

Dual Sovereigns and Double Jeopardy

An Economic Analysis of *Gamble v. United States* (Docket No. 17-646)

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I. Introduction

Debates on the balance of power between U.S. state governments and the U.S. Federal government were evident during the ratification of the U.S. Constitution in 1787.¹ The first ten (10) amendments to the Constitution, commonly known as the Bill of Rights, attempted to limit the power of the Federal government while providing further protections to individuals. These individual protections were further extended in the aftermath of the U.S. Civil War by extending such protections to individuals from State action.² Notwithstanding the foregoing, the balance of power debate in our federal system of government continues unmitigated today.

A matter presently before the U.S. Supreme Court, *Gamble v. United States* No 17-646. This case examines the issue of double jeopardy as set forth in the Fifth Amendment to the U.S. Constitution. Specifically, Terance Martez Gamble, previously convicted for possession of a firearm in Alabama State Court was subsequently convicted in U.S. District Court for possession of a firearm.³ Gambel argues that Double Jeopardy precludes such Federal action because such action was based upon the same conduct. He seeks for the U.S. Supreme Court to overturn its

¹ No. 6-9 – The Federalist Papers; see also, Madison Notes on the Constitutional Convention.

² Fourteenth Amendment; See also, *Hurtado v. California* Case Reference. 110 U.S. 516

³ The Times Editorial Board. *The Supreme Court should pull the plug on duplicate prosecutions*. LA Times. 12/10/2018.

ruling in Abbate v. United States,⁴ which provided for the so-called “separate sovereigns” exception. It is this ruling that the Fifth Circuit based its decision to affirm the district court. The purpose of this paper is to examine the economic impact of the dual sovereign’s clause on crime.

Duplicate prosecution is being tried for the same crime at both the state and federal level and is currently a hotly debated topic at the supreme court. While double jeopardy clearly states one cannot be tried for the same crime twice, there’s nothing preventing the federal court from pursuing a suspect for the same crime the state court has already tried and sentenced. Enter Terance Gamble, an Alabama man with a robbery conviction, in 2015 Mr. Gamble was found with a handgun at a traffic stop and was arrested. Pleading guilty to the state of Alabama as a felon in possession of a firearm, he was sentenced to a year in prison. However, during his state prosecution, he was also charged by the federal government for the same crime, resulting in more time added onto Mr. Gamble’s sentence. In order to annul Mr. Gamble’s sentence at the federal level, the supreme court would have to overturn a long-standing constitutional doctrine that allows such prosecutions known as “dual sovereignty”. This holds the state and federal courts as separate sovereigns and by technicality does violate the 5th amendment’s double jeopardy clause.

To better understand double jeopardy, we must examine and analyze sections of the 5th amendment in depth. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land

⁴ Abbate v United States 359 U.S. 187 (1959)

or naval forces, or in the militia, when in actual service in time of War or public danger”.

Meaning those being accused of a crime under common law courtesies and customs (as a civilian) must be tried in a court of law. Second, “Nor shall any person be subject for the same offense twice put in jeopardy of life or limb”, more simply put, one cannot be charged with the exact same crime twice. Thirdly, “Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law”. From this, we can deduce it is not within the states right to compel someone to testify against themselves in a criminal case by depriving them of their inalienable rights. Lastly, “Nor shall private property be taken for public use, without just compensation”. This stanza is a direct compliment to the fourth amendment in regard to search and seizure but pertains mainly to eminent domain. If the government wishes to take a citizen’s personal property, they must compensate that citizen for the property, at fair market value. It’s important to note in the first and second stanza’s when referring to being tried for the same crime twice and requiring a grand jury for trial, yet the article does not differentiate between the state and federal level.

So, does by having dual sovereignty fall within the constraints of the 5th amendment? Technically yes as we have determined previously but, does it fall align properly with the 8th amendment of the constitution which pertains to cruel and unusual punishment? For example, in 1979 a South Dakota man wrote a bad check for one hundred dollars resulting in life in prison sentencing, he then appealed the decision stating it was cruel and unusual punishment and in violation of the 8th amendment, the supreme court agreed in his favor⁵. So, as we can see there

⁵ Solem v. Helm. 463 U.S. 277 (1983)

is a definitive fine line between the optimal level of punishment and cruel and unusual punishment. Now the question is raised because dual sovereignty is vague under the pretense of the 5th amendment what stance should the Supreme Court have on the issue? While the sentence of life in prison may have been an excessive sentence, decisions such as this where the Supreme Court reduced the amount of punishment can have adverse economic implications as we will see in section three.

