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PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

CAPTION: AMERICAN TRUCKING ASSOCIATIONS, INC., ET  
AL., Petitioners V. MAURICE SMITH, DIRECTOR,  
ARKANSAS HIGHWAY AND TRANSPORTATION  
DEPARTMENT, ET AL.

CASE NO: 88-325

PLACE: Washington, D.C.

DATE: December 6, 1989

PAGES: 1 - 43

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IN THE UNITED STATES SUPREME COURT

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AMERICAN TRUCKING ASSOCIATIONS, :  
INC., ET AL., :  
Petitioners, :  
v. : No. 88-325  
MAURICE SMITH, DIRECTOR, :  
ARKANSAS HIGHWAY AND :  
TRANSPORTATION DEPARTMENT, :  
ET AL. :

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Washington, D.C.  
Wednesday, December 6, 1989

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 1:35 p.m.

APPEARANCES:

ANDREW L. FREY, ESQ., Washington, D.C.; on behalf of  
the Petitioners.

A. RAYMOND RANDOLPH, ESQ., Washington, D.C.; on behalf of  
the Respondents.

C O N T E N T S

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ORAL REARGUMENT OF

PAGE

ANDREW L. FREY, ESQ.

On behalf of the Petitioners

3

A. RAYMOND RANDOLPH, ESQ.

On behalf of the Respondents

19

REBUTTAL ARGUMENT OF

ANDREW L. FREY, ESQ.

On behalf of the Petitioners

39

P R O C E E D I N G S

(1:35 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-325, American Trucking Associations v. Maurice Smith.

Mr. Frey.

ORAL REARGUMENT OF ANDREW L. FREY

ON BEHALF OF THE PETITIONERS

MR. FREY: Thank you, Mr. Chief Justice, and may it please the Court:

I'm afraid I'm inflicted with laryngitis today and I ask the Court's patience with me although you should certainly feel free to ask questions, but I may be a little slow in responding to them.

We've just heard an interesting argument on the perplexing question whether and under what circumstances federal law may require refunds of unconstitutional state taxes.

It's useful to have in mind in approaching this case why that question is important to McKesson but not here. The difference in the two cases is not based on the clearly-established law factor because in this case too we have the second issue, the post-Scheiner tax collections which I think plainly violated clearly-established law laid down in Scheiner.

1           In fact, the difference between our case and  
2 McKesson is that our case was a true retroactivity case  
3 and I don't think McKesson is. Now, the best way to sum  
4 up this difference is that retroactivity tells you what  
5 substantive law governs a case, whereas, the law of  
6 remedies assumes that there has been a substantive  
7 violation and asks what type of relief is appropriate.

8           So, the Florida Supreme Court's basis for its  
9 decision in McKesson I think had nothing to do with the  
10 notion that there had been a change in law and that  
11 Florida was entitled to rely on some prior rule of law.

12           Rather, the court held that even though the  
13 statute may have been clearly unconstitutional from the  
14 very moment of its enactment, McKesson was not entitled to  
15 refund relief because of the nature of injury or lack of  
16 injury that it suffered by virtue of the Commerce Clause  
17 violation.

18           Now, whether the Florida court was talking about  
19 state or federal law when it was making that ruling, you  
20 can overturn that ruling only by finding that there is a  
21 federal right to some refund relief in the circumstances  
22 of the McKesson case.

23           In our case, however, the ruling of the Arkansas  
24 Supreme Court that the interstate truckers should not  
25 receive refunds of pre-escrow tax payments is based on a

1 non-retroactivity determination under this Court's Chevron  
2 test.

3 What the Arkansas Supreme Court effectively held  
4 is that Aero Mayflower provides the substantive Commerce  
5 Clause rule that would govern Petitioner's refund claims  
6 until August 14th, 1987 when Justice Blackmun entered his  
7 escrow order, and that the principles of Scheiner would be  
8 applied to HUE taxes collected after that date.

9 This is not in any sense a ruling that  
10 unconstitutional state highway taxes are not refundable in  
11 Arkansas because of sovereign immunity, or for any other  
12 reason. Quite to the contrary. The fact that post-escrow  
13 tax payments were refunded, shows that Arkansas law does  
14 give petitioners a right to refund of taxes to which the  
15 principals of Scheiner are applicable.

16 The refunds were denied here because in effect  
17 the highway tax at issue was treated as having been  
18 constitutional prior to the time of Justice Blackmun's  
19 escrow order.

20 Now, contrary to the arguments of respondents  
21 and their amici, the question of which substantive  
22 Commerce Clause governs here, the Aero Mayflower rule or  
23 the Scheiner rule, is surely one of federal law. And  
24 while retroactivities and right to refunds may be related  
25 from a practical standpoint, the choice of the proper

1 substantive rule is conceptually quite distinct from the  
2 question of whether a violation of federal law gives rise  
3 to right to refund.

4 So, with that underbrush I hope cleared away,  
5 let me turn to the retroactivity question in our case.

6 QUESTION: Do you think -- do you think that  
7 Arkansas makes any different claims now on reargument?

8 MR. FREY: From what it did before?

9 QUESTION: Yes.

10 MR. FREY: I think it has a -- an argument based  
11 on Union Gas and the powers of Congress and the powers of  
12 this Court, which I think is new. Otherwise, I think it's  
13 largely rearguing Scheiner, which I think is what it did  
14 before, on the merits of the retroactivity issue.

15 Now, I'm going to talk in terms of the Chevron  
16 test because that is the test that this Court has devised  
17 for deciding whether a given rule is substantive federal  
18 law, and by this I include such things as statutes of  
19 limitations for this purpose, which was what was at issue  
20 in Chevron -- what applied to events that occurred prior  
21 to the date of the case that decided that rule of law.

22 The first thing I want to say about it is that  
23 in the particular context where the proponent of non-  
24 retroactivity is the government, this Court has had some  
25 revealing things to say on that subject in the Owen case.

1 I understand the Owen case involved municipality and not  
2 the state, and it involved the statutory right under 1983,  
3 but the way the Court went about identifying the question  
4 whether there should be an obligation to make the citizen  
5 whole for a violation of his constitutional rights, even  
6 where it was not clear at the time the government action  
7 took place that it was illegal, is illuminating in our  
8 case.

