

The Riddle of Ruth Bryan Owen

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INTRODUCTION

Her ancestors helped win America's independence.¹ As a child, she watched House debates with rapt attention, vowing eventually to return to her beloved Capitol building. She gazed out on millions of cheering faces during her father's three presidential campaigns. Her uncle was a governor and vice-presidential nominee, her father the American Secretary of State. She ran the American Women's War Relief Fund alongside future First Lady Lou Hoover and nursed dying Allied soldiers. After establishing herself as Florida's leading female activist, she campaigned for the House of Representatives in 1928, promising to send her district's most exemplary young citizens to Washington on an unparalleled civic pilgrimage. She won resoundingly—making her the first woman the South ever sent to Congress—even though her home state hadn't yet ratified the Nineteenth Amendment.² She later served as our nation's first female ambassador. Who was more American than Ruth Bryan Owen?

But just as this dazzling stateswoman-to-be prepared to take her seat in Congress, her defeated opponent challenged her eligibility to participate in the federal lawmaking process. For only the second time since 1789,³ a losing House candidate impugned his opponent's qualifications on citizenship grounds, arguing that Owen hadn't "been seven Years a Citizen of the United States" as the Constitution requires.⁴ How could Owen have possibly been vulnerable on this score?

Under the Expatriation Act of 1907, American women (but not men) who married foreigners were automatically stripped of their American

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1. For these and other biographical details, see *infra* Part II and Conclusion.

2. Florida finally ratified the Amendment in 1969. LEE WILLIS, *SOUTHERN PROHIBITION: RACE, REFORM, AND PUBLIC LIFE IN MIDDLE FLORIDA, 1821-1920*, at 157 (2011).

3. See CHESTER H. ROWELL, *A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789-1901*, at 37-38 (1901) (examining David Ramsay's failed challenge to William Smith's eligibility to serve in the First Congress); *id.* at 426 (discussing *Lowry v. White*, a House case from the 1880s, in which a foreign-born candidate failed to produce his naturalization certificate).

4. U.S. CONST. art. I, § 2, cl. 2.

citizenship.⁵ Owen found true love in 1910, but her husband happened to be a subject of Edward VII of England. The Nineteenth Amendment's egalitarian ethos rendered this discriminatory regime perverse and archaic;⁶ after Congress passed the Cable Act in 1922, no American woman lost her citizenship simply by reason of marriage.⁷ But the Cable Act's justice wasn't retroactive; Owen had to undergo naturalization, even as she guided fellow aliens through the acculturation process. Finally, in 1925, her busy schedule allowed her to become naturalized on the federal judiciary's timetable. By 1928, Owen had been a U.S. citizen for at least twenty-eight years of her storied life. Wasn't this good enough?

William Lawson, Owen's challenger, argued that the period of "seven years" spelled out in the Constitution refers to the seven *immediately preceding* years as a consecutive unit.⁸ On this theory, the House Qualifications Clause regarded Owen as an American citizen only from the moment in 1925 when she became one by choice. Owen had therefore "been" a U.S. citizen for only three years when elected to Congress, and the House could not legitimately seat her.

Owen publicly regarded Lawson's challenge as a "joke" and an "absurdity . . . not worth taking seriously."⁹ When House Elections Committee No. 1 took her contest as seriously as all others, Owen rose to her own defense. She naturally replied that seven *cumulative* years of citizenship suffice.¹⁰ But more importantly, Owen welcomed this controversy as a teaching opportunity—she desired "to make more clear the laws which have dealt unjustly with women."¹¹ Accordingly, Owen stressed Section 4 of the Cable Act, which allowed any marital expatriate who later became naturalized to "have the same citizenship status as if her marriage had taken place after the passage of [the Cable Act]"—that is, that she had effectively never "cease[d] to be a citizen."¹² Congress had wiped away the old law and removed the "stain it once had placed on our citizenship record."¹³ Her involuntary expatriation was but a bad dream.

The Elections Committee issued a ten-page report in March 1930, unanimously resolving that Owen retain her seat.¹⁴ But the report's concluding resolutions masked deep interpretive disagreements. Five of

5. See Expatriation Act of 1907, Pub. L. No. 59-193, ch. 2534, § 3, 34 Stat. 1228 (1907).

6. See, e.g., *infra* notes 577-582 and accompanying text.

7. Unless she married an alien racially ineligible to become a naturalized U.S. citizen. See Cable Act of 1922, Pub. L. No. 67-345, ch. 411, § 3, 42 Stat. 1021 (1922).

8. Lawson's argument is recounted in Part III.B.4.a *infra*.

9. *Attack on Citizenship Taken as a "Joke" by Mrs. Ruth Bryan Owen*, EVE. INDEP. (St. Petersburg), Nov. 30, 1928, at 11 [hereinafter *Attack on Citizenship*].

10. Owen's argument is recounted in Part III.B.4.b *infra*.

11. *Contested Election Case of William C. Lawson v. Ruth Bryan Owen: Arguments and Hearings Before Elections Comm. No. 1, House of Reps.*, 71st Cong. 59 (1930) (statement of Rep. Owen) [hereinafter *Owen Hearing*].

12. Cable Act of 1922, Pub. L. No. 67-325, ch. 411, §§ 3-4, 42 Stat. 1021 (1922).

13. *Attack on Citizenship*, *supra* note 9.

14. For a detailed analysis of the Committee's fascinating report, see *infra* Section III.B.6.

the Committee's nine members endorsed Owen's "cumulative" reading of the citizenship requirement, seemingly unaware that it would permit *aliens* to serve in Congress if they had been U.S. citizens for any seven years of their lives. The minority instead concluded that only seven immediately preceding years of citizenship suffice. Nonetheless, it found that Section 4 utterly erased Owen's denaturalization, so she had "been" a U.S. citizen since her birth in 1885. The full House failed to adopt either interpretation—it simply seated Owen by voice vote.¹⁵

Key participants repeatedly insisted that Owen's case was unprecedented.¹⁶ Yet the Senate had confronted a remarkably similar conundrum in 1870, when Democrats protested the seating of Hiram Revels, the nation's first African-American senator-elect. The infamous *Dred Scott*¹⁷ decision had come down in 1857; the Fourteenth Amendment—which said nothing about retroactivity—was ratified only in 1868. So Revels had been a citizen for only two years, they argued, seven short of the required nine. Senate Republicans seated Revels anyway, refusing *Dred Scott* any role in the transformative arithmetic of post-Appomattox Senate qualifications.¹⁸

Professor Richard Primus rescued the Revels episode from obscurity in a 2006 law-review article, *The Riddle of Hiram Revels*.¹⁹ Primus lamented that "[m]odern constitutional law has entirely forgotten the Revels debate. It is not covered in textbooks, not written about in law reviews, not discussed by law professors, and not cited by judges. In short, it is wholly absent from our constitutional discourse."²⁰ He therefore sought to "recove[r] Revels for our collective stock of constitutional knowledge."²¹

The legal academy's neglect of Owen's historic victory also "marks a tremendous act of collective forgetting."²² Only two law-review articles since the 1930s have as much as mentioned the dispute over Owen's citizenship, both in footnotes.²³ A few modern historians have discussed the episode, but these cursory treatments either round out biographical sketches or briefly situate the contest within the broader campaign for

15. For a fuller account of this session, see *infra* Section III.B.7.

16. See *infra* notes 247 and 473-476 and accompanying text.

17. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

18. The Revels episode is chronicled in Section IV.B *infra*.

19. See generally Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680 (2006).

20. *Id.* at 1683.

21. *Id.*

22. *Id.*

23. See Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 448 n.198 (2005) ("In 1928, Ruth Bryan Owen's election to Congress was challenged by her opponent on the grounds that she had not met the constitutional requirement of seven years of citizenship."); Paul E. Salamanca & James E. Keller, *The Legislative Privilege To Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L.J. 241, 370 n.841 (2007) ("For other contests at the federal level involving qualifications, see *Lawson v. Owen* [citation omitted].").

women's independent citizenship.²⁴ This first full-length treatment of *Lawson v. Owen* examines a hidden treasure of constitutional history and a forgotten chapter of congressional constitutional interpretation. Owen's struggle cries out to be "recover[ed] . . . for our collective stock of constitutional knowledge."²⁵

Part I sorts through the applicable law in an effort to demystify the House's odd adjudicatory predicament. Part II summarizes key features of Owen's remarkable biography. Her personal history and character traits—especially her unassailable patriotism—raised absolutely none of the Qualifications Clause's and Expatriation Act's core exclusionary concerns. It is difficult to imagine a set of human facts more conducive to result-oriented constitutional reasoning.²⁶ Aware that Owen's ouster would be intolerable, the Elections Committee studied her case for months and strained to articulate a principled rule of decision.

Part III tells the story of Lawson's failed effort to unseat Owen. Because every development garnered nationwide newspaper coverage, I rely heavily on contemporaneous accounts. This long-unpublished commentary yields fascinating insights into popular understandings of women's constitutional equality. And because Owen's eligibility was a contested electoral issue, this background context offers a glimpse into a political campaign preoccupied with mass constitutional persuasion. Part III then chronicles Owen's celebrated self-advocacy and parses the Elections Committee report's curious constitutional reasoning.

Part IV puzzles over the participants' complete ignorance of applicable historical lessons. In 1845, as Congress considered annexing the Republic of Texas for immediate admission to statehood, its members sparred over whether a Texas so received could instantly be entitled to full representation in the House and Senate. This potentially hinged on whether the Qualifications Clauses refer to the *immediately preceding* seven or nine years, or *any* past seven or nine years. Clever annexationists sidestepped the obvious difficulty and secured Texas's admission. Congress soon welcomed six Texans who had recently helped govern a foreign country. Had Owen known these details, she might have fortified her forward-looking appeal with a potent argument from historical practice.

24. See, e.g., CANDICE BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* 170 (1998) (offering a four-sentence overview of the "unfortunate but propitious incident"); JO FREEMAN, *WE WILL BE HEARD: WOMEN'S STRUGGLES FOR POLITICAL POWER IN THE UNITED STATES* 109 (2008) (briefly describing Owen's political and constitutional victories); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 66 (2011) (devoting one paragraph to Lawson's challenge); J. STANLEY LEMONS, *THE WOMAN CITIZEN: SOCIAL FEMINISM IN THE 1920S*, at 235-36 (1973) (devoting two).

25. Primus, *supra* note 19, at 1683.

26. To echo Chief Justice Marshall, if these congressmen-jurists had been "permitted to indulge their sympathies, a case better calculated to excite them c[ould] scarcely be imagined." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831).

The Revels affair seems to cut the other way, however. Republicans could have buttressed their depictions of “grand, tectonic constitutional shifts” with a “technical point[] of law”²⁷—the free-born Revels had been a citizen from birth until well beyond his ninth birthday,²⁸ and that was enough. But not one senator made this argument. Lawson might have seized upon this apparent institutional waiver of the “cumulative” view in exhorting the House to reason as the Senate once did. Or Owen might have instructed the House to entirely ignore the loathsome expatriation law in computing her eligibility, just as most Senate Republicans had with *Dred Scott*. Instead, everyone played John Marshall²⁹ and argued from scratch.

Part V closes with three practical meditations on *Lawson v. Owen*. First, that controversy invited serious reflection on the present status of gender-discriminatory laws in a post-Nineteenth Amendment world. Participants and intrigued observers all seemed to agree that the Expatriation Act of 1907 was now unconstitutional, and Congress was right to repeal it posthaste. That day’s legal cognoscenti—unlike the modern Supreme Court—understood the Nineteenth Amendment as something more than a rule of equality in governments’ allocation of voting privileges.³⁰ This Article presents considerable new evidence that the Nineteenth Amendment’s contemporaries came to regard women as improper objects of state-sanctioned discrimination soon after that Amendment’s ratification.³¹ In short, Owen’s triumph marks an important turning point in American women’s effort to achieve full constitutional equality. But because scholars have largely forgotten her story, they have overlooked crucial sources that might have helped provide a historically firmer basis for modern sex-discrimination doctrine.

Second, Owen’s case yields fresh insight into one of the most hotly debated questions in modern constitutional and statutory interpretation: whether ostensibly clear legal texts can be validly deemed ambiguous after resort to external devices like purpose, consequences, and historical practice. As Professor David Strauss observed in his recent *Harvard Law Review* Foreword, the presumed distinction between specific and general constitutional provisions “has a long and illustrious history.”³² Numerous

27. Primus, *supra* note 19, at 1696.

28. Surely no Senate Republican believed that *Dred Scott* merely declared preexisting law. For a taste of Republicans’ antipathy toward *Dred Scott*, see Section IV.B *infra*.

29. Justice Scalia reflected that undertaking exhaustive historical research on the Second Amendment for his majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), was “like being John Marshall for a little tiny portion of the Constitution.” JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 351 (2009).

30. The Amendment itself reads, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” U.S. CONST. amend. XIX.

31. This view is prominently associated with Professor Steven Calabresi and Julia Rickert. See generally Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

32. David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean*

Supreme Court opinions assert that constitutional³³ and statutory³⁴ text can be entirely unambiguous on its own terms. Scholars have echoed this sentiment, often in reference to the Constitution's numerical provisions.³⁵

Yet the perceived clarity of constitutional text has long been influenced by extratextual factors.³⁶ And in three recent high-profile cases, the Supreme Court has invoked purposive and consequentialist considerations in deciding whether statutory text was clear in the first place.³⁷ It might seem unthinkable that this move could ever become necessary when interpreting “mathematical” constitutional provisions. Yet Owen's generation managed to fight over how one such “breathtakingly exact judgment[]”³⁸—the seven-year provision—applied to a strange situation. On a quick glance, the Constitution's text alone does not seem to require consecutive, immediately preceding citizenship periods. But the text suddenly seems suppler when one realizes that Owen's “cumulative” reading would allow aliens to serve in the House, Senate, and the presidency. Owen's case thus shows the folly of blanket generalizations about numerical constitutional clauses, and of the effort to classify *any* legal text as utterly “clear” without remaining open to extratextual considerations.

And third, if the Elections Committee had studied Revels's victory, Owen's case might have embodied a larger legal principle—that historical practices repugnant to the modern constitutional order should never be accorded residual legal effect. This insight offers the hope of at least some common ground in one of constitutional law's most contentious enterprises: the identification of unenumerated fundamental rights under the Due Process Clause. Two competing approaches fuel this ever-simmering methodological conflict. One is largely deductive and open-ended, requiring the exercise of reasoned judgment in prototypical common-law fashion. The other is inductive, recognizing only those rights with an amply documented historical pedigree.³⁹

In the 2015 case of *Kerry v. Din*,⁴⁰ Justice Scalia's plurality opinion invoked Section 3 of the Expatriation Act—Owen's very nemesis—in

What It Says?, 129 HARV. L. REV. 1, 59 (2015).

33. See *infra* note 601 and accompanying text.

34. See *infra* note 603 and accompanying text.

35. See *infra* note 602 and accompanying text.

36. See Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1231-55 (2015); see also *infra* notes 609-612 and accompanying text.

37. See generally Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407 (2015). He focused on *Bond v. United States*, 134 S. Ct. 2077 (2014), *Yates v. United States*, 135 S. Ct. 1074 (2015), and *King v. Burwell*, 135 S. Ct. 2480 (2015).

38. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1979 (2011).

39. For a useful overview of this doctrinal schizophrenia, see Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148-54, 162-64 (2015).

40. 135 S. Ct. 2128 (2015).

denying that an asserted liberty interest was “deeply rooted in this Nation’s history and tradition.”⁴¹ Scalia acknowledged that current equal-protection doctrine and “modern moral principles” are squarely aligned against marital expatriation.⁴² Yet he allowed the mere historical existence of an older, blatantly unconstitutional legal order to affirmatively shape modern constitutional doctrine, much as Senate Democrats had sought to do in 1870. (Lawson’s challenge was adjudicated in a similar fashion in 1930, likely because of Owen’s unfamiliarity with Revels’s regime-bridging triumph.)

The Expatriation Act, like *Dred Scott*, issued from an institution under the temporary thrall of un-American constitutional commitments. Just as Reconstruction Republicans refused to “go back and reason upon the principles” of a slaveholders’ juristocracy,⁴³ fundamental-rights identification should shun historical sources that offend “the Constitution under which we live this day.”⁴⁴ And more broadly, constitutional adjudicators should never affirmatively invoke universally rejected historical practices in a law-generating fashion.

I. UNPACKING RUTH’S RIDDLE: THE LAW AS IT STOOD

Resolving William Lawson’s challenge to Owen’s eligibility required the House to consider a citizenship-stripping law, a potentially regime-shifting constitutional amendment, and a corrective statute that purported to expunge an established historical fact when the aggrieved party met a specified condition. This Part untangles the web of applicable law and imagines several ways in which the House could have solved this peculiar constitutional puzzle.

A. Judging Qualifications

In a clearly marked departure from conventional accounts of the separation of powers, the Constitution provides that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members.”⁴⁵ In deciding whether a member-elect satisfies the enumerated age, citizenship, and residency requirements, “each chamber acts as the sole arbiter without external constraint.”⁴⁶ There is “no appeal” from this “unlimited” authority.⁴⁷ Accordingly, the Supreme Court has

41. *Id.* at 2134 (plurality opinion) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

42. *Id.* at 2136; *see id.* at 2135 (“[T]hese early regulations were premised on the derivative citizenship of women, a legacy of the law of coverture.”).

43. CONG. GLOBE, 41st Cong., 2d Sess. 1564 (1870) (statement of Sen. Sawyer).

44. *Id.* (statement of Sen. Drake).

45. U.S. CONST. art. I, § 5, cl. 1.

46. Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789-2002*, 18 *STUD. IN AM. POL. DEV.* 112, 112 (2004).

47. Vincent M. Barnett, Jr., *Contested Congressional Elections in Recent Years*, 54 *POL. SCI. Q.* 187, 188 (1939). *Powell v. McCormack*, 395 U.S. 486 (1969), refused to allow the House of

acknowledged the legislative branches' prerogative to "make an unconditional and final judgment" regarding these three qualifications.⁴⁸ So despite one observer's proposal that the Court take Owen's case if a partisan Elections Committee bungled it,⁴⁹ only the House could have legitimately decided her fate.

B. "Seven Years a Citizen"

When judging qualifications, the House enforces three Article I imperatives: Representatives must be at least twenty-five years old, inhabit the states from which they are chosen, and have "been seven Years a Citizen of the United States."⁵⁰ I have found no trace of any Framers or ratifier giving a moment's thought to the problem of inconsecutive citizenship periods (or prophesying the policy of involuntary marital expatriation).⁵¹ Yet their "mathematical" House Qualifications Clause promises absolute exclusion for those who fall within its prohibitory scope. What was the seven-year requirement designed to accomplish?

The Framers broke with early English practice in allowing naturalized citizens to serve in Congress.⁵² The Committee of Detail originally proposed that each House member "shall have been a citizen of the United States for at least three years before his election."⁵³ George Mason strenuously objected: he "was for opening a wide door for emigrants," but he "did not chuse to let foreigners and adventurers make laws for us & govern us."⁵⁴ Mason thought three years' citizenship insufficient to "ensur[e] that local knowledge which ought to be possessed by the Representative."⁵⁵ He also feared that "a rich foreign Nation, for example

Representatives to exclude a member-elect for reasons unrelated to Article I's age, citizenship, and residency qualifications, but it left untouched congressional interpretive primacy within those three domains. *Id.* at 522.

48. *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972); *cf.* *Nixon v. United States*, 506 U.S. 224, 238 (1993) (holding that because Article I grants the Senate the "sole Power to try all impeachments," its chosen impeachment procedures are nonjusticiable).

49. See Erma E. Cole, Op-Ed., *A Case for the Supreme Court*, THE SUN (Baltimore), Feb. 12, 1930, at 10 (arguing that the House should "give the case to the Supreme Court" if the Committee's decision "would be an arbitrary one and decided by a party vote").

50. U.S. CONST. art. I, § 2, cl. 2. Similarly, senators must be at least thirty years old, inhabit the states from which they are chosen, and have "been nine Years a Citizen of the United States." *Id.* art. I, § 3, cl. 3.

51. This was widely assumed to be true in 1930 and became a recurring talking point. See, e.g., *Ruth Bryan Owen's Case*, LUDINGTON DAILY NEWS (MI), Jan. 23, 1930, at 4 [hereinafter *Owen's Case*] ("Now a case like Mrs. Owen's never entered the heads of the lawyers in the constitutional convention of 1787. The political emancipation of women was then 137 years in the future.")

52. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 70 (2005).

53. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 178 (Max Farrand ed., 1911) [hereinafter RECORDS]. Professor Mary Bilder has recently explored the pitfalls of treating James Madison's notes from the Philadelphia Convention as sacrosanct. See generally MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015). But Professor Bilder does not claim that Madison tinkered specifically with his synopsis of the debate over what became the seven-year provision, nor is it obvious why he would have done so.

54. 2 RECORDS, *supra* note 53, at 216.

55. *Id.* According to Justice Story, the seven-year provision required "naturalized citizens to

Great Britain, might send over her tools who might bribe their way into the Legislature for insidious purposes.”⁵⁶

Mason moved to substitute “seven” for “three,” and all states but one agreed to the change.⁵⁷ When the Convention revisited the question, Elbridge Gerry warned that “[f]oreign powers will intermeddle in our affairs Persons having foreign attachments will be sent among us & insinuated into our councils, in order to be made instruments for their purposes.”⁵⁸ Hugh Williamson then proposed to increase the requirement to nine years.⁵⁹ He wished the United States “to acquire as fast as possible national habits” unsullied by wealthy emigrants’ “luxurious examples.”⁶⁰ The Convention ultimately voted down all departures from the seven-year rule.⁶¹

In accommodating clashing visions of eligibility, the Framers thus constitutionalized what they believed to be a precise citizenship requirement for federal legislative service.⁶² By formulating congressional qualifications in a most rule-like fashion—“seven years a citizen,” rather than “devoid of foreign attachments”—the Framers thus forbade future Congresses to monitor candidates’ Americanism directly. Significantly (if unsurprisingly), this debate proceeded on the shared premise that federal legislators must actually be U.S. citizens. The seven-year provision emerged from disagreement over how quickly foreign-born immigrants could be clothed with constitutional authority *after* undergoing naturalization.

To forestall legislative self-entrenchment, the Convention also rejected a plan to permit Congress to regulate its own membership qualifications.⁶³ By virtue of being settled in Article I, congressional qualifications were understood to be tightly fixed rather than legislatively regulable.

acquire a reasonable familiarity with the principles of our institutions and with the interests of the people.” JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* § 75 (1842). Justice James Wilson understood the requirement to perform two functions: “1. That the constituents might have a full and mature opportunity of knowing the character and merit of their representative. 2. That the representative might have a full and mature opportunity of knowing the dispositions and interests of his constituents.” *Of the Constitutions of the United States and of Pennsylvania—of the Legislative Department*, in *THE WORKS OF THE HONOURABLE JAMES WILSON*, L.L.D. 117, 141 (Bird Wilson ed., 1804).

56. 2 RECORDS, *supra* note 53, at 216; *see also* A Republican Federalist, *To the Members of the Convention of Massachusetts*, Feb. 2, 1788, *reprinted in* 1 *THE COMPLETE ANTI-FEDERALIST* 185 (Herbert J. Storing ed., 1981) (“Will there not be immediately planted in the several States, men of abilities, who, having the appearance of privates, will nevertheless be in the pay of foreign powers? . . . [W]ill you not be the puppets of foreign Courts?”).

57. 2 RECORDS, *supra* note 53, at 216.

58. *Id.* at 268.

59. *Id.*

60. *Id.*

61. *Id.* Alexander Hamilton and James Madison would have required “mere[] Citizenship”; they assumed that Congress’s uniform rule of naturalization would set the probationary period sufficiently high. *Id.*

62. In other words, this deceptively “clear text” was “the product of deliberate compromise,” not of “an inattentive mistake.” *Re, supra* note 37, at 418.

63. 2 RECORDS, *supra* note 53, at 250; AMAR, *supra* note 52, at 68.

Majoritarian contraction of the roster of eligible candidates would, in Madison's words, "subvert the Constitution."⁶⁴

Needless to say, Owen was no British tool, no alien adventurer insinuating herself into the councils of state. If she stood out as a "luxurious example," it was thanks to the richness of her republican learning.

C. Marriage as Treason: The Expatriation Act of 1907

On March 2, 1907, it became the policy of the United States that "any American woman who marries a foreigner shall take the nationality of her husband."⁶⁵ Section 3 of the Expatriation Act was uniformly interpreted to divest these women of their American citizenship, whether they remained in the United States or lived abroad.⁶⁶ A woman therefore incurred the same penalty for marrying a Canadian as she would for assisting America's military enemies.⁶⁷ In fact, assumption of her husband's nationality became "an unwritten part of a married woman's nuptial contract."⁶⁸ When Section 3 became law, no woman had ever been elected to Washington.⁶⁹ So congressmen probably didn't realize they were effectively legislating another membership qualification:⁷⁰ no American woman who had married an alien could serve in Congress.

In 1830, the Supreme Court held that an American woman who had taken a British husband did not lose her citizenship by virtue of her marriage.⁷¹ A generation later, Congress selectively overrode the common-law doctrine of perpetual allegiance in providing that any *foreign* woman who married an American would "be deemed and taken to be a citizen."⁷² Once Congress later declared voluntary self-expatriation to be a "natural and inherent right of all people,"⁷³ it eliminated a major theoretical obstacle to equality of derivative citizenship—that is, the equal right of all women to have no separate and independent nationality of their own.

64. 2 RECORDS, *supra* note 53, at 250.

65. Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228 (1907).

66. John P. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 44-45 (1950).

67. See Anne Marie Nicolosi, "We Do Not Want Our Girls To Marry Foreigners": Gender, Race, and American Citizenship, 13 NWSA J. 1, 11 (2001) ("[W]omen who married aliens faced the same punishment as if they had committed treason.").

