Who Is Who?
Group Rights in Liberal Austria and the Dilemma of Classificatory Procedure

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In imperial Austria, the years between 1905 and 1914 saw half a dozen attempts at compromise between the country's territorially intermingled and politically opposed peoples—its Czechs and Germans, for example, and its Poles and Ukrainians. The compromises between these "races" or "nations" amounted to a dramatic response to a worrisome challenge. In 1897, long-building Czech-German conflict had erupted into demonstrations and riots, and brought down the government. Over the following years, Austria's Parliament and some of the seventeen crownland legislatures, or Diets, had become lamed by unstable majorities and obstructionist minorities. Now, in the compromises, which took the form of crownland legislation, elites sought to reduce conflict by separating the peoples—not territorially but politically, and not hierarchically but on the basis of group equality of rights. At the same time, those elites tried to preserve the core, liberal principles of Austria's constitution of 1867: individual equality of rights, and liberty. They tried to reconcile legal equality for peoples with legal equality for persons, and both of those equalities with racial or national difference. Austria undertook an experiment with what might be called "separate but equal." Unlike the American experiment known by that name, however, the Austrian experiment was in earnest. "Equal" was not a lie.

Through the Moravian Compromise, in 1905, Czechs and Germans in the crownland of Moravia were segregated into mutually exclusive school systems, on the basis of national equality of rights. Czechs ran Czech schools for Czech children, and Germans ran German schools for German children. The electorate for the Diet was also divided, such that Czechs voted for Czech candidates, and Germans voted for German candidates. The number of representatives for each people was set in advance, again on the basis of national equality of rights, and the contingent of German representatives, now no longer in the majority, was equipped with strong minority protections. Next came a compromise in the Bukovina. After 1909, elections to the Diet of that crownland were conducted separately for Ukrainians, Romanians, Poles, and Germans. In Bohemia, Czech and German schoolchildren had already been segregated, with careful attention to equality, before 1900. Now separation was planned of Bohemia's electorate and of more as well. Negotiations over a Tyrolean Compromise, separating Germans from Italians, were advanced, but stalled. A Galician Compromise, dividing Polish voters from Ukrainian ones, became law in 1914. Implementation had to be postponed, however, because of the outbreak of war.[2] When war ended, imperial Austria did too, and with it, the

[1] For criticisms that helped me improve this essay, I thank Peter Bugge, Daniel Gordon, Pieter Judson, and Tara Zahra.

[2] Bosnia-Herzegovina should also be mentioned. Annexed from the Ottoman Empire in 1908, that territory became a part not of Austria but of the larger entity of Austria-Hungary. Thus the legal order imposed on it in 1910 was parallel, not subordinate, to the Austrian constitution. But that order, like several Austrian crownland ones amended between 1905 and 1914, separated inhabitants for elections to the Diet—into Catholics, Moslems, members of the Serbian Orthodox Church, and Jews. See Julius Giegl, ed., Verfassungsgesetze der Länder Bosniens und Herzegovina (Vienna: Manz, 1910).

compromises. If all of them had come into force, they would have directly affected almost twenty million citizens.[3]

This essay focuses on one of the dilemmas which resulted from group rights in a liberal state: the dilemma of classificatory procedure. The group rights created in Austria after 1905 required formal classification. They required determining, in precise, legal fashion, who was Czech and who was German, who was Polish and who was Ukrainian. But how can government mandate classification into nations or other kinds of peoples, in support of group equality of rights, without infringing on individual rights, especially the right of voluntary association? Or rather, how can government mandate national, racial, or ethnic classification, in support of group equality of rights, without infringing on individual rights any more than necessary? Classificatory procedure proves to be not just a technical matter, but an arena where group rights collide with individual ones. As Paul Starr has noted, "Although the conventional, hard-nosed view is that politics is about 'who gets what,' the prior question is who 'who' is."[4] Different classificatory procedures can produce different answers to "Who is who?," and can structure collisions of group rights with individual ones in different ways. This essay approaches the dilemma of classificatory procedure by digging into the Moravian Compromise of 1905. It closes by arguing that the Austrian experiment with liberal group rights a century ago may contain problems and techniques relevant to Affirmative Action today.

I. National Classification in 1905

The Moravian Compromise, a set of laws passed by the Moravian Diet and sanctioned by Emperor-King Francis Joseph of Habsburg in November 1905, established group rights above all in representative government and in education. The Czech and German nations in Moravia were guaranteed 73 and 46 seats respectively in the Diet. They were also guaranteed representation in specific ratios on Diet committees and on Diet-appointed boards of crownland institutions, and considerable control over the Czech-language and German-language public school systems. This required a national partitioning of several subsets of the citizenry. The adult male citizenry was separated into Czech and German electorates for the Diet. In other words, it was divided between two sets of electoral districts, with each set covering Moravia.[5] (A third, nonnational electorate

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[3] There exists no study centered on the "little compromises" of 1905-1914 as a group. Gerald Stourzh is the master of the topic, however, having explained them as a culmination of long, broad trends in Die Gleichberechtigung der Nationalitäten in der Verfassung und Verwaltung Österreichs, 1848-1918 (Vienna: Verlag der österreichischen Akademie der Wissenschaften, 1985). He has also examined individual cases and aspects in several essays, cited in the footnotes which follow.

[4] Paul Starr, "Social Categories and Claims in the Liberal State," in Social Research, vol. 59, no. 2 (summer 1992), 289-295.

[5] Landesgesetz- und Verordnungsblatt für die Markgrafschaft Mähren (Brünn: Rohrer, 1906), 2-7 (Nr. 1, §3-15), 10-17 (Nr. 2, §1-15). For a summary of the Moravian Compromise and of the historiography concerning it, see Jiří Malíř, "Der mährische Ausgleich als Vorbild für die Lösung der Nationalitätenfragen?," in Thomas Winkelbauer, ed., Kontakte und Konflikte. Böhmen, Mähren und Österreich: Aspekte eines Jahrtausends gemeinsamer Geschichte (Horn-Waidhofen an der Thaya: Waldviertler Heimatbund, 1993), 337-46. Why it was decided to partition the Diet electorate, rather than to introduce proportional voting, as well as why seats were allocated in a ratio of 73:46 (or to be more precise, 73:40:6—see note 65), are questions for

contained 200-odd great landowners, who had the right to vote in one of the national electorates as well. Its 30 seats, as well as 2 seats filled ex officio by Moravia's bishops, combined with the Czech and German seats to yield a total of 151.) School-age children were separated into Czech and German schools. Because the local, district, and crownland school boards that oversaw those schools were separated at the same time, members of those boards were separated nationally, too. So were the employees of nationally divided crownland institutions, which included public secondary schools. Only adult females and children under the age of six—ineligible to vote, to serve on school boards, or to attend primary or secondary school—were not separated officially into Czechs and Germans. The rest of the 2.5 million Austrian citizens resident in Moravia were.

The group rights created through the Moravian Compromise required formal classification. But the Compromise specified classificatory procedures only incompletely. Indeed, as a judge noted in 1906, "Regarding the procedure for determining the national belonging of members of the school authorities, no particular provisions are contained in the law."[6] What, then, did the Compromise specify about the "national belonging" or "nationality" of school board members? [7] And what provisions did it contain concerning the national classification of schoolchildren and of voters?

IA. Local School Board Members

Beginning in 1869, long before the Moravian Compromise, Austrian law mandated that municipal governments provide a free education for all resident children between the ages of six and fourteen. At first, crownland school boards possessed full discretionary authority to decide in which language that education would be provided in each municipality. (Thanks to national tensions, above all between Czechs and Germans in the neighboring crownland of Bohemia, bilingual instruction was prohibited by Article 19 of Fundamental Law 142 of 1867, whose final sentence read as follows: "In those crownlands inhabited by more than one nation, public institutions of education shall enable each of the nations to be educated in its language, without being compelled to learn a second language of the land."[8]) From the 1870s, however, as will be explained in Section IB, court rulings had set progressively stricter procedural standards

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another essay. Suffice it to say here that through partitioning, the Diet ratio could be set roughly halfway between the demographic ratio of Czechs to Germans in Moravia (understood, on the basis of language data in the census, to be about 72:28) and the per capita ratio of Czech to German tax payments (understood to be about 1:2). Czech leaders embraced the former, quantitative understanding of equality, while German leaders embraced the latter, qualitative one. See Jeremy King, "Group Rights in Liberal Austria: The Dilemma of Equality in Proportional Representation," in Lukáš Fasora, Jiří Hanuš, and Jiří Malíř, eds., Moravské vyrovnání z roku 1905/Der mährische Ausgleich von 1905 (Brno: Matice moravská, 2006), 27-42.

[6] Rudolf von Herrnritt, "Die mährischen Ausgleichsgesetze und das Nationalitätsrecht," in Österreichische Rundschau, vol. 6 (1906), 171.

[7] Regarding the inconsistent terminology used in Austrian jurisprudence, see Josef Lukas, "Territorialitäts- und Personalitätsprinzip im österreichischen Nationalitätenrecht," in Jahrbuch des öffentlichen Rechts der Gegenwart, vol. 2 (1908), 398.

[8] Edmund Bernatzik, Die österreichischen Verfassungsgesetze mit Erläuterungen, second edition (Vienna: Manz, 1911), 426-27.

regarding the determination of the language of instruction in public elementary schools.[9]

To cover the cost of the education, each municipal council levied property taxes—which were paid only by a wealthier minority of male residents. By no coincidence, that minority made up the electorate for the municipal council. And the municipal council appointed most members of the local school board, which drew up the school budget. This arrangement kept property taxes down, by preventing most parents from having a say in how much money was spent on the education of their children. It protected individual property rights. But in binational municipalities, the system did not prevent the national majority on the council and on the local school board from allocating a disproportionate amount of money to those schools which used the majority's language. It did not protect national rights. In Moravia until 1905, Czech-dominated municipalities often discriminated against their German schools, and German-dominated municipalities often discriminated against their Czech ones. Such were the realities of nineteenth-century Austrian liberalism.[10]

It was in part to prevent such discrimination that the Moravian Compromise divided school boards nationally. But only the Austrian Parliament could create a new funding mechanism for schools, or a new set of appointment procedures for school boards. The Moravian Diet, rather than waiting for Parliament to act, did what it could itself. In the Compromise, it wrapped new, crownland provisions around the model laid down for all of Austria in 1869. Henceforth, in Moravia, binational municipalities would have both a German and a Czech school board, and "The representatives of the municipality for both local school boards must be taken from members of that nation for which the school represented by the local school board is meant." A similar requirement was added for some members of the district and crownland boards.[11] (For other members at non-local levels, and for the employees of nationally divided crownland institutions, appointment procedures were nationalized in a different way, discussed in Section IIIC.) Funding for all public elementary schools continued to come from municipal property taxes. But the men who drew up the budget for Czech schools had to be Czech, and the men who drew up the budget for German schools had to be German.

This approach turned out to have problems. To be sure, the local school board of the minority could assert itself against the municipal council. To cite a ruling in 1911 by Austria's Administrative Judicial Court, the local school board of a particular nation had the right "to demand and to ensure, even in opposition to what may be divergent interests of the municipality whose obligation it is to pay for the schools, that the schools of the nation represented by it receive such resources as are required per legal directive, or that these schools are not stunted

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[9] Public elementary schools [Volksschulen/obecné školy] are the focus in this essay, rather than public secondary schools of the Bürgerschule/měšťanská škola, Realschule/reálná škola, or Gymnasium/gymnasium types, because schoolchildren were divided nationally above all upon entering first grade.

