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BOOK REVIEW

Que Significa: Belonging to America **by Kenneth. L Karst**

WILLIAM MONTERROSO

What does it mean to be labeled an “illegal” or an “alien” in America? From one perspective its core significance is simple — it means that the person does not belong to the American community. The person cannot participate in the decision making process of the community; the person is not afforded the respect and protection community members are given; and indeed, the person can be physically removed from America’s geographic boundaries by the government. Such a person lacks both formal and informal inclusion into the community.

Although I was an “illegal alien” for seven of my childhood years, I was spared the knowledge that my stay in America was precarious. Even though I had been smuggled into this country at the age of six, my parents told me we all were Americans, and I believed them. Parents are known to shelter their children from the more ugly aspects of life.

Over time, however, I realized that we were different from other families in Los Angeles. The kids at school called me a “wet-back.” My father found it hard to find a job because he did not have a “green card.” My parents whispered anxiously to each other about deportations and immigration raids at their jobs. Why did a sense of fear pervade our lives? The truth was that we were not Americans at all. We were outsiders struggling to survive in a state of limbo — living within the borders of America but outside the sphere of the recognized American community.

My family eventually qualified for U.S. residency. In 1985 I became a U.S. citizen. During the naturalization ceremony, however, I did not feel any different. After all, I had grown up in America, mastered its language, and internalized its values and culture. Receiving a certificate of citizenship seemed insignificant. Since the ceremony, however, my citizenship has assumed more meaning. I vote. I have registered people to vote. I have received

federal grants to assist me in my education. I have written articles and spoken on public radio in protest against government policy. I have taken my place as an active, participating member of the American community. I do not take my citizenship lightly. I have not always had it. To me it means more than just claiming privileges as an American. My citizenship imposes responsibilities upon me. As an American I believe it is incumbent on me, as it is on all individual Americans, to speak out against the injustices that we as a community commit.

As an immigrant I have a personal interest in assuming an American identity. This interest lead me to read Professor Kenneth L. Karst's recent book "Belonging to America".¹

"Belonging to America" explores three main themes. The denial of substantive membership as a violation of the principle of equality is the most poignant theme, involving the violation of the principle of equal citizenship. Throughout the book Professor Karst cites to instances where equality becomes a hollow notion to those groups of people excluded from the American community. His analysis offers a new perspective on the problem of equality, using the framework of what it means to belong. Professor Karst explains the importance of citizenship beyond formal membership, arguing that without substance, equal citizenship loses its significance. In order for citizenship to be meaningful, the substantive inequalities that exclude people from membership must be abolished.

The second theme is the role of the American civic culture in unifying the American community as a nation of equal citizens. The reader may well look at America today with its instances of bigotry and class divisions and ask whether such a culture expounding egalitarian ideals actually exists. Professor Karst, however, not only makes a good argument that it exists but that it has played a crucial role in widening the boundaries of the American community.

The third theme is the role American courts play in expanding membership by molding the civic culture and interpreting the Constitution. The assertion that the Judicial branch has a special responsibility in defining a more inclusive America is particularly important to Professor Karst's thesis. He suggests that judges in some instances fail to consider the important influences of membership in American society. Professor Karst sees these cases as instances where the Supreme Court has failed to meet its responsibility to include various groups of American citizens into the American community.

Professor Karst identifies some instances where the Judiciary has been instrumental in expanding membership to otherwise ex-

1. KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

cluded groups. Throughout the book he explains that *Brown*² was an important decision because it redefined the American community to include black people. In his discussion Professor Karst does not underscore the role of the black community for making such a change possible. True, without the courage and perseverance of the black movement such a change could not have taken place. However, the purpose of the book is not to document any single social movement in America. Rather, its aim is to point out that in America it is possible to have a more inclusive community and that courts play a crucial role in the process of expanding the community.

Inevitably, a substantial part of Professor Karst's book presents a discussion of race relations in America. In particular he reviews black and white relations, beginning with slavery up through the Civil Rights movement. However, the exclusion of groups is not only based on race. Professor Karst also covers the exclusion of groups based on sexual, economic and cultural differences.

What follows is a chapter by chapter summary of the book. This summary is neither comprehensive nor meant to be a substitute for a reading of the book. It underscores the main themes and arguments and attempts to offer a sense of its richness.

CHAPTER I EQUALITY, LAW, AND BELONGING: AN INTRODUCTION

In this introductory chapter Professor Karst poses what he calls the "American dilemma."³ Americans pride themselves on their egalitarian ideals. The theme of equality runs deep in the culture of American public life. Yet, despite these ideals, Americans define the American community in such a way that certain groups are excluded, treated as being less than equals.

Equality and belonging are inseparably linked. The boundaries of the community are defined by the scope of equality. So too, a sense of belonging is defined by the scope of equality in the community. Equal citizenship therefore induces certain expectations. Individuals should be treated by the community as "respected, responsible, participating member[s]"⁴ of that community. Such a status is emotionally charged because it involves the very sense of self — of belonging. In this sense Professor Karst asserts that courts have an important role in expanding the scope of belonging through principles of constitutional law, translating the Fourteenth Amendment as a guarantee of equal citizenship.

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

3. Karst, *supra* note 1, at 2.

4. *Id.* at 3.

