“BY VIRTUE OF BEING BORN HERE”:
BIRTHRIGHT CITIZENSHIP AND THE
CIVIL RIGHTS ACT OF 1866

Mark Shawhan*

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* Law clerk to the Hon. Debra Ann Livingston, U.S. Court of Appeals for the Second
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INTRODUCTION

As U.S. immigration and citizenship policy has become increasingly controversial in recent decades, so too has the issue of whether, as a historical matter, the Citizenship Clause guarantees birthright citizenship for children of undocumented immigrants. The conventional understanding is that it does; revisionist critics argue instead that the Clause was originally understood as permitting society to choose to exclude individuals from birthright citizenship—in this case, children of undocumented parents.

These citizenship arguments have largely focused on evidence from congressional debate over the Citizenship Clause alone. But the Clause was intended to entrench an earlier statutory citizenship guarantee in the Civil Rights Act of 1866. Congress drafted and enacted the Civil Rights Act in the spring of 1866, during congressional consideration of the Fourteenth Amendment. When the Amendment’s floor managers later added the Citizenship Clause to the draft Amendment, they described the Clause as protecting the citizenship guarantee in the Civil Rights Act against future statutory rescission.

Because Congress added the Clause to constitutionalize the citizenship guarantee of the Civil Rights Act, and because the Clause’s substance drew heavily from the Act, the congressional debate over the Act’s citizenship language is important evidence in analyzing the historical understanding of the Clause. Previous scholarship on the Clause, however, has given only

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1 See United States v. Wong Kim Ark, 169 U.S. 649 (1898).
4 “[A]ll persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are citizens of the United States.” Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
6 Id. at 2896 (speech of Sen. Howard).
limited consideration to the debates over the Act. This Article closes that gap by providing a full analysis of those debates and what they reveal about the Citizenship Clause today.

What they show, I argue, is that whatever its contemporary political appeal, the revisionist historical view of the Citizenship Clause is wrong. Revisionists, taking the Fourteenth Amendment out of historical context, misread the contemporary congressional understanding of the Citizenship Clause and its precursor provision in the Civil Rights Act.

Part I of this Article lays out the context in which the 39th Congress considered citizenship, in particular the competing American citizenship traditions available to legislators in 1866. One such tradition drew on the long-standing common law doctrine that the birth of children within the territory and authority of the sovereign necessarily made them citizens; the other was the more consensualist view, adopted largely by courts in the South, that society could choose to exclude children from citizenship even if they had been born in the United States and under its authority.

Part II describes and analyzes the debates over the citizenship provision in the Civil Rights Act of 1866. These debates show that Congress understood that provision to take a traditional common law approach to citizenship. Republican supporters of the Act’s citizenship language emphasized that citizenship rules should focus primarily on one’s territorial birth, not societal consent to one’s citizenship. Conversely, Democrats opposed the provision because it denied the U.S. political community the power to withhold consent to citizenship for individuals deemed undesirable.

Some revisionist critics today argue that the Act’s exclusions of individuals born “subject to any foreign power” and “Indians not taxed” reflected a consensualist, rather than territorial, view of citizenship. Yet there is little evidence that Republicans simultaneously advanced strongly contradictory citizenship positions. The legislative record suggests instead that both of these exceptions were in fact consistent with the common law view that an individual need only be born within the territory and authority of the sovereign.

Part III considers the Fourteenth Amendment in light of the debates over the Civil Rights Act’s citizenship guarantee. The Citizenship Clause merged the two exceptions from that guarantee’s scope into a single affirmative requirement that individuals be born “subject to the jurisdiction” of the United States. Yet this change was understood merely as seeking greater precision in wording, rather than a substantive change in meaning. The

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7 See, e.g., SCHUCK & SMITH, supra note 2, at 76-81; NEUMAN, supra note 3; see also Eastman, supra note 2; Mayton, supra note 2, at 241-44. Some scholars even contend that the Act is not relevant to understanding the Amendment. See Epps, supra note 3, at 352-53.
8 I proceed along originalist lines in this way not least because doing so allows for discussion and criticism of the revisionist argument on its own historical terms.
9 See, e.g., SCHUCK & SMITH, supra note 2, at 80-83; ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN AMERICAN HISTORY 308-09 (1997); See also Eastman, supra note 2, at 1481-86.
touchstone principle continued to be the extent of U.S. sovereign power over an individual at birth.

Part IV applies that principle to present-day debates. In particular, it compares the case of children of undocumented parents to the situation presented by the children of diplomats or members of an Indian tribe. The children born in the United States to undocumented parents, unlike those in the latter two categories, are born wholly within the lawmaking and law enforcement authority of the U.S. government, and are not partially insulated from that authority by any inherited parental status. As such, those children are made birthright citizens by the Citizenship Clause of the Fourteenth Amendment, regardless of the immigration status of their parents.

I. CITIZENSHIP IN HISTORICAL CONTEXT

To evaluate the debates over the Civil Rights Act of 1866 and the Fourteenth Amendment, one must understand the intellectual worldview of the legislators who drafted and debated these enactments, and the background understandings of citizenship against which those legislators operated.

A. The Common Law Citizenship Tradition

In 1866, as today, the drafters of the Civil Rights Act were faced with two opposing doctrines regarding the non-statutory acquisition of citizenship.\(^\text{10}\) The first, derived from the Anglo-American common law tradition, held that one was a birthright citizen if born within the sovereign’s territory and authority -in Justice Story’s words, “within the dominions of the sovereign; and . . . within the protection and obedience” thereof, in a “place where the sovereign is at the time in full possession and exercise of his power.”\(^\text{11}\) Thus, citizenship resulted from the sovereign’s protection provided to an infant at birth and the corollary obligation of allegiance owed by that infant to the sovereign. Where, however, protection was absent due to the sovereign’s inability to exercise its authority fully, a child would not be born a citizen even when born within the sovereign’s territory.\(^\text{12}\)

If the territory and authority criteria were met, though, a child would automatically become a citizen, without reference to the political statuses of her parents. Justice Story again: “Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while


\(^{11}\) Inglis v. Trustees of Sailor’s Snug Harbour, 28 U.S. (3 Pet.) 99, 155-56 (1830) (Story, J., concurring in part and dissenting in part).

\(^{12}\) The standard examples then given of this phenomenon were children of foreign diplomats, children born on foreign ships, and children born on domestic soil to invading foreign armies. See, e.g., id. Some judges also added children born into American Indian tribes. See, e.g., Goodell v. Jackson, 20 Johns. 693, 712 (N.Y. 1823) (Kent, C.J.).
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the parents are resident there under the protection of the government, and
owing a temporary allegiance thereto, are subjects by birth.”

This doctrine, derived initially from English precedent and commentary,
was widely adopted and employed following the Revolution by
American courts as well. Indeed, in a notable case over the citizenship of
a child born in New York of Irish parents, Vice-Chancellor Sandford of the
New York Court of Chancery concluded that the common law citizenship
doctrine had “prevailed and was the law on such point in all the states” as of
the Revolution, that there was “no intention to abrogate or change” this rule
in the Constitution, and that the proper rule continued to be that of the
common law. Sandford therefore held the child to be an American citizen from
her birth in the United States. Prior to adoption of the Fourteenth Amend-
ment, U.S. attorneys general of otherwise widely differing views viewed this

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13 Inglis, 28 U.S. (3 Pet.) at 164 (Story, J., concurring in part and dissenting in part); See also, e.g., 2 James Kent, Commentaries on American Law 33 (New York, O. Halsted 1827) (“Natives are all persons born within the jurisdiction of the United States.”); William Rawle, A View of the Constitution of the United States of America 86 (Philadelphia, Philip H. Nicklin 2d ed. 1829) (“Every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution, and entitled to all the rights and privileges appertaining to that capacity.”); Cf. 2 St. George Tucker, Blackstone’s Commentaries app. at 101 (Philadelphia, William Young Birch & Abraham Small 1803) (“Aliens by birth, are all persons born out of the dominions of the United States, since the fourth day of July, 1776 . . . .”).


15 See, e.g., Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 119-20 (1804); Dawson’s Lessee v. Godfrey, 8 U.S. (4 Cranch) 321 (1808); Hollingsworth v. Duane, 12 F. Cas. 356, 358 (C.C.D. Pa. 1801); Gardner v. Ward, reported in Kilham v. Ward, 2 Mass. 236, 244 n.a (1806); Ainslie v. Martin, 9 Mass. 454, 456-59 (1813); Jackson v. Burns, 3 Binn. 75, 84-85 (Pa. 1810) (opinion of Tilghman, C.J.); Read v. Read, 9 Va. (5 Call.) 160, 194-204 (Va. 1804) (opinion of Roane, J.); Barziza v. Hopkins, 23 Va. 276 (1824); Cf. Cox v. Gulkick, 10 N.J.L. 328, 329 (1829) (deriving pleading rules for cases in which citizenship status is material from Calvin’s Case and subsequent common-law commentary).

16 One exception was the post-Revolutionary judicial treatment of Loyalists. American federal and state courts agreed that such individuals, under the circumstances of the Revolution, had a time-limited right to elect to maintain their allegiance to the British crown, rather than the new American governments. See, e.g., McIlvaine v. Coxe’s Lessee, 8 U.S. (4 Cranch) 209, 211-12 (1808) (assuming a time-limited right of election, but declining to decide whether that right had been properly exercised); Inglis v. Trustees of Sailor’s Snug Harbour, 28 U.S. (3 Pet.) 99, 120 (1830); Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 247-48 (1830); Trimble v. Harrison, 40 Ky. (1 B. Mon.) 140, 143 (1840); Jackson v. White, 20 Johns. 313 (N.Y. 1822). This doctrine, however, was understood to be a one-time exception from the default common law rule. See supra sources cited in notes 14-15. For discussion of the right of election, see R

17 Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. Ch. 1844). Clarke seems to have been the only case that, prior to the Civil War, adjudicated the status of a child born in the United States to concededly alien parents.

18 Id. at 655-56. Vice-Chancellor Sandford specifically rejected the consensualist argument for spurning the common law rule, namely that the rule was feudal and inconsistent with basic American principles. Id. at 657-58.
decision as controlling citizenship determinations for children born in the United States to alien parents.\textsuperscript{19}

\textbf{B. The Consensualist Alternative}

General doctrinal convergence on alienage should not obscure the extent of judicial divergence on race. Specifically, a number of antebellum state courts, largely in the South, ignored extant precedents on citizenship acquisition in favor of a racially based consensualist doctrine.

The consensualist approach seems to have arisen in adjudicating the citizenship of free black residents. Under the common law view, of course, black litigants would generally be recognized as citizens. To avoid the logical implication, namely that blacks would be entitled to a range of civil rights, these courts rejected the centrality of territorial birth\textsuperscript{20} and focused instead on the political relationship between individual and state. Citizenship, here, required one to be a full, constitutive member of society, holding a share of the state’s sovereign authority.\textsuperscript{21} Courts evaluated such status by the conferral of legal privileges\textsuperscript{22} or the absence of immunities,\textsuperscript{23} but especially by the possession of political rights -suffrage.\textsuperscript{24} These courts held that by withholding such rights the political community could and did refuse to admit certain individuals to membership. The community retained power to

\textsuperscript{19} Jeremiah Black, Attorney General for James Buchanan, wrote that for children of white parents, \textit{Clarke} was the controlling precedent, 9 Op. Att’y Gen. 373, 374 (1859), and that such a child’s “own birth in this country makes him as much a citizen as if his parents had also been natives,” Letter from Attorney General Jeremiah Black to Secretary of State Lewis Cass, Sept. 8, 1858 (National Archives Microfilm Publication T969, roll 2); Letters Sent by the Attorney General, 1851-1871; General Records of the Department of Justice, Record Group 60; National Archives at College Park, College Park, MD (on file with author). Lincoln Attorney General Edward Bates, considering a similar issue in 1862, simply cited \textit{Clarke} as having already set out “a full and clear statement of the principle, and of the reasons and authorities in its support.” 10 Op. Att’y Gen. 328, 329 (1862).

