THREE-DIMENSIONAL DUAL SOVEREIGNTY: OBSERVATIONS ON THE SHORTCOMINGS OF *GAMBLE V. UNITED STATES*[*]

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I. INTRODUCTION

In *Gamble v. United States*, the Supreme Court reaffirmed the dual sovereignty doctrine, which holds that the Double Jeopardy Clause does not bar successive prosecutions where they are brought by different sovereigns.

Terance Gamble was convicted in Alabama state court of possession of a firearm as a felon.[1] He was sentenced to a term of imprisonment of one year.[2] Subsequently, Gamble was indicted in federal district court for the

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* In the interest of full disclosure, I should state that I co-authored a brief *amicus curiae* with Professors Kiel Brennan-Marquez, Stephen Henderson, and George Thomas in support of the Petitioner in *Gamble v. United States*. *See* Brief Amici Curiae of Criminal Procedure Professors Stephen E. Henderson et al. in *Gamble v. United States*, 139 S. Ct. 1960 (2019). The views expressed herein do not necessarily represent those of my co-authors on the brief.

** Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. This Symposium Article is dedicated to two of my fellow participants in this Symposium: Akhil Amar and George Thomas. Professor Amar's seminar on the Bill of Rights, which I took as a third-year law student, first introduced to me the idea that "federalism insinuated itself throughout the original Bill of Rights." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 180 (1998). Professor Thomas has been a friend and mentor to me almost from my entry into academia, and his article *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001), made me realize that many of the criminal procedure protections of the Bill of Rights are particular instantiations of federalism principles. To the extent that the reader finds anything herein valuable, most of the credit goes to them. To the extent that the reader finds anything in this Article erroneous or ill-conceived, I will gladly take the blame.

1. Gamble v. United States, 139 S. Ct. 1960, 1963 (2019) (citing ALA. CODE § 13A-11-72(a)).
2. *Id.* at 1989 (Ginsburg, J., dissenting).

Southern District of Alabama, charged with violating the federal felon-in-possession statute.[3] He was convicted and sentenced to nearly three more years in prison.[4] The Supreme Court rejected Gamble's argument that the federal prosecution violated the Fifth Amendment's proscription that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[5]

Much of the analysis by both the Court and Justice Gorsuch's dissent revolved around the original public meaning of the Double Jeopardy Clause in 1791. Both sides relied heavily on the pre-1791 common-law treatment of cross-national prosecutions.[6] The question was whether the common-law pleas of *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction) were recognized as valid pleas in a successive prosecution in one jurisdiction following a conviction or acquittal in another jurisdiction.[7] At most, the Court suggested, recognition of such pleas was a matter of comity, not law.[8] Justice Gorsuch, by contrast, saw the pre-1791 common law as clearly establishing the validity of the two common-law pleas in the context of cross-national successive prosecutions.[9]

Both sides in *Gamble* essentially treated the dual sovereignty doctrine as monolithic. Perhaps, given the focus on pre-1791 common law, this is not surprising. Before the creation of the American republic, the issue would have arisen almost exclusively in the context of successive prosecutions by fully independent nations. However, after 1791, the doctrine is invoked in three additional contexts: As in *Gamble* itself, the federal government might prosecute following a state prosecution; a state might prosecute following a federal prosecution; or a state might prosecute after another state prosecution.[10] The *Gamble* Court failed to pay adequate attention to how the potential justifications for a bar to successive inter-sovereign prosecutions might differ by context, notwithstanding the pre-1791 common law.

Assuming the majority was correct about the pre-1791 common law regarding cross-national, successive prosecutions, that context is most closely analogous to successive state–state prosecutions, which sovereignty is truly separate rather than overlapping.[11] By contrast, successive state–federal prosecutions, as in *Gamble* itself, come within the heartland of the

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3. *Id.* (citing 18 U.S.C. § 922(g)(1)).

4. *Id.*

5. U.S. CONST. amend. V; *see Gamble*, 139 S. Ct. at 1965–66.

6. *See Gamble*, 139 S. Ct. at 1969–76; *id.* at 2000–02 (Gorsuch, J., dissenting).

7. *See id.* at 1969 (majority opinion) (citing Grady v. Corbin, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting)).

8. *See id.* at 1975 & n.12.

9. *Id.* at 2000–01 (Gorsuch, J., dissenting).

10. For the sake of clarity and conciseness, these are referred to, respectively, as state–federal cases, federal–state cases, and state–state cases.

11. *See* Akhil R. Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 8 n.42 (1995) ("English double jeopardy principles . . . are far more illuminating for state-state dual sovereignty than for federal-state or state-federal dual sovereignty.").

double jeopardy prohibition. The Double Jeopardy Clause is only one provision of a larger project (the criminal procedure provisions of the Bill of Rights as a whole), which the framers and ratifiers adopted to assure the continuing primacy of the states in meting out criminal justice. The Double Jeopardy Clause, like many of these provisions, is as much about federalism as it is about rights.

By contrast, successive federal–state prosecutions are governed by the Due Process Clause of the Fourteenth Amendment. Though the Court has told us that that Clause incorporates most of the Bill of Rights lock, stock, and barrel,[12] wholesale incorporation is highly problematic if the Double Jeopardy Clause has a prominent federalism component. Even assuming that the framers and ratifiers of the Fourteenth Amendment understood it as incorporating the Fifth Amendment, the determination of whether there is a constitutional bar on successive federal–state prosecutions must temper that understanding with the recognition that the federalism aspect of the Double Jeopardy Clause cannot be incorporated. Moreover, it may well be that by 1868, the dual sovereignty doctrine had solidified, such that the original public meaning of the Fourteenth Amendment was that it incorporated the Double Jeopardy Clause with a dual-sovereignty gloss.

