Are You Native American?*

Throughout history, our nation has been obsessed with the identity of various groups of people inhabiting the United States. Since the founding, Native Americans have been tasked with protecting the traditions and customs that shape their identity against colonized norms.

In the late 1800s, the Indian Major Crimes Act was created to further strip Native Americans, or "Indians," of their identity and customs. However, the Act failed to define the term "Indian." Decades of litigation have focused on the simple question: Who qualifies as Native American? The Supreme Court of North Carolina was the latest court to weigh in on this question. The court held that the question of who is a Native American is not limited to who is an enrolled member of a certain tribe. Instead, the court decided to consider a number of nonexhaustive factors to determine if an individual is "Indian" enough, even though Native American tribes have various membership requirements that encompass some of the factors that the court mentioned.

This Recent Development argues that the Major Crimes Act is an outdated relic of the past enforcing colonized ideals onto the modern Native American and that if courts are faced with answering the question of who is "Indian" for purposes of the Major Crimes Act, their inquiry should begin and end with tribal membership.

INTRODUCTION

Are you Native American? Without hesitation, many of us could answer this question with either yes or no. Unfortunately, the federal Indian Major Crimes Act ("Major Crimes Act") complicates this question. The Major Crimes Act was part of the Indian Appropriations Act of 1885.[1] The Indian Appropriations Act was Congress's attempt to further the ultimate goal of civilizing Indians.[2] Importantly, the Major Crimes Act fails to define the term "Indian,"[3] forcing courts to develop various tests of Native American identity—

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1. Indian Appropriations Act of 1885, Pub. L. No. 48-341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153); JOHN R. WUNDER, NATIVE AMERICAN SOVEREIGNTY 21 (2005).

2. MIKAËLA M. ADAMS, WHO BELONGS?: RACE, RESOURCES, AND TRIBAL CITIZENSHIP IN THE NATIVE SOUTH 10 (2016) (stating that the Indian Appropriations Act of 1885 had the goal of "transform[ing] Indians into United States citizens").

3. State v. Nobles, 373 N.C. 471, 473, 838 S.E.2d 373, 375 (2020).

producing inconsistent results.[4] However, litigation spent on defining "Indian"[5] is superfluous. In the twenty-first century, the Major Crimes Act only serves as an outdated, unnecessary relic of the past reminding us of our founders' inability to accept and respect the individuals and the culture predating colonization.

In *State v. Nobles*,[6] the Supreme Court of North Carolina recently found itself—for the first time—defining the term "Indian" as applied to the Major Crimes Act.[7] George Lee Nobles and two others were convicted of robbing and fatally shooting Barbara Preidt within the Qualla Boundary.[8] The Qualla Boundary is "the official name for the Cherokee Indian Reservation in western North Carolina."[9] However, unlike his two codefendants who were brought before a tribal magistrate of the Eastern Band of Cherokee Indians ("EBCI") for indictment proceedings, Nobles was prosecuted by the State of North Carolina and brought before a Jackson County magistrate.[10] Since the Major Crimes Act fails to define the term "Indian,"[11] the court applied the two-pronged test created in *United States v. Rogers*[12] to define the term "Indian," but then adopted a four-factor nonexhaustive test created in *St. Cloud v. United States*[13] to further complicate the matter.[14] After considering various factors, the Supreme Court of North Carolina ultimately held that Nobles did not qualify as an Indian under the Major Crimes Act, and therefore the case must be tried

4. *See infra* Section I.C.

5. Although Native American is the correct term, I will be using "Indian" throughout this Recent Development when discussing Native Americans in order to be consistent with the language used in the federal laws. However, it is necessary to note that "Native American" or "American Indian" is the proper language that should be used.

6. 373 N.C. 471, 838 S.E.2d 373 (2020).

7. *Id.* at 477, 838 S.E.2d at 377 ("This Court has not previously had an opportunity to apply the *Rogers* test.").

8. *Id.* at 473, 838 S.E.2d at 375.

9. Michael Hill, *Qualla Boundary*, NCPEDIA (Jan. 1, 2006), https://www.ncpedia.org/qualla-boundary [https://perma.cc/GB7F-5HHS]. While this Recent Development will refer to the Qualla Boundary as a reservation, it is "technically not a reservation because individual tribal members hold title to about eight percent of the land . . . [but] [b]ecause the land is held in a federal trust, it cannot be sold except to other tribal members." *Qualla Boundary*, BLUE RIDGE HERITAGE TRAIL, https://blueridgeheritagetrail.com/explore-a-trail-of-heritage-treasures/qualla-boundary/ [https://perma.cc/NTT2-KYUH]; *Take a Journey to the Home of the Eastern Band of Cherokee Indians*, CHEROKEE N.C., https://visitcherokeenc.com/eastern-band-of-the-cherokee/ [https://perma.cc/8NF3-ESQP] (stating that instead of living on a reservation, Cherokee people live on the Qualla Boundary, which is land "owned by the Eastern Band of Cherokee Indians and kept in trust by the federal government").

10. *Nobles*, 373 N.C. at 473, 838 S.E.2d at 375.

11. *See id.*

12. 45 U.S. 567 (1846).

13. 702 F. Supp. 1456 (D.S.D. 1988).

14. *Nobles*, 373 N.C. at 473, 838 S.E.2d at 375.

by the state court instead of the federal court.[15] However, the court would have reached the same conclusion if they would have ended the analysis after consulting the EBCI's tribal enrollment.

The *Nobles* decision fails to provide guidance for future judges and ignores the decision's potential scope. The court's adoption of a nonexclusive multifactored test further complicates the relationship between the government and tribes by robbing Indian tribes of the decision of who is "Indian." Allowing a panel of judges to determine whether someone is "Indian" enough erodes tribal sovereignty.[16] By taking the decision of who is "Indian" away from the tribes, courts continue to hack away at indigenous identity.[17] Additionally, North Carolina's American Indian population, which is subject to the Major Crimes Act, is over 16,000[18] and could increase to nearly 100,000 if the Lumbee Recognition Act is passed.[19] With 16,000 American Indians—and a possibility of tremendously increasing in upcoming years—it is likely that more individuals will be impacted by the *Nobles* ruling in the future. So, after about 140 years it is time to reexamine the Major Crimes Act. The Act should either be repealed altogether or substantially modified with the goals of tribal sovereignty in mind.

15. *Id.* at 484, 838 S.E.2d at 382. The Major Crimes Act extends federal jurisdiction over crimes committed in Indian Country. *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/jurisdiction.htm [https://perma.cc/6KJK-SD2Z].

16. *See* ADAMS, *supra* note 2, at 162. Adams contends that "[f]rom the Cherokee perspective . . . only the tribal council had the sovereign authority to set qualifications for citizenship." *Id.*

17. *See* Maya Harmon, *Blood Quantum and the White Gatekeeping of Native American Identity*, CALIF. L. REV. ONLINE (Apr. 2021), https://www.californialawreview.org/blood-quantum-and-the-white-gatekeeping-of-native-american-identity/#:~:text=Whether%20by%20requiring%20a%20higher,gatekeepers%20of%20Native%20American%20identity [https://perma.cc/KNQ5-SM3D] ("Colonization caused a shift to legal and race-based definitions.").

18. *Eastern Band of Cherokee Indians*, NAFOA, https://www.nafoa.org/tribes/eastern-band-of-cherokee-indians [https://perma.cc/DW67-3F44].

19. *See* Kevin Accettulla, *North Carolina Lawmakers Introduce Bill To Give Federal Recognition to Lumbee Tribe*, WBTW NEWS 13 (Apr. 26, 2021, 10:36 AM), https://www.wbtw.com/news/state-regional-news/north-carolina-lawmakers-introduce-bill-to-give-federal-recognition-to-lumbee-tribe/ [https://perma.cc/AN2P-E62G] (stating that North Carolina lawmakers have introduced the Lumbee Recognition Act of 2021); Scott McKie, *Lumbee Acknowledgement Act Dies in Senate*, CHEROKEE ONE FEATHER (Dec. 23, 2020), https://theonefeather.com/2020/12/23/lumbee-acknowledgment-act-dies-in-senate/ [https://perma.cc/Y758-8WMJ] ("The U.S. Senate failed to act on the Lumbee Acknowledge Act after having been passed in the U.S. House of Representatives . . . ."); Lumbee Tribe of North Carolina Recognition Act, S. 1364, 117th Cong. (2021) ("This bill extends federal recognition to the Lumbee Tribe of North Carolina and makes its members eligible for the services and benefits provided to members of federally recognized tribes."); *see* Holden Kurwicki, *Lumbee Tribe Members Optimistic After US House Passes Federal Recognition, but Challenges Remain*, CBS17 (Nov. 25, 2020, 8:53 AM), https://www.cbs17.com/news/local-news/lumbee-tribe-members-optimistic-after-us-house-passes-federal-recognition-but-challenges-remain/ [https://perma.cc/JNW6-PQLK] (stating the possibility of creating a reservation which means the Lumbee Tribe could also be subject to the Major Crimes Act).

Part I of this analysis discusses the creation, development, and interpretation of the Major Crimes Act. Part II presents the facts and holding of *Nobles*. Part III shows how the *Nobles* decision could lead to various issues focused on how to weigh each factor, constitutional issues, and the issue of preserving tribal sovereignty. Part IV argues for the elimination—or at least revision—of the Major Crimes Act. Finally, Part V recommends that the Supreme Court of North Carolina adopt a bright-line test used by other courts in order to preserve tribal sovereignty and to create consistency in future decisions.

I. THE MAJOR CRIMES ACT AND ITS INTERPRETATION

A. *The Government's Misunderstanding*

Prior to 1885, crimes such as murder, manslaughter, rape, and assault were tried in tribal courts,[20] and Indian tribes were allowed to adjudicate matters as they deemed appropriate.[21] Federal officials did not have the authority to prosecute Indians who committed crimes against an Indian on a reservation.[22] These rules reflected a belief that tribes should retain control over matters important to tribal government.[23]

However, this belief began to shift in the latter part of the nineteenth century. In 1874, the Bureau of Indian Affairs ("BIA") attempted to obtain criminal jurisdiction over Indian tribes, believing that "the coercive power of the criminal law" would force Indians to assimilate.[24] While many Indian nations tried to legitimize their legal order in relation to the American legal system, some nations remained independent and continued their legal traditions.[25] The 1883 case, *Ex parte Crow Dog*,[26] signaled the beginning of federal intervention in tribal law.

20. *The Major Crimes Act—18 U.S.C. § 1153*, U.S. DEP'T JUST. ARCHIVES (Jan. 22, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153#:~:text=Prior%20to%201885%2C%20such%20offenses%20were%20tried%20in%20tribal%20courts.&text=%C2%A7%201153%2C%20federal%20courts%20have,United%20States%20v [https://perma.cc/BGB7-9355].

