Michigan Law Review

Volume 90 | Issue 6

1992

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AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION. By *Judith N. Shklar.* Cambridge: Harvard University Press. 1991. Pp. 23, 120. $17.95.

Why vote? Why work? In this provocative little volume, Judith Shklar[1] proposes linked answers to these seemingly disparate questions: when Americans vote and work, they exercise rights that mark their status as citizens. Shklar intends these answers, however, to be local rather than universal; she finds the *American* conception of citizenship distinguished by its emphasis on equality of political rights and on earning one's living as the two key indicia of social standing. Shklar offers a historical explanation for this distinctive conception — in a slaveholding democracy, voting and earning were activities that exhibited one's status as a free citizen. Ultimately, the analysis leads to a call for reform, as this conception "creates a presumption of a right to work as an element of American citizenship" (p. 99), which implies the government's obligation to ensure full employment for its citizens.

Shklar writes partly in opposition to American scholars who base their theorizing on the political thought of the founding era.[2] Her account of a dynamic citizenship, continually reshaped through the struggles of marginalized groups for inclusion, provides a valuable supplement to studies based in legal and elite political sources.[3] It may be useful, nonetheless, to state some reservations about the historical argument, which the brevity of the book leaves unaddressed.

More fundamentally, however, I will question Shklar's strategy of pursuing reform by enriching the conception of citizenship. If practically implemented, this strategy could have unintended exclusionary consequences, because many workers in the United States are not citizens. By linking the rights to vote and to earn, Shklar has recast a

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2. Pp. 9-10. The example singled out for mixed praise and blame is Cass R. Sunstein, *Beyond the Republican Revival,* 97 YALE L.J. 1539 (1988). P. 105 n.6.

3. *See, e.g.,* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978); PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).

human right as a right of citizenship. The argument thus exhibits a blind spot all too common in political theory — inattention to the presence of aliens within the community.

I

American Citizenship is a slightly expanded version of Professor Shklar's 1989 Tanner Lectures of the same title.[4] The two chapters on "Voting" and "Earning" are now preceded by an introduction whose content is largely methodological. Here Shklar contrasts the meaning of citizenship as social standing[5] — what she sometimes calls "full" citizenship — with three other common interpretations of citizenship that do not figure in the inquiry. These bracketed interpretations are citizenship as mere nationality, the general normative standard of "good citizenship," and the particular ideal of dedication to civic life embodied in the classical republican vision of citizenship (pp. 3-12).

The introduction also highlights the character of citizenship as a historically grounded, and therefore dynamic, notion. Shklar argues both that American citizenship was crucially influenced by the institution of slavery and that it has evolved further since emancipation:

> If these essays have any polemical purpose, it is not only to join those scholars who have belatedly come to recognize the part that slavery has played in our history. Important as that rethinking of our past is, I also want to remind political theorists that citizenship is not a notion that can be discussed intelligibly in a static and empty social space. . . . Citizenship has changed over the years, and political theorists who ignore the best current history and political science cannot expect to have anything very significant to contribute to our political self-understanding. [p. 9]

To determine the social meaning of American citizenship one should investigate the struggles of those women and men who were denied full citizenship. "Their voices . . . defined what was unique about American citizenship: voting and earning" (p. 15).

The first chapter explores the tension between the American ideal of equality and the persistence of restrictive suffrage qualifications. Shklar recounts successive expansions of suffrage in America, where the visible presence of actual slavery reinforced the status anxiety of the disenfranchised. First the colonists, unrepresented in Parliament, fought for a government in which they would be represented, claiming that without representation they were little more than slaves (pp. 38-42). Similar claims accompanied the struggle against property qualifications for voting, which scored many successes in the early nine-

4. *See* Judith Shklar, *American Citizenship: The Quest for Inclusion, in* XI THE TANNER LECTURES ON HUMAN VALUES 385 (Grethe B. Peterson ed., 1990) [hereinafter TANNER LECTURES].

5. Shklar explains that she employs the term *standing* in preference to the alternative *status* in order to avoid the pejorative associations the latter may evoke. P. 2.

teenth century (pp. 46-50). Less symbolic concerns about (re)enslavement motivated the Fifteenth Amendment's prohibition against racial qualifications (pp. 52-57). The continued denial of female suffrage was experienced as an insult to the status of white women, who had thereby "in one respect at least, shared the degrading lot of the slaves" (p. 61).

