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Is a treaty really a treaty or just some words soon blown off the paper into a wind?

Herrera v Wyoming and treaty rights granted to American Indian tribes

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Abstract page

Seminar work

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In this seminar paper, I plan to do a theoretical literature-based examination of the 2019 U.S. Supreme Court ruling in a tribal hunting rights case *Herrera v. Wyoming,* which ended up changing the judicial stance in respect to various treaties signed with then-independent American Indian tribes of "American frontier" during the tenure of Great Peace Commission 1867-68. This paper will be presenting a court case analysis on the Opinion and dissenting opinion of the Court. For this, relevant supreme court cases - mainly *Herrera v. Wyoming, Ward v. Race Horse, Minnesota v. Mille Lacs* as well as the 10th Circuit court ruling on *Repsis* and the original Crew tribal treaty, Wyoming statehood act and presidential proclamation of Bighorn National Forest dating back to 19th century are looked upon. This analysis efforts to highlight a fundamental disagreement in the Supreme Court on whether this case warranted a treaty interpretation or whether it should have been ruled doctrinally based on Stare Decisis and Prior Judgment Preclusion. In the conclusions, as an author I will present his personal conclusions on *Herrera v. Wyoming* and, also analyse the wider consequences of the ruling in the light of recent judicial literature written both leading to and in the aftermath of the Supreme Court's ruling..

Tässä opinnäytetyössäni aion toteuttaa teoreettisen kirjallisuustutkimuksen Yhdysvaltain korkeimman oikeuden vuonna 2019 antamasta ratkaisusta alkuperäiskansan metsästysoikeuksia kokeneessa asiassa ***Herrera v. Wyoming***. Ratkaisu muutti oikeudellisen suhtautumisen sopimuksiin, jotka solmittiin vuosina 1867–1868 ns. Great Peace Commissionin toimesta vielä tuolloin itsenäisiksi katsottujen “rajaseudun” alkuperäisheimojen kanssa. Tutkimuksessa aihetta tarkastellaan kahdesta pääasiallisesta näkökulmasta. Ensinnäkin työssä esitetään oikeustapausanalyysi korkeimman oikeuden enemmistö- ja eriävistä mielipiteistä asiaankuuluvien ennakkotapausten pohjalta. Näitä ovat erityisesti ***Herrera v. Wyoming***, ***Ward v. Race Horse*** ja ***Minnesota v. Mille Lacs*** sekä 10. Circuit Court’in (valitusoikeusaste) ratkaisu tapauksessa *Repsis*. Lisäksi tarkastelussa huomioidaan alkuperäisistä 1800-luvun dokumenteista Crow-heimon kanssa solmittu reservaattisopimus, Wyomingin osavaltioksi julistamissäädös sekä presidentin julistus Bighornin kansallispuiston perustamisesta. Tämän oikeustapausanalyysin tavoitteena on esittää korkeimman oikeuden sisällä vallinnut perustavanlaatuinen erimielisyys siitä, oliko tapausta tulkittava sopimusoikeudellisena kysymyksenä vai olisiko ratkaisu tullut antaa doktrinaalisesti oikeusperiaatteiden *stare decisis* ja aiemman tuomion oikeusvoimavaikutuksen perusteella. Tutkielman loppupäätelmäkappaleissa esitän omat johtopäätöksensä asiasta ***Herrera v. Wyoming*** ja samalla analysoin ratkaisun laajempia vaikutuksia tuoreen oikeuskirjallisuuden valossa.

Key words: *Herrera v. Wyoming,* tribal treaty, hunting rights, prior judgment preclusion

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List of Abbreviations

CJ	Chief Justice of U.S. Supreme Court
J	Justice of U.S. Supreme Court

1 Introduction to the case Herrera v. Wyoming

In this paper, the 2019 U.S. Supreme Court ruling in a case *Herrera v. Wyoming* will be examined on two main aspects: 1) how the legal principles of American Common Law system represent themselves in the case and in the precedents it either follows or overturns, 2) how does the case reflect the status of Native American in American society starting from late-19th century to the aftermath of the ruling in *Herrera v. Wyoming.* This latter part does not expand its scope to the vast fields of sociological and economical repression, but rather concentrates to a varying phases in interpreting the tribal sovereignty versus federalist ideas and powers of States.

The first point of interest concerns the court case in itself and it is approached starting from the original documents relevant to the case and which are dated over some three decades in the latter half of the 19th century. From there, the research moves on to preceding court cases of *Ward v. Race Horse* (U.S. Supreme Court in 1896), *Crow Tribe of Indians v. Repsis* (10th Circuit Court in 1995) and *Minnesota v. Mille Lacs Band of Chippewa Indians* (U.S. Supreme court in 1999). In Chapter 5, the argumentation for both the petitioner and the respondent as presented in briefs submitted for Supreme Court are looked at, and finally the most thorough section of this dissertation is reserved for the analysis of the Opinion of the Court in Chapter 6, as well as the Dissenting Opinion in subsequent Chapter 7. These Opinions give material to consider the doctrines of Stare Decisis and Prior Judgment Preclusion, as well as for the potential reasons to overturn a precedent. While the court case itself could be seen trivial, it produced very clear watershed between differing judicial philosophies.

My interest in *Herrera v. Wyoming* is not, however, only limited to a ruling of the Supreme Court, but also to the effect this decision will have as a precedent of the vitality of various treaties in future court cases. In the last decade of 19th century, Supreme Court presided by Chief Justice Melville Fuller set a precedent in their ruling on *Ward v. Race Horse*, which enshrined the equal and unrestricted State rights on higher pedestal than treaties entered by the U.S. federal government. Despite infrequent criticism on the lines of Supreme Court Justice Hugo Black's oft-quoted 1960 statement "great nations, like great men, should keep their word"[1], the preceding treaty-based rights once negotiated with and granted to various

[1] Lamirand, J.N. (2020), p. 39

Indian tribes were to be seen of having just secondary and temporary relevance. Such a judicial precedence governed U.S. jurisdiction for more than a century.

This lasted until in 1999, when Supreme Court ruled in *Minnesota v. Mille Lacs Band of Chippewa Indians* against a century-old precedent of *Ward v. Race Horse.* Even then it did so only inside the framework of an individual case - refraining from fully overturning the old ruling. Now, though, with a new majority opinion ruling on *Herrera v. Wyoming*, the earlier case has been overturned leading to a totally new landscape of treaty-interpretations.

So after first presenting the court case analysis, I will then expand the scope to cover the post-ruling analysis presented in law and bar journals to examine and draw conclusions on the wider implications of the case in question. These implications can be seen as solidifying the native tribes' sovereign status and independence from apparatus in respective States inside which borders their reservations are found. Supreme Court opinion rendered in *Herrera v. Wyoming* also seems to validate the view that American Indian Treaties have to be interpreted and shall be re-evaluated as the tribes would have understood them, on their terms[2].

1.1 The factual background

In January 2014, a group of Crow Tribe members went elk-hunting on the Crow Reservation in State of Montana. In pursuit of a herd, they crossed into Wyoming's Bighorn National Forest, where they shot three elk. Afterwards, Wyoming State officials found photographs taken at the site of the kill, were able to locate the sites inside Bighorn National Forest and to identify the tribal hunters[3] who were then cited for two criminal misdemeanours; one for taking an antlered big game animal without a license or during a closed season and the other being an accessory to the same offense[4].

