Loyola University Chicago Law Journal

Volume 17
Issue 4 *Summer 1986*

Article 9

1986

Health v. Alabama: Contravention of Double Jeopardy and Full Faith and Credit Principles

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Heath v. Alabama: Contravention of Double Jeopardy and Full Faith and Credit Principles

I. INTRODUCTION

In 1958, a Russian judge sentenced a youth to ten to twenty-five years of imprisonment for killing a militiaman during a robbery.[1] Russian citizens protested that the sentence was too lenient,[2] and authorities ordered a retrial.[3] At the second trial, a Russian sentencing tribunal condemned the youth to death.[4]

Justice Black, dissenting in *Bartkus v. Illinois*,[5] cited this example of Russian criminal justice as an illustration of the ramifications of diluted double jeopardy rights.[6] Justice Black predicted that similar occurrences would take place in the United States as a result of the Supreme Court's adherence to the dual sovereignty doctrine.[7] Notwithstanding an accused's double jeopardy rights, the dual sovereignty doctrine permits each of two or more sovereigns to prosecute an individual for the same conduct.[8]

Justice Black's premonition materialized in *Heath v. Alabama*.[9] In *Heath*, a Georgia trial court sentenced the defendant to life imprisonment in exchange for a guilty plea to a murder charge.[10] Shortly thereafter, an Alabama grand jury indicted the defendant for the same murder.[11] Following the defendant's conviction in a jury trial, an Alabama trial court imposed the death penalty.[12] On certiorari, the United States Supreme Court affirmed in a 7-2 decision.[13]

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1. N.Y. Times, Oct. 22, 1958, at 4, col. 6.
2. *Id.*
3. *Id.*
4. *Id.*
5. 359 U.S. 121 (1959).
6. *Id.* at 163-64 (Black, J., dissenting). Justice Black noted that "similar examples are not hard to find in lands torn by revolution or crushed by dictatorship." *Id.*
7. *Id.* at 164.
8. *See infra* notes 59-97 and accompanying text.
9. 106 S. Ct. 433 (1985).
10. *Id.* at 436.
11. *Id.* at 435.
12. *Id.*
13. *Id.* at 433.

At first glance, the fifth amendment's double jeopardy clause[14] seems to protect a person from being put to trial twice for the same crime.[15] Under the dual sovereignty doctrine, however, multiple prosecutions for the same offense are permitted.[16] The dual sovereignty exception to double jeopardy protections applies if the entities that prosecute an accused for the same conduct derive their sovereignty from independent sources.[17] Although the dual sovereignty doctrine has been endorsed by the Supreme Court since pre-Civil War days, *Heath* represents the first case in which the Supreme Court has upheld multiple state prosecutions for the same conduct.[18]

This note will examine the *Heath* Court's expansion of the dual sovereignty doctrine to successive sister state prosecutions for the same crime. First, this note will sketch the origins, protections and rationales underlying the double jeopardy clause. The development of and possible alternatives to the dual sovereignty doctrine then will be discussed. Next, this note will survey the policies of the Constitution's full faith and credit clause and its relation to successive prosecutions for the same conduct by two states. After a discussion of the *Heath* case, this note will demonstrate that the dual sovereignty doctrine is inconsistent with established double jeopardy policies. This note then will address the possibility that the doctrines of collateral estoppel and res judicata, as well as the full faith and credit clause, can be interpreted to preclude successive sister state prosecutions for the same offense. Finally, this note will recommend that state courts, state legislatures and Congress reject the dual sovereignty doctrine as a matter of federal and state constitutional interpretation or public policy.

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14. The double jeopardy clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

15. *See* Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 592 (1963) ("Even the man in the street knows what double jeopardy means. He is rightly shocked when he hears that somebody has been tried twice for the same thing.").

16. *See infra* notes 62-63, 67-68, 76-78, 91, 168-169 and accompanying text.

17. *See infra* notes 88-91, 169 and accompanying text.

18. *Heath*, 106 S. Ct. at 433. *Heath* was the first case in which application of the dual sovereignty doctrine resulted in two prosecutions for the same murder. Brief for the Petitioner at 19, Heath v. Alabama, 106 S. Ct. 433 (1985). *Heath* also was the first case in which use of the dual sovereignty doctrine culminated in the imposition of the death penalty. *Id.*

II. DOUBLE JEOPARDY: THE ORIGINS, PROTECTIONS AND POLICIES UNDERLYING THE PROSCRIPTION

A. Historical Foundations

Tracing double jeopardy concepts to a distinct origin may be impossible.[19] Double jeopardy proscriptions have existed in almost all systems of jurisprudence throughout history.[20] For example, early church leaders demonstrated the immorality of subjecting an accused to more than one trial or punishment for the same offense by including double jeopardy prohibitions in the Talmudic and canon laws.[21] Double jeopardy proscriptions also can be discerned in the laws of Greece,[22] Rome,[23] France,[24] and Spain.[25]

In addition, the English common law contained well-developed double jeopardy protections.[26] At common law, a previous acquit-

19. For a detailed discussion of the history of double jeopardy, see Bartkus v. Illinois, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting); J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 1-37 (1969); Kirk, *Jeopardy During the Period of the Yearbooks*, 82 U. PA. L. REV. 602, 602-17 (1934); Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252, 253-55 (1961).

20. *See infra* notes 22-27 and accompanying text.

21. Newman, *supra* note 19, at 254. Talmudic law during the fourth century A.D. provided that "for one offense, only one punishment might be inflicted, not lashes and then the death penalty, but one or the other." *Id.* In Bartkus v. Illinois, 359 U.S. 121 (1959), Justice Black related that the early Christians' abhorrence of multiple trials derived from a reading given by St. Jerome in 391 A.D. in which it was stated that "there shall not rise a double affliction." *Id.* at 152 n.4 (Black, J., dissenting) (quoting I *Nahum* 9 (Douay)). The canon law's prohibition against double jeopardy stems from the maxim that not even God judges the same act twice. *Bartkus*, 359 U.S. at 152 n.4 (Black, J., dissenting).

22. Bartkus v. Illinois, 359 U.S. 121, 152 n.3 (1959) (Black, J., dissenting) (citing R. BONNER, LAWYERS AND LITIGANTS IN ANCIENT ATHENS 195 (1927)).

23. The Code of Justinian stated that "he who has been accused of a crime can not be complained of for the same offense by another person." CODE JUST. 9.2.1.9 The Digest of Justinian provided that "[t]he governor should not permit the same person to be again accused of a crime of which he has been acquitted." DIG. JUST. 84.2.7.2; *see also* J. SIGLER, *supra* note 19, at 2 ("According to the Roman jurist Paulus, 'after a public acquittal a defendant could again be prosecuted by his informer within 30 days, but after that time this cannot be done.' ").

24. Newman, *supra* note 19, at 254 (noting that the Napoleonic Code provided that "[n]o person legally acquitted can be a second time arrested or accused by reason of the same act").

25. Kepner v. United States, 195 U.S. 100, 120-21 (1904) (citing *Fuero Real* (A.D. 1255) lib. iv. tit. xxi, 1, 13 and *Siete Partidas* Part VII, tit. i, l. xii; both of these Spanish laws proscribed a retrial for the same offense subsequent to an acquittal).

26. *See* 4 W. BLACKSTONE, COMMENTARIES, *335 (describing the proscription against double jeopardy as a "universal maxim of the common law"); *see also* United States v. Scott, 437 U.S. 82, 91 (1978); 2 W. HAWKINS, PLEAS OF THE CROWN *84. In England, double jeopardy concepts can be traced back to the thirteenth century. *See* Kirk, *supra* note 19, at 607-08.

tal or conviction in any court of competent jurisdiction barred a retrial for the same conduct.[27] Based on their common-law experience, the Framers of the federal Bill of Rights sought to prohibit more than one trial for the same offense and thus adopted the double jeopardy clause of the fifth amendment.[28] At the time of its enactment, the double jeopardy clause was thought to provide the same double jeopardy protections available at common law.[29] Moreover, the Framers intended that federal criminal law would preempt parallel state laws and thus did not contemplate that two sovereigns within the federal system might prosecute an individual for the same conduct.[30]

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27. *See* King v. Roche, 168 Eng. Rep. 169 (Crown 1775) (an acquittal for murder in Spain barred a later English prosecution); King v. Hutchinson, 84 Eng. Rep. 1011 (K.B. 1678) (an acquittal for murder in Portugal precluded a subsequent English prosecution for the same murder); *see also* Grant, *Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1318-29 (1932) [hereinafter cited as *Lanza Rule*]; Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 8-12 (1956) [hereinafter cited as *Successive Prosecutions*]; Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 13 CASE W. RES. L. REV. 700, 704-05 (1963).

28. *See* 2 J. ELLIOT, THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 548-49 (2d ed. 1881). The Maryland committee formed to report amendments to the United States Constitution proposed an amendment which stated that there could be "no trial after acquittal." *Id.* Pursuant to the suggestion of James Madison, the House of Representatives formulated a double jeopardy clause which stated, "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." 1 ANNALS OF CONG. 434 (J. Gales ed. 1789). Thereafter, the Senate, without extended debate, substituted the words "be twice put in jeopardy of life or limb by any public prosecution" in the House of Representative's double jeopardy clause. 1 SENATE JOURNAL 105 (1789). Subsequently, a conference committee composed of House and Senate representatives reworded the double jeopardy clause in its present form. J. SIGLER, *supra* note 19, at 31-33.

29. *See* 1 ANNALS OF CONG. 782 (J. Gales ed. 1789). Mr. Livermore of New Hampshire stated that the double jeopardy clause represented a "universal practice . . . [being] declaratory as it now stood." *Id.* An intent by the Framers to provide the protections of a plea in bar to the extent recognized by the common law is further borne out by the House of Representatives' rejection of a motion that would have inserted the words "by any law of the United States" after the phrase "same offense." *Id.* At common law, a plea of former jeopardy was enforced following a trial in any jurisdiction. *See supra* note 27 and accompanying text. Thus, an inference exists that successive prosecution for the same crime would be prohibited in the United States subsequent to a trial in any other jurisdiction. Abbate v. United States, 359 U.S. 187, 203-04 (1959) (Black, J., dissenting).

The double jeopardy protections available at common law and under the literal language of the double jeopardy clause extend only to those offenses which place the accused in jeopardy for his or her life. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168-70 (1873). The Supreme Court in *Lange*, however, held that the guarantee against double jeopardy applies in all criminal prosecutions notwithstanding the "life or limb" language in the double jeopardy clause. *Id.* at 172.

30. Under the Constitution, Congress has the explicit power to punish counterfeiting, piracy, felonies on the high seas and crimes against the law of nations. *See* U.S. CONST. art. I, § 8. During the debates on whether to give Congress these powers, Mr. Madison

B. The Supreme Court's Treatment of the Double Jeopardy Prohibition

The prohibition against double jeopardy is widely recognized in this country.[31] The Supreme Court has held that the double jeopardy clause, at the very least, provides the same double jeopardy protections that were available at common law.[32] Because protections against double jeopardy are a "fundamental ideal" in our constitutional heritage, the Supreme Court has made the double jeopardy clause applicable to the states through the fourteenth amendment.[33]

Notwithstanding the antiquity and widespread acceptance of double jeopardy proscriptions, the Supreme Court has acknowledged that its double jeopardy jurisprudence is befuddled.[34] The

noted that federal criminal law should preempt state laws on the same subject, stating, "If the laws of the states were to prevail on this subject, the citizens of different states would be subject to different punishments for the same offense. . . . There would be neither uniformity nor stability in the law." J. MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1789, at 474 (1984).

The Framers probably did not foresee the possibility that two states could prosecute the same crime since the states could not exercise extraterritorial jurisdiction at the time of the Constitution's enactment. *See* Huntington v. Attril, 146 U.S. 657, 673 (1882).

31. *See infra* note 33 and accompanying text.

32. *See* United States v. DiFrancesco, 449 U.S. 117, 133-34 (1980) (double jeopardy clause drafted with common law in mind); United States v. Scott, 437 U.S. 82, 96 (1978) (common-law double jeopardy prohibitions "lie at the core area protected by the Double Jeopardy Clause"); Brown v. Ohio, 432 U.S. 161, 165 (1977) (double jeopardy clause was designed "to embody the protection of the common law pleas of former jeopardy"); Green v. United States, 355 U.S. 184, 187 (1957) (double jeopardy clause was influenced by Blackstone).

