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NARROWING FROM BELOW: HOW LOWER COURTS CAN LIMIT *CASTRO-HUERTA*

Michaela B. Parks*

I. INTRODUCTION

Let me begin by offering this: the future of federal Indian¹ law is bright. It is not bleak, nor over, nor is it even the beginning of the end, despite many initial reactions to the United States Supreme Court decision *Oklahoma v. Castro-Huerta*. It is all too easy to have a human reaction to bad news. I know I, along with many others across Indian country, had a grave reaction to the Court's decision at first.² But initial reactions will get Indian country and its desires—and more significantly its needs—nowhere. Instead, Indian country must forge ahead with grit, determination, and most importantly, a plan.

This Note will offer just that, a plan for how Indian country can move forward in the wake of what anti-tribal sovereignty

*J.D. Candidate, 2024; Articles Editor, *Arkansas Law Review*. I extend my deepest gratitude to Professor Daniel Rice for his guidance, time, and wealth of knowledge. I also owe many thanks to the *Arkansas Law Review* staff, who made this Note happen. Above all, I thank my family for always encouraging my dreams. I dedicate this Note to them.

1. The terms “Indian” and “Indian law” are legal terms of art. ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, *MASTERING AMERICAN INDIAN LAW* 3 (Carolina Academic Press, 2d ed. 2019) (“In the United States, the term ‘American Indian’ or simply ‘Indian’ refers generally to the Indigenous peoples of mid-America prior to European arrival and has become common due to its use as a term in federal law. . . . When referring to an individual Indigenous person, rather than American Indian or Native American, the authors strongly encourage the readers to use specific tribal names.”). For example, I am a Cherokee woman.

2. See generally Wayne L. Ducheneaux, II, *Oklahoma v. Castro-Huerta: Bad Facts Make Bad Law*, NATIVE GOVERNANCE CTR. (July 14, 2022), [<https://perma.cc/B9D5-J5Y8>]. In a webinar hosted by the National Congress of American Indians, Chuck Hoskin, Principal Chief of Cherokee Nation, laments the decision is “heartbreaking for us in Indian country.” See National Congress of American Indians, *The Castro Huerta Decision: Understanding the Case and Discussing Next Steps*, YOUTUBE (July 7, 2022), [<https://perma.cc/8DVJ-9Z7Z>] [hereinafter *Understanding the Case*].

entities want to be a devastating decision. Indian country leaders,³ scholars,⁴ and citizens⁵ alike are rightfully worried about the potential implications of the decision. The decision contains harmful and historically inaccurate language, such as “Indian country is part of the State, not separate from the State,”⁶ and “a State has jurisdiction over all of its territory, including Indian country.”⁷ Frustratingly, the majority departed from centuries of precedent when deciding *Castro-Huerta*.⁸ But, in the words of Justice Neil Gorsuch, the Court’s “mistakes need not—and should not—be repeated.”⁹

As a defender of tribal sovereignty, the majority opinion makes my blood boil and my heart ache for their ignorance and disregard for accepted Indian law doctrine in their holding that the State of Oklahoma has concurrent jurisdiction with the federal government to prosecute crimes committed by non-Indians against Indians in Indian country.¹⁰ Tribal nations have endured bad court cases, ignorant judges and officials, and much worse.¹¹ But Indian country has always persevered and continued to fight

3. Cherokee Principal Chief Chuck Hoskin also remarked in the National Congress of American Indians webinar that the *Castro-Huerta* decision is “wrong” because “the court goes back on its own principles.” *Understanding the Case, supra* note 2. In the same webinar, David Hill, Principal Chief of Muscogee Nation, explained the decision “is a step in the wrong direction for public safety on [the Muscogee] reservation.” *Id.*

4. Professor Elizabeth Reese, Assistant Professor of Law at Stanford University, is worried about the “increased state authority,” and is fearful that courts may “start thinking: ‘what’s the point of even having tribes?’” *Id.* Kevin Washburn, Dean of The University of Iowa College of Law, equates the *Castro-Huerta* decision to the “old days” of federal Indian law and believes the “majority opinion has a lot of troubling rhetoric . . .” See Sandra Day O’Connor College of Law, *Oklahoma v. Castro-Huerta: Rebalancing Federal-State-Tribal Power*, VIMEO (July 7, 2022), [<https://perma.cc/GVR8-EWNE>] [hereinafter *Rebalancing Federal-State-Tribal Power*]. Stacy Leeds, Dean of the Arizona State University Sandra Day O’Connor College of Law explains her initial reaction to the decision was “outrage[.]” *Id.* “From an academic standpoint, [she was] stunned at some of the intellectual dishonesty . . . in the majority opinion” and “the complete disregard for settled law or the role of Congress” in the legal situation. *Id.* Robert Miller, Professor of Law at the Arizona State University Sandra Day O’Connor College of Law, is “appalled” by the decision. *Id.*

5. See generally Ducheneaux, *supra* note 2.

6. *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2493 (2022).

7. *Id.*

8. See *infra* notes 60-65 and accompanying text.

9. *Castro-Huerta*, 142 S.Ct. at 2521 (Gorsuch, J., dissenting).

10. *Id.* at 2504-05.

11. See *id.* at 2505, 2523 (Gorsuch, J., dissenting).

for tribal sovereignty and the fulfilment of promises and obligations. This time will be no different.

This Note advocates for a judicial remedy plan. Specifically, it calls upon lower courts to narrow *Castro-Huerta* from below to limit the effects of the decision. Part II provides a brief introduction to federal Indian law,¹² a general overview of criminal jurisdiction in Indian country,¹³ and concludes with a summary of *Castro-Huerta*.¹⁴ Part III outlines two approaches to limiting that lower courts can use to narrow *Castro-Huerta* from below: textual limiting¹⁵ and fact-to-fact limiting.¹⁶ It also provides illustrative examples of recent steps taken by lower courts to limit the decision using the very methods this Note argues for.¹⁷ Part IV briefly concludes this Note and urges lower courts to narrow *Castro-Huerta* from below.¹⁸

II. THE ROAD TO *CASTRO-HUERTA*

In 1778, the United States began entering into treaties with Indian nations.¹⁹ Decades later, in 1831, the United States Supreme Court classified “Indian nations existing within the territorial boundaries of the United States as domestic dependent nations.”²⁰ For nearly 150 years, “Indian nations were thought to possess all the inherent sovereign powers over their territories that had not been taken away by the U.S. Congress or given up in treaties.”²¹ Among those inherent sovereign powers is the

12. See *infra* Part II.

13. See *infra* Section II.A.

14. See *infra* Section II.B.

15. See *infra* Section III.A.

16. See *infra* Section III.B.

17. See *infra* Section III.A.3; *infra* Section III.B.3.

18. See *infra* Part IV.

19. Alex Tallchief Skibine, *Incorporation Without Assimilation: Legislating Tribal Civil Jurisdiction over Nonmembers*, 67 UCLA L. REV. DISCOURSE 166, 168 (2019); see Treaty with the Delawares, Delaware Nation-U.S., Sept. 17, 1778, 7 Stat. 13.

20. Tallchief Skibine, *supra* note 19, at 168; Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

21. Tallchief Skibine, *supra* note 19, at 168.

understanding that tribal nations are separate from states and state control in all regards.²²

Castro-Huerta, while not the first case to do so, attempts to erode that understanding and is illustrative of a common theme in federal Indian law.²³ The common theme is summarized by the old saying “two steps forward, one step back.”²⁴ Time and time again Indian country is handed down a Supreme Court decision that contradicts or limits a prior understanding.²⁵ The decision in *Castro-Huerta* is just the latest in a long line of examples of this trend because it cuts back on the notion that what occurs within tribal nations and on tribal land is separate from state control.²⁶

A. Criminal Jurisdiction in Indian Country

To best understand the ramifications of *Castro-Huerta*, one must first have a general comprehension of criminal jurisdiction as it relates to Indian country. For the readers who are well acquainted with Indian law doctrine, you know that this subject matter is riddled with complexity, and for those who are just now being introduced to the topic, buckle up.

