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ARTICLE

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INTRODUCTION

In 2003, two significant developments reflected the attitudes of big business toward the value of racial difference. That year, the Supreme Court decided the landmark cases *Gratz v. Bollinger*[1] and *Grutter v. Bollinger*[2] to address the constitutionality of race-based affirmative action in university admissions policies. Those rulings marked the culmination of support offered by representatives of big business for such policies, voiced through their filings of amici briefs.[3] Indeed, the significance of that support was not lost on the Court, as the *Grutter* majority specifically incorporated references to it in its rationale.[4] That same year, social scientists Marianne Bertrand and Sendhil Mullainathan published a study revealing a marked pattern of race-based discrimination in the hiring process of

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1. 539 U.S. 244 (2003).

2. 539 U.S. 306 (2003).

3. *See* Brief for Amici Curiae 65 Leading American Businesses, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-241) and Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-516) [hereinafter Brief for 65 Leading American Businesses]; Brief of Amici Curiae Media Companies, *Gratz* (No. 02-241) and *Grutter* (No. 02-516); Brief of Amicus Curiae Gen. Motors Corp., *Gratz* (No. 02-241) and *Grutter* (No. 02-516); Brief of Amicus Curiae BP America, Inc., *Gratz* (No. 02-241) and *Grutter* (No. 02-516); Brief of Amicus Curiae ExxonMobil Corp., *Gratz* (No. 02-241) and *Grutter* (No. 02-516).

4. *Grutter*, 539 U.S. at 333.

a cross-section of American business.[5] The study has received wide ranging acclaim as a legitimate indicator of the discrimination it reveals.[6]

These two developments appear wildly contradictory. The briefs appear to represent a recognition of the value of increasing minority employment on the part of big business. As such, a study revealing significant patterns of race-based discrimination in the hiring process would seem antithetical to the support reflected in the briefs. Why would representatives of big business refuse to hire members of the very minorities whose employment they seem to embrace in the briefs?

A close examination, however, of the support offered by representatives of big business in the *Gratz* and *Grutter* litigation reveals that no such contradiction exists. Such an examination reveals that the primary rationale for this support is not to increase minority hiring. Indeed, while an interest in increasing minority employment is present in the briefs, the *primary* interest asserted is in hiring employees who have been exposed to minorities as students, not in necessarily hiring minorities themselves. Therefore, the support of big business for race-based affirmative action in university admissions provides no contradiction to the discriminatory hiring practices observed by Bertrand and Mullainathan. Rather, the two developments may be aptly viewed as quite compatible.

This Article explores the apparent contradiction between the support big business gave to race-based affirmative action in university admissions, reflected by the amici briefs in *Gratz* and *Grutter*, and the racially discriminatory hiring practices revealed in the study conducted by Bertrand and Mullainathan. Part I will describe the support big business offered for race-based affirmative action in the *Gratz* and *Grutter* cases. Part II will detail the study conducted by Bertrand and Mullainathan, paying particular attention to their assertion that the discrimination they describe is based on race. Finally, in Part III, I will more closely examine the rationales put forth in the amici briefs and compare those rationales to the find-

5. MARIANNE BERTRAND & SENDHIL MULLAINATHAN, ARE EMILY AND GREG MORE EMPLOYABLE THAN LAKISHA AND JAMAL? A FIELD EXPERIMENT ON LABOR MARKET DISCRIMINATION, NBER WORKING PAPER SERIES, WORKING PAPER 9873 (2003).

6. *See* L.A. Johnson, *Studies find that Afrocentric names often incur a bias*, PITTSBURGH POST-GAZETTE, Nov. 25, 2003, at D1; Alan B. Krueger, *Sticks and Stones Can Break Bones, but the Wrong Name Can Make a Job Hard to Find*, N.Y. TIMES, Dec. 12, 2002, at C2.

ings of the study. In doing so, I will conclude that when taken together, the two appear to constitute a stark contradiction while, in actuality, they are indeed quite compatible.

I. BIG BUSINESS SUPPORT FOR AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS

The *Gratz* and *Grutter* litigation proved to be a landmark event in Supreme Court jurisprudence on a variety of fronts. From a legal standpoint, the case marked a statement of definition as to the relevant precedent on the matter.[7] Outside the legal arena, the decisions had dramatic impact as well. The rulings charted the course of public policy organizations from across the political spectrum for the foreseeable future.[8] In the field of higher education, the outcome served to define admissions policies for colleges and universities across the country.[9] For businesses, the decisions directly affected recruitment and hiring practices.[10] Because its impact reached so many sectors of society, interest in the case rose to abnormally high levels.[11] Accordingly, the filings of amici briefs occurred in significantly high numbers.[12]

Decided on the same day, *Grutter* and *Gratz* marked the first time the Supreme Court considered the use of race in higher education admissions programs since *Regents of Univ. of Cal. v. Bakke*.[13] Both involved, *inter alia*, challenges based on the Equal Protection

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7. *Grutter*, 539 U.S. at 321. Specifically, the Court accounted for the judicial confusion surrounding Justice Powell's concurrence in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In that opinion, Powell opined that race could be considered in a university admissions policy for the purpose of attaining a diverse student body. *Bakke*, 438 U.S. at 311 (Powell, J., concurring). The *Grutter* Court noted that circuits have been split as to the precedential value of that opinion. *Grutter*, 389 U.S. at 325 (comparing *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001) and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) with *Smith v. Univ. of Wash. Law School*, 233 F.3d 1199 (9th Cir. 2000)). The *Grutter* Court, however, chose not to decide the precedential value of the Powell concurrence in *Bakke* but rather only the validity of its substance. *Grutter*, 389 U.S. 306; *see also* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 307 (1990) (noting in 1990 that "the constitutional status of affirmative action remains uncertain").

