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MADISON BARIC

COMPARATIVE LEGAL OPPORTUNITY STRUCTURES FOR SCHOOL DESEGREGATION CASES

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Submitted to the Department of Political Science of Allegheny College in partial fulfillment of the requirements for the degree of Bachelor of Arts.

I hereby recognize and pledge to fulfill my responsibilities as defined in the Honor Code and to maintain the integrity of both myself and the College community as a whole.

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Introduction

Disempowered groups in society generally lack access to many plausible options of mobilization due to their status in society and an insurmountable political process. As a result, social movements have to seek an end to discrimination with the use of strategic litigation and the legal opportunity structure (LOS) within court systems. For much of their histories, the Roma in Eastern Europe and African Americans in the United States are linked in many ways. Both groups are marginalized by society and suffered years of discrimination, poverty, deficient healthcare, inferior housing, and segregated education. Within Europe, the Roma face vast discrimination, intolerance, and social exclusion. They are viewed as thieves, criminals, and are believed to lack morals, religion, as well as a common language (Vermeersch 2006). Due to the perverse discrimination they face, the Roma make attempts to mobilize as a social movement to address the injustice and intolerance common throughout Europe. However, as a disempowered group, they lack access to many possible options of mobilization or the adoption of methods of mobilization utilized by other successful social movements.

In 2003 the Roma began a legal campaign to desegregate schools within the Czech Republic. The European Roma Rights Center (ERRC) represented the Romani interests and modeled their strategy after the United States example in *Brown* v *Board of Education of Topeka.* The ERRC sought Jack Greenberg, and other attorneys who worked for the National Association for the Advancement of Colored People - Legal Defense Fund (NAACP-LDF), specifically those involved in school desegregation efforts to help their cause. However, were the Courts the correct venue for seeking school desegregation? Was modeling the movement for

school desegregation in the Czech Republic on the controversial *Brown* litigation and decision the best option for the ERRC and the Roma?

I aim to address how social movements make strategic choices - and what influences these choices. I will focus specifically on the NAACP-LDF and the ERRC and their strategic choice to focus their resources on the desegregation of schools in the United States and in the Czech Republic. Both organizations choose to use the Court as an avenue for social change within their movements, but why did they seek to end school segregation through their respective court systems? What made the courts the correct or incorrect option for social reform? Specifically, why did the ERRC utilize the strategy used in *Brown* as a model for their strategic litigation campaign and how did the legal opportunity structure impact the success of both movements?

In this essay I find that the courts were, in both cases, the only true available option for these disempowered groups to seek social change. I find there is a vast difference in the legal opportunity structure available in the United States and in the greater European context in regards to *Brown* and *D.H.* Specifically access to the court, relevant and available legal stock, and the configurations of elites differ greatly. *Brown* legally may have been viewed as a failure due to its lack of implementation and overall effectiveness, but it did work as a springboard for the Civil Rights Movement by shifting Americans' attitudes towards desegregation efforts and overall racial equality. The development of strategic litigation and use of the court system to seek social change used in *Brown* was then transplanted to the European context in *D.H. and Others* v. *The Czech Republic.* However, the LOS was radically different in Europe, specifically in the category of legal stock and I had thought there might have been a different outcome in the thought of implementation. I find that although the ERRC and the Roma had access to greater

legal stock, specifically antidiscrimination law, the outcome of *D.H.* largely turned out the same as *Brown,* Czech schools disregarded the European Court of Human Rights' (ECtHR) orders to desegregate and thus little to no true social change occurred. The courts are thought of as insular from politics and are supposed to safeguard the rights of disempowered groups from oppression. Yet, in both *Brown* and *D.H.* the groups are granted successful verdicts, but no true change occurs, thus making the courts the incorrect option for true social reform due to their lack of implementation power. Court decisions may work as a springboard to launch or create momentum behind a movement, but in the case of *Brown* and *D.H.* the court system and the LOS was not enough to create lasting social change in the form of school desegregation.

Literature Review

Hilson (2002) points out that when there is a general lack of political opportunity available to a marginalized groups this lack might influence the adoption of strategic litigation as a strategy. Andersen develops account of "the ways in which socio-legal structures shape movement strategies and are shaped by those strategies in turn" (Andersen 2005). She concludes that Rosenberg's conclusion on the usefulness of the court is too bleak; arguing litigation has produced favorable shifts in the legal and cultural frames. However, Anderson agrees that the courts do not have the capacity to produce social change when their decisions branch too far from the sentiments of the other two branches of government (Andersen 2005). Vanhala agrees with two of the four dimensions of LOS that Andersen offers, but questions her claims of "alliance and conflict systems" and "cultural and legal frames" as a part of the LOS (Vanhala 2012). Vanhala concludes that the courts are not whole-hearted participants in the policy process and their concern regarding access to justice is lackluster (Vanhala 2011).

Doherty and Hayes (2012) argue the judicial opportunity structure is important for scholars to understand in terms of social movement trajectories. They find that the differences in judicial opportunities do not fully account for the tactical choices made by activists. Doherty and Hayes effectively arguing that the LOS of the court is not the only deciding factor for social movements to risk using strategic litigation and thus the courts (Doherty, Hayes 2012). Hilson states that legal opportunity (LO) is comprised of access to the courts, the available 'legal stock' or precedent present for the court to base judgement on, and overall judicial receptiveness. Rhonda Evans Case and Terri E. Givens examine the types of political actors who seek to liberalize the LOS' in the European Union, finding that it is pursued by a coalition of social interests working in the European Union institutions to seek reform to facilitate strategic litigation (Case, Givens 2010).

Cichowski (2004) asks how legal mobilization can serve as a stimulus for institutional change through influencing litigation and legislation in the European Union. Finding that groups excluded from the EU policymaking often utilize the ECJ to achieve policy reform and inclusion. This access can help balance the power between social groups, as well as between the EU and national governments (Cichowski 2004). Klarman (2007) goes behind the *Brown* decision to examine the justices' deliberations and recaps his backlash thesis, arguing that *Brown* was more important for mobilizing southern white oppression rather than encouraging civil rights (Klarman 2007). Klarman sheds light on broader questions regarding the changing of racial attitudes over time, and how much judicial decisions depend on legal, political, and personal considerations, more specifically, the relationship between USSC decisions and social change (Klarman 2007).

Greenberg offers a unique perspective based on his involvement with the Civil Rights litigation in the United States (Greenberg 2010). He offers a comparison of the Civil Rights Movement and the Roma mobilization occurring in Europe. He discusses the legislation passed on school desegregation and how it has not been implemented by the government. Greenberg brings up an interesting point regarding the United States as a single nation, and Europe as separate countries with different constitutions all being bound by nothing more than the EU. Greenberg (2010) also points out the backlash Roma have against the integration of their children into the desegregated school systems.

Arabadjieva demonstrates the reasons behind the lack of progress with school desegregation, with a focus on the case law developed by the ECtHR. Strupek agrees with Arabadjieva, but contemplates the changes that the ECoHR may bring to anti-discrimination in the Czech Republic, specifically what change the *D.H. and Others v. the Czech Republic* case may bring. Devroye (2009) argues that although the *D.H.* decision is binding in only the Czech Republic the decision has an immediate tangible effect of legal systems across Europe. Devroye states,

> The European Roma Rights Centre has scored a major victory in its campaign to ensure the transposition of the EU Race Equality Directive into national legal systems. By announcing the existence of indirect discrimination, the Court has spurred renewed interest and focus in Europe on applying pressure to countries that have failed to make indirect discrimination illegal. (Devroye 2009)

Epp explores the role and influence of strategic litigation in rights revolutions and revises the common understanding of the dynamic between the courts and social change. Epp (1998) argues that the judiciary and the rising to power of civil rights and liberties has relied on access to the judicial system, and from that the shift in the rights of individuals can best be understood as a "bottom up" rather than "top down" (Epp 1998). Courts can be producers of social change by

changing the way the issue is framed and thus can compel state compliance, remove barriers to legislative change, heighten expectations, and create more empowered advocates for social movements (Keck 2009). Conversely, Perry argues that in most liberal democracies human rights laws are often superior to ordinary law, and as such are entrenched or exceedingly difficult to amend and/or repeal (Perry 2007). Rosenberg argues the USSC is structurally constrained from producing social change, even when litigants win larger scale cases aimed to reform society. Tushnet references Rosenberg's thesis and critiques it in his epilogue on the legacy of *Brown*, he agrees with Rosenberg that *Brown* was in fact a failure for the Civil Rights Movement. McCann disagrees with Rosenberg arguing the Courts can be seen as an engine for social change by showing that even when the court fails to correct discrimination, litigation and other forms of legal advocacy provide reformers with the legal stock to advance their cause (McCann 1994).

Methods

I plan to utilize a case study method to compare the strategies of the NAACP and the ERRC on the desegregation of schools through the court systems, with emphasis on *Brown* v *Board of Education* and *D.H. and Others* v *The Czech Republic*. I am choosing these cases because they are a good indicator of why opportunity structures matter. Both cases had to work their way through their respective legal structures until being granted access to the highest courts, the USSC and the ECtHR. These cases are the best to use and are a good comparison because both social movements sought relief and social change in their respective Court systems. However, the legacy of *Brown* is often questioned on whether it was actually effective for the Civil Rights Movement or if it was merely a stepping stone for larger social and institutional change. The same can be applied to the *D.H. and Others* case, the decision by the ECtHR did not effectively change the discrimination occurring in the Czech school system. Considering the

criticism of the NAACP's litigation efforts in America, how does the structure and the strategies of the ERRC replicate or differ from the NAACP? *Brown's* example on the role the courts can play in advancing social change is evident when looking at the *D.H. & Others* case.

I will draw largely from Tushnet and the history and data he provides on the NAACP's legal strategy throughout the Civil Rights Movement; focusing specifically on his data regarding the *Brown* litigation. I also rely largely on the insider insight of Greenberg and other NAACP resources. I will also rely on Tushnet and Greenberg as sources, NAACP data, and legal scholarship on the Roma and NAACP legal strategies to address my question. I am at a disadvantage for research due to an overall lack of data, or completely accurate data, on the Roma and subsequent cases due to the relatively recent decision there is a general lack of comprehensive studies done, unlike in *Brown*.

The comparative aspect of this analysis is imperative because the desegregation that occurred in the United States is similar enough to the desegregation in the Czech Republic for them to be capable of being compared. However, the cases are still unique and have different aspects which allow them to be compared. The drawback to comparing two cases is that I cannot go as in depth as I would be able to if I were to look at just one case.

Overview

In my first chapter I will define and examine the concept of legal opportunity, and institutional LOS within the court systems. I aim to address the LOS within both national and supranational court systems; The Czech Constitutional Court, the ECJ, the ECtHR, and the USSC. I will focus on the similarities and differences between the United States, the Czech Republic, and Europe. I will explore how these structures incentivize or disincentives' the Courts as a tool for social change.

In my second chapter I will provide a case study for *Brown v. Board of Education of Topeka* and the subsequent cases leading up to the *Brown I and II* decisions. I will discuss how *Brown* has served as a model for a variety of rights movements, including the Roma mobilization in Europe. I will focus on the LOS available to the NACCP-LDF and will then discuss how the movement utilized the LOS in the USSC to successfully win *Brown.* My third chapter will be parallel structure to my second, providing a case study for *D.H. and Others v. the Czech Republic.* I will discuss the influence of *Brown* on the ERRC and their use and choice of strategic litigation. I will emphasis the LOS structure in the ECtHR and how the ERRC utilizes the available LOS to successfully win *D.H.*

My fourth chapter will serve as the bulk of my analysis, where I compare and discuss how *Brown* and *D.H.* work together to find if the courts can be used as avenues for true social change. I will focus specifically on the effectiveness of courts for influencing social change, and if the decision to seek the LOS available in Courts was ultimately the correct decision for the NAACP-LDF and the ERRC. I will focus on the LOS present in both *Brown* and *D.H.* to understand why the organizations sought redress in the court systems. Finally, will analyze, and hope to answer if this strategy was this an effective method in *Brown* and in *D.H*? More specifically, if the use of strategic litigation in the respective legal opportunity structures was enough to fully achieve their collective goal of desegregation.

Chapter One

Institutional Analysis

To begin my analysis I will focus and define legal opportunity structure and how this matters to answer my question. I will then compare the similarities and differences of the legal opportunity structure present in the United States, the Czech Republic, and supra-national

institutions such as the ECJ and the ECtHR, addressing specifically how these differences matter in the larger scheme of my question. I will explore how the structure incentives and/or dis-incentivizes the Courts as an engine for social change. The success or failure of social movements attempting to seek social change within their respective country's judicial systems depend greatly on the legal opportunity structure they are in. Specific aspects, such as access to the courts, cultural and political frames, elite alignments, and available legal stock and access to resources all influence the success or failure of social movements seeking change through the judiciary. The USSC, the Czech Republic Court System, the ECJ, and the ECtHR all differ in the legal opportunity structure available to disempowered groups attempting to seek social change.

