

No. 94-771

In the Supreme Court of the United States

OCTOBER TERM, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit**

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether principles of federal preemption or Indian sovereignty preclude a State from imposing a tax on sales of motor fuel by an Indian tribe, when the fuel is purchased in substantial part by non-Indians or non-members of the Tribe, and the fuel is used outside of Indian country on roads constructed and maintained by the State.
2. Whether the legal incidence of Oklahoma's tax on motor fuel falls on the ultimate purchaser of the fuel.
3. Whether federal law precludes state taxation of the income of Indians who work on tribal trust lands but live outside of Indian country.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 31 F.3d 964. The opinion of the district court (Pet. App. 32a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1994. The petition for a writ of certiorari was filed on October

27, 1994 and was granted on January 6, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant portions of Okla. Stat., Tit. 68, Art. 5, and of the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, are reprinted at Pet. App. 39a-43a.

STATEMENT

The court of appeals' decision in this case imposes an extraordinary restriction on state taxing authority. The court held that imposition of a state tax on motor fuel sold by an Indian tribe is precluded by principles of federal preemption and Indian sovereignty — even though much of the fuel is sold to non-Indians, and virtually all of it is used outside of Indian country on roads constructed and maintained by the State. The court also held that federal law precludes the imposition of a state income tax on tribal members who are employed on tribal trust lands but who live outside of Indian country. These holdings are premised on formalism rather than economic reality, disregard the State's interest in taxing the recipients of state services, and — not surprisingly — depart from the decisions of this Court. They should be set aside.

1. The State of Oklahoma imposes a tax “upon the sale of each and every gallon” of gasoline and diesel fuel sold within the State. Okla. Stat., Tit. 68, §§ 502, 502.1. See also *id.*, §§ 502.2, 502.3, 502.4, 502.5, 502.6, 502.7, 516, 520, 522, 522.1. The tax statute makes the distributors of the fuel “agent[s] of the state for the collection of the excise tax” (*id.* § 506) and requires them to pay the tax due on each gallon of fuel sold to retailers or others in Oklahoma (*id.* § 505), although “[t]he retailer's wholesale price will include the motor fuel taxes which are in turn included in the retail price at the pump.” Pet. App. 35a. The tax, imposed at the rate of \$.17 per gallon on gasoline and \$.14 per gallon on diesel fuel, is a significant source of revenue for Oklahoma, generating approximately \$320 million annually. See Okla. Stat. Tit. 68, §§ 502, 502.1, 502.2,

502.3, 502.4, 502.5, 506.2, 502.7, 520, 522, and 522.1. Over 70% of this revenue is deposited in the State Transportation Fund for use in highway construction; most of the remainder is given to counties and municipalities for road maintenance. See *id.* §§ 504, 504.1, 518, 519, 523, 523.1.

2. Respondent (“the Tribe”), a federally recognized Indian tribe, is one of the “Five Civilized Tribes” that were relocated in the 1830s from the southeastern United States to the area that became known as Indian Territory in what is now the State of Oklahoma. See *Felix S. Cohen's Handbook of Federal Indian Law* 426 (1971 ed.); A. Gibson, *The Chickasaws* 142-162 (1971). In 1837 the Tribe received title to a substantial tract of land in what currently is southern Oklahoma on the understanding, as stated in the 1830 Treaty of Dancing Rabbit Creek, that “no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw Nation] of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State.” 7 Stat. 333.¹

In later years, however, congressional policy towards the Five Civilized Tribes underwent a radical change. Far from precluding the application of state or territorial law to those Tribes, Congress itself made the Indian Territory subject first to the laws of Arkansas

¹ This treaty actually was concluded with the Choctaw Nation, another of the Five Civilized Tribes. The lands deeded to the Chickasaw were purchased from the Choctaw, however, and the United States agreed that these lands would “be held [by the Chickasaw] on the same terms that the Choctaw now hold it.” Treaty With the Choctaw and Chickasaw, 11 Stat. 573 (1837). Because the Five Civilized Tribes supported the Confederacy during the Civil War, Congress authorized the President to abrogate the existing treaties with the Tribes in 1862. Act of July 5, 1862, 12 Stat. 512, 528. A new treaty was negotiated with the Choctaw and Chickasaw in 1866 pursuant to this authority, but it did not change the substance of the provision quoted in text. See 14 Stat. 769.

(see Act of May 2, 1890, 26 Stat. 81; Act of April 28, 1904, 33 Stat. 573) and then to the laws of the Oklahoma Territory. Act of June 16, 1906, 34 Stat. 267. Meanwhile, Congress also began a process, which was completed early in this century, of providing for the allotment of most Chickasaw lands to individual members of the Tribe, with much of the remainder to be held in trust by the United States for the Tribe's benefit. See *Woodward v. DeGraffenreid*, 238 U.S. 284 (1915); F. Cohen, *supra*, at 430-437. This “virtual dissolution of the tribal governments in the Indian Territory cleared the way for the creation of another state” (F. Cohen, *supra*, at 428); in 1906 Congress accordingly provided for the admission into the Union of the combined Indian and Oklahoma Territories as the State of Oklahoma. The following year the Tribe's lands — now a “checkerboard” of scattered allotments and trust lands (cf. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1993 (1993)) — were embraced within state boundaries with the admission of Oklahoma to the Union.²

3. The Tribe currently owns and operates convenience stores on lands held in trust for it by the United States. These stores, which are open to the general public, sell motor fuel and other goods both to tribal members and to non-member customers. Pet. App. 2a. While the State has exempted from tax fuel purchased by respondent for use in tribally owned vehicles (see *id.* at 35a), it has

² Surveying the “situation” of the Five Civilized Tribes, the Court has observed that “[a]lthough there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy” and have “little to distinguish them from all other citizens.” *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 603 (1943). See also F. Cohen, *supra*, at 429-430. The Court has also noted, however, that under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, and the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501 *et seq.*, “some progress has been made in the restoration of tribal government.” *Oklahoma Tax Comm'n v. United States*, 319 U.S. at 603 n.5.

collected the tax on fuel obtained by respondent for resale at the Tribe's convenience stores.

Invoking principles of preemption and Indian sovereignty, respondent brought this suit against the Commission in 1991, seeking to enjoin collection of the tax “on *all* motor fuel it purchases for resale” (Pet. App. 35a (emphasis added)) — including fuel sold to non-Indians for use on state roads lying outside of Indian country.³ The United States District Court for the Eastern District of Oklahoma rejected respondent's claim. *Id.* at 35a-38a. The court began by noting that “[f]ederal law does not preempt the state motor fuel tax scheme,” which meant that the Tribe could prevail only by “show[ing] that the motor fuel tax infringes on the right of tribal self-government.” *Id.* at 36a. On that issue, the district court explained that this Court's decisions “seek[] an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.” *Ibid.*

In conducting that inquiry, the court accepted a series of factual stipulations:

In Oklahoma the gasoline transported onto Indian country is for resale only and is used almost exclusively off of Indian country on State jurisdiction roads. * * *

Further, the Tribe does not construct or maintain roads and highways for the use of the general public in Oklahoma. The State of Oklahoma constructs and maintains 111,412.76 miles of streets, roads and highways in Oklahoma which is funded by the state tax on motor fuel. All of the road mileage maintained by the state is off Indian Country.

³ Indian country generally includes not only formal reservations, but also Indian allotments and trust lands. See *Sac and Fox*, 113 S. Ct. at 1991; *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

Pet. App. 36a-37a.

Against this background, the court found that the tax exemption sought by respondent would serve principally to permit it “to market an exemption from state taxation to persons who would normally do their business elsewhere.” Pet. App. 37a, quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980). In addition, because the motor fuel subject to tax is used almost exclusively on state roads maintained by Oklahoma outside Indian country, “the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a tribal member or not.” *Ibid.* “In this context,” the court concluded, “the patrons of tribal gas stations are properly subject to the State’s motor fuel taxes.” *Ibid.*

The court of appeals reversed, holding that the district court erred in two respects. Pet. App. 12a-16a. First, the court of appeals concluded that the district court should have found the legal incidence of the tax to be on the retailer and therefore, in this case, on the Tribe. The court of appeals recognized that “the statutes do not expressly declare the legal incidence of the taxes to be on the retailer” (*id.* at 13a) and acknowledged that “it may well be that the tax is ultimately passed on to the consumer at the pump.” *Id.* at 14a. But the court nevertheless relied on the observation that “[t]he statutes nowhere require the amount of the tax to be included in the retail price at the pump, a requirement which we could interpret as imposing the tax on the consumer.” *Id.* at 13a. The court also found that certain statutory provisions — in particular, those providing that distributors receive credits for tax remittances that cannot be collected from retailers — make the distributor “no more than a transmittal agent for the taxes imposed on the retailer.” *Id.* at 14a.

In this setting, the court of appeals concluded that the district court also erred in rejecting respondent’s claim that the motor

fuel tax was displaced by principles of Indian sovereignty. The court of appeals reasoned that

[b]ecause they are directed toward funding traditional government activities, the taxes fall within the ambit of the sovereignty of the tribal government. * * * Where the state action conflicts with a power within the traditional scope of Indian sovereign authority, preemption is presumed in the absence of an explicit statement of congressional intent to the contrary.