8. *See* Brief of the Cato Institute as Amici Curiae, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-241) and Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-516).

9. *See* Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 114 (2003).

10. *See* Brief for 65 Leading American Businesses, *supra* note 3, at 9.

11. Warren Richey, *Court Takes Up Racial Preferences in Landmark Case*, THE CHRISTIAN SCIENCE MONITOR, Mar. 31, 2003, at 4.

12. *Id.*

13. Grutter v. Bollinger, 539 U.S. 306, 322 (2003).

Clause of the Fourteenth Amendment, for which a classification based on race may be deemed constitutional only if it serves a compelling state interest and its means are narrowly tailored to serve that interest.[14]

In *Gratz*, the plaintiff challenged the use of race in the University of Michigan's undergraduate admissions policy.[15] While the particulars of the policy changed over time, it consistently yielded a result in which nearly all qualified African-Americans, Hispanics, and Native Americans were offered admission.[16] In the final version of the admissions policy in the period relevant to the litigation, the University employed a scale awarding applicants points for a variety of characteristics.[17] The maximum a candidate could achieve was 150 points, with 100 guaranteeing admission.[18] The university awarded twenty additional points for membership in an underrepresented racial or ethnic minority group.[19]

In *Gratz*, the petitioners were two white undergraduate applicants to the University.[20] Both were denied admission, even though the University's admissions office rated them as "well qualified" and "qualified" respectively.[21] In October 1997, the petitioners filed a lawsuit claiming violations of the Fourteenth Amendment.[22] The district court granted the petitioners' motion to certify the lawsuit as a class action on behalf of "those individuals who applied for and were not granted admission . . . who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission."[23]

The Supreme Court concluded that the admissions policy in its final form violated the Equal Protection Clause of the Fourteenth Amendment because the plan was not narrowly tailored to meet the compelling state interest of educational diversity.[24] In line with *Grutter*, the Court found the asserted state interest of educational

14. *Id.* at 326-27.
15. Gratz v. Bollinger, 539 U.S. 244, 253-57 (2003).
16. *See id.* at 249-50.
17. *Id.* at 255.
18. *Id.*
19. *Id.*
20. *Id.* at 251.
21. *Id.*
22. *Id.* at 252.
23. *Id.* at 252-53.
24. *Id.* at 275. The Court noted that it upheld the asserted compelling state interest of educational diversity in *Grutter*. *Id.* at 268.

diversity to be compelling.[25] However, the Court stated that the twenty additional points awarded for a candidate's membership in a racial minority constituted a "decisive" use of race in favor of "virtually every minimally qualified underrepresented minority applicant."[26] It is this decisiveness in the policy's use of race that the Court found constitutionally troubling. Specifically, the Court explained that giving primacy to any single characteristic fails as a means to further educational diversity.[27]

Grutter involved a challenge to the use of race in the admissions policy of the University of Michigan Law School.[28] Unlike the undergraduate admissions policy challenged in *Gratz*, the Law School admissions policy did not place a definitively quantifiable value on an applicant's membership in an underrepresented minority. Instead, the Law School sought to enroll a "'critical mass' of [underrepresented] minority students" by including race as a factor in admissions decisions.[29]

The petitioner in *Grutter* was a white applicant to the Law School who was denied admission.[30] She filed suit in 1997, claiming discrimination on the basis of race in violation of the Fourteenth Amendment.[31] Specifically, the petitioner asserted that "her application was rejected because the Law School uses race as a 'predominant' factor, giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.'"[32]

The Supreme Court found the Law School's admissions policy to be constitutional.[33] Of particular importance, the Court settled the question of whether educational diversity, as asserted by Justice Powell in *Bakke*, constitutes a compelling state interest.[34] The Court, however, bypassed the controversy as to whether Powell's opinion was binding by holding substantively that a state interest in educational diversity is compelling.[35] The Court also found the

25. *Id.* at 267.
26. *Id.*
27. *Id.*
28. Grutter v. Bollinger, 539 U.S. 306, 311 (2003).
29. *Id.* at 315.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 343-44.
34. For a review of the legal controversy surrounding the precedential value of Justice Powell's opinion in *Bakke*, see *supra* note 7.
35. *Grutter*, 539 U.S. at 325.

Law School's means to be narrowly tailored to serve that interest.[36] Specifically, unlike the means rejected in *Gratz*, the Court approved the Law School's approach because it ascribed no fixed benefit to an applicant's race but instead used race in determining admission in a "flexible, nonmechanical way."[37]

The litigation of *Gratz* and *Grutter* produced interest from a multi-faceted cross-section of American society, marked notably by the filing of amici briefs at unprecedented proportions.[38] Included in these filings were those from representatives of American business who supported both the undergraduate and Law School's use of race in their respective admissions policies.[39] (Because amici generally offered support for both the undergraduate and Law School programs together rather than separately, I will hereinafter collectively refer to them as "Michigan programs.").