Professor Karst discusses the role of the Civil Rights Movement in redefining America's local and national community. He reminds us that formal guarantees of equal civil rights are not enough. To illustrate the failure of courts in addressing the issue of constitutional equality, Professor Karst cites five different cases. The first case occurred in 1983. The Supreme Court denied Adolph Lyons, a young black man, standing to sue for an injunction against the police choke-hold in Los Angeles except when there was a threat of immediate deadly force. Between 1976 and 1983 16 people had died from such chokeholds. Twelve of them were black.⁵

The second case occurred in the late 1960's. The Supreme Court did not find racial discrimination in a Texas welfare scheme that funded an Old Age Assistance program (OAA) at 100 percent of need, but Aid to Families with Dependant Children (AFDC) benefits were set at only 50 percent of need. One factor distinguished the two programs: 60 percent of the OAA beneficiaries were white, while 87 percent of the AFDC beneficiaries were black or Hispanic.⁶

The third case occurred in the early 1970's. The Supreme Court did not find any sex discrimination in a Massachusetts law that gave veterans a preference in hiring for civil service jobs. The law effectively excluded women from the best civil service jobs.⁷

In the fourth case the Supreme Court held that an incident in 1968 was beyond reach of the Constitution, only a private act of discrimination. There a black member of the Pennsylvania House of Representatives was refused service by a lodge of the Loyal Order of Moose because of his race. The Court's holding did not consider the fact that the lodge was licensed by the Commonwealth to serve liquor.⁸

The fifth case involved an official Christmas display of a nativity scene set up by the city of Pawtucket in Rhode Island. In answer to the objections of local non-Christian residents, the Supreme Court found insufficient evidence that the display was expressing some kind of subtle governmental advocacy of a religious message.⁹

These five cases remind us that the principle of equal citizenship is violated when an individual is denied substantive membership to a group. These cases tell the story of real people hurt by exclusion. Professor Karst suggests we should pay closer attention to matters of substance. To see "how inequality hurts, which inequalities hurt most, and how law bears on those hurts, either as

5. *Id.* at 6.

6. *Id.*

7. *Id.* at 7.

8. *Id.*

9. *Id.* at 5-9.

cause or remedy."¹⁰

Professor Karst offers three alternative approaches that the judges in the five cases could have taken. First, they could have widened their analysis through historical and social inquiries. Second, the judges could have considered the origins of racial discrimination and sex discrimination in the process of identifying community formation. Third, they could have considered the special influences of membership in a society.¹¹ In order to answer the questions of who belongs and what role the constitutional protections of equality should play; Professor Karst asserts that we need to inquire into the foundations of community as the source of individual identity and into the meanings of equal citizenship in the American Civic Culture. Furthermore, the inquiry should be made in the contexts of ideals and as principles of constitutional law.

CHAPTER 2 BROWN AND BELONGING

The body of his book begins with an analysis of the 1954 Supreme Court decision striking down official racial segregation of public school children, *Brown v. Board of Education*.¹² *Brown* reoccurs throughout the book because among other things it represents a redefinition of the American culture. It makes the important connection between law and its effect on who belongs.

Although *Brown* was a unanimous decision, Professor Karst points out that some of the Justices were troubled and considered writing separate opinions. These Justices were concerned about the existence of Supreme Court precedent upholding segregation and the fact that the legislators who enacted the Fourteenth Amendment did not intend it to overturn segregation. Furthermore, those judges perceived *Brown* as an attack on the white South's sense of identity based on a racial caste system.

Nevertheless, the claims made in *Brown* also involved the plaintiffs' sense of identity, of belonging. The opinion makes the connection between Constitutional doctrine and the separation of blacks from membership in Southern society. Here, Professor Karst offers a critique of the Court's handling of the hurt of stigma and exclusion. For Black people the hurt of exclusion had begun with slavery. Even after its abolition the hurt continued with a caste system later legitimized by Jim Crow. He asserts that the Court's discussion of stigma is bland. The concept of the hurt of exclusion, the main harm of segregation, only appeared briefly.¹³ The Court failed

10. *Id.* at 11.

11. *Id.* at 12-13.

12. *Brown, supra* note 2.

13. Karst *Id.* at 18.

to underscore the main point of its decision, the recognition of a people's belonging to a community of equal citizens.

The last section of this chapter explores the connection between stigma and self-identification. For the individual, self-identification involves identification with a cultural group. We identify with features which embrace groups of people. The bonds of religion, ethnic group, and family play an important role in this process of self-identification. Group identity, however, offers more than a sense of belonging; it also reveals those who do not belong. Knowledge of those who do not belong begets the fear of the outsider: the fear that comes when a group's view of the natural order is threatened.

There is negative identity within every individual which must be repressed in order to be accepted by the group. Outsiders represent the embodiment of this negative identity for the members of the group. It is this projection that provides the members of the group with the assurance that they are worthy and that they belong. The negative impact of belonging is the distancing of outsiders. This results in the stigma of the outsider as something not human, not normal. Professor Karst sees this harm as a form of "spoiled identity."¹⁴ Not only is this a wounding of self respect for the victim, but it also provides the dominant group with the assurance that if the person is treated as an unequal he deserves it.

In this scenario law is not only an instrument used by the dominant culture but also a symbol of dominance. Professor Karst, however, argues that the opposite is also possible. Law can act as an instrument against domination, insisting on equality.

CHAPTER 3 EQUALITY AND INCLUSION: THEMES IN THE AMERICAN CIVIC CULTURE

This chapter addresses the question of how America has been able to survive as a nation of divided contending groups. For Professor Karst the ideal of equality is one of the foundations of an American identity and a national community, pervading the American civic culture.

Professor Karst argues that American nationhood is not only contractual but also cultural. Therefore, despite the diversity of American citizens, they have a strong sense of national identity based on a common American culture. Professor Karst refers to this as the American Civic Culture: a mixture of behavior and belief transcending race, religion, and ethnicity, allowing individual citizens to preserve their cultural identity and at the same time identify

14. *Id.* at 25.

as Americans.¹⁵

The post-revolution national ideology of egalitarianism and democracy certainly did not include everyone. It promoted the values of Protestant domination, white supremacy, and the subordinate status of women. However, as Professor Karst points out, since then the American Civic Culture has evolved. In the last half century there has been an increase in opportunities for women and in tolerance of racial and religious minorities. Given this historical background, *Brown* can be seen as a catalyst for cultural redefinition.

