THE RISE OF INDIRECT AFFIRMATIVE ACTION
Converging Strategies for Promoting "Diversity" in Selective Institutions of Higher Education in the United States and France

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As a general matter, affirmative action is a set of measures intended to influence the allocation of goods—such as admission to selective universities or professional schools, jobs, promotions, and public contracts—through a process that takes account of individual membership in designated groups. The goal is to increase the proportion of members of those groups in the population under consideration, where they are currently underrepresented in part as a result of past oppression by state authorities and/or present societal discrimination. Some of these measures originally emerged as prophylactic devices designed to prevent the occurrence or the persistence of intentional discrimination—as part of what may be described as an *administrative rationalization of antidiscrimination law enforcement*.[1] Most, however, are broader and were meant to produce positive externalities beyond individual recipients.[2] All of them benefit groups "with whose posi-

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[1] On the U.S. case, in the employment field, see generally Blumrosen 1993; Skrentny 1996, chap. 5.

[2] For a description of the benefits of affirmative action in eliminating stereotypes and creating minority role models, see Brest and Oshige 1995, 868–71.

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tion and esteem in society the affiliated individual may be inextricably involved."[3]

Affirmative action policies vary substantially across the many countries where they are found,[4] regarding their *intended beneficiaries* (ethnic, racial, religious, or caste-based groups held to be economically and/or socially disadvantaged, but also aboriginal peoples, women, the disabled, or even war veterans), the more or less flexible *instruments* they use, the *legal norms* (constitutional, legislative, administrative) from which they derive, the *extent of their domain of implementation*, and their *ultimate goal* as potentially inferred from observing how they work and the justifications provided to support them. They also vary in the *explicitness* with which and the *extent* to which group membership operates in the decision-making process. In this respect, there are at least three different types of affirmative action:

> —*Outreach*, that is, proactive policies designed only to bring a more diverse range of candidates into a recruitment or promotion pool, with group membership being taken into account in a limited way, within the preliminary process of enlarging the set from which applicants will eventually be selected, as opposed to the selection itself.
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> —*Direct affirmative action* is sometimes labeled "preferential treatment" in the United States[5] and is also known as "positive discrimination" in France (and Britain). It refers to measures that grant an advantage to the members of designated groups *in the final decision over the allocation of scarce goods*, through more or less flexible policy instruments (compulsory "quotas," tie-breaking rules, aspirational "goals" or "targets") that become more contentious as they become less flexible.[6]

[3] U.S. Supreme Court decision *Beauharnais v. Illinois*, 343 U.S. 250 (1952), 263. See also Fiss 1976, 148 (making the point that blacks—the group for which U.S. affirmative action programs were originally designed—"are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives"); Balkin 1997, 2360 (emphasizing that the groups with which affirmative action is concerned are those for which group membership will "affect a large percentage of one's personal interactions with others, and (...) has many mutually supporting and overlapping effects"); Williams 2000, 67 (suggesting that affirmative action targets "marginalized ascriptive groups" that have four characteristic features: "(1) patterns of social and political inequality are structured along the lines of group membership; (2) generally, membership in them is not experienced as voluntary; (3) generally, membership in them is not experienced as mutable; and (4) generally, there are negative meanings assigned to group identity by the broader. society or the dominant culture").

[4] The United States and France, but also India (Jaffrelot 2003; Hasan 2008; Deshpande forthcoming), Brazil (Htun 2004), South Africa (Featherman, Hall, and Krislov 2010), and the United Kingdom (Teles 2001), to name but a few.

[5] Cohen, Nagel, and Scanlon 1977.

[6] The second phrase italicized above is a key element in this definition, since the "outreach" variety of affirmative action also has a "nonneutral" component. For instance, as a practical matter, the fact of specifically devoting resources to setting up training programs designed to reach the members of designated groups will reduce the amount of resources available for setting up training programs that might have been directed toward other groups. In this respect, there is also a zero-sum game

In this case, an applicant from one of the designated groups (DGA 1) may be selected for a position for which he or she is basically qualified[7] in spite of there being at least one applicant from a nondesignated group whose qualifications were deemed to be higher and whose application was turned down nonetheless. This means that if there had been another applicant from a designated group (DGA 2) with the same qualifications as that applicant from a nondesignated group, he or she would have been selected instead of DGA 1.[8] In other words, group membership is the key factor that triggers the outcome: DGA 1 obtains the position only because he or she is identified as a member of a designated group. Direct affirmative action can thus be criticized for conflicting with two principles widely embraced in the different societies under consideration: the meritocratic principle,[9] according to which the most qualified applicant should always be selected; and the principle of "color (gender/caste…)-blindness," under which it would always be intrinsically wrong to draw distinctions on the basis of such characteristics (for state authorities at least).[10] As a result, in most countries this second type of affirmative action has been the main focus of political and legal controversy.[11]

—*Indirect affirmative action* refers to policies that appear impartial but are designed to benefit (implicitly) designated groups more than others and might be construed as "disparate impact" discrimination if the outcomes for the affected groups were reversed.[12] They may be understood

involved. The difference is that in one case the goods that are being preferentially allocated are in fact *resources*—namely, the probability of being in a position to participate in a training program that might open up new job opportunities—whereas in the other case the goods are the jobs themselves. In short, affirmative action may operate either at the level of the final distribution of goods or at the level of the distribution of resources that might prove instrumental in securing those goods through a competitive and supposedly meritocratic selection process (at least as far as jobs and university admissions are concerned).

[7] Of course, this minimal degree of qualification needed for eligibility may well be set at a very high level in absolute terms, depending on the nature of the position.

[8] Nagel 1973, 348. It is worth emphasizing that this definition of direct affirmative action does not imply that the methods used by the decision maker to assess the applicants' qualifications are optimal—or even adequate.

[9] Regarding the United States and France, see Carson 2007.

[10] That meritocracy and color-blindness qualify as genuine moral or legal principles, however, remains a point of contention. On color-blindness, see Crenshaw et al. 1995; Appiah and Gutmann 1996; Strauss 1986; on meritocracy, see Feinberg 1970; Selmi 1995; Miller 1996.

[11] In the U.S., this is illustrated by the fact that all the popular initiatives that led to the partial elimination of direct affirmative action programs since the second half of the 1990s targeted "preferential treatment," while in public opinion polls respondents express more support for "affirmative action" when the distinction between its "soft" (outreach) and "hard" varieties is not made salient (Steeh and Kryzan 1996). See also Weiner 1983 for a comparative analysis of direct affirmative action policies emphasizing the existence of "a convergence with respect to the kind of political process [they] produce[d]" (p. 50), namely, "a progression from one group to another in the allocation of preferences" (p. 45) and the conversion of demand for the latter into "a device for political mobilization" (p. 46). On this dynamic in the U.S. case, see Skrentny 2002.

[12] The disparate impact approach of discrimination was first embraced by the U.S. Supreme Court in its unanimous 1971 decision *Griggs v. Duke Power Company*. On this occasion the Court held that Title VII of the 1964 Civil Rights Act prohibited not only intentional discrimination but also hiring practices "fair in form but discriminatory in operation"—such as tests which, "though facially neutral (...), would have the effect of freezing the status quo created by past discrimination" (*Griggs v. Duke*

> as (more or less conspicuous) instances of a "substitution strategy" under which what looks like the secondary effect of a formally neutral principle of allocation is at least in part the reason why that principle has been adopted in the first place, given the perceived illegitimacy and/or unlawfulness of pursuing the decision maker's true objective in a more straightforward manner.[13] The goal then is to maximize the overlap between the effects of the two allocation criteria—the official one and the officious one—yet without reaching the point where the de facto equivalence between these two instruments would become so complete that the intent accounting for the choice of the official criterion could not be credibly denied. While the property on the basis of which the designated groups are distinguished does not come into play at the level of "*policy implementation*"—in that the instrument used to allocate social benefits does not take cognizance of it—it does come into play at the level of "*policy evaluation*," as it figures in the assessment of the costs and benefits of the consequences to be expected from the course of action undertaken.[14]

In part because indirect affirmative action has attracted much less attention than outreach or direct affirmative action—and almost none from within a comparative perspective—it is the focus of this contribution to the comparative politics literature on patterns of minority incorporation in the United States and Western Europe.[15] In contrast to the systematic attempts at sorting out and hierarchizing the variables accounting for the *diverging* trajectories and dissimilar outcomes of the nation-states included in the initial sample—whether the authors involved end up ascribing explanatory power to institutional factors,[16] to broadly ideational ones,[17] or to a contextually determined system of ideas, interests, and institutions,[18] my purpose here is to describe

Power Company, 401 U.S. 424 (1971), 431, 430). Thus the Court broadened the meaning of the term "discrimination" to include within the purview of the statute all forms of *indirect discrimination*, that is, hiring practices that do not rely on any of the unlawful grounds for employment decisions listed in the Civil Rights Act (race, color, religion, sex, and national origin) yet disproportionately burden groups officially discriminated against in the past, without being justifiable as a matter of "business necessity"; see generally Primus 2003. On indirect discrimination against blacks through the exclusion of occupational categories in which they were heavily overrepresented from the ambit of much of the progressive legislation enacted during the New Deal era, see Lieberman 1998; on its lingering effects and the connection between this historical legacy and the contemporary debate over direct affirmative action, see Katznelson 2005.

