SUPREME COURT OF THE UNITED STATES

No. 94–771

OKLAHOMA TAX COMMISSION, PETITIONER *v.*
CHICKASAW NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 14, 1995]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SOUTER join, concurring in part and dissenting in part.

I dissent from the portion of the Court's decision that permits Oklahoma to tax the wages that (1) the Tribe pays (2) to members of the Tribe (3) who work for the Tribe (4) within Indian country, but (5) who live outside Indian country, and, apparently, commute to work. The issue is whether such a tax falls within the scope of a promise this Nation made to the Chickasaw Nation in 1837—a promise that no "State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U. S. shall forever secure said [Chickasaw] Nation from, and against, all laws" except those the Tribe made itself (and certain others not relevant here). Treaty of Dancing Rabbit Creek, 7 Stat. 333–334 (1830); Treaty of Jan. 17, 1837, 11 Stat. 573. In my view, this language covers the tax.

For one thing, history suggests that the signatories to the Treaty intended the language to provide a broad guarantee that state law would not apply to the Chickasaws *if* they moved west of the Mississippi River—which they did. The promise's broad reach was meant initially to induce the Choctaws to make such a move in 1830, and it was extended, in 1837, to the Chickasaws for the same reason, all with the hope that other tribes would follow. See A. DeRosier, Removal of the Choctaw Indians 46, 100–128 (1970);

id., at 104 (quoting, among other things, President Jackson's statement to Congress, in 1829, that “if the Indians remained east of the Mississippi River, they would be subject to the laws of the several states,” but, if they accepted the Treaty and moved west, they would be “free of white men except for a few soldiers”).

For another thing, the language of this promise, read broadly and in light of its purpose, fits the tax at issue. The United States promised to secure the "[Chickasaw] Nation from, and against, *all* laws" for the government of the Nation, except those the Nation made itself or that Congress made. Treaty of Dancing Rabbit Creek, *supra* (emphasis added). The law in question does not fall within one of the explicit exceptions to this promise. Nor need the Court read the Treaty as creating an additional implied exception where, as here, the law in question likely affects significantly and directly the way in which the Tribe conducts its affairs in areas subject to tribal jurisdiction—how much, for example, it will likely have to pay workers on its land and what kinds of tribal expenditures it consequently will be able to afford. The impact of the tax upon tribal wages, tribal members, and tribal land makes it possible, indeed reasonable, to consider Oklahoma's tax (insofar as it applies to these tribal wages) as amounting to a law "for the government of" the Tribe. Indeed, in 1837, when the United States made its promise to the Chickasaws, the law considered a tax like the present one to be a tax on its source—*i.e.*, the Tribe itself. See, *e.g.*, *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, 445–448 (1842) (Federal Government employee salaries exempt from state tax laws). Although tax law subsequently changed, see *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 480 (1939), the empirical connection between tax and Tribe has not. The Treaty's basic objective, namely practical protection for the Tribe, suggests that this unchanging empirical impact, rather than shifting legal tax theory, is the critical consideration.

The majority sets forth several strong arguments against the Treaty's application. But, ultimately, I do not find them convincing. It is true, as the majority points out, that well-established principles of tax law permit States to tax those who reside within their

boundaries. It is equally true that the Chickasaws whom Oklahoma seeks to tax live in the State at large, although they work in Indian country. But, these truths simply pose the question in this case: Does the Treaty provide an *exception* to well-established principles of tax law, roughly the same way as do, say, treaties governing diplomats and employees of international organizations? See, *e.g.*, *Toll* v. *Moreno*, 458 U. S. 1, 14–15 (1982) (explaining that some such individuals are exempt from federal, state, and local income taxation). The statement of basic tax principles, by themselves, cannot provide the answer.

The majority is also concerned about a "line-drawing" problem. If the Treaty invalidates the law before us, what about an Oklahoma tax, for example, on residents who work for, but are not members of, the Tribe? I acknowledge the problem of line drawing, but that problem exists irrespective of where the line is drawn here. And, because this tax (1) has a strong connection to tribal government (*i.e.*, it falls on tribal members, who work for the Tribe, in Indian country), (2) does not regulate conduct outside Indian country, and (3) does not (as the Solicitor General points out) represent an effort to recover a proportionate share of, say, the cost of providing state services to residents, I am convinced that it falls on the side of the line that the Treaty's language and purpose seek to prohibit. To decide that the Treaty prohibits the law here is not to decide whether or not it would prohibit a law with a weaker link to tribal government or a stronger impact outside Indian country.

One final legal consideration strengthens the conclusion I reach. The law requires courts to construe ambiguous treaties in favor of the Indians. *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226, 247 (1985). The majority believes that even a "liberal construction cannot save the Tribe's claim," *ante*, at 15, because the Treaty says that the United

States is "obliged to secure to the said [Chickasaw] Nation . . . the jurisdiction and government of all the persons and property that may be *within their limits* west." Treaty of Dancing Rabbit Creek, 7 Stat. 333–334 (emphasis added). This language, when viewed in its historical context, however, seems primarily designed to point out that the Treaty operates only in respect to Chickasaw lands west of the Mississippi—*i.e.*, that the Chickasaws would receive no protection unless they moved there. Regardless, the Oklahoma tax in question does affect "persons," namely tribal members, and "property," namely their wages, which members work and which wages are paid well "within" the Nation's "limits," *i.e.*, in Indian country. Admittedly, the quoted language, by itself, does not say for certain that such effects are sufficient to bring the state law within the Treaty's prohibition, but neither does it clearly make residency (rather than, say, place of employment) an absolute prerequisite. In these circumstances, the law requires us to give the Tribe the benefit of the doubt.

Thus, in my view, whether we construe the Treaty's language liberally or literally, Oklahoma's tax falls within its scope. For these reasons, I believe the Treaty bars the tax. And, although I join the remainder of the Court's opinion, I respectfully dissent on this point.