When it comes to successive state–state prosecutions, we must turn back to the pre-1791 common law on successive inter-sovereign prosecutions. Assuming the *Gamble* majority was correct that the bar on such prosecutions was a matter of comity, one must ask whether the text and structure of the Constitution justify a different outcome when it comes to sister states, as it does in the context of interstate sovereign immunity. And because state power is limited also by the Fourteenth Amendment, one must layer on top of this analysis the same question regarding federal–state prosecutions: What was due process understood as requiring in 1868?

This Article contends that courts should analyze these three varieties of successive domestic inter-sovereign prosecutions separately.[13] It also argues that *Gamble* incorrectly held that the Double Jeopardy Clause does not bar state–federal cases. While it also briefly explores federal–state and state–state cases, it ultimately remains agnostic on those issues. Part II explores the way in which both the *Gamble* Court and the dissents failed to see the dual sovereignty doctrine as existing in three dimensions, not just one. Part III then explores the respective interests and values underlying the double jeopardy prohibition in each of the three possible dimensions of successive domestic inter-sovereign prosecutions.

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12. *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

13. Only a few modern scholars have explored this possibility. *See, e.g.*, Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 302 (1992).

II. *GAMBLE V. UNITED STATES* AND THE JUSTICES' ONE-DIMENSIONAL VIEW OF DUAL SOVEREIGNTY

Gamble v. United States[14] was a state–federal case in which double jeopardy protections should have been at their apogee. However, because the Court had previously held that the dual sovereignty doctrine applies to both successive federal–state[15] and state–state[16] prosecutions, all nine Justices essentially treated the Double Jeopardy Clause as applying in the same way no matter the context.

Take, for example, the way the Court described the dual sovereignty doctrine at the outset of its decision: "Under this 'dual-sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute. Or the reverse may happen, as it did here."[17] The Court also lumped together the three cases from 1847 to 1852, noting that "[t]he question of successive federal and state prosecutions arose" there.[18] However, two of those cases, *Fox v. Ohio*[19] and *Moore v. Illinois*,[20] involved potential successive state–federal prosecutions, while *United States v. Marigold*[21] involved a potential successive federal–state prosecution. In its lengthy discussion of the pre-1791 common law,[22] not once did the Court recognize that the nearest analogy to the scenario presented in that analysis—recognition of an acquittal or conviction of one nation by another nation—would be state–state cases, not federal–state cases, and certainly not state–federal cases, such as *Gamble*.

Only sporadically did any of the Justices recognize the difference between dual sovereignty within the American system and dual sovereignty between and among nations. In his concurring opinion, Justice Thomas briefly pointed out the "absence of an analogous dual-sovereign system in England" but cited that fact in support of the proposition that the framers and ratifiers of the Fifth Amendment probably did not foresee the problem of dual domestic prosecutions.[23] In dissent, Justice Gorsuch allowed that, in the context of our federal system, a bar on double jeopardy that is not sovereign-specific is even more justified than it would be across national boundaries. After surveying the pre-1791 common law, which he read as

14. *See generally Gamble*, 139 S. Ct. 1960.
15. Bartkus v. Illinois, 359 U.S. 121, 132–33 (1959).
16. Heath v. Alabama, 474 U.S. 82, 88 (1985).
17. *Id.* at 1964.
18. *Id.* at 1966.
19. Fox v. Ohio, 46 U.S. 410, 432 (1847).
20. Moore v. Illinois, 55 U.S. 13, 17 (1852).
21. United States v. Marigold, 50 U.S. 560 (1850).
22. *Gamble*, 139 S. Ct. at 1969–76.
23. *Id.* at 1980 (Thomas, J., concurring); *see also id.* at 1987 (referring to "the unique two-sovereign federalist system created by our Constitution").

barring successive prosecutions even by different sovereigns, he wrote that "anyone familiar with the American federal system likely would have thought [in 1791] the rule applied with even greater force to successive prosecutions by the United States and a constituent State, given that both governments derive their sovereignty from the American people."[24]

However, this passage also suggested that state–federal and federal–state cases should be treated identically, a reading strengthened by his conflation of the two when he asked rhetorically: "[I]f double jeopardy prevents *one* government from prosecuting a defendant multiple times for the same offense under the banner of separate statutory labels, on what account can it make a difference when *many* governments collectively seek to do the same thing?"[25] Further, his reading of the pre-1791 common law strongly suggests that state–state cases should be barred as well.[26] At the end of the day, Justice Gorsuch apparently believed that all variety of successive prosecutions should be treated alike—they should all be forbidden.

Justice Ginsburg, also dissenting, seemed to understand that successive domestic inter-sovereign prosecutions are different from successive prosecutions by different nations, writing that "Gamble was convicted in both Alabama and the United States, jurisdictions that are not foreign to each other."[27] But this, too, fails to distinguish state–federal and federal–state cases. Justice Ginsburg later confirmed her conflation of the two: "[T]he liberty-denying potential of successive prosecutions, when Federal and State Governments prosecute in tandem, is the same as it is when either prosecutes twice."[28] For Justice Ginsburg, then, the order of prosecutions was irrelevant.

