NOTE

SOVEREIGNS' INTERESTS AND DOUBLE JEOPARDY

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In the 2019 case of Gamble v. United States*, the Supreme Court upheld the dual sovereignty doctrine, reiterating that the Double Jeopardy Clause only bars successive or concurrent prosecutions by the same sovereign. When, therefore, a criminal defendant has violated the laws of two sovereigns by the same act, regardless of how similar those laws may be, no double jeopardy issue arises where both sovereigns prosecute the defendant independently. This Note argues that such an outcome is at odds with the Due Process Clause's guarantee against double jeopardy and rests upon an excessively rigid formulation of prior case law. The Supreme Court's double jeopardy jurisprudence actually suggests that the dual sovereignty doctrine should only be applied in instances where each sovereign possesses a distinct interest that they alone can vindicate. This Note advances a primary-purposes test to determine when separate or concurrent prosecutions are appropriate: a second sovereign should only be permitted to prosecute a defendant for the same crime if the primary purpose of that prosecution is to vindicate a sovereign interest that the first sovereign's prosecution would leave substantially unvindicated. Applying this test would also ease the* Gamble *Court's worry that modifying the doctrine could interfere with the balance of domestic and international prosecutions. Because the United States and a foreign sovereign, as completely independent entities, could always decline to treat the exercise of the other's jurisdiction as exclusive, each sovereign would retain an interest in prosecuting a defendant that the other sovereign could never substantially vindicate.*

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INTRODUCTION

In the 1969 case of *Benton v. Maryland*, the Supreme Court of the United States held that the Fifth Amendment's guarantee against double jeopardy, that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb,"[1] formed a fundamental right that was incorporated by the Fourteenth Amendment's Due Process Clause against the states.[2] In so doing, the Supreme Court reversed its earlier decision in *Palko v. Connecticut*, which had held that the Double Jeopardy Clause was not incorporated against the states, inasmuch as the protection was not "of the very essence of a scheme of ordered liberty."[3] In spite of *Benton*, however, the Supreme Court has regularly upheld one glaring exception to the Double Jeopardy Clause: the dual sovereignty doctrine.

Under the dual sovereignty doctrine, a defendant may be prosecuted twice for the same crime if separate sovereigns are involved in bringing each prosecution. Although the circumstances under which two entities constitute separate sovereigns may not be clear-cut as a philosophical matter, for purposes of dual sovereignty, the Supreme Court has made clear that the states and the federal government are considered distinct

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

[2] 395 U.S. 784, 794 (1969) ("[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.").

[3] 302 U.S. 319, 325 (1937).

sovereigns,[4] as are Native American tribes.[5] Territories such as Puerto Rico, however, are not.[6] A hypothetical defendant could thus be subject to all criminal jurisdictions within the United States, assuming that a jurisdictional hook connects the defendant's conduct and each of the respective sovereigns. The possibility of these concurrent or subsequent prosecutions militates against a common-sense understanding of what the Double Jeopardy Clause would seem to require. Nevertheless, the Supreme Court has repeatedly upheld the constitutionality of the dual sovereignty doctrine, and it has done so most recently in the 2019 case of *Gamble v. United States*.[7]

This Note argues that the dual sovereignty doctrine, in its current formulation as expressed in *Gamble*, unconstitutionally infringes upon defendants' due process rights. First, this Note argues that a close reading of the case law upon which the *Gamble* Court relies implies a more flexible construction of the dual sovereignty doctrine and that the doctrine should only come into play when separate prosecutions vindicate distinct sovereign interests. Moreover, the doctrine should be reinterpreted following both the ratification of the Fourteenth Amendment and the 1969 *Benton* decision incorporating the Double Jeopardy Clause through the Due Process Clause—something for which the Court has not properly accounted. Second, this Note examines an argument by the majority relating to prosecutions by international foreign sovereigns to demonstrate that the majority misunderstands the concept of sovereignty. The majority's reinterpretation of the dual sovereignty doctrine should not ipso facto alter the effect that foreign criminal proceedings may have on domestic ones. Finally, this Note proposes a "primary-purposes" balancing test, which would protect defendants' due process rights against double jeopardy while simultaneously carving out a constitutionally

[4] See, e.g., Bartkus v. Illinois, 359 U.S. 121, 132–34 (1959) (finding no double jeopardy bar to successive state and federal prosecutions as a result of the "two-sovereignty principle"); Heath v. Alabama, 474 U.S. 82, 89 (1985) ("The States are no less sovereign with respect to each other than they are with respect to the Federal Government.").

[5] United States v. Lara, 541 U.S. 193, 210 (2004) (holding that because the "inherent tribal authority[] to prosecute nonmember Indians" does "not amount to an exercise of federal power," tribes are acting as "separate sovereign[s]" for Fifth Amendment purposes during such prosecutions).

[6] Puerto Rico v. Sanchez Valle, 579 U.S. 59, 78 (2016) (holding that "[b]ecause the ultimate source of Puerto Rico's prosecutorial power is the Federal Government . . . the Commonwealth and the United States are not separate sovereigns" for Fifth Amendment purposes).

[7] 139 S. Ct. 1960, 1979–80 (2019).

permissible space for instances where subsequent prosecution by another sovereign may remain legitimate and desirable. This Note conducts a substantial-interest analysis[8] with respect to the dual sovereignty doctrine and proposes a test that would resolve the applicability of the doctrine with respect to both domestic and foreign sovereigns.[9]

I. THE CASE LAW

Part I of this Note examines the constitutional law debate over the dual sovereignty doctrine. It begins with a short factual summary of the circumstances surrounding *Gamble* and the main legal arguments advanced in defense of the majority opinion. The remainder of this Part analyzes prior cases upon which the *Gamble* Court relies.

A. Gamble v. United States

The facts of *Gamble* are fairly straightforward. During a routine traffic stop in Mobile, Alabama, petitioner Gamble was found to be in possession of a handgun by a local police officer.[10] Because Gamble had previously been convicted of second-degree robbery, he was charged under an

[8] This term may be familiar from choice-of-law theory, as it describes an analytical method "in which courts identify those states with interests in a particular issue before the court and then determine which of the competing states should have its law applied to the issue. The court makes that determination by identifying the state with the greatest interest in the matter." John Bernard Corr, Interest Analysis and Choice of Law: The Dubious Dominance of Domicile, 1983 Utah L. Rev. 651, 653 n.10. This Note advances a somewhat analogous argument in the Double Jeopardy context, namely: when two or more separate domestic sovereigns have jurisdiction over a matter, the sovereign whose interest is primarily at stake should proceed with the prosecution, and only when that sovereign, in its own proceeding, cannot substantially vindicate the interest of the other(s), should subsequent or concurrent prosecutions proceed without running afoul of the Double Jeopardy and Due Process Clauses. Otherwise, any resemblance between this Note's use of this term here and its use in a choice-of-law context is only coincidental.

[9] The *Ohio Northern University Law Review* published a short piece on *Gamble* that briefly suggested the applicability of an interest-analysis and the possible use of a balancing test in resolving the constitutional problems associated with the dual sovereignty doctrine. Alexander S. Prillaman, Student Case Notes, Gamble v. United States, 46 Ohio N.U. L. Rev. 181, 192–93 (2020). This Note, however, analyzes in significantly greater detail the prior case law upon which *Gamble* relies, discusses the consequences of the incorporation of the Double Jeopardy Clause, and examines the effects of a possible modification of the dual sovereignty doctrine vis-à-vis foreign (international) sovereign proceedings both to flesh out the possibility of a balancing test and to ground the suggestion more firmly in the broader jurisprudential principles and normative desirability of such a test.

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

Alabama statute that made it unlawful for anybody who had previously been convicted of a "crime of violence" to own or have a firearm in one's possession.[11] Gamble pleaded guilty and was sentenced to one year in prison.[12] Subsequently, however, the *federal* government charged Gamble, based on the same set of facts, for violating a federal law that forbade those who had been convicted of a crime punishable by more than one year of imprisonment "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition."[13] Gamble was subsequently sentenced by a federal court to an additional 46 months in prison.[14]

In spite of the fact that "[m]ost any ordinary speaker of English would say that Mr. Gamble was tried twice for 'the same offense,'" seven members of the Court disagreed with this proposition.[15] The opinion of the Court, authored by Justice Alito, instead upheld the dual sovereignty doctrine wholesale. In so doing, the Court relied primarily upon defining an "offence" under the Fifth Amendment's Double Jeopardy Clause as a transgression against the law of a particular sovereign.[16] Therefore, because the State of Alabama and the federal government constituted different sovereigns that had promulgated different laws, Gamble was not put in jeopardy twice for the *same offense*, inasmuch as his conduct constituted an offense against the laws of both Alabama and the United States.[17] The majority pointed to a line of cases, beginning with *Fox v. Ohio*,[18] to argue that prior case law supported the continued validity of the dual sovereignty doctrine.[19] The Court also made appeals to practical considerations to buttress its ruling, including its contention that overruling the dual sovereignty doctrine would render the United States

[11] Id. (first citing Ala. Code § 13A-11-72(a) (2015); and then citing Ala. Code § 13A-11-70(2) (2015)).

