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Once Bitten, Twice Shy: The Supreme Court's Misguided Doubling Down on the Dual Sovereigns Exception to the Fifth Amendment's Double Jeopardy Clause

Ross Ballantyne
Suffolk University Law School

ONCE BITTEN, TWICE SHY: THE SUPREME COURT'S MISGUIDED DOUBLING DOWN ON THE DUAL SOVEREIGNS EXCEPTION TO THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .[1]

I. INTRODUCTION

The Fifth Amendment's Double Jeopardy Clause is one of the most revered provisions in the Bill of Rights, as it reflects and assuages "the deeply rooted fear and abhorrence of a governmental power which allows an individual to be subjected to multiple prosecution[s] for the same offense."[2] The Clause guarantees three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense.[3] Moreover, for over forty years, defendants have been entitled to the protections against double jeopardy from the moment a jury is empaneled and sworn in.[4] Despite a period of halting progress and multiple setbacks, the Supreme Court eventually applied these protections to the states through incorporation in the late 1960's.[5] Nonetheless, a curious exception to the Double Jeopardy Clause survives today under what is known as the dual sovereigns exception ("the Exception"), where the federal government and the states are considered separate sovereign entities, such that

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

[2] *See* Ray C. Stoner, *Double Jeopardy and Dual Sovereignty: A Critical Analysis*, 11 WM. & MARY L. REV 946, 946 (1970) (noting Double Jeopardy Clause's purpose).

[3] *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (summarizing applicability of Double Jeopardy Clause's guarantee), *overruled by* Alabama v. Smith, 490 U.S. 794 (1989).

[4] *See* Crist v. Bretz, 437 U.S. 28, 38 (1978) (citing Illinois v. Somerville, 410 U.S. 458, 467 (1973)) (holding "[t]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.")

[5] *See* Benton v. Maryland, 395 U.S. 784, 787 (1969) (announcing incorporation of Double Jeopardy Clause).

the Double Jeopardy Clause does not prohibit one sovereign from prosecuting an individual following a prosecution by the other.[6]

Essentially, the Exception provides that "two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns."[7] The Exception has been extensively criticized in light of the recent explosion of federal-state cooperation, the federal government's provision of financial backing to state and local law enforcement agencies, and the drastic rise in the prison population from the War on Drugs.[8] Despite this criticism, the Supreme Court recently reaffirmed the constitutionality of the Exception in *Gamble v. United States*.[9] This Note traces the historical origins of double jeopardy protection,[10] explores its centrality to the American concept of ordered liberty and due process,[11] and argues that the Supreme Court should overrule the Exception and instead deem it as: (1) an anathema to notions of popular sovereignty, (2) a manifestation of a perverse conception of federalism, and (3) a patently unfair denigration of the rights of criminal defendants.[12]

II. FACTS

A. Underlying Case

In 2015, a Mobile police officer smelled marijuana upon approaching Terance Martez Gamble's vehicle during a traffic stop and prompted

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[6] *See* Bartkus v. Illinois, 359 U.S. 121, 136-37 (1959) (finding due process does not bar state prosecution following federal acquittal). The *Bartkus* Court suggested an exception to "the Exception," whereby the Double Jeopardy Clause would prohibit successive prosecutions where the "state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution." *Id.* at 123-24; *see also* United States v. Lanza, 260 U.S. 377, 382 (1922) (holding Double Jeopardy Clause only prevents federal government from engaging in successive prosecutions).

[7] Heath v. Alabama, 474 U.S. 82, 92 (1985) (articulating dual sovereignty principle).

[8] *See* Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 296-99 (1992) (discussing negative consequences of Exception's continued existence); *see also* Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 599 (1961) (cautioning against exercise of separate sovereign prosecutorial powers); Christina Gayle Woods, *The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole*, 24 U. BALT. L. REV. 177, 183-85 (1994) (questioning Exception's post-incorporation longevity); Kevin J. Hellman, Note, *The Fallacy of Dueling Sovereignties: Why the Supreme Court Refuses to Eliminate the Dual Sovereignty Doctrine*, 2 J.L. & POL'Y 149, 152-53 (1994) (challenging Supreme Court's federalism analysis undergirding Exception).

[9] 139 S. Ct. 1960, 1964 (2019) (affirming constitutionality of Exception).

[10] *See infra* Part III.

[11] *See infra* Part III, sections D-E.

[12] *See infra* Part IV.

him to initiate a search of Gamble's car; which ultimately yielded a loaded 9mm handgun.[13] Gamble's 2008 second-degree robbery conviction made his possession of the handgun a violation of an Alabama statute forbidding those convicted of violent crimes from possessing or controlling a firearm.[14] Gamble pleaded guilty to violating the state statute, but federal prosecutors later indicted him for the same single act of possession under federal law.[15] Gamble moved to dismiss the federal charge on the ground that it was for the same offense as the one to which he had previously pleaded guilty at the state level, thus impermissibly subjecting him to double jeopardy.[16] After the judge denied the motion to dismiss, Gamble pleaded guilty to the federal offense but also retained his right to challenge the motion's denial on double jeopardy grounds.[17] When Gamble subsequently exercised that right, the Eleventh Circuit affirmed the District Court's denial and held that Double Jeopardy Clause jurisprudence allows separate sovereigns to punish a defendant for the same criminal conduct.[18] The Supreme Court granted certiorari to Gamble's appeal to determine whether to overturn the Exception.[19]

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[13] *See Gamble*, 139 S. Ct. at 1964 (recounting facts of Gamble's case).

[14] *See id.* at 1964 (outlining history of Gamble's case); *see also* ALA. CODE § 13A-11-72(a) (2015) (providing no one "who has been convicted in [Alabama] or elsewhere of committing or attempting to commit a crime of violence . . . shall own a firearm or have one in his or her possession or under his or her control.") Gamble's previous offense of second-degree robbery is considered a violent crime under to Alabama law. ALA. CODE § 13A-11-70(2); *see also* Brianne Gorod et al., *Gamble v. United States*, CATO INSTITUTE (Dec. 4, 2017), https://www.cato.org/publications/legal-briefs/gamble-v-united-states (discussing history of Gamble's earlier conviction).

[15] *See* 18 U.S.C. § 922(g)(1), (9) (2020) (providing that it is unlawful for one "convicted in any court 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 . . . ."); *Gamble*, 139 S. Ct. at 1964 (recounting history of Gamble's case).

[16] *See Gamble*, 139 S. Ct. at 1964 (explaining why district court rejected Gamble's motion to dismiss); *see also* United States v. Gamble, No. CR 16-00090-KD-B, 2016 WL 3460414, at *2-3 (S.D. Ala. June 21, 2016), *aff'd*, 694 F. App'x 750 (11th Cir. 2017), *aff'd*, 139 S. Ct. 1960 (2019) (adhering to dual sovereignty precedent).

[17] *See Gamble*, 139 S. Ct. at 1964 (recounting lower court procedural history); *see also* Gorod, *supra* note 14 (discussing Gamble's sentencing). By pleading guilty to the federal charge, Gamble's prison sentence was extended by nearly three years. Gorod, *supra* note 14.

[18] *See Gamble*, 139 S. Ct. at 1964 (noting Eleventh Circuit decision); *see also* United States v. Gamble, 694 F. App'x 750, 750-51 (11th Cir. 2017) (per curiam) (refusing to deviate from Supreme Court precedent on dual sovereignty).

[19] *See Gamble*, 139 S. Ct. at 1964 (noting grant of certiorari); *see also* Gamble v. United States, 138 S. Ct. 2707, 2707 (2018) (granting Gamble's petition for writ of certiorari). The grant of certiorari attracted extensive coverage and commentary, as it represented the first time in nearly sixty years the Supreme Court would fully examine the Exception. *See*, *e.g.*, David Cole & Somil Trivedi, *It's Time to Close a Loophole in the Constitution's Double Jeopardy Rule*, ACLU (Sept. 12, 2018, 11:30 AM), https://www.aclu.org/blog/criminal-law-reform/its-time-close-loophole-constitutions-double-jeopardy-rule (arguing that Court should end Exception, deeming

B. Gamble v. United States

Gamble's attorneys set out the crux of their argument by explaining that the "[E]xception is incompatible with the text, original meaning, and purpose of the Double Jeopardy Clause."[20] Gamble accused the Supreme Court's twentieth and twenty-first century jurisprudence of hollowing out the protections guaranteed by the Double Jeopardy Clause as it was written, and overriding core tenets of American federalism.[21] Next, Gamble addressed probable concerns from the Court about its duty to adhere to prior decisions by writing that "[s]tare decisis loses its force when a decision's doctrinal underpinnings have been eroded."[22] Gamble further argued against the power of stare decisis by highlighting the "dramatic federalization of criminal law over the past 60 years" as a "foundational change" to the theoretical framework supporting the continued existence of the Exception.[23] Gamble continued to lay out his arguments based on: (1) the weight

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it "a betrayal of both the spirit and the letter of the Double Jeopardy Clause."); Garret Epps, *There's an Exception to the Double-Jeopardy Rule*, THE ATLANTIC (Dec. 5, 2018), https://www.theatlantic.com/ideas/archive/2018/12/gamble-v-united-states-case-double-jeopardy/577342/ (discussing importance of Gamble's challenge to Exception); Matt Ford, *The Supreme Court's Double-Jeopardy Dilemma*, THE NEW REPUBLIC (Dec. 6, 2018), https://newrepublic.com/article/152565/supreme-courts-double-jeopardy-dilemma (summarizing magnitude of case and history of Exception). In 1959, the Supreme Court reaffirmed its earlier *Lanza* decision by refusing to overrule the Exception, stating that doing so would be "highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses." Abbate v. United States, 359 U.S. 187, 195 (1959). While the Supreme Court has analyzed the Exception since *Abbate*, those cases were limited in focus to issues like the Exception's applicability to Puerto Rico, federal Indian tribes, and two states. *See*, *e.g.*, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1875-77 (2016) (holding Puerto Rico, as U.S. territory, is not considered separate sovereign); United States v. Lara, 541 U.S. 193, 210 (2004) (holding Native American tribes are separate sovereigns vis-à-vis federal government); Heath v. Alabama, 474 U.S. 82, 88 (1985) (allowing successive prosecutions under Double Jeopardy Clause by two states for same underlying criminal conduct).