21. *See* Carol Chiago Lujan & Gordon Adams, *U.S. Colonization of Indian Justice Systems: A Brief History*, 19 WICAZO SA REV. 9, 15 (2004) ("[M]any Indians preferred to live under their customary systems of justice."); *see also* United States v. Joseph, 94 U.S. 614, 617 (1876) (stating that before 1885, tribes were "left to their own rules and traditions").

22. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 144 (3d ed. 2002).

23. *Id.*

24. Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 195 (1989).

25. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 100 (Frederick Hoxie & Neal Salisbury eds., 1994).

26. 109 U.S. 556.

Crow Dog, a member of the Brulé Sioux tribe[27] in the Dakota territory, was dedicated to resisting assimilation into white, settler culture.[28] He murdered a Brulé chief, Spotted Tail, on the Great Sioux Reservation.[29] It is hypothesized that Crow Dog's motive originated from the fact that he believed Spotted Tail was too agreeable and complaisant to the Bureau of Indian Affairs.[30] Additionally, there was debate on whether or not Crow Dog was acting in self-defense.[31] Still, "[i]n accordance with Lakota tradition,"[32] the matter was resolved in tribal court.[33] The tribal council sent "peacemakers" to talk to the families, and arranged Crow Dog's family to pay $600 and a "number of ponies and blankets for the wanton murder" of Spotted Tail.[34] This punishment was consistent with the tribal law's goal of restoring peace to the community.[35]

However, the "non-Indians" believed this resolution was insufficient and called for a harsher punishment.[36] While the public was criticizing the tribe's prosecution of Crow Dog, South Dakota believed that the case was "a possible way to assert jurisdiction over the [Indians] and open their reservation lands to non-Indian settlement and development."[37] In response to the public outcry, a Dakota territorial court[38] convicted Crow Dog of murder and sentenced him to death.[39] On appeal, the U.S. Supreme Court held that the Dakota territorial

27. The Brulé Sioux tribe originated from a "band of related families of the Lakota Nation called the Sicangu." *Lower Brule Sioux Tribe*, S.D. DEP'T TOURISM, http://www.travelsouthdakota.com/trip-ideas/article/lower-brule-sioux-tribe [https://perma.cc/7XVW-WZDC]. However, in the late 1700s, "[t]he Sicangu divided into the Lower Brule and the . . . Upper Brule." *Id.*

28. G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME II: FROM RECONSTRUCTION THROUGH THE 1920S, at 81 (2016).

29. S. Lee Martin, Note, *Indian Rights and the Constitutional Implication of the Major Crimes Act*, 52 NOTRE DAME LAW. 109, 113–14 (1976) [hereinafter Martin, *Indian Rights*].

30. HARRING, *supra* note 25, at 81.

31. Richmond L. Clow, *The Anatomy of a Lakota Shooting: Crow Dog and Spotted Tail, 1879–1881*, 28 S.D. HIST. 209, 223 (1998).

32. *Id.* at 209.

33. Martin, *Indian Rights*, *supra* note 29, at 114. ("Since both Crow Dog and Spotted Tail were Indian, the then controlling jurisdictional scheme dictated that the Sioux Court had exclusive jurisdiction over Crow Dog.").

34. GEORGE E. HYDE, SPOTTED TAIL'S FOLK: A HISTORY OF THE BRULÉ SIOUX 333 (1974).

35. Clow, *supra* note 31, at 209; *see* HARRING, *supra* note 25, at 100 (stating that the Brulé people "remained independent and carried on traditional ways in their ancestral lands").

36. Jacqueline F. Langland, *Indian Status Under the Major Crimes Act*, 15 J. GENDER RACE & JUST. 109, 115 (2012); *see also* Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 HARV. J. RACIAL & ETHNIC JUST. 241, 247–48 (2010).

37. Richmond L. Clow, *A Dream Deferred: Crow Dog's Territorial Trials and the Push for Statehood*, 37 S.D. HIST. 46, 49 (2007).

38. The Dakota territorial court referenced here is the equivalent of a state court. HARRING, *supra* note 25, at 118 n.54. During this time the "territories were substantially self-governing," preparing themselves for statehood. *Id.*

39. Harring, *supra* note 24, at 192.

court lacked jurisdiction to convict and sentence Crow Dog, because as a hallmark of sovereignty, Indian tribes have a right to retain their tribal laws.[40] The characterization of Crow Dog throughout the Court's opinion solidified prejudices that non-Indians had at the time.[41] The Court described the case as one "measur[ing] the red man's revenge by the maxims of the white man's morality," and described Indians as a people of a "savage nature."[42] Although prejudices were evident, the Court held that offenses committed by an Indian against another Indian were to be dealt with by the tribe according to their traditions and customs.[43] This victory for tribal sovereignty proved to be short lived.

The *Crow Dog* opinion "reinforced the prejudices of those who saw Indians as barbaric and no doubt fueled the arguments for rapid assimilation."[44] Scholars seem to agree that *Crow Dog* was a test case by the BIA as an attempt to expend "legal control over reservation Indians."[45] Whether by design or in response to public outcry, Congress decided to react.[46] In 1885, Congress enacted the Major Crimes Act, which extends federal jurisdiction to certain felonies committed by Indians against Indians in Indian country.[47] When the Major Crimes Act was challenged in *United States v. Kagama*,[48] the U.S. Supreme Court upheld the Act on the justification that it was necessary to ensure the safety of the tribal members and those around them.[49] This opinion, authorizing the Major Crimes Act, ushered in a new era of allotment policies.

Today, the Major Crimes Act states that "[a]ny Indian who commits against the person or property of another Indian or other person . . . murder, manslaughter, kidnapping, maiming, . . . arson, burglary, robbery" shall be

40. *Ex parte* Crow Dog, 109 U.S. 556, 570–72 (1883).

41. *See* Harring, *supra* note 24, at 220–21 (stating that the Court described the relationship between the tribe and the government paternalistically, explaining that the tribe needed the United States to become a "self-supporting and self-governing society"). Additionally, the Court used the term "red man's revenge," which played on a racist and false statement of the "blood revenge" perception of tribal law compared to other "civilize[d]" methods. *See* HARRING, *supra* note 25, at 102.

42. *Ex parte Crow Dog*, 109 U.S. at 571.

43. *Id.*

44. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 212 (1984).

45. DAVID J. CARLSON, SOVEREIGN SELVES: AMERICAN INDIAN AUTOBIOGRAPHY AND THE LAW 129 (2006).

46. HARRING, *supra* note 25, at 101 (stating that "[b]y all accounts, this decision aroused such popular outcry that Congress was compelled to enact the Major Crimes Act of 1885," which extended federal jurisdiction over Indian affairs); *see also* Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49, 52 (2017) [hereinafter Skibine, *Indians, Race*] (stating that the federal Indian Major Crimes Act was a reaction to the outcome in *Crow Dog*).

47. HARRING, *supra* note 25, at 101.

48. 118 U.S. 375 (1886).

49. *Id.* at 384.

subject to "the exclusive jurisdiction of the United States."[50] The Major Crimes Act gives the federal government exclusive jurisdiction for major felonies committed on Indian reservations.[51]

The Major Crimes Act covers crimes committed by Indians against both Indians and non-Indians.[52] This federalization of serious crimes removed tribal authority; thus, the Major Crimes Act was a tremendous intrusion on the sovereign power of tribal government and an unprecedented expansion of federal authority in tribal lands.[53] When the Major Crimes Act was enacted, the focus of the federal government was assimilation.[54] The nation grappled with what to do with people who lived in the country, but claimed to be citizens of a tribal nation.[55] The Major Crimes Act was another way the government "worked to undermine tribal sovereignty . . . with the ultimate goal of assimilating Indians into American society."[56] Congress believed that extending federal jurisdiction to crimes committed by Indians on Indian land would assimilate them sooner by exposing them to the laws of a civilized nation.[57]

B. *The* Rogers *Test*

Although the Major Crimes Act contains a detailed list of covered felonies, it fails to define "Indian."[58] Defining "Indian" is crucial because an individual's

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50. 18 U.S.C. § 1153 (listing the enumerated offenses as: "murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title").

51. David Heska Wanbli Weiden, Opinion, *This 19th-Centruy Law Helps Shape Criminal Justice in Indian Country*, N.Y. TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html [https://perma.cc/72UF-MMBX (dark archive)].

52. DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 532 (7th ed. 2017).

53. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 783 (2006).

54. ADAMS, *supra* note 2, at 10 ("The ultimate goal of white reformers in this period was to transform Indians into United States Citizens.").

55. *Id.* at 10–11.

56. *Id.* at 11.

57. Keeble v. United States, 412 U.S. 205, 211–12 (1973) (stating that exposing Indians to federal jurisdiction would civilize them "a great deal sooner by being put under (federal criminal) laws and taught to regard life and personal property of others").

58. *Id.* However, "Indian" is defined in other areas of federal law. The Indian Reorganization Act defines "Indian" as:

> [A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Indian Reorganization Act, Pub. L. No. 73-383, § 19, 48 Stat. 984, 988 (1934) (codified at 25 U.S.C. § 5129).

"Indian status is an essential element of the government's case which the government must prove beyond a reasonable doubt."[59] Congress's failure to define the Act's scope led courts to adopt the test formulated in *United States v. Rogers* ("*Rogers* test").[60] To qualify as an Indian under the *Rogers* test, a defendant must (1) have "some Indian blood," and (2) be "recognized as an Indian by a tribe or the federal government or both."[61] Along with the two-prong test, courts have identified a threshold test that asks "whether the tribe with which affiliation is asserted is a federally acknowledged tribe."[62]

When a tribe is federally recognized, it means that they have a special legal and governmental relationship with the United States, making the tribe eligible for certain services and funding.[63] A non-federally recognized tribe does not possess the inherent powers of sovereignty, nor are they eligible for the benefits offered to federally recognized tribes. The EBCI, the tribe at issue in *Nobles*, is a federally recognized tribe.[64]

The American Indian Probate Reform Act of 2004 defines "Indian" as:

> (A) any person who is a member of any Indian tribe . . . ;
>
> (B) any person meeting the definition under the Indian Reorganization Act . . . ; and
>
> (C) with respect to the inheritance and ownership of trust or land in the State of California pursuant to section 2206 of this title, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that State.

American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, § 6, 118 Stat. 1773, 1804 (codified as amended at 25 U.S.C. § 2201(2)).

59. Skibine, *Indians, Race*, *supra* note 46, at 53.

60. 45 U.S. 567, 572–73 (1846).

