

GAMBLE V. UNITED STATES: A COMMENTARY

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INTRODUCTION

The Fifth Amendment of the United States Constitution promises that “[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.”¹ Long recognized as a fundamental right in Western legal thought, this bar on subsequent prosecutions for the same conduct was brought to the United States through English common law, and is enshrined today in various forms not only in the Constitution, “but in the jurisprudence or constitutions of every [U.S.] state, as well as most foreign nations.”² This right is premised on the idea that the government should not be able to make repeated attempts to convict an individual, as recurrent prosecutions “subject[] him to embarrassment, expense and ordeal and compel[] him to live in a continuing state of anxiety and insecurity, as well as enhance[] the possibility that even though innocent he may be found guilty.”³

Nevertheless, this lofty constitutional promise rings hollow for those defendants who are prosecuted by both state and federal authorities for the same offense. Under the judicially created dual-sovereignty exception,⁴ a defendant may be prosecuted by state and federal governments for the same conduct, due to the fact that the state and federal government constitute two separate sovereignties.⁵ The doctrine is grounded in the idea that each sovereign derives its power from independent sources—the federal government from the

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1. U.S. CONST. amend. V.
2. *Bartkus v. Illinois*, 359 U.S. 121, 153–54 (1959) (Black, J., dissenting).
3. *Green v. United States*, 355 U.S. 184, 187–88 (1957).
4. This doctrine is often referred to as either the “separate-sovereigns” or “dual-sovereignty” exception or doctrine. This commentary will use both terms interchangeably, as most literature on the topic does; both refer to the concept that state and federal governments are separate sovereigns and therefore, may each punish a defendant that has violated both state and federal laws with the same conduct without violating the Double Jeopardy Clause.
5. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1870 (2016).

Constitution and the states from their inherent police power, preserved to them by the Tenth Amendment—and thus, each sovereign may determine what constitutes an offense against its peace and dignity in an exercise of its own sovereignty.⁶ Under this exception, defendants, by a single act, may violate the laws of both sovereigns and therefore be liable to prosecutions by both governments for the same conduct without their Fifth Amendment rights being infringed.⁷

This Commentary will proceed by examining the precedents behind the current separate-sovereigns doctrine and analyzing the anachronistic results they have produced. It concludes by arguing that although the Court will most likely not overrule the dual-sovereignty exception to the Double Jeopardy Clause, the Court should examine how the legal and factual underpinnings of the doctrine have changed and, ultimately, choose to overrule the exception.

I. FACTUAL & PROCEDURAL BACKGROUND

In 2008, Terance Martez Gamble was convicted of second-degree robbery in Mobile County, Alabama.⁸ Second-degree robbery is classified as a felony offense in Alabama and thus, following his conviction, Gamble was barred by both state and federal law from possessing a firearm.⁹ In 2015, Gamble was driving in Mobile when he was pulled over by a police officer for a faulty headlight.¹⁰ The officer, upon smelling marijuana, searched Gamble's vehicle and unearthed two small bags of marijuana, a digital scale, and a 9-mm handgun.¹¹ The state of Alabama prosecuted Gamble for possessing marijuana and for being a felon in possession of a firearm under state law; he was convicted and sentenced to one year in state prison.¹²

While the state prosecution was pending, the federal government charged Gamble for the same offense under federal law—being a felon in possession of a firearm—arising out of “the same incident of November 29, 2015 that gave rise to his state court conviction.”¹³

6. *United States v. Lanza*, 260 U.S. 377, 382 (1922).

7. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985).

8. Brief for Petitioner at 1, *Gamble v. United States*, No. 17-646 (U.S. Sept. 4, 2018) [hereinafter Brief for Petitioner].

9. *Id.* at 1–2.

10. *Id.* at 2.

11. *Id.*

12. *Id.*

13. *Id.* (internal quotation marks and citation omitted).

