

Comment

Once Unified: The Supreme Court Split On Affirmative Action

*By CATHERINE CRIDER**

I, [Sonia Sotomayor], am a Puerto Rican born and raised in the South Bronx from what is traditionally described as a socio-economically poor background. . . .

I was accepted rather readily at Princeton and equally as fast at Yale. But my test scores were not comparable to that of my classmates¹

THIS STATEMENT would have been unthinkable at one point in the history of the United States, and it certainly would have never come from the mouth of a Supreme Court Justice. With education viewed as a privilege, reserved only for the white elite for a large part of the country's early history,² the failure to provide equal education to all has now become a source of shame.³ The United States, however, has evolved since its colonial times and the idea of affirmative action has changed the American education system. Affirmative action was introduced over fifty years ago in large part to repair the damage of the past. Controversial since its inception, affirmative action contin-

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1. ANTONIA FELIX, SONIA SOTOMAYOR: THE TRUE AMERICAN DREAM 39 (2010) (quoting Justice Sotomayor's remarks at a Practising Law Institute panel discussion in the early 1990s); see also *Practising Law Institute Panelist*, N.Y. TIMES 42:30 (June 10, 2009), <http://www.nytimes.com/video/us/politics/1194840834851/practicing-law-institute-panelist.html>.

2. See *Brown v. Board of Education*, 347 U.S. 483, 489–90 (1954) (discussing rudimentary public school system in northern schools and lack of public school system in the South).

3. See *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003) (discussing law school's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans").

ues to be an issue before the Supreme Court as individuals seek to further understand its meaning and question its necessity.⁴

Affirmative action was first mentioned in March 1961 by Executive Order 10925,⁵ which mandated “affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”⁶ This Order was followed four years later by Executive Order 11246,⁷ which implemented affirmative action in government contracts.⁸ The responsibility to clarify what exactly the U.S. Constitution allows in regards to affirmative action has since fallen on the judicial branch. Numerous court cases have come before the Court with lawyers arguing that affirmative action has resulted in violation of their clients’ Fourteenth Amendment rights.⁹

Although the Court’s opinion in *Brown v. Board of Education*¹⁰ was a unanimous one, the Court has since become divided on the issue of affirmative action. Evidence of this division comes in the numerous multipart—concurring and dissenting—opinions. Since *Brown*, justices have signed onto numerous lengthy opinions while also writing their own separate concurring and dissenting opinions.¹¹ With the most recent case of *Fisher v. University of Texas*,¹² Americans were hoping for an answer about the future of affirmative action,¹³ which a divided Court ultimately failed to provide. Such a failure does not come as a surprise, however, when one looks at the previous decisions involving affirmative action and sees how time has only widened the divide in the Court over this issue.

In an effort to better understand the Supreme Court split over affirmative action, this Comment will examine the pivotal education-

4. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

5. 3 C.F.R. 448 (1959–1963).

6. Exec. Order No. 10925, 3 C.F.R. 448, 450 (1959–1963).

7. 3 C.F.R. 339 (1964–1965).

8. Exec. Order No. 11246, 3 C.F.R. 339 (1964–1965).

9. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

10. 347 U.S. 483, 486 (1954).

11. See *infra* text accompanying notes 36–41 (*Bakke*), 52–59 (*Grutter*), 70–75 (*Gratz*), and 81–86 (*Parents Involved*).

12. 133 S. Ct. 2411.

13. See Lyle Denniston, *Argument Preview: Is Affirmative Action About to End?*, SCOTUS-BLOG (Oct. 9, 2012, 12:02 AM) (asking whether the Court will “declare an end, constitutionally, to ‘affirmative action’ as a public policy”).

related affirmative action cases from the last fifty years. First, examining *Brown* sets an important backdrop for later affirmative action cases. Next, looking at the cases prior to *Fisher* in chronological order shows how splits in the Court began and continue to grow. Finally, examining the opinions in the most recent education affirmative action case before the Court, *Fisher*, reveals that the split clearly is still alive and well.