61. United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) (citing *Rogers*, 45 U.S. at 572–73); *see also* United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015) ("We hold that proof of Indian status under the IMCA requires only two things: (1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe.").

62. *Who Is an "Indian"?*, U.S. DEP'T JUST. ARCHIVES, https://www.justice.gov/archives/jm/criminal-resource-manual-686-who-indian [https://perma.cc/EFK6-RPFT].

63. *Frequently Asked Questions*, U.S. DEP'T INTERIOR INDIAN AFFS., https://www.bia.gov/frequently-asked-questions#:~:text=A%20federally%20recognized%20tribe%20is,funding%20and%20services%20from%20the [https://perma.cc/UHP8-7VDE].

64. *Indian Country*, U.S. ATT'Y'S OFF. W. DIST. N.C. (Mar. 22, 2021), https://www.justice.gov/usao-wdnc/indian-country [https://perma.cc/VMD7-MWYX] ("The Eastern Band of Cherokee is the largest federally recognized tribe east of the Mississippi River, currently consisting of over 13,000 enrolled members."). The Lumbee Tribe is the largest tribe east of the Mississippi River. *History & Culture*, LUMBEE TRIBE N.C., https://www.lumbeetribe.com/history--culture [https://perma.cc/65XG-87VM].

Since the first prong only requires "some" blood,[65] courts have established that any amount appears sufficient.[66] However, the second prong has not been as easily interpreted.[67] It is widely held that Indian blood alone is not enough to establish federal jurisdiction.[68] Courts have found that the second prong is meant to filter out individuals who do not have current societal connections to the tribe for which they are seeking membership.[69]

The second prong serves as "recognition as an Indian," and is seen as a nonracial link to tribal members.[70] This has led federal courts to look "beyond enrollment as the basis for membership of affiliation."[71] Through dictum in *United States v. Antelope*,[72] the Supreme Court stated "that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and

65. *See* Kat Chow, *So What Exactly Is 'Blood Quantum'?*, NPR (Feb. 9, 2018, 6:00 AM), https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum [https://perma.cc/98K4-N2SW] ("Blood quantum is simply the amount of 'Indian blood' that an individual possesses.").

66. *See* SE-AH-DOM EDMO, JESSIE YOUNG & ALAN PARKER, AMERICAN INDIAN IDENTITY: CITIZENSHIP, MEMBERSHIP, AND BLOOD 102 (2016) (explaining various amounts of blood that have been deemed enough to pass the second prong of the *Rogers* test); United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005) ("Because the general requirement is only of 'some' blood, evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong."); *id.* (holding 1/8 Chippewa Indian and "certificate of Indian blood confirming this fact" is sufficient); *Stymiest*, 581 F.3d at 762 (holding "three thirty-seconds Indian blood" is sufficient); St. Cloud v. United States, 702 F. Supp. 1456, 1460 (D.S.D. 1988) (holding 15/32 Indian blood is sufficient); Goforth v. State, 644 P.2d 114, 116 (Okla. Crim. App. 1982) ("The first element of this two-prong test was satisfied by the testimony of the appellant's parents to the effect that the appellant was slightly less than one-quarter Cherokee Indian."). *See generally* Harmon, *supra* note 17 (discussing the history of blood quantum, how blood quantum determined the government's responsibilities to tribes, and the government's attempt to "eventually eliminate Native peoples" using the blood quantum system).

67. Skibine, *Indians, Race*, *supra* note 46, at 56 ("Although in the wake of *Rogers*, many courts struggled with determining whether half-blood Indians qualified as Indians.").

68. *St. Cloud*, 702 F. Supp. at 1461; Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 187 (2010) ("Courts have made clear that, by itself, having some Indian blood is not sufficient to establish Indian status because federal criminal jurisdiction is based on status rather than race.").

69. United States v. Maggi, 598 F.3d 1073, 1081 (9th Cir. 2010), *overruled by* United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015) (recognizing that "*Maggi* was right to restate the second prong of the [*Rogers*] test and to make clear that the defendant must have a current relationship with a federally recognized tribe").

70. State v. LaPier, 790 P.2d 983, 986 (Mont. 1990) (quoting *St. Cloud*, 702 F. Supp. at 1461).

71. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.02(1)(d)(i) (Nell Jessup Newton ed., 2017) [hereinafter COHEN'S HANDBOOK]; *Tribal Enrollment Process*, U.S. DEP'T INTERIOR, https://www.doi.gov/tribes/enrollment [https://perma.cc/X286-XJ5F] ("Tribal enrollment requirements preserve the unique character and traditions of each tribe. The tribes establish membership criteria based on shared customs, traditions, language and tribal blood."). The criteria for enrollment varies for each tribe, so uniform membership requirements do not exist. *Id.*; *see also LaPier*, 790 P.2d at 987 ("[T]he fact that Mr. LaPier is not enrolled in any tribe may not be determinative of Indian status.").

72. 430 U.S. 641 (1977).

'maintained tribal relations with the Indians thereon.'"[73] Further, the idea of Indian recognition is not a new concept. Indians have been reluctant to extend membership to the "white Indian"[74] in fear of these individuals threatening the tribe's rights and status.[75] Some tribal nations view "white Indian[s]" as "opportunists who wish to have all the advantages of being Indians without enduring any of the prejudices and without being willing work to make life better for Indians."[76] Thus, the second prong is a way to safeguard against those attempting to use their loose Indian status for their own benefit.

C. *Interpretations of the Second Prong*

When an individual is not enrolled in a tribe,[77] courts are divided on what is necessary to consider when analyzing the facts under the second prong of the *Rogers* test.[78] Courts' determination on what satisfies the second prong varies, from just looking at whether an individual is enrolled in a federally recognized tribe to combining tribal membership with other factors.[79]

As varying factors have been adopted, there is seemingly no correct way of tackling this issue.[80] Nevertheless, various methods of analyzing the *Rogers* test's second prong have emerged. In analyzing the interpretation of the *Rogers* test, it is important to note that, since most Indian reservations are in the West, the majority of Indian law cases are heard by the Eighth, Ninth, and Tenth Circuit Courts of Appeal.[81]

First, the Eighth Circuit has adopted a nonexhaustive, five-factor list to determine whether a person is an Indian under the second prong of the *Rogers* test.[82] The five factors include:

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73. *Id.* at 646 n.7; *see also* United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979) ("Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."); United States v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005); Means v. Navajo Nation, 432 F.3d 924, 934 (9th Cir. 2005).

74. White Indians are "people who are viewed as Indians in a legal sense only," and the term can also be applied to "Indian-looking people who fail to act as cultural traditionalists in certain situations." SHARLOTTE NEELY, SNOWBIRD CHEROKEES: PEOPLE OF PERSISTENCE 49 (2002).

75. *Id.* at 141.

76. *Id.* at 49–50.

77. It is widely accepted that federal courts can recognize an individual as an Indian under the Major Crimes Act even if they are not enrolled in a tribe. *See* Skibine, *Indians, Race*, *supra* note 46, at 49–50; *see also* discussion *infra* Section V.A (discussing how tribes have established membership criteria that effectively weeds out the "white Indian").

78. Oakley, *supra* note 68, at 197.

79. Langland, *supra* note 36, at 117.

80. United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009).

81. GETCHES ET AL., *supra* note 52, at 13. Additionally, it is important to note that the Fourth Circuit Court of Appeals has not defined "Indian" under the Major Crimes Act.

82. *Stymiest*, 581 F.3d at 763 ("It is not necessary that all of these factors be present. Rather, the jury is to consider all of the evidence in determining whether the government has proved beyond a reasonable doubt that the defendant is an Indian.").

> 1. enrollment in a tribe; 2. government recognition formally or informally through providing the defendant assistance reserved only to Indians; 3. tribal recognition formally or informally through subjecting the defendant to tribal court jurisdiction; 4. enjoying benefits of tribal affiliation; and 5. social recognition as an Indian such as living on a reservation and participating in Indian social life, including whether the defendant holds himself out as an Indian.[83]

These five factors are nonexhaustive and without designation of how much weight should be given to each.[84]

Second, the Ninth and Tenth Circuits have required "a rigid four-factor test applied in declining order of importance."[85] The Ninth Circuit adopted these factors, known as the *St. Cloud* factors, in *St. Cloud v. United States*.[86] These factors are virtually identical to the factors utilized by the Eighth Circuit, but the *St. Cloud* factors do not require the defendant to be subjected to tribal jurisdiction.[87] Even though all of the cases from the Ninth Circuit utilized the *St. Cloud* factors, one case found that even though the factors were broad, they "should not be deemed exclusive."[88] Additionally, the Tenth Circuit noted that the *St. Cloud* factors are not exclusive and only the first element, enrollment in a tribe, is dispositive.[89] Still, many scholars recognize these are the four factors that the Ninth and Tenth Circuit courts should consider.[90]

Finally, there has been a trend throughout Major Crimes Act cases that courts favor a bright-line test. In *United States v. Torres*,[91] the Seventh Circuit arguably adopted a bright-line test.[92] In *Torres*, the court held that the trial judge

83. Lewis, *supra* note 36, at 253–54; *see also Stymiest*, 581 F.3d at 763.

84. Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1665 (2016).

85. Daniel Donovan & John Rhodes, *To Be or Not To Be: Who Is an "Indian Person"?*, 73 MONT. L. REV. 61, 77 (2012).

86. *See* 702 F. Supp. 1456, 1460–62 (D.S.D. 1988).

87. *See* Rolnick, *supra* note 84, at 1664–65 ("Ninth Circuit courts consider four factors, listed in declining order of importance: '1) tribal enrollment; 2) government recognition formally and informally through the receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life.'" (quoting United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995))); United States v. Cruz, 554 F.3d 840, 849–50 (9th Cir. 2009) (identifying the four factors and noting that factors are meant to determine whether "the Native American has a sufficient non-racial link to a formerly sovereign people"); United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005) (stating the four *St. Cloud* factors to be utilized).

88. United States v. Maggi, 598 F.3d 1073, 1081 (9th Cir. 2010). This small caveat in this case demonstrates how muddled the analysis of second prong of the *Rogers* test has been for courts.

89. United States v. Nowlin, 555 F. App'x 820, 823 (10th Cir. 2014).

90. *See* Lewis, *supra* note 36, at 256 ("The Ninth Circuit's rigid application of only four exhaustive factors with descending weight."); Rolnick, *supra* note 84, at 1664–65; Skibine, *Indians, Race*, *supra* note 46, at 55.

91. 733 F.2d 449 (7th Cir. 1984).

