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*GAMBLE V. UNITED STATES: THE DUAL
SOVEREIGNTY DOCTRINE UNDER THE
NATIONAL VS. INTERNATIONALIZED CONTEXT
– WHAT IS SOVEREIGN TO ONE IS NOT
SOVEREIGN TO THE OTHER*

VERONICA MINA[†]

In *Gamble v. United States*,¹ the Supreme Court addressed whether to overrule a longstanding interpretation of the Double Jeopardy Clause of the Fifth Amendment, which provides that no person may be put in jeopardy twice for the same offense.² The Court adhered to longstanding precedent and held that a crime under one sovereign’s laws is not “the same offense” as a crime under the laws of another sovereign.³ The Court incorrectly held that the “dual-sovereignty” doctrine was constitutional in the United States, where a state may prosecute a defendant under state law even if the federal

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1. 139 S. Ct. 1960 (2019).

2. U.S. CONST. amend. V.

3. *Gamble*, 139 S. Ct. at 1963.

government already prosecuted him for the same conduct under a federal statute, or vice versa because the state government is not sovereign.⁴ Additionally, the Court incorrectly explained that “dual sovereignty” analogously applies in the international context as it does in the United States domestic context because the Court misplaced the views and roles of jurisdiction and sovereignty in international law for purposes of prosecution.⁵

I. THE CASE

In November 2015, a police officer in Mobile, Alabama pulled Terance Gamble over for a damaged headlight.⁶ The police officer smelled marijuana so he searched Gamble’s car, where he found a loaded 9-mm handgun.⁷ Gamble was previously convicted of second-degree robbery. Therefore, his possession of the handgun violated an Alabama law providing that no one convicted of “a crime of violence”⁸ “shall own a firearm or have one in his or her possession.”⁹ Gamble pleaded guilty to the possession of a handgun in violation of Alabama law. Afterward, federal prosecutors indicted him for the same instance of possession under a federal law.¹⁰ The federal law forbade those convicted of “a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition.”¹¹

Gamble moved to dismiss the federal indictment on the ground that it was for “the same offense” as the one at issue in his state conviction and thus exposed him to double jeopardy.¹² The District Court denied Gamble’s motion to dismiss.¹³ Gamble then pleaded guilty to the federal offense while preserving his right to challenge

4. *See infra* Section IV.A.

5. *See infra* Section IV.B.

6. *Gamble*, 139 S. Ct. at 1963.

7. *Id.*

8. *See* ALA. CODE § 13A-11-70(2) (2015) (defining “crime of violence” to include robbery).

9. *Gamble*, 139 S. Ct. at 1964 (citing ALA. CODE § 13A-11-72(a) (2015)).

10. *Id.*

11. *Id.* (citing 18 U.S.C. § 922(g)(1)).

12. *Id.*

13. *See* *United States v. Gamble*, No. 16-00090-KD-B, 2016 WL 3460414 (S.D. Ala. June 21, 2016) (explaining that we have here two sovereignties, deriving power from different sources . . . It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922))).

the denial of his motion to dismiss on double jeopardy grounds.¹⁴ On appeal, the Eleventh Circuit affirmed.¹⁵ Gamble appealed to the Supreme Court, which granted Gamble's petition for certiorari to determine whether to overturn the Dual Sovereignty Doctrine.¹⁶

II. LEGAL BACKGROUND

The Double Jeopardy Clause in the Fifth Amendment of the United States Constitution prevents persons from being put in jeopardy of prosecution twice for substantially the same crime.¹⁷ The relevant part of the Fifth Amendment states, "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb" ¹⁸ Section II.A discusses the elements of the Dual Jeopardy Clause and its general applicability.¹⁹ Section II.B discusses the purpose and origin of the Fifth Amendment through doctrinal applications.²⁰ Section II.C examines jurisdiction as a prior constraint to exercising sovereignty.²¹ Section II.D examines the Dual Sovereignty Doctrine.²²

A. The Elements of the Double Jeopardy Clause and its Applicability

The bar against double jeopardy applies if three elements are met. The first two elements determine "former" jeopardy, which is a prerequisite to "double" jeopardy.²³ When "former" jeopardy is assumed or established, the third element determines "double" jeopardy.²⁴ First, jeopardy had previously attached.²⁵ Second,

14. *Gamble*, 139 S. Ct. at 1964.

15. *See* *United States v. Gamble*, 694 F. App'x 750, 751 (11th Cir. 2017) (per curiam) (explaining that "the Double Jeopardy Clause does not prevent different sovereigns (i.e., a state government and the federal government) from punishing a defendant for the same criminal conduct" (citing *United States v. Bidwell*, 393 F.3d 1206, 1209 (11th Cir. 2004))).

16. *Gamble*, 139 S. Ct. at 1964.

17. *See* U.S. CONST. amend. V.

18. U.S. CONST. amend. V.

19. *See infra* Section II.A.

20. *See infra* Section II.B.

21. *See infra* Section II.C.

22. *See infra* Section II.D.

23. *State v. Corrado*, 81 Wash. App. 640, 645 (Wash. Ct. App. 1996) (citing *Serfass v. United States*, 420 U.S. 377, 393 (1975) (explaining that an accused must suffer jeopardy before he can suffer double jeopardy)).

24. *Id.*

25. *State v. Goldsmith*, 147 Wash. App. 317, 323 (Wash. Ct. App. 2008) (citing *State v. Corrado*, 81 Wash. App. 640, 645 (Wash. Ct. App. 1996)).

jeopardy is terminated.²⁶ Third, the defendant is placed in jeopardy again for the same offense.²⁷

The first element requires that jeopardy previously attached.²⁸ In order for jeopardy to attach, a defendant must risk a determination of guilt.²⁹ A plea of double jeopardy requires that the accused must have been put in jeopardy.³⁰ For example, a preliminary hearing before a magistrate to determine whether there is sufficient evidence to hold an accused for an action is not a trial.³¹ Therefore, the accused is not put in jeopardy and his or her discharge as a result of such a hearing does not bar a subsequent prosecution for the offense that gave rise to the preliminary hearing.³² Additionally, a showing of unfairness alone cannot invoke double jeopardy protection.³³ The rule of double jeopardy is applicable only when the first prosecution involves a trial before a criminal court or at least a court empowered to impose punishment by way of fine, imprisonment, or otherwise as a deterrent to the commission of a crime.³⁴ Therefore, administrative penalties, such as non-criminal lawyer disciplinary proceedings³⁵ and the suspension of a driver's license,³⁶ do not constitute criminal sanctions or "punishment," and double jeopardy does not bar further proceedings.³⁷ The second element requires that jeopardy is

26. *Id.*

27. *Id.*

28. *See supra* note 25.

29. *Odem v. State*, 175 Md. App. 684, 700 (Md. Ct. Spec. App. 2007) (citing *Serfass v. United States*, 420 U.S. 377, 392 (1975) (stating "[A] defendant does not risk a determination of guilt when a trial court determines a preliminary matter without reaching the merits of the case.")).

30. *Wampler v. Warden of Md. Penitentiary*, 231 Md. 639, 647–48 (Md. 1963).

31. *Id.*

32. *Id.*

33. *Lloyd v. State*, 42 Md. App. 167, 172 (Md. Ct. Spec. App. 1979) (rebutting defendant's argument that since one of the policies behind the double jeopardy concept is that the government act with fundamental fairness, we should find that he has been placed in double jeopardy if we find he has been treated unfairly).

34. *In re John P.*, 311 Md. 700, 708 (Md. 1988) ("When no sanctions of a criminal nature are sought by the State in either the first or the second proceeding, it would seem that the double jeopardy prohibition is inapplicable.").

35. *Md. State Bar Ass'n, Inc. v. Frank*, 272 Md. 528, 535 (Md. 1974) (explaining that the principles of double jeopardy or *res judicata* are no bar to a disciplinary proceeding which follows the disposition of a criminal indictment, though based on substantially the same conduct).

36. *State v. Jones*, 340 Md. 235, 265 (Md. 1995) (explaining that the remedial purpose of maintaining safety on the public highways amply justifies the maximum 45-day license suspension that the statute may impose upon a driver who fails blood or breath alcohol test, so that suspension does not constitute "punishment" and driver subsequently may be convicted of driving while intoxicated without violating double jeopardy principles).

37. *See also Ward v. Dep't of Pub. Safety & Corr. Serv.*, 339 Md. 343, 350 (Md. 1995)

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previously terminated.³⁸ The Double Jeopardy Clause applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.³⁹ The Supreme Court has held that the failure of the jury to reach a verdict, such as in the case of a hung jury or a mistrial, is not an event which terminates jeopardy.⁴⁰

In further determining whether the Double Jeopardy Clause of the Federal Constitution applies, two questions must be resolved: first, whether both tribunals before which the defendant was tried derived their authority and jurisdiction from the same sovereign, and second, whether both prosecutions were for the same offense.⁴¹ The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense.⁴²

First, if a person is tried for an offense in a tribunal deriving its jurisdiction and authority from the United States, and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States.⁴³ Second, the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government.⁴⁴ However, the United States Supreme Court in *Grafton v. United States*⁴⁵ acquiesced to the principle that an offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a state can be punished only by its authority and in its tribunals.⁴⁶ The same act may constitute two

(holding that disciplinary sanctions imposed on correctional employees under Division of Correction regulations are remedial in nature, not punitive, and thus, the Double Jeopardy Clause does not apply).

38. *See supra* note 26.

39. *Richardson v. U.S.*, 468 U.S. 317, 325 (1984).

40. *Id.* at 325-26 (explaining that the “ends of justice would otherwise be defeated,” as the government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree).

41. *United States v. Vaughan*, 491 F.2d 1096, 1097 (5th Cir. 1974) (citing *Harlow v. United States*, 301 F.2d 361, 373-74 (5th Cir. 1962)).

42. *Grafton v. United States*, 206 U.S. 333, 351-52 (1907).

43. *Id.* at 352.

44. *Id.*

45. *Id.*

46. *Id.* at 354.

offenses, one against the United States and the other against a state.⁴⁷

B. Understanding the Purpose and Origin of the Fifth Amendment Through A Doctrinal View of The Double Jeopardy Clause

Notwithstanding the doctrinal history, the history that led to the inception of the Double Jeopardy Clause is important.⁴⁸ The Senate favored adopting the traditional language, ‘jeopardy,’ which was adopted by the Conference Committee and approved by both Houses with no apparent dissension.⁴⁹ The idea of double jeopardy has its origins in a lengthy common-law history, specifically through ancient Greek and Roman laws.⁵⁰ In the 17th century, Lord Coke described the protection afforded by the principle of double jeopardy as a function of three related common-law pleas: *autrefois acquit* (already acquitted of the same offense), *autrefois convict* (already convicted of the same offense), and pardon.⁵¹ With some exceptions, these pleas could be raised to bar the second trial of a defendant if he could prove that he had already been convicted of the same crime.⁵² Blackstone later used the ancient term “jeopardy” in characterizing the principle underlying the two pleas of *autrefois acquit* and *autrefois convict*.⁵³ He wrote that “jeopardy” signified a “universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.”⁵⁴ The principle of double jeopardy is often referred by its Latin name, *non bis in idem* or *ne bis in idem* – “not twice for the same thing,”⁵⁵ deriving from the Roman maxim *nemo bis vexari pro una et eadam causa*, “no man

47. *Id.*

48. *United States v. Wilson*, 420 U.S. 332, 340–42 (1975) (“At the time of the first Congress, only one state had a constitutional provision embodying anything resembling a prohibition against double jeopardy. In the course of their ratification proceedings, however, two other States suggested that a double jeopardy clause be included among the first amendments to the Federal Constitution. Apparently attempting to accommodate these suggestions, James Madison added a ban against double jeopardy to the proposed version of the Bill of Rights that he presented to the House of Representatives in June 1789. Madison’s provision read: ‘No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense.’” (citing 1 *Annals of Cong.* 434 (1789))).

49. S. JOURNAL, 1st Cong., 1st Sess., 71, 77, 87–88 (1820); H.R. JOUR. 1st Cong., 1st Sess., 121 (1826).

50. *Wilson*, 420 U.S. at 340.

51. *Id.*

52. *Id.* (citing 3 E. Coke, *Institutes* 212–13 (6th ed. 1680)).

53. *Id.*

54. *Id.* (citing 4 W. Blackstone, *Commentaries* *335–36).

55. BLACK’S LAW DICTIONARY (8th ed. 2004).

shall be twice vexed or tried for the same cause.”⁵⁶

After the Double Jeopardy clause was adopted, its doctrinal application refined its purpose and meaning further. The Supreme Court first considered the Fifth Amendment’s “twice put in jeopardy” clause in *Respublica v. Shaffer*.⁵⁷ The Court explained that by questioning the competency of a court’s verdict or a unanimous jury verdict, the judicial system would necessarily introduce the oppression of a double trial.⁵⁸

Several decades later, the Supreme Court continued to uphold the Double Jeopardy Clause in *Ex parte Lange*.⁵⁹ The Court emphasized that, “[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense.”⁶⁰ In examining the purpose of the Fifth Amendment, the Court explained that, “For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict?”⁶¹ Justice Miller further explained that the issue is not the danger or jeopardy of being found guilty a second time, but rather it is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution.⁶²

56. See Gerard Conway, *Ne bis in Idem in International Law*, 3 INT’L CRIM. L. REV. 217 (2003).

57. 1 U.S. 236 (Pa. Ct. of Oyer & Terminer, 1788).

58. *Id.* at 236–37 (“It is a matter well known, and well understood, that by the laws of our country, every question which affects a man’s life, reputation, or property, must be tried by twelve of his peers; and that their unanimous verdict is, alone, competent to determine the fact in issue. If them, you undertake to enquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the Petty Jury, you will supersede the legal authority of the court, in judging of the competency and admissibility of witnesses, and, having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers described by the law of the land.”).

59. *Ex parte Lange*, 85 U.S. 163 (1873).

60. *Id.* at 164, 168 (“The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa*. It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.”); see also *Crenshaw v. The State of Tennessee*, 8 Tenn. 122 (Mart. & Yer. 1827) (holding that a conviction, judgment, and execution upon one indictment for a felony not capital is a bar to all other indictments for felonies not capital, committed previous to such conviction, judgment, and execution).

61. *Ex parte Lange*, 85 U.S. at 173.

62. *Id.* But see *Ball v. United States*, 163 U.S. 662, 669 (1986) (“The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.”).

Additionally, the purpose of the Fifth Amendment represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings.⁶³ In *United States v. Jorn*,⁶⁴ the defendant was prosecuted for willfully assisting in the preparation of false and fraudulent tax returns for a taxpayer.⁶⁵ The Supreme Court opposed allowing the government to subject the individual to repeated prosecutions for the same offense, as this would cut deeply into the framework of procedural protections that the Constitution establishes for the conduct of a criminal trial.⁶⁶ The Court took the stance that the policy underlying the Fifth Amendment is to save individuals from embarrassment, expense, ordeal, and a continuous state of anxiety.⁶⁷

C. Jurisdiction as a Prior Issue to Exercising Sovereignty

The concept of sovereignty relies on the understanding of proper jurisdiction. "Sovereignty," for double jeopardy purposes, means the legal concept of jurisdiction – specifically, independent jurisdiction to prescribe, or to make and apply, law. This prescriptive jurisdiction in turn authorizes independent jurisdiction to enforce that law through a separate prosecution. Exercise of independent jurisdiction by either federal or state government must satisfy due process under the Fifth or Fourteenth Amendment to the United States Constitution.⁶⁸

A state's exercise of prescriptive jurisdiction must satisfy constitutional tests that consider, among other things, the degree of contacts between the forum, the parties and the occurrence,⁶⁹ the interests of the forum,⁷⁰ and the reasonable expectations of the

63. *See* *United States v. Jorn*, 400 U.S. 470 (1971).

64. 400 U.S. 470 (1971).

65. *Id.* at 470.

66. *Id.* at 479 (explaining that society's awareness of the heavy personal strain that a criminal trial represents for the individual defendant is manifested in the willingness to limit the government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws).

67. *Id.* ("The state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting the person to embarrassment, expense, and ordeal, and compelling the person to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent the person may be found guilty.").

68. U.S. CONST. amend. V.

69. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

70. *Hague*, 449 U.S. at 318.

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parties,⁷¹ in order both to protect defendants and to ensure that states “do not reach out beyond the limits imposed on them by their status as coequal sovereigns.”⁷² Other relevant factors include the efficient resolution of controversies, orderly administration of law, and shared substantive policies within a system of multiple sovereigns.⁷³

At its root, jurisdiction means, “the speaking of law.”⁷⁴ The key to ascertaining dual sovereigns “turns on whether the two prosecuting entities draw their authority to punish the offender from distinct sources of power.”⁷⁵ Framed in the Supreme Court’s dual sovereignty language, prescriptive jurisdiction represents (1) the power “to determine what shall be an offense,”⁷⁶ and adjudicative and enforcement jurisdiction represents; and (2) the power “to punish such offenses.”⁷⁷ Where an entity has an independent prescriptive jurisdiction, it is functionally a “sovereign” as envisaged by the dual sovereignty doctrine – it independently may determine what shall be an offense, and may marshal its adjudicative and enforcement jurisdiction to punish that offense.⁷⁸ Since the state government and the federal government – as distinct lawgivers – enjoy distinct prescriptive jurisdictions to make and apply distinct laws, distinct prosecutions would be permissible. However, this concept of jurisdiction becomes significantly more complicated in the international sphere.⁷⁹

D. The Dual Sovereignty Doctrine: Application of the Blockburger Test

To determine whether the Dual Sovereignty Doctrine applies, the courts look at the elements of each statute, where each of the offenses require proof of a different element.⁸⁰ The applicable rule is as follows—where the same act or transaction constitutes a violation of two distinct statutory provisions, the court looks to the difference

71. *Id.*

72. *Id.* at 334 (1981) (Powell, J., dissenting) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–94 (1980)).

73. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Asahi Metal Co. v. Superior Court*, 480 U.S. 102, 113–15 (1987).

74. Costas Douzinas, *The Metaphysics of Jurisdiction*, in *JURISPRUDENCE OF JURISDICTION* 22 (Shaun McVeigh ed., 2007).

75. *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *see infra* Section IV.A.

76. *Heath*, 474 U.S. at 89–90.

77. *Id.*

78. *Id.*

79. *See infra* Section IV.B.

80. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

between the two statutes as it pertains to the pertinent facts.⁸¹ The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.⁸² An offense is determined by the applicability of the underlying law.⁸³

The first true full application of the Dual Sovereignty Doctrine in the United States was in 1922 in *United States v. Lanza*.⁸⁴ In violation of the National Prohibition Act, the defendants were charged with manufacturing intoxicating liquor, the second with transporting it, and the third with possessing it.⁸⁵ The State of Washington turned around and charged the same defendants with manufacturing, transporting, and having in possession the same liquor under its own state statute.⁸⁶ The defendants claimed that the two punishments for the same act constitute double jeopardy under the Fifth Amendment.⁸⁷

In dismissing the defendants' claims, the Supreme Court explained that in determining what is an offense against its peace and dignity, each government exercises its own sovereignty, not that of the other.⁸⁸ Furthermore, the Court emphasized that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and therefore may be punished by both.⁸⁹ In the case of *Lanza*, the same act was an offense against the state of Washington, because the offense violated one of its state laws, and also an offense against the United States under the National Prohibition Act.⁹⁰ Thus, the Court held that the defendants committed two different offenses by the same act, and a conviction by a Washington court against the state is not a conviction of the different offense against the United States, and so is not double jeopardy.⁹¹ In the first true application of the dual sovereignty

81. *Id.* at 304 (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)); *see also* *Morey v. Commonwealth*, 108 Mass. 433 (Mass. 1871) ("A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.").

82. *Morey*, 108 Mass. at 434.

83. *See supra* note 82.

84. 260 U.S. 377 (1922).

85. *Id.* at 378–79.

86. *Id.* at 379.

87. *Id.*

88. *Id.* at 382.

89. *Id.*

90. *Id.*

91. *Id.*

doctrine, the Court explicitly employed the concept of jurisdiction – and, more specifically, independent prescriptive jurisdiction to determine offenses – to justify its holding.⁹²

III. THE COURT'S REASONING

In *Gamble v. United States*, the Supreme Court addressed whether a State in the United States may prosecute a defendant under state law even if the Federal Government prosecuted him for the same conduct under a federal statute, or vice versa.⁹³ Writing for the majority, Justice Alito affirmed the Eleventh Circuit's decision that double jeopardy did not prohibit the federal government from prosecuting Gamble for the same conduct that the State of Alabama prosecuted him for, and thus upheld the Dual Sovereignty Doctrine.⁹⁴ He explained that under the principles of *stare decisis*,⁹⁵ the Clause's text coupled with 170 years of precedent and other historical evidence, did not persuade the Court to overturn that precedent.⁹⁶ The Court began its analysis by examining the language of the Double Jeopardy Clause and acquiescing to the notion that there are two sovereigns in the United States – the federal sovereign and each state sovereign.⁹⁷ Justice Alito clarified that the language of the Double Jeopardy Clause protects individuals from being twice put in jeopardy “‘for the same *offense*,’ not for the same *conduct or actions*.”⁹⁸ By clarifying the language of the Clause, Justice Alito explained that, as the term was originally understood, a law defines an “offense,” and a sovereign defines each law.⁹⁹ Therefore, where

92. *Id.* (“We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment.”).

93. *Gamble*, 139 S. Ct. at 1963–64 (2019).

94. *Id.* at 1964; *See* *United States v. Gamble*, 694 F. App'x. 750, 751 (11th Cir. 2017).

95. *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring) (explaining that the Court currently views *stare decisis* as a “‘principle of policy’” that balances several factors to decide whether the scales tip in favor of overruling precedent (citing *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 363 (2010))); *see also* *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”).

96. *Gamble*, 139 S. Ct. at 1969 (majority opinion).

97. *Id.* at 1966.

98. *Id.* at 1965 (citing *Grady v. Corbin*, 495 U.S. 508, 529 (1990)).

99. *Id.* (citing *Grady*, 495 U.S. at 529 (Scalia J., dissenting) (“If the same conduct violates two or more laws, then each offense may be separately prosecuted.”)); *see* *Moore v. Illinois*, 55 U.S. 13, 17 (1852) (“The constitutional provision is not, that no person shall be

there are two sovereigns, there are two laws, and two “offenses.”¹⁰⁰

Then the Supreme Court discussed the interests each sovereign has in punishing the same act.¹⁰¹ For instance, an assault on a United States marshal would offend the Nation and a state – the Nation by hindering the execution of legal process, and the state by breaching the peace of the State.¹⁰² Justice Alito cited additional support from the international sphere to emphasize the interests that separate sovereigns have in punishing conduct which violates each sovereign’s own laws.¹⁰³ In the majority’s view, if a United States national was murdered in another country, that country could rightfully seek to punish the killer for committing an act of violence within its territory.¹⁰⁴ Additionally, the United States looks at the same conduct and sees an act of violence against one of its nationals, a person under the particular protection of its laws.¹⁰⁵ Therefore, in Justice Alito’s view, customary international law allows exercise of jurisdiction permitting prosecution in American courts for the killing of an American abroad.¹⁰⁶ Moreover, Justice Alito recognized that that Americans may lack confidence in the competency or honesty of foreign legal systems, or less cynically, Americans may think that special protection for United States nationals serves key national interests related to security, trade, commerce, or scholarship.¹⁰⁷

While the majority acquiesces to the fact that “the Republic is ‘one whole,’”¹⁰⁸ it makes a distinction between “the whole” and a single part.¹⁰⁹ Holdings like *McCulloch v. Maryland*, asserting that a

subject, for the same act, to be twice put in jeopardy of life or limb; but for the same *offense*, the same *violation of law*, no person’s life or limb shall be twice put in jeopardy.”).

100. *Gamble*, 139 S. Ct. at 1965.

101. *Id.* at 1966 (explaining that the Double Jeopardy Clause does more than honor the formal difference between two distinct criminal codes, it honors the substantive differences between the interests that two sovereigns can have in punishing the same act).

102. *Id.* at 1966–67 (reasoning that the duality of harm explains how ‘one act’ could constitute “two offenses, for each of which the offender is justly punishable”).

103. *See supra* note 102.

104. *Gamble*, 139 S. Ct. at 1967 (explaining that the foreign country’s interest lies in protecting the peace in that territory rather than protecting the American specifically).

105. *Id.* (“The murder of a U.S. national is an offense to the United States as much as it is to the country where the murder occurred and to which the victim is a stranger.”).

106. *Id.* (citing 18 U.S.C. § 2332(a)(1)).

107. *Id.* (recognizing that such interests might also give us a stake in punishing crimes committed by United States nationals abroad – especially crimes that might do harm to our national security or foreign relations); *see, e.g.*, § 2332a(b).

108. *Gamble*, 139 S. Ct. at 1968 (citing Ginsburg, J., dissenting, at 1990).

109. *Id.* at 1968 (majority opinion) (noting that in *McCulloch*, Chief Justice Marshall distinguished precisely between “the people of a State: and “the people of all States;” between the “sovereignty which the people of a single state possess” and the sovereign

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state may not tax the national bank, recognize that states and the Nation have different “interests” and “rights.”¹¹⁰ Although the American Constitution rests on the principle that the people are sovereign, Justice Alito argues that does not mean that the people have conferred all the attributes of sovereignty on a single government.¹¹¹ In fact, when the original States declared their independence, the Constitution limited but did not abolish the sovereign powers of the States, which retained “a residuary and inviolable sovereignty.”¹¹² Therefore, according to the majority, because the Federal Government and the States wield sovereign powers, the American system of government is one of “dual sovereignty.”¹¹³

In rebutting the dissent’s opinion that the division of federal and state power was meant to promote liberty and thus not expose *Gamble* to a second sentence,¹¹⁴ Justice Alito emphasizes that because the powers of the Federal and State government often overlap, there are two layers of regulation.¹¹⁵ Similarly, it is not uncommon for the Federal Government to permit activities that a State chooses to forbid or heavily restrict, such as gambling and selling alcohol.¹¹⁶ Therefore, while the majority agrees that the system of federalism is fundamental to the protection of liberty, the system does not always maximize individual liberty at the expense of other interests.¹¹⁷ Justice Alito ultimately ends his opinion explaining that an “offense” for double jeopardy purposes is defined by statutory elements, not by what might be described in a looser sense as a unit of criminal conduct.¹¹⁸ Consequentially, eliminating the dual-sovereignty rule would do little to trim the reach of federal criminal law, and it would not even prevent many successive state and federal prosecutions for the same criminal conduct unless the system for defining an

powers “conferred by the people of the United States on the government of the Union;” and between “the action of a part” and “the action of the whole” (citing *McCulloch v. Maryland*, 4 Wheat. 316, 428–36 (1819)).