33. Benton v. Maryland, 395 U.S. 784, 794 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319, 323 (1937).

Most state constitutions contain double jeopardy clauses. *See* J. SIGLER, *supra* note 19, at 77-83. Prior to the application of the double jeopardy clause to the states, the five states that did not have double jeopardy clauses in their state constitutions had prohibited double jeopardy as a matter of common law. *See* State v. Benham, 7 Conn. 414 (1829); Gilpen v. State, 142 Md. 464, 131 A. 354 (1924); Commonwealth v. McCan, 277 Mass. 199, 178 N.E. 633 (1931); State v. Clemons, 207 N.C. 276, 176 S.E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 A. 98 (1934).

34. Tibbs v. Florida, 457 U.S. 31, 47 (1982) (White, J., dissenting) ("[T]he meaning of the Double Jeopardy Clause is not always readily apparent."); Albernaz v. United States, 450 U.S. 333, 343 (1981) ("The decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."); United States v. DiFrancesco, 449 U.S. 117, 122 (1980) ("That [the double jeopardy clause's] application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis."); Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting) (the double jeopardy guarantee seems to be one of the "least understood . . . provisions of the Bill of Rights. This Court has done little to alleviate the confusion."); Burks v. United States, 437 U.S. 1, 9 (1978) (Court's holdings "can hardly be characterized as models of consistency and clarity").

confusion may stem from the fact that the protections of the double jeopardy clause must be applied in a variety of contexts.[35] For example, the Court's interpretations of the clause have determined whether a defendant can be retried after a successful appeal,[36] a mistrial[37] or a trial resulting in an acquittal[38] or conviction.[39] Furthermore, the Court has had to construe the double jeopardy clause to ascertain whether a sentencing tribunal unconstitutionally has imposed multiple punishments for the same offense.[40] Finally, determining whether two prohibited acts constitute the "same offense" for purposes of the double jeopardy clause has presented additional difficulty.[41]

Nonetheless, several approaches to double jeopardy problems can be discerned in the Court's cases. The Court has held that one of the primary functions of the double jeopardy clause is to prevent the prosecution from harassing the accused with multiple trials for the same offense.[42] The clause thus requires the prosecution to establish a defendant's guilt in a single proceeding.[43] As a result, the

35. See Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980), for an excellent analysis of the confusion in the Supreme Court's double jeopardy cases. *See infra* notes 36-41 and accompanying text.

36. *See* Trono v. United States, 199 U.S. 521 (1905); Kepner v. United States, 195 U.S. 100 (1904); Ball v. United States, 140 U.S. 118 (1891).

37. *See* Oregon v. Kennedy, 456 U.S. 667 (1982); Arizona v. Washington, 434 U.S. 497 (1978); United States v. Dinitz, 424 U.S. 600 (1976); Illinois v. Sommerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1970); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

38. *See* United States v. Scott, 437 U.S. 82 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Price v. Georgia, 398 U.S. 323 (1970); Asche v. Swenson, 397 U.S. 436 (1970).

39. *See* Ohio v. Johnson, 467 U.S. 493 (1984); Tibbs v. Florida, 457 U.S. 31 (1982); Greene v. Massey, 437 U.S. 19 (1978); Burks v. United States, 437 U.S. 1 (1978); United States v. Wilson, 420 U.S. 332 (1975); Benton v. Maryland, 395 U.S. 784 (1969).

40. *See infra* note 49 and accompanying text.

41. *See* Illinois v. Vitale, 447 U.S. 410 (1980); Brown v. Ohio, 432 U.S. 161 (1977); Blockburger v. United States, 284 U.S. 299 (1932).

42. *See* Sanabria v. United States, 437 U.S. 54, 63 (1978) (primary purpose of double jeopardy clause is to prevent successive trials); Burks v. United States, 437 U.S. 1, 11 (1978) (double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply the evidence which it failed to muster during the first trial); Jeffers v. United States, 432 U.S. 137, 150 (1977) (prohibition of multiple prosecutions for the same crime "lies at the heart of the Double Jeopardy Clause"); United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) ("subject[ing] the citizen to a second trial for the same offense would arm the government with a potent instrument of oppression"); United States v. Wilson, 420 U.S. 332, 346 (1975) (without the threat of multiple trials, the double jeopardy clause is not offended); Green v. United States, 335 U.S. 184, 187 (double jeopardy clause designed to protect an individual from "the hazards of trial and possible conviction more than once for an alleged offense").

43. *See infra* notes 47-48 and accompanying text.

double jeopardy clause minimizes the possibility of convicting the innocent and decreases the anxiety, social stigma and expense that an accused often endures when facing criminal prosecutions.[44]

The Court also has determined that the double jeopardy clause effectuates a paramount purpose of maintaining finality in criminal proceedings.[45] To implement finality policies, the Court has interpreted the clause to provide three "separate but related protections":[46] it protects against 1) a retrial following an acquittal,[47] 2) a retrial subsequent to a conviction,[48] and 3) multiple punish-

44. Green v. United States, 355 U.S. 184, 187-88 (1957). In *Green*, Justice Black, writing for the Court, provided the Court's most famous policy statement regarding double jeopardy:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id.

45. *See* United States v. Scott, 437 U.S. 82, 92 (1978) ("primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment"); Crist v. Bretz, 437 U.S. 28, 33 (1978) (primary purpose of double jeopardy clause was to preserve finality of judgments); United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion) (double jeopardy "represents a constitutional policy of finality for the defendant's benefit").

46. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The Supreme Court continues to reiterate the theory that the double jeopardy clause contains three distinct protections. *See* Ohio v. Johnson, 467 U.S. 493 (1984); Illinois v. Vitale, 447 U.S. 410, 415 (1980).

47. *See* United States v. Scott, 437 U.S. 82 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Price v. Georgia, 398 U.S. 323 (1970); Asche v. Swenson, 397 U.S. 436 (1970); Green v. United States, 355 U.S. 184 (1957); United States v. Ball, 163 U.S. 662 (1896).

The prosecution's inability to appeal a verdict of acquittal has been termed "the most fundamental rule in the history of double jeopardy jurisprudence." *Martin Linen Supply*, 430 U.S. at 571; *see also* Arizona v. Washington, 434 U.S. 497, 503 (1978) ("The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal."). Subsequent to acquittal, the accused may not be retried even if "the acquittal was based upon an egregiously erroneous foundation." Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam).

48. *See* Ohio v. Johnson, 467 U.S. 493 (1984); Tibbs v. Florida, 457 U.S. 31 (1982); Greene v. Massey, 437 U.S. 19 (1978); Burks v. United States, 437 U.S. 1 (1978); Benton v. Maryland, 395 U.S. 784 (1969); *In re* Neilson, 131 U.S. 176 (1889); *see also* United States v. Wilson, 420 U.S. 332, 342 (1975) (once a defendant has been convicted, principles of fairness and finality require that the defendant not be subjected to further trial for the same offense).

The protection against a retrial following a conviction does not bar a second trial after a successful appeal by the defendant. United States v. Ball, 163 U.S. 662 (1896). In the absence of the threat of multiple trials for the same offense, the double jeopardy clause

ments for the same offense.[49] The Court has reached different conclusions as to the extent of each of these protections, balancing the accused's interest in the finality of criminal proceedings against society's interest in punishing the offender.[50] Under the double jeopardy clause, the protection against a retrial following an acquittal is viewed as being absolute,[51] while the prohibition against multiple punishments is not.[52]

III. An Exception to the Proscription Against Double Jeopardy: The Dual Sovereignty Doctrine

A. The Supreme Court's Development of the Doctrine

Although the states traditionally have had the responsibility of

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does not bar the government from appealing a defendant's conviction. Sanabria v. United States, 437 U.S. 54, 63 (1978).

49. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163, 176 (1873). The Court in *Lange* stated that "[i]t is very clearly the *spirit* of the [double jeopardy clause] to prevent a second punishment under judicial proceedings for the same crime." *Id.* at 170 (emphasis in original). The protection against multiple punishments ensures only that the sentencing tribunal will not pass a sentence in excess of the maximum limits permitted by the legislature. United States v. DiFrancesco, 449 U.S. 117, 139 (1980); Whalen v. United States, 445 U.S. 684, 689 (1980); Brown v. Ohio, 432 U.S. 161, 165 (1977). No absolute prohibition exists against an increase in a sentence's severity subsequent to an appeal. *DiFrancesco*, 449 U.S. at 139; *see also* Stroud v. United States, 251 U.S. 15, 18 (1919) (double jeopardy clause held not to prohibit the imposition of the death penalty at a retrial following a successful defendant's appeal when the defendant originally was sentenced to life imprisonment).

Due process principles similarly do not create an absolute bar to an increase in a defendant's sentence subsequent to an appeal; however, the increase must be justified by objective criteria. Texas v. McCullough, 106 S. Ct. 976, 979 (1986); North Carolina v. Pearce, 395 U.S. 711, 723 (1969). *But see* Chaffin v. Stynchombe, 412 U.S. 17, 25, (1973) (*Pearce* rationale does not extend to a jury sentencing the defendant to death at a retrial after an appeal when the defendant originally received a prison term for the same crime since the possibility for vindictiveness is not present).

50. *See* United States v. Scott, 437 U.S. 82, 92 (1978); Arizona v. Washington, 434 U.S. 497, 505 (1978); Illinois v. Sommerville, 410 U.S. 458, 469-71 (1973).

51. *See supra* note 47 and accompanying text. In Tibbs v. Florida, 457 U.S. 31 (1982), Justice O'Connor, writing for the Court, explained the policy reasons for disallowing a retrial following an acquittal:

> [The] prohibition [against a retrial after an acquittal], lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perservance.

Id. at 41.

One commentator has noted that acquittals may have been given such a high degree of finality in order to preserve a criminal jury's sixth amendment right to acquit against the evidence. Westen, *supra* note 35, at 1064.

52. *See* United States v. DiFrancesco, 449 U.S. 117, 133 (1980) (sentence does not have the qualities of constitutional finality that attend an acquittal).

defining and punishing crimes,[53] the Constitution also gives Congress the power to define and punish several types of offenses.[54] In the early 1800's, it became apparent that the state and federal governments could define the same conduct as a crime.[55] Thus, the existence of concurrent jurisdiction over the same prohibited conduct raised the question of whether a prosecution by one sovereign thereafter barred another sovereign from prosecuting the accused for the same conduct.

The Supreme Court first addressed this issue in 1820.[56] The Court held that federal criminal law preempted state law when both the federal and state governments could exercise jurisdiction over the same prohibited conduct.[57] The Court further held that the double jeopardy clause precluded a sovereign from initiating a prosecution subsequent to a prosecution for the same conduct by another sovereign.[58]

The tension between the federal and state governments during the pre-Civil War period, however, compelled the Court to reverse its position regarding federal preemption of state criminal law.[59] Consequently, the Court rejected its earlier position that a state could not prosecute an offender for conduct which federal law also defined as a crime.[60]

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53. *See* Abbate v. United States, 359 U.S. 189, 195 (1959).

54. *See supra* note 30.

55. *See* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 12 (1820).

56. *Id.*

57. *Id.* at 31. The Court's preemption finding was in accord with the original intent underlying the Constitution's grant of congressional power to punish counterfeiting. *See supra* note 30 and accompanying text.

58. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 31 (1820). The Court stated, "[I]f the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other." *Id.* The Court in United States v. The Pirates, 18 U.S. (5 Wheat.) 184 (1820), rendered a decision similar to that in *Houston*. The *Pirates* Court stated, "[R]obbery . . . is considered an offense within the criminal jurisdiction of all nations. It is against all, and punished by all, and there can be no doubt that [a double jeopardy plea] would be good in any civilized State." *Id.* at 197; *see also* State v. Brown, 2 N.C. (Mart.) 100, 101 (1794) (successive prosecutions for the same crime by two sovereigns are "against natural justice"); State v. Antonio, 3 S.C. (3 Brev.) 562, 578 (1816) (prosecutions by different sovereigns for the same act are "not only contrary to the express letter of the Constitution but . . . [to the] unerring principles of justice").

59. *See* Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1542 (1967); Comment, *Successive State and Federal Prosecutions for the Same Offense:* Bartkus v. Illinois *Revisited*, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 29, 33 (1971); *see also infra* notes 60-64, 100-03 and accompanying text.

60. *See* Moore v. Illinois, 55 U.S. (14 How.) 13, 19 (1852); United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847). In *Moore* the defendant, convicted under Illinois law for haboring a slave, unsuccessfully

The early cases in which the Court found that federal criminal law did not preempt state law did not involve actual occurrences of successive state and federal prosecutions.[61] The Court recognized that its holdings might subject an accused to more than one trial for the same crime, but repeatedly stated in dicta that the double jeopardy clause did not bar successive state and federal trials for the same conduct.[62] The Court rationalized this result by concluding that if a single act violated both state and federal law, that act would constitute two separate offenses for purposes of the double jeopardy clause.[63] Nonetheless, the Court perhaps tempered the effect of its subordination of double jeopardy rights to state sover-

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argued that the Illinois fugitive slave law was unconstitutional because it could subject him to double punishment for the same offense since Congress also had enacted laws prohibiting the secreting of fugitive slaves. 55 U.S. (14 How.) at 19. Similarly, the Court in *Fox* rejected the defendant's argument that the double jeopardy clause precluded a state from initiating counterfeiting prosecutions since Congress had enacted laws prohibiting counterfeiting. 46 U.S. (5 How.) at 434.

