

## **ERASING RACE: THE ROLE OF REPUBLICANISM AND RACISM IN FRENCH CONSTITUTIONAL JURISPRUDENCE**

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In the summer of 2018, France's parliament voted to remove the word "race" from the country's constitution in an effort to pursue its colorblind approach to combatting racism. Traditional French secularism stresses the non-existence of race, but by refusing to acknowledge race, France also refuses to acknowledge the reality of racism within its borders and effectively perpetuates it.

This Comment analyzes the legislative history and the sociological pressures which led to the decision to remove "race" from the French constitution, as well as the likely consequences of doing so. The Comment begins by evaluating the origins of French republicanism, the country's colonial history, and the evolution of its immigration policies. It then explores the history of the word "race" in French law as well as its attempts to combat racism through anti-discrimination legislation. Finally, this Comment discusses and evaluates the arguments on both sides of the amendment debate from parliament members, anti-racism organizations, academics, and citizens. This Comment argues that the inclusion of "race" in article one of France's constitution once served as a powerful tool in enacting and effectuating anti-discrimination legislation; and without it, France's ability, or even its willingness, to identify and combat systemic racism is significantly weakened.

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*If we stop using racial categories, then we will not be able to identify racial inequity. If we cannot identify racial inequity, then we will not be able to identify racist policies. If we cannot identify racist policies, then we cannot challenge racist policies. If we cannot challenge racist policies, then racist power’s final solution will be achieved: a world of inequity none of us can see, let alone resist. Terminating racial categories is potentially the last, not the first, step in the antiracist struggle.<sup>1</sup>*

## I. INTRODUCTION

For approximately sixty years, Article 1 of France’s Constitution declared: “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.”<sup>2</sup> In July of 2018, the French National Assembly voted to remove the word “race,” replacing it instead with “sex.”<sup>3</sup> The racism that is entrenched within

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1. IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 54 (2019).

2. 1958 CONST. art. 1 (Fr.).

3. *L’Assemblée Supprime de la Constitution le Mot « Race » et Interdit la « Distinction de Sexe »* [Assembly Removes “Race” from the Constitution and Prohibits “Sex Distinction”], LE MONDE (July 12, 2018, 6:38 PM), [https://www.lemonde.fr/politique/article/2018/07/12/l-assemblee-supprime-dans-la-constitution-le-mot-race-et-interdit-la-distinction-de-sexe\\_5330615\\_823448.html](https://www.lemonde.fr/politique/article/2018/07/12/l-assemblee-supprime-dans-la-constitution-le-mot-race-et-interdit-la-distinction-de-sexe_5330615_823448.html); Rokhaya Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its*

French society, politics, and culture, however, remains.<sup>4</sup> French republicanism stresses the non-existence of any identity other than citizenship,<sup>5</sup> but by refusing to acknowledge race, France fails to eliminate racism within its borders and may effectively perpetuate it.<sup>6</sup> If France will not say “race,” how can it say “racism?” How does a country alleviate a problem it refuses to name?

This Comment analyzes the pressures and processes that led to the removal of the word “race” from the French Constitution in 2018. It explores and evaluates the protections offered to minorities prior to the amendment, the motivations for the amendment, and its potential consequences. The remainder of this introduction provides background information on French republicanism, which is rooted in ideals of citizenship and national identity, as well as France’s colonial history and post-colonial immigration policy. These important aspects of France’s history and culture have all contributed to the identity politics in France today and are thus integral to the discussion of race policy in modern France.

Part II of this paper discusses the history and jurisprudence of the word “race” within the French Constitution and French legislative texts. It analyzes how France has sought to protect racial minorities without specifically naming them and the effectiveness of such efforts. Part III then discusses the amendment debate, highlighting the arguments in support of and against the amendment. Specific attention is given to the people, institutions, and demographics of those on either side of the debate. Part IV, finally, discusses the potential outcomes of the amendment and what it may mean for French law, policy, and society moving forward.

#### ***A. French Republicanism and National Identity***

The desire to eliminate, or debatably to *ignore*, social categories in France dates back to the Republic’s founding.<sup>7</sup> French republicanism was born from the Revolution in 1789<sup>8</sup> and is rooted in the ideals of *liberté*, *égalité*, and *fraternité*.<sup>9</sup>

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*Constitution*, WASH. POST (July 13, 2018, 4:15 PM), <https://www.washingtonpost.com/news/global-opinions/wp/2018/07/13/frances-dangerous-move-to-remove-race-from-its-constitution/>.

4. See PETER FYSH & JIM WOLFREYS, *POLITICS OF RACISM IN FRANCE* (2d ed. 2003) (analyzing the racism of the French National Rally, formerly the National Front).

5. See Erik Bleich, *Race Policy in France*, BROOKINGS (May 1, 2001), <https://www.brookings.edu/articles/race-policy-in-france/> (“Unlike the United States, Britain, or even the Netherlands, France maintains a ‘color-blind’ model of public policy. This means that it targets virtually no policies directly at racial or ethnic groups.”). See *infra* Part II for a discussion of colorblind policies in French law.

6. See *infra* Part IV for a discussion on the effects of France’s colorblind policies.

7. See Déclaration des Droits de l’Homme et du Citoyen de 1789 [Declaration of the Rights of Man and of the Citizen 1789], art. 1, <https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789> (promoting equality and discouraging social distinctions).

8. JAMES MAXWELL MOORE, *THE ROOTS OF FRENCH REPUBLICANISM* 15–16 (1962).

9. James Livesey, *The Culture and History of French Republicanism: Terror or Utopia?*, 1 *REPUBLIC* 47, 50 (2001); see MINISTÈRE DE L’EUROPE ET DES AFFAIRES ÉTRANGÈRES, *Liberty, Equality, Fraternity*, FRANCE DIPLOMACY, <https://www.diplomatie.gouv.fr/en/coming-to->

The overarching goal of French republicanism is to maintain a society in which all citizens enjoy freedom, equality, and fraternity among one another.<sup>10</sup> The Revolution and its ideals were largely inspired by the Declaration on the Rights of Man and of the Citizen (the “Declaration”), adopted by the French Assembly in 1789.<sup>11</sup> Article 1 of the Declaration states: “Men are born and remain free and equal in rights. *Social distinctions may be founded only upon the general good.*”<sup>12</sup> The Declaration later served as the preamble to the very first Constitution of the French Republic.<sup>13</sup> It is important to note, however, that despite the fact that modern France’s founding documents were based on the rights, freedoms, and equality of men, the country did not permanently and definitively abolish slavery throughout its empire until 1848.<sup>14</sup>

Under the political and cultural philosophy of French republicanism, citizenship is “the antidote to the tendencies toward the atomisation of society and alienation of the individual generated by capitalist economics and bourgeois society.”<sup>15</sup> Citizenship itself is described as “not a biological but a political fact: one is French through the practice of a language, through the learning of a culture, through the wish to participate in an economic and political life.”<sup>16</sup> In short, French republicanism believes that national identity transcends social inequalities.<sup>17</sup> It emphasizes that French citizenship supersedes all other identities, and therefore France does not formally recognize any other identity.<sup>18</sup> This “colorblind” philosophy, ingrained in the foundations of the French Republic, is still alive and well in French policy today.<sup>19</sup> Those who pushed for the removal of the word “race” from the Constitution in 2018 argued that republican ideals required its removal<sup>20</sup>—that there exists no room for racial distinctions within the French

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france/france-facts/symbols-of-the-republic/article/liberty-equality-fraternity (last visited Oct. 8, 2019) (describing the revolutionary phrase as a part of French heritage).

10. Livesey, *supra* note 9, at 50.

11. *Declaration of the Rights of Man and of the Citizen*, ENCYCLOPEDIA BRITANNICA (July 22, 2005), <https://www.britannica.com/topic/Declaration-of-the-Rights-of-Man-and-of-the-Citizen>.

12. Déclaration des Droits de l’Homme et du Citoyen de 1789 [Declaration of the Rights of Man and of the Citizen 1789], art. 1, <https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789> (emphasis added).

13. 1791 CONST. pmb. (Fr.).

14. France first abolished slavery in 1794, but it only succeeded in temporarily ending the practice in a limited number of colonies. Slavery was then restored under Napoleon Bonaparte in 1802. See Sue Peabody, *French Emancipation*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/view/document/obo-9780199730414/obo-9780199730414-0253.xml> (last modified Oct. 28, 2014).

15. Livesey, *supra* note 9, at 53.

16. See Jeremy Jennings, *Citizenship, Republicanism and Multiculturalism in Contemporary France*, 30 BRIT. J. POL. SCI. 575, 577 (2000) (summarizing the argument of French republicanism from DOMINIQUE SCHNAPPER, *LA FRANCE DE L’INTÉGRATION* 63 (1991)).

17. Livesey, *supra* note 9, at 54.

18. Bleich, *Race Policy in France*, *supra* note 5.

19. *Id.* See *infra* Part II for a discussion of colorblind policies in French law.

20. See *infra* Part II for a discussion of who supported and who opposed the amendment and their respective arguments.

identity and therefore, race simply does not exist.<sup>21</sup>

Another political philosophy intrinsic within French republicanism is secularism, or *laïcité*.<sup>22</sup> Unlike in the United States, where we view religious secularism as freedom *of* religion, in France secularism is effectively freedom *from* religion.<sup>23</sup> It is characterized as protecting the state from undue religious influence, a tenet of the separation of church and state.<sup>24</sup> In mandating *laïcité*, France prohibits the public practice of any religion, including the wearing and displaying of any religious symbols.<sup>25</sup> Notably, secularist policies unfavorably target France's Muslim population, characterizing Islamic dress as a religious symbol and effectively restricting their participation in the public sphere.<sup>26</sup> Those who support French secularism cite its goals as an attempt to form a national cohesion, but in practice, it tends to disproportionately target and alienate those who practice Islam.<sup>27</sup> While Muslims are forced to hide their religious identity, hate crimes and discrimination against them persist.<sup>28</sup> France is "blind" to religion like it is to race, and despite the first article of the Constitution including religion among its protected categories, it has done very little to deal with the discrimination and animosity directed toward French Muslims.<sup>29</sup>

The ability of the ideals of French republicanism to functionally survive a modernizing world has been contested by scholars and philosophers for centuries.<sup>30</sup>

21. Bleich, *Race Policy in France*, *supra* note 5.

22. MINISTÈRE DE L'EUROPE ET DES AFFAIRES ÉTRANGÈRES, *Secularism and Religious Freedom*, FRANCE DIPLOMACY, <https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/secularism-and-religious-freedom-in-france/article/secularism-and-religious-freedom-in-france> (last visited Oct. 9, 2019).

