The Dual Sovereignty Doctrine in the Case Law of the United States Supreme Court

La doctrina de la soberanía dual en la jurisprudencia de la Corte Suprema de Estados Unidos

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Abstract: Under the dual sovereignty doctrine the Supreme Court has accepted that different sovereigns may prosecute an individual for the same facts without violating the double jeopardy clause if the act of the individual infringed the laws of each sovereignty. This article aims to analyze the evolution of the dual sovereignty doctrine in the case law of the Supreme Court of the United States. Although the doctrine has been highly criticized by scholars, the Supreme Court has persistently upheld it. . Besides, the article addresses the safeguards that currently exist against eventual abuses of the dual sovereignty doctrine, such as the "sham exception" and the "Petite Policy". Finally, since the previous safeguards have been considered insufficient, the contribution briefly explores the possibility of applying the Eighth Amendment as an additional protection against eventual abuses committed under the dual sovereignty doctrine.

Keywords: Double jeopardy; multiple prosecutions; dual sovereignty doctrine.

Resumen: *Bajo la doctrina de la soberanía dual, la Corte Suprema ha aceptado que diferentes soberanos persigan penalmente a la misma persona sin violar la cláusula double jeopardy por los mismos hechos si es que la conducta de*

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tal individuo infringió las leyes de cada soberano. El presente artículo tiene por objeto estudiar la evolución de la doctrina de la soberanía dual en la jurisprudencia de la Corte Suprema. Además, el artículo aborda las protecciones actualmente existentes en contra de eventuales abusos que puedan ser cometidos bajo la doctrina de la soberanía dual, tales como la "sham exception" y la "Petite Policy". Finalmente, y dado que las anteriores protecciones han sido consideradas insuficientes, el artículo explora brevemente la posibilidad de aplicar la Octava Enmienda como una protección adicional en contra de eventuales abusos que la aplicación de la doctrina de la soberanía dual pueda generar.

Palabras-clave: *Ne bis in idem; persecuciones múltiples; doctrina de la soberanía dual.*

Introduction

The Fifth Amendment provision against double jeopardy is one of the basic protections afforded defendants by the United States Constitution.[2] The Fifth Amendment reads in part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb".

The United States Constitution was the first major constitutional instrument to recognize the protection against double jeopardy, and was largely inspired by the operation in English law of what are referred to as pleas in bar.[3] Even though the precise origins of the protection are

[2] SIGLER, Jay. Federal Double Jeopardy Policy, *Vanderbilt Law Review*, v. 19, n. 2, p. 375, 1966.

[3] KOKLYS, Andrea. Second Chance for Justice: Reevaluation of the United States Double Jeopardy Standard, *John Marshall Law Review*, v. 40, n. 1, p.

unclear,[4] there is no doubt that the double jeopardy possesses a long history.[5] As Justice Black correctly affirmed, the protection against being tried twice for the same offense is one of the oldest ideas found in western civilization, which roots run deep into Greek and Roman times.[6]

The double jeopardy protection has been characterized as a fundamental right and as a "cardinal principle" that lies at the foundation of criminal law.[7] In Benton v. Maryland, the United States Supreme Court affirmed that "the fundamental nature of the guarantee against double jeopardy can hardly be doubted".[8]

According to the Supreme Court, the double jeopardy clause provides three basic related protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense".[9]

Notwithstanding the protections afforded by the clause seem to be quite broad, since the mid-19th century the Supreme Court has

379, 2006; SUMMERS, Brian. Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition, *Ohio State Law Journal*, v. 56, n. 5, p. 1595, 1995.

4 For example, David Rudstein and Jay Sigler state that the Code of Hammurabi made no reference to double jeopardy clause. SIGLER, Jay. A History of Double Jeopardy, *American Journal of Legal History*, v. 7, n. 4, p. 284 (note 6), 1963; RUDSTEIN, David. A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy, *William & Mary Bill of Rights Journal*, v. 14, n. 1, p. 196, 2005. On the contrary, Thomas III affirms that "laws against changing a final judgment can be traced to the Code of Hammurabi". THOMAS III, George, *Double Jeopardy. The History, the Law*, New York University Press, 1998, p. 1.

5 RUDSTEIN, David. A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy, *William & Mary Bill of Rights Journal*, v. 14, n. 1, p. 196, 2005.

6 Bartkus v. Illinois, 359 U.S. 121, 151-152 (1959) (Black, J., dissenting).

7 PRINCIPATO, Daniel. Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts, *Cornell International Law Journal*, v. 47, n. 3, p. 769, 2014.

8 Benton v. Maryland, 395 U.S. 784, 795 (1969).

9 North Carolina v. Pearce, 395 U.S. 711, 717 (1969). See also United States v. Wilson, 420 U.S. 332, 343 (1975); Jones v. Thomas, 491 U.S. 376, 380-381 (1989); United States v. Dixon, 509 U. S. 688, 696 (1993); United States v. Ursery, 518 U.S. 267, 273 (1996).

developed the dual sovereignty doctrine, according to which different sovereigns may prosecute an individual without violating the double jeopardy clause if the act of the individual act infringed the laws of each sovereignty, even though the offenses contain identical elements.[10]

The Supreme Court has stated that the essence of the dual sovereignty doctrine is the common law conception of crime as an offense against the sovereignty of the government.[11] If a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each of them, hence he has committed two distinct offenses.[12]

Regarding its legal basis, the dual sovereignty doctrine was recognized to protect principles of federalism.[13] As correctly indicated, behind the dual sovereignty debate there is a conflict between two legal principles: sovereignty and double jeopardy.[14] The Supreme Court was

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[10] ADLER, Adam. Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem, *Yale Law Journal*, v. 124, n. 2, p. 450, 2014; WOODS, Christina. Comments: The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole, *University of Baltimore Law Review*, v. 24, n. 1, pp. 177-178, 1994; MERKL, Taryn. The Federalization of Criminal Law and Double Jeopardy, *Columbia Human Rights Law Review*, v. 31, n. 1, p. 185, 1999.

[11] Heath v. Alabama, 474 U.S. 82, 88 (1985).

[12] Heath v. Alabama, 88; United States v. Lanza, 260 U. S. 377, 382 (1922); BRICKMAN, Jay. The Dual Sovereignty Doctrine and Successive State Prosecutions: Health v. Alabama, *Chicago-Kent Law Review*, v. 63, n. 1, p. 176, 1987; RUDSTEIN, David. *Double Jeopardy. A Reference Guide to the United States Constitution*, Praeger, p. 84, 2004; COLANGELO, Anthony. Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory, *Washington University Law Review*, v. 86, n. 4, p. 779, 2009; MCANINCH, William. Unfolding the Law of Double Jeopardy, *South Carolina Law Review*, v. 44, n. 3, pp. 424-425, 1993.

[13] United States v. Wheeler, 435 U.S. 313, 320 (1978); CRANMAN, Erin. The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right, *Emory International Law Review*, v. 14, n. 3, p. 1654, 2000; FISHER, Walter. Double Jeopardy, Two Sovereignties and the Intruding Constitution, The University of Chicago Law Review, v. 28, n. 4, p. 599, 1961.

