Gamble, Dual Sovereignty, and Due Process

*Anthony J. Colangelo**

Introduction

The Constitution's Double Jeopardy Clause is an analytically gnarly beast. What seems like a fairly straightforward prohibition on multiple prosecutions for the same crime turns out to be a bramble bush of doctrinal twists and snarls. At the center is the so-called dual sovereignty doctrine. This principle holds that separate sovereigns (for example, a state and the federal government) may prosecute for what looks like the same "offence"—to use the Constitution's language[1]—because they have separate laws. And because those laws prohibit separate offenses, the Double Jeopardy Clause's bar on multiple prosecutions for the same offense simply does not come into play. As a doctrine that relates to a right guaranteed by the Bill of Rights, it's remarkably one-dimensional in favor of government.

In *Gamble v. United States*[2] the Supreme Court reaffirmed and built upon this view, or what I have called a "jurisdictional theory" of double jeopardy.[3] This theory peels back the label "sovereign" to extract its underlying rationale. Namely, sovereign means an entity with independent jurisdiction to make and apply law, or "prescriptive

* Gerald J. Ford research fellow and professor of law, Southern Methodist University Dedman School of Law. I thank Ronald J. Allen, Jeffrey Bellin, Brent Ferguson, Martin H. Redish, Carrie J. Rief, Meghan J. Ryan, and the SMU Law Faculty Forum audience for helpful comments. J. Collin Spring provided truly outstanding research assistance.

[1] The full language of the Double Jeopardy Clause reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

[2] 139 S. Ct. 1960 (2019).

[3] Anthony J. Colangelo, Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory, 86 Wash. U. L. Rev. 769, 775 (2009).

jurisdiction," and that prescriptive jurisdiction authorizes independent jurisdiction to enforce law through a separate prosecution. This terminological move from sovereignty to jurisdiction is not just semantic. Rather, it opens up analysis. The theory holds strong explanatory power for current double jeopardy law and practice as well as dynamic doctrinal and normative implications for double jeopardy law going forward—perhaps most of all for U.S. prosecutions relating to criminal activity abroad, such as human rights abuses, piracy, and various forms of terrorism.

The move also imports a whole other part of the Constitution: The Due Process Clause, or Clauses—the Fourteenth Amendment's for the states[4] and the Fifth Amendment's for the federal government[5]—for any exercise of jurisdiction in this country must be measured against due process. In other words, if the sovereign has no jurisdiction over the offense, the sovereign cannot successively prosecute. Here *Gamble*'s language that the United States might successively prosecute for crimes abroad when it has "interests" fits snugly into existing due process analyses because both the Fourteenth Amendment and the Fifth Amendment tests also involve interest analyses.

On this view, one question *Gamble* opens up is whether a prior prosecution might mitigate or erase state interests for purposes of due process and, hence, the Double Jeopardy Clause. Indeed, we already know this to be the case in at least one scenario: where the sole interest is in enforcing international law, the United States is jurisdictionally barred from successively prosecuting because the prior prosecution would have extinguished the only law available—international law—under which the defendant cannot be prosecuted twice. To be sure, this view of double jeopardy was articulated by Justice William Johnson in 1820.

Part I of this article is primarily descriptive. It seeks to recruit the Court's own language stretching back to the early 19th century to trace the origins and development of the jurisdictional view of double jeopardy. Part II also describes the law, in particular *Gamble*, with a focus, first, on the Court's adoption of a jurisdictional view and, second, on the Court's use of a state-interest analysis to explain

[4] U.S. Const. amend. XIV.

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

when the United States might seek successively to prosecute for crimes occurring abroad.

Part III contains the meat of the analysis. It attempts to interrelate the Double Jeopardy and Due Process Clauses in light of the the dual sovereignty doctrine. There is a certain structural appeal here. The Double Jeopardy Clause and Due Process Clause protections against federal power appear in the same amendment,[6] and the Fourteenth Amendment's Due Process Clause incorporates the Fifth Amendment's double jeopardy protection against the states.[7]

I begin by explaining that due process depends on state interests and that this interest analysis matches up with *Gamble*'s observation that the United States may seek a successive prosecution where it has an interest. I then propose that a useful measure of state interests can be found in international law. Indeed, this is exactly the body of law *Gamble* used to explain when the United States has an interest in successively prosecuting. International law is an appropriate gauge because it captures traditional bases of jurisdiction, and due process depends precisely upon traditional notions of fair play and substantial justice. Moreover, it is a body of law that courts already use when measuring U.S. interests in prosecuting crimes abroad under the Due Process Clause. Thus I argue not that international law limits a successive prosecution of its own force, but rather that it can be incorporated into the Due Process Clause to measure state interests. The more attenuated the interest, the weaker the jurisdictional claim. When combined with other factors—such as the influence one prosecuting entity has over the other, the extent to which the entities' laws and sentencing align, and whether the prior prosecution was a sham designed to shield the accused—there may be situations where a successively prosecuting state's interest is diminished to the vanishing point.

Exactly what such a disqualification of sovereignty would look like in precise fact is largely beyond the prescience of this author; my purpose in this short essay is merely to hatch an idea. But we do know at least one scenario, alluded to above, in which a U.S. interest in successively prosecuting would be erased by a prior prosecution: where the sole basis of jurisdiction would be to enforce international

[6] *Id.*

[7] Benton v. Maryland, 395 U.S. 784, 794 (1969).

law against certain universal crimes like human rights abuses, piracy, and certain acts of terrorism.

I. The Jurisdictional View of Sovereignty

This part traces the development of the dual sovereignty doctrine as fundamentally a doctrine of jurisdiction. At the outset, it will help to break out jurisdiction into three main types: (1) prescriptive; (2) adjudicative; and (3) enforcement. Prescriptive jurisdiction is generally understood as the power to make and apply law;[8] adjudicative jurisdiction is generally understood as the power to subject persons and things to judicial process;[9] and enforcement jurisdiction is generally understood as the power to enforce law.[10] These are just heuristics, but they do a good job helping distinguish different doctrinal tests from one another—for example, the test for personal jurisdiction before a court (adjudicative) from the test regarding when a state may apply its law for choice of law purposes (prescriptive). I propose that the Supreme Court's dual sovereignty jurisprudence can be viewed as upholding successive prosecutions for the same crime where prosecuting entities have independent jurisdiction to make and apply law, or prescriptive jurisdiction, which in turn authorizes independent jurisdiction to enforce that law through a separate prosecution.

