

THE LIMITS OF DUAL SOVEREIGNTY

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*The Double Jeopardy Clause of the Fifth Amendment provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” Yet the dual sovereignty doctrine, a longstanding rule of judicial interpretation, reads the Double Jeopardy Clause as applying only to prosecutions by a single sovereign. Successive prosecutions by separate sovereigns, including the United States and foreign nations, do not implicate double jeopardy. The Double Jeopardy Clause protects the individual from government overreach, but the dual sovereignty doctrine flips the script: It protects the interests of the sovereign at the expense of the individual. After many decades of criticism, the Supreme Court reconsidered and then reaffirmed the doctrine in *Gamble v. United States*. The current blanket rule solves one problem—the fear that sovereign interests will be thwarted by other sovereigns—but creates another: an incentive for two sovereigns to join up to evade constitutional requirements. In the shadow of the dual sovereignty rule, lower courts have articulated an exception where one sovereign manipulates another or uses it as a “sham” or a “cover” for its own aims. Without further guidance from the Supreme Court, however, courts are reluctant to find the exception to apply.*

This Note offers a new approach to inter-sovereign successive prosecutions that would reconcile these two doctrinal threads and provide greater protection to defendants at the mercy of multiple sovereigns: application of the strict scrutiny standard. Courts should embrace the complexity of inter-sovereign prosecutions, which can range from situations of obstruction, where successive prosecution may be necessary, to manipulation, where it should be prohibited. Genuine protection of the right against double jeopardy demands strict scrutiny.

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INTRODUCTION

Bernard Augustine,¹ a nineteen-year-old U.S. citizen from California, traveled to Tunisia in February 2016.² Soon after arriving, he was arrested, detained, interrogated, tried, and ultimately convicted in Tunisian court.³ His crimes: entering Tunisia with the intent to travel to Libya to join a terrorist organization and having the intent to join, participate in training, and provide support to a terrorist organization.⁴ Upon his release from prison in Tunisia, the FBI seized Augustine and transferred him to Brooklyn, where he was convicted of attempting to provide material support to a foreign terrorist organization.⁵

Augustine’s prosecution and imprisonment in Tunisia were not preordained. Before filing charges, the Tunisian authorities had offered to turn him over to the United States, the country of his citizenship.⁶ But the United States declined to take him.⁷ The FBI never-

¹ I worked on Mr. Augustine’s case at the Federal Defenders of New York between June and September 2019. All materials cited here are from the public docket with permission of Mr. Augustine’s legal team at the time.

² Press Release, Dep’t of Just., U.S. Citizen Charged in Brooklyn Federal Court with Attempting to Provide Material Support to ISIL (Feb. 27, 2018), <https://www.justice.gov/usao-edny/pr/us-citizen-charged-brooklyn-federal-court-attempting-provide-material-support-isil> [<https://perma.cc/8R2H-L8RD>].

³ Report & Recommendation at 4, United States v. Augustine, No. 18-cr-00393 (E.D.N.Y. Sept. 8, 2020), ECF No. 83.

⁴ Complaint at 5, United States v. Augustine, No. 18-cr-00393 (E.D.N.Y. Dec. 9, 2016), ECF No. 1.

⁵ Press Release, U.S. Dep’t of Just., Brooklyn Federal Jury Convicts U.S. Citizen of Attempting to Provide Material Support to ISIS (Aug. 23, 2021), <https://www.justice.gov/opa/pr/brooklyn-federal-jury-convicts-us-citizen-attempting-provide-material-support-isis> [<https://perma.cc/SH4M-XX4M>].

⁶ Objections to Report & Recommendation at 10, United States v. Augustine, No. 18-cr-00393 (E.D.N.Y. Sept. 22, 2020), ECF No. 86.

⁷ *Id.*

theless went on to assist heavily in the Tunisian investigation and prosecution,⁸ free from the confines of constitutional criminal procedure.⁹ Meanwhile, back in the United States, the FBI obtained a search warrant and began to gather evidence of Augustine's web browsing history, text messages, and online posts.¹⁰

Toward the end of Augustine's sentence, the Tunisian Ministry of Justice—apparently unaware of developments in the United States—began making plans with the FBI's legal attaché office to send Augustine back home.¹¹ Tunisian officials expressed their understanding that “an individual cannot be tried for the same crime twice” and that Augustine would not face duplicative charges in the United States.¹² Perhaps the Tunisians thought the Americans had agreed not to bring charges, and that such an agreement would be binding. Perhaps they understood that both countries would abide by the international law principle of *non bis in idem*, or “not twice for the same,” as a matter of comity. Or perhaps they believed Augustine to be protected from double jeopardy by the U.S. Constitution.

Whatever their reasoning, the Tunisian authorities were mistaken. Federal prosecutors had filed a complaint against Augustine just one month into his two-year sentence in Tunisia,¹³ and they secured an indictment as his sentence was drawing to a close.¹⁴ The district court denied Augustine's motion to dismiss on double jeopardy grounds, paving the way for trial.¹⁵

Should the protection against double jeopardy have applied to Augustine, and should it apply to others in his shoes? The Double Jeopardy Clause of the Fifth Amendment provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”¹⁶ But a longstanding rule of judicial interpretation known as the dual sovereignty doctrine reads the Double Jeopardy Clause as applying only to prosecutions by a single sovereign.¹⁷ Suc-

⁸ *Id.*

⁹ See generally Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307 (2002).

¹⁰ See generally Complaint, *supra* note 4.

¹¹ See Motion to Dismiss at 34, *United States v. Augustine*, No. 18-cr-00393 (E.D.N.Y. Sept. 20, 2019), ECF No. 36 (“The Tunisians, at least, believed there was a mutual understanding that if he served his time in Tunisia Mr. Augustine would not be punished twice for the same offence.”).

¹² *Id.* at 33.

¹³ Report & Recommendation, *supra* note 3.

¹⁴ Press Release, *supra* note 2.

¹⁵ *United States v. Augustine*, No. 18-cr-00393, 2021 WL 1381060, at *4 (E.D.N.Y. Apr. 13, 2021) (rejecting double jeopardy claims and denying motion to dismiss).

¹⁶ U.S. CONST. amend. V.

¹⁷ *Bartkus v. Illinois*, 359 U.S. 121, 132–33 (1959).

cessive prosecutions by separate sovereigns, such as Tunisia and the United States, do not implicate double jeopardy at all.¹⁸ Invoking this doctrine, the district court found no constitutional violation in the second prosecution of Augustine.¹⁹

The dual sovereignty rule has faced fierce criticism over the past six decades. Judges, scholars, and advocates have challenged its lack of historical grounding, its strained logic, and its increasing unworkability in light of doctrinal and practical developments.²⁰ The expansion of federal criminal law has created previously unthinkable opportunities for double punishment by state and federal government.²¹ Meanwhile, the globalization of U.S. law enforcement and the rise in transnational prosecutions set similar double jeopardy traps on the global stage.²²

¹⁸ *Id.*

¹⁹ *Augustine*, 2021 WL 1381060, at *4.

²⁰ See, e.g., *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring) (arguing for a reconsideration of “the entire dual sovereignty doctrine”); *United States v. Grimes*, 641 F.2d 96, 104 (3d Cir. 1981) (citing “developments in the application of the Bill of Rights to the states, consequent alterations in the system of dual sovereignty, and the historic idiosyncrasies of various of the precedents upon which *Bartkus* relies” as eroding the force of the doctrine, but declining to take a position without guidance from the Supreme Court); *United States v. Berry*, 164 F.3d 844, 847 n.4 (3d Cir. 1999) (suggesting that “the growth of federal criminal law has created a need for the Supreme Court to reconsider the application of the dual sovereignty rule”); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 2–3 (1995) (calling for a rejection of the dual sovereignty doctrine with an exception for civil rights violations); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 639 (1994) (explaining why the ACLU took the position that the dual sovereignty rule should be overruled).

²¹ See, e.g., Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 5 (1992) (describing how an increase in crime-control legislation in the latter half of the twentieth century “greatly increased the quantity of substantive criminal offenses covered by parallel federal and state statutes”).

²² See, e.g., Tuerkheimer, *supra* note 9, at 344; Dax Eric Lopez, Note, *Not Twice for the Same: How the Dual Sovereignty Doctrine Is Used to Circumvent Non Bis in Idem*, 33 VAND. J. TRANSNAT'L L. 1263, 1301 (2000); Thomas Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. REV. 1096, 1103 (1959); Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 341 (2019). Criminal codes in other countries have also expanded their reach, leading to potentially vast overlap in the conduct proscribed by multiple nations. In the wake of September 11, 2001, for example, more than 140 countries enacted or revised counterterrorism statutes, many of which criminalize mere membership in a group that has been designated a terrorist organization. HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY: COUNTERTERRORISM LAWS WORLDWIDE SINCE SEPTEMBER 11, at 27 (2012), https://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf [https://perma.cc/6VX2-CBT3] (“Many counterterrorism laws ban organizations deemed to be terrorist and impose a range of financial sanctions on them. They also frequently criminalize membership in banned organizations, without

The Supreme Court recently considered whether to overturn the dual sovereignty rule in the domestic setting in *Gamble v. United States*.²³ When Gamble petitioned for certiorari, two sitting Justices had called for a “fresh examination” of the doctrine,²⁴ leading many to hope the Court would finally reverse course.²⁵ In the end, however, a seven-Justice majority affirmed the status quo.²⁶ Justice Alito’s opinion for the Court confirmed that “an ‘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.’”²⁷ In reiterating this formal construction of the word “offence,” *Gamble* perpetuates a longstanding fiction that guts the Double Jeopardy Clause of its power.²⁸

As the dissenting Justices and numerous scholars have noted, centering the interests of the government in interpreting a constitutional provision that protects individuals is somewhat perverse.²⁹ The

reference to the actions or the intent of the individual members.”). A person who joins such a group could be violating the laws of dozens of sovereign nations.

²³ 139 S. Ct. 1960, 1963–64 (2019).

²⁴ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., joined by Thomas, J., concurring) (“The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct. Current ‘separate sovereigns’ doctrine hardly serves that objective.” (internal citations omitted)).

²⁵ See, e.g., Craig E. Countryman, *Will the Court Upend the Dual Sovereignty Doctrine?*, DAILY J. (Sept. 26, 2018), <https://www.dailyjournal.com/mcle/341-will-the-court-upend-the-dual-sovereign-doctrine> [<https://perma.cc/2JU2-H3ZR>] (describing different critiques of dual sovereignty and endorsing a critique based in the changed nature of federal law enforcement).

²⁶ *Gamble*, 139 S. Ct. at 1960.

²⁷ *Id.* at 1965; see also *United States v. Lanza*, 260 U.S. 377, 382 (1922) (“[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”); see also *Abbate v. United States*, 359 U.S. 187, 194–95 (1959) (“The *Lanza* principle has been accepted without question. . . . [U]ndesirable consequences would follow if *Lanza* were overruled.”); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852) (“Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.”).