In describing the American egalitarian ideal, Professor Karst reviews four interrelated themes. First he addresses the theme of religion and its role in equality. Early English settlers were fleeing from religious persecution. Colonial practices in slavery largely consisted of persecuting the Black slaves. Consequently, the movement to abolish slavery found early support among Quakers and other minority churches.

The second theme discussed is that of legal equality and national citizenship. From the early colonial beginnings, America has resisted legal privileges being attached to personal status. In the 19th century the abolition of slavery, the reconstruction, civil rights laws and the Civil War Amendments attempted not only to break the link between race and legal rights but also to break down legal inequalities based on personal status.

The role of Government in shaping the egalitarian ideal is the third theme. An important result of the movement started by *Brown* was the Voting Rights Act ("Act") of 1965. This Act effectively enfranchised Black citizens. Today, full participation by all citizens in electing government officials is a premise of America's political ideology.

The fourth theme Professor Karst examines is a vision of equal opportunity. Americans accept disparities in wealth and income so long as people are not excluded from participating in society. However, equal opportunity can be an empty slogan. Only substantive participation makes the concept of equal opportunity meaningful.

Professor Karst's closing comments in this chapter concern the role of behavior in America's civic culture. The egalitarian ideal of America's Civic Culture centers around equal citizenship. The law plays a crucial role in translating this ideal into behavior.¹⁶

CHAPTER 4 SLAVERY AND CITIZENSHIP

Chapter Four considers how Black people in America have suffered the denial of citizenship, beginning with slavery. It traces

15. *Id.* at 28-30.

16. *Id.* at 40-42.

the struggle to include Black people as responsible, participating members in society through legislation aimed at expanding citizenship. Professor Karst begins with an examination of *Dred Scott v. Sandford* (1857),¹⁷ which he calls "the most infamous decision in the Supreme Court's history."¹⁸ In that case, Chief Justice Roger B. Taney denied that Black people were capable of citizenship.¹⁹

Dred Scott is important for three reasons, despite its disturbing conclusions. First, it demonstrates that citizenship is an important concept. Second, it sheds light on the meaning of citizenship. Third, the basic assumptions of *Dred Scott* about racial inferiority and exclusion from citizenship highlight what the writers of the Civil War Amendments and Civil Rights Act of the reconstruction era wanted to abolish.²⁰ According to Professor Karst, Justice Taney wanted to show that Blacks could not be citizens because they had been denied the main ingredients of citizenship from the beginning — respect, responsibility, and participation. By emphasizing the legal inferior status of Blacks, Justice Taney attempted to show that they belonged to a lower caste, a position inconsistent with citizenship.

What follows is an exploration of the passage of the 1866 Civil Rights Act ("1866 Act") and the Fourteenth Amendment as early attempts to ensure legal equality through citizenship. The 1866 Act declared that all persons born in the United States were citizens and those citizens have the same rights as white citizens. The 1866 Act gave Blacks more than just a formal status in affording them citizenships. Blacks were substantively included into the American community.

The main focus of the Fourteenth Amendment was the eradication of obstacles hindering individual enjoyment of citizenship rights specifically listed in the 1866 Act. The declaration of citizenship in the Fourteenth Amendment was meant to parallel the text of the 1866 Act and abolish the caste system which had been recognized in the *Dred Scott* opinion.²¹

Professor Karst next addresses the position that the only proper way to decide a constitutional issue is to interpret the Constitution in accord with original "intent". This approach concludes that *Brown* was decided incorrectly because Congress was funding segregated schools during the passage of the Act and the Fourteenth Amendment. This suggests, so the argument goes, that the

17. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

18. Karst at 43.

19. Justice Taney argued that Black people could not acquire citizenship because they had not been identified as citizens in the Constitution. Furthermore, state laws which discriminated against Blacks during the adoption of the Constitution reinforced their allotted inferior position.

20. *Id.* at 44-49.

21. *Id.* at 53.

1866 Act and the Fourteenth Amendment were not intended to overturn segregation.

The 1866 Act declared a detailed listing of a citizen's specific rights. The Fourteenth Amendment's clauses are written in generalities, making them susceptible to broader interpretation. For Professor Karst this broad wording was adopted to allow later generations of Americans to develop their own conception of what it means to belong as a citizen of America. The drafters of the Fourteenth Amendment, by using language amenable to expansion, provided future judges the opportunity to determine the meaning of equal citizenship.

Despite passage of the 1866 Act and the Fourteenth Amendment, Blacks are continually to be kept in a subordinate racial caste because of judicial neglect. Professor Karst explains that beginning with the *Slaughter House Cases*²² and in the *Civil Rights Cases*²³ of 1883, the Supreme Court rejected the claim of racial equality based on the Fourteenth Amendment.

The *Civil Rights Cases* of 1883 involved an attack on an 1875 act of Congress prohibiting racial discrimination in places of public amusement. By introducing the "state action" limitation, the Court invalidated the act. Only Justice John Marshall Harlan dissented, arguing that under the Thirteenth Amendment Congress had power to abolish the "badges and incidents" of slavery. Harlan also argued that under the 14th Amendment Congress could protect its conferral of national citizenship against private invasion. The Supreme Court rejected both arguments. These Supreme Court decisions, including the "separate but equal" doctrine of *Plessy v. Ferguson*,²⁴ defeated the purpose of the Civil War Amendments. Much more than the abolition of slavery was needed if Blacks were to be included as citizens, as "respected participants in the society."²⁵

CHAPTER 5 CITIZENSHIP, RACE AND CULTURE

Chapter five examines the culture of subordination as it developed throughout America, after the Civil War. It explores the rise and effect of Jim Crow legislation in the South and its eventual demise.