Pet. App. 15a-16a. The court of appeals therefore held that “the district court's balancing of the respective tribal and state interests at stake was not relevant to the determination of the propriety of the fuel taxes”; it directed a grant of summary judgment in the Tribe's favor. *Id.* at 16a.

4. This case also involves a claim that the State cannot impose its income tax on persons who are employed by the Tribe on tribal trust lands. See Pet. App. 33a. The district court found that claim controlled by the Tenth Circuit's decision in *Sac and Fox Nation v. Oklahoma Tax Comm'n*, 967 F.2d 1425 (1992), and dismissed it as moot. Pet. App. 38a. While the appeal in this case was pending, however, this Court vacated and remanded the Tenth Circuit's decision in *Sac and Fox* (see *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985 (1993)), and the court below accordingly addressed the merits of respondent's claim.

The court of appeals first held that the State may impose the tax on tribal employees who are not members of the Tribe (Pet. App. 21a-22a), but that the tax may not be applied to employees who are members of the Tribe and who live on trust lands or in Indian country. *Id.* at 23a-24a. In the portion of the holding at issue here, the court then held that the state may *not* tax the income of tribal members who are employed by the Tribe but who live *outside* of Indian country. Noting that this Court in *Sac and Fox* left open the question whether such persons are presumptively outside the scope

of the State's taxing jurisdiction (*id.* at 25a, citing 113 S. Ct. at 1992), the court of appeals concluded that such a presumption should not apply. See *id.* at 26a.

The court nevertheless held, however, that state taxation of tribal members is expressly barred by the United States' treaty with the Chickasaw Nation. That treaty provides, in relevant part:

The Government and the people of the United States are hereby obliged to *secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.*

Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 (emphasis added).⁴ The court concluded that “[t]he crucial question in determining the validity of the income tax under the relevant treaty language is * * * whether the law is one imposed on the Chickasaw Nation or its descendants. Residency is simply not relevant to this determination.” Pet. App. 30a. The court therefore held that Oklahoma's income tax may not be imposed “on the wages of

⁴ As noted above (at note 1), the treaty actually was concluded with the Choctaw Nation but became applicable to the Chickasaw Nation in 1837. See also Pet. App. 29a-30a & n.10.

Chickasaw members, earned on the reservation or in Indian country, regardless of the residence of those members.” *Ibid.*⁵

SUMMARY OF ARGUMENT

1. The court of appeals' invalidation of Oklahoma's fuel tax as it applies to sales by the Tribe is insupportable. As an initial matter, the court's decision cannot be reconciled with the Hayden-Cartwright Act, 4 U.S.C. § 104, which expressly authorizes state taxation of motor fuel sales on federal reservations. But even apart from the Act, the court of appeals' application of a *conclusive* presumption against the validity of state taxation cannot bear scrutiny. This Court's modern decisions have grounded Indian tax immunities on the general preemption principles that govern all assertions of state authority affecting reservation activities, which require a particularized examination of relevant state and tribal interests. And while the Indian interest in immunity from state taxation typically is strong and the State's interest in taxing reservation activities typically is weak, that generalization hardly justifies tax immunity when it is demonstrated in a particular case that the state's justification for laying the tax is compelling, the tribal interest in resisting it is insubstantial, and the tax would have no effect on tribal governance or self-determination.

This is just such a case. Because the fuel sold by the Tribe is used almost exclusively on state roads, the activity subject to tax imposes very substantial costs on the State — but no burden at all on the Tribe. In these circumstances, imposition of the tax has *no*

⁵ The decision below also addressed challenges to two other Oklahoma taxes. The court of appeals upheld the validity of the State's tax on 3.2% beer sold in tribal stores. Pet. App. 4a-12a. In addition, respondent contended that the State was improperly requiring the collection of sales tax on retail sales made to the Tribe; the State responded that it treated such sales as exempt from tax. Both the Tribe and the court accepted Oklahoma's statement of its policy as valid. *Id.* at 16a-19a.

bearing on tribal self-government. And the levy does not reach any value generated by the Tribe on Indian land; the tax falls on “on-reservation sales outlets which market to non-members goods not manufactured by the tribe or its members, in which the tribal contribution to [the] enterprise is *de minimis*.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983). This is the paradigm of a case in which the Court has indicated that there is no tribal interest supporting immunity from state law.

On the other side of the equation, the State has a powerful interest in imposing the tax: the sale and use of motor fuel has a significant impact beyond the limits of Indian country. Tax immunity therefore would give the Tribe an enormous windfall, while leaving the State with none of the revenues but all of the burdens flowing from the Tribe's activity. And that becomes particularly clear when it is recognized that the decision below rests entirely on a formalism. It is plain from this Court's decisions that the State could impose precisely the same burden on the Tribe that it would bear if subjected directly to the tax by instead declaring the legal incidence of the tax to fall on the consumer and directing the Tribe to collect and remit the levy. By invalidating the tax because its legal incidence instead was said to fall on the Tribe, the court below “focus[ed] on [a] formalism [that] merely obscures the question whether the tax produces a forbidden effect.” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

2. If we are wrong in our first submission and the Court concludes that the legal incidence of a state tax never may be imposed on an Indian tribe, the decision below nevertheless should be set aside: the court of appeals erred in holding that the legal incidence of the fuel tax falls on the retailer. Under this Court's decisions, the legal incidence of a tax is borne not by the entity that has legal liability for payment, but rather by the one that the legislature intends to bear the burden of the levy. Here, that plainly

is the consumer. The basic definitional elements of the tax code indicate that both the distributor *and the retailer* are expected to pass the tax on to someone further down the distribution chain, while the code's tax exemptions expressly relieve certain *consumers* of the burden that they otherwise would carry of paying the tax. It may be added that if we are wrong in our definition of legal incidence — so that the legal incidence of a tax is borne only by those who are in some way subject to legal liability for payment of the tax — the incidence of the fuel tax plainly falls on the *distributor*, the only entity in the distribution chain that has any legal obligation to do anything.

3. The court of appeals' holding that the treaty with the Chickasaw Nation precludes the imposition of state income tax on members of the Tribe who work on trust lands but live outside Indian country is insupportable. The court concluded that the treaty, which grants the Chickasaw Nation jurisdiction “within their limits west, so that” states may not “pass laws for the government of the [Chickasaw] Nation,” confers tax immunity on any member of the Tribe, irrespective of residence. But the court of appeals' approach is plainly inconsistent with the terms of the treaty, which provides the Tribe with rights only within its territorial “limits.” This understanding is confirmed by the treaty's history. By guaranteeing the Chickasaw Nation that its territory would never “be embraced in any Territory or State,” the treaty literally removed the Tribe from state jurisdiction; now that Congress has changed its policy and encompassed the Tribe within the State of Oklahoma, it cannot be the case that tribal members who live outside of tribal territory are exempt from state law.

ARGUMENT

This case involves a “vexing” question (*Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 138 (1980)) that “has occupied the Court many times in the recent past” (*Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 847 (1982) (Rehnquist, J., dissenting)): how to “reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.” *Department of Taxation and Finance v. Milhelm Attea & Bros.*, 114 S. Ct. 2028, 2035 (1994), quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973). The court of appeals' answer to that question is wrong in several fundamental respects. The approach taken by the court below avowedly elevates form over substance, wholly disregarding the States' interest in taxing the recipients of state services; it departs from this Court's precedents in the placement of the legal incidence of the challenged tax; and it distorts the plain language of the relevant treaty. The decision accordingly should be reversed.

I. OKLAHOMA'S FUEL TAX MAY BE APPLIED TO SALES BY THE TRIBE

A. The Sale Of Fuel That Is Used Almost Exclusively On State Jurisdiction Roads Is Subject To Tax

At the outset, there are several areas of common ground between the parties that must frame the Court's analysis of the fuel tax in this case. *First* is the nature of the tax. The economic burden of the tax plainly falls upon the ultimate consumer of fuel, as the court of appeals itself understood; the court acknowledged that “it may well be that the tax is ultimately passed on to the consumer at the pump.” Pet. App. 14a. See *Gurley v. Rhoden*, 421 U.S. 200, 204 (1975) (“The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise.”). The purchasers bearing that burden are, in

substantial part, *non-Indians* or *non-members* of the Tribe.⁶ The motor fuel subject to tax is used almost exclusively *outside* of Indian country on state jurisdiction roads. And the tax revenues are used to defray the costs (of road construction and maintenance) imposed upon the *State* — and *only* upon the State — by the use of that fuel; the Tribe does not construct, police, or maintain significant road mileage.

