CONGRESSIONAL ENFORCEMENT OF THE RIGHTS OF CITIZENSHIP

*Rebecca E. Zietlow**

TABLE OF CONTENTS

I. INTRODUCTION

The twentieth century was marked by an expansion of equality rights by Congress and the federal courts. While the federal courts relied primarily on the Equal Protection Clause as a source of those rights, members of Congress relied on other sources as well, including the Thirteenth Amendment and the Commerce Clause.[1] However, at the end

* Charles W. Fornoff Professor of Law and Values, University of Toledo College of Law. Thanks to W. David Koeninger and Michael Vorenbreg for their comments on earlier drafts. Thanks to Brianna White for her excellent research assistance. Thanks to Mark Kende and the Drake University Law School for inviting me to participate in this fine symposium, and to the editors of the Drake Law Review for all of their hard work and hospitality.

1. Congress relied on the Commerce Clause to address private

of the twentieth century, the Supreme Court greatly limited Congress's autonomy to use its power to enforce the Equal Protection Clause and the Commerce Clause as a means of enforcing equality rights.[2] Therefore, it is necessary for members of Congress to consider a new source of congressional power to enforce those rights. This paper considers an alternative to the Equal Protection-based model of equality—congressional enforcement of the rights of citizenship pursuant to the Thirteenth Amendment, the Citizenship Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment. Reconsidering equality rights as "citizenship rights" provides an opportunity to transcend the equality-difference dilemma that requires comparison between categories of people, rather than a focus on the empowerment of outsiders.[3]

Members of Congress have often invoked the concept of citizenship when enacting legislation that defines and protects "rights of belonging"—those rights that promote an inclusive vision of who belongs to the national community of the United States and facilitate equal membership in that community.[4] That tradition dates back to the Reconstruction Era, when

discrimination because the Court had restricted Congress's power to apply the Equal Protection Clause to state action in the *Civil Rights Cases*. *See* Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts, and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 976–79 (2005).

2. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (restricting Congress's power to enact legislation enforcing the Equal Protection Clause with the "congruence and proportionality" test); *see also* Bd. of Trustees v. Garrett, 531 U.S. 356, 365 (2001) (applying the *Boerne* test to strike down legislation enforcing the right to be free from disability discrimination against state employers); United States v. Morrison, 529 U.S. 598, 613–14 (2000) (limiting Congress's power to enact civil rights legislation under the Commerce Clause to protecting "economic" rights); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204–05 (1995) (striking down a federal affirmative action program as violating the Due Process Clause).

3. *See, e.g.*, CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32–45 (1987) (describing this dynamic in the context of sex discrimination law).

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 fully participate in the national community. For example, the Civil Rights Act of 1964 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 Social Security Act of 1935, 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

members of Congress expanded the national polity to include freed slaves as citizens and gave themselves the power to protect the individual rights of people within Congress's 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 previously been denied.[5] During the other historic periods marked by the greatest expansion of rights of belonging, the New Deal and the Second Reconstruction of the 1960s, members of Congress hearkened back to the broad vision of citizenship rights held by their Reconstruction Era predecessors.

When members of Congress invoke citizenship as a source of rights of belonging, they rely on an inclusive concept of citizenship based on ties between the community and its members. Under this inclusive vision of citizenship rights, members of the national polity share mutual obligations and enjoy equal rights.[6] This inclusive vision of citizenship is an appealing model for members of Congress who wish to expand rights of belonging—people are entitled to equality rights solely because they are members of the national community. 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 by expanding it to outsiders.[7]

Citizenship is also an especially appealing model for those of us who value congressional enforcement of rights of belonging. There are several important reasons to focus on congressional protection of those rights. Historically, Congress has played a leading role in defining and protecting

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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, 160–68.

5. *See* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND CONSTRUCTION 195–97 (1998); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 236 (1984); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 310–11 (2000).

6. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 4 (1996) (emphasizing the importance of self-government and ties to community).

7. *See* ZIETLOW, *supra* note 4, at 11 ("Legislatures are the more natural enforcers of [rights of belonging] because legislatures represent the will of the community.").

those rights.[8] Congressional protection of rights also enjoys the advantage of the accountability and transparency of the legislative process, which promotes the enforcement of those rights.[9] Nevertheless, the Supreme Court recently has cut back on Congress's power to protect rights of belonging. In *City of Boerne v. Flores*, the Court restricted Congress's power to enforce the Fourteenth Amendment Equal Protection Clause.[10] In *Adarand Constructors, Inc. v. Pena*, the Court struck down affirmative action measures enacted by Congress to further what Congress considered to be the cause of racial equality.[11] In *United States v. Morrison*, the Court held that Congress could not use the Commerce Clause to enact civil rights legislation protecting non-economic rights.[12] All of these rulings present a challenge for those members of Congress who support innovative measures to fight inequality in our society.

In contrast, in the realm of citizenship rights the Court has largely deferred to Congress. The Court has recognized a virtually plenary role for Congress over immigration and naturalization policy.[13] The Court has repeatedly upheld measures based on Congress's power to protect the rights of citizenship.[14] The Court has also recognized that federalism-based limits do not apply to federal citizenship.[15] Finally, because the rights of federal citizenship are structurally based, they are not subject to federalism-based limitations such as the "state action" doctrine.[16]

Unfortunately, the inherent problem with linking rights to citizenship is that it creates a dichotomy between two classes of people—citizens and non-citizens. 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 U.S. citizens, and to limit

8. *Id.* at 38–127 (describing the history of congressional protection of rights of belonging through Reconstruction, the New Deal, and the Civil Rights Act of 1964).

9. *Id.* at 145–68 (describing the institutional advantages of Congress vis-á-vis courts as protectors of rights of belonging).

10. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

11. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204–05 (1995).

12. United States v. Morrison, 529 U.S. 598, 613 (2000).

13. *See* T. ALEX ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 11–23 (2002) (describing the Court's "plenary power" doctrine).

14. Zietlow, *supra* note 5, at 323.

15. *Id.* at 300–04.

16. *Id.* at 324–28.

the receipt of public benefits by non-citizens. Indeed, Congress's power over naturalization necessarily includes the power to exclude.[17] When Congress defines the requirements for naturalization, Congress is defining who can be included—and who will be excluded—from the national polity.

This Article considers the periods of history in which Congress has invoked the inclusive model of citizenship to expand equality rights. It is not necessary for members of Congress to be exclusionary when they define rights as citizenship rights. 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.[18] 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. However, each instance of Congress expanding rights in the name of "citizenship" is marked by a dialogue in which some people were included and others left out. Hence, this Article concludes by considering whether it is possible for members of Congress to invoke the inclusive model of citizenship without raising the specter of exclusion.

