THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY

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INTRODUCTION

The expansion of federal regulatory authority in the twentieth century

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has resulted in a substantial increase in the number of federal crimes. In turn, this growth has increased the number of situations in which an individual's actions violate both federal and state laws, forcing federal courts to face the question of whether the double jeopardy clause of the fifth amendment[1] permits both governments to prosecute an individual for a single act.

Throughout the century, the Supreme Court has allowed such successive prosecutions on the ground that double jeopardy does not apply when the two prosecutions are initiated by separate sovereigns.[2] Within the last decade, the Court has expanded the dual sovereignty exception. A 1978 decision held that the exception authorized separate trials by an Indian tribe and by a federal court.[3] Even more recently, one of the first opinions in the 1985 term applied the doctrine when two states prosecuted an individual for the same murder.[4]

This article analyzes the historical development and contemporary significance of the dual sovereignty exception to double jeopardy. Part one focuses on an often forgotten aspect of the exception: its origin in the era of national prohibition. Part two discusses the present application of the exception with a critique of the continued adherence to the dual sovereignty doctrine in contemporary cases.

The article begins with an overview of the pre-prohibition opinions used by the Supreme Court to fashion the dual sovereignty exception to double jeopardy during the 1920s. It then reviews the events leading to the insertion of the "concurrent power" language into the eighteenth amendment and analyzes the prohibition decisions in which the dual sovereignty exception was first applied. Following this historical review, the article explains the significance of the prohibition cases in establishing the basic concepts that still govern contemporary law, understanding the course of doctrinal development during the prohibition era, and, more generally, appreciating the way that judicial doctrine responds to changing social and political issues.

I

SUPREME COURT DECISIONS PRIOR TO PROHIBITION

Because the Supreme Court's double jeopardy decisions prior to prohibition involved multiple prosecutions by the federal government,[5] they provided

1. U.S. CONST. amend. V: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or libel." Sigler, *A History of Double Jeopardy*, 7 Am. J. Legal Hist. 283 (1963), provides an overview of the historical antecedents for the fifth amendment's double jeopardy clause and also describes the events leading to its inclusion in the Bill of Rights. For a modern attempt to articulate a comprehensive theory for analyzing double jeopardy problems, see Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

2. *See* Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. United States, 359 U.S. 121 (1959); Hebert v. Louisiana, 272 U.S. 312 (1926); United States v. Lanza, 260 U.S. 377 (1922).

3. United States v. Wheeler, 435 U.S. 313 (1978).

4. Heath v. Alabama, 106 S. Ct. 433.

5. *See, e.g.*, United States v. Oppenheimer, 242 U.S. 85 (1916) (judgment dismissing an indictment as barred by the statute of limitations bars second prosecution under a new indict-

relatively little guidance for determining whether the fifth amendment's double jeopardy clause applied when the federal government initiated one of the prosecutions and a state initiated the other. As a result, the Court turned to other precedents when the successive prosecution problem surfaced during the prohibition era.

Had the Court been inclined to disallow successive prosecutions, dicta in two pre-prohibition opinions—*United States v. Furlong*[6] and *Nielsen v. Oregon*[7]—could probably have furnished a conceptual basis for such an approach. Although neither *Furlong* nor *Nielsen* actually involved successive prosecutions, language in both opinions suggested that the prohibition against double jeopardy, and the *autre fois acquit* (previously acquitted) and *autre fois convict* (previously convicted) concepts on which it was based, applied when two different governments each had authority to proscribe a single criminal act.

Furlong, an 1820 case, involved federal prosecutions for robbery and murder on the high seas. The Court tied its definition of the scope of federal power to punish extraterritorial crimes to the defendant's protections against successive prosecutions. Because "[r]obbery on the seas is considered as an offense within the criminal jurisdiction of all nations,"[8] it fell within Congress' legislative jurisdiction even when the robbery was committed by a foreigner on a foreign victim in a foreign ship.[9] But one incident of this "universal jurisdiction" was the preclusion of successive prosecutions in different nations, for "there can be no doubt that the plea of *autre fois acquit* would be good in any other civilized state." By contrast, murder did not come within the universal jurisdiction principle or its *autre fois acquit* corollary. A nation did, however, have authority to punish murders committed by its citizens or within its territorial boundaries; and successive prosecutions were possible when an American citizen committed a murder on a foreign vessel. In such situations, the Constitution protected defendants "from being twice put in jeopardy" in American courts, and their potential liability to subsequent trials in another country was justifiable because it stemmed from "their own act in subjecting themselves to those laws."[10]

Eighty-nine years later, the Court used similar language in *Nielsen* when it construed the statute that designated the Columbia River as the common boundary of Oregon and Washington and gave both states "concurrent jurisdiction on the waters of that river."[11] The Court held that the jurisdiction

ment for the same offense); Keerl v. Montana, 213 U.S. 135 (1909) (retrial after dismissal of a deadlocked jury does not constitute double jeopardy); McDonald v. Massachusetts, 180 U.S. 311 (1901) (imposing a heavier punishment for recidivist offenders does not violate double jeopardy); *In Re* Chapman, 166 U.S. 661 (1897) (conduct may be punished both as an indictable misdmeanor and as contempt of Congress).

6. 18 U.S. (5 Wheat.) 184 (1820).
7. 212 U.S. 315 (1909).
8. 18 U.S. (5 Wheat.) at 197.
9. *Id.*
10. *Id.* at 197-98.
11. 212 U.S. at 319.

conferred by the statute did not allow one state to punish conduct committed within the territorial waters of the other when the other state's law expressly permitted the conduct. But the opinion also indicated that successive prosecutions would be impermissible in situations where an act violated the criminal laws of both states. According to *Nielsen*, "one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction, was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary of the channel."[12] When an act violated the criminal laws of both states, "the one first acquiring jurisdiction of the person" of the offender could "prosecute the offense."[13] Moreover, its judgment would be "a finality in both states, so that one convicted or acquitted in the courts of the one state [could not] be prosecuted for the same offense in the courts of the other."[14]

The Supreme Court ignored *Furlong* and *Nielsen* when prohibition era cases forced it to decide whether the constitutional prohibition against double jeopardy applied when both the federal government and a state initiated separate prosecutions. Instead, the Court derived the conceptual framework for its prohibition cases from nineteenth century decisions defining the appropriate spheres of federal and state legislative power. More specifically, the Court turned to those decisions that explained when states and the federal government had concurrent power to regulate or to punish a particular act.

The term "concurrent power" did not appear in the Constitution prior to the adoption of the eighteenth amendment. Nonetheless, the term had surfaced in a number of Supreme Court opinions, most of them involving the issue of whether the positive delegations of congressional power in Article I, Section 8 of the Constitution carried a negative implication denying state authority to enact legislation that affected these matters.[15]

The commerce clause offered the preeminent example of how granting power to Congress could limit a state's legislative power. Dicta in *Gibbons v. Ogden*[16] indicated that Article I's delegation to Congress of the power to regulate interstate commerce precluded state regulation of that commerce even in areas that Congress had not chosen to regulate. By the late nineteenth century, this doctrine of an implied denial of state authority to regulate interstate commerce had passed from dicta to holding[17] and had even temporarily limited the application of state prohibition laws to liquors imported from outside the state.[18] The ban was never absolute, however, and its exact parameters

12. *Id.* at 320.
13. *Id.*
14. *Id.*
15. *See infra* text accompanying notes 22-29.
16. 22 U.S. (9 Wheat.) 1, 209-210 (1824); *see also id.* at 222-39 (Johnson, J., concurring).
17. *See, e.g.*, Schollenberger v. Pennsylvania, 171 U.S. 1 (1898); Wabash, St. L. & P. Ry. v. Illinois, 118 U.S. 557 (1886).
18. Leisy v. Hardin, 135 U.S. 100 (1890); *see also* Kirmeyer v. Kansas, 236 U.S. 568 (1915).

remained uncertain.[19] Nevertheless, the commerce clause cases of the nineteenth century did confirm that granting regulatory authority to Congress could operate to displace the regulatory power that the states would otherwise enjoy.

Relying on the supremacy clause,[20] the Supreme Court also invalidated state laws that conflicted with federal statutes regulating interstate commerce.[21] Of course, the supremacy clause only applied when there was a conflict between the federal and state law. Thus, *Crossley v. California*[22] rejected the argument that federal statutes which forbade obstruction of the mail and interference with interstate commerce precluded a state murder prosecution. Noting that no statute permitted a federal murder prosecution for Crossley, the Court invoked the "settled law that the same act may constitute an offense against the United States and against a state, subjecting the guilty party to punishment under the laws of each govenrment."[23] Likewise, *Cross v. North Carolina*[24] held that federal statutes governing national banks did not evidence an intent to forbid a state forgery conviction when the forged notes were payable to a national bank and when the scheme in which they were used, false entries made in the bank's records violated federal law.

When state penal laws were challenged because they conflicted with other congressional powers, the Supreme Court was even more tolerant of state authority, whether or not Congress had exercised the power conferred on it. In *Fox v. Ohio*,[25] the Court held that a state retained authority to punish the offense of circulating counterfeit coins despite the Constitution's grant to Congress of the powers to coin money and to provide for the punishment of counterfeiting the coin of the United States.[26]

None of the pre-prohibition cases defining the scope of state and federal legislative authority involved an actual case of successive prosecutions by both state and federal governments, but dicta in a number of decisions indicated

19. For excerpts of the nineteenth century decisions, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 264-72 (10th ed. 1980); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 277-86 (5th ed. 1980).

20. U.S. CONST. art. VI, cl. 2.

21. 236 U.S. 439 (1915). For example, the holding of *Gibbons* declared a New York statute granting a ferry monopoly invalid because it conflicted with the federal statute governing the licensing of coastal vessels. Similarly, Southern Ry. Co. v. Railroad Comm'n, 236 U.S. 439 (1915), held that Indiana could not punish a railroad's failure to use certain safety equipment when that railroad was regulated by Federal Safety Appliance Act.

22. 168 U.S. 640 (1898).

23. *Id.* at 641.

24. 132 U.S. 131 (1889).

25. 46 U.S. (5 How.) 410 (1847). Similarly, Gilbert v. Minnesota, 254 U.S. 325 (1920), which was decided at the beginning of the prohibition era, upheld a state's authority to punish acts that deterred military enlistments or that discouraged aiding in the war effort against a claim that it conflicted with the Constitution's grant of the warmaking power to Congress. U.S. CONST. art. I, § 8, cl. 11; *cf. id.* at cl. 12, 13 (powers to raise and support armies and to provide and maintain a navy).

26. U.S. CONST. art. I, § 8, cl. 5, 6.

that successive prosecutions would not violate the fifth amendment's guarantee against double jeopardy, because the prosecutions involved offenses against two different sovereigns. Some language in *Fox* suggested that the grant of power to Congress to punish "counterfeiting" might not include the power to punish the circulation of those coins.[27] But the Court also indicated that the fifth amendment would not forbid multiple prosecutions if the same act fell within the "competency" of both state and federal governments. According to the *Fox* majority, protection for the individual in such a case would come not from the judiciary but from "the benignant spirit in which the institutions both of the state and federal systems are administered."[28]

A few years later, in *United States v. Marigold*,[29] the Supreme Court affirmed a federal conviction for uttering counterfeit currency despite the defendant's claim that Congress did not have the power to punish the crime of uttering. In dicta, the Court again admitted that, in view of *Fox*, an individual could be subjected to both federal and state prosecutions for the single act of uttering counterfeit coins. The result was proper because the act would, "as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."[30]

To summarize the Supreme Court decisions prior to prohibition, dicta in *Furlough* and *Nielsen* implied that successive prosecutions could be proscribed even in cases where two different governments had legislative authority to make the same conduct criminal. In addition, a few decisions—primarily involving the commerce clause—held that a constitutional grant of power could operate by itself to displace state authority to regulate activities that fell within the scope of congressional power, and other decisions invalidated state laws that conflicted with valid exercises of congressional power. However, a number of decisions allowed both state and federal regulation of certain activities. Although none of these decisions involved successive federal and state prosecutions, dicta in several opinions (including the counterfeit cases) indicated that the Constitution permitted such multiple prosecutions for activities that fell within the regulatory authority of both governments.

II

PROHIBITION·REFORMS: THE EIGHTEENTH AMENDMENT AND THE VOLSTEAD ACT

The eighteenth amendment originated as Senate Joint Resolution 17 of the Sixty-fifth Congress. As initially introduced,[31] Section 1 of the resolution

27. 46 U.S. (5 How.) at 434.
28. *Id.* at 435.
29. 50 U.S. (9 How.) 560 (1850).
30. *Id.* at 569.
31. S.J. Res. 17, 65th Cong., 1st Sess., 55 CONG. REC. 198 (1917). The original resolution

contained a substantive ban on the manufacture, sale, transportation, importation, or exportation of intoxicating liquors for beverage purposes; and Section 2 gave Congress the power to enforce the amendment by appropriate legislation. In addition, the enforcement section contained an express disavowal of any intent to "deprive the several states of their power to enact and enforce laws prohibiting the traffic in intoxicating liquors."

After deleting the language that preserved state power to prohibit traffic in intoxicating liquor, the committee favorably reported the resolution and referred it to the Senate Judiciary Committee.[32] Although this deletion suggests an intent to displace state authority to prohibit traffic in intoxicating liquor,[33] language in the Senate Report[34] as well as statements by the resolution's sponsor during the floor debate[35] indicated that the committee had no such intention.

The Senate passed the amended version[36] and sent it to the House of Representatives where it was referred to the House Judiciary Committee.[37] The House committee altered the enforcement section again and granted both Congress and the states "concurrent power" to enforce the amendment.[38] Although the committee report offered no explanation for the change,[39] the chairman of the Judiciary Committee explained, during the floor debate, that the concurrent power language was added to forestall any argument that the enforcement section might implicitly deny "the various states the right to enforce the prohibition laws of those States."[40]

Several members questioned the chairman as to the meaning of the "concurrent power" language, but his responses were unclear. Initially, he invoked the precedent of the counterfeiting cases. The "crime of counterfeiting" was,

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also omitted section 2 of the amendment, which required ratification within seven years. The Senate added a provision mandating ratification within six years during its floor debate, *id.* at 5661, but the time for ratification was lengthened to seven years, H.R. REP. No. 211, 65th Cong., 2d Sess. 1-2 (Part I) (1917), as part of a compromise with opponents of the amendment. *See, e.g.*, H. ASBURY, THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION 131-32 (1950); C. MERZ, THE DRY DECADE 30-32 (1930); P. ODEGARD, PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE 173-74 (1928).

32. S. REP. No. 52, 65th Cong., 1st Sess. 1 (1917).

33. The commerce clause cases suggested that this might be the case. *See supra* notes 16-18 and accompanying text. For an objection to the proposed change on this ground, see H.R. REP. No. 211, 65th Cong., 2d Sess. 4-5 (Part I) (1917).

34. S. REP. No. 52, 65th Cong., 1st Sess. 4-5 (1917) ("National law, enacted under an amended Constitution, could prohibit importation and sale, and *in concurrence with like legislation by the States* . . . , could soon put an end to the traffic [in intoxicating liquor].") (emphasis added).

35. 55 CONG. REC. 5640, 5552 (1917) (statements of Senator Sheppard).

36. *Id.* at 5666.

37. *Id.* at 5723.

38. H.R. REP. No. 211, 65th Cong., 2d Sess. 1-2 (Part 1) (1917). *See* A. SINCLAIR, PROHIBITION: THE ERA OF EXCESS 161 (1962).

39. *But see* H.R. REP. No. 211, 65th Cong., 2d Sess. 4-5 (Part 3) (1917) (minority views of Representatives Gard and Steele arguing that the committee proposal would abrogate state police powers with respect to intoxicating liquor).

40. 56 CONG. REC. 423 (1917).

he asserted, "peculiarly a national offense" but was also punished by "nearly all the states."[41] Later, however, he distinguished the counterfeiting cases because "Congress [had] passed a statute giving the States power to enforce the criminal law against these various acts" whereas the prohibition amendment "propose[d] to given concurrent power by the Constitution itself."[42]

Despite this confusion over the meaning of concurrent power, the chairman was clear with respect to one point: the committee language was not designed to permit both federal and state governments to prosecute offenders for a single act! When Representative Denison specifically asked the chairman whether the concurrent jurisdiction language would permit successive prosecutions by state and federal authorities for the same act, he replied that he did "not think the punishment of the offense by the state government would be followed by the punishment of the same offense by the federal government or vice versa."[43] An earlier proposal, which "provided that the State and Federal Governments might jointly or separately exercise jurisdiction and punish," would, he declared, have allowed federal and state prosecutions "for the same offense." By contrast he interpreted the concurrent power language as meaning that "the Federal Government cannot do it if the State government does it, and vice versa."[44]

The House eventually approved its committee's amendment to the enforcement section,[45] and the Senate concurred with the House amendment.[46] When the states ratified the proposal thirteen months later, the "concurrent power" language became part of the eighteenth amendment.

Congress responded to ratification of the amendment by adopting the Volstead Act as the federal enforcement legislation. The Act did not preclude federal prosecution if a defendant had previously been prosecuted in state court, nor did it forbid state prosecution following a federal prosecution for violating the Volstead Act, despite the earlier debate over the possibility of successive state and federal prosecutions.

The legislative history of the Volstead Act also ignored the successive prosecution issue. Neither the House[47] nor the Senate[48] committee reports discussed the issue, and the floor debates were likewise silent with respect to the issue. The only discussion of the "concurrent power" language was a belated argument by opponents that the phrase required state approval before any federal enforcement statute applied within the state's boundaries.[49]

41. *Id.*
42. *Id.* at 425.
43. *Id.* at 424.
44. *Id.*
45. *Id.* at 461-70.
46. *Id.* at 478.
47. H.R. REP. No. 91, 66th Cong., 1st Sess. (1919).
48. S. REP. No. 151, 66th Cong., 1st Sess. (1919).
49. 68 CONG. REC. 2429 (1919) (statement of Representative Steele); *see also* H.R. REP. No. 91, 66th Cong., 1st Sess. (Part III) (1919), *reprinted in* 58 CONG. REC. 2294-96 (1919) (minority report).

