

# *Fordham Urban Law Journal*

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*Volume 32, Number 1*

2004

*Article 4*

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## Austria's Pre-War *Brown v. Board of Education*

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# Austria's Pre-War Brown v. Board of Education

Maria L. Marcus

## Abstract

This article discusses the Austrian Constitutional Court's 1931 decision in which it held that the University of Vienna's regulations dividing students into ethnically based groups was unconstitutional. The article compares the similarities and differences between this case and later critical American equal opportunity cases including Brown v. Board of Education and suggests that an understanding of the current racial challenges is most effective by examining both global and American perspectives. This article explores the balance between maintaining universities autonomy and ensuring that racism does not foster in an institution free from judicial intervention. In discussing two cases, this article points out how in America and in Austria, the judiciary was uncomfortable with the role of dismantling segregation and the vast opposition and public riots that they faced in their attempts.

**KEYWORDS:** Constitution, fourteenth amendment, first amendment, segregation, integration, racism, equal

## AUSTRIA'S PRE-WAR *BROWN v. BOARD OF EDUCATION*

*Maria L. Marcus\**

### INTRODUCTION

On May 19, 1930, a Viennese newspaper published an article under the title, “His Magnificence The Rector: Scandal at the University of Vienna.”<sup>1</sup> The author analyzed and attacked the government-sponsored University’s new regulations dividing the students into four “nations”—German, non-German (e.g., Jewish), mixed, or “other.” These regulations had been presented by the Rector as vehicles for voluntary association of students with common ethnic roots. The article noted, however, that under the new system, individuals were precluded from deciding themselves to which nation they belonged. A student would be designated as non-German even if he was a German-speaking Austrian citizen descended from generations of citizens, unless he could prove that his parents and his grandparents had been baptized.<sup>2</sup>

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1. *Seine Magnifizenz der Rektor: Der Wiener Universitaets Skandal [His Magnificence the Rector: The Vienna University Scandal]*, WIENER SONN-UND MONTAGS ZEITUNG, May 19, 1930, at 4 (Translation Aces trans., 2001-2003) (translation on file with author). Ernst Klebinder, Editor-in-Chief, identified himself as the author of the article and took responsibility for its content. *See infra* note 82 and accompanying text.

2. *See* BRUCE F. PAULEY, FROM PREJUDICE TO PERSECUTION: A HISTORY OF AUSTRIAN ANTI-SEMITISM 125 (1992); *Protokoll über die öffentliche-mündliche Verhandlung des VfGH am 18.6.1931 [Public Hearing in Constitutional Court on June 18, 1931]*, AVA-VfGH, V 2/31-10 at 4 (Translation Aces trans., 2001-2003) (translation on file with author)

The newspaper's editor was criminally prosecuted for this publication on the grounds that he had failed to exercise "press prudence," and had defamed the Academic Senate and the Rector of the University of Vienna by accusing them of promulgating unlawful measures.<sup>3</sup> His defense was that the article had accurately characterized the university regulations as unconstitutional, and that academic officials had no authority to create such student groups. This legal analysis was grounded on the conclusions of an eminent authority, Dr. Joseph Hupka, a former Dean of Vienna Law School.<sup>4</sup> The trial court, presided over by the Justice for Press Affairs, admitted all the defendant's evidence and granted his application to petition the Constitutional Court—Austria's highest tribunal on fundamental constitutional matters—for rescission of the regulations in their entirety.<sup>5</sup>

In the hearing before the Constitutional Court, counsel for the defendant editor argued that equality of all citizens before the law prohibited differentiating individuals on the basis of ethnic group, language, or religion. In a chillingly prophetic comment, he suggested that if a government-operated university could lawfully mandate such student separation, then it would be possible for the government to do so in all situations, compelling residence in different parts of town and employment only by a person of the same religion.<sup>6</sup> The response by the Rector was that there was no constitutional defect in the University's regulations because the student groups all had identical rights.<sup>7</sup> Less than twenty-five years later in the United States, the Supreme Court unanimously rejected separate-but-equal claims in *Brown v. Board of Education*.<sup>8</sup>

Constitutional generalities such as equal protection, freedom of association, and rights of citizenship must be unpacked by focusing on their less appealing implications. Consider whether equal protection is satisfied if groups have equal rights but unequal power; whether freedom of association necessarily and invariably encompasses the freedom to exclude;

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[hereinafter *Hearing*].

3. Sammlung der Erkenntnisse und Wichtigsten Beschlüsse des Verfassungsgerichtshofes [Decision of the Austrian Constitutional Court], VfSlg 1397/1931, AVA-VfGH, V 2/31-12 at 298 (June 20, 1931) (Translation Aces trans., 2001-2003) (translation on file with author) [hereinafter *Decision*]. The decision was announced on June 23, 1931.

4. *Aus dem Gerichtssalle* [From the Courtroom], NEUE FREIE PRESSE, (Vienna), June 20, 1930, at 3. (Translation Aces trans., 2001-2003) (translation on file with author). See *infra* note 249 for a description of Dr. Hupka's prior stance in the public press.

5. *Decision*, *supra* note 3, at 298.

6. *Hearing*, *supra* note 2, at 7.

7. *Id.* at 5.

8. See generally 347 U.S. 483 (1954) (disavowing the prior decision in *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

and whether the prerogatives of generations of citizenship are inadequate to trump competing claims.

This Article analyzes these questions in two contexts: the little-known legal developments in pre-Hitler Austria that staved off the attempt to segregate University students, and the still-controversial formulation in *Brown* that sought to end racial segregation of students in America. The United States Supreme Court in the 1950's, like the Austrian Constitutional Court, was asked to interpret a constitutional equality principle that embodied the ideals of a democracy but was in conflict with a violent and historically-entrenched reality.

Part I will discuss the actual deliberations of the Austrian Constitutional Court Justices in this case and explore the shaping of their decision, a decision reflecting an uneasy synthesis of opposing views. The Justices rejected the Rector's jurisdictional objections, and instead undertook the responsibility of striking down the Student Orders on the basis of statutory violations. Yet the opinion also contained language that might guide the Academic Senate in future grouping of students by "nationality" if such division conformed to constitutional principles.

The Constitutional Court was denounced in the pan-German press as "an enemy of the German people in terms of blood and political policy,"<sup>9</sup> and members of the German Student Body protested the decision by engaging in a campaign of brutal assaults against other students.<sup>10</sup> The Rector protected these assailants from arrest by the police.<sup>11</sup> The next few years produced not only a dramatic attempt to achieve segregation of University students through federal legislation, but also a new Constitution that substantially diminished the Court's powers and the rights of Austrian citizens to receive equal treatment. Nonetheless, the judiciary's rejection of Austria's first effort to separate citizens on the basis of religion and ethnicity was effective until the Anschluss of Germany and Austria seven years later.

Part II of the Article will consider the relevance of the Constitutional Court's ruling to *Brown* and *McLaurin v. Oklahoma State Regents*,<sup>12</sup> cases and underlying facts with curious parallels to the Austrian situation. The

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9. *Der Verfassungsgerichtshof bricht deutsches Recht!* [*The Constitutional Court Breaks German Law!*], DEUTSCHÖSTERREICHISCHE TAGES-ZEITUNG (Vienna), June 24, 1931, at 1 (Translation Aces trans., 2001-2003) (translation on file with author).

10. PAULEY, *supra* note 2, at 126.

11. *See id.*

12. 339 U.S. 637 (1950) (holding that assignment of an African-America student to separate facilities within the University of Oklahoma constituted a violation of the Equal Protection Clause).

segregationist regimes in both countries invoked similar mystiques and developed similar prohibitions. There were also substantial differences: in Austria, the universities were receding from uneasy integration to (literal) dis-integration. In America, the trajectory was reversed.

Part III, however, suggests that *Brown's* prohibition against segregation in public universities has left unanswered questions about the conflict between First and Fourteenth Amendment purposes. Associational freedoms may be pitted against anti-discrimination policies and the compelling academic interest in a diverse student body recognized in the Supreme Court's *Grutter v. Bollinger* opinion.<sup>13</sup> Exploring concepts of association, equality, and diversity in the violent Austrian society of the 1930's can illuminate the present-day constitutional conflicts facing America's universities and courts.

### I.

In my discussion of mandatory invidious separation of university students in Austria and in America, I interpret the term "racism" as implicating more than one group's consuming dislike of another. Under Professor George Fredrickson's brief and useful definition, "racism exists when one ethnic group or historical collectivity dominates, excludes, or seeks to eliminate another on the basis of differences that it believes are hereditary and unalterable."<sup>14</sup>

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The University of Vienna's regulations—the Nazi Student Orders, as they came to be called—were the culmination of decades of strife that had complex political, religious, and economic elements. The Austrian Habsburg monarchy's multi-national empire had collapsed by the end of 1918, and post-war Austria was merely the bodyless head that remained after the break-up.<sup>15</sup> University students had bleak employment prospects in the diminished territory of the Austrian republic, with its enormous surplus of civil servants and soldiers. The rather high percentage of Jewish students, some from the former Austro-Hungarian eastern provinces, produced competition for jobs that helped to fuel an academic anti-

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13. 539 U.S. 306 (2003).

14. GEORGE M. FREDERICKSON, *RACISM: A SHORT HISTORY* 170 (2002). In the Nazi framework of belief, Jews were a "race" rather than adherents of a religion, tainted by nature and "blood." See *infra* Parts I.H.2 and II.A.1.

15. PAULEY, *supra* note 2, at 78-79.

Semitism exceeding that of Germany.<sup>16</sup> Professor Bruce F. Pauley has observed that this anti-Semitism was permitted by sympathetic university administrators and sheltered by a concept of academic autonomy, originating in the Middle Ages, which permitted universities to police (or decline to police) themselves.<sup>17</sup>

As will be shown below, Nazi power both inside and outside the universities increased in the 1930's, though not without conflict. Student groups fought for political dominance; the Justices of the Constitutional Court struggled for unanimity in disposing of the Nazi Student Orders; top federal officials launched a fresh legislative segregation package; and a new Constitution established an authoritarian corporate state that was later absorbed into a Third Reich in which one could be "German" but no longer Austrian and certainly not Jewish.

#### **A. The Political Setting of the Constitutional Court's Decision: Student Polarization and Nazi Violence**

The Socialist administration of "Red Vienna" gave little thought to the economic insecurity of University students, perhaps convinced that most of them were anti-Semites and anti-communists.<sup>18</sup> Flowing into this vacuum, the German Student Body set up a foreign monetary exchange and provided cheaper meals for poor students.<sup>19</sup> Its members extolled manhood and honor in the field of battle, a battle against the myriad enemies they believed were encircling them. Recurring attacks against democrats, Socialists, pacifists, and especially Jews, were carried out by the German Student Body without interference by University officials during the 1920's and early 1930's.<sup>20</sup>

To cite only a few examples, Nazi students from the Technical College invaded the lecture hall of a famous scholar at the Anatomy Institute in 1923, ordering that all Jews vacate the room.<sup>21</sup> The following day, Nazis stormed into the classroom of a professor at the College of International Trade and demanded, in the name of the German Student Body, the removal of all Jewish students. Those who did not leave within three minutes were beaten with sticks and rubber clubs, and thrown from the top

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16. *Id.* at 89.

17. *Id.*

18. John Haag, *Blood On The Ringstrasse: Vienna's Students, 1918-33*, in WEINER LIBRARY BULLETIN 29, 33 (1976).

19. *Id.*

20. *Id.* at 31; *see also infra* Part I.E.1.

21. PAULEY, *supra* note 2, at 89, 97.

of the ramp in front of the main University building.<sup>22</sup> Police officers posted nearby did not intervene because of “academic freedom”—not the students’ freedom to study and do research, but the institution’s protection from outside intervention.<sup>23</sup> This violence was so extreme that the *Reichspost*, the official daily newspaper of the Christian Social Party, called the riot “not only a great wrong, but also a great stupidity” because it would provide a strong argument for enemies of Christian German culture who wished to undermine the University’s authority to govern itself.<sup>24</sup>

During 1927 celebrations of the founding of the Republic, Nazi students attacked the Socialist Student Association, singing a triumphant party song as injured people were carried away.<sup>25</sup> In a series of confrontations, they also destroyed posters of Jewish organizations, invaded lectures of Jewish professors, captured security officials for hours at a time, and disrupted the office of the university’s chancellor.<sup>26</sup>

In the 1930’s large rings of Nazi students, armed with brass knuckles and rubber truncheons, would gang up on individuals whose religion or opinions were disfavored.<sup>27</sup> This brutality was also mirrored outside the University, where Austrian Nazis repeatedly attacked Jewish businessmen and their families, and at times assaulted pedestrians in the Viennese streets who “looked Jewish.”<sup>28</sup> Such mass aggressions also occurred with the rise of segregation in the American South, where mobs assaulted, robbed and murdered African-Americans.<sup>29</sup>

### B. The Constitutional Court’s Judgment

Under the Austrian system, no ordinary court had the power to “examine into the validity of laws duly proclaimed.”<sup>30</sup> The Constitutional Court had the sole authority to exercise this critical function.<sup>31</sup> The federal President

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22. *Id.*

23. *Id.*

24. *Id.* at 98.

25. *Id.* at 122.

26. *Id.* at 124.

27. Stenographisches Protokoll, 77, Sitzung des Nationalrates der Republik Oesterreich IV. Gesetzgebungsperiode Freitag. 29. April 1932 [Stenographic Minutes, 77<sup>th</sup> Session of the National Council of the Republic of Austria, Legislative Session, Friday, April 29, 1932], at 2084-85 (Translation Aces trans., 2001-2003) (translation on file with author) [hereinafter Parliamentary Debate]; see *infra* Part I.F.2.

28. PAULEY, *supra* note 2, at 196. The 1930 Nazi electoral victories in Germany encouraged such assailants. *Id.*

29. See *infra* Part II.A.3.

30. AUS. CONST. art. 89(1) (1929).

31. HERBERT HAUSMANINGER, THE AUSTRIAN LEGAL SYSTEM 126 (2d ed. 2000); J.A.C. Grant, *Judicial Review of Legislation Under the Austrian Constitution of 1920*, 28 AM. POL.



appointed all the Justices from legally designated slates.<sup>32</sup> The Court's President, Vice President and six of the Associate Justices were chosen from a list prepared by the federal ministry. Six additional Associate Justices were selected from lists prepared by the houses of Parliament.<sup>33</sup>

These Justices received requests from other courts and administrative bodies to resolve constitutional and legal challenges or jurisdictional disputes.<sup>34</sup> Although the newspaper editor who was prosecuted for his criticism of the Nazi Student Orders could not directly bring an action in the Constitutional Court, the trial court could hear his claims and then petition the High Court for disposition of them.

### 1. *The University's Orders and Justifications*

After affirming its jurisdiction and announcing its holding that the Student Orders were rescinded as contrary to law,<sup>35</sup> the Constitutional Court sets out the salient facts in a colorless manner that makes no mention of the violent context in which the Orders were issued.

The University of Vienna's Rector had proclaimed that students of "German ethnic origin" were organized at German universities into groups extending beyond national borders. The Academic Senate therefore established the German Student Body at Vienna University as the representative of all students of German ethnic origin, and permitted those of other ethnic origins and native languages to affiliate with other Student Nations "having the same rights and obligations."<sup>36</sup> Although each Nation could elect representatives, the Academic Senate had the authority to revoke recognition of anyone who injured interests that "affect the German character of the university."<sup>37</sup>

A student's declaration of ethnic origin and native language made in an official personal identification document was the basis for assignment to a

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SCI. REV. 670, 671 (1934).

32. HAUSMANINGER, *supra* note 31, at 139. For an overview of the development of Constitutional Courts in Europe and Central and Latin America, see *id.* at 137-138.

One should note in particular that in times of radical political change from a totalitarian to a democratic system, the regular judiciary is invariably tainted but cannot be replaced quickly, whereas a specialized constitutional court may be staffed with competent and reputable jurists. If sufficiently broad access is provided . . . , this court may swiftly impose constitutionality from above.

*Id.* at 138.

33. *Id.* at 139; Grant, *supra* note 31, at 671 n.7.

34. See Grant, *supra* note 31, at 671-72.

35. Decision, *supra* note 3, at 296.

36. *Id.* at 297.

37. *Id.*

Nation.<sup>38</sup> Such a student's self-description was not dispositive, however, because representatives of a Student Nation could file objections to any membership claim. Objections would be finally determined by an arbitration panel comprised of three people appointed from the teaching staff by the Academic Senate, one representative of the objecting Nation, and possibly one representative of another Nation.<sup>39</sup>

The opinion then explains how the case reached the High Court. Ernst Klebinder, the editor of a Viennese newspaper, was prosecuted for failing to exercise press prudence and insulting the Rector and the Academic Senate by accusing them of passing unconstitutional measures.<sup>40</sup> At a public trial on June 20, 1930 in the District Criminal Court in Vienna, the accused "produced evidence of the accuracy of all the points made in the article."<sup>41</sup> He urged that the Regulations (the Rector's term for the Student Orders) violated the Constitution, since both Austrian Jewish citizens and other citizens among the students were discriminated against in favor of the German Student Body. After receiving these pleadings, the Criminal Court proceeded to petition the Constitutional Court for rescission of the Regulations on the grounds that 1) the Academic Senate had no authority to issue them under relevant statutes and disciplinary provisions and 2) the Regulations violated constitutional guarantees of equal rights because they divided students on the basis of "the principle of ethnic origin rather than the principle of citizenship."<sup>42</sup>

At a subsequent hearing before the Constitutional Court, the Academic Senate argued on the procedural front that the Regulations were only by-laws of a student-run body having the right of self-administration.<sup>43</sup> As to the equal citizenship claims, the Senate offered the justification that the Regulations put all the Nations on the same footing. "[A]t most it can be claimed that for many of the Student Nations this right . . . has less value than it has for others" but that it would not violate the principle of equality.<sup>44</sup>

## 2. *Gist of the Court's Disposition of the Issues*

After this summary of the prior proceedings, the Constitutional Court addressed the key questions. Did the Academic Senate have the authority

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38. *Id.*

39. *Id.* at 298.

40. *Id.*

41. *Id.*

42. *Id.* at 298-99.

43. *Id.* at 300.

44. *Id.* at 301.

to establish segregated student groups? Would compulsory “ethnic origin” divisions among citizens violate the Constitution?

The first question was definitively answered. The Constitutional Court found that the Student Orders could not be issued by a non-legislative institution like the Academic Senate.<sup>45</sup> The “Nations” favored by the University were in fact associations, and were therefore strictly controlled by statute. The Associations Law of 1867 governed the genesis and purposes of all such bodies.<sup>46</sup>

This potential for full supervision over citizen organizations was a particular feature of Austrian law stemming from the reign of Emperor Franz Joseph, a feature which will be more closely examined in Part III below.<sup>47</sup> It enabled the Court to disband the German Student Body, with all the Justices affirming that result.

By contrast, the constitutional issues were not cohesively resolved. The opinion indicated that dividing students by “nationality” could be permissible if these groups were given the same rights, and if the classification accorded with constitutional principles.<sup>48</sup> No finding was made as to whether the existing groups did in fact have the same rights, nor was there any indication of how “accord” with constitutional principles would be demonstrated, or indeed which principles were being referenced.

At a later point, the opinion reached the critical question of whether the Student Nations were in fact voluntary in nature; the Academic Senate had repeatedly declared that the Orders only created a framework for student preferences. The Justices concluded that the regulations apparently established compulsory organizations and then curtly stated that it was unnecessary to expand on the reasons why such entities could not be established by mere Order. None of the statutes governing associations

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45. *Id.* at 306.

46. *Id.* at 305.

47. See also *infra* Part I.G.2.b, describing the registration procedures under the statute. Austria was still a monarchy until a little over a decade before the Constitutional Court's historic decision, and the Associations Law originated as a liberalizing measure under the Emperor.

48. Decision, *supra* note 3, at 303-04. The Court did not explain whether this dictum referred solely to the constitutionality of creating voluntary divisions. The Justices noted, however, that “as the Academic Senate emphasizes, the contested Student Regulations are aimed at giving students of a given ethnic origin the framework of an Order within which they can voluntarily come together.” *Id.* at 304-05. In the same paragraph, the opinion identifies the purpose of the Regulations: “Thus the Student Regulations are intended to be general regulations, on the basis of which the University students, depending on their origin and native language, voluntarily form permanent organized connections for the pursuit of specific common goals.” *Id.*

permitted this arrangement.<sup>49</sup> The door was now open for the Court to apply the equality principle of the Austrian Constitution and to proclaim that although *voluntary* student groupings would be permissible, compulsory divisions would be prohibited. Instead, the opinion at this point remained equivocal.<sup>50</sup>

Yet the Justices held back from explicit endorsement of mandatory divisions, whether generated by academic fiat or statute. Indeed, this failure to legitimate compulsion was duly noted by federal officials who crafted a legislative segregation package in the following year, an effort that will be discussed below at Part I.E. In presenting this package to Parliament, the Minister of Education insisted that the student divisions created were wholly voluntary.<sup>51</sup>

Also of significance was the Court's refusal to endorse "ethnic origin" as a basis for the student groupings that received conditional approval (if they all have the same rights, if they conform to the Constitution, if they accord with statutory provisions). The ethnic origin standard would *inter alia* have forced a student with a Jewish parent (or grandparent) into a Jewish group he would not elect. If he regarded himself as an entirely secular Austrian, or conversely as a devout Lutheran, it would make no difference to this unwanted group assignment.

Penetration of the Court's shifting emphases and curious omissions requires more extensive analysis. The judges' strategy at this perilous historic moment can be illuminated by discussion of their actual deliberations, which now follows. Listen to the Justices' colloquy on each of these constitutional issues, as they made concessions, created majorities, and then voted. Their shifting dialogue reflected their awareness that future legislative action or constitutional amendment might alter the terrain by validating student separation.

### C. The Justices' Internal Debate

The Austrian Constitution of 1929 was an elegant and complete statement of the civil and political rights of citizens. It built on the work of

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49. *Id.* at 306.

50. *Id.* After listing statutes governing associations in general, the Court states: "Regulations covering the students themselves and dividing them into specific groups could be created only by law." *Id.* This sentence might be interpreted as a mere summary of the statutes that have just been cited, which form a barrier against University-created Orders. On the other hand, placement of the sentence directly after identification of the Student Nations as apparently compulsory might be read as permitting even compulsory associations if they were effectuated "by law." No existing constitutional obstacles to such a plan are discussed.

