No. 16-636

In the Supreme Court of the United States

CALVIN GARY WALKER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

BRIEF OF AMICUS CURIAE STUART BANNER IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

LEGISLATIVE MATERIAL

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Stuart Banner is the Norman Abrams Professor of Law at UCLA. He would like to acquaint the Court with recent (and not yet published) research that will be useful in deciding whether to grant certiorari on petitioner's first question presented.[1]

SUMMARY OF ARGUMENT

There was no dual sovereignty doctrine at the Founding or for a long time afterwards. Until the mid-nineteenth century, the Double Jeopardy Clause was understood to bar successive prosecutions by separate sovereigns, just as it barred successive prosecutions by a single sovereign.

ARGUMENT

There was no dual sovereignty doctrine at the Founding or for a long time afterwards.

At the Founding, a prosecution by one sovereign barred subsequent prosecutions by other sovereigns. This was the virtually unanimous view expressed in early American cases and treatises. The dual sovereignty doctrine did not exist until this Court invented it in three cases decided between 1847 and 1852.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution intended to fund the preparation or submission of this brief. Both parties received timely notice under Rule 37.2(a) of amicus's intent to file this brief. Both parties have consented to the filing of this brief.

A. The Double Jeopardy Clause was intended to constitutionalize the common law defenses of *autrefois acquit* and *autrefois convict*, under which prosecution by one sovereign barred a subsequent prosecution by other sovereigns.

The Constitution's prohibition of double jeopardy has its origin in the English common law pleas of *autrefois acquit* and *autrefois convict*, which allowed a defendant to plead a prior acquittal or conviction in bar of a present prosecution. *United States v. Scott*, 437 U.S. 82, 87 (1978). While England had only one domestic sovereign, there were two well-known cases in which the Crown sought to prosecute a defendant who had already been prosecuted by a foreign sovereign, and these cases raised the question whether the pleas of *autrefois acquit* and *autrefois convict* barred a second prosecution by a different sovereign. In both cases, English courts held that a prosecution by one sovereign barred a subsequent prosecution by another.

The first case, *R. v. Hutchinson* (1678), involved a defendant who had been acquitted of murder in Portugal. When he returned to England he was indicted for the same murder. Subsequent cases state that *Hutchinson* held that the acquittal in Portugal was a bar to prosecution in England.[2] The most thorough of them explains that Hutchinson

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[2] The only apparent report of *Hutchinson* itself is a brief notation about bail. *R. v. Hutchinson*, 84 Eng. Rep. 1011 (K.B. 1678).

> had killed Mr. Colson in Portugal, and was acquitted there of the murder; the exemplification of which acquittal he produced under the Great Seal of that kingdom, on his being brought from Newgate by an *habeas corpus* to this Court; but, notwithstanding his acquittal there, the King was very willing to have him tried here for the fact; and he referred the consideration thereof to the Judges, who all agreed, that he, being already acquitted by their law, could not be tried again here.

Beak v. Thyrwhit, 87 Eng. Rep. 124, 125 (K.B. 1688). The other accounts of Hutchinson's case are identical in substance. *See Beak v. Tyrrell*, 89 Eng. Rep. 411, 411 (K.B. 1688); *Beake v. Tirrell*, 90 Eng. Rep. 379, 380 (K.B. 1688); *Burrows v. Jemino*, 93 Eng. Rep. 815, 815 (K.B. 1727); *Burroughs v. Jamineau*, 25 Eng. Rep. 235, 236 (Ch. 1727).

