THE DOUBLE JEOPARDY CLAUSE AND SUCCESSIVE PROSECUTIONS BY SEPARATE SOVEREIGNS FOR THE SAME ACT

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INTRODUCTION

Under the so-called dual sovereignty doctrine ("DSD"), the Fifth Amendment's Double Jeopardy Clause ("DJC") is not implicated by successive prosecutions brought by separate sovereigns against the same defendant for the same act. For example, if a defendant is prosecuted first by the federal government for a certain crime, that defendant's right not "to be twice put in jeopardy of life or limb"[1] for the same offence does not protect him against a subsequent prosecution by a state government for a crime involving the same conduct. As the Court put it in the recent case of *Gamble v. United States*,[2] "a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign."[3]

I argue in this Article that this DSD errs in two respects, one of which has drawn a bit of attention, and one of which has gone entirely unnoticed in the cases and academic literature. First, as suggested by Justices Ginsburg

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1. U.S. CONST. amend. V.

2. Gamble v. United States, 139 S. Ct. 1960 (2019). Throughout this Article, I refer to criminal defendants using the masculine pronoun, principally because nearly 90% of federal criminal defendants (and more than 90% of inmates in federal custody) are male, and it would therefore be precious to use nongendered pronouns. *See* MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2019, at 8, 16 (2021), https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf [https://perma.cc/Q24S-4MN2].

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

and Gorsuch in their separate *Gamble* dissents,[4] and as I elaborate, the DSD rests on a mistaken originalist view of how successive prosecutions by separate sovereigns were regarded at common law; consequently, the inference as to how the eighteenth-century English doctrine applies to the United States, which rests on a concept of divided sovereignty alien to the common law, is fundamentally flawed.[5]

Second, the current and longstanding view of the DJC assesses whether that Clause is implicated by focusing on whether the same offense (or conduct) forms the basis for successive prosecutions by separate sovereigns. I offer an entirely different methodology that does not depend (as does this orthodox view) on an unsound originalist analysis.[6] Rather than focusing on what a defendant *did* or how a sovereign has *defined* an offense, the better approach to determining whether successive prosecutions by separate sovereigns violate the DJC is to focus on what the jury *found*. The

4. *See id.* at 1989–91 (Ginsburg, J., dissenting); *id.* at 1996–99 (Gorsuch, J., dissenting). Until *Gamble*, Justice Thomas had been similarly skeptical of the originalist justification for the dual sovereignty doctrine ("DSD"), but he changed his mind. *Compare* Puerto Rico v. Sanchez Valle, 579 U.S. 59, 78 (2016) (Ginsburg, J., joined by Thomas, J., concurring), *with Gamble*, 139 S. Ct. at 1980 (Thomas, J., concurring).

5. I am not the first academic to comment on this misreading of historical record. Indeed, the Double Jeopardy Clause ("DJC") literature pertaining specifically to the historical meaning of the provision is exhaustive; sources I have found especially illuminating include the following: JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 2–4 (1969); GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 46–86 (1998). Scholarship that attacks the DSD in particular began to develop following the initial appearance of the doctrine itself. Again, the literature is substantial; and again, arguments I have found particularly compelling include the following: J.A.C. Grant, *The* Lanza *Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 W. RSRV. L. REV. 700 (1963). For perhaps the most trenchant critique, see Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994). For an unusually perspicuous analysis of the common law, see Donald Eric Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 801 (1988); *see also* Michael Kline, Note, *Wading in the Sargasso Sea: The Double Jeopardy Clause, Non-Capital Sentencing Proceedings, and California's "Three Strikes" Law Collide in* Monge v. California, 27 PEPP. L. REV. 861, 863–65 (2000); *infra* note 23.

6. *See infra* text accompanying notes 32–38 in Part III. Moreover, the approach I offer in this Article to the DSD/DJC analysis would remain superior to the existing jurisprudence even if the originalist argument for the DSD were historically sound. A nonoriginalist could therefore embrace my elements-based approach regardless of the historical critique. I nevertheless stress the weakness of the originalist argument primarily in order to clear the field of what is essentially a red herring and to obtain potential buy-in from committed originalists. Finally, although, as I say, I am not aware of any court or academic who has proposed the approach to double jeopardy I develop here, an interesting student note examined a related issue: namely, whether a criminal defendant who is subsequently sued for civil damages can invoke (or should be able to invoke) preclusion in the civil proceeding. *See* Wystan M. Ackerman, Note, *Precluding Defendants from Relitigating Sentencing Findings in Subsequent Civil Suits*, 101 COLUM. L. REV. 128, 128–30 (2001).

methodology I propose hones in on the elements of the crime with which a criminal defendant is charged in the initial prosecution because the outcome of that trial will turn on the factfinder's evaluation of those elements. To my knowledge, nobody has previously proposed this approach to analyzing double jeopardy challenges to successive prosecutions brought by separate sovereigns.

My starting point is the Supreme Court's recent decision in *Gamble*, which I summarize in Part I. Next, in Part II, I identify what I refer to as the twin errors that animate the *Gamble* holding, one entirely historical, and the other primarily analytical. In Part III, I propose a new methodology for examining whether successive prosecutions violate the DJC; I refer to this methodology as an "elements-based approach." In Part IV, I compare the analytical method outlined in Part III with *Gamble* itself and illustrate how *Gamble* would have been decided using an elements-based approach. In Part V, I turn to the principles of issue preclusion and full faith and credit and argue that an elements-based approach to double jeopardy analysis is symmetrical to a similar inquiry in the civil domain. Finally, I conclude by pointing to the DJC-DSD cases the courts have adjudicated over the past two decades, and I ask how consequential the modification I sketch would be on criminal defendants.

I. THE COURT'S APPROACH IN *GAMBLE*

Gamble involved successive prosecutions by the federal government and a state government. Its reasoning and holding, however, also apply to successive prosecutions by any two (or more) state governments. The relevant facts were as follows: A police officer in Alabama searched Gamble's vehicle following a traffic stop and found a handgun. Because Gamble was a convicted felon, his possession of the weapon violated Alabama law. He pleaded guilty to the state offense. Thereafter, federal prosecutors indicted him for the same offense; that is, possession of the weapon, which also violated federal law.[7] Gamble sought to dismiss the federal indictment as a violation of the DJC, but the district court ruled against him, noting that under the DSD, two offenses are not the same offense when prosecuted by different sovereigns. The Eleventh Circuit upheld the district court's ruling, and the Supreme Court affirmed in a 7-2 decision written by Justice Alito, with Justices Ginsburg and Gorsuch each writing separate dissents.

Justice Alito's majority opinion began by noting that the DSD is not

7. Notably, as I discuss below in Part II, although the nomenclature for the state and federal crimes were the same, the elements of the state crime differed from the elements of the federal offense.

actually an exception to the DJC; it is rather a limitation on the DJC's scope.[8] My approach shares that assessment. In addition, I concede that the answer the Court gave in *Gamble* to the double jeopardy question presented there is the right answer, even though the Court's route to arriving at that answer is flawed. One might therefore ask what is at stake if my approach yields the same answer as *Gamble* itself. I offer two answers: First, attention solely to elements provides both doctrinal coherence and constitutional elegance because it maps how double jeopardy issues are analyzed within a single jurisdiction,[9] and because it coheres with the Full Faith and Credit Clause ("FFCC").[10] Second, as I indicate below, my elements-based approach will in fact generate different results in a nontrivial number of DSD/DJC cases,[11] but unlike the view expressed by Justice Ginsburg or Justice Gorsuch, an elements-based approach would not be radically destabilizing. Insofar as doctrinal stability is a virtue, therefore, my more modest approach seems preferable to the doctrine-razing view of the *Gamble* dissenters.

At the core of the DSD is the concept of "offense."[12] An offense is a violation of a particular law, and that particular law is, of course, the law of a particular sovereign. It follows, therefore, that even identical laws, when enacted by a different sovereign, are different laws, meaning the offense each law defines is different. Consequently, even where two laws are semantically identical and carry the same legal ramifications, a violation of that law in one state is a different offense from a violation of the identical law in a second state, and—this is the critical point—it is a different offense even when it is the *same action* that results in the violation of both laws.

The centrality of the notion of offense is evident in the first analytical portion of the Court's opinion in *Gamble*, which recounts both the meaning of offense in the Founding era, and the nineteenth- and twentieth-century cases applying the DSD.[13] As the Court put it, "fidelity to the Double Jeopardy Clause's text . . . honors the substantive difference between the

8. *See Gamble*, 139 S. Ct. at 1965. In contrast, Justice Gorsuch characterized the DSD as an exception to the application of the DJC. *Id.* at 1996 (Gorsuch, J., dissenting). I think, though, that Justice Gorsuch is simply using language loosely; he obviously understands how the doctrine operates, and Justice Alito is correct in noting that the DJC is properly viewed as a limitation, not an exception.

9. *See infra* note 48.

10. *See infra* text accompanying notes 49–64 in Part V.

11. *See infra* note 75 and Appendix I.

12. For a cogent criticism of *Gamble* that focuses less on the definition of offence than on the Court's conflation of three conceptually distinct types of successive prosecutions (that is, federal-state, state-federal, and state-state), see Michael J. Zydney Mannheimer, *Three-Dimensional Dual Sovereignty: Observations on the Shortcomings of* Gamble v. United States, 53 TEX. TECH L. REV. 67, 70 (2020).

13. *Gamble*, 139 S. Ct. at 1965–66.

interests that two sovereigns can have in punishing the same act."[14] This sentence in Justice Alito's opinion points to how current DSD-DJC analysis collapses the concept of "offense" into the concept of "act": the offense is the act (possessing a handgun, in Gamble's case), the act is the offense (a felon in possession of a weapon), and an act can be a separate (and distinct) offense when prosecuted by a separate sovereign. One act can equal two (or more) offenses. As it happens, however, and as we will address below, the original meaning of the text, while consistent with Justice Alito's argumentative strategy of collapsing act into offense (and vice versa), does not support the conclusion Justice Alito derives from that collapse.

