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Matthew S. Draper

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## Comments

# What Ann Arbor Could Learn From Ulster: The Implementation of the MacBride Principles to American Higher Education Admissions

Matthew S. Draper\*

Ever so subtly, without even alluding to the last obstacles preserved by earlier opinions that we now push out of our path, we effectively replace the goal of a discrimination free society with the quite incompatible goal of proportionate representation by race and sex.<sup>1</sup>

### I. Introduction

Affirmative action programs<sup>2</sup> in the United States, specifically as

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\* 2005 Recipient of Penn State's Richard Reeve Baxter Award for outstanding legal scholarship and student comment in the field of international law. J.D. Candidate, The Pennsylvania State University Dickinson School of Law, 2006; B.A. Bucknell University, 2003. I am indebted to my wife, Louisa, for her constant support and candor. Further, Jonathan Andrews, Michael Kaplan, and Marcy McCullough of the *Penn State Law Review* and Rachael Goldfarb of the *Penn State International Law Review* provided valuable critiques to drafts of this piece. Finally, I would like to thank Lee, Kathy, and Kevin Draper for engaging in the discussions that sparked the idea for this Comment.

1. *Johnson v. Transp. Agency* 480 U.S. 616, 658 (1987) (Scalia, J., dissenting).

2. The label "affirmative action programs" is admittedly broad and encompasses a

applied to admissions at institutions of higher education, are the subject of intense discourse and disagreement. This uniquely American dilemma presents questions made exceedingly complex by the nation's long history of racial divisiveness. Issues of racial equality present some of the more significant problems in American society today and import a multitude of considerations ripe with legal, philosophical, and moral importance.

The United States Supreme Court's decision in *Grutter v. Bollinger*<sup>3</sup> has rekindled the great debate surrounding race-conscious admissions policies in American colleges and universities. The Court's *Grutter* decision enabled colleges and universities across the nation to continue the "use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."<sup>4</sup> The American public's reaction to the *Grutter* decision has been polemic.<sup>5</sup> Interestingly, both sides of the affirmative action debate have claimed that the case<sup>6</sup> represented progress for their respective causes.<sup>7</sup>

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variety of systems. For the purposes of this Comment, I intend the term "affirmative action" to mean any admissions program that functions to provide a minority applicant a greater chance of admission than a similarly or better qualified white applicant.

3. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

4. *Id.* at 343.

5. Compare Shelby Steele, *A Victory For White Guilt*, WALL ST. J., June 25, 2003, at A16, [hereinafter *White Guilt*], with Eric Slater, *Supreme Court Rulings; Day of Celebration in Michigan City at Center of Court Debate; Students at Ann Arbor university laud the Supreme Court's ruling upholding the law school's affirmative action policy*, L.A. TIMES, June 24, 2003, at A16. Mr. Steele's piece, which derides Justice O'Connor's *Grutter* opinion as being full of "euphemistic, unexamined, and empty language," argues that *Grutter* is best understood not through legal principles; instead, the Court's decisions in the realm of affirmative action can be attributed to notions of "moral accountability" or "white guilt." *White Guilt, supra*. This "white guilt," Mr. Steele argues, has caused American institutions of higher education to "engineer the visibility of black and brown faces," and for the Supreme Court to allow such social engineering programs to exist. *Id.*

In stark contrast, Mr. Slater's article uses extensive quotes from those who viewed *Grutter* as justly decided to illustrate the apparently prevalent feelings in Ann Arbor after the decision was handed down. *Day of Celebration, supra*. The true feelings at the University of Michigan, however, may be slightly different than those which were depicted in the news coverage of the *Grutter* ruling. One person that Mr. Slater spoke with noted, "If you're out and about talking against affirmative action or the university, you'll definitely get funny looks." *Id.* This observation illustrates the chilling effect of what Mr. Steele termed feelings of "moral accountability" on free and honest discussion. See *White Guilt, supra*.

6. *Grutter* was announced with a companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003). While *Grutter* challenged the University of Michigan Law School's admissions practices, *Gratz* was a challenge to Michigan's undergraduate system of admissions. *Id.* at 249-50. The Supreme Court struck down the undergraduate system, specifically because the allotment of "points," based on race alone, in a system in which a certain number of points are required for admission, is not narrowly tailored. See *id.* at 269-70. While most critics of race-conscious policies believe that *Gratz* represents a step towards

While many scholars have called for the total abandonment of race as a factor in American higher education admissions,<sup>8</sup> others have argued that colleges and universities must continue to consider race due to the lingering effects of racism and segregation on minority applicants.<sup>9</sup> While proponents of both of these positions raise many valid points in support of their respective arguments for and against race-conscious admissions policies, debates on affirmative action in the United States often give rise to more questions than answers. As Richard D. Kahlenberg, a Fellow at the Center for National Policy, in Washington, D.C., notes, these diametrically opposed arguments “fail to address the strong moral, legal, and political dilemmas posed in the affirmative action debate.”<sup>10</sup>

Due in large part to the fervent nature of affirmative action discourse in the United States, especially with regard to the policy’s use in higher education admissions, the possibility of reaching any sort of “middle ground” is rarely considered. This comment seeks to explore a possible “middle ground” solution often overlooked by both critics and proponents of race-conscious admissions policies. The MacBride Principles,<sup>11</sup> which seek to end discriminatory employment practices by

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ending affirmative action, there is some consensus that *Grutter* represents a step backwards for their cause. Linda Chavez, founder and president of the Equal Opportunity Center, believes that the Supreme Court “punted on the opportunity to once and for all get government out of the business of deciding winners and losers on the basis of skin color.” Joan Biskupic and Mary Beth Marklein, *Court upholds use of race in university admissions; But justices ban use of automatic points in rating applicants*, USA TODAY, June 24, 2003, at A1, [hereinafter Biskup and Marklein]. Conversely, Mary Sue Coleman, the president of the University of Michigan, cast the rulings in a much different light, saying, “This is a huge win for higher education.” *Id.*

7. “Critics of affirmative action cast the rulings as a split decision, and said large public universities that receive several thousand applications a year would have a hard time replacing admissions point systems with the more personal assessments required by Monday’s rulings.” Biskupic and Marklein, *supra* note 6.

8. See, e.g., Brief of Amici Curiae Law Professors Larry Alexander, et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), at 2003 WL 164181.

9. See Leland Ware, *From Brown to Grutter: Affirmative Action and Higher Education in the South*, 78 TUL. L. REV. 2097, 2114 (2004). See generally Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1060 (1992) (arguing in favor of affirmative action and quotas systems and further asserting that “quotas present the most efficacious method of remedying the past effects of discrimination”).

10. Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1037 (1996).

11. Father Sean McManus, *The MacBride Principles: The Essence*, at <http://www.irishnationalcaucus.org/pages/MacBride/MacBride%20Principles%20The%20Essence.htm> (last visited on Jan. 15, 2005). The Principles provide as follows (the 1986 “amplifications” by Sean MacBride appear in plain text):

1. Increasing the representation of individuals from underrepresented religious groups in the work force, including managerial, supervisory, administrative,

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clerical, and technical jobs.

A work force that is severely unbalanced may indicate prima facie that full equality of opportunity is not being afforded all segments of the community in Northern Ireland.

Each signatory to the MacBride Principles must make every reasonable lawful effort to increase the representation of underrepresented religious groups at all levels of its operations in Northern Ireland.

2. Adequate security for the protection of minority employees both at the workplace and while travelling to and from work.

While total security can be guaranteed nowhere today in Northern Ireland, each signatory to the MacBride Principles must make reasonable good faith efforts to protect workers against intimidation and physical abuse at the workplace. Signatories must also make reasonable good faith efforts to ensure that applicants are not deterred from seeking employment because of fear for their personal safety at the workplace or while travelling to and from work.

3. The banning of provocative religious or political emblems from the workplace.

Each signatory to the MacBride Principles must make reasonable good faith efforts to prevent the display of provocative sectarian emblems at their plants in Northern Ireland.

4. All job openings should be publicly advertised and special recruitment efforts should be made to attract applicants from underrepresented religious groups.

Signatories to the MacBride Principles must exert special efforts to attract employment applications from the sectarian community that is substantially underrepresented in the workforce. This should not be construed to imply a diminution of opportunity for other applicants.

5. Layoff, recall and termination procedures should not, in practice, favour particular religious groups.

Each signatory to the MacBride Principles must make reasonable good faith efforts to ensure that layoff, recall, and termination procedures do not penalize a particular religious group disproportionately. Layoff and termination practices that involve seniority solely can result in discrimination against a particular religious group if the bulk of employees with greatest seniority are disproportionately from another religious group.

6. The abolition of job reservations, apprenticeship restrictions, and differential employment criteria, which discriminate on the basis of religion or ethnic origin.

Signatories to the MacBride Principles must make reasonable good faith efforts to abolish all differential employment criteria whose effect is discrimination on the basis of religion. For example, job reservations and apprenticeship regulations that favour relatives of current or former employees can, in practice, promote religious discrimination if the company's workforce has historically been disproportionately drawn from another religious group.

7. The development of training programmes that will prepare substantial numbers of current minority employees for skilled jobs, including the expansion of existing programmes and the creation of new programmes to train, upgrade and improve the skills of minority employees.

This does not imply that such programmes should not be open to all members of the workforce equally.

8. The establishment of procedures to assess, identify, and actively recruit minority employees with potential for further advancement.

This section does not imply that such procedures should not apply to all employees equally.

foreign companies who conduct business in Northern Ireland,<sup>12</sup> provide American colleges and universities with an excellent model for an admissions system which represents a compromise between extremists on both sides of the American affirmative action debate.

