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ANALYZING THE IMPLICATIONS OF THE SUPREME COURT'S HOLDING IN *HERRERA v. WYOMING*

Andrew Rader[*]

Introduction

The Crow Tribe has inhabited southern Montana and northern Wyoming for more than three centuries;[1] Wyoming officially became a state in 1890, long after the Crow Tribe settled in the area.[2] The Tribe's settlement encompassed what is now known as the Bighorn National Forest, which is partly located in present-day Wyoming.[3] Various territories officially declared statehood, and a recurring question became whether tribal treaty rights relating to the lands—now a part of the state—were preempted by the declaration of statehood.[4] A common analysis in any treaty-rights case involves looking to congressional intent, as the legislature has the right to abrogate treaty rights in toto.[5] Statehood preemption questions have arisen frequently in usufructuary rights cases—ones involving hunting and fishing rights.[6] But that is not to say that the Supreme Court's analysis in usufructuary rights cases cannot be applied to other, more significant treaty rights. Due in part to recent developments in case law and turnover on the Supreme Court, tribal treaty rights—not simply usufructuary ones—are currently the safest they have ever been.

This Note will examine the line of cases involving statehood preemption of tribal treaty rights leading up to the recently decided Supreme Court case of *Herrera v. Wyoming*.[7] Part I will lay out the background and history of cases grappling with statehood preemption, the doctrine's treatment by the Supreme Court and other courts, and recent turnover on the Court in favor of the tribes. Part II will examine the recent case of *Herrera v. Wyoming* and the Supreme Court's shift in favor of the tribes with its holding in that case.[8] Part III will discuss counterarguments in support of statehood

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1. Montana v. United States, 450 U.S. 544, 547 (1981).
2. Act of July 10, 1890 (Wyoming Statehood Act), ch. 664, 26 Stat. 222.
3. Herrera v. Wyoming, 139 S. Ct. 1686, 1692–93 (2019).
4. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999).
5. *Id.*; Ward v. Race Horse, 163 U.S. 504, 511 (1896) ("That 'a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty,' is elementary.").
6. *See, e.g.*, *Herrera*, 139 S. Ct. 1686; *Mille Lacs*, 526 U.S. 172.
7. 139 S. Ct. 1686.
8. *Id.*

preemption and the implications moving forward post-*Herrera*. Finally, Part IV will conclude this Note and extrapolate on the broad reach of *Herrera* in other contexts based on the present makeup of the Supreme Court.

I. History of Statehood Preemption and Recent Supreme Court Developments

Statehood preemption has not been an issue in recent times because no territory has become a state since Hawaii joined the Union in August of 1959.[9] The issue still arises, however, when debating centuries-old tribal treaty rights.[10] Throughout more than a century of jurisprudence, the Supreme Court has essentially done an about-face with its view on the doctrine.[11] Differing views among the justices has led to many deep divides, at times along ideological lines. Overall, the case law has been developing for over a century.

A. Ward v. Race Horse *and the Early Supreme Court View*

The Supreme Court addressed a statehood preemption argument in the early case of *Ward v. Race Horse* in 1896.[12] The facts before the Court in *Race Horse* were strikingly similar to those found in *Herrera*.[13] *Race Horse* involved the Bannock Tribe of Indians, another tribe with land in present-day Wyoming, and the Tribe's treaty with the United States.[14] Within this treaty, article 4 provided, in part, the following language: "[B]ut they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."[15] The crux of this case was whether Wyoming's statehood preempted the Bannock Tribe's treaty right to hunt on the "unoccupied lands of the United States," which included the Bighorn National Forest.[16] Race Horse, a member of the Bannock Tribe, was arrested for violating a state gaming law after killing seven elk in Wyoming; he argued that he was entitled to hunt,

9. *See* Proclamation No. 3309, 24 Fed. Reg. 6868 (1959).

10. *See Mille Lacs*, 526 U.S. 172.

11. *Compare* Ward v. Race Horse, 163 U.S. 504 (1896), *with Herrera*, 139 S. Ct. 1686.

12. 163 U.S. 504.

13. *See infra* text accompanying note numbers 81–93.

14. *See* Treaty with the Eastern Band Shoshoni and Bannock (Shoshone-Bannock Treaty), July 3, 1868, 15 Stat. 673.

15. *Id.* art. 4, *quoted in Race Horse*, 163 U.S. at 507 (internal quotation marks omitted).

16. *Race Horse*, 163 U.S. at 507.

notwithstanding the law, as a member of the Tribe and in light of the clear treaty language.[17] The State of Wyoming countered that its admittance as a state to the Union abrogated the Shoshone-Bannock Treaty's provision to hunt freely on said lands.[18] The Supreme Court thus had to analyze whether the treaty remained valid.

In stark contrast to the eventual outcome in *Herrera* in 2019, the Court in *Race Horse* concluded that the Shoshone-Bannock Treaty right to hunt was extinguished when Wyoming officially became a state.[19] Justice White, writing for the majority, first reasoned that states are admitted to the Union on an "equal footing" with existing states.[20] The equal-footing doctrine dictates that "all States enter the Union with the full panoply of powers enjoyed by the original 13 States at the adoption of the Constitution."[21] The State therefore could not be burdened by treaties that conflicted with Wyoming's "vested" power "to regulate the killing of game within [its] borders."[22] Moreover, the majority deemed the treaty's hunting rights provision "essentially perishable and intended to be of limited duration."[23] The Court criticized the defendant's argument that the terms of the treaty were "perpetual," and instead opted to assume the right was "temporary and precarious."[24] The Court interpreted the Tribe's argument as "distorting the words of [the] treaty" and ignoring "the express will of Congress" since the treaty would be in direct conflict with Wyoming's ability to govern itself.[25]

The dissent, on the other hand, penned by Justice Henry Brown, came to the opposite conclusion, reasoning that "abrogation of a public treaty ought not to be inferred from doubtful language, but that the intention of congress to repudiate its obligation ought clearly to appear."[26] Justice Brown took a practical approach to interpreting the treaty. He stated that Congress surely anticipated Wyoming would become a state, but instead of reserving the Bannock Tribe's right to hunt until statehood, Congress instead reserved the hunting rights "so long as game may be found upon the lands, and so long

17. *In re* Race Horse, 70 F. 598, 599–600 (Cir. Ct. D. Wyo. 1895), *rev'd sub nom.* Ward v. Race Horse, 163 U.S. 504 (1896).

