

Rights of Belonging as Citizenship Rights

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This paper considers the question of whether it is wise, or just, to root equality rights in the concept of citizenship. Scholars who argue in favor of doing so view citizenship as an inclusive concept, pursuant to which people are entitled to fundamental human rights simply because they are members of our national polity.² Others point out the exclusionary nature of rooting rights in citizenship, the danger that only United States citizens, and not other people who live in this country, will be entitled to individual rights.³ The inherent problem with linking rights to citizenship is that it may create a dichotomy between two classes of people – citizens and non-citizens.

Members of Congress have often invoked the concept of citizenship when enacting legislation defining and protecting what I call “rights of belonging,” those rights that promote an inclusive vision of who belongs to the national community of the United States and that facilitate equal membership in that community.⁴ That tradition dates back to the Reconstruction Era, when members of Congress expanded the national polity to include freed slaves and gave themselves the power to protect the individual rights of people within their jurisdiction. Making newly freed slaves “citizens” had an important symbolic value for members of the Reconstruction Congress. Members of that Congress believed that being a United States citizen entitled one to the enjoyment of the fundamental human rights that slaves had been theretofore denied.⁵

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² See, e.g., BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 21 (1999); CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 175 (2004).

³ See, e.g., Linda S. Bosniak, *Constitutional Citizenship through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1318 (2002); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997) (pointing out the danger of exclusion in a civic republican model of citizenship).

⁴ See generally REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION AND THE PROTECTION OF INDIVIDUAL RIGHTS* (2006). Rights of belonging are rooted in equality, but they promise more than the procedural notion of equal treatment. Instead, rights of belonging are substantive – they are intended to create the conditions that enable outsiders to belong as full participants in the national community. For example, the 1964 Civil Rights Act facilitates the belonging of people of color in our society because it removes barriers to that belonging created by discrimination. Legislation creating economic benefits such as the 1935 Social Security Act also facilitates participation because it provides the material conditions for the poorest in our society to survive without a daily struggle, and it promotes belonging by establishing a connection between the state and the individual. Legislation creating the right to organize and bargain collectively facilitates both the economic and political participation of working people in our society. All of this legislation creates rights of belonging because it invites outsiders to join the national community and declares the national community’s commitment to those outsiders. *Id.* at 6-8, 160-168.

⁵ See Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 310-311 (2000); AKHIL AMAR, *THE BILL OF RIGHTS* 196 (1998); Daniel A. Farber & John E. Muench, *The Ideological origins of the Fourteenth Amendment*, 1 Const. Comm. 235, 236 (1984).

The inclusive vision of citizenship is an appealing model for members of Congress who wish to expand rights of belonging based on the view that people are entitled to equality rights solely because they are members of the national community. Moreover, statutory rights based on citizenship send a powerful message of inclusion. When members of Congress enact legislation creating rights of belonging based on citizenship, they act as representatives of that community expanding it to outsiders.⁶ Citizenship also is an especially appealing model for those of us who value congressional enforcement of rights of belonging. The Supreme Court generally defers to congressional power to define citizenship.⁷ This fact is particularly important given that the Court has recently cut back on Congress' use of its other powers to protect equality rights.⁸

There is both an historical and a conceptual link between rights of belonging and citizenship rights. The power to define citizenship is equivalent to defining who "belongs" to the national polity. However, the power to define citizenship also includes the power to exclude. This is particularly clear when Congress uses its power over naturalization to define the requirements for becoming a naturalized citizen, to limit the ability of outsiders to become US citizens, and to limit the receipt of public benefits to non-citizens. Indeed, Congress' power over naturalization necessarily includes the power to exclude.⁹ When Congress defines the requirements for naturalization, Congress is defining who can be included, and who excluded, from the national polity.

My theory of rights of belonging is intended to be a more inclusive concept than citizenship rights because rights of belonging are not limited by the boundaries of US citizenship. Members of Congress have often invoked the concept of citizenship when they enact legislation defining and protecting rights of belonging for all people. For example, supporters of the 1964 Civil Rights Act argued that its purpose was to end the "second class citizenship" of African Americans in the Jim Crow south, but they drafted the bill to protect all "persons" against race discrimination.¹⁰ Those members of Congress believed that racial equality was a component of full citizenship rights, but they did not limit the scope of those rights to U.S. citizens.

