Fifth Amendment — Double Jeopardy Clause — Separate Sovereigns Doctrine — Gamble v. United States

The Double Jeopardy Clause requires that no defendant "be subject" to prosecution twice "for the same offence."[1] But under the "separate sovereigns" doctrine, the Supreme Court has long recognized a limit to the clause: a defendant's right against double jeopardy is violated only in the case of two prosecutions by the same sovereign.[2] Because the federal government and states are distinct sovereigns, a federal prosecution after a state's, or vice versa, passes constitutional muster.[3] Last Term, in *Gamble v. United States*,[4] the Court stood by this doctrine: the defendant challenged the Court's precedent as contrary to the Constitution's original meaning, but the Court found his historical evidence insufficient to overcome stare decisis.[5] As suggested by this conclusion, originalism sheds little light on a doctrine not settled or anticipated at the Founding. A structural approach — one informed by doctrinal developments responsive to the specific needs of the federal system — is a better way of both understanding the doctrine and challenging it.

In November 2015, a police officer pulled over Terance Gamble in Mobile, Alabama, allegedly because of a damaged headlight.[6] Claiming he smelled marijuana, the officer searched Gamble's car and discovered a loaded handgun.[7] Gamble, convicted seven years earlier of robbery, was charged with violating a state law prohibiting anyone convicted of a "crime of violence" from possessing a firearm.[8] After he pleaded guilty in state court, federal prosecutors indicted him for the same act under a federal felon-in-possession statute.[9] Gamble moved to dismiss the indictment, but the district court denied the motion on the basis of the separate sovereigns doctrine, and the Eleventh Circuit affirmed.[10]

The Supreme Court, in turn, upheld the doctrine. Before addressing Gamble's main claim, Justice Alito, writing for the Court,[11] outlined the formal basis for the separate sovereigns doctrine: the Double Jeopardy

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

[2] *See, e.g.*, United States v. Lanza, 260 U.S. 377, 382 (1922). The doctrine also goes by the name of the "dual-sovereignty" doctrine. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1963 (2019).

[3] *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 136 (1959); *Lanza*, 260 U.S. at 382.

[4] 139 S. Ct. 1960 (2019).

[5] *Id.* at 1969.

[6] *Id.* at 1964.

[7] *Id.*

[8] *Id.*; Brief for the United States at 2–3, *Gamble*, 139 S. Ct. 1960 (No. 17-646). Alabama state law defines "crime of violence" to include robbery. ALA. CODE § 13A-11-70(2) (2015).

[9] *Gamble*, 139 S. Ct. at 1964.

[10] United States v. Gamble, No. 16-00090, 2016 WL 3460414, at *1–2 (S.D. Ala. June 21, 2016); United States v. Gamble, 694 Fed. Appx. 750, 751 (11th Cir. 2017) (per curiam).

[11] Justice Alito was joined by Chief Justice Roberts and Justices Thomas, Breyer, Sotomayor, Kagan, and Kavanaugh.

Clause protects against punishment twice, not for the same conduct, but for "the same offence."[12] Because an "offence" is defined by law, he explained, "where there are two sovereigns, there are two laws, and two 'offences.'"[13] This sovereign-specific interpretation "honors the substantive differences between the interests that two sovereigns can have in punishing the same act."[14] Three antebellum cases illustrated such differences.[15] The first two upheld concurrent criminal jurisdiction, recognizing that "the same act . . . [can] constitute an offense against both" federal and state governments.[16] The third offered an example of an act implicating "diverse interests": an assault on a U.S. marshal offends against the federal government, as an obstruction of the legal process, and against a state, as a breach of its peace.[17] This principle is clearer, the *Gamble* Court noted, in the case of crimes committed abroad: absent the doctrine, a foreign prosecution could bar the United States from prosecuting, say, the murder of a U.S. national in another country.[18]

Defending the conception of sovereignty underlying the doctrine, the Court explained why federal and state governments count as "separate sovereigns."[19] Though "our Constitution rests on the principle that the people are sovereign," Justice Alito wrote, "that does not mean that they have conferred all the attributes of sovereignty on a single government."[20] In adopting the Constitution, the people "'split the atom of sovereignty.'"[21] The federal structure born of this split "often results in two layers of regulation," as with taxation.[22] The permissibility of successive prosecutions is simply another consequence of the division.[23]

The Court then turned to Gamble's main claim — that the Court's precedent "contradicts the common-law rights that the Double Jeopardy Clause was originally understood to engraft onto the Constitution."[24] As evidence, Gamble began with a proposed draft of the Double Jeopardy

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

13 *Id.*

14 *Id.* at 1966.