61. *See* Moore v. Illinois, 55 U.S. (14 How.) 13, 19 (1852); United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847). *Moore*, *Fox* and *Marigold* were the first cases to announce the dual sovereignty doctrine; following these cases, the Supreme Court reaffirmed the doctrine in dicta. *See* Ponzi v. Fessenden, 258 U.S. 254, 260 (1922); Grafton v. United States, 206 U.S. 333, 353-54 (1907); *In re* Heff, 197 U.S. 488, 505-06 (1905); Sexton v. California, 189 U.S. 319, 323 (1902); Crossley v. California, 168 U.S. 640, 641 (1898); Pettibone v. United States, 148 U.S. 197, 209 (1893); *In re* Loney, 134 U.S. 372, 375 (1890); Cross v. North Carolina, 132 U.S. 131, 139 (1889); United States v. Arjona, 120 U.S. 479, 487 (1887); *Ex parte* Siebold, 100 U.S. 371, 390 (1879); United States v. Cruikshank, 92 U.S. 542, 550 (1875).

62. *See* Moore v. Illinois, 55 U.S. (14 How.) 13, 19 (1852); United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847).

In *Fox*, Justice McLean vigorously objected to the majority's creation of an exception to double jeopardy protections, stating:

> To punish the same act by the two governments would [not only] violate the common principles of humanity, but would be repugnant to the nature of both governments . . . . There is no principle better established by the common law, none more fully recognized in the federal and state constitutions, than that an individual shall not be put in jeopardy twice for the same offense. This, it is true, applies to the respective governments; but its spirit applies with equal force against a double punishment for the same act by a state and federal government.

Id. at 439 (McLean, J., dissenting). In *Moore*, Justice McLean again vigorously dissented, stating, "It is contrary to the nature and genius of our government, to punish an individual twice for the same offense." 55 U.S. (14 How.) at 21 (McLean, J., dissenting).

63. *See* Moore v. Illinois, 55 U.S. (14 How.) 13, 19 (1852); United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410, 434 (1847). The Court in *Moore* provided clear underpinnings for the dual sovereignty doctrine, stating:

> Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both.

55 U.S. (14 How.) at 20.

eignty by maintaining that successive prosecutions for the same act would occur only in extraordinary circumstances.[64]

The Supreme Court first addressed an actual occurrence of state and federal prosecutions for the same conduct in the 1922 case of *United States v. Lanza*.[65] In *Lanza*, the state and federal governments prosecuted and convicted the defendants for the same Prohibition Act violations.[66] On appeal, the Supreme Court rejected the defendants' contention that the double jeopardy clause barred state and federal prosecutions for the same crime.[67] Accordingly, the Court held that punishment by a state did not preclude the federal government from punishing the same conduct.[68] The Court speculated that in the absence of the dual sovereignty doctrine, offenders would submit themselves to prosecution in the jurisdiction with lesser penalties in order to prevent subsequent prosecution in another jurisdiction.[69]

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64. *See* Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847). The Court in *Fox* asserted:

> It is almost certain that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to the punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety might demand extraordinary rigor.

Id.

65. 260 U.S. 377 (1922).

66. *Id.* at 378-79. The federal and state governments indicted the defendants under the National Prohibition Act, enacted pursuant to the eighteenth amendment, which gave the federal government and the states concurrent power to enforce the prohibition. U.S. CONST. amend. XVIII, § 2, *repealed by* U.S. CONST. amend. XXI, § 1. The legislative history of the eighteenth amendment indicates that multiple state and federal prosecutions for the same act were to be prohibited. Newman, *supra* note 19, at 263 (citing 56 CONG. REC. 423-25 (1917)).

67. *Lanza*, 260 U.S. at 382. At that time, the fifth amendment applied only to the federal government. *Id.* Therefore, the Court concluded that the double jeopardy clause only barred a second prosecution when the federal government instituted both the first and the second prosecutions for the same offense. *Id.*

68. *Id.* Chief Justice Taft provided the classic formulation of the dual sovereignty doctrine, stating:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition . . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

Id. The *Lanza* Court, however, noted that Congress could outlaw dual sovereignty prosecutions. *Id.* at 385. In the absence of a federal law prohibiting dual sovereignty, the Court refused to bar successive state and federal prosecutions for the same act. *Id.*

69. *Id.* at 385. The fear that offenders will voluntarily submit themselves to the juris-

Thirty-six years after *Lanza*, the Supreme Court decided two cases which again addressed the issue of state and federal prosecutions for the same act.[70] In *Bartkus v. Illinois*,[71] a federal jury acquitted the defendant of robbing a federally insured bank.[72] Shortly thereafter, an Illinois grand jury indicted the defendant for the same robbery.[73] After a jury trial resulted in a guilty verdict, the state trial court sentenced the defendant to life imprisonment.[74]

On certiorari, the United States Supreme Court, in a 5-4 decision, upheld the Illinois court's rejection of the defendant's double jeopardy plea.[75] The defendant in *Bartkus* argued that the dual sovereignty doctrine could be overruled by applying the fifth amendment's double jeopardy clause to the states through the fourteenth amendment's due process clause.[76] The Court, however, concluded that dual sovereignty prosecutions were not "repugnant to the conscience of mankind" and thus did not violate the defendant's right to due process.[77] The Court, therefore, refused to overrule the dual sovereignty doctrine by incorporating double jeopardy protection into the due process clause.[78] Moreover, the majority found that our federal system justifies the dual sovereignty doctrine since a state's penal interests could be frustrated by a ruling which precluded a state from prosecuting an of-

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diction with lesser penalties to escape harsher punishment by another sovereign appears throughout the dual sovereignty cases. *See infra* notes 79, 85, 91 and accompanying text. This fear, however, may be unjustified. *See infra* notes 206-07 and accompanying text.

70. *See* Abbate v. United States, 359 U.S. 189 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

71. 359 U.S. 121 (1959).

72. *Id.* at 122.

73. *Id.* Dismayed at the federal jury's verdict of acquittal, the federal district judge who presided over Bartkus's trial telephoned an Illinois state's attorney and asked him to reprosecute Bartkus under Illinois' armed robbery statutes. Chi. Sun-Times, Nov. 17, 1983, at 113, col. 3.

74. *Bartkus*, 359 U.S. at 122. The life imprisonment term was based on Illinois' habitual offender statute. *Id.* at 137 n.25. After spending seven years in prison, the defendant in *Bartkus* was pardoned by former Illinois Governor William Stratton. Chi. Sun-Times, Nov. 17, 1983, at 113, col. 3.

75. *Bartkus*, 359 U.S. 121 (1959), *aff'g* People v. Bartkus, 7 Ill. 2d 138, 130 N.E.2d 187 (1955).

76. *Bartkus*, 359 U.S. at 136-37.

77. *Id.* at 127 (citing Palko v. Connecticut, 302 U.S. 319 (1937)).

78. *Bartkus*, 359 U.S. at 127. Subsequent to *Bartkus*, however, the Supreme Court extended the fifth amendment's double jeopardy prohibition to the states in Benton v. Maryland, 395 U.S. 784 (1969). As a result of *Benton*, some courts submitted that *Bartkus* had been substantially undermined. *See* People v. Cooper, 398 Mich. 450, 457, 247 N.W.2d 866, 869 (1976); State v. Fletcher, 22 Ohio App. 83, 87-93, 259 N.E.2d 146, 149-53 (1970); *rev'd*, 26 Ohio St. 567, 271 N.E. 567 (1971).

fender following a federal prosecution for the same act.[79] The Court thus refused to reach a result that would deprive the states of their "historic right and obligation" to establish "peace and order" within their borders.[80]

In *Abbate v. United States*,[81] the Court upheld the constitutionality of a federal prosecution which followed convictions in a state court for the same act.[82] The Court concluded that a prohibition against the federal prosecution could undermine federal law enforcement interests since federal and state interests in prosecuting crimes differ.[83] Like the Court in *Lanza*,[84] the *Abbate* Court surmised that, absent the dual sovereignty doctrine, a defendant could frustrate the federal government's penal interests by submitting himself to prosecution in a state in order to prevent a subsequent federal prosecution for the same conduct.[85]

B. The Dual Sovereignty Doctrine in a Context Other Than Federal-State Prosecutions

Policy considerations that support the dual sovereignty doctrine in a federal-state context similarly govern the doctrine's applicability to other situations.[86] The doctrine's validity depends upon the perception that enforcement of a defendant's double jeopardy rights can unduly frustrate a sovereign's legitimate penal interests.[87] In determining whether two sovereigns can prosecute the same conduct, the dispositive consideration is whether the respective prosecuting bodies "draw their authority to punish the of-

79. *Bartkus*, 359 U.S. at 137-38. The Court dismissed the common-law precedents that prohibited two sovereigns from prosecuting the same act as "dubious" and "not relevant to the constitutional law of our federalism." *Id.* at 128 n.9.

80. *Id.* at 137. The Court nonetheless indicated its distaste for dual sovereignty prosecutions by stating that "[t]he greatest self-restraint is necessary when [the] federal system yields results with which a court is in little sympathy." *Id.* at 138. Like the Court in United States v. Lanza, 260 U.S. 377 (1922), the *Bartkus* Court noted that Congress could outlaw dual sovereignty prosecutions. 359 U.S. at 138; *see supra* note 68.

81. 359 U.S. 187 (1959). Justice Brennan wrote the majority opinion, as well as a separate opinion, in *Abbate*, but dissented in *Bartkus*. Justice Brennan felt that *Abbate* was distinguishable from *Bartkus* because in *Bartkus* federal authorities solicited the subsequent state prosecution, making it "a second federal prosecution" while in *Abbate* no evidence of collusive participation could be found in the record. *Compare Abbate*, 359 U.S. at 190 n.4, *with Bartkus*, 359 U.S. at 165 (Brennan, J., dissenting).

82. *Abbate*, 359 U.S. at 196.

83. *Id.* at 195.

84. 260 U.S. 377 (1922).

85. *Abbate*, 359 U.S. at 195.

86. *See infra* notes 87-91 and accompanying text.

87. *See supra* notes 69, 79-80, 85 and accompanying text; *infra* note 91 and accompanying text.

fender from distinct sources of power."[88]

Employing this source-of-sovereignty analysis, the Supreme Court has found that a territorial government and the federal government could not prosecute an accused for the same conduct since both of these governments acquired their sovereignty from the same source.[89] The Court also has held that a prosecution by a municipality barred a subsequent state prosecution for the same offense since the municipality and the state derived their prosecutorial power from the same organic law.[90] However, the Court has allowed dual prosecutions by an Indian tribe and the federal government since the Indian tribe derived its power to prosecute from a source independent of congressional delegations of authority.[91]

C. Negative Reactions and Alternatives

The dual sovereignty doctrine has triggered outspoken criticism from a multitude of sources.[92] For example, in dissenting opinions, Justice Black vehemently condemned the doctrine.[93] Justice Black argued that the double jeopardy clause should be interpreted in accordance with the English common-law practice of prohibiting a second prosecution for the same act following a bona fide acquittal or conviction in another jurisdiction.[94] Justice Black further main-

88. Heath v. Alabama, 106 S. Ct. 433, 437 (1985); United States v. Wheeler, 435 U.S. 313, 321 (1978).

89. Puerto Rico v. Shell Co., 302 U.S. 253, 264-67 (1937); Grafton v. United States, 206 U.S. 333, 354 (1907).

90. Waller v. Florida, 397 U.S. 387, 395 (1970). Prior to *Waller*, most states treated municipalities and the state as separate sovereigns for purposes of the dual sovereignty doctrine. *Id.* at 391 n.3.

91. United States v. Wheeler, 435 U.S. 313, 330 (1978). The *Wheeler* Court noted that a tribal court could impose mild punishments in comparison to the severe punishments available under federal law for the same crime. *Id.* at 330 (citing 25 U.S.C. § 1302(7) (1976) (tribal courts cannot impose a punishment in excess of six months' imprisonment or a $500 fine)). The Court thus refused to limit the dual sovereignty doctrine to successive state and federal prosecutions since the Court believed that tribal offenders would seek to stand trial first in tribal court to avoid punishment under federal law. *Wheeler*, 435 U.S. at 330-31. Like the courts in United States v. Lanza, 260 U.S. 337 (1922), and Bartkus v. Illinois, 359 U.S. 121 (1959), the Court in *Wheeler* pointed out that Congress could outlaw the dual sovereignty doctrine. *Wheeler*, 435 U.S. at 330-31; *see supra* notes 68, 80.

92. *See infra* notes 93-108 and accompanying text.

93. *See* Abbate v. United States, 359 U.S. 189, 201-04 (1959) (Black, J., dissenting); Bartkus v. Illinois, 359 U.S. 121, 150-64 (1959) (Black, J., dissenting). Justices Douglas and Warren joined in Justice Black's *Abbate* and *Bartkus* dissents. Justice Brennan also joined Justice Black in *Bartkus*.

94. Abbate v. United States, 359 U.S. 187, 203-04 (1959) (Black, J., dissenting); Bartkus v. Illinois, 359 U.S. 121, 156 (1959) (Black, J., dissenting); *see also* Franck, *An Inter-*

tained that proponents of the doctrine were relying on an unwarranted assumption that the state and the nation attempt to subvert each other's laws.[95] He pointed out that Congress could preempt state law whenever state prosecutions might undermine federal interests.[96] Justice Black's most strenuous objection to the dual sovereignty doctrine stemmed from the invocation of federalism to give a sovereign the power to emasculate an individual's basic right not to be placed twice in jeopardy.[97] In this regard, Justice Black could not reconcile the restrictions on sovereignty and the cognizance of individual rights found in the Bill of Rights with the dual sovereignty proponents' refusal to attach any weight to an individual's interest in avoiding multiple prosecutions for the same act.[98]

Several commentators also have criticized the dual sovereignty

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national Lawyer Looks at the Bartkus *Rule*, 34 N.Y.U. L. REV. 1096, 1099-1102 (1959) (noting that most foreign countries prohibit a second prosecution following a trial for the same crime in another jurisdiction); *supra* notes 26-30 and accompanying text.

Justice Black also pointed out that a second prosecution would not be barred if the initial trial was a sham or the original trial court did not have jurisdiction. *Bartkus*, 359 U.S. at 161 (Black, J., dissenting); *see also* 21 AM. JUR. 2d *Criminal Law* § 257 (1981) (sham trials do not place an accused in jeopardy).

95. Bartkus v. Illinois, 359 U.S. 121, 156 (1959) (Black, J., dissenting).

96. *Id.* at 157. The Framers originally intended that federal criminal law would preempt state law. *See supra* note 30 and accompanying text; *see also* Pennsylvania v. Nelson, 350 U.S. 497, 500 (1956) (state sedition laws held preempted by federal law). The preemptive force of federal law ultimately depends upon congressional intent. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-30 (1947).

97. Abbate v. United States, 359 U.S. 187, 202 (1959) (Black, J., dissenting); Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting). In *Bartkus*, Justice Black commented:

> The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of "federalism." This, it seems to me, is a misuse and desecration of the concept. Our Federal Union was conceived and created "to establish Justice" and to "secure the Blessings of Liberty," not to destroy any of the bulwarks on which both freedom and justice depend. We should, therefore, be suspicious of any supposed "requirements" of "federalism" which result in obliterating ancient safeguards.

Id.

98. Abbate v. United States, 359 U.S. 187, 202 (1959) (Black, J., dissenting); Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting). Justice Black further criticized the majority in *Bartkus*, stating:

> The Court 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.

Id.

Justice Black also noted that "[i]nevitably, the victims of such double prosecutions will most often be the poor and the weak in our society, individuals without friends in high places who can influence prosecutors not to try them again." *Id.* at 163.

doctrine.[99] For example, some scholars contend that the doctrine's dubious origins compel reexamination of the continued necessity for the doctrine.[100] These scholars point out that state sovereignty constituted a burning issue among the southern states when the Supreme Court first announced the doctrine's foundations in dicta,[101] and contend that the Court subordinated double jeopardy rights to the dual sovereignty concept because a ruling that hampered a state's power to enforce penal laws could have resulted in a violent uprising by the southern states.[102] Since friction between the southern states and the federal government no longer permeates our federal system, the commentators maintain that continued application of the dual sovereignty doctrine may not be justified.[103]

Several commentators have advocated supplanting the dual sovereignty doctrine with an interest test.[104] Under this test, a dual sovereignty prosecution will be allowed only if the first prosecution did not vindicate the second sovereign's penal interests.[105] Unlike

99. *See* J. SIGLER, *supra* note 19; Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607 (1966); Fisher, *supra* note 15; Franck, *supra* note 94; *Lanza Rule*, *supra* note 27; *Successive Prosecutions*, *supra* note 27; Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); Pontikes, *supra* note 27; Note, *supra* note 59; Comment, *supra* note 59; Comment, *The Problem of Double Jeopardy in Successive Federal State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477, 499 (1979); Note, *Double Jeopardy and Dual Sovereignty: a Critical Analysis*, 11 WM. & MARY L. REV. 946 (1970); 39 B.U.L. REV. 604 (1959); 11 HASTINGS L.J. 204 (1959); 28 U. CIN. L. REV. 518 (1959); *see also* United States v. Furmento, 563 F.2d 1083, 1092 (Aldisent, J., dissenting). *But see* Note, *Successive Federal and State Trials Arising from the Same Act*, 45 CORNELL L.Q. 574 (1960) (supporting the dual sovereignty doctrine).

100. *See* Note, *supra* note 59, at 1542; Comment, *supra* note 59, at 33.

101. *See* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 83 (rev. ed. 1926); Note, *supra* note 59, at 1541-42; Comment, *supra* note 59, at 30. Interestingly, one of the first dual sovereignty cases addressed the constitutionality of a state's fugitive slave law. *See* Moore v. Illinois, 55 U.S. (14 How.) 13 (1852) (holding Illinois fugitive slave law constitutional since federal fugitive slave laws did not preempt state's power to enforce slave laws).

102. *See* Note, *supra* note 59, at 1542; Comment, *supra* note 59, at 33.

103. *See* Note, *supra* note 59, at 1546-47; Note, *Multiple Prosecutions: Federalism vs. Individual Rights*, 20 U. FLA. L. REV. 355, 367 (1968).

104. *See* Harrison, *supra* note 99, at 306; Pontikes, *supra* note 27, at 714-18; Note, *supra* note 59, at 1559-64; Comment, *supra* note 59, at 35-36; Comment, *supra* note 99, at 499.

105. The MODEL PENAL CODE § 1.10 (Proposed Official Draft 1962) codifies the interest test as follows:

> When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:
>
> (1) The first prosecution resulted in an acquittal or in a conviction . . . and the subsequent prosecution is based on the same conduct, unless (a) the offense of

the dual sovereignty doctrine, the interest test recognizes that an offender commits crimes against society as a whole, rather than against an individual sovereign.[106] The interest test thus acknowledges that a single prosecution can effectively vindicate the penal interests of more than one sovereign.[107] The test also weighs an individual's interest in avoiding two prosecutions for the same offense.[108]

Two state courts have adopted the interest test in place of the dual sovereignty doctrine.[109] Additionally, the Justice Department has adopted the interest test by prohibiting dual sovereignty prosecutions unless a distinct societal interest has been left unvindicated by another sovereign's prosecution for the same conduct.[110]

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which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and *the law defining each of such offenses is intended to prevent a substantially different harm or evil.*

Id. (emphasis added).

106. Harrison, *supra* note 99, at 327-28; Pontikes, *supra* note 27, at 714.

107. *See* Pontikes, *supra* note 27, at 711. The interest test is predicated on an assumption that different sovereigns define acts as crimes for similar reasons. *Id.*

108. *See* Commonwealth v. Mills, 447 Pa. 163, 169, 286 A.2d 638, 640-41 (1971). The *Mills* court recognized that the dual sovereignty doctrine is really a balancing test which pits a defendant's double jeopardy rights against a sovereign's prosecutorial interests. *Id.* The court, therefore, supplanted the dual sovereignty doctrine with the interest test since the interest test effectively recognizes an individual's interest in not being prosecuted twice for the same conduct. *Id.*; *see also* State v. Hogg, 118 N.H. 262, 267, 385 A.2d 844, 847 (1976) (dual sovereignty prosecutions for acts arising out of same transaction barred since individual's interest in preventing successive prosecutions is so strong).

109. *See* People v. Cooper, 398 Mich. 450, 247 N.W.2d 866 (1976); Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638 (1971). The courts in *Cooper* and *Mills* found that a prosecution by one sovereign can fully vindicate another sovereign's need to prosecute; therefore, these courts ruled that dual sovereignty prosecutions will be allowed only if a defendant's behavior violates state and federal laws which protect different interests. *Cooper*, 398 Mich. at 459-61, 247 N.W.2d at 870; *Mills*, 447 Pa. at 171-72, 286 A.2d at 642.

The Court in *Cooper* also identified the following factors as pertinent in determining the presence of divergent interests in dual sovereignty prosecutions: 1) whether the penalties of the statutes involved are disparate; 2) whether the statutes at issue evidence substantive or merely jurisdictional differences; and 3) whether one jurisdiction can be trusted to vindicate another jurisdiction's interest in obtaining a conviction. *Cooper*, 398 Mich. at 461, 247 N.W.2d at 870-71.

110. *See* U.S. ATT'Y MANUAL § 9-2.142 (1981) (dual sovereignty prosecution can be initiated only if first prosecution left a federal interest unvindicated).

In a memorandum issued to United States Attorneys one week after the *Bartkus* and *Abbate* decisions, then-Attorney General Rogers decreed that a federal dual sovereignty prosecution could be initiated only for "compelling reasons." 27 U.S.L.W. 2509 (Apr. 7, 1959). This policy became known as the *Petite* policy, named after the decision construing its effects. *See* Petite v. United States, 361 U.S. 529 (1960); *see also* Rinaldi v. United States, 434 U.S. 22 (1977) (Justice Department may drop charges if it finds a violation of the *Petite* policy). Lower courts have found that a defendant may not seek dismissal of an

To prevent dual sovereignty prosecutions, a few courts have relied upon the doctrines of collateral estoppel or res judicata.[111] Collateral estoppel prevents party litigants or their privies from relitigating issues of ultimate fact that have been resolved by a valid judgment.[112] Similarly, the doctrine of res judicata provides that a judgment on the merits precludes party litigants or their privies from relitigating any issues which were or could have been raised in the action that led to the judgment.[113] Res judicata and collateral estoppel are designed to prevent repetitive litigation.[114] The doctrines protect adversaries and the judicial system from the vexation and expense accompanying multiple trials.[115] Further, the doctrines encourage reliance on judicial determinations by eliminating inconsistent adjudications.[116]

Courts relying upon principles of collateral estoppel or res judicata have found that once an issue of ultimate fact is resolved by a prosecution in one jurisdiction, a second sovereign cannot institute

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indictment based on an alleged violation of the *Petite* policy. *See* United States v. Hutul, 416 F.2d 607, 626 (7th Cir. 1969); United States v. Jones, 334 F.2d 809, 812 (7th Cir. 1964), *cert. denied*, 379 U.S. 993 (1965). *See generally* Comment, *supra* note 99, at 488-94 (discussing the *Petite* policy).

111. *See* State v. Hogg, 118 N.H. 262, 385 A.2d 844 (1978); State v. Rogers, 90 N.M. 673, 568 P.2d 199 (Ct. App. 1977). Although these cases speak of collateral estoppel, it appears that the courts technically applied the doctrine of res judicata since the decisions gave preclusive effect to a previous judgment. *See infra* note 113 and accompanying text; *see also* Harrison, *supra* note 99, at 335; Comment, *supra* note 59, at 37.

112. *See* Montana, v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery v. Shore, 439 U.S. 322, 326 n.5 (1979); Asche v. Swenson, 397 U.S. 436, 439 (1970); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 3 1976). The *Restatement of Judgments* now labels collateral estoppel "issue preclusion." *Id.*

The Supreme Court has held that collateral estoppel is a component of the double jeopardy clause. *See Asche*, 397 U.S. at 439. The doctrines of collateral estoppel and res judicata have been recognized in the criminal law for more than seventy years. *See* United States v. Oppenheimer, 242 U.S. 85, 87-88 (1916) (judgment conclusive as to every issue that might have been presented). For a discussion of collateral estoppel and res judicata in criminal cases, see Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960); Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281 (1979).

113. *See* Allen v. McCurry, 449 U.S. 90, 95 (1980); Cromwell v. County of Sac, 94 U.S. 351, 352 (1876); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 74 (Tent. Draft No. 3 1976). The *Restatement of Judgments* now calls res judicata "claim preclusion." *Id.*

114. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) ("[C]ollateral estoppel and res judicata have a dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.")

115. Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153-54 (1979).

116. Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153-54 (1979).

a prosecution based on the same evidence.[117] Most courts, however, have ruled that the doctrines of collateral estoppel and res judicata do not preclude dual sovereignty prosecutions.[118] These courts have held that collateral estoppel and res judicata apply only when the first and second prosecutions involve the same litigants; these doctrines thus do not foreclose dual sovereignty prosecutions because a different party brings the second prosecution.[119]

D. Successive Sister State Prosecutions for the Same Act

Prior to its decision in *Heath v. Alabama*,[120] the Supreme Court never had considered directly whether the dual sovereignty doctrine could be interpreted to allow two states to prosecute an accused for the same conduct. In fact, the Court previously had stated in dicta that if two states could exercise concurrent jurisdiction over the same crime, then the entry of a judgment in one state would bar a subsequent prosecution in another state.[121]

The states have reached different conclusions as to whether a state can prosecute an individual for conduct for which he previously was prosecuted in another state.[122] Some states have refused to follow the dual sovereignty doctrine as a matter of public policy,[123] state constitutional interpretation,[124] or statute[125] and have

117. State v. Hogg, 118 N.H. 262, 267, 385 A.2d 844, 846-47 (1978); State v. Rogers, 90 N.M. 673, 678, 568 P.2d 199, 204 (Ct. App. 1977).

118. *See* Crooker v. United States, 620 F.2d 313, 314 (1st Cir. 1980) (listing cases in which courts did not apply collateral estoppel to preclude dual sovereignty prosecutions); *see also* Annot. 6 A.L.R.4th 803 (1981); Annot., 9 A.L.R.3d 215 (1966).

119. *See, e.g.*, Crooker v. United States, 620 F.2d 313, 313-14 (1st Cir. 1980); United States v. Smith, 446 F.2d 200, 202 (4th Cir. 1971).

120. 106 S. Ct. 433 (1985).

121. Nielson v. Oregon, 212 U.S. 315, 320 (1909). In *Nielson*, the Court noted that when two states can exercise concurrent jurisdiction over the same prohibited conduct, "the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of one State cannot be prosecuted for the same offense in the courts of the other." *Id. Nielson* can be read to prohibit successive sister state prosecutions for the same conduct. *See* Heath v. Alabama, 106 S. Ct. 433, 443-44 (1985) (Marshall, J., dissenting); State v. Alexander, 44 Or. App. 557, 607 P.2d 181, *aff'd*, 289 Or. 743, 617 P.2d 1376 (1980). The majority in *Heath*, however, limited *Nielson* "to its unusual facts." *Heath*, 106 S. Ct. at 438-39.

122. *See infra* notes 123-27 and accompanying text.

123. *See* State v. Rogers, 90 N.M. 673, 678, 568 P.2d 199, 204 (Ct. App. 1977); Commonwealth v. Mills, 447 Pa. 163, 171-72, 286 A.2d 638, 642 (1971).

124. *See* State v. Hogg, 118 N.H. 262, 266, 385 A.2d 844, 847 (1978); People v. Cooper, 398 Mich. 450, 461, 247 N.W.2d 866, 871 (1976).

125. Ten states limit dual sovereignty prosecutions based upon the same conduct. *See* ALASKA STAT. § 12.20.010 (1985); CAL. PENAL CODE § 793 (West 1985); IDAHO CODE § 19-315 (1979); IND. CODE § 35-41-4-5 (1978); MONT. CODE ANN. § 76-11-504

barred successive sister state prosecutions, as well as successive federal-state prosecutions, for the same criminal act.[126] Other states, however, have adhered to the dual sovereignty doctrine and have prosecuted defendants for the same conduct that was the basis for prosecution in another state.[127]

IV. THE FULL FAITH AND CREDIT CLAUSE AND MULTIPLE STATE PROSECUTIONS

On its face, the Constitution's full faith and credit clause seems relevant in determining whether the dual sovereignty doctrine can be interpreted to allow two states to prosecute and punish the same conduct.[128] The clause provides that "[f]ull faith and credit shall be given in each state to the . . . judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such . . . proceedings shall be proved, and the effect thereof."[129]

The Framers adopted the full faith and credit clause to promote

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(1985); NEV. REV. STAT. § 171.070 (1986); N.D. CENT. CODE § 29-03-13 (1974); OKLA. STAT. ANN. tit. 22, § 130 (West 1971); VA. CODE § 19.2-294 (1983) (prior federal prosecution only); WASH. REV. CODE § 10.43.040 (1980).

Eight states prohibit dual sovereignty prosecutions for the same offense. *See* ILL. REV. STAT. ch. 38, ¶ 3-4(c) (1985); KAN. STAT. ANN. § 21-3108 (1981); MINN. STAT. ANN. § 609-045 (1986); MISS. CODE ANN. § 99-11-27 (1973); N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1983); N.C. GEN. STAT. § 15A-134 (1983); UTAH CODE ANN. § 76-1-404 (1978); WIS. STAT. § 939.71 (1982).

Seven states preclude a second prosecution arising out of the same transaction unless the second prosecution is not for the same offense and serves an interest not vindicated by the first prosecution. *See* ARK. STAT. ANN. § 4-108 (1977); COLO. REV. STAT. § 18-1-3-3 (1978); DEL. CODE ANN. tit. 11, § 209 (1974); HAWAII REV. STAT. § 701-112 (1976); KY. REV. STAT. § 505.050 (1985); N.J. STAT. ANN. § 2C:1-11 (West 1982) (prior federal prosecution only); 18 PA. CONS. STAT. ANN. § 111 (Purdon 1983).

Forty-two states have adopted provisions in the Uniform Narcotic Drug Act or the Uniform Controlled Substances Act which prohibit dual sovereignty prosecutions for drug related offenses. *See* United States v. Jones, 527 F.2d 817, 832 (D.C. Cir. 1975) (Wright, J., dissenting).

126. *See supra* notes 123-25.

127. *See* Hare v. State, 387 So. 2d 299 (Ala. Crim. App. 1980); Strobhar v. State, 55 Fla. 167, 47 So. 4 (1908); Bailey v. State, 303 Md. 650, 496 A.2d 665 (1985); State v. Glover, 500 S.W.2d 271 (Mo. Ct. App. 1973); State v. Straw, 626 S.W.2d 186 (Tenn. Ct. App. 1981); *see also* 22 C.J.S. *Criminal Law* § 296(c) (1961).

128. The full faith and credit clause provides in pertinent part: "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such . . . Proceedings shall be proved and the Effect thereof." U.S. CONST. art. IV, § 1.

129. *Id.*; *see also* 28 U.S.C. § 1738 (1982), the full faith and credit statute ("[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage of the courts of such State . . . from which they are taken.").

uniformity and certainty in the law.[130] The full faith and credit clause prevents dissatisfied litigants from taking advantage of our nation's federal character by crossing state lines to relitigate issues that already have been decided in another state.[131] Like the double jeopardy clause, the full faith and credit clause promotes finality in litigation.[132] Simply stated, both constitutional provisions recognize that one trial on an issue is enough.[133]

Moreover, the full faith and credit clause clearly promotes comity among the states.[134] The clause attempts to maintain a unified nation by constitutionally establishing the premise that the states are not entirely foreign to one another.[135] To effectuate comity principles, the full faith and credit clause required the states to relinquish some of the sovereignty that belonged to them prior to

130. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1307-08 (1873).

131. Kovacs v. Brewer, 356 U.S. 604, 610 (1958) ("[The] purpose of the Full Faith and Credit Clause [is] to preclude dissatisfied litigants from taking advantage of the federal character of the Nation by relitigating in one State issues that had been duly decided in another.").

132. Kovacs v. Brewer, 356 U.S. 604, 611 (1958) (full faith and credit clause "designed to promote a major policy of the law: that there be certainty and finality and an end to harassing litigation"); Sutton v. Lieb, 342 U.S. 402, 407 ("intended function" of full faith and credit clause is to avoid relitigation in other states of adjudicated issues), *reh'g denied*, 343 U.S. 921 (1952); New York v. Halvey, 330 U.S. 610, 616 (1947) (Frankfurter, J., concurring) (purpose of full faith and credit clause is to mandate "nation-wide restriction of litigiousness").

133. Johnson v. Muelberger, 340 U.S. 581, 585 (1951) (litigants bound, "wherever they may be in the Nation, by prior orders of courts with jurisdiction. One trial of an issue is enough.").

134. *See* Underwriters Assur. Co. v. North Carolina Guaranty Ass'n, 455 U.S. 691, 704 (1982) (full faith and credit clause essential for unifying the states); Nevada v. Hall, 440 U.S. 410, 425 (1979) (full faith and credit clause demonstrates that "ours is not a union of 50 wholly independent sovereigns"); Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 618 (1947) (full faith and credit clause requires that local policy must sometimes be subordinated to comity principles); Williams v. North Carolina, 317 U.S. 287, 301 (1942) ("essential function" of the full faith and credit clause was to establish comity among the states); Milwaukee County v. White Co., 296 U.S. 268, 276-77 (1935) (full faith and credit clause alters the status of a state as an independent foreign sovereignty free to ignore another state's judicial proceedings); Broderick v. Rosner, 294 U.S. 639, 642 (1935) (full faith and credit clause abolished concept that local policy could dominate comity principles).

135. *See supra* note 134 and accompanying text; *see also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 590 (1839) ("[T]he intimate union of these States, as members of the same great political family . . . should lead us . . . to presume a greater degree of comity . . . towards one another, than we should be authorized to presume between foreign nations."); THE FEDERALIST No. 82, at 553 (A. Hamilton) (J. Cooke ed. 1961) ("The state governments and the national government . . . [are] kindred systems . . . parts of *one whole*.") (emphasis in original). The full faith and credit clause was originally contained in the Articles of Confederation. ART. OF CONF. art. IV. The states entered into the Articles to form "a firm league of friendship with each other." *Id.* at art. III.

admission to the union.[136]

Absolute adherence to the full faith and credit mandate could cause a state to subordinate its own public policy to comity principles. In response to this tension, the Supreme Court has created a narrow exception to the full faith and credit clause.[137] The Court has recognized that in exceptional circumstances[138] the clause will not require a state to violate its own public policy by applying another state's law.[139]

The Supreme Court never has considered whether the full faith and credit clause prohibits two states from prosecuting an individual for the same conduct. Without the benefit of extended analysis, two federal district courts have held that the full faith and credit clause does not prohibit dual sovereignty prosecutions in a sister state context.[140] One commentator has disagreed, arguing that the full faith and credit clause operates to prohibit multiple state prosecutions for the same act.[141] In addition, one state court has held that the clause precludes a state from relitigating another state's factual determinations in a criminal case.[142]

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136. *See supra* note 134 and accompanying text.

137. Nevada v. Hall, 440 U.S. 410, 424 (1979); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 533, 546-49 (1935); Pacific Ins. Co. v. Industrial Comm'n, 306 U.S. 493, 501 (1939); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881).

138. *See* Vanderbilt v. Vanderbilt, 354 U.S. 426, 430 (1957) (Frankfurter, J., dissenting) (instances in which the state does not have to give full faith and credit to a sister state's judgments are exceptional); Williams v. North Carolina, 317 U.S. 287 (1942) (circumstances in which the exception to the full faith and credit clause applies are "few and far between"); Broderick v. Rosner, 294 U.S. 629, 642 (1935) (room left from play between conflicting state policies is "narrow").

In *Williams*, the Court found that the exception to the full faith and credit clause applied in the case of conflicting state statutes; the Court, however, noted that it had been very reluctant to recognize the exception in instances in which state judgments were at issue. *Williams*, 317 U.S. at 295.

139. *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 424 (1979) (in a California tort suit, full faith and credit clause did not require California to recognize a Nevada statute limiting the amount that could be recovered against Nevada); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547 (1935) (full faith and credit clause did not require a state to apply another state's workers' compensation law which recognized a certain defense to workers' compensation proceedings that was not recognized in the former state) (*cited with approval in* Pacific Insur. Co. v. Industrial Comm'n, 306 U.S. 493, 501 (1939)); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) (law exempting from taxation certain bonds of enacting state did not apply extraterritorially by virtue of the full faith and credit clause); *see also infra* note 228 and accompanying text.

140. *See* United States v. Robinson, 74 F. Supp. 427 (W.D. Ark. 1947); Carr v. Lanagan, 50 F. Supp. 41 (D. Mass. 1943); *see also* Turley v. Wyrick, 554 F.2d 840 (8th Cir. 1977) (full faith and credit clause not violated by state and federal prosecutions for the same act), *cert. denied*, 434 U.S. 1033 (1978).

