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Schuette v. Coalition to Defend Affirmative Action

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No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

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

BRIEF OF COMMITTEE OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT COALITION

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INTEREST OF THE AMICI CURIAE[1]

Each of the *amici curiae* is a professor who has published books or articles on affirmative action or American constitutional history.

Amici submit this brief to show the true place of Michigan's Proposal 2 in American constitutional history; as an illegitimate attempt by a temporary majority to prevent a racial minority from achieving integration through the normal political and administrative processes. During the Jim Crow era, the Supreme Court approved such restrictions on the political activity of racial minorities, but since the dawn of the modern Civil Rights era, the Supreme Court has protected the fairness of the political process against these types of distortions.

Amici are: Michelle Adams, Professor of Law, Benjamin N. Cardozo School of Law; Richard L. Aynes, John F. Seiberling Chair of Constitutional Law, University of Akron Law School; Michael A. Lawrence, Associate Dean for International and Graduate Programs and Professor of Law, Michigan State University College of Law; Michael Perry, Robert W. Woodruff Professor of Law, Emory University School of Law; Richard Saphire, Professor Emeritus, University of Dayton Law School; and Rebecca Zietlow, Charles W.

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[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have consented to this filing.

Fornoff Professor of Law and Values, University of Toledo College of Law.

SUMMARY OF ARGUMENT

The purpose of this brief is to place the dispute over affirmative action in Michigan's public universities within a broader historical context. State constitutional amendments such as Proposal 2 are not uncommon in American history. In reaction to calls for reform from a minority group – whether it be the end of slavery, the enactment of non-discrimination laws, or the adoption of voluntary programs of racial integration – the majority has often responded by attempting to prevent the debate from occurring, by denying members of the minority group the opportunity to participate in the political process, or by making it impossible for the government to adopt the reform. State constitutional amendments like Proposal 2 are unconstitutional because they deny minority groups the equal right to achieve their goals through the normal political process.

ARGUMENT

I. CIVIL RIGHTS MOVEMENTS ARE EXERCISES IN DEMOCRACY

Movements for civil rights express the deepest yearnings of Americans for fundamental fairness and reflect our enduring faith in democracy. These struggles have often commanded the attention and consumed the energy of entire generations of American citizens. Carrie Chapman Catt described the women's suffrage movement in these words:

> "To get the word 'male' in effect out of the Constitution cost the women of the country fifty-two years of pauseless campaign... During that time they were forced to conduct fifty-six campaigns of referenda to male voters; 480 campaigns to get Legislatures to submit suffrage amendments to voters; 47 campaigns to get State constitutional conventions to write woman suffrage into state constitutions; 277 campaigns to get State party conventions to include woman suffrage planks in party platforms, and 19 campaigns with 19 successive Congresses." Carrie Chapman Catt and Nettie Rogers Shuler, *Women Suffrage and Politics* 107 (New York, Chas. Scribners Sons, 1923).

Peaceful change is possible only if the democratic process is permitted to operate on a non-discriminatory basis. A temporary majority may not defend its privileges by making it impossible for the government to respond to the minority.

II. WHEN CIVIL RIGHTS MOVEMENTS BEGIN TO ACHIEVE VICTORIES, THE TEMPORARY MAJORITY OFTEN RESPONDS BY ATTEMPTING TO MAKE IT MORE DIFFICULT FOR MINORITIES TO ACHIEVE THEIR GOALS THROUGH THE DEMOCRATIC PROCESS

When a movement for civil rights begins to make progress and accumulates victories in the legal and legislative arenas, the majority of the public pushes back and resists the minority's claims for equal opportunity. Favorable court decisions may be reversed and civil rights laws may be repealed. This back-and-forth interaction, the slow and halting pace of human progress, is to be expected within any adversarial system of justice or democratic political process. It is of course legitimate for the majority to assert its views both in the courts and before political bodies in seeking to persuade judges, legislators, and other public officials that the minority should not be granted the rights or opportunities they seek.

However, there is another common tactic – an illegitimate one – that is often utilized by members of a then-existing majority who resist reform. That is to distort the political process to make it more difficult for the minority than it is for the temporary majority to obtain the passage of laws or adoption of policies that reflect its views or interests. These tactics take many forms: restrictions on freedom of speech, denial of voting rights, or laws that constrain the authority of governmental institutions to enact reforms sought by the minority. Proposal 2 is an example of the third type of illegitimate tactic.