II. RECONSTRUCTION AND THE RIGHTS OF CITIZENSHIP

Members of Congress often invoke Reconstruction when they expand rights of belonging because Reconstruction represents the beginning of Congress's constitutional obligation to protect those rights. This Part explores the meaning of citizenship to members of the Reconstruction Congress. With the Thirteenth Amendment, members of that Congress ended slavery and empowered themselves to enforce the rights of the newly freed slaves. The framers of the Thirteenth Amendment believed that citizenship rights included both economic and racial equality.[19] With the Fourteenth Amendment, the Reconstruction Congress

17. *See* Linda S. Bozniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059 n.34 (1994) ("[T]he power to expel or exclude aliens is a fundamental sovereignty attribute exercised by [Congress] . . . .").

18. *See, e.g.*, H.R. REP. NO. 88-914, pt. 2, at 7 (1963) ("the badge of citizenship—extended to Negro as well as white by the Fourteenth amendment—demands that establishments that do public business for private profit not discriminate on the grounds of race, color, national origin, or religion."); ZIETLOW, *supra* note 4, at 111–12. Title VII of the Act also prohibits discrimination based on religion and gender in employment. 42 U.S.C. § 2000e-2 (2000).

19. *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 42–43 (2004).

constitutionalized birthright citizenship and gave itself the power to enforce the privileges and immunities of citizenship, and the due process and equal protection rights of all persons. Though the terminology varied, the debates of the Reconstruction Congress reveal that the same inclusive and expansive vision of citizenship rights underlay all of these measures.

A. *The Roots of the Reconstruction Model of Citizenship Rights*

The original Constitution and the Bill of Rights contain few references to the word "citizen." Only United States citizens can be members of the House or Senate,[20] and only "natural born" citizens are eligible to be President.[21] The jurisdiction of the federal courts extends to controversies between citizens of different states.[22] Congress is also given the power to establish a "uniform Rule of Naturalization" and thus determines the conditions under which non-citizens are eligible to become citizens.[23] Therefore, the original Constitution contemplated two levels of citizenship—state and federal. Federal citizenship was required to be an elected representative of the federal government. Interestingly, however, it was not required to be a federal judge. Members of Congress had the power to determine who would be a naturalized federal citizen.[24] State citizenship is linked to certain federal rights, including the right to litigate in federal court and the right to the privileges and immunities of citizenship.

The Bill of Rights does not mention the term citizenship, extending rights to "persons" instead.[25] Citizenship is linked to individual rights in

20. U.S. CONST. art. I, § 2, cl. 2 (House); *id.* at § 3, cl. 3 (Senate).

21. *Id.* at art. II, § 1, cl. 5.

22. *See id.* at art. III, § 2, cl. 1. The portion of Article III authorizing jurisdiction between a state and citizens of another state, to the extent that it authorizes suits for damages, was eliminated by the Eleventh Amendment. *Id.* at amend. XI. Article III also extends the federal jurisdiction to controversies "between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." *Id.* at art. III, § 2, cl. 1.

23. *Id.* at art. I, § 8, cl. 4.

24. *See* ROGERS M. SMITH, CIVIC IDEALS 119 (1997) (discussing the power of Congress to govern naturalization under Article I, Section 8).

25. *See, e.g.*, U.S. CONST. amend. IV (protecting "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."); *id.* at amend. V (protecting the due process rights of persons); *id.* at amend. IX (reaffirming the unenumerated rights of "the people"); *id.* at amend. X (reserving the powers not delegated to the United States to the states or the "people").

only one clause of the original Constitution—the Privileges and Immunities Clause of Article IV. That Clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States."[26] During the first half of the nineteenth century, the extent and content of the privileges and immunities of citizenship became a focal point for battles over slavery and the power of free states to bestow rights upon blacks who were not slaves.

The antebellum disputes over the meaning of citizenship were due to the fact that the original Constitution is ambiguous in certain important respects. First and most importantly, what is the definition of a citizen?[27] This issue became a matter of much debate as disputes arose over the question of whether free blacks were United States citizens. The Constitution refers to slaves only as persons in the infamous "Three-Fifths"[28] and Fugitive Slave[29] Clauses, but it is ambiguous as to the status of blacks who were not slaves. Battles emerged over whether states had the power to make free blacks citizens. The other major battles focused on whether state or federal citizenship would predominate, and whether there were rights of federal citizenship. Abolitionists seized upon the concept of federal citizenship as a source of rights that could undermine the institution of slavery.

The link between citizenship and fundamental rights was reflected in congressional debates well before the Reconstruction Era. As early as the First Congress, representatives from southern states believed that it would be problematic if northern states decided to bestow citizenship upon freed slaves.[30] Responding to those concerns, Congress asserted a more limited

26. *Id.* at art. IV, § 2, cl. 1.

27. *See* SMITH, *supra* note 24, at 116 (arguing that "the Constitution said little about citizenship owing to the status's pivotal, not minimal, importance").

28. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

29. *Id.* at art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

30. *See* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 792–94 (1994) (detailing the heated debates in Congress between Southern representatives who wished to maintain the status quo and Northern representatives who believed the slaves should be freed).

authority over citizenship in later naturalization acts.[31] In 1820, a provision in Missouri's proposed draft constitution that would have prohibited free blacks from entering the state almost prevented the Missouri Compromise because some northern representatives argued that the provision violated the Article IV Privileges and Immunities Clause.[32]

Disagreement over the federal rights of citizenship flared up again during congressional debates in 1849 and 1850 over the South Carolina Seaman's Acts, which authorized the imprisonment of free black sailors from northern states when they entered South Carolina waters. Representative Hudson of Massachusetts characterized those laws as "imprisoning the free colored citizens of the United States who came into their waters."[33] Representative Ashmun, also from Massachusetts, believed that because the law was being enforced against "our own citizens," it violated the Privileges and Immunities Clause of Article IV.[34] While Hudson defined the free black men as United States citizens and Ashmun referred to them as citizens of Massachusetts, both men agreed that, as citizens, black sailors from Massachusetts who entered South Carolina waters enjoyed fundamental rights—including the right to travel—and were entitled to the protection of the United States Constitution. Similarly, in 1850, Senator Winthrop of Massachusetts argued that the Seaman's Acts were invalid because freed black men were citizens under federal law once states had recognized them as free men.[35] Thus, these same members of Congress believed that citizenship was a source of fundamental rights for free blacks years before the Reconstruction amendments.

The remarks of Hudson, Ashmun, and Winthrop reflected the ideology of a group of abolitionists known as anti-slavery constitutionalists. In his 1849 book, *Treatise on the Unconstitutionality of American Slavery*, abolitionist Joel Tiffany argued that "[t]he *object* of the national government was to protect the natural and inalienable rights of each citizen

31. *Compare* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103–04 (repealed 1795) (Congress's first naturalization act) *with* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 192 (1997) (explaining the repeal of the "hospitable" first naturalization act and the subsequent "more niggardly" Naturalization Act of 1795, which clarified issues left unanswered by the first act).

32. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 245–49 (2001).

33. CONG. GLOBE, 30th Cong., 2d Sess. 418 (1849).

34. *Id.* at 419.