15 *Id.*

16 *Id.* (quoting United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850)); *see also id.* (citing Fox v. Ohio, 46 U.S. (5 How.) 410, 434–35 (1847)).

17 *Id.* at 1966–67 (citing Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852)).

18 *Id.* at 1967.

19 *Id.* at 1968.

20 *Id.*

21 *Id.* (quoting Alden v. Maine, 527 U.S. 706, 751 (1999)).

22 *Id.* at 1969.

23 *See id.*

24 *Id.* These rights "stemm[ed] from the 'common-law pleas of *auterfoits acquit* [former acquittal] and *auterfoits convict* [former conviction].'" *Id.* (alterations in original) (quoting Grady v. Corbin, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting)).

Clause, which specified "by any law of the United States."[25] Gamble argued that rejection of this draft by the First Congress (which wrote the Bill of Rights) indicated an intent to bar all successive prosecutions, regardless of sovereign.[26] But the Court dismissed this drafting history as "shoddy evidence" of original meaning.[27] More compelling, it argued, was the historical context: the Founders "quite literally *revolted* against" an English law allowing British troops indicted for murder in America to be prosecuted in England instead.[28] They were thus unlikely to have supported a bar on successive prosecutions by separate sovereigns.[29]

In a lengthy analysis, the Court found the core of Gamble's evidence — five English cases that he claimed established a principle against successive prosecutions — to be a "muddle."[30] This included a foundational case on which the others rested — the 1677 prosecution of a man named Hutchinson for a murder in Portugal.[31] When indicted in England, Hutchinson is said to have pleaded prior acquittal by a Portuguese court.[32] No direct report of the case exists, however, and later accounts suggest that Hutchinson was "spared retrial as a matter of discretion" rather than law.[33] Another one of the cases "did not even involve a foreign prosecution," but rather an English defendant who pleaded prior acquittal by a Welsh court.[34] Wales's laws were "the laws of England," Justice Alito explained, making the case "irrelevant for present purposes."[35] Trying to bolster what the Court derided as this "flimsy foundation" for his claim, Gamble argued that the cases "were widely *thought* [at the Founding] to support his view."[36] Yet contemporaneous treatises offered only "spotty support" for this position, the Court noted, and early U.S. case law was "by turns equivocal and downright harmful" to it.[37]

In sum, the Court found Gamble's evidence insufficient to overrule a "chain of precedent linking dozens of cases over 170 years."[38] After the three antebellum cases on concurrent criminal jurisdiction, the Court squarely upheld a successive prosecution for the first time in a

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[25] *Id.* at 1965. The clause would have read as follows: "No person shall be subject . . . to more than one punishment or one trial for the same offence by any law of the United States." *See* 1 ANNALS OF CONG. 451–52, 782 (1789) (Joseph Gales ed., 1834).

[26] *Gamble*, 139 S. Ct. at 1965.

[27] *Id.*

[28] *Id.* at 1966.

[29] *Id.*

[30] *Id.* at 1969–70.

[31] *Id.* at 1970. Some accounts suggest the location was Spain, not Portugal. *See, e.g.*, *id.* at 1972.

[32] *Id.* at 1970–71.

[33] *Id.* at 1970–72.

[34] *Id.* at 1973 (citing Rex v. Thomas (1664) 83 Eng. Rep. 326; 1 Lev. 118).

[35] *Id.* (first quotation quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *95).

[36] *Id.* at 1974.

[37] *Id.* at 1969.

