

## **Islands in the Stream of History: An Institutional Archeology of Dual Sovereignty**

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From one perspective, cases are merely islands in the stream of history. But this is not the perspective of most judges and legal academics, who tend to see cases as “an unconnected series of judgments that produce either favored or disfavored results.”<sup>1</sup> To focus on cases, or even doctrines, as self-contained universes misses the role that history plays in creating legal doctrine. The purpose of my essay is to engage in a bit of archeology about the dual sovereignty doctrine in double jeopardy law, with emphasis on the political theory and raw politics that may have influenced the doctrine and ultimately shaped the modern rule.

One dimension of the dual sovereignty doctrine permits the states to prosecute crimes that have resulted in convictions or acquittals in federal court. Though my double jeopardy book sought to connect double jeopardy doctrine with its history,<sup>2</sup> I failed to see the extent to which dual sovereignty teams with political significance. The issue first arose when a state asserted criminal jurisdiction over a militia that President James Madison had federalized for the War of 1812. The question was finally settled in the political cauldron that followed *Brown v. Board of Education*.<sup>3</sup> I will argue that at key moments in the history of dual sovereignty an institutional bias favored state sovereignty.

Dual sovereignty is a good doctrine to examine for the influence of history and politics, because its effect on real-life cases is far easier to see than in most areas of criminal procedure. The effect of many doctrines is lost in the loose standards that the Court adopts to implement constitutional commands. If the Court tells lower courts to permit stops and frisks based on “reasonable suspicion,” it has told an outside observer almost nothing about how courts will decide the myriad of cases that they will face. The same swamp of indeterminacy results from the Court’s command that mistrials are permitted if the prosecution can show “manifest necessity” for the mistrial.

But the effect of dual sovereignty cannot be missed. If a state seeks to prosecute a defendant who has already been prosecuted by another state, by the federal

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<sup>1</sup> *Dickerson v. United States*, 530 U.S. 428, 444–45 (2000) (Scalia, J., dissenting).

<sup>2</sup> GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998).

<sup>3</sup> 347 U.S. 483 (1954).

government, or by an Indian tribe, there is no bar in the Double Jeopardy Clause. The rule applies even if the first prosecution was for the very same criminal conduct as the second and is defined by a statute that is the “same offense.” It applies no matter which sovereign goes first, second, or third.<sup>4</sup> It does not matter what the verdict was in the first prosecution. It does not matter that the defendant was acquitted in a way that suggests the jury found him innocent of the underlying conduct. It does not matter how outrageously the prosecutor acted in obtaining a mistrial to prevent an acquittal. In no conceivable situation will double jeopardy bar multiple prosecutions by different sovereigns. If a trial judge granted a motion to dismiss in one of these categories, she would be summarily overruled (after being laughed out of the Judge’s Club). Dual sovereignty is an acid that destroys *all* double jeopardy protection.

But as Justice Hugo Black asked in his dissent in *Bartkus v. Illinois*,<sup>5</sup> why would *this* be the best understanding of double jeopardy’s protection?

Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two ‘Sovereigns’ to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, then [sic] when one of these ‘Sovereigns’ proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.<sup>6</sup>

Blackstone would not have recognized the logic of our dual sovereignty rule. In eighteenth-century England, if a defendant was tried for an offense in *another country*, he would have a plea in bar to offer against a prosecution in an English court.<sup>7</sup> If that makes sense when truly independent sovereigns are concerned, why would America adopt the opposite rule based on sovereigns that are independent only in an artificial sense (how truly independent *are* the states from Congress in most areas of law-making?), in an historical sense (Indian tribes were historically independent, but are they today?), or in a trivial sense (yes, states *are* different sovereigns from each other, but how many times do two states have jurisdiction over the same criminal conduct?)?