After the Civil War, the South began a racial caste system through Jim Crow legislation that excluded Blacks from substantively participating in the southern community. This system of subordination included not only laws which separated the races in the community's public areas but also laws that fostered private racial

22. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

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

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

25. Karst, at 60.

discrimination. Professor Karst argues that Jim Crow was more than a matter of custom in the South: ". . . it crystallized into ritual, symbolizing the avoidance of 'contamination' of white society by contact with 'impurity'."²⁶ Equally disturbing was the fact that the system was enforced through violence. Four thousand Blacks had been killed by southern White mobs by the end of World War II under this system.

The southern racial caste system was inconsistent with the nation's deeply held values of individual freedom and equality. The denial of equality, reinforced by White subordination of Blacks, caused Blacks frustration and anger, which became Black violence against Whites. White fears of violence resulted in further violent repression of blacks.²⁷

Moving out of the South did not afford Blacks much relief. Blacks in all parts of the country encountered the similar discrimination in all labor markets, based on similar attitudes Whites held regarding Black was inferiority.

The movement of W.E.B. Du Bois and National Association for the Advancement of Colored People (NAACP) with the establishment of the a successful effort to end Jim Crow by Black people. The NAACP advocated political action to bring about equality in America. W.E.B. Du Bois led a movement that sought to end the culture of subordination through changes in the law. At the beginning the NAACP sought the enactment of a federal anti-lynching law and federal legislation to effectuate the 15th Amendment's guarantee against denial of the Blacks vote. In the 1930s the NAACP's litigation produced the doctrinal foundation for constitutional rulings which eventually ended official segregation.

By the 1940s the Southern racial caste system was weakening. The numbers of educated Blacks and Black voters had increased. Also, World War II had produced a Black migration to the North and West. Between 1945 and 1950 the Supreme Court further weakened the caste system by holding that racial segregation in interstate buses unconstitutionally burdened interstate commerce,²⁸ that agreements restricting residential property to whites were unconstitutional,²⁹ and that various universities failed the test of the equal protection clause in maintaining equal but separate facilities.³⁰ Professor Karst asserts that the claims and arguments in these decisions were not new. The only difference was the change in northern White opinion concerning race relations. The Justices finally understood that racial segregation was a betrayal of the cen-

26. *Id.* at 64.

27. *Id.* at 67.

28. *Morgan v. Virginia*, 328 U.S. 373 (1946).

29. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

30. *See, e.g. Sipvel v. Oklahoma*, 332 U.S. 631 (1948).

tral values of the American civic culture.³¹

Professor Karst argues that *Brown* also played a major role in dismantling the system of subordination: "*Brown* is our leading authoritative symbol for the principle that the Constitution forbids a system of caste."³² Not only did the decision encourage further political action, but also it questioned other systems of dominance and dependence.

In observing that Jim Crow had grown into a culture, Professor Karst explains that to end the system, federal law would have to affect nongovernmental "private" conduct.³³ Furthermore, the Supreme Court would have to undermine the "state action" limitation and the restrictive definition of the badges of slavery doctrines in the *Civil Rights Cases*. Advancement in this area occurred between World War II and the end of the Warren Court. The undermining of the state action limitation began with the vindication of voting rights. It was further weakened when the Supreme Court held that court enforcement of racially restrictive covenants were unconstitutional. The Warren Court found "public functions" and "significant state involvement" where privately owned and segregated places for public accommodations, promoted private racial discrimination. The reason for these decisions was that the Warren Court was going to find governmental involvement whenever private behavior was part of the system geared at excluding Blacks.³⁴ The passage of the Civil Rights Act of 1964 finally established equal treatment in all the important public accommodations. Professor Karst reminds us, however, that the state action doctrine was revived after a change in the composition of the Supreme Court after 1970. Cases like the *Moose Lodge*³⁵ are still possible when judges ignore a citizen's claim to inclusion in the community's public life.

At the end of the chapter Professor Karst credits the Supreme Court and the 1964 Act for the improved status of Blacks in America. The legitimation of decisions like *Brown* and other such statutes is due to the integration that they have created and the behavior of millions of individuals, Black and White. This, however, is only part of an evolving definition of American culture. "If *Brown v. Board of Education*, was a critical event in our nation's recent cultural redefinition, it was still just part of a larger process."³⁶

31. Karst at 73.

32. *Id.* at 74.

33. *Id.* at 74.

34. *Id.* at 77.

35. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

36. Karst at 81.

CHAPTER 6 NATIVISM AND THE PATHS TO BELONGING

Chapter Six explores the problems faced by American ethnic minorities in gaining acceptance into the larger society. These problems include the process of assimilation, and majority domination through discrimination and exclusion.

In America the assimilation of various ethnic groups is an example of the constant redefining of a social group's boundaries. Assimilation is not only the result of conformity but also the result of the outsider's determination to belong.³⁷ Between 1815 and 1914 thirty-five million European immigrants came to America. Although the first generations of these immigrants accepted the jobs unwanted by Americans, they did so with the belief that their children would have a better life. This, however, was not always the case. Even second generation immigrants faced exclusion through overt employment discrimination.³⁸

In explaining how an immigrant becomes an American, Professor Karst cites Hector St. John de Crevecoeur who maintained that in order to belong, a group has to participate in the nation's political culture as citizens and reject its native culture.³⁹ For Professor Karst, the assumption that belonging requires a rejection of the native culture is apparent in American public policy. Whenever there is a heightened fear of the outsider, individual attachment to the existence of a native culture is questioned. An example of such fear is the suspicion of immigrant disloyalty. The suspicion has been especially acute when there has been political dissent. For example, the Sedition Act adopted by Congress made it a crime to strongly criticize government officials and was enforced against foreign critics.

