

# DIFFERENT STROKES FOR DIFFERENT FOLKS: A DIFFERENT STANDARD IS NOT INHERENTLY A DOUBLE STANDARD\*

JAMES E. COLEMAN, JR.\*\*

## INTRODUCTION

During the Senate's closed confirmation hearings on President Dwight D. Eisenhower's nomination of Charles E. Wilson, president of General Motors, to be secretary of defense, a senator asked Wilson if he would be able to make decisions as secretary of defense that were adverse to General Motors' interest.<sup>1</sup> Wilson replied that he would, but added he could not imagine having to make such a choice because "[f]or years I thought what was good for the country was good for General Motors and vice versa."<sup>2</sup> This bit of rhetorical bromide was reported erroneously by the press, which had been excluded from the closed hearing, as the arrogant manifesto of corporate superiority with which most of us are familiar: "What's good for General Motors is good for America."<sup>3</sup>

In a similar fashion, Professor Sung Hui Kim has converted the important but benign amicus support that General Motors and sixty-five other major American corporations gave to the University of Michigan in *Grutter v. Bollinger*<sup>4</sup> into a hypocritical "diversity double standard," because they allegedly embraced a diversity standard in *Grutter* that they would not accept for themselves.<sup>5</sup> According to Kim,

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\*\* John S. Bradway Professor of the Practice of Law, Duke University School of Law.

1. *SecDef Histories: Charles E. Wilson*, U.S. DEP'T OF DEF., [www.defense.gov/specials/secdef\\_histories/bios/wilson.htm](http://www.defense.gov/specials/secdef_histories/bios/wilson.htm) (last visited Feb. 11, 2011).

2. *Id.*

3. This misquoted statement also has been erroneously attributed to President Calvin Coolidge, who actually said, "The chief business of the American people is business." President Calvin Coolidge, Address Before the American Society of Newspaper Editors: The Press Under a Free Government (Jan. 17, 1925), *quoted in* OXFORD DICTIONARY OF QUOTATIONS 250 (Elizabeth Knowles ed., 7th ed. 2009).

4. 539 U.S. 306 (2003).

5. Sung Hui Kim, *The Diversity Double Standard*, 89 N.C. L. REV. 945, 949 (2011). Professor Kim also references the simultaneous amicus support in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the case that challenged the University of Michigan's undergraduate diversity policy. See Kim, *supra*, at 946. *Grutter* considered the constitutionality of the affirmative action program utilized by the University of Michigan Law School. *Grutter*, 539 U.S. at 311.

the corporate amici argued “that universities should promote diversity *because* it’s good for business,” but did not “make even a passing reference to the economic self-interest of universities or, for that matter, any of the significant costs that affirmative action programs generate for universities.”<sup>6</sup> Kim argues, however, that the very factors the corporate amici ignored in *Grutter* are central to their assessment of the appropriateness of diversity for themselves.<sup>7</sup>

This argument is an unfair characterization of the corporate amici’s position in *Grutter*. Those corporations argued only that a diverse student body such as the one that the University of Michigan voluntarily pursued in *Grutter* also serves their corporate interest. There is nothing in this position that can fairly be characterized as a diversity standard that might imperil the economic interests of elite universities or that the corporations were trying to force on unwilling universities. Professor Kim takes these corporations’ support of the University of Michigan’s affirmative action program out of the context of the *Grutter* litigation. In developing her thesis, she equates corporations’ pursuit of profits and universities’ pursuit of higher *U.S. News & World Report* (“*U.S. News*”) rankings to argue that the corporate amici pressed for a costly, inflexible standard of diversity in *Grutter* that such corporations generally would not accept for themselves.

