SUPREME COURT OF THE UNITED STATES

No. 97–1337

MINNESOTA, ET AL., PETITIONERS *v.* MILLE LACS BAND OF CHIPPEWA INDIANS ET AL.

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

[March 24, 1999]

JUSTICE THOMAS, dissenting.

I join THE CHIEF JUSTICE's dissent, but also write separately because contrary to the majority's assertion, in dicta, *ante*, at 31–32, our prior cases do not dictate the conclusion that the 1837 Treaty curtails Minnesota's regulatory authority.

As the Court has ruled today that the Chippewa retain the privilege to hunt, fish, and gather on the land they ceded in the 1837 Treaty, the question of the scope of the State's regulatory power over the Chippewas' exercise of those privileges assumes great significance– any limitations that the Federal Treaty may impose upon Minnesota's sovereign authority over its natural resources exact serious federalism costs. The questions presented, however, do not require the Court to decide whether the 1837 Treaty limits the State's regulatory authority in any way. All that they require is a judgment as to whether the usufructuary privileges at issue survive three potentially extinguishing events: President Taylor's 1850 Executive Order, the 1855 Treaty, and Minnesota's admission to the Union in 1858.

The Court nevertheless offers the following observation:

> "Here, the 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory *free of territorial, and later state, regulation*, a privilege that

> others did not enjoy. Today, this freedom from state regulation *curtails the State's ability to regulate hunting, fishing, and gathering by the Chippewa in the ceded lands*." *Ante*, at 31 (emphases added).

In light of the importance of this federalism question, the Court should not pass on it, even in dicta, without the benefit of the parties' briefing and argument. But as the Court has done so, I think it important to explain my disagreement with the italicized propositions.

The plain language of the 1837 Treaty says nothing about territorial, let alone future state, regulation. The historical evidence that the Court reviews, *ante*, at 2, to the extent that it is relevant, is likewise silent as to whether the Chippewa expected to be subject to any form of regulation in the exercise of their reserved Treaty privileges. The historical evidence certainly indicates that the Chippewa desired the privilege of access to the land they were ceding. But the 1837 Journal of Treaty Negotiations does not show that the Chippewa demanded access to the land on any particular terms. See App. 70–78.

Indeed, the Court retreats from its assertion that the 1837 Treaty gave the Chippewa an unlimited right to hunt, fish, and gather free from regulation when it states: "We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Ante*, at 31. If the 1837 Treaty gives the Chippewa a right to be free from state regulation, why may Minnesota impose any regulations, reasonable and necessary or otherwise? The Court's answer to that question is that our prior decisions have established that Indians never have "'absolute freedom,'" *ante*, at 31, from state regulation, no matter what a treaty might say; rather, Indians' hunting, fishing, and gathering activities

are limited by those state regulations which are necessary for ensuring the conservation of natural resources.

To be sure, Indians do not have absolute freedom from state regulation of their off-reservation activities. Indeed, the general rule is that the off-reservation activities of Indians are subject to a State's nondiscriminatory laws, absent express federal law to the contrary. See, *e.g.*, *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753, 765, n. 16 (1985); *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 335, n. 18 (1983). The majority, however, overlooks the fact that the scope of a State's regulatory authority depends upon the language of the treaty in question. At a *minimum*, States may issue and enforce those regulations of Indians' off-reservation usufructuary activities that are necessary in the interest of conservation. Our decisions suggest that state regulatory authority is so limited when, with the treaty in question, the Indians reserved a *right* to fish, hunt, or gather on ceded lands. But it is doubtful that the so-called "conservation necessity" standard applies in cases, such as this one, where Indians reserved no more than a *privilege* to hunt, fish, and gather.

The conservation necessity standard appears to have its origin in *Tulee* v. *Washington*, 315 U. S. 681 (1942). In the 1859 Treaty with the Yakima Indians, the Yakima reserved "'the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.'" *Id.*, at 683 (quoting 12 Stat. 953). The Court held that Washington State had the "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish*," but that the Treaty foreclosed "the state from charging the Indians a fee of the kind in question." 315 U. S., at 684 (emphasis added). Its conclusion was driven by the language of the Treaty as well as the report of the

