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**RIGHTS OF BELONGING FOR WOMEN**

REBECCA E. ZIETLOW\*

This Article presents a new way to think about women's equality, a theory of rights of belonging—those rights that promote an inclusive vision of who belongs to the national community and facilitate equal membership in that community. Rights of belonging are an alternative to the conventional, identity-based civil rights paradigm, which is based on combatting discrimination based on identifiable characteristics. In the past half century, women's equality law has been based primarily in the Equal Protection Clause of the Fourteenth Amendment and statutes prohibiting discrimination based on identifiable characteristics.<sup>1</sup> While the equal protection model has reduced such discrimination, it has failed to address deeply rooted economic inequality in our society. Because equal protection law only addresses discrimination based on easily identifiable characteristics, including race and gender, it has masked the significance of other fundamentally important, but less

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\* Charles W. Fornoff Professor of Law and Values, University of Toledo College of Law. Copyright Rebecca E. Zietlow. Thanks to the editors of the *Indiana Journal of Law and Social Equality*, especially Kyle Morrison. Thanks also to the participants in this symposium. I also presented this paper at the Workshop on Vulnerabilities and Identities at Emory University School of Law. Thanks to Martha Fineman and all the other participants at that workshop for their comments and suggestions.

<sup>1</sup> See, e.g., Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963); Title VII, Pub. L. No. 88-352, 78 Stat. 253 (1964); Title IX, Pub. L. No. 92-318, 86 Stat. 235 (1972); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *United States v. Virginia*, 518 U.S. 515 (1996).

visible, characteristics, such as poverty.<sup>2</sup> The persistent poverty of women is a sex equality issue, and pursuing economic rights is crucial to empower women to overcome economic barriers. Thus, rights of belonging must include not only the right to be free of discrimination based on identifiable characteristics, but also economic rights—the material conditions necessary to empower women to participate effectively in the world around them.

Poverty is a women’s problem.<sup>3</sup> Equal protection-based equality law has helped to alleviate women’s poverty by reducing barriers to women’s participation in the economic realm. However, we still earn less than eighty percent of what men earn for comparable work.<sup>4</sup> Female-headed households remain substantially poorer than those headed by men.<sup>5</sup> Despite the fact that women and people of color of both genders are considerably more likely to be poor than their white and male counterparts, the class identity shared by many women and people of color of both genders is not protected by the courts, and it is rarely the basis for collective action demanding reforms. Class identity-based equal protection

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2 See Angela P. Harris, *Theorizing Class, Gender and the Law: Three Approaches*, 72 L. & CONTEMP. PROBS. 37, 41 (2009) (pointing out that while “[g]ender is perhaps the central identity category in people’s lives,” people are much less likely to experience their identity in terms of class).

3 This is not to say that many men are not poor. However, in the aggregate, women are disproportionately poorer than men. Ezra Rosser, *Reclaiming Demographics: Women, Poverty, and the Common Interest in Particular Struggles*, 20 AM. U. J. GENDER SOC. POL’Y & L. 767, 767–68 (2012).

4 See Carmen DeNavas-Walt, Bernadette D. Proctor, & Jessica C. Smith, *Income, Poverty and Health Insurance Coverage in the United States: 2010*, U.S. DEP’T COMM. 12 (2011), [http://www.census.gov/prod/2011\\_pubs/p60-239.pdf](http://www.census.gov/prod/2011_pubs/p60-239.pdf).

5 According to the 2010 census, 15.8% of single male-headed households fell below the poverty line; 31.6% of households headed by a single female fell below that line. See *id.* at 18.

doctrine simply does not account for the extent to which poverty is a defining characteristic of many women's lives. More importantly, the equal protection-based model is based on the faulty premise that equality can be achieved without transforming the underlying power structure in our society.<sup>6</sup> To achieve equality in an unequal world, women need more than a chance to compete. They need the tools to help them to win. Rights of belonging seek to give women these tools.

Achieving rights of belonging for women requires rethinking the identity constructs in our civil rights discourse. Along with removing barriers to inclusion such as identity-based discrimination, rights of belonging include providing the material conditions needed for effective participation in one's community.<sup>7</sup> Rights of belonging begin with strengthening the economic safety net and pursuing the right to empowerment within the workplace, including a robust right to organize.<sup>8</sup> While economic rights are not conventionally considered to be women's rights, they are essential for women to obtain meaningful equality in our society. Effective belonging is not possible without these

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6 Other feminist theorists have pointed this out. *See, e.g.*, MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 8 (2004) ("An understanding of equality as a substantive promise to our least advantaged citizens has been sacrificed to a shallow sense of autonomy."); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

7 The focus on restructuring the community places my theory of rights of belonging in what Angela P. Harris calls "structural feminism." *See* Harris, *supra* note 2, at 45.

8 *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml> (recognizing the right to organize as a fundamental right); Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1938 (1994) (Collective bargaining can empower women by enabling them to redress issues of harassment.).

positive economic rights. Rights of belonging also suggest the need to reconsider the relationship between the individual and the state. The state must play a role not only in removing barriers to opportunity, but also in providing the requisite conditions for enabling individuals to achieve success. A theory of rights of belonging acknowledges the centrality of economic need to women's lives, and addresses that need as a means of achieving gender equality through economic empowerment.

This Article is informed by the insights of vulnerability scholarship. Scholars such as Maxine Eichner and Martha Fineman have pointed out that a neutral state cannot address persistent inequality in our society because it is based on the illusion of autonomy and independence, and ignores the extent to which vulnerability is endemic in our society.<sup>9</sup> As Fineman explains, “[I]f we seriously want a world in which each individual is assumed to stand alone, to rise or fall on her or his individual merit, and to be beholden to no one for her or his success, we must shape our policies so as to facilitate that model of society.”<sup>10</sup> This Article explores the question of how to bring about a state that is more responsible to the needs of the vulnerable. Rights of belonging are intended to empower individuals to advocate for equality within both the public and private realms. They are an alternative to

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<sup>9</sup> See MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010); FINEMAN, *supra* note 6.

<sup>10</sup> See FINEMAN, *supra* note 6, at 3.

liberalism, focused not on the individual but instead on reforming communities to make them more accessible for all people, regardless of their individual identity.<sup>11</sup>

The lack of economic rights contributes to women's vulnerability in many ways. Low-income women are vulnerable to exploitation by their employers because the lack of a safety net deprives them of a means of exit to avoid exploitative conditions.<sup>12</sup> Similarly, the lack of effective measures to empower women in the workplace not only depresses their wages, but also reduces channels of redress for discrimination and harassment there.<sup>13</sup> The lack of an adequate safety net also leaves women more vulnerable to domestic violence, as they are often economically dependent on their batterers.<sup>14</sup> A robust safety net and meaningful rights for workers are needed to reduce the vulnerability of women, to empower them, and thus enhance their belonging.