110. *Id.*

111. *Id.* (explaining that the people, by adopting the Constitution, “split the atom of sovereignty” (citing *Alden v. Maine*, 527 U.S. 706, 751 (1999))).

112. *Id.* (citing *THE FEDERALIST* NO. 39, 245 (James Madison)).

113. *Id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

114. *Id.* at 1990-91 (Ginsburg, J., dissenting); *Id.* at 1999–2000 (Gorsuch, J., dissenting).

115. *Gamble*, 139 S. Ct. at 1968-69 (majority opinion). The majority indicates that taxation is an example that comes immediately to mind.

116. *Id.*

117. *Id.* at 1969.

118. *Id.* at 1980 (citing *Blockburger v. United States*, 284 U.S. 299 (1932)).

“offense” under double jeopardy was overruled.¹¹⁹

In the dissent, Justice Ginsburg notes that garnering support from the international sphere is irrelevant in the case at hand because Gamble was convicted in both Alabama and the United States, jurisdictions that are not foreign to each other.¹²⁰ While the majority relies on precedent that spans as far back as 1922,¹²¹ Justice Ginsburg urges the majority to stay away from, in her opinion, such “ill-advised” decisions.¹²² Under her rationale, the United States and its constituent States, unlike foreign nations, are “kindred systems,” “parts of ONE WHOLE.”¹²³ She explains that the United States and its constituent States compose one people, bound by an overriding Federal Constitution.¹²⁴ Therefore, the Federal and State Governments should be restricted from accomplishing together “what neither government could do alone—prosecute an ordinary citizen twice for the same offense.”¹²⁵

Then, Justice Ginsburg emphasized that the Dual Sovereignty Doctrine treats *governments* as sovereign, whereas, in the system established by the Federal Constitution, “ultimate sovereignty” resides in the *governed*.¹²⁶ In contrast to Justice Alito’s argument that the system of dual sovereignty allows separate sovereigns to each have their own offense,¹²⁷ Justice Ginsburg explains that the division of authority between the United States and the States was intended to operate as “a double security for the rights of the people,” not as a mechanism to take away people’s rights.¹²⁸ For Justice Ginsburg, the

119. *Id.*

120. *Id.* at 1990 (Ginsburg, J., dissenting).

121. *See* United States v. Lanza, 260 U.S. 377 (1922).

122. *Gamble*, 139 S. Ct. at 1990 (Ginsburg, J., dissenting).

123. *Id.* (citing THE FEDERALIST NO. 82, 493 (Alexander Hamilton)).

124. *Id.*

125. *Id.* (citing Amar & Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 2 (1995)).

126. *Id.* (citing Arizona State Leg. v. Arizona Indep. Redistricting Comm’n, 139 S. Ct. 2652, 2675 (2015); Martin v. Hunter’s Lessee, 1 Wheat. 304, 324–35 (1816)).

127. *See supra* note 100. (NOTE 100 IS JUST A CITATION TO GAMBLE. IS THIS WHAT YOU ARE TRYING TO CROSS REFERENCE? DO YOU MEAN TEXT ACCOMPANYING NOTE 100?) Veronica’s Response: I was citing to FN 100 because the citation to Gamble in FN 100 is what I’m referencing. If it makes it easier, I am okay with just having this FN read: *Gamble*, 139 S. Ct. at 1965. (NOTE: That change would make the following footnote (128) just read: *Id.* at 1991 ... etc.).

128. *Gamble*, 139 S. Ct. at 1991 (Ginsburg, J., dissenting) (citing The Federalist No. 51, 323 (James Madison)); *see Id.* at 1994 (explaining that the Dual Sovereignty Doctrine provides new opportunities for federal and state prosecutors to “join together to take a second bite at the apple” (citing United States v. All Assets of G.P.S. Automotive, 66 F.3d 483, 498 (2d Cir. 1995) (Calabresi, J., concurring))).

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Double Jeopardy Clause embodies a principle that is deeply engrained in our system of justice.¹²⁹ Lastly, Justice Ginsburg explains that overruling the separate-sovereign doctrine would not affect large numbers of cases.¹³⁰

In a separate dissent, Justice Gorsuch argues that a free society does not allow its government to try the same individual for the same crime until it is happy with the punishment.¹³¹ In support of this argument, Justice Gorsuch uses textualist¹³² and originalist arguments.¹³³ Textually, although the Double Jeopardy Clause is silent about allowing “separate sovereigns” to sequentially do what neither may do separately, the government assures the people that the Fifth Amendment’s phrase “same offense” does this work.¹³⁴ In an originalist view, Justice Gorsuch argues that the government does not identify any evidence suggesting that the framers understood the term “same offense” to bear such a lawyerly sovereign-specific meaning.¹³⁵ The Constitution as originally adopted and understood did *not* allow successive state and federal prosecutions for the same offense.¹³⁶ In Justice Gorsuch’s opinion, trying to explain the Court’s separate sovereign rule to a criminal defendant, then or now, would be absolutely absurd.¹³⁷ Justice Gorsuch agrees with Justice Ginsburg,

129. *Gamble*, 139 S. Ct. at 1991 (“[T]hat the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” (quoting *Green v. United States*, 355 U.S. 184, 187–88 (1957))).

130. *Id.* at 1995 (“Under the *Petite* policy adopted by the Department of Justice, the Department will pursue a federal prosecution “based on substantially the same act(s) or transaction(s)” previously prosecuted in state court only if the first prosecution left a “substantial federal interest . . . demonstrably un-vindicated” and a Department senior official authorizes the prosecution.” (quoting Dept. of Justice, Justice Manual § 9-2.031(A) (rev. July 2009))).

131. *Gamble*, 139 S. Ct. at 1996.

132. *Id.* at 1997 (explaining that two statutes can punish the same offense); see U.S. CONST. amend. V.

133. *Gamble*, 139 S. Ct. at 1997.

134. *Id.*

135. *Id.* at 1998.

136. *Id.* at 2005.

137. *Id.* at 1999. Specifically, Justice Gorsuch states that one would have to explain the following to a criminal defendant: yes, you were sentenced to state prison for being a felon in possession of a firearm. And don’t worry – the State can’t prosecute you again for exactly the same thing. What’s more, that federal prosecutor may work hand-in-hand with the same state prosecutor who already went after you. They can share evidence and discuss what worked and what didn’t the first time around. And the federal prosecutor can pursue you even if you were *acquitted* in the state case. None of that offends the Constitution’s plain words protecting a person from being placed “twice . . . in jeopardy of life or limb” for the

that under the American Constitution, federal and state governments are but two expressions of a single and sovereign people.¹³⁸ For Justice Gorsuch, today's Court invokes federalism not to protect individual liberty but to threaten it, allowing two governments to achieve together an objective denied to each.¹³⁹

Lastly, Justice Gorsuch cited support from foreign cases and commentaries.¹⁴⁰ The Framers to the Constitution compared the relationship between Wales, Scotland, and England to their vision of the relationship between the national government and the States, as prosecutions in one of these countries barred subsequent prosecutions for the same offense in the others.¹⁴¹ Moreover, Justice Gorsuch's dissent emphasized foreign countries' disallowance of successive prosecutions by different sovereigns—even sovereigns as foreign to each other as England and Portugal—suggests that the American federal system should likewise prohibit successive prosecutions by federal and state governments with even greater force, given that both governments derive their sovereignty from the American people.¹⁴² Although the United States allowed the Dual Sovereignty Doctrine to exist, Justice Gorsuch insists that the Court not follow *stare decisis*

same offense." *Id.*

138. *Id.* ("[T]he government of the Union . . . is emphatically, and truly, a government of the people," and all sovereignty "emanates from them." (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 404–05 (1819))).

139. *Id.* at 2000 (explaining that the Court's example—taxation, alcohol, and marijuana—involve areas that the federal and state governments each may regulate separately under the Constitution as interpreted by this Court).

