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Riding Into the Sunset in a "Post-racial" World: Lessons in Equal Educational Opportunity and College Admissions Schemes in France and the United States

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RIDING INTO THE SUNSET IN A “POST-RACIAL” WORLD: LESSONS IN EQUAL EDUCATIONAL OPPORTUNITY AND COLLEGE ADMISSIONS SCHEMES IN FRANCE AND THE UNITED STATES

by KRISTEN BARNES*

“[If affirmative action] conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment’s very nature until complete equality is achieved in the area.”¹

-Justice Blackmun

“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²

-Justice Roberts

“We must invent methods that are faithful to and conform with our traditions, without categorizing individuals by race, ethnicity, religion. . . . It’s quite complex.”³

-Eric Besson, French Immigration Minister

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1. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 405 (1978) (Blackmun, J., separate opinion).

2. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

3. Cécilia Gabizon, *Yazid Sabeg veut plus d’élus issus de la diversité; ÉGALITÉ En pleine obamania, le commissaire à la diversité veut prendre des photos pour mesurer la progression des minorités visibles. Une idée qui ne séduit guère Éric Besson, nouveau ministre de l’Immigration*, LE FIGARO (Fr.), Jan. 21, 2009, at 11 (trans. Kristen Barnes).

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INTRODUCTION

Even in a “post-racial” world, race matters, especially when it comes to educational opportunity. French and American constitutional structures abhor and deny this reality, even though divisions along ethno-racial lines are apparent. A method of addressing the divisions in educational opportunity without running afoul of constitutional proscriptions is to use proxy strategies.⁴ As unlikely as it seems, an elite French university and the State of Texas have adopted measures that have remarkable similarities. Though they accomplish certain goals, neither program will be successful in addressing racial imbalances without directly addressing race.

France and the United States provide interesting cases of comparison for several reasons. First, both nations have substantial ethno-racial minority populations that challenge majoritarian notions of national identity, equality and access.⁵ How the minority populations within these exceptional nations fare in relation to the majority population matters and has an impact that transcends

4. See Daniel Sabbagh, *Affirmative Action in the United States and France: The Case of Higher Education*, Remarks given at the 4th Annual Conference on Economic Growth and Development 7 (Dec. 18, 2008), http://www.isid.ac.in/~pu/conference/dec_08_conf/PanelDiscussion.html (click “Affirmative Action in the United States and France: The Cost of Higher Education” hyperlink to download the file) [hereinafter Sabbagh, *Affirmative Action in the United States and France*] (defining the term “substitution strategy” as a “strategy by which what looks like a secondary effect of a facially neutral distributive rule is in fact the reason why that rule has been enacted, in a context where pursuing the decision-maker’s true objective in a more straightforward manner . . . without using the neutral rule as a proxy, would be considered illegitimate”).

5. See generally George M. Fredrickson, *Race, Ethnicity, and National Identity in France and the United States: A Comparative Historical Overview*, Paper given at the Fifth Annual Gilder Lehrman Center International Conference at Yale University, *Collective Degradation: Slavery and the Construction of Race* 11-24 (November 7-8, 2003), www.yale.edu/glc/events/race/Fredrickson.pdf (discussing the types of ethno-racial minorities in both the United States and France and comparing and contrasting the evolution of each country’s respective public policies and attitudes affecting these ethno-racial minorities).

national borders.⁶ Second, both France and the United States, historically, have imported people of color to address their labor needs.⁷ Third, in terms of identity, both nations have represented themselves as white.⁸ Fourth, the United States and France have touted themselves as uniquely exceptional nations serving as stellar examples of civilization and democracy.⁹ Fifth, there appears to be a convergence between the trend in United States equality education jurisprudence, which advocates a move toward so-called “race-neutral” alternatives,¹⁰ and the interest of

6. Newspapers worldwide gave attention to the election of Barack Obama as President. In France, Germany, and other countries one question that was loudly voiced is, “Where is our Obama?” See Luc Bronner, *Où est l’Obama français ? : L’ascension, loin de la politique* [Where is the French Obama? Progress, Far from Politics], LE MONDE (Fr.), Oct. 29, 2008, http://www.lemonde.fr/elections-americales/article/2008/10/29/l-ascension-loin-de-la-politique_1112400_829254.html, (explaining that almost no minority role models exist in the political realm in France, but that French minorities instead look to the private sector for examples of professional success); Max Colchester, *France Rethinks Relations with Minorities*, WALL ST. J., Nov. 6, 2008, <http://online.wsj.com/article/SB122591006614902049.html> (“A sense of envy at America’s electoral feat is being felt across Europe, where no nation has elevated a racial minority to its highest office.”); Letters to the Editor, *How Will Obama Govern?*, N.Y. TIMES, Oct. 10, 2008, <http://www.nytimes.com/2008/11/10/news/10iht-edlet.1.17688801.html> (describing the reactions of citizens in other countries after the election of president Obama, and how several Canadian citizens have asked news outlets “where is our Obama”); Andries Louw, *South Africa’s Leadership Crisis*, NEXTCHURCH (Nov. 7, 2008), <http://nextchurch.wordpress.com/2008/11/07/south-africas-leadership-crisis/> (discussing an article in South Africa’s Daily Sun entitled “Where is Our Obama”, which describes South Africa’s belief that they need a leader similar to Obama); see also Karine Lambin, *80% des Français prêt à voter pour un Noir?* [80% of the French are Ready to Vote for A Black Man?], LE MONDE (Fr.), Nov. 3, 2008, http://www.lemonde.fr/societe/article/2008/11/03/80-des-francais-prets-a-voter-pour-un-noir_1114239_3224.html (explaining that, in a survey of French citizens, 80% of respondents said they would be willing to vote for a black candidate for president, while only 47% of respondents actually believed a black candidate could be elected in France); Nicolas Sarkozy *Veut Avancer Sur la Discrimination Positive* [Nicolas Sarkozy Wants to Move Forward with Affirmative Action], LE MONDE (Fr.), Dec. 17, 2008, http://www.lemonde.fr/societe/article/2008/12/17/nicolas-sarkozy-veut-avancer-sur-la-discrimination-positive_1132028_3224.html [hereinafter *Sarkozy Veut Avancer*] (discussing how French president Nicolas Sarkozy reopened the issue of affirmative action in France as a result of Obama’s election).

7. See Fredrickson, *supra* note 5, at 2, 12 (noting that both France and the United States engaged in the slave trade and the use of slave labor and that “both the United States and France were immigrant-receiving societies that required massive importation of foreign labor to industrialize themselves in the late nineteenth and early twentieth centuries”).

8. See Saran Donahoo, *Reflections on Race: Affirmative Action Policies Influencing Higher Education in France and the United States*, 110 TCHRS. C. REC. 251, 271 (2008) (“In France, immigrant status and heritage consistently establish non-Whites as non-French. Although many people of color in the United States have been in the country long enough to discard or simply outgrow their immigrant identities, the physical and cultural markers of race afford them only second-class citizenship status.”).

9. See ALICE L. CONKLIN, *A MISSION TO CIVILIZE: THE REPUBLICAN IDEA OF EMPIRE IN FRANCE AND WEST AFRICA 1895-1830* 11-37 (1997) (discussing French ideological views on democracy and its civilizing mission). See generally UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION (Peter H. Schuck & James Q. Wilson eds., 2008) (relating perspectives on American exceptionalism from different scholars).

10. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 342-43 (2003) (holding that institutions of higher education should periodically review their admissions policies to determine whether or not racial preferences are still necessary to achieve diversity, and that in twenty-five years “the use of racial

the French government in identifying equality strategies that will help them improve the dire socio-economic condition of certain ethno-racial minorities (for example, individuals of African heritage) without specifically referencing ethnicity or race in the language of the policies.¹¹ Sixth, the timing of France's move to implement affirmative action policies, which comes nearly fifty years after the United States' move, provides an interesting contrast. France is just beginning the process of formulating programs that are intended to ensure that its multi-ethnic population, with emphasis on its marginalized population of African descent, is fully incorporated into the fabric of the country.¹² For France this issue is a relatively new one from the standpoint of the nation's political and legal discourse. For the United States, the question of the full inclusion of minorities has a long history. Seventh, because both nations concentrate on education as a means to change the status quo of the substantial divide between the haves and the have-nots,¹³ it makes sense to examine the strategies adopted by both to effect change and the legal environments that shape these efforts. Eighth, there are lessons that each republic can learn from the other. Placing France and the United States side by side in the mode of grappling with the common issue of how to achieve equality of educational opportunity should allow for some useful insights that can positively inform the educational policies of both nations for the future.

Academic institutions and governments in both countries have recognized that

preferences will no longer be necessary to further the interest approved today."); *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 221-22 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (argued Oct. 10, 2012) (No. 11-345) ("*Grutter* requires that any race-conscious measures must have a 'logical end point' and be 'limited in time.' This durational requirement can be satisfied by sunset provisions or by periodic reviews to reconsider whether there are feasible race-neutral alternatives that would achieve diversity interests 'about as well.' In this respect, *Grutter* is best seen not as an unqualified endorsement of racial preferences, but as a transient response to anemic academic diversity.").

11. See, e.g., Sabbagh, *Affirmative Action in the United States and France*, *supra* note 4, at 7 (explaining that although the "color-blind" admission policies of the elite French university, Sciences Po, "officially embodies an *area-based* and *class-based* approach of affirmative action, [it] may also be understood as indirectly and implicitly targeting groups that . . . would be considered as 'ethnic' or 'racial' minorities, in particular the group of second-generation North African immigrants").

12. See generally Alec G. Hargreaves, *Half-Measures: Anti-Discrimination Policy in France*, in *RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE* 227 (Herrick Chapman & Laura L. Frader eds., 2004) [hereinafter Hargreaves, *Half-Measures*] (examining the policy goals of France's integration policies to combat racial discrimination and calling into question the effectiveness of these measures); ALEC G. HARGREAVES, *MULTI-ETHNIC FRANCE: IMMIGRATION, POLITICS, CULTURE AND SOCIETY* 196 (2d ed. 2007) [hereinafter HARGREAVES, *MULTI-ETHNIC FRANCE*] (discussing the French policy of "Positive Discrimination" in education and housing as it applies to racial and ethnic minorities).

13. See, e.g., Steven Erlanger, *Top French Schools, Asked to Diversify, Fear for Standards*, N.Y. TIMES, July 1, 2010, <http://www.nytimes.com/2010/07/01/world/europe/01ecoles.html> (discussing the consequences of France's "Charter of Equal Opportunity" which asks its elite universities to "set a goal of increasing the percentage of scholarship students to 30 percent" to help "smart children of the poor overcome . . . huge cultural disadvantages"). See generally Lynn W. Huntley, *Foreword* to EBONI M. ZAMANI-GALLAHER ET AL., *THE CASE FOR AFFIRMATIVE ACTION ON CAMPUS* xi, xiii (2009) (discussing the purpose of affirmative action programs in education as a "means to gain resources, power, and influence").

education plays a substantial role for individuals in obtaining employment and being able to pursue a meaningful career. The current rhetoric emanating from France¹⁴ and the United States¹⁵ suggests that equal educational opportunity is an important goal. American and French institutions of higher learning often advance moral arguments asserting that it is the responsibility of schools to be open to all members of its society and to cultivate racial and ethnic diversity within this realm. Former United States Supreme Court Justice Sandra Day O'Connor's words are exemplary of this sentiment: "[Access to a college or university] must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."¹⁶

Sounding in a similar register, former French Education Minister Jack Lang has spoken favorably of the Priority Education Agreements, or CEP, program¹⁷ at the *Institut d'études politiques de Paris* ("Sciences Po"),¹⁸ noting that the CEP program addresses "the need for a democratic country to diversify the social origin of its elites."¹⁹ Comments made by Richard Descoings, former Director of Sciences

14. See, e.g., John Thornhill, *Ministerial Rivalry Clouded Early Response to French Riots*, FIN. TIMES, Nov. 8, 2005, <http://www.ft.com/intl/cms/s/0/3a26ea32-4ffc-11da-8b72-0000779e2340.html#axzz298uArl00> (recounting the message then French President Jacques Chirac had for protesters in the wake of the civil unrest in October 2005) ("Those who want to sow violence or fear will be caught, tried, and punished But we also understand very well that we must move towards respect for each individual, justice and *equality of opportunity*. We are all completely determined to go down this road and pursue the efforts that are already underway in this domain." (emphasis added)). France also created the post of Minister for Equal Opportunity, to which the writer Azouz Begag was appointed. See Mélina Gazsi, *Azouz Begag: An Exemplary Path*, FRANCE IN THE U.K.: FRENCH EMBASSY, <http://www.ambafrance-uk.org/Integration-Azouz-Begag-an.html> (last visited Nov. 4, 2012) (describing Azouz Begag's rise from a low income minority family, and his current goal of equalizing opportunities for people of all races in France).

15. See, e.g., Huntley, *supra* note 13, at xi ("It is the institutional arrangements, policies, and practices based upon race, gender, and other characteristics that still operate as built-in headwinds, blocking the success and upward mobility of people stuck at the bottom. It is the nation's massive failure to provide low-income people and members of minority groups with equal and fair access to quality education. Formal equal opportunity can do little good if people lack equal access to educational opportunities that would allow them to take advantage of this policy.").

16. *Grutter*, 539 U.S. at 332-33.

17. This program is known in French as the *Conventions Education Prioritaire* program. Brochure, Sciences Po, Objective: Equal Opportunity—The Priority Education Agreements 1 (2011), <http://www.sciencespo.fr/sites/default/files/Equal%20Opportunity%20and%20Diversity%20Program%202011.pdf> [hereinafter Priority Education Agreements Brochure].

18. The English translation of the school's name is The Institute of Political Studies of Paris, commonly referred to in French and English as "Sciences Po." See generally SCIENCES PO, <http://www.sciencespo.fr/en> (last visited Nov. 4, 2012) (English version of Sciences Po website).

19. John Vinocur, *Affirmative Action Recruiting for Top Schools Startles French Elite*, INT'L HERALD TRIB., Mar. 31, 2001, at 4, available at http://www.nytimes.com/2001/03/31/news/31iht-france_ed3_2.html (citation omitted); see also Erlanger, *supra* note 13 (explaining that the result of the admissions system before the Priority Education Agreements was a "self-perpetuating elite of the wealthy and white, who provide their own children the social skills, financial support and cultural knowledge to pass the entrance exams").

Po, often emphasize the "social responsibility" of France's elite universities to address socio-economic disparities.²⁰ Descoings explains:

[I]n France, it is by gaining admission into one of these few top schools (the major engineering and business schools, along with the *École normale supérieure* and Sciences Po) that you eventually get to the most elite positions, not only in the business world, but also in public administration, the media, and the cultural sphere . . . those people who have not gone through one of these schools will have a very hard time pushing through the glass ceiling found in [those sectors].²¹

The foregoing statements suggest that, as a matter of fundamental fairness, it is the responsibility of society to ensure that substantial and meaningful opportunities for quality education are presented to a broad swath of people and where those opportunities appear to be lacking (for example, for certain ethno-racial minorities and lower-income individuals), active steps must be taken to address the inequities.

The purpose of this paper is to evaluate and compare two strategies designed to promote ethno-racial²² inclusion that were initiated in France and the United States in the context of higher education.²³ In particular, I examine the Priority Education Agreements Program or CEP, an innovative affirmative action program which was implemented in 2001 by the Sciences Po, one of France's elite

20. See Suzanne Daley, *Elite French College Tackles Affirmative Action*, N.Y. TIMES, May 4, 2001, <http://www.nytimes.com/2001/05/04/world/elite-french-college-tackles-affirmative-action.html> ("The director of Sciences Po, Richard Descoings, said it was obvious to him that coming up with a way of diversifying the student body had to be a priority. 'Here at Sciences Po is where we form our elite for both business and government,' he said. 'When you have that responsibility, it is impossible not to ask yourself who is coming here. We thought about our social responsibility and we decided we had to do something.'").

21. Interview by Daniel Sabbagh with Richard Descoings, Dir. of Sciences Po, FRENCH-AM. FOUND., 1, (Feb. 2, 2010), http://equality.frenchamerican.org/sites/default/files/descoingstranscript_en.pdf [hereinafter Interview with Richard Descoings].

22. Even though, in the context of this article, I extensively use the terms "race" and "ethnicity" to apply to groups that are not Caucasian, I recognize that "race" applies to Caucasian people and that a variety of different ethnic groups may be categorized as "white." I find the definition of "ethnic group" offered by legal scholars Juan Perea, Richard Delgado, Angela Harris, Jean Stefancic, and Stephanie Wildman useful. These authors define "ethnic group" as "a group of people larger than an extended family whose boundaries are marked by a social practice or experience perceived as distinct: a history or a religion; customs or traditions; a language or alphabet; perhaps even a geography." JUAN F. PEREA, ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 5 (2000).

23. In this article, I do not focus on integration and diversity schemes at the elementary and high school levels. That topic will be the subject of a future law review article. Even though the Texas Top Ten Percent plan looks to the performance results of high school students, my discussion is concerned with the implementation of the program at the college and university level and its effectiveness in that realm given the goals stated.

universities,²⁴ in relation to the Texas Ten Percent Plan that was established in 1997 in the United States by the State of Texas.²⁵

Sections I and II of this paper will provide the historical and social contexts in which the proxy strategies created by Sciences Po and the State of Texas emerged. I then develop the fundamental points of my argument which are that: (1) race and ethnicity still “matter”²⁶ and will need to be considered in the administration of college and graduate admissions programs despite the declaration, which I dispute, that American society has entered a post-racial era and France’s continued celebration of its egalitarian principles at the expense of the attainment of substantive equality; (2) to the extent that laws permit the consideration of ethnicity and race in the United States, they should be retained for as long as necessary to accomplish equal education opportunities and meaningful access to higher education; (3) where laws permitting an express consideration of ethno-racial factors do not exist, as is the case in France, the issue of amending the relevant laws should be revisited to allow for an express consideration of these classifications to facilitate the creation of effective affirmative action approaches; (4) proxy strategies are to be encouraged because they are effective, to some degree, in achieving diversity and improving access to higher education for underrepresented ethnic and racial minority groups, and because they are politically palatable and legally viable for accomplishing the stated goals in the United States and France; and (5) while creative approaches such as proxies should be pursued, it is important to build some flexibility into the strategies and not to over rely on them particularly if it becomes apparent that they are not functioning to allow for the admission of a “critical mass”²⁷ of underrepresented ethno-racial minorities to higher education institutions.

In connection with my analysis of how the Sciences Po and Texas have navigated certain constitutional issues with respect to the implementation and maintenance of the specific admission schemes I examine, I rely upon select laws and legal cases for each country. In addressing the French constitutional issues, in Section III I examine one of the decisions rendered by France’s high legal advisory

24. See Donahoo, *supra* note 8, at 262-63 (defining the CEP program and describing generally its purpose and implementation).

25. See MARTA TIENDA, ET AL., CLOSING THE GAP?: ADMISSIONS & ENROLLMENTS AT THE TEXAS PUBLIC FLAGSHIPS BEFORE AND AFTER AFFIRMATIVE ACTION 2 (2003), available at http://theop.princeton.edu/reports/briefs/www_brief_closinggap.pdf (“[T]he . . . Texas legislature passed H.B. 588, which guarantees admission to any Texas public college or university for all seniors graduating in the top 10 percent of their class.”).

26. I am using the term “matter” in the sense that race and ethnicity still figure prominently in the treatment of individuals and in the distribution of social goods in American and French society. The ethno-racial discrimination that has historically played a role in both countries continues to substantially impact the economic and social progress of certain sectors of the French and U.S. populations.

27. Rather than offering some quantifiable number to define “critical mass,” I defer to a definition given by Erica Munzel, Director of Admissions at the University of Michigan Law School, in connection with *Grutter*, 539 U.S. at 318. According to Munzel, “critical mass” does not correspond to any particular number but rather refers to a “meaningful representation” of a group that “encourages underrepresented minority students to participate in the classroom and not feel isolated.” *Id.*

council, the *Conseil constitutionnel*,²⁸ the Preamble and Article 1 of the 1958 Constitution of the French Fifth Republic,²⁹ the 1789 Declaration of the Rights of Man,³⁰ and the Preamble to the 1946 French Constitution of the Fourth Republic.³¹ In Sections II and IV, I primarily focus upon the United States and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution,³² Section 601 of Title VI of the Civil Rights Act of 1964,³³ Section 1981(a) of 42 U.S.C. 1981,³⁴ and the cases *Brown v. Board of Education*,³⁵ *Regents of the University of California v. Bakke*,³⁶ *Grutter v. Bollinger*,³⁷ *Gratz v. Bollinger*,³⁸ *Fisher v. University of Texas at Austin*,³⁹ and *Hopwood v. Texas*⁴⁰ for my analysis.⁴¹

After examining the American and French strategies of ethno-racial inclusion in terms of their historical, social, political, and legal contexts, in Sections V and VI, I offer some thoughts on how the two programs compare overall, the positives and shortcomings of each, and the lessons that Sciences Po's plan has for the United States and Texas' plan has for France. I conclude, in Section VII, that while proxy strategies can be useful from the perspective of the goals of ethno-racial diversity and of improving access to equal educational opportunities for minorities, they alone are likely to prove insufficient to fully meet these goals because of the particular histories of the two countries, persistent socio-economic barriers and disparities, and the state of ethno-racial relations in each. Further, I maintain that in order for academic institutions to be successful in their endeavors to be inclusive and serve historically underrepresented minorities and increasingly varied multi-racial and ethnic populations, along with majority populations: (1) ethnicity and

28. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2001-450DC, July 11, 2001, Rec. 82 (Fr.), translated in MARTIN A. ROGOFF, FRENCH CONSTITUTIONAL LAW: CASES AND MATERIALS 335-36 (2011) [hereinafter Constitutional Court decision No. 2001-450DC].

29. 1958 CONST. art. 1, pmbl. (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais.pdf.

30. THE DECLARATION OF HUMAN AND CIVIC RIGHTS OF 26 AUGUST 1789 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf [hereinafter DECLARATION OF THE RIGHTS OF MAN OF 26 AUGUST 1789 (Fr.)].

31. 1946 CONST. pmbl. (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst3.pdf.

32. U.S. CONST. amend. XIV, § 1.

33. The Civil Rights Act 1964, 42 U.S.C. § 2000d-2000d-7 (2006).

34. 42 U.S.C. § 1981(a) (2006).

35. 347 U.S. 483 (1954).

36. 438 U.S. 265 (1978).

37. 539 U.S. 306.

38. 539 U.S. 244 (2003).

39. 631 F.3d 213.

40. 78 F.3d 932 (5th Cir.), cert denied, 116 S. Ct. 2581 (1996), abrogated by *Grutter*, 539 U.S. 306.

41. *Parents Involved in Community Schools v. Seattle School District No. 1* is also part of the corpus of equality of education jurisprudence. In *Parents Involved*, Chief Justice Roberts drew a sharp distinction between the policy in *Grutter*, which upheld the use of ethno-racial factors in post-secondary admissions decisions, and the use of such criteria by primary and high schools. 551 U.S. 701, 725 (2007) (plurality opinion). Since this decision concerns race-conscious plans implemented at the elementary and secondary school levels and was not used as a reference point for reworking the admissions procedures I discuss in this article, I have opted not to include it in my analysis.

race will need to be taken into account and laws must be maintained or fashioned to address this necessity; and (2) the architects and proponents of proxy strategies must adhere to transparency in the outcomes so that, if the intended goals are not being attained, there is a credible basis for making adjustments to the schemes, as necessary.

I. THE INESCAPABLE PAST AND ITS INFLUENCE ON AFFIRMATIVE ACTION
POLICIES: THE EMERGENCE OF A NEW APPROACH TO ETHNO-RACIAL INCLUSION

History largely explains why certain ethno-racial minority groups are identified as the focus of admissions policies designed to increase their representative numbers in French and American schools.⁴² For France, the colonial history in Africa and treatment of African immigrants once they arrived in the metropole must be remembered. For the United States, the history of African Americans, Latinos, and Native Americans, Jim Crow laws, years of de jure segregation, and ongoing de facto segregation must be kept in mind when formulating and evaluating student admission policies in higher education.

France, in 2001, and the United States, beginning in the 1950s, implemented educational programs and policies aimed at addressing inequalities in educational opportunities in their respective countries. This section and Section II, respectively, are intended to shed light on the controversial decisions to structure Sciences Po's CEP program and the Texas Ten Percent Plan in the manner in which they are designed.

A. *France is Burning: France's Colonial and Immigration History*

The current state of France, with its frequent eruptions of civil protests in Clichy-sous-Bois, Stains, Grigny, and other Parisian suburbs giving voice to the outcries regarding the lack of opportunities in education and employment for the French African population,⁴³ is deeply rooted in France's colonial history and its troubled twentieth century immigration policies. Even though it is generally not acknowledged in mainstream French discourse, the act of distinguishing between

42. While a historical perspective is relevant, it does not provide the only rationale for using strategies designed to increase minority representation and opportunities for underrepresented minorities at elite academic institutions. There are overall benefits that society can reap, as observed in *Grutter*, from ensuring that diverse student bodies are achieved at universities and colleges. 539 U.S. at 329. Nonetheless, history offers some clues to explain why certain ethnic and racial minorities are underrepresented and, therefore, are the target of a university's race-proxy or race-conscious admissions policies. Adopting these approaches can be viewed as equalizing measures. From a historical perspective, in general, Caucasians had opportunities to attend schools that were not available to minorities falling within the underrepresented groups. So, a policy fashioned to change the pattern and impact of historical practices is needed.

43. See, e.g., Mark Landler & Craig S. Smith, *French Officials Try to Ease Fear as Crisis Swells*, N.Y. TIMES, Nov. 8, 2005, <http://www.nytimes.com/2005/11/08/international/europe/08france.html> (discussing civil protests in 2005 in which youths burned and destroyed property, confronted police, and caused disruption primarily in the areas in which they live).

people on the basis of ethno-racial differences has played a significant role in the historical formation of France, first as an empire, and later as a leading nation-state within Europe.⁴⁴ While French law, beginning with the Constitution of 1946 purports to ensure human rights and equality for all French citizens,⁴⁵ France's historical relationship with non-white populations – in the Caribbean,⁴⁶ Africa, and Southeast Asia – along with ethno-racial tensions that were enflamed during the struggles for independence,⁴⁷ and the antisemitic Vichy period,⁴⁸ suggest that strong cultural ideas about ethno-racial differences are embedded in the consciousness of the contemporary French nation regardless of whether these ideas are apparent when examining the country's formal laws.⁴⁹

The 1950s, the period immediately preceding the end to France's colonial reign in Southeast Asia and Africa, were marked by a substantial influx of immigrants into France primarily from the Maghreb⁵⁰ and West Africa (for

44. Guillaume Aubert, *"The Blood of France": Race and Purity of Blood in the French Atlantic World*, 61 WM. & MARY Q. 439, 443 (2004) ("The idea that natural qualities were transmitted through blood from one generation to the next . . . rapidly became an essential feature of the early modern French ethos [I]nfluential French authors [of this time] repeatedly insisted on the inherent inequality of mankind.").

45. See, e.g., 1946 CONST. § 1 (Fr.) (creating the foundation for French equality by stating that "each human being, *without distinction of race, religion or creed*, possesses sacred and inalienable rights" (emphasis added)); JOHN BELL, FRENCH CONSTITUTIONAL LAW 199-206 (1992) [hereinafter BELL, FRENCH CONSTITUTIONAL LAW] (explaining that equality became the most important issue for French law after the revolution in 1789, and describing the constitutional, statutory, and court-made laws which enabled France to move forward into equality after its racially divided past).

46. See WILLIAM B. COHEN, THE FRENCH ENCOUNTER WITH AFRICANS: WHITE RESPONSE TO BLACKS, 1530-1880, at 35-39, 130-54 (1980) (recounting how France instituted colonies in Martinique, Haiti, and Guadeloupe in the 1600s that were supported by slave labor).

