In the Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION
AND IMMIGRANT RIGHTS AND FIGHT FOR
EQUALITY BY ANY MEANS NECESSARY ET AL,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Brief of Professor Carl Cohen of the
University of Michigan, Professor Robert
Koons of the University of Texas and
the Texas Association of Scholars
As Amici Curiae in Support of the Petitioner

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Table of Contents

Table of Authorities.............................................. i

Interest of Amicus Curiae................................. 1

Summary of Argument........................................ 3

Argument............................................................ 6

I. The Courts Must Declare the Sense of the Law; and if They Should be Disposed to Exercise Will Instead of Judgment, the Consequence Would Equally be the Substitution of Their Pleasure for That of the Legislative Body.................................6

   A. Voters Have the Constitutional Right to Determine Public Policy. In a Democracy, Judges Do Not.................................................................6

   B. Judges Do Not Have the Authority to Impose a De Facto Amendment to the United States Constitution.........................................................7

   C. There Is No Constitutional Right to Receive Preferential Treatment Based on Race or Ethnicity and There is No Constitutional Right to Bar the People - or a Legislature - From Deciding to End Those Preferences.................8

   D. This Court’s Equal Protection Decisions Have Always Struck Down Classifications Based on
Race as Violations of the 14th Amendment’s Equal Protection Requirement..........................14

II. The Strict Scrutiny Standard of Review Imposed on Suspect Racial or Religious Classifications Does Not Apply in This Case.................................................................15

A. Schuette is Not a Suspect Classification Case. Even if the Seattle and Erickson Cases Were Correctly Decided, Which the Amici Do Not Concede, Those Decisions Do Not Control This Case........................................15

B. This Case Involves the Voters Banning Discrimination and Not Their Imposing It......16

C. The 6th Circuit’s Reasoning in Schuette is a Complete Departure From the 9th Circuit’s Decision That was Handled Down After the Seattle and Erickson Decisions.......................18

III. The Respondent’s Underlying Rationale for Overturning the Michigan Amendment is a Direct Threat to the Democratic Process. The Alleged Reallocating of Political Power Theory is an Impermissible Basis for Nullifying a Statewide Voter Approved Initiative.......................................................20

IV. Racial Preferences Harm Politically Disfavored Minority Students Particularly Asian-Americans.................................................................22
A. Asian-American College Applicants are Intentionally Targeted for Discrimination……22

B. Civil Rights Groups, in New York, Demanded the End to Merit Based Admissions to Specialized Academic High Schools. This Further Demonstrates Their Hostility Toward Asian-Americans..................................................25

V. Respondents Are Not Discrete and Insular Minorities Requiring Special Protection by the Courts.................................................................27

A. Minority Supporters of Racially Discriminatory Preferential Treatment Received Substantial Support From Business and Labor Groups, from a Multitude of National Organizations and From Elected Officials...........................................27

B. Courts Lack the Constitutional Authority to Bar Voters From Reallocating Political Power or Altering a State’s Constitutionally Mandated, or Statutorily Required, Decision Making Processes..................................................28

VI. Diversity is Not a Permissible State Interest, Let Alone a Compelling One. “Compelling Interest” is Merely a Euphemism for “Support Our Concealed System of Racial Quotas”.................................31
A. Development of the Doctrine of a Compelling State Interest Proves That it Does Not Apply to Racial Preferences in College Admissions........................................31

B. In the Intellectual Context of This Case, Diversity Has No Societal Value and Would Have Caused Significant Harm to the United States..................................................32

C. The Absence of Racially Based Preferences Does Not Harm Minority Students..............33

VII. The Types of Discrimination That Existed in America, 60 or 75 Years Ago, Do Not Exist Today. “Diversity” was Invented by the Academic Community as a Concept to Rationalize the Use of Racial Preferences for Ideological Reasons........34

VIII. The Imposition of State Compelled Diversity Programs Harms Society..........................36

Conclusion..............................................................39
# Table of Authorities

## Cases

*Adarand Constructors v. Pena*
515 U.S. 200 (1995) .................................................. 20

*Brown v. Board of Education*
347 U.S. 483 (1954) .................................................. 17

*Buchanan v. Warley*
245 U.S. 60 (1917) .................................................. 14

*Coalition to Defend Affirmative Action v. Regents of the Univ. of Michigan, on appeal sub. nom Schuette v. Committee to Defend Affirmative Action*, 701 F. 3d 466 (6th Cir. 2012) .................. 3, 6, 7, 8, 11, 12, 14-16, 20-22, 27

*Coalition for Economic Equity v. Wilson*
122 F. 3d 692 (9th Cir. 1997) ................................. 19, 20

*Grutter v. Bollinger*

*Hirabayashi v. United States*
320 U.S. 81 (1943) .................................................. 20, 32

*Hunter v. Erickson*
393 U.S. 385 (1969) ............................................. 3, 6, 9, 15, 16, 20

*Korematsu v. United States*
323 U.S. 214 (1944) .................................................. 32
Johnson v. Miller

McDonald v. Sante Fe Transportation Co.
427 U.S. 273 (1976). ...........................................34

Palmore v. Sidoti

Parents Involved in Community Schools v.
Seattle Independent School Dist. #1
551 U.S. 710 (2003). ...........................................17,18,32,33

Personnel Administrator of Massachusetts v. Feeney
442 U.S. 256 (1979). ...........................................14

Regents of the Univ. of California v. Bakke

Ricci v. De Stefano
129 S. Ct. 2658 (2009). ...........................................27

Shaw v. Reno

Strauder v. West Virginia
100 U.S. 303 (1880). ...........................................14

Swann v. Charlotte-Mecklenburg Bd. of Education
402 U.S. 1 (1971). ...........................................10

United States v. Carolene Products Co.
304 U.S. 144 (1938). ...........................................29
Washington v. Davis
426 U.S. 229 (1976) ........................................... 19

Washington v. Seattle Ind. School District #1

Wygant v. Jackson Board of Education
476 U.S. 267 (1986) ................................. 20

