Denezpi v. United States: Tribal Self-Determination, Safety, and the Necessary Role of the Dual-Sovereignty Doctrine

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Abstract

The Double Jeopardy Clause ("Clause") of the Fifth Amendment guarantees that no person will be prosecuted twice for the same offense. The dual-sovereignty doctrine, however, operates as a significant carveout to this protection. The doctrine provides that successive prosecutions for a single act do not implicate the Clause, so long as the laws giving rise to the two prosecutions are separate offenses articulated by distinct sovereigns. For nearly a century, Supreme Court jurisprudence focused on the interplay between state and federal proceedings. It was not until 1978 that the Court decided United States v. Wheeler, *a landmark case that extended the applicability of the dual-sovereignty doctrine to Native American tribes.*

The Court recently revisited the role of the doctrine in tribal criminal proceedings. In Denezpi v. United States, *the Court held that the defendant's conviction in federal district court, following his conviction in the Court of Indian Offenses, did not violate the Double Jeopardy Clause. This comment argues that although the Court correctly decided* Denezpi*, it failed to incorporate key public policy considerations in its reasoning. Namely, the Court neglected to acknowledge that barring Denezpi's subsequent prosecution in federal court would strip the tribes utilizing the Court of Indian Offenses of their inherent judicial sovereignty, exacerbate safety concerns on reservations, and undermine the ability of sovereigns to enforce their own laws.*

TABLE OF CONTENTS

INTRODUCTION...*2*
I. THE DOUBLE JEOPARDY CLAUSE AND DUAL-SOVEREIGNTY DOCTRINE...*4*
II. THE CRIMINAL JUSTICE SYSTEM IN INDIAN COUNTRY................*7*
III. DENEZPI V. UNITED STATES.. *10*
A. Facts...10
B. Procedural History...11
C. Opinion of the Court..12
D. Justice Gorsuch's Dissenting Opinion...................................14
VI. ANALYSIS... *15*
A. Disparity Among Tribes...16
B. Tribal Safety and the Rights of Sovereigns..............................18
V. CONCLUSION.. *20*

INTRODUCTION

The Double Jeopardy Clause ("Clause") of the Fifth Amendment provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb."[1] The constitutional prohibition against double jeopardy upholds the integrity of the criminal justice system by protecting the final interests of defendants, ensuring they will not be subject to unreasonable prosecutorial discretions, and allowing for strategic plea

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[1] U.S. CONST. amend. V.

bargaining.[2] The bar against double jeopardy, however, is undermined by dual-sovereignty, a doctrine premised on the belief that distinct sovereigns are free to exercise their own rights within their respective spheres, free from the intrusion of other sovereigns.[3]

For nearly a century, Supreme Court jurisprudence on the dual-sovereignty doctrine focused on the interplay between states and the federal government. It was not until 1978 that the Court assessed the applicability of dual-sovereignty to Native American tribes, holding in *United States v. Wheeler*[4] that tribes are distinct sovereigns within the meaning of the doctrine, and the Clause does not bar the federal government from bringing charges after the defendant has already been prosecuted in tribal court.[5] The Supreme Court recently revisited the doctrine's role in tribal criminal proceedings in *Denezpi v. United States*[6], holding that the defendant's conviction in federal district court for aggravated sexual assault, following his conviction in the Court of Indian Offenses for assault and battery, did not offend the Clause.[7]

This Comment reviews Supreme Court decisions surrounding the Double Jeopardy Clause and dual-sovereignty doctrine in Section I, and discusses the criminal justice system in Indian country in Section II. An overview of *Denezpi* follows in Section III. While the Court correctly decided *Denezpi*, Section IV will show that it neglected to address critical public policy considerations in its opinion. First, the Court did not acknowledge that barring Denezpi's subsequent prosecution in federal court would render the dual-sovereignty doctrine inapplicable to the sixteen tribes that utilize the Court of Indian Offenses. A rule of this kind would strip these tribes of judicial sovereignty and create a disparity in criminal proceedings. Second, the Court neglected to assess the negative impact this rule would have on the safety of tribes and the ability of sovereigns to enforce their own laws. By failing to incorporate these concerns in its opinion, the Court neglected to show the ways in which Denezpi's argument undermines decades of public policy in favor of tribal self-determination.

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[2] Robert Matz, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Succeed, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 355-56 (1997).
[3] *Id.* at 354.
[4] 435 U.S. 313 (1978).
[5] *Id.* at 330.
[6] Denezpi v. United States, 596 U.S. 591 (2022).
[7] *Id.* at 605.

I. THE DOUBLE JEOPARDY CLAUSE AND DUAL-SOVEREIGNTY DOCTRINE

The Double Jeopardy Clause is found in the Fifth Amendment of the United States Constitution and states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[8] States are bound by this guarantee via the Fourteenth Amendment, and tribal governments are similarly bound under the Indian Civil Rights Act (ICRA).[9] The prohibition against double jeopardy ensures the efficient allocation of prosecutorial resources and on an individual level, shields defendants against the psychological and social impacts of being punished more than once for any offense.[10]

