

The Illusion of French Inclusion: The Constitutional Stratification of French Ethnic Minorities

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ABSTRACT

This Note examines the effects of discrimination on ethnic minorities in France, who suffer lower rates of education, higher rates of unemployment, and more frequent instances of police brutality than their white counterparts. Although the effects of discrimination are widely viewed, it is difficult to quantify the true magnitude of such inequality because France is a colorblind country that officially does not recognize racial categories. The French Constitution declares there is no distinction of race in France. This text has been used to effectively outlaw race and the collection of ethnic statistics. Outside of France, ethnic statistical data is used around the world to measure discrimination, understand the state of minority groups and create policy to help them. This data is useful when targeting health, education, employment, legal disparities, and challenges. However, due to the restrictive text of the French Constitution, this data is not available in France because both public and private actors are prohibited from using race as a determinant in their data collection.

Although France does not officially recognize race, it recognizes its massive inequality problem and has passed several anti-discrimination laws in the efforts to combat discrimination. Despite their vast quantity, France's anti-discrimination laws are largely ineffective because they lack the tools and necessary data to effect meaningful and lasting change. Instead of working to combat widespread discrimination based on statistical data, these laws are enforced on an individualized basis producing an insignificant anti-discriminatory effect. This note will assert that France should amend the text of its Constitution to explicitly protect ethnic minorities because its anti-discrimination laws are ineffective and inhibit its ability and efforts to combat racism and discrimination in France. This proposed amendment would allow the French government to officially recognize race and the detrimental impact it has on minority prosperity, success, and livelihood. It would further allow French actors to collect data on the state of minorities in all aspects of their lives so future anti-discrimination laws can be effective and accurately combat racism and inequality in France.

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I. INTRODUCTION

In 2017, a French court ruled that the sexual assault of an eleven-year-old French girl of Congolese descent by a twenty-eight-year-old French man was consensual and acquitted him of rape.¹ In the same year, a French Police officer brutally beat and sodomized a young Black man of Northern African descent with a baton during an identity check.² These acts sparked outrage and riots throughout France, speaking volumes about the inequality and barriers ethnic minorities face in

1. *Outrage After French Court Rules that 11-Year-Old Girl Consented to Sex with Grown Man*, N.Y. POST (Sept. 27, 2017), <https://nypost.com/2017/09/27/outrage-after-french-court-rules-that-11-year-old-girl-consented-to-sex-with-grown-man> [<https://perma.cc/4EL6-SUZF>]. Public outrage ensued after the court acquitted the man of rape. The court found that the girl was not physically forced to have sexual relations with him. *Id.* The young girl's mother said that she complied out of fear. *Id.*

2. Peter Holley, *A Man Accused French Police of Raping Him. Police Say It Was an Accident.*, CHI. TRIB. (Feb. 11, 2017), <http://www.chicagotribune.com/news/nationworld/ct-french-police-rape-charge-accident-claim-20170211-story.html> [<https://perma.cc/SX3L-4SCE>] (noting that police stated they accidentally sodomized the young man with a baton).

France when accessing justice.³ France is no stranger to these riots; they increasingly occur because of public outrage over the French government's lack of attention to the issues that detrimentally affect ethnic and religious minorities.⁴ This conflict is not a result of recent changes in French culture, but indicates the struggle and plight of many French minorities exacerbated in the past few decades.⁵

Racism and discrimination are notorious problems in France. However, they are commonly ignored because France is officially a "colorblind" society. The Constitution of France recognizes no distinction of race or religion among its citizens and residents.⁶ Additionally, the French government's Data Protection Act prohibits both public and private actors from collecting any data pertaining to race, ethnicity, or religion.⁷ This colorblind status exacerbates the problems and barriers to assimilation that ethnic and religious minorities face in France because there is no way to quantify their unique experiences.⁸ The ban on ethnic data allows discrimination to hide in the shadows. Ethnic minorities must suffer while the larger French society passes them by.⁹

In the United States, the collection of racial, ethnic, and religious data permits quantification of disparities. In the educational context, eighty percent of Latinos and seventy-four percent of African Americans attend majority-minority schools that receive far less funding than their majority-white schools.¹⁰ In the healthcare context, African American women are forty-two percent more likely to die from breast cancer than their white counterparts due to a lack of access to health care.¹¹ In the income context, the national gender wage gap is eighty percent for all women; however,

3. See Henry Samuel, *French Youths Clash with Officers and Blockade Schools in Protest Over Alleged Police Rape of Black Youth*, TELEGRAPH NEWS (Feb. 23, 2017), <http://www.telegraph.co.uk/news/2017/02/23/french-youths-clash-officers-blockade-schools-protest-alleged/> [<https://perma.cc/35UC-9PNH>]. See generally Leland Ware, *Color-Blind Racism in France: Bias Against Ethnic Minority Immigrants*, 46 WASH. U. J. L. & POL'Y 185, 186 (2014).

4. See Ware, *supra* note 3, at 212–14 (noting that some riots resulted from anti-minority sentiments).

5. See *id.*

6. See David B. Oppenheimer, *Why France Needs to Collect Data on Racial Identity . . . In a French Way*, 31 HASTINGS INT'L & COMP. L. REV. 735, 736 (2008); see also *No Such Thing as 'Race', Say French Lawmakers*, FRANCE24 (May 17, 2013) [hereinafter France24], <http://www.france24.com/en/20130517-no-such-thing-as-race-french-lawmakers-france-racism-hollande> [<https://perma.cc/N3RV-R7T4>].

7. See PATRICK SIMON, INST. NAT'L D'ETUDES DÉMOGRAPHIQUES, "ETHNIC" STATISTICS AND DATA PROTECTION IN THE COUNCIL OF EUROPE COUNTRIES STUDY REPORT 4-9 (2007); see also Oppenheimer, *supra* note 6, at 746-8.

8. Oppenheimer, *supra* note 6, at 743.

9. *Id.*

10. See GARY ORFIELD ET AL., C.R. PROJECT, E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 9 (2012), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfieldepluribusrevisedcomplete_2012.pdf [<https://perma.cc/57GB-FT4D>].

11. See Maren Dale, *Looking for Answers to Why Black Women Are More Likely to Die from Breast Cancer Than White Women*, AM. CANCER SOC'Y (Apr. 4, 2017), <https://www.cancer.org/latest-news/looking-for-answers-to-why-black-women-are-more-likely-to-die-from-breast-cancer-than-white-women.html> [<https://perma.cc/XE92-YB6E>].

African American women make only sixty-one percent of men's wages.¹² Although African American women are the fastest growing group of entrepreneurs by race and gender and enroll in undergraduate institutions at higher rates than any other group in the United States, their wage gap is sixteen percentage points below their white counterparts.¹³ This inequality is largely due to the discrimination minority groups face in the American market.¹⁴ This data is collected through both public and private actors, which allows leaders, activists, and government officials to quantify discrimination and begin public discussions about policies addressing racial and ethnic inequality.¹⁵

In contrast, the text of the French Constitution and the Data Protection Act preclude measuring the magnitude of racism and discrimination because the law forbids collection of such statistics.¹⁶ French ethnic and religious minorities are ignored by their state, forced to live in impoverished slums, and suffer at the hands of injustice and inequality.¹⁷

This Note asserts that France should amend its Constitution to explicitly protect ethnic minorities because its anti-discrimination laws are ineffective and inhibit the efforts to combat racism and discrimination. The text of the French Constitution is interpreted to outlaw the very concept of racial categories and contends there is no distinction among French citizens before the law.¹⁸ This language was then used to validate the Data Protection Act, which prohibited both private and public actors from collecting ethnic statistics, thereby inhibiting France from quantifying the significance of its discrimination problem.¹⁹ Despite the Data Protection Act's prohibition on the collection of ethnic data, some data exists. Recent surveys document the lives and successes of the "descendants of immigrants in French society."²⁰ This data

12. See DEBORAH J. VAGINS, AM. ASS'N OF UNIV. WOMEN, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP* 9 (2018), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth [<https://perma.cc/UVB8-A6VX>].