141. Fisher, *supra* note 15, at 612.

142. Commonwealth v. Firestone, 385 A.2d 489, 492-93 (Pa. Super. 1978); *see also* Vestal, *Criminal Prosecutions: Issue Preclusion and Full Faith and Credit*, 28 U. KAN. L.

V. *HEATH V. ALABAMA*

A. The Facts

Plagued by a belief that another man had impregnated his wife, the defendant Larry Gene Heath ("Heath") formulated a plan to kill her.[143] Heath arranged for his wife's death by promising Charles Owens and Gregory Lumpkin a sum of money to perform the murder.[144] On the morning of the killing, the defendant directed Owens and Lumpkin to the Heath home in Russell County, Alabama.[145] Larry Heath gave the executioners his house and car keys and then left.[146] Owens and Lumpkin entered the home and kidnaped Heath's wife, Rebecca.[147] Approximately two hours later, Rebecca's lifeless body was found in the back seat of Larry Heath's auto, which was parked on the side of a road in Troup County, Georgia.[148] A single gunshot wound to the head caused Rebecca Heath's death.[149] Although the evidence was not conclusive, it appears that the killing occurred in Georgia.[150]

Georgia and Alabama law enforcement officials engaged in a "cooperative" investigation.[151] Four days after the murder, Georgia police officers arrested Heath, who then fully confessed to having arranged his wife's kidnaping and killing.[152] A Georgia grand jury indicted the defendant for malice murder.[153] After Georgia prosecutors notified Heath that they planned to procure the death penalty,[154] he pleaded guilty to the murder charge in exchange for life imprisonment.[155]

REV. 1, 5 (1979) (full faith and credit clause requires the application of collateral estoppel in criminal proceedings).

143. Heath v. State, 455 So. 2d 898, 902 (Ala. Crim. App. 1983).

144. Heath v. Alabama, 106 S. Ct. 433, 435 (1985).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* Rebecca Heath's body was found three and one half miles from the Heath's Alabama residence. Brief for Petitioner at 12, Heath v. Alabama, 106 S. Ct. 433 (1985).

149. *Heath*, 106 S. Ct. at 435. At the time of her death, Rebecca Heath was nine months pregnant. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (citing GA. CODE ANN. § 16-5-1 (1982)).

154. *Heath*, 106 S. Ct. at 435. As the aggravating circumstances necessary under Georgia law to seek the death penalty, the prosecutors contended that the defendant "caused and directed" Rebecca Heath's murder. *Id.*; *see* GA. CODE ANN. § 17-10-30(b) (1982).

155. *Heath*, 106 S. Ct. at 435. The Court expressed its disapproval of Georgia's parole system by noting that the defendant could spend as little as seven years in prison. *Id.*

Three months later, Alabama authorities called Heath to testify at the trial of Owens and Lumpkin.[156] Heath refused to testify, citing his constitutional privilege against self incrimination.[157] One week later, an Alabama grand jury indicted Heath for his wife's murder.[158] Prior to trial in Alabama, Heath argued that the murder conviction in Georgia precluded Alabama from prosecuting him.[159] The trial court, however, rejected the defendant's contention, finding that the dual sovereignty doctrine permitted two states to prosecute an individual for the same conduct.[160]

Following a trial in which defense counsel could do little more than argue jurisdictional claims, the Alabama jury rendered a verdict of guilty.[161] The trial judge accepted the jury's decision to condemn Larry Heath to death.[162] After the Alabama Criminal Court of Appeals and the Alabama Supreme Court affirmed Larry Heath's conviction and death sentence,[163] the United States Supreme Court granted the defendant's petition for certiorari.[164]

B. The Majority Opinion

The Supreme Court limited its consideration to double jeopardy

156. Brief for Petitioner at 3, Heath v. Alabama, 106 S. Ct. 433 (1985).

157. *Id.* The defendant feared that Georgia authorities would indict him for kidnaping. *Id.* The fact that Alabama authorities did not show an interest in prosecuting the defendant until after he refused to testify might raise a due process claim of prosecutorial vindictiveness. *Cf.* Blackledge v. Perry, 417 U.S. 21 (1974) (due process violated when a prosecutor initiates charges against a defendant in retaliation for the defendant's exercise of a constitutional right). The Supreme Court, however, did not address this issue. *See infra* note 165 and accompanying text.

158. *Heath*, 106 S. Ct. at 435 n.2. The Alabama indictment did not allege where the murder had occurred. *Id.* Before the Supreme Court, Alabama conceded that Rebecca Heath was murdered in Georgia. *Id.* at 435.

159. *Id.* at 435.

160. *Id.* The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the trial court's refusal to recognize a double jeopardy bar. *Ex parte* Heath, 455 So. 2d 905, 906 (Ala. 1984); Heath v. State, 455 So. 2d 898, 900 (Ala. Crim. App. 1983).

161. Under Alabama law, if an offense "commences" in Alabama, then the offense may be prosecuted in Alabama notwithstanding the fact that the crime was consummated outside the state. ALA. CODE § 15-2-3 (1982). Heath's trial counsel argued that the murder had occurred outside Alabama. *Heath*, 106 S. Ct. at 442. The Supreme Court refused to address the petitioner's jurisdictional claims. *Id.* at 436.

162. *Heath*, 106 S. Ct. at 436. The trial judge found that the sole aggravating factor—murder during the commission of a kidnaping—outweighed the sole mitigating factor—that the defendant had pleaded guilty to the same crime in Georgia and had received a sentence of life imprisonment. *See* Heath v. State, 455 So. 2d 898, 903-04 (Ala. Crim. App. 1983).

163. *See Ex parte* Heath, 455 So. 2d 905 (Ala. 1984); Heath v. State, 455 So. 2d 898 (Ala. Crim. App. 1983).

164. Heath v. Alabama, 105 S. Ct. 1390 (1985).

issues.[165] Without extended discussion, Justice O'Connor, writing for the majority, found that if the offenses for which Georgia and Alabama prosecuted the defendant had arisen under the laws of one state, the double jeopardy clause would have barred a second conviction.[166]

The Court, however, concluded that the dual sovereignty doctrine allowed both states to prosecute Heath for the same conduct.[167] The majority noted that under the doctrine, a single act which violates the laws of two sovereigns constitutes two distinct offenses for purposes of the double jeopardy clause.[168] In refusing to limit application of the dual sovereignty doctrine to successive federal and state prosecutions, the Court concluded that the application of the doctrine does not depend on the relationship between the states and the federal government, but on "whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns."[169] The Court held that Alabama and Georgia were separate sovereigns because each state derived its power to prosecute from an independent source.[170] As a result, the Court found that the double jeopardy clause did not prevent Alabama from prosecuting Heath subsequent to Georgia's prosecution for the same murder.[171]

The majority also declined the defendant's invitation to adopt the interest test.[172] The defendant had argued that the dual sovereignty doctrine should be limited to instances in which a second sovereign prosecutes to satisfy a distinct societal interest left unvindicated by the first prosecution.[173] The Court, however, stated

165. *Heath*, 106 S. Ct. at 436-37. The Court found that a "weighty presumption against review" exists when claims are not addressed by the lower courts. *Id.* In his petition before the Alabama Supreme Court, the defendant pursued only the double jeopardy issue. *Id.* at 436.

166. *Id.* at 437.

167. *Id.* The court found this conclusion "inescapable." *Id.*

168. *Id.* at 439 (citing United States v. Lanza, 260 U.S. 377, 382 (1922)).

169. *Heath*, 106 S. Ct. at 437-38. The Court did not discuss the fact that its previous dual sovereignty cases all had evinced a concern that offenders would submit themselves to prosecution in a jurisdiction having lesser penalties in order to gain immunity from punishment in another jurisdiction. *See supra* notes 69, 79, 85, 91 and accompanying text.

170. *Id.* at 438. The majority noted that states derive their prosecutorial authority "from separate and independent sources of power originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Id.*

171. *Id.*

172. *Id.* at 439-40. For discussion of the interest test, see *supra* notes 104-10 and accompanying text.

173. *Heath*, 106 S. Ct. at 439. The defendant argued that application of the dual sovereignty doctrine should be limited to situations in which 1) the jurisdictions of the

that the interest test required "too difficult" an analysis.[174] Moreover, the Court stated that it could not condone a balancing of interests analysis which would deprive a state of its sovereign power to enforce criminal laws simply because another state won "the race to the courthouse."[175]

C. *The Dissent*

Justice Marshall, joined by Justice Brennan, submitted a strong dissent.[176] The dissent conceded that the dual sovereignty doctrine may be necessary in a federal-state context since national prosecutorial interests can be frustrated by allowing a defendant to plead a double jeopardy bar based on a previous state prosecution for the same offense.[177] Justice Marshall stated that the dual sovereignty doctrine in a federal-state context is one of the costs of dual citizenship.[178] He argued, however, that successive prosecutions for the same crime by two states cannot be justified because the states initiate prosecutions to vindicate identical concerns.[179] According to the dissent, the defendant prosecuted by two states does not enjoy dual citizenship for which he must pay the price of multiple

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successively prosecuting sovereigns substantially overlap; 2) each prosecuting sovereign pursues diverse interests that could be frustrated by the enforcement of a defendant's double jeopardy rights; and 3) multiple prosecutions are needed to satisfy the legitimate purposes of each governmental unit. Brief for Petitioner at 26, Heath v. Alabama, 106 S. Ct. 433 (1985).

174. *Heath*, 106 S. Ct. at 439. The Court noted that the interest test requires case-by-case analysis while under the dual sovereignty doctrine "the circumstances of the case are irrelevant." *Id.* The Court further noted that "the dual sovereignty doctrine is not simply a fiction that can be disregarded in difficult cases." *Id.* at 439.

175. *Id.* at 440. The majority asserted that one state can never satisfy another state's interest in vindicating its sovereign authority. *Id.*

176. *Heath*, 106 S. Ct. at 441-45 (Marshall, J., dissenting). Justice Brennan, joined by Justice Marshall, also submitted a short dissent in which he clarified the rationale of his separate opinion in Abbate v. United States, 359 U.S. 187 (1959). *See supra* note 81. In *Abbate*, Justice Brennan had argued that two statutes which otherwise define the same offense under the double jeopardy clause do not define separate offenses merely because the statutes seek to vindicate different penal interests. *Id.* at 197 (Brennan, J., separate opinion); *see also supra* note 81 and accompanying text. In *Heath*, Justice Brennan concluded that the double jeopardy clause should bar successive sister state prosecutions for the same conduct since state penal statutes serve qualitatively similar interests. *Heath*, 106 S. Ct. at 440-41 (Brennan, J., dissenting).

177. *Heath*, 106 S. Ct. at 443 (Marshall, J., dissenting). The dissent found that federal preemption of state crimes is an inappropriate solution to the dual sovereignty problem since the states traditionally have possessed the responsibility of defining crimes. *Id.*

178. *Id.* After pointing out that "the Court has always been [reluctant] to ascertain the intent of the Framers in this area," Justice Marshall noted that the dual sovereignty doctrine flourished to accommodate the unique needs of the federal system, rather than because of any inherent plausibility. *Id.* at 442 n.1.

179. *Id.* at 444.

prosecutions.[180] Therefore, Justice Marshall concluded that the majority erred in extending the dual sovereignty doctrine to allow more than one state to prosecute an individual for the same conduct.[181]

The dissent also found that Georgia and Alabama had colluded to violate the defendant's constitutional right not to be placed twice in jeopardy.[182] The dissent noted that in previous cases the Court had prohibited two sovereigns from combining to do that which each sovereign could not constitutionally do by itself.[183] The dissent concluded that as a matter of due process, two sovereigns should not be able to utilize successive prosecutions based on the same evidence to ensure the procurement of a desired death sentence.[184]

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180. *Id.*

181. *Id.*

182. *Id.* at 444-45. If Georgia had imposed the death penalty upon Larry Heath, then it is unlikely that Alabama would have initiated a dual sovereignty prosecution. This illustrates that retribution and vindictiveness often motivate a second prosecution under the dual sovereignty doctrine. *See* Commonwealth v. Mills, 447 Pa. 163, 171, 286 A.2d 638, 640 (1971); Comment, *Successive State and Federal Prosecutions for Offenses Arising Out of Same Act*, 44 MINN. L. REV. 534, 539 (1960).

183. *Heath*, 106 S. Ct. at 444 (Marshall, J., dissenting) (citing Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Elkins v. United States, 364 U.S. 206 (1960)); *see also* Stevens v. Marks, 383 U.S. 234 (1966) (Harlan, J., concurring in part, dissenting in part); (declaring that *Murphy* abolished the dual sovereignty doctrine); Note, *supra* note 59, at 1546-47 (dual sovereignty doctrine undermined by *Murphy* and *Elkins*).