Unlike the other afore-mentioned hunters who, like the petitioner, all were members of the Crow Tribe, petitioner Clayvin Herrera motioned to dismiss the charge at the trial court level, reasoning that, pursuant to a 1868 Treaty between the Crow Tribe and The United States, he retained a right to hunt on any unoccupied previous tribal land containing game. The court denied the motion and Herrera was unable to advance a treaty-based defence in his trial. Court

[2] Matsaw, S et al. (2020), p. 445
[3] *Herrera v. Wyoming* 587 U.S. 329 (2019), p. 358
[4] Cantor, B. (2019), p. 166

sanctioned Herrera with a suspended one-year jail sentence, a fine of $ 8,080 plus court costs and a suspension of hunting rights for three years.[5]

On appeal Herrera continued to asset that the off-reservation hunting rights remained valid due to the Supreme Court's ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians* rendered in 1999, but Wyoming's appellate court affirmed the lower court's ruling, citing 10th Circuit Court's 1994 ruling on *Crow Tribe of Indians v. Repsis.* Then, granting certiorari, the Supreme Court took upon itself to consider two reoccurring questions; 1) were the Crow Tribe hunting rights still valid after Wyoming statehood, and 2) is land belonging to Bighorn National Forest categorically "occupied"?[6]

Out of these two questions, the Supreme Court decision 1896 ruling on *Ward v. Race Horse* had ruled the tribal hunting rights having expired when Wyoming became a State. A century later, 10th Appellate Circuit Court ended the case *Repsis* in a conclusion that any National Forest becomes categorically "occupied" by its creation. However, since the more recent ruling on *Mille Lacs* had both these interpretations become challenged and by granting certiorari, the Supreme Court sought to solve a confusion between contradictory rulings.

1.2 The judicial background

The considerations on *Herrera v. Wyoming* draw back all the way to 19th century and 1868 2nd Treaty of Fort Laramie between the Crow Tribe and federal government of the United States. Then afterwards, the previous territory of Wyoming was declared a State of the United States in Wyoming Statehood Act in 1890 and finally, Bighorn National Forest was formed by a presidential proclamation of Grover Cleveland in 1897. These three documents were in the centre of the invigorated treaty-interpretation considerations of the Majority of the Supreme Court.

And per the norms of case law jurisdictions, a large number of precedents and other previous rulings were also cited in either or both of Opinion of the Court or dissenting opinion. All in all, twenty-nine older Supreme Court rulings and sixteen rulings from lower Federal Courts are referred to at least once in these Opinions. However, the true precedents in *Herrera v. Wyoming* can be limited in number to a three or four, namely *Race v. Ward Horse (1896),*

[5] Schwinn, S.D. (2019), p. 11
[6] Lewis, J. (2025), pp. 107-108

Crow Tribe of Indians v. Repsis (1995), Minnesota v. Mille Lacs (1999) and, partially also *Washington v. Fishing Vessel Assn. (1979).*

2 Research material and methods

This study has been concluded as a literature study of materials pertaining to the case of *Herrera v. Wyoming* with the main purpose of following the case genetics all the way from the original treaty signed in 1868 to the future of Indian treaty-based rights after the Supreme Court ruling on the case. This tract and transformation will be described in the conclusions with the emphasis on the future.

However, as already outlined in introduction, this thesis has two separate motives, the other one being to analyse the reasoning of the Supreme Court in case *Herrera v. Wyoming.* which will require considering the doctrines of Stare Decisis and Prior Judgment Preclusion versus the principle of an intervening ”change in the applicable legal context”. This argumentation between juridical philosophies forms the 1st part of the study.

Accordingly, also the research material differs between the two parts of the study.

To carry out a court case analysis, I have focused on materials of the case itself and additionally, on the most relevant documents and precedents used to govern over *Herrera v. Wyoming.* This material can be grouped followingly:

1) most important and thoroughly analysed is the Opinion of the Court including dissenting opinion as decided on May 20, 2019

2) the preceding rulings of *Ward v Race Horse* (U.S. Supreme Court 1896), *Crow Tribe of Indians v. Repsis* (10th Circuit Court 1995) and *Minnesota v. Mille Lacs Band of Chippewa Indians* (U.S. Supreme Court 1999) are included in order to analyse the justifications for the Opinion of the Court and the dissenting opinion.

3) The briefs for petitioner, respondent and written in position of amici curiae to broaden the alternative views and considerations on whether there is a sufficient cause for re-considering and repudiating a Supreme Court precedent.

4) And for the foundation of the case, also the relevant original documents from the 19th century including Tribal Treaty, Statehood Acts, Presidential proclamation and some documents from Indian department have been given a place.

For the case genetics -part, I have widened the scope of research materials to the rather scarce amount of articles written about the case and its repercussions in American bar journals and law reviews. Here, it becomes obvious that the case has not been amongst the most widely followed ones amongst the recent tumultuous period of contemporary national politics. In principle, I have not been forced to make too many selective decisions between referred writings as they only amount to a limited number.

3 The historical documents having their say

For the deliberation in *Herrera v. Wyoming*, there are three major documents to take into consideration. First, the 2nd Treaty of Fort Laramie signed in 1868 (later Crow Tribe Treaty) in which Crow Tribe ceded over 30 million acres (over 120 000 sq km) of territory in modern Montana and Wyoming to the United States[7] in exchange for a newly-formed tribal Crow Reservation and certain additional treaty-based rights including retaining hunting rights on any land ceded as long as it remained ”unoccupied” and still had game on it.

Then, Wyoming was admitted to the Union by Wyoming Statehood Act in 1890. This act fails to make any mention to pre-existing tribal rights granted for the areas of the newly-created state, but includes following sentence, which would become highly important for more than 100 years of judicial reasoning: “State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever”[8].

The third document the Supreme Court majority referred to in its renewed treaty interpretation was the Presidential proclamation No. 30 from February 1897, which declared a creation of a Public Reservation, which was to become Bighorn National Forest. In this proclamation, President Grover Cleveland made known and proclaimed that the specified forestry area “is hereby reserved from entry or settlement”[9]

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[7] Farnworth, C. (2020), p. 195
[8] Wyoming Statehood Act (1890), Sec. 1
[9] U.S. Statutes at Large, Vol.29 (1897), p. 909

4 The cases preceding *Herrera v. Wyoming*

While the Opinion of the Court and the Dissenting Opinion on *Herrera v. Wyoming* does indeed refer to total of forty-five preceding Opinions of either Supreme or Lower Courts, the judicial line can be sufficiently drawn based on three decisions alone. Originally, the dilemma between the legitimacy of the rights granted by Tribal treaties against the sovereignty of subsequently declared States was ruled late in the 19th century in *Ward v. Race Horse.*

A century later, the 10th Circuit Court held *Ward v. Race Horse* in force, while adding some alternative rationales for that holding. And then, leading to allowing a certiorari in *Herrera v. Wyoming,* the Supreme Court largely rejected the main arguments of 100-year-old precedent of *Race Horse* in its 1999 ruling on *Minnesota v. Mille Lacs Band of Chippewa Indians.*