35. CONG. GLOBE, 31st Cong., 1st Sess. 2066 (1850).

. . . ."[36] Persuaded by Tiffany and others anti-slavery constitutionalists maintained that the Privileges and Immunities Clause of Article IV and the Due Process Clause of the Fifth Amendment enabled northern states to make freed slaves citizens, and provided federal protections for free blacks.[37] Prior to the Civil War, this view of the Constitution was not widely held. However, during Reconstruction, anti-slavery constitutionalism was highly influential. Ten of the fifteen members of the Joint Committee on Reconstruction were anti-slavery constitutionalists, including the principal author of Section 1 of the Fourteenth Amendment, Ohio Representative John Bingham.[38]

Pro-slavery members of Congress refuted the claims of the anti-slavery constitutionalists. They insisted that people of African descent could not be citizens.[39] The Supreme Court adopted their pro-slavery view of citizenship in *Dred Scott v. Sandford*.[40] In his opinion, Justice Taney agreed with the abolitionists that citizenship was a font of fundamental rights.[41] However, he aligned with the pro-slavery forces in his belief that people of African descent could never enjoy those rights because they were not and could not be citizens of the United States.[42] In *Dred Scott*, the Court held that people of African descent had never been considered part of "the People" protected by the Declaration of Independence and the Constitution.[43] Thus, the Court's *Dred Scott* opinion was profoundly exclusionary. While the members of the Supreme Court hoped their *Dred Scott* opinion would end the battle over rights of citizenship, instead it fanned the flames of abolitionist fervor and contributed to the tension over

36. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 43 (quoting JOEL TIFFANY, TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY, TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT 55 (1849)) (emphasis added).

37. *Id.* at 28, 42; JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 60 (1983).

38. BAER, *supra* note 37, at 62.

39. *See id.* at 66–67 (discussing the southern anti-theory followed by many pro-slavery congressmen and expounded by political writer John C. Calhoun, which held that, despite the Declaration of Independence, the African racial group was not entitled to the liberty and rights enjoyed by adult white males).

40. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

41. *Id.* at 403.

42. *Id.* at 404.

43. *Id.* at 406–07.

slavery that exploded into the Civil War.[44]

B. *Citizenship and the Thirteenth Amendment*

After the Civil War, 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.[45] Many members of that Congress believed they accomplished this goal by enacting the Thirteenth Amendment—abolishing slavery and involuntary servitude—and by declaring freed slaves citizens in the Citizenship Clause of the Civil Rights Act of 1866. The Citizenship Clause of the 1866 Civil Rights Act is intriguing because the Thirteenth Amendment does not mention citizenship on its face. The Amendment prohibits involuntary servitude, but leaves open the question of which rights are included in the resulting freedom of former slaves.[46] Debates over the Act of 1866 reveal that a majority of the members of the Reconstruction Congress believed that to be free was to be a citizen entitled to fundamental human rights.[47] There was little disagreement on this issue among supporters of the Reconstruction measures.

Senator Lyman Trumbull introduced the 1866 Civil Rights Act immediately after the ratification of the Thirteenth Amendment. The Citizenship Clause of that Act 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 of the United States on account of race, color, or previous condition of slavery.[48]

The Act further provided:

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44. *See* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 274 (1981) (discussing the *Dred Scott* decision's influence on "Lincoln's election and Republican congressional success" and "the nearly total rejection of comity by some northern and southern state courts," and asserting that "*Dred Scott* was a factor in causing the war").

45. CURTIS, *supra* note 36, at 57–58, 62–63 (detailing the progress of the proposal for the Fourteenth Amendment prior to its passage and the assumptions of the proposal that ran contrary to the holding of the *Dred Scott* opinion).

46. U.S. CONST. amend XIII.

47. CURTIS, *supra* note 36, at 48 ("Republicans believed that the Thirteenth Amendment effectively overruled *Dred Scott* so that blacks were entitled to all rights of citizens.").

48. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

> inhabitants, 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.[49]

Thus, the Civil Rights Act of 1866 linked citizenship to civil rights.[50] 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.[51]

Introducing the Act of 1866, Senator Trumbull explained that Congress's power to enact the bill came from Section 2 of the Thirteenth Amendment, the Article IV Privileges and Immunities Clause, and Congress's power over naturalization.[52] His colleague, 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."[53] Lane argued that the Act of 1866 was an example of "appropriate legislation, to carry out that emancipation" of the Thirteenth Amendment.[54] These members of the Senate expressed an inclusive vision of citizenship rights—once slaves were freed, they immediately became entitled to the fundamental human rights that inhered in citizenship.

In the House, Representative James Wilson, Chair of the House

49. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended and with some differences in language at 42 U.S.C. §§ 1981–1982 (2000)).

50. *See* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 204 (2005). The Act "conferred U.S. citizenship on all Americans" and granted access to the federal courts "whenever individuals were denied their civil rights in the states' systems of justice." *Id.*

51. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).

52. *Id.* at 474–75.

53. *Id.* at 602.

54. *Id.*

Judiciary Committee, agreed that the bill merely affirmed the rights that were inherent in the citizenship of the newly freed slaves. He said, "It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen."[55] Representative William Lawrence elaborated: "Congress has the incidental power to enforce and protect the equal enjoyment in the States of civil rights which are inherent in national citizenship . . . . If it has not, then the Declaration of Rights is in vain."[56]

Representative 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 Fourteenth Amendment—which lacked a citizenship clause—he explained, "Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States."[57] The Civil Rights Act of 1866 was approved by an overwhelming margin over the veto of President Andrew Johnson.[58] The overwhelming vote in favor of the Act reflects the strength of the belief in citizenship rights held by members of the Reconstruction Congress.

C. *The Fourteenth Amendment and Congressional Power*

While the congressional supporters of Reconstruction shared a broad vision of the rights of citizenship, differences arose over whether the Thirteenth Amendment had sufficiently empowered Congress to enforce those rights against state infringement. These doubts led to the adoption of the Fourteenth Amendment. Led by Representative John Bingham, some members of Congress were concerned that Congress might lack the power to enforce the rights contained in the Civil Rights Act of 1866, especially

55. *Id.* at 1117.

56. *Id.* at 1835.

57. *Id.* at 1034. *See generally* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993). Aynes argues that recent scholars incorrectly interpret Bingham's views about the Fourteenth Amendment as "unreliable" and "singular," when in fact, "Bingham consistently espoused a cogent theory about the purpose of the Fourteenth Amendment" and "many of Bingham's contemporaries shared his beliefs." *Id.* at 62.

58. The House vote to override the president's veto was 122 yeas to 41 nays (21 abstentions, including Bingham). CONG. GLOBE, 39th Cong., 1st Sess. 1861 (1866).

against state governments.[59] Congress enacted the Fourteenth Amendment 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 person."[60] 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. The debates over the Fourteenth Amendment immediately followed the debates over the 1866 Act and reflect the same ideology as the statute.

