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*Fifth Amendment — Double Jeopardy Clause —  
Tribal Sovereignty — Denezpi v. United States*

The Fifth Amendment’s Double Jeopardy Clause protects criminal defendants from facing two prosecutions for the “same offence.”<sup>1</sup> Under the dual-sovereignty doctrine, the Supreme Court has historically permitted successive prosecutions for the same act when that act violates the laws of separate sovereigns.<sup>2</sup> Last term, in *Denezpi v. United States*,<sup>3</sup> the Supreme Court held that the dual-sovereignty doctrine enables successive prosecutions for substantively identical offenses in federal courts and Courts of Indian Offenses — specially constituted courts that administer some Indian tribes’ criminal laws.<sup>4</sup> In *Denezpi*, the majority dismissed without resolving a compelling and potentially dispositive argument raised sua sponte by the dissent: that the regulations that comprise the Courts of Indian Offenses assimilate tribal penal codes into federal law.<sup>5</sup> While the Supreme Court generally does not engage in sua sponte decisionmaking, *Denezpi* illustrates why this principle should operate with special force whenever the Court is in a position to potentially abrogate tribal sovereignty.

In July 2017, Merle Denezpi and V.Y., both members of the Navajo Nation, traveled to Denezpi’s friend’s house in the Ute Mountain Ute Reservation in Colorado.<sup>6</sup> Upon arriving, Denezpi forcefully raped V.Y.<sup>7</sup> A Bureau of Indian Affairs (BIA) prosecutor charged Denezpi in the Court of Indian Offenses of the Ute Mountain Ute Agency — also known as the Southwest Region C.F.R. Court<sup>8</sup> — with three offenses:

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<sup>1</sup> U.S. CONST. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

<sup>2</sup> See, e.g., *United States v. Lanza*, 260 U.S. 377, 382 (1922) (holding that the United States and the states are “two sovereignties, deriving power from different sources” and that therefore prosecutions for violations of substantively identical state and federal laws do not violate the Double Jeopardy Clause); *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (holding that “successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause” because states are separate sovereigns); *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (holding that tribal courts’ power derives from tribes’ inherent sovereignty, so successive prosecutions in tribal and federal courts for substantively identical offenses do not constitute double jeopardy).

<sup>3</sup> 142 S. Ct. 1838 (2022).

<sup>4</sup> *Id.* at 1843.

<sup>5</sup> See *id.* at 1845 n.2; *id.* at 1852 (Gorsuch, J., dissenting).

<sup>6</sup> *United States v. Denezpi*, 979 F.3d 777, 780 (10th Cir. 2020). The Supreme Court stated that Denezpi was visiting the home of a “friend,” *Denezpi*, 142 S. Ct. at 1844; the Tenth Circuit and district court reported that he was visiting his “girlfriend.” *Denezpi*, 979 F.3d at 780; Order Denying Motion to Dismiss on Double Jeopardy Grounds at 1, *United States v. Denezpi*, No. 18-cr-00267 (D. Colo. June 3, 2019), 2019 WL 295670, at \*1.

<sup>7</sup> *Denezpi*, 979 F.3d at 780; *Denezpi*, 142 S. Ct. at 1844 (noting that a federal jury found Denezpi guilty of aggravated sexual abuse).

<sup>8</sup> See U.S. Dep’t of the Interior, *Court of Indian Offenses*, INDIAN AFFS., <https://www.bia.gov/CFRCourts> [<https://perma.cc/L9JC-8AAX>] (listing the five currently operating Courts of Indian Affairs and the tribes that they serve); *Denezpi*, 979 F.3d at 780. These courts are known as “C.F.R.

assault and battery, in violation of the Ute Mountain Ute Penal Code, and terroristic threats and false imprisonment, in violation of the *Code of Federal Regulations*.<sup>9</sup> Denezpi pleaded no contest to the assault and battery charge; the other two charges were dismissed.<sup>10</sup> A federally appointed magistrate judge sentenced Denezpi to time served, which totaled 140 days.<sup>11</sup> Six months after Denezpi's first trial concluded, a federal grand jury in the District of Colorado indicted him for the same conduct.<sup>12</sup> Denezpi was convicted of violating a provision of the Major Crimes Act<sup>13</sup> that prohibits aggravated sexual assault in Indian Country<sup>14</sup> and was sentenced to thirty years in federal prison.<sup>15</sup>