In the second case, *R. v. Roche* (1775), Captain David Roche was indicted in England for a murder he allegedly committed at the Cape of Good Hope in present-day South Africa, which was then a Dutch colony. He pleaded *autrefois acquit*, based on having been acquitted of the same charge in a Dutch court at the Cape. The English court held that Roche could not simultaneously plead *autrefois acquit* and not guilty, because a finding of *autrefois acquit* would bar the jury from considering his guilt. *R. v. Roche*, 168 Eng. Rep. 169, 169 (Cr. Cas. 1775). The reporter explained in a footnote: "It is a bar, because a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction." *Id.* at 169 n.a. The reporter cited *Hutchinson*

for the proposition that "if A., having killed a person in Spain, were there prosecuted, tried and acquitted, and afterward were indicted here, at Common Law, he might plead the acquittal in Spain in bar." *Id.*

Hutchinson was discussed and quoted in several treatises of the 1750s and 1760s. *See* John Strange, *A Collection of Select Cases Relating to Evidence* 145 (1754); Henry Bathurst, *The Theory of Evidence* 39 (1761); 2 Timothy Cunningham, *The Merchant's Lawyer* 113 (1768); Francis Buller, *An Introduction to the Law Relative to Trials at* Nisi Prius 346 (1768). By the early nineteenth century, English treatises routinely cited both *Hutchinson* and *Roche*. "Where the defendant has been tried by a foreign tribunal," Thomas Starkie explained, "an acquittal will enure to his defence in this country." 1 Thomas Starkie, *A Treatise on Criminal Pleading* 301 n.h (1814). As Joseph Chitty put it two years later, "it is now settled that a legal acquittal in any court whatsoever, having competent jurisdiction to try the charge, will be sufficient to preclude any subsequent proceedings before every other tribunal." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 458 (1816). *See also* Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802) ("an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England").

The Double Jeopardy Clause was intended to entrench in the Constitution the protections afforded criminal defendants by the common law pleas of *autrefois acquit* and *autrefois convict*. As Representative Samuel Livermore explained in the first Con-

gress, the Clause "was declaratory of the law as it now stood." 1 *Annals of Cong.* 753 (1789). The consistent view of early American courts and commentators was that the Double Jeopardy Clause was not intended to work any change in the substance of the law, but merely to shift the law's grounding from the common law to the Constitution. "[T]he privilege thus secured is but a constitutional recognition of an old and well established maxim of the common law," Justice Story explained in an 1834 case, "and, therefore, we are to resort to the common law to ascertain its true use, interpretation, and limitation." *United States v. Gibert*, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834). As Francis Wharton put it in his 1846 treatise on American criminal law, the Double Jeopardy Clause was "nothing more than a solemn asseveration of the common law maxim." Francis Wharton, *A Treatise on the Criminal Law of the United States* 147 (1846). *See also Ned v. State*, 7 Port. 187, 215 (Ala. 1838); 3 Simon Greenleaf, *A Treatise on the Law of Evidence* 36 (1853).

While the text of what would become the Double Jeopardy Clause was being debated in the first Congress, Congress specifically declined to adopt language that would have changed the English rule to one that would have permitted a second prosecution by a different sovereign. The original draft of the Clause provided: "No person shall be subject . . . to more than one trial or punishment for the same offence." Representative George Partridge proposed adding, after "same offence," the words "by any law of the United States." Partridge's proposal would have created the dual sovereignty doctrine, because

it would have allowed multiple prosecutions so long as only one of them was pursuant to federal law. But Congress immediately rejected Partridge's suggestion. 1 *Annals of Cong.* 753 (1789).

B. Virtually all American courts and commentators through the 1850s agreed that a prosecution by one sovereign barred a subsequent prosecution by other sovereigns.

The two-sovereign question became much more important in the United States, where state governments and the federal government both had the authority to prosecute crimes. The question was thus frequently discussed in the first few decades after the ratification of the Constitution. Virtually all American courts and commentators reached the same conclusion as in England: that a prosecution by one sovereign would bar future prosecutions by all other sovereigns.