Second, there is no denying that the court of appeals' invalidation of the fuel tax rested on a formalism. The court properly did not suggest that the tax was preempted by the terms of any treaty; instead, it found that the legal incidence of the tax falls upon the retailer (and therefore, in this case, upon the Tribe), and proceeded to apply a *conclusive* presumption against the validity of such a tax. We explain below that the court's placement of the levy's legal incidence was wrong. But even granting for the moment that the legal incidence of the tax does fall upon the Tribe, it is beyond dispute that, at least so far as sales to non-members of the Tribe are concerned, Oklahoma could permissibly impose a tax that is, in all essential respects, *identical* to the one invalidated by the court of appeals. It has long been settled, and the Tribe does not dispute, that a State may require an Indian tribe to collect a tax on on-reservation sales to non-members where the legal incidence of the levy falls on the purchaser. See pages 17-18, *infra*. This means, as the Tribe itself acknowledged in its brief in opposition to the petition for certiorari (at 7), that Oklahoma could cure the asserted defect in the

⁶ The Court has made clear that Indians who reside in Indian country but who are not members of the Tribe with local jurisdiction are not entitled to the protections of the Indian preemption and sovereignty doctrines. See, *e.g.*, *Colville*, 447 U.S. at 160-161. References in this brief to non-members of the Tribe accordingly describe both non-Indians and Indians who are not members of the Chickasaw Nation.

tax with “a stroke of the pen” simply by declaring the levy's legal incidence to fall on the ultimate consumer rather than the retailer.

Against this background, the question in this case is whether the formalism of “legal incidence” precludes imposition of a state tax on tribal transactions that impose enormous burdens on the State and no burdens at all on the Tribe, and that in large part are concluded with non-members. In answering that question, the court below expressly disregarded economic realities, declaring the competing state and tribal interests “not relevant.” Pet. App. 16a. In our view, however, the court of appeals' answer plainly departed from this Court's precedents: it elevated form over substance, ignored the substantial extra-reservation consequences of the taxed activities, and imposed a dramatic restriction on state taxing authority. That decision also cannot be reconciled with the plain terms of the Hayden-Cartwright Act, 4 U.S.C. § 104, which expressly authorizes state taxation of motor fuel sales made on federal reservations, including Indian reservations. The holding below therefore is insupportable.

1. The Balance Of State And Tribal Interests.

a. Although it once was thought that States lacked any power to assert their authority on Indian reservations, the Court “[l]ong ago * * * departed from Mr. Chief Justice Marshall's view,” expressed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), “that `the laws of [a State] can have no force within reservation boundaries.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980), quoting *Worcester*, 31 U.S. (6 Pet.) at 561. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Instead, the Court has recognized that “through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty.” *Montana v. United States*, 450 U.S. 544, 563

(1981). As a consequence, “tribes do not possess the same attributes of sovereignty that the Federal Government and the several States enjoy.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 169 (1982) (Stevens, J., dissenting).

Although the court below resolved this case through application of a dispositive presumption, the recognition of limitations on tribal sovereignty has led the Court to the conclusion that, as a general matter, “there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.” *White Mountain Apache*, 448 U.S. at 142. “Instead, [the Court] ha[s] applied a flexible preemption analysis sensitive to the particular facts and legislation involved. Each case requires a particularized examination of the relevant state, federal, and tribal interests.” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (citation omitted). As the Court explained just last Term,

[r]esolution of conflicts of this kind does not depend on “rigid rule[s]” nor on “mechanical or absolute conceptions of state or tribal sovereignty,” but instead on a “particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.”

Milhelm Attea, 114 S. Ct. at 2035 (citation omitted). See also, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 241-215 (1985); *id.* at 223 (Stevens, J., dissenting). The controlling test accordingly looks both to tribal interests and to whether the “state interests at stake are sufficient to justify the assertion of state authority.” *New Mexico v. Mescalero Apache*, 462 U.S. at 334.

In conducting this inquiry, “[c]ongressional authority and the “semi-independent position” of Indian tribes * * * [are] two independent but related barriers to the assertion of state regulatory

authority over tribal reservations and members.” *Rice v. Rehner*, 463 U.S. 713, 718 (1983) (citations omitted). This means that “state authority may be preempted by federal law, or it may interfere with the tribe’s ability to exercise its sovereign functions.” *Ramah Navajo*, 458 U.S. at 837 (citation omitted). This distinction may not make much of a practical difference, however. While “the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption” (*McClanahan*, 411 U.S. at 172; see *Rice*, 463 U.S. at 718-719; *Colville*, 447 U.S. at 178-179 (opinion of Rehnquist, J.)), principles of Indian sovereignty “provide[] a backdrop against which the applicable treaties and federal statutes must be read.” *McClanahan*, 411 U.S. at 172. Those principles accordingly give content to the unique preemption doctrine that is applied to state laws affecting Indians. See generally *Rice*, 463 U.S. at 718-719; *White Mountain Apache*, 448 U.S. at 143; *McClanahan*, 411 U.S. at 172. The practicalities of Indian self-government therefore bear on the existence of preemption.

b. While the Court has not set out a precise formula to govern in these cases involving overlapping state and tribal concerns, it has offered “[c]ertain broad considerations [that] guide our assessment” of the competing interests. *New Mexico v. Mescalero Apache*, 462 U.S. at 334. On the tribe’s side of this equation, the Court looks above all to whether application of state law on tribal lands “would interfere with reservation self-government” (*Rice*, 463 U.S. at 718, quoting *Mescalero Apache v. Jones*, 411 U.S. at 148); “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.” *McClanahan*, 411 U.S. at 172 (citation omitted). In undertaking this assessment, the Court has found the tribal interest particularly weighty where the state action affects the tribe’s relations only with its own members. See *Montana v. United States*, 450

U.S. at 564. And not surprisingly, the Court is apt to find the assertion of state authority untenable where it is “unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes” (*White Mountain Apache*, 448 U.S. at 148-149; see *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965)), or where the State seeks revenues “derived from value generated on the reservation by activities involving the Tribes.” *Colville*, 447 U.S. at 156-157.

At the same time, in completing this calculus the Court has “recognized that any applicable regulatory interest of the State must be given weight.” *Rice*, 463 U.S. at 719. Thus, “[a] State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention”; the State’s “interest in raising revenue is ... strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.” *New Mexico v. Mescalero Apache*, 462 U.S. at 336, quoting *Colville*, 447 U.S. at 157 (ellipses inserted by the Court). By the same token, the State has a correspondingly strong interest where the tribal activities involve non-Indians and where the tribe, rather than producing on-reservation value, is simply importing goods into Indian country for immediate resale. See *Cabazon Band*, 480 U.S. at 219-220.

The Court has followed this approach of balancing the state and tribal interests in assessing the validity of at least some aspects of state taxation. It is clear, for example, that the principle of Indian sovereignty does not preclude imposition of state taxes that fall on an Indian tribe for “tribal activities conducted outside the reservation.” *Mescalero Apache v. Jones*, 411 U.S. at 148. See *Colville*, 447 U.S. at 163-164. Even as to activities taking place on reservation or trust lands, it also is plain that “sales to persons other than reservation Indians * * * are legitimately subject to state taxation.” *Milhelm Attea*, 114 S. Ct. at 2031. And so far as such transactions are concerned, the Court has held repeatedly that States may

exercise their authority *directly against tribes* by requiring them to shoulder tax collection obligations on the States' behalf; States may “impose tax collection and book-keeping burdens on reservation retailers who are themselves enrolled tribal members, including stores operated by the tribes themselves.” *Id.* at 2036. See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512, 513 (1991); *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985) (per curiam); *Colville*, 447 U.S. at 151, 159; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481-483 (1976).

2. Federal Law Does Not Preclude State Taxation Of Indian Tribes In All Circumstances. a. Having said this, we of course recognize that the Court has been especially vigilant in protecting tribal interests where the full weight of state taxation has fallen directly upon the on-reservation activities of Indian tribes. The Court thus has characterized *McClanahan*, the seminal modern decision in the area, as holding that

even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. * * * Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.

Mescalero Apache v. Jones, 411 U.S. at 148. See *Moe*, 425 U.S. at 475-476.

The Court has applied this principle repeatedly to invalidate state taxes whose legal *and* economic incidence necessarily fell on tribal activities taking place in Indian country—for example, a state income tax on “a reservation Indian whose entire income derives from reservation sources” (*McClanahan*, 411 U.S. at 165), or a tax

on a tribe's royalty interests in reservation oil and gas leases (*Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 761 (1985)), or a tax on the sale of cigarettes on the reservation “to tribal members for their own consumption.” *Milhelm Attea*, 114 S. Ct. at 2031.⁷ These decisions followed from the notion of Indian sovereignty that underlies the Court's analysis in this area, for all of the challenged taxes infringed to some degree “on the right of reservation Indians to make their own laws and be ruled by them.” *White Mountain Apache*, 448 U.S. at 142, quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959). See *McClanahan*, 411 U.S. at 172. After all, a state tax on reservation sales by the tribe to tribal members who are the recipients of tribal services could “interfere with internal governance” (*Duro v. Reina*, 495 U.S. 676, 686 (1990)) by regulating the relationship between the tribal entity and its members; direct taxation of tribal income derived from the exploitation of on-reservation tribal resources could impose potentially ruinous liability and threaten to displace the mechanisms of tribal self-government.