Before Denezpi's federal case proceeded to trial, he filed a motion to dismiss on double jeopardy grounds.<sup>16</sup> He argued that since both the C.F.R. court case and the district court case were prosecuted by federal officials, his second prosecution violated the Double Jeopardy Clause.<sup>17</sup> The Clause provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."<sup>18</sup> The district court concluded, however, that the C.F.R. court exercised "the sovereign [prosecutorial] power[] of the Ute Mountain Ute Tribe," distinct from that of the United States.<sup>19</sup> Accordingly, it denied Denezpi's motion to dismiss.<sup>20</sup> A panel of the Tenth Circuit unanimously affirmed the district court's double jeopardy holding on the same grounds.<sup>21</sup>

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courts" because they are constituted by the Code of Federal Regulations. See *Denezpi*, 142 S. Ct. at 1843 (explaining that); U.S. Dep't of the Interior, *supra*. C.F.R. courts, like tribal courts, have criminal jurisdiction only over offenses committed by members of Indian tribes. See 25 C.F.R. § 11.114 (2021); see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that tribes do not have inherent jurisdiction to try and punish "non-Indians").

<sup>9</sup> *Denezpi*, 142 S. Ct. at 1844; see also 6 UTE MOUNTAIN UTE CODE § 2 (1988); 25 C.F.R. §§ 11.402, 11.404 (2021).

<sup>10</sup> *Denezpi*, 142 S. Ct. at 1844; see *Denezpi*, 979 F.3d at 779.

<sup>11</sup> *Denezpi*, 142 S. Ct. at 1844. Under tribal law, the maximum term of imprisonment for this offense is six months. *Id.* at 1851 (Gorsuch, J., dissenting).

<sup>12</sup> *Id.* at 1844 (majority opinion).

<sup>13</sup> 18 U.S.C. § 1153.

<sup>14</sup> *Id.* §§ 1153(a), 2241(a)(1)–(2).

<sup>15</sup> See *Denezpi*, 142 S. Ct. at 1844.

<sup>16</sup> Order Denying Motion to Dismiss on Double Jeopardy Grounds, *supra* note 6, at 2, 2019 WL 295670, at \*1.

<sup>17</sup> *Id.*

<sup>18</sup> U.S. CONST. amend. V. The Double Jeopardy Clause applies to all criminal prosecutions, not just those that lead to corporal punishment. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874).

<sup>19</sup> Order Denying Motion to Dismiss on Double Jeopardy Grounds, *supra* note 6, at 7, 2019 WL 295670, at \*4.

<sup>20</sup> *Id.*

<sup>21</sup> *United States v. Denezpi*, 979 F.3d 777, 779 (10th Cir. 2020). The Tenth Circuit also dismissed Denezpi's appeal to strike parts of V.Y.'s testimony. *Id.* Denezpi did not raise this evidentiary claim to the Supreme Court. See *Petition for a Writ of Certiorari* at i, 4, *Denezpi*, 142 S. Ct. 1838 (No. 20-7622).

The Supreme Court affirmed.<sup>22</sup> Writing for the Court, Justice Barrett<sup>23</sup> held that “[b]y its terms, the [Double Jeopardy] Clause prohibits separate prosecutions for the same offense,” not successive prosecutions conducted by the same sovereign authority.<sup>24</sup> Under the dual-sovereignty doctrine, prosecutions for the same underlying act are constitutional when that act violates the laws of separate sovereigns.<sup>25</sup> Since Denezpi’s two cases were for offenses defined by different sovereigns — the Ute Mountain Ute Tribe and the United States — both were constitutional regardless of which government conducted each prosecution.<sup>26</sup>

The Court began its analysis by explaining the history and structure of C.F.R. courts.<sup>27</sup> In the late nineteenth century, the Department of the Interior (DOI) established C.F.R. courts to adjudicate violations of rules it had enacted to regulate tribes and tribal members.<sup>28</sup> Over the intervening 140 years, most tribes created independent judicial systems, but a small minority still retain the use of C.F.R. courts.<sup>29</sup> DOI appoints C.F.R. court judges,<sup>30</sup> and unless a contract with a tribe “provides otherwise,” DOI also appoints federal BIA officials to act as C.F.R. court prosecutors.<sup>31</sup> C.F.R. courts have jurisdiction over offenses initially enacted by tribes and then approved by DOI.<sup>32</sup> The penal code of the Ute Mountain Ute Tribe, a tribe with approximately two thousand members and a reservation spanning Colorado, New Mexico, and Utah, is enforced in the Southwest Region C.F.R. Court.<sup>33</sup>

