(5)(c)). Guardianships and permanent placement with relatives will be discussed in Section II.B.2.c.

78 Adoption and Safe Families Act of 1997 § 103 (codified as amended at 42 U.S.C. § 675(5)).

79 CONG. RSCH. SERV., R43458, CHILD WELFARE: AN OVERVIEW OF FEDERAL PROGRAMS AND THEIR CURRENT FUNDING 18–19 (2018).

80 Adoption and Safe Families Act of 1997 § 101 (codified as amended at 42 U.S.C. § 671(a)(15)); *see also* CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, CONCURRENT PLANNING FOR TIMELY PERMANENCE (July 2018), https://www.childwelfare.gov/pubPDFs/concurrent_planning.pdf [https://perma.cc/8RJW-X287]. Although ASFA favored adoption as the concurrent plan with reunification, there has subsequently been recognition that kinship guardianship offers benefits adoption does not. *See* Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 13–22 (2015) (discussing the potential benefits of guardianship, and particularly kinship guardianship, over adoption).

ASFA, the United States now terminates parental rights at an unprecedented rate and provides ongoing subsidies for over 469,000 adoptions.[81]

It is in part because of the child welfare system's shift in emphasis toward adoption that battles against anti-LGBTQ discrimination have come to focus on foster care. In the wake of ASFA, more than one in three children adopted in the United States is adopted out of foster care.[82] Unsurprisingly, gay couples are far more likely to want to adopt than non-gay couples,[83] and combatting laws and policies that forbid adoption by gay couples has been a critical component of the fight for LGBTQ liberation, dignity, and equality. As gay rights have advanced and more LGBTQ people have looked to adopt children from foster care, attention to antigay discrimination by foster care agencies has grown.[84]

It is to be expected that, in approaching discussions about discrimination in foster care, advocates draw on prior experiences fighting for LGBTQ rights and on the impressive array of case law and statutes that have been developed in recent decades to protect those rights. It is notable, however, that LGBTQ rights advocates have not—at least in efforts around the *Fulton* litigation—paid any meaningful attention to the significant differences between adoptions from foster care and private adoptions.[85]

To understand the issues at stake in *Fulton*, it is important to see that for children adopted out of foster care, relationships with their birth parents remain critical. Many of these children are strongly bonded to their birth parents and protecting those relationships may require very different approaches when adoption is involuntarily imposed by the State

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81 *Title IV-E Adoption Assistance*, ADMIN. FOR CHILD. & FAMS., CHILD.'S BUREAU (June 10, 2021), https://www.acf.hhs.gov/cb/grant-funding/title-iv-e-adoption-assistance [https://perma.cc/AC6J-ZJRB].

82 In 2014, there were 110,373 domestic adoptions. JO JONES & PAUL PLACEK, NAT'L COUNCIL FOR ADOPTION, ADOPTION BY THE NUMBERS 2 (Chuck Johnson & Megan Lestino eds., 2017), https://adoptioncouncil.org/article/adoption-factbook [https://perma.cc/R3GQ-WAZD]. Of those 110,373 children, 50,644 were adopted out of foster care. CHILD.'S BUREAU, THE AFCARS REPORT, NO. 22 (2015) [hereinafter AFCARS 2015], https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport22.pdf [https://perma.cc/9FAV-YKE4].

83 Danielle Taylor, *Same-Sex Couples Are More Likely to Adopt or Foster Children*, U.S. CENSUS BUREAU (Sept. 17, 2020), https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html [https://perma.cc/CX53-HHRU].

84 *See* Cathy Krebs & Currey Cook, *Government-Funded Discrimination in the Child Welfare System*, AM. BAR ASS'N (June 8, 2020), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/government-funded-discrimination-in-the-child-welfare-system [https://perma.cc/QQX8-JE55].

85 Gay rights advocates have recognized and addressed the overrepresentation of LGBTQIA youth in foster care. As discussed below, some efforts to serve LGBTQIA youth may—perhaps counterintuitively—benefit from a very different approach to religious minorities' rights than the position taken by most LGBTQIA advocates in *Fulton*. *See infra* Part V.

in the foster care context than when birth parents voluntarily give up their child for adoption.

b. The Turn Toward Open Adoption

A growing consensus in the social science literature over several decades supports the conclusion that it is harmful to children to treat adoption as a simple replacement of one family by another, thereby ignoring the complicated emotional attachments children have to their families of origin.[86] Research has shown that openness about where and who adoptive children come from is critical to their wellbeing and that it is most often beneficial for all involved for children to have contact with their birth parents following adoption.[87]

According to one well-respected, national adoption advocacy organization:

> [O]penness in adoption is a healthier and more humane way to experience adoption and should be incorporated into every adoption experience. Building relationships between first/birth family members and adoptive family members through openness in adoption may not always be easy, but it creates a richer and more authentic adoption experience.[88]

This understanding, along with rejection of the idea that adoption is shameful and should be hidden, has led to substantial change in adoption practices. For instance, there has been a concerted push to open adoption records so that adopted children can find their birth parents.[89] Most

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86 *See, e.g.*, Marianne Berry, Debora J. Cavazos Dylla, Richard P. Barth & Barbara Needell, *The Role of Open Adoption in the Adjustment of Adopted Children and Their Families*, 20 CHILD. & YOUTH SERVS. REV. 151 (1998); Thomas M. Crea & Richard P. Barth, *Patterns and Predictors of Adoption Openness and Contact: 14 Years Postadoption*, 58 FAM. REL. 607 (2009); Karie M. Frasch, Devon Brooks & Richard P. Barth, *Openness and Contact in Foster Care Adoptions: An Eight Year Follow-Up*, 49 FAM. REL. 435 (2000); *Minnesota/Texas Adoption Research Project*, UNIV. OF MASS. AMHERST: RUDD ADOPTION RSCH. PROGRAM, https://www.umass.edu/ruddchair/research/mtarp [https://perma.cc/R339-QSX9].

87 DONALDSON ADOPTION INST., LET'S ADOPT REFORM REPORT: ADOPTION IN AMERICA TODAY 11 (2016), https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/109105.pdf?r=1&rpp=10&upp=0&w=+NATIVE%28%27recno%3D109105%27%29&m=1 [https://perma.cc/RD5F-9JFZ].

88 *Id.*

89 *See, e.g.*, Elaine S. Povich, *Adoptees Press States for Access to Original Birth Certificates*, STATELINE (Apr. 26, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/04/26/adoptees-press-states-for-access-to-original-birth-certificates [https://perma.cc/RY9G-AXWZ]; Lauren Slavin, *Bloomington Resident Leading Push to Open Adoption Records in Indiana*, HERALD TIMES (Dec. 29, 2015, 7:44 AM), https://www.heraldtimesonline.com/story/news/local/2015/12/29/bloomington-resident-leading-push-to-open-adoption-records-in-indiana/47240081 [https://perma.cc/L8PC-RMPJ]. For one legislature's response to these efforts, see DEP'T OF LEGIS. SERVS., ACCESS TO ADOPTION RECORDS IN MARYLAND 5 (2013),

notable for the current analysis has been the advent of open adoption. Over a relatively short period of time, the private adoption world has shifted from the practice of entirely cutting off adopted children from their birth families, to encouraging open adoption.[90] Today, it is estimated that over two-thirds of private adoptions (those in which the children are not being adopted out of foster care) are open in the sense of having ongoing contact between the adopted children and their parents of origin.[91]

It is troubling that these insights about the importance of attachment to families of origin and the benefits of ongoing contact after adoption have not yet been fully incorporated into practice in the child welfare realm. Too often, foster care agencies still seek to sever all contact between adopted children and their families of origin.[92] A "child saver" mentality in the child welfare system has unfortunately often viewed children's interests as being opposed to their parents' interests and ignored the psychological impact on children of treating their origins as something negative that must be escaped.[93] Professor Annette Appell has persuasively challenged what she calls "the myth of separation," which is the idea "that children can be fully and existentially separated from their parents" and that "parents are fungible" in the sense that an adoptive parent can replace a birth parent.[94] She explains that "children have deep and abiding interest in their birth relations," even if they are in long-term, pre-adoptive foster homes.[95]

Fortunately, the child welfare system's longstanding hostility to birth parents has begun to shift—in part because the ideas and evidence

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https://adopteerightslaw.com/wp-content/uploads/2017/03/2013-maryland-leg-service-report-adoption-records.pdf [https://perma.cc/27DV-6J9Y] ("As adoption practices and attitudes had shifted toward a more open approach over the course of . . . thirty years, proponents of opening adoption records began to press the General Assembly for change.").

90 DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 10, 43 (2012).

91 *Id.* at 15.

92 For vivid accounts of the harm of severing contact and the struggles of families to reconnect after adoption, see D'Juan Collins, *Losing Parental Rights Won't Stop Me from Fighting to Be a Dad*, RISE (May 18, 2017), https://www.risemagazine.org/author/djuancollins [https://perma.cc/NML3-9LS2]; Ashley Albert, *The Adoption Safe Families Act Hinders Birth Parents from Regaining Their Parental Rights*, SEATTLE MEDIUM (May 26, 2021), http://seattlemedium.com/the-adoption-safe-families-act-hinders-birth-parents-from-regaining-their-parental-rights [https://perma.cc/S6AK-8R4W].

93 *See* Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 1, 11–13 (2022).

94 Annette Ruth Appell, *The Myth of Separation*, 6 NW. J.L. & SOC. POL'Y 291, 291, 295 (2011); *see also* Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1 (2010).

95 Appell, *The Myth of Separation*, *supra* note 94, at 295.

about child wellbeing developed in the private adoption world are being imported into the public adoption realm, and in part because the system's racism is being recognized and called out.[96] The federal government's latest guidance on permanency for children in foster care emphasizes the importance of maintaining children's ties to their families and communities of origin following adoption, explaining: "adoption should be viewed as an opportunity to expand a child's experience of family rather than replace their previous family."[97] The guidance urges states to encourage continued contact between adopted children and their families of origin: "Children do not need to have previous attachments severed in order to form new ones. In fact, they will be better positioned to develop new relationships if we work to preserve their original connections, sparing them from additional grief and loss."[98] Recognition of the importance of preserving family bonds has led some states to allow judges to order ongoing visitation with parents even as parental rights are terminated.[99]

Antipathy toward birth parents certainly continues, and there is much work to do to fully incorporate into practice insights on the importance of maintaining ties with families of origin post-adoption. But there is one way in which the child welfare system has embraced these insights: by prioritizing foster care placements with relatives. Kinship foster care has grown dramatically as the child welfare system has recognized its benefits to children.[100] It is broadly acknowledged that "[k]inship care helps children maintain familial and community bonds

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96 *See* Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021, 9:00 AM), https://time.com/5946929/child-welfare-black-families [https://perma.cc/42N7-C5B8]; Milner, *supra* note 73.

97 ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., ACYF-CB-IM-20-09, ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH 18–19 (2021), http://www.cwla.org/wp-content/uploads/2021/01/ACYF-CB-IM-20-09.pdf [https://perma.cc/B5V4-WTHQ].

98 *Id.* at 12 (footnote omitted).

99 FLA. STAT. ANN. § 39.811(7)(b); *In re* Adoption of Ilona, 944 N.E.2d 115, 124–26 (Mass. 2011) ("We have repeatedly recognized the equitable authority of a judge to order visitation between a child and a parent whose parental rights have been terminated, where such visitation is in the child's best interest."); *In re* Katie S., 479 S.E.2d 589, 601 (W. Va. 1996) ("[P]ost-termination visitation, either with siblings or parents, may be in the best interest of the child, especially when there is a close bond and the child maintains love and affection for either her siblings or parents.").

100 *See* Gupta-Kagan, *supra* note 80, at 5 (recognizing that child welfare agencies have been "placing increasing numbers of children with extended family members"); Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 CHILD. LEGAL RTS. J. 101, 103 (2020) ("[A]n increasing number of children in foster care are being placed with kinship caregivers . . . ."); CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, PLACEMENT OF CHILDREN WITH RELATIVES (2018), https://www.childwelfare.gov/pubPDFs/placement.pdf [https://perma.cc/NMN5-ZU4E] (detailing each state's prioritization of foster placements with relatives).

and provides them with a sense of stability, identity, and belonging, especially during times of crisis. Kinship care also helps to minimize the trauma and loss that accompany parental separation."[101] Additionally, empirical evidence demonstrates that kinship placement serves the interests of foster children by achieving better behavioral and mental health outcomes for them.[102]

The preference for kinship care is now embedded in federal law, which conditions federal funding on a requirement that states consider placement with relatives whenever children enter foster care.[103] Today, nearly one-third of all children in foster care are with relatives who have been certified as foster parents (compared to 23% in 2003).[104]

This widespread commitment to kinship placements cannot be separated from the broader value of keeping children connected with their families of origin whenever possible. Thus, it is a mistake to believe that because some foster care placements end in adoption, those placements can be made without considering the relationship between the foster parents and the birth parents. In the vast majority of cases, a constructive relationship between the foster parents and the birth parents is a prerequisite to serving the children's best interests—in order to promote family reunification when possible and to offer those children

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101 ANNIE E. CASEY FOUND., STEPPING UP FOR KIDS 2 (2012), https://assets.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf [https://perma.cc/64EP-9MFQ]; *see also* SUSAN CHIBNALL ET AL., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY 63 (2003), https://www.childwelfare.gov/pubPDFs/children.pdf [https://perma.cc/M2GT-CRZX] ("Long heralded as a strength of African-American and other minority families, the use of relatives and fictive kin (unrelated persons with whom family has a close relationship) as caregivers for children is an important measure for increasing permanency for minority children while simultaneously maintaining ties to their family system.").

102 Eun Koh, *Permanency Outcomes of Children in Kinship and Non-Kinship Foster Care: Testing the External Validity of Kinship Effects*, 32 CHILD. & YOUTH SERVS. REV. 389, 390 (2010); Eun Koh & Mark F. Testa, *Propensity Score Matching of Children in Kinship and Nonkinship Foster Care: Do Permanency Outcomes Still Differ?*, 32 SOC. WORK RES. 105, 112 (2008); *see* Marc A. Winokur, Graig A. Crawford, Ralph C. Longobardi & Deborah P. Valentine, *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMS. SOC'Y 338, 341–42 (2008).

103 Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended at 42 U.S.C. §§ 671–673).

104 *Compare* AFCARS 2020, *supra* note 35, at 1 (reporting that 32% of foster children are placed with relatives out of 423,997 total children in foster care), *with* AFCARS 2006, *supra* note 35, at 1 (reporting that 23% of foster children were placed with relatives out of 520,000 total children in foster care). Additionally, many children are placed into the custody of relatives following a child protective investigation without the relative being certified as a foster parent. ANNIE E. CASEY FOUND., *supra* note 101, at 9. Professor Dorothy Roberts has raised important concerns about the way kinship foster care links needed public benefits to state intervention in family life but, while doing so, also noted that it has substantial benefits to children over nonkinship foster care. *See* Dorothy Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619 (2001).

who are adopted the best support for ongoing contact with their families of origin.

c. Foster Children's Connections to Their Parents Are Important for All Permanency Outcomes

Approximately half of foster children will return to a parent or parents, and approximately 37% will be adopted or discharged to guardianship.[105] Perhaps counterintuitively, maintaining connections between foster children and their parents is especially important in situations in which foster children will not be discharged to their parents, and adoption and guardianship are not options. A disturbing number of foster children whose legal connections to their parents have been terminated are never adopted.[106] The United States has essentially created a new status for youth, making them legal orphans by terminating their parents' rights without connecting them to another family.[107] While the exact number of youth who leave foster care as legal orphans is difficult to pinpoint, it is certainly in the thousands each year.[108] For these young people—many of whom will have no resources other than their families after they leave foster care—maintaining relationships with their birth parents after termination of parental rights can be particularly critical.

Although statistics are not available on how many legal orphans return to live with their parents, it is certainly a significant number.[109] To create a legal mechanism to facilitate these reunifications and encourage others, many states have passed statutes over the last decade allowing the restoration of parental rights.[110] Other families *de facto* reunify without seeking a legal blessing.[111] Unless the child welfare system is content to doom some of its graduates to leave foster care without any familial ties or other support, it must protect the connections that foster youth have with their families of origin.

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105 *See* AFCARS 2020, *supra* note 35, at 3.

106 *See* Chloe Jones, *1 in 100 Kids Lose Legal Ties to Their Parents by the Time They Turn 18. This New Bill Aims to Help*, PBS (Jan. 3, 2022, 4:30 PM), https://www.pbs.org/newshour/nation/1-in-100-kids-lose-legal-ties-to-their-parents-by-the-time-they-turn-18-this-new-bill-aims-to-help [https://perma.cc/D8GL-VC5W]; Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights to Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q 121, 121–22 (1995).

107 *See* Guggenheim, *supra* note 106, at 121–22.

108 AFCARS 2020, *supra* note 35, at 1 (reporting that 71,335 children whose parents' rights have already been terminated are waiting for adoption).

109 *See* LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 318 (2009) (discussing various formal mechanisms by which parents regain custody); Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437, 477–83 (2012).

110 Taylor, *supra* note 109, at 320–21, 332–35.

111 Post & Zimmerman, *supra* note 109.

And there is yet another category of cases to consider when assessing the importance of supporting foster children's family ties: children who are placed for adoption but leave their adoptive families and ultimately return to their families of origin.[112] This number is also difficult to pinpoint, but there is evidence that foster care adoption placements are substantially more likely to splinter apart than private adoption placements, with estimates placing the percentage of adoptive placements of foster children that disrupt as high as 20%.[113] Again, families of origin are often the only resources for these young people.

Thus, across the spectrum of outcomes for foster children, it is impossible to serve their best interests without appreciating the ongoing importance of their relationships with their families of origin. These relationships carry significant emotional weight, play a central role in identity development, and are critical to successful outcomes in the vast majority of foster care cases.[114] Hopefully it is clear that the importance of families of origin does not diminish the emotional significance of the relationships between children and their foster and adoptive parents. Rather, the point is to see that foster and adoptive parents are entering the lives of children who have existing relationships with their parents and extended families. These ties are important enough that they should be taken into account when foster parents are chosen.