Members of Congress often invoke Reconstruction when they expand rights of belonging, because Reconstruction represents the beginning of Congress' constitutional obligation to protect those rights. Therefore, the remainder of this paper will explore

⁶ Zietlow, *Enforcing Equality* at ____.

⁷ See Zietlow, *The Neglected Citizenship Clause and the Limits of Federalism*; Bosniak.

⁸ See *Boerne, U.S. v. Morrison*, Garrett, Kimel.

⁹ Bosniak.

¹⁰ See, e.g., Civil Rights Act of 1963, Additional Views of Hon. William T. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark McGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell, 88th Con. § 1. Report 914 Part 2 (1963) "the badge of citizenship – extended to Negro as well as white by the 14th Amendment – demands that establishments that do public business for private profit not discriminate on the grounds of race, color, national origin or religion." *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 111-112 (New York University Press 2006). Title VII of the Act also prohibits discrimination based on religion and gender in employment.

more closely the Reconstruction roots of rights of belonging to understand the meaning of citizenship to members of the Reconstruction Congress. During debates over the Reconstruction Amendments and the 1866 Civil Rights Act, members of Congress expressed an inclusionary vision of citizenship even as they enacted legislation that on its face protected only U.S. citizens. Thus, the debates raise the question of whether those members of Congress saw citizenship as a source of belonging or exclusion.

With the Thirteenth Amendment, members of that Congress ended slavery and empowered themselves to enforce the rights of the newly freed slaves. The vision of citizenship held by the Framers of the Thirteenth Amendment embodied both economic and racial equality.¹¹ With the Fourteenth Amendment, the Reconstruction Congress constitutionalized birthright citizenship and gave itself the power to enforce the rights of citizenship, and the due process and equal protection right of all persons, against infringement by the states. Though the terminology varied, the debates of the members of the Reconstruction Congress over these measures reveal that the same inclusive and expansive vision of citizenship rights underlay all of these measures.

The concept of national citizenship, and the question of whether such citizenship bestowed rights upon individuals that could not be denied by states, permeated congressional debates leading up to the Civil War. Abolitionists in Congress argued that the Privileges and Immunities Clause of Article IV prohibited states from denying the fundamental rights of freed Blacks who were considered to be citizens by the states in which they lived. Pro-slavery members of Congress refuted these claims, and insisted that people of African descent could not be citizens. The Supreme Court adopted the pro-slavery view of citizenship in *Dred Scott v. Sanford*.¹² In his opinion, Justice Taney with the abolitionists that citizenship was a font of fundamental rights, but he maintained that people of African descent could never enjoy those rights because they were not, and could not be, citizens of the United States. Taney's opinion insisted that people of African descent were never considered to be of "the People" protected by the Constitution. Thus, the Court's *Dred Scott* opinion was profoundly exclusionary.

One of the primary goals of the Reconstruction Congress was to overturn the Court's opinion in *Dred Scott* and establish freed slaves as citizens.¹³ Many members of that Congress believed that they accomplished this goal by enacting the Thirteenth Amendment, which abolished slavery and involuntary servitude, and with the Citizenship Clause of the 1866 Civil Rights Act, which was based primarily in Congress' power to enforce the Thirteenth Amendment. This is intriguing because the Thirteenth Amendment does not mention citizenship on its face. It prohibits involuntary servitude, but leaves open the question of which rights are entailed in the resulting freedom that former slaves would enjoy. A majority of the Reconstruction Congress believed that to

¹¹ See ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* (2004).

¹² 60 U.S. (19 How.) 393 (1856).

¹³ MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 77 (1986).

be free was to be a citizen, and to be entitled to fundamental human rights.¹⁴ There was little disagreement on this issue among supporters of the Reconstruction measures. The differences arose over whether the Thirteenth Amendment had sufficiently empowered Congress to enforce those rights against state infringement.