At the same time, the history of women's suffrage confirms the primarily symbolic function of the franchise as a badge of citizenship. Women did not form a distinct political class, and in terms of practical results their enfranchisement was "the biggest non-event in our electoral history" (pp. 60-61). For Shklar, the perceived civic significance of *being* a voter helps explain why later members of a group that had struggled to overcome exclusion from the electorate might not bother to *cast* votes once their standing was no longer in question (pp. 27-28).

Parallel to standing in the political world is the citizen's standing in the social world and in the market, to which the second chapter turns. The model of the "independent citizen-earner" makes the American work ethic comprehensible "as the ideology of citizens caught between racist slavery and aristocratic pretensions" (p. 64). Jacksonian democracy made the dignity of labor a civic principle, but the coexistence of free labor and slave labor tended to bring physical work into contempt (pp. 72-81). This tension was only partly eased by the American dream of advancement from wage-earning to self-employment (pp. 64-65, 81-82). The industrial nightmare of "wage-slavery" threatened more than just material deprivation; dependency might also reduce workers to the social position of slaves (pp. 79-81). Independent earning was, of course, also precious to those excluded from the free labor force: slaves and women. For feminists, the analogy between slaves and married women, even when the latter were forced into idleness, was compelling (pp. 83-87).

The perceived civic significance of earning may explain why the work ethic in American culture persisted after hopes for meaningful work and social mobility had faded in the modern system of industrial labor (pp. 91-92). More poignantly, despite our allegiance to the work ethic, there is no guarantee that the citizen-worker will have any work to do (pp. 92-96). "The fears originally inspired by slavery, laced by racism and resentment of idleness at the top, were enhanced by the fear of being fired" (p. 92). The contradiction between the cult of earning and the specter of unemployment impels Shklar to press explicitly for reform:

> To reveal the unfulfilled promises of traditional ideologies is certainly not the only significant form of social criticism, nor is it usually the most appropriate. I have resorted to it here only because I think it important to recall not only the antiquity and continuing prevalence and relevance of the Jacksonian faith, but also the fact that it creates a presumption of

> a right to work as an element of American citizenship, and that this ought to be recognized. [p. 99]

The book thus ends with a prescription for which the ground has been carefully prepared. American citizenship should entail a right to earn, as well as a right to vote, lest our unemployed fellow citizens suffer "the loss of public respect, the reduction of standing and demotion to second-class citizenship" (p. 100). Shklar does not view this right as a universal moral right or a primary human right. Instead it is culturally grounded, "a right derived from the requirements of local citizenship" (p. 100).

II

The central contribution of *American Citizenship* is its explication of the right to work as an "emblem of equal citizenship" (pp. 61-62) that developed in the United States in reaction to slavery. The struggle for the right to vote is over, but the struggle for the right to earn continues (pp. 61-62). To the extent that the book seeks to emphasize the early acceptance of the dignity of labor in the United States, and the importance of self-support to social standing, it is highly persuasive.

The book presents itself, however, as more than simply a selective investigation of two of many facets that contribute to first-class citizenship in a modern capitalist democracy. The parallel treatment of voting and earning as badges of freedom is designed to reinforce the civic identification of the less conventional right. Shklar repeatedly ascribes a special fundamentality in American political thought to this pair of citizenship rights, and states that their prominence is distinctive to citizenship in the United States.[6] She explains this prominence as resulting from the fact that voting and earning once distinguished freemen from slaves (pp. 1-2). Unfortunately, the lecture format does not afford sufficient space in which to demonstrate, rather than merely to suggest, that these two rights crucially characterize citizenship in the United States, or that their special status was *caused* by the juxtaposition with slavery. It falls to a reviewer, therefore, to mention some unallayed doubts about the accuracy of these stronger claims.

Unquestionably the right to vote and the right to dispose of one's labor were highly prized, and were denied to slaves.[7] The same could be said, however, of many other highly prized rights. For example, slaves were denied the right to freedom of speech, the right to bear arms, the right to receive an education, and even the right of family

6. *E.g.*, pp. 3, 15.

