

## When You're Just Not "Indian" Enough: The Erosion of Tribal Sovereignty in *State v. Nobles* and the Case for Deference to Tribes on Questions of Indian Status\*

*Under the Major Crimes Act, Tribes and the federal government have exclusive jurisdiction over certain "major crimes" committed by an "Indian" in "Indian Country." In 2012, George Nobles—a "First Descendant" of the Eastern Band of Cherokee Indians—was arrested for robbery and murder on the tribal trust lands of the Eastern Band. Defined by Cherokee law, First Descendants have at least one parent who is a tribal member but are themselves one generation short of the Tribe's blood quantum requirement for membership. At the time of Nobles's arrest, First Descendants were recognized by the Eastern Band as "Indian" under Cherokee common and statutory law. Thus, under the Major Crimes Act, only the Eastern Band or the federal government should have been able to prosecute Nobles. Both crimes were "major," both took place in Indian Country, and Nobles—as a First Descendant—was Indian.*

*But in State v. Nobles, the Supreme Court of North Carolina concluded that Nobles was just not Indian enough and authorized state jurisdiction. And in doing so, the court overrode a determination that was the Tribe's to make. State v. Nobles contradicts fundamental precepts of federal Indian law and strikes at the sovereignty of the Eastern Band and similarly-situated Tribes. Where Indian status refers to the political relationship between an individual and a particular Tribe, that Tribe must have the final word on questions of Indian status. Part I of this Comment introduces State v. Nobles and explores Indian Country jurisdiction under the Major Crimes Act. Part II sets forth three principles of federal Indian law against which the facts of Nobles must be viewed and argues that these principles demand deference to Tribes on Indian status. Part III uses these principles to discuss the errors in Nobles. Lastly, Part IV argues that deference to Tribes on Indian status is necessary for robust tribal sovereignty and proposes a more cabined use of the "Rogers test" for Indian status consistent with that understanding.*

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#### INTRODUCTION

Although criminal jurisdiction in the United States is ordinarily determined by the location of the crime,<sup>1</sup> criminal jurisdiction in Indian Country flips this “basic understanding of sovereignty . . . on its head.”<sup>2</sup> For a Tribe to exercise criminal jurisdiction, it is not enough that the crime was committed on its land.<sup>3</sup> Instead, for all but a small subset of crimes, the defendant must *also* be Indian.<sup>4</sup> An array of U.S. Supreme Court decisions and federal statutes has divested Tribes of their once-held right to prosecute non-Indians for crimes committed on their lands<sup>5</sup> and, in the process, “depriv[ed] [T]ribes of the localized community control that characterizes virtually all law

1. See, e.g., FED. R. CRIM. P. 18 (“Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.”).

2. Angela Riley, *Crime and Governance in Indian Country*, 63 U.C.L.A. L. REV. 1564, 1574–75 (2016). “Indian Country” refers to tribal lands as set forth in 18 U.S.C. § 1151.

3. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (foreclosing tribal criminal jurisdiction over non-Indians without an express grant from Congress).

4. Riley, *supra* note 2, at 1566–74.

5. See *Eastern Band of Cherokee Indians v. Torres*, Nos. CR 03-1443, CR 03-1529, CR 03-1530, CR 03-1531, CR 03-1819, 2005 WL 6437828, at \*5 (E. Cherokee Sup. Ct. Apr. 12, 2005) (“After the arrival of non-Indians to what is now the United States of America and before the existence of the United States of America, the Cherokee Indians exercised inherent jurisdiction over all non-Indians found within Cherokee Country.”); *id.* at \*6 (stating that Eastern Band had “jurisdiction in 1492” over non-Indian defendants).

enforcement in the United States.”<sup>6</sup> In its wake, Indian Country has been saddled with a “jurisdictional maze” that haphazardly divides prosecutorial authority among Tribes, the federal government, and the states according to “shifting and sometimes contradictory variables,” including the type of offense and the Indian status of the defendant.<sup>7</sup>

The Major Crimes Act<sup>8</sup> demonstrates how these variables can interact. Under the Major Crimes Act, Tribes and the federal government share exclusive jurisdiction over (1) certain so-called “major crimes” that are committed (2) by an Indian (3) in Indian Country.<sup>9</sup> When all three elements are satisfied, no state may prosecute the offense.<sup>10</sup> But when the defendant is non-Indian, the Tribe loses jurisdiction—and with it, its ability to redress a harm committed on its land against its people through its own courts.<sup>11</sup> The “bizarre result” is that two individuals—one Indian and one not—can commit the same “major crime” on tribal land just feet apart from each other, yet only one can face prosecution in the Tribe’s court.<sup>12</sup>

But while the Indian status of the defendant often determines tribal jurisdiction, the Major Crimes Act is silent as to the meaning of “Indian.” In the criminal context, “Indian” refers not to the race of an individual, but rather to their political association with a particular federally recognized Tribe.<sup>13</sup> But

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6. Riley, *supra* note 2, at 1583; J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823–1835*, 32 N.C. CENT. L. REV. 27, 32 (2009) (“All of this judicial wrangling results from the faulty premise . . . that the Indian Nations did not historically exercise jurisdiction, as it is understood in the modern context, over white citizens of the United States.”).

7. Riley, *supra* note 2, at 1567, 1575.

8. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153).

9. *Id.* “Covered crimes” of the Major Crimes Act include murder, manslaughter, kidnapping, maiming, a felony under 18 U.S.C. ch. 109A (crimes of sexual abuse), incest, felony assault under 18 U.S.C. § 113 (assaults within the special maritime and territorial jurisdiction of the United States), assault against an individual under the age of 16, felony child abuse or neglect, arson, burglary, robbery, and a felony under 18 U.S.C. § 661 (taking and carrying away, with intent to steal or purloin, any personal property of another within the special maritime and territorial jurisdiction of the United States). 18 U.S.C. § 1153(a). Additionally, an Indian defendant charged with a major crime under the Major Crimes Act is entitled to request and receive a jury instruction on a lesser offense, even where the lesser offense is not a crime enumerated in the Act. *Keeble v. United States*, 412 U.S. 205, 212–14 (1973).

10. 18 U.S.C. § 1153(a) (“Any Indian who commits [a major crime] shall be subject to the . . . *exclusive jurisdiction* of the United States.”) (emphasis added).

11. *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

12. *See* Riley *supra* note 2, at 1568, 1575.

13. *United States v. Antelope*, 430 U.S. 641, 646–47 (1977) (holding that the regulation of Indians through the Major Crimes Act is “rooted in the unique status of Indians as a ‘separate people’ with their own political institutions” and is not “legislation of a ‘racial’ group”); *Morton v. Mancari*, 417 U.S. 535, 553–54, 553 n.24 (1974) (describing an Indian hiring preference as granted to Indians “not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities”); Brian L.

the Major Crimes Act does not prescribe the level of association sufficient to be “Indian.” In this absence, courts are left to ask: when is somebody Indian *enough* such that a Tribe may prosecute them for a serious crime committed on that Tribe’s land?<sup>14</sup>

This answer matters. The ability of a Tribe to prosecute crimes committed on its lands is essential to tribal sovereignty and self-government.<sup>15</sup> Far from “abstract and technical,” the delineations of tribal jurisdiction have “life-and-death” implications for the safety and well-being of Tribes and their citizens.<sup>16</sup> When a defendant commits a “major crime” on tribal land and is deemed non-Indian, the decision to prosecute rests wholly with federal and state prosecutors who are politically unaccountable to Tribes and who often lack the time, money, or incentive to investigate and prosecute Indian Country crimes.<sup>17</sup> The result is that many Indian Country crimes committed by non-Indians simply go unpunished.<sup>18</sup>

But while Tribes—in the words of one tribal court—have “historically know[n] who is and who is not Indian under tribal customary and common law,” federal and state courts have been “making [themselves] into a pretzel” trying to define “Indian” for themselves.<sup>19</sup> In the absence of any statutory definition

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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, 252 (2010) (“With *Morton*, the Court changed Indian status in the federal common law from the racial classification . . . to a political classification.”). For the requirement that the Tribe be federally recognized, see, e.g., *St. Cloud v. United States*, 702 F. Supp. 1456, 1458–66 (D.S.D. 1988) (finding that an individual who was “ethnically an Indian” but was a member of a Tribe whose federal recognition was terminated is “expose[d] . . . to state law as is any other state citizen”), and *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) (holding that individual who was “anthropologically” an Indian but was enrolled in a terminated Tribe is now “subjected to state law”).

14. See *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc) (“[T]he [Major Crimes Act] does not define ‘Indian,’ but courts have judicially explicated its meaning.”) (internal quotations omitted), *cert. denied*, 136 S. Ct. 1712 (2016).

15. See Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 834–42 (2006).

16. See Greg Ablavsky, *At the Supreme Court: Contentious Questions of Tribal Jurisdiction in Dollar General v. Choctaw Nation of Miss.*, STAN. L. SCH. (Dec. 3, 2015), <https://law.stanford.edu/2015/12/03/at-the-supreme-court-contentious-questions-of-tribal-jurisdiction-in-dollar-general-v-choctaw-nation-of-miss/> [<https://perma.cc/9SCC-SK8M>] (describing the impact of limited tribal criminal jurisdiction on the “disastrous epidemic of sexual violence by non-Native men directed against Native women”).

17. See *Riley supra* note 2, at 1587.

18. See *id.* at 1582–83, 1587 (highlighting the “astonishingly high” federal declination rates of Indian Country prosecutions and the “countless incidences of . . . failures to prosecute, paltry resources for safety and policing, as well as brazen acts of violence by savvy criminals actively seeking to commit crimes on reservations where they believe they are insulated from prosecution”); Grant Christensen, *Using Consent to Expand Tribal Court Criminal Jurisdiction*, 111 CALIF. L. REV. 1831, 1839 (2023) (describing the “untold and unrecounted harm to tribal sovereignty and to law enforcement” from the inability of Tribes to prosecute non-Indian defendants for most crimes); *infra* note 55 and accompanying text.

19. *Jackson v. Fort Peck Tribes*, 18 Am. Tribal L. 87, 91 (Fort Peck Ct. App. 2024).

in the Major Crimes Act, federal and state courts use variations of a test derived from the 1846 U.S. Supreme Court decision in *United States v. Rogers*.<sup>20</sup> Under the so-called “*Rogers* test,” a defendant “qualif[ies] as an Indian” when they (1) have “some Indian blood” and (2) are “recognized as an Indian by a [T]ribe or the federal government or both.”<sup>21</sup>

Although this inquiry can be “complicated” in some cases,<sup>22</sup> the analysis is quite simple in others. And in the case of George Nobles, it should have been simple. In 2012, George Nobles, a “First Descendant” of the Eastern Band of Cherokee Indians, was arrested for robbery and murder on tribal trust lands.<sup>23</sup> First Descendants include the children of an enrolled member of the Eastern Band who themselves are just one generation short of the Tribe’s blood quantum requirement for membership.<sup>24</sup> Although they are not full members, First Descendants receive a range of special benefits from the Tribe that are either unavailable to non-members or are even on par with those available to full members.<sup>25</sup> But perhaps most importantly, First Descendants like Nobles were expressly recognized as “Indian” under tribal common and statutory law.<sup>26</sup>

Under the Major Crimes Act, jurisdiction over the crime should have rested with the Tribe and the federal government. The crimes for which he was arrested—robbery and murder—were “major.” Both took place in Indian Country.<sup>27</sup> And under the plain text of *Rogers*, Nobles, as a First Descendant, was Indian. Where the *Rogers* test asks whether an individual of Native ancestry is “recognized as an Indian by a [T]ribe,” Nobles’s status could not have been clearer.

20. 45 U.S. (4 How.) 567 (1846); see *State v. Nobles*, 373 N.C. 471, 477, 838 S.E.2d 373, 378 (2020) (quoting *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005)) (calling the *Rogers* test the “generally accepted test for Indian status”).

21. *Nobles*, 373 N.C. at 476, 838 S.E.2d at 377 (citing *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009)).

22. See *id.* at 491, 838 S.E.2d at 375 (Earls, J., dissenting) (“Certainly, a determination of whether an individual is an Indian for the purposes of the [Major Crimes Act] is a complicated inquiry.”).

23. *Id.* at 473, 838 S.E.2d at 375 (majority opinion).

24. *Eastern Band of Cherokee Indians v. Lambert*, No. CR 03-1313, 2003 WL 25902446, at \*1 (E. Cherokee Ct. May 29, 2003).

25. See *id.* at \*1–3. For a greater discussion of the benefits available to First Descendants, see *infra* Part I.

26. See Tribal Council Ord. No. 608 (2013) (Eastern Band of Cherokee Indians Tribal Council), [https://library.municode.com/tribes\\_and\\_tribal\\_nations/eastern\\_band\\_of\\_cherokee\\_indians/ordinances/code\\_of\\_ordinances?nodeId=616401](https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/ordinances/code_of_ordinances?nodeId=616401) [<https://perma.cc/UC2J-U5HZ> (staff-uploaded archive)] (amending the Cherokee Rules of Criminal Procedure to expressly authorize criminal jurisdiction over First Descendants), superseded by Tribal Council Ord. No. 367 (2022); *Eastern Band of Cherokee Indians v. Lambert*, No. CR 03-1313, 2003 WL 25902446, at \*3 (E. Cherokee Ct. May 29, 2003) (holding that First Descendants are Indian for purposes of tribal criminal jurisdiction).

27. *Nobles*, 373 N.C. at 476, 838 S.E.2d at 377.

But the Supreme Court of North Carolina disagreed.<sup>28</sup> In *State v. Nobles*,<sup>29</sup> the court disregarded clear statements of tribal law about the Indian status of First Descendants that should have easily satisfied *Rogers*.<sup>30</sup> Instead, the majority scrutinized the specific connections between Nobles and the Eastern Band and concluded that Nobles was, in its view, not Indian *enough*.<sup>31</sup> And in doing so, the court overrode a determination that was his Tribe's to make.

*State v. Nobles* contradicts fundamental principles of federal Indian law and strikes at the sovereignty of the Eastern Band of Cherokee Indians and other similarly situated Tribes. Where "Indian" refers to a political association with a particular Tribe, casting aside the determination of *that Tribe* that a certain class of individuals that receive tribal benefits is "Indian" both ignores the meaning of the term and injects the State into a Tribe's right to self-govern. Principles of Indian law demand deference to Tribes on questions of Indian status.

Part I explores *State v. Nobles* and Indian Country jurisdiction under the Major Crimes Act. Part II sets forth three principles of federal Indian law against which *Nobles* must be viewed. Together, these principles counsel deference to Tribes on questions of Indian status. Part III uses these principles to discuss the majority's errors in *Nobles*. Consistent with these principles, Part IV argues that deference to Tribes on questions of Indian status is essential to protect tribal sovereignty and self-government. Ultimately, Part IV proposes a more cabined use of the *Rogers* test limited only to situations in which a Tribe has neither explicitly nor implicitly recognized an individual as Indian.