[13] Elster 1992, 116–20.

[14] Loury 2002, 148–49.

[15] For a recent review, see Bleich 2008a; in addition to the other references mentioned below, see also Hochschild and Mollenkopf 2009; Schain 2008; Bauböck, Perchinig, and Sievers 2009; Guiraudon 2000. Regarding indirect affirmative action in the U.S. case, see Fryer, Loury, and Yuret 2008; Skocpol 1991; Hochschild 1986; Wilson 1987, 118–20; on what is arguably the beginning of indirect affirmative action in Brazil, see Telles 2004, 251–53.

[16] Hansen 2000; Garbaye 2005.

[17] Favell 1998; Bleich 2003.

[18] Lieberman 2005.

and account for a yet unacknowledged common trend. As a complementary extension of earlier arguments describing the emerging policy *convergence* in this area, notwithstanding the conventional opposition between assimilationist and multiculturalist national models,[19] I will further illustrate this convergence by drawing upon the cases of the United States and France, two countries sometimes considered as ideal-typical embodiments of a "civic" conception of nationhood[20] yet often analyzed within an "exceptionalist" framework[21] and generally viewed as polar opposites as far as the political legitimacy and legal validity of race-based classifications are concerned.[22]

Based on an in-depth study of recent programs designed to increase the "diversity" of the student body in selective institutions of higher education, I will argue that French and U.S. policies are currently converging around the instrument of indirect (and often implicit) affirmative action.[23] In the only other comparative study of indirect affirmative action programs that I know of, anthropologist Frank de Zwart persuasively charts the effects and side effects of "replacement" strategies (what I call "indirect affirmative action") in India and Nigeria. Yet the two countries that he views as prime examples of the *alternative*, opposite models in relation to which "replacement" may appear as a "com-

[19] Hansen 2008 (highlighting the convergence between West European countries and the United States on maintaining a relatively liberal immigration regime despite the predominance of restrictionist attitudes within the general public); Weil 2001 (providing evidence of European countries moving toward jus soli and therefore becoming more similar to the U.S. in the field of citizenship law); Brubaker 2004, chap. 4 (emphasizing the convergence around neo-assimilationist policies in France, Germany, and the United States); Joppke 2007, 244 (pointing out the convergence around "civic integration for new immigrants" and "antidiscrimination for settled immigrants and their descendants" in the Netherlands, France, and Germany); Lépinard 2009 (analyzing the current trend toward the racialization of Muslims and underlining the increasingly central status of religious affiliation within the Canadian and French inclusion/exclusion regimes); Suk 2009 (describing the "procedural path dependence" that favors the predominance of the intentional discrimination paradigm in both US and French employment antidiscrimination law); Gilbert 2010 (noting a transatlantic convergence toward indirect and less transparent policy instruments as far as state-generated social spending is concerned).

[20] Huntington 1981; Brubaker 1992.

[21] For recent examples in the academic literature, see Schuck and Wilson 2008; Kuru 2008.

[22] See Bleich 2008b (in which the hypothesis of a future convergence between U.S. and French developments is briefly mentioned [p. 167], without further elaboration). For an essay contrasting the U.S. and French approaches to the related yet distinct issue of cultural pluralism, see Safran 2003.

[23] While here I will focus on the two institutions that played a pioneering role in this respect—the University of Texas at Austin and Sciences Po (Paris)—using data collected during thirty-one interviews with administrators, faculty members, and students that I have conducted since 2001, a case can be made that their programs are illustrative of a broader pattern: for complementary evidence on the search for indirect alternatives to facially race-based affirmative action at the University of California over the last decade, see Douglass 2007, chap. 8; Grodsky and Kurlaender 2010; on similar developments in Michigan, but also in states where direct affirmative action has not been legally prohibited, see Espenshade and Walton Radford 2009, 340, 367; on indirect affirmative action as a central feature of the French "integration model" beyond the sphere of selective higher education (in which outreach remains the dominant approach so far), see Calvès 2010, 113–16.

promise," that is, color-conscious, "accommodation"-oriented America and color-blind, "denial"-choosing France, have to a considerable extent already embraced that compromise.[24] Furthermore, this increasingly visible convergence between them obtains not only because of recent legal developments on the American side but also because the ultimate purpose of affirmative action in liberal democracies requires a measure of indirection and/or implicitness.

The Status of "Color-Blindness" in the United States and France: A Study in Contrasts

As established by legal historians,[25] in the United States the Equal Protection Clause of the Constitution's Fourteenth Amendment, according to which "no state shall deny to any person within its jurisdiction the equal protection of the laws," was not originally intended to incorporate a general requirement for state authorities to abstain from race-based classifications. When Wendell Phillips, one of the most influential Republican leaders of the post–Civil War period, put forward a provision prohibiting the states from drawing distinctions along racial lines, the amendment was rejected and the phrase "equal protection of the laws" was chosen instead, for its greater flexibility. True, since the 1940s the Supreme Court's case law has trended toward equating the Equal Protection Clause with a rule of color-blindness, by holding that classifications based on race are inherently suspect and should therefore automatically trigger exacting judicial scrutiny.[26] As a practical matter, this means that such classifications are now allowed to stand only if they are "narrowly tailored" to a "compelling state purpose." Yet the Court has never gone so far as to establish a general prohibition on the use of race-based classifications by state authorities, thereby leaving them free to set up race-conscious antidiscrimination and affirmative action programs under conditions to be specified.

In France, however, the legal issue of whether one ought to infer a *rule of color-blindness* from the constitutionally grounded *principle of equality* was not left for the courts to decide.[27] It was settled beforehand, and the answer was incorporated into the text of the Constitution itself. Article 1 of the 1958 Constitution thus provides that "France (…) ensures the equality of all citizens before the law, *without any distinction*

[24] de Zwart 2005b, 153–54; see also de Zwart 2005a.
[25] Kull 1992; Schnapper 1983.
[26] Siegel 2004.
[27] On the distinction between rules and principles, see Dworkin 1977, 22–28, 71–80.

of origin, race, or religion."[28] Therefore, corrective or "remedial" uses of race by state authorities are the legal equivalent of "invidious" ones and are simply ruled out. Further, not only may no public policy explicitly target segments of the population defined by this forbidden criterion but also, as a result of a 1978 law, the mere collection of statistical data using racial or ethnic categories is prohibited.[29] Therefore, researchers interested in assessing the extent of discrimination have had no option but to proceed indirectly by using a set of proxies (such as the individuals' first and/or last names, insofar as they are or are not typically "French sounding," and the birthplace and citizenship at birth of their parents) that may or may not be acknowledged as such.[30] This is all the more necessary as the distinction between using racial or ethnic categories in time-bound surveys of a social-scientific nature ensuring the anonymity of respondents and devoid of any distributive implication and the creation by the state of a standardized, permanent, and policy-oriented ethnoracial nomenclature is either dimly perceived or openly challenged. To take but one recent example, in response to protests and perceived legal liabilities some carefully worded questions about respondents' (self-declared) skin color eventually had to be removed from the survey "Trajectories and Origins" (*Trajectoires et origines*) conducted in 2008–9 by the National Institute of Demographic Studies (Institut national d'études démographiques—INED) and the National Institute for Statistics and Economic Surveys (Institut national de la statistique et des études économiques—INSEE). The first question asked: "In your opinion, what color do others think you are?" ("*D'après vous, de quelle couleur de peau les autres pensent-ils que vous êtes?*"). The following question asked: "And you, what color would you say you are?" ("*Et vous, de quelle couleur vous diriez-vous?*").[31] The existence of two distinct questions (so as to emphasize the potential disconnection between self-ascribed and other-ascribed "color identities"), the order in which such questions were asked, the somewhat contrived phrasing, and the possibility of checking the "I don't know" and/or the "I refuse to answer" boxes were all evidence of how sensitive the topic was perceived to be. Yet these precautions were ultimately unsuccessful at insulating the

[28] http://www.legifrance.gouv.fr/html/constitution/constitution2.htm, emphasis added.

[29] *Loi du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés (modifiée par la loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel du 6 août 2004)*, article 8 (1). At http://www.cnil.fr/fileadmin/documents/approfondir/textes/CNIL-78-17_definitive-annotee.pdf. While no fewer than eight exceptions to this ban are listed in the law, a case can be made that they have been underutilized overall.

[30] Centre d'analyse stratégique 2006.