47. MARTIN SHIPWAY, THE ROAD TO WAR: FRANCE AND VIETNAM 1944-1947 276-78 (Jolyon Howorth ed., 1996) (describing France's eight year war with Vietnam).

48. MICHAEL R. MARRUS & ROBERT O. PAXTON, VICHY FRANCE AND THE JEWS 181-91 (1981) (discussing how anti-semitism reached its peak in France from 1941 to 1942).

49. Numerous French scholars have commented on ethnic and race-based prejudice experienced by peoples of African heritage in France and during the colonial period. See, e.g., Thomas Deltombe & Mathieu Rigouste, *L'Ennemi Intérieur: La Construction Médiatique de la Figure de l' "Arabe"*, in LA FRACTURE COLONIALE: LA SOCIÉTÉ FRANÇAISE AU PRISME DE L'HÉRITAGE COLONIAL 191, 191-98 (Pascal Blanchard et al. eds., 2005) (Fr.) (describing the media's role in perpetuating the French view of "Arabs" as immigrants and outsiders); COHEN, *supra* note 46, at 283-93 (describing ideas of race inferiority developed during France's colonial history and how they remain present in modern French society); TAHAR BEN JELLOUN, FRENCH HOSPITALITY: RACISM AND NORTH AFRICAN IMMIGRANTS 47-51 (Barbara Bray trans., 1999) (noting numerous murders of African Immigrants in France in the year 1982-83); PATRICK MANNING, FRANCOPHONE SUB-SAHARAN AFRICA 1880-1995 26-29 (2d. ed. 1998) (describing the institution of slavery in French colonies in Africa); Interview by Daniel Sabbagh with Louis-Georges Tin, Vice President, Conseil Représentatif des Associations Noires (CRAN), FRENCH-AM. FOUND. (Jan. 27, 2010), http://equality.frenchamerican.org/sites/default/files/tintranscript_en.pdf ("Blacks in France are the victims of discrimination—that is a fact. We aren't discriminated against because we embody one aspect of 'diversity;' we are discriminated against because we are black, and perceived as such. In order to tackle racial discrimination, we first need to use the appropriate language.").

50. HARGREAVES, MULTI-ETHNIC FRANCE, *supra* note 12, at 20 (defining the Maghreb as "the western part of North Africa, consisting of Algeria, Morocco and Tunisia" and identifying this region as

example, Senegal and Mali), and to a lesser extent from Vietnam.⁵¹ Initially, France encouraged immigration from these areas because of the nation's shortage of crucially needed laborers to work in its factories.⁵² Males from these regions were heavily recruited.⁵³ Over time, with pressure from the workers and other advocates of immigrants' rights, African workers were able to bring their families to join them in France.⁵⁴ Despite the initial welcoming gestures, France had no intention of making these individuals permanent residents of France. As the need for immigrant labor decreased, the French government devised policies in the 1970s and into the 1980s regarding African immigrants intended to motivate African workers and their families to return to their originating countries.⁵⁵ Rather than return to their countries of origin, however, many African immigrants became more entrenched in French culture, in part due to their children who were born on French soil and who eventually matriculated into the French school system.⁵⁶ This community of African immigrants and their children tended to settle in regions situated in the

the source of the fastest growing group of immigrants to France in the period 1946-82).

51. *Id.* (identifying Southeast Asians, Turks, and Africans from former French colonies in West and Central Africa as major immigrant groups into France beginning in the mid-1970s).

52. See Marie-Eve Blanc, *Vietnamese in France*, in *ENCYCLOPEDIA OF DIASPORAS: IMMIGRANT AND REFUGEE CULTURES AROUND THE WORLD*, 1158, 1159-60 (Melvin Ember et al. eds., 2005) [hereinafter Blanc, *Vietnamese in France*] (noting that migration to France occurred in six waves). "The first wave corresponds to the recruitment of soldiers-workers during Word War I. The French Ministry of War decided to transplant [immigrants] . . . and employ them in factories and the war industry to replace workers mobilized for combat." *Id.* at 1159. See also James F. Hollifield, *Immigration Policy in France and Germany: Outputs versus Outcomes*, 485 *ANNALS AM. ACAD. POL. & SOC. SCI.* 113, 116 (1986) ("[T]he rationale for recruiting immigrant workers after 1945 was not only to provide additional manpower for economic reconstruction and expansion, but also to give a needed boost to the population.").

53. See Blanc, *Vietnamese in France*, *supra* note 52, at 1160 ("The second wave [of immigration] occurred during the 1920s and 1930s. . . . This volunteer . . . migration was constituted mostly of men."); James R. McDonald, *Labor Immigration in France, 1946-1965*, 59 *ANNALS ASS'N AM. GEOGRAPHERS* 116, 125 (1969) ("[A] poor harvest in Algeria or a slight expansion of employment opportunities in France has been sufficient to provoke a wave of labor migration. . . . [T]hese [Algerian] entrants are mainly coming only on speculation that jobs will be found . . . there are no . . . job contracts to provide guaranteed employment for a [sic] least a certain percentage of them, and . . . family immigration is slight . . .").

54. See Hargreaves, *MULTI-ETHNIC FRANCE*, *supra* note 12, at 23-24 (providing data showing females as an increased presence in various immigrant groups in France in the period 1946-99).

55. E.g., Hargreaves, *Half-Measures*, *supra* note 12, at 228 ("The presidency of Giscard d'Estaing was marked from its inception in 1974 to its last gasp in 1981 by a series of initiatives designed to halt and if possible reverse inward flows of migrants. . . . [T]he administration focused its efforts on . . . immigrants . . . originating in France's North African colonies."); PATRICK WEIL, *LA FRANCE ET SES ÉTRANGERS: L'AVENTURE D'UNE POLITIQUE DE L'IMMIGRATION 1938-1991*, at 107-38 (1991) (Fr.) (explaining France's reverse immigration policies in the 1970s, including one introduced before Parliament in 1977 by Prime Minister Raymond Barre in which the government would give unemployed immigrants 10,000 francs if they returned to their country of origin).

56. See Interview by Daniel Sabbagh with Dominique Sopo, President, SOS Racisme, FRENCH-AM. FOUND., 5 (Jan. 28, 2010), http://equality.frenchamerican.org/sites/default/files/sopotranscript_en.pdf [hereinafter Interview with Dominique Sopo] ("[A]round the end of the 1970s and the beginning of the 1980s, those immigrants [from North and Sub-Saharan Africa] began realizing that, because of their children, they were likely going to remain in France.").

Parisian suburbs; they were connected to, but remained apart from, the Parisian center.⁵⁷ This separation persists today and is relied upon, for better and worse, by Sciences Po in administering its equality admissions program.⁵⁸

The number of people of Arab and African ancestry living in France has been estimated to be 10% of France's population,⁵⁹ comprising three to six million⁶⁰ of the total population of approximately 63.7 million living in metropolitan France.⁶¹ Even though this minority population is substantial, the indicators for socio-economic progress show that this group is not faring well relative to the majority

57. See Maurice Blanc, *Urban Housing Segregation of North African "Immigrants" in France*, in *URBAN HOUSING SEGREGATION OF MINORITIES IN WESTERN EUROPE AND THE UNITED STATES* 145, 148 (Elizabeth D. Huttman et al. eds., 1991) ("In Paris, 110,000 North Africans represent one-third of the foreigners in the city. Most are concentrated in old housing in formerly industrial and working-class districts of the north and east of the city. In the industrial suburbs close to Paris . . . and more clearly in industrial suburbs far from Paris . . . they concentrate in large public housing estates.").

58. See Interview with Richard Descoings, *supra* note 21 ("[France] is increasingly segregated. The rich cluster together, and the poor are forced to cluster together because there's no place for them in the rich areas. Given the fact that a large fraction of young people whose parents, or grandparents, or great-grandparents immigrated to France, come from less well-off backgrounds, the social, economic, and cultural segregation I've been talking about also turns out to be an ethnic segregation to some degree. As a result, considering the location of a [high] school allows us to draw upon a much more diverse pool of potential candidates.").

59. See, e.g., Colchester, *supra* note 6 ("An estimated 10% of France's population has African or Arab roots.").

60. Because the French government prohibits statistical data of this kind, Loi 78-17 du 6 janvier modifiée relative à l'informatique, aux fichiers et aux libertés [Modified Law 78-17 of January 6, 1978 of Computer Science, Files, and Liberties], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 25, 2011, <http://www.cnil.fr/en-savoir-plus/textes-fondateurs/loi78-17/>, the estimates of the African population vary widely. See, e.g., Gerda Bikales, *African Migration and the Transformation of France: Interview with Jean-Paul Gourévitch*, 14 SOCIAL CONTRACT 91 (2004), <http://www.thesocialcontract.com/pdf/fourteen-two/xiv-2-91.pdf> ("[W]e can reasonably estimate that there are between 2.3 and 3 million Black Africans (including children) in France today, nearly as many as there are North Africans, who number a little more than 3 million."); see also *Être né en France d'un parent immigré* [Born in France to An Immigrant Parent], INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES, available at http://www.insee.fr/fr/themes/document.asp?reg_id=0&ref_id=ip1287 ("[M]ore than half of children younger than 30 have a relative who came from Africa. . . . 1.3 million descendants between 18 to 50 have at least a father or mother from Algeria, Morocco or Tunisia, or Sub-Saharan Africa. . . . Among descendants aged 18-20, 18% have a parent from Asia, the Middle East, and America." (emphasis added)); *France Métropolitaine: Les Immigrés par Sexe, Age, et Pays de Naissance* [Urban France: Immigrants by Sex, Age, and Country of Birth], INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES, <http://www.recensement-2009.insee.fr/tableauxDetaillies.action?zoneSearchField=FRANCE&codeZone=M-METRODOM&idTheme=9&idTableauDetaillie=25&niveauDetail=1> (showing that in 2009, the most recent year for which census data is available, 721,274 immigrants living in metropolitan France were from Algeria; 663,502 were from Morocco; 236,242 were from Tunisia; 681,892 were from other African countries; and 734,637 were from other non-European and non-African countries).

61. *Demography – Population at the Beginning of the Month – Metropolitan France*, INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES, <http://www.insee.fr/en/bases-de-donnees/bsweb/serie.asp?idbank=000436387> (last visited Nov. 18, 2012) (reporting France's population as 63,696,000 in October, 2012).

white French population.⁶² Recent statistics suggest that France's African French population, generally does not have the same educational opportunities that are afforded the majority white French population. According to one article:

Deep fractures have emerged in the French education system. . . . Schools in many poor neighborhoods are dangerous and run-down. Some 36% of high school dropouts are children of immigrants, and those who graduate often lack the skills to find good jobs or enter higher education. "It is becoming more and more evident that there is inequality between the schools in suburbs and those in the [more affluent] city centers." . . . Wealthier French communities get a disproportionate share of education aid because their elected officials have more clout than those from immigrant neighborhoods.⁶³

France also has an extended colonial history with the Vietnamese that carries over into the present day.⁶⁴ When compared to the African French, Vietnamese

62. See Carol Matlack et al., *Crisis in France*, BUS. WK., Nov. 21, 2005, <http://www.businessweek.com/stories/2005-11-20/crisis-in-france> ("Unemployment [in France] is nearly 10%, and among those under 25 it is nearly 22%, about twice the U.S. rate. Youth joblessness runs over 50% in the suburbs that are home to many of France's more than 5 million first- and second-generation African and Arab immigrants."). It is difficult to draw conclusions about the socio-economic state of the African diaspora in France because French law prohibits the formal collection of statistics on racial and ethnic groups, Modified Law 78-17 of January 6, 1978 of Computer Science, Files, and Liberties.

I find the approach taken by CRAN, an advocacy group for black people modeled on the United States' National Association for the Advancement of Colored People ("NAACP") to be a useful one for providing some statistical information on how peoples of African heritage are faring economically and politically in France. CRAN was created in 2005 and is composed of 120 organizations representing African and Caribbean peoples living in France. *Qu'est-ce que le CRAN?*, LE CRAN, <http://lecran.org/?p=2037> (last visited Nov. 6, 2012). CRAN has emphasized the importance of statistics on the diversity of France by commenting that they "are the only means of measuring indirect discrimination, which makes up the most egregious and serious discriminatory acts, in particular concerning salary gaps and inequalities in career advancement that are what we call the 'glass ceiling.'" Carine Fouteau, *Des Statistiques Éthniques, Pour Quoi Faire?*, DÉSIRS D'AVENIRS PARIS 5 (Mar. 29, 2009), <http://desirsdavenirparis5.over-blog.com/article-29628752.html> (Fr.) (trans. Kristen Barnes) ("[L]es statistiques de la diversité «sont le seul instrument de mesure possible des discriminations indirectes, qui constituent les discriminations les plus criantes et les plus graves, en particulier pour ce qui concerne les écarts salariaux et les inégalités dans les évolutions de carrière qui sont ce que l'on appelle le 'plafond de verre'»").

CRAN has presented statistics regarding the black French population noting that even though there are three to five million black people living in France when one examines the situation in 2009: 1) out of thirty-nine senior ministers there are zero black people serving in this capacity, 2) out of the 324 senators elected in continental France there are zero black people serving in this capacity, 3) looking at the one hundred top executives in the country there are zero black people. Patrick Lozès, President, CRAN, Presentation at Constructing Black France, "A Transatlantic Dialogue": International Symposium (Apr. 17, 2009).

63. Matlack et al., *supra* note 62 (quoting Saïd Hanchane, Researcher, Laboratory of Sociology and Labor Economics, Université de la Méditerranée).

64. See Louis-Jacques Dorais, *Vietnamese Communities in Canada, France and Denmark*, 11 J. REFUGEE STUD. 107, 113 (1998) ("As Indochina's former colonial power, France was always a magnet

people residing in France make up a relatively small portion of the overall population.⁶⁵ As measured in 2006, the number of Vietnamese immigrants who are citizens of France constituted approximately 250,000 of a total French population of sixty million.⁶⁶ Overall, there appears to be an appreciable difference in how the Vietnamese are viewed as compared to the African French. There is also a notable difference in their economic success. In general, the Vietnamese are considered to be an assimilated, well-integrated group; the second-generation often identifies more strongly as French than as Vietnamese.⁶⁷ Nonetheless, there are recent immigrant groups from Vietnam and Cambodia who do suffer from socio-economic disadvantages similar to those suffered by African immigrants and their descendants. This sector of the group tends to relocate to the same economically-challenged suburban zones populated by the marginalized African French population.⁶⁸

The disparities between the wealth and status of the African French population relative to the majority white French population have highlighted the need to develop national policies, programs, and laws that can positively impact and improve the socio-economic situation of this group and other ethno-racial minorities who lag behind the majority. A landmark response to the status quo came not from the French Government but from one of the country's *grandes écoles*, Sciences Po.

B. *The Design and Implementation of Sciences Po's Proxy Program*

At the outset some explanation of what I mean by a proxy strategy, as applied in the education policy context, is necessary. A proxy approach typically operates in the following manner: rather than expressly including race or ethnicity in the criteria which serve as components of an admissions decision-making process for an academic institution, a school references alternative criteria (for example, class, geographic location, high school rank) as substitutes to capture the target population.⁶⁹ Both Sciences Po and Texas have embraced proxy strategies out of

for Vietnamese immigration.”).

65. *Répartition des Étrangers par Nationalité*, INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES, http://www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=etrangersnat (last visited Nov. 4, 2012) (reporting that in 2009, the last year for which census data is available, approximately 41,000 Cambodians, Laotians, and Vietnamese immigrants resided in France, comprising 1.1% of France's total immigrant population; approximately 1,534,000 African immigrants resided in France in 2009, comprising 40.7% of France's total immigrant population).

66. Blanc, *Vietnamese in France*, *supra* note 52, at 1162 (“Today, almost all scholars and official figures estimate the Vietnamese communities in France to number about 200,000 to 250,000 people.”).

67. *See id.* (finding that the second and third generations of Vietnamese migrants in France know little about their country of origin, do not speak Vietnamese, and live like French people).

68. *See* Interview with Richard Descoings, *supra* note 21 (explaining that Sciences Po's geographic affirmative action program will admit Asian immigrants who live within the targeted zones). While referring to the cultural segregation in France, Descoings notes that “[t]he rich cluster together, and the poor are forced to cluster together because there's no place for them in the rich areas.” *Id.*

69. *See, e.g.,* Elise Langan, *The Normative Effects of Higher Education Policy in France*, 53 INT'L J. EDUC. RES. 32, 35 (2012) (“Critics of Sciences Po's separate admissions policies point out that

necessity in view of their challenging political and legal environments.

In 2001, Sciences Po took up the challenge to address educational disparities in France, which often play out along racial and ethnic lines. The school boldly launched an innovative and radical admissions scheme, which may be described as France's first affirmative action program.⁷⁰ Then director of Sciences Po, Richard Descoings, was a chief designer of the plan, known as the Priority Education Agreements or CEP.⁷¹ The Sciences Po administrators were responding not only to the lack of ethno-racial diversity in the university's entering classes but also to the results of a survey, which indicated that in 2001, "less than 1[%] of the students" enrolled at Sciences Po were from "working-class backgrounds—as opposed to 12.5[%] . . . enrolled at other non-selective universities."⁷² With the goal of reversing these trends in mind, the school administrators began devising a program that would not only help to socially and economically diversify Sciences Po's student population but that would also achieve a measure of ethno-racial diversity.⁷³

In pursuing these ends, the Sciences Po faced an immediate substantial hurdle in that the French Constitution does not allow ethno-racial distinctions to be made.⁷⁴ Therefore, any program designed to include the African French population could not be framed in terms of ethno-racial categories. In this respect, the strategy adopted would need to look different from affirmative action programs in the United States that typically make explicit reference to the target populations (e.g. African Americans, Latinos, Native Americans and, sometimes, Asians) that are intended to benefit from them.⁷⁵ The solution that the French school officials arrived at was to frame their admissions program in terms of class and geographic

choosing students from poor neighborhoods is a proxy for choosing them based on race and ethnicity.”).

70. See Daniel Sabbagh, *Affirmative Action at Sciences Po*, 20 FRENCH POL., CULTURE & SOC'Y 52, 53 (2002) [hereinafter Sabbagh, *Affirmative Action at Sciences Po*] (“[D]irector of Sciences Po, Richard Descoings, by way of experiment, decided to create a special admission track for the students of seven high schools located in economically disadvantaged areas (‘zones d’éducation prioritaire,’ or ZEP), with a view to ‘diversifying and democratizing’ the school’s admission process.”). See generally Sabbagh, *Affirmative Action in the United States and France*, *supra* note 4 (discussing affirmative action for college admissions in France and the United States). The name of the program is often abbreviated to “CEP” and its participants as “CEP” or “ZEP students.” At times, in this paper I also will rely on these abbreviations to reference the student participants and the program.

71. *Procédure Conventions Education Prioritaire*, SCIENCES PO ADMISSIONS, <http://admissions.sciences-po.fr/college-cep> (Fr.). See generally Priority Education Agreements Brochure, *supra* note 17, at 1-3 (describing the Priority Education Agreements, known in French as the *Conventions Education Prioritaire*).

72. Sabbagh, *Affirmative Action in the United States and France*, *supra* note 4, at 6.

73. Langan, *supra* note 69, at 35 (“The (former) director of the CEP program, Cyril Delhay, argues that the initiative is a way to promote diversity.”).

74. See 1958 CONST. I (Fr.) (“France is an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis.”).

75. See, e.g., Tara J. Yosso et al., *From Jim Crow to Affirmative Action and Back Again: A Critical Race Discussion of Racialized Rationales and Access to Higher Education*, 28 REV. RES. EDUC. 1, 8 (2004) (“[U.S. college] [a]dmissions officers . . . consider race and gender as ‘plus’ factors in deciding between multiple highly qualified candidates.”).

criteria and goals. In other words, the CEP plan would rely upon residential location and class as proxies for ethnicity and race.⁷⁶ Fashioning policies in terms of these alternative characteristics, as I discuss in more detail in Section III, is not inconsistent with the French Constitution. Thus, by structuring its program in terms that address geographic diversity or class disparity issues, the CEP plan has the effect of being an ethno-racial affirmative action policy without explicitly being labeled as such. Sciences Po professor Daniel Sabbagh, in describing Sciences Po's strategy, concludes:

Therefore, the Sciences Po program, although it officially embodies an *area-based* and *class-based* approach of affirmative action, may also be understood as indirectly and implicitly targeting groups that, in the American context, would be considered as 'ethnic' or 'racial' minorities, in particular the group of second-generation North African immigrants. It may seem at least plausible to read this formally color-blind policy as partaking of a "hidden agenda" specifically directed at accelerating the integration of these second-generation immigrants into the mainstream through a "substitution strategy."⁷⁷

The decision to implement this type of program at Sciences Po, an exclusive and revered institution, which has educated several French presidents and prominent governing officials, and continues to produce high-ranking corporate executives, was not universally welcomed.⁷⁸ In addition to constitutional challenges and outcries that the program is an affront to France's meritocracy, there have been criticisms that the program conjures up images of the period of colonialism during which a few "good ones" (namely Arabs and Muslims) of the colonized population were allowed to intermingle with the white French in Algeria but otherwise, "kept in their place."⁷⁹

76. See Langan, *supra* note 69, at 35 ("[C]hoosing students from poor neighborhoods is a proxy for choosing them based on race and ethnicity.").

77. Sabbagh, Affirmative Action in the United States and France, *supra* note 4, at 7 (emphasis added).

78. Daley, *supra* note 20.

79. *Id.* ("What hypocrisy," wrote Zaïr Kedadouche, adding that the program was reminiscent of the colonial days in Algeria when most Muslims were kept in their place, but for a few 'good ones' who were allowed to mingle with the French."); Zaïr Kedadouche, *Sciences-Politiquement Correct*, LIBÉRATION (Fr.) (Mar. 8, 2001), <http://www.liberation.fr/tribune/0101366413-sciences-politiquement-correct>. This view also relates to the concerns expressed by French legal scholar Gwénaële Calvès that quotas operate as a ceiling that hinders the access of minority groups to the particular benefit being sought. Interview by Daniel Sabbagh with Gwénaële Calvès, Prof. of Law at the Univ. of Cergy-Pontoise, FRENCH-AM. FOUND. (Jan. 28, 2010), http://equality.frenchamerican.org/sites/default/files/calvestranscript_en.pdf [hereinafter Interview with Gwénaële Calvès]. Some critics note that because all the economically disadvantaged neighborhoods are not included, those schools that have students living within a privileged zone have an advantage over students who are economically similarly situated but not attending the selected partnership schools. This criticism may be sufficiently countered in time as more partnership schools are added to the Sciences

Sciences Po structured its program by linking its admissions procedure to previously delineated priority education zones, called *zones d'éducation prioritaire* or "ZEPs."⁸⁰ Relying upon newly-devised criteria, which I discuss in the following sections, the university then selects students from the zones for admission.

1. The Targeted Zones

Sciences Po targets regions for its program based on Paris' map for dissecting the city into priority education zones.⁸¹ The specific zones concentrated on by the university were the sites of many of the high-rise housing estates in which immigrants and second and third generation French citizens of African extraction reside.⁸² While Sciences Po's equality admissions program primarily impacts students of African heritage, it is important to recognize that the measure is intended to target all economically disadvantaged students living within certain designated geographic zones.⁸³ Thus, Vietnamese and Cambodian immigrants who populate the zones are also included in the eligible pool of candidates.⁸⁴ Also, to the extent that Caucasians of varying ethnicities and recent immigrants are residents of the target zones and otherwise meet the criteria, they too are eligible to participate in the program.⁸⁵ Descoings, remarks:

Schools in less well-off neighborhoods are made up of whoever happens to live in the area—whites, Arabs, and blacks, but also immigrants from Vietnam and Cambodia (we always tend to forget Asian immigrants in this country)—, and all of these students can

Po's CEP program. *Id.*

80. Sabbagh, *Affirmative Action at Sciences Po*, *supra* note 70, at 53.

81. *Id.* (describing how Sciences Po's alternative admissions track targets Priority Education Zones); see Robert C. Lieberman, *A Tale of Two Countries*, in *RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE*, *supra* note 12, at 189, 193 (describing France's Priority Education Zones as "a program of targeted assistance to schools in depressed areas").

82. See Sabbagh, *Affirmative Action at Sciences Po*, *supra* note 7070, at 53 (noting that a substantial portion of the ZEP residents are of "North African extraction"); see also Anna Muldrine, *After the Flames*, U.S. NEWS & WORLD REP. (Nov. 13, 2005), <http://www.usnews.com/usnews/news/articles/051121/21lede.htm> ("When French Interior Minister Nicolas Sarkozy visited one of the crime-infested high-rise housing projects outside Paris to see how the government's measures against violence were working out, the answer was apparent: not so well. He was pelted with bottles and rocks by the poverty-ridden neighborhood's residents, made up mainly of the French-born children and grandchildren of North African immigrants.").

83. See Interview with Richard Descoings, *supra* note 21, at 3 ("[C]onsidering the location of a school allows us to draw upon a much more diverse pool of potential candidates").

84. *Id.*

85. Cf. *id.* at 4 ("Every now and then, [a comparatively rich parent living in a ZEP] will enroll his/her children in the local public high school. Would it be morally acceptable if, when these children apply to Sciences Po, we inflicted a disadvantage upon them because of their parents' decision to enroll them in a school where they were less unfortunate, less poor, and less socially vulnerable than the rest of the student body? It wouldn't, and it would only reinforce the tendency for such parents to avoid those schools in the first place.").

equally take advantage of this new, competitive admission track.⁸⁶

Selecting its zones based upon the local government's existing map was a clever political and legal strategy that has tremendous benefits because it functions to: (i) legitimize Sciences Po's program in that there is already the government's recognition of the CEP area as one that is in need of socio-economic assistance⁸⁷ and (ii) facilitate the achievement of the tacit goal of the CEP program, which is to accomplish ethno-racial diversity at Sciences Po along with class and geographic diversity.⁸⁸ Scholar Gwénaële Calvès comments on the priority educational areas as follows:

[T]he creation of "priority educational areas" (*zones d'éducation prioritaire*, or ZEPs), according to an administrative guideline (*circulaire*) of 1 July 1981, should "contribute to the correction of inequalities through a selective reinforcement of educational action." A 1989 law stated further that the goals of the ZEP are to provide "special pedagogical attention" to "socially disadvantaged pupils" through the allocation of additional resources. These resources were to be directed primarily toward increasing the number of teachers in these areas—offering them employment incentives as well as a "specific training." "To give more to those who have less" is the general motto of this class-based affirmative action policy.⁸⁹

By adopting and incorporating the city's map into its program, Sciences Po is able to work with the government to bring about societal changes by servicing areas of the population that are in dire need of attention with the government's

86. *Id.* at 3.

87. See Roland Bénabou et al., *Zones D'Éducation Prioritaire: Quels Moyens Pour Quels Résultats? Une Évaluation sur la Période 1982-1992* [*Priority Education Zones: Which Means for Which Ends?*], 380 *ÉCONOMIE & STATISTIQUE* 3, 3 (2004) (Fr.) ("In 1982, in response to the persistence of disadvantaged students failing in school, a new tactic seeking equality of treatment was developed: priority education zones were created in a few regions. The zones were reinforced and extended in 1989 and again in 1990, and have been steadily continued since. These zones incite schools to develop educational projects and local partnerships by giving them extra resources (credits, jobs, teaching hours, etc.). The objective is to improve school performance by stimulating new projects. Lowering class sizes is also considered a tool.") (trans. Kristen Barnes) ("*En 1982, face à la persistance de l'échec scolaire parmi les élèves les plus défavorisés, une expérience rompant avec l'idée d'égalité de traitement est tentée : les zones d'éducation prioritaire (ZEP) sont créées dans quelques régions, mesure renforcée et étendue en 1989, puis en 1990, et prorogée régulièrement depuis. Elle incite les établissements à développer des projets éducatifs et des partenariats locaux en les dotant de ressources supplémentaires (crédits, postes, heures d'enseignement, etc.). L'objectif est d'améliorer les résultats scolaires en stimulant des projets nouveaux. La baisse de la taille des classes est peu à peu considérée également comme un outil.*").

