The Dog that Didn't Bark: Eligibility to Serve in Congress and the Original Understanding of the Citizenship Clause

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President Donald J. Trump's 2025 Executive Order purporting to restrict birthright citizenship has prompted new interest in the interpretation of the Fourteenth Amendment's Citizenship Clause. This Essay analyzes an overlooked source of the original understanding of that Clause: the meaning of "citizen" when determining whether Members-elect are qualified to serve in Congress. The U.S. Constitution requires that every member of Congress be a U.S. citizen and further provides that each House "shall be the judge" of members' qualifications. Anyone is permitted to challenge a Member-elect's qualifications to serve, and hundreds of challenges have been brought over U.S. history for a variety of reasons. Accordingly, challenges to Members-elect's citizenship—as well as the absence *of such challenges—shed light on the original understanding of the Citizenship Clause.*

Using a variety of archival sources, we have researched the ancestry of all 584 members of the Thirty-ninth (1865–1867), Fortieth (1867–1869), and Forty-first (1869–1871) Congresses, and found more than a dozen whose citizenship would be suspect under President Trump's interpretation of the Citizenship Clause. Yet no one questioned these members' citizenship despite the contentious political environment that inspired frequent qualifications challenges on a variety of other grounds. This dog that didn't bark provides additional evidence that the Trump Administration's novel interpretation of the Citizenship Clause is inconsistent with the original understanding.

We conclude with an observation based on our long hours of tedious research: Determining the status of immigrants arriving in the early nineteenth century—an era with few immigration records and minimal enforcement of existing state-based restrictions on immigration—is often impossible, and always onerous. The difficulty of the task alone is evidence that no one at the time of ratification could have thought that U.S. citizenship turned on such questions.

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INTRODUCTION

On January 20, 2025, President Donald J. Trump signed an executive order excluding from birthright citizenship the children born in the United States to unauthorized immigrants and to lawful, temporary immigrants under a novel interpretation of the Fourteenth Amendment's Citizenship Clause.[1] The litigation that followed has prompted a re-examination of the original understanding of that Clause. Advocates and scholars have drawn on a variety of sources regarding the original public meaning of the Citizenship Clause, including the 1866 congressional debates over the proposed language of the Citizenship Clause, as well as nineteenth-century treatises, judicial decisions, and Executive Branch interpretations.[2]

Absent from the discussion so far, however, is one highly relevant contemporary source for the original public meaning of the Citizenship Clause: the public's understanding of the term "citizen" under the U.S. Constitution's Qualifications Clause. That Clause requires members of the House of Representatives to have been U.S. citizens for at least seven years, and Senators to be U.S. citizens for at least nine years, as well as satisfy age and residency requirements.[3] In both Houses, the practice has been to consider petitions and protests challenging the qualifications of any Member-elect filed by *anyone*, including by another member of Congress, the election opponent, or any member of the public. Hundreds of challenges have been filed over the years for a variety of reasons, and the rate of challenges increased in the Senate threefold during the politically fraught Reconstruction Era.[4] Accordingly, such challenges—and the *absence* of such challenges—shed significant light on the original understanding of the term "citizen."

This Essay reports on our research into the ancestry of hundreds of members of Congress who served during and immediately after the Fourteenth Amendment's drafting and ratification. We identified those whose citizenship was questionable under the Trump Administration's reading of the Citizenship Clause and then searched the historical record for challenges to their citizenship. Although we found more than a dozen members of the Reconstruction Congress with "suspect" citizenship under the Trump Administration's interpretation of that Clause, we could not locate a single official or unofficial challenge to those members' citizenship. In fact, we could find no evidence that anyone raised any questions at all about their parents' immigration status at the time they were born.

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[1] Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025).

[2] *See, e.g.*, Keith E. Whittington, By Birth Alone: The Original Meaning of Birthright Citizenship and Subject to the Jurisdiction of the United States 2 (Aug. 21, 2025) (unpublished manuscript) (on file with The Georgetown Law Journal); Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV (forthcoming 2026); Randy E. Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html; Adam Cox, Pamela Karlan, Marty Lederman, Trevor Morrison & Cristina Rodríguez, *The Fundamental Flaws in the Barnett/Wurman Defense of Trump's Birthright Citizenship Executive Order*, JUST SEC. (Feb. 19, 2025), https://www.justsecurity.org/108070/fundamental-flaws-barnett-wurman-birthright-citizenship/ [https://perma.cc/39M8-N3WB]; *see also* N.H. Indonesian Cmty. Support v. Trump, 765 F. Supp. 3d 102, 110–11 (D.N.H. 2025); Washington v. Trump, 145 F.4th 1013, 1026–36 (9th Cir. 2025).

[3] U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3. The Constitution also requires that "[e]ach House shall be the Judge" of its members' qualifications. *Id.* art. I, § 5, cl. 1.

[4] *See* Jeffery A. Jenkins, *Partisanship and Contested Election Cases in the Senate, 1789–2002*, 19 STUDS. IN AM. POL. DEV. 53, 55, 60 tbl. 3 (2005); *see also* MINORITY STAFF FOR RANKING MEMBER JOE MORELLE, H. COMM. ON ADMIN., 118TH CONG., CONGRESSIONAL ELECTION OBSERVATION AND CONTESTED ELECTIONS: A PRIMER 2 (MARCH 2023).

Yet the Trump Administration asserts that these questions must be both asked and answered to establish citizenship. The Executive Order denies citizenship based on parents' status "at the time of said person's birth."[5] In their plans to implement the Order, executive agencies such as the U.S. Department of State, U.S. Citizenship and Immigration Services, and the Social Security Administration have stated that to establish citizenship, all persons born in the United States after the order goes into effect must provide "acceptable evidence" that at least one of their noncitizen parents was both lawfully present and permanently domiciled in the United States "at the time of said person's birth."[6]

If the Executive Order "restores the original meaning of the Citizenship Clause," as the Trump Administration claims, then *someone* would have made the same inquiries of those members of Congress born to noncitizen parents during the Reconstruction era.[7] An originalist reading of the U.S. Constitution turns on the "original public meaning" of the text—that is, on a widely shared public understanding at the time of drafting and ratification.[8] For the Trump Administration to prevail, then, its view of the Citizenship Clause must have been common knowledge at the time, familiar both to the members of Congress who drafted it as well as to the nation that ratified it in the two years that followed. Accordingly, we would expect its view to be reflected in the one arena in which the term "citizen" was regularly open to public contestation: qualification to serve in Congress. And yet, our research has found, it was not.

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Part I of this Essay briefly describes the Fourteenth Amendment's Citizenship Clause and President Trump's Executive Order adopting a restrictive interpretation of that Clause. Part II describes the Constitution's requirement that each House "shall be the judge" of its own members' qualifications, which includes the requirement that each member be a U.S. citizen. Hundreds of challenges were brought over the nation's history, and the rate increased in the Senate threefold during the fraught Reconstruction era, when the qualifications of Members-elect to serve were regularly contested.

The core of this Essay is Part III, which summarizes our research into the ancestry of 584 members of Congress elected to serve in the Thirty-ninth, Fortieth, and Forty-first Congresses. This Part identifies more than a dozen members with noncitizen parents or unknown parentage—four of whom were born within three years (or fewer) of their parents' arrival in the United States.

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[5] Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025).

[6] U.S. SOC. SEC. ADMIN., GUIDANCE ON PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (EXECUTIVE ORDER 14160) FOR VERIFICATION REQUIREMENTS UNDER THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (2025); *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., IP-2025-0001, USCIS IMPLEMENTATION PLAN OF EXECUTIVE ORDER 14160—PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (2025); U.S. DEP'T OF STATE, EXECUTIVE ORDER 14160: PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (2025) (stating that U.S. State Department will require applicants for passports to provide "original proof of parental citizenship or immigration status to determine the citizenship status of the applicant").

[7] Petition for Writ of Certiorari Before Judgment at I, Trump v. Barbara, No. 25-365 (Sep. 26, 2025).

[8] *See, e.g.*, Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (U.S. Dep't of Just., ed., 1987); Gary S. Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 554–55 (2003); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1196–98 (2003) (describing the limited relevance of "secret" drafting history to originalism).

All of these members' citizenship would be questionable under President Trump's interpretation of the Citizenship Clause, and yet no one ever challenged their qualifications to serve in Congress. Because these members of Congress drafted the Citizenship Clause, and because voters re-elected them during and immediately after ratification of the Fourteenth Amendment, the absence of such challenges is particularly compelling evidence of the original public meaning of that Clause. Part IV explains that the absence of such challenges is the "dog that didn't bark"—further confirming that the Citizenship Clause was originally understood to grant near-universal citizenship based on location of birth, without exception for the children of temporary or unauthorized immigrants.