This Note is not focused on analyzing the ins and outs of criminal jurisdiction in Indian country. Rather, this Section will provide a summary of the basic concepts of the doctrine and survey the broad strokes of criminal jurisdiction so that the reader

22. See *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) (“The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.”).

23. See *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2493-94 (2022).

24. See Melanie Reed, *Native American Sovereignty Meets a Bend in the Road: Difficulties in Nevada v. Hicks*, 2002 BYU L. REV. 137, 137 (2002) (explaining, for the majority of Indian law doctrine, “[t]he path the Supreme Court has forged with regard to tribal sovereignty has meandered through a variety of landscapes with little predictability”).

25. See, e.g., *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (holding Congress has plenary power over Indian tribes); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-566 (1903) (holding Congress has plenary power over Indian tribes, including the power to singlehandedly abrogate treaty rights); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 191 (1978) (“Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress.”).

26. See *Castro-Huerta*, 142 S.Ct. at 2493.

may better understand what is at play in the background of *Castro-Huerta*. To begin, Indian country is defined as follows:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.²⁷

In states that have not adopted Public Law 280,²⁸ the power to prosecute hinges upon Indian status and the type of crime committed,²⁹ such as whether the crime falls under the Major Crimes Act, which includes offenses like “murder,” “kidnapping,” “felony child abuse,” and “burglary.”³⁰ Or the General Crimes Act, which “creates federal court jurisdiction for certain types of offenses committed by Indians against non-Indian

27. 18 U.S.C. § 1151 (1949).

28. Public Law 280 grants states who have adopted the provision:

[J]urisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State.

Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162). *Castro-Huerta* does not impact Public Law 280 states because in these states the State government already had prosecutorial power over offenses committed against Indians. *See* 18 U.S.C. § 1162 (2010).

29. *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL CT. CLEARINGHOUSE, [<https://perma.cc/UMW9-KBLK>] (last visited Oct. 13, 2023) [hereinafter *General Guide*].

30. Under the Major Crimes Act:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153 (2013).

victims and for all offenses committed by non-Indians against Indian victims.”³¹

For example, assume an Indian perpetrator committed a Major Crime against an Indian victim. The federal government and tribal government would have concurrent jurisdiction to prosecute.³² If the Indian status of the parties remains the same, but a crime other than a Major Crime was committed, then only the tribal government could prosecute.³³ Next, assume an Indian perpetrator committed a Major Crime against a non-Indian victim. The federal and tribal government could both prosecute the defendant.³⁴ Again, assume the status of the parties remains the same but the crime committed was one other than a Major Crime. Then, the federal government³⁵ and tribal government would still have concurrent jurisdiction.³⁶ Next, assume a non-Indian perpetrator committed a crime against an Indian victim. The federal government could prosecute under the General Crimes Act, and now, according to *Castro-Huerta*, the state can also prosecute that crime.³⁷ Lastly, if a non-Indian perpetrator committed a crime against a non-Indian victim, then the state would have sole jurisdiction to prosecute the offense.³⁸ As will be discussed in more detail below, the parties in *Castro-Huerta* fall into the non-Indian against Indian crime category.³⁹

B. *Oklahoma v. Castro-Huerta*

In June 2022, Indian country was “stunned” when the Court announced its decision in *Oklahoma v. Castro-Huerta*.⁴⁰ The “5-

31. *Indian Country Criminal Jurisdiction*, NATIVE.LAW, [https://perma.cc/2KZS-4N6X] (last visited Oct. 13, 2023); see also 18 U.S.C. § 1152.

32. *General Guide*, *supra* note 29.

33. *Id.*

34. *Id.*

35. See 18 U.S.C. § 1152 (1948).

36. *General Guide*, *supra* note 29.

37. *Id.*; see generally *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2486 (2022). A tribe could only prosecute in this instance if the crime was covered under the Violence Against Women Act and the tribe had opted into the Act’s provisions. See H.R. REP. NO. 1620, at 187-88 (2021).

38. *General Guide*, *supra* note 29.

39. *Castro-Huerta*, 142 S.Ct. at 2491.

40. *Rebalancing Federal-State-Tribal Power*, *supra* note 4.

4 decision, overturned the long-held understanding that states do not have authority to prosecute non-Indians who commit crimes against Indians in Indian country.”⁴¹ The ramifications of such a decision are potentially detrimental; however, with the help of lower courts, the decision can be applied in a narrow way to limit Indian country’s concerns.

In *Castro-Huerta*, the defendant, a non-Indian, committed the crime of child neglect against an Indian, a Cherokee citizen, in Tulsa, Oklahoma.⁴² The defendant was tried and convicted in Oklahoma state court.⁴³ The defendant then appealed the state court’s decision, and, while the appeal was pending, the Supreme Court decided *McGirt v. Oklahoma*.⁴⁴ *McGirt* is not only integral to the analysis in *Castro-Huerta*, but also to the whole of Indian law doctrine. The *McGirt* decision is widely hailed as “[h]istoric,”⁴⁵ “significant,”⁴⁶ “the biggest win for tribal sovereignty in decades,”⁴⁷ and even, the “most significant Indian Law case of the century.”⁴⁸ The opinion begins with the powerful opening line: “On the far end of the Trail of Tears was a promise.”⁴⁹

Forced to leave their ancestral lands in Georgia and Alabama, the [Muscogee] Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding “all their land, East of the Mississippi

41. The Court held “the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.” *NARF/NAI Joint Statement on SCOTUS Ruling on Castro-Huerta v. Oklahoma*, NATIVE AM. RTS. FUND (July 7, 2022), [<https://perma.cc/MN6H-3E2Z>] [hereinafter *NARF/NAI Joint Statement*].

42. *Castro-Huerta*, 142 S.Ct. at 2491.

43. *Id.*

44. *Id.*

45. Julian Brave NoiseCat, *The McGirt Case Is a Historic Win for Tribes*, THE ATLANTIC (July 12, 2020), [<https://perma.cc/6MU3-B7QQ>].

46. Lawrence Roberts, *Supreme Court Decision in McGirt v. Oklahoma Affirms Tribal Sovereignty, Upholds Treaty Rights*, ARIZ. STATE UNIV. (July 9, 2020), [<https://perma.cc/48A6-875T>].

47. Rachel Adams-Heard & Allison Herrera, *In Trust: Osage Nation Charts New Path—and So Does a Drummond*, BNN BLOOMBERG (Oct. 18, 2022), [<https://perma.cc/29VU-GXGK>].

48. MAINON A. SCHWARTZ, CONG. RSCH. SERV., LSB10527, THIS LAND IS WHOSE LAND? THE *MCGIRT V. OKLAHOMA* DECISION AND CONSIDERATIONS FOR CONGRESS 1 (2020).

49. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2459 (2020).

river,” the U.S. government agreed by treaty that “[t]he [Muscogee] country west of the Mississippi shall be solemnly guaranteed [sic] to the [Muscogee] Indians.” Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and “permanent home to the whole [Muscogee] nation,” located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that “[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.” 1832 Treaty, Art. XIV, 7 Stat. 368.⁵⁰

The Court’s decision in *McGirt* kept the United States’ solemn promise to the Muscogee Nation and held “the government to its word.”⁵¹ In doing so, the Court held Congress never disestablished the Muscogee Nation reservation; thus, the tribe’s lands remain “Indian country” for the purposes of the Major Crimes Act.⁵² Moreover, “[b]ased on *McGirt*’s reasoning, the Oklahoma Court of Criminal Appeals later recognized that several other Indian reservations in Oklahoma had likewise never been properly disestablished.”⁵³

50. *Id.* This Note refers to this tribe by its true name, “Muscogee Nation,” instead of its colonial era name “Muscogee (Creek) Nation” or “Creek Nation.” All references to “Creek” have been replaced with “Muscogee” to honor the tribe’s commitment to preserving their proper name. See Allison Herrera, *The Muscogee Nation Drops ‘Creek’ From Its Name as Part of Rebrand*, KOSU NPR (May 5, 2021, 4:15 AM), [https://perma.cc/6U49-F2WT]. The Muscogee Nation “says this isn’t an official name change or removal of the tribal seal. Muscogee (Creek) Nation will still be listed on all official business.” *Id.* Instead, the rebrand “is meant to celebrate [the tribe’s] reservation status and sovereignty.” *Id.*

51. *McGirt*, 140 S.Ct. at 2459.