4.1 Ward v. Race Horse (1896)

It did not take all that long after Wyoming's statehood in 1890 before the Supreme Court had a case where a member of an indigenous tribe, a Bannock man named John Race Horse Sr., petitioned against his detention for a hunting violation, which went against Wyoming game laws, but in a view of petitioner was a protected right based on a treaty entered into between the United States and the Eastern band of Shoshone(e)s and the Bannock tribe of Indians and taking effect 24th of February, 1869[10]. The wording of Article 4 on tribal hunting rights in this Shoshone-Bannock Treaty is identical verbatim to the Crow Treaty of 1868 and states that:

> "The Indians herein named agree, when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, *but they 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."*[11]

Completely against the expectations of Indian Service Inspector Province McCormick, who had been instrumental in formulating the petition, the Supreme Court ruled with a majority of 7-1 (Justice David J. Brewer had been absent of hearing and took no part in decision[12]) that 1) the hunting rights granted by afore-mentioned treaty had been "temporary and precarious"[13] in character, 2) Wyoming had been admitted to the Union on an "equal footing" with

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[10] *Ward v. Race Horse* (1896), p. 505
[11] *Crow Tribe of Indians v. Repsis* (1995)
[12] *Ward v. Race Horse* (1896), p. 520
[13] *Ward v. Race Horse* (1896), p. 510

previously existing states[14] and thus 3) the statehood of Wyoming had abrogated the Bannock Tribe's (and through a precedent, the identical rights granted in other tribal treaties) hunting rights as Wyoming had the state power to regulate hunting and validating the treaty's right would disregard State sovereignty and therefore contravene the will of Congress[15].

The lone dissenting Justice, Henry Billings Brown saw this ruling as sanctioning a distinct repudiation of a treaty without sanction from the Congress. J Brown made note of the fact that in the Shoshone-Bannock treaty, there were no mention of the future statehood of Wyoming being one of the situations to terminate the hunting rights despite such an ultimate course of an earlier Federal Territory becoming a full-fledged State having been self-clear for Congress to anticipate.[16]

Commenting on a decision, J Brown wrote "not doubting … the preservation of game is a matter of great importance, I regard the preservation of the public faith, even to the helpless Indian, as a matter of much greater importance.[17] And in Annual Report of the Commissioner of Indian Affairs, the bane leading to whole litigation against John Race Horse Sr. and other Bannock Tribe members - the Indian-Settler disputes around the valley of Jackson Hole in Wyoming were credited to be instigated by the settlers themselves. The majority of the white citizens of the area were scathingly termed by federal Indian Agent Thomas B. Teter as "men who have left their country for their country's good" and Jackson Hole being recognised as "the refuge of outlaws of every description".[18] Yet, in the spirit of Manifest Destiny, the treaties signed with the indigenous tribes were sacrificed on the altar of "white" civilisation and progress.

4.2 Crow Tribe of Indians v. Repsis (1995)

In 1992, almost a century after *Ward v. Race Horse* decision, the Crow Tribe brought a declaratory action against Wyoming Game and Fish officials in order to enforce its treaty-based right to hunt in the Bighorn National Forest. With their action, the Crow Tribe sought a declaration that the treaties entered into between the Tribe and the United States in 1851 and 1868 reserved to the Tribe and its members the unrestricted right to hunt and fish on all such

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[14] Rader, A. (2020), p. 405
[15] Mitchell, J (2019), p. 276
[16] *Ward v. Race Horse* (1896), p. 518
[17] *Ward v. Race Horse* (1896), p. 518
[18] Annual Report of the Commissioner of Indian Affairs for 1895, p. 67

"unoccupied land of the United States" in Wyoming, which the Tribe had ceded in 1868. This was to include but not be limited to national forest lands.[19]

Two years forward, the U.S. District Court for Wyoming held in *Crow Tribe of Indians v. Repsis* that the Crows no longer possessed that right. District Court's decision was based on precedent reasoning of *Ward v. Race Horse* and considered it foreclosed there that the rights had been extinguished by Wyoming's statehood.[20]

The Crow Tribe contended to the Appellate Court with assertions of 1) *Ward v. Race Horse* having been 1) factually dissimilar to the new case and 2) the Supreme Court having already overruled, repudiated and disclaimed each of the legal doctrines applied in *Race Horse.*

The first of these assertions was based on a fact that the treaty considered in *Ward v. Race Horse* was, as noted earlier, a different treaty and not one involving Crow Tribe. Additionally, Crow Tribe did not challenge the state authority on setting game laws as long as those regulations were essential for conservation purposes.[21] However, as the Shoshone-Bannock Treaty and the Crow Treaty were identical ad verbatim, this assertion appeared on weak legs.

The second assertion that subsequent, post-*Race Horse* Supreme Court decisions had already invalidated each legal doctrine used in the preceding verdict of 1894 is more judicially interesting. Here, the Crow Tribe contended that 1) the doctrine of state plenary control over game had been overruled in *Hughes v. Oklahoma* (1979), 2) the equal footing doctrine was already overruled and repudiated as early as 1905 in *United States v. Winans*, which indeed had interpreted another Tribal Treaty granting rights, which were not exclusive – rather "in common with citizens of the Territory"[22] - yet nevertheless continuing ones and finally 3) that Supreme Court had, subsequent to *Race Horse*, fashioned rules of treaty construction favoring Indian tribes. Those rules had replaced the ones used in *Race Horse* and the application of treaty construction rules to resolve the supposed conflict between Wyoming's admission to the Union and the Treaty with the Crows had been discredited.

However, in its conclusion rendered in December 1995, the 10th Circuit Court of Appeals affirmed District Court's decision to uphold *Ward v. Race Horse* and alsoadded two alternative rationales for its holding. The first new rationale being the "Occupation Rationale"

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[19] *Crow Tribe of Indians v. Repsis* (1995)
[20] Lazzari, B. (2023), p. 44
[21] *Crow Tribe of Indians v. Repsis* (1995)
[22] *United States v. Winans* (1905), p. 664

reasoning that National Forest was "occupied" in character and the second "Conservation Necessity Rationale" reasoning Wyoming being justified in restricting hunting for the purpose of conservation. In withholding and strengthening the verdict of *Race Horse*, this ruling by the 10th Circuit remained settled law and *Repsis* was considered to have been litigated to finality.[23]

4.3 Minnesota v. Mille Lacs Band of Chippewa Indians

If *Repsis* was thought to be a final verdict in a battle between tribal rights granted in numerous 19th century treaties between U.S. Federal government and various Native American tribes and bands, it was not to be so. Only four years later, the Supreme Court accepted a certiorari on a close to identical case pitting against each other the State of Minnesota and Mille Lacs Band of Chippewa Indians.

In a rather stunning reversal of both precedents and roles accustomed to, usually reliably conservative J Sandra Day O'Connor not only joined the accustomed liberal minority in 5-4 decision, but she even penned the Opinion of the Court stating that there had not been "express revocation of the hunting, fishing, and gathering rights afforded to … by the Treaty of 1837"[24]. While J O'Connor repudiated three differing, separate claims in her Opinion, the most important section for *Herrera v. Wyoming* was the last one concerning the effects of Minnesota's admittance to the Union.

