



NOTE

Native Treaties and Conditional Rights After *Herrera*

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Abstract. Due to the complex and often troubled history of relations between the United States and Native nations, special rules apply when courts interpret Native treaties. For example, when interpreting the scope of treaty rights, courts apply a unique set of canons of construction generally favoring the Native nations. Further, before courts will allow Congress to abrogate a treaty right, they require Congress to clearly express its intent to do so. But treaty rights conditioned on some “termination point” in the treaty text remain a gray area: What happens when the conditioned circumstances come to pass? Congress may not have affirmatively acted to abrogate the right—but does the treaty right nevertheless expire with the occurrence of those conditions? And what legal standard applies? The Supreme Court’s recent decision in *Herrera v. Wyoming* highlights the importance of these questions and provides a partial model to better understand conditional treaty rights.

This Note analyzes the conditions placed on the off-reservation hunting right in *Herrera* and argues that courts should narrowly construe such termination points. First, courts should follow the *Herrera* model and apply the Indian canons of construction in considering whether a conditional treaty right has terminated. Second, courts should require clearly expressed intent in the text of a treaty to abrogate a right through the fulfillment of a treaty condition, just as clearly expressed congressional intent is required to abrogate the treaty as a whole. Instead of assuming congressional intent to terminate a privilege, courts should apply the lessons taught by centuries of precedent and carefully construe treaty conditions before effectively abrogating such rights.

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Introduction

As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government, and never again be removed from your present habitations.

—President James Monroe¹

In an effort to give substance to government promises that treaties should last in perpetuity “as long as water flows,” courts require that Congress “clearly express its intent” to unilaterally abrogate Native treaties by subsequent incompatible treaty or legislation.² Courts further guard against undue deprivation of Native treaty rights by applying “enlarged rules of construction” ensuring that “[t]he language used in treaties with the Indians never be construed to their prejudice.”³

But what if the water no longer ran and the grass no longer grew? Many treaties condition rights on certain termination points, ostensibly granting the rights only, for example, “so long as game may be found” or “as long as peace subsists among the whites and Indians.”⁴ While Congress may not have affirmatively acted to abrogate the right, do treaty rights nevertheless expire with the occurrence of these conditions? Those treaty rights may be effectively extinguished, even if not technically abrogated. And yet courts have not resolved the question whether the same “clearly expressed” standard should

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1. CONG. GLOBE, 33d Cong., 1st Sess., app. at 202 (1854) (statement of Sen. Sam Houston) (paraphrasing a March 1818 speech by President James Monroe).
 2. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); see also *infra* Part I.A. In contrast, international law typically requires consent of both parties to suspend an otherwise valid treaty. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE UNITED STATES §§ 332-335 (AM. L. INST. 1987). This Note uses the terms “Indians” and “Natives,” particularly as terms of art, to describe the Indigenous peoples of North America under the body of federal Indian law, though other terms may be favored. For an insightful discussion of terminology, see generally Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples’ Perspectives on Racial and Ethnic Identity Labels*, AM. INDIAN Q., Spring 1999, at 1.
 3. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1867) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832)); see *infra* Part I.A. Congressional abrogation of Native treaties is also limited by the Takings Clause of the Fifth Amendment. See U.S. CONST. amend. V; H. Barry Holt, Note, *Can Indians Hunt in National Parks? Determinable Indian Treaty Rights and United States v. Hicks*, 16 ENV’T L. 207, 224 (1986).
 4. See, e.g., Treaty, Crow Nation–U.S., art. IV, May 7, 1868, 15 Stat. 649 [hereinafter 1868 Treaty with the Crows] (providing that the Crow “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”). The Court instructs lower courts to inspect “whether a termination point identified in the treaty itself has been satisfied.” *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019). Note that the Crow are properly known as the Apsáalooke, though this Note adopts the Court’s terminology. See *Crow Nation*, MONT. GOVERNOR’S OFF. INDIAN AFFS., <https://perma.cc/GK4N-4T5P> (archived Feb. 14, 2021).

apply when they interpret such conditions. If core treaty rights could be gutted by an expansive, progovernment interpretation of treaty conditions and, in effect, abrogated, why should different legal standards apply?

Scholars have largely ignored this question.⁵ The Supreme Court, for its part, most recently wrestled with how to interpret Native treaty conditions in *Herrera v. Wyoming*.⁶ Though *Herrera* did not require clearly expressed intent when interpreting treaty conditions, the Court's robust application of the Indian canons of construction suggests something close.⁷ *Herrera* examined an 1868 treaty with the Crow Tribe that guaranteed the right to hunt beyond the bounds of the Tribe's Montana reservation so long as those extraterritorial lands remained "unoccupied."⁸ The Court rejected Wyoming's arguments that either the State's admission to the Union or the creation of the Bighorn

5. For the most part, scholarship has focused on understanding abrogation rather than termination points and conditional treaty rights. For examples of abrogation analyses, see Tracy A. Diekemper, Comment, *Abrogating Treaty Rights Under the Dion Test: Upholding Traditional Notions That Indian Treaties Are the Supreme Law of the Land*, 10 J. ENV'T L. & LITIG. 473, 474 (1995) (evaluating treaty abrogation by the Endangered Species Act); Conrad A. Fjetland, Note, *The Endangered Species Act and Indian Treaty Rights: A Fresh Look*, 13 TUL. ENV'T L.J. 45, 53 (1999) (same); Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RES. J. 859, 860 (1991) (discussing the limits of treaty abrogation by federal environmental-conservation statutes of general applicability); Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 682-83 (1994) (calling for the application of abrogation principles whenever federal employment laws are applied to tribes, before treating tribes as any other private employer); and Zachary Tomlinson, Note, *Abrogation or Regulation? How Anderson v. Evans Discards the Makah's Treaty Whaling Right in the Name of Conservation Necessity*, 78 WASH. L. REV. 1101, 1102-03 (2003) (criticizing the Ninth Circuit's use of conservation necessity in treaty-abrogation analysis).

For rarer examples of academic inquiry into termination under treaty conditions, see Michelle L. Alamo & Joseph A. Lucas, Note, *Treaty Interpretation in the 20th Century: What Does "During the Pleasure of the President" Mean?*, 76 U. DET. MERCY L. REV. 821, 821-22 (1999) (reviewing *Mille Lacs's* affirmation of a tribe's hunting and fishing right through interpretation of treaty termination conditions); and Jason Mitchell, Case Note, *Unoccupied: How a Single Word Affects Wyoming's Ability to Regulate Tribal Hunting Through a Federal Treaty*, 19 WYO. L. REV. 271, 273 (2019) (analyzing a Wyoming appellate court decision holding that the Crow's hunting right had expired upon statehood and the creation of the Bighorn National Forest, in contrast to the Supreme Court's ultimate decision in *Herrera*).

6. 139 S. Ct. 1686.

7. See *infra* Part II.B.

8. *Herrera*, 139 S. Ct. at 1693 (quoting 1868 Treaty with the Crows, *supra* note 4, art. IV). Occupation is one of several conditions. The 1868 treaty guarantees the Crow "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." *Id.* (quoting 1868 Treaty with the Crows, *supra* note 4, art. IV).

National Forest constituted “occupation” that had extinguished the hunting right.⁹

Not just the Crow are affected: Many tribes signed similar treaties with similar language.¹⁰ *Herrera* is a landmark case that will shape the fate of Native hunting rights and their attendant economic and cultural importance for years to come. Treaties still govern the messy boundaries between sovereigns, and so the continued validity and scope of these treaties are some of the most important questions for courts struggling to navigate this type of relationship.¹¹

Conditional treaty language often reflects historical expectations that Native sovereignty would be temporary. Settlers would move west, the unoccupied lands would become occupied, and the treaty rights would disappear. Natives were forced westward as Congress repeatedly failed to keep its promises to them.¹² Since the first treaties with Native nations were consummated, it has become increasingly clear that federal policymakers intended for Indigenous peoples and cultures to fade away. The reservation system and later land allotment were intended to “make room for settlers” and “convert [Natives] into Christian, self-sufficient farmers, complete with a European American sense of individualism and private property ownership.”¹³ Though many hoped that

9. *Herrera*, 139 S. Ct. at 1700-01. For a discussion of *Herrera*'s facts, see Part II.A below.

10. See Reply Brief for Petitioner at 12, *Herrera*, 139 S. Ct. 1686 (No. 17-532), 2018 WL 6584714 (pointing to the “nearly twenty other tribes whose rights would be threatened” if *Herrera* had come out the other way).

11. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 1-19 (1994).

12. See REPORT OF THE BOARD OF INDIAN COMMISSIONERS (Nov. 23, 1869), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 131, 131 (Francis Paul Prucha ed., 1975) (“The history of the government connections with the Indians is a shameful record of broken treaties and unfulfilled promises.”); see also *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459, 2462 (2020) (finding that Congress had “broken more than a few of its promises to the Tribe,” but nevertheless “hold[ing] the government to its word”).

13. William T. Hagan, *Assimilation Policy*, ENCYC. GREAT PLAINS, <https://perma.cc/7B7F-NA7L> (archived Feb. 14, 2021). Reservation lands “marked the limits” of tribal mobility as those tribes that were historically nomadic “shifted from a migratory hunting subsistence to a pattern of permanent residence in an agricultural community.” Brief for Respondent at 9-10, *Herrera*, 139 S. Ct. 1686 (No. 17-532), 2018 WL 6012360 (quoting FREDERICK E. HOXIE, *PARADING THROUGH HISTORY: THE MAKING OF THE CROW NATION IN AMERICA, 1805-1935*, at 115, 184 (1995)); John Mark French, “Pensioners upon Our Humanity”: Governmentality and the Reservation System in the 19th Century 8-15 (Apr. 2019) (unpublished manuscript), <https://perma.cc/BP5H-GNDD> (describing the development of reservations as part of the federal government’s concentration policy that aimed to “colonize our Indian tribes, beyond the reach, for some years, of our white population; confining each within a small district of country, so that, as the game decreases and becomes scarce, the adults will gradually be compelled to resort to agriculture and other kinds of labor to obtain a subsistence” (quoting W. Medill, Report of the Commissioner of Indian Affairs (Nov. 30, 1848), in ANNUAL REPORT OF

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“[c]ontact with whites and ownership of land [would] teach [Natives] to become educated, civilized, and self-supporting,” land allotment under the Dawes Act of 1887 was an unmitigated failure for Native people.¹⁴ These “Americanization” efforts pervaded education as well.¹⁵ Compulsory boarding schools required Native children to speak English, convert to Christianity, and study Euro-American subjects.¹⁶

Native nations, Native peoples, and Native rights never disappeared, but neither has the assumption that they *will*. The recent controversy in *McGirt v. Oklahoma* exemplifies this assumption.¹⁷ After extended deadlock, the Supreme Court ultimately ruled that almost half of Oklahoma remains Indian Country.¹⁸ The majority held Congress to a high standard of clear intent to disestablish a reservation.¹⁹ Although Oklahoma statehood and subsequent demographic changes suggested that the Muscogee Nation reservation had been presumed to have been disestablished, that presumption was never embodied in legislative text.²⁰ But at oral argument in a related case addressing the same legal question, Justice Kavanaugh’s questioning relied on familiar nineteenth-century expectations: “[W]hy shouldn’t the historical practice, the contemporaneous

THE COMMISSIONER OF INDIAN AFFAIRS, 1847-1848, at 3, 4 (1847-1848), *reprinted in* H.R. EXEC. DOC. NO. 30-1, at 385, 386 (1848)).

14. See WILLIAM A. BROPHY & SOPHIE D. ABERLE, *THE INDIAN: AMERICA’S UNFINISHED BUSINESS—REPORT OF THE COMMISSION ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN 19-20* (1966); Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920’s Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1, 3 (1997).
15. See generally *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN,” 1880-1900*, at 192-292 (Francis Paul Prucha ed., Bison Books 1978) (1973) (collecting perspectives from late-nineteenth-century “humanitarian reformers” on creating a universal education system by which “Indians would be turned into patriotic Americans” and convert from “their savage ways”).
16. See Ann Murray Haag, Comment, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 154 (2007); Ann Piccard, *Death by Boarding School: “The Last Acceptable Racism” and the United States’ Genocide of Native Americans*, 49 GONZ. L. REV. 137, 152-53 (2013).
17. 140 S. Ct. 2452.
18. *Id.* at 2482. *McGirt* was decided two years after its question first came before the Court in *Murphy v. Royal*. In that case the Court delayed for a second round of oral arguments and ultimately stalled, perhaps because of Justice Gorsuch’s recusal from *Murphy* due to prior oversight of the case on the Tenth Circuit. See *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff’d per curiam sub nom.* *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (summarily affirming on the basis of *McGirt*); see also Michael R. Faz, Note, *Conquering a Legislative Court: Murphy and an Opportunity for Clarity in Indian Country*, 11 NEB. L. REV. BULL. 1, 23, 24 n.188 (2020).
19. *McGirt*, 140 S. Ct. at 2482 (“If Congress wishes to withdraw its promises, it must say so.”).
20. See *id.* at 2483-85 (Roberts, C.J., dissenting).

understanding, the 100 years, all the practical implications say leave well enough alone here?”²¹ Likewise, Chief Justice Roberts’s dissent in *McGirt* seemed to excuse Congress from any requirement of clear intent because “the possibility that a reservation might persist in the absence of ‘tribal ownership’ of the underlying lands was ‘unfamiliar,’ and the prevailing ‘assumption’ was that ‘Indian reservations were a thing of the past.’”²² According to the Chief Justice, despite treaty promises to secure a “permanent home to the whole Creek nation of Indians,”²³ more consequential was that “Congress believed ‘to a man’ that ‘within a short time’ the ‘Indian tribes would enter traditional American society and the reservation system would cease to exist.’”²⁴

Treaty termination points served to ground those beliefs in the text. In the late nineteenth century, the Supreme Court in *Ward v. Race Horse* answered a question similar to that in *Herrera*, coming to the opposite conclusion.²⁵ *Race Horse* interpreted treaty conditions to create rights so “temporary and precarious” that they were easily dissolvable.²⁶ Even where the text would not otherwise have supported abrogation, the Court read into unrelated treaty conditions the historical assumptions that Natives would disappear, that game would disappear, and that dual sovereignty would disappear.²⁷ The Court thus held that the Bannock Nation’s hunting right did not survive Wyoming’s statehood.²⁸

But *Herrera* renounced that “erroneous” approach.²⁹ Treaty rights are not “temporary and precarious.”³⁰ Assumptions that “[o]ff-reservation hunting rights

21. Transcript of Oral Argument at 56, *Sharp*, 140 S. Ct. 2412 (No. 17-1107), 2018 WL 6200336.

22. *McGirt*, 140 S. Ct. at 2488 (Roberts, C.J., dissenting) (quoting *Solem v. Bartlett*, 465 U.S. 463, 468 (1984)).

23. Treaty, Creek Nation–U.S., pmb., para. 2, Feb. 14, 1833, 7 Stat. 417; see also Treaty, Creek Nation–U.S., art. III, June 14, 1866, 14 Stat. 785 (reiterating a commitment that land “be forever set apart as a home for said Creek Nation” even as some of the Creek land was reduced); Treaty, Creek Nation et al.–U.S., art. IV, Aug. 7, 1856, 11 Stat. 699 (promising that “no portion” of the reservation “shall ever be embraced or included within, or annexed to, any Territory or State”).

24. *McGirt*, 140 S. Ct. at 2488 (Roberts, C.J., dissenting) (quoting *Solem*, 465 U.S. at 468).

25. *Ward v. Race Horse*, 163 U.S. 504, 504-05 (1896) (statement of the case), *abrogation recognized by Herrera v. Wyoming*, 139 S. Ct. 1686 (2019); *id.* at 514-16 (majority opinion); see also *infra* Part II.B.

26. *Race Horse*, 163 U.S. at 515.

27. See *id.* at 507-10.

28. *Id.* at 504, 516.

29. *Herrera*, 139 S. Ct. at 1696; see *infra* Part II.B.

30. *Herrera*, 139 S. Ct. at 1696 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206-07 (1999)) (describing and affirming the decision in *Mille Lacs*); see *infra* Part II.B.2. *Herrera* was not the first to walk back *Race Horse*, see note 119 and accompanying text, though some lower courts continued to follow *Race Horse* regardless.

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were temporary measures” or that “[t]here will soon be no necessity for the Indians to leave their reservations in search of subsistence, for the game will be gone,” do not in themselves terminate the hunting right.³¹ Although the dissenters in *McGirt*—as characterized by Justice Gorsuch in the majority opinion—may have subscribed to the thinking that “[y]es, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye,” the majority made clear that at the “end of the Trail of Tears was a promise,” and “[w]e hold the government to its word.”³² Expectations frozen in the nineteenth century—particularly those assumptions neither expressed in the treaty text nor tracking the actual evolution of Indigenous history—should not control the scope and validity of Native treaties today. Instead, Congress should be required to clearly express its intent to terminate a treaty right.

In the wake of *Herrera*, this Note focuses on the viability of off-reservation hunting rights that Congress has not explicitly repudiated. The bounds of common treaty conditions—occupation, presence of game, peace—are yet to be determined. Parts I and II provide background. Part I outlines principles of Indian treaty interpretation and abrogation that should equally apply to treaty termination points. Part II discusses *Herrera* and the Court’s repudiation of the notion that abrogation could be effected by anything less than clear congressional intent. Part III evaluates how treaty termination points should be understood. Both the Indian canons of construction and the congressional power to abrogate Native treaties strongly support interpreting such conditional terms narrowly. First, expectations about game disappearing or the scope of occupation were almost always the *federal government’s expectations*, but it is well established that treaties should be interpreted as Natives understood them. Second, if Congress believes that changed conditions warrant eliminating a treaty right, it may do so—and indeed it has done so repeatedly. So courts should be very reluctant to find that conditional language from the nineteenth century has extinguished a treaty right.