Two cases from 1820 suggest the dual sovereignty doctrine. The first is *Houston v. Moore*, a case involving state application of a federal law punishing delinquency from military service.[11] As the Court explained, "[t]his concerns the jurisdiction of a State military tribunal to adjudicate in a case which depends on a law of Congress, and to enforce it."[12] Thus the question presented was framed in terms of concurrent jurisdiction by courts—not legislatures—over the same offense:

> Is it competent to a Court Martial, deriving its jurisdiction under State authority, to try and punish militia men, drafted,

[8] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 101 (Am. Law Inst. 2018).

[9] *Id.*

[10] *Id.*

[11] 18 U.S. 1, 4 (1820).

[12] *Id.* at 24–25.

> detached and called forth by the President into the service of the United States, who have refused, or neglected to obey the call?[13]

The Court answered yes and observed that the offense was the same in both state and federal court because it originated from the same—federal—law.[14]

And here's where some double jeopardy language came in. Justice Bushrod Washington, writing for the Court (sort of[15]), addressed the argument that such a rule "might subject the accused to be twice tried for the same offence."[16] Washington rejected this argument, explaining that "if the jurisdiction of the two courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other."[17] But again, this was only so because the state court was applying federal law, and the accused could not be put in jeopardy twice for the same offense under the same law.[18] *Houston* therefore left the dual sovereignty question open; all it stands for is the uncontroversial proposition that someone cannot be prosecuted multiple times under the same law, and it limited itself to that scenario.[19]

[13] *Id.* at 16.

[14] *Id.* at 17.

[15] As David Currie has noted, "Washington, however, cannot be said to have spoken for the Court in *Houston*" because of the disagreement on the reasoning for the judgment. David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888 110 (1st ed. 1985). Justice Washington suggested as much, writing at the end of his opinion: "Two of the judges are of opinion, that the law in question is unconstitutional, and that the judgment below ought to be reversed. The other judges are of opinion that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion." Houston, 18 U.S. at 32. Justice Johnson was clear on this, explaining at the end of his concurrence that "there is no point whatever decided except that the fine was constitutionally imposed" by the state court, and that "[t]he course of reasoning by which the judges have reached this conclusion are [sic] various, coinciding in but one thing, *viz.*, that there is no error in the judgment [below]." *Id.* at 47.

[16] Houston, 18 U.S. at 31.

[17] *Id.*

[18] Washington posited the opposite scenario in which a federal court could not separately adjudicate a state civil law cause of action after the state court had already adjudicated that same cause of action. *Id*.

[19] See *id.* at 31–33.

But Justice Johnson did not so limit himself. Instead, he gave a full-throated exposition of the dual sovereignty doctrine as a matter of prescriptive jurisdiction, asking rhetorically, "Why may not the same offence be made punishable both under the laws of the States, and of the United States?"[20] He answered:

> Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States. . . . [W]here the United States cannot assume, or where they have not assumed [an] exclusive exercise of power, I cannot imagine a reason why the States may not also, if they feel themselves injured by the same offence, assert their right of inflicting punishment also.[21]

Indeed, "[t]he actual exercise of this concurrent right of punishing is familiar to every day's practice," according to Johnson, who gave the example of robbing the mail on a highway "which is unquestionably cognizable as highway-robbery under State laws," but also a federal offense under U.S. law.[22] Finally, Johnson turned to the consequences of a contrary rule, namely, that states could block a successive federal prosecution "when their real object is nothing less than to embarrass, the progress of the general government."[23] The dual sovereignty rule, on the other hand, would prevent this "evil."[24] He continued to reject the argument in jurisdictional terms:

> But this is a doctrine [prior acquittal as a bar to double jeopardy] which can only be maintained on the ground that an offence against the laws of the one government is an offence against the other government; and can surely never be successfully asserted in any instances but those in which jurisdiction is vested in the State Courts by statutory provisions of the United States. . . . [C]rimes against a government are only cognizable in its own Courts, or in those which derive their right of holding jurisdiction from the offended government.[25]

[20] *Id.* at 33.

[21] *Id.* at 33–34.

[22] *Id*. at 34.

[23] *Id.* at 35.

[24] *Id*.

[25] *Id.*

A couple of points come out of *Houston*. One is that the Court focused on different forms of jurisdiction when evaluating the double jeopardy question. Where multiple prosecutions were posed under the same law, or prescriptive jurisdiction, the prohibition on double jeopardy would kick in—even if the enforcement agents were different courts. But, at least for Justice Johnson, where the laws emanated from concurrent but independent prescriptive jurisdictions of different sovereigns, multiple prosecutions were permissible (and, in some cases, a good idea). If any doubt remains as to Justice Johnson's views regarding double jeopardy, it ought to be erased by his opinion for the Court in *United States v. Furlong*,[26] decided two weeks after *Houston*.

Furlong was a piracy case. *Dicta* in the opinion made a sharp distinction between the parochial crime of murder on the one hand and the international crime of piracy on the other.[27] This distinction had an outcome-determinative effect for double jeopardy law and practice. Piracy, as a result of a legal fiction, was outside the national jurisdiction of any state.[28] Pirates were by definition stateless individuals sailing on stateless vessels acknowledging the authority of no government (hence the black flag).[29] Elsewhere, the Court described them as "persons on board vessels which throw off their national character by cruising piratically and committing piracy on other vessels."[30] The crime was not "committed against the particular sovereignty of a foreign power; but . . . against all nations,

[26] See 18 U.S. (5. Wheat) 184 (1820).

[27] *Id*. at 197.

[28] See United States v. Klintock, 18 U.S. (5 Wheat.) 144, 152 (1820); see also, e.g., Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). To ensure that pirates were prosecuted wherever they were found and assertions of jurisdiction over them occasioned no interference with the sovereignty of other states, pirates were deemed outside of any state's national jurisdiction; see also Justice Antonin Scalia's more recent description in Sosa v. Alvarez-Machain, 542 U.S. 692, 748–49 (2004) (Scalia, J., concurring in part). Absent the fiction, prosecution of a pirate in custody for acts occurring outside the prosecuting state's territory theoretically could infringe another state's sovereignty; specifically, the state (or state's vessel) where the act occurred because, at the time, jurisdiction was strictly territorial in nature and the exercise of extraterritorial jurisdiction was seen as interfering with the sovereignty of the state where the crime occurred.

[29] See generally David Cordingly, Under the Black Flag: The Romance and the Reality of Life among the Pirates (1995).