After outlining the facts of Denezpi’s case, the Court analyzed the Double Jeopardy Clause’s text, which it found “focuses on whether successive prosecutions are for the same ‘offence.’”<sup>34</sup> An offense articulated by one sovereign is “necessarily a different offense from that of another sovereign” because “the sovereign source of a law is an inherent and

<sup>22</sup> *Denezpi*, 142 S. Ct. at 1843.

<sup>23</sup> Justice Barrett was joined by Chief Justice Roberts and Justices Thomas, Breyer, Alito, and Kavanaugh.

<sup>24</sup> *Denezpi*, 142 S. Ct. at 1843.

<sup>25</sup> Order Denying Motion to Dismiss on Double Jeopardy Grounds, *supra* note 6, at 2–3, 2019 WL 295670, at \*2 (quoting *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 62 (2016)).

<sup>26</sup> *See Denezpi*, 142 S. Ct. at 1843.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* (citing 25 C.F.R. § 11.104 (2021)).

<sup>30</sup> *Id.* (citing 25 C.F.R. § 11.201(a) (2021)). Appointed judges are subject to a confirmation vote by a tribe’s governing body. *Id.*

<sup>31</sup> *Id.* (citing 25 C.F.R. § 11.204 (2021)).

<sup>32</sup> *Id.* (citing 25 C.F.R. §§ 11.108, 11.449 (2021)). C.F.R. courts also have jurisdiction over regulatory offenses that originate with DOI. *Id.* (citing 25 C.F.R. §§ 11.400–454 (2021)). Denezpi was charged with one offense originally defined by the Ute Mountain Ute Tribe, to which he pleaded no contest, and two offenses originally defined by BIA, which were dismissed. *See Denezpi*, 142 S. Ct. at 1844; *United States v. Denezpi*, 979 F.3d 777, 780 (10th Cir. 2020); *see also* 6 UTE MOUNTAIN UTE CODE § 2 (1988); 25 C.F.R. §§ 11.402, 11.404 (2021).

<sup>33</sup> *Denezpi*, 142 S. Ct. at 1843–44; *see also* U.S. Dep’t of the Interior, *supra* note 8.

<sup>34</sup> *Denezpi*, 142 S. Ct. at 1844.

distinctive feature of the law itself.”<sup>35</sup> This dual-sovereignty principle applies whenever “two entities derive their power to punish from wholly independent sources.”<sup>36</sup> As the Court established in *United States v. Wheeler*,<sup>37</sup> Native nations are and always have been “self-governing sovereign political communities,” so when a defendant’s conduct violates substantively identical Indian and federal criminal laws, he can be prosecuted and convicted for both violations.<sup>38</sup> Denezpi’s position that the Double Jeopardy Clause requires separate sovereigns to “*actually prosecute*[]” each offense<sup>39</sup> is irreconcilable with its text.<sup>40</sup> Regardless of whether the BIA official who prosecuted Denezpi in the C.F.R. court exercised federal or tribal authority, Denezpi’s later federal prosecution was constitutional.<sup>41</sup>

The Court determined that because Denezpi conceded that his initial prosecution was for a violation of a tribal ordinance,<sup>42</sup> it did not need to resolve whether successive prosecutions for federal regulatory crimes and federal statutory crimes amount to double jeopardy.<sup>43</sup> Although Justice Gorsuch argued in dissent that the C.F.R. court structure assimilates tribal ordinances into the *Code of Federal Regulations*,<sup>44</sup> “[n]o party pressed the assimilation argument . . . and no lower court addressed it.”<sup>45</sup> To the majority, because “the assimilation question is complex . . . it [was] particularly imprudent to raise and resolve . . . *sua sponte*.”<sup>46</sup>

The Court also found that no legal precedent supported Denezpi’s position.<sup>47</sup> While Denezpi “stich[ed] together loose language” from cases that seemed to indicate that the Clause requires prosecutorial power to derive from separate sovereign sources, those cases all dealt with

<sup>35</sup> *Id.* at 1844–45 (citing *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019)).