The issue arose as part of the broader debate over whether federal power was exclusive of the states or whether it was concurrent with state power. This was a major unresolved question in the early republic. When Congress enacted a statute establishing a federal crime, were the states thereby divested of jurisdiction to prosecute the same crime? Or was state criminal jurisdiction concurrent with federal criminal jurisdiction? The latter view was of course the one that would eventually prevail, but while the debate was taking place, proponents of exclusive federal jurisdiction argued that concurrent jurisdiction would lead to an unlawful result—that a defendant

might be prosecuted twice for the same crime, once by the federal government and once by a state. Proponents of concurrent jurisdiction had a standard response. Such double prosecution would be impossible, they explained, because the Double Jeopardy Clauses of the federal and state Constitutions would not permit it. Once the defendant had been prosecuted by the first sovereign, double jeopardy would bar a prosecution by the second.

The early American cases thus typically addressed the issue in the context of a debate over jurisdiction, not in the context of responding to defendants' motions to dismiss on double jeopardy grounds. That would be an important distinction if we were looking for precedent in the narrow sense, because strictly speaking these were jurisdiction cases rather than double jeopardy cases. But we are not looking for precedent in the narrow sense. We are looking for evidence of what early American judges and lawyers thought the Double Jeopardy Clause meant. Such evidence is useful coming from cases addressing jurisdiction, particularly given the virtual unanimity of the views that judges and lawyers expressed.

The two-sovereign question first reached this Court in *Houston v. Moore*, 18 U.S. 1 (1820). Houston had been fined for deserting the Pennsylvania state militia. *Id.* at 3. He argued that Pennsylvania lacked the authority to criminalize desertion, because the Constitution gave Congress the power to organize and discipline the militia, and Congress had exercised that power by enacting a statute of its own that likewise punished desertion. Pennsylvania could not

exercise jurisdiction concurrently with the United States, Houston contended, because such concurrent jurisdiction "might subject the accused to be twice tried for the same offence." *Id.* at 31. The Court brushed aside this argument with a clear statement of the traditional rule. "To this I answer," responded Justice Washington in his opinion for the Court, "that, if 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.*

Justice Story dissented in *Houston* because he believed that the state and federal governments could not exercise concurrent criminal jurisdiction, but he agreed with the majority that double jeopardy principles would bar federal prosecution of a defendant already prosecuted by a state. If the state could try a defendant for desertion, Story argued, one of two impossible consequences would follow: either that the state's action would deprive the federal government of the ability to prosecute the defendant, "or that the delinquents are liable to be twice tried and punished for the same offence, against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government." *Id.* at 72 (Story, J., dissenting).

The Court again restated the traditional one-prosecution rule in *United States v. Furlong*, 18 U.S. 184 (1820). *Furlong* was a consolidated case involving a few different murders committed by several pirates aboard a few different ships. The question as to each was whether the murder was covered by the federal statute criminalizing piracy. The Court criti-

cized the drafter of the statute for blending "all crimes punishable under the admiralty jurisdiction in the general term of piracy," when in fact "there exist well-known distinctions between the crimes of piracy and murder." *Id.* at 196. The key distinction, the Court observed, was that piracy in the sense of *robbery* on the high seas was within the jurisdiction of all nations to punish, but *murder* on the high seas could only be punished by the jurisdiction upon whose vessel the murder was committed. *Id.* at 197. That distinction, in turn, had important double jeopardy implications, because any given murder was punishable by only one nation, while any given robbery was punishable by all nations. "Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations," the Court explained. "It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State." *Id.* That is, when a crime was punishable by more than one sovereign, the first prosecution would be a bar to any subsequent prosecution. "Not so with the crime of murder," the Court continued. "It is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this universal jurisdiction." *Id.* Instead, no nation could punish a murder "committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation." *Id.* The case the Court was considering involved a murder committed aboard a British ship, so only Britain had the right to prosecute, which meant "that an acquittal in this

case"—i.e., in an American court—"would not have been a good plea in a Court of Great Britain," because the United States had no right to prosecute the murder in the first place. *Id.*

