Roma Integration 'All the Way Down': Lessons from Federalism and Civil Rights

Felix B. Chang

felix.chang@uc.edu

Associate Professor

University of Cincinnati College of Law, Ohio

ORCID: https://orcid.org/0000-0002-7532-4339

Felix B. Chang is an Associate Professor at the University of Cincinnati College of Law, where he also co-directs the Corporate Law Center. His current book project compares Roma Rights and U.S. Civil Rights. His prior book was a co-edited volume titled *Chinese Migrants in Russia, Central Asia and Eastern Europe* (Routledge 2011). He received his BA from Yale and his JD from the University of Michigan Law School.

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Abstract

This article argues that critical Romani studies should examine the EU's top-down policies of Roma integration as an exercise in federalism, since the EU's quasi-federalist structure both accommodated and co-opted the fight for Roma rights. To bolster its analysis, this article draws comparisons to the actions of the United States ("U.S.") federal government during Civil Rights. Of course, both Roma integration and Civil Rights are still inchoate projects. However, the longer arc with which scholars have assessed Civil Rights, including its periods of progress and retrenchment, can help develop a framework for predicting how Romani rights within the EU's federalist system might fare during similar cycles. Three lessons flow from the comparison. First, integration policies spurred by the top rung of the federalist architecture can foment a populist backlash, especially if disparities in competence or enforcement prompt deficits in legitimacy. Second, governmental efforts are necessary for integration but not sufficient; they must work in tandem with advocacy at the grass-roots level. Finally, pushing federalism "all the way down" to incentivize local experimentation with Roma policies might counteract obstructionism to Roma integration at the national level, but this is not a panacea. Local experimentation might take the form of self-governing districts and economic set-asides, but they can just as easily permit local institutions to perpetuate exclusion and marginalization.

Keywords

- Civil Rights
- Competence
- Conditionality
- Enforcement
- Federalism
- Integration

Introduction[1]

Roma integration was a prominent part of the European Union ("EU") accession process for the candidate countries of Central and Southeast Europe ("CSEE"). While the policies dating to that period are now a quarter century old, scholars have yet to explore the federalism dimensions of the EU's Roma integration mandate. This deficit is understandable and unfortunate. While the EU expanded EU membership into post-Communist CSEE during its fifth, sixth, and seventh rounds of enlargement, it also pushed for Roma integration. Scholars have also begun to speculate why Roma integration occurred when it did, as a buffer against Romani migrants into Western Europe (Wiener and Schwellnus, 2004: 32). Yet far less has been written about the competence, or authority, of the EU in mandating Roma integration. Consequently, Romani studies has sidestepped the question of how this competence shapes the sense of legitimacy harbored by the accession countries toward the EU. Similarly, the infringement proceedings initiated by the European Commission against certain CSEE members for discriminating against Roma have been welcomed (Amnesty International, 2014; Open Society, 2015; European Roma Rights Centre, 2016a). Yet Romani studies has not explored the functional role of infringement proceedings in mediating relations between the EU and its CSEE constituents – or how remedies for discrimination can be crafted without continuous judicial oversight or enforced without "traditional military power" (Ashton, 2011).

This article argues that critical Romani studies should examine the EU's top-down policies of Roma integration as an exercise in federalism. I define Roma integration as the EU's push for socio-economic integration of Roma into mainstream society, particularly during the accession process for candidate countries in post-Communist CSEE. Confronting the federalism dimensions of Roma integration can help explain the conundrum at the heart of the broader Roma inclusion movement:[2] Why does reality for Roma lag so far behind sweeping legal change? Superficially, the last 25 years have ushered in a golden period for Roma rights in CSEE. Despite the flurry of inclusion initiatives, the gaps between Roma and non-Roma in most areas remain; improvements have been modest, while the situation for many Roma has worsened (Decade of Roma Inclusion Secretariat Foundation, 2015: 12–19).

Other efforts predate the EU's fifth round of enlargement. For instance, in education, where some of the most paradigmatic battles over integration have been fought, the European Community adopted a resolution on schooling for Romani and Traveller children in 1989 (89/C 153/02).[3] Focusing here on the period of post-Communist accession enables a fuller exploration of federalism's effects on CSEE countries, where most of Europe's Romani populations reside. This region constitutes a liminal and marginalized

1. I thank Mathias Möschel, Lan Cao, Deepa Badrinarayana, Jamila Jefferson-Jones, David Noll, and two anonymous reviewers at *Critical Romani Studies* for their thoughtful comments. Thanks, too, to the copyeditors at *Critical Romani Studies* for their thorough work. This article benefited greatly from the "Critical Approaches to Romani Studies" Conference at Central European University and the Inaugural Junior Faculty Workshop at Chapman University Fowler School of Law. Above all, I am grateful to Márton Rövid and Iulius Rostas for their work on this journal and in the field of critical Romani studies.

2. During the accession process, Roma rights were usually phrased as "integration." Later, the Roma rights moved from *integration* to the more sweeping *inclusion* (Sobotka and Vermeersch, 2012: 807).

3. The European Community was one of the "pillars" of the EU before its merger into the EU in 2009, through the Lisbon Treaty.

Other within Europe (Wolff, 1994: 3–9; Bjelić, 2005: 3–6; Todorova, 1997); hence, the efficacy of top-down policies depends on how the EU navigates its complicated relationship with Eastern Europe. The focus here on the EU sidesteps the roles played by the European Community and its prior incarnations, the Council of Europe, the Organization for Security and Co-operation in Europe, and civil society. This gloss on Roma integration is a narrowly focused top-down (rather than bottom-up) perspective that leaves grass-roots efforts and other institutions for subsequent discussion. As a trade-off, the focus on the EU during its eastern enlargement allows for an exploration of federalism's dynamics within the European "South" (or, more appropriately, the European "East") – while also facilitating comparisons with the United States ("U.S."), another federalist system that has struggled to rein in its South.