This comment is comprised of four main parts. Part I of the comment will serve as an introduction to the thesis of the comment that will be later explored in much greater detail. Part II will examine three major U.S. Supreme Court cases that have shaped the current American policy of affirmative action in higher education admissions, analyze the language of those decisions in an attempt to understand where the American judiciary presently stands on the issue, and then examine the academic critiques of both the case law and current policies. Part III will trace the history of the MacBride Principles, beginning with the well-acknowledged Catholic repression at the hands of the Protestant majority in Northern Ireland, on through the lobbying efforts of the Irish National Caucus in Washington, D.C., and into their present day form and effect on both Catholic employment in Northern Ireland and the American corporations doing business there. Finally, Part IV of the comment will explore the possibility of the theoretical implementation of an American higher education admissions program based on the philosophy and ideology embodied in the MacBride Principles.<sup>13</sup> Further, Part IV will argue that a MacBride-based program would provide an excellent transition from the current affirmative action programs to a future in which race-conscious policies are no longer necessary in American higher education.<sup>14</sup>

## II. Affirmative Action in American Higher Education Today

Perhaps no topic in America causes as much dissension, both among American legal intelligentsia and in the public at large, as

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9. The appointment of a senior management staff member to oversee the company's affirmative action efforts and the setting up of timetables to carry out affirmative action Principles.

*Id.* In addition to the above, each signatory to the MacBride Principles is required to report annually to an independent monitoring agency on its progress in the implementation of these Principles. *Id.*

12. See Neil J. Conway, *Investment Responsibility in Northern Ireland: The MacBride Principles of Fair Employment*, 24 LOY. INT'L & COMP. L. REV. 1, 15 (2002).

13. Such a hypothetical admissions program, comprised of points based on the MacBride Principles that are relevant in the educational context, is referred to in this comment alternately as a "MacBride-based approach" or a "MacBride-based program."

14. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). Justice O'Connor's majority opinion clearly indicated the Court's sentiment that the need for affirmative action programs will wane in the coming years, writing "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.*

affirmative action. One of the policy's most contentious areas of application is to admissions decisions at institutions of higher education, both at the undergraduate and graduate levels. Three cases have come to define American jurisprudence with respect to affirmative action in this arena: *Regents of University of California v. Bakke*,<sup>15</sup> *Hopwood v. Texas*,<sup>16</sup> and *Grutter v. Bollinger*.<sup>17</sup> The opinions in these cases serve to highlight the enormity of the struggles faced by a legal system seeking to acknowledge and rectify past injustice, while at the same time confined by the parameters set forth by the U.S. Constitution and other pieces of civil rights legislation.<sup>18</sup> Scholars have critiqued all three decisions on a variety of grounds,<sup>19</sup> and the American public seems generally dissatisfied with the policy that these decisions have spawned.<sup>20</sup>

In order to proffer a possible solution to such a weighty problem it is imperative to understand exactly what each of these decisions stands for, and how each successive case modified its predecessor, so that the well-intentioned can avoid the trappings of past predicaments and the failures of previous policy makers.

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

Until recently, the Supreme Court's decision in *Bakke*<sup>21</sup> had governed issues of race-conscious admissions policies in American education.<sup>22</sup> In *Bakke*, the University of California at Davis (UC-Davis)

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15. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

16. *Hopwood v. Texas*, 236 F.3d 256. (5th Cir 2000), *cert. denied*, *Texas v. Hopwood*, 533 U.S. 929 (2001).

17. *Grutter*, 539 U.S. at 306.

18. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. 2000a.

19. For a critique of *Bakke*, see Gabriel Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 881 (1996) (arguing *Bakke* is "incoherent" due to the opinion's failure to actually define diversity). For a critique of *Hopwood*, see Philip T.K. Daniel, Kyle Edward Timken, *The Rumors of My Death May Have Been Exaggerated: Hopwood's Error in "Discarding" Bakke*, 28 J.L. & EDUC. 391, 399 (1999) (arguing that *Hopwood* was wrongly decided due to its failure to follow precedent). For a critique of *Grutter*, see David Crump, *The Narrow Tailoring Issue In the Affirmative Action Cases: Reconsidering the Supreme Court's Approval In Gratz and Grutter of Race-Based Decision-Making By Individualized Discretion*, 56 FLA. L. REV. 483, 485 (2004) (arguing that the Supreme Court engaged in "weak and unpersuasive" narrow tailoring analysis).

20. In an NBC News/ *Wall Street Journal* poll conducted by Peter Hart and Robert Teeter on Jan. 19-21, 2003, and, 65% of the sample taken opposed the use of race as a factor in admissions decisions in public universities, while only 26% favored such use. This poll is far from an anomaly. In a *Time/CNN* poll conducted Jan. 15-16, 2003, by Harris Interactive, 54% of the sample disapproved of preferential admissions programs which favor minorities, while only 39% approved. Race and Ethnicity Polls, at <http://www.pollingreport.com/race.htm> (last visited on Jan. 15, 2005).

21. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 (1978).

22. *See* Corinne E. Anderson, Comment, *A Current Perspective; The Erosion of*

Medical School denied named Allan Bakke, a white male with strong academic credentials,<sup>23</sup> admission to the Medical School of for two consecutive years.<sup>24</sup> Following his second rejection, Bakke filed suit against the Medical School. Bakke alleged, among other things, that the special admissions program<sup>25</sup> in place for minority applicants<sup>26</sup> functioned as an exclusionary barrier to his admission,<sup>27</sup> and violated his rights under the Equal Protection Clause of the Fourteenth Amendment, as well as Title VI of the Civil Rights Act of 1964.<sup>28</sup>

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*Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 192 (1999).

23. See *Bakke*, 438 U.S. at 276. In fact, an interviewer at UC-Davis Medical School who met with Alan Bakke termed him "a very desirable applicant to [the] medical school." *Id.*

24. *Id.* at 276-77.

25. *Id.* at 277-78. It is interesting to note that part of the proffered rationale behind the special admissions program implemented at the UC-Davis Medical School at the time of Bakke's application (and subsequent rejection) was that minority applicants should receive credit for overcoming "disadvantage." *Id.* at 276. Exactly what "disadvantage" minority applicants had actually overcome, and why such logic was limited to minority applicants, was not explained.

26. *Id.* at 274. Justice Powell's opinion noted that the Medical School considered "Blacks," "Chicanos," "Asians," and "American Indians" to be under this "minority" umbrella of preference.

27. *Id.* at 277. The following charts, included in the *Bakke* opinion, illustrate the stark difference in academic credentials of those applicants admitted under the "regular" admissions program, as opposed to those admitted under the "special" program.

#### Class Entering in 1973

	MCAT (percentiles)					Gen. Infor.
	SGPA	OGPA	Verbal	Quantitative	Science	
Bakke . . . . .	3.44	3.46	96	94	97	72
Average of regular admittees . . . . .	3.51	3.49	81	76	83	69
Average of special admittees . . . . .	2.62	2.88	46	24	35	33

#### Class Entering in 1974

	MCAT (percentiles)					Gen. Infor.
	SGPA	OGPA	Verbal	Quantitative	Science	
Bakke . . . . .	3.44	3.46	96	94	97	72
Average of regular admittees . . . . .	3.36	3.29	69	67	82	72
Average of special admittees . . . . .	2.42	2.62	34	30	37	33

*Id.*

28. *Id.* at 266.



Writing for a fractured majority, Justice Powell condemned the system utilized at UC-Davis for its use of quotas in admissions decisions,<sup>29</sup> but allowed for modified forms of affirmative action to continue to function by determining that the “state has a substantial interest that legitimately may be served by a properly devised admissions program.”<sup>30</sup> Scholars have noted that this “substantial interest” may be served by programs that utilize race as “one of many factors to create diversity in the class for purposes of improving the learning environment.”<sup>31</sup>

Interestingly, the opinion predicted the problems that would evolve in American jurisprudence in the affirmative action arena. Justice Powell prophetically noted that programs where race serves as merely one of many factors in making admissions decisions could conceivably function as thinly-veiled duplications of the UC-Davis program, of which the Court had just explicitly disapproved.<sup>32</sup> In essence, Justice Powell acknowledged that colleges and universities across the country could, if they so desired, continue quota programs while simply using the new and preferred nomenclature: “factors.” However, in response to this hypothetical assertion, Justice Powell noted that the Supreme Court would refuse to presume that a university would undertake such deceptive measures to circumvent the spirit of the *Bakke* ruling.<sup>33</sup>

Writing separately, Justice Blackmun raised several important points in his concurrence that were not adequately addressed by the

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29. *See Bakke*, 438 U.S. at 320. Justice Powell wrote, “[i]t is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court . . .” and deemed the program’s “fatal flaw” as “its disregard of individual rights as guaranteed by the Fourteenth Amendment.” *Id.*

30. *Id.*

31. Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 461 (2004).

32. *Bakke*, 438 U.S. at 317. Indeed, in a passage that would prove rather prophetic, Justice Powell wrote, “It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program.” *Id.* Justice Powell attempted to distance the UC-Davis program from programs at institutions such as Harvard (who along with Stanford, Penn and Columbia filed an amicus brief in support of Davis), writing, “A facial intent to discriminate, however, is evident in petitioner’s preference program and not denied in this case. No such facial infirmity exists in an admissions program [such as the program employed at Harvard] where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process.” *Id.* at 317-18. Justice Powell’s assertion that the Harvard approach would likely pass Constitutional muster gave rise to programs such as the one at the University of Michigan, which today employs a factor based approach. *See* University of Michigan Undergraduate Admissions 2004-2005 Applications, Guidelines, and Process, at <http://www.admissions.umich.edu/process/review/categories/#attributes> (last visited Jan. 15, 2005).