Justices Ginsburg and Gorsuch dissented in *Gamble*. Justice Gorsuch's dissent hones in on how the DSD rests on a serious misreading of legal history (a criticism I elaborate on in the following section). "A free society," he opened, "does not allow its government to try the same individual for the same crime until it's happy with the result."[15] Justice Gorsuch examined at some length the practice in both the colonies and England from the first half of the eighteenth century to the early nineteenth century en route to conclude that neither the cases nor contemporary treatises offered any support for the DSD.[16] Yet, despite his compelling critique of the majority's reading of legal history, Justice Gorsuch ultimately rests his dissent not on that basis but on the concept of "offence": he reasons that an offence is a transgression, and "if two laws demand proof of the same facts to secure a conviction, they constitute a single offense."[17] In this respect, while reaching a different result from the Court, Justice Gorsuch's approach to the double jeopardy question, by making the idea of "offence" central, embeds the same analytical flaw I address below in Parts II and III.

Justice Ginsburg's dissent, in contrast, builds on the position she staked out previously in *Puerto Rico v. Sanchez Valle*.[18] In that decision, and again in *Gamble*, Ginsburg inexplicably concedes that the DSD may have been plausible prior to the incorporation of the DJC into the Fourteenth Amendment (and thereby made applicable to the states).[19] This remarkable

14. *Id.* at 1966.

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

16. *Id.* at 2002–05.

17. *Id.* at 1997.

18. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 78–80 (2016) (Ginsburg, J., concurring). Justice Ginsburg's opinion in *Sanchez Valle* in turn relied heavily on powerful scholarly criticism that immediately followed the emergence of the DSD in *United States v. Lanza*, 260 U.S. 377 (1922). *See, e.g.*, Grant, *supra* note 5, at 1331 (criticizing the Court's reliance in *Lanza* on the "metaphysical subtlety [of] two sovereignties" to "fritter away" a citizen's liberty).

19. *See Gamble*, 139 S. Ct. at 1993 (Ginsburg, J., dissenting). The DJC was incorporated and made applicable to the states in *Benton v. Maryland*, 395 U.S. 784 (1969).

concession is not supported by any historical source, and perhaps realizing that limitation, Justice Ginsburg effectively retracts it when she notes in *Gamble* that the Framers voted down a provision that would have expressly permitted the federal government to prosecute a defendant for an offense where that defendant had already been prosecuted by a state.[20] To be sure, she is certainly correct that the problem of a successive federal prosecution did not truly become significant until the vast expansion of federal criminal law,[21] but of course, that expansion is now a distant memory, and it shows no sign of retreat.[22] Moreover, and more importantly, that expansion did not create the analytical problem the Court confronted in *Gamble*; it simply made that problem more commonplace.

In the end, neither Justice Ginsburg nor Justice Gorsuch differs with the majority on whether the focus of the double jeopardy analysis ought to be on the concept of "act" or "offense." All nine justices, despite disagreeing about whether the United States could prosecute Gamble for possessing a weapon after Gamble had already been prosecuted by Alabama for that offense, agreed that the operative facts were Gamble's "act" of possessing the weapon and the "offense" of prohibiting felons from engaging in that act. The Court's unanimous reliance on this concept (whether "act" or "offence") is the analytical error that underlies the DSD. That error cannot be easily disentangled from the Court's unsound legal history. I turn to both these shortcomings in the following section.

II. *GAMBLE*'S TWIN MISTAKES

Two related mistakes lie at the core of *Gamble*; one is primarily historical, the other is largely analytical. Both errors grow out of the fact that the DSD is built on a faulty historical analogy that misapprehends the relationship between the federal government, on the one hand, and individual state governments, on the other. In particular, *Gamble*'s reasoning mistakenly views relationships among sovereigns in a federal structure as legally akin to the relationship between foreign nations. The *Gamble* majority therefore sees the legal relationship between (say) Texas and the federal government as akin to the relationship between (say) France and Germany. (The DSD similarly views the relationship among the various

20. *Gamble*, 139 S. Ct. at 1992 (Ginsburg, J., dissenting).

21. *See id.* at 1994.

22. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 2 (2005); *id*. at 57–74 (Thomas, J., dissenting). *See generally* George D. Brown, *Counterrevolution?—National Criminal Law After* Raich, 66 OHIO ST. L.J. 947 (2005) (reviewing expansion of federal criminal law); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997) (highlighting the disparate treatment of defendants prosecuted in federal versus state court that stems from the expansion of federal criminal law).

states through this same lens.)[23] This faulty analogy ultimately underlies both the historical and analytical flaws in the *Gamble* analysis and, for that matter, the entire DSD doctrine.

In the following section, I address at some length *Gamble*'s analytical error. (I devote more attention to that mistake because it has thus far entirely escaped either judicial or scholarly critique.) Before turning to that topic, however, I want to add to the historical criticism of the DSD by briefly mentioning two additional problems with *Gamble*'s use of legal history that have also largely evaded academic attention. The first of these problems entails that the DSD is itself superfluous, while the second suggests that the DSD is in tension with the very essence of federalism.

The first problem is this: despite the close attention paid by the caselaw to the Constitution's use of the word "offence," none of the opinions in *Gamble*—and, for that matter, none of the cases that comprise the Court's double jeopardy jurisprudence—pay any attention at all to the phrase "life or limb."[24] If one accepts the interpretive principle of no surplusage (that is, *verba cum effectu sunt accipienda*, "that every word and every provision is to be given effect"),[25] then this phrase should limit the reach of the DJC to only certain offenses. And indeed, at least one commentator has suggested that this phrase signals that the DJC was understood by the Framers to be limited to capital crimes.[26] Although the historical evidence for so drastically limiting the reach of the prohibition is thin, and although this reading is

23. I discuss the analytical error below in Part III. In this section I describe the historical error. While, to the best of my knowledge, my argument in Part III is the first to characterize the analytical error as I do, others have commented on certain shortcomings of the DSD's historical underpinnings. Sources I have relied on or found especially illuminating include SIGLER, *supra* note 5; THOMAS III, *supra* note 5; Joseph J. DeMott, Note, *Rethinking* Ashe v. Swenson *from an Originalist Perspective*, 71 STAN. L. REV. 411, 421–30 (2019). A number of commentators have argued in favor of carving out a civil rights exception to the DJC prohibition against successive prosecutions, but these somewhat tendentious arguments rest much more heavily on the weakness of the historical basis for the DSD than they do on the original meaning of the DJC itself. *See, e.g.*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 2 (1995); *see also supra* notes 5–6.

24. U.S. CONST. amend. V.

25. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012). At least one commentator, Akhil Amar, has suggested the phrase "life or limb" is merely poetic, without offering any historical support for that attempt to strip the phrase of legal consequence. *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1810 (1997). Amar's fuller argument is that the phrase is meant to capture all criminal prosecutions, as distinguished from civil matters. *See id.* at 1811. As a matter of policy, that is not an unappealing argument, but it is also not an argument supported by originalism.

26. Justin W. Curtis, Comment, *The Meaning of Life (or Limb): An Originalist Proposal for Double Jeopardy Reform*, 41 U. RICH. L. REV. 991, 994 (2007). A much broader reading of the potency of the prohibition can be found in Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition*, 90 YALE L.J. 632 (1981).

irreconcilable with the eighteenth-century cases Justice Gorsuch's *Gamble* opinion reviews,[27] the alternative interpretation simply ignores the phrase entirely. Neither alternative, therefore, is without problems. At the same time, it is indeed the case that the DJC has a unique application to capital cases with respect to sentencing proceedings,[28] and the suggestion that the DJC is limited to crimes carrying severe sanctions is not implausible. While limiting the reach of the provision to a certain category of offenses is not my present aim, it nevertheless warrants mention that if the "life or limb" language were given meaningful content, the DSD would in most cases be unnecessary. Gamble himself, for example, would not have been able to invoke the DJC following the state prosecution because neither prosecution placed him in jeopardy of life or limb.

The second point suggests not that the DSD is unnecessary, but that it misapprehends federalism, and in so doing, renders another constitutional provision unintelligible. In particular, were the Court correct in thinking that the relationship between the states and federal government, and among the states themselves, is akin to the relationship between the federal government and a foreign sovereign, the Constitution's FFCC would be peculiar, even ludicrous. That provision (which I address more fully below in Part V) requires states to give effect to judicial proceedings of other states; but if the relationship of one state (or sovereign) to another were truly like the relationship between the United States and foreign governments, as the DSD assumes, the FFCC would be nonsensical. It would be as if the United States were legally obligated to give effect in federal courts to judicial proceedings from (say) Iran or China—a prospect Justice Alito himself in *Gamble*

27. *See* Gamble v. United States, 139 S. Ct. 1960, 2002–05 (2019) (Gorsuch, J., dissenting). Justin Curtis, *see* Curtis, *supra* note 26, is not by any means inattentive to this difficulty, but his argument is not especially persuasive in addressing it. In his *Commentaries*, Justice Story clearly read the DJC as encompassing more than capital crimes. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 659 (1833). Curtis suggests Justice Story changed his mind, and relies for that conclusion on Justice Story's opinion in *U.S. v. Gibert*, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,204). *See* Curtis, *supra* note 26, at 1016–17. The problem is that, while *Gibert* itself was a capital case, Justice Story expressly stands by his conclusion in the *Commentaries*. *See Gibert*, 25 F. Cas. at 1302–03. And it is difficult to quibble with Justice Story's bona fides as having first-hand knowledge of the Framers' intentions. Indeed, the best explanation for Justice Story's focus on the capital nature of the crime in *Gibert* is that the indictment in that case *was* for a capital offense, and Justice Story therefore concentrated his examination on early American decisions where a second prosecution was sought following an acquittal in a capital case. *See id*. at 1297–1303.

28. *See, e.g.*, Bullington v. Missouri, 451 U.S. 430, 431–32 (1981). Because a death penalty trial is, in effect, two trials—one addressing guilt or innocence and the other addressing punishment—the DJC is generally not implicated where only a second sentencing proceeding recurs. *See, e.g.*, Sattazahn v. Pennsylvania, 537 U.S. 101, 106–15 (2003). Consequently, the analysis I propose here will not always work elegantly in the capital context.

recognizes to be absurd.[29]

Yet the very reason the FFCC does make sense, and the reason it is not akin to the United States deferring to (for example) Iranian judgments, is precisely because the Constitution "split the atom of sovereignty"[30]—it invented, and rests on, an idea of shared sovereignty alien to the common law. Justice Alito's opinion in *Gamble*, which seeks to gain rhetorical force by wondering whether the acquittal in a foreign country of someone accused of murdering a U.S. citizen would preclude a trial of the accused murderer in the United States,[31] proceeds as if there is no such thing as federalism, and rests on a vision of the relationships among the states, and of that between the states and the federal government, the Framers would not recognize. The conundrum Justice Alito has identified is entirely a creation of the Court's own tendentious historical analysis.