51. *See infra* Part I.F.2.

Dr. Hans Kelsen, and incorporated portions of the 1919 Treaty of Saint-Germain concerning protection of minorities.<sup>52</sup> All Austrian nationals were equal before the law, enjoying the same rights without distinction as to language, religion, or race. The Constitution guaranteed that differences in religion “shall not prejudice any Austrian national in the exercise of civil rights,” and that Austrians who belonged to racial, religious, or other minorities “shall enjoy the same treatment and security in law and in fact as the other Austrian nationals.”<sup>53</sup> These guarantees were cited by the District Criminal Court in its petition to the Constitutional Court for rescission of the challenged University regulations.

In fashioning the decision that struck down the Nazi Student Orders, the Constitutional Court judges were acutely aware of the political ramifications of their choices. They disagreed on the core issues, and on how to explain these issues to a polarized and potentially violent audience. Their backroom colloquy and concerns paralleled internal discussions among the United States Supreme Court Justices in *Brown* about the effect that a desegregation decision would have on Southern sensibilities and tempers.<sup>54</sup>

The Austrian bench was large, with fourteen members.<sup>55</sup> Because tradition precluded dissenting and concurring opinions, they operated under the internal discipline of debating and voting on each approach until the final one was reluctantly embraced.<sup>56</sup> Justices Ludwig Adamovich, Hermann Eckel, Ernst Durig, Georg Froehlich, and Arthur Lenhoff took the lead in suggesting strategies and specific wording.<sup>57</sup>

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52. See HAUSMANINGER, *supra* note 31, at 4-5 for a summary of the collapse of the Austro-Hungarian monarchy after Austria's defeat in World War I and the establishment of an Austrian republic pursuant to terms of the peace treaty of Saint-Germain; and at 137 for a summary of the role of Hans Kelsen as the “father” of the Constitution of 1920. For details of the developments of the Austrian republic in the years following 1918, see MALBONE W. GRAHAM, JR., *NEW GOVERNMENTS OF CENTRAL EUROPE* 132, 137, *passim* (1924) (“Never was a revolution carried out more peacefully and with more devout intentions.”).

53. See *Treaty of St.-Germain*, arts. 66 and 67, Part III ICL Document Status, Sept. 10, 1919. In 1934, a new Austrian Constitution launched by the administration of Chancellor Engelbert Dollfuss gave this equality provision another twist that made it malleable to executive power. See *infra* Part I.G.2.a.

54. See *infra* Part II.B.1.b.

55. HAUSMANINGER, *supra* note 31, at 139.

56. *Id.* at 149. The United States Supreme Court Justices deciding *Brown* also struggled to produce a unanimous opinion, which was facilitated by a change in the Court's composition. RICHARD KLUGER, *SIMPLE JUSTICE* 584-85, 663-65, 683-84, 697-99 (1975).

57. The backgrounds and known political affiliations of these Justices provide a very limited basis for predicting their viewpoints and votes. Dr. Adamovich, a University professor in Graz, was listed in treatises on the Court as neutral (which meant that he was appointed by the federal administration without prior nomination by a Parliamentary party);

*1. Nullification on Statutory Grounds: The Associations Law*

Minutes taken during the Justices' deliberations show that their dialogue was courteous and free-flowing, although there was initial disagreement and a split vote on every issue. The statutory challenge to the Orders was that any permanent organization must emanate from and be governed by the Austrian Associations Law. Formation of the student groups by the Academic Senate violated this principle, and therefore a formal basis existed for prohibiting them.

Disagreement centered on two points: whether the "Nations" were associations at all, and whether the students themselves retained a right to associate for common purposes regardless of any governing statute. One Justice opined that the "Nations" were only auxiliaries to University authorities in administering "discipline."<sup>58</sup> Another countered that the Nations did have significant characteristics of associations because they could affiliate with external student organizations and collect dues.<sup>59</sup> Although Justice Adamovich was not part of the liberal wing, he nonetheless emphasized that "the entire framework provided by the Student Regulations could not be reconciled with the Associations Law."<sup>60</sup> Every permanent voluntary organization committed to a continuing purpose was an association. Even if the Nations were regarded as a *sui generis* type of organization, a special law would be required.

Students could not themselves form a valid corporate body but they could apply for permission directly under the Associations Law and comply with its requirements, Justice Adamovich suggested. Justice

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Dr. Durig, neutral, was President of the Constitutional Court; Dr. Eckel was apparently affiliated with the Greater Germany Party; Dr. Froehlich, neutral, was Vice President of the Court and Reporting Justice on the Student Orders decision (assigned to present a draft opinion at the deliberations); Dr. Lenhoff, a Professor at Vienna Law School, was not a member of a political party but was nominated by the Social Democrats. Looking at the whole group of fourteen, six were categorized as neutral, one as a Social Democrat, two as neutral but leaning towards or nominated by Social Democrats, one as "Grdt," and four as Christian Social. Thomas Zavadil, *Die Ausschaltung des Verfassungsgerichtshof 1933*, Diplomarbeit zur Erlangung des Magistergrades der Philosophie and der Geisteswissenschaftlichen Fakultät der Universitaet Wien [The Exclusion of the Constitutional Court, 1933 (unpublished M.A. of Philosophy thesis, University of Vienna)] 42-43, 52, 262-266 (1997) (on file with the School of Liberal Arts of the University of Vienna) (Translation Aces trans., 2003) (translation on file with author).

58. Protokoll uber Beratung und Abstimmung des VfGH vom 19/20.6.1931 [Minutes of the Deliberations and Voting of the Constitutional Court, June 19-20 1931] AVA-VfGH, V 2/31-11 at 7-8 (Translation Aces trans., 2001-2003) (translation on file with author) [hereinafter *Deliberations*].

59. *Id.* at 8-9.

60. *Id.* at 8.

Lenhoff insisted that “fundamental rights included the right to proclaim oneself a member of a specific Nation.” But the system inaugurated by the Academic Senate did not support such student rights; indeed, it suppressed them. Membership must be based on free choice, he explained, never on compulsion. Here, a student could be assigned to a Nation “without regard to whether he did or did not want to belong to it.”<sup>61</sup>

The primacy of the Associations Law prevailed. A crucial vote was taken and the eight-person majority agreed, with five dissents, that the Nazi Student Orders must be abrogated.<sup>62</sup> The Justices’ logically-structured deliberations on the statutory question led to crisp explanations in the decision set out above. In striking contrast, their clashing agendas on the constitutional challenge precluded the development of a coherent position, even on the question of whether to take at face value the Rector’s assertion that the Orders were merely an attempt to facilitate student preferences.

## 2. *The Constitutional Debates*

The debate is notable for what it did not discuss. What would the Academic Senate achieve by putting a government stamp on student divisions based on ethnic origin? The German Student Body was already occupying a privileged position at the University, assisting the administration with “discipline,” influencing policy, affiliating with similar bodies outside of Austria, sometimes given faculty rooms for its political meetings while such spaces were off limits to other student groups, permitted with impunity to drive Jewish students out of classrooms.<sup>63</sup> Why was a new phase needed? The Government-sponsored University’s subordination of religious and other minorities by packing them into Nations of “less value” (to use the Academic Senate’s own words) had both a practical and a prophetic significance. In practical terms, the minority would be precluded from a prime benefit of equal treatment by government: sharing in the position of the strong. In prophetic terms, the stigma that the German Student Body had attempted to impose by vituperation and violence on religious and other minorities would now

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61. *Id.* at 12. Based on the information a student was obliged to provide to the University in data form with questions about ethnic origin, he would then be required to belong to an assigned nation. *Id.*

62. *Id.* at 9; see also Brigitte Fenz, *Zur Ideologie Der “Volksbürgerschaft.” Die Studentenordnung der Universitaet Wien vom 8.April 1930 vor dem Verfassungsgerichtshof [The Ideology Of “Ethnic Citizenship,” the University of Vienna’s Student Regulations of April 8, 1930 before the Constitutional Court]*, ZEIT GESCHICHTE, Jan., 1978, at 134 (Translation Aces trans., 2001-2003) (translation on file with author) [hereinafter Fenz I].

63. See PAULEY, *supra* note 2, at 93, 118; see also *Hearing, supra* note 2, at 3; CHARLES A. GULICK, *AUSTRIA FROM HABSBURG TO HITLER* 639-41 (1948).

achieve official University approval and acquire a forward motion.

As counsel for the beleaguered editor who challenged the Student Orders had emphasized, judicial permission to segregate the University's student body would be the first step towards undermining the edifice of equality and imposing segregation in employment, residence, and other areas of life.<sup>64</sup> This prediction had been presented to the Court, but no reference was made to it in the polarized Justices' dialogue. During the same era in the American South, the pervasive intrusion of racism into every aspect of political and economic life had already been established.<sup>65</sup>

The issues that emerged in Austria were these: should the Court approve the concept of separate but equal student bodies? If so, what would a valid basis for this separation be? If the equality principle were no barrier to division predicated on "common points of view," could there be other constitutional obstacles to such a division? Should "ethnic origin" be used as a permissible example of a common point of view?

Much of the subsequent disagreement centering around the validity of a separate-but-equal system does not identify that system as a compulsory one. A motion that appeared to be a compromise was made by Justice Eckel. The Court could note that division by Nation would not violate the Constitution if these Nations were accorded the same duties and rights, but the opinion should state that no finding had been made on whether in fact this equal allotment had occurred because the Student Orders had already been rescinded on other grounds.<sup>66</sup> In his draft, Justice Eckel did not contradict the Rector's assertion that the regulations merely established voluntary groups.

This approach, providing future encouragement to the Academic Senate without reaching a holding, sparked vigorous debate. Justice Adamovich argued in support that the Treaty of Saint-Germain as incorporated into the Constitution had *avored* permitting the grouping of students into nations.<sup>67</sup> He may have intended a reference to Article 67, Minority Protection, which provided that Austrian nationals belonging to racial, religious, or linguistic minorities have the right to establish their own schools and religious institutions as a matter of voluntary choice. Yet, Adamovich did not mention the Treaty's statement that such Austrians are entitled to "the same treatment . . . in law and in fact as other Austrian nationals,"<sup>68</sup> a constitutional provision that remained as a formidable barrier against any

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64. *Hearing*, *supra* note 2, at 7.

65. *See infra* Part II.A.3.

66. *Deliberations*, *supra* note 58, at 13.

67. *Id.* at 14.

68. *See supra*, note 53; Part I.C.



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compulsory division.

Another Justice voiced strong objections to Justice Eckel's motion on the grounds that majority/minority separation on any basis was prohibited. Under the Constitution of the Universities, students may only be classified according to which school they attend, and whether or not they are regular students. The Academic Senate could not construct a different, fragmenting set of divisions.<sup>69</sup>

Yes, it could, Justice Adamovich insisted. And let's insert this sentence into our decision: "Contrary to the legal opinion expressed in the petition of District Criminal Court I in Vienna, the Constitutional Court finds that classification of students according to specified common points of view" does not violate the principle of equality or any other constitutional provision if these groups have the same rights.<sup>70</sup> The District Criminal Court's opinion as quoted by the High Court would have prohibited *inter alia* the voluntary divisions that the Academic Senate and the Rector had identified. Adamovich did not unpack the question of whether his proposal would merely endorse the constitutionality of the groupings as characterized by the Rector.

Justice Lenhoff, however, opened this point for discussion by approving any divisions arrived at by choice, but stating that "compulsory inclusion" would violate the Constitution and therefore could only be created "by law."<sup>71</sup> The use of the word "law" may not have been merely a reference to a statute, because the existing Constitution would continue to trump such a lesser provision. Court President Durig and Vice President Froehlich also noted that establishment of compulsory organizations would require further law.<sup>72</sup>

Another vital question remained to be determined. If divisions (voluntary or involuntary) could be predicated on a student's background rather than on his regular enrollment, which factors in his background should count? Justice Adamovich's draft had expanded on Eckel's proposal by suggesting that the Court should legitimate classification on the basis of "ethnic origin," a principle that would have been new in Austrian law.<sup>73</sup>

Justice Lenhoff emphasized that the Court had not yet decided the issue of whether division on ethnic grounds comported with the equality principle, and urged that the phrase "ethnic origin" was not only foreign to

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69. Deliberations, *supra* note 58, at 13.

70. *Id.* at 16.

71. *Id.* at 12, 14.

72. *Id.*

73. *Id.* at 14.

the Constitution, but so vague that it could not pass constitutional muster.<sup>74</sup> He added as a compromise that if he were outvoted on this point, the draft should at least contain the phrase “if . . . *the division into these groups accords with constitutional principles.*”<sup>75</sup>

The Adamovich draft, even with the supplement suggested by Lenhoff, was opposed by another Justice on the grounds that the public would ignore any limiting clauses and would simply assume that the Court had approved the concept of “ethnic origin” grouping that the German Student Body of the University and the Academic Senate had intended.<sup>76</sup>

These deliberations revealed some factors similar to those considered by the American judges in *Brown*: consciousness of external pressures, as well as conflict between the desire to reject segregation and the desire to propitiate its proponents.<sup>77</sup> The Austrian Justices acknowledged two outside forces in their colloquy: the University’s hope for validation of the Orders or at least guidance, and the German Student Body’s intense investment in the ethnic-origin power of exclusion.

A series of votes concluded the debates. Without directly addressing the validity of compulsory division, a majority endorsed the principle that splitting the student body could comply with the Constitution if each group had the same rights and other legal requirements were met.<sup>78</sup> Next, the question of whether division “according to specified common points of view” should be approved was answered in the affirmative by a vote of 12 to 1.<sup>79</sup> The phrase “if . . . [this] classification . . . accords with constitutional principles” remained in the draft, without further explanation.

On the critical issue of whether ethnic origin should be used as an acceptable example of this “common point of view,” the vote changed. President Durig took the lead in proposing that references to ethnic origin, the term favored by the German Student Body, must be dropped.<sup>80</sup> Instead,

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74. *Id.* at 14, 16-17.

75. *Id.* at 17 (emphasis in original).

76. *Id.* at 18.

77. In the United States, however, the external influence pushed the Court towards abandoning rather than preserving segregation. See *infra* Part II.B.1.b for discussion of the pressure exerted by the executive branch’s integration initiatives and determination to avoid damaging foreign relations, and the Court’s countervailing concern about soothing Southern sensibilities by establishing gradual desegregation timetables.

78. Deliberations, *supra* note 58, at 16, 18.

79. *Id.* at 19.

80. *Id.*; cf. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (discussing the Supreme Court’s rejection of the assumption that members of the same ethnic group have a common point of view and concluding that African-American students would have varying rather than monolithic opinions).

by a vote of 10 to 3, the word “nationality” was substituted.<sup>81</sup> It is significant that this term could fit an Austrian citizen who happened to be Jewish in a way that “ethnic origin” might not. For example, the Saint-Germain Treaty stated that Austrian nationals belonging to religious or racial minorities must receive the same treatment “as the other Austrian nationals.”

### 3. *Unanimity Without Agreement*

If the Constitutional Court's decision were evaluated only as a logical exercise separated from political exigencies, it would remain problematic. When viewed as a series of concessions made by opposing jurists, however, its *raison d'être* begins to emerge. Trapped in the tradition of unanimity, a judge who would write a rigorous opinion of his own is immersed in a group dynamic that he cannot control. In this intense process, which lasted for two days, the Justices finally produced a “unanimous” document that frustrated the Academic Senate's attempt to segregate the University of Vienna's students.

The prosecution against the newspaper editor which had generated the Constitutional Court's historic decision was discontinued. After the withdrawal of the libel charges against him, editor Ernst Klebinder stated: “I did not intend to insult anyone or attack anyone in his person or honor. My concern was merely to protect Austria's highest educational institution from the shame of an order that made a mockery of morality, reason, and the constitution.”<sup>82</sup>

### D. **The Constitutional Court's Institutional Constraints and Doctrines**

The Austrian Constitutional Court appeared in some respects to have more complete control over constitutional controversies than the United States Supreme Court. In contrast to America's judicial system, where the lower federal courts dispose of the bulk of constitutional claims, Austria's High Court was the sole body authorized to determine the constitutionality of laws.<sup>83</sup> This centralized power was solidified in the Constitution of

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81. Deliberations, *supra* note 58, at 19. A 1922 decision of an Austrian administrative court had made clear that “nationality” was distinct from a biological or cultural community. PAULEY, *supra* note 2, at 88.

82. See Fenz I, *supra* note 62, at 141.

83. See Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183, 185-86 (1942). The District Criminal Court, where the case commenced, could rule on questions such as whether the honor of the Rector had been insulted and whether the editor had failed to exercise press

1920, replacing a prior system that permitted other tribunals to issue inconsistent rulings that had no *stare decisis* effect.<sup>84</sup>

As will be seen below, however, the Constitutional Court's institutional authority was far more constricted than that of its American counterpart. The Austrian Court was vulnerable to the legislature, restrained by its own civil code traditions, and—in the 1930's—facing opposition from pervasive and violent pro-separation groups.

### 1. *Finality of Rulings*

United States Supreme Court Justice Robert Jackson once said of the Court: “We are not final because we are infallible, but we are infallible only because we are final.”<sup>85</sup> This finality stems not only from the Justices' top-of-the-judicial-pyramid position, but also from their protection against legislative assault on constitutional rulings. It is the Supreme Court's prerogative, claimed since *Marbury v. Madison*,<sup>86</sup> to “say what the law is.”<sup>87</sup> The members of the Court may jettison their own prior constitutional pronouncements, but Congress would violate separation-of-powers principles if it trumped such pronouncements.<sup>88</sup>

The counter-majoritarian difficulty—the existence of an unelected branch of government with this final authority to interpret and to nullify democratic enactments—has caused some discomfort both inside and outside the judiciary.<sup>89</sup> Nevertheless, a recent call for a constitutional

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prudence.

84. *Id.*

85. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

86. 5 U.S. 137 (1803).

87. *Id.* at 177.

88. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.A. 2000bb); *Lawrence v. Texas*, 539 U.S. 558 (2003) (reversing the Court's own prior decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986)). The Supreme Court had previously held in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 919 (1990) that the government need only meet a rational relations test in prohibiting the use of peyote in religious practices. In RFRA, Congress had acted to restore a higher tier compelling-interest test in cases where government action would clash with the First Amendment. But the Supreme Court's *Boerne* decision reclaimed its judicial turf, declaring that Congress had the power to enforce the Fourteenth Amendment but no power to determine what qualifies as a constitutional violation. 521 U.S. at 536.

89. *See, e.g., J. Harvie Wilkinson III, The Rule of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 781 (1989); Bob Herbert, *In America, A Plan to Intimidate Judges*, N.Y. TIMES, Dec. 4, 2000, at A29. *But cf.* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 456 (1994) (arguing that “the undercutting democracy objection unravels on closer inspection”). For further discussion on judicial independence, see generally *infra* Part II.B.1 (discussing judicial independence).

amendment that would allow judicial decisions to be overruled by a simple majority in each house of Congress gained no momentum.<sup>90</sup> The Drafters of the United States Constitution chose to create formidable roadblocks against any amendments, thus enhancing the inviolability of the Justices' prior rulings.<sup>91</sup>

Not so in Austria. Unlike the United States Constitution, the Constitution of Austria is easily amended. Any legislative proposal may be raised to constitutional status merely by designating it as a "constitutional provision" and passing it by a two-thirds majority in the Nationalrat (National Council) of Parliament.<sup>92</sup> The resultant rule need not be incorporated into the actual text of the Constitution. Therefore, in addition to the forty or more amendments appearing in the Constitution's text, there are hundreds of constitutional provisions outside of the Constitution itself, often appearing in unexpected places.<sup>93</sup> The Austrian justices therefore had no assurance that an unpopular ruling would finally dispose of a constitutional controversy.

## 2. Tradition and Judicial Self-Restraint

Our federal courts were modeled on the English judiciary, inheriting a common law tradition. In a multi-layered analysis of judicial self-restraint, Judge Richard A. Posner notes that many of the matters that American judges must determine are "common law issues in a functional sense: the application of a body of judge-made law is required to decide them."<sup>94</sup> Rejecting as simplistic the equation of self-restraint with "goodness" and judicial activism with "badness," Posner suggests that a judge's choices must depend in part on the particular historical context of the case. If Chief Justice Marshall had exercised judicial self-restraint in deciding *Marbury v. Madison*, his choice could now be viewed as a disaster.<sup>95</sup> The Framers of the United States Constitution knew that judges made law, yet they established a federal judiciary with life-time tenure. They crafted this

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90. See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 117 (1996) (suggesting that such an amendment as the "only" means to bring the federal courts, including the Supreme Court, "back to constitutional legitimacy."). Bork later abandoned his proposal, concluding that this kind of amendment would be ineffective. Robert H. Bork, *Reins on Judges: A Long Tradition*, N.Y. TIMES, Dec. 4, 2000, at A32.

91. GEOFFREY R. STONE ET. AL., *CONSTITUTIONAL LAW* 72-74 (2d. ed. 1991) (discussing the difficulties of obtaining a constitutional amendment).

92. See HAUSMANINGER, *supra* note 31, at 19-20.

93. *Id.*

94. Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 5-6 (1983).

95. *Id.* at 14.

assurance of independence in the expectation that the judiciary would vigorously protect individual rights against encroachment by the legislature and the executive.<sup>96</sup> In doing so, the self-disciplined judge *tries* to decide a case without bringing in personal policy preferences.<sup>97</sup>

Posner concludes that judicial activism in its contemporary form has departed from this self-discipline and “gone too far.”<sup>98</sup> He uses as an example Chief Justice Earl Warren’s judicial philosophy as described by Warren’s biographer, Professor G. Edward White. Warren, who shepherded the Justices into unanimity in *Brown v. Board of Education*, conceived of craftsmanship as “knowing what results best harmonized with the ethical imperative of the Constitution and how best to encourage other justices to reach those results.”<sup>99</sup>

Posner acknowledges that there are (limited) areas in the law where judicial skill alone is insufficient to decide a case and therefore “big ideas” must be introduced.<sup>100</sup> Such policy choices became arbitrary, however, unless they are confined to values that are “widely . . . held.”<sup>101</sup>

If we apply this Posner criterion to the *Brown* decision, what result? Professor Michael Klarman has offered the view that by the 1950s, traditional Southern segregationist attitudes were already being altered by Cold War imperatives and regional linkages through television and interstate travel.<sup>102</sup> Other historians such as Richard Kluger, however, have suggested that desegregation *became* a widely held goal in part because of the *Brown* opinion’s impetus.<sup>103</sup> This would reverse the sequence of judicial choice and popular approval envisioned by Posner’s

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96. *Id.* at 15-16.