[20] *See* Brief for Petitioner at 4-5, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) (introducing argument in favor of overruling Exception); *see also* Woods, *supra* note 8, at 179-80 (summarizing proposed versions of Double Jeopardy Clause).

[21] *See* Brief for Petitioner, *supra* note 20, at 4-7 (outlining main arguments in favor of overturning Exception). Gamble posited that "[p]ermitting consecutive prosecutions for the same offense simply because different sovereigns initiate them 'hardly serves' the deeply rooted principles of finality and fairness the [Double Jeopardy] Clause was designed to protect." *Id.* at 27-28 (quoting *Puerto Rico*, 136 S. Ct. at 1877 (Ginsburg, J., concurring)).

[22] *See id.* at 7 (addressing precedent in favor of maintaining Exception). Gamble argued that the incorporation of the Double Jeopardy Clause to the states has eliminated the Exception's doctrinal justification. *Id.* at 8, 35-41 (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 79-80 (1964) (overruling prior holding that one sovereign could utilize testimony unlawfully compelled by another) and Elkins v. United States, 364 U.S. 206, 223 (1960) (overruling "silver platter" doctrine)).

[23] *See id.* at 8 (suggesting Exception is no longer sensible where federal and state criminal jurisdictions frequently overlap).

of historical evidence and scholarship,[24] (2) the shaky jurisprudential origins of the Exception,[25] (3) the Exception's incompatibility with the purposes of American federalism,[26] and (4) the nefarious effects of the Exception's continued survival.[27]

On the other side, the United States—in a full-throated invocation of stare decisis—urged the Court not to "jettison[] [its] longstanding and embedded precedent" with respect to the Exception.[28] The government also relied on the express language of the Double Jeopardy Clause to support its position, arguing that the "constitutional text expressly distinguishes 'offences' based on the sovereign 'against' which they are committed."[29] The United States then shifted to a discussion of American federalism and how, in such a system, the Exception is not at odds with the protections afforded

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[24] *See id.* at 11-15 (cataloguing long history of jurisprudence prohibiting successive prosecutions by separate sovereigns). Here, Gamble traced the rule against a second prosecution by a separate sovereign to at least 1662, and argued that the rule's enshrinement in English common law should be instructive to understanding the Clause's meaning at the time of its late eighteenth century adoption. *Id.* at 4-5; *see also id.* at 17-19 (highlighting numerous state court decisions affirming principle that a "decision in one court will bar any farther prosecution for the same offence, *in that or any other court*") (emphasis added) (quoting State v. Randall, 2 Aik. 89, 100-101 (Vt. 1827)).

[25] *See id.* at 22 (questioning creation of Exception). Gamble argues that the seminal decision that gave birth to the Exception "said nothing" of prior cases rejecting the possibility of the Exception, "of the widely known, traditional English rule," and "why the framers would have rejected that traditional rule *sub silentio*." *Id.* (citing Moore v. Illinois, 55 U.S. 13, 22 (1852)).

[26] *See* Brief for Petitioner, *supra* note 20, at 27-28 (citing Justice Black's argument against Exception's promulgation). Notably in *Bartkus*, Justice Black dissented, writing that, "[l]ooked at from the standpoint of the individual," the idea that "a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State . . . is too subtle . . . to grasp." Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting). Gamble also invoked the Hamiltonian notion that the states and federal government are "kindred systems" to question the perpetuation of a mechanism by which "successive prosecutions after an acquittal *by a coordinate government that is part of the same national system"* are permitted. Brief for Petitioner, *supra* note 20, at 30 (emphasis added) (citing THE FEDERALIST NO. 82 (Alexander Hamilton)).

[27] *See* Brief for Petitioner, *supra* note 20, at 28 (discussing practical implications of Exception); *see also* Heath v. Alabama, 474 U.S. 82, 84-85 (1985) (presenting important precedent). One of the most significant double jeopardy decisions came in 1985 when the defendant in *Heath* was tried in Georgia and sentenced to life in prison. *Heath*, 474 U.S. at 84-85. However, the defendant was then permissibly tried again in Alabama and sentenced to death—all for the same underlying crime. *Heath*, 474 U.S. at 84-85.

[28] *See* Brief for the United States at 8, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) (summarizing main argument). "An unbroken line of [the] Court's decisions, whose origin reaches back nearly two centuries, has correctly understood the violation of a state law and the violation of a federal law as distinct 'offence[s]' under the Double Jeopardy Clause." *Id.* at 6.

[29] *See id.* at 6 (discussing meaning of Double Jeopardy Clause). The United States further argued that the "federalist structure of the Constitution likewise dictates that offenses against the laws of the several States and the United States are not 'the same.'" *Id.*

by the Double Jeopardy Clause.[30] The Government also rejected Gamble's argument that the continued existence of the Exception threatens criminal defendants' liberty interests, and noted that "[t]he necessary consequence of preserving liberty by dividing power between dual sovereigns is dual regulation."[31]

The United States concluded by discussing several potential scenarios it deemed constitutionally unworkable if the Exception was overturned, including the denial to a State of "its power to enforce its criminal laws because another State has won the race to the courthouse."[32] The Government warned that this scenario "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines."[33] The Government then warned of the practical consequences that would result from overruling the Exception, and referenced one of the key cases in Double Jeopardy jurisprudence to aver that "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement [would] necessarily be hindered."[34]

Ultimately, in *Gamble*, the Supreme Court ruled 7-2 in favor of maintaining the Exception.[35] Writing for the majority, Justice Alito rejected Gamble's argument, and found that the historical evidence Gamble's legal team presented was "feeble" in the face of "the [Double Jeopardy] Clause's text, other historical evidence, and 170 years of precedent."[36] Subsequently, Justice Alito dispensed with Gamble's argument regarding the meaning of the Double Jeopardy Clause, writing that "where there are

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[30] *See id.* at 14-18 (arguing Exception's recognition of distinction between federal and state offences advances federalism principles). The United States argued that, because the several states and the United States "'derive power from different sources,' each from the organic law that established it," both "ha[ve] the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.'" *Id.* at 15 (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)) (citing United States v. Wheeler, 435 U.S. 313, 320 (1978)).

[31] *See id.* at 16 (discussing dangers of Gamble's proposed conflation of federalism and liberty interests).

[32] See *id.* at 18 (quoting Heath v. Alabama, 474 U.S. 82, 93 (1985)) (arguing that overturning Exception would deprive states of their sovereign powers).

[33] Brief for the United States, *supra* note 28, at 18 (quoting *Heath*, 474 U.S. at 93) (noting precedent articulating paramount prerogative of states to create and enforce their own criminal codes).

[34] *See id.* at 29 (quoting Abbate v. United States, 359 U.S. 187, 195 (1959)) (expressing concern regarding effects of overruling Exception with respect to effective law enforcement).

[35] *See* Gamble v. United States, 139 S. Ct. 1960, 1966 (2019) (announcing Court's ruling).

[36] *See id.* at 1964 (explaining Court has "long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign.")

two sovereigns, there are two laws, and two 'offences.'"[37] Thereafter, Justice Alito took cues from the United States' arguments in his discussion of the federalism implications of the Exception: "A close look at [Supreme Court Double Jeopardy jurisprudence] reveals how fidelity to the Double Jeopardy Clause's text 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*."[38]

In a compelling dissenting opinion, Justice Ginsburg boldly criticized the majority for its "adherence to th[e] misguided doctrine [of the Exception]."[39] Justice Ginsburg continued by responding to the majority's discussion of federalism and the sovereignty implications thereof, writing that: "[The Exception] treats *governments* as sovereign, with state power to prosecute carried over from the years predating the Constitution. In the system established by the Federal Constitution, however, 'ultimate sovereignty' resides in the *governed*."[40] With heavy reliance on the Federalist writings of Alexander Hamilton, Justice Ginsburg inveighed against the Exception's continued existence for its virtual guarantee of not "shor[ing] up people's rights."[41] Justice Ginsburg's dissenting opinion was also in accord with many of the arguments Gamble advanced—she rejected the post-incorporation existence of the Exception and balked at the power of stare decisis in both the face of questionable legal analysis and changing circumstances in the reality of criminal law enforcement.[42]

In a separate dissent, Justice Gorsuch predicated his disagreement with the majority on a plea for empathy, writing that "[a] free society does not allow its government to try the same individual for the same crime until it's happy with the result."[43] In sharp contrast to Justice Alito, Justice Gor-

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[37] *See id.* at 1965 (citing Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting)).

[38] *See id.* at 1966 (emphasis added) (finding no reason to abandon sovereign-specific reading of Double Jeopardy Clause).

[39] *See id.* at 1989 (Ginsburg, J., dissenting) (articulating primary disagreement with majority).

[40] *See Gamble*, 139 S. Ct. at 1990 (Ginsburg, J., dissenting) (internal citations omitted) (quoting Arizona State Leg. v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 820 (2015)) (accusing majority of overlooking core principles of federalism).

[41] *See id.* at 1991(2019) (Ginsburg, J., dissenting) (contending that Exception perniciously "invokes federalism to withhold liberty").

[42] *See id.* at 1991-93 (arguing Exception's post-incorporation survival "enable[s] federal and state prosecutors, proceeding one after the other, to expose defendants to double jeopardy"). Justice Ginsburg further wrote that "[i]ncorporation of the [Double Jeopardy] Clause as a restraint on action by the States . . . has rendered the [Exception] obsolete." *Id.* at 1991(citing Benton v. Maryland, 395 U.S. 784, 787 (1969)); *see also* Payne v. Tennessee, 501 U.S. 808, 828 (1991) (noting stare decisis "is not an inexorable command").

