Adjudicating Equality: Antidiscrimination Education Jurisprudence in the European Court of Human Rights

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ANTIDISCRIMINATION EDUCATION
JURISPRUDENCE IN THE EUROPEAN
COURT OF HUMAN RIGHTS

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This Article examines the state of antidiscrimination education jurisprudence in Europe by analyzing several prominent cases brought before the European Court of Human Rights. In those cases, the applicants alleged that they were discriminated against in the exercise of their right to education based upon their ethnicity in violation of the European Convention on Human Rights. Novel aspects of the cases include the Court’s recognition of the theory of indirect discrimination and its imposition of positive obligations. The cases examined have a broader application that has yet to be explored at the higher education level and by other racial minority groups. Focusing on the legal principles of proportionality, the margin of appreciation, and consensus, this Article analyzes the Court’s reasoning and delineates its framework for cases of this type. The paper offers insights concerning the Court’s theory of racial discrimination, highlights issues arising out of the theory and its application, and concludes with recommendations for the Court’s future trajectory in this realm.

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I. INTRODUCTION

This Article focuses on the role of the European Court of Human Rights (ECtHR) in the development of racial discrimination education jurisprudence. It argues that one can discern the Court’s theory for determining impermissible racial discrimination and its methodology for establishing an anti-racial discrimination education framework by carefully

1. The European Court of Human Rights will be referred to throughout this Article as the “Strasbourg Court,” “the ECtHR,” “the Court,” “the Tribunal,” or “the Strasbourg Tribunal.”
examining the Court’s racial equality education decisions. The cases can serve as foundational blocks for other disadvantaged racial and ethnic minorities to achieve similar gains and secure commensurate progress at the higher education level. Proportionality, margin of appreciation, and European consensus are essential defining aspects of the antidiscrimination education framework. Within that structure indirect discrimination and positive obligations figure prominently. The paper develops its arguments by working through these instrumental concepts and principles and by examining their operation in the highlighted cases.

The corpus (“Equality Education Cases”) consists of several successful claims initiated on behalf of children of Roma heritage. The children were ethnic minorities within their countries of residence. They alleged that their respective governments discriminated against them in the exercise of their right to education and that the harm was inflicted based upon their ethnicity. While the cases are an impressive start to assembling a construct for disarming racial discrimination in education, the Court should fine-tune its analytical approach. In order to do so, it must articulate a fully developed decision-making technique. Delineating a more detailed apparatus for evaluating such claims will achieve greater transparency in the Court’s reasoning. Furthermore, a clearly defined procedure will fortify the Court’s legitimacy as a supranational adjudicating body, in that individuals and nations can be assured that the decisions are grounded in well-reasoned legal standards. Overall, the rule of law objective of improving predictability of legal outcomes will be served. A precise and thorough proportionality test should facilitate the fulfillment of rights rather than unduly constraining them, as some scholars have argued.

2. Although the Court was established in 1959, it has only decided a modest number of racial discrimination education cases, which the Article later discusses.


about whether to bring legal cases at the supranational level to challenge racial inequalities in education.

The paper proceeds as follows: Part II delineates the corpus of the Equality Education Cases and provides important background relevant to the development of the Court’s approach to antidiscrimination education cases. Part III identifies the central tenets of the Court’s racial discrimination theory and the components of its antidiscrimination education framework. Part IV examines the ECtHR’s reasoning process in the Equality Education Cases by engaging in a detailed analysis of the proportionality review construct, taking into consideration the Court’s application of the margin of appreciation and European consensus principles. This section also makes normative recommendations for improving the Court’s analytical scheme for racial discrimination and equality education cases. Part V examines the Court’s positive obligations orders as an application of the Court’s theory. Part VI considers the potential application of the Court’s antidiscrimination education framework to other cases in the interest of furthering racial equality education goals.

II. THE SEEDS OF THE EUROPEAN COURT OF HUMAN RIGHTS’ RACIAL DISCRIMINATION THEORY: ANTIDISCRIMINATION EDUCATION CASES BEFORE THE COURT AND ROMANI CHILDREN

Although the ECtHR was established in 1959, it has only decided a modest number of racial discrimination education cases. Nonetheless, the Court’s jurisprudence in this area constitutes a rich resource for examining how the Court exercises its power and the Court’s conception of its role in the challenging endeavor of unifying Europe. Because the cases offer insight to the Court’s reasoning process, they are invaluable to any project committed to advancing racial equality education jurisprudence and to weaving human rights ideals into the fabric of European culture and discourse.

A. The Romani History of Exclusion and a Summary of the Cases

Before outlining the Equality Education Cases, it is necessary to discuss the impetus for them. Chief among the motivating aspects is the history of the Romani people. Although the term “Roma” is used as a common classification, several different ethnic groups actually comprise the Romani people. They constitute “one of Europe’s largest” minority groups, with approximately eleven million or more Roma living in Europe. As travelers, they have often remained insular, at the margins of societies.

5. Six cases in total.
6. See Council of Europe, Descriptive Glossary Relating to Roma Issues 4 (2012) [hereinafter COUNCIL] (“The term ‘Roma’ . . . refers to Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned, including persons who identify themselves as Gypsies.”).
The Roma have suffered centuries of exclusion, maltreatment, and vilification in Europe and other parts of the world.\(^8\) Nazi Germany targeted them for extermination in what has been characterized as the “forgotten Holocaust.”\(^9\) The plight of the Romani has long been a part of human rights discourse, conjuring up in Europe’s imagination some of the worst atrocities, an example of ethnic and racial discrimination taken to its extreme.\(^10\) For numerous reasons, including the racism and rejection of this ethnic group by the dominant populations they encounter, their historically migratory lifestyle,\(^11\) cultural differences, linguistic differences,\(^12\) and their sheer numbers, the Roma have presented significant integration challenges for Europe.\(^13\) Yet integration is an essential principle and goal of the European Union.\(^14\)

The plaguing question of how to integrate the Roma and protect them from being stigmatized and subjected to social exclusion informed the drafting of key international legal instruments.\(^15\) Beyond implementing policies and laws designed to improve conditions for the Roma, these measures were aimed at eradicating ethnic and racial discrimination, cultivating tolerance and respect for racial minorities, and establishing protections for vulnerable groups.\(^16\) Additional stimuli for the education

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\(^10\) See Council, *supra* note 6, at 13–22 (detailing Council of Europe legal instruments, institutions, initiatives, agencies, and NGOs addressing issues related to the Roma beginning in 1969).

\(^11\) See id. at 6 (stating that the Roma of the 21st century have shifted from a traveling existence to a more sedentary lifestyle).

\(^12\) See id. at 10 (elaborating that the mother tongue of the Romani people is the Romani language).


\(^14\) The ECtHR has recognized that one of the fundamental goals of the right to education is “safeguarding pluralism in education which is essential for the preservation of the ‘democratic society’ as conceived by the Convention” and that “integration into and first experience with society are important goals in primary school education.” Konrad v. Germany, App. No. 35504/03 Eur. Ct. H.R., paras. 6–8, https://www.hslida.org/hs/international/Germany/KONRAD_Decision.pdf [https://perma.cc/N7JD-W78V].


cases was supplied by the European Roma Rights Centre\textsuperscript{17} (the “ERRC”), a Roma advocacy group, and other litigators such as Jack Greenberg, who identified litigation as one strategy to re-ignite what appeared, at the time, to be the European Union’s (the “EU”) stalled project of integrating maligned racial minorities such as the Roma.\textsuperscript{18} Greenberg, along with Thurgood Marshall and other civil rights attorneys, argued \textit{Brown v. Board of Education}.\textsuperscript{19} \textit{Brown} itself, particularly with respect to addressing the lasting ill effects of segregation, offered some litigation strategies for the applicants.\textsuperscript{20}

Beginning in 2007, the ECtHR agreed to hear the Equality Education Cases. Relying upon the European Convention of Human Rights (ECHR),\textsuperscript{21} the applicants, alleged that certain Member States violated their right to education (Article 2 Protocol No. 1) by denying them equal education opportunities as compared to the dominant ethnic population\textsuperscript{22} and that the difference in treatment was impermissibly connected to their race or ethnicity (Article 14).\textsuperscript{23} The Equality Education Cases share certain important commonalities that are germane to appreciating the Court’s development of its theory of discrimination. For example, all applicants were Roma children who alleged that their host member states implemented procedures (e.g., tests or interviews) that resulted in their being channeled into special classes or schools designated for individuals with mental disabilities or that were remedial at the primary or secondary stage of their schooling. Due to the subpar nature of the schools they were assigned to, the applicants alleged they were deprived of the opportunity to experience an education suitable to their intellectual capacities and denied beneficial resources related to fruitful social engagement and, ultimately, gainful economic opportunities.


\textsuperscript{20} See generally MARTHA MINOW, IN BROWN’S WAKE (David Kairys ed., 2010) (discussing the enduring legacy of the Brown v. Board of Education cases).

\textsuperscript{21} Hereinafter “ECHR” or “Convention.”

\textsuperscript{22} Dominance may be defined numerically or in terms of a group’s political position with respect to other racial groups within society. Politically dominant groups are those that, \textit{inter alia}, exert significant influence with respect to the governing laws.

The applicants further alleged that the respondent states’ reliance upon apparently race neutral procedures was in fact racially discriminatory because such procedures significantly disadvantaged Romani children as compared to the majority population.\textsuperscript{24} Under the guise of equal treatment, the respondent states relied upon tests or other assessments to justify the assignment of Roma children to special classes and schools. The cases were either initiated by ERRC or were brought by individuals or groups who sought to build upon the work of ERRC. Another point of commonality concerns the geographic region of some of the respondent countries. Three involved the non-Western democracies of Hungary, the Czech Republic, and Croatia. The remaining three lawsuits were filed against Greece. Greece presents a special case in that it is politically and economically aligned with Western Europe but its geographic location places it within the borders of Eastern Europe.\textsuperscript{25}

B. The Seeds: Roma Case Specifics

Individually, each case marks the progression or reinforcement of the Court’s theory of racial discrimination and its antidiscrimination framework, which is outlined and analyzed in Part III. The discussion below is intended to highlight distinctive aspects of the cases that contribute to the ECtHR’s formulation of the concept of racial discrimination and the development of its methodological approach to right to education matters sounding in racial discrimination.

i. D.H. v. the Czech Republic

\textit{D.H. v. the Czech Republic}\textsuperscript{26} is foundational to the Court’s antidiscrimination education schema. The case exemplifies the Court’s decision-making process in this sphere. The ERRC initiated the matter on behalf of several Czech national Roma children.\textsuperscript{27} The applicants alleged that school officials had improperly assigned them to schools designated for mentally disabled persons and that their ethnic background was the real motivating reason for their assignment despite the government’s representations that it had properly relied on standardized tests and parental consent, factors which did not involve considerations of racial background.\textsuperscript{28} By highlighting the negative impact of the government’s procedures on Roma children as compared to the majority Czech schoolchildren population, the applicants were making an argument about the systemic dysfunction of the Czech school system. They alleged discriminatory practices that rendered the system fundamentally unfair.\textsuperscript{29}

\textsuperscript{24} See, e.g., D.H., App. No. 57325/00 at paras. 153, 197, and 198; Horváth, App. No. 11146/11 at paras. 1, 2, 90, and 109.


\textsuperscript{27} Id. at para. 2.

\textsuperscript{28} Id. at paras. 153, 197, and 198.

\textsuperscript{29} Id. at paras. 3, 124.
To make the more complex argument regarding structural inequality, the applicants relied upon the potent theory of indirect discrimination, which focuses on the effects of a government law or policy rather than on the actor’s language or expressed intentions.

The part of the decision pertaining to the right to education is significant because the ECtHR determined that the right was broad enough to encompass other harms beyond a government’s overt denial of entry to all nationally established schools. The first sentence of Article 2 of Protocol No. 1 declares, “No person shall be denied the right to education.” The Court’s interpretation of this language makes clear that the quality of the education provided is also relevant, not merely access. Denying individuals the right to education can mean limiting them to a substandard education. Focusing on the inferior curriculum of the special schools and the Czech Republic’s failure to incorporate a program that would address any purported learning deficiencies to facilitate moving the applicants back to the mainstream curriculum, the Court concluded that their right to education had been violated.

While the ruling on the right to education is noteworthy, it is the Court’s recognition of indirect discrimination theory that is truly remarkable. The D.H. applicants presented their Article 14 racial discrimination claim as an indirect discrimination case. Specifically, the applicants alleged that even though they could not identify statements or language in its policies evidencing racial prejudice against the Romani people, the Czech government had, nonetheless, “because of their race or ethnic origin . . . treated [them] less favourably than other children in a comparable situation without any objective and reasonable justification.”

