# Let Them Be Tribal Members: Exempting Nonmember Resident Indians from State Taxes

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## INTRODUCTION

The Supreme Court's Indian law jurisprudence has not always been friendly towards the sovereignty of tribal nations.[1] One of the more disturbing trends in this area of law has been the gradually shifting framework through which tribal sovereignty is viewed. Initially, the Court recognized that tribal sovereignty was derived from a tribal nation's authority over both its members and the geographic territory which it occupied.[2] Thus, in accordance with traditional notions of territorial sovereignty, the laws of a state "can have no force" within a tribal nation's territory.[3] Gradually, though, this conception of tribal sovereignty shifted away from tribal authority over both land and members, toward tribal authority over members alone.[4] Under this framework, states have been allowed to exercise more authority within Indian country, but that state authority is preempted in some circumstances, such as when exercising it would infringe on the tribal nation's right to self-government.[5]

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1. Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 297–98 (2004).

2. Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 96 (1993).

3. Worcester v. Georgia, 31 U.S. 515, 520 (1832).

4. Dussias, *supra* note 2, at 96.

5. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.").

Through this shifting framework, one group fell through the cracks: Indians who reside in the Indian country of a tribal nation other than the one with which they hold membership ("nonmember resident Indians"). State income taxes illustrate these types of issues faced by nonmember resident Indians. In *McClanahan v. Arizona State Tax Commission*, the Supreme Court held that a state may not tax the income of a "reservation Indian" who derives their income from reservation sources.[6] Following that decision, some state appellate courts initially determined that nonmember resident Indians were included within the term "reservation Indians," thus placing them beyond the state's authority to levy income taxes.[7] These decisions eventually fell victim to the Supreme Court's shifting tribal sovereignty framework.[8] The shift became quite evident in 1980 when the Court held that a state would not be barred from taxing a tribe's tobacco sales to nonmember Indians.[9]

Lower courts subsequently applied the Supreme Court's reasoning to income tax too, holding that state income taxes levied on nonmember resident Indians were not categorically preempted.[10] Some jurisdictions went on to analyze whether these taxes were prohibited by notions of tribal sovereignty, applying a nebulous and often subjective test, balancing the state, tribal, and federal interests at play.[11]

Unsurprisingly, jurisdictions that have applied this test have determined that the tribal interest was not compelling enough to prohibit states from levying income taxes on nonmember resident Indians.[12] Other jurisdictions stopped short of applying any balancing test, and instead effectively categorically permitted states to tax the incomes of nonmember resident

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6. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973). The Court did not define the term "reservation Indian." *Id.*

7. Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 MARQ. L. REV. 917, 959–60 (2008).

8. *See* Dussias, *supra* note 2, at 25–32 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)) (describing the Court's shift away from a geographically based view of sovereignty in *Oliphant*); State v. R.M.H., 617 N.W.2d 55, 63–64 (Minn. 2000) (holding that *Oliphant* and its progeny drew a distinction between nonmember resident Indians and resident member Indians, refuting and abrogating previous state precedent which held that the state could not levy income taxes on nonmember resident Indians).

9. Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 160–61 (1980).

10. *See, e.g.*, LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 916 (Wis. 2001) (citing *White Mountain Apache Tribe*, 448 U.S. at 142).

11. *Id.*

12. *Id.* at 917.

Indians.[13] The lack of a bright line rule preempting state income taxes on nonmember resident Indians demonstrates the continued erosion of tribal territorial sovereignty and places nonmember resident Indians in a state of serious, inconvenient, and categorical uncertainty.[14] In jurisdictions which refuse to engage in a balancing test, nonmember resident Indians do not have the same uncertainty, but only because they are certain to be taxed by the state, despite living and working within the Indian Country of a sovereign tribal nation.[15]

This Comment argues that to push back against this erosion of tribal territorial sovereignty, tribal nations ought to implement intertribal membership reciprocity agreements so that nonmember resident Indians may be considered tribal members, thus invoking *McClanahan*'s per se preemption of state income taxes levied on these Indians.[16] To that end, if a tribe's constitutional or statutory provisions related to membership create a barrier to implementing such an agreement, the tribe ought to seriously consider amending these provisions.

In Part I, this Comment outlines the background principles at play, including existing law on income taxation in Indian Country, the tribal power to define its own membership, federal laws influencing tribal membership, and similar uses of intertribal agreements in other contexts.[17] Part II further demonstrates the problems raised by state income taxation of nonmember resident Indians, along with specific circumstances in which such taxation runs counter to normative principles of tribal sovereignty.[18] Part III delves into this Comment's proposed solution, examining legal and political obstacles to implementation, as well as the benefits and drawbacks that tribal nations ought to consider prior to pursuing this strategy.[19] Part IV concludes, arguing that intertribal membership reciprocity agreements are a viable method of pushing back against the erosion of tribal territorial sovereignty, and tribes should consider pursuing constitutional and statutory

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13. *See, e.g.*, N.M. Tax'n & Revenue Dep't v. Greaves, 864 P.2d 324, 326 (N.M. 1993).

14. *See generally* Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 MARQ. L. REV. 917 (2008) (arguing that excluding nonmember resident Indians from tribal authority undermines tribal sovereignty and contradicts traditional territorially based principles of sovereignty).

15. *See, e.g.*, *Greaves*, 864 P.2d at 325.

16. *See* Jeffrey M. Lipshaw, *Thesis Sentence*, 16 GREEN BAG 2D. 225 (2013).

17. *See infra* Part I.

18. *See infra* Part II.

19. *See infra* Part III.

reform on an as-needed basis to make these agreements possible under tribal law.

## I. BACKGROUND

State taxation in Indian Country and tribal membership laws are complex topics, often varying from tribe to tribe due to differing laws between tribes and the individual provisions of treaties, compacts, and federal regulations. This Part makes no attempt to provide a comprehensive outline of Indian Country taxation and membership law, and indeed such an endeavor is well beyond the scope of this Comment. Rather, this Part is intended to provide the general background principles necessary to understand several discrete, interrelated topics in Indian Country taxation and membership law. First, this Part examines the development of the doctrine governing state income taxes levied on Indians in Indian Country.[20] Next, this Part outlines the tribal power to define its own membership, and common features of tribal membership law.[21] Further, this Part considers the role of the federal government in defining tribal membership.[22] Finally, this Part explores the use of intertribal agreements to promote tribal sovereignty.[23]

### *A. State Income Tax in Indian Country*

The leading case dealing with state income taxes in Indian Country is *McClanahan v. Arizona State Tax Commission*, decided by the Supreme Court in 1973. In that case, Rosalind McClanahan challenged Arizona's power to levy income taxes on her, contending that as a member of the Navajo Nation living and working within the Navajo reservation, the state could not enforce the tax against her.[24] Arizona courts disagreed, holding that the tax did not infringe on the rights of the Navajo Nation to be self-governing and was thus enforceable against Navajo tribal members within the Navajo reservation.[25]

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20. *See infra* Section II.A.
21. *See infra* Section II.B.
22. *See infra* Section II.C.
23. *See infra* Section II.D.
24. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165–66 (1973).
25. *Id.* at 166–67. The court below relied on the test set forth in *Williams v. Lee*, which states, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959).

The Supreme Court of the United States reversed, holding that a state may not tax the income of a reservation Indian who wholly derives their income from reservation sources.[26] In doing so, the Court directly rebutted the reasoning of the Arizona courts, suggesting that the state's taxation of reservation Indians without tribal consent would be antithetical to tribal sovereignty and self-determination.[27] Notably, the Court did not rest its decision on principles of tribal sovereignty alone, but rather reached its decision through a preemption analysis, using tribal sovereignty as a "backdrop against which the applicable treaties and federal statutes must be read."[28] In its analysis, the Court explained that when viewing the treaty establishing the Navajo reservation against the backdrop of tribal sovereignty, the treaty was clearly "meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision."[29] Along with the Navajo treaty, the Court identified the Arizona Enabling Act and the Buck Act as federal laws which, when viewed against the backdrop of tribal sovereignty, would preempt state taxation of a reservation Indian's income, drawn from reservation sources.[30]

Following the *McClanahan* decision, several state courts determined that nonmember resident Indians[31] were included within the term "reservation Indians," and were thus categorically beyond the state's authority to levy income taxes, so long as the Indian's income was derived from reservation sources.[32] One such case was *LaRoque v. State*, in which a member of the Turtle Mountain Chippewa Tribe of North Dakota, residing within the Fort Peck reservation in Montana, challenged Montana's authority to tax his income, which he earned within the boundaries of the Fort Peck reservation.[33] The trial court held that the tax could be enforced against

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26. *McClanahan*, 411 U.S. at 165.
27. *Id.* at 179.
28. *Id.* at 172.
29. *Id.* at 175.
30. *Id.* at 175–77.
31. Nonmember resident Indians are members of tribal nations who reside within the boundaries of a tribe other than the one with which they hold membership. For example, a member of the Cherokee Nation who resides within the Navajo Nation reservation would be considered a nonmember resident Indian. A resident member Indian is a member of a Tribal Nation who lives within the boundaries of that tribal nation. A member of the Navajo Nation who lives within the Navajo Nation reservation would be considered a resident member Indian.
32. *See, e.g.*, Topash v. Comm'r of Revenue, 291 N.W.2d 679, 680, 683 (Minn. 1980) (holding that the state's income tax could not be enforced against a nonmember resident Indian because the term "reservation Indian" implicitly included Indians who were members of other tribes).
33. 583 P.2d 1059, 1060 (Mont. 1978).