9 And, indeed, if you look at the state's briefs  
10 in this case, you will find that Owen is nowhere cited or  
11 discussed in their briefs.

12 Now, the Chevron test identifies three factors  
13 that go into the retroactivity analysis.

14 QUESTION: May I just interrupt for a second,  
15 Mr. Frey. You make a big point of the fact that  
16 government is a proponent of non-retroactivity. Of  
17 course, that's typical in all criminal retroactivity  
18 cases, that the government is always -- always the  
19 proponent of non-retroactivity.

20 MR. FREY: And the criminal rule is that -- is  
21 now that all decisions are fully retroactive to cases that  
22 are pending on direct appeal.

23 QUESTION: Do you argue for such a rule here?

24 MR. FREY: Excuse me?

25 QUESTION: Do you argue for a comparable rule



1 here?

2 MR. FREY: No, we don't. We don't. I think  
3 what we are actually saying -- we are not asking the  
4 Court, and we don't think the Court needs for this case,  
5 to go so far as to say that the government always loses  
6 when it's seeking non-retroactive application of some  
7 constitutional rule.

8 We do say that if you look at a case like ours  
9 in which the rule is arguably new and arguably not new,  
10 foreshadowed but -- and the state is able to say it wasn't  
11 clear that we were acting unconstitutionally when we acted  
12 and, therefore, we shouldn't have to apply the new rule to  
13 the old case -- I think Owen gives grounds for healthy  
14 skepticism about that argument. It's a factor that weighs  
15 entirely --

16 QUESTION: The question I'm raising is -- I  
17 suppose there are always two questions. One, is it  
18 retroactive, and if so, from what date? And, secondly,  
19 what does that mean? Does it mean that the tax is paid  
20 before the date or the highway is used before the date or  
21 cases pending on the date? There are a lot of things that  
22 can fall from that.

23 MR. FREY: I think in that -- in the tax --

24 QUESTION: I'm not quite clear what the position  
25 is here.

1 MR. FREY: Well, I will tell you what -- our  
2 position is that if it were non -- if it's retroactive,  
3 it's presumably retroactive to any cases that are still  
4 under litigation or open under the statute of limitations  
5 where state procedural rules have been met and you're  
6 suing for a refund.

7 If it is partially non-retroactive, which is our  
8 second issue, the post-Scheiner payments, we would say  
9 that the question is when did the transaction occur that  
10 was subject to the tax -- before or after the new rule?  
11 So, if the tax is imposed for highway use after June 23rd,  
12 1987, we would say that that's not a question of  
13 retroactivity. That's a refusal to give prospective  
14 effect to Scheiner.

15 There are three parts to the Chevron test. The  
16 extent of justifiable reliance on the old rule -- and I've  
17 talked a little bit about that; the extent of the policy  
18 that underlies the new rule, if, indeed, we have a new  
19 rule; and the equitable considerations.

20 And let me talk first about the equities because  
21 I think they're quite striking in this case and quite  
22 easily misunderstood.

23 First of all, the Court has made clear that the  
24 burden of persuasion with respect to the equities is on  
25 the proponent of non-retroactivity because the normal

1 presumption is retroactivity. In a case like this, there  
2 are two aspects to the equities.

3 The first is whether it would be inequitable not  
4 to apply the rule retroactively? That is, the equities of  
5 the taxpayers. And, on the other hand, would it be unfair  
6 or severely burdensome to the state to apply the rule  
7 retroactively? That is, the equities advanced by the  
8 state. Now, in this case both of these factors favor our  
9 position.

10 Let me look first at the impact of refunds on  
11 the state. We're dealing here with taxes that are paid  
12 into a highway trust fund dedicated for the purpose of  
13 highway repairs and maintenance, and paid by highway  
14 users.

15 What happened under the old tax was that the  
16 interstate truckers -- that is, the members of the  
17 plaintiff class by and large -- were required to pay more  
18 tax than was necessitated by their own operations on the  
19 highways. They were required to pay a tax to cover the  
20 operations of the instate operators who were getting a  
21 free ride because of the flat feature of the tax.

22 If -- if refunds end up being ordered in this  
23 case, it's perfectly clear that those refunds will be  
24 financed by new truck taxes. But those new taxes will  
25 have to be non-discriminatory, and the effect of funding

1 the refunds by non-discriminatory new taxes is to redress  
2 the past discrimination by making those who were unjustly  
3 enriched by the unlawful features of the tax repay those  
4 who were its victims.

5 In addition, the burden on the state of the --  
6 having to make a tax refund is -- can easily be and is  
7 exaggerated by my opponent because he refuses to consider  
8 the possibility of stretching out the refunds over a  
9 period of years using credits, using bonding as a means of  
10 financing the refunds and spreading out the impact.

11 On the other side of the equation let's look at  
12 it from the standpoint of the taxpayers. While the  
13 Arkansas Supreme Court suggested that there was a windfall  
14 to petitioners, we believe it's quite clear that there is  
15 no windfall on either of two grounds.

16 One ground that was offered was that we, after  
17 all, got to use the highways that were improved with the  
18 tax monies that we paid. And, of course, that's true and  
19 we are not seeking -- we don't say we have a right to a  
20 refund of our fair share of taxes. That is, the taxes  
21 that were fairly related to our highway use.

22 The problem here is that we were asked to pay  
23 taxes for their highway use, and it seems to us that from  
24 an equitable standpoint, there is no excuse for not making  
25 us whole, particularly when the money is going to come out

1 of the pockets of --

2 QUESTION: Do you see a difference between the  
3 tax you paid and what the people who paid lower taxes  
4 paid?

5 MR. FREY: We've suggested in our briefs that  
6 there are two different ways that you could measure it.  
7 There are actually three ways. You might get a full  
8 refund. We do not say federal law --

9 QUESTION: What did they -- what did they refund  
10 for the period --

11 MR. FREY: After the escrow? They ordered full  
12 refunds.

13 QUESTION: Of all the -- the complete --

14 MR. FREY: Of all, yes.

15 QUESTION: That's more than you think you are  
16 demanding, or not?

17 MR. FREY: It's more than we say federal law  
18 would require.

19 QUESTION: Yeah, but the state -- the state, as  
20 it comes to us, seems to --

21 MR. FREY: The state is --

22 QUESTION: -- say that the -- that the remedy is  
23 a refund if there is a discriminatory tax that is retro --  
24 and Scheiner is retroactive.