30. Id. at para. 195.
31. Id. at paras. 184 and 194.
32. See id. at paras. 198, 207–09.
33. The full text of Article 2 of Protocol No. 1 provides, “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221.
34. See Case “relating to certain aspect of the laws on the use of languages in education in Belgium v. Belgium” (merits), Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63 (plenary) (1968), I(B)(4), p. 28 (“The first sentence of Article 2 of the Protocol (P1-2) consequently guarantees, in the first place, a right of access to educational institutions existing at a given time, but such access constitutes only a part of the right to education.”).
35. D.H., App. No. 57325/00, at para. 135 (“It was undisputed that as a result of their assignment to special schools the applicants had received a substantially inferior education as compared with non-Roma children and that this had effectively deprived them of the opportunity to pursue a secondary education other than in a vocational training centre.”).
36. Id. at paras 198 and 210.
37. Id. at paras. 128–45, 129 (restating applicants’ assertion that “if a policy or general measure had disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory could not be ruled out even if it was not specifically aimed or directed at that group.”).
38. Id. at para. 124.
agreed, thereby giving substance to the broad scope of Article 14, which prohibits discrimination based upon certain protected grounds, such as race, sex, and political opinion. The pertinence of the concept of indirect discrimination to the ECtHR’s theory of racial discrimination is analyzed in the following section.

ii. Sampanis v. Greece

Sampanis v. Greece is next in the corpus. In Sampanis, the Strasbourg Court extended its favorable posture towards equality education racial discrimination cases to the situation of Roma applicants who sought to attend primary school in Greece. Rather than the school administrators placing the applicants within the mainstream school program, they created instead, within the existing primary school, special “preparatory classes” that were exclusively filled by the Roma. As in D.H., the absence of any direct evidence demonstrating racial bias on the part of the school administrators did not preclude the ECtHR from finding that the action of the government in segregating the Roma students, “create[d] a strong presumption of discrimination.”

Here, it is important to note that even though the government could point to the apparently neutral enrollment procedures that required parental consent, there were nonetheless other factors at work that the Court could consider to reach the conclusion that the Roma students had suffered discrimination. In this instance, the Court identified the protests of non-Roma parents displaying racial animus towards Romani people. The Court concluded the protests likely influenced the school administrators’ decision not to enroll the Roma applicants in the mainstream curriculum. The ECtHR also considered: (i) the timing of the government’s decision to institute special classes, which coincided with the applicants’ inquiries regarding enrollment in the mainstream primary school, (ii) the past practices of the school administrators, (iii) the absence of any precedent for the school system establishing separate classes, (iv) the lack of a standard instrument that school officials could use as a basis for determi-

40. The full text of Article 14 provides, “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14 (Nov. 4, 1950), 213 U.N.T.S. 221.
42. European Court of Human Rights Press Release 411, Chamber Judgment Sampanis v. Greece (May 6, 2008) (reporting the ECtHR’s holding that the government’s “failure to provide schooling for [the Roma] applicants’ children during the 2004-2005 school year and their subsequent placement in special classes [in a building adjacent to] the main . . . primary school building” was “a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1 . . . .”).
43. Id. at 3.
44. Id. at 4.
45. Id.
nations of assignments to preparatory classes, and (v) the government’s failure to demonstrate that it had subjected the applicants to tests to determine whether they needed preparatory instruction.46

In 2012, the ECHR revisited Sampanis when various applicants complained that the government had failed to comply with the Court’s 2008 order mandating that Greece work towards integrating the Roma students and discontinue its segregationist practices.47 The Strasbourg Court took the case as an opportunity to propose some corrective alternative courses of action. The recommendations included enrolling the Roma students into other integrated schools, establishing “adult education institutions,” and matriculating Roma adults into the new instruction centers to compensate for the inadequate education they received in the special schools when they were children.48

iii. Orsus v. Croatia

Two years after the first Sampanis decision, the ECHR heard Orsus v. Croatia.49 The ERRC brought the case on behalf of fifteen Roma children who, at some point during their compulsory schooling, were assigned to special classes, solely populated by Roma students.50 The Orsus applicants alleged violations of Article 2 of Protocol No. 1, separately, and in conjunction with Article 14 of the ECHR.51 As in D.H., the complainants, in invoking their right to education, were not arguing that they were prohibited from attending all Croatian schools or that they were excluded from the purview of Croatia’s compulsory education requirements. Instead, they maintained that the government’s act of segregating them from other students and subjecting them to an educational program whose depth and scope were inferior to the curriculum followed in mainstream classes52 translated into a violation of the Convention.53 The applicants further alleged that the respondent State’s actions constituted racial discrimination, which was apparent from the composition of the special classes, as compared to the traditional classes,54 and the overall number of Roma students that the government assigned to them.55

46. Id.
47. Id. at 1–4.
48. Id. at 4.
50. Id. at paras. 2 and 113.
51. Id. at paras. 3, 111, 143, 145.
52. Id. para. 123 (“The Government admitted that it was possible that the curriculum in Roma-only classes were reduced by up to 30% in relation to the regular, full curriculum.”).
53. Id. at paras. 53, 116.
54. Id. at para. 145 (“The complaint in the present case concerns alleged discrimination in respect of the applicants’ right to education on account of their having been assigned, for part of their schooling, to separate classes constituted, according to them, on the basis of ethnic criteria.”).
55. The Orsus applicants alleged, “In total, out of 153 Roma pupils in the first four grades, 137 had been assigned to Roma-only classes. In the fourth grade, out of 44 pupils, 21 were Roma, all assigned to a Roma-only class . . . . The number of Roma-
As a counter, the Croatian government argued that all the students were treated equally. That is, the same tests, “[t]he same legal basis and the same criteria had been applied in respect of all other pupils.”\footnote{56} Rather than deviating from the Convention, the government claimed it was adhering to its educational mission, as dictated in Section 2 of the Croatian Primary Education Act.\footnote{57} Section 2 provides that the goal of primary education is “to ensure the continuing development of each pupil as a spiritual, physical, moral, intellectual and social being, according to his or her capabilities and affinities.”\footnote{58}

The assignment of Roma children to the schools, then, could be read as the government focusing on the applicants’ particular needs, including their need for extensive supplemental instruction in the Croatian language.\footnote{59} Language proficiency was crucial to performance in mainstream classes.\footnote{60}

Despite Croatia’s purported rationales (i.e. catering to different learning abilities of students and addressing Croatian language deficiencies), the Court concluded it had violated the Convention.\footnote{61} It based its ruling on several factors that demonstrate the Court’s concern that public schools adopt coherent practices that align with clear educational objectives. The Court noted, for example, the government’s inability to establish that it had actually tested the students on their Croatian linguistic abilities prior to placing them in special classes.\footnote{62} Also troubling was the school administration’s lack of any clear policy mandating the segregation of students for this reason or prior practice in this regard.\footnote{63} Further evidence of the arbitrariness of the school’s actions include: the fact that the special schools’ curriculum was taught in Croatian and the government had not made any provisions to address the purported language deficiencies,\footnote{64} the government’s failure to establish a pedagogically sound connection between offering the applicants a reduced curriculum in the special schools and the purported objective of improving their language skills,\footnote{65} and the lack of any follow-up assessment and procedure to facilitate the rapid transfer of children from the special schools to mainstream classes.\footnote{66}

\footnote{56. Id. at para. 124.  
57. Id.  
58. Id.  
59. Id.  
60. Id.  
61. Id. at para. 185.  
62. Id. at paras. 159–60.  
63. Id. at para. 158.  
64. Id. at paras. 162–64.  
65. Id. at para. 165 (“As regards the fact that the curriculum taught in Roma-only classes might have been reduced by 30%, the Court first notes that the Government [has] not indicated the exact legal basis for such a reduction. Secondly, and more importantly, they have not shown how the mere fact of a possible reduction of the curriculum could be considered an appropriate way to address the applicants’ alleged lack of proficiency in Croatian.”).  
66. Id. at para. 175.}
Horváth v. Hungary

Horváth v. Hungary followed Orsus. In Horváth, representatives for two Hungarian national children of Roma ethnicity asserted violations of Article 2 Protocol No. 1 in conjunction with Article 14, relying upon indirect discrimination theory. As in D.H., Sampanis, and Orsus, the Horváth applicants were not arguing that their host country foreclosed access to all government-sponsored educational opportunities. Rather, their claim was aimed at Hungary’s systemic practice of administering intelligence diagnostic tests to students and then assigning them to special schools or classes based upon their performance.

The applicants maintained that Hungary’s practices were racially discriminatory in several respects. The tests the school system relied upon were culturally biased and incorrectly assessed their intellectual abilities. Furthermore, the government’s scoring of them resulted in school officials assigning a disproportionate number of Romani children to remedial schools that were established for children with mental disabilities. The applicants further alleged that they were subjected to a substantially less intellectually rigorous academic program. Because they were segregated, they were stigmatized and were deprived of important social integration experiences. As a result, their prospects for future beneficial social exchanges and economic prosperity were severely diminished.

Even though none of Hungary’s practices expressly targeted the applicants, in particular, or Romani children, in general, the litigants charged that, on the whole, they clearly had the effect of disadvantaging a significant number of children of Roma heritage. The Court permitted the ap-

68. According to the Hungarian government’s evidence, the tests included, inter alia, the “Budapest Binet Test,” an IQ test that draws upon the Stanford-Binet scale and is often used by schools to determine whether a child needs remedial education. See Julia M. White, Roma Educ. Fund, Pitfalls and Bias: Entry Testing and the Overrepresentation of Romani Children in Special Education 23, 53 (2012). However, “[t]he diagnoses that the applicants needed special education had not been based on a single test; they had not even been exclusively based on the results of various tests obtained in a single examination session.” Horváth paras. 95–96.
69. Specifically, the complainants alleged that “the definition of mental disability as comprising social deprivation and/or having a minority culture amounted to bias and prejudice.” They further argued that, the tests failed to appreciate the “socio-cultural background” of the applicants, and there was no tailoring of the test to each individual to make sure that the initial interpretation was accurate and the special school placement was appropriate. Id. at paras. 10, 91–93, 118.
70. Id. at paras. 6, 32, 35, 93 (“Until 2007, special schools . . . educated mentally disabled children . . . [and] also . . . children with special education needs, including educational challenge and poor socio-economic background.”).
71. Id. at para. 3.
72. Id. at para. 8, 75 (quoting a report on Hungary compiled by the European Commission against Racism and Intolerance that comments on the need to move away from a “system [according to which] children, once streamed into it, are unlikely to break out, and which overwhelmingly results in low levels of educational achievement and a high risk of unemployment”).
Applicants to introduce statistical evidence to show how their experience fit a predictable scenario of what would likely happen to a child of Roma ethnicity upon entering the Hungarian school system during the relevant time period.\textsuperscript{73} Roma students were more likely to be assigned to remedial and vocational schools than non-Roma students.\textsuperscript{74} Thus, they were subjected to different treatment.

Hungary contended that the disparate number of Roma children in special schools could be explained by “their disproportionate representation in the group deprived of the beneficial effects of modernisation on the mental development of children.”\textsuperscript{75} Essentially, the government’s position was that the tests accurately measured what they were designed to measure. Regardless of ethnic background, all students with “insufficient cultural stimuli,” including children within the dominant Hungarian population, were likely to test in a way that would result in school officials assigning them to remedial schools or a remedial curriculum.\textsuperscript{76} Because this was true for all test takers, not just the applicants, Hungary argued that its actions could not be viewed as racially discriminatory.

While the \textit{Horváth} Court recognized the legitimacy of evaluating students and assigning them to class levels or designing a course of study based upon their performance,\textsuperscript{77} this analysis was only the first layer of inquiry. The second layer concerned whether the school’s determination that the students were mentally disabled based upon the tests and the action taken (i.e. the channeling of them into remedial schools) meant that their right to education was denied and that they experienced discriminatory treatment based upon their race. An actual assessment of the tests was beyond the scope of the Court’s review.\textsuperscript{78}

The Court, however, did focus on Hungary’s scoring system and compared it to testing standards advocated by the World Health Organization (“WHO”)\textsuperscript{79} to determine whether there was any evidence of bias. If the applicants had been evaluated according to WHO scoring standards they would not have been classified as mentally disabled.\textsuperscript{80} Hungary could not “demonstrate that the tests and their application were capable of determining fairly and objectively the school aptitude and mental capacity of the applicants.”\textsuperscript{81} The Court concluded that because the applicants and substantial numbers of Roma students were impacted negatively by Hungary’s errant scoring system, Hungary was engaging in indirect racial dis-

\textsuperscript{73} The Hungarian government did not provide any statistical data to counter the applicants’ evidence of racial discrimination. \textit{id.} at para. 110.
\textsuperscript{74} The data indicated that in 1993, “at least 42% of the children in special [schools or programs] were of Roma origin . . . though they represented only 8.22% of the total student body.” \textit{id.} at paras. 110–11 (“[F]or the Court there is consequently a \textit{prima facie} case of indirect discrimination.”).
\textsuperscript{75} \textit{id.} at para. 96.
\textsuperscript{76} \textit{id.} at para. 96.
\textsuperscript{77} \textit{See id.} at paras. 10, 110.
\textsuperscript{78} \textit{id.} at para. 118.
\textsuperscript{79} \textit{See id.} at paras. 10, 110.
\textsuperscript{80} \textit{id.}
\textsuperscript{81} \textit{id.} at para. 117.
Discrimination in violation of the Convention. Specifically, the government was maintaining a set of practices that had disproportionately harmful effects. The practices were not only detrimental to the applicants, as established by statistical data, but they were also deleterious to the community of Roma children who were eligible for primary school education.

v. Lavida v. Greece

In Lavida v. Greece, the last case in the corpus, the ECtHR built upon the Horváth decision by continuing its strict evaluation of right to education racial discrimination cases where the educational program involves the government’s segregation of students apparently along racial or ethnic lines. The applicants in Lavida were twenty-three children of Roma heritage who lived in various parts of a town in Thessaly, Greece. Regardless of their place of residence, school administrators repeatedly channeled all the Roma children to the same school even if it meant that they had to travel substantial distances. Greece’s Minister of Education and school administrators chose to disregard several notices from the human rights watch NGO, Greek Helsinki Monitor, highlighting the government’s “clear ethnic segregation” of the Roma in its school assignments.