These doubts Act led to the adoption of the Fourteenth Amendment. Uncertainty over Congress' authority to legislatively overrule the Dred Scott decision prompted Congress to create birthright citizenship in that Amendment's Citizenship Clause.¹⁵ The Citizenship Clause, Privileges or Immunities Clause, and Section Five of the Fourteenth Amendment empower Congress to define and protect the rights of United States citizens. The Amendment's Equal Protection and Due Process Clauses further empower Congress to define and protect the rights of "any person" within Congress' jurisdiction. The Thirteenth and Fourteenth Amendments thus both represent a powerful commitment to rights of belonging and but their language leave ambiguous the question of whether a person would have to be a citizen in order to "belong."

The theory that Congress could extend citizenship rights to newly freed slaves is reflected in congressional debates as early as 1849. During a debate over the constitutionality of a South Carolina law that authorized the imprisonment of free Black sailors from northern states when they entered South Carolina waters, Rep. Hudson of Massachusetts characterized those laws as "imprisoning the free colored citizens of the United States who came into their waters."¹⁶ Rep. Ashmun, also from Massachusetts, elaborated that he believed that since the law was being enforced against "our own citizens," it violated the Privileges or Immunities Clause of Article IV.¹⁷ While Hudson defined the free Black men as United States citizens, and Ashmun defined them as citizens of Massachusetts, both men agreed that as citizens, those men enjoyed fundamental rights, including the right to travel, and were entitled to the protection of the United States constitution. Similarly, in 1850, Rep. Winthrop argued that freed Black men were citizens under federal law because states had recognized them as free men and claimed that the law does not distinguish between classes of free men.¹⁸ Thus, these antislavery constitutionalist members of Congress believed that citizenship was a source of fundamental rights for free Blacks years before the country adopted the Citizenship Clause of the Fourteenth Amendment.¹⁹

The United States Supreme Court resoundingly rejected this antislavery conception of citizenship in the case of Dred Scott v. Sanford. Nonetheless, some members of the Reconstruction Congress continued to articulate the theory rejected by the Court even before the Fourteenth Amendment overturned the Court's ruling. Immediately following the ratification of the Thirteenth Amendment, Senator Lyman Trumbull introduced the 1866 Civil Rights Act. The Citizenship Clause of that Act

¹⁴ Id. at 45-46.

¹⁵ See Rebecca E. Zietlow, Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship, 36 Akron L. Rev. 717, 731-732 (2003).

¹⁶ Cong Globe 30th Cong., 2d Sess. (Jan 31, 1849) at 418.

¹⁷ Id. at 419.

¹⁸ Cong. Globe S. 1654 (March 8, 1850).

¹⁹ See CURTIS, NO STATE SHALL ABRIDGE at 45.

provided “That all persons of African Descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory on account of race, color, or previous condition of servitude.”²⁰ The Act continued, “such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”²¹

Thus, the 1866 Civil Rights Act purported to establish freed slaves as citizens and endow them with fundamental human rights.²² As Senator Howard explained in a speech in support of the Act: “And what are the attributes of a freeman according to the universal understanding of the American people? . . . I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights there is to be hereafter no distinction between the white race and the black race.”²³

Introducing the 1866 Act, Senator Trumbull explained that Congress’ power to enact the bill came from Section Two, the Article IV Privileges and Immunities Clause, and Congress’ power over naturalization.²⁴ Senator Lane elaborated that former slaves “are free by the constitutional amendment lately enacted, and entitled to all the privileges and immunities of other free citizens of the United States.” He argued that Section Two made it Congress’ duty “by appropriate legislation, to carry out that emancipation” by enacting legislation such as the 1866 Civil Rights Act.²⁵ These members of the Senate expressed an inclusive vision of citizenship rights - that once slaves were freed, they immediately became entitled to the fundamental human rights that inhered in citizenship.²⁶

In the House, Rep. James Wilson, Chair of the House Judiciary Committee, speaking on the constitutionality of the 1866 Civil Rights act, agreed that the bill merely affirmed existing law. “It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen.”²⁷ Rep. William Lawrence elaborated: “Congress has the incidental power to enforce and protect the

²⁰ S. 474 39th Cong., 1st Sess. (Jan. 27, 29 1866).

²¹ Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27 (codified at 42 U.S.C. §§1981-1982 (2000)).