25 MR. FREY: This is why what the state can't do

1 is, as I think Justice Stevens makes quite clear during  
2 the preceding argument, is they can't -- like the orphan  
3 who killed his parents and pleads for mercy, they can't  
4 say, well, the only remedy we have is a full refund and it  
5 would be unequitable to give a full refund so we're going  
6 to give nothing.

7 QUESTION: Yes.

8 MR. FREY: I don't think that's an acceptable  
9 approach. And that was the second point that I was going  
10 to make, which was the suggestion that the refund -- to  
11 give us full refunds would be excessive.

12 This Court does not have to decide that  
13 question. The only question this -- that's now before  
14 this Court is what rule of substantive law governs our  
15 claim for refunds: Scheiner, Aero or Mayflower?

16 If Scheiner is the rule, then we go back to the  
17 Arkansas courts and we see what we're entitled to under  
18 the legal exactions provision of the Arkansas Constitution  
19 for a tax that violated our rights, that violated the  
20 Federal Constitution.

21 Now, the fact that we suffered a real and  
22 substantial injury in this case is undeniable and it's  
23 made clearest -- or, most simply made clear from the fact  
24 that when they were forced to pass a non-discriminatory  
25 tax that didn't have the flat feature, the rate was two

1 and a half cents per mile even though more than three-  
2 quarters of the members of the plaintiff class paid the  
3 full five cents a mile under the old tax.

4 So, it's clear we were paying at least twice as  
5 much as we should have been paying.

6 Now, let me turn to the first prong of the  
7 equation. That is, the right to -- the question of  
8 whether there is a new rule, whether there was justifiable  
9 reliance by the state. And in this connection I think we  
10 need to remember that the general rule is full  
11 retroactivity, and prospectivity is meant to be a fairly  
12 rare exception.

13 QUESTION: Is -- is that based on Chevron?

14 MR. FREY: Oh, the Court has said that in many -  
15 - in many cases.

16 QUESTION: Well, in many civil cases?

17 MR. FREY: The Court has said it in many civil  
18 cases. I think we -- Schooner Peggy and Alkasrogi, and  
19 there are a number of other cases.

20 QUESTION: Well, but Schooner Peggy is not on  
21 all fours with this, I don't think. Chevron didn't put it  
22 -- when it was talking about retroactive application of  
23 the decision of this Court, Chevron didn't put it quite as  
24 liberally for your side as you say, did it?

25 MR. FREY: Well, I think Chevron is a -- is a --

1 if you compare Chevron with our case, I'm not sure  
2 whether I'm being responsive to your question.

3 QUESTION: No, I don't think you are.

4 MR. FREY: I don't know that -- I don't remember  
5 whether Chevron said -- although I think it did but I  
6 can't point out to you something now that suggested that  
7 retroactivity is the normal rule. But it clearly is the  
8 normal rule, and last term in the Rodriguez to (inaudible)  
9 case, which is at 109 Supreme Court 1917 and the  
10 discussion of retroactivity at 1922, that was a case where  
11 the Court overruled Wilco against Swan and it rejected a  
12 retroactivity argument. And, as I said, I believe that  
13 the normal rule is a rule of retroactivity.

14 Of course there are exceptions. If you look at  
15 the Chevron case, what happened in Chevron was that the  
16 prior case, Rodriguez -- it cut the statute of limitations  
17 back from three years to one, and Mr. Huston was caught  
18 not having filed his case. He was in that one to three  
19 year gap. The inequities were striking in a case like  
20 that. Nothing like our case.

21 I'm not saying that there is never -- that there  
22 is never a prospect of only application. I am saying that  
23 it's rare and that in light of Owen it should be even  
24 rarer when we're dealing with government constitutional  
25 violations.



1 QUESTION: Well, if in considering the remedy we  
2 are concerned about massive financial costs to the state,  
3 it might exert a kind of pressure on courts to find non-  
4 retroactivity.

5 MR. FREY: Well, let me say this, Justice  
6 O'Connor. I think it's fair -- I think that -- why I  
7 started the argument the way I did is that there may be  
8 reasons why the state should not have to -- or should not  
9 want to -- and be required to pay refunds.

10 I don't think the retroactivity test should be  
11 twisted as a way to be -- to concern itself with that.  
12 You ought to look at the law of remedies.

13 QUESTION: But you can see the pressure is  
14 mounting if the rule --

15 MR. FREY: I -- I --

16 QUESTION: -- is otherwise on what has to be  
17 refunded.

18 MR. FREY: What has to be refunded would be a  
19 different question from whether this tax violated the  
20 commerce clause at the time that the money was exacted or  
21 should be treated that way.

22 Now, I cannot agree, however, with the  
23 suggestion that at least in this area that we are dealing  
24 with massive -- that with massive amounts of liabilities.  
25 I note, following up on Justice Steven's suggestion, that

1 in a previous case, while a whole lot of liquor tax was  
2 collected by Florida, it may be that the refund obligation  
3 would be very small. There would be something, but it  
4 might --

5 QUESTION: In fact, Mr. Frey --

6 MR. FREY: -- be quite small.

7 QUESTION: Mr. Frey, isn't it possible in this  
8 case -- I think the Arkansas Supreme Court did the same  
9 all-or-nothing approach. And they said, well, we'll chop  
10 it off at Justice Blackmun's escrow order and the refund  
11 will therefore be \$4.9 million instead of a hundred and  
12 fifty or something like that.

13 Isn't it possible that under the different ways  
14 of computing the retroactive refund that you claim that  
15 you might even lose some money? I mean, is it -- is it  
16 clear -- this is getting to the -- they gave you \$4.9  
17 million, but you have these different formulas that might  
18 -- I don't know what the arithmetic is, but you don't  
19 really tell us how much might be at stake under your  
20 various approaches.