[43] *See Gamble v. United States*, 139 S. Ct. 1960, 1996 (Gorsuch, J., dissenting) (expressing disdain for majority's endorsement of Exception).

such interpreted the language of the Double Jeopardy Clause in a very straightforward manner, contending that the Exception defies all foundational principles of the Fifth Amendment.[44] Justice Gorsuch further attacked the majority for its invocation of the power of stare decisis in affirming the Exception's existence and for its failure to properly consider the merits of Gamble's arguments.[45]

C. The Federalization Of Criminal Laws

In the early case of *Fox v. Ohio*, the Supreme Court justices indicated that successive prosecutions by separate sovereigns would be constitutionally permissible, and based their finding on an understanding that such prosecutions would occur in only the most exceptional of circumstances.[46] At the time of the *Fox* decision, such thinking was perfectly sensible; in the mid-nineteenth century, the federal and state criminal justice systems existed and operated almost wholly independent of one another and rarely, if ever, overlapped.[47] Even as late as the mid-1960s, the situation was such that Justice White reasonably noted that "the States still bear primary responsibility in this country for the administration of the criminal law" and that "most crimes . . . are matters of local concern . . . ."[48]

Today, the situation is drastically different, and from one scholar's perspective: "the federal government has [now] duplicated virtually every

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[44] *See id.* (finding "no meaningful support in the text of the Constitution, its original public meaning, structure, or history" for existence of Exception).

[45] *See id.* at 2005-06 (indicating that unquestioned faith in stare decisis would leave Court "still abiding grotesque errors" made in past decisions); *see also* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting) (internal citations omitted) (describing Court's tendencies when cases involve Constitution and corrective legislation is "practically impossible").

> [I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, th[e] [Supreme C]ourt has often overruled its earlier decisions . . . [and] bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet, 285 U.S. at 406-08 (Brandeis, J., dissenting).

[46] *See* Fox v. Ohio, 46 U.S. 410, 435 (1847) (observing relative rarity of successive prosecutions by separate sovereigns).

[47] *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138-40 (1995) (discussing historical federal and state government law enforcement roles).

[48] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 96 (1964) (White, J., concurring) (suggesting importance of criminal law enforcement to states' viability in federalist system).

major state crime."[49] The advent of the federal government's role in the promulgation and enforcement of criminal offenses is of recent vintage, too, with a 1998 study finding that "of all federal crimes enacted since 1865, over forty percent have been created since 1970."[50] As such, the "degree of cooperation between state and federal officials in criminal law enforcement has . . . reached unparalleled levels."[51] Gamble summarized the serious threat posed to the protections of the Double Jeopardy Clause by such federalization of criminal law, cautioning "[such federalization] creates more opportunities for successive prosecutions."[52] As early as 1964, the Court sounded the alarm over the potential for abuse of and disregard for criminal defendant rights given the "age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity."[53]

Cooperation between federal and state law enforcement departments, agencies, and personnel is most prevalent in areas related to terrorism and drug trafficking.[54] In the face of such extensive cooperation, even

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[49] *See* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 22 (1997) (noting that federalization of crime provides additional opportunities for successive prosecutions by separate sovereigns); *see also* Brickey, *supra* note 47, at 1140-45 (charting expansion of federal criminal laws); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1164-92 (1995) (analyzing rise of duplicative criminal offenses and advent of federal-state joint task forces).

[50] *See* James A. Strazzella, *The Federalization of Criminal Law*, AM. BAR. ASS'N, 1, 2 (1998), https://perma.cc/S5LM-VDHP (last visited Jan. 29, 2020) (demonstrating dramatic increase in number of federal criminal offenses).

[51] United States v. All Assets of G.P.S. Auto. Corp., 66 F.3d 483, 499 (2d Cir. 1995) (warning this level of cooperation "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the [Exception] is universally needed to protect one from the other."); *see also* Brief for Petitioner, *supra* note 20, at 44 (contending nearly every offense may now be prosecuted at both state and federal level).

[52] Brief for Petitioner, *supra* note 20, at 44-45 (decrying consequences of increased federalization of criminal law).

[53] *See Murphy*, 378 U.S. at 55-56 (noting advent of federal and state cooperation in criminal law enforcement).

[54] *See State and Local Task Forces*, DRUG ENF'T ADMIN., https://www.dea.gov/state-and-local-task-forces (last visited Oct. 15, 2020) ("In 2016, the DEA State and Local Task Force Program managed 271 state and local task forces . . . These task forces are staffed by over 2,200 DEA special agents and over 2,500 state and local officers."); *see also* Dawson, *supra* note 8, at 297-98 (summarizing federal-state cooperation with respect to drug crimes); Guerra, *supra* note 49, at 1182-85 (summarizing War on Drugs-fueled expansion of joint task forces); *Joint Terrorism Task Forces*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces (last visited Oct. 15, 2020) ("The first [Joint Terrorism Task Force] was established in New York City in 1980. Today there are about 200 task forces around the country, including at least one in each of the FBI's 56 field offices, with hundreds of participating state, local, and federal agencies.").

the federal government has acknowledged that some obstacle is required "to protect 'the individual from any unfairness associated with needless multiple prosecutions.'"[55] The federal government codified that obstacle, known as the *Petite* policy, following a Supreme Court decision in 1960.[56] Nevertheless, the *Petite* policy is the subject of much criticism; for instance, a Tenth Circuit decision highlighted the *Petite* policy's lack of substantive protections and noted that the policy's discrepancies have been widely recognized across circuits.[57] Courts and commentators alike have criticized the policy's application for being "erratic and unpredictable."[58] Moreover, defendants who find themselves in situations like Gamble's are prevented from raising such arguments, because "the *Petite* policy, [as] an internal policy of the Justice Department, *is not to be enforced against the government*."[59] Additionally, as Gamble argued, the *Petite* policy is strictly discretionary, meaning that "an individual's constitutional right not to be twice put in jeopardy for the same offense hinges on an individual prosecutor's secretive application of a discretionary and indeterminate policy."[60]

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[55] Brief for the United States, *supra* note 28, at 54 (quoting Rinaldi v. United States, 434 U.S. 22, 31 (1977)) (noting Department of Justice policy designed to limit frequency of successive prosecutions).

[56] *See* Petite v. United States, 361 U.S. 529, 530 (1960) (explaining "it is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions . . . .'"); Brief for the United States, *supra* note 28, at 54 (summarizing policy goals advanced by *Petite* policy). In essence, the policy "precludes" a successive federal prosecution based on "substantially the same act(s) or transactions involved" in a prior proceeding, and requires approval from "a senior Department of Justice official for such a prosecution to proceed." Brief for the United States, *supra* note 28, at 54 (quoting *Justice Manual*, §9-2.031(A)).

[57] *See* United States v. Barrett, 496 F.3d 1079, 1120 (10th Cir. 2007) (emphasis added) (quoting United States v. Thompson, 579 F.2d 1184, 1189 (10th Cir. 1978)) ("The problem for Barrett is that we have held, *as have many other circuits*, that the Petite policy 'is merely a housekeeping provision of the Department' that, 'at most,' serves as "a guide for the use of the Attorney General and the United States Attorneys in the field,' and *thus does not confer any enforceable rights upon criminal defendants*."); *see also* United States v. Gruttadauria, 439 F. Supp. 2d 240, 247 (E.D.N.Y. 2006) (emphasis added) (quoting United States v. Catino, 735 F.2d 718, 725 (2d Cir. 1984)) (noting that it "is well-settled that the *Petite* policy 'affords defendants no substantive rights'" but is "'merely an internal guideline for the exercise of prosecutorial discretion, *not subject to judicial review*.'")

[58] *See, e.g.*, United States v. Belcher, 762 F. Supp. 666, 673 (W.D. Va. 1991) (noting that prosecutor's decisions were "in sharp contrast to" typical *Petite* policy practices); Jon J. Jensen & Kerry S. Rosenquist, *Satisfaction of a Compelling Governmental Interest or Simply Two Convictions for the Price of One?*, 69 N.D. L. REV. 915, 927 (1993) (criticizing inconsistency in policy's application); Dawson, *supra* note 8, at 293 (calling *Petite* policy an "incomplete limitation").

[59] *See* United States v. Michel, 588 F.2d 986, 1003 n.19 (5th Cir. 1979) (emphasis added) (illustrating limitations of *Petite* policy).

[60] *See* Brief for Petitioner, *supra* note 20, at 48 (urging Court to deviate from stare decisis and discredit *Petite* policy); *see also* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) ("[T]he mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great.")

III. HISTORY

The Double Jeopardy Clause, as "the oldest of all the Bill of Rights guarantees," generally enjoys a very positive reputation.[61] The principle is now firmly entrenched in American jurisprudence, but protections against double jeopardy existed long before James Madison submitted the initial drafts of what eventually became the Fifth Amendment to the First Congress in 1789.[62]

A. Ancient Athens And Rome

As Justice Hugo Black recognized: "[f]ear and abhorrence of governmental power to try people twice for the same conduct . . . [has roots that] run deep into Greek and Roman times."[63] Despite the rather vague nature of his statement, Justice Black's claim is well-supported by an examination of early law in both societies.[64] In Athens, for example, the law provided that once tried, a person could not be retried on the same charge.[65] One scholar's thorough analysis of prosecutions in ancient Athens found that, by the latter half of the fifth century B.C., the "main concern of a man brought into court was to win a verdict by one means or another, *for once tried he could not be prosecuted again on the same charge* . . . ."[66] Moreover, Rome adopted numerous Greek traditions, and protecting against double jeopardy was certainly among them.[67] Such protections were found in

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[61] *See* George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. REV. 827, 828 (1988) (discussing immense value society and courts have bestowed upon protection against double jeopardy).

[62] *See* Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting) (calling protection against double jeopardy "one of the oldest ideas found in western civilization").

[63] *See id.* at 151-52 (noting long history of protections against double jeopardy).

[64] *See* David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 198 (2005) (examining early Greek and Roman double jeopardy protections); *see also* Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 283-84 (1963) (noting that despite idiosyncrasies of their legal systems, "[t]he principle of double jeopardy was not entirely unknown to the Greeks and Romans").

[65] *See* Thomas, *supra* note 61, at 836 (articulating early examples of fundamental double jeopardy principles); DEMOSTHENES, *Against Leptines*, *in* OLYNTHIACS, PHILIPPICS, MINOR PUBLIC SPEECHES, SPEECH AGAINST LEPTINES, XX § 147, at 589 (J.H. Vince trans., Harvard Univ. Press eds., 1998) (1930) (stating that "the laws forbids the same man to be tried twice on the same issue").

[66] *See* ROBERT J. BONNER, LAWYERS AND LITIGANTS IN ANCIENT ATHENS: THE GENESIS OF THE LEGAL PROFESSION 195 (Chicago University Press eds.,1927) (emphasis added) (noting early emergence of bars against successive prosecutions).