Legal Opportunity Structure (LOS)

As the court's power to affect policy-making and government action increases, (Cichowski 2006), social movements recognize that judicial systems have potentially become valuable arenas for social change. With an increasing number of disempowered groups using national and supranational courts to seek redress and social change, scholars are beginning to pay more attention to the concept of legal opportunity structure (Hilson 2002; Andersen 2004; Case Evans 2010). P. K. Eisinger, one of the earliest scholars who created political opportunity structure (POS), made no mention of the judiciary or the role it might have within political opportunity (Eisinger 1973). It was not until the 1980s that political theorists began to incorporate the role of the judiciary within political opportunity structure (Hilson 2002). LOS is a concept that arose from the lack of credit granted to the judiciary within the political opportunity structure. LO is used to differentiate between political opportunity on the grounds that the law and courts should be explored in their own right (Hilson 2002). The inclusion of LO within the political opportunity structure is important to understand given the role of the courts

within the political system. However, legal scholars argue that courts are fundamentally different from other law producing institutions in the nature of their approach toward law (Andersen 2004). Anderson (2004) states the judiciary is seen as a backward-looking institution. Courts make decisions retroactively and after the fact, versus the legislature and bureaucracies being viewed as more forward looking and making decisions pro-actively (Andersen 2004).

LOS is seen as multifaceted with many dimensions that impact the success of strategic litigation. Legal opportunity structures are classified along a liberal to conservative continuum (Case, Givens 2010). Liberal structures incentivize and reward strategic litigation as a mechanism for influencing policy, as well as influencing expansions in judicial power (Case, Givens 2010; Epp 1998; Cichowski 2006). Conservative structures work to impede strategic litigation. Within the legal opportunity structure, there are fundamental agents that affect a group's legal opportunity. These include, but are not limited to; access to the court; the configuration of elite alignments; alliance and conflict systems; cultural and legal frames; resources; and available legal stock (Andersen 2004; Case, Givens 2010).

Access

Access to the judiciary significantly shapes the emergence and progress of strategic litigation. The mechanics of judicial process shape access through what can and cannot be deemed as litigation, who may litigate, and where the litigation may occur (Vanhala 2012). Access to courts can be seen by acts of gatekeeping, docket control, and other hurdles presented to groups attempting to use the judiciary for social change. The ease of access to courts is a key dimension of LOS, as the cost and institutional hurdles are often associated and are widely recognized as detriments to legal mobilization (Andersen 2005; Case Evans 2010; Cichowski 2006). Two main factors shape accessibility to the court, the first being rules on legal

standing, and second is the cost or affordability of the legal process for litigants (Cichowski 2006).

In order to establish standing, the plaintiffs must show that a legally protected, personal, or proprietary interest has been violated. Interest groups or other advocates may become involved in litigation by providing an individual with representation (Case, Givens 2010). This can be seen by the ERRC representing Roma interests in the case *D. H. and Others* v *the Czech Republic*. However, it can be hard to find an individual person or group to represent as a plaintiff. This is especially true in the case of the Roma, who have an automatic distrust of the government based on their turbulent history.

Legal opportunity structures are also shaped by the availability and distribution of necessary resources for such vigorous legal advocacy. Strategic litigation requires lawyers, organizational support, and a near-constant stream of funding (Epp 1998). Litigation campaigns are expensive to fund and those from disadvantaged classes typically lack the funding needed to sustain litigation throughout the entire legal process. For marginalized and impoverished groups such as the Roma, funding these legal campaigns without support is often implausible. However, with the help of either state-supported legal aid or NGOs or other advocates, these legal crusades for equality can be managed. However, funding is only one aspect in using the judiciary as a method for social change, other barriers, such as elite configurations and power structures also work to impede such social crusades for equality. However, once access is gained to the judiciary there must be a plethora of legal stock available to the social movement. Legal stock is the set of available precedents, bodies of law, treaties or conventions on which to hand a case.

Legal Stock

The legal stock available to disempowered groups serves as an important dimension of the legal opportunity structure (Andersen 2004). The ECJ and ECtHR are bound by European law and the ECoHR, while the United States Supreme Court (USSC) is bound to uphold the Constitution of the United States. In international courts there is a norm of *stare decisis,* or using precedent from previous litigation to apply to newer cases. However, there is no written legal basis in the ECJ or in the ECtHR for *stare decisis* in international courts.Thinking of anti-discrimination policy in particular, the legal opportunity structure is more liberalized since the laws grant the following: justiciable legal rights, definitions of discrimination, and rules that shift the burden of proof to a respondent once a complaint has been established (Case Evans 2010). In most national courts, judgements establish principles for the court and lower courts to rely on when evaluating subsequent cases.

The most relevant legal stock for anti-discrimination litigation in the United States is the Civil Rights Act of 1964. The Civil Rights Act outlawed discrimination based on race, color, religion, national origin, or sex. Congress asserted its authority to legislate under a variety of parts of the US Constitution, particularly its power to regulate interstate commerce, duty to guarantee equal protection, and its duty to protect voting rights ("The Civil Rights Act of 1964"). The most relevant legal stock for anti-discrimination litigation in Europe is the Racial Equality Directive (RED) and the adoption of the non-discrimination provision, Article 14, to the ECoHR. In the year 2000 the European Council unanimously adopted the RED), which set a supranational standard for all national laws to protect against racial and ethnic discrimination. Thus the RED should affect both the Czech Republic (national) and European legal opportunity structures in terms of the available legal stock and resources for advocacy groups. Member-states of the EU were required to transpose the Directive into their national law

within the specific timeframe of three years (Case, Givens 2010). However, the transposition of the Racial Equality Directive into Czech law was not required until 1 May 2004 and as such, could not be utilized as legal stock for the *D. H. and Others* case in the Czech courts ("The Race Equality Directive" 2007). The RED could have been used to significantly expand the scope of legal protection to include public and private sectors, thus allowing groups to target discriminatory practices in a broad array of institutions. The RED also works to shift the burden of proof from the litigant to the respondent in civil cases when sufficient evidence has been presented, establishing a basis that discrimination has in fact occurred. RED creates a new definition of indirect discrimination that is more encompassing and less dependent on statistical evidence for litigants to prove (Case, Givens 2010). The non-discrimination provisions in the ECoHR are considered broad, but yet still all encompassing. The article's protection is limited in the aspect that it only prohibits discrimination with respect to the rights provided under the Convention. Hence, an applicant must prove discrimination in a specific right that is guaranteed elsewhere in the Convention.

Configurations of Elites

The configuration of elite alignments and receptivity of the judiciary also play an important role in the legal opportunity available to groups using strategic litigation. This receptiveness and configuration of elites within the judiciary refers to the way the grouping of elite members of society affects the social movement's decision to attempt legal action. Judges are the main elite that matter in the LOS because they are presented with a legal dispute to resolve (Vanhala 2011; Cichowski 2006). This view leans toward a more attitudinal model that asserts that judicial decisions are based on the personal opinions, beliefs, and experiences of judges rather than the straight forward letter of the law. In the case of the Roma, judicial

attitudes often color decisions on Roma rights and discrimination cases due to the widespread discrimination and stereotypes they face, even within the arena of the court. Epp (1998) writes, "Litigants facing unsympathetic judges, moreover, often have held out hope that they may persuade the judges of the rightness of their cause. Judicial support is necessary…" (Epp 1998). A receptive judiciary is an added and uncontrollable factor for social movements to foresee in their quest to seek redress from discrimination in the courts.

The United States Supreme Court System

Access

Within the USSC, there are both questions on jurisdiction and justiciability. Jurisdiction is asking whether the case is in the proper forum and if the USSC has the authority to hear the case. Justiciability refers to whether the USSC ought to hear the case or not. These questions, along with the Gatekeeping Rules, grant qualified parties access to the courts and justice they might not be capable of seeking through other methods. The USSC implements these hurdles to ensure that they can decide upon these cases, and as such offer discrete and insular minorities the relief they are seeking and entitled to. The USSC uses five gatekeeping rules to control its docket to ensure the arguably most important cases are being heard. The gatekeeping rules go as followed: adverseness, ripeness, non-mootness, standing, and non-political questions. These rules limit the cases to those whom have effectively exhausted all other legal avenues, maintain a disagreement, are not a politically centered question, and have adequate representation. These restrictions often impede social movements from reaching the USSC or getting their desired verdicts in a lower court system, due to general cost of litigation to make their way through the court system and appeals court. The cost of such litigation can be astronomical to disadvantaged groups and thus is not a plausible avenue without support from other organizations.

Legal Stock

The available legal stock is abundant within the USSC system, which often defers to *stare decisis, or* the use of precedent, in deciding cases. This can serve as either a benefit or hindrance to disadvantaged groups seeking social change. On one hand, the use of precedent means social movements can use earlier decisions as a springboard for other social change. However, if no positive legal precedent can be found, judges may simply defer to earlier, more negative judgements. Other available legal stock for disempowered groups comes in the form of the Fourteenth Amendment. The Fourteenth Amendment was adopted to assure that the change from slaves to citizens would take place, and protect all persons against discrimination based on religion, race, color, blood, or national origin (Marshall 1951).

Configurations of Elites

Within the United States' system of government, Congress and the President are regarded as the center of the political system. It is the legislative and executive branches that use force and influence regarding foreign and domestic public policy (Ducat 2013). As such, the USSC is often thought of as separate, or insular, from the political system and thus from politics. The USSC, arguably removed from the direct influence of politics, is often considered to be the best arena to determine if a state does in fact provide Equal Protection of the Law per the United States Constitution. The Constitution also grants the Supreme Court original jurisdiction in cases involving states and diplomats, yet allows for Congress to determine the size and overall responsibilities of the Court.

EUROPEAN COURT OF JUSTICE (ECJ)

Access

The ECJ was established in 1952 and was given the role of ensuring EU law is interpreted and standardly applied in every EU country. The ECJ also works to ensure countries and EU institutions abide by the overriding EU law. The ECJ has liberalized its legal opportunity structure in Europe through the creation of the supremacy doctrine, which grants priority to supranational laws when they conflict with national laws (Case, Givens 2010). The ECJ as an institution has also been liberalized by giving direct effect to European sources of law, hence enabling litigants to present their cases before the ECJ (Case, Givens 2010).

Due to the supranational nature of the ECJ and its ability to supersede the national courts, the Preliminary Reference Procedure was created and adopted. The preliminary reference procedure was created to help maintain communication and encourage cooperation between the national courts and the European Court of Justice. Under the Treaty on the Functioning of the European Union, if a case arises before a national court that presents a conflict of national and EU law and/or is unable to be resolved based on previous EU law, then the national court may seek assistance from the ECJ. From there, the ECJ will review the arguments and case law to issue a ruling, which in turn, the national court applies to the case up for debate. The intent of this procedure was to maintain uniform legal interpretation from the EU to the member states; however, it quickly became a powerful tool for citizens to use to ensure the national law matches the EU law. This creates a powerful check on national courts and a power structure that privileges the ECJ. The preliminary reference procedure provides marginalized groups with access to another court outside of their national judicial system to address their grievances. However, this access is only provided if a national judge agrees that there is a larger "European Question" that must be referred. This makes judges in this system much more important due to the necessity of the national courts consent on the European question at issue.

The supranational characteristic of the ECJ makes their ruling superior to that of a nation due to the compliance demanded of the member states by the EU.

Legal Stock

The development of the RED in 2000 and the addition of non-discrimination provision to the European Convention on Human Rights (ECoHR) in 2005 were made possible by the lobbying efforts of the Starting Line Group (SLG). The SLG created a coalition of societal interests, led by a group of activist lawyers who worked to create the idea of the RED in 1993 (Case, Givens 2010). The group drafted an amendment and then lobbied for it to be adopted and enforced by the European Parliament (Case, Givens 2010). The SLG formed a group aimed to lobby the EU and thus the group works as a prop in the support structure for Roma rights. The support and development effectively increased the available legal stock for the Roma and other marginalized groups within both national and supranational courts. However, the *D. H. and Others* case was not brought before the ECJ from the Czech Constitutional Court. However, due to the legal stock and access to the ECJ, it could be viewed as the correct venue for discrimination cases that arise between a conflict of policy between the Czech Republic and EU law. The creation of the supremacy doctrine and the general liberalization of the judicial system work to incentivize their system as an engine for social change. However, the Court is limited to cases of discrimination where conflicts between national and EU law are present; otherwise the case should be directed to the ECtHR. Therefore, the ECJ lacks the legal opportunity in the case of *D.H. and Others,* however, other cases, such as *Conka v. Belgium* have been successfully argued in this arena.

Czech Republic Court System

Access

The judiciary of the Czech Republic is comprised of eighty-six District Courts, eight Regional Courts, two High Courts, the Supreme Court, the Supreme Administrative Court, and the Constitutional Court (Hrádrek 2014). The Constitutional Court is the highest judicial authority in the Czech Republic, and its main duty is to protect constitutional order and fundamental rights within the Czech Republic. The Constitutional Court has jurisdiction over all Constitutional complaints, meaning a natural or legal person submitting a complaint must claim their constitutionally protected rights have been violated by an official decision, measure, or some other action committed by a public authority (Hrádrek 2014).

The right of access to a judicial body is guaranteed on a constitutional level by Section 36, Subsection 1 and Subsection 2 of the Czech Charter of Fundamental Rights and Freedoms (Hrádek 2014). In terms of antidiscrimination cases, there are no particular limitations in place for accessing the courts. However, there are issues that undermine the right of access to the courts for marginalized groups. The overall length of legal proceedings is a structural and well-known problem of the Czech legal system. This problem, in turn, leads to the issue of the overwhelming financial cost of antidiscrimination litigation. The Czech legal system provides very few, if any options on how to solve disputes regarding discrimination without full legal proceedings, such as mediation. Hence large legal fees are racked up for the litigants to pay (Hrádek 2014). Section 10 of the Antidiscrimination Act provides the right of access in discrimination cases, thus remaining one of the few options for victims of discrimination to use legal proceedings to protect their rights (Hrádek 2014). However, the Antidiscrimination Act does not offer alternative dispute settlement or policy on mediation. The current anti-discrimination legislation does not properly facilitate access to justice for victims of

discrimination based on the financial burden posed to litigants and lack of alternative resources, such as mediation.