68. BREDBENNER, *supra* note 24, at 4; see also Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 414 (2013) (concluding that, after the 1907 law, "a woman's marital identity [w]as her primary identity-producing legal status").

69. Jeannette Rankin, the first woman elected to Congress, took her seat in 1917. NORMA SMITH, JEANNETTE RANKIN: AMERICA'S CONSCIENCE 8, 103 (2002).

70. This assumes the correctness of Lawson's "immediately preceding" view; otherwise, a noncitizen could assume office. See Section III.B.5 *infra*.

71. See *Shanks v. Dupont*, 28 U.S. 242, 246 (1830) ("[M]arriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife.").

72. Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604 (1855).

73. Expatriation Act of 1868, ch. 249, § 1, 15 Stat. 223 (1868).

As abhorrent as Section 3's citizenship-stripping feature seems in hindsight, the Expatriation Act passed with little fanfare. The Act was but one element of a bureaucratically devised program to codify, clarify, and tighten citizenship policies at a time of increased anxiety over immigration.⁷⁴ America joined most other nations in declaring women's citizenship totally derivative of their husbands'.⁷⁵ While the bill was pending, virtually no one publicly debated the merits of renouncing America's commitment to native-born women with exotic romantic preferences.⁷⁶ Its suddenness came as a shock to women's-rights advocates, who were apparently kept in the dark.⁷⁷

Section 3 couldn't have been entirely unexpected—"wanderlustful" American heiresses had been publicly maligned for purchasing aristocratic bridegrooms, and such scolding continued apace after 1907. These "scattered eruptions" of indignation never spawned a political movement,⁷⁸ but they provided a prepackaged apology for the Expatriation Act (sometimes called the "Gigolo Act"⁷⁹) and helped sustain its unparalleled harshness as several states enfranchised women in the early twentieth century.⁸⁰

Many Americans came to see transatlantic marriages as "loveless unions that exchanged capital for class."⁸¹ In 1893, the *New York Times* published a scandalous list of "American Women Who Have Given Their Hearts and Money to Foreigners," with the amount of lost "enviable American cash" (\$50,000,000 in all) recorded alongside each international wedding.⁸² One prominent minister viewed these marriages as "a matter of sale and purchase" in which American girls "sold their womanhood, their country, their language, and their religion for husbands who are peculiarly contemptible cads."⁸³ Congressman Charles McGavin berated the women who "sacrific[ed] their souls and honor upon the altar of snobbery and vice," who are "not satisfied with any other name than Countess Spaghetti

74. Roche, *supra* note 66, at 25-26; BREDBENNER, *supra* note 24, at 56-57; GROSSMAN & FRIEDMAN, *supra* note 24, at 65. 1907 was the "very height of immigration, when about a million immigrants were entering the United States each year." Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440, 1461 (1998).

75. SOPHONISBA P. BRECKINRIDGE, MARRIAGE AND THE CIVIC RIGHTS OF WOMEN: SEPARATE DOMICIL AND INDEPENDENT CITIZENSHIP 20 (1931).

76. BREDBENNER, *supra* note 24, at 63; see Nicolosi, *supra* note 67, at 14 ("No Congressional records remain of the discussions of the law, only a few lines in *The Congressional Record*, making it impossible to know precisely what lawmakers were thinking when they passed the act.").

77. BREDBENNER, *supra* note 24, at 64.

78. *Id.* at 61.

79. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 456 (1997).

80. See DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 227 (1996) (detailing the early successes of the women's-suffrage movement).

81. Dana Calise Cooper, *Informal Ambassadors: American Women, Transatlantic Marriages, and Anglo-American Relations, 1865-1945*, at 214 (December 2006) (unpublished Ph.D. dissertation) (Texas Christian University).

82. *Have Found Husbands Abroad*, N.Y. TIMES, Apr. 19, 1893, at 2.

83. *Says Our Women Influence Europe*, N.Y. TIMES, Jan. 20, 1908, at 6.

or Macaroni.”⁸⁴ Even President Theodore Roosevelt denounced the man “whose son is a fool and his daughter a foreign Princess.”⁸⁵ Congressman N.E. Kendell put the problem most succinctly: “[W]e do not want our girls to marry foreigners.”⁸⁶

Congressmen frequently assumed that women invited any dreadful consequences of their international marriages. Loss of citizenship and confiscation of property⁸⁷ were “a good lesson to our American girls to marry American boys.”⁸⁸ When a “prodigal daughter”⁸⁹ made a different choice, she effected a “clear, open, broad daylight, voluntary surrender of citizenship.”⁹⁰ As Congressman Samuel Dickstein later mused, “They brought it about themselves, did they not? . . . The women who married these foreign dukes and counts, these duchesses and countesses and that sort of stuff, when there are enough Americans for them to select from.”⁹¹

In *Mackenzie v. Hare* (1915),⁹² the Supreme Court upheld Section 3 of the Expatriation Act against a constitutional challenge for precisely these reasons. Congress didn’t annul anyone’s citizenship, the Court reasoned; the Expatriation Act merely proposed a “condition voluntarily entered into, with notice of the consequences.”⁹³ Ethel Mackenzie’s betrothal was “as voluntary and distinctive as expatriation and its consequence must be considered as elected.”⁹⁴ Mackenzie’s selection of a British husband, in other words, manifested her intent to be forsaken by her motherland.⁹⁵

So when Ruth Bryan exchanged vows with Reginald Owen, Earl of

84. *American Women of Title Scorned*, N.Y. TIMES, Jan. 29, 1908, at 3; see also 62 CONG. REC. 9053 (1922) (statement of Rep. Herrick) (chastising the American women who married “some Count No Account, some degenerate from over the seas”).

85. *Roosevelt Censures Foreign Marriages*, N.Y. TIMES, May 3, 1908, at 18.

86. *Hearings Before the House Committee on Foreign Affairs on H.R. 21358, Relating to Expatriation of Citizens*, 62d Cong. 20 (1912) (statement of Rep. Kendell).

87. American-born women married to citizens of the Central Powers were themselves alien enemies during World War I. The Alien Property Custodian confiscated over \$25 million of property from them during the Great War. BREDBENNER, *supra* note 24, at 72.

88. *Hearings Before the Committee on Immigration and Naturalization, House of Representatives, Relative to Citizenship of American Women Married to Foreigners*, 65th Cong. 33 (1918) (statement of Rep. Welty) [hereinafter *Citizenship of American Women*].

89. BREDBENNER, *supra* note 24, at 6.

90. *Citizenship of American Women*, *supra* note 88, at 20 (statement of Rep. Raker).

91. *Hearings Before the Committee on Immigration and Naturalization, House of Representatives, Immigration and Citizenship of American-Born Women Married to Aliens*, 69th Cong. 18 (1926) (statement of Rep. Dickstein).

92. 239 U.S. 299 (1915).

93. *Id.* at 312.

94. *Id.*

95. As one observer noted, *Mackenzie’s* theory of the Expatriation Act “makes mere marriage conclusive evidence of intent to transfer allegiance. . . . This cannot be called an enforced transfer, for the doing of the act necessary to constitute the change must be regarded as at will.” W.W.S., Comment, *Expatriation Resulting from Marriage to Alien Husband*, 14 MICH. L. REV. 233, 235 (1916). In 1930, this reasoning “seem[ed] rather far-fetched” to Congressman J. Lincoln Newhall of the Elections Committee. *Owen Hearing*, *supra* note 11, at 33. He contended that denaturalized American women “have never invited [expatriation] any more than the martyrs of the ages have invited dire consequences because of their belief in a principle or their adherence to a faith.” 72 CONG. REC. 10196 (1930) (statement of Rep. Newhall).

Nothing, she, too, “voluntarily” cast off her native allegiance. The Congress she loved had foisted upon her an impossible choice between lifelong happiness and American citizenship. She became Ruth Bryan Owen, a virtual traitor to her country.

D. American Again: The Cable Act of 1922

Congress emphatically renounced the policy of women’s derivative citizenship in 1922. Never again would the daughters of statesmen self-expatriate by taking foreign husbands; and if the Expatriation Act’s victims so desired, they could be fully restored to their civic birthright.

The Cable Act opened with a mostly symbolic gesture that nonetheless captured emergent constitutional attitudes: “the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.”⁹⁶ Section 2 discontinued the practice of automatically conferring citizenship on alien women who married Americans.⁹⁷ Conversely, Section 3 provided that “a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this act.”⁹⁸ But what of those who *had* ceased to be “woman citizens” between 1907 and 1922?

Section 7 expressly repealed the Expatriation Act policy that had affected Owen and many others.⁹⁹ But this repeal didn’t automatically restore lost citizenship; instead, marital expatriates could become naturalized more quickly than normal.¹⁰⁰ “After her naturalization,” Section 4 proclaimed, “she shall have the same citizenship status as if her marriage had taken place after the passage of this act.”¹⁰¹ What status was that? One of a woman who had never “cease[d] to be a citizen of the United States by reason of her marriage,” according to Section 3.¹⁰² Put simply, Owen and others like her had suffered a unique and undeserved hardship. This would never happen again. As long as these women complied with the Cable Act’s relaxed naturalization procedures, federal law would regard them as lifelong citizens.¹⁰³

96. Cable Act of 1922, ch. 411, § 1, 42 Stat. 1021 (1922).

97. *See id.* § 2 (“[A]ny woman who marries a citizen of the United States . . . shall not become a citizen of the United States by reason of such marriage.”).

98. *Id.* § 3. Eight years later, the fiercely nativist Congressman Albert Johnson boasted that “[n]o woman American citizen surrenders her own citizenship under any circumstances. She is protected by our laws.” 72 CONG. REC. 9319 (1930) (statement of Rep. Albert Johnson).

99. § 7, 42 Stat. 1021.

100. *See id.* § 4 (permitting such women to be “naturalized as provided by [S]ection 2” of the Cable Act). Section 2 waived the required declaration of intention to seek naturalization and lowered the minimum period of U.S. residency from five years to one. *Id.* § 2.

101. *Id.* § 4.

102. *Id.* § 3.

103. Professor Candice Bredbenner writes that these women were to be regarded as ordinary naturalized citizens—“The new law allowed the government to disavow any knowledge of this woman’s former status as a U.S. citizen.” BREDBENNER, *supra* note 24, at 100. But this interpretation

Universal female suffrage was the chief motivating cause of a law that proved an ambitious first step toward full citizenship equality for women, or what Owen liked to call the “dignity and individuality” of female citizenship.¹⁰⁴ The Nineteenth Amendment’s several influences on the Sixty-seventh Congress are worth distinguishing. On the one hand, congressmen felt the mighty pull of practical politics. Automatic naturalization of American grooms’ foreign brides had once been touted as a low-stakes fix to promote family unity and cultural assimilation.¹⁰⁵ But the prospect of enfranchising masses of ignorant alien newlyweds prompted sober reconsideration, especially at a time when Congress was restricting immigration at unprecedented rates.¹⁰⁶ These women supposedly knew “no more about the American Constitution than they know about the Egyptian Book of the Dead.”¹⁰⁷ So making them earn American ballots made plenty of sense.

On an even more practical note, within a month of the Nineteenth Amendment’s ratification, female activists secured pledges from both parties to embrace women’s independent citizenship in their 1920 platforms.¹⁰⁸ Federal lawmakers sensed universal enthusiasm for the Expatriation Act’s repeal among what they expected to be an energetic and cohesive voting bloc.¹⁰⁹ Antagonizing millions of newly enfranchised women would have been terrible politics. Unsurprisingly, then, a Republican National Committee executive remarked that “[s]everal Congressmen whom I know feel that their seats depend on the passing of this bill.”¹¹⁰

Yet several Cable Act supporters reinforced cold, hard realities with confident lessons in constitutional law. Their Nineteenth Amendment forbade more than just gender discrimination in the bestowal of voting

defies Section 4’s unmistakably clear language, as well as Congressman Cable’s lucid explanation of the provision’s import. See *American Citizenship Rights of Women: Hearing Before a Subcommittee of the Committee on Immigration, United States Senate, 72d Cong., 2d Sess. 32* (1933) [hereinafter *Citizenship Rights of Women*] (expressing Cable’s view that naturalization under the Cable Act “restored [expatriated women] to the status of natural born citizens”); *Owen Hearing, supra* note 11, at 54 (quoting Cable’s written affirmation that Owen “stands . . . as one who has always been a citizen of the United States”).

104. 72 CONG. REC. 9318-19 (1930) (statement of Rep. Owen); *Owen Hearing, supra* note 11, at 55, 59.

105. BREDBENNER, *supra* note 24, at 9, 17; see also CONG. GLOBE, 33d Cong., 1st Sess. 170 (1854) (statement of Rep. Cutting) (claiming that such derivative citizenship “is a relief to the husband” because “it aids him in the instilling of proper principles in his children”).

106. BREDBENNER, *supra* note 24, at 17 (noting the shift toward “comprehensive and restrictive policies on naturalization and immigration”).

107. “*I Am a Citizen, Too*”, 7 LIFE AND LABOR 95 (1918); see Abrams, *supra* note 68, at 417 (“It took enfranchisement through the Nineteenth Amendment . . . and the specter of illiterate, potentially disloyal, and now voting foreign wives to finally persuade Congress that derivative national citizenship was a bad idea.”).

108. BREDBENNER, *supra* note 24, at 81.

109. *Id.* at 81, 97; see also Abrams, *supra* note 68, at 411 (observing that the Act “aroused vociferous complaint from feminists”).

110. BREDBENNER, *supra* note 24, at 104.

rights:

The tendency has been constantly toward extending the rights of women so as to bring them more and more nearly on an equality with man. . . . [T]here was no particular force in the demand for this bill until the nineteenth amendment became a part of the organic law of the land. But when women were given civil equality with men, the right to vote, it seems to me at that moment it became ludicrous for us to say that thereafter the rights of women to citizenship shall be dependent on the rights of men. At that moment the doctrine of dependent or derived citizenship became as archaic as the doctrine of ordeal by fire.¹¹¹

One congressman insisted that “[u]nder the nineteenth amendment the thing is equal. . . . The nineteenth amendment has placed women in the same position as men.”¹¹² In short, “The same laws ought to govern the women as govern the men.”¹¹³ Congressman Cable himself believed that “[s]ince the nineteenth amendment grants equal suffrage to women, so also should they have equal rights with reference to citizenship.”¹¹⁴ If an American man who married an alien woman got to keep his citizenship, “so also should the American girl who marries the alien man.”¹¹⁵ In other words, the Nineteenth Amendment precluded Congress from perpetuating a non-uniform “Rule of Naturalization” (and expatriation) between the sexes.¹¹⁶

111. 62 CONG. REC. 9047 (1922) (statement of Rep. Rogers); *see id.* at 9059 (statement of Rep. Volk) (contending that, by virtue of the Nineteenth Amendment, “[t]he doctrine of dependent or derived citizenship has become archaic”).

112. *Id.* at 9061, 9063 (statement of Rep. Stephens). Stephens believed that marital expatriation was “something in the past” even *before* the 1907 Act’s repeal. *Id.* at 9062; *see also id.* at 9040 (statement of Rep. Vaile) (asserting that women’s citizenship “should be endowed with the same dignity . . . as a man’s citizenship”); *id.* at 9048 (statement of Rep. Siegel) (“As to the right of the woman to be an independent American citizen . . . the nineteenth amendment to the Constitution has settled that.”); *id.* at 9057 (statement of Rep. Albert Johnson) (insisting that the Cable Act had “become[] necessary” after “the enactment of the nineteenth amendment”); *id.* at 9059 (statement of Rep. Volk) (claiming that “in the last few years . . . [t]he tendency has been toward extending the rights of women and to place them on a plane of civil equality with men”).

113. *Id.* at 9063 (statement of Rep. Stephens); *see id.* (“They all ought to come under the same naturalization law, because they are all citizens and electors alike. . . . What is sauce for the goose is sauce for the gander.”); *id.* (statement of Rep. Kincheloe) (demanding that “discrimination in favor of the man” be discontinued); *id.* at 9060 (statement of Rep. Chalmers) (“Having the nineteenth amendment, which places women on the same footing with men, the laws governing naturalization should be about the same for both of them, should they not?”).

114. *Id.* at 9046 (statement of Rep. Cable).

115. *Id.*; *see id.* at 9043 (statement of Rep. Raker) (“[W]e are trying to place the American woman upon the same base as the American man.”); *id.* at 9057 (statement of Rep. Raker) (“The women have been denied their rights. We want to equalize them as nearly as we can.”); *id.* at 9060 (statement of Rep. London) (declaring that the Cable Act’s proponents sought “to place the individual, irrespective of sex, on a basis of equality in society”); *id.* at 9062 (statement of Rep. Vaile) (decrying “inequitable distinction[s] between the citizenship of women and the citizenship of men”).

116. As a result, the Cable Act “abolished many deplorable discriminations against women.” *Citizenship Rights of Women*, *supra* note 103, at 29.

These parallel constitutional and statutory reforms followed a familiar pattern. Once the Fourteenth Amendment constitutionalized territorial birthright citizenship in 1868,¹¹⁷ excluding African-Americans from the privilege of naturalization lost any justification. Accordingly, the Naturalization Act of 1870 “extended [the naturalization laws] to aliens of African nativity and to persons of African descent.”¹¹⁸ The Nineteenth Amendment’s blazing ethos cried out for parallel statutory progress. The Cable Act therefore outlawed sex discrimination in the process of obtaining naturalization and in the expatriative effects of marriage.¹¹⁹

E. Counting to Seven

Lawson v. Owen presented the House Elections Committee with three separate interpretive issues: the meaning and proper application of the Qualifications Clause’s seven-year provision, Section 4 of the Cable Act, and the Nineteenth Amendment.

The Committee could have interpreted the Qualifications Clause to require either seven immediately prior years of citizenship or *any* seven years, whether they happened decades ago or in eighty-four one-month increments. It could have regarded Section 4’s restorative provision as either a valid enactment or a nullity, Congress being powerless to retroactively erase the constitutional implications of uncontested historical facts. And it could have read the Nineteenth Amendment narrowly to simply prohibit the denial of suffrage to women, or broadly as a revolutionary shift in the assumptions of American constitutionalism. In either case, the Committee might have granted marital expatriations continuing mathematical force in contested elections. If the Nineteenth Amendment changed much more than its bare text bespoke,¹²⁰ the Committee could have instead entirely denied the old, unjust law any vestigial influence in Qualifications Clause contexts, as Republicans did with *Dred Scott* in 1870.¹²¹

To prevail, Lawson had to convince the House of three propositions: 1) “seven years” meant the immediately preceding seven years, 2) Section 4 of the Cable Act was unauthorized by Congress’s enumerated powers, *and* 3) the now-unconstitutional expatriation law’s ugly tentacles should still penetrate into modern constitutional adjudication. To retain her seat, Owen just needed to persuade the House that any one of these statements was false.

117. See U.S. CONST. amend. XIV (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”).

118. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 (1870).

119. For one unfortunate exception, see *supra* note 7.

120. Cf. Primus, *supra* note 19, at 1684 (describing the prevailing Republican view that “events of the Civil War era changed the Constitution even more than the text of the Reconstruction Amendments indicates”).

121. See *infra* notes 511-525 and accompanying text.

II. RUTH'S REMARKABLE LIFE

A. Youth and Marriage

Ruth Bryan was born an American citizen in 1885, the descendant of eleven Revolutionary soldiers.¹²² She grew up in the shadow of political greatness. Her silver-tongued father, William Jennings Bryan, served in the House of Representatives from 1891 to 1895.¹²³ Ruth joined the family in Washington and frequently accompanied her father to work.¹²⁴ She watched House debates with “awed delight.”¹²⁵ As she later recalled, “when I was so small [that] I could scarcely see above the top of his desk in congress I stood beside him in that assembly and listened to his defense of democratic principles.”¹²⁶ The Capitol dome became “an obsession and a symbol” to her,¹²⁷ and she “vowed to return in triumph” as a public servant in her own right.¹²⁸ Many of her colleagues in 1929-30 were old enough to remember this “sweetheart of the House” daily slaking her thirst for political oratory.¹²⁹

Ruth campaigned with her father during each of his three presidential crusades. The Bryans traveled tens of thousands of miles by rail on these precedent-shattering nationwide campaigns.¹³⁰ Ruth was her father's secretary in 1908 and cheered proudly from the platform as he accepted the Democratic nomination.¹³¹ She addressed large crowds directly on his behalf.¹³² Her uncle, Charles Bryan, later served as Mayor of Lincoln, Governor of Nebraska, and the 1924 Democratic vice-presidential candidate.¹³³ As one columnist wrote, Ruth took in “the entire political landscape of the times, studying men and events and political manners with a cool eye that never missed anything.”¹³⁴ She also wrote nationally syndicated newspaper articles and filled in for her father on the Chautauqua lecture circuit,¹³⁵ sometimes speaking every night for months on end.¹³⁶

122. 72 CONG. REC. 9317 (1929) (statement of Rep. Owen).

123. *Bryan, William Jennings*, in BIOGRAPHICAL DICTIONARY OF THE UNITED STATES CONGRESS, 1774-2005, at 730, 731 (Andrew R. Dodge & Betty K. Koed, eds. 2005).

124. E. LYNNE WRIGHT, MORE THAN PETTICOATS: REMARKABLE FLORIDA WOMEN 69 (2d ed.) (2010).

125. Sally Vickers, *Ruth Bryan Owen: Florida's First Congresswoman and Lifetime Activist*, 77 FLA. HIST. Q. 445, 446 (1999).

126. *Daughter of Bryan Urges Smith Victory*, ATL. CONST., Oct. 20, 1928, at 1.

127. Vickers, *supra* note 125, at 446.

128. MICHAEL KAZIN, A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN 170 (2006).

129. MATTHEW ANDREW WASNIEWSKI, WOMEN IN CONGRESS, 1917-2006, at 89 (2d ed.) (2007).

130. Vickers, *supra* note 125, at 447.

131. *Id.*

132. KAZIN, *supra* note 128, at 171.

133. *Id.* at 199.

134. Marjory S. Douglas, *Bryan Name Goes Back into National Politics*, N.Y. TIMES, Nov. 11, 1928, at 164.

135. Vickers, *supra* note 125, at 450.

136. *Id.*

Bryan's daughter brushed up against the Qualifications Clause for the first time by announcing her candidacy for a House seat in the 1910 elections.¹³⁷ (She declared mere days after her twenty-fourth birthday, and would turn twenty-five only a month after the election.) At this time, no woman had ever served in Congress, nor would for eight years.¹³⁸ But life reshaped her pioneering political plans. On May 3, 1910, Ruth Bryan married Reginald Altham Owen, whom she had met while studying voice in Germany.¹³⁹ Owen was British, an officer in the Royal Engineer Corps, but no hereditary peer.¹⁴⁰ Ruth gushingly described their connection as "a *real* romance . . . *real* romance always."¹⁴¹ The Owens would enjoy a "rewarding marriage filled with mutual respect, support, and friendship."¹⁴² Ruth called Reginald her "understanding life companion."¹⁴³

Ruth Bryan Owen took a husband during the Expatriation Act's infancy, before the notorious case of *Mackenzie v. Hare* upheld the Act's constitutionality. I have found no evidence that she, or anyone, realized at the time that her choice of a spouse worked an immediate and unconditional loss of American citizenship. None of the *New York Times* articles announcing her engagement or describing the wedding ceremony mentioned the automatic consequence of expatriation.¹⁴⁴ Nor, so far as I can tell, did the scores of other newspapers that carried the information.

The United States Congress silently withdrew Owen's dearest possession, her constitutional birthright. This was no "clear, open, broad daylight, voluntary surrender of citizenship."¹⁴⁵ Owen's will operated only in "the conjugal change."¹⁴⁶ As an Elections Committee member rightly concluded, Owen's expatriation "was not due to a voluntary action on her part . . . but was forced upon her by reason of the law."¹⁴⁷

137. *Bryan's Daughter Will Run*, N.Y. TIMES, Oct. 8, 1909, at 1.

138. See *supra* note 69. Years after Owen announced her abortive congressional candidacy, traditionalists were still arguing that the Qualifications Clause excludes women because it uses the masculine pronoun "he." See generally *Does Constitution Permit Woman To Serve in House?*, INDIANAPOLIS STAR, Nov. 19, 1916, at 53.

139. STUART MCIVER, 3 TOUCHED BY THE SUN: THE FLORIDA CHRONICLES 121 (2008).

140. WRIGHT, *supra* note 124, at 73.

141. Letter from Ruth Bryan Leavitt to Carrie Dunlap (Aug. 16, 1909), quoted in SARAH P. VICKERS, THE LIFE OF RUTH BRYAN OWEN: FLORIDA'S FIRST CONGRESSWOMAN AND AMERICA'S FIRST WOMAN DIPLOMAT 34-35 (1994).

142. VICKERS, *supra* note 141, at 71.

143. *Id.* at 72.

144. See *Ruth Bryan To Wed Again*, N.Y. TIMES, Apr. 28, 1910, at 1; *Some Interesting International Matches*, N.Y. TIMES, May 1, 1910, at 11; *Leavitt Wedding To-morrow*, N.Y. TIMES, May 2, 1910, at 6; *Bryan's Daughter Marries*, N.Y. TIMES, May 4, 1910, at 2.

145. *Citizenship of American Women*, *supra* note 88, at 20 (statement of Rep. Raker).

146. *Objections To Seating Mrs. Owen*, BILOXI DAILY HER., Dec. 6, 1928, at 4 [hereinafter *Objections to Seating*].

147. *Owen Hearing*, *supra* note 11, at 33 (statement of Rep. Newhall).