140. *See* *Beak v. Tyrhwhite*, 3 Mod. 194, 87 Eng. Rep. 124 (K.B., 1688) (holding that acquittal in a foreign country followed by an attempted second prosecution in England was impermissible); 2 Hawkins § 10, at 372 ("[T]hat an [a]cquittal in any Court whatsoever, which has a [j]urisdiction of the [c]ause, is as good a [b]ar of any subsequent [p]rosecution for the same [c]rime."); H. Bathurst, *Theory of Evidence* 39 ("[A] final [d]etermination in a [c]ourt having competent [j]urisdiction is conclusive in all [c]ourts of concurrent [j]urisdiction."); F. Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 241 (If A. having killed a [p]erson in *Spain* was there prosecuted, tried, and acquitted, and afterwards was indicted here in England, he might plead the [a]cquittal in *Spain* in [b]ar.)).

141. *Gamble*, 139 S. Ct. at 2001–03 (Gorsuch, J., dissenting) ("Indeed, when an English county indicted a defendant "for murder committed . . . in Wales," it was barred from proceeding when the court learned that the defendant had already been tried and acquitted "of the same offense" in Wales." (citing *King v. Thomas*, 1 Lev. 118 (K.B. 1664))); *see also* *Her Majesty's Advocate v. MacGregor*, Ark. 49, 60 (1846) ("In 1846, the Scottish High Court of Justiciary declared that "if a man has been tried for theft in England, we would not try him again here."); *see, e.g.,* A. Amar, *America's Constitution: A Biography* 45 (2005); THE FEDERALIST NO. 17 (Alexander Hamilton); John Jay, *An Address to the People of the State of New York, in Pamphlets on the Constitution of the United States* 84 (P. Ford ed. 1788).

142. *Gamble*, 139 S. Ct. at 2002.

blindly.¹⁴³

IV. ANALYSIS

In *Gamble v. United States*, the Supreme Court held that a crime under one sovereign's law is not "the same offense" as a crime under the laws of another sovereign—even when those sovereigns are the American federal and state governments.¹⁴⁴ The Court made the incorrect judgment because it inaccurately construed the federal and states' sovereign powers in the United States.¹⁴⁵ The Court's reasoning was flawed in part as it incorrectly explained the sovereignty of foreign nations, which it used as support in upholding the Dual Sovereignty Doctrine.¹⁴⁶ Both the majority and dissent give plausible depictions of the creation of sovereignty in the United States,¹⁴⁷ yet the majority erroneously interpreted the idea of sovereignty and jurisdiction in international law and made those interpretations the "rule" for penalizing individuals under international law.¹⁴⁸

A. The Court's Holding is Incorrect Because the Federal Government and the State Government are not Distinct Sovereigns in the United States

By nature, the idea of sovereignty in the United States will likely never be resolved. There exists a deep ambiguity of sovereignty because the history of the United States can be interpreted in different ways, as evidenced by the competing interpretations between Justice Alito and Justice Ginsburg in *Gamble*. However, the arguments for one overarching sovereign federal government are strong.¹⁴⁹ The arguments for a sole sovereign power in the United States stems from various sources: (1) the notion of preemption,¹⁵⁰ (2) the argument that states have power only because the federal government gave them permission to have such power,¹⁵¹ (3) the concept of territoriality,¹⁵²

143. *Id.* at 2006 (explaining that blind obedience to *stare decisis* would leave this Court still abiding to "grotesque errors like *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Korematsu v. United States*").

144. *Id.* at 1963 (majority opinion).

145. *See infra* Section IV.A.

146. *See infra* Section IV.B.

147. *See infra* Section IV.A.

148. *See infra* Section IV.B.

149. *See infra* notes 151-53.

150. *See infra* note 203.

151. *See infra* note 207.

152. *See infra* note 211.

(4) the powers that are reserved only for the federal government such as those in Article I, Section 8, Clause 11 of the Constitution,¹⁵³ and (5) the understanding that times have changed since the inception and formation of the United States.¹⁵⁴ I will begin with the last source in order to explain how the view of state sovereignty started in the United States, and then I will examine the other four sources listed above in turn.

The notion of federalism is implicit in the structure of the United States,¹⁵⁵ in various State constitutions dating back to the inception of the states' formation,¹⁵⁶ and in a long list of doctrinal history.¹⁵⁷ Federalism is a model of government that has two separate and independent layers of government: (1) a national government that, at least in theory, has limited authority as spelled out in a Federal constitution; and (2) separate state and local governments for each of the sovereign states, each of which has more general powers as limited by each state's constitution.¹⁵⁸ Essentially, federalism is a question of how power, resources and responsibility should be divided between the federal and state governments.¹⁵⁹ James Madison conceded to a system of federalism, explaining that, "Each State, in ratifying its [c]onstitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act." Madison also clarified the powers of the federal government: "[T]he proposed government cannot be deemed a [national] one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several [s]tates a residuary and inviolable sovereignty over all other objects."¹⁶⁰

The issue of what sovereignty means has long preceded Justice Alito and Justice Ginsburg's debate. While the dissent takes the position that, "The United States and its constituent States, unlike

153. U.S. CONST. art. I, § 8, cl. 11.

154. *See infra* note 206.

155. *See infra* note 157.

156. *See* Mark A. Graber, *State Constitutions as National Constitutions*, 69 *ARK. L. REV.* 371 (2016).

157. *See infra* notes 170-78; *Moore v. Illinois*, 55 U.S. 13 (1852); *Cross v. North Carolina*, 132 U.S. 131 (1889); *Pettibone v. United States*, 148 U.S. 197 (1893); *Crossley v. California*, 168 U.S. 640 (1898); *Sexton v. California*, 189 U.S. 13 (1903); *United States v. Lanza*, 260 U.S. 377 (1922); *Herbert v. Louisiana*, 272 U.S. 312 (1926); *Jerome v. United States*, 318 U.S. 101 (1943); *Screws v. United States*, 325 U.S. 91 (1945); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959).

158. CHRISTOPHER B. POWER, ET AL., 36 *E. & MIN. L. INST.* 6, § 6.02 (2015).

159. *Id.* (citing Robert V. Percival, "Symposium: Environmental Federalism: Historical Roots and Contemporary Models," 54 *MD. L. REV.* 1141, 1143 (1995)).

160. *Id.*

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foreign nations, are 'kindred systems,' 'parts of ONE WHOLE,'"¹⁶¹ the majority contends that although this is true, there is a difference between the whole and a single part.¹⁶² The truth of the matter is that both the majority and the dissent are correct.¹⁶³ For example, three of the four state constitutions adopted before July 4, 1776 – New Jersey, New Hampshire, and South Carolina – identified the Continental Congress as the governing body responsible for the life and death of that governing charter.¹⁶⁴ Moreover, New Hampshire and South Carolina drafted and approved state constitutions only after requesting permission and receiving a recommendation from the Continental Congress to do so.¹⁶⁵ These actions point to one governing sovereign—the federal government, in which case Justice Ginsburg is correct. However, unlike New Jersey, New Hampshire, and South Carolina, Virginians made no lengthy reference to the Continental Congress when justifying their decision to approve a new state constitution.¹⁶⁶ In fact, the initial Virginia constitution referred to the state as a "country."¹⁶⁷ Given this finding, Justice Alito would also be correct that the people did not confer all attributes of sovereignty on a single government.¹⁶⁸ In sum, the dissent and the majority are telling a different story about the creation of sovereignty, both of which explain one part that the other misses.¹⁶⁹

161. *Gamble*, 139 S. Ct. at 1990 (Ginsburg, J., dissenting) (citing THE FEDERALIST No. 82 (A. Hamilton)).

162. *Id.* at 1968 (majority opinion); *see also supra* note 109.

163. Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 371, 375 (2016) ("No state constitution takes a very clear position on whether the state was an entirely independent sovereign that delegated certain powers to a federal union or whether state sovereignty was limited to certain internal matters. All vest the state government with some powers associated with national sovereignty, but not with others. Most state constitutions refer to the Continental Congress or the United States, without clarifying the nature of the relationship between the state and the United States. Most state constitutions say nothing about the relationship between the States.").

164. *Id.* at 378; *see* N.H. CONST. of 1776; N.J. CONST. of 1776.

165. Graber, *supra* note 164, at 379.

166. *Id.* at 380; *see* V.A. CONST. of 1776.

167. Graber, *supra* note 164, at 380.

168. *Gamble v. United States*, 139 S. Ct. 1968 (2019).

