Family law has escaped the colorblindness revolution. During the same time frame that the Supreme Court has adopted increasingly stringent constitutional standards for even “benign” uses of race (including most notably affirmative action), the lower courts have continued to take a loose and permissive approach to many government uses of race in the family. Thus, courts have continued to regularly affirm (and to apply minimal constitutional scrutiny to) the use of race to determine foster care and adoptive placements, as well as the use of race as a factor in custody disputes between interracial parents.

This paper, drawing on heretofore unexplored historical sources, examines the Supreme Court’s role in the development of these divergent approaches to the use of race in the affirmative action and family law contexts. As those sources demonstrate, the Court has—over the last 40 years—had numerous opportunities to address the growing divide. Nevertheless the Court (and particularly its most ardent affirmative action detractors) has been reluctant to do so, at least in part because of a normative endorsement of the race-based practices at issue in the family law context. Thus, the Court has avoided taking up cases involving the use of race in family law—and taken other steps to limit the reach of its doctrine in the family law arena—based on a normative perception that remaining instantiations of race in family law are, at their core, benign.

This history has profound implications for the Court’s broader race law jurisprudence. Supreme Court doctrine has—on its face—rejected the possibility of a role for normative judgments about the “benign” or “invidious” nature of particular race-based classifications in its Equal Protection doctrine. But the history of the Court’s approach to family law suggests strongly that the Court itself does in fact weigh such factors sub rosa in its approach to taking up and adjudicating race law claims. This Article suggests that there are serious process, legitimacy, and substantive concerns raised by such a divergence, and discusses alternatives for bringing the Court’s doctrine into greater alignment with its practice.
CONSTITUTIONAL COLORBLINDNESS
AND THE FAMILY

Katie Eyer*

INTRODUCTION

By all accounts, the colorblindness revolution has arrived. Since 1989’s City of Richmond v. J.A. Croson Co., Supreme Court majorities have proclaimed the Court’s obligation to subject all uses of race to “most rigid scrutiny.”¹ Thus, the Court’s ostensible command has been that even programs intended to benefit minority group members—such as affirmative action—must be subjected to the same constitutional regime as undoubtedly invidious uses of race.² Undergirding this approach have been empirical and moral claims of the necessity of consistency in treating all uses of race as inherently suspect.³ Scholars have reinforced this

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² See sources cited note 1, supra and note 3, infra.

³ See, e.g., Croson, 488 U.S. at 493-94; id. at 521, 527-528 (Scalia, J., concurring); Shaw v. Reno, 509 U.S. 630, 643 (1993); Adarand, 515 U.S. at 223-224, 229, 236; id. at 240-241 (Thomas, J., concurring); Parents Involved in Community Schools v. Seattle
account, contending that the Supreme Court has fundamentally turned away from a contextually variable approach to race to one in which all uses of race are presumptively malign.  

But, the colorblindness revolution’s reported rise has been at least partially apocryphal. Contrary to the conventional wisdom, the courts do not strictly scrutinize all government uses of race. Carve-outs for certain preferred uses of race remain in the lower courts, with such preferred uses of race being largely exempted from meaningful constitutional review. As a result, an array of government uses of race have continued to be ubiquitous—and largely constitutionally unchallenged—long past the announcement of the Court’s stringent and putatively global approach to contemporary uses of race. And, while the partialness of the


5 See notes 6-8, infra and accompanying text.

6 See Parts I-V, infra (detailing the courts’ constitutionally permissive approach to contemporary uses of race in family law); Balkin & Siegel, supra note 4, at 16-18 (describing other contexts, including the census and race-based suspect descriptions, in which the courts have found that use of race will not trigger strict scrutiny); R. Richard Banks, The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action, 107 YALE L.J. 875, 904-908 (1998) (hereinafter “Banks, Color of Desire”) (same, listing legislative districting, criminal profiles, adoption, and recordkeeping); R. Richard Banks, The Illusion of Colorblindness in Antidiscrimination Law, available at http://works.bepress.com/r_banks/1/ (last visited July 2, 2012) (hereinafter “Banks, Colorblindness”) (same, listing race-based suspect profiles, facilitative accommodation in adoption and racial casting); R. Richard Banks, Race-Based Suspect Selection and Colorblind Equal Protection Discourse, 48 UCLA L. REV. 1075 (2001) (hereinafter “Banks, Race-Based Suspect Selection”) (extended treatment of race-based suspect selection); Banks, supra note 4, at 579 (lower courts have declined to apply strict scrutiny to race-intentional but not racially classifying government actions).

7 See sources cited note 6, supra.
colorblindness revolution is perhaps most vividly apparent in the lower courts, it has been far from restricted to that context. Thus, the Supreme Court itself has—through the management of its docket, as well as more direct means—declined to fully embrace the implications of its colorblindness revolution. By this Article tells the story of one of the most persistent and striking contexts in which the “colorblindness revolution” has been more illusory than real: the use of race in family law. Beginning with the aftermath of Loving v. Virginia (a decision often canonized as the endpoint of race-based family law rules), it traces the courts’ generally permissive response to remaining official uses of race in the family during the following half century. As this exploration reveals, the use of race in the family has remained robust in the post-Loving era, with many state agencies and courts continuing to apply race-based rules in the adoption, foster care and custody contexts. Constitutional challenges to such race-based actions have generally fared poorly, with courts typically (albeit not always) applying de minimis constitutional scrutiny. Thus, during the same time frame that the Supreme Court has increasingly proclaimed the need to strictly scrutinize all government uses of race, family law has

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8 Id.; see also, e.g., Brown v. City of Oneanta, 221 F.3d 329 (2d Cir. 1999), cert. denied 534 U.S. 816 (2001) (denying certiorari in a case exempting race-based suspect selection from equal protection scrutiny); Monroe v. City of Charlottesville, 579 F.3d 380 (4th Cir. 2009), cert. denied 130 S.Ct. 1740 (2010) (same).

9 In the interest of space, there is one major omission from my discussion of this subject. Specifically, with the exception of the pending case of Adoptive Couple v. Baby Girl, No. 12-399, I have not devoted any discussion to the distinct constitutional issues presented by the use of race in family law involving Native American/Indian children, or the statutory scheme that governs such uses, the Indian Child Welfare Act (“ICWA”). The constitutional issues presented by this context are analytically distinct, in view of the Court’s historic treatment of classifications based on Indian status as political, rather than racial. See Morton v. Mancari, 417 U.S. 535, 553 (1973). Thus, while there are both political and legal interrelationships between the historical approach to custody and adoptive placement of Indian children and the approach taken vis-à-vis other minority children, a full discussion of this issue exceeds the scope of this paper. See generally RANDALL KENNEDY, INTERRACIAL INTIMACIES 480-518 (2003) (addressing this issue separately for similar reasons).

10 See Parts I-V, infra.

11 See id. While Palmore v. Sidoti struck down one particular use of race in child custody in the mid-1980s, i.e., the practice of removing custody based on a parent’s interracial marriage, it did little to disrupt continuing uses of race outside of that specific context, including, e.g., uses of race in the adoption, foster care and interracial parent custody dispute context. See Part III, infra.

12 See Parts I-V, infra.
remained a bastion of racial permissiveness.\footnote{Id.}

This divergence has—unsurprisingly—not gone unremarked in the legal literature. Indeed, a number of scholars have argued for the erroneousness of the lower courts’ approach to contemporary uses of race in family law (or the unconstitutionality of such racial policies themselves); contending that the Court’s contemporary affirmative action jurisprudence demands the application of strict scrutiny, and that this high bar is one that contemporary uses of race in the family are unable to meet.\footnote{See, e.g., David Meyer, Palmore Comes of Age: The Place of Race in the Placement of Children, 18 U. FLA. J. L. & PUB. POL’Y 183, 185-187 (2007); Mark Rahdert, Transracial Adoption—A Constitutional Perspective, 68 TEMP. L. REV. 1687, 1689-1690 (1995); David Rottenstein, Trans-Racial Adoption and the Statutory Preference Schemes: Before the “Best Interests” and After the “Melting Pot”, 68 ST. JOHN’S L. REV. 137 (1994); Davidson Pattiz, Racial Preference in Adoption: An Equal Protection Challenge, 82 GEO. L.J. 2571 (1994); Elizabeth Bartholet, Where Do Black Children Belong? The Politics of Race Matching in Adoption, 139 U. PA. L. REV. 1163 (1991). For a divergent perspective, see Twila L. Perry, The Transracial Adoption Controversy: An Analysis of Discourse and Subordination, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1993-1994).} According to these scholars, the lower courts’ approach to the use of race in the family has fundamentally diverged from the Supreme Court’s race law jurisprudence, and should be modified to be brought into alignment with contemporary affirmative action jurisprudence.\footnote{See sources cited supra note 14.} Thus, the story that has been told by contemporary scholars is primarily one of lower court disobedience—one in which the lower courts have failed to act as faithful implementers of the Supreme Court’s colorblindness revolution—and not one which calls into question the dominant narrative of the Court’s own jurisprudence.\footnote{Id.}

But there is a profoundly different story to be told regarding the contemporary history of race in family law. As archival Supreme Court documents reveal, far from diverging from the Supreme Court’s intended approach to the use of race in family law, it appears that the Court itself—and particularly its race conservatives\footnote{This paper will use the terms “race conservatives,” “race moderates” and “race liberals” as a shorthand for the array of positions that have been taken by the Justices in the affirmative action context vis-à-vis appropriateness of differentiating the constitutional standard for “benign” v. “invidious” uses of race. I borrow this helpful trichotomy (with a number of modifications) from Reva Siegel’s work, recognizing that these shorthand terms may oversimplify the range of positions that the Justices have taken vis-à-vis these}—have deliberately shielded
continued uses of race in the family from rigorous constitutional scrutiny. Thus, on the one occasion on which the Court has taken up the constitutionality of uses of race in the family post-Loving—Palmore v. Sidoti’s challenge to the practice of depriving a parent of custody based on a post-divorce interracial marriage—it acted carefully to ensure that its decision would not inhibit other continuing uses of race in the family, including especially adoption. And on every other occasion when the Court has been called upon to address the constitutional stature of uses of race in the family post-Loving, it has declined, based at least in part on the Court’s race conservatives’ perception of such uses of race as simply “different” and, at their core “benign.”

issues over time. See Reva Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 YALE L.J. 1278, 1282 (2011) (hereinafter “Siegel, Antibalkanization”). Although there are other axes on which one might divide the Justices into categories, for the purposes of this Article endorsement of full strict scrutiny review (even for benign uses of race) was selected as the most pertinent divide. Thus, Justices who at the time clearly expressed (internally or externally) the view that full strict scrutiny must be applied even to affirmative action are characterized as “race conservatives.” Those who expressed the view that a more flexible or relaxed regime should apply to affirmative action are characterized as “race liberals.” And those who were either then inconsistent or who were ambiguous as to their position are characterized as “race moderates.” A chart identifying the developing positions of the various Justices in the affirmative action context, and the time frames during which they would be characterized as a race conservative, race moderate, or race liberal under this rubric is available from the author upon request.

18 See Parts I-V, infra.
19 See Part II, infra.
Nor has the tension between the Court’s affirmative action jurisprudence and the lower courts’ permissive approach to race in family law simply been lost on the Justices. Since the very beginning of the Court’s modern foray into the affirmative action context, parallels between affirmative action and contemporary uses of race in the family—their characterization as benign, their putative benefits for minority group members—have been repeatedly called to the Court’s attention. Thus, both litigants and the Justices’ own law clerks have repeatedly highlighted for the Justices the doctrinal and logical overlays between race-based family law adjudication and affirmative action jurisprudence. And indeed, even where such overlaps have not been explicitly highlighted by others, the Justices themselves have not missed their significance, sua sponte identifying doctrinal overlaps between affirmative action and family law in their internal communications.

Unearthing this rich history has a number of important implications. Most significantly, exploring the constitutional history of race-based family law rules at the Supreme Court level exposes the ways in which the Court has—sub rosa—profoundly diverged from its claimed colorblindness project. Thus, the Court has claimed to reject the possibility that particular (benign) uses of race might be exempted from stringent constitutional scrutiny—on the reasoning that uses of race by the government are inherently malign—while simultaneously acting to shield

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\(^{21}\) See notes 22-23, infra and accompanying text.

\(^{22}\) See, e.g., notes 92, 186, & 220-21, infra and accompanying text.

\(^{23}\) See, e.g., notes 183-186, infra and accompanying text.

\(^{24}\) One important implication, which I do not discuss here in the interest of space, is to further substantiate the robust scholarly consensus that family law is often treated as “exceptional,” and thus not subject to normal doctrinal rules, by the courts. See, e.g., JILL ELAINE HASDAY, FAMILY LAW REIMAGINED: RECASTING THE CANON, at 3 (forthcoming) (manuscript on file with the author) (describing family law exceptionalism as the “premise that family law rejects what the law otherwise does, and does what the law otherwise rejects.”); see also Janet Halley & Kerry Rittich, Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism, 58 AM. J. OF COMPARATIVE L. 753 (2010) (introductory piece for special issue dedicated to Family Law Exceptionalism). And indeed, it appears that civil rights is a robust site for family law exceptionalism, with civil rights doctrines often being disregarded—or only partially incorporated—in the family law context. This paper is a part of a broader project investigating the manifestations and causes of family law exceptionalism in the civil rights context, other portions of which aim to more fully situate civil rights family law exceptionalism within the broader family law exceptionalism literature.
certain preferred (benign) uses of race. Indeed, it appears that certain uses of race in the family—including particularly adoption—have been deliberately preferred by the Court, based precisely on normative beliefs regarding their legitimacy. Thus, while the Court has facially claimed to adhere to a rule which rejects the salience of the normative legitimacy of particular uses of race in determining the level of constitutional scrutiny to be applied, it has in practice looked precisely to normative legitimacy as a basis for shielding particular uses of race from rigorous constitutional review.

This discordance—between the Court’s articulated standard for constitutional race adjudication and its actions—raises profound concerns. Among other things, by formally denying the salience of racial classifications’ normative underpinnings, the Court has deprived litigants of the opportunity to influence its choice of whether to classify a particular use of race as benign or malign; and thus to influence its ultimate determination of whether and where to rigorously enforce stringent standards constitutional review. Moreover, such an approach—by necessity unguided by fixed legal standards—must necessarily rest on precisely the type of intuitive, instinctive judgments about race (and which uses of race benefit the community) that troublingly echo America’s recent constitutional past. Finally, the Court’s formal adoption of a rule that does not accurately reflect its true decision-making criteria can only lead to distortions in substantive doctrine, insofar as the Court will find it increasingly difficult to avoid the more radical implications of its own pronouncements.

The modern history of race in family law thus calls for a reevaluation of the absence of an explicit place for what Ralph Richard Banks has referred to as “the Benign-Invidious Asymmetry” in Equal Protection Doctrine. That is to say, if the Court is in fact engaging sub silentio in the practice of shielding normatively desired racial practices from rigorous constitutional scrutiny, there are strong reasons why the process by which the Court does so should be unobscured and made a part

\[25\text{ See generally Part VI, infra.}\]
\[26\text{ Id.}\]
\[27\text{ Id.}\]
\[28\text{ Id.}\]
\[29\text{ Id.}\]
\[30\text{ Id.}\]
\[31\text{ See generally Banks, supra note 4.}\]
of the formal framework of Equal Protection doctrine. While it is not clear that such a formal recognition of the application of differential constitutional standards for benign and invidious uses of race would result at this juncture in a reversal of the Court’s affirmative action doctrine (and indeed the Court might well adhere to its view of affirmative action as malign), the benefits of such doctrinal “truth in advertising” would nevertheless (for all the reasons adverted to supra) be profound. Thus, the history of race in family law strong suggests that the time has come to reconsider the Court’s decades-old rejection of the notion that motivation (and effects) matter to Equal Protection doctrine.

This Article takes up the forgoing issues as follows. Part I (covering the years from 1967-1978) traces the constitutional treatment of race-based family law practices during immediate post-Loving era, and explores the initial emerging divide in the Court’s approach to “benign” uses of race in the affirmative action and family law contexts. Part II (1979-1984) turns to a discussion of Palmore v. Sidoti, and the substantial internal debates that Palmore prompted (despite its ultimate unanimity) regarding remaining instantiations of race in family law. This Part shows that Palmore was controversial in part precisely because of its potential implications for other contemporary uses of race in family law (including particularly race-matching in adoption), and the desire of a number of the Justices to leave race-matching in adoption undisturbed.

Part III (1985-1995) explores the very profound divergence—until then slowly emerging—that occurred in the post-Palmore period between the Court’s affirmative action jurisprudence (where the Court increasingly demanded that all uses of race be strictly scrutinized) and the lower courts’ approach to race in family law (where the courts most often declined to apply any meaningful constitutional scrutiny to continuing uses of race). This Part further traces these lower court decisions to the petition for certiorari stage, where they were repeatedly rejected by the Court even in circumstances where internal communications on the Court recognized that race may have been the “sole” consideration. Part IV (1996-2007) continues to follow this divergence through the most modern era, and the Court’s continued failure to address even the most clear divergences from its ostensible demand of strict scrutiny in the race law context. Finally, Part V in Epilogue, takes up two currently pending Supreme Court cases—Fisher v. University of Texas and Adoptive Couple

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32 See generally Part VI, infra.
33 Id.
v. Baby Girl—and discusses the likelihood that their respective outcomes will continue to track this historically divided constitutional race law regime.

