As Washington State Department of Licensing v. Cougar Den illustrates, not all 5-4 Supreme Court cases involve high-profile, controversial issues where the Justices are divided on ideological lines.

In this case the Supreme Court held 5-4 that a treaty forbids the State of Washington from imposing a tax upon members of the Yakama Nation that import fuel.

An 1855 treaty between the United States and the Yakama Nation reserves to the Yakamas “the right, in common with the citizens of the United States, to travel upon all public highways.” A Washington statute taxes fuel importers who bring large quantities of fuel into the state by ground transportation. Cougar Den is a wholesale fuel importer owned by a Yakama member that transports fuel by truck from Oregon to Yakama-owned gas stations in Washington. Cougar Den argued the treaty preempted the tax.

Justices Sotomayor and Kagan joined Justice Breyer’s plurality opinion that held this case involves a tax on travel with fuel. The tax violates the treaty for three reasons. First, the “in common with” treaty language could be read to mean that general legislation, like the legislation in this case, applies to Yakama and non-Yakama alike but “that is not what the Yakama understood the words to mean in 1855.” Second, the historical record indicates the right to travel includes a right to travel with good for sale. Finally, imposing a tax upon travel with goods burdens the travel.

Concurring Justices Gorsuch and Ginsburg saw their task as modest: “The State reads the treaty only as a promise to tribal members of the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied—millions of acres desperately wanted by the United States to settle the Washington Territory—was worth far more than an abject promise they would not be made prisoners on their reservation.”

Chief Justice Roberts, in his dissenting opinion joined by Justices Thomas, Alito, and Kavanaugh, concluded the treaty is not violated because “Washington is taxing Cougar Den for possessing fuel, not travelling on the highways.”

Justice Thomas joined Justice Kavanaugh’s separate dissent, which states that the treaty’s “in common with” language “means what it says.” “The treaty recognizes tribal members’ right to travel on off-reservation public highways on equal terms with other U. S. citizens. Under the text of the treaty, the tribal members, like other U. S. citizens, therefore still remain subject to nondiscriminatory state highway regulations—that is, to regulations that apply equally to tribal members and other U. S. citizens.”

The various opinions disagree about the scope and implications of the Court’s decision which is further muddied by a lack of majority opinion. Justice Breyer’s plurality opinion offers many caveats including: that it doesn’t “say or imply” that the treaty “grants protection to carry any and all goods”; it doesn’t hold that the treaty deprives states of the power to regulate for conservation or to prevent...
danger to health and safety; and it doesn’t interpret the treaty to bar states from collection sales or use taxes applied outside the reservation.

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