United States Constitution

14th Amendment. .................. passim

State Constitutions and Amendments

Michigan Proposition 2...................... 7,8,9

Washington State Constitution – Art. I Sec. I ... 11

Other Authorities

College Board 2012, “College Search”,
www.bigfuture.collegeboard.org/find-colleges ........ 24

Coming Apart: The State of White America
Charles Murray ............................................. 30

Critical Review – Faculty Political Bias
Christopher Cardiff and Daniel Klein ............ 30,31

Diversity: The Invention of a Concept
Professor Peter Wood ................................. 36,37,38
Interest of Amici

Dr. Carl Cohen is Professor of Philosophy at the University of Michigan. He has written numerous articles opposing the University’s race based admissions preferences. Dr. Robert Koons is a Professor of Philosophy at the University of Texas. The Texas Association of Scholars is an association college and university faculty who teach at institutions of higher education in Texas.

The amici believe that an academic institution of higher education must be preserved exclusively as a merit based institution. No preferential treatment should be accorded to applicants or students, directly or by subterfuge, in admissions, granting of academic scholarships, the hiring or promotion of faculty or any other matters of academic concern.

The amici disagree with the Respondents’ allegations that “the reallocation of power to a more remote decision maker” is unfair and that so doing imposes an “undue burden on minorities”. The amici believe that these arguments are specious. These arguments are an attempt to conceal the Respondent’s desire to have a society based on

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1. Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no counsel for a party, or party, made a monetary contribution for the preparation or submission of this brief. No entity or person, aside from the amici curiae and its counsel, made any monetary contribution for then preparation or submission of this brief. Counsel for the parties consented to the filing of this brief.
mandatory equality of results and to destroy merit as the outcome determinative factor in American life.

The amici are also concerned that the 6th Circuit impermissibly sought to amend the U.S. Constitution by making it all but impossible for the voters of Michigan to obtain the policy objective they sought: bias-free admissions to state universities. The 6th Circuit did so by requiring that the voters have no say in this decision. The 6th Circuit ordered that this decision must be left to a board of trustees elected for staggered 8 year terms or to unelected members of the faculty or administration of the University. That ruling unconstitutionally limited their right to self-government.
Summary of Argument

The fundamental issue underlying this case is the right of a state’s citizens, acting on their own, through initiative and referenda procedures authorized by Michigan’s constitution to determine state and local governmental policies. In a democracy, the people are entitled, as a matter of Constitutional right, to the broadest possible latitude in making such determinations. There is no 14th amendment mandate requiring that such decisions be reserved to unelected officials acceptable to a court. The people’s determinations must to be subject to the most limited of judicial review consistent with the United State Constitution. To allow a differing result would be to authorize judges to “exercise Will instead of Judgment”, James Madison, Federalist 78.


The Schuette decision is tantamount to 8 judges amending the United States constitution. The
Schuette decision makes it all but impossible, as a practical matter, for the voters, or for the Michigan legislature, to outlaw racial preferences. So doing, according to the 6th Circuit, would "impermissibly burden" a minority group’s alleged "right" to pressure university officials and life-tenured faculty into doing something that the voters want stopped: racial discrimination in university admissions.

The second critical, but unspoken, issue is the continuing effort, by the Respondents and their ideological allies, to undermine merit as the outcome determining factor of success in American life. Starting in the mid-13th century a feudal caste system existed in Europe and in many parts of Asia. Ancestry determined destiny.

America was founded on the opposite principle. The preservation of America’s merit based society is a critical issue in this case. America is supposed to be an aristocracy based on merit and not a caste society based on race.

Fairness, let alone civil rights policy, does not demand equality of result. The 14th amendment requires only equality of opportunity. Race based preferential treatment denigrates the accomplishments of those who have actually achieved something based on merit. It discounts their accomplishments by some metric based on that person not belonging to a politically protected minority group. Racial preferences reward others who accomplishments were not of the same caliber merely because they are members of a politically
protected ethnic or racial minority. Moreover, not all minority groups are beneficiaries of this “benign” discrimination. Asian-Americans are denied these “benefits” and are, in fact, the acknowledged victims of it, along with all white applicants, to Michigan’s many state universities.

The people of Michigan chose to outlaw this unfair practice only to have the Court of Appeals for the 6th Circuit eradicate their rights and impose its own policy preferences. Therefore, prior decisions of this Court in the Hunter v. Erickson, 393 U.S. 385 (1969) and Washington v. Seattle School District #1, 458 U.S. 457 (1982), must be overruled and the 6th Circuit’s opinion in Coalition to Defend Affirmative Action, etc. v. Regents of the University of Michigan, 701 F. 3d 466 (6th Cir. 2012) must be reversed.
Argument

I. The Courts Must Declare the Sense of the Law; and if They Should be Disposed to Exercise Will Instead of Judgment, the Consequence Would Equally be the Substitution of Their Pleasure for That of the Legislative Body.

A. Voters Have the Constitutional Right to Determine Public Policy. In a Democracy, Judges Do Not.

The words of James Madison, in Federalist 78, are at the heart what is constitutionally suspect in the Schuette opinion (Coalition to Defend Affirmative Action, et al v. Regents of the University of Michigan, 701 F. 3d 466 (6th Cir. 2012) on appeal sub. nom. Schuette v. Committee to Defend Affirmative Action, et al) (hereafter Schuette) and in this Court’s decisions in Hunter v. Erickson, 393 U.S. 385 (1969) (hereafter “Erickson”) and Washington v. Seattle School District #1, 458 U.S. 457 (1982) (hereafter “Seattle”). At stake is the right of the people, and potentially of their elected representatives, to determine what the law is and how they shall govern themselves. The Constitution was intended to place limits on the government’s authority to impose its will on the people, e.g., the free exercise and no establishment clauses of the 1st Amendment. The Constitution was not intended to expand that power to endanger the rights of a politically disfavored majority.
The Constitution was never intended to grant selected minority groups the right to a Constitutionally protected entitlement to a privileged place at the head of the line. India outlawed its skin-color based caste system in 1947. Neither the United States, nor any individual state, should be perpetuating a race-based caste system in 2013. The people of Michigan determined to stop doing so in 2006. They must not to be judicially compelled to do so again.