But the rule against direct taxation of a tribe's on-reservation activities has not been stated in absolute terms. It is, instead, a “presumption against jurisdiction” (*Sac and Fox*, 113 S. Ct. at 1990 (emphasis added)) under which “Indian tribes and individuals generally are exempt from state taxation within their own territory.” *Blackfeet Tribe*, 471 U.S. at 764 (emphasis added). See *White*

⁷ See also *Sac and Fox*, 113 S. Ct. at 1990-1993 (income tax, and excise tax and registration fees on vehicles, imposed on Indians in Indian country); *Potawatomi*, 498 U.S. at 507 (tax on sale of cigarettes in Indian country to tribal members); *Colville*, 447 U.S. at 162-164 (taxes on motor vehicles owned by tribes or their members); *Bryan v. Itasca County*, 426 U.S. 373, 375-377 (1976) (personal property tax on on-reservation mobile home); *Moe*, 425 U.S. at 480-481 (personal property tax on reservation property, license fee on Indian retailers doing business on the reservation, and tax on on-reservation sales of cigarettes by Indians to Indians).

Mountain Apache, 448 U.S. at 144 (“state law is *generally* inapplicable”) (emphasis added); *Duro*, 495 U.S. at 686 (“[w]e have held that States may not impose *certain* taxes on transactions of tribal members on the reservation”) (emphasis added). For its part, *McClanahan*, the fountainhead of the Court’s doctrine, based its holding on particular treaty language (see 411 U.S. at 173-177) and, even so, stated its rule as applicable only to taxes on Indian *lands* or *income*. Indeed, the Court later expressly stated that its holdings invalidating state taxes did *not* extend to levies on the receipts of reservation retailers that were “attributable to on-reservation sales to non-Indians.” *Moe*, 425 U.S. at 482.

b. As this discussion suggests, respondent’s argument (see Br. in Opp. 21-25) that state taxation of Indian tribes is entirely precluded unless in terms permitted by Congress cannot bear scrutiny. It is true that the bar on state *taxation* of Indians, like the parallel restraint on state *regulation* of reservation activities, was once understood to be absolute; that is because the decisions first recognizing Indian tax immunity, *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867), and *The New York Indians*, 72 U.S. (5 Wall.) 761, 770 (1867), simply “extended” the *Worcester* rationale “to state taxation within the reservation.” *McClanahan*, 411 U.S. at 169. See *Oklahoma Tax Comm’n v. United States*, 319 U.S. 598, 602 (1943) (*Worcester* principle “was carried into the tax field in *The Kansas Indians*, 5 Wall. 737, and for the same reasons”). While the Court occasionally has cited these nineteenth century decisions in modern times (see *Blackfeet Tribe*, 471 U.S. at 764), the broadest implications of the early holdings necessarily cannot survive the demise of the *Worcester* rule.

In later years the Court changed course, grounding Indian tax immunity, “not on the Indian sovereignty doctrine,” but rather on the theory that tribal lands and enterprises were federal instrumentalities. *McClanahan*, 411 U.S. at 169-170. See *Colville*, 447 U.S. at 183-184 n.8 (opinion of Rehnquist, J.). But that approach also “did

not survive” (*Mescalero Apache v. Jones*, 411 U.S. at 150), and the Court more recently has “decline[d] the invitation to resurrect the expansive version of the intergovernmental immunity doctrine that has been so consistently rejected in modern times.” *Id.* at 155. See *Colville*, 447 U.S. at 183-184 n.8 (opinion of Rehnquist, J.) (as applied to Indians, federal instrumentality “line of analysis * * * was later overruled”); *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949); *Oklahoma Tax Comm'n v. United States*, 319 U.S. at 603 (the “federal instrumentality theory has been renounced” in the Indian setting).

In its contemporary decisions, the Court has grounded Indian tax immunities on the more general principles that govern all assertions of state authority affecting reservation activities. The Court thus has explained that it has “held that States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination.” *Duro*, 495 U.S. at 686. See *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976) (invoking “general preemption analysis”). To be sure, the Court has “recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.” *Cabazon Band*, 480 U.S. at 215 n.17.⁸ But this generalization — with which we agree — hardly justifies tax immu-

⁸ In *Cabazon Band*, 480 U.S. at 215 n.17, the Court observed in a footnote that “[i]n the special area of state taxation on Indian tribes and tribal members, we have adopted a *per se* rule.” But *Cabazon Band*, which was not a case involving state taxation and which relied for its observation on *Blackfeet Tribe* and *McClanahan*, cannot be read as approving preemption of state law in the circumstances of this case. Certainly, the statement that “it is unnecessary to rebalance these [state and tribal] interests in every case” does not mean that *all* state taxes falling on tribes are invalid in *all* circumstances.

ity when it is demonstrated in a particular case that the state interest supporting the levy is *compelling*, that the tribal interest is *insubstantial*, and that the state tax would have no effect on “tribal governance and self-determination.”

c. Nor is there any congressional policy that requires general use of a *conclusive* presumption against the validity of a State's taxation of tribal activities. There is nothing magical in the imposition of a state tax's legal incidence, and a concomitant state-created legal obligation, on a tribe; this Court already has held, in the *Moe-Colville* line of cases, that tribes may be subjected to a legal obligation to collect and remit state taxes. By the same token, there is not, of course, any federal statute that broadly grants tax exempt status to Indians in all circumstances.⁹ And although the Court has noted the congressional goals of “encouraging tribal self-sufficiency and economic development” (*Cabazon Band*, 480 U.S. at 216; see *New Mexico v. Mescalero Apache*, 462 U.S. at 335), a state tax is not invalid simply because it affects the tribal treasury. To the contrary, the Court has expressly rejected the argument that state legislation is preempted whenever it has an “adverse effect on the Tribe's finances” (*Cotton Petroleum*, 490 U.S. at 187) — even where “the economic impact” on the Tribe “is particularly severe.” *Colville*, 447 U.S. at 151 n.27. See also *id.* at 156-157. Similarly,

⁹ To the contrary, Congress on occasion has explicitly authorized state taxation of Indian activities or lands. See *McClanahan*, 411 U.S. at 177 n.16. And lest it be thought that the existence of these statutes suggests a background congressional view that state taxes are preempted unless explicitly permitted (cf. *id.* at 177), Congress also has specifically *precluded* the application of certain state taxes to specified activities or holdings of particular tribes — including taxation of lands held by members of the Chickasaw Nation or of the other Five Civilized Tribes. See, e.g., Act of June 28, 1898, 30 Stat. 495, 505-513; Act of April 26, 1906, 34 Stat. 137, 144; Act of May 10, 1928, 45 Stat. 495, §§ 3, 5 (1928); Act of Jan. 27, 1933, 47 Stat. 777.

it is plain that a state tax on particular activities is not preempted simply because, as a practical matter, it precludes the imposition of a tribal tax on the same conduct. See *id.* at 154-159.

In fact, in the particular setting presented here, it is plain that the State's authority to tax is wholly *consistent* with — and, indeed, is expressly *permitted* by — federal enactments. The Hayden-Cartwright Act, 4 U.S.C. § 104, explicitly authorizes States to collect taxes on the sale of motor fuel in federal reservations, providing:

That all taxes levied by any State * * * upon, or with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through * * * filling stations [or] licensed traders, * * * located on United States military or other reservations, when such fuels are not for the exclusive use of the United States.

Four months after the statute's enactment, the Attorney General concluded that the reference to “reservations” in the Hayden-Cartwright Act “describe[s] any body of land, large or small, which Congress has *reserved* from sale for any purpose. It may be a military reservation, or an *Indian reservation*, or, indeed, one for any purpose for which Congress has authority to provide * * *.” 38 Op. Atty. Gen. 522, 524 (1936) (first emphasis in original), quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909). See *ibid.* (“some of the agencies [selling fuel] which are expressly designated in [the Act] apparently are such as usually pertain to military, naval, or Indian reservations”). And four years later, speaking to precisely the situation at issue here, Solicitor of the Interior Margold concluded that the Act authorizes state taxation of sales of motor fuel purchased by an on-reservation tribal enterprise for resale both to non-Indians and to members of the tribe. *Application of Federal and State Sales Taxes to Activities of*

Menominee Indian Mills, 57 Interior Dec. 129, 138-140 (1940). There is no reason to doubt that conclusion, particularly since Congress reenacted the Act in 1947 — seven years after Solicitor Margold issued his opinion — without any relevant change. 61 Stat. 644.¹⁰

3. Sales By The Tribe Are Subject To The Oklahoma Fuel Tax. a. These principles make clear that Oklahoma's fuel tax may validly be applied to respondent's sales. At the outset, the Hayden-Cartwright Act expressly authorizes the tax. There should be no doubt, as the Attorney General concluded in 1936, that the Act reaches sales of motor fuel on all lands reserved by the United States for any purpose. That plainly reaches the federal trust lands that are the sites of the sales at issue in this case. See *Sac and Fox*, 113 S. Ct. at 1991-1992.¹¹

¹⁰ In *White Mountain Apache*, 448 U.S. at 152 n.16, the Court reserved the question whether the Hayden-Cartwright Act applies to Indian reservations. But even apart from the Act's broad language, there are compelling reasons to believe that it does. As the Solicitor of the Interior noted, the Act was an amendment to the Federal Aid Highway Act of 1936, which also included “a section devoted to roadways in Indian reservations[,] indicating that attention was called in the consideration of the act to Indian reservations.” 57 Interior Dec. at 139. In addition, among the selling agencies specifically enumerated as subject to tax are “licensed traders,” a reference that is “particularly suggestive of Indian reservations.” *Ibid.*