The state courts likewise restated the traditional rule. The issue was discussed most thoroughly by the Constitutional Court of Appeals of South Carolina, in *State v. Antonio*, 7 S.C.L. 776 (1816). *Antonio*, like several of the early state cases, involved a defendant appealing a conviction of counterfeiting on the ground that the federal statute prohibiting counterfeiting divested the states of jurisdiction to prosecute counterfeiters. One of the defendant's arguments was that if state and federal jurisdiction were concurrent, "a man might be twice tried." *Id.* at 781. The court rejected the argument. "[T]his could not possibly happen," the court explained, "because it is the established comitas gentium, and is not unfrequently brought into practice, to discharge one accused of a crime, who has been tried by a court of competent jurisdiction." *Id.* The one-prosecution rule ought to be even stronger in the United States than in England, the court suggested, because in the United States both sovereigns were domestic. "If this prevails among nations who are strangers to each other," the court asked, "could it fail to be exercised with us who are so intimately bound by political ties?" *Id.* The court concluded its discussion of the issue by noting that this principle, whatever its source, had been instantiated in the Constitution. "But a guard yet more sure," the court continued, "is

to be found in the 7th article of amendments [i.e., the Fifth Amendment] to the federal constitution." *Id.*[3]

Justice Grimke concurred. He agreed that if counterfeiting were both a state and federal crime, either court would have to "allow of the plea of autrefois acquit, which will be a good bar to a second prosecution, because a determination in a court having competent jurisdiction, must be final and conclusive on all courts of concurrent jurisdiction." *Id.* at 788 (Grimke, J., concurring). He cited *R. v. Roche*, the 1775 English case, in support of this proposition. Justice Nott dissented, but he too agreed that punishment by both the state and federal governments would be "not only contrary to the express letter of the constitution, but contrary to the eternal and unerring principles of justice." *Id.* at 804 (Nott, J., dissenting).

Until the 1850s, every American court that considered the question, except one, reached the same result. A North Carolina court declared that prosecutions by multiple sovereigns for the same offense would be "against natural justice, and therefore I cannot believe it to be law." *State v. Brown*, 2 N.C. 100, 101 (1794). The Vermont Supreme Court held that where state and federal courts have concurrent criminal jurisdiction, "[t]he court that first has jurisdiction, by commencement of the prosecution, will retain the same till a decision is made; and a deci-

[3] In referring to the Fifth Amendment as the seventh article of amendments, the court was using the original numbering, which was common at the time. The Bill of Rights originally had twelve amendments, but the first two were not ratified, so article seven became the Fifth Amendment.

sion in one court will bar any farther prosecution for the same offence, in that or any other court." *State v. Randall*, 2 Aik. 89, 100-01 (Vt. 1827). The Missouri Supreme Court determined that the state's counterfeiting statute was preempted by the federal counterfeiting statute, because otherwise a conviction in state court would be a bar to federal prosecution. *Mattison v. State*, 3 Mo. 421, 426-28 (1834).

The Michigan Supreme Court, citing *Houston v. Moore*, held that a conviction in state court "would be admitted in federal courts as a bar. This would follow necessarily from the existence of a concurrent jurisdiction, even if it did not come strictly within the provision of the seventh [i.e., the fifth] article of the amendments of the constitution." *Harlan v. People*, 1 Doug. 207, 212-13 (Mich. 1843). The Massachusetts Supreme Court agreed that where federal and state jurisdiction is concurrent, "the delinquent cannot be tried and punished twice for the same offence." *Commonwealth v. Fuller*, 49 Mass. 313, 317 (1844). *See also Commonwealth v. Peters*, 53 Mass. 387, 392 (1847) (Shaw, C.J.) ("[I]f the defendant had already been tried and acquitted, in a court having concurrent jurisdiction, it must be deemed a trial and acquittal on the merits; and on the well known principle of *res judicata*, he could not be again tried."); *Manley v. People*, 7 N.Y. 295, 303 (1852) (Edmonds, J.) (citing *Houston v. Moore* and referring to "the practice of the several federal and state courts as congress extends its power by its enactments, and that is in allowing the judgment in one court to be pleaded in bar in the other").