LaRoque because he was a member of a different Tribe, effectively destroying his status as a "reservation Indian" as described in *McClanahan*.[34] On appeal, the Montana Supreme Court reversed, holding that the primary factor in limiting the state's jurisdiction was not the tribal membership status of the individual, but whether the taxed activity occurred within the reservation boundaries.[35] Interpreting the term "reservation Indian" from *McClanahan*, the Montana Supreme Court stated, "[w]e read the phrase 'reservation Indian' in *McClanahan* to mean Indians residing on the reservation, and not just Indians who are enrolled members of the tribe."[36] The appellate courts of other states adopted similar reasoning, and the issue appeared settled, until the Supreme Court inadvertently unsettled it.[37]

In *Washington v. Confederated Tribes of Colville Indian Reservation*, tribes challenged the State of Washington's imposition and collection of cigarette taxes, among other issues.[38] One of the questions presented was whether Washington could enforce its sales and cigarette taxes in transactions between a tribal retailer located within the reservation boundaries and a nonmember Indian.[39] The Court looked for a federal statute preempting state taxes on nonmember Indians within a reservation and found none.[40] The Court then briefly examined whether the tax would contravene the principle of tribal self-government, and concluded it would not because "nonmembers are not constituents of the governing Tribe."[41] The Court concluded its brief analysis by stating that in general, nonmember Indians occupy the same legal position as non-Indians within the reservation, and that the state's interest in enforcing the tax against them outweighed "any tribal interest that may exist in preventing the State from imposing its taxes."[42]

Despite the fact that *Colville* dealt with cigarette and sales taxes, the Court's treatment of nonmember Indians as practically equivalent to non-Indians crept into income tax cases.[43] Jurisdictions that had previously

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34. *Id.* at 1061.
35. *Id.* at 1063–64.
36. *Id.* at 1064.
37. *See* Taylor, *supra* note 7, at 960.
38. 447 U.S. 134, 139–41 (1980).
39. *See id.* at 159–61.
40. *Id.* at 160–61.
41. *Id.* at 161.
42. *Id.*
43. *See, e.g.*, LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 912 (Wis. 2001).

considered nonmember resident Indians to fall within *McClanahan*'s meaning of "reservation Indian" soon reversed course.[44] In *Colville*'s wake, a new analytical framework emerged in state courts, exemplified in *LaRock v. Wisconsin Department of Revenue*.[45]

In *LaRock*, the Wisconsin Supreme Court examined whether, in light of *Colville*, the state could tax the income of a member of the Menominee Tribe who worked at the Oneida Tribe's casino and lived within the Oneida reservation.[46] The court held that the state could enforce the tax, and employed a two-step analytical framework to reach that decision.[47] The first step was a statutory preemption analysis, wherein the court examined the relevant treaties between the United States and the tribe, along with federal statutes, and concluded that none preempted the state from enforcing the tax against nonmember resident Indians.[48] The second step was to balance the tribal, state, and federal interests to determine whether the exercise of state power infringed upon the right of the Indians to govern themselves.[49] The Court relied on logic similar to that of the court in *Colville*, holding that the tribal interests were functionally nonexistent because LaRock had no say in the affairs of the Oneida Tribe and had no more rights or privileges within the tribe than a non-Indian.[50]

This approach is reflected in other states as well,[51] though some states forego the balancing step altogether, categorically allowing income taxes on nonmember resident Indians.[52] Whether a state's judiciary has employed a balancing test or not, the doctrinal bottom line remains that an Indian's

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44. *Id.* at 913.
45. *See id.* at 914–15.
46. *Id.* at 908–09.
47. *Id.* at 914–17.
48. *Id.* at 916.
49. *See id.* (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)).
50. *Id.* at 916–17.
51. *See, e.g.*, Esquiro v. Dep't of Revenue, 14 Or. Tax 130 (1997) (analyzing first whether a statute or treaty preempted enforcement of income tax against a nonmember resident Indian, then analyzing whether enforcing the tax would infringe on the tribe's right of self-governance).
52. *See, e.g.*, N.M. Tax'n & Revenue Dep't v. Greaves, 864 P.2d 324 (N.M. Ct. App. 1993). An even more extreme—and in my view, legally dubious—example is seen in Oklahoma, where the state Supreme Court recently held that the state could levy taxes on the income of a citizen of the Muscogee (Creek) Nation who resided within her tribe's reservation boundaries and derived her income from reservation sources. *See* Stroble v. Okla. Tax Comm'n, 2025 OK 48, ¶12, 2025 WL 1805918, at *4. Because the Oklahoma court's decision rested on the premise that the Muscogee (Creek) Nation reservation only existed for purposes of criminal jurisdiction and thus had no effect on civil and regulatory law, full examination of *Stroble* is well outside the scope of this Comment. *See id.* at ¶ 10.

membership status can be determinative in these matters, and judicial inquiries are not solely focused on whether the taxed activity occurred within a tribal reservation.[53]

### *B. Tribal Power to Define Membership*

Because tribal membership and not mere Indian status is now just as relevant to state income tax inquiries as the location of the taxed activity, an examination of the tribe's power to define its membership is necessary.

One of the most fundamental powers of an Indian tribe is the power to determine its own membership.[54] Tribes may grant, deny, revoke, and qualify membership according to their own laws.[55] Tribal membership laws vary by tribe, so there is no uniform set of membership criteria.[56] For example, some tribes require only that one be a lineal descendant of an original enrollee, while others limit their eligibility further, requiring that one be a lineal descendant and also possess a certain minimum degree of Indian blood.[57]

One of the more common criteria for tribal membership is prohibition on dual enrollment.[58] Many tribes, often at the insistence of the Bureau of Indian Affairs ("BIA"), enact laws prohibiting individuals who are already members of one tribe from applying for membership with a second tribe.[59]

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53. *Compare LaRock*, 621 N.W.2d at 914–17 (employing a balancing test and holding that the state was not barred from taxing a nonmember resident Indian's income because of their lack of membership), *with Greaves*, 864 P.2d at 325–26 (categorically holding that the state may tax the income of an Indian, earned within a reservation of a Tribe of which the Indian is not a member).

54. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence.").

55. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.03[3] (Nell Jessup Newton & Kevin K. Washburn eds., 2024) [hereinafter COHEN'S HANDBOOK].

56. *Id.* at § 4.03[2].

57. *Compare* CHOCTAW NATION OF OKLA. CONST. art. II, § 1 ("The Choctaw Nation of Oklahoma shall consist of all Choctaw Indians by blood whose names appear on the final rolls of the Choctaw Nation . . . and their lineal descendants."), *with* NAVAJO NATION CODE ANN. tit. 1, § 701 (2014) ("The membership of the Navajo Nation shall consist of . . . [a]ny person who is at least one-fourth degree Navajo blood.").

58. *See, e.g.*, CHOCTAW NATION OF OKLA. CONST. art. II, § 2 ("[A]ny Choctaw by blood who has elected or shall hereafter elect to become a member of any other tribe or band of Indians may not be a member of this Nation.").

59. *See* Grant D. Crawford, *CN, UKB Officials Explain Nuances of Dual Enrollment*, TALEQUAH DAILY PRESS (Nov. 4, 2020), https://www.tahlequahdailypress.com/news/cn-ukb-officials-explain-nuances-of-dual-enrollment/article_c6b49c78-e4a5-56d5-a83d-e63fd5ba73f2.html [https://perma.cc/3HYN-PNYK].