¹¹ Oklahoma did not assert the Act in defense of its tax in the lower courts because it was of the view that “the relevant boundary for taxing jurisdiction is the perimeter of a formal reservation, not merely land set aside for a tribe or its members.” *Sac and Fox*, 113 S. Ct. at 1991. The State therefore viewed Chickasaw lands as indistinguishable for fuel tax purposes from other lands; because Chickasaw lands were seen as within the State's taxing jurisdiction, they were seen as outside the scope of the Hayden-Cartwright Act. But the Court's decision in *Sac and Fox*, issued after the State filed its brief in the court of appeals, rejected the State's position — and

Even apart from the Act, however, there is no principle of preemption or tribal sovereignty that precludes application of the tax. So far as we are aware, the Court has *never* invalidated a state tax in the circumstances here: where the economic burden of the tax falls on purchasers who are *non-Indians* or *non-members* of the Tribe; where the State undeniably could impose the tax directly on those purchasers — and could, under *Milhelm Attea*, *Potawatomi*, *Colville*, and *Moe*, require the Tribe to collect and remit the tax; and where use of the product sold generates costs that are imposed entirely upon the *State*. Indeed, as we note above, the Court has declared that the rule against state taxation does not reach just that situation, emphasizing that its holdings invalidating state levies on Indian income did not address claims “that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians.” *Moe*, 425 U.S. at 482.¹² See also *Colville*, 447 U.S. at 178 (opinion of Rehnquist, J.) (“[h]istorically this Court had found Indians to be exempt from taxes on Indian ownership and activity confined to the reservation *and not involving non-Indians*”) (emphasis added).

The reason is apparent. Aside from its naked interest in raising revenue, the Tribe has no significant stake here. After all, requiring a tribe to remit a tax on sales to non-members — a tax that will be

therefore implicitly made clear that the Act applies to Indian country.

¹² The Court in *Moe* was addressing *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), where the Court invalidated a state gross proceeds or income tax imposed on an on-reservation Indian trader. The Court noted that the “challenge to these [taxes] is limited to the State's attempt to apply them to gross income from sales made on the reservation to reservation Indians.” *Id.* at 686 n.1. That was so even though the legal incidence of the tax on sales to *non-Indians* plainly fell on the Indian trader. The tax immunity of licensed Indian traders is generally equivalent to that of Indians themselves. See *Milhelm Attea*, 114 S. Ct. at 2036.

used to meet costs imposed *on the State* by use of the goods sold — in no sense imposes a “burden which frustrates tribal self-government.” *Moe*, 425 U.S. at 483. To the contrary, it is difficult to see how such a tax has any bearing whatsoever on the tribes' ability “to control their own internal relations, and to preserve their own unique customs and social order.” *Duro*, 495 U.S. at 685-686. Indeed, any argument that immunity from the levy “is necessary to * * * tribal government is refuted” by the fact that the State historically assessed the tax and the Tribe until very recently paid it, so “that the parties to this case had accommodated themselves to the state regulation.” *Montana v. United States*, 450 U.S. at 564-565 n.13.

Moreover, the tax at issue here does not fall upon *any* value generated by Indians on Indian land. Instead, this is the paradigm of a case in which the Court has indicated that there is *no* tribal interest supporting immunity from state law: the tax falls on “on-reservation sales outlets which market to non-members goods not manufactured by the tribe or its members, in which the tribal contribution to [the] enterprise is *de minimis*.” *New Mexico v. Mescalero Apache*, 462 U.S. at 341. See *Cabazon Band*, 480 U.S. at 219 (noting minimal tribal interest where the tribe “merely import[s] a product onto the reservation for immediate resale to non-Indians”).

As the Court has explained in very similar circumstances:

It is painfully apparent that the value marketed by the [retailers] to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. * * * What the [retailers] offer these customers, and what is not available elsewhere, is solely an exemption from state taxation.

Colville, 447 U.S. at 155. And the Court has repeatedly “rejected the proposition that `principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxa-

tion to persons who would normally do their business elsewhere.” *Milhelm Attea*, 114 S. Ct. at 2035, quoting *Colville*, 447 U.S. at 155.¹³

c. While the Tribe has no substantial interest in avoiding the tax, the State has a compelling interest in imposing it, for the sale and use of motor fuel “has a significant impact beyond the limits of” Indian country. *Rice*, 463 U.S. at 724. “This is not a case in which the State has nothing to do with the on-reservation activity, save to tax it” (*Cotton Petroleum*, 490 U.S. at 186), or where it is impossible “to identify any regulatory function or service performed by the State that would justify the assessment of taxes.” *White Mountain Apache*, 448 U.S. at 148-149. To the contrary, it is the existence of state-funded public highways that makes possible the Tribe’s sale of fuel, while the use of that fuel requires considerable expenditures for the maintenance and construction of state roads. “This particular ‘spillover’ effect is qualitatively different from any ‘spillover’ effects of income taxes or taxes on cigarettes. ‘A State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.’” *Rice*, 463 U.S. at 724, quoting *New Mexico v. Mescalero Apache*, 462 U.S. at 336. And

¹³ After the decision below, the Tribe imposed its own tax on gasoline and diesel fuel that is roughly equivalent to that imposed by the State. See Tribal Law 11-011 (Aug. 11, 1994). That the Tribe is not now marketing its tax exemption by undercutting other retailers, however, does not mean that it — or Oklahoma’s many other tribes — will not do so in the future. In any event, even if the Tribe does not lower its prices, the tax exemption nevertheless is valuable only because it allows for imposition of a tribal tax that otherwise would not be feasible. See *Colville*, 447 U.S. at 154-159. Yet the State “‘does not infringe the right of reservation Indians ‘to make their own laws and be ruled by them,’ *Williams v. Lee*, 358 U.S. 217, 220 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving.” *Colville*, 447 U.S. at 156.

here — in contrast to other cases in which state taxes have been invalidated (see *White Mountain Apache*, 448 U.S. at 150) — the Tribe does *not* construct or maintain highways for the use of the general public; that burden falls entirely on the State.

As the district court recognized:

In Oklahoma the gasoline transported onto Indian Country is for resale only and is used almost exclusively off of Indian Country on State jurisdiction roads. * * *

Further, the Tribe does not construct or maintain roads and highways for the use of the general public in Oklahoma. The State of Oklahoma constructs and maintains 111,412.76 miles of streets, roads and highways in Oklahoma which is funded by the state tax on motor fuel. All of the road mileage maintained by the state is off Indian Country. Therefore, the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a tribal member or not.

Pet. App. 36a-37a.

It should be added that the magnitude of the State's interest here is brought home by a consideration of the practical effects of the decision below. The motor fuel tax is a very significant source of revenue for Oklahoma, producing more than \$300 million annually, almost all of which is devoted to road construction and maintenance. Under the court of appeals' rule, the taxes forgone on sales by respondent — and by Oklahoma's 40 other tribes — would be substantial. But that will not be the extent of the State's loss; “marketing” of the tax exemption by the tribes will take business (and therefore taxable sales) from non-Indian retailers, further diminishing tax revenue. The amounts involved surely will be significant since, as *amicus* Petroleum Marketers Association of America, *et al.*, demonstrates, the market for motor fuel is extraordinarily price sensitive. Cf. *Milhelm Attea*, 114 S. Ct. at 2031 (purchases of untaxed cigarettes by non-Indians cost State

\$65 million in annual revenue).¹⁴ Tax immunity therefore gives the tribes an enormous windfall, while leaving the State with few of the revenues but all of the burdens flowing from the sale and use of motor fuel.

The court of appeals accordingly erred in holding that “the district court's balancing of the respective tribal and state interests at stake was not relevant to the determination of the propriety of the fuel taxes.” Pet. App. 16a. Instead,

[w]hile the Tribes do have an interest in raising revenue for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Colville, 447 U.S. at 156-157. Under this test, the proper accommodation here is manifest.

4. The Decision Below Rests On A Formalism That Disregards Economic Realities. In these circumstances, the holding below, which invalidates the fuel tax simply because the legal incidence is said to fall on the Tribe, rests upon the most sterile formalism. It is indisputable that the State could impose precisely the same burden on the Tribe by declaring the tax to fall on the consu-

¹⁴ This is a particular problem in Oklahoma because it is home to many tribes; in addition, the history of Oklahoma allotments means that Indian country is scattered helter skelter across the State, so that purchasers of fuel always are likely to be near an Indian retailer. See generally *Sac and Fox*, 113 S. Ct. at 1987, 1993; *Woodward v. DeGraffenried*, 238 U.S. 284 (1915); M. Wright, *A Guide to the Indian Tribes of Oklahoma* (1971).

mer and directing the Tribe to collect and remit the levy. See pages 17-18, *supra*. In the court of appeals' view, then, “the only difference between” a constitutional tax and one that is invalid is “their names.” *Sac and Fox*, 113 S. Ct. at 1993.

If this defect may be cured simply by declaring in the text of the tax statute that the legal incidence falls on the consumer, as the court below appeared to suggest (Pet. App. 13a), its decision “has no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman.” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). And as this case illustrates, the trap would be a significant one. The Oklahoma statute does not, after all, “expressly declare the legal incidence of the taxes to be on the retailer” (Pet. App. 13a), and the State consistently has understood the incidence of the tax to fall on the consumer. That the court of appeals nevertheless found the incidence of the tax to rest on the Tribe — and that the Tribe is entitled to a tax exemption as a result — is sure to foment litigation, as other tribes across the country attempt to convert arguable statutory ambiguities into tax immunities.