Legal Stock

The available legal stock for anti-discrimination cases is ambiguous within the Czech legal system, and as such is not often utilized or successful. The relationship between the Antidiscrimination Act and other standing laws is unclear and thus hard for organizations to utilize within the Court system. The Antidiscrimination Act is supposed to work to unify all anti-discrimination law. However, there is a lack of clarity creating legal uncertainty and thus hindering access to the courts in the case of discrimination (Hrádek 2014).

Configurations of Elites

Considering the outcome of the *D.H. & Others* case in the Czech courts, they can be viewed as a failed arena for social change through the use of strategic litigation. While it is true that the transposition of the Racial Equality Directive into Czech law may impact the legal opportunity for the Roma in the future, I still maintain that the Czech court system is not the correct avenue for the Roma and ERRC to seek social change through litigation. However, the Czech courts, or in the broader sense, national courts, are a needed stepping stone for marginalized groups to seek access to the ECtHR, which is a more inviting venue for such groups to seek social change successfully.

European Court of Human Rights (ECtHR)

Access

The European Court of Human Rights (ECtHR) is a supranational court that was established by the Council of Europe through the European Convention on Human Rights after the Second World War. The ECtHR was established with the purpose to protect against

violations of the Convention by contracting states (General information on, 2012). The ECtHR only hears cases that deal with specific human rights violations that fall under the protections offered by the Convention, unlike the European Court of Justice (ECJ). Cases may only be brought against a state, not an individual. There are forty-seven contracting states that fall under the jurisdiction of the ECtHR. The judgements delivered by the ECtHR are binding to only the state in question, but the Court has transnational precedential powers to apply judgements to all contracting states (General information on, 2012).

Individual victims may submit their complaints directly to the ECtHR. A claim can be filed by an individual, group, or contracting state(s). The ECtHR cannot take up a case on its own initiative. Complaints and applications are made by individuals against contracting states alleging that the state has violated their rights under the European Convention on Human Rights. This application must be written and signed by the applicant or the applicant's representative body, such as legal defense or an NGO. Once the case is registered with the Court, the case is given to a judge rapporteur. The role of the judge rapporteur is to decide whether the case is admissible in the ECtHR (Smith 2005). A case can be deemed inadmissible by the judge rapporteur if it is deemed incompatible with the requirements of *ratione materiae, ratione temporis,* and *ratione personae. Ratione materiae* refers to the jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things (Jurisdiction Ratione Materiae Law & Legal Definition). *Ratione temporis* is the jurisdiction of a court over a proposed action in relation to the passage of time. (Jurisdiction Ratione Temporis Law & Legal Definition). *Ratione personae* refers to if the court's jurisdiction depends upon whether a defendant is residing within the territory of the court or whether a defendant is a citizen of the state to which the court belongs (Ratione Personae Law

& Legal Definition). A case can also be deemed inadmissible if it cannot be proceeded with on formal grounds. Such formal grounds could be, but are not limited to, non-exhaustion of national domestic remedies, a lapse of six months from the last national decision complained of, anonymity, or a substantial overlap with a matter already submitted to the Court (Smith 2005).

If the rapporteur judge decides that the case can proceed, the case is then referred to a Chamber of the Court which then also decides if it is inadmissible, providing another check. The ECtHR then communicates the case to the government of the member state against which the application is made, asking the government to present its observations on the case (Smith 2005). The Chamber of Court then deliberates and judges the case on its admissibility and its merit. The Chamber Court decides if the case will be heard based on the interpretation and/or the application of the ECoHR at issue, general importance, or an issue which might depart from previous case law. The Chamber Court could also advise the case go to the Grand Chamber if all parties to the case agree to the Chamber of the Court, thus relinquishing jurisdiction to the Grand Chamber. A panel of five judges decides whether the Grand Chamber accepts the referral (Smith 2005). Anyone may file a claim to the ECtHR, making it easily accessible to all social groups. However, in order to navigate the various proceedings and hurdles to ensure the case is even decided on is rather convoluted.

Legal Stock

The ECtHR also requires that all other legal remedies are exhausted within the national courts before the case can be heard. This proves difficult for many marginalized groups because it greatly lengthens the litigation campaign, thus needing more funds and resources from the litigants. Although the Roma and the ERRC won the *D.H. and Others* case in the ECtHR, they had to seek out three different venues. The Czech Court and the Second Chamber of the ECtHR

both decided on the case before the desired outcome was finally reached in the Grand Chamber of the ECtHR. The new discrimination component of the ECoHR helped to make it a better venue for the ERRC and the Roma to seek school desegregation. The case took over seven years to reach the desired verdict of the Roma and ERRC; however, was winning the case enough?

Configuration of Elites

The ECtHR is comprised of full-timed judges that are divided into four sections. Depending on the significance of the case, the Grand Chamber, seventeen judges, the Chamber, seven judges, or the Commission, three judges, will decide the case. Currently, the ECtHR consists of forty-seven judges, who are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates presented by all contracting states. The elected judges are viewed as independent from their countries and are supposed to disregard their countries best interests when deciding cases (Smith 2005).

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available on equal terms. (*Brown* v. *Board of Education of Topeka* 1954)

Chapter Two

Brown v. Board of Education of Topeka

I will begin this chapter by providing a brief overview on the overall importance of the decision rendered in *Brown* and how it has served as a model for a variety of rights movements, including, but not limited to, the Roma mobilization in Europe. I will then shift my focus to the legal opportunity structure present in the United States in the years leading up to *Brown* that was available to the NAACP-LDF. Finally, I will discuss the NAACP-LDF and how they harnessed the LOS present in the United States to successfully argue *Brown.*

On May 17, 1954, the USSC ruled unanimously on *Brown v. Board of Education of Topeka* that the racial segregation occurring in the public school system violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (Ducat 2013). *Brown* overturned the previously set standard of "separate but equal" developed in *Plessy v. Ferguson.* The *Brown* case was the lead case in a group of five consolidated state cases regarding school segregation. Chief Justice Earl Warren delivered the unanimous opinion of the court, stating,

> We come to then to the question presented: Does segregation of children in public school solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. (*Brown* v. *Board of Education of Topeka* 1954)

Brown was won by a band of lawyers from the NAACP- LDF, who set off to build a body of law, developed case by case, that would work to bring an end to school segregation (Greenberg 2004). Although the *Brown* decision did not succeed in fully desegregating the public school system, it did successfully realign the Constitution to be on the side of racial equality. *Brown* is often seen as a three-part case. First came the initial ruling on the state-imposed segregation of the public school system. Next was the second opinion, which dealt with remedial issues and implementation. And finally, *Bolling v. Sharpe,* which was decided separately from the *Brown* case due to issues regarding the federal government's duty to respect racial equality (Balkin 2001). *Brown II* is often referred to as the enforcement mechanism, or implementation of the school desegregation in the United States. However, the *Brown II* decision is often highly criticized as backtracking, or working to negate the impact of the original *Brown* decision. The Court's use of gradualism in reference to school desegregation, often most known as the usage of

the phrase “with all deliberate speed” worked to hinder school desegregation by giving state legislatures and justices a wide range of discretion (Klarman 2007).

The *Brown I* decision created a lasting legacy due to the impact it had on the Civil Rights Movement, and its overall success in widespread desegregation. The unanimous decision of the Court serves as a reminder that the Justices believed this issue was so important it needed to stand as a united front. Scholar Michael J. Perry (2007) observes “(*Brown)* is generally thought to represent the Court at its best (Perry 2007).” Scholars agree that *Brown* was the correct decision and often refer to it as the ‘most important judgement ever handed down by an American Supreme Court” (Klarman 2007). *Brown* became one of the USSCs most respected decisions. Although the initial ruling sparked controversy and contention, as Klarman (2007) points out in his backlash thesis, it also worked to influence the path of America’s racial transformation. The legacy of *Brown* inspired other social movements for equality within education, such as language, disability, gender, religion, socio-economic status, and sexual orientation (Minow 2010). The *Brown* legacy also influences social movements all over the world seeking equality through litigation campaigns working towards school desegregation (Minow 2010).

Legal Opportunity Structure in the United States Court System

The legal opportunity structure (LOS) present in the United States Court System aided the NAACP-LDF in their drive for equality and anti-discrimination; specifically regarding school desegregation. However, they still had to overcome various hurdles presented to them in the form of gaining access to the courts, the available legal stock, and the configurations of elites.

Access

The NAACP-LDF turned to the courts to seek justice due to the Court's ability and power to shape understandings of the Constitution, legislative rights, and protections (Vanhala 2011). In order to proceed with strategic antidiscrimination litigation, the NAACP-LDF needed to prove the existence of such discrimination and provide the Court with evidence showing the adverse impact of the discrimination (Greenberg 2004). The NAACP-LDF worked on a variety of school segregation cases in order to build up to the class action *Brown* case. *Brown* was first heard in 1951 by a three-judge panel at the U.S. District Court by the NAACP-LDF (Brown v. Board of Education Timeline 2016). The court unanimously held that within the case there was "no willful, intentional or substantial discrimination" in existence in the Topeka school system (Greenberg 2004). The U.S. District Court found that the facilities in white and black schools were in fact comparable, and the decision rendered in *Sweatt* v. *Painter* was only applicable to graduate level education (*Brown* v. *Board of Education of Topeka* 1954). The following year the NAACP-LDF argued *Davis v. County Board of Prince Edward County*, one of the cases later compiled into *Brown*, before the U.S. District Court, which also unanimously rejected the plaintiffs' request for school desegregation and instead ordered the "equalization" of schools (*Brown* v. *Board of Education of Topeka* 1954). Later that year, in 1952, the NAACP-LDF was finally successful in making it to the USSC, which announced that it would hear oral arguments for *Brown.* The Court agreed to hear all five school segregation cases combined into one under the *Brown* name (Brown v. Board of Education Timeline 2016). Although the Court later issued a separate ruling on *Bolling v. Sharpe* due to the 14th Amendment not being applicable in the District of Columbia (Brown v. Board of Education Timeline 2016).The second component of gaining access to the Court was the sheer amount of resources and funding essential to the

success of the campaign. Fortunately, the NAACP sponsored the litigation of all five of the cases that were later built into the *Brown* case (Greenberg 2004).

Legal Stock

The NAACP-LDF had very little legal stock at their fingertips to use; in fact, the law was built up severely against them. The Civil Rights Act of 1964 came a decade after the *Brown* case and as such was of no use to the NAACP- LDF at that time. Due to the overall lack of available anti-discrimination law, the NAACP worked to develop their own legal stock and precedent along with the 14th Amendment Equal Protection Clause to use in *Brown*. The NAACP-LDF developed relevant case law through the desegregation of graduate school segregation in law school, medical school, and other public school systems. However, it is important to note the cases that stood before *Brown* that were built up against the NAACP-LDF and their quest for equality.

The *Dred Scott v. Sanford* decision in 1857 by the USSC held that an African American was not an American citizen and therefore had no standing to sue in federal court (Ducat 2013). From there, the era of Jim Crow emerged in 1887 as a racially motivated caste system and racial separation became ingrained in many Americans minds. Advancing Jim Crow, the 1896 ruling in *Plessy v. Ferguson* developed the standard of "separate but equal" making state-imposed racial segregation constitutional through railway companies (Ducat 2013). In developing the *Plessy* standard, the USSC voted 7-1 that that state of Louisiana was within its constitutional boundaries by mandating racial segregation on its trains. The majority opinion written by Justice Henry Brown upheld state-imposed racial segregation based on the separate-but-equal doctrine, that separate facilities for blacks and whites pleased the Fourteenth Amendment, so long as the facilities were equal. Justice Brown noted that the Fourteenth Amendment "could not have been

intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races unsatisfactory to either (*Plessy* v. *Ferguson* 1896)." *Gaines v Canada* furthered the quest for school desegregation and brought about an end to the *Plessy* standard. Chief Justice Hughes delivered the majority opinion on the 7-2 decision, holding that by establishing Lincoln University, a state university for black students, the state of Missouri established a precedent for providing equal opportunity in higher education for black and white students (*Gaines* v. *Canada* 1938). Using this standard, the Court found that the state of Missouri denied access to legal education as unlawful discrimination. The Court held that the state's intent to create a law school at Lincoln University was not sufficient to absolve the state's inherent responsibility to provide a legal education in this case.

In 1946 the NAACP- LDF argued the case *Mendez v. Westminster* in federal court challenging the racial segregation in California schools. In the ruling, the United States Court of Appeals for the Ninth Circuit held that the segregation of Mexican and Mexican American students into separate "Mexican schools" was unconstitutional (*Mendez* v. *Westminster* 1946). The verdict in *Mendez* worked as the first ruling in the United States in favor of the desegregation of schools, creating valid legal stock for the NAACP to utilize in the build-up to *Brown.* Following *Mendez,* in 1948 the decision rendered in *Sipuel v. Board of Regents of the University of Oklahoma* ordered the admission of a black student to the University of Oklahoma School of Law, a white school, due to the lack of a law school for blacks, thus violating the "separate but equal" doctrine established in *Plessy (Sipuel* v. *Board of Regents of the University of Oklahoma* 1948).