Rights of belonging also build on the insights of critical race theorists who recognize the intersectionality between race, class, and gender that forms women's identities.<sup>15</sup> Far too

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11 See Crain, *supra* note 8, at 1922 ("Rights models based upon feminist values rather than liberal antidiscrimination norms may offer more transformative potential because they are constructed out of women's experience, they tend to have a collective character, and they encourage group identity.").

12 See Sheila R. Zedlewski, *Work Activity and Obstacles to Work Among TANF Recipients*, THE URBAN INSTITUTE (1999), <http://www.urban.org/url.cfm?ID=309091>.

13 See Crain, *supra* note 8, at 1938 (advocating for measures that empower women to combat sexual harassment in the workplace).

14 See Joan Williams, *Exploring the Economic Meanings of Gender*, 49 AM. U. L. REV. 987, 988 (2000) (acknowledging that social subsidies could offer caretakers a level of economic independence, and "[t]his would mean that we would no longer see battered women who cannot leave for economic reasons.").

15 See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001).

often, advocates for women's rights have overlooked the intersectionality of class and gender evident in the economic concerns of low-income women.<sup>16</sup> For example, in a catastrophic blow to women's rights, the Personal Responsibility and Work Opportunity Act of 1996 (PRWOA) gutted the safety net by effectively ending welfare, replacing the entitlement under the Aid to Families with Dependent Children (AFDC)<sup>17</sup> program with the paltry Temporary Assistance for Needy Families Program (TANF).<sup>18</sup> Even though welfare reform was not conventionally viewed as a women's issue, the impact of the reforms was overwhelmingly experienced by women.<sup>19</sup> However, at the time, protests by women's rights advocates were muted.<sup>20</sup> The failure of the women's movement to adequately identify with the low-income women harmed by the PRWOA reflects a rights discourse in which gender identity is privileged over economic identity.<sup>21</sup> This failure to appreciate the

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16 See Rosser, *supra* note 3. Rosser argues that the reverse is also probably true—those who care most about poverty issues may be insufficiently concerned about the needs of women.

17 Social Security Act of 1935, 42 U.S.C. §§ 401–406. Under AFDC, all persons who were eligible were entitled to benefits.

18 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. §§ 601–619 (2006)). Under TANF, there is no entitlement to benefits, and recipients are subject to a five year lifetime limit. *See Id.* § 403.

19 See AVIS JONES-DEWEEVER, JANICE PETERSON, & XUE SONG, INSTITUTE FOR WOMEN'S POLICY RESEARCH, BEFORE & AFTER WELFARE REFORM: THE WORK AND WELL-BEING OF LOW-INCOME SINGLE PARENT FAMILIES 33–34 (2003) (describing the impact of TANF reforms on single-mother low-income households).

20 See Rosser, *supra* note 3, at 767–68 (highlighting that those passionate about poverty in general may be less inclined to read about the challenges of women in poverty).

21 *See id.*

intersectionality of gender, race, and class had a devastating impact on the lives of the poor women who lost their entitlement to a government safety net in the PRWOA.<sup>22</sup>

Recognizing the centrality of economic rights to the struggle for gender equality could also increase advocates' chance of successfully achieving those rights, due to the convergence of interests of women, people in low-income communities, and the labor movement. Expanding and strengthening our safety net, and increasing the economic rights of workers, is in the interest of all of these communities. Recognizing economic rights as gender equality rights may increase the chance of achieving those rights through coalition building.

This pragmatic observation is crucial because rights of belonging must be achieved by political activism. The primary source of economic rights is not court enforcement of the Constitution, but instead, legislative enforcement of constitutional rights and rights that are widely recognized as fundamental human rights.<sup>23</sup> With their impoverished reading of the Equal Protection Clause, courts have made it clear that they are unwilling to enforce the substantive model of equality that is necessary to combat persistent, deeply rooted inequality in our society.<sup>24</sup> Instead, the courts have ceded economic rights to legislatures.<sup>25</sup>

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22 Other feminist scholars have also cited TANF as a blow to women's rights. *See, e.g.*, FINEMAN, *supra* note 6, at 38–40; Williams, *supra* note 14, at 995–96.

23 I discuss this history at length in REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* (2006) [hereinafter ZIETLOW, *ENFORCING EQUALITY*].

24 *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Dandridge v. Williams, 397 U.S. 471 (1970).



This is not all bad news because this leaves open the possibility of achieving these rights through the political process. The political process is preferable because when legislatures create rights of belonging, they act on behalf of the community to embrace and aid outsiders.<sup>26</sup> Effective political advocacy is needed to convince legislatures to act in this way.

#### I. THE PITFALLS OF EQUAL PROTECTION

In a series of cases in the 1970s, the Supreme Court held that gender-based classifications are subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment.<sup>27</sup> More recently, the Court has clarified that states must provide an “exceedingly persuasive justification” for any laws that categorize based on gender.<sup>28</sup> Applying this approach, the Court has struck down numerous laws which perpetuated outdated gender stereotypes and opened up avenues of opportunity for women to participate more fully in our society.<sup>29</sup> However, the equal protection model is not always effective in combatting gender-based discrimination. While men and women are equal in abilities in many contexts, some biological differences between men and women make it difficult for

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25 See *Dandridge*, 397 U.S. at 485–86 (deferring to the state legislature in its judgment of how to allocate public benefits).

26 See ZIETLOW, ENFORCING EQUALITY, *supra* note 23, at 160.

27 See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

28 See *U.S. v. Virginia*, 518 U.S. 515, 531 (1996).

29 See, e.g., *Virginia*, 518 U.S. at 532; *Craig*, 429 U.S. at 190; *Frontiero*, 411 U.S. at 677.

courts to apply the “equal treatment” paradigm.<sup>30</sup> More importantly, the equal protection model does not address deeply rooted inequality in our society, in part because it does not serve as an effective source of economic rights.

When applying the Equal Protection Clause, courts have been inconsistent when determining which differences are “real” and which are outdated stereotypes. For example, the United States Supreme Court has found that pregnancy is not a gender-related condition justifying differential treatment,<sup>31</sup> but the capacity to get pregnant is such a condition.<sup>32</sup> Moreover, some of the worst problems experienced by women, including sexual harassment and gender-motivated violence, are experienced primarily by women and thus do not fit well within the “equal treatment” paradigm.<sup>33</sup> The sometimes awkward fit between a theory that treats equally people who are alike, but have some very real differences, limits the effectiveness of the equal protection approach. Moreover, the model fails to account for the fact that a person’s identity is multifaceted. Our lives are shaped by the intersectionality of

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30 See Crain, *supra* note 8, at 1920 (“[B]ecause the law requires only that likes be treated alike, it cannot reach disadvantages that are unique to women.”).

31 *Geduldig v. Aiello*, 417 U.S. 484 (1974).

32 *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).