33. *Bakke*, 438 U.S. at 318.

majority opinion.<sup>34</sup> As a general observation, Justice Blackmun noted the irony in the fact that the uproar raised over race-conscious admissions policies in America is conspicuously absent from programs such as legacy preferences and athletic admissions.<sup>35</sup>

Perhaps the most remarkable aspect of Justice Blackmun's opinion is his foresight in predicting the legal battleground of the future.<sup>36</sup> Justice Blackmun, in dictum, acknowledged that the difference between the UC-Davis program, which the Court condemned in *Bakke*, and the Harvard program that the Court looked upon with favor was not "very profound or constitutionally significant."<sup>37</sup> The Court had drawn "a thin and indistinct"<sup>38</sup> line between the purportedly acceptable and unacceptable, and challenges to such a vague and indefinite policy would invariably come before the Court.

#### B. Hopwood v. Texas

The rationale behind *Bakke* was dealt a significant blow by the Fifth Circuit in *Hopwood v. Texas*,<sup>39</sup> a case which the Supreme Court later

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34. *Id.* at 402 (noting, in relevant part, that Justice Blackmun felt his opinion served to "add only some general observations that hold particular significance for me, and then a few comments on equal protection.")

35. *Id.* at 404 (Blackmun, J., concurring). As Justice Blackmun noted:

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

*Id.* at 404.

36. *Id.* at 406. Justice Blackmun argued forcefully on this point, noting:

I am not convinced, as Mr. Justice POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work. Because of my conviction that admission programs are primarily for the educators, I am willing to accept the representation that the Harvard program is one where good faith in its administration is practiced as well as professed. I agree that such a program, where race or ethnic background is only one of many factors, is a program better formulated than Davis' two-track system. *The cynical, of course, may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly.* I need not go that far, for despite its two-track aspect, the Davis program, for me, is within constitutional bounds, though perhaps barely so.

*Id.* (emphasis added).

37. *Id.*

38. *Id.*

39. *Hopwood v. Texas*, 236 F.3d 256 (5th Cir 2000), *cert. denied*, *Texas v. Hopwood*, 533 U.S. 929 (2001). For an excellent critique of the Fifth Circuit's rationale

denied certiorari.<sup>40</sup> In *Hopwood*, the Fifth Circuit struck down the University of Texas Law School's affirmative action program, which used race as a "factor" in determining which students were granted admission.<sup>41</sup> Four white Texas residents applied and were denied admission to the University of Texas Law School.<sup>42</sup> Those students argued that their denial from the Law School was attributable to the lowered standards under which minority applicants were granted admission.<sup>43</sup>

In explaining its rationale in striking down the University of Texas Law School's plan, the *Hopwood* court specifically noted that the *Bakke* rhetoric regarding diversity as a compelling governmental interest, championed by Justice Powell<sup>44</sup> and oft-cited as support for affirmative action,<sup>45</sup> was not joined by any other justice.<sup>46</sup> As a result, the Fifth Circuit reasoned that no controlling rationale regarding what circumstances warrant the use of racial preferences had actually emerged

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in *Hopwood*, see Victor V. Wright, Note, *Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down An Affirmative Action Admissions Program*, 34 HOUS. L. REV. 871, (1997). Wright argues that the Supreme Court could have found the University of Texas program unconstitutional without eviscerating the rule of law set forth in *Bakke*. See *id.* at 875.

40. *Hopwood*, 236 F.3d 256.

41. At the time of the *Hopwood* suit, the University of Texas Law School utilized the Texas Index, or "TI," score, calculated by the Law School Data Assembly Service, or "LSDAS," to determine admission. The TI took into account both the applicant's Law School Admission Test (LSAT) score and undergraduate GPA. As in the UC-Davis program that was unequivocally struck down in *Bakke*, the University of Texas Law School required TI scores much lower for a "minority" applicant's admission than those required for a white applicant's admission. *Id.* at 265. Interestingly, the Law School's definition of the word "minority" encompassed only African Americans and Mexican Americans. *Id.* at n.29. This definition of "minority" is much more restrictive than that employed by UC-Davis at the time of *Bakke*. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 276 (1978).

42. *Hopwood*, 236 F.3d at 265.

43. The University of Texas Law School's admissions criteria for minority and nonminority applicants was starkly different: a non-minority applicant needed a TI score of at least 192 to simply become a "discretionary" zone candidate. Minority applicants, on the other hand, needed a TI score of only 179 to be deemed "discretionary." *Id.*

44. *Bakke*, 438 U.S. at 316-19.

45. See, e.g., Danielle R. Holley, *Narrative Highground: The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, 54 CASE W. RES. L. REV. 103, 104-5 (2003) (noting how "well known" the "diversity" justification is in terms of rationalizing and justifying race-conscious affirmative action programs).

46. *Hopwood*, 236 F.3d at 275 n.66. In fact, the Fifth Circuit noted that:

"the same four [justices who joined Powell in holding that the "State has a substantial interest that may be legitimately served by a properly devised admissions program involving the competitive consideration of race and ethnic origin"] disagreed with him as to the rationale that is necessary to justify constitutionally the government's use of racial preferences."

*Id.* at 274.

from *Bakke*.<sup>47</sup> This perceived lack of direction from the Supreme Court in *Bakke* left the nation's lower courts "free to determine which among the competing rationales offered by the justices in *Bakke* is constitutionally valid."<sup>48</sup>

### C. Grutter v. Bollinger

After the *Hopwood* decision, critics of race-conscious admissions policies were hopeful that the Supreme Court would use *Grutter* to sound affirmative action's death knell. The Supreme Court agreed to hear *Grutter* due to a split of authority between the Fifth and Sixth Circuits;<sup>49</sup> the Fifth Circuit, in *Hopwood*, denied the constitutionality of race-based admissions,<sup>50</sup> while the Sixth Circuit had approved such policies,

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47. *Id.* at 275. *But see* *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1201 (9th Cir. 2000). In a reverse discrimination case (again regarding the constitutionality of race-conscious admissions programs) the Ninth Circuit determined that the University of Washington Law School's admissions program did not violate Title VI or the Fourteenth Amendment. While the outcome of the case is interesting in and of itself, the rationale for the decision merits separate exploration.

In coming to a conclusion regarding the UW program's constitutionality, the court posited that because Justice Brennan's opinion in *Bakke* embraced the use of racial preference programs whose "articulated purpose [was] remedying the effects of past societal discrimination," Justice Brennan and those who joined his opinion "approved of 'race-conscious programs' which sought to eradicate 'disparate racial impact.'" *Id.* at 1198.

Perhaps even more brashly, the Ninth Circuit determined that Justice Brennan and those who joined his opinion "would have accepted an even more expansive use of racial factors than that permitted in Justice Powell's opinion." *Id.* at 1199 (emphasis added). That a circuit court would utilize such seemingly unfounded suppositions, full of conjecture and unsupported assertions, is quite surprising.

Indeed, a close reading of *Bakke* reveals that Justice Brennan appeared to include an express limitation of his adoption of Justice Powell's opinion in his own opinion in *Bakke*, writing "We also agree with Mr. Justice POWELL that a plan like the "Harvard" plan . . . is constitutional under our approach *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.*" *Bakke*, 438 U.S. at 326 n.1 (Brennan, J., concurring in part and dissenting in part) (emphasis added).

This excerpt from Justice Brennan's opinion seems at odds with the Ninth Circuit's assertion in *Smith*. *See Smith*, 233 F.3d at 1199. The Fifth Circuit specifically declined to follow the *Smith* rationale, and further disagreed with the Ninth Circuit's practice of reading the Supreme Court's "fragmented opinions like tea leaves, attempting to divine what the Justices "would have" held." *Id.* at 275 n.66. Instead, the Fifth Circuit asserted that "in the absence of subsequent Supreme Court precedent squarely and unequivocally holding that diversity can never be a compelling state interest, we read *Bakke* as not foreclosing (but certainly not requiring) the acceptance by lower courts of diversity as a compelling state interest." *Id.*

48. *Hopwood*, 236 F.3d at 274.

49. M. Wood, *Grutter Will Likely End Affirmative Action, Forde-Mazrui Predicts*, at [http://www.law.virginia.edu/home2002/html/news/2003\\_spr/aff\\_action.htm](http://www.law.virginia.edu/home2002/html/news/2003_spr/aff_action.htm) (last visited on Jan. 15, 2005).

50. *Hopwood*, 236 F.3d at 275.

including those involving the University of Michigan's race-conscious admissions program.<sup>51</sup>

*Grutter* presented the justices with a scenario very similar to the one that the Court had declined to examine in *Hopwood*.<sup>52</sup> A white Michigan resident, Barbara Grutter, was rejected from the University of Michigan Law School.<sup>53</sup> She claimed that Michigan's admissions program gave minority applicants "a significantly greater chance of admission than students with similar credentials from disfavored racial groups,"<sup>54</sup> and as a result violated the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>55</sup>

Writing for the majority, Justice O'Connor conceded that "racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."<sup>56</sup> Despite this clear acknowledgement of the risk presented by such programs, the Court determined that Michigan's stated goal of enrolling a "critical mass"<sup>57</sup> of underrepresented minority students was a compelling interest, and that the race-conscious admissions program utilized at Michigan was narrowly tailored to achieve this goal.<sup>58</sup> As a result of this determination, the Court affirmed the Sixth Circuit's opinion,<sup>59</sup> thus conferring constitutionality upon the program at issue.<sup>60</sup>

*Grutter* has been widely condemned in academic circles on a variety of grounds. Some scholars have critiqued the Court's "narrow tailoring," analysis to with regard to the University of Michigan's program,<sup>61</sup> while others have gone so far as to deem the Court's assertion that racial preference programs will not be necessary in twenty-five years "pure

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51. Wood, *supra* note 49.