Of course, it is always possible that the Court wants to view the relationship among the states one way for purposes of the FFCC, and another way for purposes of the DSD. That split vision of the Constitution would perhaps ameliorate the anomaly that results from the Court's analysis in *Gamble*, but the cost of that double vision is constitutional coherence, a point I address in greater detail below in Part V.

III. AN ELEMENTS-BASED APPROACH TO THE DSD-DJC JURISPRUDENCE

Once the unsound originalism that underlies *Gamble* (as well as the entirety of the DSD) is identified[32]—that is, once it is clear that the Framers who invented federalism did not in fact view the relationship between any given state and the federal government as legally analogous to the relationship between two foreign sovereigns—we are in a position to untangle the analytical error inherent in the DSD and read the DJC in a manner that accords with the Framers' invention of divided sovereignty and that actually makes sense. I propose that, rather than asking whether a

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

30. The phrase, though certainly not the concept, was apparently coined by Justice Kennedy. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). For an instructive overview of the meaning of the phrase, see Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1, 3–6 (2002). For a nuanced analysis of the underlying political theory, see Lawrence Friedman & Neals-Erik William Delker, *Preserving the Republic: The Essence of Constitutionalism*, 76 B.U. L. REV. 1019, 1031–36 (1996) (reviewing DANIEL LAZARE, THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY (1996)).

31. *Gamble*, 139 S. Ct. at 1967.

32. As Justice Gorsuch put it, "[T]he major premise of [the Court's] argument—that 'where there are two laws there are "two offenses" '—is mistaken." *Gamble*, 139 S. Ct. at 1997 (Gorsuch, J., dissenting).

subsequent prosecution by a second sovereign against the same defendant in connection with the same action violates the DJC on the basis that the second prosecution is (or is not) for the "same offence," the inquiry should instead focus on the *elements* of the crime(s) in the respective jurisdictions that have already prosecuted and that desire to prosecute.[33]

Under an elements-based approach, courts would resolve DJC issues by drawing logical inferences from what the jury in the initial prosecution *necessarily* found given the elements of the charged offense in that jurisdiction.[34] This mode of analysis is precisely how many states adjudicate double jeopardy issues internally,[35] so an elements-based approach to double jeopardy issues triggered by serial prosecutions by separate sovereigns would therefore fit elegantly with intra-state inquiries. The constitutional foundation for this concept rests on *In re Winship*, which established that the Due Process Clause prohibits a criminal conviction unless the government proves beyond a reasonable doubt ("BRD") every element of the charged offense.[36] In the cases dealing with the DSD and the DJC, however, while there is frequent mention of offenses and acts, there is no mention whatsoever of elements.

Whenever any two sovereigns define an offense pertaining to a particular act (or set of acts), their respective definitions of the offense will relate to one another in one of three different ways. First, the elements may be the same. Second, the definition of the offense in the jurisdiction that carries out the initial prosecution might include all of the elements from the other jurisdiction, plus something additional; in such circumstances, I refer to that jurisdiction as 1+ vis-à-vis the other jurisdiction. Third, the definition of the offense in the jurisdiction that carries out the initial prosecution might include some but not all of the elements from the other jurisdiction; in such circumstances, I refer to that jurisdiction as 1- vis-à-vis the other jurisdiction. Where the elements between the two jurisdictions differ, their relationship

33. Another proposed modification of existing doctrine, which is quite different from the modification proposed here, retains the concepts of "offense" but still adds significant protection against multiple prosecutions. *See* Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1234–35 (2004). In my view, however, Professor Poulin's alternative, while superior to the DSD, still suffers from its same fundamental incoherence.

34. This suggestion is akin to issue preclusion in the civil domain. I briefly address that symmetry below in Part V.

35. *See infra* note 48 and accompanying text.

36. *In re* Winship, 397 U.S. 358, 361 (1970). By now, this view of the Due Process Clause is regarded as axiomatic. *E.g.*, Jackson v. Virginia, 443 U.S. 307, 313–16, (1979); Patterson v. New York, 432 U.S. 197, 208 (1977); Old Chief v. United States, 519 U.S. 172, 199–200 (1997) (O'Connor, J., dissenting) ("At trial, a defendant may thus choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on *each* element.").

to one another will always be reciprocal, so if one is 1+, the other will be 1-.

In general, where the relationship between the sovereigns is 1, any prosecution by either sovereign will make a prosecution by the second sovereign impermissible under the DJC. But where the relationship between the sovereigns is 1+ or 1-, the double jeopardy determination will be asymmetrical, and it will be driven by which prosecution occurs first. As explained in greater detail below, if the prosecution in the 1+ jurisdiction occurs first and there is a conviction, a subsequent prosecution in the second jurisdiction will violate the DJC; however, an acquittal in the initial prosecution will not prevent the second jurisdiction from seeking to try the defendant.[37] Similarly, where the initial prosecution occurs in the 1- jurisdiction, a conviction will not entail that subsequent prosecution in the second jurisdiction violates the DJC; however, an acquittal in the 1- jurisdiction will erect a DJC bar to a subsequent prosecution in the second jurisdiction.[38]

To illustrate how and why this asymmetry comes about, I shall refer in the remainder of this Part and in Part IV to several diagrams that use some language of symbolic logic as well as some shorthand. (I also provide explanations of these charts in ordinary English, so if a reader is (unlike me) more distracted than aided by the diagrams, they can be skimmed.) The symbolism I employ is as follows:

($x \wedge y \wedge z$) means x *and* y *and* z;

($x \vee y \vee z$) means x *or* y *or* z;

S means sovereign, so S1 means sovereign one, and S2 means sovereign two;

(e) refers to the elements of a crime in a given jurisdiction of a particular sovereign; thus, for example, S1(e) refers to the elements of a given crime under the laws of sovereign one;

P refers to the order of prosecution, so P1 means the first prosecution, and P2 means the second prosecution;

Aq means acquittal;

Cv means conviction;

DJ refers to double jeopardy, so if there is DJ for the second prosecution, that prosecution would be precluded under the DJC.

Using this notation and shorthand, the consequences of an elements-based approach on double jeopardy analysis can be summarized as follows in Table 1.

37. *See infra* Table 1 note a; *infra* note 39.
38. *See infra* Table 1 note a; *infra* note 39.

TABLE 1. Generic

Jurisdiction	*Order of Prosecution (1/2)*	*Elements of Charged Crime*	*Relationship of P1(e) / P2(e) (e.g., 1, 1-, 1+)*	*Necessary Inferences: Acquittal (Aq)*	*Necessary Inferences: Conviction (Cv)*	*DJ for Second Prosecution Following Conviction (Y/N)*[a]	*DJ for Second Prosecution Following Acquittal (Y/N)*
S1	P1	S1(e) = (x,y,z)	1+	Aq = (~x ∨ ~y ∨ ~z)	Cv = (x ^ y ^ z)	n/a	n/a
S2	P2	S2(e) = (x,y)	n/a	Aq = (~x ∨ ~y)	Cv = (x ^ y)	Y	N
…	…	…	…	…	…	…	…
S2	P1	S2(e) = (x,y)	1-	Aq = (~x ∨ ~y)	Cv = (x ^ y)	n/a	n/a
S1	P2	S1(e) = (x,y,x)	n/a	Aq = (~x ∨ ~y ∨ ~z)	Cv = (x ^ y ^ z)	N	Y

Note: [a] Justice Alito's majority opinion in *Gamble* suggests a subsequent prosecution following a conviction would be "pointless." Gamble v. United States, 139 S. Ct. 1960, 1975 (2019). But that suggestion is not correct because the sovereign that prosecutes second may have a harsher sentencing regime. Indeed, following the federal trial in which Terry Nichols, one of the two perpetrators of the bombing of the federal building in Oklahoma City, was sentenced to life in prison, the State of Oklahoma opted to prosecute him in order to obtain a death sentence. The state trial, however, also ended with a sentence of life in prison. *See* Monica Davey, *After Second Nichols Trial, Frustration on Both Sides*, N.Y. TIMES (June 14, 2004), https://www.nytimes.com/2004/06/14/us/after-second-nichols-trial-frustration-on-both-sides.html [https://perma.cc/EF72-WKZM]. Notably, in advance of the Oklahoma trial, Nichols raised a double jeopardy challenge, which the Supreme Court rejected. *See* Charles Lane, *Nichols' Double Jeopardy Claim Rebuffed by Supreme Court*, CHI. TRIB. (Jan. 8, 2002, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-2002-01-08-0201080307-story.html [https://perma.cc/ELV8-HVGE].

S1 and S2 refer to sovereign one and sovereign two, respectively. (e) represents elements of the crime in the respective jurisdiction, with the variables (x, y, z) representing distinct elements. Hence, I represent the elements of a crime in sovereign two as S2(e) = (x, y), where x and y are the elements as defined by state law that must be found BRD to support a conviction. Aq, representing an acquittal, reflects that an acquittal can occur if any member of (e) is not found BRD. In contrast, a conviction, Cv, can occur only when the jury finds all members of (e) proved BRD.

In general (as mentioned above), there are three potential relationships between the elements of a crime in S1 and the elements of the same crime in S2. Where the elements are identical (for example, S1(e) = (x, y, z), and S2(e) = (x, y, z)), the relationship between these sovereigns can be represented as 1. When S1(e) = (x, y) and S2(e) = (x, y, z),[39] the elements in S2 vis-à-vis S1 are represented as 1+. Conversely, when S1(e) = (x, y, z) and S2(e) = (x, y), the elements in S2 vis-à-vis S1 are represented as 1-. In any scenario where only two sovereigns are involved, if either is 1+ vis-à-vis the other, then, because the relationships are reciprocal, the other will be 1-.

Once we know the relationship of S1(e) to S2(e), we can state whether a subsequent prosecution in a separate jurisdiction violates the DJC. The seventh and eighth columns in Table 1 reflect these conclusions. Where S1 pursues the initial prosecution for a given crime, and where the relationship of S1(e) to S2(e) is 1+, a conviction in S1 necessarily implies the jury found BRD the elements required for conviction in S2. That is, every issue relevant in S2 has already been adjudicated in S1; the DJC would therefore bar the prosecution because the jury in S1 already found all the elements that define the crime in S2. Every question germane to criminal liability in S2 was already answered in the proceedings in S1.