[38] *Id.*

Prohibition-era case, *United States v. Lanza*.[39] The separate sovereigns doctrine was then reaffirmed in two 1959 decisions.[40] The *Gamble* Court rejected the argument that two changes — one doctrinal, the other practical — justified overruling these precedents. The doctrinal change, incorporation of the Double Jeopardy Clause in 1969, simply applied the Court's interpretation of the clause against the states.[41] That interpretation included a sovereign-specific conception of "offence," thus only barring a state from *itself* prosecuting a defendant twice.[42] The practical argument, which Gamble characterized as the "proliferation of federal criminal law . . . heighten[ing] the risk of successive prosecutions," was viewed as an issue independent of the doctrine's constitutionality.[43]

Justice Thomas filed a concurring opinion, agreeing with the Court's historical assessment but taking issue with its "stare decisis standard."[44] "[T]he Constitution," he noted, "charged federal courts primarily with applying a limited body of written laws."[45] A judge's constitutional duty is thus to overrule any precedent "demonstrably erroneous" in view of that body of law, "regardless of whether other factors support" doing so.[46] By requiring that judges balance "several factors to decide whether the scales tip in favor of overruling precedent,"[47] he argued, the Court's present stare decisis standard conflicts with a judge's duty.[48]

Justice Ginsburg and Justice Gorsuch each dissented separately. Justice Ginsburg sought to reframe the discussion, arguing that the English cases on foreign prosecutions were "inapposite."[49] "Gamble was convicted in both Alabama and the United States," she observed, "jurisdictions that are not foreign to each other."[50] Instead, they are two "parts of one whole" in which "'ultimate sovereignty' resides in the *governed*."[51] Federalism was intended as "a double security [for] the rights of the

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39 260 U.S. 377, 382 (1922).

40 Abbate v. United States, 359 U.S. 187, 196 (1959); Bartkus v. Illinois, 359 U.S. 121, 136 (1959). Unlike *Lanza* and *Abbate*, *Bartkus* involved a state prosecution after a federal. *Id.* at 124. Because the Fifth Amendment did not then bind the states, the case was decided on due process grounds. *Id.*

41 *Gamble*, 139 S. Ct. at 1979 (citing Benton v. Maryland, 395 U.S. 784, 794 (1969)).

42 *Id.*

43 *Id.* at 1979–80.

44 *Id.* at 1980–81 (Thomas, J., concurring). In 2016, Justice Thomas joined a concurrence by Justice Ginsburg that argued the doctrine warranted reconsideration. Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). He began his *Gamble* concurrence by noting "the historical record [did] not bear out [his] initial skepticism" of the doctrine. 139 S. Ct. at 1980.

45 *Gamble*, 139 S. Ct. at 1982 (Thomas, J., concurring).

46 *Id.* at 1981, 1984.

47 *Id.* at 1981.

48 *Id.* at 1988.

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

50 *Id.*

51 *Id.* (first quoting THE FEDERALIST NO. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (capitalization removed); then quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2675 (2015)).

people."[52] Yet the separate sovereigns doctrine "invokes federalism to withhold liberty."[53] The precedents "gave short shrift to contrary authority," Justice Ginsburg argued, including the First Congress's drafting history and early U.S. case law opposed to successive prosecutions.[54] She challenged the Court's dismissal of those opinions as turning on a judge's discretion rather than the law, concluding that she "would not read the Double Jeopardy Clause to tolerate 'unjust' prosecutions."[55]

Instead of adhering to the doctrine's "dubious reasoning," Justice Ginsburg advocated a departure from stare decisis on the grounds offered by Gamble.[56] With regard to the practical change he identified, Justice Ginsburg agreed that an "expansion of federal criminal law . . . exacerbated" the doctrine's deficiencies by allowing "new opportunities" for successive prosecutions.[57] As for the doctrinal change, she contrasted "the doctrine's persistence . . . with the fate of analogous dual-sovereignty doctrines" post-incorporation.[58] The "silver-platter doctrine," for instance, had allowed federal prosecutors to use evidence obtained unconstitutionally by state authorities, but was overruled once the Fourth Amendment applied against the states.[59] To the defendant, "it mattered not at all" which sovereign was violating his rights.[60] Incorporation in the double jeopardy context, Justice Ginsburg argued, should likewise prompt the Court "to ask why each of two governments . . . should be permitted to try a defendant once . . . when neither could . . . twice."[61]

Justice Gorsuch's dissent largely aligned with Justice Ginsburg's. He discerned "no evidence" that the Framers intended the word "offence" to "bear such a lawyerly sovereign-specific meaning."[62] Even if they had, he argued, the federal and state governments were not separate sovereigns but "two expressions of a single and sovereign people."[63] Any doubt on that front was "resolved by war."[64] Echoing Justice Ginsburg, Justice Gorsuch argued that the majority had "invoke[d] federalism not

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[52] *Id.* at 1991 (quoting THE FEDERALIST NO. 51, *supra* note 51, at 323 (James Madison) (alteration in original)).