I do not mean to claim that Blackstone was right or that we should today blindly

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<sup>4</sup> In theory, there could be four prosecutions for the same crime. Two states could have concurrent jurisdiction—for example, X stands in North Dakota and shoots across the state line into South Dakota, killing Z. The federal government would have jurisdiction if Z were a federal agent. And an Indian tribal court can also have jurisdiction. The latter issue is quite complex and I defer to Indian law scholars the task of constructing a hypothetical that permits the fourth prosecution.

<sup>5</sup> 359 U.S. 121 (1959).

<sup>6</sup> *Id.* at 155 (Black, J., dissenting).

<sup>7</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES 335.

follow that aspect of eighteenth-century formalism. I have argued elsewhere that if Congress or a state legislature wants its statutes prosecuted following a verdict in the courts of another sovereign, the legislative body need merely make that intent clear.<sup>8</sup> But when there is no expression of intent to have two prosecutions for the same offense, I would not infer that intent based on a stuffy notion of sovereignty.

One reason we might treat this issue differently from Blackstone, of course, is the political drama over how much state sovereignty to maintain, a drama older than the country itself. From before the founding, we have been driven by different conceptions of the United States of America. The very name suggests a federation of largely-sovereign states, so much so that in the aftermath of the Civil War, a bill was introduced to change the name to “America.”<sup>9</sup> The Constitution adopted in Philadelphia created a central government with fairly broad powers. Its ratification over the virulent opposition of the anti-Federalists is but one of many deep disputes over the appropriate role for state sovereignty in our federal system. Other examples include the drafting and ratification of the Bill of Rights, the sickening spiral toward the Civil War, and the ultimate failure of Reconstruction. Sometimes the central government has been ascendant—in the early years under our Constitution (Alien and Sedition Acts) and immediately after the Civil War (Civil War Amendments). Other times, state sovereignty has held sway—in the decades before the Civil War (Missouri Compromise) and the time from about 1880 until World War I when the Court narrowly construed the Civil War Amendments.

Well, you might say, what does all of *this* have to do with double jeopardy? One way to solve the dual sovereignty problem in double jeopardy doctrine is to give broader effect to the doctrine of preemption. If Congress legislates by, say, making bank robbery a federal crime, state robbery statutes might cease to be viable in cases where the bank is federally insured. The supremacy clause creates federal power outside the criminal context to give Congress free rein in regulating commerce, air travel, and radio and television frequencies, to name just a few areas. Why not in the narrow areas of criminal law where Congress is authorized to legislate?

The Constitution gives Congress the power to define and punish counterfeiting, piracies and felonies committed on the high seas, and offenses against the law of nations.<sup>10</sup> Article I, section 8 also permits Congress to provide for the disciplining of the state militias. That’s it. Any other power to create crimes, such as crimes involving the mails, must be found in the “inherent and proper” clause in the last paragraph of section 8 in Article I. Thus, the question of whether federal criminal law would pre-empt state criminal law would have been seen during the framing era as a matter of largely theoretical importance, if it were even “seen” at all.

The narrowness of the expected scope of federal criminal jurisdiction suggests

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<sup>8</sup> See THOMAS, *supra* note 2, at 188–94.

<sup>9</sup> The bill failed in the Judiciary Committee but the New York Times predicted that the idea would “meet with more favor at the next session of Congress.” *Proposed Change of the Name of the Government*, N.Y. TIMES, June 30, 1866, at A1.

<sup>10</sup> U.S. CONST. art. I, § 8.

that the Framers might have intended to pre-empt state law in those narrow categories. States would have no, or a very small, interest in prosecuting piracy, counterfeiting, and crimes on the high seas. Even the crimes first created under the “necessary and proper” clause did not trench harshly on state sovereignty. In 1790, Congress made it a crime to commit murder, manslaughter, mayhem, or larceny “within any fort, arsenal, dock-yard, magazine, or in any other place . . . under the sole and exclusive jurisdiction of the United States.”<sup>11</sup> In 1792, Congress made it a crime to rob a carrier of, or to steal, the mail of the United States.<sup>12</sup> Of course, state common law forbade murder, manslaughter, mayhem, larceny, and robbery. But as long as those acts took place on federal bases or were directed at mail carriers, the states might very well have been indifferent to the preemption question.

