

## COMMENT

### The Significance of Domicile in Lyman Trumbull's Conception of Citizenship

The Citizenship Clause of the Fourteenth Amendment establishes citizenship as a birthright for all children born in the United States, so long as they are "subject to the jurisdiction thereof." In recent years, as intense disagreement over U.S. immigration policy has grown, so too has academic and popular debate over the scope of this "subject to the jurisdiction" exception. In particular, a number of revisionist scholars have challenged the orthodox, "territorial" view that birth within the United States alone is sufficient to create citizenship except in certain extremely rare and narrow circumstances.<sup>1</sup> They argue that in addition to territorial birth, "subject to the jurisdiction" requires a mutual consensual relationship between individuals and the U.S. political community; children of undocumented immigrants, lacking such a relationship, are thus putatively precluded from constitutional birthright citizenship. This position has underlain conservative grassroots activism and multiple bills aimed at narrowing birthright citizenship by statute.

The debate, however, has overlooked a significant piece of historical evidence. The Amendment's Citizenship Clause draws heavily on the text of a similar citizenship provision in the Civil Rights Act of 1866, written by Senator Lyman Trumbull. In a letter to President Andrew Johnson summarizing the draft Act, Trumbull said that birthright citizenship depended on whether the

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1. See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985); see also, e.g., John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over Bush v. Gore?*, 94 *GEO. L.J.* 1475, 1484 (2006); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 *GEO. IMMIGR. L.J.* 221 (2008); Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 *HARV. J.L. & PUB. POL'Y* 465 (1999).

parents of children born in the United States were living permanently, “domiciled,” here. Revisionist consensualist scholars have frequently cited Trumbull’s public statements as significant evidence in favor of their interpretation of the Citizenship Clause. Yet this previously unanalyzed letter shows that consensualist reliance on Senator Trumbull in fact runs contrary to his actual position on citizenship.

My analysis proceeds in three parts. Part I describes the evidence that Senator Trumbull saw domicile as a determinant of birthright citizenship and explains the doctrine of domicile as it then existed. Part II lays out the consent-based interpretation of citizenship. Part III demonstrates how domicile is consistent with a modified territorial interpretation of the Citizenship Clause, rather than the consensualist view discussed in Part II.

## 1. “DOMICILE” AND ITS MEANING

The Fourteenth Amendment states that “[a]ll 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.”<sup>2</sup> Congress intended this text, similar in form to the citizenship clause of the Civil Rights Act of 1866,<sup>3</sup> to entrench the effect of that provision.<sup>4</sup> Congress drafted and passed the Act over President Johnson’s veto while the House of Representatives was considering the Amendment; scholars frequently study the Act’s citizenship language as a guide to that of the Amendment.<sup>5</sup>

While the Act was before Congress, Senator Lyman Trumbull, who wrote its citizenship language<sup>6</sup> and managed the Act in the Senate, wrote a letter to President Andrew Johnson summarizing the bill.<sup>7</sup> The letter begins: “The Bill declares ‘all persons’ born of parents domiciled in the United States, except

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2. U.S. CONST. amend. XIV, § 1.

3. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (“[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”).

4. See CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866) (statement of Sen. Howard).

5. E.g., SCHUCK & SMITH, *supra* note 1, at 74-81.

6. See CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Trumbull).

7. Letter from Sen. Lyman Trumbull, Chairman, Senate Judiciary Comm., to President Andrew Johnson (undated), in Andrew Johnson Papers, Reel 45, Manuscript Div., Library of Congress, Washington, D.C. The letter was likely written between February 2, 1866 (when the bill first passed the Senate) and March 27, 1866 (when President Johnson vetoed the bill). See CONG. GLOBE, 39th Cong., 1st Sess. 606-07, 1679 (1866).