I. The Backdrop: *Brown v. Board of Education*

Although *Brown* was decided prior to Executive Order 10925 and therefore predates affirmative action, it demonstrates a critical shift in the thinking of the U.S. Supreme Court in regards to race relations and education. In many ways, it represents the last time the Court was unified in their opinion of race and education. A consolidated opinion, *Brown* decided four different cases brought from Kansas, South Carolina, Virginia, and Delaware.¹⁴ The consolidated cases included different specific facts, but in each case, “minors of the Negro race . . . [sought] the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis.”¹⁵ All of the minors in question were denied admission to schools attended by white children under state school segregation laws.¹⁶ In every case, except the Delaware case,¹⁷ the federal district court denied relief for the plaintiffs based on the “separate but equal” doctrine announced by the Supreme Court in *Plessy v. Ferguson*.¹⁸

A unanimous decision of Chief Justice Warren and Justices Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, and Minton, *Brown* begins with a discussion of the Court’s investigation into the Fourteenth Amendment’s intended effect on public education, and its ultimate finding that, “[w]hat others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.”¹⁹ In writing the opinion of the Court, Chief Justice Warren discussed in considerable space the status of public education and its evolution since the passing of the Fourteenth Amendment.²⁰ He also

14. *Brown*, 347 U.S. at 486.

15. *Id.* at 487.

16. *Id.* at 487–88.

17. In the Delaware case, the “separate but equal” doctrine was still upheld; however, the court found that the plaintiffs must be allowed admission to the white schools because of the white school’s superior nature. *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952).

18. 163 U.S. 537 (1896); *Brown*, 347 U.S. at 488.

19. *Brown*, 347 U.S. at 489.

20. *Id.* at 490–92.

noted lower court findings that “the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.”²¹ As a result of uncertainty about the legislative intent of the Fourteenth Amendment in regards to public education and a lack of difference in tangible factors, the Court explicitly stated its decision could only be based upon “the effect of segregation itself on public education.”²²

When determining the effect of segregation, the Court first addressed whether equality in education was even necessary and looked at “public education in the light of its full development and its present place in American life.”²³ Considering the amount spent on education, the role education played in preserving cultural values / teaching civic responsibility, and its necessity for professional training, the Court found that the state had undertaken to provide an essential opportunity, which the state must make available equally to all.²⁴ Next, the Court addressed whether segregation alone deprived minority children of equal educational opportunities.²⁵ Chief Justice Warren left no doubt about the Court’s findings on this issue, explaining, “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁶

The *Brown* decision explicitly overturned the Court’s previous ruling in *Plessy*²⁷ and eliminated the “separate but equal” doctrine in public education.²⁸ The Court in *Brown* went so far as to find that separate educational facilities were inherently unequal and segregation was a denial of equal protection under the Fourteenth Amendment.²⁹ This decision and the Court’s findings on the importance of education and diversity for all provided an important foundation for the affirmative action cases to come. By presenting a unified opinion, the Court left no question as to its views on segregation. Recognizing the culture of the time and the necessity of a unanimous opinion in

21. *Id.* at 492.

22. *Id.*

23. *Id.*

24. *Id.* at 493.

25. *Id.*

26. *Id.* at 494.

27. 163 U.S. 537 (1896).

28. *Brown*, 347 U.S. at 494–95.

29. *Id.* at 495.

Brown, Chief Justice Warren worked tirelessly to unify the Court.³⁰ Sadly, this harmonious spirit would not continue in future affirmative education cases.

II. A History of Fifty Years of Division in Affirmative Action Cases

Following the creation of affirmative action through Executive Order 10925,³¹ the Court's decision in *Brown* was turned on its head; the Court was faced with addressing the constitutionality of *preference* being given to minority students. Ethnic majority students rejected from institutions of higher learning came before the Court to argue that various admission systems supporting affirmative action infringed upon their Fourteenth Amendment rights.

