Out of Many, One?

Kenneth L. Karst

University of California, Los Angeles

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the Immigration Law Commons, and the International Law Commons

Recommended Citation

Available at: https://www.repository.law.indiana.edu/ijgls/vol2/iss1/6

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Global Legal Studies by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Out of Many, One?

KENNETH L. KARST*

Once again, U.S. politics has placed the topic of immigration in the foreground of debate. The Governor of California has called for an amendment to the U.S. Constitution that would deny citizenship to a child born in the United States if the child’s parents entered the country illegally. Although this appalling proposal seems unlikely to be taken seriously in Congress, undoubtedly it is well received by a constituency the Governor needs to reassure. Similar constituencies were vocal during the colonial era, and their successors have made nativism a recurring political theme. The politics of cultural division also makes use of racial and religious hostilities, some of which are only tenuously connected to immigration. In sum, this experience makes clear that the ideal of the “Open Republic,” so ably defended by Professor Jost Delbrück,1 confronts powerful opposition. In this paper I comment briefly on the problems of maintaining political community and political legitimacy in the face of ethnic difference. Following Professor Delbrück, I discuss separately the national and global dimensions of these problems; the starting point in each case is his vision of the Open Republic.

I. A NATION OF MANY CULTURES?

In 1984 a distinguished U.S. historian, Robert Wiebe, published an illuminating study of the U.S. experience from 1780 to 1850, titled The Opening of American Society. The book describes two kinds of openings. One was geographical. The new nation, originally an Atlantic society, spilled over the Appalachians and began to fill a continent. The other kind of opening, more attuned to Professor Delbrück’s usage, was socio-political. The rule of the gentry—central to what the founding generation called republicanism—was replaced by an increasingly democratized politics. This combination of “opening out” and “opening up” created a genuinely national

* David G. Price and Dallas P. Price Professor of Law, University of California, Los Angeles.
society. To United States citizens, then as now, the metaphor of opening was appealing. But, lest his readers wax too euphoric, Professor Wiebe added this cautionary remark: "The democratization of American society coincided with the strengthening of the slave system, the drive to exterminate [N]ative Americans, and the establishment of a class line. An opening for some meant a cruel closing to many others."

So, let me begin with a caution of my own. Professor Delbrück rightly observes that the ideals of the U.S. civic culture offer a good approximation of the Open Republic. Nevertheless, precisely because the Open Republic offers such generous treatment to those who are different from the majority (in race, in religion, in ethnicity), it will spawn opposition. That opposition will be centered in groups of citizens who have a considerable psychic investment in thinking of themselves as the nation's true "Volk"—or, as some of our politicians have recently put it, as the "true Americans."

Professor Delbrück, like Wiebe, has in mind at least two different senses of "openness" within the Open Republic. First, the polity should be inclusive, democratic, and open on equal terms to all citizens. Second, it should be adaptable, open to new ideas and to institutional change. I take these characteristics of the Open Republic to be a cluster of ideals toward which a nation might strive, not a description of the political organization of any actual society, past or present—nor, for that matter, an assertion that any actual society can fully realize these ideals in the future. In Professor Delbrück's view, surely, a society's success is to be measured in degrees of approach to the ideal.

In any case, he is correct in drawing on the United States' experience to illustrate what he has in mind. The values of the U.S. civic culture have indeed played an indispensable role in maintaining a national political community and legitimizing the nation-state in the face of persistent cultural diversity. Yet this success, too, has to be measured in degrees. U.S. citizens who have felt "left out" of the national community are, to be sure, assimilated to the values of the civic culture. Nonetheless, they tend to regard that culture's promises—of freedom, of equality, and of tolerance—with some skepticism. Professor Delbrück would be the first to

recognize that the Open Republic must earn the loyalty of its citizens by making good on its promises.

