

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: OKLAHOMA TAX COMMISSION, Petitioner v.  
CHICKASAW NATION

CASE NO: No. 94-771

PLACE: Washington, D.C.

DATE: Monday, April 24, 1995

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   OKLAHOMA TAX COMMISSION,                   :

4                   Petitioner                   :

5           v.                                   :   No. 94-771

6   CHICKASAW NATION                         :

7   - - - - -X

8   Washington, D.C.

9   Monday, April 24, 1995

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   1:00 p.m.

13   APPEARANCES:

14   CHARLES ROTHFELD, ESQ., Washington, D.C.; on behalf of  
15                   the Petitioner.

16   DENNIS W. ARROW, ESQ., Oklahoma City, Oklahoma; on behalf  
17                   of the Respondent.

18   PAUL A. ENGELMAYER, ESQ., Assistant to the Solicitor  
19                   General, Department of Justice, Washington, D.C.; on  
20                   behalf of the United States, as amicus curiae,  
21                   supporting the Respondent.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 94-777 -- 771, pardon me, the Oklahoma Tax  
5 Commission v. Chickasaw Nation.

6 Mr. Rothfeld.

7 ORAL ARGUMENT OF CHARLES ROTHFELD

8 ON BEHALF OF THE PETITIONER

9 MR. ROTHFELD: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 This case concerns two Oklahoma taxes, an excise  
12 tax on motor fuel and the State income tax, that the court  
13 of appeals held could not be applied to an Indian tribe or  
14 to certain of its members. Now, I'll talk about those  
15 taxes in turn, starting with the one on motor fuel.

16 In holding the tax invalid, the court of appeals  
17 applied what it thought to be a per se rule that precludes  
18 the imposition of any State tax whose legal incidence  
19 falls upon an Indian tribe unless that tax has been  
20 expressly authorized by Congress.

21 Now, because the Court found as a matter of  
22 State law that the legal incidence of the tax falls upon  
23 the retailer of the fuel, and because the retailers in  
24 this case are tribally owned convenience stores located on  
25 Federal trust land in Indian country, the court of appeals

1 applied its per se rule to strike down the tax.

2 We think there are three things wrong with this  
3 decision. First, Congress has expressly authorized this  
4 tax. Second, the court of appeals, even apart from the  
5 congressional action, should not have applied a per se  
6 rule in the circumstances of this case, and third, the  
7 court of appeals should not have found the legal incidence  
8 of the tax to fall upon the retailer of the motor fuel.

9 First, Congress has, by statute, expressly  
10 authorized the very tax that the State has imposed in this  
11 case. The Hayden-Cartwright Act provides in so many words  
12 that States may impose taxes on motor fuel sold on United  
13 States military or other reservations.

14 QUESTION: Was this argument raised before the  
15 court of appeals, Mr. Rothfeld?

16 MR. ROTHFELD: It was not, Your Honor, but I  
17 think that should not preclude its consideration here.  
18 This is not a new claim or a new issue that's being  
19 injected into the case at this point. This is simply  
20 additional authority for what has been the Tax  
21 Commission's consistent claim, and that claim is that the  
22 tax here is not preempted.

23 I think to consider that sort of preemption  
24 claim the Court typically in Indian preemption cases looks  
25 upon the entire body of Federal legislation and certainly

1 the Hayden-Cartwright Act is legislation that deals  
2 specifically with the question of whether Congress  
3 intended a tax of this kind to be preempted.

4 QUESTION: Mr. Rothfeld, most of these gas  
5 stations, I understand it, are in Indian territory but not  
6 on the reservation. I mean, the most this statute would  
7 show is that the reservation was -- is excluded.

8 MR. ROTHFELD: Well, I think, Your Honor, there  
9 was no doubt about the meaning of the word "reservation"  
10 at the time the act was written. This Court --

11 QUESTION: It means Indian territory?

12 MR. ROTHFELD: Well, I think that this Court had  
13 said some years before in United States v. Celestine that  
14 the term "reservation" is used in the land law to refer to  
15 any body of land, large or small, that has been reserved  
16 from sale by Congress for any purpose, and that --

17 QUESTION: In the land law, but this is not land  
18 law. When you say, United States military or other  
19 reservation, I hardly think that that refers to Indian  
20 territory, apart from Indian reservations.

21 MR. ROTHFELD: Well, these --

22 QUESTION: At least, it's highly questionable  
23 that it does. That's even assuming that it covers Indian  
24 reservations at all.

25 MR. ROTHFELD: Well, I think that it clearly

1 does cover Indian reservations, Your Honor. As I say, the  
2 Court had defined the term "reservation" to include  
3 specifically Indian reservations.

4 As to whether these particular lands are covered  
5 by that, these are Federal trust lands, clearly lands that  
6 have been reserved from sale by Congress, and as the Court  
7 said in Celestine, the general use of the term is to refer  
8 to lands that have been reserved for any purpose.

9 QUESTION: Well, Mr. Rothfeld, now, this Hayden-  
10 Cartwright Act point was not raised below, or dealt with.

11 MR. ROTHFELD: That is true, Justice O'Connor.

12 QUESTION: It would require us to interpret the  
13 meaning of "reservation" within that act I guess for the  
14 first time.

15 MR. ROTHFELD: That's true. The Court has not  
16 yet expressed an opinion on it.

17 QUESTION: And there was nothing express in the  
18 petition for certiorari here that referred us to the  
19 Hayden-Cartwright Act.

20 MR. ROTHFELD: Again, that is true, Your Honor,  
21 but I think that the question presented in the petition is  
22 whether or not this Oklahoma law is preempted, and clearly  
23 to answer that question requires a consideration of the  
24 body of congressional legislation.

25 I guess there is some parallel here in the

1 Independent Insurance Agents case that the Court relied  
2 upon earlier this term in Lebron, and the issue is whether  
3 the statute had been repealed, and that point was not  
4 argued even in the briefs on the merits or at oral  
5 argument, and nevertheless the Court found it was  
6 appropriate to look to whether --

7 QUESTION: Your first question presented, which  
8 I take it the Hayden-Cartwright Act would have to come  
9 under, or -- it's not at all. It says whether principles  
10 of preemption or Indian sovereignty preclude a State from  
11 imposing a tax on sales of motor fuel.

12 Now, it doesn't seem to me that that really  
13 necessarily includes the idea that there's an applicable  
14 statute.

15 MR. ROTHFELD: Well, I think, Your Honor, that's  
16 a highfalutin way of asking whether or not the statute --  
17 the State statute is preempted, and again it's difficult  
18 to resolve a question of preemption, and particularly a  
19 question of Indian preemption which the Court has looked  
20 at the entire body of Federal legislation to see if there  
21 is an extant Federal policy that bears on the question  
22 without considering whether there is a Federal statute in  
23 the area, and this Federal statute clearly expresses the  
24 intent of Congress as to the particular point that's at  
25 issue here, so I --



1           QUESTION: Mr. Rothfeld, even if you're right  
2           that the Court could entertain this statutory argument,  
3           isn't it extraordinary for this Court to be a court of  
4           first view? Very often, the Court won't even address a  
5           question clearly raised by a petition, it will wait for a  
6           circuit split, but you're asking this Court to jump in and  
7           interpret this statute before anyone else has, and that's  
8           quite unusual.

9           MR. ROTHFELD: Well, I think, Justice Ginsburg,  
10          again, we are presenting the question of whether or not  
11          this State law is preempted, and to answer that question  
12          we think that it would be appropriate for the Court to  
13          look to the entire body of Federal legislation to  
14          determine whether or not Congress has expressed a policy  
15          that bears on the particular tax.

16          QUESTION: It might also be appropriate for the  
17          Court to say, we leave that question to one side because  
18          it has not aired before the court of appeals.

19          MR. ROTHFELD: Well, I -- certainly that's  
20          within the Court's discretion, Your Honor. I can't  
21          disagree with that, but I think that in this setting, in  
22          which the question is whether Federal law displaces the  
23          State tax, looking to the body of Federal legislation is  
24          an appropriate way of resolving that point.

25          And I think that it is quite clear that if the

1 Court were to look at the Hayden-Cartwright Act, it would  
2 see that there is a Federal policy that deals specifically  
3 with the question in this case, and specifically provides  
4 that gasoline taxes and other motor fuel taxes may be  
5 collected by States on reservations, and again, as I  
6 suggested to Justice Scalia, there was no doubt about the  
7 meaning of the word "reservation" at the time the act was  
8 written.

9 QUESTION: Your references to doubt I guess are  
10 to the departmental view at the time. We've never  
11 construed it to cover an Indian reservation. Have lower  
12 courts so construed it?