That others may, in generations past, have obtained unjustified “privileges” based on their ancestry, religion or race, does not entitle generations far removed from pre-1954 school segregation, to demand, let alone have unelected judges require, that they now receive a privileged place at the head of the line.

B. Judges Do Not Have the Authority to Impose a De Facto Amendment to the United States Constitution.

The 6th Circuit, in Schuette, based its overturning of Michigan’s Amendment 2 on the theory that the Amendment “reallocated political power” away from elected university trustees and unelected professors and administrators and returned it to the voters. So doing, the Court held, “impermissibly burdened” minority voters. The 6th Circuit, as a practical matter, thus made it impossible for anyone in Michigan to compel the University to change its admissions policies. That all but mandates the permanent enshrining of those voter repudiated
policies. This constitutes a de facto revision of the 14th amendment by eight judges.

In her dissenting opinion, Judge Gibbons pointed out that:

[T]he majority [in Schuette] seems to concede that some set of decision makers...would be able to reverse the policies that [the 6th Circuit] claims are immune from actions by the entire body politic...[the 6th Circuit] demands that any changes in educational...policies can only be enacted by individual actions of each university’s governing authority...”, 701 F. 3d at 492. “The Constitution provides that 8 member governing boards, elected to statewide office for [staggered] 8 year terms”, govern each institution, 701 F. 2d, at 499...[A]dmissions policies are placed within control of the boards or school authorities (emphasis added). . . The governing boards...delegated responsibility for establishing admissions standards to program specific administrative units which set admissions criteria through informal processes that can include a faculty vote, 701 F. 2d at 499 (emphasis added).

In a democracy, the people are the ultimate arbiters of public policy, not faceless trustees, academic bureaucrats or life tenured members of the
faculty. The 6th Circuit opinion unconstitutionally mandates that it be otherwise.

C. There Is No Constitutional Right to Receive Preferential Treatment Based on Race or Ethnicity and There is No Constitutional Right to Bar the People - or a Legislature - From Deciding to End Those Preferences.

No one has a constitutional right to a racial preference whether it is in college admissions, state government employment or in obtaining a government contract. Nothing in the 14th Amendment authorizes, let alone compels, that result. No recipient of such preferences has the right to bar the voters, acting on their own initiative, let alone a state legislature, from ending preferences that were previously granted, for whatever reason. Nothing in the 14th Amendment requires that result, either.

Minorities do not have a special constitutional right to have decisions “about which they have a special interest” made by local officials or unelected university administrators or faculty. The Seattle decision is an, “unprecedented intrusion into the structure of a state government...[the] 14th Amendment leaves the states equally free to decide matters of concern to the State at the state, rather than the local, level of government”, Washington v. Seattle Ind. Sch. Bd. #1, 458 U.S. at 489 (Powell, J. dissenting).

Justice Powell continued:
[W]e have never held....absent a federal constitutional violation that a state must treat different persons differently on account of race. In the absence of a federal constitutional violation requiring a race-specific remedy, a policy of strict racial neutrality by a State violates no federal constitutional principle”. . . This Court has never held that there is an affirmative duty to integrate schools in the absence of a finding of unconstitutional segregation, 458 U.S. at 492, citing Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 24 (1971), 458 U.S. at 491.

* * *

The Constitution does not dictate to the States a particular division of authority between legislature and judiciary or between the state and local governing bodies. It does not define institutions of local government, 458 U.S. at 493 (Powell, J. dissenting).

If Justice Powell’s dissent is correct, then there certainly can be no constitutional requirement that racially discriminatory admissions policies be implemented in order to increase minority enrollment in a state university.

Nevertheless, the 6th Circuit has done so. Its contrary conclusion is wrong. The right to participate in the political process is not a guarantee of success or of a “right” to preserve special privileges granted
either by an administrative agency, a university committee or a state legislature.

In Seattle, the Court struck down a statewide voter approved initiative that banned local school boards from imposing forced busing plans to achieve racial diversity in local schools unless the voters approved of such plans. That decision must be reversed.

There had been an earlier attempt to recall four school board members who had supported the forced busing plan, but it narrowly failed. The state-wide referendum initiative followed and was approved by a 66 percent majority of the voters. See 458 U.S. at 460 n. 1. The mandatory racial assignment plant took effect in 1978 and was overturned in the challenged referendum. Washington State’s constitution expressly reserved to the voters, “the power to propose bills and laws and to enact or reject the same at the polls, independent of the legislature”, Washington Constitution, Article I, Section II.

The implication of Justice Blackmun’s opinion, nullifying that result, is that the statewide referendum was suspect because it was under-inclusive. It limited local school board actions based on racial considerations but not on non-race related factors such as curriculum changes, school closings or local school budgets. Either the “racial” nature of the referendum or the under-inclusive scope of it, made the referendum suspect. The 6th Circuit adopted that reasoning in Schuette. This is constitutionally impermissible.
There is no constitutional basis for the Respondent’s, and the 6th Circuit’s, assertion that if the voters want to ban a policy that has race related considerations underlying it, that they are barred from doing so, because the policy is race related. Would the 6th Circuit make the same assertion if the Michigan legislature, or the U.S. Congress, imposed such a ban?

Similarly, there is no constitutional requirement that, in order to ban one policy to which the voters object that they must, in order to meet 14th amendment requirements, ban other non-race related policies dealing with the same broad subject matter, in this case local school board policies, at the same time.

