Chicago-Kent Law Review

Volume 63 | Issue 1 Article 9

April 1987

The Dual Sovereignty Doctrine and Successive State Prosecutions: Health v. Alabama

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THE DUAL SOVEREIGNTY DOCTRINE AND SUCCESSIVE STATE PROSECUTIONS:

Heath v. Alabama

INTRODUCTION

The fifth amendment to the United States Constitution provides, in part, the following: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."[1] Thus, successive prosecutions are barred by the fifth amendment only if the two offenses for which the defendant is prosecuted are the "same" for double jeopardy purposes. It is, for purposes of the double jeopardy clause, well settled that when a defendant in a single act violates the "peace and dignity" of two sovereignties by breaking the laws of each, he has committed two distinct "offenses."[2] This principle, known as the dual sovereignty doctrine,[3] permits successive prosecutions by two sovereignties for the same "act."

The unique factual setting of *Heath v. Alabama*[4] gave the United States Supreme Court the opportunity to apply the dual sovereignty doctrine to successive prosecutions by two different states. Prior to *Heath*, all but one of the cases upholding the dual sovereignty doctrine have involved successive prosecutions by the federal government and a particular state.[5] In *Heath*, the Supreme Court held that because two states constitute separate sovereignties, successive prosecutions by two states for the same conduct are not barred by the double jeopardy clause.[6]

This comment will focus on the Supreme Court's decision in *Heath v. Alabama*, with an emphasis on the Court's decision to give great weight to maintaining the balance in our federal system as the basis for extending the dual sovereignty doctrine to permit successive prosecutions

1. U.S. CONST. amend. V. In 1969, the double jeopardy clause was made applicable to the states through the due process clause of the fourteenth amendment. *See* Benton v. Maryland, 395 U.S. 784, 794-96 (1969).

2. United States v. Lanza, 260 U.S. 377, 382 (1922).

3. *See id.* at 382 ("We have here two sovereignties . . . .").

4. 106 S. Ct. 433 (1985).

5. United States v. Wheeler, 435 U.S. 313 (1978) (Court upheld successive prosecutions by Navajo tribal authorities and the federal government).

6. Under the doctrine of dual sovereignty, the double jeopardy clause does not prevent separate sovereignties from bringing successive prosecutions for the same "offense." When an act violates the laws of two sovereignties, it is, in effect, two distinct offenses. *See Lanza*, 260 U.S. at 382 (state and federal governments are separate sovereignties).

by two states.[7] This comment will also examine the past and present status of the dual sovereignty theory in reaching the conclusion that the *Heath* decision is a well-reasoned opinion resulting in the logical extension of the dual sovereignty doctrine. Finally, this comment will discuss the impact that the *Heath* decision will have on the availability of successive prosecutions.

HISTORICAL BACKGROUND

The dual sovereignty doctrine has its basis in the common law notion that a crime is an offense against the sovereignty of the government. The Supreme Court first expressed the basic premises of the doctrine in three cases decided in the years 1847-1852.[8] The first, *Fox v. Ohio*,[9] did not directly present the issue of successive trials.[10] However, the *Fox* Court explained that, in the federal-state context, a citizen can be punished by either the federal government or his state because he owes a separate and independent allegiance to each sovereign.[11] Similarly, in *United States v. Marigold* [12] and *Moore v. Illinois*,[13] the Court reaffirmed the power of the state and federal governments to prosecute an individual for a single act which violates a statute of each without one prosecution barring the other. The dictum of *Fox v. Ohio* [14] was reiterated in a series of cases prior to 1922,[15] all of which dealt with only the *possibility* of multiple prosecutions.

In 1922, the Supreme Court handed down its decision in *United States v. Lanza*.[16] *Lanza* was the first case in which the Court directly addressed the issue of successive prosecutions of a defendant for separate "offenses" arising out of a single "act." In *Lanza*, the defendants were charged in federal court with manufacturing, transporting, and possessing intoxicating liquor in violation of the Volstead Act. The defendants claimed that a prior prosecution under a Washington state statute for manufacturing, transporting, and possessing intoxicating liquor was a

7. 106 S. Ct. 437-40 (1985).

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

9. 46 U.S. (5 How.) 410 (1847).

10. The central question posed in *Fox* was whether the states had the power to punish the passing of counterfeit money under their own laws and in their own courts. *Id.* at 412-13.