untaxed Indians, to be citizens of the United States.”<sup>8</sup> Trumbull thus understood the Act’s “not subject to any foreign Power” requirement as equivalent to “child of parents domiciled in the United States.”<sup>9</sup> The Fourteenth Amendment instead requires individuals to instead be “subject to the jurisdiction,” which is slightly different wording. However, members of Congress understood that language to be more precisely describing, not substantively altering, the set of individuals excluded from birthright citizenship by the Civil Rights Act.<sup>10</sup> Trumbull did not address the issue expressly in congressional debate, but it appears logical to conclude that he intended to link “subject to the jurisdiction” to domicile as well.<sup>11</sup>

In making this connection, Trumbull drew on settled legal understandings. Domicile had an unambiguous definition in 1866: one acquired domicile in a nation or a particular place by moving there with the intention of making it one’s permanent residence.<sup>12</sup> In Justice Story’s words, domicile is “where [a person] has his true, fixed, permanent home . . . to which, whenever he is absent, he has the intention of returning”; it is “that place . . . in which [a person’s] habitation is fixed, without any present intention of moving therefrom.”<sup>13</sup> Only two prerequisites must be satisfied, Story said, for domicile to exist: “residence; and . . . intention of making it the home of the [person]”;<sup>14</sup> he makes no reference to governmental consent to or authority over domicile.

8. Letter from Sen. Lyman Trumbull to President Andrew Johnson, *supra* note 7. “[U]ntaxed Indians” refers to “those persons who yet belong to the Indian tribes . . . those Indians yet belonging to a foreign Government, and not counted as a part of our people.” CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (statement of Sen. Trumbull). Thus, tribal Indians living in U.S. territory were nonetheless not domiciled in the United States, properly speaking.
9. To the best of my research, this letter’s content has never been discussed in legal scholarship. I was alerted to its existence by references in MARK M. KRUG, LYMAN TRUMBULL: CONSERVATIVE RADICAL 240 (1965); and John H. & LaWanda Cox, *Andrew Johnson and His Ghost Writers: An Analysis of the Freedmen’s Bureau and Civil Rights Veto Messages*, 48 MISS. VALLEY HIST. REV. 460, 462 (1961), and I subsequently located it in the Andrew Johnson Papers, *supra* note 7.
10. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2893-94 (1866) (statement of Sen. Trumbull) (explaining why the Amendment altered the Act’s citizenship language, though “[t]he object to be arrived at is the same”).
11. Such links are not inconsistent with Trumbull’s stated views. See *id.* at 572 (statement of Sen. Trumbull) (expressing concern about making citizens of “persons temporarily resident in [the country]”).
12. I deal only with domicile as of the letter’s drafting in 1866.
13. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 41, 43, at 39-40, 42 (Boston, Hilliard, Gray, and Co., 1834).
14. *Id.* § 44, at 42.

Story's view of domicile was subsequently endorsed by the U.S. Supreme Court,<sup>15</sup> federal circuit courts,<sup>16</sup> and state courts.<sup>17</sup>

Several general principles follow from pre-1866 domicile opinions. A person could change domicile by leaving one jurisdiction and settling in another, regardless of whether those jurisdictions were states within a country or separate nations.<sup>18</sup> In certain international contexts (such as neutrality agreements), acquiring domicile resulted in "a national character [being] impressed upon a person, different from that which permanent allegiance gives him"; such a person, though, could easily choose to cast off that "national character" by returning to his or her native country.<sup>19</sup> Domicile and citizenship were thus distinct from one another,<sup>20</sup> and acquiring the former in a new country did not alter the latter.

To examine whether individuals had acquired domicile, courts conducted a context-dependent, subjective inquiry into the extent of any evidence demonstrating the fact and intention of their permanent residence.<sup>21</sup> They did not require a minimum period of residence.<sup>22</sup> Indeed, if the evidence of a person's intent to remain permanently in a particular place was sufficiently strong, he could gain domicile there "by a residence even of a few days."<sup>23</sup>

Judges evaluating domicile thus asked two questions. First, is a person living in a particular place? Second, does the evidence suggest he or she intends to keep living there indefinitely? If both answers were yes, then the person had domicile in that place. This link between domicile and territory, rather than

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15. See, e.g., *Ennis v. Smith*, 55 U.S. 400 (1852).