13 MR. ROTHFELD: So far as I am aware, Your Honor,  
14 there is one lower court decision on this point which has  
15 construed it. It's a decision of the South Dakota supreme  
16 court which appears in 273 Northwest Reporter involving --  
17 it's In Re Motor Fuel Liability --

18 QUESTION: Have you cited it?

19 MR. ROTHFELD: It was not cited, Your Honor. I  
20 think --

21 QUESTION: The respondents say that we should  
22 dismiss this as improvidently granted. Do you know the  
23 status of the legislation, and is what you just were  
24 talking about an added reason for doing that?

25 MR. ROTHFELD: Well, I think that the

1 . legislation that the tribe refers to in its brief is  
2 essentially dead for this term of the Oklahoma  
3 legislature, so there is no prospect that the case be  
4 mooted, and I think this is clearly -- even if the Court  
5 were to conclude that this was not a ground that it can  
6 base its decision upon, this is not a ground for  
7 dismissing the case as improvidently granted.

8           The Hayden-Cartwright Act was specifically noted  
9 in the opinion of the court of appeals, which said that it  
10 was not going to reach it, so the Court was certainly  
11 aware of the existence of the act at the time the petition  
12 was presented, and I should, I suppose, move on to the  
13 question, perhaps the more fundamental question, entirely  
14 apart from the act, of whether the court of appeals was  
15 correct in saying that there is a per se rule that  
16 precludes State taxation of the kind of this case.

17           We think that that clearly was wrong, and  
18 explaining why that's so, it's useful to start with three  
19 points that are not disputed between the parties in this  
20 case.

21           I think, first, that both the United States and  
22 the tribe recognize that the balance of State and tribal  
23 interests, which ordinarily is of crucial importance in  
24 resolving the question of whether a State may assert its  
25 jurisdiction on the reservation, they acknowledge that

1 that balance decisively favors the State in this case.

2 They also acknowledge that their rule rests upon  
3 a -- economically meaningless legal formulas, and the  
4 formulas are of legal incidence that has no connection to  
5 the economic realities in this case, and --

6 QUESTION: Well, but it's one which I gather  
7 your client has embodied in a statute.

8 MR. ROTHFELD: Well, I think that there is --

9 QUESTION: Isn't that so? I mean, under  
10 Oklahoma law the taxpayer here is deemed to be in this  
11 case the retailer, and hence the tribe.

12 MR. ROTHFELD: Well, that was the court of  
13 appeals conclusion, Your Honor. We disagree with that as  
14 a matter of State law, but we think that the question of  
15 where the legal incidence falls has no economic bearing,  
16 no bearing as a matter of economic reality. I think that  
17 the tribe acknowledges --

18 QUESTION: Well, don't we draw -- I mean, not to  
19 put too fine a point on it, but didn't Oklahoma win the  
20 last case by a little line-drawing of exactly that sort?  
21 Maybe I should ask whether you would like to win this one,  
22 or for us to go back and adopt the dissent in the Oklahoma  
23 Tax Commission case of a couple of weeks ago.

24 MR. ROTHFELD: Well, I think it would be the --

25 QUESTION: You did very well with formal line-

1 drawing then.

2 MR. ROTHFELD: I think it would be the  
3 Commission's preference to win both cases, Your Honor.

4 QUESTION: Pardon me?

5 MR. ROTHFELD: I think I can confidently state  
6 that it's the Commission's preference to win both of those  
7 cases, and I --

8 QUESTION: I guess that might be its position.

9 MR. ROTHFELD: And I think that they are  
10 entirely consistent. As I understand the Court's position  
11 in Jefferson Lines, it focused on an actual difference  
12 between a sales tax and a gross receipts tax.

13 I mean, the Court pointed out that a sales tax  
14 can be collected only in one State, and there, therefore,  
15 is no possibility of --

16 QUESTION: It did not focus on economic effects.  
17 I mean, that was one reason why the dissent and the  
18 majority parted ways.

19 MR. ROTHFELD: No, that is certainly true, but  
20 there was a real difference, a real world difference  
21 between the two types of taxes that were at issue in that  
22 case. There is no real world difference between the tax  
23 that Oklahoma is applying here as interpreted by the court  
24 of appeals and the tax --

25 QUESTION: Is there any -- I mean, you're

1 talking economic realities. Is there any such thing as a  
2 tax upon a retailer, or a tax upon a business? Any tax  
3 upon a business is going to be passed downward to the  
4 maximum extent possible.

5 MR. ROTHFELD: Well, I think that that's quite  
6 right, and that is a --

7 QUESTION: So don't we have to determine it on  
8 formalistic bases? It's going to end up, the purchaser's  
9 going to pay for it one way or another. You're telling me  
10 there's no such thing as a tax on a retailer, then.

11 MR. ROTHFELD: No. I'm suggesting, Your Honor,  
12 that what the Court should do is determine these cases  
13 without reference to the formality at all, to the legal  
14 formulas, and simply look to the effect of the State law  
15 on the tribe.

16 QUESTION: I'm saying if you do that there's no  
17 such thing as a tax on a retailer, because a retailer will  
18 always pass the tax downward to the maximum extent  
19 possible. Unless, as a matter of form, he is required to  
20 collect penny for penny from the consumer, there's no such  
21 thing. He's going to pass it down all the time.

22 MR. ROTHFELD: No, that is absolutely right, and  
23 we therefore think that in determining whether a tax of  
24 this kind is valid, the Court should look to whether or  
25 not it has an impermissible effect on the tribe.

1           QUESTION: But that's not what our previous  
2 cases have done, is it? I mean, they have stuck to what  
3 you regard as a formalistic evaluation.

4           MR. ROTHFELD: Well, I think that it's clear  
5 from the body of the Court's cases that it has not  
6 regarded legal instances as the be-all and end-all of the  
7 inquiry that is necessarily decisive.

8           In the Sac and Fox and the Colville cases, for  
9 example, the State imposed taxes, automobile and excise  
10 taxes and registration fees, on members of the reservation  
11 living on the reservation when there was the tribe living  
12 on the reservation who garaged their cars on the  
13 reservation, and the Court said that those taxes might  
14 well be valid if they were apportioned to deal with use of  
15 the car outside of Indian country.

16           The Court didn't say that the legal incidence of  
17 the tax falling upon the member of the tribe was  
18 dispositive in those cases.

19           In the Moe case, the Court also said that its  
20 decision striking down State taxes did not deal with the  
21 issue in which the receipts that are subject to tax are  
22 attributable to nonreservation sales to nonmembers, and  
23 the Court, I think generally, as in the Sac and Fox case,  
24 has referred to the rule in State imposition of taxes on  
25 Indians as a presumption. Such a presumption presumably

1 may be overcome, so I don't think it's the case that legal  
2 incidence is necessarily decisive.

3           What the Court has done is on a number of  
4 occasions strike down State taxes that fell on what the  
5 Court has described as value generated on the reservation  
6 by the tribe. Those are taxes like the tax on the income  
7 of a tribal member reservation resident, at issue in  
8 McClanahan, cases like the tax on the sale by the tribe on  
9 the reservation to members of the tribe of goods that were  
10 used on the reservation that were at issue in Moe and  
11 Colville.

12           QUESTION: If we reject your argument, I take it  
13 that Oklahoma could easily revise its taxing scheme in  
14 order to collect these taxes. Just make it a consumer-  
15 based tax.

16           MR. ROTHFELD: That's true. We think that it is  
17 clear that Oklahoma, under Moe and Colville and Chemehuevi  
18 and the other cases of the Court acknowledging the State's  
19 power to impose such a tax, the State could modify the tax  
20 legislation here.

21           The Court -- the tribe acknowledges in its brief  
22 that all the State need do is insert somewhere in the text  
23 of the tax statute the legislative intent that the burden  
24 of the tax be borne by the consumer, that that's  
25 sufficient to validate the tax.



1           QUESTION: So the cost of adhering to our  
2 precedents is really rather slight. The State can simply  
3 conform to the rules we've set forth and to the rules that  
4 all of the other States have been following in evaluating  
5 the lawfulness of their taxing schemes.

6           MR. ROTHFELD: Let me respond in two parts to  
7 that, Justice Kennedy. I think first of all the Court  
8 would not be adhering to its precedent. There certainly  
9 is no -- I mean, in the sense that the Court does not have  
10 to depart from any of its decisions to rule for the State  
11 here. There is no case in which the Court has struck down  
12 a tax that otherwise would be valid, as this one clearly  
13 would be, simply because the legal incidence was said to  
14 fall upon the wrong person.

15           But there are substantial costs that are  
16 associated with a tax -- with a rule that judges the  
17 validity of a tax based upon this kind of formalism. It  
18 serves principally this rule, as what the Court described  
19 in Complete Auto as a trap for the unwary legislative  
20 draftsman who is not likely to be focusing on this  
21 program, certainly can't anticipate that years down the  
22 road a tribe is going to become a retailer or a wholesaler  
23 of fuel.