Part VI then turns at last the implications of this rich history for the Court’s race law jurisprudence. Drawing together the historical materials explored in Parts I-V, this Part discusses the ways in which the Court’s publicly articulated rhetoric (rejecting the possibility of lesser constitutional scrutiny for benign uses of race) has failed to reflect its internal actions (facilitating precisely such a regime in the family law arena). It then discusses the profound concerns that such a divergence raises, including the legitimacy and process defects it creates. Finally, this Part explores potential ways that the Court’s race law doctrine might be rendered consistent, including the reintroduction in the Court’s formal Equal Protection doctrine of a place for normative judgments about whether a particular use of race is benign.
I. RACE IN THE FAMILY FROM LOVING TO DRUMMOND: 1967-1978

The years following the Supreme Court’s 1967 decision in Loving v. Virginia marked the high point for the constitutional invalidation of race-based decision-making in family law. Thus, during the five years following Loving eight lower courts—many within the Deep South—would invalidate race-based family law restrictions on Fourteenth Amendment grounds. And, while many of these cases can be characterized as tying up the “loose ends” of Loving—invalidating anti-miscegenation laws in response to the intransigence of local officials—others reached more broadly, constitutionally invalidating statutory restrictions on transracial adoption and relying on Loving to open up inheritance rights to the relatives of interracial couples. Thus, the five year period between 1967 and 1972 can fairly be characterized as the most activist time frame in history for the courts’ adjudication of constitutional race-based family law claims.

By the mid-1970s, however, this unified approach had begun to dissolve in the face of broader political and legal developments. Politically, the late 1960s and early 1970s witnessed a major transformation in the discourse around race equality as the black power and cultural nationalism movements gained national prominence. These movements—which called for the celebration and preservation of black difference (and often directly for racial separatism)—meant that for the first time minority voices became prominent among those promoting race’s salience in family law decision-making. Indeed, by the early to
mid 1970s, the most vocal advocates of official restrictions on interracial family formation tended to be minority organizations, such as the National Association of Black Social Workers (NABSW).\footnote{38 See, e.g., KENNEDY, supra note 9, at 111-112, 393-398 (2003); Bartholet, supra note 14, at 1179-1182. During this same time frame, Indian organizations such as the Association on Indian Affairs were also increasingly agitating for restrictions on the placement of Indian children with non-Indian families. See, e.g., Thalia Gonzalez, Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders, 42 N.M. L. REV. 131, 139-140 (2012); see also Maria E. Caposeco, Bright Hopes, Shared Heritage: Helping Latino Kids Find Roots When Adopted, SACRAMENTO BEE, July 8, 1992, at B1 (noting the long opposition of both NABSW and the Indian community to placing black or Indian children with white families). These efforts ultimately successfully culminated in the enactment of the Indian Child Welfare Act (ICWA), a federal statute that requires the placement of Indian children in Indian homes in many circumstances. See Gonzalez, supra, at 140-141. ICWA has, in turn, provided a template for calls for similar legislation vis-à-vis African American and other minority children. See, e.g., 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, 112-113, 125-126 (2008).} Noting the unique needs of minority children, such organizations argued strongly against interracial adoptive and foster care placements, contending that non-minority parents were not competent to instill a healthy sense of racial identity in black or biracial children.\footnote{39 See, e.g., KENNEDY, supra note 9, at 393-398; Bartholet, supra note 14, at 1179-1182. These sentiments would eventually come to be significantly reflected in the case law. For an interesting and nuanced treatment of the issues that spurred the development of NABSW’s position in this area, see Laura Briggs, Somebody’s Children, 2009 UTAH L. REV. 421 (2009).}

Legally, the early 1970s also witnessed major transformations in the form of racial restrictions in family law. By 1973, most Jim Crow era statutes categorically precluding interracial intimacy and family formation had been struck down or repealed.\footnote{40 In addition to anti-miscegenation laws, which were invalidated by Loving, many states had child-focused criminal or civil restrictions on interracial families during the Jim Crow era. See, e.g., S.C. CODE ANN. § 16-553 (1962) (making it a criminal offense to place a white child in “the custody, control, maintenance or support of a Negro”); LA.} The policies that remained—many of

Grossman, A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings, 17 BUFF. L. REV. 303 (1967-1968) (as of 1968, describing then-existing arguments for race-matching in custody and adoption law, which derived predominantly from traditional adoption practices promoting the appearance of a “natural” family and from Jim Crow era disapproval of race mixing; also discussing the possibility that the “increasing racial consciousness on the part of many Negroes” might lead the black community to oppose transracial adoption).
which were informal or administrative in nature—were more likely to be uncodified, and, at least in theory, less categorical, considering race as only “a factor” among many. 41 While formal and more categorical statutes and administrative policies would later experience a resurgence, during the mid-1970s the predominant uses of race in family law tended to be—at least on their face—more flexible, and were typically justified as part of a global consideration of the child’s best interests.42

Collectively, these changes in the political and legal context had a major impact on judicial perceptions of the legitimacy of race restrictions in family law. During the late 1960s and early 1970s, family law race restrictions had been fairly uniformly identified by the courts as vestiges of the nation’s Jim Crow past.43 But by the mid-1970s, this confluence of political and legal changes had considerably complicated the characterization of race-based family law decision-making as a form of

41 Of the race family law cases arising during the five year period from 1973 through 1977, only one involved a statutory or regulatory policy requiring race-matching. See In the Matter of the Adoption of Victor Lamont Haven, 1979 Ohio App. LEXIS 9744, *3 (Ohio Ct. App. 1979). Instead, most involved informal judicial or administrative policies sanctioning race only as a factor in the best interest analysis. See, e.g., Niles v. Niles, 299 So.2d 162, 162-163 (Fla. Ct. App. 1974); White v. Appleton, 304 So.2d 206, 208-209 (Ala. Ct. App. 1974); Rayser v. Gabbey, 57 A.D.2d 437, 440-443 (N.Y. App. Div. 1977); Drummond v. Fulton County Dep’t of Fam. & Children’s Servs., 563 F.2d 1200, 1204-1205 (5th Cir. 1977) (en banc), cert. denied 437 U.S. 910 (1978) (hereinafter “Drummond en banc”); but cf. Beazley v. Davis, 545 P.2d 206, 207-208 (Nev. 1976) (where lower court employed an apparently categorical approach to race-matching children of an interracial marriage with their minority parent, finding that action to be unconstitutional). Even during the Jim Crow era, a significant number of jurisdictions had statutory or regulatory regimes that did not explicitly compel race matching, although they often de facto operated in that fashion by virtue of traditional adoption norms and the perceptions of courts and agency personnel regarding children’s best interest. See, e.g., Bartholet, supra note 14, at 1176; KENNEDY, supra note 9, at 5, 367-446; Grossman, supra note 37, at 309-310, 318, 321-322, 323.

42 See note 40, supra; see also Cynthia G. Hawkins-Leon and Carla Bradley, Race and Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong, 51 CATH. U. L. REV. 1227, 1241 (2002) (as of 1987 “35 states prohibited the adoption of black children by white families.”)

43 See cases cited at note 34, supra.
invidious race discrimination. Like affirmative action, the presence of minority advocates for racial family law policies—and the arguable deployment of such policies in service of a “benign” goal, i.e., the best interest of the child—rendered the constitutional assessment of racial family law policies far from unambiguous. Thus, as the dominant discourse behind race-based family law restrictions shifted, so too judicial treatment of race restrictions in family law changed direction, from near-universal rejection in the immediate post-Loving period to a state of profound division.

Mildred and Robert Drummond, a white couple from Douglasville, Georgia, would be one of the families ultimately caught up in these changing legal and political tides. In December 1973, the Drummonds became foster parents when a one-month old mixed-race infant named Timmy was placed with them by the Fulton County Department of Family and Children’s Services (DFCS). While the placement was originally made on an emergency basis, it soon became apparent that Timmy would not be imminently reunited with his biological mother. By late 1974, the Drummonds expressed an interest in adopting Timmy, who had by then lived with them for close to a year.

There appears not to have been any question that the Drummonds provided excellent care for Timmy and loved him deeply. Indeed, the Drummonds’ care was described by DFCS personnel as “excellent,” “loving,” and “extremely competent.” Another worker noted that the Drummonds “are unusually attentive to the child’s medical and emotional

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44 See note 45, infra.
45 See, e.g., Niles, 299 So.2d at 162-163 (treating race-based family law practice as valid based on its benign objectives); White, 304 So.2d at 208-209 (same); In the Matter of B. Children, 89 Misc.2d 493, 495-498 (N.Y. Fam. Ct. 1977) (same); Raysor, 395 N.Y.S.2d at 293-295 (same); Haven, 1979 Ohio App. LEXIS 9744, at *3-16 (same); Drummond en banc, 563 F.2d at 1204-1205 (same).
47 Drummond v. Fulton County DFCS, 547 F.2d 835, 837, 843 (5th Cir. 1977), vacated and rev’d by 563 F.2d 1200 (5th Cir. 1977) (en banc), cert. denied 437 U.S. 910 (1978) (hereinafter “Drummond Panel Decision”).
48 Id. at 837.
49 Drummond en banc, 563 F.2d at 1203.
50 Drummond Panel Decision, 547 F.2d at 837.
51 Id.
needs and feel as if they are the ‘natural’ family.” Nevertheless, it was decided by DFCS that Timmy would be better off with a black couple, and that the Drummonds therefore would not be permitted to adopt. The Drummonds were informed (and apparently initially acquiesced) that they would be permitted to continue as Timmy’s foster parents, but that he ultimately would be removed and placed in a black adoptive home.

Within months of this initial determination, however, the Drummonds sought reconsideration of their request to adopt Timmy. And, while the Drummonds’ social worker was initially instructed to “stall, with no encouragement,” the Drummonds were ultimately permitted to apply formally as adoptive parents. The DFCS caseworker who evaluated the Drummonds as adoptive parents, while expressing certain limited concerns, ultimately recommended that the Drummonds be permitted to adopt, noting the Drummonds’ and Timmy’s love for each other and the Drummonds’ appropriate dealings with issues concerning Timmy’s race. Nevertheless, DFCS adhered to its original decision, and removed Timmy from the Drummond’s home at age two and a half.

The Drummonds took legal action—first in federal and then in state court—seeking to prevent (and then reverse) Timmy’s removal from their home. Represented by pioneering civil rights lawyer Margie Pitts Hames (later joined by additional counsel, including Neil Bradley of the

52 Id. at 841.
53 Id. at 837-841.
54 Id.
55 Id. at 841.
56 Id.
57 Id. at 843-46.
58 Id. at 846-848; Petition for a Writ of Certiorari at 6, Drummond v. Fulton County DFCS, No. 77-1381, cert. denied 437 U.S. 910 (1978) (hereinafter “Federal Drummond Petition”).
59 Federal Drummond Petition, at 7-8. The state proceeding was initiated after the federal district court suggested in its decision that certain of the Drummonds’ claims might only be vindicated in state court. Id.; see also Drummond v. Fulton County DFCS, 408 F.Supp. 382, 383-384 (N.D. Ga. 1976). These parallel proceedings arguably should have been precluded, but no court ever reached the issue, apparently because it was never raised by the Defendants. See Memorandum of William J. Brennan Jr. to the Conference, Re: Cases Held for No. 76-5 (June 14, 1977) (on file with the Library of Congress Justice Byron White papers (hereinafter “White Papers”), Box I:362, folder 3).
60 Margie Pitts Hames was a civil rights lawyer who litigated several important abortion rights and desegregation cases. Her work is discussed in greater detail in Tomiko Brown-Nagin’s excellent book Courage to Dissent. See TOMIKO BROWN-NAGIN,
ACLU), the Drummonds contended that the removal of Timmy from their home—on the basis of their race and without any formal hearing—violated the Fourteenth Amendment’s guarantees of Equal Protection and Due Process.61 DFCS’s race matching policy, the Drummonds emphasized, was virtually categorical, and replaced what had been until recently a formal policy of segregation.62 Moreover, any non-racial arguments raised by DFCS for Timmy’s removal (which included the Drummonds’ age and relatively racially homogeneous community), had never been articulated by DFCS prior to the initiation of litigation.63

The Drummonds’ claims were quickly rejected in the state courts, and by late 1976, the Drummonds’ state appeal options had been exhausted.64 The Drummonds petitioned the Supreme Court for review in January 1977, fortuitously just weeks before the Court’s first major case addressing the due process rights of foster families—Smith v. OFFER—was to be argued.65 OFFER, which addressed the constitutional validity of New York’s foster care procedures under the Due Process clause, raised virtually identical arguments to the Drummonds’ due process claims, contending that foster parents were entitled to procedural protections prior to the removal of a foster child from their home.66 Because the Georgia Supreme Court—which had focused almost exclusively on the Drummond’s due process claims—had rejected this same claim, a Plaintiff-favorable result in OFFER would arguably have compelled a reversal.67

Unfortunately for the Drummonds, OFFER—while not categorically foreclosing the possibility that a foster family might have a

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61 Drummond, 408 F.Supp. at 382; Federal Drummond Petition at 7.
62 Federal Drummond Petition at 11.
63 Drummond Panel Decision, 547 F.2d at 839, 849.
64 Drummond v. Fulton County DFCS, 228 S.E.2d 839 (Ga. 1976) (hereinafter “Drummond State Decision”).
65 Docket Sheet, No. 76-984, Drummond v. Fulton County DFCS (on file with the Library of Congress in Harry A. Blackmun papers (hereinafter “Blackmun Papers”), Box 678, folder 3); see also Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) (hereinafter “OFFER”).
66 OFFER, 431 U.S. at 818-823, 838-847.
67 Drummond State Decision, 228 S.E.2d at 452-54; see also Memorandum of D.B.A, law clerk, to Cert Pool, Re: Drummond v. Fulton County DFCS, No. 76-984-CSX, at 4 (Mar. 21, 1977) (Blackmun Papers, Box 872, folder 10) (recommending a hold for OFFER in view of the overlap with the issue raised in OFFER).
constitutional interest warranting procedural protections—was hardly a resounding endorsement of foster family rights. After expressing some doubt whether the Court’s due process precedents could be extended to the foster care context at all, the OFFER Court concluded that, in any event, the procedures at issue in OFFER were constitutionally adequate. As such, the Drummonds’ state case—while held by the Court for OFFER—was denied certiorari days after OFFER was decided.

The Drummonds’ federal case, however, remained pending, and would present the race issue much more unambiguously for the Court’s review. Ruling *en banc* in favor of DFCS shortly after the Supreme Court’s denial of certiorari in the Drummonds’ state case, the Fifth Circuit squarely rejected the Drummonds’ Equal Protection claims, emphatically affirming the constitutional validity of the use of race in adoption. Noting that, “[i]t is a natural thing for children to be raised by parents of their same ethnic background,” and that the use of race here was “simply another facet of finding [the child] the best possible home,” the Fifth Circuit held that where, as here, there was “no racial slur or stigma” there was “no discrimination violative of the Fourteenth Amendment.”

The Fifth Circuit’s *en banc* opinion thus explicitly distinguished “benign” uses of race, like adoption, from the Court’s race law precedents involving invidious uses of race. Indeed, the primary authority on which the Fifth Circuit relied was the Supreme Court’s recent decision in *United Jewish Organizations of Williamsburgh v. Carey*; a splintered decision

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68 *OFFER*, 431 U.S. at 838-856.

69 *OFFER*, 431 U.S. at 816 (decided on June 13, 1977); Drummond v. Fulton County DFCS, 432 U.S. 905 (1977) (denying cert on June 20, 1977); Docket Sheet, No. 76-984, Drummond v. Fulton County DFCS (Blackmun Papers, Box 678, folder 3) (state *Drummond* petition held for *OFFER*). The Court did recognize that *Drummond* also encompassed an independent equal protection claim, but apparently believed that claim to be moot, because of an erroneous belief that the Drummonds had received—and the Defendants had not challenged—the relief they sought as a result of a favorable panel decision from the Fifth Circuit in the federal proceedings. Memorandum of William J. Brennan Jr. to the Conference, Re: Cases Held for No. 76-180, Smith v. Foster Families 4-5 (June 14, 1977) (White Papers, Box I:362, folder 3). In fact, the Defendants had sought, and been granted, *en banc* review by the time that certiorari was denied in the state case, a move that would result in a total reversal of the Drummonds’ panel victory. *See* Appendix at 148 (March 28, 1977 Order Granting Rehearing En Banc), Drummond v. Fulton County DFCS, No. 77-1381, *cert. denied* 437 U.S. 910 (1978); *Drummond en banc*, 563 F.2d at 1203-1211.

70 *Drummond en banc*, 563 F.2d at 1204-1206.

71 *Id.* at 1205.

72 *Id.*
affirming the use of race in the context of a redistricting supervised by the Attorney General under Section 5 of the Voting Rights Act. 73 While much of Carey’s reasoning had related to the special constitutional significance of the Voting Rights Act, a plurality opinion—heavily relied on by the Drummond court—had focused on the benign nature of the use of race at issue, finding a broader lack of constitutional harm where no racial slur or stigma was present. 74 The Fifth Circuit’s decision thus squarely situated itself within the burgeoning constitutional debates over the proper constitutional approach to “benign” uses of race. 75

And indeed, those debates—over the proper constitutional approach to “benign” uses of race—were just beginning to be addressed in earnest at the Supreme Court at the time that the Drummond en banc was decided. Several months earlier, in February 1977, certiorari had been granted by the Court in the affirmative action case of Regents of the University of California v. Bakke. 76 And, while both of the Court’s prior precedents addressing benign uses of race—UJO and the earlier case of DeFunis v. Odegaard—were factually or procedurally unusual cases that did not result in a broad circulation of the Justices’ substantive views, Bakke presented a more procedurally and factually uncomplicated case. 77 As such, Bakke was widely perceived—by both the public and the Court itself—as a major opportunity for the Court to clarify its views on this increasingly politically controversial area of constitutional law. 78

73 Id.; see also United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977) (“UJO”).
74 UJO, 430 U.S. at 165-168; see also Drummond en banc, 563 F.2d at 1205.
75 See notes 71-74, supra and accompanying text.
77 See, e.g., UJO, 430 U.S. at 155-181 (complex set of opinions resting on an array of factors, including the unique significance of the Voting Rights Act); DeFunis v. Odegaard, 416 U.S. 312, 314-320 (1974) (per curiam) (finding DeFunis’s claims to be moot). Bakke itself was not procedurally or factually uncomplicated, simply less so than the arguably fact-bound circumstances at issue in DeFunis and UJO. See, e.g., Bench Memorandum to William J. Brennan, Re: No. 76-811, Regents of the University of California v. Bakke (September 13, 1977) (on file with the Library of Congress William J. Brennan papers (“Brennan Papers”), Box I:441, folder 1) (discussing reasons why Bakke was a non-ideal vehicle for addressing the affirmative action issue).
78 For public expressions of this sentiment, see, e.g., Lelsely Oelsner, Court to Weigh College Admission That Gives Minorities Preference, N.Y. TIMES, Feb. 23, 1977, at 12; Paul Delaney, U.S. Brief to Support Minority Admissions, N.Y. TIMES, Aug. 24, 1977, at 41; Warren Weaver, Jr., Justices Hear Bakke Arguments But Give Little Hint on Decision, N.Y. TIMES, Oct. 13, 1977, at 1. For internal discussion on the Court of the opportunity that Bakke presented to elucidate its position on the constitutionality of
True to this perception, Bakke in fact spurred in the fall of 1977 the first major exchange of views among the Justices on the constitutional standing of “benign” uses of race. These exchanges—“unprecedented” in their sheer volume—for the first time made clear internally where the fault lines lay among the Justices on affirmative action. As would become much more publicly visible in the Court’s later affirmative action precedents, those fault lines were sharp, with many Justices either strongly supporting or strongly opposing the application of strict scrutiny to race-based affirmative action. Thus, while the ultimate Bakke decisions...

affirmative action programs (and the need to do same), see, e.g., Memorandum from Justice Lewis F. Powell, Jr. to the Conference, Re: No. 76-811 Regents v. Bakke (Oct. 14, 1977) (Brennan Papers, Box I:441, folder 5); Conference Notes of Lewis F. Powell, Jr., Regents of the Univ. of Calif. v. Bakke, No 76-811 (Oct. 14, 1977) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives (hereinafter “Powell Papers”)).

Hundreds of pages of memos were exchanged among the Justices in Bakke prior to the first circulation of any draft opinion, an extremely unusual occurrence in the Court’s internal practice. See Brennan Papers, Box I: 441, folders 1-6; see also Blackmun Papers, Box 261, folder 7, Box 260, folder 8. In contrast, in UJO and DeFunis there were limited written circulations, and very few of those circulations addressed in substance the broader question of how “benign” racial classifications should be addressed. See Brennan Papers, Box I:409, folder 1 (file for UJO v. Carey, No. 75-104); Box I: 327, folder 3 (file for DeFunis v. Odegaard, No. 73-235).

Memorandum of Lewis S. Powell to the Conference, Re: No. 76-811 Regents v. Bakke (Jan. 5, 1978) (“The combination of the Chief’s invitation to circulate memoranda and our deferral of a definitive Conference vote have resulted in an unprecedented volume of circulations in this case.”) (Brennan Papers, Box I:441, folder 6); see also note 81, infra.

For Memoranda setting out the constitutional views of the various Justices on the Court regarding affirmative action, see, e.g., Memorandum of Byron R. White to the Conference, Re: No. 76-811 – Regents of the University of California v. Bakke (Oct. 13 1977) (Brennan Papers, Box I:441, folder 2) (not expressing a view on the standard of scrutiny; stating that would find Davis program to be constitutional); Memorandum of Chief Justice Burger to the Conference, Re: No. 76-811, Regents of the University of California v. Allan Bakke (Oct. 21 1977) (Brennan Papers, Box I:444, folder 2) (expressing the view that affirmative action must be subject to strict scrutiny and that the Davis program was unconstitutional) (hereinafter “Burger Bakke Memo”); Memorandum of William H. Rehnquist to the Conference, Re: No. 76-811, Regents of the University of California v. Allan Bakke (Nov. 10, 1977) (Brennan Papers, Box I: 441, folder 3) (expressing the view that affirmative action must be subject to strict scrutiny and that the Davis program was unconstitutional) (hereinafter “Rehnquist Bakke Memo”); Memorandum of William J. Brennan to the Conference, Re: 76-811, Regents of the University of California v. Allan Bakke (Nov. 23, 1977) (Brennan Papers, Box I:441, folder 4) (expressing the view that affirmative action should not be subjected to strict scrutiny, but to a lower “reasonable[ness]” standard and that the Davis program was constitutional);
showed little division on the constitutional standard (with four of the five justices to reach the constitutional issue voting for a relaxed intermediate level of scrutiny), internally, it was clear that deep divisions were emerging on the constitutional propriety of benign uses of race. 82

Given this backdrop, the en banc Drummond decision—which came up to the Court just weeks before Bakke was decided—had obvious

Memorandum of Lewis S. Powell to the Conference, Re: No. 76-811, Regents of the University of California v. Bakke (Dec. 1, 1977) (Brennan Papers, Box I:441, folder 4) (arguing that strict scrutiny was required, and that the Davis program was unconstitutional, although some use of race might be permissible) (hereinafter “Powell Bakke Memo”); Memorandum of Thurgood Marshall to the Conference, Re: No. 76-811, Regents of the University of California v. Bakke (April 13, 1978) (Brennan Papers, Box I: 441, folder 5) (arguing against “color-blindness” as the principle by which to decide the case, and for the constitutionality of affirmative action); Memorandum of Harry A. Blackmun, Re: No. 76-811, Regents of the University of California v. Bakke (May 1, 1978) (Brennan Papers, Box I:441, folder 5) (implying that strict scrutiny review was not appropriate for “benign” uses of race and expressing the view that the Davis program was constitutional, albeit perhaps just barely); see also Conference Notes of Lewis F. Powell, Jr., Regents of the Univ. of Calif. v. Bakke, No 76-811 (Dec. 9, 1977) (Powell Papers) (making clear that Stewart, although not circulating his views in a memorandum, believed that the Equal Protection clause categorically precluded adverse government actions based on race) (hereinafter “Dec. 9, 1977 Conference Notes”). Interestingly, it appears from the internal papers that there was the potential for 5 votes on the Court for the application of strict scrutiny, although the Justices diverged substantially on what the implications of strict scrutiny should be in the case before the Court. Justices Powell, Burger, Stewart, Rehnquist all unwaveringly expressed the opinion that strict scrutiny must be applied to “benign” uses of race. See Powell Bakke Memo at 3-5; Burger Bakke Memo at 2-3; Rehnquist Bakke Memo at 7-12; Dec. 9, 1977 Conference Notes. And Justice White—while ultimately joining Justice Brennan’s opinion applying only intermediate scrutiny—had initially felt strongly for “political” reasons that strict scrutiny must be applied (and indeed confusingly also joined portions of Powell’s opinion arguing for strict scrutiny). See Memorandum of C.D.L., law clerk, to William J. Brennan (undated) (Brennan Papers, Box I:441, folder 5); Lee Epstein and Jack Knight, Piercing the Veil: William J. Brennan’s Account of Regents of the University of California v. Bakke, 19 YALE L. & POL’Y REV. 341, 358, 361-63, 368 (2001) (reproducing narrative written by Justice Brennan regarding the Court’s internal consideration of Bakke); see also Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 287-291 (1978) (opinion of Powell, J., passage joined by White, J.) (rejecting the notion that something less than strict scrutiny should apply); id. at 356-359 (Brennan, J., concurring in part and dissenting in part, joined by White, J., Marshall, J. and Blackmun, J.) (finding that only intermediate scrutiny was required).

82 See note 81, supra; see also Bakke, 438 U.S. at 356-359 (Brennan plurality) (intermediate scrutiny appropriate); id. at 287-291 (Powell opinion) (strict scrutiny required).
considerations weighing in favor of a grant of certiorari.\textsuperscript{83} Most notably, the standard endorsed by the \textit{en banc} court in \textit{Drummond}—one of \textit{no} constitutional scrutiny for “benign” uses of race—was one that not even the Court’s race liberals were prepared to endorse.\textsuperscript{84} It thus arguably provided an opportunity for the Court to speak on a unified basis regarding at least \textit{some} facet of the complex and unsettled treatment of benign uses of race. Moreover, the \textit{Drummond} Court’s reliance on the \textit{UJO} plurality decision—a fact-bound decision that would be contradicted by \textit{both} of the constitutionally-based opinions issued in \textit{Bakke} (and which even more starkly contradicted the internal views articulated by many of those who ultimately voted on statutory grounds)—seemed to make the case an obvious candidate for a “GVR” (“Grant, Vacate and Remand”), i.e., a direction to the lower court to reexamine the issue in view of later, more authoritative precedent.\textsuperscript{85}

Despite these arguable strengths, certiorari would be denied in \textit{Drummond}, less than 10 days before \textit{Bakke} was decided by the Court.\textsuperscript{86} And while available records do not conclusively establish the reasons for the denial, the cert pool memo—drafted by one of Justice Blackmun’s law clerks, and circulated to Justices Blackmun, Burger, White, Powell and Rehnquist—suggests that, to at least some, adoption was simply different as a matter of common sense.\textsuperscript{87} Thus, Justice Blackmun’s clerk asserted

\textsuperscript{83} See Federal Drummond Petition (filed March 29, 1978); Memorandum from Chief Justice Burger to the Conference (June 5, 1978) (on file with the Library of Congress in Thurgood Marshall Papers (hereinafter “Marshall Papers”), Box 197, folder 4) (\textit{Drummond} was to be discussed at the Court’s June 8, 1978 conference); \textit{Bakke}, 438 U.S. at 265 (decided June 28, 1978); \textit{see generally} notes 84-86, infra and accompanying text.

\textsuperscript{84} See \textit{Drummond en banc}, 563 F.2d at 1205; \textit{see also} \textit{Bakke}, 438 U.S. at 356-359 (Brennan plurality, speaking for himself and Justices White, Marshall and Blackmun) (“On the other hand, the fact that this case does fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases.”)

\textsuperscript{85} See sources cited note 81-82, supra (setting out the views of the Justices in \textit{Bakke} regarding the appropriate standard of review); \textit{UJO}, 430 U.S. at 165 (plurality decision suggesting that discrimination is categorically not violative of the Fourteenth Amendment where it represents “no racial slur or stigma with respect to whites or any other race”); \textit{see also} Sara C. Benesh, \textit{GVRs and Their Aftermath in the Seventh Circuit and Beyond}, 32 S. Ill. U. L.J. 659, 662-664 (2008) (explaining the “GVR” process).

\textsuperscript{86} \textit{Drummond v. Fulton County DFCS}, 437 U.S. 910 (1978) (cert denied); \textit{Bakke}, 438 U.S. at 265.

\textsuperscript{87} Memorandum of K.E., law clerk to Cert Pool, Re: No. 77-1381, \textit{Drummond v.}
boldly without citation, “As to petrs’ equal protection claims, acceptance
of petrs’ argument that race should not be considered in making adoption
decisions, would defy the near-unanimous practice of state adoption
agencies and the consensus among psychologists and sociologists.”

Although recognizing the potential doctrinal overlaps with Bakke (overlaps
that had been specifically highlighted by the Drummonds in their petition
for certiorari), the author of the memo dismissed Drummond without
explanation as “arising in such different factual context [sic] that I
believe a hold is unwarranted.”

Not all of the Justices agreed with this assessment. Justices White
and Brennan voted to grant certiorari in Drummond, and indeed took the
unusual step of noting their disagreement with the denial in the published
order that was ultimately issued denying certiorari. And two other
Justices—Marshall and Stevens—struggled with their votes in Drummond
case, voting initially to grant certiorari, but then later changing their votes
to “deny’s.” But for the Court’s race conservatives—those who had

Fulton County Dept. of Family and Children’s Services (June 1, 1978) (Blackmun
Papers, Box 882, folder 4) at 13. As to the Drummonds’ due process claim, the pool
memo recommended a deny because inter alia the case was unusual insofar as the agency
was initially unaware that Timmy was bi-racial and thus “[t]he presumably unusual fact
that resps were originally unaware of the child’s race puts resps’ subsequent decision to
remove Timmy from the Drummonds’ care in a very different perspective from the
normal decision to re-place a child.” Id. at 12-13.

88 Id. at 12-13. Justice Blackmun’s marked up version of the memo, while not
commenting directly on the passage discussing the Drummonds’ Equal Protection claims,
placed a check mark next to it; suggestive of agreement with the point being made. Id. at
13.

89 Id. at 13; see also Federal Drummond Petition at 25-26; cf. Memorandum of E.S.,
law clerk to Justice Thurgood Marshall, Re: The Legislative History of Title VI of the
Civil Rights Act of 1964 (circulated to the Conference by Justice Marshall on Oct. 28,
1977) (Brennan Papers, Box I:441, folder 2), at 8 (in discussing the meaning of the
legislative history of Title VI for affirmative action programs, noting that an amendment
to Title VI that would have “expressly authorized federal grantees to take race into
account in placing children in adoptive and foster homes” was rejected as unnecessary,
thus supporting the inference that Congress did not expect to eliminate all potentially
benign uses of race by enacting Title VI).

90 Drummond, 437 U.S. at 910 (denying cert.); see also Ryan C. Black & Ryan J.
Owens, Analyzing the Reliability of Supreme Court Justices’ Agenda-Setting Records, 30
JUST. SYS. J. 254, 256 (2009) (votes of Justices as to certiorari are rarely published).

91 Docket Sheet, No. 77-1381, Drummond v. Fulton County DFCS (Blackmun
Papers, Box 681, folder 4) (showing a change in Justice Marshall’s vote from “grant” to
“deny,” also noting that ultimately only “B-W wd G,” despite the fact that Stevens is
listed as a “grant”).
argued most stridently that race restrictions of any kind must be subject to the most rigorous constitutional scrutiny during the debates on Bakke—Drummond apparently did not present an appealing candidate for review. As a result, on June 15, 1978, the Drummonds’ long legal crusade came quietly to an end with the denial of their petition for certiorari.

II. DRUMMOND TO PALMORE: 1978-1984

The lower courts’ treatment of the use of race in family law—already divided at the time that Drummond was decided—would become even more so in the period following the Court’s denial of certiorari in Drummond. Indeed, during the six year time frame between Drummond and the Supreme Court’s next major race family law case (Palmore v. Sidoti), the lower courts would issue opinions that were almost equally divided in affirming and rejecting government uses of race in the family. This division, moreover, was not simply reflective of differing bottom line results, but instead extended to virtually every feature of race family law litigation. Thus, deep divisions emerged in the post-Drummond era about whether the use of race in family law (by public agencies or courts)

92 Id. (showing that none of the Justices who endorsed strict scrutiny in the internal debates over Bakke—including Justices Rehnquist, Stewart, Powell, and Chief Justice Burger—voted in favor of review in Drummond).

93 Drummond, 437 U.S. at 910 (denying cert.).

94 See note 95, infra; see also note 46, supra.


96 See note 97, infra.
was ever permissible; if, so to what extent; and what, if anything, was the role constitution adjudication (as opposed to state family law) in resolving these disputes.  

These divisions, moreover, were not restricted simply to the adoption issue presented to the Court in Drummond (or to its closely related cousin, interracial foster care placements). Two other race-based family law practices continued to trouble the courts during the pre-Palmore time period, and both occasioned similarly divisive responses. Thus, the use of race as a plus factor for minority parents in custody disputes between interracial parents, as well as the use of a parent’s post-divorce interracial marriage as a basis for denying custody, resulted in similarly divided responses from the courts. And, as in the adoption context, these divisions extended far beyond surface outcomes (although they were certainly reflected there as well) to fundamental disagreements about the legal principles under which race family law claims should be adjudicated.

It was during this unsettled time that Linda Palmore and her ex-husband Anthony Sidoti would find themselves litigating the issue of whether the race of Linda’s new husband should result in the loss of her custody of their young daughter. Upon the couple’s divorce, in 1980, Linda had been awarded custody of their then-two year old daughter, Melanie. But just one year later, Linda and Anthony were back in court, with Anthony seeking to obtain custody. Contending that Linda (who was white) “has not acted in the best interest and welfare of [Melanie] in that she has had a black male living with her for some period of time,” and that Linda had also been neglectful in allowing Melanie to contract lice and wear clothes stained with mildew, Anthony requested that he be awarded custody of Melanie, then four.