97. *Id.* at 23.

98. *Id.* at 17.

99. *Id.* (quoting G. WHITE, EARL WARREN: A PUBLIC LIFE 229-30 (1982) (summarizing Chief Justice Warren’s approach to constitutional interpretation).

100. *Id.* at 24.

101. *Id.* at 24. Judge Posner is not referring here to the *Brown* decision in particular. As examples of subjects on which there is no ethical consensus, Posner cites abortion, capital punishment, and prison “amenities.” *Id.* at 17.

102. See *infra* Part II.B.2 (describing the challenges to *Brown*’s predicates and primacy).

103. KLUGER, *supra* note 56, at 709-10, stating:

Since the expedient demolition of reconstruction, white America had lost enthusiasm for the enabling language of equalitarianism . . . . Denied high skills or advanced learning, . . . [the African-American] remained a superfluous and lower order of American being, excess baggage in the nation’s race to prosperity and greatness. The law, as interpreted by the Supreme Court, had pronounced it permissible—indeed it was normal and expected—to degrade black America.

It was into this moral void that the Supreme Court under Earl Warren now stepped. Its opinion in *Brown v. Board of Education*, for all its economy, represented nothing short of a reconsecration of American ideals.

approach.

In Austria, judicial choices were constricted by tradition. The Justices were operating under a Roman-law-based civil code, a statutory system with little space for customary law and no recognition of judge-made law as formal precedent for future cases and parties.<sup>104</sup> As eminent Austrian scholars such as Dr. Herbert Hausmaninger have observed, the Court took a narrow view of its proper role: “[I]n the tradition of Hans Kelsen’s Vienna School of Legal Positivism, it considered itself a ‘prisoner of the words of the Constitution’ subject to ‘strict construction’ interpreting civil rights in a more formal sense than most other European courts.”<sup>105</sup> Self-restraint was a given. Evasion of responsibility, however, was not. It should be noted that the Justices could have avoided dealing with any aspect of the Nazi Student Orders case simply by adopting the Rector’s jurisdictional objections and returning the controversy to the court below, but this course was unacceptable. As the minutes of their deliberations revealed, some of the Justices were prepared to issue a broad affirmation of the Constitution’s anti-segregation equality principle. They were unable to marshal unanimity on this view, and release of several discordant opinions would not only have been blocked by tradition but would also have clouded the Court’s authority to resolve the issues. Instead, the Justices unanimously nullified the Student Orders by turning to a statutory resolution that was consonant with the Austrian legal system’s code-based foundation.

### 3. *De Facto Segregation Inside and Outside Austrian Universities*

As the Justices fully understood, opposition to segregation based on religion was not a “widely held” value. By 1931, following the huge Nazi electoral victory in Germany the preceding year, Nazi students at Vienna University were able to take control of the German Student Body.<sup>106</sup> Their power was enhanced by affiliation with like-minded groups in Germany, and the use of arms supplied by Hitler-based organizations.<sup>107</sup> Turning their attention to the faculty, the Nazi students published lists of Jewish professors—most of whom were internationally known scholars—for the purpose of organizing boycotts of their classes.<sup>108</sup> Other faculty members who were sympathetic to these objectives worked quietly to prevent the

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104. See HAUSMANINGER, *supra* note 31, at 22, 138, 229.

105. *Id.* at 147. The Court also operated under the principle of “interpretation in favor of constitutionality.” *Id.* at 165.

106. See PAULEY, *supra* note 2, at 125-27.

107. See *infra* Part I.F.2 (describing the battle in the Austrian Parliament).

108. See PAULEY, *supra* note 2, at 195.

advancement of any academics whose religion or opinions were suspect.<sup>109</sup>

In every region, the culture outside the universities was also inhospitable to the integration of Jews into Austrian life. We can turn to private recreational organizations to find examples. The Deutscher Turnerbund 1919 (German Gymnasts' League 1919), which had 115,000 members by 1932, regarded contact with Jews as contaminating.<sup>110</sup> The 250,000 member German-Austrian Alpine Club—hardly an intimate association—followed an exclusionary and segregationist line.<sup>111</sup>

The spectrum among political and occupational groups included the League of Anti-Semites, which defined a Jew as anyone with a Jewish great-grandparent and advocated legal separation of Jews and non-Jews in education and the administration of justice;<sup>112</sup> the Greater German People's Party, which favored Anschluss with Germany, and viewed treatment of Jews as a separate nation as the only means of combating their immoral "racial" characteristics;<sup>113</sup> peasant farmers who were historically anti-Semitic only at times when their particular economic interests were at issue;<sup>114</sup> and the Social Democratic Party, which favored progressive housing and education programs and had many Jewish members.<sup>115</sup> The Social Democrats criticized "Jewish capitalists" but avoided anti-Semitism in their official party platform.

Bias also affected intellectuals, as evidenced by patterns in professions such as law and medicine. Professional organizations were legally permitted to discriminate in their membership because they were private.<sup>116</sup> A union of physicians excluded Jews unless they had "honorably" become Christians.<sup>117</sup> Vienna's Chamber of Lawyers, to which all attorneys belonged, was split in 1932 when many non-Jews formed their own League

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109. *Id.* at 121.

110. *Id.* at 118-19.

111. *Id.* at 117-18; *see also infra* Part III.B (discussing efforts under American law to address the problem of large private organizations with discriminatory membership policies).

112. *See* PAULEY, *supra* note 2, at 183-85.

113. *Id.* at 180-81.

114. *Id.* at 175. But, the Austrian Heimwehr or Home Guard, a paramilitary group, had many peasant members from traditionally völkish and anti-Semitic areas like Carinthia and Styria who combined religious distrust of Jews, hatred of socialism, and alienation from metropolitan Vienna. *Id.* By 1934, the Heimwehr was no longer admitting Jews as members. *Id.* at 176.

115. *Id.* at 77-78.

116. *Id.* at 117. Lawyers could also refuse clients on religious grounds. Physicians and apothecaries, however, were legally bound to serve anyone who requested assistance. *Id.* at 119-20.

117. *Id.* at 120.



of German-Aryan Lawyers of Austria.<sup>118</sup>

### E. The Aftermath of the Constitutional Court's Decision

#### 1. Attempts to Reestablish segregation by unlawful and lawful means

News of the Constitutional Court's ruling generated an enormous upsurge of violence. The German Student Body terrorized and beat non-member students.<sup>119</sup> Signs reading "No Jews Allowed" were put on the pillars of the University's entrance. A hundred Nazi students, most in party insignia, marched from the courtroom to the University and joined hundreds of other Nazis in attacking Socialist and Jewish students with rubber truncheons and steel clubs.<sup>120</sup> Campus guards did not intervene, and University Rector Uebersberger protested when the municipal police went up the ramp of the University building in an attempt to ward off the assailants.<sup>121</sup> He also prohibited the police from entering the building. Out of gratitude, Nazi students serenaded the Rector a few days afterwards.

Demonstrators against the decision in the University's main lecture hall announced:

We can no longer tolerate the presence of the people who for years have been befouling the German Student Body and student power with venom and rage at a university that notwithstanding all Constitutional Court rulings is and will remain a German teaching and research institution. We shall occupy the entrances to the university and shall not allow Jews to enter institutions of higher learning.<sup>122</sup>

As a result of these demonstrations, the University of Vienna was closed for the rest of the academic year except for those who were taking final examinations. The Academic Senate announced in November, 1931, however, that it approved of the German Student Body's goals and methods.

Similar riots occurred after the *Brown* decision. At the University of Alabama and the University of Mississippi, newly admitted students like Autherine Lucy and James Meredith were threatened by mobs that attempted to prevent them from attending classes because they were African-Americans.<sup>123</sup> In Alabama, Lucy was expelled and the University

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118. *Id.*

119. Fenz I, *supra* note 62, at 140.

120. See PAULEY, *supra* note 2, at 126.

121. *Id.*

122. Fenz I, *supra* note 62, at 140.

123. See *infra* Part II.B.1.b.

of Alabama remained segregated for seven more years. In Mississippi, the Governor announced that integration was unconstitutional, and three-hundred national troops stayed at the University for another year to maintain order and protect Meredith.

No such protection was provided to the beleaguered students at the University of Vienna. A nationalistic Austrian newspaper proclaimed that the Constitutional Court was an enemy of the German people. In an odd inversion of fact, the article stated that the German-Austrians were being used as “a kind of punching bag,” and then went on to declare: “Jews must no longer pervert Roman law on German soil. Rather, German judges must again pronounce German law in German countries.” The paper referred to “four Jews” who rendered the “disgraceful ruling” and demanded nullification of the decision.<sup>124</sup>

The call for nullification was not ignored. Education Minister Czermak asked the Council of Ministers for permission to prepare a bill that would authorize separate student groupings in Austrian institutions of higher learning.<sup>125</sup> Justice Adamovich, who had participated actively in the Court’s decision, was one of the experts brought in to draft such a bill.

## 2. *Opposition to University Segregation*

During the year that the Nazi Student Orders were in effect, voluntarily formed cliques had been transformed into government-endorsed barriers between students, enhancing the “privileged status” of “German Student Nation” members.<sup>126</sup> Assessing the larger impact of these occurrences, a liberal Viennese newspaper had commented:

If this were merely an academic game . . . , we could still resign ourselves to it. When all is said and done, however, the future masters, leaders, administrators, jurists, and industrial and business managers of Austria are being trained at the University. They are being imbued from an early age with the idea that membership in the Aryan race is a legally circumscribed and privileged sphere.<sup>127</sup>

The Constitutional Court’s nullification of this segregation was celebrated in a Jewish weekly newspaper, *Die Wahrheit*, which described the decision as particularly welcome “in this harsh and difficult time of crisis in Austria, these difficult hours of struggle between existence and

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124. See *supra* note 9 and accompanying text.

125. See Fenz I, *supra* note 62, at 141.

126. See PAULEY, *supra* note 2, at 125-26; see also GULICK, *supra* note 63, at 639-41.

127. *Legalisierung des Arienparagrafen* [Legalization of the Aryan Paragraphs], WEINER ALLGEMEINE ZEITUNG (Vienna) Apr. 11, 1930, at 1. (Translation Aces trans. 2001-2003) (translation on file with author).

non-existence, this period so rich in disappointments.”<sup>128</sup> The paper proclaimed that the ruling was “a victory for law.”

It should be noted that Jews living in Vienna in the 1930's were a heterogeneous group with striking differences in wealth, religious outlook, and places of origin.<sup>129</sup> The majority were probably the poor, divided into their own social hierarchy. At the bottom were beggars, shoe-shiners, and sellers of newspapers; slightly higher in income were tailors and peddlers.<sup>130</sup> Most of these were immigrants from the former eastern provinces of the Empire, the despised “Ostjuden” that were a particular target of pan-German propaganda.<sup>131</sup>

In brief, among the organized factions were the Liberals, the Jewish Nationalists, the Socialists, and the Orthodox. The assimilationist Liberals centered their efforts on legal defense in the courts, personal meetings with officials, and protests submitted to the government.<sup>132</sup> The Jewish Nationalists were splintered into many factions but agreed that Jews should be recognized as a separate nation, either as a minority in countries like Austria or as a majority in their own state.<sup>133</sup> The Socialists concentrated on addressing the economic and social welfare of those in need.<sup>134</sup> The smallest group was the Orthodox Jews, generally immigrants from Hungary and Galicia who wanted neither a modern secular Jewish state nor assimilation into Austrian society.<sup>135</sup> Disagreements among these groups occurred within the Jewish communal organization of Vienna, the Israelitische Kultusgemeinde (“IKG”) Wien.<sup>136</sup> In the early 1930's the IKG was controlled by Liberals organized into the Union of Austrian Jews.

Both the Liberals and the Jewish Nationalists actively opposed the Nazi Student Orders, but for quite different reasons. The Liberals objected because the Orders in effect defined Jews as a race, rather than as adherents of a religion.<sup>137</sup> The Jewish Nationalists rejected the Orders because the

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128. Ernst Feldsberg, *Der Freiheit eine Gasse [Road Clear]*, JÜDISCHE WOCHENSCHRIFT DIE WAHRHEIT, June 26, 1931, at 1 (Translation Aces trans. 2001-2003) (translation on file with author).

129. See HARRIET PASS FREIDENREICH, *JEWISH POLITICS IN VIENNA 1918-1938* (1991).

130. See PAULEY, *supra* note 2, at 216.

131. *Id.* at 177, 216; see also *id.* at 80 (“[The] persecution and banishment [of the Ostjuden] have become a popular sport.”) (quoting a Zionist daily paper).

132. See FREIDENREICH, *supra* note 129, at 26.

133. *Id.* at 4-5.

134. *Id.* at 2.

135. See PAULEY, *supra* note 2, at 226. The Orthodox constituted approximately 20% of the Viennese Jewish community. *Id.*

136. *Id.* at 226.

137. See FREIDENREICH, *supra* note 129, at 185.

division into “Nations” was compulsory, precluding individual Jews from choosing their own nationality.<sup>138</sup>

When the Union of Austrian Jews became aware that the Ministry of Education was working on a legislative proposal to revive the Nations, the Union presented a desperate plea to Dr. Karl Buresch, Austria’s Chancellor:

We view the planned assertion of the racial-anti[-S]emitic position at Austrian institutes of higher education as an attempt to remove the first stone from the edifice of equal rights for all Austrian citizens, preparing the enactment of the National Socialist program for the treatment of Jews in the “Third Reich.” . . . We nourish the hope that Herr Bundeskanzler, as head of the government, will subject our concerns and reservations resting on constitutional grounds to reconsideration and do all in his power to protect the Jewish population of Austria that had at all times been loyally supporting the state, and whose ancestors have lived in this country for over a thousand years, from suffering a diminution of its rights.”<sup>139</sup>

## F. The 1932 Legislative “End Run” Around the Constitutional Court’s Decision

### 1. *The Chancellors’ strategy meeting*

Because the Constitutional Court had blocked the continuation of segregated student groups at the University, legislation was necessary to overcome both statutory and constitutional obstacles. A remarkable archival document shows that on November 25, 1931—months before a proposed bill was introduced in the Nationalrat (National Council)—the Austrian Chancellor Dr. Karl Buresch met with the Vice Chancellor and a group of federal ministers to discuss strategies that could enhance the bill’s passage.<sup>140</sup>

The Education Minister, Dr. Czermak, described the legislative proposal and stated that groupings would be predicated solely on “ethnic origin.”<sup>141</sup> No other basis would be allowed. Another minister said that the

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138. *Id.*

139. *Die “Union” Im Abwehrkampf gegen das “Studentenrecht”* [The “Union” fights “Student Law”], DIE WAHRHEIT (Vienna) Dec. 18, 1931, at 4 (Translation Aces trans., 2001-2003) (translation on file with author).

140. Ministerratsprotokoll Nr. 748, 9, vom. 25. November 1931 [Minutes of the Council of Ministers Meeting of November 25, 1931, No. 748, 9], *passim* (Translation Aces trans. 2001-2003) (translation on file with author).

141. *Id.* at 3.

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Government would be in a difficult situation if it presented the bill in Parliament only to suffer defeat because of objections from opposing parties.<sup>142</sup> If there were such a defeat, “certain events” could occur on academic soil. This might lead to termination of University autonomy. Therefore, it was “absolutely necessary” that the Chancellor speak to the Social Democrats in advance.

In response, Dr. Czermak assured the officials present that important parties were already behind the proposal, and indicated that he would promote it with another powerful party, the Christian Socials.<sup>143</sup> He also emphasized, however, that preparation for the debate must proceed “with all due speed.” Members of the German Student Body were soon to meet and would be angry if there were no message about the Government’s intention to forward the legislation.

## 2. *The battle in Parliament*

The debate in the National Council of the Austrian Parliament took place on April 29, 1932.<sup>144</sup> The National Council generally held three separate sessions on each proposed bill, and then voted. Members speaking for or against the proposal sometimes elicited cheers or cat-calls by political factions which were explicitly identified in the transcript of the proceedings.

The bill designed to nullify the Constitutional Court’s decision was entitled “A Law about a Student Order at Universities.”<sup>145</sup> In brief, it proposed an amendment to the Associations Law stating that academic authorities could approve the establishment of student associations under the principle of ethnic origin.<sup>146</sup> Approval may be granted “only” if this association’s by-laws require students to “prove” their affiliation to a Volk (people) on the grounds of ethnic extraction and language.<sup>147</sup>

Introducing the legislation, Minister Czermak proceeded in bland

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142. *Id.* at 4-5.

143. *Id.* at 5-6. Chancellor Buresch ended the discussion by stating that the Government’s budget legislation must be passed in Parliament before presentation of the student associations bill, because discussion of the latter might become too disruptive. He directed the Education Minister to continue his lobbying efforts to revive the nations. *Id.*

144. Parliamentary Debate, *supra* note 27, at 2063.

145. 293 der Beilagen. Nationalrat. IV Gesetzgebungsperiode 1. Vorlage der Bundesregierung, Bundesgesetz vom. 1932 über eine Studentenschaftsordnung an den Hochschulen [National Council Bill of 1932 about a Student Body Order in Universities], at 1 (Translation Aces trans. 2001-2003) (translation on file with author).

146. *Id.*

147. *Id.* (noting also that no group *except* one based on ethnic origin would be permitted under this bill).

abstractions. He did not pursue the suggestion that a general student representative body should be established with equal voting by all students. Instead, he stressed the importance of preserving the “German character” of the University through ethnic-origin guarantees.<sup>148</sup> This would assure peace and order and protect the students’ right of self-administration. Without elaboration, he stated that the High Court’s decision had posed no constitutional problem for a bill establishing separate student groups. He did not discuss the difference between the decision’s use of the word “nationality” with its implications of Austrian citizenship as a qualification for membership in a German Student Body, and the bill’s repeated use of the divisive word “ethnic origin” as a mandatory qualification.

The other speakers in this illuminating debate did not hold back from addressing the real purpose of the bill: to prevent Jews from claiming an Austrian identity and to exclude them from participation in the privileges of the German Student Body. A Christian Social supporter of the legislation, Council Member Richard Schmitz, teetered between complaining about Austrian Jews and professing his affection for them. They are competitors for jobs and adherents of the wrong political camp, he explained.<sup>149</sup> The younger generation of German-Austrians are anti-Semitic in part because they have difficulty advancing as doctors, jurists, philosophers. Yet the Social Democratic party favors Jewish doctors (transcript notes “agreement from the right”), and Jewish lawyers are rising in Social Democratic circles. Most Jews are anti-clerical and vote for Social Democratic candidates. He nonetheless expressed doubt about “racial” theories, noting that such theories are still subjective and can change as scholarly opinion develops.<sup>150</sup> He assured his hearers that he and other Catholics had no hatred towards Jews as a people or as a “race,” and were aware of a duty to love our neighbors (cry from the right, “very correct”).<sup>151</sup> Although Christians and Jews don’t have the same beliefs, he suggested, they both still worship the one God. In particular, he urged, we must not sin against committed Jewish converts by denying their sincerity. Those who accept our beliefs uprightly are in the religious sense our brothers (lively agreement from the right).<sup>152</sup> But, he concluded, that does not mean that the Jewish convert is therefore a German. We (Christian Socials) favor this legislation.

Militant approval was expressed by Dr. Franz Hueber, who made no

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148. See Parliamentary Debate, *supra* note 27, at 2063-65.

149. *Id.* at 2077-78.

150. *Id.* at 2081.

151. *Id.* at 2078.

152. *Id.* at 2083.

effort to tone down his message. It matters which “race” our judges, advocates, doctors and teachers are, he stated.<sup>153</sup> Workers, farmers, everyone should be concerned about who is coming out of the universities. We can distinguish between a German-blooded man and a Jew. Unfurling statistics about the components of the student body, he noted that in the winter semester of 1930/1931, there were 8285 students entitled to vote as members of the German Student Body but only 932 Jewish students. Germans are by far the largest group and therefore the German people “have the right to judge and to rule the University.”<sup>154</sup> Hueber concluded that it was the duty of every German-blooded member of this House to fight for passage of the bill. (Transcript notes “applause on the extreme right.”)<sup>155</sup>

Opposing this view, former Under-Secretary of State for Education Otto Glöckel gave a pungent presentation that focused on issues omitted by the supporting speakers: the scale of the violence in the University, its sources, and the hypocrisy of those who condoned the assaults. He noted that German Student Body gangs formed rings, through which disfavored students were forced to pass.<sup>156</sup> These gangs were armed with brass knuckles, rubber truncheons, and even guns introduced into the school by Hitler-based organizations. Twenty against one, and of course the twenty are victors. The lives of impoverished students are made heavy by this and their studies are hindered, but the nuances of anti-Semitism do not preclude the University Rector from having afternoon tea with Mr. Rothschild.<sup>157</sup> (Transcript notes a shout of “Quiet!” and interruptions from various quarters. Presiding Officer pleads for order.) Ultimately, Glöckel predicted, those who eat of the swastika will die from it.<sup>158</sup> (Merriment from the left, cat-calls from the right).

One forgets, he continued, that state-sponsored universities exist to provide an atmosphere in which all students are free to do research and to learn. Every exception to such freedom violates the law. (Minister

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153. *Id.* at 2090.

154. *Id.*

155. *Id.* at 2092.

156. *Id.* at 2084-85.

157. *Id.* at 2084. According to Ernst Klebinder, the beleaguered editor whose prosecution was the impetus for the Austrian Court’s desegregation decision, the Rector of the University of Vienna went to Louis Rothschild, the head of the Rothschild family, to assure him that there was “nothing in the new student regulations that is directed against the Jews,” and to ask him to “make contributions to individual university institutes.” *See* From the Courtroom, *supra* note 4, at 3.