[31] Comité pour la mesure de la diversité et l'évaluation des discriminations (COMEDD) 2010, 118.

survey from widespread hostility directed at the very principle of race- or color-based classification. Faced with a petition launched by one of the major French antiracist organizations (SOS Racisme) and signed by more than one hundred thousand persons—including the leader of the Socialist Party, François Hollande—and given the disagreement between INED and INSEE on the extent and tolerability of the legal risk involved, the more cautious stance of the latter eventually prevailed.[32]

As illustrated by this most recent episode, the different legal frameworks regarding the admissibility of race-based classifications in the United States and France clearly reflect a difference in public culture. In the United States nowadays the vocabulary of race remains in wide use, although "race" arguably denotes less the formerly predominant pseudo-anthropological classification of human beings into a set of biologically distinct and hierarchizable entities than the subset of groups having experienced the most severe forms of racist discrimination. The word is still everywhere, even though the dominant meaning of it has changed.[33] In France, by contrast, partly as a result of the participation of the Vichy government in the arrest and deportation of Jews, the delegitimization of racism through the exposure of its genocidal consequences has disqualified race as a descriptive category altogether.[34] In fact, the word itself is used in only a limited number of settings: by the most radical components of the extreme right, by social scientists looking into the history and the effects of racism, and by lawmakers concerned with prohibiting distinctions based on "race." Moreover, the rejection of this disreputable concept remains so powerful that even those advocates asking for the collection of statistical data on phenotypically defined minorities for antidiscrimination purposes are still reluctant to use it.[35] This reluctance is all the more understandable as they confront a much larger coalition including the three most well known antiracist associations—SOS Racisme,[36] the MRAP (Mouvement

[32] Author interviews, Paris, March 2009. As a rule, the names of those interviewees who wished to remain anonymous have been omitted.

[33] On the evolving meanings of race in the U.S. context, see Morning forthcoming.

[34] Bleich 2003.

[35] This is reflected in the following statement by Patrick Lozès, the president of the Representative Council of Black Associations (Conseil représentatif des associations noires—CRAN), during a meeting of the National Council on Statistical Information (Conseil national de l'information statistique—CNIS) on October 12, 2007: "I wish we could definitively expel from our vocabulary this 'ethnoracial categories' phrase that relies on notions which our history and our morality of science itself reject. Races do not exist, and I don't think ethnicity is a relevant concept in the French context. This is about measuring neither races nor ethnic groups, but the diversity of French society" (CNIS, "*Formation Démographie, Conditions de vie*"; at http://www.cnis.fr/ind_actual.htm). For another similar example, see Tin 2008, 37.

[36] SOS Racisme 2009.

pour le Rapprochement et l'Amitié entre les Peuples), and the LICRA (Ligue Contre le Racisme et l'Antisémitisme)—the national antidiscrimination agency (Haute Autorité de Lutte contre les Discriminations et pour l'Égalité—HALDE),[37] and the leadership of the Socialist Party. And while demographers Patrick Simon and Martin Clément suggest in a 2006 study that resistance to ethnoracial categorization may well be lower than expected among the general public, they still find that one-third of respondents would resent or oppose the introduction of the question, "Do you consider yourself as: White; Black; Arab or Berber; Asian; from the Indian subcontinent; Mixed-Race (*Métis*)?" in employment or administrative files—as would more than half of the North African subgroup.[38] Aside from its constitutional grounding as a legal construct, the principle of "color-blindness" thus also seems to enjoy a substantial degree of popular support.

By contrast, in the United States while the most direct, prevailing variety of affirmative action remains unpopular with a majority of the American public and has often met with successful political and legal challenges over the last quarter century, the principle of official racial classification has encountered much less resistance.[39] Tellingly, when in California, in 2003, the "Racial Privacy Initiative" led to a referendum on a measure demanding that "the state shall not classify any individual by race, ethnicity, color, or national origin" (Proposition 54), this restriction was meant to apply exclusively to the operation of public education, public contracting, and public employment. Those were the three sites where affirmative action had once been in effect and might be reinstated at some point—or so the proponents of that initiative feared. However, unlike Proposition 209—which led to the termination of all public affirmative action programs in California in 1996—Proposition 54 was roundly defeated at the polls.[40] Similarly, when in 1997 the American Anthropological Association issued a statement advocating the withdrawal of the question on race from the federal census,[41] its position was squarely rejected. In short, considered independently of any redistributive policy that would detract from it, the principle of color-blindness does not seem to have that much political traction in contemporary America.

[37] See Conseil national de l'information statistique, "Formation Démographie, Conditions de vie," meeting of October 12, 2007 (http://www.cnis.fr/Agenda/CR/CR_0405.PDF), 9–10. As of this writing, the HALDE has just been absorbed into the Défenseur des droits, a broader agency that will not focus on discrimination exclusively.

[38] Simon and Clément 2006, 50–64.

[39] Schor 2009.

[40] Amar 2005.

[41] American Anthropological Association 1997.

Indirect Affirmative Action in France: The Outcome of an Overdetermined Policy Choice

In contrast to the unequal weight of the ideology of color-blindness as a matrix of constraint in the United States and France, the celebration of "diversity"—an all-encompassing term problematically bringing together within a single analytical framework issues of recognition for cultural and religious minorities and discrimination against groups defined on an ethnoracial basis[42]—has now become a topical feature of the public discourse in both countries. In the United States this notion has been depoliticized to the extent that even the (George W.) Bush administration, while taking a public stand against the University of Michigan Law School and undergraduate affirmative action programs on relatively narrow, purportedly technical grounds, did not go so far as to challenge its status as a compelling government interest.[43] In France, since the mid-1990s, "reflecting the diversity of the French population" has been cast as an ideal and an institutional goal for political parties, the civil service, large corporations, and institutions of higher education.[44] As in the United States, the nearly consensual value of diversity—the fact that these days almost no one would go on record opposing it—partly derives from its ambiguity and from the absence of any legally grounded, authoritative specification of what it actually means. Yet using this unspecified notion as a *code word*, as a suitably euphemized placeholder for race, ethnicity, and/or "visible minority" status—a U.S.-born practice originally derived from the juridicalization of conflicts over affirmative action programs but not broadly identified as such in the French public sphere[45]—has now become widespread in France as well. In the mainstream media and, increasingly, in politics[46] the obscure and contorted phrase "*issu de la diversité*" (literally, coming from or born of diversity) is in the process of replacing "*issu de l'immigration*" (x-generation immigrant) as the ubiquitous designation encompassing all individuals whose origin or physical appearance work as a potential stigma of "otherness" (with the comparative advantage of including black French citizens from overseas territories). At the end of the day, the main divergence between France and the U.S. lies

[42] See, generally, Hollinger 2006; Ford 2005; Phillips 2007.

[43] On "the Republican Party leadership's concerted move to distance itself from the color-blind cause" (p. 699), of which this ostensibly moderate stance is but one illustration among many, see Lipson 2008, 697–700.

[44] Calvès 2005.

[45] Sabbagh 2009.

[46] Cartier et al. 2010; Avanza 2010.

in the sequential order in which antidiscrimination and the promotion of diversity have been placed on the political and legal agenda. In the United States the emphasis on diversity mostly appeared as a post hoc rationalization designed to provide a less controversial foundation for affirmative action programs originally conceived as instruments for countering the effects of racial discrimination, a rationalization that generally triggered only cosmetic changes in the nature of those programs.[47] In France, by contrast, the circulation of the diversity paradigm actually predates both the generalized awareness of the implications of existing antidiscrimination law and the implementation of effective antidiscrimination policies of a coercive kind.[48] Thus, according to one of the first empirical studies available,[49] this sequencing may well have resulted in a dilution of the benefits of the programs involved favoring women (and senior workers) at the expense of racial and religious minorities—somewhat like in the U.S., where immigrants and middle-class white women managed to obtain the biggest share of affirmative action resources.[50] Nevertheless, its full impact is yet to be assessed.

Beyond the timing of the emergence of "diversity" as a justification for egalitarian policies, however, the distinctive feature of the French setting lies in the absence of a viable alternative to indirect affirmative action, given the structural constraints induced by the status of color-blindness in the legal system and in the public culture as a whole.[51]

As a general matter, French affirmative action policies differ from their U.S. counterparts in that race is not supposed to play any role in the process leading to the identification of their beneficiaries. The criterion that most of them use is a mix of class and geographical location: residents of an area designated as economically or educationally disadvantaged will indirectly benefit from the additional input of financial resources allocated by state authorities to that area as a whole.[52] However, the contrast between U.S. and French affirmative action programs is not as stark as it seems. Although French policies officially embody an area-based and class-based approach to redistribution, they may also be understood as indirectly and implicitly targeting groups that,

[47] On university admissions, see Lipson 2007; on employment, see Dobbin 2009.

[48] Bereni 2009.

[49] Doytcheva 2009.

[50] On the unanticipated connections between immigration and affirmative action policies, see generally Graham 2002; on the overrepresentation of first- and second-generation immigrants among black students at the most prestigious U.S. universities, see Massey et al. 2007.

[51] On the additional, more specifically *political* constraint induced by the electoral risk involved in putting forward any measure ostensibly benefiting immigrants given the rise of the far-right Front National party of Jean-Marie Le Pen since the 1980s, see Dancygier 2007.