Moreover, the possibility that States could withdraw those exemptions after the fact by changing the statutory language is not a complete solution to this problem, because Indian sovereign immunity would prevent recovery by the States of forgone tax revenues. See *Potawatomi*, 498 U.S. at 509-511.¹⁵ And such a change would not be a permanent solution either, because a tribe could chase the tax exemption up the distribution chain by the simple expedient of becoming distributors of fuel. The court of appeals'

¹⁵ Of course, if the immunity conferred by the court of appeals could not be eliminated with the stroke of a pen, the ultimate constitutionality of a State's tax regime would turn on “mere nomenclature.” *Colville*, 447 U.S. at 163-164. Such an approach could impose crippling burdens on state governments.

rule, like all formalisms, thus would invite gamesmanship and manipulation.

The decision below therefore departs from this Court's clear holdings: "[t]here is of course no question that the Court has discarded the controlling significance of the label a State attaches to its taxes. A tax instead must be judged by its `practical operation.'" *Colville*, 447 U.S. at 188 (opinion of Rehnquist, J.), quoting *Detroit v. Murray Corp.*, 355 U.S. 489, 492 (1958).¹⁶ And because "[t]here is no economic consequence that follows necessarily from the use of * * * particular words, * * * and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect" (*Complete Auto*, 430 U.S. at 288), the court of appeals' approach entirely divorces Indian tax immunity from its rationale, leaving it as an engine for the destruction of the state fisc. This is a matter of the greatest significance to the States, for "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). The holding below therefore is manifestly wrong as it applies to sales by the Tribe to non-members.

¹⁶ The Court has found the legal incidence of the tax to be controlling in one circumstance: when a state levy falls directly on the United States. That is because the Federal Government's immunity from state taxation "has taken on essentially symbolic importance, as the visible `consequence of that [federal] supremacy which the constitution has declared.'" *United States v. New Mexico*, 455 U.S. 720, 735 (1982), quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). That rationale has no application to the relationship between States and Indian tribes, however. The United States, as the "suprem[e]" sovereign, is wholly immune from state regulation and taxation. In contrast, the rules of Indian sovereignty are adjusted to accommodate state interests. See pages 14-18, *supra*. That has become particularly clear with the Court's rejection of the notion that tribal enterprises are federal instrumentalities. See pages 20-21, *supra*.

5. The State May Tax Sales Of Fuel Used By Tribal Members Outside Indian Country. While we therefore think it plain that Oklahoma's tax may be imposed on sales to non-members, we also submit that the tax may be applied to sales to members of the Tribe. As Solicitor of the Interior Margold explained, the Hayden-Cartwright Act must be read to make such sales taxable

in view of the purpose of the statute to permit State taxes of all sales on reservations not previously subjected to such taxes, and of the wording of the statute, permitting taxes to be levied “in the same manner and to the same extent” as upon sales outside the reservation. Indians making purchases of gasoline outside the reservation must pay the sales tax in the same manner as other persons.

57 Interior Dec. at 140.

But even apart from the Hayden-Cartwright Act, in the circumstances of this case there is no justification for granting the Tribe immunity from tax on sales to tribal members. Because the Tribe does not maintain public highways, motor fuel purchased by tribal members is used almost exclusively on state jurisdiction roads, and therefore imposes precisely the same burdens upon the State as does the use of fuel by non-members. As the district court correctly held, “the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a tribal member or not.” Pet. App. 37a. These extra-reservation effects of the taxed activity decisively distinguish this case from those (involving cigarette, personal property, and income taxes, see pages 18-19 & n. 7, *supra*) in which the Court has invalidated taxes on tribal members; as the Court has explained, the “‘spillover’ effect [here] is qualitatively different from any ‘spillover’ effect of income taxes or taxes on cigarettes.” *Rice*, 463 U.S. at 724.

In fact, in analogous circumstances the Court has recognized that a state tax may be imposed on tribal members who live in Indian country. In both *Sac and Fox* and *Colville*, the Court suggested that automobile excise taxes and registration fees may be imposed on tribal members who live (and presumably garage their vehicles) in Indian country, so long as the amount of the tax is tailored to use of the vehicle off of Indian country. See *Sac and Fox*, 113 S. Ct. at 1993; *Colville*, 447 U.S. at 163-164. That conclusion, which rests on the understanding that a State must be able to tax recipients of its services, validates a tax on the purchase of fuel by tribal members that is “used almost exclusively off of Indian Country on State jurisdiction roads.” Pet. App. 36a.

B. The Legal Incidence Of The Fuel Tax Falls Upon The Consumer

For the reasons set out above, Oklahoma's power to impose the motor fuel tax on sales by the Tribe should be upheld regardless of who bears the legal incidence of that tax. But if the Court rejects that proposition and concludes that the legal incidence of a state tax never may be imposed on an Indian tribe absent express congressional intent (and concludes further that the Hayden-Cartwright Act does not provide that consent), the decision below regarding the fuel tax still should be set aside. The essential foundation for the court of appeals' holding — the conclusion that the legal incidence of the tax falls on the retailer — is incorrect. That conclusion disregarded both this Court's precedents on the placement of a tax's legal incidents and manifest indications of the Oklahoma Legislature's intent.

1. As the concept has been understood by this Court, the legal incidence of a tax does not necessarily fall on the entity that must remit the tax, or that can be held legally liable for nonpayment; instead, the legal incidence is borne by the entity that the legislature intended to carry the burden of the tax in a practical sense. This central role of legislative intent comes clear from this Court's decisions, including its discussion of the factors that are *not*

dispositive of the legal incidence inquiry. The Court thus has “squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment.” *United States v. Mississippi Tax Comm'n*, 421 U.S. 599, 607 (1975). Similarly, although the legal incidence of a sales tax will fall on the consumer when there is a statutory requirement that the retailer pass it on (see, e.g., *Moe*, 425 U.S. at 481-482), that will be so even when the statute does not contain any mechanism for enforcing the pass-through requirement.¹⁷ And when the legislature intends that the tax be passed on, the consumer to whom it *is* passed on may bear the levy's legal incidence even if he or she is not subject to suit by the State (or by the vendor) for nonpayment; none of this Court's decisions addressing the issue has suggested that legal provisions subjecting the consumer to legal liability are essential to a determination that the consumer bears the legal incidence of the tax.

Nor, for that matter, is an *express* pass-through requirement necessary. As this Court explained when rejecting a tribal claim of immunity from a state tax requiring payment by the tribe:

None of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary before a State may require a tribe to collect * * * taxes from non-Indian purchasers and remit the amounts of such tax to the State. Nor do our cases suggest that the only test for whether

¹⁷ See *Mississippi Tax Comm'n*, 421 U.S. at 609 n.8 (rejecting contention that, because the statute does not sanction the vendor for failing to pass on the tax, the legal incidence falls on the vendor); *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 348 (1968) (“We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor.”).

the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express “pass on and collect” provision.

Chemehuevi Indian Tribe, 474 U.S. at 11. Instead, the Court explained, “the test to be derived from [our] cases * * * is nothing more than a fair interpretation of the taxing statute as written and applied.” *Ibid.* So long as the statute, “fairly interpreted,” reveals a legislative intent that the consumer bear the ultimate burden of the tax, the legal incidence is on the consumer. See generally *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347 (1968) (“[t]here can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser”); *Gurley v. Rhoden*, 421 U.S. 200, 205 (1975) (legislative “purpose” dispositive).

A “fair interpretation” of Oklahoma's motor fuel tax leaves no doubt that the Oklahoma legislature intended the consumer (and certainly *not* the retailer) to bear the burden of the fuel tax.¹⁸ Thus, the basic definitional elements of the motor fuel tax code — which were wholly ignored by the court below — refer to the requirement that “a distributor, dealer, or *retailer* * * * *collect* taxes levied by this act.” Okla. Stat., Tit. 68, § 501C (emphasis added). This

¹⁸ Although the “legal incidence” inquiry touches on a matter of state law and this Court often defers to the views of the courts of appeals on such matters, it is clear that when the determination of a tax's legal incidence affects a federal right to tax immunity, “the duty rests on this Court to decide [such issues] for itself.” *Mississippi Tax Comm'n*, 421 U.S. at 609 (citation omitted). The Court accordingly has not viewed as dispositive even *state court* pronouncements on where the legal incidence of a state tax falls. See, e.g., *Diamond Nat'l Corp. v. State Board of Equalization*, 425 U.S. 268 (1976) (per curiam); *First Agricultural Nat'l Bank*, 392 U.S. at 346. Surely, the courts of appeals may claim no greater deference when interpreting state enactments than may the state courts themselves. See *Chemehuevi Indian Tribe*, *supra*.

makes plain that the obligation of both the distributor *and the retailer* is that of collecting the tax from someone further down the distribution chain.