Here, the "equal footing" doctrine behind *Ward v. Race Horse* is explicitly told having "rested on a false premise" and that Indian treaty rights can coexist with state management of natural resources.[25] Per majority opinion, Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. No such clear evidence on congressional intent could be found in Minnesota Enabling Act.[26]

In his dissenting opinion, Chief Justice William H. Rehnquist agreed, if not with the Opinion, then at least with the consequences of Opinion stating "today the Court appears to invalidate (or at least substantially limit) *Race Horse…*"[27]. Indeed, the Opinion rendered in *Mille Lacs* did end up indicating that the presumption favoring interpretation of treaty terms as the

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[23] Lazzari, B. (2023), p. 44
[24] Raver, A.L. (2000), p. 818
[25] *Minnesota v. Mille Lacs Band of Chippewa Indians* 526 U.S. 172 (1999), p. 204
[26] *Minnesota v. Mille Lacs Band of Chippewa Indians* 526 U.S. 172 (1999), pp. 202-203
[27] *Minnesota v. Mille Lacs Band of Chippewa Indians* 526 U.S. 172 (1999), p. 220

Indians would have understood them at the time of the treaty survived while the Equal Footing doctrine traditionally used for extinguishing tribal treaty rights lost its place in judicial canon.[28] Simultaneously, "temporary and precarious" distinction announced by the Supreme Court in *Race Horse* was limited to extreme as the Supreme Court abolished the distinction between temporary and perpetual rights and termed all Tribal Treaty rights reconcilable with the states' sovereign power.[29]

5 The arguments (and counter-arguments) for granting Herrera v. Wyoming a Certiorari of the Supreme Court

As a Counsel of record for respondent, Wyoming Attorney General Peter K. Michael, his Chief Deputy Attorney General and their Special Assistants, presented a lengthy brief to argue that petitioner Clayvin Herrera and whole Crow Tribe had long lost their right to freely hunt in Bighorn National Forest. As the starting point, the respondent present their view of *Repsis* having litigated the exact question to final judgment and "the Tribe and its members are subject to the game laws of Wyoming".[30] With final judgment going against the tribe and with the case law on the nature of tribal sovereignty binding petitioner by his tribe's prior loss, there is seen to be a clear case of issue preclusion invalidating whole case from being relitigated. The three elements of issue preclusion are listed as 1) of the matter being previously determined, 2) no party contesting the determining court having had a competent jurisdiction and 3) Herrera's membership in the tribe binding him to that decision.[31]

As their 2nd argument, the respondent denies the notion of the law or legal context having been changed sufficiently upon *Mille Lacs* to allow issue preclusion to be eliminated. Per brief for respondent, *Mille Lacs* had "intentionally preserved the interpretation of the specific treaty language in *Race Horse"*[32] and even if the dissenting opinion on *Mille Lacs* warned that the verdict "overruled *Race Horse",* the Court majority responded by explaining that dissent's contention of *Race Horse* having been reversed *sub silentio* was incorrect.[33]

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[28] Alamo, M.L & Lucas, J.A. (1999), p. 851
[29] Alamo, M.L & Lucas, J.A. (1999), p. 852
[30] Brief for respondent (2017), p. 21
[31] Brief for respondent (2017), pp. 23-24
[32] Brief for respondent (2017), p. 24
[33] Brief for respondent (2017), pp. 27-28

They further treated the request for the Supreme Court to allow a "change in the applicable legal context" to defeat issue preclusion having been previously been granted only in limited circumstances, while allowing petitioner's interpretation of this exception being a dramatic expansion.[34] Such interpretation was to endanger the principle of "a system of law placing any value on finality – as any system of law worth its salt must"[35].

The rest of the brief for respondent mostly repeats the arguments already presented in *Race Horse* and *Repsis* – namely, that arrival of non-Indians to the ceded land were to extinquish hunting rights per treaty text, that the off-reservation right to hunt ended at Wyoming statehood, and that creation of Bighorn National Forest made that land "occupied". All these could be unquestionable arguments in respondent's behalf – yet, none of these claims could be verified by an actual language of those treaties and proclamations. Thus it have to be concluded that these secondary arguments are only backed by a request for the Supreme Court to honor *stare decisis* and accept the interpretation of *Race Horse* as a correct interpretation.

In their much more concise reply brief, the counsel for petitioner based their request for certiorari on conclusions of afore-mentioned *Minnesota v. Mille Lacs*, in which decision the Supreme Court has established that Indian "treaty rights are not impliedly terminated upon statehood, but instead Congress is required to "clearly express" its intent to abrogate such rights. Opinion of the petitioner was that the district court had flouted those straightforward principles set by Supreme Court and instead relied on profoundly wrong decision in *Repsis. Repsis* being a decision, which can be found to be in conflict with numerous other decisions.[36]

After renouncing the judicial precedent for lower courts' decisions on *Herrera v. Wyoming,* the brief aims to showcase that there indeed exists a division of opinion in State and Federal Courts situated hierarchically underneath the Supreme Court. Counsel for petitioner point out the cases of *State v. Buchanan* (1999) in Washington Supreme Court and *Swim v. Bergland* (1983) in the 9th Circuit court as two glaring examples of lower courts ending in totally opposite conclusions from *Repsis.* The brief of the state dis not address either one of those decisions, although in *State v. Buchanan* it is said in verdict that "Supreme Court overruled *Race Horse* in … *Mille Lacs"*[37]. Reply brief then almost mocks the brief of respondent noting

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[34] Brief for respondent (2017), p. 30
[35] *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah* (2015), p. 26
[36] Reply brief for petitioner (2017), p. 1
[37] Reply brief for petitioner (2017), p. 5

that “it is easy to claim that no split of authority exists when one ignores the conflicting decisions”[38].

From these premise, the petitioner’s brief concludes that there is no obstacles for reviewing an issue of legacy of a Crow Tribe Treaty – and through that review also another eighteen similar federal treaties protecting tribal “rights to hunt on Federal lands away from the respective reservations”[39]. This gives a case broad implications and enhances the importance or reviewal.

Finally, he case should not either be discarded due to issue preclusion or a “collateral estoppel doctrine” as this brief’s terminology uses for the theory. Collateral estoppel does not apply when a change in the applicable legal context occurs after the earlier judgment and according to the petitioner’s brief this condition has been fulfilled by *Mille Lacs* repudiating both *Race Horse* and *Repsis.*

Additionally, the case drew plenty of interest by various *amici curiae* -parties (literally “friends of the court), which are persons or groups, who are not actual parties to an action, but still have a strong interest in the matter. In some cases, such an interest may be limited to a certain narrow sector of a whole case.

In support of respondent of Wyoming, there were amongst others amici curiae briefs from 1) States having potentially similar issues with tribal treaty rights including Kansas, Louisiana, Nebraska, North Dakota, South Dakota and Texas, 2) agricultural organisations like Stock / Wool Growers Associations and Farm Bureau Federations across several Prairie states and 3) from both public and private sector functionaries in fishing and hunting activities in Association of Fish & Wildlife agencies and Safari Club International. These briefs mainly supported the viewpoints already presented in brief of respondents, but it is worth of noting that there was an additional emphasis on the importance of a sustainable-use wildstock conservation in the briefs of both Fish and Wildlife agencies and Safari Club, a non-profit organisation with a mission to protect the hunter and educate public concerning hunting. Additionally, the agricultural sector amici curiae specifically wanted to make certain that “federally managed lands that are leased or permitted to private parties are not subject to an Indian treaty hunting right”[40]. Their interest lied less on the decision on whether tribal hunting

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[38] Reply brief for petitioner (2017), p. 5
[39] Reply brief for petitioner (2017), p. 8
[40] *Amici Curiae* brief for Wyoming Stock Growers Association et al., p. 33

right remained in existence in Bighorn (and other) National Forest, but rather that it had expired on lands leased by the United States for a private, agricultural use.