21 MR. FREY: Well, I don't think that that's what  
22 you are here to decide.

23 QUESTION: No, I know, but it --

24 MR. FREY: It may be that with respect to, let's  
25 say, the post-Scheiner pre-escrow money -- it may be that

1 we would not get back 100 percent of that.

2 QUESTION: Well, you don't really -- I mean, you  
3 don't very vigorously argue for it in your brief,  
4 certainly.

5 MR. FREY: We don't ask this Court to rule that  
6 we're entitled to a hundred percent of it, no. So why  
7 should we very vigorously argue for something we're not  
8 asking you -- when we get back to the Arkansas Supreme  
9 Court, we'll take up with them --

10 QUESTION: But I -- but, I mean, I don't think  
11 you are arguing -- I think you're saying you might be  
12 entitled to it as a matter of Arkansas law. But you are  
13 not arguing, as I understand it, that federal law commands  
14 the refund of every dollar of tax paid. I don't think  
15 you're arguing that.

16 MR. FREY: We are definitely not. We have tried  
17 to make it clear that we are not arguing that both in our  
18 amicus brief and McKesson.

19 QUESTION: (Inaudible) if you were here.

20 MR. FREY: I don't believe we would argue here  
21 that federal law requires that. I mean, we have taken the  
22 position that federal law does not require that.

23 Let me just say I do want to save the remainder  
24 of my voice for rebuttal. But with respect to Justice  
25 Scalia's question on the Eleventh Amendment, we list about

1 57 cases in our appendix to our reply brief in this case,  
2 all of which I think fit the category of cases brought in  
3 state court where this Court has reviewed --

4 QUESTION: Are they all tax cases?

5 MR. FREY: The ones we list in the appendix are  
6 all tax cases. There are a few other benefit cases and so  
7 on, but these are tax cases.

8 QUESTION: Thank you, Mr. Frey.

9 Mr. Randolph.

10 ORAL REARGUMENT OF A. RAYMOND RANDOLPH

11 ON BEHALF OF THE RESPONDENTS

12 MR. RANDOLPH: Mr. Chief Justice, and may it  
13 please the Court:

14 I would like to begin with an argument that is  
15 very prominent in petitioner's contentions here, and I  
16 think it reveals a good deal about what is really at stake  
17 here and what the issues are.

18 The petitioners have said time and again, not  
19 only in this case but also in their amicus brief in the  
20 companion case, that retroactive awards payable from the  
21 State Treasury of Arkansas are needed to deter, as they  
22 put it -- and I quote -- the impulses of the state  
23 legislators, impulses to violate the Commerce Clause.  
24 They say this is one of the reasons that we have to apply  
25 Scheiner retroactively.

1            Yet, at this late date, and even today, my  
2            opponent has sat down -- we have yet to receive an  
3            explanation of why the Arkansas legislature should be  
4            chastised for what it did in 1983.

5            As the Court will recall, at the time of the  
6            enactment of this tax, the outstanding decisions of the  
7            Court, the Aero Mayflower line of cases, were clearly in  
8            favor of the constitutionality of the tax.

9            More than that, the lower courts throughout this  
10           country -- that's both federal and state courts -- were  
11           bound to adhere to the Aero Mayflower line of cases. My  
12           opponent mentioned the Rodriguez decision last term.

13           Rodriguez says what we said in our brief, that the Supreme  
14           Court of the United States retains the exclusive privilege  
15           of overruling its own decisions. And until that time --

16           QUESTION: Well, that said that unless they are  
17           directly applicable, didn't it?

18           MR. RANDOLPH: I don't believe there was a  
19           qualification. And I believe the lower court in Rodriguez  
20           had anticipated the overruling of Wilco, and the Court  
21           said that that should not have been done -- this Court  
22           retains the privilege of overruling its decisions. But --

23           QUESTION: Well, you don't mean that we have to  
24           take a case from every circuit on exactly that issue, do  
25           you?

1 MR. RANDOLPH: No, no. Once you've overruled --

2 QUESTION: Well, hasn't Scheiner made it very  
3 clear that Aero Mayflower was no longer law?

4 MR. RANDOLPH: Ah. Well, my point may be  
5 alluding -- I may be confusing the Court.

6 My point is this. That the petitioners in this  
7 case want to hold the Arkansas legislature to a higher  
8 standard, a different standard, than is applicable to the  
9 nation's judiciary, because they want the Arkansas  
10 legislature to anticipate the course of constitutional  
11 decision-making that this Court has engaged in under the  
12 Commerce Clause.

13 And if they anticipate incorrectly, as they did  
14 in 1983, the sanction is to open up the treasury of  
15 Arkansas to these petitioners and grant them refunds.

16 QUESTION: Well, I -- I take it you concede that  
17 Mr. Justice Blackmun had -- and this Court -- had the  
18 authority to order the escrow?

19 MR. RANDOLPH: That's an injunction order  
20 against the State of Arkansas, and I think that under the  
21 line of decisions -- and I'll get to the Eleventh  
22 Amendment -- that injunctions order -- injunction orders  
23 giving perspective relief would be permissible.

24 QUESTION: And after that point any collection  
25 of the tax would have been illegal?

1 MR. RANDOLPH: After that point that is right,  
2 that is right.

3 And what that means is that if the elected  
4 representatives of the people don't combine the talents of  
5 a law professor and a soothsayer, then the people of the  
6 State of Arkansas are going to suffer either increased  
7 taxes --

8 QUESTION: Well, but is that fair, Mr. Randolph?  
9 Supposing there had never been a Scheiner case and they'd  
10 just filed the case in Arkansas, are you saying you would  
11 have won the case?

12 MR. RANDOLPH: Yes.

13 QUESTION: Oh, you don't think we would have  
14 applied the same principles we applied in Scheiner in this  
15 case if the Arkansas case had gotten there -- had gotten  
16 to us first?