13. *Id.*; see Oppenheimer, *supra* note 6, at 739 ("[D]ata is important because 'majority minority' schools have the worst facilities (buildings, labs, libraries, athletic facilities), the least qualified teachers, the worst overcrowding, and the least financial support."); see also U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATS., *STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2017* (NCES 2017-051), 98, 115 (2017), <https://nces.ed.gov/pubs2017/2017051.pdf> [<https://perma.cc/P4G3-4MYA>]; AM. EXPRESS, *2016 STATE OF WOMEN-OWNED BUSINESSES REPORT 5* (2016), http://www.womenable.com/content/userfiles/2016_State_of_Women-Owned_Businesses_Executive_Report.pdf [<https://perma.cc/3QPR-MK4F>].

14. See Valerie Wilson et al., *Black Women Have to Work 7 Months into 2017 to Be Paid the Same as White Men in 2016*, ECON. POL'Y INST. WORKING ECON. BLOG (Jul. 28, 2017, 12:49 PM), <https://www.epi.org/blog/black-women-have-to-work-7-months-into-2017-to-be-paid-the-same-as-white-men-in-2016/> [<https://perma.cc/8BYJ-TJ7E>].

15. See Danielle Ledford, *Is Race Neutrality a Fallacy—A Comparison of the U.S. and French Models of Affirmative Action in Higher Education*, 46 TEX. INT'L L.J. 355, 358-60 (2011).

16. *Id.* at 366-67.

17. See Ware, *supra* note 3, at 187.

18. See Ledford, *supra* note 15, at 366.

19. See Oppenheimer, *supra* note 6, at 746-50; see also Ledford, *supra* note 15, at 367.

20. See SIMON, *supra* note 7, at 51 ("These data are supplemented from other sources, e.g. tests for job-seekers or applicants for housing.").

provide small fragments of information that are pieced together to comprise the analysis and record of discrimination throughout France.²¹

However, if the text of the French Constitution was amended to provide for the explicit protections of minorities under the law, it would allow the French government to recognize the diversity of its population and adequately address the unique needs of its minority populations.²² This amendment would allow government and private actors to collect comprehensive and conclusive data to measure the discrimination ethnic minorities face in employment, housing, education, health care, and law enforcement.²³ Recognizing the magnitude of racial inequality would allow France to appreciate the full weight of its discrimination problem and implement effective and meaningful policies to combat it.

Part II will begin with an overview of the concepts of race and discrimination in Colonial France, post-World War II, and France today. This Note will then explore public and governmental attempts to combat discrimination through affirmative action programs and anti-discrimination laws. Part III will explain how the language of the Constitution and the Data Protection Act creates the mass disparity that French ethnic minorities face today. Part IV will propose that the French government amend its Constitution to explicitly protect its minority population in the efforts to combat the inequality that hides under the guise of race neutrality.

II. HISTORICAL BACKGROUND OF RACISM IN FRANCE

This section will explore the historical backdrop of racism in France first laying out the racial overtones of Colonial France, followed by a discussion of France's colorblind Constitution drafted in 1958. Finally, this section will examine France today exploring the different facets of inequality and discrimination that French ethnic minorities face in the housing market, educational attainment, unemployment, and police brutality.

A. *Racism in Colonial France*

Racism in France can be traced back to the birth of Western civilization. It can even be observed in French imperial propaganda depicting the Middle East, Africa, Asia, and French colonies as lands of "backwardness, lawlessness, and barbarism tamed by French rule."²⁴ These depictions are emblematic of a resounding and prominent feature of French culture, which regards itself as superior to all non-European cultures.²⁵ The same dangerous notions of "otherness" and scientific racism that influenced French officials to send Jewish families to death camps also influenced their colonial belligerence and participation in the Transatlantic slave trade of people of African descent.²⁶

21. *Id.*

22. See Ledford, *supra* note 15, at 367.

23. *Id.* (Finding the text of the French constitution prohibits the French census from collecting data on "race, religion or ethnicity.").

24. Ware, *supra* note 3, at 193.

25. *Id.* at 192 (characterizing non-Europeans people as "biologically inferior, exotic and culturally backward.").

26. See Oppenheimer, *supra* note 6, at 745-46.

During the seventeenth and eighteenth centuries, French colonies in the Caribbean and South America used “Black Codes,” which were laws governing enslaved Africans in those territories.²⁷ White Frenchmen could legally fire their guns at slave assemblies and kill enslaved people who did not have a letter of permission to be away from their “master’s” home.²⁸ These racist and segregationist laws were still used after France officially abolished slavery in 1848 to distinguish French citizens that lived in Europe from those who lived in the colonies.²⁹

B. France’s Colorblind Constitution Post World War II

After World War II and the collapse of the Fourth Republic of France, largely resulting from the Algerian War for independence, the French government felt uneasy using the concept of race and ethnicity as a means to distinguish people.³⁰ This unease derived from the French government and police conspiring with the Nazis in World War II to deport over 75,000 Jewish people to death camps.³¹ When the Fourth Republic collapsed in 1958, President Charles de Gaulle made many changes in an effort to bring stability to France amid the calamity of war.³² On October 4th, 1958, President de Gaulle and the Prime Minister Michel Debré established the Fifth Republic of France under a new constitution.³³ The new constitution established France as 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.”³⁴ The drafters thought the best way to unify France after suffering the consequences of its participation in colonialism and the Holocaust was to delegitimize race to achieve equality under the law.³⁵ They interpreted race and public religion as the antithesis of equality and outlawed them altogether.³⁶ This established the colorblind French state we know today, where racialized poverty lingers in the shadows.³⁷

Although French lawmakers say there is no race in France and everyone is “just French,” the country’s demographics have dramatically diversified over the

27. See *id.*; see also Vernon Valentine Palmer, *The Origins and Authors of the Code Noir*, 56 LA. L. REV. 363, 376 (1995) (explaining Black Codes were laws governing the mutilation, torture, and contract damages of enslaved Africans in French territories).

28. See Palmer, *supra* note 27, at 376.

29. See Oppenheimer, *supra* note 26, at 745-46; Palmer, *supra* note 27, at 376.

30. See Rene Levy et al., *Police, Minorities, and the French Republican Ideal*, 41 CRIMINOLOGY 1065, 1067 (2003) (noting that French Senator and Former head of the French National Police, Charles Pasqua, feared that the collection of ethnic data would fall into the wrong hands and repeat *Fichier des Juifs*, which was a list of Jews compiled by the French government and used to arrest and deport 76,000 Jews to Nazi death camps during World War II).

31. Daniel Sabbagh, *The Collection of Ethnoracial Statistics: Developments in the French Controversy*, FR.-AM. FOUND. 1, 1 (2008).

32. See *De Gaulle and the New French Constitution*, 3 SEC. INT’L & COMP. L. BULL. 3 (1959).

33. 1958 CONST. 1 (Fr.).

34. *Id.*

35. See generally Sabbagh, *supra* note 31.

36. *Id.* (“... Jews ... were then identified as a distinct race, the delegitimization of racism—through exposure of its genocidal consequences—had long-term effects. It has disqualified race as a descriptive category altogether.”).