In law, federalism is understood to be the division of power "between a central authority and the component entities [. . .] so as to make each of them responsible for the exercise of their own powers" (Lenaerts, 1998: 748). Roma integration fits within this rubric: in post-Communist CSEE, the undertaking frequently was spurred by initiatives imposed by the top level of the federalist hierarchy, the supranational EU, upon constituent and prospective members. Yet the failure to frame Roma integration as an exercise in federalism means that scholars have lost an opportunity to connect with the rich body of literature on race and federalism. This literature is well-developed in the U.S., an older federalist system that has alternated between excluding and protecting minority groups. In the U.S., the evolution of minority rights has often tracked the balance of power between federal and state governments. Under the version of federalism which tips that balance toward states, racial minorities have fared badly (Charles and Fuentes-Rohwer, 2015); unsurprisingly, actions to protect minorities have often – though not always – emanated from the federal level.[4]

To help elucidate the virtues and trappings of EU federalism, this article draws comparisons to the actions of the U.S. federal government during the Civil Rights Movement. Three lessons flow from the comparison. First, because of the EU's federalist architecture, EU Roma integration mandates often have been counterproductive, fueling populist antipathy at the member-state level. Second, top-down EU policies must be paired with bottom-up grass-roots efforts. Social movements are usually spurred at the grass-roots level and elicit government response only after pressure (Bell, 1980; Dudziak, 2000). Laws and policies may therefore be necessary, but they are hardly sufficient. Third, this article considers whether federalism may be an antidote to its very own problems. Specifically, if power and autonomy are pushed down to the local level, through initiatives such as set-asides for minority businesses and majority-minority (or self-governing) districts, then localities might serve as "sanctuaries" from hostility in national government or the larger society (Gerken, 2009; Issacharoff & Karlan, 2003). Here recent examples from CSEE are as mixed as their transatlantic predecessors. Federalism is merely a design of governance, but it is not outcome-determinative; pushing federalism "all the way down" (Gerken, 2009) can result in minority integration just as likely as minority exclusion.

In comparing Roma rights to American experiences with federalism, particularly where federalism intersects with Civil Rights, this article follows a broader trend. Over the last decade, scholars have

4. Before the Civil War, however, African-Americans looked to state legislatures and courts in the North, rather than the federal government, for advocacy (Kennedy, 1998: 83).

drawn parallels between Roma rights and Civil Rights with greater frequency – and looked to American scholarship in doing so.[5] For instance, influenced by critical race theory, scholars have argued that Roma and African-Americans share a legacy of structural discrimination (Rövid and Kóczé, 2012; Matache and Oehlke, 2017), that anti-Roma racism inheres in EU law (Möschel, 2014), and that Roma integration was the product of interest convergence between the Roma and political elites (Eliason, 2016). Yet these disparate strands have not coalesced into a unifying framework on Roma integration from the field of law or legal studies.

Romani studies is therefore at a curious juncture. As several conferences at the Central European University have illustrated, the field is developing its critical approach and depth (Roma Access Programs, 2017; Central European University, 2015). Along with that evolution, borrowings from Civil Rights have become more frequent. Yet we must still ensure that the borrowings are precise – and useful. This article makes the case for comparing Roma integration and Civil Rights. Its focus on governmental actors does not suggest that laws and policies are determinative for the success of either movement; however, government involvement is often necessary, especially in enforcing minority protections (Cunningham, 2013 184–214).

Of course, Roma integration cannot be analyzed solely through the lens of Civil Rights.[6] Although both the EU and the U.S. sit at the top of federal or quasi-federal hierarchies, they are bound by different sets of competences, composed of members with different types of sovereignties, and governed by entities wielding different enforcement mechanisms. Parallels must therefore be drawn cautiously.

The remainder of this article proceeds as follows. First, it makes the case for the appropriateness of the Roma integration–Civil Rights comparison. Second, it examines the federalism dimensions of Roma integration. Third, it compares the role of federalism in Roma integration and Civil Rights. The article finishes by extrapolating some general lessons from the comparison.

1. Utility of Comparing Roma Integration and Civil Rights

This section lays the groundwork for comparing Roma integration and Civil Rights as an exploration of how top-down expansion of minority rights succeeds (even if short-lived) or fails (more often than not) in the face of local resistance. It begins with an analysis of the similarities between the comparators, as well as their divergences. To interrogate the comparison's fundamental assumptions, this section considers alternate comparators in the manner of legal comparativists like Hirschl (2014) and Choudhry (1999).

This section then briefly engages with the motivations behind the EU's Roma integration policies. Derrick Bell's interest convergence theory, which has influenced decades of Civil Rights scholarship, provides a

5. Precursors of this trend include, of course, Ian Hancock (1998; 2000).

6. American legal scholars who have written on the Roma frequently compare *Brown* and the 2007 European Court of Human Rights case *D.H. and Others v. Czech Republic* (Greenberg, 2010; Minow, 2013). Of course, this court is a Council of Europe institution, not an EU institution.

useful model here. In 1980, Bell posited that it was a convergence of interests among whites and blacks (and between the federal government and civil rights groups) that enabled school desegregation. Bell's theory has been vindicated by historians such as Mary Dudziak (2000) and Thomas Borstelmann (2001) who documented the connections between Civil Rights and the Cold War. A full probe of interest convergence in Roma integration is beyond the scope of this article, which focuses instead on the EU's *method* of integration. Yet one cannot fully comprehend the method of integration without knowing the motivations for integration. Because interest convergence tracks government motivations, it is an apt framework for exploring top-down trends animating the EU and the U.S.

A. General Themes, Similarities, and Differences

Several common trends justify the comparison of Roma integration and Civil Rights. First, Roma integration and Civil Rights occurred during periods that either saw the downfall or dealt with the aftermath of seemingly immovable ideologies – Jim Crow and Communism. These two ideologies dominated the American South and CSEE, where African-Americans and the European Roma often had been most numerous. Vis-à-vis the U.S. and Europe, these two geographic areas also comprised an ideological and cultural "South," marred by legacies of war, division, and interethnic or interracial problems.

Second, the policies which expanded rights for African-Americans and the Roma were often spearheaded from the top of the federalist hierarchy – that is, the U.S. federal government and the supranational EU.[7] Thus, the heady momentum of integration can be understood as part of a larger endeavor in the legal and cultural construction of the U.S. and Europe. This endeavor framed the American "South" and European "East" as points of contradistinction from the egalitarian and democratic ideals that the U.S. and Europe were pursuing.