[67] *See* 2 JAMES LEIGH STRACHAN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW 154-60 (Oxford, Clarendon Press ed.,1912) (summarizing trial and appellate procedure rules, rights, and limitations on state power).

both the Roman Republic and the Roman Empire; in the former, "a magistrate's acquittal barred further proceedings of any kind."[68] As the Republic crumbled and an empire emerged in its stead, the sovereignty of the people was predictably impaired.[69] Nevertheless, protections against double jeopardy were not wholly absent from the Roman Empire and were, in fact, routinely enhanced during the first five centuries of its existence.[70] Early Roman emperors undoubtedly challenged the strength of these protections, but they reemerged by the turn of the third century—albeit with conditions attached.[71] However, this relatively weak period of double jeopardy protections was short-lived; in the middle of the sixth century, Emperor Justinian I promulgated the compendium of jurisprudential writings known as the *Digest of Justinian*, which recognized that "[t]he governor must not allow a man to be charged with the same offenses of which he has already been acquitted."[72] The *Digest* further states that "a person cannot be charged on account of the same crime under several statutes."[73]

B. Religious Laws And Writings

As the Roman Empire approached its mid-fifteenth century end, canonical law began developing rapidly and contained its own prohibitions against double jeopardy.[74] In 1234, Pope Gregory IX promulgated a col-

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[68] *See* GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 73 (N.Y.U Press eds.,1998) (highlighting existence of double jeopardy protections in Republican Rome).

[69] *See id.* (noting effects of shift from Republic to Empire).

[70] *See* Rudstein, *supra* note 64, at 199-200 (tracing evolution of double jeopardy protections in early Roman Empire).

[71] *See id.* at 199 (recounting instance where Emperor Tiberius attempted to undermine double jeopardy protections); *see also* THE OPINIONS OF PAULUS 4.17, *in* 1 IULIUS PAULUS, THE CIVIL LAW 323 (S.P. Scott trans., 1973) ("[A]fter a public acquittal, a defendant can again be prosecuted by his informer within thirty days, but after that time this cannot be done.")

[72] *See* DIG. 48.2.7.2 (Ulpian, Duties of Proconsuls 7), *in* 4 THE DIGEST OF JUSTINIAN 311 (Theodor Mommsen et al. eds., 1985) (summarizing Justinian-era double jeopardy protections). The principles expounded upon in the *Digest of Justinian*, although important, protected individuals from being subjected to double jeopardy by *only the same accuser*. *Id.*; 2 CHARLES PHINEAS SHERMAN, ROMAN LAW IN THE MODERN WORLD 486 (New Haven Law Book Co. eds., 2d ed. 1922) ("[A]ny Roman citizen or subject, desiring to cause anybody to be prosecuted criminally, could apply to the presiding judge of the appropriate court for permission to make an accusation against the alleged offender.") It is important to note that, under the laws of the Roman Empire at this time, criminal prosecutions were typically initiated by individuals, not the state. Sherman, *supra* note 72, at 486; *see also* Rudstein, *supra* note 64, at 200 (describing how early Roman Empire criminal prosecutions were initiated).

[73] *See* DIG. 48.2.14 (Paulus, Duties of Proconsuls 2), *in* 4 THE DIGEST OF JUSTINIAN 799 (Theodor Mommsen et al. eds., 1985) (summarizing Justinian-era double jeopardy protections).

[74] *See* MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 5, 326-27 (Oxford, Clarendon Press ed., 1969) (discussing canonical protections against double jeopardy in Middle Ages).

lection and publication of papal decrees—the *Gregorian Decretals*; these decrees proclaimed that "[a]n accusation cannot be repeated with respect to those crimes of which the accused has been absolved."[75] Nearly a century earlier, a Bolognese monk published an anthology work, the *Decretum*, which collected scores of older church council canons, scriptural passages, and papal decrees.[76] At least two references to double jeopardy are found in the *Decretum*: (1) "[t]he Scripture holds, God does not punish twice in the same manner" and (2) "[w]hether one is condemned or absolved, there can be no further action involving the same crime."[77] Religious writings regarding bars to double jeopardy, however, were not limited to Christianity.[78] The Talmud—a collection of rabbinical teachings and reflections on Hebraic law—recounts the story of a Rabbi Akiba who relied upon *Deuteronomy* 25:2 to explain why Hebraic law "prohibited a person liable to a death penalty by a human tribunal from also being flogged."[79]

C. English Common Law

Modern American reverence for protection against double jeopardy—coupled with a frequent desire to ground legal concepts in common law origins—has led to overstatements about the prominence and con-

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[75] *See* R.H. HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW 11-13, 286 (Univ. of Ga. Press ed., 1996) (summarizing double jeopardy protections contained in *Decretals*) (citing DECRETALS GREGORII IX 5.16). The chapter of the *Decretals* in which that proclamation appeared was accompanied by commentary wherein the principle was summarized as requiring "anyone . . . absolved of a crime of which he is accused . . . should not again be accused of the same thing." *Id.* at 286; *see also* Rudstein, *supra* note 64, at 200-01 (summarizing Hemmholz's work).

[76] *See* Rudstein, *supra* note 64, at 201 (introducing and discussing the *Decretum*).

[77] *See* Helmholz, *supra* note 75, at 286 (internal citations omitted) (summarizing *Decretum*'s references to double jeopardy protections).

[78] *See* Rudstein, *supra* note 64, at 197 (discussing Jewish laws and writings about double jeopardy principles); *see also* HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE 108-09 & n.6 (1952) (explaining that "in capital cases verdicts may be reversed [from conviction] to acquittal, but not [from acquittal] to conviction."); SAMUEL MENDELSOHN, THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS, 150 & n.358 (2d ed. 1968) (emphasis added) (summarizing rule that "[a] verdict of conviction may be reversed by the trial court, but a verdict of acquittal can, *under no circumstances*, be reversed.")

[79] *See* Rudstein, *supra* note 64, at 197 (citing BABYLONIAN TALMUD, *Makkoth* 13b (Isidore Epstein ed., H.M. Lazarus trans., 1935)) (recounting Talmud's summary of Rabbi Akiba's pronouncements). Rabbi Akiba interpreted that verse of *Deuteronomy* to hold that "you make [the guilty man] liable to punishment for one misdeed, but you cannot hold him liable [in multiple ways] for two misdeeds." *Id.;* GEORGE HOROWITZ, 1 THE SPIRIT OF JEWISH LAW 170 (1953) (clarifying Rabbi Akiba's interpretation). Put another way, this has been taken to mean that "for one offense, only one punishment might be inflicted." Horowitz, *supra* note 79, at 170.

sistency of such protections throughout historical English jurisprudence.[80] Such overstatements are misleading, however, since there is more than scant evidence that the earliest English rulers after the Norman Conquest had little, if any regard for questions of double jeopardy protection.[81] After later jurisdictional battles with the church led Henry II to loosen his stranglehold on criminal trials and to accept, as final, more ecclesiastical court acquittals, a general protection against double jeopardy still did not exist in England.[82] Contrary to the reverential proclamation made in *Felch*, no such reference existed in the Magna Carta—which King John originally issued in 1215, and was then reaffirmed by King Edward I before the turn of the thirteenth century.[83]

This state of affairs persisted beyond the time of the early Norman rulers and was a feature of reigns throughout the fifteenth and sixteenth centuries.[84] One of the primary reasons for this halting progress was that much of Anglo-Saxon criminal law was fully dependent upon private actors initiating suits.[85] Even when criminal law enforcement shifted away from individuals to a state prerogative and attendant recognition of double jeopardy arose, such recognitions were negative in their treatment of the

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[80] *See* State v. Felch, 105 A. 23, 25 (Vt. 1918) (describing protection against double jeopardy as "of such importance that it was given a place in the Magna Charta [sic], and that it was regarded [as] so vital to the maintenance of the Anglo-Saxon concept of individual liberty.")

[81] *See* Sigler, *supra* note 64, at 286 (recounting example of monarchical flaunting of double jeopardy protections). "In one situation, William [II] tried fifty Englishmen by the ordeal of hot iron. Since they escaped unhurt, they were, of course, acquitted; upon which the monarch 'declared he would try them again by the judgment of his court, and would not abide by the pretend judgment of God.'" *Id.* (internal citations omitted); *see also* 1 JOHN REEVES, REEVES' HISTORY OF THE ENGLISH LAW, FROM THE TIME OF THE ROMANS, TO THE END OF THE REIGN OF ELIZABETH 456 (W.F. Finlason ed., 1869) (discussing monarchical ability to override prosecutorial outcomes); Rudstein, *supra* note 64, at 209 (citing *The Charter of Liberties of Henry I* (1101), *reprinted in* MICHAEL EVANS & R. IAN JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 49-50 (1984) (noting complete lack of double jeopardy protections in Henry I's Charter of Liberties); JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 4 (1969) (deeming it likely that "[protections against] double jeopardy w[ere] not so fundamental a privilege" in early English law).

[82] *See* Rudstein, *supra* note 64, at 204-10 (discussing slow development of English double jeopardy protections); Sigler, *supra* note 64, at 291-92 (cataloguing extent of references to double jeopardy in twelfth and thirteenth-century English legal works). Indeed, the earliest treatise on the common law—written in the latter stages of the twelfth century—contains no reference to protections against double jeopardy. Sigler, *supra* note 64, at 291-92.

[83] *See* Rudstein, *supra* note 64, at 210 (summarizing state of double jeopardy protections in thirteenth century).

[84] *See* Sigler, *supra* note 64, at 287-95 (examining slow evolution of English recognition of double jeopardy protections).