This conclusion is confirmed by the exemptions that appear in virtually every one of the numerous provisions establishing the various constituents of the motor fuel tax. See Okla. Stat., Tit 68, §§ 501B, 502.2B, 502.3B, 502.4B, 502.5B, 502.6B, 502.7B, 522(d). These exemptions relieve the *consumer* of the obligation to pay the tax and are passed *up* the distribution chain to the retailer and then to the distributor. Thus, Section 501B (emphasis added) — again, a definitional provision of the statute — provides that “[p]urchasers of nontaxable diesel fuel must comply with the provisions of Section 509 [of this title] *in order to avoid the taxes* levied by Sections 502.1 and 522.1 [of this title].” Section 509B, in turn, provides that “[e]very person actually engaged in farming in Oklahoma or in a state which borders the State of Oklahoma and buying motor fuel to be used as fuel for farm tractors or stationary engines * * * and used exclusively for agricultural purposes * * * may purchase such motor fuel *without paying the tax.*” (emphasis added).¹⁹

The statute similarly declares that tax is not due on diesel fuel “used exclusively for purposes other than to operate motor vehicles on the public highways of this state” (Okla. Stat., Tit. 68, § 509.2A (1994)), and any person who places diesel fuel purchased under such an exemption “into the fuel tank of a motor vehicle for use in operating the motor vehicle on the public highways *shall be liable for the taxes.*” *Id.* § 509.2C (emphasis added). Fuel purchased by a county, city, or town for use in its vehicles is exempt from tax “provided that if the diesel fuel is placed directly into the fuel supply

¹⁹ The court of appeals itself cited this provision for the proposition “that the tax is not imposed on the distributor.” Pet. App. 14a. We agree that the exemption does indeed stand for that proposition — and for the further proposition that the tax *is* imposed on the consumer.

tank or tanks of the motor vehicle by the supplier, certification must be made on the invoice and all such sales must be reported by the supplier on forms furnished by the Oklahoma Tax Commission.” *Id.* § 509.2(F). The statute provides similar exemptions to those purchasing fuel for use in specified aircraft, in passenger buses or coaches, by public school vehicles, by FFA or 4-H club trucks, or by volunteer fire departments (*id.* §§ 508(a), 509.2E, 527). That these provisions relieve the *consumer* of the burden of “paying the tax” makes clear that the consumer ordinarily bears that burden, and thus the legal incidence of the levy. And this is confirmed by the practice when an exempt consumer purchases fuel from a retailer: the retailer subtracts from the consumer’s invoice the tax ordinarily due on the sale and obtains a credit on its next purchase of fuel from the distributor.

It is true, as the court of appeals observed, that the tax “statutes nowhere require the amount of the tax to be included in the retail price at the pump, a requirement which we could interpret as imposing the tax on the consumer.” Pet App. 13a. But, as mentioned above, this Court already has rejected a similar statutory interpretation that gave significance to the absence of “any * * * *explicit* pass-through’ language.” *Chemehuevi*, 474 U.S. at 10, quoting 757 F.2d 1047, 1056 (9th Cir. 1985) (emphasis added by the Court). Just as important, the Oklahoma statute nowhere declares its legal incidence to fall on the *retailer*, makes the *retailer* legally liable for payment of the fuel taxes as a general matter, or requires the distributor to pass the taxes on to the *retailer*. Accordingly, if it is significant that the statute does not expressly require pass-through of the tax from the retailer to the consumer, it must be equally as significant that the statute does not require pass-through of the tax from the distributor to the retailer.²⁰

²⁰ Okla. Stat., Tit. 68, § 505E does provide that a retailer “shall, at its option, pay to the distributor * * * all taxes due on all diesel fuel purchased from distributors or may procure a distributor’s license as

Finally, the provision principally relied upon by the court of appeals as evidence that the legal incidence of the tax falls on the retailer does not support its analysis. That provision, Okla. Stat., Tit. 68, § 505C, indicates that distributors remit taxes to the State “on behalf of a licensed retailer,” and that a distributor who is unable to collect the tax from the retailer may deduct that amount from its future tax remittances. See Pet. App. 13a-14a. But the reference to “collection” suggests only that the legal incidence of the tax falls somewhere down the distribution chain from the distributor; it says nothing about whether that incidence comes to rest with the retailer rather than the consumer. Moreover, the portion of § 505C omitted by the court below from its opinion makes clear that, at a minimum, the retailer cannot always bear the legal incidence of the tax. The unabridged version of the relevant portion of Section 505C refers to “[m]otor fuel taxes remitted by a distributor on behalf of a licensed retailer [for] the distributor or *collected on behalf of a nonlicensed purchaser of motor fuel*” (emphasis added). The legislature therefore expressly contemplated a class of cases in which retailers do not play any role in paying or collecting the tax. The significant point for the legislature thus was that the distributor be able to pass on the tax, not that the tax be borne by a retailer. In these circumstances, the motor fuel tax, “fairly interpreted,” imposes the legal incidence of the tax on the consumer.

2. It should be added that if we are wrong in our definition of legal incidence — so that the legal incidence of a tax is borne only by those who are in some way subject to legal liability for payment

provided in Section 510 of this title.” This provision, which refers only to taxes on diesel fuel, contains no enforcement mechanism; it also says nothing about the requirement that the retailer of diesel fuel collect the tax from those below it on the distribution chain.

of the tax — then the legal incidence of Oklahoma's fuel tax plainly falls on the *distributor*, rather than the retailer. While the Oklahoma Legislature doubtless expected that distributors *would* pass on the tax to retailers (just as it expected that retailers would pass it on to consumers), nothing in the statute *requires* them to do so. Similarly, as we note above, if the distributor does not pay the tax the State has no legal recourse against the retailer. See *Gurley*, 421 U.S. at 205-206 (“if the [distributor] does not pay the tax, the Government cannot collect it from his vendees; the statute has no provision making the vendee liable for its payment”). By the same token, the State has no right of action against a retailer who fails to compensate its distributor for taxes paid. In any event, then, the legal incidence of the tax here does not fall on the retailer, which means that the fuel tax is valid as applied to sales by tribal retailers.

II. THE TREATY WITH THE CHICKASAW NATION DOES NOT PRECLUDE IMPOSITION OF OKLAHOMA'S INCOME TAX ON TRIBAL MEMBERS WHO LIVE OUTSIDE INDIAN COUNTRY

The court of appeals also erred in holding that Oklahoma may not impose its income tax on enrolled members of the Chickasaw Nation who work on tribal trust lands but live outside the formal boundaries of Indian country. That decision rests on a plain misreading of the treaty with the Chickasaw Nation. We discuss first the framework for the court of appeals' decision, an understanding of which is critical to the issue presented here, and then proceed to demonstrate why the court's reading of the treaty is indefensible.

1. As we explain above (at 18-19), decisions such as *McClanahan* and *Mescalero Apache v. Jones* have recognized a strong presumption against state taxation of the reservation income of Indians who live on formal reservations and derive their income

from reservation sources. Two Terms ago, in *Sac and Fox*, the Court extended this presumption to Indians who live in all areas defined as “Indian country” and who derive their income from work within that territory. The Court explained that it had “never drawn [a] distinction” between formal reservations and Indian country for purposes of the *McClanahan* presumption. 113 S. Ct. at 1991. Thus, the Court held that “[i]f the tribal members do live in Indian country,” the relevant treaties and statutes would have to be analyzed, as in *McClanahan*, “against the backdrop of Indian sovereignty.” *Id.* at 1992.

At the same time that it has recognized the presumptive income tax immunity of reservation Indians, however, the Court has contrasted the status of “Indians who have left or never inhabited reservations set aside for their exclusive use,” as to whom no such presumption applies. *McClanahan*, 411 U.S. at 167. The Court in *Sac and Fox* thus reaffirmed that “[t]he residence of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction.” 113 S. Ct. at 1991. In the context of *Sac and Fox*, where the State sought to apply its income and motor vehicle excise taxes to members of the Tribe who lived in Indian country (see *id.* at 1988-1989), this statement reflected the Court’s continuing recognition of the distinction between Indians who live on land set aside for them by the United States, and those who do not. See also *id.* at 1991 (“To determine whether a tribal member is exempt from state income taxes under *McClanahan*, a court first must determine the residence of that tribal member.”).

Because all of the Indians whom Oklahoma sought to tax in *Sac and Fox* may have lived within Indian country, the Court had no occasion to determine whether the Tribe’s “right to self-governance could operate independently of its territorial jurisdiction to preempt the State’s ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country.”

113 S. Ct. at 1992. In addressing that question, the court below held that no presumption of invalidity applies to state income taxes on Indians living outside Indian country, but that a state nevertheless may be prohibited from imposing such taxes if “the tribe [can] show that the tax is barred by one of the two independent barriers to the exercise of state jurisdiction over Indians, *i.e.* interference with reservation self-government or impairment of rights granted or reserved by federal law.” Pet. App. 26a-27a. While petitioner has no quarrel with this statement in the abstract, the court’s construction of the treaty with the Chickasaw — which it held to create such an independent bar to taxation — is insupportable.

2. The court of appeals relied on Article IV of the treaty, which provides:

The Government and the people of the United States are hereby obliged to *secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants*; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333.²¹

²¹ As we have explained (at note 1, *supra*), this treaty actually was concluded with the Choctaw Nation but subsequently was applied to the Chickasaw Nation.