158. Parliamentary Debate, *supra* note 27, at 2084.

Czermak, interrupting: “There’s nothing one-sided in the bill”).<sup>159</sup> Glöckel responded that the administration is asking Parliament to shed its innocence by joining with the agitators in an attempt to legalize an unconstitutional incursion on the equality that is an attribute of citizenship. This is the first step towards creation of a racist state. German mother-tongue is not enough to entitle an applicant to membership in the German Student Body, nor are five or ten prior generations of ancestors in Austria. We’re letting fanatical youngsters dictate what equality of citizenship is, and to exclude not only Jews but also any working-class Aryans who discomfit the young Nazis. Kids who have never had to earn any money are saying to these applicants, “you’re not a [worthy] German.”<sup>160</sup>

Further opposition was voiced by a noted debater, Council Member Karl Leuthner. He not only rebutted Minister Czermak’s justifications point-by-point, but went on to illumine the German-Austrian culture and wisdom that the bill would destroy. Members of the German Student Body, who have been issued uniforms under the supervision of the Rector, have continued to terrorize other students despite the Constitutional Court’s decision.<sup>161</sup> Legalizing this regime and its protection by the Rector would not establish law and order, he explained. Nor would it enshrine freedom of association, because grouping by choice is not the reality here. The Minister has claimed that membership in a student association is completely voluntary and strongly stressed this principle. Yet members can in their discretion deny admittance to others. And this admittance is not merely to an association as a kind of student club, but to a government-established Nation with very special features.<sup>162</sup>

And what does the word “race,” the basis for these groupings, actually mean?<sup>163</sup> Nordics are only 10% of our population, he noted. Does that leave us all as bastards, including Goethe, Schiller, and Beethoven, the greatest musical genius in history? If it’s more important to be Nordic than to be imbued with German culture, then what does it mean to be German? Jews, who have been here for centuries, include writers and composers like Heine and Mendelsohn who built our art and history. Education Minister Czermak has acknowledged that someone who was not every-drop-of-blood German could be found in the German Student Body. Yes, Leuthner commented sarcastically, neither Czermak nor Buresch are exactly German names. But, those who speak our language as natives, who embrace our

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159. *Id.*

160. *Id.* at 2084, 2087-88.

161. *Id.* at 2074.

162. *Id.* at 2066.

163. *Id.*



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culture, and who are fulfilled by our spirit, *are* German even if their family names are not.

He continued with the question, must the cross bow to the swastika?<sup>164</sup> Minister Czermak has said that baptized Jews will nevertheless be placed in the Jewish group and not in the German Student Body. Therefore, somebody could be German in culture, language, and ideals with three Catholic grandparents and generations of Catholic ancestors, but “if one of his grandmothers has just a smidgeon of Jewish blood, this Jewish blood is stronger than the baptism of centuries . . . .”<sup>165</sup> Catholic theorists and writers have condemned the “myth of blood” and the “race principle.”

Minister Czermak, you say this “principle” is German. Yet students from Germany have published a letter from the German Catholic Center and democratic student organizations urging you to “ensure the establishment in Austria’s universities of a student association not legally anchored in the brutal despotism of a party but rather based on the principle of citizenship by operation of law . . . .”<sup>166</sup>

The Minister’s proposed legislation denies everything that is significant in Austrian culture and destroys its entire spiritual capital. It violates association law, republican and democratic principles, and the rights of workers, Leuthner concluded. We will fight you because passage of this bill would constitute the first legal recognition of the blood and race theories of the Nazis!<sup>167</sup> (Clapping from the left).

After this intense debate in the National Council, the bill was referred to a Parliamentary Committee. It was scheduled for a second reading, but was never debated again and disappeared.<sup>168</sup>

### G. The Dwindling of Democracy: Riots and a Repressive Constitution

As the history of segregation in America and Austria demonstrates, moral rights are fragile without the support of powerful institutions. Jim Crow laws in the South subjugated all Blacks, regardless of class, character or learning. A Southern politician justified disenfranchisement by proclaiming that no Black in the world could measure up to “the least, poorest, lowest-down white man I ever knew.”<sup>169</sup> Two branches of the

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164. *Id.*

165. *Id.* at 2071.

166. *Id.* at 2072.

167. *Id.* at 2074.

168. *Id.* at 2093.

169. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 107 (2d ed. 1966).

federal government eventually acted to dismantle Jim Crow. When the judiciary rejected “separate but equal” schools in *Brown*, it was proceeding in accord with the executive. President Harry S. Truman had issued orders prohibiting discrimination in federal employment and ending segregation in the armed forces.<sup>170</sup>

By contrast, the Austrian court stood alone in overturning the segregation edict, opposed rather than buttressed by the executive.<sup>171</sup> The subsequent administration of Chancellor Engelbert Dollfuss, which will be discussed below, abided by the Court’s 1931 ruling but engineered constitutional changes that curtailed the judiciary’s prior independence and jurisdiction.

### 1. *The Rise of Authoritarian Austria*

The riots that followed the High Court’s decision caught the attention of eminent members of the American Medical Association who were officials of a league for the protection of foreign students in Vienna.<sup>172</sup> These physicians protested to the Austrian government, to the American envoy in Austria, to the Rector of the University of Vienna, to President Herbert Hoover, and to all United States newspapers with wide circulation. The protest letter called the Nazi students “cowardly” and noted that the Rector had failed to protect the victims, some of whom were American medical students.<sup>173</sup> The American envoy continued to issue objections and warnings as subsequent waves of anti-Semitic student violence occurred.

These objections were viewed as hypocritical by an Austrian journal, which proclaimed that racial segregation was strictly enforced in the American South against anyone having a drop of Black blood.<sup>174</sup> The young Christian Social Chancellor of Austria, Engelbert Dollfuss, expressed sympathy, however, with the American position, indicating annoyance with the “gross stupidity” of the Nazi students and promising assistance.<sup>175</sup> Dollfuss was not only responding to foreign pressure,<sup>176</sup> but

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170. *Id.* at 136; *see also infra* Part II.B.1.b.

171. The legislature abandoned further discussion of the executive’s proposed segregation bill, but never voted on it. *See supra* Part I.F.2 and note 168.

172. PAULEY, *supra* note 2, at 128.

173. *Id.* George Earle, the American envoy, publicly announced that trade relations with America could be adversely affected unless the Austrian Government rejected discrimination based on ethnic origin. *See id.* at 265.

174. *Id.* at 265.

175. *Id.* at 129. This statement was made in a meeting with the American Ministry after a flare-up of violence in 1932, where Nazis set upon Jewish students with steel clubs and knives, injuring several Americans.

176. *Id.* Envoys from other governments joined America’s protest, which was publicized

also acting to block an Anschluss with Germany following Hitler's 1933 consolidation of power there.<sup>177</sup>

Abandonment of Austria's prior democratic institutions was Dollfuss's method of enforcing his goals. Two months after Hitler became the German Chancellor, all three speakers of the Austrian Parliament resigned in an argument over a minor voting procedure.<sup>178</sup> Dollfuss took this opportunity to declare that Parliament had suspended itself and that he would now rule under an unrepealed Emergency Decree promulgated at the time of the First World War.<sup>179</sup> Realizing that the Nazis had been winning local elections, Dollfuss refused to allow Parliament to reconvene.<sup>180</sup> In a series of dramatic moves, he outlawed the Communist Party and the Nazi Party, and forbade future elections.<sup>181</sup> Socialist workers in Linz, protesting these increasing signs of dictatorship, staged a revolt that was crushed in three days.<sup>182</sup> Dollfuss outlawed the Social Democratic Party in February 1934, and vast numbers of its members were arrested.<sup>183</sup>

An authoritarian corporate state had now supplanted Austrian democracy, and inaugurated a new Constitution that ultimately fostered the swift establishment of segregation when the Nazis came to full power. This Constitution crafted crucial changes in the civil liberties of Austrian citizens, and replaced the Constitutional Court with a new Constitutional and Administrative Court (Bundesgerichtshof) that merged two prior tribunals to form a new entity with drastically reduced powers.<sup>184</sup> Only four of the fourteen High Court Justices who had struck down the Nazi Student Orders were favored with an appointment to this new

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in Austria and abroad. The newly elected Rector of the University apologized to the American envoy, and threatened to expel or even institute criminal prosecution against disorderly students. A pro-Nazi newspaper characterized this apology as humiliating, and noted that students who had Jewish names were not really American, regardless of citizenship. *Id.*

177. *Id.* at 261. The Austrian government, as a condition of accepting a loan, had to agree with a League of Nations prohibition against union with Germany. Anton Staudinger, 'Austria'-The Ideology of Austrofascism, in AUSTRIA IN THE THIRTIES: CULTURE AND POLITICS 8 (Kenneth Segar & John Warren eds. 1991) [hereinafter AUSTRIA IN THE THIRTIES].

178. PAULEY, *supra* note 2, at 260.

179. Kenneth Segar & John Warren, *Preface* to AUSTRIA IN THE THIRTIES, *supra* note 177, at i, ii. This move had been supported by Benito Mussolini, the leader of Italy, who appeared at the time to be a protector of Dollfuss.

180. PAULEY, *supra* note 2, at 260-61.

181. *Id.* at 186, 261-62; Segar & Warren, *supra* note 179, at ii-iii.

182. PAULEY, *supra* note 2, at 147, 266.

183. FREIDENREICH, *supra* note 129, at 96; Segar & Warren, *supra* note 179, at iii.

184. AUS. CONST. art. 163 (1934); GULICK, *supra* note 63, *passim*.

replacement.<sup>185</sup>

## 2. How the 1934 Constitution Deconstructed Individual Rights and Liberties

Austria is a democratic republic and its law emanates from the people, said the Constitution that had governed in 1929.<sup>186</sup> In 1934, the new Constitution's preamble proclaimed: "In the Name of Almighty God from Whom All Justice Emanates, the Austrian People Receives for its Christian German Federal State on a Corporative Foundation this Constitution."<sup>187</sup> Appropriately, the country's coat of arms metamorphosed from a single-headed eagle with a crown on its head<sup>188</sup> to a double-headed eagle topped by a halo.<sup>189</sup>

A Constitution that accorded comprehensive individual rights had been replaced by one sporting a Bill of Rights perforated by amorphous exceptions. The 1934 creation abolished universal suffrage and established a "corporative" regime where the interests of state-defined groups transcend those of individuals.<sup>190</sup> Representatives are selected with administration approval only from these groups, allowing for top-down control over the results.

This system inaugurated a government of men, not of laws, although it operated through a constant effusion of new statutes. Concepts of equality, association, and citizenship were distorted and undermined by the Constitution itself and by the legislation purporting to implement it, creating only an illusion of national unity.

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185. Oesterreichisches Amts-Kalendar fur das Jahr 1936 59. Jahrgang des hof-und Staatshandbuches, II Abschnitt Bundesgerichtshof [Austrian Calendar and Handbook for Bundesgerichtshof, 1936] (showing new slate of Justices with only Ernst Durig (the President of the prior Constitutional Court), Georg Froehlich (the Vice-President of the prior Court), and Justices Hermann Eckel and Adolf Wanschura on the roster). The 1933 calendar and handbook for the Constitutional Court showed ten other Justices who had participated in the vote on the Nazi Student Orders: Ludwig Adamovich, Matthias Bernegger, Friedrich Engel, Jakob Freundlich, Ernst Ganzwohl, Max Kulisch, Artur Lenhoff, Friedrich Mathias, Georg Pockels, and Hermann Prey. Amts-Kalendar 1933 68. Jahrgang.

186. AUS. CONST. art. I (1929).

187. AUS. CONST. preamble (1934).

188. AUS. CONST. art. 8a (1929).

189. AUS. CONST. art. 3 (1934). The double-headed eagle had been previously used as a symbol in the Byzantine era, see OXFORD DICTIONARY OF BYZANTIUM Vol. 1 (1991), but apparently without a halo.

190. GULICK, *supra* note 63, at 1429-30.

*a) Equality*

The 1929 Constitution contained not only a broad “equality principle,” but also the more specific provisions imported from the Treaty of Saint-Germain that prohibited invidious discrimination against minorities.<sup>191</sup> All federal nationals were “equal before the law;” none could acquire privileges based on religion, sex, or class.<sup>192</sup> Austrians who belonged to racial, religious, or other minorities must be accorded the same security in law and in fact as other Austrian nationals.

The 1934 version retained these words, but twisted the “equal before the law” term by adding: “They may be treated unequally in the laws only so far as objective grounds afford justification.”<sup>193</sup> The safeguards for minorities could be trumped by the card of justified inequality, a card held securely by the Dollfuss administration. The drafters’ notion of objectively-grounded distinctions was exemplified by a provision stating that although hiring for government posts was “independent of religion,” exceptions to this principle could be created by law as to teachers.<sup>194</sup> Subordination of the constitutional “principle” to ordinary statutory enactments was thus secured in advance.

In a democratically-inclined society like America in the early 1950’s, the Austrian Saint-Germain-based 1929 Constitution could provide a superior model for the drafting of equal protection terminology. Consider the more specific guarantees that minorities must be accorded “the same treatment . . . in law and in fact” as those in the majority group. The word “same” becomes an additional obstacle to segregation-inclined judges and legislators. The insistence on equality “in fact” defends against the argument that enforced segregation is permissible even where the majority group has most of the power. The “in fact” reference focuses on context and implementation.

In the authoritarian Austrian society of 1934, whose rulers did not see sovereignty as residing in the people, this rigorous draftsmanship was dismantled by the new Constitution’s bald statement that inequality may be introduced at will by “stipulation” or law. A contemporary commentator noted that all the constitutional terms were “extraordinarily pliable,” because they could be abrogated by a simple cabinet resolution marked

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191. *See supra* Part I.C.

192. AUS. CONST. art. 7 (1929).

193. AUS. CONST. art. 16 (1934). Women could be denied equal rights if “the law decrees otherwise.” *Id.*

194. AUS. CONST. art. 27 (1934).

with the right label.<sup>195</sup> The 1934 Constitution was thus casually announcing that despite its heavenly origin, it was not the supreme law of the land.

*b) Association*

Prior formulations of association law were not essentially altered by the 1934 Constitution, in part because those earlier versions stemmed from an 1867 statute heavily laced with restrictions. Emperor Franz Joseph permitted this statute as an expression of largesse towards his people; they could form various kinds of groups providing *inter alia* that they registered with the police and received permission to continue.<sup>196</sup> Later developments established a fundamental right to form associations and allowed mere registration to suffice as to many categories of associations, but the potential for supervision remained.<sup>197</sup>

This prominent aspect of Austrian law gave the Dollfuss administration hands-on control not only over existing organizations but over all new citizen groups coalescing for expressive or political purposes.<sup>198</sup> The 1867 law, however, did recognize one aspect of freedom—association was voluntary. You had to follow rules in order to organize a group, but you could not be forced to join one. This aspect was emphasized by the Constitutional Court when it nullified the Nazi Student Orders, finding that they created compulsory divisions not permitted by the relevant statutes.

The administration fully honored that nullification ruling. Archival documents show that German Student Body groups at various Austrian universities were being dissolved in 1933-1935, and that dissolution was often accompanied by a seizure of their property.<sup>199</sup> When the German

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195. See GULICK, *supra* note 63, at 1450.

196. Reichs-Gesetz. Blatt für das Kaiserthum Oesterreich, Jahrgang 1867 L VIII Stück 134 Gesetz vom. 15 November 1867 Ueber das Vereinsrecht [November 1867 law concerning the right to associate] (Translation Aces trans., 2001-2003) (translation on file with author).

197. See, e.g., ERNST MAYRHOFER, HANDBUCH FÜR DEN POLITISCHEN VERWALTUNGSDIENST II [MANUAL FOR POLITICAL ADMINISTRATION] 97 (5th ed. 1896) (Translation Aces trans., 2001-2003); Adolf Merkl, JURISTISCHER BLAETTER Vol. 61, No. 23, Dec. 17, 1932, at 1 (Translation Aces trans., 2001-2003) (translation on file with author).

198. See *infra* note 200.

199. See Der Sicherheitsdirektor für das Bundesland Steiermark [Director of Security for the Federal Province of Styria], Ref. No. 384 De 32/2-1934, Graz. 20 Aug. 1934 (directing seizure of the assets of the German Student Association) (Translation Aces trans., 2001-2003) (translation on file with author); see also PAULEY, *supra* note 2, at 264-65 (noting that Dollfuss revoked Vienna University's academic autonomy, allowed police officers to enter the institution when necessary, and forbade the wearing of Nazi uniforms there).

Student Body in Innsbruck appealed to the Chancellor to prevent its demise, the reply was that compulsory organizations were impermissible under Austrian law.<sup>200</sup> This bow to associational freedom fended off further efforts to segregate by Nations, and also produced the political advantage of eliminating organizations that were increasingly controlled by their counterparts in Nazi Germany.<sup>201</sup>

Indeed, each governmental use of the control emanating from associations law was skillfully designed to weaken opponents of the Chancellor's top-down political apparatus. The Government blocked the emergence of certain voluntary and peaceful groups while relentlessly "encouraging" citizens to join its own favored political organization, the Fatherland Front.<sup>202</sup>

This pattern underlines a salient feature of associational liberty: its vitality is wholly dependent on equal protection and citizenship guarantees. By perforating the right to equal treatment, the new Constitution facilitated increasingly arbitrary distinctions among individuals who wished to pursue some common purpose through collective effort. By establishing a corporative political structure, the Constitution check-mated electoral power to reverse that erosion of associational freedom.

### c) *Citizenship*

The 1934 Constitution's abolition of universal voting rights for citizens was radical and undisguised.<sup>203</sup> Under the prior system, every man and woman over twenty had complete and equal suffrage in elections of representatives to the National Council of Parliament and to the state legislatures (diets).<sup>204</sup> These representative had protected the interests of

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200. Zu lesen: Vorekten und Vorlagebericht I Gegenschrift des Bundeskanzleramtes [For Reading: Introduction and Presentation Report I, Answer by the Office of the Federal Chancellor] (Jan. 1934) (Translation Aces trans., 2001-2003) (translation on file with author).

201. See PAULEY, *supra* note 2, at 265.

202. See GULICK, *supra* note 63, at 1432. The 1934 Constitution had added a new provision stating that federal citizens had the right to form associations "within the limits of the law." These "limits" barred Catholic and Socialist workers from forming the kinds of trade unions they desired.

Conversely, when the government wished to promote membership in an association, its efforts were unstinting. After dissolution of the Socialist, Nazi, and Social Democratic Parties, Dollfuss had created the "Fatherland Front" as an ostensible unifying body. *Id.* at 1485. Jobless workers filing for unemployment benefits had to fill out a form with the question: "What is the number of your Fatherland Front membership card?" *Id.* Taxpayers who were not members could face inflated claims by tax collectors. *Id.*

203. For an account of devices used to pass this Constitution, see *id.* at 1404 *et seq.*

204. AUS. CONST. art. 24 (1929). The federal government was composed of autonomous

widely divergent societal constituencies.

This system was replaced by a hierarchy of appointed and designated councils and assemblies. In brief, the Bundestag—a deciding legislative body—was composed of deputies from Councils whose members were appointed by the President and approved by the Chancellor, or in some degree dependent on the Chancellor for their positions.<sup>205</sup> Although these Council deputies were drawn from various groups, including recognized religious or educational bodies or financial representatives from State government, the common thread was that they all had to be “loyal patriotic” citizens.<sup>206</sup> Membership in the Fatherland Front was a minimum requirement in proving patriotism. As a further safeguard against impulses towards independence, the Constitution deprived legislators of their prior immunity from criminal prosecution for statements made in legislative sessions.<sup>207</sup>

A chief legal spokesman for the Dollfuss regime, Dr. Robert Hecht, explained that one of the “advantages” of the 1934 Constitution was that Bundestag members would no longer have “so-called political control” over administration action. Certain former legislative powers had been abolished, he frankly stated, because they would be “incompatible with authoritarian direction of the state.”<sup>208</sup>

The new system also shielded the President from accountability to the citizenry. He was now to be voted into office by regional officials, from a nomination slate of three names proposed by an assembly of the subservient Councils described above.<sup>209</sup> Under the old 1929 Constitution, Austrian citizens had elected the President by equal and direct vote.<sup>210</sup>

The government’s creation of this apparatus was motivated in part by the desire to suppress Austrian Nazis.<sup>211</sup> For this reason, the Viennese Jewish community generally trusted Dollfuss, concluding that the remaining alternative was not Democratic Socialism but National Socialism.<sup>212</sup> The administration had destroyed all political outlets except the Fatherland Front, and citizens had to make the best of it. As Sigmund Freud put it, “[F]rom our home-grown fascism we could put up with all sorts of things,

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states. *Id.* art. 2.

205. AUS. CONST. arts. 46-51 (1934); see GULICK, *supra* note 63, at 1430. The Chancellor also retained emergency powers. *Id.* at 1447.

206. *Id.* at 1429, 1444.

207. *Id.* at 1444.

208. *Id.* at 1446-47.

209. AUS. CONST. art. 73 (1934).

210. AUS. CONST. art. 60 (1929).

211. See PAULEY, *supra* note 2, at 261.

212. See FREIDENREICH, *supra* note 129, at 195.



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for it would certainly not treat us as badly as its German cousin would . . . .”<sup>213</sup>

Dollfuss was assassinated in July, 1934, apparently by Austrian Nazis,<sup>214</sup> and was succeeded by his Minister of Justice, Kurt von Schuschnigg.<sup>215</sup> Like Dollfuss, Schuschnigg never made anti-Semitic statements, and his administration punished physical attacks on Jews in the universities and elsewhere.<sup>216</sup> Yet he allowed arbitrary dismissal of Jewish teachers and preclusion of Jews from most government positions.<sup>217</sup> The Fatherland Front segregated Jewish children in its youth organization.<sup>218</sup>

The authoritarian structure of the Dollfuss-Schuschnigg regime ultimately moved the country towards segregation and Nazism, rather than away from them as claimed. The incursions on citizenship established in the 1934 Constitution did nothing to prevent a more rapacious dictatorship from taking root in Austria. Indeed, these incursions facilitated the subsequent public acceptance of the Hitler regime.<sup>219</sup>

#### d) *Judicial Independence*

An American scholar, Malbone W. Graham, Jr., noted in 1924 that “the doctrine of judicial supremacy is raised to a higher degree in the Austrian Constitution than in any other extant.”<sup>220</sup> The Constitutional Court’s refusal to countenance segregation of university students had reflected this independence.<sup>221</sup> That decision had a significance far greater than its immediate holding because it warded off the commencement of a racist process of destruction. As historian Raul Hillberg has observed, “[e]ach step of a destructive process contains the seed of the next step.”<sup>222</sup>

Chancellor Dollfuss, however, used the new Constitution to curb the judiciary’s independence and to drain its authority over any aspect of his administration’s rapidly burgeoning program. The former Constitutional Court’s merger with the Administrative Court to create a new entity was

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213. Dieter A. Binder, *The Corporate State Versus National Socialism: Some Aspects of Austria’s Resistance*, in *AUSTRIA IN THE THIRTIES*, *supra* note 177, at 77.