7. In some cases, slaves were permitted to dispose of their labor, but the permission was revocable and does not undercut Shklar's account. *See* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 391-94 (Vintage Books 1976) (1972).

members to live together.[8] Their right to bodily integrity was severely limited.[9] Shklar does not discuss why these other rights should not be regarded as key attributes of citizenship, or how they failed to achieve this status. This logical objection cannot disprove her historical thesis, but it does highlight the need for specific evidence of the asserted causality.

These doubts are not dispelled by the evidence that the threat of slavery was invoked in debates over suffrage and free labor. As Shklar explicitly recognizes, accusations of enslavement were also a traditional figure of political rhetoric transmitted to the colonies from England (p. 39). *Slavery* was the correlative of *tyranny*, of any unjustified power. As Justice Mathews wrote, condemning arbitrary administrative action in *Yick Wo v. Hopkins*,[10]

> the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[11]

The colonists subjected to taxation without representation did compare themselves to slaves, and vulnerable laborers did complain of wage-slavery.[12] But similar accusations were made by the competitors of the New Orleans slaughterhouse monopoly,[13] and in support of the Sherman Antitrust Act.[14] To this day, we still hear arguments that taxation or conscription is slavery, from people whose social standing is in no danger. Then as now, those who argue that the absence of a particular right would be tantamount to slavery do not necessarily believe their own rhetoric, and do not necessarily prize the right because it was withheld from slaves rather than because of its direct material consequences.[15]

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8. *See id.* at 29-41.

9. *See id.* at 33-40. In this regard it is interesting to note that the public whipping of white men was opposed in South Carolina because whipping "was the characteristic punishment for slaves," and thus its use on white lawbreakers threatened the racial hierarchy. MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 101-02 (1980).

10. 118 U.S. 356 (1886) (condemning discriminatory denial of consent to operate a laundry to a Chinese immigrant).

11. 118 U.S. at 370.

12. Pp. 39, 80. I do not mean to characterize the invocations of slavery by African Americans after the Civil War as merely rhetorical. In their case, denial of the rights to vote, to testify against whites, to own weapons, and so on, really did form part of a systematic effort to reduce them to a captive labor force. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 198-210 (1988).

13. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 49-51 (1873) (argument of counsel) (claiming the monopoly violated the Thirteenth Amendment).

14. *See* Standard Oil Co. v. United States, 221 U.S. 1, 83 (1911) (Harlan, J., concurring and dissenting) ("[T]he conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people.").

15. Even as regards suffrage. Although a well-known collective action problem may dimin-

Real slavery was a legal as well as a social status, defined by comprehensive disabilities. Shklar leaves such disabilities behind when the chapter on earning takes an unexpected turn. After showing the importance of the dignity of labor in the nineteenth century, Shklar briefly adverts to the situation of "the middle-class feminists who came to resent being excluded from the world of gainful employment" (p. 84). From this point, the discussion could have followed a route parallel to that of the voting chapter, and recounted the overturning of exclusions from the labor force. In other words, the quest for inclusion could have been narrated as a history of the *negative* right to earn, involving a struggle against contractual incapacity, protective legislation, uncompensated domestic work, and unequal pay. Even for middle-class women, this struggle is not yet over.

Instead, Shklar modulates from married women's forced idleness to an examination of unemployment in general and the dignity withheld from all citizens who lack remunerated work. The chapter culminates in a brief for the *positive* right to work — not mere liberty of contract, but the obligation of government to guarantee full employment for its citizens, so that all who desire jobs can find them. (Here *work* figures as a noun, corresponding to the French *droit au travail.*[16]) For Shklar, this is more than a right to livelihood, in the sense of transfer payments; citizens are entitled to an occupation that permits them to share in the dignity of labor and the social standing of the productively employed, and that offers them opportunity for advancement (pp. 100-01).

As Shklar recognizes, it is at first glance counterintuitive to derive a demand for government intervention to prevent forced idleness from the reaction against slavery, which was an avowedly paternalistic system of forced labor (p. 94). The more obvious modern target for a critique based on the experience of slavery would be a system of "workfare" that compelled welfare recipients to perform in menial, dead-end jobs (p. 97), rather than a system of unemployment insurance that provided adequate transfer payments but no work. Shklar's response is that, since the disappearance of actual slavery, the work ethic that formed as a contrast to slavery has acquired a different foil. "What [unemployed Americans] fear is welfare dependence, which has become the new focus of Jacksonian fears" (p. 96).