24           QUESTION: Well, surely the legislators of the  
25 State of Oklahoma and other States with substantial Indian

1 reservations are well aware of our taxing jurisprudence,  
2 and it would be quite astounding for us to presume to the  
3 contrary.

4 MR. ROTHFELD: Well, I think that this case  
5 actually is an illustration of the problem, that the  
6 Oklahoma legislature I think had been laboring under the  
7 assumption that the legal incidence of this tax fell upon  
8 the consumer.

9 The State has consistently taken the position  
10 throughout this litigation that it does not fall upon the  
11 retailer, and one problem with this kind of formalistic  
12 rule is that it will prompt people to search for statutory  
13 ambiguities to devise tax exemptions for themselves.

14 That --

15 QUESTION: But you're -- so you say perhaps the  
16 Tenth Circuit was wrong here in deciding the question of  
17 Oklahoma law as to where the incidence of the tax fell.  
18 Is this the legislation that's dead for this session in  
19 the Oklahoma legislature, to change the incidence of the  
20 tax?

21 MR. ROTHFELD: The legislation that is dead  
22 would have declared the intent of the Oklahoma legislature  
23 that the tax fall upon the consumer.

24 QUESTION: You claim this is a question of  
25 Federal law? Where the Oklahoma legal incidence of the

1 tax is a question of Federal law, or it's a question of --

2 MR. ROTHFELD: No, no, we don't suggest that  
3 it's a question of Federal law. Certainly in the first  
4 instance it's a matter of State law, although if the rule  
5 is, and we say it should not be, but if the rule is that  
6 the legal incidence determines the availability of an  
7 immunity from State taxation as a matter of Federal law,  
8 if there is a Federal rule of preemption that turns upon  
9 the existence of legal incidence, then clearly the Federal  
10 courts are -- must be able to determine where that  
11 incidence falls.

12 QUESTION: Why?

13 MR. ROTHFELD: It would otherwise be impossible  
14 to resolve --

15 QUESTION: I mean, they have to be able to  
16 determine what the Oklahoma law is.

17 MR. ROTHFELD: Well, that's right. We don't  
18 suggest that it is a matter of Federal law where the legal  
19 incidence lies as a matter -- as to the intent of the  
20 Oklahoma legislature, and the Court has said that the  
21 intent of the legislature is determinative in determining  
22 where the legal incidence of a tax falls.

23 QUESTION: Why should we not just accept the  
24 finding of the court of appeals on that question of State  
25 law, as we usually do?

1           MR. ROTHFELD: Well, we think the court of  
2 appeals is clearly wrong, and the court has in other  
3 cases, as in Chemehuevi, a very similar situation, has  
4 said that the court of appeals got it wrong and has  
5 determined the legal incidence for itself.

6           I mean, I think that that -- the Chief Justice  
7 referred to the cases of the Court accepting legal  
8 incidence as dispositive. I think that what the cases of  
9 the Court have done have found legal incidence as an easy  
10 way of disposing of the case, and as in Chemehuevi, where  
11 the court of appeals got it wrong, the court of appeals  
12 has stepped in, and we think that it is clear here that  
13 the court of appeals did get it wrong.

14           As we read the tax statute, there are two  
15 provisions that bear specifically on the question of  
16 whether the consumer or the retailer bears the legal  
17 incidence of the tax. We think both of those indicate  
18 that it clearly is the consumer who bears the legal  
19 incidence, and I think that if the Court chooses to move  
20 in that direction and not reach the more fundamental  
21 question of whether or not there is such a per se rule,  
22 they can easily dispose of the case by finding that the  
23 legal incidence does fall upon the consumer.

24           Those two provisions I should know quickly. One  
25 of them is a definitional provision of the statute which

1 refers to collection of taxes by both retailers and  
2 distributors, making clear that both of them were intended  
3 by the legislature to collect the tax from someone further  
4 down the distribution chain.

5 That is confirmed by another provision of the  
6 statute, an exemption provision, which provides that  
7 purchasers -- that's the ultimate consumers -- who buy  
8 gasoline for agricultural uses are relieved of the  
9 obligation of paying the tax, again indicating that it is  
10 ordinarily the purchaser who is intended to pay the tax.

11 So I think that is an easy ground on which the  
12 Court can dispose of this case, but I should return to the  
13 question of whether or not --

14 QUESTION: Are you saying then that if this  
15 pending law, or this law that is now dead, had passed,  
16 there'd be no difference at all in substance?

17 MR. ROTHFELD: That is absolutely right, Justice  
18 Ginsburg, and I think that is the most powerful argument  
19 for why such a formalistic rule makes no sense.

20 The Court has said that legal incidence falls  
21 upon the consumer where the legislator intends for the tax  
22 to be passed on to the consumer. That is so even though  
23 the tax doesn't -- even though the State law doesn't  
24 expressly require the pass-through. That was the holding  
25 in Chemehuevi, and that is true even when there is no

1 sanction imposed upon the retailer who fails to pass the  
2 tax on. That was the holding in the Mississippi Tax  
3 Commission case and First Agricultural Bank cases.

4 So all that the legislature need do to change  
5 the legislative incidence of this tax is declare somewhere  
6 in the text of the statute its intent that the burden of  
7 the tax be borne by the ultimate consumer, and as Justice  
8 Scalia noted before, that makes no difference in reality.  
9 It does not affect the tax collection procedure at all.  
10 It does not collect the obligation upon the retailer in  
11 this case.

12 To have the validity of the State tax law turn  
13 upon that sort of formalism I think makes no sense. The  
14 Court has rejected that approach in Complete Auto and in  
15 various other settings, and there is no reason why that  
16 kind of dinosaur of a rule, having become extinct  
17 everywhere else, should continue lumbering along here.

18 QUESTION: I'm not sure what I understand you  
19 want us to look to. You don't want us to look to whom the  
20 legislature intended to saddle with the tax. What do you  
21 want us to look to?

22 MR. ROTHFELD: I think, Justice Scalia, that --

23 QUESTION: Who actually ends up paying the tax?

24 MR. ROTHFELD: I think the Court should look to  
25 the same considerations that it looks to outside of the

1 tax context, where it looks to what the Court has called  
2 the particularized inquiry into the State, the tribal, and  
3 the Federal interest.

4 If the tax is one that imposes an impermissible  
5 burden on the tribe by somehow threatening to infringe on  
6 tribal sovereignty, or the mechanisms of tribal  
7 Government, as in the cases in which the Court has  
8 invalidated State taxes, the tax should be invalid, so for  
9 example --

10 QUESTION: I thought you were arguing to us that  
11 it was unrealistic to view the incidence of the tax as  
12 being on one party or the other, and now you're saying it  
13 doesn't matter who the incidence of the tax is on, you  
14 should just be -- just look at the scheme and see if it's  
15 hurting the tribes too much.

16 MR. ROTHFELD: I think it doesn't matter who the  
17 legal incidence of the tax is on. I think it matters what  
18 the effect of the tax is upon the tribe, upon the  
19 mechanisms of tribal Government.

20 QUESTION: Fine. If it's the effect, isn't it  
21 going to be adverse to the tribe no matter who you put it  
22 on?

23 MR. ROTHFELD: But the Court has already held in  
24 Moe and Colville and --

25 QUESTION: Right, so I mean, if you really want

1 us to look to the economic effect, I take it if there are  
2 only a few gas stations owned by the tribe, and prices are  
3 competitive, and there are a lot of gas stations elsewhere  
4 in the State, that whether you say the consumer is paying  
5 it or whether you say the distributor is paying it, or  
6 whether you say somebody else is paying it, in the absence  
7 of the tax, the tribe could charge more money, which  
8 they'd keep, and in the presence of the tax, they'll have  
9 to give that extra money to the Government.

10 MR. ROTHFELD: That is true, Justice Breyer, but  
11 the Court has confronted that balance repeatedly in cases  
12 in which the legal incidence fell upon the ultimate  
13 purchaser and has found that the tribal interests in those  
14 circumstances do not outweigh the State's interest, and  
15 the --

16 QUESTION: But the point is, if you look at the  
17 formality of it, the formality isn't on the tribe, is it,  
18 or is not?

19 MR. ROTHFELD: Well, the court of appeals held  
20 that it is.. We think --

21 QUESTION: Yes, all right. The formality is you  
22 don't win on that one, and if you look at the reality, you  
23 don't win on that one, either.

24 MR. ROTHFELD: No, on the contrary, I think that  
25 we do win on the reality, because the Court -- the Court



1 has judged taxes in which the legal incidence falls upon  
2 the purchaser, the taxes in Moe and in Chemehuevi, and in  
3 Colville, and in, most recently in Milhelm Attea.