Uncertainty over Congress's authority to legislatively overrule the *Dred Scott* decision prompted Congress to create birthright citizenship in the Fourteenth Amendment's Citizenship Clause.[61] During the Senate debate over the Civil Rights Act of 1866, Senator Wade expressed concern that Section 1 of the Act included the term "citizen" but did not define it.[62] He warned, "[I]f the government should fall into the hands of those who are opposed to the views that some of us maintain" they may misconstrue the term "unless we fortify and make it very strong and clear."[63] He suggested striking out the word "citizen" and replacing it with "person."[64] These remarks raised the specter of the *Dred Scott* decision, in which the Court had applied the exclusionary model of citizenship rights to deny citizenship rights to precisely those people that Congress was trying to protect.[65] A few days later, Senator Howard responded to this concern by

59. 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." *Id.* at 1291. But, does Congress have the power to prohibit discrimination in civil rights? Congress lacks the power to prohibit states from discriminating. Bingham would have remedied this problem by amending the Constitution, "expressly prohibiting the States from any such abuse of power in the future." *Id.*

60. U.S. CONST. amend. XIV, § 1.

61. *See* Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 731–32 (2003) (discussing the addition of the Citizenship Clause by the Senate—after the House had already approved the Amendment without it—to settle the question of whether Congress "had the power to declare freed slaves as Citizens in the Civil Rights Act of 1866").

62. CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866). Representative Wade identified "a good deal of uncertainty in our Government" about the term. *Id.*

63. *Id.* at 2768–69.

64. *Id.*

65. It is difficult to overstate the impact of the *Dred Scott* decision on the

proposing the Citizenship Clause of the Fourteenth Amendment.[66] Howard did not believe that it was necessary to debate the meaning of that Clause. Referring to the debates over the Civil Rights Act of 1866, he stated, "[T]he question of citizenship has been so fully discussed in this body as not to need any further elucidation . . . ."[67]

Bingham's primary goal in introducing the Fourteenth Amendment was to ensure that Congress would have the power to protect the rights of citizenship and other individual rights against state infringement. He explained, "Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution."[68] Other members of Congress also made it clear that they viewed themselves, and not the courts, as the primary protectors of rights of belonging.[69] Those members of Congress saw the U.S. Supreme Court as an apologist for the Slave Power, not a protector of individual rights. *Dred Scott* provided the background paradigm for the Reconstruction Congress's view of the Court's relationship to racial equality.[70] The overwhelming vote in favor of the

Reconstruction Congress. Members of that Congress made it clear that they not only disagreed with the Court's decision, but that the decision made them distrustful of the Court's power. They saw *Dred Scott* as a decision of a political, activist Court that was representing the interests of the Slave Power. They feared that the Court would use its power to abolish or limit the new rights they were creating. Sadly, decisions such as the *Slaughter-House Cases*, *United States v. Cruikshank*, and the *Civil Rights Cases* show that their fears proved to be well founded.

66. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). The Citizenship Clause of the Fourteenth Amendment closely resembled that of the Civil Rights Act of 1866. Senator Howard's original draft only referred to persons "born" in the United States. *Id.* The phrase "or naturalized" was added, without much discussion, pursuant to a last minute motion by Senator William Fessenden. *Id.* at 3040. *See also* U.S. CONST. amend. XIV, § 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.").

67. CONG. GLOBE, 39th Cong., 1st Sess. at 2890 (1866).

68. *Id.* at 1034.

69. *See, e.g.*, *id.* at 1056 (statement of Rep. Higby) ("But, sir, it is no more than due and proper caution . . . that we should hold the power which we possess here in this legislative body to decide this question for ourselves, and in our own way."); s*ee also* ZIETLOW, *supra* note 4, at 50 (explaining that other members of Congress "believed the courts were unable, or unwilling, to adequately protect the right of belonging").

70. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1856) (holding that African-Americans—slaves—were not entitled to the rights and privileges of

Civil Rights Act of 1866, notwithstanding the fact that its citizenship clause purported to legislatively overturn *Dred Scott*, is just one example of the disdain that the members of the Reconstruction Congress had for the Court.[71]

Those members of Congress intended their enforcement power to be extremely broad. They carefully chose the word "appropriate" in Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment to invoke the Court's deferential approach to congressional power in its opinion in *McCulloch v. Maryland*.[72] They used that power to enact a broad range of legislation protecting rights of belonging, including civil rights legislation, the Reconstruction Acts, and the Freedman Bureaus bills. All of this legislation was justified in the name of expanding citizenship and ensuring that the rights of new citizens would be protected.

D. *The Reconstruction Theory of Citizenship*

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 people in that community.[73] This was most clearly the case with regard to the newly freed slaves. By making newly freed slaves citizens, members of the Reconstruction Congress signaled that they now belonged to the national polity and should enjoy fundamental human rights as members of that polity. As citizens, the newly freed slaves—like the white northern sympathizers in the south—merited the protection of the federal government. Representative 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."[74]

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citizens); *see also* ZIETLOW, *supra* note 4, at 53 ("The Citizenship Clause of the Fourteenth Amendment was expressly intended to overrule the Court's decision in *Dred Scott*.").

71. *But see* CURTIS, *supra* note 36, at 48 (explaining, in another example of disdain for racial decisions of the Court, that the members of Congress who voted for the Civil Rights Act of 1866 believed that even the Thirteenth Amendment had overruled *Dred Scott*); s*ee also supra* note 70 and accompanying text.

72. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); *see, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statements of Rep. Wilson).

73. ZIETLOW, *supra* note 4, at 43.

74. CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866); *see also id.* at 1263 ("The rights and duties of allegiance and protection are corresponding rights and duties.

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 Representative 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. . . ."[75] Representative Hubbard summed it up, describing the Civil Rights Act of 1866 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."[76] 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. . . ."[77]

The social contract theory expressed in the foregoing remarks was widely held by members of the Reconstruction Congress.[78] To the extent that it implies a requirement of allegiance in exchange for protection, it has a potentially exclusionary edge because allegiance is a prerequisite for membership. On the other hand, it is inclusionary in that any person who swears allegiance can become a citizen. Interestingly, the Citizenship Clause itself requires no voluntary action for citizenship—all one has to do is be born in this country.

The notion of equality was crucial to the members of the Reconstruction Congress, and they expressed their vision of equality not only in the Equal Protection Clause, but also when defining the rights of citizenship. While introducing Section 1 of the Fourteenth Amendment on the floor of Congress, Senator Howard explained that the Amendment "establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most

Upon whatever square foot of the earth's surface I owe allegiance to my country, there it owes me protection.") (statement of Rep. Broomall).

75. *Id.* at 1159.

76. *Id.* at 630. Senator Trumbull further remarked that the goal was "to make citizens of everybody born in the United States who owe allegiance to the United States," and that "[a]llegiance and protection are reciprocal rights." *Id.* at 572, 1757. The second response was to Johnson's veto of the Civil Rights Act of 1866.

77. *Id.* at 630–31.

78. Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 695 (1997).

wealthy, or the most haughty."[79] The Reconstruction debates resounded with the language of equality, and the Reconstruction legislation embodies that vision.