We conclude the Essay by noting that the task we set ourselves was absurdly difficult, which in and of itself refutes the Trump Administration's novel interpretation. Attempting to determine whether a parent is domiciled and lawfully present at the time of a child's birth—both in the nineteenth century and today—is often impossible.[9] Even with the aid of modern electronic databases and devoting many hours of research, we could find evidence only of the dates of parents' arrival in the United States and (for some) dates on which they naturalized. Whether these parents intended to remain in the United States at the time of their child's birth and/or whether they violated state restrictions on immigration at the time they arrived was quickly lost to history. The difficulty of making such determinations is further evidence that no one at the time of ratification—or, for that matter, for the next 157 years—seriously thought that U.S. citizenship turned on such questions.

I. A BRIEF HISTORY OF THE CITIZENSHIP CLAUSE

A. THE FOURTEENTH AMENDMENT'S CITIZENSHIP CLAUSE

This Section provides a thumbnail sketch of the origins of the Fourteenth Amendment's Citizenship Clause, which sets the stage for the discussion to follow. Constraints of space and time do not permit a full exploration of this history, which has been described in greater depth by other scholars.[10]

The Constitution of 1787 failed to define who qualified for U.S. citizenship, and that question was contested in the antebellum era. Most assumed that the United States inherited the English common-law rule of *jus soli* under which all persons born on English soil were English subjects, including children born to temporary sojourners, with exceptions only for children of diplomats and invading armies.[11] Almost all agreed, however, that enslaved persons were not U.S. citizens, and the citizenship status of free Blacks and Native Americans was also disputed.[12]

In its 1857 decision in *Dred Scott v. Sandford*, the U.S. Supreme Court infamously declared that no person of African descent could ever be a citizen of the United States, whether enslaved or

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[9] *See, e.g.*, Lynch v. Clarke, 1 Sand. Ch. 583, 658 (N.Y. Ch. 1844) (noting the difficulty of trying to "ascertain first, by evidence of facts removed one generation from the time of the inquiry, the *status* or citizenship of the parents at the time of the birth . . .").

[10] *See generally* Garrett Epps, *The Citizenship Clause: A "Legislative History*,*"* 60 AM. U. L. REV. 331 (2010); Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020).

[11] *See, e.g.*, *Lynch*, 1 Sand. Ch. at 583–84.

[12] *See* Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUM. 73, 143–44 (1997). *See generally* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, 287–333 (1978).

free.[13] In 1865, the Civil War was over and the Thirteenth Amendment to the Constitution had abolished slavery, but the question of who qualified for U.S. citizenship remained.

In April of 1866, Congress enacted the Civil Rights Act of 1866 stating that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[14] Congress's authority to define citizenship by legislation was contested, however. On May 30, 1866, Senator Jacob Howard, a Republican from Michigan and a member of the Joint Committee on Reconstruction, proposed adding birthright citizenship to the text of what would become the Fourteenth Amendment of the U.S. Constitution. This addition, he explained, "removes all doubt as to what persons are or are not citizens of the United States" and "put[s] this question of citizenship . . . beyond the legislative power" of those "who would pull the whole system up by the roots and destroy it."[15]

The only legislative debate regarding the Citizenship Clause took place over the next few hours on the floor of the Senate. Senators explained that the Clause would give citizenship to all children born on U.S. soil, overruling *Dred Scott*. The only people excluded from citizenship based on birth in the United States were those not "subject to the jurisdiction" of the United States—language, they explained, that was intended to preserve the longstanding English common law exception for children of diplomats. Most of the brief debate focused on the status of children born within Indian tribes, who the Senators declared were also excluded from citizenship by this same language.[16] Supporters of the Clause further explained that it granted citizenship to "the children of all parentage whatever," including the children of Chinese immigrants—an immigrant group vilified at the time, and soon to become targets of restrictive federal immigration legislation.[17]

The final version of the Citizenship Clause, which is nearly identical to Senator Howard's original proposal, reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[18] In June of 1866, the Thirty-ninth Congress voted in favor of adding the Fourteenth Amendment to the U.S. Constitution by the requisite two-thirds majority.[19] The Amendment was subsequently ratified by over three-quarters of the states, though only after contentious elections that focused on the meaning and significance of that Amendment for the nation.[20] In July of 1868, Congress passed a joint resolution to add the Fourteenth Amendment to the U.S. Constitution—a pro forma vote that simply declared what the ratifying states had already made law.[21] By the time the Forty-first

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[13] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1857) (enslaved party).
[14] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (2025)).
[15] CONG. GLOBE, 39th Cong., 1st Sess. 2890, 2896 (1866).
[16] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Lyman Trumbull) ("We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them.").
[17] CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. John Conness). For an excellent history of anti-Chinese animus that led to laws restricting Chinese immigration, see BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018).
[18] U.S. CONST. amend. XIV, § 1.
[19] CONG. GLOBE, 39th Cong., 1st Sess. 3148–49 (1866).
[20] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 267 (1988) ("More than anything else, the election became a referendum on the Fourteenth Amendment. Seldom, declared the *New York Times*, had a political contest been conducted 'with so exclusive reference to a single issue.'"); *see also* GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 245–53 (2006) (describing the contentious ratification process).
[21] CONG. GLOBE, 40th Cong., 2d Sess. 4295–96 (1868).

Congress was elected in November of 1868, the Fourteenth Amendment, including the Citizenship Clause, was the law of the land.

B. EXECUTIVE ORDER

On January 20, 2025, President Donald J. Trump issued Executive Order 14,160 (EO), entitled "Protecting the Meaning and Value of American Citizenship."[22] Section 1 of the EO denies citizenship to children born in the United States to parents who are "unlawfully present in the United States" or who have "lawful but temporary" status.[23] The EO was immediately challenged in court, and lower courts universally rejected the government's position.[24] In December 2025, the Supreme Court granted the government's petition for writ of certiorari and the case will likely be decided by June of 2026.[25]

In its briefs defending the EO, the Trump Administration argues that the Citizenship Clause's exception for those born not "subject to the jurisdiction" of the United States requires the person to be "completely subject" to the "political jurisdiction" of the United States and therefore owe "allegiance" to the United States.[26] Citizens qualify, the government argues, as do noncitizens "domiciled" in the United States—which the government defines as having "lawful, permanent residence within a nation, with intent to remain."[27] Children born to noncitizens who are "temporarily or illegally" in the United States do not fall within the Citizenship Clause, the Trump Administration argues, because they (and their parents) "lack the reciprocal relationship of allegiance and protection that would bring them within the political jurisdiction of the United States."[28]

In July of 2025, several federal agencies issued memos and guidance documents outlining plans for implementation of the EO, should it be allowed to go into effect. Before recognizing citizenship of a child born in the United States, all these agencies would require "acceptable evidence" that at least one parent was a citizen or was both lawfully present and domiciled in the United States "at the time of said person's birth."[29]

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[22] Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025).

[23] *Id.* Section 2 of the EO states that the government will apply its interpretation prospectively only, which is in tension with the claim in Section 1 that the Citizenship Clause has "always excluded" the children of unauthorized and temporary immigrants. *See id.*

[24] *See, e.g.*, Preliminary Injunction Order, N.H. Indonesian Cmty. Support v. Trump, No. 25-cv-38 (D.N.H. Feb. 11, 2025); Preliminary Injunction Order, New Jersey v. Trump, No. 25-cv-10139 (D. Mass. Feb. 13, 2025)

[25] *See Trump v. Barbara (Birthright Citizenship)*, SCOTUSBLOG, https://www.scotusblog.com/cases/case-files/trump-v-barbara/ [https://perma.cc/3YZF-STK7] (last visited Jan. 18, 2026).

[26] Petition for Writ of Certiorari Before Judgment, *supra* note 7, at 3.

[27] *Id.* at 16–17.

[28] Brief for Appellants at 2, N.H. Indonesian Cmty. Support v. Trump, No. 25-1348 (1st Cir. 2025).

[29] *See* U.S. SOC. SEC. ADMIN., GUIDANCE ON PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (EXECUTIVE ORDER 14160) FOR VERIFICATION REQUIREMENTS UNDER THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (2025); U.S. DEP'T OF STATE, EXECUTIVE ORDER 14160: PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (2025) (stating that U.S. State Department will require applicants for passports to provide "original proof of parental citizenship or immigration status to determine the citizenship status of the applicant").