33 See FINEMAN, *supra* note 6, at 24; see also MACKINNON, *supra* note 6, at 40 (“To liberal feminism, the problem of sex inequality is that law and custom divide the sexes into two arbitrary and irrational gender roles that restrict human potentialities. To radical feminism, sex is a systematic division of social power, a social principle inseparable from the gender of individuals. . .”).

identity-based characteristics.<sup>34</sup> Yet courts have only recognized equal protection challenges based on single identity characteristics, such as race or gender.<sup>35</sup>

The problem with equal protection doctrine is that it is overly dependent on individualized identity-based advocacy. Equal protection doctrine requires advocates to voice their legal arguments in identity-based terms, highlighting the extent to which inequality is linked to identity. It is best suited to the claims of individuals who are being treated unfairly based on a single, identifiable characteristic.<sup>36</sup> It is less well suited to resolving systemic inequality that supersedes identifiable characteristics, including the persistent and widespread under compensation and poverty of women.<sup>37</sup>

One solution that scholars have offered to fix equal protection law is to replace the equal treatment model with an “anti-subordination” model.<sup>38</sup> Under the anti-subordination approach, courts would evaluate categories differentiating people, not based on whether or not they treat people equally, but on whether the category empowers or subordinates a

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34 See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

35 See *id.* at 141–50.

36 See Crain, *supra* note 8, at 1926 (“[S]uch individual rights are meaningful only for those who possess the emotional and financial resources to enforce them through actual or threatened litigation.”).

37 See Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 254–55 (2010).

38 See MACKINNON, *supra* note 6; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Victor C. Romero, *Are Filipinas Asians or Latinas?: Reclaiming the Anti-Subordination Objective of Equal Protection After Grutter and Gratz*, 7 U. PA. J. CONST. L. 765 (2004–2005).

group of people based on identifiable characteristics.<sup>39</sup> The anti-subordination model is focused on the root cause of inequality and aimed at the effect of legal categories.<sup>40</sup> However, the anti-subordination approach fits awkwardly with the Equal Protection Clause and with the American ideal of equality. To some, the anti-subordination approach is not equal because it requires “special” treatment.<sup>41</sup> In its affirmative action jurisprudence, the Supreme Court has rejected this model in race discrimination law precisely because of this asymmetry.<sup>42</sup> Equally problematic is the fact that the anti-subordination model requires judges to make the subjective determination of whether a category is subordinating or not. Reasonable people can and often do differ about whether a race or gender based category is subordinating,<sup>43</sup> and it is not at all clear that judges would be well suited to make such a determination.

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39 Justice Ginsburg hinted at such an approach to gender-based classifications. *U.S. v. Virginia*, 518 U.S. 515, 532–33 (1996). See Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381 (1999).

40 Rebecca E. Zietlow, *Belonging and Empowerment: A New “Civil Rights” Paradigm Based on Lessons of the Past*, 25 CONST. COMMENT. 353, 360 (2008) (reviewing RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007)).

41 As Representative Paul Ryan said in his speech after presidential candidate Mitt Romney named him as his choice for vice president, “We promise equality opportunity—not equal outcomes.” Jane Mayer, *Ayn Rand Joins the Ticket*, THE NEW YORKER (Aug. 11, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/08/paul-ryan-and-ayn-rand.html>.

42 See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

43 For example, prominent feminists have taken opposing positions over the constitutionality of public single-sex education and the question of whether employers may provide health benefits for maternity leave when they do not provide benefits for the comparable health concerns of men. See Denise C. Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women’s Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95, 96–97 (1997); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 191–96 (1982).

Rights of belonging are rooted in the concept of anti-subordination, but extend beyond the equal protection-based model. Requiring the government to treat people fairly and without discrimination based on identity-based characteristics is necessary, but not sufficient. Rather than focusing on whether the government is treating an individual equally, rights of belonging ask the question of what the government can do to empower that individual to achieve success. First and foremost, rights of belonging include the material conditions needed to participate effectively in one's community. Equal protection fails as a source of those economic rights.

Simply put, the equal protection model does not provide an avenue for addressing economic inequality. The United States Supreme Court has failed to identify any economic rights in the Constitution, and applies a deferential rational basis review to economic classifications which harm the poor.<sup>44</sup> Thus, the Equal Protection Clause does not provide a resource for those seeking to address the economic inequality of women. Instead, it perpetuates the myth of economic mobility, even though it is exceedingly difficult for low-income people to escape from poverty.<sup>45</sup> Our system of equality law presumes that women are autonomous actors who can achieve success on their own, without help from the state. Absent from this individualized vision of equality is the understanding that there is a

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<sup>44</sup> See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

<sup>45</sup> See FINEMAN, *supra* note 6, at 10 (“In a society such as ours where there is existing inequality, the guarantee of access and opportunity means little for many.”).

collective responsibility for providing the basic needs of people in our society.<sup>46</sup> Rights of belonging are based on this understanding.

## II. RIGHTS OF BELONGING

This section describes rights of belonging, focusing on the economic component of these rights. Rights of belonging are those rights which are necessary to enable women to participate as full members of their community. Equal protection-based rights fall within this category because they remove discriminatory barriers to participation. However, removing artificial barriers to access is only the beginning of the process of facilitating the belonging of outsiders to their communities. Women have been excluded from economic opportunities for centuries, and, most importantly, have been excluded from the seats of power. The relative poverty of women is the result of this history of exclusion. Facilitating women's belonging entails acknowledging this history of disempowerment. The goal of rights of belonging is to bring about the material conditions which are necessary for women to empower themselves.

Economic rights of belonging start with a robust economic safety net to protect those who are most economically vulnerable in our society, a majority of whom are women.<sup>47</sup> These rights also include a robust right to organize in order to empower women

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<sup>46</sup> *Id.*

<sup>47</sup> See *infra* notes 53–78 and accompanying text.

within the workplace to advocate for better wages and conditions.<sup>48</sup> By their very nature, they are positive rights, created not by courts, but by legislatures. Nonetheless, it is helpful to consider what the constitutional sources of these rights are, if any. Speaking in the language of the Constitution has proven to be an effective tool for advocacy, including advocacy for positive rights.<sup>49</sup> Rights of belonging can be found not only in the Equal Protection Clause but also in other constitutional sources, including the Thirteenth Amendment and the Citizenship Clause of the Fourteenth Amendment.<sup>50</sup>

*A. An Adequate Safety Net*

An adequate safety net is crucial not only to address the economic vulnerability of low-income women, but also to foster their participation in their communities. The argument that women need economic assistance from the state in order to achieve independence may seem counterintuitive since recipients of government benefits are often stigmatized as dependent.<sup>51</sup> But this argument places undue emphasis on autonomy from the state, valuing it over other forms of autonomy, such as freedom from abusive husbands and exploitative employers. Moreover, the emphasis on autonomy often comes at the expense of

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48 See *infra* notes 90–99 and accompanying text.

49 See ZIETLOW, ENFORCING EQUALITY, *supra* note 23, at 25–26 (discussing the use of “popular constitutionalism” by progressive movements to achieve measures advancing and protecting rights of belonging).