²² Robert J. Kaczorowski, Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons From Federal Remedies the Framers Enacted, 42 Harv. J. Leg. 187, 204 (2005).

²³ Cong. Globe, S. 504 (Jan. 30, 1866).

²⁴ Id. at 475.

²⁵ S. 602 (Feb. 1, 1866).

²⁶ That this theory persisted in the Reconstruction Congress is reflected in the remarks of Senator Morton during the debate over the 1871 Enforcement Act. Morton explained that Section 2 of the 13th Amendment gave Congress the power “to enforce the rights of citizenship to which the slave was admitted by the act of emancipation.” Cong Globe, March 28, 1871 (page no?????)

²⁷ Cong. Globe, H. 1117 (March 1, 1866)

equal enjoyment in the States of civil rights which are inherent in national citizenship (pursuant to the Article IV Privileges and Immunities Clause) If it has not, then the Declaration of Rights is in vain.”²⁸ Rep. John Bingham agreed with Wilson’s and Lawrence’s theories of the inherent rights of citizenship, though he disagreed with their view that Congress had the power to enforce those rights before they enacted the Fourteenth Amendment. Introducing his version of the 14th Amendment (which lacked a citizenship clause) he explained, “Every word of the proposed amendment is today in the Constitution of our Country, save the words conferring the express grant of power upon the Congress of the United States.”²⁹

The 1866 Civil Rights Act was approved by an overwhelming margin over the veto of President Andrew Johnson.³⁰ The overwhelming vote in favor of the 1866 Act reflects the strength of the belief in citizenship rights held by members of the Reconstruction Congress. However, led by Rep. John Bingham, some members of Congress continued to be concerned that Congress might lack the power to enforce those rights, especially against state governments.³¹ They enacted the Fourteenth Amendment in order to firmly establish congressional power to enforce the rights of citizenship. The Fourteenth Amendment also establishes the right to due process and equal protection of the laws for “any persons.” However, the debates over the Fourteenth Amendment reveal little, if any, dichotomy between the rights that would only be enjoyed by citizens and those that were not limited to citizens.

Members of the Reconstruction Congress saw citizenship as a means of belonging to a community. As leaders of the national community, they saw themselves as having a duty to facilitate the belonging of that community.³² This was most clearly the case with regard to the newly freed slaves. By making the newly freed slaves “citizens,” members of the Reconstruction Congress intended to signal that they now belonged to the national polity and should enjoy fundamental human rights as members of that polity. As citizens, those newly freed slaves (and the white northern sympathizers in the south) merited the protection of the federal government. Rep. Wilson of Iowa explained, “The citizen is entitled to the right of life, liberty and property,” and a remedy for the deprivation of those rights “must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the government.”³³

²⁸ H. 1835 (April 7, 1866).

²⁹ H. 1034 (Feb. 16, 1866). See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

³⁰ 1866 Civil Rights Act approved by a vote of 121 to 25 (45 abstentions). H. 348 (March 27, 1866) House vote to override H. 122 to 41 (21 abstentions, including Bingham) H. 1861 (April 7, 1866).

³¹ As John Bingham explained, “I find no fault with the introductory clause (of the Act), which is simply declaratory of what is written in the constitution, that every human being born within the jurisdiction of the United States is . . . a natural born citizen.” But, does Congress have the power to prohibit discrimination in civil rights? Congress lacks the power to prohibit states from discriminating. He would remedy this problem by amending the constitution, “expressly prohibiting the states from any such abuse of power in the future.” H.p. 1291 (March 9, 1866).

³² ZIETLOW, ENFORCING EQUALITY at 42-44.

³³ H. 1292 (March 9, 1866). See also H. 1263 (March 8, 1866) (statement of Rep. John Broomall) “The rights and duties of allegiance and protection are corresponding rights and duties. Upon whatever square foot of the earth’s surface I owe allegiance to my country, there it owes me protection.”