In 1950 the NAACP- LDF was handed down another successful verdict in *Sweatt v. Painter,* regarding the University of Texas Law Schools' legal right, or in this case, lack thereof,

to the separate black law school (Ducat 2013). The Supreme Court in a unanimous decision held that Texas failed to provide separate but equal education and thus violated the Equal Protection Clause of the Fourteenth Amendment (*Sweatt* v. *Painter* 1950). The Court found that the "law school for Negroes" was grossly unequal to the University of Texas Law School (*Sweatt* v. *Painter* 1950). Thus deciding the separate school was inferior in a variety of concrete areas, such as facilities, staff, and legal writing opportunities. The Court also, more notably, found that the mere separation from the majority of law students worked to harm students' overall abilities to compete within the legal arena (Ducat 2013). Chief Justice Vinson, in the majority opinion, discusses and references both the tangible inequalities, but also the intangible inequalities between the University of Texas Law School and the separate black law school. Vinson in the *Sweatt opinion* states,

> ... the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities...include reputation of the faculty, experience of the administration, position and influence of the alumni. (*Sweatt* v. *Painter* 1950)

The decision rendered in *Sweatt* served as a precursor for the opinion rendered in *Brown*. Building off of these "intangible factors" used in the *Sweatt* opinion, the NAACP-LDF used the *Sweatt* decision to advance their argument in *Brown.*

Psychology and social science was also utilized in Chief Justice Earl Warren's majority opinion in *Brown* showing that the "separate but equal" schools are having a clear detrimental effect on children whether the act is intentional or not. Warren writes not of the tangible factors in a child's education, but instead makes the decision on "those qualities which are incapable of objective measurement but which make for greatness in a law school" (*Sweatt* v. *Painter* 1950). Finding that "Separate educational facilities are inherently unequal" and that

"segregation is a denial of equal protection of the laws" Warren cites a variety of physiological studies, including the Clark's test on prejudice and discrimination in his majority opinion (Ducat 2013). Scholars have often discussed the simplicity and ease of the *Brown* decision, rendering that *Brown* was written in such a way that not just lawyers could read it, but any lay man was capable of reading and understanding the Court and its justification (Klarman 2007; Ducat 2013; Greenberg 2010).

Configuration of Elites

The configuration of elites within the USSC matter greatly for the success of the *Brown* litigation. When *Brown* was first argued, the Court was badly split with only four justices clearly for ending school segregation (Balkin 2001). The Court moved for the case to be re-argued the next term. Before *Brown* was argued for the second time, the alignment of justices in the USSC had been altered due the sudden passing of Chief Justice Vinson. President Eisenhower appointed Earl Warren as the new Chief Justice of the USSC (Balkin 2001). Earl Warren was often regarded as a liberal lion for individual liberties and used his appointment as Chief Justice to protect individual liberties (Klarman 2007).

With this shift, there were now five clear votes for ending school segregation in the United States. Newly appointed Chief Justice Warren pushed for *Brown* to be decided on unanimously, and many scholars identify Warren as a necessary factor in the court's decision in *Brown* (Klarman 2007). In fact, two main factors drove the USSC and Chief Justice Earl Warren towards unanimity, first being the anticipated resistance of white Southerners, who would not take to the *Brown* decision well (Klarman 2007). It is for this very reason that Warren and others pushed for there to be no dissents on the case. The second reason was that a few justices, particularly Frankfurter and Jackson, who believed *Brown* to be a disconnect between law and

politics, and as such, viewed that if the majority were to invalidate segregation, they quieted and suppressed their dissents for the good of the institution (Klarman 2007). As Philip Elman, a liberal Justice Department official, and author of the federal government's brief in Brown would later observe, "Thurgood Marshall could have stood up there and recited 'Mary Had a Little Lamb' and the result would have been exactly the same." (Patterson 2005). The other configuration of elites that worked in favor of the NAACP was the belief that there was an overall attitude shift happening in the county towards the desegregation of schools and overall racial equality. Jack Greenberg, who served as the head of the Legal Defense Fund after Marshall, offered a similar view "[There] was a current of history, and the Court became part of it (Patterson 2005)." *Brown* also had the support of the United States Attorney General, J. Lee Rankin, who presented the government's *amicus curiae* brief on behalf of the appellants, which showed support for desegregation in the public school system (Teaching with Documents: Order of Argument in the case, Brown v. Board of Education"). It is with this understanding of the legal opportunity available that the NAACP had such a successful strategic litigation campaign against school segregation.

Use of Legal Opportunity Structure

Gaining Access

The NAACP-LDF was founded in 1940 by Thurgood Marshall, and worked as the legal arm of the Civil Rights Movement ("NAACP Legal Defense Fund"). As such, they established victories for the movement through coordinated legal assaults against enforced school segregation. Through these strategic legal assaults, the campaign peaked in *Brown v. Board* where the Court unanimously overturned *Plessy,* and disbanded legal school segregation. This

success can be largely attributed to the legal strategy used by the band of lawyers working towards school desegregation and the overall goal of the movement.

In 1930 the NAACP commissioned attorney Nathan Margold to develop a legal campaign to combat segregation (Tushnet 1945). Often referred to as the Margold Report, it proposed to attack the doctrine of "separate but equal" by challenging the inherent inequality of segregation in public primary and secondary school systems (Tushnet 1945). However, Charles Hamilton Houston, the first NAACP Litigation Director, recognized the pervasiveness of racism and believed in order to be successful the NAACP need to first establish a series of legal precedents to use to achieve school desegregation (Tushnet 1945; Greenberg 2004). Houston modified the Margold Report so that the NAACP began their legal campaign through lawsuits for equal facilities in graduate and professional schools (Tushnet 1945). Houston's most important contribution to the NAACP- LDF may have been the step-by-step assault on segregation in education, which he began in the mid-1930's (Lau 2004). Referred to as "the man who ended Jim Crow" and the "architect and chief strategist of the NAACP's legal campaign..." Houston was a valuable asset to the movement (NAACP Legal Defense Fund"). He also worked to convince his constituents that desegregation was in the best interest for blacks in order to continue moving forward in their drive for overall equality (Balkin 2001). Unfortunately, Houston's' life was cut short by a heart attack in 1950 and his litigation campaign on school segregation was then turned over to his protégée and founder of the NAACP LDF, Thurgood Marshall (Greenberg 2004). Marshall, and the other NAACP LDF lawyers continued Houston's' strategized litigation campaign, and successfully argued *Brown* before the Supreme Court in 1954.

Creating Legal Stock

The lack of political power dictated the inability for the Civil Rights Movement to seek equality and reform through the American political process, thus driving the movement towards the courts (Goodwin 2004; Lau 2004). The overall strategy for the advancement of the U.S. Civil Rights Movement had primarily been sought out through legal action, by seeking integration through law enforcement and court-enforced remedies based on high impact litigation (Goodwin 2004; Tushnet 1945). The strategic litigation launched by the NAACP LDF was created by the nature of the discrimination, in the case of *Brown*, it was school segregation. The overarching goal of any anti-discrimination litigation is to raise awareness of a problem (Goodwin 2004). When successful, strategic litigation aims to seek justice for victims by punishing the perpetrators with criminal or civil sanctions and/or providing financial compensation, as well as acting as a deterrent for future acts of discrimination (Goodwin 2004).

A major component to the legal strategy developed by the NAACP LDF was litigating the case to seek desegregation in elementary and grade schools. The NAACP-LDF focused on the young children and how they were negatively affected by current school segregation in place. The case did not focus on the extreme inequalities in facilities or other concrete factors, instead *Brown* focused on the fact that even if concrete or "tangible factors" such as teachers, supplies, and facilities were equal, the separation itself was inherently unequal, hence the violation of the 14th Amendment Equal Protection Clause. The NAACP- LDF utilized the intangible factors that were used in *Sweatt* to build that separate was inherently unequal in primary and secondary schools because of such intangible factors that denied black children a complete and holistic education. Another strategy used by the NAACP- LDF was the use of social science evidence and sociological experiments used to show that "separate but equal" was having a clear adverse and detrimental effect on the children in segregated schools.

The NAACP-LDF utilized research conducted by psychologists Dr. Kenneth and Mamie Clark commonly referred to as the "Doll Test" (Brown v. Board at Fifty). In the experiment, they used four plastic dolls identical except for their skin color. They presented the dolls to black children and asked them questions to determine a racial perception and/or preference. Their results showed that almost all of the children readily identified the race of the dolls, and when asked which they preferred, a resounding majority selected the white doll and attributed positive characteristics to it (Brown v. Board at Fifty). The Clarks concluded that "prejudice, discrimination, and segregation" caused black children to develop an overall sense of self-hatred and inferiority to white children. Such a sociological approach was unheard of at the time of *Brown*, as sociologists are not lawyers, and traditionally the law is what is supposed to matter within the Court.

Swaying the Configuration of Elites

The NAACP-LDF had a winning alignment of the US Supreme Court Justices largely due to the work put forth by the newly appointed Chief Justice Earl Warren. Warren fought to change the configuration of the USSC to have a unanimous decision in *Brown*. However, there were other broader bases of support within the United States that developed because of the aftermath of World War II and the Cold War. Americans attitudes regarding segregation, equality, and basic human rights began to shift.

When America entered World War II in 1941 the military was still heavily segregated ("President Truman Issues.."). Black men were able to serve and die for their country and fight for the rights of others, yet they lacked those same rights in their own country. In 1948, President Harry S. Truman signed Executive Order 9981 to abolish racial discrimination within the United States Armed Forces ("President Truman Issues.."). The desegregated military worked to

influence thoughts regarding segregation and the movement towards racial equality within the United States. After the war was over, there was a general switch to a more "rights consciousness" within the United States after the horrors seen abroad. Black men who fought in the war came home to fight for their own rights within the United States, after fighting abroad for the rights of others.

The Cold War also facilitated key social reforms in terms of desegregation within the United States. As the United States sought to polish its international image on the brink of nuclear war, civil rights activists gained a tremendous advantage. However, the focus of these "changes" was more directed towards on improving the United States' world image rather than actual substantive change (Dudziak 2000). This lack of substantive change paired with McCarthy-era political activism and the overall triumph of law-and-order rhetoric worked to limit the overall progress of these civil rights groups (Dudziak 2000).

Chapter Three

D.H. AND OTHERS v. *THE CZECH REPUBLIC (2007)*

I will begin this chapter by offering a brief overview of the importance and impact of *D.H. and Others v. The Czech Republic.* I will then focus on the legal opportunity structure present in the Czech Republic, as well as the greater European court system, specifically the European Court of Human Rights (ECtHR). Finally, I will discuss the European Roma Rights Centre (ERRC) and how they successfully utilized the LOS present and available to them at the Czech and European level in order to reach their desired verdict in *D.H. and Others.*

One of the largest and most groundbreaking legal victories for the European Roma Rights Center (ERRC) and Roma rights within Europe was the *D. H. and Others* v *Czech Republic* case in 2007. The case centered on the school segregation of Romani children in the Czech Republic.

Eighteen applicants claimed they had been discriminated against in their pursuit of equal education because of their ethnicity. Under the terms of the Schools Act of 1984, special schools were intended for children with mental deficiencies who were unable to attend "ordinary" or specialized primary schools. Under the Act, the decision to place a child in a special school was based on two factors. The first was based on the results of tests that worked to measure the child's intelligence. The second factor was the signed consent of the child's legal guardian (*D.H. and Others* v. *The Czech Republic* 2007). The Czech schooling system used the guise of these "special schools" to segregate Romani children from the public school system, thus discriminating against them and denying them a full education. Even though many Roma parents are aware that their children do not belong in such schools, many enroll them for the free meals, clothing, and school supplies unavailable at standard schools (Greenberg 2010). The case worked its way through the Court system and eventually landed in the Grand Chamber of the ECtHR which decided by a vote of 13-4 that the segregation of Roma students into special schools was a form of unlawful discrimination (*D.H. and Others v. The Czech Republic* 2007). The ECtHR ruled the Czech Republic violated Article 14 of the ECoHR, which prohibits discrimination, along with Article 2 Protocol No. 1, which secures the right to education (*D.H. and Others* v. *The Czech Republic* 2007). The Court recognized that discrimination can not only arise in specific acts, but also through systematic practices, specifically mentioning the Roma as a particularly vulnerable and marginalized minority in need of special protection (Arabadjieva 2016). The case was a landmark decision in the ECtHR because it was the first time the court had considered a nationwide pattern of discrimination, and acknowledged the principle of indirect discrimination. Additionally, the opinion by the ECtHR clarifies that in cases where a specific policy has a discriminatory impact, the existence of discriminatory intent is irrelevant to

the case (Devroye 2009). The legal opportunity structure available in the Czech Republic and in Europe greatly influenced the success of the ERRC in their efforts to seek school desegregation and achieve equality.

Legal Opportunity Structure Available

The LOS present in the European court system aided the ERRC in their drive for equality and anti-discrimination; specifically regarding school desegregation. However, they still had to overcome hurdles and test various venues to gain eventual access to their successful arena. The ERRC worked to gain access to the courts, develop and access legal stock, and overcome the configurations of elites that were turned against them.