The trial court—while rejecting Anthony’s suggestions that Linda

97 See, e.g., Haven, 1979 Ohio App. LEXIS 9744, at *1-15; Russell, 399 N.E.2d at 213-215; Edel, 293 N.W.2d at 794-795; Kramer, 297 N.W.2d at 360-363; Mikelson, 299 N.W.2d at 673-674; Farmer, 109 Misc.2d at 140-147; Temos, 450 A.2d at 119-122; R.M.G., 454 A.2d at 784-794; Davis, 465 A.2d at 623-629.
98 See notes 99-100, infra.
99 See note 95, supra.
100 See note 97, infra.
102 Id.
103 Id.
104 Id.
had been neglectful of Melanie’s health or clothing—found that Linda’s actions in dating (and subsequently marrying) a black man were “of some significance.” The court observed that, “despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation...suffer from the social stigmatization that is sure to come.” It thus concluded that Melanie’s best interests would be best served by living in her father’s (monoracial) household, and granted his request for a custody modification.

This order by the trial court—issued almost a year after Anthony Palmore’s initial petition for modification—was summarily affirmed by the Florida District Court of Appeals in December 1982. As a result, under Florida law, the Florida Supreme Court lacked jurisdiction to hear any further appeal. Thus, by early 1983, Linda Palmore’s state court appeal options had been exhausted. Her attorneys, after unsuccessfully seeking a stay from the Florida District Court of Appeals, petitioned the United States Supreme Court directly for a stay of Melanie’s removal from Linda’s custody.

As a case arising in the geographical jurisdiction of the Eleventh Circuit, the Palmore v. Sidoti stay application was directed initially to Justice Powell, the Circuit Justice for the Eleventh Circuit. Arguably, this was a good draw for the Palmore side of the case. In Bakke, Powell had affirmed a strong commitment to strictly scrutinizing all uses of race, including even those adopted with putatively benign motives. And in Fullilove v. Klutznik—addressing a federal affirmative action program two years after Bakke—he had reiterated his commitment to the strict scrutiny standard of review, despite finding the specific use of race at issue to be

105 Appendix A (Trial Court Decision), Palmore Petition, at *21-24.
106 Id. at *23-24.
107 Id.
110 Id.
111 Palmore Petition at *9.
113 See Bakke, 438 U.S. at 287-305 (Opinion of Powell, J.).
constitutionally valid. Thus, the state court’s decision here—uncritically relying on racial considerations, without any form of constitutional scrutiny—seemed facially in conflict with Powell’s publicly expressed views on race law doctrine.

Powell, however, apparently regarded the Palmore case as a wholly undesirable matter for the Court to take up. While the reasons are not clear from the internal documents, his notes on the stay have repeated annotations suggesting his antipathy for the case:

“This is the white/black marriage-child custody case. We should not get into this.”

And again, on a later date:

“Deny. This is [the] case where petr – a white woman married a black. She & first husband are fighting over child custody…”

Under Supreme Court rules, however, Powell was not the final word on whether Linda Palmore’s stay request would be granted. Then, as now, a stay applicant may reapply to any other Justice following the denial of a stay. Thus, following Powell’s initial denial of the stay, Linda Palmore reapplied to Justice Marshall, who—in accordance with Court convention—referred the matter to the full Court. There, her stay

115 Appendix A (Trial Court Decision), Palmore Petition, at *21-24. Of course, as the work of Anders Walker has unearthed, Powell’s views on race and the law were complex, and derived from a view of racial separatism and segregation as potentially fostering genuine pluralism. See, e.g., Anders Walker, Diversity’s Strange Career: Recovering the Racial Pluralism of Lewis F. Powell, Jr., 50 SANTA CLARA L. REV. 647 (2010). Viewed through this lens it is perhaps less surprising that Powell, as described, infra, did not view racial integration within the family as a particularly desirable matter for the Court to take up.
116 See notes 117-118, infra and accompanying text.
118 Handwritten Notation on Docket Sheet, A-664, Palmore v. Sidoti (Powell Papers).
119 Sup. Ct. R. 22; see also Scali, supra note 112, at 1021.
120 Memorandum from Caldwell to the Conference, Re: A-664, Palmore v. Sidoti
request piqued greater interest, with six of the justices (including all of the Court’s race liberals) “calling for a response,” i.e., requesting that the Respondent submit a statement in response to the stay application.\footnote{Docket Sheet, A-664, Palmore v. Sidoti (Feb. 18, 1984) (Brennan Papers, Box I:595, folder 2) (identifying Justices Brennan, White, Marshall, Blackmun, Stevens and O’Connor as calling for a response, and Justices Powell, Rehnquist and Chief Justice Burger as voting against).}

The resulting response was, in the words of Powell’s law clerk, “miserable.”\footnote{Handwritten Notation from M.N. on Docket Sheet, A-664, Palmore v. Sidoti (March 2, 1983) (Powell Papers).} While contending that other, non-racial factors had also influenced the trial court’s decision, Sidoti conceded that race had been a salient factor.\footnote{Id.} And Sidoti’s primary constitutional argument—that Florida authority held only “that the effect of an interracial marriage upon a particular child is one of the many factors that may be considered in determining the best interest of the child”—was arguably in significant tension with other constitutional decisions of the Court, which had recognized that even partial influence, where dispositive, violates the Constitution.\footnote{Id. (emphasis added); see also Mt. Healthy School Dist. v. Doyle, 429 U.S. 274, 285-287 (1977); but cf. Banks, Color of Desire, supra note 6, at 904 (describing a number of contexts in which the courts have treated classifications involving “race as a factor” as if they did not entail a racial classification).}

On the other hand, the response also had according to Powell’s clerk “[o]ne key point”, i.e., that “[t]he mandate issued in February” and that Melanie was thus already in Sidoti’s custody.\footnote{Handwritten Notation from M.N. on Docket Sheet, A-664, Palmore v. Sidoti (March 2, 1983) (Powell Papers).} As Powell’s clerk observed, “therefore by this Court’s own delay, the application appears moot – the irreparable injury has occurred already.”\footnote{Id.; see also Memorandum of A.S.M., law clerk to Justice Blackmun, Re: Palmore v. Sidoti, A-664 (Mar. 3, 1983) (Blackmun Papers, Box 979, Folder 5) (expressing a similar sentiment).} He thus concluded that “TM [Thurgood Marshall] blew it,” an apparent reference to Justice Marshall’s desire (contrary to Powell’s own) to have the Court grant a stay.\footnote{Handwritten Notation from M.N. on Docket Sheet, A-664, Palmore v. Sidoti (March 2, 1983) (Powell Papers); see also Memorandum of Thurgood Marshall to the Conference, Re: No. A-664, Palmore v. Sidoti (Feb. 18, 1983) (Marshall Papers, Box...
And indeed, when the Court voted on the merits of the stay two days later, it overwhelmingly voted to deny.\textsuperscript{128} Only Justice Stevens, in a move he would later note as a particular point of pride, voted to grant the stay.\textsuperscript{129} And, while the Court would ultimately grant certiorari and rule unanimously in Palmore’s favor—thus elevating Linda Palmore’s case to canonical status—for Linda Palmore herself, the stay decision would prove to be the one that mattered.\textsuperscript{130} During the two years following Melanie’s removal, Palmore would see her daughter only once, on a court-ordered visit three months after the Supreme Court ruled in her favor.\textsuperscript{131} By 1986—more than two years after her putative victory in the Supreme Court—Palmore was reportedly preparing to sign papers awarding custody to her husband in exchange for visitation rights, having still not regained even regular visitation with Melanie through her lengthy litigation campaign.\textsuperscript{132}

At the time, however, Linda Palmore could not have known that a Supreme Court decision in her favor would ultimately be of little effect. Thus, in March 1983, shortly after the denial of the stay by the full Court, she petitioned for certiorari.\textsuperscript{133} Contending that the race of her husband was the sole basis on which the trial court had rested its decision, she argued that under \textit{Loving v. Virginia}, “[t]he equal protection and due process clauses of the Fourteenth Amendment...prohibit a court...from relying upon a subsequent interracial marriage...as a ground for ordering a change in custody.”\textsuperscript{134} She further observed that the \textit{Palmore} case was different from others in which the Court had approved the use of race, noting “[n]o modern decision of this Court has sustained a racial classification which burdens or stigmatizes black citizens on the basis of race.”\textsuperscript{135}

Despite the relatively extended discussion that \textit{Palmore} had occasioned during the stay proceedings, the cert pool memo addressing

\begin{itemize}
\item \textsuperscript{129} Id.; see also John Paul Stevens, \textit{Learning on the Job}, 74 \textit{FORDHAM L. REV.} 1561, 1564 (2006).
\item \textsuperscript{130} See notes 131-132, infra and accompanying text.
\item \textsuperscript{131} Andrew M. Williams, \textit{Domestic News}, \textit{ASSOCIATED PRESS}, Nov. 21, 1984.
\item \textsuperscript{132} TV Drama ’Fictionalized’ Custody Fight, Lawyer Says, \textit{DALLAS MORNING NEWS}, Oct. 8, 1986, at 34A.
\item \textsuperscript{133} See generally \textit{Palmore} Petition.
\item \textsuperscript{134} Id. at 10-15.
\item \textsuperscript{135} Id. at 15-16.
\end{itemize}
Linda Palmore’s petition—drafted by one of Justice Powell’s law clerks, and circulated to Justices Powell, O’Connor, Rehnquist, Blackmun, Burger and White—devoted a mere two and a half double-spaced pages to Palmore’s request for certiorari review.136 Noting that “[i]t appears…that the principal reason for denying the stay was that the case did not appear cert-worthy to four Justices,” Powell’s clerk went on to observe that “[n]othing has happened in the last three months to make this case any more cert-worthy now than it was then.”137 Without further discussing the merits or independent cert-worthiness of Palmore’s claims, Powell’s clerk recommended that the Court deny review.138

This framing of the issue—and of the stay proceedings as having been predicated on Palmore’s merits—was arguably at least partially misleading. After all, just months earlier Powell’s chambers had contended that the principal basis for denying the stay was its mootness, i.e., the fact that Melanie had already been transferred to her father’s custody, an issue material only to the stay proceedings’ requirement of “irreparable harm.”139 Nevertheless, the pool memo drafted by Powell’s law clerk failed to even mention the different standards that applied to a stay, or the possibility that those standards cut against affording too much weight to the initial stay proceedings.140

On the other hand, it appears that Powell’s clerk was in fact correct that there was not widespread support on the Court for a grant of certiorari in Palmore. Only two Justices (Brennan and Stevens) initially voted unequivocally in favor of certiorari review in Palmore.141 Two others (Marshall and Blackmun) cast “Join 3” votes, signifying that their vote should count as a grant vote only if there were three others in favor.142 Thus, Palmore squeaked by only by the narrowest of margins,

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136 Memorandum from M.S., law clerk to Cert Pool, Re: Palmore v. Sidoti, No. 82-1734 (June 9, 1983) (Blackmun Papers, Box 402, folder 11) (hereinafter “Palmore cert pool memo”).
137 Palmore cert pool memo, at 3.
138 Id.
139 Handwritten Notation from M.N. on Docket Sheet, A-664, Palmore v. Sidoti (March 2, 1983) (Powell Papers); see also Memorandum from Caldwell to the Conference, Re: A-664, Palmore v. Sidoti (Feb. 16, 1983) (Marshall Papers, Box 301, folder 1), at 4 (setting out the four requirements for a stay, including irreparable harm).
140 Palmore cert pool memo, at 3.
141 Docket Sheet, No. 82-1734, Palmore v. Sidoti (Blackmun Papers, Box 696, folder 4); Docket Sheet, No. 82-1734, Palmore v. Sidoti (Powell Papers).
142 Id.; see also Ryan Owens, Explaining the Supreme Court’s Shrinking Docket, 53 WILLIAM & MARY L. REV. 1219, 1239 (2012).
being granted review as a result of a change in Justice Marshall’s vote from a “Join 3” to a “Grant” after the initial polling.143

This reluctance to grant review—despite Palmore’s presentation of an issue that many would characterize today as of obvious constitutional significance—may have arisen at least in part from factors unrelated to the Justices’ views of the fundamental legal question it presented. The appellate court had not written a decision in Palmore, and thus there was only the trial court’s terse order for the Court’s review.144 Relatedly, it was not entirely clear whether the interracial marriage issue had been the sole consideration in the change of custody, although all of the Justices seem to have agreed that it was the predominant factor.145 And, the lower courts—both the trial court in Palmore itself, and the other states to have addressed the same issue—had typically ignored constitutional arguments raised by the parties, in favor of citing state custody law.146 Thus, Palmore, while typical of the race family law cases during this time frame in both substance and format, was arguably a non-ideal vehicle for

143 See notes 141-142, supra. Four Justices must vote in favor in order for a case to be granted certiorari.
144 See Appendix A (Trial Court Decision), Palmore Petition, at *21-24; see also Typewritten Notation on Palmore cert pool memo, at 1 (noting this issue, but recommending a “Grant”); Memorandum from M.E.N., law clerk, to Justice Lewis Powell, Re: A-664, Palmore v. Sidoti (undated, memo regarding original stay application to Powell) (Powell Papers) (noting this issue as a reason to deny review in the case); Memorandum from Caldwell to the Conference, Re: A-664, Palmore v. Sidoti (Feb. 16, 1983) (Marshall Papers, Box 301, folder 1), at 6 (noting that this factor made the case somewhat less appealing, although the case probably warranted review).
145 See Appendix A (Trial Court Decision), Palmore Petition, at *21-24; see also Memorandum from M.E.N., law clerk, to Justice Lewis Powell, Re: A-664, Palmore v. Sidoti (undated, memo regarding original stay application to Powell) (Powell Papers) (noting this concern, but also noting that the interracial marriage “was decisive to the courts below”); Handwritten Notation on Memorandum from M.S., law clerk to Cert Pool, Re: Palmore v. Sidoti, No. 82-1734 (Sep. 19, 1983) (Powell Papers) (noting this concern, but also noting that it appeared that racial factors predominated); Memorandum from Caldwell to the Conference, Re: A-664, Palmore v. Sidoti (Feb. 16, 1983) (Marshall Papers, Box 301, folder 1), at 6 (noting that this factor, but also noting that it appears that race was the sole consideration); cf. Memorandum from Chief Justice Burger to William J. Brennan (March 21, 1984) (Brennan Papers, Box I:648, folder 7) (resisting Brennan’s efforts to argue that the draft opinion should be modified to broadly prohibit the use of race as a factor on the grounds that “[r]ace was the dispositive basis and that surely is clear.”).
146 See Appendix A (Trial Court Decision), Palmore Petition, at *21-24; see also cases cited at note 95, supra.
certiorari review by traditional Supreme Court standards. But there were also substantive reasons—later articulated during the course of the Palmore proceedings before the Court—why many of the Justices may have seen Palmore as a troubling case to take up. Among other things, while the specific use of race at issue in Palmore—i.e., removal of a child from a natural parent based on an interracial marriage—was widely perceived by the Justices as constitutionally impermissible, the same was not true of other remaining uses of race in family law, including particularly adoption. As such, several of the Justices—and particularly the Court’s race conservatives—expressed deep concerns that a ruling in favor of Linda Palmore might be read as prohibiting the restriction of transracial adoptions.


148 Docket Sheet, No. 82-1734, Palmore v. Sidoti (Brennan Papers, Box I: 627, Dockets Folders) (vote in Palmore on the merits was unanimous); Memorandum from Lewis Powell to file, Re: 82-1734, Palmore v. Sidoti (Jan. 31, 1984) (Powell Papers) (although Powell opposed granting review, once review was granted noting that lower court’s use of race was improper); see also notes 149-157, infra and accompanying text for a discussion of the Justices’ views regarding other uses of race, especially adoption; cf. Post-Argument Memo from K.R.B., law clerk, to Justice White, re: Palmore v. Sidoti, No. 82-1734 (White Papers, Box I: 637, folder 12), at 2 (arguing that while the lower court decision might be flawed because of the lack of evidence of harm, a categorical rule was unjustified as “I do not understand why the Constitution should consign [a child] to an inferior home on the ground that factually relevant, but legally irrelevant, criteria cannot be considered.”).

149 See notes 150-157, infra for a discussion of which Justices articulated concerns regarding the adoption issue, and for their broader positions at the time regarding the necessity of subjecting putatively benign uses of race to strict scrutiny. See generally note 17, supra for a definitional discussion of how specific Justices were classified as “race conservatives,” “race liberals,” or “race moderates,” for the purposes of this Article.