214. See PAULEY, *supra* note 2, at 263.

215. See GULICK, *supra* note 63, at 1405.

216. See PAULEY, *supra* note 2, at 260, 265, 268.

217. See *id.* at 270, 272. But see *id.* at 267 indicating that a few Jews, generally Zionists, were appointed to high positions.

218. *Id.* at 273.

219. See GULICK, *supra* note 63, at 1416.

220. GRAHAM, *supra* note 52, at 180.

221. The ruling itself was acceptable to the Dollfuss regime, because it underlined the government’s opposition to Nazi Germany. See also *supra* note 213.

222. RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 54 (1985).

accomplished by emergency decrees of dubious legality, which gave the President unencumbered power to appoint all the judges.<sup>223</sup> As noted earlier, the vast majority of the former Constitutional Court's Justices were not returned to the new tribunal.<sup>224</sup> Although the 1934 Constitution did give this tribunal jurisdiction over the constitutionality of federal and state laws, another provision added that such jurisdiction did not extend to laws issued prior to July 1, 1934.<sup>225</sup> That manipulation neatly precluded judicial review of all the Dollfuss legislation that had poured out in the prior year.

As to post-1934 enactments, citizens claiming violations of civil liberties such as political speech could not seek review in the High Court in several categories of cases. For example, someone distributing handbills deemed by the police to be likely to wound propriety or disturb public order could be convicted of an administrative offense, with no judicial review if the sentence was below a certain number of months.<sup>226</sup> Such a person could also lose his license to do business. A particularly ominous decree provided that a citizen "assumed" to be guilty of acts or omissions inimical to the state or cabinet could be detained indefinitely; an appeal could be taken to the federal Chancellor, but not to the judiciary.<sup>227</sup>

Because Austria was threatened by a powerful external enemy, drastic measures were necessary, Chancellor Dollfuss emphasized. In an interview with a correspondent for the London Evening Standard, Dollfuss stated that the peril of forcible Anschluss with Germany justified his methods: "I am no dictator; I am a democrat . . . . My faith in the principles of the democratic form of government is unshaken. But the question now is not one of democracy; it is one of self-preservation. . . . [T]he choice is between Austria and no Austria."<sup>228</sup> This explanation has some initial appeal. Austria was geographically placed between Mussolini's Italy and Hitler's Germany and the international community showed little interest in this dilemma.<sup>229</sup> Therefore, the administration reasoned, that they were compelled to authorize indefinite detention of those who would otherwise hand Austria over to foreign powers. The Constitution is not a suicide

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223. See AUS. CONST. art. 163, art. 177(2) (1934); GULICK, *supra* note 63, at 1074 *et seq.*

224. See *supra* note 185 and accompanying text.

225. See AUS. CONST. art. 170 (1934); Art. 53 of the Constitutional Law of June 19, 1934 (which had the same status as provisions appearing in the Constitution itself); GULICK, *supra* note 63, at 1421; *supra* note 93.

226. See GULICK, *supra* note 63, at 1466.

227. *Id.* at 1468. This was of particular concern with respect to unsupported anonymous accusations. *Id.* at 1469.

228. *Id.* at 1077; see also PAULEY, *supra* note 2, at 261. *But cf.* Binder, *supra* note 213, at 71 (discussing German terrorist activities in Austria).

229. GULICK, *supra* note 63, at 1857.

pact.<sup>230</sup>

That justification loses plausibility because the government was unwilling to subject its detention decrees and other repressive measures to judicial review. There was no High Court with the authority to distinguish between criminals and innocent citizens and to bar anonymous charges. The paradigm example of the regime's own unwillingness to make such distinctions is the case of Karl Leuthner.

Leuthner was the anti-Nazi debater who had so eloquently opposed the prior administration's attempt to launch a segregation bill in Parliament.<sup>231</sup> In 1934, he was arrested and interned for six months.<sup>232</sup> As one commentator concluded, the internment of "this patently unrevolutionary anti-Marxist and errant outsider . . . can only be interpreted as a precaution acknowledging Leuthner's substantial popular following."<sup>233</sup> After his release, Leuthner never again made a public statement, and died in 1944.<sup>234</sup>

In July 1936, Schuschnigg made an agreement with Hitler to legalize the Austrian Nazi Party and permit Nazi rallies in exchange for Germany's promise to recognize Austria's independence.<sup>235</sup> The Dollfuss-Schuschnigg administration's attempt to suppress independence in its judiciary and citizenry was more successful than its abandoned attempt to suppress local Nazi activists.

Hitler did not keep his pledge to preserve Austria's independence. His plan to take over Austria had been organized even before he became Germany's Chancellor in 1933,<sup>236</sup> and had been implemented step-by-step with the aid of collaborators.<sup>237</sup> The danger of such a takeover had exerted an increasing threat to the independence of the Austrian Constitutional Court and its successor. By contrast, no external peril hampered the United States Supreme Court as it undertook the disavowal of *Plessy*.

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230. *Haig v. Agee*, 453 U.S. 280, 309-10 (1981); *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

231. *See supra* note 168 and accompanying text.

232. Roger Fletcher, *Socialist Nationalism in Central Europe Before 1914: The Case Of Karl Leuthner*, 17 CANADIAN J. HIST. 30 (1982).

233. *Id.* at 43.

234. *Id.* at 30.

235. DEBORAH DWORK & ROBERT JAN VAN PELT, *HOLOCAUST: A HISTORY* 94 (2002).

236. WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 120 (1960).

237. *See infra* note 235.

### H. Anschluss and Enforced Segregation

Germany's 1935 racist Nuremberg decrees<sup>238</sup> were accompanied by the following order:

The first main goal of the German measures must be strict segregation of Jewry from the rest of the population. . . . Then immediately, the wearing of the recognition sign consisting of a yellow Jewish star is to be brought about and all rights of freedom for Jews are to be withdrawn. . . . Any cultural activity will be completely forbidden, to the Jew. This includes the outlawing of the Jewish press, the Jewish theatres, and schools.<sup>239</sup>

Hitler's Anschluss with Austria succeeded in March 1938, and brought with it these segregation goals.<sup>240</sup> Chancellor Schuschnigg's oppositional efforts were fatally undermined by his continuing failure to cooperate with democratic elements which might have been his natural allies,<sup>241</sup> and by international indifference to Austria's isolation.<sup>242</sup> Minutes after Schuschnigg announced his resignation, local Nazis took control.<sup>243</sup> Here began the precipitous fall that had been held off for seven years by the Constitutional Court's refusal to permit the first step—enforced separation of university students.

#### 1. *The Disappearance of Diversity*

The effect of Nazi racism on universities was devastating. At the University of Vienna, 50% of the Law School faculty was fired for having the wrong religion or the wrong opinions, as was 66% of the philosophy faculty and more than 50% of the medical faculty.<sup>244</sup> Sigmund and Anna

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238. These decrees were issued on September 15, 1935. See description in the Avalon Project: Nuremberg Trial Proceedings, Vol. 2., Second Day, at 27, available at <http://www.yale.edu/lawweb/avalon/imt/proc/11-21-45.htm>.

239. *Id.*

240. PAULEY, *supra* note 2, at 275.

241. Binder, *supra* note 213, at 76-77; GULICK, *supra* note 63, at 1858.

242. See GULICK, *supra* note 63, at 1857.

243. *Id.* at 1847-48. Schuschnigg had hoped that holding a plebiscite on March 13, 1938 deciding whether Austria should remain independent of Germany, would result in a vote against Anschluss. PAULEY, *supra* note 2, at 279. Hitler's troops arrived, however, on March 12, 1938. *Id.* In his resignation speech, Schuschnigg stated that Hitler's claims that German assistance was needed to quell disorder in Austrian streets were "fabrications from A to Z." GULICK, *supra* note 63, at 1846-47. His speech concluded with "a heart-felt wish: God protect Austria." *Id.*

244. BRIGITTE LICHTENBERGER-FENZ, UNIVERSITAETEN 1938- AUSSCHLIESSUNG UND VERFOLGUNG OESTERREICHISCHER WISSENSCHAFTLERRINEN IM NATIONALSOZIALISMUS [THE UNIVERSITIES IN 1938: THE EXCLUSION AND PERSECUTION OF AUSTRIAN ACADEMICS UNDER NATIONAL SOCIALISM] 6 (Translation Aces trans., 2001-2003) (translation on file with author) [hereinafter FENZ II]. Professors were required to swear allegiance to Hitler. *Id.* at

Freud fled, Nobel prize winners were banished, and entire branches of scientific inquiry disappeared.<sup>245</sup> The diversity of thought that had enriched the University and brought international acclaim was impoverished.<sup>246</sup>

Three key figures in the invalidation of the Nazi Student Orders were affected by the Anschluss in strikingly different ways. Justice Arthur Lenhoff of the Constitutional Court, who had persistently argued that the Student Orders were unconstitutional under the equality principle, escaped from Austria in 1938 and emigrated to America where he became a law professor, practitioner, and author of two casebooks and numerous law review articles.<sup>247</sup> Constitutional Court Justice Ludwig Adamovich was forced to retire from public life in 1938, but after the war became President of the Austrian Constitutional Court when it was revived by the Allies.<sup>248</sup> Joseph Hupka, a Dean of Vienna Law School who had taken the lead in challenging the Student Orders in the public press,<sup>249</sup> was arrested by the Nazis in 1938 and sent to Theresienstadt concentration camp where he perished.<sup>250</sup>

## 2. *The Success of Segregation*

Hitler had expressed impatience with the Christian Socials for

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4. The only discipline at the University of Vienna that was untouched by the purge was history. See David F. Crew, Book Review, [WILLFÄHRIGE WISSENSCHAFT: DIE UNIVERSITÄT WIEN, 1938-45, OESTERREICHISCHE TEXTE ZUR GESELLSCHAFTSKRITIK], Vol. 43 (Gernot Heiss et al. eds., 1989).

245. FENZ II, *supra* note 244, at 7.

246. In contemporary America, establishing a diverse faculty still remains problematic. African-Americans comprise only 3% of the faculty in predominantly white institutions and 5% of faculty nationwide. Ryan Heffernan, *Faculty Diversity Still Tops Priority List*, HEIGHTS, at <http://www.bcheights.com/news/2003/02/04/> (last visited Nov. 1, 2004); Cathy A. Trower & Richard P. Chait, *Faculty Diversity: Too Little For Too Long*, HARV. MAG., at <http://www.harvardmagazine.com/on-line.030218.html> (last visited Nov. 1, 2004).

247. Saul Touster, *Arthur Lenhoff*, ASS'N OF AM. LAW SCHS., 1965 Proceedings Pt. 1-10, at 143-46. In 1963, the Austrian government gave former Justice Lenhoff an award for distinguished intellectual endeavors. *Id.* at 145.

248. ISABELLA ACKERL & FRIEDRICH WEISSENSTEINER, OESTERREICHISCHES PERSONEN LEXIKON 8 (1992).

249. See Dr. Joseph Hupka, *Die Studenten Ordnung der Universität Wien [The Student Regulations of the University of Vienna]*, NEUE FREIE PRESSE (Vienna) Apr. 23, 1930, at 1. Dr. Hupka, after parsing the disingenuous language of the regulations, concluded that very few if any law professors or jurists believed that these regulations were properly grounded in law.

250. See Juridische Fakultät und Rechtsstudium an der Universität Wien 1365-1997, Ein Überblick von Ilse Reiter, VII. 1938-1945 [Law Faculty and Law Study at the University of Vienna, 1365-1997, An Overview by Ilse Reiter, VII, 1938-1945], available at [http://www.juridicum.at/studium/fakg\\_08.htm](http://www.juridicum.at/studium/fakg_08.htm).

predicating anti-Semitism on religion, rather than on understanding that “Jews are not in any ultimate sense a religious community but a race.”<sup>251</sup> The Nuremberg laws defined a “full blooded” Jew as anyone who practiced the religion (which increased the taint) and had two Jewish grandparents, or someone who did not and had at least three Jewish grandparents.<sup>252</sup>

Implementation of segregation based on these Nazi theories was far swifter in Austria than it had been in Germany.<sup>253</sup> Within a month of the Nazi takeover, the 16,000 Jewish youngsters in Viennese primary and secondary schools were put in separate classes, then later transferred to eight all-Jewish schools, and by the following year barred from public schools altogether.<sup>254</sup> Jewish students were eventually excluded from universities.<sup>255</sup> By January 1939, Jews could not enter public parks, sports stadiums, or sleeping and dining cars on trains.<sup>256</sup> Landlords could terminate any lease made with a Jewish tenant.<sup>257</sup> Jewish doctors and lawyers were forbidden to treat Gentile patients and clients.<sup>258</sup> A stream of such legislation—250 different edicts—added a grotesque veneer of legality to these measures.<sup>259</sup> The “first” goal of the Nuremberg decrees had been achieved.

## II.

United States Supreme Court Justice Hugo Black noted at a court conference on the *Brown* case that Hitler’s creed of segregation and racial inferiority did not seem to differ markedly from the views of White Southerners about the necessity of keeping the races apart.<sup>260</sup> This point had also occurred to many Black Americans, who saw the World War II fascist enemy abroad in somewhat the same light as the Southern enemy at

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251. Kurt Rudolf Fisher, *The Death of “Austrian Philosophy,” in AUSTRIA IN THE THIRTIES*, *supra* note 177, at 302-03.

252. *See* PAULEY, *supra* note 2, at 208.

253. *Id.* at 286.

254. *Id.* at 290.

255. *Id.*

256. *Id.*

257. HILBERG, *supra* note 222, at 171. A lease could be terminated upon a showing by the landlord that the tenant could live somewhere else. *Id.* Simultaneously, Jews who still maintained their apartments were compelled to accept homeless Jewish families as tenants. *Id.* At this time Austria had been absorbed into Germany and was governed by its decrees. PAULEY, *supra* note 2, at 230.

258. PAULEY, *supra* note 2, at 290.

259. *Id.*

260. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991, at 142 (1997); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 24-25 (1994).

home.<sup>261</sup> Professor Fredrickson observes, however, that a systematic comparison between White supremacy in the southern United States and Nazi Germany's treatment of Jews must be made, and suggests parallels.<sup>262</sup>

I will explore below the similarities between Austrian and American segregationist regimes as to the mystiques they invoked and the prohibitions they developed, and will also identify substantial differences in context. This comparison will focus on the judiciary's uncomfortable role in disestablishing school segregation. The rule of law in Austria was both the product of a traditional culture and at war with prevailing power differentials. The *Brown* and *McLaurin* decisions and their aftermath pitted national law against deeply engrained Southern practices. These conflicts provide lessons forward as to current debates on issues of equality, association, and citizenship.

#### **A. The Minority's Taint and the Majority's Resultant Right to Segregate**

Racism reflects a mind-set that views the out-group as different from the in-group in ways that are so crucial and unchangeable that the two groups cannot coexist, except perhaps on the basis of domination and subjugation.<sup>263</sup> Austrian Nazis and Southern segregationists proclaimed that unless their regimes were protected by whatever measures were necessary, contamination would overwhelm traditional society.

##### *1. The Myth of Blood*

Although the Nazis and the designers of the Jim Crow laws transformed inequality into an official ideology, rationalizations for twentieth century racism predated these bureaucratized regimes. To cite a few examples, many Europeans in medieval times conceived of Jews as accomplices of Satan.<sup>264</sup> Wilhelm Marr, who founded the Anti-Semitic League in Germany, warned in an 1879 book that Jews were tainted by nature rather than merely having the wrong religious views.<sup>265</sup> In America, nineteenth century pro-slavery advocates who wished to avoid clashing with the evangelical Christian belief that all people descend from Adam, asserted that God had cursed the supposedly Black descendants of Noah's son Ham

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261. NEIL A. WYNN, *THE AFRO-AMERICAN AND THE SECOND WORLD WAR* 6-10 (1976).

262. FREDRICKSON, *supra* note 14, at 99.

263. *Id.* at 9.

264. *Id.* at 21-22.

265. PAULEY, *supra* note 2, at 28-29.

and condemned them to be “servants unto servants.”<sup>266</sup> And in a debate on an 1875 civil rights bill in Congress, John Harris of Virginia stated that “[t]here is not one gentleman upon this floor who can honestly say he really believes that the colored man is created his equal.”<sup>267</sup>

Twentieth-century racists carried forward these views. An Austrian Nazi attempting to push through the 1932 segregation bill in Parliament noted: “We can distinguish between a German-blooded man and a Jew.”<sup>268</sup> Arguing in opposition, Karl Leuthner rejected the “myth of blood” which would decree that someone could be German-Austrian in language and culture with generations of Catholic ancestors, but if one grandmother has “just a smidgeon of Jewish blood, this Jewish blood is stronger than the baptism of centuries . . . .”<sup>269</sup> As to the smidgeon of Negro blood sufficient to “taint” in the Jim Crow American South, Charles S. Mangum, Jr.’s account of the 1940’s listed states that defined a person of color as one with any ascertainable trace of Black blood or any Black blood, although there were other variations using blood percentages.<sup>270</sup> The question of who was Black was defined by Whites, and the pejorative nature of that definition was demonstrated by the fact that “Every court which has considered the question has held that writing that a white man is a Negro is libelous per se.”<sup>271</sup>

Because the dominant (pure) group could be contaminated by sexual contact, Nazis and southern segregationists were particularly obsessed about “race mixing” and enacted miscegenation laws to punish it.<sup>272</sup> Hitler accused both Jews and Blacks of attempting to ruin the White (read, Aryan) race by “bastardization” that would throw Whites down from their “cultural and political height.”<sup>273</sup>

## 2. *The Myth of the Majority’s Moral Superiority*

Loss of political height is a casualty of war rather than intermarriage,

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266. FREDRICKSON, *supra* note 14, at 79-80.

267. 2 Cong. Rec. 376 (Jan. 5, 1874) (colloquy between Rep. Harris and Rep. Ransier).

268. Parliamentary Debate, *supra* note 27, at 2090.

269. *Id.* at 2071.

270. CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 5-10 (1940); *cf.* Daniel Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1476-77 (2003) (concluding that there was greater flexibility than has been previously assumed).

271. MANGUM, *supra* note 270, at 18.

272. PAULEY, *supra* note 2, at 172; *see* *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (declaring miscegenation laws to be unconstitutional). Nicholas D. Kristof notes that there is about ten times more genetic difference within a race than between races. Nicholas D. Kristof, *Love and Race*, N.Y. TIMES, Dec. 6, 2002, at A35.

273. FREDRICKSON, *supra* note 14, at 119-120.



and fuels humiliation that may be assuaged by subordinating some internal “enemy.” The subordination process requires stigmatizing this enemy and elevating the in-group. The Treaty of Saint-Germain, binding on Austria after her defeat in World War I, was more severe than the Treaty of Versailles that bound Germany.<sup>274</sup> Austria was forced to cede most of her former imperial territory and was precluded from joining the new German republic. Many kinds of Jews—“revolutionaries,” bankers, refugees from the former eastern provinces—were conveniently blamed for this defeat and the inflation that followed.<sup>275</sup> These alleged miscreants were contrasted to the true German-Austrian people “filled with the life force,” idealistic, pious, poetic, honorable.<sup>276</sup>

In the American Civil War, White Southerners not only experienced a high casualty rate but also lost their chance for an independent Confederacy and much of their prior economic viability. They resented the African-Americans who joined the Union Army, and those who later voted Republican in the Reconstruction era dominated by northern “Carpetbaggers.”<sup>277</sup> The insolvency of some Republican-dominated state governments in which Blacks held official posts were cited as examples of the corruption of such bi-racial bodies.<sup>278</sup> Descriptions of the “war between the states” and Reconstruction were refurbished for the benefit of the next generation as though the events had just occurred and could provide a lens for viewing the present.<sup>279</sup> The Ku Klux Klan was romantically presented, while Blacks were accused of arrogance, impertinence, criminality, and incompetence.<sup>280</sup>

Those invoking the vanquished beauty of the “Old South,” who would have found it abhorrent to use kidnapped people as perpetual unpaid labor if the laborers had been White, were comfortable with the former tradition of owning African-American slaves. The lost Confederacy they envisioned was a serene, well-ordered society of gentlemen, a democratic White polity whose institutions were approved by the law, the church, and the press.<sup>281</sup>

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274. PAULEY, *supra* note 2, at 79. Austria lost areas inhabited by 3.5 million German-speaking Austrians. *Id.*

275. *Id.* at 80, 318.

276. *Id.* at 5; *see supra* note 9 and accompanying text.

277. FREDRICKSON, *supra* note 14, at 106; WOODWARD, *supra* note 169, at 85.

278. FREDRICKSON, *supra* note 14, at 85.

279. WOODWARD, *supra* note 169, at 85-86.

280. *Id.* at 76, 86.

281. *Id.* at 5.

### 3. *The Downward Trajectory to Segregation*

In the twelve years after the Treaty of Saint Germain had set out the terms for Austria's new incarnation as a Republic, rage over these terms increased. Polemicists claimed that Austria was saddled with a Constitution that specifically protected the very minority whose machinations were controlling the country.<sup>282</sup> The University of Vienna must guard the German Student Body from pollution by officially segregating it from Jewish students. Frustration of this purpose would signal a final defeat for the majority group. The German-Austrian Daily News demanded: "Are we Germans still the decision-making masters in our own country, or are we now nothing more than tolerated guests, fair game for a handful of foreigners . . .?"<sup>283</sup>

In a similar span of years after the Confederacy's surrender to Union forces, White supremacists complained that they were oppressed by "Yankee and Negro rule."<sup>284</sup> Yet, observers from both races described "freedom of association between whites and blacks . . . frequency and intimacy of personal contact, and . . . Negro participation in political affairs" in various parts of the South, as well as rising fury culminating in lynching and fanatical assertions of racism.<sup>285</sup> Professor Vann Woodward reminded us that at this point, "There were real choices to be made, and alternatives to the course eventually pursued with such single-minded unanimity and unquestioning conformity were still available."<sup>286</sup>

These two post-war periods in Austria and the American South indicate some intriguing parallels in the majority group's sense that defeat had opened the door for outsiders to change the rules of the game. As a result of this humiliating interference, the majority was now under siege by the "Other" and must act politically to terminate that threat. A difference, which will be discussed further below, was the judiciary's response. In Austria the Constitutional Court's rescission of the Nazi Student Orders postponed the onset of segregation for years, while in America the High Court's choice was to join the changing national mood elevating federalism over minority rights. Federal troops departed from the South in 1877, and the North (whose own record on race relations was hardly sterling) tilted towards sectional reconciliation.<sup>287</sup>

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282. PAULEY, *supra* note 2, at 79-80.