A brief submitted by sixty-five leading American businesses led the filings of amici briefs submitted by representatives of big business in support of the Michigan programs.[40] In its introduction, the brief stated as its main purpose that diversity in higher education is a compelling state interest, and that the Michigan programs should therefore be deemed constitutional.[41] Central to the brief's argument was the link between educational diversity and specific business benefits derived therefrom.[42] The brief's proponents identified four ways in which the education of students in diverse environments bears fruit in business practices:

> First, a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives. Second, such individuals are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those customers. Third, a racially diverse group of managers with cross-

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36. *Id.* at 334.

37. *Id.*

38. *See supra* notes 7-12 and accompanying text.

39. *See supra* note 3. The two most prominent amicus briefs submitted by representatives of big business in support of the University of Michigan were the *Brief for 65 Leading American Businesses* and the *Brief of General Motors Corporation*. Both ExxonMobil Corporation and BP America submitted briefs in support of neither party.

40. Brief for 65 Leading American Businesses, *supra* note 3.

41. *Id.* at 2-3. *Cf.* NAOMI KLEIN, NO LOGO 107-24 (1999) (documenting how corporate America ultimately embraced the idea of diversity in order to create "a candy-coated multiculturalism," which has allowed "corporations . . . to sell a single product in numerous countries without triggering the old cries of 'Coca-Colonization'").

42. *Id.* at 4.

> cultural experiences is better able to work with business partners, employees, and clientele in the United States and around the world. Fourth, individuals who have been educated in a diverse setting are likely to contribute to a positive work environment, by decreasing incidents of discrimination and stereotyping.[43]

General Motors Corporation filed a similar brief in support of the Michigan programs.[44] Its brief, however, more narrowly defined its interest in a university's consideration of race in admissions as the development of "cross-cultural competence."[45] The brief defined this notion as "the capacities to interact with and to understand the experiences of, and multiplicity of perspectives held by, persons of different races, ethnicities, and cultural histories."[46] General Motors asserted that the necessity of this trait is rooted in the expansiveness, and corresponding diversity, of the market it serves.[47] Specifically, the proponents of the brief noted that "General Motors' employees, customers, and business partners . . . could scarcely be more racially, ethnically, and culturally diverse."[48] Therefore, General Motors believed hiring workers with "cross-cultural competence" would yield significant business benefits.

Like the brief filed by sixty-five leading American businesses, the General Motors brief linked employees' development of cross-cultural competence to their experience in a diverse educational setting.[49] The brief noted: "[S]tudents are likely to acquire greater cross-cultural competence in a multicultural and multiracial academic environment, in which students and faculty of different cultures and races interact, than they are in a homogeneous one, in which cross-cultural communication is merely a theoretical construct."[50]

The input of the business community was not lost on the Court. In defining educational diversity as a compelling state interest in *Grutter*, the Court took note of the benefits of a university's attaining a critical mass of diverse students for an array of interests in society.[51] With respect to business, the Court noted, "[t]hese benefits are not theoretical but real, as major American businesses have

43. *Id.* at 7.
44. Brief of Amici Curiae Gen. Motors Corp., *supra* note 3.
45. *Id.* at 4.
46. *Id.*
47. *Id.* at 2.
48. *Id.*
49. *Id.* at 4.
50. *Id.*
51. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[52] Therefore, the filings of the briefs by representatives of big business played a significant role in the Court's finding that educational diversity constituted a compelling state interest such that the Law School's admissions program was constitutional.

II. Review of Discriminatory Hiring Practices

The study conducted by Bertrand and Mullainathan provides a significant account of racially discriminatory hiring practices among a cross-section of American businesses.[53] The study compared resumes submitted by job applicants with "very White sounding names"[54] with those submitted by applicants with "very African American sounding names."[55] The results reveal a success rate of the former 50% higher than that of the latter.[56] Put differently, as further delineated by the study, when compared with an African-American sounding name, a white sounding name produces a benefit to the applicant equal to an additional eight years of experience.[57]

To conduct their study, Bertrand and Mullainathan sent resumes to employers in response to help-wanted ads in Boston and Chicago.[58] To each resume, they assigned a name deemed to be either "very White sounding" or "very African American sounding."[59] To classify names, the researchers relied on "frequency data calculated from birth certificates of all babies born in Massachusetts between 1974 and 1979."[60]

The researchers also looked for disparities in the effect of dif-

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52. *Id.*

53. Bertrand & Mullainathan, *supra* note 5, at 3 (examining "a large spectrum of job quality, from cashier work at retail establishments and clerical work in a mail room to office and sales management positions").

54. *Id.* at 2.

55. *Id.*

56. *Id.* at 2-3.

57. *Id.* at 3.

58. *Id.* at 2.

59. *Id.*

60. *Id.* at 7. Similar studies attesting to the notion of uniquely white or uniquely African-American names are found elsewhere. *See* Johnson, *supra* note 6, at D1 (citing the most popular baby names for black females, black males, white females, and white males in 2002 as compiled by the Pennsylvania Department of Health, Bureau of Health Statistics). *See generally* Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 The Quarterly Journal of

ferences in the credentials of job applicants with respect to each racial classification.[61] Within each group, the researchers subdivided the resumes into "higher quality applicants"[62] and "lower quality applicants."[63] Each employer to whom the researchers responded received four resumes: a higher qualified applicant with a white sounding name, a lower qualified applicant with a white sounding name, a higher qualified applicant with an African-American sounding name, and a lower qualified applicant with an African-American sounding name.[64]