²⁸ See *Bartkus v. Illinois*, 359 U.S. 121, 158 (1959) (Black, J., dissenting) (warning that “the notion that, somehow, one act becomes two because two jurisdictions are involved” is “a dangerous fiction”); *Heath v. Alabama*, 474 U.S. 82, 98 (1985) (Marshall, J., dissenting) (“Mindful of the admonitions of Justice Black, we should recognize this exegesis of the Clause as, at best, a useful fiction and, at worst, a dangerous one.”). Justices Ginsburg and Gorsuch, dissenting in *Gamble*, called Alito’s construction a “syllogism.” *Gamble*, 139 S. Ct. at 1990 (Ginsburg, J., dissenting) (“This ‘compact syllogism’ is fatally flawed.”); *id.* at 1997 (Gorsuch, J., dissenting) (“Though the Double Jeopardy Clause doesn’t say anything about allowing ‘separate sovereigns’ to do sequentially what neither may do separately, the government assures us the Fifth Amendment’s phrase ‘same offence’ does this work. Adopting the government’s argument, the Court supplies [a] syllogism . . .”).

²⁹ *Gamble*, 139 S. Ct. at 1991 (2019) (Ginsburg, J., dissenting) (“It is the doctrine’s premise that each government has—and must be allowed to vindicate—a distinct interest in enforcing its own criminal laws. That is a peculiar way to look at the Double Jeopardy

Double Jeopardy Clause “by its terms safeguards the ‘person’ and restrains the government.”³⁰ The dual sovereignty doctrine flips the script: It protects the interests of the sovereign at the expense of the individual.

Some sovereign interests certainly do merit protection from interference by other sovereigns.³¹ A good example is the federal interest in punishing racial violence committed under color of state law.³² Because of dual sovereignty, the United States may prosecute federal civil rights violations by a state officer even when he has already been acquitted, pardoned, or treated leniently for the same conduct under state law.³³ This is only appropriate, as the federal civil rights statutes were enacted *because* the states have failed to protect civil rights.³⁴ The federal government has a strong interest, distinct from that of the states, in robust civil rights enforcement.³⁵ “The importance of those federal interests has thus quite properly been permitted to trump a defendant’s interest in avoiding successive prosecutions or multiple punishments for the same crime.”³⁶

After *Gamble*, the question remains whether there are any limits to the dual sovereignty rule. Do successive prosecutions by separate sovereigns *ever* implicate the Double Jeopardy Clause? The dominant doctrine, in its formalism, would say no: Where there are two sovereigns, there are two offenses, and there is no double jeopardy problem. On this view, dual sovereignty is an off switch to the Double

Clause, which by its terms safeguards the ‘person’ and restrains the government.”); *Bartkus*, 359 U.S. at 155 (1959) (Black, J., dissenting) (“Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two ‘Sovereigns’ to inflict it than for one.”).

³⁰ *Gamble*, 139 S. Ct. at 1990 (Ginsburg, J., dissenting).

³¹ *Id.* at 1967.

³² See 18 U.S.C. § 242 (providing criminal penalties for the deprivation of rights under color of state law); *Screws v. United States*, 325 U.S. 91, 108–10 & n.10 (1945) (plurality opinion) (describing how section 20 of the Criminal Code sought not to federalize the full scope of the administration of criminal justice but rather “specified acts done ‘under color’ of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States”).

³³ *Screws*, 325 U.S. at 108 n.10; see also Amar & Marcus, *supra* note 20, at 19 (arguing for an exception to the dual sovereignty doctrine for federal civil rights enforcement under section 5 of the Fourteenth Amendment).

³⁴ See, e.g., Amar & Marcus, *supra* note 20, at 17–18 (noting that the Civil Rights Bill of 1866 was designed to work in tandem with the Fourteenth Amendment to help the federal government intercede when the state failed to protect civil rights).

³⁵ See *id.* at 22 (“Section 5 of the Fourteenth Amendment suggests a special role for Congress in enforcing the Amendment’s mandate against state officials; and state governments should not be allowed to thwart that role by immunizing their own officials.”).

³⁶ *Heath v. Alabama*, 474 U.S. 82, 99 (1985).

Jeopardy Clause. The rule thus operates in practice as rational-basis review of inter-sovereign successive prosecutions: Courts presume that two sovereigns seeking to punish the same conduct are doing so for substantively different reasons. In presuming the distinctness and legitimacy of each sovereign's interest without further inquiry, the Court is implicitly applying the most deferential standard for evaluating government conduct.³⁷

Yet in the shadow of that inflexible rule, the federal courts of appeal have sought to police the limits of dual sovereignty, troubled by cases of collusion and manipulation to circumvent the Double Jeopardy Clause. Drawing on dicta in *Bartkus v. Illinois*,³⁸ courts have articulated a “*Bartkus* exception” to the dual sovereignty rule when one sovereign manipulates another or uses it as a “sham” or a “cover” for its own aims.³⁹ As the D.C. Circuit explained, *Bartkus* “stands for the proposition that federal authorities are proscribed from manipulating state processes to accomplish that which they cannot constitutionally do themselves.”⁴⁰ Courts have developed various tests for this manipulation, but without further guidance from the Supreme Court, they are reluctant to conclude that the exception applies.⁴¹ The *Bartkus* exception is thus powerful in principle but toothless in practice.⁴²

Two doctrinal threads are in tension here. The dual sovereignty rule does not permit inquiry into the actual legitimacy or independence of the two sovereigns' interests; it assumes without deciding that each sovereign has an overriding interest in enforcing its own laws. But the *Bartkus* exception introduces some complexity, allowing courts to inquire into prosecutorial motives when the defendant makes a prima facie case of manipulation.

This Note offers a new approach to inter-sovereign successive prosecutions that would reconcile these two threads of existing doctrine and provide greater protection to defendants at the mercy of multiple sovereigns. Once the dual sovereignty doctrine is understood as rational-basis-style deference to the sovereign's decision to re-prosecute, it is easy to see how this deference is misplaced. Protection

³⁷ See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

³⁸ *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959).

³⁹ *Gamble v. United States*, 139 S. Ct. 1960, 1994 n.3 (2019) (Ginsburg, J., dissenting) (“*Bartkus v. Illinois* left open the prospect that the double jeopardy ban might block a successive state prosecution that was merely ‘a sham and a cover for a federal prosecution.’ The Courts of Appeals have read this potential exception narrowly.” (citations omitted) (quoting *Bartkus*, 359 U.S. at 123–24)).

⁴⁰ *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976).

⁴¹ See *infra* Section I.B.

⁴² See *id.*

against double jeopardy is enumerated in the Bill of Rights; if any right merits more searching scrutiny, it is this one.⁴³ Courts already apply something like strict scrutiny in the single-sovereign context, permitting mistrial in cases of “manifest necessity” and applying “the strictest scrutiny” to a subsequent retrial if the reason for mistrial stemmed from the prosecutor’s actions.⁴⁴

The strict scrutiny standard offers several advantages over the current approach. First, the “compelling interest” prong of the analysis takes seriously the idea that double jeopardy can only be warranted if the second sovereign’s interest in punishing the offense is distinct from that of the first sovereign. Second, the “least restrictive means” requirement can prevent strategic circumvention of constitutional rights through the dual sovereignty loophole. Third, strict scrutiny is more flexible than the current formalist rule, which is ill-equipped to deal with cases that push the boundaries of dual sovereignty. The current blanket rule solves one problem—the fear that sovereign interests will be thwarted by other sovereigns, as in the civil rights cases—but creates another: an incentive for two sovereigns to join together to evade constitutional requirements.⁴⁵ Strict scrutiny, by contrast, can deal appropriately with both kinds of edge cases.

This Note proceeds as follows. Part I makes the descriptive claim that the dual sovereignty rule is a doctrine of deference to the executive branch. It first describes the Court’s adoption and treatment of dual sovereignty over time, culminating in the decision in *Gamble*. It then shows why the Court’s reasoning in *Gamble* supports the view of dual sovereignty as a doctrine of deference. Part II describes how lower courts have applied the *Bartkus* exception across domestic and transnational contexts and shows that the exception has failed to provide a meaningful constraint on sovereign manipulation. Part III argues that courts should apply strict scrutiny to dual-sovereign successive prosecutions and addresses potential challenges for this approach.⁴⁶ A significant complication is the “same elements” test

⁴³ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . .”).

⁴⁴ *United States v. Perez*, 22 U.S. 579, 580 (1824); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

⁴⁵ See *infra* Sections II.A, III.B.

⁴⁶ This Note focuses primarily on situations in which the United States government is the second prosecuting sovereign, often after a foreign government has already prosecuted to conviction. The analysis therefore focuses on how the U.S. federal courts have interpreted the dual sovereignty doctrine. However, there are many possible permutations for a successive prosecution, including state-state, federal-state, state-foreign, foreign-state,

applied in single-sovereign double jeopardy cases. Under the *Blockburger* test, two offenses are distinct—and thus do not implicate double jeopardy—if “each . . . requires proof of a fact which the other does not.”⁴⁷ The comparison of elements across jurisdictions is likely to be difficult. Successive transnational prosecutions that implicate double jeopardy under strict scrutiny might nonetheless pass muster if the elements of the two countries’ criminal laws are sufficiently distinct. Any serious reimagining of inter-sovereign double jeopardy therefore also requires a reassessment of *Blockburger*. This Note offers preliminary suggestions and hopes to spark further conversation on the adequacy of the *Blockburger* rule.

I

THE DUAL SOVEREIGNTY DOCTRINE

The prohibition against double jeopardy has ancient origins, dating back to Greek and Roman law.⁴⁸ In England, it was a “universal maxim of the common law” that a person could not be tried again after an acquittal or conviction for the same offense.⁴⁹ Early settlers incorporated this principle into the laws of the colonies,⁵⁰ and the First Congress ratified it in the Double Jeopardy Clause of the Fifth Amendment.⁵¹ In the words of Justice Black, “[f]ew principles have been more deeply rooted in the traditions and conscience of our people.”⁵² The fundamental principle is that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.”⁵³

The idea that double jeopardy does not apply when two sovereigns, rather than one, unleash their might upon an individual is far less deeply rooted. This Part examines the origins and evolution of the

and foreign-federal. Although these are not the focus of this Note, they sometimes provide helpful examples.

⁴⁷ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

⁴⁸ Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT’L CRIM. L. REV. 217, 222 & nn.16–17 (2003); see also *Bartkus v. Illinois*, 359 U.S. 121, 151–52 (1959) (Black, J., dissenting) (“Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times.”).

⁴⁹ *Bartkus*, 359 U.S. at 153; see also *Green v. United States*, 355 U.S. 184, 187 (1957).

⁵⁰ *Bartkus*, 359 U.S. at 153.

⁵¹ U.S. CONST. amend. V.

⁵² *Bartkus*, 359 U.S. at 155 (Black, J., dissenting) (internal quotations marks omitted).

⁵³ *Green*, 355 U.S. at 187 (1957) (Black, J.).

dual sovereignty doctrine and explains why the rule operates as a form of broad deference to the executive branch.

A. *Origins and Evolution*

Discussion of the dual sovereignty rule often hinges on the original understanding of the Double Jeopardy Clause. Founding-era cases are difficult to come by, as the vast domains of overlapping criminal jurisdiction we see today are principally a modern phenomenon.⁵⁴ Yet there is considerable evidence that at the time the Fifth Amendment was adopted in 1791, the common law understanding was that a final judgment in *any* court of competent jurisdiction was enough to bar a future prosecution for the same offense.⁵⁵

The Supreme Court's first references to a separate-sovereigns exception to the Double Jeopardy Clause appeared in dicta in a pair of mid-nineteenth-century counterfeiting cases, *Fox v. Ohio*⁵⁶ and *United States v. Marigold*.⁵⁷ The Court did not directly treat the subject until 1922, in *United States v. Lanza*, in which the federal government indicted the defendant under the National Prohibition Act after he had already been convicted under the state's comparable prohibition law.⁵⁸ The Court relied heavily on dicta from *Fox* and *Marigold* to hold that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."⁵⁹

In 1959, the Supreme Court took up a pair of cases asking it to overrule the *Lanza* doctrine allowing successive prosecutions for the

⁵⁴ See Franck, *supra* note 22, at 1098 (explaining a historical view that "crime is territorial, not personal, and therefore the criminal jurisdiction of the United States does not, as a general rule, extend to crimes committed outside the jurisdiction"); see also *Gamble*, 139 S. Ct. at 2002 (Gorsuch, J., dissenting) ("[T]he issue may not have arisen often . . .").