3. Foster Parents' Obligations to Maintain Foster Children's Cultural and Community Ties

This Section sets forth the argument that, in addition to their obligation to support foster children's ties to their families, foster parents are also obliged to support foster children's ties to their cultures and communities of origin. There are at least three types of interests that might be said to create obligations to maintain the community and cultural ties foster children have when they enter foster care: the interests of the individual children involved; the group-based interests of the

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112 *Id.*

113 CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, DISCONTINUITY AND DISRUPTION IN ADOPTIONS AND GUARDIANSHIPS 3 (2021), https://www.childwelfare.gov/pubPDFs/s_discon.pdf [https://perma.cc/5YVL-N2VS]; CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, ADOPTION DISRUPTION AND DISSOLUTION 2 (2012), https://www.childwelfare.gov/pubPDFs/s_disrup.pdf [https://perma.cc/VPV9-2FKX]; *see also* DAVE THOMAS FOUND. FOR ADOPTION, THE IMPACT OF CHILD-FOCUSED RECRUITMENT ON FOSTER CARE ADOPTION: A FIVE-YEAR EVALUATION OF WENDY'S WONDERFUL KIDS 16–17 (2011), https://www.davethomasfoundation.org/wp-content/uploads/2018/02/wwk-research-evaluation-summary.pdf [https://perma.cc/R4SA-M6M].

114 *See* ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., ACYF-CB-IM-20-09, *supra* note 97, at 11.

communities; and the distinctly American interest in the constitutional value of pluralism.

a. Foster Children's Interest in Maintaining Cultural and Community Ties

The most obvious interest favoring the maintenance of cultural and community ties are the interests of the individual children involved. Part of that interest, of course, stems from the fact that most of these children will return to their families and therefore to their communities of origin. Yet even children who will not return to their families have an interest in maintaining their cultural traditions and connections. This broadly held view is captured by the North American Council on Adoptable Children's position that "every child should be placed with a family who recognizes preservation of the child's ethnic and cultural heritage as an inherent right."[115] Some states explicitly embed in state law the right of foster children to maintain their cultural connections; others strongly encourage foster parents to support those connections.[116]

Although the interest may not be as strong with respect to infants who do not yet have substantial lived connections to any culture or community, there has been a shift toward recognizing that cultural heritage is a social good and that the interest in developing cultural connections begins at birth.[117]

Beyond this notion of intrinsic value in connection to one's cultural roots, some argue that there are distinct harms to children if they lose connection to their group of origin.[118] These commentators assert that "[t]he role that strong cultural identity plays in mental health, self-esteem,

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115 *Race/Ethnic Background and Child Welfare*, N. AM. COUNCIL ON ADOPTABLE CHILD., https://www.nacac.org/advocate/nacacs-positions/ethnic-background [https://perma.cc/LFG8-PXDD].

116 11 PA. CONS. STAT. § 2633(12) (2011) (stating that children in foster care must be provided with an "environment that maintains and reflects the child's culture as may be reasonably accommodated"); 20 ILL. COMP. STAT. 520/1-15(5) (noting "the foster parent's responsibility to support activities that will promote the child's right to relationships with his or her own family and cultural heritage").

117 *See* Annette R. Appell, *"Bad" Mothers and Spanish-Speaking Caregivers*, 7 NEV. L.J. 759, 760 (2007) ("When mothers lose their children, they lose their chance to pass on their language, culture, and values, and their children lose their chance to receive these social goods. This loss can compromise individual, cultural, and even political identity.").

118 *See, e.g.*, Maurice Anderson & L. Oriana Linares, *The Role of Cultural Dissimilarity Factors on Child Adjustment Following Foster Placement*, 34 CHILD. & YOUTH SERVS. REV. 597 (2012); Tanya M. Coakley & Kenneth Gruber, *Cultural Receptivity Among Foster Parents: Implications for Quality Transcultural Parenting*, 39 SOC. WORK RES. 11 (2015); Ariella Hope Stafanson, *Supporting Cultural Identity for Children in Foster Care*, AM. BAR ASS'N (Nov. 20, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/supporting-cultural-identity-for-children-in-foster-care [https://perma.cc/X6NS-QZS3].

and over all well-being cannot be ignored" and note that "[s]trong cultural identity [has been reported to] contribute[] to mental health resilience, higher levels of social well-being, and improved coping skills," and is "tied to lower rates of depression, anxiety, isolation, and other mental health challenges."[119]

With respect to race in particular, some argue that placement with foster parents of another race presents a risk to children because they will lose the opportunity to learn social skills critical to effectively navigating racial dynamics in the United States. For example, in discussing the needs of foster children, Professors Sandra Stukes Chipungu and Tricia B. Bent-Goodley argue:

> The impact of racism and discrimination, and the need to develop skills for negotiating a sometimes hostile social world, distinctly shape an individual and cannot be discounted. For example, the ability to function "biculturally"—that is, within the larger society as well as within a specific community—is an important survival skill for children of color. Communities of color teach children how to negotiate being bicultural in a healthy and safe manner. The skill can be significantly difficult to acquire outside the community.[120]

In a broader context, the interest of children in maintaining cultural and community ties is recognized by the United Nations Convention on the Rights of the Child,[121] which though not legally binding on the United States, certainly reflects a widely shared understanding of this interest.[122] While within the United States and internationally there is heated debate over whether racial and ethnic matching is desirable in adoptive

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119 Stafanson, *supra* note 118. Disturbingly, this article cites a study that found twenty percent of foster youth's sense of ethnic identity changed over a five-year period. *Id.*; *see also* Jessica Schmidt et al., *Who Am I? Who Do You Think I Am? Stability of Racial/Ethnic Self-Identification Among Youth in Foster Care and Concordance with Agency Categorization*, 56 CHILD. & YOUTH SERVS. REV. 61 (2015).

120 Chipungu & Bent-Goodley, *supra* note 64, at 82 (footnote omitted).

121 G.A. Res. 44/25, art. 30, Convention on the Rights of the Child (Nov. 20, 1989) ("In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.").

122 The United States' decision not to ratify the Convention was not due to objection to the article on cultural connection. On the contrary, those who oppose ratification often do so because of concern that the Convention would undermine the transmission of religious traditions from parents to children. *See, e.g.*, Alison Dundes Renteln, *Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child*, 3 ILSA J. INT'L & COMP. L. 629, 634 (1997); Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST: POST PARTISAN (Nov. 21, 2014, 4:12 PM), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty [https://perma.cc/7RYQ-4CTB] (noting that ParentalRights.org, an organization opposed to ratification, "fears that ratifying the treaty would mean children could choose their own religion").

placements, supporting connections between adopted children—including those adopted in infancy—and their cultures of origin has been embraced as a core value of adoption policy.[123] This is based in part on a growing social science literature documenting that the opportunity to explore and connect to one's cultural origins can be critical for identity development.[124] One need not undervalue transracial or transcultural adoptive families to embrace the value of supporting adopted children's ability to connect with the communities into which they were born.

b. Group-Based Interest in Maintaining Foster Children's Cultural and Community Ties

Distinct from the interests of individual children, there is a group-based interest in foster children maintaining cultural and community ties. This interest can be seen as both the affirmative interest in retaining members born into a group to support the growth, vibrancy, and perhaps even survival of the group, and as an interest in avoiding the negative effects of treating certain groups as less worthy of raising children than others.[125]

In particular, Dorothy Roberts has persuasively argued that the racial disproportionality of the foster care system is not only a reflection of anti-Black racial injustice but actively "reinforces the continued

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123 *See, e.g.*, Anjana Bahl, *Color-Coordinated Families: Race Matching in Adoption in the United States and Britain*, 28 LOY. U. CHI. L.J. 41 (1996); Sujung Kim, Note, *The Transracial Adoption Dilemma*, 6 JOHN F. KENNEDY U. L. REV. 151 (1995); Penny J. Rhodes, *The Emergence of a New Policy: 'Racial Matching' in Fostering and Adoption*, 18 J. ETHNIC & MIGRATION STUD. 191 (1992); John Wainwright & Julie Ridley, *Matching, Ethnicity and Identity: Reflections on the Practice and Realities of Ethnic Matching in Adoption*, 36 ADOPTION & FOSTERING, Oct. 2012, at 1.

124 *Maintaining Cultural Connections*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/adoption/adopt-parenting/intercountry/culturalconnections [https://perma.cc/A4RF-KV7V] ("Connecting with cultural roots is crucial for a child's identity development."). *See generally* Veronica Navarrete & Sharon Rae Jenkins, *Cultural Homelessness, Multiminority Status, Ethnic Identity Development, and Self Esteem*, 35 INT'L J. INTERCULTURAL REL. 791 (2011); Catherine Roller White et al., *Ethnic Identity Development Among Adolescents in Foster Care*, 25 CHILD & ADOLESCENT SOC. WORK J. 497 (2008); Olivia Spiegler, Ralf Wölfer & Miles Hewstone, *Dual Identity Development and Adjustment in Muslim Minority Adolescents*, 48 J. YOUTH & ADOLESCENCE 1924 (2019).

125 It is commonplace to recognize the "stigmatic and cumulative harms" of discrimination against groups. *See* Paul Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 11 (1976). Commentators coming from both antidiscrimination and anti-subordination approaches to equal protection recognize these harms. *See id.* at 46–50; Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1994). Indeed, from *Strauder v. West Virginia*, 100 U.S. 303 (1880), through *Brown v. Board of Education*, 347 U.S. 483 (1954), and beyond, the Supreme Court has acknowledged that discrimination impacts not only the individuals directly affected but all members of the group discriminated against. And if we take seriously the notion that whiteness is as significant a category as any racial category, it is clear that discrimination affects white people as much as it affects nonwhite people.

political subordination of [Black people] as a group."[126] Roberts identifies two aspects of this harm. First, she explains the direct political consequences of systematically taking children away from a marginalized group into which they were born: "Family and community disintegration weakens [Black people's] collective ability to overcome institutionalized discrimination and work toward greater political and economic strength."[127] Second, by routinely and disproportionately taking children from the parents in certain groups, the child welfare system reinforces negative stereotypes, building the sense that Black parents are incapable of raising their own children.[128]

The group-based interest in keeping children connected to their cultural heritage was most famously articulated by the National Association of Black Social Workers (NABSW), who strongly denounced transracial adoption in 1972.[129] The organization described the harm to Black children of being raised by white parents, and was widely understood to have called transracial adoption "cultural genocide."[130] The term "cultural genocide" is a complicated one that is not always used literally to refer to a threat that a culture will be extinguished.[131] In this context, the phrase captures the view that removing children from their community of origin and placing them with parents of a different race poses a significant threat to the Black community.

NABSW subsequently softened its position on transracial adoption, though it continues to recommend that Black children be placed with Black families whenever possible.[132] In their position statement on kinship foster care, the organization not only describes the benefits of

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126 *See* Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 180 (2003) [hereinafter Roberts, *Child Welfare*]; *see also* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) [hereinafter Roberts, *Punishing Drug Addicts*].

127 Roberts, *Child Welfare*, *supra* note 126, at 179.

128 *Id.* at 176; *see also* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); Roberts, *Punishing Drug Addicts*, *supra* note 126.

129 *See* NAT'L ASS'N OF BLACK SOC. WORKERS, POSITION STATEMENT ON TRANS-RACIAL ADOPTIONS (1972), https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/NABSW_Trans-Racial_Adoption_1972_Position_(b).pdf [https://perma.cc/D2JY-98P4].

130 Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 L. & SOC'Y REV. 813, 835 (2002) ("[C]ontrary to popular mythology, [the NABSW's] position statement did not include the phrase 'racial and cultural genocide.' Though the president of the association may have cast transracial adoption as 'cultural genocide' in a conference speech, this phrase is not used at all in the actual position statement issued by the NABSW.").

131 *See* Twila L. Perry, supra note 125, at 72–77.

132 NAT'L ASS'N OF BLACK SOC. WORKERS, PRESERVING FAMILIES OF AFRICAN ANCESTRY, https://cdn.ymaws.com/www.nabsw.org/resource/resmgr/position_statements_papers/preserving_families_of_afric.pdf [https://perma.cc/EW7P-PUDD].

kinship placement to individual children but also situates those interests in African American history in a way that suggests a group-based interest as well.[133]

The issue of transracial adoption is complex and remains strongly contested among child welfare practitioners, as seen in the debates around the Multi-Ethnic Placement Act (MEPA).[134] Passed in 1994, MEPA conditioned federal funding on prohibiting states from categorically denying people the opportunity to become foster or adoptive parents on the basis of race, color, or national origin and from delaying or denying a placement solely based on race.[135] When first passed, MEPA explicitly allowed states to take into account the race, color, or national origin of a child when determining what placement was in a child's best interests, so long as other factors were also considered.[136] Then, in 1996, MEPA was amended by the Interethnic Adoption Provisions of the Small Business Job Protection Act to omit that provision and to prohibit states from "delay[ing] or deny[ing] the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved."[137] In 2021, legislation was introduced that, if passed, would reinstate the provision explicitly allowing consideration of race, color, and national origin as factors in placements.[138] Whatever comes of this proposal, it is fair to say that while MEPA ostensibly prioritizes individual children's interests (in speedy placement) over group-based interests,[139] it does not reject the idea that there are group-based interests at play. Moreover, MEPA is consistent with the idea of group-based interests in the placement of children insofar as it requires states to "provide for the

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133 NAT'L ASS'N OF BLACK SOC. WORKERS, KINSHIP CARE (2003), https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/Kinship_Care_Position_Paper.pdf [https://perma.cc/QJ2Z-M3LU] ("Kinship care is a continuation of the African tradition of caring, supporting and providing cultural continuity for families. It has been manifested over many generations by an enduring tradition of informal adoption of children by extended family members. . . . [It] facilitates cultural, spiritual and social growth of both the children and extended family through continuous connectedness of families.").

134 Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (codified as amended at 42 U.S.C. §§ 5115a, 622(b) (1994)).

135 42 U.S.C. § 553(a)(1).

136 *Id.* § 553(a)(2).

137 JOAN HEIFETZ HOLLINGER, A.B.A. CTR. ON CHILD. & THE LAW, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996, at 22 (1998), https://www.americanbar.org/content/dam/aba/administrative/child_law/GuidetoMultiethnicPlacementAct.pdf [https://perma.cc/NEA4-NDNF].

138 21st Century Children and Families Act, H.R. 5856, 117th Cong. § 1 (2021).

139 I say "ostensibly" prioritizes individual children's interests because some would argue that, in fact, the choice reflects not children's interests, but rather the interests of white people prevailing over the group-based interests of Black people.

diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed."[140]

There is much to be said about the debate over transracial adoption that is beyond the scope of this Article. For the analysis here, it is sufficient to see that, while some commentators vigorously oppose consideration of race in adoption placement and prefer what they view as a "color-blind" approach,[141] many others recognize a group-based interest in protecting the racial and cultural connections children have when they enter foster care.[142] Certainly, the strong and growing support for placing foster children with relatives whenever possible discussed above[143] is consistent with recognition of both the individual and group-based interests in maintaining foster children's community ties.

Finally, no discussion in this country of the group-based interest in maintaining the cultural ties of foster children can ignore the most blatant example of group-based harm inflicted by the American child welfare system: the long and appalling history of attempting to sever the ties of Native American children to their cultural heritage.[144] That history will be discussed below. For this Section, the point is simply that it is indisputable that the child welfare system's disrespect for the cultural ties of Native Americans not only harmed countless individual Native American children but also inflicted significant group-based harm. In this history, the threat of cultural genocide has been literal.

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140 42 U.S.C. § 622(b)(7).

141 *See, e.g.*, ELIZABETH BARTHOLET, RESPONSE TO THE DONALDSON INSTITUTE CALL FOR AMENDMENT OF THE MULTIETHNIC PLACEMENT ACT (MEPA) TO REINSTATE USE OF RACE AS A PLACEMENT FACTOR, CCAI BRIEFING 3–4 (2008), http://cap.law.harvard.edu/wp-content/uploads/2016/04/Bartholetdonaldsonresponse.pdf [https://perma.cc/W2DD-RWLZ] (urging that "[h]istory tells us what would happen if social workers were again empowered to use race in making adoptive decisions, even if they were to be authorized only to use race as 'a factor'" and denying that research supports claims of children adopted transracially being worse off).

142 *See, e.g.*, Yolanda Anyon, *Reducing Racial Disparities and Disproportionalities in the Child Welfare System: Policy Perspectives About How to Serve the Best Interests of African American Youth*, 33 CHILD. & YOUTH SERVS. REV. 242 (2011); *see also supra* notes 118–23 and accompanying text.

143 *See supra* note 102 and accompanying text.

144 *See supra* Section III.B.3. *See generally* Meg Devlin O'Sullivan, *"More Destruction to These Family Ties": Native American Women, Child Welfare, and the Solution of Sovereignty*, 41 J. FAM. HIST. 19 (2016); *This Land*, CROOKED (2021), https://crooked.com/podcast-series/this-land/#all-episodes [https://perma.cc/DT65-H977] (devoting the entire second season of the podcast to the harms the child welfare system perpetuated against Native American families and communities).

c. Constitutional Pluralism Interests in Maintaining Foster Children's Cultural and Community Ties

The third type of interest that can be said to create obligations to maintain foster children's community and cultural ties is society's broader interest in protecting pluralism. A core value of American democracy, the interest in pluralism has been given constitutional protection. Though perhaps more frequently associated with freedom of speech and freedom of religion,[145] the value of pluralism in American constitutional analysis is just as integral to understanding parents' rights and the foster care system.[146] Indeed, parents' rights and religious rights are inextricably intertwined in constitutional jurisprudence.

In *Meyer v. Nebraska*[147] and *Pierce v. Society of the Sisters*,[148] the earliest Supreme Court decisions to establish the fundamental "liberty of parents and guardians to direct the upbringing and education of children," the Court concluded that "[t]he child is not the mere creature of the state."[149] These parental rights were not initially based on the idea—introduced in later constitutional jurisprudence—that parents generally act in children's best interests. Rather, parents' rights were grounded in protecting against the danger "of the state to standardize its children."[150] The underlying constitutional value in these cases is pluralism, and the grave danger the Constitution guards against is what the Court describes as the understandable impulse "to foster a homogeneous people" by impinging on parents' rights to direct the upbringing of their children.[151]

Notably, in *Meyer*, the Court emphasized the constitutional value of pluralism by contrasting American commitments with Plato's ideal of children raised communally.[152] The analogy to totalitarianism was, of course, not far below the surface, and the Court explained that "to submerge the individual and develop ideal citizens" is an approach to "the relation between individual and state [that is] wholly different from those upon which our institutions rest."[153] In other words, the Constitution places the rights of child rearing with parents to ensure that they do not

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145 *See* J.M. Balkin, *Some Realism About Pluralism*, 1990 DUKE L.J. 375, 392–94 (1990) (discussing the importance of freedom of speech to the twentieth-century understanding of democratic pluralism); Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 381–83 (1995) (discussing Madisonian religious pluralism).

146 *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 17–33 (2005).

147 Meyer v. Nebraska, 262 U.S. 390 (1923).

148 Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

149 *Id.* at 534–35.