This conflation of the three types of successive domestic inter-sovereign prosecutions worked much mischief in the majority opinion. In rejecting one of Gamble's historical claims, the Court analogized between a state–federal case, such as *Gamble*, and the practice of King George III of allowing British officials accused of crimes in the colonies to be transported to Britain for trial, rather than allowing local juries to try them.[29] The Court used this historical tidbit to dismiss Gamble's argument: "[O]n Gamble's reading, the same Founders who quite literally *revolted* against the use of acquittals abroad to bar criminal prosecutions here would soon give us an Amendment allowing foreign acquittals to spare domestic criminals. We doubt it."[30]

But the Court's example is inapposite because it reversed the roles of the prosecuting authorities involved in *Gamble*. The episode that raised the ire of the colonists involved a large, distant, central government (Britain)

24. *Id.* at 2002.
25. *Id.* at 1998.
26. *Id*. at 2000–02.
27. *Id.* at 1990 (Ginsburg, J., dissenting).
28. *Id.* at 1991.
29. *Id.* at 1965–66 (majority opinion).
30. *Id.* at 1966 (emphasis in original).

prosecuting first, potentially preempting the criminal justice prerogatives of a small, local, accountable government (the colony). *Gamble* involved just the reverse: a small, local, accountable government (the State) prosecuting first, potentially preempting the criminal justice machinery of a large, distant, central government (the federal government). That the colonists bristled at the former says nothing about how they felt about the latter. Indeed, as I will argue, the framers and ratifiers of the Bill of Rights not only had no qualms about local criminal justice policy preempting that of the federal government; they affirmatively sought that result.

III. DUAL SOVEREIGNTY IN THREE DIMENSIONS

The *Gamble* Court may well have been correct that the common law as of 1791 did not clearly provide that successive prosecutions by separate sovereigns would be barred by valid pleas of *autrefois acquit* and *autrefois convict*.[31] But even granting that, this does not settle the dual sovereignty question. The common law cannot be wrenched from its context, which addressed the relations between fully independent states and applied reflexively to the then-new Federal Republic.[32] As Justice Kennedy so evocatively put it: "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty."[33] Our constitutional structure contemplates three different kinds of successive inter-sovereign prosecutions unknown prior to the framing: state–federal, federal–state, and state–state. Our double jeopardy jurisprudence has unfortunately elided the distinctions among these three contexts.

A. Successive State–Federal Prosecutions: Double Jeopardy and Federalism

When the question is successive state–federal prosecutions, as in *Gamble* itself, the Double Jeopardy Clause applies directly, unmediated by the Fourteenth Amendment. And the Bill of Rights is as much about federalism as it is about individual rights. Although the conventional narrative on the dual sovereignty doctrine pits individual rights against federalism,[34] the two are not in tension here. The framers and ratifiers of the Bill of Rights understood that individual rights and federalism are intertwined.

That the Double Jeopardy Clause, in particular, is of this nature is suggested by an episode in the drafting history of the Clause to which the

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31. *Id.* at 1969–76.

32. *See* Dawson, *supra* note 13, at 285.

33. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

34. *See, e.g.*, Earl M. Barker, Jr. & Donald J. Hall, *Multiple Prosecution: Federalism vs. Individual Rights*, 20 U. FLA. L. REV. 355 (1968).

Gamble Court gave short shrift. On August 17, 1789, the House of Representatives was considering the proposed Double Jeopardy Clause in the form submitted to it by James Madison: "No person shall be subject, [except] in cases of impeachment, to more than one trial or one punishment for the same offence . . . ."[35] Representative George Partridge of Massachusetts "moved to insert after 'same offence,' the words 'by any law of the United States.'"[36] But "[t]his amendment was lost."[37] Had the Partridge motion passed, the Clause would then have read: "No person shall be subject, except in cases of impeachment, to more than one trial or one punishment for the same offence by any law of the United States." Gamble argued that the rejection of the Partridge amendment means that "Congress must have intended to bar successive prosecutions regardless of the sovereign bringing the charge."[38]

To demonstrate that Gamble was probably right, let us first examine what else the amendment and its rejection could have signified. First, the motion might have been intended to make clear that the Double Jeopardy Clause applied only to the federal government. If so, its rejection could lead to the surprising conclusion that the Clause was understood as applying to the states as well.[39] This interpretation is so implausible as to be readily dismissed. For one thing, no other provision of the Bill of Rights, except for the First Amendment—which is limited to "Congress"—and the Seventh Amendment—which mentions the "Court[s] of the United States"—is explicitly limited to the federal government.[40] Yet the common understanding of the founding generation, confirmed unanimously a generation later in *Barron v. City of Baltimore*,[41] was that the Bill implicitly bound only the federal government and not the states. It is extremely unlikely that the failed motion was designed to make explicit regarding the Double Jeopardy Clause what was implicit regarding the Bill of Rights generally. Indeed, had any Member of Congress wanted to do so, the much more obvious place to include an express limitation would have been in what became the Sixth Amendment, which begins: "In *all* criminal prosecutions . . . ."[42]

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35. 1 ANNALS OF CONG. 753 (1789) (Joseph Gales ed. 1834). The Annals of Congress erroneously omits the word "except."

36. *Id.* at 782.

37. *Id.*

38. Gamble v. United States, 139 S. Ct. 1960, 1965 (2019).

39. *See* JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 30–31 (1969) (making this suggestion).