23. See Dominique Decherf, *French Views of Religious Freedom*, BROOKINGS (July 1, 2001), <https://www.brookings.edu/articles/french-views-of-religious-freedom/> (highlighting the differences between religious freedom in America and France).

24. Anastasia Colosimo, *Laïcité: Why French Secularism is So Hard to Grasp*, INSTITUT MONTAIGNE (Dec. 11, 2017), <https://www.institutmontaigne.org/en/blog/laicite-why-french-secularism-so-hard-grasp>.

25. *Id.*

26. See *S.A.S. v. France*, 2014-III Eur. Ct. H.R. 341 (2014) (upholding the French law that banned burqas in public spaces); see also Kati Nieminen, *Eroding the Protection Against Discrimination: The Procedural and De-contextualized Approach to S.A.S. v France*, 19 INT'L J. DISCRIMINATION & L. 69, 77 (2019) (describing the implicit racism in French secularist policies and the failures of the European Court of Court of Human Rights).

27. See Karina Piser, *Why Forced Secularism in Schools Leads to Polarization*, ATLANTIC: EDUC. (Feb. 10, 2017), <https://www.theatlantic.com/education/archive/2017/02/why-forced-neutrality-leads-to-polarization/516222/> (describing the effects of secularism on Muslim school children).

28. *Etude: Les Comportements Racistes et les Discriminations Envers les Musulmans de France* [Study: Racist Behavior and Discrimination Against Muslims in France], DILCRAH (Nov. 6, 2019), <https://www.dilcrah.fr/2019/11/06/etude-les-comportements-racistes-et-les-discriminations-envers-les-musulmans-de-france/>; FOUND. FOR POL., ECON., & SOC. RES., EUROPEAN ISLAMOPHOBIA REPORT (Enes Bayralki & Farid Hafez eds., 2017).

29. Murtaza Hussain, *Liberté for Whom?*, INTERCEPT (Feb. 23, 2019), <https://theintercept.com/2019/02/23/france-islamophobia-islam-french-muslims-terrorism/>.

30. See Livesey, *supra* note 9, at 51–52 (describing the different criticisms of republicanism from thinkers such as Hegel and Burke).

In this Comment, I join the skeptics and explore the elimination of the word “race” from the Constitution as an evolution of French republicanism and evaluate (1) if the amendment was truly designed to fulfill the goals of freedom, equality, and fraternity,<sup>31</sup> and (2) to what extent, if at all, the amendment has achieved or will achieve these goals.

### **B. French Colonization and Decolonization**

The story of France’s complicated relationship with racial identity and racism would not be complete without a brief overview of its colonization and exploitation of the African continent and the racial political structures created therein. Colonization in itself is a deeply racist act of state power, and its legacy is unavoidably ingrained in the politics and culture of both colonized and colonizer states.<sup>32</sup>

French colonization in Africa dates as far back as the seventeenth century with the start of the slave trade.<sup>33</sup> The majority of its colonial expansion, however, began during “the scramble for Africa” in the nineteenth century, when European powers raced to conquer as much of the continent as they could.<sup>34</sup> As a result of the Berlin Conference in 1884, Europe went from controlling 10% of the African continent to 90% in just thirty years.<sup>35</sup> Accompanying, and necessary to, this huge boom of conquest were increased attitudes of white supremacy within European colonizer countries.<sup>36</sup> Early colonial rule saw mass exploitation of African people, both monetarily, with forced taxes, and physically, with forced labor.<sup>37</sup> In their pursuit of capital accumulation, the French, along with other colonizing powers, viewed African people as mere commodities to fuel economic growth and expand political power.<sup>38</sup>

Within these structures, the French maintained direct rule and practiced a principle of legal unity.<sup>39</sup> French governors and commanders were assigned to

31. MINISTÈRE DE L’EUROPE ET DES AFFAIRES ÉTRANGÈRES, *supra* note 13.

32. See David Olusoga, *The Roots of European Racism Lie in the Slave Trade, Colonialism – and Edward Long*, GUARDIAN: RACE (Sept. 8, 2015), <https://www.theguardian.com/commentisfree/2015/sep/08/european-racism-africa-slavery> (discussing the intrinsic connection between colonialism and racism).

33. Resul Mulayim, *French Influence in Africa (Colonial Period)*, BEYOND THE HORIZON (May 7, 2017), <https://www.behorizon.org/french-influence-in-africa-colonial-period/>; see, e.g., Ruth Ginio & Jennifer Sessions, *French Colonial Rule*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/view/document/obo-9780199846733/obo-9780199846733-0029.xml> (last modified Feb. 25, 2016).

34. *Scramble for Africa*, NEW WORLD ENCYC., [https://www.newworldencyclopedia.org/entry/Scramble\\_for\\_Africa](https://www.newworldencyclopedia.org/entry/Scramble_for_Africa) (last visited Sep. 28, 2019).

35. See Mulayim, *supra* note 33 (describing French expansion into Africa after the Berlin Conference).

36. See PIERRE ENGLEBERT & KEVIN C. DUNN, *INSIDE AFRICAN POLITICS* 23 (2d ed. 2019) (discussing the factors leading to mass colonization of Africa beginning in the late nineteenth century).

37. See *id.* at 26–28 (discussing early colonial rule in Africa).

38. See *id.* at 23–28 (discussing motivations for the colonization of Africa).

39. See *id.* at 31–33 (discussing how the French ruled their colonized regions in Africa).

administrative territories and subdivisions, and African commoners were strategically appointed to oversee small villages and apply French colonial law.<sup>40</sup> This principle of “legal unity” stems from the French principles of republicanism.<sup>41</sup> France wanted its colonies to become extensions of itself, rather than distinct territories,<sup>42</sup> an ideal that has become a common theme in French policy.<sup>43</sup>

This view persisted into the era of decolonization.<sup>44</sup> The end of World War II saw the spread of the ideas of liberation and self-governance, forcing European powers to reconcile these ideas with their policies of colonization.<sup>45</sup> France confronted this contradiction by reforming its colonial governance, giving colonial populations the right to vote, and ending the practice of forced labor.<sup>46</sup> Missing from these reforms, however, was the topic of independence.<sup>47</sup> Instead of granting independence to its colonies, France tried to further integrate colonial citizens into French governance and culture.<sup>48</sup> As a result, equality, rather than liberation, became the priority for many French colonies.<sup>49</sup> This effort was a reflection of the entire theme of French colonization policy—that is, a civilizing mission to transform African people into French people.<sup>50</sup> To achieve equality, African people were forced to exchange their Black and African identity for a singular French identity.<sup>51</sup> The clearest case study of this assimilationist policy at work is within Algeria. The country was essentially a “proto-French” state; France used its nationalist policies to shape the country while granting Algerians rights of French citizens.<sup>52</sup> The idea of French-African assimilation was reflected and codified in France’s 1946 Constitution.<sup>53</sup> Part sixteen of its Preamble read, “France shall form with its overseas peoples a Union founded upon equal rights and duties, without distinction of race or religion.”<sup>54</sup> 1946 marks the first time that the word “race”

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directly, as opposed to indirectly like the British).

40. *Id.*

41. See *supra* Section I.A for a discussion of French secularism.

42. See William B. Cohen, *The Colonized as Child: British and French Colonial Rule*, 3 AFR. HIST. STUD. 427, 430 (1970) (discussing the French colonial goal of assimilation).

43. See *supra* Section I.A for a discussion of French secularism.

44. See ENGLEBERT & DUNN, *supra* note 36, at 34–37 (discussing decolonization efforts after World War II).

45. *Id.*

46. *Id.* at 37–40.

47. *Id.* at 39.

48. *Id.*

49. *Id.* at 38.

50. *Id.*

51. See Alexis Buisson, *Why French and Americans Can’t Understand Each Others’ Perspective on Race*, FRENCHLY (July 23, 2018) (citing WILLIAM COHEN, *THE FRENCH ENCOUNTER WITH AFRICANS: WHITE RESPONSE TO BLACKS, 1530-1880* (2003)), <https://frenchly.us/french-americans-cant-understand-others-perspective-race/> (interviewing Crystal Marie Fleming).

52. Killian Jampierre, *Islamophobia in France: A Struggle Between Religious and National Identity* 41 (May 2019) (unpublished M.A. thesis, Brandeis University) (on file with author).

53. See ENGLEBERT & DUNN, *supra* note 36, at 38 (discussing decolonization efforts after World War II).

54. 1946 CONST. pmbl. § 16 (Fr.).

appeared in the French Constitution.<sup>55</sup>

The policy of assimilation quickly evolved into a policy of association, however, as assimilation efforts presented a risk of France being assimilated into Africa rather than the other way around.<sup>56</sup> The policy of association disintegrated French and colonial governances, while maintaining a “French community” for the purpose of governing overlapping interests.<sup>57</sup> Shortly after this policy was developed, it abruptly ended as a result of the Algerian War<sup>58</sup> in the 1950s.<sup>59</sup> French West Africa and the Maghreb, the two main French territories in Africa, were divided into individual colonies and given independence.<sup>60</sup> The haphazardness of the division, however, intentionally resulted in the instability of those colonies and thus a perpetual dependence on the French nation for support.<sup>61</sup> The French colonial view of African people as a disposable resource for economic growth<sup>62</sup> persisted past decolonization, as seen in the French recruitment of thousands of people from its former colonies to work within the country.<sup>63</sup>

### C. Post-Colonial Immigration

France’s colonization and subsequent decolonization of Africa led to a mass migration of African peoples to France during the late twentieth century.<sup>64</sup> By the end of the century, nearly 5% of France’s population was “visibly nonwhite.”<sup>65</sup>

55. See Idris Fassassi, *Removing ‘Race’ and Adding ‘Gender’ to the French Constitution: On Constitutional Redundancy and Symbols*, CONSTITUTIONNET (Aug. 24, 2018), <http://constitutionnet.org/news/removing-race-and-adding-gender-french-constitution-constitutional-redundancy-and-symbols> (detailing history of the word “race” in French legal text).

56. See ENGLEBERT & DUNN, *supra* note 36, at 37–39 (discussing decolonization efforts after World War II).

57. *Id.* at 36–37.