[14] OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, p. 797, 2003.

concerned that an expansive reading of the double jeopardy clause would bar either the Federal Government or individual state governments from enforcing their respective criminal laws.[15] As James King has pointed out, the dual sovereignty doctrine is partially based on the concern that "a contrary rule would allow one government to effectively nullify the other government's law".[16]

In addition, the Supreme Court has noted that the dual sovereignty doctrine would prevent an eventual racing of defendants to plead guilty in state court, thereby evading subsequent federal prosecution carrying larger penalties.[17] In United States v. Lanza, the Court explained: "If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect".[18]

Although the dual sovereignty doctrine has been highly criticized by scholars, the Supreme Court has persistently upheld it. On 17 June 2019, the Supreme Court handed down its decision in Gamble v. United States,[19] adding a new chapter to this history. In a 7-2 decision, the Court upheld once again its long-standing dual sovereignty doctrine under the double jeopardy clause.[20]

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[15] PRINCIPATO, Daniel. Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts, *Cornell International Law Journal*, v. 47, n. 3, p. 773, 2014; CRANMAN, Erin. The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right, *Emory International Law Review*, v. 14, n. 3, p. 1654, 2000.

[16] KING, James. The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, *Stanford Law Review*, v. 31, n. 3, p. 477, 1979.

[17] OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, p. 773, 2003.

[18] United States v. Lanza, 385. See also Heath v. Alabama, 93.

[19] Gamble v. United States, 587 U.S. ___ (2019).

[20] ESCOBAR, Javier. Double Jeopardy and Dual Sovereignty Doctrine: Gamble v. United States, *Revista de Derecho*, v. 20, n. 2, p. 227, 2019.

This article aims to analyze the evolution of the dual sovereignty doctrine in the case law of the Supreme Court of the United States. Although the doctrine has been highly criticized by scholars, the Supreme Court has persistently upheld it. Besides, the article addresses the safeguards that currently exist against eventual abuses of the dual sovereignty doctrine, such as the "sham exception" and the "Petite Policy". Finally, since the previous safeguards have been considered insufficient, the contribution briefly explores the possibility of applying the Eighth Amendment as an additional protection against eventual abuses committed under the dual sovereignty doctrine.

1. The Evolution of the Dual Sovereignty Doctrine

1.1. The Antebellum Cases.

The Supreme Court has underlined that the dual sovereignty doctrine is consistent with its case law and respects the possibility that two sovereigns could have different interests "in punishing the same act".[21]

The issue of successive federal and state prosecutions was addressed by the Supreme Court in three antebellum cases.

In Fox v. Ohio, decided in 1847, the Supreme Court condoned the possibility of concurrent criminal jurisdiction, and dismissed the argument of the defendant that under the double jeopardy clause "offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration".[22] The Court observed that the nature of the crime or its effects on "public safety" might well demand separate prosecutions.[23]

Three years later, in United States v. Marigold, the Supreme Court generalized the reasoning of Fox. The Court pointed out that with

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[21] Gamble v. United States, 5-6.

[22] Fox v. The State of Ohio, 46 U.S. 410, 435 (1847); OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, p. 771, 2003.

[23] Fox v. The State of Ohio, 435.

the view of avoiding conflicts between state and federal jurisdictions, in Fox v. Ohio it stated that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each".[24]

Finally, in Moore v. People of State of Illinois the Supreme Court expanded its concern for the distinct interests of the different sovereigns. In this case, the Supreme Court affirmed that admitting that the defendant may be punished both under state and federal law does not mean that he would be punished twice for the same offence, since "an offence, in its legal signification, means the transgression of a law".[25] The Court added that every citizen of the United States is also a citizen of a State, therefore he may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either.[26] If a same act transgresses the laws of two sovereignties, concluded the Court, the idea that either or both may punish such an offender cannot be doubted.[27]

1.2. The Development of the Dual Sovereignty Doctrine: United States v. Lanza.

The Supreme Court cemented the previous reasoning in United States v. Lanza, decided in 1922. This was the first time that the Supreme Court directly addressed the question of successive prosecutions by different sovereignties for the same conduct.[28]

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

[25] Moore v. People of State of Illinois, 55 U.S. 13, 19 (1852); ALLEN, Ronald and RATNASWAMY, John. Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court, *Journal of Criminal Law and Criminology*, v. 76, n. 4, p. 812, 1985.

[26] Moore v. People of State of Illinois, 20.

[27] Moore v. People of State of Illinois, 20.

[28] OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, p. 773, 2003; MULLEN, Kayla, Gamble v. United States: A Commentary. *Duke Journal of Constitutional Law & Public Policy*, v. 14, n. 1, p. 210, 2019.

In this case, the defendants were charged in federal court with manufacturing, transporting and possessing intoxicating liquor in violation of the Volstead Act. The defendants argued that a previous conviction under a state statute for manufacturing, transporting and possessing intoxicating liquor was a bar to the subsequent federal prosecution for the same act under the Fifth Amendment.[29]

After citing a "long line of decisions" dating back to Fox v. Ohio,[30] the Supreme Court ruled that the subsequent federal prosecution, after the state conviction, did not violate the double jeopardy clause. According to the Court, there were two different sovereignties, each of them capable of dealing with the same subject-matter within the same territory. In determining what shall be an offense against its peace and dignity, each of these sovereignty is exercising its own sovereignty, not that of the other.[31] Therefore, "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".[32]

Under the ruling of United States v. Lanza, the violation of proscriptions emanated from different "sovereigns" are different offenses for purposes of the double jeopardy clause. Consequently, as this constitutional protection only prohibits successive prosecutions or punishments for the "same offense", successive prosecutions or punishments by different sovereigns are not barred by the Fifth Amendment.[33]

1.3. The Case Law after United States v. Lanza.

The doctrine of Lanza was subsequently applied in several cases. Four years later, in Hebert v. Louisiana, the Supreme Court upheld a

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29 United States v. Lanza, 378-380.

30 United States v. Lanza, 382-384.

31 United States v. Lanza, 382.

32 United States v. Lanza, 382; BRICKMAN, Jay. The Dual Sovereignty Doctrine and Successive State Prosecutions: Health v. Alabama, *Chicago-Kent Law Review*, v. 63, n. 1, p. 177, 1987.

33 DAWSON, Michael. Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, *Yale Law Journal*, v. 102, n. 1, p. 292, 1992.

state conviction following a federal prosecution for the same conduct, rejecting any violation of the double jeopardy clause. The Court stated that where the same conduct is criminalized both under state and federal law, the person that "engages therein commits two distinct offenses, one against the United States and one against the State, and may be subjected to prosecution and punishment in the federal courts for one and in the state courts for the other without any infraction of the constitutional rule against double jeopardy".[34]

In Westfall v. United States, in response to a question certified by the Sixth Circuit Court of Appeals arising upon a review of convictions, the Supreme Court, citing Lanza, directly affirmed that "of course an act may be criminal under the laws of both jurisdictions".[35]

Afterwards, in Jerome v. United States, the Supreme Court ruled that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained.[36]

Finally, in Screws v. United States[37] the Supreme Court underlined that "the petitioners may be guilty of manslaughter or murder under Georgia law and at the same time liable for the federal offense proscribed by § 20".[38] Moreover, the Court explained that "the instances where an act denounced as a crime by both national and state sovereignties may be punished by each without violation of the double jeopardy provision of the Fifth Amendment are common".[39]

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[34] Hebert v. Louisiana, 272 U.S. 312, 314 (1926).