Based on Justice Blackmun’s theory, and the 6th Circuit’s opinion, if a city council voted to compel the payment of reparations to a racial minority through a tax increase, it would be an “impermissible reallocation of political power” for the state’s voters in a referendum, or their legislature, to ban such payments by law or by amending the state’s constitution. The constitutional amendment, or the new state law, would be struck down since it impermissibly shifted or reallocated political power away from minority voters in that city. This would be so because, in order to obtain reparations, the minority would now have to persuade the state legislature to change the law or all of the voters to throw out the constitutional amendment. Imposing such a requirement would “unfairly burden”
minority voters and, in Justice Blackmun’s view, violate the 14th Amendment. *That is not how a government in a free country functions.*

The 9th Circuit, in *Seattle*, acknowledged that, “the issue would be different had a successor school board attempted to rescind the prior Board’s plan. The 6th Circuit did not. Here, a different political entity – the vote of a statewide electorate – rescinded a policy voluntarily enacted by a locally elected school board already subject to local control”, 458 U.S. at 466. This argument is constitutionally irrelevant. Minority groups do not have a protected “right to achieve beneficial legislation” let alone to achieve those goals at the level of government most convenient to them.

Nothing in Justice Blackmun’s opinion indicates that he would have reached a different conclusion had the voters reallocated that power to the state legislature, or if the law had been changed by the legislature acting on its own initiative.

Justice Blackmun’s theory nullifies the people’s right to enact legislation if the new statute, in any manner, touches on race. This thinking underlies this Court’s rejection of the ban on enacting anti-housing discrimination ordinances without voter approval in the *Erickson* case. It is unclear if the *Erickson* and *Seattle* Courts would have rejected the challenged initiatives if they had covered all aspects of school administration or all aspects of local housing policy and not just ones related to race.
The voters acted where racial criteria were involved because racial criteria were what local officials were improperly using as the basis for policy setting. Voters ought not to be penalized for exercising their constitutional rights by being required to enact over-inclusive initiatives in order to repeal a single policy of which they disapprove.

D. This Court’s Equal Protection Decisions Have Always Struck Down Classifications Based on Race as Violations of the 14th Amendment’s Equal Protection Requirement.

“A core purpose of the 14th amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice rather than legitimate public concerns; the race not the person, dictates the category”, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). In accord see, *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (outlawing a ban on blacks serving on juries), *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down a law barring blacks from buying homes in white neighborhoods); *Loving v. Virginia*, 388 U.S. 1,11 (1967) (striking down a ban on interracial marriages); *Personnel Adm. of Massachusetts v. Feeney*, 442 U.S. 256, 272, (1979) (sustaining veteran’s preferences in public employment as not constituting gender discrimination). “Private discrimination may be outside the reach of the law, but the law cannot directly or indirectly give them effect”, *Palmore v. Sidoti*, 466 U.S. at 433. Therefore, this Court should rule the same way in *Schuette*. 
These arguments must not be read as endorsing the notion that a legislative, or voter initiated, statute, requiring racial segregation in schools or housing, would be acceptable. No matter the method employed, or level of government taking the action, such legislation would be facially unconstitutional as a violation of the 14th Amendment.

II. The Strict Scrutiny Standard of Review Imposed on Suspect Racial or Religious Classifications Does Not Apply in This Case.

A. Schuette is Not a Suspect Classification Case. Even if the Seattle and Erickson Cases Were Correctly Decided, Which the Amici Do Not Concede, Those Decisions Do Not Control This Case.

The Plaintiffs in the Seattle, Erickson and Schuette cases assert a proposition that is not contemplated by this Court’s strict scrutiny of suspect classifications jurisprudence. There is nothing in the Seattle or Erickson decisions that implies, let alone compels, treating the banning of racially preferential treatment as being a constitutionally suspect classification subject to a strict scrutiny review.

Subjecting a racial or religious minority to special burdens or classifications not imposed on all citizens, is a suspect activity. Banning the award of racially based privileges, whether to a minority or to the majority is not, and may never be, suspect.

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Taking the Erickson, Seattle and Schuette decisions to their "logical" conclusion, it would constitute a violation of the 14th Amendment if the voters decided to compel the University of Michigan and Michigan State University to withdraw from Big 10 competition in football and basketball because they took that decision making authority away from the universities. According to Erickson, Seattle and Schuette, it would be a 14th Amendment violation because minority students were special beneficiaries of the athletic scholarships that they received. The decision making over the continuation of big time basketball and football would have been impermissibly reallocated away from decision makers closest to the students concerned. This example is not far-fetched. Every time the NCAA suggests tightening the academic standards for athletic eligibility and athletic scholarships, these racially based arguments are raised against doing so.

B. This Case Involves the Voters Banning Discrimination and Not Their Imposing It.

This case involves banning racial discrimination on a statewide basis. Granting preferential treatment to minority groups based on their race or ethnicity is racial discrimination. Prohibiting it is not. Therefore, the supposed "reallocating" of political power, and the concomitant "burden" that reallocation imposes, is not suspect and, therefore, not subject to the type of scrutiny imposed by the Supreme Court in the Erickson and Seattle cases.
That the beneficiaries of a constitutionally banned program are members of a politically favored minority group endows neither the favored group, nor the program from which they benefit, with special constitutional protection. Minority groups have the same rights as the majority, not greater rights. That they demand something more, in this case racial preferences in college admissions, does not endow their demand with a protected place in the political arena. In a democracy, that cannot be permitted.

Nevertheless, this Court struck down a statewide, voter approved, initiative banning the use of race in public school assignments. The implication of the Seattle case is that a black child has a constitutionally mandated right to attend a racially integrated school. There is no such 14th amendment right. A black child has a constitutionally protected right not to be barred from attending the same school as white children because of the black child’s race. See Brown v. Board of Education, 347 U.S. 483 (1954) and Parents Involved in Community Schools v. Seattle Ind. School District #1, 551 U.S. 710 (2007). There is a vast difference between banning segregation and mandating integration by whatever means are judicially deemed to be necessary even if the voters do not approve of it.