If the dependent poor are now the disrespected other against which American citizenship defines itself through earning, one might wonder whether the dependent poor did or could serve that function irrespective of the existence of chattel slavery. In the late eighteenth and early

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ish an enfranchised individual's incentive to vote, there are evident practical dangers in belonging to a group that is known to be disenfranchised.

16. This comparative observation is not gratuitous. *See infra* notes 20-23 and accompanying text.

nineteenth centuries, they were stigmatized under the label of "pauperism." The Articles of Confederation expressly withheld from "paupers" some of the benefits of nationhood,[17] and a similar interpretation prevailed under the Constitution.[18] In numerous states, wage-earners' opposition to property qualifications for voting did not lead to universal manhood suffrage, but rather to the substitution of express disqualifications of paupers or tax payment qualifications barring the destitute, or both.[19] There is thus some reason to believe that paupers had always exemplified second-class citizenship, and a closer comparative study of attitudes in England (whence the American states derived many of their poor laws) might illuminate whether slavery was a necessary factor in developing the American conception of the self-supporting citizen.

These doubts about the causative role of slavery gain significance in view of the rhetorical role slavery plays in *American Citizenship* itself. Here slavery figures as a distinctively American experience — "it was this juxtaposition of slavery and constitutional democracy, above all else, that set America apart from other modern states" (pp. 28-29). The linking of slavery and earning therefore provides a native pedigree for the positive right to work. To recognize the importance of this move, one need only recall that the articulation of a positive right to work is usually traced to France, and particularly to the revolution of 1848.[20] This *droit au travail* is now one of the aspirational rights of the International Covenant on Economic, Social and Cultural Rights.[21] It is often argued that the economic and social rights of the Covenant are out of harmony with the Western liberal tradition, which envisions negative rights against government oppres-

17. *See* ART. OF CONFEDERATION art. IV ("The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, *paupers, vagabonds and fugitives from justice excepted,* shall be entitled to all privileges and immunities of free citizens in the several states . . . .") (emphasis added).

18. See Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), in which Justice Barbour wrote:

> We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease.

36 U.S. (11 Pet.) at 142-43. *But see* Edwards v. California, 314 U.S. 160 (1941) (finally rejecting this approach).

19. On this trend, which Shklar's chapter on voting ignores, see Robert J. Steinfeld, *Property and Suffrage in the Early American Republic,* 41 STAN. L. REV. 335 (1989).

20. *See* ROGER PRICE, THE FRENCH SECOND REPUBLIC: A SOCIAL HISTORY 105-09 (1972); Bob Hepple, *A Right to Work?,* 10 INDUS. L.J. 65, 71-72 (1981); *see also* Jon Elster, *Is There (or Should There Be) a Right to Work?, in* DEMOCRACY AND THE WELFARE STATE 53, 53 (Amy Gutmann ed., 1988) (cited at p. 114 n.52) (the "*droit au travail* was the battle cry of the workers in the French Revolution of 1848.").

21. *See* International Covenant on Economic, Social and Cultural Rights, *opened for signature* December 19, 1966, art. 6, 993 U.N.T.S. 3, 6.

sion rather than positive rights to government services.[22] Thus, *American Citizenship* might best be understood as an act of naturalization, an attempt to find roots outside the European socialist tradition for the positive right to work. Shklar may have been prescient in employing this strategy, given the current fashion for declaring the extinction of socialism.[23] Sympathetic readers may be unsure, however, whether the attempt succeeds as history.

III

Though it may be somewhat daring to assert that the right to work is distinctively *American*, still I am less troubled by this claim than by the effort to make the right to work an attribute of American *citizenship*. Shklar employs the language of citizenship in a manner not uncommon in political philosophy, seeking to fortify a claim of right by stressing the citizenship of the rightholders. As often, this seems to be done without attention to the implications of the argument for noncitizens. By construing the activity of earning as a major defining characteristic in a thick conception of citizenship, the argument sacrifices the noncitizen's rights to earn (both positive and negative) for the purpose of enhancing the positive right to earn of the citizen. The book thus provides an appropriate occasion for a plea against the overuse of the rhetoric of citizenship.