58. The Algerian War, essentially a massacre against the Algerian people, ended 132 years of French rule in Algeria. The relationship between the countries, however, remains fractured and hostilities against Algerians are still high. People of Algerian descent are routinely subject to racism, violence, and systemic discrimination within France. See Nabila Ramdani, *Macron’s Acknowledgement of France’s History of Brutality Against Algerians is Welcome, but It’s Time the Perpetrators Were Held Accountable*, INDEPENDENT (Sept. 17, 2018, 9:59 AM), <https://www.independent.co.uk/voices/emmanuel-macron-france-president-algeria-history-brutality-accountable-a8539991.html> (describing the brutal acts of the French upon Algerians during the war and the subsequent racism against Algerians in France today).

59. See ENGLEBERT & DUNN, *supra* note 36, at 37 (discussing how the Algerian war pushed France to abandon the notion of “French Community” and heavily control its colonies’ transition to independence).

60. See *id.* (discussing the decolonization of Afrique Occidentale Française and Afrique Equatoriale Française after World War II).

61. See *id.* (discussing the maintenance of Parisian influence despite colonial independence).

62. See *id.* at 23–28 (discussing motivations for the colonization of Africa).

63. James R. McDonald, *Labor Immigration in France, 1946-1965*, 59 ANNALS ASS’N AM. GEOGRAPHERS 116, 116–17 (Mar. 1969).

64. See Jacques Barou, *Integration of Immigrants in France: A Historical Perspective*, 21 IDENTITIES, Feb. 18, 2018, at 1–5 (describing French immigration trends).

65. Erik Bleich, *Antiracism Without Races: Politics and Policy in a “Color-Blind” State*, 18 FRENCH POL., CULTURE, & SOC’Y 48, 48 (2000).



France developed an immigration policy of integration,<sup>66</sup> a direct descendant of its historical colonial policy of assimilation.

Immigrant integration policies in France have developed widely over the past several decades.<sup>67</sup> In 1945, a law was passed requiring that all immigrants attempting to gain citizenship demonstrate their “assimilation to the French community.”<sup>68</sup> The law mandated—and still mandates—that all naturalized citizens speak French.<sup>69</sup> In 2003, the law was updated to require a “demonstration of knowledge of rights and duties of French citizens” as well.<sup>70</sup> In 2007, France tightened its immigration laws further and mandated that all immigrants seeking to join their family members in France take a two-month course on French language, history, and culture before entering the country.<sup>71</sup> The legislation also required immigrants to agree to “promote the integration of their families into French society.”<sup>72</sup>

French immigration policy highlights the importance France has always placed on developing a monoculture within the country.<sup>73</sup> Immigration policy also serves as one of the primary sources of racism within France.<sup>74</sup> It reflects the country’s republican assimilationist model, which is inherently exclusionary and treats people viewed as having “non-French” characteristics as “illegitimate entities within the body politic and national culture of France.”<sup>75</sup> As the country’s racial and ethnic demographics have changed, France has enhanced its message that “French” is the only identity to be formally recognized within the country.<sup>76</sup> Despite this message, or, perhaps due to it, historic attitudes of white supremacy born from the colonial period have persisted,<sup>77</sup> and French policy has failed to keep

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66. See Barou, *supra* note 64, at 5 (describing the labor and social integration of immigrants in France that occurred despite the lack of formal codification of any integration policy).

67. See Martin A. Schain, *Managing Difference: Immigrant Integration Policy in France, Britain, and the United States*, 77 SOC. RES. 205, 207–10 (2010) (describing various French immigration laws).

68. *Id.* at 210; CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 21–24 (Fr.).

69. See Schain, *supra* note 67 at 210; *but see* CODE CIVIL [C. CIV.] arts. 21–24-1 (Fr.) (“The requirement of knowledge of the French language shall not apply to political refugees and stateless persons who have resided in France regularly and usually for at least fifteen years and who are over seventy”).

70. Schain, *supra* note 67, at 210.

71. *Id.*; see also Katrin Bennhold, *Sarkozy Moves Quickly to Tighten Immigration Laws*, N.Y. TIMES (June 12, 2007), <https://www.nytimes.com/2007/06/12/world/europe/12iht-france.4.6112573.html> (describing new immigration legislation adopted to deter migration to France).

72. See Bennhold, *supra* note 71 (referencing the contract immigrants were required to sign to solidify this agreement).

73. See Jennings, *supra* note 16, at 575 (describing France’s goal of becoming a monocultural society).

74. Bleich, *Antiracism Without Races: Politics and Policy in a “Color-Blind” State*, *supra* note 65, at 49.

75. Jampierre, *supra* note 52, at 4.

76. See Bleich, *Race Policy in France*, *supra* note 5 (“France maintains a ‘color-blind’ model of public policy.”).

77. See Patrick Weil, *Immigration and the Rise of Racism in France: The Contradictions in Mitterrand’s Policies*, 9 FRENCH POL. & SOC’Y 82, 82 (1991) (“Immigration is perceived as a

up.<sup>78</sup> Discrimination against immigrants and minorities in general has flourished.<sup>79</sup> Some may argue that this discrimination solely targets immigrants and not specifically people of color.<sup>80</sup> Thus the Constitution, ensuring equality “without distinction of origin,”<sup>81</sup> already protects against such discrimination—and therefore the Constitution does not need to distinguish “race.”<sup>82</sup> It is important to note, however, that in order to discriminate against an “immigrant,”<sup>83</sup> a person must be perceived as one. Therefore, discrimination is targeted toward those who look like immigrants, primarily based on the color of their skin—the most obvious signifier of one’s race.<sup>84</sup>

## II. HISTORY OF “RACE” IN FRENCH CONSTITUTIONAL & LEGISLATIVE TEXTS

The very first time the word “race” appeared in the French Constitution was in 1946 after the end of World War II, largely in response to the Nazi party’s racist policies, which had harrowed Europe for over a decade.<sup>85</sup> The Preamble to the 1946 Constitution read:

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*, possesses 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 acknowledged in the laws of the Republic.<sup>86</sup>

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threat to order and unity, indeed the very existence of the French national community.”).

78. See *infra* Part II and accompanying text for a discussion of the word ‘race’ in French legal text.

79. Weil, *supra* note 77; Michèle Lamont, *Immigration and the Salience of Racial Boundaries Among French Workers*, 19 FRENCH POL., CULTURE & SOC’Y 1, 1 (2001) (assessing prevalent racism among French workers against North African immigrants); see, e.g., Jean Beaman, *Citizen Outsider: Racism, Marginalization, and Immigration in France*, METROPOLITICS (May 31, 2017), <https://www.metropolitiques.eu/Citizen-Outsider-Racism.html> (describing how second-generation immigrants from North Africa are discriminated against in France).

80. See Erik Bleich, *The French Model: Color-Blind Integration*, in COLOR LINES 270, 270–71 (John David Skrentny ed., 2001) (explaining how racial tensions in France are often categorized as problems of immigrant integration).

81. 1958 CONST. art. 1. (Fr.).

82. Bleich, *The French Model: Color-Blind Integration*, *supra* note 80.

83. I place ‘immigrant’ in quotations here as much of the discrimination is targeted against French citizens who are descendants of immigrants, and not solely the first-generation immigrants themselves. Leland Ware, *Color-Blind Racism in France: Bias Against Ethnic Minority Immigrants*, 46 WASH. U. J.L. & POL’Y 185, 201 (2015).

84. See Bleich, *The French Model: Color-Blind Integration*, *supra* note 80, at 274 (“To be sure, discussions of significant differences between immigrants and native French easily become elided with distinctions based on skin color.”).

85. Aamna Mohdin, *France Replaces the Word “Race” with “Sex” in its Constitution*, QUARTZ (June 28, 2018), <https://qz.com/1316951/french-mps-removed-the-word-race-from-the-countrys-constitution/>; see *Nazi Party*, HISTORY.COM (Nov. 9, 2009), <https://www.history.com/topics/world-war-ii/nazi-party> (discussing history of Nazi regime in Europe).

86. 1946 CONST. pmb. § 1 (Fr.) (emphasis added).

The French electorate only narrowly accepted the 1946 constitution.<sup>87</sup> By contrast, the 1958 Constitution was accepted by nearly 80% of the electorate, which by this time included French overseas territories.<sup>88</sup> Interestingly, Parliament did not participate in the drafting of the 1958 Constitution as it did in 1946.<sup>89</sup> The National Assembly granted Prime Minister Charles de Gaulle the authority to govern without parliamentary oversight for six months following his election in an attempt to quell the threat of mainland civil war between France and Algeria.<sup>90</sup> During this time he formed a coalition that independently drafted the 1958 Constitution.<sup>91</sup> The 1958 Constitution “confirmed and complemented” the sentiment expressed in the Preamble of the 1946 Constitution<sup>92</sup> and added another reference to “race” in the first article, which stated, “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.”<sup>93</sup>

Notably, though the Gaullist 1958 Constitution reaffirmed the equality of all French citizens regardless of race, a year after its drafting de Gaulle exclaimed that

It is very good that there be yellow Frenchmen, black Frenchmen, brown Frenchmen. They prove that France is open to all races and that she has a universal mission. *But on the condition that they remain a small minority. Otherwise, France would no longer be France.* We are after all primarily a European people of the white race, of Greek and Latin culture, and of the Christian faith. Try to mix oil and vinegar. Shake the bottle. In a moment they will separate again. Arabs are Arabs and French are French. Do you believe that the French nation can absorb ten million Muslims, who perhaps tomorrow will be twenty million and the day after forty million? If we adopt integration, if all the Arabs and Berbers of Algeria were considered as Frenchmen, what would prevent them from coming to settle in mainland France where the standard of living is so much higher? My village would no longer be called Colombey-les-Deux-Eglises, but Colombey-les-deux-Mosquées!<sup>94</sup>

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87. *Government and Society*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Government-and-society> (last visited Oct. 23, 2019).

88. *Id.*

89. *Id.*

90. William B. Cohen, *The Algerian War, the French State and Official Memory*, 28 HIST. REFLECTIONS 219, 221 (2002); *French-Algerian Truce*, HISTORY.COM (Feb. 9, 2010), <https://www.history.com/this-day-in-history/french-algerian-truce> (last updated July 28, 2019); Dr. Stephen Tyre, *De Gaulle and the Algerian War*, CRAWFORD'S WORLD, <http://www.crawfordsworld.com/rob/apcg/France/Day%20of%20the%20Jackal/TyneJackal.htm> (last visited Feb. 11, 2020); Bryan Muller, *May 1958, The Return of De Gaulle and the Fall of France's Fourth Republic*, CONVERSATION (May 16, 2018, 4:40 PM), <https://theconversation.com/i-understood-you-may-1958-the-return-of-de-gaulle-and-the-fall-of-frances-fourth-republic-93510>.