⁵⁵ *Gamble*, 139 S. Ct. at 2000 (Gorsuch, J., dissenting).

⁵⁶ 46 U.S. (5 How.) 410 (1847). Malinda Fox was convicted under Ohio law of passing counterfeit coins, and she argued that because Congress could legislate in that area, the possibility of double punishment by state and federal law meant the state law was necessarily preempted. The Court held that the law was not preempted, and in any event, it would not violate the Constitution if she were to be prosecuted by both sovereigns. But the Court also noted, in passing, that a person already punished by one sovereign "would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor." *Id.* at 435.

⁵⁷ 50 U.S. (9 How.) 560, 569 (1850) ("[T]he same act might, as to its character and tendencies, and the consequences it involved, constitute an offense 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.").

⁵⁸ 260 U.S. 377 (1922).

⁵⁹ *Id.* at 382.

same offense under state and federal law. In each case, the Court declined to change course. In *Abbate v. United States*, the Court reaffirmed the rule that a prior state conviction did not bar subsequent federal prosecution for the same offense.⁶⁰ In *Bartkus v. Illinois*, the Court held that a prior federal acquittal did not bar a subsequent state prosecution for the same offense.⁶¹ In the decades that followed *Bartkus* and *Abbate*, numerous scholars and federal judges criticized the weak doctrinal foundations and unjust results of the dual sovereignty rule in the domestic context.⁶²

Yet the Court continued along that path, expanding the doctrine in 1985 to successive prosecutions of the same crime by two different states. In doing so, the Court upheld a death sentence by Alabama after Georgia had imposed a life sentence for the same crime.⁶³ Justice Thurgood Marshall dissented, writing: “This strained reading of the Double Jeopardy Clause has survived and indeed flourished in this Court’s cases not because of any inherent plausibility, but because it provides reassuring interpretivist support for a rule that accommodates the unique nature of our federal system.”⁶⁴

B. Reaffirmation in Gamble

In 2018, the Supreme Court accepted an invitation to reevaluate the dual sovereignty rule.⁶⁵ Terance Martez Gamble was driving in Mobile, Alabama when a local officer pulled him over for a broken headlight.⁶⁶ The officer, claiming to smell marijuana, searched Gamble’s car and found a handgun in the trunk.⁶⁷ Since Gamble had a prior robbery conviction in Alabama, state prosecutors charged him under an Alabama law criminalizing possession of a firearm after having been convicted of a “crime of violence.”⁶⁸ Gamble pleaded guilty to the state violation and was sentenced to a year in prison.⁶⁹ Apparently displeased with the lenience of the sentence,⁷⁰ federal prosecutors indicted him for the same fact of possession under the

⁶⁰ 359 U.S. 187, 195 (1959).

⁶¹ 359 U.S. 121, 139 (1959). Because the Fifth Amendment had not yet been incorporated against the states, this case was brought under the Due Process Clause of the Fourteenth Amendment, not the Double Jeopardy Clause. However, the Court treated the analyses as interchangeable. *Id.* at 122, 128–29.

⁶² *See supra* note 20.

⁶³ *Heath v. Alabama*, 474 U.S. 82, 94 (1985).

⁶⁴ *Id.* at 98 (Marshall, J., dissenting).

⁶⁵ *Gamble v. United States*, 139 S. Ct. 1960 (2019).

⁶⁶ *Id.* at 1964.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1997 (Gorsuch, J., dissenting).

⁷⁰ *Id.*

federal felon-in-possession law.⁷¹ Gamble pleaded double jeopardy, yet the dual sovereignty doctrine kept him from prevailing at each stage in his case.⁷² He was convicted in federal court and sentenced to forty-six months in prison, nearly quadrupling his original sentence.⁷³

Gamble presented historical evidence that the text, original understanding, and purpose of the Double Jeopardy Clause are inconsistent with the dual sovereignty doctrine.⁷⁴ In urging the Court to abandon its longstanding rule, Gamble also argued that the doctrinal underpinnings of dual sovereignty had eroded with incorporation and that the federalization of criminal law rendered the rule unworkable.⁷⁵ Despite a wealth of historical evidence on Gamble's side, the Court found his evidence too inconclusive to overcome decades of settled precedent.⁷⁶

Justice Alito's opinion for the Court began with the text of the Fifth Amendment. Relying on eighteenth-century dictionary definitions of the word "offence," he concluded that "an '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.'" ⁷⁷ This technical maneuver has allowed the Court to find that double jeopardy does not apply at all to prosecutions by separate sovereigns. Under this formalist approach, dual-sovereign prosecutions are not an exception to the Double Jeopardy Clause; they are outside its ambit entirely.⁷⁸

The Court's underlying reasoning, however, was far more functionalist. A closer look reveals that the Court's commitment to dual sovereignty is not really about the offenses of two sovereigns being different in some transcendent sense. Instead, the Court is concerned about protecting the government's sovereign interests from the interference of other sovereigns. The majority went on to explain that

⁷¹ 18 U.S.C. § 922(g)(1).

⁷² *United States v. Gamble*, 694 F. App'x 750, 751 (11th Cir. 2017) (per curiam), *aff'd*, 139 S. Ct. 1960 (2019) ("[B]ased on Supreme Court precedent, dual sovereignty allows a state government and the federal government to prosecute an individual for the same crime . . .").

⁷³ *Gamble v. United States*, 139 S. Ct. 1960, 1997 (2019) (Gorsuch, J., dissenting).

⁷⁴ Brief for Petitioner at 9–30, *Gamble v. United States*, 139 S. Ct. 1960 (2019) (No. 17-646).

⁷⁵ *Id.* at 35–49.

⁷⁶ *Gamble*, 139 S. Ct. at 1969 ("Here, as noted, Gamble's historical arguments must overcome *numerous* 'major decisions of this Court' spanning *170 years*. In light of these factors, Gamble's historical evidence must, at a minimum, be better than middling.").

⁷⁷ *Id.* at 1965. Justices Ginsburg and Gorsuch, each writing in dissent, pointed out that this is a "syllogism." *Id.* at 1990 (Ginsburg, J., dissenting); *id.* at 1997 (Gorsuch, J., dissenting).

⁷⁸ *Id.* at 1980.

“fidelity to the Double Jeopardy Clause’s text does more than honor the formal difference between two distinct criminal codes. It honors the substantive differences between the interests that two sovereigns can have in punishing the same act.”⁷⁹

The fear that the government’s prosecutorial prerogative could be thwarted by the actions of another sovereign is at the very heart of the dual sovereignty doctrine. In the words of the *Gamble* majority, the early cases laid the “foundation . . . that a crime against two sovereigns constitutes two offenses *because each sovereign has an interest to vindicate*.”⁸⁰

Gamble’s case concerned separate sovereigns in the federal system, but the Court exhibited particular concern for how the outcome might affect the government’s ability to prosecute those convicted or acquitted abroad. *Gamble*’s pitch to the Court, after all, was that because English courts at common law gave double jeopardy effect to foreign judgments, the original meaning of the Double Jeopardy Clause must have encompassed prosecutions by separate sovereigns.⁸¹ At oral argument, the Justices searched in vain for a limiting principle that would prevent unreasonable results—such as strategic exploitation of double jeopardy by a sovereign sympathetic to the defendant⁸²—if the Court embraced this reading.

Despite the remoteness of such hypotheticals to the case at hand, the majority opinion spent some time exploring what a victory for *Gamble* would mean for the prosecution of crimes committed abroad: “If, as *Gamble* suggests, only one sovereign may prosecute for a single act, no American court—state or federal—could prosecute conduct already tried in a foreign court.”⁸³ In the absence of the dual sovereignty rule, the Court feared that the United States would be powerless to re-prosecute even where there are doubts about “the competence or honesty of the other country’s legal system.”⁸⁴ Justice Kagan put the question succinctly: “That’s what you’re asking us to say, that the original understanding was that there would be no double

⁷⁹ *Id.* at 1966.

⁸⁰ *Id.* at 1967 (emphasis added).

⁸¹ See Brief for Petitioner, *supra* note 74, at 11–15.

⁸² See Transcript of Oral Argument at 63–64, *Gamble*, 139 S. Ct. 1960 (No. 17-646) (Government Counsel arguing that, “under the new unprecedented system that Petitioner [was] asking this Court to adopt,” a person could plead guilty to a misdemeanor marijuana possession charge in California in order to avoid a felony prosecution under federal law).

⁸³ *Gamble*, 139 S. Ct. at 1967.

⁸⁴ *Id.*

jeopardy bar between different sovereigns when those sovereigns are foreign countries. So how could we avoid that consequence?”⁸⁵

Justice Gorsuch, meanwhile, was concerned about injustice at the other end of the spectrum: when the sovereigns are quite close, and their interests intertwined. He wrote in dissent:

Imagine trying to explain the Court’s separate sovereigns rule to a criminal defendant, then or now. Yes, you were sentenced to state prison for being a felon in possession of a firearm. And don’t worry—the State can’t prosecute you again. But a federal prosecutor can send you to prison again for exactly the same thing. What’s more, that federal prosecutor may work hand-in-hand with the same state prosecutor who already went after you. They can share evidence and discuss what worked and what didn’t the first time around.⁸⁶

The Court was ultimately unwilling to flip the switch on dual sovereignty and outlaw *all* duplicative prosecutions, even those where the two sovereigns and their interests are quite distant from one another. But the answer to Justice Kagan’s question above is that the Court can recognize a *qualified* right to double jeopardy protection in separate-sovereign prosecutions. If it applies strict scrutiny, rather than a categorical rule, the Court can detect and prevent both sets of scenarios that the Justices feared: exploitation of the double jeopardy rule to thwart a necessary prosecution, and exploitation of the dual sovereignty rule to get a second bite at the apple.

Part II, *infra*, explores how courts have treated the kinds of cases Justice Gorsuch is worried about—cases of manipulation or collusion that feel deeply unjust yet are ostensibly permitted under the blanket dual sovereignty rule. The next Section discusses why the prevailing rule of dual sovereignty amounts to rational-basis deference to the executive branch.

C. Dual Sovereignty as Deference

Dual sovereignty fits within a long tradition of judicial restraint when it comes to the autonomy of the prosecutor.⁸⁷ Courts defer to

⁸⁵ Transcript of Oral Argument, *supra* note 82, at 15. And Justice Alito proposed the following hypothetical: Suppose “a group of American tourists are murdered by terrorists in a foreign country,” and a “fairly inept prosecution” leads to “an acquittal or a conviction with a very light sentence.” *Id.* at 10. Could there be “a prosecution here in the United States under the statute enacted by Congress to permit the prosecution of individuals who murder Americans abroad?” *Id.*

⁸⁶ *Gamble*, 139 S. Ct. at 1999 (Gorsuch, J., dissenting).