4 The Court has viewed those in terms of the  
5 economic reality. The Court has said --

6 QUESTION: Well, isn't the economic -- that's my  
7 question. If the price is \$1 a gallon and it's set by  
8 competition all over the State, and 20 cents of that  
9 dollar is going to the State government, I guess the tribe  
10 also can charge \$1 a gallon, because that's the  
11 competitive price, and if they don't have to pay 20 cents  
12 out of that dollar to the State, they can keep it, and so  
13 those are the economic circumstances. No matter who you  
14 say this tax is being borne by, the reality is it would be  
15 borne by the tribe.

16 MR. ROTHFELD: If I may, Your Honor, I think the  
17 rule the Court has stated is that a State law is not  
18 invalid simply because it has an adverse economic impact  
19 on the tribe.

20 The Court has said there must be a  
21 particularized inquiry into the State tribal interests,  
22 and the State has conducted that inquiry, and although  
23 what you say is true as a matter of economic reality, the  
24 Court said quite clearly in Colville that there is no  
25 right on the part of the tribe to collect -- to make sales

1 that it would not otherwise have made simply because it is  
2 marketing a tax --

3 QUESTION: We haven't said that, you've said it.

4 MR. ROTHFELD: No, no --

5 QUESTION: We asked you how you determined who  
6 bears the incidence of the tax. You reject formalism.  
7 You reject who the State says must pay it. You ask us to  
8 simply decide who gets hurt by it. You're the one that's  
9 proposing this, not our prior decisions.

10 If you look at who ends up -- out of whose  
11 pocket it ultimately comes, it ultimately comes out of the  
12 tribe's pocket.

13 MR. ROTHFELD: But I think the test is not as  
14 the Court has said it. The test is not who is hurt by the  
15 tax or whose pocket the tax comes out of. The test is  
16 whether the State law infringes upon the mechanisms of  
17 tribal Government, undermines the mechanisms of tribal  
18 Government in a fundamental way.

19 QUESTION: That's quite a different test than  
20 saying we ought to look at the economic impact, which I  
21 thought you were saying a moment ago.

22 MR. ROTHFELD: Maybe I have misspoken. I don't  
23 suggest that the tax falls upon whoever bears the economic  
24 impact. I'm saying that in judging the constitutionality,  
25 the validity of a State tax law as it bears on Indian

1 tribes, the Court must look to the effect of that tax on  
2 the tribal interests that the Court has said are  
3 significant.

4 QUESTION: Well, in Chemehuevi, which was maybe  
5 10 years ago -- I just glanced at it again -- there we  
6 reversed the Ninth Circuit because we thought it had been  
7 wrong in deciding where the legal incidence of the tax  
8 was, so at least we thought at that time, 10 years ago,  
9 that that was the test.

10 MR. ROTHFELD: Well, again, I think that the  
11 Court has found it an easy and noncontroversial way to  
12 dispose of these cases on the ground that the legal  
13 incidence doesn't fall --

14 QUESTION: I think you may do us less than  
15 justice.

16 (Laughter.)

17 MR. ROTHFELD: Well, I don't presume to tell the  
18 Court what it was thinking when it resolved these cases,  
19 Your Honor, but as I said, it is I think clear from the  
20 tenor of the Court's opinion as in Sac and Fox and  
21 Colville, where it did not dispose of challenges on the  
22 ground that these taxes have a legal incidence that falls  
23 upon members of the tribe, that's the end of the matter.

24 The Court said, in fact, those taxes might well  
25 be permissible if they were properly apportioned, even

1     though the legal incidence fell upon the member of the  
2     tribe on the reservation, and I think that what the Court  
3     has looked to throughout this body of cases is whether or  
4     not the total -- the tax, as applied, has an impermissible  
5     effect on the mechanisms of tribal Government.

6             In the cases in which the legal incidence was  
7     found to fall upon someone other than the tribe, the Court  
8     has looked to whether or not tribal operations would be  
9     displaced, whether or not it was real tribal interest that  
10    was at stake, and that is clearly not the case here where  
11    all the tribe is doing is importing onto the reservation  
12    goods manufactured elsewhere that are going to be marketed  
13    for resale largely to non-Indians for use outside of  
14    Indian country.

15            I reserve the balance of my time, if the Court  
16    has no questions.

17            QUESTION: Very well, Mr. Rothfeld.

18            Mr. Arrow.

19            ORAL ARGUMENT OF DENNIS W. ARROW

20            ON BEHALF OF THE RESPONDENT

21            MR. ARROW: Mr. Chief Justice, and may it please  
22    the Court:

23            As counsel for the Tax Commission has made  
24    clear, this case involves two questions. With the Court's  
25    permission, we would first turn to the fuel tax question,

1 reserving the treaty question with relation to the income  
2 tax until later in this argument. With respect to the  
3 fuel tax, we would like to make four points before this  
4 Court.

5 First, the court of appeals decision below is  
6 entitled to deference with regard to its interpretation of  
7 State law. Counsel for the petitioner has characterized  
8 this as a State law question. We on the respondent's  
9 side, representing the Chickasaw Nation, understand that  
10 this is primarily a State law question. We agree with  
11 that proposition.

12 Obviously, as the Chief Justice has just pointed  
13 out, there is a Federal component to the extent that this  
14 Court in *Chemehuevi* established foursquare the proposition  
15 that the absence of an express pass-through provision in a  
16 State tax does not mean, *ipso facto* and *a fortiori*, that  
17 the resultant tax is not a consumer tax. That is the  
18 Federal component of the rule.

19 Beyond that, this Court has treated those  
20 questions as State law questions, and in cases too  
21 numerous to cite, but one which we have mentioned in our  
22 brief is *Haring v. Prosise*, this Court has indicated that  
23 it is this Court's practice to accept conclusions of  
24 courts of appeals with respect to questions of State law  
25 even if independent examination might have justified a

1 different conclusion. That's the first point that we  
2 would like to make with respect to the fuel tax.

3 This takes us to the second point, which is that  
4 independent examination of the court of appeals decision  
5 by this Court in this case on the State law question with  
6 reference to the incidence of the fuel tax would not  
7 justify a different conclusion with respect to the court  
8 of appeals conclusion that the incidence of the fuel tax  
9 is, in fact, on retailers, in this case the Chickasaw  
10 Nation, the retail Indian tribe.

11 QUESTION: Is there any difference that the  
12 consumer can see between what would have been if this law  
13 had passed and what is? Now, the formal incidence of the  
14 tax is on the retailer. If it had been placed on the  
15 consumer, would there be any difference in what the  
16 consumer would see at the pump, say?

17 MR. ARROW: Justice Ginsburg, I would say in  
18 answer to that that while it might be theoretically  
19 possible that a retailer might choose to "absorb" part of  
20 the tax and therefore there might be some theoretical  
21 difference, our inclination is the same as the  
22 implications of Justice Scalia's question, which is that  
23 you know, can you really see any difference between the  
24 tax and the -- regardless of where the incidence would be,  
25 and the answer might well be no.

1           With respect to Justice Scalia's question of  
2     counsel, we would simply invoke along this very same line  
3     what we have quoted in our brief in opposition at page 17,  
4     wherein we quote an argument which had been made by the  
5     Tax Commission in the court of appeals below. This is on  
6     page 17 of the brief in opposition in -- at line 3 of page  
7     17.

8           Petitioner's own earlier argumentation expressly  
9     noted that the search for taxes included in the wholesale  
10    price could look back forever, and for the same reasons it  
11    could look forward forever for the same reason as well,  
12    and so our answer would be to incline to answer Justice  
13    Ginsburg's question in the negative.

14           QUESTION: What do you do about the two  
15    provisions of law mentioned by your opponent?

16           MR. ARROW: Yes, Your Honor. This --

17           QUESTION: The definition section and the  
18    exemption section.

19           MR. ARROW: That's right. The petitioner Tax  
20    Commission has made a great deal of the fact that section  
21    501C is in a so-called definitional section of the  
22    statute.

23           When one examines that beyond the superficial  
24    characterization of the word, "definitional," one does  
25    find that, in fact, section 501 of the statute which

1 begins the fuel tax scheme has the word "definitions" in  
2 the heading.

3 When one looks at 501C, one finds that what 501C  
4 is definitional of is storage, and so to the extent that  
5 one finds it in the definitional provision of the statute,  
6 counsel for petitioner Tax Commission and the Tax  
7 Commission itself has attempted to indicate that there is  
8 some talismanic aspect of the fact that we find section  
9 501C in a definitional provision, but the definition is  
10 one of storage.