The results of the study reveal a marked pattern of racial discrimination. A callback, via telephone or email, marked a successful response to a resume submission.[65] Whereas resumes with white sounding names had a 10.08% chance of producing a callback,[66] resumes with African-American sounding names had a 6.70% chance of doing so.[67] These results represent a difference in callback rates of 3.35 percentage points, or 50%.[68] Viewed another way, the study found that a job applicant with a white sounding name can expect one callback for every ten resumes submitted while a similar applicant with an African-American sounding name can expect one callback for every fifteen resumes submitted.[69]

The study's assessment of the impact of higher quality versus lower quality resumes further exemplified the racial discrimination in the hiring process. Higher quality resumes from applicants with white sounding names produced a callback rate of more than 11%,[70] while lower quality resumes from applicants with white sounding names produced a callback rate of 8.8%.[71] Thus, the difference in callback rates between higher and lower quality resumes

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ECONOMICS 767 (Aug. 2004), *available at* http://mitpress.mit.edu/journals/pdf/qjec_119_3_767_0.pdf.

61. BERTRAND & MULLAINATHAN, *supra* note 5, at 2.

62. *Id.*

63. *Id.* The researchers define a "higher quality" resume as one that indicates more experience, fewer holes in employment history, more likely includes an e-mail address, indicates the completion of certificate degrees, foreign language skills, and/or awards or honors. *Id.*

64. *Id.*

65. *Id.* at 9.

66. *Id.* at 10.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 12.

71. *Id.*

was 2.51 percentage points or 30%.[72] For applicants with African-American sounding names, higher quality resumes produced a callback rate of 6.99% while lower quality resumes yielded a callback rate of 6.41%.[73] Thus, the difference between callback rates for higher and lower quality resumes for applicants with African-American sounding names is .58 percentage points, or 9%. Therefore, applicants with white sounding names were rewarded at a substantially higher rate for an increase in credentials than their counterparts with African-American sounding names.[74]

Bertrand and Mullainathan also assigned random addresses to the resume of each fictional job applicant.[75] Within each racial classification, a portion of each group included addresses from "more affluent" neighborhoods.[76] By doing so, the researchers sought to ascertain the effect of neighborhood status on an applicant's prospects, particularly with respect to the different racial groups.[77] This feature of the study addressed the notion that African-American sounding names serve as a proxy for socioeconomic disadvantage rather than exclusively race.[78] If this notion is correct with respect to hiring patterns, and applicants from affluent neighborhoods are appealing to employers, the presence of such a neighborhood should compensate for the presence of an African-American sounding name on an application. The study, however, did not indicate such a finding.[79] While applicants with African-American sounding names did benefit from an affluent address, they did not benefit at a rate higher than that of applicants with white sounding names.[80] Thus, the study concluded that an address in an affluent neighborhood, while certainly providing benefit to all applicants, does not provide the compensation for the African-American sounding name that one would expect if that type of name served as a proxy for socioeconomic disadvantage.[81] Therefore, according to the study, the discrimination revealed was not based on socioeco-

72. *Id.*
73. *Id.*
74. Mullainathan was most troubled by this disparity of these rewards for increased credential statistics. In an interview with the *Pittsburgh Post-Gazette*, he said, "That, to me, was the most depressing part. When you show you have skills, you should get a huge return, and [blacks] didn't." Johnson, *supra* note 6, at D1.
75. BERTRAND & MULLAINATHAN, *supra* note 5, at 13.
76. *Id.*
77. *Id.* at 13-14.
78. *Id.* at 20.
79. *Id. See also* Fryer & Levitt, *supra* note 60, at 783-86.
80. BERTRAND & MULLAINATHAN, *supra* note 5, at 20.
81. *Id.*

nomic disadvantage but race.[82]

In sum, the Bertrand and Mullainathan study reflected a marked pattern of race-based discrimination in the hiring process.[83] The study revealed that applicants with distinctively African-American sounding names receive drastically less favorable responses from employers than those with distinctively white sounding names.[84] The study further revealed that the presence of an African-American sounding name is a proxy for race, as opposed to less competitive credentials or socioeconomic disadvantage.[85] Thus, the study reflected a marked pattern of discrimination in the hiring process of American business that is specifically based on race.

III. CONTRADICTION OR COMPATIBILITY?

On the surface, the support offered by representatives of big business for the Michigan programs and the findings by Bertrand and Mullainathan of race-based hiring discrimination appear to be wildly contradictory. Of late, corporate America has recognized the value of increased minority employment as a result of the rapidly growing percentage of the American population comprised of minorities and the corresponding increase in minority purchase power.[86] Thus, it would be reasonable to interpret the amici briefs described above as furthering an effort to increase minority hiring.[87] Under this reading, these briefs and the findings of Bertrand

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82. *Id.* Other studies have revealed similar race-based discrimination at different stages in the hiring process. In particular, Floyd Weatherspoon described studies conducted by the Fair Employment Council of Greater Washington and the Urban Institute involving the use of black and white testers in interviews. Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 53 (1994). Black and white testers were paired according to similar education, demeanor, and experience. *Id.* They were then trained to give similar responses to questions during the interviews. *Id.* The studies revealed that in nearly all instances, "the white male 'testers' were either given the job, treated more favorably, encouraged to apply for jobs with the employer, or offered the higher level job." *Id.* Weatherspoon concluded, "[t]hese two employment audits illustrate that when employers have an opportunity to hire qualified African- American males, they still rely on stereotypical biases to deny them employment." *Id.*

83. *See* BERTRAND & MULLAINATHAN, *supra* note 5, at 26 ("African Americans face differential treatment when searching for jobs and this may still be a factor in why they do poorly in the labor market.").