As Shklar points out in her introduction, the term *citizenship* has had a variety of meanings in American history (p. 3). The same could be said of its uses in political philosophy. *Citizenship* can serve simply as an evocative label for elements of a model — the theorist imagines a state in isolation from all other states, and refers to all the individuals in the model as its citizens. The theorist may not then investigate which of the claims of the individuals against the state require the special resonance of citizenship and which are sufficiently grounded in the individuals' humanity.[24] Alternatively, the theorist can narrow the focus to a democratic state, and refer to the individuals as citizens to emphasize their entitlement to political participation. The theorist may then connect their moral claims to this entitlement.[25]

There is also a more sociological tradition of political thought that explores the features that constitute a preferred status for some members of a society, a status that can be called full or first-class citizen-

22. *See, e.g.*, MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 65-77 (1973).

23. The lectures were originally given in May 1989.

24. The Dworkin essay, discussed *infra* text accompanying note 30, illustrates this phenomenon. *See* Ronald Dworkin, *Foundations of Liberal Equality*, *in* TANNER LECTURES, *supra* note 4, at 1.

25. AMY GUTMANN, DEMOCRATIC EDUCATION (1987), discussed *infra* text accompanying notes 38-41, illustrates this phenomenon.

ship.[26] Investigations of the attributes of such citizenship may be descriptive, or they may expressly draw prescriptive conclusions, as Shklar does here, reinforcing moral claims by associating them with citizenship. Although Shklar's introduction clarifies her intention to discuss citizenship as social standing, which she describes as "a vague notion, implying a sense of one's place in a hierarchical society" (p. 2), that choice does not mean that her concept of citizenship is inclusive enough to cover high-status foreign nationals. This is clear, for example, from her attitude toward alien suffrage: she mentions that resident aliens once had full voting rights in many states, and no longer do, but this observation does not detract from her confidence that suffrage is now universal.[27] Shklar's focus is on the difference between first- and second-class citizenship, both of which presuppose American nationality.

I do not deny that there are some duties that a state owes first, or only, to its own citizens.[28] It owes other duties to its residents of whatever nationality; still other duties to all persons within its territory, for whatever duration; and some, perhaps contingent, duties to all of humanity. International human rights treaties often obligate states to all persons within their jurisdiction.[29]

It is nonetheless common for political theorists to limit their attention to citizens, and to leave unaddressed the state's responsibilities to noncitizens within its territory. The authors may then formulate conclusions that, if taken literally, would have serious negative consequences for those who are not citizens. For example, in the same volume of the Tanner Lectures in which the original version of Shklar's work appears, we find Ronald Dworkin describing as "a fundamental, almost defining, tenet of liberalism that the government of a political community should be tolerant of the different and often antagonistic convictions its *citizens* have about the right way to live."[30]

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26. An influential example is T.H. Marshall's lecture *Citizenship and Social Class* (1949), *in* T.H. MARSHALL, CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT 65 (Greenwood 1973) (1964).

27. Pp. 4-5, 38, 61-62. Similarly, she invokes as evidence legal texts where *citizenship* implies nationality. Pp. 15, 33-35.

28. I would agree, for example, that a state with defensible naturalization policies may limit voting rights to its own citizens. (I am treating *citizens* and *nationals* as synonyms, although their meanings may diverge when used as terms of art in particular disciplines.)

29. *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signature* December 19, 1966, art. 2(1), 999 U.N.T.S. 171, 173 ("all individuals within its territory and subject to its jurisdiction"); Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* November 4, 1950, art. 1, Europ. T.S. No. 5 ("everyone within their jurisdiction"); American Convention on Human Rights, November 22, 1969, art. 1(1), Org. Am. States T.S. No. 36 ("all persons subject to their jurisdiction"). *But see* International Covenant on Economic, Social and Cultural Rights, *supra* note 21, art. 2(3) ("*Developing countries,* with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.") (emphasis added).

30. Dworkin, *supra* note 24, at 4 (emphasis added).

This phrasing comes very close to implying the acceptability of intolerance toward convictions that are held by noncitizens but are not shared by citizens, an attitude that in the past has supported discrimination against "heathen Chinese" and the exclusion of foreigners holding "un-American" political views.

