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Reconciling Equal Protection Law in the Public and in the Family: The Role of Racial Politics

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RESPONSE

RECONCILING EQUAL PROTECTION LAW IN THE PUBLIC AND IN THE FAMILY: THE ROLE OF RACIAL POLITICS

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In response to Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537 (2014).

INTRODUCTION

In *Constitutional Colorblindness and the Family*,[1] Katie Eyer brings to our attention an intriguing contradiction in the Supreme Court's equal protection jurisprudence. Far from ending race-based family law rules with its 1967 decision, *Loving v. Virginia*,[2] the Court has ignored lower courts' decisions approving official uses of race in foster care, adoption, and custody decisions in the last half century.[3] Thus, as Eyer observes, "during the same time that the Supreme Court has increasingly proclaimed the need to strictly scrutinize all government uses of race, family law has remained a bastion of racial permissiveness."[4]

Scholars who oppose race-matching in the family law context object to the lower courts' failures to implement the colorblind mandate that the

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1 Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537 (2014).

2 388 U.S. 1 (1967).

3 *See* Eyer, *supra* note 1, at 540-41 ("Constitutional challenges to these race-based actions have generally fared poorly . . . .").

4 *Id.* at 541.

Supreme Court has set forth in its affirmative action decisions.[5] Eyer adds that the Supreme Court itself has contravened its constitutional colorblindness narrative by deliberately failing to require strict scrutiny in family law decisionmaking.[6] The Justices carefully crafted their opinion in *Palmore v. Sidoti*[7]—a child custody case—to avoid constitutionally proscribing other official uses of race in child placement decisionmaking, especially in adoption cases.[8] Furthermore, the Court has denied certiorari in family law cases where lower courts blatantly defied the principle of constitutional colorblindness.[9] Although the Justices have yet to explicitly approve race-based rules in the family law context, their actions and archival Supreme Court documents reveal a sub rosa divergence from their expressed colorblind principles.

What explains this stark dichotomy between the Supreme Court's equal protection jurisprudence in the affirmative action context and the family law context? I argue that, after examining the racial politics underlying decisions made by the Court's race conservatives, their approaches to race in public and private realms are not as contradictory as they first appear.

I. THE POLITICS BEHIND THE RHETORIC

Eyer highlights two core rhetorical arguments the Supreme Court uses to justify its uniform application of strict scrutiny to equal protection cases involving race: (1) the inherent invidiousness of state racial classifications and (2) the need for consistency when addressing such classifications.[10] Yet the Court strays from both rhetorical claims when it comes to families. According to Eyer, the Court is guilty of false advertising. The Court

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5 *See id.* ("According to these scholars, the lower courts' approach . . . has fundamentally diverged from the Supreme Court's race law jurisprudence . . . .").

6 *See id.* at 541-42 (noting that the Court has "deliberately shielded continued uses of race in the family law context from rigorous constitutional scrutiny").

7 466 U.S. 429 (1984).

8 *See id.* at 433 (recognizing the concern that "a child living with a [parent] of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin"); Eyer, *supra* note 1, at 557-72 (discussing *Palmore* and some Justices' concerns about whether an opinion on equal protection grounds could adversely affect constitutional affirmative action jurisprudence).

9 *See* Eyer, *supra* note 1, at 549-57 (discussing the Court's denial of a petition for certiorari in *Drummond v. Fulton County Department of Family and Children's Services*, 437 U.S. 910 (1978), where the lower courts upheld a Georgia race-matching adoption regime); *id.* at 577-79 (noting the Court's failure to grant certiorari review to any of five cases in the late 1980s and early 1990s that challenged race-based adoption or foster care determinations); *id.* at 582-87 (discussing a similar denial of certiorari review—and a subsequent petition for rehearing—in *Gambla v. Woodson*, 552 U.S. 1056 (2007), which involved a custody order granted primarily on race-based grounds).