In practice, whether clearly expressed intent is required may not matter. After all, Congress provides strong evidence of its intent by including conditional language in a treaty. But the Indian canons of both interpretation and abrogation, rather than a myopic view of congressional intent, should

See, e.g., *Crow Tribe of Indians v. Reppis*, 73 F.3d 982, 991 (10th Cir. 1995) (echoing the ideas of “temporary and precarious” rights (quoting *Race Horse*, 163 U.S. at 515)), *abrogation recognized by Herrera*, 139 S. Ct. 1686.

31. *See* Brief for Respondent, *supra* note 13, at 6-7 (quoting Statement of General Hancock Before the Indian Peace Commission, Fort Leavenworth, Kan. (Aug. 12, 1867), in *PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867-1868*, at 10, 14 (Inst. for the Dev. of Indian L. ed., 1975)). These assumptions were then rejected by *Herrera*. *See* 139 S. Ct. at 1695-97 (formalizing *Mille Lacs’s* “methodical[] repudiat[ion]” of *Race Horse*).

32. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459, 2482 (2020).

apply.³³ The Supreme Court’s modern jurisprudence reinforces this approach. Though the Indian canons are not always employed,³⁴ recent decisions such as *Minnesota v. Mille Lacs Band of Chippewa Indians*, *Washington State Department of Licensing v. Cougar Den, Inc.*, and *Herrera* have applied a robust form of the canons, suggesting a resurgence of interpretive principles that favor tribal interests.³⁵

I. Treaty Interpretation and Abrogation

This Part provides background on the Indian canons of construction that guide courts’ interpretation of treaties with Native nations. It then situates this Note’s analysis of conditional treaty rights within that framework, disentangling the interpretation of treaty termination points from the interpretation or abrogation of treaties writ large.

A. Background on the Indian Canons of Construction

Throughout the eighteenth and nineteenth centuries, the United States built its aggressive westward expansion on a series of treaties with Native

33. This approach is not inconsistent with traditional statutory interpretation. Even outside the Indian context, statutory interpretation rarely starts and stops entirely with the text. See generally Robert A. Katzmann, *Response to Judge Kavanaugh’s Review of Judging Statutes*, 129 HARV. L. REV. F. 388 (2016) (responding to Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (book review)) (discussing the use of legislative history and canons of statutory interpretation in interpreting ambiguous statutes). Textualist theories of statutory interpretation typically look to the ordinary meaning of the language in the textual context before asking whether there is any clear indication that some other meaning should apply. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (articulating a textual method of interpretation that directs one to, “first, find the ordinary meaning of the language in its textual context,” and, “second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies”). The Indian canons serve as a clear indication that some other information is needed.

34. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[3] (Nell Jessup Newton et al. eds., LexisNexis 2017) [hereinafter COHEN’S HANDBOOK]; cf. *Montana v. United States*, 450 U.S. 544, 551-57 (1981) (ignoring the canons); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-12 (1978) (same).

35. See *Herrera*, 139 S. Ct. at 1701; *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011-13 (2019) (plurality opinion); *Mille Lacs*, 526 U.S. at 200; see also Michael R. Newhouse, Note, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: The Mille Lacs Case*, 21 PUB. LAND & RES. L. REV. 169, 190-91 (2000) (“*Mille Lacs* . . . affirms the continuing relevancy of the canons, applying them prominently and broadly in favor of the natives. Between [the] *Mille Lacs* majority opinion and its two dissents, in fact, the canons are explicitly or implicitly acknowledged over ten times.”).

populations.³⁶ Native Americans gave up huge swaths of land for relatively little in return because of the acutely lopsided bargaining power of the parties.³⁷ Inequities pervaded the negotiating process. Federal negotiators often selected the “chiefs” to represent tribes and would then bribe or otherwise influence those representatives.³⁸ The U.S. government also had the advantage of negotiations taking place, and finalized terms being written, in English.³⁹ Yet despite these infirmities in their creation, treaties continue to help define the messy parameters of the relationship between the federal government and tribal sovereigns within each other’s geographic bounds. The Court thus characterizes tribes not as foreign nations or states but rather as “domestic dependent nations.”⁴⁰ This fragile balance between sovereigns may have tipped, but it has yet to collapse.⁴¹

36. The U.S. stopped the practice of treaty-making with the tribes in 1871. See Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71).

37. See Arthur Spirling, *U.S. Treaty Making with American Indians: Institutional Change and Relative Power, 1784-1911*, 56 AM. J. POL. SCI. 84, 84 (2012); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth”—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 609-10 (1975).

38. See Wilkinson & Volkman, *supra* note 37, at 610.

39. See *id.* at 610-11. Direct translations were fraught with problems, further compounded by a shortage of competent interpreters. See Yasuhide Kawashima, *Forest Diplomats: The Role of Interpreters in Indian-White Relations on the Early American Frontiers*, 13 AM. INDIAN Q. 1, 4-6 (1989). Some negotiations were translated to only one language carrying different meanings to each tribe involved. See Wilkinson & Volkman, *supra* note 37, at 610; see also *Duwamish Indians v. United States*, 79 Ct. Cl. 530, 537, 578 (1934).

40. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

41. Justice Thomas has repeatedly expressed discomfort with the paradoxical fit between federal plenary legislative power over the tribes and continued tribal sovereignty within the geographic and political bounds of the United States. See *United States v. Lara*, 541 U.S. 193, 214-15 (2004) (Thomas, J., concurring in the judgment); see also *Upstate Citizens for Equal, Inc. v. United States*, 140 S. Ct. 2587, 2588-89 (2017) (Thomas, J., dissenting from the denials of certiorari); *United States v. Bryant*, 136 S. Ct. 1954, 1967 (2016) (Thomas, J., concurring); *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Thomas, J., concurring in part and concurring in the judgment); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658-59 (2013) (Thomas, J., concurring). In *Lara*, Justice Thomas claimed:

[T]he time has come to reexamine the premises and logic of our tribal sovereignty cases. It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members.

Lara, 541 U.S. at 214-15 (Thomas, J., concurring) (citation omitted). For scholarship responding to Justice Thomas, see generally Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1015-17, 1082-88 (2015) (agreeing with Justice Thomas that the Indian Commerce Clause does not support plenary power over
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Treaty interpretation in federal Indian law follows its own rules—“the standard principles of statutory construction do not have their usual force in cases involving Indian law.”⁴² Since first articulating these rules in *Worcester v. Georgia*, the Supreme Court has crafted three canons of construction to be applied to treaties between the federal government and tribes.⁴³ Initially conceptualized as a fix to the disadvantaged bargaining position of the “unlettered” tribes,⁴⁴ the canons were increasingly justified by the federal government’s trust relationship with a “weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.”⁴⁵ Despite these somewhat ignominious beginnings, courts continue to give the canons force. Today, they reflect both the unequal bargaining power of the parties and the federal trust relationship, which presumes that Congress acts for the benefit of the tribes and their sovereignty.⁴⁶

Natives but questioning the historical accuracy of the Justice’s originalist interpretation and ultimately concluding that plenary power should be cabined); MacKenzie T. Batzer, Note, *Trapped in a Tangled Web—United States v. Lara: The Trouble with Tribes and the Sovereignty Debacle*, 8 CHAP. L. REV. 275, 297-98 (2005) (agreeing with Justice Thomas that plenary congressional power and tribal sovereignty are incompatible); and 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) (evaluating options for congressional restoration of tribal sovereignty in light of *Lara* and the tension between sovereignty and plenary power highlighted by Justice Thomas).

42. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

43. See 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring) (“The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.”); see also *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *United States v. Winans*, 198 U.S. 371, 380-81 (1905).

44. See *Worcester*, 31 U.S. (6 Pet.) at 582 (McLean, J., concurring).

45. *Choate v. Trapp*, 224 U.S. 665, 675 (1912); David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 41-42 (1999); see also *Winans*, 198 U.S. at 380.

46. See Bradley I. Nye, Comment, *Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 WASH. L. REV. 175, 178-79 (1992) (“In an effort to compensate for the unequal bargaining position of Indians at the time treaties were entered into, and to help factor in the trust responsibilities of the federal government to Indians because of their unique and compromised position, courts employ three special canons of construction when determining treaty rights.”). The Court has explained the lopsided positions of the parties:

[T]he negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their

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The first canon requires courts to interpret treaties as the Natives themselves would have understood the agreements at the time of signing.⁴⁷ This “treaty canon” applies broadly even to those rights that have been implied in the absence of explicit treaty language. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, as one example, emphasized that treaty language must “be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”⁴⁸ Most recently, *Herrera* reiterated that “treaty terms are construed as ‘they would naturally be understood by the Indians.’”⁴⁹ This approach is nothing new: *Cougar Den* (in 2019) and *Mille Lacs* (in 1999) echoed the same ideas articulated in *Tulee v. Washington* and *United States v. Winans* during the first half of the twentieth century.⁵⁰

Second, the “ambiguity canon” directs courts to construe treaties and other sources of law liberally in favor of Natives, with any ambiguities resolved in the Natives’ favor.⁵¹ This canon is often split into two components:

law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States

Jones v. Meehan, 175 U.S. 1, 10-11 (1899).

47. See generally Bryan H. Wildenthal, *Indian Sovereignty, General Federal Laws, and the Canons of Construction: An Overview and Update*, 6 AM. INDIAN L.J., no. 1, 2017, at 98 (applying the canons of construction to federal laws of general applicability); Diekemper, *supra* note 5, at 475-76 (reviewing the canons of construction).

48. 443 U.S. 658, 676 (1979) (quoting *Meehan*, 175 U.S. at 11).

49. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019) (quoting *Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. at 676).

50. Compare *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (interpreting a treaty “to give effect to the terms as the Indians themselves would have understood them”), and *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011 (2019) (plurality opinion), with *Tulee v. Washington*, 315 U.S. 681, 684 (1942) (“It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council”), and *Winans*, 198 U.S. at 380-81.

51. See Wildenthal, *supra* note 47 at 102; see, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“[I]t is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” (citations omitted)); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (“[W]e must be guided by that ‘eminently sound and vital canon’ that ‘statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.’” (alteration in original) (citation omitted) (first quoting *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976); and then quoting *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918))); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *State v. Miller*, 689 P.2d 81, 84 (Wash. 1984) (en banc). For one explanation of the rationale behind the

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(1) construe ambiguities in favor of the tribes, and (2) interpret provisions liberally for the tribes' benefit.⁵² Near the beginning of the twentieth century, *Winters v. United States* instructed that "ambiguities occurring will be resolved from the standpoint of the Indians,"⁵³ and *Choate v. Trapp* insisted that "[t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of [Natives]."⁵⁴ Over 100 years later, *Herrera* did the same, interpreting the Crow treaty "in light of the parties' intentions, with any ambiguities resolved in favor of the Indians."⁵⁵

Finally, because treaties are part of the supreme law of the land,⁵⁶ the "congressional intent canon" instructs that Congress (and only Congress) may unilaterally limit or abrogate tribal treaty rights through subsequent legislation.⁵⁷ Congress has "plenary power" over Native affairs, which—in combination with the "last-in-time" principle—extends retroactively to treaties.⁵⁸ But Congress's intent to abrogate treaties must be clear.⁵⁹ There must

canon, see *United States v. Washington*, 384 F. Supp. 312, 330-31 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975):

The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.

52. See COHEN'S HANDBOOK, *supra* note 34, § 2.02[1].

53. 207 U.S. 564, 576 (1908).

54. 224 U.S. 665, 675 (1912).

55. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Mille Lacs*, 526 U.S. at 206).

56. U.S. CONST. art. VI, cl. 2; see also Diekemper, *supra* note 5, at 474.

57. See *Mille Lacs*, 526 U.S. at 202-03; *United States v. Dion*, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . ."); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903) (holding that Congress's plenary power encompassed the authority to unilaterally abrogate treaty obligations with tribes). See generally Diekemper, *supra* note 5, at 476-77 (laying out judicial standards for finding abrogation).

58. See *United States v. Wheeler*, 435 U.S. 313, 331 (1978); Mike Townsend, Note, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L.J. 793, 795 (1989). The Court has suggested that plenary power is one justification for congressional power to abrogate Native treaties. *Lone Wolf*, 187 U.S. at 565-66.

59. See *Mille Lacs*, 526 U.S. at 202 ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *Dion*, 476 U.S. at 739-40. See generally Wildenthal, *supra* note 47, at 102-13 (exploring the "competing" canons of construction and the Supreme Court's mandate to "construe federal statutes *not* to abrogate or limit tribal sovereign rights (including but not limited to treaty rights), rather to *preserve* them, unless Congress clearly intended such laws to *limit* such rights").

be “clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”⁶⁰ “Intent is not ‘lightly imputed’ to Congress”⁶¹ as “backhanded” abrogation.⁶² And in case there was any doubt, when these canons are in conflict with other established principles of interpretation, the Indian canons should win out.⁶³

The development of the Indian canons of construction has not, however, been a straight line. At the turn of the twenty-first century, some Supreme Court opinions marked a possible retreat: *Chickasaw Nation v. United States*, for example, expounded that “canons are not mandatory rules” and may be weighed against other considerations and interpretive guideposts.⁶⁴ Other decisions seem to have ignored the canons entirely.⁶⁵ By the mid-1980s and 1990s, scholars expressed concern that, “with the warning that it is always difficult to tell the degree to which canons of construction are being ignored, we might conclude that future statutory construction will tilt less towards the interests of the Indians and the tribes than it has in the past.”⁶⁶ But even then

60. *Dion*, 476 U.S. at 740; see also *Mille Lacs*, 526 U.S. at 202-03 (adopting the *Dion* reasoning).

61. Diekemper, *supra* note 5, at 476 (quoting *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968)).

62. See *Menominee*, 391 U.S. at 412-13.

63. See, e.g., *Idaho v. United States*, 533 U.S. 262, 272-73, 280-81 (2001) (emphasizing that an inferred congressional intent to deal in good faith with the tribe would overcome the presumption in favor of finding state title to land under navigable waters, though not explicitly engaging with the Indian canons); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (finding that the state “fail[ed] to appreciate . . . that the standard principles of statutory construction do not have their usual force in cases involving Indian law”). For a discussion of competing canons and policies, see COHEN’S HANDBOOK, *supra* note 34, § 2.02[3] (concluding that when “the Indian law canons clash with competing canons[,] . . . the Indian law canons, which are rooted in structural, normative values, usually should displace other competing canons”).

64. 534 U.S. 84, 94 (2001). But see *id.* at 102 (O’Connor, J., dissenting) (“Faced with the unhappy choice of determining which part of a flawed statutory section is in error, I would thus rely upon the long-established Indian canon of construction and adopt the reading most favorable to the Nations.”).

65. See COHEN’S HANDBOOK, *supra* note 34, § 2.02[3]; see also, e.g., *Montana v. United States*, 450 U.S. 544, 547-68 (1981) (majority opinion) (failing to even mention the Indian canons of construction in the majority opinion). But in *Montana*, not all of the Justices were willing to set aside the canons without comment. The three-Justice dissent heavily criticized the majority’s “disregard[.]” for “this settled rule of statutory construction,” *id.* at 569 (Blackmun, J., dissenting in part), and Justice Stevens’s concurrence likewise recited the canons (though ultimately declining to apply them to the facts), *id.* at 567-68 (Stevens, J., concurring).

66. William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 21 (1987); see also Jill De La Hunt, Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REFORM 681, 703 (1984) (suggesting that the Court’s decisions by the early 1980s “indicate[d] that the judiciary
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there were exceptions: *County of Yakima v. Confederated Tribes* and then *Mille Lacs* both made efforts to revive the canons.⁶⁷

Herrera represents a return to core principles of treaty interpretation. In 2014, *Michigan v. Bay Mills Indian Community* signaled the Court's willingness to defend essential tenets of tribal sovereignty, though at the time one scholar described the outcome as a "bullet dodged," given the hostile composition of the Court.⁶⁸ Then, just before the *Herrera* decision came down in 2019, *Cougar Den* endorsed an expansive role for the canons.⁶⁹ The Court held that the Yakama Nation Treaty of 1855, which reserved to the Tribe the "right, in common with citizens of the United States, to travel upon all public highways," preempted the state's efforts to tax fuel that was imported onto the reservation by a tribally owned corporation for sale to tribal members.⁷⁰ *Cougar Den* liberally construed the travel provision, adopting an approach in which "the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855."⁷¹ The Court explained that although the phrase "in common with" could be interpreted "to permit application to the Yakamas of general legislation . . . that applies to all citizens, Yakama and non-Yakama alike," the Court had previously "concluded the contrary because that is not what the Yakamas understood the words to mean in 1855."⁷²

Herrera appeared in the midst of this revival and was soon followed by *McGirt*, a landmark decision holding that a large part of Oklahoma reserved to

no longer consider[ed] application of the canons of construction to be a critical aspect of the federal-Indian trust relationship"); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 418-26 (1993) (expressing concern that by the early-1990s the Court had "deflated the power of the Indian law canon" and moved away from constitutional or structural roots).

67. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985))); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), 200; see also COHEN'S HANDBOOK, *supra* note 34, § 2.02[1].

68. See Jacquelyn Amour Jampolsky, *Property, Sovereignty, and Governable Spaces*, 34 LAW & INEQ. 87, 88-90 (2016); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (extending tribal sovereign immunity to off-reservation commercial activities).

69. *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011 (2019) (plurality opinion); *id.* at 1016-19 (Gorsuch, J., concurring in the judgment); see also *infra* notes 176-79 and accompanying text.