III
THE JUDICIAL RESPONSE DURING THE PROHIBITION ERA

A. Acceptance of the Dual Sovereignty Doctrine

Although the possibility of successive prosecutions failed to attract attention during the debate over the Volstead Act, the problem quickly surfaced in prosecutions initiated after the eighteenth amendment became effective on January 19, 1920.[50] Within two years, at least seven federal cases, in addition to a number of state decisions, had considered the argument that the double jeopardy clause of the fifth amendment forbade a federal prosecution under the Volstead Act for conduct that had previously been the basis for a prosecution under a state prohibition law. Two early decisions—one state[51] and the other federal[52]—held that successive prosecutions by two levels of government were impermissible; but the remainder of the federal[53] and state[54] decisions allowed successive prosecutions. Interestingly enough, none of the early decisions referred to the congressional debate, which occurred on the issue when the eighteenth amendment was proposed, even though briefs filed in one early prohibition case indicated that prohibition supporters were aware of the existence of the legislative history.[55]

The lone federal decision that precluded successive prosecutions, also provided the vehicle for the Supreme Court to resolve the issue. The defendants in *United States v. Peterson*[56] were charged with violating the Volstead Act on April 12, 1920 by manufacturing, transporting, and possessing intoxicating liquor and having in their possession a still and materiel for the manufacture of intoxicating liquor. The defendants filed a special plea claiming that they had previously been convicted in the state court of manufacturing, transporting, and possessing the same liquor in violation of Washington's prohibition statute. The district court sustained the plea on the ground that "[i]t seems manifest that it was not the intent that a person should be punished by the state and [by] federal law for the same offense."[57] The court did not ana-

50. Section 1 of the eighteenth amendment banned the manufacture, sale, transportation, importation, and exportation of intoxicating liquors "[a]fter one year from the ratification of this article." This one-year grace period formed part of the compromise that extended the ratification period from six to seven years. *See supra* note 31.

51. State v. Smith, 101 Or. 127, 199 P. 194 (1921).

52. United States v. Peterson, 268 F. 864 (W.D. Wash. 1921), *rev'd sub nom.* United States v. Lanza, 260 U.S. 141 (1922).

53. United States v. McCann, 281 F. 880 (D. Conn. 1922); United States v. Ratageczak, 275 F. 558 (N.D. Ohio 1921); United States v. Regan, 273 F. 727 (D.N.H. 1921); United States v. Bostow, 273 F. 535 (S.D. Ala. 1921); United States v. Holt, 270 F. 639 (D.N.D. 1921).

54. Cooley v. State, 152 Ga. 469, 110 S.E. 449 (1922), *cert. denied*, 260 U.S. 760 (1922); State v. Mosley, 122 S.C. 62, 114 S.E. 866 (1922); *cf.* Youman v. Commonwealth, 193 Ky. 536, 237 S.W. 6 (1922) (dictum); *Ex parte* Jancaary, 295 Mo. 653, 246 S.E. 241 (1922).

55. Brief for Amicus Curiae, National Prohibition Cases, 253 U.S. 486 (1920), at 54-55.

56. 268 F. 864 (W.D. Wash. 1921), *rev'd sub nom.*, United States v. Lanza, 260 U.S. 377 (1922).

57. 268 F. at 866.

lyze the legislative history nor attempt to explain its ruling in any detail. It simply announced its conclusion and dismissed the indictment.[58]

The government appealed from the district court's dismissal of the *Peterson* indictment, and the Supreme Court reversed the lower court in *United States v. Lanza*.[59] Chief Justice Taft's opinion for a unanimous Court rejected the defendants' argument "that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy." The Chief Justice rejected the argument because he rejected the premise on which it was based: "that both laws derive their force from the same authority—the [second] section of the [Prohibition] Amendment—and therefore, that in principle, it is as if both punishments were in prosecutions by the United States in its courts." According to the Chief Justice, "[t]o regard the [eighteenth amendment] as the source of the power of the states to adopt and enforce prohibition [was] to take a partial and erroneous view of the matter." State prohibition laws, he insisted, "derive their force . . . not from this Amendment, but from power originally belonging to the states, preserved to them by the Tenth Amendment."[60]

After determining that state authority to enact prohibitory laws was not dependent on the enforcement clause of the eighteenth amendment, the Chief Justice had little difficulty concluding that the fifth amendment's ban on double jeopardy did not forbid successive state and federal prosecutions. Without referring to *Furlong*[61] or *Nielson*,[62] he declared that the prohibition against double jeopardy only applied to "a second prosecution under authority of the Federal government after a first trial for the same offense under the same authority." But in *Lanza*, "the same act" was an offense under both state and federal laws and "[t]he defendants thus committed two different offenses by the same act."[63] Citing the dicta from nineteenth century dual sovereignty decisions as well as the opinions of lower federal courts that had rejected *Peterson*,[64] he held that "a conviction by the court of Washington of the offense against that state is not a conviction of the different offense against the United States." Thus, the double jeopardy clause "did not bar the subsequent federal prosecution."[65]

Before concluding, the Chief Justice inserted a paragraph that expressly recognized congressional power "to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed

58. Some of the *Peterson* defendants had been convicted of municipal prohibition ordinances, but the *Peterson* court ruled that these prosecutions did not bar a subsequent prosecution under the Volstead Act. For a criticism of this distinction between state laws and municipal ordinances, see *Notes on Recent Cases*, 1 WIS. L. REV. 360, 371 (1922).

59. 260 U.S. 377 (1922).

60. *Id.* at 379-82.

61. 18 U.S. (5 Wheat.) 184 (1920).

62. 212 U.S. 315 (1909).

63. *Id.* at 382.

64. *Id.* at 382-84; *see supra* notes 19-21, 27-29, 53 and accompanying text.

65. 260 U.S. at 382.

. . . by proper legislative provision."[66] But, he asserted, Congress "has not done so." And he explained the likely reason for the lack of a legislative provision by invoking the very hypothetical that had troubled Congressman Denison (but not the chairman of the House Judiciary Committee) in the congressional debate on the eighteenth amendment[67]:

> If a state were to punish the manufacture, transportation, and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from Federal prosecution for such acts would not make respect for the Federal statute, or for its deterrent effect.

After raising the issue, the Chief Justice quickly avoided answering it with the declaration that "it is not for us to discuss the wisdom of legislation." Instead, he satisfied himself with the holding "that, in the absence of special provision by Congress, conviction and punishment in a state court, under a state law, for making, transporting, and selling intoxicating liquors, is not a bar to a prosecution in a court of the United States, under the Federal law, for the same acts."[68]

With few exceptions,[69] analyses of *Lanza* accepted the conceptual framework underlying the decision. For example, in one law review note,[70] the author denied that any "valid ground" existed for attacking *Lanza* as "unsound in law." Nonetheless, he recognized that "the decision, if acted on and carried out to its permissible limits, would obviously result in gross injustice." As a result, he interpreted the paragraphs, of Chief Justice Taft's opinion, which declared that Congress had the power to prohibit multiple prosecutions by

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66. *Id.* at 385.

67. *See supra* text accompanying note 43.

68. 260 U.S. at 385.

69. *See* Lanier, *Prohibition and Double Jeopardy*, 8 VA. L. REGISTER 740 (1928).

70. Bronaugh, *Double Punishment in Prohibition Cases*, 26 LAW NOTES 187 (1923) [hereinafter cited as Bronaugh, *Double Punishment*]. In a later article, Bronaugh modified his analysis by asserting that *Lanza* failed to follow "what has long been an accepted rule or doctrine of criminal jurisprudence that all criminal laws or statutes must be construed strictly against the state and favorably to the citizen." Bronaugh, *Further Discussion of Double Punishment in Prohibition Cases*, 27 LAW NOTES 9, 10 (1923). But even in this second article, he was primarily critical of the results of *Lanza* rather than its analytical framework:

> But brushing aside all legal technicalities, it matters not one iota to the poor devil accused of crime whether he is twice put in jeopardy by two federal courts or by a state and a federal court. The result to him is the same—double punishment. And the fact that his second conviction is by judicial construction given another name or effect does not help him or save him from twice paying the penalty for the same act. For in truth and verity he is twice punished for the same offense, though by the reverse application of technical rules of construction he may not have been twice in jeopardy. Call it what you will, it is repugnant to every idea of justice and repulsive to that belief in fairness embedded in the hearts and minds of a free-born people.

Id.; cf. Decker, *Double Jeopardy in Cases Coming Under Both the Eighteenth Amendment and State Prohibition Laws*, 2 OR. L. REV. 124 (1923); Editorial, *Double Jeopardy*, 27 LAW NOTES 4 (1923); Editorial, *Twice in Jeopardy*, 9 VA. L. REV. 53 (1923); Note, 6 BI-MONTHLY L. REV. 98 (1923); *Recent Decisions*, 23 COLUM. L. REV. 395 (1923).

passing appropriate legislation, as "suggest[ing] the remedy" for the possible divergence between law and justice.[71]

An editorial in the the *New York Times*[72] sounded a similar theme; it quoted the Supreme Court opinion at length and with obvious approbation. Moreover, the *Times* particularly endorsed the concluding paragraphs of the opinion as providing a useful guide for legislative action.[73]

B. Reaffirmation in the Middle Years of the Prohibition Era

Congress never abrogated or modified the dual sovereignty exception legislatively. It is hardly surprising, therefore, that the issue resurfaced in the Supreme Court a few years later in a slightly different form. Emphatically reaffirming the principles underlying the exception, *Hebert v. Louisiana*[74] held that a pending federal charge for violating the Volstead Act did not preclude a prosecution for violating a state prohibition statute based on the same conduct.

The United States initially indicted the *Hebert* defendants for manufacturing intoxicating liquor for beverage purposes in violation of the Volstead Act. After the defendants had been released on bail and while they were awaiting trial in the federal district court, the state relied on the same acts to charge them with violating the Louisiana prohibition statute. The defendants argued that the state court lacked authority to try them because the acts alleged in the state prosecution constituted an offense against the United States and that the Federal Judicial Code gave the federal district court exclusive authority to try such an offense.[75] Relying on *Lanza*, the Louisiana Supreme Court summarily rejected the objection,[76] and the United States Supreme Court affirmed the state court judgment.[77]

Perhaps because it merely reaffirmed the *Lanza* principles, *Hebert* attracted relatively little attention in legal periodicals. But only one[78] of the four articles which discussed the case[79] praised the decision, and two student com-

71. Bronaugh, *Double Punishment*, *supra* note 70, at 187, 189.

72. *Double Dry Penalties*, N.Y. Times, Jan. 9, 1923, at A22, col. 3.

73. *Id.*

74. 272 U.S. 312 (1926).

75. *Id.* at 313-14. They also contended that the state court lacked jurisdiction over their person because "their arrest under state process while they were on bail awaiting trial in the federal district court was in derogation of the authority of the latter." *Id.* at 314. The Supreme Court rejected this second contention because the United States had made no objection to the state proceedings and thus could be assumed to have "acquiesced in their arrest and trial on the accusation under the state law." *Id.* at 315-16.

76. State v. Hebert, 158 La. 209, 103 So. 742 (1924).

77. 272 U.S. at 317.

78. Potts, *Unmerited Criticism of the Supreme Court*, 12 ST. LOUIS U.L.J. 119 (1927).

79. *Id.*; Note, *Constitutional Law: Double Jeopardy: Double Liability*, 12 CORNELL L.Q. 212 (1927) [hereinafter cited as Note, *Double Jeopardy*]; *Recent Cases, Criminal Law—Former Jeopardy—Power of the State and the Federal Government to Prosecute*, 7 B.U.L. REV. 57 (1927); *Recent Cases, Intoxicating Liquors—Eighteenth Amendment—Concurrent Power of Congress and the Several States*, 11 MINN. L. REV. 173 (1927).

mentators sternly opposed the *Hebert* result,[80] although they still accepted the conceptual framework that dictated the result.

The case did attract significant newspaper coverage, and increased criticism definitely appeared in a number of urban dailies.[81] A comparison of the *New York Times* editorials on *Lanza* with those on *Hebert* illustrates the more hostile tenor of the newspaper coverage of the later case. Where the *Lanza* editorial had praised Chief Justice Taft's opinion even while it proposed legislative relief,[82] the analysis of *Hebert* criticized the legal reasoning as well. The editorial acknowledged that "ancient doctrine, founded on a long line of decisions," limited the protection of the double jeopardy clause "solely to proceedings under the federal government." However, it argued that the "application of the doctrine to infringements of the Volstead [A]ct in states that have availed themselves of 'concurrent power' . . . seems new;" and "[t]o believers in the Bill of Rights," this new application "seems abhorrent." The editorial concluded by coupling a renewed appeal for federal legislation prohibiting multiple prosecutions with the suggestion that "each fresh reminder of how much liberty has been thrown away in an attempt to repeal custom and to enact the morality of the Anti-Saloon League" was "helpful for the return of common sense and something at least of earlier freedom."[83]

C. *The Disappearance of the Problem*

Hebert provided the Supreme Court's final discussion of the dual sovereignty doctrine during the prohibition era. Moreover, the problem virtually disappeared from the reported decisions of the lower federal courts[84] and of

80. *See Recent Cases*, 7 B.U.L. REV. 57; *supra* note 79; *see also* H. MCBAIN, PROHIBITION LEGAL AND ILLEGAL 143-54 (1928).

81. *See* LITERARY DIG., Nov. 20, 1926, at 18 (quoting Columbus Dispatch, Chicago Daily News, Springfield Union, Newark News, Winston-Salem Journal, Pittsburgh Gazette Times, and Indianapolis News).

82. *See supra* text accompanying notes 72-73.

83. N.Y. Times, Nov. 3, 1926, at 22, cols. 3, 4.

84. It appears that there were only two federal dual sovereignty cases for the period between the *Hebert* decision and the end of the prohibition era. *See* 24 FED. DIG., *Criminal Law* § 201, at 231-33 (1940). Both were district court decisions, and neither actually involved successive prosecutions. One cited *Lanza* as authority to reject a defendant's claim that the indictment charging him with a nonprohibition offense, embezzlement of the funds of a national bank, was insufficient to protect him against the *possiblity* of a subsequent state prosecution. United States v. Frank, 4 F. Supp. 372, 374 (W.D. Pa. 1933). The other case cited *Lanza* as authority for rejecting the argument that issuance of a permit under the Volstead Act to manufacture articles with alcoholic content precluded application of state prohibition law against the holder of the federal permit, but the Third Circuit reversed the district court judgment on appeal. Gerber v. Schofield, 43 F.2d 222, 224 (E.D. Pa 1930), *rev'd*, 43 F.2d 225 (3d Cir. 1930). Moreover, even though the Supreme Court cited *Lanza* and *Hebert* in several post-*Hebert* opinions rendered during the prohibition era, *see, e.g.*, Asbury Truck Co. v. Railroad Comm'n, 287 U.S. 570 (1932), *aff'g*, 52 F.2d 263 (S.D. Cal. 1931); McCormick & Co. v. Brown, 286 U.S. 131, 141 (1932); Westfall v. United States, 274 U.S. 256, 258 (1927); Van Oster v. Kansas, 272 U.S. 465, 469 (1926), none of those cases involved multiple prosecutions and the remaining citations are to per curiam orders that refused to invalidate Louisiana convictions that were contemporaneous to *Hebert*. *See* State v. Breaux, 161 La. 368, 108 So. 773, *aff'd*, 273 U.S. 645 (1926); State

state courts[85] as well. As a result, the *Lanza* holding survived the prohibition era unchallenged and unchanged.

No ineluctable logic dictated this adherence to the *Lanza* doctrine. When other double jeopardy issues reached the Supreme Court, the Court's decisions showed an increased sensitivity to individual rights. Furthermore, the final years of prohibition produced a major scholarly attack on the dual sovereignty exception. This attack offered the Court a conceptual framework on which it could have relied if it had faced the dual sovereignty issue in another prohibition case.

During the 1930 term, the Supreme Court rendered two important double jeopardy decisions involving multiple federal actions against a single defendant. In *United States. v. LaFranca*,[86] the Court broadly construed the Willis-Campbell Act's ban[87] on successive prosecutions under the tax laws and the Volstead Act to bar the collection of civil tax penalties from an individual who had previously been convicted of violating the Volstead Act with respect to the same acts that gave rise to the tax penalties. On the other hand, the Court was considerably more tolerant of post-conviction forfeitures when the property being forfeited was a distillery. *Various Items of Personal Property v. United States*[88] held that since "[t]he forfeiture [was] no part of the punishment for the criminal offense," the double jeopardy clause of the fifth amendment "did not apply."[89]

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v. Long, 161 La. 250, 108 So. 471 (1926), *dismissed for want of a substantial federal question*, 273 U.S. 653 (1927); State v. Norris, 161 La. 988, 109 So. 787 (1926), *cert. denied*, 274 U.S. 719 (1927).

85. The DECENNIAL DIG. lists a number of cases that acknowledged the dual soveriegnty doctrine during the last two-thirds of the prohibition era. *See* 9 FOURTH DECENNIAL DIG., 1926-36, at 247-49 (1937). However, only four of those decisions allowed state prosecutions to proceed after a prior federal prosecution for the same type of offense, and two of the four were Louisiana decisions rendered almost contemporaneously with *Hebert*. *See* Winslett v. State, 117 So. 5 (Ala. 1928); Crouch v. Commonwealth, 238 Ky. 5, 36 S.W.2d 653 (1931); State v. Quebadeux, 162 La. 1060, 111 So. 421 (1927); State v. Breaux, 161 La. 368, 108 La. 773, *aff'd*, 273 U.S. 645 (1926). For the most part, the remainder of the decisions either: refused to permit subsequent state prosecutions, *e.g.*, People v. Spitzer, 148 Misc. 97, 266 N.Y.S. 522 (N.Y. Sup. Ct. 1933); People v. Wade, 127 Misc. 593, 217 N.Y.S. 486 (App. Div.), *rev'g*, 126 Misc. 762, 214 N.Y.S. 781 (City Mag. Ct. 1926); contained no suggestion of multiple prosecutions by federal and state governments, *see, e.g.*, People v. Skinman, 122 Ohio St. 522, 172 N.E. 367 (1930); *cf.*, People v. Papaccio, 140 Misc. 696, 251 N.Y.S. 717 (1931) (state prosecution following Italian conviction); or refused to bar the state prosecutions on the ground that the federal and state prosecutions were sufficiently distinct to have permitted multiple prosecutions by the same government. *See* People v. Arnstein, 218 App. Div. 513, 218 N.Y.S. 633 (1926); Hazelwood v. State, 273 P. 1017, 1018 (Okla. 1929); Rambu v. State, 259 P. 602, 603 (Okla. 1927); *cf.*, Henderson v. State, 244 P. 1020, 1021 (Ariz. 1926) (pre-*Hebert* decision); State v. O'Brien, 106 Vt. 97, 104-06, 170 A. 98, 101 (Vt. 1934) (post-repeal decision).