[30] Klintock, 18 U.S. (5 Wheat.) at 153.

including the United States."[31] All states had jurisdiction over piracy not as a matter of their independent national jurisdiction over territory or national persons, but instead based on a shared international jurisdiction, or what's called "universal jurisdiction."[32] *Furlong* explained that piracy "is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* [already acquitted] would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State."[33] That sounds like the prohibition on double jeopardy.

But, the Court went on, "Not so with the crime of murder."[34] For murder, unlike piracy, was not an offense under international law "within this universal jurisdiction"[35] of all states, but rather was an offense against each state's national laws. "It is punishable under the laws of each State, and . . . an acquittal in [the defendant's] case would not have been a good plea in a Court of Great Britain."[36] Moreover, unlike with piracy, there was a jurisdictional limitation on prosecuting for murder: "punishing it when committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation, has not been acknowledged as a right, much less an obligation."[37] In other words, where there was no basis for independent national jurisdiction, a state could not prosecute. The Court went on, noting that U.S. citizens could nonetheless be subject to international double jeopardy by multiple nations with concurrent prescriptive jurisdiction over their crimes: "As to our own citizens . . . their subjection to those [U.S.] laws follows them every where,"[38] and while the U.S. Constitution may protect them from multiple prosecutions under

[31] *Id.* at 152; cf. United States v. Smith, 18 U.S. (5 Wheat.) 153, 161–62 (1820) ("The common law . . . recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of the common law,) as an offence against the universal law of society, a pirate being deemed an enemy of the human race.").

[32] Furlong, 18 U.S. at 197.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

U.S. law, this protection does not extend to prosecutions under foreign law where foreign nations have jurisdiction, for "if [the accused] are also made amenable to the laws of another State, it is the result of their own act in subjecting themselves to those laws."[39]

In sum, *Furlong* speaks of two types of law emanating from two types of jurisdiction: one national, the other international. National law derives from states' independent jurisdiction over national territory and persons. International law stems from the shared interests of all states to proscribe certain offenses that affect the international community. Where two states have independent national jurisdiction to prosecute, each may do so because each has an independent law and the bar on double jeopardy does not attach. But where international or universal jurisdiction authorizes the application of only international law, multiple prosecutions are prohibited because the first state to prosecute would have "used up" the international law and a subsequent prosecution would thus, impermissibly, be for the same offense, under the same law, twice.

A string of opinions prior to the first actual application of the dual sovereignty doctrine in 1922[40] only cements the jurisdictional reasoning in *Houston* and *Furlong*. The defendant in *Fox v. Ohio* challenged her state conviction for passing counterfeit coin on the ground that only the federal government had jurisdiction over that offense.[41] The Court disposed of her argument by distinguishing counterfeiting, which was an offense exclusively within the jurisdiction of the federal government to proscribe, from passing counterfeit coin, which was fraud within the state's jurisdiction to proscribe.[42] Three years later, *United States v. Marigold* reaffirmed *Fox*'s jurisdictional holding, explaining that the states and Congress each had an independent jurisdiction to prosecute and punish uttering false currency.[43] Then two years after *Marigold*, *Moore v. Illinois* solidified the jurisdictional foundation laid by the prior case law. *Moore* involved a challenge to a state court conviction under an Illinois law outlawing the harboring of fugitive slaves.[44]

[39] *Id.* at 197–98.

[40] United States v. Lanza, 260 U.S. 377 (1922).

[41] Fox v. Ohio, 46 U.S. 410, 433 (1847).

[42] *Id.* at 433–34.

[43] United States v. Marigold, 50 U.S. 560, 569–70 (1850).

[44] Moore v. Illinois, 55 U.S. 13, 17 (1852).

Moore argued that the federal Fugitive Slave Act preempted the Illinois statute, a necessary result because otherwise he could be prosecuted twice for the same offense.[45] As to the preemption argument, the Court found that Illinois had an independent jurisdiction to outlaw the harboring of fugitive slaves.[46] And as to the related double jeopardy argument, the Court announced the dual sovereignty doctrine:

> An offence, in its legal signification, means a transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.[47]

Finally, a true dual sovereignty case presented itself. *United States v. Lanza* upheld a successive federal prosecution under the Volstead Act after a state conviction for the same acts.[48] The Court explained that "[e]ach State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State."[49] In jurisdictional terms, the "independent judgment" to make and enforce law "is an inseparable incident of independent legislative action in distinct jurisdictions."[50] Indeed, the Court observed that the dual sovereignty "doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate *only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction*."[51]

[45] *Id.*

[46] *Id.* at 18.

[47] *Id.* at 19–20.

[48] Lanza, 260 U.S. at 381.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 384 (quoting S. Ry. Co. v. R.R. Comm'n of Ind., 236 U.S. 439, 445 (1915)) (emphasis added).

The Court repeated this reasoning in subsequent cases upholding a federal prosecution following a state court conviction for the same act,[52] a successive state court conviction following an acquittal of the same acts in federal court,[53] and a successive federal prosecution following a conviction by an Indian tribunal.[54]

Moreover, the Court didn't find dual sovereignties only in respect to federal versus state and tribal authorities. In *Heath v. Alabama* the Court considered the case of a man prosecuted twice for a murder resulting from a kidnapping in Alabama, with the victim's body being found in Georgia.[55] Heath pleaded guilty in Georgia to avoid the death penalty, but was then retried in Alabama, where he was sentenced to death.[56] Before the Alabama trial, Heath leveled two challenges: one, he interposed the bar on double jeopardy; two, he contested Alabama's jurisdiction.[57] The Court found the jurisdictional challenge waived,[58] but there was something to it. It appeared that the vast majority of the acts leading up to the murder, including the planning, preparation, and murder itself, took place in Georgia (though the victim had been kidnapped in Alabama).[59] Moreover, Heath argued, the offenses for which he was prosecuted were identical for purposes of the Double Jeopardy Clause,[60] and his initial conviction in Georgia was the fruit of a joint investigation between

[52] Abbate v. United States, 359 U.S. 187 (1959).

[53] Bartkus v. Illinois, 359 U.S. 121 (1959).

[54] United States v. Wheeler, 435 U.S. 313 (1978); United States v. Lara, 541 U.S. 193 (2003).

[55] Heath v. Alabama, 474 U.S. 82, 84 (1985).

[56] *Id.* at 85–86.

[57] *Id.* at 85. Although Heath initially framed this as a "plea to the territorial jurisdiction of the Alabama court" (see Brief for Petitioner, Heath v. Alabama, 474 U.S. 82 (1985) (No. 84-5555), 1985 U.S. S. Ct. Briefs LEXIS 940 at *10), this argument would more appropriately have been styled as an objection to the application of Alabama law, since the court would have had jurisdiction over Heath by virtue of his physical custody.

