United States–Crow Treaty — Federal Indian Law — Indian Plenary Power Doctrine — Herrera v. Wyoming

As the United States expanded and its territories received statehood, questions naturally emerged about how the nature of relationships between the territories and Indian tribes on those lands would change. These questions were complicated by a changing perspective on the inherent sovereignty of Indian Tribes and how that informed what the courts found Congress could legitimately say or do when it came to (re)defining the scope of treaties. Last Term, in *Herrera v. Wyoming,*[1] the Supreme Court held that offseason hunting activity by a member of the Crow Tribe (Apsaalooke) was protected under an 1868 Treaty between the United States and the Crow Tribe and that the relevant terms did not automatically expire upon Wyoming's statehood.[2] The Court's decision in *Herrera* is a positive signal indicating its willingness to force the State to remain faithful to the promises of its treaties; this demonstrates a hopeful shift back toward the foundational principles of Federal Indian law that have suffered under the expansion of the plenary doctrine.

The Crow Tribe has been in modern-day Montana for over three centuries.[3] Both before and after American settlers moved west, its "members hunted game for subsistence."[4] In 1868, the Crow Tribe ceded much of its territory by treaty, confining itself to an 8 million acre reservation in present-day Montana.[5] The United States promised in exchange that the Crow Tribe "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 . . . on the borders of the hunting districts."[6] The Commissioner of Indian Affairs "assured them that the Tribe would have 'the right to hunt upon [the ceded land] as long as the game lasts.'"[7] Hunting has been and remains central to the Crow Tribe's way of life.[8] Even after subsequent regulations by the Indian Department, Tribe members regularly hunted near the Little Bighorn River.[9]

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[1] 139 S. Ct. 1686 (2019).

[2] *See id.* at 1698.

[3] *Id.* at 1692.

[4] *Id.*

[5] *Id.* (quoting Treaty Between the United States of America and the Crow Tribe of Indians, Crow-U.S., art. IV, May 7, 1868, 15 Stat. 650 [hereinafter 1868 Treaty]).

[6] *Id.* at 1693 (quoting 1868 Treaty, *supra* note 5).

[7] *Id.* at 1699 (quoting INST. FOR THE DEV. OF INDIAN LAW, PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867–1868, at 86 (1975)).

[8] *See id.* at 1700.

[9] *See id.* (quoting FREDERICK E. HOXIE, PARADING THROUGH HISTORY 26 (1995)).

Between the signing of the Treaty and the present case, Wyoming was established as a territory,[10] was admitted as a state,[11] and created a National Forest from an "area[] made up of lands ceded by the Crow Tribe in 1868 . . . known as the Bighorn National Forest."[12] Wyoming joined a number of other states that were admitted into the Union in the decade before the Treaty.[13] Each of their admission acts included a clause ensuring each state was "on an equal footing with the original [thirteen] States, in all respects whatever."[14]

In the present day, almost 150 years after the 1868 Treaty, Clayvin Herrera, a member of the Crow Tribe in Montana, "pursued a group of elk past the boundary of the [Crow] reservation and into the neighboring Bighorn National Forest in Wyoming."[15] Herrera's group shot several bull elk, returned to the reservation with the meat, and was later charged by the State of Wyoming for "taking elk off-season or without a state hunting license and with being an accessory to the same."[16] In state trial court, Herrera insisted that the 1868 Treaty protected his right to hunt "where and when he did,"[17] but his argument was unsuccessful and the trial court denied his pretrial motion to dismiss.[18] Herrera received a suspended sentence, a fine, and a suspension of hunting privileges for three years.[19]

On appeal, "[t]he central question facing the state appellate court was whether the Crow Tribe's off-reservation hunting right was still valid."[20] In a separate 1995 case, *Crow Tribe of Indians v. Repsis*,[21] the Court of Appeals had "review[ed] the same treaty right."[22] The appellate court decided that this previous decision "merited issue-preclusive effect against Herrera because he is a member of the Crow Tribe."[23] In the *Repsis* decision, the Tenth Circuit relied on *Ward v. Race Horse,*[24]