\textsuperscript{20} See, e.g., Bryan v. Dennis, 4 Fla. 445, 448-49 (1852); Bryan v. Walton, 14 Ga. 185, 195 (Ga. 1853); Amy v. Smith, 11 Ky. (1 Litt.) 326, 333 (Ky. 1822); Hobbs v. Fogg, 6 Watts 553, 556, 558 (Pa. 1837); State v. Claiborne, 19 Tenn. (Meigs) 331, 335 (Tenn. 1838); Aldridge v. Commonwealth, 4 Va. (2 Va. Cas.) 447, 450 (Va. 1824). The one Southern decision upholding black citizenship, by contrast, was based firmly in common law principles. See State v. Manuel, 20 N.C. (3 & 4 Dev. & Bat.) 144, 147-48 (1838).

\textsuperscript{21} See, e.g., Pendleton v. State, 6 Ark. 509, 512 (1846); Walton, 14 Ga. at 197; Mitchell v. Wells, 37 Miss. 235, 247-48 (1859); Hobbs, 6 Watts at 556-57; Claiborne, 19 Tenn. (Meigs) at 333-34.

\textsuperscript{22} See, e.g., Pendleton, 6 Ark. at 510; Crandall, 6 Ark. at 333; Leech v. Cooley, 14 Miss. (1 S. & M.) 93, 96 (1846); cf. White v. Tax Collector, 37 S.C.L. (1 Rich.) 136, 137 (1846); Claiborne, 19 Tenn. (Meigs) at 337-38.

\textsuperscript{23} See, e.g., Bryan, 4 Fla. at 449; Walton, 14 Ga. at 198; Hobbs, 6 Watts at 558; Aldridge, 2 Va. Cas. at 450.

\textsuperscript{24} See, e.g., Pendleton, 6 Ark. at 512; Crandall, 10 Conn. at 343 (jury charge); State v. Morris, 2 Del. (2 Harr.) 534, 536 (1837); Cooper v. Mayor of the City of Savannah, 4 Ga. 68, 71 (1848); Wells, 37 Miss. at 251; State v. Newson, 27 N.C. (5 Ired.) 250, 252 (1844); Hobbs, 6 Watts. at 556-57; Claiborne, 19 Tenn. (Meigs) at 333-34; Aldridge, 2 Va. Cas. at 450.
exclude even individuals born within the territory and authority of the state. 25
Since states denied many civil and political rights to free black residents, courts reasoned that those residents could not possibly be citizens. 26

Similarly, successive federal attorneys general, ignoring common law citizenship precedents, officially opined that blacks born in the United States were not citizens. Territorial birth was insufficient without “the full and equal privileges of white citizens in the state of their residence.” 27 Citizenship required one to be “an elemental part of the sovereign people, the body politic, of the United States,” 28 not a mere “subject[ ] of that sovereignty.” 29

The nadir of this antebellum consensualist approach was Scott v. Sanford. 30 According to Chief Justice Taney’s opinion for the Court, citizens were those who, at the Founding, made up that “political body who . . . form the sovereignty, and who hold the power and conduct the Government through their separate representatives.” 31 But given the prevalence of slavery and racially discriminatory laws before and after the adoption of the Constitution, this body did not include free blacks. 32 Rather, “citizenship at that time [1790] was perfectly understood to be confined to the white race . . . [who] alone constituted the sovereignty in the Government.” 33

Taney acknowledged that “a person may be a citizen . . . [who] does not possess all the rights which may belong to other citizens,” such as suffrage. 34 He argued instead that deciding that blacks could be citizens would imply their entitlement to the rights of citizens: “They would be entitled to all of these privileges and immunities in every state, and the State could not restrict them. . . . [T]hese rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens,” nor covered by the Privileges and Immunities Clause of Article IV. 35 Thus, by denying blacks the rights and privileges accruing to members of the political community, that community had shown itself to have excluded blacks from citizenship.

25 Cf. Walton, 14 Ga. at 197 (“To be a citizen of the body politic . . . requires something more than the mere act of [manumission]. To adopt into the body politic a new member is a vastly important measure in every community. It is an act of sovereignty . . . . Was there a general law, elevating all free persons of color to this condition, then the assent of the government would be given in advance of the act of manumission. No such act . . . exists.”).
26 Indeed, in the antebellum South, possession and exercise of civil and political rights was seen as constitutive not simply of citizenship, but of white racial identity itself. See Ariela J. Gross, Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South, 108 Yale L.J. 109, 156-66 (1998).
29 Id. at 749; see also id. at 753 (“[I] a free African is entitled to pre-emption [as a citizen], it can only be so considered by first overruling Mr. Wirt, and deciding that he is a citizen of the United States.”).
30 60 U.S. (19 How.) 393 (1857).
31 Id. at 404-06.
32 Id. at 415-16.
33 Id. at 419-20.
34 I.e., women. See id. at 422.
35 Id. at 422-23.
C. A Rejection of Consensualism

Analytically speaking, rejecting the Dred Scott doctrine required either accepting Taney’s consensualist premises but not his conclusions or rejecting consensualism altogether. An influential example of the latter course was the opinion on black citizenship written by Attorney General Edward Bates in 1862.

Bates agreed that one’s status as a citizen “express[es] the political quality of the individual in his relations to the nation . . . [and] declare[s] that he is a member of the body politic . . . .” Yet he rejected consensualist limitations on that membership. Rather, “our Constitution . . . reaffirms the universal principle . . . that the people born in a country do constitute the nation, and, as individuals, are natural members of the body politic.” Thus, Bates said, one is either citizen or alien, but never a native-born noncitizen.

Bates argued that the putative requirement that one must enjoy commonly-accepted privileges of citizens to hold citizenship status was fallaciously based on “loose and indeterminate language” of jurists and scholars writing about citizenship. The Constitution, Bates said, did not specify particular rights as flowing from citizenship, nor distinguish between classes of citizens based on the rights they enjoyed. Rather, “the Constitution speaks of citizens only, without any reference to their rank, grade, or class, or to the number or magnitude of their rights, privileges, and immunities . . . .”

Thus, even if Taney correctly identified legal infirmities of free blacks, these infirmities would likely not affect citizenship. Any bar to citizenship that did exist would not be perpetual: “It is an error to suppose that citizenship is ever hereditary. It never ‘passes by descent.’” Rather, regardless of race, citizenship “is as original in the child as it was in his parents. It is always either born with him or given to him directly by law.” Society could not exclude a child from birthright citizenship by denying rights to her or to her parents.

The essence of Bates’ doctrine of citizenship acquisition –citizenship from territorial birth, without regard to the views of the political commu-

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37 Id. at 394 (emphasis added). Indeed, “so strongly was Congress impressed with the great legal fact that the child takes its political status in the nation where it is born, that it was found necessary to pass a law to prevent the alienage of children of our known fellow-citizens who happen to be born in foreign countries.” Id. at 396.
38 Bates excepted only “the small and admitted class of the natural-born . . . children of foreign ministers and the like.” Id. at 397.
39 Id. at 387.
40 Id. at 388-89.
42 Id. at 399.
43 Id. at 398-99.
44 Id. at 399.
45 Id.
nity—would underpin the Republican approach to citizenship in the Civil Rights Act of 1866 and the Fourteenth Amendment.\footnote{Similarly, in early 1865 influential Republican theorist Francis Lieber proposed a series of nationalist constitutional amendments, one of which stated that “[t]he free inhabitants of each of the states, territories, districts, or places within the limits of the United States, either born free within the same or born in slavery . . . and since made or declared free, and all other inhabitants who are duly naturalized according to the laws of the United States . . . ” Francis Lieber, Amendments of the Constitution, in 2 The Miscellaneous Writings of Francis Lieber 137, 179 (Daniel C. Gilman ed., Philadelphia, J. B. Lippincott & Co. 1881); see also Michael Vorenberg, Emancipating the Constitution: Lieber and the Theory of Amendment, in Francis Lieber and the Culture of the Mind 23 (Charles R. Mack & Henry H. Lesesne eds., 2005).}

II. THE CIVIL RIGHTS ACT OF 1866

The Civil Rights Act of 1866,\footnote{Civil Rights Act of 1866, ch. 31, 14 Stat. 27.} and its unsuccessful companion bill to extend the life and powers of the Freedmen’s Bureau, were intended to protect the welfare and rights of the freedmen in the South against white discrimination, newly enacted oppressive legislation (in the form of the Black Codes), and a biased legal system.\footnote{See, e.g., Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863-77, at 198-210 (oppressive treatment of the freedmen), 239-51 (political background of the civil rights and Freedmen’s Bureau bills). Significant elements of the Act remain in effect in modified form today. See, e.g., 18 U.S.C. § 242, 28 U.S.C. § 1443(1), 42 U.S.C. § 1982 (all 2006).} Although they received Radical support, these two bills were put forward by moderates holding the balance of power in the Republican caucus, such as Sen. Lyman Trumbull (R-IL), Chairman of the Senate Judiciary Committee.\footnote{See, e.g., Foner, supra note 48, at 243-44.}

On January 29, 1866, Sen. Trumbull moved an amendment to his then-pending civil rights bill, declaring “all persons of African descent born in the United States” to be citizens;\footnote{CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866) (statement of Sen. LymanTrumbull).} the next day, he substituted different language, which declared as citizens “all persons born in the United States, and not subject to any foreign Power.”\footnote{Id. at 498.} These provisions sparked extensive congressional debate, culminating in the inclusion of a modified version of this provision in the final version of the Civil Rights Act of 1866,\footnote{“[A]ll persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are citizens of the United States.” Civil Rights Act of 1866, ch. 31, 14 Stat. 27.} passed over President Johnson’s veto.

I argue here that the debates in Congress over the Civil Rights Act’s citizenship provision provide significant insight into the congressional understanding of the Citizenship Clause of the Fourteenth Amendment, which closely followed the Act. Not everyone agrees. Professor Garrett Epps, for example, says that the debates over the Act are not relevant to interpreting the much more sweeping character of the Amendment; he points out that the
Act and the Amendment were drafted in different form by legislators with different political views.\textsuperscript{53} As such, the meaning of the Amendment “must stand on its own” without reference to the Act.\textsuperscript{54}

Yet even if the Fourteenth Amendment as a whole has a more sweeping and transformative meaning than the Civil Rights Act;\textsuperscript{55} that character does not necessarily extend to every element of the Amendment. In particular, one should be skeptical that Congress understood the Citizenship Clause to create a citizenship guarantee substantively different from that of the Act.