[52] Donzelot 2003.

in the American context, would be considered as "ethnic" or "racial" minorities—in particular, second-generation North African and sub-Saharan African immigrants. While formally color-blind, the policies arguably subscribe to an agenda directed at accelerating the integration of these minority groups into the mainstream through proxies[53] whose correlation with race/ethnicity enables policymakers to produce disproportionately positive effects for them.

In the case of primary and secondary education, for instance, second-generation immigrants of African extraction are statistically overrepresented in the "educational priority areas" (*zones* [*d'éducation*] *prioritaire*[*s*]—ZEP) created by a 1981 administrative guideline, as the proportion of foreigners was one of the criteria used for delineating such zones in the first place (in addition to other factors also correlated with membership in those groups).[54] The same holds for the urban development strategies called "*politique de la ville*" by which the state offers tax cuts as incentives to induce companies to locate in disadvantaged areas, where they are required to hire local young residents.[55] At first glance, the beneficiaries of these other "place-based" affirmative action programs are selected exclusively according to color-blind considerations. In order to delineate the tax-free areas (*zones franches urbaines*) established in 1996, for instance, the criteria used include the number of residents, the corresponding tax base, the unemployment rate, the percentage of residents under twenty-five years old, and the proportion of university graduates. However, because African immigrants happen to have higher birth rates and higher unemployment rates than the average French resident, they disproportionately benefit from this kind of affirmative action.[56]

Finally, the example of the first affirmative action plan introduced in 2001 in the sphere of higher education by one of the most prestigious French selective institutions does shed some light on how the structural tension between color-blind rhetoric and color-conscious behavior can play out and be managed in practice.

[53] On discrimination by proxy, see generally Hellman 1998; Schauer 2003.

[54] Namely, school performance and the percentage of families with three or more children. As a result, the proportion of high school students who are second-generation immigrants is nearly four times higher among ZEP students than among non-ZEP students (Toulemonde 2004, 91).

[55] de Maillard 2004; Le Galès 1995; Damamme and Jobert 1995.

[56] That the racial dimension of the policy was intentional on the part of those responsible for setting it up is indirectly confirmed by the fact that initially the proportion of foreigners was included in the list of criteria mentioned above, eventually to be replaced by the proportion of individuals without a university degree; see Estèbe 2004, 106. That the urban renewal policies which are the U.S. equivalent of "*politique de la ville*" generally do *not* operate as an indirect kind of affirmative action is persuasively argued in Kirszbaum 2009.

Heir to the École libre des sciences politiques founded by Émile Boutmy in 1872 to train the future political and administrative elites of the Third Republic, Sciences Po—a publicly funded though largely independent establishment—has carried on with that mission ever since. However, since the 1980s the class background of its student body had become increasingly homogeneous. According to a study based on the admissions data of 1998, 81.5 percent of the students came from the upper and upper middle classes, and less than 1 percent had a working-class background—as opposed to 12.5 percent of those enrolled at nonselective universities.[57] On that basis, the director of Sciences Po, Richard Descoings, by way of experiment, decided to create a special admission track for the students of seven high schools located in ZEPs, with a view to "diversifying and democratizing" the recruitment process.[58] Instead of having to take the competitive exam required of most other applicants, those students were asked to write a synthesis of press articles and an essay on a chosen topic and to defend them before a jury of teachers and administrators from their high school. The best candidates were then invited for an interview at Sciences Po, after which the final selection was made. Those who received an admission offer were also provided with both financial aid and special tutoring (available on an optional basis) to help them adjust to their new educational environment. In the fall of 2001 seventeen ZEP students were thus admitted to Sciences Po.[59]

As a practical matter, applicants who follow this alternative admission track benefit from an advantage, as suggested by the facts that their admission rate (fluctuating between 14 and 19 percent since 2001) is higher than that of other applicants (11.5 percent on average) and that their level of academic performance as measured by grades and distinctions obtained at the *baccalauréat* is lower.[60] Yet Sciences Po's affirma-

[57] Cheurfa and Tiberj 2001, 3–4. Sciences Po is hardly the only case in point. According to another study, the proportion of students with a working-class background in the overall makeup of four of the most prestigious *grandes écoles*—the École nationale d'administration, the École Normale Supérieure, Polytechnique, and Hautes études commerciales (HEC)—declined from 29 percent in the first half of the 1950s to 9 percent in 1995 (Euriat and Thélot 1995, 10).

[58] Cheurfa and Tiberj 2001, 5.

[59] They were 33 in 2002, 37 in 2003, 45 in 2004, 57 in 2005, 75 in 2006, 95 in 2007, 118 in 2008, 126 in 2009, and 130 in 2010, that is, 733 students in ten years amounting to about 6 percent of the student body since 2002. The number of high schools included in the program is now 85; Sciences Po (*Pôle Égalité des chances et diversités*), "Objectif: égalité des chances. Les conventions éducation prioritaire," February 2011, 2, unpublished document on file with author.

[60] In 2001, while 26 percent of the applicants admitted to Sciences Po after taking the traditional entrance exam had obtained their *baccalauréat* with *mention très bien* (the highest distinction possible), this was true of none of the ZEP students admitted through the new procedure. In recent years, this gap has subsided, but it has not entirely disappeared (interview, Sciences Po, Paris, May 15, 2008).

tive action program is clearly different from those of most American selective institutions of higher education. Even aside from the nature of the criteria used to identify the beneficiaries, since the program did not entail any decrease in the number of positions available for applicants following the traditional admission track[61]—as officials at Sciences Po were careful to point out—the vast majority of *nonbeneficiaries* cannot claim to be *victims* of the policy. While many may still reject the premise of the program on principle, it is more difficult than in the United States for anyone to argue that he or she was personally disadvantaged by the *addition* of a few slots earmarked for ZEP students. Besides, Sciences Po administrators have made a point of emphasizing those features that would seem to sharpen the distinction between their program and (a hugely simplified version of) the American race-based "countermodel,"[62] to the point of rejecting the very notion of affirmative action and equating it with "quotas"—even though in the U.S. affirmative action in university admissions is prohibited by law from using explicit quotas.[63] Initially, they even attempted to dissociate their initiative from the debate on racial discrimination simultaneously unfolding in France partly as a result of the transposition of the European Union Race Directive in November 2001,[64] perhaps out of a belief that the very notion of "discrimination" risked calling to mind the socially salient but legally nonexistent ethnoracial features of many ZEP residents.[65]

Notwithstanding the denials of its supporters, however, several features of the Sciences Po program suggest that it qualifies as an instance of *indirect affirmative action* as defined above.

[61] van Zanten 2010, 74.

[62] "[In the United States], affirmative action means applying different criteria to identical situations. For instance, one will admit a black, Latino, or Asian applicant because he is black, Latino, or Asian. This is definitely not what Sciences Po has in mind" ("Bilan 2003 des Conventions prioritaires," unpublished document on file with author).

[63] See the 1978 Supreme Court case *Regents of the University of California v. Bakke* (438 U.S. 265 (1978)). In this decision, Justice Lewis Powell argued that in order for an affirmative action program in higher education to be constitutionally valid, the admission committees' search for diversity-enhancing features should proceed in a flexible, case-by-case, and individual-centered way, without allowing for the official segregation of applicants into separate admission tracks—as Sciences Po actually did (*Bakke*, 314, 317–18). Only several years later did the director of Sciences Po decide to present the program as a French variety of affirmative action—while still insisting on how different it was from its U.S. counterparts. The text in which he did so, cosigned with the president of Columbia (and former president of the University of Michigan at the time when that university's affirmative action programs were being scrutinized by the Supreme Court), was eventually published in a semiacademic journal; see Bollinger and Descoings 2004.

[64] Calvès 2002.

[65] Author interview with Cyril Delhay, the Sciences Po administrator then in charge of the new admission procedure, Paris, November 10, 2001.

One is the reliance on the ambiguous notion of "diversity" as a key justification for setting up this new admission track. Originally, the very title of the program was "ZEP Conventions: Excellence within Diversity" ("*Conventions zep: l'excellence dans la diversité*"), a phrase whose dual meaning was made clearer in an article in *Le Monde* coauthored by several members of Sciences Po's management council. In that article they defined the project's basic goals and expectations as follows: "To select applicants (…) on the basis of merit, taking into account the diversity *of their previous educational experience*," while anticipating that "the diversity *of the students' social and cultural origins* will necessarily promote the development of a critical mindset and the rise of intellectual standards."[66] This argument is strikingly similar to the one found in *Bakke*, where Justice Powell held that, as a practical matter, race and ethnicity could be taken into account in university admissions only insofar as this reflected a legitimate concern for increasing the diversity of "experiences, outlooks, and ideas" within the student body.[67] Moreover, in both France and the U.S. this emphasis on the benefits of social and cultural pluralism actually served the same purpose: to legitimize a controversial type of affirmative action by linking it to a preexisting pattern by which academic institutions used their discretionary power to select students in order to promote diversity. On the American side, the argument was that racial diversity should be taken into account in making admissions decisions as simply another component of the kind of global diversity traditionally favored by university officials, including diversity in the applicants' geographical origins and in their academic and extracurricular interests and talents.[68] On the French side, Sciences Po's spokespersons also attempted to defuse the issue by pretending to see the fact of coming from a ZEP as being of a piece with other, supposedly similar diversity-increasing characteristics, such as having previously earned another, B.A.-level degree instead of applying to Sciences

[66] "Sciences Po: égalité des chances, pluralité des chances," *Le Monde*, March 11–12, 2001, 15, emphasis added.

