AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice: Due Process and Habeas Corpus: Double Jeopardy

**Gamble v. United States**, \_\_\_ U.S. \_\_\_ (2019)

*Terrence Gamble plead guilty to violating a state law forbidding a person convicted of a “crime of violence” from “own[ing] a firearm or hav[ing] one in his or her possession. Federal prosecutors then charged Gamble with violating a federal that forbade any person convicted of “a crime punishable by imprisonment for a term exceeding one year” to “ship . . . in interstate commerce, or possess in or affecting commerce, any firearm.” Gamble acknowledged that he was guilty of the federal offense. He nevertheless claimed that he could not be constitutionally convicted of the federal offense because he had already pled guilty to the identical state offense. The federal prosecution, he claimed, violated the double jeopardy clause of the Sixth Amendment. The United States responded that Gamble was not being charged for “the same offense” because under existing precedent, federal and state crimes were considered distinct offenses, even if both had identical elements. The local trial court rejected Gamble’s claim and that decision was affirmed by the Court of Appeals for the Eleventh Circuit. Gamble appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 7-2 vote found no constitutional violation. Justice Samuel Alito’s majority opinion held that the “dual sovereignty” doctrine was correct as a matter of constitutional law, and, even if it wasn't, it was not so clearly erroneous to merit overruling past Supreme Court practice. What does Alito maintain are the constitutional foundations of the dual sovereignty doctrine? Why do Justices Ruth Bader Ginsburg and Neil Gorsuch dispute those foundations? Who has the better of this argument? Justices Alito, Clarence Thomas, Ginsburg and Gorsuch dispute the role of stare decisis in Supreme Court decision-making. How do the various justices understand the role of stare decisis? How do you understand the role of stare decisis? The* Gamble *decision pit four conservatives and three liberals against a conservative and a liberal. Such boundary crossings occurred with some frequency during the 2018-2019 Supreme Court term. Why are criminal process decisions, other than the death penalty, at present less likely to divide the justices on ideological lines than other constitutional issues?*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7a1702ec90fb11e9a76eb9e71287f4ea) delivered the opinion of the Court.

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We have long held that a crime under one sovereign's laws is not “the same offence” as a crime under the laws of another sovereign. 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.

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“[T]he language of the Clause ... protects individuals from being twice put in jeopardy ‘for the same offence,’ not for the same conduct or actions.” . . . As originally understood, . . . an “offence” is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two “offences.” 

Faced with this reading, Gamble falls back on an episode from the Double Jeopardy Clause's drafting history. The first Congress, working on an earlier draft that would have banned “ ‘more than one trial or one punishment for the same offence,’ ” voted down a proposal to add “ ‘by any law of the United States.’ ” In rejecting this addition, Gamble surmises, Congress must have intended to bar successive prosecutions regardless of the sovereign bringing the charge.

Even if that inference were justified—something that the Government disputes—it would count for little. The 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. . . .

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Our cases reflect the same reading. A close look at them reveals how fidelity to the Double Jeopardy Clause's text does more than honor the formal difference between two distinct criminal codes. It honors the substantive differences between the interests that two sovereigns can have in punishing the same act.

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This principle comes into still sharper relief when we consider a prosecution in this country for crimes committed abroad. If, as Gamble suggests, only one sovereign may prosecute for a single act, no American court—state or federal—could prosecute conduct already tried in a foreign court. . . . The murder of a U.S. national is an offense to the United States as much as it is to the country where the murder occurred and to which the victim is a stranger. That is why the killing of an American abroad is a federal offense that can be prosecuted in our courts, and why customary international law allows this exercise of jurisdiction.

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. . . [O]ur Constitution rests on the principle that the people are sovereign, but that does not mean that they have conferred all the attributes of sovereignty on a single government. Instead, the people, by adopting the Constitution, “ ‘split the atom of sovereignty.’ Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of ‘dual sovereignty.