This is by no means universal though, and some tribes do not prohibit dual membership.[60]

While many tribes enumerate membership criteria in their constitutions or through statutes, these are not the only ways for tribes to define their membership.[61] Tribes can also determine their own membership through custom, intertribal agreements, or treaties with the United States.[62]

One example of an intertribal agreement defining Tribal membership is the 1867 Agreement between the Cherokee Nation and the Delaware Indians.[63] This agreement incorporated the Delawares into the Cherokee Nation, essentially adopting them into the Cherokee polity as full and equal members.[64]

It should be noted though, that the Delaware did not initially expect this.[65] The Cherokee-Delaware agreement was not the product of independent and informed negotiations between the tribes, but is better understood as "a means by which the U.S. government pursued its Indian policy."[66] The U.S. government had previously relocated the Delaware to Kansas, and after railroad expansion and harassment by settlers made their situation untenable, the government sought to remove the Delaware to the Cherokee lands in the Indian Territory.[67] A separate treaty between the United States and the Cherokee Nation contained a provision governing the treatment of other tribes that were removed to the Cherokee lands.[68] This provision gave removed tribes two options: they could abandon their existing governments and be incorporated into the Cherokee Nation, or they could pay a fee to the Cherokee Nation to preserve their governments and occupy a distinct district within the Cherokee lands.[69] The Cherokee and the Delaware originally agreed that the Delaware would preserve their own government, apart from the Cherokee Nation.[70] However, when the Delaware delegates arrived in Washington, D.C. to sign the agreement, they

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60. *Id.*
61. COHEN'S HANDBOOK, *supra* note 55, § 5.01[2][b].
62. *Id.*
63. *See* Cherokee Nation of Oklahoma v. Norton, 389 F.3d 1074, 1078–81 (10th Cir. 2004).
64. *Id.* at 1080–81.
65. Claudia Haake, *Identity, Sovereignty, and Power: The Cherokee-Delaware Agreement of 1867, Past and Present*, 26 AM. INDIAN Q. 418, 420–23 (2002).
66. *Id.* at 418.
67. *Id.* at 419–20.
68. *Id.*
69. *Id.* at 420.
70. *Id.*

were shocked to be presented with an agreement which incorporated the Delawares into the Cherokee Nation.[71] The delegates reluctantly signed the agreement, likely under great pressure from U.S. government officials who were eager to settle the matter and remove the Delawares quickly.[72]

After a complicated century together, the Delaware Nation sought independent federal recognition and a separation from the Cherokee Nation.[73] The Cherokee Nation and the Delaware Tribe entered into another agreement in 2008, undoing parts of the 1867 agreement, allowing the Delaware Tribe to seek federal recognition and define its own membership.[74] This process appears to have been much more legitimate than the 1867 process, with the two tribes working collaboratively towards a mutually acceptable resolution.[75] Though the 1867 agreement is often cited as the paradigmatic example of an intertribal agreement to define tribal membership,[76] perhaps the 2008 agreement is a more useful illustration because it resulted from a process of legitimate negotiation between tribes, rather than a process of federal strongarming.

### *C. Federal Power over Tribal Membership*

It is well established that Congress possesses plenary power over Indian affairs, and this includes the ability to regulate tribal membership.[77] Congress has regulated tribal membership in a few circumstances, defining some tribal membership schemes through statute[78] and requiring some tribes to include formerly enslaved persons as tribal members through treaties.[79]

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71. *Id.* at 420–22.

72. *Id.* Some have argued that the Delaware may not have signed the agreement at all. *Id.* at 422.

73. Cherokee Nation of Oklahoma v. Norton, 389 F.3d 1074, 1080–81 (10th Cir. 2004).

74. *See* Memorandum of Agreement Between Cherokee Nation and Delaware Tribe (Oct. 24, 2008), https://delawaretribe.org/wp-content/uploads/cherokee_delaware_moa.pdf [https://perma.cc/SWA4-QTDA].

75. *See* Will Chavez, *Sullivan Introduces Bill to Re-establish Delaware Tribe*, CHEROKEE PHOENIX (Aug. 20, 2008), https://www.cherokeephoenix.org/culture/sullivan-introduces-bill-to-re-establish-delaware-tribe/article_79ca5ccc-427e-508d-ba63-8649cf453ae9.html [https://perma.cc/A8E4-M4ZG].

76. COHEN'S HANDBOOK, *supra* note 55, § 5.01[2][b] n.76 (citing Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904) (regarding the 1867 agreement)).

77. *Id.* at § 5.01[2][b].

78. *See, e.g.*, Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973).

79. *See* Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 97–102 (D.D.C. 2017).

Additionally, Congress has delegated authority to the Department of the Interior to exercise some power over tribal membership.[80] In some cases, like where a tribe has organized pursuant to the Indian Reorganization Act, the Secretary of the Interior has the power to review tribal membership provisions within the tribal constitution.[81] Some tribes have also adopted provisions requiring that the Secretary of the Interior approve statutory changes as well, including changes to tribal membership statutes.[82] Generally though, federal power over tribal membership has been a tool to control the distribution of tribal funds and other federally controlled property to tribal members.[83]

One example of the Department of the Interior's power over tribal membership is seen in 25 C.F.R. § 111.4, which specifically regulates individuals who are members of more than one tribe.[84] This provision is a smaller part of a larger regulation on annuity and per capita payments distributed to members of some tribes.[85] It states in relevant part, "[a]n Indian holding equal rights in two or more tribes can share in payments to only one of them and will be required to elect with which tribe he wishes to be enrolled and to relinquish in writing his claims to *payments to the other*."[86] The language of this regulation reflects a few important principles. First, it is an acknowledgment that an individual Indian can be a member of more than one tribe.[87] Second, it does not prohibit this multiple membership outright; it merely prohibits the individual from collecting per capita or annuity payments from more than one tribe, presumably to prevent the individual from unfairly double dipping in the receipt of funds.[88]

It should also be noted that the formal tribal membership system in place today is only the result of federal action.[89] Prior to contact with European settlers, tribal social structures such as languages, spiritual values, and kinship systems resolved most questions of identity; formally documented membership rolls did not.[90] After contact, tribes frequently adopted non-

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80. COHEN'S HANDBOOK, *supra* note 55, § 5.01[2][b].
81. 25 U.S.C. § 5123.
82. COHEN'S HANDBOOK, *supra* note 55, § 5.01[2][b] n.81.
83. *Id.* at § 5.01[2][b].
84. 25 C.F.R. § 111.4 (2024).
85. 25 C.F.R. § 111 (2024).
86. 25 C.F.R. § 111.4 (2024) (emphasis added).
87. *Id.*
88. *Id.*
89. COHEN'S HANDBOOK, *supra* note 55, § 4.03[2].
90. *Id.*; *see* David E. Wilkins, *A Most Grievous Display of Behavior: Self-Decimation in Indian Country*, 2013 MICH. ST. L. REV. 325, 329.

Indians who married tribal members, adopted European and Africans who joined as refugees or captives, and allowed the children of Native-non-Native relationships to become members.[91] These practices were largely displaced by the formal membership system, which came about because of federal efforts to conduct tribal rolls and censuses.[92] These rolls and censuses were used to distribute funds to members, facilitate Indian removal, and establish which tribal members could vote to abrogate prior treaties.[93] At the urging of federal officials, many tribes adopted these rolls and censuses as the basis for their own membership laws.[94]

### *D. Intertribal Agreements Promoting Sovereignty*

When tribes have faced threats to self-government in the past, intertribal agreements have served as a useful tool to facilitate intergovernmental cooperation and push back against encroachments on their sovereignty.[95]

A recent example of this occurred in Oklahoma after the Governor refused to renew hunting and fishing compacts between the state and several tribes.[96] The previous compacts allowed the tribes to purchase a collective minimum of 200,000 hunting and fishing licenses from the state at a discounted rate, providing the state with significant revenue, and the tribal members with the ability to hunt and fish throughout the state without the financial burden of buying a permit directly from the state.[97] Once the compacts expired, each tribe independently planned to allow tribal members to use their tribal identification cards as hunting licenses, valid within reservation boundaries, and members would have to comply with the tribal hunting and fishing laws.[98] However, the tribes eventually changed their

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91. COHEN'S HANDBOOK, *supra* note 55, § 4.03[2].

92. *Id.*

93. *Id.*

94. *Id.*

95. *See* Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 325–38 (2004).