[58] *Id.* at 87.

[59] Brief for Petitioner, *supra* note 57, at *13–15.

[60] *Id.* at *13. The relevant test here is the so-called *Blockburger* test. See Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). For how the *Blockburger* test might factor into this essay's thesis that due process might constrain a sovereign's jurisdiction, see *infra* note 135 and accompanying text.

Georgia and Alabama law enforcement.[61] I would only point out that, on the analysis developed in Part III, the Court would have *had* to consider Heath's objections to Alabama's jurisdiction for it was *that very jurisdiction*, the ability to apply Alabama law to him, that made Alabama a "sovereign" within the meaning of the dual sovereignty doctrine.

In deciding the case on double jeopardy grounds, the Court basically restated the dual sovereignty doctrine and then applied it to the states. The restatement of the doctrine was largely a recitation of quotations from previous cases.[62] More interesting was the Court's discussion of why the doctrine applied to successive prosecutions by multiple states as opposed to states versus the federal government. Here the Court had to discern why, under the dual sovereignty doctrine, different states were separate sovereigns. The Court began by quoting *Lanza*'s statement that "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[63] That is to say, each government has independent jurisdiction to prescribe law. The Court repeated, "each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each is exercising its own sovereignty, not that of the other."[64] Thus, according to the Court, sovereignty really meant independent jurisdiction to make and apply law and the attendant jurisdiction to enforce that law.

But the Court did not always find this independent power. *Grafton v. United States*[65] is best conceptually understood as the intellectual heir of *Houston*. Grafton was serving in the U.S. Army in the

[61] *Id.* at *17. Although not grounded in due process, Heath also made a species of interest argument that the prior Georgia prosecution reduced Alabama's interest and that Heath's individual interest against multiple prosecutions outweighed Alabama's reduced interest. *Id*. at *27–31. Accord Ronald J. Allen and John P. Ratnaswamy, *Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court, 76 J. Crim. L. & Criminology 801, 823 (1985) ("A more realistic approach to ascertaining state interests than the definitional approach of the Court would have been for the Court to examine the extent to which the states actually assert that they have unique interests which cannot be satisfied by prior prosecution in another state.").

[62] Heath, 474 U.S. at 88–89 (quoting Lanza, 260 U.S. at 382; Houston, 18 U.S. at 19, 20).

[63] *Id.* at 89.

[64] *Id.* (cleaned up).

[65] Grafton v. United States, 206 U.S. 333 (1907).

then-U.S. territory of the Philippines.[66] While on duty, he killed two Filipinos and was tried by a military court martial under the Articles of War.[67] He was acquitted and then retried in the Filipino court system, where he was convicted of homicide under the Philippine Penal Code.[68] The Supreme Court explained that the court martial's "jurisdiction is not exclusive, but only concurrent with that of civil courts."[69] In other words, there was concurrent adjudicative jurisdiction. That is, "[t]he act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction[.]"[70] But as to prescriptive jurisdiction, it emanated "from the same government, namely, that of the United States[.]"[71] Indeed, the court martial's prescriptive jurisdiction even depended on the civil penal code: "a general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public."[72] Thus the court martial prosecuted Grafton for "the crime of homicide as defined by the Penal Code of the Philippines."[73] Because both the court martial and the Filipino Penal Code shared the same fundamental prescriptive jurisdiction,

> the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or another court, civil or military, of the same government.[74]

Just as in *Houston*, there was concurrent adjudicative jurisdiction. In *Houston*, it was the concurrent jurisdiction of state and federal courts. In *Grafton*, it was the concurrent jurisdiction of courts

[66] *Id.* at 341.
[67] *Id.* at 341–42.
[68] *Id.* at 342.
[69] *Id.* at 348.
[70] *Id.* at 347.
[71] *Id.* at 349.
[72] *Id.* at 351.
[73] *Id.* at 349.
[74] *Id.* at 352.

martial and local civil courts. But in both cases prescriptive jurisdiction drew power from a single source: the federal government. Because there was only one source of prescriptive jurisdiction, there was only one "offence," for which the accused could not be doubly tried.[75]

II. *Gamble*

Throughout the course of the opinion, *Gamble* uses the jurisdictional view that has been discussed so far. The Court started out by explaining, "[w]e have long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign."[76] Thus, "a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute."[77] And as we by now know, by that reasoning the reverse is true also: a federal prosecution following a state prosecution is permissible, and that's what happened to Gamble. He had been prosecuted by Alabama under a state law prohibiting felons from possessing firearms and then prosecuted by the federal government for the same acts under a federal felon-in-possession law.[78]

[75] On the basis that territorial law is derivative of federal law, the Supreme Court more recently held that Puerto Rico is not a separate sovereign for purposes of the Double Jeopardy Clause. See Commonwealth of Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1869–70 (2016) ("Because that [prosecutorial] power originally 'derived from the United States Congress'—i.e., the same source on which federal prosecutors rely—the Commonwealth could not retry Sánchez Valle and Gómez for unlawfully selling firearms.") (internal citations omitted). On this logic, the Court has also found that a municipality is not a distinct sovereign from a state because, like Congress's power over the territories, the state legislature, according to the Florida Constitution, had the power "to establish, and to abolish, municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time." Waller v. Florida, 397 U.S. 387, 392 n.4 (1970) (brackets and internal citations and quotation marks omitted). This comports with "the traditional view . . . that the Supreme Court has predicated the constitutional status of local governments entirely on the theory that a local government is merely an administrative arm of the state, utterly lacking in autonomy or in constitutional rights against the state that created it." Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 Colum. L. Rev. 1, 85 (1990).

[76] United States v. Gamble, 139 S. Ct. 1960, 1964 (2019).

[77] *Id.*

[78] *Id.*

The Court then turned to the text. Here it focused on the word "offence" and quoted Justice Antonin Scalia's "soon-vindicated"[79] dissent in *Grady v. Corbin*, a case involving whether a single state could prosecute for different offenses arising out of the same facts.[80] There, Justice Scalia explained that "the language of the Clause . . . protects individuals from being twice put in jeopardy 'for the same offence,' not for the same conduct or actions," and "'[o]ffence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'"[81] In light of this understanding, "[i]f the same conduct violates two (or more) laws, then each offense may be separately prosecuted."[82] *Gamble* transitioned this reasoning into the dual sovereignty context through the following syllogism: "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 'offenses.'"[83] This implicitly raises the question of what constitutes a "sovereign." As I hope to have shown by now, a sovereign is an entity that enjoys independent power to make and apply law, or prescriptive jurisdiction.