86. 282 U.S. 568 (1931).

87. ch. 134, 42 Stat. 222 (1921). For a brief dicussion of this case, see Murchison, *Property Forfeiture in the Era of National Prohibition: A Study of Judicial Response to Legislative Reform*, 32 BUFFALO L. REV. 417, 431 (1983).

88. 282 U.S. 577 (1931).

89. *Id.* at 581.

An article published in the 1932 volume of the *Columbia Law Review*[90] provided the scholarly attack on the dual sovereignty exception. In it, Professor J.A.C. Grant sketched a conceptual framework suitable for the Supreme Court to have used to revise the *Lanza* doctrine if the Court had faced the dual sovereignty issue during the end of the prohibition. Professor Grant's article argued that, notwithstanding the nineteenth century dicta endorsing the dual sovereignty exception to double jeopardy, the *Lanza* result was a novel one. It was the first case "in which the Supreme Court, faced with an actual instance of double prosecution, failed to find some remedy, consistent with the law, to avoid it."[91] Moreover, he challenged the *Lanza* reasoning as well as its result, arguing that a reexamination of the dual sovereignty question was appropriate because *Lanza* was inconsistent "with the views of the author of the 'concurrent power' clause of the Eighteenth Amendment, and of leaders of the dry lobbies, as to the legal consequences of that clause."[92] This reexamination convinced him that continental jurisprudence,[93] English common-law doctrine,[94] and leading American treatises[95] had all rejected a dual sovereignty exception to double jeopardy. Thus, it led him to conclude that the *Lanza* rule was "unsound" "as a matter of legal analysis" and should be abandoned to avoid "fritter[ing] away our liberties upon a metaphysical subtlety, two sovereignties."[96]

Of course, the Supreme Court never made use of Professor Grant's reexamination because it did not face the dual sovereignty issue in any prohibition case after *Hebert*. The result was to leave *Lanza* as an enduring precedent that remained as authoritative when the eighteenth amendment was repealed in 1933 as it had been when it was initially rendered in 1922.

IV
THE SIGNIFICANCE OF THE DUAL SOVEREIGNTY CASES

The most obvious significance of the cases described above is their documentation of the prohibition origins of the dual soveriegnty exception. *Lanza* presented a novel problem because it was the first occasion on which the Court faced successive prosecutions as an actual rather than a potential problem. Thus forced to address the issue of successive prosecutions directly, the Court chose to establish the dual sovereignty exception to double jeopardy, a doc-

90. Grant, *The Lanza Rule of Successive Prosecutions*, [hereinafter cited as Grant, *The Lanza Rule*], 32 COLUM. L. REV. 1309 (1932); *see also* Grant, *The Scope and Nature of Concurrent Power*, 34 COLUM. L. REV. 994 (1934); Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A. L. REV. 1 (1956).

91. Grant, *The Lanza Rule*, *supra* note 90, at 1311.

92. *Id.*; *see supra* notes 43-45, 55.

93. *Id.* at 1316-18.

94. *Id.* at 1318-1326; *see also* Grant, *Successive Prosecutions by State and Nation*, *supra* note 90, at 7-12.

95. Grant, *The Lanza Rule*, *supra* note 90, at 1326-29.

96. *Id.* at 1331.

trine that restricts individual liberty and thus contradicts the original purpose of the federalism concept from which the exception is purportedly derived.[97]

A careful review of the historical development of the dual sovereignty exception confirms that no irrefutable logic dictated the *Lanza* result. As *Furlong*,[98] *Nielsen*,[99] and Professor Grant's historical research[100] all indicate, the pre-prohibition heritage contained contrary authority that could have been used to forbid successive prosecutions. Furthermore, Grant's *Columbia Law Review* article shows that those authorities could easily have been combined into a conceptual framework forbidding successive prosecutions.[101]

Not only did the Supreme Court's *Lanza* opinion ignore some precedent that would have tended in an opposite direction, the result the Court reached was also diametrically opposed to the one that the *Congressional Record* indicates was anticipated by the Congress that proposed the eighteenth amendment.[102] Moreover, the briefs filed in the *National Prohibition Cases*[103] of 1920 indicated that dry leaders—including Wayne Wheeler, the general counsel of the Anti-Saloon League—were aware of the legislative history and accepted it as a correct statement of the respective authority of the state and federal governments under the eighteenth amendment.[104] Nonetheless, the Supreme Court completely ignored that legislative history two years later when *Lanza* created the dual sovereignty exception.

How then does one account for the Court's blatant disregard of apparent legislative intent? A close analysis of *Lanza* in its historical context suggests that at least three factors were involved: the Supreme Court's general tendency to favor governmental enforcement authorities in its early prohibition cases, the availability of nineteenth century dicta endorsing the dual sovereignty concept, and an acceptance of a pre-New Deal perspective on the proper roles of the state and federal governments in the American system. To appreciate the importance of national prohibition in producing the dual sovereignty exception requires one to look beyond the dual sovereignty cases. One must also consider the general history of prohibition and the Supreme Court's other decisions during the prohibition era.

Although exact measurements of public opinion from the prohibition era are unavailable, most historians agree that prohibition enjoyed substantial public support at the time the eighteenth amendment[105] was adopted in 1919 and throughout the early years of the 1920s. An impressive body of evidence

97. *See* L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM 1 (1968).
98. *See supra* text accompanying note 10.
99. *See supra* text accompanying note 14.
100. *See supra* notes 93-95 and accompanying text.
101. *See supra* text accompanying notes 90-96.
102. *See supra* notes 44-45 and accompanying text.
103. 233 U.S. 350 (1920).
104. Brief of Amicus Curiae, National Prohibition Cases, 253 U.S. 250 (1970), at 54-55.
105. U.S. CONST. amend. XVIII (repealed 1933). Section 1 of the amendment provided: "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the

supports this consensus: the prompt ratification of the amendment by the states,[106] the overwhelming size of the ratification vote in the state legislatures,[107] the huge majority by which the relatively strict Volstead Act was adopted as the federal enforcement statute,[108] the enactment in 1921 of the strengthening amendments of the Willis-Campbell Act,[109] and the steady growth in the number of representatives and senators who had been endorsed by the Anti-Saloon League.[110]

Dissatisfaction with prohibition increased significantly during the second half of the 1920s. Supporters acknowledged that substantial evasions of the law were occurring.[111] Press criticism—especially in the great metropolitan dailies—became more pronounced.[112] Moreover, a significant organized opposition appeared in the mid-1920s when Pierre du Point Nemours and other business leaders joined the Association Against the Prohibition Amendment.[113] The increasing criticism prompted Congress to hold hearings on prohibition in 1926[114] and in 1930.[115] But notwithstanding these pressures for

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United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

Although the nineteenth century produced various efforts to enact state prohibition laws, *see generally* J. KROUT, THE ORIGINS OF PROHIBITION 267-97 (1925) and W. RORABAUGH, THE ALCOHOLIC REPUBLIC 187-222 (1979), the history of national prohibition really begins with the founding of the Anti-Saloon League in 1893. *See generally* E. CHERRINGTON, THE STORY OF THE ANTI-SALOON LEAGUE (1913). The League combined unswerving commitment to prohibition with a tactical flexibility that enabled it to secure an impressive series of victories in the three decades after its founding. *See, e.g.*, H. ASBURY, *supra* note 31, at 182; N. CLARK, DELIVER US FROM EVIL: AN INFORMAL HISTORY OF PROHIBITION 97-98 (1976); N. CLARK, THE DRY YEARS: PROHIBITION AND SOCIAL CHANGE IN WASHINGTON 82 (1965); P. ODEGARD, PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE 28, 79, 85-86 (1928); A. SINCLAIR, *supra* note 38, at 86. Among its accomplishments prior to the ratification of the eighteenth amendment were the establishment of some form of state prohibition in twenty-six states, the passage of the federal statute forbidding the transportation of liquor into a state in violation of state law, Webb-Kenyon Act, ch.89-90, 37 Stat. 699-700 (1913), and the enactment of wartime prohibition during World War I. *See* D. KYVIG, REPEALING NATIONAL PROHIBITION 11 (1979); C. MERZ, *supra* note 31, at 40-41; J. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900-1920, at 179-80 (1963). Two factors seem to account for the League's impressive string of victories: its success in identifying its opponents with the abuses of the legalized saloons and its ability to influence general elections by its control over a large number of voters for whom the liquor question was the decisive issue. The League's crowning achievement was the ratification of the eighteenth amendment in 1919.

106. Three-fourths of the states ratified the amendment in less than 14 months. C. MERZ, *supra* note 31, at 39-42.

107. *Id.* at 315-16.

108. *Id.* at 47-50.

109. Willis-Campbell Act, ch.134, 42 Stat. 222 (1921). For discussions of various aspects of the Willis-Campbell Act, *see* D. KYVIG, *supra* note 105, at 31; C. MERZ, *supra* note 31, at 84-86; Murchison, *supra* note 87, at 431.

110. N. CLARK, DELIVER US FROM EVIL, *supra* note 105, at 166; C. MERZ, *supra* note 31, at 188; A. SINCLAIR, *supra* note 38, at 275-76.

111. *See* C. MERZ, *supra* note 31, at 237 (quoting Herbert Hoover's 1928 acceptance speech).

112. D. KYVIG, *supra* note 105, at 117; C. MERZ, *supra* note 31, at 216-20.

113. D. KYVIG, *supra* note 105, at 80-97; C. MERZ, *supra* note 31, at 208-32.

114. D. KYVIG, *supra* note 105, at 61-62; C. MERZ, *supra* note 31, at 185-93.

change, the supporters of prohibition maintained their political control throughout the 1920s. The only significant legislative changes were a 1927 statute that reorganized the Bureau of Prohibition and made its employees subject to civil service laws[116] and a 1929 act that increased the maximum penalties for most violations of the Volstead Act.[117] Despite clamors for reform, Congress consistently turned a deaf ear to proposals for modifying the Volstead Act as well as to calls for repeal of prohibition.[118]

The political strength of the opponents of prohibition increased dramatically in the 1930s. There were numerous causes for this shift including the effectiveness of the Association Against the Prohibition Amendment and other anti-prohibition organizations[119] and the growing public perception that prohibition was failing[120] to prohibit the use of intoxicating liquors. But the most significant factor was undoubtedly the Great Depression of 1929. Not only did the national economic crisis discredit adherence to prohibition as a single-issue cause, but also opponents of prohibition could now add the economic arguments that repeal of the eighteenth amendment would mean more jobs and increased tax revenues to their claims that repeal would secure personal liberties. Although Franklin Roosevelt hesitated during his campaign for the Democratic nomination,[121] both he and the party eventually endorsed repeal.[122] Following the 1932 election, the lame duck Congress voted to submit a repeal amendment to the states;[123] and acting in special ratification conventions, the states ratified the new amendment even more rapidly than they had ratified the eighteenth amendment.[124]

The United States Supreme Court rendered dozens of significant decisions during the prohibition era, and the general pattern of its decisions closely parallels the three stages of political debate outlined above. Almost all of the early cases favored those responsible for enforcing prohibition.[125] During the

115. D. KYVIG, *supra* note 105, at 112.

116. Act of Mar. 3, 1927, 44 Stat. 1381-83 (1927).

117. Pub. L. No. 70-899, 45 Stat. 1446 (1929). The new law did, however, contain a proviso declaring Congress' intent "that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor or attempts to commercialize violations of the law." *See* A. SINCLAIR, *supra* note 38, at 353-56.

118. Even opponents of prohibition tended to regard repeal as impossible. *See, e.g.*, Aaron & Musto, *Temperance and Prohibition in America: An Historical Overview*, in ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 171-72 (H. Moore & D. Gerstein eds. 1981) (quoting Clarence Darrow); F. BLACK, ILL-STARRED PROHIBITION CASES 149 (1931).

119. N. CLARK, DELIVER US FROM EVIL, *supra* note 105, at 178-80.

120. D. KYVIG, *supra* note 105, at 196.

121. *Id.* at 146-51.

122. *Id.* at 156-58.

123. S.J. RES. 211, 72d Cong., 2d Sess., 47 Stat. 1625 (1933). The newly elected Congress amended the Volstead Act to permit the sale of beers and wines containing 3.2% or less alcohol even before the states had ratified the twenty-first amendment. Pub. L. No. 73-3, ch. 4, 48 Stat. 16 (1933).

124. D. KYVIG, *supra* note 105, at 169-82; U.S. DEPT. OF STATE, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (1934).

125. For a listing of some of the major Supreme Court decisions, see Murchison, *Prohibi-*

late 1920s, the Court generally continued to support prohibition authorities, although during these middle years the Court did produce occasional decisions favoring defendants and it divided in some of the leading decisions in the government's favor.[126] By contrast, the decisions after 1930 reflected a judiciary far more sensitive to abuses of prohibition enforcement as the Court developed new doctrines substantially more favorable to the rights of individuals.[127]

Closer analysis of the overall trend requires, however, that this general pattern be qualified in several respects. First, when the Court expanded doctrines designed to protect individuals in the 1930s, it frequently chose conceptual approaches that would limit the newly recognized protections to prohibition violators.[128] Second, the Court—like Congress[129]—preferred to expand individual rights in cases involving relatively minor violations, especially during the middle years of prohibition enforcement.[130] Third, throughout the prohibition era, the Court's professional ideology made it extremely reluctant to overrule clear precedents.[131] Thus, the new doctrines in the latter years of prohibition frequently developed either as exceptions to prior rules, or as statutory protections that went beyond the requirements of the Constitution.[132]

Viewed in light of the general prohibition experience and the Supreme Court's other decisions of the era, the dual sovereignty cases permit the inference that they provide yet another example of prohibition's impact on an important twentieth century doctrine. Thus, *Lanza* was not simply an unexceptional case in which the Supreme Court applied existing doctrine. Rather, the Court chose between competing authorities, and an important force influencing its choice was its inclination, as well as the public's, to support enforcement authorities during the early years of prohibition.

The other double jeopardy decisions are also consistent with the general

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tion and the Fourth Amendment: A New Look at Some Old Cases, 73 J. CRIM. L. & CRIMINOLOGY 471, 476-77, 479 n.59 (1982).

126. *Id.* at 477-78, 480 n.60.

127. *Id.* at 478-79, 480 n.61.

128. *See, e.g.*, Murchison, *The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine*, 47 MISS. L.J. 211, 235-36 (1976) (entrapment); Murchison, *supra* note 87, at 461 (property forfeitures).

129. *See* Pub. L. No. 70-899, ch. 473, 45 Stat. 1446 (1929) (Jones Act provision directing courts to distinguish "between casual or slight violating and habitual sales of intoxicating liquor" in imposing sentences).

130. *See, e.g.*, Murchison, *Entrapment Defense*, *supra* note 128, at 235 (entrapment); Murchison, *supra* note 87, at 460-61 (property forfeitures); Murchison, *supra* note 125, at 529 (fourth amendment doctrines).

131. *See* A. MASON, THE SUPREME COURT FROM TAFT TO WARREN 15-16, 50 (1968); 1 W.F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932, at 224-25 (1969); 2 *id.* at 37-38; G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 213 (1975). For a summary of the attitudes toward prohibition of William H. Taft and Charles Evans Hughes, the two chief justices who served during the prohibition era, see A. SINCLAIR, *supra* note 38, at 140-56.

132. *See, e.g.*, Murchison, *supra* note 125, at 527; Murchison, *supra* note 87, at 458-59, 461.

pattern of prohibition opinions. Like other decisions from the middle years of the prohibition era, *Hebert*[133] was characteristic of a cautious inclination to avoid an activist approach that would reshape existing doctrine to protect prohibition defendants. By contrast, the double jeopardy decisions of the final years of prohibition displayed a greater concern for individual defendants, and they manifested that concern in two ways repeatedly used in the final prohibition cases. First, the Court showed its usual preference for protecting individual violators rather than those involved in highly organized and commercialized disobedience of the law. Thus, *Various Items of Personal Property*[134] allowed the forfeiture of a distillery under the revenue laws even though its owner had previously been convicted of violating the Volstead Act by manufacturing intoxicating liquors at the distillery. Second, the Court also followed its normal tendency to rely on statutory construction in fashioning new protections for prohibition defendants and thereby to limit the impact of its decisions in liquor cases. Since *LaFranca*[135] was based on the Court's construction of a prohibition statute (the Willis-Campbell Act), the Court could easily limit it to prohibition cases and allow the government to collect civil tax penalities from defendants convicted of other crimes.[136]

Of course, the foregoing analysis does not provide a complete explanation of the double jeopardy cases for at least two reasons. In the first place, *Lanza* itself shows the impact of influences other than public attitudes toward prohibition enforcement. Second, the emphasis on the importance of prohibition does not account for the failure to modify the dual sovereignty doctrine during the final years of prohibition when the Supreme Court was so willing to redefine other areas of criminal law. Neither of these objections requires rejection of the hypothesis that prohibition was a significant force in shaping the content of American judicial decisions during the 1920s. They do, however, require qualification of the hypothesis to recognize the impact of three other factors: pre-prohibition doctrine, the relevance of ideological concerns not directly related to prohibition, and the importance of litigation as a catalyst to doctrinal development.

The preceding paragraphs demonstrate that *Lanza* was not an inevitable decision, that the Supreme Court had alternate precedents available to it. Nonetheless, the dual sovereignty dicta in the nineteenth century decisions on the scope of legislative power undoubtedly influenced the court to permit successive prosecutions. Although contrary authorities could be invoked, candor requires acknowledgement that, in 1922, the most obvious of the existing precedents supported successive prosecutions. How else, for example, does one explain the almost uniformly favorable reaction to *Lanza* among contem-

133. 272 U.S. 312 (1926).
134. 282 U.S. 577 (1931).
135. 282 U.S. 568 (1931).
136. For other examples of the Court's tendency during the latter years of prohibition to base its decision on its construction of the prohibition statutes, see Sorrells v. United States, 287 U.S. 435 (1932); Richbourg & Motor Co. v. United States, 281 U.S. 528 (1930).

porary legal commentators?[137] Thus, the *Lanza* decision shows that prior precedents can play an important role in structuring solutions to novel problems.