11. *Id.* at 435.

12. 50 U.S. (9 How.) 560 (1850).

13. 55 U.S. (14 How.) 13 (1852).

14. 46 U.S. at 435.

15. *See*, e.g., McKelvey v. United States, 260 U.S. 353, 358-59 (1922); Southern Ry. v. Railroad Comm'n of Ind., 236 U.S. 439 (1915); Crossley v. California, 168 U.S. 640 (1898); Cross v. North Carolina, 132 U.S. 131, 139 (1889); *Ex parte* Siebold, 100 U.S. 371, 389-91 (1879).

16. 260 U.S. 377 (1922).

bar to a subsequent federal prosecution for the same act.[17] Chief Justice Taft, citing the long line of cases dating back to *Fox v. Ohio*, held that the subsequent federal prosecution (after the state conviction) did not violate the double jeopardy clause.[18] The *Lanza* Court's conclusion that the federal prosecution was valid rested on the fact 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."[19]

Four years later in *Hebert v. Louisiana*,[20] the Court cited *Lanza* with approval as the basis for sustaining a conviction under a Louisiana prohibition statute that followed a federal prosecution.[21] By this time, the constitutionality of successive prosecutions by a state and the federal government was well settled. It was not until 1959, in its decisions in *Abbate v. United States*[22] and *Bartkus v. Illinois*,[23] that the Supreme Court reexamined the dual sovereignty doctrine.

In *Abbate*, the defendants, already convicted in a state court, were subsequently prosecuted for the same conduct in a federal court.[24] *Bartkus* involved a federal acquittal followed by a state conviction.[25] In both instances, the Supreme Court affirmed the convictions, thus reinforcing the *Lanza* rule of successive prosecutions. The holdings in *Bartkus* and

17. The defendant argued that the subsequent federal prosecution violated the double jeopardy clause since both the state and federal statutes derived their authority from the same source— § 2 of the eighteenth amendment. *Id.* at 379-80.

18. *Id.* at 382.

19. Chief Justice Taft wrote:

> 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, with the limitation that no legislation can give validity to acts prohibited by the Amendment. 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.

20. 272 U.S. 312 (1926).

21. *Hebert* is factually similar to *Lanza*. In *Hebert*, like *Lanza*, the Court held that the power of a state to declare criminal the manufacture and sale of intoxicating liquor, and to prosecute offenders, is not derived from the eighteenth amendment. *Id.* at 314-15.

22. 359 U.S. 187 (1959).

23. 359 U.S. 121 (1959).

24. In *Abbate*, the defendants were convicted in a Mississippi federal court for conspiring (18 U.S.C. § 371) to violate 18 U.S.C. § 1362 which provides a penalty for the destruction of a means of communication operated or controlled by the United States. Prior to this, the defendants had been prosecuted and convicted in an Illinois state court for violating an Illinois statute making it a crime to conspire to injure or destroy the property of another. Each defendant was sentenced to three months imprisonment for violating the Illinois Criminal Code. 359 U.S. at 188.

25. Bartkus was tried and convicted in a federal district court for violation of 18 U.S.C. § 2113, which makes it a crime to rob a federally insured bank. He was later convicted in an Illinois state court for violation of an Illinois robbery statute (ILL. REV. STAT. ch.38, § 501 (1951)). 359 U.S. at 122.

Abbate were a result of the significant weight given to the concept of federalism[26] and its role in our constitutional system. As separate political entities,[27] the states and federal government have the power, inherent in any sovereignty, to determine what shall be an offense against its authority, and to punish such offenses.[28]

The final step in the development of the dual sovereignty doctrine was its application outside the federal-state context.[29] In *United States v. Wheeler*,[30] the Court held that the Navajo Tribe, whose power to prosecute its members for tribal offenses is derived from the Tribe's "primeval sovereignty"[31] rather than from federal authority, is a distinct sovereignty from the federal government for purposes of the dual sovereignty doctrine.[32] Thus, the Court continued to make the crucial determination by looking at the ultimate source of power under which a prosecution was carried out and by seeing whether the two entities draw their authority to punish from distinct sources of power.[33]

The Court, in *Heath v. Alabama*, was the first to apply the dual sovereignty doctrine in the state-state context. The historical development[34] of the dual sovereignty doctrine, and its importance to the American federal system, are crucial to understanding the Court's rationale, as

26. In *Abbate*, the Court gave significant weight to federalism because it found that to overrule *Lanza* "would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes." 359 U.S. at 195. In *Bartkus*, the Court noted that "It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." 359 U.S. at 137.

27. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819) ("In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.").

28. For excellent articles on the subject of successive prosecutions by state and federal governments, see Fisher, *Double Jeopardy, Two Sovereignties, and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); Comment, *Successive Prosecutions by State and Federal Governments for Offenses Arising Out of the Same Act*, 44 MINN. L. REV. 534 (1960).

29. *See, e.g.*, Waller v. Florida, 397 U.S. 387 (1970) (state and municipality not separate sovereignties); Puerto Rico v. The Shell Co., 302 U.S. 253 (1937) (federal and territorial courts not separate sovereignties); Grafton v. United States, 206 U.S. 333 (1907) (U.S. Military Court and territorial court not separate sovereignties).

30. 435 U.S. 313 (1978).

31. *Id.* at 328 (tribal authority is in no way attributable to any delegation of federal authority).

32. *Id.* at 332.

33. *Compare* Waller v. Florida, 397 U.S. 387, 393 (1970) (municipality is a creation of the state, and therefore, its power emanates from the same source) *with* United States v. Wheeler, 435 U.S. 313, 328 (1978) (Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, and thus, their power derives from sources different from that of the federal government).

34. For a detailed discussion of the historical development of the dual sovereignty doctrine, see L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM (1968).

well as the significant impact that this case has on individual rights.[35]

FACTS OF THE CASE

In August of 1981, Larry Gene Heath hired two men to kill his wife, Rebecca Heath. On August 31, 1981, the two men, Charles Owens and Gregory Lumpkin, kidnapped Mrs. Heath from her home in Russell County, Alabama.[36] Rebecca Heath's body was later found in the trunk of the Heath car on the side of a road in Troup County, Georgia. The cause of death was a gunshot wound to the head. The evidence indicated that the murder took place in Georgia, a fact not disputed by the State of Alabama.[37]

Larry Heath was arrested by Georgia authorities five days later. Dual investigations by the Alabama and Georgia authorities, in which they cooperated to some extent, led to Heath's arrest and subsequent confession.[38] In his confession, Heath admitted that he had arranged his wife's kidnapping and murder. In November 1981, the grand jury of Troup County, Georgia indicted Heath for the offense of "malice" murder.[39]

On February 10, 1982, Heath pleaded guilty to the Georgia murder charge in exchange for a sentence of life imprisonment.[40] As Heath understood the plea, parole was possible after serving as few as seven years in prison.[41] This plea bargain, however, was merely the beginning of an interesting series of events.

On May 5, 1982, the grand jury of Russell County, Alabama, returned an indictment against Heath for the capital offense of murder during a kidnapping.[42] Heath now faced a possible death sentence for an offense to which he had already pleaded guilty in Georgia. Before trial, Heath entered pleas of *autrefois convict*[43] and former jeopardy under the Alabama and United States Constitutions, arguing that his conviction

35. Many commentators, in analyzing the underlying rationale of the double jeopardy clause, point out that, from the defendant's perspective, the harshness of multiple prosecutions is the same whether they occur within one jurisdiction or in two. *See, e.g.*, Fisher, *supra* note 28; Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 CASE W. RES. L. REV. 700 (1963).

36. 106 S. Ct. at 435.

37. Heath did not contend otherwise. *Id.* at 435.

38. *Id.*

39. GA. CODE ANN. § 16-5-1 (1984).

40. 106 S. Ct. at 435.

41. *Id.*

42. ALA. CODE § 13A-5-40(a)(1) (1982).

43. BLACK'S LAW DICTIONARY 170 (4th ed. 1968): "A plea by a criminal in bar to an indictment that he has been formerly convicted of the same crime."

and sentence in Georgia barred his prosecution in Alabama for the same conduct.[44] Heath's second argument was that, because the crime had been committed in Georgia, Alabama did not have jurisdiction to try him.[45] After a hearing, the trial court rejected the double jeopardy claims.[46] Subsequently, after the close of the State's case, the court also rejected Heath's jurisdictional argument.[47]