[10] Graf Anton Pace, ed., Ernst Mayrhofer's Handbuch für den politischen Verwaltungsdienst in den im Reichsrathe vertretenen Königreichen und Ländern, fifth edition, vol. 4 (Vienna: Manz, 1898), 500-13, 565-67, 734-43; and Karl Lamp, "Volksschulen," in Ernst Mischler and Josef Ulbrich, eds., Österreichisches Staatswörterbuch. Handbuch des gesamten österreichischen öffentlichen Rechtes, vol. 4 (Vienna: Holder, 1909), 829-43. See also Pieter Judson, Exclusive Revolutionaries. Liberal Politics, Social Experience, and National Identity in the Austrian Empire, 1848-1914 (Ann Arbor: University of Michigan Press, 1996), 51-58.

[11] Landesgesetz- und Verordnungsblatt für…Mähren (1906), 44-48 (Nr. 4, Abt. 1, §8, 20-37).

through the withholding of any legally mandated resources."[12] But what if the national majority on a municipal council appointed men to the local school board of the other nation who only claimed to belong to it, while actually sympathizing with the other side? Or what if they did belong to it, but cared less about investing in public education than about keeping taxes on private property low?

Such things came to pass after 1905, spawning disputes. Who was Czech, and who was German? How Czech or German should a man be to count as a legitimate appointee to the relevant school board? The Diet had provided no procedure in the Compromise for resolving such disputes. Instead, it seems to have assumed that every person belonged to one nation, and that it was self-evident to which one.[13] Preceding group rights had been what Rogers Brubaker has called "groupism": a tendency to take "discrete, bounded groups as basic constituents of social life, chief protagonists of social conflicts, and fundamental units of social analysis."[14] Members of the Diet assumed the existence of national groups, and did not see that they were in fact helping to create them. They based formal classification of local school board members into nations on informal, national understandings of nationhood. And in some cases, those understandings proved to be too vague or inconsistent for legal purposes.

Groupism had led to the same problem before. The parts of the Moravian Compromise which concerned local school boards were closely modeled on legislation, the first of its kind, enacted in the neighboring crownland of Bohemia more than a generation previously. In 1873, in the minority of Bohemian municipalities which were nationally mixed (German and Czech), public education had been divided nationally. Municipal councils had been required to appoint to German and Czech local school boards only men who were "members of that nation for which the school represented by the local school board is meant." Procedures for determining national belonging had not been specified, and disputes had started immediately.[15] In 1905, the Moravian Diet committee which drew up legislation to divide many more municipalities (Czechs and Germans were considerably more intermingled in Moravia) perhaps failed to learn about those disputes in Bohemia after 1873. But it is unlikely that the same mistake was made by the legal advisers in government ministries who helped draft legislative bills, and who made formal

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[12] Administrative Judicial Court, Budwiński 8377A (5 July 1911, Moravia), in August Ritter von Popelka, ed., Budwińskis Sammlung der Erkenntnisse des k.k. Verwaltungsgerichtshofes, Administrativrechtlicher Teil, vol. 35 (Vienna: Manz, 1912), 1260. See also Landesgesetz- und Verordnungsblatt für…Mähren (1906), 51-53 (No. 4, §41-43)

[13] Alfred Freiherr von Skene, a member of the Diet who played an important role in the long-lasting negotiations which preceded the Compromise, barely mentions questions of classification in his account. Nor do the Diet protocols and committee reports from 1905. See Skene, Der nationale Ausgleich in Mähren 1905 (Vienna: Konegen, 1910); and Landtagsblatt über die Sitzungen des mit dem Allerhöchsten Patente vom 29. September 1905 einberufenen mährischen Landtages (Nach stenographischen Aufzeichnungen) (Brünn: 1905).

[14] Rogers Brubaker, Ethnicity without Groups (Cambridge: Harvard University Press, 2004), 8.

[15] Landtagsblatt, Druckvorlage 222/212 (Brünn: 1905), 1-4; and Bernatzik, Verfassungsgesetze, 989-91. See also Max Menger, Der böhmische Ausgleich (Stuttgart: Cotta, 1891), 62-70; Karl Gottfried Hugelmann, ed., Das Nationalitätenrecht des alten Österreich (Vienna: Braumüller, 1934), 234-35; and Horst Glassl, Der mährische Ausgleich (Munich: Fides, 1967), 217-24. A similar approach was used for local school boards in the crownland of Tyrol from 1892. See Bernatzik, Verfassungsgesetze, 1001.

recommendations to the Emperor-King as to whether He should sanction those bills which Austria's various legislatures passed. After all, knowing precedents and foreseeing complications was their job. Their review of the Compromise, however, had to be unusually hasty—because political pressures, including clashes in the streets, dictated that certain parts of the Compromise be written, passed, and sanctioned within days. Another, slim possibility is that the groupist approach taken in 1873 was repeated in 1905 on purpose. Perhaps key players decided to avoid the risk that legislators would get mired in disputes over the proper procedures for determining national belonging, and calculated that a later lawsuit would trigger the application of procedures worked out over the intervening years in Bohemia and other crownlands by the Administrative Judicial Court.

Whichever of these explanations is correct, the outcome is clear. Classificatory procedures developed elsewhere in Austria, by judges working to fill in holes in the law, did come to apply in cases involving local school boards in Moravia after 1905. What were those procedures? Who determined a person's national belonging? What definitions and rules of evidence were used? Who had standing to challenge the determination? Which body ruled on the appeal? And what were the effects on individual liberty and equality before the law?

A landmark decision had come in 1881, in a dispute over the national belonging of a man appointed to the German local school board in a Bohemian town by the Czech-dominated municipal council. National belonging, the Administrative Judicial Court had ruled, was "essentially a matter of consciousness and feeling." "Therefore, if in a concrete case the national belonging of an individual is contested and external manifestations of his national convictions are lacking, it will surely be necessary to question him about his national belonging, and to treat him as a member of the nation in favor of which he makes a declaration."[16] The "declaration principle" contained in this statement made liberal sense. By placing self-classification at the base of determinations of national belonging, the Court saved at least some of the individual right of voluntary association. On the other hand, a declaration could be false. The Court, with its mention of "external manifestations" of national convictions, seemed to imply that if such manifestations clearly contradicted a person's declaration, then perhaps the declaration could be overruled. Self-classification perhaps could be subjected to verification.

The 1881 decision did not specify how verification should be carried out. It did confirm who should do any verifying, though, by remanding the case to local administrative authorities. It also made clear that appeal was possible, through the two upper tiers (the crownland Governor's Office and the relevant Ministry) of the state administrative apparatus and then on to the Administrative Judicial Court, as the final instance. Later decisions spelled out more. Most important was that those decisions treated declarations as the decisive manifestation of national convictions. If a declaration was suspected to be false, the person was to be confronted—and taken at his word. In a Bohemian case in 1901, known in Austrian legal shorthand as Budwiński 27A, the Court decided that "[I]f an individual's national belonging is in question in a concrete case, then it seems that only his definite declaration, made in the matter in the course of a formal hearing, can decide the issue." As a corollary, it disallowed verification of national belonging by the authorities through inquiries into a person's public or private behavior. That behavior, Budwiński 27A explained, often could not be read at face value, because of the pressures that individuals faced to fit in or to get ahead:

the appeal assigns particular weight to the fact that in the most recent census, the

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[16] Cited in Stourzh, Gleichberechtigung, 205.

> four persons elected [by the German-dominated municipal council to the Czech school board] entered 'German' as their language of daily use. Against this, however, it must be remarked that, just as it cannot be concluded that a person belongs to a race [Volksstamm] simply because he knows the language of that race, so the language of daily use claimed by a person is not decisive for the question of his national belonging, for national belonging as such is not even polled in the census. For that matter, no more compelling conclusions regarding national belonging can be drawn from the fact that the children of the person in question attend German schools, or from that person's membership or non-membership in a voluntary association, or indeed from that person's participation in public life—even if that participation should contradict his profession of national belonging. For all the circumstances listed here can always have their roots in considerations of opportunity or of other matters which are of concern to the person in question. They need not stand in any connection with the question of national belonging.[17]

The procedures available to fill the hole in the Moravian Compromise regarding the national classification of local school board members, then, were simple and clear. Self-classification, carried out formally before administrative authorities, counted for quite a lot. Verification, carried out in quite passive fashion, counted for little.

IB. Schoolchildren

Before 1905, the Administrative Judicial Court had also applied a variant of its declaration principle to schoolchildren. In the 1870s and '80s, in several decisions, the Court had restricted the discretionary authority of crownland school boards to decide which language would be used in each public elementary school. The culmination, in 1886, had been a decision requiring the creation of a school using the language of a particular nation if the municipality in question had an average of forty schoolchildren belonging to that nation for five consecutive years. In 1896, the Court had then ruled that in the determination of such children's national belonging, their parents' declaration of national belonging was decisive. Parents exercised the right of self-classification on behalf of their minor children. Another decision, in June 1905, had laid down guidelines for orphans and for children in nationally mixed marriages.[18] Not only for

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[17] Administrative Judicial Court, Budwiński 27A (12 January 1901, Bohemia), in Rudolf Alter, ed., Budwińskis Sammlung der Erkenntnisse des k.k. Verwaltungsgerichtshofes, Administrativrechtlicher Teil, vol. 25 (Vienna: Manz, 1901), 48-49. For similar pronouncements by the Court, see Budwiński 14024 (5 April 1900, Bohemia), in Alter, Budwińskis Sammlung, vol. 24 (1901), 378-79; Budwiński 3634A (14 June 1905, Moravia), in Alter, Budwińskis Sammlung, vol. 29 (1905), 726; and Budwiński 4738A (6 November 1906, Bohemia), in Alter, Budwińskis Sammlung, vol. 30 (1906), 1148. See also Lukas, "Personalitätsprinzip," 401; Stourzh, Gleichberechtigung, 205-8; and Wolfgang Steinacker, Der Begriff der Volkszugehörigkeit und die Praxis der Volkszugehörigkeitsbestimmung im altösterreichischen Nationalitätenrecht (Innsbruck: Wagner, 1932), 17-24; as well as Budwiński 5492A (14 November 1907, Bohemia), which is discussed in Section II.

[18] Administrative Judicial Court, Budwiński 9708 (3 June 1896, Moravia), in Adam Freiherr von Budwiński, ed., Erkenntnisse des k.k. Verwaltungsgerichtshofes, vol. 20 (Vienna: Manz, 1896), 925-27; Budwiński 3634A, 722-34; Pace, Mayrhofer's Handbuch, 576-7, 672-73; Stourzh,

school board members but for schoolchildren as well, the Court had thus created safeguards for what it could salvage, from nationally segregated education, of the individual right of voluntary association. It had established an individual right of national self-classification, and checked it only with a narrow procedure for bureaucratic verification.

Now came the Moravian Compromise. The closest that it came to specifying a procedure for determining the national belonging of schoolchildren was in a single sentence known as "Lex Perek," or Perek's law, after Václav Perek, the Czech attorney who was its principal proponent in the Diet. "As a rule," read Lex Perek, "only children proficient in the language of instruction may be admitted to an elementary school." This had major implications. Since 1867, Article 18 of Fundamental Law 142 had guaranteed individuals the right to educate themselves for an occupation as and where they wished.[19] That had meant, among other things, that fathers could choose among schools for their children. But now that right (the "parental right") was to be restricted. Furthermore, the right of national self-classification established through rulings by the Administrative Judicial Court was to be canceled for schoolchildren in Moravia altogether. Now not fathers were to do the classifying but unspecified others, on the basis of language.