70. *Cougar Den*, 139 S. Ct. at 1006-07 (plurality opinion) (quoting Treaty, U.S.-Yakama Nation, art. III, June 9, 1855, 12 Stat. 951).

71. *Id.* at 1011.

72. *Id.* (quoting Treaty, U.S.-Yakama Nation, *supra* note 70, art. III).

the Five Civilized Tribes had never been disestablished by a clear congressional act.⁷³ To some extent, *McGirt* had little to say about the canons. Though the petitioner, Jimcy McGirt, urged the Court to apply the interpretive canons, the Court opted instead to rely solely on traditional principles of statutory interpretation.⁷⁴ Nothing from the decision suggests the Court meant to condemn or even question the Indian canons. Instead, the more likely explanation is simply the strength of the facts before the Court—there was no need to resort to the canons when, given the controversy surrounding the decision, doing so could be perceived as weakening the level of proof.⁷⁵

Ultimately, *McGirt* stands for the importance of finding clear congressional intent before walking back a core tribal interest, albeit in the context of reservation diminishment rather than treaty abrogation⁷⁶: “If Congress wishes to break the promise of a reservation, it must say so.”⁷⁷ More broadly, if courts take seriously the mandate to interpret treaties liberally and as understood by the Natives, then allowing wishy-washy congressional intent to override those interests seems dubious at best. Nothing short of clear congressional intent can override Natives’ understanding and abrogate a treaty.

B. The Uneasy Fit of Treaty Termination Points

The above analysis draws a clear distinction between those canons that apply when courts interpret particular treaty terms and those that apply when courts abrogate (and thus explicitly extinguish) treaty rights. The canons of *interpretation* ask courts to read treaties as they would be understood by Natives and to construe ambiguities liberally in Natives’ favor. Then the canon of *abrogation* requires “clear congressional intent” before a court may find that a

73. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

74. See *id.* at 2468-70. The Court cited the canons almost in the alternative, finding that Oklahoma’s position could not “be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights.” See *id.* at 2470 (citing *Solem v. Bartlett*, 465 U.S. 463, 472 (1984)); see also Brief for Petitioner at 21, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2020 WL 583959 (arguing that “the standard is stricter still because of the ‘canons of construction applicable in Indian law,’ ‘rooted in the unique trust relationship [with] Indians’” (quoting *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985))).

75. See *McGirt*, 140 S. Ct. at 2470 (only briefly alluding to the Indian canons). For insight into the controversy surrounding the decision, see Brief for Respondent at 43-46, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2020 WL 1478582 (catastrophizing a *McGirt* win); Acee Agoyo & Todd York, *Oklahoma Governor Stumbles into Treaty Rights Debate*, *INDIANZ* (July 21, 2020), <https://perma.cc/E3BR-D32W>.

76. See *McGirt*, 140 S. Ct. at 2459 (“Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”).

77. *Id.* at 2462.

treaty right has been terminated. But the divide may not be so well defined. The remainder of this Note analyzes the gray area between interpretation and abrogation when a treaty includes a condition or “termination point” that ostensibly terminates treaty-guaranteed rights and yet is not “abrogation” per se.

Herrera affords the ideal jumping-off point. As discussed immediately above, the Supreme Court has been trending toward a more expansive approach to Native treaty rights, with *Herrera* as the culmination.⁷⁸ To some extent, this more liberal approach to treaty interpretation upsets decades of precedent antagonistic to tribal interests. But the Court made clear in *Herrera* that the logic of prior decisions had been “methodically repudiated” and the canons fully restored.⁷⁹ Any value of stare decisis, such as predictability and consistency, crumbled where, as in the case of Native treaty rights, the Court’s precedents had diverged so far from foundational canons of federal Indian law that continued fidelity to those precedents would “cause more harm than good.”⁸⁰ As for conditional treaty rights in particular, the precedents had little to say anyway. Instead, the Supreme Court’s recent jurisprudence represents a more faithful application of federal Indian law’s long-established canons. Not even the Supreme Court suggests otherwise.

II. *Herrera v. Wyoming*

A. Case Background

In response to heightened hostilities between warring tribes and European settlers moving west, representatives from the Crow Tribe and the United States signed the Second Treaty of Fort Laramie in 1868.⁸¹ The First Treaty of Fort Laramie, signed in 1851, had allocated over 38 million acres of land in the Montana and Wyoming Territories to the Crow people.⁸² The 1868 treaty reduced those lands to only about 8 million acres in present-day Montana,

78. See *supra* Part I.A.

79. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1695 (2019) (giving full force to the Indian canons and explaining that the Court had broken from prior decisions that would erode the permanence of treaty rights).

80. See Blurton, *supra* note 45, at 47-48.

81. See Burton M. Smith, *Politics and the Crow Indian Land Cessions*, MONT., Autumn 1986, at 24, 25, 27-28, 37. For the text of the treaty, see 1868 Treaty with the Crows, *supra* note 4. Other tribes had similar treaties come out of the Fort Laramie negotiations. As one example, see Treaty, Sioux Nation–U.S., Apr. 29, 1868, 15 Stat. 635.

82. See Mitchell, *supra* note 5, at 274 & n.24 (citing Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749); see also Charles D. Bernholz, *Citation Abuse and Legal Writing: A Note on the Treaty of Fort Laramie with Sioux, etc., 1851 and 11 Stat. 749*, 29 LEGAL REFERENCE SERVS. Q. 133 (2010). The First Treaty of Fort Laramie was actually the second treaty between the Crow and United States government, following a friendship treaty in 1825. Treaty, Crow Nation–U.S., Aug. 4, 1825, 7 Stat. 266.

where the Crow Reservation, now even further downsized, is still home to 9,000 of the over 14,000 enrolled tribal members.⁸³ The terms of the 1868 treaty were expansive, including a promise of peace, establishment of the Crow Reservation, provisions for education, and financial compensation.⁸⁴

The 1868 treaty also recognized the Tribe's contemporary and continued reliance on subsistence hunting. Article IV guaranteed the right to hunt:

The Indians herein named agree... 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.⁸⁵

A century and a half later, in 2014, Clayvin Herrera inadvertently tested the bounds of that right. Herrera, a registered member of the Crow Tribe living on the reservation, pursued a herd of elk over the boundary of the Crow Reservation and into Wyoming's Bighorn National Forest.⁸⁶ There, Herrera's unlicensed hunting party shot three elk.⁸⁷ State authorities charged Herrera with two game-related misdemeanors, and a jury convicted him.⁸⁸ Herrera contested his conviction, arguing that he held a right to hunt and kill the elk under Article IV of the Second Treaty of Fort Laramie.⁸⁹

In the 150 years after the 1868 treaty was signed, circumstances changed. First, Wyoming became a state. Congress admitted Wyoming to the Union in 1890 "on an equal footing with the original States in all respects," which some courts mistakenly held to have discredited any prior agreements that would have bound the new state.⁹⁰ The statute granted only those lands expressly

83. See Mitchell, *supra* note 5, at 274.

84. 1868 Treaty with the Crows, *supra* note 4, arts. VII, X.

85. *Id.* art. IV (emphasis added); *The Crow*, BUFFALO BILL CTR. OF THE WEST, <https://perma.cc/V8R6-H2SL> (archived Mar. 29, 2021). Subsistence hunting continues to be critical for many tribal members. See Brief of the Crow Tribe of Indians as Amicus Curiae in Support of Petitioner at 2, *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (No. 17-532), 2018 WL 4381218 ("More than 150 years after the Fort Laramie Treaties were executed, subsistence hunting remains vital and necessary to the Tribe's citizens, who hunt both on the Reservation and off-reservation, including in national forest lands adjacent to the Reservation."). This is true not just of the Crow. See *State v. Tinno*, 497 P.2d 1386, 1392 (Idaho 1972) ("This Court recognized that treaty Indians have subsistence and cultural interests in hunting and fishing that are rooted more deeply than the recreational interests asserted by sportsmen."); *State v. Arthur*, 261 P.2d 135, 142 (Idaho 1953).

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

87. *Id.*; Brief of the Crow Tribe of Indians as Amicus Curiae in Support of Petitioner, *supra* note 85, at 15.

88. Brief for Respondent, *supra* note 13, at 18.

89. See Reply Brief for Petitioner, *supra* note 10, at 1.

90. *Herrera*, 139 S. Ct. at 1693 (quoting Act of July 10, 1890, ch. 664, § 1, 26 Stat. 222, 222).

provided for, and no Native treaty was mentioned.⁹¹ Second, and soon after, President Grover Cleveland established the Bighorn National Forest by presidential proclamation, casting doubt on the meaning of “unoccupied lands.”⁹² Thus, *Herrera* asked whether Wyoming’s admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe’s federal treaty right to hunt on the “unoccupied lands of the United States.”⁹³ If the state’s admission or the park’s establishment did abrogate the right, then *Herrera*’s conviction would stand.⁹⁴

The Wyoming appellate court held that the treaty right to hunt had been abrogated and that *Herrera* was collaterally estopped from asserting it.⁹⁵ After the Wyoming Supreme Court denied review, the United States Supreme Court vacated and remanded the case to the appellate court in 2019.⁹⁶ The Court held in favor of *Herrera*: First, the “Crow Tribe’s hunting rights under the 1868 Treaty remain valid,” and “those rights did not expire when Wyoming became a State in 1890.”⁹⁷ Second, the “Bighorn National Forest did not become categorically ‘occupied’ within the meaning of the 1868 Treaty when the national forest was created.”⁹⁸

Whether the specific site where the elk were hunted was “occupied,” as well as whether Wyoming may regulate the hunting right “in the interest of conservation,” were questions left to be decided on remand.⁹⁹ Rather than resolving those questions on the merits, the Wyoming trial court held that both issues were precluded by *Crow Tribe of Indians v. Repsis*, a prior Tenth Circuit decision holding that the creation of the Bighorn National Forest “occupied” the land for purposes of the Crow treaty.¹⁰⁰ Thus, neither *Herrera*

91. Act of July 10, 1890, § 2, 26 Stat. at 222.

92. See Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897); see also Mitchell, *supra* note 5 at 275.

93. *Herrera*, 139 S. Ct. at 1691-92.

94. See *id.* at 1693.

95. The Wyoming appellate court followed *Race Horse* and *Repsis*, holding that *Mille Lacs* did not overturn either decision. See Mitchell, *supra* note 5, at 280-87. The Supreme Court later found that *Repsis* did not preclude *Herrera* from relitigating the validity of the treaty hunting right. *Herrera*, 139 S. Ct. at 1697-98. Note that the Wyoming court system uses different terminology than the federal system: The circuit court first decided the case before it was appealed to the district court. See Mitchell, *supra* note 5, at 280 n.84.

96. *Herrera v. Wyoming*, No. CV 2016-242 (Wyo. Dist. Ct. Apr. 25, 2017), *review denied*, No. S-17-0129 (Wyo. June 6, 2017), *vacated*, 139 S. Ct. 1686.

97. *Herrera*, 139 S. Ct. at 1694.

98. *Id.* at 1700-01.

99. *Id.* at 1703 (quoting Petition for Writ of Certiorari app. at 39-40, *Herrera*, 139 S. Ct. 1686 (No. 17-532), 2017 U.S. S. Ct. Briefs LEXIS 3885).

100. *Wyoming v. Herrera*, Nos. CT 2014-2687 & CT 2014-2688, slip op. at 32-33 (Wyo. Cir. Ct. June 11, 2020).

nor the rest of the Crow may currently exercise the hunting right in the Bighorn National Forest.¹⁰¹ That decision is pending review by the Wyoming appeals court.

B. Abrogation by Clear Congressional Intent

Herrera conclusively foreclosed implied abrogation by statehood. In the process, it also established that conditional treaty terms—no matter how fleeting they suggest the right may be—do not abrogate the treaty. The Court reaffirmed the congressional-intent canon, asserting that statehood is “irrelevant” to the treaty termination analysis “unless a statehood Act otherwise demonstrates Congress’ clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty.”¹⁰² Echoing *Mille Lacs*, the *Herrera* Court asserted that “[t]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood.”¹⁰³ Neither statehood nor those termination points actually identified in the treaty make the right so “temporary and precarious” as to be abrogated.

In coming to the opposite conclusion, the Wyoming appellate court had relied on *Race Horse*, an 1896 Supreme Court opinion concluding that Wyoming’s statehood extinguished treaty language identical to that in *Herrera* reserving off-reservation hunting rights.¹⁰⁴ *Race Horse* rested on two alternate rationales: first, the “equal footing” doctrine, and, second, the language in the

101. *Id.* On the issue of occupation, the Wyoming trial court found that the Supreme Court in *Herrera* had repudiated the holding of *Repsis* only so far as it relied on the equal footing and temporary and precarious doctrines of *Race Horse*. *Id.* at 30-31. The “alternative basis” of the holding—that the forest is occupied because it is “no longer available for settlement” and no one could “timber, mine, log, graze cattle, or homestead on these lands without federal permission”—remains valid, at least as applied to the Crow. See *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 993 (10th Cir. 1995), *abrogation recognized by Herrera*, 139 S. Ct. 1686. The Crow Tribe has since moved to vacate *Repsis*. Plaintiff’s Memorandum in Support of Motion for Partial Relief from Judgment at 1-2, *Crow Tribe of Indians v. Repsis*, No. 92-cv-01002 (D. Wyo. Jan. 27, 2021), ECF No. 70.

102. *Herrera*, 139 S. Ct. at 1696.

103. *Id.* at 1696-97 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999)).

104. *Ward v. Race Horse*, 163 U.S. 504, 507, 514, 516 (1896), *abrogation recognized by Herrera*, 139 S. Ct. 1686. The Bannock Treaty at issue in *Race Horse* states that the Tribe “shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.” *Id.* at 507 (quoting Treaty, Eastern Band of the Shoshonee Nation et al.—U.S., art. IV, July 3, 1868, 15 Stat. 673).

treaty being “temporary and precarious.”¹⁰⁵ The Court rejected the Tribe’s assertion of a “perpetual” right, holding that the conditional “nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration.”¹⁰⁶

Though the rationale of *Race Horse* has been heavily criticized by both scholars and courts, the Wyoming court in *Herrera* was not alone in relying on this flawed precedent.¹⁰⁷ In 1995, the Tenth Circuit in *Repsis* answered the same question that reappeared decades later in *Herrera*: whether the Crow’s hunting right survived the admission of Wyoming into the Union and the creation of the Bighorn National Forest.¹⁰⁸ The Tenth Circuit, however, came to a different result. While “perpetual” rights are subject only to “reasonable and necessary” conservation regulations, conditional “temporary and precarious” rights in the vein of *Race Horse* are impliedly terminated at statehood and may thus be regulated outright by the state.¹⁰⁹ Describing *Race Horse* as “compelling, well-reasoned, and persuasive,” *Repsis* revived those assumptions “conclusively established” by *Race Horse*: (1) “the right to hunt [upon the] unoccupied lands of the United States so long as game may be found thereon, . . . reserved a temporary right which was repealed with Wyoming’s admission into the Union,” and (2) “the lands of the Big Horn National Forest have been ‘occupied’ since the creation of the national forest in 1887.”¹¹⁰ Applying those principles, the Tenth Circuit ultimately held that the “Tribe and its members are subject to the game laws of Wyoming” notwithstanding any treaty guarantees.¹¹¹

105. *Race Horse*, 163 U.S. at 512-16. Disentangling the two lines of reasoning may be impossible: The Court’s finding of error rested “on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious,” which stemmed from both the act of statehood and the creation of the Yellowstone Park Reservation. *Id.* at 509-15. However, *Herrera* clearly separated the two theories, and so this Note proceeds under the most recent analysis by the Court. See *Herrera*, 139 S. Ct. at 1694-95.

106. *Race Horse*, 163 U.S. at 515.

107. See Steven E. Silvern, *State Centrist, the Equal-Footing Doctrine, and the Historical-Legal Geographies of American Indian Treaty Rights*, 30 HIST. GEOGRAPHY 33, 51 (2002) (“Tribes and attorneys specializing in Indian law thought that *Race Horse* and the equal-footing doctrine had been so criticized by the courts that they would never be used in treaty hunting- or fishing-rights cases ever again. But, in the 1995 case of *Crow v. Repsis*, the equal-footing doctrine would resurface once again and would be accepted by a federal appeals court.”).

108. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 985-86, 991-93 (10th Cir. 1995), *abrogation recognized by Herrera*, 139 S. Ct. 1686.

109. *Id.* at 991-93 (first quoting *Race Horse*, 163 U.S. at 515; and then quoting *Dep’t of Game v. Puyallup Tribe*, 414 U.S. 44, 45 (1973)).

110. *Id.* at 994 (quoting *Race Horse*, 163 U.S. at 504).

111. *Id.*

Despite the Tenth Circuit's insistence that "there is nothing to indicate that *Race Horse* has been 'overruled, repudiated or disclaimed,'"¹¹² the Supreme Court had undermined the principles of both equal footing and "temporary and precarious" rights even before *Mille Lacs* and *Herrera*.¹¹³ After *Herrera*, the Court has unquestionably repudiated both rationales of *Race Horse*, leaving only the clear intent of Congress as a possible avenue for abrogation.