Professor Kim badly misses the mark. There is no double standard when corporations such as General Motors support in higher education voluntary diversity that they find beneficial for business—as the corporate amici did in *Grutter*—while simultaneously embracing corporate diversity “only to the extent that it furthers their economic self-interest.”<sup>8</sup> Moreover, there is nothing in the briefs filed by the corporate amici to suggest that they would impose upon any university a diversity standard contrary to the university’s self-interest, which Professor Kim identifies primarily as “prestige” in the form of higher *U.S. News* rankings.<sup>9</sup> Finally, I also question the validity of the two assumptions implicit in Professor Kim’s argument: that diversity inherently undermines a university’s “prestige” and that there is no credible business case for corporate diversity that would be consistent with a business corporation’s economic interest.<sup>10</sup>

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6. Kim, *supra* note 5, at 952 (emphasis added).

7. *Id.* at 952–54.

8. *Id.* at 952–53.

9. *Id.* at 962–63.

10. *See id.* at 971.

I. PROFESSOR KIM'S MANUFACTURED "DIVERSITY DOUBLE STANDARD"

Professor Kim notes that "distinguished business corporations" filed two amicus briefs on behalf of the University of Michigan in *Grutter* that "loudly affirmed the value of educational diversity to the business sector."<sup>11</sup> These corporations, General Motors and sixty-five other self-described "leading American businesses" ("Sixty-five Leading Businesses") argued that the racially and ethnically diverse student bodies that the university pursued in *Grutter* fit well with businesses' need, "at every level of an organization," for employees, officers, and directors exposed to "widely diverse people, cultures, ideas, and viewpoints."<sup>12</sup> According to Kim, these amici argued that the very success of American businesses in a global economy depends upon their ability "to recruit from a talented pool of racially and ethnically diverse student bodies."<sup>13</sup> From this, Kim concludes that "corporate support for educational diversity was premised on the claim that 'diversity is good for business,'"<sup>14</sup> which she calls the "business case for diversity."<sup>15</sup>

Professor Kim argues, however, that this "business case for [educational] diversity" is not good enough for American business itself; when it comes to "affirmative action efforts by for-profit business corporations" to achieve "both workplace diversity and board diversity,"<sup>16</sup> these corporations support diversity "only if the economic benefits exceed the economic costs to the corporation itself."<sup>17</sup> Professor Kim contrasts this profit-dependent position on corporate diversity with what she posits as the corporate amici's self-

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11. *Id.* at 946.

12. Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents at 5–6, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) [hereinafter *Sixty-five Businesses Brief*].

13. Kim, *supra* note 5, at 947; see Brief of General Motors Corp. as Amicus Curiae Supporting Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) [hereinafter *GM Brief*]; *Sixty-five Businesses Brief*, *supra* note 12, at 5.

14. Kim, *supra* note 5, at 947 (quoting David B. 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)).

15. *Id.* (quoting David B. 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 (2004)).

16. *Id.* at 948.

17. *Id.*

centered position on educational diversity, which she claims ignores the economic burden such a policy places on universities.

Professor Kim acknowledges that, at least superficially, these two positions are not obviously inconsistent. Both positions are “forward-looking justifications . . . [,] economic in nature,” and “grounded in the empirical claim that ‘diversity is good for business.’”<sup>18</sup> However, when Professor Kim looks deeper, she finds a “diversity double standard.” In the case of corporate diversity, the corporate amici (or, perhaps more accurately, corporations like them) “will support diversity in the workplace [and in the board room] so long as it makes money.”<sup>19</sup> And the double standard? These same corporations push educational diversity for elite universities “*regardless* of the *university’s* economic self-interest.”<sup>20</sup> These are the sands on which Professor Kim’s “diversity double standard” rests.