Congress discussed the Clause for part of an afternoon,\textsuperscript{56} in contrast to its extended consideration of equivalent language in the Act.\textsuperscript{57} Moreover discussion of the Clause merely recapitulated part of the debate over the Act, with fewer senators participating.\textsuperscript{58} And while debate was at times heated, it was resolved by voice, rather than roll call, vote.\textsuperscript{59}

True, the Clause was introduced by Sen. Jacob Howard, not the more moderate Sen. Trumbull. Yet Sen. Howard, on introducing the Clause, said that he did “not propose to say anything on that subject, except that the question of citizenship has been so fully discussed in this body as not to need any further elucidation, in my opinion.”\textsuperscript{60} When opponents of the Clause raised objections that had been made during debate on the Act, the first senator asked for an opinion was Sen. Trumbull, “who has investigated the civil rights bill so thoroughly.”\textsuperscript{61} In the ensuing debate, Trumbull and Howard were the principal speakers in favor of the Clause as introduced. Howard began his analysis by noting that he “concur[red] entirely” with Trumbull’s understanding of the scope and coverage of the Clause.\textsuperscript{62} Howard

\textsuperscript{53} Epps, supra note 3, at 349-53.
\textsuperscript{54} Id. at 353.
\textsuperscript{56} The Clause was itself introduced as a belated amendment to the extant text of what would become the Fourteenth Amendment. See CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (Amendment as originally introduced); id. at 2890 (introduction of the Citizenship Clause).
\textsuperscript{57} Compare id. at 2890-97 (Senate debate on the Clause), with id. at 475-77, 498-500, 504-06, 521-30, 570-75, 598-600, 1757-59 (Senate debate on the Act) and id. at 1115-22, 1124, 1151-57, 1160, 1262-63, 1266-69, App. 156-57, 1832-33 (House debate on the Act).
\textsuperscript{58} The House did not debate the Clause prior to adding it to the Amendment.
\textsuperscript{59} See, e.g., id. at 498-99; 504-06, 521-27, 572-75, 598-600. See also infra Section III.A.
\textsuperscript{60} See id. at 2897.
\textsuperscript{61} Id. at 2890 (statement of Sen. Howard).
\textsuperscript{62} Id. at 2893 (statement of Sen. Fessenden). Epps rightly notes that Sen. Fessenden did not call on Sen. Trumbull because Trumbull drafted the Citizenship Clause, but rather because of Trumbull’s hard-won expertise on citizenship. See Epps, supra note 3, at 358 n.99. If the Clause were understood differently from the Act, though, the logical person for Fessenden to consult would have been Howard, not Trumbull.
\textsuperscript{62} CONG. GLOBE, 39TH CONG., 1ST SESS. 2895 (1866).
also claimed later in the debate that the Clause merely entrenched the citizenship provision in the Act against conservative statutory revision.63

Most importantly, I argue, though the two provisions were phrased differently, Congress understood their substantive scope to be the same. Both supporters and opponents of the Act and the Clause understood their citizenship provisions to require only that an individual be born within both the territory and full authority of the United States. Foreign ambassadors and their families would, given their diplomatic immunity, be excepted. Similarly, Indians not fully subject to U.S. authority at birth to “the same extent and quality as applies to every citizen of the United States now” would be excluded from birthright citizenship.64 Republicans in Congress supported the Act (and the Clause) for enacting this approach; Democrats and their allies opposed both provisions for enacting a common-law derived approach that was antithetical to their consensualist views.

A. Civil Rights Act: Senate Debate65

1. January 30th: Consensualists Object to Citizenship of the Freedmen, and the Question of Indian Citizenship is First Raised

Sen. Trumbull, when first introducing his citizenship proposal on January 29th, grounded its terms squarely in common law principles: “In my judgment, persons of African descent, born in the United States, are as much citizens as white persons who are born in the country.”66 But, since “in the slaveholding States a different opinion has obtained,” Trumbull sought to end any question by “declaring all persons born in the United States to be citizens thereof. That this bill proposes to do.”67

Trumbull’s emphasis on the provision’s “declaratory” character anticipated a major Democratic objection to the Act—that the freedmen had not been citizens; that the Thirteenth Amendment was emancipatory but nothing more;68 and that Congress lacked power to make the freedmen citizens absent an additional constitutional amendment. As we shall see, this Democratic criticism, and the Republican response given here that the Act merely

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61 See id. at 2896.
62 CONG. GLOBE, 39TH CONG., 1ST SESS. 2895 (1866) (statement of Sen. Howard).
63 The discussion and analysis that follow are largely narrative in form, to provide necessary context given the twists and turns of the debate over the Act.
64 CONG. GLOBE, 39TH CONG., 1ST SESS. 475 (1866).
65 Id.
66 See, e.g., id. at 476 (1866) (statement of Sen. Willard Saulsbury) (“The States have simply said that . . . the status or condition of slavery in this country shall not longer exist—the condition in which one man belongs to another, which gives to that other a right to appropriate the profits of his labor to his own use and to control his person. . . . [T]he power given . . . relates simply and solely to one subject-matter, the abolition of the status or condition of slavery . . . .”)
declared that which was already so, would recur several times during the debate.

The next day, January 30th, brought two sets of objections to Trumbull’s move to codify a common law citizenship approach. Senate Democrats and their allies criticized how such an approach would preclude the state from choosing, based on race or other criteria, to exclude territorially-born individuals from birthright citizenship. They did so both as a general matter and with reference to the specific case of American Indians.

Peter Van Winkle of West Virginia spoke first, articulating the general objection. He began by arguing that “persons of African descent in this country” were not citizens: “Most certainly they were not counted among ‘we the people’ who established the national Constitution . . . They are not citizens by birth, for the common law of England is not of force under the national Constitution.” Rather, political communities inherently possessed power to “exclud[e] from citizenship or membership those who were objectionable . . . I do not see where it comes in that we are bound to receive into our community those whose mingling with us might be detrimental to our interests.”

Following Van Winkle’s speech, Trumbull introduced a broader provision that declared all persons “born in the United States, and not subject to any foreign power to be citizens.” Notwithstanding this change, heterodox Republican Edgar Cowan of Pennsylvania objected on the same grounds as Van Winkle. Cowan initially challenged Trumbull on whether the language declaring all those born here to be citizens would apply to “the children of Chinese and Gypsies born in this country[.]” Trumbull thought that it “undoubtedly” would, since “[c]hildren who are born here of parents who have not been naturalized are citizens.” This principle was true equally of “the children of German parents and the children of Asiatic parents.” Cowan, while agreeing that the U.S.-born children of foreign parents might be citizens if they were of an appropriate race, staunchly rejected the idea that the children of “Chinese” or “Hottentot[ ]” parents might be citizens. Indeed, to say that “children of persons of barbarian races, born into this country, are . . . from that very fact citizens of this country . . is to betray . . an utter inappreciation of the fundamental principles which underlie the whole of our system.”

69 Van Winkle addressed the initial, narrower citizenship provision, see id. at 497 (1866), but his objection also applied to the broader version. He would vote against the civil rights bill when it first passed the Senate. Id. at 607.
70 Id.
72 Id. at 497.
73 Id. at 498.
74 Id.
75 Id.
77 Id. at 499.
Cowan’s view was rather that the “freemen who emigrated to this country and established these governments . . . were the actual possessors of the political power of the colonies, and they alone had the right to say whom they would admit to a coenjoyment of that power with them.” Cowan claimed it to be clear that while the existing political community “did open the door of these privileges wide to men of their own race from Europe . . . where did they open it to the barbarian races of Asia or of Africa? Nowhere.” Thus, Cowan, Van Winkle, and their allies opposed the citizenship provision for the same reason that most Republicans were in favor: it based citizenship on territorial birth rather than parental political status or the consent of the political community.

Despite their overall differences, Trumbull and Cowan agreed on one crucial point—that a child born in the United States of alien parents was not, without more, precluded from citizenship. Some modern consensualist commentators argue that “not subject to any foreign power” was understood to exclude children who, because their parents owe a foreign allegiance, putatively lack allegiance to the United States themselves. Leaving aside that such a view would contradict the prevailing legal understandings of the time, the exchanges here between Trumbull and Cowan show they did not hold that position. Trumbull thought that the bill would “undoubtedly” make citizens of children born here to Chinese parents, since “children who are born here of parents who have not been naturalized are citizens.” And Cowan, while sneering at making citizens of children of “barbarian races,” did not question that children of certain foreign “races” were citizens. The Democratic position was that citizenship acquisition was limited by race, not alienage.
Democrats also objected more specifically that Trumbull’s proposal would (undesirably) naturalize all Indians. Democrat James Guthrie of Kentucky, for instance, responded on January 30th to Trumbull’s introduction of broader citizenship language by asking Trumbull whether he meant “to naturalize all the Indians of the United States?”

Trumbull’s reply, one he would echo frequently in these debates, focused on the relationship between citizenship and birth under the sovereign’s authority. Trumbull said that his bill would not declare the Indians to be citizens, because “[o]ur dealings with the Indians are with them as foreigners.” Tribal Indians “will not be embraced by this provision because we have always treated the Indian tribes as nations,” dealt with “by treaty, and not by law. . . .” The provision applied only to Indians “incorporated into the United States as some are, and are taxable . . . who are domesticated and pay taxes and live in civilized society.”

Trumbull thus argued that Indian tribes were inside U.S. territorial limits but not the United States per se, nor within the reach of its direct legislative power. Similarly, answering questions from Republican James Lane of Kansas, Trumbull said that Indians “are already citizens of the United States if they are separated from their tribes and incorporated in your community.”

The precise point in time at which such assimilated Indians became citizens, though, soon provoked confusion. Lane attempted to expressly exclude Indians still subject to tribal authority from birthright citizenship, so that “Indians who have taken [land] allotments and thereby separated themselves from the tribal authority may become citizens of the United States.”

Trumbull did not object, since he thought such an exclusion would not change the meaning of the provision, but Democrat Reverdy Johnson of Maryland, ever the polite troublemaker, pointed out a problem. Trumbull

have to say that a free white person born in this country, of foreign parents, is a citizen of the United States.”) (emphasis added) (citing Clarke, 1 Sand. Ch. 583).


86 CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (1866).

87 Sen. Guthrie claimed in response that “as [Indians] are mere dependents upon the Government, living in the United States, I think they would be made citizens under such a provision as this.” Id.

88 Id. at 498-99.

89 Id. at 504. “Allotments” were lands allotted, generally by treaty, to individual Indian families as private property, rather than as common property controlled by the tribe. See, e.g., 1 FRANCIS PAUL PRUCHA, GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 326-27 (single vol. ed. 1995). Breaking up tribal property in this way was an attempt to weaken tribes and encourage assimilation by tribal members. Kansas sought to treat Indians who accepted allotments like other Kansas residents, most notably by subjecting them to taxation. See CONG. GLOBE, 39TH CONG., 1ST SESS. 525-26 (1866) (statement of Sen. Samuel Pomeroy of Kansas) (describing this policy). The Supreme Court ruled late in 1866 that the Kansan effort to tax Indians maintaining tribal membership was unconstitutional, allotments or no. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866).