⁸⁷ *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (explaining that prosecutors have “broad discretion” and that, “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties”); *Wayte*

the executive's prosecutorial judgment as a matter of the separation of powers⁸⁸ and the institutional competence of the courts.⁸⁹ Both factors certainly loom large in the dual sovereignty space. The executive is tasked with faithfully executing the laws of the United States,⁹⁰ so it is best placed to decide when sovereign interests justify re-prosecution. And courts' ignorance of the strength, deterrence value, and priority level of a given prosecution makes them ill-equipped to second-guess such executive determinations.⁹¹

What maximal deference in dual sovereignty cases misses, however, is that freedom from successive prosecution is a constitutionally enumerated right held against the state. And not just any arm of the state—against the executive specifically. Recall the words of Justice Black: “[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense”⁹² Double jeopardy's pride of place in the Bill of Rights should limit the presumption of constitutionality that courts normally afford the actions of the coordinate branches.⁹³

Another layer of deference kicks in when the first prosecution was pursued by a foreign nation, and a court is asked to review the circumstances of cooperation or coordination that led to duplicative prosecution. The executive can claim not only its prosecutorial prerogative but also its power as the “sole organ of the federal government.”⁹⁴ Professor Steven Arrigg Koh has demonstrated that, in transnational prosecutions, foreign affairs deference comes into direct conflict with canons of anti-deference in criminal law.⁹⁵ And

v. United States, 470 U.S. 598, 607 (1985) (finding courts ill-equipped to evaluate prosecutorial decisions). See generally *Prosecutorial Discretion*, 48 GEO. L.J. ANN. REV. CRIM. PROC. 279 (2019); Andrew B. Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351 (2001); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997).

⁸⁸ See *Armstrong*, 517 U.S. at 465 (explaining that deference to prosecutorial discretion “stems from a concern not to unnecessarily impair the performance of a core executive constitutional function”).

⁸⁹ See *Wayte*, 470 U.S. at 607 (finding that decisions about whether to prosecute “are not readily susceptible to the kind of analysis the courts are competent to undertake”).

⁹⁰ U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed”).

⁹¹ See *Wayte*, 470 U.S. at 607.

⁹² *Green v. United States*, 355 U.S. 184, 187 (1957).

⁹³ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments”).

⁹⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

⁹⁵ Koh, *supra* note 22, at 367. “Anti-deference” here refers to a presumption *against* an agency's interpretation of the law. In the criminal context, an example of anti-deference

Professors Jinks and Katyal argue that substantial deference to the executive's interpretation of laws affecting foreign relations is inappropriate in what they call "the executive-constraining zone."⁹⁶ As a constitutional principle that directly constrains the executive, double jeopardy is a particularly poor area of the law for courts to entrust to the executive branch.

When the executive acts in a dual role as prosecutor and diplomat,⁹⁷ courts should also be cautious about which role they are deferring to. Prosecutorial discretion permits the executive to enforce the nation's laws as a matter of internal sovereignty, while the foreign affairs power lets it represent the nation as a matter of external sovereignty. Only the former should be sufficient to override the defendant's right against double jeopardy. Courts must be particularly attentive to executive efforts to conduct diplomacy with the lives of criminal defendants.⁹⁸

D. *Protections Outside the Double Jeopardy Clause*

In its briefs and at oral argument in *Gamble*, the government argued that policy constraints obviate any need for protection under the Double Jeopardy Clause.⁹⁹ In essence, this is an argument that the Constitution and the courts have no role to play.¹⁰⁰ As this Section will explain, leaving double jeopardy protection to the political branches has proven unreliable, subject to the pressures of politics and diplomacy.

When the Court defers in dual sovereignty cases, it is deferring to the discretionary judgment of the executive branch that double jeopardy is warranted under the circumstances. As this Section explains,

would be the rule of lenity. *Id.* Another example of anti-deference might be the burden of proof in criminal prosecutions: The "agency" or prosecutor must prove beyond a reasonable doubt that its theory of the case is the correct one.

⁹⁶ Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 *YALE L.J.* 1230, 1234 (2007) ("This zone refers to the domain of foreign relations law, particularly international law, that (1) has the status of supreme federal law, (2) is made at least in part outside the executive, and (3) conditions the exercise of executive power.").

⁹⁷ See Koh, *supra* note 22, at 345 (describing "criminal cases where the executive acts as both prosecutor and diplomat").

⁹⁸ *Cf.* *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (expressing concern when a defendant's right against double jeopardy is overridden in "politically charged contexts").

⁹⁹ See Brief for the United States at 5, *Gamble v. United States*, 139 S. Ct. 1960 (2019) (No. 17-646) (describing the DOJ's *Petite* policy); Transcript of Oral Argument, *supra* note 82, at 52 (same).

¹⁰⁰ See Transcript of Oral Argument, *supra* note 82, at 49 ("[Y]ou must think that there's some problem or you wouldn't have the *Petite* policy. I mean, that's—that's an odd defense of a . . . position to say, well, we take care of it somewhere else, so don't worry about it.") (Roberts, J., speaking).

there are some extrajudicial constraints on that discretion. Yet, as the following examples illustrate, leaving the decision entirely to a political branch is insufficient to protect the fundamental right against double jeopardy. The courts do have a role to play.

1. *The Petite Policy*

The Department of Justice limits successive state-federal prosecutions through what is known as the *Petite* policy.¹⁰¹ Under the policy, “the government will pursue a federal prosecution after a state disposition arising from ‘substantially the same act(s) or transaction(s)’ only when, inter alia, the state case has ‘left [a] substantial federal interest demonstrably unvindicated.’”¹⁰² The policy was introduced in response to uproar when the Supreme Court upheld the dual sovereignty rule in *Bartkus* and *Abbate*.¹⁰³ A mere seven days after the decisions were handed down in 1959, the Attorney General issued a memorandum requiring all United States Attorneys to obtain supervisory approval before prosecuting someone who had already been tried for the same acts in state court.¹⁰⁴ The memorandum explained that:

[T]he Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. . . . But the mere existence of a power, of course, does not mean that it should necessarily be exercised. . . . It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well.¹⁰⁵

The Supreme Court has explained that the *Petite* policy “serves to protect interests which, but for the ‘dual sovereignty’ principle inherent in our federal system, would be embraced by the Double Jeopardy Clause.”¹⁰⁶ Despite the constitutional values it protects, the

¹⁰¹ U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-2.031(A), (D) (2020) <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals> [<https://perma.cc/3BBR-8JBY>] [hereinafter DOJ, JUSTICE MANUAL] (outlining the *Petite* policy); see also *Petite v. United States*, 361 U.S. 529, 531 (1960) (per curiam). The stated purpose of the policy is “to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors.” DOJ, JUSTICE MANUAL, *supra*.

¹⁰² Brief for the United States, *supra* note 99, at 5.

¹⁰³ See James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477, 489 (1979) (characterizing the *Bartkus* and *Abbate* debates as a “source of heated debate in the Court”).

¹⁰⁴ *Id.* at 488–89.

¹⁰⁵ *United States v. Mechanic*, 454 F.2d 849, 855 n.5 (8th Cir. 1971).

¹⁰⁶ *Rinaldi v. United States*, 434 U.S. 22, 29 (1977) (per curiam).

policy is considered discretionary, not binding law. The circuit courts have held that an individual defendant does not have a right to invoke the *Petite* policy as a bar to a duplicative federal prosecution.¹⁰⁷

At oral argument in *Gamble*, the government estimated that it authorizes only “about a hundred” *Petite* prosecutions each year.¹⁰⁸ By that measure, the policy might seem to be working at preventing successive state-federal prosecutions. Yet information on the number of prosecutions denied under the *Petite* policy is not public, and it is not clear how compelling these cases must be to warrant approval.

Gamble itself is a case where the *Petite* policy failed meaningfully to constrain the executive branch. As Justice Gorsuch explained at oral argument, the dual sovereignty rule relies on the “promise that prosecutors wouldn’t do this in routine cases.”¹⁰⁹ Terance Gamble was convicted twice of a “run-of-the-mill” felon-in-possession charge,¹¹⁰ which certainly seems inconsistent with the aims of the *Petite* policy.¹¹¹ The government sought to justify its position at oral argument, explaining that “this case is important to us because it’s a part of a program called Operation Safe Neighborhoods. The case studies have shown, by focusing on recidivist offenders, like Petitioner, we’ve reduced crime in some neighborhoods by up to 42 percent.”¹¹² But it is up for debate whether reducing *neighborhood* crime should be considered a “substantial federal interest” left “demonstrably unvindicated” by the state conviction. To Justice Ginsburg, the ordinariness of Gamble’s infraction revealed that, “in practice, successive prosecutions are not limited to exceptional circumstances.”¹¹³

The *Petite* policy was insufficient to protect Gamble’s interest in being free from duplicative prosecution—an interest that, at minimum, is “parallel” to “the fundamental constitutional guarantee against double jeopardy.”¹¹⁴ Dual sovereignty renders double jeopardy claims in state-federal prosecutions essentially unreviewable,

¹⁰⁷ DOJ, JUSTICE MANUAL, *supra* note 101, § 9-2.031(F) (citing all of the federal circuit courts that have considered the question and held that a criminal defendant cannot invoke the Department’s policy as a bar to federal prosecution) (first citing *United States v. Snell*, 592 F.2d 1083 (9th Cir. 1979); then citing *United States v. Howard*, 590 F.2d 564 (4th Cir. 1979); then citing *United States v. Frederick*, 583 F.2d 273 (6th Cir. 1978); then citing *United States v. Thompson*, 579 F.2d 1184 (10th Cir. 1978); then citing *United States v. Wallace*, 578 F.2d 735 (8th Cir. 1978); then citing *United States v. Nelligan*, 573 F.2d 251 (5th Cir. 1978); and then citing *United States v. Hutul*, 416 F.2d 607 (7th Cir. 1969)).

¹⁰⁸ *Gamble v. United States*, 139 S. Ct. 1960, 1995 (2019) (Ginsburg, J., dissenting).

¹⁰⁹ Transcript of Oral Argument, *supra* note 82, at 53–54.

¹¹⁰ *Gamble*, 139 S. Ct. at 1994 (Ginsburg, J., dissenting).

¹¹¹ Transcript of Oral Argument, *supra* note 82, at 54.

¹¹² *Id.*

¹¹³ *Gamble*, 139 S. Ct. at 1994 (Ginsburg, J., dissenting).

¹¹⁴ *Rinaldi v. United States*, 434 U.S. 22, 29 (1977).

subject only to the self-restraint of the Department of Justice. The fox is left guarding the henhouse.

2. *Extradition Treaties*

There is no analog to the *Petite* policy for successive transnational prosecutions, but extradition treaties between the United States and other countries often include double jeopardy provisions.¹¹⁵ The power to make treaties lies with the President, subject to the advice and consent of the Senate.¹¹⁶ Because extradition treaties are considered self-executing,¹¹⁷ they are “the supreme Law of the Land,”¹¹⁸ and the federal judiciary must give effect to the rights of individuals arising under such a treaty.¹¹⁹ Yet courts have found it very difficult to interpret double jeopardy provisions in extradition treaties, because domestic law, customary international law, and the laws of treaty partners all differ in their approaches to double jeopardy. In the United States, two offenses are distinct under the *Blockburger* rule if “each . . . requires proof of an additional fact which the other does not.”¹²⁰ The civil law counterpart to double jeopardy, *non bis in idem*, is considerably broader, protecting against re-prosecution on the same facts, not just the same offense.¹²¹ Most U.S. extradition treaties use the “same offense” language, but some refer to the “same facts,” further complicating the analysis.¹²²

When a treaty provision is ambiguous, courts often defer to the interpretation of the executive branch and its account of diplomatic negotiations with the treaty partner.¹²³ As a result, in the absence of a

¹¹⁵ See generally M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (6th ed. 2014).