The Court next turned to the cases.[84] Unsurprisingly, it rehearsed the dual sovereignty reasoning of *Fox*, *Marigold*, and *Moore*.[85] But what's interesting here is the Court's heavy emphasis on "the substantive differences between the interests that two sovereigns can have in punishing the same act."[86] Hence the Court did not stop at an antiseptic jurisdictional reading of these opinions; rather, it went out of its way to "honor" the different federal and state interests at play in

[79] *Id.* at 1965.

[80] Grady v. Corbin, 495 U.S. 508 (1990).

[81] *Id.* at 529 (internal citations omitted).

[82] *Id.*

[83] Gamble, 139 S. Ct. at 1965. The Court also quoted parenthetically *Moore*'s statement that "[t]he constitutional provision is not, that no person shall be subject, for the same act, to be twice put in jeopardy of life or limb; but for the same offence, the same violation of law, no person's life or limb shall be twice put in jeopardy." *Id.* (quoting Moore, 55 U.S. at 17) (internal emphasis omitted).

[84] I should note that *Houston v. Moore* and *United States v. Furlong* were discussed in the Court's opinion, but were done so later on in the part of the opinion dealing with Gamble's arguments, which relied on those cases. See *id.* at 1976–79. The Court's reading of both cases is consistent with the argument presented here.

[85] *Id.* at 1966–67.

[86] *Id.* at 1966.

the successive prosecution scenarios illustrated by the cases. In *Fox*, it was the state's interest in prohibiting the passing of counterfeit coin;[87] and in *Marigold*, a case involving uttering false currency, the crime was measured by its "character in reference to each" prosecuting entity.[88] *Moore*, according to the Court, "expanded on this concern for the different interests of separate sovereigns"[89] by describing the hypothetical assault on a U.S. marshal that would offend both national ("hindering the execution of legal process"[90]) and state ("breaching the peace of the State"[91]) interests.[92]

And then the Court veered off the precedential track, so to speak. It speculated about the implications of Gamble's theory when it comes to prosecuting for crimes abroad. The Court worried that "[i]f . . . only one sovereign may prosecute for a single act, no American court—state or federal—could prosecute conduct already tried in a foreign court."[93] What about a U.S. national murdered abroad? In keeping with an interest analysis, the country where the murder occurred could "rightfully seek to punish the killer" because "[t]he foreign country's interest lies in protecting the peace in that territory rather than protecting the American specifically."[94] But the United States would also have an interest: the interest not to see its nationals killed—an interest captured by "customary international law."[95] Or we may have other "key national interests," among which might be "punishing crimes committed *by* U.S. nationals abroad."[96] The Court then repeated its interest approach in no uncertain terms: "a crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate."[97]

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 1966–67 (cleaned up).

[91] *Id.* at 1967 (cleaned up).

[92] That the Court chose not to "honor" the specific facts and laws at play in *Moore* is not that surprising. The case involved upholding a state prosecution for harboring fugitive slaves. Moore, 55 U.S. at 17.

[93] Gamble, 139 S. Ct. at 1967.

[94] *Id.*

[95] *Id.*

[96] *Id.* (emphasis in original).

[97] *Id.*

If sovereign means jurisdiction, and jurisdiction is triggered by interests, what interests count? And, can they ever be mitigated by a prior prosecution so as to render a successive prosecution unconstitutional?

III. Due Process and Double Jeopardy

Before answering those questions, we must give them some constitutional context. Any exercise of jurisdiction in this country must comply with due process. The Fourteenth Amendment's Due Process Clause regulates assertions of state power[98] while the Fifth Amendment's Due Process Clause regulates the federal government.[99] The relevant type of jurisdiction for our purposes is, again, prescriptive—or the power to make and apply law. Unlike in civil cases, criminal cases do not proceed in absentia in the United States, so the court will always have personal, adjudicative jurisdiction over the accused (even if custody is obtained by force or fraud).[100] The applicable Supreme Court test for discerning whether an assertion of prescriptive jurisdiction comports with due process requires that a state have "a significant contact or significant aggregation of contacts, *creating state interests*, such that choice of its law is neither arbitrary nor fundamentally unfair."[101] That is the test under the Fourteenth Amendment; the Court has not yet resolved the test under the Fifth Amendment. But lower courts that have considered the matter agree that Fifth Amendment due process applies so as not to render the application of federal law "arbitrary or fundamentally unfair."[102] The tests vary, but all appear to have found this "common denominator."[103]

[98] U.S. Const. amend. XIV, § 1.

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

[100] See Anthony J. Colangelo, Spatial Legality, 107 Nw. L. Rev. 69, 84 (2012); Anthony J. Colangelo, What Is Extraterritorial Jurisdiction?, 99 Cornell L. Rev. 1303, 1330 nn.139–41 (2014).

[101] Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (emphasis added).

[102] See, e.g., United States v. Baston, 818 F.3d 651, 669 (11th Cir. 2016); United States v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006); United States v. Juda, 46 F.3d 961, 966 (9th Cir. 1995).

[103] United States v. Carvajal, 924 F. Supp. 2d 219, 262 (D.D.C. 2013). See also United States v. Ali, 718 F.3d 929, 943 (D.C. Cir. 2013).

In recent years, both the states[104] and the federal government[105] have been experimenting with stretching jurisdiction beyond territorial borders. The federal government in particular has begun projecting U.S. law abroad in aggressive and unprecedented ways.[106] This boom of what's called "extraterritorial jurisdiction" has triggered a spike in due process challenges to the application of U.S. law abroad.[107] I want to use these jurisdictional assertions to build out and illustrate my argument interrelating the Due Process Clauses and the Double Jeopardy Clause; namely, if we take seriously due process and combine it with the interest analysis suggested by *Gamble*, there may be situations in which a prior prosecution might mitigate a successively prosecuting state's interest so as to render subsequent application of its law arbitrary or fundamentally unfair, thus vitiating the state's status as sovereign for purposes of the Double Jeopardy Clause. Recall, although the dual sovereignty "doctrine is thoroughly established . . . [u]pon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction."[108]

[104] U.S. states have for the most part adopted statutes, based on the Model Penal Code, that enlarge their territorial jurisdiction to encompass conduct within the state that leads to, or is intended to lead to, a harmful result outside the state, as well as conduct outside the state that leads to, or is intended to lead to, a harmful result inside the state. See 4 Wayne R. LaFave et al., Criminal Procedure § 16.4(c) (4th ed. 2014). The constitutionality of this legislation has been held not to violate due process "[b]ecause such legislation adheres to the territoriality principle." *Id.*

[105] See *infra* notes 111–16.

