

## Gamble v. United States 139 S. Ct. 1960 (2019)

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# Ohio Northern University Law Review

## Student Case Notes

### Gamble v. United States 139 S. Ct. 1960 (2019)

#### I. INTRODUCTION

Sometimes the issue posed at the outset of a U.S. Supreme Court decision appears clear-cut, but as reasoning and analysis for the decision unfold, the once clear question becomes a muddled pool of complex history. In *Gamble v. United States*,<sup>1</sup> the issue posed at the outset was simple: in 1791, when the Fifth Amendment of the Constitution was ratified, what was meant by the word ‘offence?’<sup>2</sup> According to the Double Jeopardy Clause of the Fifth Amendment, a person cannot be tried twice for the same offense.<sup>3</sup> In a 7-2 decision, the Court held that an offense is “a violation of a sovereign’s law,” and that violations of multiple sovereigns’ laws represent separate offenses, rather than an offense constituting, say, one unit of criminal conduct.<sup>4</sup> The majority justified its ruling with two principles: precedent and the dual sovereignty doctrine of the Fifth Amendment.<sup>5</sup> The Court, Justice Alito stated in the majority opinion, has always held that offenses laid out in separate criminal codes constitute distinct and separate offenses.<sup>6</sup> Thus, if a person commits a crime in which he or she violated both a state statute and a federal statute, both the state and federal governments can prosecute the individual regardless of the possibilities that the statutes are similar or that the prosecutions stem from the same unit of conduct. Since this is the way the Court has defined an ‘offence’ for the past 170 years, there must be “a

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

2. *Id.* at 1963.

3. U.S. CONST. amend. V.

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

5. *Id.* at 1963.

6. *Id.*

special reason over and above the belief that a prior case was wrongly decided” in order to include ‘one whole unit of criminal conduct’ within the definition of offense.<sup>7</sup> The Court ultimately found the defense’s argument and evidence to be too weak to meet this high standard.<sup>8</sup>

In 1969, the Court incorporated the Double Jeopardy Clause.<sup>9</sup> Incorporation meant that all 50 states had to follow the Court’s interpretation of the Double Jeopardy Clause.<sup>10</sup> Prior to the Court’s incorporation of the Clause, many states held that the Clause barred “repeated prosecutions for the same alleged acts.”<sup>11</sup> The Supreme Court, unlike some state courts, read the dual sovereignty doctrine to mean that violations of separate criminal codes of the state and federal governments constituted separate offenses.<sup>12</sup> Justice Ginsburg, in her dissent, addressed the idea that incorporation of the Double Jeopardy Clause never should have happened in the first place, since the “United States and its constituent States, unlike foreign nations, are ‘kindred systems, parts of one whole.’”<sup>13</sup> Ginsburg argued that there is merely one sovereignty in the United States, we the people, who follow one set of laws, the Constitution.<sup>14</sup> Thus, in her opinion, the dual sovereignty doctrine must be removed from the Fifth Amendment. Elimination of the doctrine would ensure that only one government entity would have the ability to prosecute an individual for violating the law, despite potentially multiple sovereigns having their laws violated.

Justice Gorsuch’s dissent focused on the inherent unfairness of this holding.<sup>15</sup> The Double Jeopardy Clause, Gorsuch wrote, was ratified at a time when there was not much overlap between state and federal criminal codes.<sup>16</sup> In particular, Gorsuch disagreed with the Court’s interpretation of the phrase “same offense,” which the majority opinion concluded was clearly meant to be read as sovereign-specific.<sup>17</sup> Justice Thomas wrote a concurring opinion to voice his displeasure over the majority opinion’s use of the concept of *stare decisis*.<sup>18</sup> Thomas felt that it was used by the Court as a means to reach the decision they wished to reach, rather than simply applying the standard for

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7. *Id.* at 1981 (Thomas, J., concurring).

8. *Gamble*, 139 S. Ct. at 1976.

9. *Id.* at 1978-79.