Section 2 of the EO states that it is "the policy of the United States that no department or agency of the United States government shall issue [or accept] documents recognizing United States citizenship" of those identified in Section 1. Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025). Section 2 further states that this policy will "apply only to persons who are born within the United States after 30 days from the date of this order." *Id.*

II. THE QUALIFICATIONS CLAUSE AND ELIGIBILITY CHALLENGES

Throughout the litigation, the Trump Administration argues that its interpretation "restores the original meaning of the Citizenship Clause" as understood at the time it was drafted and ratified.[30] Advocates and legal scholars have drawn on a variety of sources to debate the original meaning of that Clause, including the 1866 congressional debates adding that language to the Fourteenth Amendment, as well as nineteenth century treatises, judicial decisions, and Executive Branch interpretations.[31]

So far, however, no one has explored the original understanding of the term "citizen" when determining the qualifications of Members-elect to serve in Congress. The U.S. Constitution requires that every member of Congress be a "citizen" to take his or her seat, and qualifications to serve in office have been frequently contested over the nation's history. Accordingly, qualifications challenges are a rich source of information regarding the original public meaning of the Citizenship Clause.

Citizenship-based challenges to the qualifications of those serving from 1865 to 1871 are particularly relevant for determining the original understanding of that Clause. The Thirty-ninth Congress (1865–1867) drafted the language of the Citizenship Clause and then voted to approve the Fourteenth Amendment, triggering the ratification process. The Fortieth Congress (1867–1869) was elected during a period of intense debate over ratification, and that Congress subsequently voted on a joint resolution to add the Fourteenth Amendment to the U.S. Constitution. The Forty-first Congress (1869–1871) was the first elected after the Citizenship Clause became the law of the land. Accordingly, the definition of citizenship adopted by these Congresses, as well as by the people they represented, provides contemporaneous evidence of the original public meaning of that Clause.

A. QUALIFICATIONS TO SERVE IN CONGRESS AND PROCEDURES FOR ADDRESSING CHALLENGES

The Constitution requires that all Senators be at least thirty years old, have "been nine Years a Citizen of the United States," and be an inhabitant of the state they were elected to represent.[32] Members of the House of Representatives must be at least twenty-five years old, U.S. citizens for at least seven years, and an inhabitant of the state in which they were elected.[33] These requirements were intended to ensure that members of Congress have the requisite "stability of character," attachment to the United States, and connection to the state that elected them.[34]

In addition, Section 3 of the Fourteenth Amendment disqualifies from service in Congress (and certain other public offices) anyone who had previously taken an oath of office to support the Constitution of the United States and then "engaged in insurrection or rebellion" or who had "given

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Accordingly, the EO bars federal agencies from providing passports, social security numbers, or federal benefits to babies born to undocumented immigrants or lawful temporary immigrants after the executive order goes into effect.

[30] Petition for Writ of Certiorari Before Judgment, *supra* note 7, at I.

[31] *See supra* note 2 & accompanying text.

[32] U.S. CONST. art. I, § 3, cl. 3.

[33] *Id.* art. I, § 2, cl. 2.

[34] *See* THE FEDERALIST No. 62 (Alexander Hamilton or James Madison); Daniel B. Rice, *The Riddle of Ruth Bryan Owen*, 29 YALE J.L. & HUM. 1, 8–9 (2017) (discussing debates regarding the citizenship requirement); JACK MASKELL, CONG. RSCH. SERV., R41946, QUALIFICATIONS OF MEMBERS OF CONGRESS 10–18 (2015).

aid or comfort to the enemies thereof."[35] Congress can lift that disability by a two-thirds vote of each House.[36]

The U.S. Constitution provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."[37] In its 1929 decision in *Barry v. Cunningham*, the Supreme Court declared that the Constitution exclusively delegates to each House the power to determine whether Members-elect are qualified to be seated, and therefore that question is "beyond the authority of any other tribunal to review."[38]

Both Houses have adopted procedures to address challenges to the qualifications of those newly elected to office. Individuals who prevail in congressional elections and then appear in Congress with the credentials issued by state officials are designated "Member-elect." Challenges to a Member-elect's qualifications can be brought by another member of Congress, or by a petition or protest filed in the House or Senate by anyone (including the Member-elect's opponent). The Member-elect will then be provisionally seated until the dispute over the qualifications is resolved.[39]

Credible challenges to Members-elect's qualifications are sent to designated congressional committees for investigations, hearings, and a final report and recommendation about the Member-elect's qualifications to serve.[40] Credentials issued to Members-elect by state officials upon their election are prima facie evidence of Members-elect's qualifications, and challengers bear the burden to prove otherwise.[41] After the committee investigates and issues a final report, the entire body (House or Senate) votes on the question. If the House or Senate determines by majority vote that a Member-elect is not qualified to serve, that individual is then excluded.[42]

B. HISTORICAL PRACTICE

Over the course of U.S. history, over 700 members of Congress have been challenged for a variety of reasons,[43] including for a lack of qualifications such as U.S. citizenship.[44] In 1969, the

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[35] U.S. CONST. amend. XIV, § 3.
[36] *Id.*
[37] *Id.* art. I, § 5, cl. 1.
[38] *See* Barry v. U.S. *ex rel.* Cunningham, 279 U.S. 597, 613, 619 (1929); MASKELL, *supra* note 34, at 4.
[39] MASKELL, *supra* note 34, at 5–6.
[40] *See id.*
[41] *Id.* at 5–7; *see* ANNE M. BUTLER & WENDY WOLFF, UNITED STATES SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793–1990 xviii (1995).
[42] MASKELL, *supra* note 34, at 5.
[43] Jenkins, *supra* note 4, at 60 tbl. 3.
[44] For example, in 1793, Senator Albert Gallatin, who was born in Switzerland, was successfully challenged on the ground that he had not been nine years a citizen, as required under the U.S. Constitution to serve in the Senate. *See* KETTNER, *supra* note 1212, at 232–35. Throughout our research, we have counted at least twenty-five Members-elect who have been challenged due to their age, inhabitancy, or citizenship from 1789 to 2008, and at least thirteen former members who have been challenged under the Insurrection Clause, not including the thousands of public officials other than congressmen who briefly were not allowed to serve after the Civil War because they were in former Confederate states. *See, e.g.*, U.S. House Archives, *Known House Cases Involving Qualifications for Membership*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Qualifications/Qualifications-for-Membership-Cases/ [https://perma.cc/78YV-VFBZ] (last visited, Jan. 19, 2026) (listing 14 challenges in the House based on age, inhabitancy, or citizenship); RICHARD D. HUPMAN, SENATE ELECTION, EXPULSION AND CENSURE CASES FROM 1793 TO 1972 1–2, 5, 16–17, 28, 45, 47, 87–88, 134–35, 153–54 (1972) (listing 11 challenges in the Senate based on age, inhabitancy, or citizenship); BUTLER & WOLFF, *supra* note 41, at 3–5, 10–12, 24–25, 54–56, 82–83, 95–98, 150–54, 258–60, 359–61, 411–12

Supreme Court declared in *Powell v. McCormack* that members could only be excluded for one of the constitutionally-required reasons, which include citizenship, age, inhabitancy, and insurrection.[45] Historically, however, the qualifications of Members-elect have been challenged on extraneous grounds, such as corruption, mental health, and immoral behavior, as well as challenges to the election results based on fraud or other irregularities.[46]

Such qualifications challenges were relatively rare early in the nation's history but increased significantly during the hyper-partisan and contentious Reconstruction Era. As the Supreme Court put it in *Powell*, the "abandonment of [] restraint" in bringing such challenges "was among the casualties of the general upheaval produced in [the Civil] [W]ar's wake."[47] Between 1865 and 1871, eighteen Senators-elect were challenged, more than three times the rate of challenges brought in the first half of the nineteenth century.[48] Challengers attempted to bar these candidates from being seated for a host of reasons, including perjury, disloyalty, conspiracy, as well as failure to satisfy the Constitution's inhabitancy requirement.[49] Likewise, Members-elect's qualifications to serve in the House of Representatives were also challenged for a grab bag of reasons, including polygamy, disloyalty, vote fraud, malfeasance, treason, sedition, criminal misconduct, and personal character.[50]

A few examples give a flavor of the types of challenges brought in this era:

- In 1868, the Senate voted 27 to 20 to exclude Senator Philip Thomas of Maryland for having "voluntarily given aid . . . to persons engaged in armed hostility to the United States."[51]
- In 1868, William Dunlap Simpson was elected to serve as U.S. Representative for South Carolina in the Forty-first Congress. His opponent in that election, A.S. Wallace, challenged Simpson's right to take the seat on several grounds, including that he was disqualified from serving in Congress under Section 3 of the Fourteenth Amendment. The question was referred to a House committee, and Simpson was ultimately excluded from Congress.[52]

(listing 11 challenges in the Senate based on age, inhabitancy, or citizenship); CONG. GLOBE, 41st Cong., 2d Sess. 614–630 (1870) (listing thousands disqualified from office under the 14th Amendment's Insurrection Clause); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 88 (2021); *The Precedent for the 14th Amendment Disqualification*, CREW (July 7, 2023), https://www.citizensforethics.org/reports-investigations/crew-reports/past-14th-amendment-disqualifications/ (listing 4 disqualified from office under the 14th Amendment's Insurrection Clause); Task Force on the Rule of Law, *Report on Section 3 of the Fourteenth Amendment to the United State Constitution—The Disqualification Clause*, N.Y.C. BAR ASS'N (Sept. 29, 2022), https://www.nycbar.org/reports/historical-context-current-challenges-recommendations-regarding-the-disqualification-clause/ [https://perma.cc/9NRY-KPP2] (citing 8 disqualified from office under the 14th Amendment's Insurrection Clause).

[45] *See* Powell v. McCormack, 395 U.S. 486, 550 (1969).

[46] *See* BUTLER & WOLFF, *supra* note 41, at xiii, xx–xxv.

[47] *See Powell*, 395 U.S. at 544; *see also Legislative Exclusion*: *Julian Bond and Adam Clayton Powell*, 35 U. CHI. L. REV. 151, 157 (1967) ("Following the Civil War, congressional practice was greatly altered as the power to exclude a duly elected representative expanded considerably.").

[48] Twenty challenges were raised between 1844 and 1858 and eighteen challenges between 1793 and 1838. *See* BUTLER & WOLFF, *supra* note 41, at v–vi.

[49] *See generally id.*

[50] *See Known House Cases Involving Qualifications for Membership*, *supra* note 41.

[51] HUPMAN, *supra* note 41, at 42.

[52] PAPERS IN THE CASE OF A.S. WALLACE VS. W.D. SIMPSON, H.R. MISC. DOC. NO. 17, at 1 (1st Sess. 1868); HALBERT PAINE, WALLACE V. SIMPSON, H.R. REP. NO. 17, at 1 (2d Sess. 1870).

- In 1868, Senator Joshua Hill was challenged on the ground that members of the Georgia legislature that elected him were disqualified as disloyal under Section 3 of the Fourteenth Amendment. After several years of investigation and debate, he was seated in 1871.[53]
- After being elected as a delegate to the Fortieth Congress for the Utah Territory, William Henry Hooper was challenged on the grounds of polygamy, vote fraud, and, since he was a Mormon, being part of "a community separated from and hostile to the other portions of the people of the United States."[54] The question was referred to a committee, which rejected these challenges, and Hooper was seated.[55]
- In 1870, Senator Adelbert Ames of Mississippi was challenged for failing to meet the Constitution's inhabitancy requirement. The challenge was referred to a Senate committee for investigation, and the Senate ultimately voted 40–12 in favor of seating him.[56]
- In 1871, Senator George Goldthwaite of Alabama was challenged on the ground that some of the members of the state legislature who voted for him were not legally elected, having procured their seats through fraud. That challenge was dismissed after investigation.[57]
- Many other challenges during this same period turned on whether the former Confederate states from which these members had been elected had been permitted representation in Congress.[58]

C. THE ABSENCE OF QUALIFICATIONS CHALLENGES BASED ON MEMBERS' CITIZENSHIP BETWEEN 1865–1871

Despite all the challenges described above, with one significant exception, no one challenged a Member-elect's citizenship during the period between 1865 to 1871. That exception only helps to prove the rule that birth in the United States automatically established U.S. citizenship, regardless of ancestry. Mississippi Senator Hiram Rhodes Revels was the first Black man elected to Congress.[59] When his credentials were presented to Congress on February 23, 1870, several Democratic Senators challenged his citizenship even though all conceded he was born in the United States.[60] The issue was not, however, the immigration status of his parents. Rather, some Senators insisted that *Dred Scott* remained good law, and that the Fourteenth Amendment was itself unconstitutional.[61] Others argued that even if the Citizenship Clause could bestow citizenship on persons of African descent, it had only been in place for two years.[62] Accordingly, they argued, neither Revels (nor any other Black person) could satisfy the constitutional requirement of at least nine years of citizenship to join the Senate in 1870. After two days of intense debate, the Senate

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[53] HUPMAN, *supra* note 41, at 43–45.
[54] JOHN CHANLER, MCGRORTY V. HOOPER, H.R. REP NO. 79, at 2 (2d Sess. 1868).
[55] *Id.* at 11.
[56] HUPMAN, *supra* note 41, at 45.
[57] HUPMAN, *supra* note 41, at 49–50.
[58] BUTLER & WOLFF, *supra* note 41, at xiii.
[59] *Hiram Revels: A Featured Biography*, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Revels.htm [https://perma.cc/L4FF-GQ4L] (last visited Jan. 25, 2026).
[60] *See* Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1682–83 (2006).
[61] *Id.* at 1683–84.
[62] *Id.*

voted against referring the challenge to Revels' citizenship to the Senate Judiciary Committee, instead voting 48 to 8 to allow him to take his seat in Congress.[63]

Aside from this odious challenge to Senator Revels's citizenship, no Member-elect born in the United States was challenged based on his citizenship between 1865–1871.[64] Moreover, based on a search of digitized newspapers from the relevant era, no one ever questioned the citizenship of Members-elect born in the United States or inquired about their parents' domicile or immigration status at the time of their birth. The absence of such challenges—or even questions asked regarding parents' status—is striking in light of our finding, described below, that more than a dozen members of Congress would have had suspect citizenship under the Trump Administration's definition of the Citizenship Clause.

III. ANALYSIS OF THE BIRTHPLACE AND ANCESTRY OF THE 584 CONGRESSMEN WHO SERVED BETWEEN 1865 AND 1871

This Part describes our research methodology and our findings regarding the birthplace, ancestry, and citizenship-based qualifications challenges (or rather, lack thereof) of the 584 members of Congress who served between 1865 and 1871.

A. METHODOLOGY

We investigated the ancestry of 584 members of Congress who served in the Thirty-ninth, Fortieth, and Forty-first Congresses to determine whether their citizenship could be questioned under the interpretation of the Citizenship Clause adopted in Trump's EO.[65]

We employed a multi-step research strategy. First, we filtered the *Biographical Directory of the United States Congress* to produce a dataset limited to individuals who served in either the House of Representatives or the Senate in these three Congresses. Our goal was to classify each member into one of five categories: (1) born in the United States to two foreign-born parents; (2) foreign-born and later immigrated to the United States; (3) born in the United States to one U.S.-born parent and one foreign-born parent; (4) born in the United States to two U.S.-born parents; and (5) born in the United States and the birthplace of one or more parents is unknown.

We began by consulting the official biographical entries in the *Biographical Directory* to establish whether each member was U.S.-born or foreign-born. To determine the birthplaces of members' parents, we turned to genealogical databases and archival resources. Findagrave.com was a primary resource, as it provides photographs of tombstones as well as supplemental biographical details, such as birthplace, death location, and burial site. Many entries also contained digitized newspaper obituaries, which frequently listed these members' parents' birthplaces.

If parentage could not be confirmed through Findagrave, we consulted other genealogical platforms, including FamilySearch, WikiTree, and Geni, where descendants often published detailed histories describing family lineage. If these sources proved inconclusive, we conducted

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[63] *See id.* at 1689.

[64] In the 1930s, native-born Congresswoman Ruth Bryan Owen's citizenship was unsuccessfully challenged on the ground that she had lost her citizenship by marrying a noncitizen. *See* Rice, *supra* note 34, at 12–13.