In contrast, if the defendant is acquitted in S1, the acquittal does not entail any conclusion other than that the jury found that at least one element (x, y, z) was not established BRD. However, S2 permits conviction without proof of (z). The relationship of S2(e) to S1(e) is 1-. Consequently, because it is possible the jury in S1 arrived at a verdict of Aq because it determined that (z) was not established BRD, the DJC does not bar a prosecution in S2, where proof of (z) is irrelevant.

We can simplify the generic chart to reflect solely the double jeopardy implications of this relationship in Table 2.

39. Or, as I discuss below in the context of *Gamble*, where S1(e) = (x, y) and S2(e) = (x+, y+), S2 can also be represented as 1+ vis-à-vis S1. Where the relationship between S1 and S2 is 1, the DJC analysis will be symmetrical; where the relationship is 1+ (or 1-), the relationship will be asymmetrical. *See infra* Table 2 note a.

TABLE 2. Generic, Simplified

Jurisdiction	*Order of Prosecution*	*Relationship of P1(e) to P2(e)*	*Aq / Cv*	*DJC Preclusion (Y/N)*[a]
S1	1	1+	Aq	n/a
S1	1	1+	Cv	n/a
S2	2	n/a	(Aq)	N
S2	2	n/a	(Cv)	Y
…	…	…	…	…
S2	1	1-	Aq	n/a
S2	1	1-	Cv	n/a
S1	2	n/a	(Aq)	Y
S1	2	n/a	(Cv)	N

Note: [a] The results column makes clear that an elements-based approach will be asymmetric. This asymmetry distinguishes an elements-based approach from both approaches in *Gamble*, the majority view as well as the dissent. The *Gamble* majority would answer no to every DJC preclusion scenario, while the dissenters would answer every permutation yes. Using an elements-based analysis, where the relationship between S1 and S2 is 1, the DJC analysis will be symmetrical, as it is using the *Gamble* approach; however, where the relationship is 1+ (or 1-), the relationship will be asymmetrical.

As the matrix indicates, where S1 carries out the initial prosecution, a Cv occurs in S1, and S1 is a 1+ jurisdiction, the DJC will bar S2 (which will be 1- vis-à-vis S1) from conducting a subsequent prosecution; where an Aq occurs in S1 (which is 1+), the DJC will not preclude S2 from undertaking a subsequent prosecution. Conversely, where the initial prosecution occurs in S2, S2 is a 1- jurisdiction, and an Aq occurs in S2, the DJC will bar a subsequent prosecution in S1. But where a Cv occurs in S2 (which is a 1- jurisdiction), the DJC will not preclude a subsequent prosecution in the other jurisdiction. All these results follow from a determination of what the jury in the original prosecution *necessarily* found, and those necessary findings cannot be extracted without identifying the elements of the crime in the respective jurisdictions.

We can examine the logic of this approach in a specific hypothetical context: Suppose a defendant is charged in Texas with aggravated (or armed) robbery for robbing a bank in Texarkana, a town that straddles the Texas-Arkansas border. At trial, the state would be required to prove the following elements BRD: that the defendant (x) committed robbery as defined by

section 29.02 of the Texas Penal Code; and (y) caused serious bodily injury, or used or exhibited a deadly weapon, or threatened or placed either a disabled person or a person sixty-five years old or older in fear of imminent bodily injury or death.[40]

If, following an acquittal in Texas, Arkansas were to indict the same defendant for aggravated robbery in connection with the same bank robbery, an elements-based analysis of whether the Arkansas prosecution is barred by the DJC would proceed as follows: in Arkansas, the elements that must be proved BRD are that the defendant (x) committed robbery as defined in section 5-12-102; and (y') was armed with a deadly weapon or represented that he was armed with a deadly weapon, or inflicted or attempted to inflict death or serious bodily injury upon another person.[41]

The definition of robbery in the Arkansas statute is, in relevant part, coterminous with the definition under Texas law. Therefore, the first element (x) is essentially the same for purposes of the DJC. However, the second element in Texas (y) and the second element in Arkansas (y') differ in several salient respects.

Element y in Texas includes three disjunctive possibilities: (1) that the defendant caused serious bodily injury, or (2) that the defendant used or exhibited a deadly weapon, or (3) that the defendant threatened or placed either a person at least sixty-five years old or a person with a disability in fear of injury or death. Element y' in Arkansas is conjunctive (although containing internal disjunctive components) and requires (1') that the person was armed or represented that he was, and (2') inflicted or attempted to inflict death or serious injury on another.

If a Texas jury finds y satisfied by option (1), the (2') prong of y' in Arkansas is necessarily satisfied, but the (1') prong is not. If a Texas jury finds y satisfied by option (2), the (1') prong of y' is satisfied but (2') is not. If a Texas jury finds y satisfied by option (3), it is unclear whether option (2') of y' is satisfied, but it is clear that option (1') of y' is not. Therefore, y' requires more than y, so we represent the elements in Arkansas vis-à-vis the elements in Texas as 1+.

Using the same symbols as in the previous tables, we can describe the Arkansas-Texas prosecutions as follows:

40. TEX. PENAL CODE ANN. § 29.03 (West 2023). In turn, section 29.02 defines a robber as one who "commit[s] theft (as defined in Chapter 31) and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." *Id.* § 29.02 (West 2023).

41. ARK. CODE ANN. § 5-12-103 (West 2022).

TABLE 3. Texas-Arkansas

Jurisdiction	*Order of Prosecution (1/2)*	*Elements of Charged Crime*	*Relationship of P1(e) / P2(e) (e.g., 1, 1-, 1+)*	*Necessary Inferences: Acquittal (Aq)*	*Necessary Inferences: Conviction (Cv)*	*DJ for Second Prosecution Following Conviction (Y/N)*[a]	*DJ for Second Prosecution Following Acquittal (Y/N)*
Texas (S1)	P1	(x,y)	1-	~x ∨ ~y	x ^ y	n/a	n/a
Arkansas (S2)	P2	(x, y')	n/a	~x ∨ ~y'	x ^ y'	N	Y
...	...	...	...	...	...	...	...
Arkansas(S2)	P1	(x, y')	1+	~x ∨ ~y'	x ^ y'	n/a	n/a
Texas (S1)	P2	(x, y)	n/a	~x ∨ ~y	x ^ y	Y	N

Note: [a] *See supra* Table 1 note a.

TABLE 4. Texas-Arkansas, Simplified

Jurisdiction	*Order of Prosecution*	*Relationship of P1(e) to P2(e)*	*Aq / Cv*	*DJC Preclusion in Second Prosecution? (Y/N)*
Texas (S1)	1	1-	Aq	Y
Texas (S1)	1	1-	Cv	N
...	...	...	...	...
Arkansas (S2)	1	1+	Aq	N
Arkansas (S2)	1	1+	Cv	Y

The foregoing tables reflect results to the question of whether the DJC bars a subsequent prosecution by Texas or Arkansas where the same defendant has already been prosecuted in the other jurisdiction. The results are derived by carrying out three steps. The first is to define the elements of the crime charged in the two jurisdictions. Table 3 reflects the elements addressed in the narrative preceding it. Importantly (and in contrast to how the DJC analysis occurs under the DSD), the *name* given to the crime in each jurisdiction will be irrelevant; all that matters is what must be proved BRD to secure a conviction.

The second step is to determine, based on the jury's verdict in the first jurisdiction, what the jury *necessarily* found. (Table 3 identifies these

necessary findings under the columns *Necessary Inferences: Acquittal* and *Necessary Inferences: Conviction*.) Although general verdict forms typically reveal only the jury's conclusion (that is, guilty or not guilty), *Winship* allows us to draw inferences regarding individual elements of the charged offense based on the general verdict.

Finally, the third step is to ask whether the necessary findings in the first jurisdiction, if applied in the second jurisdiction, dictate either a conviction or an acquittal in that second jurisdiction, or, instead, whether the necessary findings in the first jurisdiction leave the conclusion as to the second jurisdiction unknown. (Table 3 indicates whether the DJC bars a subsequent prosecution under the columns *DJ for Second Prosecution Following Conviction* and *DJ for Second Prosecution Following Acquittal*.)

Given the elements in the respective jurisdictions in this hypothetical bank robbery, we can conclude that if Texas proceeds first, and the jury returns a guilty verdict, Arkansas would be able to proceed with its own prosecution. But if the Texas jury acquits, the DJC would bar a second prosecution in Arkansas.[42] In contrast, if Arkansas initiated the first prosecution and the defendant was convicted, Texas would be barred by the DJC from conducting a subsequent trial. But if the Arkansas jury returned an acquittal, Texas would be free to conduct a second prosecution.[43]

As is the case with this hypothetical, an elements-based approach will generate an asymmetrical result to the double jeopardy analysis any time the relationship between the two sovereigns is 1+ or 1-. Indeed, as the discussion of *Gamble* in Part IV explains, the fact that the DSD approach is always symmetrical, while an elements-based approach is not, is the singular distinction between these competing methods, and this asymmetry is a principal virtue of the elements-based alternative because it rests squarely on what the jury in the initial prosecution actually decided.

IV. AN ELEMENTS-BASED APPROACH VERSUS *GAMBLE*'S DSD

In *Gamble*, neither the district court, nor the court of appeals, nor the Supreme Court even identified, much less discussed, the elements of the crime under either Alabama or federal law with which the defendant was charged. This lacuna is present not only in Justice Alito's majority opinion, but in the dissenting opinions of Justice Ginsburg and Justice Gorsuch as well. It is precisely this inattention to elements that ultimately leads to the

42. *See supra* note 39; *supra* Table 2 note a; *infra* note 48. The column *DJC Preclusion in Second Prosecution?* in Table 4 reflects these conclusions.

43. *See supra* note 39; *supra* Table 2 note a; *infra* note 48. The column *DJC Preclusion in Second Prosecution?* in Table 4 reflects these conclusions.

fundamental defect in both the DSD and the view of the dissenters. Specifically, both are forced into an all-or-nothing posture. Under the DSD, *all* subsequent prosecutions are permissible; under the competing view, *no* subsequent prosecutions are permissible. The former alternative has the effect of dismantling the DJC's protection, while the latter has the effect of undermining the state's police power. The elements-based approach suffers neither of these limitations.