50 See *infra* notes 77–89, 116–24 and accompanying text.

51 See FINEMAN, *supra* note 6, at 31; Martha T. McCluskey, *Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 267, 268 (Linda McClain & Joanna Grossman eds., 2009).

equality norms.<sup>52</sup> In fact, an adequate safety net is necessary to foster women's autonomy and enable women to participate effectively in communities.<sup>53</sup>

The lack of an adequate safety net leaves women more vulnerable to domestic violence, as they are often economically dependent on their batterers. The existence of a safety net empowers low-income workers, many of whom are women, in the labor market by providing a means of exit. A safety net enables workers to leave jobs with exploitative employers, and thus empowers them to advocate for better conditions. Thus, improving the safety net must be the highest priority for those wishing to achieve rights of belonging. Moreover, the safety net must be expanded to include, at a minimum, the right to financial support, health care, and paid family leave.

While other countries recognize a right to the material conditions needed for basic subsistence, the United States does not recognize such a right.<sup>54</sup> The Supreme Court held that the Equal Protection Clause does not establish the right to a minimum income,<sup>55</sup> and the Court has rejected claims to other economic rights such as health care or housing.<sup>56</sup> Perhaps more importantly, our lawmakers have only sporadically recognized such rights through

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52 See McCluskey, *supra* note 51, at 267 (arguing that depriving people of government benefits creates an incentive for them to become dependent on private power); FINEMAN, *supra* note 6, at 8 (“An understanding of equality as a substantive promise to our least advantaged citizens has been sacrificed to a shallow sense of autonomy.”).

53 FINEMAN, *supra* note 6, at 8.

54 See *id.* at 199.

55 Dandridge v. Williams, 397 U.S. 471, 486–87 (1970).

56 Harris v. McRae, 448 U.S. 297 (1980) (holding that there is no constitutional right to funding of medical procedure); Lindsey v. Normet, 405 U.S. 56 (1972) (holding that there is no constitutional right to housing).



positive law.<sup>57</sup> In his 1941 State of the Union address, President Franklin Roosevelt introduced the concept of the Four Freedoms, including freedom from want, to advocate in favor of a right to economic security.<sup>58</sup> In 1945, Congress considered the Full Employment Act, which would have established a right to work.<sup>59</sup> In the early 1970s, Congress once again considered, but eventually rejected, a statute which would have established the right to a minimum income.<sup>60</sup> However, Congress never adopted any measures protecting the right to a minimum income.

At one time, the right to a minimum income did exist for caretakers of children. The New Deal era program of Aid to Families with Dependent Children recognized a right to welfare benefits for those who were financially eligible.<sup>61</sup> However, in the 1996 Personal Responsibility Act, Congress gutted the safety net, replacing the entitlement to welfare benefits with the short term Temporary Assistance for Needy Families (TANF) program, with a five year lifetime limit on benefits.<sup>62</sup> The PRWOA pulled out the rug from under low-income women, leaving them with no alternative but to work in low-wage jobs that do

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<sup>57</sup> See *infra* notes 59–62 and accompanying text.

<sup>58</sup> President Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), in 87 CONG. REC. 44, 46 (1941).

<sup>59</sup> William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 179 (2001) (citing *Full Employment Act of 1945: Hearings Before the Subcomm. of the S. Comm. on Banking and Currency on S. 380*, 79th Cong. 1249–59 (1945)).

<sup>60</sup> See FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 335–43 (1977).

<sup>61</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 261–63 (1970).

<sup>62</sup> See Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act), Pub. L. No. 104-93, 110 Stat. 2105 (codified at 42 U.S.C. §§ 601–19 (2006)).

not provide benefits and lack any opportunity for advancement.<sup>63</sup> It has vastly increased the vulnerability of low-income women.<sup>64</sup>

The lack of an adequate safety net makes women vulnerable to domestic violence and abuse. It forces women to stay with their abusers, upon whom they are often financially dependent.<sup>65</sup> While the TANF program allows states to exempt victims of domestic violence from the lifetime limits, many women are reluctant to report abuse because they fear losing custody of their children if they do so.<sup>66</sup> Women are thus denied the possibility of exit from abusive relationships, which can literally threaten their lives and preclude them from participating in their communities in any meaningful way.

The lack of a safety net also increases women's vulnerability in the employment realm. Women are forced to take low-wage jobs, even if they are TANF recipients, because work is required to maintain eligibility for the program.<sup>67</sup> Because they lack the alternative source of income which could have been provided by welfare benefits, women are required

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63 See Zedlewski, *supra* note 12.

64 See FINEMAN, *supra* note 6, at 38–40; *Hearing on the Reauthorization of the TANF Program Before the Subcomm. on Human Resources of the H. Comm. on House Ways and Means*, 112th Cong. 1 (2011), (statement of Terry O'Neil, President, Nat'l Org. for Women), <http://now.org/issues/economic/welfare/TANFtestimonySept2011.pdf> (“The desperate situation faced by so many millions of poor mothers and their children has been made much worse by policies enacted under the PWRORA.”).

65 See Margo Lindauer, *Damned if You Do, Damned if You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 AM. U. J. GENDER SOC. POL'Y & L. 797, 798 (2012) (“[B]attered mothers are typically financially dependent on their abusers and lack a community support system.”).

66 See *id.* at 805–07 (discussing the legal hurdles confronting poor mothers who are victims of domestic violence).

67 See Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §§ 601–619 (2006)).

to remain employed even in less than ideal workplaces. At worst, they are vulnerable to exploitation, unsafe conditions, and discriminatory treatment.<sup>68</sup> At best, they are required to work for low wages with little hope of advancement.<sup>69</sup> Thus, the lack of a safety net deprives women of the possibility of exit from low-wage jobs which is necessary to enable them to find better opportunities.

Other scholars have recognized that a social safety net is necessary for women's equality. For example, Martha Fineman points out that the principle reason why women lag behind men economically is that they overwhelmingly bear the burden of caring for dependents in our society.<sup>70</sup> In order to enable women to function as fully autonomous actors, she claims, the State should play a more active role in assisting caretakers.

Autonomy is only possible when one is in a position to be able to share in society's benefits and burdens. And sharing in benefits and burdens can only occur when individuals have the basic resources that enable them to act in ways that are consistent with the tasks and expectations imposed upon them by the society in which they live.<sup>71</sup>

Individual autonomy is an illusion that masks the inevitability of dependence. This illusion is made possible by the work of women who care for dependents with limited economic

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68 See 42 U.S.C. § 602 (2006).

69 See Zedlewski, *supra* note 12.

70 See FINEMAN, *supra* note 6, at 41.

71 *Id.* at 29.

resources and little assistance from the state.<sup>72</sup> In order for women to be truly autonomous, they need that assistance.

Other scholars have drawn on the tradition of social citizenship rights to argue in favor of an economic safety net.<sup>73</sup> Social citizenship rights include positive economic and social rights.<sup>74</sup> Liberal ideology considers social citizenship rights as secondary to the more fundamental political and civil rights.<sup>75</sup> However, advocates of social citizenship argue that economic equality is a precondition, creating the capacity for meaningful citizenship.<sup>76</sup> Rights of belonging build on this insight, recognizing that economic rights are a prerequisite to effective civic and political participation.