It was measures like Proposal 2 that led to the Civil War. The Civil War erupted in part because the southern states adopted amendments to their state constitutions that made it impossible to limit or abolish slavery through the democratic process. As a result, the conflict over slavery was transformed from a social, political, and economic contest into a military confrontation. The Equal Protection Clause of the Fourteenth Amendment was adopted to overrule these types of barriers to the political success of minorities, and to prohibit these types of laws from being enacted in the future.

III. DURING THE ANTEBELLUM PERIOD, SUPPORTERS OF SLAVERY ADOPTED LAWS AND STATE CONSTITUTIONAL AMENDMENTS THAT MADE IT IMPOSSIBLE FOR SLAVERY TO BE ABOLISHED THROUGH THE DEMOCRATIC PROCESS, THUS LEADING TO THE CIVIL WAR

The purpose of the Fourteenth Amendment becomes more clear when we consider the nature of the political crisis that led to the Civil War.

Many people in the antislavery movement hoped to persuade the people of the south to reject slavery. To achieve that purpose, antislavery advocates published works intended to stoke debate and stimulate democratic action. See, *e.g.,* Angelina Grimke, *Appeal to the Christian Women of the South* (1836) (contending that slavery is contrary to moral and religious teachings); Hinton Helper, *The Impending Crisis In the*

South (1857) (addressed to the non-slaveholding whites of the south and contending that slavery was harmful to their economic interests). However, instead of generating a robust debate on slavery in the south, these works were banned and burned. *See e.g.,* An Act to Suppress the Circulation of Incendiary Publications, ch. 66, 1836 Va. Acts 44-45 (outlawing antislavery books and speeches); Shannon D. Gilreath, *The Technicolor Constitution: Popular Constitutionalism, Ethical Norms, and Legal Pedagogy,* 9 Tex. J. Civ. Lib. & Civ. Rts. 23, 34 fn. 63 (2003) (Grimke's *Appeal* publicly burned by South Carolina postmasters). The censorship of dissent over the issue of slavery precluded the use of the democratic process to abolish the institution. State constitutional amendments prohibiting the abolition of slavery had a similar effect.

The southern states had not always prohibited public discussion about the merits of slavery. In January and February of 1832, in the wake of the Nat Turner rebellion, the Virginia General Assembly earnestly debated a bill that would have instituted a plan of gradual emancipation of slaves within the state. The bill was defeated by a margin of 73-58. See Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 Chi-Kent L. Rev. 1113, 1128 (1993). It was the last time that a state that would eventually join the Confederacy submitted the issue of slavery to the political process.

In the 1830s and 1840s southern attitudes towards slavery hardened and a number of laws were adopted that would make it impossible to resolve the continued

existence of slavery through the democratic process. Free negroes lost the right to vote (see North Carolina History Project, Constitution of 1835, at http://www.northcarolinahistory.org/commentary/32/entry; and NCPedia, John C. Sanders, NC Constitutional History 1776-1866, at http://ncpedia.org/government/constitution1776); it was forbidden to teach slaves to read and write (Curtis, *The 1859 Crisis, supra* at 1123); and, finally, it became illegal to promote the abolition of slavery. (See Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (2000), pages 131-154 (describing the efforts of southern states to make public opposition to slavery illegal); *id.* at 194-215 (describing legal theories supporting suppression of slavery agitation); *id.* at 271-299 (describing the southern response to Helper's *Impending Crisis* and the trials of Daniel Worth in North Carolina for circulating it). Even at the federal level laws and policies were adopted to silence antislavery views. The "Gag Rule" was adopted prohibiting discussion of abolition in Congress, and the Post Office refused to carry antislavery newspapers or other materials advocating emancipation into the southern states. (See Curtis, *Free Speech,* pages 155-181 (describing federal efforts to silence opposition to slavery)).

Foremost among the legal changes withdrawing slavery from the political process were amendments to the constitutions of many of the states that later formed the Confederacy. Those amendments withdrew the power of the state legislatures to abolish slavery. The Virginia Constitution of 1851 provided:

> The general assembly shall not emancipate any slave, or the descendant of any slave, either before or after the birth of such descendant. (Vir. Const. of 1851, art. IV, § 21)

This constitution also granted the state legislature the power to "impose such restrictions and conditions as they shall deem proper on the power of slave-owners to emancipate their slaves …." (Vir. Const. of 1851, art. IV, § 20). According to historian Kenneth Stampp, "Most southern constitutions prohibited the legislatures from emancipating slaves without both the consent of the owners and the payment of a full equivalent in money." Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* 198 (1956). See, *e.g.*, Ala. Const. of 1819, art. VI, § 1; Ark. Const. of 1836, art. VII, § 1; Fla. Const. of 1838, art. XVI, § 1; Miss. Const. of 1817, art. VI, § 1; Tenn. Const. of 1834, art. II, sec. 31; Tex. Const. of 1845, art. VIII, § 1.