40. U.S. CONST. amends. I, VII.

41. Barron v. City of Baltimore, 32 U.S. 243, 247 (1833).

42. U.S. CONST. amend. VI (emphasis added).

This interpretation is implausible for a second reason: Representative Partridge was a pro-administration Federalist.[43] Partridge would thus have had no interest in explicitly limiting the Double Jeopardy Clause to the federal government. On the contrary, the Federalists generally supported the enhancement of the powers of the federal government.[44] One would perhaps expect an Anti-Federalist to propose language clarifying that the Double Jeopardy Clause did not apply to the states (and the fact that this did not occur demonstrates powerfully, again, that this limitation was implicit). But for a Federalist to have done so would have made little sense.

Another possible interpretation of the failed Partridge amendment is that Partridge could have been using the word "law" to mean only statutory law in an attempt to limit the Clause to statutory crimes, as opposed to common-law crimes. Such an interpretation at least has the benefit of being consistent with Federalist ideology, given that the motion would have, on that view, enhanced federal power by limiting the applicability of the Clause. But this interpretation is also implausible. The only basis for federal jurisdiction over federal crimes was Article III, Section Two, Clause One: "The judicial Power shall extend to all Cases . . . arising under . . . the Laws of the United States . . . ."[45] If Partridge believed that the phrase "the Laws of the United States" in Article III included jurisdiction over federal common-law crimes, then his virtually identical proposed language in the Double Jeopardy Clause—"law of the United States"[46]—would not have distinguished between statutory and common-law crimes. On the other hand, if Partridge believed that the phrase "the Laws of the United States" in Article III did not include jurisdiction over federal common-law crimes, then his proposed language would have been completely unnecessary: A prior federal conviction or acquittal could be only for a statutory crime. Thus, interpreting Partridge's rejected language as distinguishing between statutory and common-law crimes also makes no sense.

The most plausible interpretation of this episode is that by rejecting the Partridge amendment, the framers of the Double Jeopardy Clause were, in effect, rejecting the dual sovereignty doctrine.[47] Partridge and his colleagues

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43. *See* John H. Aldrich & Ruth W. Grant, *The Antifederalists, the First Congress, and the First Parties*, 55 J. POL. 295, 322 (1993).

44. *See* Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 827–28 (2000).

45. U.S. CONST. art. III, § 2.

46. *See* 1 ANNALS OF CONGRESS 782 (1789) (Joseph Gales ed. 1834).

47. *See* Gamble v. United States, 139 S. Ct. 1960, 1965 (2019); *id.* at 1992 (Ginsburg, J., dissenting); Abbate v. United States, 359 U.S. 187, 204 (1959) (Black, J., dissenting); Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 809 (1985); Dominic T. Holzhaus, Note, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 COLUM. L. REV. 1697, 1708 (1986); Ray C. Stoner, Note, *Double Jeopardy and Dual Sovereignty: A Critical Analysis*, 11 WM. & MARY L. REV. 946, 947–48 (1970); Philip K. Sweigert, Note, *Constitutional Law: Successive State and Federal Prosecutions Following Conviction or Acquittal*, 11 HASTINGS L.J. 204, 209 (1959).

in the House probably understood that without his proposal, the Clause could be read as forbidding a federal prosecution following a prior federal *or state* prosecution. As a pro-administration Federalist, Partridge likely wanted to limit this constraint on the federal government so that it applied only to successive federal–federal prosecutions. That his motion failed strongly implies that the Clause was understood as covering successive state–federal prosecutions as well.

Nevertheless, the *Gamble* Court rejected this contention for two reasons. First, it wrote, "[t]he private intent behind a drafter's rejection of one version of a text is shoddy evidence of the public meaning of an altogether different text."[48] However, as Justice Ginsburg pointed out in her dissent, the Court has, in other contexts, drawn the very inference the Court here rejected.[49] In *Cook v. Gralike*, the Court rejected the idea that the states or their people had reserved power under the Tenth Amendment to give binding instructions to federal representatives, observing "that the First Congress rejected a proposal to insert a right of the people 'to instruct their representatives' into what would become the First Amendment."[50] In language that would apply equally well in *Gamble*, the *Cook* Court wrote: "The fact that the proposal was made suggests that its proponents thought it necessary, and the fact that it was rejected . . . suggests that we should give weight to the views of those who opposed the proposal."[51]

The second reason the Court gave for rejecting the argument about the defeated Partridge amendment has already been discussed: its conflation of the danger perceived by the framers and ratifiers of the Bill of Rights and the danger perceived fifteen years earlier by the colonists. Recall that the Court pointed out the colonists' abhorrence at the policy of the British Crown regarding crimes committed by British officials in the colonies by prosecuting the offenders in Britain.[52] But citing that episode as a refutation of Gamble's argument was not simply wrong; it was downright perverse. The Court was correct that Americans of that period would have bristled at the prospect of prosecution by a large, powerful, distant, central government preempting prosecution by local authorities. But the Double Jeopardy Clause, properly understood, did precisely the opposite: it permitted *local* prosecutions to preempt *federal* prosecutions. Thus, objection to the practice cited in the Declaration of Independence was entirely consistent with reading the Double Jeopardy Clause as forbidding successive state–federal prosecutions.

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

49. *Id.* at 1992 n.2 (Ginsburg, J., dissenting).

50. Cook v. Gralike, 531 U.S. 510, 521 (2001) (quoting 1 ANNALS OF CONG. 732 (1789)).

51. *Id.*

52. *Gamble*, 139 S. Ct. at 1965–66; *see supra* text accompanying notes 29–31 (explaining that the colonists were dissatisfied with Britain preempting local prosecutions).

