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Michael E. Rosman

*The Center for Individual Rights*

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## THE QUIXOTIC SEARCH FOR RACE-NEUTRAL ALTERNATIVES

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Michael E. Rosman\*

The Supreme Court has stated that the narrow-tailoring inquiry of the Equal Protection Clause's strict scrutiny analysis of racially disparate treatment by state actors requires courts to consider whether the defendant seriously considered race-neutral alternatives before adopting the race-conscious program at issue. This Article briefly examines what that means in the context of race-conscious admissions programs at colleges and universities.

Part I sets forth the basic concepts that the Supreme Court uses to analyze race-conscious decision-making by governmental actors and describes the role of "race-neutral alternatives" in that scheme. Part II examines the nature of "race-neutral alternatives" and identifies its various possible meanings, arguing that the idea of a "race-neutral alternative" only makes sense when the goal itself is race-neutral. Part II then carefully considers Supreme Court cases that mention this idea and argues that the Court has given confusing signals. Part III suggests that the idea of "race-neutral alternatives" has been misused when the government's underlying goal is race-conscious; the Court's guidance about what it means to consider a "race-neutral alternative" is practically useless because it has never explained whether that concept includes racially motivated manipulation of facially neutral criteria to achieve a racial goal. Requiring such "race-neutral alternatives" is akin to requiring the serious consideration of a slow-moving alternative to achieving a speed goal. One might well wonder why anyone would do such a counterintuitive thing, and the Court has not yet provided a good explanation.

In the world of race-conscious admissions policies, the concept of a "race-neutral alternative" distracts attention from the more important question: whether having more racial or ethnic minorities at a college or professional school leads to better educational outcomes. I suggest that the Court should eliminate the "race-neutral alternative" requirement in this context. Instead, the Court should focus

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\* General Counsel, Center for Individual Rights. B.A., University of Rochester, 1981; J.D., Yale Law School, 1984.

In the interest of full disclosure, the Center for Individual Rights (CIR) submitted an amicus brief in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), in support of the petitioner. The views expressed in this Article, however, are mine. They do not necessarily reflect or represent the views of CIR as an organization.

more attention on whether the use of race actually leads to the benefits claimed.

## I. AN INTRODUCTION TO STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

Race-conscious decisions by government actors are subject to “strict scrutiny.” Traditionally, strict scrutiny in this context means that “racial ‘classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.’”<sup>1</sup>

Much attention focuses on whether a particular interest—and especially whether an interest in the real or perceived benefits of “diversity” in education—is a compelling governmental interest.<sup>2</sup> For the purposes of this Article, I assume that “educational benefit” is a compelling interest.

Defenders of race-conscious admissions policies argue that a “diverse” student body—one that includes students from a wide variety of backgrounds—enhances learning and creates educational benefits.<sup>3</sup> They assert that “racial diversity”—defined as a class composed of a certain percentage of racial minorities—is an essential component of that broader concept of diversity because race is an important part of each person’s background.<sup>4</sup> Moreover, they contend that the conscious use of race or ethnicity in admissions is necessary to achieve the desired educational benefit.<sup>5</sup> Such necessity, it would seem, is the minimum required by “narrow tailoring.”<sup>6</sup>

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1. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

2. See e.g., *Fisher*, 133 S. Ct. at 2422–25 (Thomas, J., concurring); *Grutter*, 539 U.S. at 327–33; *id.* at 354–61 (Thomas, J., concurring and dissenting).

3. See e.g., *Grutter*, 539 U.S. at 319 (“[T]he Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom.”).

4. Although the Court has denied that it permits a quota, it has approvingly identified the Harvard Plan discussed in Justice Powell’s opinion in *Regents of the University of California v. Bakke* as consistent with the Constitution and acknowledged that such a plan has “minimum goals for minority enrollment, even if it ha[s] no specific number firmly in mind.” *Grutter*, 539 U.S. at 335 (emphasis in original). See generally *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (opinion of Powell, J.) (discussing the Harvard Plan). The Court has not said precisely what the “minimum goal” might be if it is not a “specific number firmly in mind.” See *Grutter*, 539 U.S. at 316 (noting that the Law School sought to enroll a “critical mass” of underrepresented minority students).