92. *Id.* at 456.

was correct in instructing the jury that "in order to be considered an Indian, a person must have some degree of Indian blood and must be recognized as an Indian by the Indian tribe and/or the Federal government."[93] Lower courts have taken advantage of tribal enrollment to determine this decision.[94] The bright-line test is advocated in other cases as well. For instance, the dissent in *United States v. Bruce*[95] proposed a bright-line test,[96] and *United States v. Antelope* held that an individual was subject to federal jurisdiction "because they are enrolled members of the Coeur d'Alene Tribe."[97] Finally, the Ninth Circuit discussed how it is easier for a defendant to produce evidence that they are a member of a tribe instead of a government producing evidence to the contrary.[98]

The second prong of the *Rogers* test has resulted in various tests that have similar factors but reach different results. This is largely because many courts have attempted to maintain the delicate balance of ensuring that subjecting individuals to federal jurisdiction is based on a political status, not race.[99] The lack of consensus among the courts further muddles this already complex area of law. However, the bright-line test would provide the most consistency and help maintain tribal sovereignty.

II. THE HOLDING OF *STATE v. NOBLES*

The victim in *State v. Nobles*, a white woman named Barbara Preidt,[100] was robbed and fatally shot on September 30, 2012, within the Qualla Boundary.[101] Upon investigation, the Cherokee Indian Police Department arrested three individuals: Ashlyn Carothers, Dwayne Swayney, and George Lee Nobles—the defendant.[102] Because Carothers and Swayney were members of the EBCI, their

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93. *Id.*

94. Deerleader v. Crow, No. 20-CV-0172, 2021 WL 150014, at *5 (N.D. Okla. Jan. 15, 2021) (holding that Deerleader was an "Indian" under federal law after he proved that he was an enrolled tribal member of a federally recognized tribe, and that he had some Indian blood).

95. 394 F.3d 1215 (9th Cir. 2005).

96. *Id.* at 1225 ("[I]nto a single question: whether the individual is enrolled or eligible for enrollment in a federally recognized tribe.").

97. 430 U.S. 641, 646 (1977).

98. United States v. Hester, 719 F.2d 1041, 1043 (9th Cir. 1983) ("It is far more manageable for the defendant to shoulder the burden of producing evidence that he is a member of a federally recognized tribe than it is for the Government to produce evidence that he is not a member of any one of the hundreds of such tribes.").

99. Clint Summers, *Rethinking the Federal Indian Status Test: A Look at the Supreme Court's Classification of the Freedmen of the Five Civilized Tribe of Oklahoma*, 7 AM. INDIAN L.J. 193, 222 (2018).

100. State v. Nobles, 373 N.C. 471 app. C at 145a, 838 S.E.2d app. A at 145a (2020), https://www.supremecourt.gov/DocketPDF/20/20-87/148605/20200724114857030_appendix%20Nobles%20v%20North%20Carolina.pdf [https://perma.cc/JFK2-SJEC].

101. *Nobles*, 373 N.C. at 473, 838 S.E.2d at 375. The Qualla Boundary is "land that is held in trust by the United States for the Eastern Band of Cherokee Indians (EBCI)." *Id.*

102. *Id.*

indictment proceedings occurred before an EBCI tribal magistrate.[103] However, because Nobles lacked tribal status, he was charged in Jackson County, North Carolina, for first-degree murder, robbery with a dangerous weapon, and two counts of possession of a firearm by a felon.[104]

After his indictment, Nobles moved to dismiss the charges, arguing that the State lacked subject matter jurisdiction because he was an Indian and that he should therefore be tried in federal court in accordance with the Major Crimes Act.[105] Arguing for Indian status, Nobles stated that his mother is an enrolled member of the EBCI, making him eligible as a first descendant.[106] During Nobles's hearing, an employee of the EBCI Tribal Enrollment confirmed this, and the Attorney General for the EBCI explained that status as a first descendant[107] would allow Nobles to enjoy some tribal benefits.[108]

However, the State presented evidence that from 1993 to 2011, Nobles had been incarcerated in Florida and his pre-sentence report in Florida listed his race as white.[109] Once released, Nobles requested his probation to be transferred to North Carolina where he listed his race as "white" on his transfer application.[110] Over the fourteen months that Nobles was on probation, he never represented to his probation officers that he was Indian, and he once again listed his race as "white" on a mandatory drug screening form.[111]

Additionally, although Nobles's mother stated that he had lived on the Qualla Boundary for the majority of his childhood and was enrolled in the Cherokee tribal school system, she listed his "Degree of Indian" as "none" on BIA student enrollment.[112] This "none" designation contradicted two other BIA school forms where she listed Nobles's "Tribal Affiliation" as "Cherokee."[113] Further, as a child, Nobles received care at the Cherokee Indian Hospital—which only serves enrolled members of the EBCI and first descendants—five times, and the hospital listed him as an "Indian nontribal member."[114]

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. A first-generation descendant "include[s] all children born to or adopted by an enrolled member." EASTERN BAND OF THE CHEROKEE INDIANS CODE OF ORDINANCES § 49-5(a1)(1) (2022).
108. *Nobles*, 373 N.C. at 474, 838 S.E.2d at 376 (noting that first descendants are entitled to benefits such as property rights, health care benefits, and education benefits).
109. *Id.* However, an explanation for Nobles's identification as white and the prison identifying him as white can be explained by the "negative stereotypes and cultural repression" that disincentivized American Indians from identifying as such. Carolyn A. Liebler & Timothy Ortyl, *More than One Million New American Indians in 2000: Who Are They?*, 51 DEMOGRAPHY 1101, 1105 (2014).
110. *Nobles*, 373 N.C. at 474, 838 S.E.2d. at 376.
111. *Id.*
112. *Id.*
113. *Id.* at 475, 838 S.E.2d at 376.
114. *Id.*

After hearing the evidence, the trial court found that defendant was not an Indian under the Major Crimes Act and sentenced him to life imprisonment without parole.[115] The defendant appealed his conviction, but the court of appeals upheld the trial court's verdict.[116] He then appealed to the Supreme Court of North Carolina.[117]

The first issue the court addressed was whether the defendant was an Indian under the Major Crimes Act.[118] Applying the *Rogers* test, the court found that Nobles satisfied the first prong of the test because he "possesses an Indian blood quantum of 11/256 (4.29%)."[119] However, the court held that Nobles failed the second prong after adopting the Ninth Circuit's four-factor *St. Cloud* test.[120] The court reasoned that if it accepted Nobles's argument—that he satisfied the second *Rogers* prong because he is a first descendant—it would transform the *Rogers* test based solely on genetics, which would defeat the purpose of a test meant to consider a defendant's social, societal, and spiritual ties to a tribe, rather than just blood degree.[121]

As discussed above, the *St. Cloud* factors include: (1) "enrollment in a tribe"; (2) informal or formal government recognition through "providing the person assistance reserved only to Indians"; (3) enjoying tribal affiliation benefits; and (4) "social recognition as an Indian through living on a reservation and participating in Indian social life."[122] Although the Supreme Court of North Carolina adopted the *St. Cloud* test, the court noted that courts have varied "in their precise application of the *St. Cloud* factors."[123] Some courts consider other factors, while others hold that the list is exclusive and should be considered "in declining order of importance."[124] The Supreme Court of North Carolina decided to adopt the application of the *St. Cloud* factors as applied by the Tenth Circuit, holding the factors to be nonexclusive and without assigning importance to any one factor.[125] The court reasoned that this "formulation of the test provides needed flexibility for courts in determining the inherently imprecise issue of whether an individual should be considered to be an Indian under the second prong of the *Rogers* test."[126] Relying on the *St. Cloud* test and

115. *Id.* at 475, 838 S.E.2d at 376–77.
116. *Id.*, 838 S.E.2d at 377.
117. *Id.* at 476, 838 S.E.2d at 377.
118. *Id.*
119. *Id.* at 476–77, 838 S.E.2d at 377.
120. *Id.* at 477–78, 838 S.E.2d at 378.
121. *Id.* at 478–79, 838 S.E.2d at 379.
122. *Id.* at 477, 838 S.E.2d at 377–78 (quoting St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988)).
123. *Id.* at 477, 838 S.E.2d at 378.
124. *Id.* at 478, 838 S.E.2d at 378.
125. *Id.*
126. *Id.* (finding that in different circumstances "relevant factors may exist beyond" the *St. Cloud* factors).

other factors, such as whether the defendant has been subject to the EBCI tribal court in the past, the court concluded that Nobles failed the second prong of the *Rogers* test, so he was not an Indian for Major Crimes Act purposes.[127]

Another peripheral issue in this case was whether Nobles should be entitled to a special jury verdict.[128] While the *St. Cloud* factors seem to weigh various considerations, the court held that the issue of whether the defendant is an Indian for Major Crimes Act purposes is a purely legal jurisdictional issue and should not be submitted to a jury because there is no factual dispute.[129] In its reasoning, the court relied on *State v. Darroch*,[130] another North Carolina Supreme Court case where the court found that the defendant was not challenging "the *facts* which the State contended supported jurisdiction, but the *theory* of jurisdiction relied upon by the State."[131]

In its search for a controlling authority, the Supreme Court of North Carolina has set an unclear precedent for how future courts will determine if someone is an Indian for the purposes of the Major Crimes Act. The court adopted the *St. Cloud* factors as used by the Eighth and Tenth Circuits, but the Native American populations in those circuits have a very different tribal identity, culture, and history than those of North Carolina.[132] Additionally, the broad *St. Cloud* factor test adopted by North Carolina is inefficient and uncertain as to when a Native American in North Carolina is considered "Indian" under the Major Crimes Act. Thus, a nonexclusive, unweighted four-factor test is likely not the best indicator of Native American identity in North Carolina.

127. *Id.* at 483–84, 838 S.E.2d at 382.

128. *Id.* at 484, 838 S.E.2d at 382.

129. *Id.* at 485, 838 S.E.2d at 383.

130. 305 N.C. 196, 287 S.E.2d 856 (1982).

131. *Nobles*, 373 N.C. at 485–86, 838 S.E.2d at 383 (quoting *Darroch*, 305 N.C. at 212, 287 S.E.2d at 866) (stating the facts in *Darroch*, in which a defendant was convicted of accessory before the fact to murder when she, a Virginia resident, hired two people to kill her husband in North Carolina (which they did), and on appeal she argued that the North Carolina trial court lacked jurisdiction over her because "the specific crime for which she had been charged given that the murder had been committed in North Carolina [was] arranged in another state").