Third, Roma integration and Civil Rights fit within the schema of center-periphery relations, which implicates the tropes of hegemony, resentment, and hypocrisy. For majority populations in the American South and CSEE, the pluralism espoused in minority rights was associated with incursions of outside, elitist authority in the U.S. federal government and the EU. These tensions render populism inevitable.

Yet this is a diachronic comparison. While both Roma integration and Civil Rights were counter-majoritarian, temporal differences and historical contexts distinguish the two. The march toward Civil

7. *E.g.*, the Voting Rights Act of 1965, codified at 42 U.S.C. §§ 1973 et seq.; Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d et seq. (prohibiting race, color, and national origin discrimination in programs receiving federal financial assistance); Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e et seq. (prohibiting employment discrimination on the basis of sex, race, color, national origin, or religion); Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), codified at 42 U.S.C. § 3601 et seq.; *Reynolds v. Sims*, 377 U.S. 533 (1964) (legislative districts must be equally apportioned by population); *Brown v. Topeka Bd. of Educ.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 399 U.S. 629 (1950) (separate law school inadequate); *McLaurin v. Oklahoma State Regents*, 399 U.S. 637 (1950) (striking the separation of a black student admitted to a white graduate school); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (housing discrimination by private providers banned under existing law); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state law prohibiting interracial marriage). For EU policies, see section II *infra*.

Rights began in the 1940s (if not earlier), when segregation was socially acceptable and endorsed by law.[8] Segregation was headed for a collision with foreign policy imperatives and decolonization around the world (Dudziak, 2000; Borstelmann, 2001). The Roma integration initiatives of the EU's eastern enlargement, by contrast, date to the 1990s. In the 50 years that elapsed between Civil Rights and Roma integration, international discourse on race relations has coalesced around a baseline that segregation and discrimination are wrong.

Do these differences between Civil Rights and Roma inclusion render their comparison too "thin" and "ahistorical" (Hirschl, 2014: 152)? To determine this, consider some of the alternatives which do not present the same problems – but which might be ruled out for other reasons.

The EU is a unique polity that hovers between federation and confederation, as well as between intergovernmental and supranational, models (Schütze, 2009: 2–8; Craig & de Búrca, 2011: 2–3). For all the similarities between the U.S. and EU brands of federalism, any comparator for Roma integration would have raised problems because the EU has no precise analog. For instance, racial integration or equality policies in European countries organized as either federations or confederations might provide a counterpoint to EU-driven Roma inclusion by keeping the comparison within Europe. However, EU governance defies precise comparison because, again, the polity is neither wholly a federation nor a confederation.

Because the EU is inimitable, an easy comparison can be found in political conditions (e.g., democracy and rule of law) or expansions in rights (e.g., same-sex rights) mandated by the EU, particularly through the conditionality process for Eastern European accession candidates (Kochenov, 2007a: 481–92; 2007b: 87; 2008: 28) which are now member states. Even comparing Roma inclusion to how CSEE states expanded rights for other ethnic minorities, especially minorities who can look to kin-states for advocacy, could have taught profound lessons on how the Roma are protected (or not) (Wiener & Schwellnus, 2004: 32). What all of these alternate comparators offer, then, is the ability to keep the comparison within the EU.

What those comparators lose, however, is the gravitas of race. Racial and ethnic conflict is a particularly thorny issue for Europe, where the twentieth century began with empire and colonization and ended with violent secession to create "ethnically pure" states. For another society to evoke a legacy this entangled with racial strife, the U.S. is a natural choice. America was built upon slaves who were forcefully brought from Africa and excluded from liberties protected by the Constitution.[9] Post-Civil War Reconstruction failed to achieve equality for emancipated slaves (Foner, 1988), who, in the hundred years after emancipation, endured legalized segregation and disenfranchisement (Berman, 2015), extrajudicial killings (Cunningham, 2013), and mass incarceration (Alexander, 2010). These legacies shaped the struggle for equality during the Civil Rights Movement.

8. Some would trace the roots of Civil Rights to even earlier developments, such as the NAACP's anti-lynching efforts (Francis, 2014).

9. The constitutional order also divides and excludes other groups, including Native Americans. As an example of Tribal Critical Race Theory analysis of this dynamic, see Brayboy (2005: 431–434).

A marked difference, of course, is that Civil Rights and Roma rights occurred at very different time periods. In this respect, other contemporary struggles for minority inclusion might be more appropriate benchmarks. However, the comparator must be geographically large enough to allow the physical distance between center and periphery to translate meaningfully into cultural distance. In Europe, this takes the form of a longstanding cultural and political division that aligns with the geographic assignments of East and West; in America during Civil Rights, between North and South. The criterion of geographic scale rules out smaller countries with vibrant minority rights movements.

B. Interest Convergence

As one of the most iconic products of Critical Race Theory, interest convergence has progressed from a provocative axiom to well-documented fact. Interest convergence is simple and accessible, but it is also a clear-eyed approach that tends to trample on dearly held myths. It challenges schoolbook accounts of Civil Rights by contending that the majority conveys rights to minorities only where doing so furthers the majority's interests (Dudziak, 1998: 62–63).

Applied to the European context, interest convergence upends the conventional version of Roma integration, a version which upholds the effort as part of a march toward democratic principles and fundamental human rights. In fact, the historical setting of conditionality belies this gloss. During the mid-1990s, the EU's preparations for enlargement into CSEE coincided with the violent breakup of the Socialist Federal Republic of Yugoslavia. The ensuing wars in Europe's "backyard" and the outward flow of refugees raised both the profile and stakes of ethnic conflict. Consequently, the EU called upon the post-Communist accession candidates – all of which had sizeable minority populations – to improve their minority policies.