5. *Grutter*, 539 U.S. at 328.

6. *Grutter*, 539 U.S. at 327 (“When race-based action is *necessary* to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.”) (emphasis added). Although this quote suggests that perhaps “necessity” is something apart from narrow tailoring, other cases place it in the “narrow tailoring” basket. *Fisher*, 133 S. Ct. at 2420 (“Narrow

The Court has essentially agreed with this line of argument in the context of university admissions. In expounding on the concept of “necessity,” the Court has said that both universities and courts must consider whether “race-neutral alternatives” can achieve the benefits of diversity.<sup>7</sup> If the university does not consider viable race-neutral alternatives, the consideration of race is not narrowly tailored and fails strict scrutiny. To understand exactly what “race-neutral alternatives” mean in this context—or more accurately, to understand the possible meanings—a brief case law digression is necessary.

## II. THE COURT’S USE OF THE “RACE-NEUTRAL ALTERNATIVE” CONCEPT

Before assessing whether something is “race-neutral,” one must define what “race-neutral” means. This Section posits a connection between the “neutrality” of the means used to achieve a goal and the goal itself. Specifically, this Section argues that it is very difficult to define a “race-neutral alternative” if the underlying goal is racial. It then examines how the Supreme Court has muddied the idea of “neutrality” in both admissions and non-admissions cases by ignoring this tension.

### A. *The Importance of Identifying Goals*

The concept of a race-neutral alternative depends significantly on the goal. A race-neutral alternative to achieving a race-neutral goal is fairly easy to imagine. Suppose the goal is to reduce highway deaths (which certainly sounds compelling) and it happens that one ethnicity is disproportionately causing fatal highway accidents. One could propose lowering the speed limit only for that ethnicity. But since that ethnicity is not *exclusively* causing highway accidents, there seems an obvious race-neutral alternative: lower the speed limit for everyone. Or, in terms of “necessity,” it is not necessary to single out one ethnicity to achieve the goal of reducing highway

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tailoring also requires that the reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity.”) (citing *Bakke*, 438 U.S. at 305); *United States v. Paradise*, 480 U.S. 149, 171 (1987) (providing that narrow tailoring includes “the necessity for the relief and the efficacy of alternative remedies”).

7. *Fisher*, 133 S. Ct. at 2420 (“Consideration by the university [of race-neutral alternatives] is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the education benefits of diversity.”).

fatalities. Accordingly, a hypothetical law lowering the speed limit for the ethnicity causing a disproportionate number of fatal accidents would be unconstitutional because there is a race-neutral alternative that achieves the same objective. As a result, a law that singles out one ethnicity is not narrowly tailored and cannot survive strict scrutiny analysis.

The Supreme Court has found only a few governmental interests that are sufficiently “compelling” to survive strict scrutiny in race-conscious decision-making.<sup>8</sup> One such interest is “remedying the effects of past intentional discrimination.”<sup>9</sup> What are those effects? One possible effect is that a government agency pays more for construction contracts than it otherwise would (because, for example, it discriminatorily excluded minority-owned low-cost contractors from bidding). The remedy for higher costs, then, would be lower costs. One *could* achieve lower costs by carefully scrutinizing the bids of previously successful white-owned contracting companies and requiring them to justify any profit over a particular percentage. But a race-conscious remedy does not appear necessary to achieve the goal of lower costs. One can achieve lower costs simply by permitting all qualified contractors to bid—that is, the agency can just stop discriminating.

