

KAVANAUGH, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING,  
PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
WASHINGTON

[March 19, 2019]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS joins, dissenting.

The text of the 1855 treaty between the United States and the Yakama Tribe affords the Tribe a “right, in common with citizens of the United States, to travel upon all public highways.” Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. 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. See *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 148–149 (1973). That includes, for example, speed limits, truck restrictions, and reckless driving laws.

The Washington law at issue here imposes a nondiscriminatory fuel tax. THE CHIEF JUSTICE concludes that the fuel tax is not a highway regulation and, for that reason, he says that the fuel tax does not infringe the Tribe’s treaty right to travel on the public highways. I agree with THE CHIEF JUSTICE and join his dissent.

Even if the fuel tax is a highway regulation, it is a *non-*

*discriminatory* highway regulation. For that reason as well, the fuel tax does not infringe the Tribe's treaty right to travel on the public highways on equal terms with other U. S. citizens.

The plurality, as well as the concurrence in the judgment, suggests that the treaty, if construed that way, would not have been important to the Yakamas. For that reason, the plurality and the concurrence would not adhere to that textual meaning and would interpret "in common with" other U. S. citizens to mean, in essence, "exempt from regulations that apply to" other U. S. citizens.

I respectfully disagree with that analysis. The treaty right to travel on the public highways "in common with"—that is, on equal terms with—other U. S. citizens was important to the Yakama tribal members at the time the treaty was signed. That is because, as of 1855, States and the Federal Government sometimes required tribal members to seek permission before leaving their reservations or even prohibited tribal members from leaving their reservations altogether. See, *e.g.*, Treaty Between the United States of America and the Utah Indians, Art. VII, Dec. 30, 1849, 9 Stat 985; Mo. Rev. Stat., ch. 80, §10 (1845). The Yakamas needed to travel to sell their goods and trade for other goods. As a result, those kinds of laws would have devastated the Yakamas' way of life. Importantly, the terms of the 1855 treaty made crystal clear that those kinds of travel restrictions could not be imposed on the Yakamas.

In particular, the treaty afforded Yakama tribal members two relevant rights. First was "free access" on roads from the reservation to "the nearest public highway." Art. III, 12 Stat. 953. Second was a right to travel "in common with" other U. S. citizens on "all public highways." *Ibid.* The right to free access from the reservation to public highways, combined with the right to travel off

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reservation on public highways, facilitated the Yakama tribal members' extensive trading network.

In determining the meaning of the “in common with” language, we must recognize that the treaty used different language in defining (1) the right to “free access,” which applies only on roads connecting the reservation to the off-reservation public highways, and (2) the right to travel “in common with” other U. S. citizens, which applies on those off-reservation public highways. The approach of the plurality and the concurrence would collapse that distinction between the “free access” and “in common with” language and thereby depart from the text of the treaty. I would stick with the text. The treaty’s “in common with” language—both at the time the treaty was signed and now—means what it says: the right for Yakama tribal members to travel on public highways on equal terms with other U. S. citizens.

To be sure, the treaty as negotiated and written may not have turned out to be a particularly good deal for the Yakamas. As a matter of separation of powers, however, courts are bound by the text of the treaty. See *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U. S. 753, 774 (1985). It is for Congress and the President, not the courts, to update a law and provide additional compensation or benefits to tribes beyond those provided by an old law. And since 1855, and especially since 1968, Congress has in fact taken many steps to assist tribes through a variety of significant legislative measures. In short, lament about the terms of the treaty negotiated by the Federal Government and the Tribe in 1855 does not support the Judiciary (as opposed to Congress and the President) rewriting the law in 2019.

What about precedent? It is true that some of our older precedents interpreted similar “in common with” treaty language regarding fishing rights to grant tribal members an exemption from certain fishing regulations, even when

the fishing regulations were nondiscriminatory. But as we explained in the most recent of those fishing cases, those nondiscriminatory fishing regulations had the effect of preventing the Tribes from catching a fair share of the fish in the relevant area. In other words, the fishing regulations at issue were discriminatory in effect even though nondiscriminatory on their face. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676, n. 22 (1979).

That rationale for departing from the treaty text in the narrow context of the fishing cases does not apply in the highway context. Facially nondiscriminatory highway regulations—such as speed limits, truck restrictions, and reckless driving laws—are also nondiscriminatory in effect, as relevant here. They do not deprive tribal members of use of the public highways or deprive tribal members of a fair share of the public highways.

Washington’s facially nondiscriminatory fuel tax is likewise nondiscriminatory in effect. The Washington fuel tax therefore does not violate the key principle articulated in the fishing cases. I would adhere to the text of the treaty and hold that the tribal members, like other citizens of the State of Washington, are subject to the nondiscriminatory fuel tax.

The Court (via the plurality opinion and the concurrence) disagrees. The Court relies on the fishing cases and fashions a new right for Yakama tribal members to disregard even nondiscriminatory highway regulations, such as the Washington fuel tax and perhaps also Washington’s similarly structured cigarette tax. The Court’s newly created right will allow Yakama businesses not to pay state taxes that must be paid by other competing businesses, including by businesses run by members of the many other tribes in the State of Washington. As a result, the State of Washington (along with other States) stands to lose millions of dollars annually in tax revenue, which

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will necessarily mean fewer services or increased taxes for other citizens and tribes in the State.

In addition, the Court’s newly created right—if applied across the board—would seem to afford Yakama tribal members an exemption from all manner of highway regulations, ranging from speed limits to truck restrictions to reckless driving laws. No doubt because of those negative real-world consequences, the Court simultaneously fashions a new health and safety exception.\* But neither the right nor the exception comes from the text of the treaty. As THE CHIEF JUSTICE explains, the Court’s “need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence.” *Ante*, at 8.

I share THE CHIEF JUSTICE’s concern that the Court’s new right for tribal members to disregard even nondiscriminatory highway regulations and the Court’s new exception to that right for health and safety regulations could generate significant uncertainty and unnecessary litigation for States and tribes. THE CHIEF JUSTICE says it well: The Court “digs such a deep hole that the future promises a lot of backing and filling.” *Ibid*.

Instead of judicially creating a new atextual right for tribal members to disregard nondiscriminatory highway regulations and then backfilling by judicially creating a new atextual exception to that right for health and safety regulations, I would adhere to the text of the treaty and leave it to Congress, if it chooses, to provide additional benefits for the Yakamas. In my respectful view, even when we interpret any ambiguities in the treaty in favor of the Tribe, the treaty phrase “in common with” cannot properly be read to exempt tribal members from nondiscriminatory highway regulations.

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\*I understand both the plurality opinion and the concurrence to approve of a health and safety exception.

In sum, under the treaty, Washington's nondiscriminatory fuel tax may be imposed on Yakama tribal members just as it may be imposed on other citizens and tribes in the State of Washington. I respectfully dissent.