<sup>36</sup> *Id.* at 1845 (quoting *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 68 (2016)).

<sup>37</sup> 435 U.S. 313 (1978).

<sup>38</sup> See *Denezpi*, 142 S. Ct. at 1845 (quoting *Wheeler*, 435 U.S. at 322–23).

<sup>39</sup> Brief for Petitioner at 2, *Denezpi* (No. 20-7622).

<sup>40</sup> *Denezpi*, 142 S. Ct. at 1846 (describing how the Clause “zeroes in on what the person is put in jeopardy for: the ‘offense’”); see also *id.* at 1847 (“Denezpi’s proposal . . . [is] 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. He offers no textual justification for this nonsensical result.”).

<sup>41</sup> *Id.* at 1846.

<sup>42</sup> See Brief for Petitioner, *supra* note 39, at 1 (describing Denezpi’s C.F.R. court prosecution as being for “two alleged violations of federal law and one alleged violation of tribal law,” for which he was ultimately convicted); see also Transcript of Oral Argument at 12–13, *Denezpi* (No. 20-7622), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/20-7622\\_g3bh.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-7622_g3bh.pdf) [<https://perma.cc/7SQ6-EXQQ>] (statement of Denezpi’s counsel) (admitting that Denezpi “was, in fact, charged with a violation of the Ute Mountain Ute code”).

<sup>43</sup> *Denezpi*, 142 S. Ct. at 1849; see also *id.* at 1845 n.2.

<sup>44</sup> *Id.* at 1852 (Gorsuch, J., dissenting).

<sup>45</sup> *Id.* at 1845 n.2 (majority opinion).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1847–48.

“a sovereign (or alleged sovereign) prosecuting its own laws.”<sup>48</sup> “[I]mprecise statements cannot overcome the holdings of [those] cases” or “the text of the Clause,” which all “make clear” that only enactment is dispositive in the dual-sovereignty analysis.<sup>49</sup> *Bartkus v. Illinois*,<sup>50</sup> the only case to raise tangentially the question presented in *Denezpi*, “did not begin to analyze, much less answer,” whether the source of a prosecutor’s authority is relevant under the Double Jeopardy Clause.<sup>51</sup> The Court also “disagree[d]” with *Denezpi*’s claim that C.F.R. courts are prohibited from adjudicating major crimes to limit the risk of double jeopardy violations<sup>52</sup> and determined that tribal interests are furthered whenever tribal laws are enforced, regardless of by whom.<sup>53</sup> Finally, the Court determined that if the Constitution prevents the federal government from enforcing another sovereign’s laws, the Double Jeopardy Clause is not the source of that prohibition.<sup>54</sup>

Justice Gorsuch dissented.<sup>55</sup> He characterized *Denezpi*’s first conviction as resting on a violation of a federal regulation, not a tribal ordinance, despite *Denezpi*’s concession otherwise.<sup>56</sup> While many of the offenses enforced in C.F.R. courts originate as tribal laws, like the Ute Mountain Ute Tribe’s assault and battery offense, they must be approved by a DOI official before becoming part of the *Code of Federal Regulations*.<sup>57</sup> Here, the C.F.R. court convicted *Denezpi* of violating 25 C.F.R. § 11.449, which prohibits “[v]iolation[s] of an approved tribal ordinance.”<sup>58</sup> That regulation “assimilates federally approved tribal

<sup>48</sup> *Id.* (citing *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 65–66 (2016); *Waller v. Florida*, 397 U.S. 387, 392–95 (1970)).

<sup>49</sup> *Id.* at 1848.

<sup>50</sup> 359 U.S. 121 (1959).

<sup>51</sup> *Denezpi*, 142 S. Ct. at 1848. In *Bartkus*, where the Court held that successive federal and state prosecutions do not violate due process, it mentioned in passing that the state’s prosecution was not a “cover for a federal prosecution, and thereby in essential fact another federal prosecution.” *Bartkus*, 359 U.S. at 124. *Denezpi* argued that this dictum indicated that the dual-sovereignty doctrine prohibits successive federal prosecutions. Brief for Petitioner, *supra* note 39, at 16–17.