Gamble moved to dismiss his federal indictment on the grounds that it violated the Fifth Amendment prohibition against double jeopardy, but the District Court denied his motion, citing the separate-sovereigns exception to the Double Jeopardy Clause.¹⁴ Gamble then entered a conditional guilty plea, “preserving his right to appeal the court’s denial of his double jeopardy claim,” and was sentenced to forty-six months in federal prison and three years of supervised release.¹⁵

Gamble appealed the district court’s denial of his double jeopardy claim to the Eleventh Circuit Court of Appeals, which issued a *per curiam* opinion, affirming the decision below based on the separate-sovereigns exception.¹⁶ Gamble then filed a petition for a writ of certiorari with the Supreme Court, which the Court granted on June 28, 2018.¹⁷

II. LEGAL BACKGROUND

A. *Fox v. Ohio*

Often cited as the first Supreme Court case that addressed the validity of subsequent prosecutions by state and federal governments,¹⁸ *Fox v. Ohio* tentatively laid the basis for the dual-sovereignty doctrine the Court would later introduce.¹⁹ In *Fox*, the petitioner challenged the constitutionality of an Ohio statute that criminalized passing counterfeited currency,²⁰ asserting that since Congress had imposed federal criminal sanctions on this conduct, a failure to find that the Supremacy Clause precluded the states from punishing the same conduct would subject a defendant to double punishment.²¹ The Court held that the Double Jeopardy Clause did not apply to the states, and thus, even if a defendant could possibly be subject to double punishment, the federal and state governments

14. *Id.* at 2–3.

15. *Id.* at 3.

16. *Id.*

17. *Id.*

18. *See, e.g.,* *Bartkus v. Illinois*, 359 U.S. 121, 131 (1959).

19. *See Fox v. Ohio*, 46 U.S. 410, 434 (1847) (“The punishment of a cheat or a misdemeanour practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to image an interference with those duties and functions which would be regular or justifiable.”).

20. *Id.* at 432–433.

21. *Id.* at 434.

retained the power to impose criminal sanctions on the same conduct.²²

B. *United States v. Lanza*

The Court directly confronted for the first time the question of whether a prior state conviction barred subsequent federal prosecution for the same conduct under the Double Jeopardy Clause²³ in *United States v. Lanza*.²⁴ Respondents had been convicted in state court of the state crime of manufacturing, transporting, and possessing liquor, and subsequently were indicted in federal court for the same act under federal law; they challenged the indictment on the grounds that it violated the Double Jeopardy Clause.²⁵ The Court held double jeopardy did not apply because the state and federal governments were two separate sovereigns, stating: “Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.”²⁶ Because conduct may be denounced by both state and federal governments as “an offense against the peace and dignity of both,” it may be punished by each independently without violating the Double Jeopardy Clause. Additionally, the Court noted that the Fifth Amendment only applied to the federal government at the time.²⁷ Therefore, a federal prosecution following a state conviction for the same conduct did not violate double jeopardy.²⁸

C. *Abbate v. United States and Bartkus v. Illinois*

The Court decided two double jeopardy cases on the same day in 1959, albeit on different grounds.²⁹ In *Abbate v. United States*, petitioners had been convicted under Illinois state law of conspiring to injure or destroy the property of another and were subsequently convicted for the same act under federal law in the United States District Court for the Southern District of Mississippi.³⁰ The

22. *Id.* at 434–35.

23. *Bartkus*, 359 U.S. at 129 (noting

24. *United States v. Lanza*, 260 U.S. 377, 378–80 (1922).

25. *Id.* at 378–79.

26. *Id.* at 382.

27. *Id.*

28. *Id.*

29. *Compare* *Abbate v. United States*, 359 U.S. 187, 195 (applying the dual-sovereignty doctrine), *with* *Bartkus v. Illinois*, 359 U.S. 121, 124 (applying Fourteenth Amendment due process analysis).

30. *Abbate v. United States*, 359 U.S. 187, 188–89 (1959).

petitioners challenged their federal conviction, claiming that they had been twice placed in jeopardy contrary to the Fifth Amendment,³¹ and asked the Court to overrule *United States v. Lanza*.³² The Court declined to do so, holding that “the efficiency of federal law enforcement [would] suffer if the Double Jeopardy Clause prevent[ed] successive state and federal prosecutions.”³³

In *Bartkus v. Illinois*, the petitioner had been acquitted in federal court for the robbery of a federally insured bank and was subsequently prosecuted, convicted, and sentenced to life imprisonment in Illinois state court for the same crime and using substantially the same evidence.³⁴ Due to the fact that the Fifth Amendment had not yet been incorporated against the states,³⁵ petitioner challenged his state conviction under the Fourteenth Amendment, asserting that his prior federal acquittal barred subsequent state prosecution for the same act under the Due Process Clause.³⁶ The Court stated that holding due process required such a bar would be “in derogation of our federal system to displace the reserved power of States over state offenses.”³⁷ Citing both federal and state precedents as “irrefutable evidence that state and federal courts have . . . refused to bar a second trial even though there had been a prior trial by another government for a similar offense,”³⁸ the Court held that “it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for [it] now to rule that due process compels such a bar.”³⁹

D. *Benton v. Maryland*

Ten years later, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment was incorporated against the states through the Due Process Clause of the Fourteenth Amendment in *Benton v. Maryland*.⁴⁰ Overruling *Palko v. Connecticut*,⁴¹ the Court stated that the Fifth Amendment’s prohibition on being “subject for

31. *Id.* at 189.