[65] The *Biographical Directory* lists 272 members having served in the Thirty-ninth Congress, 313 members in the Fortieth Congress, and 347 in the Forty-first Congress. After downloading the data for all members listed across the three Congresses, accounting for instances of overlapping service by the same individuals across multiple Congresses, we determined that a total of 584 unique members served during this period. *Search Results for 39th–41st Congresses*, BIOGUIDE U.S. CONG., https://bioguide.congress.gov/ (last visited Jan. 25, 2026).

targeted searches through Ancestry.com, which often includes links to census entries, city directories, and other government records. We never assumed reported family histories were reliable, but we used them as a starting point to search for confirmation in primary sources—such as census records, military records, and contemporary newspaper stories. We included a combination of identifying details in our searches (e.g., name, date and place of birth, date and place of death, and parents' names) to locate family trees, immigration records, marriage records, obituaries, and census entries. If, after exhausting these resources, we were still unable to verify the birthplace of at least one parent, we classified the member under category (5): born in the United States and birthplace of one or more parents is unknown.

B. FINDINGS

Of the 584 men serving in these three Congresses, we determined that eleven were born in the United States to parents who had both immigrated to the United States: Jacob A. Ambler, Abijah Gilbert, Samuel Scott Marshall, Samuel McLean, James Kennedy Moorhead, William Mungen, Leonard Myers, William Farrand Prosser, Thomas Elliot Stewart, Philadelph Van Trump, and Stephen Fowler Wilson.[66] According to the Trump EO, all of these members' citizenship was suspect, requiring proof of parents' lawful presence and domicile in the United States at the time of these members' birth.

Moreover, four of those eleven were born within three years or fewer of their parents' arrival in the United States, raising in particular the question whether their parents were domiciled in the United States at the time of their birth—that is, whether their parents had an intent to remain permanently in the United States.[67] In the nineteenth century, like today, noncitizens often lived in the United States for months or even years without intending to make it their permanent home.[68] In *Lynch v. Clarke*—the oft-cited New York chancery case addressing birthright citizenship in 1844—the court noted that Julia Lynch's parents were not domiciled in the United States at the time of her birth, despite having lived in the United States for "three or four years," because there was an "absence of any proof of [her father's] expressing an intention, or even expectation of remaining here, or of his taking any step toward acquiring the character of a citizen of the country."[69] (Nonetheless, the court declared that Julia Lynch was born a citizen because it rejected the claim that noncitizen parents must be domiciled in the United States to convey citizenship to their child.)[70] Likewise, because there is no evidence that these Members-elect's parents declared their intent to naturalize by the time of their child's birth, there is no evidence they had an intent

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[66] Some of the sources we located contained conflicting or unverified information, and so we cannot be completely confident of the details regarding members' ancestry listed in our findings below. For example, both the 1880 and 1900 census entries for Leonard Myers state that his parents were born in England, but the box for "foreign born" parents is not ticked in his entry in the 1870 census. The absence of accurate and consistent records further supports the conclusion that Congress and the nation could not have intended citizenship to turn on unverifiable details regarding parents' immigration status.

[67] *See* Lynch v. Clarke, 1 Sand. Ch. 583, 639 (N.Y. Ch. 1844).

[68] Based on available data, scholars estimate that approximately 30% percent of immigrants who arrived in the United States in the second half of the nineteenth century eventually returned to their home country. Although there is very little data regarding immigrants arriving in the first half of the nineteenth century, scholars estimate the return rate at about 15%. *See generally* MARK WYMAN, ROUND-TRIP TO AMERICA, THE IMMIGRANTS RETURN TO EUROPE, 1880–1930 (1993); JOSEPH P. FERRIE, YANKEYS NOW: IMMIGRANTS IN THE ANTEBELLUM U.S., 1840–1860 (1999).

[69] *Lynch*, 1 Sand. Ch. at 638.

[70] *Id.* at 683.

to remain—and so their child would not qualify for citizenship under the Trump Administration's interpretation of the Citizenship Clause.[71]

In addition, many of these noncitizen parents disembarked in states which barred entry of noncitizens who had been convicted of crimes or who were carriers of disease—raising the possibility that they violated these laws upon entry. If these parents violated these states' laws upon entry, then arguably their children born in the United States would not be citizens under President Trump's interpretation of the Citizenship Clause.[72]

Finally, we were unable to find clear records of the identity and/or birthplace of the parents of more than a dozen other members of these three Congresses. This absence of information raises the possibility that these parents were noncitizens who were not domiciled in the United States at the time of the members' births, and/or that they arrived in the United States in violation of state laws restricting immigration. If so, these members would also not have been citizens eligible to serve in Congress under the Trump Administration's interpretation of the Citizenship Clause.

At the very least, the citizenship of all of these members was suspect according to Trump's interpretation of the Citizenship Clause, requiring further information and proof to establish their citizenship, and so their eligibility to serve in Congress. Yet no one challenged these members' citizenship, or even questioned their parents' immigration status, despite the contentious times that encouraged qualifications challenges on a broad variety of grounds.

To illustrate the point, we provide below biographical details of some of the members whose citizenship would be questionable under the Trump EO.

1. Members Born Within Three Years of Noncitizen Parents' Arrival in United States

a. U.S. Representative Samuel Scott Marshall

Congressional biography. Samuel Scott Marshall served in the U.S. House of Representatives for Illinois, as a Democrat, for a total of seven terms: He was a member of the Thirty-fourth and Thirty-fifth Congresses (1855–1859), and then was elected again to the Thirty-ninth through Forty-third Congresses (1865–1875), before being defeated in his bid for re-election to the Forty-fourth Congress.[73] While in Congress, Marshall served in several leadership roles. He was a member of the powerful judiciary committee, and he was the Democrat's candidate for Speaker of the House in 1867.[74]

Marshall was fully engaged in the most contentious debates of the day. He voted against the impeachment of President Andrew Johnson both when the question came before his committee

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[71] Under the Naturalization Act of 1802, a noncitizen was permitted to file a declaration of intent to naturalize at any time after arrival but was not eligible to naturalize for at least five years after arrival, and at least three years after filing that declaration of intent. An immigrant was required to register with the district court to obtain a certificate that would be used "as evidence of the time of his arrival within the United States." Naturalization Act of 1802, Pub. L. No. 7-28, 2 Stat. 153, 155 (1802).

[72] *See, e.g.*, Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–83 (1993) (describing state laws restricting immigration in the antebellum era).

[73] BEN PERLEY POORE, CONGRESSIONAL DIRECTORY: FORTY-FOURTH CONGRESS [SECOND SESSION] 17 (2d ed. 1877); *MARSHALL, Samuel Scott*, BIOGUIDE U.S. CONG., https://bioguide.congress.gov/search/bio/M000160 (last visited Jan. 25, 2026).

[74] *See MARSHALL, Samuel Scott*, *supra* note 73; *Death of Hon. Samuel Scott Marshall*, SUNDAY HERALD (D.C.), Aug. 3, 1890 ("Marshall was a Democrat, and wielded great power with his party, both in State and nation.").

and when it came before the House of Representatives as a whole.[75] He voted against adding the Fourteenth Amendment to the U.S. Constitution in June of 1866.[76] He also voted against the joint resolution to add the text of the Fourteenth Amendment to the Constitution in June of 1868.[77]

Marshall's high-profile roles in Congress, as well as his votes on these controversial issues, made it even more likely that his political enemies would have challenged his qualifications to serve in Congress had they any credible basis for doing so.

Birthplace and ancestry. Marshall was born near Shawneetown in Gallatin County, Illinois on March 12, 1821,[78] less than two years after his Irish immigrant parents arrived in the United States. His father, Daniel Marshall, was born on January 26, 1789, in the town of Armagh in County Armagh, Ireland (now Northern Ireland)[79]; his mother, Sophia Walker, was born in 1790 in County Down, Ireland (now Northern Ireland).[80] Marshall's parents married in Armagh in about 1810, and his older brother, John Walker Marshall, was born in 1814 in Ireland.[81] The family traveled to the United States from Belfast in the spring of 1819, arriving in Philadelphia in June.[82] The Illinois Census Index lists Daniel Marshall and his son John Marshall as living in Gallatin County, Illinois in 1820.[83]