This question first attracted the Court’s attention in 1820 in *Houston v. Moore*.<sup>13</sup> The defendant was a member of the Pennsylvania militia ordered out by the governor under orders from President James Madison, dated July 4, 1814, to help defend the country during the War of 1812. Houston did not report for duty and was later convicted by a State court martial. He argued that the Constitution vested exclusive power in Congress to discipline the militias and thus that his conviction must be overturned. It was a plausible argument. Section 8 of Article I gives Congress the power to “provide for organizing, arming, and disciplining, the Militia.”

The opinion delivering the judgment in *Houston* endorsed the view that if Congress “had legislated within the scope” of the power to discipline the militia, it would be oppressive for the State to exercise the same power.<sup>14</sup> Yet the Court upheld Houston’s state conviction. What alchemy turned the lead of an oppressive state conviction into constitutional gold? The alchemist writing the opinion turned the state law into “a re-enactment of the acts of Congress,” concluding that the state court was in effect exercising the power of Congress to discipline the militia.<sup>15</sup> *Houston* thus read the state criminal law as a passive vehicle for congressional power. The twists and turns of the *Houston* opinion suggest that the question was both “delicate” and “difficult.”<sup>16</sup> Indeed, the three opinions in the case are sixty-five pages long in the official reports.

Justice Joseph Story, in dissent, agreed that Congress and the state could not punish the same conduct, but he rejected the fiction that Pennsylvania was merely exercising, through its state laws, the congressional power to punish the militia offense. Story noted the delicacy of the issue:

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<sup>11</sup> First Congress, Sess. II Ch. 9, § 3 (prohibiting murder), § 7 (prohibiting manslaughter), § 13 (prohibiting mayhem), § 16 (prohibiting larceny) (1790).

<sup>12</sup> Second Congress, Sess. I, Ch. 7, § 17 (1792).

<sup>13</sup> 18 U.S. 1 (1820).

<sup>14</sup> *Id.* at 23. This idea appears in the Court’s principal opinion, written by George Washington’s nephew, Bushrod Washington. Justice Story went even farther in dissent. He would have held that Pennsylvania lacked the power to enact a law punishing the conduct prohibited by federal law.

<sup>15</sup> The majority’s laborious analysis of the federal statute and its state analog is painful reading.

<sup>16</sup> *Id.* at 32, 25.

Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favour of the United States, unless it be clearly within the reach of its constitutional charter.<sup>17</sup>

Justice William Johnson also wrote a separate opinion. A fervent supporter of state sovereignty during his thirty-year tenure on the Supreme Court, Johnson articulated the modern view of the sovereignty issue. Indeed, so far as I can tell, he was the first to do so:

Why may not the same offence be made punishable both under the laws of the States, and of the United States? Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States. . . . [W]here the United States cannot assume, or where they have not assumed, [an] exclusive exercise of power, I cannot imagine a reason why the States may not also, if they feel themselves injured by the same offence, assert their right of inflicting punishment also.<sup>18</sup>

I noticed for the first time when writing this essay that even Justice Johnson found a double jeopardy limitation on the power of both sovereigns to *punish* the same conduct. Reading the Double Jeopardy Clause literally to apply only when “life or limb” is in jeopardy, he wrote: “In cases affecting life or member, there is an express restraint upon the exercise of the punishing power . . . a restriction which operates equally upon both governments . . . .”<sup>19</sup> Thus, in Johnson’s view, Pennsylvania could criminalize the conduct covered by Article I, section 8. But if the federal government had already prosecuted Houston, then even the architect of modern dual sovereignty theory would deny Pennsylvania the power to punish him for the same conduct.

The dual sovereignty world as it existed in 1820, during the lifetime of many who participated in creating the Constitution and the Bill of Rights, can be described as follows. *No one* believed that the federal and state governments could punish the same offense. Only one member of the Court believed that when Congress legislated within the sphere of its criminal jurisdiction, a state had independent criminal jurisdiction. If a state sought to punish conduct within the congressional sphere, it

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<sup>17</sup> *Id.* at 48 (Story, J., dissenting).