169. Graber, *supra* note 164, at 390 ("No state plainly asserted that sovereignty vested entirely in the Continental Congress, although New Hampshire came close. Likewise, no state asserted that sovereignty vested entirely within the states, although Virginia came close. States routinely insisted on retaining control over their internal police, but thought the Continental Congress empowered to make treaties. No state declaration or instruction made clear whether states had delegated power over external affairs to the Continental Congress or whether that body had inherent powers to make treaties and determine military strategies."); *Id.* at 423 ("The federal Constitution clearly changed the balance of power between the states and federal government, but the complete absence of any reference to that national constitution in the seven state constitutions ratified from 1789 to 1793 belies any easy claim

Justice Alito's interpretation of sovereignty is inherently grounded in the streams of cases that created and applied the Dual Sovereignty Doctrine. Several cases lead to the eventual creation of the Dual Sovereignty Doctrine. In *Alden v. Maine*,¹⁷⁰ the Court recognized that the people, by adopting the Constitution, "split the atom of sovereignty."¹⁷¹ By "splitting the atom of sovereignty," the Founders established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."¹⁷² In *Gregory v. Ashcroft*,¹⁷³ the Supreme Court emphasized that, "[U]nder our federal system, the states possess sovereignty concurrent with that of the federal government, subject only to the limitations imposed by the Supremacy Clause."¹⁷⁴ Justice O'Connor pointed out that the Court had described the constitutional scheme of dual sovereigns over 120 years ago.¹⁷⁵ The Constitution created a federal government of limited powers and those powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.¹⁷⁶ Moreover, Justice Alito points out that cases as early as *McCulloch v. Maryland*¹⁷⁷ admitted to a system of dual sovereignty.¹⁷⁸

The Court truly began setting the doctrine's foundation in its 1820 opinion *Houston v. Moore*.¹⁷⁹ Houston challenged his state court conviction on the ground that his offense violated the laws of the United States therefore, he could only be punished under federal

that a consensus had formed on the sovereign status of states.").

170. 527 U.S. 706 (1999).

171. *Gamble v. United States*, 139 S. Ct. 1968 (2019) (citing *Alden v. Maine*, 527 U.S. 706, 751 (1999)).

172. *Alden v. Maine*, 527 U.S. 706, 751 (1999) (citing *Saenz v. Roe*, 526 U.S. 489, 504, n. 17 (1999)).

173. 501 U.S. 452 (1991).

174. *Id.* at 457 (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

175. *Id.* ("The people of each [s]tate compose a [s]tate, having its own government, and endowed with all the functions essential to separate and independent existence . . . The Constitution, in all its provisions, looks to the indestructible Union, composed of indestructible [s]tates." (quoting *Texas v. White*, 7 Wall. 700, 725 (1869))).

176. *Id.* (citing U.S. CONST. amend. X).

177. 17 U.S. 316 (1819).

178. *Gamble v. United States*, 139 S. Ct. 1968 (2019) ("Chief Justice Marshall distinguished precisely between "the people of a State" and "[t]he people of all the States," (citing 17 U.S. at 428, 435); between the "sovereignty which the people of a single state possess" and the sovereign powers "conferred by the people of the United States on the government of the Union," (citing 17 U.S. at 429–30); and thus between "the action of a part" and "the action of the whole," (citing 17 U.S. at 435–36)).

179. 18 U.S. 1 (1820).

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laws, and cannot be punished under the laws of his own State.”¹⁸⁰ The Court rejected this argument, explaining that, “Every citizen of a state owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States.”¹⁸¹ To explain the presence of dual sovereignty, the Court gave the example of a highway mail robbery: this would be recognized as a highway robbery under state laws and a federal offense under U.S. law.¹⁸²

In 1847, the Court affirmed the notion of dual sovereignty in *Fox v. Ohio*.¹⁸³ The defendant challenged her state conviction for passing counterfeit coin on the grounds that only the federal government had jurisdiction over that offense.¹⁸⁴ The court dismissed the challenge by distinguishing counterfeiting, which was an offense exclusively within the power of the Congress to proscribe, and passing counterfeit coin, which was a fraud punishable under state law.¹⁸⁵ Just three years later in *United States v. Marigold*,¹⁸⁶ the Court affirmed *Fox*'s concurrent jurisdiction holding, explaining that the states and Congress each had independent jurisdiction to prosecute and punish uttering false currency.¹⁸⁷

Just two years later, *Moore v. Illinois*¹⁸⁸ solidified the jurisdictional foundation laid by *Houston*, *Fox* and *Marigold*. The defendant challenged his state conviction under an Illinois law outlawing harboring fugitive slaves, claiming that such conviction resulted in double jeopardy since the federal government already prosecuted him under the Fugitive Slave Act.¹⁸⁹ In response to the double jeopardy challenge, the Court announced the Dual Sovereignty Doctrine.¹⁹⁰

180. *Id.* at 33.

181. *Id.*

182. *Id.* at 34.

183. 46 U.S. 410 (1847).

184. *Id.* at 433 (insisting that the Ohio statute is repugnant to the fifth and sixth clauses of the eighth section of the first article of the [C]onstitution, which invest Congress with the power to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States).

185. *Id.*

186. 50 U.S. 560 (1850).

187. *Id.* at 569–70.

188. 55 U.S. 13 (1852).

189. *Id.* at 14, 17.

190. *Id.* at 19–20 (“An offense, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns. And may be liable to punishment for an infraction

The first true and full application of the Dual Sovereignty Doctrine came seventy years later in *United States v. Lanza*.¹⁹¹ The Court explained that each state and Congress may exercise an independent judgment in selecting and shaping measures to enforce their own laws, whereby the laws adopted by Congress become laws of the United States and the laws adopted by a State become laws of that State.¹⁹² In its first true application of the Doctrine, the Court justified its holding by explicitly using independent prescriptive jurisdiction to determine offenses.¹⁹³

Doctrinal history thus far has overwhelmingly supported Justice Alito's explanation of sovereignty in the United States. Only in particular cases will the Court not apply the Dual Sovereignty Doctrine and rule that the Double Jeopardy clause applies to bar successive prosecutions. One instance where the double jeopardy clause would apply to bar a successive federal prosecution is when state courts are empowered to apply United States *federal law*, i.e., "where jurisdiction is vested in the State Courts by statutory provisions of the United States."¹⁹⁴

The Court has also been unwilling to find a dual sovereignty exception to double jeopardy where it has stressed the absence of an independent prescriptive jurisdiction by each prosecuting entity, and has emphasized that both entities draw their jurisdiction from the same lawgiving "source."¹⁹⁵ For example, in *Grafton v. United States*,¹⁹⁶ the Court held that a homicide prosecution by military court martial foreclosed a successive prosecution for the same homicide by the civil justice system in the then-U.S. territory of the Philippines. In doing so, the Court explained that if a person is tried in a tribunal that gets its jurisdiction and authority from the United States, and is acquitted or convicted, he cannot be tried again for the same offense in another tribunal that gets its jurisdiction and authority from the

of the laws of either. The same act may be an offense or transgression of the laws of both That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment in one in bar to a conviction by the other."

191. 260 U.S. 377 (1922); *see supra* pp. 10–11.

192. 260 U.S. at 381.

193. *Id.*

194. *Houston v. Moore*, 18 U.S. 1, 35 (1820).

195. Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 788 (2009).

196. 206 U.S. 333, 351 (1909).

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United States.”¹⁹⁷ The court martial prosecuted Grafton for homicide as defined by the Penal Code of the Philippines and because he applied the civil law definition of homicide, the Court found that a successive civil court prosecution was “for the identical offense.”¹⁹⁸

While Justice Ginsburg correctly points out one view of sovereignty, her view does not make Justice Alito’s view any less incorrect as far as the history of the United States concerns. Both the majority and the dissent accurately present valid theories of the creation of sovereignty—one being a federalism theory of sovereignty and the other a liberty theory of sovereignty (that sovereignty resides with the people and the state and federal government are part of one whole). The theories of how sovereignty was created in the United States can co-exist since there has yet to be one absolute explanation of the creation of sovereignty, evidenced heavily by the different paths states took to becoming independent.¹⁹⁹ Some states took a liberty approach and others a federalist approach; however, their reasoning for each specific path remains unknown.²⁰⁰

Although the notion of sovereignty during the inception of the United States led to the creation and subsequent application of the Dual Sovereignty Doctrine as seen above, the view and understanding of sovereignty in the United States has changed significantly. The idea of sovereignty was revolutionized through concepts of preemption, territoriality and residual sovereignty. While the states in the United States retain significantly more internal autonomy than other federalist countries around the world, the states are still subservient to the federal government.²⁰¹ The Supremacy Clause is a clause within Article IV²⁰² of the United States Constitution, which dictates that federal law is the “supreme law of the land.”²⁰³ This means that judges in every state must follow the Constitution, laws, and treaties of the federal government in matters

197. *Id.* at 352.

198. *Id.* at 349. Since the military court martial and the territorial civil court derived jurisdiction from the United States government, and thus necessarily prosecuted for a crime against the laws of the United States, “a second trial of the accused for that crime in the same or another court, civil or military, of the same government” violated double jeopardy. *Id.* at 352.

199. See Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 371, 387–89 (2016) (“The different paths states took to independence in 1776 suggest that states disputed the location of sovereignty in the Americas.”).

200. *Id.* at 397.

201. See U.S. CONST. Article VI.

202. *Id.*

203. *Id.*

that are directly or indirectly within the government's control. Under the doctrine of preemption, which is based on the Supremacy Clause, federal law preempts state law even when the laws conflict. Thus, a federal court may require a state to stop certain behavior it believes interferes with, or is in conflict with, federal law. The notion of preemption cedes to the premise of one overarching sovereign power in the United States.