B. War Service, Chautauqua Speaking, and Civic Engagement

Owen indeed left America to be with her husband. But she hardly “prostitute[d] her American name to the scandals, the vices, the social immoralities and moral impurities of foreign cities.”¹⁴⁸ She never voted in England, swore allegiance to the king, or exercised the slightest privilege inconsistent with her native civic fidelity.¹⁴⁹ When the Great War came, she devoted herself to relieving her fellow creatures’ suffering. Along with Lou Hoover, wife of future-President Herbert Hoover, Owen served as co-secretary-treasurer of the London-based American Women’s War Relief Fund.¹⁵⁰ This organization employed destitute widows and starving soldiers’ wives to sew garments, then shipped these necessities to the front and to a three-thousand-bed military hospital.¹⁵¹ This hospital was so essential to the Allied military effort that the American government assumed its administration in 1917.¹⁵²

Some women in Owen’s organization were American citizens, and some involuntary expatriates,¹⁵³ but all of them self-identified as American—hence the association’s name.¹⁵⁴ American newspapers praising Owen’s efforts admired the “body of *American* women living in London”¹⁵⁵ and commended Owen for “endear[ing] herself to her *English* cousins” by raising colossal sums of relief cash.¹⁵⁶ By 1914, Owen regretfully acknowledged that “I am a Britisher now, because my husband is.”¹⁵⁷ But her Anglo-American humanitarian work “only makes me love both countries more.”¹⁵⁸ She might have been expected to revere the

148. James G. Blaine, *The Corner-Stone of Religion and a Keystone of the Temple of Morality*, in *LIFE AND WORK OF JAMES G. BLAINE* 504 (John Clark Ridpath & Selden Connor eds., 1893).

149. *Citizenship Rights of Women*, *supra* note 103, at 31; James M. Carson, Op-Ed., *Mrs. Owen, an Eligible Candidate*, *MIAMI NEWS*, Apr. 14, 1926, at 37.

150. Vickers, *supra* note 125, at 451.

151. *Id.* at 451 n.26; *U.S. Women Busy Aiding British in Relief Work*, *CHIC. DAILY TRIB.*, Dec. 25, 1914, at 4 [hereinafter *Women Busy Aiding*].

152. Vickers, *supra* note 125, at 451 n.26.

153. Cooper, *supra* note 81, at 165.

154. As Owen told the Elections Committee in 1930, “This group, I want you to notice, were the American Women’s War Relief Fund.” *Owen Hearing*, *supra* note 11, at 57 (statement of Rep. Owen). She very likely emphasized “American,” though the transcript doesn’t indicate this. *See also* *Citizenship Rights of Women*, *supra* note 103, at 31 (“At all times Mrs. Owen was looked upon by her British friends as an American citizen, despite her actual legal status.”).

155. *Aid Soldiers’ Wives*, *WASH. POST*, Sept. 7, 1914, at 7 (emphasis added).

156. *Women Busy Aiding*, *supra* note 151 (emphasis added). As Elections Committee Chairman Carroll Beedy saw the situation, Owen spent her time abroad “either working with our allies in the war or . . . closely associated with American citizens in public and charitable works of mutual interest. She at no time lost the American point of view.” 72 *CONG. REC.* 10194 (1930) (statement of Rep. Beedy).

157. *Women Busy Aiding*, *supra* note 151. But she later testified that “I always considered myself and was always considered an American.” Carson, *supra* note 149; *see also* 72 *CONG. REC.* 10202 (1930) (statement of Rep. Newhall) (“She is now, has always been, and will continue to be an American woman.”).

158. *Women Busy Aiding*, *supra* note 151. Congressman Kading of the Elections Committee later asked her, “And the fact of your marriage to your husband, who was an English subject, had no effect upon you in any way whatsoever along the line of tending to make you love the United States less, did it?” Owen answered, “Of course, it could not have.” *Owen Hearing*, *supra* note 11, at 62 (statement of Rep. Kading). So too with Owen’s “aristocratic” colleagues of the War Relief Fund—their British

nation that had elevated her father to the position of Secretary of State.¹⁵⁹

Beginning in 1915, Owen endured three gruesome years as a surgical and operating-room nurse,¹⁶⁰ at one point treating her own ailing husband.¹⁶¹ She lived and worked “absolutely as near the war as I could be without being myself a soldier.”¹⁶² Through her Allied war service, Owen had “seen, experienced, endured and helped more than most women if they should live a thousand years.”¹⁶³ (The Veterans of Foreign Wars inducted her as an honorary member in 1928—not a full member, because the American government hadn’t paid for her services after withdrawing her citizenship.¹⁶⁴)

In 1919, the exhausted couple relocated to Florida in hopes of repairing Reginald’s shattered constitution. With four young children and a husband to support on no income from her family,¹⁶⁵ Owen turned to what she knew best: the Chautauqua lecture circuit. Though technically not an American citizen, she became the highest-paid woman speaker on the circuit.¹⁶⁶ Crowds (and newspapers) all across the country acclaimed Owen’s rare rhetorical gifts. She was “[a] man’s woman”¹⁶⁷ who possessed “a power of animating the imagination of her hearers which is remarkable.”¹⁶⁸ One writer pronounced Owen the most eloquent woman he’d ever heard.¹⁶⁹ In sum, her singular American heritage and riveting wartime experiences had produced “one of the leading women of the nation.”¹⁷⁰

marriages failed to efface the Americanism inscribed in their hearts. When Consuelo Vanderbilt (the Duchess of Marlborough) returned home in 1902, the *New York Times* assured readers that “the Duchess was a most democratic young woman. . . . [H]er seven years as one of the leaders of the British aristocracy has in no wise changed her American spirit.” *Consuelo, Duchess of Marlborough, Here*, N.Y. TIMES, Aug. 20, 1902, at 7. After her divorce, she resumed “a citizenship I would never have resigned had the law of my day permitted me to retain it.” CONSUELO VANDERBILT BALSAN, *THE GLITTER AND THE GOLD* xiv (1953). Visiting her native Virginia in 1922, Nancy Langhorne (Lady Astor) was introduced as “the sweetheart of two nations . . . the first woman ever to sit in the British Parliament and the last woman in the world ever to forget the sacred soil of Virginia that bore her.” KAREN J. MUSOLF, *FROM PLYMOUTH TO PARLIAMENT: A RHETORICAL HISTORY OF NANCY ASTOR’S 1919 CAMPAIGN* 155 (1999). The mayor of Scottsville, Virginia openly encouraged her to return home and run for President. *Id.* When Lady Astor finished her American tour, she promptly published a book entitled *My Two Countries*. Cooper, *supra* note 81, at 204.

159. See KAZIN, *supra* note 128, at 215-42 (chronicling William Jennings Bryan’s tenure at the State Department).

160. *Bryan’s Daughter*, SALT LAKE TRIB., Mar. 24, 1929, at 68.

161. *Ruth Bryan Owen*, ATTICA LEDGER TRIB., Aug. 27, 1921, at 1.

162. Letter from Ruth Bryan Owen to Carrie Dunlap (Mar. 3, 1916), *quoted in* VICKERS, *supra* note 141, at 47.

163. *Ruth Bryan Owen*, THE COMMONER (Lincoln), Oct. 1, 1921, at 13.

164. *Veterans Honor Mrs. Ruth Owen*, MIAMI NEWS, May 22, 1928, at 12.

165. VICKERS, *supra* note 141, at 51. The war also destroyed Reginald’s overseas investments. *Owen Hearing*, *supra* note 11, at 58.

166. *Ruth Bryan Owen Rohde*, DEDICATED WRITERS, <http://www.dedicatedwriters.com/biographies/Ruth-Bryan-Owen-Rohde-33654.html> (last visited Jan. 5, 2017).

167. *Mrs. Ruth Bryan Owen Will Lecture in Atlanta Today*, ATL. CONST., Mar. 23, 1922, at 9.

168. *Lecture by Bryan’s Daughter Enthralls Atlanta Audience*, ATL. CONST., Mar. 24, 1922, at 9.

169. *Ruth Bryan Owen*, CORSICANA DAILY SUN (TX), May 11, 1922, at 6.

170. *Ruth Bryan Owen Talks at Y.M.C.A. on Sunday*, FT. WAYNE J. GAZ., Nov. 10, 1921, at 8.

By campaigning with her father and mesmerizing Chautauqua audiences in every state, Ruth Owen the alien came to “kno[w] her United States, every nook and corner of it, from the large cities . . . to the most obscure county districts.”¹⁷¹ She habitually “learn[ed] all she could about whatever locality she was in.”¹⁷² Owen had to contract for these tours a year in advance,¹⁷³ but she never broke a speaking appointment.¹⁷⁴ In her own caustic recollection, “the law of my country specified that I could not regain my citizenship unless I presented myself on a certain date, in Miami (a date not given me a year in advance), at the courthouse, when, in order to take care of my children I had to be perhaps in North Dakota or in Minnesota on that date.”¹⁷⁵ So it wasn’t until April 27, 1925, that Judge Rhydon Call of the U.S. District Court for the Southern District of Florida finally declared Owen a citizen of the United States in accordance with the Cable Act’s renaturalization provisions.¹⁷⁶

Owen shone as Miami’s star citizen during the Chautauqua offseason. With only mild exaggeration, a contemporary depicted her rise: “[S]oon she was chairman, director or president of every civic, church and educational movement in the State.”¹⁷⁷ She “proved her good citizenship” as president of the Miami Women’s Club by instilling “principles of Americanization” in aliens and citizens alike.¹⁷⁸ The University of Miami hired Owen as a speech professor in 1925. She donated her entire teaching salary to subsidize scholarships for students who wrote the best essays on citizenship.¹⁷⁹ Soon after, Owen was elected vice president of the University’s Board of Regents.¹⁸⁰

In 1927, Rollins College bestowed an honorary doctorate of laws on this “[g]ood daughter of a good father, mistress of the spoken word, statesman of both achievement and promise . . . for your high concept of civic duty and for your many services to your state and nation.”¹⁸¹ To consummate her storied service to state and nation, Owen sought a seat in the beloved Congress of her childhood, but also the very body that had expatriated her.

171. Douglas, *supra* note 134.

172. *Id.*

173. *Owen Hearing, supra* note 11, at 58.

174. Douglas, *supra* note 134.

175. *Owen Hearing, supra* note 11, at 60 (statement of Rep. Owen).

176. *Id.* at 16.

177. Duff Gilfond, *Gentlewomen of the House*, AMERICAN MERCURY (Baltimore), Oct. 1929, at 151, 153.

178. Grace Stone Hall, *Ruth Bryan Owen Is Silent About Political Ambitions*, MIAMI NEWS, Mar. 28, 1926, at 33.

179. *Bryan’s Daughter, supra* note 160. Owen “put her entire salary into scholarships . . . in order to give as many as possible her own deep appreciation of what it means to be a citizen of the United States.” *Ruth Bryan Owen, Congresswoman*, KERRVILLE DAILY TIMES (TX), July 11, 1929, at 3 [hereinafter *Owen, Congresswoman*].

180. McIVER, *supra* note 139, at 120.

181. Vickers, *supra* note 125, at 445.

C. The Election Years (1926-28)

When Owen first ran for Congress in 1926, the South had never sent a woman to Washington.¹⁸² Florida still hadn't ratified the Nineteenth Amendment.¹⁸³ The state Democratic Party openly opposed Owen's candidacy, preferring the eleven-year incumbent.¹⁸⁴ The *New York Times* predicted she would "meet an overwhelming 'native son' sentiment," since "the voters of Florida are notably opposed to accepting women in politics."¹⁸⁵ Owen ultimately lost the 1926 Democratic primary by a mere 776 votes—"which realistically was a triumph, considering the odds she had faced."¹⁸⁶

Owen suffered an even more crushing loss in December 1927—the death of her husband Reginald. The British officer for whom Owen had surrendered her American citizenship had become one of Miami's most "substantial, beloved citizen[s]" and a keen observer of American politics.¹⁸⁷ The American Legion had offered to support him in his poor health, and it now stood on guard at the church door as mourners honored their valiant soldier.¹⁸⁸ The *Miami News* lamented his passing as "a distinct loss to the community."¹⁸⁹

Reginald's widow transcended her "debilitating melancholy"¹⁹⁰ to run for Congress again in 1928. Channeling her tireless father, Owen campaigned in every precinct of her 588,000-resident district.¹⁹¹ She drove sixteen thousand miles, gave over six hundred speeches, and sat down with all ninety newspaper editors in her district.¹⁹² Reflecting on Owen's blistering primary campaign, one reporter marveled, "This weaker sex stuff is exploded for me forever."¹⁹³ Owen thrashed the Democratic incumbent,¹⁹⁴ then bested Republican William Lawson by a nearly two-to-one margin in November—on the same day that the Republican presidential candidate cruised to a 17-percent margin of victory in Florida.¹⁹⁵

Through it all, this "First Lady of the South"¹⁹⁶ passionately promoted her pet virtue: good citizenship. In the midst of her primary campaign, she

182. *Id.* at 454.

183. VICKERS, *supra* note 141, at 4.

184. Vickers, *supra* note 125, at 456.

185. *Bryan's Daughter Seeks Congress Seat*, N.Y. TIMES, Apr. 9, 1926, at 3 [hereinafter *Seeks Congress Seat*].

186. WRIGHT, *supra* note 124, at 74.

187. *Major Reginald Owen*, MIAMI NEWS, Dec. 13, 1927, at 6.

188. *Owen Hearing*, *supra* note 11, at 59.

189. *Major Reginald Owen*, *supra* note 187.

190. Vickers, *supra* note 125, at 456.

191. *Id.* at 458.

192. *Id.*; Gilfond, *supra* note 177, at 153.

193. Vickers, *supra* note 125, at 458.

194. She won by approximately 14,000 votes. *Id.* at 459.

195. *Id.* at 460; VICKERS, *supra* note 141, at 90.

196. VICKERS, *supra* note 141, at 90.

sponsored a statewide oratorical contest on “Citizenship.”¹⁹⁷ She spoke on “Better American Citizenship”¹⁹⁸ and implored Florida’s youth to ponder the “seriousness of citizenship.”¹⁹⁹ Owen explained that the republic “rests equally on the shoulders of every citizen. . . . [W]e need two ships inside our republic—Citizenship and Statesmanship.”²⁰⁰ Why had she embarked on such a grueling campaign? “I would fail in my duty to [my children] if I did not set them an example of citizenship.”²⁰¹ The government “can only function perfectly when each citizen bears his share in this responsibility.”²⁰² Owen even promised to send a contingent of model student-citizens to Washington every year at her own expense.²⁰³

Ruth Bryan Owen exuded republicanism. Her contemporaries, though, described her as “regal”—soon to become the “queen of congress.”²⁰⁴ One newspaper editor imagined her ascension to the presidency.²⁰⁵ Probably no one in America better appreciated the role of informed civic engagement as the grist of good government. Yet in a singular irony of American constitutional history, Owen’s defeated Republican opponent charged that she was insufficiently American to serve in the House of Representatives. Perhaps he had a point.

III. CONTESTING OWEN’S CITIZENSHIP

A. Constitutional Politics in Florida’s Fourth District

Only the House could authoritatively pass on Owen’s eligibility.²⁰⁶ But why vote for someone the House might eventually disqualify? From the outset, Owen wrestled with accusations that she could not constitutionally serve in Congress (yet). Convincing voters that a Republican House *would* seat her, and providing a cogent legal foundation for this prediction, became indispensable to her political survival.

On April 8, 1926, Owen left a handwritten note with the *Miami News* in which she announced her congressional candidacy.²⁰⁷ That very day, a

197. *County Winners To Be Eligible*, ST. PETERSBURG TIMES, Feb. 5, 1928, at 9.

198. *Mrs. Ruth Owen To Talk Twice*, MIAMI NEWS, Apr. 12, 1928, at 14.

199. *Ruth Bryan Owen Appeals for Enlistment of Youth in Ranks of Active Citizens*, PALM BEACH POST, May 16, 1928, at 2.

200. *Id.*

201. *Bryan’s Daughter Fights for Service*, PITT. PRESS, Mar. 12, 1928, at 30.

202. *Id.*

203. Vickers, *supra* note 125, at 459; *Ruth Bryan Owen To Take 36 Young Folks to Capital from 18 Florida Counties*, EVE. INDEP. (St. Petersburg), Mar. 18, 1930, at 1.

204. Treva H. Shafto, *Ruth Bryan Owen Delights Clubwomen with Lecture*, ST. PETERSBURG TIMES, Jan. 19, 1929, at 7. A *Jacksonville Journal* editor swooned: Owen, a “stalwart, wise, beautiful, magnetic woman . . . shines like the creature of cleanliness and light she is.” VICKERS, *supra* note 141, at 83.

205. *Bryan’s Daughter*, *supra* note 160.

206. *See supra* Section I.A.

207. *Mrs. Ruth Owen To Enter Race for Congress*, MIAMI NEWS, Apr. 8, 1926, at 1. Not even a year had elapsed since her naturalization on April 27, 1925.

newspaper editor contacted her with sad tidings: Article XVI, Section 20 of the Florida Constitution rendered her ineligible to serve in Congress, because she hadn't "been . . . ten years a citizen of the United States."²⁰⁸ Owen immediately called on James M. Carson, a prominent Miami attorney and close confidant, to investigate this inauspicious claim.²⁰⁹

Carson and a team of Jacksonville attorneys "agreed unanimously upon an opinion . . . that she could be seated if elected."²¹⁰ Carson dismissed Section 20 as unconstitutional,²¹¹ focusing instead on the federal Qualifications Clause. He published an expanded version of his legal opinion in the *Miami News* on April 14,²¹² the first public defense of Owen's congressional eligibility. Carson appealed to the letter of the Qualifications Clause, its underlying purposes, and the perversity of wielding the now-unconstitutional Expatriation Act as a sword against mistreated female candidates.

First, Owen had undeniably been a U.S. citizen for at least twenty-five years of her life. If the Framers had meant to say "the seven years immediately next preceding" an election, they could have.²¹³ Second, the provision's goal was to prevent foreign-born political aspirants from holding office until they had been sufficiently schooled in American principles. "[N]obody has ever questioned [Owen's] Americanism," of course; nor had the Framers contemplated women's suffrage or the congressional enumeration of individual expatriable acts.²¹⁴ (This last point clashes with Carson's assertion that the Philadelphia delegates knew exactly what they were doing when they wrote "seven years" instead of "seven years immediately next preceding.")

But Carson had a subtler and more powerful constitutional argument, one that drew upon history everyone could remember. The Nineteenth Amendment's sweeping subtext had been instantiated in the Cable Act, which governed "the very facts involved in this case" by "repeal[ing] the harsh law theretofore in existence . . . on the ground that it was unjust to

208. Carson, *supra* note 149. This provision purported to forbid state officials from issuing certificates of election to anyone "who has not been five years a citizen of the State and ten years a citizen of the United States." FLA. CONST. of 1885, art. XVI, § 20.

209. Carson, *supra* note 149; *Seeks Congress Seat*, *supra* note 185.

210. Carson, *supra* note 149.

211. *Id.* After all, "the provisions of the constitution of the state of Florida are not controlling where in any manner they are contradicted by the provisions of the constitution of the United States." *Id.* Carson cited several examples of governors deliberately disregarding analogous state constitutional provisions. *Id.* At the Elections Committee hearing, Lawson's lawyer conceded that Section 20 "avails nothing here, because it would be in conflict with the Federal Constitution and of no consequence." *Owen Hearing*, *supra* note 11, at 2. Justice Stevens might have deployed this evidence to preempt and weaken the dissenters' "state practice" arguments in *U.S. Term Limits, Inc. v. Thornton*, which held that states cannot supplement the Qualifications Clauses' three requirements for federal legislative officeholding. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995); *see id.* at 904-14 (Thomas, J., dissenting) (citing early state election laws in denying the federal Qualifications Clauses' exclusivity).

212. *See generally* Carson, *supra* note 149.

213. *Id.*

214. *Id.*

American women.”²¹⁵ It would be no less absurd for the House to exclude Owen because of this “TECHNICAL SO-CALLED POINT” than it would be for the state to convict someone for violating a repealed law.²¹⁶

For extra assurance, Owen took a written statement of her case to a Jacksonville law firm, which rendered “an unequivocal statement of [her] eligibility.”²¹⁷ Another group of volunteer Jacksonville attorneys²¹⁸ furnished a critical insight: Section 4 of the Cable Act meant nothing unless naturalization by its terms restored a woman’s citizenship “as fully as if she had not lost it.”²¹⁹ Owen’s reacquisition of citizenship was therefore “as complete as if the citizenship had never been lost.”²²⁰

Owen later told the Elections Committee that she had “consulted authorities in two cities, men of the highest integrity and reputation for knowledge in the law.”²²¹ Their written assessments were “placed at the disposal of the public” through publication in Florida newspapers.²²² Owen also took out quarter-page advertisements that confidently assured readers, “SHE WILL BE SEATED.”²²³ In 1926, Owen’s Democratic opponent had repeatedly cited her marriage to a foreigner to try to delegitimize her candidacy.²²⁴ Carson’s preemptive assistance largely silenced these voices.²²⁵ Her narrow defeat postponed a final resolution of the question.

Once Owen won the 1928 Democratic primary, Republican candidate William Lawson revived the old citizenship charge in an effort to swipe votes from her. His campaign distributed thousands of circulars throughout the Fourth District, excerpting a partial assortment of relevant provisions (but not Section 4 of the Cable Act) and inviting voters to “draw their own conclusions.”²²⁶

Owen frequently addressed her citizenship status on the hustings.²²⁷ But

215. *Id.*

216. *Id.*

217. *Owen Hearing, supra* note 11, at 48. Owen characterized the firm as one “of high repute in the State of Florida.” *Id.*

218. As Owen told the Elections Committee, “Later a number of other lawyers offered to give me their own statements on this matter, a group of lawyers in Jacksonville, Fla. . . . They voluntarily offered to investigate this matter.” *Id.*

219. *Id.* at 52.

220. *Id.*

221. *Id.* at 48. Noah Bainum, Lawson’s attorney, spoke of Carson as “a lawyer of good reputation.” *Id.* at 52.

222. *Id.* at 48.

223. *See, e.g., She Will Be Seated*, MIAMI NEWS, June 7, 1926, at 8. This particular leaflet quoted Section 4 of the Cable Act in full.

224. WRIGHT, *supra* note 124, at 74.

225. *See* Vickers, *supra* note 125, at 455 (observing that in 1926, “Owen’s offensive strategy deflected any potential controversy”).

226. *Owen Hearing, supra* note 11, at 15-16. Owen called this document a “campaign dodger” that was “in no way a legal document,” “signed by no lawyer,” and riddled with “inaccuracies.” *Id.* at 49-50.

227. *See id.* at 13, 15 (reproducing the testimony of two witnesses who heard Owen discuss the citizenship issue).

she thought it unnecessary to distribute Carson's statement as aggressively as in 1926, since "the whole attitude of the district was one of accepting my eligibility, except for an occasional attempt to stir up the question."²²⁸ Instead, the Owen campaign kept copies handy and released them individually as inquiries arose.²²⁹ Owen testified that "[i]n a large number" of her district's ninety newspapers, "there was mention editorially of the fact that I was eligible."²³⁰

After losing the general election, Lawson boldly declared that *he* should be declared "the duly elected and qualified member of Congress" from Florida's Fourth District.²³¹ Owen's supporters, he maintained, had "wantonly misapplied" their votes, choosing a candidate they knew to be ineligible and thus "dead in the eye of the law."²³² Lawson also produced a witness who insisted that the Fourth District universally rejected Owen's exposition of her congressional qualifications.²³³

Predictably, the Elections Committee ultimately reasserted the House's prerogative to judge its members' qualifications in the face of Lawson's preclusive opinion-shaping strategy. Even if all 67,130 Owen voters had believed she was as eligible as the man in the moon, "Neither Mrs. Owen's attorneys nor the people of Florida had authority to determine the question of citizenship involved."²³⁴ Her ineligibility was but a hypothesis; only through congressional action could her status "be removed from the realm of mere contention and established in fact."²³⁵ The House would confront *Lawson v. Owen's* substantive legal issues head-on.

B. *The Life of Lawson v. Owen*

1. *Governor Martin Abstains (Dec. 1928)*

William Lawson conceded Owen's House election on November 6, 1928.²³⁶ But on November 28, a Daytona Beach law firm notified Governor John W. Martin that Lawson would contest Owen's right to

228. *Id.* at 63.

229. *Id.*

230. *Id.* at 49.

231. *Contested Election Case of William C. Lawson v. Ruth Bryan Owen: Statement, Brief and Argument on Behalf of Contestant*, 71st Cong. 16 (1930) [hereinafter *Lawson Brief*].

232. *Owen Hearing*, *supra* note 11, at 7, 10. Lawson analogized Owen's situation to that of a recently deceased candidate whom voters knew to have died but elected anyway. It was as if she were "21 years of age" or "not a resident of the State from which she w[as] elected." *Id.* at 7.

233. Said that witness, Luther Ferguson, "It was generally discussed over the district that she was not eligible because she had not been a citizen long enough—for a period of seven years. . . . The fact that she was considered ineligible was known to most everyone in the fourth district keeping up with politics." *Id.* at 15-16.

234. *William C. Lawson–Ruth Bryan Owen Election Case*, H.R. Rep. No. 71-968, at 5 (1930) [hereinafter *Owen Report*].

235. *Id.*

236. *Bryan's Daughter Sent to Congress by Florida*, CHIC. DAILY TRIB., Nov. 7, 1928, at 1.

sit.²³⁷ Attorneys Noah Bainum and Lawrence Sherman (a former U.S. senator) pointed Governor Martin to Article XVI, Section 20 of the Florida Constitution.²³⁸ This provision purported to forbid Florida's governor from certifying the election of any congressional candidate "who has not been . . . ten years a citizen of the United States."²³⁹ Moreover, Owen was ineligible to serve in the House under the U.S. Constitution, having been a citizen only since her naturalization in 1925.²⁴⁰ Perhaps Governor Martin himself would act unconstitutionally by issuing Owen's certificate of election.