[35] Westfall v. United States, 274 U.S. 256. 258 (1927).

[36] Jerome v. United States, 318 U.S. 101, 105 (1943).

[37] Screws v. United States, 325 U.S. 91 (1945).

[38] Screws v. United States, 325 U.S. 91, 108 (note 10) (1945). Section 20 provided: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects', or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both".

[39] Screws v. United States, 108 (note 10).

1.4. Solidification of the Dual Sovereignty Doctrine: Bartkus v. Illinois and Abbate v. United States.

It was not until 1959 that the Supreme Court reexamined the dual sovereignty doctrine. In Bartkus v. Illinois[40] and Abbate v. United States,[41] both decided the same day, the Supreme Court solidified the dual sovereignty doctrine.[42]

In Bartkus v. Illinois, the Supreme Court upheld a state prosecution after a federal acquittal.[43] The defendant had been tried and acquitted by a jury in a federal court for robbery of a federally insured savings and loan association. After the federal prosecution, the defendant was indicted for substantially the same facts by a jury in Illinois. The accused filed a motion of autrefois acquit but the Illinois trial court rejected it. The defendant was tried, convicted and sentenced to life imprisonment.[44]

In the first place, the Supreme Court remarked that the rule that successive state and federal prosecutions do not violate the Fifth Amendment had been repeatedly upheld since Lanza,[45] not only by the same Supreme Court, but also by state and federal courts.[46]

For the Supreme Court, it was essential to ensure that states did not forfeit their right to enforce their criminal laws for the purpose of permitting federal prosecutions,[47] especially because state and federal offenses criminalizing the same conduct often carry drastically different penalties. As example, the Court cited Screws v. United States, a case in

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40 Bartkus v. Illinois, 359 U.S. 121 (1959).

41 Abbate v. United States, 359 U.S. 187 (1959).

42 OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, p. 773, 2003.

43 BRAUN, Daniel. Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, *American Journal of Criminal Law*, v. 20, n. 1, p. 3, 1992.

44 Bartkus v. Illinois, 121-122.

45 Bartkus v. Illinois, 132.

46 Bartkus v. Illinois, 136.

47 CRANMAN, Erin. The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right, *Emory International Law Review*, v. 14, n. 3, p. 1655, 2000.

which defendants were firstly tried and convicted under federal statutes with maximum sentences of a year and two years respectively, but the state crime there involved was a capital offense. If states were barred from prosecuting a defendant for a serious offence after a federal prosecution for a minor offence based on the same conduct, the result would be a shocking deprivation of the historic right and obligation of the states to maintain peace and order within their confines. The Court stated that it would be in derogation of the federal system to displace the power of states over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the states.[48]

In Abbate v. United States, the Supreme Court upheld a federal conviction after a state conviction for the same conduct. The defendants had been convicted of conspiring to dynamite facilities of a telephone company during an extended labor dispute, and were sentenced by a state court to three months' imprisonment. Subsequently, the defendants were convicted in a federal court of conspiracy to destroy integral parts of a communication system. Both state and federal convictions were based on the same facts.[49]

Firstly, the Supreme Court noted that Lanza had clearly established that a prior state conviction did not bar a subsequent federal prosecution.[50] Therefore, the defendants in Abbate were asking to overrule Lanza. The Supreme Court declined to do so, affirming that there was no persuasive reason to abandon that firmly established principle. The Court remarked that if Lanza were overruled undesirable consequences would follow, as it was recognized a century ago in Fox v. Ohio. If a state prosecution would bar a following federal prosecution based on the same acts, federal law enforcement would necessarily be hindered. However, it would also be a mistake to suggest, in order to maintain the effectiveness of federal law enforcement, displacing state power to prosecute crimes based on acts which might also violate federal law.[51] Just as happened in Bartkus, the Supreme Court was concerned on the disparity in penalties provided by

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48 Bartkus v. Illinois, 137.

49 Abbate v. United States, 187-189.

50 Abbate v. United States, 193.

51 Abbate v. United States, 195.

state and federal law. While the defendants had been convicted to three months' imprisonment under state law, under federal law they could be convicted up to five years' imprisonment.[52]

Bartkus and Abbate were extensively criticized,[53] especially by Justice Black in his dissenting opinion in Bartkus.[54] Nevertheless, the Supreme Court was not receptive to the critics and continued applying the dual sovereignty doctrine.

Not even Benton v. Maryland, the case in which the Supreme Court ruled that the double jeopardy was incorporated in the Fourteenth Amendment and was thereby applicable to the states,[55] could challenge the application of the dual sovereignty doctrine.[56] In Gamble v. United Stated, the defendant argued that the recognition of the incorporation of the double jeopardy clause had washed away any theoretical foundation for the dual sovereignty doctrine.[57] The Supreme Court rejected the argument, stating that the premises of the dual sovereignty doctrine have survived incorporation intact. Incorporation meant that the states were now required to abide the interpretation of the Court on double jeopardy, but that interpretation has long included the dual sovereignty

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52 Abbate v. United States, 195.

53 BOYLE, Richard. Double Jeopardy and Dual Sovereignty: The Impact of Benton v. Maryland on Successive Prosecution for the Same Offense by State and Federal Governments, *Indiana Law Journal*, v. 46, n. 3, p. 418. 1971; KING, James. The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, *Stanford Law Review*, v. 31, n. 3, p. 483, 1979.

54 Bartkus v. Illinois, 150-164 (Black dissenting).

55 Benton v. Maryland, 784.

56 OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, p. 776, 2003. Critically, and suggesting the necessity of a serious reexamination of the dual sovereignty doctrine after Benton v. Maryland, BOYLE, Richard. Double Jeopardy and Dual Sovereignty: The Impact of Benton v. Maryland on Successive Prosecution for the Same Offense by State and Federal Governments, *Indiana Law Journal*, v. 46, n. 3, pp. 422-427, 1971; MULLEN, Kayla. Gamble v. United States: A Commentary. *Duke Journal of Constitutional Law & Public Policy*, v. 14, n. 1, p. 210, 2019; STONER, Ray. Double Jeopardy and Dual Sovereignty: A Critical Analysis, *William & Mary Law Review*, v. 11, n. 4, pp. 952-954, 1970.

57 Gamble v. United States, 29.

doctrine.[58] As has been explained, the dual sovereignty doctrine rests on the fact that different prosecutions by distinct sovereignties are not the same offense for double jeopardy purposes, and that is just as true after incorporation as before.[59]

1.5. The Dual Sovereignty Doctrine and Successive Prosecutions in by Different States: Heath v. Alabama.

In Heath v. Alabama, decided in 1985, the Supreme Court faced a question that, until that moment, had not directly answered: whether the dual sovereignty doctrine was also applicable to successive prosecutions under the laws of different states.