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. . . . Our federal system advances individual liberty in many ways. Among other things, it limits the powers of the Federal Government and protects certain basic liberties from infringement. But because the powers of the Federal Government and the States often overlap, allowing both to regulate often results in two layers of regulation. It is also not at all uncommon for the Federal Government to permit activities that a State chooses to forbid or heavily restrict—for example, gambling and the sale of alcohol. And a State may choose to legalize an activity that federal law prohibits, such as the sale of marijuana. So while our system of federalism is fundamental to the protection of liberty, it does not always maximize individual liberty at the expense of other interests. . . .

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Stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” . . . [A] departure from precedent “demands special justification. . . . In light of these factors, Gamble's historical evidence must, at a minimum, be better than middling. And it is not. . . . All told, this evidence does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns' laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years.

. . . . Gamble has not cited and we have not found a single pre-Fifth Amendment case in which a foreign acquittal or conviction barred a second trial in a British or American court. . . . The foundation of his argument is a decision for which we have no case report: the prosecution in England in 1677 of a man named Hutchinson. . . . The report spans all of one sentence: “On Habeas Corpus it appeared the Defendant was committed to Newgate on suspicion of Murder in Portugal, which by Mr. Attorny being a Fact out of the Kings Dominions, is not triable by Commission,. but by a Constable and Marshal, and the Court refused to Bail him, & c.” . . .

From this report, all that we can tell about the court's thinking is that it found no convincing reason to grant bail, as was typical in murder cases. . . . [W]hat happened after bail was denied? The bail report does not say.

. . . . The “most instructive” case, he claims, see Brief for Petitioner 13, is the 1775 case of *King v. Roche*. . . . The defendant in Roche entered two pleas: prior acquittal abroad and not guilty of the charged crime. All that the Roche court held was that, as a procedural matter, it made no sense to charge the jury with both pleas at once, because a finding for Roche on the first (prior acquittal) would, if successful, bar consideration of the second (not guilty).

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Gamble's argument is based on treatises, but they are not nearly as helpful as he claims. . . . Gamble begins with Blackstone, but he reads volumes into a flyspeck. In the body of his Commentaries, all that Blackstone stated was that successive prosecutions could be barred by prior acquittals by “any court having competent jurisdiction of the offence.” . . .

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. . . . [T]he premises of the dual-sovereignty doctrine have survived incorporation intact. Incorporation meant that the States were now required to abide by this Court's interpretation of the Double Jeopardy Clause. But that interpretation has long included the dual-sovereignty doctrine, and there is no logical reason why incorporation should change it. After all, the doctrine rests on the fact that only same-sovereign successive prosecutions are prosecutions for the “same offense,” and that is just as true after incorporation as before.

Insofar as the expansion of the reach of federal criminal law has been questioned on constitutional rather than policy grounds, the argument has focused on whether Congress has overstepped its legislative powers under the Constitution. Eliminating the dual-sovereignty rule would do little to trim the reach of federal criminal law, and it would not even prevent many successive state and federal prosecutions for the same criminal conduct unless we also overruled the long-settled rule that an “offence” for double jeopardy purposes is defined by statutory elements, not by what might be described in a looser sense as a unit of criminal conduct. . . .

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I7a1702ec90fb11e9a76eb9e71287f4ea), concurring.

I agree that the historical record does not bear out my initial skepticism of the dual-sovereignty doctrine. The founding generation foresaw very limited potential for overlapping criminal prosecutions by the States and the Federal Government. The Founders therefore had no reason to address the double jeopardy question that the Court resolves today. Given their understanding of Congress' limited criminal jurisdiction and the absence of an analogous dual-sovereign system in England, it is difficult to conclude that the People who ratified the Fifth Amendment understood it to prohibit prosecution by a State and the Federal Government for the same offense. . . .

I write separately to address the proper role of the doctrine of *stare decisis*. In my view, the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law. . . . By applying demonstrably erroneous precedent instead of the relevant law's text—as the Court is particularly prone to do when expanding federal power or crafting new individual rights—the Court exercises “force” and “will,” two attributes the People did not give it. . . .

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A proper understanding of *stare decisis* in our constitutional structure requires a proper understanding of the nature of the “judicial Power” vested in the federal courts. That “Power” is—as Chief Justice Marshall put it—the power “to say what the law is” in the context of a particular “case” or “controversy” before the court. Phrased differently, the “judicial Power” “is fundamentally the power to decide cases in accordance with law.” It refers to the duty to exercise “judicial discretion” as distinct from “arbitrary discretion.” The Federalist No. 78, at 468, 471.