[67] *Bakke*, 314. The case for the epistemic and problem-solving value of experiential diversity is argued in Page 2007.

[68] This point was made quite explicitly in the Harvard affirmative action plan quoted at length in *Bakke*, a program Justice Powell found constitutionally admissible and from which he suggested other universities should draw inspiration: "The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard college admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; (...) violinists, painters and football players; biologists, historians and classicists. (...) In recent years, Harvard College has expanded the concept of diversity to include students from disadvantaged (...) ethnic and racial groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students" ("Brief of President and Fellows of Harvard College," *Amicus Curiae*, *DeFunis v. Odegaard*, 416 U.S. 312 (1974), 15; quoted in *Bakke*, 322).

Po just after the *baccalauréat*[69] or being a foreign student.[70] In both cases, downplaying the specificity and diluting the redistributive dimension of the policy at hand by emphasizing diversity as an overarching rhetorical frame was the dominant strategy, and it has remained so to this day.

Finally, that the "Conventions ZEP" program was conceived at least in part as an instance of indirect affirmative action is clearly reflected in statements by Sciences Po officials mentioning the beneficiaries' national origins, even though the convoluted language they use betrays their concern to avoid singling out the subgroup of second-generation African immigrants.[71] Similarly, on the cover of the first institutional brochure presenting and defending the program there was a (black-and-white) picture of some of the students that captured the ethnocultural and/or phenotypical dimension of "diversity" yet was cropped so that only the eyes were in full view, thus blurring the color-coded signal that was being sent.[72] The director of Sciences Po himself presents as a "guiding principle" the postulate that "diversifying admissions procedures will increase the diversity of the student body," while also acknowledging that "the overlap between class-based and ethnic segregation (…) allows a place-based approach to be effective" in promoting this goal—a goal made all the more compelling by the 2005 urban riots that "forced the French government to declare a state of emergency, for the first time since the Algeria-related events of 1954."[73] And, in fact, 83 percent of the students admitted through the program in 2009 were second-generation immigrants, nearly 85 percent of whom had at least one parent born in Africa.[74] Thus, to a considerable extent the policy does operate as a functional substitute for direct, race-based affirmative action.

[69] At http://www.sciences-po.fr/actualite/zep/faq.htm, 4, accessed November 9, 2001.

[70] Author interview with Cyril Delhay, Paris, November 10, 2001.

[71] "Applicants [going through the new admission track] do represent the France whose diversity was a matter for celebration in 1998 [a transparent allusion to the major contribution made by Zinedine Zidane and other players of African extraction to France's victory in the soccer World Cup that year]: a minority of them has dual citizenship, some come from Eastern Europe, others from North Africa, and some have parents who were part of the different immigration waves through the succession of which contemporary France has been made" (press conference, "Conventions éducation prioritaire: résultats de la procédure d'admission," September 13, 2001, 8, unpublished document on file with author). In a more recent document, the "markedly international outlook" of those students is also emphasized (Sciences Po (*Pôle Égalité des chances et diversités*), "Objectif: égalité des chances. Les conventions éducation prioritaire," November 30, 2009, 5, unpublished document on file with author).

[72] Unpublished document, September 2001, on file with author.

[73] Author interview with Richard Descoings, Paris, February 2, 2010. At http://equality.frenchamerican.org/experts/richard-descoings.

[74] Sciences Po, "Objectif : égalité des chances. Les conventions éducation prioritaire," 3, 6–7.

Indirect Affirmative Action in the United States: The Ultimate Step in a Pattern of Organized Opacity

Absent an unequivocal constitutional principle of color-blindness such as that stated in article 1 of the French Constitution and in view of the built-in legitimacy that standard patterns of path dependence[75] might seem to confer on racial distinctions in public policy, one may well have expected U.S. race-based affirmative action programs to be implemented in a transparent way. That this did not happen therefore requires an explanation.

True, this lack of transparency itself has never been more visible than when the elimination of all direct types of affirmative action in public institutions of higher education was legally imposed, as it has been in states such as Texas, California, and Florida since the second half of the 1990s. In Texas, for instance, in order to counteract the resulting drop in the proportion of black and Hispanic students in the most prestigious state universities and professional schools[76] and given the predictable ineffectiveness of other conceivable means to that end,[77] the legislature enacted a law in April 1997 instructing all public universities—including the flagships, the University of Texas at Austin and Texas A&M—to admit the top 10 percent of every high school's graduates, defined on the basis of the grades earned in a preselected list of courses and regardless of test scores. Because there was a correlation not only between race and test scores but also, to a lesser extent, between race and school performance,[78] Asians and whites were still overrepresented in the upper decile thus defined. However, given the relatively large number of high schools in Texas from which virtually all graduates were either black or Hispanic, the plan could be expected to mitigate the sharp

[75] See generally Pierson 2004.

[76] To take but one example, at the Austin campus of the University of Texas Law School the percentage of blacks in the student body dropped from 7 percent in 1996 to 2 percent in 1997 and the percentage of Hispanics dropped from 18 percent to 5 percent, as a result of the suppression of affirmative action programs; author interview, Austin, November 12, 2007. The extent of this decline is representative of what the consequences of eliminating affirmative action in university admissions nationwide would be as far as the most selective institutions are concerned. See Wightman 1997; Bowen and Bok 1998, 34–35; Sander 2004.

[77] The least sophisticated variety of "class-based" (direct) affirmative action equating "class" with parental income is a case in point. This is so since, on the one hand, blacks and Hispanics would then make up only a minority of the individuals eligible for this new kind of affirmative action; on the other hand, as far as test scores are concerned, if one discounts the independent impact of income by considering only the subset of students from households whose income stands below a given threshold, there remains a sizable gap between Asian, non-Hispanic white, Hispanic, and black applicants (Jencks and Phillips 1998). Most "underrepresented minority" candidates therefore would not benefit from this kind of class-based affirmative action. For a detailed demonstration, see Kane 1998.

[78] Espenshade and Walton Radford 2009, 134, 395.

decline in ethnoracial diversity perceptible since 1996,[79] in line with the original calculations of its supporters.[80] In other words, as in the French case but in a much less imperfect way, the existence of de facto school segregation—itself linked to residential segregation—provides state authorities with a functional substitute for race-based affirmative action in higher education.[81]

Because as a proxy for race-based direct affirmative action programs the top 10 percent law remained insufficient, however, other types of indirect affirmative action were introduced by UT Austin at about the same time. One of them relates to the eligibility criteria for the new scholarships set up in 1999 as a complement to the law and targeting graduates of specific high schools. While the main criterion used for delineating the set of such high schools—the number of their graduates admitted to UT Austin in recent years remaining below a certain threshold—was color-blind when considered in the abstract, both the threshold and the adjunct criteria needed to tailor the number of beneficiaries to the university's administrative and budgetary capacities were defined so that ultimately most of the selected high schools were "racially identifiable," as several of our interviewees euphemistically put it.[82] In an internal document, former university administrators Gary Hanson and Lawrence Burt describe the process as follows: "We define policy standards; apply standards to data base; examine policy outcomes; re-define policy standards (…) if the policy simulation analysis provided awards to the 'wrong' students, the number of points [assigned to the different criteria] could be re-assigned to yield a more desirable mix."[83] And, indeed, in 2003 no fewer than 85 percent of the

[79] See fn. 84.

[80] As explained by the director of admissions research and policy analysis for the Admissions Office at UT Austin, the main idea of the legislative proponents of the Texas percentage plan was to design a post–affirmative action strategy for promoting diversity by "making use of the segregated nature of the state. (…) We live in Texas. Approximately 16% of our students come from truly integrated schools. Nobody thinks this is going to change any time soon. De facto segregation is obvious to our senses. The proponents were only trying to make it work against itself"; author interview with Gary Lavergne, Austin, February 21, 2007; and e-mail from Gary Lavergne, Austin, March 16, 2011.

[81] Tienda and Niu 2006.

[82] Author interviews, University of Texas, Austin, November 12, 13, 2007.