Assimilation is also associated with a payoff of a different kind. In the United States the one factor that seems most strongly correlated with an ethnic group's assimilation is entry into the middle class. Today about half the marriages involving Japanese Americans in California are to Caucasians; at the same time, some Jewish leaders are saying that religious intermarriage has reached proportions that threaten the continued vigor of Judaism in the United States. It is no accident that both of these minority populations have had remarkable economic success in the years since World War II. Similar developments are just now beginning to produce a slower-paced increase in marriages between black and white Americans.

The reasons for these changed patterns are a good deal more interesting than those expressed in the cynical saying, common in Brazil, that "money whitens." The point is not that status is for sale in any direct way. Assimilation is a simplifying label that observers apply to large-scale human interactions that are complex.\textsuperscript{4} Interracial marriage is just one index of assimilation. The intermarriage rate goes up when children of middle-class families meet each other in college, and come to know each other as whole persons. This knowledge replaces the abstract meanings their parents have attached, in a wholesale manner, to groups who are different in race or religion or ethnicity. Of course it is possible for a marriage to be the pairing of two abstract projected images—for some reason Madonna and Sean Penn come to mind. In a typical marriage, though, the reality of the whole person simply overwhelms the label. Lest this picture be too rose-colored, I concede that, in an indirect sense, status is for sale. Entry into the middle class means increased capacity in all sorts of markets, including those that are educational and social.

In raising the question of economic class I have not left behind the subjects of citizenship and governmental legitimacy. Studies of political participation consistently show a strong correlation between voting (or other forms of citizen participation) and income levels. The "haves" generally believe the system works for them, and believe their participation in the

\textsuperscript{4} Although one may speak of an individual immigrant as "assimilated," assimilation is most usefully seen as a change visible in groups, a change that happens with the passing of generations. For elaboration of this theme, see Kenneth L. Karst, \textit{Paths to Belonging: The Constitution and Cultural Identity}, 64 N.C. L. REV. 303, 331-36 (1986).
polity can make a positive difference in their lives. The "have nots," sadly, have little reason to share either of these beliefs. So, any aspiration to full political legitimacy for the Open Republic must envision not only an egalitarian distribution of formal political power, but also an active policy to prevent the kinds of material want that are demoralizing. I am not talking about handouts; no one is a full citizen who bears the stigma of dependency. I am, however, talking about a polity that takes responsibility for offering all its citizens the dignity of honest work.

During all the recent flowerings of European constitution-making—in the creation of national constitutional courts after World War II, in the treaties that produced the human rights court and the institutions optimistically labeled the European Community, and in the new governmental structures emerging from the shadow of the Soviet empire—many of the constitution-makers have sought lessons from U.S. history. Throughout all these efforts, the most effective European planners have maintained a healthy skepticism about the transfer value of U.S. institutions.

Consider the example of Germany. It remains to be seen whether, in the face of the twin challenges of large-scale immigration and east-west integration, the German nation can make a successful transition from the ideological centrality of the "Volk" to the more inclusive political culture of the Open Republic. As we have seen, even in the United States, sharp increases in immigration have produced large-scale political "backlashes." For a nation thoroughly grounded on an ethnic base, surely one lesson to be learned from the Unites States is to recall the violent resistance that ensued when the federal judiciary led the national government's assault on racial segregation in the southern United States. With or without violence, the transition to the Open Republic is certain to be painful, for—like the end of Jim Crow—it will threaten the psychological underpinnings of millions of individual identities. On the positive side, it is worth remembering that the legal foundation for Jim Crow was, in fact, destroyed. By all means, then, let us promote the Open Republic—but let us do so with our eyes open.

II. A COMMUNITY OF NATIONS?

In a multicultural nation, then, political legitimacy goes hand in hand with the sense of community. Neither national community nor the legitimacy of the nation-state can be taken for granted; both need constant nourishment with the substance of equal citizenship. But these very labors,
to make and preserve a nation, may dampen the outward-looking aspirations of the Open Republic.