96. Molly Young, *Oklahoma Gov. Stitt Won't Renew Hunting, Fishing Compacts with Cherokee, Choctaw Tribes*, OKLAHOMAN (Dec. 15, 2021), https://www.oklahoman.com/story/news/2021/12/13/oklahoma-tribes-gov-kevin-stitt-cancel-hunting-fishing-compacts-cherokee-choctaw/6496127001/ [https://perma.cc/2U24-NUR7].

97. *Id.*

98. *Id.*

approach, banding together instead of pursuing independent regulation strategies.[99]

Utilizing an intertribal governing body, the Inter-Tribal Council of the Five Civilized Tribes, the Cherokee, Chickasaw, Choctaw, Seminole, and Muscogee (Creek) Nations negotiated and entered into an intertribal agreement to jointly regulate wildlife management.[100] The agreement provided for the adoption of uniform wildlife codes among the tribes, collaborative management of wildlife resources, and, importantly, reciprocal recognition of tribal hunting licenses.[101] Because each tribe allows its members to use their tribal identification cards as hunting licenses, any member of one of the five tribes can hunt in any of the other participating tribes' reservations without acquiring a separate permit.[102]

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In sum, this Part has established several propositions which form the premises for this Comment's overall argument. First, Indians who reside within their own tribe's reservation and derive their income from reservation sources are per se exempted from state income taxes. Second, whether an individual Indian is a member of the tribe within which they reside impacts whether a state may levy income taxes upon them. Third, membership is a core function of tribal sovereignty; tribes generally have a fundamental right to determine their own qualifications for membership, and can do so through constitutional provision, statute, or intertribal agreements. Fourth, federal restrictions on that right are few, and not wide reaching, generally only attempting to limit individuals to receiving monetary support from one tribe at a time. Finally, tribes have turned to intertribal agreements when tribal sovereignty has been threatened. Putting these together, this Comment argues that to push back against the erosion of tribal territorial sovereignty, tribal nations ought to implement intertribal membership reciprocity agreements so that nonmember resident Indians

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99. Kelly J. Bostian, *Oklahoma Tribal Nations Announce Joint Hunting-Fishing Compacts*, KOSU (July 15, 2024), https://www.kosu.org/energy-environment/2024-07-15/oklahoma-Tribal-nations-announce-joint-hunting-fishing-compacts [https://perma.cc/2DL4-9F7U].

100. *Id.*

101. *Id.*

102. *Id.*

may be considered tribal members under local tribal law, thus invoking *McClanahan*'s per se preemption of state income taxes.[103]

## II. THE PROBLEM

The problems inherent to the current status quo—wherein a state may tax the income of a nonmember resident Indian—may not be immediately obvious to those less familiar with concepts of tribal sovereignty and Indian governance.[104] Some have even suggested that all tax exemptions for Indians within Indian country are unfair and discriminate based on race.[105] This Part confronts these issues directly, explaining why it is quite troubling for states to exercise taxing power over nonmember resident Indians. First, this Part addresses the problems these taxes cause for nonmember resident Indians. Second, it examines governance challenges that these taxes cause for tribal governments. Finally, it considers the damage that these taxes inflict upon tribal sovereignty.

### *A. Problems for Nonmember Resident Indians*

State taxation of the income earned by nonmember resident Indians presents a number of challenges for these nonmember resident Indians, their families, and wider communities. This Section examines several of these situations, beginning with marriages between nonmember resident Indians and resident member Indians. This Section then considers nonmember resident Indians who are members of politically connected tribes and nonmember resident Indians who are only rendered ineligible for membership because of tribal laws prohibiting multiple membership.

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103. *See* Lipshaw, *supra* note 16, at 1. This Comment assumes that these nonmember resident Indians also derive their income from reservation sources. Where that condition is omitted within this Comment, it is solely for purposes of brevity. Further, determining whether income is derived from "reservation sources" is beyond the scope of this Comment. Rather, this Comment primarily focuses on whether (and how) nonmember resident Indians may be considered "reservation Indians" under *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973).

104. *See, e.g.*, Allison Herrera et al., *Fact-Checking Oklahoma Gov. Stitt's Statements About Tribal Compact Negotiations*, KOSU (Aug. 3, 2023), https://www.kosu.org/politics/2023-08-03/fact-checking-oklahoma-gov-stitts-statements-about-tribal-compact-negotiations [https://perma.cc/Q8H7-ET6U] (describing Oklahoma Governor Kevin Stitt's position that tribal tax exemptions are generally unfair, despite case law to the contrary).

105. *See id.*

The existing taxation framework can produce quite awkward results. For example, consider that a member of Tribe A marries a member of Tribe B, and they have children who are enrolled in Tribe A, but the family lives and works on the reservation of Tribe B. All the members of Tribe A would generally be liable to state income taxes because they do not live and derive income from within Tribe A's reservation. In contrast, the lone member of Tribe B generally would not be liable to state income taxes because they reside and derive income from within Tribe B's reservation. Despite all members of the family being Indians residing in Indian country, they receive different state income tax treatment. Aside from complicating the family's tax liability, this system also undermines traditional tribal social and familial structures.[106] By reinforcing the formal membership system, this taxation structure continues to displace more traditional notions of tribal social relations and identity.

Yet another example of the existing framework's awkward results is evident in situations involving nonmember resident Indians who are members of culturally or politically connected tribes. In *LaRock*, the petitioner argued that the Menominee Tribe, of which she was a member, had a political relationship with the Oneida Tribe, the tribe within which she resided.[107] This political relationship, which LaRock termed a "sister-tribe" relationship, derived from treaties between the two tribes regarding shared use of some tribal lands.[108] Because the Oneida and Menominee Tribes could be considered "sister-tribes," LaRock argued that it would not make sense to allow state taxation of nonmembers within the other tribe's reservation.[109] The court rejected that argument, holding that the "sister-tribe" relationship gave LaRock no say in Oneida affairs, no membership in the Oneida Tribe, and thus no immunity from state income taxes within the Oneida reservation.[110]

Scholars have criticized this reasoning as being overly reliant on the imposed political structure of federal recognition.[111] For example, one scholar observed that as of 2003, there were three different Oneida tribes: one located in New York, one in Wisconsin, and one in Canada, despite the

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106. *See supra* notes 89–94 and accompanying text.

107. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 915 (Wis. 2001).

108. *Id.*

109. *See id.*

110. *Id.*

111. Jennifer Nutt Carleton, *State Income Taxation of Nonmember Indians in Indian Country*, 27 AM. INDIAN L. REV. 253, 258–59 (2003).

fact that they were all originally one singular Oneida Nation.[112] As another example, there are several different Choctaw tribes, including the Choctaw Nation of Oklahoma and the Mississippi Band of Choctaw Indians.[113] Originally a single tribe, the split between the Mississippi Choctaws and the Oklahoma Choctaws occurred because of the federal government's forcible removal of many Choctaws to Oklahoma.[114] The Mississippi Choctaws are descended from those Choctaws who refused to relocate to Oklahoma and instead remained in Mississippi, and they eventually received federal recognition as a separate tribe.[115] Furthermore, many bands of Chippewa Indians received federal recognition as separate tribes across Wisconsin, Michigan, Minnesota, North Dakota, and Montana as a result of federal action.[116] In many instances, the political dividing lines between tribes are externally imposed, and are often the product of harmful federal efforts against tribal communities.[117] Viewed from this historical perspective, the current framework's methodology—looking to the particular tribe with which an Indian holds membership—seems problematic.[118] In many circumstances, it effectively penalizes Indians and tribes for their participation in a political system that was imposed on them.

A final example is evident in the circumstances of nonmember resident Indians who are otherwise eligible for membership but are rendered ineligible only due to their membership with a different tribe. Suppose an individual Indian is eligible for membership with Tribe A and Tribe B, and one or both tribes have enacted laws prohibiting any of their members from acquiring membership with another tribe. Thus, he must choose between the two tribes. Perhaps Tribe A offers better educational support to its members, so he chooses Tribe A and foregoes membership with Tribe B. Nonetheless, he still engages in the cultural practices of both tribes and eventually takes a job with Tribe B and moves to that reservation. Because he is not a formal member of Tribe B, he will not be exempt from state income taxes.

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112. *Id.* at 258.