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[10] *See id.* at 1693.
[11] *See id.*
[12] *See id.*
[13] *Id.* at 1699.
[14] *Id.* at 1693 (citation omitted).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* The trial court also did not permit him "to advance a treaty-based defense, and a jury convicted him on both counts." *Id.* He was also denied a stay of the trial court's order from the Wyoming Supreme Court and the United States Supreme Court. *See id.*
[19] *Id.*
[20] *Id.*
[21] 73 F.3d 982 (10th Cir. 1995).
[22] *Herrera*, 139 S. Ct. at 1693.
[23] *Id.* at 1694.
[24] 163 U.S. 504 (1896). Though *Race Horse* concerned different parties, it was "the same language found in Article 4 of the Treaty with the Crows. Since the Court's focus was on the interpretation of [the same language], it is immaterial" that the parties were different. *Repsis*, 73 F.3d at 987.

which found that statehood had changed the obligations of the Treaty.[25] Consequently, the Wyoming state appellate court found that likewise, here "the Crow Tribe's 1868 Treaty right expired upon Wyoming's statehood."[26] It rejected Herrera's argument that the Supreme Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*[27] had repudiated *Race Horse* and consequently nullified the applicability of *Repsis*.[28] Further, the court indicated that "even if the 1868 Treaty right survived Wyoming's entry into the Union, it did not permit Herrera to hunt in Bighorn National Forest" because the treaty right only applied on "unoccupied" lands, and "the national forest became categorically 'occupied' when it was created."[29] The Wyoming Supreme Court denied a petition for review.[30]

The U.S. Supreme Court vacated and remanded.[31] Writing for the Court, Justice Sotomayor[32] found the Crow Tribe's hunting rights were valid under the Treaty.[33] The Court agreed with Herrera that *Mille Lacs*, not *Race Horse*, controlled.[34] The Court emphasized that though *Mille Lacs* did not explicitly overturn *Race Horse,* it effectively undermined both its lines of reasoning.[35] *Mille Lacs* addressed "an 1837 Treaty that guaranteed . . . the privilege of hunting, fishing, and gathering in ceded lands 'during the pleasure of the President.'"[36] The *Mille Lacs* Court indicated that Minnesota's statehood *did not* automatically abrogate existing treaty rights of the bands of Chippewa Indians, "entirely reject[ing] the 'equal footing' reasoning applied in *Race Horse*"[37] and finding that treaty rights could coexist with state sovereignty over natural resources.[38] It also repudiated *Race Horse*'s second rationale.

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[25] *Race Horse*, 163 U.S. at 516.

[26] *Herrera*, 139 S. Ct. at 1694. The *Race Horse* Court found that Wyoming's statehood repealed the hunting rights outlined in the Treaty under the equal footing doctrine "because affording the Tribes a protected hunting right lasting after statehood would be 'irreconcilably in conflict'" with a state's power to regulate game. *Id.* at 1695 (quoting *Race Horse,* 163 U.S. at 514).

[27] 526 U.S. 172 (1999).

[28] *See Herrera*, 139 S. Ct. at 1694.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1703.

[32] Justices Ginsburg, Breyer, Kagan, and Gorsuch joined the opinion.

[33] *See Herrera*, 139 S. Ct. at 1698.

[34] *See id.* at 1695.

[35] *See id.* at 1696.

[36] *Id.* at 1695 (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 177 (1999)).

[37] *Id.*

[38] *Id.* The *Mille Lacs* Court emphasized turning to the events outlined in the treaty itself for analyzing whether a right is impliedly terminated upon statehood, concluding that the *Race Horse* Court was mistaken to find that Wyoming statehood implied the repeal of Indian treaty rights because it "'was informed by' that Court's erroneous conclusion 'that the Indian treaty rights were inconsistent with state sovereignty over natural resources.'" *Id.* at 1696 (quoting *Mille Lacs*, 526 U.S. at 207–08).

Specifically, it rejected the argument that the privilege in the Treaty was "temporary and precarious" because Congress implicitly anticipated that conditions would change.[39] The majority clarified that "Congress 'must clearly express' any intent to abrogate Indian treaty rights."[40] Finding no evidence in this Treaty that it was meant "to expire at statehood," the right remained.[41] The majority noted that under *Mille Lacs*, "[s]tatehood is irrelevant to this analysis" without "Congress' *clear intent* to abrogate a treaty."[42] Therefore, while *Race Horse* was not expressly overruled in *Mille Lacs*, the latter "methodically repudiated" the former's logic.[43]