150 *Id.*

151 *Meyer*, 262 U.S. at 402.

152 *Id.* at 401–02.

153 *Id.* at 402.

fall into the hands of the State because homogeneity in child rearing would directly threaten the pluralism the Constitution protects.

Even when the Court first articulated limits on parental rights in *Prince v. Massachusetts*, it reiterated that state intervention in child rearing is the exception to the rule and emphasized that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[154]

The Court reaffirmed the importance of parental rights and their grounding in the value of pluralism in 1972. In *Wisconsin v. Yoder*, the Court held that, despite the State's strong interest in compulsory education, it could not require Amish children to go to school past age fourteen against the wishes of their parents because of "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."[155] The Court was particularly interested in protecting parents' right to direct "the inculcation of moral standards" and "religious beliefs."[156] Again, the Court linked these rights to pluralism by emphasizing that any other result would threaten the very existence of the Amish community.[157]

More recently, in *Troxel v. Granville*, the Supreme Court explained that parental rights include not only the right to make decisions about education but also decisions concerning with whom children associate.[158] Justice Souter explained that this right is based in the constitutional protection against state interference with value inculcation in children:

> The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school.[159]

Critically, "parental choice in such matters is not merely a default rule," but rather a constraint on government authority to enter these decision-making arenas.[160] The Court has been remarkably consistent for over a century in seeing this constraint as essential to the political structure of American democracy. It is not an accident that *Meyer* and

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154 Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

155 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

156 *Id.* at 233.

157 *Id.* at 217–18.

158 Troxel v. Granville, 530 U.S. 57 (2000).

159 *Id.* at 78 (Souter, J., concurring).

160 *Id.* at 79.

Pierce are the only survivors of *Lochner*-era jurisprudence. Economic relations are now generally subject, of course, to majoritarian rule.[161] But child rearing is privatized and constitutionally protected from majoritarian preferences because it is so inherently value laden and so fundamental to ensuring a pluralistic society.[162]

Two additional points about the constitutional protection of parental rights are worth noting. First, although the focus throughout the constitutional jurisprudence is on parents' rights, it is important to see that the rights involved belong not only to the parents but to the children as well. In *Prince*, the Court stated that *Meyer* stood for the proposition that "children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment."[163] The *Prince* Court further stated that *Pierce* "sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools."[164] New York's high court has put the same point more simply: "The parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent."[165] Notably, the right of children in this context is not to choose their own path but is to have decisions made for them by their parents rather than by the State.

Second, these parental rights survive a finding that some state intervention into a child's upbringing is justified. In addressing the rights parents have *after* a judicial finding that there is a basis to put their children into foster care, the Supreme Court has said:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.[166]

Thus, while the State certainly has an interest in protecting children from serious harm that can justify the removal of children from parents

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161 *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

162 *See* GUGGENHEIM, *supra* note 146, at 17–33 ("The best way to guard against government becoming too involved in shaping the ideas or religion of its citizens is to deregulate and privatize childrearing.").

163 Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

164 *Id.* (citing Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925)); *see also* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (noting that the "right to the preservation of family integrity encompasses the reciprocal rights of both parent and children").

165 Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976).

166 Santosky v. Kramer, 455 U.S. 745, 753 (1982).

and placement in foster care,[167] parental rights survive that intervention.[168] Indeed, in none of the Supreme Court cases that discuss terminating the parental rights of parents whose child has been residing in foster care for some time has it been disputed that the parental right remains strong and subject to constitutional safeguards.[169]

While the exact metes and bounds of these rights are most often worked out in state courts, they are constrained by the constitutional rule that any infringement on parental rights that is necessary to protect a child from harm must be narrowly tailored to serve that interest.[170]

> In pursuing [an] important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision" . . . . [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."[171]

These constitutional considerations are critical to understanding the questions at issue in *Fulton*. For once we take seriously that the constitutional commitment to the rights of parents to direct the upbringing of their children is grounded in protecting pluralism and that

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167 *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (noting "[t]he State's right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding").

168 *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).

169 M.L.B. v. S.L.J., 519 U.S. 102 (1996); *Santosky*, 455 U.S. at 747–48 (holding that due process requires that the State "support its allegations by at least clear and convincing evidence" in order to terminate parental rights); *Lassiter*, 452 U.S. at 29–30.

170 Reno v. Flores, 507 U.S. 292, 302 (1993) (holding that when a fundamental liberty interest is implicated, the Fourteenth Amendment "forbids the government to infringe . . . [the] interest[] *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); *In re* Marie B., 465 N.E.2d 807, 810 (N.Y. 1984) ("Fundamental constitutional principles of due process and protected privacy prohibit governmental interference with the liberty of a parent to supervise and rear a child except upon a showing of overriding necessity." (first citing *Santosky*, 455 U.S. at 753; then citing Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); then citing *Stanley*, 405 U.S. at 651; and then citing Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534 (1925))).

171 Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (citations omitted) (first quoting NAACP v. Button, 371 U.S. 415, 438 (1963); and then quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)). Some argue that the intervention must be the least detrimental alternative available. *See* Jessica E. Marcus, *The Neglectful Parens Patriae: Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 273–76 (discussing O'Connor v. Donaldson, 422 U.S. 563, 576 (1975)); *id.* at 274 n.114 ("To justify restriction of constitutionally protected activity, the government must do more than show that such curtailment would promote, in a particular case, compelling governmental interests. '[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ["]less drastic means.["]'" (first alteration in original) (quoting Franz v. United States, 707 F.2d 582, 607 (D.C. Cir. 1983))).

the government's authority remains limited even when it is authorized to take children into foster care, it should become clear that choosing who will temporarily step into the caretaking role as foster parents is filled with constitutional significance.

Before turning directly to how the interests at play in foster care placements—individual, group-based, and constitutional—affect the analysis of *Fulton*, some historical context is needed. These interests can only be understood adequately in the light of the shameful history of the American child welfare system's oppression of marginalized families.[172] Any analysis that ignores that history is insufficient.

4. American Child Welfare Practitioners' History of Disrespecting and Destroying Children's Cultural and Community Ties

Thus far, this Section has focused on normative interests that are relevant to the role and obligations of foster care agencies and foster parents. Any discussion of these roles and obligations must also grapple with the history of injustice perpetrated by American child welfare practitioners and how far that history has diverged from any defensible norms. A comprehensive history is beyond the scope of this Article, but it will consider some of the most blatant harms that have been perpetrated when the State failed to maintain the family, community, and cultural ties children had when they entered foster care. The interests at stake would exist and merit protection regardless, but the history demands heightened vigilance against particular dangers posed by the child welfare system.

This Section will review two of the most extreme examples of the dangers embedded in child welfare efforts: the orphan train movement and the use of boarding schools and foster care to sever Native American families. It will then discuss the current demographics of foster care and the repeated calls by those directly impacted by the foster care system to recognize the harms it inflicts on their families and communities.

In the 1870s, a high profile case of child abuse led to the development of societies for the prevention of cruelty to children.[173] These societies were private but were authorized by law to protect children from harm by their parents.[174] Although it was a case of abuse that rallied the call for empowering these charitable organizations, the focus of these societies—

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172 *See* Roberts, *Child Welfare*, *supra* note 126. *See generally* LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (2020).

173 NINA BERNSTEIN, THE LOST CHILDREN OF *WILDER*: THE EPIC STRUGGLE TO CHANGE FOSTER CARE 86–87 (2002); BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 53–56 (1949).

174 BERNSTEIN, *supra* note 173, at 87.

as with earlier family separation practices—was on protecting children from the ills of poverty rather than from individual instances of parental abuse.[175] Throughout this period and until the 1960s, most removals of children from their parents were conducted by private actors connected to these types of charitable organizations, whose work was authorized by law.[176] Though private, these organizations are the direct forerunners of the modern foster care system run by the government. Indeed, many government child welfare agencies continue today to contract out their child welfare work to private charitable organizations, including many of the same organizations that previously operated independently under color of law. CSS, the agency whose policies were challenged in *Fulton*, is one such organization.[177]

No student of American history will be surprised to learn that early child welfare practitioners' moral judgments of poor parents were intertwined with prejudice against racial and ethnic minorities. The animating idea for these charitable agencies was that poor children needed to be "saved" from parents whose poverty indicated their inferiority and posed a threat to their children's wellbeing.[178] Led by Charles Loring Brace, founder of the Children's Aid Society, these so-called "child savers" took poor children—primarily children of immigrant, Catholic families—from the streets of Northeastern cities and put them on trains, referred to as "orphan trains," to the Midwest.[179] While some of these children later reported positive experiences with the homes into which they were placed, many of them ended up as indentured servants to Protestant farmers, and accounts of serious mistreatment were common.[180] Without suggesting a moral equivalence, it is important to note that the train station scenes at which these children were routinely displayed to prospective adoptive parents and chosen based on physical traits are disturbingly resonant with slave auctions.[181]

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175 *Id.*

176 Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1301–06 (1999).

177 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021).

178 *See* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 27–52 (1988) (discussing the class anxiety that influenced child protective efforts of the era and explaining that societies for the prevention of cruelty to children "saw cruelty to children as a vice of inferior classes and cultures which needed correction and 'raising up' to an 'American' standard").

179 BERNSTEIN, *supra* note 173, at 197–99; ANDREA ELLIOTT, INVISIBLE CHILD: POVERTY, SURVIVAL & HOPE IN AN AMERICAN CITY 182 (2021).

180 KATHRYN JOYCE, THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION 44–46 (2013).

181 *See* Neel Tandan, *Vermonter Recounts Father's Orphan Train Journey for Historical Society*, COLCHESTER SUN (Nov. 16, 2017), https://www.colchestersun.com/news/vermonter-recounts-father-s-orphan-train-journey-for-historical-society/article_c3ed3399-4c5b-5fdc-b703-

As many as 250,000 children were sent away from their communities as part of this orphan train project.[182] The term "orphan" was a misnomer in that the majority of these children had living parents.[183] The separation of families was justified as being in the best interests of the children,[184] but these agencies "sought so aggressively to 'save' needy children that they were feared and criticized by the poor as child stealers."[185]

It is clear that the concern about harm to children was deeply intermingled with disrespect and discrimination against their parents and the immigrant communities from which they came.[186] What is most notable for present purposes is that these prejudices of the child welfare

f84f4f43b169.html [https://perma.cc/TS4A-H7LF] ("'They would check your teeth, feel your muscles, see how you walked,' Bean said. 'It was like a slave market.'"); Pat Young, *The Orphan Train Denounced as a White Slave Trade in Children February 1869*, CIVILWARTALK (Jan. 13, 2019), https://civilwartalk.com/threads/the-orphan-train-denounced-as-a-white-slave-trade-in-children-february-1869.153534 [https://perma.cc/KVD5-6Q5H] (reprinting an 1869 letter to the Editor in New York Freeman's Journal and Catholic Register describing the "sale of children" at orphan auctions and comparing the process to slave auctions); *Genealogists Ride the Research Rails to Find Orphan Train Rider Ancestors*, RECORDCLICK, https://www.recordclick.com/orphan-trains [https://perma.cc/TXX2-6Z48] ("It was 1913 when the orphan train pulled into the small town of Waterloo, Indiana, and 200 children dressed in their Sunday-best filed out and were put on display for selection. Towns' folk came from miles around to inspect these 'train children' to see if they were healthy enough, muscular enough, and trainable enough to be adopted into their home.").

182 Ellen Herman, *Orphan Trains*, ADOPTION HIST. PROJECT, http://darkwing.uoregon.edu/~adoption/topics/orphan.html [http://perma.cc/TTF5-V9LB] (estimating as many as 250,000 children were placed through orphan trains, counting children taken from eastern states to midwestern and western states, as well as to Canada and Mexico); *see also* Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 MOD. AM. 3, 4 (2009) (stating the "most consistent estimates suggest that between 150,000 to 200,000 children were placed" in the U.S. and Native American territories via the orphan trains); Angelique Brown, *Orphan Trains (1854–1929)*, SOC. WELFARE HIST. PROJECT (2011), https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/orphan-trains [https://perma.cc/8K9D-JGXG].

183 BERNSTEIN, *supra* note 173, at 198; ELLIOTT, *supra* note 179, at 182.

184 JOYCE, *supra* note 180, at 45; ELLIOTT, *supra* note 179, at 182.

185 GORDON, *supra* note 178, at 33; *see also id.* at 28 ("One of the most poignant ironies of their project is that their clients turned around the meaning of their phrase and labeled their agency . . . 'the Cruelty.' Poor children said to their immigrant parents, mother-in-law said to mothers, feuding neighbors said to each other, 'Don't cross me or I'll report you to the Cruelty.'"). Naomi Cahn, however, points out that not all parents were "resistant, or even passive, recipients of unwanted intrusion and child removal" and that some opted to use the services of these organizations for assistance, sometimes including temporarily placing their children. Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1092–97 (2003) (citing Bruce William Bellingham, "Little Wanderers": A Socio-Historical Study of the Nineteenth Century Origins of Child Fostering and Adoption Reform, Based on Early Records of the New York Children's Aid Society 94–95 (1984) (Ph.D. dissertation, University of Pennsylvania) (ProQuest)) (discussing how Bellingham "challenge[d] the orthodoxy that the child-savers were overly interventionist, [and] f[ound] instead that families voluntarily placed their children and that children often returned to their biological parents").

186 GORDON, *supra* note 178, at 40, 46–48 (discussing class and cultural bias, including, for example, social workers' condemnation of parents cooking with olive oil and garlic).

practitioners led not only to the destruction of parent-child relationships but also to unconscionable severing of the children's community and cultural bonds.[187]

Turning to the second historical example, it would be difficult to overstate the injustice inflicted on Native Americans in the name of child welfare. Tens of thousands of Native American children were taken from their communities between 1860 and 1978 based on the idea that they would be "civilized" at residential facilities.[188] The discriminatory motive of this educational program was explicitly captured in the infamous phrase "[k]ill the Indian, save the man."[189] Even when child welfare professionals shifted emphasis from residential-facility care to home-based care, the separation of Native families continued. The U.S. Bureau of Indian Affairs teamed with the Child Welfare League of America to create the Indian Adoption Project, which was followed by the Adoption Resource Exchange of North America. Congressional hearings found that ultimately between 25% and 35% of Indigenous American children were taken from their parents by child welfare officials, most to be put into white foster and adoptive homes.[190]

Outrage over these harms led to the 1978 Indian Child Welfare Act (ICWA),[191] which makes it more difficult to remove Native American children from their parents and, when removals occur, requires keeping Native American children within their tribal community whenever possible.[192] The degree of ICWA's success in achieving its aims is debatable,[193] but wherever one comes down on the best means to address the harms inflicted on Native Americans by the child welfare system, the history undeniably counsels caution in determining how we structure the system into which we place children the State takes from marginalized families. It is with the backdrop of this tragic history that contemporary

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187 *See id.*; *see also* ELLIOTT, *supra* note 179, at 182.

188 *See, e.g.*, Lila J. George, *Why the Need for the Indian Child Welfare Act?*, 5 J. MULTICULTURAL SOC. WORK 165, 169 (1997).

189 WARD CHURCHILL, KILL THE INDIAN, SAVE THE MAN: THE GENOCIDAL IMPACT OF AMERICAN INDIAN RESIDENTIAL SCHOOLS (2004).

190 *The Outplacement and Adoption of Indigenous Children*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Native-American/The-outplacement-and-adoption-of-indigenous-children [https://perma.cc/YY3M-HHX2].

191 H.R. Rep. No. 95-1386, at 27 (1978); *see also Indian Child Welfare Program: Hearing Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93d Cong. (1974).

192 Indian Child Welfare Act, Pub. L. No. 95-608, § 3, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. § 1902).

193 *See generally* Lorie Graham, *Reparations and the Indian Child Welfare Act*, 25 LEGAL STUD. F. 619 (2001); Jo Ann Kessel & Susan P. Robbins, *The Indian Child Welfare Act: Dilemmas and Needs*, 63 CHILD WELFARE 225 (1984); Ann E. MacEachron, Nora S. Gustavsson, Suzanne Cross & Allison Lewis, *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 SOC. SERVS. REV. 451 (1996).

lawmakers must determine how to respond to the current concerns of the underprivileged communities that are most affected by the foster care system.

5. Structural Racism in Modern Foster Care and Calls for Community-Based Providers

No discussion of contemporary approaches to selecting foster placements should fail to address the significant racial and ethnic disproportionality of today's foster care system. Over 200,000 children from racial and ethnic minorities are in government custody in the foster system today, with African American and Native American children significantly overrepresented.[194] Over half of Black children's homes are investigated by child welfare officials.[195] Even more significant for considering the benefits of community-based foster care providers is the steep increase, in this century, of transracial adoptions of children in foster care. As the number of adoptions from foster care has soared, the percentage of transracial adoptions has also escalated, rising to 28% in 2019.[196] Ninety percent of transracial adoptions involve nonwhite children, and between 2005 and 2019, the percentage of transracial adoptions of Black children rose more than for children of any other race.[197]

While some have argued that this racial disproportionality can be explained by differences in income and other factors,[198] parents in the communities directly impacted by the child welfare system regularly characterize the system's interventions as racist in both intent and

194 AFCARS 2020, *supra* note 35, at 1–2.

195 Kim, Wildeman, Jonson-Reid & Drake, *supra* note 36, at 278.

196 ALLON KALISHER, JENNAH GOSCIAK & JILL SPIELFOGEL, OFF. OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., THE MULTIETHNIC PLACEMENT ACT 25 YEARS LATER: TRENDS IN ADOPTION AND TRANSRACIAL ADOPTION 4 (2020), https://aspe.hhs.gov/sites/default/files/private/pdf/264526/MEPA-Data-report.pdf [https://perma.cc/47YF-K2JM].

197 *Id.* at 11–12 ("Comparing trends over time, we see that the percentage of transracial adoptions among all adoptions of Black children increased 12 percentage points from 2005–2007 to 2017–2019, from 21 percent to 33 percent. . . . Thus, Black children experienced the greatest increases in transracial adoption.").