The Greek government also opted not to adopt the Regional Education Department’s recommendations for restructuring the school assignment system. Relying upon the theory of indirect discrimination, the ECtHR held that “[e]ven in the absence of discriminatory intention on the State’s part,” the failure of the government to take corrective measures and to dispense with the practice of segregating Roma students translated into a violation of Article 2 Protocol No. 1 in conjunction with Article 14.

The foregoing decisions display the ECtHR in the process of constructing a framework for judicial review of antidiscrimination education equality cases. They provide the seeds for the Court’s elaboration of a theory regarding the meaning of racial equality in education under the Convention. The framework is composed of components which include: the concept of race, indirect discrimination theory, positive obligations,
and the reasoning approach of proportionality analysis that takes into account the principles of margin of appreciation and European consensus. The next section, examines the judicial conception of race and a mechanism for capturing the occurrence of racial discrimination (i.e. indirect discrimination theory) in outlining essential aspects of the Court’s theory. In Part IV, the Article addresses the Court’s reasoning process through the proportionality construct and its application to the Equality Education Cases.

III. THE COURT’S ANTIDISCRIMINATION EDUCATION FRAMEWORK

A. Tenets of the Court’s Theory of Racial Discrimination and Their Application in Right to Education Cases

There are several principles that are associated with the ECtHR’s theory of racial discrimination and its methodology. The first principle contemplates that there are ethnic and racial group formations within societies that often operate to demarcate difference in innumerable ways. The ECtHR has recognized the interconnectedness of the classifications of race and ethnicity. Socially constructed differences are often implicated in the allocation and distribution of life-enriching resources by socio-legal orders. Structural problems exist within European countries that impair the socio-economic advancement of racial and ethnic minorities who have been framed as “Other” within their societies. The Court’s acknowledgement of ethnic and racial identities and its cognizance of how they function in various societies is informed by the numerous international human rights legal instruments that address racial and ethnic discrimination.

The second principle recognizes that racial discrimination can take at least two forms, which may be represented in a formula. From the Court’s perspective, Article 14 encompasses two kinds of discriminatory practices: (i) actions that treat “differently without an objective and rea-
sonable justification persons in relevantly similar situations”;94 and (ii) actions that fail to take into account differences resulting in a discriminatory effect.95 If a complainant can demonstrate governmental behavior that falls within one of the categories, it signals that the Court needs to further examine the governmental action to determine whether it is inconsistent with the ideals of the Convention.

The third tenet asserts that the occurrence of racial discrimination can be apprehended even when governments, or their agencies, do not expressly declare racist intentions or frame their actions or legal measures in terms of race.96 Racial discrimination often does not present itself as such. It can take form in neutral principles and evenly applied requirements or assessments. The concept of indirect discrimination is an expression of that idea. It looks beyond the formal construction of laws that have the veneer of equal treatment to their actual effects on individuals and minority groups. Indirect discrimination theory is a means to capture racial bias and societal disadvantages imposed on disfavored racial minorities (i.e. what is so often not spoken but all too often felt by ethnic and racial minorities).97 The concept of indirect discrimination, which is discussed in more detail below, is therefore useful to illuminate the patterns of activity and the conditions that are contrary to the rights and restrictions embodied in the Convention.

The fourth principle acknowledges that all discrimination on the basis of race is not prohibited by the Convention and does not necessarily conflict with international human rights laws and principles, particularly the regionalist conception of those rights and principles developed in Europe. This carve-out allows governments or the ECtHR to impose positive action measures (i.e. affirmative action) in order to correct conditions that inflict persistent harms on disadvantaged racial minorities. To the extent that this remedial action makes distinctions on the basis of race, it should not automatically be invalidated under Article 14.

The fifth precept asserts that when further inquiry into a government’s behavior is warranted, whether an action will be permitted to stand or will be held in violation of the Convention can be evaluated through a construct. The construct does not determine whether the action is discriminatory. Instead, it assesses whether the action is permissible in light

96. Id. at paras. 184, 194.
of the mandates and constraints imposed by the Convention. Proportionality analysis serves this purpose within the ECHR’s antidiscrimination education schema.

The sixth principle contemplates that the occurrence of racial discrimination may be proved in innumerable ways. For example, a sign of racism might be the absence of individuals (fitting within an ethnic or racial class) from public schools or government-sponsored academic programs. Meaningful absences can be established through statistical data.

The seventh tenet maintains that structural racial disparities and singular incidents of racism may be corrected by Court intervention through its rulings and the imposition of positive obligations. Levying positive obligations can serve the broad symbolic goals of promoting human rights values and communicating the proper courses of action for Member States.

The foregoing principles inform and are modeled in the Equality Education cases.

B. A Central Component of the Court’s Framework: Indirect Discrimination – Its Historical Origins and the ECHR’s Formulation

The concept of indirect discrimination is an essential component of the Court’s antidiscrimination education framework. A short review of the concept’s historical origins is useful for appreciating its acceptance in the European context as a legally cognizable claim and its potential efficacy for racial and ethnic minorities seeking to achieve equality in education. It is important to note that the Convention neither expressly references “indirect discrimination” nor defines “racial discrimination.” Europe, in recognizing this claim, was inspired by antidiscrimination jurisprudence in the United States, the United Kingdom, and Ireland, along with other international legal instruments.

The influence of the seminal jurisprudence of the United States Supreme Court, aimed at achieving parity in the sectors of education and employment, along with other socio-economic benefits for ethno-racial groups, is apparent if one examines the structuring of the Equality Edu-


cation Cases, the argumentation of the applicants, and some of the theories advanced.\footnote{Greenberg, \textit{supra} note 97, at 936–37.} It is noteworthy that the ECtHR, in the \textit{D.H.} case, cites \textit{Griggs v. Duke Power},\footnote{401 U.S. at 431–36 (recognizing that Title VII not only prohibits acts of direct discrimination but also pertains to “practices that are fair in form, but discriminatory in operation” when an employer required a high school diploma and certain aptitude test scores in order to receive a promotion or to be transferred out of the labor department).} the case in which the United States Supreme Court first applied the theory of disparate impact in the American law context. There are differences between the theories of indirect discrimination and disparate impact even though, in some literature, the terms are used interchangeably.\footnote{See Ioanna Tourkochoriti, ‘\textit{Disparate Impact}’ and ‘\textit{Indirect Discrimination}’: Assessing Responses to Systemic Discrimination in the U.S. and the EU, \textit{EUR. J. HUMAN RIGHTS} 297, 297–324 (2015) (providing a substantive comparison of the concepts of disparate treatment in the U.S. and indirect discrimination in the EU). See also Julie Suk, \textit{Disparate Impact Abroad, in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT} 50 (Ellen D. Katz & Samuel R. Bagenstos eds., 2014) (comparing the development of disparate impact theory in the employment context in the United States and the concept’s role in the formulation of indirect discrimination theory in Europe).} Nonetheless, the two doctrines share in common the approach of examining the effects of laws, policies, and practices to determine whether remediating court intervention is warranted.

One particularly influential document from Europe’s legal canon that shaped the ECtHR’s formulation of indirect discrimination was the EU’s 2000 Race Equality Directive.\footnote{D.H., App. No. 57325/00 at paras. 83, 94.} The Directive defines indirect discrimination as:

\begin{quote}
where an apparently neutral provision, criterion, or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
\end{quote}

The jurisprudence of the European Court of Justice (ECJ) is an influential precursor to the ECtHR’s development of the indirect discrimination concept in its cases.\footnote{Council Directive 2000/43, 2000 O.J. (L 180) 22 (EC) (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin).} The ECtHR has defined the manifestation of indirect discrimination as:

\begin{quote}
[a] difference in treatment [that] may take the form of disproportionately prejudicial effects of a general policy or measure, which though couched in neutral terms, discriminates against a group.”\footnote{D.H., App. No. 57325/00 at para. 184.}
\end{quote}

The \textit{Horváth} Court formulated this idea specifically in terms of racial discrimination by ruling that indirect racial discrimination may be found when “a general policy or measure is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who . . .
are identifiable on the basis of an ethnic criterion.” While there may be differences between the ECtHR’s interpretation of the phrase “disproportionately prejudicial effects” and the ECJ’s interpretation of “particular disadvantage,” the concepts are similar. Furthermore, proving the existence of disparities often entails the introduction of statistics. Despite the various influences, the ECtHR through its jurisprudence has defined the parameters of indirect discrimination in its own unique way; that is the relevant definition operating within its framework.

Deciding whether to accept or reject indirect discrimination theory was a defining moment for the Strasbourg Court. A rejection of this analysis would have left many potential claimants without redress for institutional harms they experienced because they lacked the direct intentional evidence to support their cases. No such evidence is required in indirect discrimination cases. Accepting the theory could have ignited resistance from Member States, threatening the ECtHR’s legitimacy. Further, from a judicial efficiency standpoint, recognizing such cases could substantially increase its already unwieldy caseload.

The Court’s decision to accept the claim in the Equality Education Cases relates to its theory regarding the existence of systemic racial discrimination and its appreciation of the practical and economic challenges that litigants often face in bringing a suit against a Member State. By granting the claim legal legitimacy, the Court was operating from its belief that indirect discrimination theory has the capacity to reify the discriminatory aspects of legal measures that satisfy the requirements of formal equality. It is a powerful mechanism for achieving this goal.

Nonetheless, it is important to recognize that the ECtHR accepted the concept knowing that there were other aspects of its antidiscrimination education stratagem that would ensure fairness and guard against the Court being too predisposed towards such claims. The proportionality construct, discussed in Part IV, is the safeguarding mechanism that involves examining the legitimacy, purpose, scope, and consistency of the measure against the backdrop of the Convention’s ideals.

The central moment for determining the existence of racial discrimination is assessing whether all individuals in relatively similar situations are being treated the same or whether the applicant’s racial group is receiving less favorable treatment. Establishing the negative difference in treatment is a threshold point. From an evidentiary perspective, the cases sug-

110. D.H., App. No. 57325/00 at paras. 184, 94.
111. See EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2015 3–5 (2016) (noting that although the Court has adopted a new procedure to reduce its caseload, it still has a hefty number of cases in the pipeline). See also Profile: European Court of Human Rights, BBC News (Feb. 5, 2015), http://www.bbc.com/news/world-europe-16924514#share-tools [https://perma.cc/5BCL-PDW3].
gest that the Strasbourg Court is indulgent of applicants, at times relying upon “inferences” that “may flow from the facts and the parties’ submissions,” or “similar unrebuted presumptions of fact,” to form conclusions in their favor.\textsuperscript{112} The Court has also been generous towards these claims in permitting but not requiring applicants to introduce “critical and reliable” statistics to establish their claims of indirect racial discrimination.\textsuperscript{113}

Regardless of whether the claim is one of direct or indirect racial discrimination, the ECtHR’s starting point for addressing both is the same.\textsuperscript{114} The Court must delineate the appropriate comparative groups in order to assess whether the applicants “were treated less favourably” than individuals in “a comparable situation”\textsuperscript{115} or, phrased alternatively, “persons in relevantly similar situations.”\textsuperscript{116} Defining a comparative group to determine whether there is indeed differential treatment is not always an easy task.\textsuperscript{117} Thus far, the Court has accepted the delineation of comparator groups that have enabled racial discrimination education cases to proceed and have successful outcomes.

Nonetheless, there are modifications that the Court can make to achieve greater efficiency in resolving these claims and to enhance the possibility that indirect discrimination will function in the way it was intended (i.e., to reveal substantive biases). One recommended adjustment is to revisit whether the comparison approach is the best model given the possibility that an individual or group may encounter difficulties with defining a similarly situated group even though they are suffering harm that should be covered by the Convention.

Another recommendation entails clarifying the acceptable factors for delineating a comparative group. A step in this direction would be to preclude the possibility of defining the comparative group according to the particular practice or effect of the practice that is being challenged. Taking this precaution would render ineffectual an argument like that of dissenting Judge Sikuta in \textit{D.H}. Judge Sikuta maintained that the appropriate comparison was between the applicants who were assigned to spe-

\textsuperscript{112} \textit{D.H.}, App. No. 57325/00 at para. 178.

\textsuperscript{113} \textit{D.H.}, App. No. 57325/00 at para. 188; \textit{see also} Horváth, App. No. 11146/11 at para. 107.