Viewing the right to a safety net as a social citizenship right suggests a constitutional foundation for arguments in favor of expanding that net: the Citizenship Clause of the Fourteenth Amendment, which states that all persons born or naturalized in the United States are United States citizens.<sup>77</sup> While the Amendment is not phrased in terms of economic entitlements, the Citizenship Clause arguably imposes a duty on the federal government to protect its citizens and provide the economic necessities for their survival.

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<sup>72</sup> See FINEMAN, *supra* note 6, at 37 (“The state is cast as a default institution providing minimal, grudging assistance should families fail. Each individual family is ideally responsible for its own members’ dependency . . .”).

<sup>73</sup> See, e.g., William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); McCluskey, *supra* note 51.

<sup>74</sup> See Forbath, *supra* note 59, at 166.

<sup>75</sup> See McCluskey, *supra* note 51, at 268.

<sup>76</sup> *Id.* at 276 (arguing that economic rights are “the core that gives [civil and political rights] substance.”).

<sup>77</sup> U.S. CONST. amend. XIV, § 1, cl. 1.

During debates over the Fourteenth Amendment, its supporters repeatedly cited the duty of the government to protect its citizens.<sup>78</sup> They gave their successors ample authority to delineate the terms of that duty to protect with the Amendment's enforcement clause.<sup>79</sup> An adequate safety net fits well within the government's power to protect and furthers the tradition of social citizenship.

During the New Deal era, lawmakers relied on a broad view of social citizenship rights when they enacted numerous measures creating an economic safety net and protecting the rights of workers.<sup>80</sup> Those lawmakers recognized that the nation as a whole had an obligation to care for the neediest in our society, but they also acted at a time when individual rights were viewed primarily in economic terms.<sup>81</sup> The paradigm of individual rights had been the "right to contract" jurisprudence of the Court's *Lochner* era.<sup>82</sup> Progressives had condemned *Lochner*, and the Court had rejected its doctrine, but reformers hoped that *Lochner* would be replaced by a progressive vision of economic rights. This vision included not only the right to public benefits, but also a right to work, to bargain

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78 See JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 32 (1983) (arguing that the Republicans who led the Reconstruction Congress were committed to the ideal of "equality in terms of entitlement or endowment, a notion that all human beings have a right to equal respect and concern.").

79 See ZIETLOW, ENFORCING EQUALITY, *supra* note 23, at 54–56.

80 See Forbath, *supra* note 59, at 166 (arguing that the New Deal Congress intended to establish rights to decent work and livelihood and a measure of economic democracy, including the right to organize and bargain collectively); ZIETLOW, ENFORCING EQUALITY, *supra* note 23, at 63.

81 See RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 9 (2007).

82 See *Lochner v. N.Y.*, 198 U.S. 45 (1905).

collectively, and to earn a fair wage.<sup>83</sup> They achieved significant success in legislative measures, including the Social Security Act,<sup>84</sup> the Fair Labor Standards Act,<sup>85</sup> and the National Labor Relations Act.<sup>86</sup> In the 1960s and 1970s, Congress created the Medicare, Medicaid, and SSI programs. Most recently, Congress enacted the 2010 Patient Protection and Affordable Care Act, which expands access to health care and recognizes a fundamental, albeit limited, right to health care.<sup>87</sup>

These acts created positive economic rights and expanded the rights of belonging for individuals in our society. While not directed at women's equality, these measures expanded access to the means of achieving equality within our society when accompanied by anti-discrimination measures. Thus, there is a history of recognizing these economic social citizenship rights, however halting and incomplete this history may be. These statutes form a safety net, but it is insufficient to meet the needs of women seeking to escape from poverty. Advocates for rights of belonging must seek to build on the social citizenship tradition, and expand the safety net to further women's equality.

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83 Forbath, *supra* note 59, at 179 (arguing that other reformers went further and sought to include the right to work free of race discrimination). See GOLUBOFF, *supra* note 81, at 124.

84 Social Security Act, ch. 531, 49 Stat. 620 (1935) (as codified as amended at 42 U.S.C. §§ 301–1304 (2006)).

85 Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–19 (2006)) (regulating the minimum wage and maximum hours of workers).

86 National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–66 (2006)) (establishing the rights of workers to organize in unions and bargain collectively).

87 See Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367 (2011) [hereinafter Zietlow, *Democratic Constitutionalism*] (describing the congressional debate over the ACA and arguing that the measure represents a congressional commitment to the right to health care).

*B. Economic Rights in the Workplace*

The other major prong of economic rights of belonging for women is strengthening and broadening the right of women to organize in unions. The right to organize is not only one of the principal tools for combatting poverty, but it is also an important way for workers to have an active say in their workplace and in the political process. Unions enable workers to join together to advocate for better wages, and they can protect workers from arbitrary and abusive employers. Thus, they are a significant tool for women's equality.<sup>88</sup>

Unionization provides women with a means of empowerment through collective action. The right to organize is recognized as a fundamental right in international treaties such as the Universal Declaration of Human Rights, in part because it is essential to the human dignity of workers.<sup>89</sup> Unions provide a means for workers to escape the common law master/servant regime, under which they are easily subject to intimidation by their employers.<sup>90</sup> Thus, the right to organize empowers all workers, including women, to improve the conditions of work and increase their compensation.

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<sup>88</sup> See Crain, *supra* note 8, at 1937 ("If working class women were at the center of a feminist agenda for change, workplace organizing would emerge as an important strategy.").

<sup>89</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948), available at <http://www.unhcr.org/refworld/docid/3ae63712c.html>; Joseph E. Slater, *The Rise and Fall of SB-5: The Rejection of an Anti-Union Law in Historical and Political Context*, 43 U. TOL. L. REV. 473, 498-99 (2012).

<sup>90</sup> For example, workers who participated in the Toledo Auto-Lite strike of 1934, advocating on behalf of the right to organize, stated that their principle concern was the arbitrary and abusive power wielded by the foreman. See Rebecca E. Zietlow & James Gray Pope, *The Toledo Auto-Lite Strike of 1934 and the Fight Against "Wage Slavery"*, 38 U. TOL. L. REV. 839 (2007).

The right to organize is a quintessential right of belonging because it enables workers to form communities that benefit workers both economically and politically. To join a union is to join a community, and unions can facilitate social integration.<sup>91</sup> Union membership empowers workers within the workplace, and also enables workers to participate more fully in the political arena because unions are a strong political force.<sup>92</sup>

The right to organize is not conventionally viewed as a sex equality right.<sup>93</sup> However, the right to organize can serve as a particularly effective tool for empowering women and improving their economic situation. Indeed, union membership is most important for workers, like women, who are otherwise disempowered. Job protections negotiated through union contracts can protect women from being arbitrarily fired. Collective bargaining agreements furnish an avenue of redress to improve conditions of employment, and to address harassment and other bad treatment that might not reach the level actionable through civil rights statutes.<sup>94</sup> Collective bargaining agreements can also serve as a means of equalizing pay scales, thus diminishing the gender gap in wages and compensation.<sup>95</sup> A recent study showed that on average, unionization raised women's

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91 See LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939*, 6–7 (1990).