In August 1981, the petitioner left his residence in Alabama to meet with the two men in Georgia. After hiring them to kill his wife, petitioner led them back to his residence and gave them the keys of the car and house. The two men kidnaped the victim from her home and killed her.[60] Both Georgia and Alabama authorities pursued dual investigations. In September 1981, the petitioner was arrested by Georgia authorities. He was convicted and sentenced under Georgia law to life imprisonment.[61] In May 1982, the petitioner was indicted by a grand jury in Alabama. Before the trial, the defendant filed a motion to dismiss the indictment, arguing that his conviction in Georgia barred his prosecution in Alabama for the same offense. The motion was rejected. The defendant was then tried, convicted and sentenced to death.[62]

The Supreme Court underlined once again that "successive prosecutions are barred by the Fifth Amendment only if the two offenses for which the defendant is prosecuted are the same for double jeopardy purposes".[63] Consequently, the Court ruled that "the dual sovereignty

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58 Gamble v. United States, 30.

59 Gamble v. United States, 30.

60 Heath v. Alabama, 83-84.

61 Heath v. Alabama, 84.

62 Heath v. Alabama, 85-86.

63 Heath v. Alabama, 87.

doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive prosecutions by two states for the same conduct are not barred by the Double Jeopardy Clause".[64]

States have been uniformly considered as separate sovereigns with respect to the Federal Government, because the power of each state to prosecute is derived from its own "inherent sovereignty", not from the Federal Government.[65] In this context, "states are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment".[66]

Moreover, the Supreme Court highlighted that "among the prerogatives of sovereignty is the power to create and enforce a criminal code. Therefore, denying a state its power to enforce its criminal laws because another state has won the race to the courthouse "would be a shocking and untoward deprivation of the historic right and obligation of the states to maintain peace and order within their confines".[67] After all, the interest of a state in "vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another state's enforcement of its own laws".[68]

In conclusion, the dual sovereignty doctrine permits successive prosecutions in three cases: (1) successive prosecutions of an individual by multiple state governments; (2) successive prosecutions of an individual by a state and the federal government; and (3) successive prosecutions of an individual by a state or the Federal Government and a foreign

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[64] Heath v. Alabama, 88; MERKL, Taryn. The Federalization of Criminal Law and Double Jeopardy, *Columbia Human Rights Law Review*, v. 31, n. 1, p. 185, 1999.

[65] Heath v. Alabama, 89.

[66] Heath v. Alabama, 89.

[67] Heath v. Alabama, 93.

[68] Heath v. Alabama, 93. For a critical comment on the arguments of the Supreme Court, see ALLEN, Ronald and RATNASWAMY, John. Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court, *Journal of Criminal Law and Criminology*, v. 76, n. 4, p. 814-824, 1985.

government.[69] By contrast, successive prosecutions for the same offense by the same sovereign are prohibited by the double jeopardy clause.[70]

1.6. The Dual Sovereignty Doctrine in 2019: Gamble v. United States.[71]

On 17 June 2019, the Supreme Court delivered its decision in Gamble v. United States, its last judgment on the dual sovereignty doctrine.

In 2008, the petitioner was convicted of second-degree robbery in Alabama. In November 2015, a local police officer searched the car of the defendant and found a firearm. Since the defendant had been convicted of second-degree robbery, his possession of the handgun violated an Alabama law providing that no one convicted of a crime of violence "shall own a firearm or have one in his or her possession".[72] The defendant pleaded guilty and was sentenced to one year in prison. After his conviction, federal prosecutors charged him with the federal version of the same offense based on the same fact.[73]

The defendant filed a motion to dismiss, arguing that the federal indictment was barred by the double jeopardy clause. Relying on the dual sovereignty doctrine, the District Court rejected the motion and the Court of Appeals affirmed.[74] The defendant then filed a petition for a

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[69] CRANMAN, Erin. The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right, *Emory International Law Review*, v. 14, n. 3, p. 1644, 2000; PRINCIPATO, Daniel. Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts, *Cornell International Law Journal*, v. 47, n. 3, p. 773, 2014.

[70] PRINCIPATO, Daniel. Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts, *Cornell International Law Journal*, v. 47, n. 3, p. 774, 2014.

[71] A first commentary on Gamble v. United States can be found in ESCOBAR, Javier. Double Jeopardy and Dual Sovereignty Doctrine: Gamble v. United States, *Revista de Derecho*, v. 20, n. 2, 2019.

[72] Gamble v. United States, 2.

[73] Gamble v. United States, 2.

[74] MULLEN, Kayla. Gamble v. United States: A Commentary. *Duke Journal of Constitutional Law & Public Policy*, v. 14, n. 1, p. 209, 2019.

writ of certiorari with the Supreme Court, which was granted to consider "whether the Court should overrule the 'separate sovereigns' exception to the double jeopardy clause".[75]

In its decision, the Supreme Court upheld the dual sovereignty doctrine, concluding that the Federal Government and a state government can bring separate criminal prosecutions against the same person for the same conduct. Because each sovereign can define its own offenses, if a single act violates different sovereigns' laws it will constitute two separate "offenses".

In the first place, the Supreme Court clarified that, although the dual sovereignty rule is often dubbed an "exception" to the double jeopardy clause,[76] it is not an exception at all. On the contrary, it flows from the explicit textual reference that the Fifth Amendment makes to the "same offense" requirement.[77] Because that the term "offense" was originally understood as transgression of a law,[78] and that each law is defined by a sovereign, the Court affirmed that "where there are two sovereigns, there are two laws, and two offences".[79] According to the Court, there is no reason to abandon

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[75] Gamble v. United States, Question Presented, Certiorari Granted on 28 June 2018.

[76] For instance, see PRINCIPATO, Daniel. Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts, *Cornell International Law Journal*, v. 47, n. 3, p. 773, 2014; MULLEN, Kayla. Gamble v. United States: A Commentary. *Duke Journal of Constitutional Law & Public Policy*, v. 14, n. 1, p. 207, 2019; MATZ, Robert. Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try, Again, *Fordham Urban Law Journal*, v. 24, n. 2, p. 359, 1997; WOODS, Christina. Comments: The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole, *University of Baltimore Law Review*, v. 24, n. 1, pp. 177-178, 1994; MERKL, Taryn. The Federalization of Criminal Law and Double Jeopardy, *Columbia Human Rights Law Review*, v. 31, n. 1, p. 177, 1999; LEE, Evan. The Dual Sovereignty Exception to Double Jeopardy: In the Wake of Garcia v. San Antonio Metropolitan Transit Authority, *New England Law Review*, v. 22, n. 1, p. 35, 1987.

[77] Gamble v. United States, 3.

[78] Huntington v. Attrill, 146 U.S. 657, 667 (1892).