\textsuperscript{114} \textit{See} Eur. Union Agency for Fundamental Rights, Handbook on European Union Non-Discrimination Law 33 (2010). This analysis recognizes, however, that if the claim is that the government failed to take into account differences that it should have, the applicant’s emphasis would be on demonstrating that his circumstances are different from the norm, thereby necessitating different treatment under the Convention. \textit{See} Thlimmenos v. Greece, App. No. 34369/97, Eur. Ct. H.R. para. 44 (2000), http://echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c= [https://perma.cc/TX43-XQJZ].

\textsuperscript{115} \textit{D.H.}, App. No. 57325/00 at para. 183.

\textsuperscript{116} \textit{Id.} at para. 175 (citations omitted).

\textsuperscript{117} Scholars and U.S. litigants have often discussed the difficulties associated with defining the similarly situated comparator group in disparate impact claims. \textit{See}, e.g., Ernest F. Lidge III, \textit{The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law}, 67 Mo. L. Rev. 831 (2002) (discussing problems that the similarly situated requirement creates for courts and litigants in Title VII cases); \textit{see also} Suzanne B. Goldberg, \textit{Discrimination by Comparison}, 120 Yale L.J. 731 (2011) (analyzing the issues associated with the comparator framework in disparate impact claims).
cial schools and all the children assigned to special schools. Based upon Judge Sikuta’s comparator group, there was no substantive difference between his two proposed groups; therefore, the Court should have ruled against the applicants because they could not establish a difference in treatment. Rather than addressing the essence of the applicants’ claim, which is that their assignment to the special schools was faulty and related to their ethnic background, Judge Sikuta’s approach failed to interrogate the validity of the distinguishing measure (i.e., the test used for assigning students). Adopting this Article’s recommendation would promote judicial efficiency by making it easier to quickly evaluate whether or not the proffered comparator groups are equivalent and to determine whether there is evidence of racial discrimination.

Once the applicant has offered sufficient evidence that the challenged government behavior is direct or indirect discrimination, the Court will assess whether the government can maintain the current practice or legal measure by applying proportionality analysis. This approach is in keeping with the two tenets that all racial discrimination does not contravene the Convention, and that the proportionality construct enables the Court to evaluate permissible and impermissible distinctions; it also facilitates the Court’s determinations of when distinctions should have been made but the government failed to do so. An analysis of the proportionality mechanism along with the principles of margin of appreciation and European Consensus follows in the next section.

IV. The Court’s Methodology for Antidiscrimination Education Cases: Deconstructing the ECHR’s Decision-Making by Examining the Concepts of Proportionality, Margin of Appreciation, and European Consensus

The legal principles of proportionality, margin of appreciation, and consensus shape the decision-making process of the Strasbourg Court and, thus, are salient to interpreting the antidiscrimination education cases. The ECHR relies upon these legal tools in its reasoning, explanation, and justification of its decisions. While a more extensive discussion of the principles is developed later in this section, a brief explanation is offered at the outset to frame the analysis.

Proportionality is a judicial analytical construct that the Court applies to assess the validity of a practice by considering the government’s stated objectives, in adopting the practice, in relation to the harm caused. In

119. Judge Sikuta writes, “[T]here was no difference in treatment between children attending the same special school, which children (Roma and non-Roma) are to be considered as ‘persons in otherwise similar situations’. I found no legal or factual ground in the instant case for the conclusion that Roma children attending special school were treated less favourably than non-Roma children attending the same special school.” Id.
order to satisfy the principle of proportionality, a respondent state must demonstrate that there is "a reasonable relationship between a particular objective and the means used to achieve that objective."\textsuperscript{121}

The margin of appreciation refers to the discretionary power a contracting state has to translate the Convention into its own domestic legal framework when it implements new measures or asserts that existing ones are in compliance with Convention requisites. The Court has described the margin of appreciation as "a tool to define relations between the domestic authorities and the Court."\textsuperscript{122}

In applying this doctrine, the ECHR is charged with determining the latitude that should be accorded to Member States.\textsuperscript{123} European consensus refers to the agreement amongst European nations regarding the importance of a Convention right and the appropriate means of adhering to that right.\textsuperscript{124} The Court assesses whether in fact there is an existing consensus on matters. The concepts of proportionality, margin of appreciation, and consensus are interrelated.

This analysis deals with proportionality first because it is a construct for the ECHR’s whole reasoning process. The margin of appreciation and European consensus principles are components that the Tribunal may insert into the calculus of deciding a right to education racial discrimination case, but the analytical frame of proportionality consolidates all the various elements that the Court should take into account.

A. Proportionality Review

i. Purposes Served by Proportionality Analysis and Its Place in the Court’s Framework

The proportionality construct is not the mechanism by which the Court determines whether racial discrimination exists. Rather, proportionality analysis is the means the Court relies upon to evaluate whether a respondent state’s behavior (action or inaction), which creates or contributes to members of an identifiable racial or ethnic group experiencing inequities in the distribution or allocation of societal resources, is permit-


\textsuperscript{123} Steven Greer defines “margin of appreciation” as a doctrine referencing “the room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations.” Steven Greer, \textit{The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?}, 3 UCL HUM. RTS. REV. 1, 2 (2010).

\textsuperscript{124} See Lisbon Network, supra note 121 (describing consensus as “a generic label used to describe the Court’s inquiry into the existence or non-existence of a common ground, mostly in the law and practice of the member states”); see also Laurence R. Helfer, \textit{Consensus, Coherence, and the European Convention on Human Rights}, 26 CORNELL INT’L L.J. 133 (1993).
ted under the Convention. It tests the congruence between a challenged government behavior and the Convention rights asserted.

Proportionality review assists the Court in determining whether a respondent state’s impairment or denial of an individual’s Convention rights is permissible.125 Rather than dispense with proportionality analysis, as some legal scholars have called for,126 the way to protect Convention rights is to craft the test appropriately to allow for a rigorous examination of governments’ justifications for the legal measures that are subject to the Court’s scrutiny.

Once an applicant bringing an Article 14 racial discrimination case demonstrates that there is differential treatment, the burden shifts to the government to explain why the aberrant treatment is warranted and legally justifiable. It is at this moment that proportionality analysis is applied. The ECtHR has formulated proportionality review in various ways.127 Yet a clearly developed segmented approach is notably absent from the decisions in the Equality Education Cases.


126. Some scholars challenge the Court’s reliance upon proportionality review because it channels the Court’s focus in the direction of curtailing rights rather than enforcing them. Their primary concerns are that, rather than ensuring fairness and flexibility in judicial reasoning, proportionality analysis will work to provide justifications for not upholding a Convention right and will lead to unpredictability, generally, in judicial decisions. For example, Von Bernstorff argues, “By empowering judges to perform an essentially political task of ‘weighing’ conflicting interests, it stands in the way of developing a distinctively legal methodology of judicial human rights protection[,] and secondly it fails to erect a body of human rights jurisprudence which provides legal certainty and predictability with regard to particularly intensive infringements of human rights.” Id. at 67 (footnote omitted). Another criticism is that proportionality review threatens the notion that rights are absolute and should not be subject to the balancing tests. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); see also Kai Möller, Constructing the Proportionality Test: An Emerging Global Conversation, in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT, supra note 124, at 31, 32 (discussing various perspectives on proportionality and configurations of the proportionality test). As an antidote to the perceived failings of judicial review balancing that is integral to proportionality review, Von Bernstoff proposes that courts, such as the ECtHR, should instead resort to “bright-line rules” for certain human rights matters. Von Bernstoff, supra note 124, at 67. According to Von Bernstoff, these rules “can be judicially constructed by reference to the ‘essence’, ‘substance’ or ‘core’ of a particular right,” which he identifies as human dignity. Id.

127. The Lisbon Network, a European a group composed of representatives of the Council of Europe Member States devoted to training judges and lawyers and developing core values, has commented on the different approaches the ECtHR has taken towards proportionality review. For example, the network highlighted a strict version of the test that the Court articulated in a case concerning the UK for application to instances involving fundamental rights: “Is there a pressing social need for some restriction of the Convention? If so, does the particular restriction correspond to this need? If so, is it a proportionate response to that need? In any case, are the reasons presented by the authorities, relevant and sufficient?” Lisbon Network, supra note 121 (citing Handyside v. United Kingdom, App. No. 5493/72, Eur. Ct.
For example, in *D.H.*, the Court stated that an Article 14 racial discrimination claim may be established where the government fails to show that its difference in treatment towards individuals or groups, which ostensibly corresponds to racial differences, has an “objective and reasonable justification.” In other words, the government cannot establish that its action “pursue[s] a legitimate aim” or that there is “a reasonable relationship of proportionality between the means employed and the aim sought to be realized.”¹²⁸ The Court’s formulation does not identify how the Court determines that a reasonable relationship exists between the goals stated and the government’s means to achieve them.

The ECtHR should adopt a more detailed and rigorous proportionality construct and highlight the various stages of the analysis in its decisions. In doing so, it will achieve several goals. It will serve consistency and predictability goals by exposing the reasoning of the Court regarding the acceptable rationales for making distinctions (or failing to make them). Member States will have a sense of what they are permitted to do or prohibited from doing in operating their public schools and administering their education programs. Working through the advanced stages of reasoning also showcases the Court’s priorities, in terms of human rights values. A transparent process would signal to future litigants ways of constructing winnable claims.

Legal scholar Kai Möller has identified a detailed formulation of the proportionality test that would be of use to the Court. It has the elements:

> [A] measure restricting a right must, first, serve a legitimate goal (legitimate goal stage); it must, secondly, be a suitable means of furthering this goal (suitability or rational connection stage); thirdly, there must not be any less restrictive but equally effective alternative (necessity stage); and fourthly, the measure must not have a disproportionate impact on the right-holder (balancing stage).¹²⁹

In order to appreciate the value of this construction, it is necessary to consider its various components in more detail.

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¹²⁹ According to Möller, this is the test the German Federal Constitutional Court utilizes. Möller, *supra* note 126, at 33 (citation omitted); see also Nikolaus Marsch & Vanessa Tümmeyer, *The Principle of Proportionality in German Administrative Law*, in *The Judge and the Proportionate Use of Discretion: A Comparative Administrative Law Study* 13, 13–15 (Sofia Ranchordás & Boudewijn de Waard eds., 2015).
ii. Unpacking the Proportionality Test

The requirement that the challenged measure serve a legitimate goal, the first element, is important because the initial burden to articulate valid reasons for implementing a measure is appropriately placed on the Member State. This step also automatically disqualifies purposes that have been declared illegal under the Member State’s laws or under the Convention’s laws. The requirement sets up the judiciary’s inquiry into government action in a useful way to reveal whether the nation’s stated objective is a pretext for some other improper purpose. The reasons the government offers to account for its actions will need to be reconciled, at a later stage, with the means it adopted to achieve the goal. As David Bilchitz notes, “[b]oth the object and the means must be proper.”

One may view this stage as the moment when the government is binding itself in terms of justifying its challenged law, policy, or practice under the Convention.

At first blush, the requirement to furnish an objective and reasonable justification appears to be a low threshold to satisfy. It should be relatively easy for the respondent state to identify a legitimate goal that makes sense in light of its actions. The ECtHR, however, has added a degree of rigor to this stage for racial discrimination cases. Where race and ethnicity discrimination claims are involved, the ECtHR has called for a strict evaluation of the proffered objectives. This means that the Court will eschew a hands-off deferential posture when evaluating these cases, and that, regardless of the reason a government provides to justify its actions, the rationale will be subjected to further examination.

The second stage of proportionality review requires the respondent state to demonstrate that the measure is “suitable” to achieving the stated objective. In commenting on the suitability requirement as it relates to the jurisprudence of the German Constitutional Court, some scholars have suggested that the more appropriate wording is whether the measure has the “capacity of furthering [the government’s stated] aim.” Suitable means that the government must establish that there is a reasonable relationship between the law or policy and the goal.


131. Horváth v. Hungary, App. No. 11146/11, Eur. Ct. H.R. para. 112 (2013), http://hudoc.echr.coe.int/eng?i=001-116124 [https://perma.cc/TCL7-HJDA]. While this Article approves of the strict approach, it is important to recognize that it has the potential of working against ethnic and racial minorities in cases of “reverse discrimination.” Strict judicial review may operate to invalidate positive corrective measures. The Court needs to be mindful of this possibility so as not to chill efforts to address structural inequalities. This is a real concern because, as Sandra Fredman notes, the concept of “reverse discrimination” is gaining currency in Europe as some question how far non-discrimination laws should extend. See Sandra Fredman, Affirmative Action and the European Court of Justice: A Critical Analysis, in SOCIAL LAW AND POLICY IN AN EVOLVING EUROPEAN UNION 171 (Jo Shaw ed., 2000).

For example, the government may state a legitimate goal of improving math scores in its schools. Suppose that within some school districts, girls attain lower math scores than boys in grades ten through twelve. If, in order to achieve the goal of improving math scores, the government implemented the practice of channeling girls who reached a certain age into alternative classes that would not be counted as part of the reporting the schools did for its math scores, and those schools were less academically challenging, there would be questions as to the suitability measure. The value of the second element is that it requires the contracting state to present its logic in fashioning a solution to an issue. The solution must be legal under the relevant laws.