10. *Id.*

11. Carolyn Kelly MacWilliam, Annotation, *Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State Offense Based on Same Facts – Modern View*, 97 A.L.R. 5th 201 (2002).

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

13. *See id.* at 1990 (Ginsburg, J., dissenting).

14. *Id.* at 1990-91.

15. *Id.* at 1996 (Gorsuch, J., dissenting).

16. *Id.* at 2008.

17. *Gamble*, 139 S. Ct. at 2008-09.

18. *Id.* at 1981 (Thomas, J., concurring).

overruling precedent and determining whether that standard had been met by the defense.<sup>19</sup> Overall, the Court's interpretation of the Double Jeopardy Clause is an increasingly important one these days as much of the federal criminal code now overlaps with state criminal codes, meaning more people are subject to multiple prosecutions stemming from one criminal unit of conduct than ever before.<sup>20</sup>

## II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

On November 29, 2015, Terance Martez Gamble was arrested by local law enforcement in Mobile, Alabama, after the arresting officer noticed that Gamble was illegally in possession of a firearm.<sup>21</sup> Having previously been convicted of second-degree robbery, Gamble, under Alabama law, was not allowed to own or possess a firearm.<sup>22</sup> Gamble was prosecuted by the State of Alabama and he pled guilty to violating the Alabama law; his conviction led to a 10-year prison sentence.<sup>23</sup> When federal prosecutors subsequently charged Gamble with violating a similar law that related to the same occurrence on November 29, 2015, Gamble moved to dismiss the charge, citing the Double Jeopardy Clause of the Fifth Amendment.<sup>24</sup>

The United States District Court for the Southern District of Alabama denied Gamble's motion, citing the Supreme Court's ruling in *Abbate v. United States* as the current interpretation of the Double Jeopardy Clause.<sup>25</sup> *Abbate* was a 1959 decision in which the Court held that "a federal prosecution is not barred by a prior state prosecution of the same person for the same acts."<sup>26</sup> The district court's opinion, written by Judge Kristi K. DuBose, held that "unless and until the Supreme Court overturns *Abbate*, Gamble's Double Jeopardy claim must likewise fail."<sup>27</sup> After Gamble's motion was denied, he pled guilty to the federal charges; the subsequent conviction subjected Gamble to an additional three-year prison sentence.<sup>28</sup> The United States Court of Appeals for the Eleventh Circuit affirmed the lower court's ruling.<sup>29</sup> The Eleventh Circuit reasoned that unless and until

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19. *Id.* at 1980.

20. *Id.* at 1980-81.

21. *Id.* at 1964.

22. ALA. CODE § 13-A-11-72(a) (2015).

23. *See Gamble*, 139 S. Ct. at 1989 (Ginsburg, J., dissenting).

24. *Id.* at 1964.

25. *United States v. Gamble*, 2016 WL 3460414, \*3 (S.D. Ala. 2016).

26. *Abbate v. United States*, 79 S. Ct. 666, 670 (1959).

27. *Gamble*, 2016 WL 3460414 at \*3.

28. *See Gamble*, 139 S. Ct. at 1989 (Ginsburg, J., dissenting).

29. *United States v. Gamble*, 694 F. App'x 750, 750-51 (11th Cir. 2017) (mem).

*Abbate* is overturned, the dual sovereignty doctrine recognizes violations of both state and federal criminal codes as separate and distinct offenses.<sup>30</sup>