Much of the caselaw surrounding the Clause focuses on the meaning of the word "offence." In *Moore v. Illinois*[11], a defendant was convicted in state court for harboring an enslaved person in violation of Illinois law and again in federal court for the same conduct in violation of the Fugitive Slave Act.[12] The Court held that the Clause did not bar the federal prosecution, as the defendant's single act violated two distinct offenses.[13] The Court reasoned that the Clause does not state that no person shall be subject twice to jeopardy for the same action, but rather for the same offense, which is merely the transgression of a law defined by a sovereign.[14] The Court has relied on and repeatedly upheld *Moore*, stating in *Heath v. Alabama*[15] that two identical laws, if defined by distinct sovereigns, are not the same offense within the meaning of the Clause.[16] In as recently as 2019, the Court reaffirmed this long-held position in *Gamble v. United States*[17], holding that the Clause does not prohibit successively placing a person in jeopardy for the same act, and instead focuses on whether the prosecutions are for the same offense.[18]

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[8] U.S. CONST. amend. V.
[9] Angela R. Riley & Sarah Glenn Thomson, *Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes*, 122 COLUM. L. REV. 1899, 1904 (2022).
[10] *Id.* at 1904-05.
[11] 55 U.S. 13 (1852).
[12] *Id.* at 17.
[13] *Id.* at 20.
[14] *Id.* at 19-20.
[15] 474 U.S. 82 (1985).
[16] *See id.* at 92.
[17] 139 S. Ct. 1960 (2019).
[18] *Id.* at 1965.

The dual-sovereignty doctrine is judicially crafted and the only carveout to the Double Jeopardy Clause.[19] The concept first appeared in dicta in *Fox v. Ohio*,[20] where the Court concluded the Clause is not implicated if the state and federal laws giving rise to a dual prosecution defined separate offenses articulated by two sovereigns.[21] The Court formally adopted the doctrine five years later in *Moore*[22], and first applied it in *United States v. Lanza.*[23] In *Lanza*, the defendants were initially charged in federal court for violating the National Prohibition Act for manufacturing, transporting, and possessing liquor, and then charged for the same conduct in Washington in violation of a state statute.[24] The Court held that an act denounced as a crime by both the state and federal government is an offense against the "peace and dignity" of both sovereigns, and may be punished by each as an exercise of their dual-sovereignty without offending the Clause.[25] The Court reasoned that "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of another."[26]

The Court expanded the doctrine's applicability in *Bartkus v. Illinois.*[27] In this case, the defendant was convicted of robbery in state court after being acquitted by a jury in federal court.[28] An officer with the Federal Bureau of Investigation provided the state with the evidence used in the federal prosecution.[29] The Court held that the mere involvement of federal law enforcement officers in the state trial did not violate the Double Jeopardy Clause.[30] Relying on the precedent set in *Lanza*, the Court reasoned that the cooperation of a federal officer did not constitute two federal prosecutions because the state prosecution was undertaken by state officials within their sovereign "discretionary responsibility" and in accordance with the violation of a state penal code.[31] By cooperating with

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[19] Matz, *supra* note 2, at 358.
[20] 46 U.S. 410 (1847)
[21] *See* Riley et al., *supra* note 9, at 1905 (discussing the holding of Fox v. Ohio, 46 U.S. 410 (1847)).
[22] *Id.*
[23] Matz, *supra* note 2, at 359.
[24] 260 U.S. 377, 378-79 (1922).
[25] *Id.*
[26] *Id.* at 382.
[27] 359 U.S. 121 (1959).
[28] *Id.* at 121-22.
[29] *Id.* at 122.
[30] *Id.* at 123-24.
[31] *Id.* at 123.

state authorities, federal officials "acted in accordance with the conventional practice between two sets of prosecutors."[32]

In 1978, the Court decided *Wheeler*, a landmark case that addressed the applicability of the dual-sovereignty doctrine to Native American tribes.[33] In *Wheeler*, a member of the Navajo Tribe was convicted in tribal court for disorderly conduct and contributing to the delinquency of a minor in violation of the Navajo Tribal Code.[34] One year later, the defendant was charged with statutory rape in the United States District Court for the District of Arizona for the same conduct.[35] The defendant moved to dismiss the indictment, arguing that because the tribal offense was a lesser included offense of statutory rape, his initial prosecution in tribal court barred the subsequent federal prosecution.[36] The Court held that the Double Jeopardy Clause did not bar the federal prosecution, for tribes act as an independent sovereign when criminally punishing a tribe member for violating tribal law.[37] The Court reasoned that tribes are "self-governing sovereign political communities" that possess the "inherent power to proscribe laws for their members and to punish infractions of those laws."[38] The dual-sovereignty doctrine therefore applies to tribes because tribal and federal prosecutions are brought by separate sovereigns.[39] The Court noted that limiting the dual-sovereignty doctrine only to state and federal prosecutions, and not extending it to tribal proceedings, would result in "undesirable consequences" and deprive the federal government of the ability to enforce its own laws.[40]

Most recently, in *Puerto Rico v. Sanchez Valle*,[41] the Court addressed the applicability of the doctrine to United States territories.[42] Here, the defendants were indicted by commonwealth prosecutors for selling a firearm without a permit in violation of the Puerto Rico Arms

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[32] *Id.*
[33] United States v. Wheeler, 435 U.S. 313 (1978).
[34] *Id.* at 315.
[35] *Id.*
[36] *Id.* at 315-16.
[37] *Id.* at 328, 330.
[38] *Id.* at 322-23. The sovereign status of Indian tribes is particularly unique, and in fact greater than that of states, because they have not "voluntarily surrendered any of their inherent powers to the federal government." Grant Christensen, *Getting Cooley Right: The Inherent Criminal Powers of Tribal Law Enforcement*, 56 U.C. DAVIS L. REV. 467, 479 (2022).
[39] Wheeler, 435 U.S. at 329-30.
[40] *Id.* at 330-31.
[41] 579 U.S. 59 (2016).
[42] *Id.* at 62.