Access

In order to gain access to each of the respective court systems, the lawyers at the ERRC were forced to overcome a variety of barriers and venues to finally be granted access to their eventual successful arena. The ERRC initially sought redress in the Czech Constitutional Court, where they were met with a variety of hurdles, a lack of sufficient legal stock, and overall unwelcome attitudes towards Roma rights in the Czech Republic. It is not until the ERRC argued the case in the ECtHR in 2007 that the ERRC were successful in their attempt to bring an end to the school segregation of Romani children in the primary and secondary public school systems. The ERRC is arguably successful in the ECtHR due to the increased legal stock available to them and the hopefully removed prejudice of the justices on the international level.

The journey began for the ERRC when the case was unsuccessfully filed in the Czech Constitutional Court in June 1999 on behalf of the eighteen children. The applicants lodged an

appeal with the Czech Constitutional Court in 1999 alleging *de facto* racial discrimination in the education system, constituting degrading treatment and depriving them of the right to an education (Goodwin 2006). The Constitutional Court of the Czech Republic took eight months to assemble, and seven years to reach a decision on the *D. H. and Others* case, which served as the core of the Roma rights litigation strategy (Goodwin 2006). The Czech Constitutional Court dismissed the application on two main factors; the non-exhaustion of all legal remedies and the lack of legal provisions. First, thirteen of the eighteen applicants had not completely exhausted all legal remedies because they had not utilized the school system's appeal process for the placement of students in the "special schools". Second, the Court felt it could not rule on the existence of the practice of racial discrimination because of the overall lack of legal provisions applied because of the little legal action and/or provisions against discrimination (Goodwin 2006). After the failed verdict, the ERRC took the case and applied to be heard by the ECtHR after complying with the court's regulation to have exhausted all other remedies, in this case, the Czech Constitutional Court.

The Second Chamber of the ECtHR heard the *D. H. and Others* case in 2000. The Second Chamber decided against the plaintiffs, concluding 6-1 in 2006, there had not been a violation of Article 14 of the Convention (*D.H. and Others* v. *The Czech Republic* 2007). The Second Chamber based its decision on three main factors. First, the "special schools" the Roma were sent to were not intentionally created for that use. Second, the tests administered deciding to send a child to the "special schools" were conducted by accredited psychologists, and thus beyond the scope, authority, and general understanding of the court to question their judgment on who was deemed fit or unfit for the "special schools." Finally, the Second Chamber ruled that the consent of the parents of the Roma children who were sent to the "special schools" was sufficient

evidence to prove there was no indirect discrimination at play in the assignment of children to special schools (*D.H. and Others* v. *Czech Republic* 2007). After another failed decision, the ERRC and litigants requested and were granted a referral of their case to the Grand Chamber of the ECtHR. The appeal proved to be successful for the ERRC and Roma. On November 13, 2007 the Grand Chamber of the ECtHR found that the applicants had in fact suffered discrimination when denied their right to education. The Court decided the segregation occurring within the Czech school system was in fact a form of systemic discrimination against the Roma (*D.H. and Others* v. *Czech Republic* 2007). The chamber held that the disproportionate placement of Roma children in "special" schools meant for mentally handicapped students was a discriminatory practice within the educational system. The Czech school system limited Roma children's access to equal education, depriving them of an equal opportunity, and placing them at a disadvantage in comparison to non-Roma children (*D. H. and Others v. Czech Republic* 2007).

Legal Stock

There was little to no legal stock available to the ERRC and the Roma at the national level. Within the Czech Republic, any claims of discrimination had to be proved as direct, given the nation had yet to transpose the Racial Equality Directive, which works to define direct and indirect discrimination. At the national level, the claim of indirect discrimination through systematic school segregation was tossed aside. Due to this overall lack of anti-discrimination law within the Czech Republic, the ERRC had to seek out an international body more accommodating to their cause. Thus the case was taken to the ECtHR, where there was additional legal stock available to the Roma and ERRC. The Racial Equality Directive (RED) and the European Convention on Human Rights (ECoHR) at the international level served as

relevant legal stock for the ERRC and other NGOs to utilize in their strategic litigation campaign against the systematic school segregation occurring in the Czech Republic.

The development of the Racial Equality Directive (RED) set a supranational standard for all national laws to protect against racial and ethnic discrimination. Thus the RED should affect both national and European legal opportunity structures in terms of the available legal stock and resources for advocacy groups. Member-states of the EU were required to transpose the Directive into their national law within the specific timeframe of three years (Case, Givens 2010). However, within the Czech Republic, the RED was not transposed into their national law during the proceedings for *D.H. and Others v. The Czech Republic* and could not be used as legal stock on the national level (Case, Givens 2010). However, it could be utilized at the European level. The RED significantly expands the scope of legal protection to include public and private sectors, thus allowing groups to target discriminatory practices in a broad array of institutions (Evans Case 2010). The RED also works to shift the burden of proof from the litigant to the respondent in civil cases when sufficient evidence has been presented which established a basis that discrimination has in fact occurred (Evans Case 2010). And finally, the RED created a new definition of indirect discrimination that is more encompassing and less dependent on statistical evidence for litigants to prove (Evans Case 2010). It is through both the RED and the Convention that the Roma and ERRC see such success in the Grand Chamber of the ECtHR.

The European Convention on Human Rights (ECoHR) has been one of the primary tools used by NGOs in the course of strategic litigation at the European and international level (Arabadjieva 2016). The ECoHR was established by the Council of Europe (Goldston 2010). As countries joined the Council they also signed and ratified the ECoHR and accepted the jurisdiction of the European Court of Human Rights, which issues binding decisions, ensuring all

contracting states protect the fundamental rights enshrined in the Convention (Goldston 2010). This is how the ERRC sought out the venue of the ECtHR after failing in the Czech Constitutional Court.

The case *Nachova and Others v. Bulgaria* also served as legal stock for the ERRC and their advancement in *D.H. and Others.* The case discerned whether discriminatory intent could be discerned in the shooting of a Roma man by a police officer, who a neighbor reported had shouted "damn Gypsies" while firing an automatic weapon (Devroye 2009). *Nachova* was the first European Court of Human Rights' case to find a violation of Article 14 in conjunction with Article 2 of the Convention regarding the principle of nondiscrimination (Devroye 2009). The Grand Chamber of the ECtHR specifically addresses the police investigation of the shooting by failing to look into "the existence of a possible link between racist attitudes and an act of violence" in the case (*Nachova and Others* v. *Bulgaria* 2005). *Nachova* effectively sets the stage for discrimination litigation in the ECtHR and effectively guides the ERRC to utilize Article 2 and Article 14 of the Convention.

Configuration of Elites

The alignment of elites arguably worked to benefit the Roma cause at the European level, however, not at the national level in the Czech Republic. European institutions and Europe's senior-most judges have increasingly distanced themselves from the racism and hostility that have characterized the Roma experience for centuries, making it clear that equality in some form is the law of the land (Goldston 2010). However, some scholars argue that the ECtHR often has difficulty identifying Convention issues where the Roma are concerned, and others have gone so far as to say there is an anti-Roma bias in the Court itself (Cahn 2006). Similarly, in the Czech Constitutional Court system, justices are not found to be removed from such prejudice and

discrimination against the Roma. Thus judges are centering around a more attitudinal model of the judiciary, where judicial decisions are based on the personal background or experiences of the judges (Vanhala 2011). At the national level, there are no divided decisions, and as such the original ruling in *D.H. and Others* was unanimous. Animosity towards Roma civil rights campaigns remains strong in the Czech Republic, partially due to the high levels of neo-Nazi activity in the nation (Greenberg 2010).

ERRC- Utilizing the Legal Opportunity Structure (LOS) Available

Gaining Access

The ERRC was created in 1996 and operates as the most prominent pro-Roma civil rights actor, with a particular emphasis placed on the legal aspect of mobilization (Goodwin 2004). The organization's goal is to use strategic high-impact litigation across a wide array of fields to create social change beneficial to the Roma (Goodwin 2004). Strategic litigation as defined by the legal department of the ERRC can be understood as "…supporting legal cases designed to expose and contribute to the elimination of discriminatory structures that prevent Roma from enjoying full equality" ("Strategic Litigation at the ERRC"). The ERRC works to achieve this goal by training local lawyers in a variety of countries of the techniques and uses of high impact litigation, creating a vast network of lawyers trained and prepared to go to battle for the Roma (Goodwin 2004). Emphasis is placed on litigation as an offensive tactic to seek grievances for the injustice faced by the litigants, and to create a broader reaching impact ("Strategic Litigation at the ERRC"). The ERRC uses strategic litigation, along with other methods imported from the American Civil Rights Movement in their quest for school desegregation and overall equality for the Roma.

In the *D.H. and Others* case, the ERRC argued that a pattern of discrimination was present in the segregated school system. The ERRC referenced General Policy Recommendation No. 7 in the European Commission against Racism and Intolerance (ECRI) under which states are prohibited from both direct and indirect discrimination and that neither requires proof of intent (*D.H. and Others* v. *Czech Republic* 2007). Not only was indirect discrimination prohibited under EU law but also under international law in the Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination (*D.H. and Others* v. *Czech Republic* 2007). The ERRC utilized Article 14 of the ECoHR to argue discrimination. Article 14 does not prevent differential treatment to protect inequalities, but a general policy with a disparate impact on a particular group may be considered discriminatory regardless of if it is specifically aimed at that group (Devroye 2009). The court stated that differential treatment that revolved on the basis of ethnicity is in fact a form of racism (*D.H. and Others v. the Czech Republic* 2007). The ERRC effectively utilized the Civil Rights Movements precedential use of social science and psychological studies to discredit the Czech Republic's governmental system of testing Roma children to place them into "special schools". The Grand Chamber of the ECtHR found that the psychological test results of the Roma school children did not amount to a reasonable justification for their placement in the "special" schools under the purposes of Article 14 of the Convention, effectively showing that there was a violation (Devroye 2009). The Grand Chamber of the ECtHR did not believe the Czech government's rationale that the discrimination against the Roma students was due to the test results (Devroye 2009).

Creating Legal Stock

When public interest organizations and lawyers began considering how to bring about Roma rights cases, the field of racial discrimination litigation was almost non-existent (Goldston

2010). This was mainly due to the overall absence of national legislation that specifically outlawed discriminatory acts (Goldston 2010). Due to this lack of national law, the ERRC specifically sought and continues to seek international court systems to provide justice and equality for the Roma. The ERRC made it easier to gain access to the European court venues, which are more likely to agree to anti-discrimination measures due to the widely held belief that Europeans do not see race and/or are not racist (Goldston 2010). The non-discrimination provision of the ECoHR, Article 14, is an accessory right, limited in application only to the other substantive rights provided by the ECoHR (Goldston 2010). The ERRC develops anti-discrimination law through their success in the Grand Chamber of the ECtHR. Within the decision the Court recognized that discrimination not only arises in specific acts, but also through systematic practices and policies, such as the policy on the testing and placement of Roma children in "special" schools. The *D.H.* decision marks the first time the court has recognized the principle of indirect discrimination. The verdict of the *D.H.* case and its findings of indirect discrimination as a violation of the European Convention becomes an important tool in the European campaign to compel all European countries, including the Czech Republic, to pass legislation deeming indirect discrimination illegal (Devroye 2009).

Swaying the Configuration of Elites

The courts, and the legal opportunity provided within the court system serve as an arena for the ERRC to seek successful reform for the Roma. The only available avenue for recourse to victims of discrimination is often through the courts, where innovative lawyers have worked to persuade judges to issue rulings that recognize an enforceable right to be free from discrimination. The aim of litigation is often to achieve redress in domestic courts, because domestic judgements are more likely to have a direct effect on social change, thus providing

faster paced redress to the victims. The Roma civil rights movement has sought out international bodies, specifically the ECtHR because domestic remedies failed (Goodwin 2004). The ERRC sought out international courts due to the insularity of such international bodies from prejudice and racial attitudes (Goldston 2010).

Chapter Four

Analysis

In the previous chapters I have addressed the structure and legal opportunity structure of the United States Supreme Court, the Czech Constitutional Court, the European Court of Justice, and the European Court of Human Rights. I have deconstructed both the cases of *Brown v. Board of Education* and *D.H. & Others v. The Czech Republic* to focus on how the litigation teams utilized the legal opportunity provided by the respective court systems. Such work will address why groups sought out the court system as a way to bring about school desegregation in both the United States and the Czech Republic.

In my final chapter, I will turn to the second part of my question, where I aim to analyze what made the courts the correct and/or incorrect option for social reform. I will discuss the implications of using the courts as an engine for social change, and how this choice affected the group's overall success in their goal of school desegregation. Both organizations sought redress in the court systems by taking advantage of the legal opportunity structure available to them, however, was this an effective method in *Brown* and in *D.H*? Was the use of strategic litigation

in the respective legal opportunity structures enough to fully achieve their collective goal of desegregation?

As previously discussed the strategy of both the U.S. Civil Rights Movement and the European Roma Rights Centre was primarily legal. The organizations sought integration through court enforced remedies by using high-impact strategic litigation. The emphasis placed on the court systems as the correct venue to address their grievances can be largely attributed to the lack of political power and support for their causes, thus the overall inability to achieve desegregation through other political processes. However, there are also negative implications to using the Court system as an engine for social change and specific shortcomings of the Court to generate social change.