On January 12, 1983, the Alabama jury convicted Larry Heath of murder during a kidnapping in the first degree. As expected, Heath received the death penalty and immediately appealed the conviction.[48] On appeal to the Alabama Court of Criminal Appeals, Heath again argued *autrefois convict* and former jeopardy. The court rejected his arguments and affirmed the conviction.[49] In a unanimous decision, the Alabama Supreme Court also affirmed the conviction.[50] In its opinion, the Alabama Supreme Court noted that "if, for double jeopardy purposes, Alabama is considered to be a sovereign entity vis-a-vis the federal government then surely it is a sovereign entity vis-a-vis the State of Georgia."[51] Because Heath failed to raise the jurisdictional issue before the Alabama Supreme Court, he was precluded from arguing the issue before the United States Supreme Court.[52]

The United States Supreme Court, in an opinion by Justice O'Connor, affirmed the Alabama Supreme Court's decision. Justices Brennan and Marshall wrote dissenting opinions.

THE COURT'S REASONING

The *Heath* Court held that the dual sovereignty doctrine allows successive prosecutions by two states for the same conduct.[53] It was noted, early in the opinion, that had these offenses arisen under the laws of one state, and had petitioner been separately prosecuted for both offenses in that state, the second conviction would have been barred by the double jeopardy clause.[54] What the Court had to decide was whether to extend the dual sovereignty doctrine from the federal-state context to cover successive prosecutions by two different states.

44. 106 S. Ct. at 435.
45. *Id.*
46. *Id.*
47. *Id.* at 435-36.
48. *Id.* at 436.
49. *Id.*
50. *Id.* (citing *Ex parte* Heath, 455 So. 2d 905 (Ala. 1984)).
51. *Id.* (quoting *Heath*, 455 So. 2d at 906).
52. *Id.*
53. *Id.* at 437.
54. *Id.*

First, the Court reviewed the history of the dual sovereignty doctrine.[55] After defining the concept of dual sovereignty,[56] the Court stated that in applying the doctrine "the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns."[57] For the Court, this determination turned on whether the two entities drew their authority to punish the offender from distinct sources of power.[58]

The Court concluded that the states are separate sovereignties with respect to each other. In support of this, the Court cited a long line of precedent[59] standing for the proposition that the states are separate sovereignties with respect to the federal government "because each state's power to prosecute is derived from its own 'inherent sovereignty,' not from the Federal Government."[60] The Court then noted that "[T]he states are no less sovereign with respect to each other than they are with respect to the Federal Government."[61] This statement was based on the fact that the states' power to undertake criminal prosecutions derived from the "separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."[62]

The Court, by referring to cases in which it had applied the dual sovereignty doctrine outside of the federal-state context,[63] illustrated the soundness of its analysis. The Court found support in *United States v. Wheeler*[64] for the proposition that sovereignty, for double jeopardy purposes, was determined by "the ultimate source of power under which the respective prosecutions were undertaken."[65]

The final step in the Court's analysis was to illustrate the cases in

55. *See supra* notes 8-35 and accompanying text.
56. 106 S. Ct. at 437. *See also Lanza*, 260 U.S. at 382.
57. 106 S. Ct. at 437.
58. *Id.* (noting United States v. Wheeler, 435 U.S. 313, 320 (1978); Waller v. Florida, 397 U.S. 387, 393 (1970); Puerto Rico v. The Shell Co., 302 U.S. 253, 264-65 (1937); United States v. Lanza, 260 U.S. 377, 382 (1922); Grafton v. United States, 206 U.S. 333, 354-55 (1907)).
59. 106 S. Ct. at 437.
60. *Id.* (citing United States v. Wheeler, 435 U.S. at 320). *See also* Abbate v. United States, 359 U.S. 187, 193-94 (1959) (collecting cases).
61. 106 S. Ct. at 438.
62. *Id.*
63. *See supra* note 29.
64. 435 U.S. 313.
65. In *Wheeler*, Justice Stewart noted (discussing *Bartkus* and *Abbate*):

> And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superceding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power.