The theory that the national government owed its citizens protection in exchange for their allegiance was particularly compelling given that many freed slaves had joined the Union army and aided in the Union victory. As Rep. William Windom of Minnesota explained, “the colored soldier, who has worn the uniform of the Republic and periled his life for its defense, shall have an equal right, nothing more, with the white rebel yet reeking with the blood of our murdered defenders.”³⁴ Rep. Hubbard summed it up, describing the 1866 Act as a “shield of protection over four million American citizens, including old men, young men, and women and children. They are loyal and faithful, every one.” They helped on the battlefield and “prayed to God for the success of the nation’s banner. . . We owe them protection in return for their faithful allegiance.”³⁵ The social contract theory expressed in the foregoing remarks was widely held by members of the Reconstruction Congress.³⁶ To the extent that it implies a requirement of allegiance in exchange for protection, it has a potentially exclusionary edge.

Some members of Congress attempted to use citizenship and race as a wedge issue to encourage opposition to Reconstruction measures. For example, in response to a question about whether this amendment would affect the Chinese, Rep. William Higby of CA says “The Chinese are nothing but a pagan race. . . You cannot make citizens of them.” He explained, the difference between Negroes and the Chinese is that “They are foreigners and the Negro is a native.”³⁷ Similarly, Sen. Cowan was concerned that the Civil Rights Act would naturalize children of gypsies and Chinese.³⁸ These members of Congress opposed the Reconstruction measures and used nativist arguments against those measures. However, those arguments did not succeed. Responding to Sen. Cowan, Sen. Trumbull was not perturbed. He maintained that the law made no distinction between children of German and Asiatic parents, emphasizing that the bill would apply to all persons born in the United States.³⁹

Other members of Congress expressed concern that the language of citizenship could limit the scope of the rights that they were creating. For example, during the debate over the 1866 Act, Rep. Bingham complained that he did not like the fact that the bill limited its protections to “citizens.” Bingham argued that the bill was not just intended to protect freedmen, it was intended to apply to everybody and was expected to be permanent.⁴⁰ Bingham’s critique elicited no direct response. Perhaps no response was due since a few days prior to Bingham’s remark, Rep. James Wilson of Iowa, Chair Committee on Judiciary, had explained that the Committee recommended an amendment

³⁴ H.p. 1159 (March 2, 1866).

³⁵ H. 630 (Feb. 3, 1866). See also remarks of Sen. Trumbull: The goal is to “make citizens of everybody born in the United States who owe allegiance to the United States.” S. 572 (Feb. 1, 1866) “Allegiance and protection are reciprocal rights.” S. 1757 (April 4, 1866 – response to Johnson veto of 1866 civil rights act).

³⁶ See Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 San Diego L. Rev. 681, 695; EARL MALTZ, *THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION* 9 (2003).

³⁷ H. 1056 (Feb. 16, 1866)

³⁸ Cong Globe, S. 499 (Jan. 30, 1866).

³⁹ Cong Globe, S. 499 (Jan. 30, 1866).

⁴⁰ H p. 1292 (March 9, 1866).

to the civil rights bill to replace “inhabitants of” with “citizens of the United States in,” limiting the protection of the legislation to citizens, because it was not clear that Congress had the power to protect non-citizens.⁴¹

During the Senate debate over the 1866 Civil Rights Act, Sen. Wade expressed concern that Section One of the Act included the term “citizen” but did not define it. He warned, “If the government should fall into the hands of those who oppose us, they might misconstrue the term “unless we fortify and make it very strong and clear,” and suggested striking out the word “citizen” and replacing it with “person.”⁴² A few days later, Senator Howard responded to this concern by proposing the Citizenship Clause of the Fourteenth Amendment.⁴³ Howard did not believe that it was necessary to debate the meaning of that clause. Referring to the debates over the 1866 Civil Rights Act, he stated, “The question of citizenship has been so fully discussed in this body as not to need any further elucidation.”⁴⁴

Finally, some members of the Reconstruction Congress made it clear that they did not believe that their measures would extend to American Indians.⁴⁵ Responding to Sen. Johnson’s claim that the bill would make Indians American citizens, Sen. Trumbull pointed out the limiting phrase in the Act, “and not subject to foreign power.”⁴⁶ Sen. Sumner explained that matters with Indians were dealt with by treaty, not by statute, and were therefore beyond the scope of the Act.⁴⁷ “Indians not taxed” were eventually covered under the 1866 Act under a compromise measure, and Indians born within US borders were covered by the Citizenship Clause of the Fourteenth Amendment.⁴⁸ This dialogue suggests that these members of Congress did not believe that Native Americans “belonged” to the national polity. On the other hand, one of the earliest pieces of anti-peonage legislation prohibited peonage on Navajo reservations.⁴⁹ The equivocal approach to Indian tribes of members of the Reconstruction Congress reflects the equivocal nature of the sovereignty of those tribes in the mid Nineteenth Century.