A. *Regents of the University of California v. Bakke*

The first of the education affirmative action cases to reach the Court was *Regents of the University of California v. Bakke*.³² Involving medical school admissions at the University of California, Davis, the key question for the Court in *Bakke* was the constitutionality of an admissions system that required "the admission of a specific number of students from certain minority groups."³³ The program in question "consisted of a separate admissions system operating in coordination with the regular admissions process."³⁴ Candidates under the separate admissions system were reviewed by a separate committee and were not required to have the minimum 2.5 grade point average that was mandatory in the regular admissions process.³⁵

In contrast to the unanimity of *Brown*, Justice Powell announced the Court's fragmented judgment and a multi-part plurality opinion.³⁶ Justice White joined in Parts I, III-A, and V-C.³⁷ Justices Brennan, Marshall, and Blackmun also joined in Parts I and V-C.³⁸ Justices Brennan, White, Marshall, and Blackmun filed an additional opinion concur-

30. See Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in Brown*, 49 N.Y.L. SCH. L. REV. 741, 761–64 (2004–2005) (discussing Chief Justice Warren's efforts and attempts to persuade the Court, especially Justice Reed, to avoid a split decision).

31. Exec. Order No. 10925, 3 C.F.R. 448 (1959–1963).

32. 438 U.S. 265 (1978).

33. *Id.* at 269–70.

34. *Id.* at 272–73.

35. *Id.* at 274–75.

36. *Id.* at 269.

37. *Id.* at 272 n.‡.

38. *Id.*

ring in part and dissenting in part.³⁹ In addition, Justices White, Marshall, and Blackmun each filed separate opinions.⁴⁰ Justice Stevens filed an opinion concurring in part and dissenting in part in which Chief Justice Burger and Justices Stewart and Rehnquist joined.⁴¹ The result of all of these opinions was two different plurality decisions that agreed with parts of Justice Powell's opinion, but not the same part.

Justices Brennan, White, Marshall, and Blackmun felt that race could be used constitutionally as a factor when it was for the purpose of remedying substantial chronic underrepresentation of certain minorities;⁴² however, Justice Powell's controlling opinion found that the use of *explicit* racial classification violated the individual rights guaranteed by the Fourteenth Amendment.⁴³ Because race is an inherently suspect distinction, plaintiff Allan Bakke was entitled to a showing that the classification was necessary to promote a substantial state interest under the majority opinion.⁴⁴ While race as a classification was not necessary for the university to meet its goals as outlined, the controlling opinion did note that competitive consideration of race could be considered a substantial interest.⁴⁵ Justice Powell's decision left open the option of race-conscious admission programs in the future.⁴⁶ Race could be deemed a "plus," but it could not insulate the applicant from comparison with all other candidates.⁴⁷ This first decision on affirmative action left the Court split almost exactly in half and left many questions in regards to what was an acceptable plus.

B. *Grutter v. Bollinger*

Next in the line of education affirmative action cases was *Grutter v. Bollinger*.⁴⁸ In *Grutter*, a law school applicant at the University of Michigan sued the university after being denied admission.⁴⁹ The law school admissions program in question focused on academic ability; however, it also included an assessment of "applicants' talents, experiences, and potential."⁵⁰ While it did not define diversity solely in

39. *Id.* at 324.

40. *Id.* at 379–408.

41. *Id.* at 408.

42. *Id.* at 369.

43. *See id.* at 320.

44. *Id.* at 305.

45. *Id.* at 320.

46. *Id.* at 326.

47. *Id.* at 317–18.

48. 539 U.S. 306 (2003).

49. *Id.* at 316.