Only one early American court broke with this consensus. In *Hendrick v. Commonwealth*, 32 Va. 707 (1834), the General Court of Virginia considered a defendant's argument that if Virginia could prosecute him for forgery, which was also a federal crime, a person might be punished twice for the same offense. The court responded: "The answer to this is, that the law of *Virginia* punishes the forgery, not because it is an offence against the *U. States*, but because it is an offence against this commonwealth, committed within its limits; and the punishment of it is designed for the protection of our own citizens." *Id.* at 713. This single sentence was the court's entire discussion of the subject. The sentence is a bit cryptic, but the court seems to have been saying that it would not be unlawful for a person to be punished twice for the same forgery, because a single act of forgery can constitute two offenses simultaneously, one against Virginia and the other against the United States. With this one exception, the early American cases were unanimous in restating the English rule that a prosecution by one sovereign will bar subsequent prosecutions by all others.

American treatises of the era uniformly reflected this consensus. James Kent's *Commentaries on American Law*, first published in 1826, was the leading general treatise in the country. Kent explained that state and federal courts had concurrent jurisdiction in criminal cases, and that "the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of the prosecution before the other." 1 James Kent, *Commentaries on American Law* 374 (1826). In this respect, Kent noted, criminal cas-

es were just like civil cases, in that "the judgment of a state court, in a civil case of concurrent jurisdiction, might be pleaded in bar of an action for the same cause instituted in a circuit court of the United States." *Id.*

Specialized treatises declared the same rule. *See* William Rawle, *A View of the Constitution of the United States of America* 191 (1825); Thomas Sergeant, *Constitutional Law* 278 (1830); Edward D. Mansfield, *The Political Grammar of the United States* 137 (1835); Francis Wharton, *A Treatise on the Criminal Law of the United States* 137 (1846); Francis Wharton, *A Treatise on the Law of Homicide in the United States* 283 (1855). The point was simply not in dispute.

C. Dual sovereignty was invented by this Court in three cases between 1847 and 1852.

This Court abandoned the traditional rule in three cases decided between 1847 and 1852: *Fox v. Ohio*, 46 U.S. 410 (1847), *United States v. Marigold*, 50 U.S. 560 (1850), and *Moore v. Illinois*, 55 U.S. 13 (1852).

Fox was a state counterfeiting case in which the defendant argued that the federal government's power to punish counterfeiting was exclusive, not concurrent. In support of this argument, the defendant's lawyer posited the absurd consequences that he argued would flow from concurrent state and federal jurisdiction. "[I]f the power be concurrent," he pointed out, "[t]he weight of authority is decidedly in favor of the doctrine, that a conviction in either court

is a bar to a prosecution in the other." *Fox*, 46 U.S. at 429. Whichever sovereign went first, the other sovereign would be prevented from prosecuting, which meant that a state could take power away from the federal government by getting to court faster. "Both the legislative and judicial powers of the United States are thus rendered abortive," he argued—the legislative power because Congress's statute could not be enforced, and the judicial power because the federal courts would be sidelined by the state prosecution. *Id.* at 430.

This argument highlighted a potential problem with the traditional rule, which was that it allowed a state to effectively nullify federal policy by racing to the courthouse and depriving the federal government of its power to prosecute. This would not be a problem in the area of counterfeiting, as there were no states with a policy of favoring counterfeiting or shielding counterfeiters from the federal government. In other areas of law, however, some states had very different policy views from those of the federal government. There was already considerable sectional tension over slavery. In the recent past, states had entered into conflict with the federal government over matters like tariffs, excise taxes, banking, and relations with the Indians, among many others. If a state prosecution barred a subsequent federal prosecution, a state government that disagreed with a federal prohibition of a certain kind of conduct could immunize a defendant from federal prosecution simply by prosecuting the defendant first and then either acquitting him, imposing a light sentence, or pardoning him. The nation had seen

great constitutional conflicts over whether a state could nullify federal law explicitly, conflicts that had been resolved in the federal government's favor, but this was a tactic that would permit states to nullify federal law under the table.