### III. THE COURT'S DECISION AND RATIONALE

#### A. *The Majority Opinion*

The majority opinion, written by Justice Alito and joined by Justices Thomas, Breyer, Sotomayor, Kagan, Kavanaugh, and Chief Justice Roberts, focused heavily on the dual sovereignty doctrine and whether the Court should eliminate the doctrine from the Double Jeopardy Clause.<sup>31</sup> In order to eliminate the dual sovereignty doctrine, the Court would have to overrule 170 years of precedent.<sup>32</sup> The standard for overruling well-established precedent is that there must be a “special reason over and above the belief that a prior case was wrongly decided.”<sup>33</sup> The defense argued that it was the intent of the framers of the Constitution to have the Double Jeopardy Clause bar subsequent prosecutions relating to one unit of criminal conduct.<sup>34</sup> Much of the defense’s argument rested on an undocumented English case from 1677 involving a man named Hutchinson. In Hutchinson’s case, the defendant was prosecuted and acquitted of murder in a foreign court.<sup>35</sup> When England prosecuted him for the same crime, the English court held that Hutchinson’s prior foreign prosecution barred retrial.<sup>36</sup> This holding, the defense argued, created the well-known Hutchinson Rule in Europe, by which it was common knowledge that a person could not be tried by two different sovereigns for the same crime.<sup>37</sup> The defense further contended that the Hutchinson Rule is within the Double Jeopardy Clause of the Fifth Amendment, whereby it was intended by the framers of the Constitution to have the Clause bar subsequent prosecutions for the same criminal violation.<sup>38</sup>

The Court ultimately decided that Gamble’s argument and evidentiary support was too weak to warrant the special justification required to overrule 170 years of precedent.<sup>39</sup> To support the Court’s holding, Justice Alito first pointed to the text of the clause itself.<sup>40</sup> In an attempt to refute the popular belief that the dual sovereignty doctrine is an exception to the clause, the

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30. *Id.*

31. *Gamble*, 139 S. Ct. 1963-64.

32. *Id.* at 1964.

33. *Id.* at 1981 (Thomas, J., concurring).

34. *Id.* at 1964-65.

35. *Id.* at 1970.

36. *Gamble*, 139 S. Ct. at 1970.

37. *Id.* at 1969-70.

38. *Id.* at 1969.

39. *Id.* at 1976.

40. *Id.* at 1965.

Court noted that the doctrine is written into the clause. The text of the Double Jeopardy Clause provides that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.”<sup>41</sup> From this text, the majority reasoned that since “an ‘offence’ is defined by a law, and each law is defined by a sovereign. . . where there are two sovereigns, there are two laws and two ‘offences.’”<sup>42</sup> Thus, the Double Jeopardy Clause itself provides the means for multiple sovereigns to prosecute an individual for the same criminal conduct, rather than the doctrine having been an exception created through a court ruling.

Next, Justice Alito pointed to the Court’s three antebellum cases that govern the Court’s current interpretation of the Clause.<sup>43</sup> All decided between 1847 to 1852, these cases held that fidelity to the clause’s text enabled the Court to honor the notions that (1) different criminal codes are always distinct and (2) each sovereign always has a substantively different interest in prosecution under its respective criminal statute from that of a different sovereign.<sup>44</sup> These three holdings explain why the Court never examined the differences between the Alabama statute and the federal statute under which Gamble was prosecuted: adherence to the text of the clause, according to the antebellum cases, means that the Alabama and the United States felon-in-possession statutes are distinct and that each sovereign was protecting a separate interest in prosecuting the defendant.<sup>45</sup>

The majority touched on the dissenting opinion’s assertion that there is merely one sovereign in the United States, we the people.<sup>46</sup> The Court rejected this argument as illogical, considering that when the people of America adopted the Constitution, they “split the atom of sovereignty” between the states and the nation.<sup>47</sup> With there clearly being two sovereigns within the United States, the Court reasoned that “the States and the Nation have different ‘interests’ and ‘right[s]’” and the dual sovereignty doctrine acts to adequately represent those differing interests.<sup>48</sup> The Court then went into a lengthy analysis of the defense’s argument, determining that if the Hutchinson Rule were found to have existed, it would provide a legitimate reason for the Court to overrule precedent.<sup>49</sup> Ultimately, however, the defense’s evidence was too lackluster and scattered to warrant a reasonable belief that the Hutchinson Rule in fact ever existed.

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41. U.S. CONST. amend. V.

42. *See Gamble*, 139 S. Ct. at 1965.

43. *Id.* at 1966.

44. *Id.*

45. *Id.* at 1966-67.

46. *Id.* at 1968.

47. *See Gamble*, 139 S. Ct. at 1968.

