



# Looking Back . . .

THE ADVOCACY OF OLIVE RABE IN *SCHWIMMER V. UNITED STATES*

By Jane Dall Wilson\*

In 1929, Justice Oliver Wendell Holmes declared that the United States Constitution calls for “free thought — not free thought for those who agree with us but freedom for the thought that we hate.”<sup>1</sup> Whose advocacy inspired the principle that now guides the way we think about First Amendment protection?

She is not well known, but she is one of our own — Olive Henrietta Rabe. Her client was better-known, at least at the time — Rosika Schwimmer, an international peace advocate during the World Wars and a nominee for the 1948 Nobel Peace Prize.<sup>2</sup> This article spotlights Rabe and the citizenship case she litigated for Schwimmer from Chicago to the Supreme Court.

## Who Was Olive Henrietta Rabe?

We know only some of Rabe’s background.<sup>3</sup> She was born and grew up in Chicago and attended the University of Chicago, studying economics and sociology.<sup>4</sup> She advocated women’s suffrage.<sup>5</sup> In 1914, at the age of 27, she enrolled in John Marshall Law School but she later transferred to Northwestern University Law School and received her Bachelor of Laws degree from Northwestern in 1916.<sup>6</sup> After law school, she began practicing labor law in Chicago, ultimately with O. David Zimring at the law firm of Rabe & Zimring.<sup>7</sup> A 1919 publication of *The Woman Lawyers’ Journal* listed Rabe as one of eleven Illinois members of the Association of Women Lawyers and listed her practice address as 105 S. LaSalle Street, Chicago, a mere two blocks away from the current home of 7th Circuit in the Everett McKinley Dirksen United States Courthouse.<sup>8</sup>

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Serious labor disputes involving the nation's packing-houses were brewing around the time Rabe began practicing, and she became involved in this arbitration on behalf of the laborers.<sup>9</sup> She spent the first ten or so years of her practice pursuing progressive causes, including a proposal advocating legitimacy for children born out of wedlock in Illinois.<sup>10</sup> Rabe also taught classes on citizenship,<sup>11</sup> prescient of the momentous future engagement that took her before the 7th Circuit and the United States Supreme Court.

### Rosika Schwimmer and Her Petition for Citizenship

Rabe's client and friend Rosika Schwimmer was born in Hungary in 1877. Schwimmer was an ardent and internationally known pacifist as well as a feminist, suffragist, and atheist. In her native country, Schwimmer founded the National Association of Women Office Workers organized the Hungarian Feminist Association (which succeeded in winning woman suffrage in 1920), edited the Hungarian feminist journal "A Nő" (The Woman), published works of fiction, and addressed the International Women's Congress. She later moved to London to serve as press secretary to the International Woman Suffrage Alliance.<sup>12</sup>

Schwimmer was bold. In the early days of World War I, she organized meetings with President Woodrow Wilson and Secretary of State William Jennings Bryan seeking sponsorship of an international mediation conference. While she could not convince them to sponsor United States-led mediation, shortly thereafter, she convinced Henry Ford to finance privately the Ford Neutral Mediation Conference in Stockholm in 1916, which commonly became known as the Peace Ship expedition.<sup>13</sup> In 1918, Schwimmer served as the Hungarian ambassador to Switzerland, the first woman in the modern world to hold an ambassadorial-level post; she left her post after the Communists

came to power in Hungary.<sup>14</sup>

In 1921, Schwimmer came to Chicago to live. After five years, she filed her application for United States citizenship. The naturalization questionnaire used in Chicago at the time asked, "If necessary, are you willing to take up arms in defense of this country?"<sup>15</sup> Schwimmer answered no: "I would not take up arms personally."<sup>16</sup>

The District Director of Naturalization, Fred J. Schlotfeldt, had concerns with Schwimmer's answer and whether it precluded her from taking the oath of allegiance. He thus conducted a formal interview with Schwimmer on September 22, 1926.<sup>17</sup> At the interview, she described the United States "as nearest to my

ideals of a democratic republic governed by the people for the people on the basis of independence and tolerance."<sup>18</sup> But she remained steadfast in her refusal to bear arms and reasoned, "I cannot see that a woman's refusal to take up arms is a contradiction to the oath of allegiance."<sup>19</sup> After the interview, Schlotfeldt requested Schwimmer address a letter in which she had written: "I am an uncompromising pacifist for whom even Jane Addams is not enough of a pacifist. I am an absolute atheist. I have no sense of nationalism, only a cosmic consciousness of belonging to the human family."<sup>20</sup> She re-affirmed these views, including that she was "an uncompromising pacifist."<sup>21</sup> These comments shaped the record of her case.<sup>22</sup>



Schlotfeldt ultimately recommended that Schwimmer's application be denied because he determined that her refusal to bear arms reflected a mental reservation against the oath of allegiance required for citizenship.<sup>23</sup> And so the legal battle began, and Schwimmer turned to Rabe for assistance.

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### District Court Proceedings

District Judge George Albert Carpenter of the Northern District of Illinois held a formal hearing on October 13, 1927.<sup>24</sup> Rabe appeared as Schwimmer's personal lawyer at that hearing; another lawyer, William B. Gemmill, appeared for the American Civil Liberties Union (ACLU).<sup>25</sup>

Rabe likely spent many hours preparing her client for the hearing. When Schwimmer testified, her testimony was carefully drawn to limit her objection to bearing arms as a conviction that she, a woman, personally held:

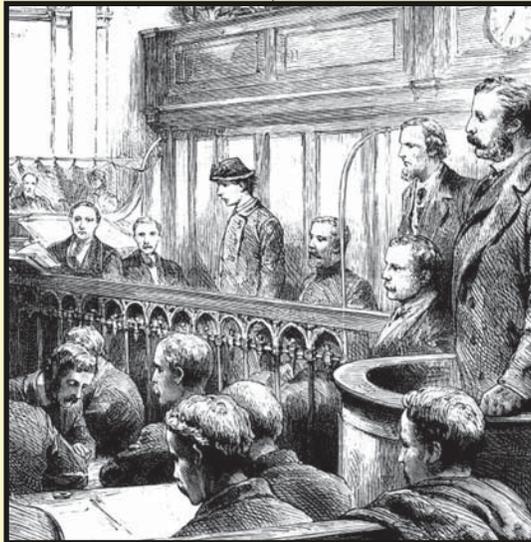
I am able to take the oath of allegiance without any reservations. I am willing to do everything that an American citizen has to do, except fighting. If American women would be compelled to do that, I would not do that. I am an uncompromising pacifist. Asked how far does that go — if I disapprove of the government fighting, I answer, it means I disapprove of the government asking me to fight personally with my fists or carrying a gun. I do not care how many other women fight, because I consider it a question of conscience. I am not willing to bear arms. In every other single way I am ready to follow the law and do everything that the law compels American citizens to do. That is why I can take the oath of allegiance, because, as far as I can find out, there is nothing that I could be compelled to do that I cannot do. If it is a question of fighting, as much as I desire American citizenship, I would not seek the citizenship.<sup>26</sup>

Despite Schwimmer's testimony, Judge Carpenter was persuaded by Schlotfeldt's view that Schwimmer's pacifist views constituted an impediment to citizenship. *The New York Times* reported a heated exchange between Judge Carpenter and Schwimmer on the critical issue of Schwimmer's willingness to bear arms. Judge Carpenter asked, "If you were a nurse, caring for a

wounded American soldier, and observed an armed enemy approaching, would you take up a pistol and shoot the enemy?" Schwimmer answered "No, but I would warn the wounded soldier. I would not kill a man, even if he tried to kill me."<sup>27</sup> *The Times* reported what followed:

Rising from the bench at her answer, Judge Carpenter pointed to the flag over the courtroom entrance and said: "You cannot be a half-way citizen under that flag. You must do what our Constitution requires of all American citizens — promise to serve that flag and defend it with your life, if necessary."<sup>28</sup>

Judge Carpenter thereafter denied her petition:



[U]pon consideration of the petition of Rosika Schwimmer . . . it appearing that the said petitioner is not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and further that she is unable to take the oath of allegiance prescribed by the Naturalization Law without a mental reservation, it is therefore ordered that the said petition be and is hereby denied.<sup>29</sup>

Immediately after the hearing, Schwimmer declared her intent to appeal. She wired *The New York Times*: "Judge Carpenter denied citizenship explicitly and exclusively because I refused to agree to take up arms. Judge declared in open court there was no other objection against me. I appeal to Circuit Court of Appeals."<sup>30</sup> Schwimmer turned again to Rabe for the appeal.

### Seventh Circuit Appeal and Aftermath

Rabe rose to the challenge — her first (and only) appeal before the 7th Circuit. Rabe had many people with whom to collaborate because Schwimmer had a large circle of supporters, including Jane Addams of Hull House. Addams and others raised a defense fund for Schwimmer's appeal, undoubtedly with Rabe's involvement.<sup>31</sup>

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Rabe prepared and filed her 7th Circuit brief on behalf of Schwimmer. In it, she argued that naturalization laws must be “uniform” under the Constitution and the courts could not prescribe new requirements for citizenship. She further argued that Schwimmer did not advocate the overthrow of organized government and thus she should not be denied citizenship because of her belief in pacifism.<sup>32</sup> Rabe also emphasized Schwimmer’s ineligibility to bear arms as a fifty-year-old woman. The Government argued that Rabe’s strident belief in pacifism showed that she was not attached to the principles of the Constitution because of the country’s need for military defense.<sup>33</sup>

The appeal was assigned to Judge Samuel Alschuler, Judge Albert Barnes Anderson, and District Judge Robert C. Baltzell. In retrospect, these judges collectively brought intriguing personal backgrounds to the case. Judge Alschuler’s parents and grandparents fled Germany after the unsuccessful Revolution of 1848 and settled in Chicago.<sup>34</sup> He was the first Jewish federal court of appeals judge.<sup>35</sup> He was considered popular and progressive.<sup>36</sup> Judge Anderson, a former district court judge from Indiana, had the reputation of a tyrant in the courtroom who was particularly tough on criminals.<sup>37</sup> District Judge Baltzell, also from Indiana, served in the military during World War I from 1917-1919.<sup>38</sup> Each was born in the United States. These three men would judge Rabe’s arguments as to whether Schwimmer’s pacifist beliefs disqualified her for naturalized citizenship.

On June 29, 1928, the 7th Circuit ruled that Schwimmer should be granted citizenship.<sup>39</sup> Judge Anderson authored an opinion that largely adopted Rabe’s arguments. Reciting the evidence, the Court reasoned:

The views expressed by the applicant at most reveal an unwillingness personally to bear arms, and it being agreed that she has shown herself in every other way qualified for citizenship, unless her expressed unwillingness to bear arms makes her conduct that of a person not attached to the principles of the constitution of the United States, or not well disposed to the good order and happiness of the same, her petition should have been granted.<sup>40</sup>

The 7th Circuit further explained:

Women are considered incapable of bearing arms. Male persons of the age of appellant have not been compelled to do so. Appellant, if admitted cannot by any present law of the United States be compelled to bear arms. Judging by all the conscription acts of which we have knowledge, she never will be required to do so; yet she is denied admission to citizenship because she says she will not fight with her fists or carry a gun.

In other words, there is put to her an hypothetical question — what would she do under circumstances that never have occurred and probably never will occur — and upon her answers to this supposed case her petition is denied. A petitioner’s rights are not to be determined by putting conundrums to her.<sup>41</sup>

And so the 7th Circuit reversed and remanded with direction to the district court to grant Schwimmer’s citizenship petition.<sup>42</sup> Rabe’s first permanent mark on history appears in this opinion: the Federal Reporter lists “Olive H. Rabe of Chicago, Ill., for appellant.”<sup>43</sup>

Rabe celebrated her and Schwimmer’s victory. After the decision, she ordered 1000 copies of the opinion and sent 800 to supporters of Schwimmer and contributors to her defense fund. Another 200 copies were given to the ACLU for distribution.<sup>44</sup>

But Rabe’s celebration came too soon. Schlotfeldt asked the Department of Labor to seek review of the case. Worse yet, Rabe’s distribution of the 7th Circuit decision was cited as a reason for further review. On August 2, 1928, referencing Rabe’s distribution of the opinion, the *Chicago Daily Tribune* reported that “The exploitation of Mme. Rosika Schwimmer’s citizenship case ‘for purposes of pacifist propaganda,’ was said to have been responsible for yesterday’s action postponing issuance to her of the certificate of citizenship.”<sup>45</sup> The *Tribune* further reported that Schlotfeldt had moved for a stay of mandate to avoid granting Schwimmer the certificate of citizenship. The 7th Circuit granted that motion, and the *Tribune* noted that United States Attorney General John G. Sargent was reviewing the matter for purposes of evaluating a petition for writ of certiorari to the Supreme Court.<sup>46</sup>

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Rabe immediately took action. The day after the stay issued, Rabe announced amicus support should the Government ask the Supreme Court to review.<sup>47</sup> The *Chicago Daily Tribune* reported that two national organizations — American Friends and National Council for the Prevention of War — had notified Rabe that they would aid Schwimmer. Specifically, “Ray Newton, secretary of the American Friends service committee advised Mrs. Rabe that the Quakers are ready to file a brief as friends of the court when deemed advisable.” Rabe and Schwimmer then waited together for the Government’s decision on whether to appeal to the Supreme Court.<sup>48</sup>

Out of the public view, lawyers for the Department of Labor and the Attorney General’s Office debated whether the Government should apply for certiorari. One lawyer in the Attorney General’s Office wrote that the fact that women did not serve in the military should not negate the required state of attachment to the Constitution, and because of the importance of the case to the administration of the naturalization laws it was important to ask for review.<sup>49</sup> Another lawyer in the Justice Department suggested that “On the cold record facts there is no indication of any past, or of any suggested future activity on her part, which would indicate a spirit of disloyalty.”<sup>50</sup> The Solicitor General expressed concern about Schwimmer’s ability to push a pacifist propaganda among men: “She is very clever . . . she speaks only of propaganda among women, who are not usually supposed to bear arms, and she cleverly dodges the issue concerning those who are required to bear arms.”<sup>51</sup> But he considered the record insufficient for Supreme Court review: “I feel the record in this respect is rather weak. . . . Under present conditions, I think it likely the Supreme Court would not care particularly about considering such a case as this, with such a slim record to go on.”<sup>52</sup> Ultimately the Acting Solicitor General made a recommendation not to seek review: “I am unable to find that

there is any real question of law involved. I think I cannot properly authorize an application for certiorari. There is nothing in the record to show that the woman is not attached to the principles of the Constitution.”<sup>53</sup> Thereafter, the Attorney General wrote to the Department of Labor and stated that the Government would not petition for a writ of certiorari.<sup>54</sup>

But the Department of Labor objected. Citing the publicity of the case and the threat to the naturalization laws, the Assistant Secretary of Labor wrote: “The matter is one of grave public concern — the department can hardly conceive of one which could be more important — and it is again respectfully urged that the Supreme Court be given the opportunity to pass upon the issue.”<sup>55</sup>



In response to this letter, the Acting Solicitor General reconsidered. Although he expressed reservations about the record, he wrote that “In deference to [the Department of Labor’s] views so solemnly expressed, I have decided to prepare and have ready for filing a petition to be submitted to the Solicitor General on his return, for his decision.”<sup>56</sup> The Solicitor General reluctantly agreed to file that petition:

Because of the state of the record I think the case a desperate one, and I greatly regret that we are

forced to present to the Supreme Court, as a test case of an important question, a record which is so deficient. . . . I am not at all sanguine that we will gain anything by filing the petition. . . . [M]y best judgment is that the question whether those who are opposed to armed defense of the Constitution and laws of the United States against invasion and insurrection are eligible to citizenship should be presented in some other case, with a satisfactory record, but because of the unanimity in your Department and the emphatic statements in your letter of September 10th I have concluded to yield my own judgment in the matter and proceed as you have requested.<sup>57</sup>

With these internal reservations, the Government sought review of the 7th Circuit decision on September 29, 1928, and the Supreme Court granted the writ on November 19, 1928.<sup>59</sup> Rabe’s representation of Schwimmer thus continued before the United States Supreme Court.

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### Supreme Court Proceedings

In its brief to the high court, the Government argued that Schwimmer's pacifist views presented a threat:

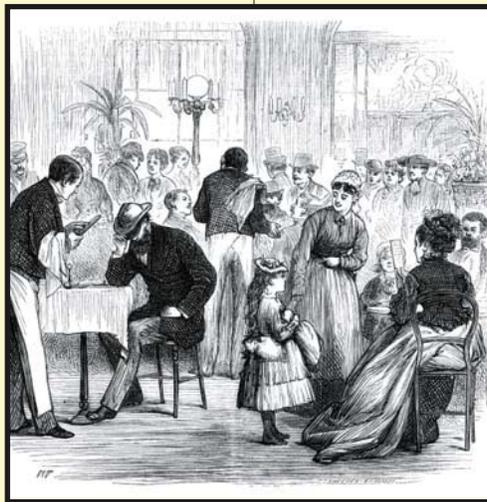
The Respondent is unalterably opposed to defense of the Constitution and Government of the United States by armed force. She would prefer to see them destroyed by invasion or insurrection than have them so defended. She is opposed to armed defense by citizens who are qualified for military service. She is an author, public speaker, and propagandist who broadcasts her views on these subjects and may be depended upon to exert her influence in their support. She is therefore not attached to the principles of the Constitution. She can not properly take the oath to support and defend the Constitution and laws against enemies, because she can not and will not defend and support armed defense by other citizens.<sup>60</sup>

Later in the brief, the Government cited Schwimmer's self-description as an "uncompromising pacifist" with "no sense of nationalism" and argued that "[t]he tone of respondent's statement shows that she is an extremist. . . . She does not believe in organized government as we understand it, because organized government can not exist without military defense."<sup>61</sup> Although these themes filled the internal memos at the Department of Justice, they had little support in the record, which Rabe and Schwimmer had carefully built around Schwimmer's personal beliefs as a woman. The Government claimed that Rabe's status as a woman and inability to serve in the armed forces was irrelevant: "That a candidate for citizenship is personally disqualified by age, sex, or physical condition from bearing arms does not render his or her opposition to armed defense of the Constitution immaterial or relieve him or her from the requirement of attachment to that principle of the Constitution."<sup>62</sup>

Rabe confronted these arguments in her response brief. She pointedly wrote:

Respondent is a woman, fifty years of age. Women are not required to bear arms in defense of any civilized country in the world. Congress, which alone has the power to decide who shall serve in the armed forces of the United States, has expressly limited the armed forces to able-bodied males. Yet the petitioner is seeking to exclude a woman from citizenship because she is not willing to do what the law does not permit her to do.<sup>63</sup>

Rabe also noted, "Petitioner's conclusion that unwillingness to bear arms is synonymous with opposition to organized government is based upon a fallacious assumption and is contrary to the evidence in the record."<sup>64</sup> And she emphasized Schwimmer's legal inability to bear arms under the statutes governing military service, asking provocatively, "Who wants her to bear arms?"<sup>65</sup>



Rabe argued the case before the Supreme Court on April 12, 1929. As one of only a few times in which a woman had argued to the Supreme Court, and the first time a woman argued a free speech case, the occasion was historic.<sup>66</sup> After the argument, at least one commentator noted Schwimmer's choice of a woman lawyer: "When Madame Rosika Schwimmer, Hungarian pacifist, decided to seek American citizenship and got into a tangle with the government that has taken the question for her eligibility before the supreme court for solution, it was quite natural that she should turn to a woman lawyer as counsel."<sup>67</sup> The author complimented Rabe and described some of her chief arguments:

[N]o layman who reads that brief can doubt that it presents very ticklish aspects for the highest tribunal to consider. . . . Lawyer Rabe makes interesting points about [Schwimmer's unwillingness to bear arms] in her brief. She holds that if "defend" necessarily means by force of arms, Quakers and others of "religious conviction" against bearing arms could not even be granted passports. Also, Lawyer Rabe touches on the presidential oath of office which includes the "defend" language. Should "defend" be held to mean by force of arms, the brief said, there was no sound reason why the same construction should not apply to the president's oath "so as to bar from the presidency a member of any religious sect whose principles forbid its members to bear arms." Which, quite obviously, is a neat reference to the fact that President Hoover, who



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also is constitutional commander-in-chief of the army and navy, is a Quaker.<sup>68</sup>

Ultimately, however, Rabe’s arguments did not persuade the majority of the Supreme Court. On May 27, 1929, the Supreme Court issued a 6-3 decision ruling that Schwimmer was not entitled to citizenship as a result of her refusal to indicate a willingness to bear arms in defense of the United States.<sup>69</sup> The Supreme Court reasoned that “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.”<sup>70</sup> The Court found the record lacking support that Schwimmer was sufficiently attached to that principle:

Her claim at the hearing that she possessed the required qualifications and was willing to take the oath was much impaired by other parts of her testimony. Taken as a whole, it shows that her objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms. Her expressed willingness to be treated as the government dealt with conscientious objectors who refused to take up arms in the recent war indicates that she deemed herself to belong to that class. The fact that she is an uncompromising pacifist, with no sense of nationalism, but only a cosmic sense of belonging to the human family, justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws. And her testimony clearly suggests that she is disposed to exert her power to influence others to such opposition.<sup>71</sup>

Justice Holmes disagreed in a dissent joined by Justice Brandeis: “So far as the adequacy of her oath is concerned I hardly can see how that is affected . . . inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to.”<sup>72</sup> Holmes famously continued,

Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperative calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate.<sup>73</sup>

Though Rabe did not persuade the Court that Schwimmer should be granted citizenship, Justice Holmes’ expression on the vitality of protection for free speech and thought has thrived in First Amendment jurisprudence.<sup>74</sup>

The published decision in the *United States Reports* reflects Rabe’s second permanent mark on history: “Mrs. Olive H. Rabe, of Chicago, Ill. for respondent.”<sup>75</sup>

### After the Supreme Court Decision

The Supreme Court overruled *Schwimmer* seventeen years later. In *Girouard v. United, States*, the Supreme Court changed course and held that “refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions,” and conscientious objectors became entitled to naturalization as United States citizens.<sup>76</sup>

Although Schwimmer and Rabe both lived to see the *Schwimmer* case overruled, Schwimmer never received citizenship. She died a foreign alien two years later on August 3, 1948.<sup>77</sup>

What happened to Olive Rabe? In the 1930s, Rabe moved on to a different phase of her life. In part due to health problems, she moved west to Colorado with literary friend, Aileen Lucia Fisher.<sup>78</sup> There, Rabe began her own writing career. Rabe and Fisher co-authored children’s plays, children’s books, and biographies of Louisa May Alcott and Emily Dickinson.<sup>79</sup> She died on December 11, 1968, at the age of 81.<sup>80</sup>

### Summation

The case Rabe litigated has endured. Holmes’ dissent continues to be cited in First Amendment litigation. The advocate who inspired his famous characterization of constitutional protection “for the speech we hate” had been lost to history before the recent efforts of First Amendment Fellow Ronald K. L. Collins and First Amendment Scholar David L. Hudson Jr. to research and document Rabe’s role in Schwimmer’s case. Their work has brought to light an interesting and important piece of First Amendment history.

Rabe’s mark on 7th Circuit legal history is also creditworthy. Rabe was a pioneer — she argued before the 7th Circuit and the United States Supreme Court long before women routinely



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practiced in federal court (much less presided over it).<sup>81</sup> Our Circuit looks substantially different now. Eighty-five years later, approximately thirty percent of our 7th Circuit Bar Association members are women, and twenty-three percent of our Article III judges are women. Rabe’s role in that legacy merits recognition.<sup>82</sup>

### Notes:

<sup>1</sup> *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Homes, J., dissenting)

<sup>2</sup> No prize was awarded in 1948. Schwimmer died before the prize was awarded thus rendering her ineligible. Ronald B. Flowers & Nadia M. Lahutsky, *The Naturalization of Rosika Schwimmer*, 32 J. Church & St. 343, 366 (1990).

<sup>3</sup> Much of Rabe’s biographical information is drawn from Ronald K.L. Collins, *Remembering 2 Forgotten Women in Free-Speech History*, First Amendment News, First Amendment Center, May 27, 2008, <http://www.firstamendmentcenter.org/remembering-2-forgotten-women-in-free-speech-history> (last visited March 29, 2013). Mr. Collins and his co-author of a companion piece also cited herein, David L. Hudson, deserve significant credit for their work in researching and reviving this forgotten history.

<sup>4</sup> Rabe’s maiden name was Hanson. Collins, *supra*. No record of Rabe’s marriage has been found, *Id.*; however, the author has located a reference to Olive H. Rabe alongside one “Henry A. Rabe.” Both are listed as “Assistants in Compilation of Data” to the 1922 report by the Chicago Commission on Race Relations on The Negro in Chicago. Both list business experience in Chicago and student experiences at the University of Chicago “specializing in economics and sociology.” Henry Rabe’s entry also lists experience “investigating industrial conditions in Chicago,” an area in which Olive Rabe also practiced. *The Negro in Chicago: A Study of Race Relations and a Race Riot*, Appendix, at 655 (1922), <http://archive.org/stream/negroinchicagost00chic#page/652/mode/2up> (last visited March 26, 2013) (concerning the death and injuries of African-Americans during the Chicago Race Riot of 1919). The author is thus tempted to speculate that Olive was, for at least some period of time, married to Henry Rabe.

<sup>5</sup> In 1912, Rabe won a \$10 prize for her list of “Ten Reasons Why Women Should Vote,” which was published in a popular magazine at the time. *Judge*, Mar. 23, 1912, at 18. At the time, Rabe was 25.

<sup>6</sup> Collins, *supra*.

<sup>7</sup> *Id.*

<sup>8</sup> 9 Woman Lawyers’ J. 1, 7 (Oct.-Dec. 1919), [http://books.google.com/books?id=vZlqAAAAYAAJ&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com/books?id=vZlqAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) (last visited Mar. 26, 2013).

<sup>9</sup> Collins, *supra*. In *History of the Seventh Circuit 1891-1941*, author Rayman L. Solomon briefly details Judge Samuel Alschuler’s involvement as the presidentially appointed arbitrator for these labor disputes from 1918-1920, but he does not mention any of the lawyers involved in that arbitration. Rayman L. Solomon, *History of the Seventh Circuit, 1891-1941*, at 151 (1981). Judge Alschuler also served on the panel for Schwimmer’s case as discussed *infra*.

<sup>10</sup> Collins, *supra*.

<sup>11</sup> *Midland Notes*, 9 Woman Lawyers’ J. 21, 23 (1920) (“Miss Alice Greenacre is a Chicago lawyer who is aiding in the work of Americanization by giving a series of classes in citizenship for the Sixth Ward, under the auspices of the Woman’s City Club. Mrs. Olive Rabe is doing the same service for the Twenty-ninth Ward.”).

<sup>12</sup> Beth Wenger, “Rosika Schwimmer,” Jewish Women’s Archive: Jewish Women—A Comprehensive Historical Encyclopedia, <http://jwa.org/encyclopedia/article/schwimmer-rosika> (last visited Mar. 29, 2013) (detailing Schwimmer’s accomplishments).

<sup>13</sup> *Id.* Delegates to the Ford Neutral Mediation Conference sailed to Stockholm from the United States aboard the Oscar II, which became widely referred to as the Peace Ship. Schwimmer also served as an adviser to that expedition but was forced to resign due to criticisms and accusations of mismanagement. *Id.*

<sup>14</sup> Flowers & Lahutsky, *supra*, at 357.

<sup>15</sup> Not all naturalization questionnaires used at the time included this question. *Id.* at 348 n.20.

<sup>16</sup> *Schwimmer v. United States*, 27 F.3d 742, 743 (7th Cir. 1928).

<sup>17</sup> Flowers & Lahutsky, *supra*, at 344.

<sup>18</sup> *Id.* at 345 (quoting Transcript of Record, The United States Court of Appeals for the Seventh Circuit, *Rosika Schwimmer v. United States*, filed Dec. 31, 1927, at 11).

<sup>19</sup> *Id.* (quoting Transcript of Record, *supra*, at 11).

<sup>20</sup> *Id.* at 346 (quoting Transcript of Record, *supra*, at 14). The letter was written to Dr. Lee Alexander Stone, commander of the Military Intelligence Association of Chicago who was responsible for investigating subversive individuals. Schwimmer was under his investigation because some believed that she was a spy. *Id.*

<sup>21</sup> *Id.* (citing Transcript of Record, *supra*, at 15-16).

<sup>22</sup> See *Schwimmer v. United States*, 27 F.2d 742, 743 (1928) (“The statement of facts consists of the questionnaire submitted to appellant by the district director of naturalization, and her answers thereto; certain correspondence between her and the director; a condensed statement of her testimony at the hearing . . .”).

<sup>23</sup> Flowers & Lahutsky, *supra*, at 347.

<sup>24</sup> Judge Carpenter served from 1910 to 1933. See *Carpenter, George Albert*, Biographical Directory of Federal Judges, History of the Federal Judiciary, Federal Judicial Center, <http://www.fjc.gov/servlet/nGetInfo?jid=379> (last visited Mar. 25, 2013).

<sup>25</sup> *Mme. Schwimmer Is Barred from Citizenship; Asserts She Would Not Kill Nation’s Enemy*, N.Y. Times, Oct. 13, 1927.

<sup>26</sup> *Schwimmer*, 27 F.2d at 743.

<sup>27</sup> *Mme. Schwimmer Is Barred from Citizenship, supra*.

<sup>28</sup> *Id.* An unpublished transcript of the hearing reports a significantly less dramatic exchange:  
 Q If you were called to the service, and the kind of work that women usually can perform better than the men can—say as a nurse or as someone to give cheer to the soldiers—and you were at some place in a war, which I hope never will come, and you saw someone coming in the headquarters or the barracks, wherever it was, with a pistol in his hand to shoot the back of an officer of our country, and you had a pistol handy by, would you kill him?  
 A No, I would not.  
 The Court: The application is denied.  
 Unpublished transcript of Hearing before the District Court of the United States for the Northern District of Illinois, Eastern Div. 23 Oct. 1927, 3-4, Schwimmer Papers in the Archives of the Hoover Institution on War, Revolution and Peace, Stanford University, cited in Flowers & Lahutsky, *supra*, at 348.

<sup>29</sup> *Schwimmer*, 27 F.2d at 743.

<sup>30</sup> *Mme. Schwimmer Is Barred from Citizenship, supra*.

<sup>31</sup> *Citizen Papers for Pacifist Are Held Up: Mme. Schwimmer’s Case Is Delayed*, Chi. Daily Trib., Aug. 2, 1928, at 23 (noting that Rabe, “chief counsel” for Schwimmer, disclosed the existence of the defense fund).

<sup>32</sup> Collins, *supra*.

<sup>33</sup> *Id.*

<sup>34</sup> Solomon, *supra*, at 91.



## Looking Back

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### Notes:

<sup>35</sup> *Id.* at 96.

<sup>36</sup> *Id.* at 92-96 (detailing Alschuler’s involvement in Democratic party politics in Illinois).

<sup>37</sup> *Id.* at 108-09 (quoting J. Niblack, *The Life and Times of a Hoosier Judge*, 174-76 (1973) (“Anderson was a typical Federal Judge, appointed for life or good behavior, and the only way he could be removed was by a vote of two-thirds of the United States Senate. Consequently, he was lord of all he surveyed and brooked no opposition to his Court room, least of all from a defendant or his attorneys.”)).

<sup>38</sup> Robert C. Baltzell, Biographical Note, online index of Robert C. Baltzell Case Record and Scrapbooks, Manuscript Section, Indiana Division, Indiana State available at <http://www.in.gov/library/4697.htm> (last visited Mar. 28, 2013).

<sup>39</sup> *Schwimmer*, 27 F.2d at 744.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 742.

<sup>44</sup> *Citizen Papers for Pacifist Are Held Up*, *supra*, at 23.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Mme. Schwimmer Gets Aid of Two Pacifist Bands*, *Chi. Daily Trib.*, Aug. 3, 1928, at 5.

<sup>48</sup> See *Showdown in Schwimmer Citizenship Soon*, *Cedar Rapids Trib.*, Sept. 21, 1928 (noting that “Olive H. Rabe, Chicago attorney, who is handling the case” stated that the Department of Labor had until September 29 to appeal”).

<sup>49</sup> Flowers & Lahutsky, *supra*, at 352 (quoting Memo. of O.R. Lurhing, Assistant Attorney General, to William Mitchell, Solicitor General, Aug. 10, 1928, 3, 5-6, Justice Department Files, National Archives (hereinafter cited as “Justice Department Archives Collection”)).

<sup>50</sup> *Id.* (quoting Memo. to Solicitor General from Harry S. Ridgely, Attorney, Justice Department, Aug. 25, 1928, 1-28, Justice Department Archives Collection).

<sup>51</sup> *Id.* at 351 (quoting Memo. of Solicitor General to Lurhing, July 30, 1928, 1-3, Justice Department Archives Collection).

<sup>52</sup> *Id.* (quoting Memo of Solicitor General to Lurhing, *supra*).

<sup>53</sup> *Id.* at 352 (quoting Memo. by Acting Solicitor General Lloyd, Aug. 27, 1928, 1-2, Justice Department Archives Collection).

<sup>54</sup> *Id.* at 353.

<sup>55</sup> *Id.* (quoting Letter of Robe Carl White, Assistant Secretary of Labor to John G. Sargent, Attorney General, Sept. 10, 1928, 1-2, Justice Department Archives Collection).

<sup>56</sup> *Id.* at 354 (quoting Letter of Acting Solicitor General Lloyd to Robe Carl White, Assistant Secretary of Labor, Sept. 13, 1928, 1-2, Justice Department Archives Collection).

<sup>57</sup> *Id.* (quoting Letter of the Solicitor General, William Mitchell, to Robe Carl White, Assistant Secretary of Labor, Sept. 28, 1928, 1-3, Justice Department Archives Collection).

<sup>58</sup> *Current Note: Supreme Court Holds Madam Schwimmer, Pacifist, Ineligible to Naturalization*, 23 *Am. J. Int’l L.* 626, 626 (1929).

<sup>59</sup> *United States v. Schwimmer* (No. 484, Nov. 19, 1928), 278 U.S. 595.

<sup>60</sup> Brief for the United States, *United States v. Schwimmer*, No. 484, at 9 (1929), located in Rosika Schwimmer Collected Papers, Swarthmore College Peace Collection.

<sup>61</sup> *Id.* at 16, 17.

<sup>62</sup> *Id.* at 8.

<sup>63</sup> Brief for Respondent, *United States v. Schwimmer*, No. 484, at 4 (1929), located in Rosika Schwimmer Collected Papers, Swarthmore College Peace Collection.

<sup>64</sup> *Id.* at 11.

<sup>65</sup> *Id.* at 18.

<sup>66</sup> Collins, *supra*.

<sup>67</sup> Kirke I. Simpson, *A Washington Bystander*, *Billings Gazette*, May 4, 1929.

<sup>68</sup> *Id.*

<sup>69</sup> *United States v. Schwimmer*, 279 U.S. 644, 653 (1929).

<sup>70</sup> *Id.* at 650.

<sup>71</sup> *Id.* at 651-52.

<sup>72</sup> *Id.* at 653-54 (Holmes, J., dissenting). Justice Sanford also filed a brief separate written dissent indicating he agreed with the 7th Circuit decision.

<sup>73</sup> *Id.* at 654-55 (Holmes, J., dissenting).

<sup>74</sup> See, e.g., *Christian Legal Soc. v. Martinez*, 130 S.Ct. 2971, 2994 n.26 (2010) (“Today’s decision thus continues this Court’s tradition of protect[ing] the freedom to express ‘the thought that we hate.’” (first internal citation omitted; quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

<sup>75</sup> *Schwimmer*, 279 U.S. at 644.

<sup>76</sup> *Girouard v. United States*, 328 U.S. 61, 64-69 (1946) (also overruling *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Bland*, 283 U.S. 636 (1931)).

<sup>77</sup> Wenger, available at <http://jwa.org/encyclopedia/article/schwimmer-rosika>.

<sup>78</sup> See Ronald K.L. Collins & David L. Hudson Jr., *To the High Court: Olive Rabe Representing Rosika Schwimmer*, *First Amendment News*, First Amendment Center, May 26, 2008, <http://www.firstamendmentcenter.org/to-the-high-court-olive-rabe-representing-rosika-schwimmer> (last visited Mar. 26, 2013).

<sup>79</sup> *Id.* Some of Rabe’s works are still available for online purchase though none are currently printed.

<sup>80</sup> *Id.* Rabe’s life ended quietly; she was buried without a memorial service and only a short obituary in a Colorado paper. *Id.*

<sup>81</sup> Many thanks to Circuit Librarian Gretchen E. Van Dam for her effort to research Rabe’s involvement in this case in the context of 7th Circuit history.

<sup>82</sup> This article was written in March, in celebration of Women’s History Month.

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