113. *See Choctaw History*, MISS. CHOCTAW, https://www.choctaw.org/about-us/tribal-history/ [https://perma.cc/UZ5H-LT2L] (describing the history of the Mississippi Choctaws); *About the Choctaw Nation*, CHOCTAW NATION OF OKLA., https://www.choctawnation.com/about/ [https://perma.cc/8R9A-4CLH] (generally describing the Choctaw Nation of Oklahoma).

114. *See Choctaw History*, *supra* note 113.

115. *Id.*

116. Carleton, *supra* note 111, at 258.

117. *See id.* at 259.

118. *Id.* at 258–59.

Once again, this is an unfortunate result because it is almost entirely the product of political and legal structures imposed on tribal communities without regard for traditional tribal social structures. Specifically, it is the result of the formal tribal membership system which displaced more fluid kinship systems.[119] It is also the result of tribal laws prohibiting membership with multiple tribes, often adopted at the express request of federal officials.[120] The current framework reinforces these externally imposed structures and refuses to give legal effect to more traditional kinship practices. Moreover, this framework can be quite confusing for litigants, who are generally much more familiar with systems like the Indian Health Service, which provides services to all Indians within a reservation, regardless of their specific tribal affiliation.[121]

### *B. Problems for Tribal Governments*

Individual Indians are not the only ones who face problems caused by the existing taxation framework; it causes substantial issues for tribal governments too. This Section analyzes two of those issues. First, it addresses issues tribal governments face in hiring qualified individuals to carry out important sovereign functions. Second, it examines the issue of dual taxation and explains how the existing framework displaces tribal taxing authority.

The current system's practical problems can be seen in situations where a tribe hires an individual who is a member of a different tribe to provide critical government services. For instance, suppose Tribe A needs to hire a tribal prosecutor, but cannot fill the position with a member of their own tribe. This is likely a common occurrence, as Indigenous communities are quite underrepresented in the legal profession.[122] Tribe A still wants to hire an Indigenous attorney who understands tribal sovereignty, so they recruit a member of Tribe B, who is an attorney with a strong understanding of Indian law, to fill the position. The new prosecutor carries out her duties faithfully, executing an important sovereign function for Tribe A. Even

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119. *See supra* notes 89–94 and accompanying text.

120. *See supra* notes 58–60 and accompanying text.

121. *See* Carleton, *supra* note 111, at 258.

122. *See* Robert Zavarella, Opinion, *To Preserve Tribal Sovereignty We Need More Native American Lawyers*, CHEROKEE PHX. (May 27, 2024), https://www.cherokeephoenix.org/opinion/opinion-to-preserve-tribal-sovereignty-we-need-more-native-american-lawyers/article_fd79d3ae-19dd-11ef-9b18-9f75a1d05e07.html [https://perma.cc/A6KW-3P7C].

here, the prosecutor's income is subject to state taxes because she is not a member of Tribe A.

At best, the prosecutor could argue that unlike in *LaRock*[123] and *Colville*,[124] tribal interests would be implicated in a balancing test because the prosecutor carries out an important governmental function. However, even this argument is unlikely to prevail under the existing framework because the petitioner in *LaRock* was a tribal employee, also carrying out an important sovereign function by facilitating revenue generation at the tribe's casino.[125] In any case, the prosecutor would not be able to invoke *McClanahan*'s per se rule to preempt the tax because she is not a member of Tribe A. Thus, the state would effectively be free to tax the sovereign governmental operations of Tribe A, as long as they are carried out by individuals who are not members of Tribe A. This could obviously create difficulty for tribes that seek to recruit employees from a wider pool than just the tribe's own members, as officials would need to convince nonmember Indians to leave tax immunity in their own reservations and relocate to a new reservation without tax immunity.

Additionally, the current scheme makes it quite difficult for tribal governments to effectively levy taxes within their reservations. Tribal taxation of nonmember activity within tribal reservations can already be a burdensome process without taking state taxes into account. Tribal governments are free to tax nonmember activity which occurs on lands held in trust for the tribe ("trust land").[126] For some tribes, the entire reservation is trust land.[127] For many other tribes, the reservation contains both trust land and land owned in fee simple by nonmembers ("nonmember fee land").[128] Tribal governments may not tax nonmember activities which occur within the reservation, on nonmember fee land, unless one of two

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123. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 909, 917 (Wis. 2001) (holding that the State of Wisconsin could tax the income of a Menominee tribal member who worked at the Oneida Tribe's casino and lived within the Oneida reservation).

124. Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 139–41 (1980) (holding that no tribal interest was implicated by the state's taxation of tribal cigarette sales to nonmember Indians).

125. *See LaRock*, 621 N.W.2d at 909.

126. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

127. *See* Stacy Leeds & Lonnie Beard, *A Wealth of Sovereign Choices: Tax Implications of* McGirt v. Oklahoma *and the Promise of Tribal Economic Development*, 56 TULSA L. REV. 417, 432 (2021).

128. *Id.* Of course, there are other types of lands within Indian reservations, including restricted fee lands and rights-of-way. *See id.* at 428, 431. An extensive enumeration of these categories is beyond the scope of this Comment.

exceptions applies.[129] First, the tribal tax is considered valid if it has some nexus to a consensual relationship between the nonmember and the tribe or its members, expressed through a contract or other arrangement.[130] Alternatively, the tribal tax is valid if it regulates nonmember conduct that threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.[131] These exceptions are notoriously difficult for tribes to meet; despite appearing to be facially quite broad, case law has limited their applicability.[132]

The situation becomes more complicated when state taxes are factored into the equation. Though tribes have the power to tax some nonmember activity within reservations, the tribal taxes do not automatically preempt state taxation of the same activity.[133] As one scholar put it, "the Supreme Court gives states near carte blanche to tax any transaction—from sales to oil and gas production—on tribal land that involves a non-Indian[,]" or a nonmember Indian, treated as a non-Indian for tax purposes.[134] This allows for circumstances where both the tribe and the state have validly levied taxes on nonmember activity, resulting in a tax burden on the nonmember that is higher than if they had simply conducted their business off-reservation.[135] This stifles tribal government efforts at economic development, contributing to "deplorable economic conditions" that plague Indian reservations.[136]

The existing framework for state taxation of nonmember resident Indian income presents the exact same problem. Even where a tribe could validly tax nonmember resident Indian income, the income would also be subject to state taxes. This economic pressure results in many tribes simply declining to levy taxes in the first place, thus depriving tribal governments of important revenue streams.[137] In all, the state taxation of nonmember resident Indian income functions as an economic disincentive to tribal government efforts to recruit diverse and qualified Native talent and

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129. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001).

130. *Id.* at 655–57.

131. *Id.* at 659.

132. *See* COHEN'S HANDBOOK, *supra* note 55, § 10.04[2][b].

133. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 187–91 (1989).

134. Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1007 (2020).

135. Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Government Revenues*, 2 PITT. TAX. REV. 93, 95 (2005).

136. *Id.* at 95–96.

137. *See* Leeds & Beard, *supra* note 127, at 432–33.

contributes to the functional divestiture of the tribal taxing power through the double taxation problem.

### *C. Erosion of Tribal Sovereignty*

Allowing state taxation of nonmember resident Indian income is consistent with the disturbing trend of viewing tribal sovereignty through a membership-based lens rather than a geographically based lens.[138] In 1832, the Supreme Court set forth a broad principle recognizing tribal territorial sovereignty, stating, "The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force."[139] This wall of separation excluding state power from tribal territory has eroded over time. In *United States v. Wheeler*, the Supreme Court affirmed the power of a tribe to prosecute its own members for violations of tribal law, but did so with reference to membership, downplaying the traditional consideration of the physical location of a crime.[140] In *Oliphant v. Suquamish Indian Tribe*, the Court held that tribes had been divested of their power to prosecute non-Indians for crimes committed within Indian reservations, representing yet another erosion of territorial sovereignty.[141] Then, in *Duro v. Reina*, the Court took another step against tribal territorial sovereignty, holding that tribes lacked the inherent authority to prosecute nonmember Indians who commit crimes within the tribe's reservation.[142] In fact, the Court in *Duro* even cited *Washington v. Confederated Tribes of Colville Indian Reservation* as authority supporting a member-nonmember dividing line for tribal sovereignty, rather than a territorial view of tribal sovereignty.[143]

This clearly demonstrates that *Colville*—and the income tax structure for nonmember resident Indians that developed in *Colville*'s wake—represents another step in a line of cases which have eroded the presumption that state law ends where a tribe's territorial boundaries begin. The erosion of tribal territorial sovereignty and the accompanying shift towards a membership-based view of sovereignty is particularly troubling because it encourages courts to treat tribes as private, voluntary organizations, rather than nations

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138. *See* Dussias, *supra* note 2, at 92–93.
139. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).
140. 435 U.S. 313, 322 (1978); *see* Dussias, *supra* note 2, at 21–25.
141. 435 U.S. 191, 210 (1978); *see* Dussias, *supra* note 2, at 25–32.
142. 495 U.S. 676, 679 (1990); *see* Dussias, *supra* note 2, at 32–37.
143. *Duro*, 495 U.S. at 687 (citing 447 U.S. 134, 161 (1980)).

with sovereign attributes.[144] This ties the hands of tribal governments in addressing reservation-wide issues and contributes to jurisdictional mazes.[145] Congress acted to remedy some of the issues the Supreme Court's shifting framework caused in the criminal context, but has not done so in the civil regulatory and taxation context.[146] Perhaps it is time for tribes to pursue solutions which require minimal congressional involvement to reclaim some semblance of territorial sovereignty.