92 See *id.* at 257–58.

93 *But see* FINEMAN, *supra* note 6, at 252 (discussing unions as a means of improving the economic condition of women).

94 See Crain, *supra* note 8, at 1938 (describing the successful joint effort of a group of unionized women to address sexual harassment in the workplace).

95 See Kate Bronfenbrenner, *Organizing Women: The Nature and Process of Union-Organizing Efforts Among U.S. Women Workers Since the mid-1990s*, 32 *WORK & OCCUPATIONS* 441, 442 (2005) (“[I]t has



wages about 11.2 percent, compared to non-union women with similar characteristics.<sup>96</sup> Women in unions were 18.8 percent more likely than their non-union counterparts to have health insurance and 24.7 percent more likely to have a pension.<sup>97</sup> Thus, it is not surprising that women tend to respond positively to union organization campaigns.

Historically, unions have been primarily a male reserve.<sup>98</sup> However, this dynamic has been changing in recent years. According to labor economist Kate Bronfenbrenner, “women [now] have more positive attitudes towards unions and are more likely to vote for unions than their male counterparts.”<sup>99</sup> Since the mid-1980s, women have accounted for the majority of the new workers organized each year.<sup>100</sup> Moreover, African American women are the only demographic group that has seen increasing union density in recent years.<sup>101</sup> This organizing success is due in part to women’s positive attitude towards unions. It is also due to the fact that unions have focused organizing campaigns on economic sectors where female workers predominate, including the service and health care sectors.<sup>102</sup> The success of women in the labor movement has its limitations. Women still are underrepresented in

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become increasingly clear that labor unions are the only major U.S. institution equipped to help women overcome” economic barriers and discrimination in the workplace).

96 See John Schmitt, *Unions and Upward Mobility for Women Workers*, Center for Economic and Policy Research 2 (2008),

[http://www.unc.edu/docUploads/unions\\_and\\_upward\\_mobility\\_for\\_women\\_workers\\_2008\\_12.pdf](http://www.unc.edu/docUploads/unions_and_upward_mobility_for_women_workers_2008_12.pdf).

97 *Id.*

98 Crain, *supra* note 8, at 1942.

99 Bronfenbrenner, *supra* note 95, at 443.

100 *Id.* at 442.

101 *Id.*

102 *Id.* at 445.

union leadership positions.<sup>103</sup> Moreover, overall union density has decreased significantly in recent decades. Only 11.8 percent of workers were unionized in January 2012, down from 20.1 percent in 1983, the first year that such data was available.<sup>104</sup> Nonetheless, union membership has significant promise for women as a means of achieving sex equality.

Unions also provide a tool for women to use to restructure the workplace to make it more favorable to the needs of women. As Joan Williams has pointed out, most jobs in our country are constructed for the “ideal” worker, “someone who works full force and full time, uninterrupted for thirty years straight.”<sup>105</sup> In order to enable women to obtain sex equality in the workplace, the workplace must be restructured to accommodate the needs of women who have family related responsibilities.<sup>106</sup> The collective bargaining process provides a mechanism for women to negotiate to restructure their jobs. Under the National Labor Relations Act, all conditions of employment may be subject to collective bargaining. Bargaining subjects can include hours of work, parental leave policies, part-time work, telecommuting, and flexible schedules—all of which can make the job more conducive to

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103 *Id.* at 461.

104 See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, NEWS RELEASE, USDL-12-0094, UNION MEMBERS—2011 (2012). Union density was significantly higher in the public sector than in the private sector. Thirty-seven percent of public sector workers, and only 6.9% of private sector workers, were unionized in January 2012. *Id.*

105 Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79, 79–80 (2009).

106 See Joan Williams, *Exploring the Economic Meanings of Gender*, 49 AM. U. L. REV. 987, 990 (1999–2000). (“Social subsidies are no substitute for restructuring jobs so as to make employment equally accessible to men and women.”). Williams gives some examples of how to restructure the legal profession to accommodate the needs of female lawyers in Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221 (2002).

caretaking. Thus, unionization can be a significant step towards restructuring the workplace to achieve gender equality.<sup>107</sup>

The decline in union density in this country is due in part to the Supreme Court's many cutbacks on the right to organize.<sup>108</sup> These cutbacks have taken away a significant avenue of economic advancement for women. Proposed amendments to the National Labor Relations Act that would make it easier to organize in unions are currently languishing in Congress.<sup>109</sup> Labor leaders have advocated in favor of these laws, but so far few have recognized their significance for women's rights.<sup>110</sup> Strengthening the right to organize by amending the National Labor Relations Act for all workers is crucial to achieving full rights of belonging for women.

It is also necessary to expand the statute's coverage to domestic and healthcare workers, the vast majority of whom are women. They tend to be disproportionately poor

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107 Some unions have joined together to form the Labor Project for Working Families, giving advice and assistance to union bargainers seeking to negotiate conditions of work that are conducive to caring for families. See *Tips on Bargaining for Work Family Balance*, LABOR PROJECT FOR WORKING FAMILIES, <http://www.working-families.org/network/basics/tips/index.html>.

108 See James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

109 See, e.g., Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

110 Unions champion the role that they can play in achieving women's rights. See, e.g., *Working Women*, AFL-CIO AMERICA'S UNION, <http://www.aflcio.org/Issues/Civil-and-Workplace-Rights/Working-Women> ("The AFL-CIO union movement champions workplace issues that affect women and all working Americans, such as equal pay, child and elder care benefits, job security, safe workplaces, affordable health care, contraceptive equity, protection from sexual harassment and violence at work."). The National Organization for Women now has a project to foster union organization for women. See *NOW and Economic Justice*, NATIONAL ORGANIZATION FOR WOMEN, <http://www.now.org/issues/economic/>. This is a positive step towards expanding women's rights of belonging.

and disproportionately likely to be women of color.<sup>111</sup> During the New Deal, domestic and agricultural workers were excluded from legislative protections for workers, including the National Labor Relations Act.<sup>112</sup> This was done to secure the votes of rural members of Congress, many of whom represented southern states.<sup>113</sup> Protections for domestic and agricultural workers would have threatened the system of labor in the Jim Crow south, and could have affected race relations as well.<sup>114</sup> This exclusion obviously also has implications for gender equality. Nonetheless, some efforts to organize domestic workers have been successful in using state laws and labor-intensive organizing tactics.<sup>115</sup> The movement to organize domestic and home health care workers is a women's rights movement. This movement can increase the standard of living of countless low-income women, and thus strengthen their rights of belonging.