84. *Id.* at 10.

85. *See id.*; *see also* Fryer & Levitt, *supra* note 60, at 770 ("Overall, Black choices of first names today differ substantially more from Whites than do the names chosen by native born Hispanics and Asians.").

86. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER, 11-12 (1998).

87. *See infra* notes 98-99 and accompanying text. This Article does not purport

and Mullainathan appear to be starkly inconsistent. If the briefs reflect an effort to increase minority hiring, why would businesses systematically refuse to hire members of some of those very minorities when given the chance? A closer examination of the briefs, and the reading given them by the Court, however, reveals that the support they exemplify and the study's findings of discriminatory hiring practices present no conflict at all, but rather, are quite compatible.

The compatibility of the findings of race-based discrimination in hiring practices and big business's support for the Michigan programs lies in characterizing its rationale for offering that support. Representatives of big business could have based their support of the Michigan programs on three potential rationales: (1) a rationale that focuses exclusively or primarily on the interests of minorities;[88] (2) a rationale in which its interests converge with those of minorities;[89] or (3) a rationale based on interests that are exclusively its own and devoid of any minority interests.[90] It is because the third type of rationale receives primacy in the briefs and exclusivity by the *Grutter* majority that it must be deemed the predominant rationale. And it is because of this predominance in the rationale rooted in exclusively corporate interests – and the eschewing of those based on minority interests or interest-convergence – that corporate support for the Michigan programs and findings of discriminatory hiring practices are indeed compatible.

A minority-focused rationale appears nowhere in the briefs submitted by representatives of big business in favor of the Michigan programs.[91] However, such rationales have been prevalent in supporting both the Michigan programs specifically and affirmative action in general.[92] Therefore, I will return to a discussion of them

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that an increase in minority hiring played no role in corporate America's support of the Michigan programs. Rather, it asserts that this motivation was not primary.

88. *See* CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 249-69 (1997).

89. *See infra* notes 93-97 and accompanying text.

90. *See infra* note 100 and accompanying text.

91. *See* David Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1553 (2004) ("Neither corporate brief makes more than a passing reference to the moral arguments in favor of helping blacks to overcome slavery, segregation, or the stigma of racism . . . .").

92. *See* LAWRENCE & MATSUDA, *supra* note 88; Brief of Amicus Curiae, NAACP Legal Defense and Education Fund, Inc. & American Civil Liberties Union, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-241) and Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-516) [hereinafter Brief for NAACP & ACLU].

in conjunction with an examination of rationales eschewed by corporate America in favor of those that are exclusively corporate.

Representatives of big business did put forth rationales that exemplify interest convergence in their support of the Michigan programs. That support for affirmative action may be predicated upon converging interests emanating from Derrick Bell's theory of interest convergence in explaining civil rights progress.[93] In analyzing *Brown v. Board of Education*, Bell explained the concept by stating, "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[94] In the context of *Brown*, Bell asserted that white interests in the political and economic gains resulting from school desegregation had as much to do with the decision as minority interests in equal education.[95] Bell's theory has wide-ranging ramifications in analyzing civil rights law and theory.[96] It puts forth as a model for certain civil rights concepts – such as affirmative action – an incorporation of interests of multiple constituencies within a single rationale.[97] Put differently, under a rationale predicated upon interest convergence, even if it were not the intent of the party asserting the rationale to incorporate minority interests, by virtue of the assertion of that rationale, minority interests are also furthered when the proponent's interests are.

Of late, there has been a notable interest on the part of big

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93. Derrick A. Bell Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

94. *Id.* at 523.

95. *Id.* at 524-25 (arguing that *Brown* "helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples" and that it was a reflection of white business leaders' desire to "make the transition from a rural, plantation society to the sunbelt with all its potential and profit"). *See also* FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 193 (1979) ("[W]ith the rise of communism the United States was thrown into intense competition for world domination, a circumstance that demanded an ideology of 'democracy' and 'freedom.' Increasingly the circumstances prevailing in the South constituted a national embarrassment and support for these arrangements by dominant economic interests weakened.").

96. Richard Delgado's contrasting of Bell's theory with "'utility-based arguments,' [which] justify affirmative action on the ground that increased representation of minorities will be useful to society" reflects how Bell's theory serves to critique these rationales for affirmative action. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 569 n.45 (1984). Because I ultimately conclude that rationales based on interest convergence were not the primary rationales of big business, it is beyond the scope of this Article to analyze the social desirability of such rationales.

97. In the context of the Michigan programs, the interests that converge are those of minorities in obtaining employment and corporations in increasing minority hiring.

business in increasing minority employment.[98] Several arguments expressed in the briefs at issue reflect this interest.[99] These arguments, while rooted in the contexts of corporate interests, represent a convergence of those interests with the interests of minorities in obtaining employment. Because these arguments run concurrent with minority interests in obtaining employment – no matter their lack of explicit concern for the minority interest itself – they seem to render this support for both Michigan programs antithetical to the findings of Bertrand and Mullainathan. To that end, it would seem inconsistent for corporate America to discriminate against racial minorities in the hiring process if its support for the Michigan programs were primarily rooted in the interest-converging rationale of increasing minority hiring.