On the opposite side of the argument, it is very natural that both the National Congress of American Indians representing fourteen additional interested parties and, additionally, several Indian tribes independently supported the petitioner in their amici curiae briefs. The positive verdict in behalf of petitioner was to also expand and return to them similar treaty-based rights, which had been abjudicated for some 125 years by *Race Horse.*

Generally, these briefs were centered around the same arguments as the petitioner's brief and added a repeated observation disagreeing with a claim of tribal hunting rights endangering the conservation of natural resources to hunt, fish or gather. However, the amici curiae brief of Southern Ute Indian Tribe and Ute Mountain Ute Tribe brought up an interesting and important notion from the passing of Forest Reserve Act in 1891. In Section 24 of the Act, which created the authorisation for US Presidents to establish forest reserves, Congress expressly provided "that nothing in this act shall change, repeal or modify any agreements or treaties with Indian tribesfor disposal of their lands … and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements"[41]. This seems to be a strong argument against the claim of a creation of Bighorn National Forest having abrogated Crow Tribe treaty-based hunting rights.

Besides the support from other native tribes and interest groups, also Indian Law professors and Natural Resources Law professors submitted separate amici curiae briefs in support of petitioner. Out of these briefs, the one by fourteen law professors representing ten different law schools brought up a concise reasoning for the re-consideration of the Lower Court decision, which can be seen as a synopsis of petitioner's arguments:

1) As the supreme law of the land, Indian treaties establish the central tenets of federal Indian law. Through these treaty relationships, Indian tribes have been recognized as distinct nations since the beginning of the Republic. While the tribes are subject to federal authority, the exclusive nature of their treaty relationship with the United States should generally insulate then from state authority. This legalistic notion was confirmed as early as in 1832 in the Supreme court case *Worcester v. Georgia.*[42]

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[41] Brief of *Amici Curiae* Southern Ute Indian Tribe and Ute Mountain Ute Tribe, p. 10
[42] Brief of *Amici Curiae* Indian Law Professors, p. 22

2) The Supreme Court has developed and relied on long-standing principles of interpreting and analyzing these Indian treaties. Those principles give proper respect to their solemnity and purpose while honoring their elevated status under the Constitution. In afore-mentioned *Worcester v. Georgia*, this was articulated as a congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate".[43] This has been seen as requiring the language of treaties to be interpreted "as the Indians themselves would have understood them"[44]

3) The Court's long-standing principles of Indian treaty interpretation demonstrate why the decision should be reversed as a) those principles ought to apply to all Indian treaties, b) these interpretive principles have been applied to permit Indians to exercise their treaty rights to hunt and fish off-reservation notwithstanding State regulations, and c) the preservation of tribal treaty rights is elemental to ensure that Constitutional power is based on the Consent of the Governed.[45]

Based on above, the Indian Law professors agreed in a conclusion that *Race Horse* and *Repsis* represent a departure from Supreme Court's precedent in interpretation of Indian treaties leading to Wyoming District Court decision being inconsistent with Supreme Court's interpretive tradition. Those earlier decisions on which Wyoming Circuit Court based its decision have been repudiated in *Mille Lacs* and *Mille Lacs* should now guide a resolution in *Herrera v. Wyoming.*[46]

The brief of Natural Resources Law professors was probably most elemental in its conclusions of fishing and hunting having always been permitted in National Forests due to their function as multi-use areas[47] and by noting that Bighorn National Forest accommodated a thriving elk population clearly exceeding the population objectives[48]. For these reasons, the defensive argument of the State on a base of needs to protect the game were seen unfounded.

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[43] Brief of *Amici Curiae* Indian Law Professors, p. 23
[44] *Minnesota v. Mille Lacs Band of Chippewa Indians* 526 U.S. 172 (1999), p. 196
[45] Brief of *Amici Curiae* Indian Law Professors, pp. 25-27
[46] Brief of *Amici Curiae* Indian Law Professors, pp. 28-32
[47] Brief of Natural Resources Law Professors as *Amici Curiae*, p. 29
[48] Brief of Natural Resources Law Professors as *Amici Curiae*, p. 34

6 Herrera v. Wyoming in the Superior Court - Opinion of the Court

The opinion of the Supreme Court in Herrera v. Wyoming was delivered in May 2019 by Justice Sotomayor and joined by Justices Ginsburg, Breyer, Kagan and Gorsuch forming a 5 – 4 majority. J Sotomayor constructs her opinion by first stating the facts concerning the case and then delivering the separate considerations on each argument stated by defendant to justify the right to restrict tribal hunting in Bighorn National Forest and levy penalties for breaking those restrictions.

As the case itself has been described earlier in this paper, I shall concentrate in the reasoning of Opinion of the Court in relation to each point of defendant's argumentation; 1) whether Crow Tribe's hunting rights granted in 1868 Treaty expired at Wyoming statehood, 2) whether Wyoming's admission to the Union (as a state of United States instead of having an earlier territorial status) had abrogated the hunting rights even if they were not expressly terminated by the statehood, and 3) whether the presidential proclamation creating Bighorn National Forest made that area "occupied".

6.1 Did hunting rights expire at Wyoming statehood?

Wyoming argues that Supreme Court's decision in *Race Horse* establishes that the Crow Tribe's 1868 Treaty right expired at statehood. But according to Opinion of the Court, this case ought to be controlled by *Mille Lacs*, not *Race Horse.*[49] While the precedent of Race Horse concerning the Shoshone-Bannock Treaty is verbatim to Crow Treaty as far as tribal hunting rights are concerned, the "equal footing" doctrine on which the opinion on *Race Horse* relied on was repudiated by the Court's Opinion on case of *Mille Lacs* 103 years later.

Opinion admits that while *Mille Lacs* stopped short of explicitly overruling *Race Horse*, it entirely rejected the afore-mentioned "equal footing". Later decisions have showed that States are not restricted from imposing reasonable, non-discriminatory regulations on tribal rights when necessary for conservation. Thus, the Crow Treaty rights of 1868 or any similar rights granted in tribal treaties are reconcilable with state sovereignty over natural resources and do not undermine statehood rights by themselves.

[49] *Herrera v. Wyoming* 587 U.S. 329 (2019), p. 337

Instead, the Court was able to draw on numerous decisions since *Race Horse* explaining that Congress ”must clearly express” any intent to abrogate tribal treaty rights. Decisions on *United States v. Dion (1986), Washington v Fishing Vessel Assn. (1979)* and *Menominee Tribe v. United States (1968)* were all used as precedents for the requirement of this clear intent and The Court found no clear evidence in Minnesota (nor Wyoming) Statehood Acts of such intent. Instead, they were silent with regards to Indian treaties.[50]

Similarly, *Mille Lacs* rejected that *Race Horse's* assertion that the treaty rights ”were not intended to survive Wyoming's statehood”[51]. Conversely, treaties itself defined the specific circumstances under which the rights would terminate and there is no suggestion to be found for the statehood satisfying any of those circumstances in itself.[52]

In accordance to the above, the Opinion of the Court in *Herrera* formalizes what was already evident in *Mille Lacs* itself. *Race Horse* ”was not expressly overruled”, but ”it must be regarded as retaining no vitality” after that decision. To avoid any future confusion, the Court makes clear in *Herrera* that *Race Horse* is repudiated to the extent it held that treaty rights can be implicitly extinguished at statehood.[53]