18. *Race Horse*, 163 U.S. at 514.

19. *Id.* at 516.

20. *Id.* at 509–14 (citing Pollard v. Hagan, 44 U.S. (3 How.) 212, 229 (1845)).

21. Herrera v. Wyoming, 139 S. Ct. 1686, 1705 (2019) (Alito, J., dissenting).

22. *Race Horse*, 163 U.S. at 509–14 (citing Lessee of Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845)).

23. *Id.* at 515.

24. *Id.* at 510.

25. *Id.* at 516.

26. *Id.* at 517 (Brown, J., dissenting).

as peace should subsist on the borders of the hunting districts."[27] In his final remarks, Justice Brown expressed his uneasiness toward the majority's holding that the mere admission of a state to the union can constructively occupy land which is, in fact, unoccupied, for the purposes of tribal treaty rights.[28]

In the case of *Herrera v. Wyoming*, the State of Wyoming relied heavily on the case of *Race Horse*, presumably because the facts before the *Herrera* Court were, for all intents and purposes, exactly the same as the facts in *Race Horse*.[29] Additionally, the State of Wyoming pointed to the holding and reasoning of the Tenth Circuit in *Crow Tribe of Indians v. Repsis* in *Herrera*.[30]

B. Crow Tribe of Indians v. Repsis *and the Tenth Circuit's Continuation of* Race Horse

The Tenth Circuit reinforced the power of statehood preemption in the 1990s in the case of *Crow Tribe of Indians v. Repsis*.[31] The *Repsis* decision would become a deeply disputed case between the majority and the dissent in *Herrera*.[32] In *Repsis*, Thomas L. Ten Bear was issued a citation by game warden Chuck Repsis for killing elk in the Bighorn National Forest without a valid hunting license.[33] Following a successful prosecution and conviction, Ten Bear challenged the ruling, citing the exact treaty at issue in *Herrera*.[34] In representing Ten Bear, the Crow Tribe sought both declaratory relief and an injunction against the State of Wyoming for violating the 1868 Treaty.[35] Before arriving at the Tenth Circuit, the case was heard by the Wyoming federal district court, which dismissed the action, citing *Race Horse* as binding authority that the Crow Tribe's hunting right had been abrogated.[36] On appeal, the Tenth Circuit affirmed the lower court's dismissal, reasoning that the Crow Tribe's argument was

27. *Id.* at 518 (Brown, J., dissenting).

28. *Id.* at 520 (Brown, J., dissenting).

29. *Compare* discussion of *Race Horse supra* text accompanying notes 12–18 *with* discussion of *Herrera infra* text accompanying notes 83–91.

30. Crow Tribe of Indians v. Repsis (*Repsis II*), 73 F.3d 982 (10th Cir. 1995).

31. *Id.*

32. *See infra* Sections II.C–D.

33. *Repsis II*, 73 F.3d at 985.

34. Treaty of Fort Laramie with the Crow Indians, art. IV, May 7, 1868, 15 Stat. 649.

35. *Repsis II*, 73 F.3d at 986.

36. Crow Tribe of Indians v. Repsis (*Repsis I*), 866 F. Supp. 520, 522–25 (D. Wyo. 1994).

too similar to the one espoused by the Bannock Tribe in *Race Horse*;[37] the hunting right was preempted by statehood.[38] To conclude, the Tenth Circuit, while admonishing the lower court's reluctance to follow *Race Horse*, found Justice White's majority opinion "compelling, well-reasoned, and persuasive."[39] "*Race Horse* is alive and well," the Court professed.[40]

Senior Circuit Judge Barrett's opinion includes a thorough examination of the holding and reasoning in *Race Horse* to elaborate on the decision's alleged persuasiveness.[41] Immediately following is a review of subsequent cases relied on by the Crow Tribe; the Tribe argued that the holding in *Race Horse* had been essentially overruled by "a string of cases upholding federal authority to regulate wildlife notwithstanding claims of interference with state sovereignty."[42] The Court expressly rejected this argument, finding that "absent any conflict between federal and state authority to regulate the taking of game, the state retains the authority, even over federal lands within its borders."[43] The fact that the *Repsis* Court based its reasoning on two separate, independent theories—statehood preemption and conservation rights—led to a bitter disagreement between the majority and dissent in *Herrera v. Wyoming*.[44]

In a final effort to convince the Tenth Circuit of its right under the treaty, the Crow Tribe contended that newly reformed canons of construction post-*Race Horse* should persuade the court to construe the treaty language in its favor.[45] The Tenth Circuit quickly dismissed this argument, citing *Worcester v. Georgia*,[46] and pointing out that these canons of construction were well-known by the Court in *Race Horse*.[47]

The Tenth Circuit's decision in *Repsis* solidified the idea that *Race Horse* was still relevant when interpreting tribal treaty language. But four years later, the Supreme Court delivered a decision with strong implications that *Race Horse* was not the controlling law that it once was.