The Court then turned to whether principles of issue preclusion blocked Herrera's argument in light of the Tenth Circuit's decision, which had relied on *Race Horse* to conclude that the Treaty right *did* terminate upon Wyoming's statehood.[44] Recognizing the important rationale for issue preclusion, the Court noted that sometimes, "[e]ven when the elements of issue preclusion are met . . . an exception may be warranted if there has been an intervening 'change in [the] applicable legal context.'"[45] Here, an exception was defensible because *Mille Lacs* repudiated the reasoning in *Race Horse* upon which *Repsis* relied.[46]

Finally, the Court addressed the merits of the case. It applied *Mille Lacs* to reach the issue of whether "Wyoming's admission to the Union abrogated the Crow Tribe's . . . hunting right," and found that was not the case.[47] First, Wyoming's Statehood Act did not explicitly "show that Congress intended to end the 1868 Treaty hunting right" as *Mille Lacs* requires.[48] Consequently, "Wyoming's arguments boil down to an attempt to read the treaty *impliedly* to terminate at statehood, precisely as *Mille Lacs* forbids."[49] The Court also rejected Wyoming's argument that even if the treaty right was intact after Wyoming's statehood, the hunting was not protected because the forest lands are now categorically

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[39] *Id.* at 1696 (internal quotation omitted).

[40] *Id.* (quoting *Mille Lacs*, 526 U.S. at 202).

[41] *Id.* Instead, the Court found that "the Chippewa Treaty itself defined the specific 'circumstances under which the rights would terminate,' and there was no suggestion that statehood would satisfy those circumstances." *Id.* (quoting *Mille Lacs*, 526 U.S. at 207).

[42] *Id.* (emphasis added). The Court also noted that Wyoming "concedes" that the equal footing rationale has been rejected. *Id.* at 1697.

[43] *Id.* at 1695.

[44] *See id.* at 1697.

[45] *Id.* (quoting Bobby v. Bies, 556 U.S. 825, 834 (2009)) (alteration in original).

[46] *Id.* at 1698.

[47] *Id.*

[48] *Id.* The Court noted that Congress must "clearly express its intent to do so," and that here, there was no indication that "Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other." *Id.* (citations omitted). In fact, the Treaty identifies four situations that would terminate the right, none of which include statehood. *Id.* at 1699.

[49] *Id.* at 1700 (emphasis added).

occupied.[50] Justice Sotomayor noted that the word "occupation" referred to settlement and "the Tribe's residence inside the reservation boundaries,"[51] rather than simply to overall government control over the territory.[52]

Justice Alito dissented.[53] He indicated that the majority's "interpretation of the treaty is debatable and is plainly contrary" to *Race Horse*.[54] Justice Alito argued that *Mille Lacs* does not "unquestionably" undercut the Court's reasoning in *Race Horse* as the majority suggested.[55] *Mille Lacs* may be reasonably interpreted as applying the implicit-repudiation principle to the facts before it and reaching a different conclusion, rather than dispensing with the implicit-repudiation principle altogether in a way that would render *Race Horse* moot on that issue.[56] Consequently, the dissent reasoned, there may not have actually been the sea change in legal context to merit overriding the issue-preclusive effect of *Repsis*.[57] Second, and more importantly to Justice Alito, *Repsis* decided the question of whether Bighorn National Forest was "unoccupied," and this holding was not subject to reversal by *Mille Lacs* or any subsequent decision.[58] The Tenth Circuit's reasoning remained valid: "'unoccupied' land within the meaning of the treaty meant land that was open for commercial or residential use, and since the creation of the national forest precluded these activities, it followed that the land was no longer 'unoccupied' in the relevant sense."[59]

The Court's decision in *Herrera* is a positive signal that "affirm[s] that treaty rights . . . continue in perpetuity unless expressly repealed by an act of Congress."[60] This demonstrates a hopeful shift back toward the foundational principles of Federal Indian law that have suffered under the expansion of the plenary power doctrine. In order to understand the significance of *Herrera*, it is helpful to first grapple with a short history of how the Supreme Court has handled the treaty power. As a

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[50] *Id.* at 1700–01.

[51] *Id.* at 1701.

[52] *Id.* at 1702. The Court also indicated that "the presence of mining and logging operations did not amount to settlement of the sort that the Tribe would have understood as rendering the forest occupied." *Id.*

[53] Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh joined Justice Alito's dissent.

[54] *Herrera*, 139 S. Ct. at 1703 (Alito, J., dissenting).

[55] *Id.* at 1709.