In *Murphy*, the Court held that a witness testifying under a state grant of immunity still can invoke the privilege against self-incrimination on the grounds that his answers may be incriminating in a federal prosecution. *Murphy*, 378 U.S. at 79. In *Elkins*, the Court found that at a federal trial, the federal government cannot introduce evidence that was illegally seized by state authorities. *Elkins*, 364 U.S. at 223. Justice Marshall submitted that the dual sovereignty doctrine had been emasculated by *Murphy* and *Elkins* since both decisions found that the state and federal governments cannot combine to avoid the application of a defendant's constitutional rights. *Heath*, 106 S. Ct. at 444 n.3 (Marshall, J., dissenting).

184. *Heath*, 106 S. Ct. at 445 (Marshall, J., dissenting) The dissent found the result in *Heath* to be analogous to that in Ciucci v. Illinois, 356 U.S. 571, *reh'g denied*, 357 U.S. 924 (1958). *Heath*, 106 S. Ct. at 445 (Marshall, J., dissenting). In *Ciucci*, the defendant committed four murders in one transaction. *Ciucci*, 356 U.S. at 572. The Supreme Court held that the due process clause did not prevent the state from prosecuting each murder separately until the death penalty finally was secured at the third trial. *Id.* at 573. Four members of the Court in *Ciucci*, however, expressed outrage at "an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieve[d] its desired result of a capital verdict." *Id.* at 573 (Douglas, J., dissenting).

The *Heath* dissent also quarreled with the majority's refusal to consider due process issues other than double jeopardy. *Heath*, 106 S. Ct. at 444 (Marshall, J., dissenting). For example, the dissent implied that the Alabama jury selection process may have been constitutionally infirm. *Id.* at 441-42. Seventy-five of the eighty-two prospective jurors questioned indicated that they knew that the defendant previously had pleaded guilty to

VI. ANALYSIS

A. The Dual Sovereignty Doctrine's Contravention of Established Double Jeopardy Protections and Policies

It seems rather anomalous that the protections provided by the historic and fundamental right not to be placed twice in jeopardy can be undermined by the mere existence of concurrent jurisdiction over the same conduct. Nonetheless, the Supreme Court continues to adhere to and expand a dual sovereignty doctrine which ignores well-established double jeopardy policies. In other contexts, the Court has asserted that the double jeopardy clause, at the very least, provides the same protection available at common law.[185] The dual sovereignty doctrine and common-law double jeopardy rights, however, cannot be reconciled. At common law, a previous trial in any court of competent jurisdiction barred another sovereign from prosecuting an individual for the same conduct.[186]

Application of the dual sovereignty doctrine also undermines the policies underlying the double jeopardy clause's three protections.[187] The double jeopardy clause prohibits a retrial after an acquittal or conviction in order to protect the individual from the unwarranted expense, embarrassment and stigma that accompany multiple trials for the same conduct.[188] The Court's dual sovereignty doctrine ignores these concerns.

Adherence to the dual sovereignty doctrine also subverts the concept that the double jeopardy clause accords absolute finality to acquittals.[189] This finality should not evaporate merely because more than one sovereign can prosecute the individual for the conduct in question. Furthermore, the Supreme Court's continued application of the dual sovereignty doctrine disregards the notion

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the same offense in Georgia. *Id.* A majority of the prospective jurors stated, however, that their knowledge of the defendant's prior guilty plea would not impair their ability to give the defendant a fair trial. *Id.* at 442. The dissent found the prospective juror's answers "remarkable" and stated "[w]ith such a well-informed jury, the outcome of the trial was surely a foregone conclusion." *Id.*

185. *See supra* note 32 and accompanying text.

186. *See supra* note 27 and accompanying text.

187. *See supra* notes 47-49 and accompanying text. The dual sovereignty doctrine permits a second trial following an acquittal, *see* Bartkus v. Illinois, 359 U.S. 121 (1959), or following a conviction, *see* Heath v. Alabama, 106 S. Ct. 433 (1985); United States v. Wheeler, 435 U.S. 313 (1978); Abbate v. United States, 359 U.S. 178 (1959); United States v. Lanza, 260 U.S. 377 (1922), and it condones different punishments for the same crime. *See* Heath v. Alabama, 106 S. Ct. 433 (1985); United States v. Wheeler, 435 U.S. 313 (1978); Abbate v. United States, 359 U.S. 178 (1959); United States v. Lanza, 260 U.S. 377 (1922).

188. *See supra* notes 42, 44 and accompanying text.

189. *See supra* notes 45, 47, 50-51 and accompanying text.

that the double jeopardy protections minimize the possibility of convicting the innocent.[190] Multiple prosecutions for the same conduct increase the odds that an innocent person will be convicted.

The dual sovereignty doctrine also operates to the detriment of society. Multiple prosecutions require expenditure of valuable prosecutorial and judicial resources on a matter which has been fully adjudicated in a previous prosecution.[191] Victims, who may have considered a tragic matter concluded, are again called upon to relive harrowing criminal confrontations, and other witnesses must expend more time to testify at a second trial for the same conduct that already has been prosecuted.[192]

In clinging to the dual sovereignty doctrine, the Supreme Court has failed to examine whether the societal conditions which gave rise to the doctrine still justify its existence. At the time of the creation of the dual sovereignty "fiction,"[193] concern over the southern states' strong interests in maintaining their sovereignty may have justified the doctrine's subordination of double jeopardy rights.[194] In this modern era of peaceful coexistence among sovereigns within the federal system, however, fundamental double jeopardy rights should not fall prey to sovereignty concerns.[195]

Moreover, when the Supreme Court first announced the underpinnings of the dual sovereignty doctrine in dicta, it stated that dual sovereignty prosecutions would occur only in exceptional circumstances.[196] This limitation, however, has been overlooked; as noted by the Court in *Heath*, the circumstances of an individual case now are irrelevant to application of the dual sovereignty doctrine.[197]

Proponents of the doctrine argue that its application is necessary

190. *See supra* note 44 and accompanying text.

191. *See* Vestal & Gilbert, *Preclusion of Duplicative Prosecutions: A Developing Mosaic*, 47 MO. L. REV. 1, 44 (1982) (expenditure of society's resources in duplicative prosecutions in more than one jurisdiction cannot be justified).

192. Two trials did not actually take place in *Heath* since the defendant pleaded guilty in the first prosecution. However, a guilty plea and a guilty verdict have the same legal effect. *See* Ohio v. Johnson, 467 U.S. 493, 503 (1984) (Stevens, J., dissenting). Moreover, *Heath* provides precedent to allow two or more full-scale trials for the same crime.

193. Heath v. Alabama, 106 S. Ct. 433, 442 (1985) (Marshall, J., dissenting).

194. *See supra* notes 59, 100-03 and accompanying text.

195. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 91-92 (1964) (Harlan, J., concurring) (state and federal governments are now in an age of cooperative federalism with regard to the enforcement of criminal laws).

196. *See supra* note 64 and accompanying text.

197. *See supra* note 174.

to prevent offenders from submitting themselves to punishment in a jurisdiction with less severe penalties to escape punishment in a jurisdiction which provides harsher penalties for the same conduct.[198] This proposition, however, ignores the realities of law enforcement. First, offenders do not control the initiation of prosecutions.[199] Second, offenders may seek to avoid punishment altogether.[200] Third, different jurisdictions often provide the same range of penalties for similar crimes.[201] Finally, it is well-established that jeopardy does not attach when an accused fraudulently submits to a prosecution in order to avoid a subsequent prosecution.[202]

B. Dual Sovereignty and Collateral Estoppel

The courts that have promulgated the dual sovereignty doctrine have failed to acknowledge that the doctrines of collateral estoppel and res judicata can operate to preclude multiple prosecutions for the same act, notwithstanding the fact that different sovereigns bring the prosecutions. Collateral estoppel and res judicata have been applied in criminal cases for more than seven decades.[203] Both the double jeopardy clause and the full faith and credit clause incorporate these doctrines.[204]

Dual sovereignty prosecutions, on the other hand, constitute the type of relitigation that collateral estoppel and res judicata principles are designed to avoid. These doctrines seek to conserve judicial resources and save the parties from the expense which accompanies repetitive and vexatious litigation such as dual sovereignty prosecutions.[205] Collateral estoppel and res judicata also

198. *See supra* notes 69, 79, 85, 91 and accompanying text.

199. *See* Kaplan, *Prosecutorial Discretion — A Comment*, 60 NW. U. L. REV. 174, 192 (order of prosecutions is random and largely depends upon which government first apprehends the defendant).

200. *Id.*

201. *See* Heath v. Alabama, 106 S. Ct. 433, 444 (1985) (Marshall, J., dissenting).

202. *See supra* note 94.

203. *See* United States v. Oppenheimer, 242 U.S. 85, 87-88 (1916).

204. *See* MIGRA v. Warren City School Dist., 465 U.S. 75, 81 (1984) (full faith and credit concepts require a federal court to give the same effect to a state judgment as that judgment would have in the state in which it was rendered) (citing Kremer v. Chemical Const. Corp., 456 U.S. 461, 467 (1980); Allen v. McCurry, 449 U.S. 90, 95 (1980)); Asche v. Swenson, 397 U.S. 436, 439 (1970) (concept of collateral estoppel encompassed by double jeopardy clause); Durfee v. Duke, 375 U.S. 106, 109 (1972) ("full faith and credit . . . generally requires every state to give a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it"); Treines v. Sunshine Mining Co., 308 U.S. 66, 78 (1939) (full faith and credit clause embodies doctrine of collateral estoppel).

205. *See supra* notes 114-15 and accompanying text.

foster consistent adjudications[206] while dual sovereignty prosecutions more often than not result in inconsistent outcomes.[207]

Although the Supreme Court has not addressed directly the issue of whether res judicata and collateral estoppel preclude dual sovereignty prosecutions, most lower courts, for want of mutuality of parties, have refused to estop dual sovereignty prosecutions.[208] These decisions, however, overlook the fact that collateral estoppel and res judicata sometimes may be invoked even though the parties have changed.[209] Collateral estoppel or res judicata can be applied in the absence of mutuality of parties if the party against whom the doctrine is asserted had a previous opportunity and incentive to litigate the matters at issue.[210] In addition, a party who was not technically a party to the first proceeding will be estopped from relitigating when that party controlled or substantially participated in the first proceeding (that is, when that party was a "participating nonparty").[211]

Thus, the real question in determining whether a sovereign is estopped from initiating a dual sovereignty prosecution is whether that sovereign had the opportunity and incentive to litigate the facts at issue in a prior proceeding. If a prosecution is viewed as vindicating the rights of society, then society can be said to be the real party in interest in both the first and second prosecutions under the dual sovereignty doctrine.[212] Under this view, collateral estoppel and res judicata would bar dual sovereignty prosecutions

206. *See supra* note 116 and accompanying text.

207. *See, e.g.*, Heath v. Alabama, 106 S. Ct. 433 (1985) (defendant, who was sentenced to life imprisonment in Georgia, was sentenced to death following an Alabama trial for the same murder); Bartkus v. Illinois, 359 U.S. 121 (1959) (defendant acquitted in federal trial found guilty in state trial for the same acts).

208. *See supra* note 118 and accompanying text.

209. *See* Montana v. United States, 440 U.S. 147, 154 (1979) (collateral estoppel can be asserted against a party who was a nonparty in the first litigation when the party against whom the estoppel is asserted assisted the prosecution or defense of the previous actions, albeit in the name of another); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (mutuality of parties not necessary for the offensive use of estoppel); Blonder Tongue Laboratories, Inc. v. University of Ill., 402 U.S. 313, 323 (1971) (requirement of mutuality of parties relaxed when the party against whom estoppel is asserted had a full and fair opportunity to litigate the same issue in a previous proceeding which reached final judgment).

210. *See* Blonder Tongue Laboratories, Inc. v. University of Ill., 402 U.S. 313, 323 (1971).

211. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83 (Tent. Draft 1975) ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.").