III. Economic Analysis

Due to the monopoly power of government, the federal government has more monopoly power than any state government. This monopoly undoubtedly comes at a cost, as President Madison stated, “the larger and more heterogeneous the polity, the greater are the transaction costs of organizing a dominant coalition” (Posner 914). Hence why it is expected that disutility is achieved more so at the federal level than the state level.

The diseconomies of scale and diversity of approaches must also be taken into consideration when examining federalist traits. Because of the size and magnitude of the federal government and its “top-down” style of information dissemination and decision-making processes, information is often lost, and mistakes are made at the cost of the organization. To avoid problems associated with the monolithicity of a large government we must have a small amount of decentralization between the federal and state governments, similar to how a firm would establish separate branches and profit centers. However, it is important that the powers of the federal government be separate and distinguished from that of the state.

Lastly, we must look at the externalities associated between centralization and decentralization. As a broad example, let’s say a form of highly toxic smog from California

causes birth defects and respiratory problems in children in the neighboring state of Nevada⁶.

There are a plethora of issues that prevent a timely and effective means of implementing a cost-effective solution or of compensation to the citizens of Nevada. Undoubtedly, this is where being able to utilize federal government to arbitrate is beneficial for the state. Although all states maintain divisional autonomy, the elements of a strong centralized federal government play a large role in our governmental hierarchy.

Federal courts still maintain jurisdiction due to incidents involving citizens of different states operating outside of state jurisdiction. For example, if there is a criminal organization that operates on a multi-state or national level each state will have some incentive to arrest and charge members of the organization and end their operations, however, if the organization committed more of its crimes in one state versus another, others will be less inclined to act. So, while states retain their authority to act, we find that federal agents and federal courts have a broader authority across state boundaries on cases which carry national precedence such as terrorism, counterfeiting, and insurrection.

In economic theory, we follow the assumption that all people are rational actors in the grand scheme of the overall market. However, observations by Dr. Posner in his 9th edition of *Economic Analysis of Law* show rationality is objective rather than subjective and one's ability and inclination to use instrumental reasoning to get on in life based on rational decisions are self-intuitive. From this psychoanalysis provided by Dr. Posner, we need to ask ourselves as rational thinkers, what is more feasible, to catch and convict as many criminals as possible or to

⁶ Air Pollution Control Act of 1955 – Signed into law by President Eisenhower

catch few criminals and punish them with a high level of severity? One would argue the latter being the more ideal in economic terms, the greater the quantity of those convicted or incarcerated the greater the cost incurred by the justice system. "The degree to which the probability of punishment increases for every extra dollar spent will depend on the efficiency of the police and judicial system" (Harrison. Theeuwes. pg432). Now we may raise the question, what is the optimal level of punishment? We find that formula as harm divided by the probability of punishment, we can also replace the term "optimal level of punishment", with, "maximum amount of punishment by fine", as prescribed by the court. In order to find the level of harm or maximum harm, we multiply the maximum amount of punishment by fine by the probability of punishment (which is typically low).

$$\text{EX: Max. Harm} = \$2,500 = 10,000 \times .25$$

While this formula pertains mainly to punitive crime that normally results in a fine, for a moment imagine the criminal who knows his crime will result in a fifty dollar fine, the demand is still relatively high at that price (marginal cost) considering the criminal's options weighing in their opportunity cost. However, if that fine were to rise to five hundred dollars, we would see a decrease in the quantity demand of crime (in some not all) criminals. Simply put, as the marginal cost of doing crime rises the less crime will be committed (see figure 1-1). At some point the punishment for a crime will be so severe it will shift the demand curve to the left indicating a change in societal trends and as the demand curve shifts arguably so will the supply of criminals.