A third influence in shaping dual sovereignty doctrine was the Court's more general concern about the meaning of federalism. After all, the basic issue of the dual sovereignty cases was the respective roles of state and federal governments in the American system of government and that issue raised ideological questions that transcended the prohibition problem. Chief Justice Taft authored the *Lanza* opinion in the October 1922 term, his second as chief justice.[138] In his inaugural term, he had authored a series of opinions that tried to define the nature of state-federal relations, and the *Lanza* result is consistent with the general theme of those decisions. In those opinions, Taft fashioned a framework that combined a broad federal power to control matters closely connected with interstate commerce[139] with a determination to preserve an area of state authority free from federal control.[140] As the rhetorical basis for defining the parameters of the area, he invoked the "reserved powers" of the states under the tenth amendment,[141] the very same concept that provided the analytical underpinning for his *Lanza* opinion.

When subjected to this more searching analysis, *Lanza* indicates that existing doctrinal concepts and ideological concerns not directly related to prohibition both played influential roles in directing the course of doctrinal growth during the prohibition era. Other prohibition decisions—those involving entrapment, the fourth amendment, and property forfeitures—demonstrate, however, that the power of these other influences was not absolute, that an existing framework did not prevent antagonistic doctrinal developments that were consistent with the Court's changing attitudes toward prohibition enforcement.[142] But the dual sovereignty cases illustrate how extant doctrine can be a powerful force when it pushes in the same direction as the general thrust of the prohibition cases and the Court's nonprohibition ideological agenda. In *Lanza*, extant doctrine persuaded the Court to ignore contrary authority and even to override contemporary expressions of legislative intent

137. *See supra* notes 69-86 and accompanying text.

138. 1 W.F. SWINDLER, *supra* note 131, at 222, 388-89 (1969).

139. *See, e.g.*, Stafford v. Wallace, 258 U.S. 495 (1922) (extending the "current of commerce" theory to justify congressional regulation of livestock after they had been unloaded from interstate carriers); Railroad Comm'n of Wisconsin v. Chicago, Burlington & Quincy Ry., 257 U.S. 563 (1922) (declining to extend the doctrine of the *Shreveport Rate Case* to allow federal regulation of intrastate portions of the carriers' business).

140. *See, e.g.*, Hill v. Wallace, 259 U.S. 44 (1922) (concluding that the tax imposed by the futures Trading Act of 1921 was an invalid attempt to exercise the police powers reserved to the states); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (Child Labor Tax was an invasion of the reserved powers of the states).

141. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

142. *See* Murchison, *supra* note 125, at 480-520 (fourth amendment decisions); Murchison, *supra* note 87, at 449-58 (property forfeiture decisions).

expressed in what would normally be regarded as authoritative sources. Similarly, in *Hebert*, clarity in existing doctrine may well have discouraged an ambivalent Court from innovation even though it did not mandate adherence to precedent.

Even more striking than the roles precedent and nonprohibition concerns seem to have played in *Lanza* and *Hebert* is the lack of any doctrinal development regarding dual sovereignty during the last years of the prohibition era. The absence of change contrasts sharply with the general pattern of prohibition decisions,[143] with the specific trend with respect to a variety of individual areas including entrapment,[144] the fourth amendment,[145] and property forfeitures,[146] and with the ability of legal scholars to reshape the conceptual framework on which *Lanza* and *Hebert* rested.[147]

The reason for the lack of doctrinal development regarding dual sovereignty is obvious. The Supreme Court never reconsidered *Lanza* during the prohibition era because no case it decided after *Hebert* presented the dual sovereignty issue. Furthermore, the likely reason for the disappearance of the legal issue is also straightforward: by the 1930s, multiple prosecutions for liquor violations were almost certainly rare.

Almost no decisions reported during the last years of prohibition discuss the dual sovereignty issue,[148] and reasons for the paucity of decisions are not difficult to discover. In several states, successive prosecutions by federal and state authorities were impossible because no state prohibition statute existed;[149] and a number of other states had enacted laws barring state prosecu-

143. *See* Murchison, *supra* note 125, at 476-80; Murchison, *The Entrapment Defense*, *supra* note 128, at 217-18, 220-21, 234-35; Murchison, *supra* note 87, at 459-61.

144. *See* Sorrells v. United States, 287 U.S. 435 (1933); Murchison, *The Entrapment Defense*, *supra* note 128, at 224-36.

145. *See* Nathanson v. United States, 290 U.S. 41 (1933); Sgro v. United States, 287 U.S. 206 (1932); Grau v. United States, 287 U.S. 124 (1932); Taylor v. United States, 286 U.S. 1 (1932); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Murchison, *supra* note 125, at 489-520.

146. General Imp. & Exp. Co. v. United States, 286 U.S. 70 (1932); United States v. The Ruth Mildred, 286 U.S. 67 (1932); United States v. Commercial Credit Co., 286 U.S. 63 (1932); General Motors Acceptance Corp. v. United States, 286 U.S. 49 (1932); United States v. Ryan, 284 U.S. 167 (1931); Richbourg Motor Co. v. United States, 281 U.S. 528 (1930); Murchison, *supra* note 87, at 449-61.

147. *See supra* text accompanying notes 90-96.

148. *See supra* notes 84-85.

149. N. CLARK, DELIVER US FROM EVIL, *supra* note 105, at 40-41. At least five states lacked prohibition enforcement laws by the late 1920s. *See* N.Y. Times, May 30, 1929, at 1, col. 5. In New York, a democratic legislature reacted to *Lanza* by repealing the state prohibition law its republican predecessor had passed just two years earlier. *See* Act of June 1, 1923, 1923 Laws of New York ch. 871 (repealing 1921 Laws chs. 155, 156); D. KYVIG, *supra* note 105, at 55-57. Other states that repealed their enforcement laws later in the prohibition era included Montana, Nevada and Wisconsin. *See* Act of May 29, 1929 Wisconsin Laws ch. 129 (abolishing office of state prohibition commissioner); N.Y. Times, May 30, 1929 at A1, col. 4 (announcing signing of act repealing prohibition enforcement legislation). In addition, Maryland apparently never adopted an enforcement law. N. CLARK, DELIVER US FROM EVIL, *supra* note 105, at 167.

tions following a federal prosecution for the same act.[150] Even in those states where successive prosecutors were possible, both federal and state prosecutors faced more prohibition cases than they could handle effectively.[151] They were thus unlikely to risk adverse publicity by prosecuting persons already convicted by another government when large numbers of defendants had never been prosecuted by anyone.

Hebert itself offers an illustration of this tendency to avoid successive prosecutions. *Hebert* is frequently cited as a double jeopardy case, but no evidence exists to suggest that the defendant was prosecuted more than once. Although a federal prosecution following the Supreme Court's affirmance of his state conviction was possible, the records of the district court show that the charges against Hebert were ultimately dismissed on the motion of the assistant United States attorney.[152] Moreover, the district court entered its order of dismissal slightly more than a year and a half after the Louisiana Supreme Court affirmed the state charges and almost eleven months before the United States Supreme Court rendered its opinion in *Hebert*. Thus, the *Hebert* proceedings suggest that the reason for the disappearance of appellate opinions challenging state and federal prosecutions was the disappearance of the multiple prosecutions themselves.

Viewed from this perspective, the dual sovereignty cases offer still another caveat to any reductionist attempt to draw a one-to-one correlation between the doctrinal developments of the prohibition era and changing public attitudes toward prohibition. Because the judicial doctrine was established in litigated cases, new doctrines developed only when active litigation challenged current dogma. On the other hand, doctrine survived unchanged when the legal system developed methods to avoid the dogma without resorting to the courts.

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150. *See supra* note 79, at 218 n.8, *citing* ARIZ. PENAL CODE § 728 (1913); CALIF. PENAL CODE § 656 (1920); IDAHO COMP. STAT.§ 8699 (1919); IND. CODE ANN. § 2045-16 (1926); MISS. CODE ANN. § 1164 (Hemingway 1917); N.D. COMP. LAWS ANN. § 10512 (1913); OR. LAW § 1388 (Olsen 1920); S.D. REV. CODE § 4516 (1919); TEX. CRIM. STAT. ANN. art. 208 (Vernon 1925); UTAH COMP. LAWS §§ 5522, 8652 (1917); VA. CODE ANN. § 4775 (1925); WASH. COMP. STAT. § 2271 (Remington 1922). The Texas statute, however, appears to have applied only when the criminal act was committed in another state, not when the act violated both a federal criminal statute and was also a state crime. In addition, Montana and New York had such laws prior to the repeal of their prohibition enforcement statutes. Note, *Double Jeopardy*, *supra* note 79, at 213 n.8, *citing* MONT. REV. CODE § 11719 (Choate 1921).

151. *See, e.g.*, H. ASBURY, *supra* note 31, at 167-73; H. JOHNSTON, WHAT RIGHTS ARE LEFT? 57 (1930); NATIONAL COMM'N ON LAW OBSERVANCE, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 55-56 (1931). For an illustration of the impact at the state level, see C. MERZ, *supra* note 31, at 203-05; *see also* H. MCBAIN, *supra* note 79, at 152.

152. Louisiana v. Hebert, Cr. No. 3932, (W.D. La.) (minute entry in docket book). Although the Supreme Court relied on *Lanza* in three per curiam decisions prior to *Hebert*, none of them contains any suggestion that the defendant had actually been subjected to multiple prosecutions. *See* State v. Power, 123 Me. 223, 122 A. 572, *dismissed for want of jurisdiction*, 269 U.S. 531 (1925); State v. Moore, 36 Idaho 565, 212 P. 349, *aff'd*, 264 U.S. 569 (1924); Chandler v. State, 89 Tex. Crim. 599, 232 S.W. 337 (1921), *aff'd*, 260 U.S. 708 (1923).

A comparison of the dual sovereignty cases with the fourth amendment decisions of the prohibition era offers a dramatic illustration of this role that litigation plays in the formation of doctrine. Because state laws and prosecutorial discretion largely eliminated successive prosecutions by state and federal governments, the dual sovereignty issue almost never arose in litigation and the *Lanza* rule survived the prohibition era intact. By contrast, litigation offered the only feasible means for resolving fourth amendment issues. As a result, all federal courts, including the Supreme Court, regularly addressed search questions;[153] and many of the Court's early decisions were significantly altered by the end of the prohibition era.[154]

CONCLUSION

The insights derived from studying the double jeopardy decisions of the prohibition era have a signficance that goes beyond any explanation of the relationship between judicial decisions and changing political attitudes toward prohibition. By providing a snapshot of some of the factors that mediate socio-political forces and judicial doctrine, the dual sovereignty decisions expand the basis for investigating the course of doctrinal development in other areas and in other times. More specifically, they serve to caution against unicausal explanations of the intellectual changes in American legal history and illustrate one reason why judicial doctrine provides only an imperfect mirror of the social, political, and economic forces of a particular moment in history, even as they confirm the significance of those forces in shaping the content of judicial opinions.

First, the double jeopardy cases demonstrate that any explanation of the relationship between politics and legal thought that focuses on a single cause is too simplistic to capture the complex reality. As important as prohibition appears to have been in shaping American judicial decisions, the double jeopardy cases reveal that prohibition was not the only political issue that had an impact on the legal system during the 1920s. Defining the appropriate division of governmental power was also becoming increasingly important as all governments increased their regulatory controls. Thus, the division of power between state and federal governments and protection of private economic interests were major. Sometimes, as in *Lanza*, those interests coincided with attitudes toward prohibition. When they did coincide, the court was much bolder and innovative than in the later years of prohibition when attitudes toward prohibition tended to diverge from opinions about the proper scope of governmental power.

Perhaps even more importantly, the double jeopardy cases offer a qualification to a major premise of most modern legal history, the assumption that law is a reflection of the economic and political preferences of a particular

153. For a listing of the Supreme Court's fourth amendment opinions, see Murchison, *supra* note 125, at 479-80 nn.59-61.

154. *Id.* at 515-19.

society.[155] Generally, the double jeopardy decisions of the prohibition era are consistent with that premise, for they show the ability of legal thought to accommodate itself to the times of which it is a part. Nonetheless, the dual sovereignty subset of the double jeopardy decisions suggest that the premise is valid only if one broadly defines the term "law" to include all of the ways a society solves legal problems. If one limits law to its intellectual manifestations, the reflection of society is only partial. The general trend of judicial doctrine moves in harmony with other cultural forces, and the judicial doctrine that these forces produce is capable of radical transformation. Anomalies still remain, however, and the dual sovereignty cases explain one reason for the anomalies—the possibility that a particular problem might be solved in ways other than by revising formal law. When these alternate solutions solve the immediate problem, they eliminate the incentive for litigants to challenge the doctrine and the need for the courts to revise it. As a result, unchallenged doctrine remains intact and the attitude it reflects may stand in sharp contrast to the attitudes reflected in most other doctrinal areas.

The dual sovereignty cases qualify the proposition that prohibition influenced legal doctrine in the 1920s in another way as well. They also illustrate the importance of institutional considerations in shaping legal thought. Because American legal thought is largely the product of judicial decisions, it normally develops in response to litigation pressure and tends to ignore intellectual issues that address problems that society has managed to solve outside the litigation process. This tendency to ignore problems that fail to surface in litigation requires those who want to understand legal thought from a political perspective to learn more than the political history of the period they are trying to analyze. They must also discover when litigation provided the forum for resolving particular political issues. Only in this way can they account for anomalies like the immutability of the dual sovereignty exception during the prohibition era and for similar anomalies in other legal doctrines that seem to contradict the temper of the eras in which they go unchallenged.

Beyond these lofty insights, the dual sovereignty cases of the prohibition era remain important for another, more pragmatic, reason—because they continue to provide the conceptual framework for contemporary double jeopardy doctrine. The continued vitality of these venerable precedents form the subject of part two of this article.

155. *See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 12 (2d ed. 1985); S. PRESSER & J. ZAINALDIN, LAW AND AMERICAN HISTORY 17 (1980). For a recent work that takes a contrary view emphasizing—and in my view exaggerating—the importance of legal tradition in shaping the content of law see A. WATSEN, THE EVOLUTION OF LAW (1985).

PART TWO: A CRITIQUE OF CONTEMPORARY DOCTRINE

INTRODUCTION

Part two describes the course of the decisions by which the federal courts have adhered to the *Lanza*[1] rule through subsequent decisions, upheld the prosecutorial decision to initiate successive prosecutions, and extended the dual sovereignty exception beyond its federal-state parameters. It also examines modern limitations to the exception and explains why the exception has remained a fixture in American law long after modern decisions in other areas have abandoned its intellectual foundations. Next, a critique of contemporary doctrine highlights potential and actual abuses permitted by the exception and offers practical suggestions for reform. Finally, the article concludes with an analysis of the implications of the historical review for modern reform efforts.

I
REAFFIRMATION OF THE *LANZA* RULE

For at least two decades following prohibition's repeal in 1933, dual sovereignty remained a curious concept with little practical importance. Dicta in several Supreme Court opinions[2] as well as those of lower federal courts[3] acknowledged the *Lanza* rule. However, only one decision of a court of appeals[4] and two district court decisions[5] actually involved situations in which the defendant had been prosecuted by a state and the federal governments.

The reported opinions suggest that multiple prosecutions became prevalent in the mid-1950s, especially in drug cases. During the 1950s, decisions in the Fifth,[6] Sixth,[7] and Ninth[8] Circuits and in at least one district court[9] all followed *Lanza* in affirming federal prosecutions following state prosecutions for the same act; and the Tenth Circuit also endorsed the rule in a case in which no prior state prosecution had occurred.[10] In addition, state courts also upheld convictions that had followed federal prosecutions based on the same

1. United States v. Lanza, 260 U.S. 377 (1922).

2. *See* California v. Zook, 336 U.S. 725, 752-53 (1949); Screws v. United States, 325 U.S. 91, 108 n.10 (1945); Jerome v. United States, 318 U.S. 101, 105 (1943); Westfall v. United States, 274 U.S. 256, 258 (1927); *cf.* Puerto Rico v. Shell Co., 302 U.S. 253, 264-65 (1937) (dual sovereignty exception inapplicable to Puerto Rico).

3. *See, e.g.*, United States v. Levine, 129 F.2d 745, 748 (2d Cir. 1942).

4. Berg v. United States, 176 F.2d 122 (9th Cir.), *cert. denied*, 338 U.S. 876 (1949).

5. United States v. Mesarosh, 13 F.R.D. 180 (W.D. Pa. 1952); Jones v. Hiatt, 50 F. Supp. 68 (M.D. Pa. 1943); *cf.* United States v. Farwell, 76 F. Supp. 35 (D. Alaska 1948) (conviction under a city ordinance in a municipal court in the territory of Alaska did not bar subsequent prosecution under a state statute in federal district court).

6. Jolley v. United States, 232 F.2d 83 (5th Cir. 1956); Serro v. United States, 203 F.2d 576 (5th Cir. 1953).

7. Smith v. United States, 243 F.2d 877 (6th Cir. 1957).

8. Rios v. United States, 256 F.2d 173 (9th Cir. 1958).

9. United States v. Mandile, 119 F. Supp. 226 (E.D.N.Y. 1954) (alternate holding).

10. Marteney v. United States, 128 F.2d 258, 263 (10th Cir. 1954), *cert. denied*, 348 U.S. 943 (1955).

conduct.[11] Two of these cases—one state and one federal—eventually reached the Supreme Court in 1959 and produced a reaffirmation of the dual sovereignty exception.

Abbate v. United States[12] involved state and federal convictions both of which resulted from a conspiracy to dynamite telephone facilities during a strike by the telephone company's employees. Two of the conspirators were convicted in an Illinois court of violating a state statute making it a crime to conspire to injure the property of another. Following the state convictions, federal authorities indicted the defendants for conspiring to injure property belonging to a means of communication operated and controlled by the United States, and a jury found them guilty. The Fifth Circuit affirmed the convictions,[13] and the Supreme Court granted certiorari to consider the claim that the federal prosecutions violated the double jeopardy clause of the fifth amendment.[14]

A divided Court rejected the double jeopardy claim.[15] Justice Brennan's majority opinion[16] reviewed *Lanza*, its antecedents, and its reaffirmation in

11. *See In Re* Illova, 351 Mich. 204, 88 N.W.2d 539 (Mich. 1958) (rejecting habeas corpus petition seeking release after expiration of federal sentence); Commonwealth v. Carter, 187 Pa. Super. 159, 144 A.2d 493 (Pa. 1958) (upholding state sentence imposed after acquittal on federal charge based on the same conduct).