17 MR. RANDOLPH: I'm confused. I think the  
18 Arkansas court was bound to adhere to Aero Mayflower.  
19 You're saying if -- if --

20 QUESTION: If it had --

21 MR. RANDOLPH: -- if the case had come up to the  
22 Supreme Court --

23 QUESTION: If there had been no Scheiner case  
24 and the Arkansas case had proceeded through the courts  
25 just as Scheiner did, and come to us as the first case

1 presenting this flat tax issue, I think --

2 MR. RANDOLPH: Then we would have lost.

3 QUESTION: -- you would have lost. Yeah.

4 MR. RANDOLPH: Assuming --

5 QUESTION: And notwithstanding the fact that the  
6 Arkansas legislature didn't predict that.

7 MR. RANDOLPH: That's correct. That's correct.

8 But --

9 QUESTION: Well -- well, don't the tax  
10 authorities in Arkansas have the duty and the authority  
11 not to collect an unconstitutional tax even though the  
12 legislature hasn't had the opportunity to reconvene?

13 MR. RANDOLPH: I think they have to follow the -  
14 - when a case is under advisement in this Court or the  
15 Arkansas courts, and there is a contention between parties  
16 about whether the tax is unconstitutional, I think the  
17 Arkansas authorities have to continue abiding by their  
18 legislative direction until the Court says otherwise.

19 QUESTION: Well, once Scheiner -- once Scheiner  
20 was decided, wasn't it clear that the tax was -- was  
21 illegal?

22 MR. RANDOLPH: It became clear. I don't think  
23 it was clear immediately and I think there's still some  
24 dispute, even to this day, about exactly what Scheiner  
25 held. The -- and I would get to the subperiod at the



1 close of my argument if I may.

2 But I think the issue that Mr. Frey wants the  
3 Court to decide is coming in here under a verbal disguise.  
4 On the one hand, we're told the Court doesn't have to  
5 decide whether there is a federal right to a refund  
6 remedy, and, on the other hand, I notice the last time we  
7 were here Mr. Frey ended his argument by saying there is  
8 such a right.

9 And the Court doesn't even have to decide what -  
10 - who among petitioners is entitled to it or what the  
11 measure of relief is. All the Court has to decide is  
12 whether Scheiner is retroactive.

13 But when my opponents get to the point of  
14 explaining why Scheiner is retroactive, they find  
15 themselves in a state of perplexity, because their reasons  
16 why Scheiner is retroactive rely on the very points they  
17 say the Court doesn't have to decide.

18 They say -- I've already mentioned one -- the  
19 Commerce Clause needs, requires, monetary remedies to  
20 deter state legislators. The other is, the Commerce  
21 Clause requires compensation.

22 Both of those reasons are what ought to be. And  
23 that "ought," which they frame up in terms of  
24 retroactivity, does not come out of the sky, I assume. It  
25 is derived from federal law.

1           Now, what they ignore in all these arguments, it  
2 seems to us, is -- and they raise fundamental questions  
3 about the relationship between state and federal  
4 governments and the role of this Court in that  
5 relationship.

6           It is, I think, fair to say, and the Court has  
7 said it many, many times, that it would be very unusual --  
8 rare -- to find a federal monetary remedy imposed on state  
9 treasuries. That is a rare occurrence.

10           It is contrary -- and the Court has said this  
11 many, many times -- to the usual constitutional balance  
12 between state and federal governments. The state  
13 governments respect the immunity of the federal  
14 government, and the federal government respects the  
15 immunity of the state governments, and that's the balance.

16           The tradition is as old as the Constitution.  
17 Hamilton talked about it in the Federalist No. 81. And, I  
18 might add, if the arguments that we're hearing here today  
19 about how this Court ought to impose monetary liability on  
20 its state treasury of Arkansas had been made at the time  
21 of the Constitution, we might not have a Constitution.  
22 That's how critical that principle was.

23           This is why the Court has said, with respect to  
24 acts of Congress, that the Court will not engage in  
25 implication or inference or emanations when it determines

1 whether Congress, which has the power under the Commerce  
2 Clause to upset that constitutional balance, has done so.

3 Congress has to say it directly on the face of  
4 the statute. And if it doesn't, then the Court's not  
5 going to infer that it has upset the balance and impose  
6 remedies on the state's monetary remedies.

7 Here, there is no clear statutory language. In  
8 fact, there is no statute at all. There had been, in the  
9 lower court -- in Arkansas the petitioners invoked 42  
10 U.S.C. 1983. They can't here and they don't because the  
11 Court decided last term, obviously in Will, that that did  
12 not give them a right to collect money from -- for a  
13 violation of federal rights, including constitutional  
14 rights.

15 Now, there is, of course, the Commerce Clause,  
16 and we've heard a good deal about that. But if the  
17 English language retains any meaning -- and I don't think  
18 the petitioners are even going to contest this -- there is  
19 nothing in the Commerce Clause that clearly, unmistakably,  
20 unequivocally, provides monetary remedies against state  
21 treasuries.

22 It contrasts sharply, I might add, with the  
23 taking clause of the Constitution, which has been  
24 mentioned here. I think one can fairly say, and the Court  
25 has, by implication at least, that the just compensation

1 clause does clearly, unequivocally provide a monetary  
2 remedy against states.

3 QUESTION: Mr. Randolph, I understood, though,  
4 that Arkansas had provided a remedy in this situation.

5 MR. RANDOLPH: Absolutely not. Arkansas -- and  
6 we have spelled this out in both briefs that we've filed  
7 in this case, Mr. Chief Justice -- does not allow suits to  
8 recover money against the treasury of Arkansas.

9 We have set forth in the brief on reargument at  
10 length the Claims Commission rules, which were a part of  
11 the exhibits in this case --

12 QUESTION: But the Supreme Court of Arkansas  
13 certainly didn't decide this case on that basis.

14 MR. RANDOLPH: That's not what petitioners  
15 thought. Petitioners -- let me be clear about this. This  
16 was their claim in Arkansas. Their claim here is entirely  
17 different than what was argued before the Arkansas Supreme  
18 Court.

19 One, they claimed only one thing: full refunds.  
20 None of this various and imaginative formulas. They did  
21 not come out with that claim until after the Arkansas  
22 Supreme Court denied their claim.