In discussing the issue of discrimination as domination, Professor Karst argues that the history of intercultural relations in America is similar to that of Jim Crow. For example, Jews were kept from voting until the mid-nineteenth century, and Asians, Chicanos, and Italians were directed to all-black schools in some southern communities.⁴⁰ Even today discrimination continues in some private schools and businessmen's clubs. Such discrimination of the ethnic outsider is a form of exclusion from belonging as a respected and responsible citizen.

An examination of *Korematsu v. United States*⁴¹ follows. There the Supreme Court upheld President Franklin Roosevelt's order moving 120,000 Japanese (about 70,000 of them American citi-

37. *Id.* at 81.

38. *Id.* at 83.

39. *Id.* at 83.

40. *Id.* at 88.

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

zens) from their homes to relocation camps during World War II demonstrates. This decision that nativist scapegoating has been prevalent in our history. Furthermore, it shows that America has not learned from its past. Constitutional rights are less likely to be protected when judges and politicians view the victims as different from themselves.

In this chapter Professor Karst also explores the issue of cultural politics and assimilation. One way cultural identity is increased is by people coming together in the face of adversity. Through cultural politics a minority culture can assume recognition and demand acceptance. Professor Karst, however, identifies the phenomenon of the decrease in ethnic identification as a group becomes more and more successful in the political arena. With the group's political success, its members are further integrated into the dominant society, undermining the group's identity as a separate political force. The end result of cultural politics is integration.⁴² In an insightful conclusion Professor Karst writes that the question of whether belonging to America requires abandonment of the native culture reflects the tension between America's strong sense of nationalism and its devotion to individual freedom and tolerance for diversity. After all, only within a particular group of people can individuality and community be attained.⁴³

Chapter six ends by considering the issues of bilingual education and government sponsorship of religion. The pattern of assimilation includes the immigrant group's adoption of English as the primary language in later generations. Professor Karst finds the Spanish-speaking community as an exception to this pattern because of the ties retained with Mexico, Central America, and Puerto Rico.⁴⁴ The demand that Spanish be maintained in schools is not a demand for separation but inclusion. It is an assertion of the worth of a people and a culture. However, Professor Karst is critical of the constitutional proposal requiring government support for bilingual education. He maintains that although bilingual education is an issue touching the sense of belonging, identity, and self-esteem of many Americans, the fact that America is multicultural makes such a proposal unwise. It would be better to leave it up to parents and local communities to determine how much cultural maintenance they want.⁴⁵

In his commentary on government sponsored religion, Professor Karst argues that the harm of school sponsored prayer is not the possible establishment of a full-scale state religion. Rather, it in-

42. Karst at 93.

43. *Id.* at 97.

44. *Id.* at 98.

45. *Id.* at 100.

volves the separation of children who do not participate as unbelievers or antagonists or both. The harm is in telling these children that they are different and that they do not belong to the community. Professor Karst points out that the Pawtucket official celebration of the Nativity of Christ was not just the recognition of a historical event as the Supreme Court suggested, but a message of dominance to non-Christian Americans.⁴⁶

CHAPTER 7 SEX AND SEPARATION

Here Professor Karst identifies some of the obstacles that have prevented women from achieving substantive inclusion and equality in America. The unique problems women face as compared to other minorities in their struggle against exclusion is underscored.

Despite advancement in guaranteeing formal equality to women, a great number of social features that hurt women persist. Part of the problem is that the identity of women in our society centers around the abstract image of "woman." Professor Karst provides a possible list of the characteristics of such an image. "Women are expected to be: 'dumb, helpless, deferential, inferior, lacking in credibility, humble, narcissitic, followers never leaders, self-abnegating, child-like'."⁴⁷ Such images hurt women in two ways. First, both men and women perceive these stereotypes of women as truth and deny women respect, responsibility, and participation. Second, since women are forced to play act their role as "woman" they are denied their individuality.

The definition of "woman" has been constructed around men's primary need to overcome deeply rooted doubts about their individual worth and identities. Since a boy becomes a man by differentiating himself from women, he needs "woman," not as individual women, but as an abstraction to define himself. For this reason men find it difficult to see a woman's individual humanity beyond the abstract image.

In 1977 even the Supreme Court found it difficult to get beyond the abstraction. The Supreme Court upheld an Alabama state prison regulation forbidding the hiring of a woman as a guard in a maximum security prison for men. The Supreme Court found that the plaintiff's ability to manage "could be directly reduced by her womanhood."⁴⁸

Professor Karst further argues that although women's claims to formal equality rest on a solid constitutional basis, there are two kinds of cases in which the Supreme Court has failed. The first type involves cases where government discrimination is not overt but in-

46. *Id.* at 103.

47. *Id.* at 106-107.

48. *Id.* at 111.

direct. In such cases the Supreme Court has refused to find discrimination in the absence of proof of discriminatory purpose. The second type of case involves legislation that purports to be protective. Included in this category is the 1981 Supreme Court decision upholding an act of Congress requiring men, but not women, to register for a possible military draft.

There have been cases where the Supreme Court has invalidated protective legislation. The difference, Professor Karst argues, turns on whether the striking down of a law poses a danger to the traditional construct of "woman" in defining masculine identity. Furthermore, although one path to belonging in America is assimilation, men do not want women to assume the characteristics of masculinity. Indeed, men are threatened by women who are powerful or aggressive.