## II. THERE IS NO DOUBLE STANDARD INHERENT IN THE POSITION THAT CORPORATE AMICI TOOK IN *GRUTTER* AND THE POSITION THAT CORPORATE DIVERSITY MUST BE BUSINESS JUSTIFIED

As a threshold matter, we must take the corporate amici’s arguments in *Grutter* in the context in which they were made. They were not advocating a position they wanted to impose on the University of Michigan. Rather, they were supporting the university’s voluntary position in the litigation. Moreover, their position appears to have been persuasive; Justice O’Connor’s majority opinion “seemingly endorsed various business rationales for diversity.”<sup>21</sup> In context, therefore, what the corporate amici did in *Grutter* was good for the University of Michigan, based on the university’s own assessment of its diversity policy.<sup>22</sup> Professor Kim mentions this but ignores it in her analysis. It is helpful, therefore, to note what the University of Michigan said about the affirmative action program to which the corporate amici lent their support.

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18. *Id.* at 948–49.

19. *Id.* at 949.

20. *Id.* (second emphasis added).

21. Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 797.

22. *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003) (noting that the University of Michigan Law School “follows an official admissions policy that seeks to achieve student body diversity . . . [b]y enrolling a ‘critical mass’ of underrepresented minority students . . . to ensure their ability to contribute to the Law School’s character and to the legal profession”); see GM Brief, *supra* note 13, at 2; Sixty-five Businesses Brief, *supra* note 12, at 1.

In *Grutter*, the University of Michigan said that its “desire for a diverse student body is at the very core of its proper institutional mission.”<sup>23</sup> This characterization of its mission is consistent with Justice Powell’s contention in *Regents of the University of California v. Bakke*<sup>24</sup> that “the cultivation of a diverse and vibrant academic environment is the most important ‘business of a university.’”<sup>25</sup> For the success of this educational business, the University of Michigan argued that

law schools need the *autonomy and discretion* to decide that teaching about the role of race in our society and legal system, and preparing their students to function effectively as leaders after graduation, are critically important aspects of their institutional mission.<sup>26</sup>

It is not clear where Professor Kim finds in this position evidence that universities such as Michigan cannot forgo diversity when it no longer serves their self-interest. The University of Michigan was not being forced to choose among competing interests in *Grutter*; rather, it was defending its right to pursue diversity *when it chose to do so*. There was nothing in the *Grutter* litigation that suggested the university would have to forego “prestige” to pursue diversity or that the corporate amici implied such a requirement in their support.

The Sixty-five Leading Businesses and General Motors participated in *Grutter* only to offer their own experiences as concrete evidence that the University of Michigan’s claims about the benefits of educational diversity were substantial; as the brief of the Sixty-five Leading Businesses said, “Amici attest to the validity of these claims through their actions.”<sup>27</sup> They had no role in formulating any standard of diversity for the university; they merely supported a standard that the university itself advanced. Whether that standard is the same or different from the standard that business corporations would support for themselves is irrelevant. Professor Kim is comparing apples and oranges.

The corporate amici pointed to their own efforts to obtain a diverse workforce and officer corps as the primary rationale for intervening into a dispute involving diversity in higher education. The Sixty-five Leading American Businesses described themselves as

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23. Brief for Respondents at 28, *Grutter*, 539 U.S. 306 (No. 02-241).

24. 438 U.S. 265 (1978).

25. Brief for Respondents, *supra* note 23, at 28 (quoting *Bakke*, 438 U.S. at 312).

26. *Id.* at 25 (emphasis added).

27. Sixty-five Businesses Brief, *supra* note 12, at 8.

“global businesses that recruit at the University of Michigan or similar leading institutions of higher education.”<sup>28</sup> Collectively, these corporations hire “thousands of graduates of . . . major public universities.”<sup>29</sup> A diverse student body such as the one the University of Michigan defended in *Grutter* “is vital to amici’s efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment.”<sup>30</sup> In pursuit of that goal, these amici asserted that they had invested “substantial financial and human resources to create and maintain a diverse workforce.”<sup>31</sup>

The amici acknowledged the cost of educational diversity, and they said they also had devoted substantial resources to support programs and initiatives to advance racial and ethnic diversity at Michigan and other major universities.<sup>32</sup> There is nothing in the brief filed by the sixty-five corporations to support Professor Kim’s claim that these corporations would force elite universities to implement diversity programs that were not fully in the universities’ self-interest, however that was defined.