#### I. STATE V. NOBLES AND INDIAN COUNTRY JURISDICTION UNDER THE MAJOR CRIMES ACT

Located near Great Smoky Mountains National Park, the Eastern Band of Cherokee Indians is a federally recognized Tribe located in western North Carolina.<sup>32</sup> Before contact with European settlers, the Cherokee people inhabited much of the present-day southeastern United States.<sup>33</sup> But just fifty years after the signing of the U.S. Constitution, a state-sponsored campaign to remove every Cherokee from the South was nearly complete.<sup>34</sup> By 1837, the federal government had assembled and forcibly removed nearly 17,000 Cherokee individuals from their homelands and marched them to a newly

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

29. *Id.*

30. *See id.* at 478–81, 838 S.E.2d at 378–80.

31. *Id.* at 481–84, 838 S.E.2d at 380–82.

32. *See NC Tribal Communities*, N.C. DEPT. ADMIN., <https://www.doa.nc.gov/divisions/american-indian-affairs/tribes> [<https://perma.cc/V9HE-BMU7>].

33. WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED* 89 (2010). The aboriginal Cherokee homelands spanned present-day Georgia, Tennessee, Alabama, Virginia, Kentucky, and the Carolinas. *Id.*

34. *See id.* at 89–120 (describing federal and state efforts to encroach into Cherokee territory).

created "Indian Territory" west of the Mississippi River.<sup>35</sup> Roughly 1,000 Cherokee people, however, defied the government's "trail of death" and remained hidden in the dense mountains of western North Carolina.<sup>36</sup> The modern-day Eastern Band of Cherokee Indians is descended from this group who refused to leave.<sup>37</sup>

In 2012, George Nobles robbed and fatally shot Barbara Preidt, a non-Indian, on the Qualla Boundary—the tribal trust lands of the Eastern Band.<sup>38</sup> Because the crimes occurred on tribal land, George Nobles was arrested by an officer of the Cherokee Indian Police Department.<sup>39</sup> Under the Cherokee Rules of Criminal Procedure, the arresting officer was to take Nobles in front of a Cherokee Magistrate Judge responsible for determining whether the Tribe had jurisdiction over the defendant.<sup>40</sup>

Under the Major Crimes Act, Tribes and the federal government have exclusive jurisdiction over so-called "major crimes"—including robbery and murder—that are committed by an "Indian" in "Indian Country."<sup>41</sup> For example, take an instance of arson, another crime covered under the Act.<sup>42</sup> If an Indian defendant sets fire to a hardware store on a Tribe's reservation, that Tribe has jurisdiction and can elect to prosecute.<sup>43</sup> Under the Major Crimes Act, the federal government can also choose to prosecute<sup>44</sup>—and because the Tribe and the federal government are "dual sovereign[s]" each with their own prosecutorial authority, double jeopardy would not attach.<sup>45</sup> But no state may prosecute the offense.<sup>46</sup> The Major Crimes Act is consistent with the longstanding prohibition of state jurisdiction over crimes committed by Indians on tribal lands absent the express consent of Congress.<sup>47</sup>

35. *Id.* at 112; GREGORY D. SMITHERS, *THE CHEROKEE DIASPORA: AN INDIGENOUS HISTORY OF MIGRATION, RESETTLEMENT, AND IDENTITY* 111 (1974). This forced march is referred to as the "Trail of Tears" and marked the culmination of "one of the greatest tragedies found in American history." ECHO-HAWK, *supra* note 33, at 113. Over 4,000 Cherokee exiles died as a direct result of the removal. *Id.*

36. SMITHERS, *supra* note 35, at 111–13.

37. ECHO-HAWK, *supra* note 33, at 119; Ben Oshel Bridgers, *An Historical Analysis of the Legal Status of the North Carolina Cherokees*, 58 N.C. L. REV. 1075, 1075–76 (1980).

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

39. *Id.*

40. *Id.* at 487, 838 S.E.2d at 384 (Earls J., dissenting).

41. 18 U.S.C. § 1153(a).

42. *Id.*; *see supra* note 9 (outlining the crimes covered under the Act).

43. This power derives not from the Major Crimes Act, but rather from a Tribe's "sovereign power to punish offenses against tribal law by members of a [T]ribe." *See United States v. Wheeler*, 435 U.S. 313, 324–25 (1978).

44. 18 U.S.C. § 1153(a). Where the crime is not codified in the U.S. Code, the federal government would apply state law. *See id.* § 1153(b).

45. *Wheeler*, 435 U.S. at 329–30.

46. 18 U.S.C. § 1153(a) ("Any Indian who commits [a covered crime] shall be subject to the . . . exclusive jurisdiction of the United States.").

47. *See infra* Section II.B.

But when the perpetrator of a “major crime” in Indian Country is non-Indian, the Tribe is robbed of jurisdiction.<sup>48</sup> A “haphazard collection” of federal statutes and U.S. Supreme Court decisions has “disaggregate[d] tribal territorial sovereignty from criminal jurisdiction”<sup>49</sup> and left Tribes with the ability to prosecute non-Indians for only a narrow class of crimes, mostly dealing with domestic violence and dating violence against Indian victims.<sup>50</sup>

So, suppose now that a *non-Indian* defendant sets fire to that same store on the reservation. In that case, the Tribe may not prosecute the offense.<sup>51</sup> While tribal law enforcement could detain the perpetrator,<sup>52</sup> the tribal police officer would need to turn them over to nontribal authorities to face potential prosecution.<sup>53</sup> The implications of this jurisdictional disconnect are stark: a non-Indian individual can violently assault a tribal member on tribal land, and that Tribe is virtually powerless to act. All the Tribe can do is turn the perpetrator over to nontribal authorities and hope they charge the crime, pursue a conviction, and provide a means to protect and seek justice for the Tribe.<sup>54</sup> And, as experience suggests, that hope may be misplaced.<sup>55</sup>

48. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). In *Oliphant*, the Court relied on (1) an apparent lack of history of tribal courts “exercis[ing] criminal jurisdiction over non-Indians” and (2) a theory that Tribes implicitly “give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress . . . by submitting to the overriding sovereignty of the United States.” *Id.* at 196–97, 210. But these “historical foundations” of *Oliphant* appear “suspect, at best.” See Martin, *supra* note 6, at 59–63 (describing an instance when a federal agent transferred custody of a non-Indian white U.S. citizen to the Cherokee Nation for a crime committed in Indian Country).

49. See Riley, *supra* note 2, at 1567.

50. See 25 U.S.C. § 1304. In recent reauthorizations of the Violence Against Women Act, Congress recognized the “inherent authority” of “participating Tribes” to exercise “special [t]ribal criminal jurisdiction” over both Indian and non-Indian defendants who commit certain “covered crimes.” See *2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, U.S. DEPT. JUST., <https://www.justice.gov/tribal/2013-and-2022-reauthorizations-violence-against-women-act-vaawa> [<https://perma.cc/B7CF-YSZC>] (last updated Apr. 7, 2023). But in order to exercise this “special [t]ribal criminal jurisdiction,” a Tribe must provide certain rights to defendants in such cases, including the right to a trial by jury that does not “systematically exclude . . . non-Indians.” See 25 U.S.C. § 1304(d).

51. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

52. See *United States v. Cooley*, 593 U.S. 345, 355 (2021) (affirming the authority of a tribal police officer to temporarily detain a non-Indian defendant on tribal lands for an amount of time reasonably necessary for nontribal authorities to arrive).

53. *Oliphant*, 435 U.S. at 212; *Duro v. Reina*, 495 U.S. 676, 697 (1990) (“Where jurisdiction to try and punish an offender rests outside the [T]ribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.”).

54. See *Eastern Band of Cherokee Indians v. Martinez*, 15 Am. Tribal L. 45, 47 (E. Cherokee Sup. Ct. 2018) (“[The] fundamental determination of whether the Tribe has authority to prosecute . . . touches on the Tribe’s ability to protect and seek justice for its tribal members.”).

55. At the federal level, prosecutors are often “ill-equipped” to deal with Indian Country crime and face “[b]udgetary, political, and geographic difficulties.” Matthew L.M. Fletcher, *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts*, 45 CT. REV. 12, 15

But while the defendant's Indian status often determines whether a Tribe can prosecute a "major crime"—and, sometimes, whether the crime will even be prosecuted at all<sup>56</sup>—the Major Crimes Act is silent as to the meaning of "Indian."<sup>57</sup> Federal and state courts have filled in the gap with a two-part test that first emerged in *United States v. Rogers*.<sup>58</sup> While courts describe the two prongs in slightly different language,<sup>59</sup> the "generally accepted"<sup>60</sup> formulation of the "Rogers test"—and the one adopted by the Supreme Court of North Carolina in *Nobles*—is that an individual "qualif[ies] as an Indian" when they (1) have "some Indian blood" and (2) are "recognized as an Indian by a [T]ribe or the federal government or both."<sup>61</sup>

This "confusing and impractical" jurisdictional framework<sup>62</sup> permits federal and state courts to usurp from Tribes the final word on Indian status whenever a defendant raises a jurisdictional challenge under the Major Crimes Act in a nontribal forum.<sup>63</sup> But "confusing and impractical" need not always mean "difficult." The second prong of *Rogers*, in theory, places great weight on

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(2009) [hereinafter Fletcher, *Sovereign Comity*]. This problem is especially severe for misdemeanors, "very, very few [of which] . . . are ever seriously investigated" by federal authorities. *Id.* at 15. At the state and local level, the reality is no less bleak. *Id.* Not only are "[l]ocal police often . . . not local to Indian country," but local prosecutors often lack the "political incentives to spend state resources on Indian Country, which does not contribute much to the local tax base." *Id.*

56. See Riley, *supra* note 2, at 1568 ("[T]he federal government's limited resources combined with an array of disincentives to investigate and prosecute Indian country crimes mean that remarkably few are ever even superficially pursued"). In 2021, the U.S. Department of Justice declined to pursue criminal prosecution of eighteen percent of cases that were referred to the department by other law enforcement groups. U.S. DEPT OF JUST., INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 4 (2021), <https://www.justice.gov/d9/2023-08/2021> [<https://perma.cc/X3KY-V88V>].

57. See *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc) ("[T]he [Major Crimes Act] does not define 'Indian,' but courts have judicially explicated its meaning." (internal quotations omitted) (citing *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005), *cert. denied*, 136 S. Ct. 1712 (2016)).

58. See *State v. Nobles*, 373 N.C. 471, 477, 838 S.E.2d 373, 377–78 (2020) (quoting *Bruce*, 394 F.3d at 1223) (calling the *Rogers* test the "generally accepted test for Indian status"). *Rogers* was authored by Chief Justice Roger Taney eleven years before he wrote the majority opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. In the years since, courts have both over relied on *Rogers* and extended its "test" well beyond its context. See *infra* Section III.B.

59. Compare *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) ("[The test] asks whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a [T]ribe or the federal government or both."), with *Zepeda*, 792 F.3d at 1113 ("We hold that proof of Indian status under the [Major Crimes Act] requires only two things: (1) proof of some quantum of Indian blood . . . , and (2) proof of membership in, or affiliation with, a federally-recognized [T]ribe."). See generally Lewis, *supra* note 13, at 265–75 (describing the circuit split in the application of *Rogers*).

60. *Stymiest*, 581 F.3d at 762.

61. *Nobles*, 373 N.C. at 476, 838 S.E.2d at 377 (quoting *Stymiest*, 581 F.3d at 762).

62. See *Eastern Band of Cherokee Indians v. Johnson*, 18 Am. Tribal L. 62, 67 (E. Cherokee Ct. 2024) (describing Indian Country criminal jurisdiction).

63. See *Jackson v. Fort Peck Tribes*, 18 Am. Tribal L. 87, 91 (Fort Peck Ct. App. 2024) ("Whereas Indian Tribes historically know who is and who is not Indian under tribal customary and common law, those customary practices may not be countenanced any longer under federal law.>").

the political determination of Tribes with regard to Indian status<sup>64</sup> and should limit the amount of guesswork required by nontribal courts. For example, when a Tribe has a formal relationship with the individual in question (like through membership), that connection is often dispositive or highly persuasive under *Rogers*.<sup>65</sup> But tribal enrollment is not a necessary condition of Indian status: an individual just has to show a “sufficient non-racial link” to the Tribe.<sup>66</sup>

With Nobles, little guesswork should have been required. The Eastern Band had already made its position clear: although Nobles was not a full member, he was a First Descendant.<sup>67</sup> A “political” classification defined by Cherokee law, First Descendants include the children of an enrolled member who themselves are one generation short of the Tribe’s blood quantum requirement for membership.<sup>68</sup> While Nobles’s mother, for example, was an enrolled member of the Eastern Band, Nobles himself only had a blood quantum of 11/256 (4.29%)<sup>69</sup>—just short of the 1/16 (6.25%) needed for enrollment eligibility.<sup>70</sup>

64. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (describing determinations of tribal affiliation and membership as “central to [a Tribe’s] existence as an independent *political community*” (emphasis added)); *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (holding that Indian status is reflective of the relationship between an individual and a “quasi-sovereign tribal entit[y]”).

65. See, e.g., *Stymiest*, 581 F.3d at 764 (explaining that no factor under the second *Rogers* prong is dispositive “unless the defendant is an enrolled tribal member”); *United States v. Juv. Male*, 666 F.3d 1212, 1215 (9th Cir. 2012) (calling tribal enrollment the “most important factor”).

66. *United States v. Cruz*, 554 F.3d 840, 849–50 (9th Cir. 2009); see also *United States v. Bruce*, 394 F.3d 1215, 1224–26 (9th Cir. 2005) (finding that a nonenrolled individual brought forward enough evidence of tribal recognition based on her social and cultural connections to the Tribe); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 11.02 (Nell Jessup Newton & Kevin K. Washburn, eds., 2024) [hereinafter COHEN’S HANDBOOK] (“The absence of tribal enrollment is not fatal to the inquiry.”).

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

68. *Eastern Band of Cherokee Indians v. Lambert*, No. CR 03-1313, 2003 WL 25902446, at \*1, \*3 (E. Cherokee Ct. May 29, 2003) (outlining membership criteria and First Descendant requirements). First Descendants also include all children adopted by an enrolled member. CHARTER AND GOVERNING DOCUMENT OF THE EASTERN BAND OF CHEROKEE INDIANS § 16, [https://library.municode.com/tribes\\_and\\_tribal\\_nations/eastern\\_band\\_of\\_cherokee\\_indians/codes/code\\_of\\_ordinances?nodeId=PTICHGODOEABACHIN](https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/codes/code_of_ordinances?nodeId=PTICHGODOEABACHIN) [<https://perma.cc/7C8Y-4J27>]. The Charter and Governing Document of the Eastern Band of Cherokee Indians is the “supreme law” of the Eastern Band. See *In re Patrick Lambert*, CSC-25-02, 2025 WL 2218955, at \*1 (E. Cherokee Sup. Ct. Aug. 5, 2025) (discussing the role of the Charter in Cherokee law). For more on the history and controversy of the blood quantum requirement common to tribal membership, see generally Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006). For a call to divorce blood quantum requirement from the Indian status inquiry, see *United States v. Zepeda*, 792 F.3d 1103, 1119–20 (9th Cir. 2015) (en banc) (Ikuda, J., concurring), cert. denied, 136 S. Ct. 1712 (2016).