90 CONG. GLOBE, 39TH CONG., 1ST SESS. 504 (1866).
intended the citizenship provision to apply to children, in his words, "[w]hen born." On Trumbull’s reading, birth status controlled, such that leaving tribal society only as an adult would not make one a citizen.\(^91\) Lane, though, preferred for policy reasons that an individual’s choice to leave tribal authority would be the determining factor.\(^92\)

2. \textit{January 31th: Renewed Consensualist Objections, and Excluding “Indians not taxed” as the Best Solution to the Indian Citizenship Question}

Much of the debate on January 31st would cover Indian citizenship, and how to formulate an exclusion of (some) Indians from birthright citizenship. The day’s debate opened, though, with a recurrence of consensualist objections to the citizenship of the freedmen. The speaker was Unionist Sen. Garrett Davis of Kentucky.

Recapitulating \textit{Dred Scott}’s historical analysis, Davis argued that blacks had never been birthright citizens prior to the adoption of the Constitution, that the Constitution would never had been adopted had it incorporated a territorial citizenship rule, and that birthright citizenship was instead constitutionally reserved to members of “the Caucasian race of Europe” born in the United States.\(^93\) Nor could Congress, he said, naturalize the freedmen, since naturalization “refers exclusively to foreigners,” and the freedmen were non-citizen natives, not aliens.\(^94\)

Before Trumbull could respond, the controversy over Indian citizenship resumed. The course of argument that day shows Trumbull’s central objective on this point: preserving the focus of the citizenship provision on birth within the territory and authority while steering among various senatorial concerns about the provision’s effect on particular groups of Indians.

To begin, Sen. Lane, attempting again to make Indians in Kansas subject to Kansas laws and taxes, proposed \textit{conferring} citizenship on all “Indi-
ans holding lands in severalty by allotment.” Yet as Trumbull quickly pointed out, this language did not differentiate tribal and non-tribal Indians. It therefore could apply to Indians “all through the Cherokee nation,” or even “outside of the organized jurisdiction of the United States in the Indian country.”

Trumbull thus objected to the interaction between Lane’s proposal and existing tribal exemptions from U.S. authority. Extant treaty provisions guaranteed the Cherokees self-governance and internal legislation and excluded Cherokee land from state or federal Territorial jurisdiction. Other tribes living on land in “Indian country” were not fully subject to otherwise-applicable federal criminal law. In either situation, tribal territory, while within U.S. limits, would be effectively outside full U.S. authority, regardless of whether that territory was owned individually or communally. Lane’s amendment would make birthright citizenship in the Indian context turn solely on the form of Indian land ownership, rather than on the extent of governmental authority over Indian landowners. Trumbull therefore preferred the original “subject to tribal authority exclusion.” In his view, Indians living outside U.S. sovereign power should not be made citizens, even those assimilating into American society through holding land individually by allotment.

Unfortunately for Trumbull, reiterating his support for the tribal authority exclusion provoked more general debate. John Conness, Republican of

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95 Id. at 522. “Lands in severalty by allotment” were lands that had been granted to particular Indian families pursuant to the allotment policy discussed in note 68, supra. See Prucha, supra note 89, at 326-27.
96 CONG. GLOBE, 39TH CONG., 1ST SESS. 525 (1866) (statement of Sen. Trumbull).
98 Indian country, as defined in the Indian Trade and Intercourse Act of 1834, was, broadly, land west of the Mississippi River and not Missouri, Louisiana, or Arkansas. Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729. This then-obsolescent definition still applied in 1866. See NULL JESSUP NEWTON ET AL., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[b], at 185 (3d ed. 2005). For background on the Trade and Intercourse Act, see 1 PRUCHA, supra note 89, at 293-302.
99 See Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733 (“That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.”). Tribal members committing crimes with non-Indian victims were sometimes exempted by treaty from direct federal law enforcement; trial in Territorial court in such cases occurred only following a quasi-extradition process. See, e.g., Treaty with the Comanches, U.S.-Comanche, art. 7, May 15, 1846, 9 Stat. 844, 845 (“[I]f any Indian or Indians shall commit a murder or robbery on any citizen of the United States, the tribe or nation to which the offender belongs shall deliver up the person or persons so complained of, on complaint being made to their chief, to the nearest post of the United States, to the end that he or they may be tried, and, if found guilty, punished, according to the law of the . . . Territory where such offence may have been committed.”).
100 CONG. GLOBE, 39TH CONG., 1ST SESS. 525 (1866).
101 Trumbull’s stance on this point undercuts the argument of Peter Schuck and Rogers Smith, see SCHUCK & SMITH, supra note 2, at 83, that the exclusion for certain Indians was an attempt by Trumbull and other Republicans to preserve the political community’s ability to exclude Indians deemed undesirable from citizenship.
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California, stated that there were Indians on California reservations who were under the full control of United States Indian agents rather than tribal authority, were not fit for citizenship, and should not be made such by the bill.102

Republican Alexander Ramsey of Minnesota chimed in. He pointed to the “large numbers of roving Indians on our frontier . . . outlaws, refugees from all tribal authority,” and objected to admitting these “most obnoxious of all Indians to the inestimable privilege of citizenship.”103

Trumbull, exasperated, argued to Sens. Ramsey and Conness that:

Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one upon the other, to be the subjects of the United States in the sense of being citizens. They must be excepted. The Constitution of the United States excludes them from the enumeration of the population of the United States when it says that Indians not taxed are to be excluded. It has occurred to me that perhaps an amendment would meet the views of all gentlemen, which used these constitutional words . . . .104

Both Conness and Ramsey saw this language as acceptable.105 Democrat Thomas Hendricks of Indiana, on the other hand, objected that such wording would make the citizenship of “Indians or anybody else . . . dependent upon . . . whether they pay taxes.”106

Trumbull, in response, drew the two strands of the broader citizenship debate together. He reiterated his own position that “persons born in the United States and under its authority, owing allegiance to the United States, are citizens without any act of Congress.”107 Though “some of the courts in the southern States have held differently,” these courts failed to recognize that “[b]y the Articles of Confederation free persons of color were citizens, just as much citizens as white persons.”108 Their citizenship, moreover, had been recognized by the courts.109 While they were thus “already citizens by the Constitution,” it was appropriate to “declare [their status] in a law . . . . to remove doubts” of skeptics such as Sen. Davis.110

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102 CONG. GLOBE, 39TH CONG., 1ST SESS. 526 (1866).
103 Id. at 527.
104 Id. (emphasis added).
105 See id. at 527 (statement of Sen. Conness); id. at 571 (statement of Sen. Ramsey).
106 Id. at 527 (statement of Sen. Hendricks).
107 CONG. GLOBE, 39TH CONG., 1ST SESS. 527 (1866).
108 Id. (statement of Sen. Trumbull).
109 Id. (statement of Sen. Trumbull). The specific court case that Trumbull referenced was State v. Manuel, which, as noted above, see supra note 20, relied expressly on common law citizenship principles.
110 Id. (statement of Sen. Trumbull).
As for Sen. Hendricks, Trumbull argued against reading “Indians not taxed” literally. The phrase was a constitutional term of art, denoting individuals over whom the United States lacked lawmakership and enforcement authority. Such Indians “have separate governments of their own. They do not recognize nor are they made subject to the laws of the United States. They make and administer their own laws; they are not counted in our population; they are not represented in our government . . . .”\textsuperscript{111} It would be ridiculous to make citizens of “the wild roaming Indians not taxed, not subject to our authority,” unlike the Indian who has “cast off his wild habits and submitted to the laws of organized society and become a citizen.”\textsuperscript{112} If an Indian child were born subject to the laws and authority of the United States, she would be a citizen; if not, she would not.\textsuperscript{113}

While this speech did not end the day’s deliberation over the citizenship provision, the debate that followed largely rehashed points that had already been made, rather than introduce new arguments or advance the discussion. Debate on the following day would be more consequential.

3. \textit{February 1st: The Choice Between Excluding “Indians not taxed” and Excluding “Indians subject to Tribal Authority”}

On February 1st, the Senate again focused principally on Indian citizenship. In particular, debate centered around defending the “Indians not taxed” language against a renewed push to exclude only Indians who were “subject to tribal authority.” That said, in a mirror image of January 31st, debate opened with a prepared speech by Lot Morrill, Republican of Maine, defending the bill’s citizenship provision from opponents such as Sen. Davis. Morrill argued that the citizenship provision “is not an enactment in the sense of law, in the sense of legislation” because it did not alter blacks’ citizenship status.\textsuperscript{114} They were already citizens, on common law principles: “every 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. That is the foundation, as I understand it, of all citizenship . . . .”\textsuperscript{115} Yet this declaration of existing law, by explicitly repudiat-
ing slavery and its legal legacy, “typifies a grand fundamental change in the politics of the country,” thus attaining “a transcendent importance.”

Debate then returned to the bill’s effect on the citizenship of tribal Indians, and how to designate Indians born outside U.S. sovereign authority. Republican John Henderson of Missouri, speaking after Morrill, repeated Hendricks’s objection that “Indians not taxed” would create a property qualification. Henderson could see no harm to states from declaring that a non-tribal Indian, who would not “ow[e] allegiance quasi to a foreign power, (regarding the Indian tribes as foreign powers) shall be regarded as a citizen of the United States.”

Henderson’s criticism provoked several responses, the first from conservative Republican James Doolittle of Wisconsin, Chairman of the Indian Affairs Committee. Doolittle, like Trumbull, understood “Indians not taxed” as a term of art. Such Indians were not part “of the population of the United States. They are subject to the tribes to which they belong . . . spoken of in the Constitution as if they were independent nations, to some extent, existing in our midst but not constituting part of our population, and with whom we make treaties.” The reach of “Indians not taxed” did not depend on paying taxes, but on whether one was “liable to be taxed.”

After Ramsey again opposed making citizens of “large numbers of wild, savage Indians, as uncivilized and as untamed as any on the plains . . . who are outlaws from their tribes and nations,” Trumbull resumed the floor and made a significant statement. He agreed that the goal was to “make citizens of everybody born in the United States who owes allegiance to the United States.” Framing the bill accordingly required care to avoid including individuals “whom we would have no right to make citizens,” in particular “the child of a foreign minister temporarily residing here.”

Sherman) (“The first section of the [civil rights] bill simply declared that a negro emancipated by the constitutional amendment is a citizen of the United States. I believe he was a citizen of the United States before if he was free, but to remove all ambiguity or doubt about it this provision was inserted in the bill . . . .”).

116 Id. at 570 (statement of Sen. Morrill).
118 Id. (statement of Sen. Henderson).
120 Id. (emphasis added). Doolittle thought that this distinction was also necessary policy, since many of the “Indians not taxed,” including those “disconnected from their tribes . . . wandering in bands and in families,” were “not yet in a condition to be incorporated as part of the citizens of the United States.” Id. at 571, 572. See also id. at 573 (statements of Sen. George Williams of Oregon) (objecting to making citizens of the Indians on Oregon reservations who, while not subject to tribal authority, would not be fit for citizenship, and stating that “[Indians not taxed] is the most certain way of defining the distinction between wild, savage, and untamed Indians, and those who associate with white people, own property, and exercise the privileges that generally attend a citizen in the community.”).
121 CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866).
122 Id. at 572. Two days before, Trumbull had said that it was appropriate to make citizens of children born here to foreign parents. See supra notes 74-75. Such children, of course, were fully subject at birth to U.S. law, while children of foreign diplomats were not. This juxtaposition suggests again that the “not subject to any foreign power” requirement simply applied existing common law principles, rather than introducing a new alienage-based exclusion.
While that problem could be solved by excluding individuals “subject to a foreign power,” that formulation did not alone resolve how to prevent a (putatively) undesired and inappropriate extension of citizenship to all Indians in the United States.