[83] Hanson and Burt 1999, 8. The authors go on, in remarkably elliptic terms: "At one point during the policy simulation analysis (….) the President and executive officers of the University (…) raised questions about how points were assigned to students when they came from a single parent rather than a two-parent family. We examined the statistical profile and made an adjustment to the points for the estimated family. (…) Arriving at an appropriate number of points for this category of students within the larger population required several iterations, but ultimately led to an acceptable outcome for the decision-makers. (…) Through repeated iterations we were able to identify an appropriate number of students with the type of qualities we were seeking…" (pp. 9–10). Nationwide, in 2006 almost 45 percent of black households were single-parent families, as against 13 percent of white households (Patterson 2008, 402).

beneficiaries of such scholarships were black (24 percent) or Hispanic (61 percent).[84]

Finally, another kind of indirect affirmative action used in conjunction with the percentage plan and the formally color-blind yet implicitly race-oriented scholarships has been the enlargement of the set of criteria considered as constitutive of the "merit" of the applicant beyond grade point averages and other conventional indicators of school performance (for those high school graduates not automatically admitted to UT as a result of their being ranked in the top 10 percent of their class). As explained by the director of UT Austin's Admissions Office, "the hope was that if you broaden your definition of success beyond GPAs and test scores you might get a more diverse range of students."[85] Thus, in 1997 UT Austin modified its admissions process so that the application of every non-top 10 percent applicant would undergo a "holistic review" giving more weight to essays reflecting the individual's capacity to "overcome adversity" and taking into account the "special circumstances" that might help "put into perspective" indicators such as test scores, GPAs, and school rank.[86] A majority of those special circumstances considered as defining the context in reference to which the above-mentioned indicators ought to be assessed were presumably objective factors of disadvantage more or less obviously selected because of their (known or anticipated) correlation with race. Thus, the remarkably detailed yet at times deliberately vague and explicitly nonexhaustive list of such circumstances established by the Texas legislature itself in 1997 comprised the following items: "The socioeconomic background of the applicant, including the percentage by which the applicant's family is above or below any recognized measure of poverty";[87] "the applicant's household income, and the applicant's parents' level of education"; "whether the applicant would be the first generation of the applicant's family to attend or graduate from an institution of higher education"; "whether the applicant has bilingual proficiency" (obviously not a disadvantage yet included as a particularly transparent proxy for Hispanic ethnicity); "the financial status of the applicant's school district"; "the applicant's responsibilities while attending school,

[84] U.S. Department of Education 2004, 20. As far as scholarships are concerned, another indirect strategy used at UT Austin has been to externalize the racially targeted ones by delegating their management to private organizations (foundations and alumni associations)—sometimes created for that very purpose—as the ban on race-based affirmative action resulting from the 5th Circuit Court of Appeals 1996 *Hopwood v. State of Texas* (78 F.3d 932) decision did not apply to them (author interviews, University of Texas, Austin, February 22, 2007).

[85] Author interview with Bruce Walker, University of Texas, Austin, February 21, 2007.

[86] Author interview with Gary Lavergne, University of Texas, Austin, February 21, 2007.

[87] On the relation between race and poverty, see Conley 1999; Lang 2007.

including whether the applicant has been employed, whether the applicant has helped to raise children, or other similar factors"; "the applicant's region of residence"; "*whether the applicant attended any school while the school was under a court-ordered desegregation plan*";[88] and "any other consideration the institution considers necessary to accomplish the institution's stated mission,"[89] a provision that eventually allowed the university to take family structure into account as well.[90] In short, just as in the 1960s the prohibition of all kinds of race-based preferential treatment implicated in the original understanding of Title VII of the 1964 Civil Rights Act had resulted in a series of training programs set up within the frame of the War on Poverty while arguably partaking of indirect affirmative action,[91] so the ban on outreach and direct affirmative action in force between 1996 and 2003[92] paved the way for a more elaborate allocative scheme, the main characteristic of which is not genuine "color-blindness" but rather a reliance on a proliferation of proxies generally acknowledged as such. The function of that scheme has been to diminish the immediate visibility of race consciousness, and its effectiveness in promoting ethnoracial diversity has been significant. Indeed, while still underrepresented in relation to their percentage in the population of the state, blacks and Hispanics in 2010 made up a larger proportion of UT Austin's freshmen class (5 percent and 23 percent, respectively) than they had in 1996 (4 percent and 14 percent, respectively), before the elimination of the most explicit variety of affirmative action.[93]

However—and most importantly—while this pattern of obfuscation has become increasingly noticeable as a result of the policy's being prohibited in some American states, a case can be made that it is also

[88] Emphasis added.

[89] *Uniform Admission Policy Act* (Texas Education Code Ann. §§ 51.801-51.805). At http://www.utexas.edu/student/admissions/research/HB588Law.html, accessed January 14, 2010.

[90] Author interviews, University of Texas, Austin, February 21, 2007. For similar evidence regarding the deliberate incorporation of yet other race-correlated traits into the set of disadvantage-producing factors routinely considered by admissions officers at the University of California following Proposition 209—including the fact of having "grow[n] up with a parent (…) in prison," see Forde-Mazrui 2000, 2332–33. That incarceration rates for blacks are much higher—about eight times higher, actually—than for whites is a widely known fact; Pettit and Western 2004, 152.

[91] Skrentny 1996, 80–91, highlighting the increasingly unbalanced racial breakdown of these programs and providing evidence that the statistical overrepresentation of blacks among the beneficiaries had been intentional.

[92] The 1996 *Hopwood* decision was overridden by the 2003 Supreme Court decision *Grutter v. Bollinger* that authorized the most informal kind of affirmative action programs in university admissions, following which race was included into the set of "special circumstances" considered by UT Austin starting from 2005.

[93] For the 2010 figures, see http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf, 7. The 1996 figures were obtained from Gary Lavergne in the course of an interview, Austin, February 21, 2007.

perceptible *within some of the key Supreme Court decisions defining the constitutional regime of affirmative action*, a fact which suggests that the lack of transparency illustrated above is not simply the product of compliance with an externally imposed legal mandate.

First, in order for an affirmative action plan in higher education to be deemed constitutionally admissible under the Equal Protection Clause of the Fourteenth Amendment, not only should the outcome of the decision process by which scarce goods are allocated not be determined by group membership *exclusively*[94] but also, paradoxically, the extent to which group membership is taken into account should be left in the background. As much was suggested initially by Justice Powell's opinion in the *Bakke* case, in which racial quotas were held to be unconstitutional even as admission committees were allowed to informally consider the race of a minority applicant as a plus in order to increase "diversity."[95] In fact, despite this distinction between quotas and "flexible" types of affirmative action, before and after 1978 the expected ethnoracial distribution of the incoming class generally has been monitored in a more systematic way than any other characteristic of the student body, and most admissions committees will calibrate the size of the bonus given to black and Hispanic applicants so as to ensure the attainment of a minimal level of "diversity."[96] At the end of the day, the difference between quotas and supposedly flexible affirmative action programs is thus "administrative and symbolic":[97] it lies not in the size of the advantage granted to blacks and Hispanics but in the fact that flexible programs do not "make public the extent of the preference and the precise workings of the system."[98]

Similarly, in the 1989 *City of Richmond v. Croson* decision in which the Court struck down a local affirmative action program that set aside 30 percent of public works contracts for "minority business enterprises," Justice O'Connor argued that Richmond should have attempted to "use alternative, race-neutral means" such as "simplification of bidding procedures, relaxation of bonding requirements, and training or financial aid for [all] disadvantaged entrepreneurs" *in order* "*to increase minority participation in city contracting.*"[99] The same—seemingly paradoxical—

[94] See *Bakke*, 315–18, where Justice Powell states that race may be taken into account in university admissions as long as it is treated as just one among many potentially diversity-increasing features of applicants, to be weighed against all the others.

[95] On the origins of affirmative action and the diversity rationale in university admissions, see Skrentny 2002, 167–78.

[96] See Conley 1995.

[97] Dworkin 1985, 309.

[98] *Bakke*, 379 (opinion of Justices Brennan, Marshall, White, and Blackmun).

[99] *City of Richmond v. Croson*, 488 U.S. 469 (1989), 471, 509–10, majority opinion, emphasis added.

point is emphasized by Justice Scalia, who describes as "permissible" the adoption of "preference[s] (…) for new businesses—which would make it easier for those previously excluded by discrimination to enter the field," since "such programs may well have racially disproportionate impact, but they are not based on race."[100] Because "blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks. Only such a program, and not one that *operates* on the basis of race, is in accord with the letter and the spirit of our Constitution."[101] It follows that as long as the decision-making authority proceeds discreetly enough, it will be left free to enact measures that are superficially color-blind yet deliberately favorable to minority members. Affirmative action for ethnoracial groups previously discriminated against is endorsed, provided it remains indirect.

Finally, that a measure of opacity regarding its modus operandi is the key condition an affirmative action plan must meet in order to be considered legal has been confirmed by a majority of the justices in 2003, as the Supreme Court validated the program of the University of Michigan Law School that sought to enroll an unspecified "critical mass" of underrepresented minority students[102] while striking down the more detailed plan of the University of Michigan's undergraduate school, which systematically distributed 20 points out of the 100 needed to guarantee admission to all members of such minorities.[103] Only in the dissents did some of the justices voice their misgivings as to the Court's approbation of precisely those schemes that "get their racially diverse results without saying directly what they are doing or why they are doing it."[104] It would seem, then, that the constitutional validity of affirmative action policies in university admissions depends in practical terms upon whether the degree to which they take race into account remains properly concealed.