91. Tyre, *supra* note 90.

92. 1958 CONST. pmb. (Fr.).

93. *Id.* art. 1.

94. DAN ESHET ET AL., *FACING HISTORY AND OURSELVES, WHAT DO WE DO WITH A DIFFERENCE?: FRANCE AND THE DEBATE OVER HEADSCARVES IN SCHOOLS* 56–57 (2008) (emphasis added).

The Preamble to the 1958 Constitution, therefore, while offering protection to racial minorities in France, was drafted in the midst of increased racial tensions and by those who did not fully support or believe in racial equality in France. The provision has since been interpreted in varying ways and degrees, and the tangible protection it actually afforded racial minorities in France is up for debate.

#### A. *Interpretation of the Provision*

Due to France's "colorblind" policy<sup>95</sup> and its dedication to the ideals of republicanism,<sup>96</sup> the provision in the 1958 Constitutional Preamble was never interpreted by the French as mandating, or even permitting, affirmative remedial actions against racism.<sup>97</sup> In an interview, Agnes van Zanten, a sociologist in France, stated that, "[i]n the French Constitution, [it is] written there shouldn't be any kind of discrimination on the basis of race or ethnicity . . . [t]hat's the idea that even positive discrimination is a form of discrimination."<sup>98</sup> The provision was instead interpreted as a reinforcement of the idea that the French identity was the only identity that mattered,<sup>99</sup> and that any distinction based on "origin, race or religion"<sup>100</sup> was illegitimate and thus prohibited.<sup>101</sup> The distinctions between these three protected categories, however, have often been blurred in France.<sup>102</sup> Discrimination in France is often targeted toward those perceived as immigrants, especially those who practice Islam.<sup>103</sup> The perceptions themselves, however, can

95. Karina Piser, *France Doesn't See Race (Officially). A Blackface Performance Challenged That*, ATLANTIC (June 11, 2019), <https://www.theatlantic.com/international/archive/2019/06/blackface-france-color-blind-identity/591187/> ("France likes to see itself as color-blind, and abides by a national myth of strict universalism, in which citizens are expected to identify with the nation over any other particular ethnic or religious identity.").

96. Jennings, *supra* note 16, at 576 (discussing how North African immigration threatens the political theory of French republicanism).

97. Compare Emma Jacobs, *In France, Affirmative Action Isn't About Race. It's About Geography*, WORLD (Dec. 27, 2016), <https://theweek.com/articles/667069/france-affirmative-action-isnt-about-race-about-geography> (describing affirmative action as an act of discrimination in violation of the constitutional provision), with Ware, *supra* note 83, at 225 (describing a 1982 policy that allocated additional funding to underprivileged neighborhoods which was later eliminated under the Chirac administration).

98. Jacobs, *supra* note 97.

99. See Bleich, *Race Policy in France*, *supra* note 5 ("For many Frenchmen, the very term race sends a shiver running down their spines.").

100. 1958 CONST. art. 1. (Fr.).

101. See Vernellia R. Randall, *Racial Discrimination: The Record of France*, U. DAYTON SCH. L. (last updated Dec. 31, 2010), <http://academic.udayton.edu/race/06hrights/georegions/Europe/France01.htm> (describing the French Constitution as criminalizing discrimination).

102. See Bleich, *The French Model: Color-Blind Integration*, *supra* note 80, at 274 ("To be sure, discussions of significant differences between immigrants and native French easily become elided with distinctions based on skin color."); see also Jennifer Anne Boittin, *Black in France: The Language and Politics of Race in the Late Third Republic*, 27 FRENCH POL., CULTURE & SOC'Y 23, 29 (2009) (describing how the concept of race involves an understanding of both skin color and origin).

103. *Beam Racist Behavior and Discrimination Against Muslims in France*, *supra* note 28; Bleich, *The French Model: Color-Blind Integration*, *supra* note 80, at 274; Piser, *Why Forced Secularism in Schools Leads to Polarization*, *supra* note 27.

often be based on race.<sup>104</sup> It is important, therefore, to determine what the word “race” means in France and how its definition affected the protections once offered under the 1958 Constitutional Preamble.

In France, people who are non-white are usually categorized as either foreign or Muslim, but both of these categories are often incorrect.<sup>105</sup> Many people categorized and discriminated against as immigrants or foreigners are actually second- or third-generation French citizens.<sup>106</sup> Because of this mingling and blurring of identities, racial categories in France typically denote “both skin color and a non-European background”<sup>107</sup> and have also become “entwined with distinctions of citizenship, geography, and class.”<sup>108</sup>

Colonialism was also foundational in the construction of race.<sup>109</sup> In order to more effectively dominate the African continent, France, along with other European powers, created a racial system that labeled Europeans as human and civilized and Africans as sub-human and savage.<sup>110</sup> Even within the colonial structure, the word “race” was often conflated and used interchangeably with tribe, origin, language, and religion.<sup>111</sup> The word, therefore, is—and always has been—intrinsically linked with varying sources of otherness.<sup>112</sup>

For decades, France seemed to understand that “race” was “highly charged with social, political, and cultural meaning” stemming from the colonization of and violence against African people.<sup>113</sup> It was not until the Nazi regime used the concept of race to inflict mass violence against Jewish people<sup>114</sup> within Europe, however, that France began to reject its own colonial construct of “race.”<sup>115</sup> Following World War II, the word “race” became associated with an illegitimate

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104. Bleich, *The French Model: Color-Blind Integration*, *supra* note 80, at 274.

105. Jean Beaman, *Feeling Race When Race Does Not “Exist,”* U. CAL. PRESS: UC PRESS BLOG (Aug. 12, 2018), <https://www.ucpress.edu/blog/37799/feeling-race-when-race-does-not-exist/>.

106. *See, e.g.*, Beaman, *Citizen Outsider: Racism, Marginalization, and Immigration in France*, *supra* note 79 (describing how second-generation immigrants from North Africa are discriminated against in France); Ware, *supra* note 83, at 221.

107. Boittin, *supra* note 102.

108. *Id.* at 37.

109. Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219, 1221 (1999); Boittin, *supra* note 102, at 39.

110. Mahmud, *supra* note 109, at 1220–21.

111. *Id.* at 1228.

112. *See id.* at 1228 (“Often categories of race, caste, tribe, nation, language, and religion were conflated and even used interchangeably.”).

113. Boittin, *supra* note 102, at 37.

114. The Nazi regime also targeted Roma, people of color, Jehovah’s Witnesses, people with disabilities, LGBTQ+ persons, and many others within Europe. *Mosaic of Victims: In Depth*, U.S. HOLOCAUST MEMORIAL MUSEUM: HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/article/mosaic-of-victims-in-depth> (last visited Feb. 13, 2020).

115. *See, e.g.*, Mario Stasi, *Le Mot “Race” Doit Disparaître de Notre Constitution [The Word “Race” Must Disappear from our Constitution]*, LE MONDE, [https://www.lemonde.fr/idees/article/2018/06/26/le-mot-race-doit-disparaitre-de-notre-constitution\\_5321573\\_3232.html](https://www.lemonde.fr/idees/article/2018/06/26/le-mot-race-doit-disparaitre-de-notre-constitution_5321573_3232.html) (last updated Jun. 28, 2018, 4:35 PM). *See also infra* Part III for a discussion of how proponents of the 2018 constitutional amendment relate the word “race” to the Nazi regime.

belief in biological hierarchies<sup>116</sup> rather than socially constructed cultural ones, which have very real social impacts.<sup>117</sup> This rejection of biological racial categories became the basis of the argument for amending the 1958 Constitution, as well as other legislative texts, to eliminate the word “race.”<sup>118</sup>

### ***B. Effectiveness of the Provision***

Under the 1958 Constitution, and despite its colorblind model of race policy,<sup>119</sup> France developed a body of what some may call anti-racist legislation.<sup>120</sup> Its work in this field, however, is notably targeted much more toward hate speech than it is toward alleviating discrimination within the marketplace, housing, and employment sectors.<sup>121</sup> For example, France has intensely criminalized hate speech and Holocaust denial in both the public and private spheres.<sup>122</sup> Though some applaud this initiative, the fact that hate speech is within the penal code rather than the civil code means that the burden of proof is high, and therefore actual enforcement is limited.<sup>123</sup>

Because of the taboo surrounding the word “race” within the country,<sup>124</sup> many of France’s intended anti-racist legislative measures use language targeting “immigrants” or economically underdeveloped neighborhoods, rather than race or

116. Karina Piser, *Breaking France’s Race Taboo*, NATION (Aug. 10, 2018), <https://www.thenation.com/article/breaking-frances-race-taboo/>.

117. Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3.

118. See *infra* Sections II.B and III.A for a discussion on France’s legislative bans on “race” and the arguments in support of eliminating the word from the Constitution.

119. See Bleich, *Race Policy in France*, *supra* note 5 (explaining the difference between France’s color-blind model of public policy and the policies of other nations, such as the United States, Britain, and the Netherlands). See *infra* Section II.C for a discussion on the ban on “race” in French legislation and Section III.A for a discussion on the arguments in support of eliminating “race” from the Constitution.

120. See Bleich, *Race Policy in France*, *supra* note 5 (“[France] has, however, developed an extensive anti-racist policy repertoire since the early 1970s.”); see also Jacqueline Costa-Lascoux, *French Legislation Against Racism and Discrimination*, 20 J. ETHNIC & MIGRATION STUD. 371, 372 (1994) (“France has a large body of legislation to combat racism and various forms of discrimination.”).

121. Bleich, *Race Policy in France*, *supra* note 5 (“French policies focused primarily on issues of hate speech—going much further than their American counterparts—and relatively less on issues of discrimination on jobs, housing, and in provision of good and services.”).

122. See, e.g., Angelique Chrisafis, *France Launches Major Anti-Racism and Hate Speech Campaign*, GUARDIAN (Apr. 17, 2015, 11:30 AM), <https://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign> (describing the government’s plan for tougher penalties for crimes deemed to be motivated by racism and anti-semitism); Aurelien Breeden, *France Will Debate a Bill to Stop Online Hate Speech. What’s at Stake?*, N.Y. TIMES (July 1, 2019), <https://www.nytimes.com/2019/07/01/world/europe/france-bill-to-stop-online-hate-speech.html> (explaining a proposed bill in France to impose legal penalties for online hate speech and harassment).