Martin, though a Republican, would have none of this. With hard-boiled simplicity, he announced, "The people of the fourth district of Florida elected Mrs. Owen and I am going to issue her a certificate."²⁴¹ Owen spoke even less elliptically. She told an audience that Lawson's challenge must be a "joke," since Section 4 of the Cable Act had ripped the reviled expatriation law from the annals of American history.²⁴² She again "laughed at" Lawson's action during an interview in mid-December.²⁴³ "[W]hat sense would there have been [in] my running for Congress" with a tarnished citizenship record?²⁴⁴ Lawson's stunt was an "absurdity . . . not worth taking seriously."²⁴⁵ Owen telegraphed Governor Martin her thanks.²⁴⁶

Lawson had lost the election, and he lost round one of his improbable legal challenge. But he vowed to persist in what he publicly regarded as a rare opportunity to serve his country. After extensive research at the Department of Labor, Lawson concluded (somewhat correctly) that this contest was "without precedent in the history of the United States."²⁴⁷ He,

237. *G.O.P. Contests Congress Seat*, ST. PETERSBURG TIMES, Nov. 29, 1928, at 1 [hereinafter *G.O.P. Contests*].

238. *Id.*

239. FLA. CONST. of 1885, art. XVI, § 20. This provision was probably doubly unconstitutional, both for curbing democratic choice beyond the Qualifications Clauses' strictures, see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995), and for requiring the governor to make independent, potentially unreviewable Qualifications Clause determinations. No occasion can arise for the House to judge a member-elect's contested eligibility if state officials refuse to certify the candidate's election.

240. *G.O.P. Contests*, *supra* note 237.

241. *Id.* Martin did so on December 20. Certificate of Election, *Lawson v. Owen*, National Archives, Center for Legislative Archives, HR71A-F9.2 (1928). H. Clay Crawford, Florida's Secretary of State, had certified the results (67,130 votes for Owen, 36,288 for Lawson) on December 7. Certificate of Secretary of State Announcing Results of Election in Fourth Congressional District, *Lawson v. Owen*, National Archives, Center for Legislative Archives, HR71A-F9.2 (1928).

242. *To Appeal on Mrs. Owen*, N.Y. TIMES, Nov. 30, 1928, at 22.

243. *Bryan's Daughter on Her Own*, L.A. TIMES, Dec. 17, 1928, at 1.

244. *Id.*

245. *Mrs. Owen Pokes Fun at Election Contest*, ATL. CONST., Nov. 30, 1928, at 7.

246. *Id.*

247. *Florida Woman Faces Election Victory Contest*, EVE. INDEP. (St. Petersburg), Nov. 29, 1928, at 2 [hereinafter *Florida Woman*]. It was unprecedented in that no losing candidate had ever asked either chamber to adopt the "cumulative" or "immediately preceding" theory of American citizenship for Qualifications Clause purposes. For an inquiry into other historical antecedents, see Part IV *infra*.

too, praised Owen as a paragon of American values. But he worried that seating someone three years removed from alienage would “set a dangerous precedent . . . in case some undesirable person was elected.”²⁴⁸ Even an unsuccessful challenge would illuminate “what construction the congress would place on that provision” requiring seven years’ citizenship.²⁴⁹ Or so one might suppose.

2. *The House Embraces Owen (Apr. 1929–Jan. 1930)*

The House received *Lawson v. Owen* testimony in early April 1929.²⁵⁰ But no one was in a hurry to decide her case. As April’s special congressional session was set to begin, the House Rules Committee changed the institution’s protocol for handling contested elections. To allow the House to concentrate on more-pressing issues, elections committees would not organize until the regular December session.²⁵¹ Candidates with properly authenticated certificates of election would take the oath of office and sit provisionally as full members.²⁵² Owen was accordingly sworn in on April 15.²⁵³ Constitutionally eligible or not, she would hold her title undisturbed until at least January 1930.

Congressmen had greeted Owen with a “standing ovation” when she paid a preparatory visit to the House chamber on February 19, 1929.²⁵⁴ As one Florida newspaper described the scene, “Members on both sides of the aisle, Democrats and Republicans alike, arose to their feet without a single exception and vigorously applauded. Old-time observers about the capitol were unable to recall a similar instance in recent congressional history.”²⁵⁵ By early March, she had “received an enthusiastic welcome from Democrat members in the House” eager to enlist her eloquence in their legislative causes.²⁵⁶

The adoration never abated. Owen “captivated Washington completely” with her potent charm, high erudition, and slightly figure.²⁵⁷ A contemporary depicted her almost-comical celebrity:

[H]er male colleagues are daft about her, and she has been

248. *Florida Woman*, *supra* note 247.

249. *Lawson Doesn’t Seek Owen Seat, He Says*, ATL. CONST., Jan. 13, 1929, at 2. Lawson certainly had “ample incentive to enforce” this “governmental process provision[.]” Bradley & Siegel, *supra* note 36, at 1287.

250. *Probably Defer House Contests*, LEWISTON MORN. TRIB. (ID), Apr. 15, 1929, at 1.

251. C.J. Lilley, *House Rules Are Changed*, PITT. PRESS, Apr. 16, 1929, at 16.

252. *Id.* The *Washington Post* later deemed Owen a “full fledged member of the Seventy-first Congress.” Elisabeth Ellicott Poe, *Hereditary Rule Grows in America*, WASH. POST, Aug. 4, 1929, at SM3.

253. 71 CONG. REC. 25 (1929).

254. MCLIVER, *supra* note 139, at 121.

255. *Id.*

256. *Eight Women in 71st Congress Give “Feminine Bloc” New Power*, NEW CASTLE NEWS (PA), Apr. 12, 1929, at 29.

257. Gilfond, *supra* note 177, at 152.

rushed like the most popular co-ed on a campus. Handsome elderly boys of the Senate come over to the House floor to sit by her side, and when she swings over to the higher chamber to listen to a debate dozens of Senators leave their seats to shake hands with her. . . . Patriots from all parts of the country request their Congressmen to introduce them to her.²⁵⁸

When she spoke, the entire House, “usually a medley of noise and confusion, listen[ed] attentively.”²⁵⁹ Her Florida colleagues were firmly in her camp.²⁶⁰ The House of Representatives would ultimately decide Owen’s political destiny, and it openly revered her.

Two months into the special session, Owen was “giving a perfectly swell demonstration of how to be a good congressman.”²⁶¹ Her “unusual amount of ability” and unrivaled constituent service created a memorable impression,²⁶² one suggesting a distinguished senatorial future.²⁶³ When Owen the Democrat requested a seat on the all-important Foreign Affairs Committee, the Republican-dominated House created one for her.²⁶⁴ (She was the first woman ever to hold this prestigious post.²⁶⁵) Amusingly, the House deemed Owen perfectly suited for the foreign-affairs position for the same reason that Congress had once annulled her citizenship: her marriage to a foreigner.²⁶⁶

Owen continued her good-citizenship crusade as she awaited an Elections Committee inquiry into her own citizenship. She queried of that generation’s excitement-seeking youth, “What could be more sensational than being a citizen of the United States?”²⁶⁷ Owen longed for her compatriots to construct a “worthy edifice of American citizenship”²⁶⁸ and

258. *Id.*

259. *New Congress Gets Up Steam*, HAWARDEN INDEP. (IA), Apr. 25, 1929, at 2.

260. See *Florida Woman Confident of Congress Post*, ST. PETERSBURG TIMES, Dec. 2, 1929, at 1-2 [hereinafter *Florida Woman Confident*] (“Behind Mrs. Owen stands the staunch body of Florida delegates who are backing up the daughter of the ‘great commoner’ in her first important battle for political prestige.”).

261. Rodney Dutcher, *Bryan’s Daughter Making Good*, TOLEDO NEWS-BEE, June 12, 1929, at 1. She preferred not to be called “Congresswoman.” As she explained, “No one says chairwoman. So why make a distinction elsewhere?” *Ruth Bryan Owen Plans Tour To Tell Voters About Congress*, READING EAGLE, June 15, 1929, at 9.

262. S. J. Woolf, *A Woman’s Voice in Foreign Affairs*, N.Y. TIMES, Jan. 5, 1930, at SM4.

263. See Dutcher, *supra* note 261 (“[T]here are a great many persons . . . who expect that she will at least some day step from the house to the senate.”).

264. 72 CONG. REC. 544 (1929); *Zihlman Course in D.C. in Doubt*, THE SUN (Baltimore), Dec. 13, 1929, at 7.

265. *Mrs. Owen Wins in House Fight To Retain Seat*, ANNISTON STAR, Mar. 2, 1930, at 13 [hereinafter *Wins in House Fight*].

266. In explaining why the House valued Owen’s international expertise, a *New York Times* profile specifically mentioned that she had “married a British army officer” and thereafter amassed a “war record . . . which added tremendously to her understanding of foreign affairs.” Douglas, *supra* note 134.

267. *Ruth Bryan Owen Has New Citizenship Idea*, PITT. PRESS, Feb. 3, 1929, at S4.

268. *Distinguished Daughter of One of Southern Illinois [sic] Greatest Sons Pays Tribute to Clark*, MT. VERNON REGISTER-NEWS (IL), May 27, 1929, at 50.

for adolescents to internalize the habits of “real American citizenship.”²⁶⁹ She presented an engraved copy of *The American’s Creed* to every high-school and college graduate in her district.²⁷⁰ In one newspaper’s estimation, “The study of citizenship and the instilling of the knowledge and appreciation of it into the youth of today may be said to be the hobbies of Mrs. Owen.”²⁷¹

Editorialists nationwide cheered for Owen as congressional elections committees lay dormant.²⁷² “W.C. Lawson,” the *Montana Standard* barked, “will go down to history as a bad loser and a poor sport. The effort to oust Mrs. Owen is based on an absolute technicality.”²⁷³ The *Biloxi Daily Herald* extolled that “brilliant woman congressman from Florida—whose American citizenship and seat in congress some mere man . . . has the effrontery to contest.”²⁷⁴ An Iowa journalist teased the “long-nosed individuals who wield hammers in that [Republican] disorganization” for “[h]aving nothing else to do for the moment.”²⁷⁵ The *Lima News* revealed its own sympathies as it measured Owen’s popular support:

Shall the Great Commoner’s daughter be denied a seat in the halls of congress because her dead husband was a subject of Great Britain? A great swelling chorus of “no” has been sweeping the nation. Thousands of women have come to Mrs. Owen’s defense, along with men of varied political faiths.²⁷⁶

As early as July 4, 1929, the *Hawarden Independent* reported that some Elections Committee members privately believed that Owen possessed an “unbeatable defense” (even if those congressmen wouldn’t speak for attribution).²⁷⁷ Other publications announced that she would likely prevail.²⁷⁸ Owen, too, happily forecast her fate: “I await the verdict in the calm and confident belief that I shall be confirmed in my right title to the seat to which I was so decisively elected.”²⁷⁹

269. William Atherton Du Puy, “*The Lady From Florida*” *Works Fast*, WASH. POST, Oct. 20, 1929, at SM7.

270. Woolf, *supra* note 262. Owen believed that “[s]urely there should be some gesture on the part of the government when the duties of citizenship in school are exchanged for those of citizenship in the nation.” *Id.*

271. *Owen, Congresswoman*, *supra* note 179.

272. Considerable searching has turned up zero pro-Lawson opinion pieces at any point in the process.

273. *The Fight on Ruth Bryan Owen*, MONTANA STAND., June 28, 1929, at 4; *see also Mrs. Owen’s Citizenship*, LINCOLN STAR, Dec. 4, 1928, at 12 (dismissing the “technicalities of the silly statute which congress wiped off the books”).

274. *Flies*, BILOXI DAILY HER., Dec. 13, 1929, at 4.

275. *Braving Heat in Washington*, HAWARDEN INDEP. (IA), July 4, 1929, at 1.

276. *Cable Assists Mrs. Owen in Congress Fight*, LIMA NEWS, July 5, 1929, at 14.

277. *Braving Heat in Washington*, *supra* note 275.

278. *See, e.g., Walsh Busy on Tariff*, LOWELL SUN, Sept. 21, 1929, at 6 (“It is not expected, however, that the claim of her contestant will be upheld. Mrs. Owen will probably retain her seat.”).

279. *Cable Assists*, *supra* note 276; *see also Florida Woman Confident*, *supra* note 260 (“I have

Finally, on December 10, 1929, the Clerk laid *Lawson v. Owen* (and all associated documents) before the House.²⁸⁰ Speaker Nicholas Longworth referred the case to House Elections Committee No. 1 two days later.²⁸¹ Lawson would wage his well-watched battle alone: Florida Republican National Committeeman Glenn B. Skipper made perfectly clear that “[n]either the State Republican organization, myself as a national committeeman, nor the national Republican organization is having anything to do with this contest, nor will we.”²⁸² Even the 1928 Republican platform had championed “whole-heartedly equality on the part of women.”²⁸³

3. Elections Committee No. 1 Hears Owen’s Case (Jan. 17-18, 1930)

The Elections Committee finally convened its *Lawson v. Owen* hearings in a “stuffy little committee room”²⁸⁴ at 10 A.M. on Friday, January 17, 1930,²⁸⁵ thirteen months after Lawson drew up his notice of contest. Owen had labored for nine months as the Fourth District’s “prima facie” congresswoman.

Lawrence Sherman, Noah Bainum, and Edward Clifford presented Lawson’s legal case in a brief submitted to the Elections Committee.²⁸⁶ Bainum and another lawyer, H. B. Morrow, fielded questions from the Committee. Owen wrote her own brief²⁸⁷ and chose not to hire a seasoned oral advocate, “because, to me, the elements we are considering are so simple that they do not require any legal presentation.”²⁸⁸ (Not that a Chautauqua legend and speech professor needed any oratorical reinforcement; she published *Elements of Public Speaking*²⁸⁹ one year

absolute confidence in my right to occupy the seat to which I have been elected. I have no doubt that the committee of the house of representatives which passes on the election contest will confirm my right to the seat and dispose of the suggestion that there is any flaw in my eligibility.”)

280. 72 CONG. REC. 572 (1929).

281. *Congress*, OGDEN STAND. EXAM. (UT), Dec. 13, 1929, at 2.

282. *Opposes Florida Contest*, N.Y. TIMES, Nov. 30, 1929, at 32.

283. *Country Raised from Depths of Depression to Heights of Prosperity by G.O.P. Claim*, ST. PETERSBURG TIMES, June 15, 1928, at 4. The 1928 Democratic platform had also advocated “equality of women with men in all political and governmental matters.” 72 CONG. REC. 9317 (1930).

284. Kenneth G. Crawford, *Ruth Bryan Owen Appeals in Person for Recognition as Florida Congresswoman*, ATL. CONST., Jan. 19, 1930, at 13A.

285. *Owen Hearing*, *supra* note 11, at 1.

286. *Lawson Brief*, *supra* note 231, at 1.

287. As far as I know, no copy of Owen’s brief survives. Lawson’s may be found in the papers of Elections Committee No. 1, Seventy-first Congress, at the National Archives. Owen’s is strangely missing from the file. On March 6, 1930, the Clerk of the House wrote the following letter to a Senate employee who had requested a copy of Owen’s brief: “I am extremely sorry I was unable to furnish you with a copy of Mrs. Owen’s brief. There were printed only sixty copies of the brief and our supply of them was exhausted some time ago. Enclosed is a copy of the Hearings held in the Lawson-Owen Case. Mrs. Owen’s statement covers all the points made in her brief, much of it quoted directly from it.” Letter from William Tyler Page to Harry Davis (Mar. 6, 1930), National Archives, Center for Legislative Archives, HR71A-F9.2.

288. *Owen Hearing*, *supra* note 11, at 47. So confident was Owen that she told Chairman Beedy, “I do not propose to take more than five minutes myself.” *Id.* at 35.

289. RUTH BRYAN OWEN, *ELEMENTS OF PUBLIC SPEAKING* (1931).

later.) Spectators filled the room to witness Owen's historic performance.²⁹⁰

As the proceedings began, Chairman Carroll Beedy pledged "to conduct this hearing just as though it were a law case."²⁹¹ But the Committee's nine members had never encountered a "profound constitutional question"²⁹² quite like this one.

a. Lawson's Argument

Noah Bainum began by assuring the Committee that he approached *Lawson v. Owen* "without any personal feeling in the matter, or without any political view of the situation."²⁹³ He focused "purely [on] the construction of the constitutional provision."²⁹⁴ Bainum's gentlemanly disclaimer ironically foreshadowed the failure of Lawson's legal team to offer any persuasive counter-account of a critical *statutory* provision: Section 4 of the Cable Act.

Bainum surprised the Committee by arguing that Owen's first twenty-four years of American citizenship—not just the middle fifteen—had been "wiped out" when she married a foreigner.²⁹⁵ "Once a Britisher always a Britisher until naturalized," he chanted.²⁹⁶ (Why this logic didn't also apply to Owen's resumed American citizenship, Bainum failed to explain.) Chairman Beedy asked Bainum how he would respond as a witness if asked whether Owen "had been at any time" a U.S. citizen for seven years. Bainum would say she had been, but he adamantly denied that she had "been seven Years a Citizen of the United States."²⁹⁷ "Why do you want us to add those words to the Constitution," Beedy groaned?²⁹⁸ "Because unless you do you would not be adhering to the Constitution."²⁹⁹ "Your Constitution, then, is different from mine."³⁰⁰

As this exchange suggests, Lawson's brief contended that the Qualifications Clause refers to the immediately prior seven years as a continuous unit. Why? Because the language "who shall not have . . . been

290. *Right to House Seat Pleaded by Mrs. Owen*, THE SUN (Baltimore), Jan. 19, 1930, at 1 (describing the "crowded committee room"). Owen's defense of her own congressional eligibility calls to mind Augustus Garland's self-representation in *Ex parte Garland*, 71 U.S. 333 (1866), which concerned the constitutionality of a statute forbidding former Confederate officials (Garland included) from appearing in the courts of the United States.

291. *Owen Hearing*, *supra* note 11, at 35.

292. *Id.* at 42.

293. *Id.* at 1.

294. *Id.*; *see id.* at 42 ("We do not view this as a party or political question at all. There is no Republicanism, there is no Democracy, in it.").

295. *Id.* at 26.

296. *Id.* at 23; *see id.* at 26 ("THE CHAIRMAN. But by that marriage she was robbed of the citizenship of 24 years which she had theretofore enjoyed? MR. BAINUM. Yes, sir."). I suppose Owen would have been forever ineligible to the presidency under this theory.

297. *Id.* at 27.

298. *Id.*

299. *Id.*

300. *Id.*

seven Years” should be read to require that Representatives “shall have been” citizens for seven years.³⁰¹ From this commonsense deduction, and with no further explanation, Lawson asked the Committee to infer that Article I’s citizenship requirement “relate[s] to seven continuous years before the member’s election.”³⁰² Bainum analogized the seven-year requirement to a statute of limitations that “can not work two years now and two years after a while. . . . This statutory period of seven years must be an entirety.”³⁰³ And it had begun to run on April 27, 1925, the day Owen was naturalized.³⁰⁴ She wouldn’t be eligible until April 27, 1932.

Bainum believed he’d won the big statutory battle by establishing that Section 3 of the Cable Act³⁰⁵ wasn’t retroactive.³⁰⁶ Hardly so. In a remarkable failure of lawyering, both Bainum and Morrow betrayed a complete ignorance of Section 4 of the Act. Neither had even read Owen’s written brief—filed at least nine days earlier³⁰⁷—before arguing Lawson’s case to the Elections Committee.³⁰⁸ Perhaps the Committee forgot to deliver a copy to Lawson’s attorneys, but the duo greatly disserved their client by agreeing to argue *Lawson v. Owen* without having seen the opposing brief. Procedural glitches aside, there can be no extenuating their failure to read every word of the one-page Cable Act. Owen’s “She Will Be Seated” advertisements had even quoted Section 4 in full.³⁰⁹ Minimal research could have anticipated this strategy.

The hearing’s first Section 4 question caught Bainum badly off guard. “I do not seem to have that [provision],” he shrugged. “Have you got it?”³¹⁰ Sticking to the script, Bainum assured the Committee that “there is nothing retroactive about [Section 4] at all.”³¹¹ That provision’s entire point, though, was to edit an expatriated woman’s past citizenship record once she became naturalized. Yet Bainum continued believing that quicker

301. *Lawson Brief*, *supra* note 231, at 12.

302. *Id.*

303. *Owen Hearing*, *supra* note 11, at 28.

304. *Id.* at 25.

305. “[A] woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act.” Cable Act of 1922, ch. 411, § 3, 42 Stat. 1021 (1922).

306. As Bainum explained, “assuming . . . the act was retroactive, there would be no occasion for Mrs. Owen to be naturalized.” *Owen Hearing*, *supra* note 11, at 22. Bainum argued the nonretroactivity point repeatedly even though no one contested it. *Id.* at 20-21. Perhaps he missed Section 7, which did the work for him: “Section 3 of the Expatriation Act of 1907 is repealed. Such repeal shall not restore citizenship lost under such section.” § 7, 42 Stat. 1021.

307. *See Hearing Saturday in Move To Oust Ruth Bryan Owen*, EVE. INDEP. (St. Petersburg), Jan. 9, 1930, at 25 (reporting that Owen had “filed her own brief”). Lawson had also submitted his brief by January 9. *See id.* (referring to Lawson’s “brief filed with the committee”).

308. Bainum was cornered into admitting that “I have not seen Mrs. Owen’s brief. I shall be very glad to have one and study it.” *Id.* at 29. I assume that if Bainum hadn’t seen Owen’s brief, neither had Morrow, who played a subsidiary role. But Owen *had* examined Lawson’s. During her oral argument, Owen observed that “[i]n his brief contestant quotes liberally the expatriation act of 1907.” *Id.* at 54.

309. *See supra* note 223 and accompanying text.

310. *Owen Hearing*, *supra* note 11, at 21.

311. *Id.*

naturalization procedures were “[t]he only privileges which Congress extended to such women.”³¹² When Chairman Beedy read Sections 3 and 4 together to suggest that Owen had always been a citizen in the eyes of the law, Bainum denied the legitimacy of this simple syllogistic exercise: “No. You are reading that into the statute. It does not say that.”³¹³ Rather, Owen enjoyed only those rights conferred on naturalized citizens of foreign birth.³¹⁴

Morrow fared no better. He emphatically denied that any part of the Cable Act “restore[d] citizenship.”³¹⁵ As far as the Committee should be concerned, Owen “became a citizen for the first time . . . when she was naturalized in 1925.”³¹⁶ Beedy reiterated his holistic reading of Sections 3 and 4. An American-born woman who had never ceased to be a citizen had always been a citizen, right? Morrow was trapped. “Answering your question, Mr. Chairman, I would say yes; but I do not think the law means that.”³¹⁷

The law did mean that. As a purely interpretive matter, Section 4 plainly purported to restore the lost citizenship of any qualifying woman who took the trouble to become naturalized. Lawson’s attorneys faltered on account of their poor preparation and inability to make mid-course corrections. But their oral obduracy contained the seeds of a potentially winning constitutional theory: Congress could not validly rewrite the historical record, overriding amply evidenced alienage.

Bainum and Morrow never labeled Section 4 unconstitutional, because they didn’t know what it said. But that conclusion followed naturally from their rhetoric. By her own admission, Bainum pointed out, Owen had been a British subject as late as April 1925.³¹⁸ “There is no such thing as restored citizenship,”³¹⁹ which would entail an absurdity—that Owen was an American when she applied for American citizenship. The record showed that she re-entered America as an alien, Morrow reminded the Committee. “If that does not constitute a foreigner, I do not know what, in law, would be a foreigner.”³²⁰ Congress “could not . . . change [Owen’s] citizenship status, a substantive thing in the law.”³²¹

A few Committee members indulged their purposivist inklings.

312. *Id.* at 24.

313. *Id.* at 41.

314. *Id.*

315. *Id.* at 36.

316. *Id.*

317. *Id.* at 39.

318. Owen had formally declared—in writing—her “intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to George V, King of Great Britain and Ireland, of whom at this time I am a subject.” *Id.* at 20.

319. *Id.* at 25.

320. *Id.* at 38.

321. *Id.* at 37. Her citizenship status until age twenty-four was apparently not “a substantive thing in the law.” Bainum had no trouble expunging that uncontested historical fact.

Chairman Beedy shared “a thought”: the Framers created a citizenship qualification because “they did not want people coming here who had no local knowledge of our institutions.”³²² Owen was technically stripped of her citizenship, “a thing which the framers of the Constitution perhaps never thought of or did not have in mind.”³²³ But she clearly satisfied the Qualifications Clause’s subsurface strictures. Why exclude her “simply on the ground of a technicality”?³²⁴ The Framers were clearly “considering the foreign born instead of the native born.”³²⁵ And to them, the “foreigner” was an emigrant “coming here unfamiliar with American institutions, and possibly not in sympathy with our form of Government.”³²⁶ Hadn’t Owen’s earliest memories consisted of her sympathizing with the American form of government?

Bainum and Morrow offered two responses. First, to maintain the “dignity and solemnity of this constitutional provision,”³²⁷ the Committee could not make Owen its special favorite. This case was an important test for the rule of law: “[I]t would be an unfair thing for this committee to apply to a person in Mrs. Owen’s situation . . . a different rule than . . . would be applied to any other foreigner.”³²⁸ With ordinary foreigners, after all, the House would undoubtedly adopt Lawson’s “immediately preceding” interpretation.³²⁹ But this response was fallacious on two levels. The House wouldn’t consciously adopt the “immediately preceding” view in the case of a foreign-born alien; it wouldn’t need to pick a precise approach, just as the Framers didn’t. And if Owen’s “cumulative” view were correct, the principle of equal treatment³³⁰ would require *its* application across the board (even if that choice wouldn’t affect most contested-citizenship cases).