283. *See supra* note 9 and accompanying text.

284. WILLIAM J. COOPER, JR., JEFFERSON DAVIS, *AMERICAN* 602 (2000).

285. WOODWARD, *supra* note 169, at 35-44.

286. *Id.* at 44.

287. *Id.* at 6, 70-71.

The United States Supreme Court had curtailed the Privileges and Immunities Clause in the *Slaughter House Cases*<sup>288</sup> and its successors,<sup>289</sup> and then held that the Fourteenth Amendment did not empower Congress to bar individuals from engaging in discriminatory conduct;<sup>290</sup> determined that a state could mandate segregation on a common carrier;<sup>291</sup> concluded in *Plessy v. Ferguson* that segregation was constitutional if based on a “separate but equal” system;<sup>292</sup> and validated Mississippi’s plan for depriving Blacks of the right to vote.<sup>293</sup>

Segregation laws freed of judicial restriction began to proliferate in the twentieth century, embodied in local regulations, city ordinances, and statutes.<sup>294</sup> In various patterns that appeared, Blacks were separated from Whites in employment, in theaters and movie houses, street cars, trains, buses, parks, and schools.<sup>295</sup> Residence for Blacks could be restricted to certain areas by law, by threats, or by economics.<sup>296</sup> In some cities, curfews forbade them to go out after 10 p.m.<sup>297</sup> Mobs robbed, assaulted, and murdered them.<sup>298</sup> In the words of Professor Woodward,

The Jim Crow laws put the authority of the state or city in the voice of the street-car conductor, the railway brakeman, the bus driver, the theater usher, and also into the voice of the hoodlum . . . . They gave free rein and the majesty of the law to mass aggressions that might otherwise have been curbed, blunted or deflected.<sup>299</sup>

And so it was also in Austria. After the Anschluss, segregation of Jews in employment and provision of professional services was put into place;<sup>300</sup> residential separation was facilitated by confiscating homes and terminating leases, forcing Jews into a few areas where large numbers lived in a few rooms.<sup>301</sup> Jews were segregated and ultimately excluded from schools, parks, movie theaters, sports stadiums, barber shops, and train

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288. *See generally* 83 U.S. 36 (1872).

289. *See generally* *United States v. Reese*, 92 U.S. 214 (1875); *U.S. v. Cruikshank*, 92 U.S. 542 (1875).

290. *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

291. *Louisville, New Orleans & Tex. Ry. Co. v. Mississippi*, 133 U.S. 587, 592 (1890).

292. 163 U.S. 537, 551 (1896).

293. *Williams v. Mississippi*, 170 U.S. 213, 225 (1898).

294. WOODWARD, *supra* note 169, at 98-99, 106.

295. *Id.*

296. *Id.* at 100-01.

297. *Id.* at 101.

298. *Id.* at 86-87.

299. *Id.* at 107-08.

300. PAULEY, *supra* note 2, at 282-83, 285-86, 290.

301. *Id.* at 288-89.

cars.<sup>302</sup> Curfews were imposed.<sup>303</sup> Bands of roving thugs, often joined by the SA, looted, tortured, and murdered Jews, especially in Vienna.<sup>304</sup> By 1941, any possibility of anonymity was removed; although Jews could not generally be identified by skin color, any Jew over the age of six had to wear the clearly visible Star of David.<sup>305</sup>

#### 4. *Significant Differences in Context Between Austrian and Southern Domination*

Before comparison of the Austrian Constitutional Court's decision with the United States Supreme Court's rulings in *Brown* and its predecessors, some distinctions in political context must be set out. These distinctions are important and intertwined with each other.

Under the Habsburg Monarchy, Austrian Jews had generally enjoyed constitutional equality, respect, and protection that enabled them to interact with modern society and to make substantial contributions to Austrian culture.<sup>306</sup> This golden age was ended when the murder of the heir to the Austro-Hungarian throne in 1914 led to four years of war and economic disaster that fueled an upsurge of Austrian anti-Semitism.<sup>307</sup> In the next two decades, poorer Jews—who were probably the bulk of the Austrian Jewish population—worked as tailors, peddlers, and newspaper salesmen. Many were immigrants from the former eastern provinces of the Empire, and were described in pan-German propaganda as foreign parasites.<sup>308</sup>

Competition between Jews and Christians tended to occur at the next level, that of middle-class merchants and professionals.<sup>309</sup> Jews had difficulty finding jobs with Gentile employers, and gravitated towards starting their own businesses, or joining professions such as architecture, law, and medicine.<sup>310</sup> If they were successful, they were often accused of rising through unfair use of influence rather than through merit.<sup>311</sup>

When Nazi power increased, it was popular and profitable to eliminate these unneeded competitors. Although Jewish businesses employed Christians, the entire enterprise could simply be “Aryanized” and the

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302. *Id.* at 284, 291.

303. *Id.* at 291.

304. *Id.* at 287.

305. *Id.* at 291.

306. *Id.* at 11, 22-23.

307. *Id.* at 60.

308. *Id.* at 80, 178, 212, 216.

309. *Id.* at 200-02.

310. *Id.* at 213.

311. *See supra* Part I.F.2.

owners given a token payment or none at all.<sup>312</sup> In 1938, all Jewish actors, musicians, journalists, and employees of banks and insurance companies were dismissed.<sup>313</sup>

By contrast, Blacks emerging from slavery in America were competing largely with lower-income Whites.<sup>314</sup> Employers used African-Americans as strike-breakers, service workers, and servants.<sup>315</sup> Landowners used them as share-croppers.<sup>316</sup> They were cheap labor, and necessary to the viability of the South. Suffering from the lingering effects of slave status in their speech and manner, they were derided as innately inferior and therefore unfit for full participation in White civilization.<sup>317</sup>

These differences in the strata of job competition are relevant to the most stark distinction between Austrian Nazi and Jim Crow domination. In Austria, the “final solution” that followed segregation was to drive out, intern, and ultimately kill the minority group.<sup>318</sup> Emigration after surrendering every asset was legally permitted until 1941, yet even before that time transports to work and death camps had begun. In the American South, the “final settlement” in the early Twentieth Century was segregation, accompanied by lynching and threats to those who did not “stay ‘in their place.’”<sup>319</sup> Neither of these outcomes could ever have occurred without prior demonization of the other as a bearer of pollution that could destroy a beautified traditional society. The economic element must be recognized, however. Austria’s Nazis were enriched by expulsion of Jews, the South’s Whites by expulsion of “Carpetbaggers” and establishment of a new kind of servitude for Blacks.

### B. *Brown* and Judicial Choices

Proponents of “separate but equal” in Austria and America favored similar tests relying on formula instead of fact. The University of Vienna’s Academic Senate proclaimed that its Student Nations each had “the same rights.” The German Student Body had the right to exclude those it categorized as Jewish; presumably, the Jewish Student Body could reject

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312. PAULEY, *supra* note 2, at 283.

313. *Id.* at 282-83.

314. FREDRICKSON, *supra* note 14, at 86.

315. *Id.* at 86-87.

316. *Id.* at 93.

317. WOODWARD, *supra* note 169, at 32, 76.

318. PAULEY, *supra* note 2, at 294-98.

319. FREDRICKSON, *supra* note 14, at 93. Note also that for Jews, the greatest period of oppression came after segregation, while the greatest oppression for Blacks—slavery—occurred before Jim Crow; WOODWARD, *supra* note 169, at 7.

any Gentile who applied. Each group could elect a representative. Thus, mandatory separation did not constitute inequality. That brand of logic surfaced in the United States Supreme Court's *Plessy v. Ferguson*<sup>320</sup> decision upholding Louisiana's authority to segregate railway carriages and noting that no race was more disadvantaged than the other. Blacks were excluded from "White" railway cars and Whites from "Black" cars.

When this equal-exclusion claim was considered in the context of higher education, the Court balked. Petitioner in *Sweatt v. Painter*<sup>321</sup> was denied admission to the state-supported University of Texas Law School because he was Black, but was given the "opportunity" (which he rejected) to enroll in a separate law school that had just been created by the State for Blacks. The unanimous bench assessed not only the tangible qualities of the two schools (the newer one was somewhat upgraded after the trial stage in the lawsuit), but also the intangible qualities: "It may be argued that excluding petitioner from . . . [Texas Law School] is no different from excluding white students from the new law school. This contention overlooks realities."<sup>322</sup> It would be highly unlikely that a majority group member attending a school with "rich traditions and prestige" would complain that he was deprived of the chance to enroll at the Black school.<sup>323</sup> Applying these realities to Austria's segregated student groups, "equal rights" could not be demonstrated merely by providing each student with a ticket to some entity labeled a Nation.

Moving to a situation of intra-school segregation that presents some parallels to the Nazi Student Orders at the University of Vienna, appellant in *McLaurin v. Oklahoma State Regents for Higher Education*<sup>324</sup> was a Black student with a Master's Degree in Education who applied to Oklahoma University in order to study for a doctorate. He was denied

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320. 163 U.S. 537, 551 (1896). "Separate but equal" was perceived as a tangible deprivation by Black students who were subjected to it. In one case, a seven-year-old third grader, who lived only a few blocks from the local Whites-only school, had to walk six blocks through dangerous railroad switching yards, then cross the area's busiest commercial street to reach a school bus pick-up point to get to an all-Black school. If the school was not yet open when the bus arrived, she waited in all weathers. The area was Topeka, Kansas, and the child was Linda Brown, the oldest of the five *Brown* plaintiffs. KLUGER, *supra* note 56, at 409-10. For detailed descriptions of disparities in facilities, see *id.* at 13-14, 302, 388-89.

321. 339 U.S. 629, 631-32 (1950).

322. *Id.* at 634.

323. *Id.* Petitioner's right to attend Texas Law School was upheld, though his request that *Plessy* be re-examined was not. *Id.* at 634-36.

324. 339 U.S. 637, 638 (1950). The case was argued by Robert L. Carter and Amos T. Hall, counsel for the National Association for the Advancement of Colored People ("NAACP"). *Id.* at 637.

admission because of his race, then (after filing a federal suit) admitted but compelled to sit in an anteroom adjoining the classroom, use only a designated mezzanine desk in the library, and eat only at a different time from other students in the cafeteria.<sup>325</sup> As the case progressed to the Supreme Court, these conditions were altered to the extent that McLaurin now sat in the regular classroom but in a separate designated row, and ate at the same time in the cafeteria as White students but at an assigned separate table. The University argued that these were nominal restrictions, and that he was permitted to wait in the same cafeteria line and talk with Whites as he did so.<sup>326</sup>

These opportunities for in-line chats did not impress the Supreme Court. Setting McLaurin apart from majority-group students would “impair and inhibit his ability to study, to engage in discussions and exchange views” with classmates.<sup>327</sup> Perhaps removal of legal restrictions would still not induce these classmates to talk to him. Nevertheless “[t]here is a vast difference – a Constitutional difference – between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar.”<sup>328</sup>

We do not have evidence about whether the Student Nations in Austria were compelled to sit apart in lunchrooms. The impact of the mandated separation was on the exercise of intra-school political rights. Jewish students excluded from the German Student Body were thereby also excluded from assisting in “discipline” and keeping order; voting in critical student elections; using special faculty spaces for meetings; helping to set policy on such issues as ceilings on the number of Jews to be admitted to the University.<sup>329</sup> These disabilities would affect opportunities for the “intellectual commingling” that was at the center of *McLaurin*'s concerns. Members of the German Student Body did not consider their individual power to impose social ostracism to be nearly sufficient; the segregation had to be State-imposed in order to consolidate their political goals. One of these was the need to stigmatize.

The United States Supreme Court finally grappled with the issue of

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325. *Id.* at 638-40.

326. *Id.* at 640-41.

327. *Id.* at 641.

328. *Id.*

329. *Hearing*, supra note 2, at 3. Assistance with “discipline” would allow members of the German Student Body to punish those who were charged with disobeying rules (or to refrain from doing so); GULICK, supra note 63, at 639-41.

stigma in *Brown*,<sup>330</sup> using it as one of the predicates for the holding that “separate but equal” is unconstitutional in the field of public education. Cases coming from the states of Kansas, South Carolina, Virginia, and Delaware were consolidated because the plaintiffs in each had been excluded from schools attended by White children under laws requiring or permitting racial segregation.<sup>331</sup> The arguments on behalf of the plaintiffs were presented by National Association for the Advancement of Colored People (“NAACP”) counsel, pursuant to an evolving strategy described in riveting detail by historian Richard Kluger.<sup>332</sup> The *Brown* opinion underscored its theme by citing with approval a pre-*Plessy* statement in *Strauder v. West Virginia*, a case involving an attempt to preclude Blacks from serving on juries: “[Due process of law includes] the right to exemption from unfriendly legislation against them distinctively as colored, . . . implying inferiority in civil society, . . . which are steps toward reducing them to the condition of a subject race.”<sup>333</sup>

This quote stressed the discriminatory *purpose* of the legislation, an approach that is highly relevant to the Nazi Student Orders. The Orders were designed to be the first step in legalizing all forms of segregation in Austria. *Brown*’s principal emphasis, however, was not on legislative intent but instead on the impact of segregation, which deprived minority-group children in public schools of equal educational opportunity. Rejecting *Plessy*’s assertion that mandatory separation of the races was only offensive if Blacks decided to interpret it that way, the Justices concluded that segregating Black children in elementary and high schools “generates a feeling of inferiority as to their status in the community” that is unlikely to be reversed.<sup>334</sup> The social science data underlying this finding were picked apart from many political perspectives in subsequent years.<sup>335</sup> The difficulty of making such judicial choices can be seen in the

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330. 347 U.S. 483 (1954).

331. *Id.* at 486.

332. KLUGER, *supra* note 56, at 509-81. Robert L. Carter argued for plaintiffs in the *Brown* case from Kansas; Thurgood Marshall represented plaintiffs in the companion case, *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955), from South Carolina. An associate of the two advocates described Carter as “the keel” and Marshall as “the wind.” KLUGER, *supra* note 56, at 272.

333. *Brown*, 347 U.S. at 492 n.5 (quoting approvingly from *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880)).

334. *Id.* at 494.

335. See, e.g., CHARLES OGLETREE, JR., ALL DELIBERATE SPEED, REFLECTIONS ON THE FIRST FALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 302 (2004). Professor Ogletree notes:

The challenge of *Brown* was not only to achieve integration but also to recognize that once integrated, all of us are diverse: we have all given up something to gain



painful deliberations and “unanimous” opinions of the Austrian Constitutional Court and the United States Supreme Court. Some issues were ignored and others bolstered, while the Justices kept a close eye on public opinion and calculated the costs of each stand they took.

### 1. *Judicial Independence*

#### a) *The Constitutional Court and External Pressures*

In response to the Austrian Constitutional Court's nullification of University segregation, the pan-German press proclaimed that “courts . . . are not independent arbitrary plantations, self-sufficient and detached from the people, who can simply turn their eyes away from the people and the government who appoint them, can simply ignore their mission and implement traitorous policies, and an ‘administration of justice’ that are inimical to the people.”<sup>336</sup>

Rather than returning the case to the court below, the Justices had undertaken the responsibility and used the Associations Law as a predicate for rescission of the Nazi Student Orders. That left no controversy about remedy; the German Student Body no longer had the imprimatur of law to continue in existence. It was foreseeable that this choice would result in an escalation of violence—pressure that the Justices did not acknowledge,

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something more. Integration does not simply place people side by side in various institutional settings; rather, it remakes America, creating a new community founded on a new form of respect and tolerance. Implicit in that challenge was the recognition that white society had to change to acknowledge in substantive ways the achievements of African-American society. It was not enough simply to admit African-Americans to the table, or even to let them dine, but to partake of the food they brought with them.

*Id.* at 295; see generally DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); PETER IRONS, *JIM CROW'S CHILDREN, THE BROKEN PROMISE OF THE BROWN DECISION* (2002); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION, A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001); Joseph D. Silbey, *Race Judicata*, SOC. SCI. RES. NETWORK ELECTRONIC LIBR., available at [http://papers.ssrn.com/paper.taf?abstract\\_id=531283](http://papers.ssrn.com/paper.taf?abstract_id=531283).

The question of whether bias would affect any group that was its object was pursued by counsel for defendants in one of the consolidated *Brown* cases emanating from Virginia. Dr. Isador Chein, a Jewish expert witness for plaintiffs who was bluntly asked whether discrimination made him feel inferior, explained that when the government of a state or country endorses the inferiority of a group on the basis of skin color or religion, its members tend to internalize that view. KLUGER, *supra* note 56, at 494.

336. See *supra* note 9. The article noted that such dangerous illusions of independence must be dispelled, by “brutality” if necessary.

even in their deliberations. Nazi electoral victories in Germany posed an increasing external threat to Austria's independence, and strengthened the determination of Austrian Nazis to achieve their segregationist goals by terrorizing their opponents. The Constitutional Court's action prevented the fruition of these goals until the Anschluss.

b) *The Supreme Court and Regional Resistance*

The American Justices were less restrained in expressing their fear that defiance and violence would follow a desegregation decree. Professor Mark Tushnet, Richard Kluger, and other historians have provided insights into the *Brown I* deliberations and the subsequent conferences about remedy in *Brown II*. Like Court President Durig in Vienna, Chief Justice Earl Warren had a crucial impact on the Supreme Court's direction. He did not make accusations against Southern segregationists which would have antagonized two of his colleagues, but instead commented only that "segregation was no longer justifiable in this day and age."<sup>337</sup>

Justice Frankfurter, an apostle of judicial restraint but nonetheless committed to overruling *Plessy*, reminded the Justices of the political implications of failing to do so.<sup>338</sup> The administration of President Harry S. Truman had opposed the caste system, and had already urged the Justices in 1950, in the prior *Henderson* case, to overrule the "separate but equal" doctrine.<sup>339</sup> In addition, there were international repercussions. The Department of Justice's *amicus* brief in the restrictive covenant cases had stated that racial segregation hampered the United States in foreign relations, especially in competition with the Soviet Union for the favor of African nations.

President Truman had taken a number of prior steps to implement racial justice. In 1946, he established a Commission on Higher Education, which concluded that segregation legislation must be repealed.<sup>340</sup> Integration of American troops pursuant to Truman's executive order of July 26, 1948, was eventually implemented, governing soldiers serving abroad in Austria and Germany and at home in army, navy, and air force bases in Georgia, the Carolinas, Virginia, Alabama, and Texas.<sup>341</sup>

Although the executive branch had advocated desegregation, the impact

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337. See Mark Tushnet & Katya Lezin, *What Really Happened In Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1877 (1991) (citing BERNARD SCHWARTZ, *SUPREME CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 95 (1985)).

338. *Id.* at 1908-09.

339. *Id.* at 1885-87.

340. WOODWARD, *supra* note 169, at 135.

341. *Id.* at 137-39.

of such a decree on southern sensibilities troubled some of the Justices. Professor Tushnet described a draft opinion by Jackson stating that the Court could not discount the claims of Whites who sincerely believed that “their blood, lineage and culture are worthy of protection by enforced separatism of races.”<sup>342</sup> Their feelings had been reinforced by the humiliation of “carpetbag government imposed by conquest” and resentment of the Reconstruction.<sup>343</sup> Justice Black predicted that overruling *Plessy* would engender resistance and violence. Nonetheless, because segregation established an unconstitutional caste system, the Court must strike it down knowing that this “means trouble.”<sup>344</sup>

And trouble came. Four states displayed open resistance by imposing penalties for compliance with the Supreme Court’s decision.<sup>345</sup> There was violence even at the university level, where the Justices had expected less difficulty because the numbers of African-Americans admitted would be smaller.<sup>346</sup> A riot broke out at the University of Alabama over the admission of Autherine Lucy, and mobs threatened her as she attended classes.<sup>347</sup> In Mississippi, Governor Ross Barnett announced that integration was unconstitutional, and that any federal officials seeking to implement it would be arrested.<sup>348</sup> Three hundred and twenty federal marshals entered the University of Mississippi at Oxford in 1962 to protect James Meredith, an African-American native of the state whose admission to the school had been ordered by Justice Black.<sup>349</sup> The marshals were dispatched by President John F. Kennedy, who had from the start of his administration proclaimed that *Brown* was “legally and morally right.”<sup>350</sup> His televised appeal for reason, urging that “the honor of your university and the state are in the balance” was unavailing.<sup>351</sup> Armed mobs attacked

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342. Tushnet & Lezin, *supra* note 337, at 1915.

343. *Id.*

344. *Id.* at 1904-05.

345. WOODWARD, *supra* note 169, at 157.

346. Tushnet & Lezin, *supra* note 337, at 1903.

347. WOODWARD, *supra* note 169, at 163. Autherine Lucy was suspended, reinstated by court order, and then immediately expelled for making “outrageous” charges against the University trustees. The University of Alabama remained segregated for seven more years. *Id.* President Dwight D. Eisenhower took no action in this instance. *Id.* But the President subsequently sent federal troops to Little Rock, Arkansas to protect nine Black children who had been prevented from entering an all-White high school by Governor Orval E. Faubus’s national guard and threatened by huge mobs. *Id.* at 166.

348. *Id.* at 174.

349. *Id.*

350. *Id.* at 172.

351. *Id.* at 174. As of 2002, African-American students comprised 13% of the enrollment at the University, and have held every major leadership post there. David M. Halbfinger, *40 Years After Infamy, Ole Miss Looks to Reflect and Heal*, N.Y. TIMES, Sept. 27, 2002, at A1.

the marshals with gasoline bombs, bricks, and firearms; the marshals augmented by army troops fought back with tear gas, and there were numerous injuries and two deaths. For the next year, three hundred national troops stayed on hand to keep order.

These riots are reminiscent of the violence at the University of Vienna: the majority had an obsessive conviction that desegregation would “befoul” society, and implemented that conviction through brutality. Yet the situations also differed in significant respects. Austria’s universities had been integrated prior to the promulgation of the Nazi Student Orders, and continuation of the Orders would have precipitated a downward trajectory fueled by an external enemy. Dis-integration was halted only by the judiciary, while the federal administration under Chancellor Buresch did not authorize police protection and unsuccessfully attempted to reestablish segregation through legislation. The judiciary’s task was completed in one decision based on statute that encompassed an immediate remedy—rescission of the German Student Body’s official separatist legitimation.