General Motors filed a separate amicus brief, making substantially the same arguments as the Sixty-five Leading Businesses. The Michigan-based company said that it “depends upon the University of Michigan and similarly selective academic institutions to prepare students for employment—to teach them the skills required to succeed and lead in the global marketplace.”<sup>33</sup> Although the brief may not have waxed eloquent about social justice, it argued that the “future of American business and, in some measure, of the American economy depends upon [universities having the freedom] to select racially and ethnically diverse student bodies.”<sup>34</sup> The brief concluded:

A ruling proscribing the consideration of race and ethnicity in admissions decisions would dramatically reduce the diversity at our Nation’s top institutions and thereby deprive the students who will become the corps of our Nation’s business elite of the interracial and multicultural interactions in an academic setting that are so integral to their acquisition of cross-cultural skills.

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28. *Id.* at 1.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1–2.

33. GM Brief, *supra* note 13, at 1.

34. *Id.* at 2.

Such a ruling also would reduce racial and ethnic diversity in the pool of employment candidates from which the Nation's businesses can draw their future leaders, impeding businesses' own effort to achieve and obtain the manifold benefits of diversity in the managerial levels of their work forces.<sup>35</sup>

The major flaw in Professor Kim's argument is her assumption that this position intentionally ignores the economic impact of diversity on universities. This is a two-step process. First, Kim criticizes the corporate amici for focusing on the "pressing economic need for businesses to compete in an increasingly global economic environment" and sidestepping "any social justice justifications for diversity, whether framed in corrective justice terms or based on the indignities of de facto segregation."<sup>36</sup> Second, she concludes that the "strong implication" from this corporate silence in *Grutter* is that "it simply doesn't matter whether diversity serves or diserves the economic self-interest of universities. The possibility that it might hurt the university's bottom line doesn't even register."<sup>37</sup> This is comparable to the journalists who were excluded from the Senate hearings of Charles Wilson's nomination to be secretary of defense writing that Wilson told the senators only that "[w]hat's good for General Motors is good for America." Unlike those reporters, however, there is no factual basis in anything that the corporate amici *actually* wrote in their briefs for what Professor Kim claims is the "strong implication" that the corporations are indifferent to the economic impact of diversity on universities.

Understandably, Professor Kim does not explain why the corporate amici would have discussed the economic impact of diversity on other interests of the University of Michigan in their briefs; nobody, let alone the corporate amici, discussed such consequences. That issue was simply not implicated in the case. Michigan was seeking only the autonomy and discretion to pursue

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35. *Id.* at 2–3.

36. Kim, *supra* note 5, at 950–51. The corporate amici did not sidestep such arguments; rather, such arguments were irrelevant. The Supreme Court long had rejected such social or historic justifications for voluntary affirmative action. *See City of Richmond v. J.A. Croson*, 488 U.S. 469, 498–99 (1989) (holding that a state affirmative action program cannot be justified solely on the ground that it is a remedy to past societal discrimination); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals [without findings of] constitutional or statutory violations."). What would have been the point of pressing such rejected claims in *Grutter*?

37. Kim, *supra* note 5, at 952 (emphasis added).

diversity; it was not being compelled to do so against its will or interest. This argument, to which Professor Kim devotes a substantial part of her article, is an attack on a straw man. Even if she is correct about the economic cost of diversity to the university, so what? All the University of Michigan has to do to protect its economic interest—if it is threatened by diversity—is curtail or terminate its voluntary affirmative action programs.

Professor Kim devotes major attention to what she calls the “economic cost” of diversity to elite universities such as the University of Michigan. According to Professor Kim, these costs are what make the so-called diversity double standard important: “[M]eaningful affirmative action programs that admit more than token numbers of underrepresented minorities (including Latinos, African Americans, and American Indians) generate more economic costs than economic benefits to universities.”<sup>38</sup> The support for this damning indictment of educational diversity is superficial and incomplete.