Such ambiguities might appear harmless if they did not feed into ambiguities in the legal system. The drafting of the Bill of Rights also reflected inattention to the position of aliens, and the infamous Alien Act of 1798 prompted a vehement debate over whether aliens had constitutional rights at all.[31] Xenophobic Federalists drew support in that debate from an interpretation of the social contract tradition as affording rights only to the "parties" to the social contract, i.e., citizens.[32] The absolute version of this argument has been rejected, but more specific attempts to narrow the reach of constitutional provisions have continued. Most recently, a four-Justice plurality of the Supreme Court read the Fourth Amendment's declaration of "[t]he right of the people to be secure in their persons, houses, papers, and effects" as excluding those aliens who are present on American soil but are not part of the "people of the United States."[33]

In recognition of the political powerlessness of resident aliens and the long history of discrimination against them, the Burger Court developed an equal protection doctrine treating alienage as a suspect classification.[34] Justice Rehnquist, however, consistently dissented from this approach, arguing that the Constitution's legitimation of discrimination against aliens in the sphere of political rights demonstrated that discrimination against aliens could not be constitutionally suspect.[35] He regarded it as "natural" for the state to reserve limited resources for its present and future citizens.[36] It is uncertain whether Chief Justice Rehnquist will someday have the votes to overturn this line of cases, and to remit the unenumerated rights of aliens to legislative discretion.

Political philosophers who rely heavily on the characteristics of citizenship in justifying a given right may even supply a rationale for withholding that right from aliens. This mode of argument can sug-

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31. I discuss this episode in Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 927-38 (1991).

32. *See id.* at 929-32.

33. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (Rehnquist, C.J.) (quoting U.S. CONST. amend. IV, pmbl.). A fifth Justice concurred in the opinion but disassociated himself from this part of the argument. *See* 494 U.S. at 276 (Kennedy, J., concurring).

34. *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 20-23 (1982) (Blackmun, J., concurring); Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

35. *See, e.g., Toll*, 458 U.S. at 39-42 (1982) (Rehnquist, J., dissenting); Sugarman v. Dougall, 413 U.S. 634, 651-52 (1973) (Rehnquist, J., dissenting). The most recent case was Bernal v. Fainter, 467 U.S. 216 (1984), in which Justice Rehnquist noted his lone dissent, 467 U.S. at 228.

36. Nyquist v. Mauclet, 432 U.S. 1, 21 (1977) (Rehnquist, J., dissenting).

gest that the reliance was necessary, and that noncitizens could not assert the right, or that noncitizens' interests must be subordinated to avoid diluting the opportunities of citizens. For example, some champions of the right to education have placed great weight on the contribution that education makes to the exercise of fundamental rights of political participation.[37] A similar linkage animates Amy Gutmann's *Democratic Education,* in which the author derives a broad range of constraints on educational policy from the proposition that the central purpose of education in a liberal democracy is to prepare children in their capacity as future citizens for deliberative participation in the polity.[38] Gutmann deemphasizes the role of education in preparing children for survival in the marketplace,[39] and consistently describes public education as a process in which citizen teachers, overseen by a government elected by citizens, train the children of citizen parents.

This rhetoric could lead to the conclusion that alien children have no place in the schools of a democracy.[40] Gutmann discusses a number of Supreme Court decisions, but gives no attention to the Texas alien children's case, *Plyler v. Doe.*[41] In that case, the state of Texas argued that the exclusion of undocumented alien children from the political community justified denying them an education altogether.[42] Justice Brennan's opinion for a carefully balanced majority of five rejected the state's argument on a number of grounds. He noted the possibility that even undocumented alien children might someday become citizens,[43] but further observed that "education provides the basic tools by which individuals might lead economically productive lives," and that educational deprivation would promote "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."[44] On Brennan's view, the role of education in training future workers and consumers, and future addressees of the laws, also constrains the democratic distribution of education.

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37. *See, e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 113-15 (1973) (Marshall, J., dissenting).

38. *See* GUTMANN, *supra* note 25, at 13-14.

39. *Id.* at 147-48.

40. Gutmann herself probably would not endorse such a conclusion, since in a later essay she has acknowledged inattention to alien residents as a "blind spot" in conventional political theory. *See* Amy Gutmann, *Introduction, in* DEMOCRACY AND THE WELFARE STATE, *supra* note 20, at 3, 11.