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37. *Repsis II*, 73 F.3d at 988.
38. *Id.* at 992 (citing Ward v. Race Horse, 163 U.S. 504, 514 (1896)).
39. *Id.* at 994.
40. *Id.*
41. *Id.* at 988–89.
42. *Id.* at 989.
43. *Id.* at 990 (citing Kleppe v. New Mexico, 426 U.S. 529, 543 (1976)).
44. *See infra* Sections II.C–D.
45. *Repsis II*, 73 F.3d at 992.
46. 31 U.S. (6 Pet.) 515, 582 (1832).
47. *Repsis II*, 73 F.3d at 992.

C. The Court's About-Face on Statehood Preemption in Minnesota v. Mille Lacs Band of Chippewa Indians

The Supreme Court sought to end the reign of the *Race Horse* decision when it decided *Minnesota v. Mille Lacs Band of Chippewa Indians*[48] in 1999. Another treaty dispute, the *Mille Lacs* decision involved the granting of hunting rights, among other things, to the Chippewa Indians in exchange for their lands in present-day Wisconsin and Minnesota.[49] After Minnesota was established as the thirty-second state in the Union,[50] the Chippewa Tribe sought a declaration from the courts that its usufructuary rights in the area were retained.[51] In a harsh rebuke of the *Race Horse* decision, both the district court and the Eighth Circuit held that the Chippewa Tribe's hunting rights under the treaty were not abrogated by Minnesota's statehood.[52] The Supreme Court subsequently granted certiorari. In a 5-4 opinion authored by Justice O'Connor, the Supreme Court held in favor of the Tribe; a stunning reversal, at least on its face, to years of precedent to the contrary.[53]

While on the surface this decision looks like an explicit overturning of *Race Horse*, the Court tried instead to distinguish its decision.[54] Specifically, Justice O'Connor reasoned that Minnesota's statehood by itself did not abrogate the Tribe's treaty right.[55] If the treaty right were to ever be abrogated, the Court held, Congress would need to express a clear intent to do so.[56] Using this methodology, the Chippewa Tribe's treaty rights were retained absent any clear intent of Congress to abrogate them.[57]

The State of Minnesota relied on the holding in *Race Horse*.[58] The Court responded to that argument in a straightforward manner: "*Race Horse* rested on a false premise."[59] Citing to a few subsequent cases, the Court found that tribal hunting rights "are not irreconcilable with a State's

48. 526 U.S. 172 (1999).
49. *Id.* at 175–76.
50. Act of May 11, 1858, ch. 31, 11 Stat. 285.
51. *Mille Lacs*, 526 U.S. at 185.
52. *Id.* at 187.
53. *Id.* at 176.
54. *Id.* at 203–08. This attempt to distinguish would ultimately lead to the battle over issue preclusion between the majority and dissent in *Herrera*.
55. *Id.* at 202–03.
56. *Id.* at 202 (citing United States v. Dion, 476 U.S. 734, 738–40 (1986)).
57. *Id.* at 203.
58. *Id.*
59. *Id.* at 204.

sovereignty over the natural resources in the State."[60] In other words, both rights can coexist.[61] The Court pointed out, however, that the Crow Tribe's usufructuary rights in *Race Horse* conflicted with Wyoming's regulation of natural resources, and therefore were an "impairment of Wyoming's sovereignty."[62] As applied to the Chippewa Tribe, the usufructuary rights were retained because Minnesota's statehood did not affect them, and Congress had not expressed a clear intent to abrogate them.[63]

Chief Justice William Rehnquist—joined by Justices Scalia, Kennedy, and Thomas—delivered a scathing dissenting opinion in *Mille Lacs*.[64] Amid other disagreements with the majority opinion, Justice Rehnquist expressed his "strong disagreement" with the Court's holding that Minnesota's admission to the Union did not abrogate the Chippewa Tribe's hunting rights.[65] Rehnquist dubbed the Court's treatment of *Race Horse* "jurisprudential legerdemain," or sleight of hand, because it seemed to overrule the decision while claiming to be distinguishable.[66] The dissent was especially confused by the fact that the treaty language in the Chippewa treaty was even more "temporary and precarious" than the language in the Crow treaty at issue in *Race Horse*.[67] In the end, the dissenters believed the equal-footing doctrine recognized by the *Race Horse* Court should have carried the day, but it was instead set aside by the majority.[68]

D. Turnover on the Supreme Court in Favor of the Tribes

Following a close 5-4 decision in *Mille Lacs*, justices on the bench favoring tribal treaty rights were only a simple majority. Of the five justices that made up the majority in *Mille Lacs*, only two remain on the Court today—Justices Ginsburg and Breyer; and of the dissenters, only Justice

60. *Id.* (citing Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Antoine v. Washington, 420 U.S. 194 (1975)).

61. *Id.*

62. *Id.*

63. *Id.* at 208.

64. *Id.* at 208–20 (Rehnquist, J., dissenting). Justice Thomas wrote a separate dissent but joined Rehnquist's dissenting opinion as well.

65. *Id.* at 217 (Rehnquist, J., dissenting).

66. *Id.* at 219 (Rehnquist, J., dissenting).

67. *Id.* at 219–20 (Rehnquist, J., dissenting) (quoting Ward v. Race Horse, 163 U.S. 504, 515 (1896)). The qualifying language in the Chippewa treaty guaranteed hunting rights "during the pleasure of the President."

68. *Id.* at 220 (Rehnquist, J., dissenting).