123. Ware, *supra* note 83, at 218; Bleich, *Race Policy in France*, *supra* note 5.

124. See *infra* Section II.C for a discussion on the legislative ban on “race” and the ban on collecting racial statistics.

ethnicity.<sup>125</sup> This, combined with the lack of data that France has regarding racism within its borders,<sup>126</sup> has led to the country's inability to effectively combat racism, even while the constitutional protection from racial discrimination existed.<sup>127</sup> For example, French courts have ruled that seemingly racist publications in the magazine *Charlie Hebdo* do not violate the laws against printing discriminatory remarks due to the satirical nature of the magazine.<sup>128</sup> Additionally, when cases arise based on discrimination in employment or housing, those accused of discriminatory behavior are able to escape prosecution by citing housing shortages and high unemployment rates in order to make their motive for denial seem innocent.<sup>129</sup> In other words, due to the low supply and high demand for jobs and housing, landlords and employers may easily discriminate and "need only omit the reason for [their] choice in order to escape prosecution."<sup>130</sup> Discrimination against racial minorities, though illegal both under specific legislation and formerly under Article 1 of the 1958 Constitution, is not seriously addressed, litigated, or alleviated in the French court system.<sup>131</sup>

Racism is also deeply entrenched within French systems and institutions.<sup>132</sup> For example, men of color, specifically men of Arab descent, make up 60% of the prison population, even though they only make up about 10% of the total French population.<sup>133</sup> This systemic discrimination can also be seen through the "de facto" segregation of non-white minorities outside of large cities:

The *banlieues*<sup>134</sup> are geographically isolated and ethnically distinct from the surrounding communities. Many public housing complexes in the *banlieues* are neglected and physically deteriorating. Poverty, substandard schools, low-levels of educational attainment, crime, and unemployment are common features of these neighborhoods.<sup>135</sup>

Those within these impoverished and underdeveloped neighborhoods in France suffer from unemployment at almost three times the rate of the national average

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125. Jeremie Gilbert & David Keane, *How French Law Makes Minorities Invisible*, INDEPENDENT (Nov. 14, 2016, 5:20 PM), <https://www.independent.co.uk/news/world/politics/how-french-law-makes-minorities-invisible-a7416656.html>.

126. See *infra* Section II.C for a discussion of the prohibition on collecting racial statistics.

127. Costa-Lascoux, *supra* note 120, at 373–74 (describing the limitations of prosecuting hate speech).

128. *Id.* at 373 (citing the Tribunal de grande instance [TGI] [ordinary courts of original jurisdiction] Paris, ref. 26, Nov. 26, 1977, J.C.P. 1978 II, 18924).

129. *Id.* at 375.

130. *Id.*

131. See Ware, *supra* note 83, at 219 ("Discrimination against these groups is not taken seriously as they are regarded as foreigners rather than French citizens entitled to equal protection of the laws.").

132. *Study: Racist Behavior and Discrimination Against Muslims in France*, *supra* note 28; Diallo, *France's Dangerous Move to Remove 'Race' from Its Constitution*, *supra* note 3.

133. Diallo, *France's Dangerous Move to Remove 'Race' from Its Constitution*, *supra* note 3.

134. "Banlieues" refer to impoverished public housing neighborhoods in the surrounding suburbs of French cities. Ware, *supra* note 83, at 186.

135. *Id.*

and can reach rates as high as 50%.<sup>136</sup> Additionally, people of color are twenty times more likely than white people to be stopped by police demanding identity checks.<sup>137</sup>

In a group of racial profiling cases in 2016, the *Cour de cassation*<sup>138</sup> conceded that there existed a “pattern of frequent identity checks carried out against ‘visible minorities,’” but rejected any presumption of discrimination on behalf of the police.<sup>139</sup> The Court accepted racially charged justifications from the police for the identity checks, including that the location of the stop was in an “area widely known to be particularly affected by delinquency.”<sup>140</sup> The Court seemed to accept fabricated security concerns to override the constitutional and legislative prohibition against discrimination. The case is now pending in front of the European Court of Human Rights to evaluate whether France properly applied its own anti-discrimination laws.<sup>141</sup> France’s failure to provide a remedy for victims of discrimination demonstrates the structural racism deeply entrenched within the French system, which it has failed to address through its legislation and despite the 1958 constitutional provision meant to protect minorities from discrimination.<sup>142</sup>

### C. Legislative Bans on “Race”

Though “race” remained in the Constitution for over half a century, its usage in other core French legislative texts has been controversial for several decades.<sup>143</sup> Formal recognition of race was first officially banned in 1978 with a law that prohibited the collection of “any information that shows, directly or indirectly, *racial origins*, political, philosophical or religious opinions, trade union membership, or moral principles.”<sup>144</sup> This was seen as a natural application of the

136. Sylvia Zappi, *Portrait Noir de la Crise Économique en Banlieue* [*Black Portrait of the Economic Crisis in the Suburbs*], LE MONDE, [https://www.lemonde.fr/banlieues/article/2016/05/03/dans-les-quartiers-prioritaires-le-chomage-affecte-de-plus-en-plus-fortement-diplomes-et-non-immigres\\_4912791\\_1653530.html](https://www.lemonde.fr/banlieues/article/2016/05/03/dans-les-quartiers-prioritaires-le-chomage-affecte-de-plus-en-plus-fortement-diplomes-et-non-immigres_4912791_1653530.html) (last updated May 4, 2016, 10:32 AM).

137. Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3 (citing DÉFENSEUR DES DROITS, ENQUÊTE SUR L’ACCÈS AUX DROITS 3 (2017)); *see also Seydi and Others v. France*, OPEN JUST. SOC’Y INITIATIVE, <https://www.justiceinitiative.org/litigation/seydi-and-others-v-france> (last visited Feb. 13, 2020) (arguing that the French court failed to apply non-discrimination law to thirteen cases of racial profiling by police officers).

138. The *Cour de cassation* is the supreme appeals court in France. *About the Court*, COUR DE CASSATION, [https://www.courdecassation.fr/about\\_the\\_court\\_9256.html](https://www.courdecassation.fr/about_the_court_9256.html) (last visited Feb. 13, 2020).

139. *Seydi and Others v. France*, *supra* note 137, ¶ 32.

140. *Id.* ¶ 36.

141. *Id.*

142. Ware, *supra* note 83, at 214 (“France’s failures resulted from social and economic policies that allowed public officials to fail to address the oppressive conditions of ethnic minorities.”); *see also* Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3 (“Racism is not addressed in a structural way in France. And that is because race is not addressed as something tangible.”).

143. David B. Oppenheimer, *Why France Needs to Collect Data on Racial Identity . . . In a French Way*, 31 HASTINGS INT’L & COMPAR. L. REV. 735, 737 (2008); Gilbert & Keane, *supra* note 125.

144. Loi 78-17 du 6 janv. 1978 relative à L’informatique, aux Fichiers et aux Libertés [Law



1958 Constitution's assurance of equality regardless of race.<sup>145</sup> In 2007, a bill was proposed to allow the collecting of racial and ethnic statistics in order to track and measure discrimination within the country.<sup>146</sup> The bill was the center of a heated political and social debate very similar to the one surrounding the 2018 constitutional amendment.<sup>147</sup> It was ultimately unsuccessful, and the 1978 law banning the collection of racial statistics was reaffirmed.<sup>148</sup> As a consequence, acquiring data and statistics regarding racial discrimination in France is hard, if not impossible.<sup>149</sup> This policy prevents France from ascertaining the level of racism rampant within its borders and prohibits any legislative measure specifically targeted to positively impact minorities.<sup>150</sup>

"Race" was later officially removed and banned from all French legislation in 2013.<sup>151</sup> Prior to this, the word and its derivatives appeared in fifty-nine different legislative texts.<sup>152</sup> The author of the bill, François Asensi, a member of the far-left "Left Front" coalition stated, "[i]n eliminating the legal category of race, the Assembly has helped our country move forward on ideological and educational levels."<sup>153</sup> Critics of the bill cited constitutional inconsistency as one of their top concerns, worried that the elimination of the word in legislative texts would be unproductive while the word remained in the Constitution.<sup>154</sup> Others were less concerned with the legal gap it created and more bothered with the idea that racism could ever be alleviated with the elimination of the word "race."<sup>155</sup> The arguments surrounding the adoption of the 2013 bill are almost identical to those surrounding the 2018 constitutional amendment.<sup>156</sup>

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78-17 of Jan. 6, 1978 on Information Technology, Data Files, and Civil Liberties], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], 1978, art.6(I) (amended Aug. 6, 2004) (emphasis added).

145. 1958 CONST. art. 1 (Fr.); see Oppenheimer, *supra* note 143 (interpreting the 1958 Constitution as banning racial distinctions).

146. Oppenheimer, *supra* note 143, at 746; see Conseil constitutionnel [CC] [Constitutional Court] decision No. 2007-557DC, Nov. 15, 2007, J.O. p. 19001 (rejecting the proposed bill).

147. See Oppenheimer, *supra* note 143. See also *infra* Part III for a discussion on the argument against and in support of the 2018 Constitutional amendment.

148. Conseil constitutionnel [CC] decision No. 2007-557DC at 19001 (rejecting the proposed bill).

149. Gilbert & Keane, *supra* note 125.

150. *Id.*

151. *No Such Thing as 'Race', Say French Lawmakers*, FRANCE 24, <https://www.france24.com/en/20130517-no-such-thing-as-race-french-lawmakers-france-racism-hollande> (last updated May 17, 2015, 2:30 PM).

152. Cengiz Barskanmaz & Emilia Roig, *La République Against Race*, VERFASSUNGSBLOG (May 22, 2013), <https://verfassungsblog.de/la-republique-against-race-2/>.

153. *No Such Thing as 'Race', Say French Lawmakers*, *supra* note 151.

154. *Id.*

155. See *id.* ("You [cannot] change reality by simply changing the words . . . you're wasting a lot of time and energy on illusions," argued Lionel Tardy, an MP with the opposition UMP party, who voted against the change.)

156. See *infra* Part III for a discussion on the arguments surrounding the 2018 amendment's elimination the word "race" from the Constitution.