Strangely enough, in November 1905, when the Emperor-King had to decide whether or not to give His sanction to the Compromise, Austria's Minister of Religion and Education expressed only mild concern about Lex Perek. "In and of itself," the Minister's report to His Majesty stated, "this measure is not entirely beyond question, for it reduces the parental right to free self-determination in this matter. Yet I do not believe myself obliged to object, given the circumstance that this proposal was made by agreement of both nations of the crownland."[20] This interpretation rested on groupist grounds, not on constitutional ones. The Minister justified enactment of the Compromise by speaking as though it were already in force—as though members of the Diet already represented one nation or the other, rather than all their constituents, regardless of national belonging.

Why did the Minister of Religion and Education seem to forget his responsibility to protect the rights guaranteed by the constitutional laws of 1867? Despite what he said, it was not in order to oblige two national movements when, for once, they could agree on something. Already in 1899, German members of the Diet, who were predominantly liberal, or "loyal to the constitution," had made clear that they would object strongly to infringement of the parental right. And after 1905, the German contingent would press often and hard for changes in how Lex Perek ended up being implemented, arguing that the phrase "as a rule" in the law necessarily implied exceptions to its language proficiency requirement for any schoolchildren whose parents so desired. Both the Minister's words and the words of Lex Perek itself seem to have been intentionally confusing, so that the Compromise could be concluded, but then turn out to mean

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Gleichberechtigung, 169-74; Steinacker, Volkszugehörigkeit, 7-9, 28-29; Hannelore Burger, Sprachenrecht und Sprachgerechtigkeit im österreichischen Unterrichtswesen 1867-1918 (Vienna: Österreichische Akademie der Wissenschaften, 1995), 64, 96-102, 199; and Rudolf Herrmann von Herrnritt, Nationalität und Recht (Vienna: Manz, 1899), 78-79.

[19] Bernatzik, Verfassungsgesetze, 1000, 426. Because Lex Perek was embedded in a section of the Compromise concerning public elementary schools, private ones were not affected. Administrative Judicial Court, Budwiński 8925A (4 May 1912, Moravia), in Popelka, Budwińskis Sammlung, vol. 36 (1912), 724-25.

[20] Stourzh, Gleichberechtigung, 221, 315.

not quite what some of its authors had intended.[21]

The fact is that Lex Perek was inserted into the Compromise at the insistence of Czech members of the Diet, to compensate for certain national inequalities—not legal, but economic, social, and demographic. Many of the other members of the Diet accepted it only reluctantly. Two or three generations previously, in the 1840s, Czechs had tended to be considerably poorer and less educated than Germans, and the Czech language had carried far less prestige than the German one. (To repeat a point made in the Administrative Judicial Court's ruling from 1907 cited above, speakers of Czech were not necessarily Czechs, nor were speakers of German necessarily Germans. After all, many people were bilingual. For that matter, many people, whether bilingual or monolingual, seem to have understood themselves simply as Austrians, or Moravians, or Catholics, etc.) By the turn of the century, those gaps had narrowed. And they promised to narrow still more: although the average German probably still outearned the average Czech, younger Czechs had pulled even in education. In 1909, a Czech member of the Diet hurled at German members that "fables about the tremendous value of German, about how a man can't become even a corporal without German, were dismissed long ago, through bitter experience. Indeed, to the contrary, we [Czechs] may say that without Czech, no one can become even the governor, or perhaps even a minister in the government. For we have come so far that we will accept injustice from no one."[22]

Another gap, however, remained stubbornly wide. The census (which was deaf to bilingualism) might show speakers of Czech to outnumber speakers of German by roughly 72:28 in Moravia and 63:37 in Bohemia. But in Austria as a whole, German-speakers outnumbered Czech-speakers by 61:39. And in Central Europe more broadly, they outnumbered Czech-speakers by more than 10:1.[23] Speakers of Czech, by mastering German, could increase their employment opportunities many times over. But the reverse did not hold true.

These patterns help explain why, before 1905, many parents who spoke Czech and little or no German had enrolled their children in German-language schools: to give them a better chance in life. Lex Perek, despite its nationally neutral language, was meant by Czech leaders to give them the right and the power to "reclaim" children for the nation—not only from the German nation and its schools but from what those leaders understood as nationally apathetic, unprincipled, or intimidated parents. "Czech leaders," to quote a German judge in 1912, have constructed for themselves, quite literally, a 'right of the nation to its children,' which even the children's own parents cannot deny to it." The Czech leaders saw matters differently. "We, too, assert," said one of them in 1909, "that yes, parents have a right to determine how and where a child is to be educated. But the bread giver, the factory owner, does not have a right to coerce, violate, and terrorize the parents, such that they cannot do otherwise than to put their children in

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[21] Stourzh, Gleichberechtigung, 216-17, 315; Landtagsblatt über die Sitzungen des…mährischen Landtages (Nach stenographischen Aufzeichnungen) (Brünn: 1909), 3510-11, 3523-30 (d'Elvert, Fischel); and Moravské listy, 31 March 1914, 1, 3.

[22] Landtagsblatt (1909), 3519 (Kadlčák). For an example of partisan statistics, see Hugo Herz, Der nationale Besitzstand und die Bevölkerungsbewegung in Mähren und österreichisch Schlesien (Brünn: 1909).

[23] Emil Brix, Die Umgangssprache in Altösterreich zwischen Agitation und Assimilation (Vienna: Böhlau, 1982), 436-37, 447; and Jeremy King, Budweisers into Czechs and Germans: A Local History of Bohemian Politics, 1848-1948 (Princeton: Princeton University Press, 2002), 58-60.

German schools." Or as another Czech explained in the Diet, Lex Perek "is not a law by which the rights of parents to their children are governed, but rather a sort of nationalities law. (Bravo! Cries: That is true!) The object of the protection of this law is the nation, by which I mean here in Moravia [u nás] both the Czech nation and the German nation."[24] German and Czech leaders both spoke a liberal language of rights and freedom. But the Germans, understanding themselves as part of a culturally and economically superior minority, tended to emphasize the individual, while the Czechs, understanding themselves as part of an oppressed majority, tended to emphasize the group.[25]

Czechs in the Diet seem not to have anticipated that Lex Perek would generate disputes over who belonged to which nation. They had anticipated disputes over schoolchildren, with parents. And they had provided a procedure for resolution, to their advantage: excluding the parents, and having national belonging determined on the basis of an "objective" criterion, proficiency in a language. A clash between individual rights and group rights was to be resolved through a particular classificatory procedure. When it came to resolving disputes between Czech leaders and German leaders, however, that procedure had holes. To cite only the largest, what constitutes proficiency for a six-year-old? Children cannot command a language as well as adults do. But what children can do, and adults cannot, is acquire an age-appropriate and native command of a language quickly and effortlessly. Depending in large part on who administered a language proficiency exam to a child, how and when, the procedure could yield a determination of "Czech," or of "German." Czech leaders, searching for an external manifestation of national belonging on which to base a classificatory procedure which was objectively verifiable but also to their advantage, had turned to a founding myth of their national movement: everyone who spoke Czech belonged to the Czech nation, even if he or she did not yet realize it.[26] But without tightly woven classificatory procedures, such groupism was no net with which to catch Czech-speaking children before they had a chance to start spouting in German, too.

As has already been mentioned, Lex Perek, by defining national belonging in terms of language, contradicted the definition developed by the Administrative Judicial Court. The 1896 decision mentioned above had agreed with the Ministry of Religion and Education that, "in the absence of legal criteria," the national belonging of children was determined on the basis of the

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[24] Edmund Bernatzik, Die Ausgestaltung des Nationalgefühls im 19. Jahrhundert. Rechtsstaat und Kulturstaat (Hannover: Helwing, 1912), 43; and Landtagsblatt (1909), 3520-21 (Kadlčák), 3533 (Stránský). See also Stourzh, Gleichberechtigung, 311-16; Steinacker, Volkszugehörigkeit, 55-57; Toshiaki Kyogoku, "Národní agitace a obecní školství na Moravě na přelomu 19. a 20. století. Boj o české dítě," in Harald Binder, Barbora Křivohlavá, and Luboš Velek, eds., Místo národních jazyků ve výchově, školství a vědě v habsburské monarchii 1867-1918 (Praha: Výzkumné centrum pro dějiny vědy, 2003), 563-77; and Tara Zahra, "Reclaiming Children for the Nation: Germanization, National Ascription, and Democracy in the Bohemian Lands, 1900-1945," in Central European History, vol. 37, no 4 (2004), 499-541.

[25] Peter Bugge, "Contradictions in Terms? Czech and Austrian-German Liberalism in the Late Habsburg Empire," article manuscript, 2005.

[26] Jeremy King, "The Nationalization of East Central Europe: Ethnicism, Ethnicity, and Beyond," in Nancy Wingfield and Maria Bucur, eds., Staging the Past: The Politics of Commemoration in Habsburg Central Europe, 1848 to the Present (West Lafayette: Purdue University Press, 2001), 112-52.

formal declaration of parents or guardians.[27] Now Lex Perek provided the legal criterion of language. And in Austria, judges could only interpret laws, not rule them unconstitutional.[28] (Judicial review would have meant the unthinkable: mere mortals deciding that the constitution or one of the crownland legal orders, all gifts in the 1860s from Emperor-King Francis Joseph to His Austrian subjects, nullified His sanctioning of new legislation.) Lex Perek thus cut Moravia's schoolchildren loose from the Court's rules of classificatory procedure, without specifying new ones. In addition to reducing the parental right, it exposed schoolchildren and their families to the caprice of whoever ended up administering the language proficiency exams. Would it have the effect of cutting loose school board members, too? Or would completely different classificatory procedures exist side by side, one for fathers and the other for children? In a law journal in 1914, Rudolf Herrmann von Herrnritt, an expert in nationalities law who was a justice on the Court, labeled Lex Perek "a fateful example of a slapdash and, frankly, irresponsible legal technique." "This legal provision," he continued, "makes a drastic intervention in primary education, and affects important interests of the population, yet was clearly inserted into the school law [of the Compromise] in haste, and, it seems, not without a certain craftiness."[29]

In May 1907, an implementation decree for Lex Perek was issued, after time-consuming and fruitless efforts at finding a formulation satisfactory to both Czech and German leaders. Through it, the new Minister of Religion and Education, a German liberal named Gustav Marchet, mended many procedural holes, just in time for the start of the school year. The language proficiency exam was to be administered by the director of the school in question. Parents, as well as the local school board of the other nation, could appeal the director's decision, to higher administrative authorities. "Proficient" was defined, very broadly: "A child is to be regarded as proficient in the language of instruction if it commands that language well enough to follow instruction in it." "As a rule" was exploited in order to allow many exceptions. Children could be admitted to a school whose language they did not yet know if, for example, the parents provided "convincing reasons."[30] In short, Marchet implemented the law in such a way as to let almost any child through. Perek and other Czech leaders, outraged to see one of their key

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[27] Budwiński 9708, 925.

[28] Hence the importance of recommendations by ministerial experts as to whether His Majesty should sanction legislation; these executive-branch advisory opinions were the major line of defense against unconstitutional laws. Bernatzik, Verfassungsgesetze, 482, 488-90, 900-901, 937; Erwin Melichar, "Die Rechtslage der Nationalitäten in Zisleithanien nach der Dezember-Verfassung 1867 im Lichte der Judikatur des Reichsgerichtes (1869-1918)," in Ludovit Holotik, ed., Der österreichisch-ungarische Ausgleich 1867 (Bratislava: Verlag der slowakischen Akademie der Wissenschaften, 1971), 474; and Stourzh, Gleichberechtigung, 63-65.

[29] Rudolf Herrmann von Herrnritt, "Die Ausgestaltung des österreichischen Nationalitätenrechtes durch den Ausgleich in Mähren und in der Bukowina," in Österreichische Zeitschrift für öffentliches Recht, vol. 1 (1914), 609-10. See also the caustic comments of Herrnritt's colleague on the Court, Friedrich Tezner, cited in Stourzh, Gleichberechtigung, 216, 315.