32. *Id.* at 195.

33. *Id.*

34. *Bartkus v. Illinois*, 359 U.S. 121, 121–22 (1959).

35. *Id.* at 127.

36. *Id.*

37. *Id.* at 137.

38. *Id.* at 136.

39. *Id.*

40. *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

41. *Id.* at 794.

the same offense to be twice placed in jeopardy of life or limb”⁴² was “fundamental to the American scheme of justice,”⁴³ and therefore, applied to the states through the Fourteenth Amendment.⁴⁴

E. *Puerto Rico v. Sánchez Valle*

In *Puerto Rico v. Sánchez Valle*, the respondents were indicted by prosecutors for illegally selling firearms in violation of the Puerto Rico Arms Act of 2000.⁴⁵ While those charges were pending, a federal grand jury indicted respondents for the same conduct in violation of federal gun trafficking laws; both respondents pled guilty to the federal charges, but moved to dismiss the pending Commonwealth charges on the grounds that they violated double jeopardy.⁴⁶ The Supreme Court of Puerto Rico held that the Commonwealth gun sale prosecutions violated double jeopardy, as the Commonwealth did not qualify as a separate sovereign under the exception,⁴⁷ and the Supreme Court of the United States agreed.⁴⁸

To determine if an entity qualifies as a separate sovereign under the doctrine, the Court examines “whether the prosecutorial powers of the two jurisdictions have independent origins — or, said conversely, whether those powers derive from the same ‘ultimate source.’”⁴⁹ Therefore, “[i]f an entity’s authority to enact and enforce criminal law ultimately comes from Congress, then it cannot follow a federal prosecution with its own.”⁵⁰ Under this analysis, because “Congress conferred the authority to create the Puerto Rico Constitution . . . mak[ing] Congress the original source of power for Puerto Rico’s prosecutors — as it is for the Federal Government’s,”⁵¹ the Court held that Puerto Rico was not a separate sovereign for purposes of the dual-sovereignty doctrine and therefore, double jeopardy did apply.⁵²

42. *Id.* at 793 (quoting U.S. CONST. amend. V).

43. *Id.* at 795 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

44. *Id.* at 794.

45. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1869 (2016).

46. *Id.*

47. *Id.*

48. *Id.* at 1870.

49. *Id.* at 1867 (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

50. *Id.* at 1876.

51. *Id.* at 1875–76.

52. *Id.* at 1876.

HOLDING

The Eleventh Circuit issued a *per curiam* opinion, upholding the district court’s ruling that Gamble’s federal prosecution did not violate the Double Jeopardy Clause of the Fifth Amendment.⁵³ Because the state of Alabama and the federal government are separate sovereigns, the defendant’s prosecution in both state and federal court for the same conduct—being a felon in possession of a firearm—did not violate the Double Jeopardy Clause under the separate-sovereigns exception.⁵⁴ As both sovereigns had statutes banning convicted felons from possessing firearms, the defendant’s conduct constituted a violation of each law, and thus, the subsequent prosecutions were not barred under the Double Jeopardy Clause.⁵⁵ The Court stated, “unless and until the Supreme Court overturns *Abbate*, the double jeopardy claim must fail based on the dual sovereignty doctrine.”⁵⁶

ARGUMENTS

A. Petitioner’s Arguments

Petitioner’s argument centers on two main premises: (1) the separate-sovereigns exception is unconstitutional and therefore, (2) *stare decisis* should not prevent the Court from vindicating the fundamental constitutional right not to be held twice in jeopardy for the same offense.⁵⁷

Regarding the constitutionality of the dual-sovereignty doctrine, Petitioner argues that the doctrine contravenes the text, original meaning, and purpose of the Fifth Amendment.⁵⁸ Petitioner first argues that the exception violates the plain text of the Double Jeopardy Clause.⁵⁹ The clause provides, in unqualified terms, that no person shall “for the same offense to be twice put in jeopardy.”⁶⁰ Petitioner argues that the text of the clause does not contemplate any exceptions and that the legislative history of the Double Jeopardy

53. *United States v. Gamble*, 694 F. App’x 750, 751 (11th Cir. 2017).