10 Eyer, *supra* note 1, at 573-74.

proclaims its allegiance to consistent colorblindness in its affirmative action decisions while duplicitously permitting a contextually variable approach in family law cases. This bifurcated approach is a problem, Eyer writes, because the Court has deprived litigants of opportunities to influence the Court's "determination of whether and where to rigorously enforce stringent standards of constitutional review."[11]

Though examining rhetoric is a useful way of analyzing the Supreme Court's affirmative action opinions, it is also important to understand the politics underlying the Justices' rhetoric. Examining the Court's understanding of racial classifications—and those classifications' relationships to racism and white supremacy—also yields insights about the Court's divergent approaches. Race by itself is meaningless apart from its utility to the political order.[12] As I observe elsewhere, "[r]ace applied to human beings is a *political* division: it is a system of governing people that classifies them into a social hierarchy based on invented biological demarcations."[13] Conservative colorblind rhetoric is not therefore simply a principle of doctrinal consistency; it is a political stance toward the role of race consciousness in perpetuating or eliminating racial inequality. Examining the racial politics underlying the Court's equal protection approaches reveals that colorblindness in affirmative action cases and racial permissiveness in family law cases are far more aligned than the Court's rhetorical rationales might suggest.

Colorblind ideology competes with race consciousness as a major framework for defining the proper treatment of race in social policy.[14] Colorblindness emerged as a conservative strategy after the civil rights movement succeeded in toppling the South's Jim Crow practices and other forms of de jure segregation in the North.[15] A backlash movement intent on

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11 *Id.* at 544.

12 *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 55 (2d ed. 1994) (discussing how "the concept of race continues to play a fundamental role in structuring and representing the social world"); DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 23-25 (2011) [hereinafter ROBERTS, FATAL INVENTION] (critiquing "the delusion that race is a biological inheritance rather than a political relationship").

13 ROBERTS, FATAL INVENTION, *supra* note 12, at x.

14 *See generally* MICHAEL K. BROWN ET AL., WHITEWASHING RACE; THE MYTH OF A COLOR-BLIND SOCIETY (2003) ("[M]ost white Americans think the United States is rapidly becoming a colorblind society, and they see little need or justification for affirmative action or other color-conscious policies.").

15 *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 2-4 (2003) (describing how the new colorblind ideology "has become a formidable political tool for the maintenance of the racial order" from the Jim Crow era).

crushing black empowerment and preserving white dominance latched on to colorblindness as an ideological tool to promote retrenchment. As sociologist Eduardo Bonilla-Silva notes in his classic *Racism Without Racists*, "[m]uch as Jim Crow served as the glue for defending a brutal and overt system of racial oppression in the pre–Civil Rights era, color-blind racism serves today as the ideological armor for a covert and institutionalized system in the post–Civil Rights era."[16] Colorblind ideology posits that, because racism no longer impedes minority progress, social policies that account for race are unnecessary.

By contrast, a race-conscious ideology seeks to address institutionalized forms of racism that persist despite the gains achieved by the civil rights movement.[17] Rather than treating racism as an aberration that contradicts American ideals, the race-conscious approach holds that racism is systematically embedded in U.S. institutions and culture, and that racism continues to be experienced by people of color. This perspective therefore rejects colorblind ignorance of, or colorblind solutions to, racial inequality. Race-conscious ideologies recognize that only aggressive race-conscious remedies can reverse the centuries-old institutionalization of white privilege and nonwhite disadvantage.

In *Loving*, the Supreme Court found that Virginia's interracial marriage ban originated as "an incident to slavery" and continued to be a "measure[] designed to maintain White Supremacy."[18] Thus, according to the Court's reasoning, the Virginia law violated the Equal Protection Clause not simply because it employed racial classifications, but because its racial classification system furthered the State's impermissible white supremacist mission.[19] The *Loving* test for constitutional validity of official uses of race does not

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16 *Id.* at 3.

17 *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1757-1777 (1993) (arguing that whiteness "continues to be perceived as materially significant" and that the Supreme Court's affirmative action doctrines perpetuate this racial subordination). *See generally* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 1999) (sampling perspectives of theorists who continue to find race relevant to modern social discourse); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (same).

18 Loving v. Virginia, 388 U.S. 1, 6, 11 (1967).

19 *See* Adele M. Morrison, *Same-Sex* Loving*: Subverting White Supremacy Through Same-Sex Marriage*, 13 MICH. J. RACE & L. 177, 197-99 (2007) (explaining that *Loving* rests on a principle of antisubordination, in addition to its commonly cited principles of freedom of choice and antidiscrimination); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (noting that *Loving* rests on both anticlassification and antisubordination principles, and arguing "that the scope of the two principles overlap, that their application shifts over time in response to social contestation and social struggle, and that antisubordination values have shaped the historical development of anticlassification understandings").

require colorblind consistency, but rather an inquiry into whether a race-based rule facilitates (or helps to dismantle) slavery's legacies. Thus, when the Supreme Court's decisions solidified a colorblind interpretation of the Equal Protection Clause to strike down affirmative action efforts and to uphold claims of reverse discrimination, the Court perverted *Loving*'s central meaning.[20] Instead of linking invidious racial classifications to political subordination as the *Loving* Court did, subsequent Court opinions wrongly relied on *Loving* to do just the opposite.