198 CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 5 (2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [https://perma.cc/P393-ZLKU] ("Children and families of diverse racial and ethnic backgrounds may have a disproportionate need for child welfare services due to a range of factors that put them at greater risk for being reported for child maltreatment—most notably, poverty.").

outcomes,[199] and there is substantial empirical evidence demonstrating that racial bias affects decision making in the child welfare system.[200] For instance, studies indicate that the same or lesser drug use by Black mothers results in greater system involvement than for white mothers, and that comparable childhood injuries are more likely to be diagnosed as child abuse in Black families than white families.[201]

While there has been recognition by some commentators of the racial disparities in the modern child welfare system since its inception in the 1960s and 1970s,[202] the issue came more prominently to the fore as a result of Dorothy Roberts' groundbreaking 2001 book *Shattered Bonds: The Color of Child Welfare*.[203] In recent years, a growing number of activists from the Black communities hit hardest by children's services and their advocates have drawn on their own experiences and Roberts' insights to mount a new movement challenging the structural racism of

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199 *See, e.g.*, Sharon L. McDaniel, *White Privilege in Child Welfare: What Racism Looks Like*, IMPRINT (June 21, 2020, 11:50 PM), https://imprintnews.org/opinion/white-privilege-in-child-welfare-what-racism-looks-like/44662 [https://perma.cc/B35J-ZDM5]; *Neighborhoods Under Scrutiny—The New 'Jane Crow' of Child Welfare Investigations and the Lasting Effects on Poor Families*, RISE (July 27, 2017), https://www.risemagazine.org/2017/07/neighborhoods-under-scrutiny-the-new-jane-crow-of-child-welfare-investigations-and-the-lasting-effects-on-poor-families [https://perma.cc/EJ4D-69YU]; *The Problem*, MOVEMENT FOR FAM. POWER, https://www.movementforfamilypower.org/new-page-2 [https://perma.cc/8BBL-HTZE] ("Low income, Black and Brown parents are not mistreating their children at higher rates than white parents. Instead, as is the case with policing and criminalization, marginalized families are subjected to more surveillance . . . .").

200 *See, e.g.*, MARNA MILLER, WASH. STATE INST. FOR PUB. POL'Y, RACIAL DISPROPORTIONALITY IN WASHINGTON STATE'S CHILD WELFARE SYSTEM 29 (2008), https://www.wsipp.wa.gov/ReportFile/1018/%20Wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_%20Full-Report.pdf [https://perma.cc/6BGB-XTSP]; Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1634–36 (2011); Kathryn Maguire-Jack, Sarah A. Font & Rebecca Dillard, *Child Protective Services Decision-Making: The Role of Children's Race and County Factors*, 90 AM. J. ORTHOPSYCHIATRY 48, 55 (2020); Stephanie L. Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children,* 87 CHILD WELFARE 151, 161 (2008).

201 *See, e.g.*, Ira J. Chasnoff, Harvey J. Landress & Mark E. Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1202 (1990); Kent P. Hymel et al., *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 J. PEDIATRICS 137 (2018); *see also* Jessica Horan-Block, *A Child Bumps Her Head. What Happens Next Depends on Race.*, N.Y. TIMES (Aug. 24, 2019), https://www.nytimes.com/2019/08/24/opinion/sunday/child-injuries-race.html [https://perma.cc/R5W9-5K4R].

202 *See, e.g.*, ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE (1972).

203 ROBERTS, SHATTERED BONDS, *supra* note 128; *see also Implications for Policy and Practice, Children of Color in the Child Welfare System: Perspectives from the Child Welfare Community*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/pubs/otherpubs/children/implications [https://perma.cc/FZW8-FTWD].

the modern child welfare system and calling for radical change.[204] The conversations begun by those activists and advocates have reached a broader audience in the wake of the Black Lives Matter movement and the reinvigoration of discussions about race following George Floyd's killing.[205]

These critics have drawn on the work of scholars such as Roberts and Peggy Cooper Davis, who have traced the underpinnings of the modern foster care system to chattel slavery and post-reconstruction efforts to disempower Black families.[206] Indeed, some have argued that, in light of this history, the child welfare system's current mistreatment of Black families demands special protections (akin to those in ICWA) to prevent the unnecessary destruction of Black families and communities.[207] And a growing chorus of commentators have analogized the racial harms of the foster system to the racial harms of the criminal system.[208] Because of the disparate impact of child welfare intervention on Black women, some have characterized it as the "New Jane Crow."[209]

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204 Gottlieb, *supra* note 96.

205 *See, e.g.*, CHILD.'S RIGHTS, *supra* note 53, at 11 ("The intersection of the child welfare system and all of these systems, themselves riddled with the effects of institutional racism, functions to systemically target, surveil, and punish Black families, with lasting effects on generations of Black children and communities."); Gottlieb, *supra* note 96; Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. 68 (2017); *End the War on Black Women*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/end-the-war-black-women [https://perma.cc/Z9JP-TZN6]; *#ReimagineChildSafety*, BLACK LIVES MATTER LA, https://www.blmla.org/reimaginechildsafety [https://perma.cc/F2BW-GZSU] ("The [child welfare] system disproportionately targets Black children for surveillance and removal, actions that, even when well-intentioned, terrorize and traumatize Black families.").

206 *See* ROBERTS, SHATTERED BONDS, *supra* note 128; Peggy Cooper Davis, "*So Tall Within*"—*The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451 (1996).

207 *See* Minnesota African American Family Preservation Act, Minn. Leg., H.F. 1151, 92d Leg., Reg. Sess. (Minn. 2021); Kenya Franklin & Robbyne Wiley, *Push Continues for Minnesota's African American Family Preservation Act: Q&A with Kelis Houston,* RISE MAG. (Mar. 13, 2020), https://www.risemagazine.org/2020/03/african-american-family-preservation-act [https://perma.cc/EDT3-EAZN].

208 *See, e.g.*, Cloud, Oyama & Teichner, *supra* note 205; Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 538 (2019); Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services [https://perma.cc/P6EL-ZMY6].

209 First coined by Pauli Murray, the phrase "Jane Crow" has been adopted by some critics of the child welfare system. *See* Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html [https://perma.cc/S43W-AG43]; Bric TV, *The New Jane Crow*, YOUTUBE (2020), https://www.youtube.com/watch?v=mGlM1EWzDy4 [https://perma.cc/GDU7-TCNK]. Others use this phrase for other aspects of reproductive justice. *See* Lynn M. Paltrow, Roe v. Wade *and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17, 17 (2013).

There has been a call from across the ideological spectrum to address the racial harms of foster care, with some calling for abolition of the child welfare system[210] and others seeking more moderate reforms.[211] Even the most mainstream children's rights organizations recognize now that "for many among the millions who actually experience it, the child welfare system is an entrenched set of government structures designed to reinforce the racist history of oppression and separation of Black families in the United States," and say "[t]hat must change."[212]

Today, as President Biden put it, it is broadly recognized that:

> Throughout our history and persisting today, too many communities of color, especially Black and Native American communities, have been treated unequally and often unfairly by the child welfare system. Black and Native American children are far more likely than white children to be removed from their homes, even when the circumstances surrounding the removal are similar. Once removed, Black and Native American children stay in care longer and are less likely to either reunite with their birth parents or be adopted.[213]

The now widely held view that structural racism permeates the foster care system and must be addressed[214] buttresses the longstanding principle that children should remain in their families of origin (and therefore their communities of origin) whenever safely possible.[215] There have been persuasive calls for a number of further steps that also could be

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210 *See, e.g.*, *About Us*, UPEND, https://upendmovement.org/about [https://perma.cc/E9WL-8RQY] (explaining why the organization upEND supports abolition of the child welfare system); Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861 (2021) (discussing termination of parental rights from an abolition perspective).

211 *See, e.g.*, *Racial Equity*, ANNIE E. CASEY FAM. PROGRAMS (Dec. 7, 2020), https://www.casey.org/racial-equity-topic-page [https://perma.cc/C7UL-FFJA] (calling for an antiracist approach to the child protection system).

212 CHILD.'S RIGHTS, *supra* note 53, at 3; *see also There Can Be No Children's Justice Without Racial Justice*, NACC (June 30, 2020), https://www.naccchildlaw.org/news/515198/There-Can-Be-No-Childrens-Justice-Without-Racial-Justice.htm [https://perma.cc/WPA9-DBAR].

213 Presidential Proclamation No. 10192, 86 Fed. Reg. 23849 (May 5, 2021), https://www.govinfo.gov/content/pkg/FR-2021-05-05/pdf/2021-09573.pdf [https://perma.cc/QQ7L-NZPJ].

214 *See* CHILD.'S RIGHTS, *supra* note 53, at 6 ("The history, current structure, and reality of child welfare surveillance, investigation, and removal demand that we *name* institutional racism as a root cause of the forced separation of Black families and their overrepresentation in the child welfare system.").

215 *Id.* at 16 ("The trauma imposed on children and their parents, especially Black families, must be assessed and continually reassessed throughout all decision points in the child welfare system. . . . Far too often, the trauma of separation—or continued separation—outweighs any actions that run contrary to keeping families together."). *But see, e.g.*, Bartholet, *supra* note 141, at 2–4 (responding to racial justice critiques of transracial adoption of Black children by white families and arguing that the consideration of race when matching children with adoptive parents harms children of color by delaying or withholding permanent homes).

taken to reduce the harms of the system.[216] Importantly, many of the critiques of the system's structural racism and calls for change stress that, in the field of child welfare, community-based services are far preferable to top-down services.[217] Much of the discussion of community-based

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216 *See, e.g.*, CHILD.'S RIGHTS, *supra* note 53, at 5 (putting forward nine legal and policy recommendations "to move us toward ending the unjust, unnecessary, and devastating removal of Black children from their families"); MOVEMENT FOR FAM. POWER, "WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR": HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR 103–12 (2020), https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf [https://perma.cc/4HE9-YTN9] (providing numerous recommendations tailored to specific actors, such as drug treatment providers, attorneys for children, and judges, that would counter the foster system's surveillance, separation, and inadequate support of families); *Parent Legislative Action Network (PLAN)*, JMAC FOR FAMS., https://www.jmacforfamilies.com/plan-2 [https://perma.cc/9NCG-HB6F] (listing New York legislative campaigns to establish *Miranda* rights in child protective services investigations and to "replac[e] anonymous reporting" of alleged maltreatment with "confidential reporting" in order to decrease malicious reporting and focus the use of agencies' resources); *Priorities*, JMAC FOR FAMS., https://www.jmacforfamilies.com/priorities [https://perma.cc/LG85-86P6] (advocating for changes to mandated reporting policy and for appointing legal counsel when an investigation commences, rather than waiting until a petition is filed); *Family Poverty Is Not Neglect*, UNITED FAM. ADVOCS., https://www.unitedfamilyadvocates.org/family-poverty-is-not-neglect [https://perma.cc/P5YQ-EBD8] (proposing changes to statutory definitions of neglect and to legal standards for removal to prevent intervention on the basis of poverty when no immediate harm exists); *Hidden Foster Care: Compelled Shadow Family Separations*, UNITED FAM. ADVOCS., https://www.unitedfamilyadvocates.org/hidden-foster-care [https://perma.cc/4TDM-H6VD] (recommending increased due process protections for parents pressured into "voluntary" placements under threat of child removal and amendments to the federal Family First Prevention Services Act to recognize this form of foster care).

217 *See, e.g.*, MOVEMENT FOR FAM. POWER, *supra* note 216, at 112 (recommending decreasing federal open-ended funding for foster care and reinvesting the funds into community-based organizations); *Target Conditions, Not Families*, RISE (2021), https://www.risemagazine.org/wp-content/uploads/2021/04/Rise-Target-Conditions-2021.pdf [https://perma.cc/LJR3-EBL2] (recommending investing in community-led social support efforts rather than children's services); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 678 (2021); Sixto Cancel, *I Will Never Forget That I Could Have Lived with People Who Loved Me*, N.Y. TIMES (Sept. 16, 2021), https://www.nytimes.com/2021/09/16/opinion/foster-care-children-us.html [https://perma.cc/Y8CR-MXNE] ("My foster care placements failed not because I didn't belong in a family but because the system failed to identify kinship placements for me and lacked enough culturally competent, community-based services to keep me in a home that had a chance at success."); *see also* ANNIE E. CASEY FOUND., RECRUITMENT, TRAINING, AND SUPPORT: THE ESSENTIAL TOOLS OF FOSTER CARE 5 (2001) [hereinafter RECRUITMENT, TRAINING, AND SUPPORT], https://assets.aecf.org/m/resourcedoc/aecf-F2FRecruitmentTrainingSupport-2001.pdf [https://perma.cc/KP9L-4L49] ("The [Annie E. Casey] Foundation's goal in child welfare is to help neighborhoods build effective responses to families and children at risk of abuse or neglect. The Foundation believes that these community-centered responses can better protect children, support families, and strengthen communities."); NAT'L TECH. ASSISTANCE AND EVALUATION CTR. FOR SYS. OF CARE, COMMUNITY-BASED APPROACHES IN CHILD WELFARE DRIVEN SYSTEMS OF CARE 4 (2009), https://www.childwelfare.gov/pubPDFs/community.pdf [https://perma.cc/SJ4T-FGMK]

services has focused on services to prevent the need for foster care, but it has also been recognized that when foster care is needed, it too should be community-based.[218]

Commentators have noted both the importance and the challenges of recruiting foster parents who are part of the communities from which foster children come.[219] Specialized foster care agencies are one means to serve that goal. As the U.S. Children's Bureau has recognized, the tradition of government child welfare agencies contracting with private foster care agencies provides a mechanism for meeting these challenges by targeting recruitment of foster parents and drawing on existing formal and informal institutions of social support in the children's communities.[220] Community-based agencies facilitate "more intimate

(noting multiple benefits of community-based resources, including that "[k]eeping children in their homes, neighborhood schools, and local communities has a positive effect on child and family well-being[, as m]oving, in many cases, generates unnecessary stress for an already traumatized child," so "[b]y remaining in the community, the child is able to retain critical bonds with friends, family, and school personnel"); ANNIE E. CASEY FOUND., LESSONS LEARNED 7 (2001), https://assets.aecf.org/m/resourcedoc/aecf-F2FLessonsLearned-2001.pdf [https://perma.cc/SW5L-639W] (demonstrating the success of "family foster care that is more neighborhood-based, culturally sensitive and located primarily in the communities in which the children live"); Rong Xiaoqing, *ACS in Action*, CITY LIMITS (Dec. 20, 2004), https://citylimits.org/2004/12/20/acs-in-action [https://perma.cc/UU4R-F3UH] (quoting John Mattingly, New York City Children's Services Commissioner, discussing the importance of community-based foster care agencies and stating: "I believe strongly it makes a difference to children and family that the person reaching out to help them is a neighbor, speaks their language, looks like them and can understand what their experience is in the community").

218 *See* RECRUITMENT, TRAINING, AND SUPPORT, *supra* note 217, at 11 (explaining that "[f]oster care that is community-based builds the bridge between the sets of parents and therefore has a much better chance of succeeding" as it "tak[es] advantage of informal support systems that occur naturally there" and the "resources devoted to foster care can become economic benefits for the community").

219 *See, e.g.*, CHIBNALL ET AL., *supra* note 101, at 60 ("[T]he ever-changing racial and ethnic make-up of this country has posed special challenges for child welfare agencies and staff. Racial and ethnic discrimination, and language and cultural barriers to service provision have become commonplace in many social service systems, including public health and education as well as in the judicial and child welfare systems. . . . Identifying the special needs of multiple racial and ethnic groups, and developing practices, programs, and strategies to meet their unique circumstances has proven an overwhelming task for a system that has yet to determine how best to meet the needs of its African-American families, families that have been overrepresented in the system for more than a decade."); KALISHER, GOSCIAK & SPIELFOGEL, *supra* note 196, at 4–7 (describing targeted efforts to recruit foster parents from specific demographic groups).

220 CHIBNALL ET AL., *supra* note 101, at 64–65 ("The long-held practice in child welfare services to contract out specific services has had particular implications for minority families. First and foremost, child welfare agencies have been able to link with programs designed to serve particular ethnic groups. Often these programs are part of agencies that emerge from informal or formal institutions in the minority community, and have particular philosophical approaches that promote the well being of that specific population. In addition, these collaborations allow for a focus on a particular service strategy, such as prevention and reunification, recruitment of minority and adoptive families, or post-placement services. These linkages also provide service settings for

relationships between the service providers and recipients, as well as the provision of more culturally and otherwise responsive services."[221]

One example of taking this approach is the New York City foster care agency Coalition of Hispanic Family Services. The agency's website explains that it was established because of "concern[] about the status of child welfare services to Latino children and families in New York City" and that it seeks to "provide community-based foster care services to Hispanic families."[222] Similarly, the co-director of the agency Center for Family Life, which "pioneered a model of neighborhood-based foster care" to avoid "the secondary trauma that results from being uprooted," explained that "[c]linical intervention in foster care services, in this model, has value only in so far as it prepares and strengthens children and families to become engaged, to lead, and to make decisions within the communities in which they live."[223]

Indeed, there have been targeted efforts in a range of different ethnic and religious communities to recruit and provide support to foster parents in those communities.[224] Such efforts can take various forms, and

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families that are in their individual communities, versus in the centralized and often bureaucratic setting of the child welfare public agency."); *see also id.* at 46–47 (discussing efforts of states to increase recruitment of nonwhite foster parents by targeting communities for recruitment and providing culturally sensitive services).

221 *Id.* at 65.

222 *About Us*, COAL. FOR HISP. FAM. SERVS., https://www.hispanicfamilyservicesny.org/about-us [https://perma.cc/R6FR-698U].

223 Julia Jean-Francois, *A Neighborhood-Based Model for Foster Care Services: Reflections on 30 Years of Practice and Thoughts About Future Directions*, CHILD.'S BUREAU EXPRESS (May 2019), https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=206&sectionid=2&articleid=5337 [https://perma.cc/8RB7-8PTD]; *see also* COAL. FOR HISP. FAM. SERVS., *supra* note 222 ("Our goal is to empower children, youth and families with opportunities for success and self-reliance while reinforcing their sense of culture and self-identity. This is achieved through a holistic, culturally competent, family based approach."). It must be noted that New York City's conscious effort in the 1990s to emphasize nonwhite-led foster care agencies was not successful, though the Coalition for Hispanic Family Services is an exception. Leslie Kaufman, *Foster Children at Risk, and an Opportunity Lost*, N.Y. TIMES (Nov. 5, 2007), https://www.nytimes.com/2007/11/05/nyregion/05foster.html [https://perma.cc/L8VZ-5UAY] (describing minority-led foster care agencies in which New York City had invested but that, with the exception of the Coalition for Hispanic Family Services, all had abandoned their mission and were shuttered due to corruption, mismanagement, and harm to children, including fatalities).