69. *Nobles*, 373 N.C. at 474, 477, 838 S.E.2d at 376–77.

70. *Lambert*, 2003 WL 25902446, at \*1. Tribal enrollment eligibility requirements are set by Tribal Council and promulgated in the Cherokee Code. See Cherokee Code § 49-2 (2021), [https://library.municode.com/tribes\\_and\\_tribal\\_nations/eastern\\_band\\_of\\_cherokee\\_indians/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH49EN\\_S49-2QUEN](https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/codes/code_of_ordinances?nodeId=PTIICOOR_CH49EN_S49-2QUEN) [<https://perma.cc/M2CB-E7WH>].

While First Descendants are not eligible for the full array of privileges available to enrolled members,<sup>71</sup> they do receive special benefits from the Eastern Band as a result of their status that are unavailable to non-Indians. For example, First Descendants receive free health and dental care at the Cherokee Indian Hospital, which only serves enrolled members and First Descendants.<sup>72</sup> First Descendants are eligible for financial assistance from the Tribe for higher education opportunities and adult education services that are unavailable to non-Indians.<sup>73</sup> They receive priority over non-Indians in employment decisions by the Tribe.<sup>74</sup> They can address Tribal Council in a manner similar to members of other Tribes.<sup>75</sup> And First Descendants have the right to “use or occupy Cherokee trust lands,” including through possession of a life estate, in a way that outsiders do not.<sup>76</sup>

But most importantly, the Tribe “recognized” First Descendants as Indian.<sup>77</sup> In 2003, in *Eastern Band of Cherokee Indians v. Lambert*,<sup>78</sup> the Cherokee Court held for the first time that First Descendants categorically satisfied the *Rogers* test and were Indian for purposes of criminal jurisdiction.<sup>79</sup> Because they had “some Indian blood” as the children of an enrolled member, First Descendants met the first prong of *Rogers*.<sup>80</sup> And with respect to the second prong, the Cherokee Court found that First Descendants were “participating members of th[e] community” and were “treated by the Tribe as such.”<sup>81</sup> Accordingly, the Cherokee Court could “only conclude” that First Descendants were “Indian” and therefore subject to its criminal jurisdiction.<sup>82</sup>

71. See *Lambert*, 2003 WL 25902446, at \*3. For example, First Descendants may not hold tribal elective office, vote in tribal elections, or purchase tribal trust lands. *Id.* at \*2.

72. *Id.* at \*1.

73. See *id.*; Cherokee Code § 115-6 (2017), [https://library.municode.com/tribes\\_and\\_tribal\\_nations/eastern\\_band\\_of\\_cherokee\\_indians/codes/code\\_of\\_ordinances?nodeId=THCHCO\\_CH115E\\_D\\_ARTIGEPR\\_S115-6FUFIGEDE](https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/codes/code_of_ordinances?nodeId=THCHCO_CH115E_D_ARTIGEPR_S115-6FUFIGEDE) [<https://perma.cc/8S59-SBXJ>].

74. *Lambert*, 2003 WL 25902446, at \*1. The priority for First Descendants is on par with that given to enrolled members of other federally recognized Tribes. *Id.*

75. *Id.* at \*3.

76. Cherokee Code § 28-2 (2022), [https://library.municode.com/tribes\\_and\\_tribal\\_nations/eastern\\_band\\_of\\_cherokee\\_indians/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH28IN\\_S28-2FIGEDE](https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/codes/code_of_ordinances?nodeId=PTIICOOR_CH28IN_S28-2FIGEDE) [<https://perma.cc/M5UK-AY9B>]; *Lambert*, 2003 WL 25902446, at \*1.

77. See *State v. Nobles*, 373 N.C. 471, 476, 838 S.E.2d 373, 377 (2020) (“To qualify as an Indian under the *Rogers* test, a defendant must . . . be ‘recognized as an Indian by a [T]ribe or the federal government or both.’” (quoting *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009))).

78. No. CR 03-1313, 2003 WL 25902446 (E. Cherokee Ct. May 29, 2003).

79. *Id.* at \*2–3.

80. *Id.* at \*3.

81. *Id.*

82. *Id.*

Later, Tribal Council modified the Cherokee Rules of Criminal Procedure to reflect the decision in *Lambert*.<sup>83</sup> After an arrest, the new rules required the officer to bring the defendant in front of a Cherokee magistrate judge for a jurisdictional determination.<sup>84</sup> If the defendant was a First Descendant, the “inquiry end[ed] there”: the defendant was Indian and could face prosecution in the tribal court.<sup>85</sup>

The officer who arrested Nobles, however, skipped a step. Instead of bringing Nobles before a magistrate for a jurisdictional determination, he checked the Tribe’s enrollment book himself, which did not include First Descendants.<sup>86</sup> Not finding Nobles’s name, the officer—after “discussing the situation” with the local district attorney and a special assistant U.S. attorney—transported him to state authorities in Jackson County, where he was charged.<sup>87</sup>

Nobles moved to dismiss the charges in state superior court for lack of jurisdiction under the Major Crimes Act, but the trial court denied the motion.<sup>88</sup> He was subsequently convicted and sentenced to life imprisonment without parole.<sup>89</sup>

Nobles appealed the denial of his motion to dismiss first to the North Carolina Court of Appeals<sup>90</sup> and then to the Supreme Court of North Carolina.<sup>91</sup> Because tribal law recognized First Descendants as Indian, Nobles argued that he plainly satisfied the *Rogers* test: he had “some Indian blood” and

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83. See Tribal Council Ord. No. 608 (2013) (Eastern Band of Cherokee Indians Tribal Council), [https://library.municode.com/tribes\\_and\\_tribal\\_nations/eastern\\_band\\_of\\_cherokee\\_indians/ordinances/code\\_of\\_ordinances?nodeId=616401](https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/ordinances/code_of_ordinances?nodeId=616401) [<https://perma.cc/UC2J-U5HZ> (staff-uploaded archive)], *superseded by* Tribal Council Ord. No. 367 (2022).

84. See *State v. Nobles*, 373 N.C. 471, 487, 838 S.E.2d 373, 384 (2020) (Earls, J., dissenting).

85. Tribal Council Ord. No. 608 (2013) (Eastern Band of Cherokee Indians Tribal Council), [https://library.municode.com/tribes\\_and\\_tribal\\_nations/eastern\\_band\\_of\\_cherokee\\_indians/ordinances/code\\_of\\_ordinances?nodeId=616401](https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/ordinances/code_of_ordinances?nodeId=616401) [<https://perma.cc/UC2J-U5HZ> (staff-uploaded archive)], *superseded by* Tribal Council Ord. No. 367 (2022).

86. *Nobles*, 373 N.C. at 487, 838 S.E.2d at 384 (Earls, J., dissenting).

87. *Id.*

88. *Id.* at 473, 475, 838 S.E.2d at 375–76 (majority opinion). It should be noted that the presiding judge was the Hon. Brad Letts, *id.* at 472, 838 S.E.2d at 373, who is the former Attorney General for the Eastern Band of Cherokee Indians and an enrolled member of the Eastern Band. Kyle Perrotti, *Letts Appointed to EBCI Supreme Court, Vacates Superior Court Seat*, SMOKEY MTN. NEWS (Nov. 6, 2024), <https://smokymountainnews.com/news/item/38634-letts-appointed-to-ebci-supreme-court-vacates-superior-court-seat> [<https://perma.cc/SX2H-SGUG>]. In 2024, Judge Letts was nominated and confirmed to a six-year term as Chief Justice of the Cherokee Supreme Court. *Id.*

89. *Nobles*, 373 N.C. at 475, 838 S.E.2d at 377.

90. See *State v. Nobles*, 260 N.C. App. 289, 818 S.E.2d 129 (2018), *aff'd*, 373 N.C. 471, 838 S.E.2d 373 (2020).

91. See *Nobles*, 373 N.C. at 475, 838 S.E.2d at 377.

was “recognized as an Indian by [his] [T]ribe.”<sup>92</sup> Under the Major Crimes Act, state jurisdiction should have been barred.

Yet, the Supreme Court of North Carolina upheld the conviction—and in doing so, undermined principles of federal Indian law and tribal sovereignty that the State is obligated to respect.

## II. PRINCIPLES OF FEDERAL INDIAN LAW

State prosecution of an individual considered “Indian” by a Tribe committed on that Tribe’s land strikes at settled principles of federal Indian law. Part II grounds *State v. Nobles* in three of these principles that are necessary to understand the errors in the case. Together, these principles demand deference to Tribes on questions of Indian status.

### A. Tribes Retain the “Inherent Power” of Self-Government

Alongside the federal government and the states, Tribes are the “third sovereign” in the American constitutional fabric.<sup>93</sup> But long before the arrival of Europeans and the creation of either the federal government or any state, Tribes were the *only* sovereigns—-independent and self-governing societies with their own legal systems.<sup>94</sup> After the United States was eventually established, the federal government initially recognized and engaged with the Tribes as what they were: sovereign entities.<sup>95</sup> As early as 1788, the United States began pursuing treaties with Indian nations, in which many Tribes relinquished much

92. See *id.* at 478–79, 838 S.E.2d at 378–79. In the alternative, Nobles argued that his own connections with the Tribe were enough to meet the *Rogers* test. See *id.* at 481–84, 838 S.E.2d at 380–82.

93. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

94. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (“[T]he powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution.”); COHEN’S HANDBOOK, *supra* note 66, § 5.01[1][b].

95. See COHEN’S HANDBOOK, *supra* note 66, § 5.01[1][b] (“The [T]ribes began their relationship with the federal government possessing the sovereign power of independent nations.”); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1061–62 (2015) (“There was widespread agreement . . . that the law of nations should govern relations between the United States and Natives.”) [hereinafter Ablavsky, *Beyond the Indian Commerce Clause*]; Fletcher, *Sovereign Comity*, *supra* note 55, at 13 (arguing that the federal government’s treaty power initially “deal[t] with Indian [T]ribes as independent sovereign nations”); Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 954 (1975) (noting that early Indian treaties “assumed that the Indian [T]ribes were sovereign and possessed complete government power over their own lands”). However, despite acknowledging and engaging with Tribes as sovereign entities, many in the founding generation nonetheless thought of tribal sovereignty as “subordinate” to the sovereignty of the United States and did not consider Tribes to be “fully external nations.” Ablavsky, *Beyond the Indian Commerce Clause*, *supra*, at 1063–66.

of their external sovereign authority and vast amounts of land in exchange for promises of peace and protection from the United States.<sup>96</sup>

Soon, however, the position of the Tribes deteriorated. As the United States sought war,<sup>97</sup> broke its treaty promises,<sup>98</sup> forcibly removed Tribes to reservations,<sup>99</sup> broke up tribal landholdings through allotment policies,<sup>100</sup> shipped Native children to boarding schools intended to eradicate Native language and culture,<sup>101</sup> and passed statutes regulating and intruding into tribal

96. See COHEN'S HANDBOOK, *supra* note 66, § 2.04. Ceded external sovereign authority included the right to enter into treaties with States or foreign nations. See MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 29–37, 123 (2017).

97. See, e.g., Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 95, at 1018–19 (highlighting the “lengthy and costly Indian war[s]” waged by the Washington administration); see also COHEN'S HANDBOOK, *supra* note 66, § 2.06[1].

98. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (upholding the right of Congress to unilaterally abrogate provisions of an “Indian treaty”). Even if treaties were upheld, many were “not negotiated bargains between coequal sovereigns” and were “imposed upon Native signatories under threat of force.” COHEN'S HANDBOOK, *supra* note 66, § 2.06[1]. In some instances, the United States assembled “arbitrary collections of leaders from multiple Native communities to sign a single collective treaty that purported to cede Native lands to the United States.” *Id.*

99. See *id.* (describing the advent of the reservation policy).

100. See Philip Deloria, *When Tribal Nations Expel Their Black Members*, NEW YORKER (July 18, 2022), <https://www.newyorker.com/magazine/2022/07/25/when-tribal-nations-expel-their-black-members-caleb-gayle-we-refuse-to-forget-alaina-e-roberts-ive-been-here-all-the-while> [https://perma.cc/D9MB-QP3Z] (reviewing CALEB GAYLE, WE REFUSE TO FORGET: A TRUE STORY OF BLACK CREEKS, AMERICAN IDENTITY, AND POWER (2022)) (“The net result of . . . [the] allotment campaign was that some ninety million acres passed out of Indian control—not in large-scale treaty concessions but in small increments, as private Native parcels ended up in white hands, often through fraud or coercion.”); Washburn, *supra* note 15, at 809–10.

101. See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641–45 (2023) (Gorsuch, J., concurring) (describing the “dark[] design[]” of federal and state officials to “destroy[] tribal identity and assimilat[e] Indians into broader society” through Indian boarding schools). In 2021, the U.S. Department of the Interior commissioned the first U.S. government investigation into the “troubled legacy of past federal Indian boarding school policies.” Press Release, U.S. Dep’t of the Interior, Secretary Haaland Announces Major Milestones for Federal Indian Boarding School Initiative (July 30, 2024), <https://www.doi.gov/pressreleases/secretary-haaland-announces-major-milestones-federal-indian-boarding-school> [https://perma.cc/KR33-8RRR]. Its findings are detailed across two volumes of the Federal Indian Boarding School Initiative Investigative Reports. See 1 BRYAN NEWLAND, U.S. DEP’T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT (2022) [hereinafter 1 INDIAN BOARD SCHOOL REPORT], [https://www.bia.gov/sites/default/files/dup/inline-files/bsi\\_investigative\\_report\\_may\\_2022\\_508.pdf](https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf) [https://perma.cc/98ZQ-SJD]; 2 BRYAN NEWLAND, U.S. DEP’T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT (2024), [https://www.bia.gov/sites/default/files/media\\_document/doi\\_federal\\_indian\\_boarding\\_school\\_initiative\\_investigative\\_report\\_vii\\_final\\_508\\_compliant.pdf](https://www.bia.gov/sites/default/files/media_document/doi_federal_indian_boarding_school_initiative_investigative_report_vii_final_508_compliant.pdf) [https://perma.cc/QP6Z-V476].

The Investigative Reports found that the Federal Indian boarding schools “deployed systematic militarized and identity-alteration methodologies” to attempt to assimilate Native children. 1 INDIAN BOARDING SCHOOL REPORT, *supra* note, at 7. The practices included renaming Indian children from Indian to English names; cutting hair of Indian children; discouraging or preventing the use of Native languages, religions, and cultural practices; and organizing Native children into units to perform military drills. *Id.*

affairs,<sup>102</sup> the federal government trampled over tribal sovereignty and brought the Tribes increasingly under its authority and within its territorial limits.<sup>103</sup>

But even as the United States asserted greater control, the Tribes nonetheless retained their right to self-govern that they had possessed and exercised in some form since their inception.<sup>104</sup> In one of its earliest decisions on tribal sovereignty, the U.S. Supreme Court in *Worcester v. Georgia*<sup>105</sup> affirmed that a Tribe does not “surrender its independence—its right to self-government—by associating with a stronger [power] and taking its protection.”<sup>106</sup> That principle remains today: while no longer “possessed of the full attributes of sovereignty,”<sup>107</sup> Tribes remain “distinct, independent political communities,” with their “original natural rights” in matters of self-government.<sup>108</sup> Though subject to broader Congressional control,<sup>109</sup> Tribes

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In 2024, President Biden formally apologized for the role of the U.S. government in Indian boarding schools. *Remarks by President Biden on the Biden-Harris Administration's Record of Delivering for Tribal Communities, Including Keeping His Promise to Make This Historic Visit to Indian Country*, WHITE HOUSE ARCHIVES (Oct. 25, 2024), <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/10/25/remarks-by-president-biden-on-the-biden-harris-administrations-record-of-delivering-for-tribal-communities-including-keeping-his-promise-to-make-this-historic-visit-to-indian-country-lavee/> [<https://perma.cc/NXN6-36QR>].