[12] Id.; id. at 1997 (Gorsuch, J., dissenting).

[13] Id. at 1964 (majority opinion) (quoting 18 U.S.C. § 922(g)(1)).

[14] Id. at 1997 (Gorsuch, J., dissenting).

[15] Id.

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

[17] Id. at 1968 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819) (distinguishing between "the people of a State" and "[t]he people of all the States")).

[18] See Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847) ("The prohibition alluded to as contained in the amendments to the constitution . . . [was] not designed as [a] limit[] upon the State governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens.").

[19] *Gamble*, 139 S. Ct. at 1966–67.

unable to prosecute a crime that a foreign (international) sovereign had already prosecuted.[20]

While the case law cited leaves the door open to the majority's conception of the dual sovereignty doctrine, the language of the prior opinions was construed too broadly by the *Gamble* Court. Moreover, the prior case law upon which *Gamble* relied should be reinterpreted following the *Benton v. Maryland* decision incorporating the Fifth Amendment's Double Jeopardy Clause[21]—something that the Supreme Court, despite its protestations to the contrary, failed to adequately consider in *Gamble*.[22]

B. The Antebellum Cases and the Character of the Offense

The three antebellum cases upon which the *Gamble* opinion primarily relies are *Fox v. Ohio*,[23] *United States v. Marigold*,[24] and *Moore v. Illinois*.[25]

Fox and *Marigold* addressed issues of state versus federal allocations of power with respect to counterfeiting money, which the Constitution explicitly grants to Congress as one of its Article I enumerated powers.[26] In *Fox*, decided in 1847, the defendant was charged and convicted under an Ohio statute that prohibited both counterfeiting and circulating false coin, "knowing them to be such."[27] Crucially, the defendant was not found guilty of *counterfeiting* the coin in question, but rather only of "utter[ing]" or "putt[ing] off false coin."[28] Nevertheless, the defendant argued that the Ohio statute was repugnant to Clauses 5 and 6 of Article I of the Constitution, which vest the federal government with the power to coin money and punish the counterfeiting thereof and grant the federal government sole power over all offenses relating to counterfeit money.[29] For if the federal and state government could both prosecute for offenses

[20] Id. at 1967.
[21] 395 U.S. 784, 787 (1969).
[22] *Gamble*, 139 S. Ct. at 1979; id. at 1993–96 (Ginsburg, J., dissenting).
[23] 46 U.S. (5 How.) 410.
[24] 50 U.S. (9 How.) 560 (1850).
[25] 55 U.S. (14 How.) 13 (1852).
[26] U.S. Const. art. I, § 8, cl. 5; id. cl. 6.
[27] 46 U.S. (5 How.) at 432.
[28] See id. at 432–33.
[29] Id. at 431; see also U.S. Const. art. I, § 8, cls. 5–6.

relating to counterfeit money, defendants could be subject to two separate prosecutions in violation of the Double Jeopardy Clause.[30]

The *Fox* Court disagreed with that argument; in so doing, however, the Court first took great pains to distinguish between the offenses of *counterfeiting coin* and *passing counterfeit coin*.[31] That is, the Court held that the Constitution limits Congress to "punishing the offence of *producing* a false representation" of the counterfeit currency itself.[32] On the other hand, the *passing* of a false coin is simply "a cheat or a misdemeanour practised within the State, and against those whom she is bound to protect, . . . [and] is peculiarly and appropriately within her functions and duties."[33] The Court thus emphasized the fundamentally different sovereign interests implicated within each sphere of the state and federal governments and the purposes and reach of the criminal laws of each. As the Court stated, "[a] material distinction has been recognized between the offences of counterfeiting the coin and of passing base coin," inasmuch as one offense concerns an offense against the federal government itself, whereas the other simply concerns a private fraud perpetrated on a private citizen.[34] Finally, the Court cited to *Barron v. Baltimore*, noting that the Fifth Amendment and the remaining Amendments in the Bill of Rights were not applicable to the states, but rather "exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens."[35]

United States v. Marigold, decided in 1850, dealt with a nearly identical question: whether the federal government could, in spite of the Court's holding in *Fox v. Ohio*, pass laws similar to Ohio's, prohibiting the utterance and passing of false currency.[36] The Court found that Congress did in fact have that authority, inasmuch as "the debasement of the coin [could be] as effectually accomplished by introducing and throwing into circulation a currency which was spurious and simulated,

[30] *Fox*, 46 U.S. (5 How.) at 431.

[31] Id. at 433 ("A material distinction has been recognized between the offences of counterfeiting the coin and of passing base coin by a government which may be deemed sufficiently jealous of its authority; . . . Thus, in England, the *counterfeiting* of the coin is made high treason, whether it be uttered or not; but those who barely *utter* false money are neither guilty of treason nor of misprision of treason.").

[32] Id. (emphasis added).

[33] Id. at 434.

[34] Id. at 433.

[35] Id. at 434 (citing Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 243 (1833)).

[36] 50 U.S. (9 How.) 560, 566 (1850).

as it would be by actually making counterfeits."[37] In so ruling, the Court was careful to indicate that the federal government exercising this power would not give rise to any double jeopardy problems, because the 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, as appropriate to its character in reference to each."[38] Thus, although the federal government might not have a power to punish the passing or utterance of false coin per se, it is nevertheless able to do so in pursuit of vindicating its constitutionally enumerated power to regulate the value of coin and prevent its debasement.[39]

From the *Fox* and *Marigold* opinions, two themes warrant special notice. The first, evidenced primarily in the *Fox* opinion, is the emphasis placed by the Court on the notion that the Fifth Amendment's Double Jeopardy Clause only serves to restrict the federal government vis-à-vis the government of the several states.[40] This argument, of course, has been rendered moot by the ratification of the Fourteenth Amendment and the subsequent incorporation of the Double Jeopardy Clause.[41] The second and more legally complex theme derives from the fact that the Court, in both cases, carefully analyzes the *nature* of the offenses in question and each sovereign's *interest* at stake before pronouncing that, if state and federal authorities had launched separate prosecutions, no violation of the Double Jeopardy Clause would have occurred. That is, in both *Fox* and *Marigold*, the Court makes a sincere effort to distinguish the *characteristics* of the offenses—as defined by each sovereign—in arguing against the applicability of the Double Jeopardy Clause to these cases.[42] In *Fox*, the Court found that Ohio was simply vindicating its interest in protecting its citizens against private fraud and had therefore rightfully made the intentional or knowing passing of counterfeit currency

[37] Id. at 569.
[38] Id. (emphases added).
[39] See U.S. Const. art. I, § 8, cl. 5; id. cl. 6.
[40] See *Fox*, 46 U.S. (5 How.) at 434.
[41] See Benton v. Maryland, 395 U.S. 784, 794 (1969).
[42] See *Fox*, 46 U.S. (5 How.) at 414 (distinguishing counterfeiting of coin and passing counterfeit coin); *Marigold*, 50 U.S. (9 How.) at 563 (distinguishing counterfeiting coin as an offense based upon defrauding the government and passing counterfeit coin as an offense defrauding individuals).

a crime, pursuant to its general police powers.[43] On the other hand, in *Marigold*, the Court found that Congress, pursuant to those powers it deemed necessary and proper to execute its enumerated power to regulate the value of money, had rightfully outlawed debasement of that money by means of the utterance or circulation of counterfeit currency; outlawing the circulation of counterfeit currency was thus merely a means to a constitutionally enumerated end.[44] In contrast, in *Gamble* and other "modern" dual sovereignty cases, the Court has tended to hew more formulaically to the line that, inasmuch as two or more sovereigns exist, a defendant's conduct must necessarily give rise to two separate offenses if that conduct has contravened the laws of each.[45]

Seen in this light, it is difficult to understand how *Gamble* remains faithful to the spirit of the law as propounded in *Fox* and *Marigold*. The statute under which Gamble was convicted outlaws possession of a firearm, in a manner affecting interstate commerce, by anybody convicted of a crime.[46] There is no evidence, however, of any analysis in the district[47] or appellate court opinions[48] that Gamble possessed a firearm *in a manner affecting interstate commerce*. Thus, unlike in *Fox* and in *Marigold*, the courts did not undertake any analyses asking *what* federal interest was being vindicated by the federal prosecution distinct from the state's interest. Rather, the parties seemed to take it for granted that the Commerce Clause,[49] insofar as it grants the federal government enough of a jurisdictional hook to engage in the "federalization of criminal law"

[43] *Marigold*, 50 U.S. (9 How.) at 568 (describing *Fox* as a case involving "a prosecution for a *private cheat* practised by one citizen of Ohio upon another").