The Erickson case has the same anti-democratic implications for policy making at the local level. The City Council enacted an anti-discrimination housing ordinance. The voters, in a city-wide referendum,
repealed that law and also required that any future anti-discrimination in housing ordinances had to receive voter approval before taking effect. This Court threw out the new law on the grounds that political power had been impermissibly reallocated from the City Council to the city's voters. Desirable as an ordinance barring housing discrimination is, a court has no right to interpose itself between the voters who dislike what the City Council did and the City Council. The voters cannot constitutionally compel segregated housing or authorize a city council to do so. But they do have the right to subject legislation banning discrimination to their review.

If a court may bar that voter review, what is to stop a court from overturning voter rejection of a local school budget or an unwanted property tax increase on the grounds that minority voters might have especially benefitted from the new school budget, or the higher taxes? Once the “reallocation of power” or “special benefit to minorities” doctrines are accepted there ceases to be any realistic limit on judicial power to overturn any new governmental policy that a minority group dislikes. The theory has no rational end-point at either the local or state levels of government.

In any event, this Court’s subsequent decision in Parents Involved in Community Schools v. Seattle Ind. School District #1, 551 U.S. 710 (2007) logically seems to overrule - or at a minimum limit - the 1982 decision in the first Seattle school case to the specific facts of the original Seattle litigation.
C. The 6th Circuit’s Reasoning in Schuette is a Complete Departure From the 9th Circuit’s Decision in a California Case Based on Facts Identical to This Case. That Case was Decided After the Erickson and Seattle Cases.

The rationale used by the Schuette court in striking down Michigan’s state constitutional Amendment is a repudiation of prior case law in another circuit. In Coalition for Economic Equity v. Wilson, 122 F. 3d 692 (9th Cir. 1997), a coalition of civil rights groups, in many ways identical to the Respondents in this case, challenged the constitutionality of California’s Proposition 209. That proposition was essentially identical in its scope and intent with Amendment 2, challenged here.

The 9th Circuit upheld Proposition 209’s constitutionality in the face of the identical equal protection and reallocation of political power arguments asserted by the Respondents here. “A system which permits one [district court] judge to block with the stroke of a pen what 4,736,180 [California] residents voted to enact as law tests the integrity of our constitutional democracy”, 122 F. 3d at 699. In fact, it destroys it.

The central purpose of the Equal Protection clause is the prevention of official conduct discriminating on the basis of race”, 122 F. 3d at 701, citing Washington v. Davis, 426 U.S. 229, 239 (1976). Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the


III. The Respondent’s Underlying Rationale for Overturning the Michigan Amendment is a Direct Threat to the Democratic Process. The Alleged Reallocating of Political Power Theory is an Impermissible Basis for Nullifying a Statewide Voter Approved Initiative

The voters of Michigan approved the challenged constitutional amendment by a majority of 58 percent of the vote. The 6th Circuit ignored both precedent (see Coalition for Economic Equity v. Wilson, 122 F. 3d 692 (9th Cir. 1992) and the essential rule that in a democracy the majority rules absent a specific and unmistakable constitutional prohibition, which is not present in this case. If the 6th Circuit were correct in its reading of this Court’s decisions in the Erickson and Seattle cases then any minority group could overturn virtually any decision
of either a legislature or the voters by asserting that its “unique minority group interest” allowed it, or a court acting on its behalf, to override the democratic process.

This, in turn, creates a license for judges’ intent on supplanting the power of the elected branches of the government, and from the people, to do so without any external restraint. The Schuette decision premised its overturning of the voters will with the absurd assertion that a, “white student could do one of four things to have the [University] adopt a legacy conscious admissions policy: she could seek to influence the schools governing board or... she could initiate a statewide campaign to alter the state’s constitution” whereas, after the amendment, “a black student seeking racially preferential treatment could only seek to amend the state’s constitution”, Coalition to Defend v. Regents of the Univ. of Michigan, 701 F. 3d at 470.

The Schuette opinion’s rationale is preposterous. (See 701 F. 3d at 470). First, the black student seeking a legacy preferential admissions policy has the same right, and the same opportunity, to seek adoption of that policy. There are thousands of black alumni of the University of Michigan. There are numerous black members of the state legislature and scores of black and white Michigan faculty members who would support her quest.

The Schuette opinion used a deliberately false analogy by comparing a white student seeking a legacy preferential admissions policy (lawful, even if
of dubious educational value) with the black student seeking a permanent racially preferential admissions policy. Even Justice O'Connor believed that racial preferences would disappear by 2028. See Grutter v. Bollinger, 539 U.S. 306, 343 (2003). If Schuette is affirmed, those racial preferences are likely to continue indefinitely.


IV. Racial Preferences Harm Politically Disfavored Minority Students Particularly Asian-Americans.

A. Asian-American College Applicants are Intentionally Targeted for Discrimination.

Michigan’s prejudicial admissions process does not harm only white students versus African-American or Hispanic students. Students of Asian backgrounds are equally injured and denied their 14th Amendment right to equal protection of the laws. It is no longer even an “open secret” that the University of California limited enrollment by Asian students because the more academically qualified Japanese, Korean and Chinese ancestry students were being admitted in numbers far beyond their
ethnic groups’ percentage of California’s overall population. This racist policy only ceased when California voters banned its use pursuant to Proposition 209.
Table 1. Asian Americans as a Percentage of Students Matriculating at Several Highly Selective Universities

<table>
<thead>
<tr>
<th>Schools That Use Racial Preferences</th>
<th>Schools That Do Not Use Racial Preferences</th>
</tr>
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<tbody>
<tr>
<td>Brown 11%</td>
<td>Cal Tech 42%</td>
</tr>
<tr>
<td>Dartmouth 14%</td>
<td>Cal Berkeley 42%</td>
</tr>
<tr>
<td>Chicago 16%</td>
<td>UCLA 33%</td>
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<tr>
<td>Yale 16%</td>
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<td>Cornell 17%</td>
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There is substantial documented evidence proving this overt anti-Asian bias. Numerous elite academic institutions have openly stated that they use race based preferences in selecting students to be admitted. Other, equally elite institutions do not. If this Court sustains the 6th Circuit’s opinion, this racial discrimination will resume.