[30] In August 1910, state administrative authorities throughout Moravia were informed that "the Ministry of Religion and Education has declared…, in the course of adjudicating an appeal, that the reason adduced by the appellant—that he wishes to send his sons to the German school so that he might eventually make better use of them in his shop, in which there is an active intercourse with German tradesmen and customers—must be considered convincing." Z. 4966 Praes., Moravský zemský archiv, B13 Carton 2039.

contributions to the Compromise turned inside out, condemned the implementation decree as "unacceptable for the entire Czech people." Challenges soon began to make their way toward the Administrative Judicial Court.[31]

IC. Diet voters

For Diet voters, the Moravian Compromise did specify a procedure for national classification, in three steps. In every municipality, the municipal authorities, "on the basis of personal relations known to them," had to assign each voter to one of the two newly constituted national electorates. Any voters who wished to switch sides could then do so. Voters neither Czech nor German were to be assigned to that Diet electorate which was larger in their municipality. Again, though, they had the right to switch to the other.[32] These first two steps ensured that every adult male not only had a right to self-classification but exercised it, at least passively. They allowed the national division of the electorate to be completed without costing anyone his right to vote.

The third step was bureaucratic verification. Every voter had the right to demand official verification of a co-national voter's national belonging. A Czech voter could challenge the Czechness of any Czech voter, and a German voter could challenge the Germanness of any German voter. State administrative authorities at the local level, working together with municipal authorities, were to make the decision, which could be appealed up the usual chain of administrative command. This other-classification, or ascription, was meant to prevent voters from making a false declaration—perhaps because their employer threatened to fire them, or because they wished to stir up trouble within the electorate of the other nation. Through the three-step classificatory procedure of assignment, self-classification, and bureaucratic verification, the right of the Czech and German Diet electorates to what might be called non-territorial, non-Wilsonian national self-determination was to be balanced with the same right of individual voters.[33]

A definition of national belonging was missing. The Compromise stated only that in the third step, the authorities should rule on a voter's national belonging "on the basis of a thorough examination of all conditions."[34] This contradicted the Administrative Judicial Court's declaration principle. Under the Court's rules of classificatory procedure for school board members and schoolchildren, developed since the 1870s, investigations into national belonging had stopped at the declaration of the relevant adult. Where would they stop now for voters?

Overall, the Moravian Compromise dramatically expanded the volume and importance of national classification in Austria. Now not only a small minority of school board members and of schoolchildren in a crownland had to be classified, as had been the case in Bohemia since 1873, but all schoolchildren and all adult males. At the same time, the Compromise specified

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[31] Burger, Sprachenrecht, 192-98; and Stourzh, Gleichberechtigung, 310. For the text of the Marchet decree, see Landesgesetz- und Verordnungsblatt für…Mähren, No. 11 (1907), 84; and Alfred Fischel, Das österreichische Sprachenrecht. Eine Quellensammlung, second edition (Brünn: Irrgang, 1910), 314-16. Fischel omits the sentence defining "proficient."

[32] Landesgesetz- und Verordnungsblatt für…Mähren (1906), 23-24 (No. 2, §30-32), 38-40 (No. 2, §66-72).

[33] Karl Renner ["Rudolf Springer"], Der Kampf der österreichischen Nationen um den Staat (Leipzig and Vienna: Deuticke, 1902), 65.

[34] Landesgesetz- und Verordnungsblatt für…Mähren (1906), 40 (No. 2, §72).

classificatory procedures only incompletely. What procedures it did specify or imply, furthermore, were inconsistent—with each other, and with the procedures developed before 1905 by the Administrative Judicial Court. The effect was to expose individuals to capricious or unequal treatment, to a loss of rights.

But the Moravian Diet was unlikely to clean up the mess it had made. For decades before 1905, Czech leaders and their "conservative" allies among great landowners had been in the minority in the Diet. They had gained seat after seat, though, and by 1903 or 1904, had high hopes of becoming the majority in the next elections, due in 1906. German leaders and their "liberal" allies among great landowners, preferring an organized retreat to a rout, agreed in the fall of 1905 to the Compromise. Through it, their opponents gained permanent control over as many as 56 percent of the Diet seats. But the new minority acquired something close to a right of veto, through a provision requiring that amendments to the Compromise pass by more than 61 percent. That, given how much Czech and German leaders disagreed with each other, blocked change. Thus in the fleshing out of how, exactly, national belonging should be determined, legislators left the administrative authorities of the executive branch, in Justice Herrnritt's words, "completely in the lurch."[35] As a check on capricious or discriminatory action by those authorities, there remained only the judiciary. Forced to sort things out were the courts.

II. Refinements to National Classification by the Courts, 1905-1914

The first dispute over classificatory procedure in the Moravian Compromise to end with a landmark court decision concerned voters. There the organization of justice in Austria further complicated an already complicated matter. In disputes involving "political rights," which included the right to vote and the parental right, the final arbiter was not the Administrative Judicial Court. Rather, it was a parallel institution, the Supreme Court.[36] Before 1905, political rights had not been tied to national belonging anywhere in Austria. Thus the Compromise, in addition to counting as the first legislation to specify a procedure—indeed, multiple procedures—for determining national belonging, broke new ground in a jurisdictional sense as well. The first high court to confront the dilemma of classificatory procedure in the wake of the Moravian Compromise was not the Administrative Judicial Court but the Supreme Court, which had confronted that dilemma only rarely in the past.[37]

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[35] Robert Luft, "Die Mittelpartei des mährischen Grossgrundbesitzes 1879 bis 1918. Zur Problematik des Ausgleichs in Mähren und Böhmen," in Ferdinand Seibt, ed., Die Chance der Verständigung: Absichten und Ansätze zu übernationaler Zusammenarbeit in den böhmischen Ländern 1848-1918 (Munich: Oldenbourg, 1987), 205; Glassl, Ausgleich, 142-48, 154-55, 168-69, 185-86; Landesgesetz- und Verordnungsblatt für…Mähren (1906), 8-9 (Nr. 1, §38); Herrnritt, Nationalität, 78, 148; and Herrnritt, "Ausgestaltung," 600.

[36] Bernatzik, Verfassungsgesetze, 482; Erwin Melichar, "Die Freiheitsrechte der Dezember-Verfassung 1867 und ihre Entwicklung in der reichsgerichtlichen Judikatur," in Österreichische Zeitschrift für öffentliches Recht, vol. 16 (1966), 256-90; and Theodor Dantscher von Kollesberg, "Politische Rechte," in Mischler and Ulbrich, Österreichisches Staatswörterbuch, vol. 3 (1907), 927-32. I translate Reichsgericht as "Supreme Court," rather than "Imperial Court," in order to avoid confusion of the institution with the Emperor's household and retinue, or Hof.

[37] In 1880, in a case concerning whether Jews were Germans, the Supreme Court had made a ruling which anticipated the declaration principle laid down by the Administrative Judicial Court

The details of the case were as follows. In January 1907, an Austrian law applied that part of the Moravian Compromise which separated Diet voters nationally to the same men again, now in their capacity as voters in elections to the lower house of the Austrian Parliament. Before parliamentary elections took place in May, and probably even before Diet elections took place the previous autumn, a number of men in Moravia's capital, Brünn/Brno, succeeded in enrolling in the German electorate, although they seem actually to have been Czechs—whatever that might have meant. As members, they made extensive use of their right to challenge the national belonging of co-national voters. They attempted to "reclaim" 3,000 German voters (of 18,000) for the Czech electorate (which numbered less than 6,000). The administrative authority having jurisdiction, the Moravian Governor's Office, did not undertake a "thorough examination of all conditions," as stipulated by the Compromise. As a representative explained before long to a panel of Supreme Court justices, the Governor's Office was overwhelmed by the number of challenges. But it "behaved passively" for another reason as well: in order to abide by the declaration principle. It followed the classificatory procedures laid down over the years by the Administrative Judicial Court, not those newly established by the Compromise. All voters in question were mailed a request for a declaration of national belonging. Then the Governor's Office denied not only the challenges made against voters who declared themselves to be Germans, but also those made against 1,500 voters who made no declaration at all.[38]

Represented by a Czech attorney, three of the supposedly German reclaimers (named Hausner, Diwišek, and Doležal), appealed the decisions of the Governor's Office. They demanded that "not the declaration of the individual but objective characteristics be considered decisive for national belonging." And in October 1907, the Supreme Court found in their favor. In Hye-Hugelmann 1531, as the decision was known, the Court ruled, on the basis of the Compromise, that "the decision by the authorities may not rest solely on a declaration regarding national belonging obtained from the persons whose enrollment is contested. Rather, the decision must rest first on inquiries into objective characteristics determining national belonging."

In the confidential deliberations which preceded this pronouncement, members of the Supreme Court expressed deep reservations. Requiring inquiries into every case would impose an impossible burden on the administrative authorities. The objective characteristics which determined national belonging remained wholly unclear, especially for bilingual persons and for Moravia's small Jewish minority. The "most holy right of the individual," to make free decisions, would be violated. On the other hand, in the course of oral arguments, the attorney for the appellants (speaking openly of the 3,000 challenges as having been organized by "the Czech party") had threatened that if the declaration principle were upheld, the Czech majority in Moravia would exploit it to invade the German electorate in certain districts, in large enough numbers to affect elections.[39] At least three of the eleven justices found the law at fault, and in

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the following year. Supreme Court, Hye 219 (12 July 1880, Galicia), in Anton Hye, ed., Sammlung der nach gepflogener mündlicher Verhandlung geschöpften Erkenntnisse des k.k. Reichsgerichtes, vol. 5 (Vienna: Manz, 1881), 1003. See Stourzh, Gleichberechtigung, 74-77.

[38] Bernatzik, Verfassungsgesetze, 762; Stourzh, Gleichberechtigung, 226-28; and Austrian State Archive, Allgemeines Verwaltungsarchiv (AVA), k.k. Reichsgericht, Sitzungsprotokolle, 15 October 1907, 50 (Wacha).

[39] See in this regard the observation by Adolf Fischhof already in 1871 that an organ formed on the basis of national separation "is the fortress within which the national minority may defend itself successfully against the attacks of the national majority, as long as the garrison is an

need of revision. Only legislators and the Emperor-King, though, had the power to change existing law. Meanwhile, that law was so clear that nine of the justices voted to interpret it as requiring inquiries even when the person in question had made a clear declaration of national belonging. The best they could do about their concerns was to give them tactful expression in Hye-Hugelmann 1531, and to state that declarations continued to be "of the greatest importance," and could prove "sufficient" for the determination of national belonging, provided that they were not contradicted by notorious circumstances or by credible factual considerations stated in a challenge.[40]

The appellants, in winning, sawed off the branch on which they were sitting. One implication of Hye-Hugelmann 1531 was that they lost hope of using patently false declarations of national belonging to prevent their own eviction from the German electorate. Their backers were more interested in capturing "renegades" and "turn-coats" for the Czech electorate than in trying to capture districts of the German electorate through Trojan horse tactics. A larger implication, however, was that all voters in Moravia lost some hope of using genuine declarations to block being transferred against their will from one national electorate to the other, on the basis of "objective characteristics."