Abraham Lincoln condemned these state constitutional amendments in his famous "Hundred Keys" speech in Springfield, Illinois, on June 26, 1857. Lincoln observed that most Americans of the revolutionary generation believed that slavery was wrong and expected its eventual extinction, but that the present generation had enacted laws – including amendments to their state constitutions – that made slavery a virtual "prison house." Speaking of the Revolutionary period, Lincoln said:

> In those days, as I understand, masters could, at their own pleasure, emancipate their slaves; but since then, such legal restraints have been made

> upon emancipation, as to amount almost to prohibition. In those days, Legislatures held the unquestioned power to abolish slavery in their respective States; but now it is becoming quite fashionable for State Constitutions to withhold that power from the Legislatures. 2 *Collected Works of Abraham Lincoln* 404 (Roy P. Basler, ed. 1953).

Lincoln employed a powerful metaphor to express the fact that the purpose of these state constitutional amendments was to make it impossible to abolish slavery:

> They have him in his prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is. *Id.*

The Civil War is the central tragedy of American history and the central failure of American democracy. Why were our ancestors unable to resolve the question of slavery peacefully? Why were we unable to abolish slavery through the democratic process?

Contemporaries believed that democracy failed because it was not given the opportunity to succeed. In a letter to John C. Calhoun, Francis Lieber wrote:

> "If you fear discussion, if you maintain that the South cannot afford it, then you admit at the same time that the whole institution is to be kept up by violence only, and is against the spirit of the times and unameliorable, which means, in other words, that violence supports it, and violence will be its end." Curtis, *Free Speech*, at 193.

In an 1864 editorial Harper's Weekly drew a similar conclusion about the cause of the war:

> "It was the knowledge that, if the right of free speech, guaranteed by the Constitution, were tolerated in the South, slavery would be destroyed by the common-sense of the Southern people, which made Calhoun and all his school insist upon suppressing it. Consequently, in its most important provision, the Constitution has been a dead letter in every slave State for more than thirty years." "The Truth Confessed," Harper's Wkly., Jan. 16, 1864, at 34 in Richard L. Aynes, 18 Journal of Contemporary Legal Issues 77, *Enforcing the Bill of Rights Against the States: The History and the Future* (2009).

Present-day historians agree. Michael Curtis states:

> "Vocal domestic Southern opposition to slavery reached a brief high water mark in the 1830s

> and thereinafter began to recede in much of the South. Southern laws and vigilance committees silenced abolition expression and did their best to take opposition to slavery off the Southern political agenda. As a result, the institution could only be dislodged by violence." Curtis, *Free Speech*, at 192-193.

Avery Craven states, "The most significant thing about the American Civil War is that it represents a complete breakdown of the democratic process." Avery Craven, *The 1840's and the Democratic Process,* Journal of Southern History XVI (1950), pp. 161-76, in Kenneth M. Stampp, *The Causes of the Civil War* 195 (Simon & Schuster 1991). Michael Holt agrees: "The Civil War represented an utter and unique breakdown of the normal democratic political process." Michael F. Holt, *The Political Crisis of the 1850s* 1 (Norton, 1978).

In the absence of the Fourteenth Amendment, the antebellum courts were powerless to protect the democratic process against state laws and practices that prevented citizens and legislators from addressing the evils of slavery, and this judicial powerlessness led directly to the Civil War. A leading objective of the newly-formed Republican Party was to incorporate the principles of the Declaration into the Constitution because this was "essential to the preservation of our republican institutions." See Plank 2 of the 1860 Republican Party Platform in John Wooley and Gerhard Peters, The American Presidency Project, *The Republican Platform of 1860*, at http://www.presidency.ucsb.edu/ws/index.php?pid=29620#axzzlalRmV7UZ. Following the war under the leadership of Republicans in Congress the nation

adopted the Fourteenth Amendment which was designed, intended, and understood to prohibit interference with the democratic operation of the political process. Despite this, however, for many decades the states continued to adopt anti-democratic laws and state constitutional amendments that were intended to make it impossible for minorities to achieve progress through the democratic process. Nearly a century passed before the Supreme Court fulfilled its duty under the Fourteenth Amendment and declared these laws unconstitutional.