1. "Equal footing"

The first theory of implied abrogation by statehood posits that new states must be admitted on "equal footing" with existing states and with equal power to legislate.¹¹⁴ Wyoming is no exception: Congress admitted Wyoming to the Union in 1890 "on an equal footing with the original States in all respects whatever."¹¹⁵ Thus—according to *Race Horse*—tribal hunting rights surviving statehood would be "irreconcilably in conflict" with those powers "vested in all the other States of the Union" to "regulate the killing of game within their borders."¹¹⁶ Though it would still be possible for the United States to create a binding right that survives statehood, "in order for such a right to be binding on the state, it must be a continuing or perpetual right—a right that is intended at its formation to be continuing against the United States and its grantees, including the state."¹¹⁷ The Court in *Race Horse*, later echoed by the Tenth Circuit in *Repsis*, was not satisfied that the hunting right was intended to last in perpetuity.¹¹⁸

112. *Id.*

113. See *infra* Parts II.B.1-2.

114. Though the Framers at the 1787 Constitutional Convention struck down a proposal to formalize that "new states shall be admitted on the same terms with the original states," congressional policy was to admit states on equal standing. See 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 492-93 (Jonathan Elliot ed., Philadelphia, J. B. Lippincott & Co. 2d ed. 1891); Valerie J. M. Brader, *Congress' Pet: Why the Clean Air Act's Favoritism of California Is Unconstitutional Under the Equal Footing Doctrine*, 13 HASTINGS W.-NW. J. ENV'T L. & POL'Y 119, 128-36 (2007). In 1845 the Supreme Court constitutionalized the practice. See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223, 228-29 (1845). For another decision applying the equal-footing doctrine, see *Shively v. Bowlby*, 152 U.S. 1, 26-30 (1894).

115. Act of July 10, 1890, ch. 664, § 1, 26 Stat. 222, 222.

116. *Ward v. Race Horse*, 163 U.S. 504, 509, 514 (1896), *abrogation recognized by Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

117. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 991 (10th Cir. 1995), *abrogation recognized by Herrera*, 139 S. Ct. 1686.

118. *Race Horse*, 163 U.S. at 515-16; *Repsis*, 73 F.3d at 992 (rejecting "the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious" (quoting *Race Horse*, 163 U.S. at 515)).

By the time *Herrera* came on the scene, numerous cases had repudiated the equal-footing doctrine.¹¹⁹ With the anomalous exception of *Race Horse*, the equal-footing doctrine as applied to Native treaties had a remarkably short life, from its creation in the 1890s to its destruction in the early twentieth century.¹²⁰ The Supreme Court stressed in *Mille Lacs* that it had “consistently rejected” the “conclusion undergirding the *Race Horse* Court’s equal footing holding.”¹²¹ *Race Horse*’s flawed analysis rested on the “erroneous conclusion” that “the Indian treaty rights were inconsistent with state sovereignty over natural resources.”¹²² Later cases undermined this faulty premise.¹²³ Finally, in *Herrera*, the Supreme Court once again rejected the equal-footing doctrine.¹²⁴ Even the Wyoming appellate court that heard *Herrera* made no attempt to revive the logic and rested its conclusion on other grounds, as discussed immediately below in Subpart 2.¹²⁵

2. “Temporary and precarious”

The Wyoming appellate court adopted the second interrelated rationale of *Race Horse*, finding the “temporary and precarious” doctrine was “alive and well.”¹²⁶ The Supreme Court had previously disagreed in *Mille Lacs* and would

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119. The Wyoming appellate court reviewing *Herrera* acknowledged that the “so called ‘equal footing’ doctrine has subsequently been rejected by numerous cases.” *Herrera v. Wyoming*, No. CV 2016-242, slip op. at 11 (Wyo. Dist. Ct. Apr. 25, 2017), *review denied*, No. S-17-0129 (Wyo. June 6, 2017), *vacated*, 139 S. Ct. 1686; *see also* Mitchell, *supra* note 5, at 276 n.46.
120. In 1896 the Court issued a series of opinions extending the equal-footing doctrine to Indian affairs, though they were walked back by 1905. *See* *Draper v. United States*, 164 U.S. 240, 246-47 (1896); *Race Horse*, 163 U.S. at 514-16; *United States v. Winans*, 198 U.S. 371, 382-83 (1905) (rejecting the argument that the treaty fishing right was repealed upon Washington’s statehood); *see also* Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 694 n.376 (2018).
121. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999); *see also* *Herrera*, 139 S. Ct. at 1695 (“[I]n addressing the effect of the Minnesota Statehood Act on the Chippewa Treaty right, the *Mille Lacs* Court entirely rejected the ‘equal footing’ reasoning applied in *Race Horse*.”).
122. *Herrera*, 139 S. Ct. at 1696 (quoting *Mille Lacs*, 526 U.S. at 207-08) (discussing *Race Horse* and the treatment of the decision in *Mille Lacs*).
123. *Mille Lacs* found that *Race Horse* rested on a “false premise” because “treaty rights are reconcilable with state sovereignty over natural resources.” *Mille Lacs*, 526 U.S. at 204-05. Thus, statehood alone is “insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries.” *Id.* at 205.
124. *Herrera*, 139 S. Ct. at 1696.
125. *Herrera v. Wyoming*, No. CV 2016-242, slip op. at 11 (Wyo. Dist. Ct. Apr. 25, 2017), *review denied*, No. S-17-0129 (Wyo. June 6, 2017), *vacated*, 139 S. Ct. 1686 (2019).
126. *Id.* (quoting *Ward v. Race Horse*, 163 U.S. 504, 515 (1896), *abrogation recognized by* *Herrera*, 139 S. Ct. 1686).

eventually disagree in *Herrera*.¹²⁷ Assumptions that a treaty right may not last in perpetuity, even where treaty conditions suggest the right may be provisional, do not create self-executing abrogation.¹²⁸

According to *Race Horse*, treaty rights not expressly provided for in the state's enabling act could survive statehood only if the rights are "of such a nature as to imply their perpetuity."¹²⁹ Though the Court paid lip service to the canons of construction that require courts to construe ambiguities liberally in favor of Natives, the Court "declined to follow" them.¹³⁰ *Race Horse* instead determined that the treaty right was "essentially perishable" and only "temporary and precarious" because Congress "clearly contemplated the disappearance of the conditions" laid out in the treaty.¹³¹ To get to this conclusion, the Court in *Race Horse* combined various unrelated treaty conditions such that the hunting right was so qualified by the conditional language that statehood—though not discussed in the treaty text or during negotiations—abrogated the treaty right entirely.¹³² In sum, the right was so worn down by unrelated conditions of occupation, game, and peace that it did not survive statehood.

127. See *infra* notes 140-49 and accompanying text.

128. Even before *Mille Lacs*, the Seventh Circuit upheld the durability of off-reservation usufructuary rights that were (1) limited by conditional language "during the pleasure of the President of the United States," and (2) "conceived pursuant to a policy of 'removal'" and thus pursuant to assumptions that the Natives and their rights would inevitably disappear. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 355-57 (7th Cir. 1983) (first quoting Treaty, Chippewa Nation–U.S., art. 5, July 29, 1837, 7 Stat. 536). The court held that these "non-permanent" rights cannot be "abrogated by a less explicit showing of intent than permanent treaty-recognized rights." *Id.* at 355. *Mille Lacs* later adopted this approach. 526 U.S. at 206-07.

129. *Race Horse*, 163 U.S. at 515.

130. See *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995) (describing the Court's approach in *Race Horse*), *abrogation recognized by Herrera*, 139 S. Ct. 1686; see also Brief of Amici Curiae Indian Law Professors in Support of Petitioner at 14, *Herrera*, 139 S. Ct. 1686 (No. 17-532), 2018 WL 4405432 ("Both *Race Horse* and *Repsis* interpreted Indian treaties to resolve ambiguities against the tribes involved.").

131. *Race Horse*, 163 U.S. at 509, 515.

132. *Id.* at 507-10; see also *Herrera*, 139 S. Ct. at 1705 (Alito, J., dissenting) (characterizing *Race Horse* as concluding that the right was "temporary and precarious" because "it depended on the continuation of several conditions, including at least one condition wholly within the control of the Government—continued federal ownership of the land" (quoting *Race Horse*, 163 U.S. at 515)); see also Brief of Amici Curiae Indian Law Professors in Support of Petitioner, *supra* note 130, at 15 ("While the parties to the treaty may have understood that the treaty language conditioned the tribal hunting rights on certain circumstances—'unoccupied land,' the presence of game, peace—the *Race Horse* Court combined those terms to concoct its own understanding of the treaty, which denigrated those rights without regard for the parties' intent or the tribal interests at stake.").

Almost immediately after *Race Horse*, however, the Supreme Court began to challenge its holding. In 1905, *Winans* articulated the “reserved rights” doctrine that “the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”¹³³ Rather than a temporary privilege, the Yakamas’ fishing right was held to be “continuing against the United States.”¹³⁴ Soon thereafter, in *Winters*, the Court read the 1888 treaty creating the Fort Belknap Reservation as impliedly reserving water rights along with any reserved land.¹³⁵ *Winters* rejected the contentions that the treaty was abrogated by Montana’s admission to the Union and that the treaty rights should be deemed temporary.¹³⁶ Emphasizing that the treaty rights were to be “necessarily continued through years,” the Court found “extreme” the contention that, “within a year” of treaty signing, “Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.”¹³⁷ Later decisions continued to recognize the durability of treaty-guaranteed rights. *Fishing Vessel*, for example, held that a compact between the United States and Canada agreeing to equally divide the Fraser River salmon catch did not “implicitly extinguish” the fishing rights of the tribes involved in the dispute.¹³⁸ Even then, some lower courts continued to rely on *Race Horse*. For example, in 1995 the Tenth Circuit in *Repsis* applied the framework from *Race Horse* to facts identical to *Herrera*, as discussed above.¹³⁹ The court held that the Crow Tribe’s right to hunt was “temporary” and thus repealed by Wyoming’s statehood.¹⁴⁰

The Supreme Court’s more recent jurisprudence expressly disclaims the “temporary and precarious” approach. Rejecting that framework, *Mille Lacs* found that Minnesota’s statehood did *not* repudiate the hunting treaty right, as the courts had found in *Race Horse* and *Repsis*.¹⁴¹ Given that Congress may

133. See *United States v. Winans*, 198 U.S. 371, 380-82 (1905).

134. *Id.* at 381-82.

135. *Winters v. United States*, 207 U.S. 564, 575-76 (1908).

136. *Id.* at 577-78.

137. *Id.* at 577.

138. *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979).

139. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 994 (10th Cir. 1995), *abrogation recognized by Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

140. *Id.* at 992, 994. The Tenth Circuit also found that the “creation of the Big Horn National Forest resulted in the ‘occupation’ of the land.” *Id.* at 993.

141. As *Herrera* explained, the *Mille Lacs* Court “observed that *Race Horse* could be read to suggest that treaty rights only survive statehood if the rights are ‘of such a nature as to imply their perpetuity,’ rather than ‘temporary and precarious.’ The Court rejected such

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unilaterally terminate any treaty right as long as it does so explicitly, in a sense all treaty rights may be temporary and are certainly precarious.¹⁴² With that understanding, the Court declared the “temporary and precarious” language to be “too broad to be useful.”¹⁴³ As characterized by *Herrera*, the *Mille Lacs* Court “rejected such an approach.”¹⁴⁴

Mille Lacs and *Herrera* mark the continued vitality of the “congressional intent canon,” requiring that Congress “clearly express” its intent to abrogate treaty rights. The Court reversed course after *Race Horse*, where the treaty right was found to have been abrogated despite the absence of any express language to that effect in the treaty or in the congressional act admitting Wyoming as a state.¹⁴⁵ *Mille Lacs* repudiated the doctrine of termination by implication: “Treaty rights are not impliedly terminated upon statehood.”¹⁴⁶ According to *Mille Lacs*, “Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.”¹⁴⁷ The Court further renewed the classic rule that “Indian treaties are to be interpreted liberally in favor of the Indians and that any ambiguities are to be resolved in their favor.”¹⁴⁸ *Herrera* reaffirmed that principle: “There must be ‘clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.’”¹⁴⁹ The Court in *Herrera* also reiterated the canons of construction that Native treaties “must be interpreted in light of the parties’ intentions, with any

an approach.” *Herrera*, 139 S. Ct. at 1696 (citation omitted) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999)). The treaty in *Mille Lacs* guaranteed bands of Chippewa Indians the right to hunt and fish on ceded lands “during the pleasure of the President,” and the Court ultimately found that the right survived the statehood of Minnesota. *Mille Lacs*, 526 U.S. at 177, 208 (quoting Treaty, Chippewa Nation–U.S., art. 5, July 29, 1837, 7 Stat. 536).

142. See *Mille Lacs*, 526 U.S. at 206-07.

143. *Id.* at 206; see also *Herrera*, 139 S. Ct. at 1696 (nodding to *Mille Lacs*).

144. *Herrera*, 139 S. Ct. at 1696 (“In sum, *Mille Lacs* upended both lines of reasoning in *Race Horse*.”).

145. See *supra* notes 126-31 and accompanying text.

146. *Mille Lacs*, 526 U.S. at 207.

147. *Id.* at 202-03 (not finding such clear evidence of congressional intent in the admission of Minnesota to the Union).

148. *Id.* at 200 (citation omitted). Chief Justice Rehnquist observed in dissent that under the treaty language, the Tribe “fully and entirely relinquish and convey to the United States, any and all right, title and interest . . . which they now have in, and to any other lands in the Territory of Minnesota or elsewhere.” *Id.* at 217 (Rehnquist, C.J., dissenting) (quoting Treaty, Chippewa Nation–U.S., art. I, Feb. 22, 1855, 10 Stat. 1132). However, the majority found in favor of the Chippewa even if silence created “plausible ambiguity.” *Id.* at 200 (majority opinion).

149. *Herrera*, 139 S. Ct. at 1698 (quoting *Mille Lacs*, 526 U.S. at 202-03).

ambiguities resolved in favor of the Indians,” and that terms must be construed “in the sense in which they would naturally be understood by the Indians.”¹⁵⁰

By disavowing *Race Horse*, the Supreme Court has firmly established that unexpressed assumptions about the expiration of a treaty right are insufficient to abrogate that right. Something more is required before a conditional treaty right may be terminated: Treaty rights cannot be terminated by implication merely because they are seemingly temporary and precarious. This low bar of congressional intent is insufficient. The Court clearly enumerated what conditions would be required: Rather than statehood alone, which is “irrelevant,” the analysis requires that either a statute “demonstrates Congress’ clear intent to abrogate a treaty[] or statehood appears as a termination point in the treaty.”¹⁵¹ Notably, the Court left open the possibility that termination points could act to abrogate the right, though it has not established clear principles to guide that analysis.

III. Conditional Treaty Rights After *Herrera*

Ostensibly, only Congress has the power to abrogate Native treaties and only when it does so explicitly.¹⁵² In practice, however, the line between abrogation and interpretation has blurred. The first question in *Herrera*—whether statehood impliedly abrogated the off-reservation hunting right—satisfied the first element (because the Court found congressional action) but not the second (because the Court rejected implicit abrogation).¹⁵³ The second issue—whether the Bighorn National Forest remained “unoccupied”—raised a critical, unanswered question of Native treaty interpretation. What happens in those instances in which treaty language or changed circumstances suggests a Native treaty right may no longer be valid, but Congress has not spoken? Is treaty language alone enough?

Subpart A argues that termination of guaranteed rights by the terms of a treaty itself should be guided by the Indian canons of both abrogation and interpretation. Even where there is some evidence of congressional intent in the treaty language, intent to terminate the right must still be clear. When courts make determinations about congressional intent to abrogate treaties, they should interpret treaties liberally and as the Natives understood them, resolving ambiguities in the Natives’ favor.

150. *Id.* at 1699 (first quoting *Mille Lacs*, 526 U.S. at 206; and then quoting *Washington v. Wash State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979)).

151. *Id.* at 1696.

152. *See supra* notes 57-63 and accompanying text.

153. *See Herrera*, 139 S. Ct. at 1696-98.

Subpart B explores specific termination points identified in the language of treaties themselves. This Subpart focuses on circumstances relevant to the off-reservation hunting right at issue in *Herrera*, namely (1) unoccupied lands, (2) on which game may be found, (3) while peace persists.¹⁵⁴ The threshold inquiry into whether those conditions establish that Congress has expressed its intent clearly and explicitly calls for interpretation. Defining when those conditions are satisfied should thus entail faithful adherence to the protective canons of construction.

Finally, Subpart C looks at claims of changed circumstances. Without specific textual evidence of congressional intent, decisions based on changed circumstances amount to implied abrogation, an approach soundly rejected by *Herrera* and *Mille Lacs*.¹⁵⁵ Accordingly, changed circumstances should also be rejected as a basis for termination.

A. Abrogation Principles and Termination Conditions

Abrogation of treaty rights requires “clearly expressed” congressional intent.¹⁵⁶ But what qualifies as abrogation is less certain. Termination points identified in a treaty may extinguish a right, at least in some qualified respect.¹⁵⁷ But courts have not considered termination points to be a matter of abrogation. Instead, conditional rights seem to be a matter of treaty interpretation with implications for whether the right is preserved, rather than a matter of abrogation requiring clear congressional intent. This Subpart argues that if tribes are to be stripped of their reserved rights, the bar for termination should not be lowered. Courts should use a light touch and narrowly interpret treaty conditions by both applying the Indian canons of construction and requiring clearly expressed intent.

154. The Second Treaty of Fort Laramie provides that the Crow “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.” *Id.* at 1693 (quoting 1868 Treaty with the Crows, *supra* note 4, art. IV). A fourth condition is that the land no longer belongs to the United States, but such a scenario is outside the scope of this Note. *Id.* at 1699.

155. *See id.* at 1696 (reinforcing the conclusion of *Mille Lacs* that “the treaty termination analysis turns on the events enumerated in the ‘Treaty itself’” and disavowing that the treaty was “impliedly repealed” (quoting *Mille Lacs*, 526 U.S. at 207)).

