ideas, Congress required that all persons wishing to be naturalized swear fidelity to the Constitution of the United States. *United States v. Schwimmer* (1929) tested the meaning of that obligation. The judicial majority on the Supreme Court ruled that Rosika Schwimmer could not be an American citizen because she was a pacifist who would not take up arms in defense of the United States. Justice Holmes was astounded, given that women in the United States did not have the legal right to take up arms to defend the country.

United States v. Wong Kim Ark, 169 U.S. 649 (1898)

Wong Kim Ark was born in San Francisco in 1873. His parents were Chinese citizens residing in the United States. In 1895 the collector of customs for San Francisco refused to allow him to return from a trip to China on the ground that he was not a citizen of the United States. The local federal district court issued a writ of habeas corpus on the ground that Wong Kim Ark was an American citizen. The United States appealed to the Supreme Court.

The Supreme Court by a 6-2 vote agreed that Wong Kim Ark was an American citizen. Justice Gray's majority opinion ruled that the Constitution of the United States adopted the common law principle that citizenship was determined by birth. Wong Kim Ark was born in the United States. His parents were not in the diplomatic service or foreign soldiers. Therefore, Wong Kim Ark enjoyed birthright citizenship. Chief Justice Fuller in dissent maintained that persons inherited citizenship from their parents, that the common law rule tying citizenship to the soil was a relic of feudalism. Who has the better argument? Does the text of the Constitution or constitutional history clarify this issue? If not, what principles are most consistent with fundamental constitutional commitments?

Wong Kim Ark's parents were legal aliens. The Supreme Court's decision in Wong Kim Ark *is, however, frequently cited for the proposition that the children of illegal aliens also enjoy birthright citizenship if they were born in the United States. Does that claim follow from the logic or spirit of Justice Gray's argument?*

JUSTICE GRAY . . . delivered the opinion of the court.

. . .

The constitution nowhere defines the meaning of [citizen], either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.

. . .

The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called "ligealty," "obedience," "faith," or "power"—of the king. The principle embraced all persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were mutual . . . and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.

. . .

The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established.

. . .

. . . The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the

United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke in *Calvin's Case* (1608), "strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject"; and his child, . . . "If born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides, seeing that, as said by Mr. Webster, when secretary of state:

> Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance,—it is well known that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulations.

To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

. . .

During the debates in the senate in January and February, 1866, upon the civil rights bill, Mr. Trumbull, the chairman of the committee which reported the bill, moved to amend the first sentence thereof so as to read: "All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color." Mr. Cowan, of Pennsylvania, asked "whether it will not have the effect of naturalizing the children of Chinese and Gypsies, born in this country?" Mr. Trumbull answered, "Undoubtedly;" . . .

The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away. "A naturalized citizen," said Chief Justice Marshall,

> becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue.

Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens by virtue of acts of congress, a fortiori no act or omission of congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the constitution itself, without any aid of legislation. The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.

. . .

The fact, therefore, that acts of congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the constitution: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

. . .

CHIEF JUSTICE FULLER, with whom concurred JUSTICE HARLAN, dissenting.

. . .

The [English common law] rule was the outcome of the connection in feudalism between the individual and the soil on which he lived, and the allegiance due was that of liege men to their liege lord. . . .

. . .

Obviously, where the constitution deals with common-law rights and uses common-law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving, as it does, international relations, and political as contradistinguished from civil status, international principles must be

considered; and, unless the municipal law of England appears to have been affirmatively accepted, it cannot be allowed to control in the matter of construction.

. . .

Before the Revolution, the views of the publicists had been thus put by Vattel: ". . . The true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage. * * * The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction."

. . .

The framers of the constitution were familiar with the distinctions between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and invisible character of origin; and there is nothing to show that in the matter of nationality they intended to adhere to principles derived from regal government, which they had just assisted in overthrowing.

. . .

By the fifth clause of the first section of article 2 of the constitution it is provided that "no person except a natural-born citizen, or a citizen of the United States, at the time of the adoption of the constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."

. . .