224 *See, e.g.*, *Our Mission*, MUSLIM FOSTER CARE ASS'N, https://muslimfostercare.org/our-mission [https://perma.cc/7KTK-6T5R] (describing organization's goals as encouraging Muslims to become foster parents, assisting Muslim foster families, and educating the Muslim community about the religious responsibility of fostering and adoption); *About KFAM*, KOREAN AM. FAM. SERVS., https://www.kfamla.org/upage.aspx?pageid=u01 [https://perma.cc/XLP9-GQBZ] (stating Korean American Family Services' mission to "empower underserved Korean American and Asian Pacific Islander families" and "specializ[ation] in providing linguistically and culturally appropriate services through its multilingual and multicultural staff" and that "speak directly to the challenges among immigrant families undergoing trauma or adaptation stresses"). This is not to suggest that these efforts and organizations are more than an exception to the common rule.

no one suggests that any one-size-fits-all solution is appropriate. The point for present purposes is that there can be significant advantages to having private foster care agencies that focus exclusively on particular communities. Specialized agencies can serve all the interests in maintaining foster children's community connections discussed above,[225] and expanding specialized agencies might serve as a direct response to calls to address structural racism by moving the child welfare system away from its historically hegemonic approach to foster care.

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It should by now be clear that foster care is a unique government service. It is an intervention into a constitutionally protected realm and therefore must be narrowly tailored. Remaining narrowly tailored while taking on, even temporarily, the enormous power entailed in child rearing presents special challenges because child rearing is inherently value laden. There are individual, group-based, and constitutional interests at stake, which require the service to be structured to protect preexisting relationships. Thus, unlike the vast majority of government or private services, foster care services not only can, but *must* take into account the race, religious, and cultural background of those it serves. Only with this in mind can the analysis of foster care as a public accommodation be properly understood.

III. FOSTER CARE AS A PUBLIC ACCOMMODATION

Turning back to *Fulton*, Philadelphia's argument that it had the authority to stop sending foster children to CSS had two components. First, it argued that CSS was violating the nondiscrimination clause in its contract with the City. This argument was unavailing because the Court concluded that Philadelphia had discretion under the contract to

225 *See, e.g.*, *Our Story*, MUSLIM FOSTER CARE ASS'N, https://muslimfostercare.org/our-story [https://perma.cc/28GN-A8XV] (explaining that the Muslim Foster Care Association was founded on concerns for the "child that has to be removed from his/her own home because of neglect, abuse, or other family tragedy and now has to live with a family that does not share their faith, culture, or language"); Josie Huang, *Seeing None, Korean-American Community Works to Recruit Foster Parents*, KPCC (Jan. 22, 2014), https://archive.kpcc.org/blogs/multiamerican/2014/01/22/15661/foster-parents-homes-korean-american-dcfs-los-ange [https://perma.cc/W4ZM-MC5H] (quoting a non-Korean parent explaining that, for the Korean child she fostered and later adopted, "[i]f he'd gone straight into a Korean home where he hadn't lost his language, where he hadn't lost his food, where he hadn't lost his smells, where he hadn't lost the overall community, the TV shows, everything—he could have felt like he could have been himself").

recognize exceptions[226] (even though the City had never exercised that discretion and indicated it had no plans to do so).[227] Once the Court found that the rule CSS violated was not generally applicable, the question of CSS's rights was not subject to *Employment Division, Department of Human Resources of Oregon v. Smith* (*Smith*), and the Court made quick work of holding that preventing CSS from continuing its foster care work for acting on a religious belief could not survive strict scrutiny.[228] Although the Court acknowledged that the City had a strong interest in protecting LGBTQ individuals from discrimination, it found that the imposition on CSS was not sufficiently narrowly tailored.[229] The Court then turned to the City's second argument, which was that CSS's policy of discriminating against LGBTQ couples violated the City's Fair Practices Ordinance.[230]

The arguments about the contract and the city ordinance both misunderstood fundamental aspects of foster care; nonetheless, this Part will focus only on the latter because the broader issues are more clearly drawn when discussing the city ordinance, and the analysis of that argument is more easily transferable to other contexts.[231]

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226 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021) ("The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by *Smith*. . . . [S]ection 3.21 incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner. The City has made clear that the Commissioner 'has no intention of granting an exception' to CSS. But the City 'may not refuse to extend that [exemption] system to cases of "religious hardship" without compelling reason.'" (citation omitted) (first quoting Petition for a Writ of Certiorari at 168a, *Fulton*, 141 S. Ct. 1868 (No. 19-123); and then quoting Emp. Div., Dep't of Hum. Res. of Or. v. Smith (*Smith*), 494 U.S. 872, 884 (1990))).

227 *See Fulton*, 141 S. Ct. at 1879 (rejecting the City's argument that "the availability of exceptions . . . is irrelevant because the Commissioner has never granted one" since it is "[t]he creation of a formal mechanism for granting exceptions [that] renders a policy not generally applicable, regardless whether any exceptions have been given").

228 *Id.* at 1881–82.

229 Applying strict scrutiny, the Court determined that "[t]he question . . . is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS." *Id.* at 1881. The Court concluded that while the City's interest in the equal treatment of foster families may be "a weighty one," the "system of exceptions . . . undermines the City's contention that its non-discrimination policies can brook no departures" and that there was "no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." *Id.* at 1882.

230 *Id.* at 1880–81.

231 While a deeper understanding of foster care would affect the drafting and the interpretation of contracts between municipalities and private foster care agencies, the question of whether and when the Constitution requires religious exceptions to antidiscrimination ordinances is more broadly applicable to and more useful for elucidating the special characteristics of foster care. For one thing, the religious rights claim is not as strong for contractees as it is for organizations or individuals who are not seeking to contract with the government but seeking exceptions to laws that restrict their behavior outside of a contract context.

Philadelphia, like many jurisdictions, has an ordinance that forbids discrimination in public accommodations on numerous grounds, including sexual orientation.[232] In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, where the question raised was whether such an ordinance prohibited discrimination even when that discrimination was based on the exercise of a religious belief, all parties agreed that the venue at issue—a bakery—is a public accommodation.[233] But in *Fulton*, the question of whether the context of the dispute—foster care—is a public accommodation was hotly disputed and received significant attention from the Court.

The City and the intervenors (The Support Center for Child Advocates and Philadelphia Family Pride) argued that foster care is a public accommodation and that therefore foster care agencies cannot discriminate against potential foster parents.[234] CSS argued that foster care is not a public accommodation.[235] Both sides were wrong. And while the Court correctly concluded that foster care agencies are not acting as a public accommodation when they certify foster parents,[236] its discussion of this point demonstrated a disturbing lack of appreciation for the constitutional aspects of foster care.

Similar to other jurisdictions, Philadelphia's Fair Practices Ordinance defines a "public accommodation" in relevant part as: a provider "whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public; including all facilities of and services provided by any public agency or authority . . . the City, its departments, boards and commissions."[237]

Foster care might be said to offer facilities (foster homes) and to be a service (caretaking). But is it reasonable to characterize this service as

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232 *Fulton*, 141 S. Ct. at 1880 ("[The Fair Practices Ordinance] forbids 'deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her race, ethnicity, color, sex, sexual orientation, . . . disability, marital status, familial status,' or several other protected categories." (alterations in original) (quoting PHILA., PA. CODE § 9-1106(1) (2016))).

233 Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1726 (2018).

234 *Fulton*, 141 S. Ct. at 1880 ("The City contends that foster care agencies are public accommodations and therefore forbidden from discriminating on the basis of sexual orientation when certifying foster parents."); Brief for Intervenor-Respondents at 3, 46, *Fulton*, 141 S. Ct. 1868 (No. 19-123) (stating that "[f]oster care services are public accommodations" and arguing that "[t]he anti-discrimination interest here is all the more vital in the context of a government program, where any discrimination carries the imprimatur of the state").

235 *Fulton*, 141 S. Ct. at 1880 (stating CSS's position that "foster care has never been treated as a 'public accommodation' in Philadelphia" (quoting Petition for a Writ of Certiorari, *supra* note 226, at 13)).

236 *Id.*

237 PHILA., PA. CODE § 9-1102(1)(w) (2021).

being offered to the public? Put differently, who is it a service for? No one could doubt that it is a service for foster children. And it may fairly be regarded as a service for the families from which the foster children come. But, decidedly, foster care is not a service *for* foster parents. Foster parents provide the service; it is not offered to them. It is difficult to imagine anyone disagreeing with this point when put directly, but unfortunately, it was never raised in the case.

Foster care does not exist to provide children to foster parents, and even though placements sometimes lead to adoption by foster parents, that is never the system's purpose. The law's goal could not be clearer: to have children reside in foster care only as long as necessary and to leave their foster parents to return home whenever possible.[238] That uncontroversial point seems to have gotten lost as foster care cases got swept into the movement to protect the rights of LGBTQ individuals who wish to become parents and have their parent-child relationships treated equally under the law. As important as it is to protect those rights,[239] including the right to adopt, they cannot include the right to parenthood at the expense of an existing parent-child relationship.[240] As the Supreme Court noted in *OFFER*, there is a "virtually unavoidable" "tension" between claims of a foster parent's rights to a child and the rights of the parent of that child, and the rights of the parent are paramount. [241]

The *Fulton* Court seemed to recognize that foster parents are not the intended beneficiaries of foster care. The decision noted the "customized and selective assessment" process involved in being certified as a foster parent and concluded that "foster care agencies do not act as public

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238 *See supra* Section II.A.

239 *See., e.g.*, David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523 (1999) (describing efforts to challenge discrimination against prospective LGBTQ foster and adoptive parents within the context of broader efforts to protect LGBTQ parents' rights).

240 Chris Gottlieb & Dorchen A. Leidholdt, *Parity with Clarity*, N.Y.L.J. ONLINE (June 9, 2016, 12:00 AM), https://www.law.com/newyorklawjournal/almID/1202759606260 [https://perma.cc/7V8N-E3G9].

241 Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 846–47 (1977) ("[O]rdinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable. . . . It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." (footnote omitted)).

accommodations in performing certifications."[242] But later in the decision, the Court said far more broadly: "We agree with CSS's position, which it has maintained from the beginning of this dispute, that its 'foster services do not constitute a "public accommodation" under the City's Fair Practices Ordinance.'"[243] This language might be viewed as dicta or as a loose restatement of the more precise aspect of the holding that foster parent certifications (rather than all aspects of foster care) are not a public accommodation, but it is concerning that it seems to indicate a failure to recognize that foster care *is* a public accommodation for some purposes. The failure on this point is clear when the majority decision criticized the concurrence for "seeing no incongruity in deeming a private religious foster agency a public accommodation,"[244] thereby indicating that the majority does not understand foster care is a public accommodation with respect to the service it provides to foster children.

This failure entails a problematic misunderstanding of foster care and, as will be discussed below, is in striking contrast to the far more nuanced grasp of foster care that the Court demonstrated in *OFFER*.[245] The misunderstanding seems to arise from the unique nature of foster care, which is not readily analogous to other services. In discussing the meaning of the term "public accommodation," the Court emphasized that availability is the key idea, saying a service is a public accommodation if it is "accessible" and "obtainable."[246] Looking at Pennsylvania law, the Court said a public accommodation "solicits the patronage of the general public,"[247] and the '"common theme"' is that it "provide[s] a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire."[248] Foster care does not easily fit this theme in part because it is not something anyone desires, and no one is being solicited to engage with it. But the fact that most people will never qualify for foster care does not mean it is not a public accommodation. While there is some variation in the definition of the term public accommodation as it is defined in different statutes,[249] the critical point is that foster care is a service offered to the public in the sense that any child in the custody of the State is entitled to it. And it is a

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242 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1880 (2021).

243 *Id.* at 1881 (quoting Petition for a Writ of Certiorari, *supra* note 226, at 159a).

244 *Id.*

245 *See infra* Part IV.

246 *Fulton*, 141 S. Ct. at 1880 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 84 (11th ed. 2005)).

247 *Id.* (quoting 43 PA. CONS. STAT. § 954(l) (2020)).

248 *Id.* (quoting Blizzard v. Floyd, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992)).

249 *See* Elizabeth Sepper, *The Role of Religion in State Public Accommodation Laws*, 60 ST. LOUIS U. L.J. 631, 639–44 (2016).

service offered to the public in the sense that any parent of a child who enters foster care is entitled to the services and support of the parent-child relationship described above in Section II.A.[250]

It is striking that neither the *Fulton* Court nor the litigants addressed the most important case on the issue of what children are entitled to from foster care and the concomitant obligations of religiously based agencies contracting to provide foster care for the state. In 1973, the New York Civil Liberties Union filed *Wilder v. Bernstein*,[251] a class action lawsuit alleging that New York City was illegally allowing religious foster care agencies to pick and choose which foster children it would accept.[252] These foster care agencies—like CSS—had been providing care to needy children since before the establishment of the modern foster care system.[253] In the 1800s and well into the 1900s, the law had given those agencies the authority to take custody of poor children and house and care for them.[254] When the government took over more of the role of protecting children in the 1960s and began to manage foster care, New York City contracted with those existing agencies.[255] Almost all of the

250 *See supra* Section II.A.

251 Wilder v. Bernstein (*Wilder II*), 499 F. Supp. 980 (S.D.N.Y. 1980). This case was originally filed as *Wilder v. Sugarman*. *See* Wilder v. Sugarman (*Wilder I*), 385 F. Supp. 1013 (S.D.N.Y. 1974).

252 *See Wilder II*, 499 F. Supp. at 990–91 (describing plaintiffs' allegations that, inter alia, defendants discriminated on the bases of religion and race and that defendant public officials "had actual knowledge that black Protestant children have been disproportionately denied access to such services"); *Wilder I*, 385 F. Supp. at 1021 ("[Plaintiffs] argue that insofar as the statutory scheme 'mandates' placement of children in accordance with their religion or that of their parents, it is unconstitutional.").

253 *See, e.g.*, BERNSTEIN, *supra* note 173, at 197–99 (describing the "orphan train" movement beginning in New York City in 1853, which led to the founding of foster care agencies still active today, including The New York Foundling Hospital, a defendant in the *Wilder* class action, as well as the prominent Children's Aid Society); *History*, SEAMEN'S SOC'Y FOR CHILD. & FAMS., https://www.seamenssociety.org/about/history [https://perma.cc/7PNV-S7XR] ("Seamen's Society for Children and Families was founded in 1846 to care for the abandoned children of sailors from the Port of New York."); *History*, FORESTDALE, https://www.forestdaleinc.org/history [https://perma.cc/L3VY-UA68] (describing agency formerly known as Brooklyn Home for Children, founded in 1854); *History*, LUTHERAN SOC. SERVS. OF N.Y., https://lssny.org/about-us/history [https://perma.cc/63RX-4Q29] (describing agency known as Lutheran Community Services, founded in 1886 as the Bethlehem Orphan and Half-Orphan Asylum). *See generally Wilder I*, 385 F. Supp. at 1019–20 (detailing "New York's historical commitment to relatively sophisticated child welfare and placement practices since early colonial days" and what "[b]y the end of the nineteenth century . . . [became] known as the 'New York System,'" which "plac[ed] dependent and neglected children who were public charges under the care of private agencies, with the responsible counties, cities and towns paying for the services provided").

254 *See Wilder I*, 385 F. Supp. at 1019–20 (surveying New York laws beginning in 1856 that recommended the removal of poor children and authorized and funded private agencies to oversee their care).

255 *See* BERNSTEIN, *supra* note 173, at 109–11 (describing New York City's "first overtly public foster-care program," opened to serve Black and Puerto Rican children rejected by the existing agencies).

foster care agencies in New York City were religiously affiliated, with the largest and best financed ones being Catholic and Jewish.[256] These agencies viewed their charitable role as helping children broadly, but they also had the specific goal of helping children of their own faiths and providing them religious education.[257] Because most of the agencies, including those that provided the highest quality foster care services, were Catholic and Jewish, and most of the Catholic and Jewish foster children were white, white children were given better foster care placements more quickly, while Black foster children languished on waiting lists and were less likely to get placed with the foster care programs thought to provide the best services.[258]

The *Wilder* case went on for decades and significantly altered New York City's foster care system. The legal challenges included race discrimination, free exercise violations, and establishment claims.[259] But the gravamen of the lawsuit was that charitable religious organizations could not legally discriminate simply because they were engaged in charitable work that they had begun outside government purview and that included the goal of serving their own particular religious

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256 *Id.* at xi (explaining that when *Wilder I* was filed, New York City's foster care system was made up of "private, mostly religious agencies," and "Catholic and Jewish charities . . . dominated the field").

257 *See, e.g.*, Harry J. Byrne, *Church, State and Foster-Care Children*, AMERICA, July 18, 1987, at 38 (defending, from the view of a Catholic pastor, religiously-affiliated foster-care agencies in response to the *Wilder* case, because "the child is assured of his or her religious identity and has the consolation of its symbols and devotions, which are so important to young lives otherwise upset by parental and other problems"); BERNSTEIN, *supra* note 173, at 274 (describing the Federation of Jewish Philanthropies' position during the *Wilder* case that its "affiliated agencies had the right to give preference to Jewish children and to offer them a Jewish experience"); Michaela Christy Simmons, *Becoming Wards of the State: Race, Crime, and Childhood in the Struggle for Foster Care Integration, 1920s to 1960s*, 85 AM. SOCIO. REV. 199, 205 (2020) ("Children were sent to an agency that aligned with their family's religious faith—Protestant, Catholic, or Jewish. . . . The loosely coordinated agencies rationalized the exclusion [of Black children] by arguing that every group takes care of their own . . . .").

258 *See* David Rosner & Gerald Markowitz, *Race, Foster Care, and the Politics of Abandonment in New York City*, 87 AM. J. PUB. HEALTH 1844, 1847–48 (1997) (describing New York City's "two-track system of [foster care] services: Jewish and Catholic children were assured services through the dominant voluntary agencies, but African-American children encountered numerous roadblocks to effective care at every turn," including exclusion by these sectarian agencies and, when they were accepted, "most were warehoused in public institutions," provided inadequate services, and preferred if they were "light-skinned," "high-achieving," and "well-mannered"); Simmons, *supra* note 257, at 206 (explaining how the family court chose to apply the "delinquency label" to children of color requiring public institutions to accept them, because "White, Catholic, Protestant, and Jewish children [were] provided for through private institutions," and "the absence of any private institutions for delinquent colored boys and girls of the Protestant faith ha[d] forced the Court to send all such children to State Training Schools . . . [at rates] entirely at variance with their percentage in the general community" (third alteration in original)).