The Court Creating and Providing Social Change

Society often views the court system as an engine for social change when the other branches of governments are lacking. The court is held as the voice of justice and equality, with their decisions being viewed as all-encompassing and binding. However, the courts lack implementation power and often rely on other institutions to enforce their decisions. The judicial system is often thought of as independent from other institutions, and as such is regarded as an insular body shielded from politics. This makes the court system a tempting route for marginalized social groups, such as the Roma to seek an end to their discrimination. Litigation can be an effective tool in pursuing public policy changes for disempowered minorities who may not have other plausible options (Keck 2009).

Keck argues that legal victories also work to heighten the public's expectations for greater change. Epp concurs that long term litigation can be effective to inspire future mobilization which can influence significant reform over time (Epp 1998). However, in turn,

Rosenberg (1991) argues the court is too weak to provide social change and relies on other actors to implement decisions. McCann disagrees with Rosenberg, arguing the Courts can be seen as an engine for social change by showing that even when the court fails to correct discrimination, litigation and other forms of legal advocacy provide reformers with the legal stock to advance their cause (McCann 1994).

Although I agree with Keck and Epp up to a point, there is validity to Rosenberg's' thesis and McCann. I insist that without other institutional bodies to back up the Court's decision, a major win in a large-scale case often means nothing for the group besides a few minutes of fame. The success of the Civil Rights Movement and the ERRC is clearly undermined by the willingness of state and nation-wide compliance. USSC Justice Jackson worried about judicial supremacy in regard to *Brown,* stating "When the Court has gone too far, it has provoked reactions which have set back the cause it was designed to advance, and has sometimes called down upon itself in severe rebuke (Klarman 2007)." Scholars argue that the court, at times, must shield away from findings that would make a too strong of a political statement and thus receive backlash or little to no attempt at implementation (Arabadjieva 2015). Law often does not have a direct impact on true substantive social change, thus its effectiveness is called into question. Jack Greenberg, a US attorney who worked on the *Brown* case states, "We won *Brown*. But almost nothing happened with the schools. The South threw up a wall of "massive resistance"..." (Greenberg 2010). The win in *Brown* lacked the enforcement and true backbone needed to forcefully desegregate the schools. The same can be said in regards to *D.H.* in the Czech Republic, although bound by the rulings of the ECtHR, rather than desegregate the schools; the Czech Republic essentially circumvents the system. Another factor to take into consideration is the fact that European countries often do not value their Court system in the same way that most

Americans do. Within Europe there is the belief that they maintain a 'stronger state' and thus the government's hold considerably more influence and authority than do Court's. Americans tend to value Court decisions due to the three branches of government and the checks and balances they pose on each other.

State Response to *Brown*

The ruling in *Brown* worked to influence the path of America's racial transformation while also working to shape the understanding of the Supreme Court's role within American society. Thus altering the way many citizens view the relationship between law and social reform. *Brown* is typically viewed as the example of the Court at its best, safeguarding the rights of disempowered groups from oppression. Ironically, opinion polls make it clear that a majority of the country endorsed school desegregation and the ultimate ruling in *Brown* from the very beginning (Klarman 2007). If *Brown* was decided ten years before, it would have been the classic example of the Court protecting a disempowered minority, however, scholars argue that the Court was merely catching up with the times (Klarman 2007). In May 1954 when the *Brown* decision was handed down the NAACP- LDF was euphoric over their win, and the unanimous verdict. After the decision, Thurgood Marshall was asked how long he believed it would take for segregation to completely be eliminated from the public school system, Marshall responded stating "it might be 'up to five years' for the entire country. (Rosenberg 1991). He continued by predicting by the time the 100th anniversary of the Emancipation Proclamation was observed in 1963, all forms of segregation in the United States were to be eliminated (Rosenberg 1991). The *Brown II* decision came out on May 31, 1955 and worked as the mechanism or implementation of *Brown*, as previously discussed. However, noticeably, the phrase "with all deliberate speed" was selected by commentators, judges, and lawyers as the applicable standard with which to

desegregate the public school system. Did the Court in the *Brown II* decision actually encourage disobedience with the inclusion of the phrase "with all deliberate speed"?

The insubordination of the states can be seen that even after *Brown* was decided, the University of Alabama, University of Georgia, and University of Mississippi all came under court orders to admit black students, enforced by troops on the campuses (Greenberg 2004). Before desegregation was to occur in schools, law suits had to be filed in every single southern state with the exception of Arkansas (Greenberg 2004). After *Brown* the Court heard three cases regarding school segregation and the implementation of *Brown II.* The first came from Arkansas in *Cooper v. Aaron when* the Arkansas legislature and Governor Faubus attempted to block the desegregation of Central High School in Little Rock, Arkansas. The USSC faced the question of whether violence and/or threat of violence in response to school desegregation efforts justified the suspension of such efforts for two and one-half years (Rosenberg 1991). The Court rejected the school boards claim, stating that the "constitutional rights of respondents [black students] are not to be sacrificed of yielded to the violence and disorder" (*Cooper* v. *Aaron* 1958). The opinion of the Court also drew from the unanimous nature of the *Brown* decision, and again, all nine justices unwaveringly signed the *Cooper* opinion (Rosenberg 1991).

Goss v. Board of Education of Knoxville (1963) disregarded the plan of desegregation that included a provision that allowed students to transfer from a school where their race was a minority to one where it predominated (Rosenberg 1991). Such a provision was challenged based on the fact that it revolved solely on race and that it would further perpetuate rather than alleviate racial segregation. The Court ruled unanimously, agreeing the one-way transfer plan violated the Fourteenth Amendment and was directly against what was established in the *Brown* decision (*Goss* v. *Board of Education of Knoxville* 1963).

Griffin v. Prince Edward County 1964 centered on the constitutionality of the closing of Prince Edward County public schools in order to avoid desegregation and use state tuition grants and tax credits to support private segregated education for white children (*Griffin* v. *Prince Edward County* 1963). The Court unanimously decided that both acts were unconstitutional. Claiming that Prince Edward County was avoiding the mandate to desegregate schools and thus denying plaintiffs equal protection of the law. *Brown I* and *II* stated the law and clearly affirmed that steps must be taken to end state-enforced and sanctioned segregation. *Cooper v. Aaron* reiterated the Brown ruling. *Goss* and *Griffin* unanimously held that attempts to avoid desegregation were unconstitutional (Rosenberg 1991). One of the most serious and pressing issues was the question on how far the 1954-1955 *Brown* decision could and should be carried? Through these cases the Court had spoken forcefully and directly on the abolishment of school segregation, meanwhile the legislative and executive branches remained silent.

The passage of the 1964 Civil Rights Act worked to further the advancements made by the NAACP and worked to outlaw segregation in all "public accommodations", thus supporting the *Brown* decision by working to desegregate the public school system. However, this support comes ten years after *Brown* is initially decided, and works as the first time the legislative branch has voiced an opinion on segregation in the United States. Johnson and Cannon (1999) argue that the USSC seldom prevails when clashing with other major political actors, such as the legislative and executive branch (Johnson Cannon 1999). The implementation of judicial decisions relies heavily on other courts and/or non-judicial actors in the political system. *Brown* serves as an example of this; the court has no police authority or ability to implement except through the lower courts.

[Figure 1 about here]

As can be seen in [Figure 1] the *Brown* decision occurred in 1955 and the percentage of all southern black schoolchildren attending school with whites remains unchanged. It is not until the passage of the Civil Rights Act of 1964 that there is a significant move towards school desegregation. While there is a lack of data for the two years immediately following the *Brown* decision, it can be seen that the main upward trend in desegregation efforts occurs in 1964. *Brown* may have helped to get the ball rolling in regards to desegregating schools, but the Court lacked implementation power to truly enforce the decision, however, the legislature and the Civil Rights Act of 1964 was more effective. So if it was not the *Brown* decision that worked to desegregate schools, why did the NAACP-LDF transplant the strategy of using the Court as an avenue for social change to Europe and the Roma Rights cause? How did the Czech Republic act in response to *D.H. & Others v. the Czech Republic?*

Czech Republic Response to *D.H*

After the ECtHR ruled that the Czech school system was discriminating against Roma children, the Czech Republic was ordered to desegregate the schools. The ECtHR affirmed that segregation is in fact a form of discrimination and thus a breach of Article 14 of the Convention. Within Europe, racism and discrimination are criminal cases, and as such damages were awarded to each of the plaintiffs. Similar to the initial decision in *Brown*, the *D.H.* decision lacks procedural implementation. The judgement does not explicitly prescribe what legal remedy the Roma should seek (Strupek 2008). While the decision implores the Czech Republic, and other European nations using the same segregation practice to desegregate their school systems considering the disproportionately prejudicial effect on the Romani community as whole (Strupek 2008). The Czech Republic in response to the decision worked to circumvent this requirement by changing the name of the "special schools" to "practice schools" and dubbing

them the all of equal value (*D.H. and Others* v. *The Czech Republic* 2007). The ECtHR appointed The Committee of Ministers of the Council of Europe to oversee and monitor the implementation of the judgement (Gall Kushen 2010) The Czech government submitted two reports that included information about the planned corrective and preventive measures, in addition, NGO's such as the ERRC, the Open Society Justice Initiative, and the Roma Education Fund submitted reports outlining serious deficiencies in the Czech government's efforts to implement the judgement (Gall Kushen 2010). In the wake of the *D.H.* decision, Amnesty International compiled a report in 2012 regarding the status of Roma children in the Czech Republic. The report found,

> Romani children are disproportionately represented in former special schools, now called "practical" elementary schools, and classes teaching a curriculum for pupils with "mild mental disabilities." In some parts of the Czech Republic Romani children account for more than 80 percent in those schools. ("Czech Republic" 2012)

The Amnesty report shows that not much progress has been made in regards to true school desegregation in the Czech Republic, even after the ECtHR ruling in *D.H.* Arabadjieva (2015) explores the limited progress behind the school desegregation after the *D.H. and Others* verdict, writing "Although the significance of these cases *(D.H. and Others)* should not be underestimated, they have not yet produced the effects that Roma rights organizations had hoped for" (Arabadijeva 2015). David Strupek (2008), an attorney that worked on the *D.H.* case states, "In any case, it has to be stressed that litigation-however successful- can never bring an ultimate solution of the situation. Litigations helps to bring new impetus… (Strupek 2008)." After the *D.H.* decision questions were swirling regarding if there would be a sudden influx of lawsuits, if the Roma, with the support of the ERRC, were planning to sue the state, and more pointedly, how much taxpayers would pay in damages in such cases.

Although the verdict was a win for Roma rights, the Court did not take the next step of requiring the defendant schools to correct their errors (Greenberg 2010). After the decision in *D.H.* many Roma rights advocates and European lawyers referred to the "American equivalent" *Brown v. Board of Education.* However, there is a clear distinction between the two. *Brown* worked to overturn the *Plessy* standard of separate but equal, and other legal underpinnings. Whereas *D.H.* was an attempt to compel the Czech Republic to apply a law that was already supposed to be transposed and in place (Greenberg 2010).

The ECtHR heard its second major case dealing with Roma school segregation occurred in *Sampanis v. Greece* in 2008. The ECtHR ruled that the placement of Roma students in separate annexes within the desegregated schools violated Article 14 (prohibition of discrimination) and Article 2 Protocol No. 1 (right to education) as well as Article 13 (right to an effective remedy) of the European Convention on Human Rights (*Sampanis* v. *Greece* 2008). Non-Roma parents heavily protested the integration of their children's schools and barred Roma children from entering. The school relented and sent the Roma to a pre-established annex school a few miles down the road. A Roma student was attacked in a link with the annexed school and as a result many Roma children withdrew from classes (Greenberg 2010). The ECtHR required the defendant school to pay 6000 euros to each plaintiff; however, similarly to *D.H.* the Court did not require the school administration to end the segregated conditions (Greenberg 2010). The next large desegregation case for the Grand Chamber in the ECtHR was *Orsus v. Croatia*. In 2010 in Croatian schools fifteen Roma children were segregated into "Roma only" classes. The Grand Chamber decided Croatia violated the Convention and ordered payment to each of the plaintiffs, and again, issued no order to Croatia or the defendant school to desegregate (*Orsus* v. *Croatia* 2010). Similarly to the United States and the years after the

Brown decision, the European Union remained silent on attempts to enforce the decisions rendered in *D.H. and Others* v. *The Czech Republic.* However, years later the European Commission has expressed its resentment and distaste that almost seven years after the *D.H.* decision that the Czech Republic continues to be in breach with the EU anti-discrimination law by maintaining social and political embedded structures of discrimination against the Roma. Despite this resentment, there are no effective tools and/or mechanisms of implementation and enforcement introduced to tackle such forms of discrimination in education on the state level. Recently, in February 2015, the European Parliament amended the Schools Act and created a new Action Plan to further the issue of integrated education from Romani children. The implementation of the reform package came into effect in September 2016 and there is no indication on if the program was a success.

Access

In order for the NAACP-LDF to gain access to the courts, they were forced to build up a large enough precedent and challenge school segregation in as many strategic locations as possible in order to reach their final venue of the USSC. *Brown* was forced to work up through various state court systems, due to the consolidation of the five cases that are encompassed in *Brown*, to eventually gain access to the USSC. The NAACP first argued *Brown* in front of a three panel judge at the U.S. District Court level, and they were disregarded. It was not until the NAACP-LDF reached the USSC and Chief Justice Earl Warren that they were handed a successful verdict. The NAACP-LDF had to prove the existence of discrimination along with the adverse impact of the segregation to the Court. Justice Brandeis in 1937 worked to restrain the USSCs power when developing the Ashwander principles in his concurring opinion in *Ashwander* v. *Tennessee Valley Authority*. Brandeis put forth a set of commandments that guided

judges' decision making to make sure they were deciding no more than really needed to be decided (Ducat 2013). Such principles follow as, the USSC will not decide a case unless the Court is the last resort, and the Court will not rule on constitutionality unless they must and the Court will rule by statutory law before considering constitutionality (*Ashwander* v. *Tennessee* 1937*).* The NAACP-LDF and the *Brown* case had to overcome these obstacles and restraints on the Court in order to achieve a truly groundbreaking opinion.