[44] Id. ("We trace both the offence and the authority to punish [circulating counterfeit coin] to the power given by the Constitution to coin money, and to the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation.").

[45] See, e.g., Denezpi v. United States, 142 S. Ct. 1838, 1844–45 (2022) ("Because the sovereign source of a law is an inherent and distinctive feature of the law itself, an offense defined by one sovereign is necessarily a different offense from that of another sovereign."); see also Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 5 (1995) (describing the Court's jurisprudence in this area as "wooden and one-sided, emphasizing the sovereign authority of government at the expense of an individual's interest in avoiding agonizing reprosecutions").

[46] Gamble v. United States, 139 S. Ct. 1960, 1964 (2019) (quoting 18 U.S.C. § 922(g)(1)).

[47] See United States v. Gamble, No. 16-cr-00090, 2016 WL 3460414 (S.D. Ala. June 21, 2016).

[48] See United States v. Gamble, 694 F. App'x 750 (11th Cir. 2017); *Gamble*, 139 S. Ct. 1960.

[49] U.S. Const. art. I, § 8, cl. 3.

necessarily applied in this case.[50] That is, it appears that it was presumed that the federal statute under which Gamble was convicted was not truly about preventing potentially dangerous convicted criminals from possessing firearms but rather about vindicating the federal government's interest in regulating interstate commerce vis-à-vis firearms.

Taking *Fox* and *Marigold* seriously, however, would require the Court to conclude that Gamble's possession of the firearm in question had affected interstate commerce such that the federal government would possess a distinct sovereign interest, independent from the state's, in prosecuting that act of possession. That said, it stretches credulity to imagine that possession of a firearm by a formerly convicted individual, even if the firearm in question had once crossed state lines, should by itself trigger the legitimate exercise of federal jurisdiction. Indeed, the *Gamble* Court never attempts to make that claim.[51] It is this complete lack of analysis by the *Gamble* Court as to the *character* of the offense against the sovereignty of the federal government—over and above the offense against the sovereignty of the state—that presents a problem and sets the opinion at odds with, at least, the spirit of the *Fox* and *Marigold* opinions.

The absence of any such analysis in *Gamble* is thrown into starker relief by the major antebellum dual sovereignty case of *Moore v. Illinois*, decided in 1852.[52] Moore had been convicted of "harboring and secreting a . . . slave" under Illinois law and argued that the law in question conflicted with an "act of Congress on the same subject,"[53] passed pursuant to the express power granted to Congress to regulate and protect

[50] Brief of Senator Orrin Hatch as Amicus Curiae in Support of Petitioner at 12, *Gamble*, 139 S. Ct. 1960 (No. 17-646) ("In contrast to the narrow and explicit grants of authority to define and punish crime that underlay the antebellum federal criminal code, this rapid federalization of criminal law was accomplished largely through the use of Congress's power to regulate commerce and used the approach that an 'entire class of a given activity, be it manufacturing goods, loan sharking or drug dealing, by definition "affects commerce" ' and could therefore be the subject of federal criminal law." (citation omitted) (quoting Thomas J. Maroney, Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?", 50 Syracuse L. Rev. 1317, 1326 (2000))).

[51] As noted previously, modern dual sovereignty cases hew to the rule that laws defined by different sovereigns necessarily and *automatically* express different interests. See, e.g., Denezpi v. United States, 142 S. Ct. 1838, 1844–45 (2022) ("And a law is defined by the sovereign that makes it, expressing the interests that the sovereign wishes to vindicate . . . an offense defined by one sovereign is necessarily a different offense from that of another sovereign." (citation omitted)). This stark statement is clearly in tension with the reasoning in *Fox* and *Marigold*.

[52] 55 U.S. (14 How.) 13 (1852).

[53] Id. at 17, 19 (citing Act of Feb. 12, 1793, ch. VII, 1 Stat. 302).

the institution of slavery under the Fugitive Slave Clause.[54] Moreover, Moore argued that allowing the Illinois statute to stand would potentially subject him to double jeopardy, as he could be subject to punishment by both state and federal authorities.[55]

The Court, as may be inferred from its reasoning in *Fox* and *Marigold*, disagreed with Moore's argument, taking the familiar tack that "[e]very citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either."[56] Yet, similar to its reasoning in *Fox* and *Marigold*, the Court was careful to emphasize why and how the different characters of both the federal and state law gave rise to two fundamentally different and separate offenses.[57] The Court noted that the "act of Congress contemplates recapture and reclamation, and punishes those who interfere with the master in the exercise of this right."[58] That is, the act of Congress in question existed to effectuate the federal interest in enforcing the Fugitive Slave Clause, which explicitly states that a person "held to Service or Labour in one State . . . escaping into another . . . shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[59] On the other hand, the Illinois statute had "for its object the prevention of the immigration of such persons [i.e., fugitive slaves] [and of] punish[ing] the harboring or secreting [of] slaves . . . without regard to the master's desire either to reclaim or abandon them."[60] The state law was thus indifferent to the question as to whether it would assist the enslaver.[61]

It instead represented an exercise of the state's general police powers, as evidenced by the Court's remark that the fine imposed for breaking the law "is not given to the master, as the party injured, but to the State, as a penalty for disobedience to its laws."[62]

From analyzing these three cases, the underlying rationale implicit in the early development of the dual sovereignty doctrine rises to the surface: the doctrine was originally applicable in cases where prosecuting two or

[54] Id. at 17 (quoting U.S. Const. art. IV, § 2, cl. 3).
[55] Id. at 19.
[56] Id. at 20.
[57] See id. at 18.
[58] Id. at 19.
[59] U.S. Const. art. IV, § 2, cl. 3.
[60] *Moore*, 55 U.S. (14 How.) at 19.
[61] Id.
[62] Id.

more offenses served to vindicate different interests or aimed at different lawmaking objectives.

C. The Postbellum Cases and Incorporation

The majority opinion of the *Gamble* Court avers that "the premises of the dual sovereignty doctrine have survived incorporation intact."[63] That assertion, however, too quickly glosses over the extent to which pre-*Benton* cases routinely rested substantial parts of their reasoning upon the assumption that the Fifth Amendment's Double Jeopardy Clause did not apply to the states. As noted earlier, *Fox v. Ohio* had explicitly stated that the Double Jeopardy Clause—following the line of reasoning laid out by Chief Justice Marshall in *Barron v. Baltimore*—was only "intended to prevent interference with the rights of the States, and of their citizens."[64] Yet two cases upon which the *Gamble* opinion substantially relies—*United States v. Lanza*[65] and *Bartkus v. Illinois*[66]—make obvious just how intertwined the dual sovereignty doctrine is with the assumption that the Fifth Amendment's Double Jeopardy Clause was limited by not being incorporated vis-à-vis the states. Indeed, when *Lanza* and *Bartkus* are interpreted against the backdrop of *Benton v. Maryland*,[67] it becomes clear that the incorporation of the Double Jeopardy Clause has fatally eroded a crucial foundation of the dual sovereignty doctrine.

In *Lanza*, the defendants were convicted under a Washington state statute that made it unlawful to manufacture, transport, or possess intoxicating liquor.[68] Subsequently, the defendants were charged in federal court under a statute passed pursuant to the Eighteenth Amendment for substantially the same crime: manufacturing, transporting, or possessing intoxicating liquor.[69] To these federal charges, the defendants pleaded that the Double Jeopardy Clause and their prior state conviction should protect them against the subsequent federal proceeding.[70] The *Lanza* Court disagreed, but in so doing made clear that

[63] 139 S. Ct. 1960, 1979 (2019).

[64] Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847) (citing Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)).

[65] 260 U.S. 377, 382 (1922).

[66] 359 U.S. 121, 127 (1959).

[67] 395 U.S. 784, 794 (1969) (incorporating the Fifth Amendment's Double Jeopardy Clause).

[68] 260 U.S. at 378–79.

[69] Id.