156. *See supra* notes 56-61 and accompanying text; *see also Mille Lacs*, 526 U.S. at 202. Before *Mille Lacs*, the standard for abrogation was much more malleable, seemingly preferring but not requiring that Congress be explicit. *See Newhouse, supra* note 35, at 192-93.

157. After all, had the Bighorn National Forest been “occupied,” the Crow would have lost their hunting right on those lands. *See Herrera*, 139 S. Ct. at 1700-01. But the extent of that loss as well as whether it could be recovered (say, if the forest became unoccupied) were not answered by the Court. *See id.* at 1700-03.

Before *Herrera*, some courts held explicitly that termination does not constitute abrogation and applied an approach reminiscent of *Race Horse's* discredited “temporary and precarious” doctrine. In 1984, for instance, a Washington district court concluded in *United States v. Hicks* that the Quinaltuls’ treaty-guaranteed hunting right on “open and unclaimed” lands was terminated by the establishment of Olympic National Park.¹⁵⁸ This conclusion likely did not survive *Herrera*, but the *Hicks* court’s underlying rationale warrants additional scrutiny.¹⁵⁹ *Hicks* held that the “concept of abrogation does not apply to the Treaty hunting provision which by its terms is self-limiting.”¹⁶⁰ The court distinguished limited termination from abrogation as a whole, reasoning that “[b]ecause the diminishment of ‘open and unclaimed’ land was contemplated during the time the Treaty was signed, there can be no abrogation of the ‘privilege of hunting,’ although it may terminate on certain lands.”¹⁶¹ According to the Washington court, only an “absolute right” not assumed to be temporary requires specific abrogation.¹⁶²

The Supreme Court has not explicitly endorsed the *Hicks* approach, although in practice it takes a similar tack. In *Herrera*, for example, the Court bifurcated its analysis: Statehood could abrogate the treaty if there had been a later congressional action, but any treatment of “abrogation,” and a requirement of clear congressional intent, disappeared when discussing conditions such as occupation.¹⁶³ Other courts have taken the same approach.¹⁶⁴ Yet the underlying rationale has changed. After *Mille Lacs*, treaty conditions do not make the right “temporary and precarious.” But the Court

158. *United States v. Hicks*, 587 F. Supp. 1162, 1163 (W.D. Wash. 1984) (quoting Treaty, Qui-nai-elt Nation et al.-U.S., art. III, Jan. 25, 1856, 12 Stat. 971).

159. The facts of *Hicks* are sufficiently comparable to those of *Herrera* that, by analogy, the establishment of a national park may not cause land to cease to be “open and unclaimed” if they are not “occupied.” For a discussion of the similar treatment of these two treaty provisions, see note 203 and accompanying text below. Echoing *Race Horse*, *Hicks* is further marred by a faulty rationale that the presence of treaty-termination points suggest the right was assumed to be temporary and is thus defeasible. See *Hicks*, 587 F. Supp. at 1164-65.

160. *Hicks*, 587 F. Supp. at 1165.

161. *Id.*

162. See *id.* at 1164-65.

163. Compare *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019) (requiring Congress to “clearly express its intent” for statehood to abrogate the hunting right (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 202 (1999))), with *id.* at 1700-03 (disclaiming any need for clear congressional intent when inquiring whether the land was occupied under treaty terms). Though, of course, the Court moved away from the *Race Horse* “temporary and precarious” approach.

164. See *State v. Cutler*, 708 P.2d 853, 857-59 (Idaho 1985); *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977).

has not replaced the defunct rationale of *Hicks* with anything else justifying the differential treatment between abrogation and termination.

Instead of applying a lower standard of congressional intent, courts should narrowly interpret these treaty conditions. Well-established principles support this approach. First, determining whether an ambiguous condition has been met is inherently fraught. The Indian canons definitively instruct that nineteenth-century treaty language produced under coercion and over a language barrier should be liberally construed in favor of tribal interests. Faithful adherence to the Indian canons is necessary to ensure that before any rights are extinguished, termination conditions have been met as understood by the Natives and as intended by Congress. Second, and relatedly, the fact that these conditions were couched in terms of nineteenth-century expectations that Natives would disappear is—after *Mille Lacs* and *Herrera*—no longer a valid basis to find the rights to be “temporary and precarious.” Contrary to the Indian canons, those expectations almost always belonged to the federal government rather than the Natives. Third, conditions change. A condition may lapse and extinguish the treaty right, only to reoccur later. And yet if the right is terminated, to then claw back a court decision is often a significant if not insurmountable hurdle.

The practical effects of “termination” and “abrogation” are the same. Treaty rights terminated once some treaty condition has been fulfilled are just as defunct as those that have been expressly abrogated. The same principles should apply. *Hicks’s* distinction between a “privilege” and an “absolute right” is a false one rejected by the courts.¹⁶⁵ Allowing treaty termination without clear congressional intent—even where there is some textual hook—would repeat the mistakes of *Race Horse*.¹⁶⁶ Courts would risk reading into the text nineteenth-century assumptions that Native peoples and their treaty rights would completely disappear, despite centuries of evidence to the contrary. “Temporary and precarious” treaty language is no longer a valid basis for terminating those rights, and conditional language should not replace it.

Theoretically, there is one key difference between conditional termination and abrogation: While abrogated rights cannot be recovered, there is no reason a right that lapsed due to the failure of a treaty condition could not be restored

165. See *United States v. Winans*, 198 U.S. 371, 377, 381 (1905) (asserting that the “treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted”); *State v. Miller*, 689 P.2d 81, 84 (Wash. 1984) (en banc) (finding that “the *Byrd* court’s implication that a treaty ‘privilege’ somehow reserves less to the Indians than a treaty ‘right’ is in direct conflict with the canons of construction applicable to Indian treaties”); see also Holt, *supra* note 3, at 209 (“There is no substantial difference between reserved ‘rights’ and ‘privileges’ in Indian treaties, despite the distinction drawn by the *Hicks* court.”).

166. *Ward v. Race Horse*, 163 U.S. 504 (1896), *abrogation recognized by Herrera*, 139 S. Ct. 1686.

if that condition were to reoccur. If the game were to disappear but then be reintroduced, or peace were to be broken but then return, the treaty right could likewise survive.¹⁶⁷ This is far from conjecture. There have been no Indian wars in over a century, and bison and other game have returned to much of the range. Peace returned, as has the game. Yet no court has ever held that a right was recovered because of the reoccurrence of some treaty condition.¹⁶⁸ The theoretical potential that a right is recoverable without a real difference in practical effect should not so distinguish conditional termination from abrogation that the principles of clear congressional intent do not apply in the termination analysis.

Moreover, termination could be even worse for the tribe. While the abrogation of hunting, fishing, and gathering rights is a Fifth Amendment taking requiring just compensation, a no-fault termination may not meet that standard.¹⁶⁹

Finally, some broken treaty conditions are the fault of the state or federal government. For example, an environmental policy exterminating the game in a region or the U.S. Army acting as the aggressor against Indigenous populations would each qualify as a fault of the state.¹⁷⁰ Allowing the government to escape its treaty obligations without “clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty,” resembles implied, backhanded abrogation rejected by the courts.¹⁷¹

To some extent, whether clear congressional intent is required may not matter. The Senate ratified Native treaties and in so doing put its stamp of approval on the text and conditional language. “Clear congressional intent” may thus be established without additional evidence. Rather than myopically

167. See *infra* notes 204-12, 228-232, 275 and accompanying text.

168. I have not been able to identify an example where a court has held that a right could be recovered. Analogy to contract law could further suggest that the right is not recoverable if the parties intended the language to be a condition and breach of that condition is material to the agreement. See Curtis J. Mahoney, Note, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 827 (2007) (arguing that contract law should guide the canons of treaty interpretation).

169. See COHEN’S HANDBOOK, *supra* note 34, § 18.07[1]. The viability of takings claims for the termination of conditional treaty rights is less clear. *Hicks* has been criticized for “sanction[ing] de facto treaty abrogation without just compensation.” See Holt, *supra* note 3, at 208-09, 251-53. But Holt draws a distinction where, on the one hand, “the treaties reserved a compensable property right in lands where the Indians traditionally had carried out the specified activities,” while, on the other hand, “the United States has no duty to retain ownership of open and unclaimed lands or to maintain treaty period population levels of game animals.” *Id.* at 221-22.

170. See *infra* Parts III.B.2-.3.

171. See *United States v. Dion*, 476 U.S. 734, 740 (1986).

accept a superficial reading, courts should use a light touch and defer to the political branches when deciding whether ambiguous phrases such as “unoccupied” or “game may be found thereon” have been satisfied.

In sum, the canons of both abrogation and interpretation work in lockstep to ensure that Congress clearly intended that the treaty right be terminated upon satisfaction of certain conditional language. These principles are further supported and applied in the following two Subparts, which explore express treaty language as well as changed circumstances that could act as termination points of the off-reservation hunting treaty right.

B. Express Treaty Language

Though the “temporary and precarious” framework has been disavowed, *Herrera* and *Mille Lacs* left open the possibility that language in the treaty itself could repudiate the treaty right so long as “Congress has *expressly abrogated* an Indian treaty right or . . . a termination point *identified in the treaty itself* has been satisfied.”¹⁷² Where a “treaty ‘itself defines the circumstances under which the rights would terminate,’” the Court must look to those circumstances when determining if those rights have been repudiated.¹⁷³

Even where the treaty language explicitly identifies termination points, the inquiry as to whether those conditions have been met is not open-and-shut. Courts should not ignore inherent ambiguity. When interpreting Native treaties, courts “look beyond the written words to the larger context that frames the Treaty, including ‘the history of the treaty, the negotiations, and the practical construction adopted by the parties.’”¹⁷⁴ The interpretive canons should guide that analysis, and recent Supreme Court decisions provide a model.¹⁷⁵ *Cougar Den*, as one example, held that the State of Washington could not tax the Yakamas for importing fuel by public roadway.¹⁷⁶ The Court credited the Yakamas’ understanding of language reserving the right “to travel upon all public highways” to include travel with goods for sale.¹⁷⁷ But if context were blindly ignored, such language could appear unambiguous and

172. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019) (emphasis added).

173. *Id.* at 1699 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999)).

174. *Mille Lacs*, 526 U.S. at 196 (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943)).

175. See *Herrera*, 139 S. Ct. at 1698-1702; *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011-13 (2019) (plurality opinion); *Mille Lacs*, 526 U.S. at 196-200.

176. *Cougar Den*, 139 S. Ct. at 1015-16 (plurality opinion).

177. *Id.* at 1011.

thus out of the reach of the protective canons.¹⁷⁸ Rather than divorce language from its historical context, the Court's approach instructs a more faithful application of the protective canons.¹⁷⁹ This is particularly true when textual interpretation implicates those conditions that could nullify treaty rights. Established Supreme Court precedent holding that congressional intent to abrogate treaty rights must be express does not evaporate merely because the repudiation appears in ill-defined treaty conditions.

In both *Mille Lacs* and *Herrera*, statehood was not one of those events contemplated in the treaty in dispute.¹⁸⁰ However, the treaties did identify events that would terminate the hunting right. In *Herrera*, three contemplated situations relevant to this Note were that "(1) the lands are no longer 'unoccupied'; ... [2] game can no longer 'be found thereon'; and [3] the Tribe and non-Indians are no longer at 'peace... on the borders of the hunting districts.'"¹⁸¹ The Crow treaty is far from unique—nineteen other tribes have reserved off-reservation hunting or usufructuary rights by almost identical language.¹⁸² This Subpart explores these conditions and the application of the Indian canons of construction.

178. See *id.* at 1016 (Gorsuch, J., concurring in the judgment) ("To some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else. But that is not how the Yakamas understood the treaty's terms." (citation omitted)).

179. See *id.* at 1011-12 (majority opinion); see also *supra* Part I.A.

180. *Herrera*, 139 S. Ct. at 1699; *Mille Lacs*, 526 U.S. at 207.

181. *Herrera*, 139 S. Ct. at 1699 (quoting 1868 Treaty with the Crows, *supra* note 4, art. IV). The numbering above the line has been adjusted to account for the omission of the condition that "the lands no longer belong to the United States." *Id.* In this case, the United States would no longer have jurisdictional power, in which case the consequences are beyond the scope of this Note.

182. See Brief for Petitioner at 20, *Herrera*, 139 S. Ct. 1686 (No. 17-532), 2018 WL 4293381 (citing those treaties that refer to "unoccupied, open, or unclaimed lands"); see, e.g., Treaty, Navajo Nation–U.S., art. IX, June 1, 1868, 15 Stat. 667 (reserving "the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase"); Treaty, Eastern Band of the Shoshonee Nation et al.–U.S., *supra* note 104, art. IV (reserving "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts"); Treaty, Qui-nai-elt Nation et al.–U.S., *supra* note 158, art. III (reserving "the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands"); Treaty, Flathead Nation et al.–U.S., art. III, July 16, 1855, 12 Stat. 975 (reserving "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); Treaty, Nez Percé Nation–U.S., art. III, June 11, 1855, 12 Stat. 957 (same); Treaty, U.S.–Yakama Nation, art. III, June 9, 1855, 12 Stat. 951 (same); Treaty, U.S.–Walla-Walla Nation et al., art. I, June 9, 1855, 12 Stat. 945 (reserving "the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens"); Treaty, Makah Nation–U.S., art. IV, Jan. 31, 1855, 12 Stat. 939 (reserving "the privilege of hunting and gathering roots and berries on open and unclaimed lands"); Treaty,
footnote continued on next page

1. “Unoccupied lands”

Herrera held that neither Wyoming’s statehood nor the establishment of the Bighorn National Forest categorically occupied the land so as to extinguish the tribe’s hunting right.¹⁸³ Whether the particular site within the forest where *Herrera* killed an elk was in fact unoccupied was not decided.¹⁸⁴ These determinations—what occupation actually means, and whether that bar has been met—should be analyzed using robust Indian canons of construction.

Courts have emphatically applied the canons when interpreting tribal hunting and fishing rights. First, before finding a hunting right to be defeasible, state and federal courts must determine that the tribes would have understood the treaty right to conflict irreconcilably with any potential settlement or occupation.¹⁸⁵ Second, the meaning of “unoccupied” (or other similar language) must be construed liberally in favor of the tribes as they would have understood the right.¹⁸⁶

Most recently, *Herrera* reaffirmed the application of the canons in this context. In determining whether the Bighorn National Forest had been categorically occupied, the Court instructed that the treaty terms be construed as “they would naturally be understood by the Indians,” and it found that the Crow “would have understood the word ‘unoccupied’ to denote an area free of residence or settlement by non-Indians.”¹⁸⁷ The Court looked to the rest of the

S’Klallam Nation–U.S., art. IV, Jan. 26, 1855, 12 Stat. 933 (same); Treaty, Dwámish Nation et al.–U.S., art. V, Jan. 22, 1855, 12 Stat. 927 (same); Treaty, Nisqually Nation et al.–U.S., art. III, Dec. 26, 1854, 10 Stat. 1132 (reserving “the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands”).

183. *Herrera*, 139 S. Ct. at 1700-01.

184. *Id.* at 1703; *see also supra* note 99; *infra* note 198.

185. *See, e.g.*, State v. Cutler, 708 P.2d 853, 856-58 (Idaho 1985) (interpreting “unoccupied lands of the United States” and finding “the signatory Indians understood that their off-reservation hunting rights reserved in the treaty were not absolute and would diminish with the increased occupation of the lands and the decrease in available game” (quoting Treaty, Eastern Band of the Shoshonee Nation et al.–U.S., *supra* note 104, art. IV)); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 365 n.14 (7th Cir. 1983) (“To the extent that the LCO band might be claiming a broader right—such as the right to engage in usufructuary activities on land that is privately owned but utilized for sport hunting and fishing—we find that the claim is inconsistent with the Indians’ understanding at the time of the cession treaties that their rights could be limited if the land were needed for white settlement.”); State v. Arthur, 261 P.2d 135, 141 (Idaho 1953) (finding a National Forest Reserve to be “open and unclaimed land”).

186. *See, e.g.*, *Herrera*, 139 S. Ct. at 1700-02 (reciting and meaningfully applying the canons of interpretation to the treaty term “unoccupied lands”).

187. *Id.* at 1701 (first quoting *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979); and then quoting 1868 Treaty with the Crows, *supra* note 4, art. IV). Of course, both parties would concede that the Crow Tribe’s hunting right would not extend to downtown Billings, the closest major city in the region. But the Court rejected Wyoming’s position that occupation should be understood to not

footnote continued on next page

treaty text and historical context to support this more liberal interpretation. The *Herrera* Court leaned on the *Mille Lacs* decision,¹⁸⁸ which painstakingly analyzed how the Natives would have understood the treaty and reiterated that “Indian treaties are to be interpreted liberally in favor of the Indians and that any ambiguities are to be resolved in their favor.”¹⁸⁹ While “Congress may abrogate Indian treaty rights . . . it must clearly express its intent to do so.”¹⁹⁰ Over a hundred years of precedent further support the Court’s approach.

Even prior to *Herrera*, other courts acted in accord with the Supreme Court’s application of the canons. For example, the Idaho Supreme Court refused to limit “unoccupied lands” to those that were ceded by the tribe, concluding that “[t]he history of the treaty signing and the written records thereof do not lend themselves to a narrow interpretation In order to be fair we must attempt to give effect to the terms of the treaty as those terms were understood by the Indian representatives.”¹⁹¹ Instead, the court concluded that unoccupied lands may extend to lands traditionally used by the tribe.¹⁹² Other courts relied on a public–private land distinction—that private land is “occupied” under the meaning of the treaty right—but this approach raises doubts about whether Natives would have understood the land to be occupied without signs of settlement or physical presence.¹⁹³ *Herrera* was silent on both the ceded–unceded and public–private distinctions, and the Court did not explain whether its requirement that occupied land be settled should require

require physical presence and instead to encompass mere governmental control over the land. *Id.* at 1700-02; *see also* Brief for Respondent, *supra* note 13, at 49-53.