## III. PROPOSED SOLUTION

To address the multitude of issues posed by state taxation of nonmember resident Indians within Indian Country, perhaps the cleanest legal solution is to provide those nonmember resident Indians with a pathway to membership with the tribal nation in which they reside. In this Part, Section A first sets out the contours of how such a system might be structured and how it would shield nonmember resident Indians from state income taxes.[147] Section B then examines the legal and political obstacles to implementing the proposed solution.[148] Section C evaluates the primary drawbacks tribal nations might encounter when implementing this solution.[149] Section D concludes this Part, presenting the benefits Indian communities may gain through implementing this solution and arguing that on balance, these benefits outweigh the potential drawbacks.[150]

### *A. A Pathway to Membership Through Intertribal Agreements*

To alleviate the taxation issues faced by nonmember resident Indians and to push back against the erosion of tribal territorial sovereignty, tribal nations ought to enter into intertribal agreements that expand tribal membership eligibility to nonmember resident Indians. In practice, such an agreement would provide that if a member of Tribe A (the individual's "home tribe") resides within the Indian Country of Tribe B (the individual's "tribe of residence"), the individual would be eligible for temporary

144. *See* Dussias, *supra* note 2, at 94.
145. *Id.* at 94–96.
146. *Id.* at 95–96.
147. *See infra* Section III.A.
148. *See infra* Section III.B.
149. *See infra* Section III.C.
150. *See infra* Section III.D.

membership with Tribe B for as long as they reside there, with their membership immediately terminating if they establish residence outside of Tribe B.[151] The agreement should also provide that once an individual obtains membership with their tribe of residence, they will be considered an inactive member of their home tribe and will not be eligible to receive membership benefits from their home tribe until their membership with their tribe of residence terminates.

Upon receiving membership in their tribe of residence pursuant to such a membership reciprocity agreement, an individual Indian need only derive their income from reservation sources to be exempt from state income taxes.[152] Assuming this requirement is met, the concern identified by the Court in *Colville* would be alleviated. This concern was essentially that nonmember Indians residing within a different tribal reservation lacked a political affiliation with the governing tribe, having no say in tribal affairs and not receiving any tribal services.[153] Because of this lack of political affiliation, the Court reasoned, allowing state taxation of nonmembers within the governing Tribe's reservation would not undermine tribal self-government, and thus the principle of tribal self-government could not serve to preempt the tax.[154] But, under an intertribal agreement providing for a pathway to membership for nonmember resident Indians, Indians who become members would gain the requisite political connection. They would have a say in tribal affairs, receive benefits from their tribe of residence, and for all intents and purposes be full members of the tribal polity as long as they reside there.

By actually possessing membership with their tribe of residence, these individuals would invoke the per se rule of *McClanahan*, which outright precludes states from taxing the income of an Indian who resides within their own reservation and derives that income wholly from reservation sources.[155] As a result, a court analyzing a challenge to a state income tax levied upon an Indian in this circumstance would not need to proceed to a balancing test like the Wisconsin Supreme Court did in *LaRock*.[156] Rather,

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151. For purposes of this discussion, I refer to the tribe with which an individual holds membership as their "home tribe," and the tribe within which they reside as their "tribe of residence."

152. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973).

153. *See* Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 161 (1980).

154. *See id.*

155. *McClanahan*, 411 U.S. at 165.

156. *See* LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 916 (Wis. 2001).

the court ought to simply stop after a preemption analysis, noting that the Supreme Court already conducted such an analysis in *McClanahan*, and concluded that a treaty between an Indian nation and the United States preempted the enforcement of state law against Indians within their own reservations.[157] Thus, by acquiring membership with their tribe of residence pursuant to an agreement like the one this Comment proposes, an Indian could effectively trigger a judicial end run around the balancing tests employed by courts to allow state taxation of nonmember resident Indians, and instead invoke *McClanahan*'s categorical prohibition. After all, as a member of their tribe of residence, such an Indian would no longer be a *nonmember* resident Indian but would instead be a *member* resident Indian.

### *B. Legal Obstacles*

Before an intertribal agreement establishing a pathway to membership for nonmember resident Indians could become effective, though, the tribes involved ought to examine whether common provisions of tribal law create obstacles to implementation. In particular, prohibitions on holding membership with multiple tribes and tribal membership restrictions based on blood quantum and lineal descendancy may create challenges to successful implementation of a pathway to membership for nonmember resident Indians.

Additionally, some obstacles may exist in federal law, especially where Congress has specifically set forth an individual tribe's membership scheme. Another federal obstacle may arise if, in the course of attempting to remove a barrier to implementation posed by tribal law, amendment of the tribal law requires approval by the Secretary of the Interior.

This Section explores these potential legal obstacles and offers solutions to each, first examining internal tribal law obstacles and then federal obstacles to implementation.

#### 1. Tribal Law Obstacles

One significant obstacle to implementing a pathway to membership for nonmember resident Indians is the prohibition on holding membership in

157. *See McClanahan*, 411 U.S. at 174–75.

multiple Indian tribes, commonly found in a given tribe's constitution.[158] These prohibitions are obstacles to implementation because the agreements this Comment proposes would allow individuals to remain members of their home tribe, while gaining new membership with their tribe of residence.[159] If the individual's home tribe had a prohibition on multiple membership, seeking new membership with their tribe of residence would likely violate their home tribe's membership law.

To illustrate the issue, take the Choctaw Nation of Oklahoma's constitutional prohibition on multiple membership as an example.[160] It provides, "[A]ny Choctaw by blood who has elected or shall hereafter elect to become a member of any other tribe or band of Indians may not be a member of this Nation."[161] Suppose the Choctaw Nation had entered into an agreement with another tribal nation, Tribe B, which provided that Choctaws who reside within Tribe B's reservation would be eligible for temporary membership with Tribe B as long as they reside within the reservation. A member of the Choctaw Nation of Oklahoma who resides within Tribe B's reservation may be eligible for membership with Tribe B as a matter of Tribe B's law, but actually obtaining that membership with Tribe B would render the individual in violation of the Choctaw Nation of Oklahoma's constitution.[162] Even if the agreement were part of the Choctaw Nation's statutory law, it would be invalidated by the clear language of the Nation's constitution.[163]

In contrast, other tribes have only a statutory prohibition on multiple membership, and not a constitutional one.[164] For example, the Navajo Nation has no written constitution and has enacted a prohibition against multiple membership through tribal statute.[165] Returning to the previous

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158. *See, e.g.*, CHOCTAW NATION OF OKLA. CONST. art. II, § 2 ("[A]ny Choctaw by blood who has elected or shall hereafter elect to become a member of any other tribe or band of Indians may not be a member of this Nation.").

159. *See supra* Section III.A.

160. *See, e.g.*, CHOCTAW NATION OF OKLA. CONST. art. II, § 2.

161. *Id.*

162. This example makes two assumptions. First, it assumes that the Constitution of the Choctaw Nation of Oklahoma is the highest source of law for the tribe, and second, that the Choctaw Nation's agreement with Tribe B did not amend the Choctaw Nation's Constitution.

163. *See* CHOCTAW NATION OF OKLA. CONST. art. IX, § 4 (requiring that legislation adopted by the Tribal Council not be inconsistent with the provisions of the constitution).

164. *See, e.g.*, NAVAJO NATION CODE ANN. tit. 1, § 703 (2014) ("No person, otherwise eligible for membership in the Navajo Nation, may enroll as a member of the Navajo Nation, who, at the same time, is on the roll of any other tribe of Indians.").

