

University of Richmond Law Review

Volume 42

Issue 4 *Allen Chair Symposium 2008: Immigration in the Twenty-First Century: Perspectives on Law and Policy*

Article 6


3-1-2008

Birthright Citizenship, The Fourteenth Amendment, and State Authority

James C. Ho

Gibson, Dunn & Crutcher, LLP, Dallas, Texas

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

 Part of the [Constitutional Law Commons](#), [Immigration Law Commons](#), [Law and Politics Commons](#), and the [Legislation Commons](#)

Recommended Citation

James C. Ho, *Birthright Citizenship, The Fourteenth Amendment, and State Authority*, 42 U. Rich. L. Rev. 969 (2008).
Available at: <https://scholarship.richmond.edu/lawreview/vol42/iss4/6>

This Symposium Essay is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

BIRTHRIGHT CITIZENSHIP, THE FOURTEENTH AMENDMENT, AND STATE AUTHORITY

James C. Ho *

Chairman Swinford, Chairman King, and distinguished members:

It is an honor to appear before this important joint committee hearing today to examine the issue of birthright citizenship and House Bill 28¹ by Representative Berman.²

The topic of immigration and border security generates considerable heat and passion. Many Texans feel strongly that America is a nation of immigrants. Many other Texans feel just as strongly that America is, first and foremost, a nation of laws. As both an immigrant and a lawyer, I have a great deal of respect for both sides.

But I am not here to speak about my personal views. Nor am I here to speak on behalf of any particular community or interest group—although I am certainly grateful that the ACLU of Texas has arranged for me to be here today.

* Of Counsel, Gibson, Dunn & Crutcher LLP, Dallas, Texas. J.D., 1999, University of Chicago School of Law; B.A., 1995, Stanford University. The author is of counsel in the Dallas office and Appellate and Constitutional Law practice group of Gibson, Dunn & Crutcher LLP. He previously served as chief counsel to the U.S. Senate Judiciary Subcommittees on the Constitution and Immigration, as an attorney in the Office of Legal Counsel of the U.S. Department of Justice, and as a law clerk to Justice Clarence Thomas. This article is adapted from testimony delivered at a joint hearing of the Committee on State Affairs and the Committee on Border and International Affairs of the Texas House of Representatives on March 28, 2007. For a more comprehensive analysis, see James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2D 367 (2006).

1. H.R. 28, 80th Leg., Reg. Sess. (Tex. 2007).

2. Since this hearing, similar laws have been proposed in the form of ballot initiatives for the 2008 elections in California and Arizona. See Amy Taxin, *Initiative Gnaws at Citizenship*, ORANGE COUNTY REG. (Santa Ana, Cal.), Nov. 18, 2007, at 17 (California); Yvonne Wingett, *Ballot Proposal Reins in Birthright Citizenship*, ARIZ. REPUBLIC (Phoenix), Dec. 7, 2007, at 3 (Arizona). The same legal analysis applies to those proposals.

Instead, I am here as an attorney who has devoted most of his career to counseling government officials and private sector clients alike about the United States Constitution and the legality of various laws and government actions. I am honored to appear here today to discuss the Fourteenth Amendment guarantee of birthright citizenship.³

Generations of Americans have come to understand that children born in the United States are entitled to U.S. citizenship, regardless of the nationality of their parents. House Bill 28 attempts to effectively do away with birthright citizenship for the U.S.-born children of illegal aliens and undocumented persons here in the great state of Texas.⁴

Let me state at the outset: I have no doubt that Representative Berman's policy views are heartfelt and sincere. Nor do I doubt that many people feel strongly that there is a connection between birthright citizenship and illegal immigration.

But there are many topics of discussion that may be otherwise legitimate, but are nevertheless restricted by the United States Constitution. Examples range widely from campaign finance laws that effectively restrict political speech in violation of the First Amendment,⁵ to the rule that only thirty-five year olds and natural born citizens may serve as President.⁶ Reasonable people may disagree on the merits of such policies, yet there is no question that the U.S. Constitution imposes important limits on them.

The U.S. Constitution speaks directly to the issue of birthright citizenship.⁷ It makes clear that birthright citizenship is a matter of constitutional right, no less for the U.S.-born children of unlawful aliens and undocumented persons than for the descendants of passengers of the Mayflower. I reach this conclusion based on the text of the Constitution, common law history, legislative history, and U.S. Supreme Court precedent.

3. See U.S. CONST. amend. XIV, § 1.

4. H.R. 28, 80th Leg., Reg. Sess. (Tex. 2007).

5. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (examining campaign finance reform in light of First Amendment concerns).

6. U.S. CONST. art. II, § 1, cl. 5; see also James C. Ho, *President Schwarzenegger—Or At Least Hughes?*, 7 GREEN BAG 2D 105 (2004).

7. U.S. CONST. amend. XIV, § 1.

We begin—as we always should—with the text of the Constitution. The first sentence of the Fourteenth Amendment states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States”⁸ The motivating purpose of this amendment was to overturn the notorious U.S. Supreme Court decision in *Dred Scott*.⁹ But the amendment was drafted broadly to guarantee citizenship to virtually everyone born in the United States.¹⁰

The critical language of the Fourteenth Amendment is the phrase “subject to the jurisdiction thereof.”¹¹ Proponents of repealing birthright citizenship argue that this language excludes all non-citizens—both lawful and unlawful—because “subject to jurisdiction” means allegiance.¹² They point out that non-citizens don’t swear allegiance to the United States; they swear allegiance to their home country.¹³

Respectfully, I don’t think that that is a reasonable reading of the text. I would submit that the plain meaning of “subject to jurisdiction” is rather straightforward. It simply means that one must have a duty to obey U.S. law. When a person is “subject to the jurisdiction” of a court of law, that person is required to obey the orders of that court. When a company is “subject to the jurisdiction” of a government agency, that company is required to obey the regulations promulgated by that agency. The meaning of the phrase is simple: One is “subject to the jurisdiction” of another whenever one is obliged to obey the laws of another.¹⁴ Simply put, the test is obedience, not allegiance.

It is also worth observing that if the drafters had intended to require allegiance, rather than obedience, they could have said so. How easy it would have been for them to state explicitly that only

8. *Id.*

9. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873) (citing *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857)) (stating that the Fourteenth Amendment “overturns the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States”).

10. See *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898); see also *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 73.

11. U.S. CONST. amend. XIV, § 1.

12. See, e.g., John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955, 957–58 (2008).

13. See *id.* at 115–17.

14. See *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 160–61 (2005) (Scalia, J., dissenting).

children born to citizens are guaranteed birthright citizenship—with a simple proviso to address the descendants of slaves. But instead, they chose the language of jurisdiction, not citizenship. And that decision deserves respect.

Of course, the phrase “subject to jurisdiction” must mean something. Otherwise, it would serve no purpose.¹⁵ Under the interpretation I put forth, it does serve a purpose. The “jurisdiction” requirement excludes only those individuals who are not required to obey U.S. law. This concept—like much of early U.S. law—derives from English common law. Under the common law, neither foreign diplomats nor enemy soldiers are legally required to obey our law. They enjoy diplomatic immunity or combatant immunity from our laws.¹⁶ As a result, their U.S.-born offspring are not entitled to birthright citizenship.

This understanding is also confirmed by the Congressional debates surrounding the Fourteenth Amendment. Members of the 39th Congress debated the *wisdom* of guaranteeing birthright citizenship, but no one disputed the amendment’s *meaning*.¹⁷ In fact, opponents of the amendment conceded—indeed, they warned—that the language of the Citizenship Clause would guarantee citizenship to the children of those who owe the U.S. no allegiance. And supporters of the amendment agreed that only members of Indian tribes, ambassadors, foreign ministers, and others who are not “subject to our laws” would fall outside the guarantee of birthright citizenship.

This interpretation is further confirmed by U.S. Supreme Court precedent.¹⁸ In 1898, the Court held in *United States v. Wong Kim Ark* that a U.S.-born child of Chinese immigrants was consti-

15. Cf. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading [of a statute] which renders some words altogether redundant.”) (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

16. See *Abdulaziz v. Metro. Dade County*, 741 F.2d 1328, 1329–30 (11th Cir. 1984) (diplomatic immunity); *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (combatant immunity).

17. See CONG. GLOBE, 39th Cong., 1st Sess. 2892–97 (1866) (debating ratification of the Fourteenth Amendment).

18. This interpretation has also been affirmed by the Executive Branch under Presidents of both parties, including Presidents Ronald Reagan and Bill Clinton. See, e.g., Brief for the United States as Amicus Curiae Supporting Appellees, *Plyler v. Doe*, 457 U.S. 202 (1982) (No. 80-1538), 1981 U.S. S. Ct. Briefs LEXIS 2363 (President Reagan); 19 Op. Off. Legal Counsel 340, 341–42 (1995) (President Clinton).

tutionally entitled to citizenship.¹⁹ The Court noted that “[t]he Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory . . . including all children here born of resident aliens.”²⁰

The Court has since reiterated this view in subsequent decisions, applying this principle specifically to the children of undocumented persons. In *Plyler v. Doe*, a majority of justices concluded—and all four dissenting justices agreed—that birthright citizenship under the Fourteenth Amendment “extends to anyone . . . who is subject to the laws of a State,” including the U.S.-born children of “illegal aliens.”²¹ And in *INS v. Rios-Pineda*, the Court unanimously observed that a child born to an undocumented immigrant was in fact a citizen of the United States.²²

I will close by acknowledging that House Bill 28 does not directly repeal birthright citizenship,²³ as some bills in Congress would do.²⁴ It simply provides that U.S.-born children of undocumented persons are denied all state and local government services.²⁵ But that approach, if anything, makes House Bill 28 less constitutional, not more constitutional. Supporters of House Bill 28 acknowledge that the legislation is intended as an indirect attack on birthright citizenship. But citizenship laws are dictated by Congress, not by the states, under Article I of the Constitution.²⁶ As a result, states are forbidden from engaging in across-the-board discrimination against individuals on the basis of their nationality, except as authorized by Congress. In this sense, House Bill 28 is even more difficult to justify—because it discriminates against *U.S. citizens* based on the nationality of their parents.

19. See 169 U.S. 649, 705 (1898).

20. *Id.* at 693.

21. 457 U.S. 202, 215 (1982); *id.* at 243 (Burger, J., dissenting).

22. 471 U.S. 444, 445, 446 (1985).

23. See H.R. 28, 80th Leg., Reg. Sess. (Tex. 2007).

24. See, e.g., Birthright Citizenship Act of 2007, H.R. 1940, 110th Cong. (1st Sess. 2007); Reducing Immigration to a Genuinely Healthy Total (RIGHT) Act of 2005, H.R. 3700, 109th Cong. (1st Sess. 2005).

25. H.R. 28, 80th Leg., Reg. Sess. (Tex. 2007).

26. See U.S. CONST. art. 1, § 8, cl. 4.