Although Eyer focuses on how family law race doctrines have diverged from the Supreme Court's consistently colorblind approach in affirmative action cases, her chronology also shows a less decisive moment when the Court applied the *Loving* precedent. As Eyer notes, in the decade following *Loving*, courts were not racially permissive in family law cases. Rather, courts universally rejected family law race restrictions because they were "fairly uniformly identified by the courts as vestiges of the nation's Jim Crow past."[21] At the same time, a majority of Justices had not yet settled on a strictly colorblind approach to affirmative action. The Justices' exchange of views surrounding *Regents of the University of California v. Bakke*[22] began to reveal fault lines between those who strongly supported and those who strongly opposed applying strict scrutiny to race-based affirmative action.[23] At that juncture, by correctly applying the *Loving* inquiry into whether the State's policy supported white supremacy, the Court could have chosen to validate race-based affirmative action efforts while continuing to apply strict scrutiny to race-based rules in the family law context. Instead, a majority of Justices followed the colorblind political ideology and subsequently crippled government programs seeking to eliminate the vestiges of slavery and Jim Crow.[24] Thus, the Court's commitment to rhetorical consistency is actually

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20 *See generally* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 304-06 (2009) (describing how the Court's "liberal justices . . . began to insist that when it came to race classifications, purpose really did matter," while the "[c]onservative justices . . . insisted on treating the race classifications in affirmative action programs as if they were exact parallels to the race classifications in segregation law").

21 Eyer, *supra* note 1, at 548-549; *see id.* at 546 n.20 (reviewing the relevant cases).

22 438 U.S. 265 (1978).

23 *See* Eyer, *supra* note 1, at 554 & n.67 (noting the Justices' conflicting views expressed in their conference memoranda).

24 *See* Derrick A. Bell, Jr., *Introduction: Awakening after* Bakke, 14 HARV. C.R.-C.L. L. REV. 1, 5 (1979) ("Minority admissions programs survived the *Bakke* litigation, but minorities lost the ability to argue entitlement to such programs as a matter of legally cognizable right."); Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1034 (2007) ("Powell effectively argued that for constitutional purposes preferential treatment and Jim Crow laws amounted to the same thing—the central claim of reactionary colorblindness.").

less telling than its political approach to the relationship between state racial classifications and institutions that perpetuate racial inequality.

II. RACIAL POLITICS IN THE PUBLIC AND PRIVATE SPHERES

Why did the Supreme Court deviate in family law cases from the colorblind approach it adopted in its affirmative action decisions? The contradiction between race jurisprudence in the affirmative action context and in the family law context rests in part on the dichotomy between public and private spheres. Race has a different political significance in the public realm of employment, government contracts, and education than it does in the private realm of intimate relationships. The public–private distinction was critical to the National Association for the Advancement of Colored People (NAACP)'s decision to delay legal challenges to antimiscegenation laws during the civil rights movement.[25] *Loving* was decided in 1967, more than a decade after *Brown v. Board of Education*, where the Court held racial segregation of public schools unconstitutional.[26] During that period, when it came to overturning interracial marriage bans, the NAACP refrained from mounting the type of aggressive litigation campaigns it had waged against laws segregating education, housing, employment, public accommodations, and voting.[27]

One impediment to aggressive challenges to interracial marriage bans was the view that state restrictions on interpersonal relationships were less important than state restrictions on public citizenship. Most civil rights activists during the civil rights movement distinguished between political rights and less pressing "social equality" rights involving personal relationships.[28] Likewise, white Americans believed that granting African Americans limited

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25 *See infra* notes 27-28 and accompanying text; *see also* Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y.L. SCH. L. REV. (forthcoming 2014) (discussing how, for the NAACP, "the subject of interracial intimacy was at once too trivial and too controversial to rise to the top of the civil rights agenda").