Thus, there is a tension between the inclusive language of equality that permeated the Reconstruction debates and the fact that some rights that members of that Congress created were limited to citizens. Perhaps the explanation for this tension is the predominance of the social contract theory in the philosophy of the day. More likely,

⁴¹ H. 1115, March 1, 1866.

⁴² S. 2768 (May 23, 1866).

⁴³ U.S. CONST., Amend. IV, §1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”) The citizenship clause of the Fourteenth Amendment closely resembled that of the 1866 Civil Rights Act. Senator Howard’s original draft only referred to person’s “born” in the United States. The phrase “or naturalized” was added, without much discussion, pursuant to a last minute motion by Senator William Fessenden. S.p. 3040 (May 8, 1866).

⁴⁴ S.p. 2890 (May 30, 1866).

⁴⁵ See Maltz at 60-62.

⁴⁶ S. 506. (Jan. 30, 1866).

⁴⁷ S. 506. (Jan. 30, 1866).

⁴⁸ Id.

⁴⁹ See Joint Resolution to aid in relieving from Peonage Women and Children of the Navajo Indians, 40th Cong., 2d Sess. Res. 83 (July 27, 1868).

members of the Reconstruction Congress used the language of citizenship so often because of their overwhelming concern with expanding the national polity to include freed slaves. Abolitionists had relied on the rhetoric of citizenship to protect the existence of slavery and during Reconstruction they continued to use that same language as they abolished slavery and constitutionalized their power to define and protect fundamental human rights.

The concept of citizenship rights played an important role during the two other periods in our history marked by a rapid expansion of rights of belonging, the New Deal and the Second Reconstruction. Members of the New Deal Congress shared a constitutional vision marked by individual freedom and social citizenship.⁵⁰ The Reconstruction roots of the New Deal can be found in the Thirteenth Amendment and its promise of economic rights. Union activists had long argued that the right to organize was rooted in the promise of liberty in the Thirteenth Amendment.⁵¹ Members of the new Deal Congress invoked this vision as they enacted the Wagner Act, which created the right to organize and bargain collectively, facilitating the economic and political empowerment of workers in our country.⁵² Supporters of the Act invoked freedom of expression and freedom from involuntary servitude, reckoning back to their Reconstruction predecessors.⁵³ New Deal measures also which created an economic safety net, establishing established a national responsibility for the economic survival of people in our country, and furthering their ability to belong to the national community rather than struggling for survival.

Though members of the New Deal Congress invoked the Reconstruction ideals of equality and economic rights in their model of social citizenship, they failed entirely to support the cause of racial equality. The measures that they enacted overlooked the gross inequality, exploitation and violence of the Jim Crow South. They excluded domestic and agricultural workers from protections for workers due to the pressure from segregationist members of Congress who represented a part of the country that depended on the economic exploitation of African American agricultural and domestic workers.⁵⁴ Behind the scenes lawyers in the Civil Rights Section of Roosevelt's Department of Justice began to craft a legal strategy that would address both racial and economic equality via anti-peonage and anti-state violence litigation.⁵⁵ In addition, buoyed by the Wagner Act, the labor movement provided an important starting point for leaders of the nascent civil rights movement such as A. Phillip Randolph.⁵⁶ However, notwithstanding the important advances in economic rights in the New Deal ideology of "social citizenship," the New Deal is hardly a model for complete inclusion and belonging.

⁵⁰ William Forbath,

⁵¹ Jim Pope, Lea Vandervelde.

⁵² Zietlow, *Enforcing Equality* at 63-86.

⁵³ *Id.* at 75-80.

⁵⁴ *Id.* at 93-95.