To understand why such a reading is likely the correct one, even beyond the strong evidence supplied by the failed Partridge amendment, let us turn to an error made by Justice Thomas in his concurring opinion. He claimed that "[t]he founding generation foresaw very limited potential for overlapping criminal prosecutions by the States and the Federal Government."[53] But this is demonstrably wrong. On the contrary, the fear that the new central government would create a criminal code parallel to those of the states was precisely what drove the Anti-Federalists to demand a Bill of Rights. For example, in his June 16, 1788 speech at the Virginia ratifying convention, Patrick Henry could not have been more explicit about the "potential for overlapping criminal prosecutions by the States and the Federal Government" when he complained: "Congress from their general powers may fully go into the business of human legislation. *They may legislate in criminal cases from treason to the lowest offence, petty larceny*. They may define crimes and prescribe punishments."[54] Henry foresaw that the more general language of Article I could be interpreted to permit Congress to "fully" create a criminal code that covered most human affairs, even going so far as to enact a federal petty-larceny statute, something it could well do under the prevailing interpretation of the Commerce Clause.[55] After all, even larceny of a candy bar from a drug store, in some small way, affects interstate commerce, particularly when one aggregates the effects of all such larcenies.[56]

George Mason, in his widely read and extremely influential[57] *Objections to the Constitution of Government Formed by the Convention*, expressed much the same sentiment. He wrote: "Under their own Construction of the general Clause at the End of the enumerated powers [i.e., the Necessary and Proper Clause] the Congress may . . . constitute new Crimes, inflict unusual and severe Punishments, and extend their Power as far as they shall think proper . . . ."[58] Although not quite as explicit as Henry, Mason was raising the specter of the new federal government's creating a vast criminal code to

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53. *Id.* at 1980 & n.1 (Thomas, J., concurring).

54. Patrick Henry, Speech in the Virginia State Ratifying Convention (June 16, 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 248 (Herbert J. Storing ed., 1981) [hereinafter STORING] (emphasis added).

55. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding that Congress may regulate even the purely intrastate possession of narcotics).

56. *See* Taylor v. United States, 136 S. Ct. 2074, 2079 (2016) (holding that the Hobbs Act, which forbids robbery that "affects commerce," applies to all "commerce" over which Congress has jurisdiction, even when the article stolen has never crossed state lines).

57. *See* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 29 (1999).

58. George Mason, *Objections to the Constitution of Government Formed by the Convention (1787)*, *reprinted in* 2 STORING, *supra* note 54, at 13.

reach into all facets of human life, using the Necessary and Proper Clause as the basis.[59]

Additionally, prevailing thought among the Federalists on federal common law suggests strongly that they, too, saw great potential for overlap between state and federal criminal law. The issue of whether there was a general federal common law of crime embroiled the Republic in controversy for its first two decades.[60] The Federalists took the position that there was indeed a federal criminal common law.[61] If Federalists thought that federal courts could, where they otherwise had jurisdiction, mete out punishment for ordinary common-law crimes under the auspices of federal criminal common law, they must have believed that there was a very substantial potential for overlap between state and federal criminal law.

The premise that the founding generation generally understood the reach of the federal prosecutor to be potentially very long tells us much about why we have the criminal procedure protections of the Bill of Rights. Because the Bill was the price paid by the Federalists to the Anti-Federalists for their reluctant acquiescence to the ratification of the Constitution, Anti-Federalist thought is critical to understanding the Bill.[62] The Anti-Federalist motivation behind the criminal procedure protections of the Bill was largely to maintain state supremacy in the field of crime and punishment.[63] Without a bill of rights, the federal government could use a potentially vast federal criminal code to sidestep common-law constraints on prosecution and punishment displacing state criminal law and annihilating the common-law Anglophone rights that had built up over the centuries.[64]

The Anti-Federalist solution was to impose on the federal government the same constraints on criminal prosecutions that the states imposed on themselves through their own constitutions, bills of rights, and common-law heritage.[65] While the Constitution allowed for a potentially vast criminal code, the criminal procedure protections of the Bill ensured that the federal government would at least have a hard time convicting and punishing alleged

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59. *See, e.g.*, JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788, at 124 (1961) ("Since the powers of Congress were so extensive, state and general governments would frequently legislate on the same subject . . . .").

60. *Id.* at 114–20.

61. *See id.* at 116–20.

62. *See* Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39, 67 (1989); Robert C. Palmer, *Liberties as Constitutional Provisions, 1776–1791*, in LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55, 105 (William E. Nelson & Robert C. Palmer eds., 1987); *see also* Aaron Zelinsky, *Misunderstanding the Anti-Federalist Papers: The Dangers of Availability*, 63 ALA. L. REV. 1067, 1080 (2012) ("[T]he Court has invoked the Anti-Federalist Papers as constructive authors of [virtually] every amendment in the Bill of Rights . . . .").

63. *See* Michael Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 106 (2012).

64. *See* Cornell, *supra* note 62, at 69.