In America, the upward trajectory based on a general constitutional command was contorted by the *Brown II* question of whether the remedy of prompt desegregation or a more gradual “deliberate speed” should be decreed. Black and Douglas, the “libertarians,” favored a clear statement of unconstitutionality coupled with granting prompt relief to the named plaintiffs only.<sup>352</sup> The gradualist solution was adopted, however, because its proponents feared that greater displays of federal judicial muscle would have provoked more widespread Southern resistance, and involved the courts in too much micro-managing.

Operating in our common law framework that contemplates judge-made law to interpret the Constitution and may shade into “judicial activism,” the Justices produced a historic departure from precedent in *Brown I*, but then applied the brakes of judicial restraint with a heavy foot in *Brown II*. Ironically, the failure of the gradualist remedy to appease segregationists eventually necessitated a wider expansion of the federal judicial power than might have resulted from the quicker solution proposed by the civil libertarians.<sup>353</sup>

## 2. *Challenges to Brown’s Predicates and Primacy*

Austrian legal academics generally maintained a silence about the validity of the Nazi Student Orders, with the exception of Dr. Joseph Hupka who had dissected them in the public press and found them to be

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352. Tushnet & Lezin, *supra* note 337, at 1930.

353. *Id.*

unlawful.<sup>354</sup> After the High Court's opinion was issued, constitutional law scholars merely summarized it or cited it largely in the context of discussing the formal requirements of Associations Law.<sup>355</sup> By contrast, American law professors were not reticent about critiquing the legal underpinnings, assumptions, and consequences of the *Brown* decision.

Professor Herbert Wechsler's "Toward Neutral Principles of Constitutional Law" counseled that where the combination of constitutional phrases, history and precedent do not yield a clear answer in an adjudication, standards must be found that transcend the case at hand.<sup>356</sup> From this unremarkable proposition, he went on to criticize the Supreme Court for failing to explain its later extension of the school desegregation decision to other facilities such as public transportation, which people are not obligated to use.<sup>357</sup> Perhaps this was simply a way of stating that avoiding extensive analysis of a legal proposition for political reasons (the Justices did want to keep *Brown* short) is unacceptable. Wechsler lost the high ground of reasonable generality, however, when he implied that the motive of the legislature should not be an object of inquiry and gave some credence to *Plessy's* statement that racial separation is a badge of inferiority for Blacks "solely" because they "choose to put that construction upon it."<sup>358</sup> Professor Charles Black responded that the Court should be able to learn and use knowledge about the caste system's purpose that is "obvious to everybody else and to the Justices as individuals,"<sup>359</sup> and Professor (now Judge) Louis Pollak noted that Wechsler's own criteria for "neutral" decision-making remained vague.<sup>360</sup> Judge Richard Posner, in turn, commented that Wechsler's unexplained reference to neutral principles may mean that judges should not premise their decisions on grounds that would "require them to engage with the messy world of empirical reality . . . ."<sup>361</sup>

Support for *Brown's* equal protection holding, though not its sociological references, was developed by Professor Michael McConnell, who concluded after a comprehensive review of the legislative history that

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354. See *supra* note 249.

355. See, e.g., Merkl, *supra* note 197.

356. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15, 19 (1959).

357. *Id.* at 22.

358. *Id.* at 33.

359. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

360. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 PENN. L. REV. 1, 34 (1959).

361. Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 33 (1993).

the Fourteenth Amendment forbids assignment of students to separate schools or classes on the basis of race.<sup>362</sup> Alexander Bickel's take on that legislative history as inconclusive<sup>363</sup> did not go far enough; originalist analysis demonstrates that *Plessy* was wrongly decided, not *Brown*.<sup>364</sup>

In a spirited exchange of views with McConnell, the primacy of *Brown* was challenged by Professor Michael Klarman.<sup>365</sup> He offered the provocative statement that *Brown* was "unnecessary from the perspective of long-term racial change" because traditional southern attitudes were already being altered by factors including Cold War imperatives, the increasing clout of northern Blacks, and the growing social integration of a nation linked by interstate travel and television.<sup>366</sup> Yet Klarman proceeded to compliment *Brown* on its unintended consequences—fueling southern resistance in the form of officially-sanctioned violence against peaceful demonstrators, which captured the attention and civil rights sympathies of the North.<sup>367</sup> The ugliness of these confrontations speeded the enactment of vital civil rights provisions.

A recent assessment by Professor James Patterson addressed in detail the entrenched phenomenon of *de facto* segregation and re-segregation, and the skepticism of critical race theorists about the goal of integration.<sup>368</sup> Nonetheless, he concluded that *Brown* was of "incalculable" value because ideals of justice and equality were reconsecrated.<sup>369</sup> As Richard Kluger observed in his monumental work *Simple Justice*: "The decision marked the turning point in America's willingness to face the consequences of centuries of racial discrimination, a practice tracing back nearly to the First Settlement of the New World."<sup>370</sup> Then Jim Crow died in 1965, with the

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362. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949-55 (1995).

363. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56-60 (1955); cf. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 938-40 (1986) (concluding after a persuasive analysis of legislative history that the framers of the fourteenth amendment conferred upon Congress and the federal courts the primary authority to enforce individual civil rights).

364. McConnell, *supra* note 362.

365. See generally Klarman, *supra* note 260.

366. *Id.* at 14.

367. *Id.* at 76.

368. See PATTERSON, *supra* note 335; see also Ogletree, *supra* note 335.

369. PATTERSON, *supra* note 335, at 222.

370. See KLUGER, *supra* note 56, at iii. Thurgood Marshall, an NAACP advocate in the *Brown* consolidated cases, was appointed as the United States Supreme Court's first Black justice in 1967. *Id.* at 760. For an analysis of Justice Marshall's efforts to implement *Brown*, see Maria L. Marcus, *Learning Together: Justice Marshall's Desegregation Opinions*, 61 FORDHAM L. REV. 69 (1992).

passage of the federal Voting Rights Act capping a year of comprehensive legislation championed by President Lyndon B. Johnson.<sup>371</sup>

This transformation of racial attitudes embodied in *Brown* was affected by post-war revulsion against Hitler's policies of racial separation and brutality in Europe.<sup>372</sup> Racism was in bad odor, and associated with the enemy that America had defeated. Southerners saw no analogy, however, and resented the efforts of Nazi propagandists to prop up their ideology by referring to Jim Crow laws.<sup>373</sup>

### III.

We study history, among other reasons, to learn from its successes as well as its mistakes. The Austrian judiciary's decision to rescind the Nazi Student Orders in 1931 responded to the same call for decency, equality, and full citizenship as *Brown v. Board of Education* did in 1954. The same currents of minority rights within majority tides swirl through both opinions. The consequences attendant on prohibitions against cultural diversity are evident,<sup>374</sup> and provide a lesson forward on the question of which doctrines should control when universities seek to avoid entanglement with associations that exclude Blacks.

#### A. State Intervention vs. State Neutrality

Associations law in 1930's Austria was premised on assumptions that sharply differ from those of contemporary America. Formation of citizen groups had been permitted as a matter of grace by Emperor Franz Joseph in 1867. This paternalistic largesse was accompanied by a high degree of police control, particularly of political groups that might become troublesome to the monarchy. Although the right to form associations was subsequently established as fundamental and the registration procedures

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371. See WOODWARD, *supra* note 169, at 188-90.

372. See Klarman, *supra* note 260, at 25-26.

373. See Johnpeter H. Grill & Robert L. Jenkins, *The Nazis and the American South in the 1930's: A Mirror Image?*, 58 J. S. HIST. 667-68, 675-76, 684-88, 993 (1992); see also *supra* note 174 and accompanying text.

374. See Council of the European Union Directive, Arts. 2, 3, and 5, prohibiting discrimination based on racial or ethnic origin, and permitting member states to compensate for disadvantages linked to such origin. Council Directive 2000/43/EC, 2000 O.J. L 180. See Arie Farnam, *Defying EU Pressure, Slovakia is Systematically Segregating Its Romany Minority Into Ghettos, and Barring Their Entrance Into Cities*, CHRISTIAN SCIENCE MONITOR, Jan. 3, 2003 at 4; *supra* Part I.H.1; cf. Mark Landler, *Rare Bosnia Success Story, Thanks to U.S. Viceroy*, N.Y. TIMES, June 17, 2003, at A3 (describing friendships between Muslims, Croats and Serbs in an integrated Bosnian high school).

applicable to associations were modified, the potential for full supervision remained in force.<sup>375</sup>

The emphasis was not on government neutrality, but rather on the organization's adherence to the rules. Thus, associations law could be used by the Constitutional Court to disband the "Nations" because they were unauthorized.<sup>376</sup> Political control over associations could also be used by the Dollfuss administration, however, to prevent the emergence of certain voluntary and peaceful groups while relentlessly "encouraging" citizens to join its own favored organization, the Fatherland Front.<sup>377</sup>

American associations law, by contrast, has adhered to the principle that government must remain content and viewpoint neutral when it interacts with private entities.<sup>378</sup> This principle necessarily involves some loss of control over racist groups, and some tension with anti-discrimination law. Yet the Austrian experience demonstrates that permitting executive officials to retain broad powers over all associations is a problematic method of suppressing racism. As some of the Austrian Justices well understood, implementation of constitutional restrictions on the authority of a public university to accommodate or dismantle associations was also needed in crafting a long-term solution.

Has American law made appropriate calibrations in developing such restrictions? Although the university setting is by tradition a center of intellectual and philosophical thought and experiment, racism has remained a stubborn reality. One out of four minority college students are victims of hate crimes or bias-driven threats or slurs every year.<sup>379</sup> Universities with segregated student bodies continue to exist in America—Bob Jones has received more than fifteen minutes of fame.<sup>380</sup> And at the high school

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375. *See supra* Part I.G.2.b.

376. *See supra* Part I.B.2.

377. *See supra* Part I.G.2.b.

378. *See, e.g.,* *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995) (Souter, J., dissenting) (ruling that the University's refusal to pay a third-party contractor for the printing costs of petitioners' student publications containing religious articles was not supported by Establishment Clause concerns). In his dissent, Justice Souter noted that "the prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond." *Id.* at 894; *see also* *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981) (disallowing state university that routinely provided facilities for meetings of registered students from barring student religious speech). The Supreme Court noted that where a state has chosen to offer a forum to citizens, exclusions "bear a heavy burden of justification." *Id.* at 268.

379. *Issues in Diversity Prejudice and Ethnoviolence On Campus* 6, HIGHER EDUC. EXTENSION SERVICE REV., No. 2 (Winter 1995) [hereinafter *IssuesI*].

380. *See infra* notes 392, 402-08.



level, a Nazi organization has demanded the use of public school facilities for its activities, resulting in a split circuit court ruling approving the request.<sup>381</sup>

The following hypothetical will illustrate the tension between First and Fourteenth Amendment guarantees. Assume that a public university in New York State generally provides large conference rooms for outside organizations which fill out a form describing their group and the activities planned for the desired space. In my example, a request for such space has been made by a club from the local town called White World, which excludes all Blacks. Some students on campus have protested against the granting of the request because of the group's White supremacist website. The club's attorney has therefore taken the precaution of attaching a letter to the request form, explaining that the University would be in violation of law if rooms for its conference series were denied. The letter is passed on to the University's counsel.

The club's lawyer describes White World as "an exclusively political association, with a clearly defined purpose: to reestablish White dominance in all public and private spheres, and to confine Blacks to the positions that reflect their innate inferiority." He notes that the First Amendment accords the freedom to associate with others for political ends and shields all-White organizations from governmental intrusion if their expressive purposes could not be promoted "nearly as effectively" without rejection of those who do not share the same racial characteristics.<sup>382</sup> The connection between White World's aims and its exclusion of Blacks is far more

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381. See *Nat'l Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1012 (4th Cir. 1973) (en banc). The White supremacist group which initiated the suit was a successor to the American Nazi Party. *Id.*

382. See *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). New York City amended its Human Rights Law, N.Y.C. ADMIN. CODE § 8-102(9) (1986), which had previously exempted clubs that were "distinctly private in nature," establishing in this amendment that clubs with more than 400 members, regularly providing meals and receiving non-member payments for the furtherance of business shall not be deemed "distinctly private." *Id.* at 5-6. In response to a suit by a consortium of 125 private clubs, the Supreme Court upheld the constitutionality of the provision, finding no evidence that associational rights were significantly affected. The Court noted, however, that it was "conceivable" that an association "organized for specific expressive purposes . . . will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex . . ." *Id.* at 13; see also concurring opinion of Justice O'Connor, suggesting protection for the associational rights of organizations "whose expressive purposes would be substantially undermined" unless they could exclude those of a different race. *Id.* at 19; see also *NAACP v. Button*, 371 U.S. 415, 428 (1963) (expanding on freedom of association). The word "association" does not appear in the Constitution but is nevertheless rooted in rights to petition the government for redress of grievances, to speak freely, and to assemble. See *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984), discussed *infra* notes 410-417 and in accompanying text.

evident than the link found sufficient in *Boy Scouts of America v. Dale*<sup>383</sup> between the Scouts' purposes and rejection of gays. White World is at present a rather small group qualifying as an intimate association with no business component, rather than a large and unselective place of public accommodation that could be reached by anti-discrimination laws. Its conferences, however, are open to all, and the club expects many young people to attend.

University counsel writes in response that although she agrees that the school cannot interfere with the club's membership policies or restrict its speech rights, she is not convinced that the organization's invidious private bias must be given affirmative constitutional protection. If the University engages in the affirmative act of giving the organization the convenience and respectability of its facilities, which are designated for "desirable public purposes," it might be going beyond what the Constitution requires and furthering the club's agenda.<sup>384</sup> Courts have found anti-discrimination policy at both national and state levels to be a compelling governmental interest that may in some contexts overcome competing First Amendment claims. The University's individualized admissions policy allowing a modest and flexible "plus factor" for Blacks in order to maintain racial diversity is also a compelling interest, one which would be incompatible with accommodating this organization's conferences.<sup>385</sup>

### B. Equal Treatment vs. Associational Freedom

*Brown* placed the plaintiffs' right to equality above the desire of Whites not to associate with them (a position that did not escape Herbert

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383. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644-45 (2000), where the membership of an assistant scoutmaster with an "exemplary" record was revoked after he identified himself as gay in a newspaper interview. Dale sued the Boy Scouts in the New Jersey courts, alleging a violation of the State's public accommodations law prohibiting discrimination on the basis of sexual orientation. *Id.* at 645. The Supreme Court held that an association does not have to "associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment." *Id.* at 655. It was sufficient that the Boy Scouts believed that "homosexual conduct is inconsistent with the values it seeks to instill in its youth members . . ." *Id.* at 654. For commentary on the majority opinion, see Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 848 (2002).

384. See, e.g., *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 893 n.12 (1985) (Souter, J., dissenting), where the Supreme Court concluded that when a university creates a limited public forum, speech distinctions based on subject matter are permissible if these distinctions are "reasonable in light of the purposes served by the forum." (*Cornelius v. NAACP*, 473 U.S. 788, 806 (1985)).

385. See *infra* Part III.C.

Wechsler's doubting eye). The Justices conceived of the Equal Protection Clause as, *inter alia*, a prohibition against the hierarchy that would confine African-Americans to being "a subject race."<sup>386</sup> Although "Black" and "White" identities in America have been constructed and expressed in a wide variety of social settings,<sup>387</sup> the racial hierarchy enforced by legal measures such as the slave laws, Black Codes, and Jim Crow strictures have made these identities continue to appear more "natural" and "primordial."<sup>388</sup> Professor Rogers M. Smith has observed that this legally-bolstered stratification not only injured Blacks but also Whites who "were tempted into investing deeply in racial lies and in oppressive arrangements that bred ongoing civil strife."<sup>389</sup>

Overcoming such barriers to equality can be viewed as an element of liberty. As Professor Cass Sunstein has suggested,

libertarians, who may appear to oppose equality, insist on equality of an important kind; they want to ensure that all citizens have an equal right to pursue their own ends. An understanding of equality lies at the heart of the libertarian creed. Freedom from desperate conditions, often treated as an egalitarian idea, is an understanding of liberty as well. Those who emphasize autonomy in the formation of preferences are speaking of both equality and liberty; they want to ensure that unjustified inequalities—inequalities based upon . . . race, or sex, for example—do not limit the free development of individual personality.<sup>390</sup>

The University would invoke two Supreme Court decisions, *Runyon v. McCrary*<sup>391</sup> and *Bob Jones University v. United States*,<sup>392</sup> to support its

386. *Brown v. Bd. of Educ.*, 347 U.S. 483, 490 n.5 (1954); see also Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435-36 (1994) [hereinafter Sunstein, *The Anticaste Principle*]; Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 150-56 (1976).

387. See e.g., K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, in *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 30-38 (1996); J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2360 (1997); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 58 (1994).

388. Rogers M. Smith, "Black" and "White" in *Brown: Equal Protection and the Legal Construction of Racial Identities*, at 11 (2003), at <http://bepress.com/ils/iss2/art16> (last visited Nov. 3, 2004).

389. *Id.* at 13.

390. Sunstein, *The Anticaste Principle*, *supra* note 386, at 2411. Sunstein explores the "alleged" opposition between equality and liberty, noting that the term "liberty" could refer to fundamental political rights such as free speech, but also to a system that would enhance autonomy in the development of personal beliefs by providing an adequate education to everyone and by countering unfair background conditions. *Id.* at 2410, 2420.

391. 427 U.S. 160 (1976); see *infra* notes 393-97 and accompanying text.

392. 461 U.S. 574 (1983); see also *infra* notes 402-09 and accompanying text.

argument that government has no constitutional duty to facilitate private bias. Both involved segregated schools but neither has been broadly extended beyond its specific context. *McCrary* was issued in response to strategies used by Southern states which had been forced to desegregate.<sup>393</sup> Public schools were severely underfunded, while money was provided to benefit Whites-only private schools. Black students who were denied admission to these all-White institutions sued under 42 U.S.C. § 1981 (1991), a federal statute giving Blacks the same liberty to make and enforce contracts as Whites.

The Supreme Court rejected petitioners' First Amendment claims, noting that while "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections," quoting from its prior statement in *Norwood v. Harrison*.<sup>394</sup> Section 1981's predecessor, the Civil Rights Act of 1866, was passed pursuant to congressional power under the Thirteenth Amendment to eliminate badges of slavery, and prohibited Whites from precluding contracts on racial grounds.<sup>395</sup> Justice Stewart's opinion for the *McCrary* majority indicated that the judiciary may not enforce discriminatory contractual schemes, and that the all-White schools must therefore extend contracts for educational services to the respondents.<sup>396</sup> The Court also concluded with little analysis that mandating the admission of these Black children to the school need not interfere with the institution's segregationist "ideas or dogma."<sup>397</sup> (Recall *Bob Jones University*, which both admits Blacks and enforces segregation).

*McCrary* underscored the difference between government assistance to a biased private entity and government regulation of such an entity's ideological expression, a point useful to the University in the White World example. But, White World could counter that despite 1981's grounding in Reconstruction era purposes, its text seeks parity of treatment between the

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393. See Brody, *supra* note 383, at 842.

394. Runyon v. McCrary, 427 U.S. 160, 176 (1976) (citing prior decision in *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973)). *Norwood* presented the question of whether a state statute providing free textbooks to students at private segregated schools violated the Equal Protection Clause. The Court opined that although private bias is not barred by the Constitution, it cannot invoke the Constitution to get aid from the State.

395. *Id.* at 170 (citing the prior decision in *Jones v. Alfred H. Meyer Co.*, 342 U.S. 409, 440 (1968)).

396. *Id.* at 172. Because these schools solicited White students generally, with telephone directory yellow pages advertisements and mass mailings, they were deemed more public than private. *Id.* at 173.

397. *Id.* at 176.

racism. If a Black applicant's right to a school contract cannot be curtailed, then the club's right to enter into a contract for space rental also cannot be denied solely because of the race of its members or its White supremacist advocacy. The University's provision of facilities for private uses has created a limited public forum in which viewpoint discrimination is presumed to be impermissible.<sup>398</sup>

Contrary to the 1930's Austrian acceptance of official control over private organizations, America's neutral limited-public-forum doctrine takes a skeptical and relativistic view of government authority to assess such private entities. Under this doctrine, a state university has many of the characteristics of a traditional public forum (such as a city park or street), "at least as to its students."<sup>399</sup> Each student group has its own constituency and beliefs, which should not be ranked by public officials. And if a school has an express policy of providing conference space for outside organizations, viewpoint discrimination is presumptively unconstitutional when it precludes speech on a subject that would otherwise be within the forum's self-designated purposes.<sup>400</sup> *White World* could also note that under a divided Fourth Circuit ruling, a forum restriction based on a Nazi group's biased membership policies would be as suspect under the First Amendment as a restriction based on the group's speech.<sup>401</sup>

This body of public-forum law gives no weight to government policies prohibiting racial discrimination. In *Bob Jones University v. United States*,<sup>402</sup> such policies were dispositive. *Bob Jones* provides another instance of the Supreme Court's unwillingness to facilitate private bias, an instance arising in the tax context. The majority held that a racially discriminatory private school could not receive tax exempt status as a charity under 501(c)(3) of the Internal Revenue Code.<sup>403</sup> This school's disciplinary rules provided that expulsion awaited anyone who dated or married "outside their own race" and anyone who encouraged such interracial bonds.<sup>404</sup> The Supreme Court noted that invidious distinctions

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398. See *supra* note 378.

399. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5, 269 (1981) (State university's refusal to grant student religious group access to university facilities generally available to other student groups, held unjustifiable content-based exclusion of religious speech).

400. *Id.* at 266. But see *supra* note 384.

401. See *Nat'l Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1016 (4th Cir. 1973) (en banc).

402. 461 U.S. 574 (1983).

403. *Id.* at 604. The government interest in eradicating racial bias in education was compelling and substantially outweighed any burden that denial of tax benefits placed on petitioners' exercise of their religious beliefs requiring segregation.

404. *Id.* at 580-81. Prior to 1971, the University entirely excluded Blacks. From 1971-1975, it accepted applications from Blacks married "within their race." *Id.* at 580. After the

based on “racial affiliation and association” are a form of racial discrimination.<sup>405</sup>

In order to qualify as a charity under the applicable tax provision, an organization must serve a desirable public purpose and confer a public benefit.<sup>406</sup> Chief Justice Burger’s majority opinion concluded that educational institutions which purvey racial bias are not beneficial influences and should not be encouraged by the government.<sup>407</sup> Citing *Brown, McCrary*, numerous federal statutes, and executive orders issued by Presidents Truman, Eisenhower, and Kennedy, Burger emphasized that the Internal Revenue Service (“I.R.S.”) was correct in recognizing that a private school is not charitable when it violates “established public policy.”<sup>408</sup> Congress affirmatively manifested its approval of this I.R.S. ruling when it enacted a statute denying tax-exempt status to social clubs that practice discrimination on the basis of race or color<sup>409</sup>—a ruling that would apply to White World.