We could find no evidence that Marshall's parents had filed a declaration of intent to naturalize with a court before his birth—a step they could have taken at any time after arrival in the United States, and which was a prerequisite to naturalization under the law in place at the time.[84]

b. U.S. Representative William Mungen

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[75] Journal of the House of Representatives of the United States, 40th Cong., 2d Sess. 391–93 (1868), https://voteview.com/source_images/house_journal/66/0#page/391/mode/2up [https://perma.cc/845N-YXGM] (recording vote of Feb. 24, 1868).
[76] Journal of the House of Representatives of the United States, 39th Cong., 1st Sess., 833–34 (1866), https://voteview.com/source_images/house_journal/63/0#page/833/mode/2up [https://perma.cc/98RE-NHUM].
[77] CONG. GLOBE, 40th Cong., 2d Sess. 4295–96 (1868).
[78] *See Samuel Scott Marshall,* FIND A GRAVE, https://www.findagrave.com/memorial/15559590/samuel-scott-marshall [https://perma.cc/MFT9-H4L9] (last visited Jan. 31, 2026) (stating his birth date).
[79] *Daniel Marshall*, FAMILYSEARCH, https://ancestors.familysearch.org/en/LVXS-T6Y/daniel-marshall-1789-1866 [https://perma.cc/7Y8C-ZJKD] (last visited Jan. 25, 2026).
[80] *Sophia Walker*, FAMILYSEARCH, https://ancestors.familysearch.org/en/M18M-9VY/sophia-walker-1790-1848 [https://perma.cc/S9KN-Z86K] (last visited Jan. 25, 2026).
[81] *John Walker Marshall*, FIND A GRAVE, https://www.findagrave.com/memorial/55469281/john_walker-marshall [https://perma.cc/PTZ7-NBW9] (last visited Jan. 25, 2026).
[82] *Id.*
[83] *All Illinois, U.S., Compiled Census and Census Substitutes Index, 1790–1890 Results for Daniel Marshall*, ANCESTRY, https://www.ancestry.com/search/collections/3545/?name=Daniel_Marshall&residence=1820_gallatin-illinois-usa_1106 [https://perma.cc/5T9R-BNRZ] (last visited Jan. 25, 2026); *All Illinois, U.S., Compiled Census and Census Substitutes Index, 1790–1890 Results for John Walker Marshall*, ANCESTRY, https://www.ancestry.com/search/collections/3545/?name=John+Walker_Marshall&residence=1820_gallatin-illinois-usa_1106 [https://perma.cc/4PXQ-NUL3] (last visited Jan. 25, 2026).
[84] Naturalization Act of 1802, Pub. L. No. 7-28, 2 Stat. 153 (1802). To search for naturalization records, we conducted standard Ancestry.com searches using each immigrant's full name, birth year, and birth country or the U.S. state in which they settled, if available. We filtered the type of record results to "Immigration & Emigration." This process yielded written oaths of allegiance, declarations of intention, indexes to naturalization records, affidavits of naturalization, and/or naturalization records issued by state superior courts, many of which included the immigrant's signature, the signature of a witness, and a notation that a Certificate of Citizenship would be issued upon payment of the application fee.

Congressional biography. William Mungen was a member of the U.S. House of Representatives for Ohio, as a Democrat, in the Fortieth Congress (1867–1869) and the Forty-First Congress (1869–1871).[85] Despite being the child of immigrants, Mungen was opposed to immigration—at least by the Chinese. In 1871, Mungen gave a speech entitled "The Heathen Chinese" in which he described Chinese immigrants as servile and advocated for legislation barring their entry into the United States.[86]

Birthplace and ancestry. Mungen was born in Baltimore, Maryland, on May 12, 1821, [87] within three years of his Irish immigrant parents' arrival in the United States. His father, John Mungen, was born in Tyron County, Ireland, on August 18, 1782.[88] His mother, Margaret (McFarland) Mungen was also born in Tyron County, Ireland, on December 10, 1791.[89] The couple were married in Ireland and immigrated together to the United States in 1818. William moved with his parents and younger siblings to Ohio in 1830, at age nine, where the family remained.[90]

We could find no evidence that Mungen's parents had filed a declaration of intent to naturalize with a court before his birth.[91]

c. U.S. Representative William Farrand Prosser

Congressional biography. William Farrand Prosser served in the U.S. House of Representatives for Tennessee, as a Republican, in the Forty-first Congress (1869–1871).[92] He was defeated in his bid for re-election to the Forty-second Congress.[93]

Birthplace and ancestry. Prosser was born in Williamsport, Pennsylvania on March 16, 1834,[94] less than two years after his parents immigrated to the United States from Wales. His father, David Green Prosser, was born in Wales in 1810,[95] and his mother, Rachel Williams, was born

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[85] *MUNGEN*, *William*, BIOGUIDE U.S. CONG., https://bioguide.congress.gov/search/bio/M001079 (last visited Jan. 25, 2026).
[86] *See* CONG. GLOBE, 41st Cong., 3d Sess. 351–60 (1871).
[87] *MUNGEN, William*, *supra* note 8585.
[88] *An Old Settler Gone*, FINDLAY JEFFERSONIAN, July 5, 1878. The obituary states that John Mungen married in Ireland and immigrated to the United States in 1818, landing at Baltimore before moving to Philadelphia and then Ohio. *Id.*
[89] *See Obituary*, FINDLAY JEFFERSONIAN, Mar. 12, 1875. The obituary records the death of "Margaret, consort of John Mungen, aged eighty-seven years, three months and two days," and states that she was born in Tyrone County, Ireland and immigrated to the United States in 1818. *Id.*; *see also* Schedule 1. Inhabitants of Findlay, in the County of Hancock, State of Ohio, 72 (Aug. 9, 1870) (on file with Nat'l Archives, 1870 Census Records) (listing John and Margaret Mungen's birthplaces as Ireland).
[90] *See* Schedule 1. Inhabitants in West Point Findlay, Borough, in the County of Hancock, State of Ohio, 45 (June 19, 1880) (on file with Nat'l Archives, 1880 Census Records) (listing Mungen as born in Maryland, and Mungen's mother and father as both born in Ireland); *MUNGEN, William*, *supra* note 85; Baltimore Census 1820, 323 (Jan. 13, 1820) (on file with Nat'l Archives, 1820 Census Records) (listing "John Mungan" as a resident of Baltimore, MD, and stating that the household consisted of one "foreigner not naturalized").
[91] They could not have naturalized before residing in the United States for at least five years. *See* Naturalization Act of 1802, Pub. L. No. 7-28, 2 Stat. 153, 153–54 (1802).
[92] *PROSSER, William Farrand*, BIOGUIDE U.S. CONG., https://bioguide.congress.gov/search/bio/p000550 (last visited Jan. 25, 2026).
[93] William Edward Hardy, "Fare well to all Radicals": Redeeming Tennessee, 1869–1870, 235–37 (Aug. 2013) (Ph.D. dissertation, University of Tennessee) (WorldCat).
[94] *William Farrand Prosser*, FIND A GRAVE, https://www.findagrave.com/memorial/10768/william-farrand-prosser [https://perma.cc/J2DU-CXV3] (last visited Jan. 25, 2026).
[95] *David Prosser*, FIND A GRAVE, https://www.findagrave.com/memorial/15103429/david-prosser [https://perma.cc/2RBV-DUFE] (last visited Jan. 25, 2026).

around 1806 in Wales.[96] His parents were married in Wales on March 28, 1832, and came to the United States sometime thereafter.[97] William Prosser's father declared an intent to become a citizen in March of 1874, at age 64.[98]

We could find no record that Prosser's parents had filed a declaration of intent to naturalize with a court before his birth.[99] Furthermore, the fact that his father started the process to naturalize forty years after Prosser's birth suggests that he had done nothing to officially declare his intent to remain in the United States before his son was born.

d. U.S. Representative Thomas Elliott Stewart

Congressional biography. Thomas Elliott Stewart served in the U.S. House of Representatives for New York, as a Republican, in the Fortieth Congress (1867–1869).[100] He did not run for reelection in 1868 to the Forty-first Congress and instead went on to be chairman of the Liberal Republican general committee of New York City in 1872 and park commissioner of New York City from 1874 to 1876.[101]

Birthplace and ancestry. Stewart was born in New York City on September 22, 1824,[102] to Irish parents just one year, four months, and nine days after they arrived in New York. His father, James Stewart, was born in Belfast, Ireland in 1795, and his mother, Mary B. Elliott, was born in Ranaldstown, Ireland in 1802.[103] The New York and U.S.–Canada Passenger and Immigration Lists show that James and Mary departed from a port in Belfast, Ireland on the ship *John Dickinson* and arrived at a port in New York on May 13, 1823.[104] New York naturalization records state that James Stewart was naturalized on May 17, 1832.[105]

We could find no record that Stewart's parents had filed a declaration of intent to naturalize with a court before his birth.[106] The fact that Stewart's father naturalized nine years after his birth suggests that he had done nothing to officially declare his intent to remain in the United States before his son was born.