The Thirteenth Amendment, which prohibits slavery and involuntary servitude, and authorizes Congress to legislate to remedy the badges and incidents of slavery, is a

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111 For example, ninety-eight percent of all family and child care workers are women. See Peggie Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 U. KAN. L. REV. 321, 333 (2007). More than fifty percent of family child care workers earn below poverty level wages. *Id.* “‘Racial-ethnic’ women account for a third of all paid child care workers.” *Id.* at 334.

112 Persons employed “in the domestic service of any family or person at his home” are excluded from the definition of “employee” in Section 2(3) of the NLRA. 29 U.S.C. § 152(3) (2006). See Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 EMP. RTS. & EMP. POL’Y J. 157, 182–83 n. 163 (2011). Moreover, this exclusion has been interpreted to extend to home health care workers, even if they are employed by an agency. *Id.* at 184.

113 GOLUBOFF, *supra* note 81, at 153. See ZIETLOW, ENFORCING EQUALITY, *supra* note 23, at 94.

114 See GOLUBOFF, *supra* note 81, at 96.

115 See Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1399–1400, 1405–12 (2008).

constitutional source for workplace rights.<sup>116</sup> The Thirteenth Amendment is a declaration of substantive rights that are immediately enforceable. Unlike the Equal Protection Clause, the Thirteenth Amendment is enforceable against private actors. But more importantly, the Thirteenth Amendment addresses the intersectionality of race, class, and gender that is experienced by many low-income workers. Slavery was made possible only by the intersection of race, class, and gender subordination.<sup>117</sup> The Thirteenth Amendment empowers courts and political actors to address the roots of the poverty experienced by so many women in our society.

Congress has used its power to enforce the Thirteenth Amendment to outlaw the most egregious labor practices, including slavery and peonage.<sup>118</sup> In the late 1940s, the Civil Rights Section of the Department of Justice (CRS) embarked on a campaign to extend Anti-Peonage Act protections to domestic workers.<sup>119</sup> Although that effort failed, decades later Congress relied on the Thirteenth Amendment enforcement power to expressly expand

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116 See Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B. U. L. REV. 255, 290–94 (2010) [hereinafter Zietlow, *Free at Last!*].

117 See Rebecca E. Zietlow, *James Ashley’s Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1720–22 (2012) [hereinafter Zietlow, *James Ashley*].

118 See Anti-Peonage Act, ch. 187, 14 Stat. 546, 546 (1867) (codified as amended at 18 U.S.C. § 1581 (2006) and 42 U.S.C. § 1994 (2006)) (prohibiting “the holding of any person to service or labor under the system known as peonage”); Anti-Peonage Act of 1948, 62 Stat. 772, 772 (codified as amended at 18 U.S.C. § 1581 (2006) and 42 U.S.C. § 1994 (2006)) (replacing the term “slave trade” with the broader and more modern term “involuntary servitude”).

119 GOLUBOFF, *supra* note 81, at 172. For example, the CRS prosecuted a family under the Slave Kidnapping Act for keeping a maid in poor conditions and paying her very little. *Id.* at 161.

women's equality rights by enacting the Trafficking Victims Protection Act of 2000.<sup>120</sup> The Act expands the meaning of "involuntary" to include workers held in exploitative conditions by psychological coercion, and makes it a federal crime to import women to work in sex trades or other conditions of work that are manifestly involuntary.<sup>121</sup> Thus, the Thirteenth Amendment provides some remedies for women who are poorly treated in the workplace by expanding their rights of belonging.

The Thirteenth Amendment is also a potential source of other sex equality rights under Congress' power to remedy the "badges and incidents of slavery."<sup>122</sup> Sexual and economic exploitation of women was central to the institution of chattel slavery in our country.<sup>123</sup> Congress can therefore use its Thirteenth Amendment enforcement power to remedy such exploitation.<sup>124</sup> Because the Thirteenth Amendment is both a source of economic and equality rights, it enables courts and political actors to address the roots of women's poverty, and to enact measures creating the material conditions necessary for women to escape poverty and improve their own condition. Thus, it is a potent source of rights of belonging for women.

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120 Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified as amended at 22 U.S.C. §§ 7101–7112 (2006)).

121 See Zietlow, *Free at Last!* *supra* note 116, at 306–11.

122 See *Jones v. Mayer*, 392 U.S. 409 (1968).

123 See Zietlow, *James Ashley*, *supra* note 117.

124 See Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641 (2012).

### III. THE IMPORTANCE OF POLITICAL ADVOCACY

In the twenty-first century, the New Deal commitment to social citizenship is threatened by congressional proposals to radically restructure our existing social safety net. In addition, state initiatives have cut back on the right to organize for all workers.<sup>125</sup> The progress that we have made in furthering rights of belonging for women and others is thus under attack. As progressives consider how to respond to these initiatives, it is vital to recognize that more is at stake than “mere” economic rights. At stake in this debate over the extent and content of our safety net and the scope of workers’ rights is access to women’s equality. Moreover, this debate will not be carried out through the process of litigation. It is a debate that must be carried out in the political process. It is necessary to engage in the political process to preserve and expand these rights. Moreover advocates for rights of belonging can articulate them most effectively in the political process. This advocacy entails moving beyond the politics of identity and focusing instead on the concept of belonging.

#### *A. Rights of Belonging in Peril*

Our nation is currently in the midst of a contentious debate over the scope and structure of our national safety net. In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA), which expanded access to health care in this country and

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<sup>125</sup> See Slater, *supra* note 89, at 481–85.

recognized a fundamental right to health care.<sup>126</sup> Though many supporters of an expanded safety net in our country would have preferred a single-payer system, the ACA was nonetheless a significant step in the right direction and a significant victory for advocates of rights of belonging.<sup>127</sup> Even before the ACA was enacted, however, the Act became a target of conservative activists who oppose increased government involvement in the healthcare system. Opposition to the ACA developed into the Tea Party movement, as Tea Party activists decried what they saw as an oppressive and intrusive federal government.<sup>128</sup> Republican politicians have seized the momentum of the Tea Party movement to propose measures which would radically restructure the United States safety net, including measures to privatize Social Security and replace Medicare with a voucher system.<sup>129</sup> While Congress rejected the most extreme proposals, more moderate restructuring measures were adopted by the United States House of Representatives in its recent budget.<sup>130</sup>

Attempts to overhaul the United States safety net directly target the ideology of social citizenship underlying New Deal measures. Measures such as the ACA, Social

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126 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). For an explanation of the Act's recognition of a fundamental right to health care, *see generally* Zietlow, *Democratic Constitutionalism*, *supra* note 87.

127 *See* Zietlow, *Democratic Constitutionalism*, *supra* note 87, at 1397–1401.

128 *See* Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 63 FLA. L. REV. 483, 489 (2012).

129 *See* Robert Pear, *G.O.P. Blueprint Would Remake Health Policy*, N.Y. TIMES, (Apr. 4, 2011), <http://www.nytimes.com/2011/04/05/health/policy/05health.html>.