11 We have a specific answer to that also. It  
12 simply states, and I'm quoting from section 501C, the  
13 critical proposition advanced by the Tax Commission,  
14 nothing in this section shall --

15 QUESTION: Is there a place in the briefs where  
16 we can find that that you're quoting?

17 MR. ARROW: Yes. Yes, Your Honor. Specifically  
18 I would refer the Court to section -- the blue brief, to  
19 the brief of petitioner at page 36, I believe it is.

20 QUESTION: Thank you.

21 MR. ARROW: Yes, Your Honor. Where they are  
22 quoting -- 36 of the brief of the petitioner, yes, Your  
23 Honor. Section 501 -- a definitional provision of the  
24 statute at about line 12 of the page.

25 Your Honor, I fail to find it in the brief of



1 petitioner at this point. It is cited in our brief, but I  
2 don't have the page in front of me. I apologize, Your  
3 Honor.

4 QUESTION: There's something on 36. You're not  
5 talking about 501B?

6 MR. ARROW: 501B, yes, Your Honor.

7 QUESTION: "Provides that" -- it's about a third  
8 of the way down the page -- "purchasers of nontaxable  
9 diesel fuel must comply with the provisions of section 509  
10 in order to avoid the taxes levied by sections 501" -- is  
11 that it? That is on page 36.

12 MR. ARROW: Yes, that -- I believe that may be  
13 a -- that may be a misquotation. I believe they're  
14 referring to 501A at that point, or 501B, pardon me. I'm  
15 talking about 501C, Your Honor.

16 QUESTION: You're talking about C.

17 MR. ARROW: I'm given the petition by cocounsel.  
18 At page 39a of the petition, and at page 39a, about two-  
19 thirds of the way down to the bottom of the page, "Nothing  
20 in this section shall require a distributor, dealer, or  
21 retailer to collect," and the Tax Commission relies  
22 heavily on the fact that it indicates that somehow  
23 retailers collect. We point out in our brief in chief  
24 that this simply requires a negative inference, that  
25 petitioner is attempting to draw a negative inference from

1 this that something else requires payment of the tax by a  
2 consumer, which is absolutely not the case.

3 We point out further that the provisions which  
4 are really definitional as to the incidence of the fuel  
5 tax are largely section 505 of the statute, specifically  
6 section 505C, and also section 506 of the statute, which  
7 provide -- and these are cited in our brief in chief --  
8 which provide that the distributor is an agent of the  
9 State for collection of the fuel tax.

10 And we find, as we have indicated in the rest of  
11 our remaining brief, that as to those provisions, section  
12 505C and section 506, as well as section 507, as well as  
13 section 502, there are numerous provisions which are  
14 ignored by the Tax Commission which establish the  
15 definition of where the legal incidence of the fuel tax is  
16 rather than simply carving out a phrase and basing their  
17 argument on a negative implication of a provision of the  
18 statute which is contained in the definition of "storage."

19 We submit that the statute taken as a whole, in  
20 short, even though there is that possible implication, but  
21 it requires a negative and an incorrect implication, that  
22 nothing -- because nothing requires a distributor,  
23 retailer, or dealer to collect, that something else  
24 requires that collection be from consumers, and there  
25 simply is no pass-through provision to consumers anywhere

1 in this scheme, express or implied.

2 With respect to the agricultural exemption which  
3 is cited, and this is the second provision that is relied  
4 upon primarily by the petitioner Tax Commission, they are  
5 referring to the agricultural exemption in section 509 of  
6 the statute, which simply states that anyone who is  
7 claiming an agricultural exemption for gasoline to be used  
8 for farm use shall not be required to pay -- "to pay."

9 And we have indicated to this Court, having  
10 recognized the significance in plain meaning in text  
11 before this Court, but we have indicated that that word,  
12 which by the way was inserted in 1939 -- and we have  
13 researched the legislative history. There is nothing  
14 which indicates any intent to change the legal incidence  
15 of fuel tax scheme in 1939, but we have described that as  
16 colloquial.

17 We also point out to this Court that in section  
18 508B of the statute the identical provision with respect  
19 to the aircraft tax indicates that the exemption is one  
20 which can be claimed by the distributor, and other  
21 provisions of the statute are silent on this whatsoever,  
22 but the critical proposition that we indicate, and the  
23 critical provisions which we have cited to this Court  
24 which affirmatively establish the legal incidence of the  
25 fuel tax, are section 505E with respect to diesel fuel

1 tax.

2 Section 505E expressly imposes payment  
3 obligations on retailers or dealers, and the only response  
4 that we've seen in the reply brief from the petitioner Tax  
5 Commission is, well, that only applies to diesel fuel,  
6 that's one, and secondly the Hayden-Cartwright Act.

7 Those are the only answers that they have to  
8 that, because it is expressed in that provision, section  
9 505E of the fuel tax statute, that under those  
10 circumstances the diesel fuel tax is clearly to be --  
11 payment obligations are imposed on retailers or dealers.

12 QUESTION: Mr. Arrow, can I ask you --

13 MR. ARROW: Yes, Your Honor.

14 QUESTION: -- probably a stupid question, but  
15 does the place where the legal incidence of the tax falls  
16 determine whether the consumer or the dealer can deduct  
17 the payment for Federal income tax purposes? Does it have  
18 any independent significance, is what I'm really asking.

19 MR. ARROW: I am not aware of any for that  
20 purpose, Your Honor.

21 QUESTION: It's -- what difference -- does it  
22 make any difference other than for this deciding whether  
23 the Indian tribes have to pay the tax?

24 MR. ARROW: Your Honor, clearly in another non-  
25 Indian context this Court, as has been pointed out by

1 Justice Souter as recently as the Jefferson Lines case,  
2 going back to Complete Auto Transit, has disregarded the  
3 formalities involved in a tax, but in this case, we submit  
4 to this Court that one either has a per se rule in this  
5 complex area, or one does not.

6 In order for there to be a per se rule, one must  
7 acknowledge the fact that the legal incidence must be  
8 controlling for purposes of the per se rule if the per se  
9 rule is to avoid cumbersome and duplicative litigation.

10 QUESTION: Doesn't the incidence of the tax have  
11 significance outside of the Indian law context? I mean,  
12 if there's a failure to pay a concededly owed tax, the  
13 State Tax Commission, it may depend on how the laws are  
14 drawn whether they can come after the wholesaler or the  
15 retailer or the purchaser, doesn't it?

16 MR. ARROW: Yes. Yes, Chief Justice Rehnquist,  
17 that's absolutely right. We point out in part,  
18 specifically along those lines, that they're unlike the  
19 Oklahoma cigarette tax, unlike the California cigarette  
20 tax at issue in Chemehuevi. Both of those cases contained  
21 independent obligations on the parts of consumers to pay  
22 for untaxed cigarettes and forbade the use of untaxed  
23 cigarettes.

24 QUESTION: Yes, but in either event, even if the  
25 retailer isn't the taxpayer in a technical sense, it still

1 can have a statutory obligation to collect the tax.

2 MR. ARROW: That -- in 1931, Your Honor, the  
3 legal incidence could only be characterized as dual. In  
4 1931, the Oklahoma legislative scheme was amended to  
5 include a situation whereby the wholesaler paid the tax  
6 but could, at its option, pass the tax along to retailers,  
7 and so both, in those situations, the statutory scheme at  
8 that point in time imposed obligations on both.

9 In 1933, during the Dust Bowl, and by the best  
10 of our research, based upon what we found with references  
11 to defaulting dealers in the statute, in 1933 the  
12 incidence clearly is moved onto wholesale -- onto  
13 retailers, pardon me, with wholesale distributors -- what  
14 has now become section 506 originated in 1933 -- with  
15 wholesale distributors limited specifically to agents of  
16 the State for collection.

17 And at that point, they still, and they do still  
18 today, have an independent obligation to pay over to the  
19 State -- to remit is the technical term of art which the  
20 Oklahoma Fuel Tax Code uses -- to remit moneys to the  
21 State which have been collected from retailers, and there  
22 is a penalty in section 506 for embezzlement. Not for tax  
23 evasion on the part of wholesalers, but rather for  
24 embezzlement in those circumstances where wholesale  
25 distributors do not pay over to the State that money which

1 we have collected, but there are independent payment  
2 obligations on retailers also, such as section 505E.

3 So the answer to your question is yes, it is  
4 possible that they both have obligations, one to remit  
5 moneys that it has collected, as the statute says, as the  
6 agent of the State, and moneys which it holds in trust,  
7 the other the primary obligation to pay, but in no sense  
8 is there any obligation on consumers, and that's the  
9 important point that I wanted to make in response to the  
10 Chief Justice's question.

11 QUESTION: Well, I have to confess that the  
12 thing that keeps running through my mind is, as I remember  
13 the Moe case, the Court said the tribe cannot market its  
14 tax exemption by selling to nonmembers.