To return to the above example, the government would have to explain how its solution, which discriminates on the basis of gender, furthers its goal. In providing this explanation, if the government wishes to prevail, it will need to be careful about what it reveals because the information will be used in the next stages of evaluating the necessity of the measure and in the ultimate balancing phase of weighing its reasonableness. Even though the second stage serves an important function, it is relatively easy to satisfy. Therefore, it is likely that the respondent state will survive both the first and second stages of the proportionality test. Success in these phases, however, will not end judicial review when the case involves a racial discrimination claim.

The third element of necessity asks whether there is a “less restrictive but equally effective alternative” to accomplish the government’s stated goal. This inquiry is entangled with the critical question of: When is it permissible to curtail an individual’s Convention rights? This phase of the analysis recognizes that there may be numerous strategies for addressing the often complex and challenging problems associated with achieving equality in education. For the Equality Education Cases, the Court would pose the question of whether there was a less restrictive means to accomplish the government’s stated goal of providing the appropriate level of government-sponsored education for all eligible children than separating Roma students from the mainstream student population for most or all of their courses.

According to Nikolaus Marsch and Vanessa Tünsmeyer, the third element is satisfied if “the aim cannot be pursued by another means, which is as suitable to achieve the aim chosen by the authority, but less restrictive with regard to the rights of the citizen.” It is important to address the question of who bears the burden at the necessity stage. In an indirect discrimination case, once the applicant makes his prima facie showing that the government is subjecting him to different treatment from those

133. Kai Möller concludes that “[a]t the suitability stage, even a marginal contribution to the achievement of the goal will suffice.” Möller, supra note 126, at 34.

134. Horváth, App. No. 11146/11, para. 112 (asserting that a strict approach must be adopted to evaluate the government’s objectives in racial discrimination cases).

135. Marsch & Tünsmeyer, supra note 132. David Bilchitz interprets the necessity language as “no other alternative must be available that can equally realize the purpose and be less invasive of the right in question.” Bilchitz, supra note 130, at 43.
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similarly situated, the burden shifts to the respondent state.\textsuperscript{136} In conformity with that evidentiary practice, at times, it is clear that it is the government’s burden to satisfy the elements of the proportionality test, which include demonstrating that its action is necessary (i.e. proportionate).

In practice, however, at other times, it appears that the burden falls upon litigants to show that the government’s action is not necessary, by proposing alternatives. It would likely take more than the applicant’s mere assertion that a practice is not necessary for the ECtHR to agree. Because applicants must identify alternatives that work as well or better than the challenged measure in order to prevail, stage three may potentially disadvantage them. Applicants often have limited resources as compared to the opposing respondent states.\textsuperscript{137}

While it is true that individual applicants who do not have the support of well-funded legal representation (or other human rights organizations) and who do not have substantial personal resources are at a disadvantage, this circumstance is not enough to dispense with the third component of the proportionality test.\textsuperscript{138} In practice, these claims are often brought by organizations (e.g., ERRC) that have the financial resources to assemble compelling cases. Applicants also may have the benefit of human rights reports, best practices suggestions, and statistical data compiled by numerous international organizations.\textsuperscript{139}

The third element serves an important purpose in the ECtHR’s reasoning process. It is imperative, however, that the Court adopts certain changes to the analysis at this phase. For example, the meaning of


\textsuperscript{137} Applicants confront the initial costs associated with filing lawsuits within their national legal system in order to satisfy the exhaustion of domestic remedies requirement of the Convention. See Article 35(1) of the ECHR. While applicants are not required to retain legal counsel in order to bring a case at the supranational level, they may choose to do so. If this is the case, there could be costs unless the legal counsel agrees to handle the case pro bono. Even when law organizations handle ECtHRs cases pro bono, presumably, there are costs associated with expending human capital securing resources, preparing documents, and when permitted by the court, making appearances before the Tribunal.

\textsuperscript{138} Instituting human rights litigation like the Equality Education Cases can be expensive. While statistics are not required to demonstrate that an individual is suffering a difference in treatment, they can be enormously helpful in establishing patterns that the Member State has engaged in regarding ethnic and racial groups. It takes time, money, and other valuable resources to compile statistics. Similarly, the time it takes lawyers to interview individuals and conduct research in order to identify alternative strategies is costly.

\textsuperscript{139} For example, in the Sampanis case, the Greek Helsinki Monitor (“GHM”), an independent human rights organization, filed the notices it had previously submitted to the government regarding GHM’s determination that Greece’s practice of segregating students constituted human rights violations. Sampanis v. Greece, App. No. 32526/05 Eur. Ct. H.R. §1, 1–2. In D.H., Orsus, and Horváth, the ECtHR took into account numerous reports filed by different human rights groups to rule in favor of the applicants. D.H., App. No. 57325/00 at paras. 134 and 161–174; Orsus, App. No. 15766/03 at paras. 138–42; Horváth, App. No. 11146/11 at paras. 114–16.
“equally effective” and “less restrictive” should be clarified and the standards for determining when the government has demonstrated that there are no equally effective measures available should be delineated. Even if a less intrusive and equally effective means cannot be identified, if the challenged measure disadvantages the applicant in a disproportionate way,\textsuperscript{140} the ECtHR should nonetheless be permitted to find that the measure is in violation of the Convention and prohibit its continued use. This recommendation differs from Aharon Barak’s reasoning, which concludes:

[II]f a hypothetical alternative means that equally advances the law’s purpose does not exist, or if this alternative means exists but its limitation of the constitutional right is no less than that of the limiting law, then we can conclude that the limiting law itself is necessary. The necessity test is met.\textsuperscript{141}

Contrary to Barak’s recommendation, allowing the ECtHR the degree of flexibility advocated herein ensures that individual rights are adequately protected. Without carving out this option, the respondent government will have a substantial advantage in asserting that any alternative measures are cost prohibitive and too disruptive to the school system and, thus, not equally effective.\textsuperscript{142} When the Court should exercise this option may vary depending upon the rights involved and whether the case is one challenging a government measure that is aimed at correcting past or present discriminatory practices, as compared to one that alleges that a government measure is discriminatory or perpetuates a situation of indirect discrimination.

Another concern regarding the “equally effective” terminology is that it is unclear, resulting in debates about its meaning. The phrasing invites questions about the appropriate elements that should be included in assessing the effectiveness of the alternative. Is it appropriate to consider factors such as cost, time, efficiency, the requirement of additional re-

\textsuperscript{140} This recommendation assumes that the Court will continue on to the fourth phase of the test to consider whether the measure has a disproportionate impact on the individual alleging a violation of his rights under the Convention.

\textsuperscript{141} Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 323 (Cambridge University Press 2012).

\textsuperscript{142} Aharon Barak argues, for example, that the proposed alternative should not result in an increase in the “financial means dedicated to the advancement of [the government’s stated purpose].” He further argues that “whenever the new means, whose limitation of the constitutional right is of a lesser extent, require additional expense, we can no longer conclude that the means originally chosen are not necessary.” Barak, supra note 142, at 326. In fairness to Barak, his argument does contemplate that the question of whether the law under scrutiny should ultimately be held constitutionally valid can be addressed at another stage in the proportionality test. He writes:

“[T]he issue, therefore, is whether the state’s choice of avoiding the additional expense in order to prevent the further limitation of a human right is constitutional. The necessity test cannot assist us in attempting to resolve this issue; indeed, this discussion should be conducted within the framework of proportionality \textit{stricto sensu}, which is based on balancing.”

\textit{Id.}
sources, or infrastructure? How much weight should each item receive? While the judiciary is in the role of making the final decision, the conclusions of the sovereign state are bound to carry substantial weight because its institutions and administrators are, arguably, better situated to make these determinations.

Notwithstanding its downsides, the third stage performs an important function, precisely because it allows for the identification of various options. It prompts the respondent government and the applicants to be creative in thinking through strategies to address the common goal of achieving racial equality in education. The necessity element permits the judiciary to receive evidence of alternatives from the parties, interveners, etc. which should result in better solutions to problems.

The best course of action may ultimately lie in a combination of what the parties propose. After the different options have been presented, the Court must consider the evidence regarding the effectiveness of those strategies in comparison to the one in place. For example, regarding the government’s stated objective of providing each student with an education appropriate to their learning needs, the practice of excluding students who were deficient in the Croatian language, without more, would violate the Convention. A potential acceptable solution would be to keep Roma students integrated in the mainstream classes while also providing for supplemental instruction and tutors, where needed. Even though the supplemental classes may be populated solely or primarily with Roma students, the harm complained of (i.e. different treatment in the exercise of the right to education) is addressed.

At the very least, the process should generate a panoply of schemes that the contracting state can choose from to accomplish important educational goals, such as providing all students with instruction that is commensurate with their learning levels, identifying when supplemental language instruction or development in other skills is required, and providing students with an opportunity to take advantage of the supplemental training so that they can enjoy the full benefits of their educational experiences.

The fourth part of the test is the most important aspect of proportionality review because the individual rights holder is foregrounded in the analysis and because it requires the Court to scrutinize the instrumentality of political systems (i.e. their structures and policies). The ECtHR

143. This position agrees with David Bilchitz, who proposes a different and more detailed configuration of the necessity stage of the proportionality test. Bilchitz divides his version of the necessity stage into the four parts “possibility, instrumentality, impact, and comparativity.” The argument herein is resistant to concluding that a measure which burdens prohibition on racial discrimination and education rights is necessary on the basis that it is the “best of all feasible alternatives” unless the measure is designed as a corrective to societal disadvantaging treatment imposed on disfavored ethnic and racial minorities. See Bilchitz, supra note 130, at 61.

144. This requirement should not be translated to mean that the respondent states are required to consider every conceivable alternative.

must weigh the measure adopted by the government to achieve its purported objective and the interest the government has in retaining that measure for the benefit of the public in relation to the impact it has on the applicant. The measure “must not have a disproportionate impact on the rights-holder.” This language intersects with the notion of indirect discrimination in that it is concerned with whether (facially neutral) laws and policies place inequitable burdens on rights holders. Rights holders are prominent in this stage in that the Court must contemplate that any curtailment of individual rights throws into question whether the Convention rights are merely ideals or concrete rights that individuals may draw upon in their daily interactions.

The ECtHR should bear in mind that its legitimacy is not just a matter of whether the Member States will continue to recognize this institution and adhere to its rulings, it is also a matter of how individuals within those Member States perceive the ECtHR and what it can do for them. The operation of margin of appreciation and European consensus principles is also evident in this stage. The next section analyzes how those principles shape the ECtHR’s reasoning and argues that the Court should temper its reliance upon them when dealing with racial equality education cases. For now, it is necessary to appreciate that margin of appreciation and European consensus principles bring back into the Court’s reasoning concerns related to the larger project of reaffirming the efficacy of the human rights regime and cultivating the dedication of Council of Europe nations to that framework.

As the foregoing section makes clear, the proportionality test is integral to the process. A carefully delineated proportionality construct can bring clarity and predictability to the Strasbourg Court’s racial equality education jurisprudence. Now that the elements of the proportionality review have been identified, and critiqued, the next section will discuss the operation of the margin of appreciation and European consensus within the proportionality construct and relate these concepts to the Equality Education Cases.

B. The Margin of Appreciation in the ECtHR’s Reasoning Process

The margin of appreciation concerns the discretion the ECtHR accords to Member States to design and implement laws and other regulations within the scheme of the Convention. As a general matter, countries have substantial latitude “in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and re-

146. Möller, supra note 126, at 33.

147. This perspective fits with the ECtHR “This Convention Belongs to You” campaign that is part of the process of building a unified Europe. See Council of Europe, The Convention Belongs to You!, YouTube (Mar. 31, 2010) https://www.youtube.com/watch?v=SZZFaQyK-cM. The ECtHR grants individuals a stake in the international arena.

148. According to Steven Greer, the margin of appreciation is “a pseudo-technical way of referring to the discretion which the Strasbourg institutions have decided the Convention permits national authorities to exercise in certain circumstances.” Greer, supra note 123, at 32.
sources of the community and of individuals." Although this principle is germane to all parts of the proportionality test, it is especially prominent in the fourth phase when the Court weighs the proffered social goal of the respondent state, the disadvantaging effect or harm resulting from the government action taken in pursuance of the goal, and the importance of the Convention rights involved.

The degree of deference the ECtHR grants to the respondent state to pursue the social goal and decide the manner in which it should be accomplished will affect the outcome of this final balancing stage. If the ECtHR adopts a wide margin of appreciation, it means that the respondent state will be granted significant latitude in its interpretation of the Convention, making it unlikely that the Court will find a violation. In contrast, under a narrow margin of appreciation, the discretion of Member States will be severely limited and government action will be subjected to more rigorous scrutiny.

In general, Member States have enjoyed a wide margin of appreciation in many areas pertaining to education including the choice to establish an education system and in the determination and adoption of their curricula. Not surprisingly, then, the respondent governments in the Equality Education Cases argued that their actions fit within the acceptable parameters of state discretion. Some of the more compelling arguments highlighted the particular challenges of the Roma and the need for the ECtHR to act with restraint and patience in allowing Member States to experiment with various approaches for integrating and educating this minority.