Such racial discrimination is never honestly called a quota but, instead, is described as “a holistic
approach to admissions” or “a plus factor” which, nevertheless, injures disfavored minority applicants. This is not disputed.

During a meeting of the National Association for College Admissions Counseling an admissions officer at Stanford told of how seriously Asian students are damaged by that prejudice. Among applicants with the same academic and personal characteristics, whites were far more likely to be admitted than Asians; literally four times as likely at the California Institute of Technology compared to Brown and nearly three times as likely compared to Harvard, Yale, Dartmouth or Cornell. See Scott Jaschik, Too Asian, Inside Higher Education, October 10, 2006 where another admissions officer referred to Asian applicants as “one more AA applicant majoring in math”, “they all play the violin” and “another boring Asian applicant”. See: http://ered.com/news/2006/10.

This open bias against Asian-American applicants is known throughout the Asian-American community. One major company that consults with parents of Asian-American applicants stated that:

College admissions directors will say that in addition to academic criteria, their applicants will be evaluated through “holistic” methods. This is a code word for racial discrimination and an undocumented quota system (emphasis added). It’s no wonder that Asian applicants refer to their ethnicity as “the anti-hook” learning that it
hurts their chances for admission. See Asian American College Consultation, www.asianadvantage.net.faq.

B. Civil Rights Groups, in New York, Demanded the End to Merit Based Admissions to Specialized Academic High Schools. This Further Demonstrates Their Hostility Toward Asian-Americans.

The impact of this anti-Asian bias is further proven in an article by Kyle Spencer, in the New York Times on October 26, 2012. New York City's public school system operates a number of nationally recognized specialized high schools including the Bronx High School of Science and Stuyvesant High School. 15,000 students take special entrance examinations for admission to these schools, annually. “Asian students...win most of the seats. In 2011, 14,415 students enrolled in these specialized high schools and Asians, who comprise only 14 percent of New York City's population earned 8,549 of those seats. (See N.Y. Times, October 12, 2012 at p. 2.)” Because of this disparity, some have begun calling for an end to the policy of using the test as the sole basis of admissions...Civil rights groups filed a complaint with the federal government contending that the policy discriminated against blacks and Hispanics...”, at p. 2. Again merit no longer counts, only membership in a politically acceptable ethnic or racial minority group

This baseless attack on using individual accomplishments, and demonstrated merit, as the
sole criterion for selecting city employees was rejected by this Court in *Ricci v. De Stefano*, 129 S. Ct. 2658 (2009). The New Haven Fire Department defended throwing out the results of an unbiased employment examination because a disproportionate number of minority applicants failed the examination. Under that odious reasoning, if 75 percent of white applicants passed a hiring or promotional examination, then 75 percent of the black and Hispanic applicants (but not the Asian applicants) must also “pass” the examination even if, based on their actual test scores, only 40 per cent actually passed. Otherwise, the examination would be deemed presumptively discriminatory.

It may be permissible to take a college applicant’s family history into account when making admissions or financial aid decisions (e.g. the applicant is an orphan or was forced to work while in high school to support an ailing parent) but it is wholly inappropriate to take such non-merit factors into account in making hiring and promotion decisions in a city agency.

Nevertheless, the 6th Circuit, and the *Seattle* and *Erickson* cases, if applied to this case as the Respondents demand, would allow unelected city officials to dictate the end of merit selection and then bar the citizens of Connecticut, or the Connecticut General Assembly, from amending Connecticut’s constitution, or enacting legislation, so as to ban the use of race norming.
V. Respondents Are Not Discrete and Insular Minorities Requiring Special Protection by the Courts.

A. Minority Supporters of Racially Discriminatory Preferential Treatment Received Substantial Support From Business and Labor Groups, from a Multitude of National Organizations and From Elected Officials.

The Circuit Court’s stated assumption that a student seeking racial preferences is politically at a disadvantage versus opponents of such racial discrimination, even if that fact were relevant, is absurd. See 701 F. 3d at 470. A race preference seeking student has at his or her disposal the legal and financial resources of numerous national and state civil rights organizations, including the 117 civilian and military groups and individuals that filed amicus briefs supporting racial preferences in Fisher v. University of Texas, argued in 2012.

In Schuette, state and national labor unions, including multiple state chapters of the American Federation of State, Country and Municipal Employees (AFSCME), the American Civil Liberties Union and major national law firms in New York, Detroit and Washington D.C. provided pro bono legal services or made financial donations to their cause. (See the list of organizations and law firms enumerated at 701 F. 3d at 469-470.)
The list of the politically and economically powerful entities and individuals supporting the use of racial preferences in *Grutter v. Bollinger*, 539 U.S. 306 (2003), consumed nearly 3 pages of the United States Reports. These entities included Fortune 50 corporations, such as General Motors, Exxon Mobil and 3M, more than a score of state attorneys general, the American Bar Association, the American Psychological Association, the American Sociological Association, members of the U.S. Senate and House of Representatives of Representatives in addition to the editorial support of major newspapers.

In this context, the various Respondents and the individuals and groups that they represent, are scarcely politically powerless individuals entitled to “footnote 4” protection. See *United States v. Carolene Products Co.*, 304 U.S. 144, at n. 4, pps. 152-153 (1938).

B. Courts Lack the Constitutional Authority to Bar Voters From Reallocating Political Power or Altering a State’s Constitutionally Mandated, or Statutorily Required, Decision Making Processes.

It is impermissible for any court to require that decision making relating to college admissions be reserved only to the lowest level within the University’s administrative hierarchy. The 14th Amendment does not require that the Respondents must be guaranteed the best opportunity to win, by limiting decisions relating to adopting racial preferences to a committee dominated by liberal faculty members or administrators. One is hard
pressed to locate where in the Constitution this alleged right is found, save in the minds of judges who dislike majority rule.

Voters have a legitimate right to remove decision making authority over the implementation, or continuation of, racial preferences. They have an unchallengeable right to bar university faculty and administrators, who are ideologically and politically hostile to the concept of equality of opportunity from setting these policies. No court has a right to interfere with the implementation of these non-discriminatory policies chosen by the people.

