SUPREME COURT OF THE UNITED STATES

No. 20–7622

MERLE DENEZPI, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 13, 2022]

JUSTICE GORSUCH, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join as to Parts I and III, dissenting.

Federal prosecutors tried Merle Denezpi twice for the same crime. First, they charged him with violating a federal regulation. Then, they charged him with violating an overlapping federal statute. Same defendant, same crime, same prosecuting authority. Yet according to the Court, the Double Jeopardy Clause has nothing to say about this case. How can that be? To justify its conclusion, the Court invokes the dual-sovereignty doctrine. For reasons I have offered previously, I believe that doctrine is at odds with the text and original meaning of the Constitution. See *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (dissenting opinion) (slip op., at 1). But even taking it at face value, the doctrine cannot sustain the Court's conclusion.

I

A

To appreciate why, some background about the Court of Indian Offenses helps. Unlike a tribal court operated by a Native American Tribe pursuant to its inherent sovereign authority, the Court of Indian Offenses is "part of the Federal Government." 58 Fed. Reg. 54407 (1993). Really, it is a creature of the Department of the Interior. Secretary H. M. Teller opened the court by administrative decree in 1883. As he put it, the court was designed to "civilize the

Indians" by forcing them to "desist from the savage and barbarous practices . . . calculated to continue them in savagery." 1 Report of the Secretary of the Interior X (June 30, 1883). Apparently, the Secretary and his contemporaries worried that too many Tribes were under "the influence of medicine men" and "without law of any kind," and they thought the Interior Department needed to take a strong hand to impose "some rule of government on the reservations." *Id.*, at X–XI.

Toward these ends, the Secretary instructed the Commissioner of Indian Affairs to promulgate "certain rules" to establish a new "tribunal" and to define new "offenses of which it was to take cognizance." *Id.*, at XII. The resulting "court" was composed of magistrates appointed by the Department who could "read and write English readily, w[ore] citizens' dress, and engage[d] in civilized pursuits." Report of the Commissioner of Indian Affairs 28 (1892) (1892 Report). The Department likewise appointed officers charged with investigating the crimes it created. Federal Office of Child Support Enforcement, IM–07–03, Tribal and State Jurisdiction To Establish and Enforce Child Support 10 (2007). And the regulatory criminal code the Department produced outlawed everything from "old heathenish dances" and "medicine men" and their "conjurers' arts" to certain Indian mourning practices. Rules Governing the Court of Indian Offenses 3–7 (1883) (1883 Rules). The Department's new criminal code also assimilated "the laws of the State or Territory within which the reservation may be located," and instructed that sentences for assimilated offenses should match those imposed by state or territorial law. 1892 Report 30. Unsurprisingly, tribal members often regarded these courts as "foreign" and "hated" institutions. V. Deloria & C. Lytle, American Indians, American Justice 115–116 (1983).

Over time, as the federal government's attitude toward

Native American traditions changed, the Department adjusted certain aspects of its regime. Now, some of the old federal offenses aimed at punishing tribal customs are gone. But the regulations still list many crimes created by federal agency officials. 25 CFR §§ 11.400–11.454 (2021). And the regulations continue to assimilate other crimes too. Instead of assimilating state and territorial crimes, federal regulations today assimilate tribal crimes. They do so, however, only if and to the extent those tribal crimes are "approved by the Assistant Secretary [of] Indian Affairs or his or her designee." § 11.449. As before, any federal punishment for assimilated offenses may not exceed the sentence provided for by the assimilated (here, tribal) law. *Ibid.* Even today, prosecutors continue to be hired and controlled by the Department unless a Tribe opts out of that arrangement. § 11.204. Likewise, the Department retains full authority to "appoint a magistrate without the need for confirmation by the Tribal governing body." 85 Fed. Reg. 10714 (2020). And the Department retains the power to remove these adjudicators. See 25 CFR § 11.202.

B

These arrangements turned out to play a pivotal role in Mr. Denezpi's case. In July 2017, he traveled to visit his girlfriend in Towaoc, Colorado, a town within the Ute Mountain Ute Reservation. His traveling companion, a woman known as V. Y., alleged that during the visit Mr. Denezpi sexually assaulted her. Mr. Denezpi claimed the encounter was consensual. Both Mr. Denezpi and V. Y. are members of the Navajo Nation.