[85] *See id.* at 288 ("[D]ouble jeopardy involves a limitation upon the power of *the state* to bring suit . . . .") (emphasis added); *see also* J. LAURENCE LAUGHLIN, *The Anglo-Saxon Legal Procedure*, *in* 1 ESSAYS IN ANGLO-SAXON LAW 183, 283-84 (1905) (discussing weak protections against double jeopardy afforded to accused parties against private complainants).

principle.[86] These negative recognitions were at least partially responsible for the sixteenth century being seen as a "'dark period' in the development of rules prohibiting double jeopardy."[87]

The truly modern common law approach to double jeopardy did not begin to emerge until the latter half of the seventeenth century.[88] By this time, however, English courts addressed several double jeopardy issues and began to consistently uphold its protections.[89] From the 1660s onward, the King's Bench generally expanded and solidified protections afforded through the prohibition against double jeopardy.[90] The pedestal upon which the protections had been placed were such that the King's Bench found that an acquittal in another country prevented subsequent domestic prosecution for the same alleged offense.[91] All the while, the King's Bench was also active in eradicating trial judge practices that tended to undermine and prevent the invocation of double jeopardy protections.[92] Moreover, by the latter half of the eighteenth century, the common double jeopardy pleas of *autrefois acquit* ("previously acquitted"), *autrefois convict* ("previously

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[86] *See* Sigler, *supra* note 64, at 288 (introducing early English recognition of double jeopardy principles). During the reign of Henry VII (1485-1509), a statute was adopted providing that capital indictments could be initiated immediately at the king's urging, without any delay provided for an appeal. *Id.* The statute also provided that the older plea of *autrefois acquit*—essentially, "previously acquitted"—commonly invoked by defendants, would *not* prevent the appeal of an acquittal. *Id.* Another statute passed just two years into Henry VII's reign further codified the common law's nearly complete disregard for the notion of protection against double jeopardy; it provided that "neither a conviction *nor an acquittal* on an indictment acted as a bar to a prosecution by way of appeal, for the same offense, if the appeal was brought within a year and a day." *Id.* at 289 (emphasis added).

[87] *See* Rudstein, *supra* note 64, at 217 (analyzing long-term effects and ramifications of Henry VII-era enactments). For instance, a statute enacted in 1534 permitted those acquitted of felonies in Wales to nevertheless be tried for the same felony in the adjacent English county within two years of the alleged offense. *Id.* (citing Jill Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 1, 12 (1984)).

[88] *See* Sigler, *supra* note 81, at 9 (charting emergence of modern English double jeopardy rules). Sigler notes that, by this time, prosecutions by the crown (i.e., the state) had begun replacing private prosecutions by appeal as the preferred means of conducting criminal prosecutions, thereby fulfilling the prerequisite of "the state's . . . power to institute suit . . . [for] a true double jeopardy situation." *Id.*

[89] *See* Turner's Case, (1664) 84 Eng. Rep. 1068 (K.B.) (holding defendant's acquittal for burglary prevented subsequent prosecution under indictment charging him with same burglary); *see also* Jones & Bever, (1665) 84 Eng. Rep. 1078 (K.B.) (holding defendants' acquittals for burglary prevented subsequent prosecution for that and another burglary).

[90] *See* Rudstein, *supra* note 64, at 219 (summarizing notable King's Bench decisions from this period). For example, one prominent case held that prosecutors were prevented from seeking new trials following an acquittal. *Id.* (citing The King v. Read, (1660) 83 Eng. Rep. 271 (K.B.)).

[91] *See* Rex v. Hutchinson, (1667) 84 Eng. Rep. 1011 (K.B.) (holding Hutchinson's prior acquittal for murder in Portugal barred prosecution in England for same killing).

[92] *See* The King v. Perkins, (1698) 90 Eng. Rep. 1122 (K.B.) (prohibiting trial judge practice of discharging juries when acquittals appeared imminent).

convicted"), and pardon were well established in English common law.[93] The permanence of these protections by this time was such that Blackstone wrote about them in his landmark treatise on the laws of England.[94]

D. American Development & Codification

Protections against double jeopardy emerged in the colonies during the mid-seventeenth century.[95] For example, in 1639, Maryland's General Assembly enacted the Act for the Liberties of the People, which some categorized as "the first American Bill of Rights."[96] The first colonial enactment to contain an express protection against double jeopardy followed shortly thereafter.[97] With its 1648 enactment of the Laws and Liberties, Massachusetts continued its commitment to protection against double jeopardy.[98] Other colonies provided similar versions of protections against double jeopardy at this time as well.[99] In the aftermath of the Revolution-

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[93] *See* Rudstein, *supra* note 64, at 220-21 (concluding trace of double jeopardy evolution at common law).

[94] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335 (1770) (noting "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 offence.")

[95] *See* Rudstein, *supra* note 64, at 221-23 (summarizing early colonial protections against double jeopardy).

[96] *See id.* at 221 (quoting 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 67 (1971)) (noting Maryland's enactment); MARYLAND ACT FOR THE LIBERTIES OF THE PEOPLE (1639), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 68 (1971) (discussing statute's protections against double jeopardy). While the Act for the Liberties of the People did not contain any *express* protections against double jeopardy, it did reaffirm the principle that non-slave inhabitants of the colony would "have and enjoy all such rights liberties immunities priviledges [sic] and customs . . . as any naturall [sic] born subject of England hath or ought to have or enjoy . . ." Schwartz, *supra* note 96, at 68.

[97] *See* Schwartz, *supra* note 96, at 71 (summarizing Massachusetts' Body of Liberties); MASS. BODY OF LIBERTIES para. 42 (1641), *reprinted in* RICHARD L. PERRY, SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 153 (1959) (presenting Massachusetts's protections against double jeopardy). Paragraph 42 of Massachusetts's 1641 Body of Liberties provided that "[n]o man shall be twise [sic] sentenced by Civil Justice for one and the same Crime, offence, or Trespasse [sic]." Perry, *supra* note 87, at 153.

[98] *See* Rudstein, *supra* note 64, at 221-22 (introducing Massachusetts' codifications of protections against double jeopardy). The Laws and Liberties contained not only the double jeopardy provision from the earlier Body of Liberties, but also provided that "everie [sic] Action between partie [sic] and partie [sic] and proceedings against delinquents in *criminal* Causes shall be . . . entered in the *rolls* of [everie] [sic] Court by the Recorder thereof, that such Actions be not afterwards brought again to the vexation of any man." *Id.* (internal citations omitted).

[99] *See id.* (discussing colonial examples of double jeopardy protections). For example, the Connecticut Code of 1652 included a clause providing that "no Person shall be twice sentenced by Civil Justice for one and the same Crime . . . ." *Id.* (citing Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 CONN. B.J. 1, 12 (2002)); *see also* THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA para. 64 (1669), *reprinted*

ary War and as the colonies became states and formed a national union, the colonial-era protections against double jeopardy faded from view—albeit briefly.[100] New Hampshire was the first state constitution to include an express protection against double jeopardy.[101] Following independence, numerous states were also acknowledging protections against double jeopardy through case law.[102]

After the failures of the Articles of Confederation, the First Congress convened on March 4, 1789, to devise a new national document.[103] On June 8th, James Madison introduced a series of proposed constitutional amendments, including those that ultimately became the Bill of Rights.[104] On August 17th, House members, sitting as a Committee of the Whole, took up debate on the clause prohibiting double jeopardy, which, by then, read: "No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence."[105] Two days later, the entire House began consideration of the proposed amendments; and on

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in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2780 (Francis Newton Thorpe ed., 1909) (noting document drafted, but never enacted, providing that "[n]o cause shall be twice tried in any one court, upon any reason or pretence [sic] whatsoever").

[100] *See* Rudstein, *supra* note 64, at 222-23 (discussing post-Revolution developments). America's initial guiding document, the Articles of Confederation, contained neither a Bill of Rights nor an express protection against double jeopardy. *Id.* at 222 (citing ARTICLES OF CONFEDERATION art. IV (1778)). Most emerging state constitutions similarly lacked express guarantees against double jeopardy, although some did implicitly provide such protections by calling for the automatic enforcement of English common law absent statutory provisions to the contrary. *See, e.g.*, DEL. CONST. of 1776 art. 25 ("The common law of England . . . shall remain in force, unless [it] shall be altered by a future law of the legislature . . . ."); N.J. CONST. of 1776 para. XXII ("[T]he common law of England . . . as [has] been heretofore practised [sic] in this Colony, shall still remain in force, until [it] shall be altered by a future law of the Legislature . . . ."); N.Y. CONST. of 1777 para. XXXV ("[T]he common law of England . . . shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same.").

[101] *See* N.H. CONST. of 1784, Part I, art. XVI (providing that "[n]o subject shall be liable to be tried, after an acquittal, for the same crime or offence").

[102] *See* Rudstein, *supra* note 64, at 223-26 (cataloguing state court decisions responsible for recognizing protections against double jeopardy).

[103] *See* 1 ANNALS OF CONG. 257 (Joseph Gales ed., 1834) (recounting history of Constitutional Convention).

[104] *See id.* (summarizing Madison's proposals). Madison's original proposal for double jeopardy protection stated that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence . . . ." *Id.*

[105] *See id.* at 451-52 (summarizing House consideration of Madison's proposed double jeopardy provision). A representative from New York objected to the "one trial or" language, arguing that the guarantee against double jeopardy was intended to prevent more than one punishment for a single offense, not, as that language suggested, to prevent an individual convicted in his first trial from challenging that conviction. *Id.*

August 21st, it adopted Madison's provision containing the double jeopardy protection, referring it the following day to a committee of representatives to send to the Senate.[106] The Senate took up the proposed constitutional amendments on September 2nd, and began its consideration of the double jeopardy clause two days later.[107] Further edits to the clause's language were made, with the "by any public prosecution" provision eliminated; on September 9th, the Senate approved the version of the clause that exists today.[108] After the House approved the Senate's revisions, and Madison's proposals were submitted to the states, the Double Jeopardy Clause became part of the Fifth Amendment following sufficient state ratification in 1791.[109]

E. Modern American Jurisprudence: Incorporation

As originally written, the protections embodied in the Bill of Rights were applicable only against the federal government and the process of enforcing the rights therein against the states— through incorporation— only began in earnest in the early twentieth century.[110] Consequently, for long stretches of American history "the Double Jeopardy Clause of the Fifth Amendment did not prohibit a state from placing an individual in jeopardy twice for the same offense."[111] The Supreme Court did not address whether due process of law protected an individual from exposure to double jeopardy at the state level until 1902.[112] This issue was not in front of the Court again for over a quarter century, until *Palko v. Connecticut*.[113]

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[106] *See id.* at 795 (recounting House adoption of proposed double jeopardy provision).

[107] *See* S.J. 1ST CONG., 1ST SESS., 19 (1789) (recounting Senate's consideration of proposed double jeopardy provision). The Senate eventually struck the words "except in case of impeachment, to more than one trial, or one punishment," and inserted the phrase "be twice put in jeopardy of life or limb by any public prosecution." *Id.* at 21, 98.