[79] Gamble v. United States, 3-4.

this interpretation of the phrase "same offense", from which the dual sovereignty doctrine follows.[80]

The Court highlighted that the text of the double jeopardy clause "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".[81]

In order to explain its position, the Supreme Court utilized as example a prosecution in the United States for a crime committed abroad: if an American national is murdered abroad, both the foreign country and the United States will be interested in punishing the killer. On the one hand, the interest of the other country will be protecting the peace in its territory. On the other hand, the interest of the United States will be protecting its nationals. The murder in question, therefore, will constitute an offence to the United States as much as it will be to the country where the murder occurred and to which the victim is a stranger. For this reason, the killing of an American national abroad is a federal offence that can be prosecuted in the American courts.[82]

2. Definition of Sovereign for Double Jeopardy Purposes

Since under the dual sovereignty doctrine the double jeopardy clause only bars successive prosecutions by the same sovereign, the Supreme Court has recognized that it is crucial to determine whether the two entities that seek successively to prosecute a defendant for the same offense can be termed separate sovereigns.[83]

According to the case law of the Supreme Court, the question of whether two entities are separate sovereigns "turns on whether the two entities draw their authority to punish the offender from distinct sources

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80 Gamble v. United States, 5.

81 Gamble v. United States, 5-6.

82 Gamble v. United States, 7.

83 Heath v. Alabama, 88; COLANGELO, Anthony. Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory, *Washington University Law Review*, v. 86, n. 4, p. 779, 2009.

of power".[84] Thus, for double jeopardy purposes the sovereignty of two prosecuting entities is determined by the ultimate source of the power under which the respective prosecutions were taken.[85] If two entities have the same "ultimate source of power", hence they both should be considered as one sovereign.[86]

With regard to the meaning of "last source of power", in Heath v. Alabama the Supreme Court underlined that two entities are separate sovereigns when each has the power to independently determine what shall be an offense against its authority and to punish such offenses.[87]

In applying the above considerations, the Supreme Court has ruled that, for double jeopardy purposes, a state and its municipalities are the same sovereign.[88] Therefore, a state and its municipality are barred from prosecuting an individual for the same offense, not being applicable the double sovereignty doctrine.[89] In holding this, the Supreme Court emphasized that "political subdivisions of states (...) never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate government instrumentalities created by the state to assist in the carrying out of state governmental functions".[90]

Similarly, the Federal Government and its territories have been considered the same sovereign for double jeopardy purposes.[91] In deciding that the Philippines and the Federal Government were the same sovereign,

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84 Heath v. Alabama, 88.

85 United States v. Lara, 541 U.S. 193, 199 (2004); Heath v. Alabama, 90; United States v. Wheeler, 320.

86 PRINCIPATO, Daniel. Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts, *Cornell International Law Journal*, v. 47, n. 3, p. 774, 2014.

87 Heath v. Alabama, 89; REED, Akhil and MARCUS, Jonathan. Double Jeopardy Law After Rodney King, *Columbia Law Review*, v. 95, n. 1, p. 5, 1995.

88 Waller v. Florida, 397 U.S. 387, 394-395 (1970).

89 Waller v. Florida, 394-395.

90 Waller v. Florida, 392. See also Reynolds v. Sims, 377 U.S. 533, 575 (1964); MCANINCH, William. Unfolding the Law of Double Jeopardy, *South Carolina Law Review*, v. 44, n. 3, p. 425, 1993.

91 United States v. Wheeler, 318; Puerto Rico v. Shell Co., 302 U.S. 253, 262-264 (1937); Grafton v. United States, 206 U.S. 333, 354 (1907).

the Court observed that "the government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by the authority of the United States".[92]

On the contrary, Native American nations and the Federal Government have been regarded as separate sovereigns for double jeopardy purposes.[93]

In conclusion, if an entity derives its sovereignty from another entity, then according to the Supreme Court those entities should be considered the same sovereign for double jeopardy purposes.[94]

3. The Sham Exception

In Bartkus v. Illinois, the Supreme Court suggested that a successive prosecution by one sovereign might be barred in cases where it is merely a cover and a tool of another sovereign seeking to prosecute the same defendant. This exception has been called the "sham exception".[95] In these cases, the prosecution brought by the second sovereign does not seek to vindicate its interest, but rather is pursued merely on behalf of the interest of the first sovereign.[96]

In the specific case of Bartkus, however, the Supreme Court found that the degree of federal participation and involvement in the

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92 Grafton v. United States, 354.

93 United States v. Wheeler, 328-330.

94 PRINCIPATO, Daniel. Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts, *Cornell International Law Journal*, v. 47, n. 3, p. 775, 2014.

95 MATZ, Robert. Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try, Again, *Fordham Urban Law Journal*, v. 24, n. 2, p. 361, 1997; WOODS, Christina. Comments: The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole, *University of Baltimore Law Review*, v. 24, n. 1, p. 188, 1994.

96 MATZ, Robert. Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try, Again, *Fordham Urban Law Journal*, v. 24, n. 2, p. 361, 1997; LOPEZ, Dax. Not Twice for the Same: How the Dual Sovereignty Doctrine Is Used to Circumvent Non Bis in Idem, *Vanderbilt Journal of Transnational Law*, v. 33, n. 5, pp. 1277-1278, 2000.

state prosecution was not sufficient to apply the sham exception.[97] In this regard, the Court affirmed: "The record establishes that the prosecution was undertaken by state prosecuting officials within their discretionary responsibility and on the basis of evidence that conduct contrary to the penal code of Illinois had occurred within their jurisdiction".[98] Moreover, the Court observed that the record established that "federal officials acted in cooperation with state authorities, as is the conventional practice between the two sets of prosecutors throughout the country".[99]

Consequently, the Court decided that the facts of the case did not support the claim that the prosecution brought by the State of Illinois was merely a tool of the federal authorities, who thereby avoided the prohibition established in the Fifth Amendment. The record of the case did 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".[100]

Although many courts have accepted the existence of the "sham exception", courts have not applied it, "setting an insurmountable bar for defendants to overcome".[101]

4. The Petite Policy

As previously stated, since its recognition the dual sovereignty doctrine has been highly criticized.[102] Its critics argue that it offends the

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97 WOODS, Christina. Comments: The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole, *University of Baltimore Law Review*, v. 24, n. 1, p. 188, 1994.

98 Bartkus v. Illinois, 123.

99 Bartkus v. Illinois, 123.

100 Bartkus v. Illinois, 123-124.

101 OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, p. 789, 2003; MATZ, Robert. Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try, Again, *Fordham Urban Law Journal*, v. 24, n. 2, p. 361, 1997.

102 For instance, Michael Dawson directly affirms that the dual sovereignty doctrine is unconstitutional. DAWSON, Michael. Popular Sovereignty, Double

interest of the defendants in finality and exposes them to capricious prosecutorial discretion.[103] In addition, the absence of limits to the dual sovereignty doctrine would create an extreme potential for abuse.[104]

Although in Bartkus v. Illinois the Supreme Court ruled that the double jeopardy clause does not bar a federal prosecution following a state prosecution for the same offence, shortly after Bartkus the Department of Justice announced, in Petite v. United States,[105] the Petite Policy,[106] which restricts the prosecutorial discretion of the Federal Government,[107] thereby assuaging fears of arbitrary successive prosecutions.[108]

The Petite Policy establishes guidelines for the exercise of discretion by the officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act involved in a prior state procedure. The aims of the Petite Policy are to vindicate substantial federal interests through appropriate federal prosecutions; to protect persons charged with criminal conduct from

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Jeopardy, and the Dual Sovereignty Doctrine, *Yale Law Journal*, v. 102, n. 1, pp. 299-302, 1992. Margaret Jones states that the dual sovereignty doctrine "has encouraged much abuse, being used principally as an easy way for prosecutors to make a record for convictions with a minimum of effort, and a means of evading the constitutional provisions against compulsory self-incrimination and illegal searches and seizures". JONES, Margaret. What Constitutes Double Jeopardy, *Journal of Criminal Law and Criminology,* v. 38, n. 4, p. 382, 1948.