88. See Langan, *supra* note 69, at 35 ("The (former) director of the CEP program, Cyril Delhay, argues that the initiative is a way to promote diversity.").

89. Gwénaële Calvès, *Color-Blindness at a Crossroads in Contemporary France*, in *RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE*, *supra* note 12, at 219, 221; see also Bénabou et al., *supra* note 87, at 3 (describing the ZEP's enactment and goals).

imprimatur of legality⁹⁰ that is apparently needed in order for the CEP measure to be accepted by the majority French population. In order to fully appreciate the innovative aspects of the program and its effectiveness it is necessary to provide more detail on how it functions.

2. Requirements for Admission under the CEP Program and How it Operates

The CEP plan impacts high school students who are applying to colleges and universities. Sciences Po, as a prestigious and selective publicly-financed university, requires a sufficiently high score on the competitive placement exams, known as *le concours*, to gain entry.⁹¹ With the adoption of the CEP track, Sciences Po established new admissions procedures that are exclusively applied to the CEP students.⁹² Initially, twenty places for students from designated geographic areas were created to add to Sciences Po's total undergraduate student population of approximately 2,500.⁹³ Rather than using the traditional entrance exam scores as a basis for admission, under the policy governing the newly created CEP slots, Sciences Po considers, as admissions criteria, the recommendations of the high

90. This is not to say that CEP's legality has not been challenged. See Langan, *supra* note 69, at 35-36 ("In 2001, France's leading right-wing union, the 'National Interuniversity Union' (UNI) asked the Court Tribunal of Paris to cancel the CEP program, arguing that by creating an admissions track that is open to certain students based on where they live, the university was violating the constitutional guarantee of equal opportunity. The French National Assembly and Senate subsequently ruled that the Board of Directors at Sciences Po could determine its conditions and methods of admission and allowed it to adopt procedures that assured diverse recruitment. It authorized Sciences Po to experiment and reaffirmed the institution's autonomous corporate status irrespective of the fact that it receives government subsidy. In 2003, an appeals court ruled that the CEP program could continue with some modifications, e.g., expanding the number of secondary schools from which Sciences Po draws; UNI is still waging efforts to dismantle the CEP initiative.").

91. *Id.* at 34 ("Sciences Po falls into the category of a *grande école* and was started to train the French elite for careers in civil service. *Grandes écoles* are characterized by their competitive entry examinations, or 'le concours,' preparation for which requires two years beyond the baccalauréat and necessitates studying a specialized curriculum only available in a limited number of selective secondary schools. Some concours preparatory courses are offered at government expense to the best students. Private courses cost over \$8000. The Sciences Po concours is comprised of four written elements: three known criteria and a surprise essay question. In addition, there is an extensive oral examination whereby applicants are not only expected to know the material but to be engaging and witty. One legendary story is when an applicant was asked how far the distance was if he were to dive off the Pont Neuf into the Seine. Without missing a beat, he replied that the bridge was slightly arched so the distance would depend on exactly where he was standing when diving.").

92. *Id.* at 35 ("Seeking to alter [the school's] white, male homogeneity, alumnus Richard Descoings, the Director of Sciences Po since 1996, admitted 18 ZEP students in the fall of 2001, without requiring them to sit for the concours. Applying ZEP students are made to write two papers—one a synthesis of press articles related to a specific topic, the other an essay on the same subject—and defend them before a jury composed of teachers and administrators from their high school. If selected, they submit to oral interviews of 30-40 min at Sciences Po before a preliminary round of five judges. Those who pass go before thirty judges composed of academics, politicians, and business executives and undergo a rigorous oral examination. Students are evaluated on their maturity, originality, and ability to succeed.").

93. Daley, *supra* note 20.

school teachers at the participating schools, test scores on the national *baccalauréat* exam,⁹⁴ grades, the student's overall "profile," an oral presentation, and an interview.⁹⁵ If selected, the CEP students "are offered financial aid and special access to tutoring and mentoring upon matriculation to help them adjust to this new and highly demanding educational environment."⁹⁶

Seventeen students were admitted under the CEP criteria in the first year of the program.⁹⁷ The program has grown beyond its initial numbers, despite ongoing resistance.⁹⁸ In 2002, thirty-two CEP students were admitted.⁹⁹ In 2007, 117 CEP students were admitted.¹⁰⁰ The number of CEP admissions increased again in 2009 to 126 students.¹⁰¹ The program has also developed in terms of the number of participating high schools targeted for the special track, expanding from the initial seven participating high schools in 2001 to eighty-eight in 2011.¹⁰²

3. Performance of CEP Students at Sciences Po and the Effectiveness of the Proxy Strategy in Increasing Diversity and in Improving Access for Ethno-Racial Minorities in France

A consideration of how the CEP students are performing at Sciences Po and of the growth of the CEP initiative is important to the assessment of this new admissions program.¹⁰³ Recent information on the CEP plan reveals that while it

94. The *baccalauréat* is different from the concours. The *baccalauréat* is administered in two parts. The first part is given during a high school student's junior year. The second part of the exam is administered over a two-week period in June and July of the senior year. Students must receive a designated minimum score. Depending upon the score one receives, an oral component may also be imposed as a requirement for passing. See Carolyn W. Schott, *The National Competency of Testing*, 2 KAN. J. L. & PUB. POL'Y 97, 102 (1992), for a discussion of the French competency exam.

95. Interview with Richard Descoings, *supra* note 21.

96. Melissa LaiFat et al., *Shaping Preferential Treatment Policies Without Race: The Case of Admission to Elite Institutions of Higher Education in France*, HUMAN. IN ACTION, <http://www.humanityinaction.org/knowledgebase/121-shaping-preferential-treatment-policies-without-race-the-case-of-admission-to-elite-institutions-of-higher-education-in-france> (last visited Nov. 8, 2012).

97. *Diversity and Accessibility: A University for All Talents*, SCIENCES PO., <http://www.sciencespo.fr/en/content/80/diversity-and-accessibility> (last visited Oct. 3, 2012) [hereinafter *Diversity and Accessibility*].

98. See Daley, *supra* note 20 ("Some have applauded the program as a small step toward addressing a growing disadvantaged population in France, and the often unspoken racial issue it entails. But others see it as an attack on a tradition that has produced scholars of high quality as well as a slide into an American-style system."); *Diversity and Accessibility*, *supra* note 97 (noting an increase in the program's numbers for student intake).

99. *Diversity and Accessibility*, *supra* note 97. In addition, of the thirty-seven students admitted in 2003, "two-thirds [had] at least one foreign-born parent . . . from Algeria or Morocco." Sasha Polakow-Suransky, *Crème de la Crème: How a Few Dozen Immigrant Students at an Elite French College Created a Crise Constitutionnelle and Still Got Good Report Cards*, LEGAL AFF. (July/Aug. 2004), http://www.legalaffairs.org/issues/July-August-2004/story_suransky_julaug04.msp.

100. *Id.*

101. *Diversity and Accessibility*, *supra* note 97.

102. Priority Education Agreements Brochure, *supra* note 17, at 4.

103. In using the term "assessment," I am not proposing to undertake an extensive empirical study of the Sciences Po CEP students' performance on exams, graduation rates, and job placement in

has had some positive effects on improving the quality of post-secondary educational opportunities available to the African French population and to students from lower socio-economic rungs, the overall results are nominal, given the enormity of the national problem.¹⁰⁴ My comments focus on the areas of (i) student performance in the program and graduation rates, (ii) the increase in ethno-racial diversity at Sciences Po, (iii) the impact of the CEP plan more broadly in terms of other post-secondary academic institutions, and (iv) the numbers reported regarding job placement rate and salaries of students.

There are three main conclusions that I draw from my examination of the reports regarding the CEP initiative. First, this proxy strategy has not been expanded enough within the walls of Sciences Po and beyond to have a profound impact on the opportunities available to underrepresented minorities, such as African French students, to attend quality institutions of higher education. Second, the prohibition on ethno-racial classifications makes it impossible to fully and accurately assess the impact of the CEP plan on the lives of the target population; thereby, impairing the development of cogent arguments regarding what remains to be done in terms of designing initiatives for the future. Third, while the ostensible limitations of the current strategy being used by Sciences Po may not be due to the fact that it is an approach that relies on other factors (that is, class and geography) in lieu of ethnicity and race, the constraints that the program is experiencing suggest that bolder initiatives, such as explicit ethno-race-based policies, are needed in addition to the CEP track in order to make significant advancement towards the goal of equal educational opportunity for all in France. Regarding the last point, Sciences Po imposes limitations on how far to extend the program based in part on the administration's political assessment of what the French population will tolerate in the interest of diversity, and also on what French laws will permit the school to do.¹⁰⁵ I discuss in greater detail the impact of the legal environment on Sciences Po's special admissions program in Section III.

The data available on student performance show that the CEP measure has been successful in demonstrating that post-secondary institutions can utilize alternative criteria as a basis for admitting students without suffering a loss in the quality of the education provided overall and without creating a situation in which the students selected under different requirements will not perform adequately to

comparison with other Sciences Po students from the inaugural moment of the program in 2001 to the present. Rather, I primarily rely upon the reports that Sciences Po has issued to draw conclusions about the program. See Vincent Tiberj, *Sciences Po, dix ans après les Conventions Education Prioritaire* [*Sciences Po, Ten Years after the Priority Education Agreements*], SCIENCES PO (2011), http://www.sciencespo.fr/sites/default/files/CEP_Etude_VTiberj_final.pdf (Fr.) (reporting progress on the CEP program ten years after its initiation); *10 Years of Promoting Student Diversity at Sciences Po*, SCIENCES PO, <http://www.sciencespo.fr/en/content/7686/10-years-promoting-student-diversity> (last visited Oct. 15, 2012) (summarizing the above report's findings in English).

104. See Hargreaves, *MULTI-ETHNIC FRANCE*, *supra* note 12, at 40-74 (analyzing the relationship between low socio-economic status and immigrants in France).

105. See Constitutional Court decision No. 2001-450DC, *supra* note 28, ¶ 31 (upholding Sciences Po's admissions policy under the French Constitution; relying in part on its guarantee of equal access to education for children and adults).

graduate.¹⁰⁶ According to a new 2011 study, commissioned by Sciences Po and conducted by French sociologist Vincent Tiberj, approximately 90% of CEP students graduate within three years of being admitted to Sciences Po.¹⁰⁷ The statistics help to counter those critics who assert that affirmative action programs undermine meritocracy. Typically, those asserting that affirmative action plans such as CEP are not meritocratic argue that exams and grades are neutral and fair mechanisms for measuring achievement and ability, and that students should be rewarded based upon how they perform by gaining admission to prestigious academic institutions.¹⁰⁸ Relevant to my thesis is my corollary argument that the concept of meritocracy itself needs to be unpacked to explore the extent to which the criteria used to structure the meritocracy serve to perpetuate ethno-racial and class stratifications and socio-economic inequities.¹⁰⁹ Where the purported neutral standard serves as a barrier to entry for certain underrepresented ethno-racial populations, other criteria (for example, ethnicity and race) must be included in the evaluation process to counter that effect.¹¹⁰ The data on the CEP program support my conclusion that the so-called neutral standards are not the only means for identifying able and talented candidates who have the potential to succeed academically and progress to meaningful, lucrative careers if given the opportunities to do so.¹¹¹ The use of the *concours* exam is not the inevitable

106. See *10 Years of Promoting Student Diversity at Sciences Po*, *supra* note 103 (concluding that CEP students “keep up or quickly catch up with their peers, and the[ir] drop-out rate is ‘marginal’”).

107. D.D. Guttenplan, *In France, a Bastion of Privilege No More*, N.Y. TIMES, Sept. 4, 2011, <http://www.nytimes.com/2011/09/05/world/europe/05iht-educLede05.html>. Older data from 2004 also shows that the CEP students performed with a “pass rate of 82 percent compared to 90 percent of students overall for the 2001-2002 academic year.” Polakow-Suransky, *supra* note 99.

108. See Sabbagh, *Affirmative Action at Sciences Po*, *supra* note 70, at 59 (addressing the criticism that the CEP program is not meritocratic).

109. See, e.g., Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1721-23 (1995) (analyzing the concept of “merit” and how it preserves the status quo). I agree with the legal scholar Ronald Dworkin that “[p]laces in selective universities are not merit badges or prizes for some innate talent or for past performance or industry: they are opportunities that are properly offered to those who show the most promise of future contribution to goals the university rightfully seeks to advance.” Ronald Dworkin, *The Court and the University*, N.Y. REV. OF BOOKS (May 15, 2003), <http://www.nybooks.com/articles/archives/2003/may/15/the-court-and-the-university/>. “These goals can be, and historically have been, social as well as more narrowly academic.” *Id.* The goal of addressing unequal access to education for underrepresented ethno-racial minorities is one that a university may appropriately adopt; however, from the United States’ legal standpoint, the compelling goal will have to be framed in terms of critical mass, defined by the educational benefits of diversity in order to satisfy constitutional requirements. See *Grutter*, 539 U.S. at 330 (“[T]he Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. These benefits are substantial.”).

110. See Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of “Preferential Treatment”*, AFR. AM. POL’Y F. (Feb. 25, 2007), <http://aapf.org/2007/02/equalizingopportunity/> (arguing that the beneficiaries of affirmative action are not less qualified than other candidates but “their capabilities are not *accurately gauged or fairly evaluated* by prevailing selection criteria and procedures” (emphasis added)).

111. E.g., Guttenplan, *supra* note 107 (“On average at least 90 percent of students admitted under the [CEP] initiative graduate after three years.”).

instrument that French schools must rely upon to bar and admit students since it is not the only means, or even necessarily the best way to determine who can succeed in academic institutions of higher education.¹¹²

From the vantage of whether the Sciences Po's proxy approach has worked to increase the ethno-racial diversity of its student population, the data suggest that the program has made some progress in improving the access of students of African heritage to this institution. The information available shows that a substantial number of the 860 CEP students admitted from 2001 to 2011 are persons of African heritage.¹¹³ The statistics further indicate that "in 2009, 83% of the beneficiaries of [the CEP program] had at least one foreign-born parent, and 85% of that 83% had a parent born on the African continent."¹¹⁴ It is not clear whether the numbers referenced are limited exclusively to the year 2009 or whether they refer to total beneficiaries of the CEP initiative over time from 2001 to 2009. If one assumes that the foregoing numbers refer to the entering class of 2009, then using other data available, which indicate that the total entering class size for that year was 1224 (this number includes the 126 CEP students admitted that year),¹¹⁵ one can estimate that of the 126 CEP students, approximately 105 had foreign-born parents and approximately 89 CEP students of the 126 were of African heritage. While the data show an improvement in numbers compared to the seeming dearth of an African presence at the school before the implementation of the CEP track, the impact is nominal. Eight hundred sixty CEP students, out of approximately 10,000 total students that attended Sciences Po from 2001 to 2011,¹¹⁶ do not establish that the goal of equal educational opportunity is being met. Rather, the limitations of the plan highlight the need for a national mandate that will prompt

112. See Sabbagh, *Affirmative Action at Sciences Po*, *supra* note 70, at 53 ("Instead of having to take the competitive exam imposed on all other applicants, [CEP applicants] were asked to write two papers—one a synthesis of several press articles collected on a chosen topic, the other an analytical essay on that same subject—and defend them before a jury made up of teachers and administrators of their high school. Then, the best candidates were invited for an interview at Sciences Po itself. Those who received an admission offer at the end of the day were also provided with financial aid, as well as with a specific kind of tutoring (available on an optional basis) to help them adjust to their new educational environment."); *10 Years of Promoting Student Diversity at Sciences Po*, *supra* note 103 (summarizing data showing CEP students' successes at Sciences Po).

113. See, e.g., Polakow-Suransky, *supra* note 99 (noting that two-thirds of the thirty-seven CEP students admitted in 2003 had at least one foreign-born parent, and the national origin of the foreign-born parent was primarily "Algeria or Morocco"); Interview with Richard Descoings, *supra* note 21, at 3 (noting that a majority of CEP students have a parent born on the African continent).

114. Interview with Richard Descoings, *supra* note 21, at 3. Institutions are allowed, under French law, to ask about the nationality of a student's parents. *Id.* From the information, one might draw conclusions about ethno-racial background, although this approach does not ensure 100% accuracy.

115. See *id.* (stating that, in 2009, 83% of CEP students had a foreign born parent, and 85% of those students had an African born parent); *2011 Bilan Chiffré Des Admissions*, SCIENCES PO (2012), http://www.sciencespo.fr/sites/default/files/ScPo_Bilan_admissions_2011_V2.pdf (Fr.) (providing admissions data for the 2009 undergraduate class).

116. *10 Years of Promoting Diversity at Sciences Po*, *supra* note 103 (stating that 860 CEP students have attended Sciences Po since the program started). The total number of attendees is calculated based on the information that 2,500 undergraduates attend Sciences Po at a time, and the program takes students three years to complete. Daley, *supra* note 20.

other *grandes écoles*, such as the *École Normale Supérieure* and the *École Supérieure des Sciences Économiques et Commerciales* ("ESSEC") business school to adopt similar diversifying policies. A nationally administered plan would enable a central institution to hold the schools accountable if there are no measurable changes in the ethno-racial and socio-economic backgrounds of their students.¹¹⁷ The commendable work of expanding educational opportunity and diversifying student populations should not fall on Sciences Po alone.

Finally, it is necessary to consider the job placement rates and salaries of the CEP students once they graduate to determine whether meaningful inroads have been made to change the socio-economic condition of this marginalized population.¹¹⁸ It is imperative that the effects of the program not stop at the doors of Sciences Po but rather operate to improve the economic mobility of this group. This result is necessary in order for the French nation to achieve the diversification of the upper echelon work force and for France to live up to its ideal of egalitarianism. The data show "two-thirds of the students who graduated between 2006 and 2011 are currently employed" and that "[t]he proportion of CEP students in full-time employment (63%) is higher than that of their Sciences Po peers (56%)."¹¹⁹ Further, "[t]wo-thirds of the CEP graduates who find employment in the private sector are on secure, permanent 'CDI' contracts" and "[h]alf of the CEP students earn more than 2500 euros per month after tax, which is 300 euros more than the average net salary of Sciences Po graduates from the class of 2009."¹²⁰ Using 860 students as the limit of the program's reach, the improvement in job

117. See *Les programmes Égalité des chances*, ESSEC BUS. SCH., <http://egalite-des-chances.essec.edu/page-fille-1> (Fr.) (last visited Nov. 4, 2012) (describing ESSEC's tutoring of high school students and alternate admissions process for socio-economically disadvantaged students, including a year-long preparatory course before applicants gain admission to the program); *Grande École Admission*, ESSEC BUS. SCH., <http://www.essec.fr/programmes/grande-ecole/admission/concours.html> (Fr.) (last visited Nov. 4, 2012) (describing three different routes to admission to ESSEC); *Socio-Educational Programs*, ÉCOLE NORMALE SUPÉRIEURE PARIS, <http://www.ens.fr/spip.php?rubrique98&lang=en> (last visited Nov. 4, 2012) (describing ENS's Talens program that provides tutoring to high school students in preparation for admission, and also Perspectives, a program that provides tutoring for high school students in rural areas of France as well as overseas territories); *Admission at the ENS*, ÉCOLE NORMALE SUPÉRIEURE PARIS, <http://www.ens.fr/spip.php?rubrique26&lang=en> (last visited Nov. 4, 2012) (describing four different routes to admission to ENS); Aisha Labi, *In France, Making Room at the Top of Higher Education*, CHRON. HIGHER EDUC. (Sept. 19, 2010), <http://chronicle.com/article/In-France-Making-Room-at-the/124438/> (contrasting the CEP program with other admissions practices and quoting Eric Keslassy, an expert on diversity, that the CEP program is "poorly perceived" because "any form of positive discrimination is seen as inconsistent with republican ideals of treating all citizens equally"). While I am not advocating the adoption of quotas here, I maintain that there has to be a way to collect statistics to determine whether the policies the schools are implementing to effect the change I have outlined are succeeding.

118. See Interview with Richard Descoings, *supra* note 21, at 7 (discussing the importance of attending one of the *grandes écoles* to achieve the most elite position in a given field).

119. *10 Years of Promoting Student Diversity at Sciences Po*, *supra* note 103; see also Tiberj, *supra* note 103, at 2-5 (summarizing these statistics in a full report in French).

120. *10 Years of Promoting Student Diversity at Sciences Po*, *supra* note 103; Tiberj, *supra* note 103, at 2-5.

attainment and salaries for a few is a positive start but it falls woefully short of the kind of change that is needed to show that the French nation is fully embracing this population.

II. THE SHIFT FROM ETHNO-RACE-BASED AFFIRMATIVE ACTION TO PROXY STRATEGIES IN THE UNITED STATES

A. *The Principle of Equal Educational Opportunity in the United States*

For my historical treatment of the concept of equal educational opportunity in the United States and the emergence of the Texas Ten Percent Plan, I am primarily concerned with the cluster of cases in which ideas about equal access and opportunity in education began to germinate. Specifically, this discussion traces the shift away from the goal of ethno-racial inclusion towards broad-based diversity, and the move towards the use of proxy strategies. There is a substantial body of historical literature that covers the development of affirmative action policies in the educational realm beginning with the Civil Rights legislation of the John F. Kennedy and Lyndon Johnson era to the present.¹²¹ It is not my intention to retread this ground but, rather, to provide enough historical context to analyze the purposes and goals related to devising the Texas Ten Percent Plan and to assess the plan's effectiveness.

1. The Rise of Affirmative Action in the United States

As an initial matter, it is necessary to provide a definition of affirmative action as it has developed in the United States. Affirmative action may be defined both as "a government policy that seeks to remedy long-standing discrimination directed at specific racial/ethnic minorities and women"¹²² and as "an umbrella concept that subsumes different types of policies and practices tailored to meet specific, context-derived problems of discrimination and unfairness."¹²³ The concept has its origins in an Executive Order that President John F. Kennedy signed on March 6, 1961.¹²⁴ Executive Order 10,925 prohibited government contractors from "discriminat[ing] against any employee or applicant for employment because of race, creed, color, or national origin" and further required "*affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."¹²⁵ President Lyndon Johnson signed Executive Order 11,246 on September 24, 1965, which superseded Executive Order

121. E.g., EBONI M. ZAMANI-GALLAHER, ET AL., THE CASE FOR AFFIRMATIVE ACTION ON CAMPUS: CONCEPTS OF EQUITY, CONSIDERATIONS FOR PRACTICE, 1-8 (2009) (discussing the evolution of diversity and affirmative action policies in U.S. universities).

122. *Id.* at 2.

123. Lynn W. Huntley, *Foreword* to ZAMANI-GALLAHER ET AL., *supra* note 121, at xiv.

124. Exec. Order No. 10925, 3 C.F.R. 448 (1959-1963 comp.), *superseded by* Exec. Order No. 11,246, 3 CFR 339 (1965).

125. *Id.* (emphasis added).

10,925.¹²⁶ Executive Order 11,246 states in relevant part that it is the Federal Government's policy to "promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency."¹²⁷

2. Equality of Educational Opportunity Historical Legal Precedents

The main historical legal precedents concerning equality of educational opportunity leading up to the implementation of the Texas Ten Percent Plan include *Sweatt v. Painter*,¹²⁸ *Brown v. Board of Education of Topeka, Kansas* ("Brown I"),¹²⁹ *Regents of the University of California v. Bakke*,¹³⁰ and *Hopwood v. Texas*.¹³¹ In many ways, the United States' initial approach to affirmative action beginning in the 1960s is captured by the words Justice Blackmun expressed in his separate opinion in *Bakke*, "[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."¹³² At the time of this quote, the "persons" Blackmun was referencing were primarily African Americans.¹³³

126. Exec. Order No. 11,246, 3 CFR 339 (1965), amended by Exec. Order No. 11375, 3 CFR 684 (1967-1970 comp.).

127. *Id.* These affirmative policies were extended to females in 1967 through Executive Order Number 11375, 3 CFR 684 (1967-1970 comp.).

128. 339 U.S. 629, 632-36 (1950). *Sweatt v. Painter* is an important historic case for at least two reasons. First, *Sweatt* dealt with the question of whether the University of Texas' law school admissions policy, which in compliance with Texas' segregation laws prohibited the admission of blacks to its school, was in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 635. The *Sweatt* Court held that the separate law school facilities for blacks proposed by the University of Texas as an alternative to granting Heman Sweatt admission were insufficient to satisfy the Equal Protection Clause of the Fourteenth Amendment. *Id.* This 1950 holding set the ground for the subsequent landmark decision of *Brown I*, 347 U.S. 483. Second, Justice Powell in *Bakke*, cited *Sweatt* as a basis for the Court's ruling on diversity noting that "even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial." 438 U.S. at 313 (opinion of Powell, J.). Justice Powell went on to quote the following relevant language from *Sweatt*:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Id. at 314 (quoting *Sweatt*, 339 U.S. at 634).

129. 347 U.S. at 495 (holding that public school segregation violates the Fourteenth Amendment).

130. 438 U.S. at 271 (holding the University of California at Davis Medical School's admissions procedure constitutionally invalid).

131. 78 F.3d at 934 (holding that the University of Texas' 1992 admissions procedure was in violation of the Fourteenth Amendment).

132. *Bakke*, 438 U.S. at 407 (Blackmun, J., separate opinion). See generally Herbert N. Bernhardt, *Affirmative Action in Employment: Considering Group Interests While Protecting Individual Rights*, 23 STETSON L. REV. 11, 20 (1993) ("Blackmun represented the moderated position, which was that affirmative action was necessary to comply with the law, but that it also carried dangers. Neither Blackmun nor other moderates in society, however, had formulated or articulated the rules that would enable affirmative action to achieve its goals while avoiding the dangers.").

133. *Bakke*, 438 U.S. at 403 (Blackmun, J., separate opinion) ("At least until the early 1970s,

The *Brown I* decision, in terms of U.S. Supreme Court jurisprudence, marks the crystallization of the concept of equality of educational opportunity that moves beyond the superficial level to a concrete lived equality.¹³⁴ Prior to *Brown I*, public schools, along with other cultural institutions and businesses, were legally permitted to exclude individuals on the basis of race from entering their doors and enjoying their benefits.¹³⁵ African Americans suffered the brunt of these exclusionary practices in the United States.¹³⁶ The legally sanctioned segregation of people on the basis of race that was endorsed by the Supreme Court in *Plessy v. Ferguson*¹³⁷ signified unwillingness on the part of American society to fully include African Americans within the concept of the nation.¹³⁸ The roots of current-day education and socio-economic disparities in the United States can be traced to the racially discriminatory practices that prevailed in this country over the course of many years.¹³⁹ The *Brown I* decision was a watershed moment in which the U.S. Supreme Court made a link between addressing societal ills, racial exclusion, and educational opportunity. The *Brown I* Court considered the question: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the

apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students in the United States were members of what we now refer to as minority groups. In addition, approximately three-fourths of our Negro physicians were trained at only two medical schools. If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious.”); see also *Challenging Race Sensitive Admission Policies: A Summary of Important Rulings*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/sats/race/summary.html> (last visited Nov. 4, 2012) (summarizing the facts in *Bakke* and stating that the University of California at Davis Medical School reserved sixteen spaces for “disadvantaged” students who were defined as “blacks, Latinos, American Indians and Asian-Americans”).