[56] *Id.* at 1707–08.

[57] *Id.* at 1706.

[58] *Id.*

[59] *Id.* (quoting Crow Tribe of Indians v. Repsis, 73 F.3d 982, 993 (10th Cir. 1995)).

[60] *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 [https://perma.cc/9M28-QY3Y].

starting point, the Marshall Trilogy and the core principles it put forward for interpreting Federal Indian law offer a window into an era of jurisprudence that recognized and respected the inherent sovereignty of Tribes and saw them as "equal entities" to the United States in treaty negotiations. With the introduction of the Indian plenary power doctrine, however, this conception changed and tribal authority was seen as conditional, premised on the more absolute sovereignty of the United States. In light of this shift, *Herrera* is a significant moment; it abrogated judicial exercise of plenary power without clear statements from Congress.

The foundational principles of Federal Indian law were set by a triad of cases in the mid-1800s known as the Marshall Trilogy.[61] One of the core principles arising from the Trilogy was that "[a]n Indian Tribe possesses, in the first instance, all the powers of any sovereign state."[62] In these foundational opinions, Chief Justice Marshall "was highly deferential to the complete autonomy of . . . Tribe[s] and guardedly critical of the political branches" when they "refused to enforce the treaty obligations of protection."[63] This reverence for Indian sovereignty "and the corresponding recognition of limited national power" colored policy and jurisprudence into the Reconstruction era.[64] The United States primarily "view[ed] Indians as distinct nations with whom the United States dealt through treaties."[65] Functionally, this meant that "the relationship upon which [treaties] were premised was a government-to-government relationship between Indian Tribes and the federal government" rather than any superseding federal power to govern Tribes directly.[66] As a result, Tribes did not face any significant constraints, either statutory or

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[61] These were *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5. Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). For more specific discussion of their background and holdings, see generally Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006).

[62] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1941). Another principle distilled from the rulings was that "[t]hese powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus *expressly qualified*, full powers of internal sovereignty are vested in the Indian Tribes." *Id.* (emphasis added).

[63] Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 139 (2002). Professor Robert Clinton discusses the example of *Cherokee Nation v. Georgia*, as "Georgia unilaterally attacked Cherokee sovereignty" in violation of this principle. *Id*; *see also id.* at 160 ("[U]nder basic American principles of constitutional authority, the federal government could not directly exercise any authority over the Indian Tribes or their members in Indian country, except by their consent through treaty.").

[64] Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 48 (2002).

[65] *Id.*

[66] Clinton, *supra* note 63, at 145. Professor Clinton uses the example of a treaty with the Lakota Tribe where the Tribe would not have been bound by certain federal legislation without express treaty agreement, owing to their inherent and equal sovereignty. As such, "their consent . . . was affirmatively sought during the treaty negotiations [to subject them to the legislation]." *Id.*

treaty-based, until the mid-1800s.[67] Even after, the general principles of the Trilogy guided the Court's understanding of the rights of Tribe members for over a century.[68]

Though this broad trend contained internal ups and downs in the intervening time, such as the diminishment of tribal rights during the Allotment era,[69] the Trilogy was still "invoked in virtually every case to support the Court's decisions" even almost a century later.[70] This period was marked by an "approach . . . [that] construe[d] laws in light of the nation's tradition of recognizing independent tribal powers to govern their territory and the people within it," and that in "interpreting ambiguous treaties and laws . . . employed canons of construction to give the benefit of doubt to Indians."[71]

The Court deviated in significant part from its protective stance toward inherent tribal sovereignty with the creation and subsequent expansion of the plenary power doctrine. One of the first instances of the plenary power doctrine was in *Lone Wolf v. Hitchcock*,[72] where the Court indicated that "[p]lenary authority over . . . the Indians has been exercised by Congress from the beginning."[73] In stark contrast to Chief Justice Marshall's characterization of treaty negotiations as between two sovereigns,[74] the *Hitchcock* Court "characteriz[ed] Congress' power as plenary," and "implied that, while the United States' relationship with tribes developed through mutual negotiation, these negotiations *were merely an exercise of Congress' absolute power over tribes.*"[75]

At first, Indian plenary power was at least only exercised by politically accountable parts of government.[76] But "beginning in the late-twentieth century, the Supreme Court . . . arrogated to itself the plenary

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[67] Cleveland, *supra* note 64, at 48.

[68] *See generally* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

[69] Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1197–200 (2001).