52. *Hopwood*, 236 F.3d 256.

53. *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003).

54. *Id.*

55. *Id.* at 317-18.

56. *Id.* at 342.

57. *Id.* at 318. One of the more interesting justifications for race-based admissions policies is the "critical mass" concept, which, as described in *Grutter*, is the notion that when a certain amount of minority students are enrolled at a particular educational institution, those minority students feel less isolated and thus more likely to participate in the classroom. Justice Scalia opined that this rationalization "for [the University of Michigan's] discrimination by race challenges even the most gullible mind." *Id.* at 346-47 (Scalia, J., concurring in part and dissenting in part).

58. *Id.* at 343.

59. *Id.* at 343-44.

60. *Id.* at 343 (specifically noting that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body").

61. See Crump, *supra* note 19, at 485.

fantasy.”<sup>62</sup> Criticism of *Grutter* has not been limited to the Court’s legal analysis or simply the terminology utilized in the opinion. Arguments have been made that the ideology and policy explicitly and implicitly endorsed by the *Grutter* opinion are antithetical to the true aim of higher education.<sup>63</sup> Since *Grutter*, it has been asserted that the Court has catered to the elusive concept of “diversity” at the expense of both meritorious applicants and, in the end, meritorious universities and colleges.<sup>64</sup>

Even more fundamentally, many critics of the Supreme Court’s handling of the case look no further than the dissents in the case itself for ample ammunition with which to attack the majority’s *Grutter* opinion.<sup>65</sup> This list of critiques is by no means exhaustive. It is meant simply to illustrate that the *Grutter* opinion has come under fire for both its legal analysis and its implicit and explicit endorsement of race-conscious admissions policies.

As the Court’s rhetoric and level of applied scrutiny in *Grutter* have come under fire from the nation’s legal intelligentsia, a spectator to America’s affirmative action debate is left to wonder whether there exists a suitable compromise which both supporters and detractors of race-conscious admissions programs would accept. The answer may be found across the ocean, in the oft-troubled region of Northern Ireland.

### III. The MacBride Principles: Background

The MacBride Principles<sup>66</sup> are a modern effort by the Catholic

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62. Lino A. Graglia, *From Brown to Grutter: Affirmative Action in Higher Education in the South*, 78 TUL. L. REV. 2037, 2043 (2004).

63. See Laurence Thomas, *Equality and the Mantra of Diversity*, 72 U. CIN. L. REV. 931, 931 (2004).

64. “Not too long ago, it seems, attracting and training talented minds was held to be the very essence of a university. And a positive correlation was thought to hold between the quality of a university and the quality of the students that it attracted. There were perhaps other aims. However, these aims were clearly thought to be subordinate to the aim of attracting and training talented minds.”

*Id.*

Professor Thomas argues that those who have elevated the concept of “diversity” to its present status are misguided; indeed in rebutting University of Michigan President Mary Sue Coleman’s claim, following the announcement of the *Grutter* decision, that “[o]ur diversity is our strength,” *id.* Professor Thomas contends that “[o]ur greatest strength lies not in our diversity, but in our wherewithal to look beyond a person’s physical features or background to the forms of excellences that the individual’s life exhibits and then to exercise our moral power of affirmation.” *Id.* at 958.

65. For example, Chief Justice Rehnquist termed the University of Michigan Law School’s plan “a naked effort to achieve racial balancing.” *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).

66. See McManus, *The MacBride Principles: The Essence*, *supra* note 11.

minority in their lengthy struggle against the Protestant majority's<sup>67</sup> repressive and systematic discrimination in Northern Ireland.<sup>68</sup> In order to understand why the institution of the MacBride Principles was a necessary measure for Catholics to ensure acceptable working conditions, it is first necessary to understand, in very broad and general terms, the Catholic-Protestant history and dynamic in Northern Ireland.

The conflict in Northern Ireland is, rather simplistically stated, a struggle for control<sup>69</sup> over Ulster,<sup>70</sup> a disputed territory which the British seized in the partition of Ireland following the Easter Rising by Irish republicans in 1916.<sup>71</sup> The partition effectively dissolved six counties from the existing nine-county province of Ulster,<sup>72</sup> leaving their respective citizens under British rule, and creating the area now commonly known as "Northern Ireland." The Protestant portion of the population approved of England's continued governance of Northern Ireland, while the Catholics by-and-large sought self-governance.<sup>73</sup>

Northern Ireland consists of a decidedly Protestant majority and a Catholic minority.<sup>74</sup> The divide between Catholics and Protestants in Northern Ireland is not simply religious;<sup>75</sup> instead, religious affiliation serves as an ethnic marker of sorts, and conveys everything from a person's local community to their perceived political affiliation.<sup>76</sup> The religious divide has historically been at its greatest with respect to the topic of Northern Ireland's existence under British rule. While issues of

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67. See Christopher McCrudden, *Human Rights Codes For Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?*, 19 OXFORD J. LEGAL STUD. 167, 178-9 (1999).

68. *Id.* at 179.

69. It is almost unnecessary to note that the conflict in Northern Ireland is multifaceted, and far more complex than a simple land control issue; however, for the purposes of this Comment, it is sufficient to note that both Catholics and Protestants in Northern Ireland feel entitled to the disputed land for very different reasons. A detailed history of the Catholic-Protestant dynamic in Northern Ireland would warrant a very lengthy exploration in and of itself, and is therefore not feasible in this Comment.

70. The area known Ulster is made up of nine counties: Donegal, Cavan, Monaghan, Fermanagh, Tyrone, Derry, Antrim, Down and Armagh. Ireland by Region: the Counties, at <http://www.irelandwide.com/regional/ulster/> (last visited Jan. 15, 2005).

71. Jane Winter & Natasha Parassram Concepcion, *Current Human Rights Concerns Arising From The Conflict and Peace Process in Northern Ireland*, 9 NO. 2 HUM. RTS. BRIEF 6, 6 (2002).

72. See Conway, *supra* note 12, at 2.

73. McCrudden, *supra* note 67 at 178-79. Ireland itself operated under a system of self-governance, separate and distinct from English supervision. *Id.*

74. *Id.*

75. Dominic Bryan, *Parading Protestants and Consenting Catholics In Northern Ireland: Communal Conflict, Contested Public Space, and Group Rights*, 5 CHI. J. INT'L L. 233, 236 (2004) ("To put it at its most basic, when one teenage boy throws a stone at others, it is usually because they represent 'the other community'; he does not do it because of disagreements over theological issues such as transubstantiation.").

76. *Id.*

national affiliation clearly were (and still are) of paramount importance to Catholics in Northern Ireland at the time of the partition, other issues, such as equality in employment, housing, and education, have also become increasingly relevant.<sup>77</sup> The increase in the importance of what once were ancillary issues is due in large part to the systematic economic discrimination that the Catholic minority suffered at the hands of the governing Protestant majority.<sup>78</sup>

Outside of the topic of self-governance and British imperialism, one of the most oft-complained issues regarding the Protestant oppression of Catholics was that of employment discrimination.<sup>79</sup> The employment statistics in many companies in Northern Ireland, when analyzed in terms of religious demographics of those companies' employees, are staggering. In 1983, before efforts had begun in full to address the discriminatory practices, Shorts Brothers PLC, which touts itself as the "world's oldest aircraft manufacturer,"<sup>80</sup> employed a workforce of 6,300, less than 5% of whom were Catholic.<sup>81</sup> In 1990, even after anti-discrimination efforts were well in place, A.S. Baird LTD, an automaker, maintained a workforce in Northern Ireland made up of only 18% Catholic workers.<sup>82</sup>

#### A. *The Conception and Implementation of the MacBride Principles*

These statistics are far from anomalous.<sup>83</sup> The assertion that Catholics in Northern Ireland have been continually subjected to discrimination at the hands of the Protestant employers is hardly a controversial one.<sup>84</sup> While this widely acknowledged discrimination, in

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77. See McCrudden, *supra* note 67 at 179.

78. *Id.*

79. Jane Hyatt Thorpe, Note, *God, Labor, and the Law: The Pursuit of Religious Equality in Northern Ireland's Workforce*, 31 VAND. J. TRANSNAT'L L. 719, 731 (1998). "The effects of the hostility between the Protestant and Catholic communities in Northern Ireland have been most obvious in the distribution of employment opportunities."

80. Shorts Brothers PLC website, at <http://www.nics.gov.uk/irtu/research/engineering-4.html> (last visited on Jan. 15, 2005).

81. See Fr. Sean McManus, *The MacBride Principles: Genesis and History*, at <http://www.irishnationalcaucus.org/pages/MacBride/MacBride%20Principles%20Genesis%20and%20History.htm>. (last visited Jan 15, 2005).

82. *Id.*

83. See McCrudden, *supra* note 67 at 180. The British government seemingly acknowledged the disparity in employment opportunities between Protestants and Catholics in Ireland with Parliament's passing of the Fair Employment (Northern Ireland) Act in 1976.