15 MR. ARROW: That's right, Your Honor.

16 QUESTION: But the answer to that is, they can  
17 do it if -- they can market the tax exemption if the  
18 incidence of the tax falls on the retailer.

19 MR. ARROW: Precisely, Your Honor. Precisely.

20 Now, of course, we are not marketing the tax  
21 exemption in a loose sense of the term. The Chickasaw  
22 Nation and all the other tribes of the State --

23 QUESTION: Well, in an economic sense you  
24 certainly are --

25 MR. ARROW: Well --

1 QUESTION: -- because you're able to sell it  
2 cheaper than the retailers who must pay the tax.

3 MR. ARROW: Well, in point of fact that doesn't  
4 occur, Your Honor, because the tribe has imposed its own  
5 fuel tax, which is precisely the same as the fuel tax  
6 imposed by the State, so therefore as a matter of economic  
7 reality in this particular set of facts there is no  
8 economic advantage whatsoever. Every tribe in the State  
9 has done the same.

10 QUESTION: They owe it to themselves, sure.

11 MR. ARROW: Well --

12 QUESTION: You mean, if I take money out of one  
13 pocket and put it in my other, that's --

14 MR. ARROW: That is correct. That is correct,  
15 Justice Scalia, but the distinction being there is no  
16 marketing and exemption from the standpoint of a consumer  
17 purchaser having any artificial inducement.

18 QUESTION: You're saying they're not using it to  
19 sell more gas.

20 MR. ARROW: That's right, Your Honor.

21 QUESTION: They're just using it to make more  
22 money.

23 MR. ARROW: That's right, Your Honor. That's  
24 correct, and our position in response to Justice Stevens'  
25 question is, if the incidence of the fuel tax is on the



1 retailer, they can do that.

2 The premise of the Moe and Colville cases was  
3 that the incidence of the fuel taxes there was on the  
4 consumers, and this Court had expressly so found and had  
5 been supported by lower court interpretations of State law  
6 in both of those cases, and as questions have indicated --

7 QUESTION: Do you know anybody in the State,  
8 other than Indians, who market more gas by charging less  
9 tax?

10 MR. ARROW: Who market more gas by charging less  
11 tax?

12 QUESTION: Maybe I'm from the East here, and I'm  
13 always used to seeing, you know, the tax price and then it  
14 says, you know, plus 3, plus 2, whatever the tax is.

15 QUESTION: Plus 4.

16 QUESTION: Plus 4, whatever it's gotten up to  
17 now. It's not like that in Oklahoma? It just says, you  
18 know, flat price, and you can bargain? You can bargain  
19 the price down?

20 MR. ARROW: No. I have not successfully  
21 negotiated yet, Your Honor.

22 QUESTION: You know, if the incidence were not  
23 on the purchaser, I would expect that some people would  
24 charge the tax and some people wouldn't.

25 MR. ARROW: If the incidence --

1 QUESTION: If there's no --

2 MR. ARROW: If the incidence were not on the  
3 retailer, Your Honor?

4 QUESTION: If -- no, if the incidence were  
5 not --

6 MR. ARROW: Not on the purchaser.

7 QUESTION: -- on the purchaser. I expect that  
8 some people simply wouldn't charge any tax.

9 MR. ARROW: Well --

10 QUESTION: The gas stations don't show a tax  
11 charge, is what you're telling me.

12 MR. ARROW: Yes. Again, Justice Scalia, with  
13 respect to your question of a while ago, with respect to  
14 your question as to whether there's really any such thing  
15 from a standpoint of economic reality, you know, the  
16 question, I suppose, might rhetorically be, is there any  
17 difference between not charging a portion of the tax and  
18 simply cutting profits 1 or 2 cents, you know, and that's  
19 right, Your Honor, and that's part of my answer to Justice  
20 Ginsburg as well.

21 If I might, Your Honor, I notice that my 5-  
22 minute light has come on, I'd like to move to the treaty  
23 question very briefly, which has not been yet addressed in  
24 this oral argument before the Court.

25 We'd like to make about four points about the

1 treaty, Your Honor. First of all, we'd like to focus on  
2 the characteristics of this treaty, which are  
3 extraordinarily unique in the history of the United  
4 States.

5 The history, which we have recounted in some  
6 detail over about the first 11 pages of our brief in  
7 chief, is very unique with respect to the relations  
8 between the United States and the Choctaw Nation. That  
9 treaty, the Treaty of Dancing Rabbit Creek, is, of course,  
10 the treaty to which the Chickasaw Nation later becomes  
11 beneficiary by treaty in 1837.

12 This treaty, and this has not been contested by  
13 the Tax Commission, involves broader guarantees of self-  
14 government than any guarantees than had ever been given in  
15 any treaty in the history of the United States. This is an  
16 uncontroverted fact. There has been no dispute of that  
17 issue by the Tax Commission.

18 It is also --

19 QUESTION: How broad is the sweep of this treaty  
20 in your view? What about an Indian who -- a tribal  
21 member who lives off the reservation and owns property off  
22 the reservation and is asked to pay a property tax?

23 MR. ARROW: Yes, Your Honor. We would not think  
24 that it would cover that situation. We think that the  
25 significant interpretive aspects of this is that first of

1 all it involves governmental relationships between tribes  
2 and their own members, and secondly that it involves a  
3 nexus to tribal lands, and here the nexus to tribal lands  
4 is that the Indian country is the situs of the place where  
5 the governmental activities and the employment occurs.  
6 That would be our limiting feature, Justice O'Connor.

7 In terms of interpretation --

8 QUESTION: How do you get that out of the  
9 statute? I mean, I would think if you're interpreting the  
10 statute as broadly as you ask us to -- or the treaty, I'm  
11 sorry.

12 MR. ARROW: Yes, Your Honor.

13 QUESTION: On the basis of just its language, I  
14 would think you'd have to say that a member of the tribe  
15 wouldn't have to obey general State laws. He's a  
16 descendant of the tribe that was given these guarantees.

17 MR. ARROW: We think that it's possible that  
18 other, broader interpretations could be made. We, as well  
19 as the Tax Commission, as well as this Court, have thought  
20 of numerous hypotheticals which could go beyond. At this  
21 point, we confine our theory, we suspect that probably  
22 many of those theories would not be successful, and should  
23 not be successful, but rather than attempting to litigate  
24 the possibilities, we have simply advanced a very narrow  
25 theory before this Court.

1 QUESTION: Mr. Arrow --

2 MR. ARROW: Yes, Your Honor.

3 QUESTION: -- that about the member of the tribe  
4 that lives in the town, that's the one we're talking  
5 about, who can vote in the town as a resident, whose  
6 children can go to school there, who gets fire, police,  
7 all protection, why should that person not have to pay  
8 tax?

9 MR. ARROW: Yes, I understand the question,  
10 Justice Ginsburg. The answer is, this Court in Sac and  
11 Fox addressed at least part of that question, as it had  
12 prior to that in McClanahan.

13 In Sac and Fox, this Court indicated very  
14 clearly that treaty questions aside, and other questions  
15 aside, and also the Williams v. Lee infringement question  
16 aside, residence is a very significant component of a  
17 presumption of the per se rule under McClanahan, and we  
18 understand that.

19 But the answer, Your Honor, is that there is  
20 simply no difference, because Chickasaw tribal members, as  
21 all tribal members, are eligible for State services  
22 whether or not they reside in Indian country, so to the  
23 extent that the Tax Commission attempts to advance the  
24 proposition that somehow, somehow it is different for  
25 tribal members who live outside of Indian country, that

1 they're somehow entitled to more State services than  
2 members who live in Indian country, this Court has already  
3 held in Sac and Fox and McClanahan that those who work and  
4 reside in Indian country are already exempt from State  
5 income taxation.

6 And therefore the distinction, for this purpose,  
7 Your Honor, the distinction is simply a distinction  
8 without a difference from the standpoint of whether or not  
9 the employee of the Government, of the tribe, lives within  
10 or without Indian country, because under either  
11 circumstance they're going to be eligible for State  
12 services, and under those circumstances, there's no  
13 principled basis for a distinction for purposes of  
14 applying the treaty, even extending the treaty to cover  
15 situations which this Court has not yet ruled on under  
16 general law and Sac and Fox.

17 QUESTION: Thank you, Mr. Arrow.

18 MR. ARROW: Thank you very much.

19 QUESTION: Mr. Engelmayer.

20 ORAL ARGUMENT OF PAUL A. ENGELMAYER

21 ON BEHALF OF THE U.S., AS AMICUS CURIAE,

22 SUPPORTING THE RESPONDENT

23 MR. ENGELMAYER: Mr. Chief Justice, and may it  
24 please the Court:

25 I would like to begin with the fuel tax issue.

1 Our position is that the Court should resolve that issue  
2 by applying the principle that a State may not directly  
3 tax Indian activities in Indian country except where  
4 Congress has abrogated tribal immunity in explicitly --  
5 excuse me, in unmistakably clear terms.