[106] These jurisdictional assertions have led to a substantial number of international double jeopardy cases in U.S. courts. See, e.g., United States v. Alcocer Roa, 753 F. App'x 846 (11th Cir. 2018) (U.S. prosecution following Panamanian prosecution); United States v. Ducuara De Saiz, 511 F. App'x 892 (11th Cir. 2013) (prior Colombian prosecution); United States v. Jeong, 624 F.3d 706 (5th Cir. 2010) (prior South Korean prosecution); United States v. Rashed, 234 F.3d 1280, 1281 (D.C. Cir. 2000) (prior Greek prosecution); United States v. Rezaq, 134 F.3d, 1121, 1126–27 (D.C. Cir. 1998) (prior Maltese prosecution); United States v. Guzman, 85 F.3d 823, 826 (1st Cir. 1996) (prior Dutch Antillean prosecution); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1362 (11th Cir. 1994) (prior Bahamian prosecution); Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1984) (prior Malaysian prosecution); United States v. McRary, 616 F.2d 181, 185 (5th Cir. 1980) (prior Cuban prosecution); United States v. Richardson, 580 F.2d 946, 947 (9th Cir. 1978) (prior Guatemalan proceedings); United States v. Martin, 574 F.2d 1359, 1360 (5th Cir. 1978) (prior Bahamian prosecution).

[107] See *infra* notes 111–16.

[108] Lanza, 260 U.S. at 384 (quoting S. Ry. Co., 236 U.S. at 445).

Because federal extraterritoriality over crimes abroad promises to be the most fast-moving and controversial area going forward, this analysis focuses principally on that scenario. As noted, the Due Process Clause of the Fourteenth Amendment requires that a state have contacts creating state interests such that application of its law is neither arbitrary nor fundamentally unfair.[109] The same type of reasoning permeates Fifth Amendment due process regarding extensions of federal law. Courts began articulating Fifth Amendment due process as a "nexus" requirement,[110] and this test still prevails in some circuits.[111] Other circuits have rejected[112] or atrophied it.[113] Despite the varying tests, however, it should come as no surprise that courts approving the extension of U.S. law abroad have found it to be in the United States's interests to do so. This is not to say that courts always come out and announce, "It is in the interests

[109] Allstate Ins. Co., 449 U.S. at 312–13 (1981).

[110] United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003) (holding that due process requires a "sufficient nexus" such that application of U.S. law is not "arbitrary or fundamentally unfair") (quoting United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1991)).

[111] *Id.* See also United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (applying nexus test in prosecution for conspiracy to kill U.S. nationals, among other charges).

[112] United States v. Wilchcombe, 838 F.3d 1179, 1186 (11th Cir. 2016) (Due process does not require a nexus between the defendants and the United States in a suit brought under the MDLEA.); United States v. Campbell, 743 F.3d 802, 810 (11th Cir. 2014) (same). United States v. Suerte, 291 F.3d 366, 375–77 (5th Cir. 2002) (finding that no nexus is required where the flag nation consented or waived objection to enforcement); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) (same); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (finding that Congress may override a nexus requirement.).

[113] See, e.g., United States v. Shibin, 722 F.3d 233, 239 (4th Cir. 2013) (finding an exception to the nexus requirement where the offense is subject to universal jurisdiction). Al Kassar, 660 F.3d at 119 (finding an exception to the nexus requirement where conduct is "self-evidently" criminal); United States v. Caicedo, 47 F.3d 370, 372–73 (9th Cir. 1995) (finding an exception to the nexus requirement when defendants are aboard "stateless vessels"); Ali, 718 F.3d at 943–44 (finding an exception to the nexus requirement when a treaty exists on the substance of cause of action); United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008) (no nexus required where acts took place on a stateless vessel); United States v. White, 51 F. Supp. 2d 1008, 1011 (E.D. Cal. 1997) ("[W]here the government seeks to prosecute a United States citizen for acts occurring in foreign lands, due process does not require a demonstration of 'nexus.'"). Although the tests may look different on the surface, they all coalesce around international law principles of jurisdiction to determine whether an assertion of jurisdiction is arbitrary or fundamentally unfair.

of the United States to apply our law in this situation."[114] Rather, courts tend to draw from an established source of markers for state interests—indeed, the same source that the Court in *Gamble* drew from: international law.[115]

As discussed in Part II, *Gamble* spoke of a U.S. interest in successively prosecuting where a U.S. national is injured abroad[116]—or what is called the passive-personality basis of jurisdiction[117]—and where crimes are committed by U.S. nationals abroad[118]—or the active-personality basis of jurisdiction.[119] And it explicitly noted that international law permits jurisdiction on these bases to support

[114] Though some courts have explicitly said that where it is in the "interest" of the United States to apply U.S. law extraterritorially, due process is satisfied—and in the international double jeopardy context to boot. See White, 51 F. Supp. at 1011 (upholding jurisdiction on the basis of defendant's U.S. citizenship [the nationality basis of jurisdiction under international law] because "[t]he interest of the United States in this case can hardly be questioned."); see also United States v. Murillo, 826 F.3d 152, 157 (4th Cir. 2016) (holding that "it is not arbitrary to prosecute a defendant in the United States if his actions affected significant American interests—even if the defendant did not mean to affect those interests") (internal quotation marks omitted).

[115] United States v. Noel, 893 F.3d 1294, 1303 (11th Cir. 2018) ("Compliance with international law satisfies due process because it puts a defendant on notice that he could be subjected to the jurisdiction of the United States.") (internal citation and quotation marks omitted); Cardales, 168 F.3d at 553 ("In determining whether due process is satisfied, we are guided by principles of international law"; finding due process satisfied by relying on the interests created by the territorial principle and the protective principle); United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378–79 (11th Cir. 2011) ("In determining whether an extraterritorial law comports with due process, appellate courts often consult international law principles such as the objective principle, the protective principle, or the territorial principle."); Davis, 905 F.2d at 249 n.2 ("[i]nternational law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States"); Carvajal, 924 F. Supp. at 262 ("whatever the Due Process Clause requires, it is satisfied where the United States applies its laws extraterritorially pursuant to the universality principle" of international law) (internal citation omitted); see also, e.g., United States v. Rojas, 812 F.3d 382, 393 (5th Cir. 2016) (relying on objective territoriality in finding due process satisfied); Murillo, 826 F.3d at 157–58 (relying on passive personality in finding due process satisfied); Clark, 435 F.3d at 1108–09 (relying on nationality or active personality in finding due process satisfied); United States v. Yousef, 327 F.3d 56, 97 (2d Cir. 2003) (finding jurisdiction under the protective principle where "planned attacks were intended to affect the United States and to alter its foreign policy").