Act.[43] While those charges were pending, the respondents were indicted by a federal grand jury for violating U.S. gun trafficking statutes.[44] The defendants pled guilty in federal court and moved to dismiss the pending commonwealth charge on double jeopardy grounds.[45] The Court held that the Clause barred Puerto Rico from successively prosecuting the defendants, as Puerto Rico's ultimate source of prosecutorial power is the U.S. government.[46] For this reason, Puerto Rico could not be considered a distinct sovereign within the meaning of the dual-sovereignty doctrine.[47] While this case focused on the sovereignty of U.S. territories, the Court reaffirmed *Wheeler*, stating that "Indian tribes . . . count as separate sovereigns under the Double Jeopardy Clause."[48] The Court most notably remarked that "unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form."[49]

II. THE CRIMINAL JUSTICE SYSTEM IN INDIAN COUNTRY

The criminal justice system in Indian country is complex and often characterized as a "jurisdictional maze" comprised of overlapping sovereign authority.[50] This is the result of centuries of judicial opinions, laws, executive memoranda, and administrative regulations that have, at times,

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[43] *Id.* at 65.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 78.
[47] *Id.* at 75.
[48] *Id.* at 70.
[49] *Id.* Lower courts have also addressed the role of the dual-sovereignty doctrine in tribal criminal proceedings. *See* United States v. Walking Crow, 560 F.2d 386 (8th Cir. 1977) (holding that federal district court that subsequently prosecuted the defendant and the tribal court of the Rosebud Sioux Tribe were not adjudicatory arms of the same sovereign); United States v. Lee, 967 F.2d 594 (9th Cir. 1992) (affirming the Court's position in *Wheeler* that the Double Jeopardy Clause did not bar the defendant's prosecution in Federal District Court for an offense upon which he was already convicted in tribal court); United States v. Long, 324 F.3d 475 (7th Cir. 2003) (stating that Indian tribes possess the criminal powers of a sovereign in the realm of internal affairs, subject to Congress's power to strip tribes of this sovereignty).
[50] Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 991 (1975).

been "utterly at odds with each other."[51] Overlapping sovereigns operate in numerous capacities depending on the location and type of the alleged offense, and whether the victim or defendant is Native American.[52]

Enacted in 1885, the Major Crimes Act (MCA) provides the federal government with jurisdiction over "certain enumerated felony offenses committed by an Indian person in Indian country."[53] Indian country includes "lands within the boundaries of that tribe's reservation, lands held in trust for the tribes or its members, . . . and lands that qualify as 'dependent Indian communities.'"[54] While Congress intended the legislation to only serve a temporary role as Native Americans were assimilated into the "broader American society," it has experienced notable longevity.[55] Today, Congress occasionally adds to the list of MCA offenses and clarifies the roles and responsibilities of federal agencies with regard to the Act,[56] but has shown no signs of "seriously questioning the continued existence of the machinery itself."[57]

After Congress enacted the MCA, the Department of the Interior (DOI) established Courts of Indian Offenses, governed by the Bureau of Indian Affairs.[58] Today, these judicial bodies are commonly referred to as CFR courts and serve the purpose of enforcing criminal laws in Indian country.[59] These courts were overtly assimilative in purpose and at their inception, and sought to extinguish Native American customs the U.S.

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[51] Riley et al., *supra* note 9, at 1908; *see also* Gregory Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, 2022 S. CT. REV. 293, 300 (2022).

[52] Riley et al., s*upra* note 9, at 1908-09. Recently, the Supreme Court held in *Oklahoma v. Castro-Huerta* that states have criminal jurisdiction over crimes committed by non-Indians, against Indians, in Indian country. 142 S. Ct. 2486, 2491 (2022). For nearly two hundred years, states lacked criminal jurisdiction in crimes of this sort. Riley et al., *supra* note 9, at 1909. In contrast, tribes do not have criminal jurisdiction over non-Indians who commit crimes on Indian land. Oliphant v. Squamish Indian Tribe, 435 U.S. 191, 195 (1978). This has led to an exacerbation of safety concerns on reservations. Riley et al., *supra* note 9, at 1914-15.

[53] Riley et al., *supra* note 9, at 1911 (referencing 18 U.S.C. § 1153 (2022)).

[54] *See* Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1673 (2016) (referencing 25 U.S.C. § 1151 (2022)).

[55] Riley et al., *supra* note 9, at 1911.

[56] *Id.*

[57] Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1093 (2010).

[58] Riley et al., *supra* note 9, at 1912; *see* Denezpi v. United States, 596 U.S. 591, 605-06 (2022) (Gorsuch, J., dissenting).