*Bob Jones* could be viewed as no more than an interpretation of terms in a tax statute, or no less than a reaffirmation that all three branches of the federal government have rejected neutrality towards racial discrimination. Yet the issue of context is significant. In the context of education, the government’s interest in eradicating institutional bias is so compelling that it requires little discussion of opposing claims. The Constitution prohibits public schools from segregating, and federal statute prohibits segregated private schools from receiving tax exemptions that would essentially require the citizenry to subsidize racism.

Public policy relating to associations such as White World, however, juggles competing interests, each of which has been respectfully received by the Supreme Court and by federal and state legislatures. *Roberts v. United States Jaycees*<sup>410</sup> eloquently presented both of these interests.

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Supreme Court’s *McCrary* decision, *supra* notes 393-397, the school began to permit unmarried African-Americans to enroll, subject to the disciplinary rules that prohibited encouraging or engaging in interracial dating or marriage. *Id.* *Bob Jones* is a fundamentalist Christian non-profit corporation unaffiliated with any religious denomination and attended by 5000 students from kindergarten through graduate school. *Id.* at 574, 580.

405. *Id.* at 605.

406. *Id.* at 591-92.

407. *Id.* at 595.

408. *Id.* at 586, 594, 598. For an illuminating article on tax expenditure concepts, see Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 447-49 (1999).

409. *Bob Jones Univ.*, 461 U.S. at 601.

410. 468 U.S. 609 (1984). For an analysis of conflicts between the mediating function of associations and other interests, see Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949 (2004).

Local chapters of the Junior Chamber of Commerce (“Jaycees”) filed charges against their national organization, alleging that the national office’s bylaws violated the Minnesota Human Rights Act by excluding women from regular membership.<sup>411</sup> As stated in the bylaws, the Jaycees’ objectives were to assist young men to participate in civic organizations and community affairs.<sup>412</sup>

Justice Brennan’s majority opinion recognized that associations may provide emotional enrichment to individuals; enhance cultural diversity; and strengthen protection for political dissenters.<sup>413</sup> Nevertheless, the constitutional protection that is warranted for such associations may not extend to larger business enterprises that qualify as places of public accommodation.<sup>414</sup> The Court emphasized that a statute prohibiting discrimination by such enterprises addresses serious personal and societal injuries: “deprivation of personal dignity that surely accompanies denials of equal access to public establishments,” a deprivation visited on historically disadvantaged groups which have been arbitrarily barred from opportunities for economic advancement.<sup>415</sup> The *Roberts* majority concluded that the Jaycees organization had neither shown that it was an intimate association, nor demonstrated that its rights of expression would have been so impaired by admission of women that the state’s interest in equality would have to yield.<sup>416</sup> It was instead a large and unselective business group subject to the Minnesota Human Rights Act’s anti-discrimination strictures.<sup>417</sup>

If *Roberts* is considered a navigational chart, White World has avoided these shoals. It is small, selectively confined to applicants with a particular ideology, and does no business. Ironically, its wholly racist aims could provide further insulation from the reach of civil rights statutes because compelled admission of Blacks would undermine its expressive message. The University’s refusal to follow limited-public-forum neutrality with respect to White World’s request cannot be premised on claims that the club’s exclusivity conflicts with federal<sup>418</sup> or New York State<sup>419</sup> public accommodations laws.

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411. *Roberts*, 468 U.S. at 614.

412. *Id.* at 612-13.

413. *Id.* at 618-19.

414. *Id.* at 620, 624.

415. *Id.* at 625.

416. *Id.* at 626-27.

417. *Id.* at 621, 628.

418. See 42 U.S.C. § 2000a, e (2003).

419. N.Y. EXEC. LAW § 296.2(a) (McKinney 2004).

### C. University Autonomy and Diversity

Two conflicting (or at least divergent) bodies of public policy emanate from Supreme Court consideration of equality versus association in cases such as *McCrary*, *Bob Jones*, and *Roberts* and its successors. But shifting to a context specific to the White World controversy, a third policy emerges from the Court's 2003 decision in *Grutter v. Bollinger*.<sup>420</sup> The majority expressed high estimation of university autonomy as grounded in the First Amendment,<sup>421</sup> unlike the Austrian Court's subordination of that autonomy to a statutory regimen.

*Grutter* gave universities broad discretion to further a compelling interest in the educational benefits of maintaining student diversity—a mix of students with varying backgrounds and experiences who will respect and learn from each other.<sup>422</sup> Just as geographical differences or particular professional experiences can add to the mix, so too can the “unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”<sup>423</sup> Justice O'Connor's majority opinion noted that not every race-influenced decision is equally problematic. Strict scrutiny, which is not always “fatal in fact” when applied, provides a framework for distinguishing between valid and invalid considerations of race in the particular context at issue.<sup>424</sup> The Court rejected a challenge to Michigan Law School's diversity policy brought by a White applicant who alleged that she had been denied admission in violation of the Fourteenth Amendment because the Law School gave favored treatment to minority students with credentials similar to those of Whites who were not accepted.<sup>425</sup>

To insure discourse benefits, the school's admissions policy utilized race as a flexible and modest “plus” factor in order to include a “critical mass” of minority students.<sup>426</sup> Stressing the importance of this goal, *Grutter* approvingly quoted Justice Powell's opinion in the landmark *Regents of University of California v. Bakke*<sup>427</sup> case: “10 or 20 black students could

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420. 539 U.S. 306 (2003).

421. *Id.* at 332; see generally Paul Horwitz, *Grutter's First Amendment*, SOC. SCI. RES. NETWORK ELECTRONIC LIBR., available at [http://papers.ssrn.com/paper.taf?abstract\\_id=568501](http://papers.ssrn.com/paper.taf?abstract_id=568501).

422. *Grutter*, 539 U.S. at 306.

423. *Id.* at 335.

424. *Id.* at 331.

425. *Id.* at 324-25.

426. *Id.* at 323-27, 337.

427. 438 U.S. 265, 323 (1978) (opinion of Powell, J.) discussed in the *Grutter* majority opinion at 336. For an analysis of the evolution of Powell's position to received wisdom, see John C. Jeffries, Jr., *Bakke Revisited*, -- SUP. CT. REV. -- (SOC. SCI. RES. ELECTRONIC



not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States.”<sup>428</sup> “Critical mass” indicated numbers that would encourage students to engage in discussions inside and outside the classroom, without feeling isolated or pressured to act as representatives of their race.<sup>429</sup>

Several prestigious constituencies filed *amicus* briefs bolstering (and influencing) the majority’s compelling-state-interest conclusions. Educational experts, major businesses, and military leaders urged that student body diversity is essential to the development of professionalism, international business skills, and an officer corps equipped to preserve the fabric of society.<sup>430</sup> Cross-racial understanding—reducing misinformation about the Other—produces an informed citizenry and prepares all students for participation in a multi-cultural country and a global marketplace.

At the University of Vienna in the 1930’s, there was little dialogue between Gentile and Jewish students. Adherents of the German Student Body—the vast majority of the whole—were deeply invested in the hierarchy of ethnic origin, and the University endorsed their assumptions.<sup>431</sup> The limited opportunity for students from varying backgrounds to exchange ideas arose within one or two political clubs that mirrored the national political parties.<sup>432</sup> Members of the German Student Body graduated to become government and business officials who regarded their Aryan heritage as a badge of entitlement.<sup>433</sup> This, in turn, affected Austria’s political institutions; democracy requires leaders who have an accurate basis for assessing different viewpoints.

American universities today are complex institutions that pursue a variety of goals.<sup>434</sup> One of these may be facilitating the upward mobility of those who are blocked by the interrelated factors of discrimination and a starting-point in poverty. These factors also hinder members of groups

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NETWORK ELECTRONIC LIBR., Working Paper No. 03-12), available at <http://ssrn.com/abstract=476061>.

428. *Bakke*, 438 U.S. at 323.

429. *Grutter*, 539 U.S. at 325-26.

430. *Id.* at 332-33.

431. *See supra* Part I.E.1.

432. *See, e.g.*, PAULEY, *supra* note 2, at 122, 124.

433. *See supra* note 127 and accompanying text.

434. Some of these are described by Christopher Kutz in *Groups, Equality, and the Promise of Democratic Politics*, in ISSUES IN LEGAL SCHOLARSHIP, THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY, at 12-13 (2003), at <http://www.bepress.com/ils/iss2/art13> (last visited Nov. 1, 2004). Professor Kutz concludes that selective Universities are not mere prizes for high test-takers, and that their purposes may include “transforming a racial status hierarchy that arose under a white supremacy system” and “preparing a cadre of professionals who are likely to serve underserved communities.” *Id.*

who are subject to widespread vilification from effective participation in the political process.<sup>435</sup> Professor Daniel Sabbagh suggests that university training which raises the historically-shaped position of African-Americans in the economic hierarchy can reduce “the correlation between race and occupational status.”<sup>436</sup> This, in turn, would reduce the “functionality”—the predictive value—of stereotypes.

In the White World example, the club’s primary purpose is to preserve such stereotypes and prevent Blacks from escaping an ascribed status. But, the University’s denial of the club’s request for conference space could have no effect on the members’ self-identification and exclusivity as established in their by-laws. Nor is the University’s decision aimed at suppressing speech. White World can convene elsewhere and has a web site (with many links to other organizations) through which it also expresses its ideology. Rather, the University’s concern is with the harmful effects on diversity which the club’s presence on campus could generate.

White World’s open conferences would bring to the campus a large number of young people who are interested in taking action to confine African-Americans to positions that accord with their “innate inferiority.” Walking across campus grounds to reach the building where the conference rooms are located, encounters with Black students would occur. Members of White supremacist organizations have engaged in violence designed to terrorize African-Americans at college campuses.<sup>437</sup> Although White World acknowledges that its adherents have on some occasions engaged in

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435. *Id.* at 12; see also the famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) questioning (as to the impact of legislation) “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

436. See Daniel Sabbagh, *Affirmative Action and the Group-Disadvantaging Principle*, in ISSUES IN LEGAL SCHOLARSHIP, THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY, at 5 (2003), at <http://www.bepress.com/ils/iss2/art14> (last visited Nov. 1, 2004); see also Cass Sustein, *Anticaste Principle*, 92 MICH. L. REV. 2410, 2416 (1994) (discussing the persistence of racial inequality even in free markets, and noting that attending a prestigious college increases employment opportunities).

437. See Sylvia Castro, *Suspect Arrested in Attack at SSUF; Clovis Man, 20, Faces Attempted Murder and Hate Crime Charges*, FRESNO BEE (California), Sept. 3, 1997, at A1; Michael Kikorian & Kimi Yoshino, *Man Arrested in Clovis Hate Crime; Brian Ritter Was Linked to Similar Crime at Fresno State*, FRESNO BEE (California), Dec. 23, 1998, at B1; see also U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE, *Hate Crimes On Campus: The Problem and Efforts to Confront It*, Hate Crimes Series no. 3, at 4, available at <http://www.ojp.usdoj.gov/BJA/pdf/187249.pdf> (describing the detonation of a pipe bomb in the dorm room of two African-American students on a Utah Campus, with the letters KKK painted in red nail polish on the bomb’s firing device).

fist-fights with Blacks as reported in the press, the club argues that its own rhetoric skirts the *Brandenburg v. Ohio* prohibition against incitement to immediate action.<sup>438</sup> The University is nonetheless hesitant to bear the risk that illegal conduct including “fighting words” and assaults would accompany the influx of outside attendees attracted to the conferences, because such acts have a long-term impact.

Fighting words can have political aspects, but the Supreme Court has barred such words from the speech marketplace because they “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth.”<sup>439</sup> Nor is an ideologically motivated assault “by any stretch of the imagination expressive conduct protected by the First Amendment.”<sup>440</sup> As Professor Laurence L. Tribe notes, “expression has special value only in the context of ‘dialogue’” between differing views, not in the context of insults that do not present ideas but instead inflict injury “by their very utterance.”<sup>441</sup>

Systematic studies of ethnoviolence on college campuses were conducted in the 1986-1995 period by the National Institute against Prejudice and Violence and other researchers.<sup>442</sup> Ethnoviolence has been defined as acts “intended to cause physical or psychological harm to persons because of their actual or perceived membership in a group.”<sup>443</sup> It ranges from assaults, arson, and intimidation to vandalism and harassment. Almost 25% of minority students had been victims of such conduct.<sup>444</sup>

Students sampled at a Maryland college and at nine colleges and universities in New York State were asked about the effect of ethnoviolence on them. Thirty percent felt afraid of more trouble; 29% tried to be less visible and not to be noticed; 26% became withdrawn; 42% obsessed about the incident; 54% were angry; 19% lost people they thought were friends.<sup>445</sup> Others who were aware that a person sharing their ethnic

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438. See 395 U.S. 444 (1969) (holding “[C]onstitutional guarantees of free speech . . . do not permit a State to . . . proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”). *Id.* at 447. For a discussion of *Brandenburg*’s sparse reasoning and implications, see Maria L. Marcus, *Policing Speech on the Airwaves: Granting Rights, Preventing Wrongs*, 15 *YALE L. & POL’Y REV.* 447, 461-467 (1997).

439. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

440. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984).

441. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 837 (1998).

442. See *Issues*, *supra* note 379, at 3, 11.

443. *Id.* at 2-3.

444. *Id.* at 6.

445. *Id.* at 11. A detailed executive summary of the underlying data states that compared to other student groups that experience trauma, “there was a definite tendency for Black

identity had been victims were also affected, even though they had not personally been targets.<sup>446</sup> Access to the full university experience and the equal opportunity to learn are truncated. If African-American students withdraw from interactions with Whites inside and outside the classroom, the benefits of diversity that were approved in *Grutter* would be dissipated. A critical mass of numbers alone cannot be the objective. (Note the scornful reference in Justice Thomas' *Grutter* dissent to a mere "aesthetic" interest in the color of students in the classrooms.)<sup>447</sup> The educational value of diversity flows from discussion of insights and experiences.

To counteract these effects, would it be sufficient for the University Dean in our example to join a grass-roots student protest against White supremacy rather than keeping White World's conferences out?<sup>448</sup> A University is a community embracing "expansive freedoms of speech and thought," and encouraging the "robust exchange of ideas."<sup>449</sup> Yet the exchange of ideas on an ongoing day-to-day basis is precisely what is being suppressed by ethnoviolence. The occurrence of vituperation and threats based solely on the highly visible (but morally irrelevant) element of race<sup>450</sup> silences its targets and erodes their sense of security, even if other groups of students or administrative officials are supportive.

The power of the neutrality principle, which would dictate that the University cannot predicate its decisions on such consequences, must now be reexamined. Considered in the abstract, an open speech marketplace without content-based regulation of groups is desirable because it could invigorate a search for permanent values and enhance democratic governance. The Supreme Court, however, has recently taken a more empirical tack. As indicated in *Virginia v. Black*'s<sup>451</sup> analysis of a statute prohibiting cross-burning with the intent to intimidate, the government is not limited to laws of general applicability when it provides legislative

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students to experience more symptoms." See *Intergroup Relations On Campus—CUMBC: The Second Study, Chapter Four, Traumatic Effects of Ethnoviolence and Sexual Harrassment*, at 7.

446. See *Issues*, *supra* note 379, at 7.

447. *Grutter v. Bollinger*, 539 U.S. 306, 349 n.3 (2003) (Thomas, J., dissenting).

448. In view of the public policy at federal and state levels that condemns racial discrimination, public officials may speak in vigorous opposition to racist ideology. Accord CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, 229, 231-32, discussed in Abner S. Greene, *Government Speech on Unsettled Issues*, 69 *FORDHAM L. REV.* 1667, 1684 and *passim* (2001). Professor Greene analyzes the conditions under which government participation even in contested debates might be permissible. *Id.*; see also Abner S. Greene, *Government of the Good*, 53 *VAND. L. REV.* 1, 2-6, 10 and *passim* (2000).

449. See *Grutter*, 539 U.S. at 324, 329.

450. See Sunstein, *The Anticaste Principle*, *supra* note 386, at 2429.

451. 538 U.S. 343 (2003).

protection for historically disadvantaged groups such as African-Americans. Although Virginia had promulgated another more facially-neutral law (burning an object with intent to intimidate) which would also have covered a crossburning,<sup>452</sup> the *Black* majority interpreted the First Amendment as permitting the state to single out the fiery cross as “a particularly virulent form of intimidation.”<sup>453</sup> Justice O’Connor’s opinion identified this symbol as a Ku Klux Klan method used to communicate threats that assisted in maintaining White supremacy.<sup>454</sup>

*Black*’s emphasis on history (“Virginia may choose to regulate this subset of intimidating messages in light of cross-burning’s long and pernicious history as a signal of impending violence”)<sup>455</sup> also has implications for equal protection interpretation. Professor Sunstein suggests that the Equal Protection Clause was “originally conceived as an effort to counteract the disproportionate subjection of black people to public and private violence.”<sup>456</sup> The University’s refusal to accommodate White World’s conferences is not an effort to shield the government from criticism; rather it is an effort to shield its Black students from disproportionate exposure to intimidation and attack. Can the school invoke both a Fourteenth and First Amendment basis for doing so?

Before *Grutter*, University counsel addressing this question had a cramped range of arguments. Caselaw in other contexts proclaims that anti-discrimination “policy” is established, while civil rights statutes provide exceptions that would protect racist clubs. The school’s characterization of its forum as designed for “desirable public purposes”—the *Bob Jones* formulation<sup>457</sup>—appeared to beg the question of whether barring biased activities was more desirable than fostering private associations.

*Grutter* grounded university autonomy on the First Amendment, and deferred to the school’s expert judgment (substantiated by the *amici*), that diversity was essential to its academic goals. This compelling interest in the educational benefits of maintaining a “critical mass” of minority students could tilt the balance against White World’s associational claims. The conference-space forum limitation to desirable purposes meshes well

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452. *Id.* at 352 n.1.

453. *Id.* at 363.

454. *Id.* at 354 (quoting with approval W. WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 147-48 (1998)).

455. *Id.* at 363.

456. See Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 821 (1993).

457. See *supra* notes 402, 407 and accompanying text. The Supreme Court concluded that purveying racial bias neither served a desirable public purpose nor conferred a public benefit.

with precluding organizations that would undermine the University's diversity mission.

To arrive at a resolution of such a controversy under American law requires intricate analysis of competing bodies of policy and of Supreme Court decisions arising in a variety of settings. Austrian law in the 1930s utilized a far more efficient system, in which all associations were circumscribed by statute and subject to official supervision. Racist groups fostered by a university could be shut down, although they could potentially be reactivated by political changes in the legislative or executive branches. America's more cumbersome approach rejects this hands-on control. Yet by forcing competing associational and equality rights into an evolving constitutional framework, we give ourselves a better chance of enduring.

### CONCLUSION

The institution of slavery, which has decisively influenced America's history and its Constitution, embraced myths about race which still linger despite judicial and legislative initiatives. Before *Brown*, unequal treatment was rationalized and bureaucratized. *Brown* articulated the baseline principles that eventually destroyed Jim Crow but new racially-fueled challenges continue to emerge, most recently in the arena of higher education. This Article suggests that an understanding of these challenges may be gained by viewing them both from an American and from a global perspective.

Universities have guarded their autonomy and discretion to decide who to admit, what to teach, and how to teach it. Such autonomy engenders a responsibility to the student body as a whole and creates a safe space for a spirit of inquiry, but poses a risk that racism might find shelter in the institution's independence from judicial intervention. Two cases discussed in this Article suggest that risk, and show how it may be obviated. Each university invoked separate-but-equal treatment and associational freedom to achieve a pre-set segregation goal, but each was eventually thwarted by the judiciary's associations analysis.

The University of Vienna argued that segregation of its Jewish and Christian students into different "Nations" was merely an internal matter, and that members of each group benefited from affiliating with those of the same "ethnic origin." The University's autonomy, however, provided no shield against the Associations Law, which allowed a high degree of government control over citizen groups. This regulatory power enabled the Austrian Constitutional Court to halt the student divisions, but was also available for use by the executive branch to further its own political

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agenda.

The University of Oklahoma asserted that its admission of G.W. McLaurin, an African-American student who was allowed to attend classes and study in a separate assigned place and eat at an assigned table alone, was sufficient to fulfill all its educational responsibilities and its obligations under state law. The Supreme Court introduced a pivotal associations concept into its equal treatment discussion: that McLaurin's education would be undermined by his government-mandated inability to have discussions and to commingle intellectually with his classmates. This approach transformed the associations doctrine, emphasizing inclusion rather than exclusion.

In America and in Austria, the judiciary was uncomfortable with the role of dismantling segregation. Both courts were confronted with implacable opposition to the idea of integration, and devoted considerable thought to crafting a decision that would somehow soothe the sensibilities and tempers of these opponents. Ultimately, the Justices in each case were constrained to accept the initial consequences of their choice: student riots and further public attempts to re-segregate.

The *Brown* decision is now celebrating its fiftieth anniversary. It has opened college, university, and graduate school doors to African-Americans in far greater numbers than before, discounting the argument that Whites were permitted to wall themselves off by law from contact with Blacks. Under *Brown's* unanimous directive, the Fourteenth Amendment secured equality by incorporating the *McLaurin* associational rights of African-American students. Most recently, *Grutter v. Bollinger* accorded broad discretion to Michigan Law School to further a compelling interest in the educational benefits of increasing student diversity and cross-racial understanding. Here it was the University's First Amendment associational right to assemble this varied student body that took precedence over a White applicant's Fourteenth Amendment claims.

While the American politics of race has its own unique features, the practice of segregating groups of people and forcing them into hierarchies dictated by the social conditions and ruling ideology of the day has tenacious roots throughout the world. The rule of law as expressed in a constitution may clash sharply with the court of public opinion and political power. The rationalization of hereditary and fixed ranking based on tainted blood was enforced by streams of legislation that led to the Holocaust in Austria and to prolonged subservience to majority rule-makers in the American South. The Supreme Court's succinct (albeit imperfect) "hard look" at *Plessy* penetrated supposedly neutral mandates and made segregation here an outlaw both legally and morally. *Brown* was decided

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less than ten years post-Holocaust—not a coincidence.