134. There are earlier segregation cases in which the U.S. Supreme Court confronted the doctrine of separate but equal in the education context. See, e.g., *McLaurin v. Okla. State Regents*, 339 U.S. 637, 642 (1950) (holding that the Fourteenth Amendment prohibits a state from treating a graduate student differently than other students on the basis of race); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (holding that a state law school could not deny admission based on race when the comparable school for blacks did not provide equal advantages). The *Brown I* case is a consolidation of five cases involving public elementary and high schools covering the states of Kansas, South Carolina, Virginia, and Delaware and was brought by African Americans who were challenging, on the ground of the Fourteenth Amendment, the constitutionality of the separate but equal doctrine in public education. 347 U.S. at 486-89.

135. See Deborah Mayo-Jefferies, *Discrimination in the Education Process Based on Race*, 21 N.C. CENT. L.J. 21, 21 (1995) (“A dual education system was established wherein African-American children attended school with African-American children, and Caucasian children attended school with Caucasian children.”).

136. See *id.* (“Under this system, only a fraction of what was spent to educate Caucasian students was allocated for African-American students.”).

137. 163 U.S. 537 (1896).

138. See Douglas J. Ficker, *From Roberts to Plessy: Educational Segregation and the “Separate but Equal” Doctrine*, 84 J. NEGRO HIST. 301, 301 (1999) (“The segregation era was a contradictory period in American legal history [marked by] institutional separation of African-Americans from European-Americans.”).

139. *Id.* (detailing state courts’ interpretation and application of the “separate but equal” doctrine from 1849 to 1954).

children of the minority group of equal educational opportunities?"¹⁴⁰

The answer from the Court was a decisive "Yes." The Court ruled in favor of the African American plaintiffs who were denied admission to public schools attended by white students pursuant to the "separate but equal" doctrine.¹⁴¹ In so ruling, the Court held that "[s]eparate educational facilities are inherently unequal"¹⁴² and that prohibiting African American students from attending certain public schools based solely upon their race meant that they were "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."¹⁴³ With this decision, the U.S. Supreme Court overruled the "separate but equal" doctrine upheld in *Plessy* and embraced the progressive idea that equality of educational opportunity means more than the enactment of facially neutral laws.¹⁴⁴ This understanding of equality as involving more than adopting legislation and implementing policies that are devoid of ethnic or racial language in the name of treating all citizens on an equal basis is one that should be kept in mind in formulating admission policies for higher education institutions. The *Brown I* Court's definition of equality of educational opportunity is a broad and expansive one.¹⁴⁵ Recognizing the fundamental role of education in the formation of individuals and citizens, the *Brown I* Court concluded that, "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."¹⁴⁶ While the Court has since moved away from the notion that education is a right,¹⁴⁷ the principle of equality of educational opportunity articulated in *Brown I* should be kept in mind when evaluating current admissions policies in place in Texas and other states.

*Regents of the University of California v. Bakke*¹⁴⁸ is the next case in the line of important legal precedents concerning the ongoing debate over the use of ethno-racial criteria in higher education admissions policies. Justice Powell's opinion is often consulted as a resource for determining the constitutionally proper contours for race-based educational programs.¹⁴⁹ *Bakke* signaled how the U.S. Supreme

140. 347 U.S. at 493.

141. *Id.* at 495.

142. *Id.* In this respect, the Court went further than its ruling in *Sweatt*.

143. *Id.*

144. *Id.*

145. *Id.* at 493.

146. 347 U.S. at 493.

147. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (stating that education is not a fundamental right guaranteed by the U.S. Constitution); see also *Plyler v. Doe*, 457 U.S. 202, 221, 230 (1982) (reaffirming that public education is not a constitutional right; holding that Texas could not deny free public education to school-age illegal immigrant children without showing that it was acting in furtherance of a substantial state interest); *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (holding that a Texas statute restricting eligibility for tuition-free education was a bona fide residency requirement and was permitted under the Constitution); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 465 (1988) (upholding a bus transportation fee imposed by North Dakota under the Constitution because the policy did not discriminate against any suspect class, interfered with no fundamental right, and served the legitimate government purpose of school district reorganization).

148. 438 U.S. 265.

149. The *Bakke* Court placed a great deal of emphasis on the Harvard College Admissions program

Court would view race-conscious programs designed to increase the educational opportunities available to historically disadvantaged minorities and to remedy past discrimination suffered by those minority groups in the educational realm.¹⁵⁰ This case is particularly significant to my analysis for several reasons: (i) because the *Bakke* case was available to both Sciences Po and Texas for the instruction it offers on the type of affirmative action admissions program that will pass constitutional muster in the United States and the type of program that will likely give rise to substantial controversy and prove constitutionally fatal;¹⁵¹ (ii) because of its holding that race may be considered as a factor in designing admissions programs, and that diversity is a compelling, constitutionally permissible interest that can be pursued by the State in the structuring of its educational programs;¹⁵² and (iii) because of the deference the Powell Court accords to school officials regarding their structuring of ethno-race-conscious admissions policies that balance the interests of the academic institution with those of their applicant pools.¹⁵³

In the initial suit, a white male named Allan Bakke, whose previous applications for admission to the Medical School at the University of California at Davis (the “Medical School”) were denied, filed a claim against the Medical School alleging that the school’s special admissions program discriminated against him on the basis of his race in violation of the Equal Protection Clause of the

described in the appendix to Justice Powell’s plurality opinion. *Bakke*, 438 U.S. at 321-24 (opinion of Powell, J.). Powell’s opinion evidences the Court’s recognition that certain race-conscious admissions programs may pass constitutional muster. *Id.* at 325-26. In addition, his favorable comments on elements of the Harvard admissions program provide some guidance to all schools on how they can design race-conscious educational policies and programs that are constitutionally valid. *Id.* at 321-24. According to that program, no target number was set for the school’s goal of diversifying its students and the notion of diversity was defined broadly to take into account past academic performance, life experience, geographic region, musical talent, scientific ability, athletic ability, race, ethnicity, etc. *Id.* at 322-23.

150. *See id.* at 362 (Brennan, J., concurring in the judgment in part and dissenting) (remediating effects of past societal discrimination is a sufficiently important interest to justify the use of race-conscious admissions programs where minority underrepresentation is substantial because of handicaps caused by past discrimination).

151. *See* Daniel Sabbagh, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting “Diversity” in Selective Institutions of Higher Education in the United States and France*, 63 WORLD POL. 470, 483 n.63 (2011) (discussing Science Po and the Supreme Court’s affirmative action discussion in *Bakke*); *see also* David Orentlicher, *Affirmative Action and Texas’ Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181, 187 (1998) (discussing how *Hopwood*’s rejection of the *Bakke* standard, and the subsequent impact of *Hopwood* on minority admissions, led to the Texas legislature’s adoption of the Ten Percent Plan).

152. *See Bakke*, 438 U.S. at 319-20, 311-12 (opinion of Powell, J.) (finding that diversity is a constitutionally valid goal and that, though the program at the Medical School violated the Fourteenth Amendment, there still may be significant state interests which might be properly served by the “competitive consideration of race” in an admissions program). Because the *Bakke* case produced six separate opinions, there was some question as to whether Justice Powell’s conclusion that diversity constitutes a legitimate compelling interest was part of the majority holding. *Id.* at 314-15. This issue was resolved in *Grutter v. Bollinger*, where the Court “endorses Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.” 539 U.S. at 325.

153. *Bakke*, 438 U.S. at 314 (opinion of Powell, J.) (“[A] university must have wide discretion in making the sensitive judgments as to who should be admitted . . .”).

Fourteenth Amendment, article I, section 21 of the California Constitution, and Section 601 of Title VI of the Civil Rights Act of 1964.¹⁵⁴ Specifically, Bakke complained about a program that the Medical School devised in the 1970s in response to the limited (or nonexistent) number of African Americans, Latino Americans, American Indians, and Asian Americans in the entering Medical School class of one hundred students.¹⁵⁵ The approach the Medical School took carved out sixteen places of the existing one hundred slots and created a program that would operate in conjunction with the pre-existing admissions program, giving special attention to identifying "qualified" economically disadvantaged students and students who were members of minority groups.¹⁵⁶ The U.S. Supreme Court affirmed the portion of the lower court's judgment that held the Medical School's special admissions program invalid under the Fourteenth Amendment, but reversed the portion of the lower court's decision that held that the Medical School may not consider race as a factor in deciding upon which applicants to admit.¹⁵⁷ Specifically, the *Bakke* Court held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."¹⁵⁸ This groundbreaking aspect of the *Bakke* decision has been essential to the development of affirmative action policies in higher education and their treatment in the U.S. legal arena from the time of the holding to the present-day debates raging over ethnicity, race, and education.¹⁵⁹

A substantial portion of my analysis of the Texas Ten Percent Plan focuses on the admissions policy of the University of Texas at Austin ("UT Austin"). *Bakke* is relevant to my discussion because the Harvard College Admissions program favorably commented on by Justice Powell in *Bakke*, along with the University of Michigan plan challenged in *Grutter*, helped shape UT Austin's admissions process.¹⁶⁰ The *Bakke* Court's holding that school officials may reference ethnicity and race as factors they may weigh in their admissions decisions and its recognition of diversity as a compelling interest are relevant to my analysis in several key respects. First, in making this allowance for ethnicity and race to be considered,

154. *Id.* at 276-78.

155. *Id.* at 272-76.

156. *See id.* at 274-75 (explaining that the minority groups that the program targeted included blacks, Latinos, Asians, and American Indians).

157. *Id.* at 320.

158. *Id.*

159. *See* Lackland H. Bloom, Jr., Hopwood, Bakke and the Future of the Diversity Justification, 29 TEX. TECH. L. REV. 1, 3-4 (1998) (addressing the impact of Justice Powell's opinion in *Bakke* on institutions of higher learning in developing acceptable affirmative action admissions processes, and the potential for *Hopwood v. Texas*, 78 F.3d 932, to have a similar impact); *see also* Kimberly A. Pacelli, Fisher v. University of Texas at Austin: Navigating the Narrows Between Grutter and Parents Involved, 63 ME. L. REV. 569, 572-73 (2011) (discussing how *Bakke* provided guidance as to how universities can use race in making admissions decisions).

160. *Fisher*, 631 F.3d at 217-18 (acknowledging that UT Austin's race-conscious admissions program was modeled after the program in *Grutter* and influenced by Justice Powell's opinion in *Bakke*).

there is an implicit acknowledgement that both factors operate in daily life in ways that can influence one's access to vital resources, the quality of education one receives, and the employment prospects one has in society.¹⁶¹ Therefore, in order to counter the negative de facto discrimination that permeates society, some reliance on ethno-racial criteria may be necessary to address the disadvantages the majority may inflict on certain ethno-racial minorities.¹⁶² The *Bakke* Court does not phrase its ruling in these terms; in fact, it expressly rejects the purpose of "countering the effects of societal discrimination" as a compelling state interest justifying the reliance on ethno-racial classifications.¹⁶³ Nonetheless, given the holding, which recognized diversity as a compelling interest and the allowance of ethno-racial factors in admissions decisions, Justice Powell's opinion suggests some tacit agreement with the aforementioned view.¹⁶⁴ Second, the *Bakke* holding regarding ethno-racial criteria functions as a fallback to proxy strategies in the United States if they fall short of their goal of admitting a meaningful number of underrepresented ethno-racial minorities to colleges and universities. That is, as I discuss later in this article, because of *Bakke* (and the *Grutter* Court's reaffirmation of certain aspects of *Bakke*), Texas can resort to ethno-racial factors in its admissions process as its schools deem necessary, even though the State has enacted a percentage plan.¹⁶⁵ The consequence is that Texas' post-secondary schools have not been limited to the indirect strategy of the Ten Percent Plan.¹⁶⁶

Third, with *Bakke*, there is a thematizing of the concept of diversity, which has helped and hurt efforts to attain equal educational opportunity for ethno-racial minorities in the United States.¹⁶⁷ The concept of diversity itself also may be viewed as a proxy to the extent that it serves as a code for discussing ethnicity and

161. See, e.g., 42 U.S.C. § 2000e-1 (indicating, through the inclusion of race and national origin as protected classes under Title VII, that a person's race and/or ethnicity has an important impact on areas of life such as employment).

162. See *id.* (showing the government's ability and willingness to protect individuals from discrimination based on their race and ethnicity).

163. *Bakke*, 438 U.S. at 306-10 (opinion of Powell, J.).

164. *Id.* at 311-14, 320.

165. See Pacelli, *supra* note 159, at 572-73 (discussing how *Bakke* provides guidance as to how universities can still use race in making admissions decisions; in particular, the *Bakke* Court noted that "the use of race as a 'plus' one factor could be appropriate"); see also Steven Thomas Poston II, *The Texas Top Ten Percent Plan: The Problem It Causes for The University of Texas and a Potential Solution*, 50 S. TEX. L. REV. 257, 265-66 (2008) (describing how the Texas Ten Percent Plan promotes racial diversity despite Texas' racially segregated rural and urban high schools, by admitting the top 10% of individual high schools and thereby creating diverse university classes; and how the program was in fact created in response Texas legislators' consideration of ethno-racial factors).

166. The U.S. Supreme Court's pending ruling in *Fisher v. University of Texas* may change this conclusion. *Fisher* will have a substantial impact on the legal landscape. The Court's holding may affirm that all of the current strategies available to post-secondary schools remain as options or it may curtail (or even prohibit) the future use of ethno-racial criteria in college admissions decisions. My assessment of the implications of the *Fisher* decision will be the subject of a future law review article.

167. See Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at The University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in Grutter*, 15 TEX. REV. L. & POL. 437, 440-41, 444-46 (2011) (discussing the introduction of diversity as a compelling state interest in constitutional law through *Bakke*).

race directly.¹⁶⁸ The *Bakke* Court's broad-based notion of diversity that is not limited to ethnicity and race is, like the other proxies that I analyze, insufficient to do the work necessary to accomplish the inclusion of a meaningful number of historically underrepresented ethno-racial minorities in academic institutions of higher education. The diversity goal casts a net that is too broad regarding who can be included under the heading. This shift in focus is evident from the language of the *Bakke* opinion, which asserts that "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."¹⁶⁹ *Bakke*'s widening of the circle waters down the goal of improving access to equal educational opportunities for certain minorities especially African Americans, Latinos, and Native Americans.

In the years that followed *Bakke*, there were a number of political shifts that took place. There were, for example, substantial moves in states such as California,¹⁷⁰ Texas, and Florida toward further curtailing the use of affirmative action, which impacted whether ethno-race-conscious criteria could be relied upon in schools' admissions processes. In Texas, the further entrenchment of a negative view towards any express reliance on ethno-race-based factors in admissions policies culminated in the case *Hopwood v. Texas*.¹⁷¹

B. *Hopwood and the Design of the Texas Ten Percent Plan*

The Texas Top Ten Percent Plan was instituted in 1997, in the wake of *Hopwood v. Texas*.¹⁷² The *Hopwood* court rejected Justice Powell's conclusion in *Bakke* that consideration of race or ethnicity by a university to achieve diversity in its student body is a compelling interest that satisfies the Fourteenth Amendment of the U.S. Constitution.¹⁷³ Specifically, the *Hopwood* court, in ruling on the constitutionality of the admissions program at the University of Texas at Austin Law School ("UT Law School"), held:

[T]he University of Texas School of Law may not use race as a

168. See Jacques Steinberg, *Using Synonyms for Race, College Strives for Diversity*, N.Y. TIMES, Dec. 8, 2002, <http://www.nytimes.com/2002/12/08/us/using-synonyms-for-race-college-strives-for-diversity.html> (explaining how admissions officers at Rice University used various means to include diverse candidates despite not being allowed to use terms like "black," "Latino," "minority," etc., in their admissions decisions).

169. 438 U.S. at 314 (opinion of Powell, J.).

170. See California Proposition 209, California Ballot Pamphlet, General Election Nov. 5, 1996, (enacted as CAL. CONST. art. I, § 31) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

171. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

172. TEX. EDUC. CODE ANN. § 51.803 (West 2010). For the bill's history, see H.B. 588, 1997 Leg., 75 Reg. Sess. (Tex. 1997), <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=75R&Bill=HB588>.

173. See 78 F.3d at 948 ("In sum, the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny [T]he key is that race itself not be taken into account.").

factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.¹⁷⁴

Texas school officials were faced with a substantial challenge after the announcement of the *Hopwood* decision. In some ways, Texas' higher academic public institutions were confronting a legal dilemma similar to that of Sciences Po prior to 2001, in that the Fifth Circuit's¹⁷⁵ interpretation of the Fourteenth Amendment, like the reigning interpretation of the French Constitution, precluded the use of ethnicity and race-based policies to achieve diversity in their student populations. Like Sciences Po, in confronting a legal environment that constrains the use of language and strategies that explicitly reference ethnicity and race, U.S. universities and colleges generally have not abandoned the objective of achieving ethno-racial diversity in their student admissions, but instead have crafted creative ways to accomplish this goal.¹⁷⁶ Texas provides one example of this ingenuity and dedication. After *Hopwood*, education and government officials began devising a way to maintain a certain number of underrepresented minority students admitted to public higher education institutions without explicitly referencing the ethnic and racial criteria schools had relied upon in the past as part of the admissions process.¹⁷⁷ In short, the academic institutions sought to find an approach that would somehow capture the underrepresented minority population, yet operate in balance with the need for school administrators to maintain control over setting admissions criteria.¹⁷⁸

Prior to *Hopwood*, Texas public colleges and universities utilized various policies that allowed admissions committees to take into account ethno-racial factors in their respective decision-making processes.¹⁷⁹ Given that UT Law

174. *Id.* at 962.

175. *Hopwood* was heard by a three-judge panel in which Judge Smith, joined by Judge Demoss, wrote the court's opinion. *Id.* at 934. Judge Wiener did not join the panel's holding that race may not be used as a factor in admissions decisions and wrote a separate opinion. *Id.* at 962-68 (Wiener, J., concurring).

176. See, e.g., Richard Kahlenberg, *New Ways to Achieve Diversity in California*, CHRON. HIGHER EDUC. BLOGS (Nov. 22, 2010, 11:23 AM), <http://chronicle.com/blogs/innovations/new-ways-to-achieve-diversity-in-california/27920> (describing California's percentage plan and the consideration of socioeconomic obstacles as an admissions criterion); see also Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1628 (2003) [hereinafter Bell, *Diversity's Distractions*] (describing how the majority in *Gratz* expressed favor towards percentage plans in states like Texas, California, and Florida).

177. See Steinberg, *supra* note 168 (describing how Rice University in Texas sought to achieve diversity in admissions post-*Hopwood*).

178. *Id.*

179. See, e.g., *Hopwood*, 78 F.3d at 935-38 (describing the admissions procedure for minority applicants to UT Law School, which gave minority applications more extensive review and consideration by the committee than other applicant files; additionally, UT Law School lowered general standards of admission for minority candidates, with the end goal of admitting a class comprised of 10% Mexican American students and 5% black students).

School's program was the subject of the *Hopwood* case, it can serve as an example of the admissions policies that were permissible in a pre-*Hopwood* legal environment. *Hopwood* involved several white Texas residents who sought admission to UT Law School.¹⁸⁰ The *Hopwood* plaintiffs claimed that the design of UT Law School's admissions program operated to benefit Mexican Americans and African Americans to the detriment of white applicants and others who were not within the favored ethno-racial categories.¹⁸¹ UT Law School relied upon a mixture of hard and soft factors in rendering admissions decisions. These factors consisted of a candidate's Texas Index ("TI"), which is composed of the individual's LSAT score and undergraduate GPA,¹⁸² undergraduate institution, undergraduate major, residency, "background," and "life experiences."¹⁸³ Several aspects of UT Law School's program reflected a consideration of ethno-racial factors including: (i) the preliminary review of Mexican American and African American candidates' files by a special committee who made recommendations to the full admissions committee,¹⁸⁴ (ii) the downward adjustment of the permitted TI score for the admission of applicants within the target minority group,¹⁸⁵ (iii) the placement of the target minority applicants onto a separate waiting list from those of non-target applicants,¹⁸⁶ (iv) the ongoing reference to the target minority candidate waiting list in conjunction with issuing acceptances to fill out the remaining admission slots for the entering class,¹⁸⁷ and (v) the stating of a desired percentage of target minority applicants to be admitted for each academic year.¹⁸⁸ With the *Hopwood* ruling, these ethnicity- and race-sensitive machinations were no longer permissible because the court concluded that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment,"¹⁸⁹ and, further, that "Justice Powell's argument . . . has never represented the view of a majority of the Court in *Bakke* or any other case."¹⁹⁰ Although *Hopwood* concerned UT's Law School, its impact was far-reaching. Consequently, after 1996, any public higher education admissions program in the State of Texas that expressly utilized racial and ethnic criteria was in jeopardy.¹⁹¹

Faced with these limitations, Texas created an approach that relied upon

180. *Id.* at 938.

181. *Id.* at 934-35.

182. *Id.* at 935.

183. *Id.*

184. *Id.* at 936, 937.

185. *Hopwood*, 78 F.3d at 936 (comparing the presumptive TI admission score for resident whites and non-preferred minorities of 199 to the presumptive TI admission score of Mexican Americans and blacks of 189).

186. *Id.* at 938.

187. *Id.* at 938 & n.11.

188. *Id.* at 937.

189. *Id.* at 944.

190. *Id.*

191. See Thompson & Schiff, *supra* note 167, at 458, 472 (describing the race-neutral means adopted by UT Austin post-*Hopwood* in order to achieve diversity).

geography, demographics, high school academic evaluative factors, and the awarding of an arbitrary percentage of students the “prize” of attending a Texas public university or college of their choice. This approach was encapsulated in House Bill 588. On May 20, 1997,¹⁹² George W. Bush, then Governor of Texas, signed into law HB 588, which became known as the Texas Top Ten Percent Plan.¹⁹³ Under the percentage plan, as originally implemented,¹⁹⁴ Texas high school students within the top 10% of their graduating class were granted automatic admission to the public state colleges and universities of their choice. The relevant language in the Texas Code provides:

[E]ach general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated with a grade point average in the top 10[%] of the student's high school graduating class in one of the two school years preceding the academic year for which the applicant is applying for admission and . . . the applicant graduated from a public or private high school in this state accredited by a generally recognized accredited organization or from a high school operated by the United States Department of Defense.¹⁹⁵

In order to understand how the Texas Plan operates as a proxy strategy, it is first important to note that it was designed with the severe racial and ethnic segregation that plagues the State of Texas in mind. Law professor and proponent of the scheme Michael Olivas predicted the measure would be “particularly efficacious in the State of Texas . . . as a result of the extreme racial isolation of its high schools” and would work to include previously marginalized students of schools in urban centers and in rural regions.¹⁹⁶ It is clear that the continued success of the plan is predicated on the need for hyper-residential segregation to remain the status quo. The Ten Percent Plan applies to the entire State of Texas, and is facially race-neutral because the beneficiaries are determined according to high school rank and geographic region.¹⁹⁷ Given that within the state there are numerous high

192. H.B. 588, 1997 Leg., 75th Reg. Sess (Tex. 1997).

193. TEX. EDUC. CODE ANN. § 51.803.

194. For information about recent modifications to the Texas Plan, see TEX. EDUC. CODE ANN. § 51.803 (a-1)-(a-3), which added an amendment limiting the number of students who are automatically granted admission to UT Austin under the program to 75% of all the seats allocated for Texas residents. This cap went into effect for the 2011-2012 academic year and is set to expire by the 2015-2016 academic year. *Id.* See also *Fisher*, 631 F.3d at 224 n.56 (describing the 2010 amendment to the Texas Ten Percent Plan).

195. TEX. EDUC. CODE ANN. § 51.803(a).

196. Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 326-27 (2001) (quoting *Hearings on H.B. 588 Before the H. Higher Educ. Comm.*, 1997 Leg., 75th Reg. Sess. (Tex. Mar. 18, 1997) (testimony of Michael Olivas)).

197. See *id.* at 326-28 (noting that the bill is race-neutral and that test scores were eliminated as an admissions criteria for students graduating in the top 10% of their high school class); see also Poston II, *supra* note 165, at 265-266 (explaining the details of the Texas Ten Percent Plan).

schools in which the student population is all black or Latino,¹⁹⁸ a policy which admits the top 10% from every high school ensures that a substantial number of black and Latino students will be captured by this approach. The so-called "neutral" factors (namely, residency, high school rank) serve as proxies for ethno-racial factors in that their application to the eligible Texas student population enables post-secondary academic institutions to achieve ethno-racial diversity without expressly referencing ethno-racial characteristics. A focus report completed in 2005 by a committee of the Texas House of Representatives appointed to assess the impact of the program and whether it should be continued¹⁹⁹ reinforced the State's reliance on the proxy strategy, noting that the purpose of the plan is "[t]o broaden access to public higher education institutions by promoting greater geographic, socioeconomic, and racial/ethnic representation without using race as an admissions criterion."²⁰⁰

The proxy approach gave Texas schools the ability to achieve their broad goals of serving their student communities and providing a wide base of the Texas population access to premier state schools, without running afoul of the Equal Protection Clause of the Fourteenth Amendment and Title VI, as interpreted by the Fifth Circuit in *Hopwood*.

1. The Effectiveness of the Texas Plan: Increasing Ethno-Racial Diversity and Access to Education Opportunities for Underrepresented Ethno-Racial Minorities in the United States

In contrast to the CEP program, which only applies to those regions selected by Sciences Po from the list of zones previously outlined by the French government,²⁰¹ the Texas Plan applies equally to the entire state in conformity with the requirements of the Fourteenth Amendment.²⁰² The program's broad application suggests that it should have an impressive impact on the areas of education access and equality; however, the available empirical data and focus reports do not support this conclusion. At best, the Texas Plan has functioned to assist administrators in maintaining the enrollment of underrepresented minorities at several key institutions in a legal environment that precluded the consideration of

198. See CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., HIGH SCHOOL GRADUATION IN TEXAS 4 (2006), available at www.edweek.org/media/texas_eperc.pdf (citing statistics that show the degree of racial isolation in high schools in Texas' largest districts, including Houston, Dallas, and San Antonio, is more than twice the average U.S. racial segregation level); see also *Texas Education Report Card*, REALIZE THE DREAM: QUALITY EDUCATION IS A CIVIL RIGHT, www.realizethedream.org/reports/states/texas/html (last visited Nov. 20, 2012) ("Texas is the 13th most segregated state for African Americans . . . [and] the 2nd most segregated state for Hispanics . . .").

199. RITA BARR, TEX. HOUSE OF REPRESENTATIVES HOUSE RESEARCH ORG, FOCUS REPORT: SHOULD TEXAS CHANGE THE TOP 10 PERCENT LAW?, NO. 79-7, at 1 (Feb. 25, 2005), available at <http://www.hro.house.state.tx.us/focus/topten79-7.pdf>.

200. *Id.* at 3.

201. See *supra* text accompanying notes 80-90 (describing the CEP program and targeted zones).

202. See TEX. EDUC. CODE ANN. § 51.803(a) (stating that the Ten Percent Plan applies to any accredited public or private high school, or a high school which is run by the Department of Defense, in the State of Texas).

ethno-racial factors in admissions policies.²⁰³ Like Science's Po's proxy approach, Texas' plan has had a limited effect from the standpoint of achieving concrete gains in admitting underrepresented minority populations to quality education institutions. Rather than lauding the Texas Plan as the solution to education disparity issues, it is more appropriate to view it as an effective backstop measure. A comparison of minority enrollment numbers at UT Austin before and after the decision is telling. In 1997 immediately after *Hopwood* Latino freshman enrollment decreased 4.3% and black freshman enrollment decreased 33.8%.²⁰⁴ By contrast after implementation of the Ten Percent Plan from 2003 to 2004, "African-American enrollment increased from 4.1% to 4.5%, Hispanic enrollment increased from 16.3% to 16.9%, and Asian-American enrollment increased from 17.6% to 17.9%."²⁰⁵

Texas Tech also reported an increase in minority student matriculation from its level of 13% in 2000 to 16% in 2007.²⁰⁶ It is also clear that a substantial percentage of underrepresented minority groups are admitted under the Ten Percent rubric. With regard to minority admissions across the State of Texas in 2004, "77% of the enrolled African-American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students."²⁰⁷ There are, however, questions regarding whether the small increases in minority admissions may be attributed wholly to the Ten Percent Plan rather than to changing demographics and the concentrated minority recruitment efforts of some schools.²⁰⁸ The data suggests that the plan merely functioned to help sustain levels of student ethno-racial diversity but did not substantially advance the goals of access and equal opportunity for historically marginalized minorities in the United States.²⁰⁹

203. Some commentators maintain that the increases in minority enrollment are due to other factors such as more concentrated outreach programs and intense recruiting by college officials and not the Ten Percent Plan. Poston II, *supra* note 165, at 269. See Steinberg, *supra* note 168 (discussing generally the tactics that Rice University uses to increase ethno-racial diversity without formally accounting for race in its admissions process, including increasing "recruiting at schools with traditionally high minority populations").

204. Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 251 (1999). The numbers were equally sobering at Texas A&M which experienced a decrease in the "freshman enrollment of Hispanic and black students" of "12.6% and 29% respectively." *Id.*

205. Angela M. Hough, *All Deliberate Ambiguity: The Question of Diversity, College Admissions, and the Future of the Texas Top-Ten-Percent Plan*, 39 TEX. TECH L. REV. 197, 214 (2006); BARR, *supra* note 199, at 3.

206. Poston II, *supra* note 165, at 268. It is important to bear in mind that these increases may be attributable, to some extent, to an increasing minority population and the case *Grutter v. Bollinger* which held the use of race and ethnicity in admission decisions as constitutional within the limits prescribed by the decision. 539 U.S. 306 (2003).

207. *Fisher*, 631 F.3d at 224.

208. Poston II, *supra* note 165, at 269.

209. Texas' Plan, however, has apparently, from the standpoint of class and geography, improved the access of students to colleges and universities in the State of Texas. Mark C. Long et al., *Policy Transparency and College Enrollment: Did the Texas Top Ten Percent Law Broaden Access to the Public Flagships?*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2010, at 82, 96-97 ("[T]he Top Ten

While the accomplishment of maintaining minority student admission levels should not be minimized, my thesis is that it is critical to not rely too heavily on proxy strategies like the Ten Percent Plan to the detriment of actually accomplishing the goals of true equality and access. True equality requires that significant numbers of underrepresented minorities have viable and sustainable entry points into quality post-secondary schools. The histories of the United States and France have entailed the oppression and exclusion of certain groups (for example, African Americans and peoples of African heritage in France). The histories must be a part of the solution.²¹⁰ Since the educational disparities that historically unrepresented groups experience today may be traced in part to the historical treatment they as a group have endured in France and the United States, it is appropriate to keep that factor in mind when formulating higher education admissions policies.

There are other shortcomings of the Texas Plan that highlight the dangers of depending exclusively on this strategy to tackle the vexing issue of educational equality. In order to take into account history, post-secondary institutions require latitude to formulate their admissions policies. One of the main shortcomings of the Texas Plan is the lack of flexibility it accords to the schools that fall within its purview. Under the original structure of the plan, students in the top 10% of their class were given the freedom to select the school of their choice. UT Austin and Texas A&M, as the state's flagship schools, tend to be the preferred choices.²¹¹ As a result of their elite status, these institutions have experienced a substantial decline in the number of discretionary slots for out-of-state applicants and for in-state students who fall below the top 10% of their class. In general, the impact on the geographic make-up of the student admissions for Texas colleges and universities is remarkable.²¹² Of the 10,200 spaces reserved for Texas residents, in 2008, 8,984 students were admitted under the Ten Percent Plan.²¹³ With respect to UT Austin

Percent Law appears to have broadened access to UT for high schools that traditionally sent fewer students there, particularly high-poverty and rural schools . . .").

210. See TAMMIE O'NEIL & LAURE-HÉLÈNE PIRON, RIGHTS-BASED APPROACHES TO TACKLING DISCRIMINATION AND HORIZONTAL INEQUALITY 13 (2003), available at <http://www.odi.org.uk/resources/docs/4555.pdf> (explaining that by ignoring past discrimination, otherwise colorblind laws may fail to place discriminated groups on an equal footing, and will continue to disadvantage certain groups).

211. See generally Poston II, *supra* note 165, at 258 ("Following the [Ten Percent] Plan's implementation, an ever increasing majority of the entering freshman classes at Texas' two flagship universities, UT Austin and Texas A&M, are composed of automatic admissions."); TIENDA ET AL., *supra* note 25, at 52 tbl.5 (noting that students in the top 10% of their class are more likely to apply to UT Austin and Texas A&M).

212. See generally THE UNIV. OF TEX. AT AUSTIN, REPORT TO THE GOVERNOR, THE LIEUTENANT GOVERNOR, AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES ON THE IMPLEMENTATION OF SB 175 (Dec. 31, 2011), available at http://www.utexas.edu/student/admissions/research/SB_175_Report_for_2011.pdf (explaining the geographic diversity of Texas Universities and the plans in place to improve the admissions for students from impoverished areas).

213. Fisher, 631 F.3d at 239 (citing *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin, Demographic Analysis of Entering Freshmen Fall*

specifically, of the seats slated for all Texas residents in 2008, 88% were made up of students who were admitted under the Ten Percent Plan; 81% of the entering first year class was composed of Top Ten Percent students.²¹⁴ As a result of the lack of flexibility, schools must overlook many excellent students who, despite their talent, do not graduate in the top decile of their classes for any number of reasons which may relate to the competitiveness of the school or the difficulty of the courses they choose to take in high school. In terms of the impact on historically underrepresented ethno-racial minorities (for example, Latinos and African Americans), those who fall within the second or even third decile are likely to suffer while Caucasians who fall within the second-tier group are likely to be admitted at a higher rate in comparison.²¹⁵

Another shortcoming of the percentage plan is that even though Texas schools may have experienced a modest increase in minority enrollments since its introduction, the increase is insufficient in view of the overall goals of achieving ethno-racial diversity and equality of educational opportunity.²¹⁶ Finally, the Plan relies upon the persistence of ethno-racial segregation in housing and high schools for its success and, therefore, works against the goal of diminishing this disturbing social reality.²¹⁷

2. Modifications to the Top Ten Percent Plan: The Seventy-Five Percent Cap

In response to the concerns raised by Texas schools that the Plan leaves them with little flexibility to decide the composition of their entering classes, the Texas state legislature opted to modify the Ten Percent Law in 2009. An amendment that went into effect beginning with the 2011-2012 academic year limits the number of students who are automatically granted admission to UT Austin under the program to 75% of all the seats allocated for Texas residents.²¹⁸ While students who are

2008, *Academic Performance of Top 10% and Non-Top 10% Students Academic Years 2003-2007*, UNIV. OF TEX. AT AUSTIN OFFICE OF ADMISSIONS, 8 tbl.2 (2008), <http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf>. [hereinafter *Implementation and Results of the Texas Automatic Admissions Law*].

214. *Id.* at 227 (citing *Implementation and Results of the Texas Automatic Admissions Law*, *supra* note 213, at 8 tbl.2); see also Long et al., *supra* note 209, at 91 (explaining that there has been a steady increase in the share of students admitted under the Texas Plan from 41% in 1998 to 54% in 2002).

215. TIENDA ET AL., *supra* note 25, at 52 tbl. 5.

216. Some commentators have argued that the potential of the plan has not been realized, in some respects, because there are substantial numbers of minority students who attend high schools in low-income neighborhoods who do not take advantage of their eligibility under the Ten Percent Plan and fail to apply for admission to flagship institutions like UT, for example. See, e.g., Long et al., *supra* note 209, at 96 (stating that “low-income and minority-dominated schools are disproportionately located in large urban districts,” and discussing the “significant decline in the share of students from urban high schools enrolling at UT”).

217. Poston II, *supra* note 165, at 265-66.

218. TEX. EDUC. CODE ANN. § 51.803(a-1). The expiration date for the cap is the 2015-2016 academic year. *Id.* § 51.803(a-3); Katherine Mangan, *Federal Court Throws Out Challenge to U. of Texas Admissions Policy*, CHRON. HIGHER EDUC. (Aug. 17, 2009), <http://chronicle.com/article/Federal->

captured within the top 10% ranking are still deemed to *qualify* for admission, the legislative change restores some discretion to UT Austin by allowing it to size down the number of students admitted under the plan, in accordance with following guidelines:

[B]y percentile rank according to high school graduating class standing based on grade point average, beginning with the top percentile rank, until the applicants qualified [for admission to UT] under [the Top Ten Percent Law] have been offered admission in the number estimated in good faith by the university as sufficient to fill 75[%] of the university's enrollment capacity designated for first-time resident undergraduate students, except that the university must offer admission to all applicants with the same percentile rank.²¹⁹

This adjustment gives UT Austin more latitude; however, it also has the potential to negatively impact minority admissions because a smaller number may be automatically captured by the plan. The change also may positively affect minority admission. It depends upon how the schools exercise their discretion in filling the new non-designated spaces. The change does not entirely free academic institutions from judicial scrutiny.²²⁰ Ultimately, what the schools can do with this new latitude to improve the access of minorities to post-secondary schools depends upon what the prevailing legal environment permits.

The foregoing sections serve to explain why Texas and Sciences Po adopted the surrogate strategies of the Ten Percent Plan and the CEP program, respectively, and highlight some of the limitations of those strategies from the standpoint of attaining equality in education. The next section explores possibilities for expanding those approaches, taking into account the legal frameworks (for example, national laws, legal principles, governing cases) and political climates in which they operate.

III. EQUALITY OF EDUCATIONAL OPPORTUNITY IN FRANCE AND THE CURRENT FRENCH LEGAL LANDSCAPE

Before discussing the relevant laws of France that impact whether the CEP program may be broadened to have a national reach including other *grandes écoles*, it is useful to place France's concept of equality in context by commenting on an essential difference between France's equality laws and those of the United States. The corrective aspects that are part of the United States' history of the Fourteenth Amendment, Title VI, and Section 1981(a) of the Civil Rights Act of 1866 are not built into France's legal background. The majority of the French laws and

Court-Throws-Out/48023/.

219. TEX. EDUC. CODE ANN. § 51.803(a-1).

220. See generally Fitzpatrick, *supra* note 196 (discussing the legal requirements and constitutionality of the Ten Percent Plan).

documents highlighted herein were not devised to address the history of slavery and colonization that France imposed on peoples of African descent. Thus, there is no foundational juridico-historical basis to the laws to make the argument that policies of ethno-race-based affirmative action should be allowed and not read as being in conflict with France's equality laws.²²¹ Whereas the United States' equality laws, as I discuss later, grow out of a history of de jure and de facto segregation and discrimination, the main historical referents for the relevant French laws are the French Revolution and the desire to supplant a system heavily influenced by wealth, royalty, and clericalism.²²² Unlike the laws of the United States which historically have allowed for the remedial legislation of affirmative action policies, civil rights laws, Title VI, and Title VII stand in conjunction with the equal protection guarantees of the Fourteenth Amendment of the U.S. Constitution, thereby permitting ethno-race-based initiatives in certain contexts,²²³ France's legal universe prohibits any carving out of a similar type of legal space to protect or assist those of African heritage in achieving de facto equality.²²⁴ Given the present construction of French law, the approach France *must* take to address its ethno-racial (in)equality issues diverges from that of the United States. As the following discussion demonstrates, under the Republic's current legal framework, France must adopt substitutes for ethno-race-conscious criteria when it seeks to implement a program that is, in part, designed to benefit a socially and economically disadvantaged community such as the African French residents of France.

Given the current constraints of France's laws, which do not allow for an express consideration of ethno-racial criteria, in order for substantial gains to be

221. See generally Cynthia A. Vroom, *Equal Protection Versus the Principle of Equality: American and French Views on Equality in the Law*, 21 CAP. U. L. REV. 199, 214-21 (1992) (overviewing the application of France's equality laws and France's notions of differential treatment).

222. See *id.* at 205 ("The French historical experience has been different than [the United States'] and has resulted in a different notion of legal equality. The principle of equality contained in article 6 of the Declaration of the Rights of Man was born of the French Revolution, a reaction to the excesses of the monarchy, feudal privileges of the nobility, and vastly disproportionate distribution of wealth and property."); see also ROGOFF, *supra* note 28, at 313 ("The French Revolution was first and foremost about equality. Particularly infuriating for the great majority of French people at the time . . . was the privileged legal status enjoyed by the clergy and the nobility.").

223. See Jared M. Mellot, Note, *The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment*, 48 WM. & MARY L. REV. 1091, 1093 (2006) (explaining that American employers and universities have been using race-centered hiring and admissions policies in order to increase diversity); Lieberman, *supra* note 81, at 200-03 (explaining how American employment discrimination law went from being color-blind to allowing affirmative action and other race-based initiatives).

224. Lieberman, *supra* note 81, at 193 ("France has carefully avoided classifying citizens by race or ethnicity Consequently, France has not explicitly adopted policies to target racially defined minorities, although social policies such as Educational Priority Zones . . . have come to be recognized as de facto instances of racial targeting."); see also ROGOFF, *supra* note 28, at 313 ("Given the traditional republican commitment to strict legal equality, legislative attempts to assist disadvantaged groups are particularly problematic."); Matlack, *supra* note 62 ("France has long opposed affirmative action on the grounds that—since the constitution requires everyone to be treated equally, and since everyone is fully French—no such programs are needed.").

made in the areas of increased access and improvement of educational opportunities for the marginalized population of peoples of African heritage, France needs to revisit the issue of amending the relevant laws to allow ethno-race-based policies to be effected. Before examining the issue of amending the French Constitution, a discussion of the panoply of laws and principles that are at stake in any proposed affirmative action policies is warranted.

A. French Laws and the Legal System: Legal Documents and Principles Bearing on Equality of Educational Opportunity and Access

It is necessary to begin by identifying: (i) the chief legal documents and laws that are implicated in any equality of educational opportunity project that France undertakes to be more inclusive of ethno-racial minorities, and (ii) the fundamental principles and values articulated in those laws and documents that are germane to the aforementioned project.

French constitutional law scholar John Bell highlights several essential documents in commenting upon the principle of equality in the French legal system.²²⁵ These documents are the 1958 Constitution of the French Fifth Republic (in particular, the Preamble and Article 1),²²⁶ the Declaration of the Rights of Man of 1789,²²⁷ and the Preamble to the 1946 French Constitution of the Fourth Republic (the "Preamble to the 1946 Constitution").²²⁸

Several provisions of the Declaration of the Rights of Man are relevant to the French Republic's goal of ensuring the equality of its citizens and, depending upon their interpretation, may hinder a project to amend France's laws to include equality provisions that expressly reference ethno-racial classifications aimed at addressing the inequities in education, wealth, employment, and social acceptance that many individuals of African heritage in France currently experience. From this standpoint, the most significant of the Declaration Articles are Article 1 and Article 6:

Article First. Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good. . . .

Article 6. The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction

225. BELL, FRENCH CONSTITUTIONAL LAW, *supra* note 45, at 57-77.

226. 1958 CONST. (Fr.).

227. DECLARATION OF THE RIGHTS OF MAN OF 26 AUGUST 1789 (Fr.).

228. 1946 CONST. pmbl. (Fr.). Combined, these legal sources along with the Charter for the Environment of 2004 and other principles and instruments referenced in the aforementioned documents, are referred to as *le bloc de constitutionnalité* (the constitutional block). ROGOFF, *supra* note 28, at 209.

than that of their virtues and talents.²²⁹

The foregoing provisions contain the language of formal equality that France emphasizes in heralding the guarantees it makes to its citizens.²³⁰ What is striking about these sections is the absence of language that would allow for recognition of gender, ethno-racial, class or religious distinctions.²³¹ Meritocracy appears to be paramount given the language in Article 6, which only allows for a consideration of individuals based on their abilities in connection with the distribution of certain social goods. From a legal standpoint, this provision for the equal treatment of individuals is admirable. The problem arises when the experiences of certain sectors of the population indicate that everyone is not being treated on an equal basis. This disparity is the dilemma that many African French people face.²³²

The relevant sections of the Preamble to the 1946 Constitution, in terms of equality of educational opportunity provide:

Section 1. In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that *each human being, without distinction of race, religion or creed, possess sacred and inalienable rights*. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles recognized by the laws of the Republic.

Section 13. The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the State.²³³

In comparison with the United States' constitutional guarantees, which do not include a provision regarding education framed in similar terms, Section 13 of the 1946 French Constitution marks a substantial difference. Section 13 raises access to education to the level of a fundamental constitutional right.²³⁴ In contrast, the

229. DECLARATION OF THE RIGHTS OF MAN OF 26 AUGUST 1789 (Fr.).

230. *Id.*

231. Articles One and Six specifically state that no distinctions may be made other than on the merits of a person's talents. *Id.*

232. See Matlack, *supra* note 62 ("France has long opposed affirmative action on the grounds that—since the constitution requires everyone to be treated equally, and since everyone is fully French—no such programs are needed. A beautiful idea, but it ignores the reality of the ghettos, which impede assimilation."); Vroom, *supra* note 221, at 222 ("Yet equality of result as a goal also has its limits. France has not been immune to the shadow of racism, and with its increasingly large immigrant population there is a visible gap between opportunities available to ethnic French and those available to immigrants from different cultures . . .").

233. 1946 CONST. pmbl. (Fr.) (emphasis added).

234. *Id.* § 13 ("The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the state.").

United States has moved away from this idea of education as a right guaranteed by the Constitution, as evidenced by the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.²³⁵ In *Rodriguez*, the Court expressly held that education is not a fundamental right protected by the United States Constitution²³⁶ stating that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense."²³⁷

The sentiment of the *Rodriguez* Court is counter to that expressed in Section 13. Perhaps then, even more so for France than the United States, there is leverage to make a constitutional claim regarding the disparities in education that the government's failure to provide meaningful opportunities for a substantial portion of the African French population to obtain a quality post-secondary education is a violation of their constitutional rights. Social unrest, the state of schools situated within residential areas populated by African French people,²³⁸ and the apparent dearth of African French individuals in positions of economic affluence and political power,²³⁹ suggest that the ideal embodied in the language of Section 13 is currently not being met. Therefore, strategies which would facilitate the fulfillment of the constitutional guarantee (for example, ethno-race-based policies) must be given more weight. The Sciences Po program is only one program. It is woefully insufficient to address the inequalities in education that the African French population experience as compared with the majority white French population. As I argue that the French Constitution should be amended to allow for reference to ethno-racial categories in connection with formulating future affirmative action policies, Section 13 could serve as the predominant legal basis for this amendment.

While the foregoing documents are important touchstones of the French Republic's identity, Article 1 of the 1958 French Constitution is the provision often cited as establishing and encapsulating the notion of formal equality.²⁴⁰ The idea that all French citizens are equal before the law is central to France's legal order.²⁴¹ Article 1 provides in relevant part: "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the

235. 411 U.S. 1 (1973). *But see Plyler v. Doe*, 457 U.S. 202, 226-30 (1982) (holding that public schools are prohibited from denying immigrant students access to public education).

236. *Rodriguez*, 411 U.S. at 35. The Supreme Court reaffirmed this holding in subsequent decisions, including *Plyler*, 457 U.S. at 221; *Martinez*, 461 U.S. at 328 n.7 (1983); and *Kadrmas*, 487 U.S. at 458.

237. *Rodriguez*, 411 U.S. at 24.

238. See Matlack et al., *supra* note 62 (detailing the circumstances causing the 2005 riots in residential Parisian suburbs by young adults from African and Arab families, stating "[m]ix in racial discrimination, crumbling education systems, and scant representation of ethnic minorities among the political and business elite, and it's easy to see why young immigrants are alienated").

239. *Id.*

240. BELL, FRENCH CONSTITUTIONAL LAW, *supra* note 45, at 199 (using an edition of the 1958 Constitution that places the text of Article 1 into Article 2, Bell states that equality "is now enshrined in article 2 of the Fifth Republic Constitution of 1958 . . .").

241. *Id.* ("Equality has stood at the core of the French republican tradition ever since the Revolution of 1789.").

law, *without distinction of origin, race or religion*. It shall respect all beliefs. It shall be organized on a decentralized basis”²⁴²

It is, in particular, because of the language in Article 1, and similar language in Section 1 of the 1946 Constitution,²⁴³ that the French government and other institutions that seek to find ways to be more inclusive of ethno-racial minorities, through hiring policies or educational programs, must resort to alternative strategies that do not explicitly reference ethnicity or race.²⁴⁴ French legal scholar, Gwénaële Calvès explains that “[t]he word ‘distinction’ [as used in the French Constitution] must . . . be understood in its original and most basic sense: current legislation prohibits—except under very restricted circumstances—labeling, classifying, or counting citizens by their religious affiliations, ‘racial’ characteristics, or national origins.”²⁴⁵ In accord with this view, French scholar Daniel Sabbagh concludes that because of the language of Article 1, which precludes any distinction based upon origin, race, or religion, “corrective or ‘remedial’ uses of race by state authorities” will be treated by French courts as “‘invidious’ . . . and simply ruled out.”²⁴⁶

While it is clear that France opposes racial and ethnic discrimination²⁴⁷ and that the country has a deep commitment to the idea of equality for all individuals residing within its borders,²⁴⁸ it is also evident that people in France encounter ethnic and racial discrimination,²⁴⁹ which can have a negative impact on their quality of life. As the current French legal terrain stands, there is no constitutional amendment on the agenda to change this reality, which means that any policies designed to address ethno-racial disparities must conform to the prevailing legal framework. The architects of the Sciences Po’s CEP program took the constraints

242. 1958 CONST. (Fr.) (emphasis added).

243. 1946 CONST. pmb. (Fr.) (“[T]he people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights.”).

244. Sabbagh, *Affirmative Action in the United States and France*, *supra* note 4, at 1-2.

245. Calvès, *supra* note 89, at 219.

246. Daniel Sabbagh, *The Collection of Ethnoracial Statistics: Developments in the French Controversy*, FRENCH-AM. FOUND., 1, (Feb. 2008), http://equality.frenchamerican.org/sites/default/files/sabbagh_ethnicstatistics_brief_en.pdf [hereinafter Sabbagh, *The Collection of Ethnoracial Statistics*].

247. In addition to signing off on the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD.], Dec. 21, 1965, 660 U.N.T.S. 195 (signed by France Jul. 28, 1971), available at <http://www2.ohchr.org/english/law/pdf/cerd.pdf>, France has added anti-discrimination measures to its Criminal Code, CODE PÉNAL [C. PÉN.] art. 225-1 (Fr.), and the Act of July 1972, Loi 72-546 du 1er juillet 1972 relative à la lutte contre le racisme [Law 72-546 of July 1, 1972 pertaining to the Fight Against Racism], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jul. 2, 1972, p. 6803. Jacqueline Costa-Lascoux, *French Legislation Against Racism and Discrimination*, 20 J. ETHNIC & MIGRATION STUD. 371, 372 (1994).

248. See Costa-Lascoux, *supra* note 247, at 372 (quoting Loi 89-548 du 2 août 1989 relative aux conditions de séjour et d’entrée des étrangers en France [Law 89-548 of August 5, 1989 on the conditions of stay and entry of foreigners in France] J.O., Aug. 8, 1989) (“From its inception, the French Republic has affirmed the principles of hospitality and tolerance which are its own. Consequently, it prohibits and condemns racism, anti-Semitism and xenophobia in all the territories under its authority.”).

249. See *id.* at 378 (providing examples of racist incidents that have led to litigation in France); BEN JELLOUN, *supra* note 49, at 47-61 (commenting on ethnic and race-based prejudice experienced by peoples of African heritage in France during the colonial period).

of the legal landscape into account when drafting their initiative.²⁵⁰ In fact, the school administrators at the Sciences Po looked to the American political and legal scene for criticisms of U.S. affirmative action education policies and sought to take some of the prominent objections into account when crafting their own plan in order to anticipate and deflect any fatal challenges.²⁵¹ Evidence of the influence of U.S. affirmative action education policies is apparent in the flexible structuring of the Sciences Po's approach, which allows for an increase in the number of admissions to accommodate the CEP track. The creation of *new slots* is a significant departure from U.S. programs. Typically U.S. programs have not added new slots, but merely carved places out of already existing admission slots,²⁵² leading to criticisms that minority students, benefitting from affirmative action, were taking the spaces of white candidates.²⁵³ *Bakke* gave voice to these criticisms. In *Bakke*, the Court viewed the Medical School's race-conscious admissions program as operating to decrease the number of admission slots that were previously available to white students, commenting that "some individuals are excluded from enjoyment of a state-provided benefit—admission to the Medical School—they otherwise would receive."²⁵⁴ That is, the Court accepted the view that, with the implementation of the special program, white students were only allowed to compete for eighty-four out of the one hundred available seats in the entering class whereas minority students were purportedly allowed to compete for every available seat.²⁵⁵ The *Bakke* court emphasized that race-based admissions programs must be evaluated in terms of whether they place undue pressures on "innocent persons" who are asked "to bear the burdens of redressing grievances not of their making."²⁵⁶ The Court struck down the Medical School's program because:

[The program] tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats

250. See, e.g., Interview with Richard Descoings, *supra* note 21, at 2-3 (explaining that Sciences Po looked to the United States in constructing the CEP program to fit within the French Republic system).

251. *Id.*; see also Sabbagh, *Affirmative Action at Sciences Po*, *supra* note 70, at 52 n.37 (offering a different view on *Bakke* and the Sciences Po's policy).

252. See, e.g., *Bakke*, 438 U.S. at 272-77 (explaining that the University of California at Davis Medical School's admissions process fixed the number of available seats for its entering class while increasing the number of minorities through a separate admissions program, thereby increasing minority enrollment from approximately 6% in 1958 to 23% in 1974).

253. See, e.g., DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 123 (5th ed. 2004) [hereinafter BELL, *RACE, RACISM AND AMERICAN LAW*] (remarking that the majorities in *Bakke* and *Grutter* appeared "paranoid" over the possibility of "unduly trammel[ing] the interests or expectations of 'innocent' nonminorities"); see also Sabbagh, *Affirmative Action at Sciences Po*, *supra* note 70, at 52 (noting that some opponents of the program criticized it as "flatly abusive," rather than suggesting alternatives to achieve a shared goal).

254. *Bakke*, 438 U.S. at 305 (opinion of Powell, J.).

255. *Id.* at 289.

256. *Id.* at 298; see also BELL, *RACE, RACISM, AND AMERICAN LAW*, *supra* note 253, at 132-33 (addressing the problems with describing affirmative action programs in terms of "innocents"); Freeman, *supra* note 111, at 29-31 (same); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299-310 (1990) (same).

in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for special admission seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.²⁵⁷

Cognizant of this criticism, the Sciences Po opted to expand its class sizes to accommodate the acceptance of CEP students.²⁵⁸ Due to this structuring of the program, the CEP plan has thus far survived the political storms surrounding it and the constitutional challenges and criticisms launched against it.²⁵⁹ There are, however, some drawbacks to this approach. First, the broadening of the program to include more ethno-racial candidates will always be constrained by the financial resources the school has to expand its class sizes. To the extent that expanded class sizes may negatively impact the learning experience (e.g., increased teacher–student ratios), it may not be desirable to continue to modify an admissions program in this way. Second, at some point, courts and the general populace may no longer accept the view that the newly created spaces are different from the admission slots that were previously in place. If this happens, the Sciences Po will have to contend with arguments that the new slots along with the previously existing ones should be open for competition by all candidates. Third, the approach reinforces the idea that the status quo pool of applicants (that is, white middle- and upper-class students) are entitled to a certain number of seats at the Sciences Po. That is, notwithstanding the implementation of the CEP plan, the Sciences Po is still primarily operating from the philosophy that admission slots are “merit badges or prizes for some innate talent or past performance or industry,”²⁶⁰ rather than “opportunities that are properly offered to those who show the most promise of future contribution to goals the university rightfully seeks to advance.”²⁶¹ Given this perspective, the impact that the institution can have on increasing educational opportunities for ethno-racial minorities and expanding ethno-racial diversity will remain severely limited. Fourth, the dedication of a specified number of spaces to CEP students that are awarded according to alternative criteria creates the special track problem criticized by the *Bakke* court, which led to the Medical School’s

257. *Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.).