[70] Id. at 379.

the fact that the Fifth Amendment had not yet been incorporated against the states was central to its conclusion.[71] The Court noted: "The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, and the double jeopardy therein forbidden is a *second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority*."[72] The logical force of reinterpreting this statement, in light of incorporation, is not immediately clear. After all, assuming that the double jeopardy protection, as the *Lanza* Court describes it, is incorporated against the states, it would prima facie only result in a rule under which states would be unable to launch a second prosecution for the same offense "under the same [i.e., state] authority."[73]

Similarly, it is not initially obvious how reinterpreting the Court's 1959 decision in *Bartkus v. Illinois* in light of the incorporation of the Double Jeopardy Clause would undermine the *Gamble* decision. In *Bartkus*, the defendant was initially indicted and tried in federal court for bank robbery, for which he was later acquitted.[74] He was subsequently prosecuted in Illinois state court under a "substantially identical" indictment, convicted, and sentenced to life imprisonment.[75] As expected, in spite of Bartkus's appeal to the Double Jeopardy Clause, the Court upheld his conviction under a state law for robbery.[76] In so doing, the Court stressed that "[s]ince the new prosecution was by Illinois, and not by the Federal Government, the claim of unconstitutionality must rest upon the Due Process Clause of the Fourteenth Amendment."[77] The Court later continued: "[W]hile at some point the cruelty of harassment by multiple prosecutions by a State would offend due process, the specific limitation imposed . . . by the Double Jeopardy Clause of the Fifth Amendment did not bind the States."[78]

At this point, it is useful to take a small step back and examine more closely why the opinions in *Lanza* and *Bartkus* were able to suggest that the Double Jeopardy Clause did not apply to the states. On the surface,

[71] Id. at 382.
[72] Id. (emphasis added) (citation omitted).
[73] Id. This argument is, in fact, the one that the *Gamble* Court tries to make. See Gamble v. United States, 139 S. Ct. 1960, 1979 (2019).
[74] 359 U.S. 121, 121–22 (1959).
[75] Id. at 122.
[76] Id. at 139.
[77] Id. at 124.
[78] Id. at 127 (discussing the Court's prior holding in *Palko v. Connecticut*).

the reason the *Lanza* and *Bartkus* lines of argumentation were acceptable at the time those cases were decided was because the 1937 case of *Palko v. Connecticut* explicitly found that the Double Jeopardy Clause was not incorporated against the states; the protection afforded by the clause was not found by the Court to be "implicit in the concept of ordered liberty."[79] Consequently, refusing to extend the double jeopardy protection to the state level would not "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[80] In other words, the denial of double jeopardy protection would not, under *Palko*, be synonymous with a denial of due process.[81] The *Palko* decision, however, was expressly overturned in the 1969 case of *Benton v. Maryland*, which held that denying a defendant's double jeopardy protection undercut a right "fundamental to the American scheme of justice" and that it accordingly violated the Fourteenth Amendment's Due Process Clause.[82] In so finding, the Court injected a new consideration that would always need to be evaluated with respect to the dual sovereignty doctrine: namely, whether successive or concurrent prosecutions by state and federal (or Native American tribal) authorities could so undermine an individual's rights *as to constitute a violation of due process of law*.[83]

If one takes the current bright-line, rule-based formulation (as articulated by the *Gamble* Court)[84] of the dual sovereignty doctrine to heart, then one could *always* be subject to multiple prosecutions, so long as these prosecutions were formally carried out by different authorities. The double jeopardy protection would be reduced to a sham and no longer "one that is deeply ingrained in at least the Anglo-American system of jurisprudence."[85] After all, *Benton*, in incorporating the Double Jeopardy

[79] 302 U.S. 319, 324–25 (1937).

[80] See id. at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (applying the same idea to the right of trial by jury)).

[81] See id. at 328.

[82] Benton v. Maryland, 395 U.S. 784, 795–96 (1969) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)); U.S. Const. amend. XIV, § 1.

[83] See Twining v. New Jersey, 211 U.S. 78, 99 (1908) ("[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

[84] Gamble v. United States, 139 S. Ct. 1960, 1965 (2019) ("[A]n 'offence' is defined by a law, and each law is defined by a sovereign. So, where there are two sovereigns, there are two laws, and two 'offences.'").

[85] *Benton*, 395 U.S. at 796 (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

Clause, did not adopt the *Lanza* formulation of the rule *tout court*. If that were the case, the Court would have said only that a "second prosecution under authority of the [state government] after a first trial for the same offense under the same authority" would be unconstitutional.[86] Rather, *Benton* incorporates the Double Jeopardy Clause under the Due Process Clause of the Fourteenth Amendment, as something "fundamental to the American scheme of justice."[87] When the double jeopardy protection is incorporated in this manner, contrary to the view promulgated by the *Gamble* Court, it will not be sufficient that the prosecuting authorities represent different sovereigns *pro forma*.[88] Instead, a court must engage in a deeper due process analysis, analyzing whether the separate prosecutions in question so conspire as to deny the defendant's due process right to double jeopardy protection, regardless of the identity of the prosecuting authorities.[89]

In Part III, this Note proposes a test to govern the circumstances under which separate prosecutions, even if formally falling under the dual sovereignty doctrine, should be seen as violating the Fourteenth Amendment's Due Process Clause. For now, there is another argument in the *Gamble* Court's majority opinion that must first be addressed: namely, the way in which that opinion discusses the concept of sovereignty and its implications for double jeopardy in an international context.

[86] United States v. Lanza, 260 U.S. 377, 382 (1922) (holding that "second prosecution under authority of the federal government after a first trial for the same offense under the same authority" would be unconstitutional); see also supra note 73 and accompanying text.

[87] *Benton*, 395 U.S. at 794–96 (quoting *Duncan*, 391 U.S. at 149).

[88] Of course, this strict and formal interpretation of the dual sovereignty doctrine did not begin with *Gamble*. See Heath v. Alabama, 474 U.S. 82, 93 (1985) ("A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of its own laws." (emphasis omitted)).

[89] This line of reasoning is arguably implicit even in *Palko v. Connecticut*, in that Justice Cardozo seems to leave open the possibility that if "[t]he state [were] . . . attempting to wear the accused out by a multitude of cases with accumulated trials," such action might rise to the level of a due process violation by the government, even absent incorporation of the Double Jeopardy Clause. 302 U.S. 319, 328 (1937); see also Richard D. Boyle, Double Jeopardy and Dual Sovereignty: The Impact of Benton v. Maryland on Successive Prosecutions for the Same Offense by State and Federal Governments, 46 Ind. L.J. 413, 424 (1971) ("Despite the evidence of erosion in the foundations of the 'dual sovereignty' doctrine, we continue to permit the state and federal government to do jointly that which neither can do alone."); Amar & Marcus, supra note 45, at 2 (noting that "in light of" *Benton*, "it seems anomalous that the federal and state governments, acting in tandem, can generally do what neither government can do alone—prosecute an ordinary citizen twice for the same offence").

II. "SOVEREIGNTY" IN THE DOMESTIC AND INTERNATIONAL CONTEXTS

The *Gamble* Court's majority argues that Gamble's construction of the Double Jeopardy Clause could end up barring domestic criminal prosecutions of crimes committed abroad if a foreign sovereign had previously prosecuted that crime.[90] As the Court describes it, "If . . . only one sovereign may prosecute for a single act, no American court . . . could prosecute conduct already tried in a foreign court."[91] The Court concludes that such a result would be impermissible; international law allows for competing sovereigns to each exercise jurisdiction,[92] and therefore the dual sovereignty doctrine could not be overruled.[93] The *Gamble* Court's appeal to the supposed effects that overriding the dual sovereignty doctrine could have on foreign prosecution of crimes falls flat, however. Sovereignty on the international stage is simply different from sovereignty in the domestic space; in spite of what the majority opinion attempts to argue, there is no logical reason why the dual sovereignty doctrine should treat the relationship between a truly foreign sovereign and the sovereignties of the United States as analogous to the relationship between the sovereignty of the federal government vis-à-vis that of the several states and tribes.

The relationship between two foreign sovereigns is, at least in theory, one of independence and equality, reinforced by a degree of mutual respect implicit in such norms as that of the principle of non-

[90] Gamble v. United States, 139 S. Ct. 1960, 1967 (2019).

[91] Id.

[92] Id.