A second possible effect of past discrimination might be that a particular person has been deprived of certain benefits. But, again, remedying a particular person’s injury does not really require race-conscious efforts by the government. Providing damages to other members of the injured party’s racial group, for example, would not necessarily remedy that individual’s losses. One can simply measure the injury and provide (or require those who caused the injury to provide) compensation.<sup>10</sup>

Yet a third effect of past discrimination, particularly of systemic discrimination, is that there may be fewer members of particular races in higher education, professions, or specific industries. If the goal is to remedy *that* effect, it presumably means striving to have more members of those races in those areas. But if the *goal itself* is a

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8. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (noting that “our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling”).

9. *Id.*

10. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring) (“[A] State may ‘undo the effects of past discrimination’ in the sense of giving the identified victim of state discrimination that which it wrongfully denied him . . . . Nothing prevents Richmond from according a contracting preference to identified victims of discrimination.”). From the context, I assume that Justice Scalia is referring to the contracting preference as a kind of compensation in lieu of damages.

racial goal, then trying to achieve it in a “race-neutral” way seems impossible or quixotic.<sup>11</sup>

*B. “Race Neutrality” in Non-Admissions Cases*

Unfortunately, the Supreme Court has not distinguished between these two kinds of goals in considering the requirement of race-neutral alternatives or the broader requirement of “necessity.” If anything, the Court has confused the matter. It has suggested, but never explicitly held, that facially neutral measures designed to achieve a racial goal are “race-neutral.”<sup>12</sup> Yet the Court has also suggested, without explicitly holding, just the opposite.<sup>13</sup>

In 1989, Justice Sandra Day O’Connor, writing for the Court, first articulated the idea of a race-neutral alternative in *City of Richmond v. J.A. Croson Co.*<sup>14</sup> The Court found that a set-aside program, called the Richmond Plan, for city construction contracts violated the Equal Protection Clause.<sup>15</sup> The discussion of race-neutral alternatives in the narrow-tailoring analysis was relatively brief:

As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means *to increase minority business participation* in city contracting. . . . Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If [minority-owned businesses] disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of

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11. Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1787 (1996) (arguing that face-neutral, but racially-motivated, remedies must still meet strict scrutiny and that such remedies are overinclusive because they benefit whites that are not part of the class of harmed individuals). Professor Ayres, focusing more on the contracting preferences that were at issue in *Croson*, considers two possible justifications for facially-neutral, racially-motivated remedies: opaqueness (that is, the inability to discern the racial motivation) and avoiding determinations about the race under which a particular individual should be classified. *See id.* at 1793–1800. He ultimately rejects both. *See id.*

12. *See Croson*, 488 U.S. at 507.

13. *Gutter v. Bollinger*, 539 U.S. 306, 340 (2003). *See discussion infra* Section II.C, pp. 9–15.

14. 488 U.S. 469 (1989).

15. *Id.*

city financing for small firms would, *a fortiori*, lead to greater minority participation.<sup>16</sup>

The Court appears to suggest that facially-neutral (even if race-motivated) means can achieve a race-conscious goal in a more narrowly-tailored way than the explicit use of race. If past discrimination created a shortage of minority contractors, the Court suggests that Richmond can “remedy” that effect by giving money to all small contractors through “a race-neutral program of city financing.” Coincidentally, this remedy permits minority firms to bid on contracts when they otherwise might lack the resources to do so.

In a later part of the opinion, a plurality of the Court stated that Richmond had “a whole array of race-neutral devices” available “[e]ven in the absence of evidence of discrimination.”<sup>17</sup> The plurality suggested “[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races” as means of “open[ing] the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.”<sup>18</sup> The plurality asserted that barriers to new entrants “may be the product of bureaucratic inertia more than actual necessity” and that “[t]heir elimination or modification would have little detrimental effect on the city’s interests . . . .”<sup>19</sup> The plurality did not identify the source of its newfound expertise on contracting procedures. And, of course, it did not state how much “training and financial aid for disadvantaged entrepreneurs of all races”<sup>20</sup> would cost the City of Richmond.

Nonetheless, the Court itself (as opposed to the plurality) did *not* say that bonding or capital requirements were generally unnecessary or that Richmond should not have imposed them in the first place. Thus, the Court’s “race-neutral” solution was more than simply the elimination of inappropriate barriers to small business success: it would have required working around otherwise apparently legitimate barriers.