### III. ARGUMENTS SURROUNDING THE AMENDMENT

*“Since 1939, the use of [the word “race”] has been invariably and alternately the instrument of those who wanted to combat racism and those who wanted to establish it.”*<sup>157</sup>

Though the National Assembly passed the amendment just recently, the idea to remove the word “race” from the French Constitution has been alive in France for over a decade.<sup>158</sup> The amendment was first proposed by—largely white—members of the Socialist party in 2004.<sup>159</sup> In the proposal, proponents described the term “race” as dangerous, divisive, and contrary to republican ideals.<sup>160</sup> The 2004 proposal, backed by future president, François Hollande, did not pass.<sup>161</sup> Hollande later made the idea of removing “race” from the Constitution a central component of his presidential campaign in 2012.<sup>162</sup> He emphasized the non-existence of race in France and stated that there was no place for race within French republicanism.<sup>163</sup> Nicolas Sarkozy, Hollande’s opponent in the 2012 presidential race, opposed the proposed amendment.<sup>164</sup> Sarkozy wished to retain the word in order to pay homage to those who lost their lives during the Holocaust, which he called “the greatest racist enterprise the world has ever known.”<sup>165</sup> Notably, Sarkozy’s reasons for opposing the amendment were not to prevent or alleviate the current racism within the country.<sup>166</sup> He views the word “race” as a historic symbol, rather than as a current reality—a mainstream viewpoint throughout the country and on either side of the amendment debate.<sup>167</sup>

157. Stasi, *supra* note 115.

158. Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3; *Proposition de Loi Constitutionnelle n° 1918 [Proposed Constitutional Law n° 1918] ASSEMBLÉE NATIONALE* (Nov. 15, 2004), <http://www.assemblee-nationale.fr/12/propositions/pion1918.asp>.

159. *Proposed Constitutional Law n° 1918*, *supra* note 158.

160. *Id.*

161. See Lionel Laurent & Gerard Bon, *France’s Hollande Battles Sarkozy over “Race,”* REUTERS (Mar. 10, 2012, 3:38 PM), <https://uk.reuters.com/article/uk-france-hollande-race/frances-hollande-battles-sarkozy-over-race-idUKBRE8290FT20120310> (describing President François Hollande’s efforts to support the constitutional amendment).

162. *Id.*

163. *Id.*; see also Mohdin, *supra* note 85 (reflecting on the history of the push to remove the word “race” from the Constitution).

164. Alana Lentin & Valérie Amiraux, *François Hollande’s Misguided Move: Taking ‘Race’ Out of the Constitution*, GUARDIAN (Feb. 12, 2013, 3:00 PM), <https://www.theguardian.com/commentisfree/2013/feb/12/francois-hollande-race-french-constitution>.

165. *Id.*

166. See *id.* (“In fact, Sarkozy and Hollande are united in their view of race as unique to the Holocaust. Their attitudes to contemporary racism differ little: both treat France’s Muslim population as either uncontrollable hooligans or unassimilable fanatics. Both hound undocumented migrants and detain children.”).

167. See Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3 (describing the evolution of her feelings toward the word “race” as a young French person).

### A. *Arguments in Support of the Amendment*

The primary argument in support of the amendment that eliminated the word “race” from the French Constitution in 2018 centers around the history of the word’s usage during the Nazi regime in Europe.<sup>168</sup> Proponents of the amendment see the use of the word “race” as a signifier of the belief in biological differences and hierarchies between humans.<sup>169</sup> For this reason, Mario Stasi, the president of the Ligue Internationale Contre le Racisme et l’Antisémitisme (LICRA) [International League against Racism and Anti-Semitism in France], sees the word “race” as a stain on French republicanism.<sup>170</sup> In an article by Stasi advocating for the amendment, he wrote,

[T]he word “race” is not just a slag inherited from a dated language and a world that has disappeared today. It is a scar whose presence in the Constitution of the French Republic is an affront to our most irreducible principles proclaimed in the Declaration of the Rights of Man and of the Citizen.<sup>171</sup>

This view is widespread throughout the country.<sup>172</sup> In France, children are taught from a very young age that race does not exist and are only taught about race in the context of the atrocities of World War II.<sup>173</sup> Similarly, the 2004 proposal emphasized that the word “race” was intrinsically linked to the historical rhetoric that supported the Holocaust.<sup>174</sup> This view is well-described by Rokhaya Diallo, a Black, female journalist in France who has documented the views against “race” that were embedded in her at a young age:

As a young French woman, the word race horrified me. I had good reasons for rejecting the word. To me, the only reference of a regime that would categorize its population by race was Nazi Germany and the translation of its racist measures into French laws during the collaboration. Given that history, erasing any mention of race in the public sphere appeared to be a reasonable solution to prevent racism.<sup>175</sup>

Proponents of eliminating the use of the word “race” within France cite the risk of further perpetuating racism.<sup>176</sup> They fear that anti-racist measures will

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168. See, e.g., Stasi, *supra* note 115 (describing negative connotations “race” inherited from historical usage).

169. Piser, *Breaking France’s Race Taboo*, *supra* note 116.

170. Stasi, *supra* note 115.

171. *Id.*

172. See Morgane Q., *France Has an R-Word. Race.*, MEDIUM (Mar. 28, 2019), <https://medium.com/@MorganeQ/france-has-an-r-word-race-7956b16da8e6> (“For quite some time now, the National Education institution has made it a mission to teach young people that race simply does not exist. It doesn’t just teach it. It’s almost indoctrination at this point.”).

173. *Id.*; Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3.

174. See *Proposed Constitutional Law n° 1918*, *supra* note 158 (“Le mot « race » a toujours servi de support au discours qui prélude à l’extermination des peuples.” [“The word ‘race’ has always served as a medium for the discourse that precludes the extermination of peoples.”]).

175. Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3.

176. See Costa-Lascoux, *supra* note 120, at 373–79 (1994) (describing the potential risks of

evolve systems of racism and discrimination rather than dismantle them.<sup>177</sup> Members of Parliament (MPs), both Black and white, strongly expressed their belief that the elimination of the word “race” would only strengthen the fight against racism.<sup>178</sup> For example, on the day of the adoption of the amendment, MP Philippe Dunoyer stated:

I believe . . . that we are about to express in the most beautiful, the strongest, the most solemn way national solidarity against racism in all its forms . . . [a]nd against a foul-smelling pseudo-theory that human beings should be classified into categories. We are preparing, by removing four letters which tainted our Constitution and by replacing them with four others, to grow our fundamental law and thereby our country.<sup>179</sup>

MP Laetitia Avia agreed with Dunoyer, proclaiming that “[t]o suppress the idea of race is not to stop fighting against discrimination and racism, on the contrary: it will allow us to deploy all the stronger means of action, and we will do it with all the necessary determination.”<sup>180</sup> MPs also discussed how the remaining prohibition against discrimination based on origin sufficiently covered discrimination against race.<sup>181</sup> Bastien Lachaud stated, “[i]t is still unthinkable in our society today that people can be discriminated against according to their origins, whatever they are – ethnicity, region, country of birth, *skin color*.”<sup>182</sup> Marc Fesneau went on to say, “[t]he concept of origin is general enough to cover a plurality of situations; any form of discrimination by law, of whatever kind, is already prohibited.”<sup>183</sup>

It was also argued that the *bloc de constitutionnalité* or “the constitutionality block” adequately protected against racism and thus the inclusion of the word “race” within the Constitution itself was not necessary.<sup>184</sup> Parliament is required to respect and adhere to the principles of the constitutionality block, which includes the 1958 Constitution, the Preamble to the 1946 Constitution, the Declaration of the Rights of Man and of the Citizen (“Declaration”), and the Environment Charter.<sup>185</sup> Articles one<sup>186</sup> and six<sup>187</sup> of the Declaration are believed to enshrine

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anti-racist legislation).

177. *See id.* at 379 (“‘Anti-racist’ legislation sometimes encourages more subtle forms of discrimination.”).

178. XV<sup>e</sup> Législature, Première Session Extraordinaire de 2017-2018: Compte Rendu Intégral [15<sup>th</sup> Legislature, First Extraordinary Session of 2017–2018: Complete Report] (July 12, 2018), <http://www.assemblee-nationale.fr/15/cr/2017-2018-extra/20181012.asp> [hereinafter “Amendment Debate”].

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* (emphasis added).

183. *Id.*

184. *Id.* (arguing that the Declaration on the Rights of Man and of the Citizen as well as the 1946 Constitution adequately protect against racial discrimination in France).

185. *How Does the Constitutional Council Protect the Constitution?*, VIE PUBLIQUE, <https://www.vie-publique.fr/fiches/19558-le-controle-de-constitutionnalite-bloc-de-constitutionnalite> (last modified July 7, 2018)..

186. Déclaration des Droits de l’Homme et du Citoyen de 1789 [Declaration of the Rights of

“the principle of equality and the prohibition of all discrimination” and MPs therefore argued that racial discrimination would still be prohibited by the constitutionality block as a whole.<sup>188</sup> Likewise, the Preamble to the 1946 Constitution states “that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights.”<sup>189</sup> MP Nicole Belloubet referred to the Preamble of the 1946 Constitution as a “legal safety net” that would allow France to continue fighting against racism while ridding the 1958 Constitution of the word “race.”<sup>190</sup> Heavy weight is also given to French legislation itself,<sup>191</sup> as the 1946 Preamble states that the French “solemnly reaffirm . . . the fundamental principles acknowledged in the laws of the Republic.”<sup>192</sup> Belloubet also cited the French penal code in arguing for the deletion of the word “race,” referencing the severe penalties for discrimination in France.<sup>193</sup>

Finally, in arguing that the word “race” in the Constitution is superfluous, Belloubet stated that public policies contribute more to “the pursuit of real equality” than the Constitution.<sup>194</sup> While there may be some weight to this assertion, the public policies aimed at combatting racism were all formed with regard to the 1958 constitutional provision prohibiting discrimination based on race.<sup>195</sup> Furthermore, it can be—and is—argued that the anti-discrimination legislation to which Belloubet refers is ineffective and thus the constitutional provision is needed to guide and improve future legislation.<sup>196</sup> The next section explores these arguments in greater depth.

### **B. Arguments against the Amendment**

Opponents of the 2018 constitutional amendment describe how the typical French view of “race”<sup>197</sup> tends to ignore the very real social and political impacts

Man and of the Citizen 1789], art. 1, <https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789> (“Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.”).