Repudiation of *Race Horse* also is seen meaning that *Repsis* does not preclude Herrera from arguing 1868 Treaty right surviving Wyoming statehood. Despite the doctrine of issue preclusion, where ”a prior judgment ... foreclos[es] successive litigation of an issue of fact or law actually litigates and resolved in a valid court determination essential to the prior judgment”54, an exception may be warranted if there has been an intervening ”change in the applicable legal context”55. Opinion then refers to four earlier Supreme Court cases utilising this logic and as there is no question that the 10th Circuit relied on *Race Horse* in their binding decision on *Repsis* without an authority to disregard Supreme Court's holding nor an ability to predict the Supreme Court's analysis in *Mille Lacs.* With the precedent having been repudiated, also *Repsis* fails to retain its preclusive force.[56]

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[50]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 340
[51]*Minnesota v. Mille Lacs Band of Chippewa Indians* 526 U.S. 172 (1999), p. 206
[52]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 341
[53]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 342
[54]*New Hampshire v. Maine* 532 U.S. 742 (2001) pp. 748-749
[55]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 343
[56]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 344

6.2 Did Wyoming's admission to the Union abrogate the hunting rights?

On second part of Opinion, Court considers whether Wyoming's admission to the Union would have nevertheless abrogated the Crow Tribe's off-reservation hunting rights even if those rights were deemed not to terminate at statehood. Again, the Court opines it did not.

Wyoming Statehood Act of 1890 "makes no mention of Indian treaty rights" and "provides no clue that Congress considered the reserved rights and decided to abrogate those rights when it passed the Act."[57] Indeed, Statehood Act does go to the great detail in how the previously federally-owned premises and land for a penitentiary located in Laramie City and land grants for educational institutions shall be transferred to a possession of a newly-formed state[58], but not a word is written in concern with tribal treaties which were "essentially contracts between two sovereign nations"[59].

In *Mille Lacs,* the Supreme Court concluded that these treaties "must be interpreted in light of parties' intentions"[60] and construed "in the sense which they would naturally be understood by the Indians"[61]. If and as the treaty itself identified and defined four situations terminating the hunting rights being; 1) the lands no longer being "unoccupied", 2) the lands no longer belonging to the United States, 3) game no longer to be found thereon, and 4) the Tribe and non-Indians no longer being at peace on the borders of the hunting districts[62], it can be stated that neither does Wyoming's statehood appear on that list nor is there any hint that any of these four conditions being necessarily satisfied at the statehood.[63]

Concerning the 3rd point above, it is worth of noticing that at the time of the Treaty signed in 1868, the United States Commissioner of Indian Affairs Nathanael G. Taylor foresaw all "the game will soon entirely disappear"[64] to a practical extinction and thus probably considered whole clause to die a natural death inside few decades. Alas, only some three decades later, a nature conservation was already raising its head in American society and for example, the Natural Reserves were created to preserve game.

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[57] *Minnesota v. Mille Lacs Band of Chippewa Indians* 526 U.S. 172 (1999), p. 203
[58] Wyoming Statehood Act (1890), pp. 5-7
[59] *Washington v. Fishing Vessel Assn.* 443 U.S. 658 (1979), p. 675
[60] *Minnesota v. Mille Lacs Band of Chippewa Indians* 526 U.S. 172 (1999), p. 206
[61] *Washington v. Fishing Vessel Assn.* 443 U.S. 658 (1979), p. 676
[62] *Herrera v. Wyoming* 587 U.S. 329 (2019), pp. 345-346
[63] *Herrera v. Wyoming* 587 U.S. 329 (2019), p. 346
[64] Deloria, V. & DeMallie, R.J. (1975), p. 90

Justice Sotomayor notes that Wyoming does not argue that the legal act of Wyoming's statehood abrogated the treaty outright, but instead draws on historical sources to assert that statehood did so as a practical matter. This viewpoint is based on assertion of statehood marking the arrival of "civilization" into the Wyoming Territory and thus rendering all the lands in the State as "occupied".[65] However, per Opinion of the Court, this claim cannot be squared with *Mille Lacs.*

Wyoming's argumentation includes several anecdotes of circumstantial evidence in effort to prove the timeline for wild frontier to disappear, federal Indian agents being instructed to confine tribal members "wholly within the limits of their respective reservations"[66] and Crow Tribe ending their off-reservation hunting altogether. However, all this evidence can be contradicted by using different contemporary sources and that makes historical record unclear and a flawed base for reasoning.

For above, it is concluded that applying the precedent of *Mille Lacs*, it is not a hard case to judge that Wyoming Statehood Act did not abrogate Crow Tribe's hunting rights nor did the 1868 Treaty expire on its own accord by said Act. The treaty itself defines the circumstances in which the right will expire. Those circumstances were not met.[67]

6.3 Do the hunting rights exist in Bighorn National Forest?

The third question to decide on, is whether creation of Bighorn National Forest in itself made the area "occupied" and thus marked the expiry of hunting rights in that specified 1.1 million acres landmass. Here, as well, Court's opinion is that it did not become categorically so.[68]

In her opinion, Justice Sotomayor emphasizes the correct procession of treaty analysis, which begins with the text and treaty terms in that text need to be construed as the tribal negotiators would have understood them. And it appears clear that the Crow Tribe would have understood the word "unoccupied" to denote any area free of residence or settlement by non-Indians.[69] This approach is in accordance with the precedent of *Washington v. Fishing Vessel Assn.*

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[65]*Herrera v. Wyoming* 587 U.S. 329 (2019), pp. 346-347
[66]Regulations of Indian Department (1884), p. 85
[67]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 348
[68]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 348
[69]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 350

This interpretation of the Bighorn National Forest remaining mainly ”unoccupied” (with some specific local exceptions of privately-owned or occupied land) follows several cues in both the treaty’s text and also President Grover Cleveland’s proclamation creating the Forest Reserve. Such ”cues” include, for example, Article IV of the 1868 Treaty making the hunting right contingent on peace ”among the whites and Indians on the borders of the hunting districts” in clearly contrasting the unoccupied hunting districts from non-Indian settlements. The treaty also refers the Crow Tribe as ”settlers” on their new reservation and termed settlement by stating that the Tribe was to make ”no permanent settlement” outside the new reservation, but could hunt on ”unoccupied” lands beyond the reservation boundary. This interpretation was also confirmed by the Board of Indian Commissioners in the Annual Report of Commissioner for Indian Affairs in 1870’s.[70]

Furthermore, in his presidential proclamation No. 30 for a creation of Big Horn National Forest in February 1897 (name changed to Bighorn National Forest in 1908), Grover Cleveland stated ”warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation”[71]. In opinion of the court, this clause of proclamation makes Bighorn National Forest more, not less hospitable to the Crow Tribe to exercise their 1868 Treaty rights.[72]

For the reasons above and for the historical sources Wyoming primarily relied in petition indicating there were very little settlement in the Bighorn - even with permanent mining and logging operations included in the scope of occupation, the Court concludes that the creation of Bighorn National Forest did not remove the federal lands, in their entirety, from the scope of the treaty.[73]

7 Herrera v. Wyoming in the Superior Court - Dissenting opinion

Justice Alito dissented and was joined by The Chief Justice Roberts, Justice Thomas and Justice Kavanaugh. In his dissenting opinion, J Alito does not really weigh the merits of the case in any meaningful way, but rather concentrates to certain fundamental Case Law doctrines in assessing that there exists no sufficient reason to overturn or discard the