In the early and mid-1990s, Roma were not subjects of concern for the EU, which was preoccupied with violent interethnic conflicts that had the potential to overrun borders or catalyze secession (Vermeersch, 2006: 196). Anti-Roma discrimination simply did not fit that model. As late as 1998, the European Commission's accession monitoring reports did not devote much space to the Roma issue.[10] By 1999, however, the Commission had pivoted to address major influxes of Roma refugees into Western Europe and Canada. The treatment of Roma by both CSEE governments and majority populations had escalated to unbearable levels. Incidents such as the burning of Roma homes by vigilantes in Romania in 1993 were becoming more common, often implicating the state (Merlino, 2006). As persecution intensified in the late 1990s, the Roma began fleeing for Western Europe and North America (Vermeersch, 2006: 138–140; Beaudoin, 2015).

10. This is not to say that the plight of Roma was wholly ignored. See, e.g., European Commission, *Hungary: Accession Partnership* (1997); European Commission, Monitoring Report on Slovakia's Progress toward Accession (1998). Ironically, in Slovakia's monitoring report, the Commission even noted that ill treatment of Roma substantiated in Slovakia the decisions of British authorities to grant refugee status to Slovakian Roma applicants.

Alarm over Roma refugees spilled over to the accession process. One by one, the Commission's monitoring reports began to take note of the exodus.[11] As Western Europe and Canada tightened immigration policies, the CSEE candidate countries were enlisted to stem the tide by integrating their Roma populations, to address the root causes of their westward flight (Cooper, 2001/2002: 73; Wiener and Schwellnus, 2004: 32).

Thus, a momentary confluence of interests brought otherwise indifferent elites to the Roma's side. For the EU, it was the fear that if candidate countries were admitted without improving the lives of their most vulnerable minorities, then a vast underclass would enjoy free movement across Europe. For CSEE governments, the motivation to integrate their Roma lay in joining the EU. More often than not, these interests were aligned only briefly, during accession negotiations; as soon as the candidates became members, the force of conditionality dissipated.

Application of the interest convergence theory to Roma integration is hardly airtight; for this theory raises other questions and counterarguments. One corollary of interest convergence theory is that Roma integration suffers from charges of hypocrisy. The high-minded language of political conditionality renders this inevitable. Slovakia, for example, deflected criticism over anti-Roma discrimination by pointing out that the EU members themselves had not all ratified the Council of Europe's Framework Convention on the Protection of National Minorities ("FCNM"), which had been imposed as a condition to EU membership (Vermeersch, 2006: 199). Indeed, the policies of Western Europe signaled to candidate countries that the EU could be flexible about its political conditions.[12] This weakened the EU's legitimacy in promulgating Roma integration, exacerbating problems inherent in the Union's federalist architecture.

Another implication of interest convergence is the power of civil society in driving minority rights. After all, there must be some group for political elites to converge *with*. With both Civil Rights and Roma integration, civil society often came to embody the priorities of minority populations, regardless of whether it truly reflected local preferences (Brown-Nagin, 2011: 7–10; McGary, 2010: 122–127).

Further, interest convergence cannot fully encapsulate the EU's motivations or fully explain its failures. Throughout the course of post-Communist *European* integration, the EU has attempted to inculcate "European" values of democracy and fundamental rights. Minority protections were not solely a utilitarian calculus to keep migrants at bay; they espoused broader aspirations built into conditionality, aspirations of an idealized Europe (Sasse, 2008; Sassatelli, 2009). For all its ethereal aspirations, conditionality did score victories. As a result of the accession process, some countries managed to incorporate aspects of EU political conditions into national law and culture (Sedelmeier, 2008; Kelley, 2004).

11. *See*, e.g., European Commission, *supra* note 130, at 17 (citing the rejection by Finland of Roma migrants from Slovakia); *supra* note 131, at 21 ("The outflow of Slovaks of Roma origin to a number of EU countries has continued and outflows to the Czech Republic have equally been detected. This has resulted in the imposition of visa requirements in certain cases. . .").

12. One of the more recent examples is France's deportation of Roma "back" to Romania and Bulgaria between 2009 and 2012 (European Commission, 2010).

Finally, conditionality lingers. Despite joining in the sixth and seventh rounds, for instance, Bulgaria, Croatia, and Romania have yet to formally enter the Schengen zone (Stone, 2017). In some respects, the pressures of conditionality – and therefore the convergences of interest – have not yet dissipated.

Yet the messy conclusions of interest convergence are not necessarily a failing. They suggest instead that interest convergence must be paired with other explanations for a complete and nuanced explanation of Roma integration.

2. Roma Integration as Federalism

There is a rich body of literature examining the EU's parallels to American federalism (Siedentop, 2001; McKay, 2001; Nicolaidis and Howse, 2001; Tushnet, 1990; Cappelletti, 1986; Backer, 2001; Bermann, 1994). In both the U.S. and EU, power is divided between central and constituent authorities. Of course, the constituents of the two comparators are vastly different: the EU is comprised not of states but nations with full-fledged sovereignty. Consigning that sovereignty to a supranational body is a proposition that nations can find difficult to accept.[13] At various times even in the last two decades, the national impulse to retain sovereignty has stymied European integration, from the drafting of a European constitution to threats to break with the Union (Craig & de Búrca, 2011: 21–24; European Commission, 2017). Despite the seeming incongruence of federalism and sovereignty, the federalism analogy appears to hold when the EU is examined with a functional lens (Isiksel, 2016).

To frame the EU as a federalist enterprise, this section examines Roma integration during a span of 12 years in CSEE, from approximately 1992 to 2004, when EU integration deepened the Union's competences while expanding its membership. During this time, the EU pursued Roma integration, particularly through the accession process for CSEE states. The coincidence of EU integration and Roma integration meant that the Roma rights movement was indelibly associated with the EU for majority populations in CSEE; thus, Roma integration became a problem for the supranational body, the EU, rather than the nations themselves, to resolve.