41. 457 U.S. 202 (1982). Nor does she mention Nyquist v. Mauclet, 432 U.S. 1 (1977) (invalidating exclusion of aliens who did not intend to become citizens from university scholarship program), or Ambach v. Norwick, 441 U.S. 68 (1979) (upholding exclusion of aliens who did not intend to become citizens from employment as public school teachers).

42. 457 U.S. at 222 n.20, 229-30. New York had earlier made a similar argument for denying financial aid to resident alien college students who did not intend to naturalize. Nyquist v. Mauclet, 432 U.S. 1, 10-12 (1977).

43. 457 U.S. at 222 n.20, 230.

44. 457 U.S. at 221, 230.

The potentially misleading democratic pedigree of a right to education is paralleled by a democratic pedigree for the right to work. Rights to economic self-sufficiency have been derived as a guarantee needed to ensure every citizen the material preconditions of political participation.[45] This argument inverts the classical republican argument for disenfranchisement of the dependent into an instrumental argument for the right to a livelihood. Again, it could be concluded that a derived right to work is a right of citizenship, not a human right.

Shklar's argument for the right to work has a different logical structure, but a similar rhetorical thrust. Shklar links the right to vote and the right to earn as historically associated indicia of the dignity of citizens in our national version of democracy. The argument tells us that an American's negative and positive rights to earn deserve protection *because* the public ethos demotes nonearning citizens to second-class citizenship. This does not inevitably imply that a noncitizen's rights to earn are as insubstantial as her right to vote, but it does indicate that they lack the most salient rationale.

Moreover, one way to address the unemployment problems of citizens is to subordinate the employment rights of aliens to those of citizens. American labor has understood this point. For example, the electorate of Arizona responded to a depression in 1914 by approving an initiative measure "to protect the citizens of the United States in their employment against non-citizens of the United States" by capping at twenty percent the percentage of aliens permitted in the workforce of any employer with more than five employees.[46]

This Arizona statute became the occasion for a major precedent on the alien's negative right to work. The Supreme Court struck it down under the Equal Protection Clause of the Fourteenth Amendment in *Truax v. Raich,* emphasizing that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."[47] The Court also observed that denying aliens the opportunity to earn a livelihood would be tantamount to denying them "entrance and abode," thus infringing the exclusive power over immigration vested in the federal government.[48]

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45. *See, e.g.,* Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements,* 13 HARV. J.L. & PUB. POLY. 37 (1990); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy,* 1979 WASH. U. L.Q. 659, 677-78.

46. *See* Truax v. Raich, 239 U.S. 33 (1915); *see also* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 183 (2d ed. 1963) (attributing the initiative to the State Federation of Labor). The quotation in the text comes from the statute's title; the 20% cap included not only aliens but also anyone else who was neither a native-born citizen nor a qualified elector. 239 U.S. at 35.

47. 239 U.S. 33, 41 (1915). The plaintiff Mike Raich was an Austrian national and worked as a cook in a restaurant.

48. 239 U.S. at 41-42.

Truax v. Raich was confirmed and extended in later decisions. Some of these cases distinguish between public sector employment, where certain "jobs" have the character of political offices, and private sector employment.[49] Justice Rehnquist, of course, has disagreed, concluding that states could bar aliens from private professions such as law and engineering, as well as from the full range of public employment.[50]

Significantly, *Truax v. Raich* also illustrates the Court's assumption that government power over aliens' access to the U.S. labor market derives from government power over aliens' access to U.S. territory, not vice versa. The peculiar character of immigration law within the American constitutional system relates not to some primacy of labor law, but rather to notions of the sovereignty of the territorial nation-state and its right to regulate the presence of aliens within its borders.[51] In the late nineteenth century this sovereignty was articulated as a power both to exclude and to prescribe the conditions on which the alien could enter.[52] The power to set conditions regarding the alien's access to employment is not broader or more basic than the power to set conditions regarding the alien's consumption, investment, or travel.

In reality as in legal doctrine, admission and exclusion of aliens involves more than just labor market policy. Some immigrants are motivated by family ties. Others are refugees fleeing persecution in their homelands; or, while not technically refugees, they seek a freer political climate or a more tolerant culture. Some limits on immigration do reflect labor protection, but others involve considerations of public health, national security, or prevention of drug-related crime. Numerical limitations also reflect a concern that cultural change should not proceed so rapidly as to destabilize American society.