A closer examination of the briefs – and the reading the Court gave them – reveals a primary corporate interest that does not converge with minority interests in employment. The bulk of corporate interests in a race-based university admissions program has little to do with increasing minority employment. Rather, the interest given primacy, by both amici and the Court, is the exposure of potential employees, regardless of race, to members of minority races while attending a university (hereinafter "exposure rationale"). Because the support of big business for the Michigan programs reflects less of a concern for hiring minorities than for hiring employees who were exposed to minorities as students, that support and the findings of Bertrand and Mullainathan are not contradictory. Furthermore, when the presence of rationales that more readily further the interests of minorities are present but eschewed, the support that does exist and the findings of discriminatory hiring practices appear to be quite compatible.

Unlike the rationales based on interest convergence, the exposure rationale is one rooted exclusively in corporate interests and is utterly devoid of minority interests in employment. The basic tenet of the exposure rationale is succinctly explained by the Brief of ExxonMobil Corporation, which states:

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98. *See supra* note 86 and accompanying text.

99. *See* Brief for 65 American Businesses, *supra* note 3, at 7 ("[A] racially diverse group of managers . . . is better able to work with business partners, employees, and clientele in the United States and around the world."); Brief of Amicus Curiae Gen. Motors Corp., *supra* note 3, at 23 ("If courts prohibit institutions of higher learning from using race as a factor in admissions, businesses will find it more difficult to hire superbly trained minority candidates."); *see also* Brief of Amici Curiae Media Companies, *supra* note 3, at 2 ("Amici actively seek minority applicants . . . .").

> [A]n institution with a culturally diverse student body produce[s] graduates possessing the variety of perspectives that ExxonMobil views as paramount to its success as a global business . . . all individuals educated at such an institution benefit from exposure to students of widely diverse backgrounds—and this exposure, in turn, benefits their employers.[100]

Thus, according to the exposure rationale, it is beneficial for business to hire employees who were exposed to minority viewpoints while students; as such, it is correspondingly beneficial to business for universities to include minorities in their student bodies.

The exposure of students to minority viewpoints that big business sought in its support of the Michigan programs is a common occurrence in institutions of higher education. The implicit responsibility of exposing an entire student body to minority viewpoints is very real for minority students. In describing their experiences, Leslie Espinoza wrote, "[m]inority law students [are] a symbol for their race. They are expected to have an unending commitment to the 'community,' beginning with the law school community."[101] Correspondingly, the presence of minorities generally produces the desired exposure on the whole of a student body. In response to a recent study conducted at the University of Florida College of Law focusing on the effects of race and ethnicity in legal education, "[a]lmost 70% of students agreed or strongly agreed that racial/ethnic and gender diversity 'enhances [their] ability to get along better with members of other races.'"[102] Thus, in supporting the Michigan programs based on the premise that minority students would expose the entire student body to minority viewpoints, representatives of big business had solid reason to believe that such exposure would actually occur.

The primacy of the exposure rationale is present in the *Brief for Amici Curiae 65 Leading American Businesses*. While this brief does include the argument that corporate interests converge with

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100. Brief of Amicus Curiae ExxonMobil Corp., *supra* note 3, at 4.

101. Leslie Espinoza, *Empowerment and Achievement in Minority Law Student Support Programs: Constructing Affirmative Action*, 22 U. MICH. J.L. REFORM 281, 291 (1989). *See also* Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 512 (1986). Citing a similar phenomenon that occurs for law faculty, Moran writes, "[s]ome students and faculty will expect the minority or woman professor to serve as a representative of all minorities and women." *Id.*

102. Nancy E. Dowd & Kenneth B. Nunn, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 J.L. & PUB. POL'Y 11, 25 (2003).

minority interests,[103] the bulk of the rationale supports corporate interests in hiring employees exposed to minority viewpoints. Such an interest lacks any convergence with minority interests in employment.

Amici's primary rationale is evident in the "Introduction and Summary of Argument," in which the brief offers nothing concerning an increase in minority employment but does state that, "[i]t is essential that [students] be educated in an environment where they are exposed to diverse people, ideas, perspectives, and interactions."[104] Furthermore, as discussed earlier, amici delineated four specific benefits they derived from a university's consideration of race in its admissions policy.[105] One of those benefits, as noted in this section, was a corporate interest in increasing minority employment, an asserted benefit in which corporate interests converge with minority interests in employment.[106] However, the remaining three asserted benefits strongly reflected corporate interests in hiring employees who were exposed to minorities as students, an interest that is devoid of any concern for minority hiring.[107] Therefore, the *Brief for Amici Curiae 65 Leading American Businesses* is more firmly rooted in the corporate interest of hiring employees who have been exposed to diversity rather than hiring a diverse workforce.

The brief submitted by General Motors Corporation even further exemplifies the corporate interest in hiring employees exposed to minorities as students rather than hiring the minorities themselves. As noted above, General Motors quantifies this notion in the term "cross-cultural competence."[108] This concept is central to the corporation's rationale for supporting the Michigan programs.[109] What is particularly noteworthy about this concept is that it is quantified as a skill to be acquired by potential employees of the corporation. Inherent in the above-referenced definition is that acquisition of cross-cultural competence occurs most readily through exposure to students from a diversity of racial groups.[110]

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103. *See supra* note 99.

104. Brief for 65 Leading American Businesses, *supra* note 3, at 2.

105. *See supra* note 43 and accompanying text.