A “tribal authority” exclusion would be insufficient because it would not exclude Indians born outside the control both of tribes and the United States. Such a phrasing would make citizens of Indians “not subject to tribal authority who yet were wild and untamed in their habits . . . were not under the laws of any civilized community, and of whom the authorities of the United States took no jurisdiction.”

Similarly, this formulation would not exclude Indians like those described by Conness, who, outside tribal authority, were on reservations “under the regulations of treaties which had been made with them, and were supplied and looked after by our Indian agents the same as other Indians who were perfectly wild, not submitting at all to the usages of civilized life.”

The “tribal authority” language thus did not exclude all those born outside U.S. laws and power. Instead, the more flexible wording of “Indians not taxed” was required. That phrase “designate[d] a class of persons who were not a part of our population . . . They are not counted in the census,”

Such individuals were “[c]onsidered virtually as foreigners, as a description of persons connected with those tribes with whom we make treaties . . . those Indians yet belonging to a foreign Government, and not counted as part of our people.”

Indians who did not “come within the jurisdiction of the United States so as to be counted,” would not be citizens, any more than would a “negro or white man [who] belonged to a foreign government.”

Tribal lands, though within the territorial limits of the United States, were, for citizenship purposes, the functional equivalent of foreign territory.

The day’s debate following Trumbull’s speech consisted chiefly of back-and-forth between Henderson, Ramsey, and George Williams of Oregon on whether, as Henderson insisted, little trouble would result from enacting a “tribal authority” exclusion that would make citizens of non-tribal Indians.

Since Henderson favored “the very broadest proposition on this subject,” and would not vote against Trumbull’s favored language, this disagreement seems more desultory than consequential. The Senate rejected Henderson’s
“tribal authority” clause by voice vote; “Indians not taxed” passed decisively, supported by Sens. Conness, Henderson, Lane, Ramsey, and Williams.\(^{130}\)

In obtaining this result, it would have been simple for Trumbull to have explained his preferred formulation as an application of consensualist principles. Yet he instead carefully assimilated the bill’s treatment of tribal Indians into the existing common law view. This makes perfect sense: Trumbull and his Republican compatriots would have little reason to adopt the consensualist approach of their bitter ideological enemies if the goals of the Republicans could be accomplished within their preferred citizenship framework.\(^{131}\)

To be clear, in passing the Civil Rights Act, Congress, literally speaking, consented to black and (some) Indian citizenship. Yet this consent does not make the Act’s citizenship rule “consensualist,” properly speaking. One should distinguish the creation of a citizenship rule itself from the rule’s substantive content.\(^{132}\)

Further, by predicating his citizenship rule on authority alone, Trumbull placed himself cleanly on the common law side of the central divide over citizenship—the extent of societal discretion to refuse citizenship to those seeking it.\(^{133}\) On Trumbull’s approach, while not all Indians lived under full U.S. sovereign authority, Indian children born under that authority would gain citizenship automatically, with no scope for society to exclude un-

\(^{130}\) See id. at 574-75.

\(^{131}\) Schuck and Smith argue that the Republicans understood their approach to Indian citizenship in consensualist terms. See SCHUCK & SMITH, supra note 2, at 83. Yet all parties to the debate over the Act saw it as repudiating the citizenship theory of Dred Scott with respect to the freedmen. Schuck and Smith provide no evidence for the counterintuitive proposition that Congress simultaneously understood the “Indians not taxed” exception as enacting Dred Scott’s approach with respect to Indian tribes.

\(^{132}\) Making rule-creation the relevant criterion renders any provision defining citizenship acquisition “consensualist”-even a Fourteenth Amendment reading, “All persons born in United States territory are automatically citizens.” If everything is consensualist, the term is analytically all but useless. See also NEUMAN, supra note 3, at 169 (making a similar argument).

\(^{133}\) Schuck and Smith suggest that consensualism involved mutual consent between individual and society regarding citizenship. See SCHUCK & SMITH, supra note 2, at 83-86. See also Mayton, supra note 2, at 226-28, 245-47 (same). Yet at the time, those who suggested that consent was required did not see the choice of the individual to seek political membership as relevant. See, e.g., supra notes 20-35; see also, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (1866) (statement of Sen. Van Winkle) (“[T]here was no right that could be exercised by any community of society more perfect than that of excluding from citizenship or membership those who were objectionable.”); id. at 499 (statement of Sen. Cowan) (same). In the context of birthright citizenship, such a focus is sensible. An infant cannot consent to political membership; even Schuck and Smith concede that consent, “in the case of children, [is] ascribed” to them through the political status of their parents. SCHUCK & SMITH, supra note 2, at 84. If citizenship is always ascribed at birth, the relevant question is society’s power to limit that ascription through restrictive citizenship criteria. For other critiques of the idea of citizenship as based on mutual consent, see Bernadette Meyler, The Gestation of Birthright Citizenship, 1868-98: States’ Rights, the Law of Nations, and Mutual Consent, 15 GEO. IMMIG. L.J. 519, 546-59 (2001); Mae Ngai, Birthright Citizenship and the Alien Citizen, 75 FORDHAM L. REV. 2521, 2526 (2007).
desirables.\textsuperscript{134} Such a stance, consistent with Trumbull’s statements throughout the debates, was the antithesis of the position of the Democrats and their consensualist allies that no matter the circumstances of an individual’s birth, society retained the right to say he should not be a citizen if he had characteristics that society deemed to be unwanted.\textsuperscript{135}

To be sure, some Senate Republicans may have taken a different view of Indian citizenship;\textsuperscript{136} yet there is little evidence that the Republican caucus as a whole followed their lead, rather than that of the drafter of the Act’s citizenship language.

4. \textit{February 2nd: Closing Thoughts on Whether the Freedmen Were (or Could Become) Citizens}

As of the addition of “Indians not taxed” to the civil rights bill, meaningful Senate deliberation on the bill had virtually ceased; discussion on February 2nd consisted only of long closing speeches on the overall bill for posterity. There was, however, one meaningful exchange on citizenship in the course of the day.

Sen. Davis spoke first. In the course of his long and fiery denunciation of the bill, Davis repeated his claim that the scope of birthright citizenship was constitutionally defined and inalterable by legislation; he argued again that if the freedmen were not already citizens by birth, Congress could not make them citizens through its naturalization power.\textsuperscript{137}

Sen. Trumbull’s reply contained two important statements reiterating his territorial view of citizenship. He said first that “in my opinion birth entitles a person to citizenship, that every free-born person in this land is, \textit{by virtue of being born here}, a citizen of the United States,”\textsuperscript{138} and that the bill’s citizenship provision “is but declaratory of what the law now is.”\textsuperscript{139} Moreover, such a declaration of citizenship was within Congress’s power, and had been previously employed, without reference to “any process of naturalization.”\textsuperscript{140} Thus, Trumbull said, even if Davis were right and Congress lacked

\textsuperscript{134} Such a stance harked back to common law-based decisions on Indian citizenship such as Chancellor Kent’s opinion in \textit{Goodell v. Jackson}, 20 Johns. 693, 712 (N.Y. 1823) (“Though born within our territorial limits, the \textit{Indians} are considered as born under the dominion of their tribes. They are not our subjects, born within the purview of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities.”).

\textsuperscript{135} \textit{E.g.}, CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (1866) (statement of Sen. Van Winkle).

\textsuperscript{136} See \textit{id.} at 573 (1866) (statement of Sen. Williams) (supporting “Indians not taxed” as the best way to distinguish “wild, savage, and untamed Indians, and those who associate with white people, own property, and exercise the privileges that generally attend a citizen in the community”).

\textsuperscript{137} See \textit{CONG. GLOBE, 39TH CONG., 1ST SESS.} 597-98 (1866).

\textsuperscript{138} \textit{Id.} at 600 (statement of Sen. Trumbull) (emphasis added).

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{Id.}
power to naturalize the freedmen, Congress would still have the power to declare their citizenship with legally meaningful effect.

Following the final round of speeches for and against, the Senate voted in favor of the civil rights bill, citizenship language and all, by 33-12. Debate then moved to the House of Representatives.

B. Civil Rights Act: House Debate

The House began floor debate on March 1, 1866. House consideration of the bill’s citizenship provision dealt only with the effect of that language on the citizenship of the freedmen, and did not touch on the issue of Indian citizenship. As in the Senate, the divide between House Republicans and Democrats turned on their views on the choice between the common law approach to citizenship and the consensualist vision embodied in *Dred Scott*.

Republican James F. Wilson of Iowa, Chairman of the House Judiciary Committee and House bill manager, gave a rousing opening speech for the common law view. He began by arguing that while “[t]his provision, I maintain, is merely declaratory of what the law now is . . . . I am sure that my proposition will be disputed by every member of this House who believes that this Government is exclusively a ‘white man’s Government.’” He therefore relied on a variety of common law authorities.

Wilson started with Blackstone’s articulation of the principle that “natural-born subjects are such as are born within the dominions of the Crown of England . . . as it is generally called, the allegiance of the king.” This principle, which “applies to this country as well as to England . . . makes a man a subject in England, and a citizen here,” without “distinction on account of race or color.” Indeed, “the English doctrine which claims as a subject every person born within the jurisdiction of the Crown[ ] made negroes born in the colonies . . . British subjects;” after the Revolution, those subjects became, “on the establishment of the Government of the United States, citizens of the United States.” Wilson noted as strange the idea that a black man would be “excluded from citizenship because of his race or color, though born within our jurisdiction and on our own soil . . . .”

Wilson also cited treatises by Chancellor James Kent and William Rawle that took a common law view. He lingered longest, though, on the

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142 The explanation for this omission is obscure; perhaps the Senate’s greater expertise in Indian treaty policy led it to be more concerned with the effect of the bill on Indian tribes.
143 *Id.* at 1115.
144 *Id.* at 1116.
145 *William Blackstone*, Commentaries *365*.
146 *Id.*.
147 *Id.* at 1117.
149 *Id.* (“Citizens, under our Constitution and laws, mean free inhabitants born within the United States or naturalized under the law of Congress.”) (citing *James Kent, Commentaries on American Law* 278 (n.d.)); *Id.* at 1117 (“Every person born within the United States, its Territories, or districts, whether the parents are citizens or aliens, is a natural-born citizen in...
citizenship opinion of Attorney General Bates. This “careful and painstaking examination,” with “ability manifested in every one of its twenty-seven pages,” clearly established black citizenship. More broadly, “every person born in the United States is a natural-born citizen of such States, except it may be that children born on our soil to temporary sojourners or representatives of foreign Governments, are native-born citizens of the United States.” As such, “by our law colored persons are citizens of the United States,” and did not lose that citizenship from “such political irrationality as lies buried in the Dred Scott case.”

Wilson believed that, in the alternative, “admit[ting] for the sake of an argument that negroes are not citizens,” Congress would nonetheless have power to naturalize them by statute. Wilson devoted far more attention and time, though, to explaining why the bill was declaratory and why the common law controlled.