What were those characteristics? In the confidential deliberations, the reporting justice, Karl Ritter von Czyhlarz, met with no disagreement when he argued that the characteristics raised in the Czech challenges (name, place of birth, schooling, language used at home, language claimed in the census, membership in voluntary associations, schools chosen for one's children, etc.) could not be considered decisive. Another characteristic, raised by the Czech attorney, was dismissed outright: the accent with which a person spoke German. During oral arguments, the representative of the administrative authorities had cited relevant excerpts from two recent decisions by the Administrative Judicial Court (including those parts of Budwiński 27A cited in Section IA of this essay). But Czyhlarz also read out loud, twice, the provision of the Moravian Compromise specifying that the authorities should determine a voter's national belonging "on the basis of a thorough examination of all conditions."[41] Hye-Hugelmann 1531 ruled no objective characteristics out of bounds—not even those involving ancestry, which counted under the circumstances as a particularly illiberal basis for other-classification.[42]

To understand the perils of assigning individuals to peoples through investigations, particularly ones involving ancestry, Austrians did not have to know about Jim Crow in America, or anticipate Nazi Germany's separation of citizens into Aryans and Jews. In the fall of 1910,

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unmixed national one, a reliable one. If there are joined to this national garrison alien or doubtful elements, however, let alone hostile ones, then the fortress becomes a trap." Cited in Gerald Stourzh, "Ethnic Attribution in Late Imperial Austria: Good Intentions, Evil Consequences," in Ritchie Robertson and Edward Timms, eds., The Habsburg Legacy: National Identity in Historical Perspective (Edinburgh: Edinburgh University Press, 1994), 69.

[40] AVA, k.k. Reichsgericht, Sitzungsprotokolle, 15 and 16 October 1907, 47-66, 81-108 ("most holy right of the individual," Piniński's words, may be found on page 105); and Supreme Court, Hye-Hugelmann 1531 (17 October 1907), in Karl Hugelmann, ed., Sammlung der nach gepflogener mündlicher Verhandlung geschöpften Erkenntnisse des k.k. Reichsgerichtes, vol. 14 (Vienna: k.k. Hof- und Staatsdruckerei, 1912), 433-40.

[41] AVA, k.k. Reichsgericht, Sitzungsprotokolle, 15 and 16 October 1907, 50 (Wacha), 55-57 (Pluhař), 65-66 (excerpts from Budwiński 27A and 14024), 82-83, 87 (Czyhlarz).

[42] Starr, "Social Categories," 290.

Edmund Bernatzik, a justice on the Supreme Court, became the new Rector of the University of Vienna. In his inaugural lecture, "On National Registries," he defended the declaration principle passionately, thereby distancing himself from Hye-Hugelmann 1531 (in which he had not participated). "From all manner of indications, including perhaps pub conversations, theater visits, the reading of suspicious books, and who knows what other circumstances," Bernatzik warned, "evidence for or against the national belonging is to be adduced. The 'genuine German man' will no longer be able to enjoy the Frenchman's wine without running the danger of being officially branded a 'traitor to the national cause.' There loom trials all too reminiscent of the tribunals of the Inquisition. At stake here, after all, is the ascertainment of convictions! ...a person could be sentenced by an authority or court to belong or not to belong to a particular nation. That is absurd, and would be even more absurd if there were to be several mutually contradictory judgments—which is entirely possible."[43]

After 1907, the Supreme Court issued no major rulings regarding the national classification of voters. Nor did it rule on the tension between Lex Perek and the parental right. Only three weeks after Hye-Hugelmann 1531, however, the Administrative Judicial Court, ruling in a Bohemian local school board case, made clear that it continued to stand by the declaration principle. Overturning a decision by the administrative authorities, it noted that they were "invoking circumstances on the basis of which a compelling conclusion regarding nationality cannot be reached. The inquiries concerned the personal, home, and family relations of the elected individuals. In particular, questions were asked about origin, nationality of parents reported in the census, language of daily use of the elected individuals and their family members, national upbringing and education of children, associational activity of the elected individuals, etc. None of these circumstances, however, may be taken into consideration in answering the question." The passage which followed comprised a slight modification of the passage already cited in this essay from Budwiński 27A. Elsewhere, in another echo of Budwiński 27A, the decision stated that "[I]f an individual's national belonging is in question in a concrete case, then it seems that only his definite declaration, made before the authorities and thus presumably made with all earnestness and consideration, can decide the issue."[44] This ruling made utterly clear to administrative authorities that the investigations which were now required by the Supreme Court for determining the national belonging of Moravian voters continued to be prohibited by the Administrative Judicial Court in the case of Bohemian or Moravian local school board members. (All Moravian school board members, of course, were also Moravian voters.)

Three years later, however, the Administrative Judicial Court changed course. Budwiński 7846A, dated December 30, 1910, established a new procedure for verifying the national self-classification of local school board members in Moravia. Despite the Compromise's lack of clarity, the Court ruled, it had been the intent of the Diet "to give sufficient guarantee for the actual appointment of nationally feeling men to local school boards." Thus enfranchised "members of the nation for which the school represented by the local school board is meant have the right to contest the appointment of any representative of the municipality for the relevant local school board on the grounds that the person appointed does not belong to their nation." The verifying authority of first instance was the district school board of the relevant nation. It had to base its decision on "how the person in question is nationally active, and to which nation the

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[43] Edmund Bernatzik, Über nationale Matriken (Vienna: Manz, 1910), 29-30.

[44] Budwiński 5492A (14 November 1907, Bohemia), in Alter, Budwińskis Sammlung, vol. 31 (1907), 1064-66.

person feels that he belongs. If a dispute exists over the belonging of a person to one of the two nations, or over the truthfulness and credibility of a person's declaration regarding his belonging, then that belonging must be determined by graspable [faßbare] characteristics. For that purpose, it is permissible to take into consideration actions from private, social, and public life which seem credible and earnest manifestations of national belonging."[45] The Czech-dominated municipal council of Trebitsch / Třebíč did not succeed in appointing its preferred candidates to the German local school board.

Budwiński 7846A marked the end of the declaration principle for school board members in Moravia. Self-classification was now subject to verification far more invasive than what the Court had allowed as recently as November 1907. Why this change in course? The justifications given in the decision were uncharacterictically vague, confusing, or irrelevant—a smokescreen. A close reading, however, undertaken over the next several pages, reveals a subtle effort by the Administrative Judicial Court, not just in Budwiński 7846A, to unify classificatory procedures for school board members, voters, and schoolchildren, and to do so around verification less active than that specified for voters by the Supreme Court in Hye-Hugelmann 1531.

The Trebitsch / Třebíč municipal council itself, one of the parties in the new case, had attempted to unify classificatory procedures for school board members and voters, in original but unconvincing fashion. In the summer of 1907, the German district school board had rejected four appointees of the municipal council to the German local school board, claiming on the basis of inquiries that they "are not to be regarded as members of the German nation." Appealing that rejection, the council had argued that "only the declared will of the person in question can be decisive." It had also argued that the school authorities were not legally entitled "to call into doubt the belonging of the elected persons to the German race, once it has been officially confirmed"—and that such confirmation had occurred when, in the parliamentary elections held in May, the administrative authorities had allowed the men to vote as Germans.[46] In other words, as in Brünn/Brno, the authorities had behaved passively, going no farther than requesting a declaration by the persons in question of their national belonging. The council preferred passive verification, a corollary of the declaration principle, to active verification, because passive verification of the men in their capacity as voters had provided evidence that they were Germans. But of course, by the time the appeal reached the Administrative Judicial Court in 1910, the Supreme Court, in Hye-Hugelmann 1531, had disallowed passive verification for Moravian voters, and mandated active verification instead, i.e., inquiry into "objective characteristics."

In Budwiński 7846A, the Administrative Judicial Court did two things. First, it prevented inquiry into "objective characteristics" from seeping into its own jurisdiction. "No legal provision exists according to which [electoral] lists might serve as evidence regarding a person's national belonging more generally, in matters unrelated to electoral procedures, and thus might serve as evidentiary documents in all cases where the national belonging of a person comes into question. Rather, in the constituting of school authorities,…which nation a person belongs to is to be determined quite independently."[47] Second, it replaced passive verification for local school board members with active verification—but of a new sort. The Supreme Court, constrained by the "thorough examination of all conditions" clause of the Compromise, had required inquiry

[45] Administrative Judicial Court, Budwiński 7846A (30 December 1910, Moravia), in Popelka, Budwińskis Sammlung, vol. 34 (1911), 1752.
[46] Budwiński 7846A, 1748-50.
[47] Budwiński 7846A, 1752-53.

into "objective characteristics." But the Administrative Judicial Court, constrained by no such clause and more experienced in managing the dilemma of classificatory procedure, permitted "consideration" of "graspable characteristics," especially "how the person in question is nationally active" and claimed to "feel," if they seemed "credible and earnest manifestations" of national belonging.

Budwiński 7846A jettisoned the declaration principle for local school board members, but established an active verification procedure in its place which was liberal, in the German sense of emphasizing the individual rather than the group and choice rather than ancestry—what a man did of his own free will, rather than who a man was. To which clubs did a man belong? Did he prefer one language over the other? Where did he send his children to school? How consistent were his choices, with each other and with his declaration of national belonging before the authorities? An Austrian scholar in the 1930s labeled this subset "objectivizations": markers not of a coerced or ancestral and involuntary national belonging but of an evolving, voluntary one.[48] Without mentioning Hye-Hugelmann 1531, the Administrative Judicial Court followed the Supreme Court in embracing active bureaucratic verification, but focused it on the "truthfulness and credibility" of self-classification, on internal, subjective consistency rather than on an external, "objective" definition. Local school board members still lost some privacy. But they retained more of their right to voluntary association, more of their right to choose between the nations.

Local school board members made up only a very small minority of the population. But on the same day it published Budwiński 7846A, the Administrative Judicial Court published Budwiński 7843A, concerning Moravian schoolchildren. On the basis of Lex Perek, this ruling overturned the Marchet decree. It redefined linguistic proficiency, fairly strictly. ("According to the natural meaning of the words, 'to be proficient in the language' means to command the language such that one can use it in intercourse as a means of communication, and express in it one's thoughts and ideas."[49]) It replaced the school director as examiner with a commission drawn from both the Czech and the German local school boards. It determined that "It is not left to the discretion of the school authorities to determine permissible exceptions" to Lex Perek. And in what Herrnritt, the reporting justice in the case, later labeled a "bold" step, Budwiński 7843A

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[48] Steinacker, Volkszugehörigkeit, 40-41, 48. See also Heinz Kloss, Grundfragen der Ethnopolitik im 20. Jahrhundert. Die Sprachgemeinschaften zwischen Recht und Gewalt (Vienna: Braumüller, 1969), 231; and Ariela Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," in Yale Law Journal, vol. 108 (October 1998), 109-88. Regarding "objective" markers, see Christopher Ford, "Administering Identity: The Determination of 'Race' in Race-Conscious Law," in California Law Review, vol. 82 (1994), 1237-38.

[49] Administrative Judicial Court, Budwiński 7843A (11 December 1910, published 30 December 1910, Moravia), in Popelka, Budwińskis Sammlung, vol. 34 (1911), 1741. See also Administrative Judicial Court, Budwiński 7844A (Moravia), issued on the same day. In the case at hand, stated this decision, it was demonstrated not that 33 schoolchildren were proficient in the language of instruction, "but rather that they command the German language of instruction 'well enough to follow instruction in it' (§2, final sentence, Ministerial Decree of 14 May 1907, Crownland Legal Gazette Nr. 52). This, however, in the view of the Judicial Court, does not suffice for the admission of the children to the German elementary school." Popelka, Budwińskis Sammlung, vol. 34 (1911), 1747.

recognized the boards as national organs, "authorized to exercise the legal claim of their nation so as to ensure that the children belonging by law to the schools of that nation are not taken from it." [50] The Court snubbed Marchet, restored the active and groupist, "objective" other-classification based on language that Czech leaders had wanted, and fleshed out procedures for its implementation.