84. See Seán Byrne & Neal Carter, *Social Cubism: Six Forces of Ethnopolitical Conflict in Northern Ireland and Québec*, 8 ILSA J. INT'L & COMP. L. 741, 744 (2002) (noting that under the 1692 Penal Laws, enacted in the era of Protestant dominance following William of Orange's victory at the battle of Boyne, "Catholics could not be elected to political office, practice their religion, speak the Gaelic language in public, or



and of itself, is rather disconcerting, perhaps more disturbing is the knowledge that many American companies were subsidizing these discriminatory practices by continuing to do business in Northern Ireland despite the discrimination practiced by the Protestant majority.

The awareness that many American companies engaged in discriminatory hiring practices and maintained overwhelmingly Protestant workforces in Northern Ireland spurred the Irish National Caucus (INC) to open an office in Washington, D.C., in 1978.<sup>85</sup> Once the issue was brought to the attention of the United States Congress, Rep. Ben Gilman, a Republican Congressman from New York,<sup>86</sup> commissioned the INC to investigate United States companies' business practices in Northern Ireland.<sup>87</sup> The INC investigators requested labor information from American companies, including employment statistics with regard to the religious composition of their labor forces.<sup>88</sup> That investigation led to a hearing in front of the Ad Hoc Congressional Committee for Irish Affairs on July 22, 1981.<sup>89</sup> This marked the first time that the United States Congress had ever held a hearing to address the issue of religious discrimination by American companies in Northern Ireland.<sup>90</sup>

The formation of the Ad Hoc Congressional Committee for Irish Affairs, combined with the hearing held by the Committee, as well as the continued lobbying efforts of the INC, led to the introduction of House Resolution 3465<sup>91</sup> in 1983.<sup>92</sup> The bill, sponsored by Congressman Dick Ottinger,<sup>93</sup> a Democrat from New York,<sup>94</sup> required that any organization operating in Northern Ireland which employed more than twenty people adhere to four basic fair employment principles: (1) desegregation in any employment facility; (2) equal employment for all employees; (3) equal pay for equal work; and (4) an increase in the representation of individuals from underrepresented religious groups in managerial,

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bequeath property unless the heir converted to the Protestant faith").

85. See MacBride Principles: Genesis and History, *supra* note 81.

86. Congressman Gilman's interest in issues in Northern Ireland stems largely from the concerns of his constituency. See Tom Kenworthy, *Unity Eludes Hill's Irish-Americans on Thorny Ulster Question*, WASH. POST, Apr. 10, 1990 at A4. His district includes "a large and politically active Irish-American community." *Id.*

87. See MacBride Principles: Genesis and History, *supra* note 81.

88. *Id.*

89. *Id.*

90. *Id.*

91. Northern Ireland Fair Employment Practices Act, H.R. 3465 (1983), available at <http://thomas.loc.gov/> (last visited Jan. 15, 2005).

92. *Id.*

93. *Id.* The Bill became known as the "Ottinger Bill," after its sponsor, Dick Ottinger.

94. *Id.*

supervisory, administrative, clerical, and technical jobs.<sup>95</sup>

The tenets of employment equality in the “Ottinger Bill” were modeled after the Sullivan Principles.<sup>96</sup> The Sullivan Principles<sup>97</sup> were created by the Reverend Leon H. Sullivan, an American, in 1977 as a way to “end discrimination against blacks in the workplace in South Africa,”<sup>98</sup> which had been fostered for decades by apartheid. Rev. Sullivan later amplified his original work<sup>99</sup> to create the Global Sullivan Principles,<sup>100</sup> a broader and more far-reaching set of guidelines designed

95. *Id.*

96. MacBride Principles: Genesis and History, *supra* note 81.

97. The Sullivan Principles, at <http://www.revleonsullivan.org/principled/principles.htm> (last visited Jan. 15, 2005). The text of the Sullivan Principles is as follows:

1. Non-segregation of the races in all eating, comfort, and work facilities.
2. Equal and fair employment practices for all employees.
3. Equal pay for all employees doing equal or comparable work for the same period of time.
4. Initiation of and development of training programs that will prepare, in substantial numbers, blacks and other nonwhites for supervisory, administrative, clerical, and technical jobs.
5. Increasing the number of blacks and other nonwhites in management and supervisory positions.
6. Improving the quality of life for blacks and other nonwhites outside the work environment in such areas as housing, transportation, school, recreation, and health facilities.
7. Working to eliminate laws and customs that impede social, economic, and political justice. (*Added in 1984.*)

*Id.*

98. Leon Sullivan, Global Sullivan Principles of Social Responsibility, at [http://globalsullivanprinciples.org/new\\_page\\_4.htm](http://globalsullivanprinciples.org/new_page_4.htm) (last visited Jan 15, 2005).

99. Sullivan Principles for Corporate Accountability Go Global, at <http://www.socialfunds.com/news/article.cgi/article135.html> (last visited Jan 15, 2005).

100. Global Sullivan Principles of Social Responsibility, Principles, at <http://globalsullivanprinciples.org/principles.htm> (last visited Jan 15, 2005). The text of the Global Sullivan Principles is as follows:

- Express our support for universal human rights and, particularly, those of our employees, the communities within which we operate, and parties with whom we do business.
- Promote equal opportunity for our employees at all levels of the company with respect to issues such as color, race, gender, age, ethnicity or religious beliefs, and operate without unacceptable worker treatment such as the exploitation of children, physical punishment, female abuse, involuntary servitude, or other forms of abuse.
- Respect our employees’ voluntary freedom of association.
- Compensate our employees to enable them to meet at least their basic needs and provide the opportunity to improve their skill and capability in order to raise their social and economic opportunities.
- Provide a safe and healthy workplace; protect human health and the environment; and promote sustainable development.
- Promote fair competition including respect for intellectual and other property rights, and not offer, pay or accept bribes.
- Work with governments and communities in which we do business to improve

for application outside of South Africa and the apartheid structure.<sup>101</sup> The similarities between the requirements set forth in the “Ottinger Bill” and those in the Sullivan Principles are undeniable.

The “Ottinger Bill” contained what would become the essence of the MacBride Principles.<sup>102</sup> INC leadership decided that the precepts enumerated in the “Ottinger Bill,”<sup>103</sup> with some revisions by the INC,<sup>104</sup> should be named after Dr. Sean MacBride, the INC Liaison in Ireland.<sup>105</sup> Dr. MacBride was an accomplished statesman and an ardent supporter of equal opportunity employment policies in Northern Ireland.<sup>106</sup> His credentials in issues of global peace and equal rights were impeccable. After co-founding Amnesty International in 1961,<sup>107</sup> Dr. MacBride won the Nobel Peace Prize in 1974<sup>108</sup> and the Lenin Peace Prize in 1977.<sup>109</sup>

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the quality of life in those communities—their educational, cultural, economic and social well being—and seek to provide training and opportunities for workers from disadvantaged backgrounds.

- Promote the application of these Principles by those with whom we do business.

*Id.*

101. See Sullivan Principles for Corporate Accountability Go Global, *supra* note 99.

102. McManus, *The MacBride Principles: Genesis and History*, *supra* note 81.

103. *Id.* The “Ottinger Bill” did not represent the totality of what would become the MacBride Principles. The Irish National Caucus (INC) itself made changes to the Bill, with input from some “expert advisors” at the office of New York City Comptroller Harrison J. Goldin. *Id.* The most obvious changes are the addition of new points of agreement, including the security requirement, and the banning of sectarian or political emblems. Further, the language in the modern MacBride Principles has been clarified greatly due to the amplifications provided in 1986 by Dr. Sean MacBride himself. See *id.*

104. There appears to be some discrepancy regarding who, in fact, was responsible for the actual drafting of the MacBride Principles. Noted scholar Christopher McCrudden places credit for the drafting of the MacBride Principles with Harrison J. Goldin, the former New York City Comptroller. See McCrudden, *supra* note 67 at 182. More specifically, McCrudden asserts that Patrick Doherty, a staff member in the Comptroller’s office, drafted the final form of the Principles. *Id.* The INC, on the other hand, while specifically acknowledging the contributions made by Comptroller Goldin’s office, specifically claims credit for the creation and drafting of the MacBride Principles. McManus, *The MacBride Principles: Genesis and History*, *supra* note 79. Refuting assertions that Comptroller Goldin’s office was responsible for the drafting of the Principle, the INC posits this question:

If the Principles originated in Goldin’s office [as many have reported] why didn’t Goldin—and not the Irish National Caucus—announce and launch the MacBride Principles Campaign? It is really too much to believe that an American politician would “originate” something and then “give” it to others to announce.

*Id.*

105. *Id.*

106. See William G. Blair, *Sean MacBride of Ireland Is Dead at 83*, N.Y. TIMES, Jan. 16, 1988, available at 1988 WLNR 1319549.