Although members of the Reconstruction Congress viewed citizenship as a powerful source of inclusion and a font of fundamental rights, they saw Congress, not the federal courts, as the primary protectors of those rights.[80] The members of the Reconstruction Congress left the content of what those rights would be to future members of Congress. However, they gave some guidance as to what they viewed as the rights of citizenship. First and foremost, were the rights to life, liberty, and property established by the Thirteenth Amendment and the Civil Rights Act of 1866.[81] Second, it was widely believed that the privileges and immunities of citizenship included those rights contained in the Bill of Rights.[82] Finally, many members of Congress articulated a natural rights theory of citizenship. Citing the influential circuit court decision of *Corfield v. Coryell*,[83] they argued that the rights of citizenship included all fundamental human rights.[84]

The issue that most divided the Reconstruction Congress was whether those fundamental rights included the right to vote. Radical representatives, such as Representative William Windom, repeatedly advocated that freed slaves would not be full members of the national polity unless they had the right to vote.[85] However, the predominant

79. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). It should be noted that the Fourteenth Amendment did not yet include the Citizenship Clause when Howard made that remark, but that was because he did not believe it to be necessary. *See supra* notes 62–65 and accompanying text.

80. CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866) (statement of Rep. Higby).

81. U.S. CONST. amend. XIII; Civil Rights Act of 1866 (codified as amended and with some differences in language at 42 U.S.C. §§ 1981-1982 (2000)).

82. *See* CURTIS, *supra* note 36, at 49–54 (discussing the beliefs of Reconstruction congressmen that privileges and immunities of citizenship included fundamental rights, that the Bill of Rights limited both state and federal governments, and that Congress could enact legislation to enforce those two ideas).

83. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

84. CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (1866) (statement of Rep. Trumbull).

85. *See, e.g.*, *id.* at 1159; s*ee also* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, at 22 (1974) (explaining that radical Republicans argued insistently "that black southerners be given a meaningful role in the political life of the restored states"—i.e., the right to vote); Xi Wang, *The Making of Federal Enforcement Laws, 1870–1872*, 70 CHI.-KENT

theory at the time was that the right to vote was not a right of citizenship, but a political right.[86] Some states granted the right to vote to non-citizens. Women and children, though citizens, did not share the right to vote.[87] Other members of Congress were also concerned that extending the right to vote would be too controversial and would prevent the legislative success of their Reconstruction program.[88] The success of the Fifteenth Amendment, which extended the right to vote free of racial discrimination, was due in part to political expediency. As the Confederate states were re-admitted to the country, Republican members of Congress realized that they would soon be outnumbered if their black southern allies were not able to vote.[89]

Since Reconstruction, however, the right to vote has become indelibly linked to citizenship in our national ideology and constitutional law. From the Reconstruction Era until the passage of the Nineteenth Amendment, which gave women the right to vote in 1920, women suffragists argued that without the right to vote they were only second-class citizens.[90] During the 1950s and 1960s, civil rights activists made the same claim as they challenged their disenfranchisement in southern states, which was occurring in blatant violation of the Fifteenth Amendment.[91] Implicitly accepting the claim that citizenship includes the right to vote, all of the constitutional amendments that extend the franchise, including the Fifteenth Amendment, limit their protections to United States citizens.[92]

L. REV. 1013, 1029 (1995) (arguing that radical Republicans saw the right to vote as "an integral part of federal citizenship").

86. *See* CURTIS, *supra* note 36, at 79 (discussing Congressman M. Russell Thayer's view that the Civil Rights Act of 1866 protected "'civil rights and immunities,'" not political privileges, such as suffrage); BENEDICT, *supra* note 85, at 136 (explaining how conservative and centrist members of Congress sought to reapportion congressional representation on the basis of the number of voters in a state rather than actually extend voting rights to blacks).

87. ALEINIKOFF, *supra* note 13, at 182.

88. BENEDICT, *supra* note 85, at 115–16.

89. *Id.* at 325–36.

90. *See* Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment*, 1 DUKE J. GENDER L. & POL'Y 89, 113–14 (1994) (discussing the case of *Minor v. Happersett*, which "constitutionalized women's status as second-class citizens").

91. *See* ZIETLOW, *supra* note 4, at 123 (discussing civil rights activists' demands for legislation to enforce the Fifteenth Amendment and finally allow blacks to "engage in the mainstream political process").

92. *See* U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition

E. *Citizenship and Exclusion in the Reconstruction Congress*

During the period of Reconstruction, the congressional debates illustrate that the language of equality was expressed in terms of citizenship. The concept of citizenship had been the anchor for those who advocated equal rights before the Civil War. After the Civil War, when the equal-rights advocates had power in Congress, they continued to use that language to invoke the inclusive model of citizenship. Abolitionists had relied on the rhetoric of citizenship to protest 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. However, the puzzle remains—why did those members of Congress extend some of those rights to "persons" and others only to "citizens"? To what extent did those members of Congress intend to exclude non-citizens from fundamental rights?

Some 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 Civil Rights Act of 1866, Representative Bingham criticized the fact that the bill limited its protections to citizens.[93] Bingham argued that the bill was not just intended to protect freed men; it was intended to apply to everyone and it was expected to be permanent.[94] Bingham's critique elicited no direct response. Perhaps no response was due: a few days prior to Bingham's remark, Representative James Wilson of Iowa, Chair of the House Committee on the Judiciary, had explained that the Committee recommended an amendment to the civil rights bill to replace "'inhabitants of'" with "'citizens of the United States in,'" thus limiting the protection of the legislation to citizens because it was not clear that Congress had the power to protect non-citizens.[95]

It is possible that the term "citizenship" was also used to exclude non-citizens, such as the Chinese immigrants in the western part of the country. Representative William Higby of California claimed that it would not

of servitude."); *id.* at amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex."); *id.* at amend. XXIV ("The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of any failure to pay any poll tax or other tax."); *id.* at amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age.").

93. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).

94. *Id.*

95. *Id.* at 1115.

affect the citizenship of people of Chinese origin because "[t]he Chinese are nothing but a pagan race . . . . You cannot make citizens of them."[96] He claimed that the difference between the Chinese and Negroes is that "[the Chinese] are foreigners and the [N]egro is a native."[97] Similarly, Senator Cowan was concerned that the Civil Rights Act would naturalize children of Gypsies and Chinese.[98] While Higby voted in favor of the Act,[99] Cowan opposed Reconstruction measures, used these arguments against the Act as a whole, and eventually voted against it.[100] Notably, the Act's chief sponsor, Senator Lyman Trumbull was not perturbed in his response to Senator Cowan. 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.[101] Thus, the evidence in favor of any exclusionary motive in the Reconstruction Congress's use of the term "citizenship" in the Civil Rights Act of 1866 is inconclusive.