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150. See Greer, supra note 123, at 5 (discussing the importance of the margin of appreciation in the Court’s treatment of cases involving certain Convention provisions such as Article 14).
151. Id. at 4.
152. The ECtHR has held that the right to education does not require states to institute a system of education. Notably, the Court has held: “Admittedly, Article 2 of the Protocol (P1-2) does not oblige the Contracting States to provide or finance education; nor does it prevent them issuing regulations governing admission to the educational facilities which they provide or subsidise, for such regulations can be ‘justified by perfectly valid reasons.’” “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, App. Nos. 1474/62, 1677/62, 169/62, 1769/63, 1994/63, 2126/64, 17 Eur. H.R. Rep. at 17 (1968); see also Lisbon Network, supra note 120 (detailing the education decisions over which contracting states retain discretion, notwithstanding the Convention).
153. The Court’s approach is decidedly hands-off in these matters. In this respect, the Court is adhering to the principle of subsidiarity, recognizing that the domestic government is in a better position to address the details of compliance because of its extensive knowledge of the state’s resources and culture, and, thus, it falls within its competence to do so.
155. See D.H., App. No. 57325/00, at paras. 11–16 (J. Jungwiert, dissenting). Judge Jungwiert argues that it is unfair for the ECtHR to make the Czech Republic the scapegoat for Europe’s larger failings in educating Roma children. Citing figures from the document, “Resolution of the Council and the Ministers of Education
For example, the Czech Republic in *D.H.* argued that the “political, social, economic and technical” challenges associated with the Roma meant that the Court should not analyze the government’s solutions solely from the standpoint of whether “fundamental rights” were breached, but rather should “exercise a degree of restraint . . . and confine [itself] to deciding whether or not the competent authorities had overstepped their margin of appreciation.”156 Notwithstanding the persuasive aspects of certain arguments, the ECtHR rejected them. In order to fully understand its reasoning and to lay the foundation for the discussion in Part VI regarding the meaning of the decisions, it is necessary to focus on the fourth phase of proportionality review.

When applying the margin of appreciation to the last stage, the ECtHR weighs the social interest asserted against the “burden” imposed on the applicants’ Convention rights as a result of the action. The alleged harms in the Equality Education Cases ranged from segregation from the non-Roma student population,157 the stigma of being improperly labeled as mentally disabled,158 limited future educational opportunities,159 diminished future earning potential,160 and social exclusion.161 Casting the ef-

meeting within the Council of 22 May 1989 on school provision for gypsy and traveller children,” Judge Jungwiert writes:

The population of the Roma community is estimated (by the same source) at 400,000 in Slovakia, 600,000 in Hungary, 750,000 in Bulgaria, and 2,100,000 in Romania. In total, there are more than 4,000,000 Roma children in Europe, approximately 2,000,000 of whom will, in all probability, never attend school in their lifetimes . . . . Nevertheless, in this sorry state of affairs, some people consider it necessary to focus attention on the Czech Republic, one of the few countries in Europe where virtually all children, including Roma children, attend school.

*Id.* at paras. 7, 10 (Jungwiert, J., dissenting). Agreeing with Judge Jungwiert, Judge Zupančič writes in his own dissenting opinion that:

[The Czech Republic is the only Contracting State which has in fact tackled special-educational troubles of Roma children. It then borders on the absurd to find the Czech Republic in violation of anti-discrimination principles. In other words this violation would have never happened had the respondent State approached the problem with benign neglect.]

*Id.* at 76 (Zupančič, J., dissenting).

156. While it is important to take note of the opinions of the dissenting judges, this Article disagrees with Judge Zupančič’s conclusion. A government’s failure to incorporate Roma children into the school system and to actively make sure that they have access to schools and are attending school would also constitute a violation under the ECHR. See *id.* at para. 146.


159. *Id.* at para. 8.

160. *Id.*

forts of the respondent governments in the most positive light, the ECtHR had to give them some credit for at least attempting to address the educational needs of its entire student population even if the method selected was faulty. In spite of recognizing the government’s effort, what tipped the balance in favor of the applicants was the racial discrimination element. This component, along with the fact that minors were involved, shaped the Court’s determination of the appropriate margin of appreciation.

The Court’s default policy in education cases is to permit broad discretion and grant countries a “certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.” However, in Article 14 cases, the Strasbourg Tribunal has adopted a strict posture where racial discrimination seems to be at the root of the government’s denial of education instruction and its associative benefits to individuals or groups. In matters involving racial discrimination, the ECtHR has made it clear that the margin of appreciation narrows and the government’s rationales will be more closely scrutinized.

A strict standard of judicial review is especially appropriate when dealing with indirect racial discrimination claims, where evidence of dis-

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162. Judge Jungwiert forcefully makes this point in his dissenting opinion to the D.H. case. His argument is essentially that the Court failed to give sufficient attention to the Czech Republic’s attempts to address what many states and other international institutions have recognized as the difficult situation of the Romani people. Rather than penalizing the Czech Republic, the ECtHR should instead have held in the government’s favor and allowed some period of time to work out the negatives associated with its educational programs and assessment practices.


164. Individuals not only have a right of access to education under the Convention but also a right to benefit from that education. For example in Orsus, the Court reasoned:

The right to education, as set out in the first sentence of Article 2 of Protocol No. 1, guarantees everyone within the jurisdiction of the Contracting States ‘a right of access to educational institutions existing at a given time’, but such access constitutes only a part of the right to education. For that right to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed. 

Id. at para. 146 (citations omitted).

165. Even though the Convention articulates individual rights, the Strasbourg Court in its interpretation of those rights looks at minority group identities. In Orsus, for example, the Court reasoned: “While the case at issue concerns the individual situation of the fourteen applicants, the Court nevertheless cannot ignore that the applicants are members of the Roma minority. Therefore, in its further analysis the Court shall take into account the specific position of the Roma population.” Id. at para. 147; see also Horváth, App. No. 11146/11, at para. 112 (“The Court stresses that where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.”). The Orsus Court held that “very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of ethnic origin as compatible with the Convention.” Orsus, App. No. 15766/03, at para. 149.
criminatory intent is likely not available and the government’s rationales for the action at issue often appear reasonable and, at times, compelling. Given the instrumental importance of education and non-discriminatory principles to the project of reinforcing the union of Council of Europe nations, the ECtHR should not rely upon the margin of appreciation doctrine to elevate States’ actions above those values and goals.

C. European Consensus and Its Role in the Court’s Decision-Making Process

The European consensus principle is essential to the ECtHR’s reasoning process. Consensus is a useful concept in that it is one means for the Court to reinforce the connection between Convention values and the Member States. The Court has deployed the idea of consensus in strategic ways. At times, the Court has pointed to various international human rights reports, documents, and instruments to delineate a measurable European consensus on the relevant issues. At other times, it appears that the Court has merely drawn upon the concept as a rhetorical device to imbue its rulings with enhanced legitimacy.

The Court’s reliance upon both strategies is evident in the Equality Education Cases. For example, when the Strasbourg Court concluded that the Roma were in need of “special protection” in the area of education, the Court pointed to the “activities of numerous European and international organisations and the recommendations of the Council of Europe bodies” to document this prevailing sentiment. The ECtHR again invoked the language of consensus when highlighting the status of the applicants as minor children, and the need to assume a protective posture towards them. In justifying its adoption of a strict standard of review for evaluating racial discrimination cases, the ECtHR asserted that there is “an emerging international consensus” regarding the challenges

166. Examples of such arguments are: (i) the action is necessary to provide an effective education for all students; and (ii) the action is necessary in order to identify student-learning deficiencies early. The Government of the Slovak Republic intervened in Orsus to argue that “in the sphere of education . . . States should not be prohibited from setting up separate classes at different types of school[s] for children with difficulties, or from implementing special education programmes to respond to special needs.” Id. at para. 136.


168. See id. (“[C]onsensus in the context of the European Convention on Human Rights is generally understood as being the basis for the evolution of Convention standards through the case-law of the European Court of Human Rights.”).


170. Id.

171. The D.H. Court concluded: “The present case therefore warrants particular attention, especially as when the applications were lodged with the Court the applicants were minor children for whom the right to education was of paramount importance.” Id.
that ethnic and racial minorities encounter in connection with enjoyment of various socio-economic benefits.\(^{172}\)

Acknowledging the Tribunal’s predilection for consensus rationales, parties appearing before the Court often invoke the idea of European consensus to frame their arguments. For example, in advocating the Court’s recognition of the theory of indirect discrimination, one third party inter\-venor argued that: “The Grand Chamber needed to consolidate a purpo\-sive interpretation of Article 14 and to bring the Court’s jurisprudence on indirect discrimination in line with existing international standards.”\(^{173}\)

Despite the value that European consensus brings to the decision-making process, it should not be the determining mechanism when the ECtHR is dealing with its antidiscrimination education docket. Instead, the Court must adhere to its principles and fulfill its responsibility to engage in the analytic moment of reasoning, represented by the proportionality test. In accordance with its antidiscrimination framework, the Court should never simply defer to European consensus or a sovereign state’s determination of the proper way to address an issue when dealing with racial disparity education cases. European consensus does not furnish enough protection for rights-holders. It may even operate to dilute human rights.

Countries can always obfuscate the issues by arguing that the subject of the consensus is unclear. For example, even though there may be a consensus that racial discrimination should not be tolerated, there is ample room to argue that the policy challenged is not racially discrimina\-tory. The Czech Republic in \textit{D.H.} adopted this strategy, when it asserted that a European consensus was lacking “regarding the criteria to be used to determine whether children should be placed in special schools or how children with special learning needs should be educated and [therefore] the special school was one of the possible and acceptable solutions to the problem.”\(^{174}\) Although in this instance the government did not prevail,\(^{175}\) the larger point that the Czech Republic was making is that, if the Court cannot confirm that a consensus exists, it should defer to the judgment of national administrators, thereby according domestic governments a wide margin of discretion.

Furthermore, while states may initially express agreement with the notion of human rights in the abstract, they are less likely to be agreeable when they are cast as a respondent state. When confronted with the Court’s determination of courses of action that respondents must under-
take to fulfill the obligations imposed by the Convention, the reaction may be virulent. Respondent states are likely to offer cultural distinctiveness and domestic competency reasons to justify their rejection of the Court’s rulings.

It is also problematic that the consensus principle alone will not help resolve the disagreements between nations. The Court must mediate between applicants and contracting states over contested meanings of rights and acceptable government practices or the failure to take action. This is the Court’s role. Where the rights at issue demand it, the ECtHR should rule in favor of the individual, even in instances where a consensus amongst the Member States cannot be identified.

As the foregoing section demonstrates, the ECtHR has a definite approach to antidiscrimination education cases that draws upon the reasoning mechanism of proportionality and that incorporates the principles of margin of appreciation and European consensus. There are, however, some inadequately developed areas of the framework that need to be addressed. The Court’s acceptance of the proposed normative recommendations should strengthen that framework to not only benefit the broader European human rights regime, but also to advance the objectives of attaining racial equity in education and dismantling the structural systems in that sphere that preserve racial disparities.

V. POSITIVE OBLIGATIONS – GIVING SUBSTANCE TO THEORY

Positive obligations are intertwined with the Council of Europe’s anti-racial discrimination objectives. They are a part of the Court’s methodological approach to racial discrimination, giving substance to the theory. They are examples of corrective behavior the Court endorses for addressing racial discrimination. Because positive obligations are practices that states may voluntarily undertake or may be judicially compelled to take

177. While there may be a consensus that everyone has a right to education, there are certainly disagreements regarding what constitutes fulfillment of that right and disagreements over the practices one may undertake that are consistent with the right.
178. This latter point refers to debates concerning when the ECHR obligates the government to take affirmative steps towards a group (e.g., women or the Roma) or towards a negative situation (e.g., inequality in education or social marginalization).
179. Karen J. Alter, *Tipping the Balance: International Courts and the Construction of International and Domestic Politics*, 13 CAMBRIDGE YEARBOOK EUR. LEGAL STUD. 1, 2 (2011). This argument is not intended to advocate a strategy that contravenes the principle of subsidiarity, but rather urges the Court to work in conjunction with this principle. That is, the freedom of governments to engage in acts of local governance should not be without limits. Assessing whether nations have remained within their limits with respect to the Convention is an essential role of the ECtHR. Karen Alter underscores the importance of building “compliance constituencies” to strengthen the legitimacy and authority of international courts and ensure that nations adhere to their rulings and reshape their laws to conform with them. Id. at 4.
180. Steven Greer explains that positive obligations “allow[] the Strasbourg Court to interpret the ECHR in a manner which imposes duties upon states [to be active in the protection of Convention] rights rather than merely the negative obligation to avoid violating them.” Greer, *supra* note 123, at 5–6.
and some of them have been framed as corrective orders to address past or ongoing racial discrimination, they may be likened to United States affirmative action measures.  