[108] *See* 1 STAT. 98 (1789) (noting Senate edits to double jeopardy provision).

[109] *See id.* (explaining ratification process and enshrinement of Double Jeopardy Clause).

[110] *See* Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 254-57 (1982) (recounting early attempts to incorporate and failures of those attempts).

[111] Rudstein, *supra* note 64, at 233 (noting pre-incorporation limitations upon Double Jeopardy Clause protections).

[112] *See* Dreyer v. Illinois, 187 U.S. 71, 85-86 (1902) (disregarding due process claims to find retrial following mistrial did not implicate double jeopardy); *see also* Rudstein, *supra* note 64, at 235 (noting that "[t]he Supreme Court did not . . . consider the merits of Dreyer's claim.")

[113] *See* 302 U.S. 319, 323-24 (1937) (summarizing twentieth-century double jeopardy jurisprudence), *overruled by* Benton v. Maryland, 395 U.S. 784, 794 (1969). Connecticut charged Frank Palko with murder in the first degree, and a jury later convicted him of murder in the second degree. *Id.* at 320-21. Following that conviction, the trial judge sentenced Palko to life imprisonment. *Id.* at 321. Pursuant to a state statute, Connecticut appealed, claiming that the judge made legal errors prejudicial to the prosecution, including his jury instructions regarding the differences between first and second-degree murder. *Id.* The Connecticut Supreme Court of Errors

Writing for the Court, Justice Cardozo held that Palko's second trial for the same offense did not deprive him of due process of law under the Fourteenth Amendment.[114] The issue arose again just sixteen years later, and once again, the Court held that a second trial after an initial mistrial did not subject a defendant to jeopardy twice for the same offense.[115] In *Brock*, the Court stressed the importance of justice being properly served and the fact that—under the Double Jeopardy Clause—there has been a "long favored rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served."[116]

Under the leadership of Chief Justice Earl Warren in the 1960s, however, the Supreme Court radically altered its approach when considering the interactions between the Bill of Rights and the Fourteenth Amendment's Due Process Clause.[117] This revolution was sparked by *Mapp v. Ohio*, in which the Court held that the Fourteenth Amendment's Due Process Clause allows for the selective incorporation of various provisions from the first eight amendments and makes those provisions fully applicable to the states.[118] By using this approach, the Warren Court incorporated a host of key constitutional protections against the states in the context of criminal prosecutions.[119] As such, in 1969, the question of whether the

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reversed Palko's second-degree murder conviction and ordered that he be tried again for first-degree murder. State v. Palko, 186 A. 657, 662 (Conn. 1936). Palko claimed that a new trial would subject him to double jeopardy for the same offense, in violation of the Fourteenth Amendment. *Palko*, 302 U.S. at 321. The trial judge rejected Palko's claim and allowed the retrial to proceed. *Id.* at 321. After the conclusion of the retrial, the jury convicted Palko of first-degree murder and sentenced him to death. *Id.* at 321-22.

[114] *See Palko*, 302 U.S. at 328 (rejecting Palko's argument that Fourteenth Amendment due process embodies Fifth Amendment protections). After reviewing prior cases, the Court held that the rights encompassed by due process of law—as applicable against the states—were those "implicit in the concept of ordered liberty." *Id.* at 325. Pursuant to that analysis, the Court reasoned that permitting the government to appeal perceived errors of law would not subject a defendant to "a hardship so acute and shocking that our polity will not endure it." *Id.* at 328. The Court further reasoned that allowing the government to appeal those potential errors of law would not "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Id.* at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

[115] *See* Brock v. North Carolina, 344 U.S. 424, 426-27 (1953) (rejecting argument that defendant being presented for trial before second jury violates due process).

[116] *Id.* at 427-28 (finding that process of presenting defendant to new jury for retrial "does not deny the fundamental essentials of a trial . . . .").

[117] *See* Rudstein, *supra* note 64, at 238-39 (introducing jurisprudential shift); *see also* Corinna Barret Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1362-65 (2004) (summarizing Warren Court's reputation for expanding criminal procedure rights through incorporation).

[118] *See* 367 U.S. 643, 655-57 (1961) (incorporating Fourth Amendment's exclusionary rule against states).

[119] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating Sixth Amendment's right to jury trial); Washington v. Texas, 388 U.S. 14, 19 (1967) (incorporating Sixth Amendment's right to compulsory process for obtaining witnesses); Klopfer v. North Carolina,

Fourteenth Amendment's Due Process Clause applied the Fifth Amendment's Double Jeopardy Clause to the states was ripe for renewed examination, and was answered affirmatively in *Benton v. Maryland*.[120] Writing for the majority, Justice Marshall noted that "[i]n an increasing number of cases, the Court 'ha[d] rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .'"[121] The majority opinion continued by referencing the extensive incorporation of criminal due process rights earlier in the decade:

> Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." *Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," the same constitutional standards apply against both the State and Federal Governments*.[122]

In concluding, Justice Marshall wrote eloquently about how the Fifth Amendment's protection against double jeopardy "represents a fundamental ideal in our constitutional heritage."[123]

F. Modern American Jurisprudence: Emergence Of The Exception

While the Exception has been most commonly invoked post-*Benton*, its theoretical origins have much older roots.[124] Indeed, the notion of the states retaining at least a modicum of their own sovereignty is a prin-

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386 U.S. 213, 223 (1967) (incorporating Sixth Amendment's right to speedy trial); Pointer v. Texas, 380 U.S. 400, 403 (1965) (incorporating Sixth Amendment's right to confront witnesses); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating Fifth Amendment's privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963) (incorporating Sixth Amendment's right to counsel); Robinson v. California, 370 U.S. 660, 667 (1962) (incorporating Eighth Amendment's protection against cruel and unusual punishment).

[120] *See* 395 U.S. 784, 787 (1969) (finding Double Jeopardy Clause applicable to states through Fourteenth Amendment).

[121] *Id.* at 794 (quoting *Malloy*, 378 U.S. at 10-11) (noting Warren-era shift in Court's approach to determining fundamental nature of Bill of Rights guarantees).

[122] *Id.* at 795 (emphasis added) (quoting *Duncan*, 391 U.S. at 149) (recognizing "the inevitab[ility]" of finding protections against double jeopardy "fundamental to American scheme of justice").

[123] *See id.* at 794 (overruling Palko v. Connecticut, 302 U.S. 319, 329 (1937)).

[124] *See* Dawson, *supra* note 8, at 289-95 (summarizing history of dual sovereignty).

ciple at the heart of the United States' system of federalism.[125] Unhelpfully, both Federalist writings and the Constitution itself left open the question of laws concerning duplication, or situations in which both the federal and state governments enact identical laws.[126] Addressing this problem therefore fell to the courts, and in 1820 the Supreme Court adopted a doctrine whereby anytime the federal government enacted legislation directed at the same subject as a state law, the federal law would supersede the state enactment.[127] Similar views were espoused nearly thirty years later, when Justice McLean declared that "[a] concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action [and it] involves a moral and physical impossibility."[128] At roughly the same time, though, states were actively pushing the notion that "since they had jurisdiction over offenses committed within their boundaries, they could not be deprived of [such jurisdiction] by the mere enactment of a federal statute on the same subject."[129] The states were rewarded for their efforts, as the Supreme Court quickly became involved and endorsed the dual sovereignty theory being advanced.[130] The

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[125] *See* THE FEDERALIST NO. 32 at 169 (Alexander Hamilton) (addressing anti-Federalist concerns regarding consolidation of states into United States).

> An entire consolidation of the States into one complete national sovereignty, would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, *the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States*.

Id. (emphasis added); *see also* U.S. CONST. amend. X (reserving to states "powers not delegated to the United States by the Constitution, nor prohibited by it to the states").

[126] *See* Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306, 309 (1963) (introducing theory of concurrent jurisdiction and problems associated therewith).

[127] *See* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 21-22 (1820) (holding that states cannot enter upon same ground and punish for same transgressions as Congress).

[128] *See* Smith v. Turner ("The Passenger Cases"), 48 U.S. (7 How.) 283, 399 (1849) (reaffirming principles regarding federal laws nullifying state laws).

[129] *See* Harrison, *supra* note 126, at 311 (introducing origins of claims to dual sovereignty).

[130] *See, e.g.*, Moore v. Illinois, 55 U.S. (14 How.) 13, 19-21 (1852) (emphasis added) (rejecting defendant's argument that punishment under Illinois law was improper due to supersession by federal law because "[*a*]n *offence . . . means the transgression of a law*"); United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850) (emphasis added) (" [T]he *same act* might, as to its character and tendencies, and the consequences it involved, constitute an *offence* against both the State and Federal governments, and might draw to its commission the *penalties denounced by either* . . . ."); Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847) (emphasis added) ("[O]ffences [sic] falling within the competency of *different authorities* to restrain or punish them . . . [are] subjected to those consequences which those authorities might ordain and affix to their perpetration.")

jurisprudential reasoning that emerged in this era is best encapsulated in a decision from 1852.[131]

Thus, the early seeds of dual sovereignty were firmly planted, and the Supreme Court— some seventy years later—was comfortable invoking the Exception to permit federal prosecution following a state prosecution and conviction for the same underlying action.[132] Relying on scores of prior cases, in 1922 the *Lanza* Court averred that "[i]t 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*."[133] The Court reaffirmed these principles in two mid-twentieth century cases notably decided on the same day.[134]

IV. ANALYSIS

The *Gamble* decision—as it represents a major endorsement of the continued existence of the Exception—is and will remain wrongly decided unless it is overturned.[135] Under that pretext, the following sections will offer compelling reasons to, finally, eliminate the Exception.

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[131] *See Moore*, 55 U.S. (14 How.) at 20 (summarizing notion of dual sovereignty).

> The same act may be an offence or transgression of the laws of both [a state and the United States . . . .] 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 offence; *but only that by one act he has committed two offences, for each of which he is justly punishable*.

Id. (emphasis added).

[132] *See* United States v. Lanza, 260 U.S. 377, 382 (1922) (finding that defendants committed two distinct, sovereign-specific offenses through same underlying act).

[133] *See id.* at 382-84 (cataloguing numerous decisions affirming dual-sovereignty principles) (emphasis added); *see also* Southern Ry. Co. v. Railroad Comm'n, 236 U.S. 439, 445 (1915) (noting that "punishment by one [sovereign] does not prevent punishment by the other.")