The Endogenous Determinants of Policy Convergence

If the United States and France are currently converging around indirect affirmative action strategies for promoting diversity in selective

[100] *City of Richmond v. Croson*, 488 U.S. 469 (1989), 526, Justice Scalia's concurring opinion.
[101] *City of Richmond v. Croson*, 488 U.S. 469 (1989), 528, emphasis added.
[102] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[103] *Gratz v. Bollinger*, 539 U.S. 244 (2003).
[104] *Gratz v. Bollinger*, 539 U.S. 244 (2003), 8, dissenting opinion of Justice Souter.

institutions of higher education, what might be the causal mechanisms involved? Providing a definitive answer to that question is beyond the scope of this article. Yet a case can be made that one of the main explanatory factors of the outcome documented above lies in the very nature of the ultimate goal that affirmative action is actually meant to achieve.

To begin with, while theories of policy transfer[105] or institutional isomorphism[106] may well help account for the spread of indirect affirmative action programs within the United States,[107] one should avoid the pitfall of assuming that a transnational similarity of public policy must be the product of imitation. To the best of my knowledge, there is not even a shred of evidence that the policy convergence identified between the two countries—as opposed to the discursive convergence around "diversity" as a rhetorical frame—is the result of a *diffusion* process.[108] This is so whether diffusion is conceived as the product of "a shift in incentives"—through coercion or regulatory competition leading to mutual policy adjustment—or of "a shift in ideas"—through learning or the influence of elite networks of experts engaged in regular interactions to the point of forming "epistemic communities."[109] Besides, and as established in the previous section, since "the distinction between more or less visible race-conscious interventions"[110] already played a decisive role in the Supreme Court's equal protection case law *before* the partial bans on direct affirmative action in eight American states,[111] the rise of indirect affirmative action in the U.S. cannot be reduced to an organizational response required by an exogenous change in the legal environment. While the authors of a recent review of empirical studies on policy convergence noted the relative paucity of policy-specific explanations and encouraged researchers not to overlook the impact of those special constraints imposed by the very nature of the problem that the policy is meant to address,[112] ours may

[105] Dolowitz and Marsh 2000.

[106] DiMaggio and Powell 1983.

[107] Lipson 2007, 1009.

[108] That is, a process in which "prior adoption of a (…) practice in a population alters the probability of adoption for remaining non-adopters"; Strang 1991, 325.

[109] Dobbin, Simmons, and Garrett 2007, 457. An epistemic community is one whose members "share common principled beliefs over ends, causal beliefs over means, and common standards of accruing and testing new knowledge"; Drezner 2001, 63.

[110] Primus 2010, 1345.

[111] Texas, Louisiana, and Mississippi, from 1996 to 2003, as a result of *Hopwood*; Florida (since 2000), as a result of a gubernatorial decision; California (since 1996); the State of Washington (since 1998); Michigan (since 2006); and Nebraska (since 2008), as a result of ballot initiatives.

[112] Eicher, Pape, and Sommerer 2005, 825, 834.

well be a case of this kind, where the convergence of policy instruments is at least in part determined by incentives pertaining to the definition of the policy's underlying purpose.[113]

As suggested by liberal-egalitarian philosopher and legal scholar Ronald Dworkin,[114] in contrast to the ultimately unsatisfactory arguments that cast affirmative action as a way of promoting corrective justice or viewpoint diversity,[115] this purpose arguably is to eradicate a specific disadvantage experienced by all black Americans as a result of the still perceptible correlation between race and class (and the negative expectations based upon it), a correlation that is itself the product of past injustice. Insofar as it works toward the reduction of this correlation, affirmative action may be understood as an effort at *racial decategorization* by which, through a planned increase of the diversity of class profiles within the black minority, that group's "monolithic separateness"[116] would dissolve and it would become impossible to ascribe to its individual components similarities other than the common, constitutive feature of the group. This argument is ultimately grounded in the assumption that the enduring relevance of race largely stems from the real informational value that skin color retains in contemporary America, that value itself being derived from an empirically ascertainable inequality in the distribution of social goods between blacks and whites. By lessening the correlation between race and class/occupational status, affirmative action would then help "break apart the logjam of black-white stratification"[117] through the erosion of the empirical basis that sustains some of the stereotypes by which blacks are negatively affected. Improving the economic and occupational predicament of the group would eventually diminish the reliability of color as a "status indicator,"[118] thus potentially unsettling the "transactional system where whites use race as a proxy for individualized data on personal abilities"[119]—and the "racial order"[120] based upon it.

My point here is not that this consequentialist justification for affirmative action put forward by Dworkin and elaborated upon by other

[113] For another, broadly similar example in which policy convergence has been analyzed as a function of certain intrinsic characteristics of the problem at hand, see Tews, Busch, and Jörgens 2003.

[114] Dworkin 1985, 294–315.

[115] The case against the corrective justice argument is made in Nagel 1973; Sabbagh 2007, 13–30; the case against the diversity argument is made in Malamud 1997, 954–67; Schuck 2003, chap. 5; Sabbagh 2007, 31–48.

[116] Parsons 1968, xxiv.

[117] Alba 2009, 228.

[118] Searle 1995, 119.

[119] Ackerman 1980, 265.

[120] King and Smith 2005.

scholars[121] has been accepted in toto by U.S. public authorities. As far as I can tell, there is no evidence that it has. The point is rather that the rise of indirect affirmative action is linked to the widespread endorsement—shared by the Supreme Court—of the quintessentially *political* metagoal ascribed by Dworkin to the policy's direct instantiation: "to integrat[e] the national community by rubbing out in the [public's] consciousness (…) a perception of racial difference in inherent capacities or deserved social standing,"[122] that is, to reduce the salience of racial boundaries[123] and eventually "eliminate race" as a principle of social organization "from the American psyche."[124] As Justice Blackmun famously put it, "[I]n order to get beyond racism, we must first take account of race."[125] While several important comparative or U.S.-focused studies have emphasized the impact of ethnoracial divisions on preferences and policy-making in seemingly disconnected domains such as poverty[126]—or even health[127]—affirmative action arguably exemplifies the reverse pattern, in which major cleavages internal to a given society are the *target*—as opposed to the hidden determinants—of the policy involved.

However, because policies unavoidably have an *expressive* as well as an *instrumental* dimension, the very existence of an allocative scheme taking account of race in a transparent way is likely to jeopardize the "deracialization" that one is trying to bring about in the long run. Not only is it theoretically conceivable that by openly integrating race into the decision process and therefore confirming its meaningfulness without being able to impose a common understanding of the meaning implied, direct affirmative action might help reify and relegitimize the categorical distinctions that it was meant to eradicate. As a matter of fact, many empirical studies in social psychology relevant to assessing the different procedures designed to increase interracial contact do confirm the risks involved in reaffirming the importance of race as a factor accounting for the agents' presence in the institutional setting where (positive) racial interactions are expected to take place.[128] So long as the criterion of race is seen to operate at the preliminary stage of identifying

[121] E.g., Sunstein 1994.

[122] Loury 2002, 151. In this respect, see also Anderson 2010.

[123] A boundary is "a social distinction that individuals make in their everyday lives and that shapes their actions and mental orientations toward others"; Alba 2009, 40. On ethnic boundaries, see generally Wimmer 2008.

[124] Forde-Mazrui 2000, 2397.

[125] *Bakke*, 407.

[126] Gilens 1999; Alesina and Glaeser 2004.

[127] Lieberman 2009.

[128] See, e.g., Brewer and Miller 1988; Rothbart and John 1985.

the participants in the interaction process, it remains unlikely that racial decategorization will occur.

More specifically, among the negative side effects arguably induced by the visibility of affirmative action, the most dangerous one is probably the additional stigma potentially inflicted upon the beneficiaries. Insofar as this policy logically implies an acknowledgment of the fact that those who benefit from the advantage involved would not have gained the position they eventually did gain without it, is there not a risk of fostering a suspicion of incompetence as far as they are concerned—a suspicion that was precisely one of the factors necessitating affirmative action in the first place? Would it not be imprudent to dismiss the possibility that the distinctions among applicants reinstitutionalized by affirmative action should come to be understood as implicitly confirming the validity of racial stereotypes and convey the impression that those are actually shared by the authorities responsible for introducing the policy?[129] In short, can one afford to ignore the danger of inadvertently "reaffirm[ing] (…) the badge of inferiority (…) in the very attempt to get rid of it"?[130] In order for the elevation of minority group members in the economic and occupational hierarchy to be taken as evidence of the inaccuracy of preexisting stereotypes (and to provide suitable role models), one should not be able to dismiss their success as resulting from an antimeritocratic scheme specifically designed to that end. In particular, assuming performance is correlated with qualifications as previously assessed within the selection process, race-based direct affirmative action, insofar as it detracts from the principle under which the most qualified applicant ought to be selected, could make it rational to take race into account as a proxy for expected performance, thus fostering the perpetuation of *statistical discrimination*.[131] The visibility of affirmative action might therefore entrench some of the very practices that the policy was meant to do away with, by apparently corroborating existing views of blacks as being deficient in some respect.[132]

[129] See Charles et al. 2009, 228, 232.

[130] Joppke 2004, 243.