<sup>52</sup> *Denezpi*, 142 S. Ct. at 1848–49; *see also* Brief for Petitioner, *supra* note 39, at 28–29.

<sup>53</sup> *Denezpi*, 142 S. Ct. at 1849.

<sup>54</sup> *Id.*

<sup>55</sup> Justice Gorsuch was joined by Justices Sotomayor and Kagan, except as to Part II. In Part II, Justice Gorsuch questioned the underlying constitutionality of C.F.R. courts, analyzed the *Code of Federal Regulations* to find that “both of Mr. *Denezpi*’s convictions were for federal offenses,” and distinguished *Denezpi*’s case from *Wheeler*. *See id.* at 1851–54 (Gorsuch, J., dissenting).

<sup>56</sup> *See id.* at 1852–53; *see also* Brief for Petitioner, *supra* note 39, at 2 (“There is no basis . . . for the notion that one sovereign may prosecute a defendant twice[,] . . . first for a violation of another sovereign’s criminal code, and then . . . a second time for a substantively identical violation of its own criminal code.”); Transcript of Oral Argument, *supra* note 42, at 12–13 (statement of *Denezpi*’s counsel).

<sup>57</sup> *Denezpi*, 142 S. Ct. at 1852–53 (Gorsuch, J., dissenting).

<sup>58</sup> *Id.* (citing 25 C.F.R. § 11.449 (2021)).

ordinances into federal law.”<sup>59</sup> Because Denezpi’s prosecutions were for substantively identical offenses enacted by the same sovereign — the United States — his second case was unconstitutional under the majority’s interpretation of the Double Jeopardy Clause.<sup>60</sup> The dissent also agreed with Denezpi that to “honor the Double Jeopardy Clause in substance as well as form,” the dual-sovereignty analysis must take into account whether separate sovereigns actually prosecuted the defendant.<sup>61</sup> The dissenting justices would have held that C.F.R. courts exercise federal prosecutorial power,<sup>62</sup> and since the federal government conducted both of Denezpi’s prosecutions, his second case was unconstitutional.<sup>63</sup>

In *Denezpi*, the majority declined to resolve a compelling and potentially dispositive argument raised by the dissent: that the regulations that constitute C.F.R. courts assimilate tribal offenses into federal law.<sup>64</sup> The majority supported its decision by characterizing the assimilation question as “complex” and therefore “particularly imprudent to raise and resolve . . . *sua sponte*.”<sup>65</sup> While this aligns with basic principles of Supreme Court review,<sup>66</sup> *Denezpi* also illustrates that the Court’s presumption against *sua sponte* decisionmaking should operate particularly strongly when the Court is positioned to potentially abrogate tribal sovereignty. Because tribes have special constitutional status as domestic sovereigns, federal Indian law is especially complex, and decisions that curtail sovereignty have a profound impact on affected tribes, the Court should generally avoid limiting tribal sovereignty *sua sponte*.

Justice Gorsuch’s assimilation argument has intuitive appeal, but it is in tension with the Court’s default decisionmaking principles. By the time a case reaches the Supreme Court, the relevant legal arguments have been clarified by lower courts and the parties,<sup>67</sup> so typically the Court considers only those arguments.<sup>68</sup> There are widely applicable prudential justifications for why the Court does not typically engage in

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<sup>59</sup> *Id.* at 1852. Justice Gorsuch also found that the federalization of tribal offenses pursuant to the C.F.R. court regulations differentiates Denezpi’s successive prosecutions from those of the defendant in *Wheeler*, where the Court held that when *tribal* courts enforce tribal offenses, they exercise tribal authority. *See id.* at 1853–54.

<sup>60</sup> *See id.* at 1852.

<sup>61</sup> *Id.* at 1854.

<sup>62</sup> *See id.* at 1854–56.

<sup>63</sup> *See id.* at 1855.

<sup>64</sup> *Id.* at 1852.

<sup>65</sup> *Id.* at 1845 n.2 (majority opinion).

<sup>66</sup> *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”).

<sup>67</sup> Rosemary Krimbel, Note, *Rehearing Sua Sponte in the Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 920 n.6 (1989).