16. See, e.g., *Prentiss v. Brennan*, 19 F. Cas. 1278 (C.C.N.D.N.Y. 1851) (No. 11,385); *Burnham v. Rangeley*, 4 F. Cas. 773 (C.C.D. Me. 1843) (No. 2176).

17. See, e.g., *Thorndike v. City of Boston*, 42 Mass. (1 Met.) 242 (1840) (Shaw, C.J.); *In re High*, 2 Doug. 515 (Mich. 1847); *Hairston v. Hairston*, 27 Miss. 704 (1854); *Hegeman v. Fox*, 31 Barb. 475 (N.Y. App. Div. 1860).

18. See, e.g., *Prentiss v. Barton*, 19 F. Cas. 1276 (C.C.D. Va. 1819) (No. 11,384) (Marshall, Circuit Justice) (states); *Ringgold v. Barley*, 5 Md. 186 (1853) (same); see also, e.g., *The Venus*, 12 U.S. (8 Cranch) 253 (1814) (nations); *Hood's Estate*, 21 Pa. 106 (1853) (same).

19. *The Venus*, 12 U.S. (8 Cranch) at 277-78, 280.

20. Cf. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 120 (1804) ("[A]n American citizen may acquire in a foreign country, the commercial privileges attached to his domicil[e].").

21. See, e.g., *The Ann Green*, 1 F. Cas. 958, 962 (C.C.D. Mass. 1812) (No. 414) (Story, Circuit Justice); *Hairston*, 27 Miss. 704.

22. See, e.g., *Town of Reading v. Town of Westport*, 19 Conn. 561 (1849).

23. *The Venus*, 12 U.S. (8 Cranch) at 279.

consent, has important implications for contemporary debates over the proper interpretation of the Fourteenth Amendment's Citizenship Clause.

## II. THE REVISIONIST INTERPRETATION OF THE CITIZENSHIP CLAUSE

The orthodox understanding of the Citizenship Clause is that it applies to virtually all children born in the United States, and that "subject to the jurisdiction" excludes only "children of foreign sovereigns or their ministers . . . [and] children of members of the Indian tribes owing direct allegiance to their several tribes."<sup>24</sup> Citizenship requires a reciprocal bond of individual allegiance owed to the sovereign and protection provided by the sovereign. That bond is created merely by birth within the territory and sovereign authority of the state.<sup>25</sup>

Some scholars have more recently criticized this territorial view for interpreting "subject to the jurisdiction" more narrowly than the historical record would justify.<sup>26</sup> These revisionist commentators point out that, in Fourteenth Amendment debates, key Republican legislators argued that, for citizenship purposes, an individual had to be subject to the "full and complete jurisdiction," of the United States, to the "same . . . extent and quality as applies to every citizen," while "[n]ot owing allegiance to anybody else."<sup>27</sup> They read such statements as distinguishing between mere "territorial" jurisdiction (applicable to everyone) and the more "complete, political jurisdiction" over an individual that flows from the individual's "allegiance to the sovereign."<sup>28</sup>

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24. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898); see also *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents*, Hearing on H.R. 705, H.R. 363, H.J. Res. 56, H.J. Res. 64, H.J. Res. 87, H.J. Res. 88, and H.J. Res. 93 Before the Subcomm. on Immigration and Claims and Subcomm. on the Constitution of the Comm. of the Judiciary, H. Comm. on the Judiciary, 104th Cong. 77-82 (1995) (statement of Walter Dellinger, Assistant Att'y Gen., Office of Legal Counsel, U.S. Department of Justice) (endorsing *Wong Kim Ark's* narrow reading of "subject to the jurisdiction").
25. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866) (statement of Sen. Morrill) ("[E]very man, by his birth, is entitled to citizenship, and that upon the general principle that he owes allegiance to the country of his birth, and that country owes him protection.").
26. See, e.g., sources cited *supra* note 1.
27. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Howard); *id.* at 2893 (statement of Sen. Trumbull). Senator Trumbull, Chairman of the Senate Judiciary Committee, drafted the citizenship clause of the Civil Rights Act; Senator Howard was floor manager of the Fourteenth Amendment. See *id.* at 2764-65 (statement of Sen. Howard).
28. Eastman, *supra* note 1, at 1488.