There are several rejoinders to the Court’s solution here. First, a race-neutral program of financing for all small contractors might be quite expensive—perhaps a lot more expensive than simply setting aside contracts for minority contractors. A proposal to implement the Court’s suggestion could well raise the following question: if the

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16. *Id.* at 507 (emphasis added).

17. *Id.* at 509 (plurality op.).

18. *Id.* at 509–10.

19. *Id.* at 510.

20. *Id.*

government has a compelling interest in increasing *minority* firm participation, why should we provide financing to firms that are *not owned by minorities*?

Second, and relatedly, a race-neutral program of financing might not increase the proportion of minority-owned firms receiving city contracts. After all, while financing minority-owned small firms is likely to increase the proportion of those firms procuring city contracts, financing non-minority-owned small firms is likely to counteract that effect. Even assuming the former effect outweighs the latter, the degree to which it will is difficult to predict. Thus, if the goal is to increase the proportion of minority-owned firms procuring city contracts, a race-neutral financing scheme is likely to be *inefficient*.

Finally, one can question whether a “race-neutral” system of financing small businesses is “race-neutral” in any meaningful sense of the term when the purpose of such a system is *to increase the number of minority-owned firms obtaining city contracts*. After all, that purpose is what the Court presumably intended when it claimed that such a program would lead to greater minority participation. Indeed, such policies would normally be considered race-conscious and subject to strict scrutiny.<sup>21</sup>

The same should hold true in the admissions context. A policy whose purpose is to achieve a particular racial goal should not be considered “race-neutral.” If a medical school began to consider singing ability as a criterion for admissions only because it was convinced that more applicants from a particular race would be offered admission as a consequence, would that really constitute “race-neutral” admissions?

### C. “Race-Neutral Alternatives” in Admissions and the Texas Plan

The meaning of “race neutrality” is peripherally part of the Court’s education and admissions cases.<sup>22</sup> When circumstances

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21. *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (“[S]tatutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object.”).

22. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting).



have required states to abandon explicitly using race in admissions,<sup>23</sup> some have adopted facially-neutral rules designed to achieve racial goals. The most well-known of these is the Texas “Top Ten Percent Plan,” enacted in the wake of a Fifth Circuit Court of Appeals decision finding that the state lacked a compelling governmental interest in using race in admissions for the University of Texas Law School at Austin.<sup>24</sup> That plan automatically admitted students ranked in the top ten percent of their high school classes to Texas public universities, including the University of Texas.<sup>25</sup> Many Texas high schools have student populations with one predominant racial group—that is, the students at many high schools are mostly white, African-American, or Hispanic.<sup>26</sup> Accordingly, the Top Ten Percent Plan actually led to a significant number of minority admissions to the University of Texas each year.<sup>27</sup> In fact, both the absolute numbers of African-Americans and Hispanics at the University of Texas in 2004 and their percentage of the entire class were the same or higher than in 1993 (when race had been an explicit admissions factor).<sup>28</sup>

It is widely believed that the Texas legislature adopted the Ten Percent Plan to increase the number of minorities admitted, not because it decided that class rank alone, without benefit of any score from a standardized text, was the best means of assessing who would be the best students.<sup>29</sup> Indeed, Texas’s brief to the Supreme

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23. A number of states have passed laws by referendum precluding any state entity (including state universities) from discriminating against or granting preferential treatment to any person on the basis of race or ethnicity. *E.g.*, CAL. CONST. art. I, § 31; WASH. REV. CODE § 49.60.400 (2012); MICH. CONST. art. I, § 26; NEB. CONST. art. I, § 30.

24. *See* *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (holding, among other things, that diversity was not a compelling governmental interest). *But see* *Grutter*, 539 U.S. at 328 (2003) (holding that diversity is a compelling governmental interest).