26 *See* 347 U.S. 483, 495 (1954) ("[I]n the field of public education the doctrine of 'separate but equal' has no place.").

27 *See* PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 173-86 (2002) (explaining how "[t]he NAACP did not view miscegenation laws as a high priority in its litigation campaign against racial discrimination").

28 *See* PASCOE, *supra* note 20, at 168 ("The right to marry across racial lines rarely seemed as important as challenging racial discrimination in jobs, housing, or political rights."); *see also* RENEE C. ROMANO, RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA 177-78 (2003) ("[M]ost civil rights activists believed that fighting segregation and disenfranchisement was more important than trying to change laws and customs prohibiting personal relationships across the color line.").

forms of *legal* equality did not necessitate treating them as whites' *social* equals.[29] This distinction between race's treatments in the public and private spheres shows in the Justices' reluctance to apply constitutional scrutiny to race-based decisions involving families. Justice Powell's note about the *Palmore* case, quoted in Eyer's Article, suggests this particular aversion to dealing with race in private matters: "This is the white/black marriage-child custody case. We should not get into this."[30]

Another reason for the split between affirmative action doctrines and family law doctrines is the common misconception of race as a natural category.[31] Because race is viewed as a biological identity inherited from one's parents, it is not surprising that courts would see race-matching as a benign state replication of the natural order. The Fifth Circuit in *Drummond*, for example, reasoned that "[i]t is a natural thing for children to be raised by parents of their same ethnic background."[32] As Eyer explains, lower courts and some Supreme Court Justices may have approved of race-matching in adoption because of the strong historical norm of "placing children with families that would be perceived as 'natural' or biologically related to the child."[33] Thus, many judges failed to see race-matching in adoption as an invidious state classification because it involved intimate relationships that were supposed to mimic "natural" and biological racial bonds.

Examining the public–private dichotomy's political significance reveals that courts' views of race in each realm are not really contradictory. Understanding race as a natural category that is salient to families complements, rather than opposes, a view that racism is irrelevant in education, employment, criminal justice, and voting.[34] Both are consistent with a conservative ideology that holds that races exist at the biological level, but that racism does not exist at the social level. Indeed, genomic science, biomedical research, and genetic technologies are resuscitating the myth that race is an innate, biological

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29 *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120 (1997) (noting that white Americans' "commitment to abolish slavery was not a commitment to recognize African-Americans as equals in all spheres of social life"); *see also* Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1696 (2005) (arguing that "the framers of the Fourteenth Amendment . . . did not consider blacks to be full social equals with whites").

30 Eyer, *supra* note 1, at 560.

31 *See generally* ROBERTS, FATAL INVENTION, *supra* note 12, at 3-5 (explaining how race is not merely "a biological category that is politically charged," but how, rather, "race *itself* is an invented political grouping").

32 Eyer, *supra* note 1, at 552 (quoting *Drummond v. Fulton Cnty. Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977) (en banc)).

33 *Id.* at 552 n.57.

34 *See generally* ROBERTS, FATAL INVENTION, *supra* note 12, at 288-91 (discussing how conservative ideologies undergird the Supreme Court's colorblind jurisprudence).

classification while the Court simultaneously solidifies a colorblind constitutionalism rejecting the use of race in social policies.[35] As with race-based rules in family law, the routine use of racial classifications in government-supported biomedical research and drug development is not considered invidious because race is considered a natural category. Thus, the United States Food and Drug Administration (FDA)'s 2005 approval of a race-specific medicine has not been challenged as a Fourteenth Amendment violation.[36] Viewing racial identities as "natural"—and as having different significance in the public and private spheres—helps to reconcile the seemingly divergent approaches to government racial classifications across affirmative action, family law, and biomedical contexts.