Allegiance, on this view, requires both birth within the United States *and* the additional prior choice by the child's parents<sup>29</sup> to affiliate themselves with the United States. This choice involves renouncing their previous allegiance,<sup>30</sup> or at least formally demonstrating "commitment" to the United States by obtaining permanent resident status and assuming the "contributive responsibilities" of citizens.<sup>31</sup> Further, affiliation must be met with the "reciprocal consent . . . of the nation to [the individual's] membership."<sup>32</sup>

In short, children of undocumented immigrants would not be citizens because they do not satisfy core elements of the consensualist approach: that children born in the United States attain birthright citizenship only when born to parents inside the U.S. political community, with that community's consent. The basic territorial model, by contrast, rejects the relevance of parental citizenship status, the political ties between individual and nation, and governmental consent.

The consensualist understanding of the Fourteenth Amendment has been used by conservative commentators,<sup>33</sup> think tanks,<sup>34</sup> and advocacy groups<sup>35</sup> to support and justify efforts to narrow birthright citizenship without a constitutional amendment. It has formed the basis for proposed legislation to limit the acquisition of citizenship.<sup>36</sup> Yet this understanding, while based in

29. On the consensualist view, it is the parents' political status when their child is born that controls the citizenship of the child. See SCHUCK & SMITH, *supra* note 1, at 86; Eastman, *supra* note 1, at 1486; Mayton, *supra* note 1, at 247; Wood, *supra* note 1, at 507.
30. Eastman, *supra* note 1, at 1489-90.
31. Mayton, *supra* note 1, at 246.
32. SCHUCK & SMITH, *supra* note 1, at 84 (emphasis omitted).
33. See, e.g., Michelle Malkin, *What Makes an American?*, TOWNHALL.COM, July 4, 2003, [http://townhall.com/columnists/MichelleMalkin/2003/07/04/what\\_makes\\_an\\_american](http://townhall.com/columnists/MichelleMalkin/2003/07/04/what_makes_an_american).
34. See, e.g., Edward Erler, *Citizenship*, in THE HERITAGE GUIDE TO THE CONSTITUTION 384, 385-86 (Edwin Meese III, David F. Forte & Matthew Spalding eds., 2005).
35. See, e.g., Fed'n for Am. Immigration Reform, *Anchor Babies: Part of the Immigration-Related American Lexicon*, <http://www.fairus.org/site/News2?page=NewsArticle&id=16535&security> (last visited Feb. 18, 2010).
36. In the 110th Congress, for example, Representative Nathan Deal (R-GA), with 104 cosponsors, proposed a bill to end birthright citizenship for children of undocumented immigrants. See Birthright Citizenship Act of 2007, H.R. 1940, 110th Cong. (2007). Representative Deal reintroduced the bill in the 111th Congress, and, as of February 13, 2010, had ninety cosponsors. See Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. (2009). For information on the text and cosponsors of H.R. 1940 and H.R. 1868, see Library of Congress, THOMAS, <http://thomas.loc.gov> (look in Advanced Search for bills sponsored by Rep. Deal in the 110th and 111th Congresses) (last visited Feb. 18, 2010). Twelve of the sixteen Republican members of the House Judiciary Committee have cosponsored H.R. 1868. Compare the cosponsors of H.R. 1868, *supra*, with the members of

significant part on statements made by Senator Trumbull,<sup>37</sup> is inconsistent with Trumbull's actual emphasis on domicile rather than consent as the determinant of birthright citizenship.