<sup>18</sup> *Id.* at 33–34.

<sup>19</sup> *Id.* at 34.

could do so, according to *Houston*, by acting as Congress's surrogate to impose federal penalties.

Now fast forward to 1959. In *Bartkus v. Illinois*,<sup>20</sup> six members of the Supreme Court thought that a state could punish the same offense for which the defendant had been *acquitted* in federal court.<sup>21</sup> Is this not double jeopardy? No, the Court said, adopting Justice Johnson's fiction (without his limitation on double punishment) that citizens owe independent duties not to violate the criminal laws of both state and federal governments. The facts in *Bartkus* were particularly favorable for the Court's 1820 position because *Bartkus* had been acquitted of federal bank robbery. Chief Justice Marshall in *McCullough v. Maryland*<sup>22</sup> established the principle that the federal government could charter banks. While a federally-*insured* bank is probably less a creature of the federal government than a federally-*chartered* bank, the necessary and proper clause likely gives Congress the power to protect its interest in banks where it insures deposits. If federally-*insured* banks had existed in 1820 and Congress had made it a crime to rob one of those banks, the *Houston* Court would likely have held that Congress had exclusive jurisdiction over the penalties for robbery of federally-*insured* banks (but not, perhaps, over murder or assault committed as part of the robbery). Yet the modern Court was resolute that states had independent, not concurrent, jurisdiction over the offense of robbing a federally-*insured* bank. The acquitted federal defendant could be made to defend against the very same charge, all in the service of state sovereignty.

*Bartkus* occurs near the beginning of a full-scale retreat for state sovereignty. We would soon learn that Ollie's Bar-B-Que in Atlanta was subject to congressional regulation.<sup>23</sup> We had already learned, in *Brown v. Board of Education*,<sup>24</sup> that the Fourteenth Amendment prohibited local schools from determining that they would be racially segregated. So why did a Court that had rejected robust state sovereignty where schools are concerned decide the double jeopardy issue in a way that was far more protective of state sovereignty than the *Houston* Court? Part of the answer might be greater fear of crime in 1959 than in 1820. Part of the answer might be a much larger modern federal criminal jurisdiction and a correspondingly greater effect on state criminal jurisdiction if the *Houston* preemption doctrine were to prevail.

A formalist would suggest a third answer: the issue was already decided and the Court was merely following precedent. Unsurprisingly, Justice Felix Frankfurter's

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<sup>20</sup> 359 U.S. 121 (1959).

<sup>21</sup> *Id.* at 164–70. Though Justice William Brennan dissented in the 5-4 case, his dissent was based on the involvement of the federal authorities in the state case that in effect made the second case another federal prosecution. He expressed support for the general notion of dual sovereignty. In a companion case, the Court held that the federal government could prosecute and punish the same offense for which the defendant had already been convicted and punished in state court, with Brennan joining the majority. *Abbate v. United States*, 359 U.S. 187 (1959).

<sup>22</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>23</sup> *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>24</sup> 347 U.S. 483 (1954).

majority opinion in *Bartkus* adopted this view, noting that several cases acknowledged the possibility of both sovereigns prosecuting the same crime. But Justice Black effectively destroys Frankfurter's formalist explanation. With a single exception, to which I will return, there were no Supreme Court cases holding that both sovereigns could prosecute the same crime. Instead, the Court's cases held only that a state could *have* a crime that overlapped with a federal crime. To be sure, dicta in some of these cases mention the possibility of double punishment, but often the dicta *condemned* the idea.<sup>25</sup> In the lower federal courts, Black found so few federal cases permitting double punishment "that one can readily discern an instinctive unwillingness to impose such hardships on defendants."<sup>26</sup>