Treaty negotiations and what it revealed to be the Yakimas' understanding of the Treaty– to preserve their right "to hunt and fish *in accordance with the immemorial customs of their tribes*." *Id.*, at 684 (emphasis added).[1] Subsequent decisions evaluating state regulation by the conservation necessity standard similarly focused upon the language of the treaty or agreement at issue and the Indians' understanding of the treaty as revealed by the historical evidence. See *Washington* v. *Washington State Commercial Passenger Fishing Assn.*, 443 U. S. 658, 665–669, 674–685 (1979) (recognizing that the Court had construed the same Treaty language several times before, and emphasizing the historical background against which the Treaty at issue was signed); *Puyallup Tribe* v. *Department of Game of Wash.*, 391 U. S. 392, 395, 397 (1968) (involving Treaty language almost identical to that at issue in *United States* v. *Winans*, 198 U. S. 371 (1905), and *Tulee*, *supra*); see also *Antoine* v. *Washington*, 420 U. S. 194, 206 (1975) (favorably comparing the somewhat different language of the agreement at issue with the language of the Treaties at issue in *Winans* and *Puyallup*). Most important, all the cases that the majority cites in support of the proposition that States may enforce against Indians in their exercise of off-reservation usufructuary activities only those regulations necessary for purposes of conservation, *ante*, at 31–32, involved the same or substantially similar Treaty language reserving a *right* to hunt or fish. And all but *Antoine* also provided that the Indians could exercise their reserved rights at the usual and accustomed

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[1] A prior case interpreting the same 1859 Treaty held that the language fixed in the land an easement for the Yakima so that they could cross private property to fish in the Columbia River. *United States* v. *Winans*, 198 U. S. 371, 381–382 (1905). But the Court also wrote that the Treaty did not "restrain the State unreasonably, *if at all*, in the regulation of the right." *Id.*, at 384 (emphasis added).

places.

In *New York ex rel. Kennedy* v. *Becker*, 241 U. S. 556 (1916), the Court considered significantly different language. The Big Tree Treaty of 1797, as the agreement was known, provided that the Seneca were to retain "the *privilege* of fishing and hunting on the said tract of land" conveyed by the agreement. 7 Stat. 602 (emphasis added); see also 241 U. S., at 562 (quoting the reservation clause). The Court characterized the Senecas' claim as one "sought to be maintained in derogation of the sovereignty of the State." *Ibid.* In rejecting such a claim, it stated:

> "[I]t can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather we are of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands *in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised.*" *Id.*, at 563–564 (emphasis added).

The only fair reading of *Kennedy* is that the Treaty reserved for the Seneca a privilege in common with all persons to whom the State chose to extend fishing and hunt-

ing privileges. The Court did not indicate that the Treaty limited New York's regulatory authority with respect to the Seneca in any way. See *id.*, at 564 (the Treaty privilege was subject to "that necessary power of appropriate regulation, *as to all those privileged*, which inhered in the sovereignty of the State over the lands where the privilege was exercised") (emphasis added). Of course, then, what was "appropriate" state regulation as applied to non-Indians was "appropriate" regulation as applied to the Seneca. Cf. *Puyallup Tribe*, *supra*, at 402, n. 14 ("The measure of the legal propriety of [regulations that are to be measured by the conservation necessity standard] is . . . distinct from the federal constitutional standard concerning the scope of the police power of a State").[2]

The 1837 Treaty at issue here did not reserve "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory" like those involved in *Tulee* and *Puyallup Tribe*. Rather, it provided that:

> "The *privilege* of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States." 1837 Treaty with the Chippewa, 7 Stat. 537 (emphasis added).

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[2] As already noted, *supra*, at 3, the Court has said that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973) (State of New Mexico permitted to tax off-reservation activities of Tribe as they would any non-Indians). In support of that proposition in *Mescalero*, the Court cited the *Puyallup Tribe* and *Tulee* decisions, but not *Kennedy*. A possible explanation is that the Treaties at issue in *Puyallup Tribe* and *Tulee* provided express federal law to the contrary, while the Treaty in *Kennedy* did not.

This language more closely resembles the language of the Big Tree Treaty at issue in *Kennedy*. Although Minnesota's regulatory authority is not at issue here, in the appropriate case we must explain whether reserved treaty *privileges* limit States' ability to regulate Indians' off-reservation usufructuary activities in the same way as a treaty reserving *rights*.[3] This is especially true with respect to the privileges reserved by Chippewa in the 1837 Treaty, which, as THE CHIEF JUSTICE explains, *ante*, at 12–13, were clearly of a temporary and precarious nature.

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[3]Various representatives of the United States have previously taken the position that treaty rights are "more substantial vested rights than treaty reserved privileges." Holt, Can Indians Hunt in National Parks?, 16 Envtl. L. 207, 236–238 (1986) (citing letters from the Department of Agriculture, Department of the Interior, and the Department of Justice to that effect).