150 See, e.g., Powell Conference Notes, Palmore v. Sidoti, No. 82-1734 (Powell Papers) (hereinafter “Powell Conference Notes Palmore v. Sidoti”) (CJ Burger: “No[t] like an adoption case – this would be different.”; White: “Agree with CJ.”; Rehnquist: “Avoid discussion of adoption – not here.”; Stevens: “If this were an adoption case, it would be different. Biological considerations are important.”) (emphasis in the original); Brennan Conference Notes, Palmore v. Sidoti, No. 82-1734 (Brennan Papers, Box I: 627, Dockets Folders) (hereinafter “Brennan Conference Notes Palmore v. Sidoti”) (Chief Justice: “This is custody, not adoption, which I wouldn’t touch.”; Powell: “Agree with CJ”; Rehnquist: “Agree with CJ”); Blackmun Conference Notes, Palmore v. Sidoti, No. 82-1734 (Blackmun Papers, Box 402, folder 11) (hereinafter “Blackmun Conference Notes, Palmore v. Sidoti”) (Chief Justice: “W[]oul]d n[]ot] touch adoption.”; Rehnquist:
whether a ruling precluding the use of race in \textit{Palmore} would compel a similar result in the adoption context—was of such central concern to the Justices that it was among the first questions posed to Linda Palmore’s counsel at oral argument.\footnote{Palmore Oral Argument Transcript; \textit{see also} Palmore Oral Argument Notes.} \footnote{Id.} He assured the Justices that adoption—which involved “a person who was not a biological parent”—was “much different than [what] we have here.”\footnote{Powell Conference Notes \textit{Palmore v. Sidoti}; Brennan Conference Notes \textit{Palmore v. Sidoti}; Blackmun Conference Notes \textit{Palmore v. Sidoti}.}

At conference in \textit{Palmore}, the adoption concern again surfaced, with several of the Court’s race conservatives (as well as Justice Stevens), arguing that the \textit{Palmore} decision should not be drafted in such a way as to extend to adoption.\footnote{See sources cited note 153, \textit{supra}. Justice Blackmun expressed disagreement with “Eschew adoption”; Stevens: “Adoption agencies do try to accommodate.”); \textit{Oral Argument Notes of Justice Powell, Palmore v. Sidoti, No. 82-1734 (Powell Papers) (hereinafter “\textit{Palmore Oral Argument Notes}”) (“Adoption is different.”) (emphasis in the original); \textit{see also} notes 151-152, \textit{infra} and accompanying text (describing the discussion of this issue at oral argument); \textit{Post-Argument Memo from K.R.B., law clerk, to Justice White, re: Palmore v. Sidoti, No. 82-1734 (White Papers, Box I: 637, folder 12), at 3 (expressing concerns that a broadly written opinion in \textit{Palmore} would interfere with the common practice of adoption agencies to place children with parents of the same race as the child, and might also interfere with similar practices in the custody context); \textit{Memorandum from E.T. to Justice Blackmun, Re: Palmore v. Sidoti, No. 82-1734 (Feb. 17, 1984) (Blackmun Papers, Box 402, folder 11) (expressing the view that “adoption is different”). This attention to adoption is perhaps unsurprising, given that the Respondent in \textit{Palmore} repeatedly—from the certiorari stage on—attempted to draw parallels to the adoption context in arguing in support of the use of race at issue in \textit{Palmore}. \textit{See, e.g.}, Respondent’s Brief in Opposition to Certiorari, at 7, Palmore v. Sidoti, 466 U.S. 429 (1984) (No. 82-1734); Brief of Respondent, at *6 n.8 & *13 n. 33. Palmore v. Sidoti, 466 U.S. 429 (1984) (No. 82-1734); \textit{Oral Argument Transcript, Palmore v. Sidoti, No. 82-1734, available at http://www.oyez.org/cases/1980-1989/1983/1983_82_1734/#transcript-text5554 (last visited 6/27/12) (hereinafter “\textit{Palmore Oral Argument Transcript}”). The Solicitor General’s brief in \textit{Palmore} also noted possible parallels to adoption, while also noting that there were possible distinguishing factors that could allow the court to strike down the use of interracial marriage in custody while leaving adoption to future consideration. Brief for the United States as Amicus Curiae Supporting Petitioner, at 21 n.8, Palmore v. Sidoti, 466 U.S. 429 (1984) (No. 82-1734) (hereinafter “United States \textit{Palmore Brief}”); \textit{see also} Memorandum from E.T. to Justice Blackmun, Re: Palmore v. Sidoti, No. 82-1734 (Feb. 17, 1984) (Blackmun Papers, Box 402, folder 11), at 5-6, 8-9 (discussing the SG’s position on this issue).}
adoption context, and might mandate a different result.\textsuperscript{155} They thus profoundly differentiated between the specific custody issue before the Court and adoption, which several Justices opined they “wouldn’t touch.”\textsuperscript{156} Ultimately, three Justices (Burger, Rehnquist and Stevens) would specifically note in conference that the decision in \textit{Palmore} should be drafted to avoid the adoption issue, a sentiment with which Justices White and Powell (and possibly also Justice O’Connor) apparently agreed.\textsuperscript{157}

If the Court’s race conservatives were concerned about \textit{Palmore}’s potential implications for adoption, several of its race liberals were concerned about its possible meaning for the ongoing battles over affirmative action.\textsuperscript{158} Despite the arguable victory that the Court’s race

\textsuperscript{155} \textit{Id.} (Blackmun: “Adoption case may not be different.”)

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{Id.; see also Palmore Oral Argument Notes} (identifying Justice O’Connor as the source of questioning about adoption concerns at oral argument). All of these Justices can be characterized as race conservatives or race moderates at the time \textit{Palmore} was decided. Justices Burger, Rehnquist and Powell had—since \textit{Bakke}—internally expressed the view that all uses of race had to be subjected to strict scrutiny, although they varied in the time frame during which they first publicly expressed that view, as well as in the extent to which they believed that as a result specific affirmative action programs should be invalidated. \textit{See note 81, supra} (documenting the internal circulations in \textit{Bakke}); \textit{see generally} Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (only Powell reaching the constitutional issue, divided views on whether use of race ever permitted); Fullilove v. Klutznick, 448 U.S. 448 (1980) (Rehnquist and Powell expressing the view that strict scrutiny required, divided views of whether specific program constitutional); Wygant v. Jackson Board of Ed., 476 U.S. 267 (1986) (Rehnquist, Burger and Powell expressing the view that strict scrutiny is required and use of race at issue invalid). Justice Stevens had historically opposed affirmative action, but was, at the time, beginning to drift to the left, and would ultimately join the “race liberals” on the Court. \textit{See} Diane Marie Amann, \textit{John Paul Stevens and Equally Impartial Government}, 43 U.C. DAVIS L. REV. 885, 887-890 (2010). And Justice White, who had initially embraced intermediate scrutiny in \textit{Bakke}, was drifting to the right and would soon provide the dispositive vote on the Court for applying strict scrutiny to state and local government affirmative action. \textit{See Bakke}, 438 U.S. at 356-359 (Brennan, J., concurring in part and dissenting in part, joined by White, J., Marshall, J. and Blackmun, J.) (finding that only intermediate scrutiny was required); \textit{Croson}, 488 U.S. at 493-495 (plurality, joined by White, finding that strict scrutiny was required); \textit{id.} at 520 (Scalia, J., concurring) (fifth vote in \textit{Croson} for strict scrutiny). Interestingly, this transition may have marked relatively little change on the personal level, as Justice White apparently felt in \textit{Bakke} that strict scrutiny was the appropriate standard, and went along with intermediate scrutiny only at Justice Brennan’s urging. \textit{See note 81, supra.}

\textsuperscript{158} \textit{See} notes 179-182, \textit{infra}. It is not entirely clear how broadly this concern was
liberals had experienced in *Fullilove v. Klutznick* (the Court’s most recent foray into the affirmative action arena), the 1983 term marked a tenuous time for affirmative action on the Court. Ronald Reagan, elected in 1980, had staked out an anti-affirmative action position in his campaign. And, the 1983 term—with the Title VII case of *Firefighters Local Union No. 1784 v. Stotts*—marked the first major opportunity for the administration to articulate its views to the Court.

The *Stotts* brief—signed by Solicitor General Rex Lee—was true to Reagan’s anti-affirmative action platform. The District Court in *Stotts* had modified a Title VII consent decree to avoid the reversal of recent black hiring gains by deviating from straight seniority layoffs. Filing on the side of the white workers, Solicitor General Lee’s brief contended that the District Court’s action—and the use of race generally to favor minority workers—was broadly precluded under Title VII, except where those workers were specifically identified victims of discrimination. More ominously (from the Court’s race liberals’ perspective), the Solicitor General’s brief also suggested that the disputed action in *Stotts*—by benefitting non-victim minority employees—might also violate the Equal Protection component of the Fifth Amendment.

What was a mere “suggestion” in *Stotts* would become an explicit argument four months later in the case of *Bratton v. City of Detroit*. *Bratton* involved the City of Detroit’s voluntary adoption of racial targets for hiring and promotion of black officers on its police force, an effort undertaken after decades of racial discrimination within the Department.
White police officers had challenged the affirmative action program on both statutory and constitutional grounds, contending that its explicit use of racial criteria violated Title VII and the Equal Protection clause. In December 1983, after losing in the Sixth Circuit, the white officers petitioned for certiorari review by the Supreme Court.

In a move widely perceived as a victory for anti-affirmative action elements within the Reagan administration, the Solicitor General’s office filed a brief supporting the white police officers’ request for certiorari review. Marking the first time that the administration had argued directly to the Court that affirmative action was unconstitutional, the brief contended broadly that voluntary affirmative action plans employing explicit racial criteria violated the Equal Protection clause. And, the administration contended, this was so even where such affirmative action plans were undertaken in response to “undeniable past discrimination against blacks” (as was the case in Bratton). The position staked out by the administration in Bratton was thus on the far extremes of the affirmative action debates, contending that voluntary affirmative action—even where designed to address past race discrimination by the state itself—was constitutionally impermissible.

It is perhaps unsurprising, then, that the Reagan administration’s brief in Palmore—filed days after its Bratton brief—was greeted with some suspicion by the Court’s race liberals. On its face, the brief (filed in support of Linda Palmore’s position) appeared to have little in it that denied 464 U.S. 1040 (1984).

168 Bratton, 704 F.2d at 881.
169 See Bratton, 704 F.2d at 884, 897-98 (rejecting the officers’ Title VII and constitutional claims); see also Robert Pear, U.S. Attacks Plan That Sets Quotas for Hiring Blacks, N.Y. TIMES, Dec. 3, 1989, at 11.
172 Id.; see also Bratton, 704 F.2d at 888-890 (affirming finding that there was a history of discrimination against black police officers in Detroit).
173 See notes 171-172, supra; see generally Robert Pear, Administration is Hoping to Force Court to Confront Racial Quotas, N.Y. TIMES, Dec. 5, 1983, at B13.
could arouse the Court’s race liberals’ ire. The fundamental position it expressed—that the lower court’s use of interracial marriage to deprive Linda Palmore of custody was constitutionally invalid—was one with which the Court’s race liberals (and indeed, ultimately all of its Justices) agreed.\textsuperscript{175} Moreover, nowhere did the administration explicitly suggest that the lower court’s actions—relying on the child’s “best interests” to transfer custody away from a white woman—could be considered akin to affirmative action.\textsuperscript{176}

But, read in the context of the administration’s mounting campaign against affirmative action, it is not difficult to see how some of the Justices saw the brief in a different, fundamentally less innocuous light. Read in light of that campaign, the administration’s argument in \textit{Palmore} that “[t]he Equal Protection Clause does not ‘protect’ certain racial classes to the exclusion of others; it protects all persons from invidious racial classification” must have seemed to the Justices not so much directed at the possibility that black parents who married interracially might be subject to the same rules, as to the broader question of whether the race of the victim “matters” to Equal Protection adjudication.\textsuperscript{177} Similarly, the administration’s exhortation that “[a] racial classification, regardless of purported motivation, is presumptively invalid” must have seemed targeted less at the best interest of the child argument at \textit{Palmore}, and more at the wider debates over “benign” motivations in race law.\textsuperscript{178}

Thus, while the Court’s race liberals (and ultimately all of its Justices) supported the result urged by the Solicitor General in \textit{Palmore}, a number of them were deeply skeptical of the reasoning proposed in the administration’s amicus brief.\textsuperscript{179} Indeed, Justice Stevens—who alone among the Justices appears to have been concerned both about the affirmative action and the adoption implications of \textit{Palmore}—went so far as to urge that the Justices avoid the potential implications of the Solicitor General’s reasoning by eschewing an Equal Protection rationale altogether.\textsuperscript{180} Instead, Justice Stevens urged that the Court rely on the Due

\textsuperscript{176} \textit{See generally} United States \textit{Palmore} Brief.
\textsuperscript{177} United States \textit{Palmore} Brief at 13.
\textsuperscript{178} United States \textit{Palmore} Brief at 12.
\textsuperscript{179} \textit{See} notes 180-182, \textit{infra} and accompanying text.
\textsuperscript{180} Brennan Conference Notes \textit{Palmore v. Sidoti} (Stevens: “I think its [sic.] quite appropriate in writing the opinion that we not follow SG approach – better is BRW’s due process approach in Stanley v. Illinois”); Blackmun Conference Notes \textit{Palmore v. Sidoti
Process reasoning that the Court had expressed in *Stanley v. Illinois* (which invalidated a presumption that unmarried fathers were unfit); an approach that at least one other Justice (Justice Blackmun) appears to have been prepared to endorse.\(^{181}\) While ultimately Stevens’s proposal did not obtain significant support among the other Justices, it appears to have been reflective of a broader feeling that the Solicitor General’s approach was intended to—and could in fact—bleed into the Court’s ongoing affirmative action debates.\(^{182}\)

Ultimately, however, the opinion drafted by Chief Justice Burger in *Palmore* would not strongly implicate either of these sets of concerns. As observed by Justice Blackmun’s law clerk, the reasoning of the initial draft was “difficult to get much [of] a handle on,” speaking in fairly sweeping rhetoric about the racial harm being remedied, while couching its holding in terms that had ambiguous salience for other legal contexts.\(^{183}\) As a result, despite the Justices’ previously expressed concerns (and at least one internal notation suggesting those concerns remained for some at the time the draft was circulated), none of the Justices apparently felt they were sufficiently implicated by Burger’s draft to warrant requesting revisions.\(^{184}\)

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\(^{182}\) See notes 180-181, *supra* and accompanying text; see also Bench Memo to Justice Marshall, Re: Palmore v. Sidoti, No. 82-1734 (Feb. 22, 1984) (Marshall Papers, Box 329, folder 5), at 5 n.3 (“An ulterior motive for the SG’s brief seeking to strike down the racially discriminatory ruling of the Florida Court may be the SG’s desire to emphasize the point that racial considerations are illicit in all contexts – including the affirmative action context.”).


\(^{184}\) See generally Blackmun Papers, Box 402, folder 11 (file for *Palmore v. Sidoti*, No. 82-1734) (showing that none of the circulated memos regarding Burger’s drafts in
Indeed, only Justice Brennan—concerned that the opinion could be read to permit the use of race where it was only a partial (as opposed to dispositive) consideration—raised any dispute at all regarding the reasoning employed by Burger in his initial draft. And when, in response, Justice Burger argued that a narrow holding was indeed warranted, and made only very minor modifications to his draft, even Justice Brennan nevertheless joined. Thus, the Court’s final ruling, issued on April 25, 1984, was unanimous in favor of Linda Palmore, bearing no external signs of the internal concerns the case had initially aroused.

III. PALMORE TO ADARAND: 1985-1995

The next 10 years—from 1985 to 1995—would mark a turning point in both the affirmative action and race family law case law in the United States. In the affirmative action context, the Court’s constitutional standards for reviewing affirmative action—arguably still hospitable to the race liberals’ preferred intermediate scrutiny standard at the time that Palmore was decided—would turn first tentatively, and then decisively,
towards strict scrutiny review.\textsuperscript{188} Thus, the Court would, by 1986, issue a decision in which four of the Justices publicly called for strict scrutiny review (a view that many of the still-serving race conservatives had privately expressed as early as \textit{Bakke}), with a fifth declining to publicly endorse a standard.\textsuperscript{189} By mid-1989, the Court had decisively held that all state and local government uses of race had to be subjected to strict scrutiny; a holding extended, after initial equivocation, to the federal government in 1995.\textsuperscript{190} Thus the decade between 1985 and 1995 marked a dramatic change in the Court’s affirmative action precedents, away from the fractured opinions that characterized the late 1970s and early 1980s (opinions at least partially favorable to the position of the Court’s race liberals), to a solid majority in favor of applying the most stringent standard of constitutional review to even “benign” uses of race.\textsuperscript{191}

This turn—perceived at the time as a major upheaval in the Court’s race law jurisprudence—was justified by the Court primarily through two core rhetorical arguments.\textsuperscript{192} First, while continuing to facially recognize that certain racial classifications might be justified by compelling circumstances, the Court by the mid-1990s spoke far more often in terms of the inherent harms of government uses of race.\textsuperscript{193} Thus, the majority

\textsuperscript{188} At the time that \textit{Palmore} was decided, the Court had decided three significant cases on “benign” uses of race: \textit{UJO v. Carey}, 430 U.S. 144 (1977); \textit{Regents of the University of California v. Bakke}, 438 U.S. 265 (1978); and \textit{Fullilove v. Klutznick}, 448 U.S. 448 (1980). In each of these cases, there was no majority opinion regarding the proper standard of scrutiny to be applied, and a plurality of Justices articulated support for something less than strict scrutiny. \textit{See Carey}, 430 U.S. at 164-168 (plurality); \textit{Bakke}, 438 U.S. at 356-359 (Brennan, J., concurring, joined by White, Marshall and Blackmun); \textit{Fullilove}, 448 U.S. at 517-519 (Marshall, J., concurring, joined by Brennan and Blackmun).

\textsuperscript{189} \textit{See Wygant v. Jackson Board of Ed.}, 476 U.S. 267, 273-274 (1986) (plurality); \textit{id.} at 295 (White, J., concurring).

\textsuperscript{190} \textit{See Croson}, 488 U.S. at 493-495 (plurality); \textit{id.} at 520 (Scalia, J., concurring) (making clear that strict scrutiny must be applied to “benign” state and local government uses of race); \textit{Adarand}, 515 U.S. at 227, \textit{overruling in relevant part} Metro Broadcasting v. FCC, 497 U.S. 547, 563-565 (1990).