Moreover, if the Respondents’ assertions as to the educational value of diversity were genuine, then one ought to inquire how many conservative political science, economics, history and sociology professors are on any university faculty. Dr. Charles Murray noted, in Coming Apart: The State of White America that, “The dominance of liberal views among faculty members at elite universities is well documented”, Coming Apart: The State of White America at page 95 (emphasis added). It is clear that university faculties, who make their own faculty hiring and promotion decisions, are determined to impose their will on the voters for whom they work. A court cannot mandate that in a free country.

This overwhelming partisan bias cannot help but affect faculty and administration views towards racial preferences. This was documented by Christopher Cardiff and Daniel B. Klein in Volume 17 Critical Review pages 237-255. Their study
determined that, in the humanities and social sciences, liberals on the faculty outnumbered conservatives by 7.4 to 1 in English, 6.2 to in history and political science 5.8 to 1 in the humanities, 4.1 to in physics and 4.0 to 1 in biology. Faculties in elite schools are even further to the left than they are in less selective schools. See *Coming Apart The State of White America*, note 25, pages 370-371.

This ideological bias was most recently demonstrated in *The Golf Shot Heard Round the Academic World*, an article written by David Feith. See the Wall Street Journal, April 6, 2013 at page A 11. A major dispute arose over the lack of intellectual diversity at Bowdoin College. A report commissioned to investigate this issue determined that "four or five out of approximately 182 full time faculty members might be described as politically conservative." A senior Bowdoin faculty member, Professor Marc Hetherington, wrote in the Bowdoin college newspaper that, “liberal professors outnumber conservative professors simply because conservatives don’t place the same emphasis on the accumulation of knowledge that liberals do”. See, Wall Street Journal at page A 11. These are the same professors and administrators who, at the University of Texas and, prior to the enactment of Proposition 2, at the University of Michigan, insist on using race and ethnicity as significant criteria for determining admissions because it is “essential that the student body be diverse.” They offer no proof, merely their self-justifying conclusion.
VI. Diversity is Not a Permissible State Interest, Let Alone a Compelling One. “Compelling Interest” is Merely a Euphemism for “Support Our Concealed System of Racial Quotas”.

A. Development of the Doctrine of a Compelling State Interest Proves That it Does Not Apply to Racial Preferences in College Admissions.

Justice Powell conceded that racially based factors were “non-objective”. No one should be permitted to use non-objective criteria to establish a compelling state interest in violating someone else’s Constitutional rights. Moreover, prior to Bakke, the only instances where the Court sustained race based discrimination was during the Second World War when it upheld the forced removal of Japanese-Americans from the west coast and their forced internment in detention centers in the interior of the United States. The reasons were “war time national security”. See Korematsu v. United States, 323 U.S. 214 (1944) and Hirabayashi v. United States, 320 U.S. 81 (1943).

That race based “compelling state interest” policies were so immoral that the United States subsequently apologized for implementing that policy and paid reparations to the victims of it. “Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,” Parents Involved in Community Schools v. Seattle School District #1, 551 U.S. 701, 720 (2007). “At the heart of the Constitutional guarantee of equal protection lies the
command that the government must treat citizens as individuals, not simply as components of a racial, religious, sexual or national class”, 551 U.S. at 730, quoting Johnson v. Miller, 515 U.S. 900, 911 (1995).

“The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from ‘patently unconstitutional’ to a ‘compelling state interest’ simply by relabeling it ‘racial diversity’”, 551 U.S. at 762 (emphasis added). [“T]he 14th Amendment itself was framed in universal terms without reference to color, ethnic origin or condition of prior servitude....[T]he 39th Congress was intent upon establishing in the federal law a broader principle than would be necessary simply to meet the particular and immediate plight of the newly freed Negro slaves”, 438 U.S. at 293, quoting McDonald v. Sante Fe Trail Transportation Co., 427 U.S. 273, 296 (1976). Therefore, no racial or ethnic group may benefit from, or be disadvantaged by, racial or ethnic preferences.

B. In the Intellectual Context of This Case, Diversity Has No Societal Value and Would Have Caused Significant Harm to the United States.

The societal danger posed of academia’s obsession with diversity is emphasized by American history. There was no mandatory “diversity” at Los Alamos. The scientists and engineers working on the Manhattan Project came from very similar cultural and religious backgrounds and national origins. No one asked about “diversity” in recruiting them. They
were asked only to demonstrate high levels of expertise. It did not matter that Nobel Prizes in Chemistry and Physics are not awarded on a culturally diverse basis. No one thought that anyone’s life experiences mattered. Consideration of the hardships these scientists faced in being forced to emigrate to America or the fact that English was a foreign language to virtually all of these men - and there were no women - would have been thought madness if used as selection criteria. It still is.

C. The Absence of Racially Based Preferences Does Not Harm Minority Students.

Students from economically or socially disadvantaged backgrounds are not injured by the absence of racially or ethnically based preferential treatment. At a Conference on The Theology of Work and the Dignity of the Worker, William, Cardinal Egan, of New York, told the Conference that:

[I] would not agree that students today are needier and less able to learn because of poor family life than were students when my grandparents came to this nation. Read the histories of New York, Chicago and other urban centers of this nation of ours during the era of great immigration from Europe. Crime, horrendous health conditions and poverty were everywhere; and somehow, the children were taught the essentials and built this nation as a result. I believe that the problems back then were as challenging as the problems we have now".

Moreover, these terrible problems were overcome without racial and ethnic preferences being given and without anyone’s college application being “plused-up” based on their national origin.

VII. The Types of Discrimination That Existed in America, 60 or 75 Years Ago, Do Not Exist Today. “Diversity” was Invented by the Academic Community as a Concept to Rationalize the Use of Racial Preferences for Ideological Reasons.