Regardless of the different paths that states took to becoming independent, the truth is that the states no longer retain the sovereignty that Justice Alito's originalist view would have one believe. States are no longer viewed as sovereign but rather they are autonomous agents.²⁰⁴ While Justice Alito essentially attempts to argue that states are still sovereign because at one point states *were* sovereign, that is simply not the case anymore. States today cannot delegate war or send troops to war because that power is reserved solely for Congress.²⁰⁵ Moreover, powers such as coining money, regulating interstate and foreign commerce, regulating the mail, declaring armies, conducting foreign affairs, establishing inferior courts and establishing rules of naturalization are all exclusive powers of the federal government.²⁰⁶ Any power not listed to the federal government is left to the states or the people by the Tenth Amendment, which likens states to more of autonomous agents rather than sovereign agents.²⁰⁷ To the extent that there are dual sovereigns, the sovereignty is between the states, such as in *Heath v. Alabama*, but not so much between the state and federal governments. *Missouri v. Holland* further settled the notion of dual sovereignty, explaining that the civil war settled that states at best retained residual sovereignty.²⁰⁸ Sovereignty may rest in the people but the federal government ultimately represents the people.²⁰⁹ In addition to the concepts of preemption and residual sovereignty, the concept of territoriality also works to eradicate the idea of dual sovereignty. In the international sphere, we generally define nation states as actors

204. *See infra* note 207.

205. U.S. CONST. art. I, § 8, cl. 11.

206. *The relationship between the states and the federal government*, KHAN ACADEMY, (last visited Apr. 29, 2020) <https://www.khanacademy.org/humanities/us-government-and-civics/us-gov-foundations/us-gov-relationship-between-the-states-and-the-federal-government/a/relationship-between-the-states-and-the-federal-government-article>.

207. U.S. CONST. amend. X.

208. *See infra* notes 256-57.

209. *Gamble v. United States*, 139 S. Ct. 1960, 1999 (2019) (Gorsuch, J., dissenting) (“[T]he government of the Union . . . is emphatically, and truly, a government of the people,” and all sovereignty “emanates from them.” (citing *McCulloch v. Maryland*, 4 Wheat 316, 404–05 (1819))).

that have power over their own territory,²¹⁰ whereas states in the United States share territory with the federal government and the federal government has supreme access to that territory.²¹¹ These concepts of preemption, territoriality and residual sovereignty give way to the notion of one supreme and overarching sovereign in the United States: the federal government.

B. The Court Improperly Used an International Analogy as Support by Incorrectly Explaining the Notion of Jurisdiction in the International Sphere

Before analyzing the misplaced international analogies used by Justice Alito, it is worth noting briefly the great irony in *Gamble*: that Justice Alito has come to take great care for international law while Justice Ginsburg, a scholar and advocate for international law and human rights, has taken a backseat to the use of international law and alternatively, advocates for its irrelevance in the case at hand. Justice Alito misuses two international examples for support in *Gamble v. United States*. First—If a United States national was murdered in another country, that country could rightfully seek to punish the killer for committing an act of violence within its territory.²¹² Justice Alito argues that customary international law allows the concurrent exercise of United States jurisdiction since the murder of a United States national is also an offense to the United States, which in turn, supports his argument that the killing of an American abroad is a federal offense that can be prosecuted in American courts.²¹³ Second—crimes that might do harm to the United States' national security or foreign relations can be punished by the other country and the United States.²¹⁴ The reason for this is because acts such as terrorism and bombings are covered under international jurisdiction, which requires no nexus to establish jurisdiction.²¹⁵

Justice Alito mischaracterized the international examples based on the concept of jurisdiction in the international sphere. There are

210. *What is a "State"?*, GLOBAL POLICY FORUM, <https://www.globalpolicy.org/nations-a-states/what-is-a-state.html> ("A state is the means of rule over a defined or "sovereign" territory.").

211. Rob Natelson, *What Does the Constitution Say About Federal Land Ownership?*, INDEPENDENCE INSTITUTE (Feb. 6, 2016), <https://i2i.org/what-does-the-constitution-say-about-federal-land-ownership/>.

212. *Gamble*, 139 S. Ct. at 1967 (explaining that the foreign country's interest lies in protecting the peace in that territory rather than protecting the American specifically).

213. *Id.*

214. *Id.* (citing 18 U.S.C. § 2332a(b) (bombings)).

215. *See infra* notes 237-38.

two kinds of prescriptive jurisdiction in international law—“national jurisdiction” and “international jurisdiction.”²¹⁶ National jurisdiction derives from “independent entitlements of each individual state vis-à-vis other states in the international system to make and apply its own law—principally, from entitlements over national territory and persons.”²¹⁷ International jurisdiction derives from “a state’s shared entitlement – along with all other states as members of the international system – to enforce international law.”²¹⁸ These two kinds of jurisdictions ultimately represent two different kinds of “sovereigns” for double jeopardy purposes—one national and the other international.²¹⁹

Under all of the foregoing principles, a state requires a nexus to the first state’s national entitlements.²²⁰ When discussing “national jurisdiction,” State *A* has jurisdiction over State *A* territory because of State *A*’s national entitlement, as recognized by international law, over its territory.²²¹ A state is entitled to exercise jurisdiction over its territory when the activity comes in reach of a State’s subjective territoriality²²² (activity that occurs, even in part, within its territory) or objective territoriality²²³ (activity that does not occur but has an effect within its territory). Moreover, a state can claim jurisdiction over activity that involves its nationals.²²⁴ The latter exercise of jurisdiction is critical to understand given Justice Alito’s use of international support. “Where the acts in question are committed by a state’s nationals, the state may claim *active personality jurisdiction*. And where the acts victimize a state’s nationals, the state may claim *passive personality jurisdiction*.”²²⁵ Additionally, under the protective principle, a state may claim jurisdiction over activity that is directed against the state’s security and/or its ability to carry out

216. Colangelo, *supra* note 195, at 790.

217. *Id.* (“We might think of national courts exercising national jurisdiction and applying national law in the international system as roughly analogous to the United States state courts applying their own state’s law in the United States federal system.”).

218. *Id.*

219. *Id.*

220. *Id.* at 793 (“For instance, absent some nexus, Germany may not apply its racial hate speech laws to speech by United States nationals, speaking only in the United States and having no connection to Germany.” (citing Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L. J. 121, 169–75 (2007))).

221. *Id.*

222. *Id.* at 794 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY § 402(1)(a) (2018)).

223. *Id.* (citing § 402(1)(c)).

224. *Id.* (citing § 402(2)).

225. *Id.* (citing § 402 (2) cmt. g.).

official state functions.²²⁶

While one might think that the passive personality principle justifies Justice Alito's example of the murder of a United States national, that is incorrect. Passive personality principle exists in international law but it does not exist in United States domestic law.²²⁷ Passive personality principle does not give American states jurisdiction, because if that were so, then the United States would be prosecuting foreign nationals on their own territory. If a United States citizen is murdered in a foreign country, the United States cannot extend its laws to prosecute the murderer unless the United States asserts some specific jurisdictional authority to do so. In essence, the United States can follow United States murderers in foreign countries, but not United States murder victims. For example, if a United States national is killed in France, the United States cannot enforce its own murder statute in France under international law.²²⁸ The one exception to this is the crime of terrorism or crimes known as *jus cogens* – crimes against humanity, both of which are recognized as a universal jurisdictional offense.²²⁹

The other type of jurisdiction is international jurisdiction. This type of jurisdiction requires no nexus at all because the basis is universal jurisdiction.²³⁰ “The very commission of certain crimes denominated universal under international law engenders jurisdiction for all states irrespective of where the crimes occur or which state's nationals are involved.”²³¹ No nexus is required because states have jurisdictional power purely from the international legal system's interest in suppressing certain international crimes no matter where they occur and whom they involve, thereby having the states act as decentralized enforcement vehicles for the international legal

226. *Id.* (citing §402 (3)).

227. Hariharan Kumar, *Passive Personality Principle: An Overview*, ACADEMIKE (Feb. 6, 2015), <https://www.lawctopus.com/academike/passive-personality-principle-overview/> (“Under the passive personality (or victim) theory, a State has prescriptive jurisdiction over anyone anywhere who injures its nationals. Jurisdiction is based on the nationality of the victim. The United States however does not recognize this theory generally - despite its recitation in certain cases – and there is a doubt whether more than handful of other States actually accepts it as a valid principle of customary international law.”).

228. *See supra* note 227.

229. *See infra* notes 237-38.