37. *Id.*

past few centuries.³⁸

Immigration rates began to rise in the middle of the century: When a census of foreigners was taken for the first time in 1851, their numbers were slightly under 380,000, representing one percent of the country's population. A quarter of a century later, the number of foreigners had more than doubled to 800,000, rising to over a million in the next five years, an unprecedented increase over so short a period.³⁹

In the nineteenth and early twentieth century, France enlisted hundreds of thousands of Africans to fight for them in both World War I and II.⁴⁰ Further, France's foreign population increased from "1.15 million in 1921 to 2.7 million in 1931."⁴¹ A significant amount of this immigration was due to France repeatedly relying on foreign labor to make up for its declining population, to maintain competition, and to foster the growth and development of French society.⁴² After World War II, France again relied heavily on foreign labor to rebuild itself.⁴³ France was so dependent on foreign labor it invoked many policies to incentivize immigration, albeit temporarily.⁴⁴ During the 1950s, the French government created agencies that built hostels to house foreign workers from sub-Saharan Africa, Senegal, Mali, and Maghrebis.⁴⁵ However, even when recruiting foreign workers, France enacted many policies to keep the workers from assimilating and becoming a part of the French culture they helped to recreate.⁴⁶

During the 1950s through the 1970s, foreign workers were considered "temporary residents" and were discouraged from reuniting with their families in France.⁴⁷ The housing intended for foreign workers only accommodated "single, male migrants in dormitory-like facilities that were not suitable for families."⁴⁸ The French government's intentions were clear: They wanted the foreign workers to rebuild French infrastructure and then return to their respective home countries.⁴⁹

Despite not wanting the foreign laborers to reside permanently in France, the government desperately needed cheap and unskilled labor to work in their new

38. See Levy et al., *supra* note 30, at 1069; see also France24, *supra* note 6; *French Population*, WORLD POPULATION REV. (2018) <http://worldpopulationreview.com/countries/france-population> [<https://perma.cc/77AC-87DJ>] ("In 2010, 27% of newborns in Metro France had at least a single foreign-born parent.").

39. See Levy et al., *supra* note 30, at 1069.

40. See Ware, *supra* note 3, at 190.

41. See Levy et al., *supra* note 30, at 1069.

42. *Id.*

43. See Ware, *supra* note 3, at 190.

44. See *id.* at 200.

45. *Id.*

46. *Id.* ("The 'Pasqua laws' of 1993, named after interior minister Charles Pasqua, attempted to dramatically limit immigration by prohibiting foreign graduates from accepting French jobs and denying the graduates resident status.").

47. *Id.* at 202.

48. See Ware, *supra* note 3, at 202–03 ("Discrimination against immigrants was widespread. Many of them were relegated to the shantytowns on the outskirts of French cities without running water or electricity.").

49. *Id.* at 197.

and vastly growing factories.⁵⁰ During the 1960s and 1970s, the public housing agency—Habitation à Loyer Modéré—constructed 195 public housing developments throughout Paris, comprised of at least 500 flats in skyscraping towers on broad tracts of land.⁵¹ These newly constructed neighborhoods were intentionally segregated and structured around the factories as “self-contained” spaces with schools, stores, and other services.⁵²

However, once France recuperated, the government attempted to limit and decrease the population of non-European immigrants through a series of laws and policies.⁵³ In 1974, France formally adjourned immigration, hoping it would decrease the flow of non-Europeans into France.⁵⁴ However, this policy had just the opposite effect: foreign workers who had been in France for decades brought their families to France in droves, fearing that if they returned to their countries of origin, they could not return to France.⁵⁵

C. Issues in France Today

1. French Housing Disparity and Discrimination

Similar to housing disparities experienced by minorities in the United States, many French minorities reside in substandard conditions, segregated from the communities and resources that white French people enjoy.⁵⁶ Natives and immigrants of African descent are overwhelmingly represented in the “banlieues,”⁵⁷ which are

50. See Ware, *supra* note 3, at 204.

51. *Id.*

52. Yvonne Yazbeck Haddad & Michael J. Balz, *The October Riots in France: A Failed Immigration Policy or the Empire Strikes Back?*, 44 INT’L MIGRATION 23, 27 (2006); see also Ware, *supra* note 3, at 206 (“The concrete and pre-fabricated materials used in the construction of the *cités* deteriorated. By the early 1990s, 80 percent of the buildings suffered “from some combination of water damage, insulation problems, broken elevators, and similar problems.”).

53. See Ware, *supra* note 3, at 197-200 (“This change in policy was adopted after the 1973 oil crisis and the end of the “trente glorieuses, in an economic recession that dampened the need for foreign labor. This resulted in high levels of unemployment.”).

54. See Ware, *supra* note 3, at 197; see also ELISA JOY WHITE, MODERNITY, FREEDOM, AND THE AFRICAN DIASPORA: DUBLIN, NEW ORLEANS, PARIS 222 (Indiana Univ. Press 2013) (“[T]he ban did not include European immigrants, asylum seekers, and what would be considered ‘desired’ professionals. Hence, the French national identity based on liberalism and egalitarianism was bifurcated, resulting in an ‘us’ (white French-speaking) and ‘them’ (everyone else) dichotomy that was further problematized by religious differences and ethnic affiliations.”).

55. See Levy et al., *supra* note 30, at 1070; Ware, *supra* note 3, at 197; see also JENNIFER FREDETTE, CONSTRUCTING MUSLIMS IN FRANCE - DISCOURSE, PUBLIC IDENTITY, AND THE POLITICS OF CITIZENSHIP 129 (Temple Univ. Press 2014) (“Deteriorating political situations in North Africa combined with the French decision to close the door on family reunification presented a ‘now or never’ scenario, and more and more North African workers brought their families to begin a permanent life in France. The housing situation arguably went from bad to worse. In the crowded rooms where single men had once lived entire families were now cramped.”); WHITE, *supra* note 54 (“Yet, even the 1974 ban on immigration to France did not eliminate the presence of the immigrants who, according to the criteria of family unification and birth, were French citizens.”).

56. See FREDETTE, *supra* note 55, at 129.

57. Ware, *supra* note 3, at 186 (“A large portion of France’s ‘visible’ minorities are segregated into public housing complexes in the suburban communities, known as banlieues . . . Many public housing complexes in the banlieues are neglected and physically deteriorating. Poverty, substandard schools, low-levels of educational

French public housing apartments tracing the outskirts of cities.⁵⁸ Today, these concentrations of French minorities are not the product of some cosmic coincidence, but rather the consequence of intentional government policies aggregating impoverished and socially excluded populations.⁵⁹ The “banlieusards”⁶⁰ suffer from similar housing conditions as poor minority families in the housing projects of American cities.⁶¹ The apartments in these areas are overcrowded, infested with bugs and rodents, and are described as containing “dangerously rickety stairs, and having no electricity and running water.”⁶²

The poor conditions of the banlieues are hazardous to the thousands of families and residents that live in these small spaces originally intended for single male use.⁶³ The delapidated conditions have caused many of the buildings to burn down—killing children and families.⁶⁴ Additionally, the banlieues experience high levels of crime rates and substandard schooling.⁶⁵ These housing and neighborhood inequities further alienate ethnic minorities as they intersect “with racism to perpetuate the presumption of foreignness and immigrant status regardless of French citizenship.”⁶⁶

2. France’s Ethnic Education Disparity

In addition to the poor living conditions of the banlieues, French minorities suffer from substandard school systems that compromise their chances at upward mobility and widens the achievement and financial gaps.⁶⁷ These underperforming schools are filled with ethnic minorities and receive less funding than their white counterparts.⁶⁸ On average, minority children in these areas do not perform at the same academic level as their white peers, and their teachers are more concerned with policing their behavior and appearance instead of their academic performance.⁶⁹

attainment, crime, and unemployment are common features of these neighborhoods. Young banlieusards (banlieue residents) are stereotyped as gang members, criminals, and potential terrorists. They are otherized as ‘immigrants’ even though many of them are second and third generation citizens born in France.”)

58. See Ware, *supra* note 3, at 243.

59. See Levy et al., *supra* note 30, at 1071.

60. Banlieusards are residents of the banlieues.

61. Levy et al., *supra* note 30, at 1065-66 n.1.

62. See WHITE, *supra* note 55, at 225.

63. *Id.* (“The [burned down] living spaces were among the one thousand run-down and abandoned buildings identified by Paris officials that contain an estimated thirteen thousand families, the majority being of African descent.”).