Second, Lawson’s attorneys insisted that the “cumulative” interpretation’s consequences would be intolerable. American women taking foreign husbands normally “acquir[ed] so many bad habits that the limitation ought to be absolute,” “perpetual.”³³¹ Notwithstanding Owen’s exquisite qualities, Morrow warned of American women marrying aliens, “going abroad and staying there a long period of time, and becoming completely out of touch with the American viewpoint, American

322. *Id.* at 33.

323. *Id.*

324. *Id.*

325. *Id.* at 37.

326. *Id.* at 38.

327. *Id.* at 42.

328. *Id.* at 41.

329. *Id.* at 42.

330. Bainum insisted that “you have got to apply this Constitution regardless of whether it is Mrs. Owen or somebody else.” *Id.* at 33. Chairman Beedy agreed: “Exactly. We ought not to use her name in the case at all.” *Id.*

331. *Id.* at 32, 34.

principles, and American customs.”³³² The Qualifications Clause should therefore be read to subject recovering expatriates to a long and continuous probationary period in which to discard their “entanglements.”³³³

The Committee adjourned three hours after it began, and reconvened the next morning to complete hearings in “Mrs. Owen’s case.”³³⁴ Chairman Beedy thanked Bainum for his efforts and initiated the hearing’s most anticipated phase: “Mrs. Owen, the committee will be very glad to hear you.”³³⁵

b. Owen’s Argument

Owen first thanked opposing counsel for proceeding without any “personal animus” or “political partisanship.”³³⁶ She confidently asserted that “the laws of my native country, exactly as the laws are written,” entitled her to a seat in Congress.³³⁷ Then, “[w]ith her hands behind her, and her body braced against a bookshelf,”³³⁸ Ruth Bryan Owen argued her case to the Elections Committee and to newspaper readers nationwide.³³⁹

Owen pounced on Lawson’s failure, “for obvious reasons,”³⁴⁰ to mention Section 4 in his brief (and during oral argument). She quoted Congressman Cable’s own analysis of the law: “[N]aturalization obliterates her foreign-citizenship status, and she stands, by virtue of such naturalization, as one who has always been a citizen of the United States.”³⁴¹ Reading Sections 3 and 4 in conjunction made this an exceedingly easy case. As Owen saw it, Congress had wiped out every trace of “my involuntary expatriation because of a law now no longer valid.”³⁴² Owen had “never by word or act,” or by act of Congress, “been anything but a loyal American citizen during my entire life.”³⁴³

But she cared far less about the “letter” of the law than its “spirit.”³⁴⁴ In a powerful culmination of Carson’s early efforts, Owen viewed her present struggle against the backdrop of America’s newly purified constitutional commitments:

332. *Id.* at 38.

333. *Id.*

334. *Id.* at 42. This quote is from Chairman Beedy, who, interestingly, chose to use Owen’s name as shorthand for the contest’s full name.

335. *Id.* at 47.

336. *Id.*

337. *Id.*

338. *Bryan’s Daughter Pleads Own Case for Congress Seat*, BILOXI DAILY HER., Jan. 18, 1930, at 1.

339. *See Owen Hearing*, *supra* note 11, at 56 (“The CHAIRMAN. Are there any press reporters here? (There were four newspaper reporters present.)”).

340. *Id.* at 54.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

No man ever lost his citizenship through his marriage. If on the same day that I married Major Owen an American man had married a woman from another country, he would not have had five minutes of loss of citizenship. The last thing that is done to [a] man who has disqualified himself in the eyes of his Government as a citizen, the last punishment that is ever inflicted on a man is the deprivation of citizenship. The traitor, the felon, the lowest criminal, is deprived of his citizenship, and yet by the enactment of my country I was deprived of my citizenship for no fault of my own . . . but because I was a woman.³⁴⁵

There was “no better time and place” than the House Elections Committee to accord women “the same dignity and individuality of citizenship which is enjoyed by the male citizen.”³⁴⁶

Owen spoke tenderly of her war service, and of the many personal comforts she had relinquished on her cyclical quests to feed and clothe six human beings.³⁴⁷ Were these the “vicious habits which American women might bring back”?³⁴⁸ Owen’s voice “dropped almost to a whisper” as she eulogized her departed husband.³⁴⁹ His gallant spirit transcended the inevitable death he first tasted in Turkish trenches. Everyone knew how ably Ruth had aided the Allied cause on British soil; now, she proudly boasted of having “conferred a favor upon my adopted State in bringing to them so beloved and so honored a citizen,” the late Reginald Altham Owen.³⁵⁰ If American law penalized this marriage, “I want to bear that penalty, as I bear my husband’s name, very proudly.”³⁵¹ And after stealing her citizenship, the government had made it impossible for Owen to petition for naturalization without losing her Chautauqua lecture fees, the family’s only income.³⁵² “If the consideration of my case is going to make more clear the laws which have dealt unjustly with women,” she decided, “I welcome this case.”³⁵³

Almost as an afterthought, Owen dutifully discussed the Qualifications Clause.³⁵⁴ The Committee’s odd interpretive dilemma posed a false

345. *Id.* at 54-55; *see id.* at 59 (“[N]o American man has ever been called before a committee of this sort to explain his marriage.”).

346. *Id.* at 55.

347. *Id.* at 56-58.

348. *Id.* at 58.

349. Crawford, *supra* note 284.

350. *Owen Hearing*, *supra* note 11, at 59.

351. *Id.*

352. *Id.* at 58.

353. *Id.* at 58-59.

354. *See id.* at 59 (“[E]ven if you find that you are unable to justify yourself in agreeing with the intent of the framer of the Cable Act, then I refer you to the Constitution.”).

choice: the seven-year provision was “definite.”³⁵⁵ Owen detected “nothing equivocal, gentlemen, about the wording of the Constitution.”³⁵⁶ It simply required seven years of citizenship. Any other stance would “qualif[y]” the Framers’ careful word choice and insert extraneous language into the Constitution.³⁵⁷ Owen had therefore “been seven Years a Citizen” many times over, regardless of how one parsed the Cable Act.³⁵⁸ Nor was there anything equivocal about the reasons for adding a citizenship requirement. The point, she thought everyone agreed, was to exclude those “who have not lived here sufficiently long to be safe guardians of our institutions” through “sufficient background and knowledge.”³⁵⁹ Owen dared the Committee to deny that someone with her “American background” would be “a safe interpreter of the laws and institutions of our country.”³⁶⁰

At bottom, though, this wasn’t a fight over the arcane incidents of legislative qualifications. It was about equality. Owen posed the question starkly: Would the House secure to the American woman “her right to the same consideration at the hands of her Government as is enjoyed by the male citizen”?³⁶¹ *Lawson v. Owen* “hinges upon the attitude of my Government toward its women citizens.”³⁶² A new constitutional day had dawned. At this aurora of full citizenship equality, Congress must vindicate “the right of an American woman before the eyes of her Government to exactly the same treatment that is meted out to a man.”³⁶³ In other words, equal protection of the laws.

“With intense feeling,”³⁶⁴ Owen held forth for over an hour.³⁶⁵ A Montana newspaper reckoned her appeal “[o]ne of the most dramatic and affecting pleas ever made before a government tribunal.”³⁶⁶ When she finished, Chairman Beedy declared the hearings closed, and House Elections Committee No. 1 went into executive session.³⁶⁷

355. *Id.*

356. *Id.* at 60.

357. *Id.* at 60-61. Chairman Beedy seemed to have been leaning this way the day before: “If, as lawyers, we are taught to believe that if a statute is retroactive it should say so . . . why, if this provision of the Constitution intended to prescribe that [the] limitation of the seven years should be next preceding the year of the election, should it not also state that too?” *Id.* at 27.

358. Forty-four years “[i]f you accept the intent of the framer of the Cable Act,” and twenty-nine otherwise. *Id.* at 61.

359. *Id.* at 60.

360. *Id.*

361. *Id.* at 61.

362. *Id.*

363. *Id.*

364. *Mrs. Owen Upholds Election Legality*, WASH. POST, Jan. 19, 1930, at 4.

365. Crawford, *supra* note 284.

366. *The Commoner's Daughter*, MONTANA STAND., Jan. 24, 1930, at 6.

367. *Owen Hearing*, *supra* note 11, at 64.

4. *Waiting for an Answer (Jan. 18–Mar. 24, 1930)*

Owen's address to the Elections Committee had made her "the most talked-of woman in the United States."³⁶⁸ This burst of attention "brought her a flood of commending communications," from men as well as women.³⁶⁹ "[M]any throughout the land" hoped and expected that the Elections Committee would unreservedly endorse Owen's eligibility.³⁷⁰

One newspaper branded Lawson a "poor loser."³⁷¹ He was "squarely beaten," his Qualifications Clause challenge "mean in spirit."³⁷² Lawson's unmanly move should "meet with disaster"³⁷³—not just because of Owen's sterling credentials, but because his "pettifogging"³⁷⁴ dignified a law that had discriminated against a class of equal American citizens. Lawson's ploy was a "hang-over from a bad law,"³⁷⁵ the "officious and unjust"³⁷⁶ Expatriation Act. *Lawson v. Owen* presented an elemental question of political justice: "whether in the general application of the law the government will discriminate against women."³⁷⁷ If constitutional fidelity mandated present-day sex discrimination, "The law is an ass!"³⁷⁸

Newspaper editors also agreed that excluding Owen would be utterly pointless. She was "[b]orn in America, raised in America, always an American."³⁷⁹ William Jennings Bryan's daughter was "100 per cent an American,"³⁸⁰ a "mighty fine American girl."³⁸¹ No one was more "American from head to foot."³⁸² If it seated Lawson, the House would commit a "rigid literalism" in the application of rule-like legal provisions.³⁸³ Even if the Qualifications Clause seemed to bar her, Owen's

368. *A Widow Fights for Her Rights*, LETHBRIDGE HER. (Alberta), Feb. 1, 1930, at 10 [hereinafter *Widow Fights*].

369. C.O. Smith, *Law Covering Nationality Is Attacked*, CALGARY DAILY HER., Jan. 28, 1930, at 2. A few days after the committee hearings, the *Ludington Daily News* accurately predicted that Owen "will have the sympathy of the American people." *Owen's Case*, *supra* note 51.

370. *The Commoner's Daughter*, *supra* note 366.

371. *Owen's Case*, *supra* note 51.

372. *Id.* After all, "a large majority of the people of [Florida's Fourth District] said by their vote that they wanted Ruth Bryan Owen as their congresswoman." *Mere Technical Objection*, OELWEIN DAILY REG. (IA), Jan. 23, 1930, at 2. Lawson was therefore seeking Owen's "justly earned seat in Congress." *An Absurd Situation*, SUNDAY MORN. STAR (Wilmington, DE), Jan. 26, 1930, at 7. One editorial even considered Lawson's legal argument a fundamentally sexist "subterfuge." *Ruth Bryan's Citizenship*, SANTA ANA REGISTER, Jan. 22, 1930, at 18.

373. *An Absurd Situation*, *supra* note 372.

374. *Id.*

375. Smith, *supra* note 369.

376. Cole, *supra* note 49.

377. Smith, *supra* note 369.

378. *Absurd Situation*, *supra* note 372.

379. *The Commoner's Daughter*, *supra* note 366.

380. *Owen's Case*, *supra* note 51.

381. *Mere Technical Objection*, *supra* note 372.

382. *An Absurd Situation*, *supra* note 372. Indeed, "one would have to hunt pretty far to find a more thorough-going American than Mrs. Owen." *Mrs. Owen Should Remain*, OAKLAND TRIB., Jan. 25, 1930, at 24.

383. *Mrs. Owen's Citizenship*, ALBUQUERQUE J., Jan. 28, 1930, at 4.

was an “exceptional case[.]”³⁸⁴ Here was someone who could have run for Congress on her wedding day, and who had only grown stronger, wiser, and more quintessentially American since. The combined force of her Section 4 and seven-year arguments “ought to satisfy the most inexorable constitutional pedants, sticklers and purists.”³⁸⁵

The Elections Committee held an executive session on January 27, 1930.³⁸⁶ It made no real headway on Owen’s case. Chairman Beedy released a statement that “the questions in the case are so complex that they will require considerable study. It will require several meetings of the committee before all the points involved can be gone into.”³⁸⁷ The Committee adjourned again on February 22 with nothing final to announce—it was “still studying the constitutional and statutory provisions dealing with the case.”³⁸⁸ As she awaited the Committee’s decision on her citizenship status, Owen was specially chosen to deliver an homage to the American flag as part of a radio series designed to inspire patriotism.³⁸⁹

Her wait ended on March 1. After an all-day conference, the Elections Committee unanimously agreed to recommend Owen’s seating.³⁹⁰ Chairman Beedy revealed nothing about the Committee’s report, because it hadn’t been written yet. He merely shared his colleagues’ bottom line—unanimity as to the outcome.³⁹¹ Owen expressed relief at this long-expected deliverance: “I am very happy that the Committee has decided in my favor, and I am exceptionally pleased that the decision was unanimous.”³⁹²

As always, the print media celebrated with her. The *Washington Post* considered Chairman Beedy’s announcement a historic “victory for women who are seeking to remove legal discriminations against their sex.”³⁹³ Another newspaper thought the decision “courteous, sensible and just,” the “gentlemanly thing to do.”³⁹⁴ The Committee’s decision had a “firm foundation in common sense” and would be “applauded by both Republicans and Democrats alike.”³⁹⁵ No one ever doubted Owen’s

384. *Id.*

385. *Owen’s Case*, *supra* note 51.

386. *No Decision Reached in Mrs. Owen’s Case*, SARASOTA HER.-TRIB., Jan. 27, 1930, at 4.

387. *Id.*

388. *No Action in Election Case of Mrs. Owen*, EVE. INDEP. (St. Petersburg), Feb. 24, 1930, at 9.

389. *Listeners To Salute Flag as Curtis Leads in Pledge*, N.Y. TIMES, Jan. 26, 1930, at 123.

390. *Wins in House Fight*, *supra* note 265.

391. *Vote To Seat Mrs. Owen*, N.Y. TIMES, Mar. 2, 1930, at 25 [hereinafter *Vote to Seat*].

392. *Mrs. Owen Wins*, IRONWOOD TIMES (MI), Mar. 14, 1930, at 4.

393. *Mrs. Owen’s Victory*, WASH. POST, Mar. 4, 1930, at 6; *see also id.* (“This is a sensible construction of the law. The effect of that untenable arrangement under which an American woman became an Englishwoman though a marriage contract should not be perpetuated, now that the measure has been supplanted.”).

394. *Sensible and Just*, ZANESVILLE TIMES RECORDER (OH), Mar. 6, 1930, at 4.

395. *A Common Sense Decision*, CARROLL DAILY HER. (IA), Mar. 10, 1930, at 2. After all, the “[a]ction to bar her . . . never had more than a flimsy technical basis.” *Ignoring a Foolish Quibble*, SCRANTON REP., Mar. 7, 1930, at 8.

“American citizenship in the broad and only important sense of the term”;³⁹⁶ her failed ouster “never did seem quite the sporting thing.”³⁹⁷ “[E]verybody” should applaud this felicitous outcome.³⁹⁸

The Elections Committee met on March 8 and again on March 16 to frame a final report, but each time the nine failed to resolve internal differences.³⁹⁹ On March 22, they simply stopped trying. After what proved to be its last executive session, the Committee decided to submit majority and minority reports to the House. These reasoned analyses would “arrive at the same conclusion”—Owen’s constitutional eligibility—“but via different routes.”⁴⁰⁰ Owen professed not to care how many reports the Committee wrote, “[s]o long as the conclusions are the same.”⁴⁰¹

Chairman Beedy submitted Report No. 968 to the House on March 24, 1930.⁴⁰² Elections Committee No. 1 passed along its unanimous “recommendation that William C. Lawson is not entitled to a seat and that Ruth Bryan Owen is entitled to the seat from the fourth district of Florida.”⁴⁰³ Busy congressmen could have been forgiven for failing to recognize *Lawson v. Owen* as a novel, multidimensional constitutional controversy. Reading Report No. 968 would have stirred them from their detachment.

5. Reading the Elections Committee Report

The ten-page report opened with brisk summaries of “The Question Involved,” “The Facts,” and “The Constitutional Provision and Federal Laws Affecting the Case.”⁴⁰⁴ It then stated the crux of Lawson’s contention: even though Owen “is, and always has been, loyal to and familiar with our American system of Government and American institutions,” the House should always insist upon a term of seven years’ citizenship immediately preceding an election.⁴⁰⁵ Otherwise, “a dangerous precedent would be established” for the injection of “foreign influence in the Federal Congress.”⁴⁰⁶

The Committee forcefully booted Lawson’s claim that Owen supporters had squandered their votes,⁴⁰⁷ but it splintered on the merits of his

396. *Id.*

397. *Id.*

398. *Mrs. Owen Wins*, *supra* note 392.

399. *Few Activities in Congress Today*, ELYRIA CHRON. TELEG., Mar. 8, 1930, at 3; *Day in Congress*, WASH. POST, Mar. 16, 1930, at 2.

400. *Committee Splits over Owen Report*, WASH. POST, Mar. 23, 1930, at 2.

401. *Id.*

402. 72 CONG. REC. 6050 (1930).

403. *Id.*

404. *Owen Report*, *supra* note 234, at 1-3.

405. *Id.* at 4.

406. *Id.*

407. See Section III.A *supra*.

constitutional plea. A five-person majority⁴⁰⁸—all Republicans—found Owen eligible “through a consideration of the constitutional provision alone.”⁴⁰⁹ They construed the seven-year provision to be “cumulative.”⁴¹⁰ When interpreting the Constitution, the majority advised, “the ordinary meaning should be ascribed to its language. . . . [W]hen that meaning is apparent on the face of the instrument,” neither courts nor legislatures can add to or subtract from it.⁴¹¹ Singing from Owen’s songbook, these five insisted that “if the framers had intended the seven years’ citizenship to have been limited to the seven years next preceding an election, they would have said so.”⁴¹² Counting the time before her marriage and after her naturalization, Owen had been a U.S. citizen for over twenty-eight years when Florida’s Fourth District elected her.⁴¹³ She was therefore quadruply eligible to serve in the House of Representatives.

The majority didn’t explain why, if the Framers hadn’t even foreseen the problem of inconsecutive citizenship periods, they would have said “immediately preceding” if they had meant it. And the majority failed to engage with an even more devastating counterargument. If any seven years’ citizenship forever qualify their holders for House membership, *noncitizens* may lawfully serve in Congress. By the “cumulative” view, one could renounce his U.S. citizenship and spitefully serve his rebuffed countrymen in the House of Representatives with no constitutional difficulty. Given the Article I and II Qualifications Clauses’ structural consonance, the same would also be true of candidates for the Senate—and even the presidency! We intuitively discredit these striking conclusions because the Qualifications Clauses seem to have as their bedrock objective the exclusion of aliens from federal legislative service. Indeed, even Antifederalist scaremongers assumed that federal legislators must actually be citizens.⁴¹⁴ After nearly two centuries of constitutional governance, the Supreme Court similarly insisted that “the right to govern is reserved to citizens.”⁴¹⁵

408. The majority consisted of Representatives F. Dickinson Letts, Godfrey G. Goodwin, Charles A. Kading, J. Lincoln Newhall, and Rowland L. Johnston. Chairman Beedy was a surprising omission, given his overt skepticism of Lawson’s “immediately preceding” theory. See *supra* note 357.

409. *Owen Report*, *supra* note 234, at 6.

410. *Id.*

411. *Id.*

412. *Id.* “A review of the debates and proceedings of the Constitutional Convention” convinced the majority that “the omission of words, such as the minority would read into the provision, was not a matter of inadvertence.” *Id.* at 9-10.

413. *Id.* at 6.

414. See, e.g., *To the Members of the Convention of Massachusetts*, *supra* note 56, at 185 (“[A]fter seven years residence, will [foreigners] not be in your federal house of representatives, or after nine years residence in your senate?”).

415. *Foley v. Connelie*, 435 U.S. 291, 297 (1978); see *id.* at 295 (suggesting that aliens may “participate in the processes of democratic decisionmaking,” whether at the federal or state level, only after becoming naturalized citizens); *id.* at 296 (“[A] democratic society is ruled by its people.”); *id.* (alluding to the “choice, and right, of the people to be governed by their citizen peers”). In fact, the Court has unequivocally—even if unwittingly—countenanced the “immediately preceding” view. See

During oral argument, Committee members acknowledged that their chosen interpretation must apply equally to everyone.⁴¹⁶ Well, one might ask, would the ratifying generation have readily permitted erstwhile Americans to run for Congress after internalizing the snobbish customs of European capitals? What if native-born Ruth Bryan had instead married Leon Trotsky and launched the Bolshevik Wives' War Relief Fund, then returned to America, still married, seeking admission to Congress "for insidious purposes"?⁴¹⁷ Since 1802, the naturalization laws have presumed that aliens must live in the United States for at least five years to cast off their inborn allegiances.⁴¹⁸ Why should a similar presumption not apply to Americans who choose to make new lives abroad? The "oddy" (and possible danger) of allowing aliens to make federal law for Americans "should weigh against endorsing this method of declaring [candidates] eligible."⁴¹⁹

The four-person minority⁴²⁰ espoused Lawson's view of the Qualifications Clause—only seven years of citizenship "next preceding the date of election" suffice.⁴²¹ But according to Congress, Owen had been an American citizen her entire life. She became naturalized as specified by Section 2 of the Cable Act, thereby acquiring "the same citizenship status as if her marriage had taken place after the passage of this act."⁴²² Section 3 defined this status as that of someone who had "not cease[d] to be a citizen of the United States by reason of her marriage."⁴²³

The minority correctly sensed that disagreement over Section 4 concerned congressional power as well as statutory interpretation. The institution that could constitutionally⁴²⁴ strip Owen of her American citizenship, the minority explained, "also had the power to pass a law which set out the procedure by means of which she could recover her American citizenship."⁴²⁵ Moreover, the Cable Act should be expansively

Harisiades v. Shaughnessy, 342 U.S. 580, 586 n.10 (1952) (explaining that the Qualifications Clauses "require that candidates for election to the House of Representatives and Senate *be citizens*") (emphasis added). Justice Story agreed, insisting that "[n]o person will deny the propriety of excluding aliens from any share in the administration of the affairs of the national government." STORY, *supra* note 55, § 75.

416. See *supra* note 330.

417. 2 RECORDS, *supra* note 53, at 216 (statement of George Mason).

418. Daniel Rice, *The "Uniform Rule" and Its Exceptions: A History of Congressional Naturalization Legislation*, 40 OZARK HIST. REV. 23, 31 (2011).

419. Primus, *supra* note 19, at 1706 n.107. Primus offered short reflections on the "cumulative" and "immediately preceding" interpretations in the course of imagining alternative justifications for seating Hiram Revels. He tentatively rejected the "cumulative" approach on consequentialist grounds. *Id.* at 1705-06.

420. The minority consisted of three Democrats (Edward E. Eslick, Robert S. Hall, and J. Bayard Clark) and the Republican Chairman, Carroll Beedy.

421. *Owen Report*, *supra* note 234, at 6.

422. *Id.* at 7. The minority was quoting Section 4.

423. *Id.*

424. At least before the Nineteenth Amendment. See *Mackenzie v. Hare*, 239 U.S. 299, 312 (1915) (upholding Section 3 of the Expatriation Act of 1907).

425. Strictly speaking, the Naturalization Clause empowered Congress to specify the *procedure*

interpreted “in the light of [the Nineteenth] [A]mendment as but another step in extending the rights and privileges of American women.”⁴²⁶ It should be “liberally construed as a measure intended to right an injustice” inflicted on American women by the Expatriation Act, and “to place her upon an equality with American men” with respect to American citizenship.⁴²⁷

The Cable Act’s connection to the Nineteenth Amendment arguably bolstered the minority’s implicit defense of congressional authority to erase the historical record.⁴²⁸ But as a statutory-interpretation lesson, this point was misplaced. The Cable Act’s relevant provisions were not susceptible of more- and less-liberal interpretations. They could properly be interpreted only to constitute Owen a perpetual, unbroken American citizen. Whether Congress possessed the authority to command such an interpretation is an entirely separate (and prior) constitutional question.

So although the Committee agreed on virtually nothing else, it rallied around the “unanimous conclusion” that Owen was eligible to sit in the House of Representatives.⁴²⁹ It urged the House to adopt two resolutions:

Resolved, That William C. Lawson was not elected a Representative to the Seventy-first Congress from the fourth congressional district of the State of Florida and is not entitled to a seat therein.

Resolved, That Ruth Bryan Owen was duly elected a Representative to the Seventy-first Congress from the fourth congressional district of the State of Florida and is entitled to retain her seat therein.⁴³⁰

Though the majority would have seated Owen on constitutional grounds alone, it felt obligated to “amplify the report of the chairman” with a stinging critique of the minority’s approach to Section 4.⁴³¹ In short, the minority had misconstrued Section 4, and Congress could not constitutionally restore lost American citizenship.

by which Owen could recover her citizenship. *See* U.S. CONST. art. I, § 8, cl. 4. The theoretical dispute over Section 4 concerned substance, not procedure. The minority probably meant that if one Congress could unmake Americans, a later Congress could reverse this decision by entirely eliminating the past, present, and future legal effects of earlier marital expatriations. This inference isn’t self-explanatory, and the minority gave no further justification for it.

426. *Owen Report*, *supra* note 234, at 7.

427. *Id.*

428. Like the Thirteenth, Fourteenth, Fifteenth, Eighteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments, the Nineteenth empowers Congress “to enforce this article by appropriate legislation.” U.S. CONST. amend. XIX. Perhaps the Sixty-seventh Congress thought it was “enforcing” the Nineteenth Amendment when it purported to deny a past discriminatory law any continuing legal effect.