2.1 The Deepening of EU Power

The question of whether the EU is a federation has inspired endless debate (Schütze, 2009). Despite protestation to the contrary, the federalism of the EU is not *sui generis*, and comparisons to other federalist paradigms can be instructive (Kochenov, 2017: xxvii). For all its vacillation between federation and confederation, as well as intergovernmental and supranational, models, the Union has steadily centralized power at the top of the federalist hierarchy (Weiler, 1991). Thus, as integration took the European Coal

13. Strikingly, even as Germany's Foreign Minister Joschka Fischer argued in 2000 for a "European federation" with division of sovereignties to facilitate the EU's enlargement and integration, he was careful to avoid the word "federalism" (Fischer, 2000).

and Steel Community ("ECSC")[14] into the European Community[15] and then into the EU,[16] the overall trajectory was that the authority of the polity deepened as its membership broadened. During these decades, the polity was coming into its own as a constitutional order featuring judicial review. In several landmark decisions, the highest court, the European Court of Justice ("CJEU"), vindicated the federalist paradigm by proclaiming the supremacy and direct effect of European law over member states (*Van Gend en Loos*, 1963; *Costa v. ENEL*, 1964).

On the eve of the execution of the Maastricht Treaty in 1992, scholars still were pondering whether the European Community – what was to become the European Union – was in fact a federation. The Union seemed to foster no cultural identity, body politic, or strong central administration (Mackenzie-Stuart, 1990: viii–ix). At most, it was an "incipient" federalism, as compared with America's "mature" federalism (Tushnet, 1990: 139–142). That distinction lost much of its force with the execution of the Maastricht Treaty, which created the Treaty on the European Union ("TEU"). Among its many innovations, the TEU established the EU, expanded the competences of the supranational body, enshrined the principle of subsidiarity (which delineated the national and supranational spheres of authority), and introduced the notion of European citizenship (Craig & de Búrca, 2011: 13–24).

Over the next 12 years, the EU would repeatedly attempt to draft a constitution through treaties and intergovernmental conferences, including the Maastricht (1992), Amsterdam (1997), and Nice (2001) treaties and the Laeken Declaration (2004). Only some of these efforts were successful, but ultimately the Constitutional Treaty produced by the Laeken Declaration would fail.[17] Nonetheless, enough law had amassed over the decades – as treaties, directives, regulations, case law, and soft law – to form a robust set of guiding principles for the EU. Commonly known as the *acquis communautaire* (the "*acquis*"), these principles survived the failed attempt to draft and ratify a written constitution (Kochenov, 2007: 43; Delcourt, 2001).

In functional terms, the absence of a formal constitution matters little because the EU wields constitutional mechanisms to augment its governing capacity. The supranational body can convince member states to entrust it with the power to adopt, monitor, and enforce policies, often at the expense of members' sovereignty (Isiksel, 2016: 8). Members must also submit to the EU's system of judicial review, and the CJEU has shown a willingness to exploit ambiguities in the treaties and invent new principles to expand the Union's authority. Through all of these mechanisms, the EU has the capacity to reconfigure the constitutional systems of its member states.

14. The ECSC was created by the Paris Treaty in 1951.

15. The EC was created by the Merger Treaty in 1965. It incorporated the ECSC and two other bodies—the European Atomic Energy Community ("EURATOM") and the European Economic Community ("EEC").

16. The EU was created by the Maastricht Treaty in 1992. It incorporated the EC and two other "pillars" – Justice and Home Affairs ("JHA") and Common Foreign and Security Policy (CFSP). In 2007, the Lisbon Treaty abolished the three-pillar structure.

17. The ratification effort was derailed by Dutch and French rejection.

Yet the EU is a very different type of federation than the U.S. The EU is ultimately an economic union; its antecedents such as the ECSC were economic blocs designed to facilitate trade and organized around the principle that economic interdependence would spur political interdependence – and, therefore, prevent another war. As testament to the primacy of the economic union, the CJEU often has exhibited greater vigor in upholding the free movement of goods, services, persons, and capital under EU law (which the Court calls *fundamental freedoms*) than in defending the "basic human interests enshrined in most domestic constitutions, the European Convention on Human Rights, and the EU Charter of Fundamental Rights" (which the Court calls *fundamental rights*) (*Ibid.*: 96). This does not mean that the EU completely avoids human rights – to the contrary, the EU has enacted rights protections into law,[18] and the CJEU has sometimes shown creativity in vindicating EU competence in this area. However, the centrality of cross-border economic activity within the EU legal order means that forays into human, civil, and minority rights are all the more controversial.

2.2 The Enlargement of EU Membership

As it reconfigured its constitutional order while sharpening its delineations of power in the 1990s and early 2000s, the EU also expanded eastward, into post-Communist CSEE (European Commission, 2013; Emmert and Petrović, 2014: 1373–1385). In 2004, the Czech Republic, Hungary, Slovakia, and Slovenia joined the EU, along with several other countries. Formal accession into the Union was preceded by a decade of monitoring by the European Commission (the "Commission") to ensure compliance with a set of conditions called the "Copenhagen criteria" that the EU had imposed upon candidate countries (European Union, 1993). This process of monitoring, censure, and negotiation was commonly known as "conditionality."

The Copenhagen criteria included a set of political conditions that required the "stability of institutions guaranteeing democracy, the rule of law, human rights and *respect for and protection of minorities*" (*Ibid.*: 13). These conditions became the fulcrum of Roma integration. For all its transformative potential, political conditionality – and, therefore, Roma integration – suffered from two major deficiencies. First, the mandate to protect minorities was as vague as it was aspirational, and the Commission struggled to translate the mandate into precise, measurable objectives. Second, apart from the basic challenges to implementation, the very design of the EU, whose enforcement structure was intended to incentivize economic cooperation, hampered any ability to penalize the infringement of minority protections.

Compared against the EU's extensive guidance on economic conditions, the ambiguity of political conditionality is glaring (Kochenov, 2007: 91). For Roma integration in particular, the Commission's monitoring reports sent incoherent and inconsistent messages to all candidate countries. Year after year, these reports excoriated candidates for failing to remedy the deplorable treatment of Roma (Sasse, 2008: 24). Here Roma integration – or, more accurately, its shortcomings – was featured prominently.[19]

18. Examples include the EU Charter of Fundamental Rights and the Race Equality Directive.

19. The oft-cited example is Slovakia, which the Commission had assessed as failing in the Copenhagen criteria's political conditions in 1997. The Roma situation was even cited as a priority in the 1999 Accession Partnership between Slovakia and the EU. The national government instituted some cosmetic changes, all beset by implementation problems, but ultimately Slovakia was admitted into the EU in step with the other candidates.