[53] *Id.*

[54] *Id.* at 1991–92.

[55] *Id.*

[56] *Id.* at 1989, 1991, 1993–94.

[57] *Id.* at 1994.

[58] *Id.* at 1993.

[59] *Id.* at 1993–94. The same occurred with a Fifth Amendment doctrine authorizing federal use of testimony compelled by state authorities. *Id.* at 1994.

[60] *Id.* at 1993 (citing Elkins v. United States, 364 U.S. 206, 208 (1960)).

[61] *Id.* at 1994. The *Gamble* majority dismissed this as a "false analogy." *Id.* at 1979 (majority opinion). It argued that, unlike with the separate sovereigns doctrine, the basis of the silver-platter doctrine — namely, "the fact that the state searches to which it applied did not at that time violate federal law" — was directly undermined through the right's application against the states. *Id.*

[62] *Id.* at 1998 (Gorsuch, J., dissenting).

[63] *Id.* at 1999.

[64] *Id.* (quoting Testa v. Katt, 330 U.S. 386, 390 (1947)).

to protect individual liberty but to threaten it, allowing two governments to achieve together an objective denied to each."[65]

Unlike Justice Ginsburg, Justice Gorsuch also defended Gamble's claim about the common law. He argued that "an array of common law authorities" suggested that prosecution in one court barred "reprosecution in another."[66] The case of Hutchinson, involving the Portuguese prosecution, came to stand for such a rule in the case law.[67] Founding-era treatises "recited the *Hutchinson* rule as black letter law,"[68] and early U.S. courts applied it in the context of the federal structure.[69] With regard to that structure, Justice Gorsuch saw "the Wales example [as] at least somewhat analogous" — the Framers themselves compared the relationship between Wales, Scotland, and England to the federal system.[70]

While recognizing that "*stare decisis* warrants respect," Justice Gorsuch nonetheless argued for a departure from the principle in the case at hand.[71] When the separate sovereigns doctrine "first emerged," the federal criminal code was "new, thin, modest, and restrained."[72] Today it features an estimated 4,500 statutes.[73] And before the Double Jeopardy Clause applied against the states, "one might have thought" the doctrine "at least served to level the playing field": "If a State could retry a defendant after a federal trial, then the federal government ought to be able to retry a defendant after a state trial."[74] With incorporation, this equalizing function evaporated.[75] These changes weighed in favor of overruling the precedents, he argued — as did the quality of their reasoning and the narrow margins by which they had been decided.[76]

Both Gamble and the majority approached the separate sovereigns doctrine from an originalist perspective, disagreeing over the Founding-era understanding of English common law cases. Yet as suggested by the Court's conclusion that his historical evidence fell short, an originalist mode of interpretation offers little guidance on a doctrine not settled at the Founding. A structural approach, informed by doctrinal developments responsive to the federal system, is more illuminating. It also underscores that incorporation was the better basis for Gamble's challenge.

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[65] *Id.* at 2000.
[66] *Id.*
[67] *Id.* at 2001.
[68] *Id.* at 2003.
[69] *Id.* at 2004–05.
[70] *Id.* at 2001–02.
[71] *Id.* at 2006–07.
[72] *Id.* at 2008.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 2006–09.
[76] *Id.*

Throughout its history, the Court's justification for the separate sovereigns doctrine has been a single syllogism: "[A]n 'offense' is a transgression of a 'sovereign's' law; the states and the federal government are 'distinct sovereignties'; therefore, a single act violating federal and state laws constitutes two distinct offenses."[77] Gamble's challenge was an originalist attack on the first premise, the sovereign-specific reading of "offence," to which the Court responded in kind.[78] Yet while the English cases are evidence of original meaning as to the first premise, just as Founding-era views on sovereignty are to the second, originalism has little to say about the consequence of combining the two within the federal structure. The Founders "foresaw very limited potential for overlapping criminal prosecutions," Justice Thomas noted.[79] They thus "had no reason to address the double jeopardy question" in *Gamble*.[80]