54. *Id.*

55. *Id.*

56. *Id.* at 750–751.

57. Brief for Petitioner, *supra* note 8, at 4–9.

58. *Id.* at 4.

59. *Id.* at 9–10.

60. *Id.* at 9 (quoting U.S. CONST. amend. V).

Clause supports this.⁶¹ The original draft of the clause “prohibited more than one trial or one punishment for the same offence,”⁶² and a member of Congress proposed to add the language “by any law of the United States,” which “would have permitted the federal government to prosecute a defendant after a conviction in state court.”⁶³ Congress rejected this amendment and then chose the current iteration of the Double Jeopardy Clause, which Petitioner argues shows that the drafters did not intend for the clause to admit of any exceptions.⁶⁴

Next, Petitioner contends that the separate-sovereigns doctrine is in conflict with the original meaning of the Double Jeopardy Clause.⁶⁵ The Clause was modeled off the English common-law rule that barred subsequent prosecutions and thus, Petitioner argues, to understand the original scope of the Double Jeopardy Clause, the Court must look to what the English common law was understood to be in 1791.⁶⁶ “English courts repeatedly held that prosecution in a foreign country would bar a second prosecution for the same crime in England,”⁶⁷ if the first prosecution was in a court of competent jurisdiction.⁶⁸ Early American cases also reflect this understanding of the rule.⁶⁹ Based on this evidence, Petitioner argues that the dual-sovereignty exception repudiates the original understanding of the Double Jeopardy Clause.⁷⁰

Petitioner also argues that the separate-sovereigns doctrine defies the purpose of the Double Jeopardy Clause.⁷¹ The purpose of the Double Jeopardy Clause is to protect individuals from repeated attempts by the government to convict them for alleged offenses, curb governmental abuse of its prosecutorial power, and ensure fairness and finality for defendants after conviction or acquittal.⁷² Petitioner argues that the dual-sovereignty exception does not serve this purpose: subsequent prosecutions are just as offensive to the principles of fairness and finality when they are carried out by

61. *Id.* at 10.

62. *Id.* (quoting 1 Annals of Cong. 753 (1789)).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 12.

67. *Id.* at 13.

68. *Id.* at 14.

69. *Id.* at 15–16.

70. *Id.* at 11.

71. *Id.* at 27.

72. *Id.* at 27–28.

separate sovereigns as they are when achieved by the same sovereign.⁷³ Petitioner also argues that the separate sovereigns exception subverts the “liberty-preserving purpose of federalism;”⁷⁴ the goal of federalism is to ensure the rights of the people, but when used to justify the exception, it instead tramples on those rights.⁷⁵ Thus, because the dual-sovereignty doctrine stands in stark contrast to the text, original meaning, and purpose of the Double Jeopardy Clause, Petitioner argues that it should be overruled.⁷⁶

Therefore, due to the unfairness of the separate-sovereigns exception, Petitioner argues that the Court should not let *stare decisis* prevent it from overruling precedent to vindicate the constitutional right to not be held twice in jeopardy for the same offense.⁷⁷ In choosing to overrule precedent, the Supreme Court usually considers five factors⁷⁸: if the precedent had originally developed without any thorough consideration of the constitutional text, was built on jurisprudential foundation that has since eroded, was dependent on a factual background that is no longer existent, has been shown to be unworkable, and had engendered strong reliance interests that would be upset.⁷⁹ Petitioner argues that the separate-sovereigns doctrine arose out of dicta in older opinions that contradicted precedents and contained incomplete historical analysis, and thus, was wrongly adopted from the start.⁸⁰ Petitioner also argues that the doctrine was constructed around the idea that the Fifth Amendment was not incorporated against the states—an idea that has since changed and therefore has eroded the validity of the overarching doctrine, as well.⁸¹

Next, Petitioner contends that the rapid federalization of criminal law has changed the factual underpinnings of the doctrine: federal criminal law is now much larger than could have ever been foreseen when the exception was developed.⁸² Petitioner also argues that the doctrine has shown itself to be unworkable: the federal government itself has implemented the “Petite policy” to protect citizens from the

73. *Id.* at 28.