64. *Id.*

65. See Ware, *supra* note 3, at 243.

66. See WHITE, *supra* note 55, at 225.

67. See FREDETTE, *supra* note 55, at 84.

68. See Daniel Sabbagh, *Affirmative Action at Sciences Po*, 20 FR. POL. CULTURE & SOC’Y 52, 53 (2002) [hereinafter Sabbagh, *Affirmative Action*].

69. See Ware, *supra* note 3, at 243 (finding many French teachers assume the “children of immigrants cannot perform at an adequate academic level and view such students as disruptive”); see also *id.* at 196 (“headscarves and burqas are regarded as threats to French society”).

The French public school system has major issues with segregation.⁷⁰ Many parents seek to send their children to more diverse schools, in the hopes that it would improve the quality of their children's education.⁷¹ However, some schools are diverse; more affluent and privileged parents take their children out of these schools and put them in less diverse private schools.⁷² This is similar to the reaction white parents had to the desegregation of public schools in the United States.⁷³

This lack of diversity in schools exacerbates the disparity of unemployment that ethnic minorities face, as French firms overwhelmingly hire workers from the elite private schools called *grandes écoles*.⁷⁴ France's political, business, and scholarly leaders come from these elite schools, where the staggering majority of the students are white and from the upper and upper-middle class.⁷⁵ In 1998, lower or working-class families comprised "[l]ess than one percent" of the student body of France's most prestigious university, Sciences Po.⁷⁶

This lack of access to elite French schools keeps minorities from achieving upward mobility and becoming leaders in French society.⁷⁷ The admissions process isolates French minority students, as they have to pass an "extremely difficult and competitive exam that requires up to two years of specialized preparation," which results in "wealthier students hav[ing] an advantage because their parents can afford elite high schools and private tutors."⁷⁸ Such educational bondage perpetuates the social and economic barriers that condemn many French minorities to remain in poverty while maintaining the privileged status quo of the white French elite.⁷⁹

70. See FREDETTE, *supra* note 55, at 84.

71. *See id.*

72. *Id.* 84-86 ("Parents with the means to do so were pulling their students out of underperforming schools, leaving those schools to decline further, and separating students of different class backgrounds into different schools.")

73. See Susheela Jayapal, *School Desegregation and White Flight: The Unconstitutionality of Integration Maintenance Plans*, U. CHI. LEGAL F. 389, 389 n.2 (1987) After the Supreme Court's decision to desegregate American public schools, white parents began to move out of the cities and put their children in all white private schools. *Id.* This exacerbated the education inequality between whites and blacks, as the black schools continued to receive less funding and became majority-minority schools with underperforming students. *Id.*

74. See FREDETTE, *supra* note 55, at 86 ("It is reasonable to assume, given France's recent immigration history and the extra economic and social challenges immigrants face, that there are some implications for non-whites and Muslims in this separation of rich and poor students."); *id.* at 84 ("The *grandes écoles* are for the rich, the white. Overall, there is no social diversity, and the big businesses always recruit from the same schools.")

75. See Ledford, *supra* note 15, at 364 ("In 1998, 81.5% of the students admitted to Sciences Po were upper or upper-middle class: 53.5% had parents who were high-level managers or academics, and 28% had parents who were entrepreneurs or other professionals.")

76. *Id.*

77. *Id.*

78. *Id.* ("Since whites make up most of the upper classes, the *grandes écoles* are predominately white.")

79. See FREDETTE, *supra* note 55, at 84 ("The homogeneity of the French elite, he argues, traces back to school days.")

3. Affirmative Action in the United States Compared to France

To combat similar discrimination in the United States, the Supreme Court held that American universities could, consistent with constitutional and statutory law, consider race in their admissions processes to further the compelling government interest in promoting a diverse student body.⁸⁰ Scholars have identified a strong correlation between high rates of poverty and lower test scores and, overall, impaired educational outcomes.⁸¹ Therefore, instead of focusing solely on test scores in the application process, American universities may consider a student's race, "leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background."⁸² Although this expansion has not cured educational disparities in the United States, it has allowed minority groups to achieve higher education at more advanced rates than minority groups in France.⁸³

Comparable minority achievements have not been observed in France because French schools are not allowed to consider race in their application process at any level.⁸⁴ The language of the French Constitution states, "*equality of all citizens before the law, without distinction of origin, race or religion.* . . . has been interpreted as essentially banning all race consciousness."⁸⁵ Therefore, French schools, firms, governmental agencies, and private actors are prohibited from collecting race data or using race as a factor in their recruitment or research.⁸⁶

However, this prohibition has not completely barred French actors from working to combat discrimination. Sciences Po created its own version of an affirmative action program, which focuses on geographical locations rather than race.⁸⁷ In 2001, Sciences Po instituted a particularized admissions program recruiting students from high schools in "economically disadvantaged" areas that were not typically considered for admission.⁸⁸ Sciences Po, recognizing the disadvantages students from these underprivileged schools face, imposes different admissions requirements on applicants to more adequately assess their accolades.⁸⁹ Instead of requiring students from

80. See Ledford, *supra* note 15, at 360. See Grutter v. Bollinger, 539 U.S. 306, 343-44 (2003).

81. See *Affirmative Action and Standardized Testing*, 4 TEX. HISP. J. L. & POL'Y 85, 95 (1998); see also Ledford, *supra* note 15, at 358 (observing twenty-seven percent of black children under the age of eighteen live in poverty, as compared with thirteen percent of white children); *American Schools Still Heavily Segregated by Race, Income: Civil Rights Project Report*, HUFFPOST (Sept. 20, 2012), http://www.huffingtonpost.com/2012/09/20/american-schools-still-he_n_1901583.html [<https://perma.cc/K8GY-UH89>].

82. See Fisher v. Univ. of Tex., 570 U.S. 297, 304 (2013); see also Grutter v. Bollinger, 539 U.S. 306, 318 (2003) (holding law schools are allowed to consider race alongside other factors to achieve a diverse student body consisting of a "critical mass" of underrepresented minority students.).

83. See U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATS., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2017 (NCES 2017-051), 92 (2017) (finding the rate of degree-seeking black men and Hispanics enrolled in college increased from 2005 to 2015.).

84. See Sabbagh, *Affirmative Action*, *supra* note 68, at 55.

85. See Ledford, *supra* note 15, at 366-67 (emphasis added) (internal quotations omitted).

86. See Oppenheimer, *supra* note 6, at 737.

87. See Sabbagh, *Affirmative Action*, *supra* note 68, at 52.

88. *Id.* at 53.

89. See *id.*

low-income districts to take the extremely competitive exam that their underfunded schools did not adequately prepare them for, they are required to write two essays for admission.⁹⁰ The first paper is a “synthesis of several press articles collected on a chosen topic, the other an analytical essay on that same subject.”⁹¹ The applicants must then defend the papers before their high school teachers and administrators.⁹² The top students are invited to an interview at Sciences Po, and those that are admitted are offered financial aid and tutoring.⁹³ This process has allowed Sciences Po to begin the slow progression of diversifying its student body.⁹⁴

Sciences Po’s admissions process shows how private actors have tried to bridge inequality gaps in France.⁹⁵ This is a positive step towards combating ethnic and racial discrimination. However, this is a singular effort at one school, which is not as impactful as the American system where all schools are allowed to consider various characteristics—including race—during their admissions process.

4. Employment Disparity and Discrimination in France

Ethnic minorities in France are largely discriminated in the labor market, wherein they experience devastating unemployment rates.⁹⁶ Young French ethnic minorities “originating from the Maghreb (Algeria, Morocco, and Tunisia) and Western and Central Africa . . . suffer an unemployment rate three times as high as the [white] French.”⁹⁷ This severe employment disparity is further displayed when comparing the rates of ethnic immigrants with those of European immigrants in France.⁹⁸ Further, when French ethnic minorities do become employed, they are overwhelmingly represented in the “lowest paying and least desirable occupations.”⁹⁹

Scholars attribute these shared impediments and obstacles to entering the labor market to the “ethnic penalty” that French racial minorities experience due to discrimination.¹⁰⁰ Discrimination effectively locks out ethnic minorities, preventing them from obtaining necessary training, opportunities, and capital to succeed in

90. *Id.*

91. *Id.*

92. See Sabbagh, *Affirmative Action*, *supra* note 68, at 53.

93. *Id.*

94. *Id.* (noting that in 2001, the first year of the program, Sciences Po admitted eighteen new students from low income neighborhoods).