[70] 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, 272 (2001).

[71] *Id.* at 267.

[72] 187 U.S. 553 (1903).

[73] *Id.* at 565.

[74] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544–45 (1832).

[75] Anna Sappington, *Is* Lara *the Answer to Implicit Divestiture? A Critical Analysis of the Congressional Delegation Exception*, 7 WYO. L. REV. 149, 157 (2007) (emphasis added). This sharp shift in doctrine was motivated in part by the political needs of the United States in relation to Indian Tribes: "[P]lenary power doctrine first emerged to rationalize late-nineteenth and early-twentieth century efforts *by Congress* to assert colonial hegemony over Indian peoples in Indian country without their consent. . . . [T]hese claims had no basis in the text, history, or theory of the United States Constitution." Clinton, *supra* note 63, at 117.

[76] *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1791, 1832 (2019) (describing judicial deference to legislative and executive branch in nineteenth- and early twentieth-century cases).

power it previously rationalized for Congress and [began] defining federal Indian law in an exercise of judicial plenary power, similarly without any lawful justification."[77] This expansion began under *Oliphant v. Suquamish Indian Tribe*,[78] which introduced a "dormant"[79] plenary power doctrine. In and after *Oliphant*, the Court began to look at the record and decide for itself what was necessary.[80] Even if the political branches did not make an explicit indication, the "Court blatantly ignor[ed] clear statutory or treaty language to arrive at its preferred normative conclusions."[81] The plenary power doctrine itself — when exercised with clear congressional statement — has already been the subject of scrutiny insofar as it lacks constitutional basis.[82] The Court only exacerbated this by expanding the doctrine when it began to unilaterally change the scope of treaties after *Oliphant*.[83] Whereas the earlier era was marked by "defer[ence] to the political branches whenever congressional policy was not clear,"[84] the Rehnquist Court in the 1980s "arrogate[d] to itself the role of reviewing and weighing non-Indian interests and, ultimately, of redesigning the sovereignty of Indian Tribes."[85] A period of "judicial minimalism" followed which, though philosophically distinct, continued this trend of limiting Native power.[86] Tribal rights shrank further in the face of a Court focused on narrow holdings rather

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[77] Clinton, *supra* note 63, at 117 (footnote omitted).

[78] 435 U.S. 191 (1978). In *Oliphant*, the Court found that tribal authorities did not have criminal jurisdiction over the conduct of non-Indians on a tribal reservation. *See id.* at 212.

[79] Blackhawk, *supra* note 76, at 1838.

[80] *See id.* at 1836–38. *Herrera*'s abrogation of the dormant portion of the plenary power doctrine is less surprising than a Court with its current makeup choosing to uphold the doctrine. Insofar as the Court has a textualist bent, affirming and applying the plenary power doctrine presents challenges because it is widely considered extraconstitutional. *See* Cleveland, *supra* note 64, at 25. As some scholars have argued, a Court that is staying true to textualist principles would return to the Marshall Trilogy and its focus on the exercise of national power. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 428 (1993); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations,* 132 U. PA. L. REV. 195, 236 (1984) ("[A]n important rationale for the Plenary Power Doctrine was the perceived racial and cultural inferiority of Indians.").

[81] Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 626 (2011).

[82] *See* Clinton, *supra* note 63, at 115 (footnote omitted) (arguing that "there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian Tribes without their consent manifested through treaty"); *see also* Blackhawk, *supra* note 76, at 1835–36.

[83] *See, e.g.*, Ennis, *supra* note 81, at 681 (describing the Court's expansive, even unwarranted reading of an ambiguous treaty in *Washington v. Wash. State Commercial Passenger Fishing Ass'n*, 442 U.S. 658 (1979)).

[84] Getches, *supra* note 70, at 267–68.

[85] David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1575 (1996).

[86] *See* Krakoff, *supra* note 69, at 1215–16.

than sweeping protections; it shied from the broad core principles of the Marshall era.[87]

Under either the Rehnquist era or minimalist approaches to Federal Indian law, it is easy to see *Herrera* coming out the other way. By invoking the expanded plenary power, the Court could have exercised its discretion to weigh Indian and non-Indian interests. In this situation the Court could have considered more seriously the State's interests in promoting ease of enforcement for National Forest employees, for example, by not allowing Tribal hunting exceptions that make it more difficult to accurately identify and apprehend violators. Under a judicial minimalism approach as well, the preclusion and precedent concerns raised by *Race Horse* would have counseled in the other direction, because reading *Mille Lacs* to repudiate *Race Horse* when it did not explicitly do so would be contrary to the minimalist principles. Instead, the Court enforced the Treaty. This is critical in light of the Rehnquist trend where "the [judicial] branch . . . has become all the more dangerous in its recent development of the doctrine of common law colonialism."[88] It is precisely this course of history that makes the Court's decision in *Herrera* a significant signal.