Id. at 320.

which it held the dual sovereignty doctrine inapplicable.[66] The Court had reasoned that municipalities, as creations of the state, derive their power to try a defendant from the "same organic law that empowers the State to prosecute,"[67] and thus, "are not separate sovereigns with respect to the State."[68] Along the same line, *Puerto Rico v. The Shell Oil Co.*[69] was cited as holding that successive prosecutions by federal and territorial courts[70] are barred because such courts are "creations emanating from the same sovereignty."[71]

The *Heath* Court's conclusion points out that each sovereign entity has certain "interests"[72] that it must be allowed to protect. The Court, in recognition of this fact, concluded that "a State must be entitled to decide that a prosecution by another State has not satisfied its legitimate sovereign interests."[73] For the Court, this conclusion followed logically from the well-settled line of cases[74] applying the dual sovereignty doctrine in the federal-state context.[75]

JUSTICE MARSHALL'S DISSENT

In his dissent, Justice Marshall concluded that the reasons for the existence of the dual sovereignty doctrine do not justify extending its application to successive state prosecutions.[76] His view was that the doctrine is applicable in the federal-state context because of the separate and distinct interests the two sovereignties might have in a particular matter.[77] For Justice Marshall, this justification was not present in the state-

66. *See supra* note 29.

67. 106 S. Ct. at 438.

68. *Id.*

69. 302 U.S. 253 (1937).

70. In *The Shell Oil Co.*, the Court held that a prosecution under either the Sherman Act or the Antitrust Act of Puerto Rico is a bar to a prosecution under the other for the same offense; thus, there was no risk of double jeopardy. 302 U.S. at 264.

71. *Id.*

72. *Heath*, 106 S. Ct. at 440. The "interest" involved here recognizes the importance of law enforcement to the notion of a state's sovereignty. A rule that prosecution by one sovereignty bars prosecution by another for the same act could effectively frustrate the law enforcement practices of the second sovereignty.

73. *Id.*

74. *See supra* notes 8-35 and accompanying text.

75. *See, e.g., Lanza*, 260 U.S. 377 (state conviction-federal conviction); *Bartkus*, 329 U.S. 121 (federal acquittal-state conviction); *Hebert*, 272 U.S. 312 (federal conviction-state conviction). *See generally* Annotation, *Acquittal or Conviction in State Court as Bar to Federal Prosecution Based on Same Act or Transaction*, 18 A.L.R. FED. 393 (1974); Annotation, *Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State Offense Based on Same Facts—Modern View*, 6 A.L.R. 4th 802 (1981).

76. 106 S. Ct. at 444 (Marshall, J., dissenting).

77. *Id.* at 443 ("The complementary nature of the sovereignty exercised by the Federal Government and the States places upon a defendant burdens commensurate with concomitant privileges.").

state context because of the identical sovereign concerns that all states possess.[78]

Justice Marshall's dissent also expressed concerns as to the fundamental fairness of Alabama's prosecution. He felt that the trial was unfair in that seventy-five of the eighty-two potential jurors were aware of Heath's prior guilty plea in Georgia. He stated that, "[w]ith such a well-informed jury, the outcome of the trial was surely a foregone conclusion."[79] For Justice Marshall, Georgia and Alabama had joined forces to do together what neither could have accomplished on its own—secure the death penalty for Larry Heath.[80]

ANALYSIS

In *Heath v. Alabama*, the United States Supreme Court ruled for the first time on the proper application of the dual sovereignty doctrine as applied to successive state prosecutions. By emphasizing the principles of federalism, as well as stare decisis, the Court reached a just result. Considering the available precedent,[81] and the current make-up of the Court, this decision is not a surprising one. The Court's holding, although viewed as working a potential hardship on the individual,[82] is the inevitable result of a thorough analysis, and consistent application, of the dual sovereignty doctrine.

The *Heath* Court, in reaching its conclusion, conducted a thorough analysis of the meaning and significance of the dual sovereignty doctrine. The strength of the decision turns upon the Court's basis for extending

78. *Id.* at 444 ("Although the two States may have opted for different policies within their assigned territorial jurisdictions, the sovereign concerns with whose vindication each State has been charged are identical." Marshall continued this line of reasoning by noting that "in contrast to the federal-state context, barring the second prosecution would still permit one government to act upon the broad range of sovereign concerns that have been reserved to the States by the Constitution.").

79. *Id.* at 442.

80. *Id.* at 445.

81. *See supra* notes 8-35 and accompanying text.