12. 359 U.S. 187 (1959).

13. 247 F.2d 410 (5th Cir. 1957).

14. 355 U.S. 902 (1957).

15. Justice Black dissented in an opinion that Chief Justice Warren and Justice Douglas joined. 359 U.S. at 201. He rejected the assumption of *Lanza* and its predecessors "that identical conduct of an accused might be prosecuted twice, once by a State and once by the Federal Government, because the 'offense' punished by each is in some, meaningful, sense different." *Id.* at 202. That "legal logic," which "prove[d] one thing to be two," was, he declared "too subtle for me to grasp." *Id.* He gave two reasons for rejecting the argument that a state and the federal government "can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately." *Id.* at 203. First, he noted that states were certainly no "more distinct from the federal government than are states from each other" and that "most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdictions." *Id.* Second, he emphasized his view of the fifth amendment's ban on double jeopardy as an attempt "to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court." *Id.* It was "just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense," *id.*; and he opposed an interpretation of the fifth amendment that permitted such a result.

16. *Id.* at 190-94. Justice Brennan also filed a separate opinion explaining why he rejected an alternate theory on which the government had relied in urging affirmance of the *Abbate* convictions. *Id.* at 196. The government argued "that two prosecutions are not 'for the same offense' within the meaning of the Fifth Amendment when they are based upon the violation of two statutes designed to vindicate different governmental interests and requiring different evidence to support convictions." *Id.* Although the Court considered it unnecessary to discuss this alternate rationale, Justice Brennan "consider[ed] its implications so disturbing as to require comment," because it could be used to permit two successive federal prosecutions as well as successive state and federal prosecutions. Such a result would, he declared, violate the fifth amendment, which prohibitied "successive federal prosecutions of the same person based on the

more recent dicta. This review led him to reject the *Abbate* challenge to *Lanza* because it did not advance any "consideration or persuasive reason not presented to the Court in prior cases" that would justify departing from *Lanza*'s "firmly established principle."[17] To the contrary, he concluded, overruling *Lanza* would produce "undesirable consequences."[18] To allow state prosecutions to bar federal prosecutions based on the same acts would, he argued, "necessarily" hinder federal law enforcement in cases like *Abbate* where "the defendants' acts impinge more seriously on a federal interest than on a state interest."[19] If the *Lanza* rule were abandoned, the federal government could avoid this interference only by "completely . . . displac[ing] state power to prosecute crimes which might also violate federal law;" and such a displacement would undermine the historical distribution of powers under American federalism, a distribution that assigned to the states "the principal responsibility for defining and prosecuting crimes."[20]

A companion case, *Bartkus v. Illinois*, [21] upheld a state robbery convic-

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same act" even when the two prosecutions were "brought under federal statutes requiring different evidence and protecting different federal interests." *Id.* at 197. In subsequent decisions, Justice Brennan has protested the Court's failure to adopt such a "transaction" test for successive federal prosecutions. *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 170 (1977) (concurring opinion); Ashe v. Sevenson, 397 U.S. 436, 448 (1970) (concurring opinion); Waller v. Florida, 397 U.S. 387, 395 (1970) (concurring opinion).

17. 359 U.S. at 195.

18. *Id.*

19. *Id.*

20. *Id.*

21. 359 U.S. 121 (1959). Justice Black dissented in an opinion that Chief Justice Warren and Justice Douglas joined. *Id.* at 150. He reaffirmed his *Abbate* position that "a federal trial following either state acquittal or conviction is barred by the Double Jeopardy Clause of the Fifth Amendment," when he declared his conviction that Bartkus's conviction should not stand regardless of whether the double jeopardy clause applied to the states. Even under "the prevailing view of the Fourteenth Amendment," Bartkus's conviction was impermissible because double prosecutions for the same offense are . . . contrary to the spirit of our free country." *Id.* at 150-51. As in *Abbate*, Justice Black emphatically rejected the position "that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State" as a "notion . . . too subtle for me to grasp." *Id.* at 155. Moreover, he was unpersuaded by the Court's reliance on federalism to justify its position. In his view, the "Federal Union was conceived and created 'to establish justice' and to 'secure the blessings of liberty;' " and the Court should, therefore, reject interpretations that "result in obliterating ancient safeguards." *Id.* He also identified two specific defects in the majority's "federalism" premise: "the unwarranted assumption that State and Nation will seek to subvert each other's laws" and "the fact that our constitution allocates power between local and federal governments in such a way that the basic rights of each can be protected without double trials." *Id.* at 156-57. Finally, the dissent concluded with a warning that "the victims of . . . double prosecutions will often be the poor and the weak in our society" as "[t]he power to try a second time will be used, as have all similar procedures to make scapegoats of helpless, political, religious, or racial minorities and those who differ, who do not conform, and who resist tyranny." *Id.* at 163.

Justice Brennan also filed a dissenting opinion that the Chief Justice and Justice Douglas joined. *Id.* at 164. He argued that Bartkus's conviction could not stand because "federal officers solicited the state indictment, arranged to assure the attendance of key witnesses, unearthed additional evidence to discredit Bartkus and one of his alibi witnesses, and in general prepared and guided the state prosecution." *Id.* at 165. This federal involvement required a

tion following the defendant's acquittal on a charge of robbery of a federally insured savings and loan association. Justice Frankfurter reaffirmed that the double jeopardy clause did not apply to the states,[22] and then offered an exhaustive review of federal[23] and state[24] precedents regarding successive prosecutions. This review convinced him that rejecting the dual sovereignty exception to double jeopardy would require the Court to "disregard . . . a long, unbroken, unquestioned course of impressive adjudication."[25] Moreover, the opinion also perceived a "practical justification" for the dual sovereignty exception: the need to keep prosecutions for minor federal offenses from infringing the power of states to punish serious offenses committed within their borders.[26] Although Justice Frankfurter noted that a number of states had enacted laws forbidding successive prosecutions, he regarded the difficulty that state courts had experienced in applying those statutes as an additional argument for declining to establish a constitutional rule governing the issue.[27] "Precedent, experience, and reason" all counseled against imposing a ban on state prosecutions following a state prosecution arising out of the same act,[28] and the Court rejected Bartkus' claim that the state prosecution deprived him of due process of law.[29]

II
MODERN LIMITATIONS TO THE *LANZA* Rule

A. Administrative Policy

Shortly after the *Abbate* and *Bartkus* decisions, Attorney General William Rogers issued a memorandum establishing Justice Department policy with respect to successive prosecutions.[30] He noted that the power confirmed

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reversal of Bartkus's conviction, he declared, because it effectively made "this state prosecution actually a second federal prosecution of Bartkus." *Id.* at 165-66.

22. *Id.* at 128-36.

23. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945); Jerome v. United States, 318 U.S. 101 (1943); Puerto Rico v. Shell Co., 302 U.S. 253 (1943); Westfall v. United States, 274 U.S. 256 (1927); Hebert v. Louisiana, 272 U.S. 312 (1926); United States v. Lanza, 260 U.S. 377 (1922); Moore v. Illinois, 55 U.S. (14 How.) 13 (1852); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).

24. *See* 359 U.S. at 135 n.24 (*citing* decisions from twenty-eight states that had considered the successive prosecution issue).

25. *Id.* at 136.

26. *Id.*; *accord* United States v. Lanza, 260 U.S. 377, 385 (1922). *But see* Murchison, *The Dual Sovereignty Exception to Double Jeopardy: The Forgotten Legacy of Prohibition*, 14 N.Y.U. REV. L. & SOC. CHANGE, Part I (1986) (discussing floor debate on the meaning of the "concurrent power" clause of the eighteenth amendment).

27. 359 U.S. at 138-39.

28. *Id.* at 139.

29. The *Bartkus* opinion used a due process analysis because the Court had previously ruled that the fourteenth amendment did not incorporate the fifth amendment's prohibition on double jeopardy. *Id.* at 124-28; *see* Palko v. Connecticut, 302 U.S. 319 (1937). In 1969, the Court reversed this premise of *Bartkus* and held the double jeopardy clause applicable to the states. Benton v. Maryland, 395 U.S. 784 (1969).

30. The *New York Times* printed the text of the memorandum in full. N.Y. Times, April 6,

in *Abbate* was being used "sparingly" because of existing department policy, and he declared that the purpose of his memorandum was to ensure a continuation of the policy. To implement this policy, he established the following standard: "After a state prosecution there should be no Federal trial for the same act or acts unless the reasons are compelling." In addition, he established a procedural prerequisite to a subsequent federal prosecution. No United States Attorney was to try a federal case "when there has already been a state prosecution for the same act" unless "the appropriate Assistant Attorney General" had approved the prosecution, and the Assistant Attorney General was directed to withhold approval until the proposed prosecution was "first brought to my attention."

More recently, the policy set forth in the memorandum issued by Attorney General Rogers has been incorporated into the United States Attorneys' Manual.[31] The United States has occasionally relied on the policy established in the memorandum to dismiss cases that were pending on appeal.[32] The Justice Department has, however, always insisted that the policy regarding multiple prosecutions is an internal administrative rule that does not create any right for a defendant to secure dismissal of a prosecution initiated in violation of the policy.[33] Moreover, the federal courts have consistently upheld the government's position in every circuit in which the issue has arisen.[34]

1959, at 19, col. 2; and the Eighth Circuit later republished it in a footnote. United States v. Mechanic, 454 F.2d 849, 856 n.5 (8th Cir. 1971).

31. U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.142 (Jan. 3, 1980). The section also establishes an essentially identical rule for determining when multiple prosecutions can be initiated against a defendant in different federal district courts. Relying on this later rule to challenge multiple federal prosecutions has been as futile as relying on the original policy to challenge successive state and federal prosecutions. *See, e.g.*, United States v. Snell, 592 F.2d 1083 (9th Cir. 1979), *cert. denied*, 442 U.S. 944 (1979).

32. *See, e.g.*, Thompson v. United States, 444 U.S. 248 (1980); Rinaldi v. United States, 434 U.S. 22 (1977); Watts v. United States, 422 U.S. 1032 (1975); Ackerson v. United States, 419 U.S. 1099 (1975); Hayles v. United States, 419 U.S. 892 (1974).

33. UNITED STATES ATTORNEY'S MANUAL, *supra* note 31, at § 9-2.142(3)(c).

34. *See, e.g.*, United States v. Ng, 699 F.2d 63 (2d Cir. 1983); United States v. Howard, 590 F.2d 564 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979) (alternate holding); United States v. Nelligan, 573 F.2d 251 (5th Cir. 1978) (alternate holding); United States v. Frederick, 583 F.2d 273 (6th Cir. 1978) (alternate holding), *cert. denied*, 440 U.S. 860 (1979); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969), *cert. denied*, Mitchell v. United States, 396 U.S. 1024 (1970); United States v. Wallace, 578 F.2d 735 (8th Cir. 1978), *cert. denied*, 439 U.S. 898 (1978); *cf.* United States v. Snell, 592 F.2d 1083 (9th Cir. 1979) (rule applied to policy against successive federal prosecutions arising out of the same conduct). Federal courts of appeals have occasionally reviewed the merits of the government's application of the policy against successive prosecutions. *See, e.g.*, United States v. Mechanic, 454 F.2d 849, 856 (8th Cir. 1971), *cert. denied*, 406 U.S. 929 (1972); United States v. Synnes, 438 F.2d 764, 773 n.1 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972); United States v. Williams, 431 F.2d 1168, 1175 (5th Cir. 1970), *rev'd en banc on other grounds*, 447 F.2d 1285 (1971), *cert denied*, 405 U.S. 954 (1972). However, none of those decisions actually reversed a defendant's conviction because of a violation of the department policy. *See generally* Note, *The Petite Policy: An Example of Enlightened Prosecutorial Discretion*, 66 GEO. L.J. 1137, 1145-47 (1978). For a brief summary of the limitations of the Justice Department policy, see Note, *Selective Preemption: A Preferen-*

B. Statutory Reforms

Modern proposals to reform both state and federal law have recommended that the number of situations in which successive prosecutions by different governments are permitted should be significantly reduced. Many states have incorporated these recommendations into their statutory law, but the impact on federal law has been much less substantial.

During the prohibition era, a number of states had adopted statutes that forbade a state prosecution subsequent to a federal prosecution for the same act.[35] These statutes generally remained in effect after the repeal of prohibition,[36] and more recently they have been copied by other states.[37] Included among the states that have adopted statutes barring successive prosecutions is Illinois, which adopted its statute shortly after the Supreme Court sustained the subsequent Illinois prosecution in *Bartkus*.[38] In addition, at least one widely adopted uniform act—the Uniform Controlled Substance Act[39]—includes a prohibition on successive prosecutions in its provisions.

In the 1950s, the American Law Institute began work on a long-delayed project to develop a model statute that states could use to reform their criminal law.[40] This project resulted in the Model Penal Code, which was issued in its final form in 1962.[41] Section 1.10 of the code proposed a substantial modification of the *Hebert-Bartkus* rule, which permitted state prosecutions follow-

tial Solution to the Bartkus-Abbate Rule in Successive Federal-State Prosecutions, 57 NOTRE DAME LAW. 340, 348-50 (1981) [hereinafter cited as Note: *Selective Preemption*].

35. Murchison, *supra* note 26, at 404-05 n.150.

36. *See* ARIZ. REV. STAT. ANN. § 13-112 (1978); CAL. PENAL CODE § 656 (West 1970); IDAHO CODE § 19-315 (1979); IND. CODE ANN. § 35-41-4-5 (Burns 1985); MISS. CODE ANN. § 99-11-27 (1972); N.D. CENT. CODE § 29-03-13 (1974); UTAH CODE ANN. § 76-1-404 (1978); VA. CODE § 19.2-294 (1983); WASH. REV. CODE ANN. § 10.43-040 (1980). Two states have, however, repealed their statutory bans against successive prosecutions. *See* 1973 Or. Laws, ch. 836, § 358; 1978 S.D. Laws, ch. 178, §§ 220, 577; *see also* 1973 Tex. Laws, ch. 399, § 2(c) (repealing provision prohibiting successive prosecutions when the criminal act occurred in another state).

37. *See* ALA. STAT. § 12.20.010 (1984); ARK. STAT. ANN. § 43-1224.1 (1977); COLO. REV. STAT. § 18-1-303 (1978 Repl. vol.); DEL. CODE ANN. tit. 11, § 209 (1979); GA. CODE ANN. § 16-1-8 (1984); HAWAII REV. STAT. § 701-112 (1976); ILL. ANN. STAT. ch. 38, 3-4g (Smith-Hurd 1972); KAN. STAT. ANN. § 21-3108(3) (1981); MONT. CODE ANN. § 46-11-504 (1983); N.J. STAT. ANN. § 2C:1-11 (West 1982); N.Y. CODE CRIM. PRO. § 40.20 (1981 & 1984-85 Supp.); OKLA. STAT. ANN. tit. 22, § 130 (West 1968); PA. CONS. STAT. ANN. § 111 (Purdon 1983); WISC. STAT. ANN. § 939.71 (West 1982). Minnesota also has a statute banning successive prosecutions when the crimes have "identical elements of law and fact," MINN. STAT. § 609.045 (1983); *see also* MICH. COMP. LAWS § 767.64 (1982) (Michigan has laws banning successive prosecutions for certain larceny offenses); MO. ANN. STAT. § 541.058 (1953) (Missouri has laws banning successive prosecutions for certain larceny offenses).

38. Act of July 22, 1959, 1959 Ill. Laws 1893, *now codified with modifications as* ILL. ANN. STAT. ch. 38, § 3-4(c) (Smith-Hurd 1972).

39. Uniformed Controlled Substance Act § 405 (1970). Not every state that has used the Uniform Act as the basis for its drug law has accepted the ban on successive prosecutions. *See, e.g.*, LA. REV. STAT. ANN. 40:961 (West 1977).

40. *See generally* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

41. MODEL PENAL CODE (Proposed Official Draft 1962).

ing a federal prosecution for the same act. It barred such successive prosecutions when they were "based on the same conduct" except in two narrow circumstances: (1) when the crimes charged in each prosecution required proof of a fact not required by the other and the laws defining the two offenses were designed to prevent "substantially different" harms or evils,[42] or (2) when the second offense was not consummated when the first prosecution began.[43] In addition, it absolutely barred successive prosecutions when the first prosecution resulted in a verdict for the defendant that "necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is prosecuted."[44]

The Model Penal Code has been an influential catalyst to criminal reform since its promulgation. Although the Commissioners on Uniform State Laws list only two states as having based comprehensive revisions of their criminal codes on it,[45] both of these states have followed the recommendations of Section 1.10.[46] Moreover, a number of other states have enacted criminal codes since 1962, and they have generally used the Model Penal Code, and specifically Section 1.10, as a guide.[47] Adding these states to those who had previously enacted statutes proscribing successive prosecutions produces a total of at least twenty-five states that presently ban them.[48]

Statutory abrogation of the dual sovereignty exception has proceeded more slowly at the federal level. A few old statutes covering specific crimes bar federal prosecutions when the state has previously prosecuted the defendant for a crime arising out of the same conduct,[49] and a few more modern statutes contain similar proscriptions.[50] Congress has, however, never enacted a general ban on successive prosecutions, although a bill incorporating such a

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42. *Id.* at § 1.10(1)(a).

43. *Id.* at § 1.10(1)(b).

44. *Id.* at § 1.10(2).

45. 10 UNIF. LAW. ANN., *Table of Jurisdictions Wherein Code Has Been Adopted* (Supp. 1985).

46. N.J. STAT. ANN. § 2C:1-11 (West 1982); 18 PA. CONS. STAT. ANN. § 111 (Purdon 1983). Pennsylvania had previously modified the dual sovereignty exception by judicial decision. *See* Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638 (1971).

47. *See, e.g.*, COLO. REV. STAT. § 18-1-303 (1978); GA. CODE ANN. § 16-1-8 (1984); HAWAII REV. STAT. § 701-112 (1976); KAN. STAT. ANN. § 21-3108(3) (1981).

48. *See supra* state laws cited at notes 36-37 *supra*. The total of twenty-five includes Minnesota, which requires that the offenses have "identical elements."

49. *See, e.g.*, 18 U.S.C. § 659 (1982) (theft from interstate carriers); 18 U.S.C. § 660 (1982) (embezzlement from interstate carriers); 18 U.S.C. § 1992 (1982) (disabling railroad cars); 18 U.S.C. § 2117 (1982) (breaking or entering facility of interstate commerce).