106. *See supra* note 99.

107. *See supra* note 43 and accompanying text. Specifically, the three asserted benefits that reflect no convergence between corporate interests and minority interests are the first, second, and fourth.

108. *See* Brief of Amici Curiae General Motors Corp., *supra* note 3, at 4.

109. *Id.*

110. *Id.* at 18 ("Open-mindedness and complex thinking are skills best honed

General Motors linked the availability of that exposure to the presence of minorities in a university setting.[111] Presumably, it would follow, acquisition of this skill would be most significant for those who presently lack it. And those who presently lack it would presumably be those who correspondingly lack exposure to minority viewpoints prior to their university experience.[112] And, it would seemingly follow, those who lack exposure to minority viewpoints would more readily be members of the majority group, as minority students would enter the university setting with that exposure already.[113] Thus, General Motors' interest in the acquisition of cross-cultural competence by its employees more readily reflected an interest in employing members of majority groups who have been exposed to members of minority groups as students than in employing members of minority groups themselves.

The corporate interest in hiring employees who have been exposed to minorities in college is also given primacy by the *Grutter* majority in legitimizing the Law School's use of race in its admissions program. As noted above, the Court specifically cited the briefs submitted by representatives of big business in arriving at a rationale for its holding.[114] Furthermore, the Court focused specifically on the exposure rationale when citing business interest, noting that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[115] The Court did cite rationales based on interest-convergence when referring to briefs from other segments of society, such as the military. However, in referring to the briefs submitted by business, the Court gave primacy to the exposure rationale. Thus, like amici themselves, the Court, when giving its reading of business interests, eschewed rationales supporting these admissions programs that either focus on or converge with minority interests in favor of those that are exclusively corporate.

In contrast to the exposure rationale, other examples of recent support for affirmative action have not been so devoid of minority

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through exposure to multiple ideas and challenging debate in an educational environment . . . . [R]acial and ethnic diversity enhances this process . . . .").

111. *See id.* at 20 n.2.

112. *See id.* at 19 ("Selective academic institutions offer a large percentage of white students their first and last opportunity for significant contact with persons of other races and cultures prior to entering the working world.").

113. *Id.*

114. *See supra* note 51 and accompanying text.

115. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

interest. Examples abound that reflect both a minority-focused rationale and an interest-convergence rationale. Such examples exist both in the support for other sectors of society for the Michigan programs and in recent case law.

An amicus brief filed by the NAACP and ACLU reflects support for the Michigan programs based on a minority-focused rationale. It centered on minority interests in remedying past discrimination and the role the Michigan programs may play in furthering those interests.[116] The underlying premise of the brief is the presence of continuing and systemic race-based discrimination, specifically "widespread racial inequality [as] a fundamental fact of American life."[117] The brief then detailed a variety of contexts in which this systemic discrimination exists, including housing, educational opportunities, job prospects, and health care.[118] The brief's proponents characterized the Michigan programs as an effort "to redress systemic racial inequity."[119] Thus, the brief submitted by the NAACP and ACLU represents a minority-focused rationale for supporting the Michigan programs; it promotes the interests of minorities in remedying the effects of discrimination as the basis for their support.

An amicus brief filed by former high ranking officers of the United States military in support of the Michigan programs represents a rationale based on the convergence of interests.[120] The brief premised its support on the notion that the American military operates most effectively when its officer corps includes significant minority representation.[121] According to the brief's proponents, military benefits derived from an officer corps with minority representation include a decrease in racial tension, a more effective flow of communication throughout the force, and a more favorable overall perception of minorities who make up a sizeable portion of the American military.[122] The argument continued that these benefits lead to greater military cohesion, which, in turn, leads to a more

116. Brief for NAACP & ACLU, *supra* note 92.

117. *Id.* at 13.

118. *Id.* at 13-22.

119. *Id.* at 3.

120. Brief of Amici Curiae Lt. Gen. Julius Becton, et al., Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-241) and Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-516).

121. *Id.* at 5.

122. *Id.* at 14 (describing how an officer corps that lacks minority representation produces the opposite of these objectives).

effective military.[123] Thus, the brief's proponents established a link between the military's interest in effectiveness and its interest in minority's presence in its officer corps. Therefore, this brief put forth a rationale for supporting the Michigan programs which are rooted in a convergence of interests – the military's in effectiveness and minority's in officer placement.

A similar rationale for supporting affirmative action is present in recent case law. In *Petit v. City of Chicago*,[124] the Seventh Circuit Court of Appeals upheld an employment promotion affirmative action program using a rationale representing a convergence of employer and minority interests.[125] The case involved a challenge against the Chicago Police Department by non-minority police officers who applied for promotion to the rank of sergeant but were denied.[126] The plaintiffs alleged that the affirmative action plan violated their rights under the Equal Protection Clause of the Fourteenth Amendment.[127] The promotions were awarded based on an examination, the scores of which were then standardized for race and ethnicity.[128] The court found the Police Department had an interest in increasing its numbers of minority sergeants "to enhance the operations of the [Chicago Police Department]."[129] As such, it had a compelling state interest to enact the affirmative action program.[130] Thus, the Police Department's interests in promoting minorities converged with minority interests in obtaining promotion. The court gave credence to additional minority interests in detailing why the Police Department may take such a position. Specifically, the court noted that in a racially and ethnically diverse city such as Chicago, minority representation in the police department improves police-community relations, which, in turn, allows police to serve the community more effectively.[131] Thus, *Petit* reflects an af-

123. *Id.* (arguing how an officer corps that lacks minority representation "undermines military effectiveness").