Democrat Andrew Jackson Rogers of New Jersey then delivered one of the principal House speeches against the civil rights bill. Rogers presumed that “negroes are not citizens of this country, for the simple reason that the common law is not in force under the Constitution of the United States . . . [and cannot] have any weight nor bearing on the important subject of rights and powers under the Constitution.”

Rather, Rogers argued, one must look to the “letter and spirit” of the “organic law . . . in view of the contemporaneous circumstances under which it was passed.” These factors “fully vindicate the authority of [Dred Scott],” which said that “negroes in this country, whether free or slave, are not citizens . . . within the meaning of the words of the Constitution.” Further, that decision, handed down “by a bench of the most enlightened and learned lawyers that ever sat upon” the Court, correctly reflected the constitutional reality that “no power . . . in the Congress of the United States can change the status of the negro. That cannot be done until the requisite amendment is made to the Constitution.”

These two opening speeches set the terms of the House debate that followed. On the one hand, Republican representatives emphasized that the freedmen were already citizens, on a common law understanding of citizenship. On the other, Democrats argued that Dred Scott was correct to hold that blacks were not citizens.

the sense of the Constitution . . . .”) (citing WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 80 (Philadelphia, Philip H. Nicklin 1st ed. 1825)).

Id. at 1117. The Democratic idea that individuals born in a country and subject to its laws could be “neither citizens nor aliens, is an absurdity which cannot survive long in the light of these days of progressive civilization.” Id.

Id. Wilson, like most other Republicans in this debate, did not address the question of how, exactly, Dred Scott came to be “buried,” rather than binding and constraining authority.

Id. at 1120 (statement of Rep. Rogers).
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Martin Thayer, Republican of Pennsylvania, stated that the bill is not “the enunciation of any new principle,” but rather “declaratory . . . reiterating an existing and acknowledged principle of law.” Thayer, like Wilson, argued in the alternative that Congress could naturalize the freedmen.

Republican John Broomall, also of Pennsylvania, claimed that “[a]s a positive enactment, this would hardly seem necessary . . . [e]ven as a declaration of existing law.” That blacks were citizens was “elementary,” since “[w]hat is a citizen but a human being who by reason of his being born within the jurisdiction of a Government owes allegiance to that Government?”

Even moderate Republican Henry Raymond of New York said that “I do not know that any bill is necessary [to ensure black citizenship] . . . I am inclined to think that none is necessary.” Rather, the “moment the disabilities imposed upon [the freedmen] by the condition of servitude were removed . . . they became, by virtue of that act, citizens of the United States . . .” This followed from the “general rule of law that every native shall be a citizen of the country on whose soil he is born,” which applied as much to blacks as to any other group.

In so emphasizing the declaratory character of the bill, House Republicans, like Trumbull, dodged whether Congress had power to make the freedmen citizens, through naturalization or other means. While Republicans could have addressed this issue directly, and some did, it was easier to avoid the issue altogether.

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158 Id. at 1152.
159 Id. Thayer, like Wilson, argued in the alternative that Congress could naturalize the freedmen.
160 Id. at 1262.
161 CONG. GLOBE, 39TH CONG., 1ST SESS. 1262 (1866).
162 For example, Raymond would ultimately vote to sustain President Johnson’s veto of the civil rights bill. Id. at 1861.
163 Id. at 1266. The bill was nonetheless important because “this point has been doubted, has been denied in courts, in legislative halls, and in the executive department of the Government.” Id. See also id. at 867 (statement of Rep. William Newell) (“There is in this country now no subject or enslaved race . . . The constitutional amendment has elevated all the people into . . . the only class we or the Constitution recognize . . . [C]itizens of the United States, possessing all the rights and immunities of such.”); id. at 1124 (statement of Rep. Burton Cook) (“This bill provides that all persons born within the United States, excepting those who do not owe allegiance to the United States Government, as children of ambassadors of foreign Powers, and such as are not subject to our laws . . . shall be citizens of the United States. I think this is the law now. I do not believe that in this Government of ours there is any class of freemen who are not citizens.”); id. at App. 156 (statement of Rep. Columbus Delano) (“In reference to the question of citizenship . . . It needs no law, in my estimation, to make citizens of these emancipated people. They are citizens by law now . . .”). Cf. id. at 1255 (statement of Sen. Henry Wilson) (“[T]he child emancipated in its cradle today is as free and as much a citizen of the United States as the Senator from Illinois or myself.”).
164 Id. at 1266.
165 See id. at 1117 (statement of Rep. Wilson); id. at 1152 (statement of Rep. Thayer).
It is possible that some Republicans dissented from this position, though the actual extent of disagreement is unclear. To the extent that dissent existed, there is no evidence that it affected the prevailing common law understanding of citizenship among House Republicans who spoke on the issue.

The Democrats, by contrast, argued that blacks were merely “African subjects of our government,” whom Congress could not statutorily make citizens. Naturalization, they said, “invest[s] an alien with the rights and privileges of a native subject or citizen,” and the freedmen were native-born residents rather than aliens. As such, “if it is desirable to confer the rights of citizenship upon negroes, we must have a constitutional amendment that will warrant the act before it can be done.” On this view, citizenship turned, not on territorial birth, but on the political community’s consent to or refusal of an individual’s membership therein. Despite such arguments, the House passed the civil rights bill, including its citizenship provision, on March 13th; the Senate concurred without debate in the House amendments two days later.

166 See Cong. Globe, 39th Cong., 1st Sess., 1291 (1866) (statement of Rep. John Bingham) (“I find no fault with the introductory clause, which is simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is . . . a natural-born citizen . . . .”); id. at 1160 (statement of Rep. Samuel Shellabarger) (dividing free-native born residents into “citizens” and “subjects,” and, noting that “according to the Dred Scott decision . . . persons of African descent” belonged in the latter category, though they would still be naturalizable by Congress).

While Bingham appeared to believe that he was announcing orthodox citizenship doctrine, neither Congressional Republicans nor Democrats then argued that the citizenship of territorially-born individuals depended on parental status. Bingham himself had previously advocated the territorial position. See, e.g., Cong. Globe, 35th Cong., 2d Sess., 984 (1859) (“Who . . . are citizens of the United States? . . . [A]ll free persons born and domiciled within the United States—not all free white persons, but all free persons.”). As for Shellabarger, it is unclear whether he was consensualist as a general matter, or simply took Dred Scott to be binding, if mistaken, authority in this context. Shellabarger also spoke only to rebut Democratic claims that Congress lacked power to naturalize the freedmen, not to lay out his views on citizenship generally. See Cong. Globe, 39th Cong., 1st Sess., 1160 (1866).

168 Cong. Globe, 39th Cong., 1st Sess., 1268 (1866) (statement of Rep. Michael Kerr). See also id. at 1155-56 (statement of Rep. Charles Eldredge) (criticizing the Republican refusal to acknowledge the authority of Dred Scott, and claiming that blacks were not yet citizens); id. at 1295 (statement of Rep. George Latham) (“Can Congress confer citizenship upon persons who are excluded by the Constitution? The courts have uniformly decided that negroes are not citizens under the Constitution.”).

169 Id. at 1268 (statement of Rep. Kerr).

170 Id. at 1155-56 (statement of Rep. Eldredge). Cf. id. at 1123 (statement of Rep. Rogers) (the enforcement clause of the Thirteenth Amendment is only “to enable Congress to lay the hand of Federal power, delegated by the states to the General Government, upon the States to prevent them from re´enslaving the blacks . . . .”).
C. Civil Rights Act: Veto Override

On March 27, 1866, President Johnson vetoed the civil rights bill;\(^{171}\) the limited discussion of citizenship in the congressional override debate that followed tracked the divide described above between common-law Republicans and consensualist Democrats.

In the Senate, Sen. Trumbull, attacking President Johnson’s veto message, reiterated his belief “that all native-born persons not subject to a foreign Power are by virtue of their birth citizens of the United States.”\(^{172}\) Trumbull also said again that the allegiance of U.S.-born children was not determined by the nationality of their parents: “as is suggested by a Senator behind me, even the infant child of a foreigner born in this land is a citizen of the United States long before his father.”\(^{173}\)

In the House, Republican William Lawrence of Ohio argued that the citizenship provision of the civil rights bill was “only declaratory of what is the law without it,” citing Rep. Wilson’s speech and the authorities on which Wilson relied. As Lawrence further emphasized, “Lynch vs. Clarke . . . conclusively show[ed]” that the rule regulating “citizenship by birth . . . was and is that all ‘children born here are citizens without any regard to the political condition or allegiance of their parents.’”\(^{174}\)

Following these abbreviated debates, the Senate overrode the president’s veto on April 6th, and the House followed suit on April 9th.\(^{175}\)

One final point on the Civil Rights Act debates deserves attention. Republicans throughout those debates understood the Act’s citizenship language to take a common law citizenship approach, distinguishing those inside and outside full U.S. sovereign authority. This inside/outside dichotomy, though, is not unassailable, especially with regard to tribal Indians.

On common law premises, citizenship tracks sovereign power because citizenship flows from protection provided by the sovereign, which in turn requires the reach and grasp of sovereign power. Even tribal Indians received some (mediated) protection from the United States, which might suggest them to be citizens under a common law approach.\(^{176}\) Also, Congress

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\(^{171}\) Id. at 1679.

\(^{172}\) Id. at 1756. Trumbull also argued that the merely “declaratory” citizenship language in the bill was needed “for greater certainty” on citizenship, given the Democratic disagreement on the matter. Id.


\(^{174}\) CONG. GLOBE, 39TH CONG., 1ST SESS. 1832 (1866) (statement of Rep. William Lawrence) (quoting Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. Ch. 1844)).

\(^{175}\) Id. at 1809 (Senate); id. at 1861 (House).

\(^{176}\) My thanks to Rogers Smith for this point.
may have seen itself as having the potential power to stop dealing with tribes by treaty and instead legislate over them directly.\textsuperscript{177}

Resolving these inconsistencies and deriving a coherent theory of the relationship between citizenship, allegiance, and overlapping sovereign authorities would not occur until the Senate debated the Citizenship Clause of the Fourteenth Amendment, discussed in Part III.

### III. The Fourteenth Amendment and Citizenship

The Fourteenth Amendment, when introduced in the Senate on May 23, 1866, lacked a citizenship provision. Bill manager Jacob Howard of Michigan nonetheless made two significant statements on citizenship in his introductory speech. Discussing the Privileges or Immunities Clause, Howard noted that a “citizen of the United States,” while not constitutionally defined, “is held by the courts to be a person who was born within the limits of the United States and subject to their laws.”\textsuperscript{178}

Howard thus rejected the relevance of consent, as opposed to birth within the state’s territory and lawmakership authority. Howard then stated that “national law, or rather . . . natural law . . . recognizes persons born within the jurisdiction of every country as . . . subjects or citizens of that country.”\textsuperscript{179}

A week later, Howard proposed adding a citizenship provision, noting that “the question of citizenship has been so fully discussed in this body [presumably during debate on the Civil Rights Act] as not to need further any elucidation . . . .”\textsuperscript{180} The provision was “declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.”\textsuperscript{181} The ensuing debate lasted the rest of the day.\textsuperscript{182}

\textsuperscript{177} Cf. \textsc{Cong. Globe}, 39th Cong., 1st Sess. 1488 (1866) (statement of Sen. Trumbull) (“I question very much whether our whole policy in regard to the Indians in making what we call treaties with them is not wrong, and whether we ought not to take them under our care, and by legislation, without attempting to get up treaties in any shape, bring them within our jurisdiction, and extend our laws over them. However, that is not the policy of the Government, and unless we change the policy, it is desirable to perfect it, and have the Indian laws fairly administered.”) (emphasis added).