50. *E.g.*, 15 U.S.C. § 80-36 (1982) (larceny and embezzlement of funds or securities of a registered investment company); 15 U.S.C. § 1282 (1982) (destruction of property in possession of an interstate carrier); 18 U.S.C. § 2101 (1982) (travelling in interstate commerce to facilitate a riot). Unlike section 405 of the Uniform Controlled Substances Act, the Federal Dangerous Drug and Controlled Substance Act, 18 U.S.C. § 801 (1982) does not forbid successive prosecutions.

ban was introduced following the Supreme Court's decision in *Abbate*.[51]

In 1966, Congress established a national commission to prepare a comprehensive revision of the federal criminal laws.[52] When the commission issued its final report in 1971, it recommended adoption of a new federal criminal code.[53] Sections 707 and 708 of the code proposed by the commission address the problem of successive prosecutions by the federal government and a state government. Section 707 limits federal prosecutions following a state prosecution, and section 708 restricts the ability of state governments to prosecute following a federal prosecution.

Subsection (a) of section 707 codifies, in a slightly modified form, the substantive provisions of the current Justice Department policy on successive prosecutions. When conduct constitutes a federal offense and also an offense under state law, subsection (a) forbids a subsequent federal prosecution "whenever the first prosecution and the subsequent prosecution [are] based on the same conduct or arose from the same criminal episode." The rule permits successive prosecutions in two instances when the laws of the two jurisdictions are "intended to prevent substantially different harm[s] or evil[s]" and when "the second offense was not consummated when the first trial began. . . ."[54]

Subsection (b) provides an even more stringent bar when the state trial has resulted in an acquittal. It forbids a successive federal prosecution if "the first prosecution was terminated by an acquittal . . . which necessarily required a determination inconsistent with a fact or legal proposition which must be established for conviction of the offense of which the defendant is subsequently prosecuted." Unlike subsection (a), subsection (b) does not contain exceptions for situations where the state and federal statutes protect against different harms or evils or where the second offense was not consummated when the first trial began.[55]

The concluding phrase of section 707 grants the Attorney General authority to override the rules of subsections (a) and (b) when the national interest requires such action. It permits a federal prosecution following a state trial if "the Attorney General of the United States certifies that the interests of the United States would be unduly harmed if the federal prosecution is barred."[56]

Section 707 also provides limited procedural protection. Although it does not require the Attorney General, rather than the individual United

51. H.R. 6176, 86th Cong., 1st Sess. (1959). *See* Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306, 345-46 (1963).

52. Pub. L. 89-801, 80 Stat. 1516 (1966).

53. *See generally* NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT: PROPOSED NEW FEDERAL CRIMINAL CODE (1971).

54. *Id.* at § 707(a).

55. *Id.* at § 707(b). For the argument that the Constitution requires greater protection for state court acquittals, see Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073 (1982) [hereinafter cited as Note: *Double Jeopardy*]. *But see* United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984).

56. PROPOSED NEW FEDERAL CRIMINAL CODE, *supra* note 53, at § 707.

States attorneys, to determine if a successive prosecution is permissible under the "substantially different harm or evil" standard, it defines that issue as a question of law subject to judicial construction. In addition, it requires the Attorney General's personal certification that failure to allow a federal prosecution following a state court acquittal would unduly harm the interest of the United States.[57]

As noted above, section 708 invokes federal legislative authority to limit state prosecutions that follow a federal prosecution when the conduct involved constitutes an offense under both state and federal law.[58] Although section 708 does not attempt to prescribe any administrative procedures that states must follow before initiating successive prosecutions, its substantive provisions track those of section 707. First, it establishes a general bar against successive prosecutions unless the laws of the state are "intended to prevent a substantally different harm or evil" than federal laws or the state offense was not consummated when the federal trial began.[59] Second, it bans successive prosecutions when "the federal prosecution was terminated by an acquittal . . . which necessarily required a determination inconsistent with a fact or legal proposition when must be established for conviction of the offense of which the defendant is subsequently prosecuted."[60] This second bar is even stricter than the analogous provision of section 707 because it does not provide an exception for cases where the Attorney General certifies that successive prosecutions are justified.[61]

Congress has, however, never enacted the criminal code proposed by the commission, and the part containing the double jeopardy provisions was even deleted from the amended version that the Senate Judiciary Committee reported favorably in 1977.[62] As a result of this inaction, successive prosecutions remain possible except where they are barred by state law or by the hodgepodge of unrelated federal crimes that include a ban on successive prosecutions in their substantive provisions.

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57. *Id.*

58. *Id.* at § 708. The Commission recognized the "novel" character of this section and notes:

> A substantial body of opinion in the Commission, while not in disagreement with the end to be achieved, favors deletion of this section, because of strong doubts concerning its constitutionality and because of the view that, even if constitutional, it would be preferable, as a matter of comity within the federal system, to permit the states to deal with the problem themselves rather than to force this result by Congressional action.

Id. at (Comment).

59. *Id.* at § 708(a).

60. *Id.* at § 708(b).

61. The Commission gave the following explanation for this omission: "[A] consideration [in section 707] . . . — federal supremacy—favoring discretionary power in the Attorney General to proceed notwithstanding a prior local acquittal does not apply here, so that there is here an absolute bar against a subsequent . . . [state] prosecution." *Id.* at § 708 (Comment).

62. *See* S. 1437, 95th Cong., 1st Sess. (1977). The Senate Bill deleted all the sections dealing with defenses.

C. Judicial Decisions

During the 1960s and for much of the 1970s, the dual sovereignty exception appeared to be a doctrine heading for extinction. Supreme Court decisions undercut the premises on which the doctrine was based, refused to extend it beyond the federal-state context, and seemed generally inclined to expand double jeopardy protections. At the same time, some state courts declined to follow *Bartkus* and refused to allow state prosecutions following a federal prosecution for the same conduct. More recently, however, the Supreme Court has begun to retract the scope of double jeopardy protection and has emphatically reaffirmed the dual sovereignty concept by applying it in new contexts.

1. Supreme Court Precedents

One important premise of the dual sovereignty doctrine was the traditional view that the Bill of Rights did not apply to the states.[63] Since the fifth amendment's prohibition against double jeopardy only limited the federal government, treating the two sovereignties as distinct entities for double jeopardy purposes seemed logical as did the analogous dual sovereignty rules applicable to the fourth amendment's ban on unreasonable searches and seizures[64] and the fifth amendment's ban on self-incrimination.[65] Of course, the Warren Court's increasing trend toward "selective incorporation" of the criminal procedures guaranteed in the Bill of Rights into the due process guarantee of the fourteenth amendment undercut this justification to a considerable degree; and it was finally eliminated in 1969 when *Benton v. Maryland*[66] overruled *Palko v. Connecticut*[67] and held that the prohibition against double jeopardy was applicable to the states.

Benton seemed even more significant in light of two decisions in which the Supreme Court rejected dual sovereignty doctrines for other rights that had been incorporated into the fourteenth amendment's due process guaran-

63. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 124-28 (1959). The classic debate on this issue is found in the concurring opinion of Justice Frankfurter and the dissenting opinion of Justice Black in Adamson v. California, 332 U.S. 46 (1947).

64. The so-called "silver platter" doctrine, Lustig v. United States, 338 U.S. 74, 79 (1949), allowed federal prosecutors to use evidence obtained by nonfederal investigators in searches that would have violated the fourth amendment if conducted by federal officials. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 398 (1914). Until the Supreme Court overruled the doctrine, Elkins v. United States, 364 U.S. 206, 208 (1960), a considerable amount of litigation focused on what degree of cooperation between federal and state officials would render the silver platter doctrine inapplicable. *See, e.g.*, Gambino v. United States, 275 U.S. 310 (1927); Byars v. United States, 273 U.S. 28 (1927); Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 502-506 (1982).

65. Feldman v. United States, 322 U.S. 487 (1944), *overruled*, Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

66. 395 U.S. 784 (1969).

67. 302 U.S. 319 (1937); *accord*, Brock v. North Carolina, 344 U.S. 424 (1953).

tee. The first of these was *Elkins v. United States.*[68] *Elkins* rejected the "silver platter" doctrine, which allowed the prosecutors of one sovereignty to use the fruits of a search conducted in violation of the fourth amendment when officials of another sovereignty were responsible for the unconstitutional search. According to *Elkins*, the silver-platter doctrine was no longer appropriate now that the fourth amendment and its exclusionary rule also applied to the states. In the Court's words, "the foundation" upon which the doctrine was based was the premise "that unreasonable searches and seizures did not violate the Federal Constitution."[69] Since that foundation had been demolished, both "principles of logic"[70] and the underlying purposes of the exclusionary rule[71] required the Court to abandon the silver-platter doctrine.[72] Just two years after the decision in *Elkins*, the Court took a similar approach to the fifth amendment's privilege against self-incrimination. *Murphy v. Waterfront Commission* [73] held that the privilege precluded the federal government from using testimony given in a state proceeding in which the state had granted the defendant immunity from use of the testimony in a subsequent proceeding. Indeed, in a concurring opinion in a later decision, Justice Harlan described *Murphy* as having "abolished the two sovereignties' rule."[74]

In 1970, the Supreme Court appeared to confine the dual sovereignty exception to its traditional federal-state context when it reviewed one of a number of state decisions[75] that had applied the doctrine to allow successive prosecutions by a state and one of its local governments. *Benton*'s holding, that the prohibition against double jeopardy applied to the states, required the Court to review this state corollary to the federal rule. The Court ruled, in

68. 364 U.S. 206 (1960); *see generally* Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 U.C.L.A. L. REV. 1 (1961).

69. 364 U.S. at 214.

70. *Id.* at 215.

71. *Id.* at 216-23.

72. *Id.* at 223-24.

73. 378 U.S. 52 (1964).

74. Stevens v. Marks, 383 U.S. 234, 250 (1966) (Harlan, J., concurring in part and dissenting in part).

75. *See* cases cited in Waller v. Florida, 397 U.S. 387, 391 n.3 (1970). It is, of course, possible to distinguish the holdings of *Elkins* and *Murphy* from the dual sovereignty issue in the double jeopardy context. After carefully analyzing the two decisions, one student commentator suggested three grounds for distinction: (1) Neither *Elkins* nor *Murphy* absolutely proscribes a second prosecution; (2) in both *Elkins* and *Murphy*, cooperation between the two entities could satisfy constitutional standards and allow each to "attain its evidentiary and information objectives"; and (3) in *Murphy* and *Elkins*, each jurisdiction involved was "attempting to use the efforts of the other jurisdiction for its own purposes," whereas in the case of successive prosecutions each jurisdiction may be acting independently for its own purpose. Note, *Double Prosecutions by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1547-50 (1967). Notwithstanding these distinctions, the commentator ultimately concluded that the Court should follow *Elkins* and *Murphy* and abolish the dual sovereignty exception to double jeopardy because "it is unlikely that criminal law enforcement would be seriously disadvantaged by an overruling of the *Bartkus* and *Abbate* cases; and state-federal cooperation would probably be increased." *Id.* at 1565.

Waller v. Florida,[76] that the dual sovereignty rationale was inapplicable to successive prosecutions at the local and state levels, because local governments were creatures of the states in which they were located. Therefore, they did not qualify as distinct sovereigns entitled to make independent decisions concerning what conduct should be punished as criminal. Instead, the local government's relationship to the state was analogous to the status of federal territories vis-à-vis the federal government, and earlier decisions had held the dual sovereignty exception inapplicable to territorial prosecutions.[77]

Other double jeopardy decisions also seemed to indicate that the court would be more likely to apply this constitutional guarantee sympathetically. For example, the 1962 decision in *Fong Foo v. United States*[78] prohibited retrial after a judgment of acquittal; and *Ashe v. Swenson*[79] applied collateral estoppel principles to double jeopardy analysis in 1970. Even as late as 1977, *Brown v. Ohio*[80] strictly applied the "same evidence" test in holding that a "joyriding" conviction for unauthorized use of a stolen automobile barred a subsequent prosecution for theft of the vehicle. Moreover, concurring opinions in *Ashe* and *Waller* vigorously urged replacement of the "same evidence" test with a broader rule that would bar subsequent prosecutions whenever the two proceedings arose out of the "same transaction."[81]

Scholarly analysis of the dual sovereignty exception was almost uniformly critical,[82] and the decisions described above suggest that the Court was moving in the same direction as the commentators. Indeed the general thrust of the decisions of the 1960s led at least one commentator to suggest that the Supreme Court might well abandon the dual sovereignty exception.[83]

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76. 397 U.S. 387 (1970).

77. *See, e.g.*, Puerto Rico v. Shell Co., 302 U.S. 253 (1937); Grafton v. United States, 206 U.S. 333 (1907).

78. 369 U.S. 141 (1962).

79. 397 U.S. 436 (1970).

80. 432 U.S. 161 (1977).

81. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 448-60 (1970) (Brennan, J., Douglas, J., and Marshall, J., concurring); Waller v. Florida, 397 U.S. 387, 395-96 (1970) (Brennan, J., concurring).

82. *See, e.g.*, Brant, *Overruling* Bartkus *and* Abbate: *A New Standard for Double Jeopardy*, 11 WASHBURN L.J. 188 (1972); Harrison, *supra* note 51; Note, *supra* note 75; Note, *Double Jeopardy and Dual Sovereignty: A Critical Analysis*, 11 WM. & MARY L. REV. 946 (1970); Note, *Multiple Prosecutions: Federalism vs. Individual Rights*, 20 U. FLA. L. REV. 355 (1968); Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979) [hereinafter cited as Note, *The Problem of Double Jeopardy*]; Note: *Selective Preemption*, *supra* note 34. *But see* L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM (1968) (arguing that the dual sovereignty concept is a logical corollary of a federal system that protects the rights of individuals by diffusing power among various levels of government). One recent commentary argues that the dual sovereignty doctrine need not—and should not—be extended to permit federal prosecutions following state court acquittals. Note: *Double Jeopardy*, *supra* note 55.

83. Note, *supra* note 75, at 1547 (1967); *cf.* Brant, *supra* note 82, at 188 ("Recent case law . . . casts doubt upon the doctrines permitting successive prosecutions."); *see also* Smith v. United States, 423 U.S. 1303, 1307 (opinion of Douglas, J., in chambers), *vacated*, 423 U.S. 810 (1975) (suggesting that *Benton* "may cast doubt on the continuing vitality of" *Bartkus* and

That prediction proved erroneous, however, as the Court's decisions since 1977 have made increasingly clear. First, the recent decisions have discontinued the trend toward expansion of the scope of double jeopardy protections. Second, the Court has emphatically reaffirmed the viability of the dual sovereignty concept by expanding it beyond its traditional federal-state parameters.

The retreat from an expansive reading of the double jeopardy clause over the last several years is consistent with the Burger Court's general retreat from oversight of the nation's criminal justice procedures. For example, in *Arizona v. Washington*[84] the Court allowed a retrial after the grant of the prosecutor's motion for a mistrial based on the conduct of defense counsel; and in *United States v. Scott*[85] the Court allowed a retrial after a successful government appeal of the trial court's dismissal of an indictment because of pretrial delay. Two years later, the Court in *United States v. DiFrancesco*[86] held that the double jeopardy clause did not bar a government appeal of the sentence imposed on a defendant designated as a "dangerous offender" under the Organized Crime Control Act.[87] Even more recently, the Court has indicated, in *Albernaz v. United States*[88] and *Missouri v. Hunter*,[89] that the double jeopardy clause protects only against multiple prosecutions and not against multiple punishments imposed after a single trial.[90]

The Court has also extended the dual sovereignty exception to new contexts. In 1978, the Supreme Court unanimously held in *United States v. Wheeler*[91] that successive prosecutions by an Indian tribe and the federal government did not violate the fifth amendment. The court rejected the argument that the exception should be limited to the state-federal context as an overly restrictive view that "would require disregard of the very words of the Double Jeopardy Clause."[92] According to the *Wheeler* opinion, the decisive issue was "the ultimate source of the power under which the respective prosecutions were undertaken."[93] Thus, the exception was inapplicable, and normal double jeopardy rules applied, when both prosecuting entities derived their

Abbate). Roger Crampton had made a similar prediction just before the court reaffirmed the dual sovereignty exception in *Abbate* and *Bartkus*. *See* Crampton, *Pennsylvania v. Nelson: A Case Study in Federal Preemption*, 26 U. CHI. L. REV. 85, 100-01 (1958).

84. 434 U.S. 497 (1978).

85. 437 U.S. 82 (1978).

86. 449 U.S. 117 (1980).

87. 18 U.S.C. § 3575 (1982).

88. 450 U.S. 333 (1981).

89. 459 U.S. 359 (1983).

90. For a discussion of the significance of *Albernaz* and *Hunter*, see Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735 (1983); *see also* Garrett v. United States, 105 S. Ct. 2407 (1985) (double jeopardy does not bar conviction and punishment for crime of "continuing criminal enterprise" after earlier conviction for drug smuggling even though the drug smuggling was one of the predicate offenses for the continuing criminal enterprise charge).

91. 435 U.S. 313 (1978).

92. *Id.* at 330.

93. *Id.* at 320.

powers from the same source of power—as in the case of successive prosecutions by federal and territorial courts[94] or by state and municipal courts.[95] On the other hand, the dual sovereignty exception operated to permit successive prosecutions whenever the prosecuting entities derived their power from independent sources—as did a state and the federal government.[96]

Applying this test, the determinative issue for the *Wheeler* Court was the source of the Navajo Tribe's power to prosecute members for tribal offenses. Once the Court decided that this power emanated from the tribe's "primeval sovereignty" rather than from a delegation of federal sovereignty,[97] the remainder of the decision was axiomatic. Since the Navajo Tribe and the federal government derived their prosecutorial powers from independent sources, the dual sovereignty exception applied, and a conviction in the tribal court did not bar a subsequent federal prosecution for the same criminal conduct.[98]

Because tribal jurisdiction is limited to members of the tribe, the practical significance of the *Wheeler* holding will probably be minimal. Nonetheless, it is important for its reaffirmation of the underlying rationale that the Court would later use to extend the dual sovereignty exception to still another context—successive prosecutions by two state governments.

In *Heath v. Alabama*[99] the court extended the dual sovereignty exception to successive prosecutions by two different states. *Heath* involved a murder in

94. *Id.* at 318 (*citing* Puerto Rico v. Shell Co., 302 U.S. 253 (1937); Grafton v. United States, 206 U.S. 333 (1907)).