Rather than simply resorting to the question-begging formulation that the second prosecution of Gamble by the federal government did not violate the DJC because that prosecution was not for the "same" offence Alabama had charged, the Court could have conducted an elements-based analysis akin to the analysis carried out above in the hypothetical cases involving Texas and Arkansas. Had the Court done so, it would have begun by examining the Alabama statute Gamble was charged with violating. That statute provides

> No person who has been convicted in this state or elsewhere of committing or attempting to commit a crime of violence, misdemeanor offense of domestic violence, violent offense as listed in Section 12-25-32(15), anyone who is subject to a valid protection order for domestic abuse, or anyone of unsound mind shall own a firearm or have one in his or her possession or under his or her control.[44]

To obtain a conviction, therefore, Alabama had to prove BRD that (1) Gamble had been convicted of a crime of violence (as defined by state law), and (2) he had had a firearm in his possession.[45]

Following the proceedings in Alabama, Gamble was charged with the federal violation. The federal statute Gamble was charged with violating provides,

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm

44. ALA. CODE § 13A-11-72(a) (2022). The definition of "violent offense" in section 12-25-32(15) includes, inter alia, murder, rape, kidnapping, burglary, and robbery. *Id.* § 12-25-32(a) (2022). Gamble had been convicted of second-degree robbery under section 13A-8-42, an offense deemed "violent" by section 12-25-32(15)(a). *See id.* § 12-25-32(15)(a)(29).

45. Gamble pleaded guilty to the state law crime. Gamble v. United States, 139 S. Ct. 1960, 1960 (2019). For purposes of this elements-based analysis, a guilty plea means the elements have been proved in the same fashion as if a jury had returned a verdict of guilty. Gamble's guilty plea is thus equivalent to the state having established both the foregoing elements.

> or ammunition which has been shipped or transported in interstate or foreign commerce.[46]

Thus, the elements of the federal crime relevant to Gamble that require proof BRD are that (1) Gamble was convicted of a crime punishable by more than a year in prison, and (2) he possessed a firearm in or affecting interstate commerce. Each of these two elements of federal law begins with the element of the state offense and adds an additional requirement.

Consequently, if Gamble initially faces federal prosecution, and the first element of the federal crime is proved, the first element of the state crime is necessarily proved (because all crimes punishable by a year or more in prison are crimes of violence under Alabama law). But the converse is not true (because not all crimes of violence under Alabama law trigger sentences of at least one year). Similarly, if the second element of the federal crime is proved, the second element of the state crime is necessarily proved (because shipping and transporting are possession, and possession in interstate commerce requires possession). But again, the converse is not true (because possessing a firearm does not necessarily require possession affecting interstate commerce).

Whereas the elements-based approach described in Part III generates asymmetrical results to the double jeopardy inquiry, depending on the relationship of the elements in the respective jurisdictions to one another as well as which jurisdiction acts first, *Gamble* and the DSD cases embed no such nuance. Instead, under the DSD, *any* second-in-time prosecution is permissible; neither the elements of the crime nor the order of prosecution matters. Consequently, the DSD, as exemplified by *Gamble*, can be represented as follows:

46. 18 U.S.C. § 922(g)(1).

TABLE 5. *Gamble*, as decided

Jurisdiction	*Order of Prosecution (1/2)*	*Crime Charged*	*DJ for Second Prosecution Following Conviction (Y/N)*[a]	*DJ for Second Prosecution Following Acquittal (Y/N)*
Alabama (S1)	1	Felon in possession	N	N
United States (S2)	2	Felon in possession	N	N
…	…	…	…	…
United States (S2)	1	Felon in possession	N	N
Alabama (S1)	2	Felon in possession	N	N

Note: [a] *See supra* Table 2 note a.

There are two key differences between Tables 1 and 3, on the one hand, and Table 5, on the other. First, as mentioned, Tables 1 and 3 are asymmetric with respect to the DJC analysis, whereas Table 5 is not.[47] The explanation for this distinction lies in the second difference between the tables, which is that Table 5 has no columns pertaining to elements; in its place is a column that simply *names* the charged offense. Nevertheless, despite the Court's lack of interest in elements, it is certainly possible to conceptualize *Gamble* using an elements-based approach. If *Gamble* is so conceptualized, the relevant variables are as follows:

S1 = Alabama, which also carried out the first prosecution.

S1(e) = (x,y), where

x = convicted of crime of violence;

y = possessed a weapon.

S2 = United States

S2(e) = (x+, y+), where

x+ = convicted of crime of violence carrying a sentence of more than one year;

y+ = possessed a weapon in interstate commerce.

47. *See supra* note 39; *supra* Table 2 note a; *infra* note 48.

Because each of the two elements in S2 (that is, the federal government) adds a feature to each of the two elements in S1 (that is, Alabama), the relationship of the S2(e) vis-à-vis S1(e) can be represented as 1+. We can therefore show how *Gamble* would be analyzed using an elements-based approach. As is the case with Tables 1–4 (but not Table 5), Table 6 exhibits an asymmetrical result.

TABLE 6. *Gamble* analyzed with elements

Jurisdiction	*Order of Prosecution (1/2)*	*Elements of Charged Crime*	*Relationship of P1(e) / P2(e) (e.g., 1, 1+, 1-)*	*Necessary Inferences: Acquittal (Aq)*	*Necessary Inferences: Conviction (Cv)*	*DJ for Second Prosecution Following Conviction (Y/N)*[a]	*DJ for Second Prosecution Following Acquittal (Y/N)*
Alabama (S1)	P1	(x, y)	1-	~x ∨ ~y	x ^ y	n/a	n/a
United States (S2)	P2	(x+, y+)	n/a	~x+ ∨ ~y+	x+ ^ y+	N	Y
...	...	...	...	...	...	...	...
United States (S2)	P1	(x+, y+)	1+	~x+ ∨ ~y+	x+ ^ y+	n/a	n/a
Alabama (S1)	P2	(x, y)	n/a	~x ∨ ~y	x ^ y	Y	N

Note: [a] *See supra* Table 2 note a.

As Table 6 reflects, because the relationship of S1(e) vis-à-vis S2(e) is 1-, a conviction in S1, which would require the government to prove BRD both x and y, would not address all the facts salient in S2 because S2(e) includes aspects not present in S1(e). For that reason, a Cv in S1 would not create a DJC impediment to a subsequent prosecution in S2. If, however, the jury in S1 acquits the defendant, that finding would entail that either x or y (or both) was not proved BRD, and that determination would perforce dictate that either x+ or y+ (or both) was already adjudicated in the first proceeding; consequently, a subsequent attempt at prosecution by S2 would be barred by the DJC.

Conversely, the relationship of S2(e) vis-à-vis S1(e) is 1+. As a result, if the federal prosecution occurs first, and the defendant is found guilty, the government has proved BRD x+ and y+; and because S2(e) includes everything in S1(e), plus something in addition, every issue germane to S1 will have been adjudicated in the proceeding in S2. For that reason, a Cv in S2 would preclude a subsequent prosecution in S1. On the other hand, if the

defendant is acquitted in the proceeding in S2, it is possible the element the jury found not proved BRD was an element not germane to the statute in S1 (that is, the "+" component of the element); accordingly, an acquittal in S2 would not create a DJC impediment to a subsequent prosecution in S1.

In sum, where the necessary inference of a verdict at the first-in-time prosecution would dictate that the jury necessarily found all the facts germane to the elements of the crime in the sovereign seeking to pursue a second-in-time prosecution, the second prosecution would be barred by the DJC.[48] Where there is no such logical entailment, a second prosecution would not be barred by the DJC.

V. FULL FAITH AND CREDIT, ISSUE PRECLUSION, AND THE ANALOGY TO CIVIL LITIGATION

The FFCC provides, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[49] Subject to certain exceptions, the FFCC requires a state to give the same preclusive effect to a subsequent action that it would receive in the state where the original litigation occurred. Because the DJC would bar a state from twice prosecuting a defendant in connection with the same alleged misconduct, it might appear that the FFCC would likewise prevent a second state from doing so—precisely the opposite of the conclusion dictated by the DSD.[50]

48. This result will be true even where the initial prosecution results in Cv because the sentencing range in S2 may be more severe or because any sentence in S2 may be consecutive to the sentence imposed in S1. *See also supra* Table 1 note a. As mentioned above, the approach I am suggesting, for purposes of DJC challenges to prosecutions by a separate sovereign, resembles the test jurisdictions apply to determine whether a second prosecution of a defendant for a separate offense following an acquittal within the same jurisdiction violates a defendant's protection under the DJC. For a general overview of the test jurisdictions apply, see Susan Demske, Michele L. Tyler & Lynn E. Fullerton, *Double Jeopardy*, 85 GEO. L.J. 1174, 1186–99 (1997). These authors included, among others, the following cases and parenthetical holdings (which I quote verbatim) to illustrate this test in practice: Rossetti v. Curran, 80 F.3d 1, 3 (1st Cir. 1996) ("successive prosecutions for armed robbery and conspiracy to commit armed robbery allowed because proof of different elements required"); Henry v. McFaul, 791 F.2d 48, 51 (6th Cir. 1986) ("successive prosecutions for reckless operation of motor vehicle and attempted murder allowed because proof of different elements required"); Harvey v. Shillinger, 76 F.3d 1528, 1533 (10th Cir.) (1996) ("successive prosecutions for conspiracy charges following vacation of convictions for substantive kidnapping and sexual assault charges allowed because 'separate and distinct offenses' "). *Id.* at 1186 n.1475. The academic literature has, as a whole, not challenged this widely shared approach, an attitude that strikes me as sound.

49. U.S. CONST. art. IV, § 1.

50. While the literature addressing the connection between the Full Faith and Credit Clause ("FFCC") and the DSD/DJC is not voluminous, it has not entirely escaped scholarly analysis, with the consensus view holding that the two cannot rest easily together. *See, e.g.*, Allan D. Vestal, *Criminal Prosecutions: Issue Preclusion and Full Faith and Credit*, 28 U. KAN. L. REV. 1, 1 (1979). Several commentators have argued that a strong reading of the FFCC is at odds with the DSD/DJC doctrine. *E.g.*,

By fiat, however, the Supreme Court has read the FFCC as inapplicable to criminal prosecutions.[51] But the doctrinal foundation for this conclusion, as I argue in Part II, is thin because it treats the relationship between and among states as akin to the relationship between, say, France and Germany.[52] For that reason, the conclusion that the DJC does not bar a prosecution in one state involving the same crime and the same defendant who was acquitted in another state is only as sound as the analogy that Texas is to Arkansas (for example) as France is to Germany.