\textsuperscript{178} Id. at 2765. Howard’s overstatement on this point, see supra notes 20-35, does not affect the broader point of how he and his audience understood the definition of citizenship. Cf. \textsc{Cong. Globe}, 39th Cong., 1st Sess. 2765 (1866) (emphasis added). Cf. supra note 13 and accompanying text. (“[T]he party must be born within a place where the sovereign is at the time in full possession and exercise of his power . . . .”). Howard’s statements in this speech also cut against reading his later statement, that the Citizenship Clause would not apply to “foreigners, aliens, who belong to the families of ambassadors or foreign ministers . . . .” id. at 2890, as suggesting a general alienage-based citizenship restriction.

\textsuperscript{180} Id. at 2790 (1866). Id. (statement of Sen. Howard) (emphasis added).

\textsuperscript{182} Debate may have been merely a courtesy to the Amendment’s opponents: the addition of the Citizenship Clause passed by voice vote. See id. at 2897.
A. The Citizenship Clause Debate

The Senate’s debate focused nearly entirely on Indian citizenship. Heterodox Republican James Doolittle, who chaired the Indian Affairs Committee in the 39th Congress, initially moved to add “Indians not taxed” to the Clause to exclude “the Indians” from citizenship. Howard objected: “Indians born within the limits of the United States, and who maintain their tribal relations” would not be subject to the jurisdiction, since they “are regarded, and always have been in our legislation and jurisprudence, as being quasi foreign nations.”

After the Cowan/Conness exchange, Doolittle pressed the point. He argued that many tribal and non-tribal Indians were “subject to the jurisdiction,” from supervision exercised by government Indian agents or through the reservation system. The government’s authority over these Indians, Doolittle contended, would therefore render them U.S. citizens. Given the problems with such a course, he argued, adding the “Indians not taxed” language was crucial.

Sen. Trumbull, in reply, made two crucial analytical moves. First, he said that “‘subject to the jurisdiction thereof’ . . . means ‘subject to the complete jurisdiction thereof,’” and linked jurisdiction to sovereign authority. For example, responding to Doolittle’s example of the Navajo Tribe, Trumbull asked, “Can you sue a Navajoe Indian in court? Are they . . . subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them.”

Trumbull distinguished between those with whom the United States made treaties and those over whom the United States exercised direct law-making power:

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183 Sen. Edgar Cowan’s objections to the Citizenship Clause sparked the one exception. His opposition married the argument that society had the right to exclude individuals from citizenship to a racist tirade on the harms from Chinese citizenship. Id. at 2890-91. Sen. John Conness of California rose in response. He said that the Citizenship Clause did declare “the children begotten of Chinese parents in California” to be citizens, and that he was “in favor of doing so,” id. at 2891, though he noted that he thought the Clause’s impact on California, practically speaking, would be small. Sen. Conness also said that he had voted for the citizenship provision of the Civil Rights Act, which had declared that “the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States . . . .” Id.

184 Id. at 2890.

185 See Cong. Globe, 39th Cong., 1st Sess. 2892-93 (1866). Doolittle thus, like other the participants in this debate, equated jurisdiction with sovereign authority. See infra notes 194-199 (statements of Sens. Trumbull and Hendricks, 209 (statement of Sen. Doolittle), and accompanying text. Doolittle, by then firmly opposed to Congressional Reconstruction, see, e.g., id. at 1809 (voting to sustain the civil rights bill veto), may have intended here to derail, not improve, the Clause. His fellow senators, though, treated his concerns as genuine.

186 Id. at 2893.

187 Id.
Would the Senator from Wisconsin think for a moment of bringing a bill into Congress to subject these wild Indians with whom we have no treaty to the laws and regulations of civilized life? Would he think of punishing them for instituting among themselves their own tribal relations? Does the Government of the United States pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another? . . . 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 . . . . [subject to the jurisdiction does not] embrace the wild Indians of the plains or any with whom we have treaty relations . . . that we have treaty relations with them shows that they are not subject to our jurisdiction. We cannot make a treaty with ourselves; it would be absurd.

On Trumbull’s view, “subject to the jurisdiction” referred to the extent and limits of the sovereign authority of the United States. Political communities within U.S. territory, but outside the scope of its laws and their executive and judicial enforcement, were not subject to the jurisdiction. Children born within those communities were not citizens.

Second, Trumbull connected sovereign authority and allegiance. Immediately before making his point about the Navajo, Trumbull asked rhetorically, “What do we mean by ‘subject to the jurisdiction’ . . . Not owing allegiance to anybody else. That is what it means.” He rejected the idea that “any Indian who owes allegiance, partial allegiance, if you please . . . is ‘subject to the jurisdiction of the United States.’”

On Trumbull’s view, “[a]llegiance and protection are reciprocal rights” under the common law. Individuals owed allegiance in recompense for governmental protection provided through sovereign legislative and executive authority. Tribal Indians, however, receiving protection from two sources (tribe and United States), potentially split allegiances between those sources. Such Indians would not be subject to the jurisdiction. Only individuals with complete allegiance to the United States, flowing from subject to full, unmediated U.S. authority and the protection it provides, would qualify.

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188 *Id.*

189 *Id.*

190 Id. at 1757 (statement of Sen. Trumbull).

191 See also *id* at 2894 (statement of Sen. Trumbull) (“[Indians] are not subject to our jurisdiction in the sense of owing allegiance solely to the United States. . . . We. . . . have today, a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure, subject [only] to their own laws and regulations . . . . They would not be embraced by this provision.”).
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Trumbull also, shifting course, also objected on the merits to adding “Indians not taxed.” He criticized “mak[ing] citizenship in this country depend on taxation,” and distinguishing for citizenship purposes between “rich” and “poor” Indians.\footnote{192 Id. at 2894.} Trumbull claimed the previous opponents of that language had inspired his turnabout by demonstrating the potential ambiguity in “Indians not taxed,” and that “subject to the jurisdiction” was clearer and preferable.\footnote{193 See id. (statement of Sen. Trumbull) (“[O]ther persons may understand [“Indians not taxed”] that way [as creating a property qualification]; and I remember that [Sen. Hendricks] was disposed to understand them differently when we had the discussion upon the civil rights bill. Therefore I think it better to avoid these words and that the language proposed in this constitutional amendment is better than the language in the civil rights bill. The object to be arrived at is the same.”).}

These arguments explain the differences between the Act and the Amendment. “Subject to the jurisdiction” was clearer and more precise than “Indians not taxed.” That phrasing also combined the “not subject to any foreign power” and “Indians not taxed” exceptions with no substantive change in meaning. Both these phrases referred to individuals within U.S. territory but not subject to its sovereign power; “subject to the jurisdiction” simply merged them into a unitary, affirmative requirement that an individual be so subject.

Not surprisingly, Trumbull’s criticism of “Indians not taxed,” and denial of U.S. lawmaking authority over tribal Indians, provoked a response from Democrat Thomas Hendricks. Hendricks asked Trumbull whether “Congress has not the power at its pleasure to extend the laws of the United States over the Indians and to govern them.”\footnote{194 See id. See also id. at 2893 (statement of Sen. Johnson) (asserting that the United States had legitimate discretionary power to fully legislate over Indian tribes, and denying that the U.S. lacked full sovereign authority anywhere within its territory).}

Trumbull, no fool, denied Hendricks’ lurking implication. In one sense, Trumbull said, Congress could extend its laws over the Indian tribes, just as it “could extend [them] over Mexico just as well . . . .”\footnote{195 CONG. GLOBE, 39TH CONG., 1ST SESS. 2894 (1866).} Nonetheless, such an exercise of “physical power” would be illegitimate. It would be “a violation of our treaty obligations, a violation of the faith of this nation, to extend our laws over these Indian tribes with whom we have made treaties saying we would not do it.”\footnote{196 Id. (statement of Sen. Trumbull).}

Though Congress might have power in the abstract to stop dealing with Indian tribes on a treaty basis,\footnote{197 See supra text accompanying note 177.} existing U.S. legal and treaty obligations precluded that power from being exercised as Hendricks had intimated. Thus, Trumbull said, while the Indians “are regarded as within the territorial boundaries of the United States . . . . I do not think they are subject to the jurisdiction of the United States in any legitimate sense; certainly not in the sense that the language is used here.”\footnote{198 CONG. GLOBE, 39TH CONG., 1ST SESS. 2894 (1866).} Hendricks replied that, policy mer-
its of a treaty-based relationship aside, “we need not treat with an Indian. We can make him obey our laws, and being liable to such obedience he is subject to the jurisdiction of the United States.”

After the Trumbull/Hendricks colloquy, Howard reentered the debate. He first attacked the “Indians not taxed” language, as allowing states to make Indians citizens by imposing taxes on them. Howard, equating his position on “jurisdiction” with Trumbull’s, said that the term denoted full and complete jurisdiction on the part of the United States, co-extensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department . . . that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now.

Jurisdiction here referred not to membership in the state’s political community, but to the state’s legitimate power over individuals. This full sovereign power did not extend to “an Indian belonging to a tribe, though born within the limits of a State . . . .” Instead, the “Government of the United States have always regarded and treated the Indian tribes within our limits as foreign Powers . . . .” While “[t]he Indians are our wards,” and the United States has asserted “the right . . . to be the first purchaser [of land] from the Indian tribes. . . . Our legislation has always recognized them as sovereign Powers.”

Thus, Howard maintained, a tribal Indian “is subject for crimes committed against the laws or usages of the tribe to the tribe itself . . . the United States courts have no power to punish” such an Indian “for a crime committed by him upon another member of the same tribe” within that tribe’s territory. In such a circumstance, “the jurisdiction of the [Indian] nation intervenes and ousts what would otherwise be perhaps a right of jurisdiction of the United States.” Any U.S. authority over a tribal Indian would be limited by concurrent tribal sovereignty. As a result, such a person would

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199 Id. at 2895 (emphasis added).
200 Id.
201 Id. (emphasis added).
202 Id.
204 Id. (statement of Sen. Howard). See also id. at 2896 (statement of Sen. Williams). Sen. Williams read “subject to the jurisdiction” as “fully and completely subject to the jurisdiction of the United States”; tribal Indians, like ambassadors, are “to a certain extent . . . subject to the jurisdiction . . . , but not in every respect.” Id. Since the Clause would not, therefore, make such Indians citizens, Williams gave it his support. Id.
205 Id.
206 Id.
207 Even in cases where wrongdoing by tribal members was punishable in U.S. courts under U.S. law, the appropriate law enforcement authorities could then, in some instances, gain custody over such offenders only through quasi-extradition requests made to their tribes, rather than be able to arrest, try, and punish them directly. See, e.g., Treaty with the Rogue River Indians, U.S.-Rogue River art. 6, Sep. 10, 1853, 10 Stat. 1018, 1019; Treaty with the Cow Creek Indians, U.S.-Cow Creek art. 6, Sep. 19, 1853, 10 Stat. 1027, 1028; Treaty with the
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not owe the United States complete allegiance, and would not be made a citizen at birth by the Amendment’s Citizenship Clause.208

Both supporters and opponents of “subject to the jurisdiction” in the Citizenship Clause understood that language as relating to the lawmaking and enforcement power of the national government. As Doolittle put it, being “subject to the jurisdiction” of the United States means being “subject . . . to its military power . . . to its political power . . . [and] to its legislative power . . . .”209 Division over the merits of “subject to the jurisdiction” flowed from disagreement over the extent of U.S. sovereign power over Indian tribes, not notions of “political” jurisdiction tied to membership in the U.S. political community.