74. *Id.* at 7.

75. *Id.* at 29.

76. *Id.* at 31.

77. *Id.*

78. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992).

79. *Id.* at 31–32.

80. *Id.* at 32.

81. *Id.* at 35.

82. *Id.* at 42.

unfairness of subsequent prosecutions.⁸³ The Petite policy “precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on” the same conduct unless a substantial federal interest still exists that was not vindicated by the prior prosecution.⁸⁴ Petitioner argues that the existence of this policy demonstrates the government’s acknowledgement of the unfairness of the dual-sovereignty doctrine.⁸⁵ Petitioner also argues that no reliance interests will be upset by overruling the separate-sovereigns exception, as the doctrine is a procedural one that does not implicate how private parties have structured their affairs.⁸⁶ Therefore, according to Petitioner, the aggregation of all five factors counsels toward overruling the dual-sovereignty exception to the Double Jeopardy Clause.⁸⁷

B. Respondent’s Arguments

Respondent first argues that the separate-sovereigns doctrine is imbedded in the text of the Double Jeopardy Clause and thus, the plain text of the Fifth Amendment supports the existence of a dual-sovereignty exception.⁸⁸ Respondent contends that an “offence [sic]” under the Double Jeopardy Clause is a violation of a particular law of a particular sovereign, and therefore, “[a] single act can . . . constitute multiple ‘offence[s]’” against multiple laws of multiple sovereigns.⁸⁹ Respondent argues that the language of the Double Jeopardy Clause protects individuals from being twice put in jeopardy for the same offense and an offense does not refer to conduct, but rather to the “transgression of a law.”⁹⁰ Thus, Respondent concludes, it follows that a single action could transgress two laws (state and federal) and constitute two distinct offences that are both punishable without violating double jeopardy.⁹¹ Respondent argues that double jeopardy jurisprudence even beyond the separate-sovereigns doctrine has recognized this: in *Grady v. Corbin*, the Court attempted to switch to a conduct-based approach for double jeopardy, but quickly overruled itself three years later in *United States v. Dixon* after witnessing the

83. *Id.* at 46–47.

84. *Id.* at 47 (quoting U.S. Dep’t of Justice, Justice Manual § 9-2.031(A) (2018)).

85. *Id.* at 46–48.

86. *Id.* at 49–50.

87. *Id.* at 32.

88. Brief for Respondent at 9, *Gamble v. United States*, No. 17-646 (U.S. Oct. 25, 2018).

89. *Id.*

90. *Id.* at 10 (quoting *Heath v. Alabama*, 474 U.S. 82, 84 (1985)).

91. *Id.* at 11.

unworkability of its approach.⁹² Thus, Respondent argues, applying the standard meaning of “offence” to the Double Jeopardy Clause yields the same results as applying the dual-sovereignty doctrine and therefore, the plain meaning of the Fifth Amendment supports not overruling the doctrine.⁹³

Respondent also argues that there is no sound reason to overturn 170 years of precedent to overrule the separate-sovereigns exception.⁹⁴ Respondent contends that Petitioner’s arguments have all been considered and rejected in the century and a half that the doctrine has existed in various cases upholding the exception and that there exists no new or compelling reason to undermine *stare decisis*.⁹⁵ Rather, Respondent argues, overruling the doctrine would create more injustice than it solves—by asking courts to determine if the laws of different sovereigns constitute same or different offenses, such an action would burden the courts and sow more confusion in double jeopardy jurisprudence.⁹⁶ Respondent also contends that if the unfairness created by the separate-sovereigns doctrine is the concern, the legislative branch, rather than the judicial branch, is best equipped to alleviate such issues.⁹⁷ “[A]ny such policy concerns about successive prosecutions by different sovereigns are best addressed in a more fine-tuned manner by the political branches,”⁹⁸ Respondent argues. Therefore, *stare decisis* weighs overwhelmingly in favor of not overruling the separate-sovereigns doctrine, according to Respondent.

ANALYSIS

The Supreme Court most likely will not overrule the separate-sovereigns exception to the Double Jeopardy Clause, as the Court is always hesitant to overturn precedent.⁹⁹ *Stare decisis* weighs heavily in favor of continuity in constitutional jurisprudence, and the Court usually will only overrule itself in extraordinary circumstances.¹⁰⁰ The Court will most likely find that the case at hand does not rise to that

92. *Id.*

93. *Id.*

94. *Id.* at 44.