Thomas remains.[69] Apart from Justice O'Connor, who was considered part of the conservative wing during her tenure on the bench,[70] the 5-4 split in *Mille Lacs* was along ideological lines. The swing vote of Justice O'Connor in favor of the Tribes was presumably unexpected since she was much more likely to vote with the conservative bloc than the liberal bloc of justices throughout her time on the Court.[71] The next time the tribal treaty issue would be construed in the same context, the makeup of the Court would be drastically different.

Since President Donald Trump was elected in 2016, he has had the opportunity to appoint two justices to the Supreme Court—Justices Neil Gorsuch and Brett Kavanaugh. Because they were appointed by a Republican president, both junior justices on the Court are considered more conservative than liberal so far in their tenure. But their minimal time on the Court begs the question of how both Gorsuch and Kavanaugh will vote in tribal cases. Because the makeup of the Court is entirely different from when *Mille Lacs* was decided, mere inferences could only be made about the voting habits of the bench in tribal treaty cases in 2019.

Prior to *Herrera v. Wyoming*, the March 2019 decision of *Washington State Department of Licensing v. Cougar Den, Inc.*[72] shed some light on the new justices' inclinations in tribal treaty cases. *Cougar Den* involved a dispute over a Washington state gasoline transportation tax enforced against the Yakama Tribe.[73] The actual text of the treaty gave members of the Yakama Tribe "the right, in common with citizens of the United States, to travel upon all public highways."[74] In a 5-4 decision, Justice Gorsuch sided with the liberal wing of justices, authoring a concurring opinion joined by Justice Ginsburg; Justice Kavanaugh joined the conservative wing and authored his own dissenting opinion.[75] Justice Gorsuch explained that the

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69. *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Sep. 29, 2019).

70. *See* JAN CRAWFORD GREENBERG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 68 (2007) (noting that O'Connor voted with Chief Justice Rehnquist, an outspoken conservative, in 87% of his opinions during her first three years on the Court).

71. *See* Robert J. Jackson & Thiruvendran Vignarajah, *Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510, 512 (2004).

72. 139 S. Ct. 1000 (2019).

73. *Id.* at 1006–07.

74. Treaty with the Yakama Nation, art. 3, June 9, 1855, 12 Stat. 951, *quoted in Cougar Den*, 139 S. Ct. at 1007.

75. *Cougar Den*, 139 S. Ct. at 1016–21 (Gorsuch, J., concurring); *id.* at 1026–29 (Kavanaugh, J., dissenting). The majority included Associate Justices Gorsuch, Ginsburg,

Court's objective was to interpret the language in a way "most consistent with the treaty's original meaning."[76] In light of that objective, Gorsuch reasoned that the "factual findings . . . require[d] a ruling for the Yakamas."[77] Justice Kavanaugh, on the other hand, sided with the State's view that the treaty language was best interpreted to give the Yakama Tribe the right to travel on "public highways on equal terms with other U.S. citizens."[78]

Cougar Den was a treaty interpretation case much like the past-discussed cases of *Race Horse*, *Mille Lacs*, and *Repsis*. The resulting votes in *Cougar Den* painted a picture of how the current Supreme Court would approach these cases. Moving forward, the result in *Cougar Den* called into question the outcome of the later decision of *Herrera v. Wyoming*, which this Note will now examine.

II. The Supreme Court's Affirmance of Mille Lacs in Herrera v. Wyoming

The century-and-a-half development of statehood preemption and its place in the Supreme Court's view would come to the forefront in 2019 in the case of *Herrera v. Wyoming*.[79] After Justice Gorsuch sided with the liberal wing on the Native American rights issue in *Cougar Den*, the Crow Tribe was hopeful that his support would continue into the usufructuary rights arena.[80]

A. Facts of the Case

The Crow Tribe was originally nomadic, inhabiting parts of Canada before making their way south to what is now southern Montana and northern Wyoming.[81] As such, the Tribe has always hunted game for subsistence.[82] Due to the increase in American settlers migrating west for new lands, the lands occupied by the Crow Tribe became the property of

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Sotomayor, Kagan, and Breyer; the dissent included Associate Justices Alito, Thomas, and Kavanaugh, as well as Chief Justice Roberts.

76. *Id.* at 1016 (Gorsuch, J., concurring).

77. *Id.* at 1017 (Gorsuch, J., concurring).

78. *Id.* at 1026 (Kavanaugh, J., dissenting).

79. 139 S. Ct. 1686 (2019).

80. *See* Nick Martin, *Gorsuch Sides with Liberal Justices to Spoil Washington's Attempt to Rewrite Tribal Law*, SPLINTER (Mar. 20, 2019, 10:29 AM), https://splinternews.com/gorsuch-sides-with-liberal-justices-to-spoil-washington-1833433274.

81. Montana v. United States, 450 U.S. 544, 547–48 (1981).

82. *Herrera*, 139 S. Ct. at 1692 (citing JOSEPH M. CROW, FROM THE HEART OF THE CROW COUNTRY: THE CROW INDIANS' OWN STORIES 4–5, 8 (1992)).

the United States after a series of treaties. The First Treaty of Fort Laramie of 1851 (1851 Treaty) was between the Tribe and the United States and designated around thirty-eight million acres as Crow territory.[83] The 1851 Treaty clarified that the Tribe "did not 'surrender the privilege of hunting, fishing, or passing over' any of the lands [at issue]."[84] The Second Treaty of Fort Laramie of 1868 (1868 Treaty) reduced the Crow reservation to around eight million acres and included a piece of the Big Horn River.[85] Many more acts of Congress reduced the Tribe's acreage further to around 2.3 million acres,[86] but, at issue in *Herrera* was the 1868 Treaty.[87]