But what about state courts? Perhaps state courts had insisted on their right to prosecute after a federal verdict as a way of vindicating their sovereignty. The majority cited eight state cases that "clarified the issue by stating opposing arguments."<sup>27</sup> But, according to Justice Black, four of these cases held that a second prosecution *could not proceed*, two refused even to find concurrent jurisdiction because of the "shocking" possibility of two trials, one contained an "inconclusive discussion," and one supported double prosecution in dicta.<sup>28</sup> One of the cases refusing to find concurrent jurisdiction was a 1794 North Carolina case where the court said that a second trial by state or federal sovereigns "was against natural justice and therefore I cannot believe it to be the law."<sup>29</sup> If these early state and federal cases were supposed to make the dual sovereignty doctrine appear settled, Frankfurter's failure is, I believe, manifest.

The Court's strongest argument that it had settled the issue is the Prohibition-era case of *United States v. Lanza*.<sup>30</sup> *Lanza* did not, as Black notes, settle the *Bartkus* question of whether a state could prosecute after an *acquittal* in federal court. *Lanza* faced charges under the National Prohibition Act after his *conviction* in state court of the same manufacture of liquor. Black argues that these questions are separate, double punishment being less onerous and less destructive of liberty than a trial for the same conduct after acquittal. I am inclined to agree, but even if the reader resists this conclusion, *Lanza* is itself an island in the stream of history. The federal indictment against *Lanza* was returned a bare three months after the Eighteenth Amendment became effective. National sentiment in favor of Prohibition was running at a fever pitch. The Supreme Court at that moment in history was not willing to hold that a fine paid in state court barred implementation of the new, powerful federal criminal machinery against liquor. The people had, after all, spoken through a constitutional amendment ordering Congress to ban alcohol. Thus, *Lanza*

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<sup>25</sup> 359 U.S. at 159–60 (Black, J., dissenting).

<sup>26</sup> *Id.* at 160.

<sup>27</sup> *Id.* at 132.

<sup>28</sup> *Id.* at 159 (Black, J., dissenting).

<sup>29</sup> *State v. Brown*, 2 N.C. 100, 101 (1794).

<sup>30</sup> 260 U.S. 377 (1922).

supports my argument that dual sovereignty is a product of politics rather than abstract principles.

One reading of the Court's evolving doctrine, therefore, is that the fervor of the anti-alcohol movement gave us *Lanza* and that *Lanza* begat *Bartkus* as a rather routine application of precedent. But much of what seemed settled in criminal law in the 1920s was turned upside down by the Warren Court. In 1922, states were not required to provide counsel to all indigent defendants, to offer jury trials, to suppress evidence found in an unreasonable search, or to provide a privilege against compelled self-incrimination.<sup>31</sup> By 1968, all of these rights extended to state defendants. In each case, the Court either overruled prior precedents or rejected their underlying premises. Moreover, the authority for the federal statute in *Lanza* was the Eighteenth Amendment's national consensus to eradicate alcohol from the country. The intent of Congress and the society to be harsh was manifest. For *Bartkus* to have overruled *Lanza*, or limited it to National Prohibition Act prosecutions, would not have torn a gaping hole in *stare decisis*.

This all leads me to believe that something else was roiling the political waters when the Court came together to decide *Bartkus*. The hidden exogenous factor is, oddly enough, the very expansion of federal power in other areas, particularly *Brown v. Board*. Today, *Brown* is viewed the way the Court surely intended. Seizing the moral high ground, the Court made a bold strike against one aspect of the reprehensible system of *de jure* racial segregation. It was bold. The Court cited no precedent. What precedent would it cite? The question had been thought settled, in favor of "separate but equal," since *Plessy v. Ferguson*.<sup>32</sup> The boldness of the move invited dissent in the states where school systems would be forced to change. "Impeach Earl Warren" signs popped up like mushrooms all over the South as opportunistic politicians like Orval Faubus, Strom Thurmond, and James Eastland stoked the South's resentment into a white hot rage. In 1955, Senator Eastland gave a speech that claimed *Brown* "was based on the writings and teaching of pro-communist agitators and other enemies of the American form of government."<sup>33</sup> Governor Marvin Griffin of Georgia condemned the *Brown* doctrine as a "bitter pill of tyranny," a pill "the people of Georgia and the South will not swallow."<sup>34</sup>