259 *Wilder II*, 499 F. Supp. 980 (S.D.N.Y. 1980).

communities.[260] Many on the boards of the largest and most influential charitable organizations in the City were incensed that their authority to conduct charitable work as they saw fit was being questioned.[261] But in the end, the settlement agreement acknowledged that once the government took over the provision of foster care, religious foster care agencies could not discriminate based on race or religion in ways that would be allowed if they were not acting as state contractors.[262]

The City reached a settlement with the plaintiffs in which it was agreed that placement of children with foster agencies would switch to a "first-come, first-served basis."[263] Religious matching of children with agencies would be allowed but only when there was an opening at an agency of the child's religion without delaying the placement of other children.[264] Additionally, the settlement required foster care agencies to provide "comparable opportunities for [foster] children to practice their [own] religion"[265] and "benefits and privileges to children without regard to religion, and [prohibited conveying] religious tenets regarding family planning except in the course of providing religious counseling."[266] And agencies also could not display "excessive religious symbols."[267]

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260 *See generally id.*

261 *See, e.g.*, BERNSTEIN, *supra* note 173, at 274–75 (describing the animosity expressed by the Federation of Jewish Philanthropies' executive vice president for whom "[i]t was practically an article of faith" that its agencies could discriminate in favor of Jewish children and who accused the ACLU team of being "against voluntarism," "undermining democracy," and "threaten[ing] the survival of the Jewish people").

262 *See* Wilder v. Bernstein, 645 F. Supp. 1292, 1304 (S.D.N.Y. 1986) (granting the settlement, which "ensure[s] that all New York City children whose placement in foster care is the responsibility of the New York City Commissioner of Social Services receive services without discrimination on the basis of race or religion and have equal access to quality services[,] and to ensure that appropriate recognition be given to a statutorily permissible wish for in-religion placement in a manner consistent with principles ensuring equal protection and non-discrimination as defined in applicable New York State and federal laws, regulations and the Constitution" (second alteration in original)); BERNSTEIN, *supra* note 173, at 353 (describing the settlement as vindicating rights to equal access and religious freedom by "establish[ing] centralized control of the placement process in the hands of the public agency" and ensuring a "fair and neutral" process for distributing the "best available services").

263 *Wilder*, 645 F. Supp. at 1305.

264 *Id.* ("Where a parent expressed a preference for placement of the child in an agency or program of a particular religious affiliation (or [New York City's Special Services for Children (SSC)] inferred such a parental preference according to its established procedures), SSC would place the child in the best available program of the relevant religious affinity, provided it had determined that such a placement was in the child's best interest and that it was practicable to make the placement. Such placement would not be 'practicable' within the meaning of the Stipulation if there was no vacancy in the best 'in-religion' program or if there was a waiting list for that program.").

265 *Id.* at 1328 (citation omitted).

266 *Id.* at 1307.

267 *Id.* (citation omitted).

Nineteen religious foster care agencies objected to the settlement, but the United States District Court overseeing the action nonetheless approved it.[268] In a thoughtful opinion, Judge Robert Ward found that the compromises made by the various parties appropriately addressed the race and religion discrimination claims the plaintiffs had made and reasonably balanced the free exercise interests of foster children against the establishment concerns raised.[269]

In approving the settlement, the Court said that when there is "*joint* implementation" of a state regulatory scheme "governing the funding of sectarian child care agencies and the religious matching of children in need of foster care with those agencies," and the child is placed with foster care but "the State and City remain ultimately responsible for the child's welfare, . . . the action of the [agency] may be fairly treated as that of the State itself."[270]

I do not mean to suggest that *Wilder* was directly relevant precedent to *Fulton* or will be to the next legal challenge involving a foster care agency that refuses to certify LGBTQ foster parents. The precise legal questions in such cases are likely to vary. They can hinge on whether foster care is a public accommodation, whether a foster care agency is a state actor for purposes of the First and Fourteenth Amendments or Section 1983 actions, or even on employment discrimination statutes.[271] But *Wilder* brought to the fore the critical point that once the State takes custody of a child, that child is entitled to maximum constitutional protection against discrimination regardless of whether the State partners with religious entities who previously provided similar charitable services outside the purview of government, even if those entities' actions would otherwise be protected by the First Amendment.

Wilder vividly brought to life that Black children in the custody of the State, such as named plaintiff Shirley Wilder, were consigned to institutions as they sat on waitlists for years, while white and Hispanic children went to higher quality foster placements at Catholic and Jewish

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268 *Id.* at 1346.

269 *Id.* at 1353–54.

270 *Id.* at 1315 (alteration in original) (citation omitted) (quoting Jackson v. Metro. Edison Co., 419 U.S. 335, 351 (1974)).

271 Hannah Roman has persuasively argued that foster parents should be deemed employees of foster care agencies, though historically child welfare officials have chosen to treat them as volunteers who are given a "stipend" to care for foster children. Roman, *supra* note 62, at 182, 193. If they are treated as employees, the question would arise whether religious foster care agencies are exempt from otherwise applicable employment discrimination statutes. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (interpreting broadly the types of employees who fall within the "ministerial exception," which bars under the First Amendment judicial review of employment disputes involving religious institutions and thus forecloses employees' discrimination claims).

agencies that preferred to accept Catholic and Jewish children.[272] It can no longer seriously be doubted that such a practice is unconstitutional. In other words, it can no longer be doubted that foster children are entitled to equal treatment regardless of whether the government contracts out foster care services.[273] As Professor Lawrence Sager pointed out in his amicus brief in *Fulton*, if the State cannot constitutionally take an action, it cannot contract with an agent to take that same action.[274] Thus, it is puzzling that CSS's position—that "foster care has never been treated as a 'public accommodation' in Philadelphia"[275]—was articulated so broadly that, if adopted wholesale, it would abnegate the right of foster children to equal treatment; and even more puzzling is that the Court's discussion of public accommodation left open the possibility that it was adopting that position.[276] Holding that foster care is not a public accommodation offered to foster parents—all that was necessary to the Court's ruling—is far more defensible than the proposition that foster care is not a public accommodation insofar as it is offered to foster children.[277] None of the

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272 *See* BERNSTEIN, *supra* note 173, at 3–7, 99–100 (detailing Shirley Wilder's experience and treatment by Catholic and Jewish foster care agencies).

273 And, of course, both children in foster care and their parents are entitled to protection under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act when being provided foster care services. U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF JUST., PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT (2015), https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html [https://perma.cc/9YY6-3KUP].

274 *See* Brief for Lawrence G. Sager as Amicus Curiae Supporting Respondents at 3, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123). As explained below in Part V, however, there is a strong argument countering Sager's further claim that referring prospective foster parents from one agency to another agency is such prohibited conduct.

275 *Fulton*, 141 S. Ct. at 1880 (quoting Brief for Petitioners, *supra* note 26, at 13).

276 *See id.* at 1881; *supra* Part III.

277 There are aspects of CSS's official statements of its core values that are reminiscent of the values found to merit protection as expressive associational rights in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). CSS's website includes descriptions of their commitment, including:

> [CSS] is one of the largest providers of social services and family service centers in the region. CSS is committed to effectively aiding those utilizing our Catholic services. Catholic identity is key to our operations . . . . Our goals, mission, beliefs and Catholic community services stem from our Catholic identity and the teachings of Catholic Church. The Catholic Church maintains a long history of charitable activity, including helping those in need.

Catholic Identity, CATH. SOC. SERVS., ARCHDIOCESE OF PHILA., https://cssphiladelphia.org/about/catholic-identity [https://perma.cc/T2Y4-ZTKK]. But one need not enter the thorny realm of the expressive-versus-commercial distinction to determine whether foster care is a public accommodation. Even those like Richard Epstein who would favor associational rights over the interest in combatting antigay discrimination should agree that antidiscrimination interests prevail with respect to foster care because the government has a monopoly on it. *See* Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as*

litigants in *Fulton* were motivated to draw that distinction, but it is a crucial one, and it is unfortunate that the Court did not make it.

IV. WHAT DO WE TALK ABOUT WHEN WE TALK ABOUT FOSTER CARE?

There is strikingly little discussion of foster care qua foster care in *Fulton*. There is the Court's brief discussion (noted above) of the foster parent certification process when it concluded that the process was not a public accommodation, and the Court spent two brief paragraphs explaining that Philadelphia contracts with private foster care agencies to approve foster homes.[278] But there is no acknowledgement at all of the unique character of the government's role when it is providing foster care services or that this role generally only arises in the wake of one of the most awesome and dangerous uses of state power in the realm of a fundamental right: forcibly separating children from their parents.[279] In contrast, the *OFFER* Court provided a lengthy and nuanced overview of foster care before turning to the specific question at hand in the case: whether a hearing is required before a child is removed from a foster home.[280]

Some might respond that discussion of these various aspects of the foster care context was not required to answer the question before the Court in *Fulton*. But the failure to appropriately situate the dispute has significant costs. Consider how differently the Court approached *OFFER*. There, the Court noted the importance of "a full appreciation of the complex and controversial [foster care] system with which this lawsuit is concerned"[281] and reviewed not only the specific statutes governing foster home transfers but also the larger structure and purposes of foster care.[282] The Court explained that:

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a Human Right, 66 STAN. L. REV. 1241, 1278, 1287–88 (2014) (arguing that "only the presence of monopoly power should trigger a generalized obligation of universal service on nondiscriminatory terms" as when "government exerts monopoly power or control over some essential facility normally open to the public at large" or public institutions are authorized to "tap into public funds to support its operations").

278 *Fulton*, 141 S. Ct. at 1875.

279 While some foster care placements are made voluntarily or follow the death of parents, the vast majority today (over 95%) are court-ordered removals. Hill, *supra* note 59, at 62, 65.

280 Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 823–38 (1977).

281 *Id.* at 838.

282 *Id.* at 823–24.

> The expressed central policy of the New York system is that "it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and . . . parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered."[283]

The Court also emphasized that when in foster care, a "child still legally 'belongs' to the parent and the parent retains guardianship."[284]

The *OFFER* Court did far more than set the stage for the statutory analysis by providing the legislative purposes of the statutory scheme. It went on to review the broader tensions and debates surrounding foster care. The Court explicitly acknowledged that "[f]oster care of children is a sensitive and emotion-laden subject, and foster-care programs consequently stir strong controversy,"[285] and it then discussed the competing concerns and differing critiques of the system. Among other points, the Court in *OFFER* highlighted the following:

- Both birth parents and foster parents presented serious challenges to the "misleadingly idealized picture" of foster care as portrayed by the State.[286]
- Children in foster care are vastly disproportionately from poor and nonwhite families.[287]
- "[F]oster care has been condemned as a class-based intrusion into the family life of the poor."[288]
- Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child. This accounts, it has been said, for the hostility of agencies to the efforts of natural parents to obtain the return of their children.[289]

All of these points could be made today. Indeed, the racial harms of foster care are, if anything, worse now and the calls for change louder from the communities directly affected by the child welfare system and

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283 *Id.* at 823 (alteration in original) (citation omitted).

284 *Id.* at 828 n.20 (citation omitted).

285 *Id.* at 833.

286 *Id.*

287 *Id.* at 833–34.

288 *Id.* at 833.

289 *Id.* at 834–35 (citations omitted).

parents and children's advocates.[290] But there is no discussion in *Fulton* of the problems of the foster care system or the debates over how those problems should be understood and addressed. Instead, the *Fulton* Court used a familiar accolade to valorize those who work within it. The Court called CSS "a point of light in the City's foster-care system," noting that Philadelphia itself used this laudatory language.[291] This phrase, of course, evokes the "thousand points of light" that President George H.W. Bush famously used to celebrate volunteerism and to emphasize the role of private charitable efforts over public social welfare efforts.[292]

The Court also described in appreciative tones the Catholic Church's long record of working with needy children in Philadelphia—mentioning its work with orphans in particular.[293] The district court opinion went even further in this regard. Its decision began as follows: "The gratitude we owe to all those working to better the lives of Philadelphia's most vulnerable children is too great to convey in words. While our gratitude is ultimately ineffable, the Court still begins by recognizing the Parties in this case for their many years of sacrifice and labor."[294]

The point of noting this tone is not, of course, to suggest that we should not express gratitude to those whose work benefits children. Rather, it is to remind us that placing the focus of discussions of foster care on the virtue of those who serve children often reflects and reinforces certain understandings of the child welfare system at the expense of others. The term "child savers" was once used by those doing social work with poor children to describe their own roles, but the idea has been widely debunked as an arrogant and dangerous approach, one that led to an inflated sense of the role of (typically white, well-off) child welfare practitioners in the lives of underprivileged children and disrespect for their nonwhite parents.[295] Today, few children's advocates willingly

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290 *See* CHILD.'S RIGHTS, *supra* note 53, at 3; Gottlieb, *supra* note 96.

291 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (quoting Brief for City Respondents at 1, *Fulton*, 141 S. Ct. 1868 (No. 19-123)).

292 Jason Deparle, *'Thousand Points' as a Cottage Industry*, N.Y. TIMES (May 29, 1991), https://www.nytimes.com/1991/05/29/us/thousand-points-as-a-cottage-industry.html?pagewanted=all&src=pm [https://perma.cc/NDB9-W99V]. Nina Bernstein usefully draws out the connection between *Wilder* and the public-private structure it challenged and the 1980's shift toward privatization of social welfare efforts. BERNSTEIN, *supra* note 173, at 328, 376.

293 *Fulton*, 141 S. Ct. at 1874.

294 Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 667 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021).

295 *See* Linda Gordon, *The Perils of Innocence, or What's Wrong with Putting Children First*, 1 J. HIST. CHILDHOOD & YOUTH 331, 340 (2008).

accept the term[296] (which is now used more often as an insult), but the danger remains.

This is more than a semantic point. The issue is not the term "child saver." It is that lauding those who work with children tends to come at the expense of the aggressive skepticism of child welfare efforts that history has demonstrated is needed to protect children and families. There is no field in which it is more crucial to heed Justice Brandeis's warning about the government's beneficent purposes.[297] The impulse to protect children is admirable and strong, and the danger of that impulse is great. When government took over the social welfare work that previously was in the hands of agencies such as CSS and turned (not everywhere, but in places like Philadelphia and New York City) to a model of public-private partnerships to administer foster care, the danger of government power in the realm of family life was made more complicated. Such a partnership model offers significant benefits, which will be discussed below, but it requires diligence in shielding against abuses of authority.

Thus, it is worrisome to see the narrative shift from *OFFER* to *Fulton*—a shift away from emphasizing the weight of parents' constitutional rights and the profound challenges of administering a foster care system, toward a description of foster care that is warm and fuzzy and fails to acknowledge the threat of government overreach. While the critiques have evolved, it is as true today as it was when Justice Brennan wrote the *OFFER* decision, that no one on any part of the ideological spectrum believes the American foster care system functions anywhere close to as it should. The dangers inherent in government intervention in family life certainly remain.[298]

Had the *Fulton* Court, the litigants, amici, or commentators been more focused on the broader issues of the foster care system as they were for *OFFER*, perhaps there would have been some comment on the fact that Philadelphia has more children in foster care per capita than any jurisdiction in the United States.[299] But it went unnoted that Philadelphia's foster care system separates children from their parents

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296 ADOPTUSKIDS, *supra* note 51, at 4 ("Phrases such as 'save a child' and references to 'orphans' give the wrong impression about the role of foster parents and the importance of valuing birth families.").

297 Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").

298 *See* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 833–38 (1977).

299 Phila., Pa., Res. No. 190798 (Oct. 10, 2019) (finding that Philadelphia has the highest rate of child separation in the country).

three times as often as New York City's and four times as often as Chicago's.[300] Nor did anyone seem to think it was worth mentioning that Philadelphia children who are separated from their parents are disproportionately Black, or that there might, therefore, be reason to recruit foster parents who are disproportionately Black.[301]

Notably, two aspects of foster care emphasized in *OFFER* have changed significantly in ways that went unmentioned in *Fulton*. First, the *OFFER* Court highlighted that at that time most foster care placements were voluntarily made by parents.[302] Some placements were involuntary, meaning they were ordered over the objection of parents based on allegations of abuse or neglect, but far more were placements at the requests of parents. In contrast, today, an overwhelming percentage of foster care placements are involuntary.[303] The *OFFER* Court noted questions regarding how truly voluntary so-called "voluntary" placements were and the lack of meaningful choice that impoverished parents had when facing crisis.[304] However important it was to question how truly voluntary placements ever were, child welfare policy has since moved starkly away from even assertions of voluntariness.[305]

In the 1960s and 70s, the public discourse around child welfare shifted from concern about poverty to a focus on child abuse and neglect by parents, i.e., from viewing child welfare as a systemic class-related issue to viewing it as an issue of the individual pathology of particular parents.[306] This new discourse led to the passage of the Child Abuse Prevention and Treatment Act of 1974 and the massive system of mandated reporting, investigation, and civil prosecution of child

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300 *Id.*; Bethany Ao, *Philadelphia Has the Highest Rate of Family Separation, and Kids in Foster Care Need Mental Health Support*, PHILA. INQUIRER (Oct. 16, 2020), https://www.inquirer.com/health/philadelphia-foster-care-mental-health-20201016.html [https://perma.cc/W39V-3CUB].

301 As of 2019, 44% of the City's population was Black. U.S. CENSUS BUREAU, QUICKFACTS: PHILADELPHIA CITY, PENNSYLVANIA, https://www.census.gov/quickfacts/philadelphiacitypennsylvania [https://perma.cc/UT4V-XKJ5]. Sixty-six percent of children in Philadelphia's foster care system were Black. PA. P'SHIPS FOR CHILD., STATE OF CHILD WELFARE 2020: PHILADELPHIA (URBAN) 2 (2020), https://www.papartnerships.org/wp-content/uploads/2020/06/2020-State-of-Child-Welfare-Philadelphia-County.pdf [https://perma.cc/W7EZ-WQ2T].

302 *Org. of Foster Fams.*, 431 U.S. 816, 824 (1977).

303 As of 2013, over 95% of children were removed involuntarily through court order. *See* Hill, *supra* note 59, at 65.

304 *Org. of Foster Fams.*, 431 U.S. at 834 (noting that while "middle- and upper-income families who need temporary care services for their children have the resources to purchase private care[, t]he poor have little choice but to submit to state-supervised child care when family crises strike" (citation omitted)).

305 *But see* Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 861 (2020) (describing a common practice of coercing parents into "voluntarily" giving up custody of their children through threats of removal and court proceedings).