95. 435 U.S. at 318 (*citing* Waller v. Florida, 397 U.S. 387 (1970)).

96. 435 U.S. at 320 (*citing* United States v. Lanza, 260 U.S. 377 (1922)).

97. 435 U.S. at 328.

98. *Id.* at 329-30.

99. 106 S. Ct. 433. Only Justices Brennan and Marshall dissented in *Heath*. Justice Marshall's dissenting opinion, in which Justice Brennan joined, first argued that the dual sovereignty exception should not be extended to successive state prosecutions. In his view, neither the text nor the history of the double jeopardy clause provided a justification for the exception. Instead, he declared, "[t]his strained reading" of the clause had "survived and indeed flourished . . . not because of any inherent plausibility, but because it provides reassuring interpretivist support for a rule that accommodates the unique nature of our federal system." But the concerns that led to the exception in the federal-state context—preserving "exclusive [federal] power to vindicate certain of our Nation's sovereign interests" while "leaving the States to exercise complimentary authority over matters of more local concern"—did not apply when two states were involved; and, therefore, the exception should not be extended to that new situation. Although he acknowledged that the refusal to extend the exception to successive state prosecutions "would preclude the State that has 'lost the race to the courthouse' from vindicating legitimate policies distinct from those underlying its sister State's prosecution," he did not regard that interest in "further[ing] a particular policy" as sufficient "to deprive a defendant of his constitutionally protected right not to be brought to bar more than once to answer essentially the same charges." *Id.* at 442-444.

In addition to questioning the extension of the dual sovereignty exception to successive state prosecutions, Justice Marshall also objected to the Court's failure "to consider the fundamental unfairness of the process by which [Heath] stands condemned to die." Georgia's cooperation with the Alabama authorities went, he noted, "far beyond their initial joint investigation." Georgia's "law enforcement authorities . . . played leading roles as prosecution witnesses in the Alabama trial," and one had even attempted to sit as an assisting officer at the Alabama prosecutor's table. In light of this involvement, he argued, Alabama's prosecution

which the victim was abducted in Alabama but actually killed in Georgia. Even though Georgia had already sentenced the defendant to life imprisonment for the murder,[100] the Court held that the dual sovereignty exception permitted Alabama to sentence him to death.

Relying heavily on *Wheeler*, Justice O'Connor's majority opinion in *Heath* declared that the Court's prior decisions "compell[ed] the conclusion" that the dual sovereignty exception applied to successive prosecutions by two states.[101] Ignoring arguably inconsistent dicta dating from the 1820 decision in *United States v. Furlong*,[102] Justice O'Connor relied on the *Lanza* to *Wheeler* line of decisions. Under those decisions, the "crucial determination"

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was not only improper under the double jeopardy clause; it also violated "the due process guarantee of fundamental fairness" as well. *Id.* at 445.

Justice Brennan prepared a brief dissenting opinion that attempted to reconcile his subscription to Justice Marshall's dissenting opinion with his earlier rejection of a "separate interests" approach in his concurring opinion in Abbate v. United States, 359 U.S. 187, 196-201 (1959). He explained that his *Abbate* opinion rejected the idea "that the different purposes or interests served by specific statutes [could] justify an exception to our established double jeopardy law." But, he asserted, Justice Marshall used the term interest analysis "in another context," He "employ[ed] it to demonstrate the qualitative difference in the general nature of federal and state interests and the qualitative similarity in the nature of states' interest;" and, unlike the specific interest analysis rejected in *Abbate*, Justice Marshall's broader approach "further[ed], rather than undermin[ed], the purpose of the Double Jeopardy Clause." *Id.* at 441.

100. The Court gave the following summary of the factual background in *Heath*:

> In August 1981, [Heath hired two men] to kill his wife. . . . On the morning of August 31, 1981, [Heath] left [his] residence in Russell County, Alabama to meet [the two men] in Georgia, just over the Alabama border from the Heath home. [Heath] led them back to the . . . residence, gave them the keys to the Heaths' car and house, and left the premises in his girfriend's truck. [The two men] then kidnapped Rebecca Heath from her home. The Heath car, with Rebecca Heath's body inside, was later found on the side of a road in Troup County, Georgia. The cause of death was a gunshot wound in the head. The estimated time of death and the distance from the Heath residence to the spot where Rebecca Heath's body was found are consistent with the theory that the murder took place in Georgia, and [the state of Alabama] does not contend otherwise.

Id. at 435.

101. *Id.* at 437.

102. 18 U.S. (5 Wheat.) 184 (1820). In explaining its holding that the United States could prosecute an American citizen who committed a murder on the high seas while serving on a foreign vessel, the *Furlong* dicta conceded that this view of federal criminal power might allow both the United States and a foreign government to prosecute American citizens in such situations. Justice Johnson regarded this result as permissible because the exposure to dual prosecutions resulted from the citizens' "own act in subjecting themselves" to the laws of the foreign government, but he insisted that such a result would be impossible "in our own courts" where the Constitution protected them "from being twice put in jeopardy of life or member." *Id.* at 197-98.

Because the *Furlong* dicta's reference to "our own courts" was almost certainly limited to federal courts, see Barron v. Mayor, 32 U.S. (7 Pet.) 243 (1833), it is not directly controlling in the *Heath* situation of successive state prosecutions. But it does show an aversion to successive prosecutions that should apply to all American jurisdictions now that the double jeopardy clause applies to the states as well as to the federal government. *See* Benton v. Maryland, 395 U.S. 784 (1969). In any case, it is surely ironic that the Burger court's "New Federalism" now permits for the 1980s the very thing—successive prosecutions in an American jurisdiction for the crime of murder—that the *Furlong* dicta declared would have been impermissible in 1820.

was whether the two prosecuting entities were "separate sovereigns."[103] Moreover, that determination hinged on whether the two entities "draw their authority to punish the offender from distinct sources of power;" and *Lanza* and its progeny had long held that a state's "power to prosecute is derived from its 'inherent sovereignty,' not from the Federal Government." Since states are "no less sovereign with respect to each other than they are with respect to the Federal Government," the dual sovereignty exception was applicable to successive prosecutions by two states and to successive state and federal prosecutions.[104]

The Court also rejected the suggestion that it should modify the dual sovereignty exception to limit it to cases where "allowing only one entity to exercise jurisdiction over the defendant will interfere with the unvindicated interests of the second entity and . . . multiple prosecutions therefore are necessary for the satisfaction of the legitimate interests of both entities."[105] According to Justice O'Connor, such a balancing of interests approach" could "not be reconciled with the dual sovereignty principle."[106] The basic premise for the exception was the conclusion "that two identical offenses are *not* the 'same offense' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." Under that approach, "the circumstances of the case are irrelevant" once the Court has determined that the prosecuting entities are separate sovereigns.[107]

Justice O'Connor closed her opinion with an emphatic reaffirmation of the necessity of the dual sovereignty exception to preserving a federal system that recognizes the sovereignty of the states within their sphere of authority. In her view, "the power to create and [to] enforce a criminal code" was "[f]oremost among the prerogatives of sovereignty,"[108] and denying a state that prerogative because of an earlier prosecution in another state "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines."[109] Nor could the "interest analysis" approach be justified by the argument that "the State's legitimate penal interests will be satisfied through a prosecution conducted by another state." A prosecution in a state's own courts not only punished the offender; it also satisfied the "state's interest in vindicating its sovereign authority through enforcement of its laws." By definition, a prosecution in another state for a violation of the other state's laws could never provide that

103. 106 S. Ct. at 437.

104. *Id.* (*citing* United States v. Wheeler, 435 U.S. 313, 320 (1978)). Compare Justice O'Connor's comment here with Justice Black's dissent in *Abbate.* He rejects successive state and federal prosecutions because States are no "more distinct from the federal government than are states from each other." 359 U.S. at 203 (Black, J. dissenting).

105. *Id.* at 439.

106. *Id.*

107. *Id.* (*citing* United States v. Lanza, 260 U.S. 377 (1922)).

108. *Id.* at 440.

109. *Id.* (*quoting* Bartkus v. Illinois, 359 U.S. 121, 137 (1959)).

vindication.[110]

2. State Court Precedents

At the state level, the supreme courts of most states have adhered to the dual sovereignty doctrine,[111] but a handful have rejected it as a rule of state law. In 1968 and 1970, two lower courts in Ohio refused to apply the dual sovereignty exception, but the Ohio Supreme Court eventually overruled these decisions on the ground that Ohio's courts were bound to allow successive prosecutions until the United States Supreme Court overruled *Bartkus*.[112] The supreme courts in three other states have, however, taken a different view.[113] Pennsylvania was the first. Its 1971 opinion in *Commonwealth v. Mills*[114] held that state law forbade a Pennsylvania prosecution based on the same conduct as a prior federal prosecution. More recently, both Michigan[115] and New Hampshire[116] have followed Pennsylvania's lead.

As the first of the state court opinions to reject the dual sovereignty exception, the *Mills* opinion offers an interesting contrast to the federal line of decisions. According to Justice Eagen's majority opinion in *Mills*, proper evaluation of the dual sovereignty exception requires "a balancing process, whereby we place the interests of the two sovereigns on one side of the judicial scale, and on the other side we place the interest of the individual to be free from twice being prosecuted for the same offense."[117] The essential error of the federal approach was its exclusive attention to one side of the balance: "the interests of the Federal and State governments." Such an approach ignored "[t]he striking feature" of the double jeopardy clause and the specific rules that implement it: "the focus . . . on the individual, on a person's basic and fundamental rights."[118] When the individual's interests were also considered, the Pennsylvania court declared, three factors struck the balance against a general rule allowing successive prosecutions—the need to pursue reform and rehabilitation in the sentencing process, the underlying conflict between successive prosecutions and "the principle that 'no one should be twice vexed for the one and the same cause,' " and the destructive impact of successive prose-

110. *Id.*

111. For a listing of state court decisions that accept the dual sovereignty doctrine, see Annot., 6 A.L.R. 4TH 802, 807-09 (1981).

112. State v. Fletcher, 15 Ohio Misc. 336, 240 N.E.2d 905 (1968), *aff'd*, 22 Ohio App. 2d 83, 259 N.E.2d 146 (1970), *rev'd*, 26 Ohio St. 2d 221, 271 N.E.2d 567 (1971), *cert. denied*, 404 U.S. 1024 (1972).

113. *See generally* Note, *The Problem of Double Jeopardy*, *supra* note 82, at 494-96 (1979).

114. Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638 (1971), *noted in* 18 VILL. L. REV. 491 (1971).

115. People v. Cooper, 398 Mich. 450, 247 N.W.2d 866 (1976). For a more recent Michigan decision applying the *Cooper* standard, see People v. Gay, 407 Mich. 681, 289 N.W.2d 651 (1980), *noted in*, 59 J. URB. L. 99 (1981).

116. State v. Hogg, 18 N.H. 262, 385 A.2d 844 (1978).

117. 447 Pa. at 169, 286 A.2d at 640-41.

118. *Id.* at 170, 286 A.2d at 641.

cutions on "finality from the individual's standpoint."[119] In light of these factors, *Mills* adopted a much more restrictive rule; it forbade successive prosecutions in Pennsylvania "unless . . . the interests of the Commonwealth . . . and the jurisdiction which initially prosecuted and imposed punishment are substantially different."[120]

III
CURRENT STATUS OF THE DOCTRINE

A realistic assessment requires one to conclude that the dual sovereignty exception is an incongruous anomaly that nonetheless remains firmly entrenched in contemporary law. Although the intellectual supports on which it was originally based have been largely stripped away, the present Court seems determined to adhere to the doctrine. Its current status is most accurately described as a rule that has remained after the reasons that originally prompted it have long since disappeared.[121]

As discussed earlier, the Warren court's decisions eliminated many of the exception's intellectual bases. It "incorporated" the double jeopardy protection into the fourteenth amendment's due process clause, rejected the dual sovereignty concept for other rights that had been so incorporated, and applied the protections of the double jeopardy clause sympathetically in a variety of situations. However, the Court never took the step of overruling *Lanza* and its progeny.

The Burger Court has not yet attempted to overrule the incorporation decisions, but its opinions treat the double jeopardy clause somewhat less sympathetically. Moreover, recent opinions have emphatically reaffirmed the validity of the dual sovereignty concept for double jeopardy analysis and even extended it to new situations—successive prosecutions by an Indian tribe and by the federal government, and successive prosecutions by two state governments.[122]

At least half of the states now forbid successive prosecutions by statute or judicial decision,[123] and the state rules certainly provide an important mitigation of the federal doctrine. But these rules are only partially successful in

119. *Id.* at 171, 286 A.2d at 642.

120. *Id.* at 171-72, 286 A.2d at 641-42 (footnote omitted).

121. *Cf.* O. HOLMES, THE COMMON LAW 5 (1881):

> A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

122. Heath v. Alabama, 106 S. Ct. 433; United States v. Wheeler, 435 U.S. 313 (1978).

123. *See supra* notes 36, 37, 46, 48 & 114-120 and accompanying text.

preventing successive prosecutions even in the states where they apply. Because they only forbid state prosecutions after a federal prosecution, federal prosecutors can circumvent them by delaying the federal prosecution until after the state proceedings have been concluded. Moreover, the concern about federal circumvention of state rules is real. Several of the federal appellate decisions upholding subsequent federal prosecutions have sanctioned a frustration of the spirit of the state rules by affirming convictions when the crime occurred in states where state law might have barred the state proceedings if the federal government had completed its prosecution first.[124]

In any event, the dual sovereignty exception applies in undiluted form in the other half of the states that provide no state modification of the federal rule. In those states, it remains an accepted part of both state and federal law and becomes ever more significant as the areas subject to both state and federal regulation continue to increase.

In sum, the dual sovereignty exception to double jeopardy remains an important feature of American criminal procedure. The decisions of the last fifty years have eroded most of its intellectual foundations, but the Court has neither abandoned nor limited it. Thus, the exception remains a significant part of contemporary law.

IV
POSSIBILITIES FOR REFORM

The argument for overruling the *Lanza-Hebert-Abbate-Bartkus-Wheeler-Heath* line of decisions is a compelling one. As Part one indicated, the dual sovereignty theory was not originally intended to be applied to double jeopardy problems, but to allocate legislative authority between the federal and state governments. In fact, dicta in some pre-prohibition opinions suggested that the double jeopardy doctrine and its common law antecedents applied even when distinct sovereigns were responsible for multiple prosecutions.[125] Unfortunately, however, the Supreme Court ignored that dicta in *Lanza*, the first case that actually required the Court to address the dual sovereignty issue in the double jeopardy context. At least in part, the antilibertarian result of *Lanza* can be explained by the fact that the case arose in the early years of the prohibition era, a time that produced a number of antilibertarian decisions.[126]

124. *See, e.g.*, United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984) (New York); United States v. Gaertner, 583 F.2d 308 (7th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979) (Wisconsin); United States v. Fritz, 580 F.2d 370 (10th Cir.), *cert. denied*, 439 U.S. 947 (1978) (Kansas); United States v. Thompson, 479 F.2d 1184 (10th Cir.), *cert. denied*, 439 U.S. 896 (1978) (Arkansas); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969); *cert. denied*, 396 U.S. 1012 (1970) (Illinois).

125. *See* Murchison, *supra* note 26, at 385-86 (*discussing* Nielson v. Oregon, 212 U.S. 315 (1909)); United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820)).

126. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925) (establishing the automobile exception to the fourth amendment's warrant requirement); Hester v. United States, 265 U.S. 57 (1924) (establishing the "open fields" exception to the fourth amendment's warrant requirement); Brede v. Powers, 263 U.S. 4 (1923) (allowing federal prosecutors to use information

Even more significantly, continued adherence to the dual sovereignty exception contradicts a half-century of constitutional law decisions that have rejected "dual federalism" for a more functional view of the problems of allocating powers between the federal and state governments. Modern decisions have consistently rejected the nineteenth century view that federalism created distinct and mutually exclusive spheres of federal and state authority for a more dynamic view that recognizes the need for changing limits and acknowledges the possibility of overlapping powers.[127] Furthermore, the Court has also abandoned the dual sovereignty rationale in related areas of criminal procedure.[128] The result is to leave the dual sovereignty exception to double jeopardy as an unprincipled anomaly that has outlasted the rationale on which it was originally based.

Nor is the dual sovereignty exception a necessary component of a modern commitment to federalism. Even supporters of the exception concede that the original purpose of the federalism concept was promotion of individual liberty and human freedom.[129] But the dual sovereignty exception frustrates those policies by allowing successive prosecutions and multiple punishments even when the state and federal government are protecting the same social interest. In such a situation, human liberty is compromised without any corresponding benefit to local initiative or autonomy or to the supremacy of national values. Perhaps Justice Black said it most eloquently in his *Bartkus* dissent:

> The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp.[130]

The only direct justification for this attack on personal freedom is Justice O'Connor's claim that a government has a "sovereignty" interest in punishing a criminal even if the penal objectives of its law have been fully vindicated by a previous prosecution in another jurisdiction.[131] But to accept that claim is to sacrifice individual rights to so vague and abstract a notion that it amounts to what Professor Grant eloquently described as "fritter[ing] away our liberties

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rather than indictments to charge misdemeanors under the Volstead Act); Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923) (construing the Volstead Act to cover intoxicating liquor kept as a part of the shop's store); Hawes v. Georgia, 258 U.S. 1 (1922) (sustaining a state law establishing a presumption that persons who occupied real property on which a distilling apparatus was found knew of its existence); J.W. Goldsmith, Jr. v. United States, 254 U.S. 505 (1921) (revenue statute that authorized seizure of property used to remove, deposit, or conceal goods forfeited the property of an innocent owner whose property was used in violation of the statute). *See generally* Murchison, *supra* note 64, at 471, 476-77, 479 n.59 (1982).

127. *See generally*, Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

128. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); United States v. Elkins, 364 U.S. 206 (1960).

129. *See, e.g.*, L. MILLER, *supra* note 82, at 1 (1968).

130. Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting).

131. *Heath*, 106 S. Ct. 433.

on a metaphysical subtlety, two sovereignties."[132]

The "practical justification"[133] offered to support the dual sovereignty exception is equally unconvincing. Both Chief Justice Taft in *Lanza*[134] and Justice Frankfurter in *Bartkus*[135] alluded to an imagined danger that one government would act in concert with criminals to frustrate the penal policy of the other. Representative Webb recognized this concern as a fanciful one in the debate over the "concurrent power" language of the eighteenth amendment,[136] and half a century of jurisprudence has proved the accuracy of his prophecy. Moreover, as opponents of the dual sovereignty exception have consistently asserted,[137] elimination of the exception would not preclude successive prosecutions in such cases.