Simultaneously, however, the reports also strained to commend the candidates' progress (Vermeersch, 2006: 197).

Worse yet, existing EU members had themselves not met some of the minority protections that the Union was demanding of CSEE candidates (*Ibid.*: 198–199). For instance, a condition of EU membership was ratification of the FCNM. The framework convention set high-level goals for achieving equality for national minorities in law, cultural expression, language rights, and education while also fostering intercultural communication between minority and majority groups.[20] Embarrassingly, it had not been ratified by all Western European countries (Craig & de Búrca, 2011: 362).

Not only did this gap signal that the EU was half-hearted about minority protections, it also entrenched the resistance of national leaders who were playing to xenophobia and Euroscepticism to galvanize their electorates. The most glaring evidence of conditionality's hollowness was the timely admission of all CSEE candidates into the Union.[21]

3. Roma Integration and Civil Rights Compared

The policies which expanded rights for African-Americans and Roma were often spearheaded from the top of the federalist hierarchy – that is, U.S. federal government and the supranational EU. The Voting Rights Act and Civil Rights Act were paradigmatic federal civil rights legislations, while the Justice Department frequently filed *amicus* briefs on the side of plaintiffs in desegregation cases. Federal courts, too, played a prominent role, especially in desegregating public institutions and spaces. Similarly, the EU was an early mover in legal protections for the Roma by conditioning the admission of CSEE candidate countries upon the integration of their Roma populations.

Yet while federal and quasi-federal supremacy fostered Civil Rights and Roma rights, just as often the federalist architecture inhibited progress. For much of American and European history, the powers reserved for the central government were weak; even when the central government committed itself to minority rights, implementation and enforcement were inconsistent. Tempting as it may be to read Civil Rights as a blueprint for Roma integration, both projects are incomplete – each in its own way. Civil Rights is a story of progress and retrenchment, while EU-driven Roma integration resembles a parable of aggressive mandates and empty promises.

This section provides a simple framework for comparing how the federalisms of the EU and U.S. affected the implementation of Roma integration and Civil Rights. Specifically, it compares the competences as

20. The FCNM covers all national minorities, not just the Roma. Notably, "national minorities" is not defined in the FCNM. *See FCNM Factsheet, supra* note 152. Article 3(2) provides that national minorities "may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others." In its interpretation of Article 3(2), however, the COE restricts this "collective dimension" to the right to use of a minority language (Council of Europe, 1995: para. 31).

21. The literature is not uniformly downbeat on conditionality. For glimmers of hope, see Sedelmeier (2008) and Kelley (2004).

well as the remedies and enforcement record (and deficits) of each legal system. To furnish a concrete example, this section concludes with school desegregation, which not only stands as an iconic symbol for integration but has also amassed a substantial body of case law and scholarly analysis.

3.1 Competences

Prior to the Civil Rights era and the fifth round of EU enlargement, minority rights had had a tenuous lineage in the U.S. and EU. In the U.S., the federal government had seldom treaded upon the authority of states, where Jim Crow laws often reinforced segregation and racial hierarchies.[22] In fact, as one of the most notorious examples of the deference of federal judicial review, the U.S. Supreme Court upheld the racial segregation of public spaces under the "separate but equal" fallacy (*Plessy v. Ferguson*, 1896; Klarman, 2008: 256–257). As for the EU, minority protection was seldom a priority in the economically minded Union. The foundational treaties mentioned neither minority rights nor the less controversial principle of equality (Toggenburg, 2000). Yet during respective Civil Rights and post-Communist enlargement, the U.S. and EU would begin a transformative process to affix equality principles firmly at the center of their competences.

Change came slowly in the U.S. Despite generations of action at the grass-roots level (Lau, 2004), the federal government only assumed a more active role in curtailing discrimination during the Cold War (Dudziak, 2000; Borstelmann, 2001). Even when it took action, the federal government moved at an agonizing pace, only responding when violence or racial conflict had shocked the national (or white) conscience (Klarman, 2008: 261). For instance, it took a decade for the Voting Rights Act and two Civil Rights acts to follow on the heels of *Brown*. Nonetheless, although federal hesitancy was rooted in deference to state sovereignty, federal victories in the Civil War and the Reconstruction Amendments – where Southern states had lost the sovereignty-based argument in favor of slavery – should have obviated that concern (Charles and Fuentes-Rohwer, 2015: 133–135). Indeed, as Congress passed Civil Rights laws to redress discrimination at the state level, the Supreme Court upheld an expansive view of federal power by virtue of the Reconstruction Amendments.[23] More recently, the Court has backpedaled on the scope of Congressional authority;[24] yet the ability of the federal government to remedy discrimination has come to be viewed as within the core of its authority (Charles and Fuentes-Rohwer, 2015).

Minority rights in the EU charted an altogether different but similarly uneven path. Prior to the Amsterdam Treaty (1997), EU primary law did not offer a single treaty provision on the protection of minorities

22. Of course, there were prominent exceptions to the contrary. The Reconstruction Amendments and the use of federal troops to protect African-Americans in the U.S. and economic prospects of Roma during Communism (though this does not implicate EU federalism) stand out as bright spots in otherwise bleak histories (Hall, 1984; Marushiakova and Popov, 2015: 21).

23. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 173 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Heart of Atlanta v. U.S.*, 379 U.S. 241 (1964). The glaring precedents to the contrary, which today are recognized as anomalous, are *The Civil Rights Cases*, 109 U.S. 3 (1883), and *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

24. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Morrison*, 529 U.S. 598, 613 (2000); *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (2013).

(Toggenburg, 2000). To be sure, the half of minority rights lineage that was rooted in the human rights principle of nondiscrimination was better developed within the EU's constitutional framework (*Stauder v. City of Ulm*, 1969). Starting in the mid-1990s, a concatenation of further developments deepened and extended EU law on equality. The Amsterdam Treaty amended the TEU to reflect that the Union was founded on respect for human rights, democracy, and the rule of law (Article 6); that respect for these principles was a condition for EU membership under Article 49 TEU; and that if the European Council found a "serious and persistent breach" by a member of Article 6 principles, it could suspend some of the member's rights under the Treaty (Article 7). After the Amsterdam Treaty, the EU Charter of Fundamental Rights and the Race Equality Directive also joined this constellation (de Búrca, 2004).