\textsuperscript{191} \textit{See} cases cited at notes 188-190, \textit{supra}.

\textsuperscript{192} For news articles discussing the significance of \textit{Adarand} and \textit{Croson}, see, e.g., Linda Greenhouse, \textit{Court Bars a Plan Set Up to Provide Jobs to Minorities}, N.Y. TIMES, January 24, 1989; David Savage, \textit{Supreme Court Rulings Herald Rehnquist Era}, LOS ANGELES TIMES, July 2, 1995, at 1; Joan Biskupic, \textit{Court’s Conservatives Make Presence Felt; Reagan Appointees Lead Move Rightward}, WASH. POST, July 2, 1995, at A01. On the rhetorical justifications used by the Court to support this doctrinal move see notes 193-201, \textit{infra} and accompanying text.

\textsuperscript{193} \textit{See}, e.g., \textit{Croson}, 488 U.S. at 493-94, 500; \textit{id.} at 521, 527-528 (Scalia, J.,
decisions for the Court during this time period began to refer to all racial classifications—including those intended to benefit racial minorities—in broadly negative terms, characterizing such classifications as “pernicious” “odious” and “stigmatizing.” While continuing to pay lip service to the notion that strict scrutiny was intended to “smoke out” invidious uses of race, the Court in fact turned towards an understanding in which government uses of race may be justified by compelling objectives, but are always fundamentally non-benign. This rhetorical turn—which would take an even more strident form in some of the later opinions of the Court’s race conservatives—provided the Court with its fundamental normative justification for treating affirmative action as constitutionally akin to invidious uses of race.

The Court buttressed these normative claims of inherent invidiousness with related claims of “consistency,” i.e., that the Court—both descriptively and as a matter of normative right—must treat all racial classifications the same. “[A]ll racial classifications,” the Court increasingly claimed “must be strictly scrutinized” by the courts. In other words, racial classifications of any kind “are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” The Court thus turned in the late 1980s and 1990s away from the notion of contextual variability, and towards a claim of global consistency; that is, that the scrutiny afforded to government uses of race must always be of a most stringent form. And while this rhetorical theme emerged primarily as a normative explanation for why the claims of white plaintiffs must be treated the same as those of racial minorities, it would ultimately evolve into a broad descriptive claim (and doctrinal mandate) of consistency to which the Court itself would claim

194 Adarand, 515 U.S. at 223-224, 229, 236; Shaw, 509 U.S. at 643.
195 See notes 193-194, supra; see also Croson, 488 U.S. at 493; Shaw, 509 U.S. at 643 (reiterating that the purpose of strict scrutiny is to “smoke out” invidious uses of race).
197 See, e.g., Adarand, 515 U.S. at 224; see also Shaw, 509 U.S. at 643.
198 Adarand, 515 U.S. at 224.
199 Id. at 227.
200 See notes 197-199, supra.
adherence. 201

Both of these core justifications for the Court’s increasingly stringent review of affirmative action programs—the inherent invidiousness of uses of race and cross-contextual consistency—arguably should have had profound implications for the race family law context. For while, in the aftermath of Palmore, the lower courts largely ceased the practice of awarding custody modifications based on an interracial marriage, 202 they typically construed Palmore as having relatively little import for other continuing uses of race. 203 Thus, continuing uses of race in the adoption and foster care contexts, as well as in the context of custody disputes between interracial parents, were not eradicated by Palmore, but were instead largely deemed acceptable by the courts, except insofar as they evidenced an exclusive reliance on racial criteria (a limitation with which only the most strategically unsophisticated government actor would be unable to demonstrate compliance). 204 Indeed, courts addressing such continued race-based family law practices following Palmore typically found them to be categorically constitutionally

201 Id.; see also Gratz, 539 U.S. at 270; PICS, 551 U.S. at 720, 739 n.16, 741-742; id. at 751-752, 758-759, 778-782 (Thomas, J., concurring).


204 Id.
acceptable (i.e., as a matter of law requiring no constitutional scrutiny of any kind), where race was not the exclusive factor considered as part of the best interest of the child assessment.205

This approach—while perhaps consistent with a narrow reading of Palmore itself—was in obvious tension with the Court’s affirmative action doctrine in the post-Palmore time frame.206 Indeed, both of the Court’s key justifications for its developing affirmative action doctrine—the inherent invidiousness of all uses of race, and the need for consistency across all race-based decision-making contexts—facially seemed to demand the application of strict scrutiny to all continuing uses of race by the government207; even those where race was not the exclusive consideration.208 And indeed, many of the race-based family law policies that the courts confronted during this time frame either formally or de facto gave at least as much weight to racial considerations as affirmative action policies that the Court had found to demand the application of strict scrutiny (with predictable results for their constitutional validity).209

205 Id.
206 As noted supra, Palmore was written narrowly by Chief Justice Burger precisely to leave open the possibility of race-as-a-factor in future family law cases. See notes 145, 185-186, supra and accompanying text.
207 All of the race family law cases at issue herein involved state action as that term has been defined for Fourteenth Amendment purposes (either in the form of race-based action by a state agency, race-based adjudication by a court, or a state statute mandating the application of racial criteria). Thus, in none of the cases of which I am aware was the absence of state action raised as a barrier to the litigant’s Equal Protection arguments.
208 Indeed, precisely such a view—that even race-as-a-factor demands strict scrutiny—was articulated internally by a number of the Court’s race conservatives as early as Bakke, and was ultimately codified explicitly by the Court in its affirmative action case law. See, e.g., Memorandum of William H. Rehnquist, Re: No. 76-811, Regents v. Bakke (January 3, 1978) (Blackmun Papers, Box 260, folder 8), at 1-4 (expressing the view in the affirmative action context that even race-as-a-factor demanded strict scrutiny or a finding of unconstitutionality); see also Grutter, 539 U.S. at 326 (affirming strict scrutiny as the appropriate standard in a case involving a “race as a factor” admissions process); cf. Mt. Healthy School Dist. v. Doyle, 429 U.S. 274, 285-287 (1977) (early decision recognizing that even where unconstitutional consideration is simply one factor, if it is dispositive, it is constitutionally problematic).
Thus, the Court’s affirmative action precedents during this time frame should have profoundly unsettled the lower courts’ approach to the remaining instantiations of race in family law (adoption, foster care, interracial parent custody disputes). But while the 1985-1995 time frame was for race family law doctrine—like affirmative action—a time of considerable change, this change was not in the direction one would expect. Thus, in the time frame between 1985 and 1995—rather than moving towards a consensus against uses of race in family law—the lower courts increasingly expressed a consensus that remaining uses of race in the family were constitutionally permissible.\(^{210}\) And while the courts were never completely unified—either in outcome or approach—by the 1990s most were expressing the view that only \textit{de minimis} (if any) constitutional scrutiny was demanded of race-based family law practices, at least where race was not the exclusive consideration.\(^{211}\) As such, the decade between 1985 and 1995 was, unlike the preceding decade, marked by increasing consistency in both the outcome and the reasoning of the courts’ approaches to government uses of race in the family, in ways that diverged profoundly from both the framework adopted (strict scrutiny) and the usual results (invalidation) in the affirmative action context during the same time frame.

Five of the disputes arising during this time frame—all involving race-based adoption or foster care determinations—prompted the litigants involved to seek Supreme Court intervention in these continuing race-
based family law practices. First in 1988 and then again in 1989, 1990, 1992 and 1994, disappointed would-be parents petitioned the Court to address state policies and practices that had resulted in the removal of African American or bi-racial children from their homes. Arguing that the courts below had carved out an exception for state-sponsored “segregation” in the family, in each case the litigants contended that the lower courts had lost touch with the Court’s broader race law jurisprudence. Often drawing explicitly on the Court’s affirmative action precedents, they called upon the Court to remedy this aberrational approach, and to strike down continuing uses of race in the adoption and foster care contexts.

But the Court was no more interested in taking up the issue of adoption (or foster care) during the 1985-1995 time frame than it had been at the time that *Palmore* was decided. While the record of the Justices’ personal views of the cases that came up to the Court during this time is sparse, none of the five appears to have been perceived as a serious candidate for review. Indeed, in most of the cases for which internal Court records are available, those records suggest that the case at issue never even made it to the Justices’ so-called “discuss list,” signifying that

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212 See note 213, infra.
214 J.H.H. Petition, at 4-8; Wilson Petition, at *11-14; Sharp Petition, at 13-18; Mauk Petition, at 12-24; see also Carlson Memo, at 9-10 (summarizing Carlson Petitioners’ arguments in their Petition for Certiorari); see generally J.H.H. Petition at 5 (describing lower court decision as sanctioning “state-sponsored racial segregation”); Sharp Petition at 10 (describing County defendant as having encouraged “racial segregation” in removing black foster child pursuant to Minnesota Minority Heritage Child Protection Act).
216 See notes 217-219, infra.
not a single Justice thought discussion of the case was warranted as a potential matter for the Court to take up.\textsuperscript{217} And while several of the cases arguably had procedural complications making them unappealing candidates for certiorari, at least one was—in the words of Justice Blackmun’s law clerk—“extraordinary,” involving a lower court decision that had denied the plaintiffs the opportunity to demonstrate that even the sole use of race as the basis for a denial of placement violated their clearly established constitutional rights.\textsuperscript{218} Nevertheless, even this “extraordinary” case appears not to have attracted any serious attention, and ultimately each of the cases would be denied certiorari.\textsuperscript{219}

IV. A\textsuperscript{D}ARAND TO G\textsuperscript{A}MBLA: 1996-2007

While the Court thus declined during the post-\textit{Palmore} period to become involved in the ongoing constitutional disputes over the propriety of race in adoption and foster care, statutory changes occurring in the mid-
1990s would ultimately limit the practical significance of this inaction. In 1994 Congress enacted (and shortly thereafter amended), the Howard M. Metzenbaum Multiethnic Placement Act of 1994 (“MEPA”).\footnote{Multiethnic Placement Act, Pub. L. 103-82 (1994) (prior to 1996 amendment); see also Solangel Maldonado, Race, Culture, and Adoption: Lessons From Mississippi Band of Choctaw Indians v. Holyfield, 17 COLUM. J. GENDER & L. 1, 32-34 (2008).} In its final form (adopted in 1996), MEPA precluded the use of race as a basis for “delay[ing]” or “deny[ing]” foster care or adoption placements by most state actors, thus achieving by statute much of what litigants had long sought (unsuccessfully) to institutionalize as a matter of constitutional law.\footnote{See Maldonado, supra note 220, at 32-34; see also 42 U.S.C. § 1996b(1); 42 U.S.C. § 671(a)(18). § 671(a)(18) explicitly applies only to those states and entities receiving federal funds, while § 1996(b)(1) is written in ostensibly categorical terms, but provides for enforcement only via Title VI, a spending clause statute. Since the overwhelming majority of state agencies receive federal funding, see Katie Eyer, Rehabilitation Act Redux, 23 YALE L. & POL’Y REV. 271, 282-287 (2005), MEPA’s restrictions thus extend, at a minimum, to the vast majority of public agencies, as well as to those private agencies receiving federal funds.} And while federal enforcement efforts were reportedly weak in the initial time frame after MEPA’s enactment (and non-compliance rampant), by the mid to late 2000s, it appears that MEPA had wrought real, albeit not universal, changes in state adoption and foster care practices.\footnote{See, e.g., Elizabeth Bartholet, Private Race Preferences in Family Formation, 107 YALE L.J. 2351, 2353-2354 (1998) (as of 1998, MEPA had had little effect, due to deeply entrenched professional preferences for race-matching and weak enforcement); Meyer, supra note 14, at 195-207 (describing DHHS’s new aggressive enforcement approach to MEPA); see also note 225, infra.} Indeed a number of states that prior to MEPA had explicit statutes requiring race-matching in adoption or foster care, modified their statutory law following MEPA to at least ostensibly preclude such practices.\footnote{Compare MINN. STAT. ANN. § 259.255 (1991) (requiring placement agencies to place minority children in same-race placements, except where a relative placement was available); with MINN. STAT. ANN. §§ 259.57, 260C.212 (2007) (collectively prohibiting the state from “delay[ing]” or “deny[ing]” foster care or adoption placements based on race).} As a result, by the mid-2000s it had become significantly more rare for public institutions (and courts) to rely explicitly on race in adoption or foster care determinations; a decline that is reflected in the case law.\footnote{The effects of MEPA can be seen both in the number and the substance of cases brought in the post-1995 period. Numerically, adoption cases have become much less common in the case law, particularly in the most recent time frame. Substantively, those post-MEPA cases that remain have increasingly involved the refusal of courts or agencies to afford greater weight to race, a claim that is often rejected on the basis of MEPA or its}
MEPA’s changes, however—explicitly limited to the adoption and foster care context—did not reach the courts’ continued use of race in custody disputes between interracial parents. Such custody disputes—while always less common than adoption disputes in the case law—had traditionally reflected very similar reasoning to that employed in the adoption and foster care context.225 Thus, the courts had typically permitted the use of race as a dispositive factor in interracial custody disputes (on the reasoning that the minority parent would be better situated to meet a biracial child’s emotional needs), most often without any meaningful constitutional scrutiny.226 (Indeed, such courts often—like courts in the adoption and foster care context—held that where race was not the exclusive consideration in the best interests analysis, no constitutional scrutiny was required at all).227 That reasoning—untouched by MEPA’s statutory changes—continued to evolve little in the post-MEPA period, with most courts continuing to affirm the propriety of weighing race as a factor in interracial custody disputes.228 Thus, while


225 See note 226, infra.


227 Id.

racial factors were not always deemed dispositive in the circumstances of a particular case, courts called upon to adjudicate interracial custody disputes during this time frame continued to regularly reaffirm the legal validity of the use of race to determine a child’s best interests in interracial custody disputes.\(^{229}\)

Exemplary of this continuing practice—and the constitutional disputes that it continued to engender—was the Illinois case of Gambla v. Woodson.\(^ {230}\) Filed in 2003 in Illinois Circuit Court, Gambla v. Woodson was the product of a brief and unhappy marriage between Christopher Gambla, a white man, and Kimberly Woodson, an African American woman.\(^ {231}\) At primary issue in Gambla and Woodson’s divorce was custody of their one child—a biracial baby daughter named Kira for whom they both claimed to be the primary caregiver.\(^ {232}\) At trial, Gambla and Woodson would each introduce an abundance of evidence in support of their custody claims, with 4 experts and 10 lay witnesses testifying over the course of the 17 day trial.\(^ {233}\) Race played an important role in the trial, with Woodson introducing expert testimony that Kira—as a biracial child—would be better served by an award of custody to her African American mother.\(^ {234}\)

Despite this evidence—and the fact that many courts in similar circumstances had awarded custody to the minority parent—Christopher had reason to be optimistic that race would not play a meaningful role in the determination of Kira’s custody. Historically, Illinois had been an unusually unsolicitous jurisdiction for race-based family law decision-making, frequently abandoning or limiting race-based family law rules long before other jurisdictions.\(^ {235}\) Indeed, the Illinois Court of Appeals was the first court in the country to invalidate a trial court’s race-based


\(^ {229}\) See note 228, supra.


\(^ {231}\) Id. at 849-850.


\(^ {233}\) Id. at 63A (Trial Court Opinion).

\(^ {234}\) Id. at 68A.

award of custody in a custody dispute between interracial parents, finding in 1956 that an automatic race-based award to the minority parent was impermissible.\(^{236}\) And while the Illinois courts had not, in the years since, issued a published decision addressing the use of race to determine custody between interracial parents, they had, in other contexts, repeatedly rejected lower court attempts to inject race into family law decision-making.\(^{237}\) Thus, while Illinois law arguably allowed the use of race as a factor in custody disputes (so long as it was not dispositive), in practice custody decisions resting on racial grounds were rarely upheld.\(^{238}\)

Moreover, in Kira’s case it seemed that all factors other than race pointed towards an award of custody to Christopher. Both of the custody experts who had evaluated the family—including Kimberly’s own—voiced strong opinions at trial that custody should be awarded to Christopher.\(^{239}\) Relying in part on psychological testing and in part on Kimberly’s history of physical aggression in intimate relationships, both expressed concerns that Kimberly suffered from impulsivity and self-control problems.\(^{240}\) Both also suggested that Kimberly—who embraced alternative medicine approaches without scientific support, and also had arguably ignored the seriousness of her older son’s mental health problems—appeared to lack judgment when it came to her children’s medical care.\(^{241}\) Finally, both noted that Christopher was more likely to encourage continued contact with the non-custodial parent, an important consideration under Illinois

\(^{236}\) Fountaine v. Fountaine, 133 N.E.2d 532, 533-535 (Ill. Ct. App. 1956). For a case illustrative of other courts’ approach to this issue during the same time frame, see, e.g., Ward v. Ward, 216 P.2d 755, 756 (Wash. 1950) (holding that bi-racial children should be raised by their African American grandmother, rather than their white mother, since “[t]hey will have a much better opportunity to take their rightful place in society [sic] if they are brought up among their own people.”)


\(^{238}\) See notes 236-237, supra. But cf. Russell, 399 N.E.2d at 214-215 (affirming trial court decision that had partially relied on the possibility of social stigmatization from mother’s interracial marriage, but disclaiming reliance on that factor on appeal).


\(^{240}\) Id.

\(^{241}\) Id.
custody law. Thus, while noting that Kimberly also was a loving and competent parent, both of the formal custody evaluators recommended an award of custody to Christopher.