102. See, e.g., Deloria, *supra* note 100 (describing the “Civilization Regulations” enacted in 1883 that “criminalized everything distinctly Native,” including dancing, ceremonies, and long hair); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2508 (2022) (Gorsuch, J., dissenting) (describing the Major Crimes Act as a response to Congressional “dissatis[action] with how the Sioux Tribe responded to the murder of a tribal member”). In a racialized and highly paternalistic decision, the U.S. Supreme Court in *United States v. Kagama*, 118 U.S. 375 (1886), upheld the constitutionality of the Major Crimes Act, which imposed federal jurisdiction onto intratribal crimes that were long thought to be within the exclusive province of tribal self-government. *Id.* at 383–85 (“The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.”); see *supra* Section II.C and accompanying text.

103. See Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 95, at 1063 (noting how the Washington Administration conceptualized the “territorial sovereignty” of the United States as extending over Indian Country).

104. See *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978) (“The powers of Indian [T]ribes are, in general, inherent powers of a limited sovereignty which has never been extinguished . . . . In sum, Indian [T]ribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”) (internal quotations omitted) (emphasis omitted); *Veneno v. United States*, 146 S. Ct. 52, 53 (2025) (Gorsuch, J., dissenting from denial of certiorari) (“As ‘sovereign and independent states,’ Native American Tribes have governed their internal affairs from ‘time immemorial.’”) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519, 561 (1832)). See generally Martin, *supra* note 6 (describing the tradition of self-government of the Eastern Band of Cherokee Indians with respect to the exercise of criminal jurisdiction).

105. 31 U.S. (6 Pet.) 515 (1832).

106. *Id.* at 520.

107. *Kagama*, 118 U.S. at 381.

108. *Worcester*, 31 U.S. at 519; see also *Wheeler*, 435 U.S. at 322 (“Although physically within the territory of the United States and subject to ultimate federal control, [Tribes] nonetheless remain a separate people, with the power of regulating their internal and social relations.”) (internal quotations omitted).

109. See *United States v. Lara*, 541 U.S. 193, 194 (2004); *supra* Section II.B.

possess and exercise this “inherent power[] of a limited sovereignty which has never been extinguished.”<sup>110</sup>

Relevant to *State v. Nobles*, the “unique and limited” sovereignty of Tribes includes the “inherent” power to self-govern in two main areas.<sup>111</sup> First, Tribes can prescribe and enforce criminal laws—a right that Tribes have “always enjoyed”<sup>112</sup> and that the United States has long recognized in increasingly expansive contexts.<sup>113</sup> In *United States v. Wheeler*,<sup>114</sup> the U.S. Supreme Court reaffirmed the power of a Tribe to “prescribe laws applicable to tribal members” and “enforce those laws by criminal sanction.”<sup>115</sup> Later, in *United States v. Lara*,<sup>116</sup> the Court upheld an amendment to the Indian Civil Rights Act that acknowledged the “inherent power” of Tribes to prosecute both member and nonmember Indians alike.<sup>117</sup> And in the Violence Against Women Act Reauthorization Act of 2022, Congress affirmed the “inherent power” of Tribes to prosecute non-Indians for certain “covered crimes.”<sup>118</sup> Read against this historical arc, the right of a Tribe to exercise criminal jurisdiction is integral to tribal self-government and has been recognized and increasingly expanded through judicial power and congressional action. And, consistent with this arc, Tribes like the Eastern Band have relied on these powers to enforce their criminal laws and to “protect and seek justice for . . . tribal members.”<sup>119</sup>

Second, tribal self-governance includes the right to define the metes and bounds of tribal affiliation. In *Santa Clara Pueblo v. Martinez*,<sup>120</sup> the U.S.

110. *Wheeler*, 435 U.S. at 322 (internal quotations omitted); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (“[T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence . . .”); see COHEN’S HANDBOOK, *supra* note 66, § 1.01; ECHO-HAWK, *supra* note 33, at 119 (“*Worcester* established . . . [that] the Indian [T]ribes enjoy a sovereign right of self-government free from interference by the states . . .”).

111. See *Wheeler*, 435 U.S. at 323.

112. *Veneno v. United States*, 146 S. Ct. 52, 53 (2025) (Gorsuch, J., dissenting from denial of certiorari) (“Among the sovereign powers Tribes have always enjoyed is the power to redress crimes involving their own peoples.”); see *Eastern Band of Cherokee Indians v. Torres*, Nos. CR 03-1443, CR 03-1529, CR 03-1530, CR 03-1531, CR 03-1819, 2005 WL 6437828, at \*6 (E. Cherokee Sup. Ct. Apr. 12, 2005) (stating that Eastern Band had “jurisdiction in 1492” over non-Indian defendants); Martin, *supra* note 6, at 41–64.

113. See *Wheeler*, 435 U.S. at 322 (calling “undisputed” the power of Tribes to “enforce their criminal laws”).

114. 435 U.S. 313 (1978).

115. *Id.* at 322.

116. 541 U.S. 193 (2004).

117. *Id.* at 196.

118. Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 840 (Codified at 34 U.S.C. § 10101); see *2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, *supra* note 50; *Eastern Band of Cherokee Indians v. Johnson*, 18 Am. Tribal L. 62, 71–72 (E. Cherokee Ct. 2024) (outlining the history of VAWA “special tribal criminal jurisdiction”).

119. See *Eastern Band of Cherokee Indians v. Martinez*, 15 Am. Tribal L. 45, 47 (E. Cherokee Sup. Ct. 2018).

120. 436 U.S. 49 (1978).

Supreme Court affirmed that a Tribe's "right to define its own membership" is "central to its existence as an independent political community."<sup>121</sup> In *Martinez*, a member of the Santa Clara Pueblo challenged in federal court a Pueblo ordinance that denied tribal membership to the children of female members who marry outside the Tribe as impermissible under the Indian Civil Rights Act.<sup>122</sup> The Supreme Court rejected the challenge on the grounds that the case was better suited for tribal courts.<sup>123</sup> Providing a federal forum for questions of tribal affiliation, the Court held, would unduly "interfere[] with tribal autonomy and self-government"<sup>124</sup> and affect a Tribe's ability to "maintain itself as a culturally and politically distinct identity."<sup>125</sup> Instead, given the "often vast gulf between tribal traditions and those with which federal courts are more intimately familiar," federal courts should leave questions of tribal affiliation to the Tribes and their own courts.<sup>126</sup> In the years since *Martinez*, lower courts have described tribal control over its membership and affiliation in even broader terms, including as having "complete authority" over "all questions" of its membership.<sup>127</sup>

*Martinez* makes clear that Tribes like the Eastern Band have the power to not only establish a descendency status, but also to define the contours of that status consistent with "tribal traditions" without interference by less "familiar" nontribal courts.<sup>128</sup> And where, as part of those "traditions," Tribes have "historically know[n] who is and who is not Indian under tribal customary and common law,"<sup>129</sup> *Martinez* counsels that Tribes should have the final word on both tribal affiliation and Indian status.

B. *State Intrusion into Indian Country Strikes at the "Heart of Tribal Sovereignty."*

Notwithstanding the "inherent sovereign authority" of Tribes, the U.S. Supreme Court has interpreted the Constitution as giving the federal

121. *Id.* at 49, 72 n.32; see *Montana v. United States*, 450 U.S. 544, 564 (1981) ("Indian [T]ribes retain their inherent power to determine tribal membership . . .").

122. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978). The Indian Civil Rights Act provides, in relevant part, that "[n]o Indian [T]ribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." *Id.*

123. *Id.* at 52, 63–66.

124. *Id.* at 59.

125. *Id.* at 72.

126. *Id.* at 72 n.32.

127. *Martinez v. Southern Ute Tribe of the S. Ute Reservation*, 249 F.2d 915, 920 (10th Cir. 1957), *cert denied* 357 U.S. 924 (1958) (emphasis added); see also *Smith v. Babbitt*, 875 F. Supp. 1353, 1360 (D. Minn. 1995) ("The great weight of authority holds that [T]ribes have *exclusive authority* to determine membership issues.") (emphasis added).

128. See *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

129. *Jackson v. Fort Peck Tribes*, 18 Am. Tribal L. 87, 91 (Fort Peck Ct. App. 2024) (emphasis added).

government “broad general powers” over Indian affairs that the Founders withheld from the States.<sup>130</sup> The Court has “consistently” interpreted this federal authority as “plenary and exclusive”—“plenary” in its breadth and “exclusive” with respect to the States.<sup>131</sup> As early as *Worcester v. Georgia*, the Court recognized this federal power in the context of criminal jurisdiction and barred the State of Georgia from extending its criminal laws into Cherokee lands.<sup>132</sup> In what Justice Gorsuch has called one of the Court’s “finer hours,” *Worcester* was clear: no State possesses the “lawful right to govern the territory of a separate sovereign.”<sup>133</sup> And especially so, Justice Gorsuch added, in the “criminal context,” which lies at the “heart of tribal sovereignty.”<sup>134</sup> While subject to exceptions, the “general rule” from *Worcester* remains: states lack jurisdiction in Indian Country absent a clear statement from Congress.<sup>135</sup>

One of these exceptions, however, is relevant to *State v. Nobles* and warrants discussion. In *United States v. McBratney*,<sup>136</sup> the Court held that States

130. *United States v. Lara*, 541 U.S. 193, 200 (2004); see *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2506 (2022) (Gorsuch, J., dissenting) (internal quotations omitted) (discussing how the Constitution sought to “resolve” the “unworkable” compromise of the Articles of Confederation that divided authority over Indian affairs between national and state authorities); see also Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 95, at 1019 (describing that the federal government, beginning with the Washington Administration, “insisted . . . [it] enjoyed exclusive constitutional authority” over Tribes, a conclusion with which “many state officials agreed”).

131. *Lara*, 541 U.S. at 200. *Lara* identifies as the “source[] of that power” an amalgam of the Indian Commerce Clause and the Treaty Clause. *Id.* The “plenary power” doctrine provided the basis in *United States v. Kagama* to uphold the Major Crimes Act. *Veneno v. United States*, 146 S. Ct. 52, 53 (2025) (Gorsuch, J., dissenting from denial of certiorari). This doctrine has received criticism from at least two sitting members of the Court for its “lack [of] any foundation in the Constitution” and its “roots . . . in archaic prejudices.” *Id.* (discussing the views of Justice Gorsuch and Justice Thomas).

132. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 561 (1832) (calling Tribes “distinct political communities” in which the “laws of [the States] can have no force”); see Clinton, *supra* note 95, at 976 (“Marshall’s opinion in *Worcester* . . . spelled out the theoretical cornerstone of [plenary and exclusive] power.”).

133. *Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting); see *Haaland v. Brackeen*, 143 S. Ct. 1609, 1652 (2025) (Gorsuch, J., concurring) (“States [can] no more prescribe rules for Tribes than they [can] legislate for one another or a foreign sovereign.”).

134. *Castro-Huerta*, 142 S. Ct. at 2512.

135. See *Williams v. Lee*, 358 U.S. 217, 219 (1959) (“Over the years this Court has modified these principles . . . but the basic policy of *Worcester* has remained.”); *Castro-Huerta*, 142 S. Ct. at 2508–11 (Gorsuch, J., dissenting) (“[A]t least one promise remained: States could play no role in the prosecution of crimes [committed] by . . . Native Americans on tribal lands . . . [T]ribal sovereign authority excludes the operation of other sovereigns’ criminal laws unless and until Congress ordains otherwise.”); ECHO-HAWK, *supra* note 33, at 119 (“*Worcester* established . . . [that] the Indian [T]ribes enjoy a sovereign right of self-government free from interference from the states . . . .”); Eric Ramoutar, Note, *Unprincipled Preemption: Why the Supreme Court Was Wrong in Oklahoma v. Castro-Huerta To Abandon Exclusive Federal Jurisdiction Over Crimes by Non-Indians Against Indians in Indian Country*, 48 AM. INDIAN L. REV. 115, 117–18 (2024) (“[S]ubsequent courts have refined the principle . . . in *Worcester*, but none have ever claimed to overrule it.”). For more on federal authorization of state jurisdiction, including through Public Law 280, see COHEN’S HANDBOOK, *supra* note 66, § 7.04[3].

136. 104 U.S. 621 (1882).

possess exclusive jurisdiction over Indian Country crimes in which both the defendant and the victim are non-Indian.<sup>137</sup> Decided in 1882, *McBratney* has been criticized as “a bit of a puzzle,”<sup>138</sup> “enigmatic,”<sup>139</sup> and inconsistent with later cases.<sup>140</sup> But because Barbara Preidt, the victim in *Nobles*, was non-Indian, *McBratney* nonetheless dictates that North Carolina would have exclusive jurisdiction over *Nobles* if he were, indeed, non-Indian.

The Court’s recent decision in *Oklahoma v. Castro-Huerta*,<sup>141</sup> however, suggests that state jurisdiction in Indian Country may be preempted when its exercise would infringe on tribal self-governance.<sup>142</sup> Widely panned as an ahistorical assault on tribal sovereignty,<sup>143</sup> *Castro-Huerta* held that, absent Congressional action indicating otherwise, States have concurrent jurisdiction with the federal government to try and punish crimes committed by non-Indians against Indians in Indian Country.<sup>144</sup> Despite centuries of “understanding that Tribes are sovereign and that in our constitutional order only Congress may displace their authority,”<sup>145</sup> Justice Kavanaugh, writing for the five-Justice majority, reversed the presumption.<sup>146</sup> Instead, *States* now possess sovereign power to prosecute Indian Country crimes unless and until Congress “preempt[s]” that authority.<sup>147</sup> And, reviewing two federal Indian Country jurisdictional grants, the *Castro-Huerta* majority concluded that

137. *Id.* at 624.

138. Nick Martin, *The Supreme Court’s Attack on Tribal Sovereignty, Explained*, HIGH COUNTRY NEWS (July 1, 2022) [hereinafter Martin, *The Supreme Court’s Attack*] (quoting Professor Elizabeth Reese), <https://www.hcn.org/articles/indigenous-affairs-justice-law-the-supreme-courts-attack-on-tribal-sovereignty-explained/> [<https://perma.cc/N4G7-GQZN>].

139. Clinton, *supra* note 95, at 978.

140. *Id.* at 984 (arguing that the “long history of ill feelings between the [T]ribes and [S]tates” relied upon by the Court to uphold the Major Crimes Act in *Kagama* belied the “state jurisdictional arguments advanced in . . . *McBratney*”).