In a deeper sense, however, the Court sided with Germans. Lex Perek, Budwiński 7843A determined, could not be used to deny a child admission to a school "if the child is not 'proficient' in the language of his own nation, but wishes to attend the school of his nation by virtue of national belonging"—which, "for school-aged children, is the same as that of their parents." In other words, "knowledge of the language of instruction has been established as the objective characteristic of national belonging (refutable through counterevidence)…in the field of elementary education." Counterevidence, however, "could not be provided through a simple declaration regarding the national belonging of the parents." Rather, "in a dispute regarding the truthfulness and credibility of the [parents'] declaration, that objective characteristic would need to be invalidated by objectively graspable characteristics of national belonging." [51] In other words, the national belonging of parents had to be determined through something like the cautious, individualized procedure prescribed by Budwiński 7846A for local school board members. To the classification of Moravia's schoolchildren on the basis of language, the Court added classification on the basis of parental self-classification, subject to objectivizing, bureaucratic verification. Czech leaders had intended Lex Perek to replace the declaration principle, but Budwiński 7843A turned other-classification from a replacement into a complement. To be sure, it also diluted the declaration principle, by giving verification much more bite. But the net effect was to protect, in a legally more defensible fashion than the Marchet decree had done, much of self-classification and of the parental right. Through its pair of rulings in December 1910, furthermore, the Administrative Judicial Court succeeded in establishing classificatory procedures for Moravian local school board members and fathers which overlapped in many ways with the procedure established by the Supreme Court for those many men in their capacity as voters, yet were more detailed, and different in important ways.

To some degree, Justice Bernatzik's prediction, made within weeks of the oral arguments in these two landmark cases, proved right. After 1910, courts did sentence persons to membership in one nation or the other. At the start of every school year, Czech boards sought to "reclaim" thousands of children. I STOPPED HERE, 7/19/07. I NEED TO LOOK AT 1911 QUESTIONNAIRES FROM THE ARCHIVES, AND ACCOUNT FOR THE PRESENCE OF ANCESTRY-ORIENTED QUESTIONS. THEN, IN THE SECTION ON ESTOPPEL, I NEED TO PULL SOME OF THE FINAL FOOTNOTE INTO THE BODY OF THE ESSAY, CUT THE QUOTE THERE FROM 7843A, AND POINT OUT THAT THE VGH'S COMPLICATED STRATEGY WITH 7843A AND 7846A WORKED AGAINST WHAT HERRNRITT WANTED: ESTOPPEL ACROSS FIELDS. And in 1911, administrative authorities responsible for adjudicating disputes over the national belonging of schoolchildren and voters began using a questionnaire. The questions concerned national belonging, national belonging of parents, schools attended, schools attended by children, language used at home and in social life, language of daily use claimed in the most recent census, membership in national associations,

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[50] Budwiński 7843A, 1734-35; Herrnritt, "Ausgestaltung," 601; and Stourzh, Gleichberechtigung, 220.

[51] Budwiński 7843A, 1740-42.

and other public engagement in national matters.[52] No doubt some cases of false self-classification were uncovered, and others prevented. But verification must also have resulted in the reversal of self-classifications which it would be a mistake to call false. For some citizens, national belonging simply did not matter much, or manifest itself in the either-or ways emphasized by the Compromise. Although the numbers of such citizens cannot be known, they were certainly a significant minority. And verification procedures, no matter how little they were used or how rarely they resulted in reversal, threatened the privacy of everyone.

Then again, the complex system of national classification which had taken shape in Moravia by 1911 was no floodlit cage. The questionnaire offset ancestry with actions in the present—and compares favorably with what American authorities demand to know today in order to verify the marriage to a citizen of an applicant for a "green card," or permission to take up permanent residence. More broadly, the Administrative Judicial Court chose repeatedly to refine the sloppy classificatory procedures of the Compromise in ways which, perhaps as much as possible, resolved clashes between individual and group rights in favor of the former. The first of the two decisions issued in December 1910, for example, passed up the chance to define proficiency in terms of a mother or first language. If parents who spoke only Czech could make their child proficient in German—perhaps by turning to a private, German-language kindergarden—then they had the right to enrol the child for first grade in a German public elementary school.

Saddled with a mess, confined to interpreting (rather than striking down) the laws that Austria's legislatures and Emperor-King had seen fit to enact, and forced to share the Moravian Compromise with the Supreme Court, the Administrative Judicial Court had struggled to defend individual rights. It had not attempted to keep alive the declaration principle, because the Compromise contradicted that principle flatly, as well as pushed many citizens to make insincere, inconsistent, or simply instrumental declarations of national belonging. But the Court had standardized procedures for the national classification of school board members and schoolchildren, and based them on some form of self-classification subject to objectivizing, bureaucratic verification. Those procedures, furthermore, were consistent enough with the procedures mandated for voters to be implemented through use of the same questionnaire. Informally at least, that allowed the Court's objectivizing approach to discourage emphasis on ancestry in the verification of voter self-classification.

But had the Court done the best possible job? Was Josef Lukas, an Austrian professor of law, right when he suggested in 1908 that self-classification subject to verification through "investigation into political-national convictions by administrative organs" was "the lesser evil," the least illiberal approach possible, under the legislated circumstances, to the dilemma of classificatory procedure?[53]

III. Alternative Approaches

IIIA. Estoppel for Self-Classification

Herrnritt argued in 1914 that his court indeed had done the best possible job, given the laws it had been dealt. Nonetheless, the outcome struck him as deeply flawed. Already in 1899,

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[52] Tara Zahra, Your Child Belongs to the Nation: Nationalization, Germanization, and Democracy in the Bohemian Lands, 1900-1945 (Ann Arbor: University of Michigan doctoral dissertation, 2005), 125-29; and Stourzh, "Ethnic Attribution," 75.

[53] Lukas, "Personalitätsprinzip," 400.

he had argued that the declaration principle had the effect of replacing national belonging, which he considered an "objective quality" of individuals, with their "subjective will" or "caprice" as the foundation for certain legal claims. After 1905, to be sure, the declaration principle yielded in Moravia to objectivizing, bureaucratic verification of self-classification. Yet the number of individuals making declarations, as well as the incentives for making instrumental ones, increased greatly. As Herrnritt wrote in 1914, "intentional deception regarding a person's national belonging occurs quite often…." He warned that unless further legislative action were taken, "the whole of nationalities law will be of problematic value, a mixture of right and caprice which, despite all the 'compromise laws,' will hold national conflict in mixed-language crownlands in a state of permanence." Badly needed, he argued, was a law that specified "who makes a declaration, to whom, and in what form; whether and how long it is binding; whether it can be changed; and which persons it concerns, i.e., whose declaration is decisive for the national belonging of children."[54]

In Moravia after 1905, the Administrative Judicial Court had succeeded in establishing formal procedures for bureaucratic verification, a form of other-classification. But it did not establish formal procedures for the self-classification which preceded verification, apparently because here the law offered no foothold. Thus Herrnritt appealed publicly to legislators, not only in 1914 but in 1899 and in 1906 as well. And because legislators had formulated the Compromise sloppily, he made detailed suggestions about what a new law should contain. His preference was for a law which required everyone to make a declaration of national belonging once every ten years, in the census, and which used those declarations to create "a sort of registry of the nations...to which the administration would then refer in cases where the national belonging of the individual was in question." Self-classification needed to be regulated in such a way, he argued, that it determined a person's national belonging "for the entire field of administration for a longer period of time, in advance." If a person called himself German for voting purposes in 1910, then he should count as German also for schooling purposes in 1915—rather than being able to self-classify differently, depending on the moment and the situation. (In Austrian law, to quote Lukas, "the declaration of nationality serves always as the foundation only for an isolated legal claim of the person who makes the declaration. Thus the possibility of abuse, of political maneuver, is much greater." [55]) Should such a strict solution prove unacceptable to the legislature, Herrnritt indicated that he would consider a less strict one better than doing nothing at all. Key was that legislators give self-classification at least some estoppel value. Or to use Herrnritt's own, less technical term, he wanted them to make self-classification more "binding."[56]

Extensive estoppel for self-classification, Herrnritt's preference, would have infringed on individual rights more, not less, than objectivizing, bureaucratic verification. By defining almost any attempt at changing national belonging as individual caprice, it would have reduced the right

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[54] Herrnritt, Nationalität, 79-80; and Herrnritt, "Ausgestaltung," 600-602. See also Steinacker, Volkszugehörigkeit, 32-33; and Christopher Ford, "Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action," in UCLA Law Review, vol. 43 (August 1996), 1954, 2006.

[55] Lukas, "Personalitätsprinzip," 400.

[56] Herrnritt, Nationalität, 77-82, 138; Herrnritt, "Ausgleichsgesetze," 171-73; and Herrnritt, "Ausgestaltung," 600-2, 615. Bernatzik made similar proposals in 1910 and 1912: see Matriken, 31-32; and Ausgestaltung, 31-33.

of the individual to self-classification. It would have expanded a right of the nation to its members. In 1914, however, it became clear that extensive estoppel had little chance of being enacted. In February of that year, fifteen Czech members of the Moravian Diet presented a bill concerning the national classification of children. Modeled, like the more open-ended of Herrnritt's two proposals, on an 1868 Austrian law regulating religious affiliation, the draft legislation would have assigned everyone to a Czech or German registry at birth, according to the belonging of the parents. Transfer would not have been allowed until the age of fourteen, and national belonging would have decided which national school system the child entered. German legislators, however, torpedoed the bill.[57] Even if it had somehow cleared the 61 percent hurdle for amendments to the Compromise, sanction by the Emperor-King would have been far from assured.

In theory, more limited estoppel for self-classification, if introduced as a replacement for bureaucratic verification, could have undermined individual rights less than it shored them up. It would have reduced the right of self-classification (and hence of voluntary association) somewhat, but restored to citizens their right to privacy. The elimination of some individual caprice from the exercise of legal claims based on national belonging might also have reduced national conflict. Theory was one thing, though, and practice another. The legislative process values consistency and restraint far less than does the judicial process, as Herrnritt himself knew all too well. By still calling for legislation which established some degree of estoppel for national self-classification, he signaled that he was not only liberal but national, not only individualist but groupist in his convictions.[58]

IIIB. Balancing Rights with Responsibilities

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[57] Bernatzik, Verfassungsgesetze, 464-68; Landtagsblatt über die Sitzungen des mährischen Landtages in der Zeit vom 16. bis 18. Juli 1913 und vom 3. bis 28. Februar 1914 (Brünn: 1914), appendix 283; and Moravské listy, 31 March 1914, 1.

[58] To my knowledge, no law in Austria established any estoppel for self-classification. The compromise for the Bohemian town of Budweis/Budějovice, however, which was on the verge of being finalized when war broke out in 1914, would have established extensive estoppel for national self-classification had it been enacted. It would also have scaled back bureaucratic verification to some degree. See King, Budweisers, 141-42; and Emil Brix, "Der böhmische Ausgleich in Budweis," in Österreichische Osthefte, 24, no. 2 (1982), 236. On the other hand, the Administrative Judicial Court did establish some estoppel for other-classification. In 1913, for example, it prohibited the admission of children to a school if they had been denied admission to a school of the same language, on grounds of insufficient proficiency, the previous year. In 1906, Herrnritt had hoped for more: "One question which will need to be answered is whether a legally binding decision regarding registration in the electoral rolls of one of the national groups should have estoppel value [präjudiziell sein] for other administrative questions of nationalities law—particularly in connection with the assertion of demands for the erection of national schools and for national representation in the school supervisory authorities." Herrnritt, "Ausgestaltung," 611; and Herrnritt, "Ausgleichsgesetze," 173. The answer given by the Court, however, was "no." The final sentence of Budwiński 7846A, in December 1910, blocked the use of national electoral rolls to settle disputes over the national belonging of school board members. "Rather, in the constituting of school authorities…, which nation a person belongs to is to be determined quite independently."