III. THE POLITICS OF TRANSRACIAL ADOPTION

In *Constitutional Colorblindness and the Family*, the opposition between racially colorblind affirmative action law and race-conscious family law relies on a narrow slice of family law: adoption, foster care, and private custody cases where government agents explicitly used race to make individualized decisions about children.[37] This focus is useful, but leaves unexamined the role of institutionalized racism and racial bias in a public child welfare system that disproportionately places black children in foster care and makes them available for adoption.[38] Although they represent only fourteen percent of the

35 *See* ROBERTS, FATAL INVENTION, *supra* note 12, at 287-88 ("[T]he ideology that race is important to genetics but not society is spreading . . . ."); Dorothy E. Roberts, *Law, Race, and Biotechnology: Toward a Biopolitical and Transdisciplinary Paradigm*, 9 ANN. REV. L. & SOC. SCI. 149, 161 (2013) [hereinafter Roberts, *Law, Race, and Biotechnology*] (noting that "biological and cultural paradigms . . . rationalize racial inequality as the fault of its deviant victims"); *see also* JONATHAN KAHN, RACE IN A BOTTLE: THE STORY OF BIDIL AND RACIALIZED MEDICINE IN A POST-GENOMIC AGE 199-201 (2013) (discussing the ideologies surrounding the use of race-specific medicine, some of which may "promote[] the framing of health disparities in terms that locate the problem in the bodies of individual members of geneticized racial groups").

36 *See generally* KAHN, *supra* note 35, at 48 ("On June 23, 2005, the FDA approved BiDil to treat heart failure in African Americans, and *only* African Americans."). For a discussion of proposals to apply strict scrutiny to States' racial classifications in scientific research, see Roberts, *Law, Race, and Biotechnology*, *supra* note 35, at 158-59.

37 *See supra* notes 6-9 and accompanying text.

38 *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 91-92 (2002) [hereinafter ROBERTS, SHATTERED BONDS] ("As the [nation's] foster care caseloads increased, so did the share of Black children."); Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 112-16 (2008) (presenting statistical research documenting African American children's disproportional representation in the child welfare system).

nation's children,[39] black children account for twenty-six percent of the foster care population.[40] As I document in *Shattered Bonds: The Color of Child Welfare*, the overrepresentation of black children in foster care results from biased decisionmaking and from policies that systematically disadvantage black families.[41] The constitutional debate about race-matching and transracial adoption should be placed in a broader context of the systemic inequities that produce the excessive supply of black children available for adoption by white parents.[42]

Opponents of race consciousness in adoption seek to remove barriers to white parents' freedom to adopt children based on their racial preferences.[43] The claim that impediments to white parents' privilege create a form of racial segregation is akin to the conservative Justices' views that affirmative action programs resemble Jim Crow discrimination. It is far more accurate to see child welfare practices—which disproportionately place black children in foster care, terminate their parents' rights, and make them available for adoption—as a form of state sponsored segregation. Indeed, for dependency court visitors who lack preconceptions about the child welfare system, the system in many large cities may appear to be designed to monitor, regulate, and disrupt black families exclusively. Thus, extending the Supreme Court's colorblind approach in affirmative action cases to the transracial adoption context unifies judicial support for white privilege across both public and private domains. The failure to notice this racism in the child welfare system

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39 CHILDREN'S DEFENSE FUND, THE STATE OF BLACK CHILDREN IN AMERICA: A PORTRAIT OF CONTINUING INEQUALITY 1 (2014), *available at* http://www.childrensdefense.org/child-research-data-publications/data/state-of-black-children-2014.pdf; *Race, Ethnicity, and Gender*, U.S. DEP'T HEALTH & HUMAN SERVS., fig.4, http://www.aspe.hhs.gov/hsp/09/NSAP/chartbook/chartbook.cfm?id=15 (last visited June 1, 2014).

40 U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 2 (2013), *available at* https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf.

41 ROBERTS, SHATTERED BONDS, *supra* note 38, at 92-99 ("Racism in reporting illustrates how racial bias combines with broader inequities to push disparate numbers of Black children into the [child welfare] system.").

42 *See generally* LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 115-21 (2012) (critiquing adoption-promotion policies that ultimately serve to remove black children from their families); Dorothy Roberts, *Adoption Myths and Racial Realities in the United States*, *in* OUTSIDERS WITHIN: WRITING ON TRANSRACIAL ADOPTION 49, 50-52 (Jane Jeong Trenka, Julia Chinyere Oparah & Sun Yung Shin eds., 2006) (describing how "[t]he racial disparity in adoptable children reflects a general inequity in the US child welfare system").