48. *Id.*

49. *See generally id.* at 1969.

*B. Concurring Opinion by Justice Thomas*

Justice Thomas wrote a concurring opinion to voice his displeasure over the majority opinion's approach to stare decisis.<sup>50</sup> Thomas believed that the Court used the age-old doctrine as a means to achieve the decision it wished to achieve, rather than using the doctrine the way it was meant to be used.<sup>51</sup> "[T]he Constitution," Thomas stated, "charged federal courts primarily with applying a limited body of written laws articulating those legal principles."<sup>52</sup> Federal courts were not charged with the power of pushing their "own private judgment."<sup>53</sup>

The Court reasoned that the founders of the Constitution foresaw the situation in *Gamble* occurring and ratified the Fifth Amendment in part to allow the states and the nation to conduct subsequent prosecutions when both statutes said essentially the same thing. Thomas argued that this conclusion simply cannot be deduced, since at the time the Fifth Amendment was ratified, there was hardly any overlap between federal and state criminal codes in the U.S.<sup>54</sup> Therefore, "the founding generation foresaw very limited potential for overlapping criminal prosecutions by the States and the Federal Government."<sup>55</sup> Nonetheless, Justice Thomas agreed with denying *Gamble*'s motion to dismiss, believing that *Gamble*'s evidence was too weak to overrule the dual sovereignty doctrine of the Double Jeopardy Clause.<sup>56</sup>

*C. Dissenting Opinion by Justice Ginsburg*

Justice Ginsburg argued that the United States is one sovereign, for which the idea of dual sovereignty does not apply.<sup>57</sup> She argued the notion that the United States is composed of two sovereignties is a metaphysical idea that is merely a way to get around the Double Jeopardy Clause.<sup>58</sup> As Justice Ginsburg pointed out, "[h]ad either the Federal Government or Alabama brought the successive prosecutions, the second would have violated *Gamble*'s right not to be 'twice put in jeopardy. . . for the same offense.'"<sup>59</sup> Thus, the idea of a dual sovereignty doctrine allowed both sovereigns to achieve what neither one could have done alone, multiple prosecutions of the same person for the same criminal act.

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50. *Id.* at 1981 (Thomas, J., concurring).

51. *Id.*

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

53. *Id.* at 1983.

54. *Id.* at 1980.

55. *Id.*

56. *Gamble*, 139 S. Ct. at 1980 (Thomas, J., concurring).

57. *Id.* at 1989 (Ginsburg, J., dissenting).

58. *Gamble*, 139 S. Ct. at 1989 (Ginsburg, J., dissenting).

59. *Id.*

Additionally, Ginsburg clarified why the United States of America is structured as an entity of separate states united under one Constitution, with a division of authority between the nation and the states. The division was “meant to operate as ‘a double security [for] the rights of the people.’”<sup>60</sup> In reality, the dual sovereignty doctrine allows a double security for the state and federal governments, who both get a chance to prosecute the same person for the same crime, so long as there are applicable statutes in each criminal code. Ginsburg’s next point of contention was the Court’s use of precedent. She believed that “[i]n adopting and reaffirming the separate-sovereigns doctrine, the Court relied on dicta from 19<sup>th</sup>-century opinions.”<sup>61</sup> These 19<sup>th</sup>-century opinions were the three antebellum cases the majority opinion used as the main support for the Court’s current interpretation of the Clause.

There are other 19<sup>th</sup>-century cases, such as *Houston v. Moore*,<sup>62</sup> that suggest early American courts were hesitant to allow successive prosecutions by the state and federal governments.<sup>63</sup> Lastly, Ginsburg contended that the test in *Blockburger v. United States*<sup>64</sup> was not met in this case, wherein offenses are distinct if “each requires proof of a fact which the other does not.”<sup>65</sup> Since under *Blockburger* Gamble’s offenses were not distinct, the Double Jeopardy clause should have barred the federal prosecution of Gamble.<sup>66</sup>