107. Colman McCarthy, *Sean MacBride’s Testament*, WASH. POST, Jan. 21, 1988, available at 1988 WL 2075160.

108. See The Norwegian Nobel Institute, List of Laureates, available at [http://www.nobel.no/eng\\_lau\\_list.html](http://www.nobel.no/eng_lau_list.html) (last visited Jan. 15, 2005). Dr. MacBride, who was honored for his work as President of the International Peace Bureau in Geneva and

After Dr. MacBride agreed to lend his name to the cause, the INC announced the launching of the MacBride Principles during the first week of November, 1984.<sup>110</sup> News of the Principles soon reached New York City, prompting City Councilmember Sal Albanese to contact the INC regarding the possibility of introducing a “MacBride Bill” in the New York City Council.<sup>111</sup> On December 19, 1984, the Bill was introduced.<sup>112</sup> The Bill met significant resistance, including opposition from Mayor Ed Koch.<sup>113</sup> At around the same time as the introduction of the New York City Council Bill, the INC succeeded in passing the MacBride Principles into Massachusetts state law with the assistance of Massachusetts State Senator Billy Bulger.<sup>114</sup> New York soon followed suit, and in 1986 the state passed the Principles into state law.<sup>115</sup>

Support for the MacBride Principles was not limited to the state level. In 1986, Congressman Hamilton Fish, Jr., a Republican of New York, and Senator Alfonse D’Amato, also a New York Republican, each introduced “MacBride Bills” into their respective houses of Congress.<sup>116</sup> The companion Bills were each known as the “Northern Ireland Fair Employment Practices Act.”<sup>117</sup> The introduction of these bills paved the way for even greater support of the MacBride Principles, which would occur on a more national scale.

The support for the MacBride Principles has grown as exposure to the issue of employment discrimination in Northern Ireland and the plight of the Catholic worker has increased. As of January, 2001, more than 50 American companies have agreed in writing to “make all lawful efforts to implement the Fair Employment Practices embodied in the MacBride Principles in their Northern Ireland operations,”<sup>118</sup> including such corporate giants as AT&T, DuPont, Ford Motor Company, General Motors, IBM, McDonald’s Corporation, Phillip Morris, Proctor &

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as the United Nations Commissioner for Namibia, shared Nobel Peace Prize Laureate honors that year with Eisaku Sato, the former Prime Minister of Japan.

109. Alexander Cockburn, *Viewpoint: Sean MacBride: The Man Who Smelled a Rat*, WALL ST. J., Jan. 21, 1988, available at 1988 WL-WSJ 470785.

110. See MacBride Principles: Genesis and History, *supra* note 81.

111. *Id.* The Bill was 0878-1984.

112. *Id.*

113. *Id.*

114. *Id.*

115. New York State Legislature website, Laws of New York, at <http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS> (last visited Jan 15, 2004). The MacBride Principles, now passed into New York State law, are codified as New York City Administrative Code § 6-115.1. *Id.*

116. See Northern Ireland Fair Employment Practices Act, H.R. 5627 (1986) available at <http://thomas.loc.gov/> (last visited Jan. 15, 2005); see also Northern Ireland Fair Employment Practices S.2909 (1986). *Id.*

117. *Id.*

118. MacBride Principles: The Essence, *supra* note 11.

Gamble, Sun Healthcare, Texaco, Verizon, Viacom, Westinghouse Electric and Xerox Corporation.<sup>119</sup> Legislation based on the MacBride Principles, which serves to codify the Principles into local law, has been passed in more than 25 cities and counties across the United States, including Cleveland, Philadelphia, Baltimore, Boston, Detroit, New York City, Washington D.C., and Chicago.<sup>120</sup>

*B. Support from the AFL-CIO: A MacBride Ally in Theory and Practice*

One group that has been consistently vocal regarding its support of the MacBride Principles is the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). The AFL-CIO's support for the Principles is logical; the AFL-CIO, which counts more than 13 million American workers and more than 60 unions among its members,<sup>121</sup> supported the Principles due to the equal hiring provisions that the Principles set forth. The AFL-CIO even went so far as to include MacBride compliance on the labor group's "scorecard" for money management firms that handle union pension investments.<sup>122</sup> The AFL-CIO has expressed the view that by making corporate MacBride compliance and non-compliance more readily identifiable, investing the AFL-CIO retirement assets of approximately \$350 billion<sup>123</sup> can be achieved without undermining Irish laborers in North Ireland.<sup>124</sup>

This labor-friendly strategy is in accord with the Principles themselves; the AFL-CIO plan of bringing an inequality before the public for scrutiny and debate, and then using whatever leverage the group may possess to exert subtle pressure on those in power to make the desired changes is very similar to the way in which the INC brought about the MacBride Principles themselves. The INC initially brought the disparity in employment opportunities between Protestants and Catholics in Northern Ireland to light in America, then, with the assistance of the Ad Hoc Committee for Irish Affairs, continued to voice opposition to the employment practices of major American corporations doing business in

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119. *Id.*

120. *Id.*

121. American Federation of Labor and Congress of Industrial Organizations website, at <http://www.aflcio.org/aboutaflcio/> (last visited Jan. 15, 2005).

122. Frank Swoboda, *Organized Labor to Keep 'Scorecard' on Pension Fund Managers*, WASH. POST, Feb. 19, 1999, at E3, available at 1999 WL 2200527.

123. *See id.* "The unions hope to use the power of their retirement funds to curb executive compensation, force independence on corporate boards, and make companies do right for labor both at home and abroad." (emphasis added).

124. *See id.* (Bill Patterson, director of the AFL-CIO's Office of Investment, stated "What we're trying to do is encourage funds to develop a view of shareholder value. I think this will be a factor in how money managers are selected.")

Northern Ireland. Finally, the INC was successful in effecting change through state, city, and county MacBride legislation, and by garnering the support of numerous major American corporations with a presence in Northern Ireland that agreed to adhere to the MacBride Principles.

### C. *The Unique Nature of the MacBride Principles*

The most unique, and perhaps the most brilliant, aspect of the MacBride Principles,<sup>125</sup> is that standing alone, they do not carry the force of law.<sup>126</sup> The Principles owe their origin to a private group, and therefore are not binding.<sup>127</sup> They were drafted to represent non-binding “admonitions,”<sup>128</sup> which served as opportunities for large corporations to demonstrate their commitment to the concept of equal opportunity employment and social responsibility in an international context.<sup>129</sup>

The success of these corporate guidelines depends wholly upon voluntary international corporate acceptance and compliance with terms set forth by the code of corporate conduct. In essence, the MacBride Principles require multinational corporations to possess and exercise (in an optimistic sense) a conscience, or a semblance of social responsibility. A more cynical (and perhaps more realistic) view is that the general public, acting both as consumer and lobbyist, can exert enough pressure on multinational corporations so that those corporations will, in the financial and economic interest of the corporation itself, be obliged to sign the Principles and act in accordance therewith.

It is this intriguing aspect of the MacBride Principles—that is, a system based entirely on voluntary compliance with a broad set of guidelines designed to truly foster a system of equality not in outcome but only in *opportunity*—which serves as an excellent model on which to base a new policy regarding American affirmative action.

## IV. Instituting the MacBride Principles in Higher Education Admissions Programs in the United States

Endeavoring to apply a set of corporate guidelines originally designed to rectify religious discrimination in the Northern Irish labor sector to American higher education admissions programs is, at first, an admittedly daunting proposition. Indeed, the MacBride Principles were

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125. McManus, *The MacBride Principles: Genesis and History*, *supra* note 81.

126. See McCrudden, *supra* 67 at 183. The voluntary corporate guidelines model originated with the Sullivan Principles, from which the MacBride Principles drew inspiration in both form and content. See *MacBride Principles: Genesis and History*, *supra* note 75.

127. *Id.*

128. *Id.*

129. *Id.*

created in an effort to halt discriminatory labor practices,<sup>130</sup> while American affirmative action programs were created to allow those in historically underrepresented minority groups opportunities for which they may not otherwise qualify.<sup>131</sup> However, despite their acknowledged differences in origin, the MacBride Principles represent a viable mechanism to improve a system which has been the target of great criticism.<sup>132</sup>

A. *Why the MacBride Principles Represent a Better Policy Choice than Grutter*

The MacBride Principles represent an improvement over the current American system of racial preference in higher education admissions on a philosophical level because they truly embody the ideal of equality; they serve as an inclusionary force rather than an exclusionary barrier.<sup>133</sup>

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130. Father Sean McManus, the President of the Irish National Caucus, the group instrumental in the passage of the MacBride Principles in the United States, wrote that the MacBride Principles were created to “stop United States dollars subsidizing anti-Catholic discrimination in Northern Ireland,” by raising awareness of the discriminatory practices utilized by many American companies doing business in Northern Ireland. MacBride Principles: The Essence, *supra* note 11.

131. In a speech to the Stanford Faculty Senate, Stanford President Gerhard Casper justified affirmative action programs with the following language:

Affirmative action is based on the judgment that a policy of true equal opportunity needs to create opportunities for members of historically underrepresented groups to be drawn into various walks of life from which they might otherwise be shut out. Barriers continue to exist in society, and therefore affirmative action asks us to cast our net more widely to broaden the competition and to engage in more active efforts for locating and recruiting applicants.

Gerhard Casper, Speech to the Faculty Senate, *available at* <http://www.stanfordalumni.org/news/magazine/1996/sep/oct/articles/casper.html> (last visited Jan. 15, 2005).

A similarly phrased rationale for the creation of affirmative action is given in the Bakke opinion—affirmative action was designed for “one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 329 (1978).