IV. FOR MORE THAN A CENTURY AFTER THE CIVIL WAR THE OPPONENTS OF CIVIL RIGHTS AND RACIAL INTEGRATION SOUGHT TO REMOVE THESE SUBJECTS FROM CONSIDERATION BY THE DEMOCRATIC PROCESS. THE SUPREME COURT EVENTUALLY STUCK DOWN THESE LAWS AND CONSTITUTIONAL AMENDMENTS THAT DISTORTED THE POLITICAL PROCESS.

For more than a century after the Civil War similar illegitimate tactics were employed to distort the political process and delay the attainment of equal rights for black citizens and to block integration. These tactics included restrictions on freedom of speech, impediments to the right to vote, and super-majoritarian barriers to government action. As before the Civil War, these tactics both limited discussion of the issues and interfered with the democratic process. These tactics have come to be known as the "Mississippi Plan." The noted historian C. Vann

Woodward describes the three stages of the Mississippi Plan, which were widely copied across the south. In 1875, white mobs terrorized African-American candidates and voters; in 1890, state laws and constitutional amendments enacting poll taxes, literacy tests, and property qualifications were adopted to deprive African-Americans of the right to vote; and in 1954 the Citizens Councils were formed "to wage unrelenting war in defense of segregation." C. Vann Woodward, *The Strange Career of Jim Crow* 152 (Oxford University Press 1966). In 1898 the Supreme Court upheld the amendments to the Mississippi constitution that were used to bar African-Americans from exercising the franchise. *Williams v. Mississippi*, 170 U.S. 213 (1898). These tactics were successful in depriving African-Americans of the opportunity to participate in the political process. For example, in 1896, there were 130,334 African-Americans registered to vote in the State of Louisiana; in 1904, there were only 1,342. Woodward, at 85. In the 1950's, only two percent of adult African-Americans in the State of Mississippi were registered to vote. Woodward, at 174. State constitutions from this era also required the separation of children by race in public schools. See, *e.g.,* Ala. Const. of 1901, Art. XIV, § 256 ("Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race."); Geo. Const. of 1877, art. VIII, § 1 ("The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.")

The foregoing portions of this brief describe how in response to the antislavery movement the southern states made changes to their constitutions limiting the

power of their state legislatures to abolish slavery, and how in response to Reconstruction states adopted laws and constitutional amendments limiting the franchise and requiring segregation of the races. The same strategy was employed during the modern civil rights era. After *Brown v. Board of Education* was decided a number of states enacted laws and constitutional amendments that were intended to make it impossible for their public institutions to comply with that decision. See *e.g.,* Ala. Const., art. XIV, § 256 amend. 111 (1956) (eliminating the requirement that the state provide every child a free public education and permitting the state to turn over land and buildings to private educational institutions); Opinion of the Justices No. 333, 624 So. 2d 107 (Ala. 1993), referencing *Alabama Coalition for Equity, et a. v Hunt,* CV-90-883 (striking down Amendment 111 because it was enacted for a discriminatory purpose); Virginia Pupil Placement Act, VA Code. §22-232.1 *et seq*. (1950), repealed in 1966 (divesting local school boards of authority to assign children to particular schools and placing that authority in a State Pupil Placement Board which without exception assigned children to separate schools based upon their race); see generally *1958 American Jewish Year Book* pp.44-68, available at http://www.ajcarchives.org/AJC_DATA/Files/1958_4_USCivicPolitical.pdf, (describing the laws and constitutional amendments adopted in several states to oppose racial integration of the public schools); *id*. at 69 (table entitled "Major Types of Legislation Adopted in Eleven Southern States Since 1952 Designed to Prevent or Control Desegregation," reprinted from *Southern School News*, September 1957). These types of laws, like Proposal 2, are unconstitutional under the Equal Protection Clause because they prohibit state-

supported educational institutions from exercising their discretion to choose to adopt policies of racial integration.

After 1938 the Supreme Court began to address many of the abuses that had accumulated during the Jim Crow era. In a series of cases, the Court struck down barriers to minorities' freedom of expression and the right to vote, as well as barriers to the adoption of anti-discrimination laws and policies of racial integration. A theme that is common to many of these cases is that the Court was restoring democracy by striking down laws that interfered with the right of minorities and their allies to seek justice through the normal political process. These decisions are consonant with what John Hart Ely has called "representation-reinforcement" – the role of the courts as the guardian of democracy. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 87-104 (1980).