2. Members Whose Parents' Identity or Birthplace is Unknown

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[96] *Rachel Williams Prosser*, FIND A GRAVE, https://www.findagrave.com/memorial/129024053/rachel-prosser [https://perma.cc/8CLS-DQL5] (last visited Jan. 25, 2026).
[97] *Brecknockshire, Wales, Anglican Baptisms, Marriages and Burials, 1538–1994 for David Prosser*, ANCESTRY, https://www.ancestry.com/search/collections/62099/records/330174 [https://perma.cc/2KBD-M5FT] (last visited Jan. 25, 2026).
[98] *Pennsylvania, U.S., Federal Naturalization Records, 1795–1945 for David Prosser*, ANCESTRY, https://www.ancestry.com/search/collections/2717/records/613564?tid=&pid=&queryId=4a7b1ecd-ebeb-48fb-a89d-245f98a94bef&usePUBJs=true [https://perma.cc/936N-9QYS] (last visited Jan. 25, 2026).
[99] They could not have naturalized before residing in the United States for at least five years. *See* Naturalization Act of 1802, Pub. L. No. 7-28, 2 Stat. 153, 153–54 (1802).
[100] *STEWART, Thomas Elliott*, BIOGUIDE U.S. CONG., https://bioguide.congress.gov/search/bio/S000920 (last visited Jan. 25, 2026).
[101] *Id.*
[102] *Id.*
[103] SCOTCH-IRISH SOC'Y OF AM., THE SCOTCH-IRISH IN AMERICA: PROCEEDINGS OF THE SCOTCH-IRISH CONGRESS 356 (1893) (listing Stewarts' parents birth dates and birthplaces).
[104] *See New York, U.S., Arriving Passenger and Immigration Lists, 1820–1850*, ANCESTRY, https://www.ancestry.com/search/collections/7485/records/1558514?tid=&pid=&queryId=24f3ada1-ed28-42d7-8beb-c5d7c5618147&usePUBJs=true [https://perma.cc/SBK4-7MLB] (last visited Jan. 25, 2026).
[105] James Stewart Naturalization Record, Marine Ct. of the City of N.Y. (May 17, 1832) (on file with Geo. L.J.).
[106] *See supra* note 99 & accompanying text.

We could not verify the identity and/or birthplace of more than a dozen other members of Congress serving between 1865–1871 who were born in the United States. We provide biographical details below for two such members of Congress as examples of the many gaps and ambiguities in the historical record.

a. U.S. Representative James Michael Cavanaugh

Congressional biography. James Michael Cavanaugh served in U.S. House of Representatives for Minnesota, as a Democrat, in the Thirty-fifth Congress (1858–1859), and was an unsuccessful candidate for re-election in the Thirty-sixth Congress.[107] He moved to Montana in 1866 and was elected as a Delegate to the Fortieth (1867–1869), and the Forty-first Congress (1869–1871).[108] He was an unsuccessful candidate for re-election to the Forty-second Congress.[109]

Birthplace and ancestry. Cavanaugh was born in Springfield, Massachusetts on July 4, 1823.[110] There is no record of his parents' birthdate or birthplace in the census records, military records, congressional biographies, or newspaper coverage.

b. U.S. Senator for California James Alexander McDougall

Congressional biography. James A. McDougall served in the U.S. House of Representatives for California, as a Democrat, in the Thirty-third Congress (1853–1855).[111] He then served for a single term in the United States Senate for California, again as a Democrat, from 1861–1867.[112] He did not run for re-election.[113]

Birthplace and ancestry. McDougall was born on November 19, 1817, in Bethlehem, New York.[114] We could find no record of the birthplace or citizenship of his father, Peter McDougall. Few records exist regarding the birthplace of his mother, Nancy Ann McLean (1788–1878), although one family tree says Nancy McLean was born in Scotland and died in Canada.[115]

* * *

In short, the citizenship of Congressmen with two noncitizen parents—particularly those born shortly after their noncitizen parents' arrival in the United States, as well as Congressmen whose parents' birthplace was unknown—would be suspect under the Trump Administration's interpretation of the Citizenship Clause. Trump's Executive Order, as well as executive agencies' implementation of that Order, interprets that Clause to deny citizenship absent "evidence" that

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[107] *CAVANAUGH, James Michael*, BIOGUIDE U.S. CONG., https://bioguide.congress.gov/search/bio/C000260 (last visited Jan. 25, 2026).
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *McDOUGALL, James Alexander*, BIOGUIDE U.S. CONG, https://bioguide.congress.gov/search/bio/M000416 (last visited Jan. 25, 2026).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Nancy Ann McLean*, ANCESTRY, https://www.ancestry.com/family-tree/person/tree/110239896/person/402257158227/facts [https://perma.cc/NYF6-NK35] (last visited Jan. 30, 2026).

noncitizen parents were lawfully present and domiciled in the United States "at the time of said person's birth."[116] None of these men could provide such evidence.

These members took leadership roles in Congress, won closely contested elections, and engaged in the most controversial political issues of their day, making them particularly likely to be targeted for qualifications challenges in an era when such challenges were commonplace. They could not establish their U.S. citizenship under President Trump's interpretation of the Citizenship Clause. And yet not one of these individuals' citizenship was challenged by anyone before, during, or after their election to Congress.

IV. THE DOG THAT DIDN'T BARK: CITIZENSHIP AND THE QUALIFICATIONS CLAUSE

In Arthur Conan Doyle's short story, *The Adventure of Silver Blaze*, detective Sherlock Holmes investigates the theft of a famous racehorse.[117] Holmes deduces that the theft must have been an inside job after learning that the stable's watchdog did not bark on the night the horse disappeared.[118] This negative fact—that the watchdog did *not* sound the alarm—was evidence that no stranger approached the stable that evening.

The same logic applies here. Congress has a constitutional obligation to determine the citizenship of its members under Article I, Section 5 of the U.S. Constitution. A Member-elect's qualifications can be formally challenged by *anyone*, including his election opponent and another member of Congress, as well as any other member of the public. In credible cases, such challenges lead to investigation by a legislative committee and a final vote on the Member-elect's qualification by the full House or Senate. Alternatively, such a challenge could be raised informally but publicly by opponents, which would then be reported in the press, with the goal of undermining the candidates' support in future elections and influence while in office.

As described in Part III, our research found that more than a dozen congressmen serving during and immediately after the Fourteenth Amendment's drafting and ratification were born in the United States to immigrant parents or to parents whose identities and/or birthplaces are unknown. They were elected in hard-fought contests in an era of extraordinary political division and partisanship, when challenges to Members-elect's qualifications were routine. According to the Trump Administration, its interpretation of the Citizenship Clause embodies the original *public* meaning—that is, the meaning widely known at the time. And yet no one—not their opponents, not the press, not the public, not a member of Congress from the opposing party—ever questioned these members' citizenship.

In short, the dog did not bark.

The absence of such challenges—the absence even of questions asked about parents' immigration status—is powerful evidence that everyone understood at the time of the Fourteenth

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[116] Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025); U.S. SOC. SEC. ADMIN., GUIDANCE ON PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (EXECUTIVE ORDER 14160) FOR VERIFICATION REQUIREMENTS UNDER THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (2025); *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., IP-2025-0001, USCIS IMPLEMENTATION PLAN OF EXECUTIVE ORDER 14160—PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (2025); U.S. DEP'T OF STATE, EXECUTIVE ORDER 14160: PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (2025) (stating that U.S. State Department will require applicants for passports to provide "original proof of parental citizenship or immigration status to determine the citizenship status of the applicant").

[117] *See generally* Arthur Conan Doyle, *Adventures of Sherlock Holmes*: *The Adventure of Silver Blaze,* THE STRAND MAG., Vol. IV 1892, at 645.

[118] *See id.* at 659.

Amendment's drafting and ratification that the Citizenship Clause replicated the English common-law rule of near-universal birthright citizenship. Under English common law, the only exceptions to the general rule of birthright citizenship were for those rare individuals born on English soil with quasi-sovereign status, such as diplomats and invading occupying armies.[119] In 1866, when Congress proposed adding birthright citizenship to the U.S. Constitution, it excepted those groups and added to that list children born within Indian tribes—another quasi-sovereign entity.[120] The Fourteenth Amendment's Citizenship Clause was ratified with only those exceptions, all included within the "subject to the jurisdiction thereof" carveout, and no others.[121] The nation shared this understanding, which is why no one challenged, or even questioned, the citizenship of members of Congress born in the United States to immigrant parents, or of unknown parentage.