¹¹⁶ U.S. CONST. art. II, § 2, cl. 2.

¹¹⁷ BASSIOUNI, *supra* note 115, at 71.

¹¹⁸ U.S. CONST. art. VI, cl. 2.

¹¹⁹ See *United States v. Rauscher*, 119 U.S. 407, 430 (1886) (“[I]f the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the federal government”); *Medellin v. Dretke*, 544 U.S. 660, 687 (2005) (O’Connor, J., dissenting) (“This Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties.”).

¹²⁰ *Blockburger v. United States*, 284 U.S. 299, 299 (1932).

¹²¹ See BASSIOUNI, *supra* note 115, at 756. In civil law jurisdictions, prosecutors must proceed on all charges arising from the facts at hand, while common-law jurisdictions permit prosecutorial discretion. *Id.*

¹²² See *id.* For other international extradition cases grappling with this problem, see *United States v. Jurado-Rodriguez*, 907 F. Supp. 568, 577–81 (E.D.N.Y. 1995) (granting in part a motion to dismiss based on a treaty’s double jeopardy provision); *Elcock v. United States*, 80 F. Supp. 2d 70, 83 (E.D.N.Y. 2000) (deferring to the executive branch’s interpretation of the treaty and denying the treaty double jeopardy claim under *Blockburger*).

¹²³ See BASSIOUNI, *supra* note 115, at 117, 156.

strong constitutional norm against transnational double jeopardy, diplomacy can end up dictating a person's fundamental rights. An ongoing case highlights this problem.

Nizar Trabelsi, a Tunisian national, was tried and convicted in Brussels criminal court of conspiring to bomb the Kleine-Brogel Air Base in Belgium.¹²⁴ He was sentenced to ten years of incarceration. While Trabelsi was in Belgian prison, the U.S. government obtained an indictment against him on four charges arising from the same unfinished plot at Kleine-Brogel.¹²⁵ They sought Trabelsi's extradition upon completion of his sentence, and Belgium granted it on the requested charges. There was just one catch: The treaty between the two countries bars extradition "when the person sought has been found guilty, convicted or acquitted in the Requested State [here, Belgium] for the offense for which extradition is granted."¹²⁶ This double jeopardy provision has caused untold disagreement over whether Trabelsi can be tried again. Meanwhile, Trabelsi himself has now spent an additional eight years behind bars, in a limbo between two trials for the same conspiracy.

When Trabelsi first challenged the extradition request, a Belgian court of first instance ruled that the extradition was permissible *except* with regard to certain overt acts—those connected with the conspiracy and attempt to bomb Kleine-Brogel.¹²⁷ The high court affirmed on appeal.¹²⁸ Yet the Belgian Minister of Justice granted the extradition in 2011, making no reference to the limitation imposed by the Belgian courts and repeatedly assuring the U.S. government that it could pursue the requested charges.¹²⁹ Trabelsi moved to dismiss the federal indictment for violating the treaty's double jeopardy provision.¹³⁰ In denying the motion, the district court applied the *Blockburger* test used in domestic double jeopardy cases to find that the federal charges were not the "same offense" as the Belgian charges.¹³¹ The D.C. Circuit affirmed, but found that it was not necessary to employ the *Blockburger* test, as the case could be resolved simply by deferring

¹²⁴ United States v. Trabelsi (*Trabelsi II*), 845 F.3d 1181, 1184 (D.C. Cir. 2017).

¹²⁵ *Id.*

¹²⁶ Extradition Treaty Between the United States of America and the Kingdom of Belgium, Belg.-U.S., art. 5, Apr. 27, 1987, S. Treaty Doc. No. 104-7.

¹²⁷ *Trabelsi II*, 845 F.3d at 1184.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ United States v. Trabelsi (*Trabelsi I*), No. 06-cr-89, 2015 WL 13227797, at *1 (D.D.C. Nov. 4, 2015), *aff'd*, 845 F.3d 1181 (D.C. Cir. 2017).

¹³¹ *Id.* at *6 ("In the absence of a clearer interpretive test or tool grounded in a sound, recognized legal framework, . . . U.S. double jeopardy law [is] the most appropriate tool to shape the analysis.").

to the Belgian government's decision to extradite.¹³² That deference has been complicated as evidence comes to light of substantial disagreement between the Belgian judicial and executive branches over the meaning of the treaty provision and the legality of Trabelsi's extradition.¹³³ The U.S. district court's most recent word on the matter is that, "[u]nder principles of international comity and separation of powers, this Court has no role to play in a dispute between coordinate branches of a foreign state."¹³⁴

Trabelsi's case shows that even where a treaty protects against double jeopardy, differing interpretations of that treaty can lead to double punishment. If that happens even in the presence of a treaty, who will enforce the defendant's right against double jeopardy in the *absence* of a treaty?

This Note argues that the judiciary should embrace its role as enforcer of constitutional rights in such cases. Just as the Department of Justice can always excuse itself from the self-imposed *Petite* policy, two parties to an extradition treaty can jointly interpret the double jeopardy provision to permit prosecution, nullifying the right. Extradition treaties, unlike the *Petite* policy, are the supreme law of the land—but they end up being just as malleable because of the deference given to the executive branch.

II

THE *BARTKUS* EXCEPTION TO DUAL SOVEREIGNTY

Ever since the Supreme Court decided *Bartkus v. Illinois*¹³⁵ in 1959, it has left open the possibility that prosecutions by separate sovereigns might violate double jeopardy if they were functionally the work of a single sovereign. This possibility has come to be known as the "*Bartkus* exception," referring to cases in which "one prosecuting sovereign can be said to be acting as a 'tool' of the other . . . or where the second prosecution amounts to a 'sham and a cover' for the

¹³² *Trabelsi II*, 845 F.3d at 1181, 1190.

¹³³ *United States v. Trabelsi (Trabelsi IV)*, No. 06-cr-89, 2021 WL 430911, at *15 (D.D.C. Feb. 5, 2021). In denying the motion to dismiss back in 2015, the district court quoted an opinion of the D.C. Circuit explaining that "an American court must give great deference to the determination of the foreign court in an extradition proceeding." *Trabelsi I*, 2015 WL 13227797, at *3. But that quote changed in the district court's 2021 denial of a motion to reconsider based on new evidence of the Belgian judiciary's disagreement with its diplomats: "[T]he Court explained that 'an American court must give great deference' to a foreign government's decision to extradite a defendant, as a matter of international comity." *Trabelsi IV*, 2021 WL 430911, at *4 (citing *Trabelsi I*).

¹³⁴ *Trabelsi IV*, 2021 WL 430911, at *15.

¹³⁵ 359 U.S. 121, 123–24 (1959).

first.”¹³⁶ Multiple courts of appeals have explored this idea, accepting that there are limits to the rule of separate sovereigns.¹³⁷ Yet none has ever reached those limits to affirm the dismissal of an indictment under the *Bartkus* exception.¹³⁸

In *Bartkus*, the Court confronted a state prosecution following a federal acquittal on “substantially identical” factual allegations.¹³⁹ Alfonse Bartkus was accused of robbing a federally insured savings bank, but the owner of a barbershop several miles away testified that Bartkus was getting a haircut at the time of the robbery.¹⁴⁰ After a federal jury acquitted Bartkus, he was tried again in state court and this time convicted.¹⁴¹ The record established that “federal officers solicited the state indictment, arranged to assure the attendance of key witnesses, unearthed additional evidence to discredit Bartkus and one of his alibi witnesses, and in general prepared and guided the state prosecution.”¹⁴²

Justice Brennan, writing in dissent, believed the facts established that the state prosecution was “actually a second federal prosecution”¹⁴³ and was thus barred by the Double Jeopardy Clause. In rejecting this argument, Justice Frankfurter reasoned for the Court that:

The record . . . does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.¹⁴⁴

¹³⁶ *United States v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984) (citing *Bartkus*, 359 U.S. at 124).

¹³⁷ *See, e.g., id.*; *United States v. Piekarsky*, 687 F.3d 134, 149 (3d Cir. 2012); *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008); *United States v. Zone*, 403 F.3d 1101, 1106 (9th Cir. 2005); *United States v. Leathers*, 354 F.3d 955, 960 (8th Cir. 2004); *United States v. Montgomery*, 262 F.3d 233, 238 (4th Cir. 2001); *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996); *United States v. Raymer*, 941 F.2d 1031, 1037 (10th Cir. 1991).

¹³⁸ In a footnote to her dissenting opinion in *Gamble*, Justice Ginsburg reiterated the possibility of an exception to the separate sovereigns rule, but noted that “[t]he Courts of Appeals have read this potential exception narrowly.” *Gamble v. United States*, 139 S. Ct. 1960, 1994 n.3 (2019) (Ginsburg, J., dissenting) (citations omitted).

¹³⁹ *Bartkus*, 359 U.S. at 122.

¹⁴⁰ *Id.* at 165 (Brennan, J., dissenting).

¹⁴¹ *Id.* at 122 (majority opinion).

¹⁴² *Id.* at 165 (Brennan, J., dissenting).

¹⁴³ *Id.* at 165–66.

¹⁴⁴ *Id.* at 123–24 (majority opinion).

The language in this passage has led to decades of uncertainty in the lower courts about how egregious a case would need to be to overcome the presumption of dual sovereignty. According to the *Bartkus* majority, there is a point at which two prosecutions, brought in name by separate sovereigns, cross a line to become the work of a single sovereign. At that point, the constitutional protection against double jeopardy kicks in. But the difficult task “is to determine how much the federal authorities must participate in a state prosecution before it so infects the conviction that we must set it aside.”¹⁴⁵

This Section discusses how the federal courts of appeals have interpreted the “tool,” “sham,” or “cover” language from the *Bartkus* majority opinion. After analyzing various formulations of the *Bartkus* exception, I argue that the courts’ language has created a nonfunctioning standard, and that strict scrutiny would provide a better means of detecting and preventing the kinds of misconduct the *Bartkus* exception describes.

A. Proliferation of Standards

The first case to discuss the limiting language in *Bartkus* was not a double jeopardy case at all.¹⁴⁶ In *United States v. Liddy*, the D.C. Circuit rejected the argument that the *dismissal* of a state prosecution at the request of federal prosecutors prior to a federal trial violated due process and the right to a speedy trial.¹⁴⁷ The D.C. Circuit found no evidence that the California prosecution “[began] at the direction of” the federal prosecutors.¹⁴⁸ The court explained that:

Bartkus, as we view it, stands for the proposition that federal authorities are proscribed from manipulating state processes to accomplish that which they cannot constitutionally do themselves. To hold otherwise would, of course, result in a mockery of the dual sovereignty concept that underlies our system of criminal justice. . . . The burden, however, of establishing that federal officials are controlling or manipulating the state processes is substantial; the

¹⁴⁵ *Id.* at 167–68 (Brennan, J., dissenting).