### III. THE SIGNIFICANCE OF DOMICILE

Taking domicile to be the birthright citizenship standard disrupts essential premises of the consensualist approach. First, children born within the territorial boundaries of the United States are U.S. citizens (or not) based on their parents' domicile, not citizenship or political status. Thus, children born here to citizens of foreign nations do not necessarily take their parents' citizenship; more precisely, such children are not, as a definitional matter, born "subject to any foreign power," as consensualists contend. This approach tracks floor statements by Senator Trumbull on citizenship: responding to President Johnson's veto of the Civil Rights Act, for example, Trumbull said, "Even the infant child of a foreigner born in this land is a citizen of the United States long before his father."<sup>38</sup>

Using domicile as the benchmark also contradicts the consensualist argument that "subject to the jurisdiction" refers not to universally applicable territorial jurisdiction, but a narrower, "political" type.<sup>39</sup> To gain domicile in 1866, one had only to have lived within the territory and planned to permanently remain; one did not need to first transfer one's sovereign allegiance. Any new "national character" that one took on through acquiring domicile in a new country was merely "adventitious," and could "be thrown off at pleasure" by leaving the country without intent to return.<sup>40</sup> This is not exactly lasting political affiliation<sup>41</sup> or allegiance.<sup>42</sup>

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the House Committee on the Judiciary, <http://judiciary.house.gov/about/members.html> (last visited Feb. 18, 2010).

37. *E.g.*, SCHUCK & SMITH, *supra* note 1, at 79-83.
38. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866); *see also id.* at 498 (statement of Sen. Trumbull) ("I understand that under the naturalization laws the children who are born here of parents who have not been naturalized are citizens.").
39. *See, e.g.*, Eastman, *supra* note 1, at 1487-88.
40. *The Venus*, 12 U.S. (8 Cranch) 253, 280 (1814).
41. William Mayton argues that contemporary lawful permanent resident status is an appropriate parental prerequisite for the citizenship of children because its level of affiliation is equivalent to historical domicile. *See* Mayton, *supra* note 1, at 252-53. However, the comparison is ill-judged: unlike the complex and bureaucratized green card process, the legally unrestricted acquisition of domicile did not require formal procedures or governmental interaction. *Compare, e.g.*, U.S. Citizenship and Immigration Servs., Green

Indeed, in the Fourteenth Amendment debates, the explanations of jurisdiction given by Trumbull and others refer not to allegiance or political affiliation of individuals, but to the sovereign authority exercised over them. In explaining why the Amendment would not make tribal Indians citizens en masse, Trumbull said:

Does the Government of the United States pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another? Are they subject to our jurisdiction in any just sense? They are not subject to our jurisdiction. We do not exercise jurisdiction over them. It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens.<sup>43</sup>

To be sure, if domicile is the appropriate standard, individuals born here and subject to our laws would not be “subject to the jurisdiction” for citizenship purposes if their parents were here only temporarily. Using domicile in this way is thus more restrictive than the pure territorial approach: it requires parents to have some meaningful ties to the country in which they are living for children born there to be citizens.<sup>44</sup> Yet a domiciliary approach,

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Card (Permanent Resident), <http://www.uscis.gov/greencard> (last visited Feb. 18, 2010), with Part I, *supra*.

42. Common law doctrine held that even aliens residing in a country “under the protection of [its] government . . . ow[e] a temporary allegiance thereto.” *Inglis v. Trs. of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 165 (1830) (Story, J., concurring); *see also* Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 873-94 (2006) (discussing this common law doctrine in the context of treason prosecutions for violations of temporary obligations of allegiance). Since consensualists think that children born here to aliens temporarily present are not citizens, their preferred allegiance must be of a deeper, more permanent character.
43. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866); *see also id.* at 2895 (statement of Sen. Howard) (“‘Jurisdiction,’ as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States . . . . Gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction. . . . The United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe. . . . Why? Because the jurisdiction of the nation intervenes and ousts what would otherwise be perhaps a right of jurisdiction of the United States.”).
44. Such a limitation may have responded to the concern that an unlimited territorial approach would make citizens completely by happenstance. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson) (“[E]very person born in the United States is a natural-born citizen of such States, except [perhaps] . . . children born on our soil to temporary sojourners or representatives of foreign Governments . . . .”); *see also id.* at 2769



even with these limitations, is still different in kind from the consensualist requirement of “political jurisdiction.”