The path to genuine equality of opportunity is not paved with racial and ethnic preferences. It is paved with genuine achievement. In 1947, John Gunther wrote, in Inside the U.S.A, that major Wall Street law firms were, “the last frigid citadel of Anglo-Saxon Protestantism” and that Jews were barred from being hired, even as associates, at these law firms. See Inside the U.S.A., chapter entitled “New York City”. Similarly, World War I hero and founder of the Office of Strategic Services, General William Donovan, was forced to found his own law firm because of similar anti-Catholic animus on Wall Street, at that time.

That world has substantially changed during the past 60 to 75 years although the Erickson, and Seattle opinions, and the 6th Circuit, refuse to recognize this fact. Wall Street law firms are heavily staffed with Jewish and Asian-American partners
and associates, not because of quotas or ethnic “plusing up” but because genuine talent and law school achievement became the criteria for hiring attorneys and not an applicant’s religious affiliation or ranking in the Social Register.

The University seeks to create artificial diversity. “It is, at best, a morally neutral contrivance. But sometimes it is much worse: a set of social arrangements that are unjust and thwart our higher aspirations”, Peter Wood, Diversity: The Invention of a Concept, at pages 39-40. Moreover, these false admissions demean the alleged beneficiaries of reverse discrimination.

To admit students in this fashion is to tell them that the college - and perhaps society at large - does not believe that they could succeed on their own abilities. It plants the idea that “equality itself is an artificial social arrangement imposed by the actions of others. . .To admit people into college even partly because of race is to hand down a life sentence of corrosive self-doubt, based on the suspicion that one could not have made it on merit alone”, Wood, op. cit. at pages 40-41.

Nowhere in the Constitution, or the Declaration of Independence, does the word “diversity” appear. Nor does it appear in the 14th Amendment. “Equality” and “liberty” are discussed repeatedly. Diversity is never mentioned. “Diversity is not about fine tuning American society. . .it aims no less than transforming American society through and through”, Wood, op. cit., at page 15 (emphasis
added). There is no Constitutional basis for the Courts, let alone a state university, to engage in a radical restructuring of America, allocating college admissions, jobs and contracts based on race.

There is no Constitutional underpinning for Justice Powell’s lone opinion in Regents of University of California v. Bakke, 348 U.S. 265, 305, (1974) that a state government has any interest, let alone a compelling state interest, in the diversity of the student body in its medical school. It is not protected 1st Amendment academic freedom. It became a compelling government interest only because Justice Powell said that it was.

VIII. The Imposition of State Compelled Diversity Programs Harms Society.

The diversity movement has substantially harmed America. “[It] has contributed significantly to declining academic standards (e.g. attacks on SAT testing as a method of identifying which students who have an aptitude to succeed in college...and made certain forms of racialism respectable again”, Wood, op. cit. at 16. And so they have, for “what proclaims itself as diversity turns out to be little more than prejudice. . . . the [civil rights] movement has appropriated the name of diversity, not to achieve a better kind of national unity, but to give license to ethnic privilege and other forms of separatism”, Wood at page 17 (emphasis added).

As Professor Wood wrote, “Such group identities may seem real enough to politicians trolling for
votes. . .but they are shadowy formulations and deeply at odds with our cultural imperative to treat individuals as individuals regardless of their ethnic backgrounds”, Wood, op. cit. at page 25 (emphasis added). Political expediency is not a compelling state interest to violate the civil rights of everyone in Texas who is not African-American or Hispanic, as Texan “defines” Hispanic.

Politically inspired “diversity” prevents merit based achievement from happening. As Professor Wood wrote:

Diversity that is achieved by racial, ethnic or other quotas in college admissions; diversity that . . .consists of books included or excluded because of the race, nationality, gender or gender preference of the authors... these are, every one of them, pernicious forms of diversity. . .To admit students in this fashion is to tell them that the college – and perhaps society at large – does not believe that they could succeed on their own abilities. It plants the idea that “equality” itself is an artificial social arrangement. . .and it negates the idea of equality as the underlying and inherent condition of all humanity. Wood, op. cit. at pages 40-41 emphasis added.)

Professor Woods' theory is confirmed by various academic studies. In Mismatch: How Affirmative Action Hurts Students it’s Intended to Help, Professor Richard Sander of the UCLA
School of Law and Stuart Taylor concluded that:

[R]acial preferences will vary across racial
groups with blacks preferred over
Hispanics, both groups preferred over
whites and whites preferred over Asians.
Nationwide, the academic index of whites
taking the SAT is about 140 points higher
than the academic index for blacks
(corresponding to a 300 point black-white
gap on the current SAT I test and a 0.4
GPA gap in high school grades, and it has
hovered in that range for the past 20 years.
Hispanics, in contrast, have an academic
index that is about 70 points lower than
whites. . .and the academic index of Asians
is about 30 points higher than whites. . .
Something close to these differences will
show up in most college applicant pools,
and with racial preferences, will carry over
to the college’s enrolled students. Mismatch
at page 17, citing Sander & Yakowitz, The
Secret of My Success: How Status Prestige
and School Performance Shape Legal
Careers at: www.seaphe.org/pdf, and How
they Really Get In, Inside Higher
Education April 9, 2012 at
www.insidehighered.com/news/2012/04/09

Historian Victor Davis Hanson summed up the
damage that race based programs have caused to the
United States:
Identities...are sometimes put on and taken off, like clothes, as self-interest dictates-given that they are no longer ascertainable by appearance. If that sounds crass or unfair, ask Elizabeth Warren who dropped her Native American claims as soon as she received tenure and found her 1/32 Indian suddenly superfluous to the apparently similarly cynical but now mum employer Harvard [Law School]. . . [N]o one knows who qualifies as an oppressed victim... The real worry is that soon we will have so many recompense-seeking victims that we will run out of concession-granting oppressors. Wall Street Journal, Notable & Quotable, page A 15, May 14, 2012.

*E Pluribus Unum* is being replaced by “E Unum Pluribus”. America is the worse for it.

**Conclusion**

The Opinion of the 6th Circuit in *Schuette* should be reversed.

Respectfully submitted,

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