429. *Owen Report*, *supra* note 234, at 7.

430. *Id.*

431. *Id.*

How to apply Section 4's key language, "After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this act"? The majority read the first "after" in contradistinction to "before," so that the Cable Act "only establishes [Owen's] citizenship status after the date of her naturalization"⁴³²—not from 1910 to 1925. But this ignores Section 3's definition of what that citizenship status would be. "After" Owen's naturalization, it would be as if she had *never* ceased to be a U.S. citizen by reason of her marriage. Sections 3 and 4 plainly purported to restore citizenship instead of just conferring full American citizenship prospectively.⁴³³ The minority invoked Section 7 as its coup de grâce; that provision clarified that the Expatriation Act's repeal "shall not restore citizenship lost."⁴³⁴ But Owen agreed that the repeal alone restored nothing; rather, *naturalization* according to the Cable Act's terms eliminated prior disabilities.

The key question, then, was whether Congress could validly erase periods of lost citizenship. The majority's addendum addressed this fascinating issue, though without using familiar terminology of constitutional power. The majority first decried the minority's "inconsistency" in reading the Qualifications Clause strictly and the Cable Act broadly.⁴³⁵ The minority "sets up a man of straw and then proceeds to rough it with him."⁴³⁶ Having read an "immediately preceding" requirement into the Clause, they apparently found it "necessary to resort to mental acrobatics to avoid what they have done" and award Owen her seat.⁴³⁷ But bulk obliteration of non-citizenship periods is a "legal fiction [that] may not be indulged. . . . It would make untrue an obvious, evident, and known fact"—that Owen was a British subject for fifteen years, applied for naturalization as a British subject, and renounced her very real political allegiance to George V.⁴³⁸

Whether liquidation of once-true legal facts is per se unconstitutional, the majority didn't clarify. But it left no doubt that it was "giv[ing] consideration to the constitutionality of the Cable Act."⁴³⁹ And it found two fatal infirmities. First, adopting the minority's interpretation of the

432. *Id.* at 8.

433. The majority's interpretation can be correct only if expatriated women would otherwise have been something less than full citizens after becoming naturalized under the Cable Act. If not, it would have been redundant to prescribe their assumption of ordinary citizenship status in Section 3. But it has never been true that some naturalized American citizens enjoy a lesser citizenship status than others. And Section 1's codification of gender equality in the privilege of naturalization belies any conception of women as lesser naturalized citizens.

434. *Id.*

435. *Id.*

436. *Id.* at 9.

437. *Id.*

438. *Id.* at 8.

439. Specifically, to Section 4. *See id.* at 9 ("We must face that responsibility. We assumed such duty in full measure when, as individuals, we subscribed to the oath of office, the chief and central obligation of which requires us to support and defend the Constitution of the United States.").

Cable Act would permit the Senate and President to usurp the House's exclusive right to judge its members' qualifications, since those institutions also played a role in enacting the absurdity.⁴⁴⁰ By this logic, any law that regulated qualification-related facts—the simplest naturalization or voluntary-expatriation law—would be automatically unconstitutional as an arrogation of the House's exclusive prerogative to judge its members' qualifications. That argument proves too much, since Article I, Section 8 empowers our bicameral Congress to “establish an uniform Rule of Naturalization.”⁴⁴¹

Second, if Congress could lawfully annul Owen's expatriation period, it could easily evade other constitutional requirements. Authority to pass an alienage-erasing Section 4 also entailed the power to proclaim that “an alien shall, after his naturalization, have the status and enjoy the privileges of a natural born citizen,” qualifying him to serve as president.⁴⁴² By the minority's logic, Congress could even pronounce aliens eligible to serve in the House of Representatives “immediately after [their] naturalization[s]”!⁴⁴³ But both points missed a plausible limiting principle,⁴⁴⁴ and the latter was self-defeating. If it would be unthinkable for new naturalized citizens to serve in Congress, surely *aliens* cannot legislate for the political community. Yet the majority's “cumulative” interpretation would permit exactly that. Perhaps the Committee would have coalesced around the minority's “immediately preceding” approach if the majority had fully grasped the consequences of its commendable (but likely misplaced) no-secret-intent philosophy.⁴⁴⁵ Instead, the Committee fractured bitterly, supplying Congress with a rare opportunity to engage in direct and unreviewable—if substantively perplexing—constitutional lawmaking.

440. *Id.*

441. U.S. CONST. art. I, § 8, cl. 4. Chairman Beedy, for one, refused to conclude “that in recognizing the binding force and effect of our naturalization laws the House has surrendered its constitutional right to be the sole judge of the qualifications of its Members.” 72 CONG. REC. 10195 (1930) (statement of Rep. Beedy). The better objection to Section 4's unusual restorative provision would be that one House cannot obligate its successors—“each House”—to disregard qualification-related historical facts, even conceding Congress's general authority over naturalization and expatriation procedures.

442. *Owen Report*, *supra* note 234, at 9.

443. *Id.*

444. Here is one possibility: Congress may not retroactively change individuals' citizenship records, except to restore citizenship lost during nonelective expatriation periods. Such periods could not arise today, since the Supreme Court held in *Afroyim v. Rusk* that Congress may not expatriate American citizens unless they “voluntarily relinquish[] that citizenship.” 387 U.S. 253, 268 (1967).

445. The majority explained itself as follows: “The framers of the Constitution sought to avoid language or phraseology which is complex and shunned any hidden meaning. They employed language which is clear, simple, and easy of understanding. The ordinary rules of construction are natural. They forbid the adding of any intent not reasonably within the meaning of the language.” *Owen Report*, *supra* note 234, at 10.

6. *The House Seats Owen (June 6, 1930)*

From reading newspaper headlines, one would never have known that Owen faced one final obstacle after her Elections Committee triumph. “House Elections Committee Ends Contest of Florida Republican,” blared the *New York Times*.⁴⁴⁶ “Mrs. Owen Wins in House Fight To Retain Seat.”⁴⁴⁷ “Mrs. Owen’s Victory.”⁴⁴⁸ “Ruth Bryan Owen Wins Congress Seat.”⁴⁴⁹ “Mrs. Owen Wins.”⁴⁵⁰ What a marvelous moment for American women—that sordid expatriation law would never again be invoked to impugn their Americanness.

Except that Report No. 968 was just a proposal; only the full House could dispose of *Lawson v. Owen*. It did just that on June 6, 1930, nearly two years after Owen’s election. The Clerk read the Committee’s two resolutions, bundled together as House Resolution 241.⁴⁵¹ The House unanimously adopted this analytically empty measure by voice vote, without the least hint of prior discussion or dissent (save a prepared speech by Chairman Beedy).⁴⁵² The House merely “agreed to” the Committee’s bottom-line determination that Owen was “duly elected” and “entitled to retain *her* seat.”⁴⁵³ Owen’s colleagues had witnessed her fourteen-month clinic on how to be a good congressman; they positively adored her.⁴⁵⁴ Rejecting the Committee’s recommendation would have effectively expelled her from Congress, creating a nationwide sensation. So although the House’s new provisional-seating rule⁴⁵⁵ guaranteed Florida a full complement of congressmen, it likely multiplied Lawson’s burden of persuasion in this made-for-media constitutional challenge.

The Elections Committee must have known that this outcome was inevitable. But three of its members troubled themselves to deliver lengthy lectures on the deeper principles involved. Chairman Beedy went first, right before the House voted. After covering much familiar ground, he firmly insisted that Congress may lawfully regulate the status of its own citizens, even to “bridge a gap” in someone’s citizenship record.⁴⁵⁶

446. *Vote To Seat*, *supra* note 391.

447. *Wins in House Fight*, *supra* note 265.

448. *Mrs. Owen’s Victory*, *supra* note 393.

449. *Ruth Bryan Owen Wins Congress Seat*, ATL. CONST., Mar. 23, 1930, at 6A.

450. *Mrs. Owen Wins*, *supra* note 392.

451. 72 CONG. REC. 10193 (1930).

452. *Id.* at 10196. Owen missed the denouement—she was still in Florida, celebrating her recent renomination. *Mrs. Owen Wins Right to Seat*, SARASOTA HER.-TRIB., June 6, 1930, at 1.

453. 72 CONG. REC. 10193, 10196 (1930) (emphasis added). In a speech written before (but delivered after) the full-House vote, Congressman Eslick ten times called Owen the “sitting Member.” *Id.* at 10198-99, 10202.

454. See Section III.B.3 *supra*. As one editor mused, “To find not one person in a republican house to vote for a republican against a democrat is quite some compliment to the democrat.” KEY WEST CITIZEN, June 9, 1930, at 2.

455. See *supra* notes 251-252 and accompanying text.

456. 72 CONG. REC. 10195 (1930) (statement of Rep. Beedy).

Legislating “in contravention of existing fact”⁴⁵⁷ was nothing new. In 1867, for example, Congress declared that enlistees who had deserted the Army and Navy after April 19, 1865, should be legally regarded as never having done so.⁴⁵⁸ That law was “but one of many of a similar nature,” and “no one has ever been heard to question its constitutionality.”⁴⁵⁹ Section 4 of the Cable Act was therefore plainly constitutional; properly interpreted, it made Owen whole.

Congressman Newhall expanded on the majority’s position in a speech given *after* the House formally seated Owen. He quoted Chief Justice Marshall’s *Dartmouth College v. Woodward*⁴⁶⁰ opinion to demonstrate the impropriety of reframing the Framers’ charter to accommodate unforeseen conditions. “The case being within the words of the rule,” Marshall had written, it “must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument,” to warrant making an exception.⁴⁶¹ The “words of the rule” called for seven years, not seven immediately prior years. As Newhall read the Convention debates, this provision was meant to ensure that Representatives possessed “a background of Americanism.”⁴⁶² Owen epitomized these qualities, so there was nothing “obviously absurd” about the majority’s application. Case closed.

Congressman Eslick of the minority responded with a pragmatic case for the “immediately preceding” position. Change had come “thick and fast” in recent years, both in public opinion and in the challenges congressmen confronted.⁴⁶³ Deep knowledge of the Fathers’ governmental machinery just wasn’t enough. Today’s lawmakers “must know the thoughts, the desires, and the heartbeat of the present age—not a decade or decades ago.”⁴⁶⁴ According to the majority, anyone born and raised in America would be eternally eligible to the House after turning seven.⁴⁶⁵ Some scoundrel might junk his Americanism for the seductive “doctrine of the reds.”⁴⁶⁶ When the apostles of Bolshevism came knocking, Eslick warned, “this case will be a precedent.”⁴⁶⁷ Cornered congressmen might

457. *Id.*

458. An Act for the Relief of Certain Soldiers and Sailors Therein Designated, ch. 28, § 1, 15 Stat. 14 (1867). This statute also eliminated a soldier or sailor’s disabilities previously “incurred by the loss of his citizenship in consequence of his desertion.” *Id.*

459. 72 CONG. REC. 10195 (1930) (statement of Rep. Beedy).

460. 17 U.S. (4 Wheat.) 518 (1819).

461. *Id.* at 644-45 (quoted (imperfectly) in 72 CONG. REC. 10196 (1930) (statement of Rep. Newhall)).

462. 72 CONG. REC. 10197 (1930) (statement of Rep. Newhall).

463. *Id.* at 10199 (statement of Rep. Eslick).

464. *Id.*

465. *See id.* (hypothesizing a candidate who lived his first seven years in America, left the country, and immigrated back after having resided in his ancestral homeland for “40 or 50 years”).

466. *Id.*

467. *Id.*

then concoct some other exclusionary pretext, but the House would not be able to deny admission to these ideological pestilences on citizenship grounds. The precedent “the majority has written in this case . . . will later rise to plague the House.”⁴⁶⁸

But what legal principle did *Lawson v. Owen* stand for? The entire 435-person House of Representatives, not any supporting committee, is authorized to judge Members’ qualifications. Five congressmen thought citizenship periods could be cumulative; four disagreed.⁴⁶⁹ The other 426 members (98 percent) left no trace of where (if anywhere) they stood, because the House imputed none of the Committee’s constitutional reasoning to itself. It merely certified that Owen was “duly elected” and “entitled” to sit.⁴⁷⁰ When endorsing or rejecting Elections Committee resolutions in disputed-citizenship cases commits either chamber to a clear legal position, up-or-down votes have determinable precedential content.⁴⁷¹ But there were many ways to defend Owen’s eligibility.⁴⁷² By declining to choose among them, the House afforded later generations creative room to characterize the legal lessons of its barebones disposition.

IV. WAS *LAWSON V. OWEN* UNPRECEDENTED?

Lawson’s legal team discovered only one previous citizenship contest, and it availed nothing.⁴⁷³ “There is no precedent in either House of Congress,” Lawson averred in his written brief.⁴⁷⁴ As far as anyone knew, this was correct. “The case is one for which there is no precedent,” Congressman Newhall declared after the contest had ended.⁴⁷⁵ Congressman Eslick, who interpreted the seven-year clause differently, at least agreed that neither chamber had ever considered the question: “I have been unable to find, and so far as I know, there is not a precedent throwing real light upon the issues involved in this contest. It is a new

468. *Id.*

469. *Id.* at 10198.

470. *Id.* at 10193, 10196.

471. For example, West Virginians elected Rush Holt to the Senate in November 1934, fully seven months before his thirtieth birthday. He stalled and presented his credentials after turning thirty. A Senate committee concluded that the “date on which a Senator-elect presents himself to the Senate, is sworn, and takes his seat, should be determinative of the age qualifications under the Constitution.” RICHARD D. HUPMAN, SENATE ELECTION, EXPULSION AND CENSURE CASES FROM 1789 TO 1960, at 135 (1962). The full Senate declared Holt eligible. JOSH CHAFETZ, DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 180 (2007). In doing so, it necessarily adopted the committee’s construction of the Qualifications Clause’s age provision, since Holt was eligible to serve only if the above-quoted statement is true.

472. See Section I.E *supra*.

473. Bainum told the Elections Committee, “There is one application that has been made of this limitation provision”—the Senate’s exclusion of James Shields in 1849. The Irish-born Shields had unquestionably not been a citizen for nine years when he presented himself for admission. *Owen Hearing, supra* note 11, at 34. Bainum also missed the Senate’s exclusion of Albert Gallatin in 1794. See Salamanca & Keller, *supra* note 23, at 278-83.

474. *Lawson Brief, supra* note 231, at 15.

475. 72 CONG. REC. 10196 (1930) (statement of Rep. Newhall).

question.”⁴⁷⁶

If they were searching for a written report in which a House or Senate committee had endorsed either the “cumulative” or “immediately preceding” view, they wouldn’t have found one. But this battle had been fought twice before—in 1845, when congressmen debated whether recent citizens of the Republic of Texas would be constitutionally eligible to serve in Congress; and in 1870, when senators sparred over whether to accord *Dred Scott*—now a constitutional laughingstock—any additive weight in calculating Hiram Revels’s technical fitness for office. These deliberations offered alluring legalistic arguments in support of each contestant’s position. But the Revels episode in particular illustrated why *Lawson v. Owen* ought to have been no riddle at all.

A. The Annexation of Texas: Hidden in Plain Sight

On December 29, 1845, the House and Senate jointly resolved that the Republic of Texas “shall be one . . . of the United States of America, and admitted into the Union on an equal footing with the original states.”⁴⁷⁷ Equal footing meant full representation in Congress. Would the State of Texas, never having been the Texas Territory, be able to elect a constitutionally eligible delegation right away? That depended on how one read the Qualifications Clauses. Texas had very recently been “a sovereign nation, independent of us, owing us no allegiance, and governed by her own laws.”⁴⁷⁸ Most of its political stars had accumulated plenty of American-citizenship credit, but they had sworn mandatory oaths of allegiance to Mexico after migrating southward.⁴⁷⁹ For the first time in American history, the problem of inconsecutive citizenship periods bedeviled conventional thinking about a concrete, numerical constitutional provision.

Opponents of slavery heaved every imaginable prudential and constitutional protest at annexationists. Early in the debates, Congressman John P. Kennedy crafted an elegantly deductive objection: if Texas were immediately admitted as a state, no one could represent it in Congress, since the Qualifications Clauses require seven and nine years’ citizenship.⁴⁸⁰ But this would create the anomaly of a state “bound to obey all our laws, yet having no voice in the making of them.”⁴⁸¹ Kennedy’s line of argument assumed that only seven or nine *immediately preceding* years of citizenship satisfy the constitutional requirement. Congressman

476. *Id.* at 10198 (statement of Rep. Eslick).

477. Joint Resolution for the Admission of the State of Texas into the Union, J. Res. 1, 29th Cong., 1st Sess., 9 Stat. 108 (1845).

478. CONG. GLOBE, 29th Cong., 1st Sess. 89 (1845) (statement of Rep. Huntington).

479. RICHARD KLUGER, SEIZING DESTINY: THE RELENTLESS EXPANSION OF AMERICAN TERRITORY 358 (2007).

480. CONG. GLOBE, 28th Cong., 2d Sess. 126 (1845) (statement of Rep. Kennedy).

481. *Id.* app. at 298.

Garrett Davis made this assumption explicit, panning the “cumulative” view as a “quibble unworthy of a county court lawyer.”⁴⁸²

At least two congressmen disagreed, arguing that Texan transplants were fully qualified under the Constitution as long as they had been American citizens past their seventh and ninth birthdays.⁴⁸³ Yet most annexationist responses implicitly conceded the “immediately preceding” interpretation’s correctness—and not just for the sake of argument. For example, several annexationists claimed that Texas could simply elect candidates who had been U.S. citizens (citizens of other states) at the precise moment of annexation.⁴⁸⁴ But if this “borrowing” theory were a sufficient answer, retorted annexation’s opponents, why did Congress admit Louisiana to statehood *nine years to the day* after the cession treaty had been signed in 1803?⁴⁸⁵

Some friends of annexation maintained that the phrase “Citizen of the United States” refers to a citizen of any state presently within the Union.⁴⁸⁶ Therefore, the entire time that American emigrants had been citizens of the Republic of Texas could count toward their congressional eligibility.⁴⁸⁷ Some in the pro-annexation bloc even contended that Americans who had taken up allegiance to the Republic of Texas hadn’t actually expatriated themselves; they had just “placed themselves beyond the operation of our laws.”⁴⁸⁸ Upon annexation, their American citizenship—merely suspended—would reactivate, just as if they had never left the country.⁴⁸⁹ Much like Section 4 of the Cable Act, these outlier arguments permitted congressmen to avoid the Qualifications Clause problem altogether if they wanted to. Such theories thus threatened to distort the precedential signal of Congress’s decision to seat, or exclude, Texas’s first senators and representatives.

Congress chose the former path. Texas sent two senators to Washington

482. *Id.* at 340 (statement of Rep. Davis).

483. *See id.* app. at 109 (statement of Rep. Tibbats) (“[T]he constitution did not require that the citizenship should be *immediately preceding the choice or election of senators and representatives*; and there was no rule of construction by which the gentleman would be authorized to interpolate such words in the constitution.”); *id.* app. at 306 (statement of Rep. Dromgoole) (“[I]n reference to the inhabitants of Texas, it is notorious that they have emigrated from the United States, and most of them *have been* seven and nine years citizens of the United States. The objection would not apply to any one who *had been* the seven or nine years a citizen of the United States; and, at the time of election, an *inhabitant* of Texas.”).

484. *Id.* at 177 (statement of Rep. Cobb); *id.* app. at 109 (statement of Rep. Tibbats); *id.* app. at 145 (statement of Rep. Rhett); *id.* app. at 409 (statement of Sen. Henderson).

485. *Id.* at 137 (statement of Rep. Davis); *id.* app. at 298 (statement of Rep. Kennedy); *id.* app. at 350 (statement of Rep. Barnard).

486. *Id.* at 190 (statement of Rep. Stephens); *id.* app. at 291 (statement of Rep. Daniel); *id.* app. at 306 (statement of Rep. Dromgoole).

487. Earl Maltz, *The Constitution and the Annexation of Texas*, 23 CONST. COMMENT. 381, 390 (2006).

488. CONG. GLOBE, 28th Cong., 2d Sess. 187 (1845) (statement of Rep. Dromgoole); *see also id.* app. at 291 (statement of Rep. Daniel) (articulating a presumption against self-expatriation).

489. *Id.* at 177 (statement of Rep. Cobb); *id.* at 187 (statement of Rep. Dromgoole).

by December 1846⁴⁹⁰ and four representatives by December 1851.⁴⁹¹ Each of these six had helped govern a foreign country fewer than seven or nine years ago,⁴⁹² yet Congress seated them all.⁴⁹³ The House and Senate probably appreciated the constitutional principles at stake, given how thoroughly they had debated the matter.⁴⁹⁴ Texas's annexation therefore weighs strongly in favor of the "cumulative" theory of the Qualifications Clauses' citizenship requirements, as do the explicit (if infrequent) assertions that American-born Texan colonists were all qualified to serve by virtue of seven and nine earlier years of citizenship.⁴⁹⁵ But the "cumulative" theory suffered explicit denunciation,⁴⁹⁶ and annexationists rarely invoked it as a justification for seating Texans in Congress (if they addressed the eligibility issue at all). And if some congressmen actually believed that Texan settlers hadn't lost their American citizenship by swearing allegiance to a foreign country or had always been U.S. citizens inasmuch as Texas was now a state, seating them was entirely consistent with the "immediately preceding" theory.

But everyone missed these points in 1929-30. The annexation of Texas was entirely absent from the parties' written briefs and oral presentations, Elections Committee members' questioning, the Committee's written report, and public discussion of *Lawson v. Owen*. That the Committee's (and the competitors') "considerable study"⁴⁹⁷ yielded no trace of this monumental legislative exchange suggests that congressional constitutional interpretation was vastly understudied in the early twentieth century. Unfortunately, the Elections Committee also overlooked the historic 1870 Senate debate concerning Hiram Revels's eligibility. It might have taught them everything they needed to know.

490. Thomas Jefferson Rusk served from 1846-57, and Sam Houston from 1846-59. BEN R. GUTTERY, *REPRESENTING TEXAS: A COMPREHENSIVE HISTORY OF U.S. AND CONFEDERATE SENATORS AND REPRESENTATIVES FROM TEXAS* 167 (2007).

491. Timothy Pilsbury served from 1846-49, David Kaufman from 1846-51, Volney Howard from 1849-53, and Richardson Scurrey from 1851-53. HUBERT HOWE BANCROFT, *2 HISTORY OF THE NORTH MEXICAN STATES AND TEXAS, 1801-1889*, at 449 (1889).

492. See *id.* at 84 (Houston and Howard); *id.* at 93 (Kaufman); *id.* at 122 (Pilsbury); *id.* at 131 (Rusk); *id.* at 136 (Scurrey).

493. I have been unable to locate the precise moment of Congressman Howard's swearing-in in the *Congressional Globe*, but no one uttered a peep about constitutional qualifications when Kaufman, Scurrey, Rusk, Pilsbury, and Houston were seated. See CONG. GLOBE, 29th Cong., 1st Sess. 553 (1846) (Rusk); *id.* at 566 (Houston); *id.* at 897 (Kaufman); *id.* at 952 (Pilsbury); CONG. GLOBE, 32d Cong., 1st Sess. 5 (1851) (Scurrey).

494. See Maltz, *supra* note 487, at 399 ("The depth and sophistication of the constitutional analysis was often extremely impressive.").

495. See *supra* note 483 and accompanying text.

496. See *supra* note 482 and accompanying text. Congressman Joshua Giddings decried the seating of Texas's Members as a naked constitutional violation. See CONG. GLOBE, 29th Cong., 1st Sess. app. at 828 (1846) (statement of Rep. Giddings) ("Here are members now present who, six months since, were citizens of a foreign nation—sworn to support a foreign Government.").

497. *No Decision Reached in Mrs. Owen's Case*, *supra* note 386.

B. Echoes of Revels: The Expatriation Act as Dred Scott

On January 20, 1870, the Mississippi legislature elected Hiram Revels to the U.S. Senate as a Republican.⁴⁹⁸ Revels was black, the first nonwhite congressman-elect in U.S. history.⁴⁹⁹ Democrats objected to his seating as soon as Senator Henry Wilson presented Revels's credentials.⁵⁰⁰ The incident quickly escalated into a controversy over Revels's constitutional eligibility. In 1857, *Dred Scott*—the “adjudicated law of the land”⁵⁰¹—had held that blacks could never be U.S. citizens.⁵⁰² The Fourteenth Amendment was ratified only in 1868.⁵⁰³ On one view, it didn't purport to confer citizenship retroactively, instead declaring that “[a]ll persons born or naturalized in the United States . . . are citizens of the United States.”⁵⁰⁴ Republicans must have understood *Dred Scott* to have been authoritative until then, or else the Fourteenth Amendment and the cognate Civil Rights Act of 1866 were redundant—a “ridiculousity,” a “preposterosity.”⁵⁰⁵ The date was now February 23, 1870. Republicans should acknowledge that a court wouldn't—couldn't—have declared Revels a U.S. citizen when General Lee surrendered his troops. Due regard for constitutional scruples meant tough luck for Revels.

There was an easy way out, one with tremendous facial appeal. To put it mildly, Republicans believed that *Dred Scott* departed from the correct understanding of national citizenship to inflict previously nonexistent disabilities on African-Americans. Under this theory, the free-born Revels had been a citizen for the first thirty-five years of his life.⁵⁰⁶ Why not claim that Revels had “been nine Years a Citizen” because he was once a citizen for thirty-five? But not a single Republican senator argued from “cumulative” premises.⁵⁰⁷ To be sure, Republicans “wanted the admission of Revels to stand for a set of larger principles”⁵⁰⁸—specifically, that it “overrul[ed] the *Dred Scott* decision squarely.”⁵⁰⁹ But surely a group that generated a gloriously prosaic argument about fractional blood quanta⁵¹⁰

498. MATTHEW WASNIEWSKI, *BLACK AMERICANS IN CONGRESS, 1870-2007*, at 56 (2012).

499. *Id.* at 54.