65. *See* Mannheimer, *supra* note 63.

offenders as the states did.[66] In that way, the Bill of Rights would take away any comparative advantage the federal government would otherwise have in prosecuting crimes. Thus, State primacy in the field of crime and punishment would be maintained against the centripetal force of the new central government.[67]

The motivations of the Anti-Federalists dovetail neatly with two overarching goals of the Double Jeopardy Clause: preserving the historic fact-finding role of the jury and preventing over-punishment. As Peter Westen and Richard Drubel argued, the primary rationale for the plea of *autrefois acquit* is to preserve "the jury's legitimate authority to acquit against the evidence."[68] And "[t]he principal interest . . . underlying the historical plea of *autrefois convict* [is] to protect the defendant from being subjected to double punishment for the same offense."[69]

That the framers and ratifiers of the Bill of Rights wanted to preserve the historic fact-finding role of the jury is evident from the inclusion of a provision to do just that: the Jury Trial Clause of the Sixth Amendment.[70] Although the proposed Constitution required that crimes be tried by juries in the state where the crime occurred,[71] the Anti-Federalists spent much of their time and energy critiquing that bare requirement and advocating for a provision that the jury come from the same "district" where the crime occurred.[72] They were successful, of course, and the Sixth Amendment jury-trial right was the result.

The primary goal of the Anti-Federalists in dedicating so much energy to making the jury-trial right more robust was to ensure that the local community has final say over a criminal defendant's guilt or non-guilt. Juries are no more qualified than judges to determine facts.[73] Indeed, they are arguably less qualified, given that judges find juridical facts for a living while jurors do so only on rare occasions. But juries provide benefits that judges appointed by the central government could not: knowledge of local conditions, customs, norms, and morals, and familiarity with the character of the defendant and the witnesses.[74] Only local jurors could view the facts adduced at trial through the lens created by localized knowledge.[75] This meant that local juries might view the evidence more favorably to the accused

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66. *See* Thomas, *supra* note **, at 160.

67. *See* Mannheimer, *supra* note 63, at 106.

68. Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 129.

69. *Id.* at 107.

70. U.S. CONST. amend. VI.

71. U.S. CONST. art. III, § 2, cl. 3.

72. *See* GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 99 (2008); Thomas, *supra* note **, at 175–76.

73. Thomas, *supra* note **, at 175–76.

74. *Id.* at 179.

75. *See* Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 91 (1989).

than twelve strangers would, that they might need more convincing to find guilt beyond a reasonable doubt, and, where they perceived the government to be overreaching, that they might acquit against the evidence.[76]

Again, the Jury Trial Clause, like the other criminal procedure protections of the Bill of Rights, serves largely to make it more difficult for the federal government to obtain convictions.[77] And the Double Jeopardy Clause, as Professor Amar has put it, "dovetails with the Sixth Amendment jury right. Together these clauses safeguard . . . the integrity of the initial petit jury's judgment."[78] This is true even—especially—where that jury acquits against the evidence.[79] State nullification of federal interests, via acquittals against the evidence that would preempt federal prosecutions, was a feature, not a bug.[80]

Likewise, we know that the framers and ratifiers of the Bill of Rights were concerned about the prospect of over-punishment because they included a provision specifically designed to prevent it: The Cruel and Unusual Punishments Clause of the Eighth Amendment.[81] That Clause was understood in 1791 as forbidding not just some methods of punishment but also punishment that was disproportionate.[82] And at least one—perhaps the primary—aspect of disproportionality that the Clause was adopted to avoid was disproportionately harsh federal punishments as compared with state punishments for the same conduct.[83] In its most extreme application, the Cruel and Unusual Punishments Clause would prevent the federal government even from criminalizing conduct that the states could make criminal but have not.

On this view, we can conceptualize the Double Jeopardy Clause as performing on a retail basis what the Cruel and Unusual Punishments Clause does wholesale. The Cruel and Unusual Punishments Clause prevents Congress from either authorizing punishment for a crime that is harsher than the states authorize for the same conduct or criminalizing conduct that is not

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76. AMAR, *supra* note **, at 180; Thomas, *supra* note **, at 179; Westen & Drubel, *supra* note 68, at 131.

77. Thomas, *supra* note **, at 179.

78. AMAR, *supra* note **, at 96; *see also* Dawson, *supra* note 13, at 288 ("[J]uries serve the role of 'populist protectors[]' . . . .").

79. AMAR, *supra* note **, at 96–97. *See also* Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 640 (1993); Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073, 1088 (1982).

80. *Contra* James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477, 487–88 (1979); David B. Owsley, Note, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 WASH. U. L.Q. 765, 783–84 (2003).

81. U.S. CONST. amend VIII.

82. *See generally* Michael J.Z. Mannheimer, Harmelin*'s Faulty Originalism*, 14 NEV. L.J. 522 (2014); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011).

83. *See generally* Mannheimer, *supra* note 63.

criminal under state law.[84] That is to say, the Clause ensures that the people of each state decide what conduct within their territory makes a person culpable and, if so, how culpable. The Double Jeopardy Clause does the same but on a retail basis. It ensures that the punishment attached to a state court conviction, in an amount the State deems appropriate for a particular offender, is not supplemented by the federal government. And it ensures that a state court acquittal, a judgment by a local jury that the defendant's acts were non-culpable, cannot be second-guessed in federal court.

Both defenders and detractors of the dual sovereignty doctrine see it as a triumph of structural concerns over individual rights;[85] they merely disagree over whether the balance has been struck correctly. But the dual sovereignty doctrine, at least in the state–federal context, is actually undermined by the same structural concerns used to defend it.[86] The Double Jeopardy Clause is infused with the spirit of federalism. Had the *Gamble* Court seen that, it could have isolated successive state–federal prosecutions from its superficially similar but actually quite distinct siblings.

B. Successive Federal–State Prosecutions: Double Jeopardy and Due Process as Separation of Powers

If the Double Jeopardy Clause is largely about federalism, and if the framers and ratifiers of the Fourteenth Amendment intended that it incorporated the Bill of Rights against the States (a contestable point but assumed here for sake of argument) then that leaves us with a paradox: How can the framers and ratifiers of the Fourteenth Amendment have intended to impose on the States a provision so pointedly designed to preserve state power?[87] A full examination of this question must await another day, but at least two possibilities are worth exploring.