[59] Riley et al., *supra* note 9, at 1912. "Courts of Indian Offenses" and "CFR courts" are used interchangeably throughout.

government perceived as "heathenish."[60] Today, CFR courts are far more tribally focused and tasked with the "administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians . . . but where tribal courts have not been established to exercise that jurisdiction."[61]

The Assistant Secretary for Indian Affairs appoints CFR magistrates, subject to confirmation by the governing body of the tribe.[62] CFR courts have jurisdiction over offenses defined in the Code of Federal Regulations and offenses enacted by the tribe's governing body.[63] These courts evolved and now include both trial and appellate divisions.[64] Only five CFR courts operate today, serving sixteen federally recognized tribes.[65] Tribal self-determination has led the majority of tribes to establish independent judicial systems, which is now the norm in Indian country.[66] The few tribes still utilizing CFR courts do so out of necessity, as they lack the resources and funding to create an "entirely tribally based system."[67]

Congress enacted the Indian Civil Rights Act (ICRA) in 1968 and in doing so, extended certain protections states enjoy under the Bill of Rights to tribal governments.[68] However, this body of legislation imposes strict sentencing limitations on tribes.[69] Initially, tribes could only issue a maximum sentence of incarceration for six months and a fine of $500 for any offense.[70] In 1986, Congress amended the ICRA and expanded tribal authority by increasing the sentence cap to one year imprisonment and a $5,000 fine for any single offense.[71] Tribes that have established their own

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[60] Ablavsky, *supra* note 51, at 307.
[61] 25 C.F.R. § 11.102 (2022).
[62] Denezpi, 596 U.S. at 595.
[63] Riley et al., *supra* note 9, at 1912.
[64] *Id.*
[65] *Id.*
[66] *Id.* Today, tribes have more autonomy in their own tribal affairs and are subject to less federal oversight. Angela R. Riley, *Tribal Self Determination and A Nation Within*, 52 SW. L. REV. 217, 219 (2023). This change in policy has "empowered Indian nations to live their own sovereignty. *Id.*
[67] Riley et al., *supra* note 9, at 1912. Despite the strides in tribal self-determination, some tribes, "like all nations[,]" continue to struggle. Riley, *supra* note 66, at 219. Angela Riley explains that "while self-determination places both the power and the responsibility in the hands of tribal governments, Indian nations have only been in a period of recovery for several decades . . . [T]ribal efforts to address the history of oppression and colonization are . . . embryonic." *Id.* at 225.
[68] Riley et al., *supra* note 9, at 1913.
[69] *Id.*
[70] *Id.*
[71] *Id.*

court system and those that utilize CFR courts must abide by sentencing restrictions.[72]

Congress amended the ICRA again in 1990, directly in response to the Supreme Court's determination in *Duro v. Reina*[73] that criminal jurisdiction did not extend to Indian defendants who were not members of the prosecuting tribe.[74] This resulted in situations in which no sovereign body had jurisdiction over certain crimes committed by Native Americans.[75] The so-called "*Duro*-fix" legislation addressed this jurisdictional gap by relaxing the restrictions on tribes in the name of inherent tribal authority.[76] The Court finally resolved the tension between the holding in *Duro* and the ICRA amendments in *United States v. Lara*[77], concluding that the criminal jurisdiction of tribes extends to all Native American persons.[78]

In the years following *Lara*, Congress continued to expand the criminal power and sentencing authority of tribes, primarily in response to tribal advocacy growing out of elevated safety concerns on reservations.[79] As of 2010, under the Tribal Law and Order Act (TLOA), tribes can opt into a program that allows tribal courts to impose three years' imprisonment and a fine of $15,000, but very few tribes have done so due to a lack of financial support.[80] Tribes that do opt in to the expanded authority under TLOA must guarantee additional protections that align with the federal Constitution.[81]

III. *DENEZPI V. UNITED STATES*

A. Facts

In July 2017, Merle Denezpi and a woman named V.Y., both members of the Navajo Nation, traveled to Towaoc, Colorado, a town

[72] *See* Denezpi v. United States, 596 U.S. 591, 608 (2022) (Gorsuch, J., dissenting) (discussing sentencing limitations in CFR courts).
[73] 495 U.S. 676 (1990).
[74] *Id.* at 679.
[75] Riley et al., *supra* note 9, 1919.
[76] *Id.*
[77] 541 U.S. 193 (2004).
[78] *Id.* at 206-07.
[79] *See* Christensen, *supra* note 38, at 485; *see also* Riley et al., *supra* note 9, at 1914.
[80] Riley et al., *supra* note 9, at 1914.
[81] *Id.*

situated on the Ute Mountain Ute Reservation.[82] V.Y. alleged that during their trip, while the two were alone at a house belonging to Denezpi's friend, Denezpi "barricaded the door, threatened V.Y., and forced her to have sex with him."[83] After he fell asleep, V.Y. escaped and reported the incident to tribal authorities.[84]

B. Procedural History

The Bureau of Indian Affairs filed a criminal complaint against Denezpi in CFR court.[85] The complaint charged him with three crimes: assault and battery in violation of Section 2 of the Ute Mountain Ute Code,[86] terroristic threats, and false imprisonment.[87] The latter two charges were brought under federal regulations enforceable in CFR courts.[88] Denezpi pled guilty to assault and battery, and the prosecutor dismissed the other two charges.[89] The judge sentenced Denezpi to 140 days' imprisonment, the maximum sentence allowed for that particular offense.[90]

Six months later, after Denezpi served his sentence, a federal grand jury in the District of Colorado indicted him on one count of aggravated sexual abuse in Indian country, an offense governed by the Major Crimes Act.[91] Denezpi moved to dismiss this indictment, arguing that the Double Jeopardy Clause barred the successive prosecution.[92] The District Court denied the motion and sentenced him to 360 months' imprisonment.[93] The Tenth Circuit affirmed, concluding that the prosecution in federal court did not violate the Double Jeopardy Clause because the Ute Mountain Ute Tribe's sovereignty was the source of power undergirding the first prosecution in CFR court.[94]

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[82] Denezpi v. United States, 596 U.S. 591, 596 (2022)
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] 6 Ute Mountain Ute Code § 2 (1988).
[87] Denezpi, 596 U.S. at 596.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *See id.* at 596-97 (referencing 18 U.S.C. §§ 2241(a)(1)–(a)(2), 1153(a) (2022)).
[92] *Id.* at 596.
[93] *Id.* at 596-97.
[94] Denezpi v. United States, 979 F.3d 777, 781-83 (10th Cir. 2020).