130 *See, e.g.*, H. BUDGET COMM., 112TH CONGRESS, THE PATH TO PROSPERITY: A BLUEPRINT FOR AMERICAN RENEWAL (2012) (Chairman Paul Ryan of Wisconsin).



Security, and Medicare reflect a commitment by the national community to aid the vulnerable and enhance that population's ability to belong in our community. Such a commitment is essential not only to create a more equal and just society, but also to further women's equality. Tea Party activists would replace this commitment with an anti-government ideology of individualism, based on the false premise that all individuals are equally autonomous. As we have seen, women tend to be the losers in the autonomy sweepstakes. Women would suffer disproportionately from the individualistic ideology that lies behind this movement to dismantle the safety net. Thus, it is not an exaggeration to see the attack on the safety net as a direct threat to women's equality.

Like our existing safety net, the rights of workers in the United States are also under attack. In Ohio and Wisconsin, state legislatures enacted measures to end the right to organize for public workers.<sup>131</sup> While a popular referendum overturned the Ohio measure,<sup>132</sup> the Wisconsin workers have not yet succeeded in restoring their rights, and other states are considering similar measures.<sup>133</sup> These measures have a disproportionate impact on workers who are women and persons of color because they are disproportionately

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<sup>131</sup> See Slater, *supra* note 89, at 482–85.

<sup>132</sup> *Id.* at 473.

<sup>133</sup> *Id.* at 483. See also Joseph E. Slater, *Public-Sector Labor in the Age of Obama*, 87 IND. L.J. 189, 203–05 (2012) (detailing other state measures restricting workers' rights).

represented among the ranks of public workers.<sup>134</sup> Of equal importance, these anti-union measures threaten the rights of belonging of all workers, including women.

As with the attacks on the safety net, attacks on workers' rights are consistent with the ideology of individualism. The right to organize is a quintessentially collective right because it is based on the recognition that workers' interests are best represented through collective advocacy.<sup>135</sup> A unionized workplace is an institutional structure for workers to identify their collective interests and advocate effectively to achieve those interests. United States labor law includes protections for individuals, including the right to file individualized grievances and the duty of fair representation.<sup>136</sup> Nonetheless, unions are by their very nature antithetical to a strong individualist ideology. Thus, it is not surprising that those who advocate individual autonomy over all other values would oppose the right to organize.<sup>137</sup>

The political debate over the safety net and the right to organize thus reflects a fundamental dispute between advocates of individual autonomy and those who seek to create more egalitarian communities. Individual autonomy is pitted against the needs of the

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134 See Bronfenbrenner, *supra* note 95.

135 See Slater, *supra* note 89, at 497–99 (describing the effect of unionization on workers' wages).

136 See 29 U.S.C. § 160(b) (2006) (union grievance process); FEDERAL LABOR RELATIONS AUTHORITY, GUIDANCE ON DUTY OF FAIR REPRESENTATION: DUTY OF FAIR REPRESENTATION ALLEGATIONS INCREASING IN THE FEDERAL SECTOR, [http://www.flra.gov/Guidance\\_duty%20of%20fair%20representation](http://www.flra.gov/Guidance_duty%20of%20fair%20representation).

137 See *e.g.*, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 6 (2001) (arguing that unions are antithetical to the individual rights of black workers). Of course, employers also have economic reasons to oppose unions, and often use the political process to do so.

collective. Because the ideology of autonomy has been so harmful to women, women have good reason to be suspicious of legal reforms premised on individualism and autonomy. While rights of belonging include some individual rights, such as the right to be free of discriminatory treatment, they are by nature collective rights focused on creating a more inclusive and egalitarian community. Therefore, it is crucial to consider what strategies advocates for rights of belonging can use to oppose these cutbacks and work to expand rights of belonging.

*B. Strategies for Expanding Rights of Belonging*

In order to combat these attacks, progressives must engage in a frank dialogue over the role of the state in protecting rights of belonging in this country. This dialogue simply cannot take place within the context of litigation. The dialogue must occur within the political process. Indeed, rights of belonging have always been achieved primarily as the result of political activism.<sup>138</sup> Needless to say, electing officials who are open to measures expanding rights of belonging is a challenge, as is convincing those officials to enact such measures once they are elected. In order to succeed in this effort, it is crucial to be able to articulate a comprehensive and persuasive vision. Coalition building is essential to this endeavor. This Article suggests a basis for coalition building—framing labor rights and the social safety net as women’s equality rights.

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<sup>138</sup> See ZIETLOW, ENFORCING EQUALITY, *supra* note 23, at 11.

Litigation has a limited capacity to expand rights of belonging. Litigation is limited to enforcing the individual rights of women who have the emotional and financial resources to pursue it.<sup>139</sup> The individualized nature of litigation makes it particularly ill-suited for creating community-based rights of belonging. Moreover, courts are also ill-suited to enforce rights of belonging because courts are, by their nature, insulated from the communities in which they function. Rights of belonging represent the commitment of the community itself to include outsiders. Political actors, such as legislators, represent that community and are accountable to the communities in which they live.<sup>140</sup>

The process of engaging in dialogue helps to generate rights of belonging. Political engagement itself is an act of belonging, and engaging politically with others is empowering. Moreover, political participation brings about a sense of community and strengthens that community. When people work together on behalf of a common cause, they share a commitment to common values with others who share the same goals. This commonality also strengthens communities, and women have much to gain from living in strong and inclusive communities.

Finally, dialogue over fundamental values strengthens civic society. Because rights of belonging are premised upon a vision of social citizenship, a stronger civic society

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139 See Crain, *supra* note 8, at 1924.

140 While the extent to which political actors are actually accountable is debatable, it is undeniable that elected officials are institutionally more accountable to their constituents than are appointed, politically insulated federal judges.

engenders concern over rights of belonging. Thus, a symbiotic link exists between rights of belonging and political activism.

What is needed, then, is a strategy to articulate rights of belonging in terms that appeal to the majority of the American people. This may seem daunting at first, given that rights of belonging are most important to the vulnerable people in our population, including women and racial minorities. However, throughout our history, social movements have repeatedly succeeded in convincing our majoritarian legislatures to enact statutes protecting rights of belonging.<sup>141</sup> Building coalitions has been crucial to this success.<sup>142</sup> Rights of belonging provide a framework for successful coalition building. Advocates for gender equality, workers' rights, civil rights, and the poor all have an interest in achieving the rights of belonging detailed in this Article. Unfortunately, these movements have too often been divided by the politics of identity. My theory of rights of belonging is an attempt to provide a framework for moving beyond these divisions and advocating for a more just and inclusive society.

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141 See ZIETLOW, ENFORCING EQUALITY, *supra* note 23 (detailing successful campaigns for rights of belonging during the Reconstruction, New Deal, and Second Reconstruction eras).

142 For example, labor leaders joined with civil rights leaders to advocate successfully for the 1964 Civil Rights Act. See Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005).