500. CONG. GLOBE, 41st Cong., 2d Sess. 1503 (1870).

501. *Id.* at 1557 (statement of Sen. Vickers).

502. *Dred Scott v. Sandford*, 50 U.S. (19 How.) 393, 407 (1857).

503. Primus, *supra* note 19, at 1682.

504. U.S. CONST. amend. XIV. After all, “all laws are prospective unless by explicit words they are made retroactive.” CONG. GLOBE, 41st Cong., 2d Sess. 1558 (1870) (statement of Sen. Vickers).

505. CONG. GLOBE, 41st Cong., 2d Sess. 1560 (1870) (statement of Sen. Vickers). In all lexical fairness, Vickers was quoting Republican Senators Charles Sumner and Carl Schurz, respectively.

506. Primus, *supra* note 19, at 1705.

507. *Id.* at 1704-05.

508. *Id.* at 1698.

509. CONG. GLOBE, 41st Cong., 2d Sess. 1543 (1870) (statement of Sen. Stewart).

510. The plea in abatement in *Dred Scott* had stated that Scott was “of pure African blood.” *Id.* (statement of Sen. Williams). At a glance, it sure seemed that Revels was “a person with a large preponderance of white blood in his veins.” *Id.* The applicable legal decisions, as Senator Williams read them, held that “persons in whom the white blood preponderates are not persons of color” and so have always been citizens. *Id.*

would have pushed for Revels's eligibility under the clear text of the Qualifications Clause if any of them had bought the "cumulative" argument. Their silence, I believe, counts as weighty evidence that a Senate majority rejected Owen's interpretation of the Clause in 1870. If only Lawson had known.

But almost all Republicans simply refused to play the numbers game. These Senators sat in judgment of *Dred Scott*, not Revels's eligibility. Taney's vile verdict had "sunk into oblivion . . . into eternal derision and contempt."⁵¹¹ This "outrage upon the Constitution" had been "repealed by the mightiest uprising which the world has ever witnessed."⁵¹² "Born a putrid corpse," *Dred Scott* "became at once a stench in the nostrils . . . to be remembered only as a warning and a shame."⁵¹³ And yet Democrats coolly cited it to exclude Revels, profaning the Declaration's solemn ode to human equality!⁵¹⁴

Republican after Republican vowed "never again to hear [*Dred Scott*] quoted as an authority."⁵¹⁵ This entailed consciously denying Taney's "reign of wrong" any continuing validity in qualifications mathematics.⁵¹⁶ Instead, Republicans would reason from the enlightened integers of Reconstruction's "reign of right and righteousness."⁵¹⁷ Senator James Nye preferred to consult "the brighter and more attractive page of modern progress" than the "cruelties and enormities" of the Taney era.⁵¹⁸ "[I]n this blaze of light and constitutional reform," no court could formally acknowledge the old regime's parchment iniquities.⁵¹⁹ Tone-deaf Democrats failed to appreciate "the music of the hour."⁵²⁰

Senator Jacob Howard, an architect of the Fourteenth Amendment, stripped the subject of any nonsense: "Shall we stand by our own legislation . . . or shall we adopt the principles of the *Dred Scott* decision?"⁵²¹ Instead of ennobling "those barbarizing enactments of other times," Senator Wilson savored "the living present and the advancing future."⁵²² Senator Frederick Sawyer also sickened of "defunct

511. *Id.* at 1542 (statement of Sen. Howard).

512. *Id.* at 1513 (statement of Sen. Nye).

513. *Id.* at 1566 (statement of Sen. Sumner); *see also id.* at 1513 (statement of Sen. Nye) (claiming that the People had jettisoned *Dred Scott* "as the lion shakes the dew from his hair").

514. *See id.* at 1566 ("All men are created equal, says the great Declaration. . . . To-day we make the Declaration a reality.") (statement of Sen. Sumner).

515. *Id.* at 1513 (statement of Sen. Nye).

516. *Id.*

517. *Id.*

518. *Id.*; *see id.* at 1514 ("Why hitch on to the stubbing-post of the past, and dwell where Taney dwelt?").

519. *Id.*; *see id.* (claiming that *Dred Scott* "is beyond the power of human skill to revive it It is dead").

520. *Id.*

521. *Id.* at 1543 (statement of Sen. Howard).

522. *Id.* at 1561-62 (statement of Sen. Wilson); *see id.* at 1566 (statement of Sen. Sumner) (refusing to suffer any "backward step").

dogmas.”⁵²³ How could oath-swearing senators “go back and reason upon the principles of the *Dred Scott* decision”?⁵²⁴ Democrats must have been reading “the Constitution of nine years ago,” not “the Constitution under which we live this day.”⁵²⁵

Lawson v. Owen presented an eerily similar problem: a legal authority the sovereign People had rendered unconstitutional,⁵²⁶ but that still threatened to pollute post-reformation progress. Typically, “constitutional rules are formally entrenched against ordinary means of legal change.”⁵²⁷ But in an ironic inversion, the Expatriation Act—a product of ordinary lawmaking—found itself entrenched against new, true constitutional norms, since individual expatriations have constitutional implications that normally dissipate only with time.⁵²⁸ In 1870, Republicans hacked *Dred Scott* to pieces and chose to pretend that it had never disgraced the U.S. Reports. By 1930, the Expatriation Act had also sunk into the unforgiving anticanon of congressional constitutionalism.⁵²⁹ Social movements seeking women’s equality had apparently changed the Constitution even more than the Nineteenth Amendment’s text indicated. Why entertain Lawson’s backward-looking challenge?

In 1930, not a single person—not even Owen—suggested that the Expatriation Act could be wholly ignored. *Everyone* “[went] into that recondite inquiry as to the political status of” marital expatriates under the 1907 law.⁵³⁰ After all, the very chamber deciding Owen’s case had passed the Expatriation Act by a nearly nine-to-one margin.⁵³¹ The Supreme Court had overwhelmingly upheld the law’s constitutionality within recent memory.⁵³² Universal female suffrage was a monumental achievement, of course, but it was hardly their grandfathers’ blood-soaked battle for the soul of America.

Still, Cable Act supporters interpreted the Nineteenth Amendment to require “equal rights with reference to citizenship.”⁵³³ Never again would

523. *Id.* at 1564 (statement of Sen. Sawyer); *see id.* (arguing that Americans had “had enough of this sort of thing” after the illuminating “fires of war of revolution”).

524. *Id.*; *see id.* (“It is too late to talk about the *Dred Scott* decision.”).

525. *Id.* (statement of Sen. Drake).

526. *See, e.g., infra* note 582 and accompanying text.

527. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1819 (2012).

528. Again, I assume the correctness of the “immediately preceding” view. The above scenario represents an unfortunate example of what Professor Sachs calls “constitutional backdrops”—nonconstitutional law insulated from ordinary methods of legal change. *See generally* Sachs, *supra* note 527.

529. *See* Section V.A *infra*.

530. CONG. GLOBE, 41st Cong., 2d Sess. 1542 (1870) (statement of Sen. Howard) (refusing to reason from antebellum assumptions in pondering Revels’s eligibility).

531. 41 CONG. REC. 1467 (1907). The relevant bill had been “unanimously reported from the Committee on Foreign Affairs at the request of the Department of State.” *Id.* at 1464 (statement of Rep. Perkins).

532. *Mackenzie v. Hare*, 239 U.S. 299, 312 (1915). *Mackenzie* was unanimous on the merits; Justice McReynolds penned an enigmatic one-sentence dissent asserting that the Court lacked jurisdiction. *Id.* at 312 (McReynolds, J., dissenting).

533. 62 CONG. REC. 9046 (1922) (statement of Rep. Cable).

“[p]articipation in our Government” be regulated “solely by a marriage ceremony.”⁵³⁴ Like *Dred Scott*, the Expatriation Act was now “as archaic as the doctrine of ordeal by fire,”⁵³⁵ meaning that *Mackenzie v. Hare* could no longer withstand scrutiny.⁵³⁶ Wouldn’t the House betray the principles of 1920 by giving continuing effect to the principles of 1907?⁵³⁷ Why dignify the “defunct dogmas”⁵³⁸ of an extinct patriarchy? Perhaps Owen’s Congress saw no other principled option. I’ve uncovered no evidence that anyone, until now, has connected the Revels and Owen episodes in this way, so the Elections Committee likely had no conception of refusing to grandfather the lingering effects of a now-unconstitutional legal authority. As charmingly esoteric as Professor Primus’s rediscovery of Revels might seem at first blush, it held the key to answering one of the strangest riddles a legislative body has ever faced.

V. WHAT CAN *LAWSON V. OWEN* TEACH US?

The next time an erstwhile expatriate seeks admission to Congress fewer than seven or nine years after her naturalization, Owen’s case will be a trove of insights. (We shouldn’t hold our breaths.⁵³⁹) But more importantly, close study of *Lawson v. Owen* unlocks new evidence that can inform three of the debates most central to constitutional law and theory.

A. *The Nineteenth Amendment and Equal Protection*

Today, the Supreme Court treats the Nineteenth Amendment as a straightforward rule—no level of government may deny women, as women, the right to vote.⁵⁴⁰ An epochal shift in the foundations of

534. *Id.*

535. *Id.* at 9058 (statement of Rep. Rogers).

536. See BRECKINRIDGE, *supra* note 75, at ix (“[T]he Nineteenth Amendment made a continuation of the old principle impossible.”). It would seem, then, that the Eleventh, Fourteenth, Sixteenth, and Twenty-sixth Amendments are not the only ones to have overruled a Supreme Court decision. For one expression of the conventional wisdom, see Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1230 (1984) (“Constitutional amendments have overturned Supreme Court decisions on only four occasions.”). In fairness, the Nineteenth Amendment was not principally designed to disturb a specific judicial precedent. But it did so just as effectively as the four listed above.

537. James Carson (Owen’s lawyer) had argued as early as 1926 that the Nineteenth Amendment expressed the People’s policy as to Owen’s very case: “If the house should enforce any other rule it would be enforcing a law which has since been repealed on the ground of justice. It would be no less absurd than for a court to convict in a criminal case a man for violating a statute which has been repealed.” Carson, *supra* note 149; see also *Mrs. Owen’s Victory*, *supra* note 393 (“The effect of that untenable arrangement under which an American woman became an Englishwoman through a marriage contract should not be perpetuated, now that the measure has been supplanted.”).

538. CONG. GLOBE, 41st Cong., 2d Sess. 1564 (1870) (statement of Sen. Sawyer).

539. See 72 CONG. REC. 10196 (1930) (statement of Rep. Newhall) (“[I]t is only remotely possible that the decision in any future case will be based upon it as a precedent.”); *id.* at 10198 (statement of Rep. Eslick) (“It is . . . probably a question that may never arise again.”).

540. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953 (2002) (observing that the Amendment is now

American governance seems to have left only this “systemically unremarkable, normatively insignificant, fragment of constitutional text.”⁵⁴¹

It was not always so. Professor Reva Siegel has persuasively argued that when Americans ratified the Nineteenth Amendment, they consciously elevated women to equal-citizenship stature by repudiating an entire way of thinking that had justified their disfranchisement.⁵⁴² In *Adkins v. Children’s Hospital*⁵⁴³—decided just three years after the Amendment’s ratification—the Court invalidated a minimum-wage law on Fifth and Nineteenth Amendment grounds for drawing distinctions on the basis of sex.⁵⁴⁴ *Adkins* has since been discredited for exalting the so-called “liberty of contract,” but modern distaste for that doctrine needn’t negate an entirely valid historical observation—that in 1923, the Supreme Court “rea[d] the Nineteenth Amendment as conferring equality on women . . . with significance for other bodies of constitutional doctrine.”⁵⁴⁵

In an important article,⁵⁴⁶ Professor Steven Calabresi and Julia Rickert built on Siegel’s synthetic approach to the Fourteenth and Nineteenth Amendments in arguing that state-sanctioned sex discrimination became unconstitutional after the latter was ratified. They claim that the Equal Protection Clause’s original public meaning forbids discrimination that creates a system of caste,⁵⁴⁷ and that sex discrimination came to be seen as a form of caste by 1920.⁵⁴⁸ Since an assurance of political rights necessarily implies full civil rights,⁵⁴⁹ a constitutionally enfranchised group may not be denied civil rights through reference to the very traits by

“interpreted as a nondiscrimination rule governing voting with no bearing on women’s citizenship outside the context of the franchise”); see also Jill Elaine Hasday, *Women’s Exclusion from the Constitutional Canon*, 2013 U. ILL. L. REV. 1715, 1722-23 (“[C]ourts settled relatively quickly on the view that the Nineteenth Amendment was simply about women’s suffrage.”). As the second Justice Harlan put it, “The Nineteenth Amendment merely gives the vote to women.” *Gray v. Sanders*, 372 U.S. 368, 386 (1963) (Harlan, J., dissenting).

541. Siegel, *supra* note 540, at 1012; see also Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 402 (1985) (grouping the Nineteenth in a list of amendments “that are rarely, if ever, taken to be the stuff of constitutional adjudication or constitutional theory”).

542. See generally Siegel, *supra* note 540.

543. 261 U.S. 525 (1923).

544. *Id.* at 553. The Court took judicial notice of the “great—not to say revolutionary—changes which have taken place since [*Muller v. Oregon* (1908)] in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment.” *Id.* It then cited the “present day trend . . . by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.” *Id.*

545. Siegel, *supra* note 540, at 1015; see also *United States v. Hinson*, 3 F.2d 200, 200 (S.D. Fla. 1925) (holding that “since the adoption of the Nineteenth Amendment,” the common-law doctrine of coverture “has no application” as a matter of constitutional law); cf. *Hollander v. Abrams*, 132 A. 224, 229 (N.J. Ch. 1926) (“[S]ince the Nineteenth Amendment to the federal Constitution, practically all of the disabilities of women, both married and single, have been removed [by legislation], so that to-day she has practically all the rights and privileges of the male citizen.”).

546. Calabresi & Rickert, *supra* note 31.

547. *Id.* at 4.

548. *Id.* at 9.

549. See *id.* at 67 (“Political rights are the apex of the rights hierarchy with civil rights at the base.”).

which voting rights are protected.⁵⁵⁰ Therefore, “fidelity to the original public meaning of the Fourteenth Amendment has, since 1920, led inexorably to the conclusion that the Fourteenth Amendment prohibits sex discrimination.”⁵⁵¹ Under this theory, the Nineteenth Amendment finished the work of John Bingham and Jacob Howard, “mak[ing] women the equals of men under the law.”⁵⁵²

I take no position on this conclusion’s correctness or the methodology employed to reach it. I wish only to note that, to the extent that the widely shared understandings of Owen’s generation may reflect actual constitutional meaning,⁵⁵³ Owen’s struggle provides powerful evidence—the most direct historical evidence yet discovered—that the Nineteenth Amendment made women not just full and equal voters, but “the equals of men under the law.”⁵⁵⁴ Justice Ginsburg’s pathbreaking successes as a litigator were *not* “the first time in United States history [when] it became possible to urge successfully, before legislatures and courts, the equal-citizenship stature of women and men as a fundamental constitutional principle.”⁵⁵⁵ Owen did just that—and to a Congress of men eager to embrace it.

Two years after the Nineteenth Amendment’s ratification, Congress explicitly proscribed sex discrimination in the field of naturalization.⁵⁵⁶ Several congressmen championed the Cable Act as an inexorable outgrowth of the Amendment’s commitment to women’s equal citizenship.⁵⁵⁷ Far-flung print commentary on *Lawson v. Owen* suggests that such legislative measures weren’t simply products of political

550. *Id.* at 85; see also Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J. L. & PUB. POL’Y 465, 471 (1995) (“[The Nineteenth Amendment] can be understood as establishing a kind of *a fortiori* argument: if women have equal political rights, *a fortiori* they should have equal civil rights.”). Eric Fish astutely notes that the Twenty-sixth Amendment sits uneasily with this “*a fortiori*” theory of constitutional protection, but he proposes a “clarification theory” that justifies the former theory’s applicability to the Nineteenth. See generally Eric S. Fish, Response, *Originalism, Sex Discrimination, and Age Discrimination*, 91 TEX. L. REV. SEE ALSO 1 (2012). Section 1 of the Twenty-sixth Amendment reads, “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.” U.S. CONST. amend. XXVI, § 1.

551. Calabresi & Rickert, *supra* note 31, at 47.

552. *Id.* at 15. Professor David Strauss, for one, seems to deny the validity of this synthetic approach in the sex-discrimination context: “[A] lot has happened since 1868. But as far as sex discrimination is concerned, not a lot has happened to the Constitution. The Nineteenth Amendment guaranteed women the right to vote, but that’s all. No amendment was ever adopted to guarantee other rights to women.” DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 13 (2010).

553. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (privileging “contemporaneous exposition[s] of the constitution”); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1811 (2013) (“[P]ost-ratification practice can frequently be indirect evidence of Founding-era thought. It is reflected light, to be sure, but light nonetheless.”).

554. Calabresi & Rickert, *supra* note 31, at 15.

555. Ruth Bader Ginsburg, *Ruth Bader Ginsburg’s Advice for Living*, N.Y. TIMES, Oct. 1, 2016, <http://www.nytimes.com/2016/10/02/opinion/sunday/ruth-bader-ginsburgs-advice-for-living.html>.

556. See Cable Act of 1922, ch. 411, § 1, 42 Stat. 1021 (1922) (“[T]he right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.”).

557. See *supra* notes 111-116 and accompanying text.

expediency. According to one newspaper, the Nineteenth Amendment “put wom[e]n on an individual citizenship basis.”⁵⁵⁸ “In these days of equality of the sexes,” another editorialist argued, Owen was right to argue that “[s]auce for the goose is sauce for the gander.”⁵⁵⁹ A *Washington Post* op-ed expressed the point as plainly as possible: the law invoked to exclude Owen deprived her of equal citizenship rights, “in clear violation of the nineteenth amendment.”⁵⁶⁰ “The only way that Congress could make this amendment fully effective,” the writer continued, would be “to remove all disabilities on account of sex.”⁵⁶¹ These understandings echoed sweeping assertions about the Nineteenth Amendment that had appeared in 1920s newspapers,⁵⁶² such as that by Congressman Edward E. Browne: “With the 19th amendment a part of our constitution it is an anomaly to deny to voting citizens subordinate rights on account of sex.”⁵⁶³ Calabresi and Rickert’s exact thesis, ninety years before.

Even Lawson joined the chorus. His written brief affirmed that the Cable Act “was caused by the ratification of the XIX Amendment.”⁵⁶⁴ Accordingly, the Act “harmonized the rights of citizenship of an American woman with an American man, placing them on an absolute equality.”⁵⁶⁵

558. *Objections to Seating*, *supra* note 146.

559. *Widow Fights*, *supra* note 368.

560. Leonidas W. Ellis, Op-Ed., *Says Ruth Bryan Owen Is Entitled to Seat in Congress Under Nineteenth Amendment*, WASH. POST, Feb. 14, 1930, at 6.

561. *Id.*

562. See, e.g., *A Patriotic Obligation*, EDGEFIELD ADVERTISER, Sept. 22, 1920, at 5 (claiming that the Nineteenth Amendment’s ratification “establish[ed] the full and equal citizenship of women”); J.C. Nagle, *We Women of Today*, THE EAGLE (Bryan, TX), Apr. 20, 1921, at 2 (“We women are equal citizens now.”); *Wisconsin Where Women Are People*, GULFPORT DAILY HER., Aug. 4, 1921, at 4 (arguing that the Nineteenth Amendment “intended to confer” “all the rights and privileges pertaining to sex equality” (quoting a Richmond newspaper)); *A Twentieth Amendment*, APPLETON POST CRESC., Oct. 8, 1921, at 4 (declaring that equality in the “rights, duties, functions and obligations of citizenship as between the two sexes are [sic] consequent upon the conferral of suffrage” (quoting a Lynchburg newspaper)); *Women and Equal Rights*, SCRANTON REP., Mar. 9, 1922, at 8 (“Unquestionably it was the intent of the nineteenth amendment to place women on a par with men as citizens.”); *Bowling Green Man Enters as Dry Candidate?*, SANDUSKY STAR JOURN. (OH), May 16, 1922, at 1, 13 (quoting a congressional candidate’s pledge to support such “laws as are necessary to afford to women full measure of the civil and political rights conferred by the nineteenth amendment” (emphasis added)); *Still Use Technicalities To Defeat Constitution*, SAN BERNADINO CNTY. SUN, Dec. 28, 1925, at 12 (“The purpose of the [Nineteenth Amendment] was to place women on an exact equality with men in all matters of civil rights and citizenship.”); *id.* (referring to the Nineteenth Amendment as “the equal rights amendment”); *Knighthood Flowers*, LIMA NEWS, May 19, 1927, at 6 (concluding that, by the Nineteenth Amendment, “Woman has gained her equality with man and as she stands in any court of the land, she must be prepared to take its findings under the same laws and the same codes that mete out justice to men”).

563. WAUKESHA DAILY FREEMAN (WA), Mar. 9, 1922, at 4; see *id.* (“[T]here certainly is no excuse or justification at the present time with the Nineteenth amendment in force for denying women the rights and privileges of men.”). A League of Women Voters representative made this same point immediately after Owen’s victory in 1930: “Women as well as men are now voters and should be entitled to all the responsibilities and obligations of citizenship as individuals without handicap by reason of sex.” Marie Elwell Onions, *Club Women Plan World Campaign To Aid Suffrage*, OAKLAND TRIB., Mar. 16, 1930, at 1S, 4S.

564. *Lawson Brief*, *supra* note 231, at 7.

565. This statement wasn’t entirely true, since the law contained lesser discriminations that women’s groups grudgingly accepted as the cost of legislative compromise. See BREDBENNER, *supra* note 24, at 87 (describing this “gradualist approach to legal equality”). But the above quote provides

Bainum reiterated this point at the Elections Committee hearing: the Cable Act had “equalize[d] the man and woman so far as citizenship is concerned,” and “she stands before the law now as a man stands.”⁵⁶⁶ “Had it not been for the nineteenth amendment,” Bainum surmised, Owen would never have appeared before the Elections Committee to argue for women’s equal treatment.⁵⁶⁷ *Lawson’s* attorney believed and spoke these things!

So did Owen. In fact, she framed *Lawson’s* challenge as a referendum on “the attitude of my Government toward its women citizens.”⁵⁶⁸ A generation before, Congress had confiscated her citizenship merely “because [she] was a woman.”⁵⁶⁹ *Lawson v. Owen* was a blessing, really, to the extent that it “ma[d]e more clear the laws which have dealt unjustly with women.”⁵⁷⁰ The House would soon author an enduring installment of constitutional history: would it “establish the dignity and individuality” of the American woman’s citizenship by confirming “her right to the same consideration at the hands of her Government as is enjoyed by the male citizen”?⁵⁷¹ Owen’s characterization stuck. The *Washington Post* considered her Elections Committee triumph “a victory for women who are seeking to remove legal discriminations against their sex.”⁵⁷²

As did the Elections Committee itself. In Report No. 968, the minority deliberately construed the Cable Act in light of its all-sufficient impetus, the Nineteenth Amendment. Their task—the law’s purpose—was “to right an injustice,” “to place [women] upon an equality with American men.”⁵⁷³ As Chairman Beedy saw it, this recent flurry of higher and ordinary lawmaking served “to place American-born women on the broad basis of enjoying all the essential rights of American citizenship.”⁵⁷⁴ Beedy fully embraced “the modern trend to give to the American woman the fullest enjoyment of those rights which are incident to American citizenship irrespective of sex.”⁵⁷⁵ (So did his political party, in its 1928 platform: “The Republican Party, which from the first has sought to bring this development about, accepts whole-heartedly equality on the part of women.”⁵⁷⁶)

For Congressman Newhall of the majority, the Nineteenth Amendment

insight into *Lawson’s* understanding of the Nineteenth Amendment, and thus the bipartisan support a more expansive reading of that Amendment once enjoyed.

566. *Owen Hearing*, *supra* note 11, at 32.

567. *Id.* at 40.

568. *Id.* at 61.

569. *Id.* at 55.

570. *Id.* at 59.

571. *Id.* at 61.

572. *Mrs. Owen’s Victory*, *supra* note 393.

573. *Owen Report*, *supra* note 234, at 7.

574. 72 CONG. REC. 10195 (1930) (statement of Rep. Beedy).

575. *Id.* at 10196.

576. *Id.* at 9317.

“made an equal citizenship status” for women.⁵⁷⁷ “There had been discrimination against woman,” but “now clothed in citizenship she possess[e] every right of man.”⁵⁷⁸ The Expatriation Act had inflicted an “archaic injustice”;⁵⁷⁹ now, the Cable Act “makes woman man’s equal.”⁵⁸⁰ The former’s constitutionality had been “upheld on the basis of [a] legal fiction.”⁵⁸¹ But after the Nineteenth Amendment, the Expatriation Act “*would now be unconstitutional.*”⁵⁸² This was no casual or cryptic remark of an indifferent politician. It was the fully considered, crystal-clear legal conclusion of a congressman who had pondered Owen’s case for months, and who cared enough about getting the constitutional reasoning right to deliver a lengthy speech for the *Congressional Record* after the House dismissed Lawson’s challenge.