In contrast, the two experts introduced by Kimberly at trial had not met with Kira or Christopher (and indeed in one instance had not met with Kimberly herself), and were not approved as custody experts by the court. They thus restricted their testimony primarily to critiquing certain methodological defects in the reports of the two custody evaluators, including the inferences that the evaluators had drawn from their psychological testing of Kimberly (inferences that her experts contended were culturally biased and lacked context). Both also testified however (despite not being qualified to do so) that because Kira is biracial she would be best served by being placed with Kimberly, the minority parent. As described by the trial court, both “seemed to be testifying for the proposition that solely because [Kimberly] is African American and because Kira is a biracial child, her custody should be awarded to [Kimberly].”

The trial court—while claiming to reject this “broad stroke” approach—would nevertheless find race to be dispositive of Kira’s best interest. After finding the parties equally deserving of custody under each of the statutory factors set out in Illinois’s Marriage and Dissolution of Marriage Act, and rejecting each of the bases articulated by the custody evaluators for awarding custody to Christopher, the court noted that Kimberly, as a black woman “will be able… to provide Kira with a breadth of cultural knowledge and experience that [Christopher] will not

242 Id.
243 Id.
245 Id.
246 Id.
248 Id. at 68A-69A.
249 For example, although Kira had a sibling in Kimberly’s custody, the Court found that the statutory factor of “interrelationship of the child with her parents, her siblings and any other persons who may significantly affect her best interests” weighed evenly in favor of both parties as Kira had a close and loving relationship with her relatives with whom she resided when living with her father. Id. at 67A.
be able to do.” It concluded based on this “special circumstance[]” that Kimberly would be better able “to provide for the emotional needs of [Kira],” and awarded sole custody to Kimberly.

On appeal, Christopher—by then proceeding pro se—argued to the Illinois Court of Appeals that this race-based decision was erroneous on both factual and legal grounds. But the Court would reject each of Christopher’s claims finding—as to the race issue—that both Illinois law and federal constitutional doctrine permitted the use of race, except where it was the *sole* consideration in an award of custody. Thus, the Court concluded the trial court’s decision—which had also mentioned factors other than race (albeit none that it suggested were dispositive)—did not run afoul of constitutional or common law custody strictures, and indeed did not even require substantive constitutional scrutiny. One Justice dissented, contending *inter alia*, that the use of race by the trial court had been constitutionally impermissible.

The Illinois Supreme Court denied review of the Illinois Court of Appeals decision on November 29, 2006. Thus, on February 27, 2007, Christopher Gambla sought certiorari review from the United States Supreme Court. Focusing principally on *Palmore v. Sidoti*, Gambla contended in his pro se petition that *Palmore* precluded precisely the type of dispositive reliance on race that had occurred in his case. If *Palmore* was to mean anything, he contended, it must mean at least that “race cannot be the basis for the decision,” as it was in his case. Moreover, he asserted, there was a conflict among the lower courts regarding *Palmore’s* reach, further justifying a grant of certiorari.

The odds for Gambla’s petition—while well-written and

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250 *Id.* at 65A-69A; *see also* Gambla, 853 N.E.2d at 872-877 (McLaren, J., dissenting).
251 *Id.* at 69A.
253 *Id.* at 868-870.
255 Gambla, 853 N.E.2d at 872-878 (McLaren, J., dissenting).
258 *Id.* at 13-15.
259 *Id.* at 15.
260 *Id.* at 15-19.
sophisticated for a pro se—did not a priori look good. The Court very rarely grants pro se petitions of any kind, and when it does, most often does so from its in forma pauperis, or unpaid, docket, of which Gambla was not a part. 261 Nevertheless, two months after Gambla’s petition was filed, the Court requested a response to the petition from Woodson’s attorney. 262 Such a “call for a response,” while by no means dispositive of a grant of certiorari, represents a significant improvement in a litigant’s odds of being granted certiorari. 263 Because the Court does not grant certiorari without a response on file, and will only call for a response where at least one Justice believes a grant may be potentially warranted, a “call for a response” is a material sign that the case stands a better than average chance of being awarded review. 264

And indeed, it is not difficult to see why one or more of the Justices thought that review might be warranted in Gambla’s case. At the time of the submission of Gambla’s petition, the Court was in the final stages of deciding Parents Involved in Community Schools v. Seattle School Dist. No. 1, one of the Court’s most significant and controversial cases to deal with “benign” racial classifications during recent decades. 265 Involving the use of race to achieve integrated schools at the elementary and secondary school level, Parents Involved was widely perceived by both supporters and opponents as a significant opportunity for the Court to further circumscribe benign uses of race. 266

In fact the Court would—when it issued the Parents Involved opinion in late June 2007—reaffirm the necessity of strictly scrutinizing all uses of race, while even more closely cabining the circumstances in which individual racial classifications are allowed. 267 And, although the Court’s

261 Kevin Smith, Justice for All? The Supreme Court’s Denial of Pro Se Petitions for Certiorari, 63 ALB. L. REV. 381, 383-384 & n.6 (1999).
264 Id. at 242.
267 PICS, 551 U.S. at 720-725, 733-735; see also id. at 725-733, 735-748 (plurality);
majority in *Parents Involved* would not speak with a wholly unified voice—with Justice Kennedy chiding his conservative colleagues for their simplistic endorsement of colorblindness in law—even Kennedy’s own concerns (which centered primarily on the individual and community harms of treating an individual differently on the basis of race) seemed equally implicated by the use of race at issue in *Gambla*. Thus, *Gambla*—which *categorically* affirmed the constitutional propriety of depriving a non-minority parent of custody based on their race, so long as race was not the exclusive factor—presented an obvious tension with the approach of the soon-to-be issued decision in *Parents Involved*.

Nevertheless, *Gambla* would not be one of the cases for which a call for a response is a precursor to a grant of full review. On October 1, 2007, after the Court’s return from its summer recess, the Court denied Gambla’s petition for certiorari. Gambla’s petition for rehearing—filed shortly thereafter—was also denied, bringing to an end his 4-year custody battle.

V. POSTSCRIPT: THE 2012 TERM

On January 4, 2013—35 years after *Bakke* and *Drummond*—the Court would once again face the question it had faced in *Drummond*: of whether to take up an adoption case in the same term as a major affirmative action decision. Just as 35 years ago, *Bakke*—by then fully briefed and argued—provided the backdrop to the Court’s consideration of whether to grant review in *Drummond, Fisher v. University of Texas*—the Court’s first major affirmative action case in nearly a decade—was fully argued and awaiting decision at the time that the Court met in conference
to decide whether or not to grant a new adoption case for review.\textsuperscript{272}

The facts of this new adoption case also bore striking similarities to the Drummonds’ own circumstances in 1978. Like \textit{Drummond}, the petitioners in the pending case had raised a child essentially from birth, only to see the child removed from their home as a toddler.\textsuperscript{273} And like \textit{Drummond}, the facts left little doubt that the child’s heritage played a key role in the removal.\textsuperscript{274} In both cases the prospective adoptive parents were undisputed to be loving and competent parents, with deep attachments to the child removed from their home.\textsuperscript{275}

But the new case in 2013—\textit{Adoptive Couple} v. \textit{Baby Girl}—nevertheless bore at least one crucial difference from the Drummonds’ own unsuccessful quest for review. Unlike \textit{Drummond}—which had directly challenged the Court to bring race-matching in adoption within the same rubric as its constitutional affirmative action precedents—\textit{Adoptive Couple} presented only statutory questions for review (under the Indian Child Welfare Act).\textsuperscript{276} Nor—in the event that constitutional issues were to arise—did \textit{Adoptive Couple} compel the result that certain of the Court’s Justices had historically sought to avoid: the application of strict scrutiny to the adoption context.\textsuperscript{277} Because the child in \textit{Adoptive Couple} was an Indian (Native American)\textsuperscript{278} child—a status the Court has traditionally

\textsuperscript{272} See \textit{id.}; see also Memorandum of K.E., law clerk to Cert Pool, Re: No 77-1381, Drummond v. Fulton County Dept. of Family and Children’s Services (June 1, 1978) (Blackmun Papers, Box 882, folder 4), at 13.


\textsuperscript{274} See \textit{Drummond en banc}, 563 F.2d at 1204-1206; \textit{Adoptive Couple}, 731 S.E.2d at 556.

\textsuperscript{275} See \textit{Drummond Panel Decision}, 547 F.2d at 841-846; \textit{Adoptive Couple}, 731 S.E.2d at 567.

\textsuperscript{276} See Federal Drummond Petition, at 4-5, 25-27 (arguing that the use of race discrimination in adoption compelled the application of strict scrutiny and analogizing to then-pending \textit{Bakke}); Petition for a Writ of Certi\textit{orari} at ii, \textit{Adoptive Couple} v. Baby Girl, No. 12-399, 2012 WL 4502948 (2012), \textit{cert. granted} 2013 WL 49813 (2013) (hereinafter “\textit{Adoptive Couple Petition}”) (presenting only statutory questions for review); \textit{but cf.} Adoptive Couple Petition at 26 (suggesting briefly that Equal Protection principles should inform the statutory analysis).

\textsuperscript{277} See note 279, \textit{infra} and accompanying text.

\textsuperscript{278} Although “Native American” is the contemporary term most often used to refer to those of Native American ancestry, “Indian” is the term of art used to refer to members of federally recognized tribes (and under ICWA, those children eligible for membership of federally recognized tribes who are also biological children of members). In the Equal Protection context, this distinction may make a difference, as Native American heritage,
treated as political, rather than racial—the Court’s existing Equal Protection doctrine would arguably demand only rational basis, rather than strict scrutiny, review.279

Thus, when the Court granted certiorari in Adoptive Couple v. Baby Girl on January 4, 2013, there seemed little likelihood that it did so with the intent to disturb the status quo.280 Indeed, the certiorari order—

standing alone, is likely insufficient for a distinction to be treated as political rather than racial. See, e.g., Rice v. Cayetano, 528 U.S. 495 (2000).

279 See Morton v. Mancari, 417 U.S. 535 (1974); cf. Regents of University of California v. Bakke, 438 U.S. 265, 304 n.42 (1978) (opinion of Powell, J.) (rejecting that Mancari supported the argument that something less than strict scrutiny could be applied, on the grounds that the classification at issue there “was not racial at all”). There is some possibility that ICWA’s definition of an “Indian child,” which extends beyond members of federally recognized Indian tribes to children of tribe members who are also eligible for membership, might take the statute outside the purview of Mancari’s ruling. See 25 U.S.C. § 1903(4). However, the Court clearly has a “rational basis” alternative available to it in taking up a case involving an Indian child; an option that would not be available (absent reconsideration of the Court’s articulated requirement of global consistency in the standard of review applied to racial classifications) in the context of a pure “race” case (e.g., a case involving an African American child).

280 From a constitutional perspective, the status quo vis-à-vis remaining race-based family law practices has been altered little in the last several decades. Thus, while such cases arise with lesser frequency today (due in part to the changes brought about by MEPA) the following jurisdictions continue to have non-overruled decisions affirming the constitutional permissibility of the use of race in adoption, foster care or interracial custody disputes, where race is not the sole factor (although it may be dispositive): District of Columbia: D.I.S., 494 A.2d at 1319-1327; F.W., 870 A.2d at 86-87 (reaffirming that race is a proper consideration in adoption, but not finding it dispositive in that case); Georgia: Drummond v. Fulton County DFCS, 228 S.E.2d 839, 844 (Ga. 1976) (no standing as a matter of Equal Protection doctrine to contest denial of adoption based on race, removal from foster parents), cert. denied, 432 U.S. 905 (1977); Illinois: In re: Marriage of Gambla, 853 N.E.2d 847, 868-870 (Ill. App. Div. 2006), cert. denied 552 U.S. 810 (2007); Kansas: Gloria G., 833 P.2d at 984-986; Kentucky: Wilson v. Darrow (Ky. Ct. App. 1989), cert. denied 498 U.S. 851 (1990), see Memorandum from J.B., law clerk, to Cert Pool, Re: Wilson v. Darrow, No. 90-123-CSX, at 3-4 (Aug. 10, 1990) (describing decision), obtained via Blackmun Digital Archive); Maryland: Adoption/Guardianship No. 2633, 646 A.2d at 1042-1049; Massachusetts: Petition to Dispense With Consent to Adoption, 453 N.E.2d 1236, 1237, 1239 (Ma. Ct. App. 1983), aff’d on other grounds 461 N.E.2d 186 (Mass. 1984); Michigan: Carpenter, 1999 Mich. App. LEXIS 2140, at *2-11; Minnesota: Carlson v. County of Hennepin, 428 N.W.2d 453, 458 (Minn. Ct. App. 1988) (qualified immunity), cert. denied 490 U.S. 1023 (1989); Nebraska: Brown v. Brown, 621 N.W.2d 70, 82-83 (Neb. 2000); Ohio: Haven, 1979 Ohio App. LEXIS 9744, at *1-15; cf. Moorehead, 600 N.E.2d at 784-789 (in different Ohio Appellate District, invalidating an agency’s exclusive use of race to disqualify family); Eastern District of Michigan: Tallman, 859 F.Supp. at 1085-1088;
granting review of only technical statutory issues—seemed to render remote any such aim. Adoptive Couple—like so many other cases before it—would not be the case to take up and address the long-standing constitutional divide between the Court’s affirmative action doctrine and contemporary race family law doctrine. Rather, it would tread lightly only around the margins of the core dispute, leaving untouched the fundamental constitutional divergence.

And so, after 35 years, it seemed that the Court’s colorblindness revolution was poised to continue—with Fisher and with Adoptive Couple—as it had already for so many years: partial, fundamentally incomplete, but clothed in the language of moral universalism.

VI. IMPLICATIONS

There are two very different stories to be told of the history of the Court’s constitutional race law jurisprudence. The first—told by the Court itself in its affirmative action opinions—is one in which motives and effects have mattered little. Under this account, what has mattered to the Court—or at least its governing coalition of race conservatives and race moderates—is not whether a particular racial classification may be categorized as putatively benign, but instead simply the use of race

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281 See Adoptive Parents Petition, at ii, cert. granted 2013 WL 49813 (2013) (stating the following questions presented for review, “(1) Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law. (2) Whether ICWA defines “parent” in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.”)

282 See notes 283-284, infra and accompanying text.
Government uses of race are simply too categorically divisive, too inherently problematic, to be exempted on any grounds from strict scrutiny review. Instead, Equal Protection has demanded (and continues to demand) that the Court strive towards colorblindness, cabining uses of race to the narrowest of circumstances; only where they may be characterized as “narrowly tailored” to meet a “compelling state interest.” This account, then, is one in which consistency—as between benign and invidious uses of race—is treated as doctrinally demanded of the Court, and held out as empirically true.

But a profoundly different story is told by the history of the Court’s involvement in contemporary race-based family law practices. Here, it seems, many of the same Justices (who have rejected normative variability in the affirmative action context) have taken the opposite approach: have embraced the normative concerns; have applied a differing approach to constitutional scrutiny; have rejected consistency as the rubric that the constitution demands. Thus, many of the same Justices who have formed the Court’s majority on affirmative action have—far from demanding the uniform application of strict scrutiny in the family law context—deliberately avoided the application of strict scrutiny to contemporary race-based family law practices. And these actions, it seems, have been based precisely on the types of normative concerns that the Court’s race conservatives have, in the affirmative action context, decried. Thus the Justices’ perception of remaining instantiations of the use of race in family law as, at their core, “natural” and benign, appears to have played a key role in shielding such practices from meaningful constitutional scrutiny by the Court.

Some might resist this second account, so far from the Court’s own. After all, we are told, denials of certiorari (the predominant, albeit not exclusive, “shielding” action by the Court in the contemporary race family law context) lack significance; what matters is what the Court says

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283 See sources cited notes 1-3, supra.
284 See sources cited notes 193-196, supra.
285 See sources cited notes 193-201, supra.
286 See sources cited notes 197-201, supra.
287 See notes 293-299, infra and accompanying text; see generally Sections I-V, supra.
288 Id.
289 Id.
290 Id.
in its published dispositions.\textsuperscript{291} Thus, one might contend that the Court’s continued failure to take up modern instantiations of race in family law fails to meaningfully inform the Court’s contemporary race law regime; it is an act divested of meaning by the Court’s own doctrinal treatment of certiorari review. And indeed, from a purely formal doctrinal perspective, the history of race in family law carries little weight in contemporary race law doctrine. It creates no new standards for contemporary race law litigants. It cannot be cited to the Court as authority for how motives can or should be considered in constitutional race law adjudication.

But a lack of formal doctrinal weight ought not to be mistaken for a lack of meaning.\textsuperscript{292} Since 1977, a consistent stream of petitions for certiorari review have come up to the Court raising constitutional race family law issues.\textsuperscript{293} In every single one of those cases for which we have internal records—including Palmore—every one of the Court’s changing cast of race conservatives has unanimously voted against certiorari.\textsuperscript{294} (In contrast, the vast majority of the Court’s race liberals—and many of its race moderates—have cast at least one or more votes in favor of review in a contemporary race family law case).\textsuperscript{295} In every one of the cases under review, the party who challenged the use of race below, lost.\textsuperscript{296}
one, the court below failed to apply strict scrutiny review.\textsuperscript{297} Such a consistent disregard by the Court’s race conservatives of their own articulated commitments in selecting cases for certiorari review cannot but inform our perspective on what those commitments truly are.

