AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 9: Liberalism Divided – Federalism

United States v. Wheeler, 435 U.S. 313 (1978)

In 1974, Anthony Robert Wheeler, a member of the Navajo Tribe, was arrested by a tribal police officer on a Navajo reservation in Arizona. In tribal court, he pled guilty under tribal law to disorderly conduct and contributing to the delinquency of a minor and was given a small fine and sentenced to a short stay in jail. Based on the same facts, a federal grand jury subsequently indicted Wheeler for the federal crime of committing statutory rape on an Indian reservation. Wheeler moved in federal district court to dismiss the indictment on the grounds that the constitutional prohibition on double jeopardy barred prosecution by both tribal and federal officials for the same offense. The trial court granted the motion, and the Court of Appeals for the Ninth Circuit affirmed that ruling. The prosecutor appealed to the U.S. Supreme Court, which unanimously reversed the lower courts.

The key question for the Court was whether the courts of the Navajo Tribe and the courts of the U.S. government were "arms of separate sovereigns" or whether there was an "identity of sovereignties" working through both prosecutions. The double jeopardy clause has been interpreted to prohibit multiple prosecutions of the same offense in courts of a single sovereign (whether of a state or the federal government) but not to prohibit multiple prosecutions of the same offense in the courts of distinct sovereigns. Were tribal courts an arm of the federal government, or did they rest on a distinct sovereign authority? The issue was complicated by the federal government's decisions to create Indian reservations within which the tribal courts operated. The Court nonetheless concluded that the tribal courts drew their authority from the distinct sovereignty of the Indian tribes.

Why are the tribal governments of Native Americans distinct sovereign entities? How are they distinct from territorial governments, such as the government of Puerto Rico? Why does the ability of the federal government to constitute and regulate those courts not deprive them of sovereignty? Why should double jeopardy not apply to cases of multiple prosecutions in the courts of distinct governments?

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JUSTICE STEWART, delivered the opinion of the Court.

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In *Bartkus v. Illinois* (1959) . . . , this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy." . . .

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The "dual sovereignty" concept does not apply, however, in every instance where successive cases are brought by nominally different prosecuting entities. . . . [S]uccessive prosecutions by federal and territorial courts are impermissible because such courts are "creations emanating from the same sovereignty." . . .

The respondent contends, and the Court of Appeals held, that the "dual sovereignty" concept should not apply to successive prosecutions by an Indian tribe and the United States because the Indian tribes are not themselves sovereigns, but derive their power to punish crimes from the Federal

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Government. This argument relies on the undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government. . . .

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Bartkus . . . rest[s] on the basic structure of our federal system, in which States and the National Government are separate political communities. State and Federal Governments "[derive] power from different sources," each from the organic law that established it. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each "is exercising its own sovereignty, not that of the other." . . .

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It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." *United States v. Kagama* (1886). . . .

The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty which has never been extinguished." Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

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. . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

It is evident that the sovereign power to punish tribal offenders has never been given up by the Navajo Tribe and that tribal exercise of that power today is therefore the continued exercise of retained tribal sovereignty. . . .

. . . . [F]ar from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of a tribe, Congress has repeatedly recognized that power and declined to disturb it.

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That the Navajo Tribe's power to punish offenses against tribal law committed by its members is an aspect of its retained sovereignty is further supported by the absence of any federal grant of such power. If Navajo self-government were merely the exercise of delegated federal sovereignty, such a delegation should logically appear somewhere. But no provision in the relevant treaties or statutes confers the right of self-government in general, or the power to punish crimes in particular, upon the Tribe.

. . . . That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power.

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. . . . Tribal courts can impose no punishment in excess of six months' imprisonment or a $500 fine. On the other hand, federal jurisdiction over crimes committed by Indians includes many major offenses. Thus, when both a federal prosecution for a major crime and a tribal prosecution for a lesser included offense are possible, the defendant will often face the potential of a mild tribal punishment and a federal punishment of substantial severity. . . . In such a case, the prospect of avoiding more severe federal punishment would surely motivate a member of a tribe charged with the commission of an offense to seek to stand trial first in a tribal court. Were the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated.

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[T]ribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests. Thus, . . . there are persuasive reasons to reject the respondent's argument that we should arbitrarily ignore the settled "dual sovereignty" concept as it applies to successive tribal and federal prosecutions.

Accordingly, the judgment of the Court of Appeals is *reversed* . . . .

JUSTICE BRENNAN took no part in the consideration or decision of this case.

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