Other Southerners joined the chorus (Trent Lott is but a recent residue of this development). Championed by Strom Thurmond, the "Southern Manifesto" condemned *Brown* as a "clear abuse of judicial power" and promised to use "all lawful means to bring about a reversal of [*Brown*] which is contrary to the

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<sup>31</sup> See *Wolf v. Colorado*, 338 U.S. 25 (1949) (search); *Betts v. Brady*, 316 U.S. 455 (1942) (counsel); *Twining v. New Jersey*, 211 U.S. 78 (1908) (privilege); *Maxwell v. Dow*, 176 U.S. 581 (1900) (jury). Though *Wolf* and *Betts* were decided in the 1940s, both asserted that they were applying the rule that had always existed.

<sup>32</sup> 163 U.S. 537 (1896).

<sup>33</sup> JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 88 (2001).

<sup>34</sup> *Id.* at 92.

Constitution.”<sup>35</sup> Only three Southern senators refused to sign—Lyndon Johnson of Texas, and Albert Gore and Estes Kefauver of Tennessee.<sup>36</sup> More disappointing than the Southern Manifesto were the failures of Congress and President Eisenhower to support *Brown*.<sup>37</sup>

When the Little Rock school board announced a desegregation plan in 1955, reaction was muted. Arkansas was, after all, not the Deep South. But segregationists continued to fan the flames of racism. In 1956, the Arkansas legislature adopted an amendment to its constitution that pledged “to oppose ‘in every Constitutional manner the Un-constitutional desegregation decisions’” of the Supreme Court.<sup>38</sup> Governor Orval Faubus, by all accounts a moderate on racial issues,<sup>39</sup> decided to whip up racial animus for his own political gain (he was re-elected by a landslide in November 1958<sup>40</sup>). He ordered National Guard units “to the Central High School grounds and placed the school ‘off limits’ to colored students.” The black students who sought to enter the school on September 4, 1957 found their way barred by Guardsmen who “‘stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students . . . from entering’ as they continued to do every day during the following three weeks.”<sup>41</sup>

On September 20, 1957, the federal district court for Little Rock entered an order enjoining Faubus from interfering with the desegregation plan. The National Guard troops were withdrawn, and city and state police accompanied the students to school on September 23. But the police quickly decided to remove the students because they lacked the forces to control a “large and demonstrating crowd which had gathered at the school.”<sup>42</sup> One writer described the “crowd” as a “howling, spitting mob” that shouted “[t]he niggers are in our school,” and the same writer suggested that the police had considerable sympathy for the demonstrators.<sup>43</sup>

On September 25, President Eisenhower simultaneously federalized the Arkansas National Guard and authorized the use of regular army troops to force compliance with the federal court order.<sup>44</sup> Ironically, the regular army troops chosen for the task

<sup>35</sup> *Id.* at 98.

<sup>36</sup> *Id.* Patterson attributes the refusal of Johnson, Kefauver, and Gore to sign the Southern Manifesto to their presidential ambitions. Perhaps. All three Senators were personal favorites of mine (I grew up in Tennessee during the 1950s), and I choose to believe they refused to sign because it was the morally right thing to do.

<sup>37</sup> DEL DICKSON, *THE SUPREME COURT IN CONFERENCE* 670 (2001).

<sup>38</sup> *Cooper v. Aaron*, 358 U.S. 1, 8–9 (1958).

<sup>39</sup> LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 158 (2000).

<sup>40</sup> *Id.* at 160.

<sup>41</sup> 358 U.S. at 9–10.

<sup>42</sup> *Id.* at 12.

<sup>43</sup> PATTERSON, *supra* note 33, at 110 (noting that “[o]ne policeman took off his badge and walked away”).