That is, as described in Part I, domicile requires individuals to integrate themselves into a nation’s social fabric through residence such that they consider it their home and have no plans to leave. Rather than reject the territorial approach’s concern with where individuals are living when the child is born, domicile creates a somewhat more restrictive definition of “living” for citizenship purposes. Consensualism, on the other hand, calls for mutual ties between an individual and the *political*, rather than the social community of a country. Beyond residence, it requires that an individual seek, and the country accept, affiliation between the individual and the government of the country.

Consensualists argue that for birthright citizenship to exist, the government must have “consented to the individual’s presence and status and offered him complete protection,” and that this consent, extended to the individual’s children born here, makes them birthright citizens.<sup>45</sup> Yet as of 1866, the requirements for domicile were solely residence and the intention that it be permanent.<sup>46</sup> Domicile was neither mediated nor restricted by state or federal law<sup>47</sup> and could arise irrespective of governmental consent.<sup>48</sup> In short, to use domicile as the determinant of birthright citizenship is to reject the set of political concerns that are at the heart of the consensualist view.

This is a particular problem for the consensualist stance on this question: its heavy use of Trumbull’s statements in congressional debate is predicated

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(statement of Sen. Fessenden) (“Suppose a person is born here of parents from abroad temporarily in this country.”).

45. SCHUCK & SMITH, *supra* note 1, at 86.

46. See *supra* notes 12-23 and accompanying text.

47. An examination of state high court decisions up to 1866 turned up no references, with one exception, to statutes defining the acquisition or characteristics of domicile. A Louisiana law defined the location of domicile within the state once acquired and governed the intrastate change of domicile. See *A. Wesson & Co. v. Marshall*, 13 La. Ann. 436 (1858); *Cole v. Lucas*, 2 La. Ann. 946, 948-50 (1847). In Louisiana, acquisition of domicile by someone moving into the state, however, was governed by the same combination of fact and intention of permanent residence used elsewhere. See *Cole*, 2 La. Ann. at 948-50. As best as can be determined, no federal statutes relate to domicile in any way.

48. Peter Schuck believes that Trumbull and others would reject the idea that one could acquire domicile through the commission of illicit acts such as fraud, or, more recently, unlawful presence. Email from Peter Schuck, Simeon E. Baldwin Professor of Law, Yale Law Sch., to Mark Shawhan (Oct. 30, 2009, 11:12 EDT) (on file with author). Pre-1866 courts and commentators seem not to have considered this issue, much less come to definite conclusions.

upon him accepting, not repudiating, consensualist principles.<sup>49</sup> It is not impossible to make a historically based consensualist argument regarding citizenship without citing Trumbull for evidence; at the very least, however, it is substantially more difficult.

This analysis is not meant to be the final word on the subject. More work remains to be done here, particularly in examining whether other legislators shared Trumbull's interpretation of the Civil Rights Act's citizenship language, and what implications would follow if they did.<sup>50</sup> This Comment has rather focused on a serious, and heretofore unrecognized, weakness in consensualist arguments about the proper understanding of "citizen of the United States."<sup>51</sup>

MARK SHAWHAN

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49. Nor is there any indication in the 1866 Civil Rights Act and Fourteenth Amendment debates that other senators (incorrectly) understood Trumbull as making consensualist arguments. On the contrary, crucial legislators such as Senator Howard saw Trumbull as equating jurisdiction with sovereign authority, not political membership. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866).
50. One difficult question, for example, would be what standard to apply to citizenship determinations. One could, for example, simply use contemporary domicile standards. While straightforward, this approach could have the anomalous and troubling effect of precluding those children who are born here to parents present for a substantial, but legally bounded, period on student or employment visas from claiming birthright citizenship. My thanks to Akhil Amar for this point. Substituting equivalent criteria such as an individual's length of time in the United States, or the extent of their social integration here, could be more nuanced and flexible, but at the expense of significant evidentiary costs.
51. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Sen. Trumbull).

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