[131] Statistical discrimination refers to any decision prejudicial to the members of a given group that is mainly motivated not by animus toward them or by the discriminating party's having embraced an ideology justifying their exclusion, but by an empirically ascertainable correlation between membership in the group and a feature objectively detrimental to the attainment of a goal of the decision maker commonly acknowledged as legitimate: see generally Lippert-Rasmussen 2007. On statistical discrimination in the U.S. labor market, see Pager and Karafin 2009.

[132] This argument was made in characteristically blunt terms by Supreme Court Justice Antonin Scalia: "To put the issue to you in its starkest form: if you must select your brain surgeon from recent graduates of (...) [a] medical school [with an affirmative action program] and have nothing to go on but their names and pictures, would you not be well advised, playing the odds, to eliminate all minority group members? It is well known to the public that the outstanding institutions of higher education

As psychologist Gordon Allport pointed out in his seminal opus on "the nature of prejudice," in order to eventually curb the power of racism, one needs to bring "the two races into close contact *on an equal footing* in a common project."[133]

Finally, it is worth emphasizing that this risk of increased stigmatization of the beneficiaries of affirmative action, explicitly discussed or alluded to in many Supreme Court decisions,[134] has been documented by empirical studies of various kinds, both in the field of social psychology[135] and in public opinion surveys. As far as the latter are concerned, it has been shown not only that race-based preferential treatment programs in employment and higher education are rejected by a majority of respondents[136]—as the outcome of all but one state referenda to eliminate such programs demonstrates[137]—but also that the mere mention of the policy by the interviewer significantly increases the likelihood that white respondents will endorse negative stereotypes about blacks.[138] Therefore, the ultimate purpose of (direct) affirmative action would make it advisable to at least conceal how the policy operates, which is exactly what the Supreme Court has invited university administrators and other decision-making authorities to do. Even in a country where there is no overarching constitutional requirement of "color-blindness," the effectiveness of affirmative action as an instrument of deracialization arguably requires that the "publicity principle"[139] characteristic of democratic government be compromised to a certain extent. Insofar as indirect and/or informal affirmative action is less likely to unwittingly foster the salience of race by perpetuating stigmatizing stereotypes and exacerbating intergroup tensions, it has been—and will remain—an

graduate the best and the brightest principally through the simple device of admitting only the best and the brightest (…). Thus, insofar as 'public image' is concerned, the immediate and predictable effect of affirmative action is to establish a second-class 'minority' degree which is a less certain certificate of quality" (Scalia 1979, 219).

[133] Allport 1954, 281, emphasis added.

[134] "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"; *Croson*, 493 (opinion of Justice O'Connor). For other examples, see *Bakke*, 398 (opinion of Justice Powell), 360 (opinion of Justices Brennan, White, Marshall, and Blackman); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), 173–74 (opinion of Justice Brennan); *Fullilove v. Klutznick*, 448 U. S. 448 (1980), 545 (opinion of Justice Stevens).

[135] For an overview of the relevant literature, see Krieger 1998, 1264–70.

[136] Steeh and Krysan 1996.

[137] The outlier is Colorado, where the proposal for a constitutional amendment banning preferential treatment in public employment, public education, and public contracting was narrowly defeated in 2008.

[138] Sniderman and Piazza 1993, 103–4.

[139] Luban 1996.

appealing, and perhaps a "*politically correct*" solution,[140] regardless of other legal, cultural, and institutional constraints of a more exogenous kind.

Conclusion

As suggested by the analysis of the policy reforms implemented at UT Austin and Sciences Po since the mid-1990s, U.S. and French strategies for promoting ethnoracial diversity in selective institutions of higher education are currently converging around varieties of affirmative action that are indirect or implicit—or both. Moreover, while this convergence has been made more visible by recent moves toward "color-blindness" as a matter of law on the U.S. side, it is not exclusively the product of legal constraints external to the policy's structure and ultimate purpose. Still, one of the enduring differences between the two countries lies in *the extent of the implicitness involved*, that is, in the degree of transparency of the very process of searching for criteria that might collectively operate as a functional substitute for race. As economist Glenn Loury aptly puts it, in the U.S. case, paradoxically enough, "the explicit use of race in a college admissions formula [was] forbidden while the intentional use of a proxy for race publicly adopted so as to reach a similar result [was] allowed."[141] In the French case, however, the proxy was not *publicly* adopted because of its racial impact. The race-conscious dimension of the policy was—and remains—much less visible than in the United States. As a general matter, French indirect affirmative action programs are not openly acknowledged as such. Unlike in the U.S., most of these policies are indirect *and* implicit as to the nature of their actual goal.

This difference has important consequences. One of them is that the main underlying assumption of the French affirmative action regime runs contrary to the logic of programs unfolding in other policy domains. There is thus an irreducible tension, if not an open conflict, between using territorial location as a proxy for race or ethnicity within the frame of affirmative action measures in employment and education and attempting to reduce patterns of racial concentration and promote what is euphemistically called "urban mixity" within the frame of public housing policies—which is exactly what state authorities have been doing in the last quarter century.[142] The persistence of a substantial

[140] Peterson 1995 (using this expression in a literal sense, as I do).
[141] Loury 2002, 134.
[142] Kirszbaum 2004.

degree of residential segregation—even though that degree remains much less than what it is in the United States[143]—is actually a precondition for the effectiveness of indirect, territory-based yet race-oriented affirmative action policies. There is a trade-off here, whose existence in France remains largely unacknowledged.

Also, as far as residential and school segregation are concerned, the convergence of policy choices around indirect affirmative action as a strategy for diversifying the student body of elite institutions of higher education in the United States and France—especially the choice of *not* using a class criterion to more narrowly circumscribe the set of graduates eligible to benefit from the new programs within a given high school—may well reflect an underlying *divergence* between the two countries that is not likely to disappear anytime soon. It would seem that in France this choice was partly determined by the fear that doing otherwise would run the risk of indirectly emphasizing the *usefulness* of segregation—the insufficient level of which would make it necessary to combine place-based and class-based targeting—and of weakening the remaining incentives that middle-class families might have not to move out of "priority educational areas." This point was made most explicitly by the director of Sciences Po himself:

> If [the parents in these families] contribute to maintaining social diversity ("*la mixité sociale*") in public schools, should one hold it against them that they earn a slightly better living than other parents and are not threatened by unemployment? (…) The answer to this question was the outcome of a political judgment: to reject good applicants on the ground that their financial predicament wasn't difficult enough would have amounted to an implicit yet fateful acknowledgement of the value of segregation (…), contrary to the very purpose of the program. It would have sent a dispiriting signal to those parents involved in promoting social diversity.[144]

Thus, the goal of not jeopardizing—or not being vulnerable to the charge of jeopardizing—(the French version of) diversity at the high school level partly determined the nature of the first program designed to promote diversity at a selective institution of higher education.

In contrast, in the United States residential and school desegregation has not been on the agenda anymore since the second half of the 1970s.[145] The choice made through the Texas top 10 percent law of relying on geography—as reflected in high school registration patterns—to

[143] Wacquant 2007; Préteceille 2009.
[144] Descoings 2007, 378–79.
[145] Clotfelter 2004; Massey and Denton 1993.

promote ethnoracial diversity signals both the extent of segregation and the de facto acceptance of its permanence by state authorities. In this respect, the endogenous factors accounting for the above-mentioned convergence are still the product of distinct demographic legacies and diverging political commitments.

Finally, beyond the cases of the United States and France, further research is needed on at least two major sets of questions raised by this comparative exercise.

The first one is about the *scope of convergence*. Is the rise of indirect affirmative action occurring only in countries where the beneficiaries defined on an ethnoracial basis are minorities and where (consequently?) the legitimacy of direct affirmative action is broadly challenged as a matter of principle? Does it also obtain in countries such as Malaysia or South Africa, where those challenges are somewhat muted by the fact that the policy benefits the majority group holding political power (and, in the South African case, by the obviousness of the causal link between current group inequality and the recently dismantled and morally discredited apartheid regime)? If it does not and if the programs involved are both more *extensive* and more *explicit*, what mix of political, legal, and cultural factors account for this alternative pattern?

The second set of questions concerns *policy outcomes*, since those are likely to be affected by many intervening variables other than the mechanisms of policy convergence. Are indirect affirmative action strategies actually effective in promoting societal integration and/or racial destigmatization?[146] Are the agents whose perceptions they are meant to transform in the long run aware of their racial dimension? If so, what difference does it make—if any? Will the potential detection of the subterfuges used to promote "diversity" breed resentment,[147] or is it true that most individuals "object to race-based selection rules, but (…) do not object to the pursuit of explicitly race-egalitarian outcomes through public policies that take no notice of race at the point of implementation?"[148] In all likelihood, answers to these questions will vary across countries where indirect affirmative action is to be found. The underlying conundrum, however, is common to all racialized societies: given their inescapably expressive value, should the instruments designed to eradicate racial distinctions reflect in their own design a mimetic representation of their ultimate goal?

[146] For a skeptical note, see Ray and Sethi 2010.
[147] As suggested in Sunstein 1999, 130.
[148] Loury 2002, 152.

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