The Moravian Compromise established national belonging as a legal status, but did not recognize as legal entities the national groups implied thereby. Capable of filing suits and otherwise defending the rights of a nation were only its individual members, each of whom acted as "the occasional representative of the anarchic whole left unorganized by the state."[59] From a legal perspective, Moravia's nations were only loose and unlinked lists of schoolchildren and voters, without executive organs capable of expressing a national will. To be sure, the Administrative Judicial Court's "bold" ruling regarding Lex Perek made the local school boards into such organs, for limited purposes. But group rights still amounted mostly to rights exercised by individuals. That approach greatly limited the rights that each nation could have, and how well those rights could be defended.[60]

Just before the Moravian Compromise, in the aftermath of the Czech and German riots that had shaken Austria in 1897, Social Democratic legal theorists had begun to advocate a far more radical approach to group rights. Austria's nations, Karl Renner had argued, had to be constituted as legal entities. Every citizen had to belong to one and only one of them, and they had to be "endowed in public and private law with executive and legislative capacity" in schooling, taxation, and additional fields. The state had to turn nations, "communities of persons," into organizations of persons—into actual groups, not just imagined ones. It had to give nations rights and responsibilities vis-à-vis each other, their members, and the state in all national matters which were compatible with a non-territorial organizational form. The result of such "national autonomy," supposedly, would be peace among citizens.[61]

Social Democratic theorists considered only one classificatory procedure compatible with national autonomy. In Renner's words, "Regarding national belonging, nothing can decide the issue but the free declaration of national belonging by the individual before the competent authority. This right to self-determination of the individual forms a corollary to the right to self-determination of the nation." Self-classification would be almost pure; there would be estoppel across fields (voting, schooling, etc.), but none across time, and no verification. Yet false declarations of national belonging would be very rare. That was because national autonomy would balance national rights of the individual with responsibilities—the responsibility to pay national taxes, to obey separate bodies of national law, and so on. Each national right of the individual would also count as a group responsibility, and each group right as an individual responsibility. What estoppel could do only mechanically, national autonomy would do organically: bind individuals to a nation. "If the declaration of national belonging is not something one does for amusement over a mug of beer on Sunday," argued Renner, "but rather a

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[59] Szema Jona Wyszewianski, Über die formalrechtliche Behandlung der Nationalitäten in der modernen Gesetzgebung (Mannheim: Hensle, 1909), 16-23.

[60] On group rights and who exercises them, see Karl Renner ["Synopticus"], Staat und Nation. Staatsrechtliche Untersuchung über die möglichen Principien einer Lösung und die juristischen Voraussetzungen eines Nationalitätengesetzes (Vienna: Dietl, 1899), 3-11; Stourzh, Gleichberechtigung, 189-96; and Peter Schuck, Diversity in America (Cambridge: Belknap, 2003), 36-39.

[61] Karl Renner ["Rudolf Springer"], Der Kampf der österreichischen Nationen um den Staat (Leipzig and Vienna: Deuticke, 1902), 37, 53, 87-90; and Otto Bauer, The Question of Nationalities and Social Democracy, edited by Ephraim Nimni and translated by Joseph O'Donnell (Minneapolis: University of Minnesota Press, 2000), 222, 281-87. See also Brubaker, Ethnicity without Groups, especially Chapter 1.

legal institution, a right and a responsibility, then that declaration demands serious reflection. …. Because Herrmann von Herrnritt does not attach any important legal consequences to the declaration of national belonging, the freedom to change national belonging at any time, at will, strikes him as alarming."[62]

James Madison, in 1788, had proposed to ensure accurate reporting from the American federal states regarding the number of their residents, without verification, by tying that number not only to a right (seats in the House of Representatives) but to a responsibility (contributions to the federal budget). Now, by similar means, Renner proposed to encourage accurate reporting from individuals regarding their membership in non-territorial federal units, i.e., in intermingled nations functioning as "states within the state." This was revolutionary. It was also utopian. Justice Bernatzik, in 1912, dismissed Renner's proposal as a "novel about the state."[63]

Even if national autonomy could have been implemented, it would have infringed on equality before the law, by making individuals in Moravia equal before separate laws. It also would have confirmed and even exacerbated social and economic inequalities. Czechs, because economically inferior to Germans, would have had worse schools, higher tax rates, or both. Otto Bauer, a Social Democrat who embraced Renner's theories, admitted the German bias of national autonomy openly. "Without doubt," he wrote in 1907, "under the rule of national autonomy in its most complete form, the old historical nations [including the German one] would retain a certain superiority; without doubt, through the dazzling development of their cultural institutions, through the lower taxation burden on their members, they would also exert a powerful force of attraction on the members of other peoples under this constitution and would thereby be able to achieve national conquests in a peaceful way."[64] Austrian Social Democrats would have "solved" the dilemma of classificatory procedure—and, supposedly, reduced national conflict—by pushing Czechs to choose between a right to be disadvantaged and a right to become Germans.

IIIC. Verification by National Jury?

Another approach to the dilemma of classificatory procedure was tucked into a corner of the Compromise. What might be called verification by national jury came in two versions. The first was used for Czech and German members of the Diet. The Compromise did not stipulate that Diet members had to belong to the electorate which elected them. But it did partition the Diet into three bodies, or "curias"—great landowning, Czech, and German—so that each could

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[62] Renner, Kampf, 65-68. See also Karl Renner, Das Selbstbestimmungsrecht der Nationen in besonderer Anwendung auf Österreich (Vienna: Deuticke, 1918), 113-14; Bauer, Question of Nationalities, 281-83; and Lukas, "Personalitätsprinzip," 400.

[63] James Madison, "The Apportionment of Members among the States," in Clinton Rossiter, ed., The Federalist Papers (New York: Signet, 2003), 338; Paul Starr, "The Sociology of Official Statistics," in William Alonso and Paul Starr, eds., The Politics of Numbers (New York: Russell Sage Foundation, 1987), 18, 33; Bernatzik, Ausgestaltung, 31, 40; Renner, Selbstbestimmungsrecht, 69; and Karl Renner, Grundlagen und Entwicklungsziele der österreichisch-ungarischen Monarchie (Vienna: Deuticke, 1906), 247-48.

[64] Lukas, "Personalitätsprinzip," 359-62; Renner, Staat und Nation, 30-31; Renner, Kampf, 69; and Bauer, Question of Nationalities, 283-291. The compromise for Budweis/Budějovice would have divided school taxes nationally, and prevented inequalities by providing Czech schools in the town with a subsidy from the Bohemian Diet—i.e., from other towns. That solution could not have worked for an entire crownland. King, Budweisers, 144.

appoint men to Diet committees and to the boards of crownland institutions. Here, complementing the local school boards, was another national organ, also with narrowly defined powers. New members of the Diet were assigned to a national curia "according to the nationality of the electoral district in which they were elected."[65] This procedure might seem to have suppressed self-classification. But each man had classified himself by courting voters of a particular national belonging. Verification, meanwhile, had taken the form of those voters, a very large jury of his national peers, electing him. Not administrative authorities but national will, as expressed at the ballot box, prevented a Czech from infiltrating the German curia, or vice versa.

The second version of verification by national jury was embedded in the procedures for appointing some members of nationally divided school boards at the district and crownland levels, as well as for hiring personnel at nationally divided crownland institutions, such as public secondary schools. Those procedures varied in their details, but all involved two steps. The relevant national curia or the relevant national members of the Crownland Committee nominated three times as many men as there were positions to fill. (The Crownland Committee, which oversaw the affairs of the Diet, consisted of nine members of the legislature. Four were chosen by the Czech curia, two by the German curia, two by the great landowning curia, and one, the chair, by the Emperor-King.) Then either the Crownland Committee as a whole or the Emperor-King, bound by that list, appointed the members. The first step amounted to a national jury drawing up a short list of qualified candidates, presumably with national belonging as one of the criteria. By nominating a person, the jury verified the national self-classification that his willingness to serve implied. The second step amounted to a binational and/or nonnational agent appointing those candidates which it considered most qualified. Here, as in the appointing of members to local school boards by municipal councils, one of the criteria was how much the men who would guide or staff a public institution which served only one section of the public enjoyed the confidence of all sections, and especially of their taxpaying elites—which footed the bill.[66]

Christopher Ford, an American jurist with expertise in race-conscious law, has noted that for liberals, other-classification into races creates some need for a classifying organ which gives no reasons for its decisions. Building on Tragic Choices (1978), a study by Guido Calabresi and Philip Bobbitt,[67] Ford argues that "As with the Calabresian example of decisions allocating the scarce resource of artificial kidney machinery, race classification is a type of necessary decision-making that is most conveniently done in the shadows…. [Consigning such power] to the hallowed secrecy of the jury room can 'make the grounds for decisions less direct and perhaps even less obvious, while at the same time trying to make sure that the decisions are based on

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[65] Landesgesetz- und Verordnungsblatt für…Mähren (1906), 3 (Nr. 1, §10a). The six members of the Diet who were elected by Moravia's Chambers of Commerce and Trade could choose between the national curias. After the elections of 1906 and 1913, all six, as expected, chose the German one. Any member of the Diet could choose to join no curia, at the high price of exclusion from the Diet's many staffing decisions.

[66] A variant of this procedure reversed the roles. A binational and/or nonnational agent nominated, and a national jury appointed. Here, however, the Compromise required that each person appointed belong to the relevant nation. Administrative authorities, not national juries, did the real work of verification. Landesgesetz- und Verordnungsblatt für…Mähren (1906), 8 (Nr. 1, §32a), 44-48 (Nr. 4, Abt. 1, §20, 22, 35, 36, 37).

[67] Guido Calabresi and Philip Bobbitt, Tragic Choices (New York: Norton, 1978).

broadly held social values.'" These last words, taken from Tragic Choices, are followed with another quotation: "'Juries apply societal standards without ever telling us what those standards are, or even that they exist. This is especially important in those situations in which the statement of standards would be terribly destructive.'" In contrast to an 'aresponsible,' jury approach, Ford writes, a bureaucratic approach "invites appeal from adverse decisions, thus exposing the process."[68] The relevance of his analysis—which inspired the terms "bureaucratic verification" and "verification by national jury" in this essay—should be clear. Better than bureaucratic verification, verification by national jury skirted the pitfalls of definition, explanation, and appeal, as well as inquisitorial invasions of privacy. It produced clear decisions, but also held out hope to the disappointed that next time, things might turn out differently.

And yet, verification by national jury could not have replaced bureaucratic verification in Moravia. First, local school board members could not have been elected by a local subset of the relevant national Diet electorate, because the Austrian school law of 1869 mandated their appointment by the municipal council. In theory, they could have been nominated to that council by a suitable pair of national organs. But no such pair existed at the local level. Creating one would have required dividing more of politics nationally—municipal councils, for example. And that expansion of national rights, like Renner's more radical one, inevitably would have caused a reduction in individual ones. In any event, German leaders would not hear of such a reform, because they feared that certain elements of Moravia's municipal electoral order which favored them (such as public voting and weighting of votes by wealth) would not survive the process. That and the 61 percent hurdle for amendments to the Compromise made such a change extremely unlikely.

Second and third, children had a right to attend school in one of the two national systems, while men had a right to belong to one of the two national electorates. But verification by national jury could work only in connection with national privileges, not with national rights. A Czech jury could verify that certain individuals eager to serve the Czech nation in one position or another were Czech. And a German jury could verify that certain individuals eager to serve the German nation in one position or another were German. But when the goal was not to honor a few individuals with positions but rather, to divide many thousands of individuals between Czech and German electorates or school systems, the dilemma of classificatory procedure reasserted itself. Who would decide which of the two juries had jurisdiction in any given case? If the individuals themselves, or their legal guardians, that would reduce the procedure to farce. Parents intent on enrolling their children in German schools would simply choose the German jury. If someone else, then who, and on what basis? Verification by national jury could serve to confirm that a person was Czech, or that a person was German. But persons who declined nomination to a national position by no means classified themselves implicitly as belonging to the other nation. Verification by national jury could not serve to determine where the line between the nations ran.