[93] Although the *Gamble* Court is correct in that international law does not recognize a general bar on subsequent or concurrent prosecutions by separate (international) sovereigns, in recent years, the principle of an international protection against double jeopardy has been gaining traction, particularly in Europe. See, e.g., Frederick T. Davis, International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe, 31 Am. U. Int'l L. Rev. 57, 100 (2016) (noting that "[i]n Europe, legislation, treaties and decisions have created a broad but not entirely consistent matrix of principles that in many cases may protect a person or corporation against multiple prosecutions within the continent"); Masamichi Yamamoto, Reassessing International Cooperation Between Securities Regulators in View of the International Double Jeopardy Principle, 65 Wayne L. Rev. 325, 353 (2020) (noting that "the EU and many countries apply the double jeopardy principle internationally"). But see Dominic T. Holzhaus, Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine, 86 Colum. L. Rev. 1697, 1702 (1986) (noting that "[w]hen the courts of a foreign country try criminals for crimes affecting the United States, the 'strict rules of jurisdiction [that] prevent the occasion for multiplicity' will in most cases rule out a subsequent prosecution in the United States" (quoting Thomas Franck, An International Lawyer Looks at the Bartkus Rule, 34 N.Y.U. L. Rev. 1096, 1097 (1959))).

intervention.[94] In contrast, the relationship between the federal government and the states and Native American tribes is one of superordination. It is true that the states and tribes are sovereign to a certain degree, but these sovereignties ultimately cannot act or legislate in such a way that would contradict or conflict with valid federal law.[95] Their sovereignty is thus incomplete and not comparable to the relationship between the United States and other foreign sovereigns.[96] For instance, writing of tribal sovereignty, Professors Hobbs and Williams note that "the Navajo Nation is not a state [in the international legal sense]. Although it exercises self-government over discrete (and considerable) territory, that land is regarded ultimately as under the jurisdiction of the United States and the Navajo are not considered to be international legal persons."[97]

From an international perspective, states are seen as falling ultimately under the jurisdiction of the United States because international law treats subnational entities as being organs of a particular sovereign state.[98] This

[94] See, e.g., U.N. Charter art. 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 202 (June 27) ("The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.").

[95] U.S. Const. art. VI, cl. 2; see, e.g., Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (finding that federal law would preempt state law in such cases where "compliance with both federal and state regulations [would be] a physical impossibility"); Hines v. Davidowitz, 312 U.S. 52, 67–68 (1941) (finding that a state law must yield to a federal law in such cases where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

[96] Michael Doran, Tribal Sovereignty Preempted, 89 Brook. L. Rev. 53, 54–55 (2023) (reinforcing the idea that regardless of the extent to which tribes and states share jurisdiction over matters within Indian Country, tribal power is nevertheless "subject to the overriding power of Congress"); Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195, 195–96 (1984) (describing Congress's ability to wield "plenary power" over tribes, even though the Supremacy Clause does not apply to the federal-tribal relationship); see also Darlene Ricker, Double Exposure: Did the Second Rodney King Trial Violate Double Jeopardy?, 79 A.B.A. J. 66, 67 (1993) (Harland Braun, an attorney who defended one of the officers charged in the King trials, explained that "there are no dual sovereigns in the United States." He continued: "The people delegate their authority to be divided between the federal and state governments.").

[97] Harry Hobbs & George Williams, Micronations and the Search for Sovereignty 54 (2022).

[98] G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 4(1) (Dec. 12, 2001).

treatment is reflected in U.S. domestic law, inasmuch as the Supremacy Clause specifically arrays the lesser sovereignties of the several states under that of the federal government, stating that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[99] The Court confirmed this relation between the states and the federal government in *Testa v. Katt* when it ruled that, due to the Supremacy Clause, state courts could not refuse to uphold the penal laws of the federal government.[100] In *Testa*, the Rhode Island Supreme Court had overturned an award given by a lower state court pursuant to § 205(e) of the Federal Emergency Price Control Act.[101] The Rhode Island Supreme Court overturned the verdict on the grounds that § 205(e) constituted "a penal statute in the international sense" because it was passed pursuant to federal as opposed to state authority.[102] Since Rhode Island "need not enforce the penal laws of a government which is foreign in the international sense," the Rhode Island Supreme Court reasoned that courts in the state could simply decline to enforce the penal laws of the United States.[103] The United States Supreme Court emphatically disagreed, rejecting the Rhode Island Supreme Court's assumption "that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country."[104] The *Testa* Court reasoned that such an assumption would not only run afoul of the Supremacy Clause but also "fl[y] in the face of the fact that the States of the Union constitute a nation."[105]

[99] U.S. Const. art. VI, cl. 2.
[100] 330 U.S. 386, 389 (1947).
[101] Id. at 386, 388.
[102] Id. at 388.
[103] Id.
[104] Id. at 389.
[105] Id. See The Federalist No. 82, at 428 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (noting that the Supreme Court's jurisdiction "ought to be construed to extend to the state tribunals" and that "the national and state systems are to be regarded as *one whole*"); see also Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("The United States is not a foreign sovereignty as regards the several States."). This pronouncement by the *Testa* Court is moreover mirrored by Justice Ginsburg's observation in her dissenting opinion in *Gamble* that "Gamble was convicted in both Alabama and the United States, jurisdictions that are not foreign to each other." Gamble v. United States, 139 S. Ct. 1960, 1990 (2019) (Ginsburg, J., dissenting).

In light of *Testa*, the argument by the *Gamble* Court that an international or foreign criminal prosecution would necessarily serve as a bar to domestic prosecution if the dual sovereignty doctrine were overturned makes little sense. Indeed, as a domestic legal matter, courts in the United States have no obligation to enforce a judicial decision by a foreign sovereign. The 2008 case of *Medellín v. Texas* presents a good illustration of this principle.[106] Before *Medellín*, the International Court of Justice ("ICJ") had held in a previous ruling, *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. United States*), that the United States (through the State of Texas), was in violation of its treaty obligations to allow foreign citizens accused of a crime access to consular authorities of the accused's home state.[107] The *Medellín* Court, however, ruled that, absent either a federal statute or a self-executing treaty, the judgment of the ICJ could not be enforced as a matter of domestic United States law, and refused to give effect to the ICJ ruling.[108] In contrast, a federal law or judgment that does not conflict with the Constitution is valid on its face within the United States and, through the Supremacy Clause, automatically carries with it implications as to how even the states are permitted to legislate or adjudicate.[109] Moreover, under the Full Faith and Credit Clause,[110] states are constitutionally required to give effect to the judgments of other states.[111] In this way, the relationships between sovereignties at the state level and those at the federal level fundamentally differ from the relationships between foreign sovereigns; judgments in the former relationships necessarily carry domestic legal effect, whereas judgments in the latter carry none, absent some *domestic* legal action according force to the decisions or laws of foreign sovereigns.[112]

[106] 552 U.S. 491, 522 (2008).

[107] Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶¶ 90, 106 (Mar. 31); *Medellín*, 552 U.S. at 497–98.

[108] 552 U.S. at 505–06.

[109] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340–41 (1816) (State judges "were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—'the supreme law of the land.'"); see also supra notes 95, 99 and accompanying text.

[110] U.S. Const. art. IV, § 1.

[111] See Chi. & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622–23 (1887).

[112] Indeed, the United States violates international law and shirks its treaty obligations often, with one legal scholar attributing this malfeasance at least in part to our "constitutional design that automatically elevates domestic U.S. law above international law." David A. Koplow, Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty, 37 Fletcher F. World Affs. 53, 70 (2013).

In light of the different conceptions of sovereignty in the international and domestic legal contexts, it is difficult to give credence to the *Gamble* Court's argument that, were the dual sovereignty doctrine to be overturned, foreign prosecutions would bar domestic ones. Given that the United States and a foreign country constitute two completely independent sovereignties, it is always possible that a foreign sovereign could decline to recognize as exclusive the authority of the United States over matters the foreign sovereign deems to fall more properly within its own jurisdiction.[113] In contrast, state and federal sovereignties are only partially independent from one another. For example, under the Supremacy Clause, states (and Native American tribes) are bound to respect federal authority, and under the Full Faith and Credit Clause, states are bound to recognize each other's authority.[114] Finally, under the Tenth Amendment, the federal government is bound to recognize the states' traditional authority to regulate intrastate matters.[115] In light of the interdependence permeating the relationship between various American domestic sovereigns, it would be reasonable, despite what the *Gamble* Court argues, to simply reinterpret the dual sovereignty doctrine in such a way that would bar concurrent or subsequent prosecutions by state, tribal, and federal governments, while recognizing that such a modification of the doctrine would have no effect on subsequent and concurrent prosecutions by different foreign sovereigns.

[113] The United States could always refuse to extradite one of its citizens to face proceedings in foreign courts. For instance, in 2020, the United States famously refused to extradite Anne Sacoolas to British authorities for her role in a fatal crash near London, claiming that, as the wife of a U.S. government official, she enjoyed diplomatic immunity. Elian Peltier, U.S. Refuses Extradition in Fatal Crash, Prompting Anger in U.K., N.Y. Times (Sept. 21, 2021), https://www.nytimes.com/2020/01/24/world/europe/anne-sacoolas-harry-dunn-extradition.html. In contrast, interstate extradition within the United States is required by the Constitution's Extradition Clause. U.S. Const. art. IV, § 2, cl. 2; see also 18 U.S.C. § 3182. In cases where the United States recognizes international jurisdiction, it recognizes the existence of that jurisdiction under *domestic law*. This is evidenced by the fact that most treaties are not self-executing, absent some implementing legislation by Congress. Cong. Rsch. Serv., ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties, Constitution Annotated, https://constitution.congress.gov/browse/essay/artII-S2-C2-1-4/ALDE_00012955/ (last visited Sept. 13, 2024).

