Adoption is about family, not race

By Elizabeth Bartholet

The U.S. Senate is now considering a bill that would endorse race separation in the family. The Multi-Ethnic Placement Act of 1993, just reported out by the Senate Labor and Human Resources Committee, takes as its premise the notion that race, color and national origin should be used in the adoption and foster care process to match children in need of homes with prospective parents. While the bill forbids their use to "unduly delay or deny" placement, it implicitly approves significant delay, and gives agencies discretion to prefer "long-term foster care" over transracial or multi-ethnic placement.

This bill would constitute an unfortunate historic first. Many states had laws in previous times forbidding interracial marriage and transracial adoption, but Congress has never passed national legislation endorsing such prohibitions. And the U.S. Supreme Court has made it clear in recent decades that as a matter of federal constitutional law race cannot be used to prevent interracial marriage, or to resolve a child custody dispute.

In passing the Indian Child Welfare Act of 1978 Congress did provide a preference for placing Native American children with Indians over non-Indians, but there are many historic and constitutional justifications for a separatist approach in dealing with Native American tribes. Congress should think long and hard before it decides to treat African-Americans as a separate nation within our nation.

Sen. Howard Metzenbaum (D-Ohio), the bill's leading sponsor, argues that it is designed to speed the release of black children from the foster limbo to which they have been condemned by current racial matching policies. The version of this bill that he was promoting last spring, which prohibited any delay, denial or other discrimination on the basis of race, would have had this effect. But he and his colleagues on the Senate committee capitulated over the summer to the National Black Social Workers Association and other advocates of racial matching.

The bill in its current form would make things worse, not better, for the black children held in foster care by validating the kind of racial matching policies now considered legally and politically suspect. Federal law already prohibits race discrimination in child placement, and gives the U.S. Department of Health and Human Services power to prevent the use of race to delay and deny adoption. The problem is that HHS has not used this power.

A law specifically authorizing delay and denial on the basis of race would be a significant step in the wrong direction. The vague prohibition against "undue" delay contained in the proposed bill will do little or nothing to free black children from long-term foster limbo given the overwhelming commitment by child welfare agency bureaucrats to race matching principles, as experience with similarly vague mandates demonstrates.

If Congress is to act at all, it should eliminate, rather than endorse, race matching. Current practices constitute a national scandal. In 50 states public agencies insist on same-race placements, holding African-American children for months, years, and often their entire childhoods in institutional or foster care, rather than placing them with waiting white families. We have been subsidizing same-race recruitment and placement for decades, and have radically revised eligibility standards for black adoptive parents in a desperate attempt to place some of the waiting black children, but there are still nowhere near enough black families available. The foster care population is exploding, with a half-million children now in out-of-home care and the numbers projected to escalate rapidly in coming years.

Children of color account for half the foster population and African-Americans for more than one-third. Many are now talking of the need to build old-style orphanages out of despair of finding enough adequate foster homes. We should be talking instead about enabling these children to find permanent adoptive homes by getting rid of current racial barriers.

Racial matching practices are doing serious damage to black children. The evidence demonstrates beyond any doubt that adoption is vastly preferable to foster care. Delay in adoptive placement has been regularly proven to be the single most important factor affecting adoptive adjustment. Studies of transracial adoption have consistently found the children flourishing and comparing well on every factor, including measures of black identity and sense of comfort with the black community, with children raised in same-race homes.

Racial matching advocates claim to speak for the black community, but there are strongly conflicting views among blacks. Surveys of black community attitudes reveal support for transracial placement as an alternative to foster care and very limited sympathy with the Black Social Workers position. The NAACP delegates have voted in their last two annual conventions to open up transracial adoption
in order to free black children from foster limbo, although they have been overruled both years by the NAACP Board of Directors.

Race matching practices cannot be justified in the name of affirmative action. Affirmative action programs are supposed to benefit members of the subjugated minority group. They are supposed to help overcome our racist legacy—help get to the point where race-conscious policies are no longer necessary. Race matching adoption practices, by contrast, do demonstrable harm to black children in the interest of promoting on-going race separatism in the family.

My argument should not be taken as a claim that race is irrelevant. Clearly race matters, and matters a lot, in a society that continues to be torn apart by racial hostilities. The question is what to do with the difference that race makes.

Transracial families, whether formed by marriage, procreation or adoption, are families that are intensely conscious of racial differences and human similarities. They are families that are struggling to make sense in this intimate context with issues of racial heritage and multiculturalism. Neither Congress nor the courts should permit state action that would prohibit or discourage the formation of such families.

Elizabeth Bartholet is a professor of law at Harvard Law School and the author of “Family Bonds: Adoption and the Politics of Parenting” and “Where do Black Children Belong? The Politics of Race Matching in Adoption.”