In contrast, the ERRC gained access to the Czech Constitutional Court by challenging segregation on the basis of the discrimination laws already in place and then worked through the ECtHR. However, the Czech court initially denied their case because they had not exhausted all other remedies; in this case, the ERRC had not taken the case to the local school board (Goodwin 2006). After a then unsuccessful decision in the Czech Constitutional Court, the ERRC brought the case to the ECtHR. Cases brought to the ECtHR must pass both a judge rapporteur and a Chamber of the Court to be deemed admissible. The case must pass the requirements of *ratione materiae*, *ratione temporis,* and *ratione personae* and other formal grounds (Smith 2005). Once the Chamber of the Court decided on the case, it was then referred to the Grand Chamber of the ECtHR where they were granted a successful verdict. The ERRC could not skip to the ECtHR to have their case heard because in order to gain access they needed to exhaust all other national remedies before bringing the case to the ECtHR. Both the ERRC and the NAACP provided the funding, resources, and the man-power for the cases to continue and eventually gain access to their successful venue.

Legal Stock

There was little legal stock for the NAACP-LDF to employ when building a strong case for *Brown.* The NAACP-LDF was forced to build their precedent case by case to overturn the

previously set *Plessy* standard of separate but equal. The *Brown* case relied heavily on the *Sweatt v. Painter* precedent which provided the intangible argument. This argument claimed that segregated schools were inherently unequal due to 'intangible' attributes. The ERRC in comparison, did not have precedent to utilize and did not build up precedent, they instead were forced to seek out a more forgiving institution that had stricter anti-discrimination laws available for the ERRC to utilize.

Another differentiating factor in the legal stock available is the concept of *de jure* and *de facto* segregation in the United States and within Europe. In the United States, segregation was mandated statewide per the *Plessy* standard, and thus the NAACP-LDF had to work to effectively overturn the previously set standard and belief that separate was equal. After the *Brown* decision the Court reads and applies the Equal Protection Clause to proscribe only *de jure* segregation, meaning the Court could only stop discriminatory acts occurring that were state imposed and/or sanctioned specifically prohibits discrimination by any state. The USSC interpreted this concept to include a wide array of state actions, statutes, their enforcement and administration, and the overall actions of state officials. Meanwhile, *de facto*, or discrimination occurring on the parts of private actors, was still occurring, such as in movie theaters or restaurants (Ducat 2013). It is not until later in the 1948 *Shelley* v. *Kramer* that the USSC finds and employs the use of nexus' to get at private discrimination and the application of the Equal Protection Clause. However, *Moose Lodge No. 107* v. *Irvis* shows the limitations of the Equal Protection Clause and the use of such nexus' to get at private segregation. Justice Rehnquist in the majority opinion states, " The Court has never held, of course that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in

any degree whatever." (*Moose Lodge No. 107* v *Irvis* 1972). The Equal Protection Clause in the United States thus could not serve as the end all be all for the legal stock utilized by the NAACP-LDF.

In contrast, within the Czech Republic, segregation was not mandated by statute, it instead developed through a mix of local official policies, which the US equivalent would be considered the above mentioned concept of "state action" and more informal forces, such as housing policy and neighborhood homogeneity, more *de facto* segregation (Greenberg 2010). As such, it can be inferred that the ERRC had less formal forces to overcome, whereas the NAACP had to overcome both formal and informal segregation.

Another important distinction occurs in *D.H. and Others* and *Brown* when litigators had to prove the existence of discrimination and provide the Court with evidence that showed the adverse impact of the discrimination. The disparate impact doctrine could have been helpful in the *Brown* case; however, it was not developed until the 1970's. The disparate impact doctrine works to prove whether a law that is racially neutral and serves legitimate government interest can still be unconstitutional due to its effect. The suspicion of intent is placed on the actor rather than placed on discrete and insular minorities. In *Washington v. Davis* the Supreme Court established that racially discriminatory laws are only unconstitutional if they have both a discriminatory purpose and a discriminatory impact in regards to statutory cases. Justice Bryon White states, "A law or other official act, without regard to whether it reflects a racially discriminatory purpose, [is not] unconstitutional solely because it has a racially disproportionate impact *Washington* v. *Davis* 1976)."

The Disparate Impact Doctrine in the United States could not be utilized in *Brown* seeing as it later develops in the 1970's when seeking desegregation of private accommodations and

that it is used in statutory cases. However, *D.H.* employed a disparate impact standard, under which the courts invalidated practices that are proved to have a disproportionate effect on members of a protected group unless a close relationship to performance of the relevant task or job validates the challenged practice (*Griggs v. Duke Power Co.* 1971*).* The utilization of the disparate impact standard can largely be attributed to the United States and their development of the standard, seeing as the ECtHR makes direct reference and cites *Griggs v. Duke Power Co.* in their decision in *D.H. (D.H. and Others v. The Czech Republic* 2007).

There are however, other ways for the Court to protect discrete and insular minorities, such as the different standards of scrutiny. As Justice Stone points out in Footnote Four of *Carolene Products,* "Discrete and insular minorities calls for a heightened scrutiny (Ducat 2013)". The 14th Amendment Equal Protection of the Law states that no state is to deny any person within its jurisdiction the equal protection of the laws (Ducat 2013). Discrimination in plain terms means the distinguishing between people or things, which in itself is not illegal. However, it is the rule of law that distinguishes what is acceptable discrimination versus discrimination that violates the Constitution. The USSC works to make such distinctions, answering that the Equal Protection Clause goes no further than prohibition "invidious discrimination" (*Williamson v. Lee Optical* 1955). In cases where strict scrutiny must be applied, the government must show that the challenged classification scheme serves a compelling state interest and that the classification is necessary and narrowly-tailored to serve that interest.

The use of strict scrutiny is to protect discrete and insular minorities from unfair and unequal discrimination and segregation. The concept of strict scrutiny arises from *Korematsu v. United States,* when the internment of Japanese citizens in the United States for reasons of

national security worked to set the standard that classifications based on race must be held at a higher standard (*Korematsu v. United States* 1944). Strict Scrutiny was utilized in the both *Brown* and *D.H.* In the *Brown* case the state needed to provide a compelling government interest for the segregation of the public school system, and that the classification of students was narrowly tailored to achieve said interest. This stringent test allowed the NAACP-LDF to achieve the ruling that segregation was unconstitutional.

The ECtHR was also able to utilize strict scrutiny when it decided on *D.H. & Others v. the Czech Republic.* The ECtHR noted that a kind of strict scrutiny would be applied to the discrepancy between means and ends in cases of racial or ethnic discrimination. The lack of proportionality in the case between the psychological test results and the placements they were supposed to justify proved just that. The psychological test results did not amount to an objective and reasonable justification for the school segregation, and therefore a violation of Article 14 had taken place (Devroye 2009).

A major distinction in the legal stock employed by either group can be seen by the development of the American Civil Rights Act and the European Racial Equality Directive (RED). The Racial Equality Directive can be viewed as very similar to the American Civil Rights Act; one could argue it was created to mirror the Civil Rights Act. However, the ERRC did not have the RED as legal stock at the national level, however, at the European level they could utilize the privileges of the RED. This is not the case in *Brown*, since the Civil Rights Act emerged years after *Brown* was decided.

Configuration of Elites

The configuration of elites worked to benefit the NAACP-LDF and their quest for school desegregation in *Brown*. The appointment of Chief Justice Earl Warren and his dedication to seeking a unanimous decision helped to advance school desegregation via *Brown.* Perry (2007)

points out the contrasting viewpoints on the empowerment of courts to protect human rights. The biggest point of contempt is the double-edged sword that the court is insular and removed from politics and thus constituents. This can be seen as beneficial in regards to civil rights cases when the court can make decisions for the best of society without retribution. However, this can also be detrimental when considering that the body interpreting and in some cases, making law, is far removed from democracy and what constituents want or believe to be true.

The configuration of elites worked in the United States and the Civil Rights Movement largely due to the insularity of the Court from elections and politics. The USSC is somewhat removed from politics but in some aspects is still affected and swayed by the politics and opinions of current society.

The configuration of elites worked to benefit the ERRC and their journey to desegregate schools and seek equality for the Romani. The ERRC had the benefit of the European court system, seeing as they are considered even more insular from politics, especially from the discriminatory attitudes present in the Czech Republic. The ECtHR also has a direct focus in human rights and discrimination, thus making them a more sympathetic court. However, within the European Courts there are larger disparities that must be addressed. The largest is the rampant belief that Europeans are not racist simply because they claim they do not see race, and thus are not racist.

Shame and emotion can be used to achieve compliance with the law, such emotions as anger, disgust, and shame are perceived as "valuable barometers of social morality" (Karstedt 2002). Within the United States the role of the media in the covering of the social movements working behind *Brown* and the Civil Rights movement helps to create this shame, anger and disgust. The media brought many significant events of the Civil Rights Movement to the

forefront of Americans minds and helped the nation evolve towards equality ("Selma, Alabama: The Role of News Media"). Americans sitting in their homes were able to watch the violence unfold around the country from the safety of their living rooms. Images and videos of police officers brutalizing peaceful marchers and protestors was streamed and watched on the news nation-wide ("Selma, Alabama: The Role of News Media"). The influence and fear helped frame the Civil Rights Movement by striking fear and shame in Americans hearts, which in turn forced the legislature to step up and propose a change. This can also be seen by the effort by the United States after World War II and during the Cold War to draw more attention to rights consciousness in order to polish their image worldwide (Dudziak 2000).

This media presence of fear and shame is lacking in the case of the Roma, because within Europe the Roma are not portrayed as victims in the media. European institutions also cannot effectively shame the Czech Republic for its mistreatment of the Roma largely because most other European countries have the same discriminatory acts against Roma in place within their countries. In fact, after the ruling in *D.H.* The power-dynamic was effectively changed on how to combat equality and school segregation for the Roma.

Conclusion

I sought to answer how social movements work to make strategic choices and the main influences on those choices. I focused specifically on the NAACP and the ERRC and their choice to focus their resources on desegregation efforts through strategic litigation within their respective court systems. Both organizations choose to use the Court as an avenue for social change within their movements, but why did they seek to end school segregation through the court? What made the courts the correct or incorrect option for social reform? Specifically, why

did the ERRC utilize the strategy used in *Brown* as a model for their strategic litigation campaign and how did the legal opportunity structure impact the success of both movements?

I worked to answer this question defining and discussing the concept of legal opportunity and legal opportunity structure. I go on to address the legal opportunity structure in both supranational and national court systems- the Czech Constitutional Court, the European Court of Justice, the European Court of Human Rights, and the United States Supreme Court. I discussed the similarities and differences between the LOS present in the United States, the Czech Republic, and Europe and explored how these structures incentivize and/or disincentives' the courts as a tool for social change.

I then provided a case study for *Brown* v. *Board of Education of Topeka* and *D.H. and Others* v. *the Czech Republic.* In these case studies I emphasis the legal opportunity available to the NAACP-LDF and the ERRC in their quest to end school segregation. I then discuss how these groups utilized the legal opportunity to argue and gain a successful verdict in their cases.

Finally, to largely address my question I discussed how *Brown* and *D.H.* work together to find if the courts can be used as avenues for true social change. I focused specifically on the effectiveness of courts for influencing social change, and if the decision to seek the LOS available in courts was ultimately the correct decision for the NAACP-LDF and the ERRC.

Findings

I find that the use of strategic litigation in the respective legal opportunity structures was not enough to fully achieve their collective goal of desegregation. Although the courts were essentially the best option for these social movements to attempt to utilize for social change, the courts lacked implementation and the power needed to create true social change. Overall, I come to find that Brown may have gotten the ball rolling in regard to school desegregation, but it was

not the singular moment for the NAACP or the Civil Rights Movement. There was outside support through grassroots organizing and then the eventual intervention of the legislature with the development and adoption of the Civil Rights Act of 1964. Essentially, Brown was decided, attempted to be implemented and was fought with contention and hatred. Many believed the Court had overstepped their boundaries and unjustly assumed the role of the third branch of the legislature, as were Justice Jackson's fears with the Brown decision. Brown was ineffective at desegregating schools because the Court lacked the implementation power necessary to force the desegregation- as can be seen by state responses to Brown. *D.H.* used the strategy developed in *Brown* and transplanted it into the European venue to gain access and win their case at the international level. However, they also faced the same issue of lack of implementation after the large win in *D.H.* While the Czech Republic is bound by the decisions handed down by the ECtHR and the European Convention on Human Rights, the Czech government, when faced with implementing school desegregation, noticeably chose to continue to segregate schools. The Czech Republic upheld the ruling by changing the names of the "special schools" they were segregating Roma students into, effectively circumventing the system. While I admit, the Court was the only option for such marginalized and disenfranchised groups; the Court was also not the most effective at achieving school desegregation. The success of the Civil Rights Movement and the NAACP can more broadly be attributed to the grassroots organizing efforts and the intervention of the legislative branch in the development and creation of the Civil Rights Act of 1964. However, the *Brown* contribution is not to be ignored, as stated previously, *Brown* worked to set the stage and helped sway public opinion on the thought of school desegregation and overall, equality. *D.H.* was decided in 2007, and as such I will be eager to see how the Roma Rights Movement advances.