Like affirmative action, positive obligations that require governments to introduce, alter, or suspend measures that take into account differences (e.g., ethnicity or gender), in order to achieve substantive equality for individuals or groups based upon protected characteristics (e.g., religion or national origin), will be in a constrained relationship with the notion of formal equality. Due to the nature of this legal remedy, which requires sovereign states to demonstrate their compliance with the Convention through action, the ECtHR’s articulation of positive obligations in the Equality Education Cases provoked heated responses. For example, in *D.H. and Others*, the Czech Republic challenged the Tribunal’s authority to impose such obligations, arguing that:

[N]either the Convention nor any other international instrument contained a general definition of the State’s positive obligations concerning the education of Roma pupils or, more generally, of children from national or ethnic minorities . . . Moreover, the posi-

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181. One can hear in some of the positive obligations rulings echoes of President Kennedy’s Executive Order 10925, requiring that government contractors “take affirmative action to ensure” that race and other enumerated factors are not relied upon to disadvantage individuals in their employment. The influence of President Johnson’s Executive Order 11246, which elaborated certain practices and requirements for government contractors to avoid racial discrimination, also is apparent. Notwithstanding this analogy, it is important to note that there are significant differences between the United States’ approaches to affirmative action and those antidiscrimination equality law strategies developing in Europe. Notably, legal innovators and activists in the United States created affirmative action measures within a singular nation while the application in the European context is to those sovereign nations constituting the Council of Europe. Although a detailed analysis of the similarities between U.S. affirmative action and European-style affirmative action is beyond the focus of this Article, the comparison is a useful one because it highlights the legal intervention of the judiciary and other legal institutions to address racial prejudices and inequalities that are manifested in various structures and practices in societies. See Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 Harv. Int’L L. Rev. 331, 331–32, 375–77 (2003) (arguing for supranational judicial restraint in fashioning and reviewing positive obligation remedies in the EU context); see also Bob Hepple, *European Legacy of Brown v. Board of Education*, 2006 U. Ill. L. Rev. 605, 616–20 (2006). Bob Hepple, commenting on positive obligations in the United Kingdom context, defines them as requiring “public authorities to monitor all their activities in order to gauge their racial impact and to develop a remedial strategy . . . [which] must fall short of overt racial preferences.” Id. at 617–18.


183. The Court’s authority to include such obligations as part of its rulings can be found in numerous documents, not the least of which is the Universal Declaration of Human Rights (“UDHR”), a foundational document of the international human rights legal regime. Celina Romany and Joon-Beom Chu note that several provisions of the UDHR frame equality rights in terms of “positive state action.” Celina Romany & Joon-Beom Chu, *Affirmative Action in International Human Rights Law*, 36 Conn. L. Rev. 831, 835 (2004).
tive obligations under Article 14 of the Convention could not be construed as an obligation to take affirmative action. That had to remain an option. It was not possible to infer from Article 14 a general obligation on the part of the State actively to compensate for all the disabilities which different sections of the population suffered from.\(^{184}\)

In *Case of Orsus v. Croatia*, the Court also advocated positive obligations in concluding that the high drop-out rate of Roma children in one of the regions:

called for the implementation of positive measures in order, *inter alia*, to raise awareness of the importance of education among the Roma population and to assist the applicants with any difficulties they encountered in following the school curriculum.\(^{185}\)

In *Horváth*, the Court recognized the need for positive obligations and specifically “took note” of the report of the Committee of Ministers\(^{186}\) which recommended that Hungary: (i) establish “appropriate structures . . . to enable Roma/Gypsy children to benefit, in particular through positive action, from equal opportunities at school;”\(^{187}\) and (ii) “avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests.”\(^{188}\) A disappointing aspect of the *Horváth* decision is that the Court failed to detail the specifics of what the respondent state needed to do in order to comply.\(^{189}\)

Notwithstanding the absence of substantive suggestions, the ECtHR’s positive obligations orders are significant for several reasons. By imposing them, the Court is privileging, appropriately, antidiscrimination and education rights over the sovereign interests of the states to exercise discretion in these matters. The authority to order positive obligations in this realm derives from the Convention’s antidiscrimination and right to education principles.\(^{190}\) Recognizing positive obligations in the educational sphere is the ECtHR’s way of emphasizing that Member States have a duty to dismantle procedures, practices, policies, and systems that reproduce racial inequities. Positive obligations in the Equality Education Cases are framed to highlight those duties:


\(^{186}\) See id. at para. 104

\(^{187}\) See id. at para. 116.


In the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures . . . These obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems, such as active and structured involvement on the part of the relevant social services.¹⁹¹

Despite the reference to “direct discrimination,” as the Equality Education Cases demonstrate, even when the case is one of indirect racial discrimination, positive obligations may be warranted and are within the Court’s purview to impose.

If positive obligation orders are going to be effective, however, it is necessary for the Court to be receptive to follow-up litigation regarding the state’s (non)compliance. When recognizing positive obligations as part of a nation’s duties, the Court should make it express that it is ruling against the respondent state for its past failures to undertake certain actions and that these obligations have a prospective application as well. Respondent states should be prohibited from reproducing, in a different form, behavior or measures that contravene the Convention. The Tribunal should also impose time limits for compliance or, at the very least, for providing evidence that the state is progressing towards compliance. When countries fail to meet deadlines, the ECtHR should impose stiff penalties.¹⁹²

The ECtHR should consider not only monetary penalties but also whether other forms of intervention may be justified. This is necessary in order for the Court to satisfy Article 13 of the Convention, which provides that “[e]veryone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority,”¹⁹³ and the Article 41 “just satisfaction” clause.¹⁹⁴ The Tribunal should entertain the possibility that the remediating penalty is for the government to adopt the plan being offered by the applicants or intervening groups to remedy the situation.

The next section examines how the Equality Education Cases should be interpreted. It argues that the decisions reveal jurisprudential clues regarding the ECtHR’s receptiveness to claims similar to those filed by the Roma. The analysis also highlights guidance the decisions offer to other disaffected ethnic and racial communities that could prove useful should they decide to bring similar claims.

¹⁹² What constitutes an appropriate remedy for ECHR violations has been the topic of human rights scholarship. See, e.g., Minow, supra note 20, at pp. 183–84.
¹⁹⁴ ECHR Article 41 provides: “If the Court finds that there has been a violation of the Conventions or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary afford just satisfaction to the injured party.” Id. at art. 41.
VI. INTERPRETING THE ANTIDISCRIMINATION EDUCATION CASES, REPLICATING THE SUCCESSES, AND EXPANDING THE ECtHR’S FRAMEWORK

This section considers the applicability of the antidiscrimination education framework to matters involving other racial and ethnic groups and other contexts, such as the realm of higher education. It also identifies main factors that likely contributed to the litigation successes of the Roma, for the purpose of considering whether those factors have to be present to replicate the outcomes. It is imperative to contemplate the Court’s next steps in this area. This reflection is both timely and essential given that the Strasbourg Court decided the most recent case in the corpus in 2013.

Europe is undergoing a crisis marked by issues dominating the media such as the backlash against refugees, global economic uncertainty, expressions of dissent by marginalized groups, the rise in tensions relating to religious differences, and the continued integrity of the European Union. Now more than ever, it is necessary for the Court to reaffirm its commitment to certain core values given the current political climate. Ideas representing these values include: education is a paramount essential good that should be distributed fairly amongst people; the human rights of children in the areas of education and non-discrimination are to be protected even at the expense of sovereign interests; ethno-racial integration is good, and segregation in education is to be avoided; social exclusion is to be minimized; overt, covert, and nontransparent racial discrimination in primary, secondary, and postsecondary education should be vigorously rooted out. All these sentiments are intrinsic to the construction and maintenance of a cohesive Europe.

While some may conclude that in the interest of stability the Court should be conservative going forward, an alternative approach, espoused herein, is for the ECtHR to reaffirm the aforementioned values by extending the gains made in the area of racial equality and parity in education. Even if immigration policies change in an effort to stem influxes, migrant populations and their descendants are already present in various parts of Europe. Refugees, new immigrants, asylum seekers, and others fall within the protection of the ECHR. Europe needs to develop poli-


196. As Helene Lambert notes: “Everyone can seek protection of their rights under the ECHR, provided they are present on the territory of a Contracting Party and the right in question is protected by the ECHR.” Helene Lambert, The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities, 24 REFUGEE SURV. Q. 39 (2005).
cies that promote the human rights expressed in the Convention. The Council of Europe and the EU are integral to identifying ways for people to live together productively. Critical to that endeavor is the obligation of governments to treat individuals equitably, with dignity and with life-enriching opportunities.

Collectively, the Equality Education Cases establish a foundation for substantial racial equality gains in the education realm. There is jurisprudential support for the conclusion that the decisions should not be viewed as Roma-specific. They hold promise for all racial and ethnic minorities within Europe who are experiencing marginalization in connection with their educational pursuits. The argument that the cases should not be contextually limited is distinct from asserting that the cases have absolute precedential value for all Council of Europe countries. Rather, the point is that the analysis, evidentiary approach, and conclusions that the ECtHR adopted in the Equality Education Cases are significant and relevant for other marginalized groups and the Court should bear that in mind in hearing future matters. Furthermore, applicants should not be hesitant in bringing other claims of indirect racial discrimination and in articulating positive obligations for the Court to adopt and incorporate into its rulings.

As a preliminary matter, however, it is important to note that education inequality problems are experienced not just by the Roma but also by other racial and ethnic minorities. As Celina Romany and Joon-Beom Chu argue, "‘Minorities,’ ‘migrants,’ ‘cultural groups,’ and ‘ethnic groups’ are descriptive categories that reflect realities not unrelated to racial discrimination and the degradation of groups." These terms are signs of difference that operate in societies. Where differences are demarcated, there is a risk that those who are defined as others in relation to the dominant or majority population will confront disadvantaging treatment in many realms, including that of education. There is impressive evidence to support this claim.

197. The Court’s generous evidentiary approach towards applicants includes: permitting applicants to introduce statistical data to establish racial discrimination (i.e. disparities in treatment), allowing for the shifting of the burden to the respondent government once the applicant has established a prima facie case, and being receptive to various theories to establish racial discrimination, such as the concept of indirect discrimination.

198. Romany & Chu, supra note 183, at 839.

In spite of endeavors to improve the educational attainment of minorities, for the most part, their educational achievements lag behind that of the majority groups. In particular, migrants from non-EU countries and some national autochthonous minority groups are faced with high rates of underachievement, which in many ways limits their future employment opportunities and negatively impacts their livelihood. The reasons for this phenomenon are complex, but it appears that inadequate pedagogical approaches, ethnic discrimination in educational institutions, and inequalities in society, on a larger scale, contribute to this situation.

It is critical for all racial and ethnic minorities who confront structural barriers to socio-economic advancement and discrimination within their countries to be able to capitalize upon the successes of the Roma litigants. Where domestic governments and their institutions fail to devise meaningful solutions to new and chronic problems impairing the right to education for minorities, the supranational court is indispensable to rectifying the situation. As Karen Alter has observed, supranational courts are uniquely poised to accomplish substantial gains in remediating harms imposed by domestic legal orders and in reforming those legal structures to curtail the likelihood that they will inflict similar harms in the future.

There are three items that complicate but should not frustrate extending the Court’s antidiscrimination education schema. One item concerns the Court’s political goals. The rulings adhere to the consensus among western European democracies that it is incommensurate with unified Europe’s human dignity and pluralistic values to racially discriminate against Roma children in a manner that inhibits their integration.

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201. While any form of discrimination (e.g., gender, national origin, religion) that hinders the ability of individuals to take advantage of educational opportunities is deeply troubling, and in fact the Convention prohibits several types of discrimination, this Article is primarily concerned with race and ethnicity. Christoph Grabenwarter comments that “democracy does not simply mean that the views of a majority must always prevail; a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position[.].” GRABENWARTER, supra note 14, at 397 (footnote omitted).

202. Karen Alter writes:

“Politically speaking, the [nternational] C[ourt’s] contribution is to become a catalyst for rights holders to assert their rights and governments to recognize these rights. Litigants claim their rights, and this claiming instigates bargaining in the shadow of the law. Rights holders may well settle for far less than the full realization of their right, and the settlement may reflect power more than law. But in offering to settle, or in letting the case proceed to litigation, the existence of the right gets recognized. Rights claimers of the future can draw inspiration, future litigants can invoke legal precedent, expectations can shift, and in the next iteration litigants, advocates, and judges can ask for more.”

and their attainment of education. From this perspective, the Strasbourg Court was acting to bring in line recalcitrant nations whose institutions and practices may be shaped by values that are contrary to those expressed in the Convention. The cases show the ECHR acting as a disciplinarian, instructing the Czech Republic, Croatia, Hungary, and Greece on appropriate behavior. The decisions suggest that it is acceptable to test students and use the examination as a basis to assign students to an appropriate educational level. The exams, however, must be reliable and actually test what the government purports to test. Any separation of students that apparently corresponds to protected characteristics (e.g., race) must be limited and accompanied by frequent follow-up checks on their progress to allow for re-integration. The Roma litigation presented the opportunity for the ECHR to admonish certain Member States for engaging in non-conforming practices with respect to European human rights values. When other Member States are involved, such as economically and politically powerful sovereigns like France or England, the Tribunal is likely to be more restrained out of fear of weakening state allegiance to this supranational institution.