<sup>68</sup> *See* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 449 (2009) (“American judges are strongly discouraged from . . . raising legal claims and arguments that the parties have overlooked or ignored — on the ground that doing so is antithetical to a legal culture that values litigant autonomy and prohibits agenda setting by judges.”).

sua sponte decisionmaking.<sup>69</sup> As Professor Alexander Bickel describes in his seminal *Harvard Law Review* Foreword on the Supreme Court's passive virtues, when the Court decides cases on the narrowest grounds possible, it enables other institutional actors to resolve deeply consequential sociolegal conflicts.<sup>70</sup> Yet the Court has broad authority to determine what to consider when adjudicating a case,<sup>71</sup> deriving from its historic "province and duty . . . to say what the law is,"<sup>72</sup> and often resolves cases on grounds that fall outside the scope of parties' initial arguments.<sup>73</sup> Indeed, "the Court openly adds or subtracts [issues] in some of its most consequential and politicizing cases."<sup>74</sup>

Here, the assimilation argument is compelling, at least superficially: Denezpi was first prosecuted for violating a federal regulation, 25 C.F.R. § 11.449, and then for violating a federal statute prohibiting substantively identical conduct.<sup>75</sup> Under the majority's dual-sovereignty framework, Denezpi's second prosecution probably violated the Double Jeopardy Clause because both offenses were enacted by the United States.<sup>76</sup> If so, the Court was in a position to either "decide the dispute on the parties' chosen terms . . . or introduce new grounds for a decision on [its] own initiative, producing a judicially driven, but more accurate,

<sup>69</sup> See generally Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). There are also constitutional limitations that prevent the Court from issuing advisory opinions. See U.S. CONST. art. III, § 2 (limiting federal court jurisdiction to cases and controversies).

<sup>70</sup> See Bickel, *supra* note 69, at 60.

<sup>71</sup> See Benjamin B. Johnson, Essay, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 794–95 (2022); see also Bert I. Huang, *A Court of Two Minds*, 122 COLUM. L. REV. F. 90, 94 (2022) (describing how the Court has "almost total control over which questions of law it will or will not decide").

<sup>72</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also Krimbel, *supra* note 67, at 920 n.6 ("Once a case or controversy has reached the Supreme Court, the Court has the power to reframe or clarify the issues within the context of the case.").

<sup>73</sup> Some of the Court's landmark decisions, including *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); and *Citizens United v. FEC*, 558 U.S. 310 (2010), were resolved on grounds the Court raised sua sponte. See Frost, *supra* note 68, at 450–51 (listing major Supreme Court decisions where the Court engaged in issue creation, including *Erie*, where the Court overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), even though neither party took issue with *Swift*); see also Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 689–90 (2012) (discussing how the Court "occasionally reformulates the questions presented [in the cert petition], and indeed sometimes exceeds the boundaries of the questions presented," *id.* at 689).

<sup>74</sup> See Johnson, *supra* note 71, at 793.

<sup>75</sup> 18 U.S.C. §§ 1153(a), 2241(a)(1)–(2).

<sup>76</sup> The majority acknowledged that "successive prosecutions for a federal regulatory crime and a federal statutory crime present a different double jeopardy question" than the one at issue in *Denezpi* but did not resolve that question. See *Denezpi*, 142 S. Ct. at 1849.

statement of law.”<sup>77</sup> In *Denezpi*, the Court seemed to be in a position to fulfill either its dispute-resolution role or its law-declaration role, but not both.<sup>78</sup>

But even if Justice Gorsuch’s position is substantively correct — which is unclear<sup>79</sup> — the Court was right to dismiss his assimilation argument. The United States has historically classified Indian tribes as “domestic dependent nations,”<sup>80</sup> a status “often considered sui generis within public law.”<sup>81</sup> Native nations’ constitutional status is singular because the federal government both engages with tribes through a government-to-government framework and possesses plenary power over them.<sup>82</sup> Because tribes have never been formally incorporated into the United States’s system of federalism or recognized as fully independent, the Court’s authority over tribes derives directly from their colonization.<sup>83</sup> Given this legal and historical context, the Court should generally avoid abrogating tribal sovereignty *sua sponte*.<sup>84</sup>

Additionally, because federal Indian law is deeply complex, the Court is not well situated to resolve questions of tribal sovereignty on

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<sup>77</sup> See Frost, *supra* note 68, at 452.