52. *Id.* at 2466; see also *Tribal Law*, OFF. FOR VICTIMS OF CRIME, [https://perma.cc/7XNP-CBC2] (last visited Oct. 13, 2023) (explaining the Major Crimes Act: “The Major Crimes Act, 18 U.S.C. § 1153, was enacted in 1885. It provides federal criminal jurisdiction over certain enumerated crimes if the defendant is Indian. It has exclusive federal jurisdiction over certain enumerated crimes such as murder, assault resulting in serious bodily injury, most sexual offenses, etc. The Major Crimes Act is the source of federal jurisdiction for crimes in which both the offender and the victim are Indians and the crime occurred in Indian Country. Tribes retain jurisdiction to prosecute Indians for the same conduct that constitutes a Section 1153 felony. In Section 1153 cases, the victim may be Indian or non-Indian. Accordingly, an Indian defendant may be prosecuted concurrently in two jurisdictions for the same offense. The Constitutional prohibition against double jeopardy does not apply because the United States and Indian tribes are separate sovereigns.”).

53. *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2491-92 (2022) (internal citations omitted) (Cherokee, Choctaw, and Chickasaw Reservations were likewise reaffirmed).

The outcome in *McGirt* is important for *Castro-Huerta* because it allowed the defendant in the latter case to ultimately appeal his conviction.⁵⁴ Because the *McGirt* court “held that Congress had never properly disestablished the [Muscogee] Nation’s reservation in eastern Oklahoma . . . the Court concluded that the [Muscogee] Reservation remained ‘Indian country.’”⁵⁵ This distinction meant that “different jurisdictional rules might apply for the prosecution of criminal offenses in that area” which encompasses Tulsa, where the crime in *Castro-Huerta* occurred.⁵⁶

It is well-settled that in most situations “the Federal Government has jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.”⁵⁷ That understanding was not at issue in *Castro-Huerta*. Instead, the Court in *Castro-Huerta* was tasked with deciding “whether the Federal Government’s jurisdiction is exclusive, or whether the State also has concurrent jurisdiction with the Federal Government.”⁵⁸

The Court began its analysis by citing to a handful of anti-tribal decisions⁵⁹ and asserting the limitations of one of its earliest Indian law holdings.⁶⁰ The select case excerpts, tactfully piecemealed together to prove the majority’s point, are used to set up a key legal question: “whether the State’s authority to prosecute crimes committed by non-Indians against Indians in Indian country has been preempted.”⁶¹ To answer this question, the Court considered if preemption had occurred “(i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on

54. *Id.* at 2491.

55. *Id.* (internal citations omitted).

56. *Id.* at 2491; *see also* 18 U.S.C. §§ 1151-1153 (2013).

57. *Castro-Huerta*, 142 S.Ct. at 2492.

58. *Id.*

59. *See id.* at 2493-94.

60. *Id.* at 2493 (citation omitted) (stating *Worcester v. Georgia*’s holding “that Georgia state law had no force in the Cherokee Nation because the Cherokee Nation ‘is a distinct community occupying its own territory,’” is no longer applicable because the Court now holds “that Indian reservations are ‘part of the surrounding State’ and subject to the State’s jurisdiction except as forbidden by federal law”).

61. *Id.* at 2494.

tribal self-government.”⁶² The Court concluded that preemption of any kind had not occurred, and it granted states concurrent jurisdiction with the federal government to prosecute crimes occurring in Indian country.⁶³ Thus, despite centuries of precedent to the contrary,⁶⁴ both the federal government and the State of Oklahoma now have the power to prosecute crimes committed by non-Indians against Indians in Indian country.⁶⁵

III. NARROWING *CASTRO-HUERTA* FROM BELOW

The most plausible solution to limiting the potential negative implications of *Castro-Huerta*, is through the court system—specifically through lower courts. This is because lower courts have the authority to apply prior precedent in a way that is reasonable, yet narrower than the original precedent.⁶⁶ Professor Richard M. Re calls this practice “narrowing from below.”⁶⁷ Professor Re explains that lower courts engage in limiting Supreme Court precedent when they “adopt narrower readings.”⁶⁸ This practice of narrowing from below is “beneficial” because it “allows lower courts to update obsolete precedents, mitigate the harmful consequences of the Court’s errors, and enhance the transparency of their decision-making process.”⁶⁹ Narrowing from below is considered “legitimate when lower courts adopt reasonable readings of higher court precedent.”⁷⁰ Furthermore, narrowing from below “acknowledge[s] that the precedent must

62. *Castro-Huerta*, 142 S.Ct. at 2494.

63. *See id.* at 2505.

64. *Id.* (“The [Worcester] decision established a foundational rule that would persist for over 200 years: Native American Tribes retain their sovereignty unless and until Congress ordains otherwise.”).

65. Matthew L.M. Fletcher, *In 5-4 Ruling, Court Dramatically Expands The Power Of States To Prosecute Crimes On Reservations*, SCOTUSBLOG (June 29, 2022, 12:35 PM), [<https://perma.cc/ZXZ5-XHTT>].

66. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 923 (2016).

67. *Id.* at 921.

68. *Id.* at 921, 932 (defining “narrowing” as “interpreting a precedent more narrowly than it is best read”).

69. *Id.* at 921.

70. *Id.*; *see also* Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54, 124-25 (1997) (noting “that a broad ambit frequently exists for reasonable disagreement about how precedents are best interpreted and tests best applied”).

remain binding in circumstances where it unmistakably applies, while also reducing the precedent's scope of application"⁷¹ Lower courts cannot simply overrule⁷² *Castro-Huerta*, but they can narrow the decision from below—through textual limiting or fact-to-fact limiting—to achieve the next best result.

A. Textual Limiting

Lower courts can employ textual limiting to ensure the effects of *Castro-Huerta* are not broadened. This Note defines textual limiting as strictly adhering to the text of a case's holding, and not going beyond the meaning of the words meticulously chosen. This method of limiting may seem too rigid to follow and lacking in reward; however, if used correctly, textual limiting can open the door for future cases to be distinguished from *Castro-Huerta* in a way that benefits Indian country.

This Section begins with an example that illustrates how this textual limiting technique has been used in a past Indian law case.⁷³ It then discusses two ways textual limiting can be applied by analyzing what the *Castro-Huerta* opinion does not say⁷⁴ and then by recognizing the language it does say that lower courts should not give deference to.⁷⁵ Next, it provides a recent example of a lower court utilizing this limiting practice.⁷⁶ It concludes by acknowledging potential pitfalls of textual limiting.⁷⁷

1. The Leading Example of Textual Limiting

The distraught sentiment that swept across Indian country following the *Castro-Huerta* decision echoed that of the reaction to the now decades old Supreme Court decision *Nevada v.*

71. Re, *supra* note 66, at 923.

72. See *infra* note 177 for an explanation on how stare decisis is implicated by the practice of narrowing from below.

73. See *infra* Section III.A.1.

74. See *infra* Section III.A.2.a.

75. See *infra* Section III.A.2.b.

76. See *infra* Section III.A.3.

77. See *infra* Section III.A.4.

Hicks.⁷⁸ The Court was said to have “meandered” off a well-defined path when it decided *Hicks*.⁷⁹ That is because in *Montana v. United States*, a prior “seminal” Indian law case, “[t]he Court finally established a guiding light for determining tribal jurisdiction.”⁸⁰ When the Court decided *Hicks*, that guiding light dimmed as tribal jurisdiction was put into question again.

a. *Nevada v. Hicks*

In 2001, the *Hicks* “Court rejected tribal court jurisdiction in a case involving a civil rights lawsuit brought by a tribal member against state police officers for a claim that arose on tribal lands.”⁸¹ The defendant in *Hicks* “[wa]s a member of the Fallon Paiute-Shoshone Tribes of western Nevada and live[d] on the Tribes’ reservation.”⁸² The defendant was suspected of an off-reservation crime where he allegedly killed an animal protected by certain game laws.⁸³ “A state game warden obtained from state court a search warrant ‘SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES.’”⁸⁴ The language found within the warrant meant that the tribe had to consent to the state’s request.⁸⁵ Next, “[a] search warrant was obtained from the tribal court, and the warden, accompanied by a tribal police officer, searched [the] respondent’s yard,” finding only another unprotected animal’s head.⁸⁶ After the “state game wardens executed state-court and tribal-court search warrants to search [the defendant’s] home for evidence of an off-reservation crime,” the defendant “filed suit in the Tribal Court against . . .