¹⁴⁶ See *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976). In September 1973, G. Gordon Liddy was indicted on California state charges for breaking into Daniel Ellsberg’s psychiatrist’s office to steal confidential medical records to use against Ellsberg. *Id.* Five months later, Liddy was indicted by a federal grand jury for conspiracy to violate the psychiatrist’s Fourth Amendment rights under federal civil rights law, 18 U.S.C. § 241. At the request of the Watergate Special Prosecution Force and over Liddy’s objection, the California prosecution was dismissed. Liddy argued that the California prosecution was used as a “tool” by the federal prosecutors to violate his Fifth and Sixth Amendment rights to due process and a speedy trial. *Liddy*, 542 F.2d at 79.

¹⁴⁷ *Liddy*, 542 F.2d at 79.

¹⁴⁸ *Id.*

Appellant must demonstrate that the state officials had little or no independent volition in the state proceedings.¹⁴⁹

Although *Liddy* did not involve a double jeopardy challenge, courts have often cited it in considering and rejecting double jeopardy claims under the *Bartkus* exception. The standard laid out in *Liddy* contains a few interrelated concepts: evasion of constitutional protections, manipulation by one sovereign, and lack of independent volition on the part of the other. Multiple courts have adopted the *Liddy* test that one sovereign must have “little or no independent volition” in its own proceedings.¹⁵⁰ Only a few, however, have echoed *Liddy*’s caution against federal authorities “manipulating state processes to accomplish that which they cannot constitutionally do themselves”¹⁵¹ or noted that to hold otherwise would be a “mockery of the dual sovereignty concept.”¹⁵²

Other courts have devised new language to describe the lack of independence that would need to be found to overcome the presumption of dual sovereignty. The First Circuit borrowed the *Liddy* language and added a distinct element of domination, explaining that “the *Bartkus* exception . . . is limited to situations in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings.”¹⁵³ The court dismissed the double jeopardy claim, finding no evidence that one sovereign’s authorities were “merely handmaidens” of the other.¹⁵⁴ The Sixth Circuit looked for evidence

¹⁴⁹ *Id.* (citations omitted).

¹⁵⁰ *E.g.*, *United States v. Burden*, 600 F.3d 204, 229 (2d Cir. 2010) (citing “little or no independent volition” language); *United States v. Zone*, 403 F.3d 1101, 1105 (9th Cir. 2005) (same); *United States v. Leathers*, 354 F.3d 955, 960 (8th Cir. 2004) (same); *United States v. Angleton*, 314 F.3d 767, 774 n.15 (5th Cir. 2002) (same); *United States v. Rashed*, 234 F.3d 1280, 1284 (D.C. Cir. 2000) (same); *United States v. Raposo*, 205 F.3d 1326 (2d Cir. 2000) (same); *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 495 (2d Cir. 1995) (same); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1992) (same); *In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990) (same); *United States v. Davis*, 906 F.2d 829, 834 (2d Cir. 1990) (same); *see also United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1361 (11th Cir. 1994) (“To fit within the exception, the defendant must show that one sovereign was so dominated, controlled, or manipulated by the actions of the other that it did not act of its own volition.” (citations omitted)); *United States v. Raymer*, 941 F.2d 1031, 1037 (10th Cir. 1991) (“When a defendant claims that federal and state officials are not acting as dual sovereigns, he has a substantial burden of proving one sovereign is so dominated by the actions of the other that the former is not acting of its own volition.”).

¹⁵¹ *United States v. Rashed*, 234 F.3d 1280, 1283 (D.C. Cir. 2000) (quoting *Liddy*, 542 F.2d at 79); *United States v. Talley*, 16 F.3d 972, 974 (8th Cir. 1994) (same); *United States v. Russotti*, 555 F. Supp. 1236, 1239 (W.D.N.Y.), *aff’d*, 717 F.2d 27 (2d Cir. 1983) (same); *United States v. Bouthot*, 685 F. Supp. 286, 294 (D. Mass. 1988) (same).

¹⁵² *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996) (citations omitted).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 828.

that the federal government was somehow “ceding its sovereign authority to prosecute and acting only because the State told it to do so.”¹⁵⁵ The Third Circuit was not convinced that “state authorities were puppets or surrogates for the federal authorities.”¹⁵⁶ Two courts have even borrowed a civil liability term appearing in the parties’ briefs and explained that one prosecution was not merely a “cat’s paw” for the other.¹⁵⁷ Meanwhile, the Fifth Circuit applied the test somewhat less colorfully, explaining that “[t]he key . . . is whether the separate sovereigns have made independent decisions to prosecute, or whether, instead, ‘one sovereign has essentially manipulated another sovereign into prosecuting.’”¹⁵⁸

B. *Bartkus Overseas*

In *United States v. Rashed*, the D.C. Circuit asked whether Greece, in prosecuting Mohammed Rashed for multiple acts of international terrorism, was “a tool of the [United States].”¹⁵⁹ After Greek authorities arrested Rashed, the United States sought his extradition to be tried on federal terrorism charges. Greece refused, choosing to prosecute him themselves. Rashed was convicted of two charges, acquitted of two, and sentenced to fifteen years in Greek prison.¹⁶⁰ He was released after eight years and, while traveling abroad, was apprehended by U.S. agents and brought to the United States for prosecution.¹⁶¹ The government urged the court to find the *Bartkus* exception inapplicable to foreign prosecutions because foreign governments are “never subject to the sort of federal domination that states may be.”¹⁶² The court disagreed with this categorical argument: “Improbability may imply rarity, but we do not think the sham relationship so unlikely as to justify a blanket rule against the exception in the foreign prosecution context.”¹⁶³

¹⁵⁵ *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008); *see also* *United States v. Willis*, 981 F.3d 511, 516 (6th Cir. 2020).

¹⁵⁶ *United States v. Piekarsky*, 687 F.3d 134, 148 (3d Cir. 2012).

¹⁵⁷ *See* *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1361 (11th Cir. 1994) (“[Appellants] argue that the Bahamian prosecution was merely a ‘sham’—a ‘tool or ‘cat’s paw’” of the United States.”); *United States v. Nosair*, 854 F. Supp. 251, 253 (S.D.N.Y. 1994) (“This scenario suggests no reason whatever for the federal government to have used the state prosecution as a cat’s paw . . .”).

¹⁵⁸ *United States v. Angleton*, 314 F.3d 767, 774 (5th Cir. 2002) (citations omitted).

¹⁵⁹ *United States v. Rashed*, 234 F.3d 1280, 1282 (D.C. Cir. 2000) (quoting *Bartkus*, 359 U.S. at 123–24).

¹⁶⁰ *Id.* at 1281.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1282.

¹⁶³ *Id.*

The court nonetheless rejected Rashed's double jeopardy claim. It explained that "[f]ar from being controlled by the United States, the Greek trial occurred only because Greece rejected U.S. demands for Rashed's extradition."¹⁶⁴ Because Rashed did not "claim that the United States preferred prosecution to extradition, or that further discovery would uncover evidence of such a preference," the court found the sham prosecution theory implausible.¹⁶⁵

The court did note that if prosecution by a foreign country poses strategic advantages, the United States might prefer that prosecution to proceed first and use it as a tool to advance its own interests: "[A] prosecutorial advantage, coupled with some evidence that the United States had helped bring it about, or that its existence had induced the United States to prefer and promote the foreign prosecution, might help support the 'tool' inference."¹⁶⁶ This inference would be strengthened by the foreign sovereign's lack of independent motive. An "easy case" of manipulation by another sovereign, according to the D.C. Circuit, "might be where a nation pursued a prosecution that did little or nothing to advance its independent interests, under threat of withdrawal of American aid on which its leadership was heavily dependent."¹⁶⁷

C. *The Nonfunctioning Exception*

Six decades after *Bartkus*, courts continue to entertain claims at the hazy outer edges of dual sovereignty.¹⁶⁸ But until the Supreme Court clarifies the doctrine, such claims are all but doomed to fail, dragging defendants, the government, and the courts through lengthy litigation that has little chance of vindicating anyone's rights.¹⁶⁹

Courts seem to be at once drawn to the *Bartkus* exception and afraid of making it real.¹⁷⁰ One court, after finding "the gravitational

¹⁶⁴ *Id.* at 1281.

¹⁶⁵ *Id.* at 1286.

¹⁶⁶ *Id.* at 1285.

¹⁶⁷ *Id.* at 1283.

¹⁶⁸ See *United States v. Willis*, 981 F.3d 511, 516 (6th Cir. 2020) (upholding dismissal of a criminal defendant's motion to dismiss on double jeopardy grounds because the defendant was charged with different crimes and prosecuted by different sovereigns, and whose prosecution did not fall under the "sham" exception).

¹⁶⁹ See *United States v. Figueroa-Soto*, 938 F.2d 1015, 1019 (9th Cir. 1991) ("As a practical matter, however, under the criteria established by *Bartkus* itself it is extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham or a cover for the other government.").

¹⁷⁰ See *United States v. Bernhardt*, 831 F.2d 181, 183 (9th Cir. 1987) ("[W]e share many of the concerns expressed by the district court that led to its invocation of the *Bartkus* exception. Nevertheless, we conclude that sufficient independent federal involvement would save the prosecutions from that exception. Accordingly, we reverse and remand to

pull of *Bartkus* irresistible” and stating that “the exception is compelled by the bedrock principles of dual sovereignty,” nonetheless declined to invoke the exception.¹⁷¹ In applying the language from *Bartkus*, courts have consistently held that mere cooperation or collaboration is insufficient to overcome dual sovereignty.¹⁷² But the degree of manipulation or control demanded by most of the courts in the cases above is all but impossible to establish. Indeed, several courts have expressed skepticism that the exception even exists.¹⁷³ Many others have emphasized how narrow it is before declaring it not to apply in the case at hand.¹⁷⁴ In only a handful of cases have courts been convinced that the evidence warranted a dismissal of the indictment or a remand for further factfinding on double jeopardy grounds.¹⁷⁵

the district court for that factual determination.”); *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997).

¹⁷¹ See *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996) (rejecting a double jeopardy claim where a Netherlands Antilles drug possession conviction preceded the Puerto Rico conviction for the same instance of possession).

¹⁷² See, e.g., *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1992) (noting that the *Bartkus* exception to dual sovereignty “is not triggered simply by cooperation between the two authorities”); *United States v. Leathers*, 354 F.3d 955, 960 (8th Cir. 2004) (“Referrals and cooperation between federal and state officials not only do not offend the Constitution but are commonplace and welcome.”); *Bernhardt*, 831 F.2d at 182 (“It is clear that the *Bartkus* exception does not bar cooperation between prosecuting sovereignties.”).

¹⁷³ See, e.g., *United States v. Angleton*, 314 F.3d 767, 773–74 (5th Cir. 2002) (“The *Bartkus* Court’s failure to identify a particular instance of a sham prosecution may mean that the exception does not exist.”); *Tirrell*, 120 F.3d at 677 (“This circuit has expressed doubts about ‘whether *Bartkus* truly meant to create such an exception, and we have uniformly rejected such claims.’” (quoting *United States v. Brocksmith*, 991 F.2d 1363, 1366 (7th Cir. 1993))).

¹⁷⁴ See *Gamble v. United States*, 139 S. Ct. 1960, 1994 n.3 (2019) (Ginsburg, J., dissenting) (“The Courts of Appeals have read this potential exception narrowly.”); *Guzman*, 85 F.3d at 827 (“We emphasize that the *Bartkus* exception is narrow.”); *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008) (“[T]he *Bartkus* sham-prosecution exception is a narrow one and, so far as this circuit is concerned, it is an exception that has yet to affect the outcome of a single case.”).