95. *Id.* at 52-53.

96. See Levy et al., *supra* note 30, at 1071; Ware, *supra* note 3, at 196.

97. See Levy et al., *supra* note 30, at 1071.

98. See Oppenheimer, *supra* note 6, at 748 (“2006 study revealed that the unemployment rate for Algerian male immigrants was 30 percent and for Turkish male immigrants was 25 percent while for Portuguese, Spanish and Italian male immigrants it was under 11 percent, and that these disparities continued in the second generation.”).

99. See Ware, *supra* note 3, at 243.

100. *Id.* (“Though several anti-discrimination laws prohibit employment discrimination, studies have shown that the laws are not very effective in protecting ethnic minorities from discriminatory practices.”).

French society.¹⁰¹ These barriers to assimilation are additionally displayed in the categorization of ethnic minorities as “immigrants” although their families have lived in France for generations.¹⁰² With high unemployment rates, young minority men are easy targets for police brutality, another significant issue.

5. Police Brutality Against French Ethnic Minorities

Banlieusards are routinely targeted by police who abuse and harass them using the pretext of identity checks. These discriminatory practices treat the young men as second-class citizens and impinge on their rights to freedoms of movement and privacy. Police brutality inflicted on banlieusards provoked large-scale riots in 1983, the 1990s, and 2005.¹⁰³

Police brutality against ethnic minorities has been a major source of civil unrest throughout France, and has resulted in riots spanning weeks.¹⁰⁴ One of the most notorious riots in France began on October 27, 2005, after two teenagers of North African descent were electrocuted to death by a transformer while hiding from police in an electricity substation.¹⁰⁵ Bouna Traoré and Zyed Benna began their day playing soccer with friends.¹⁰⁶ Their lives abruptly ended after fleeing the police who confronted them and demanded they provide documentation for a random identity check.¹⁰⁷ The boys were in the middle of a soccer match without their papers and ran to avoid further harassment by the police.¹⁰⁸ The chase led to their deaths.¹⁰⁹ Their deaths ignited a series of fiery riots that lasted nearly a month in multiple French cities forcing the government to declare a state of emergency.¹¹⁰ It was difficult for the French government to control the protest and riots because they spread through the banlieues like wildfire.¹¹¹ So many people of color were fed up with the conditions they suffered and wanted to show the government that they had had enough.

For the next three weeks, riots spread like wildfire from suburb to suburb. The turmoil affected hundreds of towns. Images of flaming cars filled news reports as approximately ten thousand cars were torched. Four thousand rioters were arrested and one hundred and twenty-five police officers were wounded. The

101. *See id.* at 214.

102. *Id.* (finding that second- and third-generation French minorities are still treated and viewed as immigrants).

103. *See id.* at 186.

104. *Id.* at 209-12.

105. *See* WHITE, *supra* note 55, at 217; Ware, *supra* note 3, at 212.

106. *See* Ware, *supra* note 3, at 211.

107. *See* WHITE, *supra* note 55, at 217; Ware, *supra* note 3, at 212.

108. *See* Ware, *supra* note 3, at 212.

109. *Id.* (“The three boys climbed the wall into the substation and searched for an exit. One of the boys touched a transformer, instantly killing himself and a second boy. The third boy was saved by a power surge that cut electricity to the town. The survivor rescaled the wall. When he emerged, he saw that no one was outside because the police had left the area.”).

110. *See id.* at 212; John Leicester, *France Declares State of Emergency*, WASH. POST (Nov. 9, 2005) <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110800095.html> [<http://perma.cc/7CYZ-P23J>].

111. *See* Ware, *supra* note 3, at 209-12.

rioters, many of them teenagers, were mainly of North and West African descent. The government declared the riots over on November 17th, 2005 after the number of cars torched the night before fell below one hundred.¹¹²

Although these riots seemed endless and spontaneous, France is no stranger to revolts and riots in response to the police brutality and governmental neglect of ethnic minorities throughout the country.¹¹³ In 1980, the Beur Movement rioted and protested police brutality towards Arab French citizens.¹¹⁴ In 1983, 100,000 protesters marched from Marseille to Paris to protest police brutality against ethnic minorities.¹¹⁵ In 1990, riots lasted over the course of a few days in response to the death of a young man who rode on a motorcycle with a friend when they were struck by a police vehicle.¹¹⁶ In 2017, France experienced another series of riots after a French policeman sodomized a young man of Northern African descent with a baton during a random identity check.¹¹⁷ Without stronger government intervention and attempts to safeguard minority rights, these riots and protests will continue and perhaps escalate in their intensity.¹¹⁸

III. FRANCE'S CURRENT CONSTITUTION AND LAWS HAVE FRUSTRATED THE ENACTMENT OF LAWS TO REMEDY RACIAL DISPARITIES

The French Data Protection Act prohibits the collection of “sensitive data [that] reveals, either directly or indirectly: racial and ethnic origin.”¹¹⁹ In 1978, France was one of the first European countries to pass a Data Protection Act (“DPA”).¹²⁰ This law established that information technology is at the service of each citizen and should not violate human identity, human rights, privacy, nor individual and private liberties through the collection of private data.¹²¹ The purpose of this act is consistent with France’s concerns about the potential for using racial data harmfully, given its history of interning and murdering government identified French Jews.¹²² The DPA also established the Commission Nationale De l’informatique et des Libertés

112. *Id.* at 212.

113. *See id.* at 209-12, 214 (“Years of police harassment, discrimination and social exclusion generated the acts of rebellion and the intense anger that was reflected in the 2005 riots. The unrest will not end until socio-economic inequalities and ethnic discrimination have been properly addressed.”).

114. *See id.* at 210.

115. *Id.* at 209-10.

116. *Id.* at 209 (“Rioting and protest have become a regular occurrence in the French banlieues for the past 3 decades.”).

117. Peter Holley, *A Man Accused French Police of Raping Him. Police Say It Was an Accident.*, CHI. TRIB. (Feb. 11, 2017), <http://www.chicagotribune.com/news/nationworld/ct-french-police-rape-charge-accident-claim-20170211-story.html> [<http://perma.cc/T2SD-WWSU>].

118. *See* Ware, *supra* note 3, at 210-12; *see also* Levy et al., *supra* note 30, at 1073 (“Riots are also triggered by the outcome of judicial investigations or trials, when local youth feel that the police officers involved have been unjustly cleared or too leniently sentenced.”).

119. *See* MYRIA SAARINEN ET AL., DATA PROTECTION IN FRANCE: OVERVIEW, THOMSON REUTERS PRACTICAL LAW COUNTRY Q&A, 6-502-1481, 8 (2018), <https://uk.practicallaw.thomsonreuters.com/6-502-1481> [<https://perma.cc/Q5MC-4MXE>].

120. *See* SIMON, *supra* note 7, at 47 (noting the Data Protection Act passed in 1978).

121. *Id.* at 47.

122. *See* Levy et al., *supra* note 30, at 1067; Oppenheimer, *supra* note 6, at 746.