The treaty language in question in *Herrera* was almost verbatim the language in the treaty in *Race Horse* but with a different tribe. Article 4 of the 1868 Treaty provided that "[t]he Indians . . . shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."[88] A few months after the 1868 Treaty was signed, Wyoming became a territory and twenty-two years later was admitted to the Union as the forty-fourth state.[89] Additionally, in 1897, President Grover Cleveland "reserved from entry or settlement" lands in Wyoming ceded by the Crow Tribe that became known as the Bighorn National Forest.[90]

Clayvin Herrera is a member of the Crow Tribe and, in 2014, he pursued a herd of elk across the boundary of the Crow reservation into the Bighorn National Forest.[91] Herrera and fellow tribal members successfully killed a few elk and returned to the reservation with the meat.[92] Subsequently,

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83. *Montana*, 450 U.S. at 547–48 (citing Treaty of Fort Laramie with Sioux, Etc., art. 5, Sept. 17, 1851, 2 INDIAN AFFAIRS: LAWS AND TREATIES 594 (Charles J. Kappler ed., 1904)).

84. *Id.* at 548 (quoting Treaty of Fort Laramie with Sioux, Etc., *supra* note 83, art. 5).

85. *Id.* (citing Treaty of Fort Laramie with the Crow Indians, supra note 34, art. 2).

86. *Id.* (citing Act of Apr. 11, 1882, ch. 74, 22 Stat. 42; Act of Mar. 5, 1891, § 31, ch. 543, 26 Stat. 989, 1039–40; Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352; Act of Aug. 31, 1937, ch. 890, 50 Stat. 884).

87. *Herrera*, 139 S. Ct. at 1691 (citing Treaty of Fort Laramie with the Crow Indians, *supra* note 34).

88. Treaty of Fort Laramie with the Crow Indians, *supra* note 34, art. 4, *quoted in Herrera*, 139 S. Ct. at 1693.

89. *Herrera*, 139 S. Ct. at 1693 (citing Act of July 10, 1890 (Wyoming Statehood Act), ch. 664, 26 Stat. 222).

90. Presidential Proclamation No. 30, 29 Stat. 909 (1897), *quoted in Herrera*, 139 S. Ct. at 1693.

91. *Herrera*, 139 S. Ct. at 1693.

92. *Id.*

Herrera was arrested by Wyoming authorities for hunting elk out of season and, thus, violating state law.[93]

B. Procedural Posture

At the state trial court level, Herrera filed a motion to dismiss the case, citing the clear language in the 1868 Treaty that gave him the right to hunt within the boundaries of the Bighorn National Forest.[94] The court denied the motion to dismiss and allowed the case to go to trial.[95] Herrera's defensive use of the treaty language was not permitted, and a jury convicted him of hunting elk out of season.[96]

Herrera then appealed to the state appellate court, whose question on appeal was "whether the Crow Tribe's off-reservation hunting right was still valid."[97] Herrera argued that the Supreme Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians* had implicitly overruled the previous holding in *Ward v. Race Horse*, and, therefore, undermined the reasoning in the Tenth Circuit's *Crow Tribe of Indians v. Repsis* decision.[98] The state appellate court instead decided that the *Repsis* decision was not undermined because *Mille Lacs* had not overruled *Race Horse*.[99] Therefore, according to the court, the treaty right under the 1868 Treaty "expired upon Wyoming's statehood."[100] As an alternative ground for dismissing Herrera's claim, the appellate court also held that issue preclusion was merited based on the judgment in *Repsis* because Herrera is a member of the Crow Tribe, which litigated the *Repsis* case "on behalf of itself and its members."[101] Lastly, the court, again relying on *Repsis*, concluded that the land on which Herrera was hunting was "occupied" within the meaning of the treaty language when the Bighorn National Forest was established.[102]

After the Wyoming Supreme Court denied Herrera's petition for review of the lower court's decision, the Supreme Court granted certiorari.[103]

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93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1693–94.
99. *Id.* at 1694.
100. *Id.* (citing Petition for Writ of Certiorari at App-31 to App-34, *Herrera*, 139 S. Ct. 1686 (No. 2016-242)).
101. *Id.*
102. *Id.* (internal quotation marks omitted).
103. *Id.*

C. Justice Sotomayor's Majority Opinion

In a 5-4 decision in favor of the Crow Tribe, Justice Sonia Sotomayor delivered the majority opinion, joined by Justices Ginsburg, Breyer, Kagan, and Gorsuch.[104] The opinion addressed two main issues: (1) whether the Crow Tribe's hunting rights under the 1868 Treaty remained valid; and (2) even if the treaty right was valid, whether the protection extends into the Bighorn National Forest if it was "occupied."[105] The majority also briefly addressed the problem of issue preclusion, which is discussed below in Section II.D.

On the first point, the majority in *Herrera* concluded that the Crow Tribe's hunting rights under the treaty remained valid, even after Wyoming became a state.[106] This conclusion was predominantly based on the Court's holding twenty years prior in *Mille Lacs*, which effectively overruled *Race Horse*, even though it had not done so explicitly.[107] In so holding, the majority rejected the "equal footing" doctrine relied on in *Race Horse*, much like the *Mille Lacs* Court had done.[108] Instead of adopting the "equal footing" doctrine, the majority in *Herrera*, again much like the *Mille Lacs* Court, decided that in order for a tribal treaty right to be deemed abrogated, Congress "must clearly express" an intent to do so.[109] In other words, the question is "whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied."[110]

Applying that analysis to the Crow Tribe's 1868 Treaty, the majority found that Wyoming's declaration of statehood, without more, did not abrogate the tribal treaty right.[111] According to Justice Sotomayor, this part of the analysis was simple because Congress never expressed an intent to abrogate Indian treaty rights when admitting Wyoming to the Union.[112] The

104. *Id.*
105. *Id.* at 1694, 1700 (internal quotation marks omitted).
106. *Id.* at 1694.
107. *Id.*
108. *Id.* at 1695 (internal quotation marks omitted).
109. *Id.* at 1696 (internal quotation marks omitted).
110. *Id.*
111. *Id.* at 1698.
112. *Id.* ("There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202–03 (1999) (quoting in turn United States v. Dion, 476 U.S. 734, 740 (1986))).