C. Opinion of the Court

The Court affirmed the Tenth Circuit's decision, holding that Denezpi's conviction in federal district court of aggravated sexual abuse in Indian country, following his conviction in a CFR court of assault and battery in violation of the Ute Mountain Ute Code, does not offend the Double Jeopardy Clause.[95] Writing for the Court, Justice Barrett, joined by Chief Justice Roberts, and Justices Thomas, Breyer, Alito, and Kavanaugh, reason that Denezpi's single act transgressed two laws (aggravated sexual abuse under the Major Crimes Act, and assault and battery under the tribal code) defined by distinct sovereigns (the federal government and the tribe itself), and therefore violated separate offenses.[96]

Justice Barrett begins by explaining that the Double Jeopardy Clause does not prohibit twice placing a defendant in jeopardy for the same conduct and instead focuses on whether subsequent prosecutions are for the same "offence."[97] An offense is defined by a law, "a law is defined by the sovereign that makes it," and therefore because the sovereign source of the law is a distinctive feature of the law itself, "an offense defined by one sovereign is necessarily a different offense from that of another sovereign."[98] Accordingly, two offenses can be successively prosecuted without violating the Clause, even if identical elements are present in each offense.[99] Relying on the Court's reasoning in *Wheeler,* because Denezpi's act transgressed both the Ute Mountain Ute Code and the Major Crimes Act, and the Ute Mountain Ute Tribe exercised its "unique sovereign authority in adopting the tribal ordinance[,]" the two laws proscribed separate offenses within the meaning of the Clause and dual-sovereignty doctrine.[100]

The Court further rejected Denezpi's argument that the dual-sovereignty doctrine is concerned with who prosecutes the offense, not merely who defines it.[101] In contrast to the defendant in *Wheeler*, who was initially prosecuted in a tribal court, Denezpi was first prosecuted in a CFR

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[95] Denezpi, 596 U.S. at 605. Gregory Ablavsky remarks that the issue in this case "underscored the challenge of making sense of federal Indian law's nakedly colonial past in construing current law." Ablavsky, *supra* note 51, at 307.
[96] Denezpi, 596 U.S. at 605.
[97] *Id.* at 597.
[98] *Id.* at 597-98.
[99] *Id.* at 598-99.
[100] *Id.*
[101] *Id.* at 599-600.

court.[102] Denezpi argued that because prosecutors in CFR courts are governed by the Bureau of Indian Affairs, they exercise federal authority, and he was therefore prosecuted twice by the United States.[103] Relying on a century of precedent, the Court reasoned that the Clause "does not prohibit successive prosecutions by the same sovereign. It prohibits successive prosecutions 'for the same offence.'"[104] Therefore, even if Denezpi was correct that he was prosecuted twice by the federal government, there is nothing in the Clause that prevents this.[105]

To bolster this position, the Court noted that an offense must necessarily refer to the crime itself, as an offense is complete when a person has carried out all the elements.[106] The Court stated that Denezpi's position would force the conclusion that "a person's single act constitutes two separate offenses at the time of commission[,] . . . but that those offenses later become the same offense if a single sovereign prosecutes both."[107] Without any textual justification, and considering that an offense merely refers to the act and its elements, this is a "nonsensical result."[108]

With the text against Denezpi, Justice Barrett stated the best he can do is rely on language from precedent that, read in isolation, aids his position.[109] In *Sanchez Valle,* the Court stated that "the issue is only whether the prosecutorial powers of the two jurisdictions have independent origins."[110] Further, as recognized in *Heath*, "the crucial determination [under the dual-sovereignty doctrine] is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns."[111] In context, the helpfulness of these cases erodes, as none of them involved a single sovereign successively prosecuting its own law and that of another sovereign.[112] Moreover, although enactment and enforcement often go hand in hand, they are separate in the context of dual-sovereignty, and enactment is what influences whether the doctrine applies.[113] Justice Barrett explained that *Bartkus* plays

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[102] *Id.*
[103] *Id.* at 600.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 601.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* (quoting Puerto Rico v. Sanchez Valle, 579 U.S. 59, 62 (2016)).
[111] *Id.* (quoting Heath v. Alabama, 474 U.S. 82, 88 (1985)).
[112] *Id.* at 602-03.
[113] *Id.* at 603.

an equally unhelpful role, as that case stands for the proposition that the involvement of federal officials does not violate the Clause, and the Court in *Bartkus* merely acknowledged that a successive federal prosecution may raise a double jeopardy question.[114]