[114] Technically speaking, the Supremacy Clause does not apply to tribal-federal relations, but the Court has routinely recognized supreme federal power over the tribes by invoking the concept of "federal plenary power." See Newton, supra note 96, at 195–96; see also U.S. Const. art. IV, § 1; id. art. VI, cl. 2.

[115] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X; see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

III. REINTERPRETING THE DOCTRINE: THE PRIMARY-PURPOSES TEST

The current formulation of the dual sovereignty doctrine ought to be revised in such a way that would allow the doctrine to fit more closely with the older case law and to accord the Double Jeopardy Clause the respect it deserves in the post-*Benton* legal landscape. This reinterpretation of the dual sovereignty doctrine has been rendered all the more pressing by the danger of the over-federalization of criminal law,[116] which has been driven by the Court's ever-expanding notion of what Congress is permitted to regulate under the Commerce Clause.[117] Indeed, in many cases, it appears that Congress has wielded the Commerce Clause merely as a jurisdictional hook so as to obtain the authority to legislate and criminalize certain behaviors that traditionally have fallen primarily (or solely) within the ambit of the states' police powers.[118] Although it falls well outside of the scope of this Note to examine whether the expansion of such federal power is constitutional or even normatively desirable, the de facto expansion of the federal government's police powers nevertheless carries significant implications as to how the Double Jeopardy Clause should be understood, and accordingly, how the dual sovereignty doctrine should be construed.[119]

In effect, the Court ought to rule that, as a constitutional matter, when the primary purposes of a concurrent or subsequent prosecution are not chiefly directed at vindicating a unique sovereign interest that would have otherwise been left unvindicated, a second prosecution would violate the defendant's rights under the Due Process Clause: a so-called "primary-purposes test." Thus, when separate sovereigns engaged in prosecution of a criminal defendant are trying to vindicate essentially the same interest, the Court ought to take its pronouncement in *Bartkus* seriously—that

[116] See Brief for Senator Orrin Hatch, supra note 50, at 12.

[117] Id. at 12, 14, 18 n.8.

[118] See, e.g., Gonzales v. Raich, 545 U.S. 1, 57–58 (2005) (Thomas, J., dissenting) ("If Congress can regulate [the growing of marijuana] under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."); Taylor v. United States, 579 U.S. 301, 315 (2016) (Thomas, J., dissenting) ("Allowing the Federal Government to [prosecute] a simple home robbery, for example, would 'encroac[h] on States' traditional police powers to define the criminal law and to protect . . . their citizens.'" (second and third alterations in original) (quoting *Raich*, 545 U.S. at 66)).

[119] See Gamble v. United States, 139 S. Ct. 1960, 1994 (2019) (Ginsburg, J., dissenting) ("The expansion of federal criminal law has exacerbated the problems created by the separate-sovereigns doctrine.").

"harassment by multiple prosecutions . . . would offend due process"—and rule that these separate prosecutions would constitute a due process violation of the Double Jeopardy Clause.[120] Any less protection cuts deeply against the Court's subsequent incorporation of the double jeopardy protection as fundamental to due process of law—a protection that the Court has characterized as "deeply ingrained in at least the Anglo-American system of jurisprudence, . . . that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual . . . , thereby subjecting him to embarrassment, expense and ordeal."[121]

As previously noted, the jurisprudential grounding for this primary-purposes test comes from the *Fox*, *Marigold*, and *Moore* line of cases.[122] In *Fox*, the Court allowed for state prosecution of the *utterance* of false coin because it was of a fundamentally different *nature* than the act of *counterfeiting* coin.[123] The purpose of the state law was to protect private citizens from fraud; the purpose of a federal law against counterfeiting coin, in contrast, was passed pursuant to an enumerated power of Congress in the Constitution to regulate coinage.[124] In *Marigold*, the Court found that the federal government could validly outlaw the utterance of false coin when doing so debased the currency—the primary purpose of that law was, again, to vindicate the federal interest, explicitly enumerated in Article I, Section 8, Clauses 5 and 6 of the Constitution, to

[120] Bartkus v. Illinois, 359 U.S. 121, 127 (1959); see also Amar & Marcus, supra note 45, at 30 (describing "the principles underlying the Double Jeopardy Clause and its companion Due Process Clause" as "protecting innocent persons and checking government overreaching"); Anne Bowen Poulin, Double Jeopardy Protection from Successive Prosecution: A Proposed Approach, 92 Geo. L.J. 1183, 1254–55 (2004) (noting that while the Supreme Court's jurisprudence on the dual sovereignty doctrine stems from its desire to "balanc[e] federalism interests against the defendant's double jeopardy interests," in practice, "[t]he Court accords such weight to the interest in federalism that the defendant's double jeopardy interests are almost always insufficient to preclude successive prosecution by separate sovereigns").

[121] Benton v. Maryland, 395 U.S. 784, 795–96 (1969) (quoting Green v. United States, 355 U.S. 184, 187 (1957)); see also Kayla Mullen, *Gamble v. United States*: A Commentary, 14 Duke J. Const. L. & Pub. Pol'y 207, 218 (2019) ("The prohibition enshrined in the Double Jeopardy Clause is 'against being twice put in jeopardy,' not being punished twice. Such equity concerns are implicated regardless of the prosecutor's identity . . . ." (quoting United States v. Ball, 163 U.S. 662, 669 (1896))).

[122] See generally supra Section I.B (explaining that these three cases demonstrate that the initial dual sovereignty doctrine was a primary-purposes test because it was applicable in cases where prosecuting two or more offenses served to vindicate different interests or different lawmaking objectives).

[123] Fox v. Ohio, 46 U.S. (5 How.) 410, 433–34 (1847).

[124] Id.

coin and regulate the value of money, as opposed to protecting private citizens from fraud.[125] Finally, in *Moore*, the Court carefully distinguished between the state and federal interests in regulating the movement of enslaved persons.[126] The federal law in that case, passed pursuant to the Fugitive Slave Clause, aimed at returning enslaved persons to slavery, whereas the state law at issue primarily aimed at regulating immigration into the state regardless of enslavers' interests in the people they enslaved.[127] In effect, these three early cases form the basis for the primary-purposes test. They all looked to what the primary purpose of the statute in question was—or, more specifically, what the primary sovereign interest was that the statute in question sought to vindicate—to determine whether there might have been a constitutionally sufficient basis for another sovereign to prosecute the defendant so as to vindicate its own unrelated interest.

A. Applying the Primary-Purposes Test

This tendency toward deeper analysis of the primary purposes of a subsequent prosecution had been lost by the time the post-Fourteenth Amendment cases of *Bartkus* and *Lanza* were decided. Perhaps by this time, the dual sovereignty doctrine had become so accepted as a background principle of Double Jeopardy Clause jurisprudence that the Court simply no longer felt the need, as it had in the antebellum cases, to point to the underlying reason animating the doctrine. Regardless of the reason for this omission, it is concededly unlikely that the use of the primary-purposes test would at any rate have affected the outcome of *Lanza*. After all, the Eighteenth Amendment, by its plain text, placed within the ambit of the federal government the power to ban the manufacture, sale, or transportation of liquor throughout the United States, and *specifically* noted that "[t]he Congress and the several States *shall have concurrent power* to enforce this article by appropriate legislation."[128] The federal law under which *Lanza* was charged thus served primarily to vindicate the explicit federal interest in enforcing the

[125] United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850); see U.S. Const. art. I, § 8, cls. 5–6.

[126] Moore v. Illinois, 55 U.S. (14 How.) 13, 15–16, 18, 20–21 (1852).

[127] Id. at 19; U.S. Const. art. IV, § 2, cl. 3.

[128] U.S. Const. amend. XVIII, §§ 1–2 (emphasis added).

Eighteenth Amendment, and the state law served primarily to vindicate the state's general interest in regulating activity within its borders.[129]

Bartkus, however, probably would have come out differently if the Court had made use of the primary-purposes test; under this test, the Court would have found that the subsequent prosecution for the robbery by the state authorities would have overlapped so much with the federal prosecution for robbery that it would have constituted a due process violation. That is, the federal government outlaws robbery for a variety of reasons, chief among which is, at least nominally, to maintain the federal interest in regulating and protecting interstate commerce.[130] Enforcing this federal law against bank robbery would also help preserve intrastate law and order, which is an interest within the state's jurisdiction. Thus, although the federal law against robbing banks would not *primarily* aim at reducing intrastate crime, it would substantially protect a state's sovereign interest in maintaining intrastate law and order. Therefore, it would be unlikely that a subsequent state proceeding would vindicate a distinct interest that the prior federal proceeding had not already vindicated. Under this framework, the primary-purposes test would hold that the subsequent state proceeding in *Bartkus* violated the Due Process Clause of the Fourteenth Amendment. After all, as the *Fox* opinion noted, the Fifth Amendment (and the other Amendments) were ultimately designed to protect the "rights of the States, *and of their citizens*."[131] It is

[129] United States v. Lanza, 260 U.S. 377, 381 (1922) (noting that "each State possessed that power in full measure prior to the [Eighteenth] Amendment").