[70]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 350
[71]Statutes At Large of the United States Vol. 29 (1897). p. 910
[72]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 351
[73]*Herrera v. Wyoming* 587 U.S. 329 (2019), pp. 351-352

precedents set in *Race Horse* and *Repsis.* The Dissenting Opinion is centered in upholding Stare Decisis and Prior Judgment Preclusion principles. Principles often termed with having a premise of ”more important that the applicable rule of law be settled that it be settled right.”[74]

In dissenting, Justice Alito is critical of majority’s view in whether *Mille Lacs* overturned or invalidated the preceding court verdicts in *Race Horse* and *Repsis.* This opinion is basically divided into three separate arguments; 1) does *Race Horse* remain an integral precedent, 2) does *Repsis* represent a ground for a prior judgment preclusion of whole *Herrera* case, and 3) even if the base argument on *Repsis* ends up disqualified, should the alternative ground for the 10th Circuit decision rendered still be sufficient for retaining the prior judgement precluding status. Each one of these dissenting arguments is to be analysed separately.

7.1 Has *Race Horse* been properly overturned or not?

Dissenting opinion avoids taking a strong stance on this first potential reasoning for refusing the petition. Alito admits that in its opinion on *Mille Lacs,* the Court repudiated one of the grounds for *Race Horse* decision in rejecting the equal-footing doctrine (which became a dead precedent at that point), but yet did not do so on the second ground. Supreme Court’s 1896 conclusion that Wyoming Statehood Act manifested a congressional intent not to burden the State with the right created by the 1868 Treaty was per dissenters only found inapplicable to the facts of *Mille Lacs*, not fully rejected. J Alito avoids claiming this interpretation being indisputable, only ”certainly reasonable”.[75]

From there, Dissenting Opinion goes on to the assessment that, in case of, interpretation above happening to be correct, *Mille Lacs* did not change the legal context as much as the majority suggests as it only knocked out some of *Race Horse’s* reasoning, but did not effectively overrule the decision.[76] Interestingly, this argument about some of *Race Horse* surviving *Mille Lacs* is not presented as a factor in itself – rather it formulates a base for a next argument concerning the preclusive powers of *Repsis.*

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[74]Cantor, B. (2019), p. 176
[75]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 361
[76]*Herrera v. Wyoming* 587 U.S. 329 (2019), pp. 361-362

7.2 Should 10th Circuit decision on *Crow Tribe of Indians v. Repsis* have an issue preclusive effect on *Herrera v. Wyoming?*

Majority Opinion of The Court concluded that as 10th Circuit decision in case *Repsis* affirmed in 1995 was still legally bound by *Race Horse*, it had to follow the Supreme Court's precedent from 1896. However, with *Race Horse* having been repudiated in *Mille Lacs* 4 years later, also the prior judgment preclusive powers *Repsis* had earlier held expired with its guiding light regarded as "retaining no vitality".

Here, dissenting Justices disagreed strongly with the Majority. Based on doctrines presented earlier and the slight haziness in to which extent *Race Horse* had been overturned with *Mille Lacs*, they asserted that *Repsis* remains a valid precedent and with that decision having been rendered in an identical case against a petitioner of Crow Tribe whom also Clayvin Herrera belong to, Herrera is barred from arguing a treaty-based defence.[77]

This is where the rather weak dissenting argumentation of *Race Horse's* remaining legitimacy becomes elemental as it defines the importance of *Repsis* and *Repsis* is the principal factor in Dissenting Opinion holding the view that there should be no re-litigation.[78] Simplified, the argument states that *Race Horse* had not been explicitly overturned and as long as it stayed non-overturned, there was no sufficient "change in the applicable legal context". Instead, the dissenters presented the preceding sentences like "an issue once determined by a competent court is conclusive"[79] and "a losing litigant deserves no rematch after a defeat fairly suffered"[80] in asserting the requirement to accept and follow the decision on *Repsis* as decisive.

7.3 The alternative ground for judgment in *Repsis*

After presenting the critique on Majority's opinion on how *Mille Lacs* had undermined *Repsis* as far as the earlier decision had been following the precedent of *Race Horse*, the Dissenting Opinion presents one more argument for holding *Repsis* and discarding the petition on prior judgment preclusion. This argument rises from a second and "independently sufficient" ground of *Repsis* that had nothing to do with *Race Horse*, which – if accepted – would bound

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[77]Farnworth, C (2020), p. 201
[78]*Herrera v. Wyoming* 587 U.S. 329 (2019), p. 369
[79]*Arizona v. California* 460 U.S. 605 (1983), p. 619
[80]*Astoria Fed. Sav. v. Solimino* 501 U.S. 104 (1991), p. 107

Herrera and other members of the Crow Tribe to the judgment in *Repsis* even if the change-in-legal-context exception is seen to apply.[81]

This alternative ground revolves around the definition of ”occupied” land. In its decision on *Repsis*, 10th Circuit Court stated:

> When the Treaty with the Crows, 1868, was executed the lands located in what is now the Big Horn National Forest were unoccupied; they were open for settlement in the westward expansion of the United States. However, in 1887, Congress created the Big Horn National Forest and expressly mandated that the national forest lands be managed and regulated for the specific purposes of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber. See 16 U.S.C. § 475. These lands were no longer available for settlement. No longer could anyone timber, mine, log, graze cattle, or homestead on these lands without federal permission. See Act of June 4, 1897, Ch. 2, 30 Stat. at 35-36 (1897). Thus, the creation of the Big Horn National Forest resulted in the "occupation" of the land. [82]

Again here, the Dissenters avoid opining of whether this determination of a Circuit Court – that a creation of National forest results in the ”occupation” of the land as meant in the Treaty of 1868 – they just assert that there is no reason to second-guess or relitigate an earlier decision of a competent court.

8 Conclusions on the Supreme Court Ruling

Reading the Opinion of the Court in *Herrera v. Wyoming* and comparing it to the dissenting opinion can easily sound like the two factions of the Supreme Court are not even considering the same case. Basing their view on ruling on *Mille* Lacs, the majority quickly discredit the preceding decisions *Race Horse* and *Repsis* moving into the field of a treaty interpretation and ending up with the conclusion of the Crow Tribe’s treaty-based hunting rights surviving to this day.

On totally different approach plane, the four dissenters regard the afore-mentioned treaty interpretation as unnecessary and even damaging as the issue preclusion doctrine should rule foremost and based specifically on *Repsis,* “once a court has decided an issue, it is forever settled as between the parties”[83]. Dissenting opinion refuses to even start considering how the

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[81] *Herrera v. Wyoming* 587 U.S. 329 (2019), p. 363
[82] *Crow Tribe of Indians v. Repsis* 73 F.3d 982 (1995), p. 993
[83] Lewis, J (2025), p. 112

Treaty should have been interpreted and states that the Supreme Court had never held any previous ruling lacking a preclusive effect because of a change in legal context.[84]

There is a line of thought, which does agree with J Alito's dissenting comments. It can be argued that whole logic and predictability of a case law system lies on being faithful to precedents and following that doctrine leads to a conclusion that the case should never had been given certiorari as the Crow Tribe had already lost its litigation on same identical issue in *Repsis* and as a member of the Crow Tribe, Clayvin Herrera was bound by that ruling.[85]

But in my opinion, there is an even stronger argument to avoid a situation, where "personal sense of justice of a few judges, who by chance have to decide a question as yet unsolved, should create duties for generations"[86]. A decision taken in 1896 in terms of 19th-century expectations that Natives would disappear, a decision already based on a treaty language produced under coercion and over a language barrier[87] and yet still finding no defending argument in the treaty itself but needing to "invent" termination clauses not to be found in any of the relevant documents – that can and should be overturned. The majority was on right side of rightneousness.