165. *Id.*

example, suppose that the same scenario exists, but with the Navajo Nation in place of the Choctaw Nation. Now, the prohibition on multiple membership is statutory, not constitutional. Assuming that the intertribal agreement is also equivalent to tribal statute, statutory interpretation principles, rather than constitutional preemption principles are the operative rules useful in determining whether an individual could validly acquire membership with Tribe B.[166]

In Navajo Nation Courts, several rules of construction guide analysis of conflicting statutes.[167] First, where statutes may conflict, courts must assess the policy behind the statutes and attempt to harmonize them.[168] Second, if the statutes cannot be harmonized, the older statute must yield to the newer statute.[169] Finally, Navajo courts must not construe statutes in a manner which will lead to absurd results or results inconsistent with underlying statutory purposes.[170] In this scenario, where the intertribal agreement may conflict with preexisting tribal statutes, the agreement providing a pathway to membership could be saved by the court's attempt to harmonize the two laws.[171]

Additionally, tribal blood quantum and lineal descendancy requirements for membership can pose similar issues to the prohibitions on multiple membership. For instance, the Mississippi Band of Choctaw Indians ("MBCI") constitutionally limits membership to those with a minimum of one-half Choctaw blood as listed on Indian Census Rolls from the Bureau of Indian Affairs.[172] If the MBCI wanted to enter into an intertribal agreement providing a path to membership for members of the Choctaw Nation of Oklahoma ("CNO"), this constitutional provision could pose a serious issue. This is because the CNO does not limit its membership eligibility based on blood quantum and only requires that one be a lineal descendant of an individual listed as Choctaw on the Dawes Rolls.[173] Thus, an individual who is a member of the CNO may lack the requisite blood

166. *See* Yazzie v. Nez, 15 Am. Tribal L. 227, 230 (Navajo 2018).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. It is important to note that because of each Tribe's inherent sovereignty, each individual Tribe may employ different rules for scenarios involving conflict of laws. While an agreement like the one proposed here could be saved in a Tribal jurisdiction where courts have a duty to harmonize, other jurisdictions may not have such rules, and thus courts may well hold such agreements as invalid.

172. MISS. BAND OF CHOCTAW INDIANS CONST. art. III, § 1.

173. CHOCTAW NATION OF OKLA. CONST. art. II, § 1.

quantum to qualify for membership under the MBCI Constitution. Furthermore, unless the intertribal agreement was treated as an amendment to the MBCI Constitution, the constitutional provision would likely invalidate the intertribal agreement as it would impermissibly expand membership eligibility beyond the constitutional limitations.

Because of these barriers found within local tribal law, tribal nations wishing to enter into these kinds of agreements would be well served by taking a few different steps. First, they ought to closely examine their existing laws to evaluate whether multiple membership prohibitions or blood quantum and lineal descendancy limitations would cause their tribal courts to order the outright invalidation of such an agreement under their constitution, or if conflicts with existing statutes would arise. Next, if existing tribal law impedes the implementation of the agreement, they ought to undertake their legal process for democratically amending the relevant tribal laws.[174]

### 2. Federal Obstacles

Though Indian tribes generally have the power to determine their own membership, Congress has exercised its plenary power over Indian affairs to fully set forth some tribal membership schemes,[175] which could pose an issue for tribes seeking to implement an intertribal agreement of the kind proposed herein.

For example, the Menominee Tribe of Wisconsin was terminated by Congress in 1954 and later restored in 1973.[176] In the legislation restoring the tribe, Congress opened membership only to those possessing at least one-quarter degree of Menominee Indian Blood.[177] The membership scheme set forth by Congress remains in place and is reflected in the tribe's constitution.[178] If the tribe attempted to implement an intertribal agreement providing a path to membership for members of another tribe living within the Menominee reservation, the agreement would likely violate both the

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174. See *infra* Section IV.D for a discussion on why amending these common tribal membership provisions would be beneficial for Indian Country broadly.

175. *See, e.g.*, Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973); *see also* United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978) ("[U]nless limited by treaty or statute, a tribe has the power to determine tribe membership.").

176. § 3(b), 87 Stat. at 770.

177. § 4(c), 87 Stat. at 771–72.

178. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. II, § 1.

tribe's own constitution and the Act of Congress restoring recognition to the Menominee Tribe.[179]

In a scenario like this one, even pursuing an amendment to the tribal constitution would not be sufficient to save the agreement from invalidation. This is because the Menominee Tribe is organized under the Indian Reorganization Act,[180] like most federally recognized tribes.[181] Under the Indian Reorganization Act, proposed amendments to tribal constitutions must be approved by the tribe's voters through an election called and authorized by the Secretary of the Interior.[182] If the amendment is approved by voters, it must also be approved by the Secretary.[183] Federal statute instructs the Secretary to approve of the amendment "within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws."[184] Because a proposed constitutional amendment expanding membership eligibility would exceed the limits set forth by Congress in the Menominee Restoration Act, the Secretary would likely be required to disapprove of the amendment, preventing it from taking effect.

These obstacles, congressionally defined membership schemes and potential secretarial disapproval, admittedly do not appear to be surmountable through tribal action alone and would instead require Congressional action to alter the federal law applicable to the tribes that wish to enter into these types of agreements. Accordingly, tribal nations that seek to enter into these agreements ought to ensure there are not relevant restrictions on membership that Congress has placed upon them through treaty or statute. Otherwise, they run the risk of Secretarial disapproval.

It is also important to note that while the Department of the Interior and Bureau of Indian Affairs tend to favor tribal law prohibitions on holding membership with more than one tribe, those preferences are not law. Federal officials may certainly urge tribes to adopt prohibitions on multiple

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179. This conclusion rests on the assumption that the regulation of an individual tribe's membership scheme does indeed fall within Congress's plenary power over Indian affairs and does not violate any other provision of the Federal Constitution. Such a discussion is well outside the scope of this Comment, and thus I proceed as if such regulations are constitutionally sound.

180. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. XIX.

181. *How Are Tribal Governments Organized?*, BUREAU OF INDIAN AFFS. (Aug. 19, 2017), https://www.bia.gov/faqs/how-are-Tribal-governments-organized [https://perma.cc/ZM5M-99JK].

182. 25 U.S.C. § 5123(a)(1).

183. *Id.* § 5123(a)(2).

184. *Id.* § 5123(d)(1).

membership,[185] but the only current official regulation regarding membership in multiple tribes does not prohibit multiple membership.[186] Accordingly, absent major changes to this regulation or intervening action by Congress on this issue, the federal preference for prohibiting multiple membership in tribal law should not be considered a major legal obstacle for most tribes; the legal obstacle is the tribal law itself.

### *C. Drawbacks*

The use of intertribal agreements to shield nonmember resident Indians from state taxes is not without potential policy drawbacks, aside from the costs of negotiation or subsequent litigation. Specifically, the use of these agreements has the potential to cause political controversy within tribes and provoke retaliation from state actors who may be antagonized by the potential loss of tax revenue.

#### 1. Internal Tribal Political Controversy

Perhaps the largest drawback for this proposal is the potential for political controversy within an implementing tribe. Changes to tribal membership schemes tend to be quite contentious within individual tribal polities, sometimes to the point of dooming larger efforts of constitutional drafting or reform.[187] Because this proposal entails providing a pathway to membership for nonmember resident Indians, thus altering existing tribal membership schemes, some amount of controversy ought to be expected.

Changes to membership schemes draw controversy for a number of reasons, some practical and some rooted in cultural considerations. For instance, some have argued that the widespread adoption of tribal gaming enterprises provides an incentive for tribes to maintain more exclusive membership criteria, in an effort to prevent tribal gaming revenue from being divided among a very large group of members.[188] This would be an example of a practical consideration a tribe may examine when amending

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185. *See supra* notes 58–60 and accompanying text.

186. *See supra* notes 84–88 and accompanying text.

187. Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 437–38 (2002).

188. Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 419–21 (1997).

their membership scheme, incentivizing a more exclusive membership policy. Thus, it may be politically contentious to propose a more inclusive membership policy in a tribe where the distribution of gaming revenue is a top concern.

On the other hand, a practical consideration incentivizing a more inclusive membership policy is the Indian Child Welfare Act ("ICWA").[189] Because the Act affords its protections only to children who are eligible for tribal membership, tribes are incentivized to adopt more inclusive membership policies which cover a greater number of children.[190] So, because of the influence of ICWA, in a tribe where there is strong political will to protect future generations, proposing a more exclusive membership policy may be quite controversial.