[130] See, e.g., Taylor v. United States, 579 U.S. 301, 307 (2016) (holding that Congress possesses the authority to pass laws outlawing the robbery of drug dealers because even the intrastate distribution of drugs necessarily affects interstate commerce); id. ("The production, possession, and distribution of controlled substances constitute a 'class of activities' that in the aggregate substantially affect interstate commerce, and therefore, the [*Raich*] Court held, Congress possesses the authority to regulate (and to criminalize) the production, possession, and distribution of controlled substances even when those activities occur entirely within the boundaries of a single State.").

[131] Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847) (emphasis added); see also Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247–48 (1833); Gamble v. United States, 139 S. Ct. 1960, 2000 (2019) (Gorsuch, J., dissenting) ("When the . . . people of the United States assigned different aspects of their sovereign power to the federal and state governments, they sought not to *multiply* governmental power but to *limit* it."); id. at 1991 (Ginsburg, J., dissenting) ("In our 'compound republic,' the division of authority between the United States and the States was meant to operate as 'a double security [for] the rights of the people.' The separate-sovereigns doctrine, however, scarcely shores up people's rights. Instead, it invokes federalism to withhold liberty." (alteration in original) (citations omitted) (quoting The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)).

difficult to see how else these rights could be protected in a situation such as *Bartkus*, especially when the factual circumstances of that case suggest that the subsequent state prosecution came about only as a result of federal collusion with the Illinois state government to get a second bite at the apple.[132]

It should be clear that application of this proposed primary-purposes test to *Gamble* would have resulted in a holding contrary to the Court's. Was Gamble's crime primarily an offense against the state—namely, against the state's general police power to regulate intrastate possession of firearms by convicted felons? Or would it be more accurate to characterize Gamble's crime as an offense primarily against the federal government—namely, against the federal government's power to regulate the trafficking and flow of guns in interstate commerce? A common-sense reading of the factual background clearly weighs in favor of the former interpretation; after all, as Justice Ginsburg describes it, *Gamble* concerns a "run-of-the-mill felon-in-possession charge[]."[133] It can thus be inferred that although Gamble was found with a single handgun in his vehicle, there was no evidence to suggest, for instance, that Gamble was involved in an operation aimed at trafficking a large amount of weapons across state lines.[134]

The subsequent federal prosecution, therefore, does not clearly vindicate any sovereign interest that the prior state proceeding had not already sufficiently vindicated. That is, the federal proceeding was not brought against Gamble primarily to vindicate the federal interest in regulating interstate commerce that his unlawful possession of a firearm, as a felon, could have affected. Rather, it would be more accurate to characterize it as an instance of federal encroachment on the traditional police powers of the states.[135]

Thus, following the primary-purposes test, absent a showing that the subsequent federal proceeding aimed to protect a unique federal interest, the *Gamble* opinion runs contrary to the line of reasoning implicit in *Fox*, *Marigold*, and *Moore* and violates Gamble's due process protection against double jeopardy.[136] Different parts of the government should not

[132] 359 U.S. 121, 164–70 (1959) (Brennan, J., dissenting).
[133] 139 S. Ct. at 1994 (Ginsburg, J., dissenting).
[134] Id. at 1964 (majority opinion).
[135] Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1905).
[136] The results of following this test would also be welcome vis-à-vis federalism considerations as applied to criminal law. See John S. Baker Jr., State Police Powers and the

be allowed to do together what they would be constitutionally disabled from doing separately,[137] and there is no dispute that, had the second proceeding been brought by the State of Alabama following a prior state proceeding by Alabama, that proceeding would have constituted a violation of the Double Jeopardy Clause.[138]

That said, the primary-purposes test is sufficiently flexible to allow for concurrent or subsequent prosecutions in certain limited instances. For example, had Gamble been found with a suitcase of guns in his car, clearly intending to introduce them into the stream of interstate commerce, there would be no reason why a subsequent federal prosecution seeking to vindicate the federal government's interest in regulating interstate commerce could not have followed the original state prosecution, assuming that the state prosecution was indeed just for a "run-of-the-mill felon-in-possession charge[]."[139] If that were the case, then the federal prosecution would indeed serve to uphold the primary purpose of the federal statute—the regulation of interstate commerce—which may have been left under-protected by the state statute.

The problem arises when the Court *assumes* that whenever separate sovereigns are involved in separate prosecutions, a double jeopardy issue never arises.[140] Similarly, to find a double jeopardy violation solely from separate sovereigns prosecuting the same conduct is inflexible and undesirable. The primary-purposes test instead looks to the context and totality of circumstances of the proceedings in question, as well as the specific statutes under which they proceed, in order to determine whether a second prosecution would be constitutionally permissible. Such a

Federalization of Local Crime, 72 Temp. L. Rev. 673, 678 (1999) ("In 1997, less than 5% of federal prosecutions involved federal statutes that [did] not duplicate state statutes."). It is reasonable to assume that the federalization of criminal law has only increased apace since 1997, especially given the ongoing War on Drugs. GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson & Liya Palagashvili, Count the Code: Quantifying Federalization of Criminal Statutes, Heritage Found. (Jan. 7, 2022), https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes [https://perma.cc/82WN-QATM] (noting that as of 2019, there were 1,510 statutes within the U.S. Code creating at least one crime—a 36% increase relative to the number in 1994); Stephen F. Smith, Federalization's Folly, 56 San Diego L. Rev. 31, 45 (2019) (discussing the role of the War on Drugs as "a leading driver of mass incarceration at the federal level").

[137] Amar & Marcus, supra note 45, at 2.

[138] See Benton v. Maryland, 395 U.S. 784, 794, 796 (1969).

[139] *Gamble*, 139 S. Ct. at 1994 (Ginsburg, J., dissenting).

[140] Holzhaus, supra note 93, at 1702 (describing such an assumption as "plac[ing] an enormous burden on individual liberties, taking no account . . . of the [sovereign] interests already vindicated").

reinterpretation of the dual sovereignty doctrine, shifting it away from the current bright-line rule,[141] would better serve defendants' due process rights to double jeopardy protection, as compared to the current status quo,[142] while also adhering more faithfully to the prior case law.[143] At the same time, the application of this new test would also ensure that federal and state governments could adequately protect their respective interests in criminal proceedings in cases where one sovereign had prosecuted a crime while leaving the other sovereign's interest substantially unvindicated.

This primary-purposes test, moreover, would not be unworkable. In fact, the Department of Justice ("DOJ") already has in place an internal guideline—the "Petite Policy"—informing DOJ prosecutors when they should be able to bring federal charges against a defendant who has already been involved in a prior state or federal proceeding based on "substantially the same act(s) or transactions."[144] Two of the Petite Policy's main prerequisites for bringing a subsequent federal charge are that (1) "the matter must involve a substantial federal interest," and (2) "the prior prosecution must have left that substantial federal interest demonstrably unvindicated."[145] The Petite Policy admirably regulates prosecutorial discretion,[146] but it ultimately remains insufficient as a means of guaranteeing the due process rights of defendants against double jeopardy. First, an assessment of whether a DOJ prosecutor has complied with the Petite Policy is left to the approval of another official within the DOJ[147] as opposed to the published legal analysis of a court, available to public scrutiny and debate.[148] Second, the level of protection afforded by

[141] See supra note 84 and accompanying text.

[142] Michael J. Zydney Mannheimer, Three-Dimensional Dual Sovereignty: Observations on the Shortcomings of *Gamble v. United States*, 53 Tex. Tech. L. Rev. 67, 84 (2020) (describing the working status quo of the dual sovereignty doctrine as an "ultimate irony" because "a provision [the Fifth Amendment] designed to limit federal involvement in criminal justice has been interpreted instead in a way that encourages it").

[143] See generally supra Section I.B (explaining how *Fox*, *Marigold*, and *Moore* support the proposed interpretation of the dual sovereignty doctrine).

[144] U.S. Dep't of Just., Justice Manual § 9-2.031 (2020).

[145] Id.

[146] Joseph S. Allerhand, The Petite Policy: An Example of Enlightened Prosecutorial Discretion, 66 Geo. L.J. 1137, 1138 (1978).

[147] The decision to prosecute is subject to approval by the "appropriate Assistant Attorney General." U.S. Department of Justice, supra note 144, § 9-2.031.