258. See Sabbagh, *Affirmative Action at Sciences Po*, *supra* note 70, at 52 (explaining that Sciences Po did not decrease the number of spaces reserved for students who gained admission under the traditional process).

259. *Id.* at 52 n.6 (citing unsuccessful challenges to the policy); Amelia Gentleman, *France Rules on Elite Education for Poorest: University May be Prevented from Targeting Pupils in Deprived Areas*, *GUARDIAN* (U.K.), Nov. 6, 2003, <http://www.guardian.co.uk/world/2003/nov/06/highereducation.internationaleducationnews?INTCMP=SRCH> (reporting on an imminent ruling on the admissions policy by the Paris appeals court); Polakow-Suransky, *supra* note 99 (recalling that the admissions policy withstood an immediate legal challenge from the National Interuniversity Union in a Paris appeals court).

260. Dworkin, *supra* note 109.

261. *Id.*

admissions program being held unconstitutional.²⁶² So, while the Sciences Po's plan avoids one potential problem, its structure remains vulnerable to a pitfall that the *Bakke* case highlights.

Nevertheless, thanks to the overall careful design of the program, it has weathered the constitutional challenges it has confronted thus far. A look at the legal challenges posed and the resulting endorsements and legal restrictions placed on the program is useful for identifying the further actions that must be taken in order to accomplish educational equality in France.

B. Signs of Change: Support for and Resistance to the CEP Program

1. France's Constitutional Council, the French Parliament, and Court Challenges

There are signs that an ideological shift is underway in certain sectors of France that allows for conversations regarding affirmative action to take place and helps to sustain a radical undertaking like the CEP plan. Signs of ideological change are found in the legal system's responses to challenges to the CEP program and legislative action. The CEP initiative met and survived several legal tests. A conservative right-wing student group, the National Interuniversity Union ("UNI"),²⁶³ brought an unsuccessful court challenge against the plan in its early days.²⁶⁴ UNI charged that the creation of an alternative admissions track that was defined solely according to the locale in which students reside violated the "French constitutional guarantee of equal opportunity."²⁶⁵ One of the UNI members complained that the program "goes against the core French tradition of equality of opportunity," remarking that "[t]he law guarantees that all *lycée* [high school] students should be treated equally, but Sciences-Po [sic] has decided to ignore that principle."²⁶⁶ A Paris court of appeals rejected that argument in November 2003, opting instead to affirm the constitutionality of the program.²⁶⁷

Another sign of change is the French Parliament's passage of a bill on June 28, 2001 in support of the program. Following its passage, the *Conseil constitutionnel*, or Constitutional Council, ex officio raised the matter of the legislation's constitutionality.²⁶⁸ The law, referred to as Article 14,²⁶⁹ provides in

262. *Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.).

263. UNI is a major right-wing student union in France. Polakow-Suransky, *supra* note 99.

264. Gentleman, *supra* note 259. In 2001, the conservative group's request for an immediate hearing was turned down by the Conseil Constitutionnel. Daley, *supra* note 20.

265. Polakow-Suransky, *supra* note 99.

266. Gentleman, *supra* note 259.

267. Burton Bollag, *A French Court Supports an Elite University's Affirmative-Action Program*, CHRON. HIGHER EDUC. (Nov. 21, 2003), <http://chronicle.com/article/A-French-Court-Supports-an/24832>; Gentleman, *supra* note 259; Aisha Labi, *Lessons From—Quelle Horreur!—les Américains*, CHRON. HIGHER EDUC. (Sept. 2, 2005), <http://chronicle.com/article/Lessons-From-Quelle/13604>; Polakow-Suransky, *supra* note 99.

268. ROGOFF, *supra* note 28, at 335.

269. *Id.*

relevant part:

The governing board of the Institute of Political Studies of Paris may determine, by derogation from the provisions of the third paragraph of article L. 621-3, the conditions and procedures for admission to the Institute's programs as well as the organization of its programs of study for the first cycles of its doctoral program. It may adopt admissions procedures that include particular modalities aimed at assuring the recruitment of a diverse student body from among undergraduate students. The admissions procedures may be implemented by way of agreements concluded with French or foreign secondary or higher educational institutions, in order to involve them in the Institute's recruitment of their pupils or students²⁷⁰

Before commenting on the outcome of this challenge, some explanation regarding France's high advisory legal institution, the Constitutional Council, is necessary.²⁷¹ Scholar John Bell examined certain decisions of the Constitutional Council and concluded that "the Conseil's notion of equality is . . . mainly concerned with non-discrimination in relation to specific constitutional values . . . rather than with requiring the legislator to seek substantive equality of outcomes,

270. *Id.* For a reproduction of the law, see *infra* Appendix (quoting Constitutional Court decision No. 2001-450DC, *supra* note 28, ¶ 32 (Fr.)). The official French version is available online at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2001/2001-450-dc/decision-n-2001-450-dc-du-11-juillet-2001.508.html> (last visited Oct. 19, 2012).

271. The Constitutional Council is charged with reviewing the legislation of the Parliament and the executive. BELL, FRENCH CONSTITUTIONAL LAW, *supra* note 45, at 31-32. Although a "third branch" of government, the Constitutional Council is not exactly the equivalent of the U.S. Supreme Court. *See id.* at 23, 27-28, 30-32, 55, 242 (identifying some of the main differences between the U.S. and French constitutional institutions). The chief role of the Conseil is to keep the other organs of the government within the limits of the French constitution. *Id.* at 21, 242. The Constitutional Council, similar to the U.S. Supreme Court, is a "supervisor of last resort" when a fundamental right is violated or threatened. *Id.* at 242. The Parliament has the leading responsibility of giving substance to fundamental rights. *Id.* The jurisdiction of the Constitutional Council is "limited to reviewing *lois* before they are promulgated; once promulgated a *loi* becomes immune from challenge in the ordinary courts." *Id.* at 55. Bell describes the nominating process for the Constitutional Council as follows:

[T]here are no criteria for membership of the Conseil other than having been nominated by either the President of the Republic, the President of the Senate, or the President of the National Assembly. One member is appointed by each of these three every three years for a non-renewable term of nine years. . . . In addition, all past Presidents of the Republic are members for life.

BELL, FRENCH CONSTITUTIONAL LAW, *supra* note 45, at 34.

Despite the fact that past Presidents of the Republic are technically members of the court, none have assumed their seats since the Fifth Republic. The seated members, therefore, number nine. *Id.* at 34, 40. The President of the Republic appoints three members. Three members are appointed by the President of the National Assembly and three members are appointed by the President of the Senate. Stéphanie Cottin & Jérôme Rabenou, *Researching French Law*, GLOBALEX (May 2005), <http://nyulawglobal.org/globalex/france.htm>.

resources, or opportunities.”²⁷²

While the foregoing assessment suggests that the Council would not be in favor of an affirmative action policy, even one that is not based on race or ethnicity, the Constitutional Council nonetheless issued a decision on July 11, 2001 (Decision no. 2001-450 DC) holding that the June 28, 2001 French Parliament law under the education code, which upholds the Sciences Po’s action to implement the CEP plan, is in conformity with the French constitution: “[O]n the condition that [the admissions criteria implemented for the CEP program] are based on objective criteria of a nature to guarantee respect for the constitutional requirement of equal access to education.”²⁷³

In so ruling, the Council specifically referenced Section 13 of the Preamble to the 1946 Constitution,²⁷⁴ underscoring that this provision is the appropriate focal point for discussions involving French laws and any radical changes needed to attain diversity in educational institutions. The Council’s ruling is encouraging and suggests that, perhaps, additional equalizing socio-economic policies and programs could be developed within the parameters of currently existing French laws and be constitutionally valid. The ruling also supports my argument that formal equality, while important, only goes so far. Article 14 indicates the French legislature’s recognition of the limits of formal equality.²⁷⁵ The ruling also marks a shift in the French government’s focus towards the objectives of “equality of outcomes, resources, [and] opportunities.”²⁷⁶ This shift may allow institutions to effect deep meaningful changes in French society to address the disparities that certain ethno-racial minorities experience. The Council does not go so far as to state that the “modalities” that may be adopted can be expanded to take note of ethno-racial classifications. If this variation were possible, then French universities would not be limited to working within pre-established segregated zones to achieve their objectives. That is, post-secondary institutions could specifically delineate the ethno-racial population that they are seeking to target without reference to geographic location, make the case that this population has been denied equal access to education and is in need of special assistance to alter the status quo, and track the status of the target group as the various programs move forward. The potential restrictive aspect of the Council’s ruling in relation to the foregoing proposed plan concerns the question that is left unanswered: How does the Council define “objective criteria” that is “of a nature” that is in conformity with the equal access requirement of Section 13?

While the French legal establishment’s responses to the Sciences Po’s plan thus far are affirming, the restrictions on making distinctions between people on the basis of race and ethnicity remain intact. Therefore, there are substantial limitations on what can be accomplished from the standpoint of the goal of ethno-racial

272. BELL, FRENCH CONSTITUTIONAL LAW, *supra* note 45, at 200.

273. Constitutional Court decision No. 2001-450DC, *supra* note 28, at 336.

274. *Id.*

275. *Id.*

276. BELL, FRENCH CONSTITUTIONAL LAW, *supra* note 45, at 200.

inclusion and access at the post-secondary education level. It is my argument that if the Republic wishes to improve or equalize the access that African minorities have to educational opportunities at prestigious French universities then it will need to implement policies utilizing ethno-race-conscious criteria. In order to do this, it is necessary to amend the French constitution. My conclusion is in keeping with recent proposals that have emerged in the context of France's ongoing debate about national identity, the direction of the nation, and its policies concerning disaffected sectors.

2. Amending the French Constitution

Recognition that the French Republic's goal of *égalité* has not yet been realized, fear of ongoing socio-political unrest similar to the uprisings in 2005, and awareness of other national models (for example, the United States' model) for addressing ethno-racial inequality motivated French President Nicolas Sarkozy²⁷⁷ to explore more aggressive options for changing the status quo in France.²⁷⁸ For example, while serving as Minister of Finance in 2004, Sarkozy announced his intention to investigate whether Article 1 and the Preamble to the 1958 French Constitution should be amended to allow for affirmative action policies to be introduced in France.²⁷⁹

President Sarkozy selected respected political figure Simone Veil²⁸⁰ to organize and head a committee that would determine whether the Preamble should be amended.²⁸¹ In December 2008, the committee issued its report (the "Veil Constitution Report").²⁸² After extensively studying affirmative action policies in

277. Sarkozy was president from 2007 until 2012. *Times Topics: Nicolas Sarkozy*, N.Y. TIMES (May 15, 2012), http://topics.nytimes.com/top/reference/timestopics/people/s/nicolas_sarkozy/index.html. In April 2012, France elected François Hollande as its new president. *Id.*

278. See, e.g., Elizabeth K. Dorminey, *France Says Non to Affirmative Action: Will the U.S. Do the Same?*, ENGAGE, July, 2009, at 42, 43, available at http://www.fed-soc.org/doclib/20090720_DormineyEngage102.pdf (noting that in 2004 President Sarkozy, as part of his constitutional reform efforts, commissioned a report to determine whether the Preamble to the French Constitution should be revised to "permit . . . minorities to gain access to opportunities in education and employment on a preferential basis" to combat social unrest and high crime "among minorities who are disproportionately unemployed and undereducated"); see also *France Backs Constitutional Reform*, BBC NEWS (Jul. 21, 2008), <http://news.bbc.co.uk/2/hi/7517505.stm> (explaining that Sarkozy's constitutional reforms, which were one of his "key election pledges," passed through Parliament).

279. Dorminey, *supra* note 278, at 43. The 1958 Preamble to the French Constitution, in relevant part, states: "The French people solemnly proclaim their commitment to the Rights of Man and the principles of national sovereignty as have been defined in the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946 . . ." 1958 CONST. pmbl. (Fr.).

280. See, e.g., Pascale Fréry, *Simone Veil*, FRANCE IN THE UNITED KINGDOM, <http://www.ambafrance-uk.org/Politics-Simone-Veil.html> (last visited Nov. 4, 2012) (explaining that Ms. Veil, currently a member of France's Constitutional Council, previously served as both President of the European Parliament and as French Minister; Ms. Veil is also an Auschwitz survivor).

281. Dorminey, *supra* note 278, at 42-43.

282. *Id.*; COMITÉ DE RÉFLEXION SUR LE PRÉAMBULE DE LA CONSTITUTION, REDÉCOUVRIR LE PRÉAMBULE DE LA CONSTITUTION: RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE (2008) (Fr.), available at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000758/0000.pdf>.

other countries and the spirit and goals of the foundational documents of the French nation, including the Declaration of the Rights of Man and the 1958 French Constitution, the committee concluded that amending the French Constitution to facilitate the implementation of affirmative action policies would be counter to the basic guiding laws and principles of the nation.²⁸³ The committee concluded that the 1958 Constitution, in its unmodified form, provides ample protection for the "fundamental rights" articulated by the French nation.²⁸⁴ Specifically, the Veil Constitution Report states:

Overall, the committee did not recommend in the Preamble of the Constitution the adoption of affirmative action measures founded on ethnic or racial grounds regardless of whether they would be conceived as temporary or not. This was not, in the committee's opinion, the meaning of the question it was asked to interpret in the mission letter spelling out the assignment. It therefore did not recommend that Article I of the Constitution which guarantees "the equality of all citizens before the law without distinction as to ethnic origin, race or religion," be modified in such manner.²⁸⁵

Other prominent French scholars, such as Patrick Weil, have also expressed opposition to amending the Constitution in this regard, arguing that inserting language permitting ethno-racial classifications recalls the days of slavery, colonization, and the Vichy regime.²⁸⁶ Patrick Weil reasons that the current language of the French 1958 Constitution, which prohibits such distinctions, is designed to ensure that similar atrocities against humanity do not happen again.²⁸⁷ Another compelling argument against the use of ethno-racial criteria and the collection of ethno-racial statistics in any form is offered by Dominique Sopo, President of SOS Racisme, a prominent anti-discrimination group in France.²⁸⁸ Sopo comments:

[T]he way in which identity has been constructed in France is very

283. Dorminey, *supra* note 278, at 43.

284. *Id.* at 43-44; ROGOFF, *supra* note 28, at 221.

285. COMITÉ DE RÉFLEXION SUR LE PRÉAMBULE DE LA CONSTITUTION, *supra* note 282, 44-45 (trans. Kristen Barnes) ("Au total, le comité n'a donc pas recommandé d'autoriser, dans le Préambule de la Constitution, des politiques d'action positive à fondement ethnique ou racial, fussent-elles conçues comme provisoires. Tel n'était du reste pas, à ses yeux, le sens qu'il fallait prêter à la question qui lui était posée dans la lettre de mission qui lui était adressée. Il n'a donc pas proposé que soit modifié en ce sens l'article 1^{er} de la Constitution Assurant «l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion».").

286. Interview with Patrick Weil, *Entretien Avec Patrick Weil, Directeur de Recherche Au Cnrs «Il faut passer à l'action au lieu de se contenter de symboles!»*, LE MONDE (Fr.), Dec. 18, 2008, http://www.lemonde.fr/cgibin/ACHATS/acheter.cgi?offre=ARCHIVES&type_item=ART_ARCH_30J&objet_id=1062848&xtmc=il_faut_passer_a_l_action_au_lieu_de_se_contenter_de_symboles&xtr=1.

287. *Id.*

288. Interview with Dominique Sopo, *supra* note 56, at 1.

different from what happened in the U.S. For example, the category “black” would be very problematic in the French context, because in this country an individual’s identity can be defined in many ways. To take my own case, I could decide to classify myself as French, or as black, or as métis (“mixed-race”), or as Togolese, or even French-Togolese. In France, if you invite people to classify themselves, you’ll end up with dozens, if not hundreds, of different answers. So, for ethno-racial categories to have any kind of utility, one would be forced to consolidate these answers into a smaller number of labels. But this would leave us with a statistical apparatus that wouldn’t allow people to decide for themselves who they are, and which eventually could harden into a normative, or even a prescriptive, set of requirements.²⁸⁹

Notwithstanding these objections, it is important to note some of the benefits²⁹⁰ that the French government could reap from officially recognizing ethno-racial classifications. If ethno-racial categories are recognized, then accurate statistics on majority and minority populations can be collected and a comprehensive assessment of how various groups are faring in education, employment, and in attaining access to other vital goods and services can be undertaken, instead of leaving these tasks to guesswork.²⁹¹ While the concerns of Weil, Sopo, and the Veil Commission should not be discounted, amending the constitution to allow for ethno-racial classifications to be recognized in connection with effectuating certain equalizing policies is not incongruous with France’s foundational principle of equality. As long as such criteria are used in a careful, sensitive, and monitored way, it could help to improve the lives of French citizens and residents overall while remaining faithful to the paramount goal of equality. Further, the concerns expressed by Sopo miss the point that regardless of whether ethno-racial statistics are collected, people, historically, have formed opinions about others, in France and the United States, when differences are detected based upon numerous factors including phenotype features, religious practices, and origins. This phenomenon has proven to be, in the history of both countries, enormously detrimental to minorities.²⁹² Given that distinctions are made anyway,

289. *Id.*

290. Law professor Gwénaële Calvès challenges whether ethno-racial statistics would be used for benign purposes. She maintains instead that businesses will seek to use the information to “demonstrate that their workforce contains an ‘appropriate proportion’ of people from a given category” in the event that they are charged with discrimination. Interview with Gwénaële Calvès, *supra* note 79, at 2. I question whether this is a negative outcome. The fact that employers may be charged with ethno-racial discrimination and their guilt or innocence may be established in part by the use of such statistics may incentivize employers to be careful and fair in their hiring practices, to the extent they are not already proceeding in this manner. Therefore, the statistics could work to curb ethno-racial discrimination in hiring.

291. See Fouteau, *supra* note 62 (explaining that racial statistics are the only means of measuring the effects of discrimination).

292. See, e.g., Sabbagh, *The Collection of Ethnoracial Statistics*, *supra* note 246, at 1 (noting that the United States’ census includes race despite the country’s history of state-sanctioned racial

why not have a formal mechanism in place to combat the harmful effects? In France, where a substantial number of individuals who fall under the broad, non-government-endorsed categories of "African" and "Arab" live in the impoverished outer cities that suffer from limited education opportunities and broad social exclusion,²⁹³ why not acknowledge that these groups are experiencing disadvantages and design programs to assist them? The fact that ethno-racial categories are acknowledged does not mean that individuals will no longer be able to engage in the ongoing process of self-definition and identification; this is a struggle that will continue to be waged, regardless of the system in place.²⁹⁴ Rather than getting inundated by endless micro-ethno-racial categories, broader categories can serve the purpose of crafting equalizing educational and anti-discrimination policies.²⁹⁵

The implications of the Veil Constitution Report for expanding pro-equality policies in the direction of ethno-racial minorities cannot be ignored. While the commission's conclusions may stall France's progression towards the explicit use of ethno-racial factors in fashioning equality of educational opportunity policies, the question of how to reconcile France's admirable grand concepts of liberty, equality, and fraternity with the real circumstances of inequality that many French African people are currently experiencing remains unanswered. Despite the unwillingness of the Veil Commission to endorse an amendment to the 1958 Constitution to allow for distinctions to be drawn on the basis of ethno-racial criteria in facilitation of affirmative action-like policies, the commission nonetheless proposed that a statement regarding "the principle of the equal human dignity of every individual" be included in Article I of the 1958 Constitution.²⁹⁶ Perhaps this suggestion can be used as a starting point when the issue of the appropriateness of ethno-racial factors and affirmative action policies in France is revisited by constitutional law experts and government officials. It is clear that given the virulence of current events, the issue will continue to resurface until more broad-based national solutions to the country's inequities are crafted.

The task of persuading a majority of the French populace and the appropriate

discrimination, whereas the French census does not include race due in part to the Vichy government's use of race to persecute Jews).

293. See, e.g., Polakow-Suransky, *supra* note 99 (explaining that France's growing North African immigrant population lives primarily in "drab" neighborhoods on the outskirts of Paris); Interview with Dominique Sopo, *supra* note 56, at 1, 3, 4-5, 8 (noting the impact that culture has on French racism and the exclusion of African immigrants from center city neighborhoods).

294. See Interview with Dominique Sopo, *supra* note 56, at 1-2 (considering the effect ethno-racial categories would have on the self-identification of France's minority citizens); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 14-16 (2002) (noting that due to ongoing and inevitable racial integration, new demographics and identities are spreading, and will continue to spread in the future).

295. See Cristina M. Rodriguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1407 (2008) ("[T]he broad, undifferentiated use of racial classifications better balances the interest in ensuring the representation of disadvantaged or subordinated minority groups in public institutions and the political process with the imperative of keeping the definition of race fluid.").

296. ROGOFF, *supra* note 28, at 221.

government officials that amending the 1958 Constitution in the manner proposed is daunting; nevertheless, it is worth noting that, historically, the French Constitution of 1958 has undergone numerous amendments²⁹⁷ and there is already a process for amending this document outlined in Title XVI, Article 89 of the Constitution.²⁹⁸ The July 2008 amendments provide recent precedents for amending the French Constitution.²⁹⁹ Thus, it is possible for the French Republic to conclude that a constitutional amendment to address the disparities in treatment of ethno-racial minorities is merited; however, it will take persistence, substantial persuasion, and the recognition that the current limited programs undertaken by certain institutions are insufficient. Persuasive support to facilitate this process of moving towards amending the French Constitution can be found within French law and within international law and the laws of the European Union, of which France is a member.

In addition to Section 13 of the Preamble to the 1946 French Constitution, which “guarantees equal access for children and adults to instruction, vocational training and culture at all levels” and avers that the “provision of free, public, and secular education at all levels is a duty of the state,”³⁰⁰ proponents of a constitutional amendment could also turn to the international law arena to bolster their arguments that France must recognize ethno-racial criteria in order to achieve the elusive goals of equal access and equality in education for African minorities residing in France.

3. An Alternative Legal Basis for Affirmative Action Grounded in International Law

While an in-depth consideration of how France’s legal regime and certain European conventions and international treaties may figure into the development of

297. *See id.* at 34 (noting that the French Constitution of 1958 has been amended twenty-three times between its creation in 1958 and February 2008 and that in July 2008, the Constitution was substantially amended in order to conform to new developments, needs, ideas, and values in French society).

298. Title XVI, Article 89 of the 1958 French Constitution provides:

The President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament alike shall have the right to initiate amendments to the Constitution.

A Government or a Private Member’s Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of article 42 and be passed by the two Houses in identical terms. The amendment shall take effect after approval by referendum.

However, a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly.

No amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy.

The republican form of government shall not be the object of any amendment.

1958 CONST. art. 89 (Fr.). Rogoff counts no less than twenty-three amendments to the 1958 French Constitution from the moment of its adoption to the present. ROGOFF, *supra* note 28, at 6.

299. ROGOFF, *supra* note 28, at 85.

300. 1946 CONST. pmbl. § 13 (Fr.).

France's affirmative action and anti-discrimination policies is beyond the scope of this article, the issue merits some attention. Within the international legal framework there is support for the argument that the matter of amending the French Constitution should be revisited to allow for the fashioning of broader national solutions to the education and socio-economic disparities that plague African minorities, along with certain other minority groups,³⁰¹ and that the necessary changes can be accomplished without violating France's fundamental principle of equality.

The complex interplay between France's laws, institutions, and procedures and the international conventions, treaties, and courts to which France is subject continues to be sorted out by the French government.³⁰² Notwithstanding this ongoing process, because France is a member of the European Union and a participant in the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"),³⁰³ proponents for the use of ethno-race-based affirmative action can resort to international law as an alternative source of support for the arguments that (i) such classifications are necessary in order to design policies that effectively assist that sector of the French population which seems to be encountering substantial obstacles in the areas of educational attainment and socio-economic advancement; and (ii) the use of such policies does not unduly impinge on the ideal that all peoples should be treated equally and not subjected to ethnic or racial discrimination.³⁰⁴ In contrast to the prevailing interpretation of French laws which deems any ethno-racial distinctions made in the context of distributing governmental resources and benefits as constitutionally-prohibited invidious racial discrimination,³⁰⁵ ICERD defines "racial discrimination" as "impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."³⁰⁶ Under the legal rubric of ICERD,

301. Recent minority immigrant groups in France from the French Caribbean, Vietnam, Cambodia, and Eastern Europe are also susceptible to suffering from the inequities noted. See HARGREAVES, MULTI-ETHNIC FRANCE, *supra* note 12, at 72-74 (discussing the difficulties that immigrants from Vietnam, Cambodia, and the French Caribbean face); see also Quinn Bennett, *Please Don't Be Our Guest: The Roma Expulsion from France Under European Union Law*, 40 GA. J. INT'L & COMP. L. 219, 226-27 (2011) (discussing the difficulties that immigrants from Eastern Europe face).

302. See ROGOFF, *supra* note 28, at 407 ("French judges have become more aware of and more sensitive to the requirements of international law, and have made enormous progress in formulating constitutional doctrine that is both responsive to the need to fulfill France's international legal obligations, while at the same time doing so with constitutional legitimacy.").

303. ICERD, *supra* note 247; Costa-Lascoux, *supra* note 247, at 371.

304. Costa-Lascoux, *supra* note 247, at 372 (noting that France makes reference to ICERD in its legislation and adopts its definitions).

305. Sabbagh, *The Collection of Ethnoracial Statistics*, *supra* note 246, at 1.

306. The full text of Part I, Article 1, Section 1 defines "racial discrimination":

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms *shall not be deemed racial discrimination*, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.³⁰⁷

Drawing inspiration and support from ICERD could be useful to the French government in at least three respects. First, referencing ICERD, the French government could formally recognize ethno-racial classifications which would allow the government to assess the extent to which certain minority groups are not receiving a quality education and have no meaningful track for acceptance into institutions of higher education as compared to the majority population. Second, policies could be specifically tailored to address the educational needs of those underserved minority groups. Third, the rationale the French government offers for adopting this track for responding to ethno-racial inequalities in education could be couched in the language of ICERD to underscore that a refusal to adopt the type of approach outlined results in a denial of the “equal enjoyment” and “exercise of human rights and fundamental freedoms” to a significant part of the French populace. That is, France’s resistance to adopting the more aggressive, explicit avenue that ICERD allows effectively consigns a substantial number of African French students to a life of poverty or severely impairs their economic advancement.³⁰⁸ To persist without change threatens France’s image as a nation that prides itself as an exceptional example of fairness and equality.

An argument can also be made that to resist such ethno-race-based approaches puts France out of step from a human rights standpoint.³⁰⁹ Rather than being a leader on this front, France is lagging behind the times with respect to the actual opportunities for minorities, including African French people, to have decent quality lives. The foregoing ICERD provision suggests that devising measures to assist ethno-racial minorities who are socially, politically, and economically marginalized is a legally permissible strategy from the standpoint of international law and, because France has acceded to this Convention, from the perspective of

ICERD, *supra* note 247, at art. 1, ¶ 1.

307. *Id.* art. 1, ¶ 4 (emphasis added).

308. See Guttenplan, *supra* note 107 (discussing the significant increase in wealth that underprivileged minorities experienced after Sciences Po decided to relax its standards for eighty-five secondary schools in underprivileged parts of France).

309. See John Rossant, *Liberté, Égalité, Affirmative Action*, BUS. WK., Jan. 30, 2005, <http://www.businessweek.com/stories/2005-01-30/liberte-egalite-affirmative-action> (arguing that affirmative action is necessary in France in order to ameliorate the unemployment and poverty in the suburbs that are home to many French citizens of North African origin).