78. Professor Robert Miller explains that when he first heard of the *Castro-Huerta* decision, he thought of *Hicks*. See *Rebalancing Federal-State-Tribal Power*, *supra* note 4, at 27:03.

79. Reed, *supra* note 24, at 137.

80. *Id.*

81. Sarah Krakoff, *Tribal Civil Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1190 (2010) (citing *Nevada v. Hicks*, 533 U.S. 353, 376-82 (2001)).

82. *Hicks*, 533 U.S. at 353.

83. *Id.* at 356.

84. *Id.*

85. *Id.*

86. *Id.*

the wardens in their individual capacities” and against Nevada, “alleging trespass, abuse of process, and violation of constitutional rights.”⁸⁷

The case begged the question “whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.”⁸⁸ The Court answered in the negative, holding “that tribal courts lack subject matter jurisdiction over civil claims against state officials arising from the on-reservation enforcement of a search warrant against a tribe member accused of an off-reservation violation of state law.”⁸⁹ “*Hicks* indicated that the presumptions against tribal civil authority over nonmembers on non-Indian lands” found in earlier case law “might apply equally to cases arising on tribal lands.”⁹⁰ The *Hicks* Court emphasized the “importance of the state’s interest in investigating off-reservation crime.”⁹¹ What remained a question after *Hicks*, however, was “[w]hether tribal land status might weigh in favor of tribal jurisdiction in future cases.”⁹²

Hicks, similar to *Castro-Huerta*, contained language that caused Indian law scholars and practitioners to pause with worry. For example, “one of the most troubling statements found in the *Hicks* decision [is] ‘[o]rdinarily,’ it is now clear, ‘an Indian reservation is considered part of the territory of the State.’”⁹³ Other troublesome language includes “[w]hen . . . state interests outside the reservation are implicated, States may regulate the activities even of tribal members on tribal land”⁹⁴ These two sentences alone were believed by some to “set[] a terribly damaging precedent that significantly erodes some of the most

87. *Hicks*, 533 U.S. at 353.

88. *Id.* at 355.

89. Catherine T. Struve, *How Bad Law Made a Hard Case Easy: Nevada v. Hicks and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288, 288 (2003).

90. Krakoff, *supra* note 81, at 1190.

91. *Id.*

92. *Id.* at 1190-91.

93. Steven Newcomb, *On Attorneys, Indian Advocacy and Nevada v. Hicks*, INDIAN COUNTRY TODAY (Sept. 12, 2018), [<https://perma.cc/7RLZ-4KR4>].

94. *Id.*

commonly understood and fundamental principles of federal Indian law.”⁹⁵

b. The Aftermath of *Hicks*

In the aftermath of *Hicks*, lower federal courts and appellate courts heard many cases in which parties argued that the *Hicks* holding applied. In many of those cases, courts limited the scope of *Hicks* in their own application.⁹⁶ The leading way lower courts accomplished this limitation was strictly adhering to the text of *Hicks* which stated: “Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.”⁹⁷ Thus, lower courts applied textual limiting to narrow the *Hicks* decision from below.

The Ninth Circuit,⁹⁸ especially, did not allow for *Hicks* to be broadened. The Ninth Circuit prudently applied the *Hicks* holding and refused to apply its holding to cases inconsistent with the text of *Hicks*.⁹⁹ By doing so, the Ninth Circuit helped halt the potential negative implications of *Hicks*.

For example, in *Window Rock Unified School District v. Reeves*, the Ninth Circuit upheld their interpretation of *Hicks* “as creating only a narrow exception to the general rule that, absent contrary provisions in treaties or federal statutes, tribes retain adjudicative authority over nonmember conduct on tribal land—land over which the tribe has the right to exclude.”¹⁰⁰ The court held that *Hicks* applies “only when the specific concerns at issue

95. *Id.*

96. Krakoff, *supra* note 81, at 1191 (explaining that “what appears to be a relentless march towards the elimination of all forms of tribal authority over nonmembers in fact has left tribes and reviewing federal courts room to approve tribal civil jurisdiction in certain well-defined contexts”).

97. *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2000).

98. The Ninth Circuit is comprised of Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. *What is the Ninth Circuit*, U.S. CTS. FOR THE NINTH CIR., [<https://perma.cc/JM6L-5JYH>] (last visited Oct. 13, 2023).

99. *See infra* notes 100-08 and accompanying text.

100. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017).

in that case exist.”¹⁰¹ The court goes on to hold “that *Hicks* is best understood as the narrow decision it explicitly claims to be,” and emphasized that *Hicks*’s “application of *Montana* to a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in [*Hicks*] exist.”¹⁰² The Ninth Circuit declined to apply *Hick*’s use of the *Montana* exceptions in a new way: in a case involving tribal land.¹⁰³ In so doing, the Ninth Circuit employed textual limiting.

In *Grand Canyon Skywalk Development, LLC v. ‘SA’ Nyu Wa Inc.*, the Ninth Circuit once again “adhered to [their] narrow reading of *Hicks*.”¹⁰⁴ In *Grand Canyon*, the court held the tribe did not lack jurisdiction “over a property and contract dispute involving a company that was operating a tourist attraction on tribal land.”¹⁰⁵ Additionally, in *McDonald v. Means*, the Ninth Circuit declined to apply *Hicks* because of its “limited nature.”¹⁰⁶ Time and time again, the Ninth Circuit used textual limiting to narrow *Hicks* from below.

The Ninth Circuit’s limits on *Hicks* are especially significant because of where the circuit is located. The circuit is home to approximately 435 federally recognized tribes.¹⁰⁷ The Ninth

101. *Id.* at 898 (quoting *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813 (9th Cir. 2011)).

102. *Id.* at 902 (quoting *Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 813).

103. *Id.* at 896.

104. *Id.* at 898 (citing *Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa Inc.*, 715 F.3d 1196, 1199 (9th Cir. 2013)).

105. *Window Rock Unified Sch. Dist.*, 861 F.3d at 898 (citing *Grand Canyon Skywalk Dev., LLC*, 715 F.3d at 1199).

106. *McDonald v. Means*, 309 F.3d 530, 533 (9th Cir. 2002).