141. 142 S. Ct. 2486 (2022).

142. *Id.* at 2500–01.

143. *See id.* at 2505, 2511 (Gorsuch, J., dissenting) (describing the majority as “acced[ing]” to a state’s “unlawful power grab at the expense of the Cherokee” and committing a “foundational” error that reflects an “ahistorical and mistaken statement of Indian law”); Martin, *The Supreme Court’s Attack*, *supra* note 138; Ramoutar, *supra* note 135, at 115 (“[*Castro-Huerta*] was grounded in an ahistorical understanding of the scope of federal authority over Indian Country, an incorrect reading of the relevant case law, and a dubious application of the Indian Country Preemption Doctrine . . .”).

144. *Castro-Huerta*, 142 S. Ct. at 2491 (majority opinion). Before *Castro-Huerta*, only the federal government could prosecute crimes committed by non-Indian defendant against Indian victims in Indian Country. *Id.* at 2513–15 (Gorsuch, J., dissenting) (discussing the General Crimes Act). *Castro-Huerta*, however, authorized out of whole cloth concurrent state and federal jurisdiction over these crimes—and broke the promise to the Cherokee people that it “would remain forever free from interference by state authorities.” *Id.* at 2505.

145. *Id.* at 2513.

146. *Id.* at 2493–94 (majority opinion).

147. *Id.*

neither preempted state jurisdiction over crimes committed by non-Indian defendants against Indian victims in Indian Country.<sup>148</sup>

But *Castro-Huerta* itself announced an exception to this preemption analysis. Even if federal law does not preempt state jurisdiction “under ordinary preemption analysis,” state jurisdiction in Indian Country is still preempted when the particular “exercise of state jurisdiction would unlawfully infringe upon tribal self-government.”<sup>149</sup> In *Castro-Huerta*, state jurisdiction was not preempted because the defendant was non-Indian: state jurisdiction would not “deprive the [T]ribe of any of its prosecutorial authority,” since the Tribe could not have prosecuted him anyway.<sup>150</sup> But where a Tribe has already adjudicated a certain individual—or a class of individuals—as Indian, state jurisdiction *does* deprive the Tribe of its prosecutorial authority over the individual and “infringes upon tribal self-government.”<sup>151</sup>

Putting *McBratney* and *Castro-Huerta* together: although States may exercise jurisdiction over crimes involving only non-Indians on tribal lands, state jurisdiction in Indian Country is preempted whenever state jurisdiction would unduly infringe on tribal self-government. The determination by a Tribe that a certain class of individuals is Indian, by virtue of generations of familial connection with the Tribe lies at the core of tribal sovereignty and implicates its right of self-government. Thus, when a State moves to prosecute a member of that class for a crime committed on tribal lands, the result is clear: “tribal sovereignty can”—indeed, must—“displace state authority.”<sup>152</sup>

C. *Statutes Regulating Indian Affairs Are To Be “Liberally Construed in Favor of the Indians.”*

When faced with competing interpretations of a statute, the U.S. Supreme Court wrote in *County of Yakima v. Bands of the Yakima Indian Nation*,<sup>153</sup> the choice between them “must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: ‘[S]tatutes are to be construed liberally in favor

148. *Id.* at 2494–500. *But see id.* at 2521 (Gorsuch, J., dissenting) (“[T]oday’s decision surely marks an embarrassing new entry into the anticanon of Indian law.”). For a reasoned critique of the majority’s opinion, see generally Ramoutar, *supra* note 135.

149. *Castro-Huerta*, 142 S. Ct. at 2500–01 (majority opinion).

150. *Id.* at 2501.

151. *See id.* at 2526 (Gorsuch, J., dissenting) (“[T]he Court’s decision is limited in still other important ways. Most significantly, the Court leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization—for that would touch the heart of “tribal self-government.”). *Cf.* *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015) (calling state prosecution of a tribal member an “infringement on tribal sovereignty”).

152. *See Castro-Huerta*, 142 S. Ct. at 2525 (Gorsuch, J., dissenting).

153. 502 U.S. 251 (1992).

of the Indians, with ambiguous provisions interpreted to their benefit.”<sup>154</sup> These “well established” methods of statutory interpretation stem from the trust relationship between the federal government and the Tribes<sup>155</sup> and function almost as the “[T]ribes’ tenth amendment” against “state and federal encroachment on tribal lands and jurisdiction.”<sup>156</sup>

This statutory canon has obtained “quasi-constitutional status,” protecting tribal sovereignty against “all but explicit congressional derogation.”<sup>157</sup> And it holds special weight in contests between “tribal sovereignty” and “state authority.”<sup>158</sup> Ambiguities in federal law, the Supreme Court has made clear, are to be “construed generously in order to comport with . . . traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence”<sup>159</sup> and “must be resolved in favor of tribal sovereignty and against state power.”<sup>160</sup>

The passage of the Major Crimes Act in 1885 was an “attack” on the exact practice of tribal self-government that these canons are meant to protect.<sup>161</sup> Just two years earlier, in 1883, the Supreme Court ruled in *Ex parte Kan-gi-Shun-ca*<sup>162</sup> that federal courts lacked jurisdiction to try an Indian for the murder of another Indian in Indian Country.<sup>163</sup> In that case, Kan-gi-Shun-ca (Crow Dog), a Brule Sioux, had murdered Sin-ta-ge-le-Scka (Spotted Tail), another Brule Sioux, on Sioux lands.<sup>164</sup> He was punished by the Tribe according to “customary

154. *Id.* at 269 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767–68 (1985)) (alteration in original) (interpreting the Indian General Allotment Act of 1887 in favor of the Yakima Indian Nation); see Jill D. Hunt, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REFORM 681, 690–91 (1984) (outlining the history of the canon).

155. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); see Hunt, *supra* note 154, at 681.

156. Russel Lawrence Barsh & James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States*, 56 WASH. L. REV. 627, 654 (1981).

157. See COHEN’S HANDBOOK, *supra* note 66, § 3.01[2]; see *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“But until Congress acts, the [T]ribes retain their existing sovereign powers.”).

158. See *Castro-Huerta*, 142 S. Ct. at 2512 (Gorsuch, J., dissenting) (“What is more, courts must ‘tread lightly’ before concluding Congress has abrogated tribal sovereignty in favor of state authority.”) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)).

159. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980).

160. *Castro-Huerta*, 142 S. Ct. at 2512 (Gorsuch, J., dissenting).

161. *Clinton*, *supra* note 95, at 962; *Veneno v. United States*, 146 S. Ct. 52, 53 (2025) (Gorsuch, J., dissenting from denial of certiorari) (“In the Major Crimes Act of 1885, the federal government sought to curtail . . . traditional sovereign tribal powers.”).

162. 109 U.S. 556 (1883). While the case is captioned *Ex parte Crow Dog* in the U.S. Reports, the case appears in the Supreme Court Reporter as *Ex parte Kan-gi-Shun-ca*, using the Siouxan name of the petitioner. See 3 S. Ct. 396 (1883). This Comment refers to the case by the Siouxan name of the petitioner in recognition of his Sioux heritage.

163. *Id.* at 557, 572.

164. *Id.* at 557.

Sioux law,” which “quickly redressed the killing and restored tribal harmony.”<sup>165</sup> Unsatisfied with the Tribe’s chosen punishment, however, the federal government *also* charged Kan-gi-Shun-ca with murder—the first assertion of federal jurisdiction over an intratribal crime.<sup>166</sup> He was tried and convicted in the District Court for the Territory of Dakota and sentenced to hang to death.<sup>167</sup>

On writ of habeas corpus, the U.S. Supreme Court overturned the conviction.<sup>168</sup> While acknowledging the power of Congress to confer jurisdiction on federal courts for intratribal crimes, the Court was unwilling to extend the “restraints of an external and unknown code” into Indian Country without the “clear expression of the intention of [C]ongress,” which it had “not been able to find.”<sup>169</sup> A strong affirmation of tribal sovereignty, *Ex parte Kan-gi-Shun-ca* assured “tribal control over tribal criminal matters between Indians.”<sup>170</sup>

But just two years later, Congress corrected course. The Major Crimes Act extended federal jurisdiction over seven “major crimes,” including murder, committed by Indians in Indian Country<sup>171</sup>—the exact factual scenario in *Ex parte Kan-gi-Shun-ca*.<sup>172</sup> The racist undertones of the Act are unmistakable. “[T]he law of the [T]ribe,” said Rep. Byron Cutcheon, the Act’s sponsor in Congress, “is just no law at all.”<sup>173</sup> The Major Crimes Act was “proper legislation” that would extend federal jurisdiction into Indian Country, thereby “civiliz[ing]” the Tribes “a great deal sooner.”<sup>174</sup> In supplanting tribal control over intratribal offenses in Indian Country, the Major Crimes Act was a “monumental encroachment” into a subject long considered the “exclusive” province of the Tribes.<sup>175</sup>

But the Major Crimes Act left undefined and unclear the meaning of “Indian.”<sup>176</sup> And the Indian canons of construction dictate that this “ambiguous

165. Sidney L. Harring, *Crow Dog’s Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 199, 199 n.17 (1989). Many Tribes, including the Eastern Band, continue to prioritize restoring harmony when meting out punishment, including through the operation of an alternative tribal forum for dispute resolution. See *infra* Part IV.A.

166. 109 U.S. at 557. For a discussion on the motive behind the federal prosecution of Kan-gi-Shun-ca, see Washburn, *supra* note 15, at 801–02.

167. Harring, *supra* note 165, at 192.

168. 109 U.S. at 572.

169. *Id.* at 571–72.

170. See Washburn, *supra* note 15, at 802.

171. *Id.* at 804.

172. See *Keeble v. United States*, 412 U.S. 205, 209–12 (1973).

173. *Id.* at 210–11 (reviewing the Act’s legislative history).

174. *Id.* at 210–12; see Washburn, *supra* note 15, at 804 (postulating that one theory behind the passage of the Major Crimes Act was the assimilation of Indians).

175. Washburn, *supra* note 15, at 783.

176. See *supra* note 56 and accompanying text.

provision[]” is to be “construed liberally in favor of the Indians.”<sup>177</sup> Criminal laws reflect community values and are essential to tribal identity and self-determination.<sup>178</sup> The Major Crimes Act, however, thrust its “own criminal code” on Indian Country<sup>179</sup> and “reflect[ed] the unilateral imposition, by an external authority, of substantive criminal norms on separate and independent communities without their consent and often against their will.”<sup>180</sup> The definition of “Indian” must therefore be construed in a way that preserves a Tribe’s right to exercise jurisdiction, enforce its own criminal laws, and express its community values through its system of punishment. At a minimum, this approach demands deference to the Tribe on questions of Indian status.

### III. THE FOUNDATIONAL ERRORS IN *STATE V. NOBLES*

George Nobles made two main arguments in front of the Supreme Court of North Carolina. Principally, he argued that his status as a First Descendant of the Eastern Band of Cherokee Indians categorically satisfied *Rogers*.<sup>181</sup> Where *Rogers* requires that an individual has “some Indian blood” and is “recognized as an Indian” by a Tribe,<sup>182</sup> Nobles—as a First Descendant—met both. In the alternative, Nobles argued that his own individual ties with the Eastern Band were sufficient to satisfy *Rogers*.<sup>183</sup>

In rejecting Nobles’s principal argument, the Supreme Court of North Carolina made two main errors. First, the majority confused the precedential value of tribal court decisions and legislative determinations with their significance to the *Rogers* inquiry. In focusing on whether tribal pronouncements are legally “binding” on state courts, *Nobles* misunderstood their importance as expressions of tribal sovereignty to which the State must be deferential. Second, the majority betrayed both the letter and the spirit of *Rogers* in holding that a First Descendant who is recognized as Indian by his Tribe is, somehow, not “recognized as an Indian by a [T]ribe” under *Rogers*.

177. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767–68 (1985); see *supra* notes 158–65 and accompanying text.

178. See Washburn, *supra* note 15, at 834–36 (discussing the connection between criminal law, community norms, and community self-determination in the context of [T]ribes).

179. *Veneno v. United States*, 146 S. Ct. 52, 53 (2025) (Gorsuch, J., dissenting from denial of certiorari).

180. Washburn, *supra* note 15, at 782–83, 834; see *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (“By subjecting Indians to federal trials for crimes committed on tribal lands [through the Major Crimes Act], Congress may have breached its promises to [T]ribes . . . that they would be free to govern themselves.”).

181. Defendant-Appellant’s New Brief at 19–28, *State v. Nobles*, 373 N.C. 471, 838 S.E.2d 373 (2020) (No. 34PA14-2).

182. *Nobles*, 373 N.C. at 476, 838 S.E.2d at 377 (quoting *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009)).

183. Defendant-Appellant’s New Brief, *supra* note 181, at 28–33. This Comment only engages with Nobles’s categorical argument.

Grounded in the Indian law principles set forth in Part II, Part III discusses each error in turn.

A. *Confusing Precedent with Significance: Deference to Tribal Law Under Rogers*

With respect to First Descendants, the Eastern Band was clear: First Descendants were categorically recognized as “Indian” by the Tribe.<sup>184</sup> All three branches of tribal government agreed. Following *Lambert*,<sup>185</sup> the Cherokee Court repeatedly affirmed the Indian status of First Descendants through subsequent decisions,<sup>186</sup> and both Tribal Council and the Principal Chief ratified *Lambert* through modifications to the Cherokee Rules of Criminal Procedure.<sup>187</sup>

Yet, with regard to *Lambert* and its progeny, the *Nobles* majority remained “unpersuaded” that it should be “bound” by Cherokee Court decisions.<sup>188</sup> Tribal court decisions have no “binding effect” on North Carolina courts, the majority reasoned, and prior exercises of tribal court jurisdiction over a class of individuals should not be dispositive over whether a state court can also exercise jurisdiction over the same individuals.<sup>189</sup>

184. See *Nobles*, 373 N.C. at 495, 838 S.E.2d at 388 (2020) (Earls, J., dissenting) (“In *Lambert*, the tribal court plainly ruled that [F]irst [D]escendants are Indians.”). As a threshold matter, the majority disagreed that *Lambert* established a categorical rule. Because *Lambert* discussed the particular defendant’s ties to the Eastern Band, the majority thought that *Lambert* established a rule that the Indian status of First Descendants would be adjudicated the Indian status of First Descendants on a case-by-case basis. *Id.* at 480, 838 S.E.2d at 379 (majority opinion). It is difficult to understand how the majority reached this conclusion. For one, as Justice Earls highlights in her dissent, all but one of *Lambert*’s findings of fact discuss the ties between the Eastern Band and First Descendants generally. *Id.* at 493–95, 838 S.E.2d at 387 (Earls, J., dissenting). Second, subsequent Cherokee Court decisions issued more than a decade before *Nobles* clarify any lingering ambiguity as to the reach of *Lambert*—decisions which the dissent cites and the majority ignores. See *id.* at 495, 838 S.E.2d at 389. But, even if *Lambert* did not establish a categorical rule for First Descendants, Tribal Council certainly did when it modified the Cherokee Rules of Criminal Procedure. See *id.* (“[I]f a defendant is a First Descendant, ‘the inquiry ends there and the Court has jurisdiction over the defendant.’”). Because the majority later assumes for the sake of argument that *Lambert* set forth a categorical rule, though, this Comment engages with that line of reasoning. See 373 N.C. at 480, 838 S.E.2d at 380 (majority opinion).