The Court concludes by rejecting Denezpi's remaining arguments.[115] Denezpi noted that CFR courts are limited in their jurisdiction over certain felonies covered by the Major Crime Act, but the court determines that nothing about this bars Denezpi's federal prosecution.[116] This merely raises the question of whether the federal government can successively prosecute a federal regulatory crime and a federal statutory crime, which is not the issue in this case.[117] Denezpi's argument that permitting successive prosecutions like his offends the purpose of the dual-sovereignty doctrine also fails because the Ute Mountain Ute Tribe's sovereign interest is actually furthered when its ordinances are enforced and crimes are prosecuted, regardless of who enforces it.[118] Finally, Denezpi's assertion that the Court's conclusion will lead other sovereigns to "broadly assume the authority to enforce other sovereigns' criminal laws in order to get two bites at the apple" is not relevant because constitutional barriers against this are not found in the Double Jeopardy Clause.[119]

D. Justice Gorsuch's Dissenting Opinion

Justice Gorsuch, joined by Justices Sotomayor and Kagan as to Parts I and III, began by stating he believes the dual sovereignty doctrine is fundamentally at odds with the text of the Constitution.[120] In Part I, Justice Gorsuch explained that Denezpi's first crime of conviction, assault and battery, is a lesser included offense of the second crime, aggravated sexual abuse.[121] Justice Gorsuch argued that under Supreme Court precedent, this is generally enough to render the charges the "same offense" and prohibit a second prosecution under the Double Jeopardy Clause.[122]

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[114] *Id.* at 604.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 605.
[119] *Id.*
[120] *Id.* at 606 (Gorsuch, J., dissenting).
[121] *Id.* at 608.
[122] *Id.*at 609 (referencing the holding in Blockburger v. United States, 284 U.S. 299, 304 (1932)).

In Part II, Justice Gorsuch explained that historically, the Court repeatedly stated that the dual-sovereignty doctrine only applies if two requirements are satisfied: (1) "the two prosecutions must be brought under 'the laws of two sovereigns,'" and (2) "the 'two prosecuting entities must derive their power to punish from wholly independent [sovereign] sources.'"[123] Justice Gorsuch argued that in Denezpi's case, neither condition is satisfied.[124] He explained that both of Denezpi's convictions were for federal offenses, as the first prosecution in CFR court was for violating a federal regulation that assimilated a tribal ordinance into federal law.[125] As to the second requirement, the majority's reliance on *Wheeler* was misguided because that case clearly involved a violation of Navajo Tribal Code, not the violation of a federal regulation that assimilates crimes defined by the tribe.[126] Because the Court of Indian Offenses may be an "arm of the Federal Government," the two prosecuting authorities did not derive their power from separate sovereign entities.[127]

Justice Gorsuch expanded on these points in Part III, stating that the sovereign authority of CFR courts does not lie in the Ute Mountain Ute Tribe, or any other tribe that utilizes these courts, but in the Department of the Interior.[128] Because federal officials continue to define and approve certain offenses enforceable in CFR courts, and control the hiring and firing of prosecutors and magistrates, it "unambiguously remains 'part of the Federal Government.'"[129] Denezpi was therefore twice convicted by the same sovereign, an act not permitted by the Double Jeopardy Clause.[130]

VI. ANALYSIS

Though the Court correctly decided *Denezpi,* the majority failed to incorporate key public policy considerations in its reasoning. First, the

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[123] *Id.* at 610 (quoting *Sanchez Valle*, 579 U.S. at 67-68).
[124] *Id.*
[125] *Id.* 611-612. If correct, this assimilation argument would have likely been dispositive. Leading Case, *Fifth Amendment--Double Jeopardy Clause--Tribal Sovereignty--Denezpi v. United States*, 136 HARV. L. REV. 350, 359 (2022). The majority declined to resolve the question of whether "the CFR court system federalizes tribal penal codes," likely because they would have to do so sua sponte. *Id.* The Court only raises issues sua sponte in "rare circumstances." *Id.*
[126] Denezpi, 596 U.S. at 613 (referencing the violation of the Navajo Tribal Code at issue in *Wheeler*, 435 U.S. at 315-16).
[127] *Id.* at 613.
[128] *Id.* at 614.
[129] *Id.* at 615 (citing 58 Fed. Reg. 54407).
[130] *Id.* at 616.

Court did not acknowledge that barring Denezpi's subsequent prosecution in federal court would render the dual-sovereignty doctrine inapplicable to the sixteen tribes that utilize the Court of Indian Offenses. This would create a disparity in criminal proceedings and result in a rule that strips these tribes of the judicial sovereignty enjoyed by tribes that have established their own court system. Second, the Court neglected to address the impact this rule would have on the safety of tribes and the right of sovereigns to enforce their own laws. These outcomes undermine public policy in favor of tribal sovereignty and safety, and offend centuries of precedent[131] supporting the right of sovereigns to enforce their laws and prosecute accordingly when violations arise.

A. Disparity Among Tribes

During oral arguments, Ms. Ross, the attorney for the respondent, stated that what Denezpi is asking for is a "different rule based on the happenstance that [a defendant] went to the reservation of a tribe that uses a different form of tribal court."[132] This statement, though deserving of considerable attention, was followed by a question that diverted the conversation.[133] The Court failed to return to this point both in oral arguments and in its opinion,[134] neglecting the opportunity to acknowledge that barring Denezpi's subsequent prosecution in federal court would render the dual-sovereignty doctrine inapplicable to the sixteen tribes that utilize CFR courts. This rule would strip these tribes of judicial sovereignty and result in unequal applications of the Double Jeopardy Clause.