After a brief investigation, an agent of the Department of the Interior swore out a criminal complaint on behalf of the "United States of America, Plaintiff." App. 9–10. Federal officials charged Mr. Denezpi with three offenses: terroristic threats, false imprisonment, and assault and battery. Federal regulations define the first two offenses. See

25 CFR §§ 11.402, 11.404. The third offense—assault and battery—is an assimilated Ute Mountain Ute tribal offense "approved" by federal officials. § 11.449. Ultimately, federal authorities dismissed the first two charges and Mr. Denezpi pleaded no contest to the third while maintaining his innocence. Pursuant to federal regulation, the court was empowered to sentence Mr. Denezpi to no more than six months in prison for his crime, the maximum punishment the assimilated tribal law permits. *Ibid.* Ultimately, the court sentenced him to 140 days—a punishment just shy of the maximum.

After further consideration, it seems federal authorities may have regretted their hasty prosecution. It seems too they may have considered the punishment authorized by tribal law and their own regulations insufficient. Six months after Mr. Denezpi finished his Interior Department sentence, the Justice Department brought new charges against him for the same offense under federal statutory law. These new charges carried the potential for a much longer sentence, one unconnected to tribal judgments about the appropriate punishments for tribal members. See 18 U. S. C. §§ 2241(a), 1153(a). In time, a federal district court convicted Mr. Denezpi and sentenced him to an additional 30 years in prison, followed by 10 years of supervised release.

Throughout, Mr. Denezpi has argued that the Constitution's Double Jeopardy Clause barred his second prosecution. The Clause provides that no person shall be "twice put in jeopardy" "for the same offense." Amdt. 5. No one disputes that Mr. Denezpi's first crime of conviction (assault and battery) is a lesser included offense of his second crime of conviction (aggravated sexual abuse). And no one disputes that, under our precedents, that is normally enough to render them the "same offense" and forbid a second prosecution. *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932). Yet both the District Court and Court of Appeals

rejected Mr. Denezpi's argument, so he brought it here.

II

By anyone's account, the Court of Indian Offenses is a curious regime. When instructing agency officials to create the Court of Indian Offenses, neither Secretary Teller nor anyone else pointed to any Act of Congress authorizing the project. On the contrary, from the beginning, federal officials recognized that these "'so-called courts'" rested on a "shaky legal foundation." W. Hagan, Indian Police and Judges: Experiments in Acculturation and Control 110 (1966). Even more than that, one might wonder how an executive agency can claim the exclusive power to define, prosecute, and judge crimes—three distinct functions the Constitution normally reserves for three separate branches. See, *e.g.*, *United States* v. *Brown*, 381 U. S. 437, 442–443 (1965). In these proceedings, however, Mr. Denezpi has not questioned whether the Court of Indian Offenses is statutorily authorized. Nor has he questioned whether the Constitution permits executive officials rather than a judge and jury to try him for crimes. Accordingly, those questions—long lingering and incredibly still unanswered—remain for another day.

Focusing on Mr. Denezpi's double jeopardy claim, the Court finds no constitutional violation thanks to the "dual-sovereignty doctrine." Under that doctrine, even successive prosecutions under identical criminal laws may be permissible if they are "brought by different sovereigns." *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59, 66–67 (2016). To my mind, that doctrine has no place in our constitutional order. See *Gamble*, 587 U. S., at ___ (GORSUCH, J., dissenting) (slip op., at 1). But even taking the doctrine on its own terms, it does not tolerate what transpired here.

This Court has long recognized that, unless carefully cabined, the dual-sovereignty doctrine can present serious dangers. Taken to its extreme, it might allow prosecutors to

coordinate and treat an initial trial in one jurisdiction as a dress rehearsal for a second trial in another. All of which would amount, in substance if not form, to successive trials for the same offense. See *Bartkus* v. *Illinois*, 359 U. S. 121, 123–124 (1959). For reasons like these, this Court has said repeatedly that the doctrine applies only when two requirements are satisfied. First, the two prosecutions must be brought under "the laws of two sovereigns." *Sánchez Valle*, 579 U. S., at 67. Second, the "two prosecuting *entities*" must "derive their power to punish from wholly independent [sovereign] sources." *Id.*, at 68 (emphasis added). Here, neither condition is satisfied.