The issue of choice, women's control over their own sexuality and maternity, involves the claim of citizenship in the sense that citizenship includes the power to influence matters that are personal. Although the Supreme Court, through its decisions since 1965, has given women some control over their private lives, Professor Karst identifies three modern problems. First, women do not have formal legal autonomy. For example, marital rape-exemption still exists, precluding the criminalization of a husband's forcible intercourse with his wife. Second, courts are continuously pressured to consider issues reshaping the status of the right to abortion. Third, what formal recognition of control women may have over their own sexuality and maternity is not reflected by actual control thereof, as the experience of battered women and rape victims demonstrates.⁴⁹

Although women share the same concerns as the members of racial or religious or ethnic minorities, belonging means something different to women. What matters to women most is the promise of tolerance of diversity professed by the American Civic Culture: the freedom to be seen as individual persons different not only from men but also from other women.⁵⁰

CHAPTER 8 CITIZENSHIP, RACE, AND MARGINALITY

This chapter discusses the reasons why the poor are excluded from American society, and the dynamics that perpetuate their isolation as a class. It also discusses the principle of equal citizenship in the context of the poor's status in America. The poor are excluded and seen as outsiders because our norms of individualism see

49. *Id.* at 120.

50. *Id.* at 123.

poverty as negative. If America is a land of opportunity, then the poor must have chosen and deserve their poverty.

Issues of poverty are complicated by its association with race. Since the majority of those who stay poor belong to racial or ethnic minorities, the perception of middle-class whites that welfare subsidizes minorities undermines public support for social welfare programs.

Elliot Liebow's book *Tally's Corner* helps Professor Karst understand the destructive effect that isolation from the rest of society has on members of marginalized groups. *Tally's Corner* describes the struggle of a group of Black men impoverished by unemployment. Part of the tragedy is that these men have absorbed society's cultural messages about the value of work and family. Since there is no formal racial caste system to blame for their misfortunes, these men can only blame themselves. Professor Karst points out that employment opportunities in the ghettos have declined since Liebow's study in the 1960s.

Professor Karst further observes that part of the problem is due to the improved situation of other Black people. The new employment, education, and housing opportunities made available by antidiscrimination laws have fragmented the Black community. When they move out of the ghetto, those left behind miss out on benefits such as employment and contact with former community leaders.⁵¹

Another factor contributing to the isolation of the poor communities is the strong pressure in the ghetto to depart from middle-class values. For Professor Karst, unemployment and poverty are not the direct cause of gangs and criminal activity. The problem arises out of the disruptive effect unemployment has on families. The result is the weakening of formal and informal social controls over young people.

In discussing citizenship and poverty, Professor Karst writes that status equality and welfare equality converge as goals in the pursuit of equal citizenship. Welfare goals include tangible improvements such as better educational and housing facilities and services. Status goals concentrate on the integration of Blacks into the general community. To seek equal citizenship as a status goal requires more than formal equality. It requires substantive equality achieved through the attainment of welfare goals.⁵²

The courts have an independent responsibility to advance equal citizenship in this area. The Warren Court moved towards the recognition that the poor are a minority deserving of protection. But Professor Karst argues that it did not go far enough. In cases

51. *Id.* at 131-132.

52. *Id.* at 135.

involving indigents in criminal prosecutions, for example, the Warren Court only required that the state provide certain items, without discussing race or the poor as a class deserving protection. For this reason cases involving indigents have never been considered as decisions about race or poverty. In fact, Professor Karst writes, the Supreme Court has now foregone its obligation to protect poor people as a class.

In the case of *Dandridge v. Williams*,⁵³ the complainants challenged an AFDC maximum grant limitation as a violation of the equal protection clause when there was a failure to appropriate enough money to satisfy the needs the state had defined. The Supreme Court denied the challenge and held that discrimination such as this fell under "the area of economics and social welfare." Such discrimination would be allowed if there was a rational basis for the government's decision. The Supreme Court found it reasonable for a state to give AFDC recipients an incentive to look for employment.⁵⁴ One reason for the Supreme Court's direction is the stopping-place problem. It has limited its options in addressing the poverty issue by either "attacking poverty wholesale or ignoring the problem altogether."⁵⁵

Another problem complicating the matter is the legally accepted notion that issues of Constitutional equality involve classification, the different treatment of people or transactions, by the legislature. The inquiry is whether the classification, or discrimination is sufficiently justified. Professor Karst calls this process "an exercise in rationalization."⁵⁶ He argues the problem is that any sensible analysis of marginalizing poverty is not subject to such rationalization. It is impossible to identify the classification that has placed individuals in poverty. It is equally impossible to show that any one individual's poverty is due to racial discrimination. Systematic discrimination can only be analyzed at the group level.

Professor Karst suggests the following approach as an alternative: "To appreciate the constitutional standing of the marginalized poor we need a fresh start — not a new edifice of doctrine but a perspective that lets us see the faces of real people behind the abstraction, poverty."⁵⁷ Courts, when considering the equal citizenship principle, should apply a more serious inquiry whenever inequalities adversely affect the responsibilities of citizenship. The more inequality stigmatizes and the more it excludes people from participation in society, the more justification should be required.

While Professor Karst admits that courts by themselves cannot

53. *Dandridge v. Williams*, 397 U.S. 471 (1970).

54. Karst at 137.

55. *Id.* at 138.

56. *Id.*

57. *Id.* at 139-140.

solve the problem of the poor in America. However, he asserts, they nonetheless have a role in ensuring that the government provides to all citizens the means necessary to participate in society as full members. "The equal citizenship principle is less concerned with correcting official wrongdoing than it is with including all Americans in the community of equal citizens."⁵⁸

CHAPTER 9 RESPONSIBILITY AND REMEDY

The judicial and legislative efforts to combat discrimination and exclusion are the concern of Chapter Nine. Professor Karst offers insight into the value, limitations, and necessity of this struggle. If the main purpose of equal citizenship is to end the exclusion of groups of people, the "stigma of caste," then antidiscrimination legislation, argues Professor Karst, erodes the racial caste system and has an integration effect.⁵⁹

Two sets of attitudes limit the sense of responsibility White Americans feel about remedying the condition of Black Americans. First, America's notion of individualism does not recognize that membership in a group is the cause of the harm that people suffer. Second, identifying Black people as outsiders, as the "other", translates disparities in wealth, status, and power into the general failings of Blacks.⁶⁰

Professor Karst observes that although some Blacks have entered into middle class White society, they are not fully accepted. Part of the reason lies in the numbers of Blacks who are still impoverished, thereby giving Whites an excuse to be prejudiced against Blacks as a group. Ghetto crime also aggravates the fear of the "other." This is especially true when such crime threatens to enter the White community. Furthermore, racial prejudice involves more than the fear of Black violence, it also involves the fear that Blacks will displace White dominance. Thus, the path to inclusion for Blacks requires more than the abolition of formal discrimination. It requires remedies that address group subordination and the entering into the middle class by the majority of American Blacks.