¹⁷⁵ See *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 496 (2d Cir. 1995) (remanding for an evidentiary hearing on whether the “state prosecute[d] to conviction and then prevail[ed] upon the federal prosecutor to deputize a state district attorney to bring a forfeiture, ostensibly in the name of the United States, but for the sole benefit of the state”); *Bernhardt*, 831 F.2d at 183 (reversing the district court’s dismissal of the indictment and remanding for an evidentiary hearing because the facts, while “troubling,” were not “sufficient as a matter of law to invoke” the *Bartkus* exception); *United States v. Belcher*, 762 F. Supp. 666, 670–71 (W.D. Va. 1991) (dismissing indictment on double jeopardy grounds and finding that *Bartkus*’s “sketchy provisions,” that is, “one sovereign acting as a tool of the other; one prosecution serving as a sham or cover for another,” are most applicable “in a situation where the principles of federalism are blurred and ‘the power of centralized government works to deprive a citizen of fundamental rights.’”). *But see United States v. Johnson*, 576 F. Supp. 2d 758, 764 n.6 (W.D. Va. 2008) (explaining that

Three features of the way the *Bartkus* exception has been formulated render it essentially nonfunctioning. First, the language in *Bartkus* itself is too vague to guide lower courts.¹⁷⁶ Second, the degree of collusion in *Bartkus* was quite egregious, leading courts to wonder just how bad a case would have to be to justify dismissal.¹⁷⁷ And third, it draws courts' attention to the domination of a sovereign, when they should instead be focused on the domination of an individual *by* the sovereign. The third point warrants special discussion, because it helps reorient thinking around dual sovereignty to the appropriate questions: how aligned or distinct the sovereign interests are, and whether the courts are unduly deferential when accepting those alignments. The next Section explores this third concern.

D. *The Role of Sovereign Domination*

Enforcing the *Bartkus* exception requires courts to label one sovereign—usually a state, but sometimes the United States or another nation—a “tool,” a “pawn,” a “handmaiden,” a “puppet,” or a “cat’s paw” for another sovereign. It demands a conclusion that one sovereign was “so thoroughly dominated” or “commandeered” by another that it retained “little or no independent volition.”¹⁷⁸ The basic language from *Bartkus* has spiraled into what is essentially a litany of insults to an independent sovereign. Concerns about federalism and international comity understandably make courts wary of finding the *Bartkus* exception applicable.

Of course, abhorrence of inter-sovereign domination motivates doctrines across constitutional law that limit the power of the federal government with respect to the states. The Court is comfortable calling out domination by the federal government in that context. But there is one major difference: in the anti-commandeering, state sovereign immunity, and federal legislative power cases, it is the state sovereign itself asserting its “dignity” against federal intrusion.¹⁷⁹ This is

the *Belcher* facts are “unique” (quoting *United States v. Ealy*, No. 00-cr-00104, 2001 WL 855894, at *1 (W.D. Va. July 30, 2001))).

¹⁷⁶ See *Belcher*, 762 F. Supp. at 670 (referring to “the sketchy provisions *Bartkus* announced”).

¹⁷⁷ See *United States v. Figueroa-Soto*, 938 F.2d 1015, 1019–20 (9th Cir. 1991) (describing “how difficult the proof is” to satisfy the *Bartkus* exception because, in that case, “the federal effort which failed in the federal courthouse was renewed a second time in the state courthouse across the street” (citing *Bartkus*, 359 U.S. at 169 (Brennan, J., dissenting))).

¹⁷⁸ See *supra* Section II.A.

¹⁷⁹ See, e.g., *New York v. United States*, 505 U.S. 144 (1992) (agreeing with the state of New York that the federal government could not force it to store radioactive waste generated by private parties); *Alden v. Maine*, 527 U.S. 706 (1999) (agreeing with the state of Maine that the federal government “could not subject state to suit in state court without

not the case in the double jeopardy sphere, where each sovereign has asserted its power against an individual and the individual pleads double jeopardy. Claims under the *Bartkus* exception are brought by defendants, not by the sovereign that was the victim of manipulation or control by another.

Thus, while one might imagine that federalism and comity concerns would motivate courts to restrain the federal government from “commandeering” a state or foreign prosecution, that is not the case here, where the wronged party is an individual. If a state itself claims it was commandeered, a court may feel comfortable telling the federal government to stop commandeering. But if the state claims it was perfectly independent, who are the courts to say it was thoroughly dominated? While the courts are comfortable resolving sovereign dignity disputes between state and federal governments, they may be less comfortable diagnosing domination that blurs the lines of sovereignty at an individual’s expense.

In Part III, I argue that the test for a violation of dual sovereignty must dispense with the notion that one sovereign lacked volition entirely. What the “volition” analysis misses is that a sovereign may have reasons for going along with a duplicative prosecution—financial or diplomatic aid from the United States, for example—that do not render it helpless or deprive it of agency. Yet those strategic reasons are not the sorts of “interests” that may permissibly be vindicated on the backs of criminal defendants through an invocation of the dual sovereignty rule.

III

STRICT SCRUTINY OF DUAL-SOVEREIGN SUCCESSIVE PROSECUTIONS

Freedom from successive prosecution for the same offense is a fundamental constitutional norm, but the Court’s dual sovereignty doctrine erases that protection entirely when prosecutions are brought by two sovereigns. Courts should instead apply strict scrutiny to such prosecutions. Section III.A begins by describing the strict scrutiny standard and why it is appropriate to dual-sovereign double jeopardy cases. Section III.B suggests how strict scrutiny would apply across three categories of cases. Section III.C addresses possible objections

its consent”); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (holding that sovereign immunity precludes private parties from suing nonconsenting states); *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 264 (2011) (Kennedy, J., concurring) (discussing the need to carefully balance a “State’s dignity” against federal interests in vindicating federal rights in federal cases against state officials).

to applying strict scrutiny in this context, and Section III.D discusses the added complication of the *Blockburger* test.

A. *The Case for Strict Scrutiny*

Strict scrutiny emerged as the dominant paradigm in the 1960s to protect constitutional rights viewed by the Supreme Court as too fundamental for mere rational-basis review, but which the Court could not practically treat as absolute.¹⁸⁰ The Warren Court applied strict scrutiny across a number of areas of civil constitutional law, including race-based classifications under the Equal Protection Clause, fundamental rights under the Due Process Clause, and content-based regulations on speech under the First Amendment.¹⁸¹ In the modern formulation, a government action subject to strict scrutiny will be upheld only if “narrowly tailored” to promote a “compelling governmental interest.”¹⁸² Strict scrutiny most often applies in challenges to legislation, but it can also be used to challenge executive action.¹⁸³

The Warren Court’s approach to constitutional criminal procedure tended more toward categorical rules than strict scrutiny,¹⁸⁴ although the Burger and Rehnquist Courts gradually eroded these categorical protections.¹⁸⁵ Double jeopardy by a single sovereign still typically requires the application of a categorical rule. If an indictment or conviction places someone “twice in jeopardy for the same offence,” it must be dismissed; there is no inquiry into how compelling the government’s interest is in the second prosecution.¹⁸⁶ However,

¹⁸⁰ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270 (2007).

¹⁸¹ *Id.* at 1269.

¹⁸² *Id.* at 1273 (first citing *Johnson v. California*, 543 U.S. 499, 505 (2005); and then citing *Miller v. Johnson*, 515 U.S. 900, 920 (1995)).

¹⁸³ *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding unconstitutional the racially discriminatory enforcement of a law criminalizing the operation of a laundry without a license, where nearly all those denied licenses were Chinese).

¹⁸⁴ Fallon, *supra* note 180, at 1291 (first citing *Miranda v. Arizona*, 384 U.S. 436 (1966) (freedom from self-incrimination); then citing *Douglas v. Alabama*, 380 U.S. 415 (1965) (right to confront witnesses); and then citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to court-appointed counsel)). *See generally* Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493 (2006) (offering a history of, and explanations for, the Supreme Court’s shift from “bright-line rule[s] to a balancing approach” in constitutional criminal procedure).

¹⁸⁵ Fisher, *supra* note 184, at 1495 (“[The] progression from a bright-line rule to a balancing approach is emblematic of the shift the Burger and Rehnquist Courts implemented in several areas of constitutional criminal procedure.”).

¹⁸⁶ *E.g.*, *Benton v. Maryland*, 395 U.S. 784, 796 (1969) (ruling that the Double Jeopardy Clause applies against the states and that petitioner’s larceny conviction, for which he was previously convicted, “cannot stand”). Other doctrinal developments, such as the *Blockburger* test discussed *infra* in Section III.D, have significantly limited the protection of the Double Jeopardy Clause by narrowing what qualifies as the “same offence,” even as it continues to apply categorically where the “same offence” requirement is met.

double jeopardy is not absolute when it comes to mistrials. If a court determines that “there is a manifest necessity . . . , or the ends of public justice would otherwise be defeated,”¹⁸⁷ it may discharge the jury and declare a mistrial. The defendant can then be charged again, despite having been placed in jeopardy once before when the first jury was impaneled.¹⁸⁸ The Court has said that “the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.”¹⁸⁹

As this brief overview has shown, strict scrutiny is not a typical formulation in double jeopardy cases, nor is it common in criminal procedure more generally. Importantly, this Note does not argue that single-sovereign double jeopardy cases should be subject to strict scrutiny. But strict scrutiny can be a useful tool in the narrow set of double jeopardy cases involving more than one sovereign, where a meaningful balancing of the interests of the prosecution and the rights of the defendant is necessary. The next Section explores how the ends and means prongs of the strict scrutiny formula provide a more useful framework than the confused inquiry courts have gone down in the *Bartkus* exception cases.¹⁹⁰

B. *Obstruction, Independence, and Manipulation*

The Supreme Court’s dual sovereignty cases and the lower courts’ exploration of the *Bartkus* exception illustrate that two sovereigns can have very distinct or very connected interests in prosecution. This Section argues that the distinctness of their interests is a key factor in the strict scrutiny analysis. I group dual-sovereign successive prosecutions into three categories based on the relationship between the two sovereigns’ interests: obstruction, independence, and manipulation.

In an obstruction case, one sovereign seeks to “veto” the other’s power to prosecute by going first and handing down an acquittal or a slap on the wrist. This is characteristic of the civil rights enforcement cases: A state might try to immunize its officers through a sham trial in the hope that it would preclude future federal prosecution. When the federal government seeks to re-prosecute, its interests directly

¹⁸⁷ United States v. Perez, 22 U.S. 579, 580 (1824).

¹⁸⁸ See generally Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449 (1977).

¹⁸⁹ Arizona v. Washington, 434 U.S. 497, 508 (1978).

¹⁹⁰ See *supra* Section II.C.

conflict with the interests that motivated the state prosecution.¹⁹¹ Obstruction cases will generally pass strict scrutiny under the compelling interest prong, so long as they are the least restrictive means of achieving that interest.¹⁹² If a state has already acquitted an officer in an attempt to immunize them from liability, the federal government has little option to vindicate its interest in accountability for civil rights violations *other* than through a second prosecution.