A

Start with the fact that both of Mr. Denezpi's convictions were for federal offenses. Almost in passing and with little analysis, the Court suggests that his first conviction was for a tribal offense and only his second involved a federal offense. *Ante*, at 6. But that is wrong. Mr. Denezpi's first prosecution in the Court of Indian Offenses was for the violation of federal regulations that assimilated tribal law into federal law.

The regulations could not be plainer. Subpart D of the regulations governing the Court of Indian Offenses is titled "Criminal Offenses." 25 CFR §§ 11.400–11.454. This subpart contains a list of federal regulatory crimes, many of which contain enumerated elements. Nested in this list is "§ 11.449: Violation of an approved tribal ordinance." That regulation declares that anyone who violates a tribal ordinance "approved by the Assistant Secretary [of] Indian Affairs" is "guilty of an offense"—that is, an offense under the Interior Department's own "Law and Order Code," Part 11. The regulation further provides that anyone guilty of violating it "shall be sentenced as provided in the [tribal] ordinance." § 11.449.

That is exactly what happened in Mr. Denezpi's first

prosecution. The Ute Mountain Ute have a tribal offense of assault and battery. By all indications, it was "approved" by the Assistant Secretary for assimilation into federal regulations. And for this federal regulatory crime, Mr. Denezpi was sentenced to a term of incarceration in a federal detention center. On any reasonable account, Mr. Denezpi was not convicted of a tribal offense. He was convicted of violating § 11.449, which assimilates federally approved tribal ordinances into federal law.

The regulation governing the Court of Indian Offenses' criminal jurisdiction confirms the conclusion. It states that, except as otherwise provided, the court has jurisdiction over "any action by an Indian . . . that is *made a criminal offense under this part*" by federal officials. § 11.114 (emphasis added). The italicized language clearly refers to the list of "Criminal Offenses" in Subpart D. And predictably enough, "the Ute Mountain Ute Code's assault and battery ordinance" is not on that list. *Ante*, at 6. What *is* on the list is a federal regulatory crime—"Violation of an approved tribal ordinance"—an offense that (to repeat) assimilates certain federally "approved" tribal laws. § 11.449.

Historical context further indicates that Mr. Denezpi was prosecuted for a federal regulatory crime. As we have seen, the Department of the Interior created the Court of Indian Offenses. And the Department wrote its own criminal code for enforcement in the court. Initially, that code included freestanding federal crimes outlawing everything from "heathenish dances" to "conjurers' arts." 1883 Rules 3–7. Other early regulations assimilated certain state and territorial laws into federal law and defined the punishment for these crimes by reference to these local laws. See Part I–A, *supra*. As we have seen, too, federal authorities have exercised the power to revise their code from time to time. They have eliminated some offenses and created others. They have chosen to end the assimilation of state and territorial offenses and incorporate instead certain "approved" tribal

offenses. Unless it should break some promise made to a particular Tribe, federal authorities could close the whole operation tomorrow just as they chose to open it in the first place.

Both text and context indicate that Mr. Denezpi was prosecuted in the Court of Indian Offenses for a federal crime, not a tribal one. That is the best reading of the relevant regulations. Nor would the result change if there were any reasonable doubt, for the rule of lenity would tip the balance in Mr. Denezpi's favor. See *Harrison* v. *Vose*, 9 How. 372, 378 (1850); *Wooden* v. *United States*, 595 U. S. ___, ___–___ (2022) (GORSUCH, J., concurring in judgment) (slip op., at 9–12).

B

Faced with so much competing evidence, how does the Court reply? It insists that *United States* v. *Wheeler*, 435 U. S. 313 (1978), "controls" our disposition of this case, mandating the conclusion that Mr. Denezpi's first prosecution was for a tribal offense, not a federal one. *Ante*, at 6.

That is mistaken. *Wheeler* held that, under the dual-sovereignty doctrine, the Double Jeopardy Clause did not bar federal prosecutors from pursuing a defendant after his conviction for an equivalent *tribal offense in tribal court*. 435 U. S., at 329–330. In doing so, the Court stressed that, "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities." *Id*., at 322–323. And the Court observed that "the power to punish offenses against tribal law committed by Tribe members" was part of inherent tribal "sovereignty, [which] has never been taken away from [Tribes], either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority." *Id*., at 328.