First, it is likely that by 1868, the federalism aspect of the Double Jeopardy Clause had faded from memory,[88] and that the prevailing view of the Clause was that it incorporated a dual sovereignty component. In a series

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84. *Id.* at 120–22.

85. *See, e.g.*, Holzhaus, *supra* note 47, at 1705; King, *supra* note 80, at 481; Owsley, *supra* note 80, at 767; Sweigert, *supra* note 47, at 205.

86. *See* Dawson, *supra* note 13, at 285 (critiquing the "fail[ure] to appreciate the structural purpose of the Double Jeopardy Clause" as opposed to a mere "procedural safeguard[] afforded criminal defendants").

87. *See* Amar & Marcus, *supra* note 11, at 25 ("The Fourteenth Amendment framers clearly did mean to apply the Bill of Rights generally against the states, but did not 'carefully consider[] clause by clause exactly how the Bill could be sensibly incorporated.'") (alteration in original) (quoting Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1243 (1991)).

88. *See* Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, *in* BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 71, 85 (Terry Eastland ed., 1995).

of three cases from 1847 to 1852, the Supreme Court said just that in dicta.[89] For example, in *Moore* v. *Illinois*, decided by an 8–1 vote a scant sixteen years before the Fourteenth Amendment was adopted, the Court articulated the rationale for the dual sovereignty doctrine ultimately reaffirmed in *Gamble*:

> Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may . . . punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.[90]

If this was the prevailing view,[91] then the original public meaning of the Fourteenth Amendment might have encompassed both an understanding that the Double Jeopardy Clause applied to the States, and that this brought with it the dual sovereignty gloss added by *Fox*, *Marigold*, and *Moore*.

The second way to view the incorporation of the Double Jeopardy Clause is through the lens of what Professor Akhil Amar called "refined incorporation."[92] "Certain alloyed provisions of the original Bill [of Rights] —part citizen right, part state right—may need to undergo refinement and filtration before their citizen-right elements can be absorbed by the Fourteenth Amendment."[93] Even if the Clause has a strong federalism component, it undoubtedly has a rights-based aspect as well. The trick in applying the Clause to the states is in filtering out the former while retaining the latter. While the primary individual rights concerns in 1791 had a heavy federalism accent, the main concern in 1868 was individual rights heavily inflected with separation of powers. As Professors Nathan Chapman and Michael McConnell have argued, whatever else "due process of law" might mean, at its core it requires that executive and judicial officials follow the law in meting out justice without making arbitrary or discriminatory distinctions in individual cases.[94]

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89. *See* Moore v. Illinois, 55 U.S. 13, 17 (1852); United States v. Marigold, 50 U.S. 560, 568–70 (1850); Fox v. Ohio, 46 U.S. 410, 432 (1847).

90. *Moore*, 55 U.S. at 20.

91. *But see* Susan N. Herman, *Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy*, 95 COLUM. L. REV. 1090, 1103 (1995) (asserting that "some federal officials of the [Reconstruction era] are said to have regarded the Double Jeopardy Clause as a limitation on their ability to reprosecute" after a state prosecution).

92. *See* AMAR, *supra* note **, at 225–30.

93. *Id.* at xiv.

94. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012).

In this light, Professor George Thomas's view of the Double Jeopardy Clause as a limit on executive and judicial, but not legislative, officials makes much sense as applied through the Fourteenth Amendment. On that view, legislatures can define offenses and permit re-litigation in some cases to the extent they deem it necessary to punish culpable conduct.[95] But however state legislatures wish to define and punish criminal offenses, prosecutors and judges cannot get around those constraints to over-punish or second-guess acquittals in individual cases by splitting claims or re-litigating issues when not legislatively authorized.[96] The dual sovereignty question, on this view, is one of legislative intent: Did the legislature intend for a successive state prosecution following acquittal or conviction by another jurisdiction?[97] Perhaps, as Professor Thomas suggested, the answer should be "no" unless the legislature makes such authorization explicit.[98]

C. Successive State–State Prosecutions: Double Jeopardy and Interstate Comity

What, then, of successive state–state prosecutions? Again, while a full examination of this question is beyond the scope of this Article, some preliminary thoughts can be sketched out. First, of course, whatever Fourteenth Amendment constraints apply to successive federal–state prosecutions would apply here too. Again, at a minimum, successive state–state prosecutions might be barred unless explicitly authorized by the legislature.

But there might be additional constraints on such prosecutions rooted not in the Fourteenth Amendment but in our constitutional structure and its premise of interstate comity.[99] Specifically, if the *Gamble* Court was correct in suggesting that pre-1791 common law treated inter-sovereign successive prosecutions as implicating mere comity concerns,[100] that would seem to apply to the states as well, whether pre- or post-ratification. Again, that might support Professor Thomas's thesis of legislative supremacy in this area.

But there is a twist. Comity among independent sovereigns is not mere courtesy; it is courtesy in the shadow of a threat.[101] A sovereign nation, if it

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95. GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 66 (1998).

96. *See id.* at 59 ("Legislatures could be trusted to divide wrongdoing into appropriate units for punishment and prosecution, but prosecutors and judges could not necessarily be trusted to respect those choices.") (quoting Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 115 (1995)).