230. Colangelo, *supra* note 195, at 794.

231. *Id.* (“Thus while a state may not, without a nexus to its national entitlements, extend its national prescriptive reach into the territories of other states, international law extends everywhere and without limitation the international prohibition on universal crimes.” (citing Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149 (2007))).

system.²³²

Justice Alito's two prime uses of international support are deceptive, because in each case, Justice Alito has explicitly either ignored the concept of jurisdiction in international law or taken an exception under international law and made it the rule by using crimes that are deemed to be covered by universal jurisdiction.²³³ In Justice Alito's first example, the murder of a United States national in a foreign country bestows jurisdiction on the foreign country and the United States.²³⁴ However, that has turned out to be explicitly incorrect by virtue of the lack of a passive personality principle in United States domestic law.²³⁵ In Justice Alito's second example, he cites 18 U.S.C. § 2332a(b), which grants the United States jurisdiction when its own national security or foreign relations are threatened.²³⁶ In reality, the United States would have jurisdiction in cases involving weapons of mass destruction or crimes of terrorism because international law recognizes terrorism as a universal jurisdictional offense.²³⁷ "It is the international nature of the crime – its very substance and definition under international law – that gives rise to jurisdiction for all states."²³⁸ Ironically enough, it is important to consider that the issue at hand in *Gamble* is a charge of possession of a firearm. Therefore, for Justice Alito to use an analogy of terrorism in the international sphere to support his argument about a case concerning possession of a firearm is far-fetched and misplaced at best. Justice Alito's analysis of sovereignty is also ironic in the respect that as a conservative, he is supporting the idea of splitting sovereignty between two governments rather than advocating for sovereignty lying with the people. These ironies give support to the idea that dual sovereignty in the United States is a legal fiction.

Justice Alito misleads individuals to believe that regardless of the crime that occurs in one nation, the other foreign nation can get jurisdiction as well by handpicking those certain crimes that fall under international law to support his idea of sovereignty in the international sphere. In international law, sovereignty is not used as a

232. *Id.* at 797.

233. *See infra* note 237.

234. *See supra* note 213.

235. *See supra* note 227.

236. 18 U.S.C. § 2332a(b) (bombings).

237. Colangelo, *supra* note 195, at 794 ("The category of universal crime . . . is now generally considered to include serious international human rights and humanitarian law violations like genocide, crimes against humanity, war crimes, torture, and most recently, certain crimes of terrorism.").

238. *Id.*

power mechanism, but rather as a limitation on power for all states.²³⁹ For example, the Rome Statute of the International Criminal Court limits subsequent prosecutions after a country has already prosecuted that individual, understanding the concerns of fairness to the accused, individual human rights, and the protection of the integrity of the judicial system.²⁴⁰ This statute in international law directly contradicts Justice Alito's application and view of sovereignty in the international sphere. Justice Alito distorted the view of sovereignty in the international sphere by using it as a power mechanism for states, which is exactly the unintended and antithetical consequence of the purpose of sovereignty in international law.²⁴¹ In sum, his use of international support in *Gamble* is deceptive and inaccurate.

C. *Sovereignty v. Autonomy*

Justice Alito's opinion inherently imputes an investigation into the states' sovereign powers. The 10th Amendment errs on the side of states being autonomous.²⁴² Per the 10th Amendment's reading, the states retain a residual sovereignty—they receive all the powers that are left over from the federal government and not delegated specifically to the federal government.²⁴³ However, Justice Alito's opinion errs on the side of states being sovereign rather than being autonomous.²⁴⁴ Justice Alito uses *Heath v. Alabama*²⁴⁵ to strengthen his view of state sovereignty. Heath had hired two men in Georgia to kidnap and kill his wife, which they did—kidnapping her in Alabama and killing her in Georgia.²⁴⁶ He was prosecuted for homicide in Georgia and pleaded guilty in exchange for a life sentence to avoid

239. See *infra* note 241.

240. Lorraine Finlay, *Does the International Criminal Court Protect against Double Jeopardy: An Analysis of Article 20 of the Rome Statute*, 15 U.C. DAVIS J. INT'L L. & POL'Y 221, 226 (2009). Article 20 of the Rome Statute, in part, states: Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. No person who has been tried by another court for conduct also proscribed under article 6, 7, or 8 shall be tried by the Court with respect to the same conduct unless [. . .].

241. *Id.*

242. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

243. See *supra* notes 207, 242.

244. See *supra* note 97.

245. *Heath*, 474 U.S. 82 (1985).

246. *Id.* at 83–84.

the death penalty.²⁴⁷ Alabama then prosecuted him for the same homicide, convicting him and sentencing him to death.²⁴⁸ Heath argued to the Supreme Court that almost all of the activity relating to the crime took place in Georgia, thus Alabama overreached its constitutional authority to exercise jurisdiction over the events that occurred in Georgia.²⁴⁹ The United States Supreme Court agreed with the Alabama Supreme Court that, “[i]f for double jeopardy purposes, Alabama is considered to be a sovereign entity vis-à-vis the federal government then surely it is a sovereign entity vis-à-vis the State of Georgia.”²⁵⁰ The Court further explained that Heath’s acts violated the “peace and dignity” of Georgia and Alabama, two separate sovereigns, by breaking the laws of each.²⁵¹ Thus he had committed two distinct offenses.²⁵²

However, Justice Alito’s view of state sovereignty is still undermined by cases such as *Missouri v. Holland*.²⁵³ In *Missouri*, the United States entered a treaty with Great Britain to prohibit the killing of migratory birds that traveled between the United States and Canada, since the birds were in danger of extinction.²⁵⁴ Missouri argued that the 10th Amendment prohibits the United States from exercising powers that are reserved to the States since the power to prohibit the killing of migratory birds was not delegated to the United States.²⁵⁵ However, the Court held that because Article 2, Section 2 expressly grants the United States the power to make treaties and Article 6 guarantees that treaties made under the authority of the United States are declared the supreme law of the land in cases where state law conflicts, the fact that Missouri claims they can regulate migratory birds is not enough to override the overarching power of Article 6.²⁵⁶ *Missouri* in essence eradicates state sovereignty by explaining that all acts of Congress are the supreme law of the land whenever states’ law conflicts, regardless of what powers were reserved or delegated to the states.²⁵⁷ What *Missouri* further

247. *Id.*

248. *Id.* at 85–86.

249. *Id.* at 85–87.

250. *Id.* at 86 (citing *Ex Parte Heath*, 455 So. 2d 905, 906 (Ala. 1984)).

251. *Id.* at 88 (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

252. *Id.*

253. 252 U.S. 416 (1920).

254. *Id.* at 431–32.

255. *Id.* at 432 (“It is said that a treaty cannot be valid if it infringes the Constitution”).

256. *Id.* (“As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri’s claim”).

257. *Id.* at 433.

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emphasizes is the concept of preemption.²⁵⁸

V. CONCLUSION

In *Gamble v. United States*, the Court upheld the Dual Sovereignty Doctrine, explaining that a state may prosecute a defendant under state law even if the federal government has prosecuted him for the same conduct under a federal statute, and the reverse.²⁵⁹ The Court incorrectly decided the case because although both, Justice Alito and Justice Ginsburg argue a valid theory of the creation of sovereignty in the United States, Justice Ginsburg's picture of sovereignty is more consistent with the evolution of sovereignty today. Moreover, Justice Alito incorrectly explained the meaning of sovereignty in the international sphere and how international law perceives sovereignty.

Moving forward, to better protect American citizen's rights against Double Jeopardy, the federal government should be encouraged to adhere to the *Petite Policy*²⁶⁰ when cases of potential double jeopardy arise. The policy constructs a barrier against successive federal prosecutions where the defendant has already been tried in state court for the same criminal activity.²⁶¹ The Department of Justice will only pursue a federal prosecution "based on substantially the same act(s) or transaction(s)" previously prosecuted in state court if the first prosecution left a "substantial federal interest demonstrably unvindicated."²⁶² The purpose of the *Petite Policy* is to institutionalize deference to prior prosecutions for the same activity by other sovereigns but to also protect defendants from having to endure multiple prosecutions unless those interests are compelling.²⁶³ This policy exists to protect the sovereign's interests while not putting the interests of those they were elected to represent on the backburner.

258. U.S. CONST. art. VI; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (explaining when state law can be preempted by federal law); *see supra* note 207.

259. *Gamble*, 139 S. Ct. at 1964. SHORT CITE – DONE.

260. The policy was named after *Petite v. United States*, 361 U.S. 529 (1960).

261. The policy applied whenever there has been a prior state or federal prosecution resulting in an acquittal, a conviction, including one resulting from a plea agreement, or a dismissal or other termination of the case on the merits after jeopardy has attached. Dept. of Justice, U.S. Attorneys' Manual, Title 9: Criminal Resource Manual § 9-2.031(C) (Dual and Successive Prosecution Policy ("Petite Policy")).

262. *Id.* at § 9-2.031(A); *Gamble*, 139 S. Ct. at 1995 (J. Ginsburg, dissenting)..

263. *Id.* at §9-2.031(A).