A better approach to *Gamble*'s double jeopardy issue is a structural one, as the precedents themselves demonstrate. "[U]nder our federal system," the Court noted in 1959, the states "have the principal responsibility for defining and prosecuting crimes."[81] At the same time, the federal government has "exclusive power to vindicate certain of our Nation's sovereign interests."[82] Only after the Founding did it become clear the ways in which these interests might overlap. With counterfeiting, for instance, the federal government soon identified an interest "in protecting the purity of its currency"; the states, an interest "in protecting their citizens against fraud."[83] Faced with a seeming double jeopardy issue, the Court introduced its sovereign-specific reading of "offence."[84] In 1919, the Eighteenth Amendment was ratified "for the

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[77] Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 25 (1992); *see* United States v. Lanza, 260 U.S. 377, 382 (1922); Moore v. Illinois, 55 U.S. (14 How.) 13, 19–20 (1852).

[78] *Gamble*, 139 S. Ct. at 1990 (Ginsburg, J., dissenting) (noting the Court "[strove] mightily to refute Gamble's account of the common law"). The Court had never before sought "to ascertain the intent of the Framers in this area." Heath v. Alabama, 474 U.S. 82, 98 n.1 (1985) (Marshall, J., dissenting). In 1959, it rejected the English cases as "dubious" for: (1) their "confused and inadequate reporting"; and (2) the fact that "they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." Bartkus v. Illinois, 359 U.S. 121, 128 n.9 (1959).

[79] *Gamble*, 139 S. Ct. at 1980 (Thomas, J., concurring). Justice Thomas blamed "the proliferation of duplicative prosecutions" on Congress acting "beyond its limited powers." *Id.* at 1980 n.1.

[80] *Id.* at 1980. The clause's drafting history is the closest to evidence otherwise, but the *Gamble* Court was rightly hesitant to "allow[] conjectures about purpose to inform [its] reading of the text." *Id.* at 1965 (majority opinion); *cf.* Brief of Amici Curiae Law Professors in Support of Petitioner at 2, *Gamble*, 139 S. Ct. 1960 (No. 17-646) (arguing the doctrine "was not part of the constitutional design").

[81] Abbate v. United States, 359 U.S. 187, 195 (1959).

[82] *Heath*, 474 U.S. at 99 (Marshall, J., dissenting).

[83] *Bartkus*, 359 U.S. at 129.

[84] *See* United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847); *see also* Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 814–15 (1985) ("[T]he dual sovereignty doctrine does not exist independent of the double jeopardy clause; rather, the doctrine is derivative of it." *Id.* at 814.).

purpose of establishing prohibition as a national policy."[85] But the states already had the power "to adopt and enforce prohibition measures."[86] The Court in *Lanza* thus determined that each government was "exercising its own sovereignty" in prosecuting Prohibition violations.[87]

From this perspective, the premises of the separate sovereigns doctrine seem less discernible originalist truths than jurisprudential constructs developed in response to the federal structure. As Justice Thurgood Marshall contended, a sovereign-specific reading of "offence" has "flourished in [the] Court's cases . . . because it provides reassuring interpretivist support for a rule that accommodates the unique nature of our federal system."[88] In fact, to bolster its formalism, the *Gamble* Court relied on doctrinal developments that highlight "substantive differences" between interests.[89] The doctrine is justified, it indicated, not only formally but also by "the diverse interests it might vindicate."[90]

This structural approach surfaces a pragmatic concern that has traditionally motivated support for the doctrine — namely that, in its absence, one sovereign might be able to frustrate the other's interests.[91] In *Lanza*, Chief Justice Taft warned that, were a state to impose "nominal fines" for violating Prohibition, there would be a "race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution."[92] Marijuana offenses offer a contemporary example.[93] Under California law, possessing 100 kilograms of marijuana with intent to distribute is a misdemeanor; under federal law, it is a felony.[94] If the Court jettisoned the separate sovereigns doctrine, an individual could plead guilty to the state offense to avoid a harsher federal penalty.[95]

In the civil rights context, some worry that a one-prosecution rule could undermine the federal government's ability to prosecute civil

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85 United States v. Lanza, 260 U.S. 377, 381 (1922).

86 *Id.*

87 *Id.* at 382.

88 Heath v. Alabama, 474 U.S. 82, 98 (1985) (Marshall, J., dissenting). Justice Marshall made this point arguing against the doctrine's application to prosecutions by two states. *Id.* at 95. He noted that, unlike the "complementary" concerns of the federal government and states, *id.*, "the sovereign concerns with whose vindication each State has been charged are identical," *id.* at 101.