124. 352 F.3d 1111 (7th Cir. 2003).

125. *Id.* at 1114.

126. *Id.* at 1112.

127. *Id.*

128. *Id.* at 1117. The court explained that the standardizing of test scores is a statistical process "of removing differences between . . . two or more groups of test-takers." *Id.* In this case, the Police Department had found elements of test design that favored white test-takers and decided to standardize for race and ethnicity accordingly. *Id.*

129. *Id.* at 1114.

130. *Id.* at 1115. The court further held that the means of the program were narrowly tailored to its goals, such that it is constitutional. *Id.* at 1117.

131. *Id.* at 1115.

firmative action program whose rationale represents a convergence of employer interests in increased effectiveness and minority interests in obtaining promotions and good policing.

Unlike the NAACP and ACLU brief, the brief submitted by military representatives, or the *Petit* court, the briefs submitted by representatives of big business eschewed as primary either a minority-focused rationale or an interest-convergence rationale for supporting the Michigan programs. In contrast to the NAACP and ACLU briefs, the briefs submitted by business representatives are completely devoid of a minority-focused argument.[132] The difference in rationale may be attributed to the difference in the stated purpose of the organizational proponents.[133] However, the point remains that had the briefs submitted by representatives of big business employed a minority-focused rationale, its support for the Michigan programs and the findings of Bertrand and Mullainathan would have been contradictory.

The primary rationale of the briefs submitted by representatives of big business also diverged from the interest convergence rationales put forth in the briefs submitted by military representatives and the *Petit* court.[134] The rationales put forth by the latter two are rooted in an interest in increasing minority hiring. Unlike the NAACP & ACLU brief, while this rationale does not center on an express concern for minority plight, it does implicate minority interests in obtaining employment and promotion. That is, if the

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132. *See supra* note 91.

133. *See* Brief for NAACP & ACLU, *supra* note 92, at 1.

134. In a recent article, Kenneth L. Karst wrote of the similarities between the brief submitted by military representatives and the briefs submitted by representatives of big business. Kenneth L. Karst, *Symposium: The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 64-68 (2004). Karst noted that both include an argument expressing a desire to increase minority hiring and concluded, "[t]he parallels between [The General Motors Corp.] brief and the brief focused on the armed services are striking." *Id.* at 68. While, as noted earlier, I agree that both briefs do include this argument, I disagree that the two are "parallel." The desire to increase minority hiring is given primacy in the brief of military representatives, but the rationale given primacy in the brief of the representatives of big business is the exposure rationale. One only has to look at the difference in treatment given the two by the *Grutter* majority to see this difference. The Court referred to both in deeming the Law School's program constitutional. However, when referring to the support of big business, it stated: "Major American businesses have made clear that the skills needed . . . can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." Grutter v. Bollinger, 539 U.S. 306, 330 (2003). When referring to the brief of the military representatives, the Court cited the military's need for a "racially diverse officer corps." *Id.* at 331. Thus, the Court's respective selections reflect the primacy of the exposure rationale in the briefs of representatives of big business and the desire to increase minority hiring in the brief of military representatives.

interests of the military in employing minority officers and the interest of the Chicago Police Department in promoting minorities to the rank of sergeant are furthered, minority interests in employment and promotion will also be furthered. Thus, had representatives of big business asserted this rationale as primary, their support for the Michigan programs and the findings of Bertrand and Mullainathan would also have been contradictory.

However, representatives of big business did not put forth as primary either a minority-focused or interest-convergence rationale in supporting the Michigan programs. Instead, their briefs assert as primary the exclusively corporate exposure rationale. That the proponents of the business briefs eschewed those in which minority interests would be furthered in favor of those that fail to further minority interests, reflects a low priority of furthering the interests of minorities in securing a place in the business world. It is here that the compatibility between big business's support for the Michigan programs and the findings of Bertrand and Mullainathan becomes apparent. As previously noted, Bertrand and Mullainathan demonstrated that the discrimination they found was not based on socioeconomic status but race.[135] Corporate America's support for the Michigan programs accounted for race and the benefits of the presence of racial difference *in the university setting*. However, the striking primacy given to rationales that do not reflect a similar valuation of racial difference in hiring practices – when such rationales are readily available – reflects a lack of similar valuation of racial difference at the hiring stage. As such, when presented with such a stark pattern of race-based discrimination as appears in the findings of Bertrand and Mullainathan, the briefs submitted by similar representatives of big business should be viewed as compatible, not contradictory.

CONCLUSION

Two developments of 2003 reflecting the attitude of American business toward racial difference – the *Grutter* and *Gratz* decisions and publication of the study conducted by Bertrand and Mullainathan – appear to be wildly contradictory. The former represented the culmination of support for race-based affirmative action programs in university admissions; the latter revealed systemic racial discrimination in hiring practices. The apparent contradiction, however, may be reconciled by closely examining the primary ratio-

135. *See supra* notes 79-82 and accompanying text.

nale representatives of big business asserted in offering their support. That rationale is most aptly characterized as the exposure rationale, a justification rooted in exclusively corporate interests and devoid of minority interests. As such, the filing of the amicus briefs supporting the Michigan programs and results of the study present no contradiction but rather compatibility.