187. *Id.* art. 6 (“Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.”).

188. Amendment Debate, *supra* note 178.

189. 1946 CONST. pmb. § 1 (Fr.).

190. Amendment Debate, *supra* note 178.

191. Philippe Cossalter, *Leçon n° 2: Les composantes du bloc de constitutionnalité* [*Lesson 2: The Components of the Constitutionality Block*], CFJA (Mar. 10, 2015), <http://etudes.cjfa.eu/lecons/lecon-27-les-composantes-du-bloc-de-constitutionnalite/>.

192. 1946 CONST. pmb. § 1 (Fr.).

193. Amendment Debate, *supra* note 178.

194. *Id.* (citing penal code Article 225-1, which prohibits discrimination based on membership to an “alleged race”).

195. See *supra* Section II.B for a discussion on various anti-discrimination statutes in France created under the 1958 constitution.

196. See *infra* Section III.B for a discussion on the need for “race” to remain in the constitution.

197. See *infra* Section III.A for a discussion on how France views the word “race” as a

of race as a social construct.<sup>198</sup> By viewing race as a purely biological construct, critics of the amendment argue that the French are able to ignore the reality and legacy of French colonialism and slavery, which created structures of racism and white supremacy within the metropolitan country.<sup>199</sup>

Émilia Roig, the founder of the Center for Intersectional Justice in Europe, said in response to the amendment, “Race may not exist, but racism still does, and it kills.”<sup>200</sup> Roig is also critical of the colorblind model in France generally; in an interview about race and republicanism in France she stated:

[R]ace is seen as a threat to this unity . . . which is a unity that de facto doesn't exist, because there is . . . very strong institutional structural discrimination in France based on race and ethnicity and religion. But race being the more general category for all this.<sup>201</sup>

She went on to argue that the race and differences in French identity should not be erased and that the true problem is the “hierarchization of those differences[.]”<sup>202</sup> Houria Bentouhami, a French philosophy professor, also criticized the decision, saying that “[i]n order to fight racism, we must have a critical tool allowing us to name it.”<sup>203</sup>

Rokhaya Diallo grew up believing in the moral principles of a colorblind France<sup>204</sup> but changed her view after engaging in anti-racism work in the country.<sup>205</sup> After the amendment last year, she wrote an article for the *Washington Post* criticizing the justification<sup>206</sup> for the decision:

Of course, blacks, Arabs, whites, Asians, Roma — we all belong to the human race. But history has created racial categories that still have an impact on the lives of those who descend from people who were enslaved and colonized. Being black today means inheriting the imagery of blacks that was invented centuries ago. That former status doesn't have any legal ground now, but its consequences still operate every

belief in biological hierarchies.

198. See Diallo, *France's Dangerous Move to Remove 'Race' from its Constitution*, *supra* note 3 (describing the way the author's view of the word “race” changed as she engaged in antiracism work in France).

199. See Buisson, *supra* note 51 (interviewing Crystal Marie Fleming, citing *The Daily Show, Trevor Responds to Criticism from the French Ambassador - Between the Scenes* (Comedy Central Broadcast July 18, 2018)).

200. *Assembly Removes Word 'Race' from French Constitution*, CONNEXION (July 13, 2018), <https://www.connexionfrance.com/French-news/france-assembly-votes-to-remove-race-French-constitution>.

201. *Who Belongs? EP 4 - Racial Justice Activism in Europe with Emilia Roig*, OTHERING & BELONGING INST. (Dec. 12, 2018), <https://belonging.berkeley.edu/whobelongs/cij>.

202. *Id.*

203. *Assembly Removes Word 'Race' from French Constitution*, *supra* note 200.

204. See Diallo *France's Dangerous Move to Remove 'Race' from Its Constitution*, *supra* note 3 and accompanying text for Diallo's prior view on colorblindness as a young Black woman in France.

205. *Id.*

206. See *supra* Section III.A for a discussion of the motivations to remove the word “race” from the French constitution.

day.<sup>207</sup>

She went on to express her fear that the removal of the word “race” from the Constitution would deprive France of the tools it needs to effectively study and combat racism.<sup>208</sup> Diallo believes that the MP’s denial of the existence of race, even as a social construct, is a denial of the very real racism and discrimination plaguing France.<sup>209</sup> Patrick Lozès, the founder of the Representative Council of France’s Black Associations, is also critical of France’s colorblind model; “[I]n reality we’re blind in France, not colorblind, but information blind, and just saying people are equal doesn’t make them equal.”<sup>210</sup>

Another argument against the amendment is rooted within Black pride movements.<sup>211</sup> A faction of left-leaning French citizens has long been advocating for *le droit à la différence*, or “the right to difference.”<sup>212</sup> While many on the left—as evidenced by the unanimous vote to remove “race” from the Constitution<sup>213</sup>—believe that the recognition of race in France equates to discrimination and therefore an infringement upon *égalité*, others believe that the recognition and tolerance of differences among French citizens in a necessary condition of equality.<sup>214</sup> Under the “right to difference” view, a multicultural state, much like the United States, is generally encouraged.<sup>215</sup>

Although the “right to difference” movement has been left in the past—largely due to it being co-opted by the *Rassemblement National*, formerly known as the National Front<sup>216</sup>—pride in the differences within French identity remains

207. Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3.

208. *Id.* (“Making the word race taboo will not change anything in the lives of people who are affected by racism. It will deprive scholars and activists of a powerful tool to study the implications of racism.”).

209. *Id.* (“Denying the existence of race means denying the reality of racial discrimination.”).

210. Michael Kimmelman, *Négritude Movement is Reborn Among French Blacks*, N.Y. TIMES (June 18, 2008), <https://www.nytimes.com/2008/06/19/arts/19iht-kimmel.1.13794953.html>.

211. *See A Brief Guide to Négritude*, POETS.ORG (May 22, 2004), <https://poets.org/text/brief-guide-negritude> (speaking about the Harlem Renaissance as an inspiration for *Négritude*); *see also* MARGARET A. MAJUMDAR, *POSTCOLONIALITY: THE FRENCH DIMENSION* 219–20 (2007) (detailing the *Marche des Beurs* which occurred as a consequence of discussions on the right to difference).

212. MAJUMDAR, *supra* note 211.

213. *Assembly Removes “Race” from the Constitution and Prohibits “Sex Distinction”*, *supra* note 3.

214. *See* MAJUMDAR, *supra* note 211 (discussing the debate on race and ethnicity in France between those on the Left and Right). *But see* Bleich, *Antiracism Without Races: Politics and Policy in a “Color-Blind” State*, *supra* note 65, at 60 (discussing how many antiracism organizations feared that the right to difference movement would negatively impact the rights of minorities).

215. Bleich, *Antiracism Without Races: Politics and Policy in a “Color-Blind” State*, *supra* note 65, at 60 (discussing the apparent shift of antiracism work in France in the early and mid-1980’s towards an American model of race-conscious policies).

216. *See id.* (explaining the National Front’s inflammatory use of “right to difference”

strong today.<sup>217</sup> While race is certainly a construction born from white supremacy,<sup>218</sup> Black people in France have long used the construction to foster a shared sense of identity and community.<sup>219</sup> Take, for example, the *Négritude* movement, beginning in the 1930s, which “was born from a shared experience of discrimination and oppression and an attempt to dispel stereotypes and create a new black consciousness.”<sup>220</sup> Black anti-imperialist political groups also helped to redefine race by

infus[ing] pre-existing, racial stereotypes with positive connotations that enabled [immigrants from Africa] to proclaim pride in the perceived differences between the French civilization and their own, and allowed them to justify a unity among disparate groups that did not necessarily have much in common other than the superficial characteristic of skin color.<sup>221</sup>

*Négritude* has since had a rebirth in France in the twenty-first century, with young Black citizens advocating for the celebration of, and pride in, a shared Black experience and cultural heritage, rather than the colorblind philosophies by which France abides.<sup>222</sup> Studies on racial socialization<sup>223</sup> have found that children who are taught to take pride in their cultural identity—as opposed to those who are raised in a colorblind setting—have higher self-esteem, are better able to cope with discrimination, achieve greater academic success, and experience “more favorable psychological outcomes.”<sup>224</sup> By removing “race” from its Constitution, and attempting to remove it from public consciousness, France does not bolster a unified identity—it effectively denigrates the inherent value of cultural identity.

#### IV. CONSEQUENCES OF THE AMENDMENT

The removal of “race” from France’s Constitution solidifies the country’s colorblind model embedded within its law and policies.<sup>225</sup> This colorblindness,

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rhetoric).

217. See Kimmelman, *supra* note 210 (discussing cultural empowerment through the rebirth of the *Négritude* movement).

218. See Mahmud, *supra* note 112 (discussing the role of colonialism in the evolution of race); Buisson, *supra* note 51 (discussing the connection between racism and white supremacy in France). See also Boittin, *supra* note 102, at 37 (“Within the interwar diasporic community, hence, racial categories became revealingly entwined with distinctions of citizenship, geography, and class.”).

219. See *A Brief Guide to Négritude*, *supra* note 214 (discussing the role of the *Négritude* movement in French colonies and celebration of “blackness”).

220. *Id.*

221. Boittin, *supra* note 102, at 38–39.

222. See Kimmelman, *supra* note 210 (sharing the modern resurgence of the *Négritude* movement in France).

223. Racial socialization refers to the process by which parents teach their children how to navigate the world as a racial minority. Ashly Gaskin, *Racial Socialization*, AM. PSYCH. ASS’N (Aug. 2015), <https://www.apa.org/pi/families/resources/newsletter/2015/08/racial-socialization>.

224. Diane Hughes et al., *Parents’ Ethnic-Racial Socialization Practices: A Review of Research and Directions for Future Study*, 42 DEVELOPMENTAL PSYCH. 747, 763–64 (2006).