50. *Id.* at 315–16.

terms of race, the plaintiff argued, it did consider factors that predominantly affected diversity.⁵¹

Justice O'Connor delivered the opinion of the highly divided Court, in which Stevens, Souter, Ginsburg, and Breyer joined in full.⁵² Justice Ginsburg filed a concurring opinion, in which Justice Breyer also joined.⁵³ Justice Thomas joined with Justice Scalia in an opinion written by Justice Scalia concurring in part and dissenting in part.⁵⁴ Justice Thomas also wrote his own opinion concurring in part and dissenting in part.⁵⁵ Justice Scalia joined in Justice Thomas' opinion as to Parts I–VII.⁵⁶ Justices Scalia and Thomas joined the majority opinion to the extent that it was consistent with the views expressed in Part VII of Justice Thomas' opinion.⁵⁷ Justices Scalia, Kennedy, and Thomas joined in the dissenting opinion filed by Chief Justice Rehnquist.⁵⁸ Justice Kennedy also filed a dissenting opinion in the case.⁵⁹

O'Connor's 5-4 majority opinion found a compelling interest in promoting class diversity.⁶⁰ It also held that a "race-conscious admissions process" did not amount to an unconstitutional quota system under *Bakke* and that such a process may favor "underrepresented minority groups" so long as other factors are analyzed on an individual basis for every applicant.⁶¹ Justices Ginsburg and Breyer concurred in the judgment of the Court but wrote separately against O'Connor's belief that affirmative action measures would be unnecessary in twenty-five years.⁶²

Written by Chief Justice Rehnquist, the main dissent in the case argued that the University of Michigan's plus system was just a thinly veiled, unconstitutional quota system.⁶³ Justice Kennedy joined in this opinion and argued in a separate dissent that the Court failed to apply strict scrutiny as required in *Bakke*.⁶⁴ These and the other dissents in the case showed very clearly that although the majority had managed

51. *Id.* at 317.

52. *Id.* at 310.

53. *Id.* at 344.

54. *Id.* at 346.

55. *Id.* at 349.

56. *Id.*

57. *Id.* at 310.

58. *Id.* at 378.

59. *Id.* at 387.

60. *Id.* at 332–33.

61. *Id.* at 335–36.

62. *Id.* at 344–46.

63. *Id.* at 370–80.

64. *Id.* at 387.

to find one additional vote since the 50/50 split of *Bakke*, the Court was still split on key issues such as what constituted a quota system and the application of strict scrutiny to affirmative action.

C. *Gratz v. Bollinger*

Heard by the Court on the same day as *Grutter*, *Gratz v. Bollinger*⁶⁵ was another case questioning the affirmative action policy at the University of Michigan.⁶⁶ While *Grutter* examined the university's law school admission process, *Gratz* focused on the university's undergraduate admission program.⁶⁷ *Gratz* examined the University of Michigan's undergraduate admissions policy, which used a point system that automatically granted twenty points to applicants from underrepresented minority groups.⁶⁸ Brought by petitioners Jennifer Gratz and Patrick Hamacher, Caucasian residents of the State of Michigan who had both applied for admission to the University of Michigan's College of Literature, Science, and the Arts. Both were rejected and they filed a class action suit that alleged racial discrimination in violation of the Fourteenth Amendment.⁶⁹

Gratz resulted in a deeply divided opinion of the Court. Chief Justice Rehnquist delivered the majority opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined.⁷⁰ Justice O'Connor also filed a concurring opinion, in which Justice Breyer joined in part.⁷¹ In addition to Justice O'Connor's concurring opinion, Justice Thomas and Justice Breyer also filed concurring opinions.⁷² Justice Stevens wrote a dissenting opinion, in which Justice Souter joined.⁷³ Justice Souter also filed a dissenting opinion, in which Justice Ginsburg joined in Part II.⁷⁴ Justice Ginsburg wrote her own dissenting opinion, in which Justice Souter joined and Justice Breyer joined in Part I.⁷⁵

The Court's majority opinion found the admissions policy made race the decisive factor for virtually every minimally qualified, under-

65. 539 U.S. 244 (2003).

66. *Id.*

67. *Id.* at 249–50.

68. *Id.* at 256.

69. *Id.* at 251–52.

70. *Id.* at 249.

71. *Id.* at 276.

72. *Id.* at 281.

73. *Id.* at 282.

74. *Id.* at 291.