82. Federalism, from the point of view of individual liberty, has its costs as well as its advantages. Justice Frankfurter, in Knapp v. Schweitzer, 357 U.S. 371, 380 (1958), observed: there is a "price we pay for our federalism, for having our one people amenable to—as well as served and protected by—two governments." In order to alleviate some of the potential hardships associated with multiple prosecutions, the federal government developed what has become known as the *Petite* policy (*see* Petite v. United States, 361 U.S. 529 (1960)). The policy was formulated by the Justice Department in direct response to the Supreme Court's opinions in *Bartkus* and *Abbate*. These cases, while reaffirming the *Lanza* rule of successive prosecutions, realized that there existed a potential for abuse (*see Bartkus*, 359 U.S. at 138) in a rule permitting multiple prosecutions. The *Petite* policy works to limit the bringing of federal prosecutions after a state prosecution to situations where the federal prosecution is necessary to advance compelling interests of federal law enforcement. *See* Rinaldi v. United States, 434 U.S. 22, 28-29 ("The *Petite* policy was designed to limit the exercise of the power to bring successive prosecutions for the same offense to situations comporting with the rationale for the existence of that power.").

the *Lanza-Bartkus-Abbate* rule[83] to successive prosecutions by two different states. This extension logically follows from the long line of historical precedent cited within the opinion.[84]

Justice O'Connor interpreted the *Lanza-Bartkus-Abbate* rule as compelling the conclusion that successive prosecutions under the laws of different states fell within the meaning of the dual sovereignty "exception" to the double jeopardy clause.[85] Justice O'Connor's use of precedent makes the Court's argument clear and convincing. By contrasting the various factual settings in which the dual sovereignty doctrine has been applied, the opinion illustrates the consistency of the doctrine's application, as well as its underlying rationale.[86] By grouping prior decisions on the basis of the applicability of the dual sovereignty theory, the opinion clears a path for examining the states' role in our federal system, and ultimately, employs this conceptualistic view[87] to extend the doctrine to encompass successive prosecutions by two states.

The *Heath* Court's emphasis on preserving the federal system as originally envisioned[88] is well placed. Recognizing that a state must be allowed to satisfy its legitimate sovereign interests, the Court took the well established theory of dual sovereignty and extended it to its next logical conclusion: successive prosecutions by two states for the same conduct are not barred by the double jeopardy clause.

Successive prosecutions are constitutionally permissible because of the federal character of our union. The Framers of the Constitution divided the powers of government between the states and the federal government in order to create a system that would provide greater protection for the rights of individuals. While the intent was to dis-

83. These cases stand for the proposition that successive state and federal prosecutions are not in violation of the fifth amendment. On this rule Justice Holmes wrote, "The general proposition is too plain to need more than statement." *See* Westfall v. United States, 274 U.S. 256, 258 (1926).

84. *See* Moore v. Illinois, 55 U.S. (14 How.) 13 (1852). *See supra* notes 8-35 and accompanying text.

85. 106 S. Ct. at 439 ("The Court's express rationale for the dual sovereignty doctrine is not simply a fiction that can be disregarded in difficult cases.").

86. *Id.* at 438 ("These cases confirm that it is the presence of independent sovereign authority to prosecute, not the relation between States and the Federal Government in our federalist system, that constitutes the basis for the dual sovereignty doctrine."). In order to reinforce the propriety of applying the dual sovereignty exception to successive prosecutions by two states, the Court contrasted *Wheeler* with *The Shell Co.*, *Grafton* and *Waller*. *Heath*, 106 S. Ct. at 338. This contrast is stated, quite correctly, as illustrating the appropriate instances when two entities that seek successively to prosecute a defendant for a single act can be termed separate sovereignties.

87. *See supra* notes 55-65 and accompanying text.

88. *See Bartkus*, 359 U.S. at 137-38 ("Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy.").

tribute authority amongst the various levels of government, some degree of overlap was inevitable. The *Lanza-Bartkus-Abbate* line of cases recognizes that the federal-state relationship requires an exception to the principle of double jeopardy. The *Heath* Court ruled that such an exception is similarly necessary when two states seek to prosecute a person for the same act.[89] Such a conclusion, although potentially disastrous to the individual defendant,[90] follows logically from the "historical understanding and political realities of the States' role in the federal system."[91]

Within our system of federalism, the states exist as integral components of the union. Under the dual sovereignty theory, state and federal courts do not regard a criminal proceeding within the other's jurisdiction as a bar, under double jeopardy analysis, to a later proceeding within their own court system. The rationale underlying this concept is that the two units, very clearly, derive their authority to punish an offender from independent sources. The states' original power to define and punish crime was reserved to them by the tenth amendment,[92] while the federal government derives its authority from specific provisions of the Constitution.[93] Thus, a state's power to prosecute is derived from its own "inherent sovereignty," not from the federal government.