⁵⁵ See RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 111-141 (2007).

⁵⁶ See MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* (2003).

In the 1960s, members of Congress again evoked the Reconstruction Era when they enacted the first civil rights measure since Reconstruction.⁵⁷ In speeches in support of the 1964 Civil Rights Act, Senator Hubert Humphrey explained that it was designed to end the system of second class citizenship embodied in segregation.⁵⁸ During this debate, leaders in the presidential administrations and in Congress often invoked the spirit of Reconstruction.⁵⁹ As President John F. Kennedy explained when he introduced the bill, “One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not free. . . . Now the time has come for the Nation to fulfill its promise. . . .”⁶⁰ Later, President Lyndon Johnson repeatedly linked the bill to Abraham Lincoln and the fact that the nation had recently celebrated the anniversary of the Emancipation Proclamation to urge members of Congress to support the bill.⁶¹ A group of House supporters of the bill, including Representatives Bill McCulloch and John Lindsay, echoed this theme in their statement in support of the bill, arguing in a memorandum that “the badge of citizenship – extended to Negro as well as white by the 14th Amendment – demands that establishments that do public business for private profit not discriminate on the grounds of race, color, national origin or religion.”⁶² Hence, the language of citizenship has been important to members of Congress expanding rights of belonging since the Reconstruction Era.

However, there are some dangers that are inherent when members of Congress invoke citizenship in support of expanding rights of belonging. First, the compromises necessary in the political process mean that not all outsiders will be included in such measures. Moreover, those who are furthest out – the most disenfranchised – won’t be included without a fight. During the New Deal Era, for example, those who were left out were precisely those who had been excluded from citizenship by the Court’s Dred Scott decision.

Any decision to facilitate belonging of a particular group implicitly incorporates a decision not to facilitate the belonging of other groups, arguably creating a hierarchy of protected categories. The 1964 Civil Rights Act does not draw lines based on citizenship, but it implicitly draws lines based on other criteria. For example, the 1964 Act prohibits employers from discriminating on the basis of race, ethnicity and religion but does not

⁵⁷ See Zietlow, *Enforcing Equality* at 112-121.

⁵⁸ ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964*, 199 (1990). (citing Norbert Mills, *The Speaking of Hubert Humphrey in favor of the Civil Rights Act* (Ph.D. dissertation, Bowling Green State University, 1974), 55, 79.

⁵⁹ See NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 111, 137, 182 (1992).

⁶⁰ JOHN KENNEDY, *PUBLIC PAPERS*, 1963, 469 (1964); CHARLES AND BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* xx (1985).

⁶¹ CQ Weekly Report, 281 (Feb. 7, 1964); See *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* (Robert D. Loevy, Ed. 1997).

⁶² Civil Rights Act of 1963, Additional Views of Hon. William T. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark McGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell, 88th Con. § 1. Report 914 Part 2 (1963).

extend its protection to gays and lesbians because it does not prohibit discrimination on the basis of sexual orientation. However, the exclusion is symbolically more profound when it is framed in terms of citizenship, limiting who “belongs” to the national polity.

The second problem with linking rights to citizenship is that citizenship marks an easy place to draw the line of non-inclusion when Congress is dividing up social goods. For example, Congress has often excluded non-citizens from welfare benefits. Moreover, during the current political climate, the language of citizenship is almost always used to exclude. Citizenship most often comes up in debates over immigration reform, with many people demanding the tightening of borders against illegal immigrants.

Unlike legislation limiting its benefits to citizens, which excludes precisely those people who are unable to participate in the national polity, legislation creating rights of belonging for one group of people does not preclude others from advocating for their rights in the political process. After the New Deal, African Americans then mobilized and demanded inclusion, and achieved legislation providing for their inclusion during the early 1960s. In the late 1960s, women did the same.⁶³ Indeed, political engagement itself is an act of belonging. While the Reconstruction predecessors left us with a strong inclusive vision of citizenship rights, advocates for rights of belonging must always be cognizant of the danger of exclusion inherent in the meaning of citizenship. Nevertheless, legislation creating rights of belonging always preserves the possibility of a more expansive, inclusive, vision of belonging.

⁶³ See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretations of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).