25. TEX. EDUC. CODE ANN. § 51.803 (West 2012). Some minor modification to the University of Texas at Austin’s obligation to accept “top 10%” students, unimportant to the discussion here, was made beginning in the 2011–12 academic year. *See id.* § 51.803(a-1). Other states have similar programs. *E.g.*, Local Path (ELC), UNIVERSITY OF CALIFORNIA, <http://admission.universityofcalifornia.edu/freshman/california-residents/local-path/index.html> (last visited Mar. 22, 2014) (describing a top 9% plan for the University of California).

26. *Fisher*, 133 S. Ct. at 2433 (2013) (Ginsburg, J., dissenting) (quoting H. RESEARCH ORGANIZATION, BILL ANALYSIS, H.B. 588, 75th Sess. at 4–5 (Tex. 1997)).

27. *See infra* note 28.

28. *Fisher v. University of Texas at Austin*, 631 F.3d 213, 223–24 (5th Cir. 2011) (noting that there were 238 African Americans and 832 Hispanics in the freshman class entering in 1993, constituting 4.5% and 15.6%, respectively, of the overall class, and that there were 309 African-Americans and 1149 Hispanics in the entering class of 2004, constituting 4.5% and 16.9% of the overall class), *rev’d*, 133 S. Ct. 2411 (2013). In 1994 and 1995, while the University continued to use race as an admissions factor, minority enrollment decreased slightly. *Id.* at 223 n.47.

29. *Cf.* 2009 Tex. Gen. Laws 4252 (“The purpose of the reforms provided for in this Act is to continue and facilitate progress in general academic institutions in this state with regard

Court in *Fisher v. University of Texas at Austin* took this position. It asserted that “increas[ing] minority admissions” was “[a]n acknowledged purpose of the law,” which came “at significant cost to educational objectives.”<sup>30</sup>

In *Grutter v. Bollinger*,<sup>31</sup> the Court hinted that the motive for adopting facially neutral admissions criteria may preclude a finding that the use of race in admissions was narrowly tailored. The United States (as an amicus) argued that “percentage plans,” like those in Texas, were race-neutral alternatives to the race-conscious admission plan at issue in that case.<sup>32</sup> Unlike in *Croson*,<sup>33</sup> the Court in *Grutter* seemed to reject that argument and questioned whether such a plan could be race-neutral if its motive were race-conscious.<sup>34</sup>

More generally, the Court identified various other problems with the “percentage plans” that the United States touted in its amicus brief. For example, it noted that “[t]he United States does not . . . explain how such plans could work for graduate and professional schools.”<sup>35</sup> Further, “[these plans] may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”<sup>36</sup>

The Court also rejected other “race-neutral” plans because they would have required the law school to abandon its commitment to other kinds of diversity and/or academic excellence.<sup>37</sup> One plan proposed diminished emphasis on grades and tests scores while continuing to assess non-racial forms of diversity.<sup>38</sup> The Court described this as a “drastic remedy” that might result in a “dramatic” sacrifice of academic quality (although it did not explain how it

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to the racial, ethnic, demographic, geographic, and rural/urban diversity of the student bodies of those institutions . . .”). See generally *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting); *Fisher v. University of Texas at Austin*, 631 F.3d 213, 224 (5th Cir. 2011) (“The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose.”), *rev’d*, 133 S. Ct. 2411 (2013); Brian Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 292, 321–29 (2001); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 287–88 (2000).

30. Brief for Respondents at 8, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

31. 539 U.S. 306 (2003).

32. *Id.* at 340.

33. 488 U.S. 469, 493 (1989).

34. 539 U.S. at 340 (“Moreover, even assuming such plans are race-neutral . . .”).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

knew that).<sup>39</sup> A second proposed race-neutral alternative was a lottery.<sup>40</sup> But, as with the Top Ten Percent Plan, one can also question whether the proposed lottery suggestion was “race-neutral.” The argument, raised by those challenging the constitutionality of the current admissions system, was that the law school could achieve similar levels of *racial diversity* by using a lottery. The Court, however, did not expressly address whether such a solution would be “race-neutral.”