188. *See Herrera*, 139 S. Ct. at 1698-1700 (repeatedly applying *Mille Lacs* and concluding that Wyoming’s argument that statehood “rendered all the lands in the State occupied . . . cannot be squared with *Mille Lacs*”).

189. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196-202 (1999) (citation omitted).

190. *Id.* at 202.

191. *State v. Tinno*, 497 P.2d 1386, 1391 (Idaho 1972).

192. *Id.* at 1390-91. Compare *Tinno* with *State v. Arthur*, which held that the Nez Perce “are entitled to hunt at any time of the year in any of the lands ceded to the federal government though such lands are outside the boundary of their reservation.” 261 P.2d 135, 143 (Idaho 1953). In coming to a more qualified understanding of unoccupied land than *Tinno*, the *Arthur* court still maintained fidelity to the canons of construction. *See Nye*, *supra* note 46, at 182-83.

193. *See, e.g., State v. Coffee*, 556 P.2d 1185, 1194 (Idaho 1976) (holding that private lands are by definition not “open and unclaimed”); *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977) (adopting the reasoning from *Coffee* and holding that private lands are not open). Some commentators have criticized the public–private approach when there is no outward evidence of ownership. *See Nye*, *supra* note 46, at 188-89 (“When the Indians’ probable lack of understanding of the notion of paper title is coupled with their unfamiliarity with the English language, it raises doubts as to whether Indians understood that land could be ‘occupied’ in the absence of actual physical presence.”).

physical settlement.¹⁹⁴ At a minimum, *Herrera* instructs courts to adhere to the Indian canons and Indian understandings of settlement rather than these automatic rules.

Race Horse and *Repsis* represent a low point for treaty rights, but the Court has now unequivocally walked those cases back. Both decisions ignored or misapplied the Indian canons under the guise of faithful interpretation that would not “distort[] the words of a treaty.”¹⁹⁵ Textual ambiguity was interpreted adversely to the tribes.¹⁹⁶ *Repsis*, for example, held that the forest was occupied without any consideration of the treaty parties’ intent or other court precedent coming to the opposite conclusion.¹⁹⁷ *Herrera* unequivocally repudiated both that holding and that broader approach.¹⁹⁸

This liberal approach to interpretation is not confined to treaty language of “occupation.” Other synonymous language has received similar interpretive treatment from the courts. The *Herrera* treaty language guaranteeing “the right to hunt on the unoccupied lands of the United States” appears in other treaties with Northern tribes.¹⁹⁹ In contrast, the Stevens treaties in the Washington Territory often reserved “the privilege of hunting and gathering roots and

194. *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). The Court neither accepted nor rejected the physical settlement standard proposed by *Herrera*. See Brief for Petitioner, *supra* note 182, at 33-37.

195. *Ward v. Race Horse*, 163 U.S. 504, 516 (1896), *abrogation recognized by Herrera*, 139 S. Ct. 1686; see also Brief of Amici Curiae Indian Law Professors in Support of Petitioner, *supra* note 130, at 14-16.

196. See Brief of Amici Curiae Indian Law Professors in Support of Petitioner, *supra* note 130, at 14-16.

197. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 993 (10th Cir. 1995), *abrogation recognized by Herrera*, 139 S. Ct. 1686; see also Brief of Amici Curiae Indian Law Professors in Support of Petitioner, *supra* note 130, at 16 & n.4 (“*Repsis* also overlooked interpretations of that term and similar treaty language by other courts, most of which reached exactly the opposite conclusion about its meaning.”).

198. See *Herrera*, 139 S. Ct. at 1694-98 (reaffirming that “*Mille Lacs* repudiated *Race Horse’s* reasoning” and, by extension, also repudiated *Repsis*). Though *Herrera* declined to address the preclusive effect of the “alternative basis” of *Repsis*, see *id.* at 1701 n.5 (quoting *Repsis*, 73 F.3d at 993), on remand the Wyoming court held that the *Repsis* judgment precluded the Crow’s exercise of the hunting right, see *Herrera v. Wyoming*, Nos. CT 2014-2687 & CT 2014-2688, slip op. at 32 (Wyo. Cir. Ct. June 11, 2020) (finding that, while the rationale of *Repsis* relying on ideas of equal footing and temporary and precarious was repudiated, the alternative ruling on occupation was not). That analysis, however, is pending review and would apply only to the Crow.

199. See COHEN’S HANDBOOK, *supra* note 34, § 18.04[2][e][iii]; see, e.g., Treaty, Eastern Band of the Shoshonee Nation et al.—U.S., *supra* note 104, art. IV (“The Indians . . . shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.”).

berries on open and unclaimed lands” to tribes in the Pacific Northwest.²⁰⁰ Western Great Lakes tribes often retained rights “throughout the ceded territories.”²⁰¹ Notwithstanding the textual variation, courts apply the interpretive canons in all three cases.²⁰² Treaty language referring to “unoccupied lands” has historically been interpreted more narrowly than those that are “open and unclaimed,” suggesting that *Herrera*—albeit liberally construed in its own right—marks the outer bounds of interpretive encroachment on treaty hunting rights.²⁰³

2. “Game may be found thereon”

The traditional canons of construction likewise apply to the question whether “game may be found thereon.” The 1974 “Boldt decision” is emblematic of a flexible interpretation of the continued presence of fish and game under a faithful adherence to the protective canons.²⁰⁴ The tribes

200. See COHEN’S HANDBOOK, *supra* note 34, § 18.04[2][e][iii]. For examples of this treaty language, see Treaty, Makah Nation–U.S., *supra* note 182, art. IV; Treaty, S’Klallam Nation–U.S., *supra* note 182, art. IV; Treaty, Dwámish Nation et al.–U.S., *supra* note 182, art. V; Treaty, Nisqually Nation et al.–U.S., *supra* note 182, art. III (affording the Tribes “the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands”).

201. See COHEN’S HANDBOOK, *supra* note 34, § 18.04[2][e][iii]; *cf.*, e.g., Treaty, Chippewa Nation–U.S., *supra* note 141, art. 5 (“The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States”).

202. See COHEN’S HANDBOOK, *supra* note 34, § 18.04[2][e][iii]. Compare *Herrera*, 139 S. Ct. at 1699 (applying the canons to “unoccupied” lands), with *State v. Buchanan*, 978 P.2d 1070, 1078, 1080-82 (Wash. 1999) (en banc) (similarly applying the canons to “open and unclaimed lands”).

203. Courts have repeatedly determined that national forest lands are “open and unclaimed” and thus subject to treaty hunting rights, whereas that was not the consensus for “occupation” until *Herrera*. See COHEN’S HANDBOOK, *supra* note 34, § 18.04[2][e][iii]; see, e.g., *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953) (holding that national forest lands are open and unclaimed); *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977) (concluding that “the National Forest lands involved herein are open and unclaimed lands”); *Buchanan*, 978 P.2d at 1081-82 (holding that a wildlife area was open and unclaimed); *cf.* *State v. Watters*, 156 P.3d 145, 156 (Or. Ct. App. 2007) (leaving open the possibility that at least a subset of privately owned forest land was not open and unclaimed).

204. *United States v. Washington*, 384 F. Supp. 312, 330-31, 343 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975) (permitting nontreaty users “up to 50%” of the fish). Note, however, that the Ninth Circuit seemed to adopt an even 50–50 allocation, see 520 F.2d at 688, and the Supreme Court subsequently endorsed the holding in a similar case, though switching the 50% figure from a minimum to a maximum of what the Tribes are entitled to, see *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 686-87, 686 n.27 (1979) (clarifying that “the 50% figure is only a ceiling” and distancing the holding from any guarantee of a “specified percentage”).

involved in the underlying dispute were guaranteed the “right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the territory.”²⁰⁵ The tribes, however, had a problem: Over time, the rivers had changed course and the fish stocks were no longer in the same place as at the time of treaty signing.²⁰⁶ Judge Boldt applied the traditional canons of construction, holding that “usual and accustomed places” were not necessarily those where any tribal member had actually fished.²⁰⁷ That is, “changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the right secured by the treaties.”²⁰⁸ Instead, given that Natives historically followed the fish, the geographic scope of the fishing right would do the same.²⁰⁹

A similar approach could be taken for hunting rights. Courts have historically treated hunting and fishing rights relatively interchangeably.²¹⁰ And just as the tribes in the Boldt decision historically followed the fish, so too did many Plains tribes follow the game.²¹¹ In both cases, the fact that the fish or game is absent would seem to signal a repudiation of the treaty right, but an approach similarly liberal to that taken by Judge Boldt would counsel that changed conditions affecting the game do not erode the hunting right secured by treaty. Admittedly, the language of “usual and accustomed places” may require a fundamentally different inquiry than that required by “game may be

205. *Washington*, 384 F. Supp. at 331. Each treaty right considered in the case was “substantially identical” to the Medicine Creek Treaty quoted above. *Id.* For a list of plaintiff tribes, see *id.* at 349.

206. *Id.* at 367.

207. See *id.* at 333, 401. The “usual and accustomed” places describe “every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters.” *Id.* at 332.

208. *Id.* at 401.

209. See *id.* at 362 (“In aboriginal times, Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including operation of the reef nets.”).

210. Courts have interpreted treaty language specifying only the right to hunt, fish, or gather as reserving to the tribe all three (contingent on specific treaty limitations or historical practice of the tribe). See COHEN’S HANDBOOK, *supra* note 34, § 18.04[2][a]; cf. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 758 F. Supp. 1262, 1270-71 (W.D. Wis. 1991) (finding that commercial logging was a purely modern activity “entirely different” than those rights reserved by treaty).

211. See MARY ENGLAR, *THE APACHE: NOMADIC HUNTERS OF THE SOUTHWEST* 6 (2003); R. B. MARCY, *THIRTY YEARS OF ARMY LIFE ON THE BORDER* 18-19 (New York, Harper & Bros. 1866); TOM MCHUGH, *THE TIME OF THE BUFFALO* 6-11 (1972). Note, however, the great diversity of tribal groups: “[M]any Indian tribes had a rich tradition of agriculture long before the first white men came to the New World.” John Fredericks III, *Indian Lands—Financing Indian Agriculture: Mortgaged Indian Lands and the Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105, 105 (1989).

found thereon”: The former is a question of historical practice, while the latter seems to turn on facts as they exist today. But, even then, that difference suggests that analysis of fishing rights should be more historical, while analysis of hunting rights should ebb and flow with changing game conditions. There is no principled basis for immunizing the fishing right, but not the hunting right, to changed circumstances.

Accordingly, no court has held that a Native hunting right has lapsed just because the game may no longer be found on the land.²¹² *Herrera* did not reach the issue.²¹³ Though some traditional game, such as buffalo, may no longer be found in the Bighorn National Forest, elk and other game are abundant.²¹⁴ The parties did not argue the point at length, and the Court did not make any explicit determination.

The eventual disappearance of game in the area was clearly contemplated by the parties, though that does not justify erosion of the treaty right. The Second Treaty of Fort Laramie in 1868 and associated justifications for the reservation system were premised on the need to feed the Crow as hunting was becoming increasingly impractical.²¹⁵ Federal negotiators acknowledged that “settlements ha[d] been made” on Crow land and the “game [was] being driven away.”²¹⁶ In *Herrera*, Wyoming argued that the understanding that “[t]he game w[ould] soon entirely disappear”²¹⁷ suggested that the “[o]ff-reservation hunting rights were temporary measures to gain time.”²¹⁸ Though the focus of

212. I have not been able to find decisions to that effect. However, the conservation-necessity doctrine allows state or federal regulation of tribal hunting or fishing when necessary for conservation. See *Antoine v. Washington*, 420 U.S. 194, 207 (1975); *Puyallup Tribe v. Dep’t of Game*, 391 U.S. 392, 398 (1968); cf. *Tomlinson*, *supra* note 5, at 1101-03, 1123-26.

213. See *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

214. See Brief of the Crow Tribe of Indians as Amicus Curiae in Support of Petitioner, *supra* note 85, at 10, 19.

215. See Brief for Respondent, *supra* note 13, at 5-7, 20-21 (“The United States offered the Tribe ‘homes and cattle, to enable [members] to begin to raise a supply [or] stock with which to support [their] families when the game was disappeared’ in return for permanent settlement on a reservation.” (quoting Proceedings of the Council with the Crow Indians (Nov. 12, 1867), in PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867-1868, *supra* note 31, at 86, 87)).

216. See *Herrera*, 139 S. Ct. at 1692 (quoting Proceedings of the Council with the Crow Indians (Nov. 12, 1867), in PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867-1868, *supra* note 31, at 86, 86).

217. *Id.* at 1692 (quoting Proceedings of the Council with the Crow Indians (Nov. 13, 1867), in PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867-1868, *supra* note 31, at 89, 90).

218. Brief for Respondent, *supra* note 13, at 6-10; see also N. G. Taylor et al., Report to the President by the Indian Peace Commission (Jan. 7, 1868) (“When the buffalo is gone the Indians will cease to hunt. A few years of peace and the game will have disappeared.”), in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, FOR THE YEAR 1868, at 26, 45 (1868), reprinted in H.R. EXEC. DOC. NO. 40-1, at 486, 505 (1868).

Wyoming's argument remained on statehood, the state's brief repeatedly referred to the fragility of the game population at the time of treaty signing as evidence of the "temporary and precarious" nature of the hunting right.²¹⁹ *Herrera* foreclosed the "temporary and precarious" approach, discussed above, ultimately rejecting the state's position.²²⁰

Several inferences may be drawn consistently with the Indian canons of construction: First, the Court interpreted the treaty term "game may be found thereon" as it would have been understood by the Natives, not just the United States.²²¹ Though Wyoming pointed to several instances of Natives (not just the federal negotiators) acknowledging that the game was disappearing, the Court deemed that evidence insufficient to prove that the treaty was understood as temporary.²²² Even expectations that a treaty may not last forever did not make it so.²²³ Second, the Court resolved ambiguities in favor of the Natives.²²⁴ It is debatable whether the treaty negotiations referring to the disappearance of the game signaled expectations that the hunting right would be temporary or, in stark contrast, signaled the importance of the hunting tradition to the Crow. The Court in *Herrera* endorsed the latter interpretation, emphasizing that, during negotiations, "[t]ribe leaders stressed the vital importance of preserving their hunting traditions."²²⁵ Thus, it can be

219. See Brief for Respondent, *supra* note 13, at 4-9, 41-42, 42 n.8, 53-55.

220. See *supra* Part II.B.

221. See *Herrera*, 139 S. Ct. at 1693, 1699 (quoting 1868 Treaty with the Crows, *supra* note 4, art. IV).

222. See, e.g., Brief for Respondent, *supra* note 13, at 7 ("At the treaty signing, Chief Blackfoot acknowledged: 'We were all raised on wild meat—buffalo, elk, mountain sheep, black-tailed & white-tailed deer. All that is getting scarcer every year. I know it [is] all going to be gone soon.'" (quoting Council with the Crows at Fort Laramie, at A3 (May 6, 1868), in Documents Relating to the Negotiation of Ratified and Unratified Treaties with Various Tribes of Indians, 1801-69, Roll 7, Ratified Treaty 370 (on file with the National Archives), reprinted in HeinOnline American Indian Law Collection)); *id.* at 6 ("Buffalo are the Indian's bread, but they are going away, and soon will be all gone, and the friends of the Indians want them, by that time, to have something else." (quoting Felix R. Brunot, R. Whittlesey & James Wright, Report of the Commission to Negotiate with the Crow Tribe of Indians (n.d.), in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR FOR THE YEAR 1873, at 113, 132 (1874), reprinted in H.R. EXEC. DOC. NO. 43-1, pt. 5, vol. I, at 481, 500 (1874))).

223. For a discussion of the Court's rejection of "temporary and precarious" Indian treaty rights, see Part II.B.2 below.

224. See *Herrera*, 139 S. Ct. at 1699.

225. See *id.* at 1692. For example, the Court quoted Black Foot's remarks: "You speak of putting us on a reservation and teaching us to farm. . . . That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised." *Id.* (quoting Proceedings of the Council with the Crow Indians (Nov. 12, 1867), in PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867-1868, *supra* note 31, at 86, 88). Likewise, another Crow representative, Wolf Bow, was
footnote continued on next page

inferred that adherence to the Indian canons suggests a more liberal construction of this history: that the hunting right should survive any fluctuations in precarious game populations.

Beyond the protective canons, the lack of case law discussing whether “the game may be found thereon” is a consequence of practical considerations. The very fact that Herrera shot an elk in the Bighorn National Forest is strong evidence that game is indeed present. There could be some higher threshold required than a single elk—if Herrera had shot the very last animal in the forest, for example, that may not have been enough for a court to find that “game may be found thereon”—but those limits have not been established.²²⁶ Because states can regulate treaty rights if necessary for conservation, that protective stopgap would likely be triggered before falling below any floor for what is considered an adequate presence of game.²²⁷

Further, *Herrera* suggests that even complete disappearance of game would not permanently destroy the hunting right. The Court ignored the opportunity—though it was identified by several amici—to hold that “[b]y the early 20th century, the period of time in which ‘game may be found’ had come to an end.”²²⁸ That is, according to the amici, there may be game now, but the game and thus the treaty right have expired.²²⁹ Shortly after the treaty was signed, “the buffalo were largely gone in the region, elk were scarce, and deer and antelope could be found only ‘after miles of hard travel.’”²³⁰ Since then, conservation efforts repopulated the game, and the elk population hunted by Herrera had even been reintroduced to the forest.²³¹ Congress is free to abrogate the treaty right at any time, and yet it never did, even as the game

troubled that “[y]ou want me to go on a reservation and farm. I do not want to do that. I was not raised so.” *Id.* (quoting Proceedings of the Council with the Crow Indians (Nov. 12, 1867), in PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867-1868, *supra* note 31, at 86, 89).