132. One of the reasons these tribes are very different is because of the 1830 Indian Removal Act. Monica Villavicencio, *Indian Territory: Tracing the Path to Oklahoma*, NPR (July 26, 2007, 5:00 PM), https://www.npr.org/templates/story/story.php?storyId=12261992 [https://perma.cc/S2RV-GQHG]. More than sixty tribes were relocated, either voluntarily or forcibly, to land west of the Mississippi River. *Id.* The tribes left in the Southeast either attempted to assimilate, cooperate with white settlers, or resisted through defiance or warfare. *Id.* Another difference is housing of Native American tribes in North Carolina. In North Carolina, Native Americans lived in small, wooden buildings while the Native Americans in the West lived in teepees. *North Carolina Indians*, https://files.nc.gov/ncdoa/documents/files/ncindiansfactsheet.pdf [https://perma.cc/Z7XL-BTD6]. The living situation demonstrates how Native Americans in North Carolina had to adapt to the land and resources around them, which differed greatly from those in the West.

III. CONSEQUENCES OF *NOBLES*

As *Nobles* was a case of first impression, the precedent it has established will lead to a multitude of problems. North Carolina has a large American Indian community, and this decision could lead to various issues centered around how much weight to give to each factor, potential void for vagueness challenges, and the reduction of tribal sovereignty.

A. *A Question for the Jury*

In *Nobles*, the Supreme Court of North Carolina held that determining Indian status was not a question for the jury.[133] However, this was unusual because it seems that the only thing the varying circuits can agree on is that the question of Indian status is a jury question.[134] The majority in the *Nobles* decision failed to recognize that federal courts have held that Indian status under the Major Crimes Act is a "mixed question of law and fact."[135]

"Mixed questions are not all alike," and it depends "on whether answering it entails primarily legal or factual work."[136] When a question is a mixture of law and fact and the two cannot be separated, then it is usually resolved by the jury who are instructed of the applicable legal standards.[137] When the inquiry is based on assessing inferences that a reasonable decisionmaker could make from evaluating "a given set of facts and the significance of those inferences to him" then that becomes a question for the jury.[138] Here, it was inappropriate for *Nobles* to determine that the decision of Indian status was not for the jury. The court relied on *Darroch* and held that the defendant was contesting an

133. *Nobles*, 373 N.C. at 486, 838 S.E.2d at 383.

134. *See* United States v. Bruce, 394 F.3d 1215, 1227 (9th Cir. 2005) (allowing the question of Indian status to be submitted to the jury); United States v. Torres, 733 F.2d 449, 457 (7th Cir. 1984) ("[I]t is apparent that for purposes of 18 U.S.C. § 1152, the jury must determine, as a question of fact, the victim's status as an Indian or non-Indian."); United States v. Stymiest, 581 F.3d 759, 763 (8th Cir. 2009) (holding that the district court properly "submitted the issue of Indian status to the jury"); United States v. Cruz, 554 F.3d 840, 844 (9th Cir. 2009) (holding that they "owe deference to the jury's ultimate factual finding"); Skibine, *Indians, Race*, *supra* note 46, at 58 ("The Eighth Circuit . . . confirmed that although the Indian status of the defendant . . . was essential to federal subject matter jurisdiction . . . , it was an element of the crime that must be submitted and decided by a jury."); Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 512 ("In the criminal jurisdiction context, the United States prosecutes 'Indians' for Indian country crimes. This requires proving to a jury that a defendant is an Indian beyond reasonable doubt."). Additionally, the *Nobles* dissent notes that the majority misconstrued the federal decisions they relied on because in those decisions "the jury is asked to decide whether the defendant is an Indian." *Nobles*, 373 N.C. at 491, 838 S.E.2d at 386 (Earls, J., dissenting).

135. *Bruce*, 394 F.3d at 1218.

136. U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018).

137. 33 CHRISTINE M.G. DAVIS, EDWARD K. ESPING, ANNE E. MELLEY, KARL OAKES, ELIZABETH WILLIAMS & ANN K. WOOSTER, FEDERAL PROCEDURE, LAWYER'S EDITION § 77:321 (2021).

138. United States v. Gaudin, 515 U.S. 506, 512 (1995) (citation omitted).

"inherently legal question"[139] of whether the Major Crimes Act applied, instead of "challenging the underlying 'facts on which the State seeks to base jurisdiction.'"[140]

While the court's reliance on *Darroch* was correct, its application was not. *Nobles* does not challenge the theory of jurisdiction but the facts in which the State sought its basis for jurisdiction—an inquiry the court acknowledges must be brought before a jury.[141] The facts of *Darroch* describe a textbook legal issue—which state has jurisdiction over the defendant[142]—while *Nobles* requires the balancing of various factual inquiries such as the amount of government assistance he received, whether he adequately took advantage of tribal affiliation benefits, and social recognition as Indian to determine whether someone is Indian under the Major Crimes Act.[143] Thus, even when using the logic of *Darroch*, the balancing of factors in *Nobles* should be submitted to the jury because it challenges the underlying facts on which jurisdiction is sought.

While the court was correct in finding that the question of jurisdiction is purely legal, it ignored—as the dissent points out—that "a determination of Indian status involves fundamental questions of fact," making this a factual dispute.[144] Adopting a test that requires analyzing and balancing a multitude of factors leads to a factual inquiry. For example, when the court analyzes whether an individual has showed a social connection to a tribe, this requires an analysis of a multitude of factors such as whether the individual spoke the tribal language, grew up on the tribe's reservation, held himself out as Indian, and participates in tribal rituals.[145] This type of multifactor inquiry can be complicated, and juries can differ on what factors deserve the most weight. Because people can analyze and interpret the facts differently, the question of whether an individual is an Indian should be submitted to the jury. Additionally, since this question should be submitted to the jury, the North Carolina Pattern Jury Instruction Committee should also supply the court with a recommended jury pattern instruction to aid trial judges.[146]

139. *Nobles*, 373 N.C. at 486, 838 S.E.2d at 383.

140. *Id.* (quoting State v. Darroch, 305 N.C. 196, 212, 287 S.E.2d 856, 866 (1982)).

141. *Id.*

142. *Id.*

143. *Id.* at 478–83, 838 S.E.2d at 378–82.

144. *Id.* at 490, 838 S.E.2d at 386 (Earls, J., dissenting).

145. *Id.* at 482–83, 838 S.E.2d at 381 (majority opinion).

146. *See North Carolina Pattern Jury Instructions*, UNC SCH. GOV'T, https://www.sog.unc.edu/resources/microsites/north-carolina-pattern-jury-instructions [https://perma.cc/J5XX-PYBZ] (noting that the importance of pattern jury instructions is to not only aid the trial judge, but also as a guide for juries). Further, the North Carolina pattern jury instructions are used to aid trial judges when cases are "based on the relevant law and facts." *Id.* The North Carolina pattern jury instruction guidance also favors submitting the question of whether someone is an "Indian" to the jury. *Id.*

B. *Void for Vagueness*

The *Nobles* decision also widens the door for possible void for vagueness challenges—challenges arguing that a statute is invalid because it is not sufficiently clear. While two cases have already challenged the "Major Crimes Act as void for vagueness, the Supreme Court has yet to rule on the issue."[147] The void for vagueness doctrine identifies criminal statutes lacking "sufficient definiteness or specificity."[148]

The doctrine is designed to achieve two goals. First, to provide those of "ordinary intelligence" a "reasonable opportunity to know what is prohibited" in order for them to act accordingly.[149] Second, to ensure that laws are not encouraging arbitrary and discriminatory enforcement, laws should provide explicit standards for policemen, judges, and juries.[150] When there is a vagueness challenge to a statute that does not violate the First Amendment, the court will only invalidate the statute as applied.[151] Because the Major Crimes Act does not involve the First Amendment, the statute would only be deemed void on a case-by-case basis.[152] Additionally, when determining whether a statute is vague, courts will look to the language of the statute and "whether judicial interpretation of the provision makes it sufficiently clear."[153]

Two cases have addressed the void for vagueness challenge of the Major Crimes Act. In *United States v. Broncheau*,[154] the Ninth Circuit rejected the plaintiff's void for vagueness challenge, reasoning that the term "Indian" in the Act has been "judicially explicated over the years" by the *Rogers* test giving sufficient notice to defendants.[155] The U.S. District Court for the Eastern District of Wisconsin similarly rejected a void for vagueness claim in *United States v. Nahwahquaw*.[156] There, the court held that even though "Indian" is not defined by the statute, "the test for determining 'Indian' status has been judicially defined over the years and is well established under federal law."[157]

147. Langland, *supra* note 36, at 126–27.

148. *Void for Vagueness and the Due Process Clause: Doctrine and Practice*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5_4_7_1_1_1/#ALDF_00011048 [http://perma.cc/CLV6-LNGY].

149. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

150. *Id.* at 108–09.

151. United States v. Other Med., 596 F.3d 677, 682 (9th Cir. 2010); *see* Langland, *supra* note 36, at 135 ("Because the Major Crimes Act does not involve First Amendment liberties, courts will find the Act impermissibly vague on a case-by-case basis.").

152. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 167–71 (1972) (holding that a vagrancy law drafted to encompass ordinary innocent activity such as "strolling" or "wandering around from place to place" is unconstitutionally vague).

153. Langland, *supra* note 36, at 135.

154. 597 F.2d 1260 (9th Cir. 1979).

155. *Id.* at 1263 (holding that since the term "Indian" has been developed by the courts, the term's meaning is widely understood placing individuals on notice as to what is expected).

156. No. 09-CR-0025, 2009 WL 1165395 (E.D. Wis. Apr. 28, 2009).

157. *Id.* at *2 (holding that *Rogers* adequately defines the term "Indian").

While courts have correctly pointed out that the *Rogers* test defines the term "Indian," the problem is that the courts have interpreted the second prong—being recognized as an Indian by a tribe or the federal government or both[158]—differently, leading to a multitude of tests. Thus, the various tests have transformed a once uniformly defined term into one that changes meaning based on where you are located, creating uncertainty and inconsistent results.[159] By adopting yet another modified version of the *St. Cloud* test, the North Carolina Supreme Court's decision in *Nobles* further expands the possibility for more void for vagueness challenges. For instance, in *Bruce* and *Vialpando v. State*,[160] both defendants were 1/8 Indian, lived on Indian reservations, and had other connections to their individual tribes, but neither were enrolled in a federally recognized tribe.[161] However, the court found that the defendant in *Bruce* could be considered an Indian, while the court in *Vialpando* found the defendant lacked sufficient evidence to gain Indian status.[162]

The justification for adopting the *St. Cloud* factors was that courts need "flexibility" to analyze the inexplicit issue of who is "Indian" under the second prong of the *Rogers* test[163] by considering both the *St. Cloud* factors and anything else a court might deem relevant.[164] This is exactly what the void for vagueness doctrine attempts to avoid because the flexible standard could lead to defendants with substantively similar facts being recognized as Indian in one instance and not Indian in another.