Successive federal-state prosecutions are supported by the basic concerns of our federal system. The states' existence and interactions with one another are part of this system. Thus, the very same constraints placed on the Court by the federal character of our system in its treatment of successive state-federal prosecutions exist in the state-state context.[94] It is upon this notion that the *Heath* majority lays the foundation for extending the dual sovereignty doctrine. "The States," explained Justice O'Connor, "are no less sovereign with respect to each other than they are with respect to the Federal Government."[95] Accepting this

89. 106 S. Ct. at 438 ("The States are no less sovereign with respect to each other than they are with respect to the Federal Government.").

90. *See Abbate*, 359 U.S. at 198-99 ("The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshall the resources and energies necessary for his defense more than once for the same alleged criminal acts.").

91. 106 S. Ct. at 439.

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

93. *See, e.g.*, United States v. Lanza, 260 U.S. 377, 381 (eighteenth amendment "adopted for the purpose of establishing prohibition as a national policy.").

94. *See Heath*, 106 S. Ct. at 440 ("Just as the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the Federal Government, a State must be entitled to decide that a prosecution by another State has not satisfied its legitimate sovereign interests.").

95. *Id.* at 438.

premise as true is the key link in extending dual sovereignty from the federal-state context to the state-state context.

In his dissent,[96] Justice Marshall felt that there was no need for such an extension. He argued that, rather than allowing each state to satisfy its individual interests, it would be consistent with pervading notions of federalism to bar a second prosecution on the theory that one state government has been permitted to "act upon the broad range of sovereign concerns that have been reserved to the States by the Constitution."[97] The majority expressly rejected this argument. "A State's interest in vindicating its sovereign authority through enforcement of its laws," argued Justice O'Connor, "by definition can never be satisfied by another State's enforcement of *its* own laws."[98]

In light of case law defining the concept of a "state," and its role in our federal system,[99] Marshall's argument is unpersuasive. It is clear that a state's power to undertake criminal prosecutions derives from that source of power and authority originally belonging to it before admission to the Union and preserved to it by the tenth amendment.[100] Thus, prior to the drafting of the Constitution, each state, by definition, derived its authority from separate and independent sources of power.[101] It has long been held that, with respect to one another, each state is "equal."[102] To say that a state's legitimate interests can be satisfied by a prosecution conducted by another state would be to disrupt accepted principles of federalism, and would constitute a serious deprivation of a state's sovereign powers. Thus, each state's prosecution for a crime against its authority is an exercise of its own sovereignty, separate and apart from that exercised by a sister state. To hold successive prosecutions unconstitutional would, therefore, enable one sovereignty to effectively deny the other the right to administer its criminal laws. Under basic notions of federalism, this frustration of sovereign interests cannot exist. From this

96. Justice Brennan joined in Justice Marshall's dissent, writing separately only to clarify his views on the "different interests" approach in determining whether two prosecutions are for the same "offense." *Id.* at 440 (Brennan, J., dissenting).

97. *Id.* at 444 (Marshall, J., dissenting).

98. *Id.* at 440 (emphasis in original).

99. *See* Coyle v. Oklahoma, 221 U.S. 559, 566 (1911) ("The definition of a 'State' is found in the powers possessed by the original States which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union.").

100. *See supra* note 92.

101. *See Coyle*, 221 U.S. at 567 (The states are "equal in power, dignity and authority, each competent to exert that residium of sovereignty not delegated to the United States by the Constitution itself.").

102. *See supra* notes 99-101 and accompanying text. *See also Coyle*, 221 U.S. at 580 ("the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized").

line of analysis it was but a short jump for the Court to extend the dual sovereignty doctrine to permit successive prosecutions by two states.[103]

To support the conclusion that successive prosecutions are constitutionally permissible, the dual sovereignty doctrine creates the notion that for double jeopardy purposes, one act,[104] when violative of the laws of two sovereignties, constitutes two distinct "offenses."[105] This conceptualism, required by the American federal system as embodied in the Constitution, is crucial to the propriety of the *Lanza-Bartkus-Abbate* rule.[106] This rule, read in conjunction with *United States v. Wheeler*,[107] compels the conclusion that, for dual sovereignty purposes, two states should be considered separate sovereignties. To commit a crime that violates the laws of two states will subject a criminal defendant to successive prosecutions for what, in essence, is a single act. For double jeopardy purposes, this "act," quite correctly, constitutes two "offenses."