The rights afforded to aliens depend in part on their immigration status. American immigration law distinguishes between aliens admitted temporarily for limited purposes and aliens admitted with the prospect of residing indefinitely.[53] Once aliens have been permitted to center their lives in the United States, their need to work here rests on most of the same reasons as apply to citizens. They need to eat, and they need to support their families. They need money to participate in American society. They may need to maintain their human capital.

49. *See, e.g.*, Cabell v. Chavez-Solido, 454 U.S. 432 (1982); Sugarman v. Dougall, 413 U.S. 634 (1973).

50. *See* Examining Bd. of Engrs., Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 609 (1976) (Rehnquist, J., dissenting in part); Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting).

51. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 5-7 (1984).

52. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

53. *See* 8 U.S.C. § 1101(a)(15) (1988) (defining immigrant and nonimmigrant categories).

They need self-respect and control of their fates. (This may be a problem for refugees especially.) Ideally, productive work can contribute structure and meaning to life. Perhaps employment will not provide aliens with a civic position equal to that of working citizens, but the other benefits sufficiently justify affording them broad occupational freedom, as the United States has traditionally done.

Nonetheless, under current law an alien resident's right to work is not always secure. Since 1986, the imposition of comprehensive employer sanctions as a supplementary tool of immigration enforcement has increased the practical threats to aliens' exercise of their right to work. One danger comes from employers, who sometimes respond to the risk of liability for hiring unauthorized aliens by avoiding alien employees altogether.[54] Statutory antidiscrimination provisions partly counterbalance this danger, but Congress chose to protect only aliens who intend to naturalize against alienage discrimination.[55]

Another danger comes from the bureaucracy, because sanctions on employers make aliens' right to work dependent on documentary proof of employment authorization provided by the Immigration and Naturalization Service, an agency proverbial for delay and disrespect.[56] The problem is exemplified by recent litigation over such INS practices as giving interim replacement documentation to permanent residents whose cards have been lost or stolen that falsely portrays their status as temporary, and "lifting" the documentation of permanent residents whom the INS accuses of being deportable.[57] Fortunately, the courts have thus far recognized the seriousness of the injury imposed by even temporary deprivation of an alien's ability to work.[58]

American Citizenship would be a vehicle for regression, not reform, if the importance of alien residents' right to work were called into question by the characterization of earning as a distinctive attribute of

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54. *See* GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 38-43 (1990).

55. For the complex definition of the class of "protected individuals," see 8 U.S.C. § 1324b(a)(3)(B) (1990). This restriction may be mitigated in practical terms by the likelihood that the employer will have no way of knowing whether the alien is a "protected individual" or not.

56. *See, e.g.*, U.S. COMMN. ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 31-37 (1980) (noting inefficiency and hostility of INS representatives); U.S. SELECT COMMN. ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, FINAL REPORT 238-44 (1981) (recommending improvements in INS operations); Bill Ong Hing, *Estoppel in Immigration Proceedings — New Life From* Akbarin *and* Miranda, 20 SAN DIEGO L. REV. 11, 19 (1982) ("The INS has always been notorious for its lengthy delays in processing petitions and applications.").

57. *See* Etuk v. Slattery, 936 F.2d 1433 (2d Cir. 1991).

58. See *Etuk*, 936 F.2d at 1447, and the cases involving the INS's implementation of its regulations on employment authorization for asylum applicants. Ramos v. Thornburgh, 732 F. Supp. 696, 699-700 (E.D. Tex. 1989); Alfaro-Orellana v. Ilchert, 720 F. Supp. 792, 798 (N.D.Cal. 1989); Doe v. Meese, 690 F. Supp. 1572, 1577 (S.D. Tex. 1988).

citizenship in the United States. I assume that Professor Shklar did not intend this result when she adopted the rhetoric of citizenship as a weapon against unemployment. No doubt it would be unduly alarmist to suggest that a single volume of political philosophy, even by so respected an author, could have such a strong unintended effect.

Still, her invocation of citizenship follows a pervasive and troubling habit in political theory. A philosophical culture that concentrates needlessly on citizens can influence public political discourse and the legal culture. I do not mean to criticize or discourage deliberate investigation of the differences between citizens and aliens — indeed, I engage in it myself. But I do plead for more caution in resorting to the rhetoric of citizenship, on occasions when the rhetoric of humanity may suffice.