89 *Gamble*, 139 S. Ct. at 1966.

90 *Id.*

91 Abbate v. United States, 359 U.S. 187, 195 (1959); *Heath*, 474 U.S. at 99 (Marshall, J., dissenting).

92 *Lanza*, 260 U.S. at 385.

93 *See* Transcript of Oral Argument at 63–64, *Gamble*, 139 S. Ct. 1960 (No. 17-646) (counsel for the federal government raising this example); Brief for Texas et al. as Amici Curiae in Support of Respondent at 21, *Gamble*, 139 S. Ct. 1960 (No. 17-646) (36 states doing the same).

94 Brief for Texas et al., *supra* note 93, at 21.

95 Transcript of Oral Argument, *supra* note 93, at 63–64. A different contemporary spin on the pragmatic concern came through in recent suggestions that the doctrine protects a state's prosecutions from possible frustration by a presidential pardon. *See, e.g.*, Adam Liptak, *Supreme Court Affirms Exception to Double Jeopardy in a Case with Implications for Trump Associates*, N.Y. TIMES (June 17, 2019), https://nyti.ms/33Q2042 [https://perma.cc/KT5G-LATS].

rights violations.[96] After Los Angeles police officers were acquitted in state court for the beating of Rodney King in 1992, a federal judge relied on the doctrine to allow their federal prosecution.[97] Such a successive prosecution is justified structurally on the basis of distinct interests: "the state's interest in preserving peace and order and the federal government's more specific interest in protecting constitutionally guaranteed rights."[98] Indeed "distinct sovereign interests" are how the federal government has explained the federal prosecution of Dylann Roof for his 2015 "race-motivated shooting of church parishioners" in Charleston.[99]

Because it challenges the structural rationale underlying the separate sovereigns doctrine, incorporation was a stronger argument for Gamble than originalism. Of course, as made clear by Justice Alito, incorporation did not undermine the doctrine's syllogism.[100] But in similar post-incorporation contexts, the Court has recognized that the so-called separate sovereigns are in fact "waging a united front against many types of criminal activity."[101] In this "age of 'cooperative federalism,'" sovereign interests are rarely distinct, let alone in conflict.[102] Gamble's "run-of-the-mill felon-in-possession charges" help demonstrate this reality.[103] Absent any clear structural justification for successive prosecutions, incorporation suggests that the federal government and states "should not be allowed to do in tandem what neither could do alone."[104]

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96 *See, e.g.*, Transcript of Oral Argument, *supra* note 93, at 24 (Breyer, J.). Professor Akhil Amar and Jonathan Marcus have argued that this concern "clearly lay behind" Justice Marshall's dissent in *Heath v. Alabama*, 474 U.S. 82 (1985), and "can be teased out of" the two 1959 decisions upholding the doctrine through their citations to *Screws v. United States*, 325 U.S. 91 (1945), a case involving a federal civil rights prosecution. Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 6, 19 (1995).

97 United States v. Koon, 833 F. Supp. 769, 790 (C.D. Cal. 1993), *aff'd in relevant part,* 34 F.3d 1416, 1438 (9th Cir. 1994). Under a separate line of case law, a civil rights violation might not constitute the same "offence" as the underlying act. Amar & Marcus, *supra* note 96, at 45–46; *see also* Blockburger v. United States, 284 U.S. 299, 304 (1932) (introducing a "same elements" test for "offense"). Yet overruling the doctrine could still "create some uncertainty concerning the ability to prosecute" civil rights violations. Brief of Amicus Curiae Howard University School of Law Thurgood Marshall Civil Rights Center in Support of Neither Party at 20, *Gamble*, 139 S. Ct. 1960 (No. 17-646).

98 Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1564 (1967).

99 Brief for the United States, *supra* note 8, at 52 (citing United States v. Roof, 252 F. Supp. 3d 469, 470–71 (D.S.C. 2017)).

100 *Gamble*, 139 S. Ct. at 1979.

101 Murphy v. Waterfront Comm'n, 378 U.S. 52, 56 (1964); *see also* Susan N. Herman, *Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy*, 95 COLUM. L. REV. 1090, 1092–93 (1995) (noting "a post-incorporation 'new age of cooperative federalism' in cases applying other Bill of Rights guarantees across jurisdictional lines").