Future litigants can use the *Nobles* decision in two ways. First, litigants can argue that the decision in *Nobles* conflicts with the *Rogers* test. The *Rogers* test provides two prongs, but because *Nobles* expanded the second prong to allow courts to consider endless factors without assigning weight to any factor, judges have no direction on how to rule in future cases. Second, the *Nobles* case provides another interpretation of the *Rogers* prong, which can give a future litigant a solid basis for arguing the Major Crimes Act itself is unconstitutionally vague. The *Rogers* test prevents the Act from being unconstitutionally vague, but since the second prong of the test has been construed in ways that are different and conflicting,[165] a litigant has a strong case for successfully arguing the statute itself is unconstitutionally vague

158. United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) (citing United States v. Rogers, 45 U.S. 567, 572–73 (1846)); *see also* United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015).

159. *See* Langland, *supra* note 36, at 138.

160. 640 P.2d 77 (Wyo. 1982).

161. *See* Langland, *supra* note 36, at 138.

162. *Id.*

163. State v. Nobles, 373 N.C. 471, 478, 838 S.E.2d 373, 378 (2020).

164. *Id.*

165. *See* discussion *supra* Section I.C. Courts have interpreted the second prong differently, leading some jurisdictions to only use the four factors of the *St. Cloud* test, others to expand on these four factors, and still others to use a bright-line rule.

because the courts have muddied the once straightforward judicially defined term.

C. *Diminishing Tribal Sovereignty*

When the Major Crimes Act was created, it ensured that Indians "would never again have the authority to decide the outcome of any serious felony case."[166] This shift of authority from tribal justice systems to "white man's law" allowed the United States to further its goal of civilizing Indians.[167] During the Act's introduction, Representative Byron M. McCutcheon stated that the Major Crimes Act was necessary to achieve "advancement and civilization of the Indian tribes" because if society does not punish Indians "under the laws of the land," then "[i]t is infamy upon our civilization, [and] a disgrace to this nation."[168]

Prior to the Revolutionary War, Indian tribes were powerful and undoubtedly sovereign, but as the United States obtained its independence, this began to change.[169] The effect of the Major Crimes Act was that it became "a monumental encroachment on the sovereign powers" and "a tremendous expansion of federal authority" over tribes.[170] Tribes were no longer allowed to have exclusive jurisdiction of these crimes. Ironically, the Major Crimes Act was meant to "represent a recognition of tribal sovereignty," but in actuality, Indian defendants were exposed to harsher punishments under the federal government than they would have received for the same crime in state courts.[171]

The Major Crimes Act was created to encroach on tribal sovereignty. Additionally, by adopting the multifactored test to determine who is Indian, the *Nobles* court effectively stripped tribes of the last remnant of sovereignty—the authority to decide who is an Indian under their tribal standards and membership requirements. Thus, the *Nobles* decision only perpetuates this encroachment on tribal sovereignty by complicating the question of who is an "Indian" and allowing a judge to decide disregards the centuries-long fight to develop tribal identity. Accordingly, the Major Crimes Act "undermined tribal

166. Weiden, *supra* note 51.

167. U.S. COMM'N ON CIV. RTS., INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 140 (1981).

168. *Id.*

169. *See* Washburn, *supra* note 53, at 790–94.

170. *Id.* at 783; *see* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) ("By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves.").

171. Jeffery T. Ulmer & Mindy S. Bradley, *Punishment in Indian Country: Ironies of Federal Punishment of Native Americans*, 35 JUST. Q. 751, 754–55 (2018).

criminal justice" by extending federal jurisdiction under the belief that tribes were incapable of addressing serious crimes.[172]

IV. REEVALUATING THE MAJOR CRIMES ACT

The issues of the Major Crimes Act are abundant: encroachment of tribal sovereignty, complicating a straightforward test, and dismissing the modern Indian identity. Thus, it is time to either reevaluate or eliminate the Major Crimes Act.

The United States has a commitment to ensuring that criminal defendants have the right to an impartial jury of their peers.[173] Over the years, the courts have developed the notion of impartiality to find jurors free from outside pressure, racial biases, and pretrial publicity.[174] With this in mind, the law pulls from a wide selection of jurors in the community in which the crime was committed to create impartiality.[175] However, this promise of an impartial jury of one's peers is a phenomenon that cannot be realized by Indian defendants prosecuted under the Major Crimes Act.[176] This is because the federal government can draw a jury from the entire federal district—not the Indian community in which the crime was committed.[177]

The issue of juries being selected when one party is Indian and the other is non-Indian is not new, and scholars have argued whether non-Indians tried in tribal reservations receive fair trials.[178] However, the same argument can be made for Indians who are not confronted with a jury of their peers—or even those within Indian country.

One alternative to repealing the Act as a whole is to revise the Major Crimes Act so that juries could still be pooled from the federal jurisdiction, but spots could be reserved for several members of the reservation. This would allow individuals who understand what it means to be an "Indian" in their community to judge the "Indianness" of the defendant.

Finally, the Major Crimes Act should be eliminated—or at least revised—because it remains an unchanged relic of the past. When the Major Crimes Act was created, society had a belief that Indians did not understand how to punish

172. Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 AM. INDIAN L. REV. 337, 353 n.55 (2015).

173. U.S. CONST. amend. VI.

174. *Sixth Amendment—Right to Trial by Impartial Jury*, ANNENBERG PUB. POL'Y CTR., https://www.annenbergclassroom.org/resource/right-trial-impartial-jury/ [https://perma.cc/ALE9-ZQ6X].

175. Alana Paris, Note, *An Unfair Cross Section: Federal Jurisdiction for Indian Country Crimes Dismantles Jury Community Conscience*, 16 NW. J.L. & SOC. POL'Y 92, 92–93 (2020).

176. *See id.* at 93.

177. *Id.* at 94.

178. *See generally* Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311 (2014) (discussing whether nonmembers of an Indian tribe are given a fair trial when being judged by Indians of the reservation).

individuals for crimes creating lawlessness on Indian reservations.[179] The Major Crimes Act was born from the belief that tribal jurisdictions lack the capacity to properly prosecute crimes. Additionally, because of confusion over jurisdiction stemming from the Major Crimes Act, many crimes were left unprosecuted.[180]

Today, society is more receptive to understanding the troubled past of indigenous people. For instance, the White House recognizes that past federal policies "systematically sought to assimilate and displace Native people and eradicate Native cultures."[181] Revising or even eliminating the Major Crimes Act is a step towards restoring Indian identity, culture, and sovereignty.

If the Major Crimes Act is eliminated, then a criminal case would not automatically be subject to federal jurisdiction. Congress has already begun restoring faith in tribal institutions by enacting the Tribal Law and Order Act of 2010 and the 2013 reauthorization of the Violence Against Women Act.[182] The legislative actions were responding to "disproportionate rates of violence in tribal communities,"[183] and believed that tribal courts were better equipped to handle crimes committed on their land. Unfortunately, there is still an imbalance on how the system views tribal courts.

The federal government's power over tribal nations is plenary.[184] But tribal court remedies must be exhausted before the case goes to the federal courts.[185] However, the United States still views tribal courts as inferior to other judicial systems.[186] Their judicial functions are not respected in the legal community and tribal courts' decisions are usually viewed under a de novo standard by federal courts.[187] This forces them to serve merely as factfinders for federal courts instead of their decisions being given deference.[188] Further, jurisdiction

179. Laura E. Pisarello, *Lawless by Design: Jurisdiction, Gender and Justice in Indian Country*, 59 EMORY L.J. 1515, 1517 (2010).

180. Emily Mendoza, *Jurisdictional Transparency and Native American Women*, 11 CALIF. L. REV. ONLINE 141, 152 (2020).

181. Proclamation No. 10,283, 86 Fed. Reg. 57,307, 57,307 (Oct. 14, 2021).

182. Stacy L. Leeds, *[Dis]Respecting the Role of Tribal Courts*, A.B.A. (June 1, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/dis-respecting-the-role-of-tribal-courts/ [https://perma.cc/J3VT-F9RZ (staff-uploaded archive)]. Both of these acts were created in response to disproportioned rates of violence in tribal communities. *Id.* This empowers tribal communities because it enhanced the tribal courts' jurisdiction on criminal matters that occur within the reservation. *Id.*

183. *Id.*

184. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).

185. *Id.* at 857.

186. Leeds, *supra* note 182.

187. Judith Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 KAN. L. REV. 241, 245–46 (1998); Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191, 193 (1994) [hereinafter Skibine, *Deference Owed*].

188. Royster, *supra* note 187, at 246.

is a vehicle for sovereignty and treating tribal courts as mere factfinders instead of giving deference to their decisions turns tribal courts into a farce instead of an extension of sovereign power.[189] Thus, if the Major Crimes Act was eliminated, or at least revised, the legal community would need to dedicate itself to respecting these institutions—something that should already be happening.

When the Major Crimes Act removed jurisdiction from tribal authorities, many tribes were discouraged from prosecuting major violent crimes. It is no secret that the federal government has a "poor track record of prosecuting violent crimes against Native Americans."[190] Additionally, the rate of violence against Indians by non-Indians is prominent.[191] Thus, revoking or revising the Major Crimes Act will end the "impunity on tribal lands."[192] Restoring tribal authority will allow tribal nations to protect their own communities.

Another reason to restore tribal authority is because the "federal judicial system is ill-equipped to handle interpersonal violent crime" as the federal government usually "deals with other crimes such as white-collar crime, and interstate and international drug-trafficking rings."[193] Revoking or at least revising the Major Crimes Act will restore tribal sovereignty and help tribal authorities protect tribal members.

It is time for the federal government to reevaluate the outmoded Major Crimes Act. Jurisdiction in Indian country is "confusing as hell," and has "created real danger in Indian Country, where crime escalates because it is so hard to prosecute."[194] Thus, allowing tribes to prosecute these major crimes will allow them to deal with local problems and reduce reliance on the federal government.

189. Skibine, *Deference Owed*, *supra* note 187, at 191.

190. Dominga Cruz, Sarah Deer & Kathleen Tipler, *The Oklahoma Decision Reveals Why Native Americans Have a Hard Time Seeking Justice*, WASH. POST (July 22, 2020), https://www.washingtonpost.com/politics/2020/07/22/oklahoma-decision-reveals-why-native-americans-have-hard-time-seeking-justice/ [https://perma.cc/6XYZ-QGRZ (dark archive)].

191. In a 2016 study, it was found that ninety-seven percent of female victims and ninety percent of male victims experience violence by non-Indian perpetrators, compared to only thirty-five percent of female and thirty-three percent of male victims experiencing violence by Indian perpetrators. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., FIVE THINGS ABOUT VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN (2016), https://www.ojp.gov/pdffiles1/nij/249815.pdf [https://perma.cc/VT66-LKC4]. *See generally* Graham Lee Brewer, *Native American Women Face an Epidemic of Violence. A Legal Loophole Prevents Prosecutions*, NBC NEWS (June 30, 2021), https://www.nbcnews.com/news/us-news/native-american-women-face-epidemic-violence-legal-loophole-prevents-prosecutions-n1272670 [https://perma.cc/6YZT-JRDC] (discussing violence against Indian women at the hands of non-Indian perpetrators).