(CNIL), which monitors and ensures that the data protection requirements are adhered to by public and private actors.¹²³ Before any actor can collect data on sensitive information, which includes ethnicity, they have to request permission from the CNIL and report the utility of the information.¹²⁴ The CNIL must “grant formal authorization, and may impose special conditions before doing so. If it withholds authorization, processing may not proceed.”¹²⁵ The CNIL scrutinizes requests closely to ensure the data collected does not violate the prohibition against race-based data.¹²⁶ Public and private actors violating these data protection provisions by attempting to measure racial discrimination are prosecuted under criminal law.¹²⁷

The ban prevents government actors from measuring the extent of the issues ethnic populations face, which renders the enforcement of anti-discrimination laws ineffective.¹²⁸ The French Constitutional Council affirmed this ban in 2007, when it rejected part of a bill passed by Parliament, which would have provided an exception for measuring racial and ethnic discrimination.¹²⁹

The French Parliament initially supported the proposed legislation; the legislature recognized the bar on collecting data worked to the detriment of minorities.¹³⁰ However, the French Constitutional Council struck down the article of the proposed bill on procedural grounds. The Council deemed that the bill was effectively “a rider insufficiently related” to the subject matter of the bill, as the proponents offered an immigration bill to remedy discrimination which affects both immigrants and French citizens.¹³¹ Further, the Constitutional Council commented that article of the proposed legislation could also be struck down on substantive grounds: The Council deemed the article inconsistent with Article 1 of the French Constitution, which prohibits distinguishing French citizens based on race or ethnicity.¹³²

A. Attempts to Combat Discrimination Have Been Ineffective

Although France is officially a colorblind country, the French government recognizes that it has a huge problem with inequality affecting ethnic minorities¹³³—

123. See SIMON, *supra* note 7, at 47-49; Oppenheimer, *supra* note 6, at 746.

124. See SIMON, *supra* note 7, at 11, 48.

125. *Id.*

126. See Sabbagh, *supra* note 31, at 1.

127. See SIMON, *supra* note 7, at 47.

128. See Ware, *supra* note 3, at 215.

129. See Oppenheimer, *supra* note 6, at 737; see also, <https://www.conseil-constitutionnel.fr/en> (“The French Constitutional Council is the court vested with the power to review the constitutionality of French Legislation.”).

130. *Id.* at 750.

131. See Sabbagh, *supra* note 31, at 2; Ware, *supra* note 3, at 214 (finding that second- and third-generation French minorities are still treated and viewed as immigrants).

132. See Sabbagh, *supra* note 31, at 2.

133. See Oppenheimer, *supra* note 6, at 744 (“According to a 2006 poll, conducted by the European Union (the ‘Euro-barometer’), 80 percent of French respondents believe that ethnic origin discrimination is widespread in France.”).

evidenced by the passage of several anti-discrimination laws.¹³⁴ In November 2001, the French government passed the Act Against Discrimination to prevent discrimination in the workplace.¹³⁵ In March 2006, France passed the Equal Opportunity Act, which requires companies with a certain number of employees to review applications anonymously to avoid racial bias.¹³⁶ The Act was an attempt to bring peace after the 2005 race riots stretched across the outskirts of the cities.¹³⁷ In 2008, France amended its Labor Code prohibiting direct and indirect discrimination during employment recruitment processes.¹³⁸

In December 2004, France formed the High Authority for Action Against Discrimination and For Equality (HALDE), which is an equal opportunity and anti-discrimination commission responsible for responding to direct reports of discrimination.¹³⁹ However, the HALDE is largely ineffective in fighting discrimination against ethnic minorities because it is limited to processing claims of discrimination on an individual basis.¹⁴⁰ The HALDE can neither institute sanctions nor impose audits on French industries to measure discrimination against minorities.¹⁴¹ Instead, the HALDE's primary purpose is to deal with individual claims of discrimination and to assist with collecting evidence to support victims in future criminal or civil litigation.¹⁴²

The HALDE has no real authority. It can neither create legislation nor make any meaningful, anti-discriminatory impact to combat the large-scale injustice.¹⁴³

There were three convictions in 1997, seven in 1999, sixteen in 2000, and twenty-nine in 2002. . . . French anti-discrimination laws have been so ineffective, because: [the] formal prohibitions of discriminatory hiring have no deterrent effect in France. . . . Most discrimination cases are brought in criminal proceedings, and convictions are very rare. Anti-discrimination law hardly deters even the most overt forms of discrimination.¹⁴⁴

Despite passing anti-discrimination laws, studies prove the laws are largely unsuccessful at safeguarding ethnic minorities from discrimination.¹⁴⁵ Minorities are widely discriminated against and disadvantaged in the French market. The laws limit the recognition of larger scale problems to individual incidents, preventing the French government from seeing and addressing the larger reality.¹⁴⁶ There

134. See SIMON, *supra* note 7, at 52.

135. *Id.* Later supplemented by the "Social Modernisation Act." *Id.*

136. *Id.*

137. *Id.*

138. See Code de Travail [C. TRAV.] [Labor Code] art. L. 112-45 (Fr.); Oppenheimer, *supra* note 6, at 737.

139. See SIMON, *supra* note 7, at 52; Ware, *supra* note 3, at 215-16.

140. See SIMON, *supra* note 7, at 52; Ware, *supra* note 3, at 217.

141. See Ware, *supra* note 3, at 217.

142. *Id.*

143. *Id.* at 217.

144. *Id.* at 218.

145. *Id.* at 243.

146. *Id.* at 217.

is a huge disconnect between the extensive quantity of French anti-discrimination laws and the triviality of their impact throughout the country where minorities are overrepresented in unemployment and poverty statistics.¹⁴⁷ This leaves a very skewed perception of the depth of discrimination that accounts for the drastic unemployment of minorities, specifically Northern Africans in France.¹⁴⁸

These acts are primarily ineffective because they lack the necessary tools to enforce compliance and punish bad actors who violate the law.¹⁴⁹ None of the anti-discrimination laws specify what data or statistics would be necessary to accomplish their goals of combating inequality.¹⁵⁰ Racial and ethnic data accumulated using a national census are commonly examined for evidence of discrimination.¹⁵¹ For example, in the United States, statistics show African American women have a median net worth of \$100, compared to the \$10,000 net worth of single African American men, and the \$41,000 net worth of single white women.¹⁵² The French anti-discrimination laws are ineffective because there is no way to measure or obtain similar statistics and, thus, no scope of the extent of racial discrimination in France.¹⁵³

IV. FINDING A SOLUTION TO FRANCE'S RACIAL DISPARITIES

A. A Constitutional Amendment as a Remedy

France should amend the text of its Constitution to explicitly protect ethnic minorities. The Constitutional text should decree that every individual is entitled to equal protection under the law without discrimination based on their race, ethnicity, or national origin. This would allow France to officially recognize the intersectional relationship between race, status, and achievement in French society.¹⁵⁴ The French republican ideal of nationality has not evolved despite the robust diversification of France, which now possesses the largest Muslim population in Europe.¹⁵⁵ French culture is still defined by white European desires and the rejection of non-white citizens and residents as *others*, while the conflicts that involve ethnic minority populations have increased dramatically.¹⁵⁶ Despite the fact that mass amounts of ethnic minority groups have lived in France for centuries, some third and fourth

147. See Ledford, *supra* note 16, at 364; Ware, *supra* note 3, at 218-19 (“[U]nlawful discrimination against ethnic minorities is not taken seriously in France. Overt discrimination is widespread and tolerated.”).

148. See Levy et al., *supra* note 30, at 1071.

149. See Ware, *supra* note 3, at 217.

150. See SIMON, *supra* note 7, at 52.

151. See Oppenheimer, *supra* note 6, at 737.

152. See Mariko Chang, *Women of Color Lag Behind in Wealth*, NPR (Aug. 11, 2010), <http://www.npr.org/templates/story/story.php?storyId=129130480> [<http://perma.cc/69Y5-WVPH>].

153. See Oppenheimer, *supra* note 6, at 743.

154. See Ware, *supra* note 3, at 186.

155. See Ware, *supra* note 3, at 185-92 (finding “immigration from former colonies in North and Sub-Saharan Africa has had a significant effect on France’s demographic composition . . . By the 1980s, Maghrebis represented approximately 30% of France’s total immigration population, making them the largest non-European minority in France.”).