#### *D. Dissenting Opinion by Justice Gorsuch*

Much of Justice Gorsuch’s dissent echoed Justice Ginsburg’s sentiments. “A free society,” he wrote, “does not allow its government to try the same individual for the same crime until it’s happy with the result.”<sup>67</sup> Gorsuch pressed the notion that both the federal and state governments could prosecute Gamble for possessing a firearm when neither sovereign on its own could have prosecuted him twice was unconstitutional. Gorsuch contended that Gamble only committed one offense, illegally possessing a firearm.<sup>68</sup> Since both statutes required the same essential elements to be met, there was successive prosecutions over a singular offense, which the Double Jeopardy Clause was intended to prevent.

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60. *Id.* at 1991.

61. *Id.* 1991-92.

62. *Houston v. Moore*, 18 U.S. 1, 12 (1820).

63. *Id.* at 1992.

64. *Blockburger v. United States*, 284 U.S. 299, 299 (1932).

65. *Gamble*, 139 S. Ct. at 1992-93 (Ginsburg, J., dissenting).

66. *Id.*

67. *Id.* at 1996 (Gorsuch, J., dissenting).

68. *Id.* at 1996-97.



Gorsuch also turned to the intent of the framers of the Constitution. He argued that the framers did not intend for the term “‘same offence’ to bear such a lawyerly sovereign-specific meaning.”<sup>69</sup> Lastly, Gorsuch turned to the idea that the dual sovereignty doctrine was not meant to apply to “the United States and a constituent state, given that both governments derive their sovereignty from the American people.”<sup>70</sup> This was similar to Ginsburg’s argument; since all governments within the United States derive their sovereignty from the American people, there is truly only one sovereignty in America.

#### IV. ANALYSIS

##### *A. Introduction*

Despite the fact that the majority opinion properly addressed the issue of the case, one could argue that the Court never actually answered the question posed. Indeed, in 1791, when the Fifth Amendment was ratified, what was meant by the word ‘offence’ within the Double Jeopardy Clause was the crucial issue in the case.<sup>71</sup> However, the Court’s answer, that an offense was “a violation of a sovereign’s law,” merely answered the question ‘in what light was the word ‘offence’ within the Clause meant to be read?’<sup>72</sup> The Court’s answer to that question was that ‘offence’ must be read within a dual sovereignty light, for which violations of multiple sovereign’s laws represent distinct and separate violations, each qualified to bring forth separate prosecutions from the sovereigns.<sup>73</sup>

The true answer to the question of ‘what was meant by the word ‘offence’?’ can nonetheless be found within the majority’s opinion. Citing Justice Scalia’s dissent in *Grady v. Corbin*, the Court noted that the word ‘offence’ in 1791 meant “an act committed against law, or omitted where the law requires it.”<sup>74</sup> An ‘offence’ meant “an act committed against law,” or, in other words, the breaking of the law. After examining the two statutes that Gamble violated, Alabama Code § 13A-11-72(a) and 18 U.S.C. § 922(g)(1), it was clear that Gamble broke one law, which was possession of a firearm as a convicted felon. Gamble’s ability to be prosecuted multiple times under effectively identical statutes marked a stark contrast from *Abbate*, a case in which the defendants were prosecuted under a federal statute that was materially different from the state statute that they were prosecuted under in

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69. *Id.* at 1988.

70. *Gamble*, 139 S. Ct. at 2002 (Gorsuch, J., dissenting).

71. *Id.* at 1963-64.

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

73. *Id.* at 1964.

74. *Id.* at 1965.

state court.<sup>75</sup> Additionally, after considering the framers' intent behind the Constitution and the Double Jeopardy Clause, one could argue that the Court's interpretation of 'offence' strayed from the word's original meaning. The Double Jeopardy Clause was put in place to make it more difficult for a person to twice be tried for the same unit of criminal conduct, not easier.<sup>76</sup>

Ultimately, the Court's interpretation of 'offence' did not fall in line with the Constitution's intended meaning of the word. In addition, *Abbate* is inapplicable to cases such as *Gamble*, where the state and federal statutes contain essentially the same elements. Proving the unconstitutional nature of the Court's interpretation of 'offence' as well as the irrelevancy of *Abbate* to cases involving dual prosecutions under identical statutes would satisfy the high burden of upending precedent and prevent outcomes such as *Gamble* from occurring in the future.