Exactly none of that "controls" the disposition of this case. *Wheeler* involved a prosecution by tribal authorities exercising their retained sovereign authority to punish tribal

members before their own courts. It did not involve a prosecution by federal authorities before a federal tribunal. The Tribe's prosecution in *Wheeler* was clearly for a tribal offense too—contributing to the delinquency of a minor in violation of Title 17, § 321 of the Navajo Tribal Code. See 435 U. S., at 315–316. It did not involve a federal regulation that assimilates approved tribal ordinances. What is more, the Court in *Wheeler* expressly noted and specifically reserved the question presented here. It stated that it "need not decide" whether its holding applied to the Court of Indian Offenses. *Id.*, at 327, n. 26. And it reserved that question in part because it acknowledged that, unlike tribal courts, the Court of Indian Offenses may be an "arm of the Federal Government." *Ibid.* *Wheeler* settles nothing.

Aware of the weakness of its appeal to precedent, the Court ultimately retreats to another argument. It contends that Mr. Denezpi has "agree[d]" his first conviction was for a "tribal" rather than a "federal" offense. See *ante*, at 6–7. But if the Court intends to rely on a purported concession to reach its judgment in this case, lower courts and future litigants should see today's decision for what it is: a one-off, case-specific ruling. Whether the Court of Indian Offenses enforces federal regulatory offenses rather than tribal offenses remains an open question for other litigants to preserve and pursue—and its answer is clear.

III

A

Proceeding further only underscores Mr. Denezpi's entitlement to relief. As this Court expressly acknowledged in *Gamble*, the application of the dual-sovereignty doctrine does not turn solely on "the formal difference between two distinct criminal codes." 587 U. S., at ___ (slip op., at 5). It also turns on "the substantive differences between the interests that two sovereigns can have in punishing the same act." *Id.*, at ___–___ (slip op., at 5–6). So, for example, this

Court will find a Double Jeopardy Clause violation even if an individual is tried under two separate legal codes if the two prosecuting entities derive their ultimate authority from the same sovereign source. See *Sánchez Valle*, 579 U. S., at 67–68. Likewise, if one sovereign uses another's laws as a "cover" or "sham" for what in substance amounts to its own successive prosecution, it will violate the Clause. *Bartkus*, 359 U. S., at 123–124. Really, this aspect of our jurisprudence represents nothing more than a recognition that "what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows." *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1867).

To honor the Double Jeopardy Clause in substance as well as form, our cases indicate that we must ask, among other things, whether "the 'entities that seek successively to prosecute a defendant . . . [are] separate sovereigns,'" based on "the deepest wellsprings . . . of [their] prosecutorial authority." *Sánchez Valle*, 579 U. S., at 67–68. "Whether two prosecuting entities are dual sovereigns in the double jeopardy context, we have stated, depends on whether they draw their authority to punish the offender from distinct sources of power. The inquiry is thus historical." *Id.*, at 68 (citation and internal quotation marks omitted). Under this inquiry, "[i]f two entities derive their power to punish from wholly independent sources . . . then they may bring successive prosecutions. Conversely, if those entities draw their power from the same ultimate source . . . then they may not." *Ibid.* (internal quotation marks omitted). So, for example, this Court has held that successive prosecutions for the same offense in a Puerto Rico court and a federal court are barred by the Double Jeopardy Clause because both ultimately derive their authority from Congress. *Id.*, at 73–77.

Applying these principles here, it is clear that the deepest historical wellsprings of the Court of Indian Offenses' authority lie not in the Ute Mountain Ute or any other Tribe,

but in the halls of the Department of the Interior. As we have seen, federal administrative authorities created this tribunal. Even today, federal officials continue to define and approve offenses for enforcement before it. They amend their list of offenses from time to time. They control the hiring and firing of prosecutors and magistrates. They opened this court; they may close it. The Court of Indian Offenses was and remains a federal scheme. See Part I–A, *supra*.