In *Fox* the Court thus expressed some doubts about the traditional one-prosecution rule. "It is almost certain," the Court noted, "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 punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor." *Id.* at 435. The Court was suggesting that the one-prosecution rule was a matter of government grace rather than a strict rule of law, and that the rule could be suspended in extreme cases. The Court did not say what those extreme cases would look like, but it was most likely envisioning the circumstances that Fox's lawyer had imagined, cases in which a state was intentionally subverting federal policy. "But were a contrary course of policy and action either probable or usual," the Court concluded—i.e., were double prosecutions to become the norm—"this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." *Id.* That is, regardless of

whether double prosecution was likely or unlikely, it was lawful.

Justice McLean defended the traditional one-prosecution rule in a lengthy dissent. "[T]o punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments," he insisted. "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 offence." *Id.* at 439 (McLean, J., dissenting).

The Court took its second step toward dual sovereignty two years later, in *United States v. Marigold*. *Marigold* was the inverse of *Fox*: the defendant had been convicted of counterfeiting in *federal* court, and he argued that *state* jurisdiction over counterfeiting was exclusive. The Court dispensed with this argument unanimously in a short opinion, written again by Justice Daniel. Toward the end, the Court characterized *Fox* as having stated that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either." *Marigold*, 50 U.S. at 569.

Moore v. Illinois, the third case, was exactly the kind of case that raised worries about allowing a state prosecution to bar a subsequent federal prosecution. The defendant was the prominent Illinois abolitionist Richard Eells. (Eells died while the case was pending; Moore was his executor.) Eells was the

president of the Illinois Anti-Slavery Party and the party's candidate for governor in 1846. He lived in Quincy, just a few blocks from the Mississippi River, across which lay the slave state of Missouri. His house was the first stop on the Underground Railroad for slaves escaping from Missouri. In 1842, Eells was caught trying to hide a slave named Charley, who had swum across the river. He was convicted under state law of harboring a fugitive slave.[4]

The case attracted a great deal of attention, because of the intense controversy surrounding the question of how much power free states possessed to regulate the capture of fugitive slaves. In *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), the Court held that the federal Fugitive Slave Act preempted a state law prohibiting the recapture of fugitive slaves. Pennsylvania had tried to nullify federal fugitive slave law, and the Court had rejected the attempt. Abolitionist lawyers, citing *Prigg*, then argued that if states lacked the power to *impede* the return of fugitive slaves to their owners, states should also lack the power to *promote* the return of fugitive slaves by prosecuting those who helped the slaves escape. *Moore*, 55 U.S. at 14-15.

Eells was represented by Salmon Chase, who was then a Senator and one of the most well-known abolitionists in the country. As part of Chase's argument that only the federal government had the power to punish the harboring of fugitive slaves, he made the familiar contention that federal jurisdiction had to

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[4] National Park Service, *Dr. Richard Eells House*, www.nps.gov/nr/travel/underground/il3.htm.

be exclusive, or else a person might be unconstitutionally punished twice for the same offense. *Id.* at 19. But the issue of fugitive slaves presented the worst possible context for invoking the traditional one-prosecution rule. The difficulty with the rule was that it could empower a state to nullify federal policy by beating the federal government to the courthouse, and slavery was the one area in which states clearly *would* make that attempt if they could. The northern states had been rebuffed in their efforts to nullify the Fugitive Slave Act by prohibiting the capture of fugitive slaves, but the one-prosecution rule offered the northern states an obvious alternative. Instead of prohibiting the *capture* of fugitive slaves, a state could prohibit the *harboring* of fugitive slaves. If an abolitionist harboring a slave simply surrendered to state authorities, to be promptly "prosecuted" in state court, he would be immunized from federal prosecution. The federal Fugitive Slave Act would be rendered toothless.

The Court thus had an especially pressing policy reason in *Moore v. Illinois* to reject Chase's invocation of the one-prosecution rule. The Court addressed the double jeopardy issue at length. "An offence, in its legal signification, means the transgression of a law," the Court began.

> 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 offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States,

> and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.