That means two things, the first prohibitory and the second obligatory. First, the Judiciary lacks “force” (the power to execute the law) and “will” (the power to legislate). . . . The Judiciary thus may not “substitute [its] own pleasure to the constitutional intentions of the legislature.” The Federalist No. 78, at 468–469.

Second, “judicial discretion” requires the “liquidat[ion]” or “ascertain[ment]” of the meaning of the law. . . . Therefore, judicial discretion is not the power to “alter” the law; it is the duty to correctly “expound” it.

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*Stare decisis* has its pedigree in the unwritten common law of England. . . . In the common-law system, *stare decisis* played an important role because “judicial decisions [were] the principal and most authoritative evidence, that [could] be given, of the existence of such a custom as shall form a part of the common law.”, , . In other words, judges were expected to adhere to precedents because they embodied the very law the judges were bound to apply.

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Federal courts today look to different sources of law when exercising the judicial power than did the common-law courts of England. The Court has long held that “[t]here is no federal general common law.” Instead, the federal courts primarily interpret and apply three bodies of federal positive law—the Constitution; federal statutes, rules, and regulations; and treaties. That removes most (if not all) of the force that *stare decisis* held in the English common-law system, where judicial precedents were among the only documents identifying the governing “customs” or “rules and maxims.” We operate in a system of written law in which courts need not—and generally cannot—articulate the law in the first instance. The Constitution, federal statutes, and treaties *are* the law, and the systematic development of the law is accomplished democratically. Our judicial task is modest: We interpret and apply written law to the facts of particular cases.

Underlying this legal system is the key premise that words, including written laws, are capable of objective, ascertainable meaning. As I have previously explained, “[m]y vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions.” Accordingly, judicial decisions may incorrectly interpret the law, and when they do, subsequent courts must confront the question when to depart from them.

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When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it. This view of *stare decisis* follows directly from the Constitution's supremacy over other sources of law—including our own precedents. . . . Notably, the Constitution does not mandate that judicial officers swear to uphold judicial precedents. And the Court has long recognized the supremacy of the Constitution with respect to executive action and “legislative act[s] repugnant to” it. The same goes for judicial precedent. . . . Put differently, because the Constitution is supreme over other sources of law, it requires us to privilege its text over our own precedents when the two are in conflict. . . .

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Although precedent does not supersede the original meaning of a legal text, it may remain relevant when it is not demonstrably erroneous. As discussed, the “judicial Power” requires the Court to clarify and settle—or, as Madison and Hamilton put it, to “liquidate”—the meaning of written laws. . . . It is within that range of permissible interpretations that precedent is relevant. If, for example, the meaning of a statute has been “liquidated” in a way that is not demonstrably erroneous (*i.e.,* not an impermissible interpretation of the text), the judicial policy of *stare decisis* permits courts to constitutionally adhere to that interpretation, even if a later court might have ruled another way as a matter of first impression. . . .

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This case is a good example. The historical record presents knotty issues about the original meaning of the Fifth Amendment, and Justice GORSUCH does an admirable job arguing against our longstanding interpretation of the Double Jeopardy Clause. Although Justice GORSUCH identifies support for his view in several postratification treatises, I do not find these treatises conclusive without a stronger showing that they reflected the understanding of the Fifth Amendment at the time of ratification. . . . . Ultimately, I am not persuaded that our precedent is incorrect as an original matter, much less demonstrably erroneous.

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Members of this Court have lamented the supposed “uncertainty” created when the Court overrules its precedent. As I see it, we would eliminate a significant amount of uncertainty and provide the very stability sought if we replaced our malleable balancing test with a clear, principled rule grounded in the meaning of the text.

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Our judicial duty to interpret the law requires adherence to the original meaning of the text. For that reason, we should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous. Because petitioner and the dissenting opinions have not shown that the Court's dual-sovereignty doctrine is incorrect, much less demonstrably erroneous, I concur in the majority's opinion.