### *B. Discussion*

#### *i. Examining the Offenses*

The majority opinion acknowledged in its holding that an offense in 1791 meant "an act committed against law."<sup>77</sup> In analyzing whether *Gamble* was allowed to be prosecuted for violations of two sovereign's laws, it was surprising that the Court did not compare the state and federal laws under which *Gamble* was prosecuted. Doing this would have helped to determine whether the violations of the state and federal laws represented substantively different crimes that affected each prosecuting sovereign uniquely, or represented essentially the same crime. To determine this, a closer look at each statute is required. The Alabama statute *Gamble* was convicted under reads as follows:

(a) No person who has been convicted in this state or elsewhere of committing or attempting to commit a crime of violence, misdemeanor offense of domestic violence, violent offense as listed in Section 12-25-32(15), anyone who is subject to a valid protection order for domestic abuse, or anyone of unsound mind shall own a firearm or have one in his or her possession or under his or her control.<sup>78</sup>

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75. *Abbate*, 79 S. Ct. at 667.

76. *Gamble*, 139 S. Ct at 1962.

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

78. ALA. CODE § 13-A-11-72(a).

Section 12-25-32(15) lists second-degree robbery as a violent offense, thereby triggering Gamble's violation of the code. By comparison, the federal statute Gamble was convicted under reads as follows:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

[ . . . ]

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.<sup>79</sup>

Most of Section 12-25-32(15)'s exhaustive list of violent offenses garner prison sentences of terms exceeding one year.<sup>80</sup> In addition, the Commerce Clause has enabled federal prosecutors to successfully argue that possession of a gun, which is typically acquired through interstate commerce, affects interstate commerce.<sup>81</sup> Thus, both statutes essentially boil down to this: it shall be unlawful for any person previously convicted of and incarcerated for a crime of violence to own or possess a firearm.

The Court's counter to both statutes punishing the same conduct was that since the state and federal felon-in-possession-of-a-firearm statutes were laid out in separate criminal codes, the violation of each represented distinct and separate offenses.<sup>82</sup> The principal case the Court used to back this argument was *Abbate v. United States*.<sup>83</sup> In *Abbate*, the defendants were convicted in Illinois state court for violating an Illinois conspiracy statute, in which it was unlawful to conspire to destroy the property of another, regardless of where the property was located and so long as the conspiracy was conjured in Illinois.<sup>84</sup> The United States subsequently prosecuted the defendants under a federal conspiracy statute, in which it was unlawful to conspire to destroy property owned or operated by the United States.<sup>85</sup>

Although the properties of the federal prosecution were the same as the state prosecution, there was a material difference between the state and

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79. 18 U.S.C. § 922(g)(1), (9) (2019).

80. ALA. CODE § 12-25-32(15).

81. Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. MARSHALL L. REV. 385, 391 (2006).

82. See *Gamble*, 139 S. Ct. at 1991 (Ginsburg, J., dissenting).

83. See *Gamble*, 139 S. Ct. at 1967.

84. See *Abbate*, 79 S. Ct. at 667.

85. *Id.* at 667-68.

federal statutes. To violate the Illinois statute, the defendants had to merely intend to destroy the property of another, regardless of who owned the property.<sup>86</sup> To violate the federal statute, however, the defendants had to intend to destroy property owned or operated by the United States.<sup>87</sup> In *Abbate*, the property the defendants conspired to destroy was facilities of the Southern Bell Telegraph and Telephone Company. Within the facilities were coaxial repeater stations and micro-wave towers “which were essential and integral parts of systems and means of communication operated and controlled by the United States.”<sup>88</sup> Thus, in prosecuting the defendants, the United States sought to protect an interest that was separate from the interests of the State of Illinois in their prosecution. The United States sought to protect property that was owned by the federal government from being destroyed.<sup>89</sup> Illinois, in contrast, merely sought to protect all individuals’ property from being destroyed.<sup>90</sup>