23 But more than that, they had two arguments.  
24 They said we want to -- we're suing under the illegal  
25 exactions statute. The state responded: you can't,

1 that's sovereign immunity. They said earlier in the  
2 proceedings: we want an injunction, we want an escrow  
3 because we can't get the money back once it goes into the  
4 treasury of Arkansas, we'd have to go through the Claims  
5 Commission which is a legislative arm.

6 But, two, nevertheless, it doesn't matter. Even  
7 if we don't get money as a result of the illegal exaction  
8 line -- and Arkansas has never held that you can recover  
9 money out of the state treasury -- we have a federal right  
10 to a remedy. That was their argument in the Arkansas  
11 court.

12 The Arkansas Supreme Court rendered a judgment,  
13 and the court is here -- California versus Rooney and  
14 other cases -- the court is here to review judgments.  
15 That judgment said you don't get refunds; we reject both  
16 your claims, necessarily reject both claims.

17 QUESTION: Well, but the opinion certainly  
18 didn't take the position that -- that you're taking. I'm  
19 not saying that your position -- you know more about  
20 Arkansas law than I do. But the opinion of the Supreme  
21 Court of Arkansas certainly didn't say that there is no  
22 way that you can get money out of the Arkansas treasury.  
23 They said that Scheiner was not retroactive.

24 MR. RANDOLPH: They did say that. There is no  
25 doubt about that. And this brings me to my point. But on

1 the petition for a rehearing in light of the arguments  
2 that were made, petitioners said that the only basis on  
3 which the Arkansas court drew its line between the escrow  
4 order and the pre-escrow period was on the basis of  
5 sovereign immunity, and they argued against that. And I  
6 think that's right.

7           Where I was going is this. If -- if inferences  
8 and implication are not sufficient for acts of Congress to  
9 impose damage remedies, monetary remedies on state  
10 treasuries, still less are they insufficient when the  
11 federal judiciary is asked to impose monetary remedies  
12 against the state on the basis of the Constitution without  
13 any statutory foundation whatsoever.

14           Erie versus Tompkins was mentioned in the  
15 argument here. There is a line from Erie versus Tompkins.  
16 Except in matters governed by acts of Congress or the  
17 Constitution state law applies -- that's our position  
18 here. That this is not governed by an act of Congress and  
19 it's not governed by the Constitution.

20           And what -- everything that I said I think  
21 follows, ought to follow, from the assurances given 200  
22 years ago, and I mentioned the Federalist No. 81, that  
23 this Court would not impose such liability on state  
24 treasuries.

25           The Court acted early on -- and this may be the

1 best case petitioners have -- in Chisholm versus Georgia -  
2 - and did just that. Violated the assurances, and the  
3 Court knows what the consequence was. The consequence was  
4 the Eleventh Amendment.

5 QUESTION: Is the -- is the issue here the  
6 retroactivity of Scheiner? Is that one of the issues?

7 MR. RANDOLPH: We don't -- we think there's far  
8 more at stake in this case than merely toting up the  
9 Chevron factors. If we have to deal solely with  
10 retroactivity, we are happy to meet plaintiffs -- or, the  
11 petitioners -- on their playing field.

12 QUESTION: Well --

13 MR. RANDOLPH: But we think there's more at  
14 stake here, Justice White, than that.

15 QUESTION: Well, that may be, but the  
16 petitioners say Scheiner is retroactive and I -- and  
17 that's one of the issues they've presented to us.

18 MR. RANDOLPH: One of the -- one of the  
19 questions whenever --

20 QUESTION: And they say that that's the only  
21 issue there is, and if there is any other issue in the  
22 case, we're going to trundle back to Arkansas.

23 MR. RANDOLPH: With a -- consider how the  
24 opinion would read. The Supreme Court of the United  
25 States says Scheiner is --

1 QUESTION: How do you know?

2 MR. RANDOLPH: -- is retroactive. Scheiner is  
3 retroactive. We don't decide whether there is any federal  
4 principle that governs retroactive monetary awards against  
5 states. What we do say is it's retroactive because we  
6 think the Commerce Clause requires state legislatures to  
7 be deterred. We think the Commerce Clause requires  
8 compensatory relief. Here, Arkansas, take that judgment  
9 and you tell us what state law says.

10 In other words, don't decide all these issues,  
11 petitioners say, just decide that's what the law ought to  
12 be.

13 QUESTION: Well, Mr. Randolph, the Supreme Court  
14 of Arkansas -- and this is one sentence from its opinion,  
15 but it certainly seems to say something. On page 3(a) it  
16 says, "To hold the interstate truckers were entitled to  
17 all of their HUE tax payments, we would have to apply the  
18 Scheiner decision retroactively."

19 MR. RANDOLPH: Yeah.

20 QUESTION: Now, that certainly sounds to me as  
21 if they had felt the Scheiner decision was retroactive,  
22 they would have given something in the way of relief.

23 MR. RANDOLPH: I don't think that -- it may  
24 sound like that, but I don't think that follows.

25 QUESTION: Well, you know, it sounds like that



1 to those who read the English language.

2 (Laughter.)

3 MR. RANDOLPH: I don't think that is exactly  
4 what was at stake and it may not be an artful way of  
5 phrasing it, but I think what they said is you have  
6 presented us with a claim, you want full refunds; we're  
7 not going to recognize it. The reasons are we hold it's  
8 not retroactive.

9 Whether they were doing that as a matter of  
10 state law, though, is not entirely clear. States around  
11 the country, as the Court may be aware, have adopted the  
12 Chevron test as a matter of state law. Arkansas has never  
13 explicitly done it. But that's certain --

14 QUESTION: Well, I guess all we have to decide  
15 is the retroactivity question.

16 MR. RANDOLPH: I'm sorry, I --

17 QUESTION: I guess all we have to decide is  
18 whether Scheiner is retroactive.

19 MR. RANDOLPH: But where I was going is, you  
20 cannot decide that question without dealing with the  
21 ought. And the ought is --

22 QUESTION: Why not?

23 MR. RANDOLPH: What -- if --

24 QUESTION: I mean, that's what the court below  
25 rested its opinion on. Why can't you just decide that and

1 nothing else and say it's remanded?