Although the stigma of racial inferiority does not end with the abolition of formal caste distinctions, the Supreme Court has limited racial discrimination to stigma that is enforced by law. The Court will only find racial discrimination in cases where government officials are shown to have deliberately intended racially disparate results. A showing that an action disfavors Blacks as a group is not enough. Professor Karst argues that this level of proof is difficult to achieve because White attitudes concerning Blacks for the

58. *Id.* at 142.

59. *Id.* at 147.

60. *Id.* at 148.

most part, work in the unconcious. In any given case an official can argue that a decision was not based on race. Judges are therefore unwilling to find racial discrimination except in the most obvious cases.⁶¹

This level of proof required also harms the relationship between the litigants. Animosity is inevitable when motives become the central issue. This is especially detrimental when the litigants have to work together to remedy social ills.⁶² Even so, Professor Karst argues that stopping judicial inquiry at the point of “discriminatory motive” does not resolve the stigma of caste problem. Racial subordination still exists today, the only difference is that its harm is done unthinkingly.⁶³

The main function of affirmative action, Professor Karst states, is to promote the equal citizenship values of respect and participation by remedying the effects of past and continuing discrimination. Affirmative action programs are criticized for overlooking the principle of individual merit by factoring in race as a specific consideration. Professor Karst argues that individual merit in this sense is misleading. First, it assumes that a constitutional claim of equality can only be an individual claim and that such a claim is different from a claim based on membership in a group. Second, it separates merit from someone’s perception of community needs.⁶⁴

For Professor Karst, affirmative action meets the goal of remedying the effects of past group subordination. Whenever a group has been excluded from equal citizenship, the government should provide either substantial justification, rectification, or both.⁶⁵

In answer to the view that Whites today are not responsible for past discrimination of Blacks because they have not benefited from such discrimination, Professor Karst writes that the status harm inflicted on Blacks by discrimination has benefited Whites free of such harm who have not had to compete with Blacks in the social and economic marketplaces. In this sense every White, willing or not, is a status beneficiary of the act — fully supported by the community’s previous interpretation of its Constitution and laws — that reduced black people to slavery and to membership in a subordinate caste.⁶⁶ Thus, affirmative action does not promote separatism but instead advances inclusion. Professor Karst argues that acceptance into the larger society can only come when large numbers of the excluded group enter the middle class. This can only be accomplished by first providing employment to large numbers of people

61. *Id.* at 153.

62. *Id.* at 155.

63. *Id.* at 156.

64. *Id.* at 160.

65. *Id.* at 165.

66. *Id.* at 167.

through affirmative action programs. "Jobs are the key to stable families, to educational motivation, to all the conditions that facilitate a family's advance from one generation to the next."⁶⁷

CHAPTER 10 CITIZENSHIP AND NATIONHOOD

In examining America's identity as a nation Professor Karst argues that the American civic culture can be a vehicle for the continuing inclusion of all Americans as participants in the national community. The argument begins by identifying two forms of fragmentations in American society: the irony that the very need to belong requires the exclusion of other groups of people and each individual's multiple associations which fragment the self. The American civic culture lessens the effect of these fragmentations by providing a sense of wholeness. The American civic culture creates a common ground for all subcultures and gives the individual an identity which overrides other forms of identification.⁶⁸

Another aspect of American society that further complicates national unity is the sharing of power between the states and the national government. Despite this division, Americans primarily identify with the nation. One of the reasons for this allegiance is the shared belief in the value of equal citizenship.

In addition to assuring laws apply equally to everyone and assuring political participation, the Fourteenth Amendment also implies the existence of a "national moral community whose members bear responsibility to each other."⁶⁹ Professor Karst admits that national unity has not been completely achieved. He suggests that a more inclusive definition of a national community is possible. In the American civic culture it is consistent simultaneously to express a strong ethnic and national identification and also to hold true the principle of tolerance as a national ideal.

The chapter concludes with a consideration of the effect on local communities of the national citizenship present in the Fourteenth Amendment. An example is the redefinition of the southern community through the abolition of the Jim Crow culture in the name of national equal citizenship. Professor Karst argues that although redefinition was forced on the South, it was inclusionary, not only because it recognized Blacks as participants but also because it included the South as part of the nation. The imposition of the national principle of racial nondiscrimination, argues Professor Karst, did not limit local communities in their functions. Rather, it widened the opportunity for all citizens to participate in local public life.

67. *Id.* at 169.

68. *Id.* at 173.

69. *Id.* at 182.

CHAPTER 11 GENERATIONS OF INCLUSION

In discussing the importance of belonging to a community, Professor Karst observes that an essential ingredient of community formation is the perception by its members that "we are all in this together."⁷⁰ In this sense, membership in a community implies trust, a notion of obligation between its members.

Law also has a role in contributing to community and a sense of belonging because it defines specific obligations and a sense of loyalty that members owe each other by establishing and enforcing norms. In America, the Constitution is the symbol for national community because it embodies the nation's substantive values.