[116] Gamble, 139 S. Ct. at 1967.

[117] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 411.

[118] Gamble, 139 S. Ct. at 1967.

[119] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 410.

its analysis.[120] Add to this list subjective territoriality (where conduct occurs or has been initiated on the state's territory),[121] objective territoriality (where part but not necessarily all of the conduct is completed on the state's territory[122]), and "effects" jurisdiction (where conduct has or is intended to have an effect on the state's territory, even if the conduct occurs elsewhere).[123] Then there's the so-called protective principle, which authorizes jurisdiction where conduct affects official state functions or the security of the state.[124] Finally, there's universal jurisdiction,[125] already introduced in the discussion of *Furlong*.[126] This basis of jurisdiction essentially holds that certain offenses under international law are so harmful, any state in the world can prosecute the perpetrators.[127] The idea here, as I've argued, is that the state is not applying its national law to the accused, but rather is acting as the decentralized enforcement agent for an international law that covers the globe.[128]

None of this is to suggest that these bases of jurisdiction on their own have the force of law in U.S. courts such that if the United States exceeds its jurisdiction under international law, the exercise of jurisdiction is unconstitutional. Rather, the argument is more subtle. It seeks in effect to incorporate these jurisdictional principles into the Due Process Clause to measure the strength of a U.S. interest in successively prosecuting. In short, the jurisdictional bases are proxies for interests. The further away from the bases one gets, the less the interest, and the less a successive prosecution complies with due process and, hence, the Double Jeopardy Clause.

At this stage, a couple of points must be addressed. One involves the argument that these *particular* bases ought to serve as baselines, such that the further away one gets from a basis, the more

[120] Gamble, 139 S. Ct. at 1967.

[121] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 408 cmt. c.

[122] *Id*.

[123] *Id*. at § 409.

[124] *Id.* at § 412.

[125] *Id.* at § 413.

[126] See *supra* notes 26–40.

[127] See Restatement (Fourth) of the Foreign Relations Law of the U.S. § 413.

[128] Anthony J. Colangelo, Universal Jurisdiction as an International "False Conflict" of Laws, 30 Mich. J. Int'l L. 881 (2009). See also Ali, 718 F.3d at 935 ("Universal jurisdiction is not some idiosyncratic domestic invention but a creature of international law.").

attenuated the interest. Who's to say that these bases, as opposed to other bases—say, the place where the family of the accused lives—ought to provide the constitutional touchstone? The answer is that these bases capture the traditional rationales upon which states assert jurisdiction; indeed, it is for this very reason that they embody customary international law.[129] And due process cares deeply about tradition, for it requires that any assertion of jurisdiction obey "traditional notions of fair play and substantial justice."[130] Satisfaction of this criterion, in turn, avoids the exercise of jurisdiction being "arbitrary or fundamentally unfair."[131] It is not arbitrary because the state has a recognized basis under an established body of law applicable to all on which to apply its law. And it is not fundamentally unfair because the individual defendant is on notice that the state's law may apply to him on a recognized basis under an established body of law applicable to all.[132]

The next point transitions to the double jeopardy discussion. So far we have been talking only about how attenuated the interest must be from traditional bases of jurisdiction for it to violate the Constitution. This question must be complicated, however. If that were the end of the discussion, it would be no different from the question of whether the United States has jurisdiction to begin with, which is something courts have been wrestling with for roughly a quarter century. The confounding variable for the present analysis is the prior prosecution. More specifically, the constitutional question

[129] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 101 cmt. a ("customary international law . . . results from a general and consistent practice of states followed out of a sense of international legal right or obligation.").

[130] Burnham v. Superior Court of Cal., 495 U.S. 604, 609 (1990) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)); Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 105 (1987) (quoting Int'l Shoe, 326 U.S. at 316). I realize that citing these cases adds to the prescriptive jurisdiction analysis considerations about adjudicative jurisdiction and, particularly, personal jurisdiction. However, as Justice William Brennan, paraphrasing Justice Hugo Black, has pointed out, "both inquiries are often closely related and to a substantial degree depend upon similar considerations." Shaffer v. Heitner, 433 U.S. 186, 224–25 (1977) (internal citation omitted). Requiring traditional bases of jurisdiction also provides a constraint on states from inventing or manufacturing novel interests upon which to apply their laws in extravagant ways.

[131] *Supra* note 102.

[132] Fair notice of the law is a primary consideration in due process analysis. See Colangelo, Spatial Legality, *supra* note 100, at 81.

is whether an attenuated interest *combined with* a prior prosecution comports with due process.

Here I want to propose other factors that may inform this calculus on an interest analysis: (a) the degree of influence the entity seeking successively to prosecute has on the initial prosecuting entity; (b) the degree to which the laws and sentencing align; and (c) the degree to which the foreign prosecution is a sham designed to shield the accused. Each of these factors can instruct whether the successively prosecuting state's interest has been sufficiently vindicated so as to render another prosecution unconstitutional.

As to the degree of influence one prosecuting entity has on the other, the more influence, the more both states' interests would appear to be vindicated by a single prosecution. Courts have already carved out an exception to the dual sovereignty doctrine that would bar a successive prosecution by a separate sovereign where "one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings."[133] I agree that this must be a high bar as a factor contributing to disqualifying sovereignty under the dual sovereignty doctrine lest it create a perverse incentive for prosecuting entities not to engage in beneficial communication and cooperation at the expense of giving up the right to prosecute successively.[134]

As to the laws aligning, the relevant test for double jeopardy purposes is the *Blockburger* test.[135] It provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two

[133] United States v. Guzman, 85 F.3d 823, 827 (1st Cir. 1996) (internal citation omitted). See also United States v. Raymer, 941 F.2d 1031, 1037 (10th Cir. 1991); United States v. Bernhardt, 831 F.2d 181, 182 (9th Cir. 1987).