Court then addressed the alternative grounds for the holding in *Race Horse*, namely, whether the treaty rights were never meant to be perpetual, but rather "temporary and precarious."[113] The Court found no such evidence that the treaty rights at issue were meant to expire at statehood, again applying the congressional intent test set forth in *Mille Lacs*.[114] "Indian treaties," the Court stated, "'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.'"[115] The State of Wyoming had also argued that even under the *Mille Lacs* decision it should prevail because statehood, as a practical matter, "marked the arrival of 'civilization' in the Wyoming Territory and thus rendered all the lands in the State occupied."[116] The Court rejected this alternative argument, however, reasoning that "statehood as a proxy for occupation" goes against the Court's clear instruction that "treaty-protected rights 'are not impliedly terminated upon statehood.'"[117]

On the second point, the majority in *Herrera* held that the establishment of Bighorn National Forest did not categorically "occupy" the land within the meaning of the 1868 Treaty.[118] The majority relied on case law stating that treaty terms should be construed "as they would naturally be understood by the Indians."[119] Thus, the Indians' understanding of the word "unoccupied" would "denote an area free of residence or settlement by non-Indians."[120] Justice Sotomayor broke down the treaty and referred to the word choice and syntax of various other articles of the 1868 Treaty to bolster her conclusion. Citing articles 2 and 4, the opinion notes that the word "occupation" was used by the drafters to also refer to the Tribe's occupation within the reservation—supporting the argument that occupation and residence are synonymous.[121] Additionally, the treaty refers to the Tribe members as "'settlers' on the new reservation."[122] Commissioner Taylor, a key player in the treaty negotiations, even

113. *See* Ward v. Race Horse, 163 U.S. 504, 515 (1896).

114. *Herrera*, 139 S. Ct. at 1699.

115. *Id.* (quoting *Mille Lacs*, 526 U.S. at 206).

116. *Id.* at 1699–1700 (quoting Brief for Respondent at 48, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (No. 17-532)).

117. *Id.* at 1700 (quoting *Mille Lacs*, 526 U.S. at 207).

118. *Id.* at 1700–01.

119. *Id.* at 1701 (quoting Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979)) (internal quotation marks omitted).

120. *Id.*

121. *Id.* at 1701–02 (citing Treaty of Fort Laramie with the Crow Indians, *supra* note 34, arts. 2, 4).

122. *Id.* at 1701.

commented that "white people [were] rapidly increasing and . . . *occupying* all the valuable lands."[123]

After citing such compelling parallels, among other things, the majority concluded it was "clear that President Cleveland's proclamation creating Bighorn National Forest did not 'occupy' that area within the treaty's meaning."[124] According to the majority, the President's proclamation language "made Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty right."[125] Overall, the majority found Wyoming's arguments unpersuasive; these included citing to mining and logging activity on the land and federal regulation of the area as enough to render the area "occupied."[126] Taking the stance that the treaty should be understood as the Tribe understood it, the Court declared Bighorn National Forest unoccupied when considering the Crow Tribe's usufructuary rights laid out in the 1868 Treaty.[127]

The majority rounded out its opinion with a few limitations. First was that the entirety of the Bighorn forestland was not necessarily "unoccupied," and that Wyoming could prove on remand that the specific place in which Herrera hunted was occupied.[128] At this stage, the State had failed to carry that burden of proof. Second was that the argument concerning the State's ability to regulate the area was impeded by the Tribe's hunting right was not raised at the appellate level, and thus would not be analyzed by the Supreme Court.[129] This point could be proven by the State on remand as well.

D. Justice Alito's Dissenting Opinion and the Dispute of Issue Preclusion

Justice Alito authored a dissenting opinion, in which Chief Justice Roberts, and Justices Thomas and Kavanaugh joined.[130] While the dissent ultimately disagreed with the majority's treaty interpretation methodology, calling it "debatable,"[131] the predominant disagreement concerned the doctrine of issue preclusion.[132] The dissent contended that, based on the

123. *Id.* at 1702 (alteration in original) (emphasis added).

124. *Id.* "The President 'reserved' the lands 'from entry or settlement.'" (quoting Presidential Proclamation No. 30, 29 Stat. 909).

125. *Id.*

126. *Id.* at 1702–03.

127. *Id.* at 1703.

128. *Id.*

129. *Id.*

130. *Id.* (Alito, J., dissenting).

131. *Id.*

132. *Id.* at 1703–13 (Alito, J., dissenting).

Tenth Circuit's holding in *Crow of Tribe Indians v. Repsis*, Herrera was precluded from bringing the action against the State, and the *Repsis* decision controlled.[133]

Fundamentally, the majority and dissent disagreed about *Minnesota v. Mille Lacs Band of Chippewa Indians* and its effect on the legal context involved in these many similar cases.[134] The majority reasoned that the legal context had changed based on the decision in *Mille Lacs*, and therefore warranted invoking an exception to issue preclusion in *Herrera*.[135] While the dissent recognized the existence of the change-in-law exception, Justice Alito warned that "caution is in order" when applying it, so as to protect the doctrine of issue preclusion.[136] In other words, whether *Ward v. Race Horse* was overturned in *Mille Lacs* was a question of degree.