Professor Karst argues that America as a community has been expanded to include many groups of people. An example of how the American civic culture has been redefined is that White supremacy and Protestant domination are no longer deemed acceptable in public life. These changes are not only entrenched in the American community, but also appear to be permanent. The permanence of these changes can be attributed to judges who interpret the Constitution as protecting the inclusion of those benefitted by the changes.⁷¹ Although the constitutional promises of liberty and equality have been expanded to include a number of groups, Professor Karst nonetheless contends that in some areas inclusion has been delayed.

Specifically, Professor Karst explores the *Bowers v. Hardwick*⁷² case. There the Supreme Court upheld as constitutional a Georgia anti-sodomy law. Although the law applied to both heterosexual and homosexual conduct, it became clear at trial that Georgia would only enforce its law against homosexuals. Professor Karst argues that such laws are official statements meant to stigmatize and exclude gays and lesbians. "In fact, one common argument against repealing those laws is that the repeal may suggest state approval of homosexual behavior."⁷³ For Professor Karst, the Court's decision served to legitimize the official exclusion of a group of people from full membership in the American community.

The Government also stigmatizes homosexuals by excluding them from the armed services and by denying them security clearances. Professor Karst suggests that the distinction between status and conduct offers guidance in finding a solution to the exclusion of homosexuals in the armed services. He argues that service regulations discharging homosexual persons, even in the absence of some conduct, is discriminatory and therefore unconstitutional. The dis-

70. *Id.* at 190.

71. *Id.* at 197.

72. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

73. Karst at 203.

crimination is based on status, being homosexual. This analytical approach is helpful because it would focus a court's attention on the harm of the status exclusion. Furthermore, it would be a doctrinal starting point for future decisions.⁷⁴

Professor Karst identifies another important change that comes with the redefinition of the American civic culture. Whenever members of a new group are included as full participants in the community, they take on an active role. In this sense, equal citizenship includes not only respect but also participation and responsibility. Professor Karst observes that it is usually the new group of participants that is conscious of remaining inequalities and will therefore ask for further restructuring. However, he suggests that before social reform is undertaken to remedy inequality there must be a reasonable expectation of success and "emotional fuel." In this respect the courts played an important role in the Black political movement. First, the *Brown* decision created a reasonable expectation of success because afterwards "black people found it easier to see themselves as citizens demanding their rights, not as supplicants offering their pleas to white America."⁷⁵ Second, the resentment over the betrayal of America's egalitarian ideals provides the emotional fuel. The judiciary, Professor Karst argues, has kept alive America's egalitarian ideals.

CHAPTER 12 THE COURTS AND THE NATIONAL COMMUNITY

From Professor Karst's perspective, the judiciary has a special responsibility to answer the question of who belongs to America because its interpretation of the Constitution defines America as a nation. He explains that when Justices interpret constitutional provisions or other questions of law, they do so in the context of the cases before them. They do not interpret such meanings in the abstract. In this sense Justices reason backwards from the present case in order to determine what interpretation a constitutional provision should be given. Included in this formula are the principles set out by past Supreme Court decisions. However, Professor Karst argues that in deriving interpretations the Supreme Court applies the entire historical experience to a present case. For this reason Professor Karst concludes "[i]n the light of this history-much of which is a history of constitutional change-it is ludicrous to insist that the adopters' intentions are the Constitution's only relevant past."⁷⁶

In the section entitled "Judicial Review and the claims of Citizenship" Professor Karst explains that the Supreme Court's role of reviewing legislative action has legitimized itself. One of the reasons

74. *Id.* at 209-210.

75. *Id.* at 212.

76. *Id.* at 221-222.

why judicial review has been accepted is that it has "stayed rooted in the popular folklore."⁷⁷ While legislators represent their constituencies, the courts have a special responsibility to serve the nation's citizens. For this reason, judicial review is most important when acts of legislators effectively exclude people from belonging to our community. Courts are seen as having the special responsibility of preserving equality of citizenship because they are in a position to represent all people's interests and desires to be members of a national community.

The final section of his book addresses the criticism that the Warren Court departed from the objectivity that judges are required to exercise in deciding cases by relying on an unprincipled "web of subjectivity."⁷⁸ Professor Karst points out that the traditional notion of justices needing to be completely detached from the identity of the contending parties is faulty. Indeed, judges "perform best when they inquire into the concrete facts that touch the lives of the real people who will be affected by their decisions."⁷⁹ The Court did not impose the Justices' personal preferences while abandoning principle. The underlying principle for the Court was the eradication of a racial caste system through the rediscovery of the Fourteenth Amendment's guarantee of equal citizenship. In this sense, the Warren Court was not "subjective", it was properly considering cases in their political and social context. Professor Karst adds that the Court was not always entirely clear in its decisions, but he attributes that more to the early beginnings of a new doctrine redefining a more inclusive American community rather than to an exercise of subjectivity.⁸⁰

REVIEWER'S COMMENTS

"Belonging to America" is an insightful and informative book about how America has, and continues to define itself as a community. The book not only speaks to those of us who struggle with becoming Americans, but it especially speaks to those who are already secure in their membership in the American community.

"Belonging to America" serves as a reminder of the actual progress America has achieved in ensuring equal rights to many different groups of people; it explores the values and concerns in America that made such progress possible. Professor Karst does not declare that equality has been achieved. Indeed, the book is full of instances where the American promise of equality has been violated. Profes-

77. *Id.* at 222.

78. *Id.* at 234.

79. *Id.*

80. *Id.* at 240-241.

sor Karst writes about the hurt of exclusion, the harm that comes from being an outsider. Such vision and sensitivity is a rarity.

“Belonging to America” is an invaluable contribution to the pursuit for a more inclusive America. At a time when racial and class tensions threaten to undo the social cohesion America has attained, it is important to look back and examine our successes and failures in order to face future challenges. Professor Karst’s work not only serves as a reminder of how much America has developed as a community, but also how this experience can be of use in achieving further equality.