In addition, some members of the Reconstruction Congress made it clear they did not believe that their measures would extend to American Indians.[102] Responding to Senator Johnson's claim that the bill would make American Indians into citizens, Senator Trumbull pointed out the limiting phrase in the Act: "'[a]nd not subject to any foreign Power.'"[103] Senator Sumner explained that matters with Indians were dealt with by treaty, not by statute, and were therefore beyond the scope of the Act.[104] This dialogue suggests that these members of Congress did not believe that American Indians "belonged" to the national polity. On the other hand, one of the earliest pieces of anti-peonage legislation prohibited peonage on Navajo reservations.[105] Indians who were not taxed were eventually covered by the Civil Rights Act of 1866 under a compromise measure, and

96. *Id.* at 1056.
97. *Id.*
98. *Id.* at 498.
99. *Id.* at 1367 (House vote of Mar. 15, 1866).
100. *Id.* at 606–07 (Senate vote of Feb. 2, 1866).
101. *Id.* at 498.
102. *See* EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 60–62 (2003) (discussing the discord among Republican senators over including American Indians—some of whom owed allegiance to tribal authority and others who owed allegiance only to the United States government—whom many viewed as belonging to the lowest of classes).
103. CONG. GLOBE, 39th Cong., 1st Sess. 506 (1866).
104. *Id.*
105. *See* H.R.J. Res. 83, 40th Cong. (1868).

Indians born within the United States' borders were covered by the Citizenship Clause of the Fourteenth Amendment.[106] The equivocal approach members of the Reconstruction Congress took regarding Indian tribes reflects the equivocal nature of the sovereignty of those tribes in the mid-nineteenth century.[107]

Finally, although the Thirteenth Amendment also freed women who were former slaves and protected them from discrimination based on race by the other Reconstruction measures, neither they nor their Caucasian sisters obtained any protections from discrimination on the basis of gender.[108] Not only did members of the Reconstruction Congress consciously exclude women from the right to vote in the Fifteenth Amendment, Section 2 of the Fourteenth Amendment expressly restricts voting rights protections to "male inhabitants," expressly constitutionalizing gender inequality in the voting rights realm.[109] Moreover, although all women were formally given the right to contract free of race discrimination, state property acts still restricted married women's rights to enter into contracts, making the protections of the Civil Rights Act of 1866 relatively meaningless for women.[110]

Thus, there is a tension between the inclusive language of equality that permeated the Reconstruction debates and the fact that some rights members of 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, which required allegiance in return for the benefits of citizenship. More likely, members of the Reconstruction Congress used the language of citizenship so often because of their

106. *See id.*; *see also infra* note 107 and accompanying text; U.S. CONST. amend. XIV, § 1.

107. Congress resolved this ambiguity when it enacted the Indian Citizenship Act of 1924, which clarified that members of Indian tribes born within the United States were United States citizens. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924). This statute received a relatively hostile reception from tribal leaders, who perceived it as undermining tribal sovereignty. *See* CASES AND MATERIALS ON FEDERAL INDIAN LAW 164–65 (David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr. eds., 5th ed. 2005) (discussing the requirements of many Indian citizenship laws that the subject Indians conform "individual behavior to the dominant society's norms and renounc[e] tribal culture and traditions").

108. *Compare* U.S. CONST. amend. XIII (outlawing slavery) *with id.* at amend. XVI (outlawing voting discrimination on the basis of race, but not sex).

109. *See id.* at amend. XIV, § 2; *id.* at amend. XV.

110. Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 736 n.10 (2002).

overwhelming concern with expanding the national polity to include freed slaves.

III. TWENTIETH CENTURY ENFORCEMENT OF CITIZENSHIP RIGHTS

Members of Congress have invoked the inclusive model of citizenship during other periods in which they created and expanded rights of belonging. During the New Deal, Congress created an economic safety net and established the right of workers to form a union and bargain collectively with their employers.[111] During the "Second Reconstruction" of the 1960s and 1970s, members of Congress vowed to end "second-class citizenship" by enacting a series of statutes enforcing racial equality and sex equality, and prohibiting discrimination based on disability and age.[112]

While the New Deal legislation established a basis for economic empowerment in the tradition of the Thirteenth Amendment (but notably lacking that Amendment's promise of racial equality), the Second Reconstruction legislation established a nondiscrimination ethic based in principles of equal protection.[113] During both periods, members of Congress invoked the Reconstruction vision of citizenship rights as they expanded the opportunities for people in our country to participate in the national polity on an equal basis. However, the dialectic between insiders and outsiders, and between the inclusive versus the exclusive model of citizenship, continued to play out during these periods of expansion.

A. *The New Deal*

Members of the New Deal Congress shared a constitutional vision

111. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 70 (1999) (The passing of the Wagner Act in 1935 coincided with a grassroots labor movement demanding "affirmative government protection for union organizing and collective bargaining.").

112. *See infra* Part III.B.

113. During both periods, members of Congress relied primarily on the Commerce Clause as the basis of their power to legislate in order to ensure that the Court would uphold their power. For example, the New Deal Congress based its power to enact the National Labor Relations Act on the Commerce Clause rather than the Thirteenth Amendment, because it believed that the Court would be more likely to uphold the Act based on the Commerce Power. *See* ZIETLOW, *supra* note 4, at 79–80. During the Second Reconstruction, supporters of the 1964 Civil Rights Act felt constrained from relying on Section 5 of the Fourteenth Amendment based on the Court's ruling in the *Civil Rights Cases* that the Section 5 power only reached state action. *Id.* at 114.

marked by individual freedom and social citizenship.[114] 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.[115] 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.[116] Supporters of the Act invoked freedom of expression and freedom from involuntary servitude, hearkening back to their Reconstruction predecessors.[117] New Deal measures created an economic safety net by establishing a national responsibility for the economic survival of people in our country and furthering the ability of all people to belong to the national community rather than perpetuating their struggle for survival.[118]

Though members of the New Deal Congress invoked the Reconstruction ideals of equality and economic rights in their model of social citizenship, they omitted Reconstruction's promise 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 because of 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.[119]

Behind the scenes, lawyers in the Civil Rights Section of Roosevelt's

114. Forbath, *supra* note 111, at 69–71.

115. *See* James Grey Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 942 (1997) (discussing the activist view that the Thirteenth Amendment protected fundamental labor rights and prohibited anti-strike laws); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438–39 (1989) (arguing that the Thirteenth Amendment embraces a vision of labor that encompasses more than the mere abolition of slavery).

116. *See* ZIETLOW, *supra* note 4, at 63–86 (discussing how union leaders and congressmen viewed the Thirteenth Amendment as a tool to prevent labor exploitation of all races of workers, to promote industrial democracy, and as providing a constitutional right to unionize).

117. *Id.* at 75–80.

118. *Id.* at 93–95 (arguing that New Deal legislators attempted to provide citizens with a sense of belonging within their class and as fellow workers of the nation).

119. *Id.* at 94–95 (discussing how New Dealers in Congress again and again failed to address or facilitate the issue of race in the workplace).

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.[120] In addition, while the labor movement was marred by race discrimination, it also provided an important starting point for leaders of the nascent civil rights movement such as A. Philip Randolph.[121] Notwithstanding the important advances in economic rights in the New Deal ideology of "social citizenship," however, the New Deal was hardly a model for complete inclusion and belonging.

B. *The Second Reconstruction*

In the 1960s, members of Congress again invoked the Reconstruction Era when they enacted the first civil rights measures since Reconstruction.[122] The first such measure was the Civil Rights Act of 1964, which outlawed race discrimination in places of public accommodation, employment, and education.[123] Supporters of that Act explained that they intended it to enable African-Americans to be full citizens in our country, ending the "second-class citizenship" that they suffered under Jim Crow.