The harder cases for the Court to broaden the application of its methodology will probably involve dominant nations, higher education, or allegations of intersecting discriminating treatment, such as infringement of the prohibitions on racial or national origin discrimination and religious discrimination resulting in a violation of the individual’s right to education. Other challenging cases may involve instances in which the narrative of meritocracy prevails over the reality of an entrenched structure in which the privileged enjoy the status quo and only a select few others are permitted to enter that echelon.

Still other problematic applications may entail circumstances in which the systemic disadvantaging treatment may not be as blatant or well documented as those involving the Roma, but which are just as troubling from an equality education standpoint. While the Court has recognized that Article 2 Protocol No. 1 pertains to higher education, it has not

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204. See Minow, supra note 20, at 177 (noting the EU’s role in fostering certain social and legal measures designed to address the marginalization of the Roma).

205. Kimberle Crenshaw explains how individuals/groups (e.g., black women) who are covered by two constitutionally protected classifications such as race and gender can end up having their claims effectively erased, because they must be segmented in a binary way to fit either a racial discrimination category or a gender discrimination category, but the harms that they have suffered don’t fit neatly under either heading. See Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991).

206. In Leyla Sahin v. Turkey, the ECHR concluded:

In light of all the foregoing considerations, it is clear that any institutions of higher education existing at a given time come within the scope of the first sentence of Article 2 of Protocol No. 1, since the right of access to such institutions is an inherent part of the right set out in that provision.
decided a case that has the overlapping claims of the right to education, ethnic or racial discrimination, and some other form of discrimination. As Christa Tobler urges, when dealing with overlapping or intersecting discrimination claims, the supranational judiciary should “focus on the higher level of protection from discrimination.” Where mixed racial and religious discrimination are asserted, the Court should undertake extensive inquiry of the challenged policies regardless of the government’s countering arguments of maintaining wide discretion in religious matters.

Despite the concerns, the recognition of the theory of indirect discrimination and the emphasis on non-discrimination principles by both European structures, that of the ECHR/ECtHR and that of the European Union/European Court of Justice, suggest that there may be sufficient judicial appetite and political will to extend the juridical framework beyond the Roma to more ethnic and racial minority groups. The Roma decisions can and should be interpreted more broadly. Such cases need to be filed and accepted for hearing by the ECtHR to test this conclusion.

A second factor that may be construed as weighing in favor of treating the Equality Education Cases as Roma-specific concerns the Court’s assessment of the political tolerance for rulings in favor of the Roma. That is, the ECtHR may have been cognizant of the momentary alignment of interests between Europe’s project of establishing a supranational human rights regime and those of the Romani, and their advocates, in achieving socio-economic equality. According to this view, the ECtHR was able to rule in favor of the Roma applicants, without risking legitimacy, because judicially favorable outcomes for this group were in alignment with Europe’s human rights goals of promoting education and denouncing racial

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While the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no watertight division separating higher education from other forms of education. In a number of recently adopted instruments, the Council of Europe has stressed the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy. As the Convention on the Recognition of Qualifications concerning Higher Education in the European Region states, higher education “is instrumental in the pursuit and advancement of knowledge” and “constitutes an exceptionally rich cultural and scientific asset for both individuals and society.” Consequently, it would be hard to imagine that institutions of higher education existing at a given time do not come within the scope of the first sentence of Article 2 of Protocol No 1. Although that Article does not impose a duty on the Contracting States to set up institutions of higher education, any State doing so will be under an obligation to afford an effective right of access to them.

Id. at paras. 136–37 (citations omitted).

207. Christa Tobler flags a similar problem of intersecting discrimination in commenting on the challenge of applying indirect discrimination when asserting claims under the Race Equality Directive. Tobler writes: “Multiple discrimination cases raise complex issues, not least because of the different rationales underlying the different discrimination grounds . . . . On a practical level, they often pose challenges in view of the differences in scope of the relevant laws and in the derogations they permit.” Tobler, supra note 98 at 44 (2008) (citations omitted).
and ethnic discrimination. The argument regarding the alignment in interests and goals can be translated to pertain to other ethnic and racial groups and, thus, should not be a barrier to enlarging the scope of the Court’s approach.

A third item that complicates extending the antidiscrimination education framework to other racial minority groups is the Court’s recognition of the Roma’s “special vulnerable” status. Taking its cue from international human rights and other advocacy organizations, the Horváth Court described the Roma as “a specific type of disadvantaged and vulnerable minority” in need of “special protection.” For this reason, the Horváth Court concludes, “special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.” Highlighting the special vulnerable status of the Roma raises the questions of: i) whether this status is required in order to take advantage of the ECtHR’s charitable reasoning process and, if so, ii) what are the prerequisites for attaining it.

With respect to the latter query, the Strasbourg Tribunal has noted “the turbulent history and constant uprooting” of the Roma. In some instances there was evidence of the history of maltreatment the Roma suffered from the respondent states. The Court also took into account the Parliamentary Assembly’s report which highlighted the unenviable legal circumstances of the Roma being subjected to “discrimination,

208. This analysis draws upon Derrick Bell’s convergence theory, which asserts that the temporary alignment of the interests of African Americans and whites made many of the gains of the United States civil rights movement possible. Bell asserts that the Brown v. Board of Education decision “cannot be understood without some consideration of the decision’s value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.” Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 83 HARV. L. REV. 518, 524 (1980).


marginalization, and segregation” in many facets of their lives.\textsuperscript{214} Yet, it should not be a requirement that the racial group alleging that they are suffering racial discrimination in the pursuit of their education must demonstrate that they have been subjected to this treatment for centuries, as is the case with the Roma, in order to benefit from the Court’s approach in the Equality Education Cases. This would be too onerous and would limit the efficacy of the Convention and ECtHR as instruments of transformative change.

While the experience of societal and legal maltreatment can help to identify other racial and ethnic minorities who qualify for special vulnerable status, what is important is the experience of the applicants, not the “status.” Other minorities may be marginalized but may not have the benefit of being the subject of numerous reports by NGOs and other human rights organizations.\textsuperscript{215} Often racial oppression manifests over a substantial time period but it can also arise fairly quickly when peoples of different ethnicities, races, gender, faiths, or national origins come into sustained contact with one another. With the contemporary rapid shifts in demographics, which entail new minority transplants moving into areas, there is always a potential for racial groups that are different from majority- or dominant-defined norms to be treated in ways that will cripple their social and economic mobility.

Academic institutions are prime vehicles for socially filtering out individuals and for saddling disfavored groups with inferior instruction, services, and opportunities, all of which ultimately impact their future socioeconomic positioning. For this reason, the ECtHR’s review should be demanding in all matters concerning legal measures that perpetuate racial discrimination and inhibit educational opportunities. Requiring proof of special vulnerability status adds an extra unnecessary layer to establishing an Article 14 claim. Despite the complication of the “special vulnerable” status category, the ECtHR has put the building blocks in place to extend its equality education decisions.

There are items that lend weight to the argument that the ECtHR can and should broaden the frame of its approach to encompass claims involving higher education and more racial and ethnic groups. Language in the ECtHR’s decisions, acknowledging the often inequitable positioning of racial and ethnic minorities in relation to defining majority populations, supports the argument regarding the expandability of the Court’s framework. For example, in \textit{D.H. and Others}, the Strasbourg Tribunal observed:

\begin{quote}
[T]here could be said to be an emerging international consensus among the Contracting States of the Council of Europe recogniz-
\end{quote}

\textsuperscript{214} D.H., App. No. 57325/00, at paras. 58, 182 (quoting the Parliamentary Assembly’s Recommendation No. 1557 (2002) on the Legal Situation of Roma in Europe); see also Or˘s˘u, App. No. 15766/03, at para. 177.

\textsuperscript{215} Lilla Farkas notes that the ECtHR relied on data from “domestic NGOs, sociologists and ombudspersons . . . [and other] [r]eports from Council of Europe monitoring bodies” in deciding the Equality Education Cases. LILLA FARKAS, EUR. COMMISSION, REPORT ON DISCRIMINATION OF ROMA CHILDREN IN EDUCATION 40 (Apr. 2014).
ing the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.\textsuperscript{216}

Here, the Court does not limit its comment to the Roma but instead refers broadly to minority communities. Additional evidence that the ECtHR’s antidiscrimination education jurisprudence is not and should not be limited to the Roma is the Court’s expansive response to an argument made by the \textit{Horváth} applicants asserting that they were the only ethnic group negatively impacted by the practices of the school system.\textsuperscript{217} Rejecting this view, the Tribunal concluded that the applicants did not need to establish that “the different treatment as such resulted from a \textit{de facto} situation that affected only the Roma” in order to establish their case of racial discrimination.\textsuperscript{218} This ruling supports the argument that the Court recognized that disadvantaging elements of an educational system may negatively impact other racial minorities. The holding makes it easier for applicants to establish their cases because it does not insist that they show that the government’s actions solely burden them.

If the ECtHR is receptive to new antidiscrimination education cases, as this Article urges it should be, the Court’s defining language for indirect discrimination of “disproportionately prejudicial effects” affords it substantial latitude. In accordance with its conception of indirect discrimination, the Court should look to patterns of behavior within school districts and across school districts to identify disadvantaging treatment towards individuals or populations of people that are identifiable (and are identified) by race or by ethnic heritage. The ECtHR will also need to refer to the larger society in which the school systems are located for evidence of substantial animus\textsuperscript{219} towards groups who are complaining that schools are indirectly discriminating against them.

In so doing, the Court’s approach would be similar to how it treated evidence of the protests of non-Roma parents in \textit{Sampanis and Others v. Greece}. There, the Court accepted evidence of anti-Roma demonstrations in the community to establish that there was widespread rejection of the Roma and this prevailing sentiment likely tainted the attitudes and practices of school administrators.\textsuperscript{220} Timing is also important. If enough time has passed so that there is empirical evidence that the individual (or group) has been subjected to disadvantaging treatment—and the individual has exhausted his domestic remedies—the case is ripe.

Under the Court’s demanding antidiscrimination education scheme, domestic legal systems would need to make the necessary adjustments—

\begin{footnotesize}
\textsuperscript{216} D.H., App. No. 57325/00, at para. 181 (citations omitted).
\textsuperscript{217} The applicants made this assertion in connection with making their case that they were treated differently from similarly situated groups.
\textsuperscript{218} \textit{Horváth}, App. No. 11146/11, at para. 110.
\textsuperscript{219} It is important to bear in mind that intent is not required to establish a claim of racial discrimination.
\end{footnotesize}
instituting positive action/affirmative action measures where necessary—to ensure that the disadvantaging aspects of the school systems do not continue to prevent a disproportionate number of certain racial groups from enjoying significant quality educational opportunities that would position them to benefit from gainful employment throughout various sectors of society. If these changes prompt litigation of the "reverse discrimination" type, then the Court would need to carefully evaluate the reasons for the program, consulting its theory of racial discrimination. Where the Court determines that new measures are intended to achieve the education equality objectives of the Convention, they should be upheld.

VII. CONCLUSION

Formulating sound strategies requires understanding the meaning of previous court decisions and taking into account the guidance they impart regarding how to address racial disparities in education. The ECtHR is essential to remediating the seemingly intractable problem of racial inequalities in European national education systems and has made inroads in this realm. The Equality Education Cases are the first wave in the Strasbourg Court’s antidiscrimination education jurisprudence. The corpus highlights the ECtHR’s process of wrestling with several difficult questions: How should the Court evaluate state action that purportedly aligns with human rights goals? How should the Court respond when governments assert that their practices are designed to educate all children through a state-sponsored system of public education but the effects are harmful to certain minority groups, either because they fail to reasonably and adequately account for racial differences or they focus too much attention on differences, relying upon them to segregate students?

The next frontier is the harder case involving higher education or politically dominant Member States, such as the United Kingdom, France, Germany, or Italy, where the Tribunal may be more sensitive to challenges to its legitimacy and authority. Those future difficult cases are likely to involve assertions by the respondent states that the Court is improperly transgressing the country’s cultural heritage, or threatening its national security or identity. Reactions to attempts to unravel aspects of systems that are marked by racially discriminatory effects are often

221. The so-called “reverse discrimination” cases are matters in which members from the majority (or dominant) population argue that measures designed to address the inequalities to which minorities are subjected in fact contravene equality laws and norms and, therefore, must be held invalid on that basis. Such cases have been mounted in the United States to challenge numerous affirmative action policies. See, e.g., Regents of the University of California v. Baake, 438 U.S. 265 (1978) (holding constitutionally invalid the university’s use of racial quotas in medical school admissions policies).

222. For scholarship supporting treating corrective measures in the manner proposed, see EUR. UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN UNION NON-DISCRIMINATION LAW 35–43 (2010); see also Mulder, supra note 182, at 69–71 (discussing positive measures and international legal instruments).

framed in this manner. In order to build upon the progress it has made in antidiscrimination education jurisprudence, the ECtHR will need to be bold in its willingness to accept future claims of this nature. Critical to this posture is the application of a thorough exacting proportionality review that privileges the right to education and the prohibition on racial discrimination.