102 *Murphy*, 378 U.S. at 55–56. *But see* Heath v. Alabama, 474 U.S. 82, 93 (1985) ("[One sovereign's] interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another [sovereign's] enforcement of *its* own laws.").

103 *Gamble*, 139 S. Ct. at 1994 (Ginsburg, J., dissenting); *cf.* Amar & Marcus, *supra* note 96, at 6 (noting the absence of distinct interests in the case of two states prosecuting a defendant for murder).

104 Amar & Marcus, *supra* note 96, at 16.

If the Court preferred not to overrule the doctrine in view of cases where the two sovereigns *are* "working at cross purposes,"[105] it could instead have addressed its structural overbreadth. For instance, it could bar a successive prosecution where the two are effectively acting as one.[106] This might make more robust an existing exception for prosecutions by one sovereign that are "a sham and a cover" for a second prosecution by the other sovereign.[107] Alternatively, it could require that the second sovereign demonstrate a distinct interest.[108] This would in effect constitutionalize the federal government's policy to pursue a second prosecution only when a state's has "left [a] substantial federal interest demonstrably unvindicated."[109] To be sure, there would be questions as to how such a rule would be administered and whether it could limit successive prosecutions in practice.[110] But the larger hurdle to such change is that it would require departing from the doctrine's formalism.

The *Gamble* Court's decision to adhere to that formalism seems largely a result of stare decisis; its originalism was tempered by its deference to precedent. Several of the Justices emphasized the principle at oral argument[111] — an emphasis that translated in the opinion into the high bar that Gamble's evidence was required to overcome.[112] This task was made especially difficult to the extent he had to demonstrate the precedent was "grievously wrong," as suggested by Justice Kavanaugh.[113] Though of little solace to Gamble, successive prosecutions are relatively rare in practice,[114] and they often have merit policywise, as in the civil rights context.[115] Against this backdrop, it is unsurprising that the Court maintained course — and that Gamble's originalism further entrenched a doctrine better justified and attacked structurally.

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105 *Gamble*, 139 S. Ct. at 1992 (Ginsburg, J., dissenting).

106 *See* Braun, *supra* note 77, at 73.

107 Bartkus v. Illinois, 359 U.S. 121, 123–24 (1959) (holding the state was not "a tool of the federal authorities," *id.* at 123); *see also* Braun, *supra* note 77, at 60–65. Though lower courts have read such an exception into this language, they have not actually applied it to bar successive prosecutions. *Id.* at 60.

108 *See* Note, *supra* note 98, at 1561.

109 U.S. DEP'T. OF JUSTICE, JUSTICE MANUAL § 9-2.031(D) (2018); *see also* Petite v. United States, 361 U.S. 529, 530–31 (1960) (per curiam) (first recognizing the policy).

110 *See* Braun, *supra* note 77, at 74–75; Note, *supra* note 98, at 1562–63.

111 *See* Transcript of Oral Argument, *supra* note 93, at 20 (Kagan, J.); *id.* at 41–42 (Kavanaugh, J.); *id.* at 68 (Breyer, J.); *id.* at 88 (Alito, J.).

112 *Gamble*, 139 S. Ct. at 1969 (noting the evidence would have to be better than "middling").

113 *See* Transcript of Oral Argument, *supra* note 93, at 41; *see also* John O. McGinnis, *Is Justice Kavanaugh Grievously Wrong on Stare Decisis?*, LAW & LIBERTY (Dec. 7, 2018), https://www.lawliberty.org/2018/12/07/is-justice-kavanaugh-grievously-wrong-on-stare-decisis [https://perma.cc/FE4C-6HEE].

114 The federal government estimates that it authorizes "about a hundred" each year. Transcript of Oral Argument, *supra* note 93, at 54. As for the states, thirty-five "have some type of statutory constraint" on successive prosecutions. Brief for Texas et al., *supra* note 93, at 28–29.

115 Two-thirds of successive federal prosecutions actually arise where an Indian tribe is the other sovereign, often in domestic violence cases. Transcript of Oral Argument, *supra* note 93, at 65–66; *see also* Brief of Amici Curiae National Indigenous Women's Resource Center and National Congress of American Indians in Support of Respondent at 2–6, *Gamble*, 139 S. Ct. 1960 (No. 17-646).