107. Arizona is home to twenty-two federally recognized tribes. See *22 Federally Recognized Tribes in Arizona*, ARIZ. DEP’T OF EDUC. [<https://perma.cc/6V2R-58V9>] (last visited Oct. 13, 2023). Nevada is home to twenty federally recognized tribes. See *Tribal Matters - Indian Country & Public Lands*, U.S. ATT’YS OFF. DIST. OF NEV., [<https://perma.cc/LYK9-PZ39>] (last visited Oct. 13, 2023). There are approximately 110 federally recognized tribes in California. *Frequently Asked Questions: Indian Tribes and Tribal Communities in California*, CAL. TRIBAL CT.-STATE CT. F., [<https://perma.cc/VLN9-YV83>] (last visited Oct. 7, 2023). There are nine tribes in Oregon. *Native Peoples of Oregon*, OR. SEC’Y OF STATE, [<https://perma.cc/F7VT-XXSH>] (last visited Oct. 13, 2023). There are twenty-nine tribes in Washington. *Indigenous Tribes of Seattle and Washington*, AM. LIBR. ASS’N, [<https://perma.cc/Q48F-UFCM>] (last visited Oct. 13, 2023). There are five tribes in Idaho. *Tribal Lands*, U.S. ATT’YS OFF. DIST. OF IDAHO, [<https://perma.cc/AB92-4XYZ>] (last visited Oct. 13, 2023). There are twelve tribes in Montana. *Montana Indians: Their History and Location*, MONT. OFF. OF PUB. INSTRUCTION

Circuit takes “*Hicks* at its word that its ‘holding . . . is limited to the question of tribal-court jurisdiction over state officers enforcing state law.’”¹⁰⁸ By repeatedly limiting *Hicks*, the Ninth Circuit is ensuring that the hundreds of tribal nations within the circuit are not negatively impacted by *Hicks*.

However, the Ninth Circuit was not alone in its endeavors to limit *Hicks*. The United States District Court for the District of Minnesota similarly practiced textual limiting when deciding *Tiessen v. Capital*.¹⁰⁹ At issue in *Tiessen* was whether the *Hicks* holding should extend to certain federal claims thus rendering tribal court an inadequate venue to hear such a claim.¹¹⁰ The *Tiessen* court declined to extend *Hicks* in this case because of the footnote in *Hicks* which states: “Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.”¹¹¹ Thus, the court held that, because *Tiessen* did “not involve state officers enforcing state law . . . *Hicks* does not control,” the case is proper in tribal court, rather than federal court.¹¹²

As discussed above, lower courts employed textual limiting to narrow *Hicks* from below in *Window Rock Unified School District, Grand Canyon, McDonald*, and *Tiessen*.¹¹³ These cases ultimately demonstrate that Supreme Court precedent can be successfully narrowed from below through the use of textual limiting.

2. Avenues of Textual Limiting

Textual limiting can feasibly limit the effects of *Castro-Huerta*, just as it did with *Hicks*. *Castro-Huerta*’s majority opinion contains incorrect and worrisome language that must be

1 (2015), [https://perma.cc/5D2H-XD3V]. There are 228 tribes in Alaska. *Alaska Region*, U.S. DEP’T OF THE INTERIOR, [https://perma.cc/H284-GLLC] (last visited Oct. 13, 2023).

108. *Window Rock Unified Sch. Dist.*, 861 F.3d at 906 (quoting *Nevada v. Hicks*, 533 U.S. 353, 358 n.2(2001)).

109. *See generally* *Tiessen v. Capital*, No. 16-cv-422, 2016 WL 6782776, at *4 (D. Minn. Oct. 20, 2016).

110. *Id.*

111. *Id.* (quoting *Hicks*, 533 U.S. at 358 n.2).

112. *Id.* at *4, *7.

113. *Supra* notes 100-12 and accompanying text.

dealt with properly. To properly employ textual limiting, lower courts must be tasked with the job of determining which text in the opinion is binding, and which parts are simply dicta.¹¹⁴ This task can be accomplished by looking at what the text of the opinion does and does not say.

It is important for lower courts to acknowledge what the opinion *does not say*—the Court goes so far as to explicitly *invite* future distinguishing by clearly stating what the decision does not hold.¹¹⁵ It would be a grave error for a lower court to misinterpret the textual language and hand down a decision that creates catastrophe across Indian country. In a similar vein, it would be unwise for lower courts to read between the lines of what the opinion does say and overapply *Castro-Huerta* where its application is unwarranted.

a. What the Opinion Does Not Say

In order to “*Hicks*” *Castro-Huerta*, lower courts should first focus on what the opinion *does not say*. Because, in this instance, what the majority opinion does not hold is far more important than what it does hold. First, “the Court leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization.”¹¹⁶ This is significant and should relieve some of the worry felt across Indian country in the wake of this decision.¹¹⁷ Additionally, the Court makes no mention of seeking to eradicate this “ancient rule” in future cases—despite the fact that the Court actively elected to do so in other hot issue cases in the same term.¹¹⁸

Second, *Castro-Huerta* does not take away a right previously held by tribes to prosecute non-Indians in Indian

114. *See infra* Sections III.A.2.a-b.

115. *See infra* Section III.A.2.a.

116. *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2526 (2022) (Gorsuch, J., dissenting).

117. *See id.*

118. *Id.*; *see, e.g., Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2284 (2022).

country.¹¹⁹ Tribes can only prosecute non-Indian crimes committed against Indians in Indian country that fall under the Violence Against Women Act (“VAWA”).¹²⁰ Notably, nothing in *Castro-Huerta* threatens VAWA or eliminates tribal jurisdiction.¹²¹ Instead, it grants concurrent jurisdiction to the State of Oklahoma.¹²²

b. What the Opinion Does Say

The tougher battle Indian country will face in the fight to remedy *Castro-Huerta* in a similar fashion to *Hicks* is grappling with what the opinion does say. Let’s begin on a positive note. The majority opinion refuses to reexamine *McGirt*.¹²³ This is significant for many reasons, but above all, it upholds notions of inherent tribal sovereignty.¹²⁴ *McGirt* is an example of the “two steps forward” theme and should be recognized as a huge step (or two) in the right direction.¹²⁵ Additionally, “the Court admits that tribal sovereignty *can* displace state authority even without a preemptive statute.”¹²⁶ The positives, however, end there.

119. See *Castro-Huerta*, 142 S.Ct. at 2526 (Gorsuch, J., dissenting) (explaining “the Court’s ruling today rests in significant part on the fact that Tribes currently lack criminal jurisdiction over non-Indians who commit crimes on tribal lands”).

120. See *2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA)*, U.S. DEP’T OF JUST., [https://perma.cc/C2XR-JDLZ] (last updated Apr. 7, 2023) (“The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) included a historic provision that recognized the inherent authority of ‘participating Tribes’ to exercise ‘special domestic violence criminal jurisdiction’ (SDVCJ) over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. This provision enabled Tribes to exercise criminal jurisdiction over non-Indian offenders for the first time since the Supreme Court’s 1978 decision in *Oliphant v. Suquamish Indian Tribe*, which held that, absent express Congressional authorization, Tribes lack jurisdiction over all crimes committed by non-Indians.”).

121. See generally *Castro-Huerta*, 142 S.Ct. at 2504-05.

122. *Id.*

123. *Id.* at 2510 (Gorsuch, J., dissenting) (“[T]he State has asked this Court to revisit *McGirt* and unilaterally eliminate all reservations in Oklahoma” but the “Court declined to entertain the State’s . . . argument.”).

124. See *supra* notes 45-54 and accompanying text.

125. See *supra* note 24 and accompanying text.

126. *Castro-Huerta*, 142 S.Ct. at 2525 (Gorsuch, J., dissenting) (citing *Castro-Huerta*, 142 S.Ct. at 2494-2500).

The majority opinion contains language that is not historically or factually supported.¹²⁷ The majority opinion relies loosely on the Tenth Amendment for many of its claims, including “Indian country is part of the State, not separate from the State,”¹²⁸ and “a State has jurisdiction over all of its territory, including Indian country.”¹²⁹ The Court discusses “[u]nder the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted (in a manner consistent with the Constitution) by federal law or by principles of tribal self-government.”¹³⁰ The issue with this, and why lower courts should not operate under this assumption in regard to Indian law cases, is that it is inconsistent with prior precedent.