<sup>78</sup> See Monaghan, *supra* note 73, at 668–69 (discussing how, when the Court acts in accordance with the dispute-resolution model, it resolves “the actual dispute between the litigants,” *id.* at 668, and when it acts in accordance with the law-declaration model it focuses “on the judicial role in saying what the law is . . . irrespective of the wishes of the litigants,” *id.* at 668–69).

<sup>79</sup> See *COBRA*, DIVIDED ARGUMENT, at 51:30 (June 19, 2022), <https://www.dividedargument.com/episodes/cobra> [<https://perma.cc/98YG-9CRG>] (describing the assimilation question as a complex “metaphysical” inquiry that goes to the “heart of conflict of laws”).

<sup>80</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (opinion of Marshall, C.J.) (“[Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations.”).

<sup>81</sup> Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1863 (2019).

<sup>82</sup> See, e.g., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[2] (Nell Jessup Newton ed., 2019); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1139–40 (1990) (describing the contours of the plenary power, which at its most potent enables Congress to “terminate the sovereignty of a tribe without its consent,” *id.* at 1140). One manifestation of tribes’ special legal status is the Indian canons, a series of substantive canons that apply exclusively to the interpretation of treaties and statutes that affect tribal rights and powers. See *infra* pp. 498–99.

<sup>83</sup> See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 434 (2005) (“[F]ederal Indian law [is] the law governing the historical and ongoing colonial process underpinning the United States.”); see also *id.* at 436 (arguing that the Supreme Court has an “even more inferior constitutional pedigree” to frustrate tribal prerogatives than Congress has); Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignities*, 170 U. PA. L. REV. 549, 558 (2022) (describing how tribal sovereignty has persisted since the founding despite ongoing colonization and coercion).

<sup>84</sup> Cf. Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1178–80 (2001) (arguing that the Court should issue narrow decisions that “do not divest tribes of aspects of their sovereignty”). In his dissent in this Term’s *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), Justice Gorsuch writes that the Court “has no business usurping congressional decisions about the appropriate balance between federal, tribal, and state interests.” *Id.* at 2525 (Gorsuch, J., dissenting).



grounds other than those crystallized by the litigants.<sup>85</sup> Scholars have remarked that “[f]ew things confound the Supreme Court more than Indian law”<sup>86</sup> and that “federal Indian law is characterized by doctrinal incoherence.”<sup>87</sup> Centuries of “extensive federal involvement in Indian country has led to the complex entanglement of tribal and federal authority.”<sup>88</sup> Accordingly, “there is nothing clean or straightforward about the CFR [c]ourts.”<sup>89</sup> In *Denezpi*, as the majority asserted, “the answer to the [assimilation] question is not as obvious as the dissent claims.”<sup>90</sup> According to federal Indian law scholars, by the early twentieth century, C.F.R. courts conducted their work “almost always in Indigenous languages” and “ruled based on tribal law and customs,” despite the federal government’s coercive assimilationist policies.<sup>91</sup> How that history affects the formal pedigree of the offenses prosecuted in C.F.R. courts today is not obvious. For instance, it is plausible that the first offense for which *Denezpi* was convicted — the Ute Mountain Ute Tribe’s assault and battery ordinance, as incorporated into 25 C.F.R. § 11.449 — is the product of both federal *and* tribal sovereignty.<sup>92</sup> By declining to take up the assimilation question *sua sponte*, the Court avoided making uninformed judgments about abstract and complicated issues without assistance from the parties, the lower courts, or the affected tribes.

*Denezpi* also illustrates the potential negative consequences that *sua sponte* Supreme Court decisions could have on tribes’ self-constitution. The *Denezpi* majority’s narrow decision preserved the Ute Mountain Ute Tribe’s ability to meaningfully participate in the C.F.R. court system — the only judicial structure practically available to the tribe.<sup>93</sup> As

<sup>85</sup> See Frickey, *supra* note 83, at 433–37. While tribes themselves are not always litigants in Indian law cases that reach the Supreme Court, they almost always assist the Court by filing amicus briefs, as the Ute Mountain Ute Tribe did here. See, e.g., Brief *Amici Curiae* of the Ute Mountain Ute Tribe et al. in Support of the United States, *Denezpi*, 142 S. Ct. 1838 (No. 20-7622) [hereinafter Brief of Ute Mountain Ute Tribe et al.].