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I7a1702ec90fb11e9a76eb9e71287f4ea), dissenting

Gamble urges that the Double Jeopardy Clause incorporates English common law. That law, he maintains, recognized a foreign acquittal or conviction as a bar to retrial in England for the same offense. . . . Gamble was convicted in both Alabama and the United States, jurisdictions that are not foreign to each other. English court decisions regarding the respect due to a foreign nation's judgment are therefore inapposite.

. . . . The United States and its constituent States, unlike foreign nations, are “kindred systems,” “parts of ONE WHOLE.” They compose one people, bound by an overriding Federal Constitution. Within that “WHOLE,” the Federal and State Governments should be disabled from accomplishing together “what neither government [could] do alone—prosecute an ordinary citizen twice for the same offence.” . . . In the system established by the Federal Constitution, however, “ultimate sovereignty” resides in the governed. . . . In our “compound republic,” the division of authority between the United States and the States was meant to operate as “a double security [for] the rights of the people.” The separate-sovereigns doctrine, however, scarcely shores up people's rights. Instead, it invokes federalism to withhold liberty.

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. . . . [T]he Framers of the Bill of Rights voted down an amendment that would have permitted the Federal Government to reprosecute a defendant initially tried by a State. Nevermind that this amendment failed; the Court has attributed to the Clause the very meaning the First Congress refrained from adopting. . . . [E]arly American courts regarded with disfavor the prospect of successive prosecutions by the Federal and State Governments. . . . Most of the early state decisions cited by the parties regarded successive federal-state prosecutions as unacceptable. Only one court roundly endorsed a separate-sovereigns theory. , , ,

Finally, the Court has reasoned that the separate-sovereigns doctrine is necessary to prevent either the Federal Government or a State from encroaching on the other's law enforcement prerogatives. . . . This concern envisions federal and state prosecutors working at cross purposes, but cooperation between authorities is the norm. . . .

The separate-sovereigns doctrine, I acknowledge, has been embraced repeatedly by the Court. But “[s]tare decisis is not an inexorable command.” Our adherence to precedent is weakest in cases “concerning procedural rules that implicate fundamental constitutional protections.” . . .

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The separate-sovereigns doctrine's persistence contrasts with the fate of analogous dual-sovereignty doctrines following application of the rights at issue to the States. Prior to incorporation of the Fourth Amendment as a restraint on state action, federal prosecutors were free to use evidence obtained illegally by state or local officers, then served up to federal officers on a “silver platter.” . . . Similarly, before incorporation of the Fifth Amendment privilege against self-incrimination, the Court held that the privilege did not prevent state authorities from compelling a defendant to provide testimony that could incriminate him or her in another jurisdiction. . . .The Court regards incorporation as immaterial because application of the Double Jeopardy Clause to the States did not affect comprehension of the word “offence” to mean the violation of one sovereign's law. But the Court attributed a separate-sovereigns meaning to “offence” at least in part because the Double Jeopardy Clause did not apply to the States. Incorporation of the Clause should prompt the Court to consider the protection against double jeopardy from the defendant's perspective and to ask why each of two governments within the United States should be permitted to try a defendant once for the same offense when neither could try him or her twice.

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Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I7a1702ec90fb11e9a76eb9e71287f4ea), dissenting.

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“Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.” Throughout history, people have worried about the vast disparity of power between governments and individuals, the capacity of the state to bring charges repeatedly until it wins the result it wants, and what little would be left of human liberty if that power remained unchecked. To address the problem, the law in ancient Athens held that “[a] man could not be tried twice for the same offense.” . . . The rule against double jeopardy was firmly entrenched in both the American colonies and England at the time of our Revolution.[6](https://1.next.westlaw.com/Document/I7a1702ec90fb11e9a76eb9e71287f4ea/View/FullText.html?navigationPath=%2FFoldering%2Fv3%2Fmgraber%3D40law.umaryland.edu%2Fhistory%2Fitems%2FdocumentNavigation%2F71f0f2fe-8cc5-4433-b371-3e50d4f02c5b%2FjZDeclssJ0dv8Ij8wZi8PJdP09JaVTP5pgDt6H%60jiaB3YzAmHI7IvzXWBRia9SJTiDtjx0dbHnTk3vRgwyeR1uLWylyzeUFx&listSource=Foldering&list=historyDocuments&rank=1&sessionScopeId=3e2b4b5328a306f7b3092eb8b169609c37a5e0dbbccadfe28e1ee885524420b1&originationContext=MyResearchHistoryAll&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0#co_footnote_B00352048498596) And the Fifth Amendment, which prohibits placing a defendant “twice ... in jeopardy of life or limb” for “the same offence” sought to carry the traditional common law rule into our Constitution. . . .