All federally recognized tribes have a distinct sovereignty, meaning they have the ability to operate and maintain their own criminal justice system.[135] In 1934, Congress passed the Indian Reorganization Act, which marked a significant shift away from assimilation-based policies and promoted tribal self-governance and sovereignty.[136] While Supreme Court

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[131] *See* cases cited *supra* notes 11-20, 24-41 and accompanying text.
[132] Transcript of Oral Argument at 66, Denezpi v. United States, 596 U.S. 591 (2022) (No. 20-7622).
[133] *See id.*
[134] *See generally id.*; Denezpi, 596 U.S. at 591-605 (Ms. Ross's point does not appear elsewhere in the oral argument transcript, and the Court does not mention it in the opinion).
[135] Riley et al., *supra* note 9, at 1908.
[136] *Id.* at 1912. The executive branch later took the lead in advocating for tribal self-determination, with President Nixon outlining a detailed policy in favor of tribal autonomy in 1970. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L. J.

jurisprudence on the dual-sovereignty doctrine in the tribal-federal context remained sparse, *Wheeler* reinforced the key tenet of Indian law that "[t]ribal sovereignty is inherent[,] and . . . therefore, tribes are separate sovereigns for the purpose of the dual-sovereignty doctrine."[137] If the Court were to hold in favor of Denezpi, this view would no longer extend to tribes that utilize CFR courts but continue to apply to tribes that have established their own court systems.

A rule of this kind would therefore strip tribes that rely on CFR courts of their inherent judicial sovereignty.[138] The Court noted in *Wheeler* that when tribes enact, enforce, and prosecute their own laws, they do so as a sovereign body, not as an "arm of the Federal Government."[139] Despite the fact that tribes utilizing CFR courts enact tribal ordinances and define their own offenses, holding in favor of Denezpi would indicate that these tribes are no longer judicial sovereigns simply because the offenses are prosecuted in courts initially established by the federal government. If Denezpi's subsequent prosecution was indeed barred by the Double Jeopardy Clause, the tribal court system would effectually be deemed an "arm of the Federal Government"[140] rather than a sovereign body. This is fundamentally at odds with decades of policy recognizing the inherent sovereignty of tribes.[141]

In accordance with Ms. Ross's concern expressed in her oral argument,[142] not only would the rule create a disparity in tribal sovereignty, defendants would be subject to unequal criminal proceedings simply because of the location of the alleged crime. An individual who commits a crime in Indian country on the reservation of a tribe that has its own court system may be subject to double jeopardy if the act violates both a tribal and federal

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403, 406 (2004). Today, the Department of Justice has an official statement detailing their commitment to assisting and strengthening tribal governments. *Id.*

[137] Riley et al., *supra* note 9, at 1902.

[138] The majority's narrow holding also preserves the ability of the Ute Mountain Ute Tribe to "meaningfully participate in the CFR court system–the only judicial structure practically available to the tribe." Leading Case, *supra* note 125, at 358. This compliments the inherent sovereignty of tribes still relying on CFR courts.

[139] United States v. Wheeler, 435 U.S. 313, 328 (1978).

[140] *Id.*

[141] *See* Riley et al., *supra* note 9, at 1912. Since the 1960s, the federal government has committed to a policy of tribal self-determination. *Id.* The hallmark of this contemporary movement is the Indian Self-Determination and Education Assistance Act of 1975. 25 U.S.C. §§ 5301-5423 (2023).

[142] *See* Transcript of Oral Argument, *supra* note 132.

offense.[143] In contrast, an individual who commits a crime on the reservation of a tribe that utilizes CFR courts would not, and could only be prosecuted in a Court of Indian Offenses or federal court, but not both.[144] Whether a defendant is subject to double jeopardy would therefore be entirely premised on the location of the alleged crime, creating a disparity in criminal proceedings and adding intricacies to the already complex criminal justice system in Indian country.

B. Tribal Safety and the Rights of Sovereigns

The Court further neglected to address that holding in Denezpi's favor may exacerbate safety concerns for tribes that utilize CFR courts. Additionally, the Court did not discuss the ways in which Denezpi's argument offends the long-held view that sovereigns possess the right to enforce their own laws, as the rule would require either tribes or the federal government to forego this authority.[145]

Considering the strict sentencing limitations established in the ICRA, the dual-sovereignty doctrine plays a critical role in ensuring general safety in Indian country.[146] Sentencing limitations, combined with the fact that the federal government rarely takes cases that occur in Indian country, effectively results in inadequate punishments for serious crimes.[147] This has "devastating impacts on Native women and girls," as crimes often go

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[143] *See generally* Wheeler, 435 U.S. at 328, 330 (holding that tribes and the Federal Government are separate sovereigns within the meaning of the dual-sovereignty doctrine, and subsequent prosecutions are therefore not barred by the Double Jeopardy Clause).
[144] Riley et al., *supra* note 9, at 1933.
[145] Matz, *supra* note 2, at 358.
[146] Riley et al., *supra* note 9, at 1930. The dual-sovereignty doctrine has harmful effects as well. It increases the likelihood that dual-prosecutions will occur in the tribal-federal context, and it is almost exclusively Native American defendants who are subject to tribal and federal prosecutions. *Id.* at 1933. Considering there are nearly twice as many concurrent tribal and federal prosecutions each year than state and federal, this places Native Americans at a heightened risk of exposure compared to non-Native defendants. *Id.* The federal government plays a primary role in in law enforcement in Indian country, and as a result, the federal government is the primary enforcing entity in the majority of these cases. *Id.* at 1934. Additionally, unlike many Americans who only face federal prosecutions for offenses with a "federal nexus," such as narcotics or terrorism, Native Americans in Indian country are subject to federal prosecution for multiple felonies, including homicide, rape, and burglary. Washburn, *supra* note 136, at 403. Outside of Indian country, these offenses do not rise to the level of federal prosecution. *Id.*
[147] Riley et al., *supra* note 9, at 1933. Some scholars argue that the sentencing restrictions have alternatively expanded the authority of prosecutors, and the limitations undermine the traditional role of defense counsel. Washburn, *supra* note 136, at 404.