Additionally, cultural considerations underlie controversies surrounding changes to tribal membership policies. For example, in one tribe, membership eligibility extends to those whose names appeared on an original tribal census form, and any children born to tribal members residing within the reservation at the time of the child's birth.[191] Some members and tribal officials proposed to expand membership eligibility to all children born to tribal members, regardless of whether the member resided within the reservation at the time of the child's birth, citing concerns that the residency requirement may incidentally make the future grandchildren of some members ineligible.[192] This became a contentious point, with others advocating to keep the residency requirement, citing the cultural concern that removing it could lead to individuals with little actual connection to tribal life within the reservation dominating the tribe's political process.[193]

The proposal to implement intertribal agreements providing a path to membership for nonmember resident Indians could be challenged in any given tribal polity on either practical or cultural grounds. For example, current members may be concerned that allowing nonmember resident Indians to become temporary members will be a drain on already scarce tribal resources.[194] Or they may be concerned that it would dilute the tribe's unique culture to allow a pathway to membership for members of dissimilar

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189. 25 U.S.C. §§ 1901–1963.
190. Goldberg, *supra* note 187, at 451–52.
191. *Id.* at 442.
192. *Id.* at 443.
193. *Id.*
194. Rand & Light, *supra* note 188, at 421.

tribes.[195] These are fair criticisms, but they can certainly be mitigated through informed policy. Practical concerns could be mitigated by levying modest taxes on these new members, allowing them to contribute to the tribe's welfare rather than simply seeking a free ride to evade state taxes. Cultural concerns could be alleviated by including a provision within the initial intertribal agreement that in order for a nonmember resident Indian to become eligible for temporary membership, they must complete a cultural class from the tribe of residence, demonstrate some level of language proficiency, or otherwise provide the tribe with some kind of shibboleth to indicate their cultural competency.

### 2. Political Retaliation from State Actors

Tribal implementation of the solution presented in this Comment could also result in political retaliation from state government actors. The solution presented herein necessarily involves the loss of income tax revenue for the state government, which is not something that state governments have enjoyed in the past. For example, in the wake of the Supreme Court's decision recognizing the existence of the Muscogee (Creek) Nation's Reservation in *McGirt v. Oklahoma*,[196] the Oklahoma Tax Commission estimated that Oklahoma would lose over $70 million per year in income tax revenue.[197] This was because more tribal members would suddenly be within their tribe's reservation boundaries—which Oklahoma asserted had long been disestablished—and thus immune from several state taxes, including income taxes.[198] Oklahoma's Governor—himself a member of the Cherokee Nation—responded by engaging in a protracted political feud with tribes: he vetoed legislation supported by tribal leaders, sought to renegotiate gambling, tobacco, and car tag compacts to squeeze more

195. Goldberg, *supra* note 187, at 443.

196. 591 U.S. 894, 897–98 (2020).

197. Leeds & Beard, *supra* note 127, at 422.

198. *Id.* The Oklahoma Supreme Court later held that *McGirt* only reaffirmed reservation boundaries in the context of federal law regarding criminal jurisdiction in Indian Country. Stroble v. Okla. Tax Comm'n, 2025 OK 48, ¶¶ 7–12, 2025 WL 1805918, at *3–4. As a result, many tribal citizens living within their own reservation and deriving their income from reservation sources must still pay Oklahoma income taxes. *See id.* This is, in my view, an egregiously poor reading of *McGirt*, a direct contradiction of *McClanahan*, and is a decision worthy of extensive scholarly refutation. Such a task is outside the scope of this Comment. Despite the Oklahoma Supreme Court's dubious intervention, the situation nevertheless serves as a useful illustration of the kind of pushback tribes ought to expect from state government actors.

money from tribes, and outright refused to renew hunting and fishing compacts between Oklahoma and several tribes.[199] In implementing the solution proposed herein, tribal leaders ought to expect that state actors may take similar retaliatory steps due to the prospect of lost revenue.

### *D. Benefits*

The solution advanced in this Comment carries several benefits and goes a long way towards resolving the issues posed by the present framework, which were raised in Part II. The problems facing nonmember resident Indians could be resolved, as could the issues facing tribal governments. Additionally, while this solution would not fully restore tribal territorial sovereignty, it would be a step in that direction.

The present framework poses a number of problems for nonmember resident Indians, including complicating family taxes, confusing tribal litigants, displacing traditional kinship structures, and forcing tribal members into externally imposed membership structures.[200] In contrast, the solution advanced in this Comment places agency back in the hands of tribal actors. Generally, tribes would be free to seek agreements with any other tribe they choose. This would allow tribal governments themselves to resolve the practical problems of complicated family taxes and confusion among tribal members by seeking agreements with other relevant tribes. It would also allow for tribal governments to seek agreements with actual sister tribes, repairing some of the artificial divisions between tribes created by harmful federal policies. In short, this solution can function as a useful workaround to mitigate some of the harm presented by externally imposed formal membership schemes. Moreover, it would generally do so without congressional involvement, meaning that tribes would not need to run the risk of external political actors meddling in tribal affairs. We can do this one ourselves.

This solution would also be a step in the right direction regarding the issues faced by tribal governments under the current framework. Presently, state taxation of nonmember resident Indian income harms the ability of a tribal government to recruit competitive Native talent from outside of their

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199. *See* Sean Murphy, *Oklahoma Governor's Feud with Native American Tribes Continues over Revenue Agreements*, ASSOCIATED PRESS (July 21, 2023), https://apnews.com/article/oklahoma-governor-native-american-revenue-agreements-bf90f0248d17c0ff47e774c6b9b5234d [https://perma.cc/9ZDL-5C2H].

200. *See supra* Section II.A.

own reservation and effectively deprives tribes of a tax base through the economic pressures of double taxation.[201] Under the proposed solution, these issues would essentially be solved, at least between the tribes which are parties to such an agreement. Once two tribes enter into an agreement like the one proposed, talent can flow freely between the two unimpeded and the double taxation issue is solved as to each tribe's members. Granted, unless all tribes enter into a universal agreement, this solution will not completely solve these issues. At the very least though, allowing tribes to pursue government-to-government solutions is a step in the right direction.

Finally, this solution repairs some semblance of tribal territorial sovereignty by including more individuals on a tribe's reservation under the umbrella of tribal membership. In a legal landscape where the Supreme Court seems more inclined to view tribal sovereignty through a membership lens than a geographic lens, perhaps one solution to increasing tribal sovereignty in the aggregate is to allow for more people to be included in a tribe's membership. That is precisely what this solution does.

## IV. CONCLUSION

The gradual creeping of state power into Indian Country has had quite poor results for Indian Country governance.[202] These difficulties can be seen clearly in the context of state taxation of nonmember resident Indian income. While the income of an Indian who lives and works within their own tribe's reservation is per se exempted from state income tax, nonmember resident Indians remain subject to state income taxes. This arrangement creates practical and cultural problems for Indian families, harms tribal governmental efforts in economic development, and contributes to the further erosion of tribal territorial sovereignty.

Fortunately, tribes already possess the power to solve this problem. Tribes ought to enter into intertribal membership reciprocity agreements which offer a pathway to temporary membership for the members of one tribe living within the reservation of the other. This would result in nonmember resident Indians being considered actual members of their tribe of residence, thus invoking the per se exemption from state income taxes.

Before tribes can put such agreements into practice though, they must remove the major legal barrier to implementation caused by prohibitions on

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201. *See supra* Section II.B.
202. *See* Dussias, *supra* note 2, at 94.

holding membership with multiple tribes, commonly found in tribal law. Tribes should also ensure that Congress has not separately defined the tribe's membership scheme, as entering into an agreement with contrary terms to a congressionally defined membership scheme would be legally dubious at best.

These agreements would certainly come with some drawbacks, such as internal political controversy and retaliatory action from state actors motivated by the loss of tax revenue. However, these drawbacks are far outweighed by the benefits, which include reducing inconvenience for nonmember resident Indians, reducing reliance on externally imposed systems of membership, and enhancing the abilities of tribal governments to engage in economic development projects. Moreover, these agreements would include more individuals within a tribe's membership, allowing it to exercise greater sovereign power within its territory. Enacting intertribal agreements to let the nonmember resident Indians become tribal members is a viable solution to the taxation problems faced by nonmember resident Indians and represents a strong step towards reclaiming eroded tribal sovereignty.