However, as Justices Ginsburg and Gorsuch explained in *Gamble*, and as a number of legal scholars have argued, the historical basis for the DSD is evanescent. Once the DSD is understood to rest on an infirm historical premise, the principles of the FFCC can be extrapolated to evaluate whether a prosecution by a second sovereign against the same defendant violates the DJC.[53] A brief summary of those relevant principles follows.

Suppose P1, a citizen of S1, sues D1, which is incorporated in S2, in the courts of S1 for negligence and gross negligence. P1 prevails. After D1

Marc Martin, Case Note, Heath v. Alabama*: Contravention of Double Jeopardy and Full Faith and Credit Principles*, 17 LOY. U. CHI. L.J. 721, 752–55 (1986) (arguing that the FFCC bars successive state prosecutions, like the one at issue in Gillis v. State, 633 A.2d 888 (Md. 1993)); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 612 (1961) (observing that the FFCC "weighs heavily" against the DSD/DJC). One obvious and important difference between the FFCC and the DSD/DJC lines of cases is that the FFCC generally applies to disputes involving private parties, whereas the DSD/DJC necessarily applies only when a state is the prosecuting party. *See* Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 9 (1996). I say more about this distinction in the text. *See infra* text accompanying note 63.

51. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 288–89 (1888). The Court noted that penal laws do not extend beyond a nation's own territory, reasoning that the states are essentially foreign nations vis-à-vis one another when it comes to penal judgments. *See id.* Why this remains true despite the FFCC, however, is an issue the Court did not truly address because its reasoning was more focused on whether Article III created federal jurisdiction to enforce intra-party penal judgments than on whether the FFCC was inapplicable where one party to the litigation in the first action was a sovereign state. *See id*. at 296–300; *see also, e.g.*, Huntington v, Attrill, 146 U.S. 657, 683–86 (1892); Nelson v. George, 399 U.S. 224, 229 (1970) ("[T]he Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment."). Somewhat oddly, however, the Court in *Milwaukee County v. M.E. White Co.* had this to say:

> We intimate no opinion whether a suit upon a judgment for an obligation created by a penal law, in the international sense, is within the jurisdiction of the federal District Courts, or whether full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.

Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 279 (1935) (citation omitted).

52. *Pelican Ins. Co.*, 127 U.S. at 288–300. A useful guide to several of these issues is Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 86–90 (2001).

53. My aim here is merely to provide sufficient summary of the FFCC to illustrate how it would apply to interstate (or inter-sovereign) double jeopardy claims. A full discussion of the FFCC, as well as the elements of res judicata, estoppel, and preclusion that are implicated by the FFCC, is beyond my scope in this Article.

refuses to pay the judgment, P1 sues in the courts of S2 to enforce the judgment from the litigation in S1. Generally, the courts of S2 must respect and give effect to the judgment of the courts in S1 and enforce the judgment.[54] The same concept holds if P1 loses in the action in S1. If P1 then sues D1 in the courts of S2 for the same injury growing out of the same conduct, again invoking negligence and gross negligence, P1's action will not be permitted to proceed. Because P1's action would be barred by preclusion doctrine in S1, it is similarly barred in S2 by virtue of the FFCC.[55]

Issue preclusion bars relitigating an issue that was determined by and essential to a final judgment in a fully and fairly litigated prior proceeding.[56] That is why, in the foregoing example, a plaintiff who obtains a judgment in S1 and later seeks to enforce that judgment in S2 does not need to reestablish entitlement to the judgment in S2. It is not conceptually difficult to apply this idea to criminal prosecutions. For example, if we were to apply the concept to successive criminal prosecutions for murder in different jurisdictions where a finding of mens rea is essential to finding a defendant guilty of first-degree murder, a trial in S1 where the defendant is found to have lacked mens rea would preclude relitigating that issue in a murder trial in S2 growing out of the same set of facts.

A major difficulty with resolving the DJC issue by resorting to issue-preclusion doctrine, however, is that for issue preclusion to be successfully invoked, the party against whom estoppel is asserted must have had a full

54. *E.g.*, Baker v. Gen. Motors Corp., 522 U.S. 222, 232–33 (1998). *See generally* Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 WASH. & LEE L. REV. 47 (2001) (surveying wide variance among common law jurisdictions as to the meaning and application of res judicata). For an interesting discussion of potential equitable limitations on the reach of the FFCC in the context of enforcing foreign judgments, see Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 837–40 (1998); *see also* Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment?*, 67 WASH. & LEE L. REV. 467, 472–77 (2010) (surveying variety of approaches in state law to enforce foreign judgments); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 102 cmt. c, 117 (AM. L. INST. 1971).

55. *See, e.g.*, D.G. Real Estate, LLC v. Tex. Brand Bancshares, Inc., No. 10-cv-02400-MJW-KMT, 2012 WL 683493, at *14–17 (D. Colo. Mar. 2, 2012); Lawrence v. Household Bank (SB), N.A., 505 F. Supp. 2d 1279, 1281–83 (N.D. Ala. 2007); *see also* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 479–84 (1982). *See generally* Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 U. KAN. L. REV. 413 (1999) (arguing that the Supreme Court has not recognized the importance of federal interests in large class action settlements); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945 (1998) (surveying problems associated with interjurisdictional preclusion, especially choice of law issues).

56. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17–19 (AM. L. INST. 1982); 18 EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4402–16 (3d ed. 2022). Outside of the context of the DSD, the Supreme Court has indeed drawn from issue-preclusion law to examine whether and under what circumstances the DJC bars subsequent prosecutions within a single jurisdiction. *See, e.g.*, Bravo-Fernandez v. United States, 580 U.S. 5, 10–14 (2016) (discussing whether an appellate court's vacatur of a conviction alters issue-preclusion analysis under the DJC).

and fair opportunity to contest the resolution of that issue in the original proceeding.[57] Nevertheless, and importantly for our purposes here, this final criterion for preclusion—that the party against whom preclusion is asserted had an opportunity to participate in the original proceeding—is not without exception. That is, preclusion does not apply only where there is an identity of parties.[58] Instead, it may also be asserted against a party who was (or is) in privity with a party to the earlier proceeding.[59]

Obviously, in the DJC context, there is not a perfect identity of parties. The defendant is the same, but the prosecution is not. There are thus two possible avenues to conclude that the second state will be precluded from prosecuting the defendant as a consequence of the earlier state's prosecution. The first is to consider the meaning of "in privity with."

"[T]here is no universally applicable definition of privity."[60] The Ninth Circuit has noted that privity exists for preclusion purposes when "two parties have identical . . . rights with respect to a particular legal interest."[61] This definition of privity resembles the definition in contract law, where a party may sue another for breach (of contract or warranty) if that party is in privity with the other.[62] In both the preclusion and contract contexts, therefore, the determination of whether the privity requirement is satisfied is

57. *E.g.*, RESTATEMENT (SECOND) OF JUDGMENTS §§ 27–28 (Am. L. Inst. 1982); *see also* Stuart M. Widman, *The Preclusive Effect of Arbitration Awards*, 47 LITIG. 35, 35–40 (2020) (summarizing recent case law in the arbitration context); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 93–96 (2019). *See generally* sources cited *supra* in notes 55–56.

58. The breadth of preclusion doctrine is a matter of state law, and some states do in fact require identity of parties for preclusion to be invoked. Other states do not. The salient point for my purposes is that preclusion does not inherently require identity of parties. *See, e.g.*, DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 77–78 (2001); RESTATEMENT (SECOND) OF JUDGMENTS § 40 (AM. L. INST. 1982); Edward D. Cavanagh, *Issue Preclusion in Complex Litigation*, 29 REV. LITIG. 859, 862–64 (2010).

59. *E.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 27 (Am. L. Inst. 1982); *see also* G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 624–26, 625 n.10 ("Any party may invoke collateral estoppel 'defensively' against a plaintiff bringing a second suit on an issue the plaintiff litigated and lost in the prior action. *See* Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313, 324 (1971)[.] A plaintiff in a second action may also assert issue preclusion 'offensively' against a defendant who has litigated and lost an issue in a prior proceeding. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)." (citation omitted)).

60. Miller v. S&S Hay Co., No. 1:12-CV-01796-LJO-SMS, 2013 WL 1281589, at *7 (E.D. Cal. 2013) (quoting Bates v. Jones, 904 F. Supp. 1080, 1088–89 (N.D. Cal. 1995)).

61. Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1053 (9th Cir. 2005); *see also* Smith v. Nasserazad, 544 S.E.2d 186, 188 (Ga. Ct. App. 2001) (same under Georgia law); Weinberger v. Tucker, 510 F.3d 486, 492 (4th Cir. 2007) ("[P]rivity requires an alignment of interests and not an exact identity of parties.").

62. *E.g.*, DAVID R. DOW & CRAIG SMYSER, CONTRACT LAW—TEXAS PRACTICE SERIES §§ 9.2, 10.2 (2005 & Supp. 2021); *see also* Shelby D. Green, *Contesting Disclaimer-of-Reliance Clauses by Efficiency, Free Will, and Conscience*, 2 TEX. A&M L. REV. 1, 38–39, 38 n.259 (2014).

largely question-begging: if the interests of the two are viewed as sufficiently intertwined, privity is satisfied; if they are not so viewed, it is not. Or, as the Third Circuit put it, "Privity . . . is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata."[63]

To return to our illustration from Part III, where Texas first prosecutes a defendant for an armed robbery carried out on the Texas-Arkansas line, the question for preclusion purposes is whether the relationship between Arkansas and Texas is such that Arkansas is bound by estoppel principles from pursuing a subsequent prosecution against the same defendant for events growing out of the same conduct. The answer to this question, when posed in the context of existing preclusion law, turns on the respective interests of Texas and Arkansas. If they are alike, we can say the two jurisdictions are in privity with one another, but if they are not sufficiently alike, there is no privity, and hence no requirement that the second state respect the judgment of the first to go to trial.