The most significant cost of educational diversity that Professor Kim identifies is a negative impact on the university’s “prestige,” which “may hamper the ability of universities to charge premium tuitions and attract alumni donations.”<sup>39</sup> The current, most universal measure of prestige is the “institutional rankings published by *U.S. News & World Report*.”<sup>40</sup> Based on the positive impact that a high ranking has on the quality of students a university is able to attract, and the amount of additional financial aid a university would have to provide to attract such students if its rankings slipped, Professor Kim purports to show an inverse relationship between meaningful diversity and *U.S. News* rankings.<sup>41</sup>

Professor Kim claims empirical support for the proposition that “a university’s efforts at promoting racial and ethnic diversity beyond mere tokenism may be at cross-purposes with maintaining or increasing rankings.”<sup>42</sup> The evidence on which she relies is the familiar literature showing that some racial and ethnic minorities underperform on the standardized tests on which universities heavily

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38. *Id.* at 959 (footnotes omitted). One might argue that in assessing the costs and benefits of diversity for *public* universities, such long-term costs to society are appropriately considered. See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“The diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”).

39. Kim, *supra* note 5, at 959.

40. *Id.* at 960.

41. See *id.* at 963–974.

42. *Id.* at 963.

rely in admissions. These same test results are also heavily weighted in *U.S. News* rankings; therefore, the more of these underperforming applicants a university admits, the lower its *U.S. News* ranking will be. That conclusion assumes a more direct relationship between diversity and ranking than Kim's data support; she offers no evidence that the pursuit of diversity in fact has undermined any university's *U.S. News* ranking. In fact, sticking with *U.S. News*, one can find evidence for the opposite conclusion, or at least for the proposition that diversity and a high ranking appear to be compatible goals.

Professor Kim mentions in passing that *U.S. News* also ranks universities and colleges on the basis of their diversity.<sup>43</sup> This diversity index seeks to rank universities based on the racial and ethnic diversity of their student bodies.

A university is truly diverse if there are many different ethnic groups enrolled on campus and those groups have around the same percentage of students enrolled. In other words, if a college has only one ethnic group that makes up the vast percentage of its entire student body, it's not very diverse, even though it might have many other ethnic groups represented in small percentages.<sup>44</sup>

Using an "ethnic diversity mathematical formula," *U.S. News* has created a "diversity index that ranges from 0.0 (entire enrollment is one racial/ethnic group) to 1.0 (school's enrollment is equally distributed over all racial/ethnic groups)."<sup>45</sup> The closer a university's index score is to 1.0, the more diverse it is.

On the latest diversity index, the most diverse American university is Rutgers, The State University of New Jersey, which has an index score of 0.74,<sup>46</sup> which "means that nearly 3 out of every 4 people you run into [at Rutgers] will be from a different ethnic group."<sup>47</sup> Only seventeen colleges have a diversity index of 0.7 or

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43. *Id.* at 973 n.120.

44. Bob Morse, *Which Colleges Have the Most Student Diversity?*, MORSE CODE: INSIDE THE COLLEGE RANKINGS (Aug. 27, 2009, 2:18 PM), <http://www.usnews.com/blogs/college-rankings-blog/2009/08/27/which-colleges-have-the-most-student-diversity.html>.

45. *Id.*

46. *Id.*

47. *Id.*

higher.<sup>48</sup> Using this index as a measure, it does not obviously appear that more diversity has a negative impact on a school's ranking.

The following table sets out the diversity index for the top twenty universities in the country, based on *U.S. News*' most recent list of top colleges. The average diversity index for the top eleven universities is 0.58, compared to an average of 0.50 for the next nine. Moreover, within the first group of universities, there is no university with an index less than 0.51 (the University of Chicago). In the next tier, however, the lowest index is 0.38 (the University of Notre Dame). Among the top eleven universities, fourth-ranked Columbia University has an index of 0.60; fifth-ranked Stanford has an index of 0.68, and seventh-ranked MIT has an index of 0.67, also ranking them among the most diverse universities in the country.