Id. at 19-20. In this passage, the Court made clear that northern states could not nullify the Fugitive Slave Act by conducting sham prosecutions of their own. To do so, however, the Court had to elaborate a dual sovereignty doctrine that was exactly the opposite of the way the Double Jeopardy Clause had been understood since the Founding.

D. The discussion of the history of dual sovereignty in *Bartkus v. Illinois* is mistaken in several respects.

The Court has examined the early sources relevant to the origin of dual sovereignty on only one occasion. In *Bartkus v. Illinois*, 359 U.S. 121 (1959), the Court devoted two paragraphs to the early American cases, and concluded that the historical record is "totally inconclusive" as to whether dual sover-

eignty existed before the mid-nineteenth century. *Id.* at 131. This conclusion is mistaken. It rests on three major errors.

First, the Court refused even to consider the English cases, on the ground that they are "dubious"—in part because they exist in different reported versions, and in part because "they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Id.* at 128 n.9. Neither of these arguments stands up to the slightest scrutiny. Two of the English cases, the ones discussing *Hutchinson*, are indeed reported slightly differently by different reporters, but each version says that a prosecution by one sovereign bars a subsequent prosecution by another. *Roche*, the other English case saying the same thing, exists in only one reported version. And the cases do not reflect any discretion vested in English judges. They state a clear rule of law barring a subsequent prosecution. Had the Court considered the English treatises along with the cases, the Court would have realized that the rule declared in the cases was repeated uniformly by commentators. There was nothing dubious about it.

Second, the Court misread several of the early American state cases. The Court's opinion asserts that four of the state cases were consistent with the dual sovereignty doctrine. *Id.* at 129-30 & nn. 10-12, 14. In fact, this is true only of one, the Virginia Supreme Court's opinion in *Hendrick v. Commonwealth*, which is discussed above as the sole exception to the otherwise unanimous view before the mid-nineteenth century that a prosecution by one

sovereign will bar subsequent prosecutions by all others. The Court was simply wrong about the other three. Two of them, the Missouri Supreme Court's decision in *Mattison v. State* and the North Carolina decision in *State v. Brown*, actually stated the traditional one-prosecution rule, as discussed above. The third, a South Carolina case called *State v. Tutt*, 18 S.C.L. 44 (1831), did not reach the issue at all.

Third, the Court misinterpreted its own 1820 decision in *Houston v. Moore*. In *Bartkus*, the Court contended that the *Houston* Court's reaffirmation of the traditional one-prosecution rule was meant to apply only where a state imposed criminal sanctions for a violation of a federal criminal law, not in the more common circumstance in which a state imposed sanctions for a violation of its own criminal law. *Bartkus*, 359 U.S. at 130. In fact, neither the *Houston* Court's statement of the traditional rule nor Justice Story's agreement with the rule in his dissent included any such limitation. *Houston*, 18 U.S. at 31, 72. In the part of *Houston* relied upon by the Court in *Bartkus*, the Court merely stated that the purpose of the Pennsylvania law at issue was to punish the same conduct that the federal government already punished, as evidenced by the fact that much of the Pennsylvania statute was copied word-for-word from the federal statute. *Bartkus*, 359 U.S. at 130 (quoting *Houston*, 18 U.S. at 28).

Because of these errors, the *Bartkus* Court mistakenly concluded that there was nothing to be learned from a review of the early English and American sources. The Court has not reviewed them since.

This inattention to the early sources has become particularly unfortunate in recent years, as the Court has paid closer attention to the original meaning of the constitutional protections for criminal defendants. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 949-50 (2012); *Crawford v. Washington*, 541 U.S. 36, 42-56 (2004). Defendants today have weaker double jeopardy protection than they did at the Founding, when the Double Jeopardy Clause was understood to bar successive prosecutions by all sovereigns, not just the sovereign that prosecuted first. If judges can weaken constitutional protections for policy reasons that seem pressing at the time, one wonders what the Constitution is for.

CONCLUSION

The petition for a writ of certiorari should be granted as to question 1.

Respectfully submitted,

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