At one level of generality, those interests manifestly diverge, insofar as Texas penal laws aim primarily to protect Texans, while Arkansas penal laws aim primarily to protect Arkansans. But at a higher level of generality, both sovereigns have the same interest in prohibiting wrongful conduct and punishing that conduct when it occurs. To be sure, they may define wrongful conduct differently, but where they define it in roughly the same manner, it would seem the interest of either is furthered by a successful prosecution undertaken by the other. Existing preclusion doctrine could therefore easily accommodate the conclusion that Arkansas may not prosecute the defendant for the same conduct already subject to prosecution in Texas.

But there is a second, more compelling reason the DJC would prohibit a second jurisdiction from prosecuting a defendant for the same crime another jurisdiction has already prosecuted (and where, of course, the elements of the crime are the same in the two jurisdictions). In the context of the FFCC, issue preclusion, and estoppel, it is the Due Process Clause that establishes hard boundaries against the reach of these doctrines.[64] Thus,

63. Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir. 1950) (Goodrich, J., concurring) (quoted in *Weinberger*, 510 F.3d at 492).

64. *See, e.g.*, Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 500 (1939) (identifying due process limit on FFCC); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980) (same); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 482 (1982); Blonder-Tongue Lab'ys v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971) (addressing due process limit on application of preclusion to new parties); State Farm Fire & Cas. Co. v. Fullerton, 118 F.3d 374, 387 (5th Cir. 1997) (same); *see also* Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 566–70 (2017) (addressing due process and preclusion); Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1553–54 (1992) (discussing other possible

where estoppel is invoked against a party in a second proceeding in the courts of a second sovereign, and where that party was not directly involved in the original proceeding (or not in privity with a party who was directly involved), the Due Process Clause limits the potency of the earlier judgment's preclusive effect.[65]

But the Due Process Clause protects persons and citizens, not states or sovereigns.[66] It is a limit on the states' power to act, not something the state may invoke for its own protection.[67] It safeguards individual rights, not state power. Consequently, if a state prosecutes a defendant who then invokes the DJC in the face of a second prosecution by a second state, the second state cannot invoke the Due Process Clause as a limit on the earlier judgment's preclusive effect simply because states do not enjoy due process protection; only people do.[68]

With the due process concerns excised from the preclusion analysis, all that a second state that desires to prosecute a defendant who has already been

federal constraints on state preclusion law besides due process); William B. Sohn, Note, *Supreme Court Review of Misconstructions of Sister State Law*, 98 VA. L. REV. 1861, 1864–73 (2012) (discussing the "constitutional limitations on choice of law" and "how state courts are able to avoid those constraints through unsupported interpretations of sister state law"). For an interesting analogy of the doctrine of stare decisis to preclusion law, with an argument that due process should likewise limit the reach of stare decisis, see Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597, 597–600 (2010).

65. *See supra* notes 57–59 and accompanying text.

66. For an illuminating treatment of early cases, see Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 23–55 (2007). For an examination of the concept of "states' rights" in the Tenth Amendment context, see Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1167–80 (1977). On rights and duties generally, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). I have elsewhere discussed the incoherence of the idea that the state has rights in the criminal procedure domain. *See* David R. Dow, *Individuals, Governments, and Rights: A Reply to Cathleen Herasimchuk*, 30 S. TEX. L. REV. 369, 369–74 (1990). The distinction between citizens and persons in terms of who may claim due process protection has been widely discussed, most recently, in the context of what rights extend to so-called enemy combatants seized in the aftermath of 9/11. For a lucid example, see Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1962–64 (2005).

67. *E.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989) (clarifying that the Due Process Clause acts "as a limitation on the State's power to act"). The distinction between the Due Process Clause's limits on the government vis-à-vis citizens versus the limits it places on the government vis-à-vis persons is not presently germane. *See* Randy E. Barnett, *Foreword: What's So Wicked About* Lochner*?*, 1 N.Y.U. J.L. & LIBERTY 325, 331–32 (2005) (noting the Due Process Clause protects all persons while the Privileges and Immunities Clause does not).

68. Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 519 (2008) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998)) ("The touchstone of due process is protection of the individual against arbitrary action of government."); *cf.* Sharp Corp. v. Hisense USA Corp., 292 F. Supp. 3d 157, 173 (D.D.C. 2017).

prosecuted elsewhere has left is the historically untenable DSD—a fact acknowledged by the Maryland Supreme Court in *Gillis v. State*.[69] In *Gillis*, the Maryland Supreme Court permitted the state to move forward with a murder prosecution against Gillis even though Gillis had been acquitted of the very same murder in Delaware. Gillis had argued the Maryland prosecution was barred by the FFCC. Without addressing the FFCC at any great length, the Maryland court merely invoked the DSD, noting the doctrine rendered the FFCC inapplicable, and the court thereby brushed aside the DJC concern.

But as soon as we relax the two assumptions the Maryland Supreme Court made—namely, the soundness of the historical foundation for the DSD and the Supreme Court's holding by fiat that the FFCC does not apply in criminal cases—the double jeopardy argument Gillis asserted acquires significant traction. If that argument had been assessed using the elements-based approach to the DJC I propose, the analysis would have proceeded as follows: Ronald Gillis was tried in Delaware for first-degree murder in connection with the death of Byron Parker, who disappeared after a quarrel with Gillis and whose body was never located.[70] As relevant to the case involving Gillis, first-degree murder in Delaware requires that the defendant "intentionally cause[] the death of another person."[71] Gillis was acquitted, meaning the jury could have found that the state did not prove BRD that Parker was dead, or that the state did not prove BRD that Gillis killed him, or that the state did not prove BRD that Gillis killed Parker intentionally.

First-degree murder in Maryland can be satisfied by a number of examples of homicide,[72] but as relevant to the charge that Gillis killed Parker, the elements would have been a "deliberate, premeditated, and willful killing" committed in the course of another enumerated felony or attempt to commit that felony.[73] Using the nomenclature from the preceding sections, Maryland, vis-à-vis Delaware, can be represented as 1+ in the elements-based analysis of the DJD. Consequently, because every element

69. Gillis v. State, 633 A.2d 888 (Md. 1993). For an analysis of the Maryland Supreme Court's decision, see Leora R. Simantov, *Dual Sovereignty: Trumping the Full Faith and Credit Clause*, 54 MD. L. REV. 730, 740–47 (1995). For another focus on *Gillis* and a criticism of the DSD/DJC doctrine as being essentially a loophole, which unfortunately errs by seeing the DSD as an exception, see Christina Galye Woods, Comment, *The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole*, 24 U. BALT. L. REV. 177, 191–94, 208–10 (1994).

70. Sheridan Lyons, *Del. Man Acquitted in '90 Now Due Md. Murder Trial*, BALT. SUN (July 25, 1992), https://www.baltimoresun.com/news/bs-xpm-1992-07-25-1992207006-story.html [https://perma.cc/W3C8-BHPL].

71. DEL. CODE ANN. tit. 11, § 636(a)(1) (2022).

72. *See* MD. CODE ANN., CRIM. LAW § 2-201 (West 2022).

73. *Id.* § 2-201(a)(1), (4).

of first-degree murder that must be found in Delaware to support a conviction must also be found in Maryland, the fact the jury in Delaware found in favor of Gillis should have resulted in the conclusion that the DJC precluded his subsequent prosecution in Maryland. (Conversely, because Delaware can be represented, vis-à-vis Maryland, as a 1-, had Gillis been first tried and acquitted in Maryland, the DJC would not have barred a subsequent prosecution in Delaware.)

The plain meaning of the FFCC, and the jurisprudence surrounding it, cannot be reconciled with the DSD.[74] The Constitution's full faith and credit language signals a relationship between and among separate sovereigns that is fundamentally at odds with the vision of that relationship embedded in the DSD. Yet unlike the DSD, the FFCC captures not only the Framers' intent, but also their very words. Moreover, unlike the DSD, which simply waves away the protection against double jeopardy, the FFCC is capable of mediating the double jeopardy concerns that arise when successive sovereigns seek to prosecute the same defendant for crimes growing out of the same set of actions. Such mediation, however, demands an attention to a crime's elements in a manner absent from the dual sovereignty cases.

CONCLUSION: HOW MUCH DIFFERENCE WILL THIS MAKE?

Analyzing the question of double jeopardy through an elements-focused lens has at least three virtues: first, while this advantage will perhaps appeal solely to originalists, an elements-based approach is faithful to the views of the Framers while the DSD is not; second, by tracking how DJC analysis proceeds within a single jurisdiction, an elements-based approach creates constitutional coherence between interstate double jeopardy analysis and intrastate analysis; finally, by virtue of its consistency with preclusion law and the FFCC, an elements-based approach provides symmetrical elegance between the criminal and civil law regimes in separate states.

And it is possible to achieve all of these benefits without incurring substantial cost. To be sure, although the body of case law turning on this doctrine does not make entirely clear whether the consequence of the modification I propose will be a substantially more robust protection for criminal defendants, that consequence is certainly conceptually probable.[75]

74. *See supra* note 50. My claim in the text is categorical, whereas the sources cited in note 50 are more cautious. At the same time, I am aware of no judicial opinion or scholarly analysis that reconciles the two.

75. Appendix I identifies all reported cases over the past twenty years evaluating a double jeopardy challenge in the context of the DSD. The column to the farthest right indicates whether, to the extent we can tell from the published opinion, the result of the case would have been different had the court applied the analysis I provide here.

As we have seen, for example, applying an elements-based approach in the *Gillis* case would have mattered: it would have meant the Maryland murder prosecution could not proceed.

But it would be imprudent to conclude that the result in that particular case would portend a radical upheaval of double jeopardy jurisprudence if the elements-based approach I suggest here were to displace the dual sovereignty analysis when a second sovereign pursues a criminal prosecution against a defendant who has already been prosecuted elsewhere. Indeed, the outcome would have been unchanged in *Gamble* itself: because the federal government could be represented as 1+ vis-à-vis Alabama, the plea agreement in Alabama would not have created a DJC barrier to a subsequent prosecution. More generally, cases decided over the past two decades suggest the result in *Gillis* would occur with some regularity, but not with any especial frequency.[76] The elements-based approach would therefore add a modest degree of additional double jeopardy protection but would probably not cause massive upheaval or instability. The disruption it would predictably cause seems a small price to pay for a much greater degree of doctrinal coherence.