156. See Ware, *supra* note 3, at 201 (“At some point, France will have to accept the reality of an increasingly diverse population.”).

generation born French citizens are often considered immigrants in French social and political realms.¹⁵⁷ This inhibits ethnic minorities from assimilating and embracing the united colorblind identity of French culture because the country does not consider them French.¹⁵⁸

Notwithstanding France's efforts, the government did not achieve equality under the law simply by declaring itself a colorblind state and effectively outlawing the concept of race.¹⁵⁹ The text of the Fifth Republic's Constitution did not eradicate the problems that led to colonial slavery and the French internment of Jewish people.¹⁶⁰ It only made the inequalities and injustices that ethnic minorities face invisible in plain sight.¹⁶¹ In fact, France is hardly colorblind, as racism and discrimination is still visible behind the coded language used to describe the minority populations.¹⁶² For example, the French government continues to distinguish people on the basis of race as when they refer to second and third generation French citizens as "immigrants."¹⁶³ France is operating in a false reality, recognizing the obvious differences between its citizens but ignoring the problems that result from discrimination.¹⁶⁴

Today, most French people recognize inequality and racial injustice as widespread issues that are detrimental to the country.¹⁶⁵ French officials can neither adequately nor meaningfully address any of these problems.¹⁶⁶ The proposed constitutional

157. See Oppenheimer, *supra* note 6, at 744 ("Whether we describe them as 'minorities' or 'visible minorities' or 'immigrants' (a term sometimes extended to non-immigrant French citizens who are descended from non-European ancestors), or 'blacks and Arabs' or 'Africans' or 'North and sub-Saharan Africans' or some other term of outsider identity, there are a substantial number of French citizens who are distinguished from French citizens of European descent by their skin color and ancestral origins."); see also Ware, *supra* note 3, at 187, 201 ("the term 'immigrant' has become a shorthand reference to ethnic minorities who are harshly criticized for failing to assimilate French values and traditions. This is particularly so in the case of Muslims, as many consider Islam to be incompatible with French values."); *id.* at 243 ("The labeling of second- and third-generation Maghrebis as 'immigrants' shows that they are not considered French, even though they were born there and are French citizens.").

158. See Ware, *supra* note 3, at 187-88 ("Ethnic minorities are treated as permanent *étrangers* ('strangers') unworthy of acceptance by the majority population. The problem is not that North and sub-Saharan Africans refuse to integrate into French society—the reality is France won't allow them to do so."); see also WHITE, *supra* note 55, at 217 ("The youths were mostly of North and sub-Saharan African descent and, therefore, represented communities that are restricted from a full realization of citizenship and removed from the idealist notions of what French society offers"); *id.* at 222 ("Despite the perception that 'racial' and ethnic backgrounds were not significant issues—provided one fully apprehended the language and other aspects of French culture—the issue of difference remained, as Frenchness continued to be linked to 'whiteness.'").

159. 1958 CONST. 1 (Fr.).

160. *Id.*

161. See Ware, *supra* note 3, at 215; see also France24, *supra* note 6, (explaining that French lawmakers say there is no such thing as race and others responded, "You cannot change reality by simply changing the words.").

162. See Ware, *supra* note 3, at 187.

163. *Id.*

164. *Id.* at 214.

165. See Oppenheimer, *supra* note 6, at 737 ("But to bar state recognition of race is not to eliminate racism. While racial/ethnic/religious discrimination and inequality may be difficult to measure in France, most observers agree that it is a serious problem.").

166. See Ware, *supra* note 3, at 214 (finding "France's failures resulted from social and economic policies that allowed public officials to fail to address the oppressive conditions of ethnic minorities.").

amendment would permit the government and private actors to collect ethnic statistics which are currently outlawed by the Data Protection Act.¹⁶⁷ The following section of this Note will examine the proposed text and how it can counter the inequality and discrimination ethnic minorities face in the housing market, educational system, unemployment, and police brutality.

B. France Should Model Canada's Constitutional Language and Adopt a Constitutional Amendment that Protects its Citizens Against Discrimination

Throughout history, countries experiencing the detrimental effects of racism and discrimination have made efforts to combat these effects and protect their citizens. This section will analyze two constitutional protection models: the United States' and Canada's. The United States' Constitution takes a vague approach of prohibiting racial discrimination, whereas Canada's Constitution takes an explicit approach. These models have had contrasting results in their efforts to eradicate discrimination.¹⁶⁸

Although the Fourteenth Amendment of the U.S. Constitution granted African Americans citizenship, the Canadian Charter of Rights employs language that is more intentional and explicit.¹⁶⁹ The language of the U.S. Constitution is vague with regards to the rights of minorities and the provisions protecting them.¹⁷⁰ The U.S. Bill of Rights does not contain an equal rights provision.¹⁷¹ The Fourteenth Amendment's Equal Protection Clause guarantees all citizens equal protection under the law:¹⁷²

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, 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.¹⁷³

The Fourteenth Amendment discusses equality in terms of all citizens; it does not outlaw discrimination based on specific minority statuses like the Canadian Charter of Rights. Because there are no provisions creating explicit minority rights in the U.S. Constitution, Congress passed the Civil Rights Act of 1964, which outlawed

167. See SAARINEN ET AL., *supra* note 119.

168. Compare U.S. CONST. amend. XIV (stating without explicit mention of ethnicity and race that “[n]o state shall make or enforce any law . . . that den[ies] any person within its jurisdiction equal protection of the laws”), with Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, c 15 (U.K) (stating explicitly that “[e]very individual . . . has the right to equal benefit of the law . . . without discrimination *based on race, national or ethnic origin, colour*”) (emphasis added).

169. Compare U.S. CONST. amend. XIV, with Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, c 15 (U.K.).

170. See, e.g., U.S. CONST. amend. XIV, § 1 (no explicit reference to race or ethnicity).

171. See U.S. CONST. amend. I–XV.

172. See U.S. CONST. amend. XIII–XIV (The Fourteenth and Fifteenth Amendments were passed after African Americans were freed from slavery through the Thirteenth Amendment.).

173. See U.S. CONST. amend. XIV, § 1.

employment discrimination based on race, sex, color, religion, and national origin.¹⁷⁴

Despite these successful congressional acts in the United States, they are not as durable as the Canadian Charter of Rights because they rely on interpreting the U.S. Constitution's ethereal position on race, rather than being explicitly grounded in the text of the Constitution.¹⁷⁵ Without this constitutional foundation, these congressional acts are unreliable, subject to attack and repeal when political powers shift.¹⁷⁶ This renders minority rights unstable.

In contrast, the equal protection rights bestowed upon Canadian minorities is more concrete. Canadian minorities can quote their protection explicitly in Canadian Charter of Rights to respond to unconstitutional attacks on their rights:

Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, *without discrimination based on race, national or ethnic origin*, colour, religion, sex, age or mental or physical disability.

Subsection [15(1)] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups *including those that are disadvantaged because of race, national or ethnic origin*, colour, religion, sex, age or mental or physical disability.¹⁷⁷

The language of the Canadian Charter of Rights and Freedoms is especially explicit in its protection of minority groups. The Charter's direct reference to "race and national or ethnic origin" makes it easy for minority groups to proclaim constitutional protections and obtain legal remedies for harms suffered by discrimination.¹⁷⁸ The Charter goes a step further, protecting programs implemented with the intent to combat discrimination and achieve equality for these disadvantaged groups.¹⁷⁹

174. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (1964). Congress also passed the Voting Rights Act of 1965 to combat the legal barriers imposed by states, such as arbitrary literacy tests prohibiting African Americans from voting. *See History of Federal Voting Rights Laws*, U.S. DEP'T OF JUST. (July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws> [<https://perma.cc/35XL-PT6Q>].

175. *Compare* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (1964) *and* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (amended as 52 U.S.C.A. § 10301 (West)), *with* Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, c 15 (U.K.).