132. See *infra* discussion Part II.

133. See MacBride Principles: The Essence, *supra* note 11. The language of the Principles makes clear the INC’s desire for the Principles not to create a diminished opportunity for the Protestant majority. For example, MacBride Principle (4), which calls for public advertisement of jobs and special recruitment efforts directed at minority applicants specifically provides, “This should not be construed to imply a diminution of opportunity for other applicants.” *Id.* MacBride Principle (7) echoes this equality, and calls for the creation of a training program for minority workers, noting, “This does not imply that such programs should not be open to all members of the workforce equally.” *Id.* Further, MacBride Principle 8, which requires signatories to implement programs designed to actively recruit minority applicants, notes, “This section does not imply that such procedures should not apply to all employee equally.” *Id.*

This inclusionary function occurs in large part to the terminology and phrasing of both the Principles themselves and the amplifications subsequently issued by Dr. MacBride.<sup>134</sup> The carefully chosen language of the MacBride Principles and the subsequent amplifications fail to require preference for one group at the expense of any other;<sup>135</sup> indeed, the Principles by their very terms forbid this sort of exclusionary action.<sup>136</sup>

Instead, the Principles call only for an absolute end to discrimination, regardless of which group such discrimination is purported to favor or assist. The INC recognized that in order to gain support for a movement to end religious discrimination against the Catholic minority in Northern Ireland, a set of policies explicating the INC's aims had to be drafted in a manner that did not function to discriminate against the majority in an attempt to redress past inequities.<sup>137</sup> Instead, the INC drafted the MacBride Principles to require only equality in opportunity. This equality of opportunity, and not necessarily in outcome or result, is the type that should be the goal of a society truly free of discrimination.

#### *B. Benefits of a MacBride Approach Over the Current American System*

The MacBride Principles represent the culmination of the evolution of affirmative action policies across the world. The goal of affirmative action policies, including both the MacBride approach and the admissions system currently in place in American higher education, is to create a society in which such policies are no longer necessary. The MacBride Principles, therefore, represent a positive advancement for affirmative action policies. The Principles are a step away from programs steeped in race-consciousness, and a step closer to the creation of an America in which all citizens believe that society has made measurable progress, so much so that affirmative action programs are no

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134. *Id.* The amplifications were issued in 1986.

135. *See id.* While the MacBride Principles suggest that the "representation of individuals from underrepresented religious groups in the work force" be increased, there exist nowhere in the Principles any request that preference be accorded to those underrepresented groups. Instead, the Principles only call for "special recruitment efforts" and the "abolition of job reservations." *Id.* Further, "[a]pprenticeship restrictions, and differential employment criteria which discriminate on the basis of religion U.S. or ethnic origin." *Id.*

136. *See id.* The MacBride Principles are notable for the repeated assertion that those who institute the Principles are not required to engage in preferential employment practices: "This should not be construed to imply a diminution of opportunities for other employees." *Id.*

137. *See id.*



longer necessary.

Perhaps the most ingenious aspect of the MacBride Principles (and likely the most beneficial to American institutions of higher education) is that while the Principles do request special action from employers designed to increase the number of minority employees in the workforce,<sup>138</sup> nowhere in the language of the Principles is any special consideration accorded to religious minorities when employment *decisions* are made. The fact that the Principles do not impose the demand that religious affiliation play a part in hiring decisions allows for employers to make their hiring decisions based on merit. This represents a solution to a widely criticized aspect of American affirmative action programs; namely, that the American system of affirmative action places merit behind ethnic diversity in the hierarchy of importance and desirability.<sup>139</sup>

Unlike the American system of affirmative action, the Principles make the very logical supposition that by simply discouraging employers in Northern Ireland from engaging in discriminatory practices,<sup>140</sup> and by requiring those employers to develop and seek out qualified minority applicants,<sup>141</sup> the representation of minority workers in the labor force will naturally increase. In essence, the MacBride Principles serve to encourage an increase in the number of viable minority applicants, which will invariably lead to an increase in minority employment figures. There exists in the MacBride Principles no semblance of the patriarchy inherent in American affirmative action.<sup>142</sup>

A MacBride-based approach to ending race-consciousness has a dual advantage over the approach currently utilized in American higher education admissions. First, such a system would not require a college

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138. *Id.* 4. All job openings should be publicly advertised and special recruitment efforts should be made to attract applicants from underrepresented religious groups.

139. *See* Thomas, *supra* note 63.

140. *See* McManus, *The MacBride Principles: The Essence*, *supra* note 11.

141. *See id.*

142. Interview by Peter Robinson with Shelby Steele, Hoover Institution Research Fellow, at <http://www-hoover.stanford.edu/publications/selections/962/steele.html> (last visited Jan. 15, 2005). Shelby Steele, vocal African-American critic of affirmative action, noted this patriarchal effect in an interview with Hoover Institution research fellow Peter Robinson, stating:

Affirmative action has created what I call a “culture of preference.” It’s not just a benign social policy having to do with college admissions. It is a vast and all-defining culture that continues to lock me in, as a black person, to a victim-focused identity. Affirmative action makes me passive. It makes me into someone who cannot move forward unless white people are benevolent and help me move forward. It perpetuates dependency. I think affirmative action is the greatest negative force—the greatest force in opposition to black uplift—in society today.”

*Id.*

or university to discriminate against *any* applicant, regardless of their ethnic status. Indeed, the MacBride Principles specifically note in the amplification of Principle (4), that “*This should not be construed to imply a diminution of opportunities for other employees.*”<sup>143</sup> This requirement would allay perhaps the single most widely utilized argument (and perhaps the most litigated theory)<sup>144</sup> against affirmative action programs; that is, all race-conscious admissions programs inherently work as discriminatory barriers to admission for white students.

The MacBride Principles explicitly call for the end of discriminatory employment practices in Northern Ireland.<sup>145</sup> Calling for a stop to discriminatory practices would seem to be a rather uncontroversial step in creating a discriminatory-free society. However, as previously discussed, present-day American colleges and universities have instituted admissions policies ripe with discrimination.<sup>146</sup> Indeed, the American concept of affirmative action is, somewhat ironically, held by many to be a central tenet of modern racial egalitarianism,<sup>147</sup> and perhaps even a weapon in the arsenal of those who claim to battle discrimination.

If the MacBride Principles were implemented in the United States within the context of the academic admissions practices, the reverse discrimination which has long been a source of frustration for many qualified white applicants<sup>148</sup> would, by the very language of the Principles, cease. Applicants would be evaluated solely on merit, as

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143. See MacBride Principles: The Essence, *supra* note 11.

144. Lieutenant Colonel Joseph Fetterman asserts that “reverse discrimination” suits began in earnest with the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Joseph C. Fetterman, *Affirmative Action Hiring Obligations; Is It Time For a Race Neutral Policy or a Race to the Court House?*, 33 PUB. CONT. L.J. 781, 784 (2004). For interesting discussion on the topic of “reverse discrimination” in the realm of affirmative action programs in the United States, see David Schwartz, *The Case Of The Vanishing Protected Class: Reflections On Reverse Discrimination, Affirmative Action, and Racial Balance*, 2000 WIS. L. REV. 657 (2000).

145. MacBride Principles: The Essence, *supra* note 11. “5. Layoff, recall and termination procedures should not, in practice, favour particular religious groups. 6. The abolition of job reservations, apprenticeship restrictions, and differential employment criteria, which discriminate on the basis of religion or ethnic origin.”

146. See *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000).

147. See, e.g., *Richmond v. J.A. Croson*, 488 U.S. 469, 519 (1989) (Scalia, J., concurring). As Justice Scalia further noted:

The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. *A solution to the first problem that aggravates the second is no solution at all.*

*Id.* at 520-21 (emphasis added).

148. See Fetterman, *supra* note 142, at 784.

determined in various ways by the admissions officers at each respective university or college.

Second, a MacBride-based approach would remove the stigma which has plagued minorities who have achieved success in America while affirmative action programs have been in place.<sup>149</sup> A MacBride-based approach would allow everyone involved in any facet of American higher education to know that each and every student on campus earned their way into higher education, and that they stood on equal footing with their peers.<sup>150</sup>

*C. How Would a MacBride-Based System Actually Be Implemented in American Higher Education?*

This Comment has espoused the many benefits of the MacBride Principles, from its policy of voluntary adherence to its focus on equality in opportunity. While many would agree that such a policy is admirable and desirable in theory, the application of the Principles to American higher education admissions, at first glance, seems perhaps implausible. Due to the skepticism that such a proposal would engender, the feasibility of implementing a MacBride-based approach to American admissions programs is an issue that merits exploration.

While initial skepticism may be prevalent to a MacBride-based proposal, the more that such a possibility is explored, the more feasible the scheme becomes. The MacBride Principles began with a lobbying

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149. See *Fullilove v. Klutznick*, 100 S.Ct. 2758 (1980). In his dissent in a case dealing with the "minority business enterprise" provision of the Public Works Employment Act of 1977, Justice Stevens acknowledged the negative ramifications of affirmative action programs on those whom the programs are designed to aid, writing "But, even though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." *Id.* at 2809 (Stevens, J., dissenting). Justice Stevens is not alone in this conclusion; three years before the *Fullilove* decision, Justice Brennan wrote that "preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such policy may imply to some the recipients' inferiority and especial need for protection." *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 97 S.Ct. 996, 1013-14 (1977) (Brennan, J., concurring).

150. See R.A. Lenhart, *Understanding the Mark, Race, Stigma and Equality in Context*, 79 N.Y.U. L. REV. 803, 902 (2004). Professor Lenhart observes that three main arguments are generally made regarding stigma by critics of affirmative action. First, critics of the program often liken the risk of racial stigmatization under present affirmative action programs to the racial stigma created by segregated educational practices. Second, minority students admitted under affirmative action programs are often not as well-prepared as counterparts admitted under normal processes, and that this can lead to demoralization and failure. This failure, it is argued, can then serve to confirm any preexisting belief of minority inferiority. Finally, affirmative action programs stigmatize and penalize minority students who were qualified enough to have "made it" on their own merit without racial preference programs in place. *Id.* at 902-04.

effort by a small group of committed individuals in Washington, D.C.<sup>151</sup> The terms of the Principles were subsequently agreed to by major corporations due to the same lobbying effort. The Principles could certainly take on an educational form<sup>152</sup> with a similar lobbying campaign.