Admittedly, minority rights cannot be fully subsumed within fundamental human rights (Hillion, 2004: 719). Negative rights such as freedom from discrimination are well established in both U.S. and EU constitutional law; however, affirmative rights, of the kind and magnitude needed to truly incorporate historically enslaved and marginalized groups into society, rest upon shakier foundations. Here, the minority rights jurisprudences of the U.S. and EU diverge. American institutions experimented for several decades with various forms of positive rights programs. This includes the use of affirmative action in employment and university admissions decisions, set-asides for minority businesses in government contracting, and majority-minority districts and cumulative voting in elections. Over time, many of these practices have been overturned in challenges under a plethora of constitutional arguments,[25] but when they stood, they managed to combat structural inequities in ways that anti-discrimination measures could not (Guinier, 1991; Gerken, 2009). By contrast, these measures could not be foisted upon member states by the EU due to a lack of competence (Wiener and Schwellnus, 2004: 11–15; Hillion, 2004: 726).

However, during the accession process, the EU was free to demand a more muscular form of Roma integration than what it was entitled to require of its members. Minority protection under the Copenhagen criteria was far broader than the scope of the *acquis* (Kochenov, 2007: 82). This discrepancy has inflamed the perception of duplicity on the part of the EU; while the Union proscribed anti-Roma discrimination for CSEE candidates, its members were engaging in the very same behavior without sanction (*Common Market Law Review*, 2012).

3.2 Remedies and Enforcement

It is axiomatic that EU governance does not fit neatly within American preconceptions about separation of power among the legislative, executive, judicial, and administrative branches (Craig & de Búrca, 2011: 31). For instance, the Commission, which is charged with applying EU law (TEU Article 17(1)), retains and exercises legislative, executive, and judicial powers (Craig & de Búrca, 2011: 37–39). Yet the Commission has no access to a standing army, so it cannot enforce a judicial remedy

25. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (minority set-aside program); *Shaw v. Reno*, 509 U.S. 630 (1993) (majority-minority districts); *Fisher v. Univ. of Texas*, 133 S.Ct. 2411 (2013) (affirmative action); Shelby County, 133 S.Ct. (preclearance under the Voting Rights Act).

for desegregation the way American Presidents did or threatened to, with a display of military might. Due to both the Commission's hybridity and its limitations, analogies between the Commission and U.S. federal executive branch are imprecise.

For our purposes, however, a better starting point might be judicial remedies devised for persistent segregation in one realm – say, public schools. After all, judicial review is central to delineating the boundaries of state and constituent power under federalism. In Judge Lenaerts' formulation, federalism is present "whenever a divided sovereign is guaranteed by a national or supranational constitution and umpired by the supreme court of the common legal order" (1998: 263). From this perspective, what emerges from American federal courts is a trajectory of progression on desegregation remedies since *Brown* that peaked in 1973 and then steadily backpedaled. By contrast, what emerges from the EU is a nascent problem that may never develop into a body of case law precisely because other institutions can take the judiciary's place in devising remedies.

The celebrated decision in *Brown* that had overruled the "separate but equal" doctrine of *Plessy* was followed the next year by a decision calling for desegregation "with all deliberate speed" (*Brown II*, 1955). Some of the most iconic images from the Civil Rights era, in fact, came from President Eisenhower's forcible integration of Central High School in Little Rock, Arkansas, after *Brown II* (Lewis, 1957). Yet the pace of school desegregation remained glacial; in 1968, the Supreme Court admonished school systems to immediately eliminate traces of segregation "root and branch" (*Green v. New Kent County School Board*). In the way of remedies, the Court authorized cross-district bussing in 1971, along with the use of quotas and reassignment of teachers (*Swann v. Charlotte-Mecklenburg Board of Education*). Two years later, the Court extended its school integration jurisprudence to the American West (i.e., beyond the South and border states) and to Hispanic as well as African-American students (*Keyes v. School District No. 1*, 1973). The following year, however, the Court struck down a multi-district school desegregation program in Detroit, which touched off years of retrenchment in the federal courts (*Milliken v. Bradley*, 1974). Today, American schools have reverted to the same levels of racial segregation as during the era of *Brown*.

EU courts, by contrast, have not taken up the issue of school desegregation. While the European Court of Human Rights – which is *not* an EU institution – has found several CSEE states to have discriminated against Roma schoolchildren (*D.H and Others v. Czech Republic*, 2007; *Sampanis v. Greece*, 2008; *Orsus v. Croatia*, 2010), this issue has not percolated up to the CJEU. This may be in part because, from a functional perspective, other EU institutions (e.g., the European Council, European Parliament, European Commission, and Fundamental Rights Agency) have formulated policies and recommendations to integrate Roma into schools (Danka and Rostas, 2012: 72–82). Yet many of these initiatives do not have any teeth.

One promising development is the Commission's recent decision to pursue infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union against three CSEE states for perpetuating segregated education. The infringement procedure consists of four phases: (1) initial dialogue between the Commission and the member, (2) notification by Commission formally alleging an infringement, (3) delivery by the Commission of a reasoned opinion of infringement, and (4) referral of the matter to the CJEU (Craig & de Búrca, 2011: 413). Appearance before the CJEU is reserved as the last step. While these proceedings may lead to CJEU jurisprudence on anti-Roma discrimination in education, this is not likely to happen. By design, the Commission's enforcement authority under