306 *See* NELSON, *supra* note 173, at 1–19.

maltreatment that we have today.[307] There is much to say about this shift and the subsequent explosion in involuntary family separations that is beyond the scope of this Article. The point here is that it is striking that the Supreme Court was highly attuned to the dangers of the foster care system infringing parental rights at a time when most foster care placements were purportedly voluntary and did not mention that danger at a time when nearly 400,000 children in the United States are in foster care involuntarily.[308]

Second, the *OFFER* Court noted that a "distinctive feature" of foster care is that "it is for a *planned* period—either temporary or extended"—and that it "is unlike adoptive placement, which implies a *permanent* substitution of one home for another."[309] While adoption from foster care was not unheard of at the time, the Court's language reflects that foster care was not viewed then as intertwined with adoption. That is no longer true today because of the changes wrought by the Adoption and Safe Families Act of 1997 (ASFA), which significantly reshaped foster care in the United States.[310] For the first time, ASFA prioritized adoption as a goal of the American foster care system. Adoption is the secondary goal, after family reunification, but it is aggressively incentivized through federal funding, including adoption subsidies to many foster parents who adopt, bonuses to states for increasing the number of adoptions they complete, and financial penalties for not filing termination of parental rights petitions once a child has been in foster care for fifteen months.[311]

As a result of ASFA, an unprecedented number of children are now adopted out of foster care in the United States, and concurrent planning—preparing for adoption as a backup plan even while the goal is still to reunify a child with her parents—is widespread.[312] As noted above, this aspect of the foster care context is critical to understanding why the challenge in *Fulton* arose. Foster care has become a flash point in the broader clash over LGBTQ rights because it is now a major route to

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307 Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (codified at 42 U.S.C. § 5101).

308 *See* AFCARS 2020, *supra* note 35, at 1 (noting there were close to 424,000 children in foster care in 2020); Hill, *supra* note 59, at 65 (noting that over 95% of children in foster care are placed there by court order).

309 *Org. of Foster Fams.*, 431 U.S. at 824 (quoting ALFRED KADUSHIN, CHILD WELFARE SERVICES 355 (1967)).

310 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 1305).

311 *Id.* §§ 103(a)(3)(E), 201.

312 AFCARS 2020, *supra* note 35, at 1 (reporting that the case plan goal for 28% of children in foster care is adoption).

acquiring children to adopt.[313] Close to 60% of children adopted in the United States today are adopted from foster care, while only 15% are adopted domestically as the result of decisions by mothers to put their babies up for adoption. The rest are international.[314]

Yet there has been virtually no mention in discussions of *Fulton* that far more people care about foster care today—enough people for it to be chosen as a frontline battleground in the culture war—because it has become a pipeline to adoption. As a point of comparison, when *OFFER* was decided, it got one paragraph in *The New York Times*, buried on page nineteen;[315] *Fulton*, of course, was front page news.[316] Indeed, much of the press coverage (from all sides of the ideological spectrum) referred to *Fulton* as a case about "adoption,"[317] though technically it was about whether LGBTQ couples could be certified as foster parents, not adoptive parents. It is not incorrect for the litigants on both sides to view foster care as intertwined with adoption as it is now. But it seems critical to recognize that the dangers of abuse of authority can only arise when a government system is in the business of taking children from some parents and providing them to others to adopt.

The point of contrasting the narrative focuses of *Fulton* and *OFFER* is to highlight the dangers of shifting away from keeping constitutional rights to family integrity at the forefront of discussions about foster care. It is important that disputes over who has access to foster children are

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313 This does not count stepparent adoptions. *See U.S. Adoption Statistics*, ADOPTION NETWORK, https://adoptionnetwork.com/adoption-myths-facts/domestic-us-statistics [https://perma.cc/WN76-LXWD].

314 *Id.*

315 *Supreme Court Actions*, N.Y. TIMES (June 14, 1977), https://www.nytimes.com/1977/06/14/archives/supreme-court-actions.html [https://perma.cc/BEM2-NMN9].

316 Adam Liptak, *Court Supports Catholic Agency in Dispute on Gay Foster Parents*, N.Y. TIMES, June 18, 2021, at A1.

317 *See, e.g.*, Dominic Holden, *The Supreme Court Will Consider Whether Adoption Agencies That Get Tax Money Can Turn Away Same-Sex Couples*, BUZZFEED NEWS (Feb. 24, 2020, 11:20 AM), https://www.buzzfeednews.com/article/dominicholden/supreme-court-same-sex-adoption-case-pennsylvania [https://perma.cc/W3SP-K48U]; *Supreme Court Hears Arguments in Philadelphia Adoption Case*, CATH. NEWS AGENCY (Nov. 4, 2020, 12:35 PM), https://www.catholicnewsagency.com/news/46482/supreme-court-hears-arguments-in-philadelphia-adoption-case [https://perma.cc/634K-4HMR]; *Supreme Court Hears Bias Case Between Philadelphia, Catholic Adoption Agency*, BREITBART (Nov. 4, 2020), https://www.breitbart.com/news/supreme-court-hears-bias-case-between-philadelphia-catholic-adoption-agency [https://perma.cc/AKD8-4V9E]; Derrick Clifton, *The Supreme Court Is Hearing a Major LGBTQ+ Adoption Rights Case Today*, THEM (Nov. 4, 2020), https://www.them.us/story/supreme-court-lgbtq-adoption-case-fulton-philadelphia [https://perma.cc/R6S6-4LX7]; Fulton v. City of Philadelphia*: A Guide for Journalists Covering the November 4th Oral Arguments on Adoption by LGBTQ Families Before the Supreme Court*, GLAAD (Nov. 3, 2020), https://www.glaad.org/blog/fulton-v-city-philadelphia-guide-journalists-covering-november-4th-oral-arguments-adoption [https://perma.cc/AS8R-XKME].

disputes over access to children who have parents. I do not mean to suggest that that fact resolves the *Fulton* question one way or the other, though I will explain in the next Part that it may push more in one direction. But however necessary it sometimes is for the State to exercise its power to separate families in circumstances where that is necessary to protect children, the danger of potential abuse of that power always looms. It will perhaps be seen as alarmist to say that this case had anything to do with abuses of the authority to take children. But in light of the track record of the United States in failing to protect the rights of marginalized families from unlawful separations by the child welfare system,[318] it is difficult to imagine what would constitute an excess of caution on this front.

It does not denigrate the importance of the rights of anyone who wants to foster or adopt to remind ourselves that we must always be on guard against the recurring impulse of adults to use best interests arguments for their own purposes, i.e., to argue that their position is aligned with children's best interests.[319] To anyone concerned about this danger, it should be disturbing that, while in *OFFER* the Court said "there are . . . important distinctions between the foster family and the natural family" and found the constitutional weight of the latter far more important,[320] in *Fulton*, the Court discussed the foster care agencies' obligation to "continue[] to support *the family* throughout the placement" and clearly meant foster families.[321] Disturbingly, this was the only reference to families of foster children in the opinion at all.

V. PLURALISM AND FOSTER CARE: THE COUNTERINTUITIVELY SHARED INTERESTS OF MANY BEDFELLOWS

The main arguments of this Article thus far have been that the Court and the litigants misunderstood how to analyze foster care as a public accommodation and more broadly failed to understand the key constitutional considerations and constitutional dangers inherent in the foster care system. Once those constitutional underpinnings are properly understood, a number of questions follow, which would have been useful to address in *Fulton*, and certainly should be considered before similar challenges are brought back to the Supreme Court. These questions have to do with the benefits of placing foster children with foster care agencies that are connected to the communities from which the children come.

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318 *See* discussion *supra* Section II.B.4.

319 GUGGENHEIM, *supra* note 146, at 39–42.

320 Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 845 (1977).

321 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021) (emphasis added).

As discussed above in Part I, foster homes that are culturally connected to foster children's families of origin both support the likelihood of achieving the primary goal of family reunification and serve the important purpose of maintaining cultural and community ties when children are ultimately adopted by the foster parents. These benefits have constitutional dimensions if we take seriously the limits on the State's power to intervene in the parent-child relationship.

It is most obvious that the constitutional right to raise one's child is at stake at the moment that the State seeks to separate child from parent. But as significant as that moment of separation is, the constitutional stakes are even higher after a child has been in the custody of the State. It is then that the interests discussed in Part I come to the fore: the foster child's interests in remaining connected to her family, her culture, and her community; the interest of the community from which the foster child comes in maintaining the children's cultural and community ties; and the constitutional interest in pluralism that demands maintaining the foster children's cultural and community ties.[322] These interests require a foster care system that proactively seeks to provide care to children that supports, rather than undermines, their existing connections. Recent history suggests we can predict the government will take over 260,000 children into custody annually.[323] While some of these children will be returned to their homes quickly enough that the issue of sustaining cultural connections will not arise, it is predictable that a significant number of them will remain in placements long term.[324] A narrowly-tailored approach that can justify family separation therefore requires developing a foster care system that is designed to support maintaining the cultural and community ties of children who are removed from their parents.[325]

The practice that can most directly achieve this purpose is being pursued around the country: encouraging and expanding the use of

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322 *See supra* Part I.

323 Between 2015 and 2019, an average of 265,000 children entered foster care each year. *See* AFCARS 2020, *supra* note 35, at 1.

324 Of children who exited foster care in 2019, 8% had been in state care for less than one month while 30% of children had been in foster care for two or more years. *Id.* at 3. When a child is in foster care for a week or a weekend, placing them in a culturally unfamiliar home does not threaten the constitutional interests under discussion, but it is often still the case that residing in culturally familiar foster homes, even for those brief periods—with languages, foods, and traditions recognizable to the child—would lessen the trauma of the separations. *See, e.g.*, Anderson & Linares, *supra* note 118, at 12 (finding a correlation between cultural dissimilarity of a foster care placement and a child's difficulty adjusting, including feelings of depression, loneliness, and social dissatisfaction).

325 This concept of "narrow tailoring" can usefully also be discussed as the least restrictive means of state interference with a fundamental constitutional right.

kinship foster care whenever possible. Placing children who are in the legal custody of the State into the temporary care of relatives typically minimizes the disruption to the child's relationships and comes closest to continuing the upbringing the parent had chosen.[326] But there are a significant number of cases in which kinship care is unavailable. In light of this, an important question to consider is whether the State should be seeking contracts with foster care agencies that are linked to particular religious or ethnic communities. Put differently, a critical omission in the discussion around *Fulton* has been the lack of attention to the potential benefit to children and families from minority[327] communities of having foster care agencies that are connected to those particular communities. The participants and observers of *Fulton* were so focused on the interests of potential foster parents—the LGBTQ couples who could not be certified at CSS and the Catholic foster parents, such as plaintiffs Sharonell Fulton, Cecelia Paul, and Toni Lynn Simms-Busch (the foster parents individually thanked for their service by the district court),[328] who want to work at an agency that follows their religious beliefs—that they ignored the interests foster children and their families have in how foster care is structured and who gets to be a foster parent.

There was discussion of the children's interests insofar as there was debate as to what outcome in *Fulton* would lead to a greater number of foster homes (with the City and some amici arguing that discouraging LGBTQ couples will mean fewer foster homes and CSS and others arguing that disallowing the religious exception could lead to the closure of Catholic foster agencies and therefore fewer foster homes), but there was no consideration of the substantive interests of the foster children.[329] One important possibility is that it may be strongly in the interests of foster children and their parents for children to be placed in foster homes that share their heritage—religious, racial, ethnic, or cultural. This is not, of course, an uncontroversial claim (as indicated by the MEPA restrictions on considering the race or ethnicity of potential adoptive parents), and this Article is not aimed at persuading anyone on it as a

326 *See supra* note 100.

327 Use of the term "minority" to refer to racial and ethnic communities is complicated but seems useful in this context, where it is intended to refer to both white and nonwhite minority groups. *See* Edward Schumacher-Matos, *On Race: The Relevance of Saying 'Minority'*, NPR PUB. ED. (Aug. 29, 2011, 4:48 PM), https://www.npr.org/sections/publiceditor/2011/08/29/140040441/on-race-the-relevance-of-saying-minority [https://perma.cc/4VQA-W2GQ].

328 *See* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 667–68 (E.D. Pa. 2018).

329 Martin Guggenheim has argued that foster children have a strong interest in being placed with foster parents who are not homophobic. *See* Martin Guggenheim, Fulton v. City of Philadelphia*: How No One Paid Any Attention to Children's Rights*, 60 FAM. CT. REV. 23, 28–29 (2021).

matter of social policy. But it is certainly a possibility that at least deserved consideration in the discussion around *Fulton*.

The current political realities that shaped *Fulton* have turned traditional tensions between majority and minority interests so inside out that some of the interests at stake were wholly ignored, and the dramatic shift in the position deemed "progressive" obscured how minority rights most often play out in foster care. The *Smith* decision that so many conservatives are looking to reverse was, of course, written by conservative Justice Scalia at a time when protecting the rights of minorities against the will of the majority was seen as progressive work.

In the *Smith* decision, which empowered majorities to impose their views on religious minorities so long as no minority group was targeted, Justice Scalia acknowledged "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[330] The iconic liberal Justices Blackmun, Marshall, and Brennan joined Justice O'Connor in a strongly worded dissent, insisting that:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . . One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[331]

That liberal vanguard would be surprised to read the current progressive commentary on *Fulton*, which fiercely resists returning to stronger protections of minority views against majoritarian control. The shift is explained in part by a change in the minority groups that feel most threatened by majoritarian values. Today, of course, Catholics and evangelical Christians are the most prominent supporters of religious liberty. They are associated with the political Right and not typically viewed (now) as oppressed groups. But throughout American history, the champions of religious rights were groups not associated with the Right and were typically marginalized groups subject to discrimination, such as the Amish, Jews, the Mormons, and Jehovah's Witnesses.[332] The losing parties in *Smith* were Native Americans who claimed the right to smoke

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330 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

331 *Id.* at 903 (O'Connor, J., concurring) (citation omitted).

332 *See* Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986).

peyote during religious services at the height of the war on drugs.[333] Thus, the progressive inclination to protect minorities was aligned in that case with protecting a particular minority to whom they were sympathetic. Indeed, the dissenters bemoaned the ruling's failure to recognize "years of religious persecution and intolerance" and the consequent need to "protect[] the religious freedom of Native Americans."[334] The political alignments are very different now that the minority groups leading the charge for religious liberty are not viewed as persecuted or oppressed.

Further complicating the politics is that the "majoritarian" position in *Fulton* is protecting the majority's right to protect those in the minority LGBTQ community from discrimination. We have reached a point where advocates for the rights of the historically oppressed LGBTQ community are pressing a majoritarian-empowering view because LGBTQ rights have successfully garnered the support of a majority of voters; while the religious Right, which historically has been more privileged and has at times been aligned with oppression of people of color, is now at the vanguard of defending minority rights. The dramatic shift in alignments that occurred between *Smith* and *Fulton* can be seen in the amicus filings. In *Smith*, the ACLU,[335] Jewish organizations,[336] and Native American groups[337] filed amicus briefs in support of minority religious rights. Notably, no amici supported the government's position. In contrast, this time around, the ACLU[338] and several other left-leaning groups[339] sided with the government against the claim for constitutional protection by the religious minority.

To recognize this as an important shift is not, of course, to say which position is stronger or even necessarily to accuse either side of inconsistency. It may be that antigay discrimination poses a stronger reason to limit the rights of religious minorities than were at stake in earlier clashes of majority and minority interests. But it is one thing to come out in favor of antidiscrimination laws against minority religious rights and quite another to act as though there are no competing

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333 *Smith*, 494 U.S. at 874.

334 *Id.* at 920 (Blackmun, J., dissenting).

335 Brief for American Civil Liberties Union and the ACLU of Oregon as Amicus Curiae Supporting Respondents, *Smith*, 494 U.S. 872 (No. 88-1213).

336 Brief for American Jewish Congress as Amicus Curiae in Support of Respondents, *Smith*, 494 U.S. 872 (No. 88-1213).

337 Brief for Ass'n on American Indian Affairs et al. as Amici Curiae Supporting Respondents, *Smith*, 494 U.S. 872 (No. 88-1213).

338 Brief for Intervenors-Appellees Support Center for Child Advocates and Philadelphia Family Pride as Amici Curiae Supporting Respondents, Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019) (No. 18-2574).

339 Brief for Organizations Serving LGBTQ Youth as of Amici Curiae Supporting Respondents, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

progressive values at stake. The lack of acknowledgement of this conceptual tension[340] made it more difficult for *Fulton* observers to see the important constitutional interests at stake in the foster care context. The interests in keeping foster children connected to their families and communities are the interests of minority groups (typically disadvantaged minority groups) and complicate the question of when a majority should be able to impose its preferences on a minority.

Many of the loudest and most compelling critiques of the child welfare system in recent years have come from activists in the communities most heavily overrepresented in the child welfare system who are calling for a shift to more community-based programming.[341] They emphasize the importance of culturally sensitive practices and strongly prefer bottom-up to top-down support. They condemn the taking of children from parents in certain communities and placing them in the care of foster parents of a different background—connecting this practice to roots in chattel slavery.[342] Many of these activists are calling for the abolition of the child welfare system rather than reform, but, to the extent reform is more likely or that certain reforms are viewed as abolitionist,[343] these commentators seem to be suggesting an approach that would favor community-based foster care agencies. Though some oppose state-run foster care altogether, when children do go into foster

340 The lack of acknowledgment may be related to a shift on the Left from a rights-based orientation to a power-based orientation, as discussed in the commentary on the current roiling of the American Left. *See, e.g.*, GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND (2018); Ross Douthat, Opinion, *When Politics Isn't About Principle*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/2021/09/14/opinion/vaccine-politics.html [https://perma.cc/PEC8-84B2]; Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES (June 6, 2021), https://www.nytimes.com/2021/06/06/us/aclu-free-speech.html [https://perma.cc/FA5V-PTQJ].

341 *See Shift Power and Support Families and Communities as First Responders*, UPEND, https://upendmovement.org/shift-power-support-families-communities-first-responders [https://perma.cc/D628-69A9] ("Services should not interfere with but rather support and maintain families' cultural practices and connections."); JMAC FOR FAMS., https://www.jmacforfamilies.com [https://perma.cc/YW9B-W4AN]; *Target Conditions, Not Families*, *supra* note 217; Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/FTB6-BYD3].

342 *See* Albert et al., *supra* note 210, at 873; Franklin & Wiley, *supra* note 207.

343 Abolitionists draw a distinction between reform and "non-reformist reforms" or "abolitionist steps." The former "reinforces the status quo and entrenches oppressive cultures," while the latter further the end goal of abolition by making policy changes that "tug at the root" of the system. Albert et al., *supra* note 210, at 890–92.

care, these critics prefer assistance that comes directly from the communities of the children involved.[344]

This is not a new idea. Many of the religious agencies whose practices were challenged in *Wilder* for discriminating against Black Protestant children were established in response to mistreatment directed at Catholic and Jewish children by Protestant child welfare practitioners.[345] There was a strong impulse for these communities to want to take care of their children and keep them connected to the communities into which they were born.