[103] CRANMAN, Erin. The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right, *Emory International Law Review*, v. 14, n. 3, p. 1667, 2000.

[104] CRANMAN, Erin. The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right, *Emory International Law Review*, v. 14, n. 3, p. 1669, 2000.

[105] Petite v. United States, 361 U.S. 529 (1960).

[106] Justice Manual, Title 9: Criminal, Section 9-2.031 – Dual and Successive Prosecution Policy ("Petite Policy"), available at: https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031.

[107] DAWSON, Michael. Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, *Yale Law Journal*, v. 102, n. 1, p. 293, 1992.

[108] OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, p. 793, 2003; Woods, Christina, op. cit., note 9, p. 189.

the burdens associated with multiple prosecutions for substantially the same act; to promote efficient utilization of resources of the Department of Justice; and to promote coordination and cooperation between federal and state prosecutors.[109]

The Petite Policy allows the initiation or continuation of a federal prosecution following a prior state or federal prosecution based on substantially the same acts if the following three requisites are satisfied: first, the matter must involve a substantial federal interest; second, the state prosecution must have left that interest demonstrably unvindicated; and third, the federal prosecutor must believe that conduct of the defendant constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.[110]

In addition, the federal prosecution must be approved by the appropriate Assistant Attorney General.[111]

In determining whether a second prosecution may be authorized, it has been noted that the second criterion is critical.[112]

Satisfaction of the previous requirements does not mean, however, that a proposed prosecution necessarily must be approved or brought. Traditional elements of federal prosecutorial discretion continue to apply.[113]

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[109] Justice Manual, Title 9: Criminal, Section 9-2.031 – Dual and Successive Prosecution Policy ("Petite Policy"), Statement of Policy.

[110] Justice Manual, Title 9: Criminal, Section 9-2.031 – Dual and Successive Prosecution Policy ("Petite Policy"), Statement of Policy.

[111] Justice Manual, Title 9: Criminal, Section 9-2.031 – Dual and Successive Prosecution Policy ("Petite Policy"), Statement of Policy; PODGOR, Ellen. Department of Justice Guidelines: Balancing Discretionary Justice, *Cornell Journal of Law and Public Policy*, v. 13, n. 2, p. 178, 2004; COONEY, John. Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach, *Journal of Criminal Law and Criminology*, v. 96, n. 2, p. 448, 2006.

[112] COONEY, John. Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach, *Journal of Criminal Law and Criminology*, v. 96, n. 2, p. 448, 2006.

[113] Justice Manual, Title 9: Criminal, Section 9-2.031 – Dual and Successive Prosecution Policy ("Petite Policy"), Statement of Policy.

Notwithstanding the Federal Government has discretion to dismiss cases when the Petite Policy is violated,[114] defendants are not afforded the same opportunity.[115] Courts[116] have found that the Petite Policy is a doctrine of federal prosecutorial policy, not a matter of constitutional law. Therefore, failing to adhere to the internal guidelines of the Department of Justice would not be sufficient to warrant court action.[117]

Scholars have extendedly criticized the Petite Policy, characterizing it as an incomplete protection,[118] noting that only the government can invoke it[119] and that it is "neither clear nor fully understood by federal prosecutors".[120] Moreover, critics state that some standards of the policy are vague and that the Justice Department has not clarified them.[121]

5. The Dual Sovereignty Doctrine After Gamble v. United States

The current vitality of the legal basis of the dual sovereignty doctrine, the existence of safeguards against potential abuses and the

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[114] For instance, Thompson v. United States, 444 U.S. 248 (1980); Marakar v. United States, 370 U. S. 723 (1962).

[115] MCANINCH, William. Unfolding the Law of Double Jeopardy, *South Carolina Law Review*, v. 44, n. 3, p. 426, 1993.

[116] PODGOR, Ellen. Department of Justice Guidelines: Balancing Discretionary Justice, *Cornell Journal of Law and Public Policy*, v. 13, n. 2, p. 180 (notes 75 and 76), 2004.

[117] PODGOR, Ellen. Department of Justice Guidelines: Balancing Discretionary Justice, *Cornell Journal of Law and Public Policy*, v. 13, n. 2, p. 179-180, 2004; KING, James. The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, *Stanford Law Review*, v. 31, n. 3, pp. 489-490, 1979; DAWSON, Michael. Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, *Yale Law Journal*, v. 102, n. 1, p. 293, 1992.

[118] DAWSON, Michael. Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, *Yale Law Journal*, v. 102, n. 1, p. 293, 1992.

[119] DAWSON, Michael. Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, *Yale Law Journal*, v. 102, n. 1, p. 293, 1992.

[120] KING, James. The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, *Stanford Law Review*, v. 31, n. 3, p. 492, 1979.

[121] KING, James. The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, *Stanford Law Review*, v. 31, n. 3, p. 492, 1979.

lack of judicial alternatives become improbable any drastic deviation from the status quo.[122] Gamble v. United States proves it.

How should the dual sovereignty doctrine be faced after Gamble v. United States?

Adam Adler has pointed out that the problem with most of the criticisms against the dual sovereignty doctrine is that they focus too much on the double jeopardy clause, excluding other legal or constitutional provisions.[123] For instance, to solve the problems inherent to the dual sovereignty doctrine James King suggests to apply a new Fifth Amendment standard,[124] argument that has been permanently rejected by the Supreme Court.

Besides the "sham exception" and the Petite Policy, David Owsley has stated that potential abuses under the dual sovereignty doctrine could be correctly addressed by political accountability of the executive branch; state legislation; federal sentencing guidelines, which can prevent duplicative punishment or mitigate the unfairness of a successive prosecution; and continuing vigilance of state and national electorates, who can consent at any time through legislation, generally or particularly tailored, to the adjudications of other jurisdictions.[125]

Although the effectiveness of these safeguards could certainly be discussed, especially the political accountability of the executive branch and the continuing vigilance of state and national electorates, one of the merits of Owsley is having put the focus on constitutional and legal provisions different to the Fifth Amendment.

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[122] OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, p. 800, 2003.

[123] ADLER, Adam. Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem, *Yale Law Journal*, v. 124, n. 2, p. 451, 2014.

[124] KING, James. The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, *Stanford Law Review*, v. 31, n. 3, p. 478, 1979.

[125] OWSLEY, David. Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study, *Washington University Law Review*, v. 81, n. 3, pp. 795-796, 2003.