75. *Id.* at 298.

represented minority applicant.⁷⁶ As the policy was “not narrowly tailored to achieve [the University’s] asserted compelling interest in diversity,” the policy violated the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981.⁷⁷

Although the 6-3 decision in *Gratz* was the most unified support by the Supreme Court Justices for a majority opinion in an education-related affirmative action case since *Brown*, a split within the Court was still clearly evident based on the number of separate decisions that were written and the combined 5-4 verdict in *Grutter*.

D. *Parents Involved in Community Schools v. Seattle School District Number 1*

Following the University of Michigan cases, the next affirmative action case to reach the Supreme Court was *Parents Involved in Community Schools v. Seattle School District Number 1*,⁷⁸ which was heard together with *Meredith v. Jefferson County Board of Education*.⁷⁹ Both school districts had adopted plans that largely considered race in placing children into district schools to ensure that schools were racially balanced.⁸⁰

Chief Justice Roberts delivered the opinion of the Court.⁸¹ Justices Scalia, Kennedy, Thomas, and Alito joined in Parts I, II, III-A, and III-C.⁸² Justices Scalia, Thomas, and Alito joined in Parts II-B and IV.⁸³ Additionally, Justice Thomas filed a concurring opinion, and Justice Kennedy filed an opinion concurring in part.⁸⁴ Justice Stevens filed a dissenting opinion.⁸⁵ Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined.⁸⁶

Once again returning to a true split decision (4-1-4), Justice Kennedy played toward both four-justice opinions in *Parents Involved*. Because Justice Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito in limited respect, the majority opinion held that although the districts did not operate legally segregated

76. *Id.* at 272.

77. *Id.* at 275.

78. 551 U.S. 701 (2007).

79. 547 U.S. 1178 (2006).

80. *Parents Involved*, 551 U.S. at 709–10.

81. *Id.* at 708.

82. *Id.*

83. *Id.* at 708–09.

84. *Id.* at 748, 782.

85. *Id.* at 798.

86. *Id.* at 803.

schools, students were still denied equal protection because the school assignments largely relied on race.⁸⁷ The school districts failed to establish racial diversity as merely one type of desirable diversity because their plans used a white/nonwhite binary as the determining factor in student placement in district schools.⁸⁸ Racial imbalance in the schools alone was not unconstitutional, and the minimal effect the classifications actually had on school assignments indicated that other means could effectively achieve the school districts' goals.⁸⁹

Justice Kennedy, as a true swing vote, also sided with Justices Breyer, Stevens, Souter, and Ginsburg, to include in the majority holding that "compelling interest[s] exist[] in avoiding racial isolation" and promoting diversity.⁹⁰ Although the need for these compelling interests was not present in *Parents Involved* for the reasons previously mentioned, Justice Kennedy's concurring opinion clearly stated, "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."⁹¹ However, this compelling interest did not mean it was permissible to "classify every student on the basis of race and to assign each of them to schools based on that classification."⁹²

The *Parents Involved* decision truly showed how split the Supreme Court was over affirmative action. Two separate camps had clearly emerged by this point with a swing vote in Justice Kennedy. Such a divided Court invited future grants of certiorari on affirmative action after *Parents Involved*, and another case involving admissions at the University of Texas at Austin came just six years later.

III. The Road to the Future: *Fisher v. University of Texas at Austin*

In *Fisher v. University of Texas at Austin*, the most recent Supreme Court case involving affirmative action, an applicant denied admission to the University of Texas sued the university because of the way it considered race in determining the incoming class.⁹³ Basing their decisions largely on the Supreme Court's holdings in *Grutter* and *Gratz*,

87. *Id.* at 702–03.

88. *Id.* at 723.

89. *Id.* at 733.

90. *Id.* at 797–98.

91. *Id.* at 797.

92. *Id.* at 798.

93. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2415 (2013).

the district court and the Fifth Circuit gave substantial deference to the compelling interest of diversity and found for the university.⁹⁴

Joined by Chief Justice Roberts and Justices Scalia, Thomas, Breyer, Alito, and Sotomayor, Justice Kennedy delivered the opinion of the Court.⁹⁵ In addition to the majority opinion, Justices Scalia and Thomas filed separate concurring opinions.⁹⁶ Justice Ginsburg filed a dissenting opinion.⁹⁷ Justice Kagan took no part in the consideration or decision of the case due to her previous involvement in the case as Solicitor General.⁹⁸

The Court found that the Fifth Circuit did not hold the university to the demanding burden of strict scrutiny previously laid out in *Bakke* and *Grutter*.⁹⁹ Citing back to Justice Powell's principal opinion in the *Bakke* case, the majority opinion in *Fisher* noted the benefits that flow from a diverse student body are complex and encompass a broad array "of qualifications and characteristics of which racial or ethnic origin is but a single though important element."¹⁰⁰

Showing his unwavering position on affirmative action, Justice Scalia's concurring opinion was only a paragraph in length.¹⁰¹ In this paragraph, Justice Scalia maintained the same view that he first expressed in his concurring opinion in *Grutter*: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."¹⁰² However, since the petitioner had not asked to overturn the holding in *Grutter*, Justice Scalia joined with the majority in full.¹⁰³ In his own concurring opinion, Justice Thomas elected to explain that *Grutter* should be overruled because the Equal Protection Clause categorically prohibits "a State's use of race in higher education admissions decisions."¹⁰⁴

In her lone dissenting opinion, Justice Ginsburg would have affirmed the Fifth Circuit's ruling finding that a proper analysis under *Bakke* and *Grutter* had been done.¹⁰⁵ Although Justice Ginsburg was

94. *Id.* at 2417.

95. *Id.* at 2414.

96. *Id.* at 2422.

97. *Id.* at 2432.

98. *Id.* at 2411.

99. *Id.* at 2415.

100. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

101. *Fisher*, 133 S. Ct. at 2422 (Scalia, J., concurring).

102. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part)).

103. *Id.*

104. *Id.* (Thomas, J., concurring).

105. *Id.* at 2432–34.

the sole dissenter, the complete opposite opinions expressed in Justice Scalia's and Justice Thomas's concurring opinions proves the split in the Court remains.

Conclusion

Since its creation in Executive Order 10925, affirmative action has been a source of controversy. As a result of the surrounding debate, the Supreme Court of the United States has addressed the constitutionality of affirmative action multiple times. Although *Brown* came down as a unanimous decision, the Court has been very split in the subsequent decisions dealing with how affirmative action should appropriately be carried out. The most recent decision in *Fisher* has provided little clarity. As a result, it is highly likely that the Supreme Court will soon decide another case involving affirmative action.¹⁰⁶ Although the Court has been hesitant up until this point to eliminate affirmative action, the decisions of the Court have been inching closer and closer to such a holding—particularly in the area of higher education.

If future rulings limit how race consideration can look in admission systems it will be hard for affirmative action to survive. As university admission programs continue to get drawn into lawsuits, leaders may shy away from policies strongly favoring affirmative action and consideration of race. At a minimum, they will have to rethink how they word their admissions policies. With American colleges enrolling historic proportions of females¹⁰⁷ and minority students,¹⁰⁸ questions about the necessity of affirmative action will continue to be raised until the Court provides a more unified, decisive answer on the constitutionality of this issue in today's society.

106. See Petition for Writ of Certiorari at i, *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682 (U.S. argued Oct. 15, 2013) (presenting as question “[w]hether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions”).

107. THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEPT. OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2012, at 319 (2013), available at <http://nces.ed.gov/pubs2014/2014015.pdf> (finding 57.0 percent of students enrolled in degree-granting institutions receiving Title IV financial aid in fall 2011 identified as female compared to 34.7 percent in fall 1957).

108. *Id.* at 363 (finding the percentage of students enrolled in degree-granting institutions that receive Title IV financial aid in fall 2011 that identified as other than white was 38.8 percent in 2011 compared to 20.1 percent in fall 1990. The percentage identifying as black was 15.1 percent in 2011 compared to 9.3 percent in 1990).