“Tribal sovereignty means that the criminal laws of the States ‘can have no force’ on tribal members within tribal bounds unless and until Congress clearly ordains otherwise.”¹³¹ The Supreme Court got it backwards when they held to the contrary. The Court incorrectly assumes that *states* have the basis for jurisdiction unless preempted by federal law or tribal self-government, when in reality—pursuant to two hundred years of precedent—*tribes* have the basis for jurisdiction unless preempted by federal law.¹³²

The Tenth Amendment language is what many Indian law scholars are most worried about moving forward.¹³³ This Note argues that lower courts should regard the language as dicta and not allow it to control in future proceedings. The worry is those who oppose tribal sovereignty and self-determination might take the dicta and declare it binding before lower courts.¹³⁴ It is vital

127. *Rebalancing Federal-State-Tribal Power*, *supra* note 4. Dean Stacy Leeds states “it’s hard to fathom that there could be a bigger misstatement of what the field of federal Indian law is than that majority opinion.” *Id.*

128. *Castro-Huerta*, 142 S.Ct. at 2493.

129. *Id.*

130. *Id.* at 2502.

131. *Id.* at 2511.

132. *See id.*

133. *See Rebalancing Federal-State-Tribal Power*, *supra* note 4, at 23:50-25:08 (explaining why the majority’s citing of the Tenth Amendment is worrisome, legally incorrect, and inconsistent with textualist views).

134. *See id.* (citing *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2493 (2022) (explaining that the Court is likely to cite “Indian country is part of the State, not separate from the State,” and “a State has jurisdiction over all of its territory, including Indian

that lower courts be able to discern these litigants' motivations and not allow the dicta to creep into decisions where it does not belong.

3. Recent Example of Textual Limiting Applied to *Castro-Huerta*

Following the *Castro-Huerta* decision, many lower courts have already been asked to apply its ruling and some have already used textual limiting to narrow its reach. For example, in January 2023, the United States District Court for the District of Minnesota ruled in *Mille Lacs Band of Ojibwe v. County of Mille Lacs, Minnesota*. In *Mille Lacs*, the “County asserts that Public Law 280 ‘overrides the Band’s interests in self-government,’ and ‘grant[s] Minnesota primacy over criminal law enforcement jurisdiction throughout Indian country in Minnesota.’”¹³⁵ The defendant in *Mille Lacs* relied on language found in *Castro-Huerta* to forward their argument.¹³⁶ However, the District Court refused to advance *Castro-Huerta* and rejected a broader reading of the decision:

Castro-Huerta, on which the County relies, does not confer “primacy” on states. Rather, it holds that the federal government and states share concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. While the Supreme Court observed that Public Law 280 generally affords states broad criminal jurisdiction over state-law offenses committed by or against Indians in Indian country, the case did not involve the issue of tribal law enforcement authority, much less Public Law 280’s effect on such authority. While the Court commented that absent Public Law 280, state jurisdiction over Indian country crimes committed by Indians “could implicate principles of tribal self-government,” *it did not state that*

country” in future cases decreasing the likelihood of the language to be considered purely dicta)).

135. *Mille Lacs Band of Ojibwe v. Cnty. of Mille Lacs, Minn.*, No. 17-cv-05155, 2023 WL 146834, at *29 (D. Minn. Jan. 10, 2023).

136. *Id.*

Public Law 280 grants states jurisdictional primacy or that it overrides a tribe's interests in self-government.¹³⁷

The District of Minnesota employed textual limiting in this instance by asserting what the Court “did not state” in *Castro-Huerta*.¹³⁸ By doing so, the court refused to apply the case more liberally, and instead chose to strictly adhere to the holding and plain meaning of the *Castro-Huerta* decision. This Note calls upon other lower courts to do the same.

4. Downsides to Textual Limiting

Solutions are not always absolute, and this proffered solution is no different. The downside of narrowing *Castro-Huerta* through textual limiting is twofold: (1) *Castro-Huerta* does not contain an analogous footnote to that found in *Hicks*; and (2) it may be an uphill battle convincing lower courts that the majority's Tenth Amendment language is purely dicta.

The first, and most obvious flaw, is the *Castro-Huerta* opinion does not contain a limiting footnote, like that found in the text of *Hicks*. Lower courts were able to limit their decisions, ensuring *Hicks* was not extended, because the Court explicitly allowed for that practice in its text.¹³⁹ However, the comparison is not completely apples to oranges. As previously discussed, the *Castro-Huerta* Court explicitly invited lower courts to distinguish future cases by stating what the opinion does not do.¹⁴⁰ But what the opinion does say is dangerous and lower courts must carefully parse through the decision's actual holding, paying little mind to dicta to ensure *Castro-Huerta* is not expanded. This flaw, while easy to spot, may be the most challenging to overcome.

And for the second downside—which inevitably flows from the first—Indian law scholars are not convinced that the Court's Tenth Amendment claims will be considered dicta in the eyes of other courts.¹⁴¹ It is foreseeable that future opinions will

137. *Id.* (internal citations omitted) (emphasis added).

138. *Id.*

139. *See* Nevada v. Hicks, 533 U.S. 346, 353 n.2 (2001).

140. *See supra* Section III.A.2.a.

141. *See supra* note 133 and accompanying text.

reference the majority's bold claims of states having inherent power across Indian country to further many anti-tribal agendas beyond just criminal jurisdiction. Many jurists are unfamiliar with Indian law doctrine and may fall victim to such anti-tribal arguments.¹⁴²

Recognizing the downsides of this solution and understanding the uphill battle ahead should not be a deterrent. Indian country can find a way over these hurdles and continue its fight to limit *Castro-Huerta*.

B. Fact-to-Fact Limiting

The second method lower courts can use to narrow *Castro-Huerta* from below is fact-to-fact limiting. This type of limiting is not novel, but it can be a worthwhile method to employ when narrowing a Supreme Court decision, such as *Castro-Huerta*. This Note defines fact-to-fact limiting as only applying a prior case's holding in subsequent cases that have overwhelmingly similarly situated facts. This method results in extreme limiting, that some scholars argue treads closer to nullification.¹⁴³ As will be discussed, fact-to-fact limiting is controversial and may seem like a disingenuous approach to some lower courts.¹⁴⁴ However, given that the Supreme Court upended two hundred years of precedent in *Castro-Huerta*, I find it an appropriate tactic for lower federal courts to not lend too much credence to the decision's unprecedented holding.

This Section begins by analyzing an example of fact-to-fact limiting in federal Indian law that can serve as a model moving forward.¹⁴⁵ Next, it offers different approaches lower courts can

142. See Stephen Wermiel, *SCOTUS for Law Students: Indian Cases at the Court*, SCOTUSBLOG (Jan. 4, 2016, 9:48 AM), [https://perma.cc/GR6L-92HC] (“Because of the uniqueness of Indian law and as a result of its patchwork nature, Justices have been known in private conversation to express frustration with the vagaries of Indian law cases. More than two decades ago, a Justice who was speaking in private to a group of scholars observed that when it came to Indian law, ‘we just make it up as we go.’”).

143. See Chad Flanders, *Bush v. Gore and the Uses of “Limiting”*, 116 YALE L. J. 1159, 1163 (2007) (explaining “[w]hen the Court limits a case to its facts, it is not trying to narrow a principle; it is trying to void the principle of the case by restricting its application not merely to a narrower set of circumstances but to only a single set of facts”).

144. See *infra* Section III.B.4.

145. See *infra* Section III.B.1.

take to practice this limiting technique.¹⁴⁶ Then, it points out a recent decision where a lower court employed this very method to limit *Castro-Huerta*.¹⁴⁷ Lastly, this Section discusses the potential dangers and controversies of fact-to-fact limiting.¹⁴⁸

1. A Model to be Gleaned by *McGirt*

Limiting a case to its facts is commonly used in every area of law, including Indian law cases. Looking to a recent example of a court using fact-to-fact limiting to achieve a new result, one can look to the Supreme Court itself for guidance. When the Court decided *McGirt*, it provided a model for fact-to-fact limiting that which lower courts can apply.¹⁴⁹

When deciding whether the Muscogee reservation had been disestablished, the *McGirt* court clarified a prior precedent first explained in *Solem v. Bartlett*.¹⁵⁰ “Under the *Solem* framework, courts may examine: (1) the language of the governing federal statute; (2) the historical circumstances of the statute’s enactment; and (3) subsequent events, such as Congress’s later treatment of an affected area.”¹⁵¹ However, in *McGirt*, the court held only step one need be addressed because the facts of *McGirt* called for such an application of the *Solem* framework.¹⁵² The Court limited its prior precedent in *Solem* by correctly recognizing that the facts in *McGirt* called for a different application and a different decision.¹⁵³

The Supreme Court laid out this model of fact-to-fact limiting when deciding *McGirt*. Lower courts should similarly use this model of fact-to-fact limiting when deciding cases implicated by *Castro-Huerta* to achieve results more consistent with Indian law doctrine.