95. *Id.*

96. *Id.* at 47.

97. *Id.* at 52.

98. *Id.*

99. *See* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”).

100. *Id.* at 854–55.

level and, therefore, will decline to overrule the dual-sovereignty doctrine.

The case at hand, however, does raise grave concerns about fairness in the application of the separate-sovereigns doctrine. The Fifth Amendment bar on double jeopardy is firmly rooted in the belief that an individual should not be harassed by multiple trials and should not be required to deploy the time and expense to defend him or herself against multiple prosecutions for the same conduct.¹⁰¹ The prohibition enshrined in the Double Jeopardy Clause is “against being twice put in jeopardy,” not being punished twice.¹⁰² Such equity concerns are implicated regardless of the prosecutor’s identity, as it is just as much an outrage “to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense.”¹⁰³ In each case, an individual is forced to run the gauntlet twice for the same conduct and the distinction drawn by the Court between one sovereign prosecuting a defendant twice for the same act and two sovereigns each prosecuting a defendant once for the same act feels artificial and formalistic.¹⁰⁴ Following the incorporation of the Double Jeopardy Clause of the Fifth Amendment against the states in *Benton v. Maryland*,¹⁰⁵ this distinction appears even more anachronistic. Through the separate-sovereigns doctrine, two sovereigns are able to do together what neither can do on its own,¹⁰⁶ in contravention of the protections of the Double Jeopardy Clause.¹⁰⁷

While the Court in previous decisions has worried about a “race to the courthouse” by state and federal authorities if the exception were overruled,¹⁰⁸ the existence of the Petite policy seems to disprove that view of the dynamic between state and federal prosecutors.¹⁰⁹ The

101. *Abbate v. United States*, 359 U.S. 187, 198–99 (1959).

102. *United States v. Ball*, 163 U.S. 662, 669 (1896).

103. *Abbate*, 359 U.S. at 203 (Black, J., dissenting).

104. *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting) (“If double punishment is what is feared, it hurts no less for two ‘Sovereigns’ to inflict it than for one.”).

105. See *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (holding that the Double Jeopardy Clause of the Fifth Amendment was incorporated against the states through the Due Process Clause of the Fourteenth Amendment).

106. *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting).

107. U.S. CONST. amend. V.

108. See *Abbate v. United States*, 359 U.S. 187, 195 (1959) (“This would bring about a marked change in the distribution of powers to administer criminal justice.”).

109. Brief for Petitioner, *supra* note 8, at 47.

policy's presence depends entirely on cooperation between state and federal authorities in deciding which sovereign will continue the criminal prosecution of a defendant who has been charged under both state and federal laws,¹¹⁰ and there has been no evidence presented that this dynamic would change if the separate-sovereigns doctrine were overruled. State and federal authorities could continue to collaborate in deciding which entity will prosecute the defendant.¹¹¹ Additionally, in order to proceed with a subsequent federal prosecution that will follow a state prosecution, the federal government must obtain a Petite policy approval, showing that a substantial federal interest exists in the case and will not be vindicated by the state prosecution.¹¹² But Petite policy approvals are rare: only around 100 are granted each year.¹¹³ The small number of approvals each year only strengthens the argument that the federal and state prosecutors cooperate in determining which entity shall go forward with a prosecution, and demonstrates that it is rare that both state and federal prosecutions must go forward to vindicate state and federal interests. Although it may be argued that the Petite policy guards against double jeopardy,¹¹⁴ using prosecutorial discretion to protect constitutional rights is thin protection for a right that has been enshrined as fundamental in the Constitution.

CONCLUSION

Gamble v. United States provides the perfect opportunity for the Supreme Court to overrule the separate-sovereigns exception to the Double Jeopardy Clause, and eliminate the formalistic distinctions that allow the state and federal governments to contravene defendants' Fifth Amendment rights. In doing so, the Court will ensure that the promise of the Fifth Amendment rings true for all defendants, and that federalism is not subverted to allow the state and federal government to do together what the Constitution bars them from doing alone.

110. *Id.*

111. *Id.*

112. *Id.*

113. Transcript of Oral Argument at 54, *Gamble v. United States*, No. 17-646 (U.S. argued Dec. 6, 2018).

114. *See id.* at 51–52.