43 *See, e.g.*, R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 887-95 (1998) (responding to views expressed by Elizabeth Bartholet that criticize race-matching practices while failing to critique facilitative accommodation practices).

is a form of colorblindness that links family law closely to the conservative Justices' approach to affirmative action.[44]

Eyer casts *Adoptive Couple v. Baby Girl*[45] as a race-matching case that tests the constitutionality of restrictions on white parents' freedom to adopt Native American children.[46] This definition of the constitutional question at issue accentuates the importance of a political perspective. Eyer centers her discussion of *Adoptive Couple* on the adoptive parents' interest in adopting a Native American girl (who had been living with her Native American father pursuant to South Carolina lower court decisions), rather than on the Cherokee Nation's interest in protecting its sovereignty over the custody of a child considered a tribal member.[47] At issue was the viability of the Indian Child Welfare Act (ICWA),[48] enacted by Congress in 1978 to address the systematic removal of Native American children from their homes often for ultimate placement in white families and institutions.[49]

As with transracial adoption of black children, focusing on the white adoptive parents' entitlement obscures not only the history of racist child welfare practices, but also the political commonality between the Supreme Court's approaches to race in the affirmative action context and in the family law context. The Court's decision in *Adoptive Couple* weakened congressional efforts to address repression of Native American tribes by child welfare authorities. Hence, that decision was consistent with the Court's decision in

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44 *See* Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 102-04 (1993-1994) (discussing how "fram[ing] the transracial adoption issue in terms of affirmative action contributes to the subordination of Black children"); *see also* Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131, 133-34 (1995) (responding favorably to Perry, *supra*, and arguing against colorblindness in adoption policies).

45 133 S. Ct. 2552 (2013).

46 Eyer, *supra* note 1, at 588-92 (discussing the case).

47 *Id.* at 594-95 (failing to mention the Cherokee Nation).

48 25 U.S.C. §§ 1901–23 (2012).

49 *See generally* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32-37 (1989) (noting how ICWA was meant to respond to "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption of foster care placement, usually in non-Indian homes"); ROBERTS, SHATTERED BONDS, *supra* note 37, at 248-51 (explaining how Congress passed ICWA "to redress the cultural injury that the [federal] adoption policy inflicted on Indian tribes"); Thalia González, *Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption Protections for Indian Status Offenders*, 42 N.M. L. REV. 131, 138-40 (2012) (discussing how ICWA responded to the "alarmingly high percentage of Indian children . . . being removed from their natural parents").

Fisher[50] during that same term, as well as its subsequent decision in *Schuette v. BAMN*,[51] which weakened public universities' efforts to address racial inequities in education.

True, the Court failed to extend its colorblind approach to invalidate ICWA wholesale. Such alignment between the Court's racial jurisprudence in the affirmative action and family law contexts would even more consistently disregard the need for race-conscious remedies for institutionalized racism. While this result would narrow the family law gap in colorblind constitutional jurisprudence, it would dangerously consolidate the Court's dismantling of government efforts to redress institutionalized racism across public and private realms.

CONCLUSION

Truth in advertising by the Supreme Court would not necessarily predict the future course of equal protection doctrine in either its affirmative action decisions or its family law decisions. Eyer notes that "the Court might well adhere to its view that all affirmative action programs must uniformly be strictly scrutinized"[52] and that, once its sub rosa family law approach is revealed, the Court might apply consistent and colorblind strict scrutiny to family law cases as well. If the problem is inconsistency, this would be a salubrious resolution. A political perspective, however, shows that this could be disastrous for government efforts to eliminate the vestiges of slavery and Jim Crow, which the *Loving* Court reasoned was the mission of the Equal Protection Clause.

Eyer concludes her Article by noting, "without an honest starting point, we cannot hope to have meaningful conversations about the contemporary constitutional significance of race."[53] To me, an honest starting point is to acknowledge the racial politics that underlie both the Supreme Court's colorblind rhetoric in affirmative action cases and its racial permissiveness in family law cases. This political inquiry helps to reconcile the Court's seemingly contradictory approaches to race in the public and private domains. It also reveals the need to return equal protection analysis in both

50 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013). In *Fisher*, the Supreme Court reinforced the requirement that strict scrutiny be applied "to any admissions program using racial categories or classification" to promote educational diversity. *Id.* at 2419.

51 Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), No. 12-682, 2014 U.S. LEXIS 2932, at *1638 (U.S. Apr. 22, 2014) (citing voter interests to uphold a voter initiative banning affirmative action in state educational institutions).

52 Eyer, *supra* note 1, at 544.

53 *Id.* at 601.

contexts to the test articulated in *Loving*—whether government uses of race are measures designed to maintain or contest white supremacy.

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