The Act's chief sponsor in the Senate, Senator Hubert Humphrey, often evoked what he called the "citizenship gap" in stump speeches supporting the Act.[124] His ally in the House, Representative Archie Moore, argued that "[t]he right to be free from all forms of racial intolerance is so fundamentally the privilege of each and every citizen of the United States that it cannot be made the plaything of politics."[125] A group of House supporters of the bill, including Representatives William McCulloch and John Lindsay, agreed that "the badge of citizenship—extended to Negro as well as white by the 14th Amendment—demands

120. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 111–41 (2007) (detailing the work of the Civil Rights Section in protecting labor and First Amendment rights—the first governmental unit in history to actively prosecute infringement of those rights).

121. *See* MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY 282–83 (2003).

122. *See* ZIETLOW, *supra* note 4, at 112.

123. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243–46, 253, 255, 257 (codified at 42 U.S.C. §§ 2000a-c, 2000e (2000)).

124. *See* ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 199 (1990) (discussing Humphrey's use of the term to describe "the idea that there was a tremendous 'gap' between the rights of white Americans as citizens and the rights of black Americans as citizens," especially in hiring and job training).

125. H.R. REP. NO. 88-914, at 62 (1963).

that establishments that do public business for private profit not discriminate on the grounds of race, color, national origin, or religion."[126] Directly evoking his Reconstruction predecessors, McCulloch stated that "an obligation rests with the National Government to see that the citizens of every State are treated equally, without regard to their race or color or religion or national origin."[127] As Senator Everett Dirksen summed it up, "There is involved here the citizenship of people under the Constitution who, by the 14th Amendment are made . . . citizens of the United States of America."[128]

During the 1960s and the 1970s, members of Congress expressed by far the most inclusive vision of citizenship rights as they completed the project of Reconstruction by enacting the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.[129] They expanded the Reconstruction vision by enacting protections from discrimination for women, the disabled, and the elderly, and mandated a right to education for disabled children.[130] During that era, members of Congress also expanded economic rights, enacting the War on Poverty legislation during the 1960s and creating Medicare, Medicaid, and the Supplemental Security Income programs.[131]

However, the Second Reconstruction was followed by a backlash against some of the rights and programs that Congress created during that era. The expansion of welfare rights was followed by President Ronald

126. *Id.* pt. 2, at 7.

127. 110 CONG. REC. 1529 (1964).

128. *Id.* at 14510.

129. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h (2000)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2000)); Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3631 (2000)).

130. Education of the Handicapped Act of 1970 (codified as amended as the Individuals with Disabilities Education Act), 20 U.S.C. §§ 1400–1491 (2000); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2000) (prohibiting gender discrimination in education); Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (2000).

131. Supplemental Security Income for the Aged, Blind and Disabled Act of 1974, 42 U.S.C. §§ 1381–1385 (2000); Health Insurance for the Aged (Medicare) Act, Pub. L. No. 89-97, Title I, 79 Stat. 290 (1965) (codified at 42 U.S.C. §§ 1395–1395iii (2000)); Medicaid Act, Pub. L. No. 89-97, 79 Stat. 343 (1965) (codified as amended in 42 U.S.C. § 1396 (2000)).

Reagan's campaign against welfare "fraud."[132] Opposition to welfare eventually led Congress to eliminate the entitlement to cash welfare assistance and restrict it to a temporary program in the Personal Responsibility and Work Opportunity Act of 1996.[133] While the anti-discrimination rights of women, blacks, the disabled, and the elderly remain politically popular, a divisive political debate has emerged over whether expanding racial equality justifies race-conscious measures such as affirmative action and race-based elementary school districts.[134]

C. *Other Legislation*

The inclusive model of citizenship and the protection of citizenship rights in the Reconstruction Amendments provide Congress an opportunity to expand rights of belonging in ways that go beyond the model of equality, which has been restricted by the United States Supreme Court. This Part provides examples of legislation that might be based on that model. It does not pretend to provide a comprehensive list. That depends on the future needs of our people and the creativity of future members of Congress who wish to expand the meaning of equal citizenship in our society.

First and foremost, the rights of citizenship include the right to the protection of the government, including protection against violations by private individuals. Members of the Reconstruction Congress made this clear when they enacted the Civil Rights Act of 1866—which protects against private race discrimination in contracts—and the Enforcement Act of 1871—which creates civil and criminal penalties against private interference with civil rights.[135] The Supreme Court has repeatedly

132. *See* Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POL. 225, 227, 286–87 (1998) (discussing the goals of the Reagan Administration to reform welfare by financially disabling the Aid to Families with Dependent Children program and only providing support to those who could show true need).

133. Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C § 1305 (2000)).

134. *See* Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1, 2 (2005) (analyzing the advantages and disadvantages of the race-based affirmative action sanction of *Grutter v. Bollinger*, and arguing that race-neutral admissions standards should not be left by the wayside); *but see* Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 737 (2002) (exploring the legality of redistricting processes that benefit minorities).

135. Civil Rights Act of 1866, 42 U.S.C. §§ 1982, 1987–1988, 1991–1992 (2000);

interpreted the Constitution not to create any positive right to government protection in cases such as *DeShaney v. Winnebago County Department of Corrections* and *Town of Castle Rock v. Gonzales*.[136] If members of Congress want to create such rights by statute, enforcing the rights of citizenship enables them to do so.

For example, in *United States v. Morrison*, the Court struck down the civil rights remedy of the Violence Against Women Act (VAWA), which created a federal cause of action for victims of gender-motivated violence to sue private defendants in federal court.[137] The Court found the measure fell beyond Congress's power to enforce the Commerce Clause and the Equal Protection Clause.[138] However, if freedom from gender-motivated violence is a civil right—as members of Congress found when they enacted the original VAWA remedy—then this statute falls squarely within Congress's power to enforce the rights of citizens to freedom from private, bias-motivated violence by providing the protection of the federal government.[139] Similarly, the Hate Crimes Act currently pending in Congress, which would criminalize crimes of violence motivated by bias, also falls within Congress's power to provide the protection of the federal government to victims of bias-motivated violence.[140]

Enforcement Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2000)).

136. Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) (holding a citizen has no right to have police enforce a restraining order); DeShaney v. Winnebago County Dep't of Corr., 489 U.S. 189, 202 (1989) (holding a citizen has no right to adequate governmental protection against the violent acts of a private actor).

137. United States v. Morrison, 529 U.S. 598, 627 (2000).

138. *Id.*

139. *See* Zietlow, *supra* note 5, at 286–87 (discussing the dilemma facing Congress in passing civil rights legislation because the Court has yet to allow it under either the Commerce Clause or Section 5 of the Fourteenth Amendment); Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FLA. ST. U. L. REV. 731, 740 (2007) (discussing the bases for the Violence Against Women Act).