146. See *infra* Section III.B.2.

147. See *infra* Section III.B.3.

148. See *infra* Section III.B.4.

149. See *supra* notes 44-48 and accompanying text.

150. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2468-2470 (2020).

151. SCHWARTZ, *supra* note 48, at 3.

152. *Id.*

153. *Id.*

2. Avenues of Fact-to-Fact Limiting

The majority opinion does not explicitly advise lower courts to limit future decisions implicated by the *Castro-Huerta* decision to its facts, but it can nonetheless still be done. The decision's dissent, authored by Justice Gorsuch, offers many avenues by which this decision can be limited.¹⁵⁴ In this instance, if lower courts wished to apply the *Castro-Huerta* ruling as is, they would only be able to do so if the facts of the case were near identical to those found in *Castro-Huerta*. Herein lies the opportunity for lower courts to limit *Castro-Huerta*'s effects through fact-to-fact limiting.

a. Correctly Applying a Preemption Analysis

One apparent avenue is for lower courts to recognize the Supreme Court's misapplied preemption analysis to the case's facts and refuse to repeat it. The majority opinion relies on foundational errors when determining whether preemption has occurred.¹⁵⁵ The Court relies "on the premise that Oklahoma possesses 'inherent' sovereign power to prosecute crimes on tribal reservations until and unless Congress 'preempt[s]' that authority."¹⁵⁶ But this reliance is incorrect. The preemption rule applicable to other entities, "is exactly the opposite of the normal rule."¹⁵⁷ The Supreme Court itself has declared, time and time again that "[b]ecause Tribes are sovereigns, this Court has consistently recognized that the usual 'standards of preemption' are 'unhelpful.'"¹⁵⁸

154. See generally *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2505-27 (2022) (Gorsuch, J., dissenting).

155. *Id.* at 2511.

156. *Id.* (quoting *Castro-Huerta*, 142 S.Ct. at 2492-2501).

157. *Id.* ("Tribal sovereignty means that the criminal laws of the States 'can have no force' on tribal members within tribal bounds unless and until Congress clearly ordains otherwise. . . . After all, the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty. . . . A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders' . . .").

158. *Id.* at 2512 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989); *Moe v.*

Lower courts should take advantage of different factual situations found in future cases to revert to the preemption analysis that is meant to be used when deciding Indian law cases. Specifically, courts should “‘start with the assumption’ that Congress has not displaced state authority.”¹⁵⁹ Lower courts should refrain from “searching for an Act of Congress *displacing* state authority [because] our cases require a search for federal legislation *conferring* state authority.”¹⁶⁰ Furthermore, lower courts should decide future cases “against the ‘backdrop’ of tribal sovereignty . . . with an ‘assumption that the States have no power to regulate the affairs of Indians on a reservation’ or other tribal lands.”¹⁶¹ Correctly applying a preemption analysis to new factual situations will decrease the negative impact of *Castro-Huerta*.

b. Distinguishing Treaty Language

Another avenue lower courts can take to limit *Castro-Huerta* to its facts is to recognize that applicable treaties in future cases may, and will most likely be different from the treaty language referenced in *Castro-Huerta*. In future cases, lower courts should be “cognizant[t] of the particular circumstances of the Tribe in question, including all relevant treaties and statutes.”¹⁶² “Tribes and their treaties [are not] ‘fungible,’” nor are they monolithic; thus, an analysis of such treaties will need to be done on a case by case and fact by fact basis.¹⁶³

For instance, some treaties “appear to promise tribal freedom from state criminal jurisdiction in express terms.”¹⁶⁴ If lower courts find analogous language within the treaty before them, then

Confederated Salish & Kootenai Tribes of Flathead Rsvr., 425 U.S. 463, 475-476 (1976); *McClanahan v. Ariz. Tax Comm’n*, 411 U.S. 164, 170-172 (1973).

159. *Castro-Huerta*, 142 S.Ct. at 2512 (Gorsuch, J., dissenting) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

160. *Id.* at 2512.

161. *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 219-220 (1959)).

162. *Id.* (quoting *Bracker*, 448 U.S. at 145).

163. *Castro-Huerta*, 142 S.Ct. at 2526 (Gorsuch, J., dissenting) (citing Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1071-72 (2004)).

164. *Id.* (citing Treaty with the Navajo art. I, Navajo Nation-U.S., June 1, 1868, 15 Stat. 667 (“guaranteeing that those who commit crimes against tribal members will be ‘arrested and punished according to the laws of the United States’”)).

they will be able to distinguish the case's facts from *Castro-Huerta*'s. Because every case is so different from the next, it logically follows that *Castro-Huerta* cannot be broadly applied to every future case that stems from the decision. Therefore, lower courts can reasonably narrow *Castro-Huerta* from below through fact-to-fact limiting.

3. Recent Example of Fact-to-Fact Limiting Applied to *Castro-Huerta*

Since the *Castro-Huerta* decision came down, numerous cases have cited to the ruling.¹⁶⁵ We can look again to the District of Minnesota as a guide as they have already embarked on the journey of narrowing *Castro-Huerta* through fact-to-fact limiting.¹⁶⁶

In October 2022, just four months after the *Castro-Huerta* decision was rendered, the District of Minnesota ruled in *United States v. Lussier*.¹⁶⁷ In *Lussier*, the defendant argues:

[F]ollowing the Court's opinion in *Castro-Huerta*, including the Court's interpretation therein of Public Law 280, "the claim that the tribe has 'inherent sovereign authority,' is no longer persuasive" because "[t]he old definition of 'Tribal sovereignty' . . . carries no weight in light of" the assertion in *Castro-Huerta* that "Indian country is part of a state, not separate from a State." Thus, according to Defendant, "it cannot be said that Red Lake is a sovereignty with respect to enforcement of its criminal law."¹⁶⁸

The *Lussier* court rejected the defendant's argument stating it "is entirely without merit."¹⁶⁹ The court stressed "[n]othing in *Castro-Huerta* diminishes [a tribe's] existence as a distinct sovereign entity or the long standing dual sovereign doctrine."¹⁷⁰

165. See, e.g., *United States v. Lussier*, No. 21-cr-145, 2022 WL 17476661, at *14 (D. Minn. Oct. 11, 2022); *Mille Lacs Band of Ojibwe v. Cnty. of Mille Lacs*, Minn., No. 17-cv-05155, 2023 WL 146834, at *29 (D. Minn. Jan. 10, 2023); *United States v. Smith*, No. 21-35036, 2022 WL 3102454, at *1 (9th Cir. Aug. 4, 2022); *Gregg v. United States*, No. 20-cv-433, 2022 WL 16745717, at *1 (D. Minn. Nov. 7, 2022).

166. See *Lussier*, 2022 WL 17476661, at *14; *Mille Lacs*, 2023 WL 146834, at *29.

167. 2022 WL 17476661, at *1.

168. *Id.* at *14 (citations omitted).