6 Applying that principle, Oklahoma may not impose  
7 its fuel tax on the Chickasaw Nation's retailers, because  
8 Congress has not abrogated tribal immunity in this area,  
9 and because under State law the court of appeals  
10 reasonably concluded that legal incidence falls on the  
11 retailer.

12 QUESTION: Well, Mr. Engelmayer, is your  
13 principle that if Congress hasn't abrogated the immunity,  
14 the State can't? Is that consistent with our decisions in  
15 Moe and Colville and Chemehuevi?

16 MR. ENGELMAYER: Absolutely. It is legal  
17 incidence that determines whether or not a showing of  
18 congressional abrogation is required. If the tax were  
19 to --

20 QUESTION: Why is it not required in the case of  
21 one kind of legal incidence, if your theory is correct?

22 MR. ENGELMAYER: I believe it is correct. I  
23 mean, I don't believe there is any distinction.

24 In other words, In Moe and Colville, Mr. Chief  
25 Justice, the tax -- the determinative factor where taxes

1 fell on the purchaser was whether the purchaser was an  
2 Indian, in which case the tax could not be imposed, or  
3 whether it was on a non-Indian, so there was legal  
4 incidence there, as in Chemehuevi, that was the decisive  
5 factor.

6 QUESTION: And then -- and you say you trace  
7 that back to a congressional determination of what?

8 MR. ENGELMAYER: I think the basis for the per  
9 se rule, which relies on legal incidence, goes back  
10 historically to the sovereign immunity that tribes have  
11 had under the -- vis-a-vis the States under the  
12 Constitution.

13 It also, though, as the Court noted in County of  
14 Yakima just 3 years ago, has practical justifications.  
15 For example, one of them is that it serves the goal of  
16 predictability. It allows both States and tribes alike to  
17 rely categorically on the presence or absence of  
18 congressional authorization in determining whether a tax  
19 would be or is valid.

20 It also obviates the need for an ongoing inquiry  
21 into whether the balance of interests that at one point  
22 may have justified a tax has changed over time, if, for  
23 example, it is shown that only a portion of a given tax  
24 maybe is being passed along.

25 As I noted, there is also an historical



1 dimension to it, in that it reflects the sovereign  
2 immunity the tribes have under the Constitution vis-a-vis  
3 the States, and finally, and perhaps this is most  
4 important, it leaves the States with considerable  
5 flexibility. In this case, all Oklahoma need do is to  
6 change the legal incidence of the fuel tax to make sure  
7 that it falls on the ultimate purchaser.

8 That is what other States with significant  
9 Indian populations have done. That's so they've  
10 administered their tax statutes consistent with principles  
11 of Indian sovereignty.

12 I think this case is very much like Citizen Band  
13 Potawatomi, in that Oklahoma, having applied its tax laws  
14 in violation of settled principles announced by this Court  
15 of Indian sovereignty, has now come to this Court asking  
16 that those principles be scrapped. Rather, I think the  
17 proper solution is for Oklahoma to conform its tax  
18 practices to those principles.

19 Now, I'd like to turn very briefly to the  
20 subject of Hayden-Cartwright, recognizing that it is our  
21 view that the subject was not raised below or in the  
22 petition and therefore should not be reached, but should  
23 the Court reach the issue, our position is that the act  
24 does not authorize State taxation of Indian tribes.

25 That, we submit, is clear from this Court's

1 decision in White Mountain Apache. There, the Court held  
2 that the act does not authorize taxation of fuel use by a  
3 non-Indian company doing business for a tribe on its  
4 reservation, this despite the fact that the Hayden-  
5 Cartwright Act explicitly authorizes taxation of fuel use,  
6 and the Court in that case reserved the question of  
7 whether the act even applies on a reservation.

8 Our submission is that if the act did not  
9 authorize direct taxation of a non-Indian company doing  
10 business for a tribe on its reservation, it's awfully  
11 difficult to see how the act could then be said to  
12 authorize direct State taxation.

13 Moreover, applying the unmistakably clear  
14 standard from Yakima and Blackfeet and Bryan, the tribe --  
15 neither the statute -- the Hayden-Cartwright Act doesn't  
16 refer anywhere to tribes or Indians. There's no  
17 indication that at the time of the act, 1936, Indians were  
18 even selling fuel on their reservations, and there's no  
19 evidence that Congress considered the distinct barrier to  
20 taxation posed by tribal immunity.

21 What the act does, I think, instead is to  
22 address and get rid of a distinct separate barrier posed  
23 by the territorial barrier posed by the Federal status of  
24 certain land, for example, military reservations.

25 On the subject of legal incidence, just very

1 briefly, we believe it's principally a question of State  
2 law. There are sound bases for the court of appeals  
3 decision. In particular, as my cocounsel has noted, it  
4 appears that the statute requires that the retailer pay  
5 the taxes to the distributor for remission to the State,  
6 and it protects distributors against nonpaying retailers,  
7 but has no corresponding provisions governing the  
8 retailer-to-consumer step in the transaction.

9 In addition, there's a useful contrast here  
10 between other Oklahoma laws, which quite explicitly put  
11 legal incidence on the consumer. The cigarette tax law  
12 that was adverted to by the court of appeals for example,  
13 and the special fuels tax law that Oklahoma has at section  
14 702 and 703 of its code book, and it's cited, I believe,  
15 at pages 6 to 7 in a general way, the special fuel tax  
16 section of my cocounsel's brief. That also applies  
17 explicitly to the consumer. I think some sort of a  
18 conclusion can be drawn based on the absence of such clear  
19 focus on either use or consumption in this tax.

20 Finally, with regard --

21 QUESTION: Do you know the answer to the  
22 question whether there's any consequence for Federal tax  
23 purposes placing the incidence on the retailer?

24 MR. ENGELMAYER: I do not, Justice Ginsburg.

25 Finally, our position is that the Chickasaw

1 Nation's treaty with the United States prohibits the  
2 States from taxing wages paid by the Chickasaw Nation to  
3 its member employees.

4 Now, it's certainly true, as Justice Scalia  
5 pointed out, that the treaty says absolutely nothing about  
6 income taxes, or taxation of any kind. Nevertheless, I  
7 think one has to read the treaty, as this Court noted in  
8 Choctaw Nation involving the very same treaty, from the  
9 vantage point of the Indian signatory in 1830 in the case  
10 of the Choctaw, 1837 in the case of the Chickasaw,  
11 those --

12 QUESTION: I would think that what it meant to  
13 them at that time is that an Indian who was living in  
14 Indian country was not subject to State regulation, taxes  
15 or anything else, but the one who was living outside of  
16 Indian country would be subject to State regulation and  
17 State taxes.

18 MR. ENGELMAYER: I think the --

19 QUESTION: Why do you draw the line just for  
20 purposes of taxes? How can you get that out of this  
21 statute? It seems to me if you say that an Indian off of  
22 the reservation or out of Indian country cannot be taxed,  
23 it seems to me you would also say he cannot be regulated  
24 in any other fashion.

25 MR. ENGELMAYER: If I may respond this way, I

1 think from the vantage point of the Indian signatory in  
2 1830, having no idea that some day this territory would be  
3 -- this land would some day become part of a State known  
4 as Oklahoma, or of any State, having no conception of this  
5 idea, even, of State income taxation, such an Indian, if  
6 they were trying to express the thought that no State  
7 shall ever interfere with the relationship between a tribe  
8 and its member, if they were trying to figure out how to  
9 put that in a treaty, it's hard to think of a more  
10 emphatic way than the language which the treaty uses,  
11 which is, "No territory or State shall ever have the right  
12 to pass laws for the Government of the Chickasaw Nation or  
13 their descendents."

14 The treaty also provides that where any well-  
15 founded doubt appears regarding treaty terms, it should be  
16 construed in favor of the tribe, and while that's a tenet  
17 of statutory construction that this court has used in many  
18 Indian treaty cases, this is a rare treaty that  
19 furthermore includes it itself.

20 Justice Ginsburg inquired as to the limits of  
21 this theory. In our view, the limits of the theory  
22 involve simply laws that would interpose the State between  
23 the tribe and its members, in this case by actually  
24 removing part of the wages paid by a tribe to its members,  
25 and thus, a property tax, for example, or a residency tax,

1 or a gasoline tax imposed on off-reservation activity.

2 QUESTION: Even though the members are long gone  
3 from the reservation?

4 MR. ENGELMAYER: Well, they're not long gone in  
5 the sense that they're working, in this case, for the  
6 tribe, and they're tribal employees.