9 The Way to and Forward from *Herrera v. Wyoming*

The ruling on *Herrera v. Wyoming* and the explicit, final overturning of the old *Race Horse* precedent will obviously have much wider consequences than just disqualifying some fines, a temporary hunting ban and an already-suspended jail sentence. The most direct and immediate implications are for other Native American tribes with identical treaty-based hunting rights for the unoccupied Federal lands in Wyoming. These include the tribe of a long-deceased John Race Horse Sr. – the Shoshone Bannock tribe, as well as Eastern Shoshones. Shoshones having signed the 2nd Treaty of Fort Bridger only months after Crow Indians did sign their 2nd Treaty of Fort Kearney and both having identical text concerning the retention of off-reservation hunting rights. Their rights have now been unequivocally revived and future conservation efforts and hunting restrictions in unoccupied Federal lands including

[84] Lewis, J (2025), p. 113
[85] Mitchell, J (2019), p. 289
[86] Laun, R (1938), p. 21
[87] Cole, K.M (2021), p. 1076

National Forests have to be developed in co-operation between respective States and the sovereign Tribes[88].

But 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".[89] If *Race Horse* and *Repsis* represented a low point for treaty rights, the Court has now unequivocally walked those cases back[90] and tribal treaty rights are currently the safest they have ever been[91].

This celebratory tone from the highest members of American Indian representation deserves to be reflected in the light of a legal and contractual history of American Indians dating back to early decades of European colonialisation on the Eastern coast. Contrary to the popularised American or Western history describing violent race wars for territory, the initial nearly two-centuries long period of the initial multicultural encounter, Indians and whites negotiated hundreds of treaties and even engendered a set of legal traditions that still today, at least according to the Indian side, forms much of the core of Federal Indian Law.[92] As a noted historian Francis Jennings in his 1984 book *The Amibiguous Iroquois Empire* writes "Indian cooperation was the prime requisite for European penetration and colonization of the North American continent."[93] During this "Classical Era of Indian-white treaty diplomacy" the tribes were often treated in fact as rough political, economic, and military equals by their European trading partners.[94]

Moving ahead to 1830's, both the economic and military power had taken a turn in favor of Euro-white colonists, but in so-called *Cherokee cases* (1831-1832), the Marshall court (named after CJ John Marshall) still articulated the rules of interpretation for Indian treaties very favourably to Indians, even if the justification had changed to a trust relationship with a "weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."[95] These rules have formed three canons of construction to be applied to treaties between the federal government and tribes; 1) requiring the courts to

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[88] Reimer, D. (2019), p. 21-22
[89] Rader, A. (2020), p. 418
[90] Cole, K.M (2021), p. 1082
[91] Rader, A. (2020), p. 422
[92] Williams, R.A. (1996), p. 988
[93] Jennings, F. (1984), p. 367
[94] Williams, R.A. (1996), p. 988
[95] Cole, K.M (2021), p. 1057

interpret the treaties as the Natives themselves would have understood them at the time of the signing, 2) directing the courts to construe treaties and other sources of law liberally in favor of Natives, and 3) instructing that the Congress and only congress may unilaterally limit or abrogate tribal treaty rights through subsequent legislation, but Congress's intent of doing so must be clear.[96]

These canons seem to fit hand-in-hand with the U.S. Constitution as it assigns the Congress a sole duty to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".[97] This is actually quite a stinging argument against the Supreme Court dissenters, who wanted to present themselves as "defenders of legal tradition from a maverick majority". But it can rather be said that the actual Equal Footing Doctrine enshrining State's sovereignty and forming the major argument of *Ward v. Race Horse,* appears in itself of always having been contradictory of U.S. Constitution.

But almost simultaneously with the reasonably native-friendly outcomes in *Cherokee cases,* the American westward expansion started to be justified through a nationalistic doctrine grounded in natural law. The United States proclaimed as their "manifest destiny" to spread liberty and self-governance across the continent and, in doing so, trampled the liberty and rights of the Native tribes[98] (and also, the slaved Negroes and preceding Spanish-Mexican settlers all the same). In the most famous document of this ethos, a historian Frederick Turner's Frontier Thesis, Indian tribes had only the most trivial place in the Americanizing experience of Euro-Americans moving westward.[99]

With the constant growth of population with European origins (adding roughly 1/3 in every 10 years for most of 19th century and only slowing down slightly for last decades) and expanding interest in natural resources offered by the hitherto minimally intruded interior of the Continent, the pressure to push the "Frontier" and "wilderness" further and further grew until by about 1890 the frontier was said to no longer exist. Simultaneously, the ancient lands of Native tribes had been lost or, at very least, irreversibly transformed.

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[96] Cole, K.M (2021), pp. 1058-1059
[97] Lamirand, J.N (2020), p. 36
[98] Hughes, E.J.F. (2023), p. 20
[99] Hughes, E.J.F. (2023), p. 21

And amongst this change - more than any other judicial decision, *Ward v. Race Horse* institutionalised Frontier Thesis into American case law[100]. As termed before, it was the lowest point of American Indians' legal status.

It is notable that not all the disputes of that era and afterwards were rendered in a fashion detrimental to native tribes. In a complete contrary to *Race Horse*, a series of Supreme Court cases concerning the coastal tribes of Pacific Northwest - beginning already in 1905 with *United States v. Winans* and culminating in 1979 with *Washington v. Fishing Vessel Association*, interpreted that a treaty provision of "the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of Territory" reserved the Indians a right, not merely an opportunity, to take fish. This right was then articulated as a sizable allotment of an annual natural salmon for harvest reserved to tribe(s).[101]

But notwithstanding the cases where Indian rights had been more satisfactorily respected, notwithstanding the states (like Idaho) with warmer, co-operative existence of a state and Indian reservations simultaneously side-by-side, this has still existed in a space granted by "white" hegemony. Yet nowhere would tribal peoples have agreed to their own destruction, it is and has been a forced hand excluding the Indigenous voice from the room of science, justice, academe or otherwise. This exclusion from the table of knowledge and from the power to make decisions has proven a detriment to the land, waterways, flora and fauna, and human beings.[102]

After *Herrera v. Wyoming*, it appears that the Native tribes and their rights have achieved a major victory in their continuous battle against the efforts of the States to erode their tribal sovereignty. And this is an important victory for American Indians in times when the US Supreme Court's 1886 opinion in *United States v. Kagama* still often sound true: "Because of the local ill feeling, the people of the states where they [natives] are found are often their deadliest enemies"[103]. The effect of *Herrera v. Wyoming* appears to force the tribal voice to be heard as equal in all the state-level decision-making in interactions with tribes and tribal governments.

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[100] Hughes, E.J.F. (2023), p. 22
[101] Gray, J.D. (1980), pp. 933-934
[102] Matsaw, S et al. (2020), p. 415
[103] Williams, R.A. (1996), p. 981