169. *Id.*

170. *Id.*

The court also took time to emphasize *Castro-Huerta*'s "majority opinions' departure from almost two hundred years of well settled federal Indian law."¹⁷¹ But perhaps the greatest effort the *Lussier* court makes in limiting *Castro-Huerta* is by acknowledging that:

[T]he effect of *Castro-Huerta* is limited exclusively to the narrow holding and *specific facts* of *Castro-Huerta*—"the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country," . . . provided Congress has not otherwise specifically precluded such state action in Indian Country; *Castro-Huerta*, stands only for the proposition that Congress has not limited the ability of the State of Oklahoma to prosecute non-Indians for crimes committed within Indian country in *Oklahoma*.¹⁷²

More litigation will inevitably follow *Castro-Huerta* and it will be the job of attorneys to present lower courts with "reasonable"¹⁷³ arguments as to why the court should employ fact-to-fact limiting, ultimately narrowing *Castro-Huerta*'s implications. As previously discussed, the best place to begin the search for sound arguments lies in the decision's dissent and from there attorneys will be able to conceptualize additional arguments that can be presented to lower courts.¹⁷⁴

4. Downsides of Fact-to-Fact Limiting

Aforementioned, every solution has potential downsides.¹⁷⁵ The first, and most jarring downside is fact-to-fact limiting is not always the best use of judicial power, and many scholars believe it is quite disingenuous to not adhere to vertical stare decisis.¹⁷⁶

171. *Id.*

172. *Lussier*, 2022 WL 17476661, at *14 (internal citations omitted) (emphasis added).

173. *Re*, *supra* note 66, at 921.

174. *See supra* Section III.B.2; *see generally* *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2527 (2022) (Gorsuch, J., dissenting).

175. *See supra* Section III.A.4.

176. *See Re*, *supra* note 66, at 924 (explaining "narrowing from below can undermine the authority of higher courts"). Professor *Re* explains:

Commentators typically emphasize the conventional view that vertical stare decisis imposes an "absolute" demand. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 957 (2005) ("Vertical stare decisis is generally considered absolute . . ."); Michael C. Dorf, *Dicta*

Take *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, and its line of cases, for example.¹⁷⁷ *Bivens* was a landmark case that has been stripped down to virtually nothing due to fact-to-fact limiting.¹⁷⁸ Scholars and practitioners alike denounce the way lower courts and the Supreme Court have limited the *Bivens* holding to such a confined box that it is rarely applicable.¹⁷⁹

To overcome this downside, we can look to motive. “[C]onservative jurists and commentators [believe] that *Bivens* was wrongly decided,” so they narrow *Bivens*’ subsequent cases through fact-to-fact limiting.¹⁸⁰ But in reality, those who oppose *Bivens* are likely motivated by their desire to protect federal officers from suit and save the government from paying out

and Article III, 142 U. PA. L. REV. 1997, 2025 (1994) (asserting that “[a] lower court must always follow a higher court’s precedents”); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 203 (2014) (noting that “the American federal system” is one that “treat[s] vertical precedent as absolutely binding” and that “[w]here a Supreme Court holding applies to a pending dispute, an inferior court has only one available course of action”); Paul W. Werner, *The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over Application*, 1994 BYU L. REV. 633, 639 (explaining that “stare decisis requires absolute adherence to decisions rendered by higher courts”).

Id. at 924, n.8.

177. 403 U.S. 388 (1970). In 1971 the Supreme Court decided “*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which allowed Webster Bivens, a Black man who was manacled and strip searched, to sue the narcotics officers responsible under the Fourth Amendment.” Anya Bidwell & Nick Sibilla, *Limiting Bivens: The US Supreme Court’s Reluctance to Allow Lawsuits Against Federal Agents*, JURIST (Nov. 22, 2021, 9:00 AM), [https://perma.cc/BF5Y-KRN3]; see also Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2019-2020 CATO SUP. CT. REV. 263, 263 (2020) (explaining “[i]n *Bivens* . . . the Supreme Court recognized at least some circumstances in which federal courts can and should fashion a judge-made damages remedy for constitutional violations by federal officers”). In recent years, however, some conservative jurists are “willing to eliminate *Bivens* claims” all together and others “would largely limit it to its facts.” Cassandra Robertson, *SCOTUS Sharply Limits Bivens Claims—and Hints at Further Retrenchment*, AM. BAR ASS’N. (Apr. 14, 2020), [https://perma.cc/FD6S-2HC5].

178. “[T]he Court has become increasingly wary of allowing suits for damages outside of Section 1983, so aside from a few increasingly narrow circumstances, it became virtually impossible to sue a federal officer who violated the Constitution, even if they aren’t shielded by qualified immunity.” Bidwell & Sibilla, *supra* note 177 (explaining *Bivens* is “practically a dead letter”).

179. See generally Vladeck, *supra* note 177, at 263; see also Bidwell & Sibilla, *supra* note 177.

180. Vladeck, *supra* note 177, at 263.

damages.¹⁸¹ Whereas those who wish to limit *Castro-Huerta* want to do so because the case defies two hundred years of precedent and the inherent rights of tribal sovereigns.¹⁸² There is a difference between protecting one's pocketbook and protecting one's inherent sovereignty. This difference might only be apparent if looking through rose-colored lenses, but motivations matter and should be considered when deciding whether fact-to-fact limiting can be done in a genuine way.

Again, this solution is not perfect, and many courts and scholars will not take kindly to it. But, if lower courts can reasonably justify their decision to employ fact-to-fact limiting, then they are less likely to be abusing their judicial power, and hypocrisy is less likely present. Thus, for lower courts to not run afoul of this concern, the courts must be presented with reasonable arguments grounded in case law and Indian law doctrine so that they may base their rulings off such principles.

The second downside is fact-to-fact limiting could result in inconsistencies across Indian country. When lower courts participate in fact-to-fact limiting because they disagree with the ruling, it can create instability among prior precedent.¹⁸³ Meaning, if some lower courts choose to narrowly apply the *Castro-Huerta* ruling, while others apply it more liberally, some tribes will not grapple with the decision's holding, but others will be forced to a different fate.¹⁸⁴ This downside should not encourage supporters of this solution to throw in the towel.¹⁸⁵ On

181. Henry Rose, *The Demise of the Bivens Remedy is Rendering Enforcement of Federal Constitutional Rights Inequitable but Congress Can Fix It*, 42 N. ILL. U. L. REV. 229, 241 (2022) (explaining how in the *Bivens* line of cases “the Supreme Court has protected the interests of the federal government over the interests of persons whose federal constitutional rights have been violated by federal actors. As a result, enforcement of personal federal constitutional rights has been diminished”).

182. See *supra* note 62 and accompanying text.

183. See *Re*, *supra* note 66, at 924 (“narrowing from below can . . . generate legal disuniformity as varying jurisdictions construe higher court precedent in divergent ways”).

184. *Id.*

185. This downside is common across all areas of law because of circuit splits. See Legal Information Institute, *Circuit Split*, CORNELL L. SCH. (July 2022), [<https://perma.cc/K9ZY-JTRC>] (“Circuit split arises when two or more circuits in the U.S. Court of Appeals reach different decisions on the same legal issue. This disagreement means federal law is applied differently in different parts of the country, so that similarly situated litigants receive different treatment across jurisdictions”).

the contrary, if not every tribe has to succumb to the same fate as the Cherokees in the *Castro-Huerta* decision, then that is a small win towards the ultimate goal of reducing the decision down to nothing.

Despite these downsides, fact-to-fact limiting is still a viable solution attorneys can use to argue before lower courts as they attempt to persuade these courts to limit *Castro-Huerta*.

IV. CONCLUSION

Castro-Huerta, left unchecked, could lead to more cases reeking of the same foul, and unsupported language.¹⁸⁶ However, with the help of lower courts, Indian country can see this case remedied and reeled back in.¹⁸⁷ The stakes are high, but the solutions are achievable. As this Note advocates, lower courts can constrain the implications of the decision through textual limiting by strictly adhering to the text of *Castro-Huerta*'s holding and not going beyond the meaning of the words chosen.¹⁸⁸ In addition, the decision can be narrowed through fact-to-fact limiting by lower courts only applying the case's holding in subsequent cases that have overwhelmingly similarly situated facts.¹⁸⁹ The suggested solutions can ultimately remedy a decision that relies on baseless and precedentially incorrect assumptions. With solutions in hand, Indian country will continue to advocate for its inherent rights.

186. *See supra* note 127 and accompanying text.

187. *See supra* Part III.

188. *See supra* Section III.A.

189. *See supra* Section III.B.