IV. Applying Past to Present

When applying this understanding to contemporary interpretation of “subject to the jurisdiction,” one might conclude that the proper conclusion is straightforward. Today, children of undocumented parents are born here under the unmediated sovereign power of the United States, fully and directly subject to the legitimate force of federal law and its executive enforcement. As such, do they not satisfy the “jurisdiction” requirement for citizenship?

While I argue that the answer is indeed yes, it is not quite so simple. Consider the differences between children of alien parents and children of members of Indian tribes. Children born in the United States to non-citizen parents are citizens, on the common law theory, because those children are born in U.S., rather than foreign territory. At birth they owe full allegiance to U.S. law and receive full U.S. protection; this reciprocal relationship creates citizenship. This result is so regardless of the citizenship status of their parents, or any additional citizenship status acquired through the parents.210

Nisquallys, U.S.-Nisqually art. 8, Dec. 26, 1854, 10 Stat. 1132, 1134; Treaty with the Sioux, U.S.-Sioux art. 6, June 19, 1858, 12 Stat. 1037, 1039.

208 See also NEUMAN, supra note 3, at 171-72 (reaching a similar conclusion).

209 CONG. GLOBE, 39TH CONG., 1ST SESS. 2896 (1866). See also id. at 2893 (statement of Sen. Johnson) (“[O]ver all the Indian tribes within the limits of the United States, the United States may—that is the test—exercise jurisdiction. Whether they exercise it in point of fact is another question . . . but the question about the authority to legislate is one, I think, about which . . . the courts would have no doubt; and when, therefore, the courts come to consider the meaning of this provision . . . I think they will decide that Indians born within the United States have become citizens by virtue of this amendment.”). Compare Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (Marshall, C.J.) (Indian tribes are separate, largely sovereign political communities not subject to state laws), with United States v. Rogers, 45 U.S. (4 How.) 567 (1846) (Taney, C.J.) (Indian tribes are neither sovereign nor outside the reach of state laws).


210 John Eastman, among others, criticizes the common law interpretation of the Citizenship Clause for creating such overlapping allegiances. Eastman, supra note 2, at 1489-90. Yet the same creation of dual citizenship occurred from the Founding onward whenever the United
Yet had these children been born to the same parents abroad, under the laws and protection of a foreign sovereign, they obviously would not be U.S. citizens at birth.

Sens. Trumbull and Howard, applying this distinction, argued in 1866 that the Citizenship Clause would not make Indians citizens categorically because Indians, they said, were quasi-foreign governments, with whom the United States had purely diplomatic relations. An Indian born into a tribe, outside full U.S. authority and protection, would not be a birthright citizen for the same reasons as an individual born in a foreign country.

This analogy implicitly follows from the territory/authority connection—the idea that the United States lacked authority over Indian lands just as it did over, say, Spain. But in explaining “Indians not taxed” and “subject to the jurisdiction,” Trumbull and Howard spoke more broadly. Instead of being limited to Indian territory, the citizenship language, they said, would not apply to “persons connected with those tribes with whom we make treaties,” to “an Indian belonging to a tribe.” Taken on its face, that understanding would apply equally to a child of tribal members born in, say, Baltimore and to that child, born in the Indian country.

Now, Trumbull, Howard, and the Congressional Republicans that they were attempting to reassure may not have understood these statements so broadly. Skeptical senators raised the question of Indian citizenship to suggest that the Civil Rights Act and the Fourteenth Amendment would declare or create the citizenship of tribal Indians already living on tribal land, or living outside the reach of organized U.S. lawmaking authority altogether. Much of the disagreement on this point turned on the statuses of the tribes, and whether the United States could (then) exercise full authority over the tribes on their own land. It is thus quite possible that all involved took the issue to be how the Citizenship Clause would apply to Indian children born in Indian territory, not a child born later to tribal members off tribal lands.

Say, though, that the Senate did understand Trumbull and Howard’s statements to refer to an immunity to U.S. authority that ran with tribal status, rather than territory. Such a sui generis exception to the usual connection...
tion between territory and authority might be consistent with existing legal arrangements between the United States and the Indian tribes. But it raises a puzzle: if a child born in territory governed by the full “constitutional power of the United States” would sometimes not be a citizen, what about children of undocumented immigrants, born in the United States? When does the parental status control the status of their children?

The answer flows from the relationship between the status of the parents and the reach of U.S. authority over their children. Assume in each instance that the child takes the status of his or her parents at birth: a child of two foreign nationals would have foreign citizenship; a child of two tribal members, tribal membership; and a child of foreign diplomatic personnel, foreign citizenship and diplomatic status. The determining factor would then be whether the parentally derived status also carries exemption from otherwise applicable U.S. lawmaking and enforcement power. For a person “connected with those tribes with whom we make treaties,” or for a member of a diplomatic household, the answer would be yes.

This immunity would not exist, however, for the child born here to foreign parents: private foreign nationals and their children have the same obligations to obey U.S. law when here as U.S. citizens do, and are equally subject to penalties for its violation. The same is true of children of undocumented immigrants. One is not exempt from the authority of U.S. laws if one’s parents lack proper immigration status. That this lack of status may preclude the parents from political membership does not preclude birthright citizenship for their children; the relevant criterion, historically speaking, is the extent of U.S. sovereign authority over those children at birth, not the consent of the political community to their membership.

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218 For example, treaty-based limitations on direct enforcement of federal criminal law were not limited by their terms to crimes committed on Indian land. See supra notes 99, 207 (collecting treaties).


220 Id. at 572 (statement of Sen. Trumbull).

221 Agreements such as the Vienna Convention facilitate legal representation of foreign nationals arrested for crimes committed in the United States, and do not create substantive immunities from U.S. criminal law. See Vienna Convention on Consular Relations art. 36.1, Apr. 24, 1963, 596 U.N.T.S. 262, 292.

222 Wood, supra note 80, at 508-11, suggests, incorrectly, that the drafters of the Fourteenth Amendment understood “subject to the jurisdiction” as requiring actual, as well as formal, power over individuals. Wood equates a sovereign’s lack of legitimate power over an individual (so that the individual would lack a duty of obedience) with the sovereign’s inability to bring legitimate power fully to bear. Wood, supra, at 509. Yet that it may in some cases be difficult to find or punish an individual for violations of their duty of obedience does not mean that they do not have such a duty. (One doubts that Wood would endorse his argument’s implications for efforts to prevent the sale of illegal drugs). Recall also that Sen. Howard linked jurisdiction to the extent and quality of “constitutional power of the United States” over citizens. See Cong. Globe, 39th Cong., 1st Sess. 2895 (1866) (emphasis added).

Peter Schuck nonetheless argues against this reading because the 39th Congress, if it had acted under the conditions of current immigration policy, would not, he says, willingly have conferred birthright citizenship on children of undocumented parents.\textsuperscript{224} As a historicist matter, though, we should not assume 19th Century members of Congress would see this issue in a particular way today, not least \textit{because} the legal, political, and moral contexts of immigration and citizenship have changed so completely. Guesses, even good guesses, are not evidence. Also, the original drafter’s understanding of citizenship is distinct from how that understanding might have changed in a different situation. One should not read the evidence of how the drafters of the Fourteenth Amendment \textit{did} interpret the Citizenship Clause in light of how they \textit{might} have interpreted it in circumstances they never faced.

To be sure, one may maintain that adhering to the Citizenship Clause as historically understood is inappropriate or unwise because today’s circumstances differ fundamentally from those in 1866. Yet this argument does not affect the content and contours of the original citizenship standards themselves—the subject of this Article.

**CONCLUSION**

From a purely textual standpoint, there are several problems with the argument that “subject to the jurisdiction” should be read as creating a consent-based requirement for birthright citizenship. Such a reading runs contrary to the conventional understanding of jurisdiction as territorially linked legitimate authority.\textsuperscript{225} That reading would suggest that jurisdiction be read quite differently in the Citizenship and Equal Protection Clauses of Section 1 of the Fourteenth Amendment.\textsuperscript{226} And such a reading is contrary to how jurisdiction was used in debates by the members of the 39th Congress.\textsuperscript{227}


\textsuperscript{225} See, e.g., Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); see also \textit{Neuman, supra note 3, at 171-72} (criticizing consensualist interpretation of “jurisdiction”).

\textsuperscript{226} See \textit{U.S. CONST. amend. XIV, §1, cl. 1} (“subject to the jurisdiction thereof”); \textit{id.}, cl. 4 (“nor deny to any person within its jurisdiction”). These are different constructions, to be sure. Yet one wonders whether the difference between “subject to its jurisdiction” and “within its jurisdiction” will bear the weight that consensualists must place upon it. \textit{Cf.} Lafayette Ins. Co. v. French, 59 U.S. 404, 407 (1855) (using “subject to the jurisdiction” to refer to the sovereign authority exercised by a state).

\textsuperscript{227} For repeated examples of such usage, in debate over the authority of Kansas over Indian lands within state territorial limits, see \textit{Cong. Globe, 39th Cong., 1st Sess.} 1683-84, 1700-03 (1866). See also, e.g., \textit{id. at 527} (statement of Sen. Trumbull) (referring to individuals holding land “outside of the organized jurisdiction of the United States in the Indian country”); \textit{id. at 572} (statement of Sen. Trumbull) (referring to Indians “not under the laws of any civilized community, and of whom the authorities of the United States took no jurisdiction”).
That the consensualist reading of jurisdiction is idiosyncratic is not necessarily a fatal flaw; the Fourteenth Amendment’s drafters could have understood the Citizenship Clause to employ jurisdiction idiosyncratically. Yet there is little evidence of such an understanding.

The consistent tenor of congressional debates over citizenship language in the Civil Rights Act of 1866, and their echo in senatorial discussion of the Citizenship Clause of the Fourteenth Amendment, demonstrates instead that only the opponents of those provisions held consensualist views. The drafters and supporters of the Act and the Amendment adhered to the broadly common law approach that birthright citizenship necessarily attached to all individuals born within the United States and subject to its full, unmediated sovereign authority. Further, both supporters and opponents of these enactments understood them to incorporate that common law approach, and voted yea, or nay, accordingly.

We thus come full circle to the proper application today of the historical standard, based as it was on sovereign power. What is the status of a child born here to undocumented parents? Unlike ambassadorial or tribal children, she is not exempted at birth from the force of U.S. authority. Born under the full protection of the United States, she must obey U.S. law and render full allegiance to the legitimate demands of U.S. sovereign power. As an original matter, this reciprocal relationship renders her, “by virtue of being born here, a citizen of the United States.”

Recall that all parties debating the Citizenship Clause of the Fourteenth Amendment equated “jurisdiction” with legitimate lawmaking and enforcement authority. See supra notes 185-209. 228 CONG. GLOBE, 39TH CONG., 1ST SESS. 600 (1866) (statement of Sen. Trumbull).