Verification by national jury was not a viable approach to Austria's dilemma of classificatory procedure. It was an attempt at verifying national self-classification in national fashion, and thus an exercise in groupism. To cite Ford again, "The problem with group classifications arises where the categories employed are neither genuinely 'objective' (i.e., scientifically determinable) nor susceptible to legitimation by reference to a decision-making entity (such as a Native American 'tribe') whose authority to make such decisions is

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[68] Ford, "Administering Identity," 1283-84, citing Calabresi and Bobbitt, Tragic Choices, 57, 71.

unquestioned." In such cases, other-classification cannot work "without presuming the very thing formal classification seeks to accomplish: the division of the population into discrete groups of clearly-differentiated individuals. Where there is no identifiable 'base population' with a formal structure permitting collective in-group decision-making, the Native American approach to classification by member-reference will be of no use."[69]

Renner's and Herrnritt's approaches were exercises in groupism, too. To Renner, nations were "communities of persons." To Herrnritt, national belonging was an "objective quality." Both men were confronted with strong evidence to the contrary. Yet, in a testimony less to personal failings than to the power of groupism in late imperial Austria, they failed to see beyond groups, to the dilemma of classificatory procedure.

In 1914, Herrnritt expressed deep misgivings about the compromises. "The road taken…," he wrote, "must lead to a gradual alienation of the nations from one another, and, worse still, from the idea of a unitary state." Given that legislators and the Emperor-King had taken that road, however, Herrnritt urged that they travel farther along it, and mandate tighter classificatory procedures. "As long as Austrian legislators lack the courage, through appropriate regulations…to organize the nations of the state and to determine and secure reliably who their members are, every attempt at an ordering of the legal relations of the nations and their members will remain only a half-measure, sure to lead to continually renewed struggle."[70] Less individual caprice and more group rights, he seems to have thought, would help Austria reduce national conflict—even though thus far, such shifts in balance probably had made national conflict worse, and certainly had made individuals less free.

In 1994, Ford saw the threat of a similar hardening of difference in the United States, as a consequence of Affirmative Action. For him, though, classificatory procedure counted not as a solution but as one of the dilemmas of liberal group rights: "a coherent system of group benefit-allocation requires more attention to the process of classification than has hitherto been given, but this attention may solidify the very social divisions beyond which preferential programs were ostensibly designed to move us. Many will thus doubtless suggest that there is something profoundly wrong with an…ethic which calls forth such jurisprudential segregation and brands badges of racial identity onto the face of public life, insisting that the real problem lies deeper in the group-essentialist paradigm rather than merely at the level of procedural propriety."[71] The constitutional order prevented Herrnritt and other Austrians with "courage" from putting their solutions into effect. To the extent that liberal principles are worth defending, that was probably for the best.

IV. Conclusions

What conclusions can be drawn from the dilemma of classificatory procedure, as it was manifested in one of the Austrian compromises between 1905 and 1914? First, nations, races, and other kinds of peoples are not best understood as groups. Peoples are above all cognitive categories, widely shared views on the world which work in many ways, including through "systems of classification, categorization and identification, formal and informal." So writes Rogers Brubaker in Ethnicity without Groups (2004).[72] This essay complements and confirms

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[69] Ford, "Administering Identity," 1238, 1267. See also 1272-73.
[70] Herrnritt, "Ausgestaltung," 615. See also Lukas, "Personalitätsprinzip," 405.
[71] Ford, "Administering Identity," 1285.
[72] Brubaker, Ethnicity without Groups, 17.

his arguments by showing in a specific instance that classification did not simply articulate peoples which were already "out there" as groups. Rather, classification rested on an understanding of peoples as groups, and thus contributed to constituting them more as such.

Second, the Moravian Compromise encourages pessimism, if not despair, about how well group rights can be reconciled with liberalism. Will Kymlicka, in his influential study, Multicultural Citizenship (1995), discusses the decision of the U.S. Supreme Court in Brown v. Board of Education (1954), that "Separate educational facilities [for Negro and white children] are inherently unequal." Invoking it, American and even Canadian courts have struck down legislation providing separate institutions for Native Americans and other "national minorities"—which Kymlicka distinguishes from racial ones. This "overgeneralization of Brown," he finds, is "unfortunate, and unjust." "Nothing in the judgement warrants the claim that national rights are incompatible with liberal equality."[73] In part, the Moravian Compromise confirms this argument. After 1905, the equality before the law guaranteed to citizens by the Austrian constitution suffered little damage.[74] Unlike Jim Crow, the Compromise was a genuine attempt at "separate but equal." But as has already been mentioned, bulking up Austrian group rights past the quite modest levels of the Compromise, in the direction of Renner's national autonomy, would have entailed considerable infringement on equality before the law, because it would have made citizens equal before separate bodies of national law. Furthermore, liberalism is not only about equality. It is also about liberty. At modest levels, group rights may not imply legal inequality between individuals. But they must imply classification into peoples. And that raises the dilemma of classificatory procedure, which Kymlicka and others today appreciate perhaps less than did Herrnritt.[75] Who is who? How to classify individuals racially or nationally without violating their rights, their liberty? How to establish what Ford has termed "classificatory due process," while being ever mindful to keep asking "what 'process,' in this respect, we are all 'due'"?[76] It is no solution simply to assume, as a Czech saying goes, that the wolf will eat its fill and the goat will remain whole.

Third and last, the Austrian compromises are relevant to Affirmative Action in America today. Contrasts, to be sure, are stark. Affirmative Action rests on an "implicit normative theory

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[73] Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford: Clarendon, 1995), 37, 58-60.

[74] The Czech electoral districts created through the Moravian Compromise contained more voters than did the German ones. A Czech and a German whose votes had carried equal weight before 1905 were thus rendered unequal by law. See Landtagsblatt (1905), 309-10 (Svozil), 536 (Fux); Wyszewianski, Behandlung, 74; and Suzanne Konirsch, "Constitutional Aspects of the Struggle between Germans and Czechs in the Austro-Hungarian Monarchy," in Journal of Modern History, 27, no. 3 (September 1955), 232. A similar inequality holds in the United States to this day, in elections to the Senate—and was the norm in state legislatures until Reynolds v. Sims (1964), 377 U.S. 533. See Harlan dissent, at 589.

[75] See, for example, Iris Marion Young, Justice and the Politics of Difference (Princeton: Princeton University Press, 1990); as well as Brubaker's critique of Young, in Ethnicity without Groups, 58-60. Also relevant is Zahra's critique of Kymlicka, in "Your Child," 34. For an approach to Affirmative Action which perhaps errs in the opposite direction, by rejecting racial classification altogether, see Andrew Kull, The Color-Blind Constitution (Cambridge: Harvard University Press, 1992).

[76] Ford, "Administering Identity," 1282-1285.

of proportional representation in the workforce,"[77] while the Moravian Compromise rested on an explicit normative theory of separation in politics. Blackness in America has a historical link with slavery, while neither Czechness nor Germanness had any particular link with a significant legal status (although since the "ethnic cleansing" of the 1940s, they have been linked with different citizenships). In America, the list of "official minorities" has expanded since the 1960s to include a majority of the population. In the process, women, the disabled, and others have been "racialized." In Austria, the number of peoples remained constant. An attempt by some Jewish leaders at adding a Jewish people was denied by the Supreme Court in 1909.[78]

And yet, America today and Austria back then have much in common: a liberal constitutional order, multiple peoples, and considerable social and economic inequality among them. Affirmative Action, like most of the Austrian experiment with "separate but equal," addresses such inequality through group rights exercised by individuals. America and Austria thus share the dilemma of classificatory procedure. India, with its liberal constitution and preferential policies for "backward castes," shares it with them. Indian classificatory procedures today are strikingly similar to those developed in Moravia after 1905.[79] Compelling comparisons have been made of India's preferential policies with America's Affirmative Action, including their classificatory approaches.[80] No one, however, has compared either America's or India's approaches with Austria's—probably because Austria's is so little known in the English-speaking world.

Such comparison might not prove a merely academic exercise. Affirmative Action, in contrast with Jim Crow, has survived legal challenge on the grounds that it infringes on equality before the law. Challenge to Affirmative Action's racial classification on the grounds that it infringes on due process, on the other hand, seems not to have been attempted. That is probably because the procedures for racial classification used by liberal America today are quite different from those used by illiberal America not so long ago.[81] The procedures for Affirmative Action

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[77] Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy (New York: Oxford University Press, 1990), 120, 321, 383.

[78] See John Skrentny, The Minority Rights Revolution (Cambridge: Belknap Press, 2002); and Gerald Stourzh, "Galten die Juden als Nationalität Altösterreichs?," in Anna Maria Drabek, ed., Prag, Czernowitz, Jerusalem: der österreichische Staat und die Juden vom Zeitalter des Absolutismus bis zum Ende der Monarchie (Eisenstadt: Edition Roetzer, 1984), 73-117.

[79] Regarding preferential policies and caste classification in India, see Marc Galanter, Competing Equalities. Law and the Backward Classes in India (Berkeley: University of California Press, 1984); Ford, "Administering Identity;" and Laura Dudley Jenkins, Identity and Identification in India: Defining the Disadvantaged (New York: Routledge Curzon, 2003).

[80] See the works cited in the preceding note, as well as Clark Cunningham, Glenn Loury, and John Skrentny, "Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs," in Georgetown Law Journal, vol. 90 (2002), 836-82; Clark Cunningham, "After Grutter Things Get Interesting! The American Debate over Affirmative Action is Finally Ready for Some Fresh Ideas from Abroad," in Connecticut Law Review, vol. 36, no. 3 (Spring 2004), 665-77; and Laura Dudley Jenkins, "Race, Caste and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States," in Connecticut Law Review, vol. 36, no. 3 (Spring 2004), 747-85.

[81] Recent scholarship on pre-civil rights era racial classification includes Gross, "Litigating Whiteness"; and Daniel Sharfstein, "The Secret History of Race in the United States," in Yale

have employed more self-classification and less verification, have been much more ad hoc, and have been administered very inclusively, if not consistently. Yet those procedures, like the older ones, have rested in large measure on folk definitions of race as natural and self-evident, often manifested through "objective markers" such as skin color. And such definitions are now eroding, under the impact of immigration and intermarriage, as well as scholarship on the social construction of race and ethnicity. That, although perhaps good news, is helping to make instrumental self-classification, or "identity fraud," a growing problem. Who is black and who is white? Who is Hispanic, who is Asian, and who is Native American? What is the connection between those categories and the disadvantage that Affirmative Action is supposed to counter? Like Ford, other experts see building pressure for different and more formal classificatory procedures.[82] Austria, other than India, seems the only liberal country which has experimented with formal procedures for classifying citizens into peoples to any great degree. Its complex experiences might prove instructive, and cautionary, to Americans as they begin to confront their own version of the dilemma of classificatory procedure.

Law Journal, vol. 112 (April 2003), 1473-1509.

[82] Lawrence Wright, "One Drop of Blood," in The New Yorker, 25 July 1994, 46-55; Cunningham et al, "Passing Strict Scrutiny"; Skrentny, Minority Rights Revolution, especially v-vi, 355; and Hugh Davis Graham, Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy in America (New York: Oxford University Press, 2002). For an alarming perspective, see Luther Wright, "Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications," in Vanderbilt Law Review, vol. 48 (March 1995), 515-69.