*Table 1: Diversity Index for Top Twenty U.S. Universities*

<b>2011 U.S. News Ranking<sup>49</sup></b>	<b>2011 Diversity Index<sup>50</sup></b>
1. Harvard University	0.55
2. Princeton University	0.54
3. Yale University	0.55
4. Columbia University	0.60
5. Stanford University	0.68
6. University of Pennsylvania	0.56
7. California Institute of Technology	0.58
7. Massachusetts Institute of Technology	0.67
9. Dartmouth College	0.56
9. Duke University	0.58
9. University of Chicago	0.61
12. Northwestern University	0.51
13. John Hopkins University	0.55
13. Washington University (St. Louis)	0.44

48. *See id.*

49. *National Universities Rankings*, U.S. NEWS & WORLD REP., <http://colleges.usnews.rankingsandreviews.com/best-colleges/national-universities-rankings> (last visited Feb. 12, 2011).

50. *Racial Diversity: National Universities*, U.S. NEWS & WORLD REP., <http://colleges.usnews.rankingsandreviews.com/best-colleges/national-campus-ethnic-diversity> (last visited Feb. 12, 2011).

15. Brown University	0.53
15. Cornell University	0.48
17. Rice University	0.62
17. Vanderbilt University	0.44
19. University of Notre Dame	0.38
20. Emory University	0.57

Wholly apart from whether Professor Kim is correct in her claim that real diversity may come at the cost of prestige (in other words, a higher *U.S. News* ranking), she fails to show how that claim is relevant to any issue in *Grutter* or how it makes the corporate amici hypocrites for supporting the University of Michigan's desire to pursue real diversity. The choice whether to sacrifice prestige for diversity—if such a choice was presented—was made solely by the University of Michigan, which voluntarily pursued its affirmative action program. All that the corporate amici did was offer evidence that diversity in higher education served their corporate interest, which apparently was important to some of the Justices who decided *Grutter*.

### III. A PROFIT-BASED STANDARD FOR CORPORATE DIVERSITY IS NOT INHERENTLY A BAD STANDARD

Finally, Professor Kim does not even address the principal implication of her article, that there is no credible business justification for meaningful corporate diversity.<sup>51</sup> The corporate amici would beg to differ.

In the two briefs filed by the Sixty-five Leading Businesses and General Motors, the corporate amici put forth clear business justifications for diversity, based on the assumption that diversity in their workforces and among their leaders directly contributes to their business success, especially in the global market. The Sixty-five

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51. Kim does not explicitly argue that corporate diversity has been ineffective, but she cites data intended to refute any suggestion that “diversity is thriving in corporate America.” Kim, *supra* note 5, at 955–56. Moreover, if she thought corporate diversity, as she describes it, was compatible with businesses’ economic interest, her diversity double standard would be irrelevant. The double standard is noteworthy only if corporate diversity predicated on business justification has been a failure. Kim does not produce empirical evidence to support that conclusion, but it is inherent in her diversity double standard thesis. *See id.* at 949 (admitting that “one could argue that it is just a different standard, not deserving of the more pejorative ‘double standard’ label, because the corporation and university are in such different circumstances”).