<sup>86</sup> Stephen Wermiel, *SCOTUS for Law Students: Indian Cases at the Court*, SCOTUSBLOG (Jan. 4, 2016, 9:48 AM), <http://www.scotusblog.com/2016/01/scotus-for-law-students-indian-cases-at-the-court> [https://perma.cc/MX3D-ZUQQ].

<sup>87</sup> Frickey, *supra* note 83, at 435 (quoting Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997)).

<sup>88</sup> See Brief of *Amici Curiae* Federal Indian Law Scholars & Historians in Support of Respondent at 13, *Denezpi* (No. 20-7622) [hereinafter Brief of Federal Indian Law Scholars & Historians].

<sup>89</sup> See Brief of Ute Mountain Ute Tribe et al., *supra* note 85, at 3.

<sup>90</sup> *Denezpi*, 142 S. Ct. at 1845 n.2.

<sup>91</sup> Brief of Federal Indian Law Scholars & Historians, *supra* note 88, at 9–10.

<sup>92</sup> Offenses like that for which *Denezpi* was initially convicted are clearly the product of some interaction between tribes and the federal government. The Court of Indian Appeals for the Kiowa Tribe, for example, has noted that “[C.F.R. courts] have been acknowledged to operate under the residual sovereignty of the tribes as well as under the authority of the federal government.” *Kiowa Election Bd. v. Lujan*, 1 Okla. Trib. 140, 151 (Kiowa CIA 1987).

<sup>93</sup> See Brief of Ute Mountain Ute Tribe et al., *supra* note 85, at 4; see also Brief of Federal Indian Law Scholars & Historians, *supra* note 88, at 12 (“[T]hese courts remain vital for the tribes that

the tribe explains in its amicus brief, the Ute Mountain Ute reservation experiences extremely high rates of violent crime, and the closest federal courthouse is over four hundred miles from the reservation's main city.<sup>94</sup> The tribe has a "profound need" for its C.F.R. court.<sup>95</sup> But federal law severely limits the authority of C.F.R. courts, which cannot sentence any defendant to more than one year in prison for any offense.<sup>96</sup> If successive prosecutions for tribal offenses as incorporated into the *Code of Federal Regulations* and substantively identical federal statutory offenses were unconstitutional, the tribes that use C.F.R. courts would be left with an untenable choice: enforcing their own penal codes in their own court systems or abdicating all prosecutorial authority to the federal government in order to achieve meaningful punishment and deterrence.<sup>97</sup> If the majority had adopted Justice Gorsuch's assimilation argument, the Ute Mountain Ute Tribe's C.F.R. court would be functionally disempowered "at the expense of the Tribe's own sovereignty."<sup>98</sup>

In *Denezpi*, the Court declined to resolve sua sponte whether the C.F.R. court system federalizes tribal penal codes, even though that argument, if correct, would have likely been dispositive and led the Court to hold that *Denezpi*'s second prosecution violated the Double Jeopardy Clause. The majority probably based this decision on the general principle that the Court raises issues sua sponte only in rare circumstances. *Denezpi* illustrates why this principle should operate especially strongly whenever the Court is in a position to potentially abrogate tribal sovereignty.

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have elected to maintain them."). The Ute Mountain Ute Tribe is extremely impoverished and underresourced. See Brief of Ute Mountain Ute Tribe et al., *supra* note 85, at 9 (describing how "enduring poverty" burdens the tribe and its citizens).

<sup>94</sup> Brief of Ute Mountain Ute Tribe et al., *supra* note 85, at 2, 5–6, 9.

<sup>95</sup> *Id.* at 4.

<sup>96</sup> 25 C.F.R. § 11.315(a)(1). The maximum sentence a C.F.R. court can issue for *Denezpi*'s convicted offense — assault and battery — is just six months, even though the same crime carries a much longer sentence in other judicial systems. See *Denezpi*, 142 S. Ct. at 1851 (Gorsuch, J., dissenting).

<sup>97</sup> See Brief of *Amici Curiae* National Indigenous Women's Resource Center & National Congress of American Indians in Support of Respondent at 4, *Denezpi* (No. 20-7622).

<sup>98</sup> Brief of Ute Mountain Ute Tribe et al., *supra* note 85, at 6.