[148] Internal decisions are less publicly accountable. It is unclear from the courts' opinions in each of the *Gamble* decisions (not only at the trial and appellate levels but also at the Supreme Court) why the DOJ in Gamble's case decided to proceed with the federal prosecution. See

the Petite Policy may be constitutionally inadequate.[149] If, as this Note has argued, subsequent or concurrent prosecutions can rise (or should be seen as rising) to the level of a constitutional violation of a defendant's due process rights when the second prosecution does not vindicate substantially distinct sovereign interests left unprotected by the other proceeding, then the proper venue for the protection of these rights is and has been, since at least the day of *Marbury v. Madison*, constitutional review by the courts.[150] Finally, the Petite Policy is limited in scope—it only covers federal prosecutions subsequent to a prior state or federal prosecution and can obviously have no legal effect on whether a state decides to embark upon prosecution subsequent to a prior federal prosecution.[151] Since a defendant's double jeopardy rights can, post-*Benton*, be violated just as easily by a state government as by the federal government, turning the primary-purposes test into a constitutional requirement would ensure that defendants' rights remain protected from double jeopardy violations at all levels of sovereignty.

B. The Primary-Purposes Test and Theories of International Jurisdiction

The primary-purposes test would also present a cogent response to the majority's argument in *Gamble* that eliminating (or in this case, modifying) the dual sovereignty doctrine would bar domestic prosecutions for crimes that had already been prosecuted by foreign authorities.[152] Part II of this Note laid out the arguments as to why prior foreign prosecutions should be treated differently than prior domestic prosecutions for double jeopardy purposes.[153] The primary-purposes test presents an additional underlying consideration as to why prosecutions by

generally United States v. Gamble, No. 16-cr-00090, 2016 WL 3460414 (S.D. Ala. June 21, 2016); United States v. Gamble, 694 F. App'x 750 (11th Cir. 2017); Gamble v. United States, 139 S. Ct. 1960 (2019).

[149] Even as a factual matter, it is unclear to what extent the Petite Policy, which "is invoked at the government's discretion," has prevented such concurrent or subsequent federal prosecutions. Michael A. Dawson, Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, 102 Yale L.J. 281, 293 (1992).

[150] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). That is, if indeed these subsequent prosecutions are unconstitutional, it should be left up to the Court to determine, subject to judicial review, at what point these prosecutions become unconstitutional.

[151] Indeed, it appears that "state prosecutions following federal prosecutions for offenses arising from the same conduct are brought routinely." Dawson, supra note 149, at 294.

[152] See *Gamble*, 139 S. Ct. at 1967.

[153] See supra Part II.

foreign sovereigns should be treated differently as a matter of principle: because the interests of a foreign sovereign can never be properly vindicated by the proceeding of a United States sovereign, and vice versa.[154]

In international law, states are generally permitted to assert criminal prosecutorial authority or jurisdiction for five reasons: the principle of territoriality, active personality, passive personality, the protective principle, and universal jurisdiction.[155] Territoriality concerns the ability of a state to prosecute criminal acts that occur within its borders and conduct occurring outside its borders that has a substantial effect within its territory.[156] Active personality concerns the ability of a state to prosecute acts carried out by its citizens.[157] Passive personality concerns the ability of a state to prosecute crimes carried out against its citizens.[158] The protective principle allows for a state to prosecute acts carried out by noncitizens outside of the state's borders "directed against the security of the state or against a limited class of other fundamental state interests."[159] Finally, universal jurisdiction, though more controversial in its scope, permits any state to exercise jurisdiction over a narrow scope of particularly egregious offenses, such as genocide, piracy, slavery, and torture.[160]

If, to analyze a hypothetical situation, an American citizen were to murder an Australian citizen in Italy, under the primary-purposes test, the three separate sovereigns should each be permitted to prosecute the American citizen without any double jeopardy issue, because each form

[154] As the Supreme Court once noted:

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation . . . shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." . . .
>
> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will on the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

[155] Restatement (Fourth) of Foreign Relations Law of the United States §§ 408–13 (Am. L. Inst. 2017).

[156] Id. §§ 408–09.

[157] Id. § 410.

[158] Id. § 411.

[159] Id. § 412.

[160] Id. § 413; id. § 413 cmt. 2.

of jurisdiction attaches to a separate and distinct sovereign interest that would have been violated. Italy could exercise territorial jurisdiction because a murder on its soil represents a violation of its sovereign interest in keeping peace throughout its territory.[161] Australia could exercise passive personality jurisdiction because the murder of one of its subjects represents an affront to its sovereign interest to prevent unjust harm from befalling its subjects.[162] The United States could exercise active personality jurisdiction because it possesses a sovereign interest in seeing that its citizens, who claim certain privileges from (and assert rights against) the United States for the duration that they hold citizenship, do not, upon crossing an international border, surrender their concomitant obligations to domestic law.[163] If, moreover, the hypothetical American in question had been engaged in espionage while in Italy against a fourth country—for example, Switzerland—it would make sense for Switzerland to independently protect its own interest by exercising protective principle jurisdiction, since neither Italy nor the United States in this scenario would be able to protect Switzerland's fundamental national security interests.[164] Finally, if an individual were to have committed one of the offenses considered sufficiently morally outrageous

[161] Charles Doyle, Cong. Rsch. Serv., 94-116, Extraterritorial Application of American Criminal Law 1 (2023) ("Crime is traditionally proscribed, tried, and punished according to the laws of the place where it occurs.").

[162] Geoffrey R. Watson, The Passive Personality Principle, 28 Tex. Int'l L.J. 1, 19 (1993) ("Passive personality jurisdiction . . . serves an important state interest—protection of its own nationals abroad—and does so with at least some efficacy.").

[163] As a domestic legal matter, the Supreme Court has recognized the principle of active personality at least since 1932 for this very reason. In speaking of a United States citizen who had moved to France and subsequently ignored a subpoena, for which he was held in contempt, the Court has written:

> By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country . . . . For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. . . . Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen . . . and to penalize him in case of refusal.

Blackmer v. United States, 284 U.S. 421, 436–37 (1932).

[164] Robert Staal, International Conflict of Laws—The Protective Principle in Extraterritorial Criminal Jurisdiction, 15 U. Mia. L. Rev. 428, 432 (1961) ("There is good reason to make criminal jurisdiction extraterritorial with reference to aliens. 'So long as the State within whose territory such offences are committed fails to take adequate measures, competence must be conceded to the State whose fundamental interests are threatened.'" (quoting Harvard Research in International Law, Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. 543, 552 (Supp. 1935))).

to trigger the exercise of universal jurisdiction, the prosecution of the offender, as *hostis humani generis*, would naturally and perforce fall within the interest and ambit of any sovereign.[165] The primary-purposes test would thus never present a constitutional bar to a United States sovereign embarking upon a criminal prosecution, regardless of whether the defendant had already been tried for the conduct in question in the court of a foreign sovereign, because none of these foreign sovereigns could have in fact fully vindicated the interest of any other in prosecuting such offenses.

CONCLUSION

The *Gamble* Court construed the dual sovereignty doctrine too broadly, and, in so doing, handed down a decision that will result in the continued violation of defendants' due process rights against double jeopardy. Correcting this jurisprudential error, however, is relatively simple, as the Court need only look to the older line of cases—*Fox*, *Marigold*, and *Moore*—to develop a "primary-purposes test" to determine whether a second state, federal, or tribal prosecution would be constitutionally permissible. This primary-purposes test would require courts to analyze whether the primary purposes of a concurrent or subsequent prosecution are chiefly directed at vindicating a unique sovereign interest that would have otherwise been left unvindicated absent this second proceeding. If a court finds that the second prosecution does not fulfill the requirements of this test, then it should overturn the results of the subsequent prosecution as constituting a due process violation of the Double Jeopardy Clause. This test would thus strike a balance between ensuring that defendants' rights are adequately protected while also allowing for some instances in which a subsequent prosecution could be legitimately brought by a distinct domestic sovereign.

This test would also not interfere with the ability of the United States to prosecute a crime, even in such cases where a foreign sovereign had already prosecuted a defendant for the same conduct. In such instances, the primary-purposes test would recognize that the United States would be vindicating a sovereign interest per se distinct from that of a foreign

[165] Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785, 791–95 (1988) ("Piracy is the oldest offense that invokes universal jurisdiction. . . . [P]irates [were considered] enemies of all people and are punishable by every state because of the threatening acts they commit: . . . [they are thus] *hostis humani generis*.").

sovereign, both by virtue of the United States' truly independent sovereignty, but also because each international basis for criminal jurisdiction (i.e., the principle of territoriality, active personality, and passive personality) necessarily implicates and is grounded upon a distinct sovereign interest.