The material differences between the state and federal statutes in *Abbate* cannot be found in the statutes for which Gamble was prosecuted. Unlike *Abbate*, in *Gamble*, the United States prosecuted under a law that required satisfaction of the same elements as the state law for which the defendant had already been tried.<sup>91</sup> If *Abbate* continues to guide the Court’s interpretation of the Double Jeopardy Clause, it should not apply to cases such as *Gamble* where the state and federal laws contain essentially the same elements with no material differences between them.

#### *ii. Response to the Dual Sovereignty Doctrine*

The United States of America, as the name suggests, is one of the most unique structures of government in the world. America was founded on the idea that each state had the power to make its own laws and adjudicate on those laws, while simultaneously coming together under a national set of laws.<sup>92</sup> The foremost of these national laws was the Constitution, and this set of rules and rights reigns supreme as the highest law across all 50 states.<sup>93</sup> Justice Alito was correct when he stated that once the Constitution was ratified, the people of the United States “split the atom of sovereignty”

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86. *See id.* at 667.

87. *Id.*

88. *See Abbate*, 79 S. Ct. at 667.

89. *Id.* at 667-68.

90. *Id.* at 667.

91. *See Gamble*, 139 S. Ct. at 1964.

92. Robert Levy, *Rights, Powers, Dual Sovereignty, and Federalism*, CATO INSTITUTE (September 30, 2011), <https://www.cato.org/policy-report/septemberoctober-2011/rights-powers-dual-sovereignty-federalism>.

93. U.S. CONST. amend. IV.

between the states and the nation, creating two separate sovereigns.<sup>94</sup> There is little to argue over the assertion that there are two sovereigns in America, the states and the nation, and that each sovereign has its own set of laws. The assertion that leaves plenty of room for argument is that an ‘offence’ is defined by a law, and each law defined by a sovereign. Thus, where there are two sovereigns, there are two laws and two ‘offences.’<sup>95</sup>

This assertion completely overlooks the actual language of the statutes themselves. An offense is violating the law, but when two statutes contain the same elements and punish the same conduct, that does not make it two separate offenses. In Gamble’s case, he did not drive in Alabama, get arrested for violating Alabama’s felon-in-possession-of-a-firearm statute and then proceed to drive across state lines and distribute a firearm. Nor did he drive with a firearm that was owned and controlled by the United States. Those both would have warranted subsequent federal prosecutions, as the United States would have a separate interest to protect from the State of Alabama. Instead, Gamble drove solely in the State of Alabama possessing a firearm. Gamble committed one offense – possessing a firearm after having been previously convicted and incarcerated for a violent offense.<sup>96</sup> As was already stated, Alabama Code § 13A-11-72(a) and 18 U.S.C. § 922(g)(1), the state statute and the federal statute under which Gamble was prosecuted, respectively, both contained the same essential elements and were protecting the same interest.<sup>97</sup> Holding, as the majority did, that since there are two sovereigns in America, and each has its own sets of laws, violations of each sovereign’s laws automatically allows for multiple prosecutions is unconstitutional.

The dual sovereignty doctrine is a part of the Double Jeopardy Clause that is worthy of standing the test of time. United States case law leaves it well established that there are two sovereignties in this nation, the states and the federal government.<sup>98</sup> The aspect that should not stand the test of time is the Court’s interpretation of the Double Jeopardy Clause. The clause was put in place to make it harder for individuals to be twice prosecuted for the same unit of criminal conduct, not easier.<sup>99</sup> It is worth mentioning, as Justice Thomas did in his concurrence, that in 1791 when the Fifth Amendment was ratified, there was very little overlap between state and federal criminal codes.<sup>100</sup> A majority of the criminal statutes in America at the time were

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94. *Gamble*, 139 S. Ct. at 1968.

95. *Id.* at 1964.