To be sure, none of the members of Congress described in Part III are clearly barred from citizenship at birth under the Trump Administration's interpretation of the Citizenship Clause. Although some were born shortly after their parents arrived in the United States to parents who had chosen not to file a declaration of intent to naturalize, as far as we can tell, their parents remained in the country. Perhaps these parents were intending to remain permanently in the United States at the time of the Members' birth—we can't be sure one way or another. According to the Trump Administration, however, remaining in the United States is *not* sufficient evidence of domicile; the EO denies citizenship to a child whose parents held temporary visas at the time of the birth even if the parents later obtain green cards and naturalize.[122]

Not only did no one question these Members-elect's citizenship, no one ever asked for evidence that their parents intended to remain in the United States "at the time of [their] birth," as the EO claims is required under the original understanding of the Citizenship Clause.[123] Nor did anyone investigate whether their parents violated state laws barring the entry of noncitizens who were convicts, poor, or diseased, as was true of both Pennsylvania (where Congressman William Prosser's and Congressman Samuel Marshall's parents arrived shortly before his birth) and New York (where Congressman Thomas Stewart's parents arrived shortly before his birth), among others.[124]

Under the Trump Administration's interpretation of the Citizenship Clause, these are all essential questions that it plans to require immigrants and their U.S.-born children today to answer if the EO goes into effect. For example, the U.S. Department of State plans to require applicants for passports to provide "original proof of parental citizenship or immigration status to determine the citizenship status of the applicant . . . *at the time of the [applicant's] birth*."[125] The Social Security Administration states that before it will issue a social security number, it will "require evidence that such person's mother and/or father is a U.S. citizen or in an eligible immigration

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[119] *See* Price*, supra* note 12, at 73–75.
[120] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890–96.
[121] *See* U.S. CONST. amend. XIV, § 1.
[122] Domicile requires intent to remain in the United States, and even parents remaining in the country for years may not have formed such an intent at the time of the child's birth. *See* Lynch v. Clarke, 1 Sand. Ch. 583, 638 (N.Y. Ch. 1844) (stating that although Julia Lynch's father had lived in the United States for "three or four years," there was an "absence of any proof of his expressing an intention, or even expectation of remaining here, or of his taking any step towards acquiring the character of a citizen of the country").
[123] *See* Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025).
[124] *See* Neuman, *supra* note 72, at 1842, 1853.
[125] *See, e.g.*, U.S. DEP'T OF STATE, EXECUTIVE ORDER 14160: PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (2025).

status *at the time of the person's birth*."[126] In 2020, John Eastman—a former Trump advisor who long argued in favor of the EO' interpretation of the Citizenship Clause—questioned Senator Kamala Harris' citizenship after she was selected by Joe Biden to be his running mate. Eastman declared that "before we so cavalierly accept" her citizenship, "we should ask her a few questions," including whether "Harris' parents [were] lawful permanent residents *at the time* of her birth."[127]

No one asked these same questions of Members-elect at the time the Citizenship Clause was drafted and ratified because everyone knew they were irrelevant. For the purpose of establishing U.S. citizenship under the Citizenship Clause, the entire nation—including hundreds of members of Congress, their opponents, and the people they represented—knew that birth in the United States was sole and sufficient proof of that status.

* * *

We make two final observations based on our research into the ancestry of hundreds of members of Congress. First, determining the immigration status of parents at the time of an individual's birth is absurdly difficult. In the nineteenth century, most immigrants to the United States arrived without paperwork or passports.[128] Under the Naturalization Act of 1802, a "free white person" could choose to file a declaration of intent to naturalize with a court, but they were not required to do so even if they remained in the United States for the rest of their lives.[129] Although state and federal laws restricted immigration in various ways, there was little capacity to monitor and enforce those restrictions. In short, for most immigrants, no records exist regarding whether they intended to remain indefinitely in the United States, or their right to do so under the law, at the time their children were born.[130]

The difficulty of the inquiry is further evidence that Congress could never have intended citizenship to turn on such questions, and that the public would never have understood the Citizenship Clause to do so. The Reconstruction Congress drafted the Citizenship Clause to establish a clear, bright line, and easily administrable rule of citizenship for almost everyone born in the United States—one that does not require either the judiciary or the executive to make individualized determinations.[131] Mandating that every person claiming birthright citizenship first dig up documentation of their parents' birthplace and immigration history from decades in the past, with all the uncertainty that would entail, is incompatible with that goal.

Second, determining an individual's parents' domicile, as well as their legal right to remain in the United States, is just as difficult today, albeit for different reasons. Although in the twenty-first century the U.S. government maintains records for most (though not all) noncitizens entering the country, it is even harder to determine the parents' domicile on the date of a child's birth. If

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[126] U.S. SOC. SEC. ADMIN., GUIDANCE ON PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP (EXECUTIVE ORDER 14160) FOR VERIFICATION REQUIREMENTS UNDER THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (2025) (emphasis added).

[127] John C. Eastman, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK (Aug. 14, 2020, at 17:40 ET), https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483.

[128] JOHN C. TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 114–18 (2d ed. 2018).

[129] *See* Naturalization Act of 1802, Pub. L. No. 7-28, 2 Stat. 153, 153–55 (1802).

[130] *See* Lynch v. Clarke, 1 Sand. Ch. 583, 658 (N.Y. Ch. 1844) (noting the difficulty of trying to "ascertain first, by evidence of facts removed one generation from the time of the inquiry, the *status* or citizenship of the parents at the time of the birth").

[131] *See supra* Part II.

"domicile" turns in part on the noncitizen parents' intent to remain in the United States, as the Trump Administration claims, then the child's citizenship would require a detailed factual inquiry into the parents' mental state at the time of birth.[132] Furthermore, if "domicile" also requires the legal right to remain in the United States indefinitely, as the Trump Administration also claims, then a child's citizenship would turn on whether the law would allow the parents to adjust to lawful permanent resident status—another complicated question under immigration law.[133]

If the Trump Administration's EO were to go into effect, it would destabilize the citizenship of hundreds of thousands of newborns. Status would turn on ambiguous and discretionary decisions by government bureaucrats, requiring reams of paperwork and investigation into children's ancestry, and in particular their parents' mental state at the time of the members' birth. Perhaps that is just what the Trump Administration would like, but it is not what the Reconstruction Congress intended, or the nation understood at the time that the Fourteenth Amendment was ratified.

CONCLUSION

President Trump's Executive Order adopting a novel, restrictive interpretation of the Citizenship Clause has prompted a debate over the original understanding of that Clause. This Essay is the first to analyze the contemporaneous understanding of that Clause by examining challenges to Members-elect's citizenship on the grounds that they were not qualified to serve in Congress under the U.S. Constitution's Qualifications Clause.

Our research into the ancestry of the 584 members of Congress who served between 1865 and 1871 uncovered eleven members born to two noncitizen parents, and more than a dozen others born in the United States whose parents' identity and/or birthplace were uncertain. All these congressmen's citizenship would be suspect under the Trump Administration's interpretation of the Citizenship Clause. For all these congressmen, it would have been difficult, perhaps impossible, to produce evidence of their parents' status at the time of their birth, as the Trump administration states is constitutionally required. Moreover, all were elected at a contentious moment in U.S. politics when challenges to Members-elect's eligibility to serve increased in the Senate more than threefold. And yet there were no challenges to these members' citizenship—formal or informal—raised by anyone at the time. This dog that didn't bark is further evidence that the Citizenship Clause was understood to grant automatic citizenship based on birth in the United States, not parents' immigration status.

We conclude with an observation based on our long hours of tedious research: Determining the status of immigrants arriving in the early nineteenth century—an era with few immigration records and minimal enforcement of existing state-based restrictions on immigration—is often impossible, and always onerous. The difficulty of the task alone is evidence that no one at the time of ratification could have seriously thought that U.S. citizenship turned on such questions.

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[132] Such a convoluted inquiry is required to determine a party's state citizenship for the purposes of diversity jurisdiction, often requiring searches of multiple records (such as records of drivers' license, car registration, voting, membership in clubs and associations, and real estate purchases) as well as an affidavit by the individual stating whether he or she intended to remain indefinitely in that state, followed by a judicial hearing on that question. *See, e.g.*, Ceglia v. Zuckerberg, 772 F. Supp. 2d 453, 456 (W.D.N.Y. 2011).

[133] *See, e.g.*, Immigration and Nationality Act, 8 U.S.C. § 1255 (2026) (describing the variety of circumstances under which a noncitizen can adjust to lawful permanent resident status).