The court focused in particular on the language providing that “no Territory or State shall ever have [the] right to pass laws for the government of the [Chickasaw] Nation,” reading this language to mean that “[t]he crucial question in determining the validity” of Oklahoma’s tax is simply “whether the law is one imposed on the Chickasaw Nation or its descendants.” Pet. App. 30a. Under this analysis, “[r]esidency is simply not relevant.” *Ibid.* All that matters is whether the law — although facially neutral as between Indians and non-Indians — is being applied to members of the Tribe. If so, in the court of appeals’ view, the law is one “for the government of the Chickasaw Nation” and is invalid.

This approach does violence to the plain terms of the treaty, which precludes the State from “pass[ing] laws for the *government* of the [Chickasaw] Nation” (emphasis added). In light of the *McClanahan* presumption, this language may reasonably be read as barring state laws that govern the Chickasaw in a manner that displaces the mechanisms of tribal government in Indian country. But it cannot fairly be stretched to proscribe a non-discriminatory state income tax imposed on persons living outside of Indian country, who receive from the State both a myriad of particular services and “[t]he intangible value of citizenship in an organized society.” *Cotton Petroleum*, 490 U.S. at 190. One would not, after all, characterize a state income tax imposed on a federal employee who lives within the State’s jurisdiction as a law passed “for the government of the United States.”

That point is conclusively established by the treaty language immediately preceding that relied upon by the court of appeals. Read in context, the treaty provides that the “United States are hereby obliged to secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all persons and property

that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants” (emphasis added). This provides expressly that the agreement confers rights to the Tribe “within their limits” (what we would now call the reservation, trust land, or Indian country); the conferral of these rights “so that” state laws may not be passed for the Tribe makes clear that the treaty has effect only within Indian country.

It may be added that the imposition of a tax on someone living *outside* Indian country is not rendered a law “for the government of the Chickasaw Nation” “within their limits west” simply because the income subject to tax is earned in Indian country. The tax here is not imposed upon the payment of funds *by* the tribal government in Indian country; it falls, instead, upon individual members of the Tribe who reside outside of Indian country. See *United States v. County of Fresno*, 429 U.S. 452, 461 n.9 (1977) (“The theory * * * that a tax on income is legally or economically a tax on its source, is no longer tenable”) (citation omitted).²² By declaring that the residence of that tribal member “is simply not relevant” (Pet. App. 30a), the court of appeals therefore necessarily has held that tax immunity is an entitlement conferred upon individual Chickasaws. While the court purported not to resolve the question (see *id.* at 30a n.11), this

²² A tax on tribal members who live outside but work within Indian country is in this respect identical to a tax on *non-members* who work for the Tribe. The latter tax, as the court of appeals itself recognized, plainly is valid. Pet. App. 21a. Cf. *Cotton Petroleum, supra* (state could impose severance tax on on-reservation oil and gas drilling by non-member company, where tax did not affect tribal interests and company derived substantial benefits from the state). In both instances, the legal and economic incidence of the tax falls on the individual taxed, not the entity by whom the individual is employed. See *County of Fresno*, 429 U.S. at 461 n.9.

rule would seem to preclude the imposition of Oklahoma's income tax on all Chickasaw Indians who live outside Indian country, not just those who derive their income from work on the reservation. Indeed, taken to the limits of its logic, the court's analysis would preclude the imposition of *any* state law on members of the Tribe—including all the other laws of Oklahoma and the laws of other states when Chickasaw Indians journey beyond the borders of Oklahoma. The parties to this treaty surely cannot have intended to provide Chickasaw Indians with a blanket exemption from all state law. But if that is not what the treaty means, the holding of the court below is insupportable.

Moreover, the court of appeals' holding cannot be reconciled with the rule that Indians are “subject to nondiscriminatory state law otherwise applicable to all citizens of the State” when they travel beyond the reservation boundaries. *Mescalero Apache v. Jones*, 411 U.S. at 148-149. While that presumption may be overcome by “express federal law” (*ibid.*), the treaty language relied upon here hardly carries the necessary clarity. In fact, this Court has *never* found federal law sufficient to overcome the rule of *Mescalero Apache*. That is not surprising, for the interest of Indians in remaining “free from state jurisdiction and control” (*McClanahan*, 411 U.S. at 168 (citation omitted)) is most significant when “on-reservation conduct involving only Indians is at issue.” *White Mountain Apache*, 448 U.S. at 144. See *Potawatomi*, 498 U.S. at 511.²³

²³ The court of appeals evidently found it significant that on-reservation Indian immunity from state regulation is stated more explicitly in the treaty with the Chickasaw than in the treaties addressed in *McClanahan* and *Sac and Fox*. See Pet. App. 27a-28a. Even if true, however, that observation hardly supports the court's conclusion. The tax at issue in *McClanahan* was invalidated because it fell upon a *reservation* Indian and therefore was (needless to say) subject to the *McClanahan* presumption; the Court *left open* whether the tax at issue in *Sac and Fox* could be applied to Indians living outside of Indian country.

3. This understanding of the treaty is confirmed by the purposes of its draftsmen and the circumstances of its drafting. The guarantee of freedom from state laws “for the government of the Choctaw Nation,” a guarantee subsequently applied to the Chickasaw Nation, must be understood in relation to language elsewhere in the treaty and to the other clauses in Article IV of the Treaty of Dancing Rabbit Creek. As explained in the preamble, the treaty was necessitated by the State of Mississippi's extension of its laws to “persons and property” within the State's limits and the inability of the United States to guarantee the Choctaw (and Chickasaw) people freedom from those laws. See also Treaty with the Chickasaw, 7 Stat. 450 (1834). The United States therefore agreed to convey “a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it.” Treaty of Dancing Rabbit Creek, Art. II.

The land given to the Choctaw and Chickasaw Nations did not at that time lie within any State. And critically, Article IV promised that it never would: “No part of the land granted them shall ever be embraced in any State or Territory.” Because they were to be outside the jurisdiction of any political unit (except the United States), other portions of Article IV gave the Chickasaw a significant degree of sovereignty within their lands. They were to be subject only to their own laws (so long as those laws were consistent with the Constitution and federal law) and to the exercise of federal power pursuant to the Indian Commerce Clause. This and similar treaties under which the Five Civilized Tribes removed to Indian Territory caused this Court to comment, prior to statehood, that the Territory stood “in an entirely different relation to the United States from other Territories, and * * * for most purposes it is to be consi-

dered as an independent country.” *Atlantic and Pacific R. Co. v. Mingus*, 165 U.S. 413, 435-436 (1897).²⁴

It is in this context that the first clause of Article IV must be read. The point of the treaty, after all, was *literally* to remove the Tribe from the jurisdiction of any State, and concomitantly to grant the Tribe “the jurisdiction and government of all the persons and property *that may be within their limits west*.” Given the understanding that the Tribe's lands never would be within the jurisdiction of a State, it was quite natural for the treaty to provide that “no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation.” In this setting, the drafters could not have meant to create state tax immunities for members of the Tribe who moved west of the Mississippi yet lived outside Indian country, because it was not thought that those members would live within a State.

The subsequent history of the territory that was conveyed to the Chickasaw further demonstrates that the court of appeals' interpretation of the treaty is untenable. As noted above, the treaty provided that this territory would never be embraced within any state. The Chickasaw Nation, as well as several of the other tribes that removed to Indian Territory, initially had fully functioning systems of government. See F. Cohen, *supra*, at 427. But as we also have explained (at 3-4), Congress substantially modified the guarantee that Indian lands would be free from state encroachment, first by extending certain laws of Arkansas to a portion of Indian Territory (Act of May 2, 1890, 26 Stat. 81), then by displacing tribal law (Act of April 28, 1904, 33 Stat. 573), allotting Chickasaw lands, enacting the Oklahoma Enabling Act that authorized the admission to the Union of the Oklahoma and Indian Territories as

²⁴ This relationship is further confirmed by the fact that the treaty granted the land in fee simple to the Chickasaw Nation “as a quasi independent nation,” and was not to be held in trust by the United States. *Fleming v. McCurtain*, 215 U.S. 56, 60 (1909).

the State of Oklahoma (Act of June 16, 1906, 34 Stat. 267), and, finally, by admitting Oklahoma to the Union on November 16, 1907.

This Court has, on several occasions, observed that treaty rights “must be read in light of * * * subsequent” relevant legislation. *South Dakota v. Bourland*, 113 S. Ct. 2309, 2321 (1993) (quoting *Montana v. United States*, 450 U.S. 544, 561 (1981)). See also *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 422 (1989) (opinion of White, J.); *Puyallup Tribe v. Washington Game Dep’t*, 433 U.S. 165, 174 (1977). In the case of the Chickasaw Nation, Acts of Congress subsequent to 1830 made it possible for members of the Tribe to reside within the State of Oklahoma on lands that no longer were subject to the obligations of the treaty. In these circumstances, “[i]t defies common sense” (*Brendale*, 492 U.S. at 423 (opinion of White, J.) (citation omitted)) to conclude that tribal members — who live in and receive services from Oklahoma — are exempted from state tax by the treaty.

CONCLUSION

The decision of the court of appeals for the Tenth Circuit should be reversed.

Respectfully submitted.

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