96. *Id.*

97. ALA. CODE § 13-A-11-72(a); 18 U.S.C. § 922(g)(1), (9).

98. *Bond v. United States*, 131 S. Ct. 2355, 2356 (2011).

99. *Levy*, *supra* note 92.

100. *See Gamble*, 139 S. Ct. at 1980 (Thomas, J., concurring).

contained in state criminal codes.<sup>101</sup> Since 1791, the federal criminal code has expanded, and these days has begun to overlap greatly with state criminal codes.<sup>102</sup> These events could not have been foreseen by the framers of the Constitution, and it was certainly not their intention for the Constitution to allow the government to be able to easily exercise its power over the people of America. In short, the dual sovereignty doctrine is an exception that the Court used blindly as a crutch, without ever examining the criminal charges that brought Gamble into court in the first place.

*iii. Alternates to the Current Interpretation of the Double Jeopardy Clause*

In order to fix the jumbled mess that is the Court's interpretation of the Double Jeopardy Clause, the Court need not look further than certain states interpretations of the Clause prior to the Clause's incorporation in 1969. Before incorporation, many states, "focusing on an individual's interest in being free from repeated prosecutions for the same alleged acts," held that multiple prosecutions by separate sovereigns for crimes arising out of the same criminal charge constituted a violation of the defendant's Fifth Amendment rights.<sup>103</sup> Most of these states adopted a two-part factor test for determining whether a subsequent prosecution should be barred. The test weighed "the similarity of the state and federal charges and whether the state and federal laws were designed to protect the same governmental interest."<sup>104</sup> The essence of the test required "proof that each offense contains an element not required by the other or that the applicable statutes were designed to prevent substantially different harms or evils."<sup>105</sup> Had the Court applied this test in *Gamble*, it would have failed since the material elements within the state and federal statutes in question are the same, and both prosecutions were aimed at protecting the same interest. The Court's three antebellum cases on how to interpret the Double Jeopardy Clause all held that "a crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate."<sup>106</sup> The aforementioned factor test would suggest, however, that each sovereign does not have an interest to vindicate when its interest has already been vindicated by a prior prosecution.

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101. Federal Judicial Center, *Jurisdiction: Criminal*, <https://www.fjc.gov/history/courts/jurisdiction-criminal>.

102. David Cole & Somil Trivedi, *It's Time to Close a Loophole in the Constitution's Double Jeopardy Rule*, ACLU (September 12, 2018, 11:30 AM), <https://www.aclu.org/blog/criminal-law-reform/its-time-close-loophole-constitutions-double-jeopardy-rule>.

103. Carolyn Kelly MacWilliam, *supra* note 9.

104. *Id.*

105. *Id.*

106. *See Gamble*, 139 S. Ct. at 1966-67.

## V. CONCLUSION

Overall, the Court's interpretation of the Double Jeopardy Clause in *Gamble* ran afoul of the language within the Fifth Amendment of the Constitution. In 1791, there was very little overlap between state and federal criminal codes; thus, it would have made little sense that the framers intended the phrase "same offence" to be given a sovereign-specific meaning. Indeed, there is 170 years of American case law that upholds the notion that multiple sovereigns can prosecute the same individual for the same unit of criminal conduct.<sup>107</sup> However, the three antebellum cases that interpreted the clause this way did so in part to allow each sovereign to protect its own unique interests. This notion was evidenced in *Abbate*, where each sovereign had a unique interest it was seeking to protect in prosecuting the same individual for the same criminal conduct.<sup>108</sup> *Gamble* evidenced no separate interests between the federal and state governments that would have warranted successive prosecutions. Both sovereign's statutes contained the same material elements and both prosecutions used the same evidence to convict *Gamble*.<sup>109</sup> If the inherent unfairness that is found in *Gamble* did not help to overrule the Court's mistaken interpretation of the Double Jeopardy Clause, it is safe to say that no case ever will.

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107. *Id.* at 1962-63.

108. *Abbate*, 79 S. Ct. at 667.

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