The same Supreme Court recognized in Hudson v. United States that some of the ills at which some interpretations on double jeopardy have been directed are addressed by other constitutional provisions.[126]

From my perspective, eventual excesses under the dual sovereignty doctrine could be prevented by the application of the cruel and unusual punishments clause contained in the Eighth Amendment,[127] which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". The Eighth Amendment was adopted in 1791, directly from the English Bill of Rights of 1689.[128] The history of the Eighth Amendment indicates that the framers intended the entire amendment to act as a limit on the power of the government to punish.[129]

The Eighth Amendment incorporates three different prohibitions: a prohibition of excessive bail, a prohibition of cruel and unusual punishments, which is concerned with matters such as the duration or conditions of confinement, and a prohibition of excessive fines, which limits the power of the government to extract payments as punishment for some offense.[130]

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[126] Hudson v. United States, 522 U.S. 93, 102-103 (1997).

[127] Harmelin v. Michigan, 501 U. S. 957, 996-997 (Kennedy, J., concurring in part and concurring in judgment) (1991). See also Solem v. Helm, 463 U.S. 277, 284 (1983); Ewing v. California, 538 U.S. 11, 20 (2003); HOFFMANN, Joseph. The Cruel and Unusual Punishment Clause. A Limit on the Power to Punish or Constitutional Rhetoric? In: BODENHAMER, David and ELY, James (Eds.). *The Bill of Rights in Modern America*, Indiana University Press, 2008, p. 185.

[128] GRANUCCI, Anthony. "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, *California Law Review*, v. 57, n. 4, p. 840, 1969.

[129] REINHART, Douglas. Applying the Eighth Amendment to Civil Forfeiture after Austin v. United States: Excessiveness and Proportionality, *William & Mary Law Review*, v. 36, n. 1, p. 252, 1994.

[130] Alexander v. United States, 509 U.S. 544, 558 (1993); ALBIN, Laurel Anne. Notes: Constitutional Limitations of Civil in Rem Forfeiture and the Double Jeopardy Dilemma: Civil in Rem Forfeiture Constitutes Punishment and Is Subject to Excessive Fines Analysis. Aravanis v. Somerset County, 339 Md. 644, 664 A.2d 888 (1995), Cert. Denied, 116 S. Ct. 916 (1996), *University of Baltimore Law Review*, v. 26, n. 1, p. 156, 1996. See also Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257, 265 (1989); Austin v. United States, 509 U.S. 602, 609-610 (1993); United States v. Bajakajian, 524 U.S. 321, 328 (1998).

The Supreme Court has stated that the cruel and unusual punishments clause contained in the Eighth Amendment "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes (...); second, it proscribes punishment grossly disproportionate to the severity of the crime (...); and third, it imposes substantive limits on what can be made criminal and punished as such".[131]

Regarding the scope of the cruel and unusual punishments clause, today is well settled that it does not only prohibit those forms of punishment that are "barbaric", but also those that are "excessive" in relation to the crime committed.[132] The Supreme Court has underlined that although legislation is enacted from an experience of evils, it should not be necessarily confined to the form that evil had theretofore taken. "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth".[133] Accordingly, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society".[134]

The first time the Supreme Court declared a punishment cruel and unusual under the eighth amendment was in Weems v. United States, decided in 1910.[135] In this case, the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal", a form of imprisonment that included hard labor in chains and permanent civil disabilities. After endorsing the principle of proportionality as a constitutional standard, affirming that "it is a precept

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131 Ingraham v. Wright, 430 U.S. 651, 667 (1977).

132 Weems v. United States, 217 U. S. 349, 373 (1910); Coker v. Georgia, 433 U.S. 584, 592 (1977); CLAPP, Randy. Eighth Amendment Proportionality, *American Journal of Criminal Law*, v. 7, n. 2, p. 260, 1979.

133 Weems v. United States, 373.

134 Trop v. Dulles, 356 U.S. 86, 101 (1958).

135 CLAPP, Randy. Eighth Amendment Proportionality, *American Journal of Criminal Law*, v. 7, n. 2, p. 260, 1979; ROOKER, John. Crime and Punishment: The Eighth Amendment's Proportionality Guarantee after Harmelin v. Michigan, *Brigham Young University Journal of Public Law*, v. 7, n. 1, pp. 162-163, 1992; GRANUCCI, Anthony. "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, *California Law Review*, v. 57, n. 4, p. 843, 1969.

of justice that punishment for crime should be graduated and proportioned to offense",[136] the Supreme Court expressed its abhorrence to the cruelty of "cadena temporal". The Court held that it was "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind".[137]

The reasoning in Weems was followed in Trop v. Dulles. In this instance, the Supreme Court found that the sanction of denaturalization for the offence of wartime desertion violated the Eighth Amendment. The Court pointed out that even though denaturalization did involve neither physical mistreatment nor primitive torture, there was instead the total destruction of the individual's status in organized society. The Court found that denaturalization was a form of punishment "more primitive than torture, for it destroys for the individual the political existence that was centuries in the development".[138]

The Supreme Court subsequently applied the proportionality principle in Robinson v. California and Coker v. Georgia. In the first case, the Court ruled that a ninety-day prison sentence for the crime of being addicted to narcotics was contrary to the Eighth Amendment. Even though ninety days' imprisonment is not clearly a sentence "cruel and unusual" in abstract,[139] the Court found that the punishment was disproportionate to the crime.[140] In Coker v. Georgia, the Supreme Court held that a sentence of death was grossly disproportionate and excessive for the crime of rape of an adult woman and was therefore forbidden by the Eighth Amendment as cruel and unusual punishment.[141]

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[136] Weems v. United States, 367.

[137] Weems v. United States, 377; CLAPP, Randy. Eighth Amendment Proportionality, *American Journal of Criminal Law*, v. 7, n. 2, p. 260, 1979.

[138] Trop v. Dulles, 101.

[139] Robinson v. California, 370 U.S. 660, 667 (1962).

[140] Robinson v. California, 667; HOFFMANN, Joseph. The Cruel and Unusual Punishment Clause. A Limit on the Power to Punish or Constitutional Rhetoric? In: BODENHAMER, David and ELY, James (Eds.). *The Bill of Rights in Modern America*, Indiana University Press, 2008, p. 185.

[141] Coker v. Georgia, 592.

In Solem v. Helm, decided in 1983, the Court ruled that a life sentence without possibility of parole under a recidivist statute for a person convicted of seven nonviolent felonies was disproportionate. In this case, the accused was convicted of issuing a "no account" check for $100. The crime was punishable with five years' imprisonment but under the recidivist statute of South Dakota the accused, who had previously been convicted of six nonviolent felonies, was sentenced to imprisonment without possibility of parole.[142] The Supreme Court rejected the argument of the government that the principle of proportionality did not apply to felony prison sentences,[143] explaining that it had been already recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments. Accordingly, as a matter of principle the Court held a straightforward idea: "a criminal sentence must be proportionate to the crime for which the defendant has been convicted".[144]

In applying the proportionality principle contained in the cruel and unusual punishments clause, the Supreme Court has ruled, for instance, that executing offenders who committed crimes while under the age of eighteen was unconstitutional.[145] The Court has also stated that executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment.[146]

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[142] Solem v. Helm, 279-283.