APPENDIX I

The following spreadsheet identifies cases decided over the past two decades (2000–2020) addressing a double jeopardy claim in the context of the DSD. The dataset identifies the name of the case (with citation), the relevant jurisdiction, and the disposition. In addition, the final column of the spreadsheet indicates whether the elements-based approach I put forward in this Article, if applied by the court, would have resulted in a different disposition (denoted by Y for yes) or resulted in the same outcome (denoted by N for no).

In a number of cases, it is not possible to state whether my methodology would yield a different outcome compared to existing doctrine. In general, the reason for this uncertainty is that the precise facts found by the jury in the initial proceeding cannot be determined, either because the relevant statute is not identified, or because the jury returned a general verdict of guilt under a statute that allows a conviction on multiple disjunctive grounds. Where I cannot be certain whether the result would be the same or different under an elements-based approach, the final column indicates the result would be unknown (denoted by U).

Over the period studied, we located 100 germane cases. Of that number,

76. *See supra* note 75.

the result under my approach would be the same (or probably be the same) in 69 cases (or 69% of the time); the result would be different (or probably be different) or the result is unknown in 31 cases (or 31% of the time). In short, the consequences of replacing the DSD with an elements-based approach would be meaningful, but not radically destabilizing.

APPENDIX I.

Case	*Dual Sovereignty Doctrine Upheld?*	*Would Results Be Different Using Dow's Theory?*
Hale v. State, 985 S.W.2d 303 (Ark. 1999)	Y	N
United States v. Beckford, 211 F.3d 1266 (4th Cir. 2000)	Y	U
United States v. Denny, 221 F.3d 1349 (9th Cir. 2000)	Y	U
United States v. Walter, 213 F.3d 645 (9th Cir. 2000)	Y	N
State v. Hansen, 627 N.W.2d 195 (Wis. 2001)	N	Y
Byrd v. People, 58 P.3d 50 (Colo. 2002)	N	N
Commonwealth v. Stephenson, 82 S.W.3d 876 (Ky. 2002)	N	U
Garcia v. State Tax Comm'n, 38 P.3d 1266 (Idaho 2002)	Y	N
State v. Myers, 58 P.3d 643 (Haw. 2002)	N	N
State v. Chavez, 668 N.W.2d 89 (S.D. 2003)	Y	U
United States v. Haseley, 67 F. App'x 653 (2d Cir. 2004)	Y	N
United States v. Williams, 87 F. App'x 908 (4th Cir. 2004)	Y	U
People v. Davis, 695 N.W.2d 45 (Mich. 2005)	Y	N
State v. Thomas, 158 S.W.3d 361 (Tenn. 2005)	Y	U

United States v. Villanueva, 408 F.3d 193 (5th Cir. 2005)	Y	U
Koller v. State, 130 P.3d 653 (Nev. 2006)	N	U
United States v. Martinez, No. 05–2350, 2006 WL 2821357 (10th Cir. Oct. 4, 2006)	Y	U
State v. Rodriguez, 917 A.2d. 409 (R.I. 2007)	Y	N
Polito v. Walsh, 871 N.E.2d 537 (N.Y. 2007)	Y	N
United States v. Barrett, 496 F.3d 1079 (10th Cir. 2007)	Y	U
United States v. Clark, 254 F. App'x 528 (6th Cir. 2007)	Y	U
United States v. Jackson, 473 F.3d 660 (6th Cir. 2007)	Y	U
United States v. Layman, 244 F. App'x 206 (10th Cir. 2007)	Y	N
United States v. Scott, 259 F. App'x 579 (4th Cir. 2007)	Y	U
United States v. Tamayo, 223 F. App'x 72 (2d Cir. 2007)	Y	N
United States v. Moreno-Diaz, 257 F. App'x 435 (2d Cir. 2007)	Y	N
United States v. Scott, 259 F. App'x 579 (4th Cir. 2007)	Y	N
United States v. Young, 296 F. App'x 314 (4th Cir. 2008)	Y	N
United States v. Cote, 544 F.3d 88 (2d Cir. 2008)	Y	N
United States v. Harrell, 288 F. App'x 86 (4th Cir. 2008)	Y	N
United States v. Jackson, 292 F. App'x 770 (11th Cir. 2008)	Y	N
United States v. Ross, 300 F. App'x 386 (6th Cir. 2008)	Y	N

United States v. Jackson, 295 F. App'x 572 (4th Cir. 2008)	Y	U
United States v. Young, 296 F. App'x 314 (4th Cir. 2008)	Y	N
Briston v. Wholey, 307 F. App'x 616 (3d Cir. 2009)	Y	N
United States v. Felder, 320 F. App'x 182 (4th Cir. 2009)	Y	N
United States v. Burgest, 519 F.3d 1307 (11th Cir. 2008)	Y	N
United States v. Studabaker, 578 F.3d 423 (6th Cir. 2009)	Y	N
United States v. Deitz, 577 F.3d 672 (6th Cir. 2009)	Y	N
United States v. Douglas, 336 F. App'x 11 (2d Cir. 2009)	Y	U
United States v. Ortiz-Velez, 328 F. App'x 765 (3d Cir. 2009)	Y	N
United States v. Gerhard, 615 F.3d 7 (1st Cir. 2010)	Y	N
United States v. Gholikhan, 370 F. App'x 987 (11th Cir. 2010)	Y	U
United States v. Mardis, 600 F.3d 693 (6th Cir. 2010)	Y	N
United States v. Berringer, 393 F. App'x 257 (6th Cir. 2010)	Y	U
United States v. Moore, 370 F. App'x 559 (5th Cir. 2010)	Y	U
United States v. Vanhoesen, 366 F. App'x 264 (2d Cir. 2010)	Y	N
People v. Homick, 55 Cal. 4th 816 (Cal. 2012)	N	N
United States v. Ward, 505 F. App'x 18 (2d Cir. 2012)	Y	U

United States v. Wilson, 503 F. App'x 598 (10th Cir. 2012)	Y	N
United States v. Piekarsky, 687 F.3d 134 (3d Cir. 2012)	Y	N
United States v. Ballinger, 465 F. App'x 563 (7th Cir. 2012)	Y	U
United States v. Jackson, 491 F. App'x 554 (6th Cir. 2012)	Y	N
United States v. Melton, 496 F. App'x 297 (4th Cir. 2012)	Y	U
State v. Castillo-Alvarez, 836 N.W.2d 527 (Minn. 2013)	N	U
Gladney v. Copenhaven, 508 F. App'x 717 (10th Cir. 2013)	Y	N
State v. Cline, 305 P.3d 55 (Mont. 2013)	N	N
United States v. Ducuara De Saiz, 511 F. App'x 892 (11th Cir. 2013)	Y	N
United States v. McNair, 524 F. App'x 901 (4th Cir. 2013)	Y	N
United States v. Roland, 545 F. App'x 108 (3d Cir. 2013)	Y	N
United States v. Faison, 555 F. App'x 60 (2d Cir. 2014)	Y	N
Kostich v. McCollum, 624 F. App'x 618 (10th Cir. 2015)	Y	N
State v. Hoover, 121 A.3d 1281 (Me. 2015)	Y	N
United States v. Roman, 608 F. App'x 694 (10th Cir. 2015)	Y	N
Ex parte Walker, 489 S.W.3d 1 (Tex. App. 2016)	Y	N
Puerto Rico v. Sanchez Valle, 579 U.S. 59 (2016)	N	N
United States v. Langham, 670 F. App'x 991 (10th Cir. 2016)	Y	N

United States v. Lucas, 841 F.3d 796 (9th Cir. 2016)	Y	N
United States v. Richardson, 672 F. App'x 368 (5th Cir. 2016)	Y	N
State v. Robertson, 438 P.3d 491 (Utah 2017)	N	N
United States v. Gordillo-Escandon, 706 F. App'x 119 (4th Cir. 2017) (mem.)	Y	N
United States v. Morales, 682 F. App'x 690 (10th Cir. 2017)	Y	N
United States v. Sanders, 712 F. App'x 956 (11th Cir. 2017)	Y	N
Calloway v. State, 810 S.E.2d 105 (Ga. 2018)	N	U
Moorer v. United States, No. 16–4721, 2018 WL 2979900 (6th Cir. Apr. 30, 2018)	Y	N
Turner v. United States, 885 F.3d 949 (6th Cir. 2018)	Y	N
United States v. Alcocer Roa, 753 F. App'x 846 (11th Cir. 2018)	Y	U
United States v. Carter, 754 F. App'x 534 (9th Cir. 2018)	Y	N
United States v. Hall, 725 F. App'x 210 (4th Cir. 2018)	Y	U
United States v. Jones, 739 F. App'x 376 (9th Cir. 2018)	Y	U
United States v. Roman, 746 F. App'x 743 (10th Cir. 2018)	Y	U
United States v. Wills, 742 F. App'x 887 (5th Cir. 2018)	Y	N
United States v. Willson, 712 F. App'x 115 (2d Cir. 2018)	Y	N
Gamble v. United States, 139 S. Ct. 1960 (2019)	Y	N

Gutierrez v. Gray, No. 19-3514, 2019 WL 6445420 (6th Cir. Oct. 23, 2019)	Y	N
United States v. Lawson, 773 F. App'x 94 (3d Cir. 2019) (mem.)	Y	N
United States v. Nyenekor, 784 F. App'x 810 (2d Cir. 2019)	Y	U
United States v. Perez, 773 F. App'x 399 (9th Cir. 2019) (mem.)	Y	U
United States v. Reese, 785 F. App'x 343 (6th Cir. 2019)	Y	N
United States v. Reese, 789 F. App'x 112 (11th Cir.)	Y	N
United States v. Almonte-Nunez, 963 F.3d 58 (1st Cir. 2020)	Y	N
United States v. Brown, 973 F.3d 667 (7th Cir. 2020)	Y	N
United States v. Cavazos, 950 F.3d 329 (6th Cir. 2020)	Y	N
United States v. Denezpi, 979 F.3d 777 (10th Cir. 2020)	Y	N
United States v. Hughes, 799 F. App'x 794 (11th Cir. 2020)	Y	N
United States v. James, 831 F. App'x 442 (11th Cir. 2020)	Y	N
United States v. Webb, 965 F.3d 262 (4th Cir. 2020)	Y	N
United States v. Willis, 981 F.3d 511 (6th Cir. 2020)	Y	N
United States v. Brown, 994 F.3d 147 (3d Cir. 2021)	Y	N
United States v. Graves, 846 F. App'x 170 (4th Cir. 2021)	Y	U