By contrast, the decided cases reveal that the exception has produced real abuses in the quarter of a century since *Abbate* and *Bartkus* were decided. Defendants have been the most obvious victims of the policy that permits successive prosecutions, and these prosecutions have not been limited to unusual cases in which special state or federal interests are involved. In literally dozens of cases since 1959, federal courts have affirmed multiple convictions.[138] Furthermore, the multiple convictions seem to have caused the waste of prosecutorial resources in many of these cases; in a number of reported decisions, the federal government has not even bothered to follow its own rules for deciding when successive prosecutions are justified.[139] Less obviously, the multiple convictions have, at least occasionally, failed to respect the federalism value that the exception was ostensibly designed to protect. Several appellate decisions have frustrated state policies on successive prosecutions by affirming subsequent federal covictions in states where state law would have precluded state prosecutions following federal convictions.[140] The practical effect of such federal prosecutions is to override the state's determination that multiple prosecutions are not necessary to vindicate the policies of its criminal law.

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132. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1331 (1932).

133. Bartkus, 359 U.S. at 136.

134. 260 U.S. at 385.

135. 359 U.S. at 137.

136. 56 CONG. REC. 424 (1917).

137. *See, e.g.*, Abbate v. United States, 359 U.S. 187, 202 n.2 (1959) (Black, J. dissenting); Grant, *supra* note 132, at 1331 (1932).

138. *See, e.g.*, United States v. Ng, 699 F.2d 63 (2d Cir. 1983); United States v. Iaquinta, 674 F.2d 260 (4th Cir. 1982); United States v. Sandate, 630 F.2d 326 (5th Cir. 1980); Delay v. United States, 602 F.2d 173 (8th Cir. 1979); United States v. Gomez, 603 F.2d 147 (10th Cir. 1979); United States v. Frederick, 583 F.2d 273 (6th Cir. 1978); *cf.* United States v. Alston, 609 F.2d 531 (D.C. Cir. 1979) (rejecting defendant's claim that nonapplicability of policy against successive prosecutions denied him equal protection). *See generally* 23 FED. PRAC. DIG. 3D, *Criminal Law* § 201 (1984); FED. PRAC. DIG. 2D, *Criminal Law* § 201 (1976).

139. *See, e.g.*, United States v. Fritz, 580 F.2d 370 (10th Cir.), *cert. denied*, 439 U.S. 947 (1978); United States v. Thompson, 579 F.2d 1184 (10th Cir.), *cert. denied*, 439 U.S. 896 (1978); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

140. *See supra* cases cited at note 124.

Finally, it bears emphasis that rejection of the dual sovereignty exception would not necessarily erect an absolute bar to successive prosecutions in all cases. Multiple prosecutions would be permitted whenever multiple prosecutions by a single government would be permissible; that is, whenever the prosecutions did not involve the "same offense" for double jeopardy purposes.[141] In addition, the Court might well choose a lesser standard that would allow successive prosecutions by different sovereignties in some cases where multiple prosecutions would not be permissible by a single government. It might, for example, choose to apply the "compelling reasons" standard now embodied in the United States Attorneys' Manual,[142] the "substantially different interest" test used by the Model Penal Code[143] and some state courts,[144] or the "different harm or evil" rule of the proposed federal criminal code.[145] Such an approach would enable the federal government to prevent a state from frustrating national values (like the guarantee of racial equality), and also would permit a state to enforce its own distinct views of social policy so long as they did not conflict with national values. But even these relatively mild controls would go far to eliminate the abuses that the preceding paragraphs have summarized.

Despite the persuasiveness of the arguments outlined above, recent Supreme Court decisions provide little basis for believing that the Court will abandon the dual sovereignty doctrine in the near future.[146] Therefore, advocates of reform might well turn their attention to possibilities of limiting the abuses of the dual sovereignty exception without expressly repudiating it. Several such possibilities are readily apparent.

Modern decisions establishing the procedural protections afforded by the due process clause outside of criminal proceedings offer one alternative constitutional argument for limiting the dual sovereignty doctrine. Since *Mathews v. Eldridge*,[147] the present Supreme Court has fairly consistently emphasized that the government must follow procedures that comply with the requirements of due process when it acts to deprive an individual of a liberty interest protected under the fifth or fourteenth amendments. Furthermore, the Court has attempted to concretize the vague fairness standard by emphasizing that it requires the judiciary to balance three factors: the impact on the individual, the risk of an erroneous determination, and the cost of alternative procedures.[148]

141. *See generally* Brown v. Ohio, 432 U.S. 161 (1977); Blockburger v. United States, 284 U.S. 299 (1932).

142. *See supra* notes 31-33 and accompanying text.

143. *See supra* notes 41-45 and accompanying text.

144. *See supra* notes 114-120 and accompanying text.

145. *See supra* notes 53-61 and accompanying text.

146. *See supra* notes 84-91 and accompanying text.

147. 424 U.S. 319 (1976).

148. *Id.* at 335. The Supreme Court has relied on the *Mathews* factors in a number of recent cases. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487 (1985); Lassiter v.

Because multiple prosecutions involve governmental action that deprives an individual of the very core of the liberty interest protected by the fifth and fourteenth amendments, application of the fairness standard of *Mathews* seems both reasonable and consistent with the decisions of the present Court. Moreover, when the *Mathews* factors are applied in the successive prosecution context, they suggest that the Court should refuse to allow such prosecutions unless the Justice Department has followed its own procedures prior to initiating the prosecution.

The impact of the failure to follow departmental policy on individual defendants is obviously very great. Defendants are exposed to the possibility of imprisonment, often for lengthy periods of time. At the same time, the risk of an erroneous determination seems quite large, if departmental policy is not followed. Since the 1950s, the attorneys general have consistently determined that successive prosecutions should only be permitted when "compelling reasons" justify them, and they have consolidated the decision-making authority in the assistant attorneys general to assure the standard is applied uniformly. Ignoring these procedures runs the risk that the decisions will be made in the offices of different United States attorneys who may be indifferent to, or unfamiliar with, the department policy[149] or who may be influenced by the desire to bring a particular investigation to a successful conclusion. On the other hand, the cost of the alternate procedures seems minimal inasmuch as the Court would merely be requiring the department to comply with procedures that the department itself has indicated are desirable before committing limited prosecution resources to successive prosecutions. In sum, all three *Mathews* factors coalesce to suggest that fundamental fairness requires the government to make a considered decision about the need for successive prosecutions before initiating them.

Another way of reaching the same result is to emphasize the importance of procedural regularity in government decisions with important consequences for individuals. Whether viewed as an alternate way of expressing the "fundamental fairness" required by the due process clause or as a requirement of the Administrative Procedure Act,[150] the result is the same—to force the govern-

Department of Social Services, 452 U.S. 18 (1981); Parham v. J.R., 442 U.S. 584 (1979); Ingraham v. White, 430 U.S. 651 (1977).

149. *See, e.g.*, United States v. Thompson, 579 F.2d 1184, 1192 (10th Cir.) (Seth, C.J., dissenting), *cert. denied*, 439 U.S. 896 (1978). One reason that the Justice Department gave for its belated approval of the subsequent federal prosecution was a "reference . . . to the fact that the policy was not known to the prosecution until the defendant raised the matter in district court in his motion to dismiss."

150. 5 U.S.C. §§ 704, 706 (1982) (judicial review of administrative action). Cases that refuse to exclude evidence obtained in violation of administrative rules, *e.g.*, United States v. Caceres, 440 U.S. 741 (1979), should not bar the relief suggested here. Here the relief sought is not exclusion of evidence but "invalidation of the agency action," the traditional basis for challenging agency action under the Administrative Procedure Act. *See id.* at 754. Nor should the customary deference to prosecutorial discretion *see, e.g.*, Heckler v. Chaney, 105 S. Ct. 1649 (1985), preclude review here. In the case of successive prosecutions, the Attorney General has

ment to follow regular procedures in making decisions that significantly affect individuals. The chief obstacle to this argument (and the one that has lead to its rejection in those courts of appeal that have considered it) is the rule that internal departmental procedures do not create judicially enforcible rights for individuals who are adversely affected by a departmental decision.[151] But that rule need not create an insuperable barrier to recognition of the claim in the successive prosecution context.

As the Supreme Court itself has recognized,[152] the Justice Department policy does not have the conservation of departmental resources as its sole objective. It was also designed to vindicate an important value of our constitutional order, namely to insure that individuals are not needlessly subjected to multiple prosecutions. When Attorney General Rogers announced the Justice Department policy, he justified it as necessary to avoid the "considerable hardship" that could result if the dual sovereignty rule were "[a]pplied indiscriminately."[153] Because this purpose transcends the department's desire for internal efficiency, it seems inappropriate to treat the policy as an internal administrative rule. Instead, the Court should recognize the rule as a substantive policy designed to implement an important constitutional value.

Once the claim that the policy against successive prosecutions is merely an "internal departmental procedure" has been rejected, no good reason exists for refusing to require that the government comply with the policy or for declining to review decisions based on the policy. While the procedural aspects of the policy would be the easiest to enforce, the substantive aspects of the policy should not be completely ignored. Of course, courts should adopt a deferential approach in reviewing substantive decisions. But even deferential review could force the government to articulate the "compelling" reason that justifies treating a particular case as exceptional and—over time—to adopt a consistent approach to recurring problems.

One can fashion an even narrower limitation of the dual sovereignty rule by invoking the very federalism values on which it is based. Approximately half of the states have adopted legislative or judicial rules forbidding subsequent state prosecutions. The federal government can, however, negate those state policies by delaying the federal prosecution until the state proceedings

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exercised his discretion in promulgating the United States Attorneys' Manual, and the courts would merely be requiring United States attorneys to comply with that exercise of discretion.

151. *See, e.g., Caceres*, 440 U.S. at 754 n.18; American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970); Sullivan v. United States, 348 U.S. 170 (1959).

152. Rinaldi v. United States, 434 U.S. 22, 27 (1977) (per curiam):

> The [Justice Department] policy . . . limits the federal prosecutor in the exercise of his discretion to initiate, or to withhold, prosecution for federal crimes. The policy is useful to the efficient management of limited Executive resources and encouraging local responsibility in law enforcement. *But it also serves the more important purpose of protecting the citizen from any unfairness that is associated with successive prosecution based on the same conduct.* (emphasis added).

Accord, Commonweath v. Mills, 447 Pa. 163, 169-170, 286 A.2d 638, 641 (1971).

153. N.Y. Times, Apr. 6, 1959, at 19, col. 4.

have been concluded. Reported decisions suggest that this type of negation occurs at least occasionally,[154] and no valid federal interest is served by this overriding of state decision-making machinery. At a minimum then, the Supreme Court should forbid subsequent federal prosecutions in a state in which state law would have barred the state proceeding if the federal proceeding had preceded it. Although the Court might decide to create exceptions for rare cases where the subsequent prosecution is necessary to protect important federal values, apprehension about the possible existence of such unusual cases should not lead the Court to tolerate this flaunting of federalism values in the ordinary cases that form the bulk of situations in which the issue arises.

Finally, legislative or executive intiatives are desirable if the Court continues to ignore the injustices that the dual sovereignty exception has spawned. The number of states that have taken steps in this direction is quite large, and others should be encouraged to follow the progressive lead of those that have modified or rejected the exception. But the foregoing discussion makes it clear that state actions will never be sufficient by themselves because they can be circumvented by delaying the federal proceedings until the state prosecution has been completed. What is needed is federal action to establish uniform rules that will protect all defendants from successive state and federal prosecutions.

The most desirable reform would be a federal statute forbidding successive federal and state prosecutions. To avoid the largely hypothetical danger that one government might willfully frustrate the criminal policy of another, the statute might well incorporate the "compelling reasons" exception of the Justice Department policy. But if such an exception is created, the statute should establish mandatory procedures to be followed before the government decides to allow successive prosecutions, and the decision to proceed with successive prosecutions should be subject to judicial review.

Even without a federal statute, the Justice Department could take several steps that would provide for improved implementation of the policy now set forth in the United States Attorneys' Manual. First, it could establish an administrative mechanism requiring the United States Attorney to seek a voluntary dismissal of any charges that are initiated in violation of the procedures set forth in the manual. Second, it could abandon its position that the manual provisions merely create internal operating rules and acknowledge that they establish substantive principles designed to protect individuals from the harassment of multiple prosecutions except in very unusual cases. Third, the Department could maintain an administrative record of decisions in cases in which United States attorneys request successive prosecutions. The Department could use past decisions to insure uniformity in the decisions in recurring types of cases.

154. *See supra* cases cited at note 139.

CONCLUSION

An analysis of the development of the dual sovereignty exception to the fifth amendment's prohibition against double jeopardy vividly illustrates the historicity of legal doctrine. By revealing how one particular doctrine was established and perpetuated to meet the needs of an earlier period of history, it frees those who live in a new era to modify the doctrine to fit the times in which they live.

The concepts on which the exception was based originated with a quite distinct problem characteristic of the nineteenth century—defining the permissible scope of state legislative power. When the problem of successive prosecutions actually appeared in the early years of the prohibition era, the Supreme Court, in deciding the prohibition cases, ignored dicta which stated that the double jeopardy bar applied to prosecutions by different governments. Instead, it seized the nineteenth century precedents dealing with legislative power to create a dual sovereignty exception to double jeopardy. Three reasons seem to account for this antilibertarian approach that established the constitutional rule down to the present: the dual sovereignty dicta in the nineteenth century decisions on legislative power, the Taft Court's concern with demarking a sphere of state power independent of federal control, and the tendency of the Taft Court to support extensions of prosecutorial power in the early years of the prohibition era.

A more detailed explanation is needed to account for the survival of the dual sovereignty exception to the present. Inasmuch as successive prosecutions were virtually nonexistent for the quarter century following the repeal of national prohibition in 1933, it is not surprising that the exception remained unchallenged during that period. But it is more difficult to understand how the exception survived the so-called criminal law revolution of the 1950s and 1960s.

The initial problem in unravelling this riddle is to understand why the Court reaffirmed the doctrine in its 1959 decisions in *Abbate* and *Bartkus*. Two factors seem to have explanatory power. First, the dual sovereignty cases arose near the beginning of the Court's decisions expanding the rights of criminal law defendants. In particular, they arose before the Court began to hold that the fourteenth amendment "incorporated" the criminal procedures of the Bill of Rights and thereby granted defendants in state criminal proceedings the same rights enjoyed by federal defendants. Once the Court began its attempt to nationalize criminal procedure, the traditional reliance on different sovereignties made considerably less sense, as shown by the Court's abandonment of dual sovereignty rationales in fourth and fifth amendment decisions during the 1960s.[155] A second persuasive explanation for the reluctance to overrule the dual sovereignty legacy is the potential for conflict with another

155. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Elkins v. United States, 364 U.S. 206 (1960); *see supra* notes 68-74 and accompanying text.

major emphasis of the Warren Court: the determination of the Court to protect the civil rights of black Americans.[156] During the days of massive resistance and the protests of the civil rights movement, the risk that those charged with the administration of the criminal law in some southern states might at least tolerate violence directed toward blacks was more than a hypothetical concern.[157] Of course, retreat from the dual sovereignty exception need not have rendered the federal government powerless to protect the civil rights of its citizens,[158] but concern over how to decide when to permit multiple prosecutions if the dual sovereignty exception were abandoned may well have encouraged restraint on the part of some justices who later joined in expanding the rights of criminal defendants.[159]

Even if the foregoing analysis is correct, one must still explain how the exception managed to survive the nationalization of criminal procedure during the 1960s. In large measure, that anomaly seems to be an accident of history. Because successive prosecutions are less common in the criminal process than interrogation techniques, searches, and lineups, one can easily understand why an activist court dealt with those issues first. And in those cases where the successive prosecution issue was clearly presented, the government requested—and the Court granted—permission to dismiss the charges voluntarily. Then, during the 1970s when the membership of the Court changed, the Burger Court began to direct its attention to limiting rather than extending the Warren Court decisions in the criminal procedure area. The result has been to leave the doctrine as firmly entrenched as it was following the repeal of prohibition half a century ago.

Once the historically contingent character of the dual sovereignty exception becomes apparent, it seems essential to assess the suitability of applying the exception at the end of the twentieth century. As the proceeding section has demonstrated, such an analysis reveals the unpersuasive character of the arguments that have been advanced to support continued adherence to the doctrine. On the one hand, modern decisions document that defendants are frequently subjected to multiple prosecutions that are neither reviewed by executive authority nor subject to judicial review. Yet, that same experience provides no evidence that the present rule is necessary to protect state or federal interests, and it reveals that the rule has—at least occasionally—frustrated the very federalism values on which it is purportedly based.

The most desirable remedy for the present situation would be a Supreme

156. *See, e.g.*, Jones v. Alfred H. Meyer Co., 392 U.S. 409 (1968); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. McClung, 379 U.S. 294 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954). For the argument that the concern with racial discrimination was an important factor in the Supreme Court's invalidation of death penalty statutes in existence in the early 1970s, see Murchison, *Toward a Perspective on the Death Penalty Cases*, 27 EMORY L.J. 469, 538-44 (1978).

157. *See* Note, *supra* note 74, at 1551-54.

158. *See, e.g., id.* at 1554-57.

159. *See* Abbate v. United States, 359 U.S. 187, 196 (1959) (Brennan, J., concurring).

Court decision expressly overruling the *Lanza-Hebert-Abbate-Bartkus* line of cases. Unfortunately, the recent decisions of the Burger Court provide little hope that the Court will take that step in the near future, and so prudent advocates of reform must also explore alternatives for correcting the abuses of the current doctrine. At least four possibilities are readily apparent: recognizing the procedural and substantive protections of the Justice Department policy on successive prosecutions as the minimum requirements of due process, holding that due process requires the Justice Department to comply with the policy set forth in the United States Attorneys' Manual, refusing to permit federal prosecutions that would circumvent state bans on successive prosecutions, and establishing legislative or executive standards to limit successive prosecutions to situations where the different governments are truly enforcing distinct interests. None of these alternatives would be as effective as a revision of the Supreme Court's double jeopardy doctrine. Nonetheless, each of them would at least mitigate some of the worst abuses of the current doctrine. Therefore, they deserve the attention of reformers interested in improving the fairness of criminal procedure in the United States.