2 MR. RANDOLPH: Because the process under Chevron  
3 that petitioners want the Court to engage in is deciding  
4 what the Commerce Clause requires in the nature of  
5 retroactive monetary relief. And they're right back --  
6 when they make those arguments, they can't avoid it.

7 They say, and they've said it, that there is a  
8 federally compelled refund remedy. And that's what I am  
9 addressing.

10 If you look, for example, at page 28 of their  
11 opening --

12 QUESTION: Well, what --

13 MR. RANDOLPH: -- brief in this case --

14 QUESTION: What is --

15 MR. RANDOLPH: -- that's precisely --

16 QUESTION: What is required if a state clearly  
17 and knowingly enacts a law in violation of the Commerce  
18 Clause?

19 MR. RANDOLPH: An injunction.

20 QUESTION: And provides no monetary relief  
21 whatever for a taxpayer who pays the taxes under protest  
22 under that unlawful act while it's challenging the act?

23 MR. RANDOLPH: The -- my answer is the same  
24 answer that -- and I think I brought it with me although I  
25 don't have it out -- that Alexander Hamilton gave 200

1 years ago, that it's not the business of the federal  
2 judiciary to impose liability on the state government.

3 We can deal with hypotheticals, Justice  
4 O'Connor, and any time there is a sovereign immunity  
5 claim, that is always the argument against it -- what if  
6 the following occurred?

7 But what I am saying is, Arkansas is immune,  
8 Arkansas is not subject to having a federally-imposed  
9 remedy put on it by the Supreme Court of the United  
10 States.

11 QUESTION: And you say that we can't -- we  
12 cannot review the federal question even though -- even  
13 where the basis for its denying relief -- relief it's  
14 entitled to deny by hypothesis -- is the federal question.

15 MR. RANDOLPH: Well, I think you can review it.

16 QUESTION: Well, Mr. --

17 MR. RANDOLPH: What I --

18 QUESTION: Suppose -- suppose Arkansas says --  
19 there are these federal securities laws under which  
20 certain -- other federal laws under which private actions  
21 have not been allowed. But we are going to allow private  
22 actions under those federal laws as a matter of state law.  
23 Okay?

24 And then, in adjudicating those claims, the  
25 state courts misinterpret the federal law; they get it all

1 botched up. The state could argue, as I think you -- as I  
2 thought you were arguing here -- what difference does it  
3 make, it's up to us whom we -- whom we allow to get  
4 relief. If we want to do it on the basis of a mistake in  
5 interpretation of state law, that is ultimately a question  
6 of state law.

7 MR. RANDOLPH: Yes.

8 QUESTION: So -- so, butt out, Supreme Court,  
9 it's not your business.

10 MR. RANDOLPH: I think that --

11 QUESTION: Is that the position that you take?

12 MR. RANDOLPH: No, it's not. I think that  
13 misapprehends my argument.

14 QUESTION: All right.

15 QUESTION: My argument is that the questions of  
16 substantive federal law, whether a state tax violates the  
17 Commerce Clause -- those questions -- whether there is in  
18 a federal statute a right to sue. Those questions can be  
19 decided by this Court.

20 My position is limited solely to remedy. Just  
21 like Adelman versus Jordan is limited solely to remedy.  
22 You cannot impose a retroactive monetary award upon a  
23 state, and you can't do it directly under the Commerce  
24 Clause or indirectly on the --

25 QUESTION: Excuse me.

1 MR. RANDOLPH: -- basis of retroactivity.

2 QUESTION: Even though the denial -- you're  
3 saying it cannot base the denial of a substantive right  
4 upon misinterpretation of federal law, but it can base the  
5 denial of a remedy upon misinterpretation of federal law?

6 MR. RANDOLPH: If it does, the Court could give  
7 an opinion and say, as I would request the Court to do,  
8 that federal law is indifferent, that federal law is  
9 neutral, that federal law does not require or does not  
10 deny. And this, the Supreme Court says, is a matter of  
11 solely for state governments.

12 And I might add, if -- if in Union Gas, the  
13 Court applied stringent standards of interpretation, no  
14 implication to federal statutes, then the question here is  
15 whether the Supreme Court will apply those standards not  
16 only to --

17 QUESTION: Mr. --

18 MR. RANDOLPH: -- the Constitution but also  
19 really to itself rather than to Congress.

20 QUESTION: But, Mr. Randolph, those were --  
21 those were cases in the federal judicial system. This is  
22 a case in the state system.

23 Unless you have -- adopt your argument about the  
24 Eleventh Amendment applies to appeals of state court. The  
25 Eleventh Amendment has nothing to do with this case.

1 MR. RANDOLPH: Unless we think it applies.

2 QUESTION: Yes. Unless you said --

3 MR. RANDOLPH: And my argument is that it  
4 applies.

5 QUESTION: -- because it's an -- but assume we  
6 reject that, as the Court implicitly has many times in the  
7 past, then there's nothing to your argument, is there?

8 MR. RANDOLPH: I don't agree that the Court has  
9 implicitly rejected it.

10 QUESTION: Well, I understand. But assume that  
11 they -- assume that we don't buy that, that the Eleventh  
12 Amendment applies -- deprives this Court of jurisdiction  
13 to review an appeal from a state supreme court. If we  
14 don't buy that argument, doesn't your whole argument fall?

15 MR. RANDOLPH: Oh, heavens, no. The Commerce  
16 Clause is still there. The Court is acting on negative  
17 implications when it even strikes down a state's tax  
18 statute, let alone --

19 QUESTION: Yeah, but your strict -- you know,  
20 strict language cases are all Eleventh Amendment cases.

21 MR. RANDOLPH: And -- well, if we get back to  
22 Bivens -- and that's where we're going in interpreting the  
23 Commerce Clause -- and that was the first brief I filed in  
24 this court -- then --

25 QUESTION: That was a federal case. That was

1 another case.

2 MR. RANDOLPH: You cannot take the Commerce  
3 Clause, which says Congress has the power to regulate, and  
4 imply from that a right of action on the basis that  
5 somebody's constitutional rights were violated, and it  
6 must be assumed -- implied -- that the framers of the  
7 Constitution, in saying Congress can regulate, said what  
8 they really meant was the Supreme Court can open up state  
9 treasuries.