This question of degree can be broken down into the two premises upon which *Race Horse* relied: (1) the equal-footing doctrine, and (2) congressional intent through statehood preemption.[137] Justice Alito writes that while it may be clear that the *Mille Lacs* majority repudiated the equal-footing rationale of *Race Horse*, "it is by no means clear that *Mille Lacs* also rejected the second ground."[138] Whether sufficient congressional intent is present to relinquish treaty rights, Justice Alito contends, is a fact-specific question that must be analyzed in the context of the specific treaty.[139]

With this approach in mind, the dissent concluded that *Race Horse* had not been sufficiently overruled in *Mille Lacs*, and therefore, the legal context had not changed enough to warrant any exception to the doctrine of issue preclusion.[140] In other words, "there may not have actually been the sea change in legal context to merit overriding the issue-preclusive effect of *Repsis*."[141] Under this rationale, Herrera would be precluded from bringing

133. *Id.* at 1706 (Alito, J., dissenting).

134. *Compare Herrera*, 139 S. Ct. at 1694 ("[T]his case is controlled by *Mille Lacs*, not *Race Horse*"), *with Herrera*, 139 S. Ct. at 1707–08 (Alito, J., dissenting).

135. *Id.* at 1707 (Alito, J., dissenting).

136. *Id.* at 1707–08 (Alito, J., dissenting).

137. *Id.* at 1708 (Alito, J., dissenting); *see also* Ward v. Race Horse, 163 U.S. 504 (1896).

138. *Herrera*, 139 S. Ct. at 1708 (Alito, J., dissenting).

139. *Id.*

140. *Id.*

141. *United States–Crow Treaty — Federal Indian Law — Indian Plenary Power Doctrine* — Herrera v. Wyoming, 133 HARV. L. REV. 402, 406 (2019) [hereinafter *Indian Plenary Power Doctrine*].

any challenge against the state since he is bound by the prior Tenth Circuit judgment in *Crow Tribe of Indians v. Repsis*.[142]

Taking it a step further, Justice Alito contended that, even if the change-in-law exception applied to issue preclusion based on *Mille Lacs*' apparent reversal of *Race Horse*, Herrera was alternatively precluded by *Repsis* based on the "unoccupied" portion of the *Repsis* opinion.[143] The dissent disagreed with the majority's choice to brush this conclusion aside, and reasoned that this "independently sufficient ground" of the *Repsis* holding acts with the same force as the primary holding referred to by the majority.[144] This disagreement highlights the different Restatement of Judgments approaches to issue preclusion when the case at issue contains more than one holding.[145] The dissent favored the approach found in the First Restatement of Judgments, which states that "a judgment based on alternative grounds 'is determinative on both grounds, although either alone would have been sufficient to support the judgment.'"[146] On the contrary, the majority favored the Second Restatement's approach, which states that "a judgment based on the determination of two independent issues 'is not conclusive with respect to either issue standing alone.'"[147]

Put simply, the dissent believed that, in this instance, "each conclusion provide[d] an independent basis for preclusion,"[148] while the majority believed that a change in the legal context of either would warrant applying the exception to issue preclusion.[149] An in-depth look at the details of the dissent highlight the significance of Justice Gorsuch's vote, discussed in Part IV of this Note. Part III, however, will briefly examine the merits of counterarguments in favor of the state.

III. The Case for Statehood Preemption and Looking Towards the Future

As Jefferson Keel, President of the National Congress of American Indians, reiterated, the *Herrera* decision "affirm[s] that treaty rights are the supreme law of the land, and they continue in perpetuity unless expressly

142. *Herrera*, 139 S. Ct. at 1709 (Alito, J., dissenting).
143. *Id.*
144. *Id.*
145. *Id.* at 1710 (Alito, J., dissenting).
146. *Id.* (quoting RESTATEMENT OF JUDGMENTS § 68 cmt. n (AM. LAW INST. 1942)).
147. *Id.* (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (AM. LAW INST. 1982)).
148. *Id.* at 1711 (Alito, J., dissenting).
149. *Id.* at 1697–98.

repealed by an act of Congress."[150] This tribal-friendly approach echoes the original canons of construction found in landmark cases like *Worcester v. Georgia* and the rest of the Marshall Trilogy.[151] These cases read much like *Herrera*: requiring clear congressional intent to extinguish treaty rights with high deference to the tribes. As discussed in Part I, *supra*, the early case of *Ward v. Race Horse* played a seminal role in establishing more state-friendly approaches to treaty interpretation that would be followed for more than a century.[152] This shift away from tribal deference to state deference heavily impacted tribal rights over the years, until cases like *Mille Lacs* and *Cougar Den* were decided.

"Plenary power" approaches like statehood preemption are not without their own merits. While these approaches see tribal authority as more "conditional" and "premised on the more absolute sovereignty of the United States,"[153] they also take into account the ability of state governments to regulate themselves unburdened by treaties made by the federal government. This is especially true when usufructuary rights are at issue.[154] The question inevitably becomes whether the idea of statehood preemption actually stands in contrast to the original canons of construction laid out by the Marshall Court. For example, the *Race Horse* Court, after examining a treaty identical to the one in *Herrera*, found the language "temporary and precarious" in nature;[155] thus, the Court deemed the treaty right expendable as originally understood by the drafters. The canons of construction laid out in the Marshall Trilogy are employed by "giv[ing] the benefit of doubt to Indians."[156] While initially it may seem likely that a court like the *Race Horse* Court would fail to defer to the tribes, as the dissent in *Herrera*

150. *NCAI Applauds the U.S. Supreme Court's Opinion Issued in Herrera v. Wyoming*, NAT'L CONGRESS OF AM. INDIANS (May 20, 2019), http://www.ncai.org/news/articles/2019/05/20/ncai-applauds-the-u-s-supreme-court-s-opinion-issued-in-herrera-v-wyoming.