Heath v. Alabama was, therefore, decided correctly. To hold otherwise would have required the overruling of the *Lanza-Bartkus-Abbate* line of cases. Such a decision would yield undesirable consequences.[108] Invalidating successive prosecutions would either hinder federal law enforcement or, in the alternative, erode the traditional law enforcement responsibilities of the state.[109] The dual sovereignty theory recognizes

103. The *Heath* majority relied upon the dual sovereignty doctrine to reach its conclusion. Heath argued that the Court should restrict the applicability of the doctrine to cases in which two governmental entities "can demonstrate that allowing only one entity to exercise jurisdiction over the defendant will interfere with the unvindicated interests of the second entity and that multiple prosecutions therefore are necessary for the satisfaction of the legitimate interests of both entities." 106 S. Ct. at 439. Rejecting this, the Court responded: "If the States are separate sovereigns, as they must be under the definition of sovereignty which the Court consistently has employed, the circumstances of the case are irrelevant." *Id.*

104. *See, e.g., Bartkus*, 359 U.S. 121 (robbery of federally insured bank constitutes two offenses for double jeopardy purposes). *See also* Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949).

105. *See* Kirchheimer, *supra* note 104.

106. *See supra* notes 16-28 and accompanying text.

107. 435 U.S. 313, 322 ("The powers of Indian tribes are, in general, 'inherent powers of limited sovereignty which has never been extinguished.' ") (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)).

108. *Wheeler*, 435 U.S. at 317-18 ("It was noted in *Abbate* . . . that the 'undesirable consequences' that would result from the imposition of a double jeopardy bar in such circumstances further support the 'dual sovereignty' concept. Prosecution by one sovereign for a relatively minor offense might bar prosecution by the other for a much graver one. . . . "). *Cf.* Screws v. United States, 325 U.S. 91 (1944).

109. *See Abbate*, 359 U.S. at 195:

> But one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice, for the states under our federal system have the principal responsibility for defining and prosecuting crimes.

See also Screws, 325 U.S. at 104; Jerome v. United States, 318 U.S. 101, 104-05 (1943).

the importance of a sovereignty's right to satisfy its legitimate interests. If a prior state or federal prosecution acted as a bar to a subsequent prosecution by a second sovereignty, one sovereignty's act would effectively deny the other the right to administer its criminal laws. In the state-state context, this would have the effect of denying a state the right to satisfy its legitimate sovereign interests because another state has won "the race to the courthouse."[110] Such a result is wholly inconsistent with basic notions of American federalism, and thus, supports the conclusion that the dual sovereignty doctrine is applicable in the state-state context.

The Court's holding in *Heath* further solidifies the future of multiple prosecutions. In certain instances, the dual sovereignty doctrine yields somewhat harsh results. The *Heath* majority, however, recognized that its role is limited to determining the constitutionality of certain governmental actions. While the dissent expressed a certain uneasiness with the result,[111] it is clear that the Court's ultimate holding was constitutionally compelled. Any attempt to alleviate the harshness of successive prosecutions by different states must, quite properly, come from the state legislatures.

CONCLUSION

The dual sovereignty doctrine created an exception to the double jeopardy clause. Historically, the doctrine was applied almost exclusively in cases involving successive prosecutions by a state and the federal government. In *Heath v. Alabama*, the Supreme Court extended the doctrine to successive prosecutions by two different states. The Court held that the double jeopardy clause of the fifth amendment did not bar Alabama from trying Larry Heath for the capital offense of murder during a kidnapping after a Georgia court had convicted him of murder based on the same homicide. The *Heath* opinion reflects the persuasiveness of prior case law, as well as the prerequisites of federalism. The Court's reliance on precedent and the practical considerations of the states' role in our federal system provided a sound basis for extending the theory of dual sovereignty. The holding of the case leaves no doubt as to the doctrine's proper application in the context of successive state prosecutions.

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110. *See Heath*, 106 S. Ct. at 440.

111. *Id.* at 445 (Marshall, J., dissenting) ("Whether viewed as a violation of the Double Jeopardy Clause or simply as an affront to the due process guarantee of fundamental fairness, Alabama's prosecution of petitioner cannot survive constitutional scrutiny.").