192. Cruz et al., *supra* note 190.

193. *Id.*

194. Elizabeth A. Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, U. CHI. L. REV. ONLINE (Aug. 13, 2020), https://lawreviewblog.uchicago.edu/2020/08/13/mcgirt-reese/ [https://perma.cc/45DX-VK32].

V. ADOPTION OF A BRIGHT-LINE RULE

The Major Crimes Act has been around for around 140 years. Like many legal documents, it is a relic of the past that continues to exist even though it was founded on harmful stereotypes. So, if the Act is not revoked, then its application should be analyzed to retain the remnants of tribal sovereignty.

Without adjusting its analysis, the Supreme Court of North Carolina will find itself subject to void for vagueness challenges, and tribal sovereignty will be greatly diminished. While trying to make sense of North Carolina Supreme Court's analysis, courts will deny individuals the right to a federal trial because they are not Indian enough.

This begs the question—is there a better approach to deciding whether someone is "Indian" under the Major Crimes Act? The court acknowledged that courts have "varied . . . in their precise application of the *St. Cloud* factors," but they chose to adopt the Eighth and Tenth Circuit's application of the *St. Cloud* factors.[195] When considering notions of tribal identity and sovereignty, the best available option is to adopt a bright-line test. Since tribal uncertainty can lead to problems of criminal jurisdiction in "Indian country," bright-line tests are favored.[196] The second prong of the *Rogers* test—the only inquiry into whether the individual is recognized by a tribe—is the best option for numerous reasons, such as to strengthen tribal sovereignty, recognize the evolution of Indian identity, maintain the essence of the *Rogers* test, and evade strict scrutiny. Interestingly, adoption of a bright-line rule would have generated the same result in *Nobles*, without the headache. Nobles would not fall under this section because he was not an enrolled member of the EBCI.[197]

A. *Strengthen Tribal Sovereignty*

First, a bright-line test will strengthen tribal sovereignty.[198] Sovereignty for tribes is the right of American Indians to govern themselves.[199] Beyond the right to establish their own form of government, tribal sovereignty also includes the right to determine membership requirements.[200] This has allowed tribes to

195. State v. Nobles, 373 N.C. 471, 477–78, 838 S.E.2d 373, 378 (2020).

196. COHEN'S HANDBOOK, *supra* note 71.

197. *Nobles*, 373 N.C. at 473, 838 S.E.2d at 375.

198. Oakley, *supra* note 68, at 207 ("Importantly, leaving the decision to each particular tribe would allow them to exercise their sovereignty.").

199. *Tribal Governance*, NAT'L CONG. AM. INDIANS, http://www.ncai.org/policy-issues/tribal-governance [https://perma.cc/7RU2-YWHJ].

200. *An Issue of Sovereignty*, NAT'L CONF. ST. LEGISLATURES (Jan. 2013), https://www.ncsl.org/research/state-tribal-institute/an-issue-of-sovereignty.aspx#:~:text=Tribal%20sovereignty%20refers%20to%20the,to%20regulate%20their%20internal%20affairs. [https://perma.cc/9Z2B-W7KN].

establish explicit membership requirements.[201] The ability for tribes to create their own criteria for enrollment is an essential feature of sovereignty.[202]

Tribes have created their own requirements for membership, and because each tribe is different, there is not a uniform membership requirement.[203] The history of the EBCI's citizenry chronicles the tribe's struggle to resist outside influence over tribal rolls.[204] Currently, the EBCI requires that members (1) have a direct lineal ancestor on the 1924 Baker Roll of the Eastern Band of Cherokee Indians and (2) possess at least 1/16 degree of Eastern Cherokee blood.[205] While this two-part membership requirement seems simple, the establishment of the 1924 Baker Roll represented years of struggle. Forced expulsion of the Cherokee Nation in the 1830s, scrutinization of Cherokee blood, restricting citizenship to those who helped rebuild the Cherokee North Carolina land base, and an emphasis of a shared culture were all considerations of citizenship that went into the creation of the Baker Roll.[206] The enrollment criteria developed over the years "limited citizenship to core Cherokee community."[207]

In contrast, the Lumbee Tribe of North Carolina, while federally recognized in name only,[208] requires individuals to have (1) biological descent to at least one person named on the tribe's base roll[209] and (2) historical or present-day contact.[210] Historic contact is determined when an individual "attended a school that was all Indian prior to desegregation, or they are/w[ere]

201. Oakley, *supra* note 68, at 207; *see also Tribal Registration*, CHEROKEE NATION (Aug. 4, 2021), https://www.cherokee.org/all-services/tribal-registration/#:~:text=The%20basic%20criteria%20for%20CDIB,of%20the%20Five%20Civilized%20Tribes [https://perma.cc/4NRS-P3GB] ("The basic criteria for CDIB/Cherokee Nation tribal citizenship is that an application must be submitted along with documents that directly connect a person to an enrolled lineal ancestor who is listed on the 'Dawes Roll' Final Rolls of Citizens and Freedman of the Five Civilized Tribes.").

202. Jennie Bricker, *Defining Indian: Kennewick Man Case Focused Attention on Native Identity and Sovereignty*, 79 OR. ST. BAR BULL., no. 7, May 2019, at 28, 30; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1978) ("To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it.").

203. *Tribal Enrollment Process*, *supra* note 71.

204. *See* ADAMS, *supra* note 2, at 168. A tribal roll or "'base roll' is the original list of members as designated in a tribal constitution or other document specifying enrollment criteria." *Tribal Enrollment Process*, *supra* note 71.

205. EASTERN BAND OF CHEROKEE INDIANS CODE OF ORDINANCES § 49-2 (2022).

206. *See* ADAMS, *supra* note 2, at 133, 144–46, 152–62.

207. *Id.* at 168.

208. McKie, *supra* note 19 ("The Lumbee Act of 1956 states in part, 'Nothing in this Act shall make such Indians (Lumbee) eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians.'").

209. The base roll, also known as the Baker Roll of 1924, is the date collected from older roll and tribal censuses, and is "the foundation on which all enrollment decisions are made." EASTERN BAND OF CHEROKEE INDIANS CODE OF ORDINANCES § 49-2(a) (2022).

210. *Tribal Enrollment*, LUMBEE TRIBE N.C., https://www.lumbeetribe.com/tribal-tips [https://perma.cc/TXP4-YLWH].

a member of a historical Lumbee church."[211] To establish present-day contact an individual must attend a historic culture class before completing the application.[212] The difference among tribal enrollment requirements demonstrates the various factors that the tribe itself has determined important when establishing membership requirements. Tribes have spent years cultivating their own membership criteria to reflect their tribal beliefs, and to maintain the delicate balance of being a political rather than racial group. For instance, before colonization, individuals "without any ancestral tie to the tribe could sometimes become incorporated into the tribal structure."[213] So, determining who belonged to what tribe was nuanced and depended on the criteria of individual tribes. Thus, adopting a bright-line test will not only retain the remnants of sovereignty, but will also respect and acknowledge the years of struggle that went into classifying tribal membership.

Acknowledging that Native American tribes have their own criteria when determining membership, the Ninth Circuit in *United States v. Cruz*[214] stated that "there appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not 'an Indian.'"[215] However, the court reasoned that this question is the necessary product of a complex relationship between the federal government and Indian tribes.[216] While there has been a long and complicated relationship between the federal government and Indian tribes, there is no justification for why the courts should determine whether a specific individual belongs to a group because they lack expertise to do so.[217] The tribes will know better than anyone "whether an individual has Indian blood or has been living an Indian-lifestyle."[218]

The Major Crimes Act is an outdated remnant of the past. It risks exposing Indians to "more severe punishment than they would have gotten in state courts if: (a) they were not Indian, and/or (b) they were not subject to federal jurisdiction for crimes that are ordinarily addressed in state courts."[219] Although the Major Crimes Act should be eliminated, at the very least, a bright-line test for the second prong of the *Rogers* test should be adopted. Allowing the tribes to determine who is a member would strengthen sovereignty to a certain extent. However, the issue remains that as long as the Major Crimes Act exists, tribes will be unable to prosecute as they see fit.

211. *Id.*

212. *Id.*

213. Allison Krause Elder, *"Indian" as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act*, 13 NW. J.L. & SOC. POL'Y 417, 425 (2018).

214. 554 F.3d 840 (9th Cir. 2009).

215. *Id.* at 842.

216. *Id.*

217. Oakley, *supra* note 68, at 207.

218. *Id.*

219. Ulmer & Bradley, *supra* note 171, at 755.

B. *Indian Identity*

The Major Crimes Act was enacted in 1885, and Indian identity has drastically changed since the statute's enactment.[220] One reason for this change is the United States' plan to assimilate Indians in the 1950s by moving them into the cities and eliminating reservations.[221] This shift has directly impacted Indian life today—the majority of Indians live outside of reservations and in urban areas.[222] Additionally, intermarriage, mainstream universities as opposed to historically Native American colleges or universities, and cultural change have created an Indian today that is almost unrecognizable compared to the accepted notions of Indians in 1885.[223] During the last 140 years, history has created a complex system of identity, familial relationships, and the notion of the modern Indian can no longer be discerned by arbitrary factors.

Additionally, the factors utilized by other circuits do not necessarily pertain to the uniqueness of Indian identity in North Carolina or the Fourth Circuit. For decades, tribes of the Southeast fought to retain their identity.[224] Original notions of Indian identity romanticize the idea that Indians are racially different, culturally different, and geographically different[225] to determine who is Indian.[226] However, the reality is that the modern-day Indian—especially in the southeastern United States—is not the romanticized idea. Instead, Indian identity is the result of historical changes such as "geographic movement," adoption of outside culture, and racial mixing.[227]

Therefore, by adopting a bright-line test, the courts will not have to meddle in centuries of history that has complicated the once easily ascertainable identification. While proponents of the *St. Cloud* factors would argue this would

220. The notion of who was Indian in 1885 has changed drastically. In 1885, Indians were not even considered U.S. citizens—that would not occur until 1924. NCC Staff, *On This Day, All Indians Made United States Citizens*, NAT'L CONST. CTR. (June 2, 2021), https://constitutioncenter.org/blog/on-this-day-in-1924-all-indians-made-united-states-citizens [https://perma.cc/DH77-383G]. It was not until 1962 that voting rights were guaranteed for every Indian. Becky Little, *Native Americans Weren't Guaranteed the Right To Vote in Every State Until 1962*, HISTORY (Nov 6, 2018), https://www.history.com/news/native-american-voting-rights-citizenship [https://perma.cc/75DR-9YWZ]. Thus, it was not until 1962 that the individuals who were subject to federal jurisdiction of the Major Crimes Act had involvement in the government that was prosecuting them.