7 QUESTION: Well, how about a member that lives  
8 off the reservation and works off the reservation?

9 MR. ENGELMAYER: For the tribe, Mr. Chief  
10 Justice? If it's not for the tribe --

11 QUESTION: Not for the tribe.

12 MR. ENGELMAYER: If it's not for the tribe,  
13 there's no tribal relationship with the members that's  
14 being disturbed. If it is --

15 QUESTION: Well, that's a nice line you're  
16 drawing. I mean, it may be a wonderful line, but I don't  
17 see how it has anything to do with the treaty language.

18 MR. ENGELMAYER: But this Court --

19 QUESTION: The government of the descendants of  
20 the Chickasaw -- it seems to me you're governing the  
21 descendants of the Chickasaw Nation if you regulate their  
22 conduct, whether with regard to charging them an income  
23 tax, or with regard to preventing certain actions of  
24 theirs by reason of criminal law, or anything else.

25 MR. ENGELMAYER: Justice --

1           QUESTION: If you want us to give this a liberal  
2 interpretation, it means that nobody will govern the  
3 descendants of the Chickasaw Nation. It's clear what that  
4 means. You don't govern them.

5           MR. ENGELMAYER: I think if we were talking here  
6 about a treaty or a statute that had been enacted not  
7 having to do with the Indian context, I would probably  
8 agree with you that government probably would have  
9 something more to do with the process of governance, as  
10 you say.

11           But I think from the vantage point of the  
12 Indians at the time, I think the understanding would be  
13 that, you know, at least insofar as the tribe is dealing  
14 with its members, nobody should be getting in between  
15 there.

16           Once you stray off the reservation and you're  
17 not dealing with your tribe, criminal laws in a State, for  
18 example, I don't think that historically make -- that the  
19 logic would carry through as much.

20           QUESTION: It's a good line. I just don't see  
21 it anywhere in the text of the --

22           MR. ENGELMAYER: Thank you.

23           QUESTION: Thank you, Mr. Engelmayer.

24           Mr. Rothfeld, you have 5 minutes remaining.

25           REBUTTAL ARGUMENT OF CHARLES ROTHFELD

1 ON BEHALF OF THE PETITIONER

2 MR. ROTHFELD: Thank you, Mr. Chief Justice.

3 There are a couple of points. Let me start with  
4 the motor fuel tax and questions that were raised by the  
5 Chief Justice and Justice Stevens, whether or not the  
6 legal incidence actually makes any difference in the real  
7 world. I think the answer quite clearly is no.

8 The only entity that has a legal obligation to  
9 do something here, and against whom the State has any  
10 rights, is the distributor, who neither of us suggests  
11 bears the legal incidence of the tax, so the question then  
12 is whether or not the State's failure to insert these  
13 magic words of legal incidence somewhere in the text of  
14 the tax statutes, words that would have no actual effect,  
15 should render the tax invalid.

16 QUESTION: If there's no difference, how do you  
17 explain the reluctance of the -- or the nonaction by the  
18 Senate in killing this bill?

19 MR. ROTHFELD: Of the State --

20 QUESTION: Oklahoma.

21 MR. ROTHFELD: I think that the State was of the  
22 view that it should get this issue resolved, that it  
23 should not be bound by a semantic rule to resolve its law  
24 around something which is meaningless, and I think the  
25 Court --



1 QUESTION: But since that would clarify it for  
2 the future, there wouldn't be any possible doubt. Why  
3 wouldn't they just go ahead and do it?

4 MR. ROTHFELD: Well, if the Tax Commission is  
5 correct in its contention here that that rule should not  
6 have legal effect, the legal incidence rule, then there is  
7 no need for the State to modify its rule in accordance  
8 with this.

9 QUESTION: I think the reason they did it,  
10 Mr. Rothfeld, is they were worried that it would prejudice  
11 this litigation. By changing the rule, they would in  
12 effect be admitting that it wasn't already that way.

13 MR. ROTHFELD: Well, I think they may have been  
14 concerned that it would moot the case.

15 QUESTION: So is the reason that they didn't  
16 pass it because they didn't want to moot the case?

17 MR. ROTHFELD: Well, I can't speak for all the  
18 motivations of the --

19 QUESTION: You can speak for the Tax Commission.

20 QUESTION: Well, it wouldn't moot the case as to  
21 past tax obligations, would it?

22 MR. ROTHFELD: Well, past tax obligations are  
23 precluded -- a suit to collect those precluded by the  
24 tribe's sovereign immunity, which is one problem with this  
25 type of rule. In fact --

1 QUESTION: But is it your view that the only  
2 reason -- if it made no difference, it's hard to see why  
3 they didn't pass it, unless they were worried that it  
4 might make the significance of this case less significant  
5 and maybe we would dismiss it.

6 MR. ROTHFELD: Well, I think they may well have  
7 been concerned --

8 QUESTION: Given your new argument.

9 MR. ROTHFELD: They may well have been concerned  
10 that it would moot the case. I don't think they were  
11 concerned that it would reflect some weakness in the case.  
12 I think --

13 QUESTION: Not a weakness, but --

14 MR. ROTHFELD: I think they thought there was  
15 unnecessary --

16 QUESTION: All right. I mean, but that's -- if  
17 this is a tactical concern of one kind or another, which  
18 is what I'm curious about -- I'm not saying it expresses a  
19 weakness in the case -- I think that might be relevant, if  
20 that is your view.

21 MR. ROTHFELD: I'm sorry, I may not be following  
22 the --

23 QUESTION: Well, there's a problem for us in  
24 this case in that there's a new issue brought that wasn't  
25 argued below that isn't obvious how it comes out one way

1 or the other, yet is determinative, and so that makes it a  
2 harder matter to reach the issue that this was granted  
3 cert to decide, and in the meantime, it's additionally  
4 confused because they could moot -- or not moot it, but  
5 they could get rid of the problem by changing the law, and  
6 so that somehow feeds into this mix, too --

7 MR. ROTHFELD: Well, it will always be the --

8 QUESTION: -- and that's why I ask the question.

9 MR. ROTHFELD: It will always be the case that  
10 where there's an argument about the meaning of legal  
11 incidence that it's possible to avoid it by changing the  
12 State law. I mean, that has not been the Court's reaction  
13 in the past.

14 In a case like Complete Auto, the State could  
15 have changes its law to delete the reference to privilege  
16 of doing business in interstate commerce, which the  
17 Court's prior decisions it heard, it felt held  
18 determinative, and the Court said it wasn't necessary for  
19 the State to modify its law around the formalism.

20 The proper course was to get rid of the  
21 formalism so that it wasn't determinative in the future,  
22 and clearly, as I was saying before, there is no real  
23 world impact of determining the legal incidence falls on  
24 one party or the other, and therefore the question is  
25 whether or not the law should be held invalid because the

1 magic words were not used.

2 The Court has rejected that rule in the past in  
3 virtually every other context. There is no reason to have  
4 it here unless precedent --

5 QUESTION: But if you don't have the per se  
6 rule, supposing it's not a sale to a consumer. Suppose  
7 they went into the hotel business. They opened a hotel,  
8 or a ski resort, right on the reservation. Could Oklahoma  
9 tax the income and the property and everything else from  
10 that activity?

11 MR. ROTHFELD: I think probably not, and the  
12 reason is because the Court has said, looking to the  
13 economic reality, that the State can't tax value generated  
14 on the reservation by a tribal enterprise, and that  
15 explains the outcome, I think, in cases like Colville and  
16 Moe, in which the Court said that the State could not tax  
17 sales by the tribe to tribal members of goods for use on  
18 the reservation.

19 That was an entirely intertribal operation, and  
20 allowing the State to assert its interest there, where it  
21 really has no concern, no regulatory concern at all, and  
22 no responsibilities, would really threaten to displace the  
23 mechanisms of tribal government.

24 That principle does not apply here, because the  
25 customers are in large part nonmembers who are taking the

1 goods subject to tax off the reservation immediately.

2 QUESTION: I'm not sure that I -- maybe it's  
3 obvious, but why is it -- supposing the ski resort  
4 attracts skiers from all over the State, most of whom are  
5 not Indians, and don't they market their tax exemption if  
6 they don't have to pay any taxes?

7 MR. ROTHFELD: Well, I think that's true, Your  
8 Honor, but the lines the Court has drawn in cases like  
9 Hebezon is whether or not there is value generated on the  
10 reservation by the tribe.

11 QUESTION: And you -- well, okay.

12 CHIEF JUSTICE REHNQUIST: Thank you,  
13 Mr. Rothfeld.

14 The case is submitted.

15 (Whereupon, at 2:00 p.m., the case in the above-  
16 entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

OKLAHOMA TAX COMMISSION, Petitioner v. CHICKASAW NATION

CASE NO. :94-771

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Marie Federico

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