Building and maintaining a nation that embraces disparate ethnic groups is, above all, an exercise in persuasion. Those who lead the nation must convince the members of all "tribal" groups that their loyalties must transcend the boundaries of race and religion and ethnicity, that they also share an identity that is national. If history is to be our guide, an essential part of that sales effort will be the rhetoric of "the nation." A vital element of the U.S. civic culture is nationalism itself, and the slogan "We are all Americans" is a rhetorical device we can ill afford to cast aside. But if nationalism is a substitute for petty tribalism, it is itself a form of tribalism, one that may prove a formidable obstacle as the leaders of the Open Republic seek to make its "internal openness effective on the international and global level."

Europe would seem to be the make-or-break case for any aspiration toward global community. If the nations of Europe, with all they have in common, are still struggling to achieve the "openness" of full economic integration, it is hard to imagine that other regions of the world can reach even that goal. And, whatever may eventuate in Europe, it is even harder to imagine institutional arrangements that can achieve the Open Republic's central global objective: an expansive redefinition of national interest to include "the public interest of the community of States."

Ultimately, law makes its most important contribution to the sense of political community and the legitimacy of power by defining rights and wrongs in the realm of values. But most new communities begin their legal orderings in the realm of interests. The early visionaries of European unity sought peace and friendship, but sensibly began with attainable goals. Today's Europe had its modest beginnings in what seemed an oxymoron, a "coal and steel community." One who seeks to bring historic rivals together can rarely hope to begin with agreements on fundamental values; it is much better, then, to start with a sharing of specific economic goals, a pooling of

5. See, e.g., id. at 361-69. Furthermore, "[i]t is our fate as a nation not to have ideologies but to be one." HANS KOHN, AMERICAN NATIONALISM: AN INTERPRETATIVE ESSAY 13 (1957) (quoting Richard Hofstadler).

6. Delbrück, supra note 1, at 63.

7. For a recent summary and analysis, see William J. Davey, European Integration: Reflections on its Limitis and Effects, 1 IND. J. GLOBAL LEGAL STUD. 185, 198-203, passim (1993).

8. Delbrück, supra note 1, at 64.
management for an enterprise with narrowly defined ends. Later—a full
generation later—European courts were declaring substantive rights of
Europeans, ranging from the freedom of the press to the freedom of intimate
association.

Given Professor Delbrück’s emphasis on judicial review as a central
feature of the Open Republic, some historical parallels in the experience of
the United States are worth recalling. The Supreme Court began to play its
strong unifying role in the nineteenth century by imposing severe limits on
the states’ powers to impede the development of a national economy. Only
after that body of law was rather well developed did the Court begin to offer
effective protection for “personal” constitutional rights—in the criminal
justice system and the electoral process, for example. But it is substantive
rights of this character—especially, as Professor Delbrück notes, rights of
equal citizenship—that have been the Supreme Court’s distinctive
contribution to the U.S. civic culture. So it may be in Europe, but my guess
is that economic integration will have to be carried considerably further
before European courts can contribute effectively to integration at the level
of values.

When we look beyond North America and Europe, the global ideal of
the Open Republic seems a distant dream. Some political cultures, even in
rapidly developing economies, seem especially resistant to openness, either
internal or external. Examples include Singapore, China, or even Japan.
When we leave the developed world, the prospects are even dimmer. Just
as the “haves” within a nation tend to resist when the “have nats” make
their claims to equal citizenship, so the sharp division of rich nations and
poor nations bodes ill for the evolution of a sense of global public interest
as a foundation for a “federation” of Open Republics. Full membership in
the community of States is like full citizenship within a nation: no
dependent State can hope to be a full member.

I agree that the extension of the Open Republic beyond the Atlantic
world—even to the southern hemisphere—is a vision that deserves to be
kept alive. But realization of that global vision, like the attainment of most
of the goals of world community, must surely begin with the achievement
of inclusive national societies. The one place where U.S. citizens can hope
to make a real difference is the United States. Here, in our own country, the
ideal of the Open Republic remains incompletely realized. Even as we
aspire to a global community, let us remember that the nourishment of
community begins at home.