[134] See Rashed, 234 F.3d at 1281 ("U.S. assistance was so pervasive that Greece gathered little of the presented evidence independently. But [the exception] acknowledges that extensive law enforcement and prosecutorial cooperation between two sovereigns does not make a trial by either a sham."). This is not to say that the bar could never be met and such a foreign state prosecution could never qualify for the exception. See *id.* at 1283 ("An easy case, for example, 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. But where the United States simply lends a foreign government investigatory resources, the manipulation moniker is out of the question.").

[135] See Blockburger, 284 U.S. at 304.

offenses or only one, is whether each provision requires proof of a fact which the other does not."[136] If the laws match up under this test such that the offenses are the same for double jeopardy purposes, the less a successive prosecution would seem appropriate.[137] Sentencing can be evaluated on a case-by-case basis,[138] but it obviously also factors into whether the previous trial is a sham. According to the Rome Statute for the International Criminal Court, if the proceedings were undertaken "for the purpose of shielding the person concerned from criminal responsibility," they would constitute a sham trial.[139] The more the previous trial looks like it was designed to shield the accused from criminal responsibility, the more appropriate a successive prosecution. A context-sensitive analysis that takes into account these factors and a successively prosecuting entity's degree of jurisdictional connection with the crime, as measured by established bases that capture state interests, provides a sophisticated and workable constitutional test.

At the very least there is one scenario, raised by *Furlong* back in 1820, in which the United States would be barred from successively

[136] *Id.*

[137] This was the case in *Heath*, for example. As Heath's counsel argued, "the elements of the two statutes being virtually indistinguishable, the *Blockburger* 'same elements' test is also satisfied." Brief for the Petitioner, *supra* note 57, at *8. The Court brushed this type of argument aside, flatly observing that "[i]f the States are separate sovereigns, as they must be under the definition of sovereignty which the Court consistently has employed, the circumstances of the case are irrelevant." Heath, 474 U.S. at 92. It is submitted that, as Part I demonstrated, the definition of sovereignty hinges on jurisdiction, and a jurisdictional analysis based on state interests may well consider the degree to which the laws align to measure whether the successively prosecuting state's interests have been satisfied.

[138] Defendants in *United States v. Richardson* were let go upon purchasing their freedom in Guatemala; the court noted that a successive U.S. prosecution was appropriate in part because they "were permitted to avoid prison terms by paying a relatively small sum of money." 580 F.2d 946, 947 (1978). See also Rashed, 234 F.3d at 1281 (U.S. successive prosecution where defendant was released by Greek authorities after eight years following conviction for, among other things, aircraft bombing and murder, which under U.S. law carries a sentence of death or life imprisonment); Rezaq, 134 F.3d at 1125–27 (U.S. successive prosecution where defendant was released by Maltese authorities after seven years following conviction for hostage taking and murder, which under a U.S. law prohibiting air piracy carries a sentence of death or life imprisonment).

[139] Rome Statute of the International Criminal Court, art. 17(2)(a), July 17, 1998, 2187 U.N.T.S. 90.

prosecuting under a jurisdictional view. Suppose the United States seeks successively to prosecute a foreign perpetrator of piracy, terrorism, torture, or genocide not explicitly linked to U.S. territory or nationals. There are a host of statutes on the books authorizing and arguably even mandating a U.S. prosecution in respect of these crimes if the United States gets personal jurisdiction over the alleged perpetrators.[140] And we have pursued such prosecutions.[141] But under international law, there would be no recognized national interest regarding U.S. territory or persons upon which to apply uniquely U.S. national law. The only interest (and indeed, authorization) would be the enforcement of international law, as implemented in the U.S. code, under the principle of universal jurisdiction. If a foreign nation gets there first and applies international law (via a prosecution resting on a national basis of jurisdiction or resting on universal jurisdiction), the United States may not do so again. Now, this would require applying the definition of the offense under international law in the foreign prosecution. But that would largely be the case where foreign law implements the international treaty proscribing the offense in question, since treaties largely embody customary international law definitions of universal crimes.[142]

[140] See, e.g., 18 U.S.C. § 2332f(2)(C) (American jurisdiction exists to prosecute for bombing occurring outside the U.S. when "a perpetrator is found in the United States."); see also 18 U.S.C. § 1091(e)(2)(D) (genocide); 18 U.S.C. § 2340A(b)(2) (torture); 49 U.S.C. § 46502(b)(2)(C) (aircraft piracy); 18 U.S.C. § 1203(b)(1)(B) (hostage taking); 18 U.S.C. § 1651 (piracy); 18 U.S.C. § 2339C(b)(2)(B) (financing terrorism). These statutes largely implement international treaties to which we are party, which mandate that we prosecute or extradite offenders found within our territory. See, e.g., International Convention for the Suppresion of Acts of Nuclear Terrorism, art. 9(4), Sept. 14, 2005, S. Treaty Doc. No, 110-4, 2445 U.N.T.S. 89; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5(2), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

[141] See e.g., Ali, 718 F.3d at 942, 944 (universal jurisdiction over hostage taking); Shi, 525 F.3d at 722–23 (universal jurisdiction over piracy).

[142] Anthony J. Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 Harv. Int'l L.J. 121, 176–85 (2007). The treaties do not contemplate a bar on double jeopardy by multiple sovereigns. Rezaq, 134 F. 3d at 1129.

Conclusion

There exists a lens through which the Supreme Court's dual sovereignty jurisprudence coheres. That lens has been crafted by the Court's language throughout the history of the doctrine, spanning back to 1820. It provides that "sovereign" really means independent jurisdiction to make and apply law. Because any exercise of jurisdiction must comply with due process, the next question becomes how to measure jurisdiction under the Constitution's Due Process Clauses. *Gamble* gave a clue when it explained that historically different sovereigns were justified in prosecuting successively when they had an interest in doing so, and suggested that the United States might prosecute successively for a foreign crime when that crime touches U.S. interests as measured by international law.

This discussion of interests fits nicely with traditional due process tests that require established interests for a state to apply its law. And when it comes to extraterritorial assertions of jurisdiction, the established interests are found in international law, as *Gamble* indicated. The further the assertion of jurisdiction gets from these bases, the weaker the assertion of jurisdiction becomes as a matter of due process. Combined with other factors—such as the degree of influence a successively prosecuting state has over the initial prosecution, the degree to which the prior prosecution implements laws that align with those of the successively prosecuting state, and the extent to which the prior prosecution is a sham, a nuanced and managable new test emerges. Finally, where a successive prosecution is based only on the interest in enforcing international law and the prior prosecution has already used that same law, the successive prosecution is barred under a jurisdictional view.