The first series of cases upheld the First Amendment rights of minorities to advocate in the political process. In *NAACP v. Alabama*, 357 U.S. 449 (1958) and *NAACP v. Button*, 371 U.S. 415 (1963) the Court struck down Alabama and Virginia laws that were intended to hinder the operation of the nation's leading civil rights organization. In *Edwards v. South Carolina*, 372 U.S. 229 (1963) and *Cox v. Louisiana*, 379 U.S. 536 (1964) the Court upheld the right of citizens to engage in peaceful protests in support of civil rights. And in *New York Times v. Sullivan*, 376 U.S. 254 (1964) the Court prohibited the states from using the law of libel to silence newspapers from covering the civil rights movement.

The second set of cases reaffirmed and protected the right to vote and the effectiveness of those votes. In *Smith v. Allwright*, 321 U.S. 649 (1944) the Supreme Court abolished white primaries, thus opening the nomination process to African-Americans. See also *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down malapportionment of the Alabama legislature); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (striking down Virginia poll tax); and *Rogers v. Lodge*, 458 U.S. 615 (1982) (striking down an at-large representation scheme in a rural Georgia county). In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court considered the constitutionality of an Alabama constitutional provision adopted in 1901 that barred felons from voting. The Court found this provision to be unconstitutional because it was adopted for the purpose of disenfranchising African-Americans. *Id.* at 229 (stating, "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks."). In all of these cases the Supreme Court removed impediments to voting and protected the rights of all citizens, regardless of race, to participate in the political process on an equal basis.

In a third set of cases, most closely analogous to the issue at hand, the Court invalidated barriers to minorities achieving success in the political process, including constitutional amendments like Proposal 2. The Supreme Court considered the constitutionality of three such popularly-enacted laws and found them all to be invalid. In the first case, the Court struck down a California constitutional amendment that prohibited the state legislature from enacting fair housing laws. *Reitman v. Mulkey*, 387 U.S. 369 (1967). In a second

case, the Court struck down an amendment to the city charter of Akron that made it more difficult to enact fair housing laws. *Hunter v. Erickson*, 393 U.S. 395 (1969). In a third case, the Court rejected a statewide initiative prohibiting school districts from voluntarily busing children for integration. *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). In all of these cases, the laws had a similar effect to Proposal 2 – blocking minorities from using the democratic process to secure the adoption of anti-discrimination measures or policies promoting racial integration. Accordingly, in all of these cases the laws were declared unconstitutional.

In *Romer v. Evans*, 517 U.S. 620 (1996) the Supreme Court announced a simple guiding principle that explains the decisions in *Reitman*, *Seattle School District*, and *Hunter*. In *Romer* the Court stated:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. 517 U.S., at 633.

In all of these cases the Supreme Court properly struck down state laws that interfered with the equal right of minority groups to end discrimination and promote integration.

V. PROPOSAL 2 IS SIMILAR TO OTHER STATE CONSTITUTIONAL AMENDMENTS THAT HAVE BEEN PROPERLY DECLARED UNCONSTITUTIONAL

Michigan Proposal 2 makes it more difficult for public universities to integrate their institutions as allowed by this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). The state constitutional amendment makes it more difficult for African-Americans and other racial minorities to "seek aid from the government" in their admission to state universities. The fact that Proposal 2 is a product of direct democracy does not diminish the fact that it is profoundly anti-democratic. It is but one example of the long history of discriminatory state constitutional amendments and other laws adopted by a temporary majority to prevent the minority from being able to make progress in civil rights through normal governmental channels. The closest analogy to Proposal 2 is the statewide initiative struck down in *Washington v. Seattle School District* that prohibited school districts from voluntarily adopting programs of busing to integrate the public schools.

Throughout American history movements for civil rights have sought to transform their goals into law by pursuing justice in the courts and the adoption of legislation and official policies through the political process. While it is legitimate for a majority to refuse to adopt civil rights policies or to repeal policies that have already been adopted, it is illegitimate for a temporary majority to enact constitutional amendments such as Proposal 2 that distort the political process to make it more difficult for the minority to achieve its goals.

CONCLUSION

The Court should affirm the decision of the Sixth Circuit and rule that Michigan Proposal 2 is unconstitutional under the Equal Protection Clause because it makes it more difficult for minorities to achieve integration of the public universities through normal political and administrative processes.

Respectfully Submitted,

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