Article 258 TFEU encourages "friendly settlements" with members accused to have violated EU law (Andersen, 2012: 18). Prior to CJEU referral, there are several opportunities for the state to resolve the matter with the Commission, as well as for the Commission to drop the proceeding. Indeed, the vast majority of cases are concluded with friendly settlement prior to the last phase (Andersen, 2012: 18). In essence, the charge of the Commission under the EU Treaties is to promote the "general interest" of the Union (TFEU Article 17(a)), a charge that is "inherently political" and may steer the Commission toward selective enforcement or premature settlement during infringement proceedings (Andersen, 2012: 18). Thus, when the Commission finally brought infringement proceedings against members for failing to integrate Romani minorities, skeptics contended it was predictable that the Commission selected the Czech Republic, Hungary, and Slovakia. These are three CSEE states that do not carry the political clout of, say, France. In fact, the ultimate result of these proceedings may well be settlement before the CJEU has the opportunity to weigh in and impose monetary penalties.[26]

Of course, pre-litigation posturing and negotiation also unfolds behind the scenes in the U.S. For instance, in 1963, after James Meredith secured an injunction compelling the University of Mississippi to enroll him, Mississippi Governor Ross Barnett orchestrated state-level legislation and executive decrees preventing Meredith's enrollment (*Meredith v. Fair*, 1962; *U.S. v. Barnett*, 1964). President John F. Kennedy and Governor Barnett hurtled toward confrontation, ultimately with U.S. Marshals entering the university campus in Army trucks. Before the clash, however, a series of placatory conversations took place between Barnett and U.S. Attorney General Robert F. Kennedy (Conversation of Attorney General and Governor Ross Barnett, 1962).

Nonetheless, the fact remains that the U.S. federal government *possesses* the power to dispatch federal troops and also to federalize state troops. At various times in American history, this power has conveyed a minimum level of protection for African-Americans by preventing them from being killed by an unruly majority, but, on the whole, the federal government has seldom utilized it (Hall, 1984). Barebones as that protection seems, it can make all the difference (Klarman, 2005: 257). By contrast, the Commission is much feebler. Even at the height of its powers to demand concessions (i.e., during the accession process), the Commission railed against anti-Roma persecution but seemed incapable of much more.[27] After accession, the Commission only could resort to the politicized process of infringement proceedings, whose design was meant to accommodate the sovereignty of member states.

26. *See* TEFU Article 260. In another sense, it can be said that the infringement proceedings against these three CSEE states are *precisely* the investigations that the Commission envisions: these infringements undermine the rule of law and implicate the failure to implement directives. *See* European Commission, *European Governance – A White Paper*, COM/2001/248; *Better Monitoring of the Application of Community Law*, COM/2002/725.

27. In the early monitoring reports on Romania, for instance, the Commission could only note, with a sense of helplessness, that Roma were direly exposed and their situations needed to be vastly improved (European Commission, 1999). The plight of Roma did not significantly improve even up to the point of Romania's accession (European Commission, 2006: 11–12). Notably, this came on the heels of several well-publicized and particularly brutal episodes of killing and persecution (Merlino, 2006).

4. General Lessons

If a movement for equality and integration relies too heavily on laws, policies, and programs spearheaded from the top rung of the federalist hierarchy, government involvement may prove counterproductive. The federalist architecture will spur charges of hypocrisy and inflame populist resistance. These dynamics are especially volatile for the EU, whose enforcement powers are comparatively limited while the sovereignty of its constituent members is comparatively broad. Roma are aware of the predicament. Romani activists have shied away from being identified with EU integration measures, out of the fear that these measures delegitimize Roma integration (Vermeersch, 2006: 200).

However, two caveats can be extrapolated from the Civil Rights comparison. First, if civil society is strong, then it can act as a bulwark against minority rights retrenchment. It was a grass-roots push in the U.S., after all, that spurred Civil Rights legislation. Analyzing Civil Rights exclusively from the standpoints of legislation and litigation only feeds into the "great man" narrative of history, which views the movement as a product of visionary lawmakers and courageous lawyers (Brown-Nagin, 2004). Contrary to this top-down narrative, grass-roots participation was pivotal not only to the advocacy and local enforcement of desegregation cases, but also to the orchestration of reactionary violence that shocked the popular conscience into action (Issacharoff & Karlan, 2003: 37–38).

The obstacles to a similar coalescence of Romani civil society are formidable but not insurmountable. Fracturing of the Romani community due to weak ethnic identity, infighting, and poor leadership is compounded by throngs of NGOs claiming to represent Roma interests (McGary, 2010: 104). Hundreds of Roma rights NGOs are scattered across CSEE; many of them merely entrench a narrow group of elites who specialize in procuring EU grants (Rövid and Kóczé, 2012). While this challenge of authenticity for civil society is not unique (Brown-Nagin, 2004: 230), Roma are a transnational group; their advocacy groups must traverse national borders to concentrate political power while staying true to local concerns. The most effective coalition might be assembled from local and international organizations, paired with national and supranational governments (McGary, 2010: 165–170), but the proper balance of these constituencies will have to be tackled in future research.

The second foil to populism might reside in federalism itself. If the central government exhibits antipathy to minorities, they can rally at the state level for support; if states become hostile, then they can rally at the local level. Translated to Roma integration, this means that the solution to obstructionism at the national level may well be to empower Roma at the local level – to push federalism "all the way down," so to say (Gerken, 2009). This can take the form of self-governing Roma districts or majority-Roma schools that are held to high academic standards. As American experimentation shows, the political power of self-governing districts can translate into economic power if those districts adopt set-asides for Romani businesses (Issacharoff & Karlan, 2003: 47–48). Further, majority-Roma schools can neutralize the stigma that comes from being subsumed within hostile majority-majority schools (James, 2014: 451–452; Bell, 2003).

Of course, these measures are harder to coordinate among the plethora of sovereign EU members than within the U.S. Further, the rationale that federalism inspires local experimentation to serve

"laboratories of democracy" (*New State Ice Co. v. Liebmann*, 1932) misses the mark. At the local level in CSEE, innovation has taken the form of creative measures to circumvent integration mandates, such as establishing religious or neighborhood schools and separate buildings or classes for Roma pupils (European Roma Rights Centre, 2016b). Innovation also has taken the form of deliberate measures to integrate the Roma into municipal life (Goethe-Institut, 2017; Lyman, 2017). Thus, pushing federalism "all the way down" can make minority integration just as likely as minority exclusion.

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