[134] *See* Abbate v. United States, 359 U.S. 187, 193-96 (1959) (holding federal prosecution following state conviction does not violate due process of law); *see also* Bartkus v. Illinois, 359 U.S. 121, 138-39 (1959) (holding state prosecution following federal acquittal does not violate due process of law).

[135] *See* Robert Barnes, *In Ruling with Implications for Trump's Pardon Power, Supreme Court Continues to Allow State and Federal Prosecutions for Same Offense*, WASH. POST (June 17, 2019, 4:48 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-reaffirms-precedent-that-allows-state-and-federal-prosecutions-for-the-same-offense/2019/06/17/aed18054-9106-11e9-b570-6416efdc0803_story.html (noting Exception "exposes defendants to the potential harassment, trauma, expense and sometimes extra punishment the [D]ouble [J]eopardy [C]lause was designed to prevent").

A. The Exception Undermines Popular Sovereignty

In the United States, there has long existed the notion that "[t]he *power of the people* lies at the foundation of American government."[136] Similar notions were also espoused by the Federalist authors, Alexander Hamilton and James Madison, and foreign observers.[137] More modern endorsements of this line of thinking exist as well.[138] The continued existence of the Exception is an affront to the power granted to the federal and state governments by the people, who, when they "assigned different aspects of their sovereign power . . . sought not to *multiply* governmental power but to *limit* it."[139] Additionally, the Exception makes a mockery of the people's popular sovereignty that undergirds the Double Jeopardy Clause and the protections it purports to afford.[140] Since the exercise of the people's ultimate sovereignty is to be final and, crucially, unappealable, the permission that the Exception grants the states and the federal government to successively prosecute an individual for the same underlying transgression undoubtedly represents an intrusion upon and disregard for that popular sovereignty.[141]

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[136] Dawson, *supra* note 8, at 282 (emphasis added) (internal citations omitted) (analyzing principle of popular sovereignty); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (supporting notion of popular sovereignty). Such beliefs were manifest in the text of the Declaration of Independence, which states that "Governments are instituted among Men, deriving their just powers *from the consent of the governed*[.]" THE DECLARATION OF INDEPENDENCE para. 2 (emphasis added); McCulloch v. Maryland, 17 U.S. 316, 404-05 (1819). Additionally, in 1819, Chief Justice John Marshall wrote that "[t]he government of the Union . . . is, emphatically and truly, a government *of the people*. In form, and in substance, it emanates *from them*. Its powers are granted *by them* . . . ." McCulloch, 17 U.S. at 404-05 (emphasis added).

[137] *See, e.g.*, THE FEDERALIST NO. 22 (Alexander Hamilton) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."); THE FEDERALIST No. 39 (James Madison) (defining a constitutionally-created republic as a government "which derives all its power directly or indirectly from the great body of the people"); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55 (Phillips Bradley ed. 1945) ("Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin.")

[138] *See* Arizona State Leg. v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 820 (2015) (explaining that people possess "ultimate sovereignty"); *see also* Powell v. McCormack, 395 U.S. 486, 540-41 (1969) (quoting 2 DEBATES ON THE FEDERAL CONSTITUTION 257 (J. Elliot ed. 1876)) ("[T]he true principle of a republic is, that the people should choose whom they please to govern them . . . .")

[139] *See* Gamble v. United States, 139 S. Ct. 1960, 2000 (2019) (Gorsuch, J., dissenting) (accusing majority of invoking federalism to threaten individual liberty).

[140] *See* Dawson, *supra* note 8, at 299 (calling Exception "unconstitutional").

[141] *See id.* at 284 (discussing Exception's denigration of popular sovereignty); *see also* JAMES WILSON, 1 COLLECTED WORKS OF JAMES WILSON 201(Liberty Fund, Kermit L. Hall & Mark David Hall eds., 2007) (cataloguing remarks made at Constitutional Convention).

Further, the logic underlying one of the main defenses of the exception—namely, that popular sovereignty is not denigrated by a second prosecution because the latter prosecution is before a different sovereign—crumbles under the slightest scrutiny.[142] At its core, this defense posits that, while the American people are indeed sovereign, they are also the representatives of two sovereigns simultaneously—their state government and the federal government.[143] In the context of successive prosecutions permitted by the Exception, the proponents of this defense assert that juries sitting in a state court "will represent the people of the state while the very same jurors empaneled across the street in a federal court house will represent the people of the United States."[144] What this defense suggests, then, is the rather implausible notion that somehow, "a collection of citizens empaneled in a state courthouse is different in kind from a collection of citizens empaneled across the street in a federal courthouse."[145] Such a notion is highly incompatible with the concept of popular sovereignty, under which "the federal and state governments *are but two expressions of a single and sovereign people*."[146] Proponents of the Exception–especially those who defend it against the accusation that it usurps popular sovereignty–miss the crucial point that the Constitution itself provides protection and even enhancement of the people's popular sovereignty.[147]

> Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, *that sovereignty resides in the people*; *they have not parted with it* . . . [T]he proposed system sets out with a declaration that its existence *depends upon the supreme authority of the people alone*.

Id. (emphasis added).

142 *See* Dawson, *supra* note 8, at 301 (responding to defense of Exception).

143 *See id.* (explaining defense).

144 *See id.* at 301-02 (summarizing logic underlying Exception defense).

145 *See id.* at 301 (questioning substance of Exception defense).

146 Gamble v. United States, 139 S. Ct. 1960, 1999 (2019) (Gorsuch, J., dissenting) (emphasis added) (criticizing majority's assertions regarding possession of ultimate sovereignty).

147 *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .") "[T]he accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*[.]" U.S. CONST. amend. VI. In practice, this defense proposes that in cases like Gamble's, the jurors in his state trial were representing and protecting exclusively Alabama's interests, while the jurors in his federal trial were representing and protecting exclusively the federal government's interests. *See Gamble*, 139 S. Ct. at 1998 (Gorsuch, J., dissenting) (expressing skepticism that trials before different sovereigns are particularly distinct). However, such a proposition ignores the fact that jurors in both trials were drawn from the same population, across comparable areas. *Gamble*, 139 S. Ct. at 1998 (Gorsuch, J., dissenting); Dawson, *supra* note 8, at 301-02 (questioning "[d]iehard dual sovereigntists'" de-

The undermining effect that the Exception wreaks on popular sovereignty is especially pernicious when a successive prosecution is brought after an initial acquittal because one of the most direct and powerful ways in which the people exert and express their collective sovereignty is by serving on juries, where they serve as a final, unassailable check on governmental power.[148] Placement of the Double Jeopardy Clause into the greater Bill of Rights context underscores this point, insofar as three Bill of Rights Amendments are expressly concerned with juries.[149] Pursuant to each of these rights and guarantees, juries—as the people's representative—act as what one scholar memorably describes as "populist protectors."[150] The Constitution imbues the people with the power to exert their collective sovereignty with finality against the power and authority of the government, and to hold the government to extremely high standards in jury trials.[151] The Exception assaults this power, and removes the finality that should otherwise be inherent in a jury's initial acquittal, thereby usurping and weakening the people's popular sovereignty.[152] Indeed, some scholars have argued that the Exception's effect of usurping the people's nullification power alone is sufficient to find the Exception unconstitutional.[153] A subsequent prosecution by a separate government—following an acquittal in a prior prosecution by another government—evinces disrespect

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fense of Exception). This defense of Exception is also highly theoretical, and offers little solace to those concerned with practical considerations, including how a juror goes about expressly representing and protecting the interests of one sovereign to the exclusion of another. Dawson, *supra* note 8, at 301-02.

148 *See* Robert Matz, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 374 (1997) (discussing juror ability to nullify governmental power and will); *see also* De Tocqueville, *supra* note 137, at 282-83 (highlighting how juries amplify people's sovereignty).

149 *See* U.S. CONST. amend. V (establishing requirement of grand jury's involvement in criminal cases); U.S. CONST. amend. VI (guaranteeing right to jury in criminal trials); U.S. CONST. amend. VII (providing for right to jury in certain civil cases).

150 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183-85 (1991) (discussing important role juries play).

151 *See id.* (underlining crucial role juries play in checking governmental power).

152 *See* Matz, *supra* note 148, at 374 n.127 (summarizing arguments that Exception is unconstitutional due to usurpation of jury nullification power); *see also* Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979) (noting that "the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty.'")

153 *See, e.g.*, Dawson, *supra* note 8, at 299 (calling Exception "unconstitutional because it denigrates the principle of popular sovereignty underlying the Double Jeopardy Clause."); Robert C. Gorman, *The Second Rodney King Trial: Justice in Jeopardy?*, 27 AKRON L. REV. 57, 72 (1994) (summarizing arguments positing unconstitutionality of Exception); Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 130 (1978) (noting that "Double Jeopardy Clause . . . allows [a] jury to exercise its constitutional function as the conscience of the community in applying the law: to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgments.")

for and disregard of perhaps the purest and most powerful expression of popular sovereignty against the government.[154]

B. The Dual Sovereigns Exception Is Patently Unfair To Criminal Defendants

The protections guaranteed by the Bill of Rights, including the Fifth Amendment's Double Jeopardy Clause, were enshrined in the Constitution to "further guard[] . . . public liberty & individual rights."[155] The Bill of Rights is premised on protecting the liberty interests of the people against governmental overreach and intrusion, and yet one of the most notable protections contained therein—the guarantee against double jeopardy—is consistently undermined by the Exception and its "failure to consider the liberty interests of the accused."[156] This undermining is rendered particularly offensive given the respect the Supreme Court routinely affords other Bill of Rights guarantees.[157]

The Court's commitment to its understanding of federalism blatantly ignores the clear concern expressed in the Bill of Rights about placing individuals in a vulnerable position against a powerful government.[158] When the people sacrificed parts of their inherent sovereign power as citizens of states to the federal government, they did so with the belief that "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism [would] protect[] the liberty of the individual from arbitrary power."[159] In practice, though, the preservation of the Ex-

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[154] *See* Dawson, *supra* note 8, at 299 ("Having invited the popular will to check its authority, government may not simply disregard it and try again.")