In a case of independence, each sovereign acts in pursuit of its own interests without seeking to influence the other; those interests might differ, but they are not necessarily wholly distinct or incompatible. An example of independence is the state-federal prosecution in *Gamble*. There, the state accepted a plea deal, but the federal government sought to prosecute again and seek a higher sentence. There was no evidence that the state was trying to immunize Gamble from future federal prosecution when it accepted his plea deal. Nor was there evidence that the state encouraged a second try by the federal government, or that the federal government encouraged the state to prosecute first.¹⁹³ These prosecutions might pass strict scrutiny if the second sovereign can show that it has an interest wholly distinct from that pursued by the first sovereign.

Finally, in a case of manipulation, one sovereign seeks to use the other to gain an advantage over the defendant or to circumvent the Double Jeopardy Clause. *Bartkus* is the classic case: Disappointed with the acquittal in federal court, federal prosecutors encouraged their state counterparts to initiate a second prosecution and then guided and prepared the state's case. The federal government used the state for a second bite at the apple.¹⁹⁴ *Augustine* is another case of manipulation, this time not for a second bite at the apple but instead for a prosecutorial advantage. The first prosecution in Tunisia, which would not have been brought but for the apparent encouragement by the United States, bought federal prosecutors valuable time and generated evidence through tactics that would not be constitutional on U.S. soil.¹⁹⁵ Cases of manipulation are likely to fail strict scrutiny either on the compelling interest prong or on the narrow tailoring prong. If the manipulating sovereign prosecuted first, then the defendant can challenge the second prosecution on the grounds that the second sovereign does not truly have a distinct (and therefore not compelling) interest in prosecution—its interests are bound up in the

¹⁹¹ See *supra* Introduction.

¹⁹² See *infra* Section III.B.2.

¹⁹³ See *supra* Section I.B.

¹⁹⁴ See *supra* Part II.

¹⁹⁵ See *supra* Introduction, Section II.B.

goals of the first sovereign directing the prosecution. If the manipulating sovereign prosecutes second, it is unlikely to be narrowly tailored: Rather than encouraging the other sovereign to go first, it would have been far less burdensome on the double jeopardy right to initiate its own prosecution. Unless the second prosecutor can demonstrate a good faith effort to prosecute first and avoid double jeopardy, the second indictment should be dismissed.

1. *Compelling Interest*

In dual-sovereign successive prosecutions, a compelling interest can be shown when the two sovereigns are genuinely pursuing distinct interests in their prosecutions. The United States may have an interest in prosecution that remains unvindicated even after a crime has been prosecuted and punished by another sovereign. If the United States was not responsible for the other proceeding, it would be unfair to preclude it from vindicating its interest as an *absolute* matter. The stronger the federal interest in prosecution, the greater the deference courts should show to the executive. The *Petite* policy serves as a good model for the interest analysis here.¹⁹⁶

If the two prosecuting sovereigns colluded to obtain a second prosecution, or if one sovereign encouraged and assisted the other prosecution, it is more difficult to conclude that each has a distinct interest wholly unvindicated by the other's prosecution.

2. *Least Restrictive Means*

Under strict scrutiny, the government's chosen action must also be the "least restrictive means" of achieving its stated goal. For example, in the affirmative action context, narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."¹⁹⁷ In the double jeopardy context, sovereigns must make a good-faith effort to coordinate their prosecutions when their interests are aligned and avoid double prosecution whenever possible.

Evidence that one sovereign sought to exploit constitutional gaps and achieve something it could not do alone demonstrates a failure of narrow tailoring. There may be a "prosecutorial advantage"¹⁹⁸ to be

¹⁹⁶ *Petite Policy*, *supra* note 101 ("[T]he matter must involve a substantial federal interest. This determination will be made on a case-by-case basis, applying the considerations applicable to all federal prosecutions. Matters that come within the national investigative or prosecutorial priorities established by the Department are more likely than others to satisfy this requirement." (citations omitted)).

¹⁹⁷ *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

¹⁹⁸ *United States v. Rashed*, 234 F.3d 1280, 1285 (D.C. Cir. 2000).

gained by allowing a prior prosecution to proceed first. For example, defendants who are detained, investigated, and prosecuted abroad—even at the encouragement or with the involvement of the United States—are not granted the same Fourth and Fifth Amendment protections as those prosecuted on U.S. soil.¹⁹⁹ These constitutional gaps can allow federal prosecutors to test their theories, obtain confessions through torture by foreign proxies, and rely on the defendant's prolonged detention before they even file a federal complaint.

Successive prosecution can more straightforwardly permit a second bite at the apple when a first prosecution fails. Prosecutors can work together to ensure that evidence, theories, and witnesses that failed to win a conviction on the first try are successful on the second try. When prosecutors arrange a second prosecution to secure this kind of advantage, their actions are not the least restrictive means to achieve a compelling government interest.

C. Counterarguments

One might challenge the application of strict scrutiny to dual-sovereign double jeopardy cases from two directions. For double jeopardy absolutists, such as Justice Black, applying strict scrutiny to a constitutionally enumerated right erodes the absolute protection of the right. Proponents of strict scrutiny as a flexible safeguard of individual rights, on the other hand, might fear that its application to this set of cases might undermine strict scrutiny overall if courts nevertheless continue to defer.

Justice Black, the Court's most outspoken critic of the dual sovereignty doctrine, would not approve of a proposal to strictly scrutinize dual-sovereign successive prosecutions. He believed that the rights enumerated in the Bill of Rights are absolute and should not be subject to any compelling interest or reasonableness inquiry.²⁰⁰ Other scholars have also criticized the rise of balancing tests in constitutional law and criminal procedure.²⁰¹ Although the balancing approach once offered hope for greater protection of rights that were not quite fundamental enough to be treated as absolute, the strict scrutiny formula

¹⁹⁹ See generally Tuerkheimer, *supra* note 9 (examining the extent to which constitutional protections are afforded to defendants in transnational criminal prosecutions).

²⁰⁰ Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553, 559 (1962).

²⁰¹ See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987); Fisher, *supra* note 184.

has been beset by problems of definition and the Court has never quite settled on a stable method of evaluation.²⁰²

One could also imagine that courts, adopting the strict scrutiny approach to dual-sovereign successive prosecution, nonetheless continue to defer to prosecutorial judgments about the importance of their interests—especially in transnational cases. If this were to happen, strict scrutiny would be “strict in theory but feeble in fact.”²⁰³ Applying strict scrutiny to an area such as dual sovereignty, where courts have been so very reluctant to override prosecutorial prerogative, risks undermining the very idea that strict scrutiny is strict.

Ultimately, this Note argues that strict scrutiny in the dual-sovereign sphere is preferable to the status quo, and it is more realistic than an absolute approach where dual sovereignty would make no difference at all. The standard is recognizable to courts; it has been used for decades in a wide range of individual-rights settings. Moreover, its focus on both ends and means helps capture some of the most glaring issues that troubled the courts in the *Bartkus* exception cases, but which the *Bartkus* exception was unable to handle. Although strict scrutiny is not a perfect doctrinal test, it offers the possibility of protection for individuals facing dual punishment by separate sovereigns. Under the dual sovereignty doctrine, these individuals have no constitutional remedy at all.

D. *Rethinking the Blockburger Test*

Of course, even if a case satisfies many of the factors for double jeopardy outlined above, it may flounder when it reaches the stage of comparing elements under *Blockburger*.²⁰⁴ At the end of his opinion for the Court in *Gamble*, Justice Alito noted that overturning dual sovereignty “would not even prevent many successive state and federal prosecutions for the same criminal conduct unless we also overruled the long-settled rule that an ‘offence’ for double jeopardy purposes is defined by statutory elements, not by what might be described in a looser sense as a unit of criminal conduct.”²⁰⁵ Justice Alito suggests here that *Blockburger* would effectively rule out any double jeopardy protection even if the dual sovereignty doctrine were overruled. In a sense he is right: If the Court is willing to embrace the

²⁰² See Fallon, *supra* note 180, at 1302–15 (describing three different variations on the strict scrutiny standard).

²⁰³ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 314 (2013).

²⁰⁴ *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (explaining that two offenses are distinct for double jeopardy purposes if “each . . . requires proof of an additional fact which the other does not”).

²⁰⁵ *Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019) (citations omitted).

complexity of double-jeopardy rights in the dual-sovereign space, it must also develop an alternative to the *Blockburger* test. A strict comparison of statutory elements is nonsensical in the cross-sovereign context; foreign criminal codes are likely to use different definitions and include different elements than the U.S. code, even for substantially similar crimes. At a minimum, the test for the “same offense” in dual-sovereign situations should not consider jurisdictional elements. Additionally, differences in how an element is defined (for example, the statutory definition of a designated terrorist organization) should not foreclose a double jeopardy claim if each prosecution is predicated on a common fact (for example, the same terrorist group). The question instead should be whether the first prosecution was largely predicated on the same facts and legal theories as the second.

The need to come up with an alternative to *Blockburger* might be seen as a reason to keep the current dual sovereignty doctrine. But there are growing signs that the *Blockburger* standard is due for a rethinking. In two contexts in which courts are already scrutinizing cross-jurisdictional double jeopardy claims—international extradition and military tribunals²⁰⁶—the *Blockburger* standard leaves something to be desired. For example, in *Trabelsi*, nearly a decade of litigation has followed from the question of whether the same-conduct or same-elements test should apply in the interpretation of a treaty double jeopardy provision.²⁰⁷ In a recent case, the Court of Appeals for the Armed Forces found that jurisdictional elements should not be counted as elements for purposes of the *Blockburger* comparison.²⁰⁸

Although a full discussion of *Blockburger* in dual-sovereign contexts is beyond the scope of this Note, these recent doctrinal developments point to a need to reconsider the *Blockburger* test whether or not the Court abandons the dual sovereignty rule.

CONCLUSION

The dual sovereignty doctrine has created a constitutional void, contravening the purpose and original understanding of the Double Jeopardy Clause. This Note proposes a new solution to fill the void. Rather than deferring by default, courts should apply the familiar

²⁰⁶ See *Trabelsi II*, 845 F.3d 1181, 1184 (D.C. Cir. 2017); *United States v. Rice*, 80 M.J. 36 (C.A.A.F. 2020). Cases in which a person was tried under military jurisdiction and again under federal law are single-sovereign cases and do not implicate the dual sovereignty rule. *Rice*, 80 M.J. at 40 n.10. However, because they are tried by different courts interpreting distinct legal codes, they raise similar questions about the strict comparison of elements as do dual-sovereign double jeopardy cases.

²⁰⁷ See *supra* Section I.D.

²⁰⁸ *Rice*, 80 M.J. at 40.

strict scrutiny standard in deciding whether a successive prosecution by another sovereign for the same crime violates the Double Jeopardy Clause. This approach would meaningfully address concerns about the circumvention of constitutional rights that have continued to surface over many decades of dual sovereignty jurisprudence—not just in the many fierce dissents and scholarly critiques, but also in the majority opinion in *Bartkus* and in lower court decisions interpreting that case.

Dual sovereignty should not be an on–off switch, where an individual’s rights are protected absolutely if she is tried by a single sovereign and not at all if she is tried by two. Dual-sovereign successive prosecutions encompass a wide range of situations, from obstruction of one sovereign’s interests by another to manipulation of dual sovereignty to circumvent constitutional requirements. If courts embrace the complexity of these situations, they can balance the interest of the government in prosecuting against the defendant’s fundamental right to finality and freedom from successive prosecution. Defendants will not always win these cases, but their rights will be protected far more than they are in the current framework. Deference is not the answer where a fundamental constitutional right is at stake.