The tension between *Crososon* and *Grutter* is clear. Why should the City of Richmond spend unknown amounts of money (with a concomitant increase in taxes on its citizens) on a “race-neutral” financing system for all small businesses when the University of Michigan Law School need not even generally moderate its admissions requirements for fear that the academic quality of its students (measured solely by their GPA and LSAT scores) might be lowered?<sup>41</sup> Surely, one can argue that the City of Richmond has an interest in preserving the public fisc that is at least equal to the law school’s interest in “maintaining a reputation for excellence”<sup>42</sup> (which is apparently highly sensitive to the GPA and LSAT scores of its students). The Court appears inconsistent in its treatment of different compelling interests—or, perhaps, different defendants.

In *Fisher v. University of Texas at Austin*,<sup>43</sup> the Court considered an admissions system for undergraduates that continued to use the Top Ten Percent Plan but that also explicitly considered race as a potential diversity factor for those not admitted under the plan. The Court did not address whether the Top Ten Percent Plan was race-neutral nor what the consequences would be if it were not.<sup>44</sup> Rather, it simply reiterated the following rule from *Grutter*: narrow tailoring does not require the consideration of every conceivable race-neutral alternative but does require the good-faith consideration of “workable” race-neutral alternatives.<sup>45</sup> It did not state whether Texas’s Top Ten Percent Plan was either “race-neutral” or

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39. *Id.*

40. *Id.*

41. I say “generally” because the Court surely understood that the law school *was* modifying its admissions criteria—that is, admitting students with lower credentials on undergraduate GPA and the LSAT test—to provide a racial preference. *Id.* at 320 (noting the testimony of the law school’s expert that race-neutral admissions would have a very dramatic negative effect on underrepresented minority admissions). Thus, it may have been a bit disingenuous of the Court to suggest that the law school should not have had to lower its academic standards just to find a “race-neutral” method of admitting more minorities.

42. *Id.* at 339.

43. 133 S. Ct. 2411 (2013).

44. In *Fisher*, plaintiffs had not challenged the Top Ten Percent Plan. *Fisher v. University of Texas at Austin*, 631 F.3d 213, 242 n.156 (5th Cir. 2011), *rev’d*, 133 S. Ct. 2411 (2012).

45. *Fisher*, 133 S. Ct. at 2420.

“workable” (although it would presumably pass the latter requirement since Texas actually employed it for some time). Indeed, as the discussion in this Section shows, the Court has never supplied satisfactory definitions for these terms. Nor has it discussed what role the motivation behind a policy might play in determining whether it is “race-neutral.”

Justice Ginsburg, the sole dissenter in *Fisher*, however, had no problem claiming that “only an ostrich could regard the supposedly neutral alternatives as race unconscious.”<sup>46</sup> She insisted that “i[t] is race consciousness, not blindness to race, that drives such plans.”<sup>47</sup>

But the Court did not respond to Justice Ginsburg’s claim. In *Crosby*, it had suggested a “race neutral alternative” could be a policy that is facially neutral, but designed to achieve a racial goal.<sup>48</sup> The Court’s unwillingness to decide whether motive is a determining factor as to whether a policy is race-neutral leaves little guidance for future litigation.

### III. RACE-NEUTRALITY RECONSIDERED

Whether considering the potential of a race-neutral alternative should be part of “strict scrutiny” depends on the compelling governmental interest. If the compelling interest is “national security,” by all means every race-neutral alternative should be considered before resorting to race. On the other hand, if the goal is “more African American engineers”—or “more African American engineers” is essential to some other compelling interest—it seems disingenuous to suggest that we should consider a “race-neutral” alternative to a race-conscious goal. Almost by definition, the “race-neutral” means will not be race-neutral if they are designed to reach the race-conscious goal.