Considering the circumstances surrounding the framing of the constitution, I submit that it is unreasonable to conclude that "natural-born citizen" applied to everybody born within the geographical tract known as the United States, irrespective of circumstances; and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay, or other race, were eligible to the presidency, while children of our citizens, born abroad, were not.

. . .

The civil rights act became a law April 9, 1866, and provided "that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." . . .

. . .

If the act of 1866 had not contained the words "and not subject to any foreign power," the children neither of public ministers nor of aliens in territory in hostile occupation would have been included within its terms on any proper construction, for their birth would not have subjected them to ties of allegiance, whether local and temporary, or general and permanent.

There was no necessity as to them for the insertion of the words, although they were embraced by them.

But there were others in respect of whom the exception was needed, namely, the children of aliens, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power by virtue of the tie of permanent allegiance, which they had not severed by formal abjuration or equivalent conduct, and some of whom were not permitted to do so if they would.

And it was to prevent the acquisition of citizenship by the children of such aliens merely by birth within the geographical limits of the United States that the words were inserted.

Two months after the statute was enacted, on June 16, 1866, the fourteenth amendment was proposed, and declared ratified July 28, 1868. The first clause of the first section reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." The act was passed and the amendment proposed by the same congress, and it is not open to reasonable doubt that the words "subject to the jurisdiction thereof," in the amendment, were used as synonymous with the words "and not subject to any foreign power," of the act.

. . .

These considerations lead to the conclusion that the rule in respect of citizenship of the United States prior to the fourteenth amendment differed from the English common-law rule in vital particulars, and, among others, in that it did not recognize allegiance as indelible, and in that it did recognize an essential difference between birth during temporary and birth during permanent residence. If children born in the United States were deemed presumptively and generally citizens, this was not so when they were born of aliens whose residence was merely temporary, either in fact or in point of law.

. . .

In other words, the fourteenth amendment does not exclude from citizenship by birth children born in the

United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this government, are and must remain aliens.

United States v. Schwimmer, 279 U.S. 644 (1929)

Rosika Schwimmer emigrated from Hungary to the United States in 1921. Five years later she sought to become an American citizen. The Naturalization Act of 1906 required that all applicants "declare on oath in open court" that they "will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." At her naturalization hearing Schwimmer testified, "I am willing to do everything that an American citizen has to do except fighting. If American women would be compelled to do that, I would not do that. I am an uncompromising pacifist." On this basis, the local federal district court declared that Schwimmer was ineligible for citizenship. That decision was reversed by the Court of Appeals for the Seventh Circuit. The United States appealed to the Supreme Court of the United States.

The Supreme Court ruled by a 6-3 vote that Schwimmer was ineligible for citizenship. Justice Butler's majority opinion maintained that bearing arms was a fundamental duty of citizens, and, as such, Schwimmer was insufficiently attached to constitutional principles. Schwimmer was a fifty-year-old woman who was not legally allowed to bear arms. Why does Justice Butler think that these facts have no bearing on the case? Was he right? Suppose that Schwimmer believed in an established church or that the federal government should not have the power to regulate bankruptcy. Would she be ineligible for American citizenship because she was insufficiently attached to constitutional principles? Would Justice Holmes deny citizenship to an anarchist?

JUSTICE BUTLER delivered the opinion of the Court.

. . .

Except for eligibility to the Presidency, naturalized citizens stand on the same footing as do native-born citizens. All alike owe allegiance to the government, and the government owes to them the duty of protection. These are reciprocal obligations, and each is a consideration for the other. But aliens can acquire such equality only by naturalization according to the uniform rules prescribed by the Congress. They have no natural right to become citizens, but only that which is by statute conferred upon them. Because of the great value of the privileges conferred by naturalization, the statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the government. And, in order to safeguard against admission of those who are unworthy, or who for any reason fail to measure up to required standards, the law puts the burden upon every applicant to show by satisfactory evidence that he has the specified qualifications.

. . .

That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

. . .

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the "good order and happiness" of the United States cannot long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. . . .

. . .

A pacifist, in the general sense of the word, is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Constitution and policy of our government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization.