INDIANS AND CITIZENSHIP: TERRITORIAL BIRTH & PARENTAL STATUS IN CONTEMPORANEOUS CASELAW

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INTRODUCTION

Soon, in *Trump v. Barbara*, the Supreme Court will weigh in on the question of birthright citizenship. At issue is one sentence in the Fourteenth Amendment: "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."[1] The Court will have to confront what exactly it means to be "born . . . subject to the jurisdiction" of the United States.

Originalist scholars have weighed in. On one side of the debate is Professor Ilan Wurman. He has argued that "birthright citizenship depended largely, even if not exclusively, on the status of the parents as being within the allegiance and under the protection of the sovereign."[2] If a parent was "within the allegiance and under the protection of the sovereign," he was subject to the sovereign's complete "municipal jurisdiction."[3] And, if that were the case, any children that parent had would be bona fide citizens of the polity. Others disagree with Wurman's focus on parental status. Professor Keith Whittington, for example, has argued that, "except under very narrow exceptions," "[c]hildren born within the territory of the United States are natural-born citizens."[4] The status of one's parents, in this account, is largely immaterial. As long as you are "born within the governing authority of the nation," you "are thereby subject to its jurisdiction."[5] For Whittington, citizenship hinges upon *where* you are born.

The status of Indians presents a conceptual problem for Whittington's view.[6] After all, those born to "parents in a Native American tribe" are "born within the geographic territory of the United States."[7] But it's widely understood that those children are *not* citizens under the Fourteenth Amendment.[8] Whittington deals with this issue by arguing that "[t]he critical point .

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[1] U.S. CONST. amend. XIV, § 1.

[2] Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL'Y 315, 372 (2026).

[3] *Id.* at 374.

[4] Keith E. Whittington, *By Birth Alone: The Original Meaning of Birthright Citizenship and Subject to the Jurisdiction of the United States*, 49 HARV. J.L. & PUB. POL'Y 459, 462 (2026).

[5] *Id.* at 463.

[6] It is, of course, not a problem for Wurman's thesis. Indian parents who are members of tribes are not subject to the complete municipal jurisdiction of the United States, and thus, their children would not be citizens upon birth. *See, e.g.*, Wurman, *supra* note 2, at 423.

[7] Whittington, *supra* note 4, at 468.

[8] Steven J. Menashi, *The Birthright Citizenship Debate*, 49 HARV. J.L. & PUB. POL'Y 301, 309 (2026).

. . was that Indians born on tribal lands were foreigners to the United States."[9] But, for him, "the *land* is doing the important work. Indian land is within the *territory* of the United States but is not *governed* by the United States."[10] To Whittington, "the Reconstruction Congress was . . . concerned with whether 'Indian country' was governed by American law."[11] Put another way, the central question was whether a child was born on "sovereign territory" (i.e., Indian *land*).[12]

But what if a Native American parent had a child *outside* Indian country? Or, alternatively, what if an American had a child *inside* Indian country? Would the child of a Native American parent be born an American? Would the child of the American parent be born a tribal member? If not—if citizenship didn't track location but instead tracked parental status—cracks would start to form in Whittington's territory-centric view.

This short essay sheds light on these questions. It presents a handful of cases—all of which have been largely overlooked in the recent literature[13]—that call into question this territory-focused conception of citizenship. Shortly after the Fourteenth Amendment was ratified, courts were asked to determine the citizenship status of litigants and parties before them: Were they Indians or United States citizens? What the following demonstrates is that courts did not adopt a territory-centric view of citizenship. A child might still be considered an Indian even if he was born *outside* tribal land. And a child might still be considered an American even if he was born *within* tribal land. Rather than focusing on the location of birth, courts often probed the legal status of the child's parents. Of course, none of this evidence answers the ultimate question in *Barbara.* This essay just speaks to one of the issues in that case: Do we look at location of birth or parental status? Consistent with the history recounted in this paper, it may still be the case, as prominent originalist Professor Michael Ramsey has argued, that temporary visitors and those here unlawfully are "subject to the jurisdiction" of the United States; as such, their children *would* be citizens under the Fourteenth Amendment.[14] But this essay's findings do suggest that birth in a particular territory alone was not the decisive factor in citizenship determinations.

HOW COURTS TALKED ABOUT LOCATION

Consider the 1871 case of *McKay v. Campbell*.[15] As the court put it: "The case turn[ed] upon [a] single point—was the plaintiff born subject to the jurisdiction of the United States . . . ?"[16] That is, was William McKay a citizen under the Fourteenth Amendment? Answering that question was

[9] *Id.* at 506 (emphasis in original).

[10] *Id.*

[11] *Id.* at 506–07.

[12] *Id.* at 506.

[13] The interesting part, however, is that some of these cases have been hiding in plain sight; several of them were quoted or cited in the Supreme Court's opinion in *Elk v. Wilkins*, 112 U.S. 94, 107 (1884) (citing United States v. Elm, 25 F. Cas. 1006 (N.D.N.Y. 1877)); *id.* at 109 (citing McKay v. Campbell, 16 F. Cas. 161 (D. Or. 1871)).

[14] *See* Michael D. Ramsey, *Birthright Citizenship Re-Examined*, 101 NOTRE DAME L. REV. (forthcoming 2026) (manuscript at 111–12) ("[A]ll persons, including all noncitizens other than those with international law immunities, in sovereign territory were under sovereign authority, and thus within the nineteenth-century meaning of 'subject to the jurisdiction' of the sovereign. . . . [T]emporary visitors and persons not lawfully present are subject to complete jurisdiction of the United States while in U.S. territory.").

[15] 16 F. Cas. 161 (D. Or. 1871).

[16] *Id.* at 163.

tricky. McKay was born in 1823 in Fort George,[17] which, at the time, was "jointly occupied" by both American and British governments.[18] To be more specific, Fort George was "delivered to the United States" and thus was not "held by the British government;" however, it was "occupied by a British corporation—British subjects—in pursuance of a treaty of joint occupation."[19] Complicating the picture even more, McKay's father was a "British subject"[20] and his mother a "Chinook Indian."[21]

The court concluded that, no matter how one analyzed the question, McKay could not be considered an American citizen: "In legal contemplation [McKay was either] an American Indian, by virtue of his mother being a member of the Chinook tribe, or a British subject, without reference to his race, by virtue of being the son of Thomas McKay, and his birth in the allegiance of the British crown."[22] In other words, the status of his parents was crucial. And whether the relevant reference point was his mother or father, McKay was out of luck. "In neither case was he born a citizen of the United States . . . ."[23]

The court's parent-focused approach is noteworthy. The court, first, "[s]uppose[d] that . . . [McKay] . . . follow[ed] the condition of his mother, and [was] therefore a Chinook Indian."[24] If that were the case, was he "then a citizen of the United States under" the Fourteenth Amendment?[25] As the court noted, "[a]ccording to the doctrine that has been uniformly held in regard to the status of the Indian tribes in the United States he [would] not [be]."[26] If he followed the condition of his mother, he would be "born a member of 'an independent political community'—the Chinook."[27] And, if that were the case, he would "not [be] born subject to the jurisdiction of the United States;" he would not be "born in its allegiance."[28] And, "[o]n the other hand, if [McKay] [was] held to follow the condition of his father he [would be] a Canadian of mixed blood, born in the allegiance of the British crown, and therefore a British subject."[29]

Critically, the judge did not think that *where* McKay was born drove the analysis. Whether his mother gave birth in Indian territory, in American territory, or in the territory controlled by the British corporation, wouldn't answer the question of McKay's status. Rather, the court reasoned that if the relevant legal rule was that citizenship status passed from mother to son, McKay would be considered an "American Indian"—not a United States citizen. That point is significant because it demonstrates that whether or not a person was deemed an Indian hinged upon *the status of their parent* and not *the location of their birth*. After all, McKay, as far as we know, was not born on tribal land. In fact, the court mentioned that, while McKay "was born of a Chinook

[17] *Id.* at 162.
[18] *Id.* at 164.
[19] *Id.* at 165.
[20] *Id.*
[21] *Id.* at 166.
[22] *Id.* at 166.
[23] *Id.* at 167.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

woman," the record did not state "who the Chinook Indians were, or where they lived."[30] His legal status as an Indian did not derive from being born on a specific piece of Indian territory. Wherever he had been born, the court still viewed it as a possibility that McKay could be an Indian. That's because, irrespective of his place of birth, McKay would be "born a member of 'an independent political community.'"[31] Because of his mother's relation to her tribe, McKay could be born in the "allegiance" of the tribe even if he were born on American (or British) territory. The court's discussion in *McKay*, then, casts doubt on the territory-centric view of birthright citizenship.[32]

Ex parte Reynolds[33] similarly undermines the territory-centric view. There, a federal court had to determine whether a man was Indian "either by blood or marriage."[34] Concluding that "he [was] not [Indian] by blood," the court asked whether his wife was an Indian.[35] So, "[w]hat d[id] the evidence show as to the nationality of [his wife]?"[36] Well, "[i]t show[ed] that her mother had some Indian blood in her veins; that her father also had some Indian blood, but that her paternal grandfather was a full-blooded white man; that she was born and raised in the state of Mississippi, and married . . . in that state."[37]

Given those facts, the court had to determine "if she [was] a citizen of the United States or a Choctaw woman."[38] Before reaching that conclusion, the court sought "some rule to guide [it] in tracing her nationality."[39] It "look[ed] to the status of the Indian people" generally, reasoning that "[t]hey [were] not citizens, although born in the United States; at least the courts have always so held."[40]

Still, the court had to determine whether the wife herself "belong[ed]" to the Choctaw tribe or not.[41] Guided by the common law rule that "offspring follow[ed] the condition of the father,"[42] the court concluded that she was not an Indian. After all, "[t]he evidence in the case show[ed] that the paternal grandfather of [the wife] was a white man, living in the state of Mississippi, and not with an Indian tribe;" he was, therefore, "a citizen of the . . . United States."[43] That "ma[d]e

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[30] *Id.* at 166. True, the court "supposed[]" that it had "judicial knowledge of a fact so well-known in the history of Oregon, as that the Chinook Indians at the period of the plaintiff's birth, were a well-known tribe living at or near the mouth of the Columbia river." *Id.* But no suggestion was made that McKay was born on that tribal land. And the court didn't deem that fact relevant to its analysis. *See id.*

[31] *Id.* at 167.

[32] Whittington discusses other portions of McKay in passing but does not engage with this part of the court's opinion. *See* Whittington, *supra* note 4, at 484–85. Wurman cites a case note discussing the case, but the note appears omit the relevant paragraphs. See Wurman, *supra* note 2, at 357 & n.134. Professor Kurt Lash does talk about the case in his work. *See* Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance, and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV. (forthcoming 2026) (manuscript at 171–73).

[33] 20 F. Cas. 582 (C.C.W.D. Ark. 1879).

[34] *Id.* at 583.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 585.

[43] *Id.*

her father a citizen of the United States, and subject to the jurisdiction of the courts thereof."[44] And, so, "[t]he same principles would make [the wife] a citizen of the United States, and subject to the jurisdiction of the courts thereof."[45] So, the man "was married to a woman who was legally a member of the white race, or of the body politic known as citizens of the United States. He did not, therefore, become a Choctaw by marriage, but was a citizen of the United States."[46]

As in *McKay*, the court again looked to the status of an individual's parents—rather than merely considering the location of birth. It's not clear from the opinion whether the wife was born on tribal land in Mississippi or, like her grandfather, was born on non-tribal land in the state. The court simply found that inquiry irrelevant. The inquiry was rather about the legal status of the wife's father and grandfather. Concluding that they were American citizens, the court, in turn, concluded that the wife was an "American citizen[]" and "subjected to the full responsibility of such citizens."[47]

United States v. Elm[48] took a similar analytical tack. The facts of this case are complicated. After Abraham Elm was alleged to have voted illegally, a federal court in New York had to figure out whether he was a citizen of the United States or not.[49] Elm was born in 1842[50] in the town of Lenox in New York State.[51] Whether he was born on tribal land or not is unclear from the opinion. Elm was an "Oneida Indian."[52] But, around 1838, the "main body of the Oneidas" relocated from New York to Wisconsin.[53] "Since then, the tribal government ha[d] ceased as to those who remained in [the] state."[54] In fact, "[t]he 20 families which constitute[d] the remnant of the Oneidas reside[d] in the vicinity of their original reservation. [But] they d[id] not constitute a community by themselves."[55] Rather, "their dwellings [were] interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they [were] identified with the rest of the population."[56]

Thus, there was a strong case to be made that Elm was *not* born on tribal territory in 1842. Nevertheless, the court did not ask whether the physical land on which he was born was tribal or American soil. Rather, the court stated, "there are classes of residents who, *though they may be born here,* are not subject to the exercise of those prerogatives of sovereignty which a government has the right to enforce over its own citizens, and over them alone."[57] That is, some person, "though born here, are born within the allegiance of a foreign sovereign, or of another government, [and]

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 584.

[48] 25 F. Cas. 1006 (N.D.N.Y. 1877).

[49] *Id.* at 1006.

[50] Laurence M. Hauptman, *American Indians and the Right to Vote:* United States v. Elm *(1877), Its Origins, and Its Impact*, 20 J. GILDED AGE & PROGRESSIVE ERA 234, 238 (2021).

[51] *Elm*, 25 F. Cas. at 1006.

[52] *Id.*

[53] *Id.* at 1008.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 1006 (emphasis added).

are not subject to the jurisdiction of the United States."[58] For example, "Indians who maintain their tribal relations are the subjects of independent governments, and, as such, not in the jurisdiction of the United States, within the meaning of the amendment, because the Indian nations have always been regarded as distinct political communities."[59]

The key question was therefore whether Elm's "tribe continued to maintain its tribal integrity, and [whether] he continued to recognize his tribal relations, [such that] his status as a citizen would not be affected by the fourteenth amendment[?]"[60] The question was *not* whether Elm was born on tribal or American soil, but rather whether he still maintained an allegiance and political connection to the Oneida Nation. The court concluded that he did not: "His tribe has ceased to maintain its tribal integrity, and he ha[d] abandoned his tribal relations . . . . [A]nd because of these facts, and because Indians in this state are subject to taxation, he is a citizen, within the meaning of the fourteenth amendment."[61]

Elm, then, stands for one of two propositions—either of which undermines the territory-centric view. If Elm *was not* born on tribal territory, but the court nevertheless assessed whether he had an enduring allegiance to his tribe, that is definitive evidence that it did not view the mere fact of being born on American soil as establishing American citizenship. If Elm *was* born on tribal land in 1842, the court's restatement of the relevant legal rules is still noteworthy. When discussing the status of Indians, the court did not consider the location of their birth to be legally relevant. What mattered was whether a particular individual "continued to recognize his tribal relations" and whether the tribe itself "maintain[ed] its tribal integrity."[62]

In this respect, *McKay*, *Ex parte Reynolds*, and *Elm*—three cases decided within eleven years of the ratification of the Fourteenth Amendment—call into question the view that an individual's citizenship hinged solely upon the location of their birth. Other considerations were at play.

And it's not just these three cases. In *Keith v. United States*[63] and *United States v. Ward*,[64] courts had to determine whether particular individuals were Indians within the meaning of the Major Crimes Act[65] and the Dawes Act.[66] In both cases, the individuals were born on reservations.[67] However, the location of their birth was not dispositive. Instead, in both cases, the courts looked at the "condition of [their] father"[68]—that is, their fathers' citizenship status—to figure out the individuals' status. So, for instance, in *Keith*, though it was "averred that [the individual] was a member of the Arapahoe tribe, and enjoyed all the rights of a member of such tribe," it was

[58] *Id.*
[59] *Id.*
[60] *Id.* at 1007.
[61] *Id.*
[62] *Id.*
[63] 58 P. 507 (Okla. 1899).
[64] 42 F. 320 (C.C.S.D. Cal. 1890).
[65] 18 U.S.C. § 1153.
[66] Ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.).
[67] *Keith*, 58 P. at 507; *Ward*, 42 F. at 321. True, in *Keith*, the court just said that "that the plaintiff was born in the Arapahoe tribe of Indians." *Keith*, 58 P. at 507. It *could* be the case that the court meant that the plaintiff was born into the tribe but not on tribal land. Either way, location of birth didn't drive the court's analysis.
[68] *Keith*, 58 P. at 508; *Ward*, 42 F. at 322.

decisive that his father was a "citizen of the United States."[69] Likewise, in *Ward*, even though the individual was born on a reservation and currently lived there,[70] his father was not an Indian, and that rendered Keith "not an Indian[] within the meaning of the statute."[71] In both of these cases, figuring out the place of birth did not end the inquiry. More was needed. The status of their parents was legally decisive.

CONCLUSION

Does "citizenship . . . follow automatically from birth in the territory?"[72] Some, like Whitington, think so. And they have suggested that the exclusion of Indians from automatic citizenship does not undermine this simple territorial rule because the exclusion resulted from the unique territorial status of Indian lands. But the cases surveyed above suggest a different basis for the exclusion. In the years after the ratification of the Fourteenth Amendment, judges were often asked to determine whether a particular person was an Indian or a citizen "subject to the jurisdiction" of the United States. When they answered that question, their analysis did not focus on the location of birth alone. Rather, they looked at parental status, asking whether one's parent had an allegiance to a tribal government—an "independent political community." To be sure, this evidence does not answer the ultimate question in *Barbara*. Perhaps, temporary visitors and those unlawfully present are "subject to jurisdiction" of the United States; as such, their children *would* be citizens of the United States upon birth.[73] But this essay has shown that citizenship did not hinge upon mere birth on a particular territory.

[69] *Keith*, 58 P. at 507–08.
[70] *Ward*, 42 F. at 321.
[71] *Id.* at 322.
[72] Menashi, *supra* note 8, at 302.
[73] *See supra* note 13 and accompanying text.