French legal principles as well.³¹⁰ There is even a basis, within French constitutional law, for addressing complaints that adopting policies to satisfy France's obligations under ICERD would be in conflict with French laws. French constitutional law scholar Martin Rogoff comments that Article 55 of the French Constitution,³¹¹ under certain circumstances, supports the position that in matters of conflict between a French law and international treaties and conventions, the international convention should trump.³¹² Finally, the language of ICERD indicates that it is aimed at promoting the aggressive undertaking of affirmative action policies that will assist in eradicating, *inter alia*, unequal (educational) opportunities that are suffered by ethno-racial minorities.³¹³

IV. EQUALITY OF EDUCATIONAL OPPORTUNITY IN TEXAS AND THE CURRENT U.S. LEGAL LANDSCAPE

A. *What a Difference a Day Makes: Grutter, Gratz, and the Ten Percent Plan*

In Section II, I highlighted the cases *Brown*,³¹⁴ *Bakke*,³¹⁵ and *Hopwood*,³¹⁶ as the historical legal precedents that laid the foundation for the Texas Ten Percent Plan. Since the plan's implementation in 1998, U.S. educational equality law has experienced some tumultuous shifts and remains contested.³¹⁷ Fierce debates continue to be waged over the best methods to address historic inequalities that certain minorities have experienced,³¹⁸ and continue to experience, within this country while also remaining faithful to the idea that all citizens are equal before the law.³¹⁹ The legal changes have a critical impact on the ways in which the plan

310. ICERD, *supra* note 247, art. 1, ¶ 4.

311. "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party." 1958 CONST. art. 55 (Fr.).

312. See ROGOFF, *supra* note 28, at 224. ("Treaties and international agreements . . . can be applied by the Council of State and the Court of Cassation, and in case of conflict with a law or administrative act, the international obligation, by virtue of article 55 of the constitution, will take priority.").

313. See ICERD, *supra* note 247, art. 7 ("States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, *education*, culture and information, with a view to combating prejudices which lead to racial discrimination" (emphasis added)).

314. 347 U.S. 483.

315. 438 U.S. 265.

316. 78 F.3d 932.

317. See Ronald Caldwell Jr., *The Erosion of Affirmative Action and Its Consequences for the Black-White Educational Attainment Gap*, 57 U. KAN. L. REV. 813, 818 (2009) (discussing the various laws that were passed in multiple states regarding affirmative action in education contemporaneously to the Texas Ten Percent Plan).

318. *Id.* at 813 (noting that the "disparity in economic outcomes between whites and blacks in the United States has long been an important social and political issue" and that the "use of affirmative action in university admissions has now endured more than a decade of legal, political, and social challenges and will likely remain a topic of significant debate in the near future").

319. The Declaration of Independence of 1776, a cornerstone U.S. history proclaims, "We hold these truths to be self-evident, that all men are created equal" THE DECLARATION OF INDEPENDENCE para. 2 (1776).

can be reformed and expanded in the interests of attaining equality in educational opportunities for underrepresented minorities. The proposed modifications to the Ten Percent Law relate to my first and second theses, that race and ethnicity still matter, requiring academic institutions and policy makers to continue to take these factors into account when formulating equality policies. At the forefront of the shift in U.S. equality jurisprudence is the U.S. Supreme Court decision *Grutter v. Bollinger*,³²⁰ which redefined the education equality law landscape.³²¹

The *Grutter* decision marked the U.S. Supreme Court's return to the question whether the use of ethno-racial criteria by public universities in admissions decisions is constitutionally permissible, after nearly twenty-six years of silence following the *Bakke* case.³²² A white female resident of Michigan, named Barbara Grutter, in 1996 brought the case after she applied to the University of Michigan Law School ("UM Law School"), was placed on a waiting list, and eventually was denied admission. In the following year, Ms. Grutter filed suit against the UM Law School, the Regents of the University of Michigan, and school officials responsible for overseeing the admissions process, alleging that those named in the suit discriminated against her on the basis of race in violation of the Fourteenth Amendment,³²³ Title VI of the Civil Rights Act of 1964,³²⁴ and 42 U.S.C. § 1981.³²⁵ As relief, Grutter sought compensatory and punitive damages, an order directing the UM Law School to grant her admission, and an injunction to prohibit the law school from continuing to engage in racially discriminatory practices.³²⁶ The policy challenged in *Grutter* entails the selection of students based upon a range of factors including LSAT score, grade point average, essays, letters of recommendation,

320. 539 U.S. 306.

321. *Id.* at 337-44 (holding that a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment" and not based on race alone was within constitutionally prescribed limits for the admissions process of a post-secondary educational institution); *see also Fisher*, 631 F.3d at 249-51 (Garza, J., concurring) ("[T]he Court [in *Grutter*] redefined the meaning of narrow tailoring. . . . And thus, all that truly remains of strict scrutiny's narrow tailoring inquiry post-*Grutter* is the requirement of 'individualized consideration.'").

322. *See* Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in Grutter*, 15 TEX. REV. L. & POL. 437, 446 (2011) (noting that during the twenty-five years between *Bakke* and *Grutter*, the Supreme Court had many opportunities to introduce diversity as a compelling state interest, but declined to do so).

323. U.S. CONST. amend. XIV., § 2.

324. 42 U.S.C. § 2000d.

325. *Grutter*, 539 U.S. at 317. The framing of Ms. Grutter's suit is exemplary of lawsuits involving equal educational opportunity issues. As an interesting aside, both the intended beneficiaries of these laws, from the vantage point of the legislative histories, and complainants who seek to dismantle affirmative action have relied upon the aforementioned laws in stating their claims. *See, e.g., Gratz*, 539 U.S. at 270 (holding that the university's policy utilizing ethno-racial criteria was not narrowly tailored and therefore violated the Equal Protection Clause of the Fourteenth Amendment, Title VI, and 42 U.S.C. § 1981(a)); *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (holding that the failure of the school district to provide remedial language instruction to non-English speaking Chinese students violated Title VI).

326. *Grutter*, 539 U.S. at 317.

undergraduate courses taken, and life experience.³²⁷ The UM Law School also includes, as part of its admissions policy, a focus on attaining and maintaining a diverse student body with special emphasis on individuals from groups that have been historically marginalized such as African Americans, Latinos, and Native Americans.³²⁸

Grutter resolves opposing views of the lower courts regarding whether Justice Powell's opinion in *Bakke*, that assembling a diverse student population constitutes a sufficiently compelling interest to withstand strict scrutiny,³²⁹ and that race and ethnicity may be included as factors for consideration in administering a school's admissions policy,³³⁰ is binding precedent.³³¹ The *Grutter* Court answered in the affirmative holding that (1) "student body diversity is a compelling state interest that can justify the use of race in university admissions"³³² and (2) the UM Law School's use of ethnicity and race in its admissions policy was not precluded by the Equal Protection Clause because it was "narrowly tailored" to the school's "compelling interest in obtaining the educational benefits that flow from a diverse student body."³³³ The *Grutter* holding had direct and substantial implications for school administrators and the Texas Ten Percent Plan because it overruled *Hopwood* and cleared the way for race and ethnicity to once again be considered by public colleges and universities in Texas in formulating their student admissions schemes.³³⁴ The *Grutter* holding offered desperately needed maneuverability to school administrators, judging from the limitations that they were encountering in having to rely solely upon the percentage strategy to accomplish ethno-racial access and diversity in their student populations. Evidence of the limited effectiveness of the Ten Percent strategy is provided, in part, by the comments voiced by the Plan's administrators, who observed that the plan does not result in a sufficient number of admissions of underrepresented minorities if one takes into account the ethno-racial make-up of the state.³³⁵ Patricia Ohlendorf, Vice President for Legal Affairs at UT Austin has expressed concern that the surrogate Ten Percent approach is inadequate

327. *Id.* at 315.

328. *Id.* at 316.

329. In a section of the opinion that was not joined by a majority of the Court, Justice Powell concluded that "the attainment of a diverse student body" is "clearly a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.).

330. *Id.* at 320.

331. See *Hopwood*, 78 F.3d at 944 ("Justice Powell's view in *Bakke* is not binding precedent on this issue."); cf. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (stating, without mentioning *Bakke*, that diversity cannot "be elevated to the 'compelling' level").

332. 539 U.S. at 325. Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer were the majority upholding the UM Law School's ethno-race-conscious admissions policy. *Id.* at 343-44. Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy dissented from the majority decision. *Id.* at 379 (dissenting opinion).

333. *Id.* at 343.

334. See Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 519 (2007) (noting that due to the holdings in *Grutter* and *Gratz*, public college and universities are now free to consider race and ethnicity in their admissions process).

335. See Holley & Spencer, *supra* note 204, at 247 (discussing that when taking into account the racial make-up of Texas, the Texas Plan fails to admit enough underrepresented minorities).

to satisfy the important objective of providing significant educational opportunities to a multi-ethnic community, particularly in view of the growing Latino population.³³⁶ Ohlendorf observed, “We [at UT Austin] have not found that the top-10-percent law and policy in and of itself have been sufficient to achieve a *critical mass* of minority students.”³³⁷

Comments about the potential resulting shortfalls of Texas’ Plan did not fall on deaf ears. Empowered by *Grutter*, the University of Texas Board of Regents, by an August 6, 2003 resolution, invited each university in the Texas school system to review whether ethno-racial factors should be reintroduced and considered as part of the admissions process.³³⁸ Relying upon *Grutter* as a roadmap, the Board of Regents cautioned that taking into account such criteria must be done in a “holistic” way conforming to the type of review advocated in *Grutter*.³³⁹ Following each school’s independent assessment of whether ethnic and race-based information should be incorporated back into the admissions decisions, the Texas Board of Regents opined in August 2004 that race and ethnicity could be considered as a “special circumstance” in determining the personal achievement score of a high school applicant.³⁴⁰

Taking its cue from the Board of Regents decision, in 2004, UT Austin announced its intention to address the constraints of the plan by fashioning an ethno-race-conscious admissions approach, based upon the admissions policy scrutinized and held constitutional in *Grutter*, to operate in tandem with the Ten Percent Plan.³⁴¹ UT Austin outlined its plan in the document, *Proposal to Consider Race and Ethnicity in Admissions* (“UT 2004 Proposal”).³⁴² Under this plan, UT Austin kept in place, for Texas residents, its policy of first granting automatic admission to those individuals meeting the criteria of the Ten Percent Law. For the remaining slots carved out for Texas residents, those students who do not qualify for automatic admission under the Ten Percent Law are granted admission based upon their Academic Index (“AI”) and Personal Achievement Index (“PAI”).³⁴³

336. Mangan, *supra* note 218.

337. *Id.* (emphasis added). The concept of “critical mass” is an important one that will continue to arise in the debates regarding equal education. Justice O’Connor, in *Grutter*, distinguished a quota from the critical mass concept emphasizing that the first is too rigid in that it requires that a fixed number be met. 539 U.S. at 325.

338. *Fisher*, 645 F. Supp. 2d at 593.

339. *Id.*

340. *Id.* at 594.

341. See James F. Blumstein, *Grutter and Fisher: A Reassessment and a Preview*, 65 VAND. L. REV. EN BANC 57, 58-59 (2012) (“In 2004, the University of Texas reintroduced the consideration of race into the admissions process as a means of increasing student body diversity.”).

342. *Fisher*, 645 F. Supp. 2d at 601.

343. The AI is “a computation based on the student’s high school class rank, standardized test scores, and the extent to which the applicant exceeded UT’s required high school curriculum.” *Fisher*, 631 F.3d at 222. The PAI is composed of three scores. Two separate scores are awarded for the two mandatory essays, and a “personal achievement score” which is based on the complete file of the applicant. *Id.* at 227-28. The personal achievement score is based on admissions officials’ “assess[ment] [of] an applicant’s demonstrated leadership qualities, awards, and honors, work experience, and involvement in extracurricular activities . . . [and] a ‘special circumstances’ element that may reflect the socioeconomic

Whereas ethnicity and race previously were not included as items for consideration, UT Austin modified its permissible criteria to allow race and ethnicity factors to be weighed as part of a student's PAI. UT Austin's addition of ethno-race-based criteria to the admissions decisions process yielded notable increases in Latino and African American enrollment. At the time the 2004 proposal was issued, African Americans comprised 4.5% of the first year class and Latinos constituted 16.9%³⁴⁴ of a total entering class of approximately 7000 students.³⁴⁵ With the addition of the ethno-racial components into UT Austin's admissions decisions, the percentage of Latino students in the first year class advanced to 20% and the percentage of African American students climbed to 6%.³⁴⁶ The Texas Board of Regent's decision to allow the reintegration of ethnicity and race into college admissions procedures suggests that a successful strategy to include historically excluded ethno-racial minorities must expressly account for those factors which were the basis of their prior exclusion (that is, race and ethnicity). The Texas results also indicate that a battery of inclusion strategies may be necessary to attain the elusive ideal of equality of educational opportunity. UT Austin's hybrid plan of attack strikes the right balance by combining the percentage plan, which works to some extent, with the use of ethno-racial criteria to address the shortfalls of minority admissions under the plan.

Grutter is not only significant because of what it permits schools to consider in rendering their admissions decisions, but also because it helps to delineate the constitutionally-acceptable boundaries within which a school may operate according to its admissions procedures.³⁴⁷ The Texas Board of Regents and UT Austin took note of these boundaries when re-incorporating ethnic and racial elements back into the admissions process.³⁴⁸ UT Austin's attentiveness to this aspect of *Grutter* proved useful to it in terms of withstanding a challenge to its revised policies in 2009.³⁴⁹ The *Grutter* Court accomplished the feat of outlining the appropriate contours for an admissions policy by giving substantial attention to

status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school, *and beginning in 2004—the applicant's race.*" *Id.* at 228 (emphasis added). Allowing race to be factored into an applicant's PAI represents the significant change to the AI/PAI system, which was in place as early as 1997. *Fisher*, 645 F. Supp. 2d at 596. Other permissible factors in the "special circumstances" consideration include "whether [the applicant] lives in a single-parent home, whether languages other than English are spoken at home, [and] her SAT/ACT score compared to her school's average score." *Id.* (citing IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW, *supra* note 213, at 2).

344. *Fisher*, 631 F.3d at 244. Some sources report the figure of 16.3% for the Latino population in 2004. Hough, *supra* note 205, at 214.

345. *Fisher*, 631 F.3d at 224.

346. *Fisher*, 645 F. Supp. 2d at 594.

347. *See Grutter*, 539 U.S. at 327-28, 334 (holding that a university's race-based admissions decisions were constitutional as they were narrowly tailored and necessary to further a compelling governmental interest in achieving educational benefits from a diverse student body).

348. *Fisher*, 631 F.3d at 225.

349. *Id.* at 247.

the legal standard it applied to review UM Law School's admissions scheme.³⁵⁰ The Court adopted strict scrutiny as the legal standard of review in accordance with *City of Richmond v. J.A. Croson Co.*,³⁵¹ *Adarand Constructors, Inc. v. Peña*,³⁵² and *Bakke*.³⁵³ The strict scrutiny standard requires that any ethnic or racial classifications imposed by federal, state or local government be "narrowly tailored" and "further compelling governmental interests" in order to be held constitutional.³⁵⁴

Grutter demonstrates that a school can consider ethnicity and race without being found to have acted counter to the equal protection guarantees of the Fourteenth Amendment³⁵⁵ and the equality guarantees of Title VI³⁵⁶ and Section 1981(a).³⁵⁷ The ability to take ethno-racial criteria into account even though there are laws in place that guarantee equal treatment exemplifies the tension Justice Harry Blackmun identifies in the epigraph to this article.³⁵⁸ While the *Grutter* case is positive in the sense that it supports the use of a variety of strategies in the name of equal educational opportunity, it still plays into the hands of the proxy strategy

350. See *Grutter*, 539 U.S. at 326-28 (discussing its application of strict scrutiny to all racial classifications imposed by the government and examining UM Law School's stated compelling government interest to obtain educational benefits from a diverse student body).

351. 488 U.S. 469, 493 (1989) (plurality opinion); see *Grutter*, 539 U.S. at 333 ("The purpose of the narrow tailoring requirement is to ensure that the means chosen fit th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." (internal quotation marks omitted)).

352. 515 U.S. 200 (1995) (plurality opinion); see *Grutter*, 539 U.S. at 334 ("[W]e adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to take . . . 'relevant differences into account.'" (citations omitted)).

353. See *Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants. . . . Instead, a university may consider race or ethnicity only as a plus in a particular applicant's file, without insulat[ing] the individual from comparison with all other candidates for the available seats." (alterations in original) (quoting *Bakke*, 438 U.S. at 315-317) (internal quotation marks omitted)).

354. *Adarand*, 515 U.S. at 227.

355. 539 U.S. at 343. See generally U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

356. 539 U.S. at 343; see Civil Rights Act of 1964, 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

357. 539 U.S. at 343; see 42 U.S.C. § 1981(a) ("All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .").

358. See *Bakke*, 438 U.S. at 405 (Blackmun, J., separate opinion) ("If [affirmative action] conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area.").

approach in that it obscures ethnicity and race by enfolding it within the notion of a "holistic" view.³⁵⁹ That is, schools can rely on ethno-racial criteria, as part of their admissions decision-making as long as they also consider a host of other factors such as high school region, language ability, athletic ability, etc. Encapsulating ethnicity and race in this way is perhaps necessary given a conservative political environment that is resistant to any policies which suggest that certain minorities are benefiting from preferences to the detriment of "innocent" non-minority candidates.³⁶⁰ But, this maneuver also limits how far government and institutions can go with attempting to equalize educational opportunities for underrepresented minorities.³⁶¹ Applying *Grutter*'s guidelines to its institution, UT Austin administrators also shielded ethnicity and race behind a phalanx of items under the PAI that may be considered for admitting students.³⁶²

In reformulating its admissions components, UT Austin also had to take into account the U.S. Supreme Court's decision, *Gratz v. Bollinger*,³⁶³ which was issued in conjunction with *Grutter*.³⁶⁴ *Gratz* explained how much latitude public universities have in fashioning policies designed to address the vestiges of past discrimination and to stem the ongoing impact of disparities and discriminatory practices. It is clear from the *Gratz* holding, which struck down UM's ethno-race inflected admissions policy, that under the current U.S. legal regime, the freedom public post-secondary institutions have to attend to these issues is severely restricted.³⁶⁵ *Gratz* involved UM's use of ethno-racial factors in its admissions

359. See *Grutter*, 539 U.S. at 337 (characterizing UM's admissions program as a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."). See generally Sabbagh, Affirmative Action in the United States and France, *supra* note 4, at 7 (explaining the nature of a proxy strategy).

360. The *Grutter* Court made the determination that UM Law School's race-conscious policy does not "unduly harm nonminority applicants" and placed substantial weight on the fact that "[t]he Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected." *Grutter*, 539 U.S. at 338, 341. Legal scholar Derrick Bell has commented extensively on this practice of restricting affirmative action policies to the extent that they will harm the majority white population. See BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 253, at 209 ("[O]pponents [of minority admissions plans] resist any policy that appears to require that whites pay or even risk paying for racial wrongs that they did not themselves commit."); *id.* at 126 ("The admissions program upheld in *Grutter* is one example of a race-based measure that furthers racial justice without unduly interfering with nonminority expectations.").

361. See BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 253, at 120 ("[N]arrow tailoring requires that any race-based classification be limited in time, necessary to achieve the desired goal, and minimally burdensome to innocent nonminorities.").

362. *Fisher*, 631 F.3d at 227-28.

363. 539 U.S. 244.

364. See *Fisher*, 631 F.3d at 235 & n.121 (explaining how the UT Austin administration knew that a quota system of establishing a specific number would not survive judicial review in consideration of *Gratz*, 539 U.S. at 268, 271-72, which held that a university may not award a fixed number of bonus points to minority applicants in admissions decisions).

365. See *Gratz*, 539 U.S. at 271-72 (finding UM's admissions policy problematic because it automatically distributes twenty points to every applicant from an underrepresented minority group and lacks an individualized consideration that "has the effect of making 'the factor of race . . . decisive' for

procedures for the undergraduate program in the College of Literature and Arts.³⁶⁶ UM, in administering its program, considered a variety of factors including, *inter alia*, test scores, grades, high school curriculum, alumni connections, quality of high school attended, personal essays, in-state residency, race, and ethnicity.³⁶⁷ Regarding the latter two factors, UM identified Native Americans, African Americans, and Latinos as underrepresented minorities in their student population and sought to increase the representation of individuals from these groups.³⁶⁸ Accordingly, UM awarded students points based upon the multi-layered criteria identified above.³⁶⁹ The Court chose to focus on the aspect of UM's approach that awarded twenty points to applicants who are members of the underrepresented minority groups and concluded that:

[T]he University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.³⁷⁰

Based upon its determination that UM's admissions scheme did not meet the strict scrutiny requirement of narrow tailoring, the Court held that the policy was unconstitutional in that it violated the Equal Protection Clause of the Fourteenth Amendment, Title VI, and 42 U.S.C. § 1981.³⁷¹ Bearing in mind the parameters that *Gratz* defined, UT Austin, in refactoring racial and ethnic elements back into its admissions calculus, was careful not to quantify how these elements would be evaluated (for example, by awarding a specific number of "points" for race or ethnicity). Instead, UT Austin nestles ethnicity and race among other "special circumstance" elements and encases them within the constitutionally-approved holistic approach of the PAI.³⁷²

B. *Reintroducing Race and Ethnicity Criteria: The Fisher Case*

UT Austin's decision to re-infuse ethnicity and race into the school's admissions considerations incited some controversy and gave rise to the case

virtually every minimally qualified underrepresented minority applicant." (quoting *Bakke*, 438 U.S. at 317)).

366. *Id.* at 265.

367. *Id.* at 255.

368. *Id.* at 253-54.

369. *Id.* at 255.

370. *Gratz*, 539 U.S. at 270.

371. Justices Rehnquist, O'Connor, Scalia, Kennedy, Thomas, and Breyer constituted the majority to hold UM's admissions policy unconstitutional. *Id.* at 275-76. Justices Stevens, *id.* at 282-91 (Stevens, J., dissenting), Souter, *id.* at 291-98 (Souter, J., dissenting), and Ginsburg, *id.* at 298-305 (Ginsburg, J., dissenting), all filed dissenting opinions.

372. *Fisher*, 645 F. Supp. 2d at 596-98.

Fisher v. University of Texas.³⁷³ The immediate critical importance of the *Fisher* case in the U.S. affirmative action debate cannot be overemphasized, especially because a final decision on the case, which was argued before the Court in October 2012, is anticipated in the coming year.³⁷⁴ In *Fisher*, two white Texas residents filed the initial lawsuit in the U.S. District Court for the Western District of Texas against UT Austin and other school officials after the school denied them admission for the 2008 school year.³⁷⁵ The crux of the plaintiffs' argument was that UT Austin is precluded from re-introducing ethnicity and race criteria into its admission process given that it already has in place a strategy that does not rely on these criteria (that is, the Ten Percent Plan) yet achieves a diverse student population. In other words, UT Austin may not simultaneously pursue two different strategies to accomplish ethno-racial diversity, and, further, where a non-ethno-race-based strategy exists, the university's reliance upon such factors is not constitutionally permissible.³⁷⁶ Specifically, the *Fisher* plaintiffs argued that:

UT's decision to reintroduce the use of race-conscious admissions was unconstitutional because minority enrollment already met or exceeded "critical mass" when this decision was made, and thus any further facial consideration of race was neither warranted nor constitutional.³⁷⁷

Despite the plaintiffs' argument, there is no numeric value attached to the definition of "critical mass"³⁷⁸ and thus, as a preliminary matter, their attempt to posit what constitutes that threshold does not have a basis in equal education jurisprudence. Rejecting the plaintiffs' argument, the District Court held that, "Nothing in *Grutter* prohibits a university from using both race-neutral alternatives and race itself."³⁷⁹ Concluding that "[a] university presenting itself as open to all may be challenged when the state's minority population grows steadily but minority enrollment does not,"³⁸⁰ the Fifth Circuit affirmed the constitutionality of UT Austin's admissions program.³⁸¹

The controversy in *Fisher* demonstrates the necessity of keeping the goals of inclusion and diversity transparent in admissions processes, even when the processes rely on non-race-based strategies and ethno-racial proxies. This clarity is

373. 631 F.3d at 213.

374. 132 S. Ct. 1536, No. 11-345 (argued Oct. 10, 2012).

375. *Fisher*, 645 F. Supp. 2d at 590.

376. *Fisher*, 631 F.3d at 242-43.

377. *Id.* at 242.

378. *Id.* at 235.

379. *Fisher*, 645 F. Supp. 2d at 612 (emphasis added).

380. *Fisher*, 631 F.3d at 237.

381. *Id.* at 246-47. The recent *Fisher* decision was rendered by a federal appeals court consisting of a three-judge panel, which was composed of Judge Patrick Higginbotham, the author of the opinion, Judge Carolyn Dineen King, and Judge Emilio M. Garza. In a nine to seven vote, the judges of the U.S. Court of Appeals of the Fifth Circuit declined to grant a rehearing of the *Fisher* case before the full Fifth Circuit.

necessary so that, if the proxy approach is deemed inadequate by school officials, for example, an appropriate adjustment can be made, including one that allows for the express consideration of ethno-racial criteria. UT Austin's move to reincorporate an ethno-race-conscious policy into its admissions decisions indicates that proxy strategies, such as percentage plans, are insufficient to achieve the goals of equal access and ethno-racial diversity.

However, while current proxy plans may have limited potential to produce a critical mass of minority students, this limitation derives from the specific application of the plans. Proxies may not be inherently inferior. That is, a substitute approach could be crafted combining a number of factors as proxies (for example, low economic status, attendance at poorly performing schools of limited economic resources, and residence in economically-challenged neighborhoods) that disproportionately impact underrepresented minority students.³⁸² This "super-proxy" could result in a significant increase in the percentage of minority students admitted to post-secondary schools. However, there would likely be a public outcry over the adoption of a super-proxy. A mechanism particularized in this manner that yields a substantial increase in minority admissions would lose its claim to being racially "neutral" and would be subject to constitutional challenge. Opponents would likely argue that the super-proxy is a mere pretext for making ethno-race-conscious decisions. Political climate limits how far schools may go with developing a proxy for admissions programs.³⁸³ When one encounters the limits of proxy strategies, there may be a need to take ethno-racial factors into account. If one has been clear about which outcomes are important, then it strengthens the response to legal challenges. My thesis is in accord with the guidelines recently issued by the Office of Civil Rights for the U.S. Department of Education and the Civil Rights Division of the U.S. Department of Justice, which assert that "[i]n some cases, race-neutral approaches will be unworkable because they will be ineffective to achieve the diversity the institution seeks."³⁸⁴

V. OVERALL COMPARISON OF THE SIMILARITIES AND DIFFERENCES BETWEEN THE TEXAS TEN PERCENT PLAN AND THE SCIENCES PO'S CEP PLAN

A. *Similarities Between the Texas and the Sciences Po Strategies*

The proxy approaches implemented in the United States and France share similar goals regarding diversity. Like the Sciences Po's CEP program, the Texas

382. See, e.g., U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. & U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION 7 (2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.pdf> [hereinafter GUIDANCE ON THE VOLUNTARY USE OF RACE] ("An institution could consider an applicant's socioeconomic status, first-generation college status, geographic residency, or other race-neutral criteria if doing so would assist in drawing students from different racial backgrounds to the institution.").

383. BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 253, at 211.

384. GUIDANCE ON THE VOLUNTARY USE OF RACE, *supra* note 382, at 6.

Plan relies upon factors other than race and ethnicity to categorize and select students.³⁸⁵ Also, like the French program, the Texas Plan relies upon the secondary factor of ethno-racial high school demographics and housing so that its program can be cast as facially race-neutral.³⁸⁶ Both plans were introduced into challenging legal environments that ostensibly precluded explicit references to and reliance upon ethno-racial criteria.³⁸⁷

Another similarity that both plans share is the shortcoming that the way in which the schemes are structured means they are inadequate proxies to fully capture sufficient numbers of underrepresented ethno-racial students.³⁸⁸ Just as there are talented Texas students from the underrepresented pool who fall within the second and third deciles and, thus, do not qualify for automatic admission under the Top Ten Percent Law, there are talented underrepresented minority French students who do not live within the favored zones but may, nonetheless, encounter exclusion or discrimination which impairs their ability to advance within France's education system and ultimately, to acquire gainful and prestigious employment.

B. Differences Between the Texas and Sciences Po Strategies

There are also some important differences between the CEP scheme and Texas' Plan. First, as distinguished from the French plan, the Texas Plan does not have to de-emphasize ethnicity and race to the same degree as the French program in order to be deemed constitutionally valid because, under *Grutter*, race may be considered as one factor among many to achieve the compelling goal of diversifying a school's student population.³⁸⁹ For political reasons, the ethno-racial goals are not always highlighted, but Texas schools are permitted, under the U.S. Constitution, to articulate and pursue the goals of equal access and diversity in education.³⁹⁰ Indeed, as expressed in the amicus brief filed by the United States in *Grutter*, the goal of "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective."³⁹¹ The Sciences Po, in contrast, strategically chooses not to emphasize the ethno-racial diversity goals of its CEP program so as not to run afoul of the constitutional prohibition of not making distinctions as to "origin, race or religion."³⁹²

Second, as previously discussed, the CEP program is more limited in focus in that it does not apply to the whole of France or even to the entire center of Paris

385. *Fisher*, 631 F.3d at 228.

386. *Id.* at 228-29.

387. Donahoo, *supra* note 8, at 264.

388. *See id.* at 253 ("[T]hese programs help to protect White privilege by providing a limited pathway that allows a few non-Whites to succeed in what continue to be racially hostile environments.").

389. 539 U.S. at 334.

390. *Id.* at 343.

391. Brief for the United States as Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 176635 at *13.

392. 1958 CONST. art. 1 (Fr.).

and its adjacent outlying regions and is confined to the admissions of one university.³⁹³ This reach is in contrast to the Texas plan, which applies to the entire State of Texas and all of the state's public post-secondary education institutions.³⁹⁴

A third difference is that, while the Texas Plan stipulates that a certain percentage of high school students are qualified to be admitted to a Texas college or university of their choice, there is no agreed upon percentage of top students from each high school that is granted admission under the French plan. Rather, the Sciences Po has substantial discretion in selecting who will be admitted under the CEP program and the number of students.³⁹⁵ The Texas schools had to lobby to reintroduce discretion back into their admissions process.³⁹⁶

Fourth, under the CEP plan, students are very clearly subjected to a different set of admissions criteria than the students living outside of the designated zones who are admitted under the regular admissions process. Most notably, the CEP students do not have to take the *concours*.³⁹⁷ One potential way that the CEP program can eliminate this glaring difference in admissions criteria is to require the CEP students to take the *concours* as part of their application requirements. This change would mean that the students would need to undertake the rigorous two-year preparatory course to sit for the *concours*.³⁹⁸ The Sciences Po administrators could set a different minimum score level threshold for the CEP students, so that they would not be barred from admission based upon their test scores, or they could disregard the scores altogether but at least they would have a record of them. Adding this component to their application requirements would help, in appearance, to equalize the application process for all French students. Also, adding the test requirement would allow the Sciences Po to keep track of test performance levels of students from the CEP regions over time as a way to track whether the effects of the program are positively impacting curriculum, quality of teaching, and the test taking abilities of the students. Comparing the selection criteria of the Sciences Po to that of Texas, while the Ten Percent Plan is neutral on its face, in that all admitted students must meet the criteria stipulated by the Ten Percent Law,³⁹⁹ there remain differences in the particular courses of study Texas high school students may follow and in the quality of the various high schools they attend. The main equalizing factors are that for the top ten percent students, the standardized test scores (namely, SAT or ACT scores) are disregarded and class rank is decisive.⁴⁰⁰

Fifth, the CEP students are only competing amongst themselves for the

393. Donahoo, *supra* note 8, at 262-63.

394. *Fisher*, 631 F.3d at 224 n.56.

395. Donahoo, *supra* note 8, at 263.

396. *Fisher*, 631 F.3d at 224-26.

397. Donahoo, *supra* note 8, at 263 (describing the *concours* as "rigorous competitive entrance exams").

398. *Id.*

399. *Fisher*, 631 F.3d at 224.

400. *Id.* at 241.

separate admission slots created by the Sciences Po.⁴⁰¹ It is clear that a special track of entry has been created for them that is not available to France's general student population who reside outside of the targeted regions.⁴⁰² In some respects, the special track is like the one that was held unconstitutional in *Bakke*.⁴⁰³ The difference in admissions criteria and the isolation of the review of CEP candidates from other candidates for admission may raise questions in terms of evaluating the Sciences Po's plan from the constitutional perspective of the United States,⁴⁰⁴ even though the ethno-racial impact is not offered as the primary purpose of the plan and race and ethnicity are not the declared factors determining admission. In contrast to the Sciences Po's scheme, the Texas Plan allows all graduating Texas resident high school students to compete for the Texas resident top ten percent slots.⁴⁰⁵ In this respect, it differs from the Sciences Po program; however, in terms of the entire pool of applicants to UT Austin, for example, applicants are placed within groups and individuals within those discrete groups compete amongst themselves for available spaces.⁴⁰⁶

VI. LESSONS FOR THE UNITED STATES AND FRANCE: THE FUTURE OF PROXY STRATEGIES AND DIVERSITY IN EDUCATION

There are lessons the United States and France can glean from one another in examining the initiatives both nations have instituted in the pursuit of ways to achieve and maintain ethno-racial diversity in their respective institutions of higher learning. Regarding this discussion of the lessons for France and the United States, I appreciate that there may be resistance to the idea of looking to other jurisdictions

401. While the Sciences Po's strategy of increasing class size to accommodate the CEP students worked well at its institution to help dampen the potential outcry that CEP students were taking admission seats away from more qualified candidates, for the U.S., expanding class sizes to accommodate a disenfranchised student population may not be economically feasible to the extent that there may be a need for budget-constrained schools to increase financial packages for certain students. Increasing student admissions also may not be desirable, in terms of classroom learning experiences and maintaining reasonable student to teacher ratios. It is unlikely that U.S. courts would accept the Sciences Po's characterization to view the newly created seats as admissions slots that students outside of the Sciences Po's targeted zones were never allowed to compete for, because they didn't exist prior to the advent of the CEP program, and never would be allowed to compete for if the program ended. A more probable outcome is that U.S. courts would view all the admissions places, including the new slots, as the entire pool of admission seats that all students should be able to compete for without any restrictions.

402. Sabbagh, *Affirmative Action in the United States and France*, *supra* note 4, at 5-6.

403. *See id.* (noting that the special track policy of focusing on geography is similarly systematic to programs which focus on race).

404. According to the *Grutter* Court, universities implementing race-conscious programs "cannot establish quotas for members of certain racial groups or put members of those groups on separate admission tracks. . . . Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission." 539 U.S. at 334 (internal citations omitted).

405. TEX. EDUC. CODE ANN. § 51.803.

406. The district court in *Fisher* noted: "Before their candidacies are evaluated, all applicants to UT are divided into three pools: Texas residents, domestic non-Texas residents and international students. . . . Students compete only against other students in their respective pools for admission." 645 F. Supp. 2d at 595 (internal citations omitted).

for solutions to address the issues of social integration and fuller inclusion of ethno-racial minorities.⁴⁰⁷ I am not advocating the wholesale adoption of antidiscrimination and pro-equality strategies developed in one nation by another nation. I know and expect that even though a policy developed in France could be potentially effective if adopted by the United States, the policy will be deconstructed and reformulated, as necessary, to take into account the particularities of a country and to fit the contours of the social and juridical landscape. In this section, my goal is to draw some conclusions regarding the potential sharing of strategies to tackle issues that are germane to both the United States and France.

A. What the Sciences Po's Approach to Affirmative Action Can Teach the United States

One of the most compelling aspects of the Sciences Po's plan and, more broadly, France's equality project, is the challenge to try to think outside of ethno-racial classifications. France offers a testing ground for this approach. France's form of affirmative action, via the Sciences Po, provides the United States with an opportunity to monitor the results that can be achieved when a modern Western society holds steadfast to the position that ethno-racial categories will not be formally acknowledged or relied upon in designing affirmative action policies. The Sciences Po's approach reflects France's postulate that an equal, non-race-based society should not codify the language of ethnic-racial difference in that society's socio-economic policies. Accordingly, policymakers who seek to address racial disparity should not have to worry about finding ways to excise ethno-racial language from the laws once ethnic-racial balance is achieved and discrimination is eradicated. In such a paradigm, it will be unnecessary to address the sunset provision issue that arises in the United States. If applied in the United States, such a policy's lack of explicit reference to race would obviate the need to assess whether the policy has a clearly delineated durational endpoint.⁴⁰⁸ Further, there would not be tension between the proposed affirmative action policy and constitutional language which requires, for example, the "equality of all citizens before the law, without distinction of origin, race, or religion"⁴⁰⁹ or that "[n]o state

407. Legal scholar Gwénaële Calvès' words are exemplary of this resistance:

We can't simply import a technique or method we've come across in another country and, with the help of this "magic wand," solve the problem of discrimination in our own country. To imagine that we can is to depoliticize the issue. Discrimination tells us something about the society from which it has arisen; and French society is not American society. Can we really abstract from the fundamental differences—historical, political, economic, and social differences—between France and the U.S. and transfer this or that technique, considered in isolation? I do not think so, and so I reiterate my assessment of a decade ago: there is nothing that France can learn from the U.S. as far as antidiscrimination is concerned.

Interview with Gwénaële Calvès, *supra* note 79. While I share Professor Calvès' concerns and recognize the need to evaluate the initiatives proposed, I disagree with her conclusion.

408. *Grutter*, 539 U.S. at 342.

409. 1958 CONST. art. 1 (Fr.).

shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁴¹⁰

The Sciences Po's CEP approach also suggests that focusing on economic class or geographic location, given the prevailing ethno-racial segregation in housing, are more useful markers, than ethnicity or race, of socio-economic disparities; therefore, a program could rely upon these factors and still be effective without offending the principle of equality.⁴¹¹ Some parallels may be drawn between the ethno-racial housing segregation in the United States and France. In both countries, where one lives can significantly impact one's access to quality schools, jobs, and other precious resources.⁴¹² So, to the extent that a plan can be designed to counteract the concomitant negative aspects of locale, such a plan should be encouraged. The Texas Plan already appropriates the (negative) fact of segregation for the positive purpose of increasing ethno-racial minority admissions to post-secondary schools.⁴¹³ While percentage plans may not work in all regions of the United States, some consideration should be given to expanding this geographic approach if it would help to achieve the goals of eliminating disparities in the quality of education and access to education opportunities for underrepresented ethno-racial minorities. Regarding using economic class as a proxy, France's emphasis on this factor converges with the rising sentiment in some U.S. quarters that Americans find class preferences more acceptable than ethno-racial ones⁴¹⁴ and thus, schemes designed to target students who suffer economic disadvantages are less likely to provoke constitutional challenges. Further, because there is a disturbing degree of overlap between economic status and the underrepresented

410. U.S. CONST. amend. XIV, § 1.

411. Adopting the approach of concentrating on other factors (e.g., housing demographics) holds some promise for success and is in keeping with the views expressed by Justice Kennedy in his concurring opinion in *Parents Involved*, wherein he suggested that school boards could "draw[] attendance zones with general recognition of the demographics of neighborhoods" as an alternative, constitutionally-permissible strategy for achieving ethno-racial diversity in schools. 551 U.S. at 789 (Kennedy, J., concurring).

412. See Richard Fry & Paul Taylor, *The Rise of Residential Segregation by Income*, PEW RES. CTR. (2012), <http://www.pewsocialtrends.org/files/2012/08/Rise-of-Residential-Income-Segregation-2012.2.pdf> (discussing the rise of residential segregation by income in the United States); Florence Goffette-Nagot & Yves Schaeffe, *Income Segregation and Suburbanization in France: A Discrete Choice Approach*, GROUPE D'ANALYSE DE THÉORIE ÉCONOMIQUE LYON - ST ÉTIENNE (Mar. 30, 2011), <http://halshs.archives-ouvertes.fr/docs/00/58/11/39/PDF/1112.pdf> (discussing residential segregation by income in France).

413. TEX. EDUC. CODE ANN. § 51.803.

414. See RICHARD KAHLENBERG, *REWARDING STRIVERS* 179 (2010) (advocating a class-based approach to affirmative action rather than an ethno-race-based focus); RICHARD KAHLENBERG, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION* 83 (1996) (arguing for class-based affirmative action); Richard Kahlenberg, *Is Affirmative Action Headed Back to the Supreme Court?*, CHRON. HIGHER EDUC. (June 21, 2011), <http://chronicle.com/blogs/innovations/is-affirmative-action-headed-back-to-the-supreme-court/29699> (discussing that more people believe they are divided by income and not race); Richard Kahlenberg, *Reactions: Is it Time for Class-Based Affirmative Action?*, CHRON. HIGHER EDUC. (Dec. 16, 2009), <http://chronicle.com/article/Reactions-Is-It-Time-for/62615/> (explaining the expectation that trends will shift toward income based affirmative action).

ethno-racial minorities that schools seek to target,⁴¹⁵ a proxy focusing on class is likely to address the intended groups that a race-conscious affirmative action policy would also capture. While class-based affirmative action may serve with limited effectiveness some of the same goals as ethno-race-based programs, it is important to take care that the outcomes of increased ethno-racial diversity and access to education for underrepresented minorities are not, ultimately, subordinated.⁴¹⁶ Depending upon the statistics regarding lower income underrepresented minorities in comparison with lower income whites, programs that only focus on class may end up primarily benefitting white majority lower-income students.⁴¹⁷ While alleviating class disparities is also an important objective, it would mean that the goal of equality in education for certain ethno-racial minorities is once again thwarted.

B. *What Texas' Approach to Affirmative Action Can Teach France*

The history of affirmative action policies in education in the United States suggests that in order for such policies to have a substantial impact and for the citizenry to accept them, the policies must be undertaken at the national as well as local levels. France needs to create national strategies for addressing issues of ethno-racial exclusion and discrimination.

In the move towards nationalizing affirmative action equal education policies, France may conclude that the percentage plan offers substantial promise as a vehicle to increase access to its colleges and universities without explicitly referencing ethno-racial criteria. The Ten Percent Plan demonstrates that percentage plans can work to increase the admission of underrepresented ethno-racial minorities to elite academic universities thereby assisting in the process of equalizing educational opportunities. Not surprisingly, U.S. percentage plans have already come to the attention of France because of their emphasis on high school rank and geographic location.⁴¹⁸ Several prominent advocates have lobbied the

415. A recent study by the Pew Research Center reports that the "[m]edian wealth of whites is now 20 times that of black households and 18 times that of Hispanic households." Sabrina Tavernise, *Recession Study Finds Hispanics Hit the Hardest*, N.Y. TIMES, July 26, 2011, <http://www.nytimes.com/2011/07/26/us/26hispanics.html> (citing Paul Taylor et al., *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks, and Hispanics*, PEW RES. CTR., 5 (July 26, 2011), http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf).

416. Carl Irving, *There's No Valid Surrogate for Race*, NAT'L CTR. FOR PUB. POL'Y & HIGHER EDUC. (May 1998), <http://www.highereducation.org/crosstalk/ct0598/news0598-race.shtml>.

417. Numerous scholars in the United States have been critical of adopting class-based approaches over race-conscious ones. See, e.g., Carson Byrd et al., *Class-Based Policies Are Not a Remedy for Racial Inequality*, CHRON. HIGHER EDUC. (Sept. 25, 2011), <http://chronicle.com/article/Class-Based-Policies-Are-Not-a/129097> (explaining that class cannot serve as a proxy for race and ethnicity).

418. The French-American Foundation, in 2007, sent a special delegation to the United States charging the participants with the task of learning more about the structure, operation, and success of percentage plans in California and Texas. *The Equality of Opportunity Program Initiative on Selective Higher Education*, FRENCH-AM. FOUND., 1 (2008), http://www.frenchamerican.org/sites/default/files/documents/media_reports/percentageplans_brief_en.pdf. The delegation produced a report on their observations and recommendations for France.

government to adopt percentage plans as part of its project to develop pro-equality policies.⁴¹⁹ Sarkozy even proposed that for the preparatory courses necessary to succeed on the *concours*, and required by some *grandes écoles*, all students in the top 5% of their high school classes be admitted to the courses.⁴²⁰ While this proposal, if approved, does not entirely address the problem of access to quality academic institutions at the postsecondary education level, it has the potential to increase the pool of underrepresented minority candidates for the exclusive schools.⁴²¹ In pursuing this proxy strategy of the percentage plan, in order to accurately assess whether the outcomes of increased ethno-racial diversity and access are being met, the government will need to allow for the collection of ethno-racial statistics. Statistical data will help evaluate how the program is impacting the proxy's main target population (that is, "students from racial-ethnic or recent immigrant backgrounds").⁴²² Being transparent about the outcomes of an initiative is important.

Finally, in terms of what lessons the U.S. experience holds for France, just as France provides the United States with a focal point to view whether the absence of the formal recognition of ethno-racial categories results in the outcomes desired, the United States offers an example of whether the use of ethno-racial categories affords any positives in terms of social policies. For France, Texas' reintroduction of ethno-racial criteria is particularly worthy of note.

VII. THE LIMITS OF PROXY STRATEGIES

While I believe proxy strategies should be supported because they have achieved some positive results regarding the goals of attaining equality of education in France and the United States, my endorsement is given along with some caveats and suggestions.

A. *The Potential Danger of Disguising Objectives*

First, it is critical to be clear in terms of the outcomes being sought and the rationales underlying the policies implemented. That way, if modifications need to

Promouvoir l'égalité des chances dans l'enseignement supérieur sélectif: l'expérience américaine des percentage plans et sa pertinence dans le contexte français [Promoting Equal Opportunity in Selective Higher Education: The American Experience with Percentage Plans and its Relevance for the French Context], FRENCH-AM. FOUND., 1 (2007), http://www.frenchamerican.org/sites/default/files/documents/media_reports/percentageplans_report_fr.pdf.

419. Interview by Daniel Sabbagh with Richard François Héran, FRENCH-AM. FOUND., 12 (2010), http://equality.frenchamerican.org/sites/default/files/herantranscript_en.pdf.

420. *The Equality of Opportunity Program Initiative on Selective Higher Education*, FRENCH-AM. FOUND., *supra* note 418, at 1.

421. A future potential avenue may be to introduce a percentage plan that would have a more direct impact ensuring that a substantial number of underrepresented ethno-racial minorities are actually granted admission to the elite institutions and not merely admission to the preparatory course needed to take the exam in order to qualify for admission to the *grandes écoles*. *Id.*

422. *Id.*

be made in the event the objectives are not being met, there is less of a chance that the original purposes will be muddled and redirected towards other goals. For example, if there is a charge, like that of Patricia Ohlendorf's regarding the Ten Percent Plan, that an academic institution's policy is operating in some way to hinder the number of ethno-racial minorities admitted or that the policy fails to maintain (or to increase) minority admissions over time,⁴²³ it is less likely that the original goals (that is, diversity and equal access for underrepresented minorities) can be supplanted by others or subordinated. The CEP plan is operating on a much smaller scale than the Texas scheme. It is being administered by an elite school, rather than on a regional or national level. While the change in scale does not alter my recommendation of maintaining clarity in the outcomes, the difference in the application of the Sciences Po's plan means that there is latitude for the school to make sure that its objectives (stated and unstated) are met. The problem that I allude to will become more a reality for France if programs, like the one at the Sciences Po, are expanded across regions and embraced by the government. Then, the act of disguising the objectives of ethno-racial diversity and access as ones of geographic and class diversification will likely limit what programs framed in this manner can ultimately accomplish.

B. Drawbacks to Relying Upon Socio-Economic and Housing Segregation as Part of the Solution

Second, it is important not to become complacent with a strategy just because it yields some positive results. U.S. and French schools and policymakers should attempt to create alternatives to percentage plans and the CEP initiative that do not rely upon what may be perceived as a social negative (for example, persistent socio-economic disparities and housing segregation) for the proxy. Both proxy strategies depend upon the continuation of ethnically and racially-segregated housing patterns and, thus, help to legitimate those patterns.⁴²⁴ Both plans recognize and play upon the "interdependence" between race, poverty, and marginalization.⁴²⁵ As a consequence, even though the schemes are facially neutral and appear to be egalitarian, the policies are, arguably, complicit in maintaining continued ethno-racial social fracturing. This is a problem if the United States and France believe that a healthier society is one that has substantial ethno-racial interactions and that society should work towards decreasing this type of segregation. On the other hand, one could argue that to the extent the proxy strategies improve ethnic and racial social interactions at the college level, and

423. See, e.g., Brief for Petitioner at 38-40, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (No. 11-345), 2012 WL 1882759 (characterizing the statistical gains in diversity attributable to Texas' percentage plan as "infinitesimal" and not narrowly tailored).

424. See Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1730 (2011) (discussing the reality that percentage plans can only have a positive effect on minority enrollment if housing is firmly segregated).

425. *Id.* at 1747 (explaining the interdependent relationship between percentage plans and racial housing segregation); Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331, 1352 (1988).

hopefully later in the employment sector, the good accomplished mitigates any potential harm.

C. *The Problem with Coded Language*

Third, while I ultimately weigh in favor of the use of proxy strategies, it is important to register my uneasiness with the apparent necessity to pursue equality in education for underrepresented ethno-racial minorities by this surrogate method. U.S. Supreme Court Justice Ginsberg's sentiment that transparency is better at fostering equality of opportunity than programs that operate to "achiev[e] similar numbers through winks, nods, and disguises"⁴²⁶ resonates, to some degree, with my own. My discomfort is related to my position that neither the United States nor France is experiencing a post-racial historical moment. Residence, the location of high schools, and economic status can serve as somewhat effective proxies for race because the societal ill of racism has had a substantial impact on where people live, attend school, and obtain employment,⁴²⁷ and because racism still exists.⁴²⁸ The proxy is popular, in part, because there is a prevailing denial of the relationship between race and racism. The proxy allows people to speak in terms of geographic location and high school rank instead of the uncomfortable language of ethnicity, race, and racism. The proxy strategy also makes the goals of ethno-racial diversity and increased access to education more difficult to attain because it is necessary to continuously come up with coded constructs to do so.⁴²⁹ The use of coded language requires vigilant monitoring to ensure that the school's equity in education and diversity objectives are being met.⁴³⁰

CONCLUSION

The question of how to achieve equal access to educational opportunities is one that continues to be heavily debated. At the time of writing this article the United States Supreme Court had not yet granted certiorari to hear the *Fisher* case. The Court's agreement to hear the case signals that the American legal landscape is in flux regarding matters of education and ethno-racial diversity. The *Fisher*

426. *Gratz*, 539 U.S. at 304 (Ginsberg, J., dissenting).

427. See N.R. Kleinfield, 'Why Don't We Have Any White Kids?,' N.Y. TIMES, May 11, 2012, <http://www.nytimes.com/2012/05/13/education/at-explore-charter-school-a-portrait-of-segregated-education.html> (exploring the persistence of racially segregated schools); Jonathan Roswell, *Housing Costs, Zoning, and Access to High-Scoring Schools*, BROOKINGS INST. REP. (April 19, 2012), <http://www.brookings.edu/research/papers/2012/04/19-school-inequality-rothwell> (exploring the connections between segregated schools, housing, and zoning regulations).

428. See Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1072 (2010) (discussing racial disparities that result from continuing patterns of racism).

429. Bell, *Diversity's Distractions*, *supra* note 176, at 1622 (discussing Supreme Court rulings that have enabled policy makers to avoid tackling issues of race and class).

430. *Id.* (discussing the extra litigation invited by the term diversity, which, in comparison to race, offers "a distinction without a real difference").

decision will dramatically influence the strategies that schools can adopt in pursuing equality in college admissions. Regardless of the outcome of the case, the importance of the topic means that the intense polemics will continue. This paper is essential to the ongoing discussions in that it provides guidance on how to think through solutions to the issues in different juridical landscapes.

This article critically evaluates and compares two key proxy strategies that have been adopted by higher education institutions in France and the United States to achieve ethno-racial diversity and increase educational opportunities for underrepresented minorities. It further examines the legal environments in which the strategies arose. The histories of the United States and France concerning certain ethno-racial minorities require that both countries move beyond the emphasis on formal equality in order to extend to those minorities substantial and meaningful opportunities to attend quality post-secondary education institutions. The United States' troubled history is defined by slavery, *de jure* and *de facto* segregation, and the marginalization of racial minorities, in particular, African Americans, Latinos, and Native Americans. Similarly, in France, the history of slavery in the empire and colonization of parts of Africa are at the root of many current issues plaguing the nation regarding the African French minority population. These oppressive histories must be taken into account when formulating education policies.

Recent events in France suggest that now more than ever it is open to finding ways of fully including ethno-racial minorities (e.g., the African French population) into mainstream French society. The government and academic institutions, like the Sciences Po, are appropriately focusing on the key areas of education, employment, and government as crucial sectors that if opened up will help pave the way towards bringing France more in conformity with its egalitarian ideals. Despite the shortcomings and the fact that the scale of the Sciences Po's CEP program cannot adequately address the enormity of the problem, the school's effort is a crucial step towards tackling the current socio-economic inequities that the African French community is experiencing. The CEP program is one that should be expanded and serve as a model for other equalizing initiatives in French society.

In Texas the Ten Percent Plan performed the critical role of permitting Texas colleges and universities to maintain minority student admissions during precarious times; however, the constraints of the program mean that it ultimately stymies progress towards the goal of attaining and improving access to post-secondary institutions for underrepresented minorities. The University of Texas' reliance upon a mix of strategies (ethno-racial criteria and the percentage plan) offers a more effective approach for wrestling with the challenging issues of access and equality of educational opportunity and, as such, should be considered by other jurisdictions and countries, including France.

The overall lesson for both the United States and France is to continue to be nimble and flexible in devising ways to address the challenging issue of equal educational opportunity and to remember that if groups of people experience *de facto* ethno-racial discrimination and marginalization, the methods proposed for countering this experience cannot wholly rely upon so-called "race-neutral" criteria because the substantive harms, including denial of a valuable life-changing

education, will be obscured by a dazzling cloak of formal equality.

CONSTITUTIONAL COUNCIL

DECISION 2001-450 DC, July 11, 2001, Rec. 82⁴³¹

THE CONSTITUTIONAL COUNCIL . . .

31. Considering that paragraph I of article 14 of the referred law adds . . . to the Education Code an article L. 621-3, which provides: “The governing board of the Institute of Political Studies of Paris may determine, by derogation from the provisions of the third paragraph of article L. 612-3, the conditions and procedures for admission to the Institute’s programs as well as the organization of its programs of study for the first cycles of its doctoral program. It may adopt admissions procedures that include particular modalities aimed at assuring the recruitment of a diverse student body from among undergraduate students. The admissions procedures may be implemented by way of agreements concluded with French or foreign secondary or higher educational institutions, in order to involve them in the Institute’s recruitment of their pupils or students”;

32. Considering that, according to paragraph 13 of the Preamble of the Constitution 1946: “The Nation guarantees equal access for children and adults to instruction, vocational training and culture . . .”;

33. Considering that, even if it is permissible for the legislature to derogate from the provisions of the third paragraph of article L. 612 – 3 of the Education Code for the purpose of allowing diversification of access of undergraduate students to the Institute’s programs, it is only on the condition that the particular modalities that the governing board of the Institute establishes, subject to judicial review, are based on objective criteria of a nature to guarantee respect for the constitutional requirement of equal access to education; that, with this reservation, article 14 conforms to the Constitution . . .

431. Constitutional Court decision No. 2001-450DC, *supra* note 28.