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151. See MacBride Principles: Genesis and History, *supra* note 81,

152. I acknowledge that the actual terminology of the MacBride Principles is not wholly applicable to the admissions process. The language of the Principles is tailored to function in an employment and labor context. Some points of the Principles would not translate to American educational settings, in part because they may be unnecessary. For example, Principle (2) deals with the security of minority workers. Clearly, some of the terminology of the Principles would require alteration to allow for application in an education arena. I would propose the following alternative form of the MacBride Principles for use in higher education admissions programs (material alterations to the applicable sections of the current MacBride Principles are italicized):

(1) Increasing the representation of individual, from underrepresented *minority groups in the student population of the United States' colleges and universities.*

*A student body* that is severely unbalanced may indicate prima facie that full equality of opportunity is not being afforded all segments of the community in *the United States.* Each signatory to the MacBride Principles must make every reasonable lawful effort to increase the representation of underrepresented *minority groups* at all levels of *education* in America.

(2) Providing that all *admissions opportunities* be advertised to *all segments of society* and providing that special recruitment efforts be made to attract applicants from underrepresented *minority groups.* Signatories to the MacBride Principles must exert special efforts to attract employment applications from the *minority groups* that are substantially underrepresented in the *higher education.* This should not be construed to imply a diminution of opportunity for other applicants.

(3) Providing that *admissions* procedures do not favor a particular *racial or ethnic group.* Each signatory to the MacBride Principles must make reasonable good faith efforts to ensure *admissions* procedures do not penalize *racial or ethnic groups* disproportionately.

(4) Abolishing *admissions reservations, quotas, and differential admissions criteria* which discriminate on the basis of *race or ethnicity.* Signatories to the MacBride Principles must make reasonable good faith efforts to abolish all differential employment criteria whose effect is discrimination on the basis of *race or ethnicity.*

(5) Providing for the development of *academic assistance* programs that will prepare substantial numbers of *minority applicants* for admission to colleges and universities, including the expansion of existing programs and the creation of new programs to *assist and improve the skills of minority applicants.* This does not imply that such programs should not be open to all members of the *applicant pool* equally.

(6) Establishing procedures to assess, identify and actively recruit *minority applicants* with the potential for *admission and academic success.* This section does not imply that such procedures should not apply to all *applicants* equally.

(7) Providing for the appointment of a senior *admissions* staff member to be responsible for the *recruitment* efforts of the *college or university* and, within a reasonable period of time, the implementation of the principles described above. In addition to the above, each signatory to the MacBride Principles is required to report annually to an independent monitoring agency on its progress in the implementation of these Principles.

A concentrated lobbying effort could convince an American college or university that a MacBride-based admissions program is superior to the present system. The college or university would then agree to cease its present affirmative action efforts in favor of a MacBride-based approach. Next, the institution would voluntarily agree to be bound, in good faith, to the Principles. The institution would then, in accordance with the requirements of the Principles, appoint a staff member to oversee the recruitment efforts mandated in the Principles. This staff member would then report to an independent monitoring agency regarding the college's or university's successful adherence to the program.

Whether a MacBride-based program thrives is a function of how successful such a program turns out to be in achieving the aims of its signatories. If the program is successful in its application, then it is logical that other colleges and universities would implement such a program. If it is not, then it would represent no more than a failed attempt at improving a flawed system.

*D. MacBride: A Loss for Proponents of Affirmative Action?*

If the application of race-blind admissions standards were the only aspect of the MacBride Principles implementation to American colleges and universities, then it would seem that those who have derided affirmative action policies and called for their end would have achieved a total victory. However, as the preceding pages have made clear, the MacBride Principles in their labor and employment context represent a two-prong solution to discriminatory practices. The requirement that signatory corporations end current discriminatory practices in hiring and promotion<sup>153</sup> serves to rectify the problems of current discrimination. That obligation is coupled with the condition that signatory corporations must engage in affirmative efforts to target, recruit, and prepare qualified individuals in underrepresented groups for employment,<sup>154</sup> which serves to rectify any negative lingering effects of past discrimination.

Thus, while the implementation of a MacBride-based approach to higher education admissions would seem to signal a rather lopsided victory for critics of current affirmative action policies in higher education, it is the second prong of the MacBride approach that represents the nexus of both the compromise and the solution. Indeed, this requirement serves as both the impetus for those who deem affirmative action programs still necessary in American society to accept

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153. See MacBride Principles: The Essence, *supra* note 11.

154. *Id.*

the program, and as the means by which to totally phase-out race-consciousness in collegiate admissions decisions.

*E. The Phase-Out*

In the *Grutter* majority opinion, Justice O'Connor wrote "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>155</sup> While her belief that the policies approved of in *Grutter* will lead to a society in which affirmative action is deemed no longer necessary is, perhaps, tenuous,<sup>156</sup> it indicates that the Supreme Court does acknowledge that race conscious admissions policies should not, and cannot, exist into perpetuity. This proclamation from Justice O'Connor should represent a victory for both sides of the affirmative action debate; those who think race conscious policies have no place in American society will see the end of affirmative action, and those who have long seen race preference programs as a necessary measure to combat the lingering effects of racism in American culture can take heart in the knowledge that the United States is presently more free of racism than at any time in the nation's past.

Justice O'Connor's statement regarding the future of affirmative action, as well as the erosion of affirmative action policies in the years since *Bakke*,<sup>157</sup> indicate with relative certainty that race conscious policies in American higher education will, perhaps within the lifetime of today's college students, become a thing of the past. It is therefore necessary to determine the best way to "phase-out" a program that has become so entrenched in American education.

The MacBride Principles represent a logical mechanism by which to bring about an unequivocal end to discrimination in admissions in the future. This phase-out will be possible due specifically to the "prepare and recruit" philosophy embodied in the MacBride Principles. The "prepare aspect" of the Principles is best illustrated by MacBride Principle (7), which requires companies to undertake: "[t]he development of training programmes that will prepare substantial numbers of current minority employees for skilled jobs, including the expansion of existing programmes and the creation of new programmes to train, upgrade and improve the skills of minority employees."<sup>158</sup>

The "recruit" function of the Principles is embodied in Principle (4),

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155. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

156. See Graglia, *supra* note 62 at 2043.

157. *Compare Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), with *Hopwood v. Texas*, 236 F.3d 256 (2000).

158. *Id.*

which requires that “[a]ll job openings should be publicly advertised and special recruitment efforts should be made to attract applicants from underrepresented religious groups.”<sup>159</sup> The Principles themselves therefore provide a mechanism designed to ensure that parity exists in the opportunity to achieve, regardless of ethnic background.

Therefore, while it is undeniable that the MacBride Principles specifically denounce preference in *selection*, calling for the abolition of “all differential employment criteria whose effect is discrimination,”<sup>160</sup> they specifically mandate assistance for minorities in both preparation and recruitment. This allows for equality in *opportunity*.

Through these procedures, the minority applicant pool expands both in terms of the number and quality of applicants. By undertaking these measures, parity in education will result almost by default. Meritorious applicants of all races and ethnicities will exist, and they will compete for admission based on academic qualifications.

## V. Conclusion

The MacBride Principles represent a stark theoretical and philosophical deviation from the current American policies approved of in *Grutter* regarding race-conscious admissions programs. While American affirmative action programs in institutions of higher education generally regard an applicant’s minority background as a benefit to the applicant in admissions decisions, and thus inherently regard a white applicant’s race as a disadvantage, the MacBride Principles explicitly denote that any sort of preferential program would be antithetical to the aim of equality towards which the Irish National Congress strives.

Instead, the MacBride Principles seek equality in its truest and clearest form; equality of *opportunity*. If American colleges and universities adopted a MacBride-based program, admissions decisions could no longer be decried as racially based. Instead, meritorious applicants, regardless of their race, would be granted admission to American colleges and universities. Equally important, the patriarchy intrinsic in affirmative action programs would be eradicated.

If the MacBride Principles were implemented in American institutions of higher education in place of the present system of affirmative action, many would argue that minority enrollment will greatly suffer at the more selective schools.<sup>161</sup> This contention is not an

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159. See McManus, *The MacBride Principles: The Essence*, *supra* note 11.

160. *Id.*

161. This argument is not without merit; in fact, after the University of California at Berkeley altered its affirmative action program so as to be in accordance with Proposition 209 (a voter-based referendum banning racial preferences), the number of African-Americans admissions to Berkeley plummeted by 66%. Steve Stecklow, *Higher*

uncommon one.<sup>162</sup>

In response to this assertion, Hoover Institution research fellow Shelby Steele, an avowed critic of racial-preference policies, offers this provocative query in response: “[w]ill blacks [and other minorities] disappear from higher education? That is not a decision for white Americans to make. That is a decision for black Americans to make.”<sup>163</sup>

The MacBride Principles, by providing for equality of opportunity, allow individuals to determine their own academic destiny based on their credentials, not their skin color. In an America in which MacBride-based admissions programs reigned supreme, merit would regain its rightful place as the sole criterion on which admissions decisions are made.

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*Yearning: College-Bound Senior Is in the Right Place But at the Wrong Time*, WALL ST. J. April 21, 1998, at A1.

162. See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 541 (2003) (asserting that the drop in nonwhite enrollment in the wake of the *Hopwood* decision was predictable).

163. Interview by Peter Robinson with Shelby Steele, *supra* note 142.