Limitations

My findings have limitations based on timing, research, and overall implications of the cases that I utilized. One of the largest drawbacks to my findings can be attributed to the fifty-four year difference between *Brown* and *D.H.* This over fifty year difference is truly shown in the lack of literature and research conducted regarding *D.H.* which was decided in 2007. There is also evidence that perhaps my findings are premature, maybe in another ten years there will be more literature and more social change regarding *D.H* considering *Brown* took over ten years to truly see change and desegregated public schools in the United States. In comparison, *D.H.* was decided in 2007, a mere nine years ago in comparison, and as such, perhaps true social change will occur in the future. But for now, *D.H.* remains largely ineffective, just as *Brown* was.

Another limitation to my findings is the fact that I largely focused on two cases rather than one, and thus was not able to go as in depth as I could have been able to had I only focused on a singular case to see if the courts could provide social change. Based on the nature of focusing on two cases, I also studied two very contrasting cases not only when considering the legal opportunity structure but also based on the cases' vitality. Hansford and Spriggs (2002) discuss the concept of precedent and their legal vitality, or the extent to which they maintain legal relevance, authority, and applicability (Hansford Spriggs 2002).

Precedents vary in their legal vitality, or the extent to which they maintain legal relevance, authority, and applicability. This variation in the authority of precedent has important. Hansford and Spriggs (2002) argue that if the Court has positively interpreted a precedent then it takes on greater authority, is more institutionalized, and thus has greater legal weight (Hansford Spriggs 2002). This can be seen in *Brown,* the USSC set an important precedent that was carried on for years to come and served to influence a variety of other rights movements both nationally

and internationally. Essentially *Brown* matters in a way that other cases do not. *D.H.* lacks this vitality that *Brown* has established, and therefore has other social and cultural implications that are not as withstanding.

Moving Forward

Drawing from my conclusion and findings, the utilization of the courts as an avenue for social change can only work if it is just a tool within the overall progress. There must be a multi-faceted strategy in order to create true social change, the courts cannot be the end all be all. The civil rights movement had the strategic litigation campaign launched by the NAACP-LDF, but also had a strong grassroots component that organized sit-ins, marches, and protests, as well as the eventual creation and adoption of the Civil Rights Act of 1964. All of these components worked towards a larger strategy for empowerment, and in my findings it is apparent that this holistic approach was not fully employed in the fight for Roma rights within Europe. In the larger context, future groups aiming to create social change must adopt a holistic strategy that incorporates court decisions, legislation, and grassroots organizing to truly change societal views and combat racism and discrimination.

Bibliography

Andersen, Ellen Ann. 2005. *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Print.

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, (1937)

Arabadjieva, Kalina. 2016. "Challenging the School Segregation of Roma Children in Central and Eastern Europe." *The International Journal of Human Rights* 20.1: 33-22. CrossRef. Web.

Balkin, J. M. 2001. *What Brown v. Board of Education Should Have Said*. New York [u.a.]: New York Univ. Press.

Brassói, Vivien. (2016) "INFRINGEMENT PROCEDURES AGAINST CZECH REPUBLIC, SLOVAKIA, HUNGARY FOR SEGREGATING ROMANI CHILDREN". Romedia Foundation.

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

"*Brown v. Board* at Fifty: "With an Even Hand" Brown v. Board of Education of Topeka, Kansas." Brown v. Board of Education of Topeka, Kansas. Library of Congress, n.d. Web. 26 Oct. 2016. https://www.loc.gov/exhibits/brown/brown-brown.html

"*Brown v. Board of Education* Timeline | National Archives." *National Archives and Records Administration.* 15 Aug. 2016. Web. 02 Nov. 2016.

Cahn, C. 2006. The elephant in the room: On not tackling systemic racial discrimination at the european court of human rights; *European Anti-Discrimination Law Review,* (4) Retrieved from http://ec.europa.eu/justice/discrimination/files/lawrev4_en.pdf

Cichowski, Rachel A. 2004. "Women's Rights, the European Court, and Supranational Constitutionalism." *Law & Society Review* 38.3: 489-512. Print.

"Czech Republic."2012. *Amnesty International.*

Devroye, Jennifer. 2009." The Case of D.H. and Others v. the Czech Republic." *Northwestern Journal of International Human Rights* Vol. 7 Issue. 1.

D.H. and Others v. The Czech Republic (GC), no. 57325/00, 442, ECtHR 2007.

Ducat, Craig R. 2003. *Constitutional Interpretation.* 10 . Belmont, CA: Wadsworth.

Dudziak, Mary L. 2000. *Cold War Civil Rights*. Princeton [u.a.]: Princeton Univ. Press.

Eisinger, Peter K. 1973. The Conditions of Protest Behavior in American Cities. *American Political Science Review,* 67, pp 11-28. doi:10.2307/1958525.

Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective.* Chicago: U of Chicago. Print.

EVANS CASE, RHONDA, and TERRI E. GIVENS. 2010. "Re-Engineering Legal Opportunity Structures in the European Union? the Starting Line Group and the Politics of the Racial Equality Directive." *Journal of Common Market Studies* 48.2: 221-41. Print.

"Expanding Civil Rights- Landmark Cases: Brown v. Board of Education." PBS. PBS, n.d. Web. 02 Nov. 2016.

Gaines v. Canada, (USSC), 305 U.S. 337 (1938)

General information on the court. (2012). Retrieved from: http://www. echr. coe. int/echr/homepage_en/

Goldston, James A. 2010. "The Struggle for Roma Rights: Arguments that have Worked." *Human Rights Quarterly* 32.2 : 311-25. Print.

Goldston, James A. 2006. "Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges." *Human Rights Quarterly 28.2*: 492-527.

Goodwin, Morag. 2006. *"*White Knights on Chargers: Using The US Approach To Promote Roma Rights In Europe?" *German Law Journal*. Vol. 5. No. 12.

Greenberg, Jack. 2010. *"*Brown v. Board of Education: An Axe in the Frozen Sea of Racism". *Saint Louis University Law Journal.* LexisNexis Academic.

Greenberg, Jack. 2010. "REPORT ON ROMA EDUCATION TODAY: FROM SLAVERY TO SEGREGATION AND BEYOND." *Columbia Law Review,* 110(4), 919–1001. Retrieved from http://www.jstor.org/stable/27806640

Griggs v. Duke Power Co., 401 US 424 (1971).

Hilson, Chris. 2002. "New Social Movements: The Role of Legal Opportunity." *Journal of European Public Policy* 9.2: 238-55. Print.

Hrádek, Jiří. (2014) "V. the Czech Republic." *European Tort Law Yearbook 3.1*: 139-68. Web.

Johnson, C.A and Bradley Cannon. 1999. *Judicial Policies: Implementation and Impact.* Congressional Quarterly.

"Jurisdiction Ratione Materiae Law & Legal Definition." *Jurisdiction Ratione Materiae Law & Legal Definition*. N.p., n.d. Web. 05 May 2016.

"Jurisdiction Ratione Temporis Law & Legal Definition." *Jurisdiction Ratione Temporis Law & Legal Definition.* N.p., n.d. Web. 05 May 2016.

Karstedt, Susanne. 2002. "Emotions and Criminal Justice." Theoretical Criminology 6 (3) (August 01):299-317.

Keck, Thomas M. 2009."Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights." *Law & Society Review 43.1*: 151-86. Print.

Klarman, Michael J. 2007. *Brown V. Board of Education and the Civil Rights Movement.* New York [u.a.]: Oxford Univ. Press.

Korematsu v. United States, 323 U.S. 214 (1944).

Lau, Peter F. 2004. *From The Grassroots to the Supreme Court: Brown v. Board of Education and American Democracy.* Durham: Duke University Press.

Marshall, Thurgood. 1951. The supreme court as protector of civil rights: Equal protection of the laws. *The Annals of the American Academy of Political and Social Science, 275*(1), 101-110. doi:10.1177/000271625127500113

Mendez et al. v. Westminster, 64 F. Supp. 544 (S.D. Cal. 1946)

Minow, M. 2010. *In Brown's Wake.* New York [u.a.]: Oxford Univ. Press.

Moose Lodge No. 107 v. *Irvis*, 407 US 163 (1972)

"NAACP Legal Defense Fund : Defend, Educate, Empower." History. NAACP, n.d. Web. 11 Nov. 2016.

Nachova and Others v. Bulgaria (GC), No. 4377/98 and 43579/98 ECtHR. 2005.

Orsus and Others v. Croatia (GC), No. 15766/03, ECtHR. 2007.

Patterson, J. T. 2005. Brown v. Board of Education and the Civil Rights Movement. *Stetson Law Review, 34*(2), 413.

Perry, Michael J. 2007. *Toward a Theory of Human Rights: Religion, Law, Courts.* Cambridge University Press.

Plessy v. Ferguson, 163 U.S. 537 (1896).

"President Truman Issues Executive Order No. 9981 Desegregating the Military." This Day In Truman History: July 26, 1948. Harry S. Truman Library & Museum, n.d. Web. 15 Nov. 2016.

"Ratione Personae Law & Legal Definition." *Ratione Personae Law & Legal Definition.* N.p., n.d. Web. 05 May 2016.

Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring about Social Change?* Chicago: University of Chicago.

"Selma, Alabama: The Role of News Media in the Civil Rights Movement | The African Americans." PBS LearningMedia. N.p., n.d. Web. 11 Nov. 2016.

Sipuel v. Board of Regents of the University of Oklahoma, 332 U.S. 631 (1948)

Spriggs, James and Thomas G. Hansford. 2002. "The U.S. Supreme Court's Incorporation and Interpretation of Precedent." *Law and Society Review* 36 (Jan 1,):139-813.

Sweatt v. Painter, 339 U.S. 629 (1950)

Smith, Rhona K.M.; Van der Anker, Christien. 2005. *The Essentials of Human Rights.* Hodder Arnold.

"*Strategic Litigation At the European Roma Rights Centre* ." 2015. ERRC.org. http://www.errc.org/strategic-litigation (March 7, 2016).

"The Civil Rights Act of 1964: A Long Struggle for Freedom." *The Civil Rights Act of 1964*. Library of Congress, n.d. Web. 15 Nov. 2016.

"The Race Equality Directive." *European Commission.* Europa, 27 June 2007. Web. 05 May 2016.

Tushnet, Mark V. 1987. *The NAACP's Legal Strategy against Segregated Education: 1925-1959.* Chapel Hill: Univ. of North Carolina.

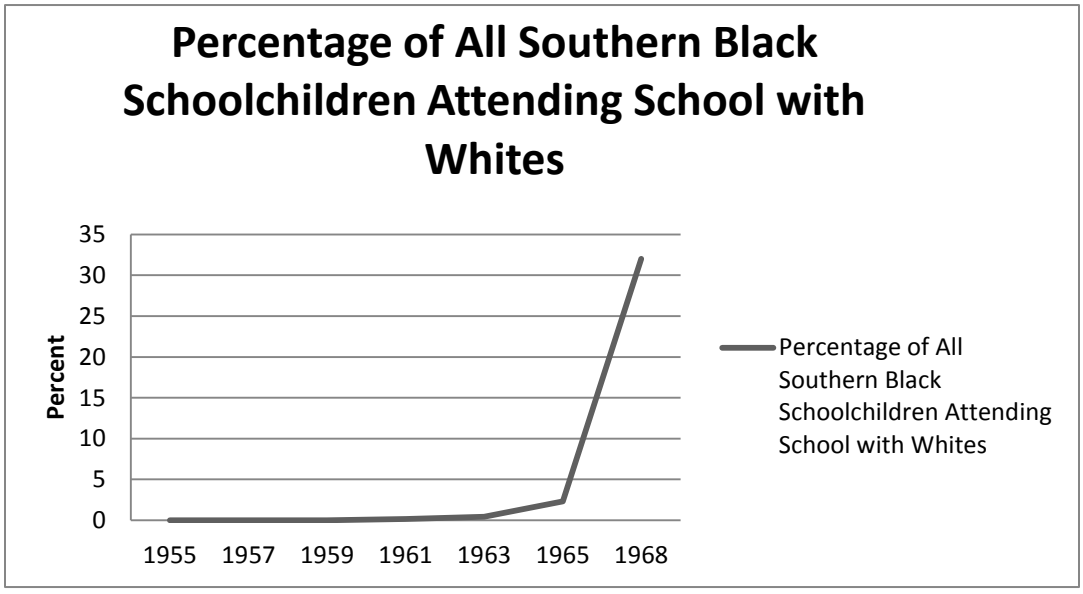
Vanhala, Lisa. 2012."Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK." *Law & Society Review* 46.3: 523-56. Print.

Vanhala, Lisa. 2011. *Making Rights a Reality?Disability Rights Activists and Legal Mobilization.* Cambridge University Press. Print.

Vermeersch, Peter. 2006. *The Romani Movement: Minority Politics and Ethnic Mobilization in Contemporary Central Europe.* New York: Berghahn Books.

Williamson v. Lee Optical Co., 1955348 U.S. 483, (1955).

[Figure 1] (Rosenberg 1991)



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