140. Local Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. (2007); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. (2007). The Local Law Enforcement Hate Crimes Prevention Act of 2007 was passed in the House on May 3, 2007. Govtrack.us, H.R. 1592: Local Law Enforcement Hate Crimes Prevention Act, http://www.govtrack.us/congress/bill.xpd?bill=h110-1592 (last visited Aug. 25, 2008). However, the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007 has yet to be debated or brought to a floor vote in the Senate. Govtrack.us, S. 1105: Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, http://www.govtrack.us/congress/bill.xpd?bill=s110-1105 (last visited Aug. 25, 2008).

Second, the rights of citizenship model enables members of Congress to go beyond the "equal treatment" model of equality currently enforced by the United States Supreme Court in cases such as *Adarand v. Pena*[141] and *Parents Involved in Community Schools v. City of Seattle*,[142] and to develop a more substantive model of equality. Members of the Reconstruction Congress made it clear that they believed citizenship itself contained a measure of equality. They left it up to future members of Congress to define what equality would mean. If a majority of members of a twenty-first century Congress believe that equality means more than equal treatment, but instead a right to the substantive conditions that make equality possible, then enforcing the rights of citizenship gives Congress the opportunity to create those conditions.

Members of Congress have enforced a substantive vision of equality a number of times. For example, in the Pregnancy Discrimination Act, [143] Congress recognized that pregnancy is a condition uniquely experienced by women, not a gender-neutral phenomenon experienced by "pregnant persons," as the Court had defined it.[144] Similarly, in the Family Medical Leave Act, Congress went beyond the equal treatment model of Title VII and created a substantive right for people not to lose their jobs if they have family-related obligations that cause them to miss work—a burden experienced far more often by women than by men.[145] In the No Child

141. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny to race-based federal affirmative action measures).

142. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2759–60 (2007) (holding that racial classifications in student assignment plans were not necessary to meet the district's goal of racial diversity).

143. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)); *see also* Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J.L. & POL. 381, 430–35 (2000) (discussing the Pregnancy Discrimination Act of 1978, a legislative response to the Supreme Court's determination that pregnancy discrimination is not sex discrimination).

144. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976) (holding that a disability benefits plan does not violate Title VII due to its failure to cover pregnancy-related disabilities); Geduldig v. Aiello, 417 U.S. 484 (1974) (finding pregnancy discrimination is not an equal protection violation); Hoy, *supra* note 143, at 420–21.

145. Family Medical Leave Act, 29 U.S.C. §§ 2601–2654 (1998); *see generally* 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) (discussing the theory of Section 5 power as applied to the case of *Nevada v. Hibbs*—a case involving the Family and Medical Leave Act (FMLA)). The Court accepted this argument when it upheld the FMLA as Section 5-based legislation in *Hibbs*. Nevada v. Hibbs, 538 U.S. 721 (2003).

Left Behind Act, Congress established a positive right to an adequate education that may eventually prove to be more meaningful to minority students than the equal protection right that now restricts Congress from enacting race-based solutions to segregation.[146]

Future legislation based on this model could include legislation requiring employers to provide sick time to their employees. It could also include election finance reforms that reduce the impact of money on the election process to further the empowerment of those who lack the financial resources to influence the system and, thus, enhance their right to vote. Clearly, protecting the rights of citizenship allows for Congress to be creative in determining and enforcing the civil rights of Americans in the twenty-first century.

IV. THE DANGER OF EXCLUSION

In our national ideology, doing away with second-class citizenship has a powerful appeal. But is this vision obtainable without excluding people from those rights on the grounds that they are not citizens? Citizenship has often been granted on discriminatory terms in our country, from the early twentieth century statutes limiting naturalization to whites to the Alien Exclusion Acts, which excluded even temporary immigration by Asians until the 1960s.[147] Some dangers 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—will not 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

146. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. § 6301 (2006)).

147. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103–04 (1790) (repealed 1795) (naturalization limited to free white persons); Chinese Exclusion Act of 1882, ch. 126, § 1, 22 Stat. 58 (ordering a ten-year suspension of Chinese laborer immigration); Phillipine Independence (Tydings-McDuffie) Act, ch. 84, § 8(a), 48 Stat. 456 (1934) (restricting Filipino immigration to fifty immigrants per year); s*ee also* John Hayakawa Török, *Asian American Jurisprudence: On Curriculum*, 2005 MICH. ST. L. REV. 635, 674–76 (2005), Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13–14 (1998) (discussing the Acts cited within this note).

incorporates a decision not to facilitate the belonging of other groups, arguably creating a hierarchy of protected categories.[148] 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 is an easy place to draw the line of exclusion when Congress is dividing up social goods. For example, Congress has often excluded non-citizens from welfare benefits.[149] 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.[150] The most punitive measures of the government's "war against terrorism" have been imposed against non-citizens.[151] These examples counsel caution for advocates of rights of belonging seeking to base those rights in citizenship.

Perhaps the solution is to frame rights, not in terms of citizenship per se, but in the more open-ended concept of "belonging." 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 mobilized, demanded inclusion, and achieved

148. For example, the Civil Rights Act of 1964 does not draw lines based on citizenship, but it implicitly draws lines based on other criteria, prohibiting employers from discriminating on the basis of race, ethnicity, and religion, but not on the basis of sexual orientation.

149. *See* Kenneth D. Heath, *The Symmetries of Citizenship: Welfare, Expatriate Taxation, and Stakeholding*, 13 GEO. IMMIGR. L.J. 533, 552–53 (1999) (discussing the effect of the Personal Responsibility and Work Opportunity Act of 1996 on the availability of welfare benefits to non-citizens).

150. *See* Patricia Smith, *The Great Immigration Debate*, N.Y. TIMES UPFRONT, May 8, 2006, at 8 (discussing the two common approaches to fixing the immigration system—the 700-mile fence along the southern border of the United States and the guest-worker program); *USA Cover Charge*, HOUSTON CHRON., June 4, 2007, at B6 (discussing increases in citizenship and residency application fees); Stephen Dinan, *President Touts Alien Citizenship*, WASH. TIMES, Oct. 7, 2006, at A3 (discussing controversy surrounding reform plans granting U.S. citizenship to some illegal aliens).

151. *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 17–21 (2003) (discussing the effect of anti-terrorism efforts on non-citizens through the experiences of a Muslim foreign national in America).

legislation providing for their inclusion during the early 1960s.[152] In the late 1960s, women did the same.[153] 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 and inclusive vision of belonging. Therefore, it is a useful starting place, if not an ending place, for a model of rights of belonging.

V. CONCLUSION

The future of the inclusive model of citizenship in Congress remains unwritten. While the danger of exclusion counsels caution when advocates and members of Congress base rights of belonging on citizenship, the promise of removing barriers to belonging that create "second-class citizenship" remains a profound one in our nation's consciousness. Members of Congress should consider the potential that the Reconstruction model of citizenship gives them to define and protect rights of belonging, and further the belonging of members of our national community. The members of the Reconstruction Congress intended citizenship to be a font of those rights and for Congress to play the primary role in defining and enforcing those rights. The twenty-first century provides an apt opportunity for members of Congress to continue to fulfill this promise.

152. *See* ZIETLOW, *supra* note 4, at 103.

153. *See* Post & Siegel, *supra* note 145, at 1985.