10 The two don't go together. And so you cannot  
11 use that whole line of implication cases to come to the  
12 conclusion, regardless of the Eleventh Amendment, that the  
13 Commerce Clause has a policy in favor of deterring state -  
14 - that the Commerce Clause has a policy of opening up  
15 state treasuries. It doesn't.

16 I -- I want to, if I may, as a practical --

17 QUESTION: But, see, the state supreme court  
18 didn't rely on any of this at all, did it?

19 MR. RANDOLPH: I'm sorry?

20 QUESTION: The Arkansas Supreme Court didn't  
21 rely on any of this presentation.

22 MR. RANDOLPH: No, but the argument is from me.

23 QUESTION: From their opinion the assumption is  
24 that we have a perfectly valid state procedure with state  
25 remedies when they're constitutional violations. We just

1 don't think the remedy is appropriate here.

2 MR. RANDOLPH: No, I don't think they said that,  
3 Justice Stevens. I don't think they said that we have a  
4 perfectly appropriate system --

5 QUESTION: You kind of assume that from the way  
6 they write their opinion. They do not suggest any self-  
7 imposed limitations on their ability to give an  
8 appropriate remedy.

9 MR. RANDOLPH: And their judgment was, no  
10 refunds.

11 QUESTION: The judgment was \$4.9 million of  
12 refunds, that's what their judgment was. Not no refund.  
13 And that, itself, is inconsistent with your notion that  
14 they won't give any refunds.

15 MR. RANDOLPH: Not when the money is deposited  
16 in the state treasury. That -- my position is when it's  
17 in the state treasury, there's no refunds. That's Adelman  
18 versus Jordan.

19 QUESTION: Thank you, Mr. Randolph.

20 Mr. Frey, you have three minutes remaining.

21 REBUTTAL ARGUMENT OF ANDREW L. FREY

22 ON BEHALF OF THE PETITIONERS

23 MR. FREY: Thank you, Mr. Chief Justice.

24 I think Mr. Randolph has made this case a lot  
25 more complicated than it needs to be. In the brief in op,



1 Arkansas got it right. They said at page 4 of their brief  
2 in op, "The Arkansas Supreme Court, however, did not reach  
3 questions of state law inasmuch as it did not need to  
4 answer state law questions on tax refunds in its opinion."  
5 They say it decided only the retroactivity of Scheiner.  
6 Now --

7 QUESTION: That was before they had Mr.  
8 Randolph.

9 MR. FREY: That was before, although --  
10 (Laughter.)

11 MR. FREY: -- I have had the unpleasant  
12 experience in a case called Steigal versus the United  
13 States of having had an unfortunate concession made in a  
14 brief in op and the court refused to entertain a contrary  
15 argument on the merits.

16 In any event, I'm not worried about it because  
17 it seems to me the contrary argument is so --

18 QUESTION: Life evens things up.  
19 (Laughter.)

20 MR. FREY: Well, let me -- because there is some  
21 potential confusion -- retroactivity and refunds are  
22 similar. That's because non-retroactivity is one ground  
23 for denying refunds, and it happens to be the ground that  
24 the Arkansas Supreme Court relied on.

25 Now, this is in fact a state cause of action in

1 the first instance for refunds under the illegal exaction  
2 clause, refunds withheld because of a ruling on a question  
3 of federal law, the retroactivity of Scheiner.

4 Justice Scalia, you asked -- we cited at pages 9  
5 to 12 of our reply brief a series of cases, Limbach versus  
6 Hooven and Allison, Three Affiliated Tribes against Wold  
7 Engineering, where you had a state cause of action. And  
8 there's a case called Standard Oil against Johnson in 316  
9 U.S. which is a case involving a state tax in which they  
10 said the tax didn't apply in sales to the federal --  
11 federal instrumentalities, and the question was whether an  
12 Army post exchange, under the state law, is a federal  
13 instrumentality. The Supreme Court reviewed that. It's a  
14 question of federal law.

15 Now, the reason the Arkansas Supreme Court drew  
16 the pre-escrow, post-escrow line has nothing to do with  
17 sovereign immunity. It had to do with their view that it  
18 was Justice Blackmun's opinion in granting the escrow that  
19 made it clear that the HUE tax was unconstitutional.  
20 That's why they drew the line at that point. That seems  
21 to me quite an untenable position.

22 Finally, we've gone through these two arguments  
23 and it seems to me not enough attention has been paid to  
24 the fact that there are a series of cases by this Court  
25 involving the right to tax refunds in which it was assumed

1 by Justices no less than Holmes, Brandeis, Stone, and  
2 repeatedly said that there is some federal right to  
3 restitution of unconstitutional taxes.

4 And it seems to me that the burden of persuasion  
5 to the contrary is on our opponents who would wish to  
6 overturn those precedents. And I don't mean to be  
7 understood as saying that every pen -- that we have to get  
8 every penny back that was exacted. It depends on what was  
9 wrong with the tax and what the federal constitutional  
10 injury was that was suffered.

11 QUESTION: (Inaudible) that Scheiner is  
12 retroactive back to when the law was enacted? Or back to  
13 what date?

14 MR. FREY: Well, it happens that the law was  
15 enacted after -- after Complete Auto and after  
16 Commonwealth Edison. So, we would say it's -- it's fully  
17 retroactive.

18 QUESTION: Back to when?

19 MR. FREY: Back to the time -- we sued before  
20 the tax went into effect. So, it's --

21 QUESTION: Back to '81 then?

22 MR. FREY: -- back to the time the first dollar  
23 was collected.

24 QUESTION: Back to '81?

25 MR. FREY: '83.

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QUESTION: '83. '83. Yeah.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Frey.

The case is submitted.

(Whereupon, at 2:20 p.m., the case in the above-entitled matter was submitted.)

## CERTIFICATION

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

NO. 88-325 - AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., Petitioners

V. MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT,  
ET AL.

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

BY Alan Friedman

(REPORTER)

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