151. These cases include *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

152. 163 U.S. 504 (1896).

153. *Indian Plenary Power Doctrine*, *supra* note 141, at 406.

154. *See, e.g.*, *Herrera*, 139 S. Ct. 1686.

155. *Race Horse*, 163 U.S. at 514–16.

156. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001).

contended, the balance may simply have fallen the other way based on the originalist interpretation of the treaty in question.[157]

In the words of the late former Justice Antonin Scalia, the plenary power approaches are characterized as determining "what the current state of affairs *ought* to be."[158] This was the mindset long espoused by the Rehnquist Court in the 1980s and 1990s.[159] Dubbed the "subjectivist approach" by some,[160] it has been heavily criticized and seems to have been abandoned by a majority of the Court today, as seen in *Herrera*. But just how far *Herrera* reaches is unclear; this Note will now examine its implications.

IV. The Boundaries of the Herrera *Decision, or the Lack Thereof*

As noted previously,[161] prior to *Herrera*, in *Washington State Dept. of Licensing v. Cougar Den, Inc.*, Justice Gorsuch sided with the liberal wing of the Court and decided in favor of the Yakama Tribe after analyzing the original interpretation of the clause in question.[162] In *Herrera*, Gorsuch again departed from the conservative wing of the Court and became the decisive fifth vote in favor of the Crow Tribe.[163] When comparing a case like *Herrera* to a case like *Repsis*, it becomes clear that either case could have easily gone the opposite way. Notably, when analyzing the reasoning of both the majority and dissent in *Herrera*, it appears the majority had to fight tooth and nail to reach a conclusion in favor of the Crow Tribe. This is because, under issue preclusion, "a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive."[164] The majority applied a legitimate exception to the doctrine in order to give Herrera his day in court, but, as the dissent noted, the reasoning was somewhat attenuated since the *Mille Lacs* decision did not

157. *Herrera*, 139 S. Ct. at 1703 (Alito, J., dissenting) (describing the majority's interpretation of the treaty "debatable").

158. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996) (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990)) (emphasis added).

159. *See, e.g.*, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

160. *See* Getches, *supra* note 156, at 268.

161. *See supra* text accompanying notes 75–77.

162. *See* Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016 (Gorsuch, J., concurring).

163. *Herrera*, 139 S. Ct. 1686.

164. Arizona v. California, 460 U.S. 605, 619 (1983).

explicitly overturn *Race Horse*.[165] Moreover, the *Repsis* decision was based on alternative holdings, one of which was not reliant on the *Race Horse* decision.[166]

A key drawback of the *Herrera* decision is that the dissent mostly discussed issue preclusion without reaching the interpretation question explicitly. Justice Alito did refer to the majority's interpretation as "debatable," but not necessarily erroneous.[167] In the coming years, the Court will likely deal with more disputes like those in *Herrera*, and we will hopefully see where each justice stands on actual treaty interpretation rather than legal obstacles like issue preclusion. What is important to take away from *Herrera*, however, is how far the majority was willing to go to find for the Crow Tribe rather than the State of Wyoming.

The *Herrera* decision ultimately foreshadows a "hopeful shift back toward the foundational principles of Federal Indian law that have suffered under the plenary power doctrine."[168] Following the departure of numerous justices after the *Mille Lacs* decision and prior to cases like *Cougar Den*, the Court's stance in the Roberts era was shrouded in mystery in the context of treaty interpretation. Justice Gorsuch's concurrence in *Cougar Den* displayed his approach to treaty interpretation generally. His vote with the majority in *Herrera* displayed his deference to the tribes. The question becomes, however, whether such deference reaches further than hunting rights on unoccupied land, or if it remains limited.

Because the *Herrera* decision was not an easy one for the Court, it seems tribal deference is strong on the current Supreme Court after remaining a mystery in recent years. Justice Gorsuch may have originally been thought to side with the conservative bloc of justices on many issues, but tribal issues seem to be one with which he diverges. As a newer justice on the current Court, it will take more time to reveal his full stance on tribal issues. Neither in *Cougar Den*, nor in *Herrera* did the majority use any language that would limit its analysis to usufructuary rights cases. Put simply, the majority in both cases approached treaty interpretation with an originalist lens, giving the tribes the benefit of the doubt whenever possible. According to Justice Gorsuch, the goal is to interpret the language in a way "most consistent with the treaty's original meaning."[169]

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165. *Herrera*, 139 S. Ct. at 1707–08 (Alito, J., dissenting).

166. *Id.* at 1709 (Alito, J., dissenting).

167. *Id.* at 1703 (Alito, J., dissenting).

168. *Indian Plenary Power Doctrine*, *supra* note 141, at 406.

169. Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring).

V. Conclusion

In short, tribal treaty rights—not simply usufructuary ones—are currently the safest they have ever been. Recent developments in case law and turnover on the Supreme Court have all but solidified a strong majority favoring tribal deference in treaty disputes. While the shift away from plenary power approaches began with cases like *Mille Lacs*, it was not until *Herrera v. Wyoming* that Americans got a glance into what seems like a bright future for Native American tribes. The path to its ultimate conclusion in favor of the Crow Tribe demonstrates the majority's apparent goal in treaty disputes: to analyze treaties with an originalist lens, ascertain the intent of both parties, and extinguish tribal treaty rights only when the congressional intent to do so is clear and unambiguous.