<sup>44</sup> JAMES C. DURAN, *A MODERATE AMONG EXTREMISTS: DWIGHT D. EISENHOWER AND THE SCHOOL DESEGREGATION CASES* 156–57 (1981).

were from the 101st Airborne “Screaming Eagle” Division,<sup>45</sup> the same unit that, under Eisenhower’s command in World War II, seized Bastogne during the Battle of the Bulge and held it against fierce attacks by German forces of overwhelming numerical superiority. In irony stacked on irony, Senator Richard Russell of Georgia compared the 101st Airborne troops in Little Rock to “Hitler’s storm troopers.”<sup>46</sup> The 101st held Bastogne in 1944 and the 1,100 paratroopers with bayonets on their rifles got the nine students safely into the Little Rock school in 1957.

Finding themselves in the cross-hairs of violence and hatred, the Little Rock School Board in February 1958 petitioned the District Court for a postponement of the desegregation program.<sup>47</sup> The district court held that the situation at Central High was “intolerable” and granted the request to delay the plan. The Eighth Circuit Court of Appeals reversed the district court on August 18, 1958. Later that month, the Supreme Court convened a rare special term and on September 11, 1958, heard oral arguments in *Cooper v. Aaron*. The Court granted certiorari in open court and then heard arguments on the merits. The next day, the Court unanimously affirmed the Court of Appeals. The full opinion explaining the judgment would come on September 29, authored by all nine members of the Court.<sup>48</sup> I don’t know how rare it is for an opinion to be authored by all members of the Court, but I can never recall seeing it before. The opinion begins:

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution.<sup>49</sup>

This was high Supreme Court drama indeed. A state governor and legislature were asserting that they were not bound by the Court’s considered, unanimous judgment in *Brown*. While there was no doubt what the Court’s response would be, the Court seemed disconcerted by such a naked and profound challenge to its judgment. The language and unorthodox nature of the opinion in *Cooper* suggests as much.

And it was not just in Little Rock that the Court’s legitimacy was under violent attack. One writer describes the southern white reaction to *Brown* this way: “Violence. Intimidation. Anguished alarms about social and sexual mingling. Emotional appeals to the Cause of the Confederacy. Raising the specter of

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<sup>45</sup> *Id.* at 157.

<sup>46</sup> PATTERSON, *supra* note 33, at 111.

<sup>47</sup> 358 U.S. at 12.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> *Id.*

communism.”<sup>50</sup> Examples include the case of Autherine Lucy, who was admitted to a graduate program at the University of Alabama. On her third day of classes, in February, 1956, she was pelted with rotten eggs while white students shouted “Lynch the Nigger” and “Hit the Nigger Whore.” The university board of trustees voted that night to exclude her from campus and, later, to expel her.<sup>51</sup> In September, 1957, Dorothy Counts sought to enter an all-white high school in North Carolina pursuant to a pledge the school had given to permit desegregation. She faced angry mobs who threw sticks and pebbles at her and spat in her face. At school, she was shoved and her locker was ransacked. Her family decided to send her to school in Philadelphia.<sup>52</sup>

The Court must have been painfully aware of these, and similar, events when it convened its regular 1958 Term the month after asserting federal supremacy in *Cooper*. With its legitimacy under attack, was the Court going to tell Illinois that it could not prosecute, under its state robbery law, a defendant who had been acquitted in federal court? How much did Alfonse Bartkus, or any criminal defendant, “count” in the federalism war being fought to forge a national consensus about the equality of the races? The Court heard arguments in *Bartkus* and a companion case, *Abbate v. United States*, on October 21 and 22, 1958. This was just one month after *Cooper v. Aaron*. A December 1958 Gallup poll of Americans “placed [Arkansas governor] Faubus among Winston Churchill, Albert Schweitzer, Jonas Salk, and Eisenhower as one of the ten most admired men in the world.”<sup>53</sup>

Professor Lucas A. Powe, Jr. finds it significant that *Bartkus* was decided five months after a case from the Soviet Union where public outcry over an acquittal led the authorities to re-try a defendant and sentence him to death.<sup>54</sup> This explanation misses the mark. While the news account does appear in Justice Black’s dissent, the majority does not mention the story. And why would it? In 1958, the Court would not want to be accused of copying the Soviet Union’s approach to double jeopardy!