226. Conservation necessity could play a role here; for example, there could be no floor for the question whether there is game, but conservation necessity could be triggered at some point. *See supra* note 212.

227. *See id.*

228. *See* Brief for Western Ass’n of Fish & Wildlife Agencies & Conservation, Hunting, Fishing & Outfitter & Guide Ass’ns as Amici Curiae Supporting Respondent at 14, *Herrera*, 139 S. Ct. 1686 (No. 17-532), 2018 WL 6134104.

229. *See id.* at 13-14.

230. *Id.* at 14 (quoting S. R. Martin, Report of Agent in Wyoming Territory (Aug. 20, 1885), in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR FOR THE YEAR 1885, at 209, 212 (1885), *reprinted in* H.R. EXEC. DOC. NO. 49-1, pt. 5, vol. II, at 435, 438 (1885)).

231. *Id.* (citing CAROLYN B. MEYER, DENNIS H. KNIGHT & GREGORY K. DILLON, U.S. DEP’T OF AGRIC., RMRS-GTR-140, HISTORIC RANGE OF VARIABILITY FOR UPLAND VEGETATION IN THE BIGHORN NATIONAL FOREST, WYOMING 15-16 (2005)).

population dwindled. Courts should not freeze the game population at zero—allowing the game to disappear but not recognizing any potential for reintroduction. If the game returns, so may the hunting right. By analogy, reservation-diminishment cases demonstrate how Congress is freely able to terminate and later restore tribal interests.²³² Just as Congress may reestablish reservations, so may the game return and reestablish the hunting right.

Finally, if the U.S. government is at fault for the disappearance of game, its actions should not be read to constitute backhanded abrogation of the treaty right.²³³ The *Culverts Case* illustrates this principle—that the government’s culpability for destroying game does not relieve the government of its treaty obligations.²³⁴ In 2017, the Ninth Circuit held that Washington’s construction and maintenance of culverts that blocked salmon from their spawning grounds infringed on a group of tribes’ treaty-protected fishing rights.²³⁵ The State caused the damage to the fish population, and the Ninth Circuit held the State responsible for rebuilding it.²³⁶ An equally divided Supreme Court affirmed in a per curiam opinion.²³⁷

As another example, unofficial U.S. policy for many years was to kill buffalo as a means of control over Native plains populations.²³⁸ One colonel reportedly ordered troops to “kill every buffalo you can. Every buffalo dead is an Indian gone.”²³⁹ These efforts were largely successful: By the end of the nineteenth century, the buffalo had been hunted from more than 30 million to

232. See Jay Donald Jerde, Case Note, *Learning to Sell Grandmother: Why City of Sherrill, New York v. Oneida Indian Nation of New York Should Be Upheld to Preserve Tax-Free Status of Tribal Real Estate Acquisition*, 28 HAMLIN L. REV. 341, 369 & nn.176-78 (2005) (referring to congressional reestablishment of terminated tribes).

233. As discussed below, in the context of continuing peace and changed circumstances, “unclean hands” do not and should not absolve the government of treaty liability. See *infra* Part III.B.3.

234. *United States v. Washington (Culverts Case)*, 853 F.3d 946, 954 (9th Cir. 2017) (affirming the district court’s holding “that in building and maintaining these culverts Washington had caused the size of salmon runs in the Case Area to diminish and that Washington thereby violated its obligation under the Treaties”), *aff’d mem. by an equally divided court*, 138 S. Ct. 1832 (2018).

235. *Id.*

236. *Id.*

237. *United States v. Washington*, 138 S. Ct. 1832 (2018) (mem.).

238. See CAROLYN MERCHANT, *AMERICAN ENVIRONMENTAL HISTORY: AN INTRODUCTION* 20 (2007).

239. *Id.* Another military official offered medals for those who killed buffalo and once declared: “Let them kill, skin, and sell, until the buffalo is exterminated. It is the only way to bring a lasting peace and allow civilization to advance.” *Id.*

just several hundred.²⁴⁰ And this near-extinction of the buffalo was mirrored in the decline of the plains tribes.²⁴¹ To hold now that “the game may no longer be found” where the buffalo have been intentionally exterminated would absolve the government of fault while allowing roundabout abrogation by extracongressional action.

3. “Peace subsists”

On its face, the hunting right in *Herrera* lasts only “as long as peace subsists among the whites and the Indians on the borders of the hunting districts.”²⁴² The Court in *Herrera* did not confront the issue, nor has any other court. The Crow Tribe has been able to rely on the continued peace between itself and the United States since the treaty was executed in 1868, and it has characterized its people as “staunch allies” of the federal government both before and after that point.²⁴³

Other tribes cannot rely on the same peaceful history. For example, the Northern Cheyenne and Lakota were also signatories of 1868 treaties signed at Fort Laramie and so, like the Crow, were guaranteed a continuing hunting right.²⁴⁴ But soon thereafter, gold was discovered in the Black Hills, and the reserved lands were quickly overrun by prospectors—in express violation of the treaty terms.²⁴⁵ Tensions rose: The Northern Pacific Railroad’s route was

240. See J. Weston Phippen, “Kill Every Buffalo You Can! Every Buffalo Dead Is an Indian Gone,” *ATLANTIC* (May 13, 2016), <https://perma.cc/4KH6-86TN>; see also *MERCHANT*, *supra* note 238, at 20.

241. See *MERCHANT*, *supra* note 238, at 20.

242. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1693 (2019) (quoting 1868 Treaty with the Crows, *supra* note 4, art. IV).

243. Brief of the Crow Tribe of Indians as Amicus Curiae in Support of Petitioner, *supra* note 85, at 19.

244. See Treaty, Northern Cheyenne Nation et al.—U.S., art. II, May 10, 1868, 15 Stat. 655; Treaty, Sioux Nation—U.S., art. XI, Apr. 29, 1868, 15 Stat. 635. However, subsequent legislation retracted the Sioux’s off-reservation hunting right. See Act of Feb. 28, 1877, ch. 72, art. I, 19 Stat. 254, 255; see also *United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980) (finding that the 1877 Act abrogated the Sioux Nation’s treaty rights and effected a taking that entitled the tribe to compensation under the Fifth Amendment).

245. The Black Hills are still the subject of a legal battle between the Sioux and U.S. government. In 1980 the Supreme Court ruled that the federal government owed over \$100 million in reparations for illegally appropriating the land. See *Sioux Nation of Indians*, 448 U.S. at 390, 423–24 (“[T]he 1877 Act did not effect a ‘mere change in the form of investment of Indian tribal property.’ Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.” (citation omitted) (quoting *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903))); see also Carla F. Fredericks & Jesse D. Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, 89 U. *footnote continued on next page*

proposed to run through the buffalo hunting grounds, U.S. troops destroyed a series of Cheyenne camps, and negotiations between the tribes and the government failed.²⁴⁶ Though the 1868 treaty was meant to put an end to hostilities, the Great Sioux War of 1876 destroyed any illusion that peace subsisted in the region. Ultimately, hostile resistance efforts dried up by the end of the nineteenth century.²⁴⁷

War can dramatically redefine treaties. In traditional international law, many treaties between states at war no longer make sense and so are modified or abrogated.²⁴⁸ As one example adjacent to Indian law, experts believe that the Jay Treaty with Great Britain, which contained a right of free passage for Indians, was abrogated by the War of 1812.²⁴⁹ Abrogation is not, however, always the automatic result of war. Some treaties are intended to remain in force where, for example, the terms regulate the conduct of combatants or the rights of neutral parties.²⁵⁰ Modern international law allows for an intermediate position between automatic abrogation and automatic continuance in the case of armed conflict: Treaties are suspended for the duration of hostilities but return to force thereafter, whether in their original form or modified in accordance with the new reality.²⁵¹ There is, of course, an

COLO. L. REV. 477, 509-16 (2018). But the Sioux have refused to accept the payment, asserting that the land was never for sale. See *Why the Sioux Are Refusing \$1.3 Billion*, PBS NEWSHOUR (Aug. 24, 2011, 3:57 PM EDT), <https://perma.cc/LX6R-Z5HJ>.

246. See M. JOHN LUBETKIN, JAY COOKE'S GAMBLE: THE NORTHERN PACIFIC RAILROAD, THE SIOUX, AND THE PANIC OF 1873, at 23, 39 (2006); JAMES C. OLSON, RED CLOUD AND THE SIOUX PROBLEM 199-222 (1965) (recounting failed negotiations for the Black Hills and the subsequent outbreak of hostilities); Margot Liberty, *Cheyenne Primacy: The Tribes' Perspective as Opposed to That of the United States Army; A Possible Alternative to "The Great Sioux War of 1876,"* FRIENDS OF THE LITTLE BIGHORN BATTLEFIELD (Nov. 2006), <https://perma.cc/YK35-47XW>.
247. Many point to the massacre of hundreds of Lakota at Wounded Knee as the end of organized resistance in the West. See Livia Gershon, *Wounded Knee and the Myth of the Vanished Indian*, JSTOR DAILY (Feb. 17, 2020), <https://perma.cc/X5BN-23TL>. But see MARTIN GITLIN, WOUNDED KNEE MASSACRE, at xv (2011) ("It has been said that the resistance of Plains Indians was broken for the final time at Wounded Knee, but such claims are misleading. Resistance against the overwhelming might of the U.S. military had died soon after Little Bighorn. Neither the sporadic fighting thereafter nor the Ghost Dance could ever be interpreted as resistance.").
248. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE UNITED STATES § 336(e) (AM. L. INST. 1987).
249. See Marcia Yablon-Zug, *Gone but Not Forgotten: The Strange Afterlife of the Jay Treaty's Indian Free Passage Right*, 33 QUEEN'S L.J. 565, 569 (2008).
250. See Arnold Pronto, *The Effect of War on Law—What Happens to Their Treaties When States Go to War?*, 2 CAMBRIDGE J. INT'L & COMP. L. 227, 227 (2013) (giving the Geneva Conventions of 1949 as one example of a treaty designed to apply during armed conflict).
251. *Id.* at 228.

essential difference between these international treaties that are silent on the issue of peace and those with tribes that specify that the right will terminate if war breaks out. But traditional international law assumes that the contracting sovereigns bargain on roughly equal footing, whereas the Indian canons recognize that “treaties of removal appear to often have been imposed by force or fraud, tainted by corruption or lack of authority by Indian representatives.”²⁵² International law thus may serve as a starting point for interpretation of Native treaties from which the protective canons further guide a more liberal approach.²⁵³

Treaties with Natives follow their own rules. As discussed above, the traditional canons guide the interpretation of terms such as “peace subsists” and the ultimate question of abrogation.²⁵⁴ The Court has been more reluctant to find implied abrogation of Native treaties than of treaties between independent nations.²⁵⁵ When Congress has wanted to rescind a treaty in the

252. Elizabeth Ann Kronk Warner, *Everything Old Is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change-Threatened Resources*, 94 NEB. L. REV. 916, 957 (2016) (quoting Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 578-79 (1995)); see also Wilkinson & Volkman, *supra* note 37, at 620 (“The United States and Indian tribes were almost never in equal negotiating positions, while many international treaties are negotiated between parties of comparable strength.” (footnote omitted)).

253. Scholars are split over the applicability of international law to Native treaties, however, Chief Justice Dickson of Canada suggests what seems to be the consensus view: While international law principles of treaty termination might be “helpful by analogy, they [are] not determinative in Indian treaty matters.” John Borrows & Leonard I. Rotman, *The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?*, 36 ALBERTA L. REV. 9, 22 (1997); see, e.g., Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1623 (2000) (“Indian treaties are unique instruments, which are premised on international treaties, but are also distinctive because of the unique relationship of trust and protection that the European sovereigns assumed toward the Indian nations.”); Kronk Warner, *supra* note 252, at 955-61 (tracing the applicability of international law to Native treaties and concluding that “while international treaty law may not be applied by federal courts to interpret tribal treaties, it may still prove helpful in interpreting the scope of federal duties”); Wilkinson & Volkman, *supra* note 37, at 620-23 (emphasizing the different principles that guide Native versus international treaty interpretation).

At least initially, international law was intended to apply to Native treaties. See Kronk Warner, *supra* note 252, at 956-58. But even though “it is unlikely the international law of treaties would be directly applicable to the interpretation of such tribal treaties,” Kronk Warner still concluded that “consideration of international norms is helpful as such norms may provide direction on how tribal treaties should be interpreted.” *Id.* at 956. Likewise, even after tracing the differences between international and Native treaties and acknowledging that “[s]ome authors have rejected the international law character of Indian treaties,” Wiessner concluded that, “with respect to abrogation, no distinction between international and Indian treaties exists.” Wiessner, *supra* note 252, at 574-80, 585.

254. See *supra* Parts III.A-B.

255. See Townsend, *supra* note 58, at 798.

wake of conflict with Natives, it has done so explicitly through legislation. For example, after the U.S.–Dakota War of 1862 sparked calls for the “extermination or removal” of the Dakota people from Minnesota, Congress passed an act in 1863 that “abrogated and annulled” all treaties with those peoples.²⁵⁶ Congress acted contemporaneously and explicitly. Further, the *United States Code* unequivocally provided for presidential treaty abrogation in the event of hostilities:

Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done consistently with good faith and legal and national obligations.²⁵⁷

Congress clearly contemplated methods of explicit treaty abrogation rather than quiet dissolution when “peace” is broken.

Likewise, the Sioux exemplify the congressional approach to explicit, legislative abrogation of off-reservation hunting rights even after the breach of the peace requirement. The treaty the Tribe signed at Fort Laramie in 1868 reserved to the Sioux “the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase,” expressly conditioned on maintaining certain peace provisions in the region.²⁵⁸ But peace did not last. Sioux attacks continued on railroad crews, the U.S. Army, and enemy bands.²⁵⁹ The Sioux massacre of the Pawnee in 1873 was the last straw. That year’s Annual Report of the Commissioner of Indian Affairs recommended “that this matter be laid before Congress, in order that this prohibition may be enforced, by declaring that that portion of the treaty of 1868, allowing them to hunt within a certain range of country where buffalo are found, be rendered null and void by the act of the Sioux in attacking the Pawnees.”²⁶⁰ But even then the

256. Howard J. Vogel, *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland*, 39 WM. MITCHELL L. REV. 538, 539 (2013).

257. 25 U.S.C. § 72. Note that legislation pending in Congress would repeal this statute. Repealing Existing Substandard Provisions Encouraging Conciliation with Tribes Act, S. 789, 117th Cong. § 2 (2021).

258. Treaty, Sioux Nation–U.S., *supra* note 244, art. XI.

259. See GUY GIBBON, *THE SIOUX: THE DAKOTA AND LAKOTA NATIONS* 115-16 (2003); PAUL L. HEDREN, *FORT LARAMIE AND THE GREAT SIOUX WAR* 6-8 (Univ. Okla. Press rev. ed. 1988); FRANCIS B. ROBERTSON, “We Are Going to Have a Big Sioux War”: Colonel David S. Stanley’s *Yellowstone Expedition, 1872*, MONT., Autumn 1984, at 2, 5, 11-15. Notably, the U.S. government also did not abide by the treaty terms, ultimately seizing the Black Hills guaranteed to the Sioux. Ownership of these lands is still disputed. See *supra* note 245.

260. Edward P. Smith, Report of the Commissioner of Indian Affairs (1873), in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR FOR THE YEAR 1873, *supra* note 222, at 3, 8, H.R. EXEC. DOC. NO. 43-1, pt. 5, vol. I, at 371, 376.

Sioux's hunting right did not simply vanish without further congressional action. Instead, subsequent legislation extinguished the Sioux's off-reservation hunting right on unceded lands.²⁶¹

The protective canons should govern interpretations of whether there has been continued peace. "Continued peace" is inherently ambiguous: What is "peace" or "war" and with what nation? Large conflicts such as the War of 1812, the Seminole Wars, Red Cloud's War, and the Great Sioux War seem to be the clearest cases.²⁶² But, even then, "war" may be a misnomer. With the exception of the declaration of war with Great Britain in 1812, Congress has never declared war on any Native American population.²⁶³ Instead, some characterize the forceful removal of tribes as domestic policing of domestic laws.²⁶⁴ Others point to the Indian Citizenship Act of 1924 to support the claim that war cannot exist between citizens and their own government.²⁶⁵ The United States was inconsistent in whether it applied domestic criminal law or the law of war to conflicts with Natives. Often, captured combatants were treated as prisoners of war: eventually released and rarely prosecuted as criminals.²⁶⁶ The Santee Sioux uprising in 1862 presents a tragic counterexample. A military commission determined that the Santee Sioux had "exceeded the bounds of warfare" and sentenced 303 Santees to death, though the President commuted all but 38.²⁶⁷

Smaller skirmishes and massacres by U.S. troops punctuated the history of U.S.–Native relations, further confounding the bounds of peace and war. Certainly, Wounded Knee and other massacres were not "peaceful." Some

261. See Act of Feb. 28, 1877, ch. 72, art. I, 19 Stat. 254, 255; see also *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423 (1980). Whether the Sioux's hunting rights were in fact extinguished may still be in dispute given that the Tribe never accepted compensation even after *Sioux Nation*.