Nor need we simply speculate as to the reasons why the Court’s race conservatives have been so reluctant to take up continuing uses of race in family law. While the record is not comprehensive, neither is it bare. What it tells us is that, indeed, several of the Court’s race conservatives (and race moderates) have historically viewed continuing uses of race in family law (and particularly the use of race-matching in adoption and foster care) as fundamentally normatively distinct from invidious race-based practices.\textsuperscript{298} Thus, we see comments in the Justices’ papers characterizing race-matching in adoption and foster care as “different” and “natural,” as a practice neither necessitating Supreme Court intervention nor stringent constitutional review.\textsuperscript{299} To the extent the historical record provides us with direct indications of the Justices’ motives in failing to demand rigorous constitutional scrutiny of continuing uses of race in family law, such indications overwhelmingly support a normative desirability account.

Moreover, other alternative accounts of the Justices’ motivations simply fail under the weight of the historical record. Thus, the most obvious alternative argument—that contemporary race family law cases have simply not be cert-worthy—is belied by the myriad of circumstances in which contemporary race-based family law practices have come up to the Court. The cases that have come up to the Court have included ones in which the court below found race to be the sole cause, in which there was a formal statute mandating placement preferences for only minority children, in which there was a categorical policy of placing minority children with minority families, in which no Justice disputed that race was dispositive.\textsuperscript{300} Under these circumstances, it is difficult—if not

\textsuperscript{297} Id.

\textsuperscript{298} See sources cited note 299, infra.

\textsuperscript{299} See sources cited notes 87-89, 148, 150-157; see also sources cited notes 117-118, 127.

impossible—to credit that the Court has simply been unable to find an appropriate vehicle for review.

Nor is the other most obvious alternative explanation—that it is family law, not race family law to which the Justices have an aversion—persuasive, or, ultimately, even relevant if true. No doubt, the Court has long mythologized family law as a bastion of exclusive state control, as an area in which the Court has little business intervening.301 But here too the Court’s account is more myth than real.302 The Court regularly takes up family law cases in which a federal issue has been properly presented.303 Indeed, as legal historian Michael Grossberg has observed, the Court’s decisions have “fundamentally redefined” American family law, re-focusing its central discourse on rights in a way unimaginable under the old regime.304 One need look no farther than the current term—in which no less than four family law cases (ranging from custody to adoption to marriage) are currently pending at the Court—to know that the Court has little reticence about injecting itself when it so desires in family law disputes.305

Moreover, even if the Court’s reluctance to take up continued uses of race in family law has derived in part from a generalized reluctance to

302 See sources cited notes 303-304, infra. I am not the first scholar to have observed this phenomenon. Perhaps most prominently, Jill Elaine Hasday has persuasively challenged the accuracy of the Court’s rhetorical characterization of family law as a bastion of state control, outside the Court’s own purview. See, e.g., Hasday, supra note 302; Hasday, supra note 24, at 28-68.
303 See, e.g., HASDAY, supra note 24, at 47-51.
take up family law issues, in the end, this matters little. The Court’s own contemporary race law doctrine leaves no room for exceptions, whatever their derivation, from strict scrutiny’s inexorable command.\textsuperscript{306} It is just as inconsistent for the Court to decline to compel the application of strict scrutiny to an area because it is one in which it wishes to reduce its institutional profile as it is for the Court to do so because it perceives the practice as normatively benign.\textsuperscript{307} If the Court has elected to remove a particular contemporary racial practice from the realm of rigorous constitutional scrutiny it is—whatever the reasons—profoundly divergent from the Court’s own race law account.\textsuperscript{308}

This divergence—between the Court’s claimed standard and its actual approach to race and the law—creates profound process, legitimacy and substantive concerns. Because the Court has explicitly articulated a particular doctrinal rule—that no deviations are permitted from strict scrutiny’s inexorable command—while \textit{sub silentio} following a different approach, it has deprived litigants and the public of the ability to fully participate in one of the most important debates in contemporary American constitutionalism (i.e., which contemporary uses of race should be permitted to endure).\textsuperscript{309} Moreover, the Court’s current approach—

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\textsuperscript{306} See notes 193-201, \textit{supra} and accompanying text.
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\textsuperscript{307} I am not contending here that were there some genuine doctrinal bar on the Court’s failure to take up a particular use of race (federalism-based or otherwise) that that would render its race law jurisprudence incoherent or even inconsistent. But the type of generalized statements of state exclusivity that the Court has articulated in the family law context pose no genuine doctrinal bar to taking up race family law issues, nor are they meaningfully distinguishable from a whole array of practices that the Court has historically designated as “local” in which it now actively intervenes to preclude race-based decision-making. (Most notably, education—like family law—has long been mythologized as an arena in which federalism dictates state control, \textit{see}, \textit{e.g.}, United States v. Lopez, 514 U.S. 549, 564-568 (1995), and yet that obviously has not deterred the Court from intervening in race-based government action in that context, \textit{see}, \textit{e.g.}, Brown v. Board of Education, 347 U.S. 483 (1954); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007)). Indeed, the Court has recognized for more than a century that the purpose of the Fourteenth Amendment was precisely to authorize interventions into areas of traditional state control where race-based concerns are at issue. \textit{See}, \textit{e.g.}, Ex Parte Virginia, 100 U.S. 339, 346 (1880).
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\textsuperscript{308} I thank my colleague Stacy Hawkins for this insight.
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\textsuperscript{309} Litigants do have limited room to put on evidence regarding the benefits of a particular race-based practice, even where strict scrutiny is applied. However, there is no room in the doctrinal test for evidence regarding the harms (or lack thereof) of a particular racial practice, and even with respect to benefits, the Court has so significantly narrowed what may be considered a compelling interest that most of the factors that one might want to consider in assessing whether a particular racial classification is
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unguided by fixed legal standards, and conducted out of sight of any public scrutiny—of necessity puts the Justices in the position of picking and choosing which uses of race to favor based on no more then their own normative intuitions.310 Such a regime cannot—in the long term—be sustained without fundamental damage to the Court’s legitimacy as the ultimate arbiter of constitutional race law doctrine.311

As importantly, such a regime seems likely to inexorably lead to distortions in the further development of constitutional race law jurisprudence. Explicitly disclaiming the salience of normative underpinnings while in fact attending to them sub rosa predictably leads to doctrinal confusion and inconsistency. Indeed, arguably a number of the most incoherent and logically tortured features of both the Court’s and the lower courts’ constitutional race law jurisprudence have derived from the attempt to fit normatively desired practices (including, but not limited to, family law) within the Court’s normatively valueless race law framework.312 Thus, the divergence between doctrine and practice seems likely to only further lead to the fragmentation and intellectual disintegration of race law doctrine, stripping it of even the limited veneer of fairness it derives from its putative mandate of consistency today.

Perhaps, then, prior family law litigants have been right: what is needed is for the Court to take up and address contemporary uses of race

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310 See Parts I-V, supra.
311 Whatever the merits or drawbacks of the Court’s claimed approach to race in the law, it has the veneer of adherence to the rule of law, of an even-handed and neutral decision-making principle. Absent such a veneer, the Court’s actions begin to look troublingly like race politics. For all the reasons that the Court’s race moderates have emphasized, such appearances—whatever the reality—matter. Indeed, few would dispute that it is deeply divisive for the Court to be perceived as a naked power player in the continuing debates over the proper role of race in American society. Cf. Banks, Race-Based Suspect Selection, supra note 6, at 1120 (making a similar point in the context of discussing the problems with treating race-based suspect selection as constitutionally exceptional).
312 See Sections I-V, supra (discussing family law); see also, e.g., Banks, Race-Based Suspect Selection, supra note 6, at 1108-1125 (race-based suspect selection); Siegel, Antibalkanzation, supra note 17, at 1361 (same); cf. Miller v. Johnson, 515 U.S. 900, 916 (1995) (in favored context of redistricting, plaintiff must show that race was the “predominant factor” to trigger strict scrutiny); Grutter, 539 U.S. at 326 (in the disfavored context of affirmative action, only race as a factor is required).
and family law, and to bring them under the strict scrutiny rubric. And indeed, if family law stood alone, such an approach might—despite the long historical record—seem the most plausible approach. There can be no doubt that the Court has turned even further towards constitutional colorblindness in recent years, nor that many of its Justices have a deeply felt normative commitment to eradicating at least certain uses of race from contemporary public life. It might be that faced with the need to cohere contemporary race family law doctrine and affirmative action, that the Justices—whatever their normative beliefs about family law—would prefer the route that does least damage to the Court’s claimed colorblindness agenda.

But family law does not stand alone in its current exemption from the Court’s putatively categorical colorblindness revolution. As scholars such as Rick Banks and Reva Siegel have observed, family law is only one of a number of areas—including race-based suspect selection, non-classifying (but race intentional) efforts to promote integration, and other non-individualized efforts to promote substantive equality—in which the lower courts have consistently declined to apply strict scrutiny review, and in which the Supreme Court has consistently declined to intervene.314 There are strong reasons to believe that this phenomenon (in both the lower courts and in the Supreme Court’s pattern of certiorari denials) derives from precisely the same normative intuitions that appear to have limited the Court’s interventions in the family law context; intuitions that these remaining instantiations of race in public life are normatively benign.315 Indeed, the Court’s current swing Justice (Justice Kennedy) has quite publicly articulated precisely such a view (i.e., an unwillingness to apply strict scrutiny due to normative concerns), in one key area, albeit without further developing the possible doctrinal justification for such an approach.316

313 See notes 193-201, supra and note 274, supra and accompanying text.
314 See sources cited note 6, supra.
315 See, e.g., Banks, supra note 4, at 574-581, 585; Banks, Colorblindness, supra note 6, at 32-37, Banks, Race-Based Suspect Selection, supra note 6, at 1120-1121; Siegel, Antibalkanization, supra note 17; Balkin & Siegel, supra note 4, at 26-28; Jack M. Balkin and Reva B. Siegel, Remembering How to Do Equality in THE CONSTITUTION IN 2020 100-101 (Balkin & Siegel, eds. 2009); cf. notes 293-299, supra (discussing this issue in the family law context).
316 PICS, 551 U.S. at 787-789, 796-798 (Kennedy, J. concurring); see also Siegel, Antibalkanization, supra note 17, at 1308 (making a similar observation about Justice Kennedy’s position in PICS).
Moreover, these non-strict scrutiny uses of race—long relegated to the background in constitutional race law jurisprudence—are currently drifting towards the forefront of contemporary race law jurisprudence.\(^{317}\) (In particular, what might be characterized as “race intentional, but non-racially classifying”\(^{318}\) government actions are increasingly garnering the attention of conservative impact litigation groups, the lower courts and the Court itself).\(^{319}\) As they do, the backdrop against which the Court makes constitutional race law doctrine will shift—away from affirmative action, an area where the Court’s race conservatives have been traditionally eager to apply strict scrutiny—and towards a set of practices that the lower courts (and the Court itself) have historically been reluctant to meaningfully scrutinize.\(^{320}\) And in this context, the set of rules that the Court has set for itself—born in the Court’s long struggles over affirmative action—may no longer seem so appropriate to the Court itself.

\(^{317}\) See note 319, infra.

\(^{318}\) “Race intentional but non-racially classifying” government uses of race embrace any government use of race that seeks to achieve racial results (for example, greater integration), while not distributing benefits and burdens based on individualized racial classification. Thus, this category would include things like Texas’s 10% plan (designed to increase minority enrollment in UT), race-conscious school redistricting (designed to promote integration), and disparate impact doctrine (designed to lessen unnecessary barriers to employment for minority groups). Traditionally, such uses of race have been referred to as “race neutral” by the Court, but in more recent years this characterization has come under pressure both within and outside the Court. See generally Siegel, Antibalkanization, supra note 17.

\(^{319}\) For example, the conservative litigation organization Pacific Legal Foundation has apparently embraced this issue as a core litigation concern, repeatedly urging the Court since 2008 to take it up and require strict scrutiny. See, e.g., Brief of Amicus Curiae of Pacific Legal Foundation, Student Doe 1 v. Lower Merion School Dist., No. 11-1135, 2012 WL 1332585 (2012); Brief Amicus Curiae of Pacific Legal Foundation and Center for Equal Opportunity, City of New Haven v. Briscoe, No. 11-1024, 2012 WL 942965 (2012). And in the Court itself, these types of uses of race—long characterized as “race neutral” and exempted from review—have been subject to increasingly critical interrogation. See, e.g., Grutter, 539 U.S. at 340 (questioning whether 10% plans like Texas’s can properly be characterized as “race neutral”); PICS, 551 U.S. at 2766 (plurality) (declining to express any opinion “even in dicta” on the constitutional validity of race-intentional government actions); Transcript of Oral Argument, No. 11-345, Fisher v. University of Texas at Austin, at 23-24 (Justice Ginsburg, questioning whether Texas’s 10% plan can be characterized as race neutral); see also Siegel, Antibalkanization, supra note 17, at 1283 (making a similar observation); cf. Lewis v. Ascension Parish School Bd., 662 F.3d 343, 349 (5th Cir. 2011) (questioning, in the aftermath of PICS, whether “benign” race-intentional school redistricting can be exempted from strict scrutiny).

\(^{320}\) See sources cited notes 314-316, supra.
For while it is easy to reject the salience of a benign/invidious divide in Equal Protection doctrine in the context of a racial practice that one perceives as invidious (affirmative action), history suggests that it may not be so easy to do so in the context of a practice that one perceives as benign. 321

Thus, it may be that the coming era of constitutional race law doctrine can be seen as one uniquely open to revisiting the long-standing fiction that normative underpinnings do not matter. For, as other scholars have theorized (and as the history of race in family law confirms), the Justices—like the rest of us—do in fact view the world in terms that ascribe normative—and practical—significance to the differing motives and effects of particular government uses of race. 322 Thus, as the Justices’ attention (and in particular that of the Court’s race conservatives) shifts away from the context of affirmative action—a context the Court’s race conservatives have long perceived as malign—and towards more favored practices, it may be that the Court will have a new openness to reimagining its constitutional race law regime. And in this new regime, perhaps, the normative underpinnings of constitutional race law doctrine can be formally embraced at last. 323

And such a development—whatever its substantive outcomes—would be an improvement. In an area as divisive and charged as race, it can only breed cynicism and disrespect for the Court to hold out as the fundamental justification for its actions normative and empirical claims that are not true. Nor can such an approach hope to achieve real progress in solving the genuine problems posed by race in our society. In short, without an honest starting point, we cannot hope to have meaningful conversations about the contemporary constitutional significance of race.

CONCLUSION

321 Id.; see generally Sections I-V, supra.
322 For an extensive discussion of this issue, see Banks, supra note 4; see also sources cited note 321, supra.
323 A full exposition of the specific doctrinal form such a development might take, as well as its implications, are beyond the scope of this paper. Perhaps the most obvious approach would be to develop a framework built around the three foundational principles of the Court’s Equal Protection doctrine that scholars have identified (anticlassification, antibalkanization, antisubordination). See generally Siegel, Antibalkanization, supra note 17. Such a framework could arguably accommodate most of the contemporary results that the Court has reached, while allowing greater flexibility for normative concerns. Id.
As Jed Rubenfeld has observed, it is sometimes only by looking across the sweep of the law that we can understand the Court’s true doctrinal and normative commitments.\textsuperscript{324} The contemporary history of race in family law bears this out, and demonstrates that even within the relatively narrow span of Equal Protection doctrine, a non-holistic view can obscure key insights. Thus, it is only by looking across the spread of Equal Protection doctrine—and particularly at the Court’s complex history as a player in the history of contemporary race family doctrine—that the very partial nature of the Court’s commitment to its colorblindness regime becomes apparent.

This partiality has—or should have—fundamental implications for the Court’s race law doctrine. If there are in fact certain favored uses of race in the law, such uses should be decided—not in accordance with the intuitive and personal views of the Justices—but instead based on some systematic and transparent means of adjudication. Indeed, it is difficult to imagine a more complete abrogation of the rule of law than the Court’s current approach to determining which instantiations of racial decision-making receive favored treatment: decisions made in secret, in complete contradiction of the Court’s formally articulated legal rule, without litigant or other stakeholder input.\textsuperscript{325} It is time to bring such concerns “out in the open,” and to have a real conversation about which government uses of race should survive.

But whither family law’s future under an explicit benign/invidious regime? Critics claim that contemporary uses of race in family law rest on racial stereotypes, and have harmed minority and biracial children by privileging race over all other best interest concerns.\textsuperscript{326} And, such critics have observed, there are many facial similarities between contemporary race-based practices in family law and Jim Crow era practices.\textsuperscript{327} But others have long contended that such practices address very real concerns arising from the identity challenges that minority and biracial children


\textsuperscript{327} See, e.g., KENNEDY, supra note 9, at 3-12, 367-373; Bartholet, supra note 14, at 1175-1178; Ward v. Ward, 216 P.2d 755 (Wash. 1950); see generally Grossman, supra note 37.
face, and that they are necessary to counteract institutional biases against African American caregivers.\textsuperscript{328} And such practices have long had many minority proponents, although minority communities are by no means monolithic in their endorsement of contemporary race-based family law doctrine.\textsuperscript{329}

In short, it is not clear on which side contemporary uses of race in the family should fall of the benign/invidious divide. But it is time for the constitutional conversation to begin.


\textsuperscript{329} See, e.g., NABSW Statement, supra note 350; see also Bartholet, \textit{supra} note 222 at 2352 (noting the divided opinions in both black and white communities about the practice of race-matching in adoption).