It would be deeply revisionist to suggest otherwise. Yes, the federal government has now eliminated many of its regulatory crimes aimed at expunging tribal traditions. Yes, some Tribes today see these courts as an alternative to creating their own tribal courts. But as the government's regulations make plain, the Court of Indian Offenses unambiguously remains "part of the Federal Government." 58 Fed. Reg. 54407. The federal government still exercises the authority to define its own offenses without reference to tribal law. And it enforces only those tribal ordinances its bureaucrats approve. If the courts of Puerto Rico are properly classified as federal under our case law, it defies the imagination to think administrative tribunals hatched by the Department of the Interior could be treated differently.

The facts of this case drive the point home. Federal authorities brought charges against Mr. Denezpi in his first prosecution in the name of the United States. Those who prosecuted him were employed and controlled by the federal government. See 25 CFR § 11.204; see also Brief for Ute Mountain Ute Tribe et al. as *Amici Curiae* 10. He was sentenced by a magistrate whom the federal government had the right to appoint and remove. See 85 Fed. Reg. 10714; 25 CFR § 11.202. And for his crime, Mr. Denezpi was incarcerated in a federal detention center. Federal agency officials played every meaningful role in his case: legislator, prosecutor, judge, and jailor.

There is more too. Federal authorities apparently regretted their hasty first prosecution. And far from seeking to vindicate tribal sentencing policy, it seems they may have found it wanting. So six months after the Interior Department finished the first case, the Justice Department took up the second. This time federal authorities invoked federal statutes carrying exponentially longer sentences, ones that care less about tribal sentencing policy for tribal members. Today, the federal government seeks license to follow this same course in future cases too. Whether viewed historically or through the lens of this contemporary case, the wellsprings here are federal through and through.

B

Once more, the Court's reply is unpersuasive. It admits that, in case after case, this Court has emphasized that the dual-sovereignty doctrine does not permit successive prosecutions by the same sovereign. *Ante*, at 9–10. Yet the Court today tries to brush all these precedents aside, offhandedly suggesting that each was mistaken. *Ante*, at 10. On its telling, the only thing that matters is that Mr. Denezpi was charged under two different sets of laws. *Ibid.* And here again the Court proceeds on an assumption that Mr. Denezpi was charged first under tribal law and then under federal law.

But the dual-sovereignty doctrine has never exalted form over substance in this way. If taken to its extreme, the Court's reasoning could seemingly allow a State to punish an individual twice for identical offenses, so long as one is proscribed by state law and the other by federal law. It would potentially allow the federal government to do the same. This Court has never before endorsed such a parsimonious and easily evaded understanding of the Double Jeopardy Clause.

Notice, too, what the Court does *not* say. In rejecting Mr.

Denezpi's arguments, it does not conclude that the Constitution *allows* successive prosecutions by one sovereign based on another sovereign's laws. Instead, it holds only that the "constitutional barrier to such cross-enforcement . . . does not derive from the Double Jeopardy Clause." *Ante*, at 12. The Court says nothing, for example, about whether the Due Process Clauses may have something to say on the subject. See Amdts. 5, 14. Under their terms, governments generally may not deprive citizens of liberty or property unless they do so according to "those settled usages and modes of proceeding" existing at common law. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). And the Court points to no case blessing successive prosecutions by a single sovereign using its own and another's laws, much less any "settled" tradition of doing so. So here again, the Court's decision today leaves much open for the future.

*

As early as the 1890s, observers expressed concern that the creation of the Court of Indian Offenses could make it "possible to try a man twice for the same offense," first for a federal regulatory offense, then for a federal statutory crime. Proceedings of the Eighth Annual Meeting of the Lake Mohonk Conference 32 (1890) (statement of T. Riggs). As they put it, a federal officer might "tak[e] up" a Native American who might then "spen[d] two or three days in the agency lockup" pursuant to federal regulatory charges, and "then for the same offense [might] be brought before [a federal district] court." *Ibid.* Today, that pessimistic prediction has proved true. It is hard to believe this Court would long tolerate a similar state of affairs in any other context—allowing federal bureaucrats to define an offense; prosecute, judge, and punish an individual for it; and then transfer the case to the resident U. S. Attorney for a second trial for the same offense under federal statutory law. Still, for

over a century that regime has persisted in this country for Native Americans, and today the Court extends its seal of approval to at least one aspect of it. Worse, the Court does so in the name of vindicating tribal sovereign authority. *Ante*, at 6. The irony will not be lost on those whose rights are diminished by today's decision. Respectfully, I dissent.