unanswered or nominal sentences are imposed.[148] Moreover, the Ute Mountain Ute reservation experiences extremely high rates of violent crime, and the closest federal courthouse is over four hundred miles away.[149] If the dual-sovereignty doctrine did not apply, tribes that utilize CFR courts would be forced to make the difficult decision of prosecuting defendants in CFR court and imposing inadequate sentences, or waiting for the federal government to step in.[150] Both courses of action threaten the safety of the tribe, as the former allows defendants to reenter society after a short imprisonment period and the latter is premised on the hope that a federal prosecution will eventually occur.

Commensurate with the unequal risk of double jeopardy established in the preceding section, it is plausible that crime would increase on reservations that use CFR courts. Without the possibility of twice being prosecuted, or prosecuted at all if the federal government declines to address the matter, crime may increase on these reservations. This would perpetuate the narrative of Indian country as a prosecution-free zone and harm reservations that are already considerably lacking in prosecutorial resources.[151] These tribes therefore benefit from the dual-sovereignty doctrine in this capacity, as it allows criminal matters to be addressed immediately by the tribe, preserves the possibility that the federal government will later impose a more appropriate sentence,[152] and mitigates the possibility of increased criminal activity.

Denezpi's argument further undermines the long-held right of sovereigns to enforce their own laws.[153] At the core of the dual-sovereignty

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[148] Riley et al., *supra* note 9, at 1933. In response to this concern, Congress reauthorized the Violence Against Women Act (VAWA) in 2013, which permitted tribes to exercise a small portion of their inherent criminal jurisdiction over non-Indians. *Id.* at 1915. However, it became clear that this was still inadequate to address growing domestic violence concerns on reservations. *Id.* Congress again expanded the VAWA in 2022 and broadened the scope of criminal authority over non-Indians, but like the enhanced sentencing authority under TLOA, it is entirely elective. *Id.* Since 2013, very few tribes have opted into the expanded jurisdiction. *Id.* Scholars also point to the Supreme Court's decision in *Oliphant v. Squamish Indian Tribe*, 431 U.S. 191 (1978) as a source of considerable proliferation in crime on reservations. Riley et al., *supra* note 9, at 1914-15.

[149] Leading Case, *supra* note 125, at 359. In light of these considerations, the tribe has a critical need for its CFR courts. *Id.* If the majority were to adopt Justice Gorsuch's reasoning in his dissent, the tribe's CFR court would be rendered "functionally disempowered[.]" *See id.*

[150] Riley et al., *supra* note 9, at 1933.

[151] *Id.* at 1931-32.

[152] *Id.*

[153] *See id.* at 1905 (referencing the dicta in *Fox*, 46 U.S. at 435).

doctrine is the vindication of the right of distinct sovereigns to prosecute defendants for violating its laws, and an individual is only ever subject to double jeopardy if their single act violates two separate offenses.[154] The rule Denezpi advances would deprive either the tribe or the federal government of the power to enforce its own laws, an issue otherwise not encountered when offenses are committed on reservations that have their own court system.

Recall the difficult decision tribes would have to make in selecting a forum for prosecution: if a single act violated both a tribal ordinance and federal law, and the tribe decided to prosecute, the federal government would be deprived of the ability to also prosecute a violation of a federal offense.[155] Alternatively, if the tribe opted for a federal prosecution, they would similarly be unable to enforce its own laws.[156] An essential element of a functioning government is the ability to exercise sovereignty over its people, and the power to "arrest, prosecute, and, where necessary, punish offenders . . . goes to a core governmental duty."[157] Forcing tribes to choose between prosecuting an offense in tribal court or federal court would overtly offend centuries of Supreme Court precedent on the rights of sovereigns to prosecute offense violations as they see fit,[158] an integral concern the Court neglected to consider.

V. CONCLUSION

While the Court correctly decided *Denezpi*, it failed to address that barring Denezpi's subsequent prosecution in federal court would render the dual-sovereignty doctrine inapplicable to the sixteen tribes still utilizing the Court of Indian Offenses. This strips away the judicial sovereignty enjoyed by tribes that have established their own court system, and results in disparate criminal proceedings depending on the location of an alleged crime. A rule of this kind may further harm tribes by incentivizing criminal activity and exacerbating safety concerns. Moreover, either tribes or the federal government would have to forego the authority to enforce their own laws. The Court was remiss in failing to address decades of legislation in

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[154] Matz, *supra* note 2, at 369.

[155] *See generally* Riley et al., *supra* note 9, at 1932 (discussing the converse of this scenario).

[156] *Id.*

[157] Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1619 (2016).

[158] *See* Riley et al., *supra* note 9, at 1932 (analyzing the ways the Supreme Court has upheld the dual-sovereignty doctrine and articulated its core principles).

favor of tribal self-determination and centuries of precedent promoting sovereign autonomy.