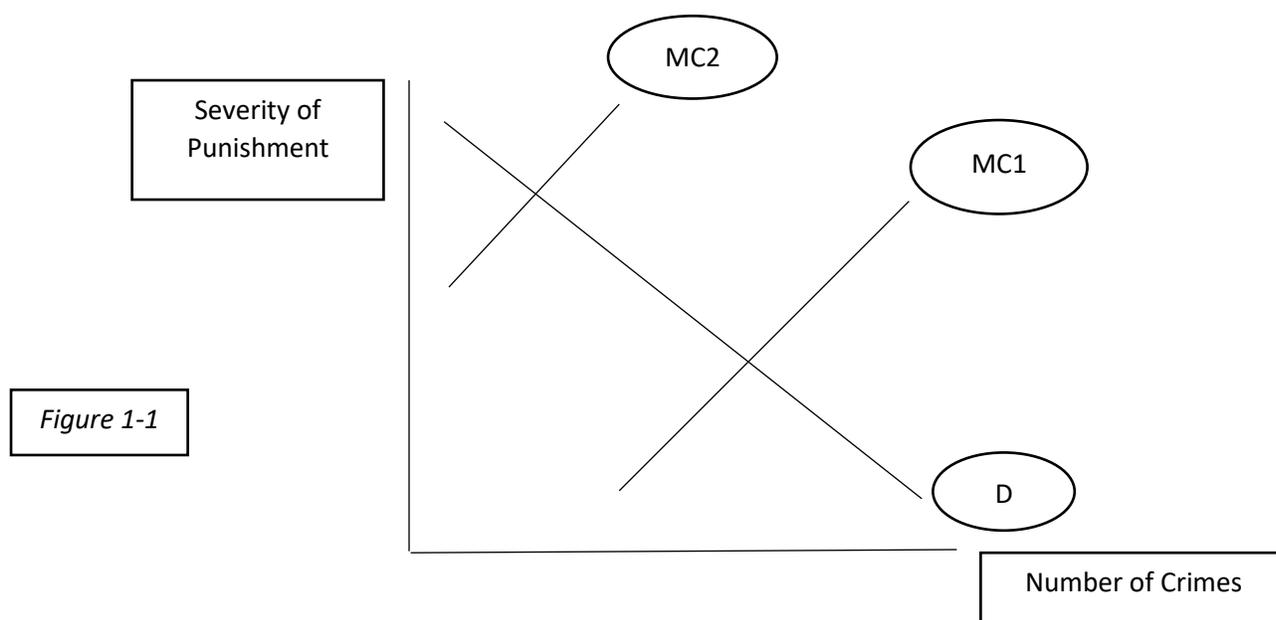


Figure 1-1

So, for what reason may the federal court system have for supplementing if not reinforcing the state courts on prosecutions? Well, first we need to ask for what reasons do people commit crimes in the first place? Often criminals violate the law to gain the upper hand financially, politically, physically over other individuals in one aspect or another. We know that economics is essentially decision making under circumstances of limited resources and certainty and is bound by the theory of rational choice. However, what we find is not all people act rationally. “Economic analysts of law have presented evidence that human behavior exhibits systematic departures from rationality” (Posner 19). Hence, not everyone acts rationally under duress and the application of behavioral economic theory is limited in the subject of law. To curb the incentive to act nefariously in the public eye the judicial system rightfully implements punishments and sentences to maintain good law and order and deter future crimes. If the Supreme Court were to reverse its stance on dual sovereigns and the amount of punishment

decrease, it is extremely possible that we could see an increase in the crime rate on a national level.

Conclusion

The purpose of this paper is to perform an economic analysis on the issue of dual sovereigns as currently seen before the Supreme Court in *Gamble v. United States* No 17-646. We find that the federal court is right in maintaining its posture on dual sovereignty on the economic basis of the marginal cost of crime. If the federal government were to rebuke its stance on dual sovereignty the marginal cost of crime would decrease. Thus, an increase in the national rate of crime.

One must ask what the potential ramifications are of cross-government agencies extending their power and reach, such as members of the executive branch offering pardons and overriding judiciary rulings at the federal level. Subsequently, creating an adverse rift in the economic effect on crime created by the federal court. More importantly where does the issue of pardon's fall in the realm of dual sovereignty and do the states or Congress have the ability to overturn an executive pardon if it is of national precedence?