Thus, when a race-conscious goal is at issue, the consideration of a “race-neutral” alternative seems misplaced as an element of narrow tailoring. Rather, the analysis should consider the possibility of

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46. *Id.* at 2433 (Ginsburg, J., dissenting); *cf.* *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (Ginsburg, J., dissenting) (asserting that it is “disingenuous” to characterize percentage plans as “race-neutral”). Justice Ginsburg’s attack on race-neutral alternatives seemed to extend to “race-blind holistic review of each applicant,” apparently because universities *might* resort to camouflage in such review to enroll more minorities. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting). No doubt that is true, but the same could be said about any subjective criteria, such as evaluation of writing ability. In and of itself, the mere potential for manipulation should not be sufficient to characterize any process as race-conscious.

47. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

48. *See supra* Part II.B.

a race-neutral alternative to the compelling interest.<sup>49</sup> Suppose a local government identifies a dearth of minority-owned companies in a particular industry. One solution could require government actors to consider, as part of the strict scrutiny analysis, whether the absence of minority-owned companies is part of a larger problem, like the lack of companies owned by low-income individuals of all races or the start-ups' inability to obtain valuable experience. If a plaintiff challenging a race-conscious program can demonstrate that there is a larger problem that the government entity has ignored or overlooked (i.e., a race-neutral goal), a court then could conclude that the defendant really did not have a compelling governmental interest to use race in the first place.

In any event, no narrow-tailoring analysis is necessary when the Court, as it did in *Croson*, concludes that there is no compelling governmental interest because the government failed to demonstrate that the absence of minorities is attributable to past discrimination.

When we consider race-conscious admissions to colleges and universities, the debate should not be about whether a race-motivated but facially neutral plan like Texas's Top Ten Percent Plan is more "narrowly-tailored" than a system that openly uses race. Rather, it should be about whether the goal—or, more accurately, the government's compelling interest—includes racial diversity.<sup>50</sup> Those who favor an openly race-conscious admissions system insist that it should. If they are right, using a pretextual method to obtain the needed racial diversity is just bizarre.

And those who oppose such admissions should either, like Justice Thomas, argue that "educational benefits" are not a compelling governmental interest or that they can be achieved without *racial* diversity.<sup>51</sup> Thus, a number of scholars propose class-based affirmative action as an alternative to race-based affirmative action.<sup>52</sup> Their arguments should be that class-based affirmative action successfully provides the same benefits of diversity in higher education.<sup>53</sup> They should *not* argue that class-based affirmative action is a "race-neutral

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49. Cf. Michael E. Rosman, *Thoughts on Bakke and its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL F. 45, 69 n.93 (2002).

50. As mentioned earlier, we can assume that the educational benefits of "diversity" are compelling for purposes of this Article. See discussion *supra* Part I, pp. 2–4.

51. *Grutter v. Bollinger*, 539 U.S. 306, 354–61 (2003) (Thomas, J., dissenting).

52. See, e.g., RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996).

53. *Id.* at 83–120.

alternative” because it achieves a substantial amount of racial diversity.<sup>54</sup>

#### IV. CONCLUSION

This brief examination of race-neutral alternative jurisprudence has argued that the Court misconceives what “race-neutral” actually means. One cannot consider whether something is a “race-neutral” alternative until one examines the goal more carefully. Meaningful race-conscious goals cannot be achieved by “race-neutral” means. For purposes of the debate over the use of race-conscious admissions system in higher education, that debate should center around whether there are unique educational benefits from racial diversity and whether those unique—and marginal, in the sense that they purport to provide additional educational benefits beyond what a student body diverse in non-racial ways would provide—benefits are compelling. It cannot be about whether we can behave ostrich-like (to borrow Justice Ginsburg’s notion) and ignore the obvious racial motivation behind facially neutral selection criteria.

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54. Kahlenberg sometimes makes this suggestion. See Richard Kahlenberg, *Online Fisher Symposium: Race-Neutral Alternatives Work*, SCOTUSblog (Sept. 4, 2012, 4:36 PM), <http://www.scotusblog.com/2012/09/online-fisher-symposium-race-neutral-alternatives-work> (noting the racial outcomes of Texas’s admissions systems after *Hopwood*).