Remarkably, *Lawson v. Owen* overlapped with a League of Nations conference that addressed member states’ nationality laws. The American delegates walked out in protest over the attendees’ refusal to abolish derivative citizenship for women.⁵⁸³ On May 21, 1930, two weeks before Owen was formally seated, the House debated whether to pass a resolution approving the delegates’ actions. Not a single participant denied the “absolute equality for both sexes in nationality to be our policy”;⁵⁸⁴ dissent emerged only over the wisdom of inserting the House into an international-law imbroglio. Owen told her doleful tale to the very House preparing to judge her qualifications.⁵⁸⁵ Minutes later, Republican Congressman Albert Johnson, reactionary in other respects,⁵⁸⁶ remarked that “each and every one of us here is firmly of the belief that every woman in the United States should have every right that every man in the United States has—it is our policy.”⁵⁸⁷

In short, very soon after the Nineteenth Amendment’s ratification, “the same exposition” of women’s constitutional equality “was explicitly

577. *Id.* at 10200 (statement of Rep. Newhall).

578. *Id.* at 10200-01.

579. *Id.* at 10196.

580. *Id.* at 10201.

581. *Id.* at 10196.

582. *Id.* (emphasis added); *see id.* at 10201 (observing that *Mackenzie v. Hare* “was before the nineteenth amendment and the passage of the Cable Act. If this question were presented now and under existing law, I think the judgment of the court would be the reverse”). One might instead conclude that the Nineteenth Amendment rendered the Expatriation Act unconstitutional merely as to new foreign marriages, because the Act had deprived certain women (Americans marrying foreigners) of the right to vote on the basis of their sex. Clearly, Newhall took a far more sweeping view of the Nineteenth Amendment.

583. *Id.* at 9317; *see id.* (“[W]e believe in equality in nationality without distinction as to sex.”) (statement of Rep. Fish).

584. *Id.* (statement of Rep. Fish).

585. *See id.* (“Because of that recent experience of my own, the nationality laws of our country are a matter of deep personal concern.”) (statement of Rep. Owen).

586. Johnson was the most vocal nativist in a Congress that had passed unprecedented immigration restrictions in the early 1920s. ROGER DANIELS & OTIS L. GRAHAM, *DEBATING AMERICAN IMMIGRATION, 1882-PRESENT*, 20 (2001).

587. 72 CONG. REC. 9320 (1930) (statement of Rep. Albert Johnson).

declared and admitted by the friends and by the opponents⁵⁸⁸ of Owen's political party. Yet, *Adkins* aside, not until the 1970s did the Supreme Court invoke equal-protection principles to invalidate laws discriminating on the basis of sex.⁵⁸⁹ In 1994, Justice Ginsburg reflected on this doctrinal path not taken, one marked so vividly by Owen's generation:

There was always a view that once the Nineteenth Amendment was passed and it made women full citizens, that was in effect an Equal Rights Amendment. . . . Many people thought you could put the Fourteenth Amendment together with the Nineteenth Amendment and that was essentially the Equal Rights Amendment. But it didn't happen.⁵⁹⁰

Calabresi and Rickert argue that it should have, that "the Court has missed the boat" on the Nineteenth Amendment.⁵⁹¹ The documentary history of *Lawson v. Owen* furnishes significant new evidence for their provocative counter-doctrinal claim. Owen's story also necessitates two related inquiries: When did her generation's shared assumption of women's constitutional equality begin to break down, receding into a decades-long dormancy? And why, given the Court's frequent resort to "constitutional history,"⁵⁹² has modern sex-discrimination doctrine developed so ahistorically?⁵⁹³ It might have instead taken root in the post-suffrage proposition that "every woman in the United States should have every right that every man in the United States has."⁵⁹⁴

Lawson v. Owen was the epitome of what might have been. It shows that constitutional change can be as transient as it is transformative when citizen activism loses its steam. What Ruth Bryan Owen's victory might have meant for equal-protection doctrine, and why she instead bequeathed no lasting constitutional legacy, deserve serious scholarly examination.

B. "Seven Years": Phantom Clarity and Lived Experience

In researching her own eligibility, Owen found "nothing equivocal . . . about the wording of the Constitution."⁵⁹⁵ The Elections

588. *Martin v. Hunter's Lessee*, 14 (1 Wheat.) U.S. 304, 351 (1816).

589. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

590. GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 46 (2006); see also Hasday, *supra* note 540, at 1722-23 ("The Court's sex discrimination jurisprudence did not develop as an interpretation of the Nineteenth Amendment.")

591. Calabresi & Rickert, *supra* note 31, at 96.

592. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016).

593. See *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) ("We might also note that, *over the past decade*, Congress has itself manifested an increasing sensitivity to sex-based classifications.") (emphasis added).

594. 72 CONG. REC. 9320 (1930) (statement of Rep. Albert Johnson).

595. *Owen Hearing*, *supra* note 11, at 60.

Committee majority also deemed the seven-year provision's "ordinary meaning . . . apparent on the face of the instrument."⁵⁹⁶ Who could fault them? Hadn't Owen indisputably "been" seven years a citizen?

Almost all modern constitutional theorists agree that the Constitution contains some hard-wired provisions that, by their nature, dictate easy answers to legal disputes. Where the Framers consciously entrenched "particularized, bright-line demarcations,"⁵⁹⁷ this wisdom holds, the Constitution simply "means what it says and says what it means."⁵⁹⁸ For such "specific" provisions, "conscious reference to purpose seems unnecessary."⁵⁹⁹ It would simply be preposterous to allow "the principles or purposes behind the text" to override an "unambiguous, concrete and specific rule."⁶⁰⁰ Accordingly, generations of judicial⁶⁰¹ and scholarly⁶⁰²

596. *Owen Report*, *supra* note 234, at 6.

597. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 363 (1981).

598. Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237, 239 (1995).

599. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 13 (1980).

600. JACK M. BALKIN, *LIVING ORIGINALISM* 14 (2011).

601. *See, e.g.,* *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2690 (2015) (Roberts, C.J., dissenting) ("[T]he Constitution . . . speaks in some places with elegant specificity."); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2617 (2014) (Scalia, J., concurring in the judgment) (finding the relevant constitutional text to convey a "clear" meaning, regardless of historical practice); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring in the judgment) (claiming that "explicit and unambiguous balances . . . are struck in various provisions of the Constitution"); *INS v. Chadha*, 462 U.S. 919, 945 (1983) (finding certain constitutional clauses "explicit and unambiguous" on their own terms); *Reid v. Covert*, 354 U.S. 1, 8 n.7 (1957) (plurality opinion) ("[T]he language of the Constitution where clear and unambiguous must be given its plain evident meaning."); *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) (claiming that the Constitution's "arithmetic[al]" provisions are "explicit and specific"); *United States v. Lovett*, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring) (contrasting "very specific constitutional provisions" with "broad standards of fairness"); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (describing some constitutional provisions as "so particularized as not to admit of construction"); *Lake Cnty. v. Rollins*, 130 U.S. 662, 670 (1889) ("[W]hen the text of a constitutional provision is not ambiguous, the courts . . . are not at liberty to search for meaning beyond the instrument."); *Ogden v. Saunders*, 25 U.S. 213, 302-03 (1827) (explaining that a constitutional provision can be "unambiguous, and its meaning entirely free from doubt").

602. *See, e.g.,* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 263 (2005) ("Sometimes the original meaning of a text is clear and rule-like . . . and it directly dictates the outcome of a case or controversy."); Bradley & Siegel, *supra* note 36, at 1233 (characterizing as "taken for granted" in legal scholarship that the "rule-oriented function of numbers in legal texts" entails a "bright-line approach to issues like candidate qualifications"); Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1455 (1997) ("[T]he Constitution contains some fairly specific rules that do not change over time. . . . [L]itigation about those parts of the Constitution is unthinkable, and thus never occurs."); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 731 (2011) (summarizing the prevailing view that "[w]hen the original meaning of a constitutional provision is narrow and rule-like, . . . there can be only one result that is consistent with original meaning"); Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 321 n.15 ("The Constitution's numerical provisions are . . . extreme instances of rule-like norms."); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195 (1987) ("Where the text speaks clearly and unambiguously . . . its plain meaning is dispositive."); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1708 (2004) ("[T]he everyday meaning of some clauses will simply be clear and precise in context."); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 881 (2009)

authority proclaim that absolute constitutional clarity can be ascertained from the face of the document itself. The same is often said of statutory text.⁶⁰³

The House and Senate Qualifications Clauses speak in numbers, not norms. Representatives and senators must have been citizens for “seven” and “nine” years, respectively. These clauses appear in Professor Frederick Schauer’s list of “settled” and “[u]nlitigated” constitutional provisions,⁶⁰⁴ the ones that *never* “generate the important questions of constitutional theory.”⁶⁰⁵ The seven-year figure was a somewhat-arbitrary product of interest-balancing, but the fact that the Framers settled on a hard number instead of a list of requisite traits is compelling evidence that they sought to bind future Congresses “to respond in a determinate way to the presence of delimiting triggering facts.”⁶⁰⁶ What could be complicated about a congressional citizenship contest?

The unanticipated puzzle of lost birthright citizenship followed by naturalization, leading to scattered citizenship periods, forced the Seventy-first Congress to decide *when* a member-elect must have “been seven Years a Citizen.” One might deny the problem’s existence, as Owen did, by pointing to the clause’s rule-like precision. But without probing the citizenship requirement’s basic purpose—and the “cumulative” view’s unthinkable implications—the provision’s application to “new and unforeseen phenomena”⁶⁰⁷ strikes at the heart of Article I, Section 2. For if the seven-year requirement is meant to accomplish anything, it forbids aliens from serving in Congress.⁶⁰⁸ Yet the Elections Committee majority—and Owen herself—unwittingly granted that the Constitution

(“Sometimes the words state bright-line rules, like the thirty-five years of age requirement.”); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 2 (1998) (claiming that interpretive issues regarding the Constitution’s “numerical provisions” are “beyond contestation”); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1526 (2011) (“[E]veryone agrees that the text, where specific, should control.”).

603. See, e.g., *Nichols v. United States*, 136 S. Ct. 1113, 1119 (2016) (“[E]ven the most formidable argument concerning the statute’s purposes could not overcome the clarity we find in the statute’s text.” (quoting *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012)); *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1710 (2012) (concluding that “a purposive argument simply cannot overcome the force of the plain text”); *BedRod Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (“[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.”).

604. Schauer, *supra* note 541, at 404.

605. *Id.* at 401; see *id.* at 418–19 (“We need not depart from the text to determine . . . the age and other qualifications for various federal offices.”); Strauss, *supra* note 32, at 12 (“[S]ome issues are so conclusively settled by the text that they are never litigated.”).

606. Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (describing rule-like legal directives, as opposed to standards, which “ten[d] to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation”); see also Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 101, 103 (claiming that “[c]onstitutional adopters choose hardwired rules because they want to limit discretion”).

607. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45 (Amy Gutman ed., 1997).

608. For Supreme Court case law strongly supporting this position, see *supra* note 415.

permits this inconceivable outcome.

It is not exactly news that the clarity-in-practice of seemingly precise legal language can be shaped by extratextual considerations. District of Columbia residents may avail themselves of federal courts' diversity jurisdiction, even though Article III speaks of "Citizens of different States."⁶⁰⁹ The military would surely be forbidden to quarter troops in someone's apartment or dormitory, as well as her "house."⁶¹⁰ It is widely assumed that neither the Executive nor the judiciary, in addition to "Congress," may abridge First Amendment guarantees.⁶¹¹ And despite that Amendment's iconic phrase "*no law*," the government may in fact silence speakers if its restrictions are sufficiently tailored to achieve a valuable enough state interest.⁶¹² As Professor Jamal Greene puts it, "The susceptibility of semantic meaning to political and historical construction may pose a serious challenge to the intelligibility of the rules-standards distinction."⁶¹³

We as a legal culture have decided—at least sometimes—to allow concerns extraneous to the constitutional text to trigger perceptions of textual ambiguity. And as the Supreme Court has recently demonstrated in three marquee statutory-interpretation decisions, this move "can be made with respect to any text."⁶¹⁴ In *Bond v. United States*, for example, the Court concluded that statutory ambiguity "*derive[d]* from the improbably broad reach of the key statutory definition" and "the deeply serious consequences of adopting such a boundless reading."⁶¹⁵ Justice Scalia ridiculed this departure from diagnosing clarity on the basis of text alone: "Whatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . *is ambiguous!*"⁶¹⁶ *Yates v. United States* and *King v. Burwell* similarly allowed purposive and pragmatic considerations to override initial perceptions of textual clarity.⁶¹⁷

This judge-empowering interpretive device has proven immensely

609. U.S. CONST. art. III, § 2, cl. 1; see *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

610. U.S. CONST. amend. III; see *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982).

611. U.S. CONST. amend. I; see *Bradley & Siegel*, *supra* note 36, at 1243-47.

612. U.S. CONST. amend. I (emphasis added). Even in the most speech-friendly doctrinal circumstances, abridgments are permitted if they are "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

613. Jamal Greene, *The Supreme Court, 2013 Term — Comment: The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 147 (2014).

614. *Re*, *supra* note 37, at 418.

615. 134 S. Ct. 2077, 2090 (2015) (emphasis added).

616. *Id.* at 2096 (Scalia, J., concurring in the judgment); see also Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2150, 2152 (2015) ("The naked text could hardly have been clearer. . . . There does not seem to be any textual ambiguity in the law.")

617. See *Yates v. United States*, 135 S. Ct. 1074 (2015) (concluding that not all objects that are tangible are encompassed within the statutory phrase "any . . . tangible object"); *King v. Burwell*, 135 S. Ct. 2480 (2015) (holding that the statutory phrase "an Exchange established by the State" included exchanges established by the federal government).

controversial,⁶¹⁸ for it threatens to distort the achievements of successful political coalitions. *Lawson v. Owen* should compound this anxiety, because it confirms that in some instances, purposive and pragmatic considerations are necessary to determine whether a text is clear in the first place. That long-overlooked episode shows that not even “mathematical” provisions are immune—indeed, perhaps the Framers used “breathtakingly exact”⁶¹⁹ language when they most overestimated their own predictive abilities, causing them to dictate consequences at war with uniformly shared objectives. This isn’t to say that every numerical constitutional provision must suddenly be thrown into chaos, or that all exemplars of “constructed constraint”⁶²⁰ or “the New Holy Trinity”⁶²¹ were correctly decided. But unless the Qualifications Clauses allow aliens to make Americans’ laws for them, Owen’s case shows why those interpretive techniques cannot be flatly rejected.

C. *Expatriation’s Revenge? Containing Repudiated Constitutional Principles*

As news of Owen’s Elections Committee victory broke, a *Washington Post* editorial offered a lucid overview of the situation: Owen’s challenger had perversely sought to capitalize on the lingering legal implications of a now-unconstitutional statute. In other words, “The effect of that untenable arrangement under which an American woman became an Englishwoman though a marriage contract should not be perpetuated, now that the measure has been supplanted.”⁶²²

But in 2015, a Supreme Court plurality perpetuated the effect of that very law—one that had divested *only* women of their American citizenship upon taking a non-citizen spouse. Justice Scalia’s opinion in *Kerry v. Din* affirmatively cited the Expatriation Act of 1907 as part of our long and “all-too-recent practice” of “regulating spousal immigration.”⁶²³ In denying that an American woman possessed a liberty interest in the disposition of her foreign husband’s visa application, Scalia observed that women in the plaintiff’s position had once “lost [their] *own* rights as a citizen upon marriage.”⁶²⁴ This was a “striking[]”⁶²⁵ indication that the

618. See *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015) (Roberts, C.J., dissenting) (denouncing the Court’s “magic trick” in “interpret[ing] the constitutional term ‘the Legislature’ to mean ‘the people’”); *King*, 135 S. Ct. at 1497 (Scalia, J., dissenting) (“The Secretary of Health and Human Services is not a State.”); *Yates*, 135 S. Ct. at 1092 (Kagan, J., dissenting) (“Congress said what it meant and meant what it said.”); Heather K. Gerken, *The Supreme Court, 2013 Term — Comment: Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 89 (2014) (claiming that the *Bond* Court “[found] ambiguity where none existed,” for “[t]he statute’s language was crystalline”).

619. Manning, *supra* note 38, at 1979.

620. See generally Bradley & Siegel, *supra* note 36.

621. See generally Re, *supra* note 37.

622. *Mrs. Owen’s Victory*, *supra* note 393.

623. 135 S. Ct. 2128, 2136 (2015) (plurality opinion).

624. *Id.* at 2135.

asserted liberty interest was not “objectively, deeply rooted in this Nation’s history and tradition,” which the plurality took to be a prerequisite for recognizing unenumerated fundamental rights under the Due Process Clause.⁶²⁶

Aside from the factual inaptness of this citation,⁶²⁷ the *Din* plurality thought it immaterial that women’s marital expatriation was a primitive practice now understood to offend elemental principles of inclusion in the American constitutional order. If enacted today, the Expatriation Act would be unconstitutional twice over. First of all, as even the *Din* plurality acknowledged, women’s derivative citizenship was a vestige of the Blackstonian-era law of coverture.⁶²⁸ To understate the case significantly, “Modern equal-protection doctrine casts substantial doubt” on the male-empowering legal unity of husband and wife.⁶²⁹ And second, the Supreme Court held in *Afroyim v. Rusk* that Congress may not “take away an American citizen’s citizenship without his assent.”⁶³⁰ *Afroyim* repudiated the reasoning of *Mackenzie v. Hare*, which had legitimated the fiction that a woman’s marriage to a foreigner demonstrated conclusively that she intended to renounce her citizenship.⁶³¹ Yet the *Din* plurality accorded this outmoded, long-repealed law continued force in present-day constitutional adjudication.

In recent years, the proper methodology for identifying fundamental constitutional rights has been as unstable as the Court’s shifting coalitions. The majority opinion in *Obergefell v. Hodges* (2015) insisted that this task “requires courts to exercise reasoned judgment” in a way that is “guide[d] and discipline[d],” but not wholly determined, by past practices.⁶³² This approach finds considerable support in the case law.⁶³³ But Chief Justice Roberts (in dissent) could also plausibly claim that “[o]ur precedents have

625. *Id.*

626. *Id.* at 2138 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

627. Section 3 of the Expatriation Act hardly regulated “spousal immigration” or women’s treatment “in the immigration context,” *id.* at 2135-36—it simply specified the citizenship consequences of taking a foreign husband, even if the marriage occurred domestically and husband and wife continued to reside together in the United States. See *Mackenzie v. Hare*, 239 U.S. 299, 307 (1915) (finding that the Act imposed “no limitation of place” on marriage’s expatriative effects).

628. See *Mackenzie*, 239 U.S. at 311 (remarking that “[t]he identity of husband and wife is an ancient principle of our jurisprudence . . . giv[ing] dominance to the husband”).

629. *Din*, 135 S. Ct. at 2136 (plurality opinion).

630. 387 U.S. 253, 257 (1967); see also *Vance v. Terrazas*, 444 U.S. 252, 261 (1980) (“[T]he trier of fact must . . . conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship.”).

631. See *Mackenzie*, 239 U.S. at 312 (asserting that the Expatriation Act proposed “a condition [to be] voluntarily entered into, with notice of the consequences”).

632. 135 S. Ct. 2584, 2598 (2015).

633. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[H]istory and tradition are . . . not in all cases the ending point of the substantive due process inquiry.” (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992) (explaining that this inquiry requires “reasoned judgment,” for due process’s “boundaries are not susceptible of expression as a simple rule”); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (opining that liberty exists along “a rational continuum” that must be curated with “reasonable and sensitive judgment”).

required that implied fundamental rights be ‘objectively, deeply rooted in this Nation’s history and tradition.’”⁶³⁴ The latter approach—which the *Din* plurality had embraced two weeks earlier—is designed to err on the side of preserving space for democratic choice. After all, “guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended,”⁶³⁵ and the Court’s exaltation of contested social and economic theories has accounted for some of its gravest historical errors.⁶³⁶

But resurrecting flatly *unconstitutional* practices is entirely unnecessary to maintaining an appropriately modest judicial role. Americans are not “engaged in an earnest and profound debate”⁶³⁷ about whether to involuntarily expatriate a portion of their law-abiding female citizenry. That ruinous policy choice has been constitutionally off limits for many decades. Forbidding constitutional actors to invoke such abhorrent traditions in generating new doctrine would be one way to ensure that “tradition is a living thing,” and that due-process jurisprudence not “build[] on” “traditions from which [the nation] broke.”⁶³⁸ But that narrow rule of admissibility—which could exist entirely apart from the feared subjectification of individual liberty—would not force judges to consider whether the philosophical underpinnings of certain practices have become obsolete, as Justice Brennan once advocated.⁶³⁹

The approach adopted by the *Din* plurality would truly “allow[] the past alone to rule the present,”⁶⁴⁰ even if every member of the Supreme Court agreed that the relevant “past” was now plainly unconstitutional. If forced female expatriation is part of “*this* Nation’s history and constitutional traditions”⁶⁴¹—and thus fair game for undercutting alleged liberty interests—then it is entirely proper to argue that a claimed right cannot be considered fundamental because American law once tolerated the slave trade, poll taxes, racial segregation, and women’s exclusion from the legal profession. Practices that have been extirpated from our constitutional tradition ought not weigh against a finding that others have firmly taken root there. “[C]areful ‘respect for the teachings of history’”⁶⁴² requires at least this much. Or as the Supreme Court recently remarked in dissociating itself from past constitutional wrongs, “There is no grandfather clause that

634. *Obergefell*, 135 S. Ct. at 2618 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)); see also, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (requiring that any asserted liberty interest “be [one] traditionally protected by our society”).

635. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

636. See *Obergefell*, 135 S. Ct. at 2616-17 (Roberts, C.J., dissenting).

637. *Glucksberg*, 521 U.S. at 735.

638. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

639. See *Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting) (preferring “to ask whether the basis for [a] rule . . . has changed too often or too recently to call the rule embodying that rationale a ‘tradition’”).

640. *Obergefell*, 135 S. Ct. at 2598.

641. *Glucksberg*, 521 U.S. at 725 (emphasis added).

642. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment)).

permits States to enforce punishments the Constitution forbids.”⁶⁴³

In allowing a blatantly unconstitutional practice to shape modern due-process doctrine, Justice Scalia’s traditionalist *Din* opinion was itself quite innovative—apparently the first of its kind. *Din*’s law-generating reanimation of revolting historical traditions should be rejected no less forcefully than the practices themselves. And more broadly, adjudicators of all stripes should never “giv[e] legal effect to the fact that other principles—evil principles—[were] applied at an earlier time.”⁶⁴⁴

CONCLUSION

A surge of anti-prohibition sentiment swept Ruth Bryan Owen from office in November 1932.⁶⁴⁵ But President Roosevelt deemed her continued service indispensable. On April 12, 1933, he nominated Owen to become America’s Minister to Denmark and the nation’s first female ambassador.⁶⁴⁶ The Senate unanimously confirmed her that same day without the customary referral to the Foreign Affairs Committee.⁶⁴⁷ In the ultimate tragicomic twist, Owen resigned the post under considerable pressure after taking a Danish husband in 1936.⁶⁴⁸ Denmark hadn’t yet abolished women’s derivative citizenship, so the American Minister to Denmark found herself a subject of King Christian X!⁶⁴⁹

But Ruth Bryan Owen Rohde’s native country knew better than to abandon her again. Less than a week after this controversial marriage, the Daughters of the American Revolution named her honorary chairman of their Good Citizenship Pilgrimage, modeled after Owen’s innovative citizenship contests for schoolchildren.⁶⁵⁰ Much later, the New York City Federation of Women’s Clubs honored Ruth for her “outstanding contributions to good citizenship” and devotion to “the letter as well as the spirit of our Constitution and the Bill of Rights.”⁶⁵¹

643. *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016); *see also id.* at 732 (clarifying that states have no interest in “preserv[ing] a conviction or sentence that the Constitution deprives [them] of power to impose”).

644. *Primus*, *supra* note 19, at 1688; *see also Entines v. United States*, 160 F. Supp. 3d 208, 214 (D.D.C. 2016) (“[T]he Court today gives no continuing legal effect to the racial classifications of an earlier era.”); *cf.* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL’Y 817, 848 (2015) (“Our law might require us to ignore what past law actually was, in favor of what we now say it was. An honest positivist in mid-1650s England would say that the monarchy had been abolished; but when the Restoration came in 1660, the official position of English law was that Charles II had been king for the last twelve years.”).

645. Harris G. Sims, *Mrs. Owen’s Defeat Grieves Floridians*, N.Y. TIMES, June 19, 1932, at E6.

646. WRIGHT, *supra* note 124, at 78. Having seen the actual nomination letter, I can report (sadly) that it is marred by ink stains and pencil markings.

647. 77 CONG. REC. 1570 (1933).

648. *Ruth Owen Quits Her Post as Envoy*, N.Y. TIMES, Aug. 31, 1936, at 1.

649. Chesly Manly, *Find No Law To Bar Ruth Owen as U.S. Envoy*, CHIC. DAILY TRIB., July 25, 1936, at 5.

650. *Mrs. Rohde Named D.A.R. Group Head*, N.Y. TIMES, July 13, 1936, at 12.

651. *Freedom Rally Honors 7 Women for Contributions to U.S. Heritage*, N.Y. TIMES, Dec. 30, 1948, at 21.

Ruth Bryan Owen lived her life on the vanguard of social and constitutional change. Her celebrated citizenship case made her the face of gender equality in American law. But constitutional scholars have overlooked Owen's struggles, and so for decades have missed crucial evidence that might have helped provide a more historically faithful basis for modern sex-discrimination doctrine. Likewise, this overlooked eligibility contest proves that whether even the Constitution's numerical clauses are "clear" may well depend on extrinsic considerations that change continuously in light of freshly received facts. And the peculiar nature of Owen's near-exclusion—an unconstitutional statute threatening to overshadow the very principles that supplanted it—shows why practices repugnant to the modern constitutional order should never be accorded residual legal effect.

Revels and Owen illuminate two generations' efforts to make sense of our deepest national values by transcending a darker, not-so-distant past. Their gripping citizenship contests evoke long-forgotten—yet truly fundamental—strands of our constitutional heritage. What other neglected heroes have escaped our attention, and what will their stories tell us?