[143] Solem v. Helm, 288.

[144] Solem v. Helm, 290.

[145] The Court firstly held, in Thompson v. Oklahoma, 487 U.S. 815, 838 (1988), that executing offenders who committed crimes while under the age of sixteen was unconstitutional. In Roper v. Simmons, 543 U.S. 551 (2005) the Court extended the prohibition to offenders who committed crimes while under the age of eighteen. Roper v. Simmons overruled Stanford v. Kentucky, 492 U.S. 361, 380 (1989), a decision in which the Court concluded that the "Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18".

[146] Atkins v. Virginia, 536 U.S. 304, 321 (2002). Before Atkins v. Virginia, the Court had ruled that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded defendants. See Penry v. Lynaugh, 492 U.S. 302, 340 (1989).

Eight years after Solem, however, the Supreme Court weakened the proportionality principle in Harmelin v. Michigan.[147] In this case, the defendant had been convicted of possessing 672 grams of cocaine and sentenced under Michigan state law to a mandatory life term without the possibility of parole.[148] The majority of the Court rejected the claim of the defendant that his sentence violated the Eighth Amendment, but the Court could not agree on why the proportionality argument of the defendant failed.

On the one hand, Justice Scalia, joined by the Chief Justice, wrote that the proportionality principle was "an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law".[149] Therefore, outside the capital context the "Eighth Amendment contains no proportionality guarantee".[150] On the other hand, Justice Kennedy, joined by two other Members of the Court, expressly recognized that "the Eighth Amendment proportionality principle also applies to noncapital sentences". Kennedy identified four principles of proportionality review: "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors". Subsequently, he concluded that the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime,[151] which was not the case of Harmelin.[152]

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147 BAKER, Roozbeh, Proportionality in the Criminal Law: The Differing American versus Canadian Approaches to Punishment, *University of Miami Inter-American Law Review*, v. 39, n. 3, p. 488, 2008.

148 Harmelin v. Michigan, 961.

149 Harmelin v. Michigan, 994.

150 Harmelin v. Michigan, 957. See also Rummel v. Estelle, 272; Hutto v. Davis, 454 U.S. 370, 374 (1982); ROOKER, John. Crime and Punishment: The Eighth Amendment's Proportionality Guarantee after Harmelin v. Michigan, *Brigham Young University Journal of Public Law*, v. 7, n. 1, p. 166, 1992.

151 Harmelin v. Michigan, 1004-1005 (Kennedy, J., concurring in part and concurring in judgment).

152 Harmelin v. Michigan, 1009 (Kennedy, J., concurring in part and concurring in judgment).

In Ewing v. California, decided in 2003, the Supreme Court finally adopted the guide suggested by Justice Kennedy. In this case, the defendant, while on parole, was convicted of felony grand theft for stealing three golf clubs, worth $399 apiece. Because the defendant had been previously convicted of four serious or violent felonies, the prosecutor alleged and the trial court applied the California's three strikes law, sentencing him to 25 years to life. The Supreme Court stated that the Eighth Amendment contains a "narrow proportionality principle", which only forbids extreme sentences that are "grossly disproportionate"' to the crime.[153] Regarding the case in question, the Court concluded that the sentence of 25 years to life in prison, imposed on the defendant for the offense of felony grand theft under the three strikes law was not grossly disproportionate, therefore there was no violation of the Eighth Amendment.[154]

How should the Eighth Amendment apply in cases of multi sovereignties prosecutions?

If the Eighth Amendment is to serve as a "backup" for cumulative punishments imposed in multi sovereignties prosecutions, then the analysis of proportionality should consider all the penalties together and not one at a time.[155] Therefore, in order to determine whether a disproportionate sanction has been imposed on the defendant every court that sanctions the defendant will have to consider all the penalties that have been previously imposed on the defendant for the same conduct, including those ordered by different courts.[156]

For instance, if a defendant is convicted in a state prosecution for theft to ten years' imprisonment, and later is convicted in a federal prosecution for the same conduct to fifteen' years imprisonment, the question to resolve will not be whether a penalty of ten or fifteen years'

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[153] Ewing v. California, 20. See also Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

[154] Ewing v. California, 30; LEE, Youngjae. The Constitutional Right against Excessive Punishment, *Virginia Law Review*, v. 91, n. 3, pp. 694-695, 2005.

[155] KING, Nancy. Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, *University of Pennsylvania Law Review*, v. 144, n. 1, p. 150, 1995.

[156] KING, Nancy. Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, *University of Pennsylvania Law Review*, v. 144, n. 1, p. 152, 1995.

imprisonment is disproportionate for a theft, but rather whether a sanction of twenty-five years' imprisonment for a theft respects the principle of proportionality under the Eighth Amendment.

A dual sovereignty exception to the Eighth Amendment would be clearly a mistake.[157]

Conclusions

Under the dual sovereignty doctrine of the Supreme Court of the United States, successive criminal prosecutions against the same defendant for the same conduct do not violate the double jeopardy clause in three cases: (1) successive prosecutions by multiple state governments; (2) successive prosecutions by a state and the federal government; and (3) successive prosecutions by a state or the Federal Government and a foreign government.

Notwithstanding the dual sovereignty doctrine has been strongly criticized by scholars, the Supreme Court has persistently upheld it. Indeed, in Gamble v. United States, decided in 2019, the Supreme Court once again upheld its long-standing dual sovereignty doctrine. The current vitality of the dual sovereignty doctrine, therefore, could hardly be challenged.

Taking into account the above, the discussion should focus on the safeguards against eventual abuses committed under the dual sovereignty doctrine.

Regarding the existing safeguards, they are two: the "sham exception" and the "Petite Policy". Both have proved, however, to be insufficient. Concerning the sham exception, even though many courts have accepted it, they have not applied it, setting an insuperable burden for defendants to overcome. With regard to the Petite Policy, it has shown the problems with self-regulation in the context of criminal justice. Although the Department of Justice has tried to conform its practices to the "sham exception", the Petite Policy has been deemed unenforceable: courts have ruled that the Petite Policy is not a matter of constitutional law, therefore failing to adhere to the internal guidelines

[157] KING, Nancy. Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, *University of Pennsylvania Law Review*, v. 144, n. 1, p. 155, 1995.

of the Department of Justice is not sufficient to warrant court action. Considering the ineffectiveness of the existing safeguards, it would seem necessary to develop other safeguards against eventual abuses committed under the dual sovereignty doctrine. From my perspective, eventual excesses under the dual sovereignty doctrine could be prevented by the application of the cruel and unusual punishments clause contained in the Eighth Amendment, which forbids extreme sentences that are "grossly disproportionate"' to the crime.

The Eighth Amendment would serve as a "backup" for cumulative punishments imposed in multi sovereignties prosecutions allowed by the double jeopardy clause. For purposes of determining whether a disproportionate sanction has been imposed on the defendant in multi sovereignties prosecutions, the analysis of proportionality should consider all the penalties together and not one at a time. Therefore, every court that sanctions the defendant will have to consider all the penalties that have been previously imposed on the defendant for the same conduct, including those ordered by different courts.

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