262. The "Indian Wars" involved dozens of such conflicts. See generally 1-2 THE ENCYCLOPEDIA OF NORTH AMERICAN INDIAN WARS, 1607-1890: A POLITICAL, SOCIAL, AND MILITARY HISTORY (Spencer C. Tucker et al. eds., 2011).

263. See *Declarations of War by Congress*, U.S. SENATE, <https://perma.cc/3772-UU9F> (archived Feb. 14, 2021). Native nations joined both sides of the War of 1812. Donald Fixico, *A Native Nations Perspective on the War of 1812*, PBS: THE WAR OF 1812, <https://perma.cc/DU6M-S7V3> (archived Nov. 12, 2020) (to locate, click "View the live page"). Though none were named in the declaration of war upon the United Kingdom, some Natives joined the British in hopes of gaining British support for their own efforts to oppose U.S. settlement in the West. *Id.*

264. See, e.g., Laurence Armand French, *Militarization of the Police*, in POLICE USE OF FORCE: IMPORTANT ISSUES FACING THE POLICE AND THE COMMUNITIES THEY SERVE 65, 67-69 (Michael J. Palmiotto ed., 2017) (characterizing conflicts between Natives and the U.S. Army as police enforcement).

265. See JACK UTTER, AMERICAN INDIANS: ANSWERS TO TODAY'S QUESTIONS 203-04 (2d ed. 2001).

266. See *id.* at 203.

267. *Id.*

initially characterized Wounded Knee as a battle, though the violence was almost entirely one-sided and Big Foot's band was not the aggressor.²⁶⁸ Should courts be able to discard Native treaties based on their own government's breach of peace? Abrogating Native treaty rights by the unilateral action of the U.S. Army, acting outside the express authority of Congress, clearly contravenes any reasonable application of the protective canons. Neither Congress nor the Natives likely envisioned, let alone expressly intended, that "unclean hands" of the government would break the peace and the treaty right. At least in the international context, good faith is a "basic norm" of customary law foundational to any treaty, the breach of which is not an escape hatch from those obligations.²⁶⁹

Further muddying the already ambiguous waters, the makeup of tribes today may be very different than at the time of treaty signing or any violent conflict.²⁷⁰ For example, the Sioux today are a "loose alliance of tribes in the northern plains" with three primary divisions: the Dakota, the Yankton-Yanktonai, and the Lakota, as well as numerous smaller political subdivisions.²⁷¹ A messy history has blurred the lines of historical divisions

268. See GITLIN, *supra* note 247, at xv-xvi; *This Day in History—December 29, 1890: U.S. Army Massacres Sioux Indians at Wounded Knee*, HISTORY, <https://perma.cc/X8KJ-4WQT> (last updated Dec. 21, 2020).

269. See Wiessner, *supra* note 252, at 567 (quoting HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 2d ed. 1967)); see also Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573, 641-42 (2005) ("Good faith is a critical element of all aspects of international law."). The 1969 Vienna Convention on the Law of Treaties makes this explicit: "Every treaty in force is binding upon the parties to it and must be performed by them in *good faith*." Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1980) (emphasis added). Wiessner extends this principle to Native treaties: "'Great nations, like great men [and women], should keep their word.' This overriding principle of both international and domestic law applies to treaties with American Indians as well." Wiessner, *supra* note 252, at 601 (quoting *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (Black, J., dissenting)).

270. See generally MIKAËLA M. ADAMS, *WHO BELONGS? RACE, RESOURCES, AND TRIBAL CITIZENSHIP IN THE NATIVE SOUTH* (2016) (following the challenges of several southeastern tribes defining tribal citizenship and how that citizenship has changed over time); Gregory Ablavsky, "With the Indian Tribes": *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025 (2018) (tracing the tension between defining tribal membership and the radicalization of Native identity); S. Ryan Johansson, *The Demographic History of the Native Peoples of North America: A Selective Bibliography*, 25 Y.B. PHYSICAL ANTHROPOLOGY 133, 139-42 (1982) (explaining that "most of the peoples who existed as distinct collective entities at the time of the first sustained European settlements ultimately disappeared").

271. GIBBON, *supra* note 259, at 2.

and federal recognition.²⁷² For example, the Standing Rock Sioux Reservation, located in North Dakota and South Dakota, comprises members of the Dakota and Lakota nations, including the Hunkpapa, Sicasapa, Ihanktonwona, and Hunkpatina bands.²⁷³

Historical fighting should have no bearing on continued treaty rights over a century later. There is no reason for those treaties that Congress and the courts have maintained and respected for 150 years to lose their force. *Race Horse* explained that the “provision allowing the Indian to avail himself of [the hunting right] only whilst peace reigned on the borders” was inserted in order to “prevent this privilege from becoming dangerous to the peace of the new settlements as they advanced.”²⁷⁴ Certainly in the late nineteenth century, in the midst of the Great Sioux War, the treaty hunting right could plausibly have been abrogated in line with that purpose. Today, the rationale falls apart.

At a minimum, courts should obey the contemporary international law approach: only temporarily suspending treaty rights during periods of armed conflict.²⁷⁵ The treaty-guaranteed hunting right would survive and revert to its full force. Just as historical fluctuations in game populations should not abrogate treaty rights today historical hostilities should be irrelevant.

C. Changed Circumstances

All the provisions discussed in Subpart B envision some sort of changed circumstance: The unoccupied land has become occupied, the once abundant game has dwindled, promises of peace have broken down. In the discussion above, a specific condition in the text has been breached or otherwise failed to materialize. In contrast, the doctrine of fundamental changed circumstances asks instead whether the treaty is inapplicable due to some development not envisioned by the parties.²⁷⁶ No court has ever applied the doctrine to a Native treaty.²⁷⁷ Nor should one do so, absent truly extraordinary circumstances.²⁷⁸

272. For a thoughtful look at the evolution of tribes up to their current political status, see Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012).

273. N.D. DEP’T OF PUB. INSTRUCTION, THE HISTORY AND CULTURE OF THE STANDING ROCK OYATE 4 (1995), <https://perma.cc/YVF5-UXY2>.

274. *Ward v. Race Horse*, 163 U.S. 504, 509 (1896), *abrogation recognized by Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

275. Several commentators have explored the applicability of international law to Indian treaties. *See, e.g.*, Kronk Warner, *supra* note 252, 955-60 (concluding that “international law applies in interpreting treaties entered into between the United States and tribes”). Though international law does not completely govern the analysis, international norms provide helpful guidance and direction. *Id.* at 955-56.

276. In international law, the doctrine of changed circumstances is known as *rebus sic stantibus*, and the Vienna Convention on the Law of Treaties codified this principle in international law. Vienna Convention on the Law of Treaties, *supra* note 269, art. 62, *footnote continued on next page*

Allowing a Native treaty to lapse because of a change in circumstances unforeseen by the parties clashes irreconcilably with the protective canons of construction. Even in the international law context, the doctrine is applied narrowly,²⁷⁹ likely due to the risk of misuse when one dissatisfied party wants to escape from burdensome obligations. Those risks only multiply when the sovereigns are on unequal footing. The canons are designed to protect against this very type of abuse. Natives were unlikely to have understood that their rights could evaporate in circumstances short of catastrophe.²⁸⁰ Further, the fact that unforeseen events are by definition not considered in the treaty language or negotiations suggests an ambiguity that should be construed liberally in favor of the Natives. Without explicit consideration by Congress, abrogation by changed circumstances would be no more than abrogation by implication. By definition, where there are unforeseen changed circumstances, there cannot be “clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other”—let alone that Congress made an affirmative choice “to resolve that conflict by abrogating the treaty.”²⁸¹

1155 U.N.T.S. at 347; *see also* Kronk Warner, *supra* note 252, at 959-60. The doctrine is traditionally justified on the grounds that parties would simply break the law if international law provided no escape from overly onerous treaty obligations. *See* Townsend, *supra* note 58, at 809 n.142.

277. *See* Kronk Warner, *supra* note 252, at 960.

278. *See id.*; *see also* John Howard Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 *BUFF. L. REV.* 669, 699-700 (1978); Frank B. Higgins, *International Law Consideration of the American Indian Nations by the United States*, 3 *ARIZ. L. REV.* 74, 84 (1961); Townsend, *supra* note 58, at 809; *cf.* *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974) (“The passage of time and the changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the right secured by the treaties but have merely affected the limits which may be placed upon its exercise in order to preserve the fish resources which are necessary to the continued and future enjoyment of the right.”), *aff’d*, 520 F.2d 676 (9th Cir. 1975). Note, however, that the doctrine of changed circumstances has at least been hinted at when the Court has interpreted Native treaties. *See* *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903); Townsend, *supra* note 58, at 795.

279. *See* Townsend, *supra* note 58, at 810.

280. *See* Kronk Warner, *supra* note 252, at 960-61 (explaining that neither the development of the relationship between tribes and the federal government nor even the extreme physical repercussions due to climate change would constitute fundamental changed circumstances). Kronk Warner goes on to explain that the doctrine of changed circumstances “requires that ‘the effect of the change must be to transform radically the extent of [treaty] obligations,’ and such a high standard has yet to be met in the tribal treaty context.” *Id.* at 960 (quoting Townsend, *supra* note 58, at 809-10).

281. *United States v. Dion*, 476 U.S. 734, 740 (1986).

A catchall provision in the text of a treaty would run up against the same problems. Though the textual hook would provide some evidence that the parties envisioned the possibility of abrogation due to some unforeseen event (and, more to the point, that Congress envisioned this possibility of abrogation), an understanding that *something* might happen is unlikely to meet the bar of express congressional intent.

Even putting the canons aside, the traditional requirements of changed circumstances from the international law context are particularly difficult to meet given the realities of Indigenous history. The doctrine requires that the obligations be unperformed.²⁸² The changes cannot have been foreseen and must be such that they “transform radically the extent of [treaty] obligations.”²⁸³ Further, the U.S. government must have “clean hands” before invoking the doctrine—unlikely, given the historically destructive treatment of the tribes.²⁸⁴ The party invoking the doctrine must approach the other in a good-faith effort to resolve the issue, yet the negotiations have traditionally been characterized by “coercion, threats, and bribery.”²⁸⁵ With this understanding, scholars have concluded that “such a high standard has yet to be met in the tribal treaty context”; changed circumstances, such as the consequences of climate change or the evolving relationship between tribes and the federal government, do *not* qualify as grounds to terminate a treaty.²⁸⁶

This approach has played out in the courts. The *Culverts Case*, discussed above,²⁸⁷ illustrates changed circumstances (disappearance of the salmon runs)

282. See Townsend, *supra* note 58, at 809.

283. *Id.* at 809-10. The Restatement of the Foreign Relations Law of the United States provides:

A fundamental change of circumstances that has occurred with regard to those existing at the time of the conclusion of an international agreement, and which was not foreseen by the parties, may generally be invoked as a ground for terminating or withdrawing from the agreement but only if (a) the existence of those circumstances constituted an *essential basis* of the consent of the parties to be bound by the agreement; and (b) the effect of the change is *radically to transform the extent of obligations* still to be performed under the agreement.

RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE UNITED STATES § 336 (AM. L. INST. 1987) (emphasis added).

284. See Townsend, *supra* note 58, at 810 (“The doctrine includes a ‘clean hands’ principle, under which the party invoking the doctrine must not have wrongfully caused the change in circumstances, but it could be argued forcefully that in the Indian context the United States was the cause of many, if not most, substantial changes.”). The clean-hands requirement is related to the general treaty obligation that the parties “perform their obligations in good faith.” See *id.* at 796.

285. *Id.* at 810; see also RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE UNITED STATES § 336 cmt. f.

286. Kronk Warner, *supra* note 252, at 960-61.

287. *United States v. Washington (Culverts Case)*, 853 F.3d 946 (9th Cir. 2017), *aff’d mem. by an equally divided court*, 138 S. Ct. 1832 (2018); *supra* notes 234-37 and accompanying text.

due to government action (Washington's culvert system obstructing the passage of fish). Though the treaty guaranteed the "right to off-reservation fishing,"²⁸⁸ the changed circumstances were arguably not envisioned by the parties. Washington claimed that the "impact of development on salmon" was not specifically contemplated by the parties, and the Tribes' assumptions that "guaranteeing access to usual and accustomed fishing places would suffice to guarantee the Tribes' access to salmon" were "incorrect."²⁸⁹ Thus, according to Washington, the right to a "moderate living" from fishing evaporates wherever the salmon runs had been disrupted.²⁹⁰

The Ninth Circuit disagreed.²⁹¹ Not only were the Tribes able to preserve their treaty-guaranteed fishing right, but the injunction against the state lent the right substantive weight.²⁹² The treaty right was protected against man-made degradation and the unclean hands of the State.²⁹³ Applying the Indian canons, the court found that the "Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them."²⁹⁴ Refusing to read in a "qualification that would allow the government to diminish or destroy the fish runs," the court upheld the treaty-guaranteed right of taking fish against changed circumstances.²⁹⁵

The Supreme Court has confined its application of the doctrine of changed circumstances to a more abstract justification of congressional power to unilaterally abrogate Native treaties. Traditionally, plenary power and the

288. *Culverts Case*, 853 F.3d at 954.

289. Brief for the Petitioner at 35, *Washington*, 138 S. Ct. 1832 (No. 17-269), 2018 WL 1083741; see also Brief of Amici Curiae Law Professors in Support of Respondents at 4, *Washington*, 138 S. Ct. 1832 (No. 17-269), 2018 WL 1666003 (describing Washington's argument that changed circumstances were not specifically contemplated by the parties).

290. See *Culverts Case*, 853 F.3d at 960, 965, 980; Brief for the Petitioner, *supra* note 289, at 35.

291. *Culverts Case*, 853 F.3d at 954. An equally divided Supreme Court affirmed without opinion. *Washington*, 138 S. Ct. 1832.

292. An earlier decision guaranteed the Tribes 50% of the harvestable fish. *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). The *Culverts Case* interpreted the treaty right to affirm an injunction requiring the state to modify or replace the culverts "to allow the free passage of fish" so they "would be available to the Tribes for harvest." *Culverts Case*, 853 F.3d at 962-66.

293. *Culverts Case*, 853 F.3d at 962-66. A district court in the 1980s had previously explained that the Tribes were guaranteed "a sufficient quantity of fish to satisfy their moderate living needs," in turn encompassing a "right to have the fishery habitat protected from man-made despoliation"—though the Ninth Circuit reversed on this ground. *United States v. Washington*, 506 F. Supp. 187, 203, 208 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982).

294. *Culverts Case*, 853 F.3d at 964.

295. *Id.*

last-in-time rule have undergirded the exercise of congressional authority in this area.²⁹⁶ In *Lone Wolf*, the Court supplemented its theory of unilateral abrogation with something akin to changed circumstances:

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so[,]... particularly if consistent with perfect good faith towards the Indians.²⁹⁷

Thus, part of Congress's power to abrogate Native treaties rests on an understanding that times change. If circumstances are so disrupted that a treaty should be dissolved, Congress is free to make that choice. But Congress must do so explicitly. The courts should not just step in. The doctrine of changed circumstances justifies congressional power to unilaterally abrogate treaty rights much more clearly than it justifies judicial power to interpret away those rights.

Conclusion

Indian treaty rights are too fundamental to be easily cast aside.

—*United States v. Dion* (1986)²⁹⁸

Courts can draw three primary lessons from the Supreme Court's approach to abrogation by statehood, express treaty language, and changed circumstances. First, the Indian canons of abrogation and interpretation should apply even when Congress appears already to have spoken. Second, a government-caused failure of some treaty condition, absent clear congressional intent to bring about that result, should not abrogate a treaty right. Lastly, even if a termination point is met, the treaty right may not be irrevocably lost. If the condition is restored, the treaty right may be as well.

Treaty rights are not temporary and precarious: Conditions in treaty language do not in themselves create an “essentially perishable” right, as *Race Horse* erroneously held.²⁹⁹ Rather, myopic assumptions that treaty rights

296. In a seminal case, *The Cherokee Tobacco*, the Supreme Court relied on the last-in-time rule, giving effect to whichever conflicting treaty or federal statute was enacted most recently. 78 U.S. (11 Wall.) 616, 621 (1871). *Lone Wolf v. Hitchcock* then added the import of Congress's plenary power. 187 U.S. 553, 565-66 (1903); see also Townsend, *supra* note 58, at 799-805 (discussing the last-in-time rule).

297. *Lone Wolf*, 187 U.S. at 566; see also Townsend, *supra* note 58, at 795, 806-07 (explaining that *Lone Wolf* “suggests that abrogation can be viewed as an application of the international law doctrine of *rebus sic stantibus*”).

298. *United States v. Dion*, 476 U.S. 734, 739 (1986).

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

would disappear—even those assumptions incorporated in the treaty text—should be carefully construed to guard against unjustified loss of reserved rights. To hold otherwise would be to repeat the error of *Race Horse*. While the text of the treaty can offer strong (or even conclusive) evidence that Congress intended that the right expire upon certain conditions, the core idea underpinning the Indian canons of interpretation is that the treaty text cannot always be taken at face value without considering how the treaty would have been understood by the Natives, construing the treaty and any ambiguities liberally in favor of the tribes.

Ultimately, the Indian canons of construction should guide how termination conditions are understood. The mere fact that termination occurs by treaty condition rather than by later congressional act does not diminish the importance of finding clear congressional intent before a right is effectively abrogated. Applying the protective canons to define whether the termination condition has actually been met is critical to ensuring that congressional intent is not “lightly imputed.”³⁰⁰ Blind adherence to nineteenth-century assumptions that would cast aside fundamental treaty rights does injustice that cannot and should not survive *Herrera*.

300. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968) (quoting *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox Ltd.*, 291 U.S. 138, 160 (1934)).