185. Eastern Band of Cherokee Indians v. Lambert, No. CR 03-1313, 2003 WL 25902446, at \*2 (E. Cherokee Ct. May 29, 2003).

186. See *In re Welch*, No. SC 03-13, 2003 WL 25902440, at \*4 (E. Cherokee Ct. Oct. 31, 2003) (“[T]his Court has held [in *Lambert*] that first lineal descendants [First Descendants] . . . [are] subject to the criminal jurisdiction of this Court.”); Eastern Band of Cherokee Indians v. Prater, No. CR 03-1616, 2004 WL 5807679, at \*1 (E. Cherokee Ct. 2004) (describing *Lambert* as having held “that First Lineal Descendants are Indians for the purposes of the exercise of this Court’s jurisdiction”).

187. Defendant-Appellant’s New Brief, *supra* note 181, at 12 (“[Cherokee Rule of Criminal Procedure] Rule 6 was passed by the [T]ribal [C]ouncil and ratified by the EBCI [Eastern Band of Cherokee Indians] Principal Chief.”).

188. *Nobles*, 373 N.C. at 479–80, 838 S.E.2d at 379–80.

189. *Id.* at 480, 838 S.E.2d at 380. In its analysis, the majority made no mention of the fact that tribal statutory law also considered First Descendants to be Indian—but it is not hard to figure that it would have been similarly unpersuaded by such a any pronouncement from Tribal Council. See *id.* at 496, 838 S.E.2d at 389 (Earls, J., dissenting).

But, by focusing on the precedential value of *Lambert*, the majority missed the point. Obviously *Lambert* has no “binding effect” on North Carolina courts—as the majority correctly pointed out, Cherokee Court decisions are not even binding on the Tribe’s own Supreme Court.<sup>190</sup> Instead, the point is that Tribes—not state courts—have the sovereign right to determine the contours of tribal affiliation, including whether a certain class of individuals has a “sufficient non-racial link” with the Tribe required by *Rogers* for Indian status.<sup>191</sup> And the decisions of the Cherokee Court opinions and statements of Tribal Council and the Principal Chief on the Indian status of First Descendants were examples of the Eastern Band exercising that right.

But what *is* “binding” on state courts, however, is the Indian canon of construction, which demands that federal statutes like the Major Crimes Act be interpreted in favor of “tribal sovereignty” and “against state power.”<sup>192</sup> This liberal presumption is consistently applied by state courts when interpreting federal law<sup>193</sup>—and, on at least two occasions, the canon was explicitly applied by North Carolina appellate courts when construing two other federal statutes regulating Indian affairs.<sup>194</sup> The statutory canon should apply to state court interpretations of the Major Crimes Act by state courts: “Indian” must be construed “generously” in a way that permits Tribes to more robustly exercise jurisdiction pursuant to their sovereign right to prescribe and enforce their criminal laws.<sup>195</sup> In short, the Indian canons of construction require deference to tribal determinations of Indian status.

Instead, the *Nobles* majority construed “Indian” in a way that explicitly contravened tribal common and statutory law and undercut the Eastern Band’s

190. See *id.* at 480, 838 S.E.2d at 380 (majority opinion). Regardless of whether Eastern Band judicial orders are strictly “binding,” North Carolina extends full faith and credit to all judgments, decrees, and orders signed by a judicial officer of the Eastern Band. N.C. GEN. STAT. § 1E-1.

191. See *United States v. Cruz*, 554 F.3d 840, 849 (9th Cir. 2009); *supra* Section II.1.

192. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2512 (2022) (Gorsuch, J., dissenting); see *supra* Section II.C.

193. See, e.g., *State v. Major*, 725 P.2d 115, 121 (Idaho 1986) (“When addressing the question of state jurisdiction in Indian [C]ountry, we are guided by the canon of construction that federal and state ‘statutes passed for the benefit of Indians are to be construed in the Indians’ favor.”); *In re Dependency of Z.J.G. & M.E.J.G.*, 471 P.3d 853, 859 (Wash. 2020) (en banc) (applying the canon of construction when interpreting the Indian Child Welfare Act); *People v. V.K.L.*, 512 P.3d 132, 139 (Colo. 2002) (same); *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 491, 687 S.E.2d 690, 697 (2009) (Indian Gaming Regulatory Act); *State v. Romero*, 142 P.3d 887, 890 (N.M. 2006) (Pueblo Lands Act and the definition of “Indian Country” in 18 U.S.C. § 1151).

194. *McCracken & Amick*, 201 N.C. App. at 491–92, 687 S.E.2d at 697 (Indian Gaming Regulatory Act); *In re E.G.M.*, 230 N.C. App. 196, 207, 750 S.E.2d 857, 864 (2013) (Indian Child Welfare Act). *McCracken* was authored by Judge Robert C. Hunter, who later became an Associate Justice of the Cherokee Supreme Court in 2015. See *Three Judges Sworn-in at Cherokee Tribal Court*, CHEROKEE ONE FEATHER (Apr. 23, 2015), <https://theonefeather.com/library/uploads/2021/07/April-23-15.pdf> [<https://perma.cc/9ZNV-QLHC>].

195. See *supra* note 193 and accompanying text.

right of self-government.<sup>196</sup> Where a Tribe is silent on the Indian status of an individual, state courts can certainly play a more scrutinizing role in adjudicating Indian status. But where a Tribe has spoken clearly and categorically on the question of Indian status, like the Eastern Band had with First Descendants like Nobles, that determination by the Tribe must carry “significant weight.”<sup>197</sup> Because that determination is the Tribe’s to make.

B. *Betraying the Letter and Spirit of Rogers: Tribal Recognition of Indian Status as Conclusive*

In its second error, the *Nobles* majority thought that Nobles’s status as a First Descendant did not “conclusively demonstrate[]” as a matter of law that he satisfied the second prong of *Rogers* (recognition as Indian by a Tribe)—despite the fact, of course, that the Eastern Band did recognize First Descendants as Indian exactly as required by *Rogers*.<sup>198</sup> Instead, the majority was “concern[ed]” that taking the Eastern Band at its word would “reduce the *Rogers* test into a purely blood-based inquiry.”<sup>199</sup> Since First Descendant eligibility, considers Cherokee lineal descentance, the court thought that taking First Descendant status as conclusive proof of Indian status would “conflat[e] the two prongs of the *Rogers* test into one.”<sup>200</sup> In other words, tribal recognition as Indian can only be conclusive under the second prong of *Rogers* when that recognition is wholly divorced from any racial criteria.

This analysis is misconceived. For one, this argument misconstrues tribal membership and affiliation as a racial distinction rather than as a political classification.<sup>201</sup> Even if it incorporates lineal descentancy as an eligibility metric, tribal affiliation describes a political relationship with a Tribe as an “independent political community.”<sup>202</sup> Accepting a determination by the Eastern Band that a Native individual (prong one of *Rogers*) is “Indian” by virtue of the Tribe’s determination of Indian status (prong two) does not “conflat[e]” the two prongs of *Rogers* into one—it merely satisfies the plain text

196. Neither the majority nor dissent made any mention of the canon of construction.

197. See *Nobles*, 373 N.C. at 495, 838 S.E.2d at 389 (Earls, J., dissenting); *infra* Section IV.B (proposing a cabined role for state and federal courts when analyzing Indian status).

198. *Nobles*, 373 N.C. at 471, 478–79, 838 S.E.2d at 374, 377–78 (majority opinion).

199. *Id.* at 478, 838 S.E.2d at 378.

200. *Id.* at 478–79, 838 S.E.2d at 378–79.

201. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (“A [T]ribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an *independent political community*.”) (emphasis added).

202. See *id.*; *supra* note 13 and accompanying text.

of *Rogers*. And indeed, courts often analyze tribal membership and affiliation in exactly that way.<sup>203</sup>

For another, this argument extends *Rogers* well beyond its facts, especially in light of the Major Crimes Act. *Rogers* involved a white man named William Rogers who killed Jacob Nicholson, another white man, in the Cherokee territory west of Arkansas.<sup>204</sup> Rogers's story is peculiar and is somewhat lost to history. He had initially come to "Cherokee country" in 1836 as an army volunteer to help forcibly remove the Cherokees from their eastern homelands.<sup>205</sup> But soon after his arrival, he was discharged from the army for reasons unknown—and not five months later, he married a Cherokee woman and moved with her to the newly established Cherokee lands west of the Mississippi River.<sup>206</sup> Nicholson was Rogers's brother-in-law who had also moved to Indian Country and married a Cherokee woman.<sup>207</sup>

After killing Nicholson, Rogers evaded capture for seven months by hiding out along the border between the Cherokee territory and Arkansas.<sup>208</sup> Eventually, he was found and arrested by a tribal sheriff.<sup>209</sup> But, because the Tribe did not have its own jail at the time, the sheriff brought him to a U.S. military base just outside tribal borders.<sup>210</sup> Once in their custody, federal authorities decided to transport Rogers to Little Rock to face federal prosecution.<sup>211</sup>

Rogers challenged federal jurisdiction.<sup>212</sup> The case took place decades before the passage of the Major Crimes Act, when federal jurisdiction in Indian Country did not extend to situations where both the victim and the defendant were Indian.<sup>213</sup> Rogers argued that he and Nicholson, though white, had been

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203. See, e.g., *United States v. Prentiss*, 273 F.3d 1277, 1283 n.4 (10th Cir. 2001) (explaining that tribal laws can be sufficient to prove Indian status where it is established that (a) that tribal law provided that some degree of Indian blood was a requirement for tribal membership and (b) the defendant was a tribal member). This argument from *Nobles* is the equivalent of saying that U.S. recognition of an individual's foreign citizenship is "blood-based" if that country determines its citizenship partly through racial descendency. In recognizing that foreign citizenship, the United States is respecting the *political* determination of that sovereign, not making a racial determination on its own.

204. *United States v. Rogers*, 45 U.S. (4 How.) 567, 567 (1846).

205. Bethany R. Berger, "Power Over this Unfortunate Race": *Race, Politics, and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 1982 (2004).

206. See *id.* at 1982–83. Professor Berger speculates that this sudden about-face was likely not a story of "true romance." *Id.* Instead, she argues, Rogers likely "signed up with the army to be all that he could be, and then, after clashing with military discipline, decided that what he really wanted to be was a western settler with an Indian bride." *Id.* at 1983.

207. *Id.*

208. *Id.* at 1984. The circumstances surrounding the killing are not known. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 1989.

212. *Id.* at 1965.

213. *Id.*

“adopted” by the Tribe and had “become . . . Cherokee Indian[s]”: they permanently moved to Indian country, married Cherokee women, gained Cherokee citizenship, and “exercised all the rights and privileges of a Cherokee Indian.”<sup>214</sup> Thus, the murder was an intratribal crime that could not be prosecuted in a federal tribunal.<sup>215</sup>

In a highly racialized opinion written by Chief Justice Roger Taney—eleven years before he penned *Dred Scott v. Sandford*<sup>216</sup>—the U.S. Supreme Court disagreed.<sup>217</sup> It was not enough that Rogers was adopted by the Tribe; he was, and forever would be, “still a white man, of the white race.”<sup>218</sup> And a “white man who at a mature age is adopted in an Indian [T]ribe does not thereby become an Indian.”<sup>219</sup> Instead, for an individual to be “Indian” for purposes of federal criminal jurisdiction, the Court held that they must *also* belong to the “[Indian] race generally”—to the “family of Indians” that Congress had intended to be governed by “Indian usages and customs.”<sup>220</sup> Or else, Chief Justice Taney feared, mischievous white men everywhere might “at pleasure settle among them” and seek adoption in order to evade federal prosecution and “throw off all responsibility to the laws of the United States . . . as if they were Indian born.”<sup>221</sup>

In this way, *Rogers* incorporated a racial component to Indian status as something of a jurisdictional backstop. A formal relationship with a Tribe is sufficient for an individual to be Indian for jurisdictional purposes—so long as that person is also of Native ancestry. And the situation *Rogers* contemplated with this backstop is rather limited, and one that Chief Justice Taney probably thought applied to Rogers himself: white rabblers who abscond to Indian Country to evade federal prosecutors.<sup>222</sup>

214. *United States v. Rogers*, 45 U.S. (4 How.) 567, 571 (1846). Any Cherokee perspective on Rogers’s affiliation with the Tribe is absent from the opinion. However, part of his story is not necessarily out of the ordinary: there is historical precedent that a “significant number” of white men married Cherokee women in the decades before *Rogers* and that the Tribe did “naturaliz[e] racial outsiders as members of the [T]ribe.” Berger, *supra* note 205, at 2020–21. Indeed, one of the earliest written laws of the Cherokee Nation concerned the political rights of intermarried citizens. *Id.* at 2021.

215. *See Ex parte Kan-gi-Shun-ca*, 109 U.S. 556, 571–72 (1883); *supra* notes 168–70 and accompanying text.

216. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

217. *Rogers*, 45 U.S. (4 How.) at 573–74.

218. *See id.* at 572–73.

219. *Id.* at 572.

220. *Id.* at 573.

221. *See id.* This argument makes a mockery out of tribal self-governance and assumes that “adoption” into a Tribe is something white men can simply choose to do “at pleasure” without Tribal assent.

222. *See United States v. Zepeda*, 792 F.3d 1103, 1118 (9th Cir. 2015) (en banc) (Kozinski, J., concurring) (“*Rogers* stands for the limited proposition that ‘a white man who at mature age is adopted in an Indian [T]ribe does not thereby become an Indian’ when the adoption occurs for the purpose of evading prosecution.” (quoting *Rogers*, 45 U.S. (4 How.) at 572), *cert. denied*, 136 S. Ct. 1712 (2016)).

This situation is a far cry from that of First Descendants. Nobles's own story illustrates the point. Although his father was white, his mother was an enrolled member of the Eastern Band.<sup>223</sup> For much of his childhood, Nobles lived on or near the Qualla Boundary, and he attended Cherokee Indian schools for a number of years.<sup>224</sup> As a child, he received five instances of free healthcare at the Cherokee Indian Hospital, and on one occasion the Tribe even paid for his medical expenses not covered by insurance for treatment he received off of the Qualla Boundary.<sup>225</sup> After he served time in Florida for an off-Boundary crime, he returned to western North Carolina, living at various addresses on or near the Boundary and working at a fast food restaurant on the Boundary.<sup>226</sup> Neither Nobles individually nor First Descendants generally are white men who sought to "procur[e] an adoption" into the Eastern Band to "throw off all responsibility to the laws of the United States."<sup>227</sup> First Descendants are individuals of Cherokee ancestry who are part of the tradition and story of the Eastern Band and are "treated by the Tribe as such"—exactly the group that should easily meet the second prong of *Rogers*.<sup>228</sup>

Besides, the passage of the Major Crimes Act mutes the exact scenario of which *Rogers* was fearful. Even if they wanted to, neither First Descendants nor enrolled members nor even individuals like Rogers who marry into a Tribe can "claim" Indian status to "throw off all responsibility to the laws of the United States" when they commit a major crime. Gone are the days of *Ex parte Kan-gi-Shun-ca*, when Tribes possessed exclusive jurisdiction over certain major crimes committed in Indian Country.<sup>229</sup> Now, depending on the Indian status of the victim, a major crime defendant will *always* be subject to either federal or state prosecution (or both). Indian status is no longer the jurisdictional shield that Chief Justice Taney once feared it could be.<sup>230</sup>

As such, and especially in prosecutions for major crimes, the test that emerged from *Rogers* should be taken literally. Because First Descendants have "some Indian blood" and were "recognized as Indian" by the Eastern Band, the inquiry should have ended there. Treating the Tribe's determination of the Indian status of First Descendants as conclusive would not, as the Supreme

223. *State v. Nobles*, 373 N.C. 471, 474, 838 S.E.2d 373, 376 (2020).