Leading Businesses wrote that “racial and ethnic diversity in institutions of higher education is vital to amici’s efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment.”<sup>52</sup> According to these amici, “such a workforce is important to amici’s continued success in the global marketplace.”<sup>53</sup> The global importance of a diverse workforce reflects the world in which American businesses must operate: “[T]he increasingly global reach of American business, [and] the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints.”<sup>54</sup> As a result, “[e]mployees at every level of an organization must be able to work effectively with people who are different from themselves.”<sup>55</sup> In sum, American corporations need a “workforce that is as diverse as the world around it.”<sup>56</sup>

General Motors also based its support for diversity in higher education on its need for a diverse workforce that can compete in a global market.<sup>57</sup> But the company also argued that diversity was important domestically, as the American population becomes increasingly diverse. As that process accelerates, the

capacity of many businesses to recruit and retain talented labor—a critical resource—therefore increasingly will depend upon the sensitivity of their managers to interracial and multicultural issues. “Companies with strong records for developing and advancing minorities and women will find it easier to recruit [and retain] members of those groups.”<sup>58</sup>

According to General Motors, workplace diversity also improves creativity and productivity: “The best ideas and products are created by teams of people who can work together without prejudice or discomfort.”<sup>59</sup> Based on that principle, General Motors created

a “walls down” work environment to foster “idea flow”—an interactive process of creative brainstorming unhindered by titles and positions. Idea flow cannot be achieved across

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52. Sixty-five Businesses Brief, *supra* note 12, at 1.

53. *Id.*

54. *Id.* at 5.

55. *Id.*

56. *Id.* at 6.

57. See GM Brief, *supra* note 13, at 12–17.

58. *Id.* at 15 (quoting FED. GLASS CEILING COMM’N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL 4 (1995)).

59. *Id.* at 15–16.

barriers of racial and cultural discomfort or among team members who are unable to accept diverse views.<sup>60</sup>

General Motor's rationale for corporate diversity finds theoretical support in a recent article by Tristin Green.<sup>61</sup> Professor Green's thesis is that the use of race and gender to organize how employees, managers, and directors work and who does the work also promotes nondiscrimination when employment decisions are "part of an employer's broader integrative effort, an effort comprised of various structural reforms that are likely to foster functional integration and reduce workplace discrimination."<sup>62</sup> This argument is very similar to the University of Michigan's rationale for diversity in higher education: people who work and learn together as peers are less likely to be divided by race and gender in their daily activities and are less likely to make decisions based on race and gender or to act on racial or sexual stereotypes.<sup>63</sup> Indeed, that also appears to be the rationale for General Motors' "walls down" work environment.

It is not easy to achieve meaningful diversity in higher education or corporate America. Like the University of Michigan in *Grutter*, however, the corporate amici argued that diversity was critical to their core mission, not an ancillary luxury. Kim assumes that is not true. Rather, she implies—as she argues in the case of diversity in higher education—that meaningful diversity can be achieved only at the expense of corporate profitability. But Kim fails to make that case; consequently, her claim of a diversity double standard lacks traction.

#### CONCLUSION

Professor Kim's claim that American corporations such as those that supported the University of Michigan in *Grutter v. Bollinger* were endorsing a standard of diversity that they would not support for themselves is an unfair characterization of the corporate amici's position in *Grutter*. They did not independently advance any standard for diversity in higher education. Instead, they offered their own business experiences in support of the standard of voluntary diversity that the University of Michigan had adopted. It is naive to think that universities will pursue diversity when it is not in their interest to do so, just as it is naive to expect businesses to pursue diversity "for its

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60. *Id.* at 16.

61. Tristin K. Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and Integration*, 59 EMORY L.J. 585, 585 (2010).

62. *Id.* at 591.

63. See Brief for Respondents, *supra* note 23, at 22–26.

own sake,'<sup>64</sup> whatever that implies. Professor Kim seems to have no faith that diversity and a high *U.S. News* ranking can coexist or that workplace diversity and profits can coexist. But, as General Motors actually argued in its brief in *Grutter*, diversity that is good for the University of Michigan is good for General Motors, and vice versa.

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64. Kim, *supra* note 5, at 948 (quoting CAROLYN KAY BRANCATO & D. JEANNE PATTERSON, CONFERENCE BD., BOARD DIVERSITY IN U.S. CORPORATIONS: BEST PRACTICES FOR BROADENING THE PROFILE OF CORPORATE BOARDS 7 (1999)).