The dormant expansion of the plenary power doctrine was reversed by *Herrera*'s refusal to accept such judicial encroachment.[89] *Herrera* moved closer to the original conception of tribal sovereignty by following "[a] clear-statement approach based on Chief Justice Marshall's legacy [which] . . . retain[s] a baseline of Indian sovereignty and render[s] outcomes like *Oliphant* deviations from that baseline."[90] In this way, though *Herrera* legitimizes the plenary power doctrine in part by reaffirming that Congress can repudiate treaties, it removes the dormant portion of the plenary power by insisting that Congress must now do so explicitly,[91] reeling back any belief that the Court can find repudiation on its own or read into "implicit" congressional words and deeds.

This clear signal was especially critical in light of the fact that jurisprudence since the Rehnquist era is checkered at best and "has mystified both academics and practitioners,"[92] demonstrating a need to right the

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87 *See id.*

88 Blackhawk, *supra* note 76, at 1847.

89 Professor Sarah Cleveland suggests that the Court's lack of concern for groups that are culturally, racially, and religiously distinct can help to explain this encroachment over two centuries. *See* Cleveland, *supra* note 64, at 11.

90 Frickey, *supra* note 80, at 420 n.162.

91 As Professor Clinton explains, the Court's "role changed dramatically . . . when the federal judiciary through common law development increasingly usurped the historical role of the political branches in the formulation of Indian policy, often adopting legal rules inconsistent with the spirit, and sometimes the letter, of congressional statements in the field." Clinton, *supra* note 63, at 205.

92 Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 267 (2000).

course. This is what makes *Herrera* valuable. It is true that in more recent years, the Court has found in favor of tribal authority in a variety of difficult instances[93] — from upholding the imposition of tribal taxes on non-Indian developments on reservations[94] to more challenging tensions such as refusing to pass judgement on a Tribe's decision to place more burdensome membership requirements for children of female members who have married outside the Tribe.[95] However, other controversies — such as disagreements around the use of sovereign immunity by tribes to engage in lending practices that may have steeper fees — could counteract this trend of judicial deference to tribal authority.[96] In other words, there are still instances where rather than viewing treaties as codified commitments, courts have continued to "assume[] the prerogative of balancing various non-Indian interests in order to prune tribal sovereignty to the Court's own notion of what it ought to look like."[97]

As a result, it is significant that in light of this broad use of dormant plenary power the Court upheld the Treaty — especially given that there was case law that could have easily allowed this to go the other way. Therefore, the *Herrera* decision should be seen as an affirmative choice and an affirmative signal from the Court. *Herrera* does not convert the doctrinal landscape completely to the Marshall era.[98] But it is not trivial that the Court had two equally applicable cases and, in choosing one over another, closed the *Race Horse* path. In a world where congressional action and the relevant standards of clarity required for such action are paramount in delineating protections for tribes, this signal starts a trend in the right direction to provide some much needed clarity "for lower courts trying to decipher the implications of [conflicting case law]."[99] *Herrera* is therefore a positive signal that the newest iteration of the Court will continue to move toward the foundational principles of the Marshall Trilogy.[100]

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[93] *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 325 (1983) (allowing outdoor activities by non-Indians on reservations to be regulated by tribes); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973) (stopping state collection of taxes on income earned by an Indian on reservation land).

[94] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982).

[95] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51–52 (1978).

[96] For more background on the tribal lending trend, see Gavin Clarkson et al., *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 VAND. J. ENT. & TECH. L. 1, 7–9 (2016).

[97] Getches, *supra* note 85, at 1620.

[98] *See* Clinton, *supra* note 63, at 160 ("[U]nder basic American principles of constitutional authority, the federal government could not directly exercise any authority over the Indian tribes or their members in Indian country, except by their consent through treaty.").

[99] Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 360 (1997).

[100] For a discussion of potential pathways forward, see Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651 (2009).