. . . . The framers understood the term “offence” to mean a “transgression.” And they understood that the same transgression might be punished by two pieces of positive law: After all, constitutional protections were not meant to be flimsy things but to embody “principles that are permanent, uniform, and universal.” And by everyone's admission, that is exactly what we have here: The statute under which the federal government proceeded required it to prove no facts beyond those Alabama needed to prove under state law to win its conviction; the two prosecutions were for the same offense.

That leaves the government and the Court to rest on the fact that distinct governmental entities, federal and state, enacted these identical laws. This, we are told, is enough to transform what everyone agrees would otherwise be the same offense into two different offenses. But where is that distinction to be found in the Constitution's text or original public understanding? We know that the framers didn't conceive of the term “same offence” in some technical way as referring only to the same statute. And if 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? The government identifies no evidence suggesting that the framers understood the term “same offence” to bear such a lawyerly sovereign-specific meaning.

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The history of the Double Jeopardy Clause itself supplies more evidence yet. The original draft prohibited “more than one trial or one punishment for the same offence.” One representative then proposed adding the words “by any law of the United States” after “same offence.” That proposal clearly would have codified the government's sovereign-specific view of the Clause's operation. Yet, Congress proceeded to reject it.

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The Court seems to assume that sovereignty in this country belongs to the state and federal governments, much as it once belonged to the King of England. But as Chief Justice Marshall explained, “[t]he government of the Union ... is emphatically, and truly, a government of the people,” and all sovereignty “emanates from them.” . . . When the “ONE WHOLE” people of the United States assigned different aspects of their sovereign power to the federal and state governments, they sought not to multiply governmental power but to limit it. . . . Yet today's Court invokes federalism not to protect individual liberty but to threaten it, allowing two governments to achieve together an objective denied to each. . . .

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By 1791 when the Fifth Amendment was adopted, an array of common law authorities suggested that a prosecution in any court, so long as the court had jurisdiction over the offense, was enough to bar future reprosecution in another court. Blackstone, for example, reported that an acquittal “before any court having competent jurisdiction of the offence” could be pleaded “in bar of any subsequent accusation for the same crime.”. . . [Several] treatises cited the 1678 English case of *King v. Hutchinson*. Although no surviving written report of *Hutchinson* remains, several early common law cases . . . described its holding in exactly the same way the treatise writers did: All agreed that it barred the retrial in England of a defendant previously tried for murder in Spain or Portugal.

When they envisioned the relationship between the national government and the States under the new Constitution, the framers sometimes referenced by way of comparison the relationship between Wales, Scotland, and England. And prosecutions in one of these places pretty plainly barred subsequent prosecutions for the same offense in the others. . .

Against this uniform body of common law weighs *Gage v. Bulkeley*—a civil, not criminal, case from 1744 that suggested *Hutchinson* had held only that the English courts lacked jurisdiction to try a defendant for an offense committed in Portugal. . . . But no one else—not the treatise writers or the other English cases that favorably cited Hutchinson—adopted Gage's restrictive reading of that precedent.

What we know about the common law before the Fifth Amendment's ratification in 1791 finds further confirmation in how later legal thinkers in both England and America described the rule they had inherited. Start with England. As it turns out, “it would have been difficult to have made more than the most cursory examination of nineteenth century or later English treatises or digests without encountering” the Hutchinson rule. . . . Even more pertinently, consider how 18th-century Americans understood the double jeopardy provision they had adopted. The legal treatises an American lawyer practicing between the founding and the Civil War might have consulted uniformly recited the *Hutchinson* rule as black letter law. . . .