[155] *See* 25 LETTERS OF DELEGATES TO CONGRESS: MARCH 1, 1788 - JULY 25, 1789 427 (Paul H. Smith ed., 1988) (reprinting Oct. 1788 letter from Madison to Jefferson regarding Madison's views on Bill of Rights); *See* 1 ANNALS OF CONG. 448-60 (1789) (quoting Madison's speech introducing Bill of Rights). Indeed, at its inception the Bill of Rights was recognized as designed to "limit and qualify the powers of Government." *See* 1 ANNALS OF CONG. at 448-60.

[156] *See* Gorman, *supra* note 153, at 72 (noting common critique of Exception).

[157] *See id.* at 73-74 (discussing generally broad interpretation of individual rights and liberties); *see also* Gouled v. United States, 255 U.S. 298, 304 (1921) ("It has been repeatedly decided that [the Bill of Rights] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights.")

[158] *See* Gorman, *supra* note 153, at 72 (criticizing Court's "adher[ence] to its formalistic theory [of] federalism" in *Heath*); *see also* Heath v. Alabama, 474 U.S. 82, 92 (1985) (discussing use of balancing test). In fact, the *Heath* Court explicitly rejected calls to adopt a balancing test under which the liberty interests of the accused would be weighed against the government's interest in obtaining justice in a second prosecution. *Heath*, 474 U.S. at 92.

[159] *See* Bond v. United States, 564 U.S. 211, 222 (2011) (explaining that unconstrained governmental power threatens liberty of people); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1774, 653-54 (1833) ("The great object of a trial by

ception permits the Court to invoke federalism in order to brush aside individual liberty interests and, instead, threaten those interests by empowering distinct governments to achieve in tandem what each alone could not do alone.[160]

The Exception—such that it permits governments to subject criminal defendants to multiple judicial proceedings—is antithetical to the Court's own recognition that being charged with and prosecuted for criminal activity exposes a defendant to "embarrassment, expense and ordeal and compel[s] him to live in a continuing state of anxiety and insecurity, as well as enhance[s] the possibility that even though innocent he may be found guilty."[161] The successive prosecutions the Exception permits exacerbate these effects and, most perniciously, increase the likelihood that an innocent defendant may be wrongfully convicted.[162] At its core, the Double Jeopardy Clause is designed to prohibit governments from working together to repeatedly harass a criminal defendant for a single act or transaction; however, this is a reality that the Exception allows and implicitly encourages in the name of justice.[163] The continued ability that state and federal governments have to successively prosecute an individual for the same underlying act or transaction gives both "an illegitimate dress rehearsal of its case and a cheat peek at the defense."[164] Accordingly, the Exception is not defensible pursuant to an argument that a second prosecu-

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jury in criminal cases, is to guard against a spirit of oppression and tyranny on the part of the rulers . . . .")

[160] *See* Mark E. Lewis, *The Conflict Between Dual Sovereignty and Double Jeopardy*, 38 ALA. L. REV. 153, 159 (1986) (reacting to *Heath* decision). Lewis opined that the *Heath* Court "[r]ather than seeing federalism as a means to protect individual interests and to provide insurance against an arbitrary government . . . viewed federalism as an end itself to be achieved at the expense of individual rights." *Id.*

[161] *See* Green v. United States, 355 U.S. 184, 187-88 (1957) (recognizing hardships inherent to being criminally prosecuted).

[162] *See* Brief of Constitutional Accountability Center, CATO Institute, American Civil Liberties Union, and American Civil Liberties Union of Alabama as *Amici Curiae* in Support of Petitioner at 4, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) [hereinafter *Amici Curiae*] (articulating how Exception undermines Double Jeopardy Clause's ability to safeguard individual liberty); *see also* Yeager v. United States, 557 U.S. 110, 117-18 (2009) (quoting *Green*, 355 U.S. at 187-88) (describing protection against double jeopardy as designed to shield individuals from "continuing state of anxiety and insecurity" that would flow from government, "with all its resources and power," being able to "make repeated attempts to convict an individual for an alleged offense").

[163] *See Amici Curiae*, *supra* note 162, at 22 (noting possibility of successive prosecutions being "especially acute in light of the increased federal-state cooperation in fighting crime").

[164] *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 9-10 (1995) (praising Justice Black's *Bartkus* and *Abbate* dissents for refusing to allow such situations); *see also* Ashe v. Swenson, 397 U.S. 436, 447 (1970) (averring that Double Jeopardy Clause theoretically protects against government "treat[ing] the first trial as no more than a dry run for the second prosecution").

tion, like the previous one, would be tried before a jury and thus subject to an instrument of popular control.[165] In fact, this line of arguing is flawed on two counts, for not only does it disregard the requirement that an exercise of popular sovereignty be final and unassailable, but it also critically overlooks how a second trial heavily favors the prosecution.[166]

One of the key protections that is meant to mitigate against such unfairness is the prosecution exception promulgated by the *Bartkus* Court.[167] In reality, however, that exception is particularly narrow, if not a sham in its own right.[168] Perhaps most alarming is the fact that many of these claims are rejected and dismissed even in circumstances strongly indicative of the presence of a sham prosecution, such as a notable case where a federal prosecutor was listed as a state's witness and an FBI agent testified for the state prosecution.[169] Incredibly, a sham prosecution claim was rejected, even where a state initiated criminal proceedings against a defendant at the behest of federal authorities and the same federal authorities

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[165] *See* Dawson, *supra* note 8, at 300 (articulating flaws in such an argument).

[166] *See* Gamble v. United States, 139 S. Ct. 1960, 1999 (2019) (Gorsuch, J., dissenting) (questioning draconian nature of Exception with respect to Gamble's case).

> Imagine trying to explain the Court's [Exception] 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. But a federal prosecutor *can* send you to prison again for exactly the same thing. What's more, the 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 same offence." Really?

Id. (quoting U.S. CONST. amend. V).

[167] *See supra* text accompanying note 6 (summarizing 'sham prosecution' loophole to Exception).

[168] *See* Dawson, *supra* note 8, at 296 (criticizing ineffectiveness of sham prosecution exception). Claims of impermissible exposure to double jeopardy predicated on the sham prosecution exception survive appeal in only the rarest of circumstances; however, more often than not, these claims are dismissed outright. *Id.* nn.110, 113, 116 (listing examples of rejections of sham prosecution claims); *see also* United States v. Bernhardt, 831 F.2d 181, 182 (9th Cir. 1987) (rejecting idea that mere "cooperation between prosecutorial sovereignties" is automatically sufficient to invoke sham prosecution exception); Bartkus v. Illinois, 359 U.S. 121, 164-66 (1959) (Brennan, J., dissenting) (questioning majority's refusal to remand on sham prosecution question in face of extensive federal-state cooperation).

[169] *See* United States v. Aleman, 609 F.2d 298, 309 (7th Cir. 1979) (deeming "[l]aw enforcement cooperation between state and federal authorities . . . a welcome invitation."); *see also Bernhardt*, 831 F.2d at 183 (escribing another instance of sham prosecution claim). In another case, a defendant's sham prosecution claim was rejected despite the fact that a deputy state attorney general was deputized to the Department of Justice as a Special Assistant U.S. Attorney and granted responsibility for the federal prosecution while still collecting his state salary. *Bernhardt*, 831 F.2d at 183.

sat with the state prosecution at trial, testified as witnesses, collected evidence for the state's case, postponed sentencing a prosecution witness until after he testified for the state, helped in witness preparation, and appointed the state prosecutor to the position of Special Assistant to the U.S. Attorney for the subsequent federal prosecution.[170] The flimsy protection that the sham prosecution exception appears to offer criminal defendants is rendered even weaker because its very existence is often doubted.[171]

Finally, the continued existence of the Exception and the ability it gives to the state and federal governments to try their cases one after the other, often gives rise to other violations of criminal defendants' constitutional rights.[172] Such violations are particularly likely where a federal prosecution follows a state prosecution, because a lengthy delay in the initiation of the federal prosecution implicates a defendant's right to a speedy trial under the Sixth Amendment.[173] These delays also implicate protections extended to defendants under the Speedy Trial Act,[174] and the discretionary power granted to courts under the Federal Rules of Criminal Procedure in the event of undue delays.[175] Claims made by defendants pursuant to these interests, however, are all too frequently rejected and dismissed.[176]

V. CONCLUSION

The Double Jeopardy Clause of the Fifth Amendment exists to protect Americans against governmental abuse of its prosecutorial power and, in theory, shields criminal defendants from the ordeal of repeated judicial proceedings. The Supreme Court, however, in *Gamble v. United States*, unwisely extended the life of the Exception, under which the protections offered in the Double Jeopardy Clause are little more than illusory. Instead of safeguarding the rights of individuals against the power and authority of

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[170] *See* United States v. Figueroa-Soto, 938 F.2d 1015, 1018-20 (9th Cir. 1991) (finding that "close collaboration" does not "amount[] to one government being the other's 'tool' or providing a 'sham' or 'cover.'")

[171] *See* United States v. Patterson, 809 F.2d 244, 247 n.2 (5th Cir. 1987) (questioning whether sham prosecution exception is valid rebuttal to Exception).

[172] *See* Matz, *supra* note 148, at 375 (analyzing secondary effects of Exception).

[173] *See* U.S. CONST. amend. VI (providing that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .")

[174] *See* 18 U.S.C. § 3161 (2008) (setting time limits on various phases of criminal prosecutions).

[175] *See* FED. R. CRIM. P. 48(b) (allowing federal courts to "dismiss an indictment, information, or complaint" due to unnecessary delay in "presenting a charge to a grand jury; filing an information against a defendant; or bringing a defendant to trial").

[176] *See* Barker v. Wingo, 407 U.S. 514, 529-30 (1972) (establishing difficulty of succeeding on right to speedy trial violation claim).

government, the Double Jeopardy Clause—as currently qualified by the Exception—unforgivably operates as both a vehicle for state oppression and a violation of constitutionally enshrined rights.

The continued existence of this Exception evinces a draconian misreading of: (1) centuries of history, (2) the centrality of individual rights and liberties to the Bill of Rights, and (3) founding-era conceptions of federalism. Moreover, the Exception perpetuates a criminal justice system that degrades and disregards the rights and dignity of criminal defendants. The Exception is an affront to both the meaning and spirit of the Double Jeopardy Clause and should unquestionably be overturned at the next time of asking.

Ross Ballantyne