212. *See* Harrison, *supra* note 99, at 327; Comment, *supra* note 99, at 447; Note, *supra* note 103, at 485.

based on the same evidence.[213]

For those who do not agree with the argument that a criminal commits crimes against society in general rather than against a particular sovereign, case-by-case analysis can be employed to determine whether particular dual sovereignty prosecutions should be barred by estoppel. For example, the facts in *Heath* demonstrate that Alabama should have been estopped from reprosecuting the defendant since Alabama was a "participating nonparty" in the Georgia prosecution. Alabama and Georgia law enforcement officers not only conducted a "cooperative investigation"[214] but also worked in tandem throughout the period of Heath's two trials.[215] Moreover, prior to Heath's Georgia indictment, Alabama had the opportunity to initiate a prosecution against Heath but was content to allow Georgia to prosecute.[216] Even if a second sovereign normally is a different "party" for purposes of collateral estoppel and res judicata, two sovereigns that join forces in a mutual effort like that in *Heath* should be forced to abide by the result that their joint effort produces in the first prosecution.[217]

C. Successive Sister State Prosecutions and Full Faith and Credit

In extending application of the dual sovereignty doctrine to successive sister state prosecutions for the same act, the *Heath* Court[218] confined itself to the narrow issue of whether the several states derive their prosecutorial power from independent sources. The *Heath* Court did not address the possibility that another constitutional provision[219] the full faith and credit clause, might preclude the extension of the dual sovereignty doctrine to a sister state context.[220] The full faith and credit clause[221] can be interpreted to bar a state from prosecuting an accused subsequent to another state's prosecution for the same conduct.

Interpreting the full faith and credit clause to bar dual sovereignty prosecutions in a sister state context is not entirely without

213. *See* State v. Hogg, 118 N.H. 262, 266, 385 A.2d 844, 847 (1978).
214. *Heath*, 106 S. Ct. at 435.
215. *Id.* at 445 (Marshall, J., dissenting).
216. *See id.* at 442.
217. *See also* Bartkus v. Illinois, 359 U.S. 121, 164-70 (1959) (Brennan, J., dissenting).
218. 106 S. Ct. 433 (1985).
219. *Heath*, 106 S. Ct. at 437 (1985).
220. *See supra* note 165 and accompanying text.
221. For the text of the full faith and credit clause, see *supra* note 128.

obstacles created by judicial gloss. Although the full faith and credit clause, on its face does not differentiate between civil and criminal proceedings,[222] the clause has been applied primarily in civil litigation.[223] The infrequent utilization of the full faith and credit clause in criminal cases may have resulted from the Supreme Court's early pronouncement that the clause does not require one state to enforce another state's penal laws.[224] This proposition, however, does not foreclose application of the full faith and credit clause whenever criminal judicial proceedings are involved. Moreover, the Supreme Court has recognized that full faith and credit concepts prevent relitigation of the factual determinations made in a previous criminal proceeding.[225]

The differences between criminal and civil procedures further account for the unrecognized potential of full faith and credit theories in criminal cases.[226] Civil litigants often must file an action in

222. *Id.* Whether in a civil or criminal context, a judicial proceeding *is* a judicial proceeding. *See, e.g.*, Ex parte Lange, 85 U.S. (18 Wall.) 163, 170 (1873) (referring to criminal prosecution as a "judicial proceeding"). A judicial proceeding has been defined as:

> [a]ny proceeding wherein judicial action is invoked and taken . . . . Any step taken in a court of justice in the prosecution or defense of an action. A general term for proceedings relating to, practiced in, or proceeding from, a court of justice . . . . A proceeding in a legally constituted court. A proceeding wherein there are parties, who have an opportunity to be heard, and wherein the tribunal proceeds either to a determination of facts upon evidence or of law upon proved or conceded facts.

BLACK'S LAW DICTIONARY 762 (5th ed. 1979).

223. Vestal, *supra* note 142, at 5 (1979).

224. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825); *see also* Nelson v. George, 399 U.S. 224, 229 (1969) (full faith and credit clause does not require sister states to enforce foreign penal judgment); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888) (rule that no state executes another state's law applies to civil judgments which are pecuniary in nature as well as criminal judgments); Huntington v. Attril, 146 U.S. 657, 669 (1882) (full faith and credit clause does not require that one state execute the penal laws of another). *See generally* Note, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 195-206 (1932). These cases set forth the unremarkable proposition that a person will not be imprisoned in one state because of a conviction in another. *See* Vestal, *supra* note 142, at 6.

225. Allen v. McCurry, 449 U.S. 90 (1980), and Williams v. North Carolina, 317 U.S. 287 (1942), demonstrate the Court's willingness to utilize full faith and credit concepts in criminal proceedings. In *Allen*, the plaintiff brought an action under 42 U.S.C. § 1983 based upon an alleged illegal search and seizure. *Allen*, 449 U.S. at 91. The Court found that the full faith and credit statute, 28 U.S.C. § 1738, precluded the plaintiff from relitigating the constitutionality of the search and seizure in question since a state court had resolved the issue in a criminal pretrial suppression hearing. *Id.* at 101. In *Williams*, the Court reversed the defendant's convictions for bigamy and held that the full faith and credit clause compelled North Carolina to give preclusive effect to the defendant's Nevada divorce decrees. *Williams*, 317 U.S. at 303.

226. *See* Vestal, *supra* note 142, at 6-7.

one state to enforce a judgment obtained in another state.[227] Since states do not enforce each other's criminal judgments, however, there are no parallel criminal proceedings.[228] Accordingly, civil and criminal procedures predicated upon full faith and credit principles necessarily differ.[229] Criminal and civil proceedings, however, do share the common denominator of resort to the doctrines of collateral estoppel and res judicata to prevent repetitious litigation.[230] To the extent that the full faith and credit clause incorporates these doctrines,[231] it should be interpreted to compel the application of estoppel principles to preclude extension of the dual sovereignty doctrine in a sister state context.

Barring the dual sovereignty doctrine in this context would advance the full faith and credit clause's function of promoting finality in adjudications.[232] The result in *Heath* contravened this interest in finality. The Georgia proceedings in *Heath* fully determined the issues of the defendant's guilt and punishment.[233] The *Heath* Court should have held that once these issues were decided by a court of competent jurisdiction, the full faith and credit clause rendered the Georgia determinations final and barred Alabama from relitigating the issues of the defendant's guilt and punishment.

The result in *Heath* also ignores the full faith and credit clause's function of unifying the nation.[234] The full faith and credit clause contradicts the *Heath* Court's faulty assumption that two states can prosecute the same act since the states are foreign to each other.[235] Thus, *Heath*, by condoning one state's failure to respect

227. *Id.*
228. *Id.*
229. *Id.*
230. *See supra* notes 111-16, 204 and accompanying text.
231. *See supra* note 204 and accompanying text.
232. *See supra* notes 131-33 and accompanying text.
233. Under existing precedent, the Court in *Heath* could have ruled that Alabama could not impose the death penalty upon the defendant subsequent to Georgia's determination that the defendant should be sentenced to life imprisonment for murdering his wife. In Arizona v. Rumsey, 467 U.S. 203 (1984), and Bullington v. Missouri, 451 U.S. 430 (1981), the Court found that the death penalty could not be imposed following an appeal when the defendant originally was sentenced to life imprisonment. In these cases, the Court found that the first sentencing tribunal's decision not to condemn the defendant to death must be accorded the same finality that attends acquittals. *Rumsey*, 467 U.S. at 212; *Bullington*, 451 U.S. at 44-45.
234. *See supra* notes 134-36 and accompanying text.
235. *See supra* notes 135-36 and accompanying text. In *Heath*, the Court stated, "It is well established that the states, as political communities, [are] distinct and sovereign, and consequently foreign to each other." *Heath*, 106 S. Ct. at 439 (quoting Bank of United States v. Daniel, 37 U.S. (12 Pet.) 32, 54 (1838)).

another state's determination of the appropriate punishment for a particular criminal act, contravenes the full faith and credit clause's function of advancing comity among the states.

Proponents of the dual sovereignty concept might attempt to refute the argument that the full faith and credit clause prohibits dual sovereignty prosecutions in a sister state context by pointing to cases which hold that the clause does not require a state to apply another state's law in violation of its own public policy.[236] Hence, it might be argued that the deprivation of a state's power to enforce its criminal law violates public policy and that a state therefore need not give full faith and credit to another state's criminal proceedings. A balancing of the competing policies at stake, however, renders this argument uncompelling. The Supreme Court has held that the public-policy exception to full faith and credit principles must be narrowly construed.[237] Notwithstanding the *Heath* Court's reliance on the separate sources of state sovereignty,[238] the facts remain that the full faith and credit clause *does* restrict that sovereignty—a restriction which is "part of the price of our federal system."[239] Thus, a state may be required to yield its prosecutorial power to full faith and credit principles when another state previously has determined the issue of a defendant's guilt or innocence.

VII. RECOMMENDATIONS

By expanding the dual sovereignty doctrine, the Supreme Court has refused to balance a defendant's double jeopardy rights against society's need to prosecute an individual twice for the same conduct. A full and fair hearing on the merits satisfies society's interest in prosecuting prohibited conduct; at the same time, the accused's double jeopardy rights are triggered. Thus, following a completed prosecution, society's interest in prosecution dissipates while the accused obtains a fundamental right not to be reprosecuted for the same conduct. Since the balance of competing interests now has tipped in the defendant's favor, reprosecution of that individual for a single act should be prohibited regardless of the fact that a different sovereign undertakes the second prosecution. In the alternative, a sovereign that seeks to initiate a second prosecution under the dual sovereignty doctrine should have the burden of proving that the second prosecution seeks to vindicate a

236. *See supra* notes 137-39 and accompanying text.
237. *See supra* note 139 and accompanying text.
238. *See supra* notes 167-70 and accompanying text.
239. Williams v. North Carolina, 317 U.S. 287, 302 (1942).

penal interest that has been left unvindicated by the first prosecution.[240]

Principles of res judicata also can be employed to prevent prosecution for an offense that constitutes the "same offense" for purposes of the double jeopardy clause when another sovereign previously has prosecuted that offense.[241] If a sovereign prosecutes an individual for a crime which does not constitute the "same offense" previously prosecuted by another sovereign but which involves conduct that was examined and litigated in the previous prosecution, then the doctrine of collateral estoppel should prevent the relitigation of facts that were resolved in the defendant's favor.[242]

Although the Supreme Court is responsible for the pervasiveness of the dual sovereignty doctrine, the Court does not deserve all of the blame. The Court repeatedly has noted that Congress has the power to abolish the doctrine by preempting state law.[243] Except in a few isolated instances, however, Congress has failed to act.[244] *Heath*[245] should serve as the impetus for congressional action. The Constitution explicitly grants Congress the power to enforce the full faith and credit clause.[246] Therefore, Congress can utilize this power to prohibit the extension of the dual sovereignty doctrine to successive sister state prosecutions for the same act. In the absence of congressional action, the states can prohibit dual sovereignty prosecutions by statute or by judicial decision predicated upon state constitutional interpretation or public policy.[247]

If federal and state laws do not prevent application of the dual sovereignty doctrine, then the decision whether to initiate a dual sovereignty prosecution rests within the prosecutor's discretion. A fair-minded prosecutor who recognizes comity and double jeopardy principles might refrain from launching dual sovereignty

240. *See supra* notes 104-09 and accompanying text.

241. *See supra* notes 113, 203-16 and accompanying text.

242. *See supra* notes 112, 203-16 and accompanying text.

243. *See supra* notes 68, 80, 91.

244. *See* 18 U.S.C. § 659 (1982) (federal prosecution for theft from an interstate carrier cannot be initiated after a state judgment of acquittal or conviction for the same act or acts); 18 U.S.C. § 660 (1982) (federal prosecution for embezzlement or theft of carrier's funds barred after a state acquittal or conviction for the same act or acts); 18 U.S.C. § 1992 (1982) (federal prosecution for wrecking trains precluded subsequent to state acquittal or conviction for the same act or acts); 18 U.S.C. § 2117 (1982) (federal prosecution for breaking and entering interstate carrier facilities barred following a state acquittal or conviction for the same act or acts).

245. 106 S. Ct. 433 (1985).

246. See *supra* note 128 for the text of the full faith and credit clause.

247. *See supra* notes 108-09, 123-25 and accompanying text.

prosecutions. A prosecutor's office policy of refusing to initiate dual sovereignty prosecutions, however, does not give the defendant full protection of the right not to be placed in double jeopardy, since internal prosecutorial office policies are not judicially enforceable.[248] Moreover, the enforcement of basic comity and double jeopardy principles should not depend upon the whim of the prosecutorial advocate.

VIII. CONCLUSION

The fundamental right not to be placed twice in jeopardy for the same offense has been recognized in almost all systems of jurisprudence throughout history. Application of the dual sovereignty doctrine, however, directly contravenes established double jeopardy protections and policies. Retreat to the fiction that a single act can constitute two offenses for purposes of the double jeopardy clause would not occur if the courts would recognize the true extent of fundamental double jeopardy rights. Notwithstanding the dual sovereignty doctrine's violation of double jeopardy and full faith and credit principles, *Heath* demonstrates that the Supreme Court will continue to cling to the dual sovereignty fiction. Therefore, to defend against the dual sovereignty doctrine's attack on fundamental human rights, Congress and the states must be relied upon to eliminate dual sovereignty prosecutions.

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248. *See* Comment, *supra* note 99, at 488-94.