I think the 1958 Court was frying bigger fish than double jeopardy. A month after *Cooper v. Aaron*, the Court just had no stomach to restrict state sovereignty in the criminal arena. Let Illinois try Alfonse Bartkus after the federal authorities failed to convict him. As long as the Court could continue its heroic, but lonely, quest for racial equality in the United States, the Alfonse Bartkuses of the world counted for little.

I do not claim that the Court consciously weighed Bartkus’s second trial against the goal of racial equality and found Bartkus’s claim wanting. I do not even claim that the Court *thought* about *Cooper v. Aaron* when it decided to permit robust state sovereignty in the criminal area. Nor was *Cooper v. Aaron* an isolated event that suddenly predisposed the Court to permit dual prosecutions. My claim in this essay is a modest one. In deciding *Bartkus*, the Court was aware of the potentially

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<sup>50</sup> PATTERSON, *supra* note 33, at 94.

<sup>51</sup> *Id.* at 105.

<sup>52</sup> *Id.* at 106–07.

<sup>53</sup> POWE, *supra* note 39, at 160.

<sup>54</sup> *Id.* at 194.

destabilizing resistance to the desegregation cases. This awareness would have formed part of the background structure that led individual justices to a position on the dual sovereignty double jeopardy issue. It was, I think, similar to the leftover radiation from the Big Bang that we can still measure if our instruments are sufficiently sensitive. *Bartkus* and *Cooper v. Aaron* are part of the institutional structure that produced a view of dual sovereignty diametrically opposed to Blackstone's rule and the Court's own view in 1820.

One might wonder why a Court so willing to decide *Brown* and, a few years later, *Miranda v. Arizona*, would shy away from ruling in *Bartkus*'s favor. Why wouldn't the same institutional pressures that drove the Court to affirm state sovereignty in *Bartkus* also have driven the Court to different decisions in a whole host of criminal procedure cases as we moved into the 1960s? A partial answer denies the premise of the question. The Court was *not* particularly willing to decide *Brown*. Why else would the Court wait until 1954 to overrule the morally offensive *Plessy v. Ferguson*? It took an issue of fundamental moral significance to get the Court to flex its muscles against state sovereignty. To be sure, two years after *Bartkus*, the Court imposed the Fourth Amendment exclusionary rule on the states.<sup>55</sup> But the period between 1959 and 1961 might have seemed a very long time to the Court. By 1961, it was clear that disaster had been averted in Little Rock and, probably more importantly, the Court in 1961 had an ally, rather than an anchor, in the White House.

Now we can sketch the course of the dual sovereignty "stream." Its headwaters were in 1820 with an opinion of the Marshall Court denying that states could punish federal crimes independently of the congressional scheme. It meandered through the rest of the nineteenth century, generally reaffirming that while states could *enact* crimes that overlapped with federal crimes, they could not *prosecute* them following a federal verdict. In 1922, the earthquake of Prohibition made the stream run uphill. In 1959, faced with a determined challenge to its legitimacy, and to its goal of racial equality, the Court changed the law of gravity and told us that this stream naturally runs uphill. *Bartkus* called the Prohibition case of *Lanza* a "well-established principle." But *Lanza* was far from "well-established." The *Lanza* Court could not cite a single Supreme Court case upholding double prosecutions by state and federal sovereigns, and did not even mention *Houston v. Moore*.<sup>56</sup>

Dual sovereignty was created as a way of giving voice to the intolerance of Prohibition and reaffirmed while fighting Southern racial intolerance. At least that is one way to view the dual sovereignty "stream."

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<sup>55</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>56</sup> *Bartkus* acknowledged *Houston* but essentially limited it to the ultra-rare situation in which a state provides sanctions for violations of a federal statute.