97. *Id.* at 190; *see also* Walter T. Fisher, *Double Jeopardy, Two Sovereigns and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 600 (1961) ("The courts have failed to distinguish between disregard of a foreign judgment when authorized by statute and disregard of a foreign judgment at the unauthorized election of the prosecutor.").

98. *See* THOMAS, *supra* note 95, at 190.

99. *See* U.S. CONST. art. IV, §§ 1, 2.

100. *See* Gamble v. United States, 139 S. Ct. 1960, 1975 & n.12 (2019).

101. *See* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1496–97 (2019).

feels that it is not being treated with the respect it deserves, can respond not only by reciprocating in kind but also with stronger measures: diplomatic persuasion, economic sanctions, or, in the extreme case, war.[102] It may do so alone or in league with like-minded nations. But the states do not have those same weapons in their arsenal: the Constitution largely prevents economic measures,[103] it outright forbids offensive warfare,[104] and it eschews formal alliances among states or with foreign governments.[105] Thus, relations that were governed by comity prior to 1788 might require enforcement by the federal government post-ratification.

Such is the case regarding interstate sovereign immunity, as the Court held just a month before *Gamble* in *Franchise Tax Board v. Hyatt*.[106] The majority in *Hyatt* acknowledged that "before the Constitution was ratified, the States had the power of fully independent nations to deny immunity to fellow sovereigns."[107] However, the Court concluded, "the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns."[108] Specifically, the Constitution "divests the States of the traditional diplomatic and military tools" that other sovereigns could use to "prevent or remedy departures from customary international law."[109] As a result, the Constitution replaced the system of comity vis-à-vis sovereign immunity with a system that "embeds interstate sovereign immunity within the constitutional design."[110]

Perhaps the same is true of interstate recognition of criminal judgments. Even if the majority in *Gamble* was correct that such recognition was based purely on comity at common law, the Constitution might have changed this. This is particularly true given that the Constitution contains an explicit requirement of interstate recognition of judgments: The Full Faith and Credit Clause.[111] This provision has historically been read to exclude criminal

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102. *See id.* at 1497.

103. *See* U.S. CONST. art. 1, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ."); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019) ("[I]f a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to 'advance a legitimate local purpose.'").

104. *See* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

105. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . ."); U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .").

106. *Franchise Tax Bd.*, 139 S. Ct. at 1485.

107. *Id.* at 1496; *see also id.* at 1500 (Breyer, J., dissenting) ("At the time of the founding, nations granted other nations sovereign immunity in their courts not as a matter of legal obligation but as a matter of choice, *i.e.*, of comity or grace or consent.").

108. *Id.* at 1497.

109. *Id.*

110. *Id.*

111. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). *See* Marc Martin, Note, Heath v. Alabama*: Contravention of Double Jeopardy and Full Faith and Credit Principles*, 17 LOY. U. CHI. L.J. 721, 752–

judgments based on the rule that one sovereign cannot be required to enforce the penal judgments of another.[112] But this reasoning conflates interstate *enforcement* with interstate *recognition* of criminal judgments.[113]

IV. CONCLUSION

"[T]hings that look the same may be different."[114] By conflating the three different kinds of successive domestic inter-sovereign prosecutions, the Court has failed to see the differences among the constitutional provisions governing each one. The Double Jeopardy Clause intertwines individual rights and federalism. The Due Process Clause is facially about individual rights but has a strong separation-of-powers tint. Article IV, and a good portion of constitutional structure more broadly, is grounded in interstate comity, which in some instances must be backed by federal dictate. Because the *Gamble* Court had in mind different varieties of successive domestic inter-sovereign prosecutions, it failed to see that Gamble's case fell within the very heartland of the Double Jeopardy prohibition: a powerful central government tossing aside the considered judgment of state and local policymakers that his culpable conduct deserved only a certain quantum of punishment and no more. There is perhaps no better example than *Gamble* of the unfortunate process of watering down the Bill of Rights described by Professor Thomas:

> First, the criminal procedure right is incorporated into the Fourteenth Amendment . . . . Second, the fact that States have exclusive jurisdiction over the crimes that most affect our daily lives . . . causes the right to be gradually diluted in order to permit States more latitude in investigating and prosecuting these crimes. . . . [T]hird, . . . the Court later follows the new and narrower precedents when the issue arises in federal court.[115]

The ultimate irony is that a provision designed to limit federal involvement in criminal justice has been interpreted instead in a way that encourages it.

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55 (1986) (arguing that the Full Faith and Credit Clause should be interpreted to bar successive state–state prosecutions); *see also* Allen & Ratnaswamy, *supra* note 47, at 818 (observing that "states must give deference to other states in certain circumstances, such as when required by the [F]ull [F]aith and [C]redit [C]lause"); Fisher, *supra* note 97, at 612 (observing that, in state–state cases, "the principle of full faith and credit weighs heavily" against the dual sovereignty doctrine and that "[t]here is good reason for a state to respect the criminal as well as the civil judgments of its sister states").

112. The Antelope, 23 U.S. 66, 123 (1825) (Marshall, C.J.) ("The Courts of no country execute the penal laws of another[] . . . .")

113. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 620, at 516 (1834) ("No other nation . . . has any right to punish [foreign crimes]; *or is under any obligation to take notice of*, or to enforce any judgment, rendered in such cases by the tribunals having authority to hold jurisdiction within the territory, where [such crimes] are committed.") (emphasis added).

114. Westen & Drubel, *supra* note 68, at 169.

115. Thomas, *supra* note 63, at 151.