221. Erik Stegman, *Native People Continue To Resist 1950s Policies*, ASPEN INST. (Nov. 22, 2019), https://www.aspeninstitute.org/blog-posts/native-people-continue-to-resist-1950s-policies/ [https://perma.cc/E7TT-8C5R].

222. *Id.*

223. Perry G. Horse (Kiowa), *Native American Identity*, 109 NEW DIRECTIONS FOR STUDENT SERVS. 61, 61–62 (2005).

224. ADAMS, *supra* note 2, at 208.

225. I use "geographically different" to underscore the belief that Indians were normally individuals who could be pinned to a certain geographical area.

226. MALINDA MAYNOR LOWERY, LUMBEE INDIANS IN THE JIM CROW SOUTH: RACE, IDENTITY, AND THE MAKING OF A NATION, at xii (2010).

227. *Id.*

eradicate individuals who are only claiming membership to receive benefits, the reality is that these protections are already created by the tribes themselves through their enrollment requirements.

C. *The* Rogers *Test*

The original *Rogers* test only applies two prongs: (1) have "some Indian blood," and (2) be "recognized as an Indian by a tribe or the federal government or both."[228] The original *Rogers* test did not provide factors or tests to discern the second prong. *Rogers* held that Indian status is "confined to those who by the usages and customs of the Indians are regarded as *belonging to their race*."[229] It appears that the language in *Rogers* explicitly leaves the decision to the tribes,[230] and arguably *Rogers* rejected the prospect of using additional factors to determine Indian status.[231] Unfortunately, courts have not interpreted the language of the case to mean that tribes reserve the right to determine who is Indian.[232]

Rogers was decided 175 years ago. Those who argue that the second prong should be expanded probably point to the fact that the *Rogers* court did not want the decision to be left solely to tribes[233] and that the second prong should be altered to accommodate the modern-day Indian. While this is true, it still does not justify leaving the decision for the courts to decide. As stated above, tribes are better equipped to determine individual membership than courts.[234]

D. *Evading Strict Scrutiny*

Whether to subject someone to federal jurisdiction is determined by whether that person is an "Indian" under the Major Crimes Act. In our judicial system, when a law imposes a race-based classification, strict scrutiny applies. While the Supreme Court has held that "the classification of individuals as Indians is a political classification and not a racial classification," some scholars have argued that "Indian" is a racial classification, and thus "the Major Crimes Act should be subject to strict scrutiny."[235]

However, a bright-line test would still evade strict scrutiny. Race, under equal protection doctrine, is a suspect classification deserving of strict

228. United States v. Stymiest, 581 F.3d 759, 962 (8th Cir. 2009) (citing United States v. Rogers, 45 U.S. 567, 572–73 (1846)).

229. *Rogers*, 45 U.S. at 573 (emphasis added).

230. *Id.* ("It does not speak of members of a tribe, but the race generally—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.").

231. Skibine, *Indians, Race*, *supra* note 46, at 55.

232. *Id.*

233. Rolnick, *supra* note 84, at 380.

234. *See* discussion *supra* Section V.B.

235. Langland, *supra* note 36, at 130.

scrutiny—meaning there needs to be strong justification for the law's creation.[236] The federal government has always viewed the Indian population as a "political designation, not a race-based designation."[237] While the government has stated that the designation of "Indian" is political rather than racial, it is undisputed that Indians were subject to segregation across the South because of their race.[238]

"Indian" as a political, rather than racial, classification is confusing. Indians have endured a "long, complicated history," and Indian-law scholars "argue, 'the political and racial elements of Indianness are inseparable' and 'hopelessly intertwined.'"[239] One way to understand why "Indian" is political is to look at the Constitution. The Constitution holds that Indian tribes are separate, sovereign governments, implicitly defining Indians as a political group.[240]

Racially classifying "Indian" would chip away at tribal sovereignty. Professor Sarah Krakoff notes that "Indian" as a racial classification has historically served as a way for the U.S. government to "justify[] expropriation of their lands and impos[e] policies of forced assimilation."[241] She further argues that retaining the political classification of "Indian" is important to ensure that the government upholds their various treaties, policies, and statutes made with tribes, which would undoubtedly be struck down if strict scrutiny were to apply.[242]

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236. Lauren Sudeall Lucas, *Functionally Suspect: Reconceptualizing "Race" as a Suspect Classification*, 20 MICH. J. RACE & L. 255, 256 (2015).

237. Randall Akee, *40 Years Ago We Stopped the Practice of Separating American Indian Families. Let's Not Reverse Course.*, BROOKINGS (Oct. 11, 2018), https://www.brookings.edu/blog/up-front/2018/10/11/40-years-ago-we-stopped-the-practice-of-separating-american-indian-families-lets-not-reverse-course [https://perma.cc/H9RK-8NHV]; *see also* United States v. Antelope, 430 U.S. 641, 645 (1977).

238. *See, e.g.*, Alysa Landry, *'No Accommodations for Indians:' The Civil Rights Fight in North Carolina*, INDIAN COUNTRY TODAY, https://indiancountrytoday.com/archive/no-accommodations-for-indians-the-civil-rights-fight-in-north-carolina [https://perma.cc/EAM5-KP5E] (Sept. 13, 2018). Pertinent to North Carolina, the state was one of the few that was designated as "tri-racial" by the Civil Rights Movement. *Id.* "Tri-racial" means an area inhabited by African Americans, Native Americans, and whites. *Triracial Isolates*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/triracial-isolates [https://perma.cc/6C8X-LD5K]. The University of North Carolina at Pembroke was founded out of the difficulty of a tri-racial state in 1887 to educate American Indian teachers—providing Lumbee Indians the opportunity to have an education. *See History*, UNC PEMBROKE, https://www.uncp.edu/about/history [https://perma.cc/L4RX-XA6R]; *see also* Jonathan Martin, *The University of North Carolina Pembroke*, N.C. HIST. PROJECT, https://www.northcarolina.edu/institution/unc-pembroke/ [https://perma.cc/W97U-3LXU].

239. Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1029 (2018) (quoting Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 967–68 (2011)).

240. *See* U.S. CONST. art. I, § 8, cl. 2.

241. Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, WASH. L. REV. 1041, 1043 (2012).

242. *Id.* at 1056.

So, to uphold tribal sovereignty, the inquiry must be political rather than racial;[243] allowing the tribes to determine whether they recognize an individual as a member is just a feature of their political institutions. Additionally, when tribes create membership criteria there is no doubt that they had the political classification in mind. For instance, in the late 1800s the EBCI realized that they are "a political organization with economic interests," so those claiming Cherokee heritage had to "prove their political citizenship in and economic ties to [EBCI]."[244] Thus, the question of whether someone is "Indian" under the Major Crimes Act is not a racial inquiry at all. While Indian blood appears racial on its face, it must be characterized as political in order to maintain tribal sovereignty. It has consistently been held in Indian law that Indian nations are "distinct political communities, having territorial boundaries."[245] Maintaining this distinction of being a political group is extremely important to tribal sovereignty because it allows tribes to maintain their governmental structures without U.S. interference. The inquiry of whether someone is "Indian" is not a racial, but rather a political inquiry, so it is not subject to strict scrutiny.

In sum, adopting a bright-line rule to interpret tribal enrollment will allow tribes to exercise their sovereignty, adapt to modern notions of family and identity, and retain the original purpose of the *Rogers* rule. The bright-line rule would also alleviate the courts' responsibility of imposing and balancing factors because the only thing that would need to happen is to check tribal documents to determine identity.

CONCLUSION

Allowing North Carolina Supreme Court Justices to determine who is an Indian is contrary to tribal sovereignty. Even though the EBCI is the only North Carolina tribe officially recognized by the federal government,[246] they have over 16,000 enrolled members.[247] The Major Crimes Act resulted in a reduction of tribal sovereignty and an "increase in tribal dependence on the federal government."[248] While the Major Crimes Act has reduced tribal sovereignty, the Supreme Court of North Carolina has reduced sovereignty even more by leaving the decision of who is an Indian with the court instead of the tribe.

243. Oakley, *supra* note 68, at 207.

244. ADAMS, *supra* note 2, at 153.

245. Worcester v. Georgia, 31 U.S. 515, 557 (1832).

246. Gregory A. Richardson, *American Indian Tribes in North Carolina*, NCPEDIA (2005), https://www.ncpedia.org/tribes [https://perma.cc/7ERZ-LYLK].

247. *Take a Journey to the Home of the Eastern Band of Cherokee Indians*, VISIT CHEROKEE N.C., https://visitcherokeenc.com/eastern-band-of-the-cherokee/#:~:text=In%201850%20the%20Eastern%20Band,nation%20with%20over%2014%2C000%20members [https://perma.cc/FK5T-8JLY].

248. Martin, *Indian Rights*, *supra* note 29, at 115.

The *Nobles* decision has created a convoluted test that gives future litigants and courts little to no direction. A bright-line test that only considers tribal membership would avoid the balancing of various factors—this is especially important because there is currently no direction on which factors should be considered and what importance should be assigned to each. Although adopting a bright-line test would not have altered the outcome of Nobles's specific case, this would have a significant impact on the tribal community as a whole.

The broader issues of the Major Crimes Act are outside of the North Carolina Supreme Court's scope of influence. Congress is the true vehicle for eliminating the issues that the Major Crimes Act creates, but the *Nobles* decision has exacerbated the issues in the meantime. Thus, the court should be wary of creating ambiguous tests whose repercussions could include different results among seemingly indistinguishable facts. Tribes have had a long history of creating their tribal enrollment practices. This is why the second prong of the *Rogers* test should be left to the tribe to determine who qualifies as a member. Tribes are in a much better position to determine who is an "Indian" in their tribe than state court judges.

While determining who is "Indian" should be left to the tribes, it is time for Congress to reconsider the Major Crimes Act to untangle the unnecessary web of confusion. Jurisdiction should be put back into the hands of tribal government to further cement tribal sovereignty. Tribal governments have the means and desire to alleviate violence that occurs in Indian country. For 140 years, tribes have been under the thumb of the federal government—continuously having jurisdiction stripped from them. And over these 140 years the violence in Indian communities against Indians has been overlooked, discarded, and unjust, leaving many victims to rely on a government that has continuously attempted to define them in a way that makes it easier for the whites in power. It is now time to return jurisdiction back to the tribal governments.

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