The settlement in the *Wilder* case specifically allowed for exceptions to the first-come, first-served policy to allow children to be placed with "specially designated" agencies if the family from which they come has religious beliefs that "pervade and determine the entire mode of their lives, regulating it with detail through strictly enforced rules of the religion."[346] That provision allowed, for instance, the City to continue to contract with an Orthodox Jewish foster care agency that recruited Orthodox Jews to be foster parents for Orthodox Jewish foster children—an agency that continues to provide foster care today.[347] Such recruitment and placement certainly entails discrimination based on religion—raising an important question of whether such a program falls within an exception to otherwise applicable constitutional and statutory rules against discrimination.

Some of the defendants in *Wilder* challenged the exception provision in the proposed settlement on First Amendment and Equal Protection grounds. Assuming strict scrutiny applied, the Court found the "interest in protecting the Free Exercise rights of children from pervasive religious cultures is sufficiently compelling to justify their differential treatment."[348] One of the points that was missed by *Fulton*

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344 *See generally An Unavoidable System: The Harms of Family Policing and Parents' Vision for Investing in Community Care*, RISE (2021), https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf [https://perma.cc/FQ32-XEUG] (emphasizing the importance of community-based care).

345 *See, e.g.*, JOHN O'GRADY, CATHOLIC CHARITIES IN THE UNITED STATES 435 (1994); SUSAN S. WALTON, TO PRESERVE THE FAITH: CATHOLIC CHARITIES IN BOSTON, 1870–1930, at 66–69 (1993); Ellen Herman, *The Difference Difference Makes: Justine Wise Polier and Religious Matching in Twentieth-Century Child Adoption*, 10 RELIGION & AM. CULTURE 57, 64 (2000); Elizabeth McKeown & Dorothy M. Brown, *Saving New York's Children*, 13 U.S. CATH. HISTORIAN 77, 79–81 (1995).

346 Wilder v. Bernstein, 645 F. Supp. 1292, 1306 (S.D.N.Y. 1986). The stipulation allowed placement in such an agency upon request of the parent so long as the placement was "diagnostically appropriate" for the child. *Id.* In such cases, if the children were over fourteen, their preferences were to be considered. *Id.*

347 *Id.* at 1300 (recognizing Orthodox Judaism as demanding a "pervasive religious upbringing").

348 *Id.* at 1328.

commentators is that this kind of exception for foster care agencies might well receive strong support from both ends of the ideological spectrum. At a minimum, those who oppose granting a religious minority exception that would allow CSS to violate otherwise applicable antidiscrimination laws should grapple with what that position means about the viability of a religious foster care agency that seeks to discriminate in order to match foster children with foster parents from their communities.[349]

Consider, for instance, the specialized foster care agency Coalition of Hispanic Family Services, discussed above. The mission statement includes a commitment "to empower children, youth and families with opportunities for success and self-reliance while reinforcing their sense of culture and self-identity."[350] Any attempt to limit the ability of a foster care agency to discriminate puts an agency with this type of mission at risk. If an agency seeks to support families whose children go into foster care by offering foster families who share racial, ethnic, religious, or cultural backgrounds, that requires discriminating against potential foster parents who do not share those characteristics. Of course, those potential foster parents need not be denied the right to foster, but if there were significant numbers of such applicants, they would have to be referred to other foster care agencies in order for the specialized agency to maintain its mission focus. CSS made the point in *Fulton* that it sought only to refer LGBTQ couples to other foster care agencies, but that is what the City found an unacceptable violation of its antidiscrimination ordinance.[351] Just as the Coalition for Hispanic Family Services likely does not have to turn away many non-Hispanic foster parents because they self-screen and apply to other agencies, it was undisputed that no gay person applied to foster through CSS.[352] A discriminatory policy need not, of course, lead to actual discrimination to be harmful if it works by deterring applications. The point is that there are strong analogies between what CSS was doing and what foster care agencies do if they are seeking to link foster children with foster parents from similar backgrounds.

Even more counterintuitively, opposition to exemptions allowing foster care agencies to discriminate may limit the ability of foster care

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349 Legal research reveals no challenges to matching under the stipulation provision (which has expired but is still followed in practice). Despite the colorable potential challenge under MEPA, other antidiscrimination statutes, and the Constitution, no one seems motivated to make such a challenge. Disagreements between two parents and/or the child about whether a placement should be made to the Orthodox Jewish agency tend to be resolved by the Family Court overseeing the foster care placement using a best interest standard. *See, e.g.*, *In re* Sabrina M.A., 195 A.D.3d 709 (N.Y. App. Div. 2021).

350 *About Us*, COAL. FOR HISP. FAM. SERVS., *supra* note 222.

351 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021).

352 *Id.*

agencies to cater to LGBTQ youth in some ways that LGBTQ advocates might support. In a *New York Times* opinion piece published just before *Fulton* was decided, professors Stephen Vider and David S. Byers argued that if the Court ruled in favor of CSS in *Fulton*, that would hurt not only LGBTQ foster parents but LGBTQ foster youth as well because it "would embolden foster care agencies across the country to acquiesce in and perpetuate discrimination against L.G.B.T.Q. people."[353] Vider and Byers rightly point out that LGBTQ youth are significantly overrepresented in the foster care population, and part of the State's obligation is to provide foster care that is sensitive to their needs.[354] They go on to tout efforts in Philadelphia and elsewhere to specifically recruit LGBTQ foster parents in order to match them with LGBTQ youth.[355] They applaud the expansion of a Philadelphia LGBTQ counseling center, Eromin, into a foster care agency specifically designed to recruit LGBTQ foster parents for LGBTQ youth.[356] It is possible to imagine that such an agency could recruit LGBTQ foster parents without turning down straight applicants. But to the extent it is recognized as beneficial to establish foster care agencies that are purposely not diverse because they seek to specialize in providing services to a particular community—whether that be based on sexual orientation, race, ethnicity, religion, or culture—it should be acknowledged that such specialization is at odds with banning discrimination in the certification of foster parents if we include in the definition of discrimination (as LGBTQ advocates did in *Fulton*) referring potential foster parents to different foster care agencies.

Thus, in the foster care realm, insisting on granular diversity (meaning diversity within every provider agency) means giving up pluralism because if every foster care agency reflects the full diversity of society, foster children cannot be placed in a way that optimizes their connection to the community from which they were removed. I do not mean to suggest that there are obvious answers to when specialization of foster care agencies and the discrimination it requires should be allowed,[357] but rather to make clear that there would be a significant cost to disallowing all discrimination that does not seem to have been considered by those who opposed CSS in *Fulton*. None of the litigants or

353 Stephen Vider & David S. Byers, *A Supreme Court Case Poses a Threat to L.G.B.T.Q. Foster Kids*, N.Y. TIMES (June 5, 2021), https://www.nytimes.com/2021/06/05/opinion/Supreme-Court-LGBTQ-foster.html [https://perma.cc/9H4P-EB2Y].

354 *Id.*

355 *Id.*

356 *Id.*

357 Particularly difficult questions arise when the preferences of parents diverge from the preferences of older youth in foster care.

amici seemed to recognize this trade off,[358] and the Court did not address it.[359]

The most clear-cut example of the trade off in foster care between nondiscrimination and diversity on the one hand and pluralism on the other is presented, of course, by ICWA, which prioritizes placing Native American foster children with Native American foster parents.[360] Under ICWA, every potential foster parent who is not a Native American is denied (with few exceptions) the opportunity to be a foster parent of a Native American child solely on the basis of their status as non-Native American.[361] ICWA is certainly not uncontroversial and, in fact, a movement is underway to overturn it precisely because it discriminates. ICWA has only survived equal protection challenges because it is based on political status rather than race and nonetheless may well be struck down soon.[362] Again, the point here is not to argue that discrimination in who can serve as a foster parent is constitutional but rather to clarify the question, identify the strongest arguments in favor of allowing discrimination in this particular arena, and draw out the consequences of arguing that it is illegal to discriminate against LGBTQ foster parent applicants. There is little doubt that many of the supporters of the City's position in *Fulton*—the position seen as pro-LGBTQ and therefore

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358 *But see* Brief for James and Gail Blais and the General Conference of Seventh-Day Adventists as Amicus Curiae in Support of Petitioners, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (discussing Washington State's denial to grant foster care certification to the grandparents of a child in foster care, despite their willingness to serve as a kinship resource, due to their religious beliefs violating Washington State policy of supporting LGBTQ children in foster care because they would not commit to allowing hormone therapy if their eight-month-old granddaughter had gender dysphoria as a teenager).

359 At one point, the *Fulton* decision references foster care agency specialization in a seemingly positive way, saying: "[A]gencies understandably approach this sensitive [foster care] process from different angles. As the City itself explains to prospective foster parents, '[e]ach agency has slightly different requirements, specialties, and training programs.'" 141 S. Ct. at 1880 (second alteration in original) (citation omitted). But the decision does not explore the benefits or constitutional aspects of specialization discussed here.

360 Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1934 (1978)).

361 25 U.S.C. § 1915. Non-Native American parents may adopt a Native American child when no Native American family has sought to adopt. Adoptive Couple v. Baby Girl, 570 U.S. 637, 642 (2013).

362 *See* Morton v. Mancari, 417 U.S. 535, 554 (1974) (holding that Native American classifications are based on membership in a "quasi-sovereign tribal entit[y]" rather than race). Despite this precedent, a federal district court in Texas recently struck down the preferential placement provisions of ICWA on equal protection grounds. Brackeen v. Zinke, 338 F. Supp. 3d 514, 533–34 (N.D. Tex. 2018) (citing Rice v. Cayetano, 528 U.S. 495, 496 (2000)). That decision was reversed by the Fifth Circuit en banc in *Brackeen v. Haaland*, 994 F.3d 249, 337–39 (2021), and a petition for a writ of certiorari is pending before the Supreme Court. On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, *Brackeen*, 994 F.3d 249 (No. 21-380).

progressive—will oppose challenges to ICWA.[363] But the strongest arguments for ICWA include emphasizing the constitutional significance of pluralism, parental choice, and cultural continuity in foster care placements[364]—arguments that would have been undermined by a decision in *Fulton* that forbid any discrimination in selecting foster parents.

Because of the horrific history of child stealing that led to it, ICWA is the strongest possible reminder that truly serving foster children demands vigilance in respecting their community ties and questioning the motives of those seeking custody of them. If we fully grasp that foster care is not *for* potential foster parents and adoptive parents—that it is not a service designed to help any adults *get* children—we approach the claims of potential foster parents differently. That is not to say, of course, that claims of discrimination by foster parents should never prevail, but the first steps when a potential foster parent complains they were wrongfully denied a foster child should be to ask what foster placement the child's parent favors and, in the absence of an answer on that, to query what placement would likely be best at keeping the child connected to her family and community.

On this reasoning, CSS might have argued that its approach of applying Church doctrine was tied to its recruitment of Catholic foster parents (a claim some of the foster parent plaintiffs seemed to support) and that having more Catholic foster parents was good for foster children.[365] They argued that having foster parents through CSS was good for foster children (and that closure of referrals to CSS was bad for those

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363 *Compare, e.g.*, Brief of Casey Family Programs and 30 Other Organizations Working with Children, Families, and Courts to Support Children's Welfare as Amici Curiae in Support of Appellants, Brackeen v. Berhardt, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479), 2019 WL 7046959 (arguing in support of the constitutionality of ICWA), *with* Brief of Amici Curiae the Annie E. Casey Foundation et al. in Support of Respondents, *Fulton*, 141 S. Ct. 1868 (No. 19-123) (arguing in support of the City of Philadelphia's enforcement of antidiscrimination laws against CSS).

364 Of course, there are arguments in support of ICWA that rest on the unique horrors of the United States' historical treatment of Native Americans and that might have been reconciled with a CSS loss in *Fulton*. The point in the text is that there is an unacknowledged tension between forbidding discrimination against some potential foster parents and celebrating such discrimination in other contexts.

365 *See* Toni Simms-Busch, *Philadelphia's Closing of a Catholic Ministry Will Put Kids at Risk. The Supreme Court Must Stop It*, WASH. POST (Nov. 3, 2020), https://www.washingtonpost.com/opinions/2020/11/03/fulton-v-philadelphia-supreme-court-side-with-catholic-social-services [https://perma.cc/KD9M-ZWKJ] ("As a Catholic, I share many of the values that animate the work of CSS. That is why, when I wanted to foster children myself, I chose to work with Catholic Social Services."); *cf.* Sharonell Fulton, *My Faith Led Me to Foster More Than 40 Kids; Philly Is Wrong to Cut Ties with Catholic Foster Agencies*, PHILA. INQUIRER (May 24, 2018), https://www.inquirer.com/philly/opinion/commentary/catholic-social-services-philadelphia-lawsuit-lgbtq-gay-foster-parents-adoption-sharonell-fulton-20180524.html [https://perma.cc/U4V6-QV9R].

children),[366] but they did not argue that there was anything specific about Catholic foster parents that would serve the children or help keep them connected to their families and communities. It is not clear from the public data whether there was an argument to be made that CSS serves a significant number of Catholic children, but it does seem to be the case that CSS has an unusually high percentage of Black foster parents,[367] which is significant in a city where 70% of the children in foster care are Black.[368] If the recruitment of Catholic foster parents overlaps with the recruitment of Black foster parents, there would be a strong argument that it benefits Philadelphia's foster children (and serves the group-based interests and constitutional pluralism interests discussed here) to have an agency with the specialized focus CSS has.

Whether available to CSS or not, there is an important argument that foster care agencies that focus on maintaining the ties of foster children to particular communities should get an exception to otherwise applicable antidiscrimination laws because the benefits of having diversity among, rather than within, foster care agencies have constitutional dimension.[369] While, of course, the State must serve all foster children (and their families) in a nondiscriminatory manner, best serving each foster child means providing that child with a foster home that will keep her connected to her family and community of origin. If a state chooses to promote that goal by contracting with multiple foster care agencies, each of which serve different populations, then referring a foster parent applicant from one agency to another is not necessarily illegal discrimination. And if there are fewer slots for foster parent applicants in certain demographics, that is not a violation of antidiscrimination laws any more than it would be for the military to hire more chaplains of one religion than another based on the percentage of military troops of different religions.

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366 Brief of Appellants Sharonell Fulton, Cecelia Paul, Toni-Lynn Simms-Busch, and Catholic Services at 19–22, Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019) (No. 18-2574).

367 Sharonell Fulton & Toni Simms-Busch, *The Justices Side with Foster Children*, WALL ST. J. (June 24, 2021), https://www.wsj.com/articles/the-justices-side-with-foster-children-11624466809 [https://perma.cc/Q2FA-F8ZD] (asserting that 60% of foster families certified through CSS are racial or ethnic minorities).

368 CITY OF PHILA., DEP'T OF HUM. SERVS., ANNUAL INDICATORS REPORT 16 (2019), https://www.phila.gov/media/20191206140850/Annual-Indicators-Report-FY2019-FINAL.pdf [https://perma.cc/DWW4-GTT3].

369 Thus, while Larry Sager was correct that the State cannot contract with an agent to engage in conduct the State could not legally engage in, he may not be correct that the State could not refer foster parent applicants from one office to another. Brief for Lawrence G. Sager as Amicus Curiae Supporting Respondents at 3, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

It is worth noting that this argument could fit within the so-called "hybrid exception" to *Smith*. In *Smith*, Justice Scalia distinguished seemingly contrary precedent by explaining:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents to direct the education of their children. . . .
>
> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.[370]

This language opened the door to the possibility of a "hybrid" exception, in which strict scrutiny is imposed if another fundamental right is involved in addition to free exercise,[371] though the viability of this approach has been seriously questioned.[372] Exploring the viability of the hybrid approach is beyond the scope of this Article, and it is unnecessary to answer the question of whether there is a hybrid category of cases in which neither the free exercise clause nor another constitutional right alone is sufficient to trigger strict scrutiny, but the two together are enough. The relevant point is that *Smith* specifically excluded from its reach *Yoder*-like cases that demand protection of parental rights. And the constitutional commitment to the privatization of child rearing means that the need to protect parents' rights is at its height when the State is taking the extreme step of putting children into foster care. It is at that intervention that constitutional concerns to avoid the State overstepping into the business of child rearing are at their peak.

It should by now be clear that many of the points raised in this Part complicate, rather than answer, the question of when and whether there should be exceptions for foster care agencies to antidiscrimination requirements; hopefully it is also clear that these complications should lead to consensus on one matter: the unique aspects of foster care make it an inappropriate context in which to have the Supreme Court reconsider *Smith*. The arguments about whether to overturn *Smith* and what rule to replace it with are muddied by the competing interests that

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370 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 881–82 (1990) (footnote omitted) (citations omitted).

371 *See* Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692, 703–07 (9th Cir. 1999), *rev'd en banc on other grounds*, 220 F.3d 1134 (9th Cir. 2000).

372 *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121–22 (1990) (questioning the coherence and ingenuousness of the hybrid exception); Leebaert v. Harrington, 332 F.3d 134, 143–44 (2d Cir. 2003) (explaining that the hybrid approach in *Smith* is dicta and declining to follow).

arise in the foster care context. These complications do not benefit those on either side of the larger questions about *Smith* and may even prevent the Court from reaching those questions if foster care cases fall into a hybrid exception to *Smith*. The additional set of constitutional rights at stake in foster care makes it the wrong vehicle for establishing a broader rule about whether religious minorities have the right to discriminate.

Worse, the rights of the families who are supposed to be served by foster care—who should be central to discussions of foster care's purpose and constitutional dangers—would not be adequately represented in such a challenge. A Supreme Court decision that is primarily focused on whether to overturn *Smith* and, if so, what to replace it with is unlikely to give nuanced attention to the unique aspects of foster care—the kind of attention the *OFFER* Court gave and that was so clearly lacking in the *Fulton* decision. And there is grave risk that insufficient attention may lead to Supreme Court language that has unintended negative consequences for foster children and their families, particularly given that the litigants in a *Fulton* redux are likely to have no more interest in addressing the issues most critical to those families than the *Fulton* litigants did. There is always a risk that heated rhetoric around children's best interests will be distorted to serve adult interests. Nowhere is it more critical to resist the dangers of the "child saver" mentality than in discussions about children in state care. One need not impugn the intentions of foster care agencies or those who aspire to become foster parents to say that the rights of foster children and their families should not be defined in cases in which they are not represented.

The Supreme Court rarely has the opportunity to address the constitutional rights of the families separated by the State who litigate those rights daily in dependency courts around the country. It does not diminish the significance of revisiting *Smith* to say that these families deserve more than to have their rights treated as a weigh station on the path down which the religious Right and LGBTQ advocates are racing.