225. See *supra* Section II.B.1 for a discussion on the legislative bans on “race” in France and the pressure to remove the word from the Constitution.



however, does nothing to suppress racism, but rather allows it to become more covert within institutional frameworks and, thus, harder to combat.<sup>226</sup> By refusing to acknowledge the reality of race as a social construct, France also refuses to acknowledge the very real and racist consequences of that construct.<sup>227</sup> While the tangible consequences of the amendment are difficult to discern due to its recency,<sup>228</sup> examining the racism and discrimination present in France after the elimination of almost all forms of “race” from the country’s legislation in 2013 can provide some insight on its potential social repercussions.<sup>229</sup> Additionally, the amendment may cause France to fall out of line with its international human rights obligations, potentially impacting the country’s reputation in the international community.<sup>230</sup>

#### A. *Racism in a Colorblind State*

Despite France’s colorblind policies, and now Constitution, racism and discrimination still exist within the country.<sup>231</sup> While the criminalization of hate speech and the prohibition on categorizing citizens based on race<sup>232</sup> may have led to the decline of instances of overt racism in France,<sup>233</sup> many sociologists argue that the exacerbation of “colorblindness” works as a disguise for racial inequality and the maintenance of white supremacy.<sup>234</sup> An analysis of the behavior of French security personnel and public officers in urban areas suggests that France is more concerned with the performance of “non-racism” than it is with actual anti-racism

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226. See Adia Harvey Wingfield, *Color-Blindness Is Counterproductive*, ATLANTIC (Sept. 13, 2015), <https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/> (discussing the argument that not seeing race can result in people ignoring discrimination).

227. See *supra* notes 200–206 and accompanying text for the arguments against a colorblind approach and consequences of adopting such a policy; see also *id.* (“[Sociologists] fear that the refusal to take public note of race actually allows people to ignore manifestations of persistent discrimination.”).

228. Due to the recent passage of the amendment in 2018, there has yet to be a body of court cases analyzing racism and discrimination under the amendment.

229. See *supra* Section II.B.1 for a discussion on the legislative bans on “race” in France.

230. See *infra* Section IV.B for a discussion of France’s international obligations which may be impacted by its decision to remove “race” from its Constitution.

231. See *Notre Actualité* [Our News], CONSEIL REPRÉSENTATIF DES ASSOCIATIONS NOIRES, <http://le-cran.fr/#> (reporting on current instances of racism and discrimination within France) (last visited Jan. 20, 2020).

232. Loi 78-17 du 6 janvier 1978 de informatique et libertés [Law 78-17 of January 6, 1978 on Information Technology, Data Files and Civil Liberties], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Jan. 6, 1978, art. 1-8 (amended Aug. 6, 2004).

233. See, e.g., Chrisafis, *supra* note 122; Breeden, *supra* note 122; Gilbert & Keane, *supra* note 125 (discussing various changes to French law in an attempt to fight racism and discrimination).

234. See François Bonnet, *How to Perform Non-Racism? Colour-Blind Speech Norms and Race-Conscious Policies Among French Security Personnel*, 40 J. ETHNIC & MIGRATION STUD. 1275, 1276–78 (2014) (discussing issues resulting from performative non-racism).

work.<sup>235</sup> The difference being that non-racism is performed in order to avoid an accusation of racism, whereas anti-racist measures are actively taken in order to effectively address and alleviate racism and discrimination.<sup>236</sup> So while France may be colorblind on paper, in its legislation and now Constitution, institutional racism and discrimination still run rampant in the country,<sup>237</sup> and the white leaders advocating for colorblindness benefit from it.<sup>238</sup>

The European Commission Against Racism and Intolerance (ECRI) publishes a report on racism in France every five years.<sup>239</sup> Although the most recent report has not yet been published at the time of writing, the findings of the 2015 report demonstrate France's ongoing struggle with racism.<sup>240</sup> In its very *introduction*,<sup>241</sup> the ECRI mentioned its concern that France's prohibition on compiling data based on race has contributed to the lack of insight into the "situation of vulnerable groups with regard to the racist crimes or discrimination from which they suffer."<sup>242</sup>

The ECRI reported a decrease in "tolerance of diversity" between the years of 2009 and 2015.<sup>243</sup> It should be noted that France's legislative ban on the word "race" occurred between these years.<sup>244</sup> The organization also observed an increase in racist violence, in particular acts committed by extremist groups.<sup>245</sup> It estimated that "hundreds of thousands of people a year over the entire country are victims of racist abuse" that goes unreported,<sup>246</sup> a problem which is compounded by France's lack of specific data collection.<sup>247</sup> Systemic racism within the police force also

235. *See id.* (pointing out the need for security personnel to appear non-racist and the general public's performative non-racism).

236. *Id.* at 1276–77.

237. *See* Rokhaya Diallo, *French Whiteness Is in Crisis*, AL JAZEERA (Oct. 10, 2019), <https://www.aljazeera.com/indepth/opinion/french-whiteness-crisis-191009182931542.html> ("We experience institutional discrimination that influences our everyday lives in various ways – from healthcare to education, housing to police brutality.").

238. *See* Bonnet, *supra* note 234, at 1277 (discussing how institutional racism maintains and perpetuates white supremacy).

239. *See Country Monitoring*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/country-monitoring> (listing member states for which country monitoring work is reported on and published) (last visited Jan. 19, 2020).

240. *See* EUR. COMM'N AGAINST RACISM & INTOLERANCE, ECRI REPORT ON FRANCE 15 (2016) [hereinafter "ECRI"], <https://rm.coe.int/fifth-report-on-france/16808b572d> (providing data on hate speech and other racist acts in France starting in 2009).

241. The introduction is labeled "Summary" but appears at the very beginning of the report. *See id.* at 9 (beginning the Summary section).

242. *Id.* at 10.

243. *Id.* at 15.

244. *See supra* Section II.C for a discussion on the removal of the word "race" from French legislation in 2013.

245. *See* ECRI, *supra* note 240, at 15, 22 (discussing increased hate speech and racial violence by extremist groups).

246. *Id.* at 34.

247. *See id.* at 13 (discussing the lack of French legislation to compensate those disadvantaged because of their race or collecting data on equality and discrimination in the country).

contributes to unreported acts of racial abuse and violence.<sup>248</sup> Not only are police officers themselves often perpetrators of racist and discriminatory acts against minorities, they often discourage victims of racist acts from making formal complaints.<sup>249</sup> As a result, “a significant proportion of racist . . . acts are not subject to any judicial procedure.”<sup>250</sup> Despite the significant under reporting, the ECRI noted that the Ministry of the Interior did not intend to change the policy allowing officers to discourage or refuse the recording of complaints.<sup>251</sup>

The ECRI also noted that although France has indeed implemented a body of anti-discrimination policies, those policies do not contain any mechanism of evaluation.<sup>252</sup> Of the policies and programs that do provide for assessment, they contain “no breakdown according to target groups, thereby making it hard to establish to what extent these policies have actually been able to benefit vulnerable groups.”<sup>253</sup> This exemplifies how colorblind policies in France “perform” non-racism, yet achieve no discernable anti-racist results. It is reasonable to assume that a colorblind constitution will produce the same outcome.

### ***B. International Convention on the Elimination of All Forms of Racial Discrimination***

France is party to a number of international treaties that prohibit member states from discriminating on the basis of race.<sup>254</sup> Among them, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is the leading international instrument addressing racial inequality.<sup>255</sup> France ratified ICERD in 1971<sup>256</sup> and is thus bound to take proactive measures to eliminate not only intentional discrimination, but “discrimination in effect” as well.<sup>257</sup>

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248. *See id.* at 34 (highlighting particular behaviors of French law enforcement that likely add to underreporting).

249. *Id.*

250. *Id.* at 35.

251. *See id.* (discussing the importance of public awareness of hate crimes and racial discrimination in France).

252. *See id.* at 25, 35 (discussing the various policies implemented in France, but recommending the need to evaluate the effectiveness of such policies).

253. *Id.* at 25.

254. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 005.

255. *See* Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUM. RTS. L. REV. 239, 240 (2005) (discussing human rights standards as established by the United Nations).

256. *See International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. TREATY COLLECTION, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-2&chapter=4&clang=en> (listing the state parties to the convention along with accession, succession, and ratification dates) (last visited Jan. 20, 2020).

257. *Frequently Asked Questions: Convention on the Elimination of All Forms of Racial Discrimination*, ACLU, [https://www.aclu.org/sites/default/files/field\\_document/cerd\\_faqs.pdf](https://www.aclu.org/sites/default/files/field_document/cerd_faqs.pdf) (last visited Jan. 20, 2020).

While France has legislation in place intended to combat intentional discrimination,<sup>258</sup> institutional, structural, and systematic discrimination—along with intentional discrimination—remain ubiquitous within the country.<sup>259</sup> By removing “race” as a protected category in the Constitution, France has eliminated one of the only tools it had to address these forms of racism and discrimination.<sup>260</sup> This deficit is compounded by the lack of data on minorities in France,<sup>261</sup> and the lack of evaluation of the policies meant to positively target minorities.<sup>262</sup> By not effectively working to eliminate structural racism and discrimination in France—and by removing the strongest tool it had to do so—the French government is unable to meet its international obligation to combat racial discrimination “in all its forms and manifestations.”<sup>263</sup>

### V. CONCLUSION

All laws in France are meant to conform to the framework provided by the French Constitution.<sup>264</sup> Without the fundamental protection against racial discrimination once enshrined in the Constitution, French law and policy will no longer be evaluated under that framework. Because of the solidification of a colorblind model in France, the country risks not only failing to properly address racism, but also perpetuating it. Article 1 of the 1958 Constitution served as a key tool in enacting anti-discrimination legislation and in identifying discrimination. Without it, France limits its ability to name—and thus address and combat—the institutional racism in which the country’s history is rooted.

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258. See Bleich, *Race Policy in France*, *supra* note 5 (“[France] has . . . developed an extensive anti-racist policy repertoire since the early 1970s.”); Costa-Lascoux, *supra* note 120, at 372 (“French law has a large body of legislation to combat racism and various forms of discrimination.”).

259. *Study: Racist Behavior and Discrimination Against Muslims in France*, *supra* note 28; Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3 (discussing the ways France unsuccessfully tries to address and fight racism).

260. Diallo, *France’s Dangerous Move to Remove ‘Race’ from Its Constitution*, *supra* note 3 (“Making the word race taboo will not change anything in the lives of people who are affected by racism. It will deprive scholars and activists of a powerful tool to study the implications of racism.”).

261. See Gilbert & Keane, *supra* note 125 (discussing the negative impact of declining to collect data on minorities).

262. See ECRI, *supra* note 240, at 25 (discussing the various policies implemented in France, but recommending the need to evaluate the effectiveness of such policies).

263. See ICERD, *supra* note 254 (affirming the United Nation’s commitment to ending racial discrimination globally).

264. See 1958 CONST. art. 61 (Fr.) (explaining the role of the *Conseil constitutionnel* in making sure all legislation conforms to constitutional principles).