176. *See, e.g.*, Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html> [<https://perma.cc/ZH33-DBQZ>] (noting the U.S. Supreme Court "effectively struck down the heart" of the Voting Rights Act); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2207 (2016) (plaintiffs attacking the constitutionality of an affirmative action program); Stephen Dinan, *Supreme Court Says Voting Rights Act of 1965 Is No Longer Relevant*, WASH. TIMES (June 25, 2013), <https://www.washingtontimes.com/news/2013/jun/25/court-past-voting-discrimination-no-longer-held/> [<https://perma.cc/J6HH-468N>]. Almost immediately after the Supreme Court struck down a key provision of the Voting Rights Act, Texas began to change its voter identification and redistricting laws to requirements previously deemed illegal, without any vetting from the federal government. *Id.*

177. *See* Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, c 15 (U.K.) (emphasis added).

178. *Id.*

179. *Id.*

Of the two options, the French government should adopt the Canadian constitutional approach and amend its Constitution to explicitly protect ethnic minorities. This solution will allow France to successfully conquer its inability to effectively combat racism and discrimination. Placing concrete constitutional protections on minority equality rights will set France on the path of true equality before the law. The seemingly harmless language of the French Constitution is even more vague than the text of the U.S. Constitution and is used to maintain the ignored plight of French minorities throughout France. The French Constitution states, “France shall be 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.”¹⁸⁰ This language established France’s colorblind policies and justified France’s subsequent bans on race, ethnicity, and religion as a means of identifying citizens.¹⁸¹ This language also validated France’s Data Protection Act, which outlawed the collection of ethnic statistics and prevented state actors from quantifying the discrimination that minorities face in all aspects of their French lives.¹⁸²

Although the idea of a constitutional amendment may seem daunting, France has successfully enacted more than fifteen constitutions and numerous amendments in the past three centuries.¹⁸³ The solution must be a constitutional amendment. It cannot be left up to the legislature. Any bill that passes could be later reversed, succumbing equality rights to shifts in political power.¹⁸⁴ The text of the Constitution, as it currently stands, effectively prevents addressing these inequalities.

Incorporating text akin to that of the Canadian Constitution would allow France to protect minority rights and the programs serving them. The current language of the French Constitution seeks to achieve the “equality of all citizens before the law without distinction of race.”¹⁸⁵ However, this language impedes equality because it ensures that there is no way to effectively quantify it. This change would allow the French government and public actors to legally recognize racial diversity in France and begin to implement policy to improve the plight of ethnic minorities.¹⁸⁶

C. *How This Amendment Would Affect Current Racial Disparities*

Amending the French Constitution to explicitly protect minorities would help address housing disparities and other forms of racial inequality. These constitutional

180. 1958 CONST. 1 (Fr.).

181. See Oppenheimer, *supra* note 6, at 746-47.

182. *Id.* at 746-50. Note that under the Data Protection Act, questions about race are not permitted, but ethnic origin is permitted to a limited extent. *Id.* at 747.

183. See U.S. CONST. amend. I-XXVII; Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 60-65 (1997) (describing France’s eight constitutions between 1791 and 1815, five constitutions between 1815 to 1875, one in 1940, one in 1958, and numerous constitutional amendments through this time period and thereafter).

184. Admittedly, while the constitutional amendments can also be reversed later, these would be more difficult than a law enacted by the French legislature. See, e.g., Part III.D discussing CNIL’s failed legislation.

185. See 1958 CONST. 1 (Fr.); see also SIMON, *supra* note 7, at 52.

186. See Sabbagh, *supra* note 31, at 2.

protections would allow the French government to use its census to collect racial housing data and quantify the disparity of household income and assets between white and minority French populations.¹⁸⁷ Further, the amendment would allow the government to audit educational systems and illuminate, with precision, the country's educational disparities.¹⁸⁸ This would effectively combat the discrimination and inequity impeding the success of French minorities.¹⁸⁹

Amending the French Constitution would also permit the government to measure the percentages of people of color in particular fields, firms, and companies, instead of trying to calculate and combat this discrimination on an individual basis.¹⁹⁰ The proposed constitutional amendment would allow the French government to monitor and address the issues of discrimination and racism in law enforcement by analyzing the race and punishments for citizens committing similar crimes.

D. A Constitutional Amendment Strengthens France's Current Antidiscrimination Laws and Protections

A constitutional amendment would also allow the French government to modify the Data Protection Act to quantify and address the full weight of discrimination throughout the country.¹⁹¹ Such an amendment would allow France to collect statistics on race and ethnicity to identify disparities in housing, health, education, employment, and other social concerns on a much larger scale. France could then effectuate policy that meaningfully addresses inequality on a systemic basis, as opposed to creating change on an individual basis.¹⁹² Anti-discrimination laws and the HALDE could then be more effective.

European Data Protection laws were created to protect citizens against the collection of data that may be used for heinous purposes.¹⁹³ France would still be able to protect the identities of its citizens and prevent the repetition of the horrors and evils of the past. However, an outright ban on the collection of racial data is too far-reaching to meet the needs of identity protection. The ban's broadness works to the detriment of ethnic minorities, forcing them to live with gross disparities and ineffective anti-discrimination laws, concealing their problems with no means to adequately address them.¹⁹⁴ In contrast, other countries have found ways to collect racial data

187. See, e.g., Ware, *supra* note 3, at 186 (discussing how France's "visible minorities" are segregated into public housing that are isolated, ethnically concentrated, neglected, and physically deteriorating).

188. See, e.g., Sabbagh, *Affirmative Action*, *supra* note 68, at 53.

189. See *infra* III.C.

190. See SIMON, *supra* note 7, at 52 (discussing how HALDE analyzes complaints based on discrimination faced by individuals); see also Ware, *supra* note 3, at 217-18 (providing an overview of how HALDE handles employment discrimination cases).

191. See Oppenheimer, *supra* note 6, at 737 (noting that to win discrimination claims, large-scale data on discrimination is often required to prove discrimination occurred, which France currently lacks).

192. See SIMON, *supra* note 7, at 52; Ware, *supra* note 3, at 217.

193. See SIMON, *supra* note 7, at 10; Oppenheimer, *supra* note 6, at 746-50.

194. See Ware, *supra* note 3, at 218-19 ("French discrimination laws have been . . . ineffective. . . . Discrimination against ethnic minorities is obscured by the French belief that it is color-blind. . . .").

and simultaneously guard against improper usage.¹⁹⁵

For example, to protect French citizens' identities, the government could collect ethnic data in anonymous files, excluding identifying information and preserving only the key facts of their race, education, employment, neighborhood, salary, and other demographic data.¹⁹⁶ The government could also follow Sciences Po University's example, collecting mass amounts of data based on geographical locations, noting the race and ethnicities of residents while excluding their names.¹⁹⁷ Similarly, the French government could audit industries and school districts to analyze the correlation between quality of life, access to resources, and race. This data would allow France to see how intersectionality influences the lives and achievement of all their citizens, giving it a starting point to combat inequality, diversify the elite class, and create more opportunities for ethnic minorities.

V. CONCLUSION

Today, the race-neutral language of the French Constitution obscures the disparities of French minorities in the areas of housing, education, employment, and police relations. France should amend its constitution such that it provides explicit equality rights for ethnic minorities and protects programs assisting them. This proposed constitutional amendment would allow the French government to collect data based on ethnicity and race demographics, and thus be able to adequately address and fix its problem of inequality. The amendment would also allow the government to provide protections for the programs that seek to combat discrimination. These programs, without the necessary safeguards, will be subject to changes in political power and civil unrest.¹⁹⁸ Anti-discrimination policies and programs are commonly attacked by the majority. Thus, constitutional protections would anchor these rights and send the message that minority equality rights are not subject to shifting political climates.

195. See Oppenheimer, *supra* note 6, at 738 ("The United States Census Bureau collects and reports extensive data about American demography based on race and ethnicity. As a result, it is relatively easy to measure the existence of racial inequality in the United States.").

196. *Id.* at 750.

197. See Sabbagh, *Affirmative Action*, *supra* note 68, at 52.

198. See Liptak, *supra* note 176; see also *Fisher*, 136 S. Ct. at 2207 (constitutionality attack of affirmative action program).