224. *Id.* at 474–75, 838 S.E.2d at 376.

225. *Id.* at 475, 838 S.E.2d at 376. Off-Boundary refers to lands off the Qualla Boundary, the tribal trust lands of the Eastern Band of Indian. *See supra* Part I.

226. *Nobles*, 373 N.C. at 474, 838 S.E.2d at 376.

227. *See United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846).

228. *See Eastern Band of Cherokee Indians v. Lambert*, No. CR 03-1313, 2003 WL 25902446, at \*3 (E. Cherokee Ct. May 29, 2003).

229. *See Ex parte Kan-gi-Shun-ca*, 109 U.S. 556, 571–72 (1883); *supra* notes 168–70 and accompanying text.

230. Underlying *Rogers* is the same presumption that underlies *United States v. Kagama* and *Oliphant v. Suquamish Indian Tribe*: that tribal law is insufficient to administer justice. This presumption was as wrong in 1846 as it is today.

Court of North Carolina feared, “reduce the *Rogers* test into a purely blood-based inquiry.”<sup>231</sup> First Descendants are not Indian because they are the children of enrolled members. They are Indian because the Eastern Band made a political determination to formally associate with a class of individuals culturally connected with the Tribe. And the method by which the Tribe determines which individuals belong to that class is not for state or federal courts to scrutinize as part of the *Rogers* inquiry.<sup>232</sup>

#### IV. THE CASE FOR DEFERENCE

“At first glance,” the Ninth Circuit noted in a case on Indian status, “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.’”<sup>233</sup> And there is something especially “odd” when the adjudicating court is a nontribal tribunal.<sup>234</sup> But the long and sorry history of limiting tribal court criminal jurisdiction largely on the basis of Indian status has thrust federal and state judiciaries into this position.

Building on the principles of federal Indian law laid out in Part II, Part IV argues that deference to Tribes on questions of Indian status is essential for a more robust conception of tribal sovereignty, one with greater tribal control over two related aspects of self-government: (1) the tribal criminal justice systems and (2) tribal membership. Consistent with this understanding, Part IV proposes confining *Rogers* to only those situations in which no Tribe has previously adjudicated the Indian status of the particular individual in question.

##### A. Tribal Criminal Justice Systems

Tribal courts are expressions of tribal sovereignty.<sup>235</sup> In the criminal context, the Tribe, through its elected representatives, passes laws that reflect the “moral foundations of the community.”<sup>236</sup> These laws reflect what the Tribe values and what it condemns.<sup>237</sup> And violation of those laws offends the sovereignty of the Tribe.<sup>238</sup> When those laws are broken, tribal courts constitute

231. *Nobles*, 373 N.C. at 478, 838 S.E.2d at 378.

232. See *supra* Section II.A; see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52, 63–66 (1978) (denying federal jurisdiction over a tribal membership dispute).

233. *United States v. Cruz*, 554 F.3d 840, 842 (9th Cir. 2009).

234. See Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 539 (2020) [hereinafter Fletcher, *Politics, Indian Law, and the Constitution*] (calling it “absurd” to leave the determinations of Indian status to Article III courts).

235. Lauren van Schlifgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CALIF. L. REV. 103, 105 (2024).

236. Washburn, *supra* note 15, at 834.

237. *Id.*

238. See *United States v. Lara*, 541 U.S. 193, 197 (2004).

forums to repair the harm done to the Tribe.<sup>239</sup> They are mechanisms through which the Tribe can “protect the safety, health, economic development, liberty and the general welfare” of the both the Tribe and those who live on, work on, and visit tribal lands.<sup>240</sup>

In this capacity, tribal courts interpret and apply tribal constitutional, statutory, and common law to disputes at hand.<sup>241</sup> And, unlike state and federal courts, tribal courts often have “specific charges to apply tribal customary or traditional law.”<sup>242</sup> Many tribal constitutions, tribal court codes and ordinances, and tribal court rules mandate application of tribal customs and traditions in judicial decision making.<sup>243</sup> The result is that tribal courts breathe continued life into “ancient customs and traditions” of the Tribe<sup>244</sup> that trace back to its “primeval sovereignty.”<sup>245</sup>

Tribal courts also serve important roles in their communities.<sup>246</sup> In addition to the regular adjudicatory functions of any court, tribal courts often have to navigate “centuries of Native historical trauma” in Indian Country.<sup>247</sup>

239. See van Schlifgaarde, *supra* note 235, at 105.

240. See *Eastern Band of Cherokee Indians v. Torres*, Nos. CR 03-1443, CR 03-1529, CR 03-1530, CR 03-1531, CR 03-1819, 2005 WL 6437828, at \*6 (E. Cherokee Sup. Ct. Apr. 12, 2005).

241. See van Schlifgaarde, *supra* note 235, at 105.

242. Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 62 (2007) [hereinafter Fletcher, *Rethinking Customary Law*].

243. *Id.* at 65–66. For example, the Cherokee Code instructs Eastern Band courts to first “analyze and apply pertinent EBCI [Eastern Band of Cherokee Indians] laws, customs, traditions, and precedents as controlling law.” *Campos v. Eastern Band of Cherokee Indians*, 18 Am. Tribal L. 137, 158 (E. Cherokee Sup. Ct. 2024). If none is on point for the case at hand, the judicial branch is to look “next to Federal law, then to North Carolina law, and finally to the law of other jurisdictions for guidance.” *Id.* (quoting Cherokee Code § 7-2(d)). When deciding whether a party has presented a “colorable claim under Cherokee custom and tradition,” the Cherokee Court may:

Hear[] testimony regarding pertinent custom and tradition from witnesses learned in EBCI culture and tradition who are recognized in the EBCI community as Cherokee knowledge keepers, and mak[e] determinations on the record as to whether specific customs or traditions put forth to the trial court should establish a Cherokee common law claim or defense as alleged, or whether the court should establish an alleged legal standard informed by a purported Cherokee custom and tradition to be recognized in this jurisdiction as an established duty to be utilized in deciding issues brought before the court.

*Id.* at 159. For example, in *In re Saunooke*, 15 Am. Tribal L. 176, 183 (E. Cherokee Sup. Ct. 2018), the Cherokee Supreme Court considered sworn affidavits from tribal leaders serving on Tribal Council and the Eastern Band Board of Elections to “provide[] a factual, evidentiary basis of a [t]ribal custom and tradition” with respect to allowing out-of-jurisdiction attorneys to engage in the practice of law before certain quasi-judicial tribunals. *Campos*, 15 Am. Tribal L. at 160 (discussing *In re Saunooke*, 15 Am. Tribal L. at 183).

244. Fletcher, *Rethinking Customary Law*, *supra* note 242, at 2.

245. See *United States v. Wheeler*, 435 U.S. 313, 328 (1978).

246. van Schlifgaarde, *supra* note 235, at 131.

247. *Id.* at 132. Historical trauma—the “cumulative emotional and psychological wounding across generations”—can manifest in both individual and communal suffering, and in the context of Indian

Tribal communities suffer from high rates of alcohol and substance abuse, mental health disorders, suicide, sexual and child abuse, and domestic violence.<sup>248</sup> Yet, both jurisdictional and sentencing limitations have hamstrung the ability of tribal courts to redress these recurring harms in tribal communities.<sup>249</sup>

As a result, tribal courts have pursued “innovative tweaks” to their criminal justice systems<sup>250</sup> that seek to address the “cycles of harm that Native communities face.”<sup>251</sup> Some Tribes, for example, have promoted systems of restorative justice as a supplement to the more familiar adversarial model.<sup>252</sup> Restorative justice approaches are often community-based and rooted in tribal custom and tradition<sup>253</sup>; they tend to “focus on the needs of the defendant and their relation to the community,”<sup>254</sup> viewing the defendant not just as an “isolated wrongdoer” but as a “community member.”<sup>255</sup> Restorative justice models can offer meaningful opportunities to “respond to the historical trauma needs of their community members”<sup>256</sup> through methods that are both reflective of certain tribal traditions and catered to the needs of that particular tribal community.<sup>257</sup>

As part of this approach, over ninety Tribes and Alaska Native entities,<sup>258</sup> including the Eastern Band,<sup>259</sup> have established specialized “alternative justice courts.”<sup>260</sup> One example is a wellness court. Wellness courts—sometimes called the “tribal version[] of drug courts”<sup>261</sup>—focus on “rehabilitation as an alternative

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Country is connected to “communal historical harms of conquest, disease, and federal Indian policies.” These traumas have produced “adverse impacts . . . connected to depression, anxiety, suicidality, and substance abuse.” *Id.* at 132–33.

248. *Id.* at 131–33.

249. *Id.* at 132, 132 n.187 (describing “extensive barriers to criminal accountability in Indian country due to the jurisdictional maze, which includes high declination, or failure to prosecute rates, by federal and state prosecutors for crimes in Indian country”).

250. *Id.* at 135.

251. *See id.* at 133.

252. *Id.* at 136.

253. Michelle Chen, *Restorative Justice in Indian Country*, DISSENT MAG. (Apr. 16, 2021), [https://www.dissentmagazine.org/online\\_articles/restorative-justice-in-indian-country/](https://www.dissentmagazine.org/online_articles/restorative-justice-in-indian-country/) [<https://perma.cc/E9W5-BNCA>].

254. van Schlifgaarde, *supra* note 235, at 138.

255. *Id.* at 136.

256. *Id.* at 138.

257. Samuel E. Ennis & Caroline P. Mayhew, 38 AM. INDIAN L. REV. 421, 455 (2014).

258. Chen, *supra* note 253.

259. *See* Cherokee Code § 7C (2018), [https://library.municode.com/tribes\\_and\\_tribal\\_nations/eastern\\_band\\_of\\_cherokee\\_indians/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH7CT--T-SCHWECO](https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/codes/code_of_ordinances?nodeId=PTIICOOR_CH7CT--T-SCHWECO) [<https://perma.cc/J6RR-8F2K>].

260. van Schlifgaarde, *supra* note 235, at 137 n.215 (describing different tribal alternative justice systems).

261. Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence+*, 2013 MICH. STATE L. REV. 403, 409 (2013).

to incarceration” through a “culturally driven treatment framework.”<sup>262</sup> While the exact model differs from Tribe to Tribe, wellness courts emphasize rebuilding support and trust over punishment and connect individuals with tribal resources and support programs to aid community reintegration.<sup>263</sup> In this way, wellness courts can offer a “potent salve” tailored to the needs of each tribal community.<sup>264</sup>

The Eastern Band, for example, set up the Cherokee *Tsu-Na-Da-Ne-Tsi-Yv-Sdi-Yi* Court, a wellness court that borrows its name from the Cherokee phrase for “where they have a change of heart.”<sup>265</sup> The Cherokee *Tsu-Na-Da-Ne-Tsi-Yv-Sdi-Yi* Court functions as a “comprehensive court program that blends treatment and sanction alternatives to effectively address offender behavior, rehabilitation, and the safety of the community.”<sup>266</sup> Individuals can be referred to *Tsu-Na-Da-Ne-Tsi-Yv-Sdi-Yi* Court from the Cherokee Court if they plead guilty to or have been convicted of at least one crime that is directly or indirectly related to substance use or addition.<sup>267</sup>

Criminal justice in Indian Country depends on giving tribal communities “meaningful access and control of the instruments of criminal justice,” including the ability to redress harms through their own courts, own laws, own customs and traditions, and own preferred systems and methods of justice.<sup>268</sup> Regardless of the Indian status of the defendant, the commission of a crime on tribal land remains “an offense against the sovereignty of the government.”<sup>269</sup> Yet, tribal courts remain stymied by arcane and dated jurisdictional rules that largely hinge on Indian status. As a result, Tribes are often forced to place their trust in state and federal courts with a blotchy history of protecting tribal interests.<sup>270</sup> Deference to Tribes on questions of Indian status would allow Tribes to exercise greater control over the manner in which to repair damage to their communities.

#### B. *Tribal Membership and Affiliation*

The ability of a Tribe to define the contours of tribal membership and affiliation is a core attribute of tribal sovereignty.<sup>271</sup> Perhaps out of respect for this tribal prerogative or because Tribes have “historically know[n] who is and

262. Chen, *supra* note 253.

263. *Id.*

264. van Schlifgaarde, *supra* note 235, at 138.

265. Cherokee Code § 7C-2 (2018).

266. *Id.* § 7C-1 (2018).

267. *Id.* § 7C-3 (2018).

268. See Washburn, *supra* note 15, at 854.

269. United States v. Lara, 541 U.S. 193, 197 (2004) (internal quotations omitted).

270. See ECHO-HAWK, *supra* note 33, at 6.

271. See *supra* Section II.C.

who is not Indian under tribal customary and common law,”<sup>272</sup> many state and federal courts wisely treat tribal membership as sufficient (though not necessary) to meet the tribal recognition prong of *Rogers*.<sup>273</sup>

Under *Rogers*, though, tribal recognition as Indian is not enough for Indian status as a whole. Instead, the test *also* demands blood quantum—a requirement that has been subject to sharp criticism.<sup>274</sup> Often, this first prong imposes no additional hurdle on Indian status: most Tribes themselves demand a minimum blood quantum for tribal membership or affiliation, so any enrolled tribal member likely has at least some “Indian blood.”<sup>275</sup>

But when a Tribe lacks a blood requirement for membership or affiliation, reliance on the *Rogers* test undermines the Tribe’s sovereign right to decide for itself who it considers part of the Tribe. At bottom, Indian status is a “political classification” that describes the relationship of an individual with a tribal entity.<sup>276</sup> Yet, because of the first prong of *Rogers*, an individual can have that relationship—they can be a tribal member, live and work on tribal lands, and even hold tribal office—and still elude tribal court jurisdiction because they lack “Indian blood.”<sup>277</sup> This result harms both Tribes and tribal members.

272. *Jackson v. Fort Peck Tribes*, 18 Am. Tribal L. 87, 91 (Fort Peck Ct. App. 2024).

273. *See, e.g.*, *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009) (explaining that no factor under the second *Rogers* prong is dispositive “unless the defendant is an enrolled tribal member.”); *United States v. Nowlin*, 555 F.App’x 820, 823 (10th Cir. 2014) (same); *United States v. Prentiss*, 273 F.3d 1277, 1283 n.4 (10th Cir. 2001). Lack of tribal enrollment, though, is not dispositive of Indian status. *See, e.g.*, *Stymiest*, 582 F.3d at 764 (calling enrollment “not essential and its absence . . . not determinative”); *United States v. Antelope*, 430 U.S. 641, 647 n.7 (1977) (citing *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938)); Alexander Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV’T L. REV. 49, 49–50 (2017) (“[F]ederal courts have not restricted the term ‘Indian’ to enrolled members of Indian [T]ribes but have also included persons of Indian ancestry with substantial ties to Indian communities.”).

274. *See, e.g.*, *United States v. Zepeda*, 792 F.3d 1103, 1118 (9th Cir. 2015) (en banc) (Kozinski, J., concurring) (attacking the “dubious racial undertones” of *Rogers*), *cert. denied*, 136 S. Ct. 1712 (2016); *id.* at 1119–20 (Ikuta, J. concurring) (describing the “sorry history” of the use of blood quantum tests); *In re Effect of Cherokee Nation v. Nash*, 16 Am. Tribal Law 268, 275–76 (Cherokee Nation Sup. Ct. 2021) (“The ‘by blood’ language . . . is illegal, obsolete, and repugnant to the ideal of liberty.”); Ashleigh Lussenden, Note, *Blood Quantum and the Ever-Tightening Chokehold on Tribal Citizenship: The Reproductive Implications of Blood Quantum Requirements*, 111 CALIF. L. REV. 287, 289–92 (2023). *But see* Fletcher, *Politics, Indian Law, and the Constitution*, *supra* note 234, at 544 (noting that the blood quantum requirement “serves a crucial gap-filling function for those Indian people who are not tribal members because of tribal membership’s shortcomings as a catch-all for Indian status”). *See generally* *Blood Quantum and Sovereignty: A Guide*, NATIVE GOVERNANCE CTR., <https://nativegov.org/resources/blood-quantum-and-sovereignty-a-guide/> [<https://perma.cc/H2RG-WDZJ>] (summarizing arguments for and against a blood quantum requirement).

275. *See* Lussenden, *supra* note 274, at 289 (“Most Native Nations require a certain blood quantum—often one-quarter—to qualify for citizenship.”); *see, e.g.*, Cherokee Code § 49-2(c)–(d) (2021) (requiring at least 1/16 degree of “Eastern Cherokee Indian blood”).

276. *See supra* note 13 and accompanying text.

277. *See* Order Denying Defendant’s Motion to Dismiss Based on Lack of Jurisdiction at 2, *State v. Hill*, No. CF-2020-00263 (Dist. Ct. Okmulgee Cnty., Okla. Sep. 15, 2021) (denying a motion to

Two recent developments illustrate the point. In 2021, the Cherokee Supreme Court struck down the Tribe's blood-based membership requirement as inconsistent with the Treaty of 1866 between the Cherokee Nation and the United States.<sup>278</sup> In 2025, the Muscogee (Creek) Nation Supreme Court similarly voided its Tribe's blood-based membership requirement based on its own 1866 treaty with the United States.<sup>279</sup> The effect of both decisions was to disengage tribal membership from blood quantum and fully restore tribal citizenship for Cherokee<sup>280</sup> and Creek Freedmen<sup>281</sup>—the descendants of those individuals formerly enslaved by each Tribe.<sup>282</sup>

The history of Cherokee and Creek Freedmen is inextricably intertwined with the history of the Tribes themselves. Along with the three other principal Tribes in the antebellum Southeast, the Cherokee and Muscogee (Creek) were slaveholders who used enslaved labor to work their plantations.<sup>283</sup> When the Tribes were forcibly removed to present-day Oklahoma in the 1830s, these enslaved people supported, suffered, and died alongside Native Cherokee and Creek on the Trail of Tears.<sup>284</sup> Once in Oklahoma, the population of enslaved workers continued to grow; by 1860, enslaved people made up roughly fifteen percent of the Cherokee Nation and ten percent of the Muscogee (Creek) Nation.<sup>285</sup> Both Tribes supported the Confederacy during the Civil War.<sup>286</sup>

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dismiss based on lack of jurisdiction for an enrolled citizen of the Cherokee Nation who lacked a blood quantum); Chris Cameron & Mark Walker, *Two Black Members of Native Tribes Were Arrested. The Law Sees Only One as Indian*, N.Y. TIMES (June 6, 2023), <https://www.nytimes.com/2023/06/03/us/politics/freedmen-mcgrirt-ruling-oklahoma.html> [<https://perma.cc/87RB-687D> (dark archive)] (describing the defendant in *Hill* as “enjoy[ing] every other benefit, every other responsibility, every other right of being a Cherokee citizen” except the ability to be tried in Cherokee Nation courts).

278. *In re Effect of Cherokee Nation v. Nash*, 16 Am. Tribal L. 268, 275–76 (Cherokee Nation Sup. Ct. 2021).

279. *Citizenship Bd. of the Muscogee (Creek) Nation v. Grayson*, No. SC-2023-10, slip op. at 2 (Muscogee (Creek) Nation Sup. Ct. 2025); see Deloria, *supra* note 100 (describing the history of the “by blood” requirement).

280. *In re Effect of Cherokee Nation*, 16 Am. Tribal L. at 270–71 (“[T]he Cherokee Nation, as a whole, lifts itself into the 21st century and sheds the heavy weight of antebellum and the pervasiveness of racism and racial injustice in favor of equality and justice for all.”)

281. *Grayson*, slip op. at 2.

282. Ted Shepherd, *Not “Indian” Enough: Freedmen, Jurisdiction, and Equal Protection*, 2024 PEPP. L. REV. 43, 45 (2024).

283. *Id.* at 50. The other three Tribes include the Choctaw, Chickasaw, and Seminole (collectively known as the “Five Civilized Tribes”). *Id.*; see *Cherokee Nation v. Nash*, 267 F.Supp.3d 86, 95 (D.D.C. 2017) (“[T]he Cherokee Nation was complicit in legitimizing slavery within the Nation and securing the intended durability of the practice, as well as the disenfranchisement of people of African descent . . .”); Deloria, *supra* note 100 (describing the practice of slavery among the Southeastern Tribes).

284. Shepherd, *supra* note 282, at 51 (“Many [tribal members brought them along on the Trail, using them to clear obstructions, hunt for game, act as night watchmen, and serve as cooks and nurses.”).

285. *Id.* at 51–52.

286. *Id.* at 53.

After the war, the United States sought punishing new treaties with the Cherokee Nation and the Muscogee (Creek) Nation, in which each Tribe would abolish slavery and grant full citizenship rights to those formerly enslaved and to their descendants (in addition to each Tribe ceding half of their land).<sup>287</sup> The Muscogee (Creek), for example, promised that any Creek Freedman residing on or returning to Creek lands within a year of ratification “shall have and enjoy all the rights and privileges of [N]ative [Creek] citizens,” and that Creek laws “shall be equally binding upon and give equal protection to all such persons.”<sup>288</sup> The Cherokees similarly agreed that Cherokee Freedmen residing on or returning to Cherokee lands within six months of ratification “shall have the rights of native Cherokees.”<sup>289</sup> Such rights would pass onto their descendants.<sup>290</sup>

Subsequent efforts by the Cherokee Nation and the Muscogee (Creek) Nation to restrict tribal citizenship by blood<sup>291</sup> were struck down as inconsistent with these treaty promises “made so many years ago.”<sup>292</sup> Each Tribe’s supreme court made “unequivocally” clear that Cherokee and Creek Freedmen are full tribal members that continue to “have rights equal to ‘by blood’ or native Cherokees” or Creek.<sup>293</sup> Their “inherent” rights as tribal members are “birthright[s] springing from their ancestors’ oppression and displacement as people of color” and their centuries of connection to the Tribes.<sup>294</sup> As the Cherokee Supreme Court concluded when vitiating the blood requirement, “‘By blood’ is a relic of a painful and ugly, racist past. These two words have no place in the Cherokee Nation, neither in present day, nor in its future.”<sup>295</sup>

The story of Cherokee and Creek Freedmen emphasizes the need to defer to Tribes on the question of Indian status. Cherokee Freedmen, for example, “enjoy[] every other benefit, every other responsibility, every other right of

287. *Id.* at 53–54; Deloria, *supra* note 100.

288. Citizenship Bd. Muscogee (Creek) Nation v. Grayson, No. SC-2023-10, slip op. at 3 (Muscogee (Creek) Nation Sup. Ct. 2025) (quoting the Treaty of 1866 between the Muscogee (Creek) Nation and the United States).

289. Cherokee Nation v. Nash, 267 F.Supp.3d 86, 89–90 (D.D.C. 2017) (quoting the Treaty of 1866 between the Cherokee Nation and the United States).

290. *Id.* at 90 (Cherokee Freedmen); *Grayson*, slip op. at 2 (Creek Freedmen).

291. See generally Shepherd, *supra* note 282, at 54–57 (describing efforts to restrict citizenship after tribal self-government was restored in the Principal Chiefs Act of 1970).

292. *Grayson*, slip op. at 2; see *In re Effect of Cherokee Nation v. Nash*, 16 Am. Tribal L. 268, 270–74 (Cherokee Nation Sup. Ct. 2021).

293. *Id.* at 271 (Cherokee Nation Sup. Ct. 2021); *Grayson*, slip op. at 2.

294. *In re Effect of Cherokee Nation*, 16 Am. Tribal L. at 271; see *Grayson*, slip op. at 18. One Creek Freedman, for example, recounted that her ancestors “grew up on Creek land, sang Creek songs, picked up curse words and joked in the Muscogee language, and felt that they were ‘Creek to the bone.’” Deloria, *supra* note 100. Her story is similar to those of other Freedmen who grew up among the so-called Five Civilized Tribes, including the Cherokee. *Id.*

295. *In re Effect of Cherokee Nation*, 16 Am. Tribal L. at 274; see *Grayson*, slip op. at 21–22 (“[A]ny reference to ‘by blood’ citizenship . . . is unlawful and void *ab initio*.”).

being a Cherokee citizen.”<sup>296</sup> They can even hold elected tribal office.<sup>297</sup> Yet, if a Cherokee citizen of Freedmen descent is charged under the Major Crimes Act for a crime committed on Cherokee lands and lacks “Indian blood,” “his status as a Cherokee Nation citizen will be completely ignored.”<sup>298</sup> Because of *Rogers*, that Cherokee citizen loses the right to be tried by a tribal prosecutor under tribal law as interpreted by tribal courts.<sup>299</sup> And the Cherokee Nation loses its right to redress the harm in the manner its laws prescribe.<sup>300</sup>

*Rogers* can still have a place in Indian status adjudication. Because tribal membership and affiliation requirements can be underinclusive of Indian status,<sup>301</sup> *Rogers*’s dual of blood quantum and “sufficient non-racial link[s]” with a Tribe<sup>302</sup> can “serve[] a crucial gap-filling function.”<sup>303</sup> But, as a “gap-fill[er],” *Rogers* should come at the end of the analysis, not at the beginning.

Instead, the inquiry should start with the simple question: Does a Tribe recognize this individual as Indian? When that answer is yes, the inquiry is over: they are Indian. Sometimes, like in *Nobles*, that answer might be extraordinarily explicit.<sup>304</sup> Sometimes, like in the case of Cherokee and Creek Freedmen, it may be inferred through tribal membership or affiliation. And other times, it may be implicit, like through a prior exercise of tribal criminal jurisdiction.<sup>305</sup> Only where the answer is not clear should federal and state courts employ *Rogers* and engage in the “odd” task of trying to probe whether somebody is Indian *enough* to face tribal or federal prosecution.<sup>306</sup>

#### CONCLUSION

“After the arrival of non-Indians to what is now the United States of America and before the existence of the United States of America,” wrote

296. Cameron & Walker, *supra* note 277.

297. *In re Effect of Cherokee Nation*, 16 Am. Tribal L. at 275.

298. Chad Hunter, *AG: Push continues for equality under Major Crimes Act*, CHEROKEE PHOENIX, [https://www.cherokeephoenix.org/news/ag-push-continues-for-equality-under-major-crimes-act/article\\_82dc04b6-088d-11ef-bb7a-27b916eb958f.html](https://www.cherokeephoenix.org/news/ag-push-continues-for-equality-under-major-crimes-act/article_82dc04b6-088d-11ef-bb7a-27b916eb958f.html) [http://perma.cc/88DD-PMSM] (last updated May 2, 2024).

299. *Id.*

300. As a result, the Cherokee Nation has been lobbying to update the Major Crimes Act to permit tribal and federal prosecution of Cherokee Freedmen. *Id.*

301. See Fletcher, *Politics, Indian Law, and the Constitution*, *supra* note 234, at 544–45.

302. See *United States v. Cruz*, 554 F.3d 840, 849 (9th Cir. 2009) (explaining the intent of the second prong of *Rogers* to discern whether a “sufficient non-racial link to a formerly sovereign people” exists).

303. Fletcher, *Politics, Indian Law, and the Constitution*, *supra* note 234, at 544.

304. *Eastern Band of Cherokee Indians v. Lambert*, No. CR 03-1313, 2003 WL 25902446, at \*3 (E. Cherokee Ct. May 29, 2003).

305. See *United States v. LaBuff*, 658 F.3d 873, 879 (9th Cir. 2011) (finding that the defendant was Indian because, among other factors, he had been previously convicted of three crimes in tribal court on the basis of his Indian status).

306. See *Cruz*, 554 F.3d at 850.

Justice Harry C. Martin for the Cherokee Supreme Court, “the Cherokee Indians exercised inherent jurisdiction over all non-Indians found within Cherokee Country.”<sup>307</sup> Since that arrival, some things have changed: centuries of subjugation of Native peoples and the imposition of corrosive legal frameworks have eroded tribal sovereignty and restricted tribal court jurisdiction. But some things remain the same. Tribes continue to possess the “inherent powers of a limited sovereignty which has never been extinguished.”<sup>308</sup> And tribal courts continue to be “important mechanisms for protecting significant tribal interests.”<sup>309</sup> To safeguard that mechanism, state and federal courts must defer to Tribes on questions of Indian status. *State v. Nobles* must not be the guide.

DANIEL G. SULLIVAN\*\*

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307. *Eastern Band of Cherokee Indians v. Torres*, Nos. CR 03-1443, CR 03-1529, CR 03-1530, CR 03-1531, CR 03-1819, 2005 WL 6437828, at \*5 (E. Cherokee Sup. Ct. 2005). Justice Harry C. Martin served as an associate justice on the Supreme Court of North Carolina for ten years before he helped the Eastern Band of Cherokee Indians stand up the modern iteration of the Cherokee Court system. He served as its first Chief Justice. See Anthony Brown, *Harry Corpening Martin—Obituary*, CHEROKEE ONE FEATHER (May 5, 2015), <https://theonefeather.com/2015/05/05/harry-corpening-martin-obituary> [<https://perma.cc/6M9F-W7NF>].

308. *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (internal quotations omitted).

309. *Id.* at 332; see *Veneno v. United States*, 146 S. Ct. 52, 53 (2025) (Gorsuch, J., dissenting from denial of certiorari) (“[A] great many Tribes today have courts, not wholly unlike those found in States and counties across the country, open to render justice when one tribal member commits an offense against another tribal member.”).

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