This Court's early decisions reflected the same principle. In [*Houston v. Moore*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1820119693&pubNum=0000780&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), . . . Justice Washington . . . reassured the defendant that “if the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be [later] pleaded in bar of the prosecution before the other.” . . . In [*United States v. Furlong*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1820107321&pubNum=0000780&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), . . . [t]hos Court unanimously held that “[r]obbery on the seas is considered as an offence within the criminal jurisdiction of all nations” that can therefore be “punished by all,” and there can be “no doubt that the plea of autre fois acquit [double jeopardy] would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State.” A number of early state cases followed the same rule. . . . In the face of so much contrary authority, the Court winds up leaning heavily on a single 1794 North Carolina Superior Court decision, [*State v. Brown*.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1794017811&pubNum=0000572&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) . . . [*Brown*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1794017811&pubNum=0000572&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) said that a verdict in North Carolina would not be “pleadable in bar to an indictment preferred against [the defendant] in the Territory South of the Ohio.” But the Court leaves out what happened next. [Brown](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1794017811&pubNum=0000572&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) went on to reject concurrent jurisdiction because trying the defendant “according to the several laws of each State” could result in him being “cropped in one, branded and whipped in another, imprisoned in a third, and hanged in a fourth; and all for one and the same offence.”

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Stare decisis has many virtues, but when it comes to enforcing the Constitution this Court must take (and always has taken) special care in the doctrine's application. . . . As Justice Brandeis explained, “in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.” For all these reasons, while stare decisis warrants respect, it has never been “ ‘an inexorable command,’ ” and it is “at its weakest when we interpret the Constitution.” In deciding whether one of our cases should be retained or overruled, this Court has traditionally considered “the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.”

 . . . .The first cases to suggest that successive prosecutions by state and federal authorities might be permissible did not seek to address the original meaning of the word “offence,” the troubling federalism implications of the exception, or the relevant historical sources. . . . The first time the Court actually approved an “instance of double prosecution [and] failed to find some remedy ... to avoid it” didn't arrive until 1922. In that case, [*United States v. Lanza*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1922118205&pubNum=0000708&originatingDoc=I7a1702ec90fb11e9a76eb9e71287f4ea&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), . . . the defendants did not directly question the permissibility of successive prosecutions for the same offense under state and federal law. Instead, the defendants argued that both of the laws under which they were punished really derived from the “same sovereign:” the national government. . . After rejecting that argument as an “erroneous view of the matter,” the Court proceeded on, perhaps unnecessarily, to offer its view that “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.” Given that the Court was not asked directly to consider the propriety of successive prosecutions under separate state and federal laws for the same offense, it is perhaps unsurprising the Court did not consult the original meaning of the Double Jeopardy Clause or consult virtually any of the relevant historical sources before offering its dictum.

. . . .

Enforcing the Constitution always bears its costs. But when the people adopted the Constitution and its Bill of Rights, they thought the liberties promised there worth the costs. It is not for this Court to reassess this judgment to make the prosecutor's job easier. Nor is there any doubt that the benefits the framers saw in prohibiting double prosecutions remain real, and maybe more vital than ever, today. When governments may unleash all their might in multiple prosecutions against an individual, exhausting themselves only when those who hold the reins of power are content with the result, it is “the poor and the weak,”[101](https://1.next.westlaw.com/Document/I7a1702ec90fb11e9a76eb9e71287f4ea/View/FullText.html?navigationPath=%2FFoldering%2Fv3%2Fmgraber%3D40law.umaryland.edu%2Fhistory%2Fitems%2FdocumentNavigation%2F71f0f2fe-8cc5-4433-b371-3e50d4f02c5b%2FjZDeclssJ0dv8Ij8wZi8PJdP09JaVTP5pgDt6H%60jiaB3YzAmHI7IvzXWBRia9SJTiDtjx0dbHnTk3vRgwyeR1uLWylyzeUFx&listSource=Foldering&list=historyDocuments&rank=1&sessionScopeId=3e2b4b5328a306f7b3092eb8b169609c37a5e0dbbccadfe28e1ee885524420b1&originationContext=MyResearchHistoryAll&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0#co_footnote_B01302048498596) and the unpopular and controversial, who suffer first—and there is nothing to stop them from being the last. The separate sovereigns exception was wrong when it was invented, and it remains wrong today.